

Marine Pilots; Essential Colleagues or Convenient Scapegoats?

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Severson
& Werson



Today's pilots are:

- Indispensable
- Professional
- Highly Skilled
- Infallible

Indispensable?

- “Pilots are thus *indispensable* cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents ... It affects the safety of lives and cargo ...”

Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 558 (1947).

Trained, highly professional?

- “They are trained, highly professional individuals, whose judgments must be spot-on for the hundreds of decisions they must make ...”

Rear Admiral Brian M. Salerno, U.S. Coast Guard (2008).

Skilled

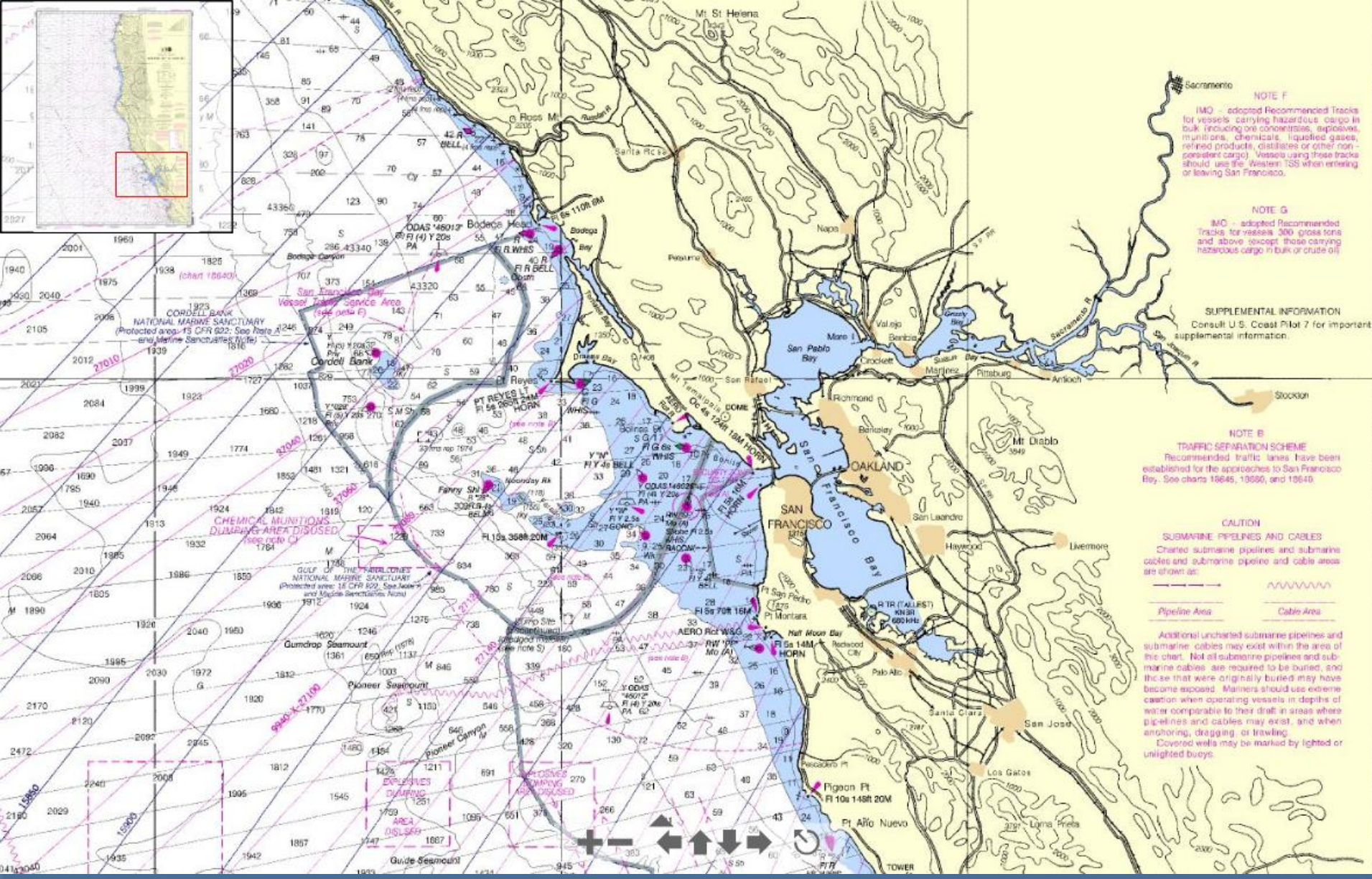
- One of the most challenging jobs in the maritime industry. *Bach v. Trident Steamship Co.*, 920 F.2d 322 (5th Cir. 1991); Judge John R. Brown.

Indispensable?

- Compulsory
- Federal and state law requires use of a pilot in most U.S. Ports and on major rivers.

San Francisco Bar Pilots

- 200 miles of harbors, rivers and channels



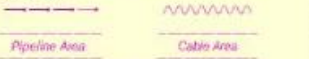
NOTE F
 IMO - adopted Recommended Tracks for vessels carrying hazardous cargo in bulk (including oil concentrates, explosives, munitions, chemicals, liquefied gases, refined products, distillates or other non-liquid cargo). Vessels using these tracks should use the Western TSS when entering or leaving San Francisco.

NOTE G
 IMO - adopted Recommended Tracks for vessels 300 gross tons and above (except those carrying hazardous cargo in bulk or crude oil).

SUPPLEMENTAL INFORMATION
 Consult U.S. Coast Pilot 7 for important supplemental information.

NOTE B
TRAFFIC SEPARATION SCHEME
 Recommended traffic lanes have been established for the approaches to San Francisco Bay. See charts 18645, 18686, and 18640.

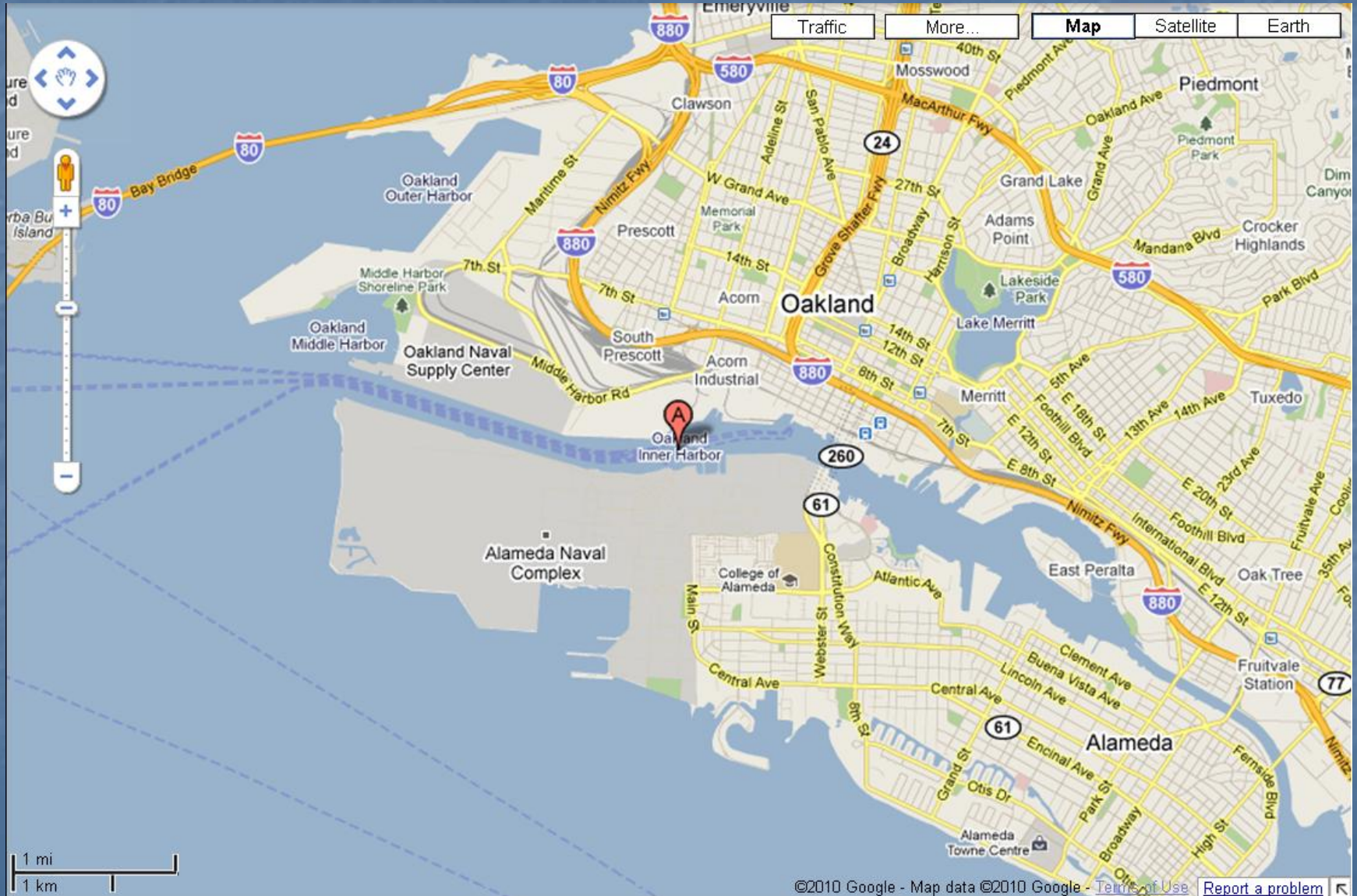
CAUTION
SUBMARINE PIPELINES AND CABLES
 Charted submarine pipelines and submarine cables and submarine pipeline and cable areas are shown as:



Additional uncharted submarine pipelines and submarine cables may exist within the area of this chart. Not all submarine pipelines and submarine cables are required to be buried, and those that were originally buried may have become exposed. Mariners should use extreme caution when operating vessels in depths of water comparable to their draft in areas where pipelines and cables may exist, and when anchoring, dragging, or trawling.
 Covered wells may be marked by lighted or unlighted buoys.

- 10 ports, 2 of them upriver 60 and 75 miles
- 172 days per year
- 24 hours a day
- Any weather
- Every ship that comes along

Port of Oakland - Alameda Estuary

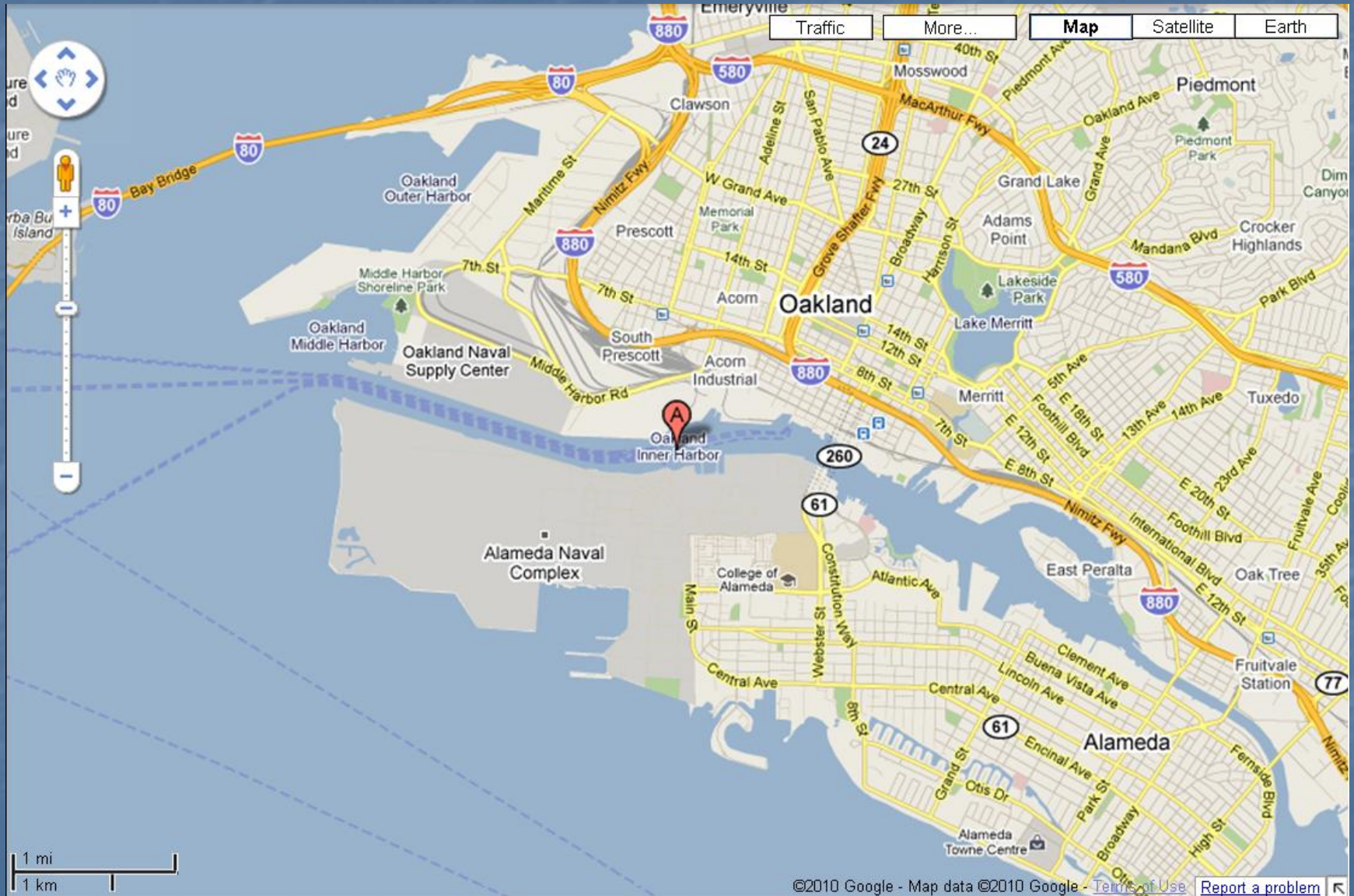


MSC DANIELA



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How wide is the Alameda Estuary turning basin?



- Turning basin: 1200 feet
- MSC DANIELA: 1200.8 feet

Binary system

- State and federal laws
- State and federal rules
- State and federal licenses
- All state-licensed pilots must hold a federal license as well, either by state law or local pilot association rule

Federal (U.S. Coast Guard):

- First class pilot's license
- First class pilotage endorsement to an underlying mariner's license
- There is no economy class

Various states:

state pilot's license

Hypothetical

- M/V LEAKY, departing a U.S. West Coast Port
- Pilot: Captain Dodgy

Depends on where the ship is headed

- Foreign going; state license
- Coast-wise (San Francisco to Seattle); federal license
- Regulation of commerce between and among the states is federal (U.S. Constitution)

Article III, Section 2 (Admiralty)

- Power to regulate pilots
- Commerce clause (1824)
- Regulate commerce to facilitate it

*Cooley v. Board of Wardens of the
Port of Philadelphia* (U.S.
Supreme Court, 1851)

- Key decision for pilotage law
- More importantly, key decision construing relationship of state and federal regulatory powers under the Commerce Clause
- Held: regulation of pilots is left to the states

But:

- What about the need for uniformity in admiralty?
- *Southern Pacific Co. v. Jensen* (1917)
- Maritime Law Association of the United States;
Uniformity Committee
- Admiralty but local

Federal pilotage waters: Great Lakes

- 1959: St. Lawrence Seaway opens
- Great Lakes shipping greatly increases
- Eight U.S. states plus Canada
- International relations impacted
- Need for uniformity

Prince William Sound, Alaska

- Key waterway; export of Alaskan crude oil
- Part of aftermath of EXXON VALDEZ
- Part of OPA-90

Pilot system in the U.S. has
undergone great changes

Former qualification system:

- Tug captain
- No college degree
- “Up through the hawsepipes”
- Rough and tumble



Modern system:

- State maritime academy or U.S. Merchant Marine Academy graduate
- Four-year university bachelor's degree
- Unlimited master's license
- More than 10-12 years sailing
- Three year apprenticeship; 51 weeks a year at a very low salary

Modern system, continued:

- Usually an MBA or other master's degree
- Look more like bankers
- Bring their own GPS-equipped laptops to every ship move
- Truly are managers

Can you sue a pilot?

Limitation of liability for pilot's negligence:

- Set by Legislature
- Determined to be in the public interest

Simple cap:

- \$250,000: Alaska
- \$5,000: Washington, South Carolina, Maine
- \$1,000: Texas
- Zero: Louisiana

Dual rate system:

- Oregon
- San Francisco (but not Southern California)

COSCO BUSAN

- 900 foot long container ship
- Owned by Regal Stone, managed by Fleet Management
- November 7, 2007
- Captain John Cota onboard 0600, sailed 0820
- 25-year veteran pilot from the former system

COSCO BUSAN

- Heavy fog
- Chinese captain who did not speak English
- On his first visit to San Francisco
- Chinese crew who hardly spoke English
- Crew who had only been on the ship for 3 weeks
- ECDIS system that was improperly adjusted, and locked
- All company directives and manuals printed in English only

- Hit Delta Tower, San Francisco-Oakland Bay Bridge





Chronicle / Michael Macor



- Spilled approximately 53,000 gallons of bunker fuel

Bay Area spill



Sources: *Cosco Busan Spill Response*; ESRI

THE ASSOCIATED PRESS

U.S. Coast Guard performed a drug test on the pilot, Captain Cota

- Tested for alcohol and “recreational drugs”
- Came out clean
- Coast Guard then destroyed the samples
- Could not retest them for prescription medications
- Serious problem of proof

What will happen?

- *Soriano* case (Ninth Circuit 1974).
- But state can revoke state license

Captain Cota was charged criminally by the U.S. Justice Department with violating:

1. CERCLA (Comprehensive Environmental Response, Compensation and Liability Act)
2. Federal Water Pollution Control Act / Clean Water Act
3. Migratory Bird Treaty Act
4. National Marine Sanctuaries Act
5. OPA-90 (Oil Pollution Act of 1990)
6. Park System Resource Protection Act
7. Rivers and Harbors Act
8. All of the above

- Capt. Cota pled guilty to one count each of violating:
- The Clean Water Act (negligently discharging a pollutant)
- The Migratory Bird Treaty Act (unlawfully “taking” a migratory bird)
- Served 10 months in Federal Prison
- Garden-variety negligence

Owners and operators were also charged with most of the same crimes, plus obstruction of justice (falsifying documents) and filing fraudulent statements.

- Fleet Management pled guilty to three counts
- Agreed to pay \$10 million criminal fine
- U.S. Government is suing them in a civil suit for tens of millions more

Owners and operators filed civil lawsuit against:

- San Francisco Bar Pilots
- Port Agent Captain McIsaac
- Former Port Agent Captain Nyborg
- SFBP Benevolent and Protective Association
- Captain Cota

Dual rate system

- Harbors and Navigation Code, Section 1198
- Pilots required to offer trip insurance
- \$36 million policy insuring pilot and pilot organization
- Any claim relating to, directly or indirectly, the provision of pilotage service
- Ordered by ship's agent when he books a pilot
- If declined, vessel owner is legally deemed to have elected the obligation to defend, indemnify and hold the pilots harmless

Lawyers for the COSCO BUSAN and her P&I Club attacked California Code Section 1198:

- Federal, not state law should control pilotage
- California Section 1198 violates federalism
- Need for uniformity in admiralty
- Federal cases (*Jensen*) trump state statute

Small problem: 46 U.S.C. § 8501:

“... pilots in the bays, rivers, harbors, and ports of the United States shall be regulated **only** in conformity with the laws of the States.”

- The word “only” was added for emphasis by Congress in 1983.

Federal District Court held:

- State law controls, not Federal
- Section 1198 is “regulation” of pilotage
- Section 1198 applies in this case
- Owners and operators of the COSCO BUSAN have to defend and indemnify the SFBP.
- Cannot sue pilots’ Port Agent; State Constitutional officer
- Owners and operators got nothing from the Pilots

Essential Colleagues or Convenient Scapegoats?

- 8,000 uneventful ship moves per year by the SFBP
- No ship has ever hit Golden Gate Bridge
- No ship had ever hit San Francisco-Oakland Bay Bridge before
- No ship collision on San Francisco Bay since 1971



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