

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

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### MINUTES OF BOARD MEETING September 24, 2009

#### Call to Order and Roll Call -9:35 AM

President Miller, Vice President Tate, Commissioners Johnston, Osen, Roberts and Wainwright were all present, constituting a quorum. Also present: Executive Director Captain Patrick Moloney, Assistant Director Nancy Hall Bennett, the Port Agent, Capt. Peter McIsaac, Attorneys Chris Tiedemann (substituting for Dennis Eagan, the Board's government counsel, who was on vacation) and Raymond Paetzold (maritime counsel), and Staff Services Analyst Katharine Weir. On this occasion, Business, Transportation and Housing Secretary Bonner was not represented.

President Miller noted the presence of several people in attendance:

- Deputy Attorney General Jon Cooper of the Licensing Section in the AG's office in San Francisco. Mr. Cooper will be the Board's government legal counsel on licensing law and licensing matters.
- Capt. Andrew Coe, President of the Puget Sound Pilots and Walt Tabler, Executive Director and Chief Counsel of Puget Sound Pilots
- Capt. Paul Amos, President of the Columbia River Pilots.

#### 1) Request Approval of Minutes-

A motion was made and seconded to approve the August 27, 2009 regular Board meeting minutes. The minutes were approved without further comment or amendment. President Miller noted that during a closed session at the August 27, 2009 meeting, the Board had voted to grant the continuance requested by Capt. Simenstad in the XIN NING BO matter but took no other action during the session regarding the pending evaluation of the Board's Executive Director at the end of August 27, 2009 Board meeting.

#### 2) President's Report – President Miller

President Miller congratulated Commissioner Osen on his appointment to the Harbor Safety Committee and noted that he will chair the Subcommittee on California Air Resources Board (CARB) regulations requiring the use of low sulfur fuel. President Miller also noted that this would be the last Board meeting attended by San Francisco Bar Pilots Business Director Kenny Levin due to his retirement. Mr. Levin has served in that capacity for nearly 10 years and has

been a regular participant in Board and committee meetings. President Miller wished Mr. Levin well in his retirement.

3) **Executive Director's Report**- Executive Director Moloney  
a. Correspondence/Activities since August 27, 2009 meeting:

Received:

- 4 September Letter from the Office of the Attorney General regarding Pension benefit calculations documents.
- 11 September Letter from Ghirardo CPA regarding September 2009 Pension allocation and mill calculations worksheets.
- 15 September Letter from Capt. Welch regarding his intent to file for disability retirement under current HNC and BOPC regulations.

Sent:

- 2 September Letter to Marine Operations requesting vessel speed information for the XIN NING BO.

b. Other Pilot Matters - Nothing to Report

4) **Port Agent's Report**- SFBP Captain Peter McIsaac ó reported that retired SFBP Capt. Don Hughes passed away.

**NFFD:**

Captain Welch was found NFFD on Nov 10.

Captain Fuller has been NFFD since Aug 25<sup>th</sup> due to severe back pain. He is undergoing P.T. and will be reevaluated next week.

Captain Pinder was NFFD from July 3<sup>rd</sup> until Sept 16<sup>th</sup> while recovering from back surgery.

Captain McCloy was NFFD from June 30<sup>th</sup> until Sept 2<sup>nd</sup> while recovering from knee surgery.

Captain MacLachlan was NFFD from July 29<sup>th</sup> until Aug 26<sup>th</sup> while recovering from a broken toe.

**New Build** – anticipated acceptance for the new *P/V DRAKE* date is Oct 6<sup>th</sup>, 2009

**Old Drake**- The SFBP reached a sales agreement with a private individual to sell the boat for \$40K. As per the regulation net monies received will be used to reduce the debt on the new boat.

**Man Overboard**- On Sept 10 a crewmember on a container vessel approaching the Bay Bridge fell overboard. The crew of the PV Golden Gate recovered the victim and passed him over to a Coast Guard vessel. Commissioner Roberts noted that he was aboard the pilot boat and complemented the crew on their timely and professional efforts to recover the victim.

**Recommended Minimum Rest Period (MRP) Exceptions:** There were 11 over four days during the month of August. The shortest rest period was 9.7 hours and the average was 10.8. Six of the exceptions occurred during Board mandated training.

### **Billed Vessel Moves in Aug 09 compared to a 3-year average**

Bar Crossings: -7.5%

Bay Moves: -25.8%

River Moves: -27.2%

Total Moves: -11.9%

GRT: 25.2M -7.2%

Compared to the first eight months of 2009 bar crossings were down 4.6%; total moves were down 8.7% and GRT were down 6.4 %.

There was a brief discussion regarding the continued decline in ship movements and GRT and the effect on local and regional economy.

### **Unfinished Business**

#### **5) Pilot Ladder Reportable Incidents- Executive Director Moloney**

**\*\*\*\*need additional information\*\*\*\***

Executive Director Moloney distributed a report of a pilot ladder incident aboard the M/V \_\_\_\_\_. A copy is available at the Board office. The matter had been reported to the Coast Guard. The IRC determined that the vessel was not scheduled to return to the San Francisco Bay area. It was moved and seconded to accept the report. The motion carried without further discussion or comment.

#### **6) Non-Incidents- Executive Director Moloney ó nothing was reported at this time.**

#### **7) Open Incidents- Executive Director Moloneyó the hearing on the following items was moved to the end of the agenda until completion of the remaining non-IRC items:**

- a. *M/V MORNING MERMAID*, pilot SFBP Capt. Bill Wells, hard landing, Richmond Berth 8, June 19, 2009
- b. *M/V KRITI JADE*, pilot SFBP Capt. Arnold Kelso, mast struck UPRR Bridge and Benicia/Martinez Highway Bridge, June 26, 2009

Both of these incidents were reported under items 33 ó 34 below. Executive Director Moloney reported that there had been three new incidents that occurred in August:

1. M/V S.H. GRACE, grounding in Sacramento DWS Channel, vicinity of Mark 49A ó Aug. 27, 2009;
2. M/V TASMAN RESOLUTION, grounding near Light 34, San Joaquin DWS Channel ó Aug. 27, 2009;
3. M/V VOC ROSE, allision/hard landing, Stockton Berths 12/13 ó Aug. 29, 2009.

All incidents are under investigation.

- 8) **Rules and Regulations Committee**- Commissioner Wainwright  
Reported on the results of September 17, 2009 committee meeting: The following have been sent to rule drafting technician to prepare for formal rulemaking: Minimum qualifications for Commission Investigators and Board Examining Physicians, amending the Board's Conflict of Interest Code, amending the Board's regulations on continuing education including procedures to extend time to complete mandated continuing education, and amending Board regulations regarding the Port Agent's reporting requirements and regarding records on vessels piloted. A draft Statement of Incompatible Activities had been prepared but the committee was waiting to discuss with BTH counsel before making a recommendation. No Board action was required at this time.
- 9) **Finance Committee**- Commissioner Osen  
Reported on committee meeting of September 22, 2009; no recommendations to adjust surcharges at this time; motion made and seconded to seek annual contract with CPA firm doing SFBP audit to perform audit of receipts and disbursement under statutory pilot pension plan. Motion carried.  
Discussion was had in regard to expanding the audit to other board collected surcharges and will be added to a future agenda to discuss possible expansion to include similar audit of remaining surcharges.
- 10) **Pilot Continuing Education Committee**- Commissioner Roberts reported on progress made on performance evaluations and expects to receive evaluation forms for the last class that attended MITAGS shortly.
- 11) **Pilot Evaluation Committee**- Captain E. Nyborg  
The Pilot Evaluation Committee met on Sept. 23, 2009.

In closed session, all eight trainees were interviewed individually. The current trainees include: Tylawski, Bridgeman, Martin, Ruff, Merritt, Fawcett, Peery, and Kellerman. Their time in the program ranges from 4 months to 26 months. All trainees are progressing at their own rate. The Committee was certain there would be no recommendations for appointments within 3 months. There may be recommendations for 1-3 appointments within the next 6 months. There are no problems with the progress of any individual that is notable at this time.

*Progress on the written portion of the Entry Exam:*

This part of the exam remains stalled until the COMIRA contracts are approved. The target date for the exam remains May 2010. Next month, the Committee would divide the recommended maritime reference books on the list provided to applicants and begin the process of creating fresh written questions. Normally the PEC would do this with the help of the psychometricians, but the PEC felt that further delay would result in larger problems.

*PMI Train the Assessor course for PEC members:*

The Committee is waiting for the funding from the Commission to proceed with scheduling this training. PEC members hope to attend the course this fall or winter.

*Status of the Trainee Drug Testing Program:*

Two months ago it was determined that the Trainee drug-testing program was lacking. It was determined that this program was a responsibility of the Board. In light of delays inherent in

State contracting and funding, SFBP has entered into a temporary contract with a testing company to develop and administer a program that meets State and Federal requirements for random and post-incident testing of mariners. In the first month four trainees were randomly tested. In the 2<sup>nd</sup> month, two separate River incidents with trainees on board resulted in the post-incident testing of 6 trainees. These trainees were not piloting the vessel, but were required to be tested by the USCG. Capt. Nyborg thanked Capt. McIsaac, Fran Black, Kenny Levin and David Gates for their help in moving this program forward to fill the void until the state contracting process can be completed.

Assistant Director Bennett informed the Board that she has consulted with CHP contract administration personnel and has been informed that the necessary contract to provide the mandated drug testing services of trainees must be put out for bid and would provide an update at the next Board meeting.

The next PEC meeting will be Oct. 21, 2009.

Assistant Director Bennett discussed providing staff support for PEC ó including developing less cumbersome graphing tools to permit PEC to track traineesøprogress in the program.

- 12) **Pilot Trainee Selection Process**- Captain E. Nyborg  
CMA simulator portion of the trainee selection exam is nearly ready, pending score sheet adjustment and approval by psychometric experts. Assistant Director Bennett explained reasons for the delay in contracting with COMIRA and would provide an update at the next Board meeting. She stated that it was not unrealistic to have the contract in place by mid-November. Discussed how intensive written test development and how demanding of pilotsøtime to do it correctly. NW regional pilots reported on the process used there ó which was essentially the same. Discussion re whether private concern could prepare the exam, whether applicants can be charged a fee to cover the cost, as done in Washington State, differences in the laws. Columbia River does not have a fee schedule. The topic of a possible fee schedule will placed on the Boardø agenda for a future meeting.
- 13) **Pilot Power Committee**- Commissioner Roberts - Nothing to report.
- 14) **Pension Committee**- Commissioner Tate  
Commissioner Tate reported the Committeeø plans to hold a meeting for follow up on the EFI Actuarial Report. Commissioner Tate requested staff to look into process to secure funding to invite EFI to attend meeting and answer additional questions that the Board and public may have. Also planning meeting to address SFBP Capt. Welchø request for disability determination.
- 15) **Pilot Vessel Advisory Committee**- Commissioner Johnston - Nothing to report.
- 16) **UPRR Bridge**- Executive Director Moloney ó Nothing to report.  
(The incident in which a vesselø mast struck the bridge is reported under Open Incidents)
- 17) **Ad Hoc Advisory Committee on Pilot Selection** - Commissioner Tate - Nothing to report.
- 18) **Navigation Technology Committee**- Commissioner Johnston - Nothing to report.

- 19) **Pilot Identification Cards**- Assistant Director Bennett  
Status of obtaining a more substantial Pilot I.D. card. - Nothing to report.
- 20) **Ad Hoc Committee to Review Investigation Procedures**- Commissioner Osen - Nothing to report.
- 21) **Pilot Fitness Committee**- Commissioner Roberts  
Report on status of Interagency Agreement with UCSF, Dr. Kosnik. Commissioner Roberts expected the contract to be in place by October 1, 2009 but the contract approval process internal to UCSF has taken longer than expected. The meeting scheduled for September 17, 2009 was cancelled due to scheduling issues. The committee plans to meet in or after late October.
- 22) **Board Audit** - President Miller  
President Miller reported that the scheduled release date of the Bureau of State Audits (BSA) report is November 24, 2009. President Miller briefly outlined the procedure for the exit interview and for responding to the draft report. The Board's response will be published as part of the BSA Audit Report.
- 23) **Legislation** - President Miller  
President Miller reported on the status of SB 300 (Yee) regarding clean-up legislation. The bill is still on the Governor's desk awaiting signature. The Governor has until Oct. 11 to act upon the bill.

## New Business

- 24) **President's Term of Office** – Commissioner Tate  
Motion made and seconded to commence the formal rulemaking process to amend Title 7 Calif. Code of Regulations Section 206(a) to read as follows:
- (a) The Board shall elect a President from among its members, ~~who shall serve for a term of one year. A member shall not serve as President for more than two consecutive terms. The term of office is two years and it is renewable without any limitation. The President serves in such capacity at the pleasure of the Board, and could be recalled at any time by the members of the Board at a properly noticed meeting.~~
- (b) The President shall preside at regular and special meetings of the Board and direct the administrative operations of the Board.
- The motion carried with a unanimous vote. Board staff was directed to commence the formal rulemaking process.
- 25) **Low Sulfur Fuel** – effect on vessel safety of implementation of recent CARB regulations 6  
President Miller reported that Commissioner Osen had been appointed to the Harbor Safety Committee and will be able to keep the Board informed on the on-going efforts of the HSC on this issue and the reports of the Coast Guard's investigations of all reported incidents involving

potential engine problems resulting from implementation of the new regulations; the concern for vessel safety has been recognized and this matter will be kept on the Board's agenda. PMSA VP Jacob commented that the HSC needed to hear directly from the Board on this matter.

- 26) **Audit of Pension Surcharge** ó proposal to spend up to \$5K a year under a purchase order for audit of pension surcharge ó was discussed under Finance Committee, Item 9 above.
- 27) **Administrative Assistant** - moved and seconded to authorize staff to prepare conforming rulemaking amendments to delete reference to "admin assistant" as currently in regulation as the term is no longer applicable. Motion carried.
- 28) **Confidential Information - safeguarding** ó The Assistant Director reported to the Board that staff has taken precautions to secure and store all confidential materials in files in a lockable filling cabinet. This cabinet is to be remained locked at all times when access is not required.
- 29) **Pension Calculation** ó The Assistant Director reported that she was unable to develop a system to provide a calculation for this meeting, and requested from the board an extension to report back at the next meeting. Mike Jacob, of PMSA commented that this process should not serve as substitution for formal rulemaking on pension calculations.
- 30) **Form 700 procedures** ó The Assistant Director reported that she has developed a tracking system to record completed 700 forms. She stated she would have this form for the Board to view at the next meeting.

## **Other Matters**

- 31) **Public Comment on Matters not on the Agenda** - There were none.
- 32) **Proposals for Additions to Next Month's Agenda** -There were none.

## **Unfinished Business (continued)**

### **INCIDENT REVIEW COMMITTEE** – (Approximate start time 10:00 a.m.)

#### **Hearing Under Harbors and Navigation Code Section 1180.6(a)**

On June 19, 2009, there was a report of a hard landing of the auto carrier M/V MORNING MERMAID at Richmond Berth 8. On June 26, 2009, there was a report that the mast (antenna) of the M/V KRITI JADE struck the UPRR Bridge and the I-680 Highway Bridge. The Board received the reports of the Incident Review Committee concerning these two incidents, and heard presentations by the Incident Review Committee.

- 33) **Closed Session to Consider Action Regarding M/V MORNING MERMAID and M/V KRITI JADE Incidents**

After closing the hearing in the foregoing matters, the Board went into closed session to deliberate concerning appropriate action under Harbors and Navigation Code section 1180.6(a), as authorized by the Open Meeting Act, Government Code section 11126(c)(3).

## **RESUME OPEN MEETING**

### **34) Announcement of Decision**

The Board reconvened the public meeting and announced its decisions regarding the *M/V MORNING MERMAID* and *M/V KRITI JADE* incidents. President Miller announced the Board's decisions:

With respect to the *M/V MORNING MERMAID*, the Board agreed with the recommendation of the Incident Review Committee and found that there was no pilot error and the investigation is closed without further action.

With respect to the *M/V KRITI JADE*, the Board agreed with the recommendation of the Incident Review Committee and found that the occurrence was a non-incident and the investigation is closed without further action.

The Board recessed at 12:15 p.m.

The Board reconvened at 1:15 p.m.

The roll was called. Commissioners Miller, Tate, Wainwright, and Osen were present and seated at the dais. Commissioner Johnston was present and seated at the IRC table. A quorum was present. Executive Director Moloney also was seated at the IRC table.

### **35) Hearing Under Harbors and Navigation Code Section 1180.6(a)**

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 its August 27, 2009 Board meeting, the pilot of the *XIN NING BO* requested, and the Board granted, a one-month continuance to hear presentations on these matters. At this hearing, the Board will 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 made the following statement:

At our last meeting, we heard an opening statement from Mr. Gleason who submitted for the record the written reports from the IRC pertaining to two incidents involving the *XIN NING BO*. The Board received the reports, which were marked for the record as Exhibits A and B. Mr. Nowell, representing Capt. Simenstad, requested a continuance on various grounds. After deliberation in closed session, the Board granted the continuance to allow Capt. Simenstad and his counsel time to review the evidence and prepare a response. The Board returned to open session and I announced the action of the Board of the granting of the continuance.

President Miller then read a statement from Deputy Attorney General Judith Loach that addressed developments in San Francisco Superior Court with respect to litigation involving the Board and Capt. Simenstad:



- August 24, 2009: Capt. Simenstad filed an ex parte application for a temporary restraining order to enjoin the IRC from presenting its "excessive speed report" to the Board.
- August 26, 2009: Capt. Simenstad's TRO was denied by Judge Busch. The court also held that it did not have jurisdiction to consider the matter.
- September 11, 2009: Capt. Simenstad filed a motion for a preliminary injunction -- once again to enjoin the IRC from presenting its "excessive speed report" to the Board and/or having the Board "ever" consider the IRC's report on the Simenstad incident. The hearing for this is not set until October 6, 2009. Accordingly, it appears that the motion for preliminary injunction will be held to be moot by the time of the hearing.
- September 23, 2009: BOPC filed an opposition to Capt. Simenstad's motion for preliminary injunction and a demurrer to his Verified Complaint. Hearing on demurrer is set for October 20, 2009.

The Board then heard presentations by Mr. Gleason for the Incident Review Committee, and Mr. Nowell for Capt. Simenstad. A number of documents were offered and received and marked for identification in the record.

### **36) Closed Session to Consider Action Regarding M/V XIN NING BO Incidents**

After closing the hearing in the foregoing matter, the Board went into closed session to deliberate concerning appropriate action under Harbors and Navigation Code section 1180.6(a), as authorized by the Open Meeting Act, Government Code section 11126(c)(3).

## **RESUME OPEN MEETING**

### **37) Announcement of Decision**

The Board reconvened the public meeting to announce its decision regarding the *M/V XIN NING BO* incidents. President Miller announced the Board's decision:

The Board has determined, concerning the allegation of excessive speed, that there is a rational basis for concluding that the pilot's actions or failure to act may provide grounds for suspension of the pilot's license. Staff is directed to prepare and serve an accusation for suspension of the pilot's license. Concerning the interaction with the *M/V BONASIA*, the Board has determined that there was no pilot error, and that the investigation is closed without further action.

## **CLOSED MEETING**

The Board went into closed session to address the following items:

- 38)** 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, all as authorized by Government Code Section 11126(e)(1).

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

### **RESUME OPEN MEETING**

40) **Announcements**

Announcement of any Board actions taken in the closed session, where required by the Open Meeting Act: President Miller announced that the Board had taken no actions.

41) **Adjournment**

The meeting was adjourned at \_\_\_\_\_.