

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

7952 HOUSE LABOR & COMMERCE

1 pilotage; providing for rate hearings upon  
 2 petition to the board; providing for rate  
 3 hearing application fees; providing for fee  
 4 waiver under certain circumstances; creating s.  
 5 310.182, F.S.; providing for authority of port  
 6 pilot associations; providing for review and  
 7 repeal; providing an effective date.

8

9 Be It Enacted by the Legislature of the State of Florida:

10

11 Section 1. Section 310.0015, Florida Statutes, is  
 12 created to read:

13 310.0015 Piloting regulation; general provisions.--  
 14 (1) Pilotage is an essential service, and the need for  
 15 pilotage is deemed to be of such paramount importance that the  
 16 continued existence of the service must be secured by the  
 17 state and may not be left open to market forces.

18 (2) Because safety is the primary objective in the  
 19 regulation of piloting by the state and because of the  
 20 significant economies of scale in delivering the service, the  
 21 requirement of a large capital investment in order to provide  
 22 required service, and the fact that pilots are supplying  
 23 services which are considered to be essential to the economy  
 24 and the public welfare, it is determined that economic  
 25 regulation, rather than competition in the marketplace, will  
 26 better serve to protect the public health, safety, and  
 27 welfare.

28 (3) The rate-setting process, the issuance of licenses  
 29 only in numbers deemed necessary or prudent by the board, and  
 30 other aspects of the economic regulation of piloting  
 31 established in this chapter are intended to protect the public

1 from the adverse effects of unrestricted competition which  
 2 would result from an unlimited number of licensed pilots being  
 3 allowed to market their services on the basis of lower prices  
 4 rather than safety concerns. This system of regulation  
 5 benefits and protects the public interest by maximizing  
 6 safety, avoiding uneconomic duplication of capital expenses  
 7 and facilities and by enhancing state regulatory oversight.  
 8 The system seeks to provide pilots with reasonable revenues,  
 9 taking into consideration the normal uncertainties of vessel  
 10 traffic and port usage sufficient to maintain reliable, stable  
 11 pilotage operations. Pilots have certain restrictions and  
 12 obligations under this system, including, but not limited to,  
 13 the following:

14 (a) Pilots may not refuse to provide piloting services  
 15 to any person or entity which may lawfully request such  
 16 services, except for justifiable concerns relating to safety,  
 17 or, in the case of a vessel planning a departure, for  
 18 nonpayment of pilotage.

19 (b) Pilots may not unilaterally determine the pilotage  
 20 rates which they charge. Such pilotage rates shall instead be  
 21 determined by the board, in the public interest, as set forth  
 22 in s. 310.151.

23 (c) Pilots may not discriminate or give preference  
 24 among their customers as to pilotage charges or services,  
 25 except as might be explicitly established in statute, or  
 26 except to the extent of distinctions set forth in the rates.

27 (d) Pilots shall maintain adequate pilot boats, office  
 28 facilities and equipment, dispatch systems, communication  
 29 equipment and other facilities, and equipment and support  
 30 services necessary for a modern, dependable pilotage  
 31 operation.

1 (e) Port pilot associations shall properly train and  
2 adequately compensate all member deputy pilots.

3 Section 2. Subsection (7) of section 310.002, Florida  
4 Statutes, is amended, and subsection (10) is added to said  
5 section, to read:

6 310.002 Definitions.--As used in this act:

7 (7) The word "pilotage" means the compensation fixed  
8 by the board which is payable by a vessel, its owners, agents,  
9 charterers, or consignees to one or more pilots or to the port  
10 pilot association in the port where piloting is performed.

11 The word "pilotage" shall also mean the compensation of all  
12 types and sources derived by one or more pilots or deputy  
13 pilots, including compensation received by the port pilot  
14 association in that port for the performance of piloting in  
15 state waters at that port by licensed pilots or by certified  
16 deputy pilots, whether such piloting is performed pursuant to  
17 this chapter or is performed by state-licensed pilots or  
18 state-certified deputy pilots when acting as a federal pilot  
19 for vessels not required by this chapter to use a state-  
20 licensed pilot or state-certified deputy pilot.

21 (10) The term "port pilot association" means a group  
22 of one or more licensed state pilots registered by the  
23 department, and may include certificated deputy pilots,  
24 organized for administrative purposes to work cooperatively to  
25 provide pilotage services within a port. Such services shall  
26 include, but not be limited to, provision of pilot boat  
27 services, pilot dispatching services, pilotage billing  
28 services, and other statutorily required duties and  
29 responsibilities.

30 Section 3. Subsection (1) of section 310.021, Florida  
31 Statutes, is amended to read:

1 310.021 How board constituted.--

2 (1) The Governor shall appoint five active licensed  
3 state pilots who shall possess the qualifications specified in  
4 s. 310.011 and five citizens of the state who are not pilots,  
5 one two of whom shall be actively involved in a their  
6 professional or business capacity in maritime or marine  
7 shipping, one of whom shall be a user of pilotage services,  
8 and three of whom shall not be involved or monetarily  
9 interested in the piloting profession or in the maritime  
10 industry or marine shipping, to constitute the members of the  
11 board. For purposes of this subsection, a "user of pilotage  
12 services" may include any person with an ownership interest in  
13 a business which regularly employs licensed state pilots or  
14 certificated deputy pilots for the purpose of delivering  
15 pilotage services, or any person who is a direct employee of,  
16 and who is employed in a management position for, such  
17 business. Each member shall be appointed for a term of 4  
18 years. The Governor shall have power to remove members of the  
19 board from office for neglect of duty required by this law,  
20 for incompetency, or for unprofessional conduct. Any vacancy  
21 which may occur in the board in consequence of death,  
22 resignation, removal from the state, or other cause shall be  
23 filled for the unexpired term by the Governor in the same  
24 manner. Except as provided in s. 310.151(1), a majority of  
25 those serving on the board shall constitute a quorum.

26 Section 4. Section 310.061, Florida Statutes, is  
27 amended to read:

28 310.061 State pilots; number; cross licensing.--

29 (1) The board shall determine the number of pilots  
30 based on the supply and demand for piloting services and the  
31 public interest in maintaining efficient and safe piloting

1 services. Based on the economic conditions of the port, the  
2 board may adopt rules authorizing cross licensing between  
3 ports, if this will best serve the public interest.

4 (2)(a) The board may appoint a licensed state pilot or  
5 a certificated deputy pilot as a cross licensed deputy pilot  
6 in any port to address an emergency situation resulting from a  
7 lack of available licensed state pilots or certificated deputy  
8 pilots necessary to supply pilotage services for that port,  
9 providing that such an appointment will best serve the public  
10 interest. Such appointment shall be on a temporary basis for  
11 a period that shall not extend beyond the duration of the  
12 state of emergency. The board may adopt rules establishing  
13 the circumstances under which such an emergency may be  
14 considered to exist.

15 (b) The board shall provide notice of an opening, and  
16 schedule at the earliest reasonable date an examination, for  
17 such position or positions as are necessary to assure  
18 sufficient availability of pilotage services in the port for  
19 which an emergency has been declared. The cross licensed  
20 deputy pilot may serve as a pilot for purposes of training a  
21 deputy pilot and for purposes of recommending the advancement  
22 of said pilot.

23 Section 5. Section 310.071, Florida Statutes, is  
24 amended to read:

25 310.071 Deputy pilot certification.--

26 (1) In addition to meeting other requirements  
27 specified in this chapter, each applicant for certification as  
28 a deputy pilot must:

29 (a) Be at least 21 years of age, as evidenced by a  
30 copy of a birth certificate or other legal proof of age.

31

1 (b) Have successfully completed 12 years of formal  
2 education, as evidenced by a high school diploma or by  
3 equivalent evidence thereof that is satisfactory to the board.

4 (c) Be in good physical and mental health, as  
5 evidenced by documentary proof of having satisfactorily passed  
6 a complete physical examination administered by a licensed  
7 physician within the preceding 6 months. The board may adopt  
8 rules to establish requirements for passing the physical  
9 examination, which rules shall establish minimum standards for  
10 the physical or mental capabilities necessary to carry out the  
11 professional duties of a licensed state pilot or a  
12 certificated deputy pilot.

13 (d) Have had maritime experience satisfactory to the  
14 board prior to taking the examination required under s.

15 310.081(2), as evidenced by documentation of the following  
16 service while holding a United States Coast Guard license:

17 1. At least 2 years of service at sea during the 5-  
18 year period immediately preceding the examination, 1 year of  
19 which must have been in at least the capacity of an unlimited  
20 second mate;

21 2. At least 2 years of service during the 5-year  
22 period immediately preceding the examination in a deepwater  
23 United States port as an active first-class unlimited pilot  
24 serving on at least an unlimited second mate's license or a  
25 license as master of freight and towing vessel of not less  
26 than 1,600 ~~1,700~~ gross registered tons upon oceans, and acting  
27 under authority of a duly constituted governmental regulatory  
28 entity;

29 3. At least 2 years of service during the 5-year  
30 period immediately preceding the examination as an active

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1 first-class unlimited pilot serving on a Great Lakes unlimited  
2 master's license; or

3 4. At least 2 years of towing experience during the 5-  
4 year period immediately preceding the examination, 1 year of  
5 which must have been in the capacity of master of a  
6 tugboat/barge combination of at least 5,000 gross registered  
7 tons, combined tonnage, while holding a license as master of  
8 freight and towing vessel of at least 1,600 ~~1,700~~ gross  
9 registered tons upon oceans.

10  
11 However, except as provided in paragraph (f), and unless the  
12 applicant is already licensed in another port and is being  
13 cross licensed, the applicant may not be qualified for  
14 certification by the board unless he holds a valid license  
15 issued by the United States Coast Guard of an equal or higher  
16 grade than the lowest grade of license issued by the United  
17 States Coast Guard held by any licensed state pilot in the  
18 port who is not cross licensed with any other port in which he  
19 seeks certification, notwithstanding subparagraphs 1., 2., 3.,  
20 and 4.

21 (e) Submit full documentation of sea time through  
22 discharges, continuous discharge books, or other official  
23 documents.

24 (f) Submit proof of sufficient maritime background and  
25 experience, except for required trips, to enable the  
26 applicant, if not already so licensed, to be eligible to  
27 obtain a valid United States Coast Guard first-class unlimited  
28 pilot's license covering all of the waters of the port in  
29 which service as a deputy pilot is intended within 90 days of  
30 the appointment as a deputy pilot.

1 (2) The board may adopt rules authorizing equivalent  
2 combinations of service from two or more of the areas  
3 specified in subparagraphs (1)(d)1., 2., 3., and 4. However,  
4 the board may waive the maritime experience requirements  
5 prescribed in paragraph (1)(d) when necessary to fill an  
6 opening, provided an applicant meeting such requirements has  
7 not applied for the opening and the opening has been  
8 advertised more than once.

9 (3) The initial certificate issued to a deputy pilot  
10 shall be valid for a period of 12 ~~9~~ months, and at the end of  
11 this period, the certificate shall automatically expire and  
12 shall not be renewed. During this period, the board shall  
13 thoroughly evaluate the deputy pilot's performance for  
14 suitability to continue training and shall make appropriate  
15 recommendations to the department. Upon receipt of a  
16 favorable recommendation by the board, the department shall  
17 issue a certificate to the deputy pilot, which shall be valid  
18 for a period of 2 years. The certificate may be renewed only  
19 two times, except in the case of a fully licensed pilot who is  
20 cross licensed as deputy pilot in another port, and as  
21 necessary, provided the deputy pilot meets the requirements  
22 specified for pilots in paragraph (1)(c).

23 Section 6. Subsection (3) of section 310.073, Florida  
24 Statutes, is amended to read:

25 310.073 State pilot licensing.--In addition to meeting  
26 other requirements specified in this chapter, each applicant  
27 for license as a state pilot must:

28 (3) Be in good physical and mental health, as  
29 evidenced by documentary proof of having satisfactorily passed  
30 a complete physical examination administered by a licensed  
31 physician within the preceding 6 months. The board may adopt

1 rules to establish requirements for passing the physical  
 2 examination, which rules shall establish minimum standards for  
 3 the physical or mental capabilities necessary to carry out the  
 4 professional duties of a licensed state pilot or a  
 5 certificated deputy pilot.

6 Section 7. Paragraph (b) of subsection (3) of section  
 7 310.081, Florida Statutes, is amended to read:

8 310.081 Department to examine and license state pilots  
 9 and certificate deputy pilots; vacancies.--

10 (3) Pilots shall hold their licenses or certificates  
 11 pursuant to the requirements of this chapter so long as they:

12 (b) Are in good physical and mental health as  
 13 evidenced by documentary proof of having satisfactorily passed  
 14 a physical examination administered by a licensed physician or  
 15 physician assistant within each calendar year. The board may  
 16 adopt rules to establish requirements for passing the physical  
 17 examination, which rules shall establish minimum standards for  
 18 the physical or mental capabilities necessary to carry out the  
 19 professional duties of a licensed state pilot or a  
 20 certificated deputy pilot.

21  
 22 Upon resignation or in the case of disability permanently  
 23 affecting a pilot's ability to serve, the state license or  
 24 certificate issued under this chapter shall be revoked by the  
 25 department.

26 Section 8. Paragraph (f) of subsection (1), and  
 27 paragraph (f) of subsection (2) of section 310.101, Florida  
 28 Statutes, are amended to read:

29 310.101 Grounds for disciplinary action by the  
 30 board.--

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1 (1) Any act of misconduct, inattention to duty,  
 2 negligence, or incompetence; any willful violation of any law  
 3 or rule, including the rules of the road, applicable to a  
 4 licensed state pilot or certificated deputy pilot; or any  
 5 failure to exercise that care which a reasonable and prudent  
 6 licensed state pilot or certificated deputy pilot would  
 7 exercise under the same or similar circumstances may result in  
 8 disciplinary action. Examples of acts by a licensed state  
 9 pilot or certificated deputy pilot which constitute grounds  
 10 for disciplinary action include, but are not limited to:

11 (f) Having a license or certificate to practice  
 12 piloting ~~revoked, or suspended, restricted, placed on~~  
 13 probation, or in any way acted against, including the  
 14 relinquishing or depositing of said license in lieu of further  
 15 disciplinary action, by the regulatory authority of another  
 16 state, the Federal Government, a territory, or another country  
 17 for an act which would constitute a ground for discipline if  
 18 the act had occurred while piloting under authority of the  
 19 Florida state pilot's license or deputy pilot's certificate.

20 (2) When the board finds any person has committed any  
 21 act set forth in subsection (1), it may enter an order  
 22 imposing one or more of the following penalties:

23 (f) Placing the licensed state pilot or certificated  
 24 deputy pilot on probation for such period of time and subject  
 25 to such conditions as the board may specify, including, but  
 26 not limited to, requiring the pilot to submit to treatment,  
 27 submit to additional or remedial training, submit to  
 28 reexamination, or undergo a complete physical examination.

29 Section 9. Section 310.121, Florida Statutes, is  
 30 amended to read:

31

1 310.121 Application, examination, and biennial fees  
2 for licenses and certificates.--

3 (1) The department shall, in accordance with rules set  
4 by the board, assess and collect the following fees:

5 (a) A fee not to exceed \$300 for each application for  
6 state pilot or certificated deputy pilot. This fee shall be  
7 nonrefundable.

8 (b) A fee not to exceed \$300 for each examination for  
9 state pilot or certificated deputy pilot.

10 (c) A fee not to exceed \$300 for each examination  
11 review.

12 (d) A biennial registration fee not to exceed \$300 for  
13 each port pilot association registered by the department.

14 (2) The department shall assess and collect biennially  
15 from each licensed state pilot and each certificated deputy  
16 pilot a fee, not to exceed \$200 in the case of a licensed  
17 state pilot or \$100 in the case of a certificated deputy  
18 pilot, such fees to be set by the board.

19 Section 10. Section 310.131, Florida Statutes, is  
20 amended to read:

21 310.131 Assessment of percentage of gross pilotage.--  
22 The department shall assess the licensed state pilots in the  
23 respective ports of the state a percentage of the gross amount  
24 of pilotage earned by such pilots during each year, which  
25 percentage will be established by the board not to exceed 2  
26 percent, to be paid into the Professional Regulation Trust  
27 Fund by such pilots at such time and in such manner as the  
28 board prescribes or as is set forth in the Appropriations Act.  
29 Each port pilot association shall, not later than April 15th  
30 annually, submit a financial statement in a format to be  
31 determined by board rule, including a profit and loss

1 statement and balance sheet, which shall include relevant  
2 fiscal information on companies owned or partially owned by  
3 pilots that supply, for compensation, goods or services  
4 reported as or relating to pilot operating expenses. The  
5 financial records of all pilots and deputy pilots relating to  
6 pilotage are subject to audit by the department and the  
7 Auditor General. The department shall by rule set a procedure  
8 for verifying the amount of pilotage at each port and may  
9 charge costs to the appropriate port if the port does not  
10 comply with such procedure.

11 Section 11. Subsections (1) and (2) of section  
12 310.141, Florida Statutes, is amended to read:

13 310.141 Vessels subject to pilotage.--

14 (1) All vessels, except vessels exempted by the laws  
15 of the United States or vessels drawing less than 7 feet of  
16 water, shall have a licensed state pilot or certificated  
17 deputy pilot on board to direct the movements of the vessel  
18 when entering or leaving ports of this state or when underway  
19 upon the navigable waters of the bays, rivers, harbors, and  
20 ports of this state, except:

21 (a) Vessels exempted by the laws of the United States;  
22 When docking or undocking; or

23 (b) Mono-hulled vessels drawing less than 7 feet of  
24 water; When moving about within a shipyard or moving between a  
25 shipyard and a berth or slip directly adjacent to the  
26 shipyard;

27 (c) Multi-hulled, swath, or nondisplacement vessels  
28 for which the product of the length overall and extreme beam  
29 is less than 6,000 square feet, and which draw less than 7  
30 feet of water;

31 (d) Any vessel, when docking or undocking; or

1 (e) Any vessel, when moving about within a shipyard or  
2 moving between a shipyard and a berth or slip directly  
3 adjacent to the shipyard.

4 (2) A vessel is docking or undocking when a tug or  
5 tugs are assisting the vessel, or the vessel is making use of  
6 a bow thruster or other lateral thrust devices incorporated  
7 into the vessel itself, in close proximity to the dock, with  
8 the vessel under the direction or control of the master,  
9 docking master, licensed state pilot, or certificated deputy  
10 pilot. If the vessel that is docking or undocking is under  
11 the direction or control of the master or docking master, such  
12 direction or control must have been delivered from the  
13 licensed state pilot or be in the process of being delivered  
14 to the licensed state pilot.

15 Section 12. Section 310.151, Florida Statutes, is  
16 amended to read:

17 (Substantial rewording of section. See  
18 s. 310.151, F.S., for present text.)

19 310.151 Rates of pilotage.--

20 (1) For the purposes of this section, the board shall  
21 consist of five members: one of the pilot members of the  
22 board to be designated by the chairman of the board; the board  
23 member actively involved in his professional or business  
24 capacity in maritime or marine shipping, or the member  
25 representing the pilotage user, to be designated by the  
26 chairman of the board; and the three board members not  
27 involved or monetarily interested in the piloting profession  
28 or in the maritime industry or marine shipping.

29 (2) The board is granted the power under this chapter  
30 to fix, by order, rates of pilotage to be charged by licensed  
31 state pilots and certificated deputy pilots after a hearing

1 held pursuant to the Administrative Procedure Act. The rates  
2 of pilotage in effect in the ports in the state or the  
3 effective date of this act shall be collectible and  
4 enforceable until the board fixes different rates of pilotage  
5 as provided in this chapter.

6 (3) Any person whose substantial interests are  
7 affected by the rates established by the board may petition  
8 the board requesting a rate hearing. However, for each port:

9 (a) A rate hearing for the purpose of adjusting rates  
10 may not be held within 18 months of the conclusion of a  
11 previous rate hearing convened for the purpose of adjusting  
12 rates, and may not be held within 24 months of a rate hearing  
13 which actually adjusted rates.

14 (b) An exception to the restriction in paragraph (a)  
15 may be granted by the board if it is shown that gross pilotage  
16 revenue in the port has fallen by more than 25 percent, or has  
17 risen more than 25 percent, since the last rate hearing for  
18 that port.

19 (4)(a) Upon receipt of a completed petition, the board  
20 shall provide notice of said petition in the Florida  
21 Administrative Law Weekly, in a newspaper of general  
22 circulation in the affected port area, and to those parties  
23 who have formally requested notice of any rate adjustment  
24 hearings for the affected port area. The notice shall advise  
25 all interested parties that they may file an answer, an  
26 additional or alternative petition, or any other applicable  
27 pleading or response, within 45 days of the date of  
28 publication of the notice, and the notice shall specify the  
29 last date by which any such pleadings must be filed. The  
30 board may, for good cause, extend the period for responses to  
31 a petition.

1 (b) The board shall consider, and schedule for hearing  
 2 at the earliest reasonable date, any completed petition as  
 3 well as any completed alternative petition, unless otherwise  
 4 prohibited under this section. The board may not grant any  
 5 relief greater than that which is contained in a petition and  
 6 publicly noticed. Notice of any hearing to consider an  
 7 adjustment in rates shall be published in the Florida  
 8 Administrative Law Weekly and in a newspaper of general  
 9 circulation in the affected port area, and shall be mailed to  
 10 each party who has formally requested notice of any rate  
 11 adjustment hearings for the affected port area at least 14  
 12 days prior to said hearing. Such hearing shall be held at the  
 13 port area affected, unless all parties to the proceeding  
 14 consent to the hearing held in another location.

15 (c) Whenever the completed petition or completed  
 16 alternative petition involves a disputed issue of material  
 17 fact, the proceeding shall be transferred to the Division of  
 18 Administrative Hearings for the assignment of a hearing  
 19 officer and a formal proceeding pursuant to s. 120.57(1).

20 (5) The petition asking for a rate increase is deemed  
 21 completed and filed when the board office has received a  
 22 nonrefundable rate hearing application fee of \$1,000 and the  
 23 board has received:

24 (a) A petition for specific rate increases from an  
 25 interested party alleging that the current rates are not  
 26 sufficient to maintain safe and efficient pilotage services  
 27 within the port or are not sufficient to yield just and  
 28 reasonable compensation for services rendered, with  
 29 information and arguments supporting such an allegation.

30 (b) All information, fiscal and otherwise, on the  
 31 piloting activities within the port which the board or

1 department justifiably deems necessary in order to properly  
 2 consider the petition and has requested from any pilot or  
 3 pilot association.

4 (6) The petition asking for a rate decrease is deemed  
 5 filed when the board office has received a nonrefundable rate  
 6 hearing application fee of \$1,000 to defray the expenses of  
 7 the hearing, and the board has received a proposal for  
 8 specific rate reduction from an interested party alleging one  
 9 or both of the following:

10 (a) That the current rates are yielding the pilots  
 11 excessive compensation for the service rendered, with  
 12 information and arguments supporting such an allegation.

13 (b) That the current rates are causing economic  
 14 hardship to local shipping interests or local commerce, with  
 15 information and arguments supporting such an allegation.

16  
 17 It is not necessary for the petitioner to provide fiscal  
 18 information relating to the petitioner's business operation if  
 19 the petition seeks to justify its proposal solely according to  
 20 paragraph (a). However, if the rate hearing request seeks to  
 21 justify itself according to the provisions of (b), or if such  
 22 arguments are formally provided and contained in a rate  
 23 decrease petition, the board may require that the petitioner  
 24 provide the board the minimum amount of information, fiscal or  
 25 otherwise, necessary to evaluate claims made by the petition.

26 (7)(a) The board, in fixing the rates of pilotage,  
 27 shall seek to insure that pilot net income is at a level which  
 28 will yield just and reasonable compensation for services  
 29 rendered and will insure continued safe and efficient service  
 30 in that port. The board shall not establish rates which are  
 31 unjust, unreasonable, or excessive.

1 (b) In determining whether an existing pilotage rate  
 2 or a proposed pilotage rate change is reasonable or is  
 3 excessive, the board shall consider, but not be limited to,  
 4 the following factors:

5 1. The public interest in promoting safe and efficient  
 6 piloting services and in having qualified pilots available to  
 7 respond promptly to vessels needing their service.

8 2. A determination of the actual net income of pilots,  
 9 including the value of all benefits derived from service as a  
 10 pilot. For the purposes of this section, "net income of  
 11 pilots" refers to total pilotage fees collected in the port,  
 12 minus reasonable operating expenses, divided by the number of  
 13 licensed and active state pilots within the port.

14 3. Reasonable operating expenses of pilots and  
 15 associations.

16 4. Pilotage rates in other ports.

17 5. The amount of time each pilot spends on actual  
 18 piloting duty, the time spent traveling to and from the  
 19 vessel, the time spent on other essential support services,  
 20 and the time available for other employment or activities.

21 6. The prevailing compensation available to  
 22 individuals in other maritime services of comparable  
 23 professional skill and standing as that sought in pilots, it  
 24 being recognized that in order to attract to the profession of  
 25 piloting and to hold the best and most qualified individuals  
 26 as pilots, the overall compensation accorded pilots should be  
 27 equal to or greater than that available to such individuals in  
 28 comparable maritime employment.

29 7. The impact the rate changes may have on individual  
 30 pilot compensation and whether such changes will lead to a  
 31

1 shortage of licensed state pilots, certificated deputy pilots,  
 2 or qualified pilot applicants.

3 8. Projected changes in vessel traffic.  
 4 9. Costs of retirement and medical plans.  
 5 10. Physical risks inherent in the job.  
 6 11. Special characteristics, dangers, and risks of the  
 7 particular port.

8 12. Any other factors the board may deem relevant in  
 9 determining a just and reasonable rate.

10 (c) In fixing the rates of pilotage pursuant to  
 11 subsection (2), the board shall give due regard to the  
 12 following: length, beam, net tonnage, gross tonnage, dead  
 13 weight tonnage, draft, freeboard or height above the  
 14 waterline, and any other dimensions, or combination of the  
 15 dimensions of the vessels to be piloted.

16 (d) The board shall not consider as valid the  
 17 proposition that pilotage rates should keep pace with, or in  
 18 any direct way relate to, the consumer price index or any  
 19 gaugage of inflation. The consumer price index or any gaugage of  
 20 inflation may be considered relevant only in relation to the  
 21 net income of the pilot.

22 (8) The board may waive the rate hearing application  
 23 fee required in subsection (5) or subsection (6), in whole or  
 24 in part, upon a showing of economic hardship by the  
 25 petitioner.

26 (9) The port pilot association in the port for which a  
 27 request for rate increase has been filed shall submit a  
 28 financial statement. The financial statement provided by the  
 29 port pilot association pursuant to this subsection shall:

30 (a) Be on a consolidated basis, in a format to be  
 31 determined by board rule.

1 (b) Include financial information on all entities with  
2 pilotage-related income or expenses, or entities owned or  
3 partially owned by pilots, and which supply, for compensation,  
4 goods or services reported as or relating to pilot operating  
5 expenses.

6 (c) Be by certified audit with unqualified opinion for  
7 those ports where gross pilotage is more than \$250,000 per  
8 year.

9 Section 13. Section 310.182, Florida Statutes, is  
10 created to read:

11 310.182 Authority of port pilot associations.--

12 (1) Pilots within a port may associate themselves for  
13 the purposes of providing the services required of them,  
14 administrative purposes as a corporation pursuant to ch. 607,  
15 as a partnership pursuant to ch. 620, or as an unincorporated  
16 association.

17 (2) Each licensed state pilot and certificated deputy  
18 pilot shall obtain a membership in a port pilot association.  
19 No port pilot association shall, except for good cause, deny  
20 membership to any validly licensed state pilot or certificated  
21 deputy pilot.

22 (3) Port pilot associations organized pursuant to  
23 subsection (1) shall have authority for billing and  
24 collection, payment of port operating expenses, administering  
25 board-approved training programs, establishment of work  
26 rotation schedules, dispatching of state pilots and  
27 certificated deputy pilots, and other duties and  
28 responsibilities statutorily required of ports and pilots by  
29 chapter 310 and rules of the board unless specifically  
30 required of individual state pilots or certificated deputy  
31 pilots.

1 (4) Port pilot associations formed pursuant to  
2 subsection (1) shall be registered by the department as  
3 established by rule of the board. The board shall not  
4 register any port pilot association unless the association has  
5 shown that, according to criteria established by board rule,  
6 it has sufficient resources, financial and otherwise, to offer  
7 piloting services on a continual basis in a safe and reliable  
8 manner. Those organizations of pilots presently providing the  
9 services of port pilot associations in any port of this state  
10 are presumed to meet the requirements of this section as of  
11 the effective date of this act, and such existing  
12 organizations may apply for registration and upon application  
13 shall be registered with the department upon this act becoming  
14 effective without a showing of compliance with the  
15 requirements of this section. Such registration shall be  
16 effective for financial accounting purposes as from January 1,  
17 1993.

18 (5) A pilotage fee shall not be assessed for pilotage  
19 services unless the pilot or his corporate entity providing  
20 the pilotage service is a member of a pilot association  
21 registered by the department.

22 Section 14. Each section which is added to chapter  
23 310, Florida Statutes, by this act is repealed on October 1,  
24 1996, and shall be reviewed by the Legislature pursuant to s.  
25 11.61, Florida Statutes.

26 Section 15. This act shall take effect upon becoming a  
27 law.

XX

HOUSE SUMMARY

With respect to ch. 310, F.S., relating to pilots, piloting, and pilotage, provides general provisions with respect to the regulation of pilotage in the state. Provides specified restrictions and obligations of pilots. Revises the definition of "pilotage" and defines "port pilot association" for purposes of the act. Revises the composition of the Board of Pilot Commissioners.

Provides for the temporary appointment of cross licensed deputy pilots during a state of emergency. Revises requirements for certification as a deputy pilot. Extends the period of validity of such certificates from 9 months to 1 year and limits renewal thereof. Authorizes the adoption of rules establishing physical examination requirements for pilots and deputy pilots. Revises grounds for disciplinary action and penalties imposed by the board.

Requires specified application and examination fees for licensure as a pilot or certification as a deputy pilot. Establishes fees for examination review and biennial registration of port pilot associations. Requires submission of annual financial statements by port pilot associations. Provides that financial records of all pilots and deputy pilots which relate to pilotage are subject to audit by the Department of Professional Regulation. Revises provisions relating to vessels that are subject to pilotage regulation.

Substantially revises provisions regulating rates of pilotage. Provides for composition of the Board of Pilot Commissioners for purposes of fixing rates of pilotage. Provides for rate hearings upon petition to the board. Provides for nonrefundable rate hearing application fees for petitions for rate increases and rate decreases, and provides for waiver of the fee under certain circumstances. Provides a limit on relief which may be granted by the board. Sets forth factors used to determine whether existing pilotage rates or proposed rate changes are reasonable or excessive.

Specifies the authority of port pilot associations. Requires each licensed state pilot and certificated deputy pilot to obtain membership in such an association. Requires port pilot associations to be registered by the department.

See bill for details.

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TO: Linda Giguere  
FROM: Marwood Harris

DATE: 12/6

Linda,

Here are copies of two articles  
on pilot laws and accidents. They're  
both pretty technical, but I couldn't  
find anything else from the legal  
perspective.

Marwood

## COMMENT

### DISCIPLINING MARITIME PILOTS: A REVIEW OF STATE AND FEDERAL PILOTAGE REGULATION

At the sound of the cry of your pilots  
the countryside shakes  
and down from their  
ships come all that handle the oar.<sup>1</sup>

#### INTRODUCTION

A continuing objective of maritime legislation in the United States has been to compel the safe navigation of public waterways.<sup>2</sup> Among these legislative efforts, the regulation of pilotage<sup>3</sup> is especially important because of the preeminent position that a

1. *Ezekiel* 27:28 (Revised Standard). The verse is taken from the allegorical lamentation over the City of Tyre. The good ship Tyre sank with all hands and cargo lost. The "skilled men of Zemer" had acted as the ship's pilots. *Id.* at 27:8. The prophet's lament recognizes the important place that pilots occupied even in these early times.

Maritime disaster attracts media attention and spurs public discourse, especially when accompanied by the loss of life. Frequently, the pilot, master, or captain of the ship occupies center stage in the subsequent drama of investigation and fixing blame. The pilot might paraphrase the prophet's lament and adopt it as his own:

At the sound of the cry of the countryside  
your pilots shake  
and down from their ships  
come all until quiet is restored.

2. For articulations of this objective, see, for example, the statements of purpose set forth in maritime legislation as seemingly diverse as the Port and Waterways Safety Act, 33 U.S.C. §§ 1221-1236 (1982); Rules of the Road for the Inland Waters, the Great Lakes, and the Western Rivers, 33 U.S.C. §§ 154-232, 241-295, 301-356 (1976), *repealed, amended, and recodified at* 33 U.S.C. §§ 2001-2073 (1982); Port and Tanker Safety Act of 1978, 92 Stat. 1471 (1978) (formerly codified at 46 U.S.C. § 391(a) (1976)). See also Pilot Rules for the Inland Waters, 33 C.F.R. § 80 (1976); Pilot Rules for the Great Lakes, 33 C.F.R. § 90 (1974); Pilot Rules for the Western Rivers, 33 C.F.R. § 95 (1976), each regulation promulgated pursuant to statutory authority contained in 33 U.S.C. § 157 (1970), *amended by* 33 U.S.C. § 2071 (1982), and now removed from the *Code of Federal Regulations*.

3. See generally A. PARRS, *LAW OF TUG, TOW AND PILOTAGE* 1003-12 (2d ed. 1982). For a review of pilotage regulations from the perspective of the American Pilots' Association, see E. CLOTHIER & W. LOWE, *STATE PILOTAGE IN AMERICA* (2d ed. 1979).

pilot holds in the safe conduct of vessels into and out of various ports. Recognizing the difficult nature of this facet of vessel navigation, states have enacted regulations that require the presence of licensed pilots on vessels transiting the states' harbors and streams.<sup>4</sup> Additionally, the federal government has established a regulatory scheme for pilot licensure.<sup>5</sup> Unfailingly, legislatures have chosen licensing procedures to restrict the pilotage of vessels to qualified persons. Revocation and suspension proceedings are used to facilitate the enforcement of the various pilotage regulations.<sup>6</sup>

On occasion, courts have been called upon to review the dynamics of the concurrent federal and state systems of pilotage regulation.<sup>7</sup> The process of legislative enactment and judicial interpretation of these pilotage regulation schemes has yielded a

4. Compulsory pilotage statutes have represented an essential characteristic of pilotage regulation in the United States throughout its history. See, e.g., MASS. LAWS ch. 13 (1783), *cited in* Jackson v. Marine Exploration Co., 583 F.2d 1336, 1339 & n.4 (5th Cir. 1978); At least twenty-three states have enacted compulsory pilotage statutes. 583 F.2d at 1339 & n.5. In Jackson, Judge Brown briefly recounts the history of pilotage regulation in the United States. For an able discussion of this history and the leading authorities in the area, one could do no better than to study the Jackson opinion. The Louisiana and Florida compulsory statutes are representative of this kind of legislation. See FLA. STAT. ANN. § 310.151 (West Supp. 1984); LA. REV. STAT. ANN. § 34:953 (West 1964). See also Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, *reh'g denied*, 331 U.S. 864 (1947); Brechtel v. Board of Examiners of Bar Pilots for Port of New Orleans, 230 F. Supp. 18 (E.D. La. 1964).

5. Despite the existence of these comprehensive regulatory schemes, marine casualties involving vessels directed by duly licensed pilots have continued to plague the maritime world. Just as comprehensive motor vehicle regulation has not rendered our highways accident-free, pilotage regulation can be expected to do no more than decrease the likelihood of accident and disaster. Even the attempt to attain this more limited goal can be no more effective than are those provisions of the pilotage schemes that ensure the enforcement of the various regulations.

6. For an excellent summary and discussion of the procedures associated with federal revocation and suspension proceedings, see Fidell, *Improving Competence in the Merchant Marine: Suspension and Revocation Proceedings*, 45 Mo. L. Rev. 1 (1980). For the purposes of this comment, revocation and suspension proceedings against the licenses of maritime pilots will often be referred to as "pilot licensure hearings." Because the comment discusses only interstitially the actual licensing of pilots, the reader should experience no confusion when reference is made to the revocation and suspension aspects of pilot licensure hearings.

7. See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 (1912); Thompson v. Darden, 198 U.S. 310 (1905); Olsen v. Smith, 195 U.S. 332 (1904); Wilson v. McNamee, 102 U.S. 572 (1880); *Ex parte McNiel*, 80 U.S. (13 Wall.) 236 (1871); Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450 (1864); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); Jackson v. Marine Exploration Co., 583 F.2d 1336 (5th Cir. 1978).

ifurcated structure of jurisdiction in which the federal or state system of regulation may operate to the exclusion of the other.<sup>8</sup> The exclusivity of the state regulation of pilots directing the movements of foreign vessels and registered United States vessels<sup>9</sup> conceivably may give rise to enforcement problems for the agency primarily charged with the task of ensuring the safe navigation of public waterways—the United States Coast Guard.<sup>10</sup> It is the purpose of this comment to delineate the problem of enforcement posed by this concurrent system of pilotage regulation, to trace the legislative and jurisprudential development of the jurisdictional dichotomy, and to suggest several alternatives for modifying the existing regulatory scheme to effectuate the broad purpose of safe navigation on the waterways of the United States.

#### THE PROBLEM—A HYPOTHETICAL, THE REALITY OF MARINE DISASTERS, AND THE IMPOTENCE OF THE COAST GUARD

##### *The Hypothetical*

The fairness problem underlying the existing system of state and federal pilotage regulation can best be highlighted with a series of simple hypotheticals. Suppose that vessels *A* and *B*, under *enrollment*<sup>11</sup> or license, are piloted by Coast Guard-licensed pilots. Both vessels are negligently piloted and collide. The Coast Guard may proceed against each pilot's federal license in a suspension and revocation proceeding. Under this, the federal model, the result is both fair and equitable in treating similarly situated parties in a similar manner. In addition, the Coast Guard fulfills its statutory duty of promoting the safety of

8. For a discussion of the jurisdictional dichotomy underlying the concurrent federal and state pilotage regulatory schemes, see *infra* notes 11-14 and accompanying text.

9. Registered vessels are permitted to engage in foreign trade only. Enrolled vessels—those vessels under license—"may engage in coastwise trade or the fisheries, or navigate the Great Lakes" but "may not engage in foreign trade." *Jackson v. Marine Exploration Co.*, 523 F.2d 1336, 1341 n.10 (5th Cir. 1978). For a further explanation of concepts of "enrollment" and "registry," see *infra* notes 11, 13. See also *Pacific Imp Co. v. U.S. Dep't of Transp.*, 375 F. Supp. 1036, 1039 (W.D. Wash. 1974).

10. See 46 U.S.C.A. §§ 2103-2104 (West Supp. 1983). See also *infra* pp. 1480-82.

11. "Enrollment" is defined as the "recording and certification of vessels employed in coastwise or inland navigation." BLACK'S LAW DICTIONARY 476 (rev. 5th ed. 1979). See *infra* note 9. See also G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 9-50 & n.246, 695-96 & n.246 (2d ed. 1974) (citing 46 U.S.C. §§ 251, 259, 263 (1976)).

life and property at sea.<sup>12</sup>

In a second hypothetical, vessels *C* and *D*, under *register*<sup>13</sup> or engaged in foreign trade, are piloted by state- and Coast Guard-licensed pilots. Again, both vessels are negligently piloted and collide. Because, under this *state* model, the pilots were acting under the authority of their state licenses, the Coast Guard is precluded from proceeding against the pilots' federal licenses. The state regulatory agency, however, may proceed against the state licenses of the pilots. Although this state model does achieve the equal treatment of both pilots, it does not permit the Coast Guard to take action against the pilots' federal licenses—action that the Coast Guard deems necessary to effectuate its statutory duty of enabling safe navigation. Nor does the state model promote uniform results.<sup>14</sup>

Now consider a situation in which *enrolled* vessel *X*, engaged in coastwise shipping and negligently piloted by state- and Coast Guard-licensed pilot *X*, collides with vessel *Y*, sailing under *register* and piloted by the equally negligent state- and Coast Guard-licensed pilot *Y*. The anomalous result is as predictable as it is unfair: the Coast Guard may take action against pilot *X* in a licensure hearing, but must leave to the state the task of disciplining pilot *Y*. If the state's regulatory mechanism operates to discipline the pilot, there is no unfairness and the policy of safe navigation has been effectuated. If the state's regu-

12. See 46 C.F.R. § 5.01-15(a) (1983).

13. "Registry" is defined as "[t]he list or record of ships subject to the maritime regulations of a particular country. . . . Generally, 'registry' applies to vessels in foreign commerce. . . ." BLACK'S LAW DICTIONARY 1155 (rev. 5th ed. 1979) (citing *R.C. Craig Ltd. v. Ships of the Sea Inc.*, 345 F. Supp. 1066, 1070 (S.D. Ga. 1972)). See G. GILMORE & C. BLACK, *supra* note 11, § 9-50 & n.246, at 695-96 & n.246 (citing 46 U.S.C. § 11 (1976)).

14. Even the similar treatment of transgressing pilots *C* and *D* may fail if, at the time of the collision, *C* is operating under the authority of one state and *D* another. In such a case, which as a practical matter will never arise, one must ask the perennial question: Is such a result the price we pay for a federal system? See, e.g., *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) ("Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors."); *Tooker v. Lopez*, 24 N.Y.2d 569, 580, 249 N.E.2d 394, 400, 301 N.Y.S.2d 519, 528 (1969) ("[A]ny anomaly resulting from the application of Michigan law to bar an action of [a Michigan resident] is 'the implicit consequence' of a Federal system which, at a time when we have truly become one nation, permits a citizen of one State to recover for injuries sustained in an automobile accident and denies a citizen of another State the right to recover for injuries sustained in a similar accident.").

atory agency fails to take action against the license of a pilot when the Coast Guard would have done so, an injustice is done and blatantly unsafe navigation remains unremedied.

### *The Case of the Summit Venture*

On May 9, 1980, the Liberian bulk carrier Summit Venture collided with a support pier of the Sunshine Skyway Bridge in Tampa Bay, Florida, causing a portion of the bridge roadway and superstructure to fall into the bay.<sup>15</sup> Several vehicles plunged into the bay resulting in thirty-five deaths. The bridge suffered an estimated \$30 million in damages, and repair costs to the Summit Venture were estimated at \$1 million.<sup>16</sup> The vessel, under movements directed by a certificated and licensed member of the Tampa Bay Pilots Association, had unexpectedly encountered high winds and heavy rain during her transit of the channel approaching the ill-fated bridge. The National Transportation Safety Board (NTSB) identified three probable causes of the accident: the weather, "the failure of the National Weather Service to issue a severe weather warning for mariners, and the failure of the pilot to abandon the transit when visual and radar navigational references for the channel and the bridge were lost in the heavy rain."<sup>17</sup>

A great deal of publicity surrounded the incident and subse-

15. The most detailed accounts of the collision and its aftermath can be found in the *St. Petersburg Times* and *The Tampa Tribune* newspapers beginning with the May 1980 editions. For a succinct, yet complete, presentation of these events, see J. CURTIS, *SKYWAY* (1980) (available in the Florida Collection of the University of South Florida Library). See also *Freighter rams Skyway, span falls into sea, 30 are killed*, *St. Petersburg Times*, May 10, 1980, § 1, at 1, col. 1; *32 killed as Ship Wrecks Bridge in Florida*, *N.Y. Times*, May 10, 1980, § 1, at 1, col. 6; *32 Die in Tampa Bay*, *New Orleans Times-Picayune/States-Item*, May 10, 1980, § 1, at 1, col. 6. The National Transportation Safety Board (NTSB) issued a Marine Accident Report recounting and analyzing the incident based on information gathered by a U.S. Coast Guard Marine Board of Investigation and the NTSB in a ten-day public hearing. NATIONAL TRANSPORTATION SAFETY BOARD, No. NTSB-MAR-81-3, *RAMMING OF THE SUNSHINE SKYWAY BRIDGE BY THE LIBERIAN BULK CARRIER SUMMIT VENTURE, TAMPA BAY, FLORIDA, MAY 9, 1980* (1981) [hereinafter cited as MARINE ACCIDENT REPORT]. See also Gilbert, *Anatomy of Two Collisions, Proceedings*, Oct. 1980, at 132, 134 (U.S. Naval Inst.).

16. MARINE ACCIDENT REPORT, *supra* note 15, at 1.

17. *Id.* The report lists two other factors that contributed to the tragic loss of life: the lack of a structural pier protection system which could have absorbed some of the impact force or redirected the vessel" and "the lack of a motorist warning system which could have warned the highway vehicle drivers of the danger ahead." *Id.*

quent investigations.<sup>18</sup> The public was shocked and outraged by the needless loss of life, pressing for an explanation of how such a disaster could occur and clamoring for a probe of the Florida pilotage system.<sup>19</sup> On May 13, just four days after the accident, the Coast Guard convened a Marine Board of Investigation in Tampa. The public hearings lasted ten days and received thorough press coverage.

Although this joint Coast Guard-NTSB investigation fixed responsibility for the collision, the Coast Guard, perceiving that it had no jurisdiction, took no action against the pilot. The pilot who was in charge of the Summit Venture at the time of the accident held both a federal license and a harbor pilot's license issued to him pursuant to Florida state regulation. The state license was temporarily suspended on June 17 by the Department of Professional Regulation (DPR) under an emergency order. On September 17, a Florida state court affirmed the DPR order, observing that "[t]he order recited specific facts and reasons for finding an immediate danger to the public health, safety, or welfare necessitating the emergency suspension of [the pilot's] license, as required by [Florida law]."<sup>20</sup> A formal suspension and revocation hearing was conducted by the DPR on October 20 as required by section 120.60(7) of the Florida statutes.<sup>21</sup> On Christmas Eve, the hearing examiner appointed by the DPR announced his finding that the pilot was free of all fault in the collision and recommended that the pilot's license be restored, presenting the pilot with an "early Christmas present."<sup>22</sup> In March 1981, the full State Board of Pilot Commissioners voted unanimously to uphold the hearing examiner's report.<sup>23</sup> State officials then abandoned any further attempts to discipline the pilot, returning to him the harbor pilot's license.<sup>24</sup> A month later,

18. Gilbert, *supra* note 15, at 135.

19. See, e.g., *The Aftermath*, *Tampa Tribune*, May 11, 1980, at A6, col. 1; *Horror*, *Tampa Tribune*, May 10, 1980, at A10, col. 1; *The tragedy that was no accident*, *Tampa Tribune*, May 10, 1980, at A20, col. 2; *The view from the top: terror*, *Tampa Tribune*, May 10, 1980, at A22, col. 1. See also J. CURTIS, *supra* note 15, at 28, 35.

20. *Lerro v. Department of Professional Regulation*, 388 So. 2d 47, 48 (Fla. Dist. Ct. App. 1980) (citing FLA. STAT. § 120.54(9)(a)(3) (1979)).

21. FLA. STAT. § 120.60(7) (1979), cited in *Lerro v. Department of Professional Regulation*, 388 So. 2d 47, 48 n.2 (Fla. Dist. Ct. App. 1980).

22. *Pilot in Ship Crash Gets Good News*, *New Orleans Times-Picayune/States-Item*, Dec. 25, 1980, § 1, at 3, col. 6.

23. *Pilot Board Finds Lerro Blameless*, *Tampa Tribune*, Mar. 4, 1981, at 1, col. 1.

24. *Lerro Gets Deputy Pilot's License Back*, *Tampa Tribune*, Mar. 12, 1981, at 1, col. 1.

the NTSB issued its report identifying pilot error as one of three probable causes of the accident.<sup>25</sup>

#### Coast Guard Impotence

The Marine Accident Report<sup>26</sup> noted that, although the pilot was licensed by the Coast Guard as a first-class pilot for Tampa Bay, he was also certified by the state as a Tampa Bay deputy pilot. The report further observed that the pilot "was operating under the authority of the State certificate at the time of the accident."<sup>27</sup> The report then succinctly outlined the NTSB's interpretation of Coast Guard responsibility for pilotage regulation under the existing jurisprudence:

A Tampa Bay pilot may hold both a Coast Guard license and a State license. A pilot serves under the authority of his Federal license when piloting a U.S. vessel enrolled in coastwise trade; when piloting foreign vessels or U.S. vessels engaged in foreign trade, the pilot serves under the authority of his State license. The Coast Guard cannot act against a pilot's Federal license for wrongful acts committed as a State pilot, and the State might not act against a pilot's State license for wrongful acts committed as a Federal pilot.<sup>28</sup>

Although the NTSB identified the pilot's negligence as one factor in causing the collision,<sup>29</sup> the Coast Guard was frus-

trated<sup>30</sup> by its apparent inability to take any action against the pilot because he was operating under the authority of his state license.<sup>31</sup> The frustration was evident in the report's summation of state authority:

The Florida Board of Pilot Commissioners sets the requirements for licensed State pilots and for certificated deputy pilots, and has the authority to discipline State pilots for wrongful acts committed while piloting under the authority of their State license. *In its 5-year history before this accident, the State Board had not disciplined a pilot for a wrongful act.*<sup>32</sup>

In this context, it is not unexpected that one of the NTSB's recommendations was to seek legislation that would permit "the Coast Guard to act against a pilot's Federal license for acts com-

30. Frustration over a seeming inability to discipline a pilot whom it deemed negligent was not confined to the Coast Guard. Although the full State Board of Pilot Commissioners voted unanimously to uphold the hearing examiner's report finding the pilot blameless, four of the six commissioners made it plain that they thought the pilot was wrong in continuing the transit of the channel and a fifth commissioner indicated his agreement. They voiced "frustration at their apparent impotence to strip [the pilot] of his license to pilot ships on Tampa Bay." *Pilot Board Finds Lerro Blameless*, Tampa Tribune, Mar. 4, 1981, at A1, col. 1. The Board felt compelled to ratify the hearing officer's findings. *Id.* col. 2. Holm Griffen, assistant attorney general of Florida and legal adviser to the Board, observed: "It's the hearing officer's prerogative [sic] to make a decision. It doesn't matter what you think of that decision." *Id.* col. 4. Not surprisingly, the DPR's attorney disagreed with the legal advice given the Board. *Id.*

31. Finding 17 in the "Conclusions" section of the report observes that "[t]he Coast Guard cannot act against the Federal license of a pilot for wrongful acts committed while serving under the authority of a State license." MARINE ACCIDENT REPORT, *supra* note 15, at 41. In discussing "Pilotage Authority," the NTSB authors write:

The existing State and Federal laws pertaining to Tampa Bay and other pilotage services allow a pilot who holds both licenses to operate under the authority of either, but not both at the same time. If a Coast Guard revokes a pilot's Federal license, this will not necessarily prevent him from piloting vessels under his State license; the converse is also true. This condition can limit the Coast Guard's jurisdiction in setting the qualifications for obtaining a pilot's license and in initiating remedial action for suspending or revoking a pilot's licenses.

*Id.* at 37 (emphasis added).

32. *Id.* at 20 (emphasis added). There had been 239 cases before the Florida Board of Pilot Commissioners during the five-year period immediately preceding the Sunshine Skyway incident with not a single incidence of disciplinary action against a pilot. *Board: Lerro's Decision Not Reasonable*, Tampa Tribune, Apr. 11, 1981, at B2, cols. 1-2. One report noted that Tampa, the busiest port in the state, experienced more nautical mishaps—120 of the 239—from 1975 to 1980 than all the other ports in the State of Florida combined. *Legislator asks probe of harbor pilot setup*, Tampa Tribune, May 10, 1980, at A9, col. 1.

col. 1.

25. *Safety Board Blames Lerro, Weather Data*, Tampa Tribune, Apr. 8, 1981, at A1, col. 3; *Board: Lerro's Decision Not Reasonable*, Tampa Tribune, Apr. 11, 1981, at B1, col. 1.

26. MARINE ACCIDENT REPORT, *supra* note 15.

27. *Id.* at 14.

28. *Id.* at 20.

29. *Id.* at 42. Finding 6 recited the NTSB's conclusion that "[t]he pilot's decision to attempt to navigate the SUMMIT VENTURE through the channel and under the Sunshine Skyway Bridge after visual and radar navigational references were lost 0.2 nmi west of buoy 2A was not a reasonable and prudent decision." *Id.* at 40 (emphasis added). To avoid unfairness to the pilot of the Summit Venture, it should be stressed that one member of the NTSB agreed with the Florida Board's finding of no pilot fault. His concurring and dissenting statement related in pertinent part:

Although I concur with the majority in the basic thrust of the probable cause, I must take exception to the finding of failure on the part of the pilot of the SUMMIT VENTURE. After a careful review of the events of the day, I don't feel we can hold the pilot responsible to the degree implied in the majority's probable cause. In retrospect, we can see that if he had taken another course of action the tragedy might have been averted. However, I feel he acted in a manner which accords with reasonable professional standards.

*Id.* at 45.

mitted while serving under the authority of his State license."<sup>33</sup>

THE DEVELOPMENT OF THE STATUTORY AND JUDICIAL FOUNDATION OF CONCURRENT FEDERAL AND STATE PILOTAGE

The Supreme Court has recognized that "[p]ilots are . . . indispensable cogs in the transportation system of every maritime economy."<sup>34</sup> They are called upon to guide vessels through the maze of local navigation hazards—a special skill. Consequently, a pilot, in exercising his skill, is held to the high standard of care articulated by Dean Prosser: "[T]hose who undertake any work calling for special skill . . . are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability."<sup>35</sup> In *Atlee v. Packet Co.*,<sup>36</sup> a case involving the night-time collision of a pilot-directed barge with an unlighted stone pier, Justice Miller observed that the "standard minimum of special knowledge and ability" for a pilot of a river steamer and a harbor pilot alike includes a "personal knowledge of the topography through which he steers his vessel."<sup>37</sup> A compulsory pilot<sup>38</sup> is held to an excep-

33. MAINE ACCIDENT REPORT, *supra* note 15, at 43. The NTSB hastened to add that "[t]his need not reduce the State's authority in the area of pilotage." *Id.* at 37. This qualification is *not* a necessary constitutional or statutory prerequisite for congressional action; rather, it is an indication of the NTSB's recognition of the political sensitivities involved in just such a legislative attempt.

34. *Jackson v. Marine Exploration Co.*, 583 F.2d 1336, 1339 (5th Cir. 1978) (quoting *Kotch v. Board of River Pilot Comm'rs*, 330 U.S. 552 (1947)). "A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided . . ." *Ex parte McNiel*, 80 U.S. (13 Wall.) 236, 238 (1871). "Pilots hold a unique position in the maritime world" because they possess a special skill which subjects them to a high standard of care. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 93-94 (1955).

35. W. PROSSER, *LAW OF TORTS* § 32, at 161 (4th ed. 1971).

36. 88 U.S. (21 Wall.) 389 (1875).

37. *Id.* at 396. Justice Miller articulated more completely the standard of knowledge required of a river pilot:

In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand-bars, snags, sunken rocks or trees, or abandoned vessels or barges. All of this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand-bars newly made, of logs or snags, or other objects newly presented, against which his vessel might be

tionally high standard of care and may be charged with the knowledge of a local condition as a matter of law.<sup>39</sup> The extensive system of state and federal regulation comports with the standard against which pilot conduct is measured. The existing pilotage regulations attempt to give effect to this standard of care.

*The Antecedents of Pilotage Regulation*

Pilotage regulation has a venerable heritage and a persistent purpose. In *Ex parte McNiel*,<sup>40</sup> Justice Swayne traced compulsory pilotage laws to the ancient Roman law.<sup>41</sup> The endurance of pilotage regulation is reflected in his discussion of compulsory pilotage laws in the Hanseatic ordinances (1457), sixteenth-century Swedish maritime law, the Netherlands' maritime code of the *Pays Bas*, and the maritime law of seventeenth-century France and England.<sup>42</sup> Regulation in the form of sanctions against negligent pilots was not foreign to these comprehensive pilot regulatory schemes. For example, Professor Parks recounts the English case of *Re Rumney and Wood*<sup>43</sup> in which the President of the Admiralty Court found a pair of pilots negligent for permitting their vessels to go aground and imperil the safety of life and property. The transgressors were imprisoned for a year and forbidden from piloting ships ever again—a sentence which, "by today's standards, was exceedingly severe."<sup>44</sup>

*Id.* For more recent articulations of the standard for pilots, see, for example, *Transorient Navigators Co., S.A. v. M/S Southwind*, 714 F.2d 1358 (5th Cir. 1983); *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790 (5th Cir.), *reh'g denied en banc*, 564 F.2d 97 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

38. Pilotage is "compulsory" when a statute imposes a fine or imprisonment on the owners of ships that fail to take a pilot. G. GUMORE & C. BLACK, *supra* note 11, § 7-16, at 520. See *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912); *Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique*, 182 U.S. 406 (1901); *The China*, 74 U.S. (7 Wall.) 53 (1869).

39. *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 798-99 & n.6 (5th Cir.) *reh'g denied en banc*, 564 F.2d 97 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

40. 80 U.S. (13 Wall.) 236 (1871). For a discussion of this case, see *infra* text accompanying notes 84-87.

41. 80 U.S. (13 Wall.) 236, 239 (1871) (citing DIG. JUST. 19.2). See also E. CLOTHIER & W. LOWE, *supra* note 3, at 164-65.

42. 80 U.S. (13 Wall.) 236, 239 (1871).

43. A. PARKS, *supra* note 3, at 1003 (citing *Re Rumney and Wood*, Act Book, No. 128, Aug. 1, 1541 (p. 213, Vol. 1, Select Pleas in the Court of Admiralty, A.D. 1390-1404 and A.D. 1527-1545, Selden Society)).

44. *Id.* at 1004. Professor Parks excerpted the court's language condemning the pilots:

The late seventeenth century witnessed the beginnings of state pilotage in America.<sup>45</sup> The colonial commercial establishment, which became increasingly dependent on maritime activity,<sup>46</sup> quickly perceived the need for pilotage regulation. In the

And I dismiss, absolve, and discharge you and each of you being unworthy, unfit, unskilful, inexperienced, lazy, negligent and careless men from the charge, care, and practice of conducting, commanding, and piloting any ships whatsoever as well from any ports whatsoever within this famous realm of England as to ports over the seas . . .

*Id.*

The early enactments of pilotage regulation reflect a similar severity in sanctioning pilots for negligent conduct. Article XXIII of the Roll of Oleron provided:

If a Pilot undertakes the conduct of a vessel, . . . and fail of his Duty therein, so as the Vessel miscarry by reason of his Ignorance in what he undertook, and the Merchants Sustain Damage thereby, he shall be Obligated to make full Satisfaction for the same, if he has wherewithal and if not lose his Head.

E. CLOTHIER & W. LOWE, *supra* note 3, at 166 (quoting J. ALEXANDER, *A GENERAL TREATISE OF THE DOMINION OF THE SEA AND A COMPLETE BODY OF THE SEA LAWS* 151 (2d ed. 1709)). Article XXV prohibited and prescribed punishments for conspiring to destroy ships and their cargo so as to enrich the local lords, sailors, merchants, mariners, and pilots. Whereas these conspirators were to be "Accursed and Excommunicated and punished as Robbers and Thieves," pilots were allotted a special punishment.

[A]ll false and treacherous Pilots shall be condemned to suffer a most vigorous and unmerciful death; and high Gibbets [a kind of gallows] shall be erected for them in the same Place, or as nigh as conveniently may be, where they so guided and brought any Ship or Vessel to Ruin as aforesaid, and thereon these accursed Pilots are with Ignominy and much Shame to end their Days; which said Gibbets are to abide and remain to succeeding Ages on that Place, as a visible Caution to other Ships that afterwards shall sail thereby.

E. CLOTHIER & W. LOWE, *supra* note 3, at 167 (quoting J. ALEXANDER, *supra*, at 152-53).

England's *Black Book of the Admiralty* was no less severe in permitting a ship's company, whose vessel had been "placed in peril" by a pilot unfamiliar with local waters, to "cause [the pilot's] head to be cut off." E. CLOTHIER & W. LOWE, *supra* note 3, at 168 (citing *THE CUSTOMS OF THE SEA—THE BLACK BOOK OF THE ADMIRALTY* app. pt. 3 (T. Twiss ed. 1874)).

Article XXVII of the Hanseatic ordinances read: "He who shall be found incapable of discharging his duty as a pilot or mariner, for which he has received his wages, shall forfeit all that was promised him, and be besides punished according to his demerit." E. CLOTHIER & W. LOWE, *supra* note 3, at 171 (quoting J. ALEXANDER, *supra*, at 198). One need not long ponder the fate of a pilot whose inability led to the loss of ship, cargo, or men.

One of the fifty-four sections that made up the *Sea Laws of France*, promulgated in 1681, was devoted entirely to pilotage. The last article addressed pilot sanctions:

A Pilot that ignorantly runs a Ship aground, shall be whipped by the Hand of the Hangman, and for ever depriv'd of his employment; and as for such as maliciously and designedly run a Ship upon a Rock or Bank, or Shore, he shall be punished with Death, and his Body hung up upon a Mast that shall be planted near the Place of the Shipwreck.

E. CLOTHIER & W. LOWE, *supra* note 3, at 173 (quoting J. ALEXANDER, *supra*, at 343).

45. E. CLOTHIER & W. LOWE, *supra* note 3, at 5.

46. See generally S. MORISON, *THE MARITIME HISTORY OF MASSACHUSETTS* (1921);

1660's, the Virginia House of Burgesses enacted a series of regulations intended to eliminate incompetent pilotage and disruptive, competitive practices among those proffering their services as pilots.<sup>47</sup> By 1775, Virginia had enacted a broad scheme of pilotage regulation.<sup>48</sup> The Pennsylvania Legislature had established a similar scheme in 1766 and 1767.<sup>49</sup> The earliest identified compulsory pilotage statute in the United States was a Massachusetts law enacted in 1783.<sup>50</sup> "Pilot laws existed in several of the States [when the Constitution took effect in March of 1789], and were subsequently enacted in others."<sup>51</sup> The fate of these laws under the nascent federalist system awaited congressional action.

In striking the balance of power between the states and the national government under the federalist structure, the first Congress was faced with the task of demarcating authority over the subject of pilotage. In 1789, Congress enacted a statute providing that pilots should continue to be regulated under existing or subsequently enacted state pilotage schemes "until further legislative provision shall be made by Congress."<sup>52</sup> Justice Swayne in *Ex parte McNeil* was convinced that the Act clearly evinced Congress' belief that the states had the power to enact pilotage regulations.<sup>53</sup> Whatever else was intended by the 1789

D. ROBERTSON, *ADMIRALTY AND FEDERALISM* 65-103 (1970).

47. E. CLOTHIER & W. LOWE, *supra* note 3, at 9-10 (quoting 48 *MD. HIST. MAG.* 111-12 (1953)).

48. *Id.* at 10 (quoting 48 *MD. HIST. MAG.* 112 (1953)).

49. *Id.* at 107 (citing Pennsylvania Acts of Feb. 8, 1766 and May 20, 1767).

50. *MASS. LAWS* ch. 13 (1783), cited in *Ex parte McNeil*, 80 U.S. (13 Wall.) 236, 239 (1871), and *Jackson v. Marine Exploration Co.*, 583 F.2d 1336, 1339 & n.1 (5th Cir. 1978).

51. *Ex parte McNeil*, 80 U.S. (13 Wall.) 236, 241 (1871).

52. Act of Aug. 7, 1789, ch. 9, § 4, 1 Stat. 53, 54 (current version at 46 U.S.C.A. § 8501 (West Supp. 1983)). The Act reads in pertinent part:

That all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.

53. 80 U.S. (13 Wall.) at 241. It will become evident in the discussion of *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), *infra* pp. 1473-75, that the understanding of the framers of the Constitution must have been that the states had ceded their power to regulate pilotage to the national government which, in turn, through the Act of 1789 or, in the absence of asserting its power to regulate pilotage, retroceded the power to the states. This view follows from the premise that "the power to regulate commerce [under the U.S. Constitution article I, section 8, clause 3] includes the regulation of navi-

statute, the predominant view of its effect, and the interpretation of its existing descendant statute,<sup>61</sup> is that the system of federal-state regulation of pilotage is only concurrent to the extent that Congress acts in a positive manner pursuant to its commerce power to regulate pilotage.<sup>62</sup>

During the period from 1812 to 1849, general efforts were made to provide for greater security at sea.<sup>63</sup> One such effort was the Act of 1837, which provided that a vessel transiting waters that form a boundary between two states may employ a pilot from either state.<sup>64</sup> The statute encouraged the utilization of pilotage services by providing shipowners the choice of pilot when a more restrictive statute might have achieved a more limited compliance. To further encourage safe navigation, several states enacted half-pilotage laws<sup>65</sup> which required vessels that refused pilotage services to pay half the cost of such services.<sup>66</sup> The offer to perform, plus the ability to perform, amounted to a legal performance albeit at half the cost.<sup>67</sup> The purposes of the half-pilotage laws were to provide an incentive for vessels to take on persons skilled in directing ships into and out of port and to ensure that local pilots received some measure of compensation for

gation." *Cooley*, 53 U.S. (12 How.) at 315. See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 210 (1824) (commerce clause gave Congress the power to regulate navigation on navigable waters of the United States).

54. 46 U.S.C.A. § 8501 (West Supp. 1983) (formerly 46 U.S.C. § 211 (1976)).

55.

The First Congress in 1789 obviously felt that *until further action was taken*, it was the better part of wisdom to leave the regulation of local pilotage grounds to the various states since different situations existed with respect to the various states in relation to their respective harbors, ports and waters.

A. PANKS, *supra* note 3, at 1012 (emphasis added). It is clear, however, that, under the supremacy clause, federal enactments in the pilotage area which are in conflict with state laws would preempt the latter. U.S. CONST. art. IV, cl. 2. See *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1977); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947).

56. A. PANKS, *supra* note 3, at 1014.

57. Act of Mar. 2, 1837, ch. 22, 5 Stat. 153 (current version at 46 U.S.C.A. § 8501(b) (West Supp. 1983)).

58. Counsel for the Board of Wardens of the Port of Philadelphia cited to the half-pilotage laws of Alabama, Delaware, Georgia, Louisiana, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, and Virginia. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 308 (1851).

59. See *id.* at 311. See also G. GILMORE & C. BLACK, *supra* note 11, § 7-16, at 520; BLACK'S LAW DICTIONARY 643 (rev. 5th ed. 1979).

60. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 312 (1851).

their readiness to perform their trade.<sup>61</sup>

In 1851, the Supreme Court rendered its landmark decision in *Cooley v. Board of Wardens of Philadelphia*,<sup>62</sup> holding *inter alia* that Congress' power to regulate commerce, including the regulation of navigation and pilotage, does *not* preclude the states from enacting any laws regulating commerce. The Court upheld a Pennsylvania half-pilotage statute covering the Port of Philadelphia. The *Cooley* doctrine permitted states "to regulate those aspects of interstate and foreign commerce so *local* in character as to demand diverse treatment, while Congress alone [could] regulate those aspects of interstate and foreign commerce so *national* in character that a single, uniform rule is necessary."<sup>63</sup> Significantly, in holding that pilotage regulation was indeed *local* and thereby within the power of state legislatures to effect, Justice Curtis relied upon the Act of 1789 authorizing state regulation of pilotage in the absence of congressional enactment.<sup>64</sup>

61. *Id.* The laws may be viewed as protectionist in at least three ways. First, the laws protected the existence of a professional pilot guild by forcing shipowners to pay for services they chose not to utilize. The failure to do so would have led to a greater competition among pilots when their services were requested. In addition, without a measure of compensation, fewer skilled mariners would have been attracted to the pilot trade. Second, certain local industries may have been exempt from half-pilotage. This was true of the coal industry under the Pennsylvania statute at issue in *Cooley*. *Id.* at 304. Third, a preference may have been given to the ports of one state over those of another. Such a preference also constituted a part of the pertinent Pennsylvania statute at issue in *Cooley*. *Id.* at 306.

62. 53 U.S. (12 How.) 299 (1851). For a complete discussion of *Cooley* and its impact upon the subsequent interpretation of the interface between state and national power, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-4, 6-12, 6-25, at 324-26, 340-42, 386-89 (1978).

63. L. TRIBE, *supra* note 62, § 6-4, at 324 (emphasis in the original).

64. 53 U.S. (12 How.) at 315. See also L. TRIBE, *supra* note 62, § 6-4, at 324. Because the Court relied on the legislative intent behind a 1789 statute, its 1851 characterization of pilotage as local in nature raises the following question: can subsequent developments in the field of maritime commerce in the United States render previously local pilotage *national* in character, or is pilotage in U.S. ports characterized as local in perpetuity based on the state of U.S. maritime commerce in 1789? One may legitimately question whether the resolution of this problem matters in the light of subsequent interpretations of the commerce clause and their effect on federal-state relations. See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *California v. Zook*, 336 U.S. 725 (1949); *Southern Pac. Co. v. Arizona*, 325 U.S. 701 (1945). Clearly, the characterization mattered to the Ninth Circuit in *Soriano v. United States*, 494 F.2d 681, 684 (9th Cir. 1974), the leading case discussing the Coast Guard's authority to act against pilot licenses in suspension and revocation proceedings.

In August 1852, shortly after *Cooley* was decided, Congress enacted amendments<sup>65</sup> to the federal pilotage regulatory scheme, "supplant[ing] the states' individual control over the piloting and engineering of steam vessels with a system of federal inspection and federally qualified pilots and engineers."<sup>66</sup> The Act applied to both *registered* and *enrolled* vessels.<sup>67</sup>

Subsection 9 of section 9 of the 1852 statute delineated the authority of the federal board to revoke a pilot's license "upon proof of negligence, unskillfulness, or inattention to the duties of the station."<sup>68</sup> The subsection then outlined an appeal procedure for "wronged" pilots. Subsection 13 of section 9 vested in a board of inspectors the power to summon and examine pilots preparatory to the suspension or revocation of their licenses.<sup>69</sup> Had Congress acted positively and within its power to make exclusive the federal regulation of pilotage? Did the 1852 amendments effectively overrule *Cooley* in its more limited application to pilotage regulations?<sup>70</sup> The broad coverage of the Act makes

65. Act of Aug. 30, 1852, ch. 106, 10 Stat. 61 (current version at 46 U.S.C.A. §§ 6101, 6301, 6303-6307, 7101, 7106, 7701-7703, 7705 (West Supp. 1983)). In *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450, 470 (1864), dissenting Justice Miller observed: "Unquestionably, Congress intended [by the 1852 Act] to supply that very system [of pilotage] which the Supreme Court [in *Cooley*] had intimated was needed, and was in the power of Congress to provide."

66. *Dietze v. Siler*, 414 F. Supp. 1105, 1110 (E.D. La. 1976).

67. The Act, entitled, "An Act to provide for the Better Security of the Lives of Passengers on board on vessels propelled in whole or in part by steam . . ." provided in pertinent part:

[I]nstead of the present system of pilotage on [steamers carrying passengers] . . . the following regulations shall be observed . . .

Whenever any person claiming to be a skillful pilot for any such vessel shall offer himself for a license, the said board shall make diligent inquiry as to his character and merits; and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, they shall give him a certificate to that effect, licensing him for one year to be a pilot of any such vessels within the limit prescribed in the certificate; but the license of any . . . pilot may be revoked upon proof of negligence, unskillfulness, or inattention to the duties of the station . . .

Act of Aug. 30, 1852, ch. 106, § 9(9), 10 Stat. 61, 67.

68. *Id.* This paragraph of section 9 is the antecedent of 46 U.S.C.A. §§ 7101, 7703 (West Supp. 1983).

69. Act of Aug. 30, 1852, ch. 106, § 9(13), 10 Stat. 61, 68 (current version at 46 U.S.C.A. §§ 7701-7703, 7705 (West Supp. 1983)).

70. Various lower courts answered both questions in the affirmative, at least as to the types of vessels covered by the Act. See, e.g., *The Panama*, 10 F. Cas. 1068 (D. Ore. 1861) (No. 10,702).

comprehensible Professor Parks' view that "[t]he status of state pilotage acts—and in fact the entire system of state pilotage—was seriously threatened and in a state of hiatus from 1852 until [the repeal of the 1852 amendments in] 1871."<sup>71</sup> Arguably, then, the 1852 Act had transformed a concurrent system of pilotage regulation into one exclusively federal.

The Supreme Court gave short shrift to this argument in its 1864 *Steamship Company v. Joliffe* decision.<sup>72</sup> In 1861, the California Legislature passed a set of pilotage regulations for the Port of San Francisco, including authorization for the licensing of local pilots by a board of commissioners and the determination of pilotage fees. The state statute came under direct attack in *Joliffe*. The pilot, whose proffered services were refused by the defendant's vessel, was claiming half-pilotage; the defendant steamship company contended that the 1852 Act preempted California's power to regulate pilotage. In upholding the California statute, Justice Field determined that the congressional intent underlying the 1852 Act was limited to the regulation of pilots on "steamers on the voyage, and not to port pilots."<sup>73</sup> Justice Field reasoned that the Act "was not directed to the remedy of any evils of the local pilot system."<sup>74</sup> The *Joliffe* decision effectively reinstated the dichotomy of federal-state regulation of pilotage on enrolled as contrasted with registered or foreign vessels.<sup>75</sup>

The reasoning of the 4-3 *Joliffe* decision is subject to some

71. A. PARKS, *supra* note 3, at 1013.

72. 69 U.S. (2 Wall.) 450 (1864).

73. *Id.* at 461. In the opinion, Justice Field set out the two different meanings of "pilot": first, one engaged to guide vessels into and out of port through local navigational hazards; and, second, one engaged to direct the movements of a vessel throughout the course of her voyage. He then posited that the language employed in the statute—"a vessel leaving her port," "deprived of their services on her voyage," and "pilots . . . belonging to the vessels on which they are employed"—was not appropriate to describe the temporary nature of a local or port pilot's affiliation with a vessel. *Id.* at 461-62 (emphasis added).

74. In finding that the wording of section 9 displaced various state provisions for the inspection of steamers and their equipment, Justice Field noted:

If the section had also been directed against the law recognizing State regulations in respect to port pilotage, the intention of Congress in that respect would undoubtedly have been expressed with equal clearness, and not left to be implied from the use of an indefinite and ambiguous term.

*Id.* at 462-63.

75. See *Dietze v. Siler*, 414 F. Supp. 1105, 1110 n.8 (E.D. La. 1976).

question. The dissent viewed Congress' intent in enacting the 1852 Act to be exactly what the Act said it was—the displacement of the existing system of pilotage with a federal system.<sup>76</sup> Rejecting the Court's distinction between the regulation of voyage pilots and that of port pilots, Justice Miller wrote:

All the other regulations of commerce extend to the ports, and they are emphatically the theatre where commercial regulations are most needed, and where Congress has oftenest exercised its power to regulate commerce. As to the services usually rendered by these pilots, if they are more difficult and require a higher degree of skill than others, there would seem to be the greater necessity why they should be thoroughly examined and licensed by the proper authority, and also why they should be under the control of proper officers, and subjected to laws and rules calculated to compel a strict performance of their duties. All these are well provided for in the act of Congress.<sup>77</sup>

Despite Justice Miller's forceful dissent, *Joliffe* effectively emasculated the 1852 Act's scheme of federal pilotage regulation.<sup>78</sup>

In 1866, an act was passed by Congress that once again threatened to drastically alter the state pilotage system. The statute required that every seagoing vessel subject to the navigation laws of the United States and underway on the navigable waters of the United States, excepting the high seas, should "be

76. To this effect, Justice Miller reasoned:

[I]t was [the system of state pilotage regulation] which was to be superseded, and the one provided in the act of Congress introduced in its stead. This idea derives support from the significant fact that [the *Cooley* decision], holding that the State regulations were in force because no system had been adopted by Congress, was made in the winter of 1851-2; and this act, which provides such a system, was passed by Congress, August 30th, 1852. Unquestionably, Congress intended to supply that very system which the Supreme Court had intimated was needed, and was in the power of Congress to provide.

69 U.S. (2 Wall.) at 470.

Congressional responses to Supreme Court invitations to act are as prevalent in admiralty law as in other areas of the law. For example, the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act were enacted partly in response to Justice White's suggestion that "[t]he invitation to move [the *Jensen* line] landward must be addressed to Congress, not to this Court." *Nacirena Operating Co. v. Johnson*, 396 U.S. 212, 224 (1969) (referring to the jurisdictional line delineated by *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917)). Hence, Justice Miller's suggestion that Congress had acted in 1852 to provide a federal system of pilotage regulation is certainly not unreasonable.

77. 69 U.S. (2 Wall.) at 471-72 (emphasis added).

78. Cf. E. CLOTHIER & W. LOWE, *supra* note 3, at 111.

under the control and direction of pilots licensed" by federal inspectors of steam vessels.<sup>79</sup> Following in the wake of the *Joliffe* decision, which had undermined Congress' previous attempt to assert federal control in the pilotage area, the requirement of the 1866 Act that pilots be federally licensed when serving in U.S. waters should be read as statutorily overturning the *Joliffe* decision.<sup>80</sup> One authority commented that "[w]hile the purpose of such legislation appears to have been strengthening the safety provisions with respect to steam vessels, the net effect was that state pilotage was doomed."<sup>81</sup> The very next year, however, Congress added a proviso to the 1866 statutory language that nothing in the Act should be read to preclude states from enacting compulsory pilotage statutes.<sup>82</sup> The seven-month period from July 1866 to February 1867 represented a hiatus in the efficacy of state pilotage systems; only federal legislation had remained in effect to regulate pilotage.<sup>83</sup>

In *Ex parte McNiel*,<sup>84</sup> the Supreme Court ensured the continued viability of state regulatory systems by construing the 1867 proviso to reinstate the voyage pilot/port pilot distinction.<sup>85</sup> The Court upheld the claim of a New York-licensed pilot for half-pilotage. Justice Swayne reaffirmed the *Cooley* doctrine that state regulation of pilotage was constitutionally permissible when Congress has not acted to supersede it. He reviewed congressional legislation in the pilotage area, including the Act of 1866 and the 1867 proviso, and concluded that, although Congress had plenary power over the subject, it had not acted to preempt the state statutes.<sup>86</sup>

A later Court noted that, with the 1867 proviso, "[t]he existing state laws respecting port pilotage again became opera-

79. Act of July 25, 1866, ch. 234, § 9, 14 Stat. 227, 228.

80. It has been suggested, however, that "Congress did not intend to achieve the adverse effects upon state pilotage systems which resulted from the language of the act," rather, the purpose of the legislation appears to have been directed to a strengthening of the safety of steam-vessel navigation. E. CLOTHIER & W. LOWE, *supra* note 3, at 113.

81. A. PARKS, *supra* note 3, at 1013-14.

82. Act of Feb. 25, 1867, ch. 83, § 9, 14 Stat. 411, 411-12.

83. See E. CLOTHIER & W. LOWE, *supra* note 3, at 113-14.

84. 80 U.S. (13 Wall.) 236 (1872).

85. See also *Henderson v. Spofford*, 59 N.Y. 131 (1874), *Board of Comm'rs of Pilots v. Pacific Mail S.S. Co.*, 52 N.Y. 609 (1873); *Sturgis v. Spofford*, 45 N.Y. 446 (1871).

86. 80 U.S. (13 Wall.) at 242. See also *Wilson v. McNamee*, 102 U.S. 572 (1880).

tive."<sup>87</sup> Although the *Ex parte McNiel* Court interpreted the proviso as resurrecting the *Joliffe* distinction between voyage and port pilots, the Court could have construed it to provide truly concurrent federal and state jurisdiction over pilot licensure. Such a construction would suggest that, whereas all vessels navigating U.S. waters were required by both the 1866 Act and the 1867 proviso to carry federally licensed pilots, these same vessels would be required to engage the services of a state-licensed pilot when entering or leaving a port situated in that state. A state-licensed pilot could carry a federal license obviating the need to employ the services of two pilots. In contrast to the *Ex parte McNiel* rationale, however, this construction of the concurrent regulation facilitated by the 1866 Act would allow action by federal inspectors against a negligent pilot's federal license and would allow state governments or their authorized agents, usually licensing boards, to take action against the pilot's state license. The state would be permitted to act only against the state license and then only when the pilot performed the negligent acts while piloting under the authority of his state license. In contrast, the federal inspectors could institute actions against a pilot's federal license whether the pilot was acting under the authority of his federal license or his state license. Under this construction, Congress, in passing the 1866 Act, took no power away from the states but merely authorized federal action against a negligent pilot's federal license. Thus, although the 1867 proviso did indeed make operative the state statutory scheme of port pilotage, it was given too broad a reading by the *Ex parte McNiel* Court.

Congress acted in 1871 to resolve the confusion about federal and state jurisdiction over pilotage, repealing the 1852 and 1866 Acts and establishing a new federal system of pilotage regulation.<sup>88</sup> The Act of 1871 bears a substantial resemblance to the present law governing pilotage in the federal sector. Section 18, precursor of 46 U.S.C. § 7703, granted federal inspectors licensing authority and provided that "such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, or inattention to the duties of [the pilot's] station, or for intemperance, or the wilful violation of any provision of this

87. *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 197 (1913).

88. Act of Feb. 28, 1871, ch. 100, 16 Stat. 440.

act."<sup>89</sup> Section 19, precursor of 46 U.S.C. § 6301, vested boards of inspectors with the authority to "investigate all acts of incompetency or misconduct committed by any such licensed officer while acting under the authority of his license."<sup>90</sup> The section outlined the procedure leading to suspension or revocation of the license. Section 51, precursor of 46 U.S.C. §§ 8501(c) and 8502, provided in a positive manner that coastwise seagoing vessels and vessels navigating the Great Lakes were required to be under the control of federally licensed pilots. Additionally,

nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate [sic] upon the waters of such State.<sup>91</sup>

Although the Supreme Court was called upon to review the subject of pilotage in several cases<sup>92</sup> following the enactment of the 1871 Act, not until 1912 did the Court examine the Act's effect on the system of state and federal pilotage regulation.<sup>93</sup> In *Anderson v. Pacific Coast Steamship Co.*,<sup>94</sup> the Court held that the 1871 Act did not free vessels sailing under register from liability for pilotage fees under California's compulsory pilotage statute. Writing for the Court, Justice (later Chief Justice) Hughes construed section 51 of the 1871 Act as mandating the use of federal pilots on coastwise seagoing steam vessels which

89. *Id.* § 18 (current version at 46 U.S.C.A. § 7703 (West Supp. 1983)).

90. *Id.* § 19 (emphasis added) (current version at 46 U.S.C.A. § 6301 (West Supp. 1983)).

91. *Id.* § 51 (current version at 46 U.S.C.A. §§ 8501(c), 8502 (West Supp. 1983)).

92. *Thompson v. Darden*, 198 U.S. 310 (1905); *Olsen v. Smith*, 195 U.S. 332 (1904); *Wilson v. McNamee*, 102 U.S. 572 (1880).

93. During the period from 1871 to 1912, there were strong movements made in Congress to displace the existing system of state pilotage. Some of these proposals included the complete federalization of pilotage regulation. Each of these proposals was defeated largely because of the efforts of the newly organized American Pilots' Association. For a lively account of these events, see E. CLORMEN & W. LOWE, *supra* note 3, at 31-32, 36, 38-39, 43-64. Captains Clothier and Lowe suggest that the real motive behind the "anti-pilotage" bills was "that some of the principal navigation companies of New England, enjoying a rather lucrative trade with the southern states, sought to avoid pilotage fees levied under the [compulsory pilotage] laws of the South Atlantic states." *Id.* at 46.

94. 225 U.S. 187 (1912). In *Anderson*, the Supreme Court answered four certified questions submitted by the Ninth Circuit concerning the effect of the 1871 Act on the California system of pilotage regulation. *Id.* at 193-94.

were enrolled or licensed; in contrast, coastwise seagoing steam vessels sailing under register were not covered by the section, but were subject to state law in the area of port pilotage.<sup>95</sup> In adhering to the dichotomy of regulation between federal (enrolled vessels) and state (registered or foreign vessels) authorities, Justice Hughes viewed the Act of 1871 as buttressing the traditional view that states could regulate port pilotage unless Congress acted to displace their authority.<sup>96</sup> He concluded that "[w]hether or not it is wise to establish Federal rules as to port pilotage for the registered vessels exempted from this regulation is a question for Congress to determine."<sup>97</sup> Seventy years have passed since Justice Hughes placed the onus of revision of the port pilotage laws on Congress and, with but minor revision and recodification, no substantial change has been effected.<sup>98</sup>

#### THE STATUTORY FRAMEWORK

With two exceptions, the existing statutory framework of Title 46 provides that pilots of enrolled vessels are subject to federal regulation whereas pilots of foreign vessels or vessels sailing under register are subject to state regulation. Section 8501(a) continues state pilotage regulation in all areas in which Congress does not make alternative provision.<sup>99</sup> The Coast Guard is empowered to license qualifying pilots for a term of five years but subject to the proviso that the license would be suspended or revoked if the pilot were negligent, unskillful, inattentive to the duties of his station, or intemperate, or if he willfully violated any shipping/marine safety law or regulation.<sup>100</sup>

95. *Id.* at 200.

96. *See supra* note 55.

97. 225 U.S. at 205.

98. The most recent congressional action in the pilotage area was the consolidation of Title 46 of the United States Code, including a recodification of the pilotage provisions. Act of Aug. 26, 1983, Pub. L. No. 98-89, 97 Stat. 500.

99. "Except as otherwise provided in this part, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States." 46 U.S.C.A. § 8501(a) (West Supp. 1983). Former section 211, tracking more closely the language of the Act of 1799, stated:

Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose. 46 U.S.C. § 211 (1976).

100. 46 U.S.C.A. §§ 7101, 7106, 7703 (West Supp. 1983) (formerly 46 U.S.C. § 214 (1976)).

The Coast Guard also has the power to investigate marine casualties and initiate suspension and revocation proceedings against a federally licensed pilot, who, when acting under the authority of his federal license, evidences incompetence, negligence, misconduct, unskillfulness, or willful violation of the law.<sup>101</sup>

Congress has carved out two areas of exclusive federal jurisdiction over port pilotage. First, Coast Guard-licensed pilots are required to control and direct all coastwise seagoing steam vessels of the United States not sailing under register.<sup>102</sup> Second, foreign vessels and registered vessels of the United States, as well as enrolled or licensed vessels, shall be directed in their movements by federally licensed pilots when navigating the waters of the Great Lakes.<sup>103</sup>

The statutory enactments are supplemented with various regulations promulgated by the Commandant of the United States Coast Guard.<sup>104</sup> These regulations represent the policies and procedures for effectuating remedial action with regard to issued licenses.<sup>105</sup> Licensure proceedings aid the Coast Guard in fulfilling its statutory duty to promote the safety of life and property at sea.<sup>106</sup> The regulations emphasize that "[s]uspension and revocation proceedings are remedial and not penal in nature because they are intended to maintain standards of competence and conduct essential to . . . promote the safety of life and property at sea by insuring that the licensed . . . persons continue to be qualified to carry out their duties."<sup>107</sup> Investigations into incompetence or one of the other just causes for suspension or revocation of a license may proceed only against one acting under the authority of his federal license. A pilot is acting

101. *Id.* §§ 6301-6307, 7701-7703 (West Supp. 1983) (formerly 46 U.S.C. § 239 (1976)). For an excellent discussion of the procedural aspects of suspension and revocation proceedings and the issues raised by such proceedings, see Fidell, *supra* note 6.

102. 46 U.S.C.A. § 8502 (West Supp. 1983) (formerly 46 U.S.C. § 364 (1976)).

103. *Id.* § 9302 (formerly 46 U.S.C. § 216 (1976)).

104. Regulations dealing solely with suspension and revocation proceedings are collected at 46 C.F.R. pt. 5.

105. 46 C.F.R. § 5.01-10(a) (1983).

106. *Id.* § 5.01-15(a). This regulation explains that the obligation to protect life and property at sea "extends to the interests of passengers, crews, cargoes, shipowners and the general public."

107. *Id.* § 5.01-20(a) (emphasis added). Hence, the purpose of pilot discipline is to effectuate safe, effective, and competent pilotage, not to punish the pilot. *Siler v. Gillman*, No. EM-58, slip op. at 4-5 (N.T.S.B. Mar. 29, 1977); cf. *Hayes v. Hardsow*, No. EM-76 (N.T.S.P. Oct. 9, 1979). From the pilot's perspective, this is a very fine distinction.

under the authority of his federal license when either (1) the license is required by law or regulation, or (2) the license is required as a condition of employment.<sup>108</sup>

The modern statutory and regulatory network of federal pilotage law may be traced to the various congressional attempts to expand or restrict the scope of that network.<sup>109</sup> In each attempt, the congressional enactments were subject to strict analysis upon judicial review. Just two federal cases involving actions against pilot licenses have been decided with the existing statutory and regulatory scheme in place.

#### THE IMPACT OF *Soriano* AND *Dietze*

On September 20, 1967, a foreign-flag vessel, piloted by federal- and state-licensed Dewey Soriano, collided with another vessel in Puget Sound. As the pilot of a foreign vessel, Soriano was serving under the laws of the State of Washington at the time of the collision. Washington law required a federal license as a prerequisite to the issuance of a state license for piloting in Puget Sound.<sup>110</sup> The collision was investigated by the Coast Guard pursuant to section 239(b),<sup>111</sup> and Soriano was charged with misconduct and negligence. At the licensure hearing, the examiner held that the Coast Guard had jurisdiction to act against Soriano's federal license.<sup>112</sup> Utilizing two statutory arguments and an overriding policy rationale, the examiner suspended Soriano's license for one year. He reasoned that section 214<sup>113</sup> gave the Coast Guard authority to proceed against the license.<sup>114</sup> In the alternative, the examiner posited that jurisdiction was based on Washington's requirement of a federal license as a "condition precedent" to receiving a state license. The federal license was taken to be a "condition of employment" because a pilot could not ply his trade in Puget Sound without it.

108. 46 C.F.R. § 5.01-35(a) (1983).

109. For a discussion of these congressional attempts, see *supra* notes 52-98 and accompanying text. See also E. CLORNER & W. LOWE, *supra* note 3, at 43-64, 107-26; A. PARKS, *supra* note 3, at 1011-20.

110. *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974). For a more detailed statement of the facts of this case, see *Dewey Soriano-Pilot License*, 1969 A.M.C. 2141 (U.S.C.G.).

111. Current version at 46 U.S.C.A. § 6301 (West Supp. 1983).

112. *Dewey Soriano-Pilot License*, 1969 A.M.C. 2141, 2147 (U.S.C.G.).

113. Current version at 46 U.S.C.A. §§ 7101, 7106 (West Supp. 1983).

114. *Dewey Soriano-Pilot License*, 1969 A.M.C. 2141, 2151 (U.S.C.G.).

Therefore, within the meaning of 46 C.F.R. § 137.01-35(a),<sup>115</sup> Soriano was acting under the authority of his federal license at the time of the collision and, consequently, was subject to Coast Guard disciplinary proceedings.<sup>116</sup> The policy consideration guiding the examiner throughout the hearing was that a failure to find Coast Guard jurisdiction "would be to casually overlook, disregard and render as immaterial the fact that the United States Coast Guard has a mandate from Congress to safeguard life and property at sea."<sup>117</sup> The Commandant of the Coast Guard affirmed the suspension<sup>118</sup> as did the district court,<sup>119</sup> the latter reasoning that "[a] person is serving under authority of a license or document issued by the Coast Guard if the possession of that license or document is a condition of employment and the character of the employment is that involving the scope of the license or document issued."<sup>120</sup>

The Ninth Circuit reversed the suspension, holding that the Coast Guard had no jurisdiction to proceed against the federal license of a pilot acting under the authority of his state license at the time of the collision.<sup>121</sup> The court accepted Soriano's contention that the condition-of-employment regulation<sup>122</sup> issued by the Coast Guard went beyond the power granted the Coast Guard under federal pilotage statutes. The court rejected the two grounds upon which interpretative regulations were to receive special deference:<sup>123</sup> (1) the regulation, promulgated in 1965, did not embody an interpretation "made contemporaneously with the enactment of the [Act of 1871]" and did not warrant the "extra authoritative weight" usually given such regula-

115. Current version at 46 C.F.R. § 5.01-35 (1983).

116. *Dewey Soriano-Pilot License*, 1969 A.M.C. 2147, 2151-52 (U.S.C.G.).

117. *Id.* at 2150.

118. At the time of this decision, the Commandant represented the final authority in the administrative chain of review. Under present law, the suspension or revocation proceeding would be held by an administrative law judge with subsequent review of his findings by the Commandant and the National Transportation Safety Board. See *Fidell*, *supra* note 6, at 26-36.

119. The district court was authorized to review final agency administrative action under sections 701-706 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982). *Soriano v. United States*, 1974 A.M.C. 1767 (W.D. Wash.). See also *Fidell*, *supra* note 6, at 26-36.

120. 1972 A.M.C. at 1768.

121. *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974).

122. 46 C.F.R. § 137.01-35(a) (1970) (current version at 46 C.F.R. § 5.01-35(a) (1983)).

123. 494 F.2d at 683.

tions;<sup>124</sup> and (2) the regulation did not warrant the deference given those regulations that have been "consistently followed for a long period" because this regulation had been promulgated just two years before the collision involving Soriano.<sup>125</sup> The Ninth Circuit asserted that the regulation infringed on the power of states pursuant to section 215<sup>126</sup> to regulate pilotage. Additionally, the court was incredulous that a state statute requiring a federal license prior to the issuance of a state license could authorize Coast Guard action against the pilot's federal license when Congress had not acted and when the state could eliminate this authority by merely repealing the requirement.<sup>127</sup>

*Soriano v. United States* has become the leading authority for denying Coast Guard jurisdiction to proceed against the federal license of pilots directing foreign vessels or United States vessels under register. In its decision, the Ninth Circuit gave but cursory attention to the convoluted legislative history of federal pilotage statutes. The court is not open to severe criticism, however, because it merely adopted the prevailing interpretation<sup>128</sup> that Congress, in enacting the existing pilotage laws, intended that states have exclusive jurisdiction over the investigation and disciplining of pilots serving under the authority of their state license.

The decision in *Dietze v. Siler*<sup>129</sup> reflects a more careful consideration of the antecedents of federal pilotage regulations than does *Soriano*. In *Dietze*, a federal- and state-licensed pilot, who was found to have piloted negligently a foreign vessel involved in a collision on the Mississippi River, had his federal license suspended for three months. The administrative law judge found

that the Coast Guard's jurisdiction to institute the suspension and revocation proceedings against Dietze's federal license was predicated on 46 U.S.C. § 214 and 46 U.S.C. § 239.<sup>130</sup> The Commandant rejected jurisdiction based on section 239 but "recognized section 214 as a separate and independent basis of jurisdiction" and affirmed the suspension.<sup>131</sup>

The *Dietze* court held that section 214, standing alone, did not authorize the Coast Guard to proceed against a pilot's federal license when the pilot was *not* acting under the authority of that license. The court reasoned that the proviso appended to section 214 that the license is subject to suspension or revocation upon certain grounds is but an admonition and not a basis of jurisdiction separate from that provided in section 239. The court rejected as unreasonable the contention that sections 214, 226,<sup>132</sup> 228,<sup>133</sup> and 229,<sup>134</sup> in addition to the more general provisions of section 239, represented five separate bases of jurisdiction. Examining the antecedents of sections 214 and 239, Judge Boyle observed that, in enacting section 18 of the 1871 Act, Congress had removed the provisions relating to licensure proceedings which had been contained in a comparable provision of the 1852 Act. He reasoned that

[h]ad Congress intended to grant the Coast Guard jurisdictional authority solely on the basis of the earlier-placed provisions in any of the statutes—1852, 1871 or the current version—its labor to separately allow for authority to investigate, conduct proceedings and revoke or suspend licenses within the proper procedural limits of due process, makes precious little sense.<sup>135</sup>

The court was concerned with preserving the integrity of state pilotage regulation and enforcement and with avoiding the pos-

130. Sections 6301, 7101, and 7106 replaced sections 239 and 214 with the 1983 revision and consolidation of subtitle 2 of title 46 of the Code. See Pub. L. No. 98-89, § 1, 97 Stat. 500, 537, 539-40 (1983) (current version at 46 U.S.C.A. §§ 6301, 7101, 7106 (West Supp. 1983)).

131. 414 F. Supp. at 1107.

132. 46 U.S.C. § 226 (1976) (regarding licenses of captains) (current version at 46 U.S.C.A. §§ 7101, 7106, 7703 (West Supp. 1983)).

133. 46 U.S.C. § 228 (1976) (regarding licenses of mates) (current version at 46 U.S.C.A. §§ 7101, 7106 (West Supp. 1983)).

134. 46 U.S.C. § 229 (1976) (regarding licenses of engineers) (current version at 46 U.S.C.A. §§ 7101, 7106 (West Supp. 1983)).

135. 414 F. Supp. at 1111.

124. *Id.* The court cited a previous case involving Soriano which had held that the Coast Guard did not have jurisdiction to proceed against the pilot's federal license because, at the time of the collision, he was acting under the authority of his state license. *In re Dewey Soriano*, 1965 A.M.C. 391 (U.S.C.G. 1964). The condition-of-employment regulation was promulgated shortly after *In re Soriano* and became the object of dispute in *Soriano*.

125. 494 F.2d at 683.

126. 46 U.S.C. § 215 (1976) (current version at 46 U.S.C.A. § 8501(c) (West Supp. 1983)).

127. 494 F.2d at 694.

128. See *supra* text accompanying notes 88-96.

129. 414 F. Supp. 1105 (E.D. La. 1976). See also *Hayes v. Cliff* 1982 A.M.C. 2215 (N.T.S.B. 1981). But see *Siler v. Nelson*, No. EM-60 (N.T.S.B. May 24, 1977) (Coast Guard could suspend federal license of pilot who could not show that he was performing pilotage authorized and regulated exclusively by the state).

sibility that a pilot could be disciplined twice for the same act.<sup>136</sup> Reminiscent of Justice Hughes' proposal in *Anderson v. Pacific Coast Steamship Co.*,<sup>137</sup> the *Dietze* court advised that, "[t]o the extent certain events have transpired which lead the Coast Guard to now question the fairness of this balance, its remedy is perhaps more legislative than judicial in nature."<sup>138</sup>

#### THE PORT AND TANKER SAFETY ACT—A VAIN ATTEMPT AT REVISION

Heeding the advice of the *Dietze* court, the Coast Guard began lobbying for substantive changes in federal pilotage regulation. In 1977 the Senate, at the urging of the Carter Administration, passed Senate bill 682 (S. 682), which amended section 4442 of the Revised Statutes to authorize the Commandant of the Coast Guard "to take disciplinary action against a Federal license in cases of misconduct or negligence which occurred while the pilot was serving under the authority of his State license."<sup>139</sup> In a March 17, 1977 message to Congress, President Carter outlined three objectives to be secured by the passage of the Port and Tanker Safety Act.<sup>140</sup> One of these objectives was the improvement of crew licensing and qualification stan-

136. *Id.* at 1113.

137. See *supra* text accompanying note 97.

138. 414 F. Supp. at 1113.

139. H.R. Rep. No. 1384(I), 95th Cong., 2d Sess. 37 (1978), [hereinafter cited as H.R. Rep. No. 1384(I)] reprinted in 1978 U.S. CODE CONG. & AD. NEWS 3270, 3305-06. Section 5 of S. 682, entitled "Improved Pilotage Standards," provided in pertinent part:

(d) The Commandant may revoke or suspend any license to pilot any steam vessel, after notice and an opportunity for a hearing, upon satisfactory evidence of—

- (1) negligence;
- (2) unskillfulness;
- (3) failure to adhere to any requirements for a license;
- (4) willful violation of title 52 of the Revised Statutes; or
- (5) other just cause related to the performance of pilot duties, including conduct when acting solely under the authority of a State pilot license.

(e) The Secretary [of Transportation] shall develop and shall seek adoption by the States of uniform, minimum standards relating to the regulation of pilotage at least equal to those required of federally licensed pilots.

S. 682, 95th Cong., 1st Sess. § 5(d)-(e), 124 CONG. REC. 28,964-65 (1978) (emphasis added). It should be noted that subsection (d) would have authorized action against "any" federal license, not any federal or state license.

140. 123 CONG. REC. 10,834 (1977) (report of Brock Adams, Secretary of Transportation).

dards.<sup>141</sup> Secretary of Transportation Brock Adams explained that this objective of the proposed Act recognized that "80-85 percent of tanker accidents involve human error on the part of the crew or embarked pilots."<sup>142</sup> One of the Senate findings prompting passage of S. 682 was that "[i]ncreased inspection and enforcement efforts by the Federal Government are necessary to reduce the possibility of vessel or cargo loss, or damage to life, property, or the marine environment."<sup>143</sup>

The pilotage provisions of the bill encountered difficulty in the House of Representatives. A Department of Transportation report expressed the concern that section 4442 of the Revised Statutes was not the most appropriate section under which the revision of the federal pilotage law should be effected and that treating pilotage under section 4442 could "create confusion or produce judicial interpretations which are contrary to the purpose of the provision."<sup>144</sup> The department felt that it would be wiser to amend "section 4450 of the Revised Statutes, which, according to judicial decisions, is the sole jurisdictional authority for disciplinary action with respect to maritime licenses in general."<sup>145</sup> Therefore, the Transportation Department proposed an alternative revision of federal pilotage legislation focusing on Revised Statutes section 4450. No action was taken on this proposal.

The version of the Act finally receiving House approval eliminated the provisions authorizing the Coast Guard to take

141. The other two objectives involved improving tanker construction and equipment standards and tanker certification and inspection standards. *Id.* It is evident from the bill itself, and from statements accompanying discussion of the bill that the Act's third objective contemplated the improvement of licensing and qualification standards for pilots as well as crew members. See *supra* text at note 139 and *infra* notes 142-43.

142. 123 CONG. REC. 16,834 (1977). Senator Durkin observed from the floor that: [n]umerous studies have advocated the stiffening of maritime licensing requirements to include formal and recurrent training of pilots and other personnel, performance testing, periodic renewal and proficiency checks, and restrictive licensing based on the size and class vessel involved. The absence of such regulation becomes all the more appalling when we read statistics and reports indicating that over one-half of all tanker accidents are caused by some degree of human failure, and that almost 80 percent of merchant marine casualties are related to human error. S. 682 states minimum requirements for pilotage . . .

*Id.* at 16,840.

143. *Id.* at 16,842.

144. H.R. Rep. No. 1384(I), *supra* note 139, at 37-38, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 3306.

145. *Id.*

action against pilots acting under the authority of their state licenses.<sup>146</sup> The comments to the Port and Tanker Safety Act make clear that Congress adhered to the judicial interpretations of federal pilotage regulation recited in *Soriano v. United States* and *Dietze v. Siler*.<sup>147</sup> The House Committee on Merchant Marine and Fisheries declined to recommend the expansion of federal jurisdiction over state licenses because proponents of such expansion did not statistically substantiate their view that state pilotage commissions were deficient in disciplining pilots subject to their authority vis-à-vis the disciplinary record of the Coast Guard.<sup>148</sup>

#### THE 1983 PARTIAL REVISION OF TITLE 46

In August 1983, upon the recommendation of the Coast Guard, Congress acted to revise and consolidate Title 46 of the United States Code, including the maritime safety laws dealing with pilotage regulation.<sup>149</sup> The purpose of the legislation was to make maritime safety laws easier for the Coast Guard to administer, for the maritime community to use, and for the public to understand.<sup>150</sup> The legislation culminated a twenty-year effort

146. Paragraphs (d) and (e) of the Act were eliminated and the remainder of the "Improved Pilotage Standards" received the approval of Congress and were codified at 46 U.S.C. § 214 (1976). The current version of the Act appears at 46 U.S.C.A. §§ 7101, 7106 (West Supp. 1983).

147. The comments expressly approve the holding in *Dietze*. See H.R. REP. NO. 1384(I), *supra* note 139, at 18, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 3286.

148. *Id.* 1978 U.S. CODE CONG. & AD. NEWS 3286-87. Effectively relating committee opposition to the expanded federal jurisdiction over state licenses, Representative (later Louisiana Governor) David C. Treen commented:

The State pilots feel that only they have the specialized knowledge of local waters and conditions necessary to regulate pilotage properly. They also feel that over the years they have done a very good job. Since this system of pilotage has been in existence since 1789, I feel we should have strong proof that the system is no longer functioning properly before we change it. That proof was simply not presented. H.R. 13311 [the House version of S. 682] upholds State regulation of pilotage by providing that the Federal Government may require a federally licensed pilot on a vessel engaged in foreign trade only where "not otherwise required by State law."

124 CONG. REC. 28,938 (1978).

149. Act of Aug. 26, 1983, Pub. L. No. 98-89, § 1, 97 Stat. 500.

150. H.R. REP. NO. 338, 98th Cong., 1st Sess. 113 (1983), reprinted in 1983 U.S. CODE CONG. & AD. NEWS 924, 925. Senator Packwood articulated the three purposes of the legislation as reorganization of the maritime safety laws, revision of the laws to make their application easier, quicker, and less expensive, and repeal of outmoded laws. 129 CONG. REC. S5580 (daily ed. Apr. 28, 1983) (statement of Sen. Packwood).

by the Coast Guard and congressional committees to render manageable maritime safety laws.<sup>151</sup>

The 1983 revision did not alter the existing system of pilotage regulation. The Senate report accompanying the bill that was eventually enacted indicated that "no substantive changes of a controversial nature [were] intended to be made by [the] bill."<sup>152</sup> The report further reflected the congressional intent "that section 8501(a) . . . preserve the meaning of the disclaimer language in the second sentence of 46 U.S.C. § 215 regarding the impact on State laws regulating pilotage."<sup>153</sup> During committee hearings on the House version of the bill,<sup>154</sup> representatives of the pilots' associations testified in "strong support" of the bill, expressing their desire that Congress "retain the provisions in existing law that prevents (sic) the Coast Guard from taking action against a pilot's federal license when the pilot violates, or fails to comply with the law or commits an act of incompetence, misconduct, or negligence when acting under a State license."<sup>155</sup> The House and Senate acknowledged these views in revising Title 46 and "confirm[ed] the State and Federal relationship with respect to pilotage that has evolved since the founding of the Nation."<sup>156</sup> Hence, in its latest enactment in the area, Congress has preserved the statutory scheme and attendant jurisprudence which permits the disparate treatment of

151. 129 CONG. REC. S5580 (daily ed. Apr. 28, 1983) (statement of Sen. Packwood). The House report describes various attempts to revise and update the maritime safety laws during the past sixty years. H.R. REP. NO. 338, 98th Cong., 1st Sess. 112-13 (1983), reprinted in 1983 U.S. CODE CONG. & AD. NEWS 924, 926-27.

152. S. REP. NO. 56, 98th Cong., 1st Sess. 10 (1983).

153. *Id.* at 18 (describing the impact on 46 U.S.C. § 215 (1976) of 46 U.S.C.A. § 8501(a) (West Supp. 1983)).

154. H.R. 2247, 98th Cong., 1st Sess. (1983). See also S. 46, 98th Cong., 1st Sess., 129 CONG. REC. S5581-5611 (1983).

155. H.R. REP. NO. 338, 98th Cong., 1st Sess. 124 (1983), reprinted in 1983 U.S. CODE CONG. & AD. NEWS 924, 936. The representatives were from the American Pilots' Association and the New Orleans-Baton Rouge Steamboat Pilots' Association. The testimony was taken on April 28, 1983, by the Subcommittees on Coast Guard and Navigation and on Merchant Marine of the House Committee on Merchant Marine and Fisheries.

156. *Id.* at 184, reprinted in 1983 U.S. CODE CONG. & AD. NEWS 995-97.

Although this comment questions whether the existing federal-state relationship in the pilotage area has remained the same as it was in 1789, there is no doubt that the 1983 revision indicated Congress' intent to confirm the existing relationship as it has evolved from the Act of August 7, 1789 through *Soriano*, *Dietze*, and the revision attempted by the Port and Tanker Safety Act of 1977.

pilots acting under their state licenses and those acting under their federal licenses. Substantive reform of the laws regulating pilots was left for another day.<sup>157</sup>

#### ALTERNATIVES

##### *The State Option*

Pilots and pilots' associations favor an affirmation of the status quo, permitting states to regulate the pilotage of foreign and registered vessels in state territorial waters.<sup>158</sup> One corollary of a federal system is that each state should be allowed to adopt the regulatory scheme that it concludes will best achieve a safer navigation of its public waterways. Hence, one state may require a lengthy and rigorous apprenticeship period before licensing, whereas another state may permit its deputy pilots to direct ship movements prior to achieving pilot status in the local association.<sup>159</sup> One state's board of pilot commissioners may be composed entirely of former pilots, whereas another state's board includes political appointees only some of whom may be pilots.<sup>160</sup> A committee of Florida pilots spoke for all pilots in writing: "We contend that change from a system which has withstood the test of time and operated in the public interest for many, many years . . . to a completely untried and untested system, would be neither desirable nor to the public benefit."<sup>161</sup>

The pilots' associations contend that the professional regulation of pilots is best achieved if the disciplinary authority is vested in a board of pilot commissioners, preferably composed of

157. "Proposals for substantive reform will be welcome in subsequent legislation providing all members of the maritime community with an opportunity to criticize and contribute to such reform." 129 CONG. REC. S5580 (daily ed. Apr. 28, 1983) (remarks of Sen. Packwood).

158. H.R. REP. NO. 338, 98th Cong., 1st Sess. 124 (1983), reprinted in 1983 U.S. CODE CONG. & AD. NEWS 924, 935-36; E. CLOTHIER & W. LOWE, *supra* note 3. See also E. SPIVA, J. CAREY, J. TOMPKINS & J. WARE, *THE FLORIDA STATE PILOTAGE SYSTEM* (1965) (available in the Florida Collection of the University of South Florida library) [hereinafter cited as *FLORIDA STATE PILOTAGE SYSTEM*].

159. Compare LA. REV. STAT. ANN. §§ 34:948, :959 (West 1964 & Supp. 1984) (requiring apprentice pilot period) with FLA. STAT. ANN. § 310.081(2) (West Supp. 1983) (permitting deputy pilots to direct ship movements).

160. Compare LA. REV. STAT. ANN. § 34:942 (West 1964) (board shall consist of former pilots) with FLA. STAT. ANN. § 310.011 (West Supp. 1983) (governor shall appoint board members including at least two former pilots).

161. *FLORIDA STATE PILOTAGE SYSTEM*, *supra* note 158, at 11. See also *supra* note 148 (remarks of Rep. Treen).

former pilots or individuals having a deep interest in the welfare of the port.<sup>162</sup> In this sense, pilots, in desiring to have their peers review the propriety of their professional conduct, are no different from lawyers, whose conduct is usually monitored by a committee of their peers.<sup>163</sup>

The associations suggest that the experience of former pilots sitting on pilot commissions contrasts most favorably with that of Coast Guard officials.<sup>164</sup> Even the most seasoned Coast Guard officer has not conned a vessel nearly the size of a super-tanker or container ship. The associations query whether the Coast Guard would be able to apply an objective standard to pilot conduct if Coast Guard officials have no inkling of what a reasonably prudent pilot would do under similar circumstances.<sup>165</sup> Pilots have the expertise and special knowledge of local navigation necessary to apply a reasonable pilot standard fairly and effectively.

Moreover, a "Board of Pilot Commissioners, whose sole job is to study and regulate pilotage, will be able to do a more efficient and dedicated job than [port authorities or the Coast Guard] which [are] already overloaded with a wide spectrum of other matters."<sup>166</sup> At a time of shrinking budgets and expanded responsibility,<sup>167</sup> the Coast Guard appears to be ill-equipped to take on the additional burden of regulating the pilotage of for-

162. *FLORIDA STATE PILOTAGE SYSTEM*, *supra* note 158, at 15; cf. E. CLOTHIER & W. LOWE, *supra* note 3, at 91-93.

163. See generally J. AUERBACH, *UNEQUAL JUSTICE* (1976); V. COUNTRYMAN, T. FINMAN & T. SCHNEVER, *THE LAWYER IN MODERN SOCIETY* 375-431 (2d ed. 1976); L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 561-63 (1973).

164. See, e.g., E. CLOTHIER & W. LOWE, *supra* note 3, at 91. This view has been confirmed by conversations of the author with pilots representing two other associations.

165. *Id.* Ironically, the Sandy Hook Pilot School, a formal pilot training school, opened in 1970 under the supervision of a retired *Coast Guard* captain. *Id.* at 96.

166. *FLORIDA STATE PILOTAGE SYSTEM*, *supra* note 158, at 15. This statement was made by an attorney/pilot commissioner in response to a proposal that the Florida port authorities regulate pilotage in addition to performing their other duties. The statement is no less applicable to the Coast Guard's proposed assumption of regulatory responsibilities in the pilotage area.

167. For example, as part of the Reagan Administration's crackdown on narcotics trafficking, the Coast Guard has stepped up its operations against smugglers. Compare N.Y. Times, Oct. 20, 1981, at A14, col. 1 (shrinking Coast Guard budget) with Maitland, *Key to the Battle on Drugs: Doubling of Troops*, N.Y. Times, Dec. 2, 1982, at B14, col. 3; Sullivan, *New York Drug Seizures Rise with Florida Route Cut*, N.Y. Times, Aug. 18, 1982, at B4, cols. 5-6; N.Y. Times, Oct. 15, 1982, at A20, col. 3 (text of Pres. Reagan's speech announcing campaign against drug trafficking).

eign and registered vessels.

Finally, the pilots' associations and their legislative champions contend that the time-honored system of state and local regulation of pilotage should be tampered with only if there is strong evidence that the various state boards of pilot commissioners were not ensuring safe navigation in territorial waters.<sup>168</sup> To date no statistical study has been produced substantiating the claim that remedial actions taken by the state boards have been ineffective. An isolated maritime disaster, such as the Summit Venture case, although highlighting the problem of uniform action in licensure proceedings, offers no measurement of the pilot boards' effectiveness or disciplinary record. Additionally, there is no evidence that the Coast Guard would be fairer or more evenhanded in disciplining maritime pilots than are the state boards.<sup>169</sup> Therefore, under the state option, there is absolutely no need for restructuring pilotage regulation and there is much that counsels against it.

#### *The Federal Option*

Proponents of the federal option considered the Port and Tanker Safety Act<sup>170</sup> a valiant effort at revising the anomalous jurisdictional results obtained by existing federal pilotage law.<sup>171</sup> Maritime disaster is a continuing, albeit unfortunate, characteristic of commercial navigation as evidenced by the Summit Venture's collision with the Sunshine Skyway Bridge in 1980. It has been observed that rules and procedures established under federal law to secure the safe navigation of the navigable waters of the United States might best be achieved through Coast Guard

168. See *supra* notes 143-48 and accompanying text.

169. It is interesting to note that on the same day that the National Transportation Safety Board labeled the decision of Summit Venture pilot John Lerro unreasonable and imprudent, the Coast Guard issued a letter of reprimand (a sanction hardly as severe as the revocation or suspension of a pilot's license) to the Coast Guard officer who negligently conned the Coast Guard cutter Blackthorn the night it collided with a freighter and sank in Tampa Bay. Compare Board: *Lerro's Decision Not Reasonable*, Tampa Tribune, Apr. 11, 1981, at B1, col. 1 with *Blackthorn Officer Gets Reprimand*, Tampa Tribune, Apr. 11, 1981, at B1, col. 1. Perhaps the Coast Guard's suspicion that pilot boards protect their own when making their disciplinary decisions is borne out by the Coast Guard's own such tendencies.

170. See *supra* notes 139-45 and accompanying text.

171. In addition to the Coast Guard, proponents of the federal option include the American Institute of Merchant Shipping and the American Petroleum Institute, whose views have been described in E. Clorimen & W. Lowe, *supra* note 3, at 93-95.

licensure proceedings against negligent pilots regardless of the authority under which they perform their services.<sup>172</sup> It can be inferred from an examination of the legislative history of the existing federal pilotage statutes that Congress had previously acted to provide the jurisdictional predicate for Coast Guard suspension or revocation proceedings against the federal licenses of all pilots.<sup>173</sup> Nevertheless, the prevailing jurisprudence and apparent congressional intent underlying the federal scheme of pilotage preclude uniform enforcement action by the Coast Guard.<sup>174</sup> Under the federal option, Congress should act to amend chapter 77 of Title 46 to provide for Coast Guard jurisdiction in licensure proceedings involving pilots who have committed acts of misconduct or negligence while piloting under the authority of their state licenses.

The opponents of S. 682 voiced concern over abandoning the state regulation of pilotage without proof that such regulation was not functioning properly.<sup>175</sup> The Summit Venture disaster, and the short-term suspension of the pilot involved in that disaster, is but one indication that the policy of deterring improper pilotage, at least partially motivating both the state and federal regulatory schemes, has not been furthered under the present system. A uniform policy of deterrence can be effectuated only by the evenhanded application of the pilotage regulations.<sup>176</sup> Such an application would result if Congress would enact a statute similar to that embodied in subsections 5(d) and (e) of S. 682.<sup>177</sup> More particularly, a pilot's federal license should be subject to revocation or to suspension, after notice and a hearing, and after proof of the pilot's negligence, unskillfulness, failure to adhere to licensure requirements, willful violation of

172. H.R. REP. NO. 1384(I), *supra* note 139, at 37, reprinted in 1978 U.S. CONG. & AD. NEWS 3306; MARINE ACCIDENT REPORT, *supra* note 15, at 43; Fidell, *supra* note 6, at 38-39. See *supra* note 33 and accompanying text.

173. See *supra* notes 71, 76-77 and accompanying text.

174. See *supra* notes 148-57 and accompanying text.

175. See *supra* notes 168-69 and accompanying text.

176. The desire for uniformity has been cited as the justification for previous federal efforts in the pilotage area. For example, see E. Clorimen & W. Lowe, *supra* note 3, at 109-10, which discusses passage of the Act of 1837 governing licensure of pilots on waters that form the boundary between two states. "It seems clear that pilotage matters, which by their very nature demand uniformity throughout the country, call forth overriding action by the Congress under the Commerce Clause of the Constitution." *Id.* at 110 (emphasis added).

177. See *supra* note 139.

pilotage regulations, or any other just cause, whether or not the pilot is acting under the authority of a state license.<sup>178</sup>

Given our federal structure of government, the dual system of licensing is understandable, even laudable. The federal government has an interest in ensuring the safe navigation of navigable waters of the United States—a crucial element in effectuating free and unrestrained commerce. Likewise, the states have an interest in regulating pilot conduct in the light of the standards required by local navigational conditions. But if a pilot is negligent, regardless of what license he is acting under and regardless of whether state action is or is not taken, the federal government still has interests in ensuring the competence of pilots holding a federal license as well as in protecting the public from unsafe navigation. Authorizing the Coast Guard to take action against a pilot's federal license does not impinge upon a state's authority to act against the pilot's state license, but preventing the Coast Guard from taking action against a pilot's federal license when the pilot is acting under his state license, unnecessarily hinders federal authorities in ensuring that those pilots who hold a federal license are competent.<sup>179</sup>

The principle of subjecting the wrongdoing pilot, regardless of which license he was acting under, to revocation or to suspension represents the thrust of subsection 5(d) of S. 682. The adoption of such a provision would ensure that Coast Guard enforcement is evenhanded and would give effect to the policy of deterrence underlying the regulatory objective of safe navigation.

The adoption of subsection 5(e) of S. 682 would give further effect to these policies. This section provides that states should be encouraged to adopt *de minimus* standards for pilotage regulation "at least equal to those required of federally licensed pilots."<sup>180</sup> The minimum standard of conduct for pilots would then be uniform under both federal and state pilotage regulations and

178. This language tracks S. 682, 95th Cong., 1st Sess. § 5(d)-(e) (1977), 124 CONG. REC. 28, 964-65 (1978).

179. See Fidell, *supra* note 6, at 38-39 ("The needless complications surrounding the exercise of federal jurisdiction over pilots sailing under the authority of state licenses should be corrected by legislation. Malpractice as a pilot—whether serving under a state license or not—fairly raises a question as to whether the individual's federal license should be withdrawn.")

180. S. 682, 95th Cong., 1st Sess., § 5(e) (1977), 124 CONG. REC. 28, 964-65 (1978).

a pilot's expectations of discipline for improper conduct would not vary with the waters in which he plies his trade. Hence, the policy of evenhanded enforcement is facilitated by subsection 5(e). Most importantly, however, subsection 5(e) embodies a minimum standard against which pilot conduct can be measured, deterring negligent pilotage and compelling safer navigation of public waterways.

With the adoption of provisions similar to subsections 5(d) and (e) of S. 682, Congress would *overrule* the jurisprudence culminating in *Soriano* and *Dietze*. The statute would not require the creation of an administrative body charged with enforcing its provisions but would untie the hands of a Coast Guard dedicated to achieving safe navigation and ready to assume this additional enforcement objective.<sup>181</sup> Instead, the provisions represent a simple, workable method of deterring improper pilot conduct on territorial waters and the high seas while ensuring the equitable disciplining of maritime pilots in suspension or revocation proceedings.

#### THE COMPROMISE OPTION—A PROPOSED STATUTE

The concerns expressed by both the Coast Guard and the various pilots' associations are significant but are not necessarily at odds. The Coast Guard correctly perceives that the equitable disciplining of wrongdoing pilots, whether operating under the authority of their federal or state license at the time of the improper conduct, would further the policy of deterring unsafe navigation. Empowering an organization like the Coast Guard to take disciplinary action against the federal licenses<sup>182</sup> of transgressing pilots would facilitate the uniform treatment of similarly situated pilots and would generate a minimum standard of professional conduct for all maritime pilots.

Nevertheless, the objections of the pilots' associations to Coast Guard oversight are credible in the light of the limited experience in supership navigation of even the most senior Coast Guard officers, the ever-expanding Coast Guard mission concin-

181. Gilbert, *supra* note 15, at 135.

182. Some adherents to the federal option have proposed "that the Coast Guard have authority to take disciplinary action over any pilot license, whether Federal or State." H.R. REP. NO. 1384(I), *supra* note 139, at 18, reprinted in 1978 U.S. CONG. & AD. NEWS 3287.

itant with the service's ever-dwindling resources, and the pilots' interest in self-regulation. Existing pilot boards are staffed with persons possessed of great experience in pilotage operations and of deep interest in an efficient port enterprise.<sup>183</sup>

It is submitted that a regulatory scheme can be developed that would further the policies of deterring unsafe navigation and of ensuring uniform enforcement and would simultaneously draw on the personnel resources of the pilot boards, thereby satiating the primary concerns of both the Coast Guard and the pilots' associations. The statute would establish a national board of pilot commissioners that would draw its members from each of the state boards. Members would serve for a specified term or would be selected on an as-required basis. The national board would be authorized to investigate an incident of alleged pilot misconduct and to revoke or suspend the federal license of a pilot evidencing negligence, unskillfulness, inconsideration of license requirements, violation of any pilotage regulation, or other just cause, whether or not the pilot was acting under the authority of his state license.

In practice, the membership of the national board would be chosen at random from the pool of state board commissioners. If the number of board seats were set at five, it is conceivable—perhaps likely—that a board reviewing the conduct of a pilot would include commissioners from five different states. The suspicion that state boards protect their own pilots is negated by this procedure. Sitting board members would share an interest in reaching the decision that would best remedy the case before the board and would simultaneously facilitate safer navigation. In short order, board decisions would forge a body of precedent establishing norms for reasonable pilot conduct and fixing pilots' expectations of discipline in cases of misconduct. Although mandated statutorily from without, the envisioned regulatory scheme would establish a system of quasi-self-regulation within the pilot profession.

The national board of pilot commissioners represents a balancing of the various concerns of the pilots' associations and of the Coast Guard. Unquestionably, both the associations and the Coast Guard value highly the safe navigation of our public wa-

183. See *supra* text accompanying notes 161-62.

terways and both recognize the legitimacy of the other's concerns. Operation of the national board would result in the uniform treatment of pilots because all disciplinary actions would originate from the same source—the national board. Improper pilot conduct would be deterred because all pilots would be subject to licensure hearings regardless of the authority under which they were acting at the time of the alleged misconduct. Wrongdoing pilots would be subject to the scrutinizing eye of experienced pilots having an interest in maintaining the integrity and image of their profession.

Critics might suggest that the particularized knowledge and experience of local pilots would be lost under the proposed scheme. The force of this criticism could be blunted, however, by allotting one or more seats on each board to a state board commissioner representing the region where the incident took place. An additional criticism is that the national board would involve some additional federal cost. Presumably, the states would save some expense under the scheme, but it is doubtful that the savings would entirely compensate for the additional federal cost.

The national board of pilot commissioners represents a compromise scheme addressing the salient concerns of the proponents of both the state and federal options. Given Congress' venerable and sustained interest in furthering the safe navigation of public waterways, it would do well to consider the proposed regulatory scheme as a means of establishing an effective and equitable system of pilotage.

#### CONCLUSION

The history of pilotage regulation in the United States reflects a series of false starts or failed starts at federal regulation. Pilots and their associations are content with the states' employment of pilot boards to supervise pilot conduct and administer discipline. Yet, maritime disaster is a phenomenon warranting every effort toward mitigation if not eradication. Any and all remedial measures for pilot misconduct contributing to maritime disaster should be diligently employed. Such are the aims of both the federal and state approaches to pilotage regulation. Which, if either, of these options can best achieve the goal of safe navigation is a difficult if not unanswerable question. Perhaps more certain is the fact that neither option satisfactorily

addresses the primary concerns of its critics.

The regulatory scheme proposed by this comment involving the establishment of a national board of pilot commissioners for reviewing alleged pilot misconduct, incorporates and gives effect to the primary concerns of uniform enforcement of minimal standards for pilot conduct, effective deterrence of improper pilot conduct, and self-regulation of the pilot profession. Wrong-doing pilots should not be permitted to betray the public trust. But neither should the public, however outraged by the senselessness of maritime disaster, permit its horror to taint its perception of the honorable and valued service of the pilot. Only a reasoned and balanced system of pilotage can achieve these twin aims. The proposed national board of pilot commissioners would serve to strike this balance and to restore certainty and equity to our system of pilotage regulation.

BARRY W. ASHE

## NOTES

### ADMIRALTY—REMEDIES AVAILABLE TO OCEANOGRAPHIC RESEARCH VESSEL PERSONNEL IN THE WAKE OF *Presley v. M/V Carribean Seal*

The plaintiff, a member of the seismic crew on the oceanographic research vessel *M/V Carribean Seal*, was injured on board ship while in the course of his employment.<sup>1</sup> In a suit against his employer (the vessel's time-charterer) and the vessel owner, the plaintiff alleged he was a seaman,<sup>2</sup> sought relief under the Jones Act,<sup>3</sup> and asserted an unseaworthiness claim under general maritime law.<sup>4</sup> The defendant employer opposed the action, arguing that the plaintiff's shipboard billet fell within the category of "scientific personnel on an oceanographic research vessel," as defined within the Oceanographic Research Vessels Act (ORVA),<sup>5</sup> and contending that the plaintiff thus was pre-

1. The *M/V Carribean Seal* is an oceanographic research vessel which conducts seismic measurements. The plaintiff was repairing an air compressor, used exclusively to supply air at high pressure to the air guns which are fired to produce seismic data, when he became entangled in the machinery and injured his arm. He received medical treatment and workmen's compensation in accordance with the terms of his employment contract from the date of the injury until suit was filed.

2.

The classification of a maritime worker as a seaman has two consequences. It makes him eligible for the benefits granted seamen by general maritime law, principally maintenance and cure in the event of disability in the service of his vessel and the warranty of seaworthiness of the vessel on which he is engaged. In addition, a seaman has the protection of the Jones Act with the right to claim damages for injury or death resulting from the negligence of his employer. . . .

*Sennett v. Shell Oil Co.*, 325 F. Supp. 1, 4-5 (E.D. La. 1971).

3. 46 U.S.C. § 688 (1976). For a background history of the Jones Act, see *infra* note 33.

4. See Plaintiff's Petition for Writ of Certiorari at 5, *Presley v. Geophysical Service, Inc.*, 52 U.S.L.W. 3191 (U.S. Sept. 20, 1983) (No. 83-424). For an explanation of the substance of these claims, see *infra* notes 19 and 33.

5. The Oceanographic Research Vessels Act, 46 U.S.C. §§ 441-445 (1976) (§§ 442 and 445 have been repealed by Act of Aug. 26, 1983, Pub. L. No. 98-89, § 4(b), 97 Stat. 500, 604), provides, in pertinent part, as follows:

§ 441. Exemption of oceanographic research vessels from inspection laws;

Supreme Court in *Clary Insurance Agency v. Doyle*.<sup>80</sup> The evidence showed that the broker, after his initial failure to obtain insurance, which constituted ordinary negligence, failed to acknowledge the error to the assured and continued to act as though the assured were covered.<sup>81</sup> Punitive damages were awarded for double the amount of the compensatory damages.<sup>82</sup>

#### CONCLUSION

Because the United States lacks comprehensive legislation governing marine insurance, the courts have had to alternatively look to state law, the general maritime law, the English Marine Insurance Act of 1906, and English jurisprudence for authority. The duties and liabilities of a marine insurance broker and agent are by and large derived from the application of the general law of agency to the relationships among an assured, a broker, and an insurer. When a broker or agent is exercising any discretion, he must do so with the level of skill, knowledge, and care prevalent in the profession, and with a primary view toward protecting his principal's interests.

80. 620 P.2d 194, 205 (Alaska 1980).

81. *Id.* at 198-99.

82. *Id.* at 205.

## INFORMAL GUIDE TO COAST GUARD INVESTIGATIONS OF MARINE CASUALTIES AND ACCIDENTS INVOLVING COMMERCIAL VESSELS\*

William B. Thomas\*\*

As part of its mission to promote the safety of life and property at sea,<sup>1</sup> the United States Coast Guard investigates marine accidents and casualties.<sup>2</sup> This article will discuss the authority for these investigations, their general nature, and utilization of the information developed, focusing on accidents involving commercial vessels.

#### AUTHORITY AND PURPOSE

Subsection (a) of section 4450 of title 52 of the Revised Statutes gives the Coast Guard authority to prescribe regulations governing

\* The views expressed in this paper are strictly those of the author and in no way constitute the official position of the United States Coast Guard or any other government agency.

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1. 14 U.S.C. § 2 (1976).

2. The primary authority for these investigations is section 4450 of title 52 of the Revised Statutes of 1873, which is derived from Act of Feb. 28, 1871, ch. 100, § 19, 16 Stat. 447 (codified as amended at 46 U.S.C. § 239 (1976)). The Revised Statutes comprise all of the statutes of the United States in force on Dec. 1, 1873, codified into seventy-four titles by subject. Title 52 is entitled "Regulation of Steam Vessels" and consists of §§ 4399-4500 of the Revised Statutes. The Revised Statutes, as amended by subsequent Statutes-at-Large, have been recodified into the fifty titles of the present-day United States Code; however, of the three United States Code titles most frequently used in Coast Guard investigations (title 14—Coast Guard, title 33—Navigation and Navigable Waters, and title 46—Shipping), only title 14 has been enacted into positive law (as of Jan. 25, 1982). See *Preface* to U.S.C. Supp. V 1981 at vii. For titles 33 and 46, the language of the Revised Statutes and the Statutes-at-Large remains authoritative. See generally M. Cohen, *How to Find the Law* 126-29 (7th ed. 1976). As a matter of practice, Coast Guard investigators usually refer to the relevant sections by their numbers in the Revised Statutes. To find the location of a specific section number of the Revised Statutes in title 46 of the United States Code, reference must be made to a note entitled "References in Text" which follows the text of 46 U.S.C. § 239 (1976).

the investigation of marine casualties involving loss of life.<sup>3</sup> Subsection (b) of the statute authorizes the Coast Guard to establish regulations for the investigation of three other distinct types of maritime occurrences:<sup>4</sup> marine casualties, or accidents not involving loss of life; acts in violation of title 52 of the Revised Statutes;<sup>5</sup> and acts of misconduct or incompetence by mariners acting under the authority of licenses or documents issued by the Coast Guard.<sup>6</sup>

Subsection (d) of the statute provides for the immediate investigation, in accordance with the regulations established under subsections (a) and (b), of all marine casualties and accidents and their attendant circumstances, all acts in violation of title 52 of the Revised Statutes, and all acts of misconduct or incompetence by mariners acting under the authority of licenses or documents issued by the Coast Guard.<sup>7</sup> This subsection also specifies that violations, misconduct, or incompetence are to be investigated, whether or not they are committed in connection with any marine casualty or accident.

The statutory authority to prescribe regulations governing investigations has been exercised by the Coast Guard and is found in parts 4 and 5 of title 46 of the Code of Federal Regulations. Part 4 is entitled "Marine Investigation Regulations" and governs the conduct of investigations of: marine casualties and accidents; acts in violation of specified sections of title 46 of the United States Code, or any of the regulations issued thereunder; and, acts of incompetency or misconduct committed by any licensed officer or

3. 46 U.S.C. § 239(a) (1976); see *supra* note 2.

4. 46 U.S.C. § 239(b) (1976).

5. See *supra* note 2.

6. Coast Guard regulations govern the number of officers and seamen required to operate United States merchant vessels. They also establish the minimum qualifications for service in the various positions on board such vessels. See generally *Manning of Vessels*, 46 C.F.R. pt. 157 (1981). The Coast Guard administers tests and examinations of merchant mariners to determine whether or not they meet the qualifications. Qualified seamen are issued a merchant mariners document (MMD) certifying that they are eligible to serve in the crews of United States merchant vessels. Applicants who have the requisite experience and who pass the required tests are issued licenses as officers in the United States Merchant Marine. See generally 46 C.F.R. §§ 10.01-1 to 10.16-81 (1981). See also the Coast Guard Marine Safety Manual (Commandant Instruction M16000.3), Vol. III, entitled "Marine Industry Personnel." The Coast Guard Marine Safety Manual (Commandant Instruction M16000.3) consists of seven volumes which provide procedure and policy guidance to Coast Guard personnel engaged in marine safety duties. Volume V of the manual, entitled "Investigations," provides the basis for most of the Coast Guard policy discussed in this article. Hereinafter it is cited as "5 MSM" followed by the appropriate paragraph number.

7. 46 U.S.C. § 239(d) (1976).

holder of a merchant mariner's document issued by the Coast Guard, when such acts are committed in connection with any marine casualty or accident.<sup>8</sup>

The term "marine casualty and accident," as used in part 4 of the regulations,<sup>9</sup> covers occurrences involving all vessels<sup>10</sup> on the navigable waters of the United States,<sup>11</sup> or involving vessels of the United States<sup>12</sup> wherever located, which result in damage to or by the vessels, their gear, or cargo, or in the injury or death of any person.<sup>13</sup> The term includes collisions, groundings, heavy weather damage, fires, explosions, failure of gear and equipment, and any other damage which might affect the seaworthiness of the vessel.<sup>14</sup> The death or injury of any person while diving from a vessel and using underwater breathing apparatus is also included.<sup>15</sup>

Part 5 of title 46 of the Code of Federal Regulations governs investigations associated with proceedings to suspend or revoke licenses, or documents issued to mariners by the Coast Guard.<sup>16</sup> These investigations are strictly concerned with acts of incompetence, negligence, misconduct, and willful violations of law, by individuals acting under the authority of their merchant mariner's document or license.<sup>17</sup> Mariners' conduct does not have to be asso-

8. 46 C.F.R. § 4.01-1 (1981). The violations in subsection (b) of the regulation are essentially the same as those in title 52 of the Revised Statutes. See *supra* note 2.

9. 46 C.F.R. § 4.01-1(a) (1981).

10. 46 C.F.R. § 4.03-1(a) (1981) excepts "public vessels." These are defined in 46 C.F.R. § 4.03-40 (1981) as vessels owned outright by the United States (bareboat charter to United States is not sufficient) and used for a public purpose, not in trade or commercial service. See also 46 C.F.R. § 4.40-5(e) (1981).

11. See 33 C.F.R. § 2.05-25 (1981).

12. 46 C.F.R. § 4.40-5(f) (1981).

13. 46 C.F.R. § 4.03-1 (1981).

14. 46 C.F.R. § 4.03-1(b) (1981).

15. 46 C.F.R. § 4.03-1(c) (1981).

16. For the procedures applicable to suspension and revocation investigations and hearings, see 46 C.F.R. pt. 5 (1981). For Coast Guard policy on the subject, see 5 MSM 71. For discussion of the purpose and procedures involved, see Fidell, *Improving Competence in the Merchant Marine: Suspension and Revocation Proceedings*, 45 Mo. L. Rev. 1 (1980).

17. With the exception of narcotics violations and of willful violations of title 52 of the Revised Statutes (see *supra* note 5), Coast Guard action against a mariner's document or license must be based on his or her conduct while "acting under the authority" of the license or document. 46 C.F.R. § 5.01-35 (1981) defines this as being whenever the license or document was required by law or was a condition of employment. See also *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974); *Dietze v. Siler*, 414 F. Supp. 1105 (E.D. La. 1976) (Coast Guard held to be without jurisdiction over pilots acting under state pilot licenses, even though holding a federal license, issued by the Coast Guard, was a prerequisite for holding the state license.)

ciated with a casualty or accident in order to be investigated under part 5. Such investigations, however, are often initiated as a result of information developed during an accident or casualty investigation conducted under part 4.

The purpose of Coast Guard marine accident and casualty investigations as outlined in subsection (d) of the statute, is to determine, as far as possible, the cause of any such accident or casualty, the person responsible, and whether or not Coast Guard employees properly performed their inspection and licensing duties with regard to any vessel or personnel involved.<sup>18</sup> The implementing regulations elaborate on this by requiring that the investigation further determine whether or not any failure of material (physical or design) contributed to the casualty.<sup>19</sup> The regulations also note that the investigations are made "for the purpose of taking appropriate measures for promoting safety of life and property at sea, and are not intended to fix civil or criminal responsibility."<sup>20</sup>

#### NOTIFICATION AND REPORTING REQUIREMENTS

When a vessel is involved in a marine accident or casualty in waters subject to the jurisdiction of the United States,<sup>21</sup> the owner, agent, master, or person in charge of the vessel is usually required to report the accident to the appropriate authorities.<sup>22</sup> For "unin-

spected" vessels<sup>23</sup> which are used for recreational purposes or are required to be "numbered" under the Federal Boat Safety Act of 1971,<sup>24</sup> the report is normally required to be made to state authorities in the state where the accident occurred.<sup>25</sup> A report is required when, as a result of an occurrence involving a vessel or its equipment: a person dies, disappears, or requires medical treatment beyond first aid; a vessel is lost; or property damage exceeds two hundred dollars.<sup>26</sup>

For most other vessels,<sup>27</sup> accident or casualty reports must be made to the Coast Guard. This requirement governs all "inspected"<sup>28</sup> vessels of the United States,<sup>29</sup> regardless of location or

23. The term "uninspected vessels" refers to vessels which are not formally inspected by the Coast Guard. The vessels which are required to be "inspected" by the Coast Guard are listed in 46 C.F.R. § 90.05-1(a) (1981). Inspected vessels include those carrying combustible or flammable liquid cargoes in bulk, more than six passengers for hire, freight for hire, and dangerous cargoes in bulk.

24. The numbering of vessels under the Federal Boat Safety Act of 1971, Pub. L. 92-75, § 2, 85 Stat. 213 (1971) (codified as amended at 46 U.S.C. §§ 1451-29 (1976 & Supp. IV 1980)) is similar to the registration and licensing of an automobile under the laws of a state. It is governed by 33 C.F.R. §§ 173.11-35 (1981) and generally applies to all vessels except foreign vessels, public vessels, and vessels which have or are required to have marine documents as vessels of the United States.

25. 33 C.F.R. § 173.59 (1981). In Alaska, New Hampshire, Washington, and American Samoa, the reports are submitted to the Coast Guard. 33 C.F.R. pt. 173, app. A (1981).

26. See 33 C.F.R. §§ 173.51-.59. Because of the terms used, determining exactly to which vessels these reporting requirements apply is not simple. Some guidance is provided by 5 MSM 72-2-15 which indicates that the requirements apply to:

- [1] Vessels which are "numbered" and used for recreational purposes;
- [2] Documented yachts;
- [3] Commercial vessels which are numbered and uninspected;
- [4] Commercial vessels which are "numbered" and "uninspected"; and which were used for recreational purposes at the time of the accident.

This guidance is summarized by noting that if the vessel is "uninspected" and either "numbered" or being used for recreational purposes, then, regardless of other factors, any required report should be made in accordance with 33 C.F.R. §§ 173.51-.59 (1981). *Id.*

27. The language in 46 C.F.R. § 4.05-1 (1981) appears to apply to all vessels, but other sections of 46 C.F.R. pt. 4 provide exceptions to the reporting requirements. See 46 C.F.R. § 4.03-1(a) (1981) (public vessels); 46 C.F.R. § 4.01-3(a) (1981) (vessels subject to the reporting requirements of 33 C.F.R. § 173.51); 46 C.F.R. § 4.01-3(b) (1981) (vessels involved in diving accidents under certain conditions); 47 Fed. Reg. 39,683 (1982) (to be codified at 46 C.F.R. § 4.01-3(c)) (vessels involved with injury or death to shipyard workers "when such accidents are not the result of either a vessel casualty [e.g. collision] or a vessel equipment casualty [e.g. cargo boom failure] and are subject to the reporting requirements of Occupational Safety and Health Administration [OSHA]."). See also 5 MSM 72-2-15 (dual reporting under 33 C.F.R. § 173.51 and 46 C.F.R. § 4.01-3 is not required).

28. See *supra* note 23.

29. 46 C.F.R. § 4.40-5(f) (1981).

18. 46 U.S.C. § 239(d) (1976). See also 5 MSM 72-1-5.

19. 46 C.F.R. § 4.07-1(c) (1981) provides:

(c) The investigation will determine as closely as possible:

- (1) The cause of the accident;
- (2) Whether there is evidence that any failure of material (either physical or design) was involved or contributed to the casualty, so that proper recommendations for prevention of the recurrence of similar casualties may be made;
- (3) Whether there is evidence that any act of misconduct, inattention to duty, negligence or willful violation of law on the part of any licensed or certificated man contributed to the casualty, so that appropriate proceedings against the license or certificate of such person may be recommended and taken under Title 46, U.S. Code, Section 239;
- (4) Whether there is evidence that any Coast Guard personnel or any representative or employee of any other government agency or any other person caused or contributed to the cause of the casualty; or
- (5) Whether the accident shall be further investigated by a Marine Board of Investigation in accordance with regulations in Subpart 4.09.

20. 46 C.F.R. § 4.07-1(b) (1981). See also 5 MSM 72-1-10.

21. 33 C.F.R. § 2.05-30 (1981).

22. The accident must be reported if the vessel and the circumstances fit within the scope of 33 C.F.R. §§ 173.51, 173.55 (1981) or 46 C.F.R. §§ 4.03-1, 4.05-1 (1981).

use at the time of the accident or casualty; "documented"<sup>30</sup> but "uninspected"<sup>31</sup> vessels of the United States being used for commercial purposes at the time of the accident or casualty; and, foreign vessels, for accidents and casualties occurring in the navigable waters of the United States.<sup>32</sup> The specific reporting requirements as set forth in subpart 4.05 of the marine investigation regulations are as follows:

The owner, agent, master or person in charge of a vessel involved in a marine casualty shall give notice as soon as possible to the nearest Coast Guard Marine Safety or Marine Inspection Office whenever the casualty involves any of the following:

- (a) All accidental groundings and any intentional grounding which also meets any of the other reporting criteria or creates a hazard to navigation, the environment, or the safety of the vessel;
- (b) Loss of main propulsion or primary steering, or any associated component or control system, the loss of which causes a reduction of the maneuvering capabilities of the vessel. Loss means that systems, component parts, subsystems, or control systems do not perform the specified or required function;
- (c) An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure or damage to fixed fire extinguishing systems, lifesaving equipment, auxiliary power generating equipment, or bilge pumping systems;
- (d) Loss of life;
- (e) Injury causing a person to remain incapacitated for

30. "Documented" vessels are vessels which have received a "document" from the Coast Guard which formally identifies the vessel as a "vessel of the United States." This may be analogized to a passport identifying a person as a citizen of the United States. The vessel document also specifies what types of activities the vessel may engage in, such as foreign trade, the coastwise trade, commercial fishing, or pleasure use only. Generally, only vessels built and owned in the United States may be documented, but there are exceptions to this rule. Commercial vessels of 5 net tons and over are generally required to be documented, and any qualifying vessel of 5 net tons and over may be documented. For specific requirements and exceptions, see generally 46 U.S.C. § 65 (Supp. IV 1980); 46 C.F.R. pts. 66-67 (1981).

31. See *supra* note 23.

32. 46 C.F.R. § 4.03-1(a) (1981). See also 33 C.F.R. § 2.05-25 (1981).

a period in excess of 72 hours;

(f) An occurrence not meeting any of the above criteria but resulting in damage to property in excess of \$25,000.00. Damage includes the cost necessary to restore the property to the service condition which existed prior to the casualty, including the cost of salvage, gas freeing, and dry dock. It does not include such items as demurrage.<sup>33</sup>

The notice to the Coast Guard must include the name and official number<sup>34</sup> of the vessel involved, the name of the vessel's owner or agent, the nature and circumstances of the casualty, the location where it occurred, the nature and extent of any injury to persons, and the damage to property.<sup>35</sup>

In addition to giving "notice,"<sup>36</sup> the person in charge of a vessel

33. 46 C.F.R. § 4.05-1 (1981). See also 45 Fed. Reg. 77,439-41 (1980) (discussion of the changes which resulted in present wording of section 4.05-1). The reporting requirements may also be found in the regulations for the different types of vessels. See, e.g., 46 C.F.R. pts. 26, 35, 78, 97, 109, 167, 185, 196 (1981). Note that "demurrage," as used in 46 C.F.R. § 4.05-1(f), is compensation for delaying a ship from loading, unloading, or sailing as scheduled.

The Coast Guard's marine safety responsibilities in any particular port area have traditionally been split between an "Officer in Charge, Marine Inspection" (OCMI), and a "Captain of the Port" (COTP) under the overall supervision of the Coast Guard District Commander. See 33 C.F.R. § 1.01-1 (1981); 46 C.F.R. §§ 1.01-.05 (1981).

The Officer in Charge, Marine Inspection, commands a "Marine Inspection Zone" from a "Marine Inspection Office" (MIO). 33 C.F.R. § 3.01-1(d) (1981). He or she is responsible for: the inspection, documentation and measurement of vessels; the inspection of marine equipment requiring Coast Guard approval; the licensing and certification of merchant marines; and the investigation of marine accidents, violations of law, and misconduct by mariners serving under the authority of licenses or documents issued by the Coast Guard. 33 C.F.R. § 1.01-20 (1981).

The Captain of the Port commands a "Captain of the Port Area" (33 C.F.R. § 3.01-1(e) (1981)), and is responsible for port safety and security, including the control of vessel movements and the handling of dangerous cargoes. The COTP is also responsible for marine environmental protection which includes the prevention, clean-up, and investigation of oil and hazardous chemical spills. 33 C.F.R. § 1.01-30(a) (1981).

Most of the Marine Inspection Zones and Captain of the Port Areas cover the same territory (see 33 C.F.R. pt. 3 (1981)) so the Coast Guard has combined the two offices in most, but not all, ports. The combined entity is known as a Marine Safety Office, and its commanding officer functions as both the Officer in Charge, Marine Inspection, and the Captain of the Port.

34. A documented vessel is required to have a number permanently affixed to her main beam. 46 U.S.C. § 45 (1976). Other vessels are assigned numbers by the state in which they are principally used which are required to be displayed on the bow of the vessel. See generally 33 C.F.R. pts. 173, 174 (1981).

35. 46 C.F.R. § 4.05-5 (1981).

36. If a written report is submitted "without delay," then it may also fulfill the notice

involved in a marine casualty or accident is required to report<sup>37</sup> as soon as possible to the Coast Guard "Officer in Charge, Marine Inspection,"<sup>38</sup> at the port in which the casualty occurred or nearest the port of first arrival.<sup>39</sup> The written report is required to be on Coast Guard Form 2692 entitled "Report of Marine Accident, Injury or Death."<sup>40</sup>

The owner, agent, master, or person in charge of a vessel involved in a marine casualty or accident is also responsible for preserving all records relating to the vessel's voyage, such as logs, charts, and cargo stowage plans. These are to be made available to the Coast Guard upon request.<sup>41</sup>

Failure to give notice and report to the Coast Guard in a timely manner could result in a monetary penalty.<sup>42</sup> Such failure by the

requirement. 47 Fed. Reg. 35,747 (1982) (to be codified at 46 C.F.R. § 4.05-10(b)).

37. See 47 Fed. Reg. 35,747 (1982) (to be codified at 46 C.F.R. § 4.05-10(a)). The revision eliminated the requirements to report casualties in person in addition to the written report. See also 33 U.S.C. §§ 361, 362, 365 (1976) (requiring written reports of vessel accidents).

38. The authority to investigate marine casualties and accidents in 46 U.S.C. § 239 (1976) is given to the Commandant of the Coast Guard by the statute itself. Authority given to the Secretary of the Department of Transportation by other marine safety statutes is delegated to the Commandant of the Coast Guard. See 49 C.F.R. § 1.46 (1981). Each Officer in Charge, Marine Inspection, is responsible for a Marine Inspection Zone where he exercises the authority delegated by the Commandant of the Coast Guard. A listing of these Marine Inspection Zones with a description of the area covered by each one is contained in 33 C.F.R. pt. 3 (1981). The headquarters for the Marine Inspection Zone is either a Marine Inspection Office or a Marine Safety Office. See *supra* note 33. In each of these offices, the responsibility for investigating marine accidents and casualties is assigned to the Investigation Department headed by an individual known as the "Senior Investigating Officer." He and his "Investigating Officers" normally conduct the actual investigations. See 46 C.F.R. § 4.03-30 (1981).

39. 47 Fed. Reg. 35,741 (1982) (to be codified at 46 C.F.R. § 4.05-10(a)).

40. *Id.* The casualty reporting requirements in 46 C.F.R. pts. 4, 26, 35, 78, 97, 109, 167, 185, 196, and 197 were revised to provide for the use of a single new casualty reporting form to replace the old Form CG-2692, "Report of Vessel Casualty or Accident," and the old Form CG-924E, "Report of Personal Injury or Loss of Life." The new form is entitled "Report of Marine Accident, Injury or Death" and is designated CG-2692 (Rev. 6-82). The new form is designed to reduce the paperwork burden on the public while improving the Coast Guard's ability to analyze accidents. For accidents involving barges a separate form CG-2692A entitled "Barge Addendum," has been developed which contains reproductions of the barge information section of the CG-2692. The addendum can be used for accidents resulting in damage to more than one barge in a tow, eliminating the old practice of requiring a full CG-2692 for each barge involved in the accident. The new forms can be obtained from Coast Guard Marine Inspection and Marine Safety Offices and their use will be mandatory after January 1, 1983. See also 47 Fed. Reg. 35,736 (1982) (to be codified at 33 C.F.R. pt. 1.46) (revising the casualty reporting requirements for facilities, vessels, and other units engaged in activities on the outer continental shelf).

41. 46 C.F.R. § 4.05-15 (1981). See also 33 U.S.C. § 361 (1976).

42. 5 MSM 72-2-45.

master or person in charge of a vessel, serving under the authority of a Coast Guard license and/or merchant mariner's document could also be the basis for suspension or revocation of that license or document.<sup>43</sup>

Besides the direct notification and reporting by the parties involved as discussed above, the Coast Guard may become aware of the occurrence of a marine accident or casualty in the course of monitoring radio distress frequencies, in responding to calls for search and rescue assistance, or in providing vessel traffic services.<sup>44</sup> Other sources of initial notification of accidents or casualties include local law enforcement agencies, state boating accident reports,<sup>45</sup> queries from insurance companies prior to paying claims, queries from attorneys preparing civil cases, and reports of oil or hazardous substance spills in the navigable waters.<sup>46</sup>

## THE INVESTIGATION PROCESS

### Initial Action

Regardless of the form or source of the information,<sup>47</sup> when a Coast Guard "investigating officer"<sup>48</sup> is notified of the occurrence of a marine casualty or accident, he or she must make an initial determination as to what, if any, immediate action should be

43. 5 MSM 72-2-45; 46 C.F.R. pt. 5 (1981).

44. See generally 33 U.S.C. §§ 1221-32 (Supp. V 1981); 33 C.F.R. pt. 161 (1981).

45. See *supra* notes 23-26 and accompanying text; 33 C.F.R. §§ 174.101-125 (1981) (providing for state casualty reporting systems and the forwarding of state marine accident and casualty reports to the Coast Guard); 5 MSM 72-2-15 (state marine accident and casualty reports are forwarded to the cognizant Officer in Charge, Marine Inspection, for investigation by a Coast Guard investigating officer when: (1) the vessel involved was being used for commercial purposes and the accident or casualty meets the reporting criteria in 46 C.F.R. § 4.05, or (2) a death is involved (even where the vessel was being used for recreation)). See also 5 MSM 75 (providing general Coast Guard guidance and policy on conducting boating accident investigations).

46. See 33 U.S.C. § 1321(b)(3) (Supp. V 1981); 33 C.F.R. §§ 153.201-205 (1981) (requires immediate notice to be given to the Coast Guard of any discharge of oil or a hazardous substance into the navigable waters of the United States, and provides for up to a \$10,000 fine and/or one year in prison for failure to notify).

47. Notice of accidents reach the Coast Guard by almost every known means of communications, from in-person reports of individuals who walk into a Marine Inspection Office, to telephone calls, telegrams, messages and letters, with or without the accident report forms attached.

48. See 46 C.F.R. § 4.03-30 (1981). This is normally a Coast Guard officer working for an Officer in Charge, Marine Inspection, at either a Marine Inspection Office or a Marine Safety Office. See *supra* notes 33 & 38.

taken.<sup>49</sup> The initial action taken varies with the seriousness of the incident and timeliness of the notification.<sup>50</sup>

If insufficient information is contained in the initial notification,<sup>51</sup> the investigating officer must obtain enough basic information about the accident (such as types of vessels involved, injuries or deaths, damage, and hazards to navigation or the environment) to determine whether the incident qualifies as a "reportable marine casualty." This term is used informally by Coast Guard investigating officers for referring only to those marine accidents or casualties for which a report is required to be submitted or forwarded to a Coast Guard investigating officer for investigation.<sup>52</sup> For vessels engaged in commercial service, "reportable marine casualties" are generally limited to those marine accidents or casualties meeting the criteria discussed in subpart 4.05 of the marine investigation regulations, including groundings, loss of power or steering, fire, flooding or failure of safety equipment, death, or injury causing incapacitation over 72 hours, or property damage over \$25,000.<sup>53</sup>

If from the available information it appears that an accident does not qualify as a "reportable marine casualty," then the Inves-

49. Most Coast Guard Marine Safety or Marine Inspection Offices have a Duty Investigating Officer (IO) available to receive reports of vessel accidents at any time. If on evenings or weekends there is no answer at the phone number listed for the Marine Safety or Marine Inspection Office, information can usually be given to the Search and Rescue Duty Officer at the phone number for Coast Guard Marine Emergencies. The information will then be relayed to the Duty Investigating Officer. Although the Duty Investigating Officer often has to make the initial determinations as to what to do, consultation with higher authority is normally readily available and is usually required for serious incidents.

50. For example, on-scene investigation is preferred for serious accidents when the accident scene is accessible and notice is received so that the investigator can get to the scene while the vessels and personnel involved are still there.

51. See *supra* note 33 and accompanying text.

52. See *supra* note 45.

53. See *supra* note 33 and accompanying text. In addition to the accidents involving commercial vessels, the Coast Guard investigates numerous other types of marine incidents. E.g., boating accidents (see *supra* notes 23-25 & 46; 33 C.F.R. §§ 173.51, 174.121 (1981); 5 MSM 74); accidents involving deepwater ports (see 33 C.F.R. § 150.711 (1981)); diving accidents (see 46 C.F.R. §§ 197.202, 484 (1981)); water pollution incidents (see *supra* note 45; 5 MSM 74); incidents involving hazardous materials (see 46 C.F.R. § 4.05-30 (1981); 49 C.F.R. §§ 171.15-.16 (1981)); accidents on artificial islands or fixed structures on the outer continental shelf (see 43 U.S.C. §§ 1333, 1348, 1356 (1976 & Supp. V 1981); 47 Fed. Reg. 9,366 (1982) (to be codified at 33 C.F.R. §§ 140, 146); 5 MSM 77). For an in-depth discussion of disputes between the Coast Guard and OSHA over the authority to regulate maritime working conditions on the outer continental shelf and other areas, see Comment, *Regulation of Maritime Safety: A Conflict of Standards*, 4 Mar. Law 89 (1979).

tigating Officer normally recommends<sup>54</sup> that the case be closed without further Coast Guard investigative action.<sup>55</sup> If the case is closed, the information already received is filed for future reference.<sup>56</sup> The Officer in Charge, Marine Inspection,<sup>57</sup> and the cognizant Coast Guard District Commander<sup>58</sup> have the discretion to order other less serious accidents to be investigated.<sup>59</sup> Due to cost and resource limitations, however, this is rarely done.

If an accident or casualty is serious enough to be classified as "reportable," then it must be investigated to the extent necessary to make the required determinations as to such things as cause, evidence of material failure, misconduct, and violation of law.<sup>60</sup> For more serious incidents,<sup>61</sup> the investigating officer must insure that the cognizant Coast Guard District Commander and the Commandant of the Coast Guard are notified by the most rapid means available.<sup>62</sup> In certain instances, the Commandant will notify the National Transportation Safety Board<sup>63</sup> (NTSB) and/or the Intergovernmental Maritime Consultative Organization<sup>64</sup> (IMCO).

54. The final decision on whether or not to investigate an incident is normally made by the Senior Investigating Officer (see *supra* notes 38 & 49) during regular working hours or by the duty officer acting for the Officer in Charge, Marine Inspection (see *supra* note 33), on evenings or weekends. Notification of higher authorities may be required. See *infra* notes 61-62 and accompanying text.

55. Even though a case may not be "reportable" under 46 C.F.R. § 4.05-1 (1981), it may still be investigated by the Coast Guard under some other law or regulation. See *supra* note 53.

56. The investigation department of the cognizant Marine Inspection or Marine Safety Office (see *supra* notes 33 & 38) normally keeps the information on file for at least one year to cover the possibility that an incident may later be found to require further investigation.

57. See *supra* notes 33 & 38.

58. See 33 C.F.R. pt. 3 (1981); 46 C.F.R. § 4.03-25 (1981).

59. 5 MSM 72-2-40 provides generally that reports of marine accidents should not be submitted to the Commandant of the Coast Guard unless the accident falls within the criteria in 46 C.F.R. § 4.05-1 (1981) or 33 C.F.R. § 173.55 (1981). It then goes on to state that "[o]ther less serious casualties may be investigated for local administrative or other purposes; however, this is left to the discretion of the OCMI and the district commander." *Id.*

60. See *supra* note 19.

61. These incidents usually involve such things as multiple loss of life, extensive property damage, the loss of a vessel, or a serious threat to life, property, or the environment. See 5 MSM 72-1-25C for definitions of "major," "public/non-public vessel," "serious," and "significant" marine casualties in which special notice to higher authority is required.

62. See 5 MSM 72-2-5 (usually by telephone).

63. See 5 MSM 72-1-25C(1), (2). See also *infra* text accompanying notes 89-91.

64. See 5 MSM 72-1-25C(3).

### *Nature and Scope of Investigation*

The nature of the investigation conducted is normally tailored to fit the circumstances of the particular incident. The scope and procedural formalities involved range from an informal review of the information received in the notification report<sup>65</sup> to a formal hearing with sworn testimony and a verbatim record before a board of senior Coast Guard Officers<sup>66</sup> and one or more representatives of the NTSB.<sup>67</sup>

In keeping with the purpose of promoting safety, the scope of investigation and degree of formality is dependent not only on the seriousness of the incident, but also on the potential contribution to marine safety of the information which may be developed. Consequently, an accident involving loss of life and/or considerable property damage may not receive an extensive investigation when the cause is obvious and well understood. A less serious accident will get a thorough investigation if the cause is likely to have a significant impact in preventing similar incidents in the future.

The simplest type of Coast Guard marine accident or casualty investigation is a "routine"<sup>68</sup> investigation conducted by a single Coast Guard investigating officer. Routine investigations are conducted with varying degrees of procedural formality,<sup>69</sup> consistent with the rights of persons with a direct interest in the results of the investigation.<sup>70</sup> The investigating officer may obtain the necessary facts through correspondence, telephone or personal interviews, signed or unsigned statements, and/or by means of a review of information in the notification reports.<sup>71</sup> Witnesses are rarely required to testify under oath and are often contacted separately.<sup>72</sup> A verbatim record usually is not made, but the investigating officer's

65. See *supra* notes 33 & 36; 5 MSM 72-4-10B. Informal review can be done in uncomplicated cases where the accident or injury report forms are submitted as the required notice and provide all the information necessary to make the required determinations under 46 C.F.R. § 4.07-1(c) (1981).

66. See *infra* text accompanying notes 77-79; 46 C.F.R. subpt. 4.09 (1981); 5 MSM 72-3-10.

67. See *infra* notes 85-93 and accompanying text; 46 C.F.R. subpt. 4.40 (1981).

68. 5 MSM 72-4-5B.

69. *Id.*

70. Persons with a direct interest in the results of an investigation are called "parties in interest." See *infra* notes 115-22 and accompanying text; 46 C.F.R. § 4.03-10.

71. 5 MSM 72-4-5B.

72. *Id.*

notes are kept on file.<sup>73</sup>

Routine investigations are ideal for the vast majority of reportable marine accidents and casualties which do not involve particularly complex or unusual issues. The lack of procedural formalities permits a thorough investigation of an accident with minimal delay or inconvenience to the parties involved.

For more serious marine accidents or where, for any reason, it is considered necessary to take testimony under oath and make a verbatim record, a more formal investigation may be appropriate.<sup>74</sup> There are two types of "formal" Coast Guard marine casualty investigations, the most common of which is conducted by a single Coast Guard investigating officer who normally is designated to investigate the case by the cognizant Coast Guard District Commander.<sup>75</sup>

This "one-man-formal" type of investigation may be most appropriate where the accident under investigation is not particularly complex, and yet, the parties disagree as to what happened. In such cases, sworn testimony often proves to be the most effective method of eliciting the facts. It also can be useful in instances where substantial public interest in an otherwise "routine" case may provide a significant contribution to marine safety through increased public awareness of an unsafe practice or safety problem.<sup>76</sup>

Where a marine casualty or accident is of such magnitude or complexity that the information to be derived from its investigation is potentially of great significance in promoting marine safety, the second type of formal investigation may be appropriate, and a formal Coast Guard Marine Board of Investigation may be needed.<sup>77</sup> A "marine board" is usually composed of three senior Coast Guard officers with substantial experience in the field of marine safety.<sup>78</sup> Specialists and/or technical experts also may be assigned to assist the board as necessary.<sup>79</sup>

The Commandant of the Coast Guard is the only person who can convene a marine board of investigation.<sup>80</sup> The Commandant's decision may be based on information in the notification of a "ma-

73. 5 MSM 72-4-10B.

74. *Id.*

75. 5 MSM 72-4-20A.

76. See, e.g., 5 MSM 72-4-10A, -20A.

77. See, e.g., 46 C.F.R. § 4.09-1 (1981); 5 MSM 72-3-1, -4-10A.

78. 5 MSM 72-3-10.

79. *Id.*

80. See 46 C.F.R. § 4.09-1 (1981); 5 MSM 72-3-1.

job" or "significant" marine casualty,<sup>81</sup> on recommendations of a district commander, or on information obtained in a "routine" or "one-man-formal" investigation.<sup>82</sup>

Most incidents for which marine boards are convened involve multiple loss of life, extensive property damage, and considerable public interest. The decision to convene a marine board, however, should be influenced primarily by the knowledge to be gained from an intensive investigation of the incident.<sup>83</sup> Where the potential information to be gained is of considerable significance to marine safety, the time and expense of a marine board can be justified to insure inquiry into every aspect of the case.<sup>84</sup>

When a "major marine casualty"<sup>85</sup> involving a United States flag vessel<sup>86</sup> or an accident involving public<sup>87</sup> and non-public vessels is being investigated by the Coast Guard,<sup>88</sup> the NTSB may designate one or more persons to participate.<sup>89</sup> This does not reduce or mod-

81. See *supra* note 61; 5 MSM 72-2-1A, -5.

82. See 46 C.F.R. § 4.07-1(c)(5) (1981).

83. See 5 MSM 72-4-10A.

84. *Id.*

85. A "major marine casualty" is a casualty involving a vessel, other than a public vessel, that results in:

- (1) The loss of six or more lives;
- (2) The loss of a mechanically propelled vessel of 100 or more gross tons;
- (3) Property damage initially estimated at \$500,000 or more; or
- (4) Serious threat, as determined by the Commandant and concurred in by the Chairman [of the NTSB], to life, property, or the environment by hazardous materials.

46 C.F.R. § 4.40-5(d) (1981). See also 5 MSM 72-1-25 C(1).

86. 46 C.F.R. § 4.40-5(f) (1981).

87. 46 C.F.R. § 4.40-5(e) (1981).

88. An incident serious enough to qualify as a "major marine casualty" or which involves public vessels would normally warrant a formal investigation, either a "one-man-formal" investigation or a "marine board."

89. The NTSB is an independent federal agency which conducts investigations of major marine casualties or accidents involving public and non-public vessels. It operates under the authority of the Independent Safety Board Act, 49 U.S.C. §§ 1901-1907 (1976 & Supp. V 1981). For the regulations governing NTSB participation in Coast Guard marine casualty investigations, see 46 C.F.R. pt. 4.40 (1981), as amended by 47 Fed. Reg. 45,881 (1982) and 49 C.F.R. pt. 850 (1981), as amended by 47 Fed. Reg. 46,089 (1982). See also 5 MSM 72-2-55D, -3-50.

46 C.F.R. pt. 4.40 and 49 C.F.R. pt. 850 cover the jurisdictional relationship between the Coast Guard and the NTSB. Prior to the 1982 amendments, the NTSB's investigative responsibility was discretionary with the NTSB. See 49 C.F.R. § 850.15 (1981). Now, however, the NTSB has a mandatory investigatory function when a Coast Guard vessel is involved in a collision which results in at least one fatality or \$75,000 in property damage. See 47 Fed. Reg. 46,090 (1982) (to be codified at 49 C.F.R. § 850.15(b)(1)).

The factual predicates, moreover, warranting Coast Guard investigations have been made

ify the Coast Guard's responsibility for the investigation in any way,<sup>90</sup> and the Coast Guard investigating officer or Marine Board Chairman continues to direct the course of the investigation.<sup>91</sup>

The NTSB representative may, however, make recommendations about the scope of the investigation, call and examine witnesses, and submit or request additional evidence.<sup>92</sup> At the conclusion of the investigation, the Coast Guard provides the NTSB with a record of the proceedings, and the NTSB makes its own independent determination of the facts and the cause of the accident.<sup>93</sup>

#### Formal Investigation Procedures

The procedural formalities are basically the same for all "formal" investigations, whether conducted by a single investigating officer or a marine board and with or without National Transportation Safety Board participation. The sessions of the investigation are usually conducted in a hearing room<sup>94</sup> with a court reporter present to make a verbatim transcript of all testimony.<sup>95</sup> The sessions are open to the public,<sup>96</sup> but a courtroom atmosphere is generally maintained. Photography and any other disruptive activities are prohibited during the proceedings.<sup>97</sup>

At the start of the first session the investigating officer or members of the marine board are sworn in and appropriate introductions are made.<sup>98</sup> The investigating officer or chairman of the marine board then makes an "opening statement" covering the subject matter under investigation, the authority for the investigation and its purpose, and the persons designated as parties in interest and their rights.<sup>99</sup> The appearances of the parties in interest and/or their counsel are noted in the record.<sup>100</sup>

Thereafter, the investigating officer calls the first witness to testify. While a witness is testifying, all other persons expected to tes-

more explicit. See, e.g., 47 Fed. Reg. 46,089 (1982) (to be codified at 49 C.F.R. § 850.10).

90. 46 C.F.R. § 4.40-3 (1981); 5 MSM 72-2-55D.

91. 46 C.F.R. § 4.40-30(c) (1981); 5 MSM 72-2-55D.

92. 46 C.F.R. § 4.40-30(c) (1981).

93. 46 C.F.R. § 4.40-30(d)-(e) (1981).

94. 5 MSM 72-4-25B, -25C.

95. 46 C.F.R. §§ 4.07-30(b), 4.09-20 (1981); 5 MSM 72-1-5A.

96. 46 C.F.R. § 4.09-17 (1981); MSM 72-4-25A.

97. 5 MSM 72-3-40, -45, -50C.

98. 5 MSM 72-3-50A, -50B, -4-55B.

99. 46 C.F.R. § 4.07-7; 5 MSM 72-3-50C, -4-50A.

100. 5 MSM 72-3-50D.

tify during the investigation, except for the parties in interest, are excluded from the hearing room.<sup>101</sup> After being sworn in,<sup>102</sup> witnesses are questioned by the investigating officer.<sup>103</sup> Witnesses generally are asked to describe in their own words the circumstances surrounding the accident or casualty.<sup>104</sup> When the witness has finished telling his or her story, the investigating officer normally asks specific questions concerning the incident. The witness may also be asked to draw a sketch or diagram to clarify points covered in testimony.<sup>105</sup>

When the investigating officer has finished questioning a witness, the witness' counsel is permitted to ask questions if the witness is a party in interest.<sup>106</sup> Counsel for any other parties in interest may then question the witness.<sup>107</sup> Unless the investigating officer has further questions or the witness indicates that he or she has additional information not already elicited, the witness is excused.<sup>108</sup>

Exhibits consisting of documentary or real evidence may be entered into the record at any time. Each exhibit must be marked for proper identification.<sup>109</sup> When necessary, logs, records, or similar items may be copied or read into the record, so that the original can be returned to the owner. Likewise, photographs or lab reports can be substituted in the record for real evidence when necessary.<sup>110</sup>

#### PROCEDURAL REQUIREMENTS

Although not specifically stated in the statute or regulations governing Coast Guard marine accident and casualty investigations, it is understood that all Coast Guard investigations are subject to the basic requirements of procedural due process and fundamental fairness. If the Coast Guard fails to comply with any statute, regulation, or internal Coast Guard rule intended to confer important

101. 5 MSM 72-3-55.

102. 5 MSM 72-3-55, -4-5A, -4-55.

103. 5 MSM 72-4-50E, -50F.

104. 5 MSM 72-4-50E(2)(f).

105. 5 MSM 72-3-55.

106. 46 C.F.R. § 4.07-35 (1981).

107. 5 MSM 72-4-50F. Counsel for witnesses who are not parties in interest are not permitted to examine witnesses or otherwise participate in the investigation. 46 C.F.R. § 4.07-35(b) (1981).

108. 5 MSM 72-4-50F.

109. 5 MSM 72-4-50G.

110. *Id.*

procedural benefits upon individuals, then its action is subject to being struck down by the courts.<sup>111</sup> On the other hand, minor failures to accord procedural niceties, where substantial prejudice is not shown, may not justify relief.<sup>112</sup> This is in line with the Coast Guard's policy concerning the construction of its investigation regulations, which state that "[t]he regulations in this part shall be liberally construed to insure just, speedy, and inexpensive determination of the issues presented."<sup>113</sup>

Regardless of the type, scope, or degree of formality involved in a marine accident or casualty investigation, the same basic procedural due process requirements apply to all Coast Guard investigations conducted under the authority of 46 U.S.C. § 239. These stem from the statute itself, which provides in pertinent part:

(d) . . . In all investigations conducted under the authority of this section, any . . . person whose conduct is under investigation, or any other party in interest, shall be allowed to be represented by counsel, to cross-examine witnesses, and to call witnesses in his own behalf. . . .

(g) . . . the person whose conduct is under investigation shall be given reasonable notice of the time, place, and subject of such investigation and an opportunity to be heard in his own defense.<sup>114</sup>

#### *Parties in Interest*

At the start of an investigation or at the time of designation during the investigation, entities determined to qualify as "parties in interest" should be advised of their right to be represented by counsel, to cross-examine witnesses, and to call witnesses on their

111. See *United States v. Ceramic Bo-Truc #5, Inc.*, 538 F.2d 696 (5th Cir. 1976) (fine assessed by the Coast Guard struck down because it failed to hold an administrative hearing mandated by 46 U.S.C. § 239(d) (1976) prior to assessment); *United States v. Laborde*, 1981 A.M.C. 248 (E.D. La. 1978) (subpoena quashed when Coast Guard failed to comply with appeal requirements in 33 C.F.R. § 107 (1981)); *Van Teslaar v. Bender*, 365 F. Supp. 1007 (D. Md. 1973) (Coast Guard substitution of hearing officers in middle of a proceeding deprived person of fair hearing).

112. *Van Teslaar v. Bender*, 365 F. Supp. at 1009 (Coast Guard failure to give informal notice of complaint prior to formally charging as required by regulation was not jurisdictional defect where no substantial prejudice was shown).

113. 46 C.F.R. § 4.19-1 (1981).

114. 46 U.S.C. § 239(d), (g) (1976). See also 46 C.F.R. §§ 4.07-7, -35(a), 4.09-15 (1981).

own behalf.<sup>115</sup> The Coast Guard recently expanded the class of those considered to be parties in interest, or those having a "direct interest," to include any individual, organization, or other entity found to have a "demonstrable link or connection with the casualty under investigation."<sup>116</sup> The class has been defined to include, but not necessarily be limited to, the following categories of entities:

A. An owner, charterer, or agent [of a vessel, platform, facility, etc.], a licensed officer, or any holder of a merchant mariner's document, or any other person whose conduct is under investigation;

B. The lawful representative of a deceased who would have been a party in interest under category A. above;

C. A manufacturer, owner, shipper, time or space charterer, or other cargo interest, where there is an indication that cargo contributed to the cause of the casualty;

D. An insurer or underwriter which has succeeded to the rights of a party qualifying under categories A. or C. above; or

E. An entity, such as a maritime labor union, pilots association, a standards making organization, or an individual or corporation incurring damages as a result of the casualty which can demonstrate the potential for significantly contributing to the completeness of the investigation, or otherwise enhancing the safety of life and property at sea, through participation as a party in interest.<sup>117</sup>

The term party in interest had been construed more narrowly by the Coast Guard.<sup>118</sup> The position had been that unions, insurance

115. 46 C.F.R. § 4.07-7 (1981); 5 MSM 72-1-25E as amended by Commandant of the Coast Guard message R 170601Z March, 1982, ALDIST 093/82, Comdt. Note 16732, effective March 17, 1982 [hereinafter cited as ALDIST 093/82].

116. See 5 MSM 72-1-25E, 72-3-50C as amended by ALDIST 093/82, *supra* note 115. The change essentially indicates that the status of a party in interest is no longer limited to those who may have been responsible for the casualty. Now, others who can demonstrate the potential for significantly contributing to the completeness of the investigation or otherwise enhancing marine safety are included.

117. 5 MSM 72-1-25E as amended by ALDIST 093/83, *supra* note 115. The change specifies that parties in interest may be required to make an offer of proof of what facts are expected to be elicited solely, or primarily, through that entity's participation. It indicates further that parties with essentially identical interests, who do not qualify under category A, may be required to speak through a single representative.

118. See 5 MSM 72-1-25E, -3-50C, prior to amendment in March, 1982, by ALDIST 093/

companies, cargo interests, or injured parties were not ordinarily considered parties in interest unless they might have been responsible for or contributed to the cause of the accident.<sup>119</sup>

Prior to the redefinition of "party in interest," at least one court had held that the Coast Guard's old interpretation was too restrictive.<sup>120</sup> In a suit by a seaman's union seeking designation as a party in interest on behalf of its members, some of whom were killed or injured in the collision being investigated, the United States District Court for the Southern District of New York found that the old Coast Guard regulation defining "party in interest" "impermissibly narrowed the statutory grant of participatory rights" as set forth in 46 U.S.C. § 239(d).<sup>121</sup> The union noted that the purpose of the investigation was to determine the cause of the collision to prevent the recurrence of similar accidents. It argued that its members might have relevant information on the cause as well as suggestions for preventing future accidents, even if they were in no way responsible for the accident. The court accepted the union's argument and reading of the statute and permanently enjoined the Coast Guard from enforcing 46 C.F.R. §§ 4.03-10 and 4.07-35 to the extent that these regulations were inconsistent with 46 U.S.C. § 239, as construed by the court.<sup>122</sup>

### Subpoena

46 U.S.C. § 239(e) gives Coast Guard investigating officers the authority to administer oaths, subpoena witnesses, and require the production of relevant documents or other evidence.<sup>123</sup> It also spec-

82, *supra* note 115. The term included anyone with a "direct" interest in the investigation, including vessel owners, operators, masters, bareboat charterers, or their agents, and mariners holding licenses or documents issued by the Coast Guard whose conduct was under investigation.

119. See 5 MSM 72-1-25E prior to March, 1982.

120. *Seafarers Int'l Union v. Secretary of Transp.*, 78 Civ. 4698, slip op. (S.D.N.Y. Sept. 17, 1979).

121. *Id.* (granting union's request for a preliminary injunction against enforcement of the Coast Guard regulations).

122. *Seafarers Int'l Union v. Secretary of Transp.*, 78 Civ. 4698, slip op. (S.D.N.Y. Oct. 17, 1980).

123. 46 U.S.C. § 239(e) (1976). See also 5 MSM 72-4-40. The authority to issue administrative subpoenas has been delegated by the Commandant of the Coast Guard to investigating officers in 46 C.F.R. § 4.07-5(b) (1981) and to marine boards in 46 C.F.R. § 4.09-6 (1981). This authority to issue subpoenas under 46 U.S.C. § 239 and the authority of the federal district courts to enforce the subpoenas has been upheld on several occasions. See, e.g., *United States v. Lober*, 630 F.2d 335 (5th Cir. 1980) (Coast Guard subpoenas for records to

ifies that the attendance of witnesses or the production of evidence is to be compelled by a process similar to that used in the United States district courts.<sup>124</sup>

The issuance of subpoenas in United States district courts is currently covered by Rule 45 of the Federal Rules of Civil Procedure.<sup>125</sup> It provides that a subpoena requiring the attendance of a witness at a hearing (investigation) may be served at any place within the [federal judicial] district<sup>126</sup> or at any place outside the [federal judicial] district that is within 100 miles of the place of the hearing (investigation) specified in the subpoena.<sup>127</sup> Different limits are provided for subpoenas when taking depositions.<sup>128</sup> A witness who is available only in a judicial district remote from the one in which the investigation is being conducted may be subpoenaed to appear before another Coast Guard investigating officer in the remote district. Testimony or evidence obtained is then forwarded to the officer conducting the investigation.<sup>129</sup>

While the exact format of a Coast Guard subpoena is not specified, it must have at least the name "United States Coast Guard," the word "SUBPOENA," and the local Coast Guard address from which it was issued.<sup>130</sup> It must command the person to whom it is directed to attend at a specified place and time to give testimony or to produce documents or other evidence which must be described with particularity.<sup>131</sup>

Guidance for service of Coast Guard subpoenas is contained in

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unravel corporate ownership scheme upheld in collision investigation where no licensed officers were involved); *United States v. Luborde*, 601 F.2d 219 (5th Cir. 1979) (Coast Guard subpoena for freight records to check for possible safety violations upheld under the authority of 46 C.F.R. pt. 5 (1981)). *But see In re Dimitratos*, 91 F. Supp. 426 (N.D. Cal. 1949) (Coast Guard order requiring seaman to deliver certificates of service held to amount to a suspension of the certificates without due process of law). *See also* 46 C.F.R. § 4.11-1 (1981) (employees of Army or Navy public vessels may not be subpoenaed without consent of the agency concerned).

124. 46 C.F.R. § 239(e) (1976).

125. Fed. R. Civ. P. 45.

126. "District" refers to the geographic area of the federal judicial district in which the Coast Guard investigation will be conducted. This area should not be confused with the area of the Coast Guard Districts discussed in 46 C.F.R. 4.03-20 (1981) and 33 C.F.R. subpt. 3.05 (1981). *See also* 422 U.S. Coast Guard L. Bull. 3 (1979).

127. Fed. R. Civ. P. 45(e); 5 MSM 72-4-40A(4).

128. Fed. R. Civ. P. 45(d).

129. *See* 46 C.F.R. §§ 4.07-25, 4.12-1(e) (1981). *See generally* 46 C.F.R. § 4.12-1 (1981) (procedures for taking testimony by interrogatories and depositions).

130. 46 C.F.R. § 5.15-5(a) (1981).

131. *Id.* at § 5.15-5(b).

46 C.F.R. subpart 5.15. Service may be made by delivering a copy of the subpoena to the person named thereon, or by certified mail with return receipt signed by the addressee only. The person subpoenaed usually is requested to accept personal service by signing the bottom of the subpoena and by entering the place and date. If the person subpoenaed refuses to accept service, then a certificate of service noting the time, date, place, and manner of service can be used to establish proof of service.<sup>132</sup>

If a properly subpoenaed witness fails to appear, or after appearing, unjustifiably fails to answer relevant questions<sup>133</sup> or produce required evidence, then judicial enforcement of the subpoena to compel compliance may be sought.<sup>134</sup> The standard for obtaining judicial enforcement of a Coast Guard subpoena which the investigator must be prepared to meet is: (1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry is relevant to that purpose; (3) that the information is not already in the Coast Guard's possession; and (4) that the administrative steps required by the applicable statutes and regulations have been followed.<sup>135</sup> Since the burden of proof in any challenge to an administrative subpoena rests with the challenger, this showing of lawfulness of the subpoena generally should not be required until the issue of the existence of defects in the subpoena has been raised.<sup>136</sup>

#### *Witnesses, Evidence, and Due Process*

Witnesses subpoenaed to appear at any Coast Guard marine accident or casualty investigation are entitled to be paid an attendance fee and travel expenses at the rates applicable in the United States district courts.<sup>137</sup> This is currently \$30 per day as an attend-

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132. *See id.* at § 5.15-20; 5 MSM 72-4-40A.

133. 5 MSM 72-4-45. A witness is justified in refusing to answer a question only on the grounds of self-incrimination, i.e., if it appears that answering would tend to expose him or her to "criminal" liability, as distinguished from suspension or revocation of a license under 46 C.F.R. pt. 5 (1981) or a civil penalty imposed in accordance with 33 C.F.R. § 1.07-20 (1981).

134. *See* 46 C.F.R. § 5.15-30 (1981); 5 MSM 72-4-45.

135. *United States v. Lober*, No. H-79-18, slip op. (S.D. Tex. Nov. 8, 1979), *aff'd*, 630 F.2d 335 (5th Cir. 1980). *See United States v. Powell*, 379 U.S. 48, 57-8 (1964) (setting forth the standard to be applied in enforcing subpoenas by administrative agencies). *See also* *Donaldson v. United States*, 400 U.S. 517, 526-27 (1971); *Lynn v. Biderman*, 536 F.2d 820, 824 (9th Cir. 1976); *United States v. Newman*, 441 F.2d 165, 169 (5th Cir. 1971).

136. *Donaldson v. United States*, 400 U.S. 417 (1971); *Federal Trade Comm'n v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979); *United States v. Newman*, 414 F.2d 165 (5th Cir. 1971).

137. 46 U.S.C. § 239(f) (1976). *See also* 46 C.F.R. §§ 4.09-10, 4.11-10, 5.17-1 (1981).

ance fee plus reimbursement for reasonable travel and lodging expenses.<sup>138</sup>

Witnesses may be required to testify under oath or affirmation in an investigation, and their testimony can be reduced to writing.<sup>139</sup> Written statements or reports submitted by witnesses must be signed and verified under oath.<sup>140</sup> When testifying under oath in a Coast Guard marine accident investigation, a witness is subject to criminal sanctions for perjury or for making a false statement.<sup>141</sup> Likewise, any attempt to coerce or otherwise induce a witness to give false testimony in such an investigation or to leave the jurisdiction of the United States to avoid testifying, is a criminal offense.<sup>142</sup>

Witnesses who are also parties in interest in the investigation have all the rights that go with that status, including the right to counsel, to examine and cross-examine witnesses, and to call witnesses in their own behalf.<sup>143</sup> Witnesses who are not parties in interest may be assisted by counsel for the limited purpose of advising them of their rights.<sup>144</sup>

While 46 U.S.C. § 239 establishes procedural requirements for the conduct of Coast Guard marine accident and casualty investigations, it is silent as to what, if any, evidentiary standard applies to information presented for consideration. The Coast Guard implementing regulations specify that: "[a]s hearings under this part are administrative in character, strict adherence to the formal rules of evidence is not imperative. However, in the interest of orderly presentation of the facts of a case, the rules of evidence should be observed as closely as possible."<sup>145</sup> Any evidentiary objections raised by parties in interest during the course of the investigation are considered and ruled on by the investigating officer or marine board.<sup>146</sup>

138. 28 U.S.C. § 1821(b) (Supp. V 1981).

139. 46 C.F.R. §§ 4.07-30(a), 4.09-5 (1981); 5 MSM 72-4-55A.

140. 46 C.F.R. § 4.07-30(b) (1981).

141. 5 MSM 72-3-50C, -4-55A(2). See also 18 U.S.C. § 1001 (1976).

142. 46 C.F.R. § 4.11-5 (1981).

143. 46 C.F.R. § 4.07-35(a) (1981).

144. 46 C.F.R. § 4.07-35(b) (1981). Counsel for witnesses who are not parties in interest are not permitted to examine witnesses or otherwise participate in the investigation.

145. 46 C.F.R. § 4.19-5 (1981).

146. 46 C.F.R. § 4.12-1(f) (1981); 5 MSM 72-3-55.

#### REPORTS AND AVAILABILITY OF INFORMATION

46 U.S.C. § 239(d) requires that "a full and complete record of the facts and circumstances" of all marine accidents and casualties investigated under the authority of that statute "be submitted to the Commandant of the Coast Guard."<sup>147</sup> The implementing regulations specify that at the conclusion of the investigation, the investigating officer or marine board shall submit a written report to the Commandant containing findings of fact, opinions, and recommendations.<sup>148</sup>

As previously discussed, the ultimate purpose of Coast Guard marine accident and casualty investigations is to promote the safety of life and property at sea.<sup>149</sup> In order to properly fulfill that purpose, the investigative report must not only make all of the required determinations as to cause, material failure, evidence of negligence or misconduct, etc., but it must also provide detailed factual data on which appropriate corrective measures may be based.<sup>150</sup>

As with the nature, scope, and degree of formality of the investigation itself, the nature, scope, and format of the report will vary with the circumstances of the incident being investigated. Where the facts indicating how and why the accident or casualty occurred are obvious from the statements, testimony, accident and/or injury report forms,<sup>151</sup> a simple "letter of transmittal" forwarding this evidence may be sufficient.<sup>152</sup> This type of report format is particularly appropriate where the facts developed are of little significance with respect to improving marine safety in general, and the actions taken or recommended may be simply stated.<sup>153</sup>

Even with an abbreviated report format, all of the required determinations<sup>154</sup> raised by the facts should be made. In all cases the report should state the proximate cause of the accident or casualty,

147. 46 U.S.C. § 239(d) (1976).

148. 46 C.F.R. §§ 4.07-10, 4.09-20 (1981). Normally, an investigating officer's report is submitted via the Officer in Charge, Marine Inspection (and sometimes via the cognizant Coast Guard District Commander), while the record of a marine board goes directly to the Commandant of the Coast Guard. See also 5 MSM 72-1-25H; 72-5-5, -10I, -40.

149. 46 C.F.R. § 4.07-1(b) (1981). See *supra* note 20 and accompanying text.

150. 5 MSM 72-5-5, -15A.

151. 46 C.F.R. § 4.05-10 (1981); 5 MSM 72-2-10, -5-1.

152. 5 MSM 72-5-5, -10.

153. 5 MSM 72-5-10.

154. See *supra* note 19.

any contributing causes, and the actions taken or recommended.<sup>155</sup>

For more serious or complex incidents with extensive or conflicting evidence, a "narrative" report may be required.<sup>156</sup> The narrative report format consists of the pertinent data on the vessels and personnel involved, a description of the essential events and circumstances associated with the incident, and findings of fact, conclusions, and recommendations.<sup>157</sup>

The record of proceedings of a marine board or one-man formal investigation is even more extensive. In addition to a narrative report, it includes the precept establishing the board, a verbatim transcript of all testimony, a correspondence file, and a file of all exhibits.<sup>158</sup>

The availability of Coast Guard records and reports involving investigations of marine casualties and accidents is governed primarily by the Freedom of Information Act,<sup>159</sup> the Privacy Act,<sup>160</sup> and Department of Transportation regulations.<sup>161</sup> Records in an investigation file, with the exception of those specifically protected from disclosure,<sup>162</sup> are normally available at any time during the course of an investigation.<sup>163</sup> A written request specifying the particular documents desired should be submitted to the cognizant Officer in Charge, Marine Inspection, or the Chairman of the Marine Board.<sup>164</sup>

The report of investigation, whether a letter of transmittal or narrative, containing the findings of fact, conclusions, and recommendations, is releasable when complete.<sup>165</sup> For cases involving

155. See 5 MSM 72-5-5A, -10.

156. See 5 MSM 72-5-15 (contents of narrative report); 72-5-20 (conclusions); 72-5-25 (recommendations); 72-6-35B (definition of narrative report).

157. 5 MSM 72-5-15A.

158. See generally 5 MSM 70-8 (form of transcribed records); 72-3-70 (investigation record); 72-6 (investigative records).

159. 5 U.S.C. § 552 (1976 & Supp. V 1981).

160. 5 U.S.C. § 552a (1976 & Supp. V 1981).

161. 49 C.F.R. pt. 7 (1981). See also 46 C.F.R. § 4.13-1 (1981); 5 MSM 72-6-45, -5-30.

162. See 49 C.F.R. § 7.67 (1981) (records exempted from disclosure by statute include: trade secrets protected under 18 U.S.C. § 905, the source of reports of defects in vessels protected under 46 U.S.C. § 234 (1976), and records pertaining to merchant seamen protected under 46 U.S.C. § 643) (1976 & Supp. IV 1980). See also 46 U.S.C. § 1486(e) (1976) (protecting boating accident reports submitted to state authorities under 33 C.F.R. § 173 app. A(a) but not if submitted directly to the Coast Guard under 33 C.F.R. § 173 app. A(b) (1981)). See also 5 MSM 72-6-15, -45.

163. 5 MSM 72-6-45A.

164. *Id.*

165. See 49 C.F.R. § 7.41(a)(1) (1981) (final opinions); 5 MSM 72-6-45B, -45C.

death, the report is considered complete when it is approved by the Commandant of the Coast Guard.<sup>166</sup> For non-death cases it is complete when approved by the Officer in Charge, Marine Inspection, or cognizant Coast Guard District Commander.<sup>167</sup>

#### UTILIZATION OF INFORMATION DEVELOPED

##### *Government Utilization of Information*

The information developed by Coast Guard marine accident and casualty investigation is utilized in a variety of different ways. In furtherance of the goal of preventing similar accidents, immediate use of information at the local level is encouraged.

When the cause of an accident is found to be beyond the scope of existing laws and safety regulations, the owner of the vessel involved is provided with a copy of the report, and, when appropriate, with suggestions on how to prevent similar accidents in the future.<sup>168</sup> Within the Coast Guard, the cognizant Officer in Charge, Marine Inspection, and District Commander takes steps to implement recommendations of the investigating officer that fall within their scope of authority.<sup>169</sup>

If the information may have broad significance, the Commandant of the Coast Guard will implement any recommendations derived from it that are deemed necessary to improve the safety of life and property at sea.<sup>170</sup> This may involve new or revised regulations under existing laws or proposals to Congress for new legislation. The collection and organization of statistical data on marine accidents and casualties to support such legislative proposals has become an important part of this implementation process.

For marine accidents classified as "serious,"<sup>171</sup> a copy of the Coast Guard's report of investigation is forwarded to the Intergovernmental Maritime Consultative Organization (IMCO).<sup>172</sup>

When an investigation of a marine casualty or accident reveals evidence of improper conduct by individuals or companies, some type of remedial or punitive action may be the most effective way

166. 5 MSM 72-6-45B.

167. 5 MSM 72-5-40, -6-45C.

168. 5 MSM 72-5-25G.

169. 46 C.F.R. § 4.07-15.

170. 46 C.F.R. § 4.09-30.

171. 5 MSM 72-1-25C(3).

172. 5 MSM 72-5-25F, -6-30(D).

to promote marine safety in the future. Proceedings for such action are conducted independently of the Coast Guard accident investigation.<sup>173</sup> If the evidence indicates possible negligence, misconduct, mental or physical incompetence, violation of law or regulation, etc., by a mariner acting under the authority of a license or document issued by the Coast Guard, additional investigation under the regulations governing suspension and revocation proceedings<sup>174</sup> may be initiated.<sup>175</sup> When there is evidence of a violation of law or regulation by anyone else,<sup>176</sup> initiation of action under the procedures for enforcement and administration of statutory penalty provisions<sup>177</sup> may be appropriate.<sup>178</sup> Evidence of criminal violations is referred to the Department of Justice for appropriate action.<sup>179</sup>

#### Private Utilization of Information

Counsel preparing for expected civil litigation often utilize the Coast Guard investigation process as a means of marshalling evidence and obtaining advance discovery.<sup>180</sup> This type of utilization may be expected to increase because of recent decisions indicating that testimony given in Coast Guard investigations and the findings of fact (but not conclusions) from Coast Guard investigation reports may be admitted in subsequent civil court proceedings.

At common law, the findings of a Coast Guard Marine Board of Investigation were not admissible in civil actions.<sup>181</sup> This prohibition was superseded by the "new" Federal Rules of Evidence which became effective on July 1, 1975.<sup>182</sup> Under Rule 803(8)(C), covering public records and reports, "factual findings resulting from an investigation made pursuant to authority granted by law," are not

173. 5 MSM 72-5-45.

174. See 46 C.F.R. pt. 5 (1981); *supra* notes 16-17 and accompanying text.

175. See 46 C.F.R. §§ 4.07-1(C)(3), 4.09-35 (1981). See also 5 MSM 72-5-45B.

176. "Anyone else" refers to anyone other than a mariner serving under the authority of a Coast Guard license or document. While civil penalty action could be taken against licensed mariners and holders of merchant mariners documents, the remedial procedures in 46 C.F.R. pt. 5 are preferred over the penalty provision of 33 C.F.R. §§ 1.07-85 to -95.

177. 33 C.F.R. § 1.07-20 (1981).

178. 5 MSM 72-5-45C.

179. 46 U.S.C. § 239(h) (1976); 46 C.F.R. § 4.23-1 (1981). See also 33 C.F.R. § 1.07-90 (1981).

180. See generally *Seafarers Int'l Union v. Secretary of Transp.*, No. 78-4698, slip. op. (S.D.N.Y. Sept. 17, 1979).

181. See, e.g., *The Charles Morgan*, 115 U.S. 69 (1885); *Steward v. Atlantic Refining Co.*, 240 F.2d 715 (3d Cir. 1957); J. Griffin, *The American Law of Collision* § 268 (1959).

182. Act of Jan. 2, 1974, Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1974).

excluded as hearsay in civil actions even though the declarant is available as a witness "unless the source of information or other circumstances indicate a lack of trustworthiness."<sup>183</sup> Under Rule 804(b)(1), covering former testimony, the testimony of a "witness at another hearing of the same or a different proceeding" is not excluded as hearsay in a civil proceeding, if the declarant is unavailable as a witness, and the party against whom the testimony is now offered, or a "predecessor in interest," had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.<sup>184</sup>

In *In re American Export Lines*,<sup>185</sup> the court ruled that factual findings and exhibits included in the record and report of a Coast Guard Marine Board of Investigation would be admissible in a civil case under Rule 803(8).<sup>186</sup> The court held that any evaluative conclusions or opinions in the report would not be admissible,<sup>187</sup> and the NTSB report was excluded from evidence in civil litigation by statute.<sup>188</sup> The court then reserved its decision on the admissibility under Rule 804(b)(1) of testimony given during the Coast Guard investigation pending the establishment of the unavailability of the witnesses who gave the testimony.<sup>189</sup>

The Court of Appeals for the Third Circuit, in *Lloyd v. American Export Lines*,<sup>190</sup> held that the Decision and Order of the Coast Guard hearing examiner was admissible under Rule 803(3)(C) as a Public Record and Report.<sup>191</sup> Excerpts of the testimony from the transcript of a Coast Guard suspension and revocation proceeding, conducted under 46 U.S.C. § 239 and 46 C.F.R. part 5, were admissible under Rule 804(b)(1).<sup>192</sup> This was a civil case and the Coast Guard was found to be a "predecessor in interest" to one of the parties in the litigation.<sup>193</sup>

183. Fed. R. Evid. 803(8)(C).

184. Fed. R. Evid. 804(b)(1).

185. 73 F.R.D. 454, 1977 A.M.C. 2632 (S.D.N.Y. 1977).

186. 73 F.R.D. at 459-60, 1977 A.M.C. at 2638-40.

187. 73 F.R.D. at 458, 1977 A.M.C. at 2636-37.

188. 49 U.S.C. § 1903(e) (1976). See 73 F.R.D. at 458-59, 1977 A.M.C. at 2637-38.

189. 73 F.R.D. at 460, 1977 A.M.C. at 2639-40.

190. 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).

191. *Id.* at 1182-83.

192. *Id.* at 1183-87.

193. *Id.* at 1184-87. For a discussion of the evidentiary issues in the case, see Note, *Evaluation Reports and Predecessor in Interest Construed to Admit Coast Guard Hearing Report and Testimony Under Federal Rules of Evidence*, 4 *Mur. Law.* 155 (1979).

In *Smith v. Ithaca Corp.*,<sup>194</sup> the Court of Appeals for the Fifth Circuit upheld the admissibility of the findings of fact from the report of a Coast Guard Marine Board of Investigation, under Rule 803(8)(C), but excluded the Board's conclusions.<sup>195</sup> The court found that because of "the experience and expertise of the Coast Guard in investigating marine disasters, the timeliness of the investigation in this case, and the impartiality of the Coast Guard," the report was "sufficiently trustworthy" to justify admission of the findings of fact.<sup>196</sup>

Recently, however, in *Mac Towing Inc. v. American Commercial Lines*,<sup>197</sup> the Fifth Circuit panel did not mention either *Smith v. Ithaca* or Rule 803(8)(C) when it upheld as proper the district court's admission of a Coast Guard accident report into evidence. The court held that the district judge was "entitled to give the report whatever deference he felt it deserved."<sup>198</sup> The court then stated that "[s]ince the Coast Guard report is merely advisory, [the district judge] acted within his discretion and committed no error in failing to bow to its conclusions."<sup>199</sup> In support of the admissibility of the report, the Fifth Circuit cited *Afran Transport Co. v. The S/S Transcolorado*,<sup>200</sup> a case decided before the Federal Rules of Evidence had been changed, and wherein the findings and conclusions of the Board of Local Inspectors of the Panama Canal Zone had been properly received into evidence. The holding in *Afran* was based upon a decision which had established that such findings and conclusions were admissible as an exception to the hearsay rule under the Canal Zone Code.<sup>201</sup> Due to the somewhat cursory treatment of the admissibility issue in *Mac Towing*, the analysis in *Smith v. Ithaca* should be relied on for guidance.

A Coast Guard determination was raised as a basis for collateral estoppel in *Shannon v. Moffett*.<sup>202</sup> The Court of Appeals of Oregon, however, held that a Coast Guard finding of negligence in a suspension and revocation proceeding could not be used as a basis for collateral estoppel in a subsequent civil action in state court.

194. 612 F.2d 215 (5th Cir. 1980).

195. *Id.* at 222.

196. *Id.*

197. 670 F.2d 543, 547 (5th Cir. 1982).

198. *Id.* at 547.

199. *Id.*

200. 458 F.2d 164, 171 (5th Cir. 1972).

201. *Luckenbach Steamship Co. v. Panama Canal Co.*, 380 F.2d 31 (5th Cir. 1967).

202. 43 Or. App. 723, 604 P.2d 407 (Or. Ct. App. 1979).

There are no reported cases on the admissibility of testimony or findings of fact from an investigation where witnesses were not formally examined and cross-examined under oath. In such a case, even though the experience, timeliness, and impartiality factors of *Smith v. Ithaca* are still present, the offeror may have a more difficult time establishing that the evidence is "sufficiently trustworthy" to justify admission.

Developing information for use in civil litigation is clearly not one of the intended purposes of Coast Guard investigations.<sup>203</sup> The practice can hamper the investigation process by making parties reluctant to speak freely because of the possibility that the information they give may be used to their detriment in subsequent proceedings. However, to the extent that the civil court system promotes safety by requiring negligent parties to pay for the damage they cause, even this "misuse" of the investigation process may advance the cause of marine safety.

#### CONCLUSION

In the current era of budget cuts and reductions in government involvement in the affairs of industry, rumors abound concerning reductions in Coast Guard marine safety programs, including investigations. Reductions which eliminate requirements to investigate incidents, where the information likely to be developed will be of minimal significance to marine safety in general, could prove to be beneficial for all concerned. Beyond that, it is suggested that thorough investigation of marine accidents and casualties is, and should remain, a vital part of the Coast Guard mission to promote the safety of life and property at sea.

203. 46 C.F.R. § 4.07-1 (1981).



Alaska State Legislature  
**LEGISLATIVE RESEARCH AGENCY**  
130 Seward Street, Suite 218, Juneau, Alaska 99801-2196  
907-465-3991 Fax: 907-463-3351

TO: Lynda Giguere      DATE: 3/12/93  
FROM: Marwood Harris

Here's Paula's request - hope it has something.

I just spoke with Bill Bock President of Puget Sound Pilots Assoc. In 1982 a group split off for a short time but was not based on an exclusive contract (like Holland Amer.) The two groups came back together on their own (w/out state action). In Washington the tariff commission decides annually how many licenses will be allowed w/in each region.

Marwood

LEGISLATOR'S COPY -- If you have modifications, please contact the assigned staff immediately

**Legislative Research Agency**  
Phone: 465-3991 Fax: 463-3351

**WORK ORDER**

No. 93.178

Short Title: Central Dispatch of Marine Pilots

Legislator: Representative Bill Hudson Phone: 465-3744

Requested By: Lynda Giguere  Phone  Memo

Date Requested: March 8, 1993

Staff Assignment: Marwood Harris

Date Assigned: March 11, 1993

**QUESTIONS ASKED/INFORMATION SOUGHT:**

Do any coastal states provide a system of centralized dispatch for marine pilots?

Columbia River pilots  
single dispatch office

PURPOSE: \_\_\_\_\_

REGARDING BILL NUMBER: \_\_\_\_\_

INFORMATION GATHERED/SOURCES CONTACTED: \_\_\_\_\_

COMPLETION DATE: March 19, 1993

ATTACHMENT A  
Pilotage Fees  
State of California  
Port of Long Beach  
and San Francisco Bar

PORT OF LONG BEACH  
TARIFF NO. 4

SECTION 2 - PILOTAGE

ITEM  
NO.

PILOTAGE, CHARGES FOR - Continued

(a) Pilotage charges are in addition to all other charges contained in this tariff and shall be assessed against all vessels subject to the payment of pilotage under this section and shall be paid to the Port of Long Beach piloting contractor by the owners, master, operators, charterers or agents of the vessel so assessed before any such vessel leaves the Port of Long Beach, unless satisfactory credit is obtained (subject to Exceptions 1, 2 and 3 and (Note):

OVERALL LENGTH OF VESSEL IN METERS (See Item 215)		DOLLARS PER MOVEMENT		
Over	But Not Over	Entering or Leaving	Inter Harbor	Intra Harbor
0	100	\$180	\$180	\$180
100	104	182	180	180
104	107	194	180	180
107	110	205	180	180
110	113	216	180	180
113	116	226	180	180
116	119	238	182	180
119	122	251	186	180
122	125	262	190	180
125	128	274	193	180
128	131	286	201	180
131	134	299	208	180
134	137	314	219	189
137	140	334	234	201
140	143	354	249	213
143	146	373	262	225
146	149	393	276	237
149	152	412	289	249
152	155	433	303	261
155	158	452	316	271
158	161	471	336	283
161	164	491	343	295
164	167	511	358	307
167	170	530	371	318
170	173	550	385	336
173	176	570	399	342
176	179	594	416	356
179	182	620	434	372
182	185	646	452	387
185	188	673	477	404
188	191	702	489	420
191	194	726	508	435

(I)  
220

ISSUED AUGUST 21, 1991  
Correction No. 210

OCTOBER 1, 1991

Post-It™ brand fax transmittal memo 7671 # of pages 3

To	From
Co.	Co. POLB
Dept.	Phone # 590-4110
Fax # 907/443-3351	Fax # 491-1180

## SECTION 2 - PILOTAGE

ITEM  
NO.

## PILOTAGE, CHARGES FOR - Continued

OVERALL LENGTH OF VESSEL IN METERS (See Item 215)		DOLLARS PER MOVEMENT		
Over	But Not Over	Entering or Leaving	Inter Harbor	Intra Harbor
194	197	752	526	451
197	200	778	544	467
200	203	805	564	483
203	206	831	582	499
206	210	858	601	514
210	214	884	619	530
214	220	910	637	545
220	226	936	656	562
226	232	962	674	578
232	238	990	693	594
238	244	1016	711	609
244	250	1042	729	625
250	256	1068	748	642
256	262	1094	766	657
262	268	1122	784	673
268	274	1148	803	688
274	280	1174	822	704
280	286	1200	840	720
286	292	1226	859	736
292	298	1254	877	752
298	304	1280	895	767
304	310	1306	913	783
310	316	1332	933	800
316	322	1358	950	815
322	328	1385	970	831
328	334	1412	988	847
334	340	1438	1006	862
340	346	1464	1026	879
346	352	1490	1043	895
352	358	1517	1063	910
358	364	1543	1080	925
364	370	1570	1099	942
370	376	1596	1117	958
376	382	1622	1136	973
382	388	1649	1154	990
388	394 and over	1675	1173	1005

(I)  
220  
Con't

Exception 1: Three fourths (3/4) the entering or leaving charge shall be assessed when a vessel subject to the payment of pilotage is not piloted by a pilot.

ISSUED AUGUST 21, 1991  
Correction No. 211

EFFECTIVE OCTOBER 1, 1991

ISSUED BY  
EXECUTIVE DIRECTOR  
P. O. BOX 570, LONG BEACH, CA 90801

PORT OF LONG BEACH  
TARIFF NO. 4

SECTION 2 - PILOTAGE

ITEM  
NO.

PILOTAGE, CHARGES FOR - Continued

Exception 2: One-half (1/2) the applicable charge shall be assessed when a vessel utilizes a pilot for a movement between the open sea and anchorage in either direction when no other movement is involved and when the period at anchor does not exceed 24 hours.

Exception 3: No intra-harbor shifting charge shall be assessed on entering vessel which anchors because of inclement weather or other causes beyond the control of such vessel, if such vessel proceeds thence to berth immediately after such cause of delay ceases to exist.

(b) The pilotage assessed for the services proffered or rendered by a piloting contractor are assessed in accordance with and based upon each and every of the limitations, agreements, covenants and conditions set forth in Item 205, and this Item 220. However, the rates and charges for pilotage do not include marine insurance insuring the vessel, her owners, agents, charterers, and operators against the consequences of the negligence of the pilot, the piloting contractor, or other employees of the piloting contractor. Upon reasonable notice from the owners, agents, charterers or operators of the vessel, the piloting contractor will provide such marine insurance on a trip basis in an amount specified, up to a maximum limit of liability of \$2,500,000, the premium for which will be assessed at cost in addition to the pilotage specified above.

(I)  
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Con't

The coverage provided will insure the vessel, her owners, agents, charterers and operators, as their interests may appear, against those losses or physical damages to the vessel and against those legal liabilities and damages which arise from the consequences of the negligence of the pilot, the piloting contractor, or other employees of the piloting contractor; provided, however, that such insurance will provide coverage only for that proportion of losses, damages, and liabilities sustained by the vessel, her owners, master, operators and charterers proximately caused by the negligence of the pilot, the piloting contractor, or other employees of the piloting contractor, and that no coverage is provided for losses, damages or liabilities resulting from any other cause whatsoever.

The election of the owners, agents, charterers, or operators to use a pilot through whom trip insurance could have been obtained shall constitute a binding and irrevocable agreement on the part of the owners, agents, charterers and operators to the terms and conditions set forth in Item 205(e).

A copy of the insurance policy under which such insurance is available will be provided upon written request to the piloting contractor.

(c) If a request for a pilot is cancelled less than one hour prior to the requested time, a charge of \$132.00 will be assessed.

(d) If a pilot is required to stand by in excess of one hour, a stand-by charge of \$132.00 per hour or fraction thereof will be assessed in addition to the charges named in Paragraph (a) hereof.

NOTE: The minimum charge for Pilotage will be \$165.00

ISSUED SEPTEMBER 15, 1989  
Correction No. 178

EFFECTIVE OCTOBER 1, 1989

ISSUED BY  
EXECUTIVE DIRECTOR  
P. O. BOX 570, LONG BEACH, CA 90801

# SAN FRANCISCO BAR PILOTS

P.O. Box 26409  
San Francisco, California 94126  
415-362-5436 Fax 415-982-4721

January 2, 1992

RE: BAR PILOTAGE RATES AS DEFINED IN  
THE HARBORS AND NAVIGATION CODE  
STATE OF CALIFORNIA

To All Customers:

As of January 1, 1992, the following rate change will be in effect:

The Bar Pilotage rate per high gross registered ton will be (.05601) fifty-six and one hundredths mills, Section 1190(1), and seven dollars and thirty-five cents (\$7.35) per draft foot of the vessel's deepest draft and fractions of a foot pro rata.

The minimum charge for bar pilotage, Section 1190(2) continues to be \$600 for each vessel piloted plus the additional charge, Section 1163(a)1) will be four and nine hundredths mills (.00409) per high gross registered ton for each vessel piloted. Section 1163(a)1) of the Harbors and Navigation Code provides for the pension plan.

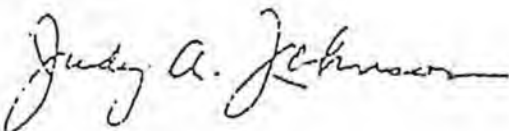
The Pilot Commission surcharge, Section 1159.1 will continue to be zero percent of all pilotage fees as per the direction of the State Board of Pilot Commissioners effective September 1, 1991.

The Pilot Training Program surcharge continues to be \$50.00 per ship movement as established by the State Board of Pilot Commissioners on November 1, 1990.

The Trainee surcharge remains at \$5.00 per trainee based on the Board's instructions effective July 1, 1990. The total surcharge per ship movement is \$50.00 effective January 1, 1992.

All other fees remain the same as listed on the attached service code listing.

Sincerely,



Judy A. Johnson  
General Manager  
Controlier

SAN FRANCISCO BAR PILOTS  
 SERVICE CODE & CHARGE LISTING  
 January 1, 1991  
 (revised 11-91)

CODE	SERVICE DESCRIPTION	CHARGE
	INBOUND/OUTBOUND BAR PILOTAGE	
891 IN	PILOTAGE FROM SEA TO BERTH, ANCHORAGE	Per Rates Listed
891 OT	PILOTAGE FROM BERTH, ANCHORAGE TO SEA	Per Rates Listed
894 IN	HALF-CHARGE, PILOTAGE FROM SEA TO BERTH, ANCHORAGE	Variable
894 OT	HALF-CHARGE, PILOTAGE TO SEA FROM BERTH, ANCHORAGE	Variable

SURCHARGES - ADDITIONAL TO INBOUND/OUTBOUND CHARGES

617 SC	BETWEEN HUNTERS POINT AND SOUTH	\$354
618 SC	BETWEEN S P BRIDGE - AVON, MARTINEZ TERMINAL	264
619 SC	BETWEEN S P BRIDGE - PORT CHICAGO	314
620 SC	BETWEEN S P BRIDGE - PITTSBURG	368
621 SC	BETWEEN S P BRIDGE - ANTIOCH	398
622 SC	BETWEEN S P BRIDGE - SACRAMENTO OR STOCKTON	750

BAY AND/OR RIVER MOVES/SHIFT CHARGES  
 (BM = BAY/RIVER MOVE; BA = FLAT TOW)

*When Bar Pilots are required to perform duties other than the uninterrupted passage of vessels from sea to all ports and berths of San Francisco, San Pablo and Suisun Bays, Sacramento and Stockton; or, return from these ports and berths to sea, additional charges shall be made as detailed below:*

		BM	BA
601 BM (BA)	S F (SOUTH OF NORTH END T. I.) TO HUNTERS POINT	\$203	\$406
602 BM (BA)	S F AREA TO RICHMOND, PT. SAN PABLO	234	468
603 BM (BA)	S F AREA TO SOUTH OF HUNTERS POINT	354	708
604 BM (BA)	S F AREA TO SEQUOIA, OLEUM	314	628

SAN FRANCISCO BAR PILOTS  
 SERVICE CODE & CHARGE LISTING  
 January 1, 1991  
 Page 2

CODE	SERVICE DESCRIPTION	CHARGE	
		BM	BA
CONTD	BAY AND/OR RIVER MOVES/SHIFT CHARGES (BM = BAY/RIVER MOVE; BA = FLAT TOW)		
605 BM (BA)	S F AREA TO AVON, MARTINEZ TERMINAL	\$368	\$736
606 BM (BA)	BETWEEN OLEUM, S F BRIDGE AND AVON	264	528
607 BM (BA)	BETWEEN AVON, PORT CHICAGO AND PITTSBURG	278	556
608 BM (BA)	S F AREA TO NORTH EXTREMITY SUISUN BAY	493	986
609 BM (BA)	S F AREA TO MARE ISLAND, VALLEJO, MARTINEZ, BENICIA	340	680
610 BM (BA)	BETWEEN SEQUOIA, OLEUM, MARE ISLAND AND S P BRIDGE	271	542
611 BM (BA)	BETWEEN OLEUM, S P BRIDGE AND NORTH SUISUN BAY	363	736
615 BM (BA)	S F AREA TO PORT CHICAGO	431	862
616 BM (BA)	BETWEEN OLEUM, S P BRIDGE AND PORT CHICAGO	314	628
623 BM (BA)	BETWEEN SAN FRANCISCO AND SACRAMENTO	827	1654
624 BM (BA)	BETWEEN SAN FRANCISCO AND STOCKTON	827	1654
625 BM (BA)	SACRAMENTO TO STOCKTON	827	1654
626 BM (BA)	STOCKTON TO SACRAMENTO	827	1654
627 BM (BA)	SHIFTING AT SACRAMENTO OR STOCKTON	264	528
628 BM (BA)	S F AREA AND ANTIOCH	520	1040
629 BM (BA)	BETWEEN OLEUM, S P BRIDGE AND ANTIOCH	398	796
630 BM (BA)	BETWEEN OLEUM, S P BRIDGE AND SACTO/STOCKTON	750	1500
631 BM (BA)	BETWEEN AVON, PORT CHICAGO AND ANTIOCH	308	616
632 BM (BA)	BETWEEN AVON, PORT CHICAGO AND SACTO/STOCKTON	584	1168
633 BM (BA)	BETWEEN PITTSBURG, ANTIOCH AND SACTO/STOCKTON	476	952

SAN FRANCISCO BAR PILOTS  
 SERVICE CODE & CHARGE LISTING  
 January 1, 1991  
 Page 3

VESSEL LENGTH SURCHARGE

*Computed for vessels 600 ft. or longer on base rate charges of Bay/ River Moves listed above. Vessels from 600 ft. to 625 ft. in length overall shall be charged an additional 14 percent of the base rate. Thereafter, an additional 4 percent shall be charged for each increment of 25 ft., computed to the nearest 25 ft. level below the actual length of the vessel.*

<u>LENGTH FT.</u>	<u>ADDITIONAL CHARGE</u>		
600 - 625	A	Base Rate Plus	14%
625 - 650	B	114% of Base Rate Plus	4%
650 - 675	C	Sum of B Above Plus	4%
675 - 700	D	Sum of C Above Plus	4%

Et Cetera

<u>CODE</u>	<u>SERVICE DESCRIPTION - MISCELLANEOUS CHARGES</u>	<u>CHARGE</u>	
	<i>Those charges noted in separate column for BA are computed as double standard for all dead ship or flat w/h pilotage.</i>		
			BA
817 DD	DOCK TO DOCK, EXCLUDING ABOVE ANTILOCH	\$101	202
818 AD	DOCK STERN-IN OR DOWN-TIDE (BM/BA) The higher of 14% of Pilotage Fee or \$36		Doubled
821 AD	ADJUST COMPASS, RDF, RADAR - 1 SWING	235	
822 AD	ADJUST COMPASS, RDF, RADAR - 2 SWINGS	278	
831 SB	STANDBY TIME PER HOUR	50	
840 CP	CANCEL SERVICE LESS THAN 4 HOURS	62	
840 DT	PILOT CARRIED AWAY, PER DAY (NOT TO EXCEED \$1,500)	180	
841 CN	CANCEL AFTER PILOT REPORTS	125	
845 EX	PILOT ON BOARD EXCESS 8 HOURS, PER HOUR	84	
851 ET	ENGINE OR DOCK TRIALS, PER HOUR	125	
853 AN	ANCHORING AFTER DEPARTURE	73	146
871 DT	DELAY ENROUTE, INCLUDING VTS ORDERED, PER HOUR	97	
899 CM	CREDIT MEMO	Varies	
899 DM	DEBIT MEMO	Varies	

ATTACHMENT B  
Pilotage Fees  
State Of Florida  
Port of Miami

# BISCAYNE BAY PILOTS

*Serving the Port of Miami since 1911*



2911 PORT BOULEVARD • MIAMI, FLORIDA 33132 • TELEPHONE (305) 375-8453 • CABLE: MIAMIPILOT

## PORT OF MIAMI                      PILOTAGE RATES                      EFFECTIVE 1 JANUARY 1992

<u>CHARGE</u>	<u>AMOUNT</u>
<u>DRAFT PER FOOT</u>	\$ 15.12
MINIMUM DRAFT	14 FEET
<u>TONNAGE PER GROSS REGISTERED TON (GRT)</u>	\$.0315
MINIMUM TONNAGE	2,500 GRT
SHIFTING	DRAFT & TONNAGE APPLY
ANCHORING OFFSHORE	DRAFT & TONNAGE APPLY
CANCELLED ORDERS (after pilot is aboard)	\$50.00
DETENTION (pilot remains on board)	\$50.00 PER HOUR
The minimum fee is:	14 ft. X \$15.12/ft. = \$211.68 2500 GRT X \$.0315/GRT = 78.75 \$290.43

Draft and tonnage charge apply to each vessel inbound, outbound, shifting within the port or anchoring offshore.

Late payment charge is 1.5% per month after 30 days.

Tonnage is the highest GRT listed in Lloyds' Register.

Pilotage rates are effective 1 January 1992 as ordered by the Florida Board of Pilot Commissioners on 8 October 1991.

### PILOTING REGULATIONS

- A. Vessels subject to pilotage (F.S. 310.141)  
All vessels, except those exempt under the laws of the United States or vessels drawing less than 7 feet of water shall have a licensed state pilot or deputy pilot on board.....
- B. Piloting without a license (F.S. 310.161)  
Any individual who directs the movements of a vessel and is not licensed as a state pilot or deputy pilot is guilty of a second degree misdemeanor. In addition the state may through the courts seek a penalty of not less than \$500. and not more than \$5000.

ATTACHMENT C  
Pilotage Fees  
State of Louisiana  
Port of New Orleans

ASSOCIATED BRANCH PILOTS  
PILOTAGE FEES

*Dale D. [unclear]*

The Associated Branch Pilots (Bar Pilots) shall be entitled to ask and to receive the following fees for their pilotage services from January 15, 1992, through December 31, 1992.

\$20.06 per foot of water drawn in fresh water by vessels piloted by them provided that should any vessel have a draft of 20 feet or less, the pilotage charges shall be \$401.20 which shall be the minimum charge for such service.

The said Bar Pilots shall also be entitled to demand and receive an additional charge based on the greater deadweight tonnage listed in Lloyd's Register, as follows:

\$78.20 for vessels of at least 21,000 deadweight tons with increments of \$9.48 for each 1,000 deadweight tons in excess of 21,000 deadweight tons to at least 60,000 deadweight tons and \$11.50 for each 1,000 deadweight tons in excess of 60,000 deadweight tons.

When pilot services are timely offered and refused said vessel shall pay such charge.

Said Bar Pilots shall also be entitled to enter into agreements with the masters or owners of ships and vessels for special services and the hire of boats and equipment, and the like, at such rates and for such sums as may be agreed upon between them.

Vessels of one hundred tons or under, lawfully engaged in coastwise trade of the United States shall not be required to take a pilot, unless the master of such vessel demands pilots service.

In the event a pilot is detained for any cause, except grounding, more than one hour, a detention charge shall apply thereafter, up to and including the fourth hour, and be paid per hour, or fraction thereof, at an hourly rate of \$91.12, and after the fourth hour, the detention charge shall be \$155.44 per hour or a fraction thereof.

Land transportation of \$38.30 for embarking or disembarking a pilot at Hopedale, LA, will be paid by the vessel.

When the pilots use their boat to embark or disembark a pilot at the entrance of the Mississippi River-Gulf Outlet, the vessel will pay a boat charge of \$268.00. This charge will not apply if the vessel embarks or disembarks the pilot at South Pass or would have done so but for a request from the pilot or Pilot Association. When the pilots use their boat to embark or disembark a pilot at the entrance of South Pass, the vessel will pay a boat charge of \$100.65. When the pilots use their boat to embark or disembark a pilot at the entrance of Southwest Pass, the vessel will pay a boat charge of \$70.10.

If through the fault of the master or owner, any vessel carries the pilot to sea when a boat is attending to receive him, or if the pilot is taken to sea for the convenience or safety or preservation of the vessel under severe weather conditions during which a boat is not attending to receive him, the master or owner shall, in addition to the pilotage charges fixed herein, pay the sum of \$750.40 per day or fraction thereof, until the pilot is returned to the Port of New Orleans, Louisiana, and first class accommodations, first class transportation, and expenses for the return of the pilot to the Port of New Orleans, Louisiana.

ASSOCIATED BRANCH PILOTS  
TONNAGE RATE SCHEDULE

\$78.20 for vessels of at least 21,000 summer deadweight tons with increments of \$9.48 for each 1,000 summer deadweight tons in excess of 21,000 summer deadweight tons to at least 60,000 summer deadweight tons and \$11.50 for each 1,000 summer deadweight tons in excess of 60,000 summer deadweight tons. Effective January 15, 1992

TONNAGE	AMOUNT	TONNAGE	AMOUNT	TONNAGE	AMOUNT	TONNAGE	AMOUNT
21,000	78.20	70,000	562.92	120,000	1137.92	170,000	1712.92
22,000	87.68	71,000	574.42	121,000	1149.42	171,000	1724.42
23,000	97.16	72,000	585.92	122,000	1160.92	172,000	1735.92
24,000	106.64	73,000	597.42	123,000	1172.42	173,000	1747.42
25,000	116.12	74,000	608.92	124,000	1183.92	174,000	1758.92
26,000	125.60	75,000	620.42	125,000	1195.42	175,000	1770.42
27,000	135.08	76,000	631.92	126,000	1206.92	176,000	1781.92
28,000	144.56	77,000	643.42	127,000	1218.42	177,000	1793.42
29,000	154.04	78,000	654.92	128,000	1229.92	178,000	1804.92
		79,000	666.42	129,000	1241.42	179,000	1816.42
30,000	163.52	80,000	677.92	130,000	1252.92	180,000	1827.92
31,000	173.00	81,000	689.42	131,000	1264.42	181,000	1839.42
32,000	182.48	82,000	700.92	132,000	1275.92	182,000	1850.92
33,000	191.96	83,000	712.42	133,000	1287.42	183,000	1862.42
34,000	201.44	84,000	723.92	134,000	1298.92	184,000	1873.92
35,000	210.92	85,000	735.42	135,000	1310.42	185,000	1885.42
36,000	220.40	86,000	746.92	136,000	1321.92	186,000	1896.92
37,000	229.88	87,000	758.42	137,000	1333.42	187,000	1908.42
38,000	239.36	88,000	769.92	138,000	1344.92	188,000	1919.92
39,000	248.84	89,000	781.42	139,000	1356.42	189,000	1931.42
40,000	258.32	90,000	792.92	140,000	1367.92	190,000	1942.92
41,000	267.80	91,000	804.42	141,000	1379.42	191,000	1954.42
42,000	277.28	92,000	815.92	142,000	1390.92	192,000	1965.92
43,000	286.76	93,000	827.42	143,000	1402.42	193,000	1977.42
44,000	296.24	94,000	838.92	144,000	1413.92	194,000	1988.92
45,000	305.72	95,000	850.42	145,000	1425.42	195,000	2000.42
46,000	315.20	96,000	861.92	146,000	1436.92	196,000	2011.92
47,000	324.68	97,000	873.42	147,000	1448.42	197,000	2023.42
48,000	334.16	98,000	884.92	148,000	1459.92	198,000	2034.92
49,000	343.64	99,000	896.42	149,000	1471.42	199,000	2046.42
50,000	353.12	100,000	907.92	150,000	1482.92	200,000	2057.92
51,000	362.60	101,000	919.42	151,000	1494.42	201,000	2069.42
52,000	372.08	102,000	930.92	152,000	1505.92	202,000	2080.92
53,000	381.56	103,000	942.42	153,000	1517.42	203,000	2092.42
54,000	391.04	104,000	953.92	154,000	1528.92	204,000	2103.92
55,000	400.52	105,000	965.42	155,000	1540.42	205,000	2115.42
56,000	410.00	106,000	976.92	156,000	1551.92	206,000	2126.92
57,000	419.48	107,000	988.42	157,000	1563.42	207,000	2138.42
58,000	428.96	108,000	999.92	158,000	1574.92	208,000	2149.92
59,000	438.44	109,000	1011.42	159,000	1586.42	209,000	2161.42
60,000	447.92	110,000	1022.92	160,000	1597.92	210,000	2172.92
61,000	457.40	111,000	1034.42	161,000	1609.42	211,000	2184.42
62,000	470.92	112,000	1045.92	162,000	1620.92	212,000	2195.92
63,000	482.42	113,000	1057.42	163,000	1632.42	213,000	2207.42
64,000	493.92	114,000	1068.92	164,000	1643.92	214,000	2218.92
65,000	505.42	115,000	1080.42	165,000	1655.42	215,000	2230.42
66,000	516.92	116,000	1091.92	166,000	1666.92	216,000	2241.92
67,000	528.42	117,000	1103.42	167,000	1678.42	217,000	2253.42
68,000	539.92	118,000	1114.92	168,000	1689.92	218,000	2264.92
69,000	551.42	119,000	1126.42	169,000	1701.42	219,000	2276.42

ASSOCIATED BRANCH PILOTS  
RATES FOR PILOTAGE

\$20.06 per draft foot, minimum 20 feet.  
Effective January 15, 1992 through December 31, 1992

DRAFT FOOT	AMOUNT	DRAFT FOOT	AMOUNT	DRAFT FOOT	AMOUNT	DRAFT FOOT	AMOUNT	DRAFT FOOT	AMOUNT
20'00"	401.20	26'00"	521.56	32'00"	641.92	38'00"	762.28	44'00"	882.64
20'01"	402.88	26'01"	523.24	32'01"	643.40	38'01"	763.96	44'01"	884.32
20'02"	404.56	26'02"	524.92	32'02"	645.28	38'02"	765.64	44'02"	886.00
20'03"	406.24	26'03"	526.60	32'03"	646.96	38'03"	767.32	44'03"	887.68
20'04"	407.92	26'04"	528.28	32'04"	648.64	38'04"	769.00	44'04"	889.36
20'05"	409.60	26'05"	529.96	32'05"	650.32	38'05"	770.68	44'05"	891.04
20'06"	411.28	26'06"	531.64	32'06"	652.00	38'06"	772.36	44'06"	892.72
20'07"	412.96	26'07"	533.32	32'07"	653.68	38'07"	774.04	44'07"	894.40
20'08"	414.64	26'08"	535.00	32'08"	655.36	38'08"	775.72	44'08"	896.08
20'09"	416.32	26'09"	536.68	32'09"	657.04	38'09"	777.40	44'09"	897.76
20'10"	418.00	26'10"	538.36	32'10"	658.72	38'10"	779.08	44'10"	899.44
20'11"	419.68	26'11"	540.04	32'11"	660.40	38'11"	780.76	44'11"	901.12
21'00"	421.26	27'00"	541.62	33'00"	661.98	39'00"	782.34	45'00"	902.70
21'01"	422.94	27'01"	543.30	33'01"	663.66	39'01"	784.02	45'01"	904.38
21'02"	424.62	27'02"	544.98	33'02"	665.34	39'02"	785.70	45'02"	906.06
21'03"	426.30	27'03"	546.66	33'03"	667.02	39'03"	787.38	45'03"	907.74
21'04"	427.98	27'04"	548.34	33'04"	668.70	39'04"	789.06	45'04"	909.42
21'05"	429.66	27'05"	550.02	33'05"	670.38	39'05"	790.74	45'05"	911.10
21'06"	431.34	27'06"	551.70	33'06"	672.06	39'06"	792.42	45'06"	912.78
21'07"	433.02	27'07"	553.38	33'07"	673.74	39'07"	794.10	45'07"	914.46
21'08"	434.70	27'08"	555.06	33'08"	675.42	39'08"	795.78	45'08"	916.14
21'09"	436.38	27'09"	556.74	33'09"	677.10	39'09"	797.46	45'09"	917.82
21'10"	438.06	27'10"	558.42	33'10"	678.78	39'10"	799.14	45'10"	919.50
21'11"	439.74	27'11"	560.10	33'11"	680.46	39'11"	800.82	45'11"	921.18
22'00"	441.32	28'00"	561.68	34'00"	682.04	40'00"	802.40	46'00"	922.76
22'01"	443.00	28'01"	563.36	34'01"	683.72	40'01"	804.08	46'01"	924.44
22'02"	444.68	28'02"	565.04	34'02"	685.40	40'02"	805.76	46'02"	926.12
22'03"	446.36	28'03"	566.72	34'03"	687.08	40'03"	807.44	46'03"	927.80
22'04"	448.04	28'04"	568.40	34'04"	688.76	40'04"	809.12	46'04"	929.48
22'05"	449.72	28'05"	570.08	34'05"	690.44	40'05"	810.80	46'05"	931.16
22'06"	451.40	28'06"	571.76	34'06"	692.12	40'06"	812.48	46'06"	932.84
22'07"	453.08	28'07"	573.44	34'07"	693.80	40'07"	814.16	46'07"	934.52
22'08"	454.76	28'08"	575.12	34'08"	695.48	40'08"	815.84	46'08"	936.20
22'09"	456.44	28'09"	576.80	34'09"	697.16	40'09"	817.52	46'09"	937.88
22'10"	458.12	28'10"	578.48	34'10"	698.84	40'10"	819.20	46'10"	939.56
22'11"	459.80	28'11"	580.16	34'11"	700.52	40'11"	820.88	46'11"	941.24
23'00"	461.38	29'00"	581.74	35'00"	702.10	41'00"	822.46	47'00"	942.82
23'01"	463.06	29'01"	583.42	35'01"	703.78	41'01"	824.14	47'01"	944.50
23'02"	464.74	29'02"	585.10	35'02"	705.46	41'02"	825.82	47'02"	946.18
23'03"	466.42	29'03"	586.78	35'03"	707.14	41'03"	827.50	47'03"	947.86
23'04"	468.10	29'04"	588.46	35'04"	708.82	41'04"	829.18	47'04"	949.54
23'05"	469.78	29'05"	590.14	35'05"	710.50	41'05"	830.86	47'05"	951.22
23'06"	471.46	29'06"	591.82	35'06"	712.18	41'06"	832.54	47'06"	952.90
23'07"	473.14	29'07"	593.50	35'07"	713.86	41'07"	834.22	47'07"	954.58
23'08"	474.82	29'08"	595.18	35'08"	715.54	41'08"	835.90	47'08"	956.26
23'09"	476.50	29'09"	596.86	35'09"	717.22	41'09"	837.58	47'09"	957.94
23'10"	478.18	29'10"	598.54	35'10"	718.90	41'10"	839.26	47'10"	959.62
23'11"	479.86	29'11"	600.22	35'11"	720.58	41'11"	840.94	47'11"	961.30
24'00"	481.44	30'00"	601.80	36'00"	722.16	42'00"	842.52	48'00"	962.88
24'01"	483.12	30'01"	603.48	36'01"	723.84	42'01"	844.20	48'01"	964.56
24'02"	484.80	30'02"	605.16	36'02"	725.52	42'02"	845.88	48'02"	966.24
24'03"	486.48	30'03"	606.84	36'03"	727.20	42'03"	847.56	48'03"	967.92
24'04"	488.16	30'04"	608.52	36'04"	728.88	42'04"	849.24	48'04"	969.60
24'05"	489.84	30'05"	610.20	36'05"	730.56	42'05"	850.92	48'05"	971.28
24'06"	491.52	30'06"	611.88	36'06"	732.24	42'06"	852.60	48'06"	972.96
24'07"	493.20	30'07"	613.56	36'07"	733.92	42'07"	854.28	48'07"	974.64
24'08"	494.88	30'08"	615.24	36'08"	735.60	42'08"	855.96	48'08"	976.32
24'09"	496.56	30'09"	616.92	36'09"	737.28	42'09"	857.64	48'09"	978.00
24'10"	498.24	30'10"	618.60	36'10"	738.96	42'10"	859.32	48'10"	979.68
24'11"	499.92	30'11"	620.28	36'11"	740.64	42'11"	861.00	48'11"	981.36
25'00"	501.50	31'00"	621.86	37'00"	742.22	43'00"	862.58	49'00"	982.94
25'01"	503.18	31'01"	623.54	37'01"	743.90	43'01"	864.26	49'01"	984.62
25'02"	504.86	31'02"	625.22	37'02"	745.58	43'02"	865.94	49'02"	986.30
25'03"	506.54	31'03"	626.90	37'03"	747.26	43'03"	867.62	49'03"	987.98
25'04"	508.22	31'04"	628.58	37'04"	748.94	43'04"	869.30	49'04"	989.66
25'05"	509.90	31'05"	630.26	37'05"	750.62	43'05"	870.98	49'05"	991.34
25'06"	511.58	31'06"	631.94	37'06"	752.30	43'06"	872.66	49'06"	993.02
25'07"	513.26	31'07"	633.62	37'07"	753.98	43'07"	874.34	49'07"	994.70
25'08"	514.94	31'08"	635.30	37'08"	755.66	43'08"	876.02	49'08"	996.38
25'09"	516.62	31'09"	636.98	37'09"	757.34	43'09"	877.70	49'09"	998.06
25'10"	518.30	31'10"	638.66	37'10"	759.02	43'10"	879.38	49'10"	999.74
25'11"	519.98	31'11"	640.34	37'11"	760.70	43'11"	881.06	49'11"	1001.42

ATTACHMENT D  
Pilotage Fees  
States of New York and New Jersey  
Ports of New York and New Jersey

FOR TRANSPORTING A VESSEL BETWEEN POINTS, indicated below, the fee shall be \$1.25 per pilotage unit, with a minimum charge of \$75.00, and a maximum charge of \$300.00.

	Leonards, via Ambrose and Sandy Hook Channel	Tenth Ambury	Fulton River	Arthur Kill, South of Tullis Point	Kill van Kull, Arthur Kill, and Newark Bay, South way
Upper Bay and Graveland Bay	23 mi.	32 mi.	34 mi.	38 mi.	42 mi. +
Hudson River, South of George Washington Bridge	34 mi.	43 mi.	43 mi.	49 mi.	53 mi. +
Hudson River at Yonkers	41 mi.	51 mi.	53 mi.	57 mi.	60 mi. +
East River, South of Hell Gate	31 mi.	40 mi.	42 mi.	46 mi.	50 mi. +
East River, West of Hunts Point	35 mi.	44 mi.	46 mi.	50 mi.	54 mi. +
Newark Bay and Triborough	31 mi.	40 mi.	42 mi.	46 mi.	50 mi. +
Kill van Kull and Arthur Kill, North of Tullis Point	44 mi.	53 mi.	55 mi.	59 mi.	63 mi. +

**PILOTAGE FEES  
PORT OF NEW YORK/NEW JERSEY**

A COMPLETE PILOT SERVICE FOR THE PORT OF NEW YORK

PLEASE ORDER PILOTS DIRECTLY THROUGH THIS OFFICE

**H. B. Jesby, Agent for  
NEW YORK SANDY HOOK PILOTS**

**T. A. McGoldrick, Agent for  
NEW JERSEY SANDY HOOK PILOTS**

201 EDGEWATER ST., STATEN ISLAND, N.Y. 10305

Telephone: (718) 448-3000

— SERVICE 24 HOURS —

TWX: 710-588-2100

FAX: 718-447-1582

CABLE: HOOK PILOTS NEW YORK

CHANGES IN DOLLARS FOR SERVICES BETWEEN ANY TWO POINTS ON THIS CHART ARE NOTED IN THE INDIVIDUAL BOXES.	Upper Bay and Graveland Bay	Hudson River South of George Washington Bridge	Hudson River at Yonkers	East River South of Hell Gate	East River West of Hunts Point	Newark Bay and Triborough	Kill van Kull and Arthur Kill, North of Tullis Point	Jersey Bay	Leonards via Channel
Upper Bay and Graveland Bay	100	150	200	150	200	150	150	150	150
Hudson River South of George Washington Bridge	150	100	150	150	200	200	200	200	200
Hudson River at Yonkers	200	150	100	200	150	250	250	250	150
East River South of Hell Gate	150	150	200	100	150	200	200	200	200
East River West of Hunts Point	200	200	150	150	100	210	210	250	250
Newark Bay and Triborough	150	200	250	200	200	100	150	250	250
Kill van Kull and Arthur Kill, North of Tullis Point	150	200	250	200	250	150	100	200	200
Jersey Bay	150	200	250	200	250	250	200	100	200
Leonards via Channel	150	200	250	200	250	200	200	200	200



PILOTAGE FEES — PORT OF NEW YORK/NEW JERSEY

For Vessels Inbound or Outbound, Charges Shall Be Based on "Pilotage Units"

### Pilotage Fees

The following rate table shall be used to calculate pilotage fees by multiplying total pilotage units per vessel by the designated factor, then adding or subtracting designated adjustment:

From July 30, 1989 to July 29, 1990

PILOTAGE UNITS	FACTOR	ADJUSTMENT
0 to 24.99	0	442
25 to 49.99	0	552
50 to 99.99	0	690
100 to 299.99	7.11	- 21
300 to 474.99	6.94	+ 28
475 and over	0.43	+ 3123

Fee = (# P.U. x Factor) ± Adjustment

From July 30, 1990 to July 29, 1991

The following rate table shall be used to calculate pilotage fees by multiplying total pilotage units per vessel by the designated factor, then adding or subtracting designated adjustment:

PILOTAGE UNITS	FACTOR	ADJUSTMENT
0 to 24.99	0	442
25 to 49.99	0	552
50 to 99.99	0	690
100 to 299.99	7.11	- 21
300 to 474.99	7.14	- 30
475 and over	0.52	3111

Fee = (# P.U. x Factor) ± Adjustment

From July 30, 1991 and thereafter:

The following rate table shall be used to calculate pilotage fees by multiplying total pilotage units per vessel by the designated factor, then adding or subtracting designated adjustment:

PILOTAGE UNITS	FACTOR	ADJUSTMENT
0 to 24.99	0	455
25 to 49.99	0	548
50 to 99.99	0	710
100 to 299.99	7.65	- 55
300 to 474.99	6.89	173
475 and over	0.91	3014

Fee = (# P.U. x Factor) ± Adjustment

"Pilotage Units" as used in this subdivision shall be determined by multiplying the overall length of the vessel by the extreme breadth by the depth to the uppermost continuous deck and dividing the total by ten thousand, as expressed by the following formula:

Overall Length X Extreme Breadth X Depth  
to Uppermost Continuous Deck

10,000

equals Pilotage Units

All measurements shall be in feet and inches (U.S.). The Board of Commissioners of Pilots shall be the sole arbiter with respect to a question concerning these definitions. The decision by the board shall be final.

The measurements of overall length, extreme breadth and depth, shall be made available to the pilot by the master or his agent for the purpose of computation of pilotage fees. Failure to provide the measurements so required shall subject the vessel to

### CHARGES FOR OTHER SERVICES

In any case where no other fee shall have been established these regulations, the fee for transporting a vessel within waters of the Port of New York shall be \$100.00.

Vessels returning from sea in consequence of head winds stress of weather, shall pay full pilotage.

For delivering a letter on board a vessel coming to New York ordering her to go instead to another port without calling Port New York, the charge shall be \$50.00.

A pilot detained on board a vessel on account of quarantine disease shall be entitled to a fee of \$50.00 for each hour detain

In any case where the rendering of services is delayed for convenience of the vessel, the pilot shall be entitled to \$50.00 each hour or part thereof. However, if the pilot's services are within one hour, no charge will be incurred.

In any case where a pilot reporting on board a vessel is dismissed without rendering services, he shall be entitled to \$150.00.

In any case where a pilot is detained on board a vessel awaiting favorable tide, a berth or an anchorage, the fee shall be \$50.00 per hour except where Section 96, Part 4 of the Navigation Law applicable.

When a pilot for the convenience of the vessel for any reason ordered to stand by, the fee shall be \$50.00 an hour for the time bound but the minimum shall be \$150.00.

A vessel that passes the Narrows inbound after 1200 hours anchor, and then gets underway after 0600 hours shall be subject to a transporting fee per the tables.

When a pilot is discharged from a vessel within the Port of New York and the vessel later proceeds to a berth or another anchor with a Sandy Hook pilot on board, a transporting fee shall apply.

Whenever, under permission granted by Commission Regulations, a pilot shall assist in either the docking or the undocking of a vessel at the Port of New York, such pilot may collect the following fee in addition to any fee otherwise established.

Without the assistance of tugs or a bow thruster, 25 percent of the statutory rate for registered vessels.

Without the assistance of tugs but with the assistance of a bow thruster, 15 percent of the statutory rate for registered vessels.

With the assistance of a tug or tugs, 10 percent of the statutory rate for registered vessels.

When a pilot is called upon to swing a ship in connection with adjustment of her compass or calibration of her direction finder or both, his compensation shall be \$50.00 in addition to the regular pilotage.

Fee for anchoring a vessel in the vicinity of Pilot Station.

If a vessel for its own convenience desires to anchor in the vicinity of Pilot Station before proceeding into port, and requests a Sandy Hook pilot for that purpose, the pilot shall be entitled to an anchoring fee of \$175.00.

Vessels which arrive at the Pilot Station without at least 9 hours prior notice will be charged a fee of \$250.00.

If the arrival of a vessel is cancelled less than six hours before its scheduled arrival time, there shall be a charge of \$150.00.

If a vessel arrives at the Pilot Station more than one hour late from its scheduled arrival time and the pilot boat or station or the pilot office has not been notified of the delay, arrival at least three hours before the scheduled arrival time, there shall be a charge of \$50.00 for each hour or part thereof. The maximum charge shall be \$300.00.

If an order to pilot a vessel outbound is received less than three hours prior to sailing time, there shall be a charge of \$100.00.

All charges covered by this section shall be in addition to other fees prescribed by the Navigation Law and these regulations.

ATTACHMENT E  
Pilotage Fees  
State of Oregon  
Columbia River Bar  
Columbia and Willamette River  
Coos Bay Bar and Harbor  
Yaquina Bay

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NOTES:

- 1) This tariff supersedes Oregon Pilotage Tariff No. A-4. Changes from the last issued rates have been underlined.
- 2) This tariff is issued in loose leaf form. Revisions will be made by reprinting of entire page containing correction or addition. Corrected pages will carry correction numbers which will be issued in consecutive order. As received, these should be checked off against the list of corrections for this tariff. If numbers do not appear in consecutive order, the Board should be advised.

EFFECTIVE: 00:01 A.M., Sep. 27, 1986  
REISSUED: 00:01 A.M. Nov. 28, 1989

Section 1. GENERAL

1. APPLICATION

The rates, terms, conditions and rules specified in this tariff apply to all pilotage services provided by Oregon pilots.

2. RESPONSIBILITY AND INSURANCE

The provisions of ORS 776.510 and section 7 of chapter 330 of the 1983 Oregon Laws hereby are incorporated into and made part of this tariff. By reason of the option granted by ORS 776.510, the rates and charges named in this tariff do not include the cost of marine insurance insuring the pilot and any organization of pilots to which the pilot belongs, the vessel, its owners, agents or operators from the consequences of negligence or errors in judgment of the pilots or organizations of pilots.

However, upon reasonable notice to the pilots in writing from the vessel, its master, owners, agents or operators, the pilots parties hereto will procure such insurance on a "trip" basis in an amount equal to the value of the vessel and its cargo, or such other amount as may be agreed upon between the pilots and the vessel, its master, owners, agents or operators, insuring the pilots and the organization of pilots to which they belong against all claims or demands arising from or based upon, directly or indirectly, pilotage of the vessel. The premium for such insurance shall be assessed in addition to the rates and charges specified herein.

The election of the vessel, its master, owners, agents or operators not to request pilots parties hereto to procure such insurance and thereby elect to have the pilots parties hereto perform services on the rates and charges specified herein shall constitute a binding and irrevocable agreement on the part of the vessel, its master, owners, agents or operators to the terms and conditions of the following:

It is understood and agreed, and is the essence of the contract under which services of the pilot are tendered to and accepted by the vessel, its master, operators and owners, that:

A. The services rendered hereunder are rendered by a pilot duly and regularly licensed by the State of Oregon pursuant to ORS chapter 776, or (with respect to domestic vessels) the holder of a valid license issued by the Federal Government;

EFFECTIVE: 00:01 A.M., Sep. 27, 1986  
REISSUED: 00:01 A.M., Nov. 28, 1989

Section 1. GENERAL, cont'd.

B. The services of any individual pilot (except with respect to domestic vessels) have been voluntarily accepted and are voluntarily rendered pursuant to the election authorized by CRS 776.510;

C. Such services are advisory in nature only, the master of the vessel remaining at all times in full command of the vessel and empowered to relieve the pilot of duties;

D. The services of the pilot are accepted on the express understanding that when the pilot goes aboard the vessel the pilot becomes the servant of the vessel and its owners and operators, and the master, owners and operators of the vessel expressly covenant and agree not to assert directly or indirectly, any personal liability against the pilot, any organization of pilots to which the pilot belongs, and against any members of such organization, to respond in damage (including any rights over) arising out of or connected with, directly or indirectly, any damage, loss or expense sustained by the vessel, its master, owners, operators and crew, and any third parties (including cargo), even though resulting from acts or omissions of any organization of pilots to which the pilot belongs, from acts or omissions of its members, or any acts or omissions of the pilot, and to defend, indemnify and hold harmless the pilot, and organization of pilots to which the pilot belongs, and any members of such organization, from any claims whatsoever for damages, loss or expense arising out of, or connected with any acts or omissions of the pilot or organization of pilots which relate, directly or indirectly, to pilotage of the vessel except as to such personal liability and rights over as may arise by reason of the willful misconduct or gross negligence of the pilot;

E. The master, owners and operators of the vessel shall not be liable to indemnify and hold harmless the pilot and any organization of pilots to an extent greater than the amount to which the liability of the vessel, its owners and operators, is limited by reason of contract, bill of lading or statute, including but not limited to, the Limitation of Liability Act (46 U.S.C. §§ 181-189), the Harter Act (46 U.S.C. §§ 190-195), the Carriage of Goods by Sea Act (46 U.S.C. §§ 1300-1315), and the Federal Water Pollution Control Act (33 U.S.C. § 1321); and

F. The fees charged for the services rendered by the pilot have been computed and are assessed in accordance with and based upon the above stipulations.

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Section 1. GENERAL, cont'd.

3. LIABILITY FOR CHARGES

Attention is directed to the provisions of ORS 776.445, reading as follows: "In addition to the lien of the pilot upon the vessel for any sum due for piloting, the master, owner, and consignee or agent are jointly and severally liable to the pilot therefor." This shall apply whether the person or persons ordering such services are doing so on behalf of a disclosed or undisclosed principal.

4. ORDERS FOR SERVICES

Orders for pilots should be made to the pilots' dispatching offices during the hours set forth and in the manner requested under sections covering for each respective grounds. Due care shall be exercised in placing orders and in keeping the pilots informed in respect to any changes in time on operations in order that efficient service may be provided.

5. SERVICES FOR WHICH RATES NOT FIXED

(Extraordinary pilotage services, services to vessels in distress, salvage services, etc.)

With respect to services for which rates are not fixed by this tariff, the pilot shall invoice reasonable charges for services rendered. Within ten (10) days after invoice is presented, the party invoiced may apply to the Oregon Board of Maritime Pilots for a reduction or modification of the charges. In the event of such application, the decision of the Board shall be final and binding.

6. VESSEL ASSISTANCE

If weather, tide, or other conditions warrant, tug or tugs may be recommended by the pilot but the final decision thereon shall be that of the master.

7. RATES AND CHARGES

Rates are in dollars per move or per item of service for each pilot employed.

8. DEFINITIONS

A. Draft and Tonnage Rates. The rates established by the Oregon Board of Maritime Pilots pursuant to ORS 776.115 are based on the actual deepest draft and the international gross registered tonnage of the vessel being piloted.

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