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January 17, 2014


Emelyn Rodriguez  
Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814-2329

RE: Appeal of Denied Petition to add the position of Port Agent to the Conflict of Interest Code of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun ("Board of Pilot Commissioners")

Dear Ms. Rodriguez:

Enclosed is the original of the BRIEF OF BOARD OF PILOT COMMISSIONERS IN OPPOSITION TO APPEAL OF PACIFIC MERCHANT SHIPPING ASSOCIATION, which was e-mailed to you on Friday, January 17, 2014.

Sincerely,

  
DENNIS M. EAGAN  
Deputy Attorney General

For KAMALA D. HARRIS  
Attorney General

DE:sa

Enclosure

cc w/encl.: Mike Jacob  
Vice President and General Counsel  
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9 FAIR POLITICAL PRACTICES COMMISSION

10 STATE OF CALIFORNIA

11  
12 **PACIFIC MERCHANT SHIPPING ASSOCIATION,**

13 Appellant,

14 v.

15  
16 **BOARD OF PILOT COMMISSIONERS FOR THE  
17 BAYS OF SAN FRANCISCO, SAN PABLO, AND  
SUISUN,**

18 Respondent.

**BRIEF OF BOARD OF PILOT  
COMMISSIONERS IN OPPOSITION TO  
APPEAL OF PACIFIC MERCHANT  
SHIPPING ASSOCIATION**

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1 NATURE OF THE CASE

2 Maritime pilots are mariners who assist in the navigation of vessels entering and leaving  
3 ports. They have specialized knowledge of local conditions such as tides, winds, currents, and  
4 water depths and are thus a valuable resource in safely navigating a vessel in waters with which  
5 they are intimately familiar. In this, they contrast with the typical ship's master, who calls on  
6 many ports and is unlikely to have the same detailed knowledge of local waters.

7 For vessels transiting into, out of, and over San Francisco Bay and its tributaries, as well as  
8 Monterey Bay, pilotage services are provided by a private business formed as an unincorporated  
9 association, the San Francisco Bar Pilots ("Association"). (Exh. A, Decl. of Peter McIsaac, p. 1,  
10 ¶¶ 1, 2.) The 58 pilots who are members of the Association control operation of the business and  
11 split the profits among themselves. (*Ibid.*) These pilots are licensed and regulated by the Board of  
12 Pilot Commissioners, a regional state agency whose jurisdiction is co-extensive with the pilotage  
13 grounds in which pilotage services are provided by members of the Association. (Exh. A, pp. 1-2,  
14 ¶¶ 3-5.; Exh. B, Decl. of Allen Garfinkle, p. 2, ¶¶ 7-9.)

15 The pilots elect a President of the Association and, pursuant to the statutory directive  
16 contained in Harbors and Navigation Code section 1130,<sup>1</sup> they also appoint one of their number  
17 to act as Port Agent. (Exh. A, pp. 1, 2, ¶¶ 1, 6.) Although the Board must confirm this private  
18 appointment, it cannot itself appoint the Port Agent and it has no power to remove the Port Agent.  
19 (Exh. A, p. 2, ¶ 6.) The pilot who is Port Agent is subject to additional regulatory direction over  
20 and above the regulatory directives that the Board applies alike to all pilots. (Exh. A, p. 2, ¶¶ 4,  
21 5.) It has been this way since 1850, when the Board was created to regulate the provision of  
22 private pilotage services into and out of San Francisco Bay and on adjacent waters. (See Stats.  
23 1850, ch. 18, p. 65.)

24 On September 16, 2013, the Pacific Merchant Shipping Association ("PMSA") petitioned  
25 the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun to add  
26 the Port Agent to the list of "designated employees" contained in the Board's Conflict of Interest

27 <sup>1</sup> Unless otherwise indicated, all section references are to the Harbors and Navigation  
28 Code.

1 Code. By order dated October 24, 2013, the Board concluded that the Port Agent was not a  
2 “designated employee” and on that basis denied the petition.

3 **ISSUE PRESENTED**

4 The Political Reform Act of 1974 requires every state agency to adopt a Conflict of Interest  
5 Code that lists positions “within the agency” that involve the making or participation in the  
6 making of decisions that may foreseeably have a material effect on any financial interest. (Gov.  
7 Code, §§ 87300, 87302, subd. (a).) Any violation of a COI Code by a “designated employee” is a  
8 violation of chapter 7 of the act. (Gov. Code, § 87300.) “Designated employee” is defined in the  
9 act as an “officer, employee, member, or consultant” of a state agency who engages in certain  
10 types of agency decisions. (Gov. Code, § 82019, subd. (a).)

11 The issue presented is straightforward: is the Port Agent an “officer, employee, member, or  
12 consultant” of the Board of Pilot Commissioners?

13 To be clear, an issue that is *not* presented is whether the Port Agent is himself a “state  
14 agency” who must adopt a COI Code applicable only to himself. We take time for this  
15 clarification only because PMSA is equivocal on this point. It lists two issues presented:  
16 (1) whether the Port Agent is a “designated employee” and (2) whether the Port Agent “should be  
17 treated as a standalone ‘agency’ separate and apart from the Board.” (PMSA Appeal, pp. 1, 13–  
18 15.) This appeal is taken solely from the Board’s action in denying PMSA’s petition asking that  
19 the Board add the Port Agent to the Board’s COI Code. It is only that decision that is under  
20 review. No such petition has been directed to the Port Agent.

21 Without waiving this objection to improperly extending the scope of this appeal, the Board  
22 nonetheless maintains that the discussion of the Port Agent’s role in this brief disposes of any  
23 notion that the Port Agent himself is required to adopt a COI Code applicable only to himself.

24 ///

1 **I. THE PORT AGENT IS NOT AN OFFICER, EMPLOYEE, MEMBER, OR CONSULTANT OF**  
2 **THE BOARD**

3 **A. Consultant**

4 PMSA concedes that the Port Agent is not a “consultant.” (PMSA Appeal, p. 7.) Exhibit B,  
5 the Garfinkle Declaration, states that: “There is no contract between the Board and the Port Agent  
6 for the performance of services or for any other purpose.” (Exh. B, p. 2, ¶ 6.) In recently  
7 concluded litigation between the Board and PMSA, the California Court of Appeal concluded that  
8 the Port Agent’s duties are prescribed by statute and the Board’s regulations. (*Board of Pilot*  
9 *Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 589.) The Harbors and Navigation  
10 Code, the Board’s regulations, and the Garfinkle Declaration confirm this. (§ 1130; Cal. Code  
11 Regs., tit. 7, § 218; Exh. B, p. 2, ¶ 9.) Because these duties do not arise from any contractual  
12 relationship with the Board, the Port Agent is not within the FPPC’s definition of a “consultant.”  
13 (See Cal. Code Regs., tit. 2, § 18701(a)(2).)

14 **B. Member**

15 In the Board’s recent litigation with PMSA, the Court of Appeal also concluded that the  
16 Port Agent is not a member of the Board. (*Board of Pilot Commissioners, supra*, 218 Cal.App.4th  
17 at p. 583.) The Board consists of seven voting members, all appointed by the Governor, and one  
18 ex officio member, the Secretary of the California State Transportation Agency, who does not  
19 have a vote. (§ 1150.) The Port Agent is neither an appointed nor an ex officio member of the  
20 Board. (Exh. B, p. 1, ¶ 4.) Nor is he a member of any Board committee. PMSA does not dispute  
21 any of this. Accordingly, the Port Agent is not a “member” of a state agency under Government  
22 Code section 82019 or section 18701(a)(1) of the FPPC’s regulations.

23 Confronted with these hard facts, PMSA takes an independent course, repeatedly  
24 characterizing the Port Agent as holding an “office” in which he exercises powers “emanating  
25 directly from the State” and as exercising the powers of the Board “on its behalf.” (PMSA  
26 Appeal, p. 4, & fn. 5.) PMSA never ties these assertions to the language of the act or of the  
27 FPPC’s regulations. There are echoes in this argument of PMSA’s assertions elsewhere in its  
28

1 brief that the Port Agent is exercising the “sovereign” or “governmental” powers of the state.  
2 (E.g., PMSA Appeal, p. 6.)

3 As discussed later in this brief, these statements are premised on the insupportable premise  
4 that the Board itself is providing pilotage services and that such services are necessarily a  
5 “sovereign” or “governmental” function. It is enough to say here that the relationship between the  
6 Board and the Port Agent is one between a regulatory agency and one who is regulated. “The Port  
7 Agent . . . has responsibilities imposed by statute and by administrative regulation.” (*Board of*  
8 *Pilot Commissioners, supra*, 218 Cal.App.4th at p. 589.) The Board is the regulating agency and  
9 the Port Agent is a principal object of the Board’s regulatory authority. The Board exercises  
10 regulatory power over the Port Agent through regulations and occasional directives in furtherance  
11 of the state’s regulatory regime. (Exh. A, p. 2, ¶¶ 4, 5; Exh. B, p. 2, ¶ 9.) When performing the  
12 duties required of him by the state’s regulatory program, however, the Port Agent is not acting  
13 “on behalf of” the Board or as the Board’s “agent.” (Exh. B, p. 2, ¶¶ 7-9.) As summarized by the  
14 Court of Appeal, “[T]he Board has statutory licensing and oversight authority. But the  
15 individually licensed members of [the San Francisco Bar Pilots] render piloting services directly  
16 to their maritime clients, not on behalf of the Board. . . . And the Legislature has never given the  
17 Board the authority to make pilot assignments or to direct them.” (*Board of Pilot Commissioners,*  
18 *supra*, 218 Cal.App.4th at p. 599.)

### 19 C. Officer

20 Contrary to PMSA’s argument here, the Court of Appeal has concluded that the Port Agent  
21 is not an officer of the Board. (*Board of Pilot Commissioners, supra*, 218 Cal.App.4th 577, 583,  
22 588.) The Board has two officers, a President and a Vice President. (Cal. Code Regs., tit. 7,  
23 §§ 206, 207.) The Port Agent occupies neither position. (Exh. B, p. 1, ¶ 5.)

24 In its argument on this point, PMSA fashions an argument that the Port Agent is an  
25 “officer” because the Legislature has delegated to him “some portion of the sovereign functions  
26 of government.” (PMSA Appeal, p. 6.) As discussed later, there is nothing inherent in piloting  
27 that renders it innately a governmental function. Throughout history, piloting has, with few  
28 exceptions, been performed by private parties. And again, the argument ignores that the Port

1 Agent is the object of regulation, not its implementer.

2 PMSA places its principal reliance on a mischaracterization of the Court of Appeal's recent  
3 holding in *Board of Pilot Commissioners, supra*, 218 Cal.App.4th 577. PMSA quotes the court's  
4 ultimate conclusion that it would treat the Port Agent as a state officer for purposes of the  
5 California Public Records Act, but omits the page of discussion that precedes this conclusion.  
6 When that is considered, the court's actual holding is revealed as quite different from that  
7 suggested by PMSA's truncated excerpt.

8 The Court of Appeal in *Board of Pilot Commissioners* was presented with a question of  
9 statutory interpretation: whether the Port Agent was a "state officer" within the meaning of the  
10 California Public Records Act. If he was, then he was required under the act to respond to  
11 requests from the public for "public records" in his possession. In its decision, the court declined  
12 to assess whether the Legislature intended the term "state officer," as used in the Public Records  
13 Act, to include the Port Agent. Instead, it held that the Port Agent was barred by the doctrine of  
14 "judicial estoppel" from arguing otherwise. (*Id.* at pp. 589–591.) The court noted that the Port  
15 Agent had successfully argued in another case that, as a "state official," he was immune from suit  
16 in federal district court under the Eleventh Amendment to the United States Constitution. (*Id.* at  
17 p. 589.) The court concluded that the Port Agent's legal arguments in the two lawsuits were  
18 inconsistent and that it would not permit the Port Agent to argue that he was not a "state officer"  
19 under the Public Records Act, regardless of the Legislature's intent as to the meaning of that  
20 term. (*Id.* at pp. 590–591.)

21 Importantly, the court ruled that it was only the Port Agent, not the Board, that was barred  
22 from arguing that the Port Agent was not a "state officer" under the Public Records Act. The  
23 court stated: "The Board is, however, correct in its assertion that the doctrine [of judicial  
24 estoppel] cannot be applied to it, since it was not a party to the [federal district court] proceeding  
25 and has never adopted the position taken in that litigation by the Port Agent." (*Board of Pilot  
26 Commissioners, supra*, 218 Cal.App.4th at p. 591, fn. 17.) The court chose not to rule on the  
27 Board's argument that, as a matter of statutory interpretation, the Port Agent was not a "state  
28 officer" under the Public Records Act, concluding only that, given the Port Agent's arguments in



1 the earlier federal lawsuit, it would treat the Port Agent as a “state officer.” (*Id.* at pp. 590–591.)

2 The court’s ultimate conclusion was that the Port Agent was not required to produce the  
3 records sought because the evidence established that the records were not “public records.” (*Id.* at  
4 pp. 597–600.) This ruling rendered the court’s discussion of the “state officer” issue dicta.

5 In any case, the court was not asked to decide, and did not decide, whether the Port Agent  
6 was a state officer within the meaning of the Political Reform Act provisions concerning COI  
7 Codes. That was not an issue in the case. The issue before the court was whether the Port Agent  
8 should be regarded as a “state officer” under the Public Records Act, and thus responsible for  
9 producing public records in response to requests from the public.

#### 10 D. Employee

11 The Court of Appeal decision in *Board of Pilot Commissioners* also applies here. The court  
12 concluded that the Port Agent was not an employee of the Board. (*Board of Pilot Commissioners*,  
13 *supra*, 218 Cal.App.4th at p. 588.) The conclusion is amply supported by the McIsaac and  
14 Garfinkle Declarations. (Exh. A, p. 2, ¶ 7; Exh. B, p. 1, ¶¶ 2, 3.) The Board has four employees:  
15 the Executive Director and the Assistant Director, who are exempt from state civil service, and  
16 two state civil service employees, a Staff Services Analyst and an Office Technician. (Exh. B,  
17 p. 1, ¶ 2.) Under the California Constitution, there are only two kinds of state employees: state  
18 civil service employees and those exempt from state civil service. (See Cal. Const., art. VII,  
19 §§ 1(a), 4.) The Executive Director and the Assistant Director hold their employee positions by  
20 virtue of an exemption from civil service for “a deputy or employee selected by each board or  
21 commission either appointed by the Governor or authorized by statute.” (*Id.* at § 4(d).)

22 These constitutional provisions are supplemented by the unequivocal testimony of the two  
23 declarants that:

- 24 • The Port Agent is not an employee
- 25 • He doesn’t receive any compensation from the Board
- 26 • The Executive Director is not charged with supervising his work
- 27 • The Board does not provide him with staff, office space, or other facilities

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1 • He performs his duties at the private offices of the Association at Pier 9, rather than the  
2 offices of the Board at 660 Davis Street  
3 (Exh. A, p. 2, ¶ 7, Exh. B, p. 1, ¶¶ 2, 3.)

4 In light of the foregoing, PMSA's discussion of common law concepts of who is an  
5 employee versus who is an independent contractor is beside the point. Perhaps most important,  
6 PMSA posits a false dichotomy: that the Port Agent must be either an employee or an  
7 independent contractor. (See PMSA Appeal, p. 8, referring to "the mutual exclusivity of the terms  
8 'employee' and 'consultant.'") There is a third, and accurate, characterization: the Port Agent is  
9 neither. This is so because his duties are imposed upon him neither by contract nor by  
10 employment, but rather by government regulation. Along with his fellow pilots, the Port Agent is  
11 engaged in a private business that is regulated by government.

12 **II. THE PORT AGENT DOES NOT ACT "ON BEHALF OF THE BOARD" IN PERFORMING A**  
13 **"GOVERNMENTAL" OR "SOVEREIGN" FUNCTION**

14 PMSA characterizes the provision of pilot services as a "sovereign function of government"  
15 and says that this "function of government" has been "delegated" by the Board to the Port Agent.  
16 (See PMSA Appeal, p. 6.) The argument is that the Port Agent is acting "on behalf of" the Board  
17 in implementing a program whereby government itself provides pilotage services. PMSA  
18 concludes that this alleged implementation role renders the Port Agent, in effect, a member of the  
19 Board, or an officer of the Board, or an employee of the Board.

20 The problem with this argument is that it is based on the erroneous assumption that it is  
21 government, not private business, that provides pilotage services. To the contrary, the most  
22 common model for the provision of pilotage is that of a private pilotage business whose member  
23 pilots are subject to "regulation and licensing" by a government agency. (See, e.g., Harb. & Nav.  
24 Code, §§ 1101, subds. (e)<sup>2</sup> & (g),<sup>3</sup> 1127, subd. (c).<sup>4</sup>) That is what exists with regard to pilots who

25 <sup>2</sup> "(e) A program of pilot regulation and licensing is necessary in order to ascertain and  
26 guarantee the qualifications, fitness, and reliability of qualified personnel who can provide safe  
27 pilotage of vessels entering and using Monterey Bay and the Bays of San Francisco, San Pablo,  
28 and Suisun."

<sup>3</sup> "(g) Bar pilotage in the Bays of San Francisco, San Pablo, and Suisun has continuously  
been regulated by a single-purpose state board since 1850, and that regulation and licensing  
(continued...)

1 provide pilotage services over the San Francisco Bar west of the Golden Gate and on San  
2 Francisco, San Pablo, and Suisun Bays as far inland as the Ports of Sacramento and Stockton.  
3 (Harb. & Nav. Code, §§ 1100, 1110, 1114.5, 1125.) These pilots also pilot vessels on Monterey  
4 Bay. They also hold pilot licenses issued by the U.S. Coast Guard. This template of private  
5 pilotage business regulated by government is in use throughout the country. (E.g., N.Y. Nav.  
6 Law, §§ 87-89 (2014); Or. Rev. Stat., §§ 776.015–776.991 (2011); Tex. Transp. Code, §§ 66.001-  
7 66.083 (2014); Wash. Rev. Code, §§ 88.16.005–88.16.200 (2013).)

8 Regulation of private pilotage has a long history in California. The Legislature enacted the  
9 first statute regulating pilotage on San Francisco Bay in 1850, the first year of statehood. (Stats.  
10 1850, ch. 18, p. 65.) Starting with this first statute, regulation of pilotage on the bay has involved  
11 licensure of pilots by a board of pilot commissioners (*id.* at § 12), along with a recognition that  
12 individual pilots would associate with one another in a private business enterprise in order to  
13 spread the costs of providing pilotage—such as pilot boats—over multiple pilots (*id.* at §§ 15,  
14 21). From the outset, there was provision for the pilots to “select one from their number, whose  
15 duty it shall be to make reports to the Commissioners.” (*Id.* at § 15.) One of these reports  
16 concerned the names of the vessels piloted and the fees received from each, along with a paying  
17 over to the Board of a percentage of the pilotage fees assessed for support of the Board. (Compare  
18 *id.* at § 16 with Harb. & Nav. Code, §§ 1136, 1137; Cal. Code Regs., tit. 7, §§ 218(d)(4), 219(a).)  
19 Then as now, the costs of operating the Board were funded by a percentage of the “joint earnings  
20 of the pilots.” (Compare *id.* at § 41 with Harb. & Nav. Code, § 1159.2.) The pilots’ earnings were  
21 governed by the number and size of ships serviced and by rates set by the statute.

22 Also from the outset, there was provision for suspension or revocation of a pilot’s license  
23 for such things as “incapacity,” “misconduct,” and “negligently losing any vessel.” (*Id.* at §§ 14,  
24 22.) In common with many other professional licensing statutes, there was no effort to develop  
25 detailed instructions to pilots in how to perform their professional duties. Once competence had  
26

27 (...continued)  
should be continued.”

28 <sup>4</sup>“(c) The board shall regulate pilotage on waters of the state as provided in this division.”

1 been assessed by examination, the working premise was that the pilots were professionals who  
2 knew their business, and that license disciplinary proceedings would suffice to discourage  
3 negligence and incompetence. Of note, the business of pilots included not just shiphandling skills  
4 but such things as how to distribute the work among themselves (that is, making assignments of  
5 pilots to particular vessels). The primary legislative focus was upon ensuring that there were  
6 competent pilots who would provide pilotage services in an orderly and efficient manner and  
7 without discrimination among vessels based on anticipated revenue.<sup>5</sup> As the Court of Appeal said  
8 recently with specific regard to pilot assignments by the pilots' chosen representative, who is now  
9 called the Port Agent:

10 Bar pilotage is a recognized but regulated monopoly, and the Board has statutory  
11 licensing and oversight authority. But the individually licensed members of the Bar  
12 Pilots render piloting services directly to their maritime clients, not on behalf of the  
13 Board. The pilot work rules are generally established by the Bar Pilots and not by the  
14 Board. And the Legislature has never given the Board the authority to make pilot  
15 assignments *or to direct them*. (Italics added.)

16 (*Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 599.)

17 As required by statute, the members of the San Francisco Bar Pilots appoint one of their  
18 number to serve as the Port Agent. As was the case with the original 1850 statute discussed  
19 above, the Legislature determined that certain of the Board's regulatory authority needed to be  
20 directed to a single point of contact selected by the pilots from among their number in order for  
21 certain regulatory objectives to be achieved. The Board must confirm this appointment by the  
22 pilots for it to be effective, but the Board has no power either to appoint the Port Agent or to  
23 remove the Port Agent. (Harb. & Nav. Code, § 1130, subd. (a); *Board of Pilot Commissioners*,  
24 *supra*, 218 Cal.App.4th at p. 589 ["The Port Agent . . . is only 'confirmed' by the Board without  
25 permission].")

26 <sup>5</sup> We still see this concern for order, efficiency, and non-discrimination in the statute and  
27 the Board's regulations. (E.g., Harb. & Nav. Code, § 1138 [penalties for pilot not going to vessel  
28 nearest the shore or in the most distress and for pilot refusing to board a vessel when required];  
Cal. Code Regs., tit. 7, §§ 219(d) [pilot shall always take inbound vessels in their order of arrival,  
and in case of simultaneous arrivals, the vessel closest to shore shall have priority] & 219(e) [pilot  
shall not leave outward-bound vessel inside the 10-fathom curve without the master's  
permission].)

1 any provision for his removal.”].) The powers of appointment and removal lie solely with the  
2 other pilots.

3 Pilots are subject to regulation by both the U.S. Coast Guard and state and local  
4 governments. In California, there is no government agency with statewide authority over pilotage.  
5 Instead, there are three models for the involvement of state or local government in the provision  
6 of pilotage.

7 One model that contrasts with that in use in Oregon and Washington and by the Board is  
8 that of the Port of Long Beach, which has contracted with a private pilotage business to provide  
9 pilot services to vessels calling at its port. (Exh. A, p. 3, ¶ 8; Exh. B, p. 3, ¶ 11; Port of Long  
10 Beach Tariff No. 4, pp. 2,000,046–2,000,056 <[http://www.polb.com/economics/port\\_tariff.asp](http://www.polb.com/economics/port_tariff.asp)>.)  
11 These pilots do not hold pilot licenses issued by the Port of Long Beach and are not regulated by  
12 the Port except for prescribed pilotage fees that are set in the Port’s tariff. (Exh. A, p. 3, ¶ 8;  
13 Exh. B, p. 3, ¶ 11.) They hold federal pilot licenses issued by the U.S. Coast Guard, but no  
14 licenses issued by state, regional, or local government. (*Ibid.*)

15 It is only in the neighboring Port of Los Angeles where the city itself provides pilotage  
16 services, using pilots who are civil service employees. (Exh. A, p. 3, ¶ 8; Exh. B, p. 3, ¶ 11; Port  
17 of Los Angeles Tariff No. 4, p. 31 <[http://www.portoflosangeles.org/finance/tariff\\_4.asp](http://www.portoflosangeles.org/finance/tariff_4.asp)>.)  
18 These pilots hold no licenses other than those issued by the U.S. Coast Guard. (*Ibid.*)

19 PMSA’s argument for characterization of the Port Agent as a member, officer, or employee  
20 of the Board was tissue-thin to begin with, but it collapses entirely in light of the dominant  
21 private-business model for the provision of pilot services. Provision of pilotage is not an innate  
22 aspect of sovereignty, nor is it a function exclusively of government.

23 **III. FPPC’S OPINIONS CONCERNING WHETHER AN ENTITY IS AN “AGENCY” FOR**  
24 **PURPOSES OF THE POLITICAL REFORM ACT HAVE NO BEARING ON WHETHER THE**  
25 **PORT AGENT IS A “DESIGNATED EMPLOYEE” OF THE BOARD, WHICH IS**  
26 **ADMITTEDLY A STATE AGENCY**

26 PMSA devotes much attention to two FPPC opinions, *In re Siegel* (1977) 3 FPPC Ops. 62,  
27 and *In re Vonk* (1981) 6 FPPC Ops. 1. Both opinions analyzed whether an entity was an “agency”  
28 within the meaning of the act. That is not an issue here. The Board of Pilot Commissioners is

1 without question an "agency." The question in our case is whether the Port Agent is a "member,"  
2 "officer," or "employee" of the Board. There was no issue in *Siegel* or *Vonk*, once "agency" status  
3 was determined, whether certain persons were "designated employees." The opinions are  
4 irrelevant here.

5  
6 **CONCLUSION**

7 The Port Agent, along with his fellow pilots, is the object of government regulation. He is  
8 not the Board's "agent" or "acting on behalf of the Board" in furtherance of a "sovereign  
9 government function" whereby the Board itself provides pilotage services. Because the Port  
10 Agent is not a member, officer, employee, or consultant of the Board, the Board respectfully  
11 requests that the Commission affirm the Board's decision declining to add the Port Agent to the  
12 Board's Conflict of Interest Code.

13 Dated: January 17, 2014

14 Respectfully Submitted,

15 KAMALA D. HARRIS  
16 Attorney General of California

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18 DENNIS M. EAGAN  
19 Deputy Attorney General  
20 *Attorneys for Board of  
21 Pilot Commissioners*

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Exh A

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**DECLARATION OF PETER McISAAC**

I, PETER McISAAC, declare:

1. I am one of 58 members of the San Francisco Bar Pilots (“SFBP”) and have served as a pilot since 1994. I am currently serving my fifth two-year term as President of the SFBP. I was elected president by the other members of the SFBP. I and the other members of the SFBP are maritime pilots. I select and assign pilots to provide piloting services to vessels over the pilotage grounds that are specified in sections 1110 and 1114.5 of the Harbors and Navigation Code, including the San Francisco Bar, which lies west of the Golden Gate; San Francisco, San Pablo, Suisun, and Monterey Bays; and the Sacramento and San Joaquin Rivers as far inland as the Ports of Sacramento and Stockton. Each pilot charges a fee for the pilotage services rendered, which is the liability of the vessel served. The fees are set by the California Legislature.

2. The SFBP is a private unincorporated association. It was formed by individual pilots to perform certain functions of common benefit to the pilots. The association provides support for the conduct of the pilots’ business, including pilot boats and crews to transport pilots to their assignments, office space and mooring facilities at Pier 9 in San Francisco, fiscal and other office staff, dispatchers to accept requests for pilotage services from ship’s agents, billing and collection services, and provision of insurance and other benefits for association employees and the pilots. The purpose of the organization is to operate all aspects of the SFBP’s business, both those aspects of the business that are regulated by the Board of Pilot Commissioners and those that are not. After all expenses are paid, the pilots, as members of the association, share net revenues generated by their pilotage services. The SFBP’s offices at Pier 9 are not open to the public. The SFBP has 35 employees, consisting of 28 union employees (5 dispatchers and 23 boat personnel) and 6 non-union employees.

3. The Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun (“Board”) is a regional state agency that is charged with licensing and regulating the pilots who pilot vessels on the pilotage grounds described in sections 1110 and 1114.5 of the Harbors and Navigation Code. All of the pilots, including me, are required to obtain a license as a pilot



1 from the Board. Under section 1177 of the Harbors and Navigation Code, all pilots are also  
2 required to obtain endorsements to their federal license from the U.S. Coast Guard, authorizing  
3 them to pilot vessels on the pilotage grounds.

4 4. In furtherance of its regulatory function, the Board, by regulation, has imposed  
5 certain duties upon the pilots. The regulations are set forth in title 7 of the California Code of  
6 Regulations, sections 201–237. Some of the duties imposed by regulation are directed to all  
7 licensed pilots. Section 219 is an example of such a regulation. The Board, by section 218 of its  
8 regulations, has imposed other duties specifically applicable to the licensed pilot who is serving  
9 as Port Agent.

10 5. Under section 218 of the Board's regulations, the Port Agent is charged by regulation  
11 with a range of duties, including assigning pilots to vessels, reporting to the Board incidents that  
12 may justify disciplinary action against a pilot, ensuring that adequate pilots and pilot vessels are  
13 available for performance of piloting duties, reporting to the Board a pilot's absence due to illness  
14 lasting longer than seven days, and ordering the San Francisco Bar closed for reasons of public,  
15 pilot, or vessel safety.

16 6. By a vote of the pilots who are members of the SFBP, I was appointed as Port Agent  
17 and am currently serving in that position. As authorized by statute, the Board confirmed my  
18 appointment, but it did not itself make the appointment. The appointing function lies solely with  
19 the membership of the SFBP. I am currently serving my fifth two-year term as Port Agent. At all  
20 times during my membership in the SFBP, the pilot serving as President of the SFBP has  
21 simultaneously served as Port Agent.

22 7. None of the pilots, including me, are employees of the Board of Pilot Commissioners  
23 or any other state agency, and none of us receives any compensation from the Board of Pilot  
24 Commissioners or any other state agency. Neither the Board nor any other state agency provides  
25 any funding, staff, office space, or other facilities to any of the pilots, including me, with the  
26 exception of the two pilots who serve as members of the Board. I perform all of my duties, both  
27 as President and Port Agent, at the private offices of the association located at Pier 9.

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1           8. In the course of my duties as President of the SFBP, I have occasion to communicate  
2 and share information with pilots who perform pilotage services in other west coast ports and  
3 pilotage grounds. By virtue of these interactions, I am familiar with the manner in which pilotage  
4 services are delivered in these other locations. In Oregon and Washington, for instance, the model  
5 is similar to the regulatory model used by the Board of Pilot Commissioners for the Bays of San  
6 Francisco, San Pablo, and Suisun. That is, local pilots are licensed and regulated by a state  
7 agency, but the agency does not itself provide pilotage services; those services are provided by  
8 pilots who operate as a private business. The Port of Los Angeles uses a different model. There,  
9 the pilots navigating vessels in and out of the Port of Los Angeles are employees of the city's  
10 Harbor Department; it is the city itself, through its port, that provides pilotage services. These  
11 municipal pilots are not licensed as pilots by the city or its port. Instead, the only pilot licenses  
12 that they hold are those issued by the U.S. Coast Guard. Finally, there is the model of the Port of  
13 Long Beach. There, pilotage services are provided under a contract between the Port and a  
14 privately owned pilotage company, Jacobsen Pilot Service Inc. The Jacobsen pilots are not  
15 licensed by any state or regional governmental agency, but do hold pilot licenses issued by the  
16 U.S. Coast Guard.

17           9. I am not a member of the Board.

18           10. I am not an officer of the Board.

19           11. I am not a consultant of the Board. There is no contract between the Port Agent and  
20 the Board for the performance of services.

21           I declare under penalty of perjury under the laws of the State of California that the  
22 foregoing is true and correct and that this declaration is signed on January 15, 2014, in San  
23 Francisco, California.

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25   
26 PETER McISAAC

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Exh B

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3 **DECLARATION OF ALLEN GARFINKLE**

4 1. I am the Executive Director of the Board of Pilot Commissioners for the Bays of San  
5 Francisco, San Pablo, and Suisun ("Board"). I was appointed to that position by the Board and  
6 have held that position for four years. My position is exempt from state civil service. My duties  
7 are set forth in section 1156 of the Harbors and Navigation Code. Among other duties, I  
8 administer and supervise the other employees of the Board.

9 2. The Board has three employees other than myself: an Assistant Director, who is  
10 exempt from state civil service and is appointed by the Secretary of the California State  
11 Transportation Agency, and two state civil service employees, a Staff Services Analyst and an  
12 Office Technician, who are appointed by the Board. The Board has no other employees.

13 3. Specifically, Captain Peter McIsaac, the Port Agent, is not an employee of the Board,  
14 and I am not charged with directing or supervising his work. Captain McIsaac receives no  
15 compensation from the Board for performing the duties required of him by Board regulations or  
16 other regulatory directives. Captain McIsaac does not have an office or work space at the Board  
17 offices at 660 Davis Street in San Francisco. Nor does he have Board staff or facilities available  
18 to him to perform any of the duties that the Board has imposed upon him as Port Agent in  
19 furtherance of the Board's regulatory responsibilities.

20 4. The Board has seven voting members, consisting of three public members; two  
21 representatives of industry, one from tanker company operations and one from dry cargo  
22 operations; and two licensed pilots. The Secretary of the California State Transportation Agency  
23 sits ex officio as an eighth, non-voting member of the Board. Captain McIsaac is not a member of  
24 the Board.

25 5. The Board has two officers, a President and a Vice President, who are selected from  
26 among the membership of the Board. The current President of the Board is Admiral Frank  
27 Johnston and the current Vice President is Mr. Dave Connolly. Captain McIsaac is not an officer  
28 of the Board.

1           6.     My duties include administering contracts to which the Board is a party. I am familiar  
2 with all such contracts. There is no contract between the Board and the Port Agent for the  
3 performance of services or for any other purpose. Captain McIsaac is not a consultant of the  
4 Board.

5           7.     Captain McIsaac is not the Board's agent for any purpose. His actions do not bind the  
6 Board and he does not act to discharge the duties of the Board. None of the duties of the Port  
7 Agent specified in section 218 of the Board's regulations, for instance, are duties of the Board. As  
8 examples, the Board has no responsibility to assign pilots to vessels or to order closure of the San  
9 Francisco Bar. More generally, the Board itself does not provide pilotage services; those are  
10 provided by a private business, the members of which are pilots licensed by the Board. The Board  
11 regulates those who provide the services but does not itself provide the services.

12           8.     As Executive Director, I am a member of the Incident Review Committee ("IRC").  
13 The IRC investigates situations in which a pilot may have been guilty of conduct that would  
14 warrant disciplinary action by the Board and makes recommendations to the Board on such  
15 matters. At public hearings to review IRC recommendations, the Board takes evidence and  
16 decides whether disciplinary action is warranted. Under section 218(d)(6) and (7) of the Board's  
17 regulations, the Port Agent is required to report to me "all accidents, groundings, collisions or  
18 similar navigational incidents involving vessels to which a pilot has been assigned, as well as  
19 suspected pilot misconduct, pilot violations of these regulations or the Harbors and Navigation  
20 Code, and other matters for which a pilot may be disciplined by the Board." The Port Agent has  
21 no role in deciding whether discipline is appropriate; that is strictly for the Board. In my four  
22 years as Executive Director, I do not recall any instance of the Port Agent reporting, or the IRC  
23 investigating, an alleged violation by a pilot of a directive by the Port Agent.

24           9.     Captain McIsaac is licensed as a pilot by the Board. Along with the other pilots, who  
25 are also licensees of the Board, he is regulated by the Board. Such duties as he and the other pilots  
26 have are imposed by the regulations of the Board or by the regulatory directives of the Board.  
27 These duties, including Captain McIsaac's duties as Port Agent, do not arise by virtue of anything  
28 other than the regulations of the Board and the regulatory directives of the Board; there is no

1 other relationship between the Port Agent and the Board—whether by agency, employment, or  
2 otherwise—that gives rise to these duties.

3 10. The Board's Conflict of Interest Code under the Political Reform Act is set forth in  
4 section 212.5 of the Board's regulations. The Conflict of Interest Code does not include the Port  
5 Agent. Another section of the Board's regulations, however, section 222, prescribes a conflict of  
6 interest code applicable to all pilots, under the authority of section 1170.3 of the Harbors and  
7 Navigation Code.

8 11. Prior to my employment as Executive Director, I was employed as a ship's master for  
9 Matson. I captained Matson ships that called periodically at the Port of Los Angeles and the Port  
10 of Long Beach. By virtue of those calls, I am familiar with the manner in which pilotage services  
11 are provided at those ports. The provision of pilotage services in the Port of Los Angeles differs  
12 from that employed in the pilotage grounds regulated by the Board. There, the pilots navigating  
13 vessels in and out of the Port of Los Angeles are employees of the city's Harbor Department; it is  
14 the city itself, through its port, that provides pilotage services. These municipal pilots are not  
15 licensed as pilots by the city or its port. Instead, the only pilot licenses that they hold are those  
16 issued by the U.S. Coast Guard. Next door, in the Port of Long Beach, still another means is used  
17 to provide pilotage services. In the Port of Long Beach, pilotage services are provided under a  
18 contract between the Port and a privately owned pilotage company, Jacobsen Pilot Service Inc.  
19 The Jacobsen pilots are not licensed by any state or regional governmental agency, but do hold  
20 pilot licenses issued by the U.S. Coast Guard.

21 I declare under penalty of perjury under the laws of the State of California that the  
22 foregoing is true and correct and that this declaration is signed on January 16, 2014, in San  
23 Francisco, California.

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26 ALLEN GARFINKLE

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: *Pacific Merchant Shipping v. Board of Pilot Commissioners, et al.*

I declare:

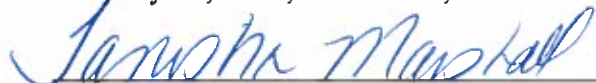
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 17, 2014, I served the attached **BRIEF OF BOARD OF PILOT COMMISSIONERS IN OPPOSITION TO APPEAL OF PACIFIC MERCHANT SHIPPING ASSOCIATION** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550, addressed as follows:

Mike Jacob  
Vice President & General Counsel  
Pacific Merchant Shipping Association  
250 Montgomery St., Suite 700  
San Francisco, CA 94104

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 17, 2014, at Oakland, California.

Tanisha N. Marshall  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature