OBARRA PARA COMMENTAL STATE OF THE PARA COMMENTAL STATE OF 1 JOSEPH P. RUSSONIELLO United States Attorney BRIAN J. STRETCH (CASBN 163973) 2 Chief, Criminal Division STAĆEY P. GEIS (CASBN 181444) 3 JONATHAN SCHMIDT (CASBN 230646) Assistant United States Attorneys 4 450 Golden Gate Ave., 11th Floor San Francisco, CA 94102 (415) 436-7126 (tel) 5 (415) 436-7234 (fax) 6 Stacey.Geis@usdoj.gov 7 Jonathan Schmidt@usdoj.gov 8 RONALD J. TENPAS 9 Assistant Attorney General Environment and Natural Resources Division United States Department of Justice 10 Richard A. Udell 11 Senior Trial Attorney Environmental Crimes Section 12 P.O. Box 23985 L'Enfant Plaza Station Washington, DC 20004 (202) 305-0361 (tel) (202) 514-8865 (fax) 13 14 Richard. Udell@usdoj.gov 15 Attorneys for Plaintiff United States of America 16 17 UNITED STATES DISTRICT COURT 18 NORTHERN DISTRICT OF CALIFORNIA 19 SAN FRANCISCO DIVISION 20 21 No. CR 08 -00160-JCS UNITED STATES OF AMERICA. 22 VIOLATIONS: Plaintiff, Title 18 U.S.C. § 1001 (false statements) 23 (two counts); Title 33 U.S.C. §§ 1319(c)(1)(A), 1321(b)(3) (Clean Water Act) (one 24 v. JOHN JOSEPH COTA, count)(a Class A misdemeanor); 25 Title 16 U.S.C. §§ 703, 707 (Migratory Bird Treaty Act) (one count) Defendant. 26 (a Class B Misdemeanor) 27 28

SUPERSEDING INDICTMENT

The Grand Jury charges:

INTRODUCTION

At all times relevant to this Indictment:

- 1. The Defendant, JOHN JOSEPH COTA, was a resident of Petaluma, California, and a member of the San Francisco Bar Pilots Association. He held a federal first class pilot's license issued by the United States Coast Guard, and a state pilot's license issued by the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun. COTA had been employed as a Pilot in San Francisco Bay since 1981.
- 2. The *M/V Cosco Busan* was a 901 foot, 65,131 gross ton container ship registered in Hong Kong and bearing IMO number 9231743.
- 3. On November 7, 2007, the *M/V Cosco Busan*, with JOHN JOSEPH COTA as its pilot, departed the Port of Oakland in heavy fog and struck the Delta tower of the San Francisco Bay Bridge, which resulted in the discharge of more than 50,000 gallons of heavy fuel oil and caused environmental damage, including the loss of migratory birds.

LEGAL FRAMEWORK

Federal Requirements for Licensed Pilot's Annual Medical Exam

4. Title 46 U.S.C. § 7101 together with 46 C.F.R. §10.709 mandates that "every person holding a license or endorsement as a first class pilot shall have a thorough physical examination each year while holding a license or endorsement." 46 C.F.R. § 10.709(b). Further, an individual with a first class license or endorsement "may not operate under authority of that license or endorsement until a physical examination has been satisfactorily completed." 46 C.F.R. §10.709(d). The exam must be given by a licensed physician or physician assistant who completes a Coast Guard physical examination form or the equivalent. 46 C.F.R.§§ 10.205(d), 10.709(d).

The Clean Water Act and the Oil Pollution Act

5. In the Federal Water Pollution Control Act (the "Clean Water Act"), as amended by the Oil Pollution Act, 33 U.S.C. § 1321(b)(1), Congress has declared that it is the

policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States or the adjoining shorelines.

- 6. The Clean Water Act makes it a crime for a person to negligently discharge oil into or upon the navigable waters or contiguous zone of the United States in such quantities as may be harmful. 33 U.S.C. §§ 1319(c)(1) and 1321(b)(3).
- 7. The Clean Water Act defines a "discharge" as any spilling, leaking, pumping, pouring, emitting, emptying or dumping. 33 U.S.C. § 1321(a)(2). The Clean Water Act defines "oil" as oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge and oil residue. 33 U.S.C. § 1321(a)(1).
- 8. Federal regulations promulgated under the Clean Water Act define a "harmful" quantity of oil as including any discharges of oil that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or adjoining shorelines. 40 C.F.R. § 110.3
- 9. The Clean Water Act defines the "navigable waters" of the United States as the waters of the United States and the territorial seas, which are defined to be water extending three (3) miles seaward of the ordinary low tide mark. 33 U.S.C. §§ 1362(7) and 1362(8). Navigable waters also includes internal waters, which are "the waters shoreward of the territorial sea baseline." 33 C.F.R. §§ 2.24(a); 2.36. San Francisco Bay is a navigable waterway of the United States.

The Migratory Bird Treaty Act

- 10. The Migratory Bird Treaty Act ("MBTA") makes it unlawful for any person, at any time, by any means or in any manner, to take or kill any migratory bird without a permit or as otherwise provided by regulation. 16 U.S.C. §§ 703, 707(a).
 - 11. The term "take" in the MBTA includes killing or wounding. 50 C.F.R. § 10.12.
- 12. The Brown Pelican (*Pelecanus occidentalis*), Marbled Murrelet, (*Brachyramphus marmoratus*), and Western Grebe, (*Aechmophorus occidentalis*), among others, are listed

Count One -- 18 U.S.C. §1001 (False Statements)

- 13. Paragraphs 1-4 are realleged and incorporated by reference as though fully set forth herein.
- 14. On or about January 18, 2006, in the Northern District of California, the defendant,

JOHN JOSEPH COTA,

knowingly and willfully made a materially false, fictitious, and fraudulent statement and representation in a matter within the jurisdiction of the executive branch of the Government of the United States, specifically on United States Coast Guard Form CG-719K – Merchant Mariner Physical Examination Report – in that he certified that all the information he provided was complete and true to the best of his knowledge, when in fact he knew that the information he provided was neither complete nor true; including the information provided in Sections VI and VII of the form regarding current medications, the dosage, possible side effects and medical conditions for which the medications are taken.

All in violation of Title 18, United States Code, Section 1001(a)(2).

Count Two -- 18 U.S.C. §1001 (False Statements)

- 15. Paragraphs 1-4 are realleged and incorporated by reference as though fully set forth herein.
 - 16. On or about January 19, 2007, in the Northern District of California, the defendant, JOHN JOSEPH COTA,

knowingly and willfully made a materially false, fictitious, and fraudulent statement and representation in a matter within the jurisdiction of the executive branch of the Government of the United States, specifically on United States Coast Guard Form CG-719K – Merchant Mariner Physical Examination Report – in that he certified that all the information he provided was complete and true to the best of his knowledge, when in fact he knew that the information he provided was neither complete nor true; including the information provided in Sections VI and VII of the form regarding current medications, the dosage, possible side effects and medical conditions for which the medications were taken.

All in violation of Title 18, United States Code, Section 1001(a)(2).

Count Three -- 33 U.S.C. §§ 1319(c)(1), 1321(b)(3) (Clean Water Act - Negligent Discharge of a Pollutant)

17. Paragraphs 1-10 are realleged and incorporated by reference as though fully set forth herein.

18. On or about November 7, 2007, in San Francisco Bay, within the Northern District of California, the defendant,

JOHN JOSEPH COTA,

did negligently discharge and cause the discharge of oil in such quantities as may be harmful from a vessel, the *M/V Cosco Busan*, into and upon the navigable waters of the United States, without a permit. Specifically, on or about November 7, 2007, Defendant Cota, while piloting the *M/V Cosco Busan*, negligently caused more than 50,000 gallons of heavy fuel oil to be discharged from the vessel into San Francisco Bay by acting in a negligent manner, that included, the following: (a) failing to pilot a collision free course; (b) failing to adequately review with the Captain and crew of the *M/V Cosco Busan* prior to departure the official navigational charts of the proposed course, the location of the San Francisco Bay aids to navigation, and the operation of the vessel's navigational equipment; (c) departing port in heavy fog and then failing to proceed at a safe speed during the voyage despite limited visibility; (d) failing to use the vessel's radar while making the final approach to the Bay Bridge; (e) failing to use positional fixes during the voyage; and (f) failing to verify the vessel's position vis-à-vis other established and recognized aids to navigation throughout the voyage.

All in violation of Title 33, United States Code, Sections 1319(c)(1)(A) and 1321(b)(3), a Class A misdemeanor.

Count Four – 16 U.S.C. §§ 703 and 707(a) (Migratory Bird Treaty Act)

- 19. Paragraphs 1-13 are realleged and incorporated by reference as though fully set forth herein.
- 20. On or about November 7, 2007, in San Francisco Bay, within the Northern District of California, the defendant,

JOHN JOSEPH COTA,

without being permitted to do so by regulation as required by law, did take migratory birds, including at least one Brown Pelican, (*Pelecanus occidentalis*), Marbled Murrelet, (Brachyramphus marmoratus), and Western Grebe, (Aechmophorus occidentalis).

All in violation of Title 16, United States Code, Sections 703 and 707(a), and Title 50, Code of Federal Regulations, Sections 21.11, 20.71 and 20.72, a Class B misdemeanor.

DATED:	A TRUE BILL.
	FOREPERSON

JOSEPH P. RUSSONIELLO United States Attorney

ief, Criminal Division

(Approved as to form:

RONALD J. TENPAS ssistant Attorney General

Senior Trial Attorney Environmental Crimes Section