

Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun
Pier 9, Suite 102, San Francisco, CA 94111
Phone: (415) 397-2253 Fax: (415) 397-9463
E-mail: pilots@earthlink.net
Website: www.pilotcommission.org



September 23, 2009

MINUTES OF BOARD MEETING

August 27, 2009

OPEN MEETING

Call to Order and Roll Call- 9:35AM

President Miller presided. Vice President Tate, Commissioners Johnston, Osen, Roberts and Wainwright were all present, constituting a quorum. Business, Transportation and Housing Deputy General Counsel Gabor Morocz was present as delegate for Secretary Bonner. Also present: Executive Director Captain Patrick Moloney, Assistant Director Nancy Hall Bennett, Dennis Eagan from the CA Attorney General's office, Raymond Paetzold as maritime counsel, Staff Services Analyst Katharine Weir; Captain Richard Hurt representing the San Francisco Bar Pilots as Acting Port Agent during Peter McIsaac's absence; PEC Chair Captain Einar Nyborg and various members of the audience.

1) **Request Approval of Minutes-**

A motion was made and seconded to approve the July 23, 2009 regular Board meeting minutes. There were no corrections, comments or discussion and the motion passed unanimously.

2) **President's Report** - Commissioner Miller

President Miller reported that an application for a Temporary Restraining Order (TRO) had been filed earlier that week in San Francisco Superior Court on behalf of SFBP Pilot Captain Michael Simenstad seeking to prevent the Incident Review Committee from issuing its report on its investigation of alleged violation of speed restrictions in a Regulated Navigation Area by the M/V XIN NING BO at today's Board meeting. Deputy Attorney General Judith Loach filed an opposition to the TRO application. The Court denied the application for a TRO on August 26.

3) **Comments from Secretary, Business, Transportation and Housing Agency-** Secretary Bonner

Mr. Morocz reported that a lawsuit was filed by SEIU (a union representing government employees) against the BOPC regarding the Executive Order imposing furloughs on the

employees of special funded agencies, including those of the BOPC. The Board will be represented by attorneys from the Department of Personnel Administration.

Mr. Morocz also reported that a revised State Budget had been approved. There were a few remaining issues within that Budget but none that would affect the BOPC. Additionally, Mr. Morocz stated that the issuance of IOUs to contractors in lieu of checks for goods and services provided to state agencies would be ending on September 4, 2009.

4) **EFI Actuary Report Regarding Pension Plan**- Graham A. Schmidt, ASA; consideration of the report by the Board; possible Board action to accept the report.

Mr. Schmidt presented the report by his firm, EFI Actuaries, which had been commissioned by the fiduciary for the Pilot Pension Plan at the direction of the Board. A copy of this report is available at the BOPC office.

There was discussion regarding various aspects of the report, its purpose and intent, and the effect of Board action to accept the report (that it was not equivalent to endorsing the report or adopting its conclusions).

A motion was made by Commissioner Tate and seconded by Commissioner Osen to accept the report. Commissioners Wainwright and Roberts stated that they would need additional time to understand the report before they could vote to accept it. A roll call vote was called. The motion passed 4-2 with Commissioners Miller, Tate, Osen and Johnston voting "YES" with Commissioners Roberts and Wainwright voting "NO".

Mr. Jacob thanked the Board for completion of the study.

Commissioner Roberts requested that Mr. Schmidt's contract be extended in order to meet with the Pension Committee and further explain the report. He also requested that the Pension Committee meet to discuss the findings and implications of the actuarial study. Commissioner Tate stated that he would look into it.

5) **Executive Director's Report**- Executive Director Moloney

a. Correspondence/Activities since the July 23, 2009 meeting

Received:

- o 25 June Letter from Department of Personnel regarding SEIU v. Schwarzenegger
- o 5 August Letter from John McLaurin, PMSA regarding a request to recalculate the pension of Captain John Cota
- o 11 August Letter from Ghirardo CPA regarding pension plan participation

Sent:

- o 28 July Letter to Department of Personnel requesting representation for the Executive Director regarding SEIU v. Schwarzenegger
- o 3 August Letter to Capt. Welch regarding his Not Fit for Duty status
- o 10 August Letter to stakeholders requesting completion to receive agendas via e-mail rather than US postal service

There was a discussion regarding the status of the license of a pilot who is not fit for duty at the time his or her license expired and the means to ensure that a license is not renewed without evidence that the pilot is fit for duty.

Captain Moloney stated that he has since developed a checklist to prevent the issuing of licenses without a Fit For Duty clearance from a board approved doctor.

It was suggested that the Executive Director include in his monthly report on license renewals the status of any licenses that expired but had not been renewed and the reason (such as the lack of a current fit for duty determination by a Board examining physician.)

Assistant Director Bennett noted that the August 10 letter to stakeholders asking interested parties whether they would like to receive future mailings via email or United States Postal Service was mailed out in response to the Board's request to reduce mailing expenses.

b. Other Pilot Matters-
None to report

6) **Port Agent's Report**- SFBP Captain Peter McIsaac
Captain Richard Hurt reported as the Acting Port Agent while Capitan McIssac is away until his return on September 18, 2009.

Not Fit for Duty Status (NFFD):

- o Captain Welch NFFD since Nov 12, 2008 per the BOPC physician.
- o Captain Pinder had back surgery July 3rd expects to be back to work Sept. 16th.
- o Captain McCloy had knee surgery on June 30th and expects to be back to work Sept. 2nd
- o Captain Lemke reported NFFD Aug 23rd. Possible food poisoning. Expects to be back Sept 2nd.

Pilot Vessels: New Build - Progress of construction of the new station boat continues with expected delivery date in late Sept.

P/V Golden Gate- removed from service Aug 17th for annual maintenance and expected to be back in service Aug 28th.

CARB – Low Sulfur Fuel - There have been additional reports of vessels losing power or similar engineering issues that may have been associated with shifting to low sulfur fuel as required by CARB regulations that went into effect on July 1. The pilots and USCG are following these incidents closely. There was further discussion of experiences with similar incidents and comparisons with the experience in other ports. It was requested that this item be placed on the Board's agenda for its September meeting.

MRP Exceptions- There were 2 MRP exceptions in July with the shortest rest period being 11 hrs.

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Billed Vessel Moves in July compared to a three-year average:

Bar Crossings: - 6.7 %
Bay Moves: - 25.1 %
River Moves: - 26.7 %
Total Moves: - 11.1 %
GRT: 24.99M - 6.7 %

Compared to the first seven months of 2008 total moves were down 8.3%, GRT was down 6%, and total bar moves were down 4.3%.

This data will be shared with the maritime community at the next Marine Exchange meeting.

Unfinished Business

- 7) **Pilot Ladder Reportable Incidents**- Executive Director Moloney
None to report.
- 8) **Non-Incidents**- Executive Director Moloney
None to report.
- 9) **Open Incidents**- Executive Director Moloney
 - a. ***M/V MORNING MERMAID***, hard landing, Richmond Berth 8, June 19, 2009
Executive Director Moloney requested a one-month extension as the IRC had been concentrating its efforts on the XIN NING BO incidents. A motion was made by Commissioner Wainwright to grant a one-month extension and seconded by Commissioner Johnston. The motion was unanimously approved without further discussion or public comment.
 - b. ***M/V KRITI JADE***, mast struck UPRR Bridge and Benicia/Martinez Highway Bridge, June 26, 2009
Executive Director Moloney reported that the investigation was still in progress and that a report would be ready for the September Board meeting.
- 10) **Rules and Regulations Committee**- Commissioner Wainwright
Commissioner Wainwright reported that the Committee planned to schedule its next meeting for September 17, 2009 with a focus on: 1) Investigator qualifications; 2) Board Physician qualifications; 3) Statement of Incompatible Activities; and 4) Amendment of the Board's Conflict of Interest Code. He anticipated that the committee may need assistance from government counsel on the treatment of confidential personal information under the recent legislation. There was a discussion on staffing and the rulemaking process.
- 11) **Finance Committee**- Commissioner Osen
Status of Implementing EO 09-09
Assistant Director Bennett reported that staff was currently tracking the implementation of Executive Order 09-09.

Commissioner Osen announced that the Finance Committee plans to schedule its next meeting for September.

12) Pilot Continuing Education Committee- Commissioner Roberts

Commissioner Roberts reported on contract matters involving payments to Port Revel and the status of the development of performance evaluations by MITAGS. He noted that any future amendments to the Port Revel contract should include a provision for performance evaluations.

13) Pilot Evaluation Committee- Captain E. Nyborg

The Pilot Evaluation Committee met on August 19th, 2009. Capt. Nyborg thanked Assistant Director Bennett for attending the open session portion of the meeting where they were able to discuss methods for evaluating trainees, the tools the PEC used to chart their progress, recent improvements, and upcoming needs and issues.

In closed session, all eight trainees were interviewed individually. The current trainees are: Captains Tylawski, Bridgeman, Martin, Ruff, Merritt, Fawcett, Peerey and Kellerman. Trainees' time in the program ranges from 3 months to 25 months. All trainees are progressing at each individual's own rate. The PEC will not be recommending any trainees for appointment within the next 3 months. There may be possible recommendations for 2 or 3 appointments within the next 6 months. Currently, there are no foreseeable problems with the progress of any individual that are notable at this time.

PEC and two trainees met at the CMA simulator on August 5 and 20th. Capt. Moloney and Maritime Counsel Paetzold were in attendance. The trainees and an untested pilot were all run through the simulation. Some problems were identified and corrected. The score sheet was evaluated and amended. Capt. Nyborg reported that the simulator portion of the examination was well along for timely completion, subject to approval by the Board's psychometric contractor.

Progress on the written portion of the trainee selection exam remains stalled pending approval of the COMIRA contract. The PEC's target date for administration of the next trainee selection exam remains May 2010 at CMA.

The PEC is also waiting for the funding from the Commission to proceed with scheduling the PMI's Train the Assessor course for PEC members. Capt Nyborg stated that the PEC is hoping to attend the course this fall or winter.

The next PEC meeting is scheduled for September 23, 2009.

14) Pilot Power Committee- Commissioner Roberts

Nothing to Report

15) Pension Committee- Commissioner Tate

Nothing to Report

16) Pilot Vessel Advisory Committee- Commissioner Johnston

Nothing to Report

17) **UPRR Bridge**- Executive Director Moloney

Nothing to Report

18) **Ad Hoc Advisory Committee on Pilot Selection** - Commissioner Tate

Nothing to Report

19) **Navigation Technology Committee**- Commissioner Johnston

Nothing to Report.

20) **Pilot Identification Cards**- Executive Director Moloney

Assistant Director Bennett reported that she is looking into a possible contract by competitive bidding to prepare credit card-size identification cards for pilots, the one inland pilot, trainees, investigators, and Commissioners.

Ad Hoc Committee to Review Investigation Procedures- Commissioner Osen

Commissioner Osen made a motion, which was seconded by Commissioner Tate, to initiate rulemaking to adopt minimum standards for a Commission Investigator to include:

1. Basic Knowledge of Investigation Techniques, including:
 - Questioning witnesses
 - Identifying, obtaining and securing evidence
 - Preparing Reports as directed by IRC

2. Basic Knowledge of Maritime Issues, including familiarity with:
 - Commercial vessels and their operation in piloting waters
 - Shipboard navigation equipment, logs and recording devices related to navigation, propulsion and steering
 - Tugs used in assisting and escorting ships in harbors
 - Pilot ladders and related USCG and IMO safety standards
 - Mooring facilities and the proper mooring of ships
 - Obtaining access to shoreside facilities and to moored and anchored ships within the geographic jurisdiction of the Board of Pilot Commissioners

3. Possesses current Transportation Worker Identification Credential (TWIC) issued by the Department of Homeland Security; and

4. Physically fit to perform the above functions.

The vote was unanimous and the motion was adopted.

22) **Pilot Trainee Selection Process**- Captain E. Nyborg

Please see Agenda Item 13.

23) **Pilot Fitness Committee**- Commissioner Roberts

Commissioner Johnston made a motion, which was seconded by Commissioner Osen to initiate rulemaking to adopt minimum qualifications for Board Examining Physicians, to include:

1. Possession of current license to practice medicine from the State of California

2. Minimum of five (5) years experience in occupational medicine

3. Qualified to determine suitability of a person to perform the duties of a maritime pilot licensed by the Board of Pilot Commissioners, including familiarity with

- Duties of a pilot, inland pilot and pilot trainee
- Techniques and procedures to assess physical fitness for performing piloting duties
- Evaluating the effects of prescription medications on fitness to perform piloting duties

The Board's Pilot Fitness Committee expects to receive more detailed recommendations on the qualifications of Board examining physicians from Dr. Kosnik under the Interagency Agreement with the U.C. San Francisco Medical Center (addressed under Agenda Item 23.c.) in time to be considered during the rulemaking process.

The vote was unanimous and the motion was adopted.

The next meeting for the Pilot Fitness Committee was scheduled for September 17, 2009.

24) Board Audit

There was a brief discussion on the status of the audit and the process for Board response.

Vice President Tate made a motion, which was seconded by Commissioner Johnston, to authorize Commissioner Miller, and/or Executive Director Moloney to respond on behalf of the Board as provided by the audit procedures. The vote was unanimous and the motion was adopted.

New Business

25) Legislation- SB 300 (Yee)

Assistant Director Nancy Bennett provided the Board with an updated version of SB 300 including amendments through August 20, 2009.

Mr. Jacob announced that PMSA was no longer opposed to SB 300. It currently has no position on the bill.

A motion was made by Commissioner Wainwright and seconded by Commissioner Johnston to support the August 20, 2009 version of SB 300. The vote was unanimous and the motion was adopted. Staff will prepare an Enrolled Bill Report to the Governor's Office.

Other Matters

26) Public Comment on Matters not on the Agenda

There were none.

27) Proposals for Additions to Next Month's Agenda

There were none.

At 12:05 PM, President Miller announced that the Board would recess until 1:30 PM and would resume the Open Meeting to convene for a report from the Incident Review Committee on Agenda Item 28.

The Open Meeting reconvened at 1:35 PM.

INCIDENT REVIEW COMMITTEE-

28) Hearing Under Harbors and Navigation Code Section 1180.6(a)

At 1:35p.m. Commissioner Miller, presiding, opened the Board informal hearing to receive investigation reports from the Incident Review Committee (IRC) as noticed on the agenda. He noted that this portion of the open meeting would be recorded. A roll call was taken. In attendance were: Commissioners Miller, Tate, Osen, Roberts, and Wainwright and representing Secretary Bonner, was Mr. Morocz. Board Counsel, Dennis Eagan sat with the aforementioned Commissioners.

Commissioner Johnston was in attendance as well and sat with Maritime Counsel Gary Gleason and Executive Director Patrick Moloney at a separate table. At another table, Captain Simenstead sat with his Attorneys, George Nowell and John Cigavic III.

Commissioner Miller asked Board Counsel Eagan to briefly explain the process. Mr. Eagan explained the informal hearing process and the options available to the Board following the presentation of the report from the Incident Review Committee and any additional evidence by the pilot or the committee.

Mr. Nowell requested a continuance of the proceedings. Mr. Eagan advised the Board on its options. President Miller noted that the pilot's request to issue a Temporary Restraining Order (TRO) which would have prevented the IRC from issuing its report today had already been denied by a court of competent jurisdiction and that the Board would proceed with the receiving the IRC's report.

President Miller then read Agenda Item #28:

On February 7, 2009, there was a report of a vessel interaction between *M/V XIN NING BO* and *M/V BONASIA* at Oakland Berth 65. On the same date, there was a report of excessive speed by *M/V XIN NING BO* in a regulated navigation area. At this hearing, the Board will receive the report of the Incident Review Committee concerning these incidents, hear presentations by the Incident Review Committee and the pilot involved, and consider what action to take under Harbors and Navigation Code Section 1180.6(a).

President Miller then called on the IRC to present its report. Mr. Gleason offered Exhibits A and B which are the IRC's reports on its investigation of the vessel interaction report and of the excessive speeding report, respectively.

Mr. Nowell again objected to the reports and asked for a continuance of any further presentation of evidence maintaining that his client only became aware of the IRC's determination of a second segment of excessive speeding during the same voyage only 14 days ago, that, until that time, the pilot was under the impression that the matter would be closed and that while the Superior Court had denied the TRO, the pilot's request for a preliminary injunction was still pending before the Court.

There was additional discussion on the availability of various ship's documents pertaining to the speeding allegations.

After consulting with Board counsel, President Miller announced that the Board would move into closed session to deliberate on the request for continuance, as authorized by Government Code Section 11126(c)(3).

The Board went into closed session at 2:22 p.m. to deliberate on the pilot's request for a continuance and resumed its open session at 2:44 p.m..

President Miller announced that the Board voted to grant a continuance and that the hearing will be continued to the next regular Board meeting, which was scheduled for September 24, 2009.

29) Closed Session to Consider Action Regarding M/V XIN NING BO Incidents

Continued to September 24, 2009 meeting.

30) Announcement of Decision

Continued to September 24, 2009 meeting.

President Miller then closed the meeting at 2:45 p.m. to address the following Agenda Items as authorized by the Open Meeting Act, Government Code Section 11126(e)(1):

31) Confer with the Board's legal counsel regarding pending litigation in United States of America vs. M/V COSCO BUSAN, et al., Case No. C 07 06045 (SC); People of the State of California (Caltrans) vs. Regal Stone, Ltd, et al., filed in Admiralty, Case No. 2268 EMC, pending in the United States District Court for the Northern District of California; Anderson, et al. v. Cota et al., Case No. CGC-08-483409, pending in San Francisco Superior Court; and in Regal Stone v. People of the State of California, Case No. 34-2008-00035818-CU-TT-GDS, pending in the Sacramento Superior Court, including cross-actions, counter-claims and related actions pending in federal and state court arising out of the same incident, as authorized by Government Code Section 11126(e)(1).

32) Update on Performance Evaluation of Board's Executive Director as authorized by Government Code section 11126(a)(1).

The Board resumed its Open Session at about 3:25 p.m.

33) Announcements

Announcement of any Board actions taken in the closed session, where required by the Open Meeting Act.

President Miller announced that no Board action was taken during the closed meeting.

34) Adjournment

The meeting was adjourned at about 3:30 p.m.

Respectfully submitted,

Nancy Hall Bennett,
Assistant Director