

UNION OF B.C. CHIEFS

UNION of B.C. INDIAN CHIEFS



0012675

WEST COAST OIL PORTS INQUIRY

A PUBLIC INQUIRY PURSUANT TO ORDER-IN-COUNCIL
PC 1977-597 DATED MARCH 10TH, 1977.

(Before Dr. Andrew R. Thompson, Commissioner)

Vancouver, B. C.

September 29th, 1977.

PROCEEDINGS AT INQUIRY

Volume 8

E R R A T U M

VOLUME 7:

Page 1052, delete exhibits on lines 11 through 13 and
insert:

(PRESS RELEASE, OTTAWA, JANUARY 20, 1975 MARKED
EXHIBIT 38)

(EXCHANGE OF CORRESPONDENCE BETWEEN COMMISSION
COUNSEL AND U. S. DEPARTMENT OF STATE MARKED
EXHIBIT 39A)

(SWORN STATEMENT OF EVIDENCE OF LIEUTENANT LARRY
C. WIESE MARKED EXHIBIT 39B)

Page 1048, line 26, delete:

"...that the witnesses or..."

LIST OF APPEARANCES

Commission Counsel	Russell Anthony Peter Bernard Bryan Williams Rod Snow
Kitimat Pipeline Ltd.	Jack Cressey
TransMountain Pipeline Co.	Al Johnson and Mary Allen
Kitimat Oil Coalition	Anne Rounthwaite and Marvin Storrow
Nishga Tribal Council	Don Rosenbloom
United Fishermen and Allied Workers' Union	Arnold Thomlinson
B. C. Wildlife Federation	David Anderson and Dieter Wagner
West Coast Environmental Law Association	Peter Fischer
District of Kitimat	Adrian Jones
Queen Charlotte Coalition	
Blue Peace Foundation, Victoria	
Labour Advisory Committee, Prince Rupert	
Attorney-General for British Columbia	Robert Edwards
Union of British Columbia Indian Chiefs	Louise Mandell

I N D E X

LIEUTENANT LARRY C. WIESE

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- Cross-Examination by Mr. Thomlinson	1186
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- Cross-Examination by Mr. McDade	1212

CHARLES LEAN,
HENRY DROEGE
MARC HERSHMAN
CHARLES ROE
THEODORE LEGROS

- In Chief by Mr. Anthony	1225
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EXHIBITS:

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Vancouver, B. C.

September 29th, 1977.

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE COMMISSIONER: Any time,
counsel.

MR. ANTHONY: Mr. Commissioner
before Lieutenant Wiese carries on with his statement of
evidence, just two quick matters.

First, at your directions
yesterday, Mr. Commissioner, I met with the counsel for the
Kitimat Oil Coalition and the counsel for the Department
of Justice with respect to expediting and obtaining the
information you requested from the Ministry of Transport
and the Department of External Affairs, relating to Part
XX of the Canada Shipping Act.

I think we're at the situation now where the Department recognizes that they -- there are documents that should be before this Inquiry, and Mr. Lowe, the Commission, has asked that he be able to return to Ottawa and get the information he needs, so that he can advise the Inquiry in some precise detail, both with respect to the timing for the delivery of any documents that are available, and the method of doing that and so on.

1 It seemed that that would
2 speed the matters up if that could be accomplished, since
3 that's where the documents are located, and that's where
4 the people are who can advise where the documents are and
5 how long it will take to provide them. He has therefore
6 indicated that he will be communicating formally with the
7 Inquiry at the earliest possible opportunity, and I anti-
8 cipate hearing from him on Monday morning, and at that time,
9 I will be able to advise counsel in advance what the
10 situation is, and if there is a need for further discussion,
11 we can perhaps address it at that time.

12 I think that's probably the
13 speediest method of ensuring we get the documents in ample
14 time for the needs of this Inquiry.

15 THE COMMISSIONER: Thank you.

16 MS. ROUNTHWAITE: Mr.

17 Commissioner, my concerns are merely to make sure that I
18 have it straight. It's my understanding that the Ministry
19 of Transport, and the Department of Justice acting on
20 behalf of them, has agreed to do a search and make available
21 a list of documents, that the problem was with the Depart-
22 ment of External Affairs, and I would ask that you make a
23 formal request, if that's not been done, pursuant to your
24 powers under Section 4 of the Inquiries Act, that the
25 Ministry of External Affairs undertake the same search and
26 provision of a list.

1 MR. ANTHONY: Mr. Commissioner,
2 I've suggest that you've made your desires known to both
3 departments, both departments have indicated they are pre-
4 pared to comply, and they are in the process of trying to
5 determine how best they can comply and both departments
6 are examining the issue and both are expected to respond to
7 this Commission as soon as they can.

8 THE COMMISSIONER: And when we
9 get the responses then if necessary, the matter can be
10 raised again.

11 Thank you.

12 MR. ANTHONY: Mr. Commissioner,
13 the second matter, I would ask then that Lieutenant Wiese
14 continue with his evidence in chief, and Mr. Bernard of the
15 Commission Counsel will be attending.

16
17 LARRY C. WIESE, Resumed:

18
19 DIRECT EXAMINATION, CONTINUED, BY MR. BERNARD:

20
21 A Good morning, Mr.
22 Commissioner.

23 I believe when we concluded
24 my testimony yesterday, I was on page 22 of my prepared
25 statement, so I will just continue from that point.

26

1 International agreements
2 play an extremely limited role in the subject of safe
3 navigation. The Convention on the International Regulations
4 for Preventing Collisions at Sea or the international
5 "rules of the road", as they are more commonly known,
6 is most significant in this regard. These rules set up
7 the navigational servitudes of vessels in various situations
8 and prescribe various light and sound signals.

9 These international rules
10 are applicable to all vessels beyond the line of demarcation.
11 In the case of Puget Sound, which is located inside the
12 line of demarcation, the inland rules of the road apply.
13 Here I'm talking about in U. S. navigable waters and
14 not Canadian waters.

15 THE COMMISSIONER: May I
16 ask again, just for clarification of terms, how would
17 you explain the line of demarcation?

18 A Well, it is described
19 in U. S. regulations--I guess the best description
20 would be, it is the line for purposes of U. S. regulations
21 which divides the high seas from internal waters.

22 THE COMMISSIONER: From the
23 internal waters?

24 A Internal waters, yes,
25 not navigable waters. It does not include the territorial
26 sea. The inland rules are codified by statute and apply

1 to all vessels navigating on U. S. waters within Puget
2 Sound. A civil penalty may be imposed on mariners who
3 violate the inland rules of the road.

4 I'm picking up again over
5 on page 23, the next subject heading, which is waterfront
6 facilities and transfer operations.

7 The Coast Guard exercises
8 authority over waterfront facilities under Title 1 of
9 the Ports and Waterways Safety Act, the Magnuson Act,
10 in Section 311 of the Federal Water Pollution Control Act
11 as amended. The regulations which have been issued under
12 authority of these statutes deal with three areas of
13 concern - port safety, national defense, and pollution
14 prevention.

15 For instance, the Coast
16 Guard may prescribe minimum safety equipment requirements
17 for structures in or adjacent to navigable waters, such
18 as oil reception terminals, to ensure adequate protection
19 from fire, explosion, natural disasters or other serious
20 accidents or casualties. The experience of the Coast
21 Guard has indicated that the transfer at cargo at terminals
22 contributes a proportionately small, but nevertheless
23 significant volume of pollution.

24 A major transfer spill
25 incident is rare, but there are numerous minor discharges.
26 To address this problem, the Coast Guard has promulgated

1 a wide ranging set of regulations applicable for both
2 U. S. and foreign flag ships. These requires extensive
3 checks before transfer operations have begun and the
4 installation of equipment facilities to contain spills
5 in the event of an accident.

6 The next subject heading
7 is oil pollution prevention, containment and removal.
8 The first legislation in the United States which addressed
9 oil pollution specifically was the Oil Pollution Act of
10 1924. That act was repealed with the first overall
11 legislation on the subject, the Water Quality Improvement
12 Act of 1970. This statute declared a national policy that
13 there should be no discharges of oil into or upon the
14 navigable waters of the United States, the adjoining
15 shoreline or from vessels operating in the contiguous
16 zone.

17 The Water Quality Improvement
18 Act as amended in 1972 is commonly called today the
19 Federal Water Pollution Control Act or the F. W. P. C. A.
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A comprehensive program to

1 control oil pollution in the marine environment requires
2 a plan to contain, recover and clean up any accidental
3 discharges as rapidly as possible, to minimize their adverse
4 effects.

5 The National Oil and Hazard-
6 ous Substances Pollution Contingency Plan, promulgated by
7 the Council on Environmental Quality under the authority
8 of the FWPCA, is such a plan. I have a copy of that here
9 with me, if you desire to have it.

10 THE COMMISSIONER: Is that
11 available to us?

12 A Yes, it's in regulatory
13 form.

14 THE COMMISSIONER: Do we
15 have it, do you know, in the regulations that were pre-
16 viously filed?

17 A Well I didn't cite it
18 here in my prepared statement. It is in the regulations,
19 and --

20 THE COMMISSIONER: I'll leave
21 it maybe to you, Mr. Bernard, to see whether or not that's
22 a document that we already have. If it isn't, maybe --
23 we would be appreciative if you would arrange to have it
24 marked as an exhibit later.

25 MR. BERNARD: Yes, I'll check
26 that now, Mr. Commissioner.

1 THE COMMISSIONER: Thank you.

2 LIEUT. WIESE:

3 A It assigns specific
4 responsibilities to various federal agencies to ensure
5 well-co-ordinated response effort to any pollutant discharge.
6 The Coast Guard is assigned a lead agency role in the
7 coastal regions, the Great Lakes and ports and harbours.

8 The Coast Guard predesignates
9 on-scene co-ordinators for all areas of responsibility;
10 develops regional response plans to anticipate potential
11 problem areas; identifies available pollution control
12 resources; establishes a rapid and effective response
13 capability for any pollution incident; and trains emergency
14 task forces assigned to each Coast Guard Captain of the port
15 and capable of responding to pollution emergencies.

16 I'll add something here. In
17 developing these regional plans, we call on all forms of
18 governmental entities, including state and local govern-
19 mental entities, to provide their services in cases of
20 pollution incidents.

21 The Coast Guard also operates
22 the National Strike Force which currently consists of
23 three strike teams of specially trained and equipped
24 pollution control experts. The teams provide technical
25 advice to on-scene co-ordinators during limited pollution
26 incidents and undertake containment and clean-up under

1 the direction of the on-scene co-ordinator in those inci-
2 dents that exceed local pollution control capabilities.
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1 These strike forces have
2 also been called upon on occasion to help other nations
3 in pollution emergencies.

4 When a polluting discharge
5 occurs, the FWPCA requires the persons responsible
6 for the discharge to notify immediately the appropriate
7 federal agency. For this purpose, the Coast Guard main-
8 tains a National Response Center in Washington, D. C.
9 which is manned 24 hours a day. Reports of pollution
10 incidents can be telephoned toll free to a number in
11 Washington. Of course, they can also be reported to any
12 Coast Guard station.

13 When the on-scene coordinator
14 receives the report, he evaluates the situation and
15 initiates whatever federal action may be required. As a
16 matter of policy, the party responsible for the discharge
17 will be encouraged to undertake appropriate clean-up
18 action. If the responsible party declines to take action
19 or if his efforts are inadequate or untimely, the on-scene
20 coordinator assumes responsibility for the clean-up
21 operation, using commercial contractors, emergency task
22 force personnel and equipment, the National Strike Force
23 or any combination of these resources as the circumstances
24 of the incident may dictate.

25 The Coast Guard has conducted
26 a number of research and development projects to improve

1 the state of the art in containment recovery and clean-up
2 of oil spills. Before 1970 there was little demand for
3 this capability and this technology is therefore still in
4 its infancy.

5 Advanced equipment developed
6 by the Coast Guard thus far for use in coping with pollution
7 incidents resulting from vessel incidents includes an
8 air deliverable, high capacity pumping system for pumping
9 oil or oil-water mixtures from damaged tankers, a high
10 seas oil containment system and a high seas recovery
11 skimming system. Any or all of this equipment can be
12 fully deployed within twenty-four hours. To facilitate
13 the deployment of this equipment in major ports, the
14 Coast Guard has developed a high speed surface delivery
15 capability. These containment and recovery systems will
16 function effectively in five foot seas, twenty knot
17 winds, and one and one-half knot currents. There are
18 presently fifteen 612 foot containment barriers, eighteen
19 pumping systems, and one oil recovery system in the Strike
20 Team inventory. I'm told that we are expanding that
21 farther.

22 The FWPCA grants the Coast
23 Guard authority to prescribe regulations requiring that
24 vessel owners or operators take preventative measures
25 to avoid pollution incidents. Regulations have been
26 promulgated under this authority. These pollution prevention

1 regulations involve the monitoring of over 50,000 transfer
2 operations annually and the boarding of thousands of tank
3 vessels and barges. These regulations apply to U. S.
4 vessels and foreign vessels in U. S. waters.

5 Subsection 311 (p) of the
6 FWPCA requires that vessels of over 300 gross tons, carrying
7 oil as cargo, must carry certificates of financial
8 responsibility, evidencing the ability of the owner or
9 operator to meet any removal cost liability under this
10 section, and authorizes impositions of fines and denial
11 of entry or clearance as sanctions to enforce the
12 provision.

13 The FWPCA deals primarily
14 with preventative actions and clean-up after a spill.
15 It does not provide a compensation scheme for private
16 third party damage. Other statutory remedies and common
17 law theories of liability, such as tort recovery, would
18 still apply to discharges which resulted in harm to
19 persons or property.

20 I'm deleting a major
21 segment here that I think has been already covered by our
22 previous speakers.

23 The next section that I'll
24 cover is boarding authority and enforcement.
25
26

Authority for boarding is also found in the Tanker Act, which was discussed previously. Sub-section (5) of the Tanker Act states that no vessel subject to the provisions of the section will be permitted to have on board, any bulk cargo designated in sub-section (2) until a permit has been endorsed on the vessel's certificate of inspection, indicating that

1 the vessel is in compliance with the provisions of the
2 section, and the rules and regulations for vessel safety
3 issued thereunder.

4 The permit must also show
5 the kinds and grades of cargo that the vessel may have on
6 board or transport. No permit may be endorsed until the
7 vessel has been inspected and found to be in compliance.
8 For this purpose, approved plans and certificates of class
9 of the American Bureau of Shipping, or other recognized
10 classification societies, for class vessels, may be
11 accepted as evidence of the structural efficiency of the
12 hull and the reliability of the machinery, unless some
13 other law places the responsibility for classification
14 directly on the Coast Guard.

15 With respect to foreign
16 vessels entering U.S. waters, the rules and regulations
17 for vessel safety established pursuant to the Tanker Act,
18 shall not apply to those vessels if they have on board a
19 valid certificate of inspection, recognized under law or
20 treaty by the United States.

21 With respect to vessel
22 detention and entry denial, Title II of the Ports and
23 Waterways Safety Act, discussed previously, authorizes
24 the promulgation of regulations to establish vessel safety
25 standards which if not met, could result in detention or
26 denial of entry to tank vessels.

1 In addition, the captain of
2 the port has been given authority to prevent any person,
3 article or thing from boarding or being taken or placed on
4 board any vessel or waterfront facility, whenever it
5 appears to him that such action is necessary in order to
6 secure the vessel, facility or waters of the United States
7 from damage or injury.

8 The Captain of the port is
9 also authorized to establish security zones into which no
10 vessel or person may enter without his permission. In
11 order to carry out his functions effectively, the captain
12 of the port may cause to be inspected and searched at any
13 time, any vessel, waterfront facility or person, article
14 or thing thereon or therein.

15 With respect to dangerous
16 cargo, the captain of the port may supervise and control
17 the transportation, handling, loading, discharging, stow-
18 age or storage of inflammable or combustible liquids in
19 bulk or other dangerous cargo covered by the regulations
20 governing tank vessels. The commandant may also designate
21 waterfront facilities for the handling and storage of
22 such cargo.

23 Regulations have also
24 been promulgated pursuant to Title I of the Ports and
25 Waterways Safety Act, providing that the Coast Guard
26 District Commanders, Captains of the Port or their

1 authorized representatives may temporarily control vessel
2 traffic in those areas they determine to be especially
3 hazardous. For this purpose, they may specify times of
4 vessel entry, movement or departure from any port, harbour
5 or U.S. waters.

6 Penalties are prescribed for
7 violations of any order issued by authorized Coast Guard
8 personnel carrying out these functions.

1 I only have one point of
2 clarification here. If the captains of the port, and I
3 suppose you don't know what those are. Captains of the
4 port are designated Coast Guard officers in port areas.
5 They're in the chain of command. They're under district
6 commanders. The Coast Guard is divided into a number of
7 coastal districts and the captains of the port are the
8 authorized officers in charge of a port area.

9 If a captain of a port
10 exercises this temporary control for vessel traffic, he
11 would do so in conditions of, let us say limited visibility
12 because of fog or something of this nature, and because
13 of the emergency nature of this type of action, no type
14 of formal rule-making would have to be followed.

15 The next section is liability
16 and compensation for oil spills. The three important
17 economic consequences of an oil spill are: the loss of
18 the oil itself, the clean-up costs and the damages
19 directly related to the presence of the discharged oil.

20 The first of these has not
21 caused much concern, nor has it been addressed in existing
22 legislation by the United States. The cost of any oil lost
23 in a spill is borne by the oil and oil transportation,
24 industry as a routine business expense. Bulk cargoes of
25 oil are normally insured against loss in the same manner
26 as other cargoes.

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1 By saying that, I don't
2 mean to suggest that the costs of the oil are small. Quite
3 often the cost of the oil may be larger than the ship
4 itself.

5 THE COMMISSIONER: Do you know,
6 Lieutenant Wiese, whether the laws of salvage would apply
7 in connection with the clean-up of oil?

8 A In what respect, sir?

9 THE COMMISSIONER: Well, I
10 was thinking that if a diligent operator had invented
11 some system of cleaning up oil effectively, could he move
12 in and clean it up and claim the oil under laws of
13 salvage?

14 A I don't know of the
15 law itself in an area. I've never known of a case where
16 that has happened.

17 THE COMMISSIONER: Partly,
18 I suppose, because of such effective methods, it would
19 make it a worthwhile business to clean-up the oil that
20 probably hasn't yet been discovered.

21 A In fact, we've had
22 some discussions in my current position as to who owns
23 the oil after we clean it up. I'm not sure that it has
24 a market value. I'm sure in some instances, depending
25 on the type of oil, it might, but I really don't know
26 the answer to that question.

As with the general limitation statute, a polluter cannot limit his liability in those cases where it is shown that the discharge was a result of gross or wilfull negligence on the part of the polluter.

1 The FWPCA was not designed
2 to provide statutory relief for private parties who have
3 been harmed as a result of an oil spill, except to the
4 extent that these persons benefit from the clean-up and
5 removal of the substance.

6 Provision for compensation
7 of damages directly related to the presence of oil is the
8 least settled area of the law.

9 THE COMMISSIONER: Excuse
10 me, before you go into liability for damages, we've heard
11 evidence about the TOVALOP scheme is to compensate for
12 clean-up costs, as I understand it. What's its relationship
13 to the strict liability under the FWPCA?

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1 know if TOVALOP would be available should a spill occur
2 within the contiguous zone, and the costs of clean-up
3 exceed the limitations under the FWPCA? In effect, would
4 exceed, say, 14 million dollars, would the deficiency, so
5 far as the United States government is concerned, be the
6 subject of a claim against TOVALOP?

7 A Well, I'm not -- I'm
8 really afraid to venture a judgment on that. I believe it
9 would be, but we have never had any experience where we
10 have gone to that group or in that case.

11 THE COMMISSIONER: Thank you.

12 A Provision for compen-
13 sation of damages directly related to the presence of oil
14 is the least settled area of the law. On the international
15 level, two conventions have been developed under the
16 auspices of IMCO. These are the International Convention
17 on Civil Liability for Oil Pollution Damage; and the
18 International Convention on the Establishment of an
19 International Fund for Compensation for Oil Pollution
20 Damage.

21 Neither of these conventions
22 has been ratified by the United States, apparently out of
23 concern that the amounts provided for compensation are
24 insufficient to cover a major spill.

25 In anticipation of the
26 increased tanker trade on the west coast, as a result of

1 the completion of the Trans-Alaska Pipeline, and in recog-
2 nition that recovery in the United States courts for oil
3 pollution damages under general tort theory was problematic,
4 the Congress created an additional statutory liability
5 scheme in the Trans-Alaska Pipeline Act, or the TAP Act,
6 as it's commonly referred to.

7 The TAP Act places strict
8 liability for oil pollution damage on the owners and
9 operators of ships which transport TAP oil to U.S. ports.
10 The TAP Act is designed to cover all injuries related to
11 oil pollution, and is not limited to clean-up costs.

12 Under the TAP Act, vessel
13 liability is limited to 14 million dollars per incident.
14 Claims beyond that, up to 100 million dollars, are to be
15 paid from the Trans-Alaska Pipeline Liability Fund,
16 created by the TAP statute. The liability fund is main-
17 tained through a levy of 5 cents per barrel of TAP oil,
18 loaded on vessels for shipment to U.S. ports.

19 Defences available to the
20 vessel owner and the TAP Liability Fund, which is -- the
21 TAP Liability Fund is maintained by a public corporation --
22 defences available to the vessel owner and the TAP
23 Liability Fund are limited to proof that the pollution
24 damage was caused by an act of war, the negligence of
25 the United States or other governmental agency, or the
26 negligence of the claimant party.

1 THE COMMISSIONER: Is that a
2 contributory negligence?

3 A Yes.

4 The U.S. Department of
5 Commerce, through the Federal Maritime Commission, has
6 issued regulations requiring owners and operators of
7 vessels carrying oil in the Alaska oil trade to provide
8 evidence of their capacity to pay any damage up to the
9 limit which may be imposed under the Act.

10 Coverage is specifically
11 extended to residents of Canada under the Act by Section
12 204(c) (1).
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1 A second United States
2 statute, the Deepwater Ports Act of 1974, creates a fund
3 which would be available for the compensation of victims
4 of certain types of oil pollution incidents. Again, this
5 act creates a strict liability regime up to a specified
6 amount for owners or operators of vessels which discharge
7 oil while operating in a safety zone around a U. S.
8 deepwater port.

9 There currently are no
10 deepwater ports in the United States. Two applications
11 have been received by the Coast Guard for construction
12 of deepwater ports off the coast of Texas and Louisiana
13 in the Gulf of Mexico. Therefore, this act will apparently
14 have no effect on Alaskan tanker trade, while the tankers
15 are in the vicinity of Canada.

16 THE COMMISSIONER: Excuse me.
17 What defines a deepwater port, as distinguished from
18 other ports? Do you know offhand?

19 A Well, I'd have to go
20 to the definition in the statute itself. I can say this,
21 it's a rather unique concept in the sense that these
22 deepwater ports are located beyond U. S. jurisdictional
23 waters. Just by the very nature of the port itself in the
24 Gulf and the depth of the water there, they had to be
25 located beyond twelve miles.

26 Our jurisdiction over the

1 port is based on the Outer Continental Shelf Lands Act,
2 since we consider it to be a fixed structure of the shelf.
3 Ships trading at these ports, if they are built, will have
4 to recognize that they are submitting themselves to the
5 United States jurisdiction when they offload oil in the
6 zone which will surround the port.

7 THE COMMISSIONER: Thank you.

8 A Beginning in the
9 early 1970's, various states of the United States also
10 began to enact legislation covering damages in various
11 degrees, resulting from oil pollution incidents. The
12 constitutionality of these statutes was upheld by the
13 United States Supreme Court in the case of Askew versus
14 The American Waterways Operators, Inc. Today approximately
15 one-half of the coastal states of the United States have
16 statutes dealing with liability and compensation for
17 oil spills. These statutes often provide stricter
18 standards of liability than do federal laws.

19 Because of the nature of
20 the United States federal system of government, we have today
21 a patchwork of laws which sometimes contain conflicting
22 provisions relating to oil pollution liability and
23 compensation. For this reason, legislation has been
24 introduced into the current session of the Congress, which
25 would combine all of these divergent laws into a single,
26 comprehensive scheme of liability and compensation for

1 damages caused by oil pollution in the navigable waters
2 of the United States, contiguous zone of the high seas.
3 The bill is called the Oil Pollution Liability and
4 Compensation Act. President Carter has given his support
5 to the bill, and I am told that the probability of passage
6 of the bill during this current congressional session
7 is quite likely, particularly in light of the unfortunate
8 number of vessel casualties that the United States
9 experienced last winter.

10 The purpose of the proposed
11 legislation is to establish a comprehensive scheme of
12 liability and compensation for damages caused by oil
13 pollution in the navigable waters of the United States,
14 their connective or tributary waters, and on the high
15 seas. The legislation would establish strict liability
16 for the owners and operators of the sources of oil
17 discharge, and create a back-up compensation fund to
18 respond to damage claims which are not satisfied for
19 whatever reason by the party responsible for the discharge,
20 or to respond to damage claims where the party responsible
21 cannot be identified.

22 The fund would be maintained
23 at a level of between one hundred fifty million and two
24 hundred million dollars. The system would supercede
25 duplicative funds which now exist under various state and
26 federal statutes previously mentioned. In other words, it's

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1 designed to preempt the field.

2 THE COMMISSIONER: Under
3 United States constitutional law, a federal statute of
4 this type could preempt the state legislation?

5 A This is quite true
6 that it could, Mr. Chairman. This concludes my prepared
7 remarks this morning. At this time, I'll entertain any
8 questions which you might have and that I'm competent
9 to answer.

10 THE COMMISSIONER: Thank you.

11 MR. BERNARD: Mr.
12 Commissioner, just before you embark upon those questions,
13 the National Oil and Hazardous Substances Pollution
14 Contingency Plan was not contained in the regulations
15 filed thus far. So that if Lieutenant Wiese has a copy
16 of that document, we will file such as an exhibit.

17 THE COMMISSIONER: That's
18 Exhibit 40.

19 MR. BERNARD: Thank you,
20 Mr. Commissioner. I'll obtain the copy from Lieutenant
21 Wiese at the break and provide it to the Secretary.

22 THE COMMISSIONER: Thank you.

23 (NATIONAL OIL AND HARZARDOUS SUBSTANCES POLLUTION
24 CONTINGENCY PLAN MARKED EXHIBIT 40)

25

26

1 THE COMMISSIONER: We could
2 follow the order of cross-examination that we used yester-
3 day unless counsel have reason to depart from it.

4 MR. BERNARD: That's agreeable.

5 THE COMMISSIONER: Ms.

6 Rounthwaite?

7 MS. ROUNTHWAITE: I take it
8 neither TransMountain or Kitimat Pipeline are cross-exam-
9 ining?

10 THE COMMISSIONER: Pardon me.

11

12 CROSS-EXAMINATION BY MS. ROUNTHWAITE:

13

14 Q The impression that I
15 get from reading your paper, which I found very helpful,
16 is that there are large gaps in international law in this
17 area, is that correct?

18 A Well, I'm not going
19 to comment on how large those gaps might be. The United
20 States has not ratified, I think on one of the pages that
21 I prepared here, I indicated the conventions which we are
22 party to, and you'll note that we are not a party to
23 quite a number.

24

25 At least in that regard,
26 there are gaps in the international scene as far as the
United States is concerned.

1 Q You state the domestic
2 laws permit states to fill the gaps in international law,
3 and the United States certainly seems to have a very exten-
4 sive legislative scheme dealing with marine pollution and
5 in particular, pollution from oil. That suggests to me
6 that there were large gaps to fill.

7 THE COMMISSIONER: I think
8 the witness has already agreed with that.

9 MS. ROUNTHWAITE:

10 Q Would you agree that
11 in many respects, the United States is ahead of other
12 maritime nations in this area?

13 A Well that would require
14 some knowledge, on my part, of how extensive the laws of
15 other nations are, such as Canada, and I don't think I'm
16 qualified to make a judgment of that sort.

17 Q Can you tell me then
18 what has proved to be the most effective laws or legislat-
19 ive schemes which the U.S. has adopted?

20 A Well, it's difficult
21 to answer a question like that. I currently work in the
22 Litigation Division of the Coast Guard, and through my
23 experience in that office, or in that division, I have
24 found the Federal Water Pollution Control Act to be a very
25 effective deterrent against pollution, and also an effect-
26 ive mechanism whereby we can remove oil which has been

1 spilled.

2 If I had to pinpoint a statute
3 which I think probably has done the most good, it would be
4 that statute.

5 Q Can you give me some
6 specific provisions of that statute, that you think of?

7 A Well, polluters --

8 Q How does it deter?

9 A Well there's -- it's
10 mainly a financial deterrent in the sense that a polluter
11 is strictly liable for the costs of clean-up of the oil.
12 If he doesn't undertake action to remove the oil himself
13 once it's spilled, then the Coast Guard moves in, normally
14 by entering contracts with private parties to remove the
15 oil.

16 There's not a great deal of
17 competition in this area, let us say, among private
18 parties to remove the oil. It's quite an expensive
19 proposition, so it's in the best interest of the transporter
20 of the oil to ensure that he doesn't have to cover those
21 costs.

22 Q In other words, he
23 could probably do it more cheaply himself?

24 A We've maintained that
25 rigidly, yes.

26 Q Can you tell me what

1 sort of delay there is, how long does the Coast Guard give
2 the polluters to take action before they step in?

3 A Well, that would depend
4 on the type of spill that you have. We try to respond
5 immediately, as soon as we have notification that there is
6 a spill, we try to, if it's a large spill, we try to have
7 someone on the scene.

8 The polluter is, if he can
9 be identified, a demand is placed upon him to undertake
10 action to remove the oil. I don't think there's any speci-
11 fied time limit in which he must respond to that demand,
12 but if it's clear that no action is being taken and that
13 the potential damage is increasing, that we'll go ahead
14 and act.

15 Q So I would think that
16 the sort of situation could arise where decisions would
17 have to be made within a matter of hours. Can the Coast
18 Guard do that?

19 A I think we're competent
20 to do that, yes.

21 Q Do you know whether
22 it's done with that sort of alacrity?

23 A I beg your pardon?

24 Q Do you know whether
25 the Coast Guard does move in with that sort of alacrity?
26

1 A Well, we move in as
2 quickly as possible. That's about the extent of the answer
3 that I could give.

4 Q So, a polluter could
5 be contacted in the middle of the night and asked whether
6 he's going to clean up the spill, and if he says no, or
7 indicates some delay--

8 A Well, normally if we
9 know the vessel or the land based facility from which this
10 discharge occurred, the polluter is going to be on station.
11 He's going to be there. So, there's no problem getting
12 contact with the person. Usually you're dealing with the
13 master of a vessel, who in turn is going to contact the
14 shipping agent or someone.

15 Q I'm interested in your
16 comment that in the past American law making and I think
17 it's probably a common fault, hasn't reflected long term
18 planning but has been more a response to crisis situations.
19 Do you think there's any change now in the American
20 legislative mechanism?

21 A Well, I think there's
22 more public concern than ever before, particular this
23 year, because of incidents like the "ARGO MERCHANT" last
24 winter. I don't know whether that's responsive to what
25 you're saying, but there is, I believe, more public concern
26 about oil pollution.

1 Q Would that be throughout
2 the United States, or is it something that is centered on
3 the coast?

4 A Well, I haven't made
5 any polls, but certainly you read more about it in the
6 media than ever before.

7 Q Now, I understand that
8 there's a requirement for U. S. tank vessels to obtain
9 and carry a certificate of inspection. Can you tell us
10 what the penalties for violating this provision are, and
11 what sort of enforcement methods are used?

12 A Well, as I said, a
13 U. S. flag vessel--steam vessels, which includes all
14 tank vessels, can't operate without a certificate of
15 inspection. The greatest deterrent--and there are criminal
16 penalties and civil penalties for operating without a
17 certificate. The greatest deterrent a master or an owner
18 of a vessel has to not meeting the standards on a continuing
19 basis for the certificate is the fact that a Coast Guard
20 officer can revoke it at any time, if he finds that it
21 doesn't continue to meet the standards for which it was
22 originally issued.

23 Q And the effective
24 revocation is that the ship is not allowed to sail?

25 A That's true.

26 Q Could you explain for

1 us, I don't believe we have the distinction between civil
2 and criminal penalties in Canada, what that is.

3 A Well, greater minds
4 than myself have debated this. Generally a civil penalty--
5 you're talking about a monetary penalty, and the distinction
6 lies in the type of proceeding under which it can be
7 invoked. If it's a civil proceeding, you don't have the
8 constitutional guarantees to matters such as ^{the right to} trial by jury,
9 guarantee against self-incrimination, this sort of thing;
10 which is guaranteed in the United States Constitution.

11 Of course, civil penalties
12 would not allow for any type of imprisonment.

13 Q But these still are
14 the result of the prosecution?

15 A They're the result of
16 at least an administrative hearing, some type of decision-
17 making by a judicial type body.

18 Q The Tanker Act, Title
19 2 of the 1972 Ports and Waterways Safety Act, allows the
20 Coast Guard to make regulations with regard to a wide
21 variety of requirements for tankers. Have regulations
22 been promulgated in all the areas that the Tanker Act
23 encompasses?

24 A No, I'm sure that they
25 could be a great deal broader than what we've issued thus
26 far. You have to strike a balance any time you're issuing

1 rules between the reasonableness of the rule and the mission
2 you're trying to accomplish. I think I covered in my
3 statement what we've done thus far. We have a lot of
4 proposed regulations which are out in a notice to proposed
5 rule making form. We could do more, but again it depends
6 on the balance that you try to strike in issuing
7 regulations.

8 Q Can you tell me, along
9 that line, at what stage in the United States are proposed
10 amendments to existing statutes or proposed new regulations
11 made public?

12 A Well, they're made
13 public at the time that they come out in a notice form
14 in the Federal Register.

15 Q And that's prior to
16 a reading in Congress?
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1 A Well, I suppose I
2 should explain the difference. Regulations are issued by
3 administrative agencies which are given through some
4 statute a rule making authority. They're not a legislated
5 function. An agency is given some type of broad authority
6 usually to consider appropriate rules, and then as it goes
7 through the administrative process of notice and public
8 hearings, it issues those rules, and once issued, they
9 become binding at law.

10 Q Are public hearings
11 held with regard to all new regulations, or just in
12 certain instances?

13 A It depends on the
14 degree of public interest, and the type of regulation.
15 Most of these Tanker Act type regulations^{do} have public
16 hearings.

17 Q I think I have it
18 right. Some of the regulations under the Tanker Act
19 establish stringent limitations on the operational dis-
20 charge of oil?

21 A True.

22 Q Can you give us, in
23 general rather than citing those regulations, what sort
24 of limitations have been placed on that?

25 A I'd rather not. I
26 think you had better wait until some of our technical

1 people get here for that.

2 Q In several cases, you
3 indicate that the Coast Guard has under study, certain
4 proposals, and those would be for new regulations or
5 amendments. Could you describe for us, is there an arm
6 of the Coast Guard which is established for research and
7 proposing changes?

8 A Well, as far as the
9 regulations for the design of tankers, it would be done
10 -- the regulations would be issued through our Office of
11 Merchant Marine Safety. We do have a division or office
12 of research and development. We have our own lab in
13 Groton, Connecticut, they do do some work in this area.
14 But the actual regulations which are issued, they're
15 written within the Office of Merchant Marine Safety, and
16 of course they receive some type of legal review.

17 Q Merchant Marine Safety,
18 is that in the Coast Guard, or --

19 A Yes, I'm sorry, it is
20 within the Coast Guard.

21 Q So when the Coast Guard
22 is studying a proposal to extend segregated ballast
23 requirements to existing vessels, what exactly does that
24 mean? There is a proposal to do that and it's under
25 discussion?

26 A It comes out in a

1 notice form in the Federal Register which is published
2 daily. There's a solicitation for public comment, usually
3 there's some type of hearing announced, and after all the
4 comments are in, the Coast Guard makes a decision on it.

5 A lot of these regulations
6 which I think I spoke of, these planned regulations,
7 they're in a notice or announced notice for proposed rule
8 making form, and they're not going to become effective
9 if they do indeed become effective, until after the 1978
10 IMCO Convention, which is coming up, I believe in February
11 or January, I'm not sure.

12 Q I would like to obtain
13 a copy of --

14 A A conference, I'm
15 sorry, I said convention.

16 Q I would like to obtain
17 a copy of a notice of proposed rule making in the solicit-
18 ation of public input. Could you make that available,
19 would that be found in the Federal Register?

20 A I'm not going to
21 enter anything into the record, because I'm not sure how
22 complete this list I have right here is. You're certainly
23 welcome to take a look at this, and it has the dates when
24 various notice to -- of proposed rule makings were issued,
25 and you're certainly welcome to take a look at it if you
26 want.

1 MR. ANTHONY: Mr. Commissioner
2 I can provide my friend with a copy of the Federal Register
3 edition, relative to the proposed rule changes, if she
4 wishes.

5 THE COMMISSIONER: Would it
6 be the same as the list that Lieutenant Wiese is referring
7 to?

8 MR. BERNARD: I think the
9 list is a broader document than the more specific edition
10 of the Federal Register than I'm thinking of.

11 A Well these came out
12 on various dates, and I think probably the one you have
13 is one of the larger ones, but there's more than one.
14 It occurred on more than one date.

15 THE COMMISSIONER: Can this
16 be made available to us, and we can make arrangements to
17 obtain copies of those that are important?

18 A Yes, if you'll just
19 put that in some type of written form, we can get it for
20 you.

21 MR. BERNARD: Many of those
22 may be available in the Inquiry library now.

23 THE COMMISSIONER: They may
24 be available now, but the list would be helpful. I guess
25 it should be marked, should it?

26 A Are you talking about

1 the list I have here?

2 THE COMMISSIONER: Yes, is
3 there any reason why that can't be provided?

4 A Well it's not an offi-
5 cial publication. This is just a list that I jotted down
6 --

7 THE COMMISSIONER: It would
8 just be helpful to us, I think in identifying --

9 A You're certainly welcome
10 to have it. I would rather not have it entered in the
11 record, because it's not official.

12 THE COMMISSIONER: All right.

13 MR. BERNARD: Perhaps I
14 can review the list at the break, Mr. Commissioner, and
15 raise this again.

16 THE COMMISSIONER: Fine, is
17 that satisfactory?

18 MS. ROUNTHWAITE: Yes, I just
19 felt that the notice of proposed rule making would be
20 interesting, if we don't have that sort of thing in our
21 legislative development in Canada.

22 Q In dealing with the
23 1960 SOLAS convention, which deals with adequate manning
24 of vessels, you say in practice, a port state cannot
25 intervene unless there are glaring deficiencies in the
26 qualifications of the ship's crew which clearly render

1 the vessel unseaworthy or a hazard to the port area.

2 Have you any statistics, or
3 a general impression of the frequency with which the U.S.
4 Coast Guard has intervened?

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1 A I think those statistics
2 at least in the recent past, are available. I don't have
3 them. I think if you request them, we probably can give
4 you some type of background in that area.

5 Q Are you familiar with
6 the requirements for manning, which the Coast Guard
7 has?

8 A Yes.

9 Q Could you outline those
10 in a general way?

11 A Well--

12 THE COMMISSIONER: With respect
13 to tankers?

14 MS. ROUNTHWAITE: Yes.

15 A Okay. Well, the Coast
16 Guard has a whole subchapter or several subchapters on
17 manning in the regulations. Generally, in order to be
18 qualified to serve on a U. S. merchant vessel, an
19 applicant to the Coast Guard has to pass the Coast Guard
20 administrative examinations to test his competence. He
21 also has to pass some type of background checks for
22 national security purposes.

23 The examinations which are
24 administered depend on the type of position that he's
25 applying for. On tank vessels, the Tanker Act specifically
26 provided that if a tank vessel was not required by other

1 regulation or statute to have at least two licensed
2 officers on board, that they carry tankermen. Tankermen
3 is a new hybrid. It's a creation of regulation, if you
4 will, but to qualify for the position of tankerman, you
5 have to have various past experience, and I can't testify
6 on what the specific regulatory requirements are for his
7 number of years doing various type jobs.

8 But they do have to have--
9 satisfy a requisite time period of experience and they
10 have to pass an examination also. So, it's rather difficult
11 to become a merchant mariner of the United States, and
12 the United States and the Coast Guard has authority to
13 revoke any seaman's documents or licenses for proof of
14 negligence or misconduct on board a vessel, and it's
15 unlawful to serve on a vessel in a capacity which requires
16 a certain license or document, unless an applicant has
17 it.

18 Q So that it appears
19 that personnel operating tankers in the U. S. would be
20 well qualified?

21 A Yes, I think they are
22 highly qualified.

23 Q Now, in Canada
24 there's a phenomenon where legislation is passed, allowing
25 for regulations to be made, and years may go by in which
26 regulations are not made, so that the statute itself remains

1 rather empty, or else we may in fact have regulations drawn
2 and on the books for a long time but not proclaimed. Does
3 the United States have this problem?

4 A That's a question that
5 I really can't respond to. You're asking for an opinion
6 on my part, and I really can't give that.

7 Q Well, are you familiar
8 with, generally speaking, the length of time that it
9 takes for regulations to be made?

10 A I suppose that varies
11 from statute to statute and regulation to regulation.
12 Some of these regulations are very controversial. Some
13 of them, I think it's safe to say, will require an enormous
14 capital expenditure by oil companies, by vessel owners,
15 and in order to facilitate full participation by all
16 involved parties, some of them take longer than others, I
17 can say that; but as far as trying to put some type of
18 definition on the time it takes, I can't do that.

19 Q But frequently in the
20 United States when there is a delay between the passing
21 of a statute and the passing of regulations under it, that
22 delay would be filled with public hearings and public
23 discussion of the proposed regulations, rather than secret
24 studies.

25 A Well, our rule making
26 is open to the public. I'll say that.

1 Q With regard to the manning,
2 you have an interesting requirement that a tanker which is
3 the vessel of the United States and documented must have
4 only citizen officers.

5 A That's right.

6 Q Is the purpose of that,
7 to your knowledge, to maintain a high quality of personnel
8 or does it have to do with immigration requirements and the
9 wish to provide jobs for Americans?

10 A Well, the manning
11 requirements are going to apply regardless of whether the
12 person is a citizen or not. That provision which provides
13 for the citizenship, seventy-five per cent crew and one
14 hundred per cent officers--I'd rather not say what the
15 intended purpose of that provision was when it was passed.
16 It exists.

17 Q Can you comment on the
18 effect that it has on tanker operations?
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1 A The effect is that
2 you have American citizens on your tankers.

3
4 Q Do you think that
5 affects the operation? Does it affect the operation?

6 A I'm not going to make
7 a judgment call on whether Americans are more qualified
8 than other persons.

9 Q Though you might
10 think so?

11 You went into some explanation
12 about the Loran system, and it still remains a puzzle to me.
13 Can you outline in very simple terms, what it is and how
14 it works?

15 A Yes, I think I can on
16 a simple basis. The Coast Guard maintains a number of
17 radio transmitting stations. They're up and down the
18 east coast and west coast, they're in Alaska, some are
19 in foreign nations.

20 The way a Loran receiver
21 works, the receiver must receive transmission from any two
22 stations, and when it does, through the mechanisms in the
23 receiver itself, it can pinpoint with a high degree of
24 accuracy, the position of the vessel, where specifically
25 it is in relation to a chart.

26 Q So I could compare

1 it to a radar tracking system?

2 A It's somewhat similar
3 to that, yes, except it's the reverse. The Coast Guard
4 is not tracking these vessels, these vessels are using the
5 mechanism to determine their own position.

6 Q So it's a sophisticated
7 aid to navigation?

8 A It is, yes.

9 Q Is English the inter-
10 national language of shipping?

11 A Well I probably would
12 say that it's used more frequently than any other language.
13 Whether it's an international language of shipping, I don't
14 think I can say whether it is or not. It's required to be
15 used under the Radio-Telephone Act by operators of vessels
16 on inland waters of the United States.

17 THE COMMISSIONER: What was
18 the name of the Act?

19 A Radio-Telephone Act,
20 it was mentioned in here.

21 THE COMMISSIONER: Yes.

22 MS. ROUNTHWAITE:

23 Q Inland waters don't
24 include then the territorial sea?

25 A No.

26 Q So a vessel approaching

1 an American port could be doing so in a foreign language?

2 A It could.

3 Q You probably have no
4 direct knowledge of how that affects the docking procedure?

5 A Well, I'll make a
6 qualification to that statement. Under the vessel traffic
7 system regulations, at least the ones for Puget Sound,
8 transmission to the central co-ordinator has to be in
9 English, and I believe the regulations require the first
10 call to be at an approach point to Puget Sound, and that
11 would have to be in English.

12 Q And from then on,
13 communications are in English?

14 A True.

15 Q Is there a significance
16 to the difference between vessel trafficking systems and
17 air traffic control, the difference that you've pinpointed
18 being that a vessel's navigation is the responsibility of
19 the master, relying on advice by VTS, and I gather in air
20 traffic control, the responsibility is the controllers?

21 A As I understand it,
22 yes.

23 Q Is that different,
24 what is the effect of that difference?

25 A Well, my understanding
26 of the VTS system, one of its main functions is to enable

1 the mariner to be aware of all the other traffic which he
2 is going to encounter when he's in a confined area. For
3 this purpose, at least with regard to Puget Sound, mariners
4 are required to radio their position at previously designated
5 points, points that are also designated in the regulations.
6 This, in turn, allows the co-ordinator to track all vessels
7 within the area, and he in turn can tell vessels which
8 ships they're going to be approaching, at what times, in
9 what areas.

10 There are some emergency
11 powers under the VTS system which allows the co-ordinator
12 to order a ship not to enter an area at a certain time,
13 say because of reduced visibility, because of heavy
14 traffic, this sort of thing, but generally speaking, the
15 responsibility for navigation of the ship remains with
16 the master.

1 Q Now, you've said that
2 international agreements play an extremely limited role
3 in the subject of safe navigation. Does this cause
4 difficulties?

5 A Well, that is a judgment
6 call on my part. No, I don't think it does. Navigation--
7 the primary responsibility for navigation is on the
8 individual ship and the individual master. We do have
9 these international collision regulations which are like--
10 I guess they can be compared to driving rules. It sets
11 up a navigational servitude between vessels in crossing
12 situations; which vessel is the burden vessel, which
13 vessel is the privileged vessel.

14 It sets up certain light
15 requirements so that the vessels can be identified at
16 night and their direction can be identified by the colour
17 of the lights. That probably is the international agreement
18 which provides the most assistance in this area. But I
19 wouldn't say that this has caused a great deal of problem.

20 Q Does vessel traffic
21 management come within the subject of navigation?

22 A Yes, it does.

23 Q It seems to me that
24 in the waters which border on both Canada and the United
25 States, international agreements or laws would be required.

26 A If you have a fully

1 comprehensive program to cover all of Puget Sound and the
2 shipping rights in Puget Sound, it does, and I think one
3 is being worked out at this time.

4 Q Do you know whether the
5 United States has mandatory regulations for vessel traffic
6 management?

7 A The V. T. S. system
8 which was issued under Ports and Waterways Safety Act is
9 mandatory on the American side.

10 Q And to what area does
11 that apply?

12 A I could read the
13 description out of the regulations. I think there is a
14 provision in here specifically stating the area, but--
15 I'll just read you the Section 161.180 of V. T. S. rules
16 which are found in Title 33 of Federal regulations.

17 "The V. T. S. area consists of the
18 navigable waters of the United States
19 inshore of the boundary line of inland
20 waters described in Section 82.120 of
21 this chapter.

22 This area includes the waters and
23 the Straits of Georgia, Harris Strait,
24 the Strait of Juan de Fuca that are east
25 of the line of demarcation; Rosario
26 Strait, Bellingham Bay",

1 and it goes on.

2 Q So, it does cover the
3 northwest coast?

4 A Yes.

5 Q There's a section on
6 waterfront facilities and transfer operations. You
7 indicate that the Coast Guard may prescribe minimum safety
8 equipment requirements for structures in or adjacent to
9 navigable waters.

10 A Correct.

11 Q Have they done so?

12 A In certain respects.

13 We require that certain pollution abatement equipment be
14 held by the facility, the receiving facility. We require
15 that certain personnel monitor the transfer itself. There's
16 got to be a tankerman on board the vessel. There's got
17 to be a tankerman on the receiving side, or vice versa,
18 depending on which direction the flow of oil is going.

19 Yes, we've done some things
20 in this area.

21 Q Have you requirements
22 for oil reception terminals?

23 A Well, yes, we do.

24 That, of course, is part of the '73 Convention. I believe
25 that's the designation.

26 Q So, in this area, you've

1 adopted the international rules?

2 A Yes, we have.

3 THE COMMISSIONER: Pardon me.

4 Are those terminals provided? Is there any agency of the
5 United States Government, or are they left to private
6 operators?

7 A They are private.

8 MS. ROUNTHWAITE:

9 Q Inspected by the Coast
10 Guard?

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A Well, it's a tangential type function. We have reception facilities because operation of the vessels require that there be some. We have such strict laws regarding discharge of oil that for normal operation, they've got to get rid of their ballast in some fashion.

7 If a vessel's coming in under
8 ballast, and it's got oil/water mixture, it's got to get
9 rid of it in some fashion before it can unload oil or vice-
10 versa, so it's done because they have to do it for normal
11 operation.

12 Q Are you aware of what
13 volume of total oil pollution the transfer of cargo at
14 terminals forms?

15 A Percentage wise?

16 Q Yes.

17 A Not personally, I
18 think there are some studies which could attempt to put a
19 percentage figure on that. In fact, one was done last
20 year at the order of the President, a special Task Force
21 within the Department of Transportation, and if my memory
22 serves me correctly, it did have some estimates as to
23 percentage of oil pollution caused by different sources.
24 Probably it would have something on that, but I don't have
25 it.

Probably it's available for

1 your use if you want to request it.

2 Q Are the studies prepared
3 by the Coast Guard in contemplating new regulations avail-
4 able to the public?

5 A Some would be, I don't
6 really know. That would require a call on somebody's part.
7 Generally they are, yes, if you're willing to pay for them,
8 generally they are.

9 Q I'm interested in the
10 characteristic of American legislation where many statutes
11 contain declarations of national policy. Canadian statutes,
12 in general, don't have a declaration.

13 Can you describe the process
14 by which a national policy, for example, the one that
15 there should be no discharges of oil into or upon the
16 navigable waters of the United States, et cetera, are
17 arrived at?

18 A Well, of course, all
19 these statutes began their legislative process in a
20 committee form, or they begin their trip through Congress
21 in some committee.

22 The drafting of the statutes
23 usually is done by the committee staff, it's reviewed by
24 the committee, the committee being members of Congress.
25 I can't say where the policy statements come from. It's
26 about the only answer I could give you.

1 When they're voted on in
2 statute form, they become a statement of policy, but
3 as far as who originates the statement of policy, I don't
4 know.

5 THE COMMISSIONER: In the
6 United States, how do the rules of interpretation of
7 statutes apply to policy statements? How are they given
8 effect in interpreting --

9 A Well, policy statements
10 such as, I think I mentioned one with regard to the Federal
11 Water Pollution Control Act. When administrative agencies
12 review their statutory authority to issue specific regulat-
13 ions, a policy statement might be helpful in deciding the
14 extent or magnitude of that authority.

15 With regard to the Federal
16 Water Pollution Control Act, there's a policy statement
17 that there shall be no discharges of oil into the waters
18 of the United States. With that type statement, it might
19 ease the decision making process of a regulatory agency,
20 I would think.

21 THE COMMISSIONER: If the
22 question of interpretation of authority under a regulation
23 were brought before a court, would the court's inter-
24 pretation be affected by the policy statement?

25 A It could be, yes,
26 looking into the legislative history of it.

1 Q Are you familiar
2 yourself with the practicalities of enforcing Section 311
3 of the FWPCA which makes it unlawful to discharge oil in
4 harmful quantities into the navigable waters of the United
5 States?

6 A The division that
7 I'm in now does quite a bit of work with collection
8 actions for discharges, where we're having to prove that
9 a suspected source, in fact, did discharge.

10 Q Do you encounter
11 difficulties?

12 A Well, it depends on the
13 quality of evidence that we have. If a discharge occurs
14 in a crowded harbour where you have four or five tankers
15 at night, sometimes it can be a problem, yes.

16 Q So the same problems
17 would occur if there were a discharge at night or in a
18 fog?

19 A It depends on the
20 type of evidence that you have. We have a rather sophisticated
21 technique for sampling oil and analyzing it. We're getting
22 better at it all the time, and the courts have recognized
23 the admissibility of this type of evidence. When we have
24 a discharge under circumstances as that, that I just
25 described, where you don't have any eye witness actually
26 seeing the oil go into the water, quite often we'll board

1 all the tankers in the harbour and we'll take samples
2 from their bilges, from their tanks, various sources of
3 oil. We'll take samples of the oil in the water. We'll
4 subject those samples to chemical analysis and quite often
5 we match the two.

6 Q I gather that a
7 process like that would require a lot of resources, at least
8 a large number of men.

9 A Well, some of the work--
10 it depends on where the discharge occurs. Some of the
11 work is contracted out to private labs. Some of it is done
12 by in-house labs. Yes, it takes some equipment. I don't
13 know what the capital investment is.

14 Q It indicates to me
15 a dedication on the part of the Coast Guard to enforcing
16 the laws within its jurisdiction.

17 A I think we're
18 dedicated to enforcement of the laws.

19 THE COMMISSIONER: Is that
20 a good point at which to take a coffee break?

21 (PROCEEDINGS ADJOURNED)
22
23
24
25
26

1 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

2

3

THE COMMISSIONER: Mr.

4

Thomlinson, are you ready to proceed?

5

MR. THOMLINSON: Mr.

6

Commissioner, I do have some questions. However, Ms.

7

Rounthwaite was doing a good job of covering them and

8

I was sitting making crosses on my questions, and the

9

list is getting smaller and smaller, which delights me.

10

I don't mind proceeding at all, as long as it would be

11

understood that she could resume once she comes back.

12

THE COMMISSIONER: Yes.

13

There's no question about that. I think she's here

14

now.

15

MS. ROUNTHWAITE: I'm sorry,

16

Mr. Commissioner.

17

Q Lieutenant Wiese, can
and or minimum

18

you tell me what is the maximum/penalty for failing to

19

report a pollution incident to the Coast Guard?

20

A I believe it's a five

21

year imprisonment. I can't remember. Not less than

22

\$5,000.00 or more than \$50,000.00 and imprisonment of

23

not more than five years. I believe that's correct.

24

Q Are there statistics

25

available on the incidents for which prosecutions have

26

been undertaken and the results thereof?

1 A Well, a criminal
2 prosecution, of course, would be done by United States
3 attorney. There have been some. I don't know whether
4 statistics are available in my office or not. I don't
5 have them personally, but if you'd make a request, we
6 can attempt to get them if they are available.

7 Q Thank you. Would it be
8 possible as well to obtain examples of plans under the
9 National Oil and Hazardous Substances Pollution Contingency
10 Plan?

11 A I'm sorry?

12 Q Perhaps I'm misunderstanding
13 here. Have we got that on file as an exhibit?

14 THE COMMISSIONER: You're
15 referring to the Contingency Plan?

16 MS. ROUNTHWAITE: Yes.

17 A Yes, I think probably
18 counsel does have a copy of that. That plan, I might
19 add, just sets up the responsibilities of various regional
20 coordinators. It predesignates on-scene coordinators for
21 say Baltimore Harbour and it just sets up the responsibilities
22 of various agencies; who's to do what.

23 So, in the case of an
24 emergency, we won't be running around not knowing who is
25 in charge.
26

1 Q Are there detailed regional
2 plans which have been formulated under this national
3 umbrella --

4 A I believe there have,
5 yes.

6 Q And could we obtain an
7 example of one of those plans?

8 A If you make a written
9 request, we will try to comply with that.

10 Q Have you any experience
11 with how one of these plans works?

12 A Well, as I said, the
13 plan, the overall plan, is designed to make a predesignation
14 of who is responsible, who can make an operational type
15 decision, who can commit funds of the United States govern-
16 ment to say cover a contract for removal costs of oil, if
17 the polluter does not accept financial responsibility.

18 For instance, I am a Coast
19 Guard officer, but I could not obligate funds of the
20 United States for this purpose. Certain people who are
21 predesignated, not as individuals, but in their capacity
22 as say a captain of a port, have that authority under
23 these plans.

24 Q But you've never been
25 present when a plan -- when action is taken under a plan?

26 A No, I have not.

1 Q Can you provide any
2 more details on the National Strike Force? How many men,
3 what type --

4 A There are three teams.
5 They're located on the west coast, east coast and Gulf
6 coast. Each team, I believe, has 8 to 10 members, a couple
7 of officers and a number of enlisted men. These gentlemen
8 have been trained in pollution techniques. They're only
9 called into duty in those cases where the regional respons-
10 ibility or the regional co-ordinator feels that response,
11 the necessary response is beyond his capabilities.

12 These teams fly throughout
13 the United States on occasion for different type vessel
14 strandings, groundings. They were used, for instance, I
15 think one in Chile a couple of years ago they flew down
16 to assist in an incident down there.

17 Q Would the men be
18 assigned full time from the National Strike Force?

19 A They are, that's their
20 job.

21 Q And where do they
22 receive their training?

23 A Well, we have our
24 own Pollution Control School, which is located at the
25 Reserve Training Centre in Yorktown, Virginia. I would
26 suspect that most of their training is of a practical

1 type because they're involved with this type of thing daily.

2 Q How many people, if
3 you know, are employed at the Pollution Control School?

4 A Well, I don't know, I
5 haven't been through it. It's an 8 week course.

6 Q Do you know how long
7 the course lasts?

8 A Eight weeks, eight
9 weeks.

10 Q Sorry.

11 A I don't know how many
12 people are employed down there. It's a training centre,
13 we have various type schools going on all the time, and
14 I would think that probably some of the instructors serve
15 in dual capacities down there, for the different type
16 schools.

17 Q And you don't know what
18 sort of things are covered in it?

19 A Well, one of the things
20 that's covered is the thing that I'm doing right here,
21 a statutory definition of what our authority is, but beyond
22 that, training is given in techniques of removal of oil,
23 how to deploy these various booms, how to operate these
24 skimmers, this sort of thing.

25

26

1 Q Do you know how widely
2 used the National Response Center is?

3 A I don't know how many
4 calls that we get at that number. I think part of the
5 problem is that although we've attempted to spread the
6 word that this is the toll free number for giving notifi-
7 cation of spills, a lot of people still don't know it.

8 Quite often the first
9 notification which the Coast Guard will receive will be
10 say at a captain of the ports office or merchant marine
11 inspection office, something of that sort; and then, of
12 course, the word will be passed out up the chain. Most
13 people, I think, are aware that the United States Coast
14 Guard is the federal agency responsible for oil pollution
15 control, but I don't think that many people know about
16 the toll free number. We try to get the information
17 out to them. Most facilities, oil transfer facilities,
18 they will know that that's the number, but for small
19 discharges, I feel that a lot of people don't know about
20 it.

21 Q How does the Coast
22 Guard go about encouraging those responsible for discharges
23 to take the appropriate clean-up actions?

24 A We just simply explain
25 to them that it's in their best interest from a financial
26 standpoint if they do it themselves. The probability is

1 that if we, either ourselves in-house, or through private
2 contracts clean it up, there's a high degree of probability
3 that the costs will be greater.

4 And the statute is quite
5 clear. The polluter is strictly liable for the costs,
6 including our own in-house costs. The salaries of people
7 who are committed to the clean-up effort, the ship board
8 hours for ships that are on station; the polluter is
9 strictly liable for those costs.

10 Q Now, you mention that
11 the Coast Guard has containment and recovery systems which
12 will function effectively in five foot seas, twenty knot
13 winds and one and one-half knot currents.

14 A That's what I was told,
15 yes.

16 Q You've never seen those
17 operate?

18 A I know that in the
19 case of the "ARGO MERCHANT", which at least, during part
20 of our containment efforts, was situated in very high
21 seas, most of those systems would not work. When you have
22 heavy seas, heavy wave action, a skimmer which is designed
23 to move across the top of the water and remove the floating
24 oil, it simply won't work.

25 Those type of resources are
26 best utilized in confined waters.

1 Q Can you comment on the
2 effect of the provisions that vessels must carry certificates
3 of financial responsibility?

4 A The effect is that they're
5 all insured, up to the limits of their financial
6 responsibility.

7 Q Have you had experience
8 with the situation prior to the enactment of this
9 requirement, and can you compare?

10 A You mean what effect
11 that this--no, I really can't. That provision is part
12 of the FWPCA. I think it was part of the original 1970
13 amendments. I really can't tell you as to any personal
14 experiences what happened before that time.

15 Q Does it now mean that
16 if you can get through the problems of evidence, and
17 establish liability on the part of a polluter, that there--
18 once a judgment is made, there is no problem with collection?

19 A We can proceed directly
20 against the insurer.

21

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1 THE COMMISSIONER: Just
2 following up that other issue, is there control over who may
3 be insured ?

4 A The Federal Maritime
5 Commission is the responsible agency for determining the
6 adequacy of the evidence of financial responsibility.
7 Usually it's in the form of some type of insurance policy,
8 but they could file a bond or any type of evidence of
9 financial responsibility.

10 I am told that we've never
11 had a problem in that regard. I'm sure that they do
12 inspect the soundness of the policy, let us say.

13 Q Can you comment on the
14 relative effectiveness of fines, as opposed to denial of
15 entry or clearance as sanctions to enforce, for example,
16 the financial responsibility provisions, of any provision?

17 A Well, as far as oper-
18 ation of the ship, time is money, and if we deny clearance
19 to a ship which is bound for an American port, the financial
20 ramifications of that can be quite severe.

21 In that regard, I think
22 denial of clearance would be a much greater deterrent
23 than the fine.

24 Q Have you any idea
25 with what frequency clearance is denied?

26 A Well it depends on for

1 what purpose. For purposes of evidence of financial
2 responsibility, or for purposes of inadequacy of the tanker
3 itself?

4 Q For any purpose?

5 A No, I don't have any
6 statistics, it's been done. We have stepped up our board-
7 ing responsibilities, frequency of boardings in the recent
8 past, and there are some statistics available regarding the
9 number of regulatory deficiencies that we've discovered as
10 a result of those boardings in the recent past. Those are
11 available.

12 I don't have them but you
13 can secure them.

14 Q Right. Are you
15 familiar with the numbers of times, in say the last ten
16 years, that a discharge violation has been reported to a
17 flag state by the United States?

18 A Those statistics may
19 be available also, but I don't know how frequently they
20 have been.

21 Q It would be the Coast
22 Guard who would undertake to do that?

23 A Oh, I think the message
24 would be transmitted by the Department of State. We would
25 make a request to them.

26 Q So you have no idea

1 of what action may have been taken by various flag states
2 as a result of reports by the United States?

3 A No, I don't.

4 Q What is the procedure
5 when the United States receives a report that one of its
6 ships has been in violation of an international rule?

7 A Well, I suppose there
8 would be some type of investigation made regarding the
9 incident. I haven't been party to an investigation like
10 that. There is a penalty provision for violation of what
11 is it, the '54 convention, I believe that's the designation.

12 But there would be some type
13 of investigation, since it is a penalty, there would have
14 to be some type of hearing, there would have to be proof
15 involved, proof of the charges. We just can't arbitrarily
16 assess a penalty for something, for an allegation.

17 I don't know how often, if
18 at any time that's been done.

19 Q Is the Coast Guard as
20 anxious to investigate and hear charges against one of
21 its flag ships operating in other than U.S. waters, as it
22 is to proceed against a ship in U.S. waters?

23

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Q There's a provision, I believe, under the Intervention Act, for liability of the United States, for damages caused by any action exceeding those that were reasonably necessary to prevent oil pollution damage.

Q Has it ever been used?

There haven't been that many incidents where we have invoked the Intervention Convention and Intervention Act. We did act in the "ARGO MERCHANT" disaster according to that act.

1 Q That would be because
2 there haven't been a large number of cases of extreme
3 urgency?

4 A There haven't been a large
5 number of cases of vessel collisions or stranding beyond
6 our jurisdictional waters, which pose that type of hazard,
7 yes.

8 Q Could you outline these
9 considerations that are taken into account in deciding
10 whether and what kind of intervention to make?

11 A Well, it's a subjective
12 judgment. It depends on the circumstances, I would think,
13 and it would be pointless for me to try to articulate what
14 I think the considerations would be. You just have to
15 decide whether there is, in effect, a grave danger to
16 your own territorial interests.

17 Q Who makes the judgments?

18 A I would think--I'm not
19 sure of this. I would think the commandant of the Coast
20 Guard, in consultation with the Department of State, would
21 make that decision.

22 Q Now, at present, Coast
23 Guard officers seem to have very wide powers for pollution
24 prevention or control. Has this always been the case or
25 has there been a gradual strengthening of their powers?

26 A Well, there's been an

1 expansion. In the last ten years there's been a great
2 expansion in the statutory authority for oil pollution, but
3 our boarding authority, our general boarding authority, in
4 14 U. S. Code 89, dates back--I don't remember the exact
5 date, but it was in the 19th century when that act was
6 passed, I believe. So, it's been there quite some time.

7 Q Coast Guard personnel
8 in ships are armed, are they not?

9 A They are, yes. Well,
10 it depends on the size, but the larger cutters are.

11 Q With regard to
12 compensation for damages, has the United States adopted
13 any particularly effective legislative means of getting
14 around the numerous problems in this area?

15 A Are you talking about
16 third party damage here? A land owner, for example?

17 Q For example, yes.

18 A There is no federal
19 statutory scheme for that right now, outside of the Trans
20 Alaska Pipeline Act for that trade. As I mentioned in
21 the closing portion of my statement, there is a bill which
22 would bring together all these various liability statutes
23 and would provide strict liability for third party type
24 claims.

25 I don't know what form that
26 bill is in right now. It was introduced into the Congress,

1 I think, the last three sessions, but it appears that it's
2 going to pass in one form or another this session.
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1 As I understand it, the Coast
2 Guard, or the Department of Transportation will be respon-
3 sible for administration of the fund created for purposes
4 of that statute.

5 Q To your knowledge, does
6 that comprehensive scheme provide for limitation of liability
7 by ship owners or oil owners?

8 A There will be a limit-
9 ation provision, yes.

10 Q And is that linked
11 with fault?

12 A Well a party is strictly
13 liable under that scheme or any of these other schemes,
14 it's strictly liable up to a specified dollar figure,
15 depending on the tonnage of the vessel with limited statu-
16 tory defences.

17 Q And would they --

18 A Beyond that, there
19 will be a fund which will be created through, I think it's
20 still in the form of a tax on the receiver of the oil,
21 and that fund will be available for payouts to parties
22 who are damaged in excess of the limitation.

23 Q So ship owners who
24 are at fault, as well as those who aren't, will be able
25 to limit liability?

26 A It depends on, you

1 can break limitation under any of these acts, you
2 can break limitation.

3 For instance, in the Federal
4 Water Pollution Control Act, I think the magic word, if
5 you will, is "gross and wilful misconduct or negligence"
6 or something of that sort. Yes, you can break limitation.
7 It's a pretty heavy burden to prove, but you can do it.

8 I think as far as the ability
9 to break that limitation, the speakers who are going to
10 follow me, I know at least one of the speakers is a pract-
11 icing attorney, Admiralty attorney, and he probably can
12 elaborate on the difficulty which is caused by that pro-
13 vision.

14 Q Aside from the problems
15 of proof, have you in your role, in the Litigation Depart-
16 ment of the Coast Guard, experienced other difficulties in
17 suing and collecting -- in your case it wouldn't be
18 damages caused by pollution, but compensation for costs
19 of clean-up?

20 A That's what we would
21 be after in our type of litigation. Well, as I said
22 earlier, proof sometimes is a problem, and we try to
23 negotiate settlement of our claims for an extended period.
24 We usually put some type of date certain on when the
25 negotiations will cease, after which we refer it to the
26 Department of Justice for institution of collection actions.

1 In response to your specific
2 question as to problems, I think that's probably the biggest
3 problem, sometimes, proof is difficult.

4 Q Because of your finan-
5 cial responsibility requirements, you don't run into the
6 problem of uninsured vessel owners?

7 A No.

8 Q But you do, I would
9 think, encounter problems where a ship may have left the
10 jurisdiction, where a company owns but one ship, and seizing
11 that ship does not allow you to recover your full costs.

12 A No, that's not a pro-
13 blem because of the financial responsibility requisite.
14 As I said, there's a certificate of financial responsibility
15 which is issued by the Federal Maritime Commission to the
16 ship, and we've never had any trouble with being able to
17 serve process on a ship owner.

18 It's an in rem, at least it's
19 permissible to sue in rem against the ship. I don't know
20 whether Canadian practice allows that, but under the Federal
21 Water Pollution Control Act you can sue in rem, and seize
22 a ship, prior to any type judgment.

23 Q Is it possible for
24 you to explain the thinking behind what they call the
25 "Superfund"? Why is it that there seems to be recognition
26 of the fact that the ship owner's liability should be

1 limited?

2 A I would rather not go
3 into that. I know one of the precipitating arguments for
4 creation of this fund which would pre-empt the field and
5 bring all these divergent funds together is that it's
6 expensive for a ship owner, probably unnecessarily so, to
7 have to maintain a separate evidence of financial respon-
8 sibility for each one of these divergent funds.

9 The cost inevitably, I think,
10 would be met by the consumer by having to pay for that oil.

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1 And that's about the best
2 answer that I could give.

3 Q Is the provision of TAPA
4 which extends its protections to Canadian residents unique
5 in American law?

6 A Well, it's unique in
7 the sense that it's not provided, to my knowledge, in
8 any other statute. It may be but I'm not aware of any
9 other one. I might add there that that provision only
10 applies to tankers leaving Alaska and Valdez for an
11 American port. It does not apply to tankers leaving Valdez
12 bound for a Canadian port.

13 But again, that TAPA
14 Act will be--at least the liability portions of it will be
15 replaced, if and when this new super fund is passed.

16 Q And it's now contemplated
17 that the super fund, if it includes Canadian residents,
18 would only do so if there's some sort of reciprocal action
19 by the Canadian Government?

20 A That provision was in
21 the bill, at least in the form that I saw it last. I don't
22 know what current forum it's in.

23 MR. ANTHONY: Mr. Commissioner,
24 it may assist Ms. Rounthwaite to know that the panel that's
25 waiting to appear--at least two of the panelists have in
26 their Statement of Evidence comments on it and Mr. Le Gros

1 who will be appearing has assisted us by obtaining the
2 latest and up-to-date information he can on that particular
3 act, and is prepared to discuss it at length when he gets
4 on the stand.

5 MS. ROUNTHWAITE: Thank you.
6 I have no further questions of Lieutenant Wiese, Mr.
7 Commissioner.

8 THE COMMISSIONER: Thank you.
9 Ms. Mandell?

10 MS. MANDELL: I could begin
11 my cross-examination now. However, it may be an appropriate
12 time to break for lunch.

13 THE COMMISSIONER: I think
14 we might as well get started.

15 MS. MANDELL: Okay, sir.

16 THE COMMISSIONER: You have
17 ten minutes.

18 CROSS-EXAMINATION BY MS. MANDELL:

19 Q My first series of
20 questions are going to be limited to the territory and
21 the resources of the Coast Guard, for my own information.
22 Some of that information, I know, is contained in part
23 in your evidence, Statement of Evidence. However, I'd
24 like to review it again. I wonder if you might tell us
25 at this time the precise area of the territory which is
26 covered by Coast Guard?

1 A Do you mean a geographic
2 area?

3 Q I mean geographically,
4 bearing in mind the definitions you've already given us
5 of contiguous zone and territorial zone.

6 A Well, as a Federal law
7 enforcement agency, we have authority over any waters or
8 vessels which are subject to U. S. jurisdiction. For me
9 to try to define specifically the extent of our jurisdiction,
10 it's difficult to do because each statute has a different
11 limitation on it.

12 For instance, the Federal
13 Water Pollution Control Act applies--it includes the
14 territorial sea and it includes the contiguous zone. The
15 Intervention Act and the authority of the Coast Guard to act
16 under the Intervention Act applies beyond that.

17 Q All right. Would it
18 be fair to say then that you have absolute authority to
19 deal in a territorial zone?

20 A To enforce federal
21 laws, yes.

22 Q And that you also have
23 absolute authority to enforce federal law in the contiguous
24 zone?

25 A Those laws that apply
26 to the contiguous zone, we do.

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Q Do you have a fishing zone?

A We do.

Q And how far does that extend?

A Two hundred miles.

Q All right, and does the federal authority extend then to cover the fishing zone in some instances?

A We enforce the Fisheries Conservation Management Act, yes.

Q All right, and I take it that you also enforce on the deep sea to some extent?

A Well, jurisdiction over U. S. vessels extends to wherever those vessels may be. So, to that extent, yes.

Q All right. How many ships does the Coast Guard have at its disposal?

A Inventory? We have them divided according to different classes; high endurance cutters, medium endurance cutters, and smaller boats. A number of high endurance cutters, our largest class of ship, I would say we probably have--oh, this is just a guess on my part, fifteen to twenty, twenty-five. Something in that class. Medium endurance cutters, I'm not sure how many we have.

1 Q Could you give us your
2 best guess.

3 A I'd say probably that
4 the total of high endurance and medium endurance is in the
5 range of thirty to forty.

6 Q All right. Would you
7 estimate then that your ship inventory is approximately
8 fifty to sixty vessels?

9 A No, I think it would
10 be much higher than that. We have quite a number of smaller
11 vessels which do work in inland waterways. We have a
12 number of tugs, small boats for harbour patrol. I would
13 think that it would probably be a lot more than that.

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1 I wouldn't venture a guess on that. I could get the numbers
2 for you, but --

3 Q It would be useful if
4 you could, thank you, and with respect to personnel, and
5 by that I don't mean administrative personnel, but the per-
6 sonnel directly on the waterways, can you venture a guess
7 or be actually accurate as to the number of people you have
8 to man these waters?

9 A Out in the field?

10 Q Yes.

11 A Well I like to think
12 that the Coast Guard relied on bureaucrats such as myself
13 we're a very action-oriented type organization. Most of our
14 people are out in the field.

15 I think we have 35,000
16 officers and enlisted men, and I think the number of people
17 in Washington -- again this is a guess -- but it's in the
18 1,500 to 2,000 range with the remainder out in the various
19 districts.

20 Q And what's your budget
21 of this fiscal year?

22 A I don't know, I under-
23 stand that we got more than we asked for. I don't know.
24 I think it's in excess of -- well, I'm not going to venture
25 a guess on that. I don't know, I can get that for you.

26 Q Fine, thank you, and

1 I wonder if when getting the budget, you might also be
2 able to provide us with figures as to the relative budget
3 increases in the last five years?

4 THE COMMISSIONER: Is it
5 likely that there would be an annual report of the Coast
6 Guard, because chances are an annual report would include
7 the kind of information you're after.

8 A That information is
9 available.

10 MS. MANDELL: Yes, thank
11 you very much.

12 Q Now, with respect to
13 the Pacific Northwest, are there -- I wonder if you might
14 describe the general facilities provided to that area from
15 the Coast Guard, bearing in mind the questions I've already
16 asked of ship and personnel and resources?

17 A Well, we have five
18 Pacific Districts. The 11th District is comprised, as far
19 as the coastal states, it includes inland areas also, but
20 as far as the coastal states, it includes Southern Cali-
21 fornia.

22 The 12th District is Northern
23 California; the 13th is Oregon and Washington; the 17th
24 is Alaska.

25 Q I'm interested speci-
26 ficially in the Pacific Northwest.

1 A That's the 14th District.

2 Q All right.

3 A The District headquart-
4 ers are in Seattle.

5 Q And do you have inform-
6 ation concerning the relative facilities to that area?

7 A You mean the number of
8 stations, the number of vessels, this sort of thing?

9 Q Correct, yes.

10 A Not available, but those
11 can be procured, if you like.

12 Q Thank you very much.

13 A We have a number of
14 small facilities located in all our coastal areas, and I
15 just couldn't, in my mind, tabulate the number of facilities.

16 Q I'm wondering whether
17 or not you also have available, proposed plans for develop-
18 ment of the facilities in the Pacific Northwest? Again,
19 bearing in mind the questions of ships and manpower and
20 --

21 A You mean expansion?

22 Q That's correct.

23 A I don't have -- I'm
24 sure that some of our policy planners would have some.
25 I don't know if that's available.

26 Q If it is available,

1 could that be made available?

2 A Well, I can't make a
3 judgmental call on it. You can certainly request it.

4 Q Thank you.

5 THE COMMISSIONER: I think
6 you should speak to counsel. There are a number of items
7 of information we're going to obviously be requesting, and
8 if you'll speak to Commission Counsel, such a list can be
9 put together.

10 MS. MANDELL: Thank you.

11 Q The next -- Lieutenant
12 Wiese, I'm going to make a general statement and ask you
13 whether or not you feel that it's true, and that's simply
14 that the laws and the technology around oil tanker traffic
15 and regulations, have developed over the years in response
16 to the new knowledge acquired.

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1 A Well, I think--
2 I think probably that the technology has developed as a
3 result of the statutory requirements more than the reverse.

4 Q All right. In the
5 last ten years, and I'm again directing all of these ques-
6 tions to the general topic of oil technology and tanker
7 traffic, I wonder if you might tell us some of the signi-
8 ficant technological developments which have occurred in
9 the Coast Guard and the Coast Guard applications.

10 A Well, are you talking
11 about removal technology, this sort of thing?

12 Q I'm talking about the
13 whole vast range of machinery called technology in oil
14 development.

15 THE COMMISSIONER: You'll
16 have to be more specific than that.

17 MS. MANDELL: All right.

18 THE COMMISSIONER: You're
19 not talking about, for instance, developments in seismic
20 or exploration or --

21 MS. MANDELL:

22 Q All right, begin first
23 with removal, removal of oil spills. Have there been any
24 major technological implementations in that area?

25 A Well, as I said in
26 my statement, the Coast Guard really didn't get involved

1 in development of technology in this field until passage
2 of the Federal Water Pollution Control Act, so we haven't
3 had a whole lot of time to develop machines, if you will,
4 to assist us in removal of oil. We do have some and we're
5 expanding our inventory. I think I've described what we
6 have in our inventory earlier.

7 Q You'll agree with me
8 that technology has, with respect to radar, for example
9 and the positioning of ships, has increased over the last
10 ten years as the ships have gotten larger down the coast?

11 A Well, we've had our
12 Loran system in effect on a voluntary basis for years.
13 I don't know exactly when we started operating the stations,
14 but I know they have been there for a number of years.

15 MR. ANTHONY: Excuse me,
16 Mr. Commissioner, I don't want to interrupt, but I do want
17 to make sure I'm fair to Lieutenant Wiese and while we
18 appreciate his comments on the technical elements of whether
19 or not the radar system is better or worse, I think it's
20 somewhat unfair to pursue that line with him.

21 I think that we will be
22 getting into the technology that Ms. Mandell has been
23 referring to, and we'll be getting, we hope, technical
24 witnesses who can speak in some detail as to the technology
25 and whether it's improving.

26 I think in fairness to

1 Lieutenant Wiese, he's attempting to respond as best he
2 can, but perhaps those technical questions should best be
3 deferred to the appropriate phase.

4 MS. MANDELL: All right,
5 I'll accept that, however I just simply want to confirm
6 the statement which is found on page 27 of the report, that
7 before 1970, there was little demand for this capacity,
8 referring to the development projects to improve the state
9 of art in containment and recovery and clean-up of oil
10 spills, and this technology is therefore still in its
11 infancy.

12 A Well, I put that in
13 there because prior to that time, we had no statute which
14 made a polluter strictly liable for his removal costs.

15 The Federal Government wasn't
16 actively involved in this effort until that time.

17 THE COMMISSIONER: On the
18 other hand, you're not saying that there weren't any spills
19 before 1970?

20 A No, there were spills.

21 MS. MANDELL:

22 Q Now, the Oil Pollution
23 Act of 1924, do you know much about the contents of that
24 Act in general terms?

25 A Only that it was the
26 earliest statute that dealt with this, and no, I have

1 never dealt with this statute.

2 Q You don't know generally
3 the topics that it covers?

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1 A No, I really don't.
2 That information is also available, if you make a request,
3 but I'd be afraid to test my memory on something like that.

4 Q We've got access to that
5 material ourselves. And the next statute, major one, I
6 take it and correct me if I'm wrong, is the Federal Quality
7 Improvement Act of 1970?

8 A Yes.

9 Q And now there's the
10 proposed Oil Pollution Liability Act; is that correct?

11 A Super fund, yes.

12 Q What are the major
13 differences, and I'm speaking in general terms, between
14 a proposed legislation and the legislation currently on
15 the books?

16 A The Federal Water
17 Pollution Control Act only deals with the removal of
18 oil once spilled. The person is responsible for the
19 removal of the oil. This super fund addresses damages
20 by third parties.

21 Q All right.

22 A Third parties in the
23 sense of private persons who otherwise would have to
24 litigate in court to be compensated for their damage.

25 Q All right. And I take
26 it that the development towards the proposed legislation

1 was largely in response to the development of tanker
2 traffic and the problems which were seen?

3 A That's a judgmental
4 call. I can't state what the intentions of Congress is.

5 Q How long does it take
6 generally for a law to go from the proposed state to the
7 past state, bearing in mind U. S. process?

8 A There's no way that
9 I could answer that. As I said, this super fund--I believe
10 my memory serves me correctly when I say that it's been
11 introduced for the last three sessions of Congress, but
12 it may be more than that. It just varies, you know, I
13 can't answer that.

14 THE COMMISSIONER: Is this a
15 good time for a break, or are you almost finished?

16 MS. MANDELL: Yes, it's a
17 good time.

18 THE COMMISSIONER: Thank you.
19 Two o'clock.

20 (PROCEEDINGS ADJOURNED)
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2 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

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4 THE CHAIRMAN: Are you ready
5 to proceed?

6 MS. MANDELL: Yes, I'm ready
7 to proceed.

8
9 CROSS-EXAMINATION BY MS. MANDELL, CONTINUED:

10
11 Q Lieutenant Wiese,
12 we were this morning discussing the development of the
13 technology and laws as it regards oil tanker traffic, and
14 I'm now at the point in my questioning where I would ask
15 you to tell the Inquiry when the National Strike Force,
16 the National Response Centre were created, and in response
17 to what pressures?

18 A Well, they were
19 created by regulation. I don't know the exact date. It's
20 all part of this contingency plan, and I think the public-
21 ation date on that was back in late '74 or early '75.

22 Q Thanks.

23 A But I don't know the
24 exact date.

25 Q Now, you've heard the
26 phrase "supertankers"?

1 A Yes.

2 Q And are there any super-
3 tankers currently travelling the coasts of the United States
4 at the moment?

5 A Well that's the reason
6 that Congress passed this Deep Water Port Act, to provide a
7 port facility which could service those tankers, but there
8 have been no deep water ports built.

9 Q And are there now
10 supertankers travelling the coast?

11 A Well a supertanker,
12 it depends on a definition of what that is in size, but no,
13 I don't think there are servicing any American ports.

14 Q All right. Perhaps
15 you could define supertanker for this Inquiry, to the best
16 of your ability?

17 THE COMMISSIONER: I think
18 that's kind of arbitrary in the sense that there are
19 different definitions. Would it serve your purpose if
20 you used the distinction that is used in the State of
21 Washington between tankers under 125,000 dead weight tons,
22 and those in excess of it?

23 MS. MANDELL: Yes, thank you.

24 A I can say this. The
25 largest crude oil carriers that exist, it's my understand-
26 ing that they cannot be served in any United States ports

1 at present. This deep water ports, if any are built, would
2 give the United States the capability to service those
3 tankers.
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1 Q Now, are pilots
2 specially trained, to the best of your knowledge, to cope
3 with the technology of tankers over the 125 ton carrying?

4 A Well, as I explained
5 in my statement, the Federal Government licenses pilots
6 for purposes of the coast waters trade. Those pilots have
7 to pass tests, administered by the Coast Guard. The
8 tests are based on the waters in which they are licensed
9 to operate. As far as the foreign trade, tankers coming
10 in from foreign ports into the United States for the
11 most part that is regulated by the various states, and
12 they have their own requirements.

13 Most states require that
14 as a prerequisite to licensing, the applicant have a
15 federal pilots license, but perhaps you can direct that
16 question to the representatives of the State of
17 Washington, who's going to appear after me.

18 Q As regards the
19 jurisdiction of the Federal Coast Guard to the state
20 legislation, I wonder if you might advise whether or not
21 the Federal Coast Guard enforces state law?

22 A We do not.

23 Q And so there would be
24 a separate body of ships to enforce state laws as regards
25 supertankers?

26 A I couldn't comment on

1 facilities that are available to states. I will say this,
2 there is a provision in the Federal Code which allows for
3 assistance by Coast Guard vessels to state authorities
4 for purposes of state law enforcement. If that provision
5 is invoked, we may make a vessel available to a state
6 authority for a specified purpose, but we, ourselves,
7 would not be the law enforcement agency and we do not enforce
8 state law.

9 I know of no incident whereby
10 we have made our vessels available to state agencies for
11 purposes of enforcement of state law. We have, on occasion,
12 assisted in enforcement of fisheries laws, specifically
13 salmon, but nothing with regard to tankers, that I know
14 of.

15 Q Perhaps this question
16 is outside your area of expertise, but do you know of any
17 state authority in the northwest coastal region who could
18 in fact enforce state laws as regards to supertankers?
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1 A I think you had best
2 direct that question to the witnesses who will follow me.

3 Q All right. Now, what's
4 the largest oil spill which, to the best of your knowledge,
5 the National Response Centre has had the opportunity of
6 cleaning up?

7 A Well we had a strike
8 force on location on the "ARGO MERCHANT". That was a very
9 large spill, but as I said earlier, fortunately it didn't
10 cause a great deal of damage. We had enormous expenses
11 entailed in monitoring that spill, but I guess -- well, I
12 could venture a guess. Those statistics would be available,
13 but I just don't know. It depends on what you define as
14 being a major spill. Is it based purely on our costs, is
15 it based purely on damage to third parties?

16 It's a hard question to
17 answer. If you formulate that question and submit it,
18 we'll try to answer it, but I don't think that I can
19 answer it here.

20 Q All right, the question
21 was going to be as regards the actual quantity of oil
22 spilled, not the relative --

23 A The "ARGO MERCHANT"
24 could very well be the largest vessel based spill that
25 we've ever had. Probably it is, I'm not sure of that.

26 Q Do you have statistics

1 which would be available as to the number of spills, oil
2 spills which have occurred on your coast in the last ten
3 years?

4 A Yes, they are available.

5 Q And the causes of those
6 spills?

7 A Well, I don't know,
8 it might be broken down as to cause, there are such
9 statistics.

10 Q If those could be made
11 available, then I would formally ask for them.

12 A If the request is made,
13 we'll try to facilitate that.

14 MR. ANTHONY: Mr. Commissioner,
15 I'm sorry to interrupt again. I think that we will be
16 calling evidence at subsequent phases of the Inquiry as to
17 spills, types, responses, the ability to respond, how you
18 respond, how successful the response is and so on. That
19 information may be available, but I would prefer if it be
20 made available through witnesses that can shed some light
21 on the information.

22 We're here to discuss the
23 existing laws and how they operate, and I think that
24 information, just having it filed, doesn't necessarily
25 bring us a long way along the path, and perhaps that sort
26 of question and that sort of information could be elicited

1 when we are dealing with those problems.

2 MS. MANDELL: Very well.

3 Q Now, under the -- I
4 have one further question in that area, bearing in mind
5 what my friend has said. Would you agree with the statement
6 that we -- the United States government really doesn't know
7 what kinds of problems are going to be encountered with
8 respect to supertanker traffic?

9 A That's a judgmental type
10 question. Certainly we've done planning in this regard.
11 The entire permit program which has been set up for purposes
12 of the deep water port, and it's quite extensive, the
13 documentation of that, specifically addressed to the
14 manoeuvrability of supertankers, this sort of thing.

15 I don't know if that's
16 responsive or not.

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1 Q I'm going to refer you
2 to page 8 of your statement, and in it, you refer to the
3 Ports and Waterways Safety Act, and my reading of this
4 section, and correct me if I'm wrong, is that Title 2
5 of the Act provides a comprehensive authority to regulate
6 oil tankers specifically and that's, in fact, in the Tanker
7 Act which has been referred to.

8 A True.

9 Q And Title 1 provides
10 the authority to regulate the movement of tankers. Now,
11 is there a corresponding act to deal with the Title 1
12 area?

13 A Well, we have called
14 Title 2 the Tanker Act just for ease of expression. They
15 have been codified at different parts of the code. That's
16 the reason that they're separate. They were passed at the
17 same time. If you go into the legislative history, they
18 appear as one act, but when they went into the Code, they
19 were placed in different sections, and each title is designed
20 for a different purpose.

21 Title 2 deals specifically
22 with tankers and title 1 deals with control of the movement
23 of all vessels.

24 Q Could you provide
25 us with some more detail at this time as to the contents
26 of Title 1?

1 A Well, it's very broad
2 authority. It gives the Coast Guard the authority to regulate
3 the movement of any vessel in the navigable waters of the
4 United States. It gives us the authority to set up systems
5 like the Puget Sound V.T.S. system.

6 It gives us authority to
7 require that pilots be on board vessels in areas where
8 the state has not enacted requirements that they have
9 pilots.

10 Q All right, applying
11 American law, would the United States Coast Guard have
12 the authority to forcibly prevent the entry of a foreign
13 vessel into the fishing zone, the contiguous zone and/
14 or the territorial zone, if the Coast Guard believes that
15 the oil carrying vessel in question may possibly endanger
16 any of those zones?

17 A We can deny entry:
18 into the territorial sea. Beyond that, no, I don't think
19 we can. I think it would be violation of international
20 law.

21 THE COMMISSIONER: Except in
22 the case of intervention?

23 A Except in the case of
24 intervention, yes. But I think the question, Mr. Commissioner,
25 was just regarding control of movement, for a vessel that
26 is not in a situation that would permit intervention.

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MS. MANDELL:

Q I wonder if you might
expand on intervention, the term.

A Well, it's our act
parallels the provisions of the Intervention Convention.
That convention, I think, was discussed by other witnesses,
but I can go into it if you like. Briefly, it allows for
a coastal state to intervene beyond the contiguous zone
to protect its own national interest when the threat of
pollution is grave.

THE COMMISSIONER: Grave
and imminent danger.

A I believe those were
the words.

1 Q Now under the compen-
2 sation provisions, do the Canadian fishermen have any
3 special right to claim on funds where oil from ships would
4 damage Canadian waters?

5 A With regard to the
6 Trans-Alaskan Pipeline Act, or the Alaska trade oil, if a
7 ship is moving from Alaska and is destined to an American
8 port, and if there is an oil pollution incident which
9 causes damages to third parties who are Canadians, they
10 may make a claim against the vessel owner and the fund,
11 if their claims are high enough.

12 Q All right. Assuming a
13 situation such as this, where the oil is not coming from
14 Alaska, but perhaps is coming from Indonesia to Cherry
15 Point, and there's a spill which causes the oil to drift
16 up over the coastal -- up through the coastal waters into
17 Canadian territory, and damages Canadian fish, would the
18 Canadian fishermen have any authority or right to claim
19 on the fund in that situation?

20 A The Trans-Alaska
21 Pipeline Act would not cover that situation. Whether or
22 not a Canadian claimant would have recourse in the
23 American courts, I think he probably would. You can
24 address that question better to the practicing Admiralty
25 attornies who will be following me.
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1 Q All right. In 1971,
2 approximately, I understand that there was a spill at
3 Cherry Point which came up over the boundary again and
4 polluted our waters around White Rock. I'm wondering in
5 circumstances such as that, could the White Rock residents
6 draw on the Coast Guard facilities to clean up?

7 A There is an agreement
8 between the Canadian Coast Guard and the American Coast
9 Guard for joint participation in clean-ups, on the Great
10 Lakes and in Puget Sound. I don't know whether we assisted
11 in the clean-up in that instance, but we can, yes.

12 Q And again as regards
13 clean-up, I understand the situation is that the company
14 is responsible, and bearing in mind that they decline or
15 don't do adequate jobs, the Coast Guard will move in, is
16 that correctly stating the situation?

17 A We'll move in, do the
18 job either ourselves or by contract with private party,
19 and then we'll bill them. If they still refuse to pay,
20 then we have to decide the issue in court.

21 Q All right, now, how
22 much time in your knowledge, may elapse between the time
23 when the Canadian -- sorry, the company declines to act
24 and the government accepts the responsibility?

25 A Well I think it's
26 immediate. If they make an affirmative statement, we

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1 decline to accept financial responsibility," then the Coast
2 Guard takes immediate steps to clean up the oil.

3 Q However, I can anticipate
4 a situation where the government suddenly realizes that the
5 company isn't going to comply. Are there any facilities
6 to ensure that there's some immediacy with respect to response
7 to clean-up?

8 A Well, we have delegated
9 the authority, the commandant has delegated the authority
10 out to the field, and in the end, it's a subjective judgment
11 made by the on-scene co-ordinator at the scene of the
12 accident.

13 As I said, he has authority
14 to commit funds on behalf of the United States Government,
15 and if it's evident that these people aren't going to
16 clean up, then we'll do it.

17 Q Now the compensation
18 plans have limits. My understanding, and again correct
19 me if I'm wrong, is that the Alaskan Oil Compensation Plan
20 allows for a 100 million dollar limit, and there's a
21 second plan which has a limit of how much?

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Q I want to confirm a suspicion I have. I want to put to you a hypothetical and you ask you what the answer to it is. If the Kitimat oil port were built and Exxon, for example, buys oil in

1 Indonesia and ships it for delivery in continental U. S.
2 on a foreign-owned vessel, does the Coast Guard have any
3 control over spills concerning that vessel?

4 A You're talking about
5 an Indonesian vessel?

6 Q I'm talking about an
7 Indonesian vessel, Exxon oil, a Canadian port, foreign-
8 owned vessel, yes.

9 A I can't say that we'd
10 have any authority over that. If it's not an American
11 flag ship, and if it's not travelling between U. S. ports,
12 it's not bound for a U. S. port, no.

13 MS. MANDELL: Thank you.
14 Those are my questions.

15 THE COMMISSIONER: Thank you.
16 Mr. Thomlinson?

17 CROSS-EXAMINATION BY MR. THOMLINSON:

18 MR. THOMLINSON: Mr.
19 Commissioner, I just have a few questions, and I think
20 they can be dealt with most quickly if I refer to the pages
21 within Mr. Wiese's testimony.

22 Q On page 5, is there
23 any general reason why the United States has not ratified
24 these items that are so indicated with astericks?

25 A It's a policy matter,
26 and I don't think I'm competent to answer it. I will say

1 this, with regards to the '69 Civil Liability Convention
2 and the '71 Fund Convention, we have been strong advocates
3 for raising the limits under that convention, but I say
4 that only because I was at the IMCO Legal Committee when
5 those positions were made.

6 Q I take it from that
7 response then that you could not proceed to tell us any
8 specific reasons why individual items have not been
9 ratified.

10 A That calls for personal
11 judgment, and I'm not willing to give that, no.

12 Q Thank you. Could we
13 move to page 25. You've made reference to the recovery
14 of costs in the instances where the Coast Guard has to
15 make clean-up in the absence of the guilty party carrying
16 it out. Can you tell us anything about the statistics
17 of what percentage of spills have to be handled this way?
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1 A As far as the Coast
2 Guard doing the clean-up?

3 Q Yes, what percentage
4 of the spills does the Coast Guard have to clean up, and
5 then attempt to recover costs?

6 A Well now, I don't have
7 the statistics. I know that there are a lot of cases in
8 our office that we're dealing with, but I don't think that
9 the number in my office, which is the Litigation Division,
10 is indicative of the overall response by tanker owners.

11 I think, all in all, they
12 are a fairly responsible lot in this regard, mainly
13 because the reason I told you earlier, it's to their own
14 economic advantage to do the work themselves.

15 We don't come cheap when we
16 do the work.

17 Q Yes, from what I hear
18 of oil spill clean-up, nobody comes cheap in that regard?

19 A That's true. It's
20 very expensive work.

21 Q If I missed the answer
22 to this question, it was answered earlier, just let me
23 know, but I would like to know if you could tell us what
24 is the maximum fine and/or imprisonment for the violation
25 that you mention here with regard to reporting?

26 A I believe it's a five

1 year imprisonment, and I'm not -- I could look it up, it's
2 in the statute, I believe it's a five year imprisonment,
3 and a \$50,000.00 fine, but I'll have to look it up.

4 Q I'm not so much inter-
5 ested in precise figures, as to get an indication as to
6 whether or not it's substantial enough to really be a
7 deterrent.

8 A It's a felony offence.

9 Q That would be regarded
10 as somewhat of a --

11 A A felony usually being
12 regarded as one year or more offence.

13 Q That makes me --

14 A That's for refusal
15 to report.

16 Q Yes. That makes me
17 curious then as to who it is that is likely to be held
18 guilty or culpable, and might go to jail in this event;
19 would it be the captain of the vessel, or the officer on
20 watch at the time that an oil spill took place, or the
21 owner of the vessel?

22 A The master, I think
23 it's the master.

24 Q I see.

25 A In the case of a
26 vessel.

1 Q Yes. Could you tell us
2 a little bit about whether convictions in this regard
3 are fairly frequently obtained?

4 A I don't think there
5 have been that many prosecutions under this section. There
6 have been some, I don't have the statistics available,
7 and I don't know what type of punishment has been adminis-
8 tered --

9 Q Yes, you see --

10 A -- in those cases where
11 a conviction has been made.

12 Q Yes, I asked this
13 because in our experience, we know there are a lot of
14 spills, we can find the oil to testify to the fact that
15 there's been a spill, but very often there's nobody
16 reporting it, and --

17 A Well that happens with
18 us too, but again, generally speaking, I think most
19 vessel operators and most receiving facilities are
20 responsible in this regard. They do report, they do report
21 even the most minor spill.

22 We get reports of one gallon,
23 which goes into the water, which is a violation of the
24 Federal Water Pollution Control Act, and they are penalized
25 civilly for every incident. There is a monetary -- regard-
26 less of the amount of money that we might spend in clean-up.

1 Q Thanks. If we could
2 move to page 28 now, I'm curious about the inventory of
3 oil spill equipment. Is this, the figures that are given
4 in your testimony, are these sort of standard equipment at
5 each Coast Guard station, or is this the total for Wash-
6 ington State, or --

7 A I got these -- this
8 inventory list from our office of Marine Environment
9 Systems. I know that we are expanding the number of
10 units that we have of these various types of machines.
11 Each district does have, in its own inventory, certain
12 pollution containment equipment.

13 The larger machines,
14 although I think this is accurate, the numbers that I've
15 given you here, but as I said, we are investing money in
16 more equipment, but we -- of the equipment that we have,
17 we are able to deploy it within a short period of time
18 through air flights, and we have, on occasion, done that.

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1 Q Well, that was part of
2 my next question. It relates to the amount of containment
3 barrier that you mentioned. You give a figure of
4 612 barriers, each--

5 A Fifteen, I believe.

6 Q And there are fifteen
7 of them. So, that looks to me like something a little
8 under two miles of total barrier.

9 A Well, you've got to
10 understand, again I'm not a technician, but these types
11 of barriers, they're only effective in contained waters,
12 where the length of the barriers indicated here would be
13 effective. You can't put these things out with any degree
14 of accuracy or degree of effectiveness in the open ocean.
15 They just don't work with wave action, if the waves
16 go over the barriers,

17 Q Yes, I wasn't trying
18 to push you into that kind of technical discussion. I
19 think we can ask other people that later on. But I am
20 concerned about capability of getting that, whatever
21 equipment that is--

22 A On-scene.

23 Q On-scene, and what
24 sorts of legal decisions have to be made in order to get--

25 A No legal decisions.

26 If we're committed to the clean-up, we'll deploy it. We'll

1 spend the money, and I think it's accurate to say that
2 we're satisfied with our capability right now, although we
3 are expanding this some so that we'll have more of this
4 equipment.

5 Q I think my next question
6 probably refers mostly to the testimony on page 37. Could
7 you give me an estimate of the unit cost for oil spill
8 containment and clean-up?

9 A It varies according
10 to the circumstances. I couldn't, no. It depends on where
11 it occurs, how much it's dispersed at the time that we
12 begin our action, any number of variables. I don't think
13 there's an accurate means of making a judgment.

14 Q Well, given that, if
15 there is a long delay and there's such wide dispersion that
16 essentially there's no containment, it becomes a question
17 of clean-up rather than containment. I think that would be
18 a safe--

19 A Well, they go hand in
20 hand. If it's widely dispersed as was the "ARGO MERCHANT"
21 there's no hope of clean-up. The ocean has to take care
22 of itself.

23 Q Yes. Now, for the
24 ones which are fairly well contained, say by booms, would
25 you agree that around ten dollars a gallon would be a
26 fairly useful rule of thumb?

1 A I really couldn't
2 estimate it. It varies according to the contractor that
3 we hire. If we're using contractors, they charge different
4 prices. We don't have time in these emergency type
5 situations to solicit bids. We just take whatever is there
6 and whatever is available. We do in later instances, on
7 occasion, challenge the reasonableness of costs which are
8 billed to the United States, but I think it's safe to
9 say that no two companies are going to charge the same
10 thing.

11 Q Well, what I'm leading
12 up to and I hope somebody will be able to answer it for
13 me sometime, is if say, for example, the next time "ARCTIC
14 JUNEAU" comes through with a load of Alaskan crude into
15 various Straits, she piles up, and dumps twenty or
16 thirty million gallons; as possible recipients of part
17 of that oil, I'm curious to know as to what the costs
18 would be, if even if we can get on to the spot immediately
19 and surround it and clean it up.

20 A Well, you're certainly
21 welcome to submit that hypothetical to our technicians.
22 I don't know whether they'll be able to give you even a
23 ballpark figure on it.

24 Q Yes, okay. I have
25 one more question referring to page 42. Would you say that
26 Washington State law is more stringent with respect to oil

1 pollution than is U. S. Federal law?

2 A I'm not going to venture
3 a guess on that one.

4 Q I thought you had implied
5 in here that there was a difference in the laws.

6 A There are differences.
7 I called your attention to the fact, at the beginning of
8 my statement, that there are certain matters under litigation
9 or in litigation right now. One of those cases involves
10 the issues which you are putting to me right now, and I'm
11 not going to comment on it.

12 Q Which of the two laws
13 then is in effect at the moment. If the "ARCTIC JUNEAU"
14 does pile up the next time she comes in, are we going
15 to be faced with a legal dispute as to which law is to
16 be enforced or do we rest assured?

17 A As far as response
18 to pollution incidents, I don't think there's any question
19 that the Coast Guard is going to go ahead and act.
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1 MR. THOMLINSON: Thank you.

2 Those are all the questions I have, Mr. Commissioner.

3 THE COMMISSIONER: Thank you,
4 Mr. Thomlinson.

5 Mr. Anderson?

6

7 CROSS-EXAMINATION BY MR. ANDERSON:

8

9 Q Lieutenant, are you
10 aware of any United States domestic legislation which
11 would in any way limit the Coast Guard or the administration
12 in arranging bilateral agreements with countries such as
13 Canada, with whom you share joint waters, such as the
14 Strait of Juan de Fuca?

15 A Limit us? We don't
16 do the negotiations, it depends on the level, but generally
17 the State Department is responsible for all international
18 negotiations. With regard to bilaterals with Canada, of a
19 technical nature such as these oil pollution matters, the
20 Coast Guard is usually a party to the negotiations, but
21 --

22 Q So there's no --

23 A -- I don't think there
24 are any limitations, no.

25 Q There would be no legal
26 impediment then to, that you can envisage in the future, to

1 a successful mandatory vessel and traffic management scheme?

2 A We hope that agreement
3 can be reached on that in the near future.

4 Q Thank you. You referred
5 to deep water port. I assume this means a port outside the
6 three mile limit?

7 A Outside the 12 mile
8 limit.

9 Q Twelve mile, thank you
10 very much.

11 A The ones that are being
12 considered now, yes, and the Deep Water Port Act specific-
13 ally addresses that type port, yes.

14 Q Outside 12 miles?

15 A That's because of the
16 depth of the Gulf of Mexico, where the oil companies are
17 interested in locating these ports.

18 Q I understand from the
19 testimony you gave that any foreign vessel in the 12 to
20 200 mile area off your coast, would not be under your
21 jurisdiction, because in that area you cover only fisheries
22 matters? This is any vessel which you might wish to board
23 for some pollution control reason?

24 A With the exception
25 of things like the Intervention Act, and matters like
26 the Deep Water Port Act which we have -- we require that

1 if there is any of these built, and again, there have been
2 no permits issued yet, but if a deep water port is built,
3 a vessel calling on that port will subject itself to U.S.
4 jurisdiction, in a zone surrounding the port.

5 Q A 12 miles ring around
6 the port?

7 A Yes.

8 Q In the case of a ship
9 which last winter got into severe difficulties some 100
10 miles from Hawaii, the ship eventually went down and I
11 believe most of the crew was rescued, had that ship been
12 closer to Hawaii, say 15 to 25 miles offshore, now even
13 though the Coast Guard considered it to be a pollution
14 hazard, environmental hazard to the coastline of Hawaii,
15 the beaches of Hawaii, legally you would not have been
16 able to order that ship, order the captain of that ship
17 to follow your directions, is that the case?

18 A Not unless the vessel
19 is in distress and causes, or it appears to be in a situat-
20 ion that's jeopardizing our national interest, we can.
21 Just passing --

22 Q Purity of the beaches
23 of Hawaii are not considered the national interest, I
24 guess, under those circumstances?

25 A Certainly it is, but
26 if the vessel is not in a condition which appears that it's

1 going to cause some type of pollution, we can't.

2 Q Would it be --

3 A There is still a basic
4 principle of freedom of the high seas that exists.

5 Q Yes, which as we see
6 it, is where there is some difference between American and
7 Canadian practices and attitudes.

8 Are you aware of any legis-
9 lation in the United States, in draft form before Congress,
10 which would indeed extend the pollution control zone of the
11 United States, out from 12 miles to 200?

12 A I really can't comment
13 on that. I am aware of some proposals that have been made
14 by Congressmen to extend our regulatory authority out to 200
15 miles, but beyond that, I don't know what form --

16 Q Beyond that, Lieutenant,
17 I won't question you then.

18 Could I ask you what happens
19 if a ship entering American waters, say bordered by a pilot,
20 is discovered by the pilot to be defective, for example a
21 rudder position indicator not visible to the helmsman, the
22 ship navigational equipment being inadequate or something
23 of that nature, what would happen under those circumstances?

24 A Well state pilots who
25 would be navigating that type vessel coming in, a foreign
26 vessel, are not federal law enforcement officials,

1 therefore they in themselves, they can't tell that ship to
2 do anything, but I would think that a responsible pilot,
3 if he noted these glaring deficiencies, it would be in his
4 own best interests not to navigate that vessel if the likeli-
5 hood is that it's going to be involved in some type of
6 casualty, I wouldn't think he would take it in.

A There are statistics available on our boarding program in the recent past, which indicates the number of boardings and the number of deficiencies that we have found as a result of those boardings, which we have required to be corrected. You can

1 write for those. I don't have them.

2 Q Sure. Could I ask
3 you then if the ship is discovered to be defective by the
4 boarding team, what happens to it? Is it prevented from
5 leaving United States waters until all those defects
6 are remedied?

7 A It can be. It can
8 be prevented from entering those waters.

9 Q So, there's no question
10 of it simply being turned around and sent out again. It
11 comes in and stays there until it's corrected, until the
12 deficiencies are corrected.

13 A We can do either.
14 We can wave it off or we can allow it to come in and have
15 the deficiencies corrected when it comes into port.

16 Q In your testimony,
17 there was some reference to the words "glaring deficiencies".
18 When a ship, for example, comes in, it's pulled in for
19 some defect or other, do you then carry out a fairly
20 thorough inspection, if it's got one thing wrong with it,
21 or do you simply then accept the certificate for all the
22 other things on board, the international certificate or
23 the flag certificate?

24 A If the vessel has a
25 SOLAS certificate, generally we honour that. We might
26 make an inspection to see if in fact that SOLAS certificate

1 is accurate, but generally we do recognize them. As far
2 as manning is concerned, I think I covered that in my
3 presentation. It's a difficult thing to enforce. I know
4 with regard to the "ARGO MERCHANT", which occurred again outside
5 the contiguous zone, it was headed for a U. S. port. I
6 think as far as compliance with the Officers Competency
7 Convention, it did comply with that convention, but in the
8 studies that have been conducted subsequent to that
9 disaster, things have been learned about the operation of
10 that vessel, such as a language barrier between some of
11 the officers and some of the crew members.

12 I think in that instance
13 we could act to prevent the vessel from coming in, if we
14 had knowledge of it. But generally we do recognize
15 international certificates, if a vessel has one.

16 Q Now, I was thinking,
17 sir, of a case on the west coast where a foreign flag
18 vessel came in and proceeded for some miles past the
19 pilot station without picking up a pilot, proceeded
20 through the traffic separation zone in a manner which was
21 considered hazardous.

22 On that ship, the knowledge
23 of the English language was apparently lacking. The
24 officer simply didn't speak English and the manning of the
25 ship, at least from newspaper reports, was/considered quite inadequate.
26 I believe the ship was "The White Peony". Now, in a case

1 like that, would you lock the ship up until such time as
2 a new crew was flown in or new officers were flown in?

3 A Well, we could do that,
4 if that ship were coming into a mandatory type V.T.S.
5 system such as Puget Sound. The fact that the officers
6 couldn't communicate in English to the traffic control
7 of
8 coordinator is a violation/regulation, and we could assess
9 civil penalties for that.

10 Q Which would include
11 arresting the ship until such time as the crew--the manning
12 levels met your standards?

13 A Yes, we could do that.

14 THE COMMISSIONER: Is there
15 a policy in this respect; if a vessel entered the system
16 without acknowledging it, because of communication difficulty
17 and simply proceeding without a pilot, would a Coast
18 Guard vessel be dispatched to interrupt, to arrest that
19 ship as it were?

20 A Well, as I said, the
21 pilotage of foreign flag vessels bound for U. S. ports,
22 for the most part is a matter for state regulation. If
23 a vessel were proceeding into a port which required some
24 type of state pilot, it would be up to the state officials
25 to take whatever action is necessary to enforce that.
26

1 THE COMMISSIONER:

2 Q But the hypothetical
3 I'm putting is that in effect, the regulations of the
4 mandatory VTS system are being violated?

5 In other words, is it a
6 matter of policy to consider it so serious to enter a
7 regulated traffic system without paying attention to the
8 system? Is it considered so serious that the vessel
9 would be interrupted?

10 A Yes, I think it is,
11 I think it is. I don't know what action we would take
12 necessarily, but it's certainly serious.

13 THE COMMISSIONER: There's
14 no policy that in effect says that in that situation, the
15 ship should be arrested?

16 A No, there's no policy,
17 I think that says in all instances the ship will be
18 arrested.

19 THE COMMISSIONER: Is, in
20 effect, that kind of decision making left to the discretion
21 of the field officer in the regions?

22 A Field officers have
23 discretion in all law enforcement. We try to decentralize
24 decision making as much as possible.

25 MR. ANDERSON:

26 Q I understand that in the

1 1960's, when there was a series of fires on passenger
2 ships, the United States government decided to not recog-
3 nize foreign certificates dealing with fire regulations,
4 simply because they felt that their own standards were
5 superior and should prevail.

6 They prevented such ships
7 from picking up passengers at American ports, I understand,
8 and the net result was that all the ships in the passenger
9 business who wished to have any dealings with the United
10 States, naturally met American standards.

11 Now, whether -- this is my
12 understanding. I wonder if there have been any other
13 cases of specific attempts to force other nations to meet
14 American standards in some other class of ships, tankers
15 or bulk carriers, hazardous products carriers, or anything
16 of that nature?

17 A Well I think as I said,
18 we try to allow our regulations to parallel international
19 agreements as much as possible. Some of the proposed
20 regulations, which I mentioned earlier, such as double
21 bottoms, exceed the requirements of international agree-
22 ment .

23 Now, whether those proposed
24 regulations ever become effective, or whether agreement is
25 made on the international level regarding some of those
26 proposals, I won't venture a guess.

1 Q It's not, sir, inter-
2 national agreements that I'm particularly concerned about
3 so much as a realization that in certain areas, international
4 agreements and the practices of some flag nations are inade-
5 quate from the American point of view, and therefore, to
6 deal with an American port in the passenger ship case, the
7 U.S. government insisted upon compliance with the United
8 States regulations.

9 A A coastal state is
10 always free to act in its own best interests consistent
11 with its own agreements.

12 Q In no way am I critical
13 of it, I just wondered if you knew of any other class of
14 ships where a similar action had been taken?

15 A That's a question which
16 I would rather not answer.

17 Q Thank you. Could you
18 explain the term "under register", which occurs at page 15.
19 Is this --

20 A Documented under U.S. law,
21 if it's registered for the foreign trade, it can proceed
22 from a U.S. port to a foreign port. If it's enrolled and
23 licensed, it can participate in the coastwise trade,
24 which would be trade between American ports.

25 Q Thank you. You
26 talked about Loran C, and the fact that this may become

1 compulsory. Were there any areas where Loran A or any
2 other navigational aid of that nature, was compulsory?

3 A It has not been compul-
4 sory in the past.

5 Q It has not been, so this
6 is new in other words, it's not --

7 A It's new in the sense
8 that there has been a proposal to make it mandatory. The
9 Loran system has been in existence for quite some time, and
10 I believe most ships engaged in trade with United States
11 are equipped with that capability, at least I'm led to
12 believe that they are.

13 Q Prior to the establish-
14 ment of the Vessel Traffic Management System in Puget
15 Sound, the Coast Guard must have done studies indicating
16 the risk, or the potential problems, the need for such a
17 system obviously. Were these related specifically to
18 tanker traffic, or were they simply general studies
19 governing the amount of traffic coming in in the normal
20 course of events?

21 A Well, studies were
22 done, and studies were done for Puget Sound, and I'm sure
23 that tanker traffic was addressed, particularly in anti-
24 cipation of completion of the Trans-Alaska Pipeline Act.

25 If you request those,
26 I'm sure they would be available. I am not going to try

1 to summarize those.

2 Q Yes, but I wondered
3 whether from your knowledge, you knew that this was
4 specifically related to tanker traffic?

5 A I'm sure it is, yes.
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22 Q So, my understanding
23 that a traffic lane system offshore, which I believe to
24 be permissible under American law--the Canadian law, but
25 not possible to make mandatory under American. That
26 understanding is probably correct then, from the American

1 legal point of view?

2 A I believe that's
3 a correct statement.

4 Q You mentioned that
5 there's been no real problem getting certificates of
6 financial liability for ships, American ships or ships
7 entering American ports. Do you require them to deal
8 with certain specific insurance companies? In other words,
9 how do you avoid the problem of an American ship--or a
10 foreign flag ship acquiring a certificate of financial
11 liability or an insurance document from an insurance company
12 registered in Monaco, Panama, Liberia, whatever?

13 What method is there of really
14 making sure these certificates issued in other countries
15 or by insurance companies beyond the reach of American law
16 are actually good?

17 A Well, I don't think
18 the country of incorporation is necessarily indicative
19 of the responsibility of the company to begin with; but
20 beyond that, the Federal Maritime Commission issues the
21 regulations and administers the program for issuance of
22 certificates of financial responsibility. The Coast
23 Guard is not involved in that. Our only involvement is
24 to ensure that these ships have the certificates on
25 board.

26 I'm sure that the Maritime

1 Commission, before issuing a certificate, is convinced that
2 the policy is valid.

3 Q But you're not aware
4 of how they come to that determination then?

5 A No, I'm not.

6 MR. ANDERSON: Thank you.

7 THE COMMISSIONER: Thank you,
8 Mr. Anderson.

9 MR. ANTHONY: Mr. Commissioner,
10 I'm advised that a representative of the West Coast
11 Environmental Law Association wishes to ask some questions.
12 If you can give me a moment, perhaps I can see if they're
13 still here and intending to ask questions.

14 MR. MCDADE: I have a couple
15 of questions, sir.

16 CROSS-EXAMINATION BY MR. MCDADE:

17 Q You discussed the
18 National Strike for us at some length, but I don't believe
19 you've told us on what basis you make it available to other
20 nations.

21 A Well, I'm not sure
22 that there is any written prescription for that. Requests
23 would be coordinated through the State Department and
24 I don't think you'll find anything in writing which says
25 we will provide these services to other countries, but
26 it has been done on occasion.

1 Q It's a formal request
2 from one state to your state?

3 A I believe that's
4 probably the way it's handled, yes.

5 Q What about cost? Is
6 there any cost to the nation that requests the Strike
7 Force?

8 A I'm not certain if any
9 type of payment has been made for those services or whether
10 we just provide them on request. Certainly we wouldn't
11 provide it in those instances where there would be need
12 for the Strike Force for reasons here in the United States.

13 Q Well, if it was perhaps
14 an American ship in Canadian waters, we could be reasonably
15 certain that it would be supplied?

16 A I'm not a policy
17 decision-maker in this regard, but personally I feel
18 confident that we could make it available.

19 Q Thank you. Another
20 matter which you discussed earlier was the security zones
21 in ports which the Port Captain has the power to direct
22 ships and limit their access to. What is the function of
23 those security zones? What is the purpose of them?

24

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1 A Mostly national defence.
2 We can set up security zones, say in areas which harbour
3 navy installations. We also could set up security zones
4 in areas which have a high risk of explosion, for example,
5 but I'm not sure that that's been done. I think the major
6 function for that security zone program has been, thus far,
7 for national defence.

8 Q So it could be a
9 pollution measure, but it hasn't been up until now?

10 A Well, I'm not sure
11 that that's a totally accurate statement, but we do have
12 some security zones which have been set up in particular
13 port areas. I think there's some down in the Norfolk
14 area, Norfolk, Virginia. I don't know whether there are
15 any in the Puget Sound area.

16 That's about as responsive
17 as I can be.

18 Q Thank you. When we
19 were talking about the TOVALOP agreement earlier, you
20 mentioned the case of the "ARGO MERCHANT" and you said
21 that that was under negotiation right now.

22 A True.

23 Q I'm wondering if what
24 you're negotiating is a settlement for the entire amount
25 of clean-up, or if you're haggling over figures and will
26 come to some middle ground?

26 Q So this is an agreement

1 by tanker owners and it's voluntary on their part?

2 A It is.

3 Q Are you aware of any
4 other situation besides the "ARGO MERCHANT" where some
5 money has been paid out of the TOVALOP fund?

6 A Personally I'm not
7 aware of any other ones, no, but there have been payouts.
8 I don't know the magnitude of them.

9 Q Thank you. I would
10 like to go now to the TAP Act, the Alaskan Act. Under
11 that Act, negligence by the United States government or
12 its agencies is a defence to a claim. Would that apply
13 to a claim by Canadian parties?

14 A Well, in what regard?

15 Q Well, Canadians are
16 allowed to claim under that --

17 A That's true.

18 Q -- fund, is that
19 correct, for damage to Canadian property?

20 A In the case where a
21 tanker owner alleges that he grounded as a result, say,
22 of an off-station buoy, it is a defence, in which case
23 demand could be made against the third party, which would
24 be the United States.

25 You have got to realize
26 that when you're talking about that fund, that 86 million

1 dollar fund, that's not government money. That's public,
2 it's a public corporation, the money is raised by a tax
3 at the delivery point in Valdez, and you know, maybe I'm
4 not being responsive --

5 Q No, I think you
6 responded. One further question on that matter; if a
7 claim is made against that fund -- you say it's a public
8 corporation -- are we in the same position that we're in
9 with TOVALOP, wherein they have to negotiate, or is that
10 enforceable in the courts?

11 A Well TOVALOP doesn't
12 apply when the pay-out is under some other type of statu-
13 tory scheme.

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1 Q I'm just using that as
2 an example. If we claim against the TAP Fund, is it
3 enforceable in the court, or are we forced to negotiate
4 with that corporation?

5 A Well, the corporation
6 can sue or be sued in court. Again, when you're talking
7 about the eighty-six million dollar fund, you're talking
8 about the second layer. The first fourteen million dollar
9 layer is strict liability on the part of the tanker owner.

10 If a party is not successful
11 in getting payment out of the first layer, then the
12 fund picks up the slack, if you will. If there are legitimate
13 claims, proveable claims, the fund will pay. I don't
14 think there's any problems there.

15 Q It's U. S. courts we'd
16 have to go through, is it?

17 A Well, no, it's an
18 administrative type procedure, through the one hundred million
19 dollar liability.

20 Q Yes. The Super Fund
21 Bill that's proposed; will Canadians be able to claim under
22 that act?

23 MR. ANTHONY: Excuse me,
24 Mr. Commissioner, I think we've been to this point earlier
25 and I think indicated that the latest information we have
26 on that bill, as least as it was reported out of the last

1 committee, will presented to Mr. Le Gros on the subsequent
2 panel, and I think that perhaps that's where the questions
3 with respect to this legislation should be addressed.

4 MR. MCDADE: Fine.

5 A I do know that in one
6 form it did provide for compensation by Canadian claimants,
7 based on a reciprocity type clause. If the same avenues
8 were afforded to American claimants, then the provisions
9 applied, but again that was in one form and I don't know
10 what form it's in now.

11 Q Well, we'll leave that
12 for later witness. I apologize, I wasn't here during all
13 your testimony, but I didn't hear anything when I was
14 here about the Jones Act. Did you discuss the Jones Act?

15 A I don't know if I
16 discussed it by name, the Jones Act, but the provisions
17 that we deal with, I did discuss. I can go through it
18 again. It's in my testimony.

19 Q Could you tell me in
20 one sentence what that Act is all about?

21 A Well--

22 THE COMMISSIONER: Could you
23 indicate what particular part you mean?

24 MR. MCDADE: That might help.

25 A Let me find it for
26 you. It's only--it's in the provision on manning. I guess,

1 to summarize it, only American built ships can participate
2 in the coast-wise trade. In order to be documented, a
3 ship has to be American owned, documented either for the
4 coast-wise trade or registered for the foreign trade.

5 As far as the coast-wise
6 trade and the foreign trade for that matter is concerned,
7 the citizenship requirements are seventy-five per cent
8 of the crew and one hundred per cent of the officers must
9 be American citizens for an American flag vessel.

10 Q So, it covers manning
11 and it covers U. S. constructed ships?

12 A Yes, it does.

13 MR. MCDADE: Fine. That's
14 all my questions.

15 A By the way, those
16 paragraphs, I think, are on page 16 and 17, that general
17 area.

18 THE COMMISSIONER: Have you
19 any reexamination, Mr. Anthony?

20 MR. ANTHONY: No questions
21 by way of redirect, Mr. Commissioner.

22 THE COMMISSIONER: I just
23 have a couple of questions and then we can excuse you.
24 Are there any United States laws that you know of that
25 impose restrictions related to tanker traffic through the
26 medium of cargo owners, owners of the oil in shipment?

1 A Well, the owners of the
2 oil are financing this TAP Fund.

3 THE COMMISSIONER: But I was
4 thinking not so much in liability, but are there any
5 restrictions, for example, that say that shippers of crude
6 in the United States must only enter into charter party
7 with certain types of tankers or certain types of crewing?

8 A No, I know of none.

9 THE COMMISSIONER: You know
10 of none.

11 A No, I know of none.
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1 THE COMMISSIONER: Has the
2 Coast Guard considered, in some official way that you can
3 mention, any process of blacklisting tankers or --

4 A Well, there's been
5 discussion about publication of the names of tankers which
6 are repeat violators, but you know, I don't think there's
7 any policy decision on that.

8 THE COMMISSIONER: Is there
9 any policy that would --

10 A Let me interrupt, Mr.
11 Chairman. Blacklisting, it depends on what you mean by
12 that.

13 THE COMMISSIONER: Well maybe
14 my next question would --

15 A Okay.

16 THE COMMISSIONER: Is there
17 any policy, or if not a policy is it a practice, for Coast
18 Guard, at the operational level, to in effect keep lists
19 of vessels that concern them, and is this then likely to
20 result in more stringent boarding and examination?

21 A We do and certainly
22 it does, and if a vessel is guilty of past violations, the
23 probability that we'll board is higher.

24 THE COMMISSIONER: Thank
25 you.

26 Has the Coast Guard any

1 responsibility for hydrographic surveying?

2 A No.

3 THE COMMISSIONER: Thank you
4 very much, and I would like, before you stand down, to
5 express the appreciation of the Inquiry for your coming to
6 give evidence. It's a courtesy that you're extending to
7 us, and we do appreciate it.

8 Thank you very much for
9 your time.

10 LIEUTENANT WIESE: My
11 pleasure.

12 THE CHAIRMAN: We'll take a
13 15 minute break.

14
15 (PROCEEDINGS ADJOURNED)

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2 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)
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4 CHARLES LEAN, Sworn:
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6 HENRY DROEGE, Sworn:
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8 MARC HERSHMAN, Sworn:
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10 CHARLES ROE, Sworn:
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12 THEODORE LEGROS, Sworn:
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14 THE COMMISSIONER: You may proceed
15 when you're ready.

16 MR. ANTHONY: Mr. Commissioner,
17 I have the pleasure now to present to you the balance of
18 the evidence called by Commission Counsel with respect to
19 American legislation in Phase I.

20 The gentlemen before you, start-
21 ing at the end closest to me are Mr. Charles Roe; next
22 to him is Mr. Charles Lean; next Mr. Henry Droege; Mr.
23 Marc Hershman and Mr. Ted LeGros.

24 Perhaps if I can take them in
25 that order and introduce the panel to yourself, Mr.
26 Commissioner.

1 DIRECT EXAMINATION BY MR. ANTHONY:

2

3

Q Mr. Roe, could you

4

tell me whether the statement of evidence as filed with

5

the Inquiry under your name and circulated to the major

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participants is your statement before this Inquiry, subject

7

to any variation you may wish to make in your presentation

8

today?

9

MR. ROE:

10

A It's a correct statement.

11

Q And does the biograph-

12

ical notes circulated with your statement of evidence

13

actively describe your education and experience relevant

14

to issues you are addressing before this Inquiry?

15

A Yes.

16

MR. ANTHONY: Mr. Commissioner,

17

Mr. Roe is the Senior Assistant Attorney-General of the

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State of Washington, and the Chief Counsel for the

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Washington State Department of Ecology.

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He has a Bachelor Degree from

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the University of Puget Sound, and a Doctor of Law Degree

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from the University of Washington. He's been with the

23

Washington State Attorney-General's office since 1960,

24

specializing in natural resources and environmental

25

protection law.

26

Q Mr. Lean, could you

1 tell me whether the biographical notes circulated with the
2 Statement of Evidence presented by Mr. Roe, actively
3 describes your education and experience?

4 MR. LEAN:

5 A Yes, it does.

6 MR. ANTHONY: Mr. Commissioner,
7 Mr. Lean is an Assistant Attorney-General for the State
8 of Washington, assigned to the Washington State Department
9 of Ecology. He has a Bachelor of Arts Degree and a Doctor
10 of Laws Degree from the University of Washington.

11 During 1974-75, the office
12 assigned the responsibility for preparing guidelines for
13 the State Environmental Policy Act his primary responsi-
14 bility with the Attorney-General's Department, up to the
15 present time have been in the fields of water rights,
16 water pollution and environmental policy legislation.

17 Q Mr. Droege, does the
18 biographical note circulated with Mr. Roe's Statement
19 of Evidence actively describe your education and experience?

20 MR. DROEGE:

21 A Yes, it does.

22 MR. ANTHONY: Sir, Mr. Droege
23 has a Bachelor's Degree in Chemical Engineering from the
24 University of California at Berkeley. He has been with
25 the State Air Pollution Control Program since 1968.

26 At the present time, he is the

1 supervisor of the Air Resources Division of the Department
2 of Ecology at the State of Washington.

3 Q Professor Hershman,
4 does the biographical material circulated with your State-
5 ment of Evidence accurately describe your education and
6 experience?

7 PROF. HERSHMAN:

8 A Yes, it does.
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Roe, Lean, Droege,
Hershman, LeGros
In Chief

• 1228

1 A Yes, it does.

2 MR. ANTHONY:

3 Q Mr. Commissioner,

4 Professor Hershman is a professor at the University of
5 Washington. He is a graduate of Temple University and
6 Temple University Law School where he obtained his
7 Doctor of Law Degree in 1967. He is presently Associate
8 Professor of Marine Studies and Associate Professor
9 of Law at the University of Washington dealing with
10 questions of coastal zone management, and has from 1970 been
11 involved in teaching at the Louisiana State University in
12 the area of coastal marine law and other related fields.
13 That's prior to his appointment at the University of
14 Washington.

15 Along with the biographical
16 note is an extensive and quite impressive list of
17 publications and research by Professor Hershman dealing
18 with questions of coastal zone management and related
19 subjects.

20 Mr. Le Gros, does the
21 biographical note circulated with your Statement of
22 Evidence accurately describe your education and experience?

23 MR. LE GROS:

24 A It does.

25 MR. ANTHONY: Mr. Commissioner,
26 Mr. Le Gros graduated from Washington State University in

1 1942 and graduated from the University of Michigan in law
2 in 1945. He was admitted to the Bar in 1946. He's an
3 associate editor of the American Maritime Cases since
4 1967 and is presently a senior partner in the Seattle
5 law firm, practicing in the area of maritime law.

6 He's also a lecturer at the
7 University of Washington School of Law and the University
8 of Washington, Department of National Resources.

9 Mr. Commissioner, all the
10 panelists have been sworn, and I would ask that they be
11 allowed to read their evidence in chief first, subject
12 to cross-examination following presentation of all three
13 papers. Perhaps we could start with Professor Hershman,
14 if you wouldn't mind making your presentation to the
15 Commission.

16 MR. HERSHMAN:

17 A I would like to, since
18 my presentation is somewhat lengthy, there are a couple
19 of places where I believe I could summarize or just mention
20 the first line of a paragraph and that would be sufficient.
21 I would like to do this with respect to the introduction
22 and then perhaps merely summarize the last Section 11,
23 which begins on page 20.

24 Then I would also like to
25 insert comments at various places. I'll read through the
26 statement once I get past the introduction, and then when

1 I have an insert to make, I'll indicate that so that you'll
2 understand that I'm no longer following the text, if that's
3 an agreeable procedure.

4 Figure 1 depicts the most
5 important aspect of the legal framework for governmental
6 approval to develop a major energy related facility in the
7 coastal area of the State of Washington. You might note
8 on figure 1 that the paragraphs that follow in the testimony
9 are identified on the figures so that you can use the
10 figures as a way to understand where I'm speaking.

11 No attempt has been made
12 to include all the laws and agencies charged with some type
13 of responsibility over energy facility questions. This
14 would be an enormous task and I've limited myself to those
15 that I feel are most important.

16 Second, on page 2 near the
17 bottom. Second, siting issues are usually handled on a
18 case by case basis with little prior planning by government
19 agencies to identify allowable sites in advance. This is
20 a characteristic in the United States that most decisions
21 are made by a site by site basis. Planning is rather at
22 a low level.

23 On page 3, third; the agencies
24 involved in the legal framework either issue their own
25 permits, licenses or approvals, ^{or} review and comment on
26 permit applications or analysis of other agencies. The

1 point that that paragraph makes is simply that there are
2 only a couple of formal permits required, but many agencies
3 comment on these and each has some effective power in
4 determining whether the permit is issued.

5 Fourth, there is often an
6 informal, interagency consultation or coordination function
7 in operation which cannot be identified in reference to
8 laws or administrative regulations. This is a caveat,
9 that although we understand the structure as we see it on
10 the books, often the agencies work out special arrangements
11 and this is the way in which a decision is made.

1 Fifth, on major siting issues,
2 such as an oil port in or out of Puget Sound, the influence
3 of key politicians, as they are swayed by public opinion
4 and matters of personal conviction, is key. And the point
5 of this paragraph is to mention that we're in a very much
6 changing situation in Washington State, where each political
7 actor having a particular view is changing the law as best
8 they can to bring about the desired result that they would
9 like to see.

10 This makes it very difficult,
11 therefore, to make a static statement of what the law is
12 because it's in a constant state of change, and I'll men-
13 tion a number of those situations as we go along.

14 Now, beginning with industry
15 initiative, I'll read the statement at this point.

16 Industry initiative must be
17 taken to identify a site and gain government approval.
18 There is no government planning agency which makes advance
19 determinations of energy facility sites.

20 Only a few efforts in the
21 United States suggest the beginnings of government planning
22 for energy facility sites. Local government planning,
23 state level energy planning by coastal management, energy
24 offices and state planning offices, and some general sur-
25 veys at the federal level by the Federal Power Commission,
26 Federal Energy Administration and the Corps of Engineers

1 have been conducted. These activities include surveys of
2 existing facilities, general demand projections and general
3 policies. They do not address particular sites for
4 particular facilities.

5 Proposals to enhance energy
6 facility planning through a national facility, energy
7 facility siting bill or a national land use bill, have
8 not passed the U.S. Congress, and probably will not in
9 the near future.

10 Some States have taken the
11 initiative to plan for energy siting. Maryland, for
12 example, can acquire and hold land for future energy
13 facility development.

14 Washington State does not
15 have a program to determine sites for future energy
16 facilities, but I'd like to insert at this point, that
17 under the Energy Facility Siting Act, which I'll mention
18 later, there is a provision for potential site evaluations,
19 and these potential sites can be requested by an applicant,
20 and a special evaluation procedure can be made.

21 Continuing on page 5.

22 The State Energy Office does studies into general energy
23 problems and policies for the state, and the State Depart-
24 ment of Ecology, through the State's Coastal Management
25 Program, will be initiating additional energy facility
26 studies.

1 The second major point relates
2 to local government. Local shoreline master programs, and
3 the issuance of substantial development permits are the key
4 planning and control mechanisms available to local govern-
5 ment to control shoreline uses, but the State's Energy
6 Facility Siting Act pre-empts the issuance of substantial
7 development permits by local governments when major energy
8 facilities defined below are certified by the Energy
9 Facilities Site Evaluation Council, or EFSEC, and EFSEC
10 we'll be discussing more in a minute.

11 The State Shoreline Manage-
12 ment Act was enacted in 1971. Local governments are pri-
13 marily responsible for planning and regulating uses of the
14 state shorelines, guided by policies in the Act and State
15 guidelines.

16 Jurisdiction extends 200 feet
17 inland from the mean high tide line, and includes submerged
18 lands and associated wetlands.

19 Two main tasks are mandated
20 in the Shorelines Management Act, shoreline regulations
21 through a permit system, and shoreline planning through
22 the formulation of local shoreline master programs.
23 Every local government is responsible for developing
24 a master program to guide proposed activities along its
25 shorelines.

26 Regulation of shoreline

1 development is accomplished through a permit system
2 administered by local government, with a review at the
3 state level by the Department of Ecology and the Attorney-
4 General.

5 Appeals can be taken to a
6 shorelines hearing board.

7
8 (STATEMENT OF EVIDENCE OF MR. ROE, MARKED
9 AS EXHIBIT NUMBER 41)

10
11 (STATEMENT OF EVIDENCE OF PROF. HERSHMAN,
12 MARKED AS EXHIBIT NUMBER 42)

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14 (STATEMENT OF EVIDENCE OF MR. LEGROS,
15 MARKED AS EXHIBIT NUMBER 43)

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1 The substantial development
2 permit process is the portion of the shorelines management
3 program superceded by EFSA when an energy facility, as
4 defined in EFSA, is certified. It is unclear whether the
5 policies and criteria of the Shoreline Management Act and
6 local master programs must be applied by EFSEC.

7 The Energy Act states on the
8 one hand that its certification is in lieu of permits from
9 other agencies, that conflicts with other provisions of
10 law are to be resolved in favor of EFSA and that EFSA
11 preempts the field of energy facility certification.

12 On the other hand, EFSA
13 states that agreements entered into pursuant to the
14 certification of energy facilities must contain conditions
15 designed to recognize the purpose of laws or ordinances,
16 rules or regulations that are preempted or superceded by
17 EFSA. No issue has yet arisen to test the scope of the
18 preemption provisions of EFSA since the Act was amended
19 as recently as July 15th, 1977.

20 I'd like to insert a comment
21 at this point that the requirement that conditions be im-
22 posed on a certification to ensure that the laws, rules
23 and regs. of other agencies that have been superceded applies
24 only to applications for facilities after the amendment.

25 Now, the two major facility
26 proposals; one at Cherry Point and one at Port Angeles,

1 both were proposed prior to the 1977 amendments and a
2 different set of rules applies to them. Those rules are--
3 in my view, give the state more authority to determine its
4 own criteria for deciding where an energy facility should
5 go.

6 Three; zoning, planning and
7 other controls, traditional to local governments, are
8 preempted by EFSA when energy facilities are proposed.
9 However, the EFSEC must consider local land use plans and
10 zoning requirements at a public hearing and protect local
11 government and community interests in their certification
12 of the development activity. Local government controls
13 over land use normally fall into four categories; zoning
14 subdivision control, health and safety codes, and the
15 provision of public services.

16 Normally local government
17 need only consider local interests in determining the
18 types of controls to be applied to particular uses, and
19 the determining of the use will be allowed in a local area.
20 Regional needs or problems do not have to be considered.

21 This situation has now
22 changed with respect to energy facilities. EFSEC must
23 consider regional and state-wide problems in siting key
24 energy facilities. The question of whether local controls
25 are overridden by EFSEC's determination was unclear until
26 the 1977 session of the Washington Legislature. The

1 Legislature passed two conflicting provisions within the
2 same law during the 1977 session. One, enhancing state
3 preemptive powers and the other, preserving local land
4 use powers, but Governor Ray vetoed the provision which
5 saved the local land use plans, resuming ordinances from
6 preemption.

7 It is now likely that local
8 control over the siting of energy facilities is superceded
9 by EFSA.

The 1977 amendments provide that political subdivisions of the state, are bound by EFSEC certifications and that the certification is in lieu of permits, certificates, or similar documents of other departments, boards, divisions, commissions and political subdivision.

THE COMMISSIONER: May I
interrupt you there?

A Yes.

THE COMMISSIONER: I think you said that because Cherry Point and Port Angeles proposals were initiated prior to 1977 amendments, that they were exempt from these amendments?

A Yes, sir.

THE COMMISSIONER: Does your statement then on page 7,

"It is now likely that local control over the siting of energy facilities is superseded by EFSEC..."

not apply with respect to that?

A Yes, the next paragraph in the statement deals with that.

THE COMMISSIONER: All right, thank you.

A This is the law today,

1 but not with respect to those two applications.

2 There is still one ambiguous
3 provision which requires EFSEC to determine at a public
4 hearing whether the proposed site is consistent and in
5 compliance with country original land use plans or zoning
6 ordinances. EFSA does not indicate what happens if the
7 proposed site is not consistent with land use plans or
8 zoning ordinances.

9 The statute, read as a whole,
10 however, supports a finding that local land use control
11 over energy facilities are pre-empted. Since this issue
12 represents a power struggle between the state and local
13 governments, it is likely that the issue will be raised
14 again in subsequent legislative sessions or in the courts.

15 One important point should be
16 made about EFSA and the pre-emption issue. The 1977
17 amendments to EFSA, effective July 15, 1977, apply only
18 to applications made on or after that date. The applicat-
19 ion for an oil port at Port Angeles, and inserting here,
20 and at Cherry Point, were filed long before the new amend-
21 ments and are subject to the 1976 law.

22 With respect to those
23 applications, the law is ambiguous as to whether local
24 zoning ordinances are superceded. It says that the state
25 pre-empts the regulation of energy facilities, but refers
26 only to state laws, agencies and regulations when speaking

1 of the permits the EFSA certification replaces. Also,
2 hearings are to be held to determine the applicant's
3 consistency with local land use regulation.

4 The language used suggests
5 state deference to local government desires. Thus, the
6 rules of the game under which the current Port Angeles oil
7 port application is considered, and also the Cherry Point
8 application, give considerably more weight to the argument
9 that local regulations are still potent. An attorney-
10 general's opinion on the interpretation of the 1976 Act
11 finds that the state did pre-empt local ordinances, but
12 this opinion has been questioned.

13 I would like to insert a
14 comment at this point. The 1977 amendments to EFSA, I
15 believe resolve the issues that were raised in the attorney-
16 general's opinion, and may be an indication of legislative
17 intent, which would be a different opinion than the attorney-
18 general.

19 THE COMMISSIONER: Which
20 would which?

21 A Because the 1977 amend-
22 ments were passed which clarified, in my view, the pre-
23 emptio issue, it may be indicative that the legislature
24 intended in the 1976 law, that pre-emption did occur.
25 I mean, the pre-emption did not occur because they clari-
26 fied in the next session of the legislature to make sure

1 that it did, but there are different interpretations on
2 that question, and that's a major issue.

3 On the bottom of 8. Putting
4 aside the pre-emption issue, local interests are recognized
5 within EFSA in four ways. First, a temporary voting
6 member of EFSEC is appointed by appropriate local govern-
7 ment officials within the local area where the facility
8 is proposed to be located. This member sits with the 15
9 other state agency representatives only when EFSEC considers
10 the proposed site of interest to the temporary member.

11 Second, EFSEC must consider,
12 at a public hearing, whether the proposed site is consist-
13 ent and in compliance with local government land use plans.
14 The legal effect of this is not clear, since EFSEC can
15 supercede local land use plans, but local interests would
16 have to be heard and considered.

17 Third, any agreement between
18 EFSEC and the developer must include conditions to protect
19 state or local governmental or community interests
20 affected by the development.

21 Fourth, any such agreement
22 must be designed to recognize the purpose of laws,
23 ordinances or regulations pre-empted or superceded by
24 EFSA.

25 It should be remembered,
26 however, that these local interest questions are decided

1 by a board made up almost exclusively of state departments
2 and agencies.

3 Also, I would like to insert
4 here that with respect to points 3 and 4, these would not
5 apply with respect to the two applications now being heard,
6 because they were 1977 amendments to the law.

7 Shifting now from the local
8 government to the state government level. The Energy
9 Facility Siting Act establishes the Energy Facility Site
10 Evaluation Council, which recommends to the Governor the
11 siting and environmental requirements for energy facilities.
12 EFSEC is made up of state agency representatives primarily.

13 The procedures of EFSA
14 supercede other state and local requirements. EFSA is
15 the primary legal device in Washington State for energy
16 facility siting decisions.

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1 a facility is proposed completes the list.

2 The key power of EFSEC
3 relates to the role in the certification process. After
4 receiving an application, EFSEC must determine if it is
5 complete and includes all needed information. Then,
6 EFSEC commissions an independent study to determine the
7 environmental impact likely to result from the proposed
8 facility. This study is paid for from the applicant's
9 initial filing fee of \$25,000.00.

10 Now, I'd like to delete the
11 remainder of that page and insert a substitute to clarify
12 some points that were not clear there. EFSEC then holds
13 hearings near the site of the proposed activity to
14 determine the consistency of the proposed facility with
15 local land use control. If consistency is found, local
16 government may not then change their plans or ordinances
17 in the future.

18 A law suit has been filed
19 less than two weeks ago by the Coalition Against Oil
20 Pollution, challenging EFSEC's finding that the Trans-
21 Mountain application at Cherry Point is consistent with
22 local land use plans. That's in litigation now. After
23 studies are completed, a more formal and lengthy hearing
24 is held, called a contested case hearing. The entire
25 application is reviewed, a counsel for the environment
26 is appointed, witnesses are heard and cross-examined, and

1 a record of the hearing is kept.

2 This process often takes
3 between thirty and sixty days. This contested case hearing
4 has not been held as yet with respect to either of the
5 two applications.

6 Now, continuing on the top
7 of page 11, EFSEC must report its recommendations to the
8 Governor within twelve months from the time the application
9 is received. The report must contain an overall recommendation
10 on the application, and if positive, contain criterias
11 specific to the site and transmission line routing and
12 a draft certification agreement containing conditions to
13 implement EFSEC guidelines.

14 Under EFSA, the Governor,
15 not EFSEC, makes the final determination to reject the
16 application or approve it and execute the agreement with
17 the applicant. The Governor may direct EFSEC to reconsider
18 aspects of the draft agreement. Once the agreement is
19 executed by the Governor and the applicant, it becomes
20 binding and operates in lieu of any permit, certificate
21 or similar document of state agencies or political
22 subdivisions of the state. Again ^a inserting/comment here.

23 Because the 1976 laws is the
24 one that appplies, the political subdivisions part does
25 not apply to the two existing applications.

26 The effect of this provision

1 and the issue of EFSA preemption is discussed in other
2 sections of the memo. A binding agreement is enforceable
3 in the courts. It can also be revoked, but the law does
4 not say who may revoke the agreement; the Governor, the
5 courts, or EFSEC.
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Other provisions of EFSA aid the implementation and effectiveness of the certification process. EFSEC is empowered to develop environmental guidelines to aid in selecting sites and environmental conditions appropriate to certain applicants. In addition, EFSEC can study certain sites prior to receiving an application. I mentioned this earlier. They also may prescribe means for monitoring the effects of facilities.

Finally, EFSA permits an expedited application process for those applications not significant enough to warrant a full review.

The provisions of EFSA have been described. EFSA plays a central role in the legal framework for siting energy facilities. The key issues, relate however, to the interface of EFSA with other requirements of local, state and federal law. The question of the pre-emption of local requirements has been dealt with in some detail, but subsequent sections relate EFSA to other state programs and to federal agencies.

Inserting a comment at this point, just as a summary. I think we should think about the legal controls in Washington with EFSA as the centre-piece, and the question of local controls would be to the extent they inter-relate with EFSA, and all other state agencies also relate to EFSA, so that's an organizing way to think of the program in Washington.

The coastal management program of Washington, which is approved by the Federal Government, relies on EFSEC determinations for energy facility siting and contains an oil trans-shipment port policy requiring such a port to be at or west of Port Angeles.

The conflicting views about the best site for an oil port, or whether there should be one at all in Washington, has resulted in lawsuits, legislative and administrative action surrounding the coastal management program, all of which are pending.

The state's coastal management program, which was developed and approved under the federal Coastal Zone Management Act of 1972, consists of a network of state and local agencies and authorities which control land and water uses in the coastal zone. The heart of the state's program is the policies and procedures outlined in the Shorelines Management Act, as discussed above under the Local Shoreline Master Programs.

EFSEC is noted in the coastal management program as one of the network of agencies to be involved in the program when energy facilities are proposed in the coastal zone. The coastal management program contains a policy statement that any oil trans-shipment facility developed in the state would be at or west of Port Angeles. This reflected the policy of the Governor

1 of the state at the time the coastal management program
2 was approved, and presumably reflected the policy of EFSEC
3 as well, since most EFSEC members are the Governor's
4 appointees.

5 With a new Governor and a
6 changed policy favouring a site in northern Puget Sound,
7 there is now the potential for a direct conflict within
8 the state's coastal management program. On the one hand,
9 EFSEC could favour a northern Puget Sound location for a
10 trans-shipment facility. On the other hand, the stated
11 policy of the coastal management program for a facility
12 at or west of Port Angeles is still intact.

13 Under state law, it would
14 appear that EFSEC would determine the siting question,
15 since the coastal management program is not, in itself, a
16 state law. Under federal law, a substantial problem
17 arises.

18 The Federal Coastal Manage-
19 ment Act requires that federal agencies conduct their
20 activities and issue their permits in a way that is con-
21 sistent with the approved coastal management program.
22 Because Washington State could have conflicting policies
23 under the coastal management program, it would be unclear
24 with which state policy federal agencies must be consist-
25 ent.

26 Further, the State Department

1 of Ecology, rather than EFSEC, determines whether appli-
2 cations for federal permits, licences and leases are con-
3 sistent with the coastal management program.

4 Washington is now faced with
5 conflicting policies, and potentially conflicting agency
6 views, regarding the question of oil trans-shipment
7 facilities and the coastal management program. Four
8 actions are in progress at this writing to try to resolve
9 the matter.

10 First, the legislature during
11 the last session passed S.H.B. 743 asserting that any oil
12 trans-shipment facility must be at or west of Port Angeles.
13 The Governor vetoed the bill, but because it passed both
14 houses of the legislature by strong margins, legislative
15 leaders argue that it is the state's policy as expressed
16 by the legislature, and that a veto override or other
17 strategy will be attempted in the future to establish the
18 legislature's policy as state law.

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A preliminary guess is that it would be June 15th, 1978, before final approval for the amendment would be received. That assumes that all procedures flow smoothly and expeditiously. Because of the strong differing views on this issue, it could go well beyond that date, and at the end of my testimony, I have

1 some additional comments on timing of all these reviews
2 which I'll share with everyone.

3 THE COMMISSIONER: You are
4 referring to the specific amendment relating to the siting
5 of an oil port facility?

6 A Yes. This is an amendment
7 to delete the oil port policy from the state's coastal
8 management program.

9 THE COMMISSIONER: Thank you.

10 A Third: Clallam County
11 has brought suit--strike "and the City of Port Angeles".
12 That's an error. Has brought suit in Federal Court challenging
13 the validity of the state's coastal management program
14 and the oil port provision. They argue that the oil port
15 policy was included too late in the environmental impact
16 assessment process for it to receive adequate public notice
17 and debate. This case has not as yet been heard or
18 decided.

19 Fourth: the Coalition Against
20 Oil Pollution has sued the Governor and the Department
21 of Ecology to force them to notify the U. S. Corps of
22 Engineers that an application from ARCO for a Corps permit
23 for dock expansion at Cherry Point should not be considered
24 because it violates the state's coastal management program.
25 This case is also pending.

26 I'd like to add an insert

1 at this point as well. The Coalition Against Oil Pollution
2 has also sued the Corps of Engineers to present their review
3 of the ARCO application alleging that it violates the
4 state coastal management program.

5 I might mention here that
6 three of these cases are closely related and it's likely
7 that they will be joined and heard in Federal Court at
8 some point in the future.

9 An environmental impact
10 statement must be prepared on projects which significantly
11 affect the quality of environment and which require any
12 governmental authorization. EFSEC must prepare an
13 environmental impact statement to accompany the proposed
14 energy facility project throughout the review and
15 analysis process.

16 With your permission, Mr.
17 Commissioner, I think I can delete the explanatory
18 information there on that particular point. I think in
19 the interest of time, it wouldn't be worth the time it
20 would take to read it.

21 Point number 7 on page
22 15: other state agencies concerned with resources and the
23 environment are represented on the Energy Facility Site
24 Evaluation Council, where their views can be considered
25 in the certification of an energy facility. The State
26 Department of Natural Resources, which leases stateowned

1 tidelands and waterbottoms, may be outside the scope of the
2 EFSA preemption.

3 I think also, with your
4 permission, this part--they're interesting legal points,
5 but perhaps don't go to some of the things that are--

6 On page 16, the Federal
7 Government role, number 8. Activities affecting the
8 navigable waters of the United States are reviewed by
9 the U. S. Army Corps of Engineers. Permits are issued
10 for those activities that are in the overall public interest,
11 considering economic and environmental factors, and
12 considering the views of agencies at all levels of
13 government and the public.

14 The Corps of Engineers will
15 not issue a permit if state or local agencies have denied
16 authorization and will issue a permit for an activity,
17 approved at the state and local levels unless there are
18 overriding national factors of the public interest
19 requiring denial.
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1 The Corps of Engineers is
2 the key agency of the Federal Government reviewing acti-
3 vities taking place in navigable waters. The Corps of
4 Engineers' authority stems from the 1899 Rivers and Harbours
5 Act and the 1972 Federal Water Pollution Control Act.

6 The activities reviewed are
7 quite broad, including piers, jetties, bulkheads, dredge
8 and fill, dumping, drainage and many other activities.
9 Jurisdiction of the Corps of Engineers extends to navigable
10 waters, which has been construed very broadly to include
11 all water bodies subject to tidal action up to the mean
12 high water mark, associated wetlands, other waters used
13 or capable of use in interstate commerce, and periodically
14 inundated fresh or salt water areas characterized by
15 vegetation requiring saturated soil conditions.

16 Virtually every shoreland
17 development activity will require a Corps of Engineers
18 permit. In reviewing permits, the Corps of Engineers
19 considers whether the benefits of the proposed project
20 outweigh the costs, considering conservation, economics,
21 aesthetics, historic, fish and wildlife, recreation,
22 water resource and other values.

23 The Corps of Engineers also
24 considers the need for the project, alternative locations
25 and cumulative impacts. Wetlands are noted for special
26 consideration and protection because of their unique

1 contribution to the aquatic environment and fish and
2 wildlife resources.

3 The Corps of Engineers relies
4 a great deal on the input of other federal agencies, state
5 and local agencies, and the public in making its decisions,
6 As mentioned above, the Corps of Engineers will act contrary
7 to state and local wishes, only in cases of an overriding
8 national interest, and these occasions are very rare.

9 Because of the potential for
10 conflicting views from different state and local agencies
11 in Washington State regarding an oil trans-shipment port,
12 Corps of Engineer regulations require that the Governor
13 be consulted to determine the state's policy on a particular
14 application. Thus, with respect to the Corps of Engineers
15 decision on an energy facility, the Governor's views would
16 carry considerable weight should local government, state
17 agencies or legislative views differ.

18 I would like to just pause
19 here and emphasize that point. There is a great deal of
20 difference over the facilities, and the Corps' new regul-
21 ations, which were just published this summer, would rely
22 on the Governor to resolve those differences, and that, of
23 course, is very important in Washington State considering
24 the Governor's clear views on oil ports.

25 Because of the extent of
26 control given to the U.S. Corps of Engineers, and the claim

1 by many that the Federal Government is now involved in
2 issues that are primarily local in nature, bills are now
3 proceeding through the U.S. Congress to limit Corps of
4 Engineers' jurisdiction. Under the bills, Corps of
5 Engineers permit activities would be restricted to those
6 areas below mean high tide and exclude associated wetlands
7 and areas inundated only part of the year.

8 Again, I would like to insert
9 here that at the time this was written, the bill seemed to
10 have a lot more life than it does at this particular time,
11 so you never know.

12 Point number 9. The protect-
13 ion of fish, wildlife and water quality is the responsi-
14 bility of several federal agencies. These agencies provide
15 input to the Corps of Engineers on each permit application.
16 The Corps must give considerable weight to the views of
17 these agencies in reaching a decision, and with respect
18 to one of those agencies, Corps of Engineers' decisions
19 can be overridden.

20 Under the Fish and Wildlife
21 Co-ordination Act, the U.S. Fish and Wildlife Service, the
22 National Marine Fisheries Service and the fish and game
23 departments of the states, are required to comment on the
24 effect proposed projects may have on fish and wildlife
25 resources.

26 An Agreement between the

1 Corps of Engineers and the Federal Fish and Wildlife
2 Agencies, provides that disagreements between the Corps
3 and fish and wildlife agencies that cannot be resolved
4 at a local level, must be forwarded through channels to
5 the Chief of Engineers in Washington, D.C. Because of
6 the reluctance of agencies to involve higher headquarters
7 in local issues, the concerns of fish and wildlife
8 agencies are considered seriously by the Corps and the
9 applicant, thus affording them considerable weight in the
10 decision making process.

11 The goals of fish and wildlife
12 agencies when evaluating proposed projects is to preserve
13 fish and wildlife habitat and resources, and to protect
14 the rights of public use of U.S. navigable waters and their
15 resources. They discourage projects that would encroach
16 on biologically productive wetlands, encourage adherence
17 to local land use plans that balance conservation and
18 development needs, encourage only water dependent develop-
19 ments, and encourage projects designed to avoid preventable
20 damage to fish and wildlife resources.

21 With respect to dredge and
22 fill activities reviewed by the Corps, the federal Environ-
23 mental Protection Agency plays an important oversight role.
24 Although the Corps has primary responsibility for issuing
25 dredge and fill permits, EPA can overrule a Corps permit
26 approval, if they find, after hearings, that the activity

1 will have unacceptable adverse effects on municipal water
2 supplies, shell fish beds and fishing areas, wildlife or
3 recreational values.

4 In evaluating dredge and
5 fill activities, EPA considers the need for the project,
6 availability of alternative sites and water quality
7 standards, as well as other factors.

Further, NEPA requires agencies to approach environmental problems through the integrated use of natural and social sciences and environmental design arts. Further, agencies must develop methods for taking unquantified environmental values into account in decision-making. And, less damaging alternatives to the proposed action must be actively sought out and explored.

1 NEPA is perhaps the most
2 effective review and analysis tool for major development
3 proposals at the federal level. Courts have vigorously
4 supported its procedural requirements and its intent.
5 Most of the important land use and environmental questions
6 with respect to a proposed development are brought out
7 during the process of public hearings and technical
8 review of the Environmental Impact Statement.

9 I'd like to insert at this
10 point, the Corps has indicated that they intend to do a
11 comprehensive environmental impact statement on the
12 TransMountain application at Cherry Point, and have actually
13 begun to do some work on it. This often takes a long time
14 since the Corps uses outside consultants and frequently
15 must get additional funds for larger EIS's.

16 Mr. Commissioner, I would
17 like to delete the point number 11, which again I think
18 is not worth the time to take at this point. It merely
19 outlines other federal agencies and the input they make--
20 they may have with respect to the Corps' permit review
21 process, but I think the major ones have already been
22 mentioned.

23 But I'd like now to mention
24 orrespond to a request made by Commission counsel, to
25 comment briefly on the timeframe in which all this review
26 would take place. First, it is a very difficult job. It's

1 a guess and, you know, many people can make guesses, and
2 I'll give you mind for what it's worth and hopefully others
3 will also give you their views.

4 The guess I'm making is
5 probably a conservative one in terms of the time. I would
6 think that if anything the guesses--that it will take a
7 longer period of time. With respect to two scenarios
8 which I'll discuss, each with its own set of assumptions,
9 I would say that for Cherry Point application, for it
10 to proceed through, would take three and a half to four
11 years from now.

12 For a second scenario, which
13 would be a federal siting bill, which I will describe what
14 it might be, that it would take four to five years from
15 now before final determination would be made regarding an
16 energy facility in Washington State. Now, I'd like to
17 go through my reasoning with respect to those two scenarios,
18 to just explain how I got to it, because I really think
19 what's most important here is not the time that I mentioned,
20 but the reasoning behind it, because we're all in the
21 business of speculating and guessing when it comes to
22 trying to work this out.

23 With respect to the Cherry
24 Point scenario, I chose this one for the purpose of making
25 a time guess, first, because I think it's the most active
26 proposal being pursued at this time in Washington State.

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Hershman, LeGros
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1 Second, it's likely to be
2 the simplest from the regulatory standpoint because the
3 size of the actual pipeline connection would be the
4 shortest and the number of agencies involved, the least.
5 So, that it would be the best case in terms of the shortest
6 possible review period.

7 Thirdly, there's certainly
8 industry and executive pressure behind this proposal in
9 Washington State, making it a very likely candidate, and
10 I think that making a guess on Cherry Point would be most
11 useful to your Inquiry because the time estimate here would
12 be related to a very live proposal that is very much on
13 your mind.

14 Now, the assumptions with
15 respect to the Cherry Point facility are, first of all, that
16 the three and a half to four year guess is that the rules--
17 it's based on the fact that the rules of the game will
18 remain the same over this three and a half to four year
19 period.

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1 That is, there will be no major amendments to the legis-
2 lation that's currently used to review the application.
3 In other words, it's a straight line projection and doesn't
4 assume any major changes in the legislation.

5 Now, this is a big assumption.
6 The legislature meets every year, and does many strange
7 things sometimes.

8 The second assumption is that
9 the views on the issue remain as adamant as they are now.
10 That the Governor's view, and the legislative leader's view,
11 and those who are concerned about this problem in Washington
12 state, that their views over the three to four year period
13 remain about the same.

14 Third, I have built into the
15 time frame, the assumption that there would be legal court
16 challenges with respect to almost each phase of the
17 administrative process, but I've also assumed that the
18 court challenge, the resolution of the course case would
19 be in favour of the development proposal, and that appeals
20 would not go beyond the Trial Court.

21 Now, those assumptions are
22 not made because I think that that is what will happen,
23 but it's just a way to create a framework to make a guess
24 from. I keep saying guess, because that's really what
25 I'm doing.

26 Now, the reasons for the

1 three and a half to four year estimate can be discussed
2 in terms of the four major decision points in the Cherry
3 Point application.

4 The first decision point
5 regards the validity of the coastal management program,
6 and the oil port policy which I mentioned. I mentioned
7 that the cases are in litigation now, that there will
8 likely be joined not too long from now, but the issues have
9 yet to be fully clarified, hearings have not been heard on
10 any of them yet, so it would, to my view, be the spring
11 of '78 before we get any final resolution of that particular
12 issue.

13 The second major decision
14 point deals with the amendment to the coastal management
15 program that's now in process. Now, one person who is very
16 close to this process estimated June of 1978, based on a
17 number of steps that they know they have to go through.

18 Hearings are about to be
19 held, both the state and the federal level,
20 do reviews on this. A federal environmental impact state-
21 ment will have to be made.

22 My own view is that it's
23 at least a year from now before that final impact statement
24 would be filed, and the actual amendment approved. I base
25 this on what I've seen as being the time that it normally
26 takes to review and circulate an environmental impact

1 statement in the U.S. It always takes longer than it's
2 planned to take, and then I would say that if a lawsuit
3 results from that, a further delay would be another year.
4 So that that might delay that issue until October of '79.

5 Now, the third decision
6 point --

7 THE COMMISSIONER: Excuse me.

8 A Yes.

9 THE COMMISSIONER: When you
10 stated the assumption that rules will remain the same, I
11 wondered mentally whether you meant that the Coastal Zone
12 Management Act would not be amended, but I gather you're
13 assuming that that amendment would go through?

14 Without it there couldn't be
15 a hearing?

16 A The Coastal Management
17 Act would not be amended, but this is an amendment to the
18 program.

19 THE COMMISSIONER: An amend-
20 ment to the program, that's right.

21 A When I said the rules
22 wouldn't be changed, I meant the actual statutory rules.

23 : This is
24 an established administrative procedure within the
25 Coastal Management Act to make amendments.

26 The third decision point

1 that relates to the determination under the Energy Facility
2 Siting Act, or EFSA, and under EFSA there's a 12 month
3 period in which the decisions or recommendations are
4 supposed to be made to the Governor.

5 Delays are already apparent,
6 and as long as the applicant agrees with the council, there
7 can be an agreement to a delay in the 12 month period.
8 Based on the pace at which things are going right now,
9 with the major hearings not having been held yet, and some
10 of the studies certainly not complete, I would say it's an
11 18 to 24 month proposition before a final decision is
12 made on the determination by EFSEC.

The Corps' practice has been, at least from my experience, to always delay to include further views because they would have to go back through it all over again in litigation if they're not

1 complete.

2 So, I would say that it would
3 tend toward taking longer. There's certainly air pollution
4 and water pollution reviews that have to be made at this
5 time as well. So that my guess is that a July 1, 1980
6 timeframe for the Corps finishing its entire review would
7 be a good guess. Then assuming delays because of lawsuits
8 there, then we would say the spring or summer of 1981
9 perhaps before we'd have a final resolution of the E.I.S.
10 that the Corps has prepared.

11 Let me say again that this
12 is a highly speculative scenario, but I hope it's useful.
13 The second scenario would be that the Federal Government
14 jumps into this game and decides that they're going to have
15 a special law to deal with this particular problem in the
16 west coast area and the State of Washington. I would
17 think that it would take four to five years before a
18 license or permit could be given for a project, assuming
19 that that scenario were to go, and here's my reasoning.
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1 First of all, I would assume
2 that this is a reasonable approach to making a scenario on,
3 because there's been a trend in U.S. federal legislation
4 to do exactly this. The TAPA Act, the Alaska Natural Gas
5 Act, the Deep Water Port Act, and the Coastal Energy
6 Impact program, all are very recent actions at the federal
7 level, which indicate that this is the way tough problems
8 are solved. You pass a special Act to deal with the tough
9 problem.

10 Congress tends to try to
11 solve one problem at a time. There are going to be press-
12 ures, strong pressures to have the Congress take some sort
13 of action like this, and there's a bill already in the
14 Congress now, the Melcher bill, to consider this kind of
15 an approach.

16 All right, the assumptions
17 are that this bill would pre-empt the state, but provide
18 a strong state role in resolving the issue.

19 Secondly, it would consolid-
20 ate federal reviews of the proposal, would provide a
21 definite time period for review, probably about a year or
22 less, would establish an environmental and land use
23 review process, and also I'm assuming here that this is
24 not done because of some severe national emergency, but
25 rather the general pressures that we see now.

26 If there was some major

1 oil embargo problem, I think we'd see a much different
2 situation, but that's not part of the scenario.

3 Under this scenario, I would
4 say that it would take a year before any legislation of
5 this type could be adopted. Other legislation took a long
6 time to hammer out; based on that experience, I'd say it's
7 a year before it would happen here as well.

8 The Deep Water Port Act as
9 a model, or was one that I've looked at. It took a year
10 for them to work out the regulations under the Act, as to
11 how you apply for a permit, so I'm building into this
12 scenario, the possibility of up to a year for developing
13 the regulations and hammering out the precise procedures.

14 Then I assume that there's
15 a time period on the review, and that would take about a
16 year, so there's three years.

17 THE COMMISSIONER: What was
18 that for?

19 A That is once, I'm
20 assuming the Act would set up a procedure, it would take
21 a year to do that procedure.

22 The Deep Water Port Act,
23 for example, has a 330 day time phased review process for
24 a permit. I'm assuming that any other special legislation
25 would probably have again a definite time frame in which
26 a decision has to be made, and then I've put in a one to

1 two year delay factor for litigation, relating to this
2 particular provision, so that's how I arrived at four to
3 five years on that.

4 Again, I would like to say
5 that what's most valuable here is thinking about the differ-
6 ent procedures that we have to go through, assuming the
7 laws stay about as they are now for the first scenario,
8 or the kind of law I have laid out for the second scenario.
9 But there are so many factors that could change these rules,
10 and again very rapidly, perhaps things we couldn't even
11 foresee at this time.

12 I hope that it stays in the
13 framework of guessing or speculation, and that others will
14 provide other thoughts so that you have other views of
15 people to rely on in this.

16 THE COMMISSIONER: Could I
17 ask you to make one further speculation?

18 A Sure, why not.

19 THE COMMISSIONER: If there
20 were an emergency this winter which caused interruption
21 of oil supplies to the United States, or even a very great
22 concern about it, what would be the fastest period of time
23 in which there could be action by Congress, and permitting
24 for such a project?

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1 A Well, the only way I
2 can respond is to look back at other emergency situations,
3 I guess, in 1973 or '74 when there were energy shortages,
4 the Congress can act very, very rapidly on minor things.
5 When it dealt with the allocation schemes to different
6 parts of the country, changing the clock time so that there
7 was more daylight hours instead of dark hours when one
8 was up working. Congress can react very rapidly, but only
9 if it's really an emergency.

10 THE COMMISSIONER: I suppose
11 such action could actually include designations in the
12 statute of the site and a completely sweeping away of all
13 permit requirements? Is that possible? All review
14 requirements?

15 A I would say that the
16 Congress would have the authority to do about as stringent
17 a measure as what you must mentioned. What would be more
18 likely is that they would find a way to use their own
19 lands or lands of federal agencies that are already
20 available and then move ahead with the project at a very
21 rapid pace that way.

22 THE COMMISSIONER: In that
23 event, have you any idea of how long it might take?

24 A Okay. Assuming a
25 severe emergency that's got everyone truly frightened,
26 I would think that within a year, that something would be

1 in the process of being built. I'm not familiar with the
2 construction time problem, but--

3 THE COMMISSIONER: No, I was
4 really just thinking of the time to be taken up to the
5 point at which the blades can start to move, cut the
6 ground sort of thing.

7 A Yes. Oh, I think it
8 could be done within a year if there was a very earnest
9 desire to do that. A national emergency declaration.

10 THE COMMISSIONER: Thank you.

11 A That concludes the
12 prepared comments. I'm sorry I took so long, Mr.
13 Commissioner.

14 THE COMMISSIONER: No, no,
15 not at all.

16 MR. ANTHONY: Just one point
17 in order that the record may be clear and correct. You
18 stated Mr. Hershman the number of times that you'll delete
19 subsequent sections. You mean solely for purposes of
20 oral presentation, but they still form part of your evidence?

21 A Yes. I'd be glad
22 to answer any questions on those, even though I did not
23 present it.

24 Q And does that include
25 the comments with respect to deletion you made when you
26 were discussing the last part of page 10 of your evidence?

1 THE COMMISSIONER: There was
2 a substitution.

3 A On page 10 I would
4 prefer that we would strike after the "\$25,000.00" to the
5 bottom of the page. Strike that, and then add my oral
6 testimony, and then pick it up again with the word "EFSEC",
7 the last word on that page, and then continue on the next
8 page, because there are some unclear statements there which
9 only confuse the record.

10 MR. ANTHONY:

11 Q Fine. Thank you. I
12 just wanted to be sure that the record was accurate. Do
13 you wish to adjourn at this time.

14 THE COMMISSIONER: I think
15 we should adjourn now and resume at ten o'clock in the
16 morning.

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18 (PROCEEDINGS ADJOURNED TO SEPTEMBER 30TH, 1977 AT 10:00 A.M.)
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