

## **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 September 27, 2012 9:30 a.m.**

#### OPEN MEETING

#### **1. Call to Order and Roll Call – President Miller**

President Knute Michael Miller called the meeting to order at 9:35 a.m. Vice President Frank Johnston and Commissioners David Wainwright, Steve Roberts, and John Cronin were present, constituting a quorum. Commissioners John Brooks and Eric Osen were not present. Business, Transportation, and Housing Agency Acting Secretary Brian P. Kelly was represented by BTH Deputy General Counsel Gabor Morocz who participated by telephone. Members of staff present were Executive Director Allen Garfinkle, Board Counsel Dennis Eagan, Staff Services Analyst Kelly Dolcini, and Office Technician Sigrid Hjelle. San Francisco Bar Pilots (SFBP) Port Agent Capt. Bruce Horton was also seated at the Commission table. Commissioner Osen listened to the meeting telephonically from 9:46 a.m. to 11:45 a.m. but did not speak or otherwise participate.

#### **2. Request Approval of Minutes – President Miller**

President Miller requested approval of the minutes of the August 23, 2012 Board meeting. Vice President Johnston moved approval of the minutes with authority to Board staff to make clerical, non-substantive changes. Commissioner Wainwright seconded the motion, which passed unanimously on a voice vote.

#### **3. Announcements – President Miller**

President Miller announced that Capt. G. Ross Wheatley, USCG (Ret.), Senior Investigating Officer and Chief, Investigations Division, Sector San Francisco, has departed the Coast Guard for new responsibilities. President Miller noted that Capt. Wheatley has been a regular member of the public audience at the Board's monthly meetings and that he and his staff often worked closely with the Board's Incident Review Committee when investigating maritime incidents of common focus. After 35 plus years of active duty and civilian time, Capt. Wheatley has accepted a new position as an Administrative Law Judge (ALJ) with the Social Security Administration (SSA) Office of Adjudication and Review (ODAR). He began his new responsibilities on September 24, 2012.

#### **4. Board Member Activities – Board Members**

President Miller announced that on September 10, 2012 he had called on Capt. Whit Smith, President of the Charleston (South Carolina) Branch Pilots Association at the Association Offices. President Miller reported that they had discussed pilotage safety issues in the wake of the COSCO BUSAN accident in San Francisco Bay.

President Miller announced that on September 17, 2012 he had had a telephone conference with Capt. Harry Dudley, Chairman of the Washington Board of Pilotage Commissioners. Capt. Dudley expressed the continuing intention by the Washington Board to host a regional pilotage regulators' conference but stated that the meeting likely would not occur until early 2013. Capt. Dudley's intention is to expand the list of invitees to include regulatory authorities for California ports in addition to those under our Board's jurisdiction. The Hawaiian authorities also will be invited.

#### **5. Executive Director's Report – Executive Director**

##### **A) Correspondence and activities since the August 23, 2012 meeting.**

Executive Director Garfinkle reported that on September 21, 2012, Board staff sent a letter to Richard Aschieris, Director of the Port of Stockton emphasizing the importance of current soundings to the vessels calling at its port.

On September 26, 2012, staff received copies of condition and valuation survey reports prepared by Teicheira Maritime Surveyors on the P/V SAN FRANCISCO and the P/V CALIFORNIA. He recommended that both vessels be equipped with carbon monoxide (CO) detection systems.

The fair market value of the P/V SAN FRANCISCO was estimated to be \$4.865m, with a replacement value of \$8.586m, and the surveyor noted that with the exception of the recommendation to install a CO detection system, this vessel appeared to be in satisfactory condition for operation.

The P/V CALIFORNIA has a fair market value of \$5.15m and a replacement value of \$8.586m, and the surveyor noted that this vessel appeared to be in satisfactory condition for operation for its intended purpose as a pilot station vessel.

##### **B) Report on pilot licensing matters in the past month and current month.**

Between the August and September Board meetings, staff renewed licenses for Captains Laakso, Burger, and Coney.

Since the August meeting, staff has renewed a license for Capt. Holl.

### **C) Report on surcharges received by the Board**

For the month of August, the Board received \$156,103.35 broken down as follows:

Board Operations Charge: \$51,423.35

Continuing Education Surcharge: \$73,605.00

Trainee Training Surcharge: \$31,075.00

### **D) Report on legislative activities and contractual matters.**

Executive Director Garfinkle reported that the second hearing on Assembly Bill 2042 had been cancelled at the request of the author with no rescheduled date.

Senate Bill 1408 was enrolled and presented to the governor for signing on September 12, 2012.

Assembly Bill 2287 was also re-referred to the Senate Appropriations Committee.

Executive Director Garfinkle also reported that Board staff is currently working to locate firms that can perform a market analysis function to accompany the Pilot Medical Assessment rulemaking.

Board staff is also beginning the contracting process to digitize Incident Review Committee (IRC) reports and begin preparation for the trainee applicant exam, which includes contracts with California Maritime Academy, retired pilot Capt. James Gates, and psychometricians.

## **6. Port Agent's Report – SFBP Port Agent Capt. Bruce Horton**

### **A) Monthly report on SFBP ship piloting activity.**

Capt. Horton reported that billed vessel moves in July, when compared to a three year average were as follows: 535 bar crossings (down 4.3%), 115 bay moves (down 6.9%), 11 river moves (up 15.7%), making total billed moves 661 (down 3.9%), with a gross registered tonnage (GRT) of 26,897,259 (up 3.1%). When compared to a three year average, bar crossings are down 9.3%, total moves are down 8.5% and gross registered tonnage is down 2.3%.

Capt. Horton reported that the P/V GOLDEN GATE was out of service from August 13 to September 19, 2012 for planned maintenance. From September 19 to September 21, 2012, the P/V SAN FRANCISCO was out of service due to a lube oil cooler failure. The P/V DRAKE was taken out of service on September 24, 2012 for annual dry docking and tonnage modifications. The P/V CALIFORNIA was out of service from August 13 to September 14, 2012 for annual dry docking and tonnage modifications.

**B) Monthly report on pilot availability and absences.**

Capt. Horton delivered the Port Agent's report on pilot availability and absences as follows:

On a daily basis, I am continually watching the list for any possible minimum rest period (MRP) exceptions. If there are potential MRP exceptions I use many different measures to mitigate them. These measures include, but are not limited to, suspending continuing professional development protocols, cancelling scheduled meetings, cancelling previously granted compensatory time requests, suspending our policy of reporting 30 minutes early to the job, suspending our internal working rules, or calling in off-watch pilots.

There were three MRP exceptions during the last month:

August 11/1800 hours – 11.8 hours off duty, 30 assignments on that date, three pilots short of authorized number of 60, two pilots not fit for duty (NFFD), one pilot on compensatory time.

August 12/0645 hours – 11.8 hours off duty, 15 assignments on that date, three pilots short of authorized number of 60, two pilots NFFD, two pilots on comp time. This MRP exception occurred because of the need to special assign a specific pilot ahead of his turn to do a job at the San Francisco dry dock.

July 25/0430 hours – 10.8 hours off duty, 26 assignments on that date, three pilots short of authorized number of 60, one pilot NFFD, one pilot on compensatory time, and one pilot on pilot business. This MRP exception occurred because of the need to special assign a pilot who is experienced in turning a 1200 foot vessel, in order to safely turn the MSC ALTAIR in the Oakland turning basin.

Two pilots were absent for medical reasons: Captain Hugo Kenyon was NFFD on August 29, 2012 with a non-work-related injury. Captain Nancy Wagner was NFFD on September 2, 2012 with a non-work-related illness. Captain Chris Anderson was placed on medical disability leave on September 13, 2012 by a Board-appointed physician.

**C) Monthly confidential written report of pilots who have been absent for medical reasons (AFMR) presented to Board.**

The Board reviewed the confidential written report. After all Board members had had the opportunity to review the report, President Miller asked whether any member wished to go into closed session to discuss the report. There were no requests.

## **7. Pilot Evaluation Committee – Capt. Einar Nyborg**

### **A) Report on August 22, 2012 Committee meeting**

Captain Nyborg reported as follows:

The Pilot Evaluation Committee met on September 26, 2012.

In closed session, all four trainees were interviewed individually. The current trainees include Captain's Carr, Johnson, Lingo and Favro. Their time in the program ranges from 12 to 21 months. All trainees have advanced to the final level of training. This is called the "evaluation stage."

In the evaluation stage of training, the trainee alone does each job, without the coaching that is common in the earlier stages of the program. To reach this stage, a trainee must demonstrate that he is capable of providing safe, efficient, and professional quality pilot service without repeated corrections of a senior pilot. To qualify for the evaluation stage a trainee must be performing at or very near a grade point average of 4.0. This score is given if a trainee is doing the quality of work expected from a working pilot.

The success of this phase of training requires a very clear pre-transit plan agreed to between trainee and pilot so that both are on the same page and understand how the transit will progress. The trainee will propose the transit details that will be approved or amended by the pilot. During the job the pilot will resist any temptation to coach the trainee or provide input or assistance of any kind. Any corrections required during the transit will result in poor marks or comments in specific categories allowing Pilot Evaluation Committee (PEC) to focus in on trainee weaknesses in the final months of training. This stage of training continues for at least three months prior to final recommendation to the Board. More typically six months is needed. In six months a trainee typically completes about 180 jobs, giving a clear base line of unassisted performance through a wide variety of work.

A trainee entering into the evaluation phase enters a new experience in piloting. He finds himself suddenly on his own, perhaps questioning his readiness and abilities. At first stressful, in a matter of days or weeks you can see him relax because he knows his next move and is not second guessing what the pilot might be thinking. He comes to trust his own timing and decision-making. He knows the entire job is up to him. What we commonly see is that a trainee finally begins to pilot in his own style, a culmination of all the lessons he or she has experienced to date.

Next month's PEC meeting is scheduled for Oct 17, 2012.

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

- B) Possible recommendation for a determination that a trainee has or trainees have completed the pilot trainee training program; Possible Board action.**

There was no recommendation.

- C) Possible Executive Director recommendation for the appointment of a new pilot or pilots; Possible Board action.**

There was no recommendation.

**8. Reported Safety Standard Violations and Investigations – Executive Director Garfinkle**

There have been no safety standard violations since the last meeting.

**9. Reportable Piloting Events – Executive Director Garfinkle**

There have been no reportable piloting events since the last meeting.

- A) Status report of the M/V MULBERRY WILTON interaction with the M/T OVERSEAS TAMPA while passing Plains Terminal, Martinez, on January 27, 2012. Request for an extension from the Board to present this report at the October 25, 2102 Board meeting.**

Executive Director Garfinkle announced that the Incident Review Committee would present a report and recommendations later in the meeting in connection with its investigation of the incident. Accordingly, the Board took no action with respect to an extension.

- B) Status report of the OVERSEAS TAMPA alleged near miss while departing Richmond Long Wharf Berth #2 on February 18, 2012. Request for an extension from the Board to present this report at the October 25, 2012 Board meeting.**

Executive Director Garfinkle reported on the status of the IRC investigation and stated that he had been unable to complete the report in time for today's meeting because of the press of other Board business and the need to complete investigation of incidents antedating the matter concerning the OVERSEAS TAMPA. Commissioner Wainwright moved to grant an extension to October 25, 2012. Commissioner Roberts seconded the motion. President Miller called for discussion by the Board and comments by the public. There were none. Whereupon the motion passed unanimously on a voice vote, Vice President Johnston abstaining.

## **10. Rules and Regulations Committee – Commissioner Wainwright**

### **A) Report on the September 11, 2012 and September 20, 2012 Joint Rules and Regulations Committee and Pilot Fitness Committee meeting.**

Chairman Wainwright reported that the Rules and Regulations Committee had met jointly with the Pilot Fitness Committee on September 11, 2012 and September 20, 2012 and was prepared to submit the draft document to the Board for consideration

### **B) Presentation of draft regulations on pilot fitness and recommendation from Joint Rules and Regulations and Pilot Fitness Committees to direct staff to commence formal rulemaking based on draft pilot fitness regulations.**

Commissioner Wainwright reported the Committee had finished its review and submitted the draft document to the Board for comments pending the passage of Senate Bill 1408.

## **11. Finance Committee – Commissioner Cronin.**

### **A) Report on September 12, 2012 Finance Committee meeting.**

Commissioner Cronin reported that the Finance Committee had met on September 12, 2012 and considered whether a change to the bar crossing mill rate was required. The current and projected number of licensed pilots on October 1, 2012 stands at 57. Accordingly, no adjustment is required. The Committee also considered the condition and balances of the Board's several funds and found them to be adequate and the Committee does not recommend any adjustment at this time. Finally, the Committee considered the question of imposing fees on applicants for the selection examination for the Board's pilot trainee training program. The Committee determined that the cost of the last selection examination (not including allocable staff costs) was in excess of \$135,000 and that if all applicants who actually sat for the exam when it was last given (in 2010) had paid \$1000 each, the total fees collected would not have exceeded the cost to the Board of administering the examination.

The Committee recommended that the Board impose a fee of \$500 to be paid with the filing of the application to sit for the selection exam, which is refundable if the applicant does not in fact sit for the written portion of the examination. The Committee further recommends that the Board impose an additional fee of \$500 to be paid prior to commencement of the simulator portion of the examination, which is also refundable if the applicant does not participate in the simulator portion of the exam. The Committee recommends that the Board direct staff to proceed with formal rulemaking to establish these fees.



**B) Review of the number of licensed bar pilots anticipated on October 1, 2012 and recommendation for possible adjustment to pilotage rates for the calendar quarter beginning on that date as specified in Harbors and Navigation Code section 1190(a)(1).**

Commissioner Roberts moved that the bar crossing mill rate be set at \$0.09107 per high gross registered ton, for the calendar quarter beginning October 1, 2012 and that staff be directed to so inform the San Francisco Bar Pilots Association. Commissioner Wainwright seconded the motion. President Miller called for discussion by the Board and comments from the public. There were none. Whereupon the motion passed unanimously on a voice vote.

**C) Review of Finance Committee recommendations on policies to administer Pilot Training Program exam fees.**

Commissioner Wainwright moved that the Board impose a fee of \$500 to be paid upon the filing of the application to sit for the trainee training program selection exam, which would be refundable if the applicant does not in fact sit for the written portion of the examination, and that the Board impose an additional fee of \$500 to be paid prior to commencement of the simulator portion of the examination, which would be refundable if the applicant does not in fact participate in the simulator portion of the exam. Vice President Johnston seconded the motion. President Miller called for discussion by the Board. There was discussion regarding the ability of all potential applicants to pay the proposed fees. Commissioner Cronin responded that the Committee had considered the issue and concluded that any currently employed mariner would be able to pay the proposed fees. Executive Director Garfinkle added that the Board staff does not have the resources to determine legitimate financial need of an applicant. President Miller noted that the fees charged by the Washington State Board of Pilotage Commissioners are considerably higher – \$400 upon filing the application to sit for the exam, followed by a \$2500 non-refundable fee to secure a seat at the actual examination. President Miller then called for comments from the public. There were none. Whereupon the motion passed unanimously on a voice vote.

Commissioner Wainwright moved that the Board direct staff to proceed with formal rulemaking consistent with the fees adopted by the Board. Vice President Johnston seconded the motion. President Miller called for discussion by the Board and comments from the public. There were none. Whereupon the motion passed unanimously on a voice vote.

**12. Pilot Fitness Committee – Commissioner Roberts**

There was no report.

**13. Low Sulfur Fuel – Executive Director Garfinkle**



There was no report.

#### **14. Ad Hoc Working Group on Trainee Recruitment – Commissioner Wainwright**

Commissioner Wainwright reported that the Ad Hoc Working Group on Trainee Recruitment met on September 11, 2012 and would meet again on October 4, 2012.

#### **15. Continuing Education Committee – Commissioner Roberts**

Commissioner Roberts reported that the Committee had not met since the last Board meeting but that the San Francisco Bar Pilots were compiling information on manned model facilities to be presented to the Board.

#### **16. Pilot Power Committee – Commissioner Roberts**

Commissioner Roberts reported that the Pilot Power Committee had not met since the last Board meeting.

#### **17. Ad Hoc Committee on Blue Card Rates – Vice President Johnston**

There was no report. Capt Horton expressed interest in seeing this Committee continue work on its agenda. Vice President Johnston, who chairs the Committee, requested that it schedule another meeting as soon as possible. Board staff will poll Committee members to set a date.

#### **The Board then considered Agenda Item # 20.**

#### **20. Proposal to reschedule December Board meeting date from December 20, 2012 to December 13, 2012.**

President Miller spoke to the question of scheduling for the Board meeting in December, 2012. He explained to the Board and to the public that the Board historically has met on the fourth Thursday of each month, except in November and December when the meeting dates were advanced to the third Thursday of the respective months in order to accommodate holiday plans and travel of Board members, staff, and the interested public. The third Thursday in December, 2012 falls on December 20, 2012 which is a date quite close to the December holidays. Vice President Johnston moved that the Board reschedule its December meeting from December 20, 2012 to December 13, 2012. Commissioner Cronin seconded the motion. President Miller called for further discussion by the Board and comments from the public. There were none. Whereupon the motion passed unanimously on a voice vote. President Miller requested staff to notify all interested parties of the change of the December meeting date.

## **21. Public Comment on Matters not on the Agenda**

There were no comments.

## **22. Proposals for Additions to Next Month's Agenda**

There were no proposals

**The Board stood in recess at 10:36 a.m.**

**The Board reconvened in open session at 10:53 a.m.**

President Miller noted that by inspection all Commissioners (except Commissioners Brooks and Osen) had returned and that a quorum was present. Member Morocz and Commissioner Osen were present by telephone.

**The Board then considered Agenda Item # 19.**

### **19) IRC Incident Report on the M/V MULBERRY WILTON interaction with the M/T OVERSEAS TAMPA while passing Plains Terminal, Martinez, on January 27, 2012 – Vice President Johnston and Executive Director Garfinkle.**

Commissioner Johnston, as chair of the Incident Review Committee, introduced Executive Director Garfinkle, who presented the IRC's report concerning the vessel interaction on January 27, 2012, between the M/V MULBERRY WILTON, piloted by Captain Michael Sweeney, and the M/T OVERSEAS TAMPA, which was moored at the Plains Terminal just east of the Union Pacific Railroad Bridge. As a result of the interaction, certain of the mooring pendants of the OVERSEAS TAMPA parted. There was no other damage.

Captain Sweeney was represented by attorney David Singelstad. Mr. Singelstad introduced navigation charts for the area and discussed the issues presented in the IRC report. Captain Sweeney also spoke and responded to questions.

Issues presented included the speed of the MULBERRY WILTON as it passed the OVERSEAS TAMPA, impaired visibility due to fog and darkness, the handling characteristics of the MULBERRY WILTON, whether the OVERSEAS TAMPA was properly moored, what options Captain Sweeney had to avoid or mitigate the interaction that occurred between the two vessels, and whether he exercised reasonable care and prudence under all the circumstances.

At the conclusion of the hearing, the Board adjourned into closed session to deliberate. The closed session was attended by President Miller and Board members Cronin, Roberts, Wainwright, and (by telephone) Morocz (representing ex officio member Brian Kelly, Acting Secretary of the Business, Transportation and Housing Agency).

**The Board began its deliberations in closed session at 12:06 p.m.**

**The Board returned in open session at 1:30 p.m.**

The Board returned to open session to announce its decision.

President Miller noted that by inspection all Commissioners (except Commissioners Brooks and Osen) had returned and that a quorum was present. Member Morocz was present by telephone.

The Board determined that no pilot error was established regarding Captain Sweeney. It ordered that the incident be evaluated for lessons learned. The IRC report will be delivered to the Pilot Evaluation Committee for review. Within 90 days, Captain Sweeney will present a “chalk talk” concerning the incident to the PEC and current pilot trainees and discuss with them what can be learned from the incident for future educational purposes.

**The Board then considered Agenda Item #18.**

#### **18. Report of the Attorney General's Office – Board Counsel Eagan**

Report on current litigation: Pacific Merchant Shipping Association vs. BOPC and Bruce Horton as Port Agent, Writ of Mandate. **The Board may go into closed session to discuss with Board Counsel any matters subject to attorney-client privilege as per Government Code Section 11126(e)(i) of the Bagley-Keene Open Meeting Act.**

Board Counsel Dennis Eagan delivered an update on the lawsuit filed by the Pacific Merchant Shipping Association against the Board and the Port Agent under the California Public Records Act.

The lawsuit seeks an order requiring both the Board and the Port Agent to produce, for the years 2002 through 2011, documents that PMSA describes as “Pilot Logs.” In their responding papers, both the Board and the Port Agent advised that they do not have such documents. The Port Agent further stated that the San Francisco Bar Pilots do maintain a dataset that includes some of the types of information that PMSA asserts are contained in the “Pilot Logs.” He further stated, however, that this information is not used by him in the performance of his duties as Port Agent.

After a hearing on September 18, 2012, the superior court concluded that the Port Agent was a “public official” under the California Public Records Act and that he used the “Pilot Logs” in the performance of his public duties. The court ordered the Port Agent to respond to the court’s order in one of three ways: (1) produce the Pilot Logs, (2) submit a query to the database that would produce the requested data that PMSA asserted is in the “Pilot Logs,” or (3) unequivocally declare under penalty of perjury that the data do not exist or are not within

his control. Concerning the Board, the court ordered it to submit a like declaration if the data do not exist or are not within its control.

In so ruling, the court declined to accept arguments that:

- The SFBP is a private, nongovernmental organization whose records are not subject to the Public Records Act.
- The Port Agent is not a state officer subject to the Public Records Act.
- The only records subject to disclosure under the Public Records Act are those that the Port Agent is required to provide to the Board pursuant to Board regulation or Board request.

The superior court denied other relief requested by PMSA, including the following:

- It denied a request for a declaration that all documents in the Port Agent's possession that are "related to the business and official duties of pilots" are public records.
- It denied a request that the Board and the Port Agent be required to prepare an index of, and identify the location of, all other types of records that are used, maintained, or retained by the Port Agent as they relate to his statutory duties.
- It denied a request that the Board and the Port Agent provide a description of all other documents used, maintained, or retained by the Port Agent.
- The court stated that it was not requiring the Port Agent to create documents that did not exist.

If either the Board or the Port Agent wishes to seek appellate review of the superior court's decision, they have until October 10th to do so.

**The Board went into closed session at 1:37 p.m. to discuss with Board Counsel matters subject to the attorney-client privilege.**

**The Board returned in open session at 2:20 p.m.**

President Miller noted that by inspection all Commissioners (except Commissioners Brooks and Osen) had returned and that a quorum was present. Member Morocz was present by telephone.

President Miller reported that the Board had discussed with Board Counsel matters subject to the attorney-client privilege.

## **23) Adjournment**

There being no additional matters to be brought before the Board, it adjourned at 2:22 p.m.

Respectfully submitted,

Kelly Dolcini  
Staff Services Analyst