

**Board of Pilot Commissioners for the Bays
of San Francisco, San Pablo, and Suisun**

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BOARD OF PILOT COMMISSIONERS
BOARD MEETING
MINUTES
April 2, 2012 9:30 a.m.
(Meeting continued from March 22, 2012)

OPEN MEETING:

1) Call to Order and Roll Call – President Miller

President Knute Michael Miller called the meeting to order at 9:36 a.m. Vice President Frank Johnston and Commissioners John Brooks, Eric Osen, John Cronin, Steve Roberts, and David Wainwright were present, constituting a quorum. Business, Transportation and Housing Agency (BTH) Acting Secretary Brian Kelly was represented by BTH Deputy General Counsel Gabor Morocz, who participated by telephone from Sacramento. Members of staff present were Executive Director Allen Garfinkle, Board Counsel Dennis Eagan, and Staff Services Analyst Kelly Dolcini. San Francisco Bar Pilots (SFBP) Port Agent Capt. Bruce Horton was offsite by telephone. He did not participate in the meeting in any way. Legislative Joint Sunset Committee Senior Consultant Sarah Weaver was present in the meeting.

2) Request Approval of Minutes – President Miller

As this was a continuation of a previous meeting, there were no minutes to be approved.

3) Announcements – President Miller

There were no announcements

4) Board member activities – Board members

President Miller reported that he and Vice President Johnston had participated in several events during the week of March 25, 2012 leading to and including the commissioning on March 31, 2012 of the USCG cutter STRATTON. The commissioning ceremony was conducted at Coast Guard Island in Alameda, California. First Lady Michelle Obama served as Sponsor of the cutter and delivered the principal address at the ceremony.

Having covered the majority of the Board agenda at the March 22, 2012 meeting, President Miller called the Board member's attention to items #22, then #21.

22) Review of surcharge audit reports for the year ended December 31, 2011 prepared by Shea Labagh Dobberstein under contract with the Board. Possible Board action to accept the reports in satisfaction of contract scope of work for 2011.

President Miller announced that the Board had not yet received the surcharge audit reports for the year ended December 31, 2011 and that they would be on the agenda for the next Board meeting on April 26, 2012. Accordingly the Board did not take up agenda item 22 on this occasion.

21) Report on inquiry into pilotage charges for CMA CGM NORMA and other fees not expressly provided for by statute, together with opinion of counsel concerning validity of such fees –Board Counsel Eagan and Executive Director Garfinkle.

Board Counsel Dennis Eagan stated that he would not report on the inquiry into the pilotage charges for the CMA CGM NORMA on this occasion. Accordingly the Board did not take up agenda item 21 on this occasion.

Whereupon the Board turned its attention to agenda item 20.

20) Discussion, analysis, and determination of Board position on pending legislation, AB 2042 – Member Morocz

A. Report on March 14, 2012 vote held by the Joint Sunset Review Committee of the California Legislature.

During its March 14 meeting, the Sunset Review Committee did not have a quorum and was deferred the vote on Sunset Review Committee recommendations.

B. Board discussion and possible Board action to direct staff to draft Legislative analysis including Board position for submission to Agency.

A draft analysis was provided by Member Morocz who led the discussion and began by citing the two functions of the legislation: to sunset the Board, and simultaneously to transfer the functions of the Board to BT&H. He noted that there would be a significant fiscal impact as BT&H will have to pay for expertise that is now currently volunteered by Board members and Committee members.

Commissioner Roberts moved to adopt the draft analysis. Vice President Johnston seconded the motion. President Miller called for discussion.

Board members discussed the draft analysis of AB 2042 as submitted and several reasons for opposition were brought forth. Sarah Weaver, Senior Consultant on the Sunset Review Committee staff, made the point that the purpose of the legislation was to review the Board, not

eliminate it. President Miller noted that the bill might be misinterpreted because if the legislature does nothing, the Board would sunset.

PMSA Vice President Michael Jacob stated that PMSA has not announced support for the bill as of this date but intends to. He added that it is a valid concern that the functions would end up at the agency level.

President Miller called for additional discussion by the Board and comments from the public. There were none.

President Miller called the question and a vote was taken. The motion passed on a roll call vote with six yeas and Commissioner Osen voting nay.

Following the vote, Ms. Weaver requested that technical changes be submitted to her office.

The Board then turned its attention to agenda item 19.

19) Discussion, analysis, and determination of Board position on pending legislation, SB 1408 – Member Morocz

At the March 22, 2012 Board meeting, Member Morocz asked that Board members submit written opinions on a draft of Senate Bill 1408, a bill sponsored by the Pacific Merchant Shipping Association. He received comments from four Commissioners.

Commissioner Johnston made a motion to oppose the re-numbering of provisions of the Harbors and Navigation Code called for in the bill without changes to their substance, and Commissioner Roberts seconded the motion. President Miller called for discussion.

Commissioner Osen inquired if there was any history of the legislature doing this? Board Counsel Eagan noted that unfortunately there is.

President Miller called for comments from the public. PMSA Vice President Mike Jacob stated that he believed confusion resulting from the re-numbering would be minimal. Member Morocz pointed out that section 1130.7 would shift the responsibility of providing accounting from individual pilots to the Port Agent. Commissioner Osen pointed out that this is what is effectively happening now. Board Counsel Eagan then asked why move it then, just leave section 1136 in and have Port Agent be the one to report. Mike Jacob countered with the question of whether the Board wanted an organized statute. Mr. Eagan asked if that was enough reason to change what exists. Mike Jacob ended the discussion with the request that if anyone has changes to better the wording of the bill, to please submit their ideas. PMSA is open to suggestions.

The motion before the Board was to oppose moving items in cases where there is no substantive change to the Code.

President Miller called for additional discussion by the Board and comments by the public. There were none.

A roll call vote was taken and the vote was six ayes and one nay by Commissioner Osen. The motion was agreed to.

Member Morocz then moved to a discussion of section 10 of the bill, and specifically the addition of new section 1143, which would mandate that the Board publish operations guidelines for pilotage on waters under its jurisdiction. Commissioner Osen objected at this point, stating that this discussion was beyond the scope of the agenda. President Miller responded that it was within the scope of bill analysis. Commissioner Osen stated he objected to the jumping around and felt that the Board should have one action item. Executive Director Garfinkle responded that staff needed detailed policy guidance to draft an analysis. Commissioner Osen noted that legislative analysis had been done by staff prior without such detailed input. President Miller agreed that this had been done in the past when there was a time constraint, but in this case the Board has the opportunity to develop Board consensus prior to staff analysis.

Returning to the substantive discussion of whether pilotage operations guidelines should be in regulation, President Miller argued that the Board does not have the expertise to promulgate guidelines and that having them in regulation will delay changes that may be related to safety issues that may arise from time to time.

Commissioner Wainwright noted that the Board is a licensing Board that authorizes pilots to do a job, and part of that job is using their expertise to set safety guidelines. When looking at the proposed changes as a whole, the proposed statute would mandate the Board, with less expertise, to issue guidelines, which section 1148 would then mandate the Port Agent act consistent with.

Mike Jacob responded that there needs to be transparency in setting the guidelines with public and stakeholders being able to comment on them. Commissioner Cronin expressed concern that the guidelines may be changed in ways that affect the shippers without their input. His concerns were that shippers may be blindsided by changes and if they have economic impact, shippers should have a say. Commissioner Wainwright expressed concern that the state would be placed between two businesses, adding another layer between pilots and shippers, and that the pilots have a business interest in keeping the shippers informed and happy as they pay the bills.

Commissioner Roberts noted that the guidelines are there for safety. He pointed out that many terminals such as Chevron and Tesoro set guidelines for their terminals and they don't approach the ship owners and ask permission. President Miller added that these are guidelines and that there will be anomalies that arise and the guidelines are just a guide. Commissioner Osen asked if the guidelines are about safety, why you would not want them transparent. Commissioner Cronin asked if there are guidelines that benefit the pilots with which shippers do not agree.

President Miller noted that the guidelines are published openly on the SFBP web site. Mike Jacob stated that the challenge is that this is the licensing Board of a monopoly. PMSA cannot condone guidelines that are changed unilaterally by the pilots. He believes there should be public feedback and a public forum before guidelines change.

Commissioner Roberts moved to oppose section ten of the bill. Commissioner Wainwright seconded the motion. After some discussion Commissioner Wainwright withdrew his second and **Commissioner Roberts amended the motion to oppose proposed section 1143 plus subdivisions of proposed section 1148 that govern assignments in accordance with proposed section 1143 (proposed guidelines).**

President Miller called for discussion and comments from the public. Board Counsel Eagan noted that the bill does not speak to the existence of the present guidelines. There were no additional comments.

A roll-call vote was taken on the motion, with five ayes and two nays, with Commissioners Osen and Cronin voting nay.

President Miller announced that the Board would stand in recess for a brief period. The Board stood in recess at 11:15 a.m.

The Board reconvened in open session at 11:27 a.m. President Miller noted that, by inspection, all Commissioners had returned and that a quorum was present.

Member Morocz then went on to present proposed code sections 1145 and 1146 of section ten of the bill which would address hours of work rules.

Commissioner Roberts requested the members of the Board refer to his written comments in which he opposes these sections. Commissioner Wainwright commented that proposed section 1145 is admirable but the pilots are already engaged in this activity.

Commissioner Roberts moved to oppose proposed sections 1145 and 1146. Commissioner Wainwright seconded the motion. President Miller called for discussion.

Commissioner Osen explained that when he first started in the industry, the Oil Pollution Act of 1990 (OPA 90) was just passed. There was a lot of grumbling in the industry but we ended up with a much safer workplace. He noted similarities between that legislation and what is proposed here.

Commissioner Wainwright argued for an approach which starts at the Board level and not with the legislature.

President Miller opined that he was uncomfortable with a one-size-fits-all approach and the rigid formulation of the proposal. He further noted that the existing system is workable and that SFBP has taken pilot fatigue and questions of minimum periods of time off duty between jobs to heart. He also noted that if the situation was that there were many MRP's, then we might have an issue.

Mike Jacob explained that proposed sections 1145 and 1146 set absolute minimums but it does not say what the hours of service should be. Section 1146 doesn't say what is best, but it does set a "backstop."

Commissioner Roberts expressed concern that at times a "backstop" becomes the guideline and that what SFBP is doing currently is working.

Commissioner Cronin inquired of the pilot members of the Commission what their reasons for opposing the proposals were. Commissioner Wainwright thought it is an admirable concept but he has difficulty endorsing a seemingly arbitrary number.

President Miller called for additional discussion by the Board and comments by the public. There were none.

Following discussion, a roll-call vote was taken in which three Commissioners voted aye, two nays, and two voted “pass.” Commissioners Cronin and Osen voted nay. President Miller and Commissioner Roberts passed initially, but after the other Commissioners completed voting, both President Miller and Commissioner Roberts voted aye for a final vote count of five ayes and two nays. The motion carried.

The discussion then turned to bill section 5, which would enact a new section 1135 making it a misdemeanor for a licensee to have a blood alcohol content (BAC) of 0.01% or more while conducting licensed activities.

Commissioner Roberts moved to oppose section 5. President Miller seconded the motion and called for discussion.

Commissioner Roberts provided the Board with background information on the recent Committee and Board activity concerning blood alcohol content. The Pilot Fitness Committee had recommended that the Board adopt a standard of 0.04% BAC (which coincides with federal law), which the Board did. The Fitness Committee also grappled with a behavioral standard, but has not as yet presented a recommendation to the Board.

President Miller noted that the language of the bill draws on all licensed activity, which would sweep in the Port Agent and in that respect, it is overbroad.

Board Counsel Eagan pointed out that the existing statute talks about impairment regardless of BAC. It is his belief that existing law, section 1181(f) and regulation 219(s), covers the subject adequately.

Mike Jacob stated that this section is about prevention – to prevent incidents.

President Miller called for additional discussion by the Board and comments from the public. There were none.

President Miller called for a roll-call vote, which resulted in six ayes and one nay, with Commissioner Osen voting nay.

Member Morocz moved on to bill section 24, which would add a new section 1178 mandating that the Board and Port Agent participate in a California Department of Motor Vehicles “pull notice” system to in order to receive driving records for all pilots and trainees.

President Miller noted that he favors this provision of the bill, but supports with amendments in that he doesn’t support requiring it of the Port Agent, but he does for the Board. He believes the information should be provided to the Board appointed physician for evaluation in connection with a fitness for duty determination, and this information might suggest that the pilot or trainee suffer from an addictive personality.

Commissioner Roberts expressed hope that this could be handled in regulation as opposed to statute. Member Morocz wondered if this could be done by regulation. Board Counsel Eagan said existing code section 1171(b) gives the Board the authority.

Member Morocz stated that the more important question is what the Board does with the information once it has it. Board Counsel agreed with President Miller by suggesting the Board designated physician is the person best suited to process and analyze the information.

Commissioner Roberts moved to oppose bill section 24 and Commissioner Wainwright seconded the motion.

President Miller called for additional discussion by the Board and comments by the public. There were none.

A roll-call vote was taken and the motion passed with six ayes and one abstention by President Miller.

The discussion then turned to bill section 19 which would create a new section 1175.5 which would permit the Board to deny a license on the grounds that applicant made a false statement on the application or subverted a pilot trainee training program selection exam. The bill refers to the Business and Profession Code.

President Miller noted that these provisions may seem fair on their face, but there is a body of law associated with the Business and Professions Code which may color these provisions.

Commissioner Roberts stated that he was neutral on bill sections 17, 19, 22, and 27 subject to further review. **Commissioner Roberts moved to stay neutral on sections 17, 19, 22, and 27. Commissioner Osen seconded the motion.**

President Miller called for additional discussion by the Board and comments by the public. There were none.

A roll-call vote was taken. The motion passed with seven ayes and no nays.

Commissioner Roberts then moved to oppose bill section 26. Section 26 would add a new section 1181.5 which would permit the Board to suspend or revoke a license based on unprofessional conduct and would permit the Board to treat a criminal conviction related to pilotage as unprofessional conduct. Commissioner Wainwright seconded the motion. President Miller called for discussion.

Mike Jacob noted that parts of the new section 26 are existing law in Harbors and Navigation Code section 1141.

Commissioner Wainwright questioned the wording of the proposal. “What is unprofessional conduct” and “What crimes are substantially related to pilotage?”

President Miller called for additional discussion by the Board and comments from the public. There were none.

President Miller called for a roll-call vote. There were six ayes and one nay, with Commissioner Osen voting nay.

Commissioner Roberts then moved to oppose SB 1408. Commissioner Wainwright seconded the motion.

President Miller called for additional discussion by the Board and comments from the public. There were none.

President Miller called for a roll-call vote, with six ayes and one nay, Commissioner Osen voting nay.

27) Public Comment on Matters not on the Agenda

There were none.

28) Proposals for Additions to Next Month's Agenda

Commissioner Wainwright requested that the subject of "pull notice" be added to the April agenda.

29) Adjournment

The meeting adjourned at 1:04 p.m. The next Board meeting is scheduled for April 26, 2012 at 9:30 a.m.