

Insurance and Liability

Dennis Nixon

RVOC

Duluth, MN

October 8, 2003

Marine Mammals

Marine Mammals

- The Marine Mammal Protection Act is currently going through the amendment process in the House (H.R. 2693)
- On September 25, 2003 the revised version passed from the Resources subcommittee on Fisheries Conservation, Wildlife, and Oceans to the full committee for further mark-up and discussion

Marine Mammal Protection Act

- Proposed changes to the MMPA include:
 - The definition of “harassment” has been modified to protect the survival and reproduction of marine mammals without restricting scientific research and other activities
 - Under harassment, the “potential to injure” has been modified to the “probability of injuring,” which would result in a lower degree of protection for marine mammals
 - These amendments focus on the impacts on the entire stock, and place less importance on the individual

Sound and Marine Mammals

- These proposed amendments to the MMPA come at a controversial time
- Relaxing the definition of harassment could become controversial due to recent marine mammal strandings apparently caused by sonar use in the ocean
- Behavioral responses to ocean sound are variable and depend on both internal and external factors (NRC 2003)

Sound and Marine Mammals

- Internal factors influencing behavioral responses to sound (NRC 2003):
 - Hearing sensitivity, activity patterns, and motivational/behavioral state during exposure
 - Past experience with sound that could lead to habituation or sensitization
 - Demographic factors (age, sex, offspring presence)

Sound and Marine Mammals

- External factors influencing behavioral responses to sound (NRC 2003):
 - Nonacoustic characteristics of the source (i.e. moving/stationary)
 - Environmental variables influencing sound transmission
 - Habitat characteristics
 - Location (i.e. confined, proximity to shore, etc.)

Sound and Marine Mammals

- Behavioral responses to anthropogenic noise range, but include:
 - Changes in surfacing and breathing patterns
 - Vocalization cessation/adjustment
 - Active avoidance/escape from area
 - Changes in migration patterns
- These responses are still considered “harassment” under the new MMPA amendments, however, cessation of activity will need to occur if there is a “probability” rather than “potential” to injure the marine mammal

Sound and Marine Mammals

- The NRC report Ocean Noise and Marine Mammals (2003) developed several recommendations concerning the effects of sound on marine mammals resulting from research activities

Sound and Marine Mammals

Recommendations of NRC

- These recommendations are as follows:
 1. When possible, research conducted on marine mammals should include the ability to predict whether the observed response is particular to that individual, or whether the effect could be felt throughout the entire population.
 2. Research should be expanded into new areas and marine mammal populations and their distributions should be studied throughout the world's oceans.

Sound and Marine Mammals

Recommendations of NRC, cont.

3. Research should be initiated that describes the distribution and characteristics of marine mammal sounds seasonally, geographically, and within behavioral contexts.
4. Tagging studies should be continued for the purpose of observing behavioral changes to acoustic cues and to provide data for simulation models.

Sound and Marine Mammals

Recommendations of NRC, cont.

5. Subtle changes in marine mammal behavior should be documented to determine if anthropogenic sound is masking marine mammal ability to detect calls from other marine mammals or hear echoes from their own echolocation.
6. Research should determine whether long-term stress indicators exist and if they can be used to differentiate between noise-induced stress and other stress-related sources.

Insurance and Liability

Insurance and Liability

- In addition to the potential amendments of the MMPA, other insurance and liability updates have arisen from cases decided during the past year
- The cases to be discussed concern collisions, breach of contract with fraudulent misrepresentation, personal injury claims, the Jones Act, Maintenance and Cure, and general maritime law

Collisions and Liability

*Trico Marine Assets, Inc. v.
Diamond B. Marine Services, 332 F.3d 779*

Court: U.S. Court of Appeals, 5th Circuit; 28 May 2003

Facts: Trico owns the O.S.V. Cane River (a supply boat), which collided with the Miss Bernice (a crewboat) owned by Diamond B.

- The collision occurred during low visibility weather on the Mississippi River on March 25, 1999
- The crewboat was powered at full speed without a lookout onboard, without running lights or fog signals, and the captain did not know how to use the radar system

Trico v. Diamond B, cont.

Facts, cont.:

- The supply boat had an active lookout person, two radar systems, and the vessel's speed was powered at the minimum speed at which a vessel can be driven safely

Issues:

1. Did the supply boat violate navigational rules that could have caused the collision?
2. Was the crew boat liable for the collision?
3. Were the medical damages and lost wage payments awarded to the seamen adequate?

Trico v. Diamond B, cont.

Holding and Reasoning:

1. The supply boat was not liable for the collision because it was following the proper navigation and line of sight rules.

2. The crewboat was liable for the collision because:
 1. A lookout was not provided by the owner of the crewboat
 2. The captain was not trained to use radar
 3. The captain's competence and the crewboat's seaworthiness was not assessed
 4. A safety manager, safety manuals, and safety training were not provided

Trico v. Diamond B, cont.

3. Medical damages awarded were adequate.

The awards given were based on previous cases in which seamen were injured in similar ways.

Future lost wages were not awarded because one claimant had already begun to work, and the other two had transferable skills that could be applied to other fields of work.

The 5th circuit decided to include *past* lost wages in the damages allocated.

Breach of Contract/Misrepresentation

*Texas A&M Research Foundation v.
Magna Transportation; 2003 WL 21540641*

Court: U.S. Court of Appeals (5th circuit); 9 July 2003

Facts: Texas A&M Research Foundation (TAMRF) brings admiralty suit against Magna Transportation

- Magna was to deliver specialized equipment to the Joides Resolution
- TAMRF alleges breach of contract and fraudulent misrepresentation because specialized equipment was delivered late

Issue: Could Magna foresee that the untimely delivery of cargo would result in “special damages”?

Texas A&M v. Magna, cont.

Holding and Reasoning:

- Magna was liable for “special damages” because they had knowledge of the time-sensitive nature of the research
- Since TAMRF scientists were at sea waiting for research equipment that was never delivered, their research was never conducted
- These “special damages” compensated them for their loss

Personal Injury Claims

Patrick Pike v. Woods Hole Oceanographic Institution, Inc.
223 F.Supp.2d 198; 2 December 2002

- Facts: Pike was a crewmember aboard the R/V Oceanus when he “sustained severe and painful personal injuries”
- Pike wishes to collect money for his medical expenses by using the Jones Act, the rule of unseaworthiness, and maintenance and cure
 - Woods Hole wishes to pay no more than \$20,000 in damages
 - Massachusetts *state* law says that a charitable institution (like Woods Hole) does not have to pay more than \$20,000 in a case like this
 - Pike could collect more money if the courts rule that *federal* law applies (the Jones Act/unseaworthiness/maintenance and cure)

Pike v. WHOI, cont.

Issue: Do state or federal laws apply to this case?

Holding and Reasoning:

- Due to lack of evidence the case was dropped
- However, under normal circumstances federal law rules over state law

Personal Injuries and general maritime law

Wolfram Mansel v. Baker Hughes, Inc. and Western Atlas Int'l; 203 F.Supp.2d 745

Court: U.S. District Court for the Southern District of Texas, Galveston Division; 6 May 2002

Facts:

- Mansel was a German citizen permanently residing in Lima, Peru
- He was injured on the M/V Western Anchorage while the vessel resided in Nigerian territorial waters
- Mansel claims negligence and seeks compensation for his injuries under general maritime law and maintenance and cure

Mansel v. Hughes, cont.

Facts, cont.:

- General maritime law does not apply to aliens engaged in foreign waters (like Mansel)
- However, Mansel claims he is “scientific personnel”
- The Oceanographic Research Vessels Act (ORVA) does not bar “scientific personnel” from bringing a claim under general maritime law

Issue: Can Mansel collect damages by claiming he is “scientific personnel” under ORVA?

Holding and Reasoning:

- Mansel cannot claim damages under general maritime law
- Regardless of “scientific personnel”, he is still an alien and was operating in foreign waters, so U.S. laws do not apply to him

Maintenance and Cure

*In re Rene Cross Construction, Inc.; 2003 WL 359936
14 February 2003*

Facts: Percy Parker suffered neck, back, and knee injuries in a collision between the J/B Crossbow and the M/V Sundowner

- Parker had previous neck, back, and knee problems that he did not disclose to the doctor in his pre-employment physical exam
- Parker would not have been hired for the position if he had told the doctor about these problems

In re Rene Cross Construction, cont.

Issue: Can Parker collect damages from maintenance and cure even if he did not tell his employer of his existing condition?

Holding and Reasoning:

- Maintenance and cure cannot be awarded because he did not reveal his previous health problems to the doctor

General Maritime Law

Obedean Crear, Jr. v. Omega Protein, Inc.; 2003 U.S. Dist. LEXIS 7198

Court: U.S. District Court for the Eastern District of Louisiana

Facts: Obedean Crear was working as a crewmember aboard the M/V Willard P. Lebough when the stern pipe came loose and struck him on the head

- A lawsuit was filed under the Jones Act and general maritime law claiming the strike caused severe head, neck, and back injuries and mental illness
- The case took a different turn when Crear murdered his grandmother with a hatchet
- The eight children of the deceased grandmother filed suit alleging that the injuries Crear incurred and the lack of prompt/proper treatment caused the insanity that ended in his Grandmother's death

Crear v. Omega Protein, cont.

Issue: Was the death of Crear's grandmother a foreseeable act, thus resulting in an act of negligence by the Defendants?

Holding and Reasoning:

- The death was not a foreseeable act.
- Crear did not exhibit violent behavior and did not indicate he would murder his grandmother
- The ship owner was not liable for the murder

Updates to the Marine Insurance Industry

General Updates

- Premium rates increased by an average of 20-25 percent in the February 2002 renewal season and are expected to show similar or greater increases in February 2003 (National Underwriter)
- Rate improvements have done little to compensate for investment and underwriting losses within the marine protection and indemnity market (Standard & Poor's Annual P&I Report)
- The final months of 2002 saw headline-grabbing losses for marine hull and cargo underwriters, with estimates of industry-wide fourth-quarter losses of between \$800 million and \$850 million (Business Insurance)

General Updates, cont.

- The poor underwriting performance combined with deteriorating returns in equity markets has led S&P to project a negative outlook for the industry's financial strength ratings (National Underwriter)
- "The year 2002 turned out to be another disaster for international marine insurance," said Tore Forsmo, managing director for the Central Union of Marine Underwriters in Oslo. "I would say that the problem we're facing in the market is pretty much the same whether you are in Norway or London or the U.S." (Journal of Commerce)
- Insurers suffered underwriting losses in key areas such as ocean hull and property-casualty coverage. Claims and expenses for those coverages ranged from \$130 to \$160 on every \$100 companies received in premiums (Journal of Commerce)

General Updates, cont.

- In years past, insurers often were able to make up underwriting losses through investment income. But with the stock market weak and interest rates low, investment income was also down (Journal of Commerce)
- Standard & Poor's said that global marine hull insurance rates are expected to peak in 2005, a year later than previously expected. But the ratings company noted that although increases could ease a troubled market, "it remains uncertain whether just two more years of rate increases will be sufficient to return the market to profitability." (cited from the Journal of Commerce Online)

General Updates, cont.

- "Profits in the marine market have been constrained by lower- than-expected rate increases in marine hull business at the 2003 renewal, despite the cost to the industry of a number of major losses in the fourth quarter of 2002," said S & P credit analyst Rowena Potter. "Stronger increases are expected at the 2004 renewal and, although uncertain, there is still a chance that by 2005 the market could be operating at a sustainable level." (cited from the Journal of Commerce Online)

General Updates, cont.

- Rates have been rising since the February 2001 renewals in the protection and indemnity (P & I) market (J. of Commerce Online)
- Shipowners have recognized the need for very significant increases, but they have been unable to absorb them at once, resulting in a three- to four-year time horizon for pricing levels to reach an economic level," Potter said, calling the outlook for P & I "somewhat brighter, given the rolling premium increases, with rates having been on an upward trend for two and a half years. There has been little sign of an increase in claims frequency, although claims costs are on the rise. It is expected that, by the end of the current policy year, most if not all P & I players will have returned to profit." (cited from J. of Commerce Online)

Space Shuttle Updates

- The owner of a \$67 million science laboratory module that was aboard the space shuttle Columbia retained more than three-fifths of its risk but has marine insurance and a U.S. government guarantee to cover the remainder of its loss. Marine underwriters at Lloyd's of London wrote nearly \$17.7 million above an \$8 million primary retention assumed by NASA (Business Insurance)

Piracy Updates

- Piracy is on the rise, but it has had less effect on marine insurance rates than the stock market, according to a new report. Maritime crime effects a relatively small percentage of world shipping and, as a result, has little or no impact on insurance rates (J. of Commerce Online)
- Piracy is concentrated in a few key areas. Waters off Indonesia and Somalia are targets for high-level organized crime, and South America, including Brazil and Ecuador are the scene of many opportunistic thefts (J. of Commerce Online)

Piracy Updates, cont.

- The International Maritime Bureau reported there were 370 incidents of piracy in 2002, particularly in Indonesian and Malaysian waters, Dick said, which is still a concern for insurers. According to the International Maritime Bureau's 2002 annual report, there were 370 attacks on ships, up from 335 in 2001. The bureau says although the risk of terrorist attacks can never be eliminated "the issue is how seriously do the governments take the threat of maritime terrorism." (cited from Best's Review)
- Incidences of piracy fluctuate in relation to economic conditions, said David French, president of the American International Marine Agency, a member of American International Group. "Typically a downturn in the economy will raise the incidences of piracy." (Best's Review)

Piracy Updates, cont.

- Shipping companies using the trade routes off the coast of Somalia face a heavy increase in insurance costs following recent pirate attacks (African Business)
- A ship maybe considered uninsured in the event of a pirate attack off Somalia because such an event is considered a war risk. Piracy is usually defined as an act of theft or attempted theft at sea, perpetrated through violence or threat of violence (African Business)
- Losses caused by weapons of war, for example where armed militia might deploy bombs or rockets, are excluded from P&I insurance cover, even though the militia were initially engaged in piracy. Ship owners are now being recommended to buy war risk cover for the Somali coast for such excluded risks from a commercial war risk underwriter. Many owners have now been taking out such cover after the events of September 11 2001 (African Business)

Piracy and Research Vessels

- On August 31, 2001 the R/V Maurice Ewing was conducting research in the Gulf of Aden off the coast of Somalia
- A small vessel fired shots and attempted to board the Maurice Ewing in an act of piracy
- The R/V was able to outrun the small vessel and avoid further conflict
- Considering this attack and the rise of piracy in this area, the insurance industry might need to adjust rates to account for the increased risk

ISM Code Update

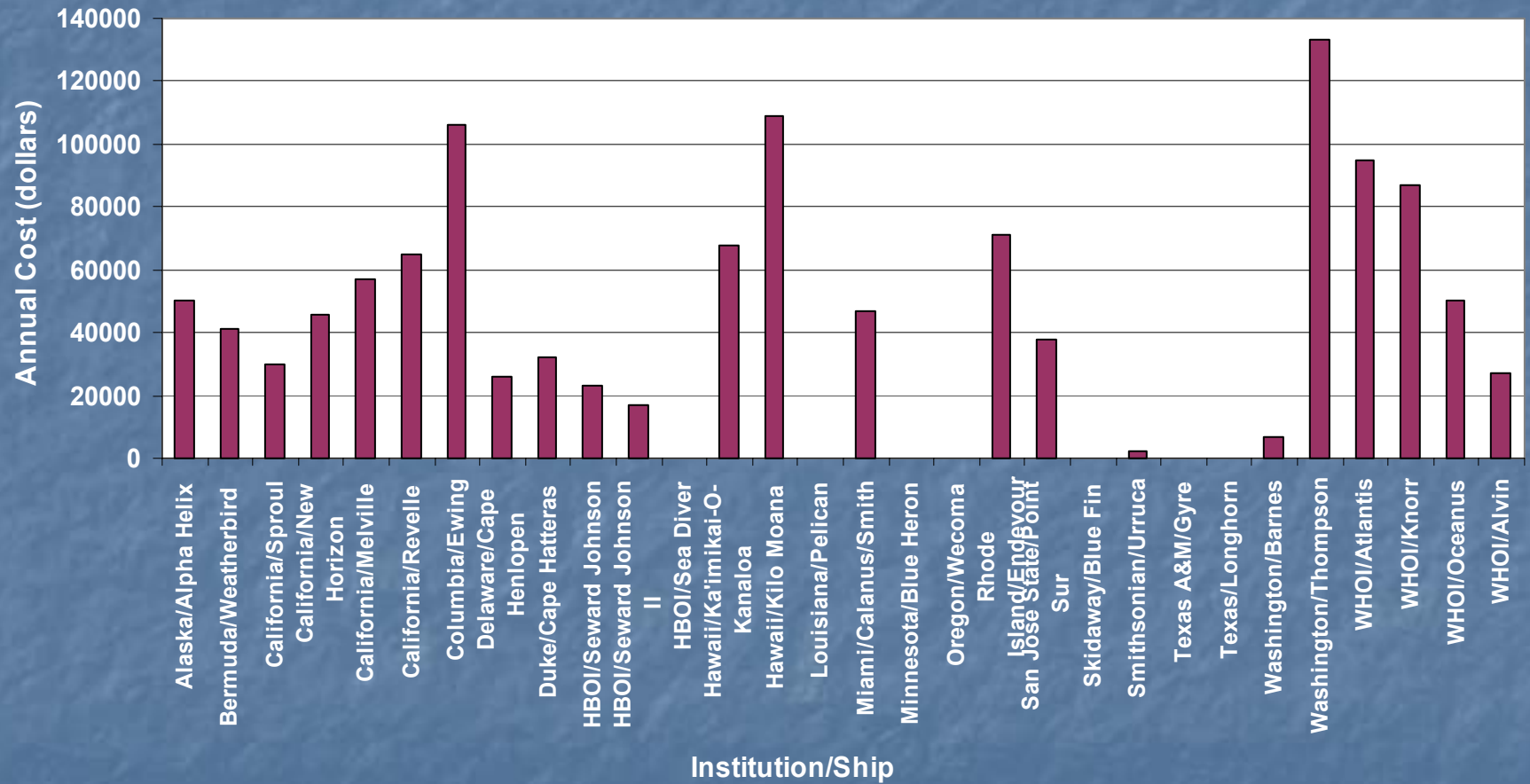
- Casualties: a Korean forum was held on the effectiveness of Phase 1 of the ISM and determined there was a 65% reduction in the number of casualties since its implementation
- Is ISM Working? Phil Anderson has generated a report from 3,000 surveys collected from seafarers, operators, and other interested parties that reflects the views of those working under the ISM code. A general consensus among those surveyed include:
 - The ISM code generates too much paperwork that is difficult to complete in the hours allotted
 - This lack of time to complete the paperwork could result in an accident because seafarers then try to do it while they are on watch
 - It requires too much additional administration
 - Available resources on board are not adequate/sufficient to cope with demand
 - It has become a paper exercise without any obvious benefit
- However, those who have passed through these barriers have witnessed an increase in profits and a noticeable decrease in accidents (this is dependent upon nationality...the OECD nationals hold a middle to negative view of ISM, possibly due to being older or having already had a safety system in place. The Far East/Indian nationals had a more positive view, possibly because they lacked or had a deficient safety system in place before ISM became mandatory for all ships)

2002 Marine Insurance Expenditures

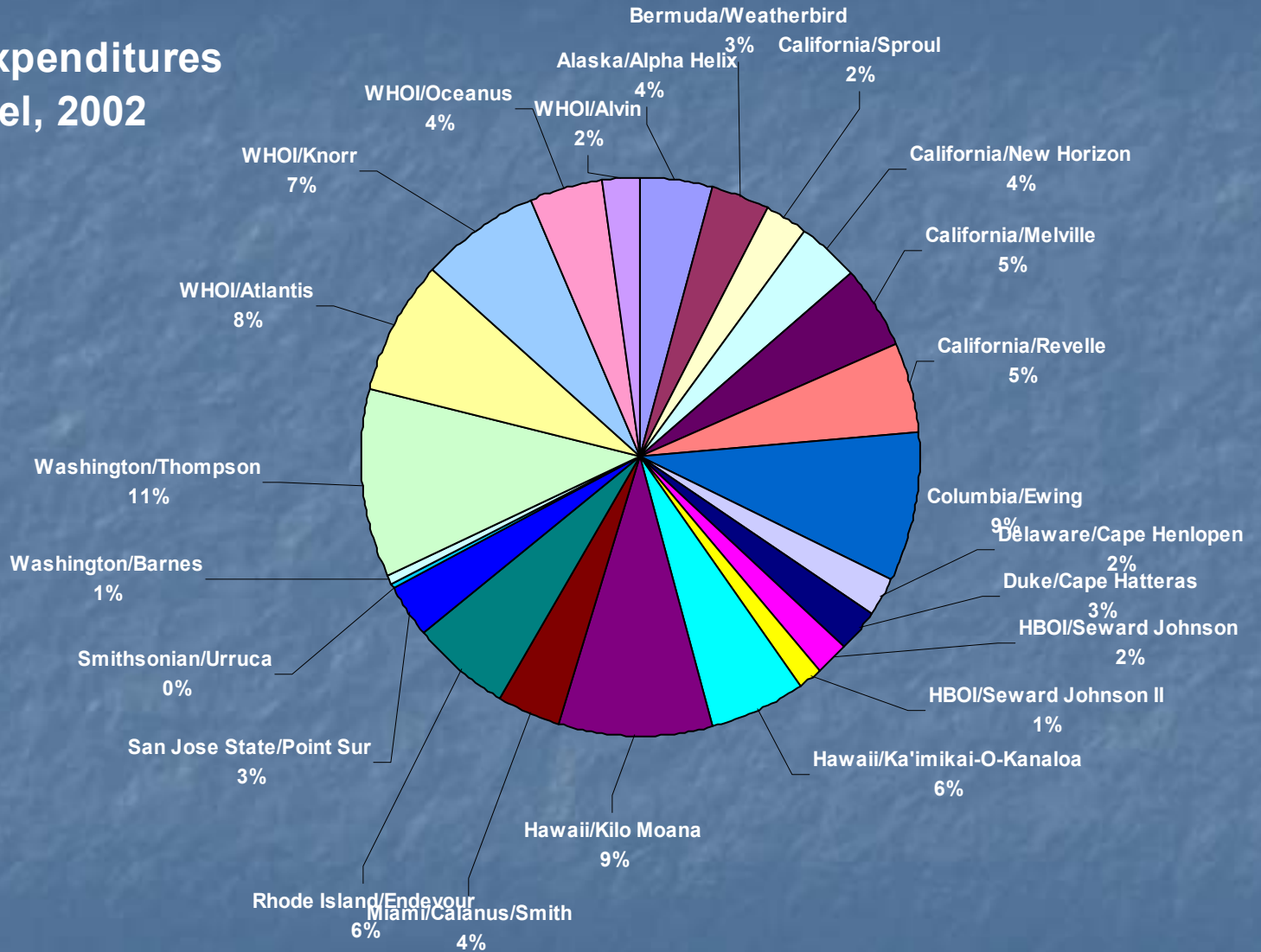
Insurance Expenditures 1991-2002

Institutions/Ship	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	totals by ship
Alaska/Alpha Helix	60	60	60	75	78	77	69	36	34	34	37	50	670
Bermuda/Weatherbird	51	50	52	32	33	31	31	30	31	30	30	41	442
California/Sproul	35	33	35	20	21	20	17	15	13	18	27	30	284
California/New Horizon	74	65	55	24	22	22	19	16	14	19	30	46	406
California/Melville	0	42	53	54	51	49	40	38	34	32	56	57	506
California/Revelle	0	0	0	0	0	14	48	48	43	33	63	65	314
Columbia/Ewing	240	309	234	131	161	147	88	77	85	74	85	106	1737
Delaware/Cape Henlope	47	47	47	36	27	27	25	26	26	22	22	26	378
Duke/Cape Hatteras	60	35	46	63	83	74	52	49	49	32	30	32	605
HBOI/Seward Johnson	64	79	79	62	86	97	10	16	16	19	22	23	573
HBOI/Seward Johnson II	50	63	59	62	49	57	7	11	11	9	19	17	414
HBOI/Sea Diver	0	0	0	43	16	19	4	5	5	5	5	0	102
Hawaii/Ka'imikai-O-Kana	---	---	---	---	---	---	---	---	---	47	48	68	163
Hawaii/Kilo Moana	---	---	---	---	---	---	---	---	---	---	---	109	109
Louisiana/Pelican	100	0	0	0	11	25	0	0	0	0	0	0	136
Miami/Calanus/Smith	118	21	21	21	11	4	10	13	31	46	50	47	393
Minnesota/Blue Heron	0	0	0	0	0	0	0	8	8	8	17	0	41
Oregon/Wecoma	45	25	35	45	40	0	0	0	2	0	0	0	192
Rhode Island/Endevour	108	123	42	86	65	61	77	36	70	54	59	71	852
San Jose State/Point Su	54	54	43	45	45	38	48	43	40	31	31	38	510
Skidaway/Blue Fin	12	12	12	12	0	0	0	0	0	0	0	0	48
Smithsonian/Urruca	0	0	0	0	10	10	2	2	3	2	2	2	33
Texas A&M/Gyre	12	6	45	45	73	76	21	39	20	20	0	0	357
Texas/Longhorn	12	6	45	45	73	76	0	0	0	0	0	0	257
Washington/Barnes	22		19	19	15	12	9	6	5	6	7	7	127
Washington/Thompson	58	116	126	120	123	118	121	121	83	81	120	133	1320
WHOI/Atlantis	0	0	0	0	0	0	45	67	69	64	60	95	400
WHOI/Knorr	35	35	55	54	54	64	93	66	35	72	68	87	718
WHOI/Oceanus	20	25	39	39	40	36	64	38	40	25	39	50	455
WHOI/Alvin	17	19	19	18	21	28	40	52	31	27	39	27	338
Total Insurance Expend	1294	1225	1221	1151	1208	1182	940	858	798	810	966	1227	12880

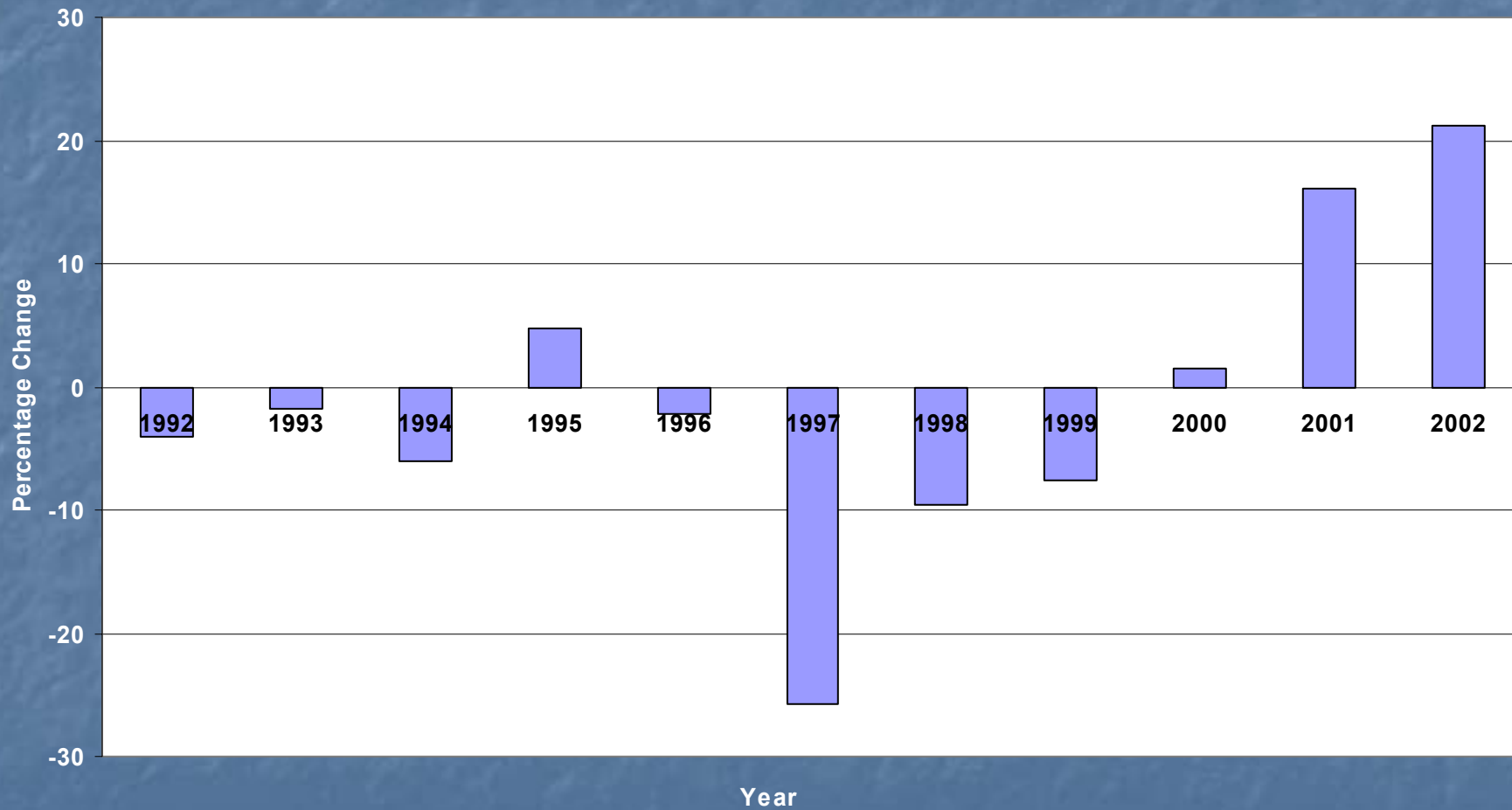
Insurance Expenditures By Ship, 2002



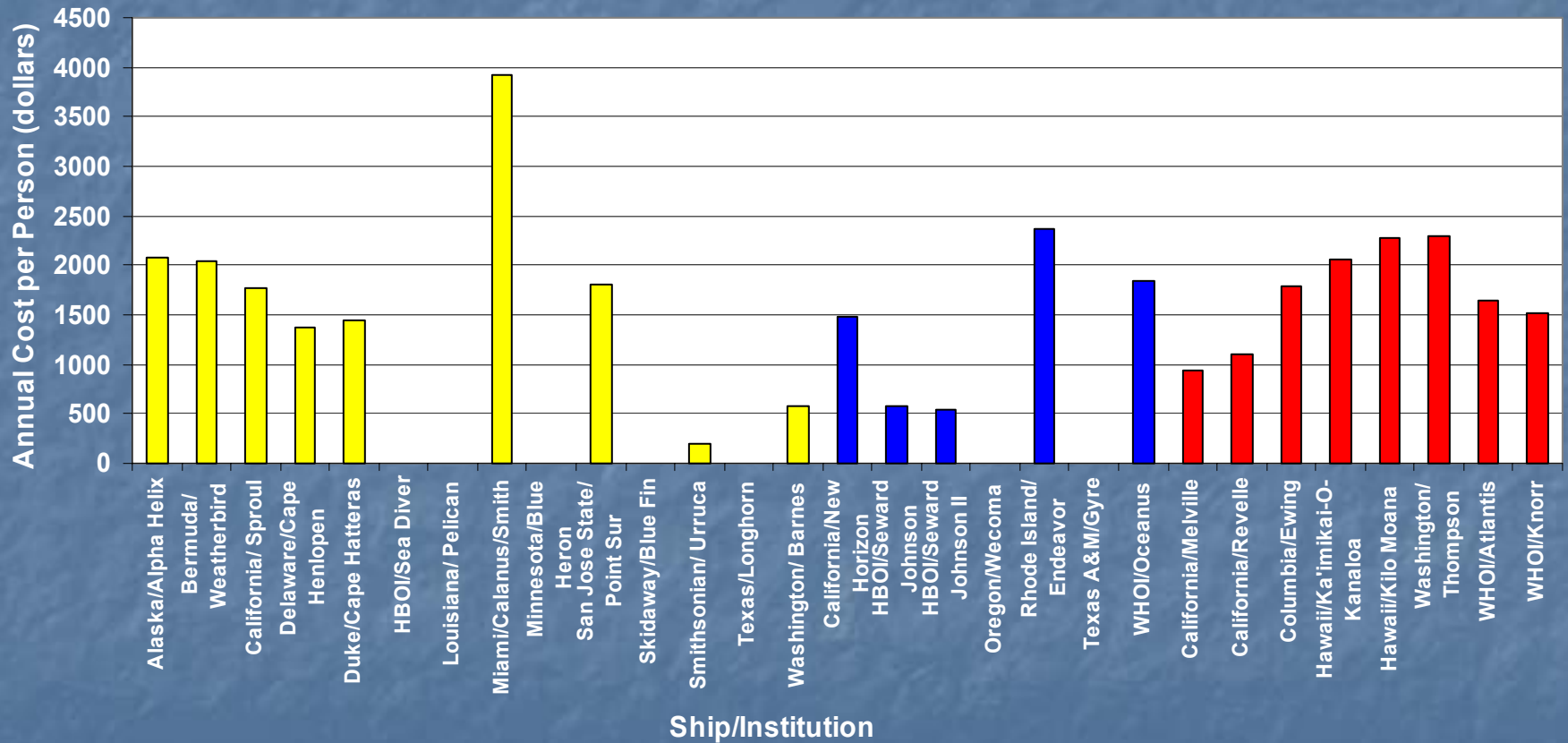
Insurance Expenditures by Vessel, 2002



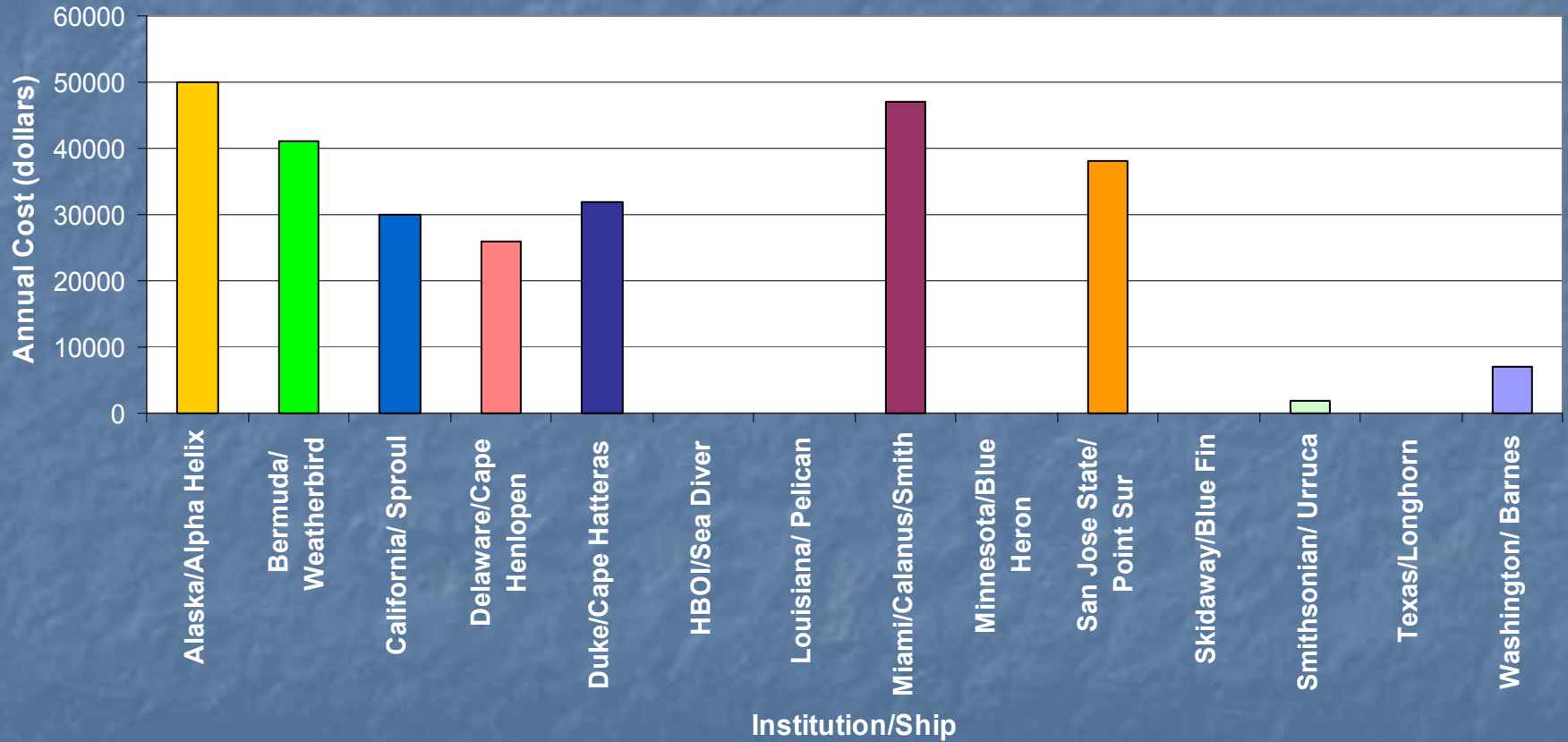
Vessel Expenditure Percentage Change per Year 1992-2002



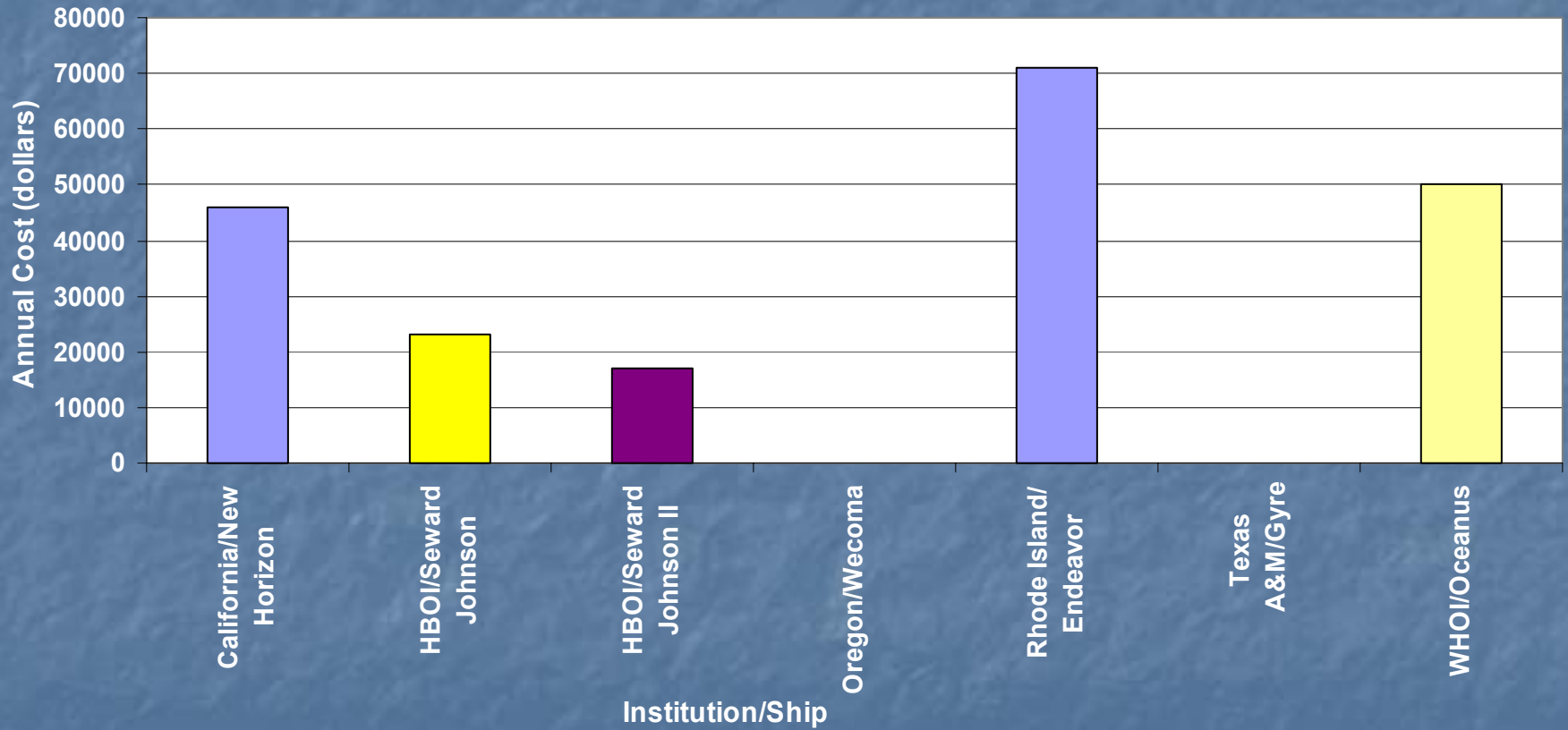
Insurance Expenditure Per Person, 2002



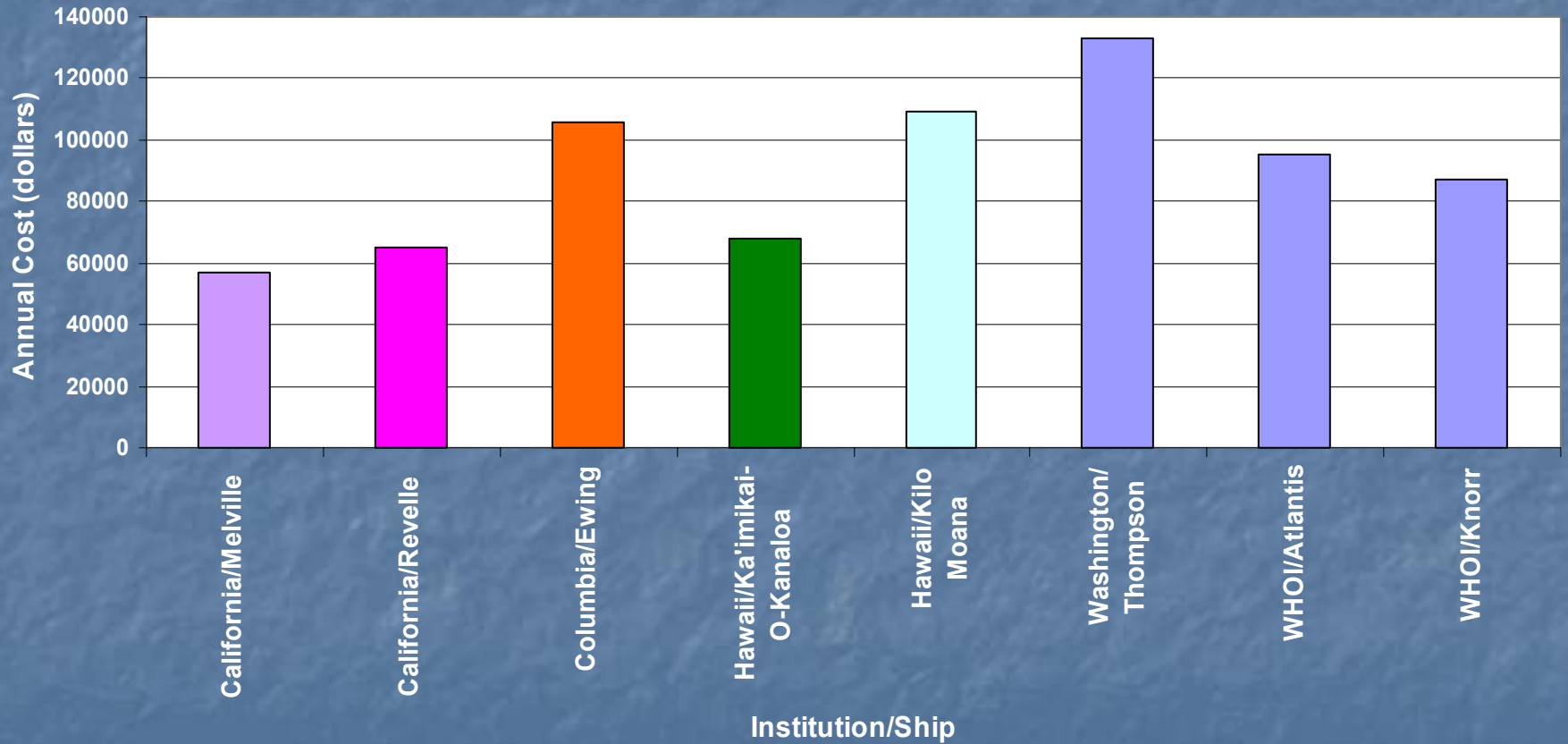
Institution/Ship Insurance Expenditures Small Class, 2002



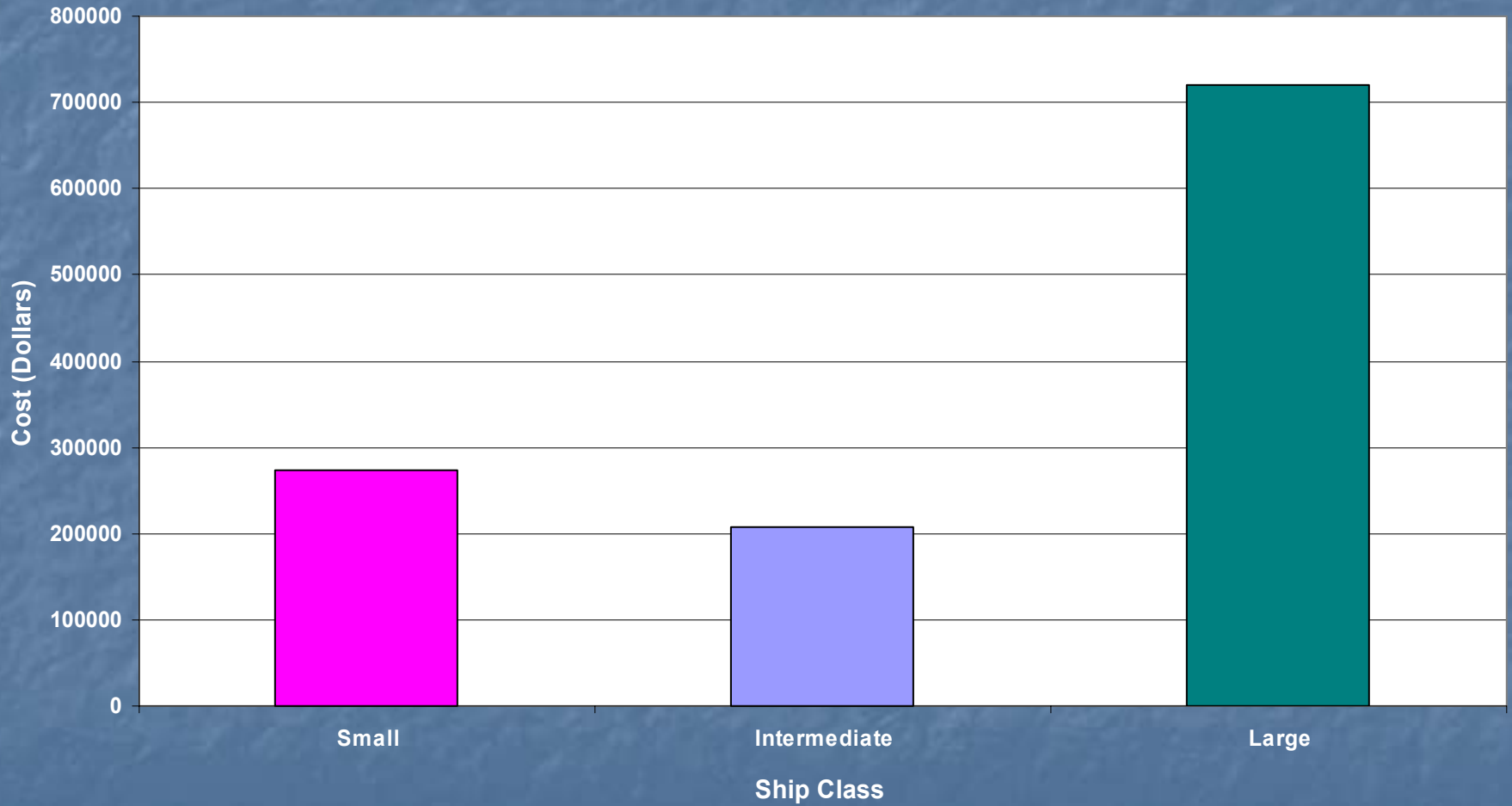
Institution/Ship Insurance Expenditures Intermediate Class, 2002



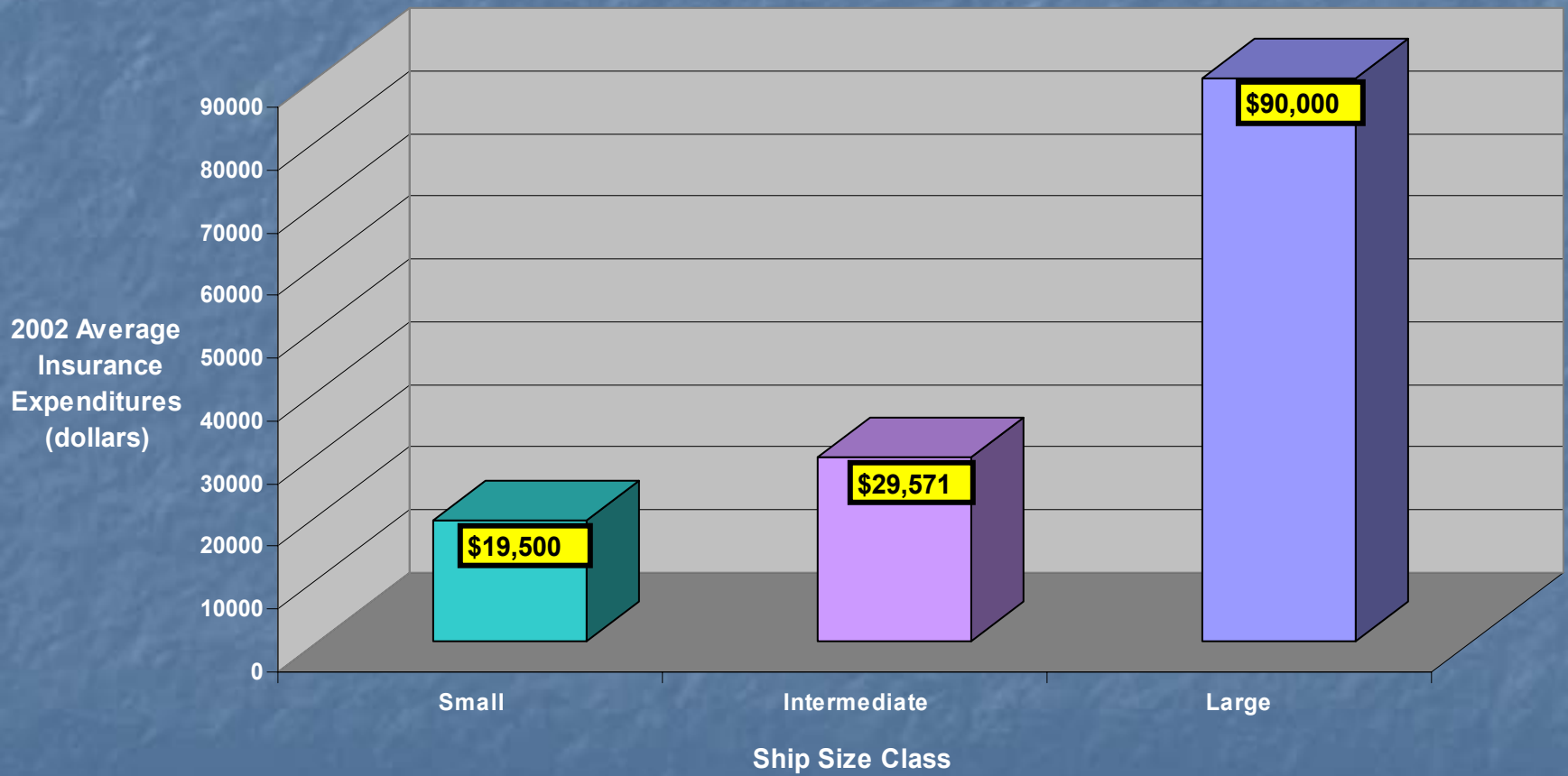
Institution/Ship Insurance Expenditures Large Class, 2002



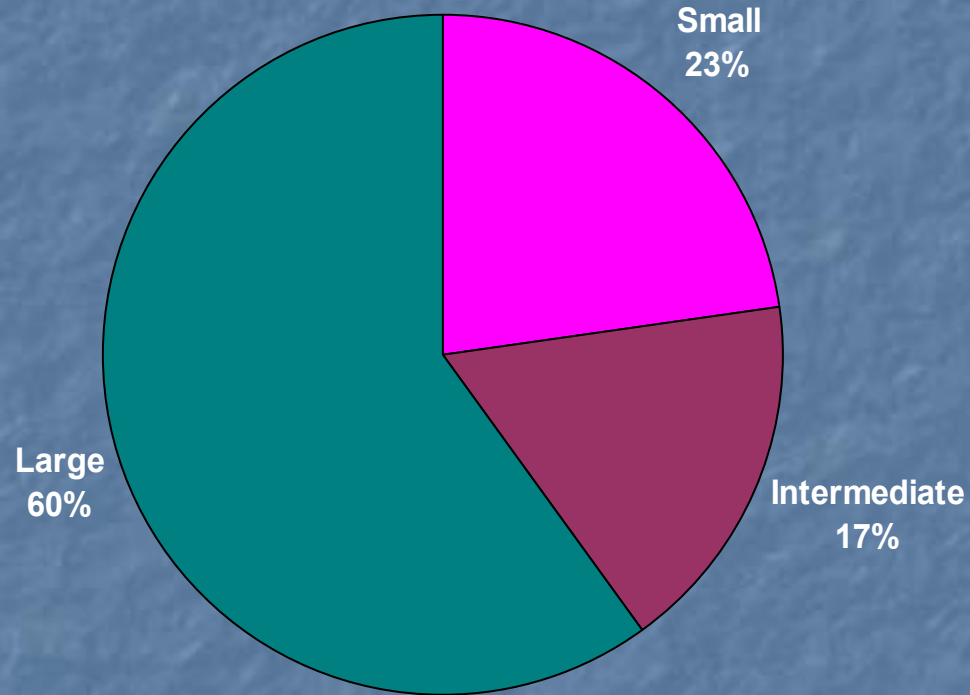
Insurance Expenditures By Ship Class, 2002



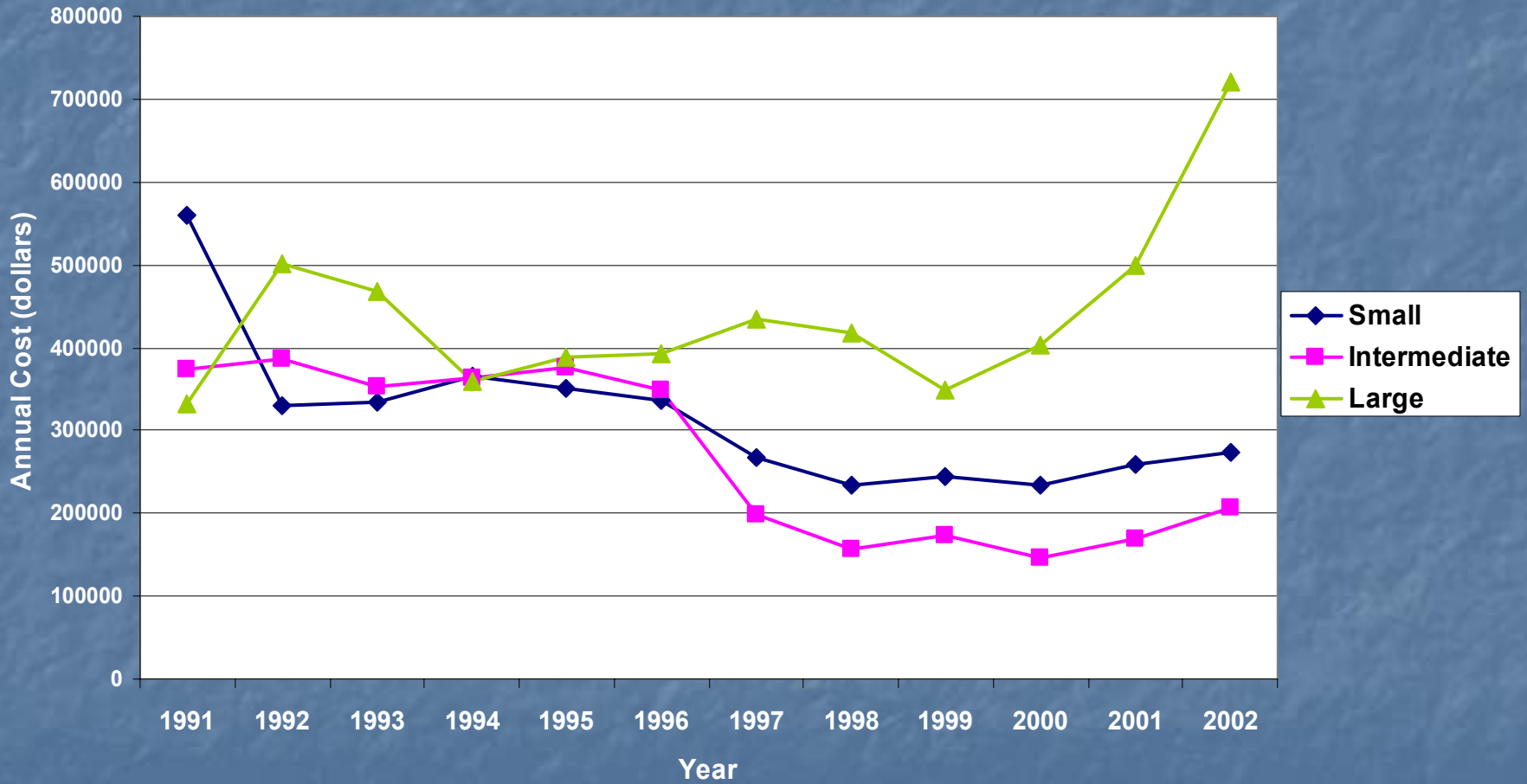
Average Insurance Expenditures By Ship Size Class, 2002



Insurance Expenditures By Ship Class, 2002



Insurance Expenditures By Ship Class 1991-2002



Insurance Expenditures by Class, 1991-2002

