

# Insuring Pilotage Risks in Today's "Environment"



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# Washington State – Pilotage Statutes

RCW 88.16.070

Vessels exempted and included under chapter—Fee—Penalty.

Every vessel not exempt under this section that operates in the waters of the Puget Sound pilotage district or Grays Harbor pilotage district is subject to compulsory pilotage under this chapter.

(1) A United States vessel on a voyage in which it is operating exclusively on its coastwise endorsement, its fishery endorsement (including catching and processing its own catch outside United States waters and economic zone for delivery in the United States), and/or its recreational (or pleasure) endorsement, and all United States and Canadian vessels engaged exclusively in the coasting trade on the west coast of the continental United States (including Alaska) and/or British Columbia SHALL BE EXEMPT FROM THE PROVISIONS OF THIS CHAPTER UNLESS A PILOT LICENSED UNDER THIS CHAPTER BE ACTUALLY EMPLOYED, **IN WHICH CASE THE PILOTAGE RATES PROVIDED FOR IN THIS CHAPTER OR ESTABLISHED UNDER RCW 81.116.010 THROUGH 81.116.060 SHALL APPLY.**

**RCW 88.16.100**

**Pilots' licenses—Revocation, suspension, etc., of—Reprimand or fine—Other disciplinary actions—Procedure—Judicial review.**

(1) The board shall have power on its own motion or, in its discretion, upon the written request of any interested party, to investigate the performance of pilotage services subject to this chapter and to **issue a reprimand, impose a fine against a pilot in an amount not to exceed five thousand dollars (\$5,000), suspend, withhold, or revoke the license of any pilot, or any combination of the above, for misconduct, incompetency, inattention to duty, intoxication, or failure to perform his duties under this chapter, or violation of any of the rules or regulations provided by the board for the government of pilots.** The board may partially or totally stay any disciplinary action authorized in this subsection and subsection (2) of this section. The board shall have the power to require that a pilot satisfactorily complete a specific course of training or treatment.

(2) In all instances where a pilot licensed under this chapter performs pilot services on a VESSEL EXEMPT under RCW **88.16.070**, the board may on its own motion, or in its discretion upon the written request of any interested party, investigate whether the services were performed in a professional manner consistent with sound maritime practices. If the board finds that the pilotage services were performed in a manner that constitutes an act of incompetence, misconduct, or negligence so as to endanger life, limb, or property, or violated or failed to comply with state laws or regulations intended to promote marine safety or to protect navigable waters, the board may issue a reprimand, **impose a fine against a pilot in an amount not to exceed five thousand dollars (\$5,000), suspend, withhold, or revoke the state pilot license, or any combination of the above.** The board shall have the power to require that a pilot satisfactorily complete a specific course of training or treatment.

RCW 88.16.118

**Limited liability of pilots and pilot trainees—Liability of vessel, owner, or operator not limited.**

- (1)(a) A pilot licensed to act as such by the state of Washington, and any countywide port district located partly or entirely within the Grays Harbor pilotage district as defined by RCW 88.16.050(2) authorized to provide pilotage services with pilots employed by or under contract with the port district, **shall not be liable for damages in excess of the amount of five thousand dollars (\$5,000) for damages or loss occasioned by a pilot's or pilot trainee's errors, omissions, fault, or neglect in the performance of pilotage or pilot training services, EXCEPT AS MAY ARISE BY REASON OF THE WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OF THE PILOT.**
- (b) A pilot trainee licensed to act as such by the state of Washington is not liable for damages in excess of the amount of five thousand dollars for damages or loss occasioned by the pilot trainee's errors, omissions, fault, or neglect in the performance of pilotage or pilot training services, **EXCEPT AS MAY ARISE BY REASON OF THE WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OF THE PILOT TRAINEE.**
- (2) When a pilot or pilot trainee boards a vessel to provide pilotage services, that pilot or pilot trainee becomes a servant of the vessel and its owner and operator. Nothing in this section exempts the vessel, its owner, or its operator from liability for damage or loss occasioned by that ship to a person or property on the ground that (a) the ship was piloted by a Washington state licensed pilot or pilot trainee, or (b) the damage or loss was occasioned by the error, omission, fault, or neglect of a Washington state licensed pilot or pilot trainee.

# Incident Scenario

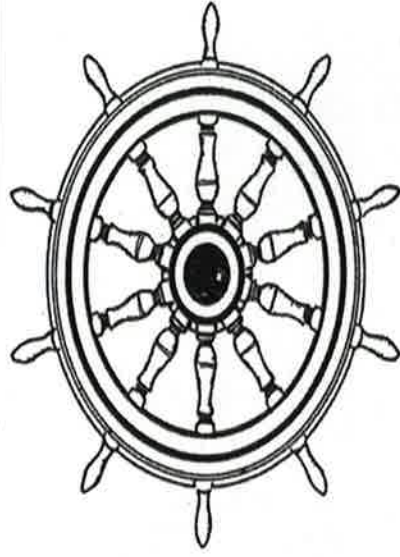
- **VESSEL:** Fully laden foreign bulk carrier
- **PILOT:** Operating under State License
- **LOCATION:** Narrow, restricted waterway
- **EVENT:** A ferry loses power directly in front of ship
- **ACTION:** Pilot orders evasive maneuver to avoid ferry
- **RESULT:** Ship avoids collision with the ferry but runs aground breaching two of the vessels fuel tanks



# What to do Next?

## GET REPRESENTATION

- **Refer to your Incident Card**  
(or call Pilot Office)
- **Incident Card should provide the following:**
  - List of Approved Attorneys
  - Your Rights and Obligations
  - Who to Notify
  - Drug Testing Information



## Sample Incident Card

**SHOULD YOU BE INVOLVED IN A MARINE INCIDENT OR CASUALTY, OR ARE CONTACTED BY THE U.S. COAST GUARD OR A STATE AGENCY REGARDING YOUR PERFORMANCE OF DUTIES AS A PILOT, BEFORE DISCUSSING THE MATTER WITH ANYONE, FOLLOW THESE INSTRUCTIONS:**

Do not talk to anyone about your performance or the cause of the incident before calling and speaking with an approved attorney. Have the dispatcher immediately call the #1 pilot and between them, as a first order of business, make sure that an approved attorney is contacted.

**You have the right to speak with an attorney before discussing any incident with anyone, including representatives of the U.S. Coast Guard. They cannot require you to speak with them about the cause of the incident without proper representation.**

You may speak with the U.S. Coast Guard about steps necessary to respond to or stabilize the post casualty situation, but you should refrain from responding to inquiries as to cause without consulting your attorney. Refer all inquiries and questions about your performance or the cause of the incident to your attorney.

Once you have reached one of the approved attorneys, you may be asked to write down a narrative of what happened. If you do so, do it in the form of a letter or memo to your attorney, marking it "confidential and privileged." If a report to the Coast Guard or any other agency is required, consult first your attorney, who might wish to coordinate a response with other parties.

Write down the names, addresses and phone numbers of any witnesses or persons who may have been injured in the casualty. If there is property damage, try to take pictures and ascertain the extent of damage.

Do not make any statements as to the fault of anyone involved.

Post accident drug and alcohol testing is mandatory for all participants who are directly involved in a "serious marine incident" as defined by 46 CFR 4.03-2.

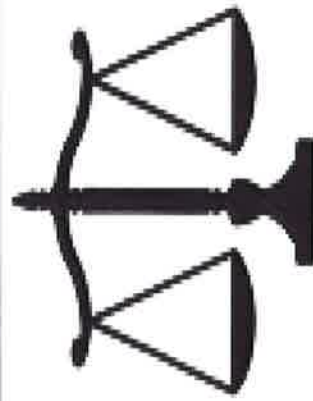


# What Exposures will this Pilot Face?

**License Action** → Hearings focused on possible suspension or revocation

**Civil Action** → Civil proceedings focusing on civil liabilities, fines & penalties

**Criminal Action** → Criminal proceedings focusing on fines and possible jail time



# Insurances Available for License Actions

- **License Defense** coverage will respond to pay legal costs associated with an action against a State or Federal License.
- **Loss of Income** will reimburse the Pilot for the monthly income amount in the policy for a period of up to 12 months if their license is suspended or revoked.



# Insurances Available for Civil Actions

- **Civil Defense** coverage will pay to defend pilots from various legal actions. Focus will be on relevant state Pilotage Statutes.
- **Civil Liability** coverage will pay for any judgment or settlement from a civil lawsuit but not fines or penalties.
- **Civil Fines and Penalties** will reimburse Pilot for fines or penalties under Federal or State Statute or Regulations.



# Criminal Actions

In July, 1997 USCG issued Instructions for Criminal Enforcement of Environmental Laws including this “Criminal Case Selection Criteria “ .



## A. Significant Environmental Harm

Factor 1 - Actual Harm (**Big spill = Criminal Charges**)

Factor 2 - Threat of Significant Harm

Factor 3 - Failure to Report

Factor 4 - Illegal Conduct That Appears to Represent a Trend  
**(Punish one as a deterrent to others)**

## B. Culpable Conduct

Factor 1 - History of Repeated Violations (**Prior warnings or civil penalties increase risk of criminal investigation**)

Factor 2 - Knowledge of Illegality of Conduct

Factor 3 - Presence of Deliberate Misconduct

Factor 4 - Concealing Misconduct, Falsifying Documents, Tampering with Monitoring Devices and Providing False Statements

Factor 5 - Other Illegal Activities/Obstruction of Justice

# What Is Insurable?

To determine insurability in criminal cases, it is important to try and distinguish between mistakes (negligence) vs. other types of conduct.

- **Public Policy Concerns:** In most jurisdictions, it is viewed to be against public policy to insure intentional criminal acts.

Many of the elements of the Coast Guard Criminal Case Selection Criteria would appear to fall into this category:

- Deliberate Misconduct
- Knowledge of Illegal Conduct
- Providing False Statements
- Other Illegal Activities

**Insurance coverage should distinguish between intentional actions which are operational judgments versus other types of conduct.**

# Insurability cont'd.



Certain "environmental crimes" actually criminalize "non-intentional" conduct and considered insurable in many states. These include:

- Migratory Bird Treaty Act and Refuse Act - **Impose strict liability**
- Clean Water Act - **Criminalizes simple negligence**

## Typical Insurance Policy Exclusions:

- Conduct determined to be willful, wanton or intentional
- Arising under statutes/regulations denominated as criminal

# Exceptions to Criminal Acts Exclusion

## Criminal Acts Defense

Provides Defense costs up to the policy limit to represent and defend a pilot from criminal proceedings arising from a **pollution** incident.



## Criminal Acts Fines and Penalties

Provides coverage for criminal fine or penalty arising a **pollution** incident pursuant to federal or state statutes **EXCEPT:**

**Coverage shall not apply if it is determined to be contrary to the law or public policy in the relevant jurisdiction(s).**

# Additional Exceptions to Criminal Acts Exclusion



## SEAMAN'S MANSLAUGHTER STATUTE:

The Seaman's Manslaughter Statute is now being used to criminally prosecute licensed mariners for deaths on the high seas. Like many of the pollution laws, this allows a vessel operator to be charged criminally for simple negligence that causes someone's death.

The below referenced article focuses on the Seaman's Manslaughter Statute and states, "It is important to note that intent is not necessary to show that the acts or omissions that caused the death were willful or intentional. In fact, in most jurisdictions where the statute has been utilized, simple negligence is enough to secure a conviction."

<http://www.blankrome.com/siteFiles/Publications/4D76CA4EB2CDD7657004213CE6FFE866.pdf>



## Additional Exceptions to Criminal Acts Exclusion

**Marine Mammals Protection Act:** Allows for Criminal fines of up to \$20,000 for knowingly violating certain provision of the MMPA.

**Endangered Species Act:** Allows for Criminal fines of up to \$50,000 for knowingly violating certain provision of the ESA.



**THANK YOU**

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