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IN THE TRIAL COURTS FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs

JOSEPH HAZELWOOD,

Defendant.

No. 3AN 89-7217; 3AN 89-7218

TRIAL BY JURY
FEBRUARY 22, 1990
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ARLIS

H & M Court Reporting
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BEFORE THE HONORABLE KARL JOHNSTONE
Superior Court Judge

Anchorage, Alaska
February 22, 1989
8:35 a.m.

APPEARANCES:

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TABLE OF CONTENTS

WITNESS INDEX

DIRECT CROSS REDIRECT RECROSS VOIR DIRE

FOR PLAINTIFF:

FALKENSTEIN, THOMAS

Mr. Cole 4851 4948/4960
Mr. Chalos 4887 4954

SHEPHERD, FRANKLIN

Ms. Henry 4964
Mr. Madson 4966

SUZUMOTO, BRUCE

Ms. Henry 4970 4988
Mr. Madson 4980

KRON, THOMAS

Ms. Henry 4990
Mr. Madson 4997

FOX, MICHAEL

Ms. Henry 5000

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(907) 274-5661

EXHIBIT INDEX

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
107	Copy of 46 USC 8502	4874
Q	RTC log	4900
R	Chart - Valdez Narrows	4900
109	Aerial view Sawmill Bay	4975
110	Aerial view Sawmill Bay	4976
102	Cassett tape - interview w/Hazelwood	5020
119	Bottle of Moussy Beer	5023

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1 PROCEEDINGS

2 FEBRUARY 22, 1989

3 (Tape: C-3634)

4 (103)

5 (Jury present.)

6 MR. CHALOS: Your Honor, may I hand these to
7 Scott to mark?

8 THE COURT: Mr. Purdon? Yes, just as soon as
9 he's finished with this. All right, Mr. Cole, you may
10 call your next witness.

11 MR. COLE: Your Honor, at this time the State
12 would call Lieutenant Commander Tom Falkenstein to the
13 witness stand. Sir, could you take the stand right
14 there?

15 THE CLERK: Sir, you'll find a microphone
16 right there, would you please attach that and remain
17 standing and raise your right hand?

18 (Oath administered)

19 A I do.

20 THOMAS G. FALKENSTEIN,
21 called as a witness in behalf of the Plaintiff, being
22 first duly sworn upon oath, testified as follows:

23 THE CLERK: Sir, would you please state your
24 full name, and then spell your last name?

25 A Thomas G. Falkenstein, F-a-l-k-e-n-s-t-e-i-n.

1 THE CLERK: And your current mailing address?

2 A P.O. Box 486, Valdez, Alaska.

3 THE CLERK: And your current occupation?

4 A I'm a Lieutenant Commander in the United
5 States Coast Guard.

6 THE CLERK: Thank you.

7 DIRECT EXAMINATION OF MR. FALKENSTEIN

8 BY MR. COLE:

9 Q Lieutenant Commander Falkenstein, how long
10 have you lived in -- you're living right now in
11 Valdez, is that correct?

12 A Yes, sir.

13 Q How long have you lived there?

14 A Approximately two and a half years.

15 Q Would you describe what your present position
16 is?

17 A I'm the executive officer at the Marine Safety
18 Office.

19 Q And that's located in Anchorage?

20 A It's located in Valdez.

21 Q How long have you been in the Coast Guard?

22 A I've been in the Coast Guard about 13 and a
23 half years.

24 Q Would you briefly describe your career in the
25 Coast Guard before being assigned to Valdez?

1 A After graduation, I attended -- I was assigned
2 to the Coast Guard cutter Comanche in Eureka,
3 California. From there I was transferred to the
4 Marine Inspection Office in New Orleans,
5 Louisiana. From there the Marine Safety Office
6 in San Francisco, California, and then here.

7 Q What did your duties entail in the Marine
8 Inspection Office?

9 A In the Marine Inspection Office I was an
10 investigator, licensing examiner, and an
11 inspector.

12 Q And in the Marine Safety Office?

13 A I was assigned to inspections in the port
14 operations department, and then briefly in the
15 military readiness branch.

16 Q Would you describe for the jury what your
17 present responsibilities are as Lieutenant
18 Commander in Valdez?

19 A As the executive officer in the Marine Safety
20 Office, I'm the second in command of the
21 commanding officer.

22 Q Judge, do you hear this noise?

23 THE COURT: I do, I hear a high squeaking
24 noise. I don't hear it any more. Mr. Chalos?

25 MR. CHALOS: Just fine.

1 THE COURT: I don't know -- Mr. Purdon said
2 -- no, he's not writing, it's still going on. I hear
3 it again. Anybody got any equipment on them here? Go
4 ahead.

5 Q How many people do you oversee in Valdez?

6 A Approximately 36.

7 Q And have you been in that position since
8 you've been in Valdez?

9 A Yes, sir.

10 Q What is the focus of the Marine Safety Office
11 in Valdez?

12 A The Marine Safety Office in Valdez has several
13 purposes. One is pollution prevention, and port
14 safety for the Prince William Sound area. We're
15 involved in vessel inspections, casualty
16 investigations, and vessel traffic services. We
17 also provide radio coordination for search and
18 rescue within Prince William Sound.

19 Q What department is the vessel traffic system a
20 part of?

21 A The vessel traffic system is a part of what we
22 call our operations department.

23 Q When was the vessel traffic system created?

24 A The vessel traffic system for Prince William
25 Sound was created in 1977.

1 Q What was the purpose of creating this system?

2 A It was to help tankers in their transit of
3 Prince William Sound, provide 'em assistance in
4 the safe navigation through the Sound and narrows
5 in Valdez Arm.

6 THE COURT: We may have to just live with it,
7 Mr. Cole.

8 MR. COLE: That's fine.

9 THE COURT: I just want to make sure that you
10 ...

11 Q What type of equipment was available in March
12 of 1989 in Valdez for carrying out this purpose
13 that you just described?

14 A Vessel traffic?

15 Q Yes.

16 A The vessel traffic had a radio communications
17 network covering Prince William Sound, and then
18 had two radar sites, one located at Potato Point
19 in Valdez Arm, and the second located at the
20 Valdez Spit to monitor tanker traffic both in the
21 Port of Valdez and the upper end of Valdez Arm.

22 Q What was the communication network that you
23 had in Prince William Sound?

24 A It consisted of a series of communications,
25 VHF communications sites, which is the marine

1 frequency, located at various areas in the Sound
2 to communicate with vessels transiting the Sound.

3 Q The center of this whole system, is that
4 what's known as the VTS Center?

5 A The Vessel Traffic Center is the physical
6 location of the watch standers.

7 Q Where is that located?

8 A That's located in the Marine Safety Office
9 building in Valdez.

10 Q How many people work in the Vessel Traffic
11 Center?

12 A There's two people stationed in the Vessel
13 Traffic Center 24 hours a day.

14 Q How many radar screens are located in the
15 Vessel Traffic Center?

16 A There's three radar repeaters in the Center
17 itself.

18 Q Could you describe for the jury what the
19 tracking board is that is used to keep track of
20 the vessels as they enter and leave Prince
21 William Sound?

22 A Well, the vessels are generally -- very
23 generally kept track of as far as their current
24 position on a large chart which covers a wall,
25 and the vessel has a magnetic marker and that's

1 placed on the chart as it moves through the Sound
2 till it gets into radar range.

3 Q Would you describe the monitoring procedure of
4 tankers within the Port of Valdez?

5 A Tankers within the Port of Valdez, once they
6 come into radar range in the Valdez Arm, are
7 monitored the entire time that they're in radar
8 range.

9 Q Now, is there a point where they are plotted
10 automatically, their positions are plotted and
11 kept track of automatically?

12 A Yes, sir.

13 Q Would you explain that to the jury?

14 A The vessels when they come into what's called
15 a one-way zone, which is approximately Tongue
16 Point ...

17 Q Maybe I have a little bit better diagram than
18 the one that's up there ...

19 (Indiscernible - side conversation)

20 A The vessels as they come into the one-way
21 zone, inbound, which is approximately Tongue
22 Point, will automatically be plotted at three-
23 minute intervals, until they come approximately
24 abeam of Entrance Island, and for the outbound
25 leg, the reverse is also done.

1 Q Are there any speed limits in that particular
2 area, the one-way zone?

3 A Within the one-way zone, outbound tankers are
4 restricted to a six-knot speed, and inbound
5 tankers may proceed at 12 knots, provided the
6 inbound tanker is not laden.

7 Q Would you tell the jury how wide the narrows
8 are, at its narrowest point?

9 A At its narrowest point, which is approximately
10 right here at Middle Rock, they're roughly 800
11 yards wide.

12 Q Now, are there -- why is Prince William Sound
13 area -- is there something about the Prince
14 William Sound area that is -- are there certain
15 bridge manuals that are required to be kept on
16 tankers that are involved in traveling through
17 the Prince William Sound area? Coast Guard
18 manuals?

19 A There are several regulations manuals which
20 are required to be ...

21 (0495)

22 MR. CHALOS: Your Honor, I'd like to object to
23 the form of that question. We've had testimony about
24 bridge manuals, such as the kind that Exxon has on
25 their ships. I think Mr. Cole is talking about Coast

1 Guard manuals, I don't -- I think he's confused me,
2 it's not clear to me which he's referring to.

3 THE COURT: You start out with bridge manuals,
4 then you changed it to Coast Guard, I assume you're
5 referring to Coast Guard manuals?

6 Q (Mr. Falkenstein by Mr. Cole:) Do you
7 recognize what's previously been admitted as
8 Plaintiff's Exhibit Number 75?

9 A Yes, sir.

10 Q What is that?

11 A That's the Coast Guard Prince William Sound's
12 Vessel Traffic System User's Manual.

13 Q Is that required to be kept on tankers that
14 use your system?

15 A Yes, sir.

16 Q I'd like to talk about the reporting
17 requirements for a tanker entering Prince William
18 Sound. When is the initial reporting time?

19 A For a tanker entering Prince William Sound
20 from outside the Sound, there's two reports
21 required, one's required three hours prior to
22 entry into the Sound, and the second is required
23 one hour prior to entry.

24 Q What information is provided in the three-hour
25 report?

1 A A variety of information's provided, including
2 the status of the propulsion machinery, status of
3 the steering gear, the electronic navigation
4 equipment, the crew, whether it's -- they have
5 anyone sick or injured, or whether they're short
6 any personnel, they're all reported at that
7 three-hour precall.

8 Q The destinations? Where they've been?

9 A The last port of call is also reported.

10 Q At some time, are they asked whether they have
11 pilotage on board?

12 A Yes, sir, that's one of the questions that
13 they're asked.

14 Q When is the next reporting time, required
15 report time?

16 A The next one is at one hour.

17 Q One hour what?

18 A Prior to entry into Prince William Sound.

19 Q What information is passed along at that
20 point?

21 A Roughly the same information, or anything that
22 may have changed in the two hours.

23 Q And would that include ETAs?

24 A Yes, sir.

25 Q What does the term "pilotage" mean?

1 A Pilotage refers to a vessel that has a master
2 or mate with a pilotage endorsement on their
3 license for the Prince William Sound area. At
4 least that's how it's applied here.

5 Q We're talking about when they are asked if
6 they have pilotage on board, in the three-hour.

7 A Yes, sir, that's what we're referring to.

8 Q And if they were to be a non-pilotage vessel,
9 what would that mean?

10 A That would mean that they have no one on board
11 with a master or mate -- or no master or mate
12 with a pilotage endorsement for Prince William
13 Sound, and they didn't intend to pick up a pilot
14 at Hinchinbrook Entrance.

15 Q What is meant by "coastwise trade"?

16 A Coastwise trade is interstate trade, trade
17 between one state and another.

18 Q What law governs the regulation of coastwise
19 trade?

20 A I'm confused by the question, sir.

21 Q What law, federal, state?

22 A Federal law, sir.

23 Q If a tanker is a non-pilotage vessel engaged
24 in coastwise trade, under what circumstances
25 could it proceed into Prince William Sound?

1 A If a tanker has -- declares themselves to be
2 non-pilotage, then a series of restrictions would
3 be placed on the vessel, and the vessel would
4 have to meet certain conditions to enter the
5 Sound.

6 Q What would those be?

7 A There are several ...

8 Q Back in 1989, what were those?

9 A Well, the conditions that are required to be
10 met is the propulsion machinery, the steering
11 gear, all have to be in good working order. They
12 have to be fully crewed, and the crew has to be
13 fully fit for duty. The -- there has to be two
14 miles of visibility expected for the duration of
15 their transit in the Sound. Their bridge
16 navigation equipment, radars, radio equipment all
17 has to be in good working order, and they'll have
18 to provide a bridge navigation team under the
19 direction -- supervision of a licensed mate other
20 than the mate who's on watch.

21 Q And how far would they be allowed to proceed?

22 A They would have to pick up their pilot -- a pilot
23 off of Bligh Reef Buoy Number 6.

24 Q Now, if a vessel declares itself a pilotage
25 vessel, engaged in coastwise trade, under what

1 conditions can the tanker proceed into Prince
2 William Sound?

3 A Without weather restrictions, if there were no
4 restrictions due to weather or some other
5 conditions that may preclude the tanker's entry
6 in the Sound, they could probably proceed into
7 the Sound under any conditions.

8 Q Where would they be able to proceed to?

9 A Again, precluding weather or some other
10 problem, they could proceed to Rocky Point, where
11 they'd pick up a local pilot.

12 Q Now, were you asked to make a chart, design a
13 chart for explaining the pilotage practices for
14 Prince William Sound tankers?

15 A Yes, sir.

16 Q And I'm showing you what's been marked for
17 identification as Plaintiff's Exhibit Number 106,
18 do you recognize that?

19 A Yes, sir.

20 Q And does that accurately represent the
21 testimony you've just given?

22 A Yes, sir.

23 MR. COLE: Your Honor, I move for the
24 admission of Plaintiff's Exhibit 106.

25 MR. CHALOS: Judge, I would object. If this

1 is just a recap of his testimony, we have his
2 testimony. We've never seen this before, we were never
3 provided with a copy.

4 THE COURT: Mr. Cole, it's exactly what he
5 just said, isn't it?

6 MR. COLE: It's just for illustrative
7 purposes, Your Honor.

8 (0789)

9 THE COURT: I'll let you use it for
10 illustrative purposes, I'll let you use it for final
11 argument, but it won't go to the jury as a piece of
12 evidence.

13 Q Now, when a pilotage vessel proceeds into -- a
14 pilotage vessel in coastwise trade proceeds into
15 Prince William Sound, who must be -- what other
16 requirements are there besides weather?

17 A The vessel must be under the direction and
18 control of a licensed officer, licensed deck
19 officer, holding an endorsement for Prince
20 William Sound pilotage.

21 Q And -- Your Honor, can we approach the bench?

22 THE COURT: Yes, sir.

23 (Whispered bench conference as follows:)

24 MR. COLE: My next question is going to be
25 where is the authority for that, he's going to say

1 (indiscernible - papers rustling). This is the
2 pilotage statute the law requires. We have checked on
3 that, Your Honor, because there's mention of any
4 changes that's initial in this case (indiscernible -
5 whispered).

6 THE COURT: We're going to be getting into
7 your application for judicial notice in the general
8 analysis with this witness?

9 MR. COLE: Yes.

10 THE COURT: Let's excuse the jury and take it
11 up outside the jury's presence. I'd better keep this.
12 Do you need it right now, Mr. Cole?

13 MR. COLE: No.

14 (End of whispered bench conference)

15 THE COURT: We need to take a matter up
16 outside your presence, ladies and gentlemen. Don't
17 speculate on what we're doing in your absence, don't
18 discuss the matter in any fashion, and please don't
19 form or express any opinions. We'll call you back as
20 soon as we've completed this.

21 (Jury not present.)

22 (0900)

23 THE COURT: I know you're unaware of this, and
24 I've been cautioning you, but your conversations are so
25 loud between the two of you, I have noticed jurors

1 looking at you lots of times, and I can hear you, and
2 Mr. Cole has been looking at you when you've been
3 rustling paper over there, I really wish you'd keep it
4 down to a minimum, please.

5 MR. MADSON: Sorry, Your Honor, I thought we
6 were doing better with it.

7 THE COURT: Well, in case you ...

8 MR. MADSON: I appreciate your calling our
9 attention to it ...

10 THE COURT: I won't call your attention to it
11 in front of the jury, but ...

12 MR. MADSON: Well, even now I appreciate it,
13 we didn't mean ...

14 THE COURT: Okay, Mr. Cole, your applications?

15 MR. COLE: Your Honor, my application at this
16 time is to ask Lieutenant Falkenstein where the
17 authority for his statement just now that a pilotage
18 vessel must be under the direction or control of a
19 master or mate holding endorsement for transiting
20 Prince William Sound, and my belief is that he will
21 respond that it is under U.S. Law 46-USC-8502, which
22 I've supplied the court with a copy. That says that
23 the vessels engaged in coastwise trade must have a
24 pilot -- must be under the -- the pilotage vessel must
25 be under the direction and control of a pilot.

1 We filed a motion on this for coastwise
2 vessels, the evidence in this case has been that the
3 Exxon Valdez was going in a coastwise -- it was
4 involved in coastwise trade, it was going from -- it
5 had come from San Francisco to Valdez, and was going on
6 to Long Beach, there's no evidence that it's on the
7 register -- well, it may be on the register, but in
8 this particular voyage, it was engaged in interstate
9 travel.

10 Therefore, it comes under the federal pilotage
11 laws as a coastwise vessel. It declared that it was
12 pilotage, and that's in the evidence through the
13 business document and the testimony of Mr. Taylor. It
14 picked up the pilot at Rocky Point, it went into the
15 Port of Valdez, it didn't change its intentions, which
16 it's required to do if it's going to go from a vessel
17 being engaged in coastwise trade to a vessel engaged in
18 something on the register, foreign trade -- it dropped
19 the pilot off at Rocky Point on the way out. Captain
20 Hazelwood had federal pilotage for this particular
21 area.

22 The only issue here is whether or not -- well,
23 the only -- there isn't any issue about whether this is
24 involved in anything other than coastwise trade, and
25 the law is on coastwise trade, they're either a

1 pilotage vessel or they're a non-pilotage vessel.

2 MR. CHALOS: Your Honor, I think Mr. Cole is
3 confused as far as coastwise and register is concerned.
4 The law says that a vessel, under the new
5 documentation, a vessel can sail either under
6 enrollment or under register. It's the master's
7 choice. In this case, this vessel was sailing under
8 register. Notwithstanding the fact that it was going
9 between two U.S. ports. You can have a situation where
10 you're going between two U.S. ports and still sailing
11 on register.

12 Now, if you're a registered vessel, you're
13 exempt from pilotage. Pilotage does not apply to a
14 registered vessel. That's one of the arguments we've
15 made. The second argument that we've made is that as a
16 result of the September 19, 1986 letter, pilotage was
17 waived. Now, Mr. Cole hired an expert in this case,
18 Mr. Greiner, who contacted the Coast Guard asking about
19 this waiver, and they wrote back to him on October 18,
20 1989, and told him that at the time of the Exxon Valdez
21 casualty, a policy waiver was in effect, and they give
22 him an enclosure which he hasn't supplied to us, but
23 the point that we're making is the waiver of the
24 pilotage is an issue, the application of the pilotage
25 regulations is an issue, the regulation that we're

1 talking about here, that a pilotage vessel has to be
2 under the control and -- direction and control of a
3 master, we're not disputing. There is such a
4 regulation, what we're talking about is that this
5 vessel, the Exxon Valdez, at the time of the casualty,
6 was operating under a waiver as were all other vessels
7 after 1986.

8 This regulation that we're referring to was
9 instituted prior to 1986 by a Coast Guard order,
10 Captain of the Port order, it went in a funny way
11 through the agent, which is another issue that we're
12 going to raise here, is that that's not the proper way
13 of issuing Coast Guard orders. The pilotage was
14 waived. And anyone reading that could reasonably
15 conclude that pilotage was waived, and that's the
16 operation of mind that -- of Captain Hazelwood in this
17 particular case, and other captains who will come and
18 testify.

19 So our point is that the issue of pilotage,
20 the application of pilotage, is an issue that's been
21 raised early on, Mr. Cole knows about it, he himself
22 has done research on this, he's had an expert check it
23 out, and he knows that it's an issue. I think his
24 attempt now is to try and ramrod this whole issue into
25 one motion saying that this vessel is under coastwise

1 trade, coastwise vessels have to have pilotage, Captain
2 Hazelwood had pilotage, and that's it. Well, it's not
3 that simple.

4 THE COURT: Mr. Chalos, Mr. Cole has just
5 simply asked me to take judicial notice of a federal
6 statute, and whether or not it is applicable or not is
7 a disputed question.

8 MR. CHALOS: Yes, that's our point.

9 THE COURT: It's a disputed question, that
10 doesn't mean that the court should not take judicial
11 notice of it, that means that it's a question of fact,
12 whether or not it's applicable or not, that can be
13 argued to the jury, but not whether or not I should
14 admit it or not.

15 MR. CHALOS: Your Honor, we don't have a
16 problem with the introduction of the statute, as I
17 said, but if the statute is introduced for the
18 proposition that that lays to rest the pilotage issue
19 once and for all, then of course we object. If it's
20 just for the purpose that there was a statute existing
21 that says X, Y, and Z, we don't have an objection to
22 that.

23 THE COURT: Well, that's what the purpose of
24 judicial notice of law is. Now, there may -- sometimes
25 it's not applicable, but sometimes it is, it depends on

1 what the jury concludes. I see no reason based on your
2 argument that the court should not take judicial notice
3 under Evidence Rule 202, Section 8502 at this time.
4 Whether or not it's in effect or not remains to be
5 seen.

6 MR. CHALOS: Okay ...

7 THE COURT: But whether or not it -- if it was
8 something that applied to Captain Hazelwood remains to
9 be seen.

10 MR. CHALOS: Well, that's fine, but with that
11 kind of -- I suppose of instruction to the jury, it
12 would satisfy our concerns.

13 THE COURT: Well, the court doesn't instruct
14 the jury on judicial notice of law, to the best of my
15 knowledge, if it was judicial notice of fact, then the
16 court would have an instruction responsibility, but at
17 this time it would be my intention, upon request, after
18 having given you notice, this court will take judicial
19 notice of Section 8502 of Title 46 of USC. And that
20 section can be introduced in evidence as an exhibit.
21 Now what about the Captain of the Port order 1-80, and
22 the September 3, 1986 memorandum? Do we need to deal
23 with that at this point in time also?

24 MR. COLE: Well, I think yes. That would be
25 the easiest way.

1 THE COURT: I mean, are we going to have to
2 interrupt this testimony again ...

3 MR. COLE: Well, I assume it -- I don't plan
4 on going into it, but I assume from listening to Mr.
5 Chalos that he does.

6 MR. CHALOS: Your Honor, my only objection to
7 that portion of Mr. Cole's motion is that the September
8 3, 1986 order that he's referring to was not a Captain
9 of the Port order, what it was was an internal document
10 between Commander McCall and the various Coast Guard
11 personnel at Valdez. That document was never seen by
12 the public, that came out in the foyer* request, so
13 unless there's going to be some connection made by Mr.
14 Cole that Captain Hazelwood was aware of an internal
15 memo exchanged between the Coast Guard, we would object
16 to its introduction. The Captain of the Port order 1-
17 80 may have gone to the public, so I don't have a
18 problem with that, but the September 3, 1986 memo did
19 not.

20 THE COURT: What is the effect of the
21 September 3, 1986 memorandum, is that the effect of a
22 regulation adopted by an agency, Mr. Cole?

23 MR. COLE: I got lost there, judge.

24 MR. CHALOS: I can show you ...

25 THE COURT: Well, Mr. Cole, you've asked me to

1 take judicial notice of 46 USC 8502, together with the
2 procedures set forth in Captain of the Port order
3 number 1-80, which there's no dispute over, and
4 Commander McCall's September 3, 1986 memorandum. My
5 question to you is, is that memorandum considered by
6 you to be a regulation adopted by an agency of the
7 government, or anything that comes under 202-C, and if
8 so, which one does it come under?

9 MR. CHALOS: While Mr. Cole's looking that up,
10 Your Honor, may I show you the memo that I'm referring
11 to?

12 THE COURT: Yes, sir.

13 MR. CHALOS: You notice it's from the
14 commanding officer to people within the Coast Guard.

15 MR. COLE: Judge, I would agree with you that
16 that memo should come in under judicial notice, the
17 September 3, 1986. I apologize ...

18 THE COURT: Well, you'll be agreeing with Mr.
19 Chalos, you're not agreeing with me, I'm ...

20 MR. COLE: Right.

21 THE COURT: ... just asking if there's any
22 authority for it. Okay, if you're withdrawing it at
23 this time, then it won't be given judicial notice. So
24 the court will take judicial notice of 46 USC 8502, and
25 Captain of the Port order number 1-80. We're ready

1 with the jury now?

2 MR. COLE: Yes.

3 THE COURT: Okay, now, how do you propose I
4 take judicial notice of this? Do you expect to have an
5 exhibit of the order 1-80?

6 MR. COLE: I -- just mark it as an exhibit
7 would be fine with me, Your Honor.

8 THE COURT: Okay, I don't have 1-80, I have
9 the federal statute 8502, so we'll mark that at this
10 time as an exhibit.

11 THE COURT: Okay, the statute is Exhibit 107,
12 Mr. Chalos, and Captain of the Port order 1-80 will be
13 108. Is there anything we should take up before I
14 bring the jury back in?

15 MR. COLE: No.

16 THE COURT: Okay.

17 (Indiscernible - whispering)

18 THE COURT: Would you like a glass of water?
19 Get one anyway.

20 (Jury present.)

21 THE COURT: Thank you, ladies and gentlemen.
22 Mr. Cole?

23 (1515)

24 Q (Mr. Falkenstein by Mr. Cole:) Lieutenant
25 Commander Falkenstein, you indicated that a

1 pilotage vessel must be under the direction and
2 control of -- under what law is that required?

3 A A pilotage vessel on a coastwise voyage must
4 be under the direction and control of a master or
5 mate under section 8502 of Title 46, United
6 States Code.

7 Q Your Honor, we would ask the court to take
8 judicial notice of 46 U.S. 8502, and that's
9 Plaintiff's Exhibit 107.

10 THE COURT: Okay, is that admitted? Court
11 will take judicial notice of law -- that statute.

12 EXHIBIT 107 ADMITTED

13 Q What does that phrase "vessel must be under
14 the direction and control" mean?

15 MR. CHALOS: Objection, Your Honor. It's
16 irrelevant in this particular case and there's no
17 foundation.

18 THE COURT: I'll let the witness give his
19 opinion, and objection overruled.

20 A Basically being under the direction and
21 control means that the individual directing the
22 vessel's movement through the water, the
23 individual who has the conn, must have the
24 pilotage endorsement.

25 Q Now, when a vessel gets into Valdez, and loads

1 up, does it have a reporting time then prior to
2 leaving?

3 A Yes, sir, 30 minutes prior to getting
4 underway, the vessel's to report in to the Vessel
5 Traffic Center.

6 Q What time -- what information is passed at
7 that?

8 A The status of the propulsion machinery,
9 steering gear again, electronics equipment,
10 radio, navigation equipment, and next port of
11 call, and again, whether or not the vessel has
12 pilotage.

13 Q Now, on March 24, 1989, were part of your
14 responsibilities responding to and investigating
15 oil spills?

16 A Yes, sir.

17 Q Were you required to go to the Exxon Valdez on
18 that day?

19 A Yes, sir.

20 Q Would you explain to the jury -- what time
21 were you called that morning?

22 A I was called at about 12:30 in the morning.

23 Q Who called you?

24 A Mr. Blandford.

25 Q What did you do after being called?

1 A Contacted Commander McCall, met him outside my
2 house, and proceeded to the station.

3 Q When did you get to the traffic zone?

4 A At approximately 12:40.

5 Q What is an OD?

6 A He's the officer of the day, and is the
7 commanding officer's direct representative after
8 hours.

9 Q After hours, meaning after ...

10 A After the normal work day and on weekends.

11 Q Who was the OD on duty on March 23, 1989?

12 A Petty Officer Gonzalez.

13 Q Was he required to be on duty all evening?

14 A Yes, sir, he was on duty all evening.

15 Q Would being on duty mean that he was at the
16 station, or could he have been away from there?

17 A No, sir, he could have been away from the
18 station.

19 Q What happened after you got to the station at
20 12:40?

21 A I believe Commander McCall contacted the Exxon
22 Valdez on the radio, spoke briefly with someone
23 on the Exxon Valdez, and then I contacted our
24 district office to inform them of the casualty.

25 Q District office where?

1 A In Juneau.

2 Q And after doing that, did you arrange to go
3 out to the Exxon Valdez?

4 A Yes, sir, it was decided that I and Mr.
5 Delozier would go out to the Exxon Valdez to
6 investigate, assess the situation.

7 Q How did you arrange to be taken out there?

8 A Someone arranged for the pilot water taxi to
9 take us out to the ship.

10 Q And who was to go on that ship out to -- the
11 Exxon Valdez?

12 A Myself, Mr. Delozier, and someone from the
13 Department of Environmental Conservation.

14 Q What time did you leave Valdez?

15 A Sometime between 0200 and 0230.

16 Q Can you give the jury an idea of approximately
17 what time you reached the Exxon Valdez?

18 A We arrived at the Exxon Valdez sometime around
19 0330.

20 Q Were you able to get on immediately, or what
21 happened when you arrived?

22 A We changed boats and went to another pilot
23 boat, and he brought us alongside the ship, and
24 we climbed up the ladder and boarded the ship
25 then.

1 Q Did anyone meet you at the ladder?

2 A Yes, sir, personnel from the ship met us at
3 the ladder.

4 Q What was the purpose of you going out to the
5 vessel?

6 A To investigate -- initiate an investigation
7 into the casualty and to assess the situation as
8 far as pollution response and salvage if
9 necessary.

10 Q Were you concerned with the crew? The safety
11 of the crew?

12 A Yes, sir, that's part of it.

13 Q When you arrived at the scene, could you see
14 oil?

15 A Yes, sir, in the lights we could see oil in
16 the water.

17 Q How was it -- would you describe what you saw?

18 A There was a boiling motion or action along the
19 side of the ship on the starboard side of the
20 ship. As we approached, the ship was surrounded
21 by oil, except I believe for the starboard
22 quarter, the after starboard side of the ship.
23 There was a strong smell of oil in the air, and
24 in the lights we could see oil on the water.

25 Q Was there any concern about the danger of

1 explosion during this time?

2 A Yes, sir.

3 Q Why is that?

4 A Well, any time you have crude oil, petroleum
5 products in the water, fresh, there's going to be
6 strong vapors, and the vapors always have a
7 potential for explosion.

8 Q What happened after you got up on the deck?

9 A We were escorted to the bridge.

10 Q And when you got to the bridge, what did you
11 do?

12 A I approached one of the individuals on the
13 bridge and asked him if he was the master.

14 Q What happened then?

15 A He indicated he wasn't, and he pointed to
16 Captain Hazelwood, who was in the port bridge
17 corner -- port corner of the bridge.

18 Q What was Captain Hazelwood doing there?

19 A At the time, he was looking out across the
20 forward decks of the Valdez.

21 Q Was he standing, or sitting, or ...

22 A I don't recall, sir.

23 Q When -- did you go over and meet Captain
24 Hazelwood then?

25 A Yes, sir.

1 Q What did he describe to you was the damage
2 done to the Exxon Valdez?

3 A He indicated some of the tanks had been holed,
4 that he had stopped the engines, the engines were
5 all stopped, rudder was amidships I believe, and
6 the general motion on the vessel before it got
7 onto the reef.

8 Q Would you explain that last sentence again,
9 the general motion of the vessel?

10 A He described how the vessel felt as it
11 initially grounded.

12 Q What did he say? How did it -- that it felt?

13 A He said something to the effect that it kind
14 of bumped and rolled a little bit.

15 Q What were your concerns while you were talking
16 -- let me rephrase that. How far away from
17 Captain Hazelwood were you when you were speaking
18 with him?

19 A Approximately two and a half feet.

20 Q Did you notice any signs that Captain
21 Hazelwood had been drinking?

22 A There was a smell of alcohol on his breath,
23 sir.

24 Q Would you describe, was it a strong smell, or
25 ...

1 MR. CHALOS: Objection, Your Honor. Mr.
2 Cole's leading the witness.
3 Q Would you describe the type of smell, the
4 degree ...
5 A It was an obvious smell.
6 Q Did that concern you?
7 A I was focused ...
8 (1990)
9 MR. CHALOS: Objection, Your Honor. Leading
10 the witness again.
11 THE COURT: Objection overruled.
12 A At the time I was initially focusing on the
13 damage to the vessel.
14 Q What happened after you made this observation
15 of Captain Hazelwood?
16 A After I discussed with Captain Hazelwood his
17 -- the condition of his vessel, how we were
18 sittin', and the damage, I left his company and
19 believe I spoke with Mr. Lawn, who'd accompanied
20 us out to the ship. I believe Mr. Delozier spoke
21 with Captain Hazelwood. After that, Mr. Delozier
22 indicated he wanted to have a conference with me
23 outside the bridge, on the bridgeway.
24 Q Where did you go then?
25 A We went out to the portside bridgeway, and Mr.

1 Delozier and I had a brief discussion.

2 Q What did you say?

3 A I was asked if I had noticed the captain's
4 breath, and Mr. Delozier -- by Mr. Delozier, I
5 indicated yes, and we discussed it briefly, what
6 our next course of action should be.

7 Q What did you decide to do then?

8 A We decided to contact the commanding officer
9 via the satellite telephone, and describe to him
10 the problem and request that a testing officer or
11 a law enforcement officer who had equipment to
12 take an alcohol blood test or breath test of some
13 type come out to the ship.

14 Q Who did you talk to?

15 A I spoke directly with Commander McCall.

16 Q That's Lieutenant Commander Steve McCall?

17 A It's Commander Steve McCall.

18 Q What did you exactly -- who did you tell him
19 was the captain of the Exxon Valdez?

20 A I didn't tell him who the captain of the Exxon
21 Valdez, I assumed he knew.

22 Q And who was res -- was he -- okay. You told
23 him what?

24 A I indicated to him that the master had the
25 smell of alcohol on his breath, and that we

1 needed to have someone come out who could test
2 for blood alcohol content.

3 Q Did you indicate that you felt that it was
4 something that needed to be done immediately, or
5 it could wait for a while?

6 A It needed to be done as soon as possible.

7 Q Why did you feel that -- why did you say that?

8 A Because with time, blood alcohol level
9 diminishes and you do not get as accurate a test.

10 Q And you made your concerns known to Commander
11 McCall.

12 A Yes, sir.

13 Q What time was that phone call?

14 A Very shortly after I got on board the vessel,
15 sir. I'm not exactly sure what time, maybe
16 around 4:00.

17 Q What did you -- what number did you call to
18 call up Commander McCall?

19 A I believe that call was on the primary number,
20 835-4791.

21 Q Did you make other calls that morning?

22 A Yes, sir.

23 Q And would you have been calling other numbers
24 at the Coast Guard?

25 A There would have been one other number I may

1 have called, and that would have been the number
2 directly to the commander, on his private line.

3 Q Which was?

4 A 835-2827.

5 Q After -- you smelled alcohol on the captain's
6 bridge when you came aboard. Why didn't you ask
7 -- did you have the authority to relieve him at
8 that time?

9 A Yes, sir, we could have.

10 Q Why didn't you?

11 A Because Captain Hazelwood is more aware of the
12 condition of his vessel and his vessel's
13 abilities and the damage than anyone in the Coast
14 Guard would be.

15 Q After this initial phone call, did you divide
16 up the responsibilities that day with Mr.
17 Delozier?

18 A Mr. Delozier and I divided the
19 responsibilities almost immediately. We divided
20 'em during that conversation on the bridgeway.

21 Q And what were your responsibilities to be?

22 A I instructed Mr. Delozier to focus on
23 investigation, and I concentrated on salvage and
24 pollution response.

25 Q Who did you deal with then during the course

1 of the day? That morning?

2 A Well, I dealt with the second and chief mates,
3 primarily.

4 Q What did you do that morning? Can you give
5 the jury an idea of what went on after that?

6 A We made arrangements for couplings and
7 connections and hoses to be delivered to the
8 Valdez to initiate lightering operations. Made
9 arrangements with the Exxon Baton Rouge to come
10 alongside -- moor alongside to take cargo from
11 the Valdez, and monitored the progress of the
12 pollution response.

13 Q How did you know it would be safe for the
14 Exxon Baton Rouge to come alongside the Exxon
15 Valdez?

16 A We had one of the pilot boats take and run
17 across an area on both sides of the Valdez,
18 noting bottom depths at various positions
19 relative to the ship.

20 Q When did that occur?

21 A I'm not exactly sure, it occurred before the
22 arrival of the Baton Rouge, which arrived on
23 scene at about 1000.

24 Q 10:00 in the morning?

25 A Yes, sir.

1 Q Did it happen after you arrived on there?
2 A Was there any information available to you
3 when you arrived as to what the soundings were
4 around the vessel?
5 A I'm not sure whether it was available when we
6 arrived or shortly after, when we started having
7 the pilot vessel take soundings.
8 Q Did you have any concern for the stability of
9 this vessel while you were on it that morning?
10 A Yes, sir, I worked with the chief mate, and
11 talked with him concerning the vessel's stability
12 and structural integrity.
13 Q Did that cause you concern?
14 A Yes, sir, we were mostly concerned with the
15 structural integrity of the vessel as the tide
16 went out.
17 Q Why is that?
18 A We didn't know how much damage the vessel had
19 suffered, and as the tide went out, would the
20 rock that it was sitting on have a tendency to
21 break the vessel in half, to bend it too far, and
22 it basically break in half due to its own weight.
23 Q And did you have any discussions with Captain
24 Hazelwood about this?
25 A Not that I recall, sir.

1 Q Just one minute. I have nothing further,
2 thank you.

3 (2445)

4 CROSS EXAMINATION OF MR. FALKENSTEIN

5 BY MR. CHALOS:

6 Q Good morning, Mr. Falkenstein. When did you
7 first come to Valdez?

8 A July of 1987.

9 Q You came on board as the XO?

10 A Yes, sir.

11 Q Now, you said that in your job in the Marine
12 Safety Office in San Francisco and New Orleans,
13 you were in charge of licensing?

14 A No, sir, I was an examiner in New Orleans.

15 Q Just in New Orleans?

16 A Yes, sir.

17 Q Who did you examine?

18 A We examined deck officers, engineering
19 officers, small passenger vessel operators,
20 towboat operators, all categories of licenses.

21 Q As part of the examination, did you administer
22 a radar observer test?

23 A Yes, sir.

24 Q Now, a radar observer endorsement is required
25 by the Coast Guard for every deck officer, is it

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not?

A I believe so, yes, sir.

Q Could you tell the jury what someone has to do to get the radar observer endorsement?

A The radar observer endorsement, in order to obtain it, you have to attend a certified school to get the radar observer certificate from that school, before the Coast Guard'll give you the endorsement.

Q And as part of the examination, does a person have to look at a radar and plot targets on a radar?

A I don't know, sir, I've never attended the school.

Q I take it you don't hold a radar observer's endorsement?

A No, sir.

Q Now, I'd like to ask you a little bit about the VTS. Am I correct that the mission of the VTS in Prince William Sound is to prevent collisions and groundings?

A The VTS in Prince William Sound is to assist the mariner with information that he may not ordinarily have.

Q Have you read the Vessel Traffic Service

1 manual?

2 A Yes, sir.

3 Q Do you recall reading in there that the
4 primary objective of the VTS system is to prevent
5 collisions and groundings?

6 A No, sir.

7 Q Your Honor, may I approach the witness?

8 THE COURT: Yes, sir.

9 (Pause)

10 Q Are you familiar with ...

11 THE COURT: Could I see the cite, please,
12 first?

13 Q Exhibit G.

14 MR. COLE: Your Honor, I'm going to object to
15 Exhibit G, it's not been admitted into evidence, it's
16 not current policy, it's the 1977 one. Mr. Blandford
17 indicated that's not the manual that was in effect at
18 this time, it was superseded.

19 MR. CHALOS: Mr. Cole is right, I was looking
20 for Exhibit H. Sorry, it's Exhibit I.

21 THE COURT: It's Exhibit I in evidence?

22 (Pause)

23 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
24 Falkenstein, I refer your attention to Exhibit I,
25 paragraph 1.2.1, and ask you if you would read it

1 to yourself, and I'll ask you the question again.

2 Well, why don't you read it out loud to the jury?

3 MR. COLE: Judge, I'm going to object, Mr.
4 Chalos' question was in the VTC manual. What he is
5 reading is the operator's manual, and I believe
6 Commander Falkenstein was referring to that document
7 that he has to the right of him, which is the manual
8 that's required to be kept by tanker captains.

9 MR. CHALOS: And I'm referring to the manual
10 that states the obligations and the procedures that the
11 Coast Guard has to follow, this is their manual. This
12 is what states the purpose of the whole VTS system.

13 THE COURT: Your question went to whether he
14 was aware of that being one of the purposes.

15 MR. CHALOS: Yes.

16 THE COURT: This manual I is the manual, the
17 Coast Guard manual.

18 MR. CHALOS: Yes, sir.

19 THE COURT: Any further, Mr. Cole?

20 MR. COLE: Just wanted to make sure that that
21 was clear.

22 THE COURT: You may proceed, sir.

23 (2866)

24 Q (Mr. Falkenstein by Mr. Cole:) Would you
25 please read 1.2.1?

1 A Sir, "Concept of Operations, Background. The
2 Port and Waterway Safety Act of 1972 authorizes
3 the Coast Guard to establish and operate vessel
4 traffic systems in order to prevent damage to or
5 destruction or loss of any vessel, bridge, or
6 other structure on or in the navigable waters of
7 the United States, or any land structure of shore
8 area or -- of shore area immediately adjacent to
9 those waters, and to protect the navigable waters
10 and the resources therein from environmental harm
11 resulting from vessel or structural damage --
12 vessel or structure damage, destruction, or loss.
13 The Trans-Alaska Pipeline Authorization Act,
14 passed in November of 1973, amended the Ports and
15 Waterways Safety Act to specifically require the
16 Coast Guard to establish and operate a Vessel
17 Traffic Service in Prince William Sound."

18 Q And in fact, the VTS is that traffic service,
19 is it not?

20 A Yes, sir.

21 Q Now, you, in response to Mr. Cole's question,
22 said the Vessel Traffic System extends from the
23 Port of Valdez through the Narrows and down to
24 Valdez Arm, do you recall that?

25 A The Vessel Traffic System extends throughout

1 the entire Prince William Sound area.

2 Q When you speak about the Valdez -- strike
3 that, let me go back. With respect to the VTS
4 system, the Coast Guard requires mandatory
5 reporting starting from three hours out of Cape
6 Hinchinbrook right on through to the Port of
7 Valdez, does it not?

8 A It requires mandatory reporting at specific
9 points.

10 Q Starting three hours before you get to
11 Hinchinbrook.

12 A Yes, sir, that's the initial report-in.

13 Q Now, when you speak about the Valdez Arm, what
14 are you referring to, and let me, if I may, have
15 you point that out on Exhibit 25, where the
16 Valdez Arm extends to. Would you point to it,
17 please?

18 A Roughly, the Valdez Arm will extend from this
19 area here down through here.

20 Q To Bligh Reef.

21 A Roughly, yes, sir.

22 Q And that's the area that your radar is
23 supposed to cover, is it not?

24 A The radar was intended to cover primarily the
25 Narrows area.

1 Q I thought you said that the radar covers down
2 in the Valdez Arm as well.

3 A It covers into the Arm, yes, sir.

4 Q And as a matter of fact, the procedures manual
5 says that there will be radar coverage in the
6 Valdez Arm, does it not?

7 A Yes, sir.

8 Q So someone who knows that the Valdez Arm
9 extends down to Bligh Reef can reasonably assume
10 that he's being watched on radar all the way down
11 to Bligh Reef.

12 (3078)

13 MR. COLE: Objection, speculation.

14 MR. CHALOS: I'm asking for his opinion, Your
15 Honor.

16 THE COURT: He can give his opinion, based on
17 his experience.

18 A Anyone who's familiar with radar operations
19 knows that in certain conditions, certain weather
20 conditions, coverage is not gonna be as extensive
21 as in others. So the assumption that you're
22 gonna be watched the entire time is not
23 necessarily a valid one.

24 Q (Mr. Falkenstein by Mr. Chalos:) Sir, you're
25 not very familiar with radar operations, are you?

1 A Somewhat familiar, but not a technical expert,
2 no, sir.

3 Q As a matter of fact, when you were interviewed
4 by the State, you told them that you're not very
5 familiar with radar operations.

6 A Yes, sir.

7 Q Now, we had some testimony here by Mr.
8 Blandford, who was the VTC watch stander,
9 civilian watch stander?

10 A Yes, sir.

11 Q He stated that he had been told by Mr. Taylor,
12 who was the previous civilian on watch, that they
13 had lost the Exxon Valdez on their radar, and
14 that he made one attempt to see the ship, and he
15 couldn't see it on the radar, and thereafter he
16 got a call from Captain Hazelwood telling him
17 that the vessel was aground, he turned on his
18 radar and there was the ship. Do you recall
19 giving an interview to Connie Chung?

20 MR. COLE: Your Honor, I object to this line
21 of questioning. First he asks the question about what
22 -- he makes a speech about what Mr. Blandford says, and
23 then he goes on to another area.

24 MR. CHALOS: Your Honor, I was just laying the
25 foundation for the question.

1 THE COURT: Okay, you can answer that question
2 of giving an interview, but don't answer the next
3 question until there's a chance to discuss it. Go
4 ahead.

5 Q (Mr. Falkenstein by Mr. Chalos:) Do you
6 remember giving an interview to Connie Chung?

7 A Yes, sir.

8 Q Do you remember being asked why, in your
9 opinion, the ship was off the radar when Mr.
10 Blandford said he looked for it, and why it was
11 then seen after the grounding?

12 A If you're asking why I thought the vessel was
13 off the radar initially, and then on the radar
14 secondarily ...

15 Q Yes.

16 A ... I believe I answered, I don't know.

17 Q You said you couldn't explain.

18 A Yes, sir.

19 Q You had no explanation.

20 A All right, sir.

21 Q Now, you spoke about two people being
22 stationed at the Vessel Traffic Control Center at
23 all times, 24 hours a day?

24 A Two people are assigned to the Center, yes,
25 sir, 24 hours a day.

1 Q One is the radar watch stander, and the other
2 is the radio watch stander, is that the way the
3 watches are set?

4 A Yes, sir.

5 Q The radio guy doesn't have anything to do with
6 the radar, and the radar guy doesn't really have
7 anything to do with the radio, is that the way it
8 works?

9 A Not entirely. The radio operator will
10 sometimes answer calls from vessels, but he does
11 not assume the radar watch, nor does the radar
12 operator assume the radio watch.

13 Q And the radio watch stander wouldn't
14 necessarily be plotting vessels on the radar?

15 A No, sir.

16 Q Now, the watch that's set at the VTC Center is
17 set much like a bridge watch on a ship, is that
18 correct?

19 A Not entirely, sir.

20 Q The manual states that, though, does it not?

21 A That statement is in there to explain
22 relatively speaking how the Vessel Traffic
23 Operations Center is to be run.

24 Q Now, the OD, the officer of the day, is the
25 senior man on that particular watch, is he not?

1 A The officer of the day is the commanding
2 officer's direct representative, sir. Not
3 necessarily the senior man.

4 Q If in fact a bridge watch, or the -- something
5 akin to a bridge watch was set, the OD would be
6 the man with the conn, would he not?

7 A In this case, sir, because this is not a ship,
8 the OD has other responsibilities besides just
9 the Vessel Traffic Center.

10 Q So what the OD would do when carrying out his
11 other responsibilities is delegate to the watch
12 stander whatever duties he might have with
13 respect to the radar or the radio, correct?

14 A Yes, sir.

15 Q And then he leaves the area?

16 A Yes, sir.

17 Q And in fact, in this case, went home?

18 A Yes, sir.

19 Q So if an emergency came up, he'd have to be
20 tracked down, not in the station but somewhere at
21 home.

22 A Wouldn't have to be tracked down very hard,
23 sir, he carries a beeper with him, or a radio at
24 all times, or if he's at home, he's able to be
25 contacted by phone.

1 Q And then he could get back to the station
2 within five to ten minutes if he had to.

3 A Yes, sir, after he could initiate a response
4 at the station by his orders over the phone or
5 radio.

6 Q But in fact, if he was needed, all they have
7 to do is call him on the phone and say, "X, Y,
8 and Z occurred, what's your advice?"

9 A Yes, sir.

10 Q You spoke, in response to Mr. Cole's question,
11 about some automatic radar plots that the Coast
12 Guard does?

13 A Yes, sir.

14 (3450)

15 Q Let me show you two documents, if I may. I'll
16 show you what's been marked for identification as
17 Defendant's Exhibit Q and Defendant's Exhibit R.
18 Could you tell the jury what these two documents
19 are?

20 A These appear to be copies of -- Q appears to
21 be a copy of the data logger plot of the Exxon
22 Valdez transit outbound, and R appears to be a
23 copy of the physical plotting on a chart or
24 chartlet of the data provided by that data logger
25 printout.

1 Q Could you explain to the jury what the
2 automatic data logger is?

3 A The computer -- there's a computer interface
4 in the radar, which at set time intervals, which
5 can be set by the operator, in this case they're
6 three-minute intervals, will note the bearing and
7 range of a target from the radar at a particular
8 site.

9 Q Now, this is the Coast Guard radar in the VTC
10 Center?

11 A This is the radar repeater in the VTC Center,
12 yes, sir.

13 Q And you're plotting the vessel automatically
14 every three minutes?

15 A Yes, sir. I can't tell where this -- which
16 one this is from, whether this is from the Spit
17 site radar or from the Potato Point radar.

18 Q In any event, there's a printout that comes
19 off your radar, and this Exhibit Q, is that a
20 printout?

21 A Yes, sir, it's a printout that comes -- is
22 taken from a printer, data logger, that gets its
23 information from the radar.

24 Q And Exhibit R is an actual plot of the three-
25 minute positions that the data logger is

1 plotting?

2 A Yes, sir, it appears to be.

3 Q Both of these documents come from the Coast
4 Guard?

5 A Yes, sir, they appear to have come from the
6 Coast Guard.

7 MR. CHALOS: Your Honor, I offer Exhibit Q and
8 Exhibit R as evidence.

9 MR. COLE: I have no objection.

10 THE COURT: They're both admitted.

11 EXHIBITS Q AND R ADMITTED

12 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
13 Falkenstein, you're not aware of any Coast Guard
14 regulations that require vessels to have company
15 bridge organization manuals on board, are you?

16 A No, sir.

17 Q And the bridge organiza -- if there is a
18 bridge organization manual on board, that
19 wouldn't be considered to be Coast Guard
20 regulations, am I correct?

21 A No, sir.

22 Q You spoke about a question that's asked of
23 ships incoming or outgoing from Prince William
24 Sound, and you said one of the questions asked is
25 whether there is pilotage on board. Am I

1 correct?

2 A Yes, sir.

3 Q Now, the question is, "Is there pilotage on
4 board?" is it not?

5 A I don't know how the watch standers each
6 phrase it.

7 Q Now, you are aware of the fact that there's no
8 question saying, "Is the man that has the
9 pilotage endorsement going to navigate this
10 vessel through the Sound?" That's not a question
11 that's asked.

12 A That's an assumption. That's correct, sir.

13 Q There is no definition that you're aware of,
14 is there, that says when you ask the question,
15 "Do you have pilotage on board?" that means that
16 the pilot is obligated to be on the bridge at all
17 times? You're not aware of any such definition,
18 are you?

19 A Yes, sir, I believe the law defines that.

20 Q Where does the law define that?

21 A I believe in section 8502 of 46 U.S. Code
22 specifies that a vessel not sailing under
23 registry, in other words on a coastwise voyage,
24 must be under the direction and control of a
25 licensed pilot.

1 Q Now, it's true, is it not, that there is no
2 definition in those regulations that you just
3 referred to, that defines what direction and
4 control means?

5 A I do not know, sir. I do not recall.

6 Q In any event, if there was such a definition,
7 it would be in those regulations, would it not?

8 A It could be in another section of Title 46.

9 Q Now, are you aware of any Alaska regulations
10 that require someone with a pilotage endorsement
11 to be on a ship while it transits Prince William
12 Sound?

13 A I'm aware that the State of Alaska has
14 pilotage laws and regulations.

15 Q Do you know what those regulations say?

16 A Not entirely, sir, I'm not -- I don't enforce
17 State law.

18 Q And are you aware that the Alaska Pilot
19 Regulations only extend to Rocky Point?

20 (4020)

21 MR. COLE: Objection, relevance.

22 MR. CHALOS: Well, Your Honor, I'm just
23 following up an answer that this witness gave, that
24 he's aware of pilotage regulations under Alaska law.

25 THE COURT: Answer the question.

1 A I'm not exactly sure of where the pilotage
2 regulations begin for the State of Alaska.

3 Q (Mr. Falkenstein by Mr. Chalos:) I'd like to
4 ask you a little bit about the pilotage
5 regulations. You said that a vessel that's not
6 sailing on register requires a federal-licensed
7 pilot to be on board while transiting Prince
8 William Sound, is that correct?

9 A No, sir, I said that a vessel not sailing
10 under register requires -- is required to be
11 under the direction and control of a federally-
12 licensed pilot while transiting Prince William
13 Sound.

14 Q And I take it you interpret "direction and
15 control" to mean what?

16 A "Direction and control" means the individual
17 has control of the vessel's movement through the
18 water.

19 Q Will you agree that someone who is directing
20 and controlling a vessel can do it from various
21 places on the bridge?

22 A Yes, sir.

23 Q Can do it from various places off the bridge?

24 A No, sir.

25 Q You don't think a captain can say to a mate on

1 watch, "I want you to make the following
2 maneuver, and I'm going to step down and go to
3 the bathroom for a second"?

4 A No, sir, because there's a head on the bridge,
5 for one thing, and for two, he would no longer be
6 directing the vessel's movement through the water
7 as it moved.

8 Q Well, what if he told the mate that "This is
9 the turn I want you to make and I don't want you
10 to make anything else"? Would you consider that
11 to be direction and control?

12 A No, sir, I don't think so.

13 Q Do you think the mate could then countermand
14 what the captain just told him, or the man with
15 the pilotage?

16 A Yes, sir, given a certain set of conditions, I
17 believe the mate would, and probably should if
18 something came up to force him to change those
19 -- that order.

20 Q Mr. Falkenstein, if Commander McCall told you,
21 "I want you to do X, Y, and Z," and then walked
22 away for a second, do you think that you would be
23 in a position to countermand that order?

24 A Under certain ...

25 MR. COLE: Objection, relevance.

1 THE COURT: Yeah, we're getting a little off
2 the track here. Objection sustained.

3 Q All right, let me -- let's get back to the
4 pilotage. You are aware, are you not, that a
5 vessel can sail on register between two U.S.
6 ports?

7 A No, sir, I'm not aware of that.

8 Q You're not aware of the dual documentation
9 requirements?

10 A Yes, sir, I'm aware the documentation
11 requirements have changed recently, but my
12 interpretation, my understanding of the
13 documentation is that the vessel's sailing under
14 registry if it's sailing to a foreign port, and
15 if it's not, it's on a coastwise voyage.

16 Q My question was more specific. Under this
17 dual documentation, isn't it true that a vessel
18 could sail coastwise, could go from San Francisco
19 to Long Beach under a register?

20 A I'm not aware of that, no, sir.

21 Q You're not.

22 A No, sir.

23 Q I take it you're not an expert in
24 documentation.

25 A No, sir.

1 Q Were you aware that in 1986, the -- a letter
2 was sent out by ALAMAR (ph.) to various shipping
3 companies explaining what was termed as new
4 pilotage regulations?

5 A I've been made aware of that letter since the
6 Exxon Valdez grounding.

7 Q When did you first become aware of it?

8 A May, June, sometime, sir.

9 Q Of this year?

10 A Of 1989, sir.

11 Q Have you read that letter?

12 A Some time ago.

13 Q Your Honor, may I approach the witness?

14 THE COURT: This would be a good time for us
15 to take our break. Don't discuss the matter among
16 yourselves or with any other person, don't form or
17 express any opinions, we'll be back in 10 or 15
18 minutes.

19 (4172)

20 (Off record - 10:01 a.m.)

21 (On record - 10:18 a.m.)

22 THE COURT: Thank you, you may resume.

23 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
24 Falkenstein, you have Exhibit 107 in front of
25 you?

1 A Yes, sir.

2 Q That's the Coast Guard regulation that speaks
3 about direction and control, is it not?

4 A This is the law, yes, sir.

5 Q Now, have you had a chance to read through
6 that particular section?

7 (Tape: C-3635)

8 A Yes, sir, most of it.

9 Q There is nothing in that section that defines
10 direction and control, is there?

11 A Not that I can see, no, sir.

12 Q I'd like to speak to you a little bit about
13 pilotage, now, when the pipeline first opened up
14 in 1977, federal pilotage was required for all of
15 Prince William Sound, was it not?

16 A Yes, sir.

17 Q Some time thereafter, around 1980, there was
18 an easement -- an easing of that restriction, was
19 there not?

20 A In certain conditions, yes, sir.

21 Q The easing was to the effect that vessels
22 could transit Prince William Sound in the
23 daylight without pilotage up to Bligh Reef?

24 A If they declared that they did not have the
25 pilotage, yes, sir. And they met other certain

1 conditions.

2 Q The overall statute requiring pilotage in
3 Prince William Sound was still in effect, was it
4 not?

5 A Yes, sir.

6 Q And that easing came about because of a
7 Captain of the Port order?

8 A Through a Captain of the Port order, yes, sir.

9 Q Now, what that meant, then, once the easing of
10 the regulation came about, was that a ship could
11 travel to Bligh Reef with no pilotage, if they
12 met certain requirements?

13 A And they declared that they did not have a
14 pilot aboard, yes, sir.

15 Q Now, are you familiar that in 1985 the Coast
16 Guard proposed new rules that would have done
17 away completely with the pilotage in Prince
18 William Sound?

19 (0079)

20 MR. COLE: Objection, relevance.

21 MR. CHALOS: Your Honor, this is all -- goes
22 to the issue of what the pilotage regulations were, and
23 what the basis for the pilotage regulations.

24 THE COURT: Rules that were proposed and never
25 enacted have no relevance. There's a lot of rules that

1 have been proposed for Prince William Sound.

2 MR. CHALOS: What I'm getting at, Your Honor,
3 is the thinking behind the proposed rule, why did the
4 Coast Guard propose rules that would have eliminated
5 pilotage?

6 THE COURT: Objection sustained.

7 MR. CHALOS: Your Honor, may I make an offer
8 of proof to the bench?

9 THE COURT: All right, you can at a break, but
10 not at this time. I sustain the objection. You just
11 made the offer, that's why I let you speak.

12 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
13 Falkenstein, were you ever involved with any
14 decisions to eliminate pilotage in Prince William
15 Sound?

16 MR. COLE: Objection, relevance.

17 Q Prior to the grounding. Prior to the
18 grounding.

19 MR. COLE: Objection, relevance.

20 MR. CHALOS: Your Honor, again, this goes to
21 the issue of pilotage and what was in effect, and what
22 the basis was for this particular letter of September
23 19, which waived, in our argument, pilotage for that
24 area.

25 THE COURT: Objection sustained.

1 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
2 Falkenstein, were you aware that in 1986 the
3 pilotage requirement was further eased to permit
4 transit of vessel at night without pilotage?
5 A The ...
6 Q So long as the visibility was two miles?
7 A Yes, sir, the primary requirement for transits
8 of vessels being daylight was changed to being
9 two miles visibility.
10 Q Now, with respect to those vessels that did
11 not have pilotage, that operated under these
12 eased regulations, there was no requirement that
13 the master be on the bridge, was there?
14 A Not specifically, no, sir.
15 Q Well, what you've testified to was that only
16 two officers were required to be up there.
17 A Yes, sir.
18 Q You are aware of the fact, are you not, that
19 foreign vessels call at the Port of Valdez?
20 A Yes, sir.
21 Q And you are aware that sometimes these vessels
22 are coming up for the first time?
23 A Yes, sir.
24 Q But the Coast Guard does permit those vessels
25 to come up into Prince William Sound ...

1 (0190)

2 MR. COLE: Judge, I object to going into
3 foreign vessels, we're not dealing with that at all.

4 MR. CHALOS: Your Honor, again, this all goes
5 to -- Mr. Cole opened the door on the pilotage
6 requirement, what's the difference between pilotage and
7 non-pilotage, and the various regulations that apply.
8 And that's what I'm exploring.

9 MR. COLE: Judge, my questions were directed
10 specifically toward coastwise vessels, and that's what
11 Commander Falkenstein ...

12 THE COURT: Are you asserting this as a
13 foreign vessel ...

14 MR. CHALOS: No, Your Honor, I'm just
15 asserting -- I would assume that the risk for a foreign
16 vessel or a Coast Guard vessel, navigational risk, are
17 the same, I'm just trying to explore this non-pilotage
18 versus pilotage issue.

19 THE COURT: Are you trying to explore the
20 reasons behind it, and why it applies to one and maybe
21 not others?

22 MR. CHALOS: Yes.

23 THE COURT: Objection sustained.

24 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
25 Falkenstein, I think you've said that the easing

1 of the regulations in 1986 continued the
2 requirement that there'd be two officers on the
3 bridge when transiting Prince William Sound with
4 no pilotage, do you recall that?

5 A Yes, sir, that is the requirement.

6 Q Do you have Exhibit B in front of you? That's
7 that letter of September 19, 1986?

8 A Yes, sir.

9 Q Would you read item number 3 in the second to
10 the last paragraph?

11 A "A bridge navigation team consisting of an
12 extra watch stander under the direction of a deck
13 officer other than the one on watch must report
14 the vessel's position every 10 minutes while
15 navigating from Cape Hinchinbrook to Montague
16 Point."

17 Q Now, where is Montague Point, could you point
18 it out on the chart?

19 A Be approximately right there.

20 Q Would you agree that, reading that paragraph,
21 it appears to imply that the two-man navigation
22 team only be in effect between Hinchinbrook and
23 Montague Point?

24 A Yes, sir, it seems to imply that.

25 Q And this letter refers to a pilot's station,

1 does it not? If you read the first paragraph.
2 A Yes, sir, it does.
3 Q There's no mention of Bligh Reef there, or
4 Bligh Reef buoy.
5 A No, sir, there does not appear to be.
6 Q And you are familiar that the Coast Guard
7 regulations state that the pilot's station is at
8 Rocky Point?
9 A No, sir, they do not.
10 Q The Coast Guard regulations do not?
11 A No, sir. Coast Guard regulations do not
12 specify where the pilot's station is.
13 Q But you are familiar that the pilot's station
14 as designated is the one at Rocky Point?
15 A Yes, sir, there is a pilot's station
16 designated to be at Rocky Point.
17 Q Now, you spoke -- in this chart that you made
18 up, you say that the State pilot for non-pilotage
19 vessels board and disembarks at Bligh Reef buoy,
20 is that correct?
21 A Yes, sir.
22 Q Is that abeam of Bligh Reef buoy?
23 A I believe the requirement on our checksheet
24 said that the pilot will board off of Bligh Reef
25 buoy number 6.

1 Q And that's the one -- would you point out what
2 we're talking about there?

3 A That would be that buoy right there.

4 Q I take it in the traffic lanes is where you
5 want the pilot to get on and off.

6 A Hopefully, yes, sir.

7 Q Are you aware of a practice of pilots in
8 getting on or off north of Bligh Reef, on vessels
9 without pilotage?

10 A No, sir, I'm not.

11 Q Okay, I'd like to turn our attention for the
12 moment to the evening of the 23rd. Before I do
13 that, I asked you if you're familiar with the
14 Alaska State Statute regarding pilotage?

15 A Not really, no, sir.

16 Q Let me show you -- have the clerk mark this
17 and I'll show you. What's been marked as
18 Defendant's Exhibit S, which is the Alaska
19 Statute, section -- I believe it's -- chapter 63,
20 section 08.62.185, and ask you, have you ever
21 read that statute?

22 A No, sir.

23 Q Could you tell me -- could you read that to
24 the jury?

25 MR. COLE: I object. What is the purpose of

1 this? Is he trying to put it in ...

2 MR. CHALOS: I will ask the court ...

3 THE COURT: If he's never seen the statute,
4 then you're -- well, go ahead and make your
5 application.

6 MR. CHALOS: Yes, I would like to ask the
7 court, Your Honor, to take judicial notice of this
8 Alaska Statute regarding the Alaska laws with respect
9 to pilotage.

10 MR. COLE: May I see it? Thank you.

11 THE COURT: Any objections?

12 MR. COLE: No.

13 MR. CHALOS: I also -- Exhibit S -- sorry ...

14 THE COURT: May I see it, please? So you're
15 offering 8.62.185, the top one?

16 MR. CHALOS: Yes, Your Honor.

17 (0450)

18 THE COURT: All right, what we'll do, then, is
19 we'll, without objection, we'll take judicial notice,
20 the court will take judicial notice of Alaska Statute
21 Title 8, chapter 62, section 185, "Certain license
22 powers required for oil tankers," which is Exhibit S.
23 Before the jury is given this document, though, we'll
24 cover up the other statutes that you didn't ask for.

25 MR. CHALOS: Your Honor, may I just have one

1 minute with Mr. Madson? That'll be fine, Your Honor.

2 THE COURT: Make sure that that does get
3 covered up, Mr. Purdon ...

4 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
5 Falkenstein, would you read subsection D of that
6 statute?

7 A "The pilot required in (A) of this section
8 shall control the vessel during all docking
9 operations."

10 Q There's nothing in there that speaks about
11 having a pilot on board through the transit of
12 Prince William Sound, is there?

13 A Not in the Alaska Statute, no, sir.

14 Q All right, let's go to the events of the
15 morning of the 24th of March. Now, you testified
16 in response to Mr. Cole's question that the
17 captain of the port, Commander McCall, gave you
18 certain instructions?

19 A At what time, sir?

20 Q When you got to the VTC Center.

21 A Yes, sir, he did.

22 Q What instructions did you receive?

23 MR. COLE: Objection ...

24 MR. CHALOS: Your Honor, I'm not offering it
25 for its truth, only that he acted in conformity with

1 the instructions that he received.

2 THE COURT: Mr. Cole?

3 MR. COLE: If that's the purpose, I have no
4 problem with it.

5 Q (Mr. Falkenstein by Mr. Chalos:) Would you
6 tell us what you were told to do?

7 A I was directed to contact the district office
8 and to notify our people in the Operations Center
9 at the Juneau office, and also notify the
10 responsible people in the Marine Safety Division
11 that we'd had a casualty.

12 Q Were there any other instructions given to you
13 by Commander McCall?

14 A Yes, sir, there were several of 'em. One of
15 'em was that I was to get some equipment here
16 together and go out to the vessel.

17 Q And I take it you followed Commander McCall's
18 instructions?

19 A Yes, sir.

20 Q On your way out to the vessel, you said you
21 left sometime around 2:30?

22 A Sometime between two and 2:30, yes, sir..

23 Q And you got to the vessel around 3:30?

24 A Yes, sir.

25 Q Did you see any ice on the way out there?

1 A No, sir.

2 Q You saw no ice at all?

3 A No, sir.

4 Q Do you remember being interviewed by the
5 State?

6 A Yes, sir.

7 Q You remember telling them that on the way out
8 you saw some ice?

9 A I don't recall, sir.

10 Q When you got on board the vessel, did you see
11 ice sometime thereafter?

12 A Yes, sir.

13 Q When did you see the ice for the first time?

14 A I don't recall exactly when, it was starting
15 to get a little more daylight, though.

16 Q Would you describe the ice that you saw?

17 A Nearest the vessel there were several chunks
18 that were five to eight feet across. Farther
19 away, there were some much larger pieces of ice.
20 I don't recall the exact size, but they were
21 significantly large pieces of ice.

22 Q Now, you stated in response to Mr. Cole's
23 question that when you came alongside the vessel,
24 you were concerned about the threat of explosion.

25 A Yes, sir.

1 Q You remember testifying before the NTSB?

2 A Yes, sir.

3 Q Do you remember being ...

4 MR. COLE: Judge, I'm going to object at this
5 point. This is the second time that I haven't gotten a
6 reference, and I'm trying to find the first time the
7 reference that Mr. Chalos made, I still can't find that
8 one.

9 MR. CHALOS: Well, Your Honor, Mr. Cole had
10 promised to give us copies of the NTSB testimony, the
11 official transcript, we still don't have that, so I
12 have to rely on my copy, then I'll show ...

13 MR. COLE: They were provided last Friday.

14 THE COURT: Mr. Cole, Mr. Cole, the rule says
15 upon request you can be shown this, and you can make a
16 polite request for it, and he'll show it to you.

17 (0670)

18 Q (Mr. Falkenstein by Mr. Chalos:) Do you
19 remember being asked these questions and giving
20 these answers? Question: "Commander Falkenstein,
21 when you went out to the ship that first day, you
22 said there were a lot of vapors around. Were you
23 ever worried about explosions or the boat having
24 an explosion problem when you came alongside?"
25 Answer: "As we were coming alongside, sir?"

1 Question: "Yes." Answer: "Not particularly." Do
2 you remember giving that answer?

3 A No, sir, I don't remember it, but if that's
4 part of the transcript, I must have.

5 Q Now, at the time that you came on board the
6 ship, did you notice any oil leaking over the
7 side?

8 A I didn't see any oil running down the side, I
9 saw some stains, I believe, sir.

10 Q I think you've described the stains as being
11 relatively small streaks, is that right?

12 A Yes, sir, two, four foot across, something
13 like that.

14 Q Now, when you went -- you went directly from,
15 I take it, the foredeck of the vessel right up to
16 the bridge?

17 A We boarded, I believe, just aft amidships on
18 the starboard side, and proceeded from there
19 directly to the bridge, yes, sir.

20 Q And that's where you saw the captain? For the
21 first time.

22 A Yes, sir.

23 Q And the captain was standing forward on the
24 bridge, on the port side?

25 A Yes, sir, he was standing in the port forward

1 corner of the bridge.

2 Q Who went up to the bridge with you?

3 A Myself, Dan Lawn, and Mr. Delozier.

4 Q And did you all approach the captain, all

5 three of you?

6 A I don't recall, sir, I know I was the first

7 one to speak with the captain, though.

8 Q Were you the only one that spoke with the

9 captain at that time?

10 A I spoke with him first alone, and then I

11 believe Mr. Delozier spoke with him, and maybe

12 Mr. Lawn, I'm not sure of that, though.

13 Q Right about the same period of time?

14 A No, sir, it was one after the other.

15 Q Within five minutes of each other?

16 A Yes, sir.

17 Q How close were you standing?

18 A About two and a half feet, sir.

19 Q And how close was Mr. Lawn standing?

20 A At the time I was talking to him, I'm not

21 aware of where Mr. Lawn was standing, I don't

22 recall he or Mr. Delozier being in the immediate

23 vicinity.

24 Q Do you have a recollection of seeing Mr. Lawn

25 talking with the captain close up?

1 A No, sir, I do not.

2 Q But you are aware that Mr. Lawn was talking
3 with the captain at some point.

4 A He may have, I'm not sure, sir.

5 Q Now, when you were going out to the vessel,
6 were you aware of the fact that Mr. Delozier had
7 been in the Pipeline Club the evening before?

8 A No, sir.

9 Q You were not aware of that.

10 A No, sir.

11 Q You say that when you got within two, two and
12 a half feet of the captain, you smelled what you
13 perceived to be a smell of alcohol, is that
14 correct?'

15 A Yes, sir, I'd been talking to him for a couple
16 of minutes.

17 Q Where was Mr. Delozier at the time?

18 A I do not recall, sir. I don't recall him
19 being ...

20 Q Was he standing close by?

21 A I don't recall him being close by, no, sir.

22 Q You recall this interview that you gave to
23 Connie Chung, do you not?

24 A Yes, sir.

25 Q And you recall her asking you ...

1 MR. COLE: Judge, I'd like to see this
2 statement.

3 MR. CHALOS: Well, I'm going to ask the
4 witness, if he doesn't deny what I'm asking in this,
5 there's no point in showing.

6 THE COURT: You have to have a good faith
7 basis for this, Mr. Chalos ...

8 MR. CHALOS: I do, Your Honor.

9 THE COURT: ... before you can ask the
10 question, and if you do, why don't you give Mr. Cole
11 -- he's asking for a copy of the interview, or tell him
12 what you expect that witness would say.

13 MR. CHALOS: Shall I whisper it to him?

14 THE COURT: Uh-huh (affirmative).

15 (Indiscernible - whispering)

16 THE COURT: You may proceed.

17 (0835)

18 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
19 Falkenstein, you remember the interview with
20 Connie Chung?

21 A Yes, sir.

22 Q And you remember being asked by her if you
23 smelled alcohol on the captain's breath?

24 A I don't recall exactly, no, sir.

25 Q Do you remember giving an answer, "I smelled

1 alcohol in the area"?

2 A I don't recall exactly what I answered.

3 Q Your Honor, may we approach the bench?

4 (Indiscernible - whispered bench conference)

5 (End of whispered bench conference)

6 THE COURT: We're going to set up a procedure
7 outside of your presence and review it first before
8 you're shown it, ladies and gentlemen, so we'll let you
9 go back to the jury room for a few minutes. Remember
10 not to discuss the matter, or form or express any
11 opinions. We'll call you back when we can.

12 (Jury not present.)

13 THE COURT: Now, what we can do is, we can go
14 ahead and show it to Mr. Cole, you can turn it on, the
15 jury's not here, and then if you're going to be using
16 it to refresh the witness' recollection, it doesn't get
17 shown to the jury, Mr. Cole can look at it, if you're
18 using it to impeach the witness' testimony, it can be
19 shown to the jury. If you can lay a foundation for the
20 voice and the picture being of the witness, which I
21 assume you can.

22 MR. CHALOS: Yes.

23 THE COURT: As I understand it, the witness
24 has said first under oath that he smelled alcohol on
25 the breath of Captain Hazelwood, and your theory is now

1 that he at an earlier date said he just smelled alcohol
2 in the general vicinity.

3 MR. CHALOS: Yes.

4 THE COURT: Which is inconsistent.

5 MR. CHALOS: Right.

6 THE COURT: So it's up to you how you do this,
7 those are the ground rules to do it, though.

8 (Indiscernible - away from mike)

9 (Videotape played)

10 THE COURT: All right, turn back to it, and

11 ...

12 (Videotape played)

13 THE COURT: Mr. Cole, go back and start it so
14 we can hear the question.

15 (Videotape played)

16 THE COURT: Are you ready with the jury now?

17 MR. CHALOS: Yes, Your Honor.

18 THE COURT: How do you plan on proceeding?

19 MR. CHALOS: I'm going to use it to impeach
20 this witness, Your Honor.

21 THE COURT: All right. Bring the jury in.

22 (Jury present.)

23 (1310)

24 MR. COLE: Judge, I want to make sure that Mr.
25 Chalos is prepared to stop this.

1 MR. CHALOS: I'll stop it, Your Honor.

2 THE COURT: Thank you for your patience. Mr.

3 Chalos?

4 Q (Mr. Falkenstein by Mr. Chalos:) Yes, Mr.

5 Falkenstein, do you recall giving an interview to

6 Connie Chung?

7 A Yes, sir.

8 Q We just played a portion of that interview,

9 was that you on the television?

10 A It appeared to be, yes, sir.

11 (Videotape played)

12 Q Commander Falkenstein, you say you were not

13 aware that Mr. Delozier had been drinking the

14 night before, is that correct?

15 A No, sir.

16 Q Was it Mr. Delozier that called you out on the

17 bridgeway?

18 A Yes, sir.

19 Q And was it Mr. Delozier that said to you, "I

20 think I can smell alcohol on the captain's

21 breath"?

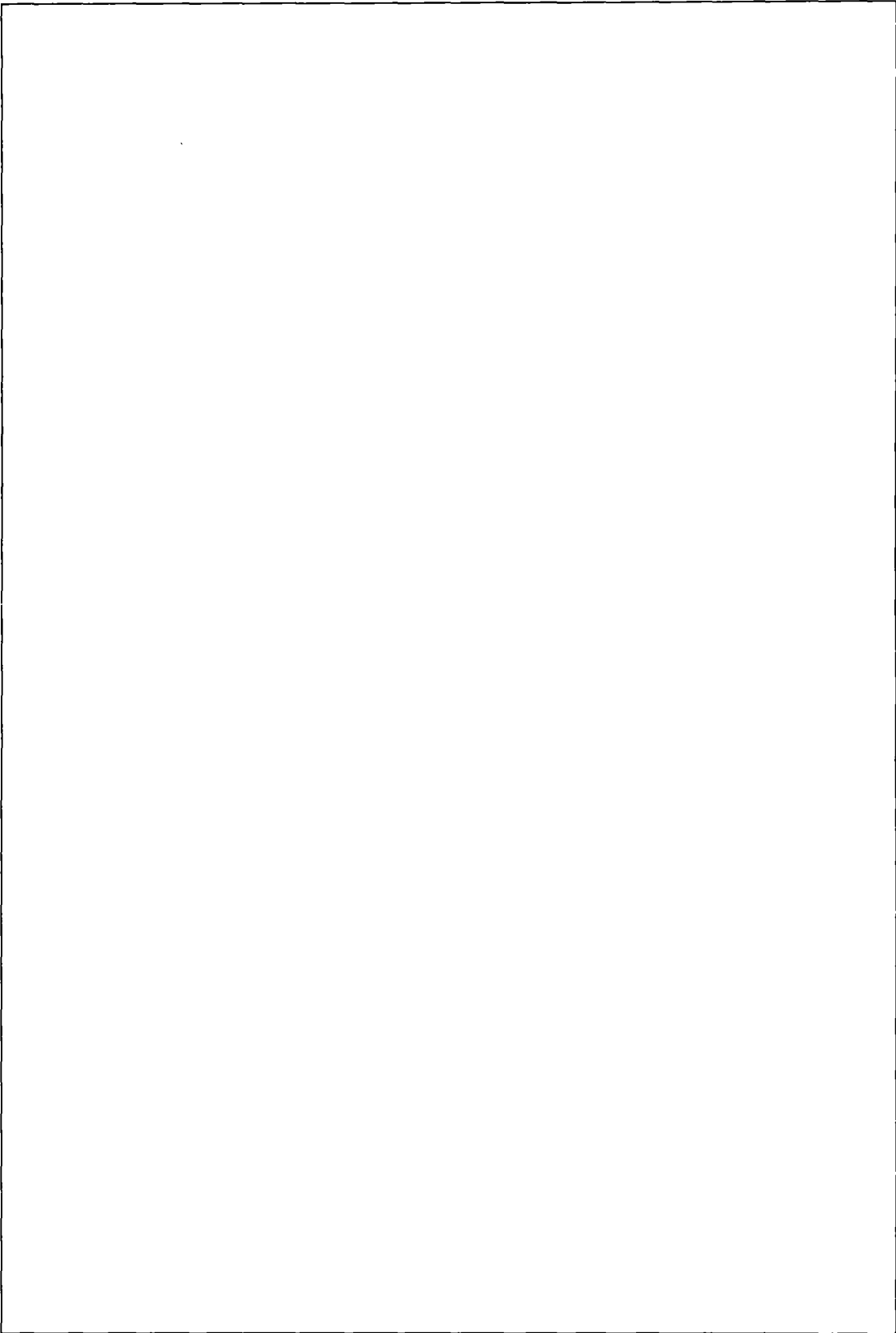
22 A No, sir, he didn't say that.

23 Q What did Mr. Delozier say?

24 A He asked me if I smelled the captain's breath,

25 if I noticed it, and I said yes, I did.

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1 Q Now. I take it that you're not trained in
2 alcohol detection, are you?
3 A Not formally, no, sir.
4 Q You spoke a little bit about that you were
5 concerned that with the passage of time the
6 alcohol would dissipate in the blood, do you
7 recall that?
8 A Yes, sir.
9 Q You don't have any formal training in that
10 either, do you, as far as dissipation rates?
11 A No, sir.
12 Q Mr. Cole asked you a series of questions about
13 Commander McCall, and whether Commander McCall
14 knew Captain Hazelwood. Was it ever your
15 impression that morning that Commander McCall was
16 stalling sending someone out to the vessel to
17 -- with a blood alcohol kit?
18 A No, sir.
19 Q Commander McCall was pretty busy that morning,
20 wasn't he?
21 MR. COLE: Objection, speculation.
22 THE COURT: Objection overruled.
23 A Yes, sir, I presume he was.
24 Q I take it there hasn't been any transcription
25 or any record kept of the actual phone calls made

1 to Commander McCall, has there?
2 A Yes, sir, there are copies of the phone calls
3 made to Commander McCall.
4 Q What I'm talking about is the actual what was
5 said.
6 A Yes, sir.
7 Q There are.
8 A Yes, sir.
9 Q Have you made those available to anyone?
10 A No, sir.
11 Q Is there a particular reason?
12 MR. COLE: Objection, relevance.
13 THE COURT: ... particular reason, objection
14 sustained.
15 Q Do you know why those transcripts have not
16 been made available?
17 MR. COLE: Objection, speculation, relevance.
18 MR. CHALOS: I'm asking ...
19 THE COURT: He's asking him if he knows,
20 that's personal knowledge ...
21 A No, sir, I do not.
22 Q You had the authority, if you felt that
23 Captain Hazelwood was in any way impaired or
24 intoxicated on that particular morning, to
25 relieve him as captain, did you not?

1 A The Coast Guard can remove the captain of a
2 vessel, yes, sir.

3 Q And you as the on-scene investigator had that
4 authority.

5 A Yes, sir.

6 Q You said the reason you didn't remove Captain
7 Hazelwood, I believe, was because he was the one
8 most familiar with the ship and its condition.

9 A He's far more familiar than I would be, yes,
10 sir.

11 Q If you felt that the captain was impaired or
12 intoxicated, you could have replaced him with the
13 chief mate, could you not?

14 A Yes, sir, I believe we could have.

15 Q Did you see any signs of impairment or
16 intoxication when you met with Captain Hazelwood?

17 A That was the first time I had met Captain
18 Hazelwood. I saw no physical signs of
19 impairment.

20 Q Then he wasn't slurring his speech, he wasn't
21 ...

22 A I've got nothing to base my judgement of
23 Captain Hazelwood's speech ...

24 Q His movements were steady?

25 A They appeared to be, yes, sir.

1 Q You said he appeared to be lucid?
2 A Yes, sir.
3 Q Appeared to be in command of his vessel?
4 A As much as one can be in command under those
5 conditions, yes, sir.
6 Q Now, did you at any time tell Captain
7 Hazelwood, "Captain, I believe you have been
8 drinking, I want to do a blood test on you"?
9 A No, sir, I did not.
10 Q Was there a particular reason why not?
11 A Because immediately after speaking with
12 Captain Hazelwood on the bridge, Mr. Delozier and
13 I split the responsibilities. I concentrated on
14 salvage and pollution response. Mr. Delozier
15 concentrated on investigations. At that point, I
16 took myself out of direct involvement in the
17 investigations.
18 Q When you came on board the vessel that
19 morning, was she hard aground by then?
20 A Yes, sir, I had been told she was hard aground
21 by Captain Hazelwood.
22 Q And there was no movement of the vessel that
23 you could discern, was there?
24 A Not particularly, no, sir.
25 Q Now you mentioned that you and Captain

1 Hazelwood spoke about the movement of the vessel
2 prior to the grounding, do you recall that?

3 A Yes, sir.

4 Q Did Captain Hazelwood tell you what he had
5 wanted the third mate to do?

6 (1650)

7 MR. COLE: Objection, agony, hearsay.

8 MR. CHALOS: Your Honor, this goes to
9 admissions, I think Mr. Cole opened the door for that,
10 it goes to declarations against interest.

11 THE COURT: You're offering this against your
12 own client? No, I'm sorry, Mr. Chalos, that's not
13 permitted.

14 MR. CHALOS: Well, then ...

15 THE COURT: It can only be offered by a party
16 opponent.

17 MR. CHALOS: Then I would rely on what -- on
18 the door that Mr. Cole opened as to what was discussed
19 with the captain.

20 THE COURT: Opening door is not an exception.
21 Sustained.

22 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
23 Falkenstein, did you and the captain look at the
24 chart that day?

25 A Yes, sir, later on.

1 Q Was there any discussion as to the maneuvers
2 of this vessel prior to the grounding?

3 MR. COLE: Objection, hearsay.

4 MR. CHALOS: Your Honor, may we approach the
5 bench?

6 THE COURT: No, it's not necessary, unless you
7 can cite me an exception to the hearsay rule, Mr.
8 Chalos, this is strictly curbed by agony and is
9 strictly hearsay. Objection sustained.

10 MR. CHALOS: Your Honor, I would again raise
11 the point that what Captain Hazelwood might have said
12 to this witness would be an admission, it could be a
13 declaration against interest, I don't know what his
14 answer is going to be.

15 THE COURT: Okay, we'll excuse the jury to
16 take this up so we can resolve this, we won't have this
17 problem again. Don't discuss this matter among
18 yourselves, form or express any opinions, or speculate
19 on what we're doing.

20 (Jury not present.)

21 MR. CHALOS: Your Honor, may we also have the
22 witness excused?

23 THE COURT: All right.

24 MR. CHALOS: Judge, if you recall, Mr.
25 Delozier testified that the master told him that he had

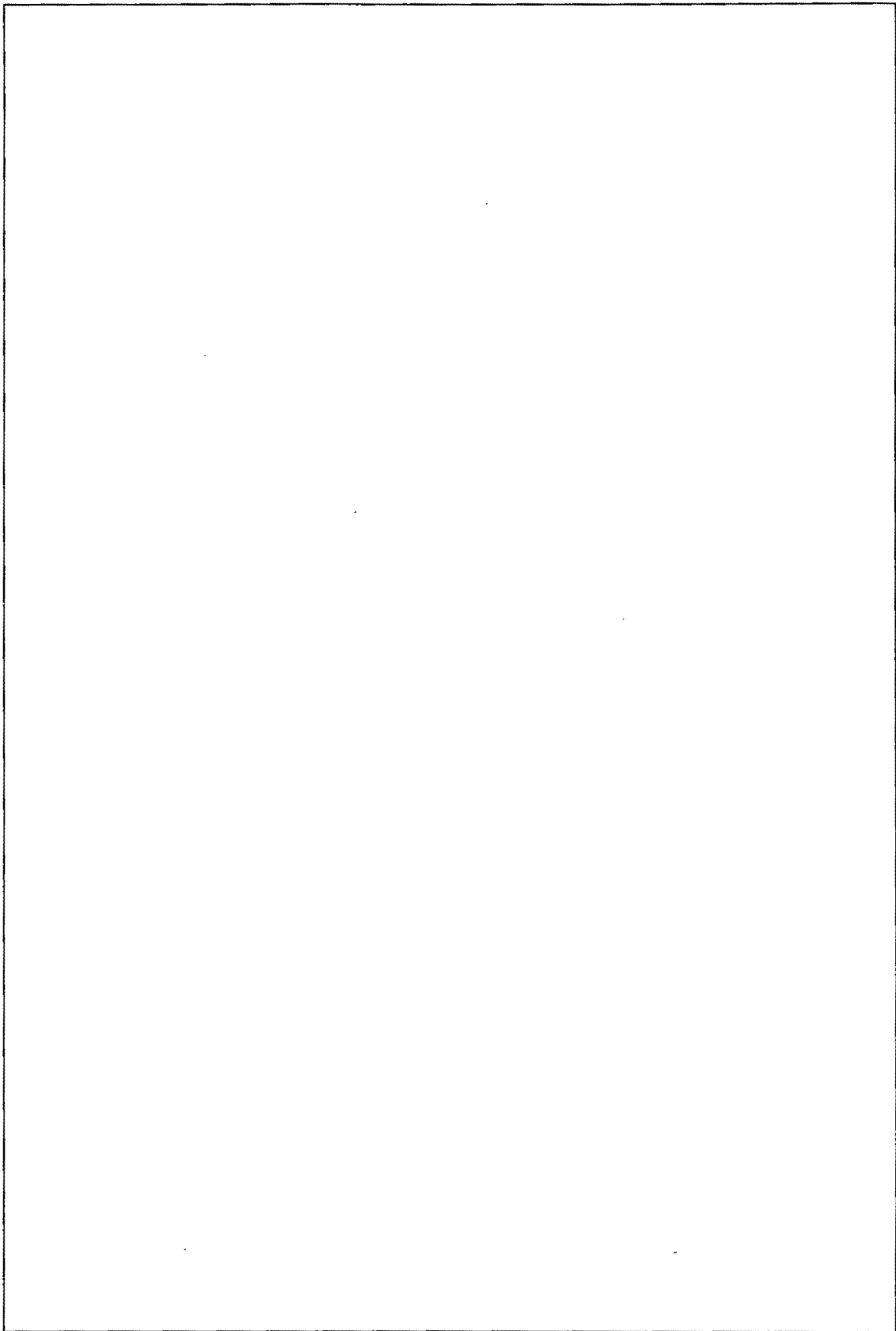
1 told the mate to come down to the 38 fathom mark and
2 start his turn. Mr. Falkenstein has already testified
3 in the NTSB and told the State investigators that he
4 met with the captain, the captain told him that he
5 wanted the third mate to start his abeam of Busby, and
6 that's what I'm driving at here. This goes to the
7 impeachment of the testimony given already by Mr.
8 Delozier, at least a contradiction, because he met with
9 him at the same time.

10 MR. COLE: The position remains the same, it's
11 just hearsay. And ...

12 THE COURT: Now, it's hearsay, now, can you
13 cite me some rule that it would come under? It still
14 remains hearsay. What Captain Hazelwood said, that
15 you're offering, is hearsay. Now, unless it comes as a
16 non-hearsay admission under 801, or an exception under
17 803, then it is not covered by a declaration against
18 interest, since it's a party -- it would come in as an
19 admission by a party opponent. Agony v. State covers
20 that kind of thing, Mr. Chalos. Normally you have to
21 put your client on the stand in order for him to say
22 what happened and what he said and what he did, and
23 Agony points out you can't avoid that by hearsay.

24 And Mr. Chalos, 801 -- I think it's two
25 instead of 801, D2, talks about admissions by party

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1 opponent. If the statement is offered against a party
2 ...

3 MR. CHALOS: Your Honor, I'm looking at 803 as
4 an admission being an out-of-court statement
5 demonstrating an intent to act in a particular manner
6 is admissible to show the declarant subsequently acted
7 in accord with such a plan. Mr. Delozier stated that
8 the captain told him that he had wanted the mate to
9 turn at the 38 fathom mark, well, what we're trying to
10 introduce here is that his plan had always been to turn
11 at Busby, and we have evidence from Mr. Cousins saying
12 that he was told that, we have evidence that he told
13 the helmsman at that point to start his turn, and if
14 that was the plan, that's what I'm trying to introduce
15 here, and I think under 803 that's at least ...

16 (1886)

17 MR. COLE: 803 says, Judge, "A statement of
18 the declarant when the existing state of mind,
19 emotions, and state of physical condition are offered
20 to prove his present condition or future action, but
21 not including a statement of memory or belief to prove
22 the fact remembered or believed, unless it is --
23 relates to the execution, revocation, identification,
24 or terms of the declarant's will." I don't think that
25 that applies here.

1 THE COURT: It doesn't apply, Mr. Chalos.

2 MR. CHALOS: Well, the other thing, Your
3 Honor, is this, that Mr. Delozier testified that Mr.
4 Falkenstein was present when this statement was made,
5 and that's the reason I'm introducing that as well.

6 THE COURT: It still doesn't apply, Mr.
7 Chalos. It's still hearsay, and if you want to get
8 these kind of statements in, you're going to have to
9 put Captain Hazelwood on the stand to do it. You can't
10 do it through the back door, through hearsay. This is
11 something that's always attempted by all defense
12 attorneys, and we have this same argument each time,
13 that Agony covers it, and 801 doesn't apply to
14 defendants. You can't get in an admission of your own
15 client.

16 MR. CHALOS: Well, what I'm talking about
17 here, Your Honor, is Mr. Delozier made a certain
18 statement that he says took place in the presence of
19 Commander Falkenstein and the captain. What I'm trying
20 to do now is refute that statement by this witness, who
21 was present. I mean, I can lay the groundwork and ask
22 him if he was present at this meeting, and whether
23 there was any discussion of the 38-fathom mark, but I
24 suppose we'll have the same objection.

25 THE COURT: Objection sustained. Now, I've

1 ruled -- I want to make sure that we don't have this
2 crop up many more times. Do you have any other
3 expectation of this witness of statements by Captain
4 Hazelwood that you'd like to introduce?

5 MR. CHALOS: I can't think of any now.

6 THE COURT: Okay. Are you ready for the jury
7 then?

8 MR. CHALOS: Yes.

9 THE COURT: Okay.

10 (2060)

11 (Jury present.)

12 THE COURT: All right, Mr. Chalos, you may
13 resume.

14 Q (Mr. Falkenstein by Mr. Chalos:) Sir, you
15 stated that at some point you and the captain
16 went to the chart room?

17 A Yes, sir.

18 Q Who else was present when you were in the
19 chart room with the captain?

20 A No one that I can recall.

21 Q Just you and the captain.

22 A Yes, sir.

23 Q As a result of that particular meeting at the
24 chart room, did you have an understanding of what
25 maneuvers ...

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MR. COLE: Objection, hearsay.

MR. CHALOS: Your Honor, I only want to know if he had an understanding, I'm not going to ask the next question.

MR. COLE: It would be based -- the only way you could have it, it'd be based on the statements of Captain Hazelwood, we've already gone into that.

THE COURT: Well, if you're not going to ask the next question, then what probative value does this witness' understanding have to the elements of this case?

MR. CHALOS: What he may have done as a result of that.

THE COURT: Okay. I'll let you ask that question and see what he did as a result of it. I don't want the witness to indicate what his understanding was, or what Captain Hazelwood told him he had done.

Q (Mr. Falkenstein by Mr. Chalos:) At the conclusion of this meeting in the chart room, did you have an understanding of what maneuvers were to be performed?

A Generally, yes, sir.

Q And was that understanding on the basis of what Captain Hazelwood told you?

1 MR. COLE: Objection. Hearsay.

2 MR. CHALOS: I'm exploring the basis for his
3 understanding, Your Honor.

4 THE COURT: As long as it doesn't come in, but
5 the next question's going to be the one that's going to
6 have to have some probative value, and the question of
7 what did you do as a result of that might or might not,
8 I -- was it on the basis of what Captain Hazelwood told
9 you? Don't tell us what he said, but what was the
10 basis of that understanding?

11 A My understanding of what the vessel was
12 supposed to have -- how the vessel's supposed to
13 have been maneuvered was based on what Captain
14 Hazelwood explained to me.

15 Q (Mr. Falkenstein by Mr. Chalos:) Did you do
16 anything after you received the information from
17 Captain Hazelwood?

18 A I believe I discussed it with Mr. Delozier.

19 Q What did you say to Mr. Delozier?

20 A I relayed to him what the captain had told me.

21 Q And what did you say to Mr. Delozier?

22 A I don't ...

23 THE COURT: Mr. Chalos, you're doing --
24 indirectly, you're trying to do indirectly what I
25 specifically, outside the presence of the jury, said

1 you could not do.

2 Q I'll withdraw the question, Your Honor. At
3 the time that you were standing at the table with
4 Captain Hazelwood, did he make any markings on
5 the chart?

6 A No, sir.

7 MR. COLE: Objection, hearsay.

8 THE COURT: You're just a little late on it,
9 but the answer was no, so no harm done.

10 Q Mr. Falkenstein, I'd like to ask you some
11 questions about the ice conditions in Prince
12 William Sound. You are familiar, are you not,
13 that the ice conditions in and around the Bligh
14 Reef area as a result of the calving from
15 Columbia Glacier have been getting worse in the
16 recent years?

17 A Yes, sir.

18 Q And as a result of this calving, more and more
19 ice comes into the traffic lanes?

20 A Yes, sir.

21 Q And because of that, vessels have to divert
22 outside the lanes to avoid the ice?

23 A Occasionally, yes, sir.

24 Q And when the Coast Guard is asked for
25 permission to deviate, that's always granted. In

1 and around the Bligh Reef area.

2 A Technically, the vessels are not required to
3 request permission to deviate, they're required
4 to inform the Vessel Traffic Service of their
5 intentions to deviate outside of a designated
6 traffic lane, into the traffic separation scheme
7 or outside of the scheme itself -- zone or
8 outside of the traffic scheme itself. They
9 advise the Vessel Traffic Service that their
10 intention's to deviate, and if there are no
11 underlying reasons to prevent that deviation that
12 the vessel may not be aware of, the traffic
13 service grants that permission.

14 Q Are you aware of any situation where the
15 Vessel Traffic Center has told a vessel desiring
16 to leave the lanes as a result of ice, "No, you
17 can't do that"?

18 A No, sir, I'm not personally aware of any.

19 Q Would you agree that diverting for ice, to
20 avoid ice, isn't that a per se dangerous
21 maneuver?

22 MR. COLE: Objection, lack of foundation.

23 THE COURT: Overruled.

24 A Not the maneuver in itself per se.

25 Q Now, could you tell the jury what the Notice

1 -- what the information called Notice to Mariners
2 is?

3 A The Notice to Mariners publishes the latest
4 navigational information available to merchant
5 mariners. It's published by the Coast Guard
6 Office of Navigation in the Juneau office for the
7 local notice, and the General Notice to Mariners
8 is published by the Washington, D.C. offices.

9 Q Could you explain what the Local Notice to
10 Mariners is?

11 A The Local Notice to Mariners disseminates
12 information on light conditions, is the light
13 operating, is the light not operating, if there's
14 log rafting operations, or any other seasonal
15 information such as ice for the mariner to be
16 aware of in transiting certain waters.

17 Q Mr. Falkenstein, do you recall receiving a
18 telephone call from an Exxon captain about seven
19 to 10 days before the grounding, advising you of
20 ice?

21 (2406)

22 MR. COLE: Objection, hearsay.

23 MR. CHALOS: Your Honor, I'm not offering it
24 for its truth, only that he got the call and what he
25 did about it.

1 THE COURT: Seven or 10 days before the
2 grounding?

3 MR. CHALOS: Around seven to 10 days.

4 MR. COLE: Relevance, then.

5 THE COURT: I'll overrule the hearsay
6 objection, but are you going to tie this up somehow
7 with the ...

8 MR. CHALOS: Yes, I'll tie it together.

9 Q (Mr. Falkenstein by Mr. Chalos:) Do you
10 recall that?

11 A I don't recall getting a telephone call, no,
12 sir.

13 Q Do you recall a Captain Martineau calling you?

14 A There were some communications with Captain
15 Martineau, yes, sir.

16 Q Do you recall what those communications were?

17 A That was about the time the Exxon North Slope,
18 which Captain Martineau was the master of, had
19 experienced a hull fracture, and I recall working
20 with Captain Martineau on repairing that
21 fracture.

22 Q Do you recall receiving a call from Captain
23 Martineau reporting to you the ice conditions
24 that he experienced coming in and out of Prince
25 William Sound?

1 A Not coming in, no, sir. I believe he may have
2 called on the ice conditions outbound.

3 Q Do you recall what he said to you?

4 MR. COLE: Objection, relevance.

5 THE COURT: I will give Mr. Chalos a little
6 latitude as he's going to tie it up here, it's --
7 you'll have to do it with the next series of questions.

8 A That may have been -- he may have been
9 recommending -- making recommendations about the
10 ice, I don't recall, though.

11 Q Would you agree, sir, on the basis of the
12 information you received, that March of 1989 was
13 a heavy ice month?

14 A Yes, sir.

15 Q And do you remember Captain Martineau telling
16 you that this was possibly the worst ice he had
17 ever seen?

18 MR. COLE: Objection, hearsay.

19 MR. CHALOS: Your Honor, again, it's not
20 offered for its truth, only what he did.

21 THE COURT: Objection sustained, it is offered
22 for its truth, that's the effect it's going to have, so
23 objection sustained.

24 Q After you received this phone call from
25 Captain Martineau, did you do anything?

1 A Not personally, no, sir.

2 Q Did you discuss it with Commander McCall?

3 A I don't recall.

4 Q When you say "not personally," what was done?

5 A I don't recall taking the call from Captain
6 Martineau personally, and I don't recall anything
7 being done.

8 Q Had the Coast Guard sent out any Notice, Local
9 Notice to Mariners regarding the heavy ice
10 conditions that you just testified to?

11 A I do not recall.

12 Q If a Notice to Mariners was sent out, that
13 would be in the files, would it not? In the
14 Coast Guard files?

15 A Possibly.

16 Q You stayed on the vessel until when?

17 A Approximately three or 3:30 Sunday afternoon.

18 Q During that particular time, from Friday when
19 you got on until Sunday, was the weather fairly
20 calm?

21 A Yes, sir.

22 Q Did most of the oil that had come out of the
23 vessel remain in the vicinity of the vessel?

24 A No, sir, most of it drifted to the southwest.

25 Q For what distance?

1 A I can't tell that, sir.

2 Q Were you aware that a storm came up Sunday
3 evening?

4 A Yes, sir.

5 Q Were you on board for that storm?

6 A No, sir.

7 Q Now, do you have a recollection of when the
8 first piece of Alyeska equipment arrived on the
9 scene?

10 MR. COLE: Objection, relevance.

11 MR. CHALOS: Your Honor, may we approach the
12 bench?

13 (Indiscernible - whispered bench conference)

14 THE COURT: I'm going to sustain the objection
15 (indiscernible - unclear), based on your offer of
16 proof, Mr. Chalos.

17 (End of whispered bench conference)

18 Q (Mr. Falkenstein by Mr. Chalos:) Mr.
19 Falkenstein, did you discuss your testimony that
20 you're about to give today with anyone before
21 coming here?

22 A Yes, sir.

23 Q With whom did you discuss your testimony?

24 A An attorney from the Department of Justice, a
25 Coast Guard attorney, and Mr. Cole and one or two

1 of his assistants.

2 Q Was there a particular reason why you met with
3 attorneys from the Department of Justice or the
4 Coast Guard?

5 MR. COLE: Objection, relevance.

6 MR. CHALOS: Your Honor, it goes to possible
7 bias, possible credibility ...

8 THE COURT: I'll let the question be answered.

9 A Could you repeat it, please?

10 Q Yes, was there any particular reason why you
11 met with attorneys from the Department of Justice
12 and the Coast Guard?

13 A The attorneys from the Coast Guard and the
14 Department of Justice told me to.

15 Q Was there any suggestion made to you as to how
16 you should testify today?

17 A Yes, sir.

18 Q What did they tell you?

19 A Tell the truth.

20 Q Was there any suggestion that the Coast Guard
21 may have liability in this matter?

22 A No, sir.

23 Q Do you understand -- or has anyone told you
24 that the Coast Guard may have liability in this
25 matter?

1 A Not that I recall, sir.

2 Q Now, Mr. Falkenstein, were you -- did you test
3 any Moussy beer while you were on board the
4 vessel?

5 A In what way do you mean test?

6 Q Were you given some Moussy beer to smell?

7 A Yes, sir.

8 Q Who gave you the Moussy beer?

9 A Trooper Fox.

10 Q Did you drink any of it?

11 A No, sir.

12 Q What did the Moussy beer smell like?

13 A Moussy beer. I can't describe it, I don't
14 -- that's the first time I had ever smelled it.

15 Q Does it smell like regular beer?

16 A I don't think so.

17 Q Was the smell that you smelled on Captain
18 Hazelwood's breath similar to the smell of the
19 Moussy beer that you smelled?

20 A I can't recall.

21 Q Now, to the best of your knowledge, has the
22 Coast Guard ever closed the Port of Valdez due to
23 ice?

24 A No, sir.

25 Q Were you ever told by the Department of Energy

1 that you must maintain the port open at all
2 costs?

3 A No, sir.

4 Q You're not familiar with any such direction to
5 anyone?

6 A None at all, sir.

7 Q No further questions, Your Honor.

8 (2920)

9 REDIRECT EXAMINATION OF MR. FALKENSTEIN

10 BY MR. COLE:

11 Q Lieutenant Commander Falkenstein, has the Port
12 of Valdez been closed in the past?

13 A Yes, sir.

14 Q What kind of -- what reasons?

15 A We closed it in I believe January of 1989 due
16 to high winds.

17 Q It obviously was closed after March.

18 A It was closed for a period of time after the
19 Valdez grounding. And it's been closed -- I
20 believe we've closed it a couple of times this
21 year for high winds as well.

22 Q What is the reason for asking for ice reports
23 from incoming and outgoing tankers as they go
24 through Prince William Sound?

25 A So that we can get updated ice conditions in

1 the area to pass on to other ships that will be
2 transiting that area.

3 Q Why is that helpful for others?

4 A So that other ships would know the extent of
5 the ice and the master can plan a course or
6 attempt to anticipate a course of action he may
7 need to take to transit the ice. Or an
8 alternative, if there is no ice, that he doesn't
9 need to worry about it then.

10 Q You indicated that there were some
11 conversations that you had had between yourself
12 and Commander McCall, and that those have been
13 transcribed in some manner?

14 A They've been recorded, sir.

15 Q Are you aware of whether those have been given
16 to the State of Alaska?

17 A Not to my knowledge, sir.

18 Q Now, when did you first see Mr. Delozier on
19 the morning of the 24th?

20 A I'm not exactly sure, it was sometime before
21 we boarded the pilot launch to go out to the
22 Valdez.

23 Q How close were you to him? Did you ever --
24 how close was the closest you got to him prior to
25 leaving on the pilot boat out to the Exxon

1 Valdez?

2 A Couple of feet.

3 Q Did you ever smell any alcohol on his breath
4 at that time?

5 A No, sir.

6 Q Did you smell any alcohol on anyone's breath
7 from the time you reported to the VTC Center
8 until you got out to the Exxon Valdez?

9 A No, sir.

10 Q Now, when you were up at the bridge speaking
11 to the captain, was there anyone else around this
12 area that you said -- smelled alcohol?

13 A Not that I'm aware of, sir.

14 Q And did you have any discussions -- the
15 discussions that you had down in the radio room,
16 was Mr. Delozier there for those?

17 A The telephone conversations, sir?

18 Q Telephone conversations.

19 A Yes, sir, I believe he was.

20 Q How far away from him were you then?

21 A Within five feet, typically, sometimes closer.

22 Q Did you ever smell any alcohol on his breath
23 during that time?

24 A No, sir.

25 Q I'd like you -- you were shown a letter, I

1 think it's been marked for identification as
2 Plaintiff's Exhibit Number B. Does the Alaska
3 Maritime Agency make regulations for the Prince
4 William Sound area?

5 A No, sir.

6 Q Do they make law on how vessels are to travel
7 in and out of Prince William Sound?

8 A No, sir.

9 Q What is Alaska Maritime Agency?

10 A They're a shipping agency, basically, they
11 coordinate logistics, paperwork, cargo manifest
12 details for the ship, they do the shore work, as
13 much as possible, for the ship prior to, during,
14 and after its arrival at port.

15 Q And if a person wanted to find out the most
16 reliable information on pilotage laws in Prince
17 William Sound, where would he look?

18 A To the Coast Guard Marine Safety Office.

19 Q Now, the requirements that came into effect on
20 September 1, 1986, did those affect pilotage
21 vessels or non-pilotage vessels?

22 A Those affected non-pilotage vessels.

23 Q And that's only vessels that did not have a
24 federally licensed pilot aboard?

25 A Yes.

1 MR. CHALOS: Objection, Your Honor. Leading
2 the witness.

3 THE COURT: Technically, he's correct, but the
4 answer is standard and he can get it anyway, so we'll
5 go on.

6 Q What changes in the regulations have occurred
7 for pilotage regulations since 1980?

8 A None.

9 Q Can a captain change from a pilotage to non-
10 pilotage vessel by going below the bridge?

11 A No, sir.

12 Q What steps would a captain have to take in
13 order to change from a pilotage to non-pilotage
14 situation? Let's say he was in the Port of
15 Valdez and he had come in under pilotage, what
16 would he do to make that a non-pilotage vessel?

17 A Assuming that he decided to sail out as a non-
18 pilotage vessel, prior to his departure, he'd
19 have to declare that he was going to sail out
20 non-pilotage. He'd have to answer the questions
21 of the VTC pertaining to the equipment, the crew,
22 he'd have to provide for a bridge navigation
23 watch, and the pilot would remain on board the
24 vessel until the vessel became abeam of Bligh
25 Reef buoy number 6.

1 Q Would it be possible for a tanker captain to
2 drop the pilot off at Rocky Point and then
3 declare himself non-pilotage from that point on?

4 A The situation's never come up, but my
5 professional opinion is no, sir.

6 Q Now, how rapidly does the ice that floats
7 through the TSS system appear and disappear?

8 A Depending on the current, on the time of year,
9 the wind, weather, that type of thing, it can
10 change with the tide, every four, six hours,
11 sometimes less than the tide cycle. It changes
12 rather rapidly.

13 Q Are these changes -- can they be dramatic, or
14 ...

15 MR. CHALOS: Objection, Your Honor.

16 Q ... what kind of changes are we talking about?

17 A The outbound lane can be fairly well choked
18 with ice chunks, and six hours later, or a tide
19 cycle later, it can be clear.

20 Q What would happen if a tanker captain called
21 you and indicated that they did not want to
22 proceed out through the narrows because of what
23 they believed to be hazardous ice conditions?
24 What would be the Coast Guard's response?

25 A It would depend entirely on the vessel's

1 position at the time they reported that to us.

2 Q At the berth, they reported it.

3 A We wouldn't make 'em get underway.

4 Q Your Honor, I have no further questions at
5 this time.

6 (3477)

7 RECROSS EXAMINATION OF MR. FALKENSTEIN

8 BY MR. CHALOS:

9 Q Mr. Falkenstein, you don't know how Exhibit B
10 came about, do you? That's the letter of
11 September 19.

12 A From Alaska Maritime Agencies?

13 Q Yes.

14 A No, sir, I do not.

15 Q You weren't at the Coast Guard in Valdez at
16 that time.

17 A No, sir, I was not.

18 Q So you don't know if Commander McCall called
19 Alaska Maritime and said these were the new
20 regulations?

21 A No, sir, I do not.

22 Q And there hasn't been a Captain of the Port
23 order issued with respect to the changes that
24 we're talking about here, was there?

25 A The Captain of the Port orders with respect to

1 pilotage have been rescinded. There are no
2 Captain of the Port orders in effect with respect
3 to pilotage.

4 Q They were all rescinded after the grounding?

5 A They were rescinded by the memo of September
6 3, 1986.

7 Q Now, just getting back to this pilotage and
8 non-pilotage issue again, as I understand it, a
9 non-pilotage vessel, that is, one who doesn't
10 have the pilotage endorsement, the captain could
11 be below the whole transit of Prince William
12 Sound and never come up on the bridge, is that
13 correct?

14 A Yes, sir, provided the deck officers that were
15 required were on the bridge doing their jobs.

16 Q Uh-huh (affirmative). And if one were to read
17 that letter of September 19, one could say a non-
18 pilotage vessel north of Montague Point would
19 only need one officer on the bridge.

20 A The letter of September 19 has -- doesn't
21 agree at all with Commander McCall's memorandum,
22 how -- I believe it was Mr. Arts (ph.) who signed
23 that, interpreted that, you'd have to ask Mr.
24 Arts, I don't know what he based that letter on.

25 Q Now, in contrast, though, if a captain has the

1 pilotage endorsement, which means that he has
2 certain knowledge of the area, he has a certain
3 knowledge of the navigational hazards, if you
4 will, he has to remain on the bridge the entire
5 passage, is that right?

6 A The licensed officer with the pilotage
7 endorsement must remain on the bridge during the
8 passage in those waters.

9 Q Can you explain to us the logic behind that,
10 that ...

11 MR. COLE: Objection, relevance

12 MR. CHALOS: Your Honor, he expressed his
13 opinion on pilotage, I'm just exploring it.

14 THE COURT: You can ask the question.

15 Q Can you explain the logic of a situation where
16 a non-pilotage vessel, that is, you have no one
17 on there that might know the local area, permits
18 the captain to be below, but one -- a vessel that
19 has pilotage requires that particular person to
20 be on the bridge the entire time?

21 A The vessel with pilotage means that there is a
22 licensed deck officer with a pilotage endorsement
23 on their license for those waters. They've
24 demonstrated a higher degree of navigational
25 competence and care to operate a vessel in those

1 waters. It doesn't necessarily have to be the
2 master, it can be the third mate, second mate,
3 chief mate, as long as the person who has that
4 endorsement is providing direction and control to
5 the vessel's movement.

6 Q But aren't the navigational risks and hazards
7 the same?

8 MR. COLE: I object -- he was cut off in his
9 question, I want to make sure he got a chance ...

10 Q I'm sorry, were you finished?

11 A The vessel that doesn't have pilotage is under
12 the control of an individual monitoring the
13 vessel's movement by plotting its position, as
14 well as a second person who is providing
15 direction to ensure the vessel's movement is in a
16 safe manner.

17 Q Would you agree that the navigational risks
18 that one would face in Prince William Sound are
19 the same whether you're a pilotage vessel or a
20 non-pilotage vessel?

21 A Yes, sir.

22 Q Would you also agree that a ship's officer
23 without the endorsement could have the same
24 degree of knowledge of navigational hazards and
25 aids as one with an endorsement?

1 (3730)

2 MR. COLE: Objection, speculation.

3 THE COURT: I don't know how the answer is
4 going to assist anybody. I'm going to sustain the
5 objection.

6 Q Let me rephrase it and ask you this. Would
7 you agree that as part of a mate's duties,
8 whether he's a third mate, second mate, or first
9 mate, standing a bridge watch in Prince William
10 Sound, part of his duties are to know the area
11 and know the charts and know the navigational
12 hazards?

13 A Yes, sir.

14 Q Now, Mr. Cole asked you a hypothetical, to the
15 effect that a vessel declares itself to be a
16 pilotage vessel, drops the pilot off at Rocky
17 Point, and then calls up and says "I want to be a
18 non-pilotage vessel." And you said in your
19 personal opinion that that wouldn't happen.

20 A Yes, sir.

21 Q That's your personal opinion.

22 A Yes, sir.

23 Q That's not the Coast Guard's opinion, is it?

24 A As the executive officer for the Marine Safety
25 Office, that could be the Coast Guard's opinion

1 as well, sir.

2 Q Are there any Coast Guard regulations that
3 address that point?

4 A No, sir.

5 Q Now, if a particular berth, pier, is required
6 to be used, is it your understanding that the
7 vessel then occupying the berth has to leave,
8 once it's completed its loading?

9 A If the master decided he didn't want to leave,
10 we would support the master, if he requested it.

11 Q If the master was asked to leave, either by
12 his company or by Alyeska, where would the
13 captain have to go if he wanted to anchor?

14 A He'd have to proceed to Knowles Head.

15 Q And to proceed to Knowles Head, you have to go
16 past Bligh Reef, do you not?

17 A Yes, sir.

18 Q And if there were ice in the vicinity, you
19 have to avoid the ice somehow.

20 A Yes, sir.

21 Q I have -- excuse me. In response again to Mr.
22 Cole's question, you said that the ice conditions
23 change, sometimes rapidly, sometimes over a
24 period of time.

25 A Yes, sir.

1 Q But seasonal ice conditions are generally the
2 same, what might vary is the time of day, is that
3 what we're talking about?

4 A Generally, yes, sir.

5 Q Now, assuming that a captain received an ice
6 report that was four hours or six hours old, in
7 order for him to determine what the then existing
8 ice conditions were, he would basically have to
9 go out to take a look, would he not?

10 A Yes, sir.

11 Q I have no further questions, Your Honor.

12 THE COURT: Mr. Cole, are you through?

13 REDIRECT EXAMINATION OF MR. FALKENSTEIN

14 BY MR. COLE:

15 Q A tanker captain could always turn around, go
16 back to the port, couldn't he?

17 A Depending on where he was at the time, yes,
18 sir.

19 Q I have nothing further.

20 THE COURT: May this witness be excused from
21 further participation?

22 MR. CHALOS: Yes, Your Honor, I have no
23 further questions.

24 THE COURT: You're excused, you're free to go.
25 We'll take a recess, ladies and gentlemen, until about

1 noon, we'll come back then. Don't discuss the matter
2 among yourselves or with anybody else, don't form or
3 express any opinions, or -- is there anything we can
4 take up, counsel?

5 MR. CHALOS: Your Honor, I was going to make
6 an offer of proof as to the Coast Guard regulations.

7 THE COURT: Let the jury go and we'll take
8 that up now.

9 (Jury not present.)

10 (Indiscernible - side conversation)

11 THE COURT: All right, at a side bench
12 conference, Mr. Chalos made an offer of proof as to the
13 reason behind asking if Alyeska got there late, or if
14 they were late in getting there, and in response to my
15 question, it appeared to me that Mr. Chalos was trying
16 to show that some of the damage caused to the
17 shoreline, some of the expenses incurred by the State,
18 were caused as a result of Alyeska's lack of a prompt
19 response. The objection was Kuzmeiter (ph.), and the
20 court sustained the objection. Now, if you want to
21 elaborate ...

22 (Tape: C-3636)

23 (0022)

24 MR. CHALOS: No, Your Honor, what I wanted to
25 make an offer of proof on is the proposed rule making

1 in 1985 and 1988. I've marked -- if I may approach the
2 bench? I've marked for identification the proposed
3 rule making dated Monday, June 24, 1985 as Defendant's
4 Exhibit T, and the proposed rule making for Monday,
5 June 6, 1988 as Defendant's Exhibit U.

6 What these two proposed rule making documents
7 that the Coast Guard filed in the federal register
8 purport to do is to waive the federal pilotage
9 requirement in Prince William Sound up to Rocky Point,
10 in other words, under these two proposed rules, federal
11 pilotage would have been waived completely, so anyone
12 could come up without the pilotage endorsement and go
13 right up to Rocky Point.

14 The reason, as I understand, behind these two
15 proposed rule making was one, commercial, on the one
16 hand, where the various oil companies convinced the
17 Coast Guard that it was not needed, and the second
18 reason was that the Coast Guard made an independent
19 determination that the area that we're talking about
20 south of Rocky Point was not dangerous, and pilotage
21 was not required, that vessels could transit that area
22 safely.

23 I think that that determination by the Coast
24 Guard is relevant in this case because Mr. Cole has
25 time and time again tried to paint these waters as

1 being very very dangerous waters, that pilotage was
2 required because they were very very dangerous waters,
3 and that the maneuver that was being performed was a
4 very dangerous maneuver.

5 What I'm trying to show by these two proposed
6 rule making, and the basis of the two proposed rule
7 making, was that the Coast Guard had come to an
8 independent conclusion as early as 1985, that these
9 waters were not dangerous and pilotage was not
10 required. And but for this grounding, these two rules,
11 or the quote rule making would have taken effect. And
12 that's the basis of my attempt to introduce the
13 proposed rule making into evidence.

14 THE COURT: Mr. Cole, anything further?

15 MR. COLE: No.

16 THE COURT: Your offer of proof has been made;
17 the ruling remains the same. We can take our break
18 now.

19 (Off record - 11:45 a.m.)

20 (On record - 12:11 p.m.)

21 (110)

22 (Oath administered)

23 A I do.

24 FRANKLIN H. SHEPHERD

25 called as a witness in behalf of the Plaintiff, being

1 first duly sworn upon oath, testified as follows:

2 THE CLERK: Sir, would you please state your
3 full name, and then spell your last name?

4 A Franklin Henry Shepherd, S-h-e-p-h-e-r-d.

5 THE CLERK: And your current mailing address,
6 sir?

7 A 920 Court Street, Sault Sainte Marie,
8 Michigan.

9 THE CLERK: And your current occupation?

10 A I just got out of the Coast Guard two days
11 ago, so unemployed.

12 DIRECT EXAMINATION OF FRANKLIN H. SHEPHERD

13 BY MS. HENRY:

14 Q Sir, going back to March the 22 of 1989, were
15 you employed in Valdez?

16 A Yes, I was.

17 Q And what was your job in Valdez?

18 A Vessel Traffic Controller.

19 Q And was that as a civilian or as a Coast
20 Guard?

21 A Coast Guard, enlisted.

22 Q And going specifically to the afternoon of
23 March 22nd, 1989 were you working as a watch
24 stander that day?

25 A Yes, I was.

1 Q And were you requested this morning to listen
2 to a portion of a tape of some Coast Guard
3 communications that had occurred that morning?

4 A That's correct.

5 Q Did you recognize that series of
6 communications?

7 A Certainly.

8 Q And did you recognize your voice on the tape?

9 A Yes.

10 Q Sir, I will show you what's been marked as
11 Plaintiff's Exhibit 117 for identification. Is
12 that the tape that you were requested to listen
13 to this morning?

14 A Yes. I believe it is.

15 Q And the conversations on that tape, was that a
16 conversation between you and another vessel?

17 A Yes. It was I and the Exxon Valdez, I
18 believe, as their three hour pre-call.

19 Q And what is a three hour pre-call?

20 A Three hours prior to the time that tanker will
21 arrive at Cape Hinchinbrook, they give a pre-
22 call. That's one of the established times, if
23 you will, that they check in and provide you with
24 certain information, which you fill out a form
25 and retain.

1 A Thank you, sir. I have no other questions.

2 THE COURT: Any questions?

3 CROSS EXAMINATION OF MR. SHEPHERD

4 BY MR. MADSON:

5 Q Well, Mr. Shepherd, if I understand your
6 testimony correctly, you've listened to a copy.
7 Now, when we say, "That tape", we're referring to
8 Exhibit 117, in front of you?

9 A The tape I listened to this morning was a copy
10 of my conversation with the Exxon Valdez on the
11 22nd.

12 Q Okay. My question is, was it that tape you
13 have in front of you right there?

14 A I didn't look at an exhibit number or
15 anything.

16 Q Does it appear to be the same? I mean, was it
17 a cassette tape?

18 A Yes, it was.

19 Q Okay. And you recognized your voice on it?

20 A That's correct.

21 Q There is a master, is there not, a tape
22 recording machine at the VTC?

23 A Yes. There's a 20 channel Magnasync.

24 Q And how long did you work there at Valdez at
25 the VTC?

1 A From February of '87 until just a month ago.

2 Q Now, when you speak to a vessel, this is

3 recorded on that tape machine you had there?

4 A That's correct.

5 Q That's a 40 channel, reel to reel?

6 A I believe it's 20 channels.

7 Q Twenty channels?

8 A Yes.

9 Q And after a reel is used up -- let me ask you

10 this. How long are recordings kept?

11 A Well, I certainly couldn't state what their

12 current procedure is, but at the time, the

13 procedure was to retain the tapes for a period of

14 one month unless there was some occurrence which

15 would lead you to believe you should save it for

16 a longer period.

17 Q And do you know if the original tape, that is

18 the original 20 channel tape recording on the

19 VTC, between yourself and the Exxon Valdez on the

20 afternoon of March 22nd is still in existence or

21 has been destroyed?

22 A I really couldn't tell you at this point.

23 MR. MADSON: I don't have any other questions,

24 Your Honor.

25 MS. HENRY: No questions.

1 THE COURT: Sir, when you listened to your
2 voice on that tape, was there any difference in your
3 voice on that tape than would have occurred at the time
4 you talked? A difference in the tone or any difference
5 in the speed in which you talked?

6 A Between then and now? Only ...

7 THE COURT: No. I mean, when you listened to
8 that tape.

9 A No. No. No. No question it was me.

10 THE COURT: Speaking in your normal voice that
11 you use?

12 A That's correct.

13 THE COURT: Okay. Any further?

14 MS. HENRY: No, Your Honor.

15 THE COURT: Okay. Thank you.

16 MR. MADSON: Well, Your Honor. I do have a
17 follow-up on that, Your Honor.

18 Q Mr. Shepherd, did you compare them side by
19 side, by any chance? The original tape and this
20 one to see if there are, in fact, any
21 differences?

22 A No, I did not.

23 Q I mean, you hear yourself speak on tape
24 recordings and heard that before, have you not?

25 A Yes, I have.

1 Q What, home machines type things -- cassette
2 and home recorders?
3 A No. I've been involved in other cases wherein
4 I was called in and had to listen to recordings.
5 Q You have no idea how that copy was made?
6 A No.
7 Q Do you know for instance if it's a copy of a
8 copy?
9 A I have no idea.
10 Q So you wouldn't know the type of equipment,
11 the speed at which it was played, or anything
12 else like that?
13 A That's correct.
14 MR. MADSON: Your Honor, I have no other
15 questions.
16 MS. HENRY: No other questions, Your Honor.
17 (348)
18 (Oath administered)
19 A I do.
20 BRUCE SUZUMOTO
21 called as a witness in behalf of the plaintiff, being
22 first duly sworn upon oath, testified as follows:
23 THE CLERK: Would you please state your full
24 name, and then spell your last name?
25 A Certainly. My name is Bruce Suzumoto, spelled

1 S-u-z-u-m-o-t-o.

2 THE CLERK: M-o-t-?

3 A O.

4 THE CLERK: And your current mailing address?

5 A PO Box 285, Cordova, Alaska.

6 THE CLERK: And your current occupation, sir?

7 A I'm president of Prince William Sound
8 Aquaculture Corporation.

9 (409)

10 DIRECT EXAMINATION OF MR. SUZUMOTO

11 BY MS. HENRY:

12 Q Sir, would you please explain what the Prince
13 William Sound Aquaculture Association is?

14 A Yes. We're a private, non-profit regional
15 aquaculture association. We have a board of
16 directors made up of commercial fishermen,
17 processors, local municipalities, sport fishing
18 groups, and professionals -- biologists with Fish
19 and Game...

20 Q How long has this association been in
21 existence?

22 A Since 1975.

23 Q And how long have you been the president?

24 A I've been president three years now.

25 Q All right. Now, part of the responsibility of

1 the Prince William Sound Aquaculture Association
2 is to run hatcheries in Prince William Sound. Is
3 that correct?

4 A That's correct.

5 Q Does the Association actually own the
6 hatcheries or lease them?

7 A We own two hatcheries, the Armin F. Koerning
8 Hatchery and the Wally Noernberg, which was the
9 Esther Lake Hatchery. We both own those. And we
10 lease a hatchery, Cannery Creek Hatchery, in
11 Unakwik Inlet from the State of Alaska.

12 Q If you would, referring to the chart behind
13 you, and I think there should be a pointer there.
14 Do you see a pointer?

15 A Oh, yeah.

16 Q And, again, if you could indicate on the chart
17 where each one of these hatcheries is and also
18 tell us, again, their names.

19 A Okay. The Armin F. Koerning Hatchery is down
20 here in the Southwest District of the Prince
21 William Sound. It's in Sawmill Bay.

22 The Wally Noernberg Hatchery is on Esther
23 Island, right there in Lake Bay.

24 And the Cannery Creek Hatchery is in Unakwik
25 Inlet. Up there.

1 Q Okay. Thank you, sir. The last one that you
2 indicated, the Cannery Creek Hatchery. Is that
3 the one that's owned by the State?

4 A Yes.

5 Q All right. And what sort of an agreement do
6 you have with the State with respect to that
7 hatchery?

8 A We have a 20 year lease to run the facility
9 for the State of Alaska.

10 Q Sir, after you learned of the oil spill caused
11 by the grounding of the Exxon Valdez, did you
12 have some concerns about your hatcheries?

13 A Yes, we did.

14 Q And what were those concerns?

15 A Well, we had a large number of fish that were
16 ready to be released from the facilities. We
17 have about 500 million fish that we release a
18 year from our hatcheries.

19 Q And so, what would be the concern with respect
20 to the oil?

21 A Mortality of the fry which we hold in net pens
22 and when they go out to sea.

23 Q What steps did you and the Association take to
24 protect the three hatcheries?

25 A We immediately -- we had some oil booms at our

1 facilities and we immediately put them around our
2 net pens. And then we began the process of
3 purchasing more oil boom material to boom off the
4 lakes, I mean the bays, around the hatcheries.

5 Q And where did you purchase these booms?

6 A At first we purchased them from domestics
7 supplies here in Alaska and the Lower 48 and then
8 we went outside the country. We bought some
9 booms from Norway.

10 Q From where?

11 A Norway.

12 Q Can you describe what these booms look like?
13 How big they are and what they really are?

14 A Well, we used two types primarily. One is a
15 floatation type boom with a skirt on it. It has
16 a type of a vinyl or rubberized floatation unit
17 and then there's a vinyl skirt that goes down
18 below that flotation...

19 Q About how big are these?

20 A ...portion. Pardon?

21 Q How big are they?

22 A It depends. We used -- some times the floats
23 were about eight inches in diameter with a 12
24 inch skirt. Those were generally called harbor
25 booms. And we had some ocean-going booms that

1 had a 24 inch float in diameter and about 36 inch
2 skirts.

3 Q What were the purposes of the skirt?

4 A It's to prevent the oil from flowing
5 underneath the booming material.

6 The other type of boom we had was sorbent
7 boom.

8 Q All right. Why don't you tell us what that
9 is.

10 A It's just a type of boom which absorbs oil and
11 other material.

12 (610)

13 Q Thank you. Sir, I'm showing you what's been
14 marked for identification as Plaintiff's Exhibit
15 109. Do you recognize what is in that
16 photograph?

17 A Yes.

18 Q And what is in that photograph?

19 A It's an aerial photograph of the Armin F.
20 Koerning Hatchery with the boom material placed
21 out in front.

22 Q All right. And, now, is that the hatchery
23 that's also called the Sawmill Bay Hatchery?

24 A Yes.

25 Q And you said that that reflects the booms that

1 had been put up?

2 A It looks like in the early stages. This is

3 -- we had more booms later on, but this -- that's

4 correct.

5 Q That was in the early stages?

6 A Yes.

7 Q Do you see any oil in that photograph?

8 A Yes.

9 Q And does that photograph accurately depict the

10 Sawmill Bay area and the booms that were up in

11 the early stages?

12 A Yes, it does.

13 MS. HENRY: At this time the State would move

14 into evidence Exhibit 109.

15 MR. MADSON: No objection.

16 THE COURT: Admitted.

17 EXHIBIT 109 ADMITTED

18 Q (Mr. Suzumoto by Ms. Henry:) I'm showing you

19 what's been marked for identification as State's

20 Exhibit 110. Do you recognize what is in that

21 photograph?

22 A Yes. It's another photograph of the same

23 area.

24 Q And can you tell whether or not that

25 photograph was taken before or after the

1 photograph 109?

2 A From this I have difficulty telling -- looks
3 like it's after. No -- yes, it is -- I mean,
4 it's before, I'm sorry, because we have some
5 other booming material out in front here.

6 Q All right. So, which one is first in time?

7 A This is first and this is second.

8 Q Okay. So, State's Exhibit 110 is first in
9 time and...

10 A Yes.

11 Q ...109 is second?

12 A That's correct.

13 Q And does 110 also reflect the booms that were
14 placed to protect Sawmill Bay?

15 A Yes.

16 Q And does it also show some oil?

17 A Yes, it does.

18 Q Does that accurately reflect the area prior to
19 the area that's depicted in 109?

20 A Yes, it does.

21 MS. HENRY: At this time the State will move
22 into evidence Exhibit 110.

23 MR. MADSON: No objection.

24 THE COURT: Admitted.

25 EXHIBIT 110 ADMITTED

1 Q (Mr. Suzumoto by Ms. Henry:) How long did you
2 keep the booms in place once you put them in late
3 March, early April?

4 A Until the end of September.

5 Q Of 1989?

6 A Yes.

7 Q Now, the photographs were only of Sawmill Bay,
8 but did you boom the other two hatcheries also?

9 A The Wally Noernberg Hatchery we did. We
10 boomed off the bay there. At the Cannery Creek
11 Hatchery, it's such a wide inlet, we weren't able
12 to boom off the bay. We had to put booms around
13 the net pens. That was all we did.

14 Q All right. So there all you did was boom the
15 net pens?

16 A Yes.

17 Q Did you, in fact, release any fish from any of
18 these hatcheries last summer?

19 A Yes, we did.

20 Q When did you release the fish?

21 A In April and May.

22 Q All right. As far as you're concerned, was
23 the booming procedure successful in protecting
24 the hatcheries?

25 A Yes, it was.

1 Q Now, the fish that you released last summer,
2 when will they be returning?

3 A The majority of them will be returning this
4 year. Pink salmon will be coming back this year.

5 Q So, at this point you don't know what may have
6 happened to them after you released them?

7 A No, we don't.

8 Q Now, switching gears for just a moment. Where
9 does the money come from for your budget for the
10 Prince William Sound Aquaculture Association?

11 A Basically, from two sources. One is an
12 enhancement tax, a two percent (2%), which the
13 commercial fishermen pay off their gross
14 revenues. And the other is from fish sales which
15 we -- we sell fish at our facilities when they
16 return.

17 Q Now, the two percent (2%) tax, that comes from
18 the fishermen?

19 A Yes, it does. They pay two percent (2%) on
20 their gross revenue.

21 Q Of the fish they catch?

22 A Right. And that's collected by the State of
23 Alaska.

24 Q Now, assuming that the oil had impacted the
25 hatcheries so that you could not release the fish

1 or assuming that the mortality rate was very high
2 after you did release the fish, how would that
3 affect your budget?

4 (797)

5 MR. MADSON: Well, Your Honor, I'll object.
6 It's based on assumptions. Speculation. It's not even
7 relevant.

8 MS. HENRY: Your Honor, the State must prove
9 risk of damage and I'm attempting to prove risk of
10 damage assuming the oil had, in fact, impacted the
11 hatcheries.

12 MR. MADSON: Well, Your Honor, they have to
13 prove a substantial and justifiable risk. And, I think
14 by making these assumptions, it goes way beyond. We're
15 into the area of speculation and conjecture and not
16 real substantial risk.

17 THE COURT: Overruled.

18 Q (Mr. Suzumoto by Ms. Henry:) Assuming that
19 -- do you remember the question?

20 A Yes. We'd be in trouble, basically, because,
21 if the fishermen didn't catch the fish, we
22 wouldn't get the tax revenue and, if the we
23 weren't -- if the fish didn't show up or we
24 weren't able to harvest them, we wouldn't have
25 any revenue from fish sales either.

1 Q And what is, approximately, your annual
2 operating budget?

3 A Our operational budget is \$6.6 million. We
4 have a capital construction budget of about
5 another \$3-\$3.5 million. So, it's about \$10
6 million overall.

7 Q Okay. Thank you, sir.

8 MS. HENRY: I have no other questions.

9 (854)

10 CROSS EXAMINATION OF MR. SUZUMOTO

11 BY MR. MADSON:

12 Q Sir, I believe you said Exhibit 110 was taken
13 -- you believe was taken before Exhibit 109. Is
14 that correct?

15 A Yes. I think so. Because I...

16 Q Looking at them here, I guess it goes this
17 way.

18 A Yeah, they both go -- they both go like that.
19 And I thought that was because I see the booming
20 material here.

21 Q You say booming -- well, perhaps you -- I know
22 it might be difficult for the Jury to see, but
23 could you just hold them up and try to illustrate
24 what you're...

25 A Certainly.

1 Q Why don't you tell them than me. Okay?

2 A Okay. I don't know if you can see from there,
3 but this is an aerial of the area.

4 MR. MADSON: Your Honor, I wonder if he could
5 step forward as far as the cord could reach and
6 perhaps...

7 A Do you want me to get over there?

8 Q Yes.

9 (910)

10 THE COURT: Pick up the amplifier at the end
11 of this thin cord and carry that with you.

12 A Okay.

13 MR. MADSON: I'll get those.

14 A Okay. Thanks. This is where the hatchery is
15 located, right there. And what we did is we put
16 up oil booms in those locations. The reason why
17 I thought this is -- I don't know for sure, but
18 the reason why I thought this is a later
19 photograph, because there is some building
20 material out here, which I didn't see on this
21 photograph here.

22 Q Sir, would you also show the jury where the
23 oil is that you referred to?

24 A In this area here. You can see the patterns
25 of oil around Latouche Island there.

1 Q Which exhibit are you referring to there, sir?
2 A This is Exhibit 110.
3 Q And when you say "there", how close is it to
4 the booms, if you know?
5 A It's probably about a half a mile or so.
6 Q And then how about the other exhibit. Can you
7 refer to that and show the oil on that one?
8 A Certainly.
9 Q And I'll ask you if there is any substantial
10 changes or differences in the oil on that one as
11 opposed to the other exhibit you just looked at?
12 A Not substantially. You can see some oil
13 through this area here. It's hard to tell on --
14 well, actually you can see it up here, too. So
15 it's less than a half a mile, if you consider
16 that oil right there -- the majority of the oil
17 is going to be there.
18 Q Thank you very much. If I understand
19 correctly, then, after the spill occurred, you
20 naturally wanted to take every possible
21 precaution to protect the hatcheries?
22 A Yes.
23 Q And then a decision was made to put these
24 booms out in case the oil did, in fact, come in
25 through Sawmill -- in Sawmill Bay, is that where

1 that one...

2 A Uh-huh (affirmative).

3 Q That's what it's referred to?

4 A Yes.

5 Q In case, for instance, the oil did come into

6 Sawmill Bay, right?

7 A That's correct.

8 Q But, in fact, the oil did not go in there,

9 right?

10 A That's correct, because we had the booms up.

11 Q Was there oil that ever reached the booms?

12 A Yes.

13 Q Do you know if it would have ever reached the

14 hatcheries if the booms weren't there?

15 A I assume so. I don't know for sure.

16 Q You can't say whether it would or wouldn't?

17 A All I know is the oil was held back by the

18 booms there.

19 Q Those photographs don't illustrate that oil in

20 the vicinity of the boom. You said it was a half

21 mile away, is that right.

22 A It looked like it was closer. I saw some

23 other streaks there, but probably in that range,

24 quarter mile.

25 Q So you would be having to make an assumption

1 that if the boom was not there, the oil, in fact,
2 would come in there and would, in fact, impact
3 somewhat on the hatchery?

4 A That was the risk, yes.

5 Q Now once the fish were released, as you
6 indicated, and they were released in September,
7 right?

8 A No, they were released in April and May.

9 Q Oh, I'm sorry. I may have misunderstood you.
10 Of what year?

11 A Of 1989.

12 Q So they were released while there was still
13 oil out in the sound?

14 A That's correct. We couldn't hold on to the
15 fish. We had, like, I mentioned, 500 million
16 fish going out, and we just don't have the
17 capability of holding on to those fish.

18 Q Well, you've got to keep them there and feed
19 them for a time?

20 A Yes, that's exactly right.

21 Q If you had to keep them longer, would that
22 involve, what, more feeding, or were they just
23 getting too big?

24 A Well, both. What we do is we time our release
25 with this plankton bloom which occurs out in the

1 Sound there. There is a bloom of zoa plankton
2 that occurs in April and May. And what we find
3 is that the fish, or the fry, feed on this
4 plankton, so we try to take advantage of that
5 food source.

6 Q And once you release the fish, they're not
7 tagged. Each fish doesn't have a little state of
8 Alaska tag on it, does it?

9 A Not each one, but actually some of them do.

10 Q How many are tagged?

11 A I think last year we tagged approximately
12 700,000.

13 Q And is that for the purpose of seeing if those
14 fish actually live, survive and come back again?

15 A That's part of the reason, that's correct.
16 There is also -- we do it to differentiate them
17 -- well, to understand how many hatchery fish are
18 caught in the commercial fishery.

19 Q You expect those fish to return when, sir?

20 A The majority of the fish, the pink salmon --
21 all the pink salmon will be returning next year.

22 Q What about other varieties?

23 A Or, this year, I'm sorry.

24 Q Are other varieties the same?

25 A Yes. We raise all five species of Pacific

1 Salmon.

2 Q Do some come back later than others?

3 A Yes, they do.

4 Q What is the next one to return?

5 A Actually the coho at the Wally Noernberg
6 Hatchery -- the Esther Hatchery. They will
7 return next year, also. We have chum salmon
8 which will return two, three and four years from
9 now. We have chinook salmon that will return
10 two, three, four and five years from now. And we
11 have sockeye salmon that will return two, three,
12 four years from now.

13 Q Now, when they return they don't go right back
14 into your pens up there, do they? When you say
15 "return", they are returned for the purpose of
16 being caught?

17 A That's right. Actually, they could return
18 right back to those pens.

19 Q It would make it kinda easy, wouldn't it?

20 A It's a pretty slick operation that way.

21 Q But in spite of that, they return to Prince
22 William Sound, or the area where there's fishing
23 allowed?

24 A That's correct.

25 Q That would include foreign fisheries,

1 Japanese, Koreans?

2 A If they are caught outside the fishing zone,
3 the 200 mile limit, yes.

4 Q Once they are released you kinda lose control
5 over those fish, isn't that fair to say?

6 A Yes, that's right.

7 Q And you hope that they are going to survive
8 and be caught, and you won't know for some time
9 whether or not -- well, I guess you won't know
10 what is going to happen to those fish until you
11 get some returns back from the commercial
12 fishermen, right?

13 A That's right. Right. The commercial fleet
14 catches the fish before they return to the
15 hatchery, and...

16 Q And that can actually be affected by a number
17 of factors such as natural predators, or disease,
18 or something, right?

19 A It can, that's correct.

20 Q Sealions eat salmon, do they?

21 A The adults. I don't think they would bother
22 with the...

23 Q Well, anyway, there is a number of factors
24 that are involved in the overall release and
25 catching, is that right?

1 A Yes.

2 Q Thank you, sir. I don't have any other
3 questions.

4 REDIRECT EXAMINATION OF MR. SUZUMOTO

5 BY MS. HENRY:

6 Q Mr. Madson asked you whether or not the oil
7 actually impacted the hatcheries, and it did not,
8 is that correct? As far as the hatcheries
9 themselves.

10 A We were able to keep it out of the hatchery
11 area there.

12 Q Do you have some concern that the oil affected
13 the fish after they were released?

14 A Yes, we do.

15 Q What sort of concerns?

16 A We're just not sure how it affected them
17 because -- well, one thing, is we don't know what
18 kind of mortality occurred when they were
19 released, or there is another thing. Salmon home
20 via old fashionly -- via smell, and we're not
21 sure if there is an effective -- you know, the
22 oil on their homing behavior.

23 Q What about eating plankton?

24 A That's another possibility. There may be some
25 chronic effect that we don't know about. We

1 didn't observe any mortality immediately, but
2 there could be some chronic effect.

3 Q Thank you, sir. I have no other questions.
4 MR. MADSON: I have nothing else.
5 THE COURT: Okay. You're excused. Thank you.
6 (1241)
7 (Oath administered)

8 A I do.

9 THOMAS M. KRON,
10 called as a witness in behalf of the Plaintiff, being
11 first duly sworn upon oath, testified as follows:
12 THE CLERK: Please be seated. Sir, would you
13 please state your full name and then spell your last
14 name?

15 A Thomas Michael Kron, spelling on the last name
16 is K-r-o-n.
17 THE CLERK: And your current mailing address
18 now?

19 A Current mailing address is 333 Raspberry Road,
20 Anchorage, 99518.
21 THE CLERK: And your current occupation?
22 A Current occupation is regional supervisor for
23 the Alaska Department of Fish and Game, Division
24 of Fisheries, Rehabilitation, Enhancement, and
25 Development.

1 DIRECT EXAMINATION OF MR. KRON

2 BY MS. HENRY:

3 Q Sir, how long have you been with the
4 Department of Fish and Game?

5 A Fifteen years.

6 Q And how long have you been in this particular
7 section that you are currently in?

8 A Fifteen years.

9 Q Now, as part of your responsibilities in that
10 section, do you monitor fish hatcheries in the
11 State of Alaska?

12 A Yes.

13 Q And are you aware of which hatcheries were put
14 at risk as a result of the oil spill of the Exxon
15 Valdez?

16 A Yes.

17 Q How is it that you're aware of that?

18 A Within the region for which I'm responsible
19 for within the Department of Fish and Game, we
20 operate facilities in Prince William Sound, Cook
21 Inlet, and Kodiak area, and we were involved this
22 past spring and summer with activities to protect
23 those facilities in cooperation with Coast Guard,
24 Exxon support, DEC, and putting oil booms in
25 those areas to keep the oil from encroaching upon

1 the areas directly in front of the hatchery where
2 we rear fish, and again in a number of cases,
3 when fish come back, the harvest occurs.

4 Q Now, we've heard about one hatchery that's
5 called the Cannery Creek Hatchery, is that owned
6 by the State of Alaska?

7 A That facility is owned by the State of Alaska,
8 it is operated under contract with the Prince
9 William Sound Aquaculture Corporation.

10 Q Okay, and sir, we've also heard about the two
11 hatcheries that are owned by Prince William Sound
12 Aquaculture Association, so going beyond those,
13 can you tell us some of the other hatcheries that
14 were put at risk by the oil spill?

15 A The one which received a lot of oil out front
16 in the Sound was the Main Bay Hatchery. It is
17 located approximately midway between the Esther
18 Lake facility or Armin -- or Wally, Wallace
19 Noernberg facility, and the Wally Noernberg
20 facility. It's midway between those two. That
21 is operated by the State, it's a developmental
22 facility for sockeye salmon. There's another
23 private non-profit ...

24 Q Okay, before we go any further, can you,
25 referring to the chart behind you and perhaps

1 using the pointer behind you on the other side
2 here -- that's fine -- can you indicate on the
3 chart where that hatchery is that you've just
4 described?

5 A Okay, get my orientation here -- Knight Island
6 -- okay, we -- okay, Main Bay facility is in this
7 area here.

8 Q Okay, why don't you continue with ...

9 A Okay, there's another facility, another
10 operator in the Sound, there are two private non-
11 profit hatchery operators in the Sound. Prince
12 William Sound Aquaculture Corporation is the
13 largest. Another operator is located in Valdez
14 Arm, Valdez Fisheries Development Association.
15 So those facilities constitute the hatchery
16 operations in the Sound ...

17 Q Is there actually a hatchery in the Port of
18 Valdez area?

19 A Yes.

20 Q Do you know where it is approximately on that
21 chart?

22 A Approximately right here.

23 Q All right, why don't you continue?

24 A There were facilities outside the Sound as
25 well that were impacted. A facility which was

1 operated cooperatively by the Department of Fish
2 and Game and the Kodiak Regional Aquaculture
3 Association at Katoy Bay, Katoy Bay Hatchery,
4 several hundred miles from the location here, was
5 also impacted last summer by the oil, in late
6 April and May and all the way through most of the
7 summer we were hit by tarballs and oil, as it was
8 washing ashore there in that area, so that area
9 was boomed off with oil booms as well.

10 Q And were there any other hatcheries that were
11 affected?

12 A A facility in Lower Cook Inlet across from
13 Homer, Kachemak Bay, Tutka Hatchery, a State-
14 operated hatchery, we had oil that was within
15 about three or four miles of that facility,
16 during a period in May, then the oil moved back
17 out, but there was a period where we thought we
18 were going to get hit there as well.

19 Q Sir, if you would now, explain how the
20 operating budget works for these hatcheries.

21 (1530)

22 A The several facilities I mentioned are State-
23 operated facilities. The Main Bay Hatchery, the
24 budget there is 100 percent State general funds.
25 The Tutka Hatchery, the one across from Homer, is

1 100 percent State general funds. The Katoy
2 Hatchery, the one in Kodiak that was impacted,
3 the budget there is about half State general
4 funds, about half funds from the Kodiak Regional
5 Aquaculture Association. Prince William Sound
6 Aquaculture Corporation provides operational
7 funds for the Armin F. Koerning Hatchery, the
8 Wally Noernberg facility, and the Cannery Creek
9 Hatchery. Again, the Cannery Creek Hatchery is
10 owned by the State, but operated under contract,
11 by PWSAC. The Valdez Fisheries Development
12 Association, again, the other PNP in the Sound,
13 supports the operations of that facility there.

14 Q The two facilities, then, that are partially
15 funded -- mostly funded by the local aquaculture
16 associations, that would be Katoy and the one in
17 the Port of Valdez.

18 A Katoy is 50 percent, about 50 percent funded
19 by the local aquaculture association in Kodiak.
20 Valdez, the facility there is funded by the
21 Valdez Fisheries Development Association, a
22 private non-profit entity, and then again, the
23 three Prince William Sound Aquaculture
24 Corporation facilities in the Sound.

25 Q And they receive their money from fish

1 returning, is that correct?

2 A They receive their money from a number of
3 different sources, the primary sources are a tax
4 on the commercial catch -- let's say, in Prince
5 William Sound, for example, there is a tax,
6 percentage tax on a commercial catch. That money
7 goes through the legislature back to Prince
8 William Sound Aquaculture Corporation. That is a
9 major chunk of their revenues. Also, under State
10 statutes, they have authorization to harvest a
11 portion of the fish that return to their
12 facility, to sell them to pay operational costs
13 as well.

14 So Prince William Sound Aquaculture
15 Corporation, Valdez Fisheries Development
16 Association, Kodiak Regional Aquaculture
17 Association, those three private non-profit
18 entities have the capability of harvesting a
19 portion of the fish that come back to help pay
20 the cost of operating the facilities. Kodiak
21 Regional Aquaculture Association and Prince
22 William Sound Regional Aquaculture Association
23 receive the tax from the commercial catch, from
24 the salmon in those areas.

25 Q Sir, what is the operating budget for the

1 hatchery at Katoy?

2 A Okay. The operating budget for the hatchery
3 at Katoy is about \$1/2 million*, of which the
4 State provides half, and the Kodiak Regional
5 Aquaculture Association provides half.

6 Q And what is the operating budget for the
7 hatchery in the Port of Valdez?

8 A Approximately \$900,000.00, and again, that is
9 a private non-profit facility.

10 Q All right, sir, what concerns would you have
11 about fish being released through the oil or
12 returning through the oil?

13 A A large share of the production in the areas
14 that I've mentioned, Prince William Sound, lower
15 Cook Inlet, and Kodiak, a large share of the
16 production from those areas is pink salmon. Chum
17 salmon are also important, there's also
18 production of king and coho and sockeye. Pink
19 and chum salmon in particular, their natural
20 behavior is to migrate very close to shore, you
21 know, within several feet, in very shallow water,
22 and there has been concern, because in fact the
23 natural behavior of these fish puts them right up
24 in many of the areas that were impacted by the
25 oil.

1 Q Okay, thank you, sir, that's all the questions
2 I have.

3 CROSS EXAMINATION OF MR. KRON

4 BY MR. MADSON:

5 Q When are the pinks and the chums expected to
6 be returned, the ones that were released from the
7 State-operated hatcheries?

8 A The pink salmon return basically on a two-year
9 cycle. The chum salmon return in three to five
10 years from the time that they spawn.

11 Q I take it the fish were released from these
12 hatcheries, as far as you know, in a normal
13 manner?

14 A Yes, we don't really have an awful lot of
15 alternatives.

16 Q You can't keep them there, right?

17 A Right.

18 Q And so you released them, but you don't know
19 what's going to happen to them, is that fair to
20 say?

21 A We released them, there are tagging programs
22 underway, so there will be an assessment of what
23 the returns are.

24 Q Well, when will that assessment be made?

25 A The assessment for pink salmon, for those that

1 were released and migrated last spring, will be
2 this fall, when the adults come back, the adult
3 pink salmon come back. In the case of chum
4 salmon, it will be, you know, we will have a very
5 small number that will return this year, but
6 again, being a fish that returns at an older age,
7 a full assessment will not be possible for a
8 number of years.

9 Q Okay. So until then it's just kind of
10 anybody's guess as to what happened to them,
11 right?

12 A There's an impact assessment program underway,
13 and again, when the results are in, you know,
14 we'll be able to analyze that.

15 Q You said the pinks and the chums normally swim
16 close to shore in shallow water, what depth of
17 water are we talking about here?

18 A It depends on the gradient of the beach. If
19 you've got a beach that does not have a very
20 steep gradient, they will be sometimes in six
21 inches to a foot of water. If you've got it
22 along -- you know, if the area is very steep
23 gradient, rocky shoreline, sometimes they'll be
24 over 10, or maybe even 100 feet of water if
25 you've got a steep dropoff, but they will be

1 close to shore, feeding in that area.

2 Q So they may or may not feed in an area that is

3 -- let's say, has a lot of oil on the surface, or

4 contaminated, right?

5 A That's correct.

6 Q Lastly, any expenses incurred by your

7 department, and when I say "your," I guess it's

8 the Department of Fish and Game, right?

9 A Yes.

10 Q Are you keeping track of that with the

11 expectation that Exxon will pay for any

12 expenditures?

13 A We're keeping track of that, you know, the

14 actual payments are being handled by, I think,

15 the coordination in the Governor's office.

16 Q Well, my question was, do you expect that this

17 will ultimately be paid for by Exxon?

18 A That's the hope.

19 Q Thank you. No other questions.

20 MS. HENRY: No other questions, Your Honor.

21 THE COURT: You're excused.

22 (1879)

23 (Oath administered)

24 A Yes.

25 MICHAEL J. FOX,

H & M COURT REPORTING • 510 L Street • Suite 350 • Anchorage, Alaska 99501 • (907) 274-5661

1 called as a witness in behalf of the Plaintiff, being
2 first duly sworn upon oath, testified as follows:

3 THE CLERK: Please be seated. Sir, would you
4 please state your full name, and then spell your last
5 name.

6 A My name is Michael J. Fox, F-o-x.

7 THE CLERK: And your current mailing address,
8 sir?

9 A Post Office Box 2286, Valdez, 99686.

10 THE CLERK: And your current occupation?

11 A I'm a Fish and Wildlife Trooper.

12 DIRECT EXAMINATION OF MR. FOX

13 BY MS. HENRY:

14 Q Trooper Fox, how long have you been a Fish and
15 Wildlife Trooper?

16 A I've been commissioned year-round since 1979,
17 January.

18 Q And what is the difference between an Alaska
19 State Trooper and a Fish and Wildlife Trooper?

20 A The Department of Public Safety has State
21 Troopers, some are assigned to the blue shirt
22 division, which is the Alaska State Troopers, and
23 some are assigned to the brown division, the Fish
24 and Wildlife Protection Division, and I am
25 assigned to the Fish and Wildlife Protection

1 Division.

2 Q So you wear a brown uniform, sir?

3 A Yes, and I would be more -- my job involves
4 enforcement of State regulations and laws in
5 regards to the State's resources -- wildlife
6 resources.

7 Q Did you attend the Alaska State Trooper
8 Academy?

9 A Yes.

10 Q And when did you attend the academy?

11 A I started on January 15, 1979.

12 Q How long is that academy?

13 A Three months.

14 Q During that academy, did you receive any
15 special training regarding the detection and
16 apprehension of persons who have been suspected
17 of driving while impaired?

18 A It's a basic police academy, and you receive
19 basic training on traffic and drunk driving, yes.

20 Q So you did receive some training in that area?

21 A Yes.

22 Q And that was back in '79?

23 A Yes.

24 Q Since receiving that training, how many times
25 have you had an opportunity to request that a

1 suspected impaired driver -- to do field sobriety
2 tests?

3 A Twice.

4 Q Now, going specifically to Valdez, how long
5 have you been stationed in Valdez?

6 A Since February of 1981.

7 Q And have you been stationed anywhere else
8 before that?

9 A I was in Cordova prior to that, I went to
10 Cordova in July of '79, and I was in Juneau for
11 the three months preceding that, and then the
12 three months preceding that I was in Sitka.

13 Q Is there an Alaska State Trooper, I guess,
14 blue shirt also stationed in Valdez?

15 A Yes.

16 Q And who is that?

17 A That's Tim Alexander.

18 Q Now, going specifically to March 23 and 24 of
19 last year, was that trooper there, in town?

20 A No, he was vacationing. Out of the state.

21 Q In fact, on March 23, were you in Valdez?

22 A I arrived at 11:00 at night on the ferry from
23 Cordova on the 23rd.

24 Q Going to the early morning of March 24 of last
25 year, did you receive a phone call that morning?

1 A Yes, I did.

2 Q Approximately what time was that at?

3 A The first call was about 2:20 a.m.

4 Q And what was the purpose of that call?

5 A The Coast Guard officer, Chief Peterson (ph.),
6 I believe it was, notified ...

7 MR. MADSON: Your Honor, I'm not going to
8 object to the hearsay as long as it's just for the
9 purpose of showing what this witness did, but not for
10 the truth of it, I assume that's what it's offered for.

11 MS. HENRY: Actually, it's to show what the
12 witness did not do.

13 MR. MADSON: Okay, even better. Okay, no
14 objection then.

15 Q Go ahead.

16 A Chief Peterson (ph.) of the Coast Guard called
17 me and advised me that the tanker Exxon Valdez
18 was aground and spilling oil.

19 Q Was there any reason that he was calling you?

20 A I asked him if there was a particular request,
21 and he said, "No, you are on the notification
22 list for this type of incident, and we're just
23 notifying your agency that this occurred." And
24 then I hung up the phone and -- well, actually, I
25 talked to him for a little while, asking him,

1 "Are you sure? You know, I mean, this sounds
2 kind of wild," and I made him repeat it a few
3 times, particularly the location, because I had a
4 hard time believing that an outbound tanker hit
5 Bligh Reef, and then he said, "Yeah, that's it,
6 and I gotta make some more calls."

7 So then I hung up, and I called him right
8 back, like just seconds later, and asked him was
9 there any risk of fire, was the tanker about to
10 tip over, is there any public safety issue that I
11 should be aware of to initiate a sort of a
12 rescue-type or public safety mission. And he
13 said, "No, it's just sittin' there hard aground."

14 Q So I take it you didn't do anything.

15 A No, I didn't. I called the dispatch office in
16 Anchorage, and left a message there to notify my
17 boss when he checked in in the morning.

18 Q And who is your boss?

19 A That'd be Lieutenant Mills of Palmer.

20 Q All right, did you receive another call that
21 morning?

22 A Yes, at about 4:30 they called me back again,
23 the Coast Guard did.

24 Q And what was the purpose of this call?

25 A This time they said, I believe that Chief

1 Peterson (ph.) made the call, and then Commander
2 McCall got on the line, and he told me that they
3 were requesting my attention, and they wanted me
4 to go out to the tanker because the captain was
5 drunk, and they needed a trooper to come take
6 care of it.

7 Q Is that what Commander McCall said to you?

8 A Well, I can't remember if he said "drunk" or
9 "intoxicated," but what I remember thinking was,
10 "Aha, this is how it happened, you know, I need
11 to go take care of this drunk call."

12 Q And so he was requesting your assistance?

13 A Yes.

14 Q Did he mention any names of persons that were
15 actually requesting your assistance?

16 A Yes, he said, "Tom says the captain is drunk."
17 He said "Tom." And I took it to believe that it
18 was Tom McCardy. Tom McCardy is a DEC employee
19 in Valdez. When DEC has a problem that they
20 can't handle in regards to an unhappy landowner
21 or a restaurant person or in this case a drunk
22 captain, and they need a more qualified law
23 enforcement person to help 'em out of a jam, they
24 will call the troopers. And I thought that he
25 was telling me that Tom McCardy needed help

1 essentially wrestling this drunk off the tanker,
2 'cause of what I thought the call was. So I
3 said, "Okay," you know, and I called up to the
4 dispatch ...

5 Q Before you go on, was there any requests or
6 comments about a Breathalyzer or a blood test or
7 a portable breath test?

8 A No. No.

9 Q As a result of that call, what did you do?

10 A Well, then I called Anchorage dispatch again,
11 because I have little experience with drunk
12 drivers, I said, "Quick, tell me what the
13 elements are that I have to prove here, for this
14 drunk driving, and I'm on my way out there." And
15 they said, "Well, just prove control of the
16 vessel, and the person that was in control was
17 impaired." So I said, "Okay," and the Coast
18 Guard had told me they were holdin' a boat for
19 me, so I just put on my uniform and ran down to
20 the dock.

21 Q And I take it you took a pilot boat out to the
22 Exxon Valdez?

23 A I took a -- I rode on a Coast Guard boat with
24 Coast Guard people driving it.

25 Q All right, now, do you know approximately what

1 time it was that you reached the area of the
2 Exxon Valdez?

3 A Yes, 6:45.

4 Q And from what you could observe, did it appear
5 to be hard aground on something?

6 A Yeah, it was not movin'.

7 Q And the area where it was, is that within the
8 Third Judicial District?

9 A Yes, it is.

10 Q Now, did you have any particular problems in
11 trying to board the Exxon Valdez?

12 (2310)

13 A Yes, the Chief Petty -- or the Petty Officer,
14 John Brown, was driving the boat, and I've gone
15 out with him before, and he's a competent boat
16 driver, and he was approaching the starboard side
17 of the boat, the tanker, and there was a ladder
18 coming down the side of the ship there, and he
19 headed in for the ladder, and as we approached
20 the boat, we were driving through oil. And you
21 could tell we were driving through oil, 'cause it
22 wasn't water, it was oil. And he pulled up
23 alongside of the boat, the ship, and the oil was
24 coming up the side of the ship, up above the
25 level of the -- actually it was oil, but we'll

1 say the water, it was coming up about that high
2 all along the side of the ship ...

3 Q How much is that high?

4 A Oh, about this far, foot and a half or so, and
5 it was kind of stickin' out, maybe, that part,
6 kinda like a rolling mass of this hot oil, was
7 comin' out and then there was a little bit of
8 wave action, but the oil was so heavy that the
9 waves really weren't like you'd expect, it was
10 sorta like this thick gooey kind of wave action,
11 and with this oil comin' out and these waves and
12 stuff, he was havin' a real hard time stayin' by
13 the ladder, and also the guys on the ship had a
14 hard time gettin' the ladder down low enough, so
15 we're kinda yellin' back and forth, and the deck
16 was kinda snowy and icy, we were havin' a hard
17 time stayin' there, and finally I'm standin'
18 there lookin' at this stuff, and I didn't want to
19 fall in it, of course, so I -- we decided to
20 regroup, and the guys on the tanker said, "Well,
21 go around the other side of the tanker, we'll put
22 another ladder down."

23 So then we left the starboard side, went
24 around the stern of the tanker, and on the other
25 side they were able to lower the ladder a little

1 bit lower, and there was not near as much oil,
2 where the ladder was there, it was going around
3 both ends of the ship and kinda comin' together
4 and headin' off towards the Naked Island area in
5 like a river type of deal. So where we were
6 there wasn't as much oil by the ladder.

7 Q Did you smell any particular odors when ...

8 A Oh yeah, it was -- you could feel it, too, it
9 was kinda warm, like hot air comin' off of this,
10 hot gases comin' off of this oil, and you could
11 smell it and kinda taste it, and John Brown, the
12 Coast Guard guy, told everybody no ...

13 MR. MADSON: I object to the hearsay of what
14 Mr. Brown said.

15 A Okay. I was told ...

16 Q No, don't ...

17 A Oh. What do you want me to ...

18 Q Trooper Fox, let me ask a question, that'll
19 help.

20 A Okay.

21 Q Okay, now, you said you put your uniform on,
22 so you did have your brown uniform on?

23 A Yes.

24 Q And when you actually finally got on board,
25 where did you go?

1 A I was met at the top of the ladder by two
2 crewmen, they were dressed in hard hats and
3 coveralls, and they showed me the way to the
4 bridge.

5 Q Now, when you went up to the bridge, who did
6 you make contact with?

7 A On the bridge there was -- I first talked to
8 Lieutenant Commander Falkenstein.

9 Q Did you see Mark Delozier on the bridge at
10 all?

11 A Yes, he was there too.

12 Q At some point did you discover that your
13 impression of the purpose of your boarding the
14 Exxon Valdez was incorrect?

15 A Yes.

16 Q And how did that occur?

17 A Well, when I got there, I was expecting a
18 problem. You know, that's why I was there. And
19 there wasn't any problem. I mean, it was quiet,
20 and kinda dark, and everybody just kinda sittin'
21 there gazin' out the window, and there was
22 nothin' goin' on, it was just quiet -- the second
23 mate, Mr. LeCain, I believe his name is, was
24 standin' there lookin' out the windows, and the
25 two Coast Guard guys were standin' there kinda

1 lookin' out the windows, and ...

2 Q Okay, did anybody ask you if you had brought

3 any ...

4 A Yes, Lieutenant Falkenstein asked me if I'd

5 brought any blood sampling equipment.

6 Q And what did you respond?

7 A I said, "No, I don't take blood out of people,

8 that's ...

9 Q Are you qualified to do that?

10 A No.

11 Q And did he ask for any other kind of

12 equipment, breath testing equipment or anything?

13 A No, he just mentioned taking blood samples,

14 and I said, "Well, if we want to take blood

15 samples, we have to get a nurse or a doctor or

16 somebody, or we have to take these people to

17 where there is a nurse or a doctor or somebody

18 that can do that, I'm a policeman, I'm not a

19 medical person."

20 Q Now, at the time that you boarded the Exxon

21 Valdez and spoke to the members of the Coast

22 Guard that were on the bridge, were you advised

23 as to where the captain was?

24 A Yeah, they said he was in bed.

25 Q All right, now, as long as you are on board,

1 did you decide to assist the Coast Guard in any
2 way?

3 A Well, I asked 'em what we were gonna do, and
4 of course everybody was wondering how this
5 happened, and I knew that the State of course
6 would be interested in how this happened, and see
7 if any crimes were committed, so I asked the
8 Coast Guard whether the alcohol issue was still
9 up front of the conversation, because they
10 thought I was bringing some sort of blood
11 sampling equipment, and this was the first I ever
12 heard of that.

13 And I assumed that there was some problem in
14 communication between what they asked for and
15 what I was told, so we talked about that, and
16 right away they decided that, "Well, how about if
17 we send the people that we want to be sampled to
18 town with you?" And I said, "Sure, I'll take
19 these guys to town, it's no problem."

20 So that was kinda decided right in the
21 beginning, and then they kinda changed their mind
22 and said, "Well, maybe it's better to leave these
23 guys on the boat, because the boat's obviously in
24 distress, and it might not be very smart to take
25 the people in control of the boat to town," so

1 then they kinda changed their mind there, and
2 eventually they decided that, "Well, we'll go
3 ahead and try to get the samples, the blood and
4 urine samples and what not, taken on the ship
5 rather than remove the people from the boat."

6 Q Were you also interested in seeing that
7 persons that may know something be interviewed?

8 A Sure.

9 Q All right, and did you volunteer to assist in
10 that?

11 A Yes, I was told that Mr. Delozier would be in
12 charge of the investigations of the cause, Mr.
13 Falkenstein would worry about salvage and oil
14 cleanup. So I told Mr. Delozier that I'd be
15 happy to help him do the interviews and conduct
16 the investigation, because I have quite a bit of
17 experience with boats and I'd be happy to help
18 him out, and he said, "Okay," and at the same
19 time I'd be representing the State and their
20 interests.

21 Q Are you aware of whether or not Mr. Kagan was
22 interviewed?

23 A Yes, I was there.

24 Q And after the interview with Mr. Kagan, did
25 you ever see Captain Hazelwood?

1 A Yes.

2 Q And where was that?

3 A I saw him between the interview with Mr. Kagan
4 and Mr. Cousins, we were doing the interviews in
5 the spare officers' quarters, and I was going
6 from the spare officers' quarters to the bridge,
7 we were gonna find Mr. Cousins, and I don't
8 remember if I actually talked to him on the
9 bridge or in the companionway just right outside
10 of the bridge.

11 Q Talked to who?

12 A The captain.

13 Q Why don't you tell us what the conversation
14 was?

15 (2709)

16 A Well, I hadn't seen him yet, this was the
17 first time I'd seen him, and he obviously didn't
18 know who I was, so I introduced myself to him,
19 and one of the people around me said, "That's the
20 captain." That's how I knew who he was. And I
21 told him who I was, and I was representing the
22 State, and that I was helping with the
23 investigation into cause, why it happened, and I
24 said, "Well, what the heck is the problem?" and
25 he said, "You're lookin' at it."

1 Q How did Captain Hazelwood appear physically at
2 that time?

3 A Time, he had bloodshot eyes, he was smoking
4 cigarettes, I didn't smell any alcohol, I just
5 smelled morning breath, bad breath.

6 Q What about his ability to move around, did you
7 notice any impairment?

8 A Seemed fine.

9 Q Pardon me?

10 A He seemed fine.

11 Q Now ...

12 A And that was at 8:30.

13 Q Oh, 8:30 in the morning?

14 A Yes.

15 Q Of the 24th?

16 A Yes.

17 Q Now, were you also present during the
18 interview with Mr. Cousins?

19 A Yes.

20 Q Okay, backing up for just a moment, after you
21 had introduced yourself to Captain Hazelwood,
22 during the next several minutes or hour or so,
23 did you happen to observe any interaction between
24 Captain Hazelwood and Mr. Cousins?

25 A Not between those two, but I saw Captain

1 Hazelwood going about the business of running the
2 ship.

3 Q And he was permitted to do that?

4 A Oh yes.

5 Q Where was Mr. Cousins during this time?

6 A He'd kinda disappear and reappear. Sometimes
7 he'd be standing on the bridge smokin', and other
8 times he'd disappear, I assume he'd go to other
9 areas on the ship.

10 Q Did you have any concern about the fact that
11 Mr. Cousins and Captain Hazelwood were smoking?

12 MR. MADSON: I'd object, Your Honor, it's
13 totally irrelevant, and there's no foundation.

14 THE COURT: Objection overruled.

15 A Well, I was told by the Coast Guard not to
16 smoke ...

17 MR. MADSON: Then I object on the grounds of
18 hearsay.

19 THE COURT: The question is did you have any
20 concerns, not what somebody told you.

21 A Oh. Well, I could smell hydrocarbons,
22 whatever that stuff is that comes off, that gas
23 that comes off the oil, and I didn't wanna get
24 -- start a fire or anything, so yes, I was
25 wondering a little bit why these guys were

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smokin'.

Q Was the odor stronger in some places and weaker in other places?

A On the deck it was the strongest, and in the cabin -- in the house of the boat it was less.

Q Now, at some point that morning, did you attempt to begin an interview, you or Mr. Delozier attempt to begin an interview with Captain Hazelwood?

A There was quite a bit of organization, and we certainly discussed it, and said, "Well, we'd like to talk to you, when can you do it?" and he'd say, "Well, I have to make some phone calls," and there was a lot of discussion, we said, "Okay, we'll do Mr. Cousins now, and then when you're done we can take care of you, and that sort of thing."

Q So there were other things that Captain Hazelwood had to do at that hour.

A Sure, he was on the phone a lot ...

Q Did you eventually interview Captain Hazelwood?

A Yes, we did.

Q And where did that interview take place?

A In his office suite.

1 Q Who all was present?

2 A There was myself, Mark Delozier, and the
3 captain.

4 Q And did you tape-record that interview?

5 A Yes, I did.

6 Q Have you had an opportunity to listen to the
7 tape of that interview?

8 A Yes, I did.

9 Q And have you also had an opportunity to
10 compare it with a transcript that was prepared of
11 that interview?

12 A Yes, I did.

13 Q Sir, showing you what's been marked as
14 Plaintiff's Exhibit Number 102 for
15 identification, do you recognize that tape?

16 A Yes.

17 Q Is that the tape that you listened to?

18 A Yes.

19 Q And does that tape accurately reflect the
20 interview conducted of Captain Hazelwood by you
21 and Mr. Delozier?

22 A Yes, it does.

23 Q Now, going to the transcript that you were
24 able to look at too, I haven't given you a copy
25 of it, going to the transcript that you were able

1 to look at, does the transcript accurately
2 reflect the conversation, with a couple of
3 errors?

4 A Yes.

5 Q And what were those errors?

6 A On one page -- I don't remember what page it
7 was, a crew member came in and told the captain
8 that the fenders were delivered to start -- they
9 were bringing another ship alongside to lighter
10 oil from the crippled ship to the empty ship, and
11 they have these big inflatable fenders that they
12 put down between the two ships, and the fellow
13 said that they had these fenders, and they were
14 gonna be blowing one up, and the word they used
15 in the transcription said "rolling it up," and it
16 should have been "blowing it up." And then ...

17 Q All right, what is the other error?

18 A The other error was the last conversation on
19 the tape was identified as myself and it was Mark
20 Delozier.

21 Q Asking the questions?

22 A Yes.

23 Q Now when listening to the tape, it appears to
24 stop rather suddenly, or end rather suddenly.
25 Why is that?

1 (3033)

2 A It ran out -- it was a two-sided cassette
3 tape, and the one side ran out.

4 Q And you didn't flip it over?

5 A And I didn't -- well, I was going to, but the
6 interview ended, and I never got it turned over.

7 Q So after the tape stops, was there any more of
8 an interview?

9 A Not really an interview. We were still
10 talking, but it wasn't about what happened, you
11 know ...

12 MS. HENRY: Now at this time the State would
13 move into evidence Plaintiff's Exhibit Number 102.

14 MR. MADSON: Well, without hearing it,
15 obviously -- you know, I would assume that's the same
16 one, but you know, I haven't heard that particular
17 tape, so if that is the one, I have no objection.

18 THE COURT: It's admitted.

19 EXHIBIT 102 ADMITTED

20 MS. HENRY: And Your Honor, at this time I
21 would like to be able to play it, however, it is about
22 30 minutes, what I can do is do some other questions
23 which will be rather brief, or would you want me to
24 start playing?

25 THE COURT: If you can get some other

1 questions in, we might as well, and then when we come
2 back tomorrow we'll start with the tape.

3 MS. HENRY: All right, thank you.

4 THE COURT: Mr. Madson, that'll give you an
5 opportunity to verify ...

6 MR. MADSON: Oh, I'm sure, Your Honor -- I
7 have no doubt that it is a copy of the same interview.

8 Q (Mr. Fox by Ms. Henry:) Now, the interview
9 took place where again?

10 A In the captain's room.

11 Q Had you been in the captain's room some time
12 prior to the interview?

13 A Yes.

14 Q Why were you in there then?

15 A I don't really remember. It would -- the
16 places that I were were the bridge, the spare
17 officers' quarters, the radio room, and the
18 captain's suite. The captain's suite is kind of
19 like an office and a lounge and a bedroom, and
20 the lounge area was where we spent quite a bit of
21 time.

22 Q During the interview with Captain Hazelwood,
23 was there mention made of Moussy beer?

24 A Yes.

25 Q And did you see any Moussy beer in the

1 captain's officer quarters?

2 A In his refrigerator.

3 Q When did you see that?

4 A Well, I'm not ...

5 Q Was it before or after the interview?

6 A During the interview, and right before the

7 interview, when we first got in there the captain

8 offered us a soft drink or something, and he

9 himself got, I believe it was a Pepsi or

10 something out of the fridge, and when he opened

11 it it was in there.

12 Q Did you seize any of the Moussy beer that was

13 in the refrigerator?

14 A I seized two out of the officers' cooler, the

15 officers' mess.

16 Q All right, so let's back up a minute then, you

17 saw -- you found Moussy beer in other areas of

18 the ship?

19 A Officers' mess.

20 Q And did you seize any of the Moussy beer then?

21 A Two bottles.

22 (Pause)

23 Q Sir, showing you what's been marked as

24 Plaintiff's Exhibit Number 119 for

25 identification, do you recognize that?

1 A Yes.

2 Q And what is that?

3 A It's a bottle of Moussy Light Malt Beverage.

4 Q And is that one of the bottles that you
5 seized?

6 A Yes, it is.

7 Q What's the red tag that's attached to the
8 bottle?

9 A Oh, this is an evidence tag, and this is my
10 last name that I wrote on the label.

11 Q And the evidence tag is basically a chain of
12 custody form?

13 A Correct.

14 MS. HENRY: The State would move into evidence
15 Plaintiff's Exhibit Number 119.

16 MR. MADSON: No objection.

17 THE COURT: It's admitted.

18 EXHIBIT 119 ADMITTED

19 Q (Mr. Fox by Ms. Henry:) Sir, do you know what
20 the percentage of alcohol is in Moussy beer?

21 A The label says 0.5 percent.

22 Q Okay, thank you. Sir, did you, either that
23 day or a later time, search portions of the Exxon
24 Valdez to see if you could find any hard liquor
25 bottles?

1 A April 2.

2 Q All right.

3 A Yes.

4 Q And where did you search?

5 A My assigned area was the captain's quarters
6 and the ship's garbage.

7 Q Are we talking about a lot of garbage here?

8 A Yes.

9 Q Okay, did you find any hard liquor bottles?

10 A No.

11 MS. HENRY: Your Honor, except for playing the
12 tape, that's all the questions that I have for this
13 witness.

14 (3365)

15 THE COURT: Okay, we'll recess for the day.
16 See you folks back at 8:15 tomorrow morning, we'll try
17 to get started promptly at 8:30, counsel will come in
18 at 8:15 to take up matters that we can do then.
19 Remember my instructions about media and not discussing
20 this case, and please don't form or express any
21 opinions. I'll try to get a feel from counsel of if
22 we're still on schedule or not, I'll let you folks know
23 tomorrow morning. We'll go until 1:30 again tomorrow
24 morning, and I think that you can plan on the 8:30 to
25 1:30 schedule for next week, too, because I've got a

1 lot of things in the afternoon, so that's how it'll be
2 next week too. See you folks tomorrow, and be safe.

3 You may step down.

4 (Jury not present.)

5 THE COURT: Two things, that 0.5 percent, is
6 that one half of one percent, is that what that means?

7 MR. COLE: That'll be explained by the intox
8 cultures, it's five percent alcohol by volume. Point
9 five percent alcohol by volume.

10 THE COURT: One half of one percent ...

11 MR. COLE: Right.

12 THE COURT: ... alcohol by volume. Okay, and
13 I asked you last week about your scheduling, and I'm
14 wondering if you're still on schedule.

15 MR. COLE: Judge, I think I predicted at the
16 beginning about three weeks, and it's -- we're going to
17 be three weeks tomorrow, and I expect our case to be
18 done by Tuesday.

19 THE COURT: Okay, just wanted to make sure.

20 MR. COLE: I've conveyed that information to
21 ...

22 THE COURT: Without committing yourself in any
23 way, can you give me a ballpark figure of how much your
24 case is going to take, and the reason I'm asking is
25 I've got I think three homicide cases now that are

1 stacking up on me, and I'm just trying to be able to
2 tell counsel when to expect it.

3 MR. MADSON: Well, I would say we're looking
4 at at least two weeks. Don't you agree, Mike?

5 THE COURT: I'm not going to hold you to it.

6 MR. MADSON: I mean, it depends on cross-
7 examination, really.

8 THE COURT: I'm not going to hold you to it,
9 but do you think two weeks is a reasonable estimate?

10 MR. MADSON: Well, I'd say on the outside,
11 okay?

12 THE COURT: Okay.

13 MR. MADSON: We'd like to do it in a week, if
14 we could, but I think it's the farthest extreme,
15 probably two weeks.

16 THE COURT: Sure, and I don't mean to be
17 pushing you in any way by asking this question, I'm
18 just trying to get a ...

19 MR. MADSON: That's of course assuming we have
20 to put on a case, Your Honor.

21 THE COURT: Yes, that's with that assumption
22 in mind.

23 (Off record - 1:23 p.m.)

24 ***CONTINUED***