

March 28, 2008

Via Federal Express and Facsimile: (202) 314-6454

Robert Henry, Hearing Officer
National Transportation Safety Board
490 L'Enfant Plaza East, SW
Washington, DC 20594

Re: *NTSB Accident No. DCA08MM004* – Allision of the Motorized Vessel Cosco Busan with the San Francisco-Oakland Bay Bridge that occurred on November 7, 2007, in San Francisco Bay, California

Dear Mr. Henry:

We are in receipt of the subpoena to our client, Captain John Cota, for him to testify at the National Transportation Safety Board (“NTSB”) hearing currently scheduled for April 8-9, 2008, in the referenced matter. This letter responds to that subpoena, and we request that it be made part of the record. Captain Cota has provided statements to the NTSB and Coast Guard investigators. He has been fully cooperating in the NTSB investigation, as well as investigations undertaken by other government agencies. He would like very much to meet again with the NTSB investigators and to testify before the Board but for the reasons stated below, must respectfully decline.

By law, the NTSB is required to “investigate or have investigated ...and establish the facts, circumstances, and cause or probable cause of...a major marine casualty ...occurring on the navigable waters or territorial seas of the United States.” 49 U.S.C. §1131. Respectful of this important statutory responsibility, Captain Cota has consistently sought to assist the government through the NTSB to ensure that its investigation of this unfortunate incident is complete, that all contributing causes are understood, and to help prevent such accidents from occurring in the future. In that regard, he participated in three NTSB/Coast Guard interviews last fall, including one just after the accident, and a subsequent several hour interview.

Notwithstanding the ongoing NTSB investigation, the government through the United States Attorney and Department of Justice (“DOJ”) on March 17, 2008 filed criminal charges against Captain Cota specifically alleging that his negligence caused the accident. Captain Cota is the first pilot ever charged with criminal negligence under the federal Clean Water Act and the

additional criminal count under the Migratory Bird Treaty Act in these circumstances. According to the criminal Information, Captain Cota alone “caused” the oil spill. We think it is wrong for the government to criminalize this incident against anyone. These matters have always been handled through proceedings against the mariner’s license.

The DOJ’s actions in filing criminal charges arising out of this accident unnecessarily impede the NTSB investigation and undermine the NTSB by predetermining the outcome of its inquiry before the facts are fully investigated. It is difficult to imagine a scenario in which the NTSB would contradict the DOJ’s allegations, regardless of what the facts show. The cause of marine safety is not served by this process.

It also means that Captain Cota is effectively prevented from further cooperating with the NTSB because, in light of these criminal charges, Captain Cota must assert his Constitutionally-guaranteed Fifth Amendment right and decline to testify before the NTSB. This is not to suggest that Captain Cota has “anything to hide” and his cooperation up to now clearly demonstrates that is not the case. Indeed, Courts have long recognized that such an inference in a context such as this is wrong. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981); *Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978).

To demonstrate Captain Cota’s desire to support the NTSB investigation, Captain Cota participated in a three-hour interview with federal, state, and local officials on November 16, 2007. At the time of this interview, Captain Cota did not have access to crucial information such as data from the ship’s Voyage Data Recording System (VDR) and Voyage Monitoring System (VMS) that were necessary to ensure that his recollection was accurate and complete. He was also the victim of an intense media blitz at that time that has caused him an incredible amount of stress since this incident.

Nonetheless, he thought it more important to cooperate as best he could even though these difficult and extraordinarily stressful conditions created the very real possibility that he might misspeak or not remember everything perfectly. While these factors may raise some question about the accuracy and reliability of certain aspects of the previous interview transcript, Captain Cota tried to give important information to the NTSB so that it could complete its investigation promptly and without unnecessary delay. Captain Cota had anticipated elaborating and clarifying some of his earlier responses had the DOJ not acted preemptively in filing charges before the completion of the NTSB fact finding process.

In hopes that the NTSB will not be constrained by the DOJ action, and is interested in conducting a full, complete and objective investigation, we respectfully submit that it consider, among others, the following issues and investigate them on its own:

(1) What was the role of the ship’s Master and Officers during the voyage including their duties and obligations to the pilot as set out in the STCW code? Was the Master concerned about the safety of the ship in the foggy conditions and, if so, did he say anything to the pilot?

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Did the Master feel that it was safe to depart on the morning of this incident? What, if any, training and instructions in the morning of the allision did the lookout(s) have regarding his/their responsibilities, including sight and sound? Did the Master and his crew follow the company's directives contained in the Bridge Procedure Manual? Did the Master or the ship's officers receive any Bridge Team Resource Management Training?

(2) What information/interaction occurred between the Master and Captain Cota before the allision? Did the Master read and understand the Master-Pilot Exchange Card that he was given by Captain Cota? Under the company's own policies, is not the Master required to go over his voyage plan with the pilot? Did he do that in this case and, if not, why not? What representations were made by the Master to the pilot as to the meaning of the symbols shown on the VMS? Were there any delays in executing navigational commands, misunderstandings or miscommunications because of deficiencies in the Master's or crews' English language abilities? Did any failure by the Master and crew to comply with the vessel's own written procedures regarding navigation and bridge team management contribute to the cause of the incident? Did the Coast Guard timely test the Master and ship's crew for drugs and alcohol following the incident?

(3) Did the Master and/or ship's Officers notice and provide or attempt to provide any information to Captain Cota about the voyage or the ship's positions and courses prior to the allision? In particular, it appears that the watch officer took two position fixes and plotted them on a paper chart at 0820 and 0830. Did the Mate or Master provide any of this information to the pilot prior to the allision? If not, why not? Were the Master and crew properly trained and sufficiently skilled and experienced in the use of the radar equipment and VMS? Was the VMS software IMO approved? Did any component of the Cosco Busan's navigational system malfunction? What is the explanation for the difficulty the Master and Mate had in adjusting the radars prior to leaving the dock? Why was the radar picture lacking in clarity and definition and showing extraneous radar returns? Did the crew make any adjustments to the radars at any time prior to the incident that caused the radars to be wired incorrectly? Did the Sperry technician make any adjustments or repairs to the radars following the incident?

(4) Did the United States Coast Guard act appropriately in failing to provide any warnings to mariners in general on the morning of November 7, 2007? If the United States Coast Guard through the Vessel Traffic Service (VTS) thought it was too dangerous to leave the dock because of the fog, did it so warn mariners that morning? When Captain Cota called VTS before departure and advised them of his intended route outbound, including that he would pass through the Delta-Echo span of the Oakland Bay Bridge, why did not VTS provide him with any warnings or other cautionary information? Under the applicable Harbor Safety Plan then in effect, was it not permissible for a vessel to leave the dock even if visibility was less than 1/2 mile if the operator felt that it was safe to do so? Under that same plan, did not the Captain of the Port have the authority to prohibit the movement of all vessels during adverse weather conditions? Did the VTS caution any of the large vessels or high-speed passenger ferries about sailing on the day of the incident? If not, why not?

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(5) Did the VTS have information in its possession regarding the ship's position and course relative to the Delta Tower that could have prevented the allision had it timely communicated this information to the ship? If the Coast Guard had such information and failed to disclose it to the ship, did that failure violate its own policy? The User's Manual VTS puts out to all "participants" in the VTS system (and for them to rely on) states on p. 2: "... [A]t certain times the VTS will recommend action be taken by a participant to prevent a potentially dangerous situation. Such recommendations are offered to assist the participant in avoiding hazardous situations early on. Recommendations are made on the premise that there is information available to VTS of which the participant may not be aware." Is the NTSB looking into the mandatory nature of the VTS services?

(6) What was the role of the Coast Guard (VTS) in monitoring the Cosco Busan's position during the voyage? Why did the Coast Guard (VTS) fail to provide clear and helpful information to Captain Cota when it contacted the ship minutes before the allision? What did the VTS personnel mean when they radioed the pilot and advised him the ship was heading "235"? Were they referring to the "Course Over Ground"? When they asked the pilot his intentions and he said "still Delta-Echo" – why did they not advise him that the ship was out of position since they knew or should have known that the ship was at that point either parallel to or likely West of the Delta Tower? Should the VTS have a trained pilot in its control tower at all times as it does in other ports?

(7) Did the Coast Guard (VTS) have any concerns that an allision was possible or even likely when it radioed Captain Cota? If so, why did not the VTS say anything to the ship about these concerns? If the VTS personnel had given the pilot information about the vessel's position relative to the Delta Tower or warned the ship about trying to pass through the "Delta-Echo span" from where they knew the ship was at that time, isn't it likely that the allision would have been avoided? In this regard, did not the Coast Guard (VTS) have the "last clear chance" to prevent the allision had it acted promptly and clearly in its communication with the ship?

(8) Did VTS personnel discuss among themselves the chances/odds that the ship would hit the bridge after their last communication with the pilot? Did they take "bets" on the outcome, as we have heard? Did VTS immediately notify the Coast Guard Command Center of its concerns before the allision? Did VTS notify the Coast Guard Command Center about the allision and the oil spill immediately after being notified about the incident? If not, why not? Did the Captain of the Port promptly respond to the reports he received that oil was seen in the water minutes after the allision?


Captain Cota was born and raised in San Francisco. He cares deeply about the San Francisco Bay and its ecosystem and is deeply distressed about what happened on November 7. He is a qualified, experienced pilot, who has worked on the San Francisco Bay for almost 27 years without any serious incident and has safely piloted some 4,000 ships with only one minor grounding incident that caused no damage.

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We again want to emphasize Captain Cota's desire to participate and assist in the investigation being conducted by the NTSB. Unfortunately, because the DOJ has reached its own conclusions before the NTSB has finished its investigation and has focused exclusively on Captain Cota's role in this unfortunate incident, Captain Cota is therefore compelled to exercise his Constitutional rights to decline to testify at the NTSB hearing. Nevertheless, we have contacted your lead investigator Tom Roth-Roffey and offered to assist in any way we can consistent with protecting our client's Constitutional rights.

Please contact us if you have any questions.

Very truly yours,


Jeffrey L. Bornstein

Counsel for John Cota

cc: Gary L. Halbert, Esq., General Counsel, NTSB, by facsimile
Denise D'Avella, Esq., Assistant General Counsel, NTSB, by facsimile
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Captain John Cota