

SUPREME COURT OF THE UNITED STATES
No. 142, Original

STATE OF FLORIDA,)
Plaintiff,)
V.) VOLUME V
STATE OF GEORGIA)
Defendants.)

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for HEARING before SPECIAL MASTER RALPH I. LANCASTER, held in the U. S. Bankruptcy Court, at 537 Congress Street, Portland, Maine, on November 7, 2016, commencing at 8:56 a.m., before Claudette G. Mason, RMR, CRR, a Notary Public in and for the State of Maine.

APPEARANCES:

For the State of Florida: PHILIP J. PERRY, ESQ.
JAMIE L. WINE, ESQ.
CHRISTOPHER J. PAWAL, ESQ.

For the State of Georgia: CRAIG S. PRIMIS, ESQ.
K. WINN ALLEN, ESQ.
BARACK S. ECHOLS, ESQ.
DEVORA W. ALLON, ESQ.

Also Present: JOSHUA D. DUNLAP, ESQ.

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1 PROCEEDINGS
2 SPECIAL MASTER LANCASTER: Good morning,
3 counsel.
4 MR. ALLEN: Good morning.
5 MR. PERRY: Good morning, your Honor.
6 SPECIAL MASTER LANCASTER: Predictably,
7 the weatherman was wrong when he said we were
8 going to get heavy snow and rain over the
9 weekend. So I hope you were able to get out,
10 get a good dinner, get relaxed, and you're
11 ready to roll.
12 MR. PERRY: We're ready.
13 SPECIAL MASTER LANCASTER: Okay.
14 MR. PERRY: Yes, your Honor. And on
15 that note, I would like to provide the Court
16 with an anticipated schedule for this week,
17 naming the witnesses we hope to be able to
18 cover. And I'm going to read a list of
19 individuals now, if I might.
20 SPECIAL MASTER LANCASTER: Please.
21 MR. PERRY: And I'm going to predict,
22 probably incorrectly, which day each may
23 appear. Of course, we don't have perfect
24 control over the timing. But today, your
25 Honor, I believe we're going to have Major

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1 Rob Beaton from the Florida Fish and Wildlife
2 Conservation Commission as well as Mr. Eric
3 Sutton from that same agency.
4 Tomorrow, Tuesday, we hope to have
5 Dr. Greenblatt, an expert on bay issues and a
6 water resources engineer, along with
7 Dr. Kimbro, an ecologist who did a lengthy
8 study of Apalachicola Bay, and Dr. White.
9 On Wednesday we hope to have Mr. Tommy
10 Ward here. He expects to be here. He's a
11 lifelong resident of Apalachicola Bay and an
12 oyster dealer. As well as Dr. Pat Glibert,
13 who is an estuarine ecologist.
14 Now, we're not sure how long all those
15 witnesses will take. Of course, we'll see.
16 But our current plan is on Thursday to start
17 with Dr. Hornberger, who is one of our team
18 of hydrologists, your Honor.
19 And we worked to accommodate some
20 scheduling issues that Georgia counsel had,
21 so we hope that schedule will hold. And we
22 have, for next week, made some accommodations
23 in who we're going to call when.
24 SPECIAL MASTER LANCASTER: Thank you.
25 MR. PERRY: Thank you.

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1 THE CLERK: Please raise your right
 2 hand.
 3 Do you solemnly swear that the testimony
 4 you shall give in the cause now in hearing
 5 shall be the truth, the whole truth, and
 6 nothing but the truth, so help you God?
 7 THE WITNESS: I do.
 8 THE CLERK: If you could be seated and
 9 state your full name and spell your name for
 10 the record, please.
 11 THE WITNESS: My name is Robert Beaton,
 12 B E A T O N. I'm a major with the Florida
 13 Fish and Wildlife Conservation Commission.
 14 MR. FAWAL: Good morning, your Honor.
 15 State of Florida presents Major Robert
 16 Beaton, a 25-year veteran of the Fish and
 17 Wildlife Conservation Commission.
 18 May I approach the witness to provide
 19 his prefiled testimony?
 20 DIRECT EXAMINATION
 21 BY MR. FAWAL:
 22 Q. Major Beaton, do you recognize this to be your
 23 prefiled direct testimony?
 24 A. I do.
 25 Q. Do you adopt it in whole and in substance as your

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1 testimony in this case?
 2 A. That's correct.
 3 MR. ALLEN: Good morning, Special Master
 4 Lancaster. You haven't had the chance to
 5 hear from me yet. Just to remind you, I'm
 6 Winn Allen on behalf of the State of Georgia
 7 from Kirkland & Ellis. It's a pleasure to be
 8 before you, sir.
 9 CROSS-EXAMINATION
 10 BY MR. ALLEN:
 11 Q. Major Beaton, I haven't met you yet. My name is
 12 Winn Allen. I, again, represent the State of
 13 Georgia in this case. I'm going to have some
 14 questions for you this morning, if that's all
 15 right.
 16 A. That's fine.
 17 MR. ALLEN: Your Honor, we have prepared
 18 some documents that we would like to walk
 19 through with Major Beaton in his examination.
 20 I'm going to hand those out now.
 21 SPECIAL MASTER LANCASTER: Please.
 22 BY MR. ALLEN:
 23 Q. Sir, you are a law enforcement officer with the
 24 Florida Fish and Wildlife Conservation
 25 Commission. Correct?

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1 A. That's correct.
 2 Q. And if I refer to FWC, will you understand that
 3 I'm referring to the Florida Fish and Wildlife
 4 Conservation Commission?
 5 A. I will.
 6 Q. And, sir, in your written testimony you testify
 7 about some of the harvesting rules and
 8 regulations that apply in Apalachicola Bay.
 9 Correct?
 10 A. Correct.
 11 Q. And FWC is responsible for enforcing those rules
 12 and regulations. Correct?
 13 A. Correct.
 14 Q. So, for example, sir, some of those rules are
 15 that, for example, there's a size limit on
 16 oysters that can be harvested from Apalachicola
 17 Bay. Correct?
 18 A. That's correct.
 19 Q. And the current size limit is 3 inches?
 20 A. Correct.
 21 Q. There are also limits on the number of bags of
 22 oysters that can be harvested in a day. Correct,
 23 sir?
 24 A. That's correct. And it fluctuates.
 25 Q. And that is sometimes referred to as a bag limit?

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1 A. Correct.
 2 Q. And periodically parts of Apalachicola Bay are
 3 closed to oyster harvesting. Correct?
 4 A. Correct.
 5 Q. And people are not allowed to harvest oysters in
 6 the parts of the bay that are closed. Correct?
 7 A. Correct.
 8 Q. And I understand it's also unlawful to harvest
 9 oysters at night in Apalachicola Bay?
 10 A. That's correct.
 11 Q. And, sir, we can agree, can we not, that it's
 12 important that those rules be followed?
 13 A. Yes.
 14 Q. And we can agree that it's important that those
 15 rules be enforced?
 16 A. Yes.
 17 Q. Okay. Sir, I want to talk about some specific
 18 parts of your written direct testimony today.
 19 And I know you have a copy from your counsel.
 20 For everyone's benefit, I have also included
 21 a copy as tab 1 of your binder. It's the same as
 22 the prefiled direct you just swore to. So if
 23 it's easier for folks, they can use tab 1 of your
 24 binder.
 25 And I would like to start with paragraph 10

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1 of tab 1. Are you with me, sir?

2 **A. I'm with you.**

3 **Q.** Okay. And you testify that FWC's enforcement

4 authority, as it relates to oyster size limits,

5 is limited to times when the oysters are on the

6 water and in bags or containers aboard the

7 harvesters' boats. Do you see that, sir?

8 **A. I do.**

9 **Q.** And you also say, we can patrol and inspect

10 oyster harvesters for compliance with size limits

11 and other regulations while they are out on the

12 water; but another agency, the Florida Department

13 of Agriculture and Consumer Services, FDACS,

14 shares jurisdiction with the FWC once oysters are

15 brought to shellfish processing facilities on the

16 land.

17 Do you see that, sir?

18 **A. I do.**

19 **Q.** Okay. I just -- I want to be very clear and I

20 want the Special Master to be clear and I want

21 the Supreme Court to be very clear about what

22 this testimony means. FWC does not have

23 authority to enforce oyster size limits on land.

24 Correct?

25 **A. That's correct.**

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1 **Q.** So FWC does not have authority to enforce oyster

2 size limits in shellfish processing facilities;

3 correct?

4 **A. Correct.**

5 **Q.** And FWC does not have authority to enforce oyster

6 size limits at commercial dealers. Correct?

7 **A. Correct.**

8 **Q.** And FWC does not have authority to enforce oyster

9 size limits at retailers. Correct?

10 **A. Correct.**

11 **Q.** And FWC does not have authority to enforce oyster

12 size limits at restaurants. Correct?

13 **A. Correct.**

14 **Q.** And FWC does not have authority to enforce the

15 oyster size limit with respect to trucks on the

16 road and things like that. Correct?

17 **A. Correct.**

18 **Q.** Now, sir, in your testimony you mention FDACS.

19 Is it okay if I just refer to that as DACS?

20 Is that okay with you, sir?

21 **A. That's fine.**

22 **Q.** Okay. And you say that DACS shares jurisdiction

23 with FWC once oysters are brought to shellfish

24 processing facilities. Do you see that, sir?

25 **A. I do.**

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1 **Q.** And I just want to be very clear. When you say

2 share jurisdiction, you're not suggesting that

3 FWC can enforce the oyster size in shellfish

4 processing facilities. Correct, sir?

5 **A. Correct.**

6 **Q.** And to your knowledge, sir, nobody has authority

7 to enforce the size limit as it relates to

8 commercial dealers or retailers. Correct?

9 **A. As it relates to size limits.**

10 **Q.** As it relates to size limits?

11 **A. Correct.**

12 **Q.** And I'll just ask the question again so the

13 question is clear. To your knowledge nobody has

14 authority to enforce the size limit as it relates

15 to commercial dealers or retailers. Correct?

16 **A. Once they're in the processing facility; correct.**

17 **Q.** All right, sir. Can you turn to tab 2 in your

18 binder, please. Tab 2 is a series of e-mails

19 from 2006, and you're copied on a number of these

20 e-mails. And I have some questions about them

21 that I will ask you about.

22 But just to set the table a little bit, sir,

23 you worked at FWC in 2006. Correct?

24 **A. I did.**

25 **Q.** And in 2006 I believe you were working at the

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1 Tallahassee headquarters of FWC. Correct?

2 **A. Correct. I believe that's the -- close to the**

3 **time I was promoted to captain.**

4 **Q.** Okay. And if you will turn to page 7 for me,

5 sir, we're going to go to the e-mail that starts

6 this chain on page 7 to understand the context a

7 little bit. Okay?

8 And on page 7 there's an e-mail from Linda --

9 I believe Linda Raffield. Do you know Linda

10 Raffield, sir?

11 **A. I believe it's the same Ms. Raffield I have**

12 **spoken to before.**

13 **Q.** And she e-mails David Heil. Do you know who he

14 is, sir?

15 **A. I do.**

16 **Q.** And what's his role?

17 **A. Currently he is with our Division of Marine**

18 **Fisheries Management at FWC.**

19 **Q.** And in the second paragraph, Ms. Raffield says, I

20 am the secretary for the FCSWA, Franklin County

21 Seafood Workers Association. Do you see that,

22 sir?

23 **A. I do.**

24 **Q.** And do you have any knowledge as to whether she

25 was actually the secretary of that organization?

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1 **A. I don't specifically know at that point in time.**
 2 **Q.** Okay. On this -- in this e-mail she poses a
 3 number of questions. And if you look at page 8,
 4 sir, which is the last page of the document,
 5 there's questions 4 and 5 that she has. Question
 6 No. 4 is, what can be done to enforce the size
 7 limit in all oyster houses? And question No. 5
 8 is, can the marine patrol start having
 9 checkpoints for undersized oysters again?
 10 Do you see that, sir?
 11 **A. I do.**
 12 **Q.** Okay. Those questions get answered, or answers
 13 are proposed in the course of this document.
 14 Mr. Heil answers a few of them, and then he
 15 forwards some over to FWC for an answer.
 16 The first time we see an answer to questions
 17 4 and 5 is on pages 2 and 3 of this document. So
 18 I would direct your attention to pages -- the
 19 e-mail that spans pages 2 and 3 of tab 2. In
 20 there, sir, there is an e-mail from Bruce Buckson
 21 on the bottom. Let me know when you're there,
 22 sir.
 23 **A. The bottom of page 2?**
 24 **Q.** Yes, sir.
 25 **A. I'm there.**

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1 **Q.** Okay. So on the bottom of page 2 there is an
 2 e-mail from Bruce Buckson. And I believe at this
 3 time was Mr. Buckson a lieutenant colonel at FWC?
 4 **A. I do not believe so. I believe in '06 he was a**
 5 **major.**
 6 **Q.** Okay. What was his role at the time, if you
 7 know?
 8 **A. He oversaw several programs, one of them being**
 9 **marine fisheries issues, as a liaison between**
 10 **Marine Fishery Management and law enforcement.**
 11 **Q.** Okay. And at the top of page 3 he reproduces
 12 Ms. Raffield's question there. And it says
 13 No. 4, what can be done to enforce the size limit
 14 in all oyster houses?
 15 Do you see that?
 16 **A. Yes.**
 17 **Q.** And Mr. Buckson writes, the current rule language
 18 is below. This section was changed in October of
 19 2001 at the request of the industry and applies
 20 to the harvest and possession while on the water
 21 and landing.
 22 The previous language required oysters to be
 23 at least 3 inches when sold, exchanged, bartered,
 24 or simply possessed at any time. Both rules
 25 were/are accompanied by a section allowing a

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1 tolerance for attached and unattached undersized
 2 oysters. These tolerances will allow some
 3 oysters under the 3-inch size limit in possession
 4 or for sale.
 5 Do you see that, sir?
 6 **A. I do.**
 7 **Q.** And then he next writes, the FWC's primary area
 8 of enforcement of the oyster size limit is on the
 9 water at time of harvest and landing. The
 10 industry could request the commission consider
 11 replacing the size limit which applies to any
 12 location at any time and review the tolerance
 13 sections.
 14 Do you see that, sir?
 15 **A. I do.**
 16 **Q.** And when this refers to an oyster landing, do you
 17 understand an oyster landing as being the act of
 18 physically bringing oysters ashore?
 19 **A. Yes.**
 20 **Q.** Okay. And then, sir, if you look down at No. 5,
 21 Bruce Buckson provides another answer to
 22 Ms. Raffield's question. He reproduces her
 23 question here. No. 5, can the marine patrol
 24 start having checkpoints for undersized oysters
 25 again?

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1 And then the answer that Mr. Buckson provides
 2 reads, the current FWC rule lists commercial
 3 harvester requirements when a monitoring station
 4 is in operation. There is no legislative budget
 5 provided to FWC for the operation of monitoring
 6 stations. FWC's primary enforcement of shellfish
 7 regulations is conducted on the water by officers
 8 patrolling harvest areas.
 9 Do you see that, sir?
 10 **A. I do.**
 11 **Q.** And this e-mail was sent in -- I believe in April
 12 of 2006; does that appear to be the case, sir?
 13 **A. Yes, it does.**
 14 **Q.** And, sir, you were the captain of FWC's field
 15 office for Franklin County from September 2012 to
 16 September 2014. Right, sir?
 17 **A. That's correct.**
 18 **Q.** Okay. And during your tenure at -- and that
 19 office was in Carrabelle, I believe?
 20 **A. It was, yes.**
 21 **Q.** And Carrabelle, that's in Franklin County?
 22 **A. It is.**
 23 **Q.** During your tenure at Carrabelle, FWC did not
 24 operate formal checkpoints on the water; did
 25 they, sir?

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1 **A. Not during my two years there.**
 2 **Q.** All right, sir. If you turn with me to page 1 of
 3 tab 2, and in the middle of page 1 there's an
 4 e-mail from Dave Pridgen. Do you see that, sir?
 5 **A. I do.**
 6 **Q.** Who is Dave Pridgen?
 7 **A. Dave Pridgen was Major Pridgen at that time, and**
 8 **he was the regional commander for the Northwest**
 9 **Panhandle Region of Florida which included**
 10 **Franklin County.**
 11 **Q.** Was he your boss at this time?
 12 **A. No, he was not.**
 13 **Q.** He was not, okay. Was he a superior to you at
 14 this time? Did he have a higher rank, I guess is
 15 my question?
 16 **A. He was a major and I was a captain.**
 17 **Q.** Okay. Mr. Pridgen writes -- at No. 4 he says, as
 18 you noted, the change was made to accommodate the
 19 industry. We had worked a number of details in
 20 the Northwest Region -- excuse me -- NW region
 21 where officers stopped trucks for inspection on
 22 the road. We found and seized a lot of
 23 undersized oysters. As you can understand, even
 24 with several officers working, it took awhile to
 25 unload, inspect, and reload a truck full of

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1 oysters. The industry complained that their
 2 trucks were unreasonably delayed by our
 3 inspections. They could have prevented these
 4 delays by inviting us to inspect while the trucks
 5 were being loaded at their place of business but
 6 chose instead to seek an exception from the size
 7 limit for oysters in shipment and at business.
 8 Do you see that, sir?
 9 **A. I do.**
 10 **Q.** And do you remember I asked this question
 11 earlier, but it is the case today, right, sir,
 12 that FWC cannot inspect trucks on the road with
 13 respect to the size limits?
 14 **A. That's correct.**
 15 **Q.** All right. Looking in that same e-mail from
 16 Mr. Pridgen, there's a paragraph that begins --
 17 or a line that begins, our rule, right after the
 18 section I just read. Do you see that, sir?
 19 **A. Yes.**
 20 **Q.** And he writes, our rule as currently written
 21 seems grossly unfair in that it causes FWC
 22 officers to cite the working person on the water
 23 for possessing short oysters which the
 24 businessmen can legally possess. In all
 25 fairness, we should either prohibit the

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1 possession of undersized oysters for everyone or
 2 no one.
 3 Do you see that, sir?
 4 **A. I do.**
 5 **Q.** And then above there is an e-mail from Donald
 6 Duval. Do you see that, sir?
 7 **A. I do.**
 8 **Q.** And is Donald Duval sometimes called Craig Duval?
 9 **A. He is.**
 10 **Q.** And he writes an e-mail where he says -- and,
 11 again, this is in April of 2006. Mr. Duval says,
 12 I agreed with Major Pridgen's comments. I would
 13 like to attend the meetings and would also take
 14 Lieutenant Messer as well. Having dealt with
 15 this issue for many years, I believe we need to
 16 change the rule to possession of undersized
 17 oysters by anyone is prohibited, regardless of
 18 where the possession happens to be, land or sea.
 19 Lieutenant Messer also has a great deal of
 20 experience dealing with the issue. He was an
 21 oysterman at one time himself. We in the past
 22 had a good relationship with retail dealers,
 23 calling and giving us information about U/S
 24 oysters and who they were buying from. Since the
 25 rule change, we have relaxed the enforcement to

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1 just the water and dockside patrol.
 2 Do you see that, sir?
 3 **A. I do.**
 4 **Q.** And in 2006 was Captain Duval a field captain in
 5 the Carrabelle office?
 6 **A. Yes.**
 7 **Q.** And did he at that time hold the position that
 8 you later held from 2012 to 2014?
 9 **A. That's correct.**
 10 **Q.** And since 2006, sir, the rule has not in fact
 11 been changed to give FWC authority to enforce the
 12 undersized oyster rule on land. Correct?
 13 **A. That's correct.**
 14 **Q.** I would like to turn to tab 3 of the binder.
 15 Tab 3 is an e-mail from you to Christopher Brooks
 16 on August 22, 2013. And there is a document
 17 attached which we have also included in tab 3.
 18 The document is titled Law Enforcement
 19 Perspective on Oyster Issues in Apalachicola.
 20 Do you see that, sir?
 21 **A. I do.**
 22 **Q.** And can you just tell me who is Christopher
 23 Brooks?
 24 **A. At the time, I forget his exact title; but he was**
 25 **with FDACS or DACS Division of Aquaculture.**

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1 **Q.** If we look at the attachment, sir, at the top --

2 again, I'm on the second page of tab 2. This is

3 actually the first page of the attachment, but

4 the second page of tab 2. At the top it says Law

5 Enforcement Perspective on the Oyster Issues in

6 Apalachicola.

7 Sir, this is a document that you wrote.

8 Correct?

9 **A. I wrote it. I submitted it. It was a**

10 **collaborative effort between myself, the**

11 **lieutenant in Franklin County, as well as some of**

12 **the officers; and the major of the Northwest**

13 **Region was also involved in review.**

14 **Q.** Okay. Just for the record, this is GX-662.

15 So, I'm sorry. You were involved in drafting

16 this document. Correct, sir?

17 **A. Correct.**

18 **Q.** Okay. And if we look on the second page of the

19 attachment, it is the page that ends in 6456 in

20 the bottom right. Do you see that, sir?

21 **A. I do.**

22 **Q.** And there is a heading that says Undersized

23 Oysters. Do you see that?

24 **A. I do.**

25 **Q.** And you write, it is a well-known fact that there

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1 has always been harvest of undersized oysters

2 from Apalachicola Bay. The bay was in a healthy

3 state several years ago and could sustain the

4 taking of a certain percentage of undersized

5 product; however, several factors have affected

6 the bay in the past years. The issues have been

7 well vetted and we do not need to rehash those

8 factors. The bottom line is that the oyster

9 industry, from harvester to producer, is the best

10 entity to control the harvest, process, and sale

11 of undersized oysters. If the finger continues

12 to point at FWC enforcement, then some additional

13 rule changes need to be considered in order to

14 make the enforcement of undersized oysters more

15 effective.

16 Do you see that, sir?

17 **A. I do.**

18 **Q.** And then this document goes on to make, I

19 believe, two recommendations. And I would like

20 to talk about those, sir. Before we do, I just

21 want to set the table a little bit by explaining

22 a concept you refer to in your written direct.

23 In your written direct you refer to something

24 called a tolerance level. Correct, sir?

25 **A. Correct.**

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1 **Q.** And the tolerance level, I believe, now is

2 5 percent; is that right, sir?

3 **A. It's 5 percent and was 5 percent for unattached**

4 **single oysters and 15 percent for clusters of**

5 **oysters.**

6 **Q.** Okay.

7 **A. On both -- sorry, go ahead.**

8 **Q.** If FWC searches a bag of oysters and more than

9 5 percent or more than 15 percent, as the case

10 may be, of the oysters are undersized, that's a

11 violation. Correct, sir?

12 **A. We take into account several factors when we**

13 **measure a bag. Oysters grow very rapidly, and**

14 **they have a very fine lip of the shell. So it's**

15 **very likely that if a harvester raked up oysters,**

16 **put them on the cull board, measured them on the**

17 **vessel, put them in the bag, and then in the**

18 **process of him shaking down the bag to make more**

19 **room for oysters and in moving that bag, it's**

20 **very possible that some of that fine lip would**

21 **break off. So enforcement-wise, we would take**

22 **that into consideration because it was a legal**

23 **oyster at the time of harvest.**

24 **So it's not good law enforcement when**

25 **somebody is making an honest, legitimate effort**

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1 **to be in compliance to penalize them. So there**

2 **would be oysters that we would measure that would**

3 **come just under the 3-inch mark, and you can see**

4 **where the lip has been broken.**

5 **And the officers know the process of**

6 **harvesting. So to say that every bag that**

7 **contained greater than 5 percent isn't affording**

8 **anybody the actual process of how the harvest**

9 **occurs nor any officer discretion.**

10 **Q.** I appreciate that all, sir. My question is a

11 little narrower which is it is the rule, is it

12 not, that no more than 5 percent of an oyster

13 harvester's catch may consist of sub-legal

14 oysters?

15 **A. That's what's in the rule.**

16 **Q.** Okay. And in order to determine whether there's

17 been a violation of that rule, FWC has to

18 physically inspect a bag of oysters. Correct?

19 **A. Correct.**

20 **Q.** And it can take an hour or longer for an officer

21 to physically inspect a bag of oysters. Correct?

22 **A. I don't believe I said -- the process could take**

23 **between 30 and 45 minutes, depending on the size**

24 **of the bag and the number of oysters contained**

25 **within.**

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1 Q. I'm sorry, sir. You don't agree with me that it
 2 can take an hour or longer for an officer to
 3 count and measure a single bag of oysters on the
 4 water?
 5 A. **Again, it would depend on the circumstances. On
 6 a smooth day, a clean boat with a clean cull
 7 board, it would be easy to count oysters. A
 8 rougher day, it's a little more difficult
 9 depending on the size of the oysters. So -- and
 10 it could vary.**
 11 Q. Okay. I'm just going to ask you straightforward.
 12 It can take an hour or longer for an officer to
 13 count a single bag of oysters on the water.
 14 Correct?
 15 A. **I'm not going to say that it couldn't, depending
 16 on the factors.**
 17 Q. All right. Doctor -- excuse me. Do you remember
 18 giving a deposition in this case?
 19 A. **I do.**
 20 Q. And do you remember taking an oath to tell the
 21 truth during the deposition?
 22 A. **I do.**
 23 Q. And you did tell the truth during the deposition?
 24 A. **Yes, I did.**
 25 MR. ALLEN: Your Honor, may I approach
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1 with a copy of the deposition?
 2 BY MR. ALLEN:
 3 Q. All right. Sir, would you turn with me to page
 4 72, please. Lines 16 to 21, sir.
 5 MR. ALLEN: And, Mr. Smith, can you play
 6 clip 21, please.
 7 (Whereupon the video was played.)
 8 BY MR. ALLEN:
 9 Q. Sir, during your deposition were you asked that
 10 question, and did you give that answer?
 11 A. **I did and I still say that today. The question
 12 was would you agree that it could take up to an
 13 hour? There was no mention of an hour and a
 14 half. It was an hour. And I said it could take
 15 that long depending on situations.**
 16 Q. Sir, during your deposition were you asked this
 17 question, and did you give this answer?
 18 Would you agree that it can take an hour or
 19 longer for an officer to count and measure a
 20 single bag of oysters on the water?
 21 Answer. Yes.
 22 Were you asked that question, and did you
 23 give that answer?
 24 A. **I'm looking at my deposition. You said page 72,
 25 line 16?**
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1 Q. Sir, page 72, lines 16 to 21.
 2 Question. I have a couple of questions about
 3 that. That's a lot of information there. Would
 4 you agree that it can take an hour or longer for
 5 an officer to count and measure a single bag of
 6 oysters on the water?
 7 Answer. Yes.
 8 Were you asked that question, and did you
 9 give that answer during your deposition, sir?
 10 A. **Yes.**
 11 Q. Okay. All right, sir. Let's go back to tab 3,
 12 please, of your binder. And we were talking
 13 about the tolerance thresholds. And we just read
 14 in tab 3 this section on Undersized Oysters. And
 15 then below that paragraph --
 16 MR. ALLEN: Again, I'm on tab 3, your
 17 Honor; and I'm on the page that ends in the
 18 Bates number 6456.
 19 SPECIAL MASTER LANCASTER: Yes.
 20 BY MR. ALLEN:
 21 Q. And there is a paragraph that reads as follows:
 22 First we need to remove the incentives for the
 23 harvester. What I mean by this is if a harvester
 24 has six bags of oysters aboard his/her vessel and
 25 we do an inspection for tolerance compliance, we
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1 will pick one bag at random, dump out the
 2 product, and begin to measure and count oysters
 3 to determine compliance. From beginning to end
 4 this process could take between 30 to 45 minutes
 5 depending on the size of the bag and the number
 6 of undersized oysters in the bag. Harvesters
 7 taking traditional product for raw consumption,
 8 half-shell, work under strict time and
 9 temperature requirements, especially in the
 10 summer months. Officers will generally only
 11 delay a harvester long enough to check one bag.
 12 If the bag contains a high percentage of
 13 undersized oysters, a citation is issued; and the
 14 officer ends the stop leaving the harvester free
 15 to sell the other five bags of oysters that
 16 likely contain a high percentage of undersized
 17 oysters as well. Five bags times \$32 per bag
 18 equals \$160. Being cited is considered, quote, a
 19 cost of doing business since court fines are
 20 generally low and the likelihood of the same
 21 harvester being checked again in the same month
 22 is low.
 23 Do you see that, sir?
 24 A. **I do.**
 25 Q. All right. And after that setup you go on to
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1 give a recommendation on the next page, which is
 2 page 6457. Do you see that, sir?
 3 **A. I do.**
 4 **Q.** And it says, recommendation No. 1. Consider a
 5 rule change that, quote, if after inspection any
 6 one bag/bucket/container, or other apparatus
 7 containing oysters is determined to contain
 8 greater than 20 percent of culled oysters, then
 9 it is prima facie evidence that all other bags,
 10 buckets, containers or other apparatuses also
 11 contain an illegal tolerance of undersized
 12 oysters, and all product on board the vessel or
 13 in the possession of the harvester shall be
 14 returned to the water. This would take the
 15 incentive out of harvesting large quantities of
 16 undersized oysters. The harvester could
 17 potentially have nothing to show for a day's work
 18 if he/she chooses to ignore regulations for size.
 19 Do you see that?
 20 **A. I do.**
 21 **Q.** And, sir, as we sit here today, to your knowledge
 22 has the rule been changed to include the language
 23 you include in here?
 24 **A. To my knowledge it has not.**
 25 **Q.** Recommendation No. 2, which is directly below
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1 recommendation No. 1, says allow FWC to enforce
 2 size limits in land-based facilities to include
 3 processors, dealers, and wholesalers. This
 4 recommendation will have to be well-vetted
 5 through workshops and meetings with industry.
 6 Do you see that, sir?
 7 **A. I do.**
 8 **Q.** And as we sit here today, sir, has that
 9 recommendation been implemented in the rules to
 10 your knowledge?
 11 **A. It has not.**
 12 **Q.** All right. Let's turn to tab 4. Tab 4 is
 13 GX-1286. This is another e-mail from you, sir;
 14 and it's about two, two-and-a-half weeks after
 15 the e-mail we saw in tab 3. It attaches the same
 16 document. I will submit to you, sir, there have
 17 been some edits made in this version compared to
 18 the other version we looked at; but I'm not going
 19 to walk through all of them, again, with the
 20 Court because most of the language we just read
 21 is the same. I don't want to waste the Court's
 22 time.
 23 In the middle there's an e-mail from Bruce
 24 Cooper to you; and it's dated September 12, 2013.
 25 Do you see that?
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1 **A. Yes.**
 2 **Q.** And who is Bruce Cooper?
 3 **A. Bruce Cooper is -- at that time was the regional**
 4 **commander who replaced Major Pridgen when Major**
 5 **Pridgen retired.**
 6 **Q.** And do you see the e-mail below that one there is
 7 an e-mail from Bruce Cooper to Jeffrey Hubert.
 8 Do you see that?
 9 **A. I do.**
 10 **Q.** And who is Jeffrey Hubert?
 11 **A. He was a lieutenant colonel in headquarters.**
 12 **Q.** And does it work like in the Army, that a
 13 lieutenant colonel is more senior than a major?
 14 **A. Yes.**
 15 **Q.** And a captain is below that?
 16 **A. Yes.**
 17 **Q.** Okay. Got it.
 18 And then from -- in the middle in the Bruce
 19 Cooper e-mail to you, he writes, start moving
 20 forward with possible rule changes.
 21 Do you see that, sir?
 22 **A. Yes.**
 23 **Q.** Okay. And then at the top is an e-mail from you
 24 to Jim Estes. Do you see that?
 25 **A. I do.**
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1 **Q.** And at this time what was Jim Estes's role?
 2 **A. I believe he was and still is the deputy director**
 3 **of Division of Marine Fisheries Management.**
 4 **Q.** At FWC?
 5 **A. Correct.**
 6 **Q.** Okay. And you write, here is a revised version
 7 after input from Colonel Hubert. How do we get
 8 the ball rolling? We have full support from
 9 industry representatives and states attorney.
 10 Do you see that, sir?
 11 **A. I do.**
 12 **Q.** And this e-mail was sent in September of 2013.
 13 Right, sir?
 14 **A. Yes.**
 15 **Q.** And again, as we sit here today, neither of the
 16 recommendations you included in your memo have
 17 been adopted into the rules. Correct?
 18 **A. That's correct.**
 19 **Q.** And, sir, attached is the attachment. There is
 20 just one thing I want to look at. In the last
 21 page which is FL-ACF 02022087, do you see that,
 22 sir?
 23 **A. I do.**
 24 **Q.** And there's a page that at the top says July 1,
 25 2012, to August 22, 2013. Do you see that?
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1 **A. I do.**
 2 **Q.** And then it lists a number of citations and
 3 warnings issued broken down by different
 4 violations. Do you see that?
 5 **A. Yes.**
 6 **Q.** And then if you look at the second one, sir, it
 7 says, four citations, and then it lists a rule,
 8 and then it says, tolerance for
 9 individual/unattached oysters 5 percent. Do you
 10 see that?
 11 **A. Yes.**
 12 **Q.** All right, sir. I would like to look back at
 13 your prefiled testimony, if I can, just tab 1.
 14 And you might also have a loose copy there.
 15 And if we could look to paragraph 12 in your
 16 prefiled testimony, which is on page 5, it says,
 17 the Apalachicola Bay area and its resources have
 18 been a historical enforcement priority for the
 19 FWC and all of its predecessor agencies.
 20 Do you see that, sir?
 21 **A. I do.**
 22 **Q.** It says, appropriate resources and staff have
 23 been assigned to the area to enforce oyster
 24 harvesting regulations.
 25 Do you see that?

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1 **A. Yes.**
 2 **Q.** Okay. It's a technical term, top dog.
 3 All right, sir. It says Jim, here is a draft
 4 of the Apalachicola Bay situation report that we
 5 will present to the industry and community in
 6 April. Given that much of the data came from the
 7 FWC, and given how much time you spent helping us
 8 work on those data, I would appreciate your
 9 review of the attachment.
 10 And then it says, please send me comments
 11 about factual errors or errors of interpretation
 12 and, if possible, please get the comments to me
 13 by COB next Thursday, April 4.
 14 Do you see that?
 15 **A. I do.**
 16 **Q.** And then Jim Estes in the middle forwards this
 17 e-mail to you and Charlie Wood. Charlie Wood, I
 18 believe, was a lieutenant working for you at the
 19 time?
 20 **A. Correct. He was the Franklin County lieutenant.**
 21 **Q.** And Jim writes to you and Charlie, I told Karl
 22 that I would send him something by the end of the
 23 day on Friday. Let me know if there are any
 24 particular comments you would like me to make.
 25 You see that; right, sir?

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1 **A. I do.**
 2 **Q.** And then if you look down at page -- paragraph 14
 3 on that same page, sir, you have the second
 4 sentence in paragraph 14 that says, but there is
 5 no question that FWC has had enough people,
 6 boats, and other resources to be able to
 7 aggressively patrol the Apalachicola Bay and
 8 discover -- and discourage potential violators.
 9 Do you see that, sir?
 10 **A. I do.**
 11 **Q.** All right. Let's turn to page -- tab 5, if we
 12 might. Tab 5 is some e-mails from late March and
 13 early April of 2013. And at this time, sir, you
 14 were in charge of the Carrabelle field office in
 15 Franklin County. Correct?
 16 **A. Correct.**
 17 **Q.** And in that role you oversaw enforcement of the
 18 state's oyster harvesting rules and regulations
 19 in Apalachicola Bay. Correct?
 20 **A. I did.**
 21 **Q.** The bottom e-mail is from Karl Havens, and he
 22 writes an e-mail to Jim Estes and Nick Wiley.
 23 Sir, who is Nick Wiley?
 24 **A. Nick Wiley is the executive director of FWC.**
 25 **Q.** He's the boss? He's the top dog?

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1 **A. I do.**
 2 **Q.** And then you write an e-mail back to Jim Estes,
 3 and you copy Bruce Cooper. And who was Bruce
 4 Cooper at the time?
 5 **A. The regional commander.**
 6 **Q.** Regional commander?
 7 **A. The major.**
 8 **Q.** Got it.
 9 It says, Jim, I ran some keyword searches
 10 through the document. I think your ideas and
 11 comments we discussed during the call were
 12 appropriate. We need to stress that there is
 13 enforcement; however, we are greatly outnumbered
 14 and the risk/reward for harvesting undersized is
 15 a motivating factor. There is a demand for
 16 undersize product, and until the demand is
 17 reduced enforcement will continue to face
 18 challenges.
 19 Do you see that, sir?
 20 **A. I do.**
 21 **Q.** And when you refer to undersize product, you're
 22 referring to undersized oysters there. Correct,
 23 sir?
 24 **A. Correct.**
 25 **Q.** All right, sir. I would like to turn back to

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1 your written direct testimony, if we can. It's
 2 tab 1, paragraph 21. Now, in your written
 3 direct, sir, you testify about an enforcement
 4 operation called Black Pearl. Correct?
 5 **A. Yes.**
 6 **Q.** Black Pearl is the -- it's an operational name.
 7 Correct?
 8 Or how would you -- it's a --
 9 **A. It was a name for -- a name for an operational**
 10 **plan.**
 11 **Q.** I got it. Okay. And Black Pearl took place in
 12 October of 2013. Correct?
 13 **A. Correct.**
 14 **Q.** And I believe you testified here that it was a
 15 three-day enforcement effort. Correct?
 16 **A. Correct.**
 17 **Q.** And you also testified, I believe, that it
 18 involved more than 30 law enforcement officers.
 19 Right?
 20 **A. Yes.**
 21 **Q.** And it involved an around-the-clock patrolling
 22 effort. Correct?
 23 **A. Correct.**
 24 **Q.** And, sir, if we could look at -- at paragraph 23,
 25 which is on the next page, in the second sentence
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1 you say in your written direct testimony, the
 2 operation gave FWC a full picture of the range of
 3 illegal harvesting activity occurring in the
 4 Apalachicola Bay and allowed the agency to verify
 5 whether reports from harvesters and rumors about
 6 widespread unlawful activity were accurate.
 7 Correct, sir?
 8 **A. That's correct.**
 9 **Q.** And so you wrote it would give FWC a full picture
 10 of the range of illegal harvesting. Correct?
 11 **A. A fuller picture than we had in the past.**
 12 **Q.** Got it. Okay. A fuller picture than you had in
 13 the past.
 14 **A. Right.**
 15 **Q.** All right, sir. And then in the next paragraph,
 16 24, you give some statistics about the operation.
 17 Correct, sir?
 18 **A. Yes.**
 19 **Q.** And I'm going to --
 20 MR. ALLEN: Your Honor, if I might leave
 21 the well, I would like to use the easel
 22 there, if I might.
 23 SPECIAL MASTER LANCASTER: Please.
 24 BY MR. ALLEN:
 25 **Q.** Okay. In your testimony you say -- and I'm in
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1 paragraph 24, Major. In the third sentence you
 2 say, based upon the number of inspections. Do
 3 you see that?
 4 **A. Yes.**
 5 **Q.** Based upon the number of inspections, arrests,
 6 and warrants, we determined that only 7 percent
 7 of users inspected, 50 out of 737, were issued
 8 warnings or citations for possessing undersized
 9 oysters in excess of the 5 percent tolerance
 10 allowed by rule.
 11 Do you see that?
 12 **A. I do.**
 13 **Q.** Okay. So I'm going to put 50 right here for the
 14 number of warnings and citations that were
 15 issued. Is that okay?
 16 **A. Okay.**
 17 **Q.** Okay. And, again, you testified this was a
 18 three-day enforcement effort. Right, sir?
 19 **A. Correct.**
 20 **Q.** Okay. And you also testified here that -- let's
 21 see -- only 7 percent of users inspected were
 22 issued warnings or citations. Right, sir?
 23 **A. Yes.**
 24 **Q.** Okay. Now, just -- this is three days. I'm just
 25 going to make a little note here that says
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1 October 2013 because the operation was at the
 2 very end of October 2013. Right, sir?
 3 **A. Correct.**
 4 **Q.** Okay. All right. Can you turn to tab 26 for me,
 5 sir.
 6 **A. I don't have a tab 26.**
 7 **Q.** I'm sorry. Tab 6. Sorry. I'm getting ahead of
 8 myself. Tab 6.
 9 And tab 6 is JX-67. It's a joint exhibit.
 10 It's titled Oyster Resource Assessment Report,
 11 Apalachicola Bay, August 2012. We spent a lot of
 12 time going through this with Mr. Berrigan on
 13 Friday. I won't bore everyone with going through
 14 it again, but I do want to look at page 2. So,
 15 sir, do you see page 2 as a table, table 1,
 16 Oyster Landings in Apalachicola Bay? Do you see
 17 that?
 18 **A. Yes.**
 19 **Q.** And do you see that for the year -- do you see
 20 the year 2010 there, sir?
 21 **A. I do.**
 22 **Q.** Okay. I'm just going to write 2010 here.
 23 Do you see the number of trips reported as
 24 32,330? Do you see that?
 25 **A. I do.**
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1 **Q.** And do you see 2011, sir?

2 **A. Yes.**

3 **Q.** All right. And do you see the number of trips

4 reported as 39,176?

5 **A. I do.**

6 **Q.** All right, sir. Do you trust me to calculate

7 7 percent of 32,330? You trust me, right, sir?

8 I can give you a calculator.

9 **A. I don't know you, so I really don't trust you.**

10 **Q.** Oh, that's good. That's wise.

11 **A. But go ahead. I'm sure somebody will be checking**

12 **your math.**

13 **Q.** I'm sure. 7 percent of 32,330 is 2,263, and

14 7 percent of 39,176 is 2,742.

15 Okay. We got that. Back to my questions.

16 All right. Can you turn to tab 7, sir?

17 Tab 7 is JX-56. It's a joint exhibit between

18 Georgia and Florida, and at the top is an e-mail

19 from Mark Glasser. Is that how you pronounce

20 that, sir?

21 **A. Yes, it is.**

22 **Q.** Who is Mark Glasser?

23 **A. Mark Glasser at the time was the Food and Drug**

24 **Administration's shellfish specialist that was**

25 **assigned to the Southeast Region.**

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1 **Q.** Okay. And at the bottom is an e-mail from

2 Charlie Wood to you and Antonio Kilpatrick. Do

3 you see that?

4 **A. Yes.**

5 **Q.** Okay. And I'm at the bottom of the first page of

6 JX-56. He says, gentlemen, the following

7 represents a brief overview of activities

8 relating to oysters on Apalachicola Bay from the

9 time period July 1, 2010, through June 30, 2011.

10 Do you see that?

11 **A. I do.**

12 **Q.** And that's your fiscal year. Right, sir?

13 **A. Yes.**

14 **Q.** Okay. And on the next page, page 2 of JX-56, it

15 says, during this time period, officers who

16 worked Franklin County as their assigned county/
17 duty station, nine officers provided 76 patrols

18 in Apalachicola Bay. During these patrols 60

19 misdemeanor citations were issued for violations

20 pertaining to oysters. The following is a

21 breakdown of those violations.

22 Do you see that, sir?

23 **A. Yes.**

24 **Q.** And you have reason to believe that these numbers

25 are correct. Right, sir?

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1 **A. I do.**

2 **Q.** Okay. The first line is, cannot harvest,

3 possess, or land 3-inch oysters. And that has

4 three cases. Right, sir?

5 **A. Yes.**

6 **Q.** And the second line is, possession of undersized

7 oysters, 5 percent tolerance, 35 cases. Do you

8 see that, sir?

9 **A. I do.**

10 **Q.** 35 plus 3 is 38, I believe, sir?

11 **A. In a year's time.**

12 **Q.** Okay. In a year's time. Right, sir?

13 **A. Yes.**

14 **Q.** I'm going to write here fiscal year 2010, 38.

15 All right, sir. And let's turn back to tab

16 4, if we can. Sorry to bounce around in your

17 binder a little bit.

18 And tab 4 is a document we discussed earlier.

19 If we turn to the last page of tab 4, the page

20 that ends in 22087, do you see that, sir?

21 **A. Yes.**

22 **Q.** And, again, at the top this lists a time period

23 from July 1, 2012, to August 22, 2013. That's

24 roughly close to your fiscal year, maybe a month

25 longer. Right, sir?

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1 **A. Yes.**

2 **Q.** Okay. Is it okay if I call it fiscal year 2012?

3 **A. That's fine.**

4 **Q.** Okay. And we -- as we discussed earlier, during

5 that time period this document says, four

6 citations for tolerance for individual and

7 unattached oysters. Right, sir?

8 **A. That's correct.**

9 **Q.** I'm just going to write that up here. Fiscal

10 year 2012, four citations. Okay.

11 All right, sir. So during a three-day

12 operation in 2013 FWC issued 50 citations for

13 undersized oysters. Correct?

14 **A. Correct.**

15 **Q.** And in all of 2010, fiscal year 2010, FWC issued

16 38 citations. Correct, sir?

17 **A. Correct.**

18 **Q.** All right, sir. I want to touch briefly on

19 something we discussed earlier. But if we could

20 look, again, back at your written direct, and

21 again -- oh, I'm sorry.

22 MR. ALLEN: Your Honor, may I mark this

23 as Georgia Beaton demonstrative 1?

24 BY MR. ALLEN:

25 **Q.** All right. Looking back at your written direct,

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1 sir, paragraph 24 -- and, again, it's on page 8.

2 And this is a sentence we looked at earlier, but

3 I want to talk about a different part of it this

4 time. Again, it's the third sentence where you

5 say, based upon the number of inspections,

6 arrests, and warnings, we determined that only

7 7 percent of users inspected, 50 out of 737, were

8 issued warnings or citations for possessing

9 undersized oysters in excess of the 5 percent

10 tolerance allowed by rule.

11 You see that; right, sir?

12 **A. I do.**

13 **Q.** Okay. Let's turn to tab 8. Tab 8 is the -- at

14 the top is an e-mail from you to Melissa Thompson

15 on November 22, 2013. Do you see that, sir?

16 **A. I do.**

17 **Q.** And this is about three weeks, four weeks after

18 operation Black Pearl took place. Right, sir?

19 **A. Correct.**

20 **Q.** Okay. And your e-mail to Melissa Thompson -- and

21 Melissa Thompson, I believe -- is she a

22 legislative aide to a member of the state

23 legislature?

24 **A. I believe Senator Montford.**

25 **Q.** Okay. She's a legislative aide to Senator

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1 Montford?

2 **A. I believe so.**

3 **Q.** Do you know where Senator Montford's district is?

4 **A. I have been removed for a while since going to**

5 **the Keys, but I believe he has the Panhandle**

6 **area.**

7 **Q.** Okay. And you copied Jackie Falls, who I believe

8 is the legislative affairs liaison for FWC, or

9 was at the time?

10 **A. That's correct.**

11 **Q.** And in your -- at the top e-mail you said,

12 Ms. Thompson, it was a please speaking to you on

13 the phone a few minutes ago. Below is an e-mail

14 I sent Jackie after I had a conversation with the

15 constituent who had concerns similar to those you

16 received.

17 Do you see that?

18 **A. Yes, I do.**

19 **Q.** And then in the e-mail below, you refer to --

20 you write an e-mail to Jackie Falls. And you

21 say, Jackie, below is a summarization of my

22 conversation with Ms. Linda Raffield of

23 November 23, 2013. Do you see that, sir?

24 **A. Yes.**

25 **Q.** Let's flip the page to page 2 of JX-100, and

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1 there is a long paragraph in the middle of the

2 page. Do you see that, sir?

3 **A. I do.**

4 **Q.** And it begins, I explained to Ms. Raffield that

5 we had done a targeted enforcement detail in the

6 East Point area October 28 to November 1.

7 Do you see that?

8 **A. I do.**

9 **Q.** And you're referring to the Black Pearl operation

10 there. Correct, sir?

11 **A. Correct.**

12 **Q.** Okay. I want to go to the middle of this long

13 paragraph. There is a -- let's see. There is

14 a -- it's probably about 10 lines down. There is

15 a phrase -- a sentence that begins, I let

16 Ms. Raffield know that our officers were using.

17 Do you see that?

18 **A. I see that.**

19 MR. ALLEN: Maybe you can highlight that

20 on the screen so everybody knows where we

21 are.

22 BY MR. ALLEN:

23 **Q.** Do you see that?

24 Okay. There we go. Sorry, it's a long

25 paragraph. It's hard to find specific sentences

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1 in here.

2 And you write here, I let Ms. Raffield know

3 that our officers were using a high level of

4 discretion when looking at undersized oysters and

5 we were only citing individuals if they had a

6 greater than 25 percent undersized in a bag even

7 though the rule is 5 percent. I also explained

8 that if an oyster was close to 3 inches, we were

9 counting it as a legal oyster.

10 Do you see that, sir?

11 **A. I do.**

12 **Q.** And that statement was accurate at the time you

13 made it. Correct?

14 **A. This was a summarization, like the first line of**

15 **the e-mail to Jackie Falls. It's a**

16 **summarization. There's a whole lot more detail**

17 **in the conversation with Ms. Raffield that lasted**

18 **probably near an hour. And some of that**

19 **information was when I referenced the 25**

20 **percent -- you know, at the beginning of the**

21 **e-mail was she heard that we were arresting**

22 **anybody and everybody for anything. That was her**

23 **concern. And there's a whole bunch of good**

24 **people in Apalachicola. There's a whole bunch of**

25 **law-abiding officers and harvesters. And the**

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1 **rumor mill was that we were writing and arresting**
 2 **everybody using no discretion. And I explained**
 3 **to Ms. Raffield that we were taking into account**
 4 **the process of taking an oyster from the bottom**
 5 **when it could be a legal product, some of the lip**
 6 **breaking off into the bag. And if we saw a bag**
 7 **where the oysters reasonably could be short**
 8 **because of the breakoff, the harvester was making**
 9 **a good effort to put in the bag individual**
 10 **oysters, that we can tell they were taking their**
 11 **time, that we were using discretion.**
 12 **Now, we were not out there to arrest anybody**
 13 **for anything. We were out there to do some type**
 14 **of validation. We were out there to show that we**
 15 **were serious about the issue, but we were also**
 16 **fair. And that was her concern.**
 17 **Q.** Okay. I appreciate that answer, sir.
 18 My question is just a little narrower, which
 19 is when you said, quote, I let Ms. Raffield know
 20 that our officers were using a high level of
 21 discretion when looking at undersized oysters and
 22 we were only citing individuals if they had a
 23 greater than 25 percent undersize in a bag even
 24 though the rule is 5 percent, that statement was
 25 accurate at the time you made it. Correct, sir?

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1 **A. Yes. But it doesn't capture the entirety of the**
 2 **conversation with Ms. Raffield.**
 3 **Q.** Got it.
 4 All right, sir. If we look down a few lines,
 5 maybe three sentences, on the left it begins,
 6 pass the heritage down. And then if you scroll
 7 over, it says, she also agreed with me when I
 8 told her that.
 9 Do you see that sentence?
 10 **A. Yes. This group wants to be able to pass the**
 11 **heritage down, talking about the law-abiding**
 12 **harvesters.**
 13 **Q.** Yes. I see that. And then she says she agreed.
 14 Right, sir?
 15 **A. Yes.**
 16 **Q.** Okay. Then she says, she also agreed with me
 17 when I told her that there is also a segment who
 18 could care less about the bay and are taking
 19 everything they can tong off the bottom. She
 20 used an expletive to describe this group. When I
 21 told her some of the percentages of undersized
 22 oysters in a bag of oysters, she was quite
 23 shocked, in my opinion. I don't think she
 24 understood that we had many cases where bags
 25 contained greater than 50 percent undersized

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1 oysters and several in the 70 to 90 percent
 2 category. She understood that the oyster bars
 3 could not sustain that type of pressure on the
 4 undersized oysters and that the undersized
 5 oysters were the future of the bar.
 6 Do you see that, sir?
 7 **A. I do.**
 8 **Q.** And this is the e-mail that you forwarded to
 9 Melissa Thompson, a legislative aide, on
 10 November 22, 2013. Correct, sir?
 11 **A. It is.**
 12 **Q.** All right, sir. I would like to switch gears and
 13 talk about a different topic here. And, sir, in
 14 your written direct testimony, you testified that
 15 there were exaggerated concerns of overharvesting
 16 and harvesting of undersized oysters. Correct?
 17 **A. Where was that written?**
 18 **Q.** Okay. Sir, if we turn to tab 1, page 6, in the
 19 middle of the page there is a bold heading. It
 20 says Exaggerated Concerns of Overharvesting and
 21 Undersized Oysters. Do you see that, sir?
 22 **A. I do. It appears to be a header for**
 23 **paragraph 18.**
 24 **Q.** Okay. That's your testimony though. Right, sir?
 25 **A. I would have to read paragraph 18 since it's a**

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1 **header.**
 2 **Q.** You're saying the header is not part of your
 3 testimony?
 4 **A. No. I want to see exactly what's in 18.**
 5 **Q.** Okay. Fair enough.
 6 If you turn to paragraph -- let's go to
 7 paragraph 3, which is on page 2 of your direct
 8 testimony, the second sentence says, these
 9 operations, in addition to observations from our
 10 daily law enforcement activity, confirmed that
 11 concerns about overharvesting and the harvesting
 12 of undersized oysters were overstated and that
 13 the vast majority of oyster harvesters in the
 14 Apalachicola Bay comply with the applicable
 15 rules.
 16 That's your testimony; right, sir?
 17 **A. Yes.**
 18 **Q.** Okay. Let's turn to tab 9. Tab 9 is GX-302.
 19 It's a couple e-mails from February of 2010.
 20 And, again, in 2010 you were working at FWC
 21 headquarters in Tallahassee. Correct, sir?
 22 **A. Correct.**
 23 **Q.** I will have you turn to page 2. On the bottom of
 24 page 2 there is an e-mail from Joe -- Joseph
 25 Shields to David Heil that later gets forwarded

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1 to you. Do you see that, sir?

2 **A. Yes.**

3 **Q.** And it says, David, I am providing information

4 involving reports of harvesting in closed waters.

5 We fielded many calls from industry last week

6 regarding harvesting occurring at 1612, Hagen

7 Flats. We followed every call up by notifying

8 FWC enforcement. According to the, presumed

9 same, callers, late in the day, FWC did not do

10 any enforcement regarding these infractions.

11 This weekend, Mr. Harris stated that he saw 40 to

12 50 boats at Dry Bar on Sunday while he was

13 sampling. He notified FWC, but stated they did

14 not appear on site while he was in the vicinity.

15 Additionally, Ms. Horton stated she observed

16 harvesting inside the East Point breakwater this

17 weekend as she was driving to Carrabelle. She

18 stated that FWC did not answer their phones over

19 the weekend.

20 And then in the next paragraph Mr. Shields

21 says, obviously the concern is the presumed

22 disregard industry is now showing by harvesting

23 in closed areas as well as the limited law

24 enforcement involvement.

25 Do you see that, sir?

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1 **A. I do.**

2 **Q.** Okay. And this -- this language mentions Hagen

3 Flats. Do you believe that Hagen Flats is in

4 Apalachicola Bay?

5 **A. Not specifically.**

6 **Q.** How about Dry Bar? Do you know that Dry Bar is

7 in Apalachicola Bay?

8 **A. Yes.**

9 **Q.** Okay. And who is Joseph Shields?

10 **A. I forget his exact title at the time. But I know**

11 **that he did work for FDACS.**

12 **Q.** He worked at DACS. Correct, sir?

13 **A. Correct.**

14 **Q.** And he forwarded -- it appears he forwarded

15 the -- that David Heil forwarded this e-mail to

16 you in February of 2010. Do you see that on the

17 same page, one e-mail up?

18 **A. On page 1?**

19 **Q.** Sorry. I'm sorry, sir. Page 2.

20 **A. Okay.**

21 **Q.** Just one e-mail up from the e-mail we were

22 reading?

23 **A. Yes.**

24 **Q.** And who is David Heil?

25 **A. David Heil at that time was with FDACS before he**

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1 **came to FWC.**

2 **Q.** Okay. All right. So that's from February of

3 2010. Let's turn to tab 10 and look at an e-mail

4 from June of 2010.

5 **A. It's also fair to say that in the e-mail, we did**

6 **respond to the calls on the 14th.**

7 **Q.** I appreciate that, sir.

8 **A. People were --**

9 **Q.** I'm sorry. Go ahead.

10 **A. People did respond. FWC did respond.**

11 **Q.** I appreciate that, sir; and your counsel will

12 have an opportunity to ask you about that --

13 **A. Okay.**

14 **Q.** -- on redirect examination.

15 On tab 10, sir, this is an e-mail from

16 June 17, 2010. And it is from FDACS, press

17 release to Rob Beaton. Do you see that, sir?

18 **A. Yes.**

19 **Q.** And it starts at the top, it says, for immediate

20 release, June 17, 2010. And if you look at the

21 head -- the title of the press release right

22 under the name Lee Schlesinger it says, Florida

23 provides for increased Apalachicola Bay oyster

24 production.

25 Do you see that, sir?

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1 **A. I do.**

2 **Q.** Then the first paragraph says, Tallahassee.

3 Florida Agriculture and Consumer Services

4 Commissioner Charles H. Bronson, and Chairman

5 Rodney Barreto of the Florida Fish and Wildlife

6 Conservation Commission, FDACS, today announced

7 that both the winter and summer oyster harvesting

8 areas in the Apalachicola Bay system will be

9 open for harvest seven days per week through

10 August 31, 2010.

11 Do you see that, sir?

12 **A. I do.**

13 **Q.** And who is Chairman Rodney Barreto?

14 **A. Rodney Barreto.**

15 **Q.** Oh, I'm sorry. I apologize, sir.

16 **A. We have a seven-member Board of Commissioners,**

17 **and he was the chairman.**

18 **Q.** Got it. Okay. And then the next paragraph says,

19 before this action was taken, the summer oyster

20 areas were closed for harvest on Fridays in June,

21 July, and August; and the winter oyster areas

22 were closed altogether for harvest during those

23 months. This action marks the first time that

24 the two agencies which jointly manage oyster

25 resources in Florida have permitted

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1 seven-day-per-week harvest during the summer
 2 months and opened the winter oyster areas during
 3 the summer months.
 4 Do you see that, sir?
 5 **A. I do.**
 6 **Q.** And you don't have any reason to dispute the
 7 accuracy of what's reported in the press release.
 8 Correct, sir?
 9 **A. I do not.**
 10 **Q.** All right. That's from June of 2010.
 11 Let's turn to tab 11, which is from July of
 12 2010. It's a few weeks after. And, again, there
 13 is an e-mail from FDACS, press release, but you
 14 forwarded it on to the Emergency Operations
 15 Center at the top. And at the bottom -- do you
 16 see there is a press release in the middle of the
 17 page? The title of it says, Bronson Extends
 18 Apalachicola Bay Oyster Harvesting License
 19 Application Period.
 20 Do you see that, sir?
 21 **A. Yes.**
 22 **Q.** And it reads, Tallahassee. Florida Agriculture
 23 and Consumer Services Commissioner Charles H.
 24 Bronson today announced the extension of the
 25 licensing periods for the Apalachicola Bay oyster

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1 harvesting license. The license, in addition to
 2 the saltwater products license, is required to
 3 commercially harvest oysters from the
 4 Apalachicola Bay system.
 5 And then the next paragraph reads, this
 6 action is being taken as a result of the BP
 7 Deepwater Horizon oil spill event, which is
 8 causing severe economic hardship and uncertainty
 9 for the oyster industry. Under normal
 10 circumstances, licenses for the fiscal year that
 11 begins July 1 have to be obtained between May 17
 12 and June 30, or applicants face a \$500 late fee.
 13 Today's action extends this year's licensing
 14 period through August 31, 2010, meaning that no
 15 late fee will be imposed after that date.
 16 Do you see that, sir?
 17 **A. I do.**
 18 **Q.** And you don't have any reason to dispute the
 19 accuracy of this press release either. Correct,
 20 sir?
 21 **A. I do not.**
 22 MR. ALLEN: This is GX-334 for the
 23 record, your Honor.
 24 BY MR. ALLEN:
 25 **Q.** All right. So this is from July of 2010. If we

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1 turn to tab 12, there's some series of e-mails
 2 from a little later in July of 2010. It's a few
 3 weeks later. I want to spend some time on this,
 4 sir. And I want to start at -- with the last
 5 e-mail. It's on the bottom of page 3. And on
 6 the bottom of page 3 there is an e-mail from
 7 David Heil. Did you see that, sir?
 8 **A. I do.**
 9 **Q.** And David Heil, again, he worked -- at this time
 10 did he work at DACS? Is that right?
 11 **A. Yes.**
 12 **Q.** Okay. And he sends an e-mail to you and Donald
 13 Duval and Bruce Buckson? It says, Rob, Bruce and
 14 Donald, this week we have received several
 15 complaints reporting a significant amount of
 16 unculled oysters and bag limit violations in the
 17 Apalachicola Bay system. Just passing on what we
 18 are hearing. Prior to this week we received a
 19 couple of complaints about undersized oysters.
 20 See attached.
 21 Do you see that, sir?
 22 **A. I do.**
 23 **Q.** And unculled oysters are not having the smaller
 24 oysters knocked off. Correct, sir?
 25 **A. Correct.**

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1 **Q.** And harvesters are responsible for culling
 2 oysters on the water. Right, sir?
 3 **A. Correct.**
 4 **Q.** And on page 2 there's a long e-mail from Captain
 5 Duval from July of 2010 that I would like to
 6 spend some time on, sir. But before we do, at
 7 this time in July of 2010 was Captain Duval still
 8 the captain of the Carrabelle field office in
 9 Franklin County?
 10 **A. Yes, he was.**
 11 **Q.** And again, this is the position that you later
 12 held from September 2012 to, I believe, September
 13 2014. Right, sir?
 14 **A. Correct.**
 15 **Q.** Then he sends an e-mail to you and Lieutenant
 16 Colonel Buckson. In the top paragraph he writes,
 17 the officers have continued working the
 18 Apalachicola Bay looking for unculled,
 19 undersized, untagged, or bag limit violations.
 20 It was reported to me that officers have issued
 21 several citations for undersized at Sammy Crum's
 22 Seafood. It is very apparent that we should
 23 probably readdress the size limit rule for
 24 applying to whoever possessed the product instead
 25 of the current rule stating while on the waters

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1 of the state. The current rule allows dealers to
 2 possess the product if it has been landed. This
 3 allows the issue to continue to be a major --
 4 strike that -- to be a potential major problem
 5 for the resource.
 6 Do you see that, sir?
 7 **A. I do.**
 8 **Q.** Okay. He then writes, I was contacted today by
 9 the assistant state attorney in Apalachicola,
 10 Jared Patterson.
 11 Do you know Mr. Patterson, sir?
 12 **A. I do not.**
 13 **Q.** He stated that the local county judge has made a
 14 ruling stating that he will not adjudicate
 15 someone without us, officers, bringing the
 16 oysters on cases for undersized to court to prove
 17 the case. This ruling will force the officers to
 18 keep bags of oysters and bring them to the
 19 evidence compound for storage. We currently
 20 cannot store this amount/volume of product at our
 21 facility and should not be mandated. This will
 22 cause our division to kill or destroy the
 23 resource by storing it for over two months
 24 awaiting a hearing.
 25 Do you see that, sir?

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1 **A. I do.**
 2 **Q.** The next paragraph says, the local judge is not
 3 accepting photographs as evidence in these types
 4 of cases. He has also in the past said he would
 5 not accept our GPS readings on closed water
 6 cases.
 7 Then he goes on to say, also, I would
 8 recommend that we need to readdress the current
 9 rules to allow officers to seize all bags of
 10 oysters from harvesters or possessors when a
 11 subject is found to be in violation of unculled
 12 or undersized oysters. Officers currently
 13 randomly select a bag from a harvester/processor.
 14 Once they do, they inspect the contents of that
 15 bag and measure the contents. It goes without
 16 saying that if an officer randomly selects a bag,
 17 one could argue that the other bags are probably
 18 undersized as well. We issue citations, and the
 19 rest of their catch is not subject to seizure
 20 unless we select another bag. A single case
 21 takes approximately one hour or longer to count
 22 and measure these types of cases. This loophole
 23 is and has been referred to by harvesters as the
 24 price of doing business.
 25 Do you see that, sir?

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1 **A. I do.**
 2 **Q.** And when he says harvesters there, he means
 3 oyster harvesters. Right, sir?
 4 **A. Correct.**
 5 **Q.** And then in the last paragraph -- that's not the
 6 last paragraph, sorry, just the last paragraph on
 7 this stage -- on this page. He says, dealers
 8 continue to benefit from illegal products being
 9 harvested by oystermen. At a meeting earlier
 10 this year, I was informed that oysters do not
 11 reproduce until they reach 2-inch size limits.
 12 From what we are seeing, the majority of the
 13 catch does not meet this limit. With that being
 14 said, I see the resource suffering from the
 15 oyster harvesting of the illegal product. With
 16 dealers in some cases encouraging this activity
 17 and profiting from the illegal or undersized
 18 product, they should also be accountable for the
 19 size limits.
 20 Do you see that, sir?
 21 **A. I do.**
 22 **Q.** And then if we go to the top of page 3, Captain
 23 Duval has two paragraphs that finishes his --
 24 finishes his e-mail here. He says, lastly, the
 25 officers as of late have not seen a case where

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1 the product is unculled. With that said, I am
 2 sure that there are some that have violated this
 3 but have not been inspected or caught as of date.
 4 This activity has been referred to by locals as
 5 being tonged in the hole.
 6 Have you ever heard the phrase tonged in the
 7 hole, sir?
 8 **A. That's the first time -- well, I read it before.**
 9 **Q.** Right.
 10 **A. But I've heard it through these documents.**
 11 **Q.** Got it. It says, I am writing the above as my
 12 thoughts on addressing the issues we are facing
 13 with the continual problems regarding oysters.
 14 Do you see that, sir?
 15 **A. I do.**
 16 **Q.** And this is in Craig Duval's e-mail of July of
 17 2010. And then on the next page it gets
 18 forwarded around to a couple individuals I want
 19 to ask you about. On page 1 of tab 12, which is
 20 GX-339 for the record, there is an e-mail here in
 21 the middle from Mike Wiwi. Do you see that, sir?
 22 **A. Michael Wiwi, yes.**
 23 **Q.** Wiwi?
 24 **A. Yes.**
 25 **Q.** Michael Wiwi. Who is Michael Wiwi?

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1 **A. He's retired now. He was a lieutenant colonel.**

2 **Q.** And then there's also an e-mail from Dave Pridgen

3 at the time. And what was Dave Pridgen's role in

4 July of 2010, if you know?

5 **A. Major regional commander in the Northwest Region.**

6 **Q.** And Mr. Pridgen writes, as you all know, this has

7 been a problem for some time. In addition, Tanya

8 James, president of the Franklin County Seafood

9 Workers Association, is asking that we change the

10 FWC oyster size rule so it applies to everyone,

11 not just the harvesters with oysters on state

12 waters.

13 Do you see that, sir?

14 **A. I do.**

15 **Q.** Again, as we sit here today, the size rule still

16 only applies on the waters to the state. Right,

17 sir?

18 **A. As far as our enforcement, correct.**

19 **Q.** All right, sir. So these are e-mails from July

20 of 2010. If we turn to tab 13, we get an e-mail

21 from August of 2010. And it's an e-mail in the

22 middle that's from Donald Duval to you and Dave

23 Pridgen. Do you see that, sir?

24 **A. I do.**

25 **Q.** And it says Rob, see attached photo of a sign at

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1 Webb's Oyster House in East Point. It says,

2 2-1/2 and up on oysters by 2 p.m. It is just an

3 example of dealers encouraging undersized oyster

4 harvest.

5 And then if we flip the page, sir, there's a

6 picture. Do you see the picture, sir?

7 **A. I do.**

8 **Q.** And in the middle in red it says, be in and

9 unloaded oysters by 2, 2-1/2 and up. Do you see

10 that?

11 **A. I do.**

12 **Q.** And East Point is in Franklin County. Right,

13 sir?

14 **A. Correct.**

15 **Q.** I believe it's just right across the bridge from

16 Apalachicola?

17 **A. Yes.**

18 **Q.** Okay. So this is from August of 2010. If we

19 turn to tab 14, sir, there is another e-mail from

20 August of 2010. It's a string of e-mails that

21 gets forwarded around. The bottom one is from

22 Michael C. Voisin, I think is how you pronounce

23 it. And the subject is Florida Oyster Letter.

24 MR. ALLEN: And this is -- just for the

25 record, tab 14 is GX-344.

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1 BY MR. ALLEN:

2 **Q.** It says, Bob, attached is a signed copy of the

3 GOIC's letter to Commissioner Bronson.

4 Do you see that?

5 **A. I do.**

6 **Q.** And can you just remind me who Commissioner

7 Bronson is?

8 **A. The commissioner for FDACS.**

9 **Q.** The head commissioner for FDACS?

10 **A. Yes.**

11 **Q.** And it gets forwarded through some people. And

12 one of the middle e-mails, David Heil forwards it

13 to Bruce Buckson, and I think attempted to

14 forwarded it to you but used your wrong e-mail

15 address. So Bruce Buckson forwards it to you

16 again on Thursday, July 29, 2010. Do you see

17 that?

18 **A. I do.**

19 **Q.** And then you forward it on to Donald Duval --

20 Craig Duval -- in August 2010. Do you see

21 that?

22 **A. I do.**

23 **Q.** Okay. And if we turn to the attachment, it's a

24 letter dated July 28, 2010. And if we go to the

25 second paragraph of the attachment -- and the

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1 document, again, is GX-344, and the Bates is

2 Florida ACF-1205757. The second paragraph says,

3 we certainly don't want to interfere in Florida's

4 fishery management programs, but we are concerned

5 about the very small Florida oysters being

6 supplied to the market. Grossly undersized

7 oysters harm the Gulf oyster industry's efforts

8 for economic recovery from the current oil

9 challenge.

10 And then the next paragraph says, please help

11 us maintain high consumer demand for Gulf of

12 Mexico oysters by preventing the harvesting and

13 shipping of undersized oysters.

14 Do you see that, sir?

15 **A. I do.**

16 **Q.** Do you know who Mike Voisin is?

17 **A. I do not.**

18 **Q.** Okay. All right, sir. Let's turn to tab 15.

19 The document we just looked at is from August

20 of 2010. The next e-mail is from February of

21 2011, a few months later. And I want to start at

22 the bottom of the e-mail chain just to give us

23 some context here.

24 MR. ALLEN: And, again, this is tab 15;

25 and the exhibit number is GX-1291.

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1 BY MR. ALLEN:
 2 **Q.** And on page 2 at the bottom e-mail before we get
 3 to the attachment, there's an e-mail from Nick
 4 Wiley. Do you see that, sir?
 5 **A. I do.**
 6 **Q.** I think you said earlier Nick Wiley is executive
 7 director of FWC?
 8 **A. Correct.**
 9 **Q.** Does he still hold that position today?
 10 **A. He does.**
 11 **Q.** And he writes to a number of people, hello, I
 12 have a meeting scheduled next week, Wednesday,
 13 with our new Commissioner of Agriculture and
 14 Chairman Barreto -- is that how you say that --
 15 Barreto?
 16 I would appreciate each of you giving some
 17 thought to our interactions with DACS and provide
 18 a list of possible agenda items that I could
 19 discuss with them.
 20 Do you see that?
 21 **A. I do.**
 22 **Q.** And then on the bottom of page 1 Mr. Wiley's
 23 e-mail is forwarded by a gentleman named
 24 Mr. Jim Brown. And his -- was he at the time the
 25 Director of the Division of Law Enforcement at

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1 FWC?
 2 **A. I would have to remember. I don't recall exactly**
 3 **when he -- he was lieutenant colonel; and then he**
 4 **was colonel for a time.**
 5 **Q.** Got it. The only reason I ask is the signature
 6 block on the bottom of page 1 says the Director
 7 of the Division of Law Enforcement.
 8 **A. Yes. He was colonel then at that time.**
 9 **Q.** Got it. And he writes an e-mail to a couple
 10 people forwarding Mr. Wiley's e-mail. He says,
 11 please let me know if you have any issues to
 12 provide Nick by COB this Thursday. Please ask
 13 Rob to provide a few bullets on the oyster issue
 14 from our perspective.
 15 Do you see that?
 16 **A. I do.**
 17 **Q.** And then on the next e-mail up, Mr. Wiwi forwards
 18 the e-mail to you on February 2, 2011. Do you
 19 see that?
 20 **A. I do.**
 21 **Q.** And he says, Rob, please see the below request
 22 from Colonel Brown. This is something we need to
 23 get done before the end of the day tomorrow. If
 24 you will take the first shot at putting a few
 25 bullets together, Bruce and I will review and

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1 then we can forward to Colonel Brown.
 2 Do you see that?
 3 **A. I do.**
 4 **Q.** And then you respond at 9 a.m. on Thursday --
 5 9:09 a.m. on Thursday to Mr. Wiwi and Mr. Buckson
 6 with the -- and you say, first draft. Do you see
 7 that?
 8 **A. I do.**
 9 **Q.** And then there is an attachment, if we flip over
 10 to the last page of the document; and there are
 11 some bullets here. Do you see that?
 12 **A. Yes.**
 13 **Q.** And it's correct, sir, that you drafted these
 14 bullets. Right, sir?
 15 **A. Yes.**
 16 **Q.** Okay. Flip to tab 16. This is the same set of
 17 e-mails. It's from 9:56 a.m. on the same day.
 18 It's about 50 minutes later from the e-mail we
 19 just looked at in tab 15. It is GX-1288. And
 20 you say, see attached second version.
 21 Do you see that, sir?
 22 **A. I do.**
 23 **Q.** Okay. And then let's look at the new attachment.
 24 The new attachment is on FL-ACF-01842925. Do you
 25 see that?

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1 **A. I do.**
 2 **Q.** And in the bottom here you have added some
 3 bullets in your second draft. It says, current
 4 issues, addressing complaints from the public and
 5 industry concerning undersized oysters. Closures
 6 in other states due to the oil spill created a
 7 huge demand for oysters. Florida waters were
 8 open. All oyster bars were open and a "get them
 9 while you can" mentality combined with demand
 10 created incentive to harvest undersized oysters.
 11 FWCLE -- and by that you mean by FWC Law
 12 Enforcement. Right, sir?
 13 **A. Correct.**
 14 **Q.** FWC law enforcement made more undersized cases in
 15 2010 than in the last five years. FWCLE cannot
 16 enforce size limits once product has landed.
 17 Do you see that, sir?
 18 **A. I do.**
 19 **Q.** And these are bullets that you drafted. Right,
 20 sir?
 21 **A. Yes.**
 22 MR. ALLEN: Your Honor, I anticipate I
 23 have about 15 minutes left in my examination.
 24 SPECIAL MASTER LANCASTER: We stand in
 25 recess.

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1 MR. ALLEN: Thank you.
 2 (Time Noted: 10:23 a.m.)
 3 (Recess Called)
 4 (Time Noted: 10:36 a.m.)
 5 SPECIAL MASTER LANCASTER: Proceed, counsel.
 6 MR. ALLEN: Thank you, your Honor.
 7 BY MR. ALLEN:
 8 Q. Major, we're back from the break. Can you turn
 9 with me to tab 18 of the binder, please. Tab 18
 10 are some e-mails from late September of 2013.
 11 And the bottom one is an e-mail from Bruce
 12 Cooper. Do you see that, sir?
 13 A. I do.
 14 Q. And who is Bruce Cooper? What was his role in
 15 September of 2013?
 16 A. Regional commander, major.
 17 Q. Was he your boss at the time?
 18 A. Correct.
 19 Q. And he writes a number -- e-mails a number of
 20 individuals, copies Jeffrey Hubert; and the
 21 subject is Oyster Operation. And he says, as
 22 many of you have been following the oyster
 23 problems in Apalachicola, we have currently
 24 reached a point of substantial abuse of the
 25 resource by a larger than normal segment of
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1 commercial oyster harvesters.
 2 Do you see that?
 3 A. Yes.
 4 Q. And he says, my officers are making size and area
 5 closure cases on a daily basis, but are not
 6 putting a dent in the abuse.
 7 Do you see that?
 8 A. I do.
 9 Q. And then Major Cooper forwards that e-mail to you
 10 and says, Rob, please get with your RPS in
 11 uniform and create an operational plan with the
 12 below in mind.
 13 And RPS stands for Resource Protection Squad.
 14 Right, sir?
 15 A. Correct.
 16 Q. And then he says, please get me a draft by the
 17 end of the week.
 18 You write back and say, I'm on it.
 19 The operational plan that ultimately came
 20 from this e-mail, that was the Black Pearl
 21 operational plan. Correct, sir?
 22 A. The timing is similar, so I believe it would be
 23 the Black Pearl.
 24 Q. Okay. So these e-mails were sent in September of
 25 2013, and I believe Black Pearl was the last week
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1 of October of 2013. Correct, sir?
 2 A. Correct.
 3 Q. Okay. And you oversaw execution of the Black
 4 Pearl operation. Right, sir?
 5 A. That's correct.
 6 Q. And you had Lieutenant Kent Harvey draft the plan
 7 for the operation. Correct?
 8 A. Correct.
 9 Q. And you oversaw the drafting of the plan? You
 10 reviewed -- strike that.
 11 You reviewed drafts of the operational plan?
 12 A. Reviewed and final approval, yes.
 13 Q. So you reviewed drafts of the operational plan,
 14 and you gave your final approval to the draft
 15 operational plan. Correct, sir?
 16 A. Correct.
 17 Q. All right, sir. So if we turn to 19 -- tab 19,
 18 which is JX-134, this is the actual operational
 19 plan for Black Pearl. Correct, sir?
 20 A. Correct.
 21 Q. And if we turn to page 1 of JX-134 -- again, this
 22 is tab 19 of your binder -- there is a Roman I
 23 that says Situation. Do you see that, sir?
 24 A. I do.
 25 Q. And the third sentence says, research indicates
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1 it takes oysters three years to reach a
 2 marketable size. Do you see that?
 3 A. Yes.
 4 Q. Okay. So it says, research indicates it takes
 5 oysters three years to reach a marketable size.
 6 Since the beginning of the year, there has been
 7 an exceptional increase in illegal harvest from
 8 shellfish. These violations seem to be on the
 9 rise with extreme and gross malice.
 10 Do you see that, sir?
 11 A. I do.
 12 Q. And you agree that as of October 2013 the illegal
 13 harvesting of shellfish was on the rise with
 14 extreme and gross malice. Correct, sir?
 15 A. I would.
 16 Q. If we turn to tab 20, sir, tab 20 is GX-1289.
 17 It's an e-mail from September of 2012. Do you
 18 see that, sir?
 19 A. I do.
 20 Q. So this is about a year before the Black Pearl
 21 operation. Correct, sir?
 22 A. Correct.
 23 Q. About 13 months?
 24 A. Yes.
 25 Q. E-mails were from September of 2012 and I think
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1 we just said Black Pearl was in October of 2013.
 2 Right, sir?
 3 **A. Correct.**
 4 **Q.** And September of 2012 is also the month where you
 5 took over as captain of the Carrabelle office in
 6 Franklin County. Correct, sir?
 7 **A. Yes.**
 8 **Q.** And on Wednesday, September 19, 2012, you write
 9 an e-mail to Major Bruce Cooper, who again, as we
 10 said at the time, he was your boss. Right, sir?
 11 **A. Correct.**
 12 **Q.** He was the regional commander for the northwest
 13 division. Right, sir?
 14 **A. Yes.**
 15 **Q.** And you write, FYI, illegal harvest is really
 16 exploding. We may need to expand our detail and
 17 bring in some out-of-area folks.
 18 Do you see that, sir?
 19 **A. I do. And it's also related to the subject line**
 20 **of Closed Area and Night Oystering.**
 21 **Q.** Got it. When you told Bruce Cooper, FYI, illegal
 22 harvesting is really exploding, you meant for
 23 that statement to be accurate. Correct?
 24 **A. I did.**
 25 MR. ALLEN: Thank you, your Honor. I
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1 have no further questions.
 2 Before I leave the podium, if I might,
 3 my colleagues inform me that I referred to
 4 some tab numbers without providing the
 5 exhibit numbers. Can I read those into the
 6 record very quickly, your Honor?
 7 SPECIAL MASTER LANCASTER: Sure.
 8 MR. ALLEN: Tab 2 is GX-105. Tab 8 is
 9 GX-100. And tab 10 is GX-331.
 10 Sorry. Tab 8 is JX-100, not GX-100.
 11 Thank you.
 12 REDIRECT EXAMINATION.
 13 BY MR. FAWAL:
 14 **Q.** Good morning, again, Major Beaton.
 15 **A. Good morning.**
 16 **Q.** I believe you testified earlier that you arrived
 17 in the Carrabelle office in September 2012. Is
 18 that right?
 19 **A. That's correct.**
 20 **Q.** Before joining the Carrabelle office, were you
 21 generally aware of the enforcement going on in
 22 that office?
 23 **A. I was not aware of the day-to-day operations in**
 24 **the Carrabelle field office. I was in tune with**
 25 **some of the oyster issues because of my liaison**
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1 **role with the FDA and also with the role I had in**
 2 **headquarters at the time with Division of Marine**
 3 **Fisheries Management.**
 4 **Q.** Were you familiar with the guidelines and
 5 requirements for enforcement in Apalachicola Bay?
 6 **A. As set by --**
 7 **Q.** FDA.
 8 **A. Okay. The FDA, yes, I was.**
 9 **Q.** What were those guidelines?
 10 **A. FDA sets a standard for patrol frequencies for**
 11 **harvest areas based upon risk factors. I'm not a**
 12 **scientist, so I can't go through all the criteria**
 13 **measures that are made. But Apalachicola Bay**
 14 **area, all of the public bars that are open for**
 15 **harvest has a requirement by the FDA to be**
 16 **patrolled eight times per month.**
 17 **Q.** Are you aware of whether the bay was patrolled
 18 eight times per month?
 19 **A. It was -- it far exceeded that. I was**
 20 **responsible for compiling the patrol data for all**
 21 **of the harvest areas around the state. And**
 22 **Apalachicola Bay areas always annually exceeded**
 23 **the patrol requirement by nearly almost 500**
 24 **percent.**
 25 **Q.** Was that true during the time you were in
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1 Carrabelle?
 2 **A. Yes.**
 3 **Q.** And that was true during the time you were at the
 4 headquarters as well?
 5 **A. Yes.**
 6 **Q.** During that time was there any requirement for
 7 the amount of time required for marine patrol to
 8 be on the water?
 9 **A. At that time for their annual evaluations,**
 10 **officers, in order to get a rating of achieved**
 11 **their expectations, one of the categories for**
 12 **coastal officers, officers assigned to coastal**
 13 **counties, was that they spend 70 percent of their**
 14 **work time in what we termed as boots in boats,**
 15 **meaning that you were in the boat, you were on**
 16 **patrol 70 percent of their requirement in order**
 17 **to meet their performance expectations.**
 18 **Q.** When you arrived in the Carrabelle office, what
 19 was your view generally of the state of law
 20 enforcement there?
 21 **A. It was very good. I had a great team. The**
 22 **lieutenant in Franklin County, Lieutenant Charlie**
 23 **Wood, he was born and raised in Franklin County,**
 24 **had a lot of pride in being from that area, was**
 25 **well in tune with not only industry people but**
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1 **just private citizens. He was also a pastor of**
 2 **the church in Franklin County. So he knew a lot**
 3 **of people. I was very confident in his ability**
 4 **to run the Franklin County squad and address any**
 5 **issues.**
 6 **Q.** Did they take their job seriously?
 7 **A. Oh, yes.**
 8 **Q.** Before we get to your time there, I want to look
 9 at a couple of documents that Mr. Allen showed
 10 you. If you will turn first to tab 9 in your
 11 binder, it's GX-302. This is February 2010. And
 12 I only ask because Mr. Allen gave me the
 13 opportunity to ask you what actually happened in
 14 this instance.
 15 **A. As a summary, information came from FDACS. It**
 16 **got up to me. I kicked it back to the captain of**
 17 **the Carrabelle office. And he responded to -- he**
 18 **addressed the complaints, what enforcement did**
 19 **regarding the complaints.**
 20 **Q.** And in the e-mail at the bottom Georgia's counsel
 21 directed you to the statement, FWC did not do any
 22 enforcement regarding these infractions. Do you
 23 see that?
 24 **A. I do.**
 25 **Q.** Do you remember him asking you about that?

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1 **A. Yes.**
 2 **Q.** Based on your review of the rest of this
 3 document, do you believe that's correct?
 4 **A. No.**
 5 **Q.** What is your understanding as to why you would
 6 receive information that was actually incorrect
 7 in this context?
 8 **A. Well, the information -- I thought you meant the**
 9 **question that counsel asked me.**
 10 **Q.** No, no, you did. I'm just trying to understand
 11 why you would receive an e-mail if it turns out
 12 someone was wrong.
 13 **A. Well, we didn't know -- we still received the**
 14 **e-mail. You don't know it's wrong until you get**
 15 **a response from the field saying exactly -- based**
 16 **on the computer-aided dispatch -- that's CAD --**
 17 **we did respond to the call on the 14th and issued**
 18 **warnings.**
 19 **On the other calls we issued a BOLA.**
 20 **Somebody was there. They arrived, and the vessel**
 21 **was gone.**
 22 **And I believe, again, you will see Captain**
 23 **Duval talking to David Heil saying that he had**
 24 **spoken to Joe several times; and he's given him**
 25 **his direct cell number in order to take**

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1 **information in a timely manner rather than it**
 2 **goes from one person to another person in an**
 3 **e-mail.**
 4 **So we established that ability to communicate**
 5 **directly with enforcement with FDACS staff so if**
 6 **we do see -- if they do see something that**
 7 **doesn't look right, they can immediately read**
 8 **that information to us; and we can work on either**
 9 **responding or taking appropriate action.**
 10 **Q.** Sir, I want to turn to another document that
 11 Mr. Allen asked you about. It's tab 12, I
 12 believe, in your binder, GX-339. You just
 13 mentioned Captain Duval. Georgia's counsel
 14 directed you to the longer e-mail from Captain
 15 Duval. It's on page 2 of this document. Do you
 16 see that?
 17 **A. I do.**
 18 **Q.** Sir, in the first sentence Captain Duval writes,
 19 the officers have continued working the
 20 Apalachicola Bay looking for unculled,
 21 undersized, untagged, or bag limit violations.
 22 Is that consistent with your view, that law
 23 enforcement was enforcing regulations at the
 24 time?
 25 **A. Yes.**

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1 **Q.** At the end of this e-mail Captain Duval writes, I
 2 am writing the above as my thoughts on addressing
 3 the issues we are facing with continual problems
 4 regarding oysters.
 5 What's your understanding as to what Captain
 6 Duval was trying to accomplish with this e-mail?
 7 **A. There's some -- another e-mail that refers to it**
 8 **with the -- we have a subgroup of harvesters, is**
 9 **what I'll refer them to, that are out there for**
 10 **an easy dollar. They will do whatever it takes**
 11 **to make a buck. Some of the recommendations that**
 12 **we saw about if one bag is greater than 20**
 13 **percent, all bags shall be deemed to be**
 14 **undersized, that was a way of focusing -- giving**
 15 **us some more tools in the toolbox to deal with**
 16 **these flagrant violators and take some of the**
 17 **cost incentive out of their harvesting practices.**
 18 **But information, even some of the numbers on**
 19 **the board, there's 1,700 licensees. And the**
 20 **issues with these severe and egregious violations**
 21 **were limited to a smaller subgroup of harvesters**
 22 **that had no vested history with the bay. Their**
 23 **family wasn't involved in the bay. They had,**
 24 **most of them, a lot of other personal issues,**
 25 **substance abuse. So they were out there just for**

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1 **the day, make the dollar, and then go back out.**
 2 **Those were the type of bad guys that our**
 3 **officers are trying to catch. We're not trying**
 4 **to catch the harvester who is making a valid**
 5 **effort, measuring the oysters, separating the**
 6 **oysters, having good oysters in his bags.**
 7 **Q.** Georgia's counsel suggested that after the BP oil
 8 spill, law enforcement was lax. Do you recall
 9 that?
 10 **A. I do.**
 11 **Q.** And the date of this e-mail is July 2010.
 12 Correct?
 13 **A. Are we still on tab 12?**
 14 **Q.** Still on tab 12.
 15 **A. I've got July 23rd.**
 16 **Q.** Yes, 2010.
 17 **A. Yes.**
 18 **Q.** And that was after the BP oil spill. Correct?
 19 **A. Yes. BP was in April of '10.**
 20 **Q.** And does this suggest to you that law enforcement
 21 is lax?
 22 **A. No.**
 23 **Q.** Did you ever see widespread harvesting of oysters
 24 of less than 2 inches?
 25 **A. I personally did not.**

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1 **Q.** Was it something that you were ever aware of?
 2 **A. We would hear -- just like this e-mail**
 3 **demonstrates -- there are several e-mails that**
 4 **demonstrate; but when we actually would narrow**
 5 **down the who, what, where, when is what law**
 6 **enforcement does. We don't operate on mass**
 7 **rumor. We take information. We vet it. We**
 8 **narrow it down. We try to identify suspects.**
 9 **Black Pearl and a couple of the other**
 10 **examples do show that the individuals that were**
 11 **participating in the illegal undersize harvest**
 12 **was a small percentage.**
 13 **By the time I had gotten there, the reason**
 14 **why that one e-mail said -- and we'll probably**
 15 **get to it -- that illegal harvest is exploding is**
 16 **because there is no longer any product in the**
 17 **bay. And these people that are looking to live**
 18 **for tomorrow -- or live for today rather, are**
 19 **going into closed, prohibited areas to get bags**
 20 **of oysters. They're not harvesting on the open**
 21 **bars because there is nothing left. The demand**
 22 **and their need to support their families or their**
 23 **habits or whatever they had pushed them to closed**
 24 **areas.**
 25 **So the reference to oyster -- oyster**

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1 **violations are exploding, as I pointed out to**
 2 **counsel, the subject line was Closed Prohibited**
 3 **and Night Harvesting. That's what we were seeing**
 4 **happen.**
 5 **Q.** And I believe it was your testimony, but was
 6 that -- when was that something you were seeing
 7 happening?
 8 **A. Well into 2012 when I first got there, I believe**
 9 **is when we started seeing this trend.**
 10 **Q.** And for context, was that before or after the
 11 oyster collapse?
 12 **A. I believe there was a quest to -- a request for**
 13 **the declaration in 2012. The exact date that it**
 14 **was declared a disaster -- a fishery disaster I**
 15 **don't recall.**
 16 **Q.** Turn your attention to tab 13. This is GX-1287.
 17 Georgia's counsel showed you a photo of this
 18 oyster house. Do you recall that?
 19 **A. I do.**
 20 **Q.** I direct your attention to the advertisement for
 21 2-1/2 and up oysters. Do you recall that?
 22 **A. I do.**
 23 **Q.** When law enforcement received this type of
 24 information, what would you do?
 25 **A. We would do several things. First part of --**

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1 **especially Lieutenant Wood and myself, our**
 2 **relationship and our role that we play in the**
 3 **area, we would talk to the processor and say, you**
 4 **know, this isn't the right thing to do.**
 5 **We first try to get compliance on their end**
 6 **voluntarily. Depending on their attitude, you**
 7 **know, we could possibly set up officers right at**
 8 **their docks because there's a nexus from the**
 9 **water to the landing, as was pointed out. So we**
 10 **can still do undersize enforcement right there at**
 11 **the docks and inspect the fishermen, hoping that**
 12 **that will curtail some of their efforts.**
 13 **There were a very small handful. There were**
 14 **two or three processors that I will say did**
 15 **encourage this; and it put the burden on the**
 16 **harvester. However, I'm sure that industry**
 17 **leaders, if they were here, would be -- take**
 18 **offense to the fact that it's being suggested**
 19 **that this was an industry-wide issue, that**
 20 **everybody was doing this.**
 21 **Q.** Did you feel that FWC had the tools to address
 22 issues with processors like this one?
 23 **A. We did in a way. Could there have been more**
 24 **tools in the toolbox? Sure. Would our ability**
 25 **to enforce undersized oysters in the processing**

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1 **facilities cause the collapse not to happen? No.**
 2 **This was a situation where enforcement --**
 3 **regrettably, due to the environmental conditions,**
 4 **we saw it. Those officers that had been there**
 5 **for a while knew the bay, had been there for**
 6 **years and years, seen it bounce back. The**
 7 **information we were getting there was nothing**
 8 **else enforcement-wise we could have done to save**
 9 **the bay.**
 10 **Q.** Just so we're clear, what was the status of
 11 Apalachicola Bay when you arrived in the
 12 Carrabelle office?
 13 **A.** **Again, shortly after I applied -- arrived, the**
 14 **request for the declaration had been made. I --**
 15 **I don't know the exact condition of the bay. But**
 16 **hearing what I heard when I was in Tallahassee**
 17 **prior to coming to Carrabelle in 2012 and getting**
 18 **up to speed with Lieutenant Wood and talking to**
 19 **processors and going to the processing facilities**
 20 **and seeing the mound of oyster drill shells next**
 21 **to the mound of half-shell shells, you could**
 22 **definitely see that there was a problem.**
 23 **Q.** And how did that affect issues you faced in law
 24 enforcement?
 25 **A.** **It challenged us because it pushed people out of**

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1 **the area.**
 2 **We took information. Again -- the biggest**
 3 **trend that we saw was folks going out illegally,**
 4 **harvesting in small runoff creeks where there**
 5 **were oysters in prohibited waters, which is a**
 6 **huge health safety issue. People can die**
 7 **literally from eating those oysters. There's a**
 8 **reason why those waters are prohibited and**
 9 **closed.**
 10 **So we saw that trend. And that was an**
 11 **indicator that there was no product left that**
 12 **they could get in a bag, get a reasonable number**
 13 **of bags there on the bay.**
 14 **Q.** Given that, did law enforcement set up special
 15 details to deal with those problems?
 16 **A.** **We did. Black Pearl was an example of that.**
 17 **That was a grander scale operation. A lot of**
 18 **logistics, bringing in officers from other areas,**
 19 **had to deviate some funding, hotels, scheduling.**
 20 **But the Carrabelle office had six counties.**
 21 **So we internally would always do smaller details.**
 22 **In fact, I believe there's a reference to the one**
 23 **about when I made the comment about it's**
 24 **exploding. That was a detail we did internally.**
 25 **So even though it's not a glamorous, multi-page**

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1 **operational plan, we were constantly working**
 2 **information. We would get this information from**
 3 **FDACS or other people. It would be very clear to**
 4 **our officers when we were in fish processing**
 5 **facilities, you knew what oysters looked like**
 6 **when they came from Cat Point or East Hole.**
 7 **They -- they have a distinct color. They have a**
 8 **distinct growth on them. Much like the oysters**
 9 **up here in Maine that I saw at a local fish**
 10 **house, all different oysters are all from Maine;**
 11 **but every one of them looks different.**
 12 **So if an officer would go into a processing**
 13 **facility and seen an oyster that had a tag on it**
 14 **that said Cat Point, but it's a different color**
 15 **oyster, different shape, different barnacle**
 16 **growth on it, he would know that that didn't come**
 17 **from East Point. This guy or gal very likely is**
 18 **harvesting from an area that's not open. Take**
 19 **that information, identify vehicles, patrol at**
 20 **night, look for remote boat ramps, find out where**
 21 **they're launching from, and eventually catch**
 22 **them.**
 23 **Q.** I show you a document that's marked GX-449. Let
 24 me know when you have had a chance to review it.
 25 **A.** **I have.**

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1 **Q.** Okay. And the date of this e-mail is
 2 September 8, 2012. Correct?
 3 **A.** **Correct.**
 4 **Q.** And it's from Lieutenant Wood; is that right?
 5 **A.** **Yes.**
 6 **Q.** And it's directed to a number of people, and
 7 you're on the copy line. Right?
 8 **A.** **Yes.**
 9 **Q.** The subject of the e-mail is Shellfish Detail?
 10 **A.** **Yes.**
 11 **Q.** Follow along with me. The first sentence reads,
 12 data presented this past week by the Department
 13 of Aquaculture has shown a significant drop in
 14 the number of oysters within Apalachicola Bay.
 15 Do you see that?
 16 **A.** **I do.**
 17 **Q.** Is that consistent with your testimony that when
 18 you arrived in Carrabelle, the oyster decline had
 19 begun?
 20 **A.** **Yes.**
 21 **Q.** The next sentence says, commercial harvesters in
 22 the area have confirmed this since the opening of
 23 the winter harvest areas. With the reduced
 24 landing of oysters, the price being paid by the
 25 dealers has skyrocketed to \$30 a bag to the

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1 harvester.

2 Do you see that?

3 **A. I do.**

4 **Q.** What's your understanding of what Lieutenant Wood

5 is communicating to you there?

6 **A. It's the basic concept of supply and demand, that**

7 **the -- there is still demand, and the price has**

8 **increased. But there's no oysters left really to**

9 **harvest in the bay.**

10 **Q.** So he continues, with these increased prices some

11 harvesters may leave Franklin County waters to

12 harvest in adjacent cooler county waters. Being

13 unfamiliar with these waters, they may find

14 themselves harvesting in closed waters as well as

15 some unscrupulous harvesters may be tempted to

16 harvest under the cover of darkness in closed

17 waters in the boundaries of other counties.

18 Again, what's your understanding of what he's

19 communicating there?

20 **A. Again, people are being forced to harvest**

21 **elsewhere. There is not a viable harvest in**

22 **Apalachicola Bay.**

23 **Q.** And the next paragraph begins, with that said we

24 are planning to put together a shellfish detail

25 to address night oystering and closed waters

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1 harvest of oysters in Franklin and Wakulla

2 County.

3 Do you see that?

4 **A. I do.**

5 **Q.** And is that consistent with the shellfish detail

6 referenced in the subject line?

7 **A. Yes.**

8 **Q.** And recollect for a moment that this e-mail is

9 dated September 8, 2012.

10 Tab 20 in your binder is GX-1289. I believe

11 Georgia's counsel just asked you about that. Do

12 you recall that?

13 **A. I do.**

14 **Q.** The date of this e-mail exchange is September 19,

15 2012. Do you see that?

16 **A. I do.**

17 **Q.** And the subject says Closed Area and Night

18 Oystering Arrest. Do you see that?

19 **A. Yes.**

20 **Q.** It says, FYI Blake and Jason arrested three more

21 individuals this morning oystering in Chaires

22 Creek in Ochlockonee Bay at 3 a.m.

23 First of all, why would they be making

24 arrests at 3 a.m.?

25 **A. These are, again, bad guys that we like to catch**

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1 **that had no regard for any rule that FWC had in**

2 **place. They were up in Chaires Creek,**

3 **Ochlockonee Bay at 3:00 in the morning trying to**

4 **conceal their operation under the cover of**

5 **darkness.**

6 **Q.** For those of us who may not know, where is

7 Ochlockonee Bay?

8 **A. Ochlockonee Bay, Ochlockonee River is the county**

9 **boundary line between Franklin and Wakulla**

10 **County. It's the eastern boundary of Franklin.**

11 **Q.** To be clear, is that in Apalachicola Bay?

12 **A. Oh, it's far removed from Apalachicola Bay.**

13 **Q.** Further down in this e-mail in the second

14 paragraph, the second sentence, Mr. Harvey

15 continues, also I want to note most of the

16 subjects arrested have been repeat offenders.

17 Is that consistent with your understanding of

18 the primary issues?

19 **A. It's completely consistent with it.**

20 **Q.** And then the last paragraph, Mr. Harvey

21 continues, Blake, Steven, and Jason have been

22 doing a good job standing on this and trying

23 their best in keeping a safe product on the

24 market in regards to shellfish. When you see

25 them, give them a pat on the back. They deserve

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1 it.

2 What's Mr. Harvey trying to communicate to

3 you there?

4 **A. That nobody wants to be out at 3:00 in the**

5 **morning. But these -- my team was dedicated to**

6 **do whatever they needed to do to ensure safe**

7 **quality oysters were reaching the market. This**

8 **is a good example of that -- law enforcement**

9 **anticipating a trend, setting up a detail to**

10 **target that trend, and having successful results**

11 **due to their hard work.**

12 **Q.** Georgia's counsel directed you to the e-mail from

13 you at the top. Do you remember that?

14 **A. Yes.**

15 **Q.** He noted -- it says, illegal harvest is really

16 exploding.

17 Do you see that?

18 **A. I do.**

19 **Q.** And then it also says, we may need to expand our

20 detail and bring in some out-of-area folks.

21 Do you see that?

22 **A. I do.**

23 **Q.** Did the Carrabelle office actually bring in some

24 folks?

25 **A. Yes.**

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1 **Q.** And when you wrote, illegal harvesting is
 2 exploding, what were you referring to?
 3 **A. The night harvest, closed, prohibited water**
 4 **harvest.**
 5 **Q.** Were you referring to harvesting in Apalachicola
 6 Bay?
 7 **A. I was not.**
 8 **Q.** Were you referring to size violations?
 9 **A. No, I was not.**
 10 **Q.** Bag limit violations?
 11 **A. No.**
 12 **Q.** So if Georgia's expert quoted you in this e-mail
 13 as part of overwhelming evidence that
 14 unsustainable harvest and not low river flows
 15 caused the Apalachicola Bay oyster fisheries
 16 collapse in 2012, would you agree with him?
 17 **A. If he used this specific statement from me, he**
 18 **was way off base.**
 19 **Q.** Georgia's counsel asked you a number of questions
 20 about the interaction between DACS and FWC. Do
 21 you remember that?
 22 **A. I do.**
 23 **Q.** In general, what's the relationship between FWC
 24 and DACS as it relates to law enforcement?
 25 **A. They're an entity that we share oyster oversight.**
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1 **So we're always communicating back and forth. So**
 2 **that's why you would see myself in my role as a**
 3 **captain in headquarters dealing with the FDA, the**
 4 **Food and Drug Administration, in those e-mail**
 5 **chains with regional personnel. David Heil and**
 6 **Chris Brooks would keep more or less everybody in**
 7 **the loop of what's going on. So it's open**
 8 **communications back and forth as part of a**
 9 **working relationship with another agency that**
 10 **shares similar responsibilities.**
 11 **Q.** Did you credit the information that you received
 12 from them?
 13 **A. Yes. We would -- you know, there would be broad**
 14 **complaints. I believe we hit the one example**
 15 **about nobody responded. We would look into it;**
 16 **and it's like, no, in fact we did respond.**
 17 **We would get complaints from some staff at**
 18 **DACS every once in awhile saying, you know,**
 19 **there's just way too many undersized oysters. We**
 20 **would communicate with them. We would try to get**
 21 **the details.**
 22 **What law enforcement does is, well, next time**
 23 **you see a bag of oysters come in that's**
 24 **undersize, it's got a high percentage of**
 25 **undersized, get us an SPL number, get us a name.**
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1 **And, again, our law enforcement would take that**
 2 **information, do their due diligence, do what law**
 3 **enforcement does, and eventually either disprove**
 4 **it -- we checked them twice since we got this**
 5 **information; there's no violation -- or confirm**
 6 **it and write the citation.**
 7 **Q.** And just for clarity, you testified earlier that
 8 DACS had jurisdiction over processors. Correct?
 9 **A. As it relates to tagging, time-temperature**
 10 **matrix, quality control, health safety issues.**
 11 **Q.** Turn to tab 16 in your binder, please. It's
 12 GX-1288.
 13 **A. Okay.**
 14 **Q.** And do you recall Georgia's counsel showed you
 15 two different versions of this document? There
 16 was a prior one; and then this one has some
 17 additional -- it's an attached second version.
 18 **A. Yes.**
 19 **Q.** And you testified earlier that these were some of
 20 your notes. Correct?
 21 **A. Yes.**
 22 **Q.** The top bullet reads, FWC works closely with DACS
 23 on oysters and other shellfish-related issues.
 24 What did you mean by that?
 25 **A. Those are all bullets of how we work together as**
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1 **a partnership in the enforcement.**
 2 **Q.** In the second section, the Current Issues
 3 section --
 4 **A. Yes?**
 5 **Q.** -- in the second bullet Georgia's counsel pointed
 6 you to the language that says, all oyster bars
 7 were open and a "get them while you can"
 8 mentality combined with demand created incentive
 9 to harvest undersized oysters.
 10 Was that something that law enforcement was
 11 aware of?
 12 **A. That was a mentality that we heard, and that's**
 13 **why I used it as a quote. That comment floating**
 14 **around the industry was -- it's a good**
 15 **summarization of what they were saying.**
 16 **Q.** And is your inclusion of it in this memo
 17 consistent with your view that it was something
 18 law enforcement could address?
 19 **A. Yes. There was an issue. But, again, it's a**
 20 **"get them while you can". We're dealing with**
 21 **very few processors and a handful of -- a small**
 22 **percentage of the 1,700 licensed individuals that**
 23 **can harvest in Apalachicola Bay. So a lot of the**
 24 **stuff is -- you know, there's information; but**
 25 **it's only a small group of people.**
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1 **Q.** Was the harvesting of undersized oysters
 2 something that law enforcement did address?
 3 **A. Absolutely.**
 4 **Q.** How?
 5 **A. On the water enforcement, checks. An example**
 6 **of -- we'll just use a five bags of oyster bag**
 7 **limit per harvester in the summer months where**
 8 **there's a four-hour harvest window. We could**
 9 **monitor these bars because at this time they were**
 10 **compressed to Cat Point and East Hole. And we**
 11 **could use binoculars, telescopes. We could have**
 12 **officers driving by the boats on patrol. And if**
 13 **two hours into the harvest period you saw a**
 14 **harvester that maybe had half a bag, but two**
 15 **hours into the harvest period you see a boat with**
 16 **two licensed harvesters, and they've already got**
 17 **three bags of oysters on the boat, odds are**
 18 **they're probably not doing a very good job**
 19 **measuring. So enforcement would focus based upon**
 20 **knowledge of the area, knowing what the reef will**
 21 **yield, and go to that person.**
 22 **Same thing, even though we weren't seeing**
 23 **high visibility patrols, we had unmarked assets.**
 24 **We would use aircraft. We would monitor people**
 25 **from shore that we suspected of being a -- one of**

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1 **these flagrant violators. And as we were**
 2 **monitoring them, the officer doing the monitoring**
 3 **would see the boat coming in and say, okay, Billy**
 4 **Smith is leaving the bar. It looks like he's**
 5 **headed to Jean's Seafood. And we would do a dock**
 6 **inspection, check them there.**
 7 **It's all based upon information, knowing the**
 8 **area, and doing what law enforcement does.**
 9 **Q.** Georgia's counsel asked you a number of questions
 10 about some of the options that law enforcement
 11 considered. So I'm going to show you another
 12 document that he did not show you. Let me know
 13 when you have had a moment to review.
 14 **A. Okay.**
 15 **Q.** For the record, this is JX-151.
 16 This is an e-mail from Leslie Palmer to a
 17 number of individuals including you. Correct?
 18 **A. Correct.**
 19 **Q.** It's dated September 17, 2012.
 20 **A. Yes.**
 21 **Q.** In the first sentence Ms. Palmer writes, Mark
 22 Berrigan did a good job of compiling all of the
 23 relevant issues re: the current oyster situation.
 24 Do you see that?
 25 **A. I do.**

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1 **Q.** Is that consistent with your understanding that
 2 Mark Berrigan put together the attached memo?
 3 **A. Yes.**
 4 **Q.** Did you receive that?
 5 **A. It was -- I'm not on the e-mail; so I don't**
 6 **specifically remember the date and time I**
 7 **received it and going through it. But I'm in the**
 8 **e-mail chain, so I received it.**
 9 **Q.** Let's -- let's turn to the first page of that
 10 management plan. Do you see at the top it says
 11 Management Plan Options for Recovery of Oyster
 12 Resources in Florida? Do you see that?
 13 **A. I do.**
 14 **Q.** What, if any, significance do you draw from the
 15 fact that it references a recovery of oysters?
 16 **A. Recovery means that there's already been a crash.**
 17 **Q.** Is that consistent with your understanding of the
 18 situation at Apalachicola Bay in September 2012?
 19 **A. From my knowing and talking to people and my**
 20 **personal observations, yes, it's consistent.**
 21 **Q.** And if you will -- there are a number of options
 22 listed here by Mr. Berrigan; and I won't drag you
 23 through all of them. But if you will turn to
 24 what's labeled 611 at the bottom -- this doesn't
 25 actually have page numbers -- there's a subject

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1 heading Possible Oyster Recovery and Management
 2 Options. Do you see that?
 3 **A. Yes.**
 4 **Q.** And so, again, Mr. Berrigan listed out a number
 5 of options, resource management options,
 6 regulatory options. But on the following page,
 7 6112, he has law enforcement options. Do you see
 8 those?
 9 **A. I do.**
 10 **Q.** And do you understand those to be options that
 11 law enforcement could consider as part of the
 12 recovery?
 13 **A. That's what he has listed here, yes.**
 14 **Q.** So I just want to ask about a few of these.
 15 Did law enforcement undertake check stations?
 16 **A. Not during my two years at Carrabelle, but they**
 17 **did implement them shortly thereafter.**
 18 **Q.** Okay. During your time did you see on-water
 19 enforcement?
 20 **A. Yes.**
 21 **Q.** Was that something that the Carrabelle office
 22 undertook during that time?
 23 **A. Absolutely, as demonstrated by the patrol --**
 24 **harvest area patrols documented with the FDA.**
 25 **Q.** The next bullet says off-water enforcement. Do

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1 you see that?

2 **A. I do.**

3 **Q.** Did Florida engage in off-water enforcement at

4 all?

5 **A. Yes, we did, monitoring vehicles. Even though we**

6 **couldn't do size-limit violations on land, if we**

7 **saw bags -- oftentimes the harvester will go into**

8 **a boat ramp and relay the bags in the back of**

9 **their pickup truck. It still requires shaking.**

10 **We can do a lawful inspection stop to enforce the**

11 **shaking. And, of course, if they're not tagged,**

12 **there is a violation there. If the dog is in the**

13 **back of the bed of the truck along with the**

14 **oysters, serious health safety issue. We can**

15 **enforce that.**

16 **So we did have off-the-water and on-the-water**

17 **enforcement.**

18 **Q.** The next bullet says, increase the number and

19 presence of officers. Did Florida increase the

20 number and presence of officers?

21 **A. As far as assigning any new paid, funded**

22 **positions, I don't know if we have. But at the**

23 **time, like I stated earlier, the Carrabelle**

24 **office had six counties. So we would frequently**

25 **pull officers from other counties to help augment**

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1 **our patrol presence in Apalachicola. Plus the**

2 **details that we would do, not only the big**

3 **glamorous operation Black Pearls, but the**

4 **regularly-occurring details that were put**

5 **together within the office area.**

6 **Q.** The next bullet down says, encourage judicial

7 support for law enforcement. Did FWC encourage

8 judicial support as well?

9 **A. Yes, we did. Again, part of my -- when I was in**

10 **Tallahassee and saw some of those 2010 e-mails, I**

11 **worked with -- as well as Captain Duval at the**

12 **time and Lieutenant Wood, the processors have an**

13 **organization -- the name escapes me. They were a**

14 **task force of some sort, just their own internal**

15 **group. We shared some of the concerns that**

16 **Major -- or Captain Duval at the time had. And**

17 **right around -- right before the time I got there**

18 **to the time I was there, we started seeing an**

19 **increase in penalties, increased number of**

20 **adjudications of guilt. And that's what law**

21 **enforcement does. We work with industry leaders**

22 **to also aid us in our goals. So we use other**

23 **people external to the agency to use their**

24 **position to help us accomplish a common goal.**

25 **Q.** The last bullet says, encourage and support

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1 industry self-regulation. Is that something that

2 FWC did as well?

3 **A. Yes, we did.**

4 **Q.** How so?

5 **A. Again, working with the groups. Apalachicola has**

6 **got some colorful characters, and they would**

7 **self-regulate in ways. There were mentioned--**

8 **the three or four of the small processing**

9 **facilities, like the one where the sign was and a**

10 **couple of others, those folks that were running**

11 **those knew that they were not held in very high**

12 **regard by the other processors and would -- they**

13 **would often -- I didn't witness it personally;**

14 **but I have heard comments and words if they were**

15 **to meet in various establishments around**

16 **Apalachicola. So that's one form of**

17 **self-regulation.**

18 **And we would also communicate with them, work**

19 **through the harvesters association, again, to**

20 **encourage them to do the right thing. The bay is**

21 **in a crisis. You know, the more the people can**

22 **do to do the right thing, the better chance the**

23 **bay may have.**

24 **But again, a lot of that was beyond our**

25 **control.**

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1 **Q.** You have testified some about Operation Black

2 Pearl. Georgia's counsel asked you some

3 questions about that. Do you remember that?

4 **A. I do.**

5 **Q.** They also showed you some of the statistics from

6 Operation Black Pearl. Correct?

7 **A. Correct.**

8 **Q.** Based on the results from Operation Black Pearl,

9 how widespread was the illegal harvest of

10 undersized oysters?

11 **A. It was a very small percentage. I believe it was**

12 **around 7 -- 7 percent is what the math came out**

13 **to be, that, you know, despite what we were**

14 **hearing, despite what --I call it the Chicken**

15 **Little concept. The sky is falling; the sky is**

16 **falling.**

17 **When we went out and did intensive**

18 **enforcement effort, the statistics didn't**

19 **validate it. You know, it showed that it was a**

20 **small percentage. And, again, I go back to say**

21 **that they were very flagrant percentage**

22 **violations that were occurring. But they were**

23 **done by a very small percentage of the**

24 **harvesters. And I'm very proud of the**

25 **enforcement we did there. We were very effective**

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1 in catching those bad guys I'll call them. In
 2 fact, Captain Duval mentioned it about the one,
 3 that most of these are repeat offenders. So it's
 4 a small group. And the comments -- the talk
 5 about taking the incentives away from those
 6 harvesters, those are aimed at that small group.
 7 It's not aimed at, again, the vast majority of
 8 the harvesters that are out there doing the right
 9 thing, have a generational vested interest in the
 10 bay.
 11 There's not a lot to do in Apalachicola.
 12 There's no Best Buy. There's no Sam's Club.
 13 There's no Wal-Mart. This bay is the people's
 14 lives for a whole bunch of the citizens there.
 15 So just like the processors would take offense if
 16 they were all painted with this broad brush that
 17 it's just gone crazy, so, too, would the vast
 18 majority of the harvesters. If they were painted
 19 with the brush that everybody is out here,
 20 they're all poaching, nobody cares, they would
 21 take great offense.
 22 Q. So could you turn to tab 8, JX-100. You
 23 testified earlier that Ms. Raffield -- Raffield
 24 had some concerns about Operation Black Pearl.
 25 Is that right?

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1 A. That's correct.
 2 Q. And were her concerns consistent with the view
 3 you just testified to about these issues being
 4 widespread?
 5 A. That was the belief, that while she -- she knew
 6 about this subgroup. In fact, it was
 7 specifically mentioned when we were talking; and
 8 it was a very long conversation. She was rather
 9 upset in the beginning. But when I talked to her
 10 about what we were doing, how we were doing it,
 11 much like I have explained to the Court, that set
 12 her at ease.
 13 I meant -- I said here this group talked
 14 about -- I let her know there was a large segment
 15 of the harvesters who are good people, have a
 16 vested interest in the bay. This group wants to
 17 be able to pass down the heritage down to their
 18 children and grandchildren. She agreed. She
 19 also agreed with me when I told her that there's
 20 a segment who could care less about the bay and
 21 are taking everything they can tong off the reef,
 22 off the bottom. And she used an expletive to
 23 describe this group. I didn't want to put it in
 24 a summary to a senator's aide. But she was well
 25 aware that there was a small subgroup of people

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1 that just don't care. So she was aware of this
 2 subgroup.
 3 What I had to dispel was her thought that we
 4 were not using any discretion, that we were
 5 coming in so heavy-handed right before the
 6 holiday season and how unfair this is to those
 7 people that are honest, hard-working people.
 8 That's what I had to communicate to her, that we
 9 were using discretion. We were being fair.
 10 Q. In the very last sentence of the large paragraph
 11 on page 2 of this document, do you see that?
 12 A. Yes.
 13 Q. The sentence reads, I provided an example of our
 14 recent enforcement efforts from November 12,
 15 which was a follow-up to the detail to see what
 16 type of compliance we may have gained.
 17 What did you mean by compliance you may have
 18 gained?
 19 A. Again, the percentages, looking at the number of
 20 users checked and the types of citations issued.
 21 Q. And just to direct your attention to the
 22 statistics directly below that paragraph, it
 23 indicates 111 users checked. Correct?
 24 A. Correct.
 25 Q. And four citations for undersized oysters.

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1 Correct?
 2 A. Yes.
 3 Q. And is that consistent with your view that there
 4 was compliance gained based on Operation Black
 5 Pearl?
 6 A. It's -- there was a decrease in those
 7 percentages. Black Pearl was 7 percent, and four
 8 out of 111, so just under 4 percent. You know,
 9 this was a follow-up just to make sure that --
 10 this was a -- more or less a one-day use of local
 11 assets to go out there unexpectedly because, you
 12 know, Black Pearl, after the third day, you know,
 13 they knew we were there.
 14 But -- so, you know, it's been consistent
 15 even from the -- some of the stats I saw with
 16 Black Pearl II, those periods it ran, the
 17 undersize cases that were made by the number of
 18 users inspected was very small at each one of
 19 these efforts.
 20 Q. Georgia's counsel asked you a number of questions
 21 about enforcement of oyster size limitations off
 22 the water. Do you recall those?
 23 A. Yes.
 24 Q. He showed you some documents where you advocated
 25 for potentially adding additional regulations.

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1 Do you remember those?

2 **A. Yes.**

3 **Q.** What's the purpose for advocating for additional

4 regulations?

5 **A. It's the same theme that related to Captain**

6 **Duval's e-mail back in 2010. I reiterated**

7 **basically the same thing, that we used to have**

8 **these people that are using -- they're not being**

9 **responsible. It's another tool in the**

10 **enforcement toolbox. We can write them citations**

11 **for undersized. Do we go through and measure**

12 **every bag and make every single bag a separate**

13 **case? In some cases we have. But in order to be**

14 **efficient, we know who these people are. It aids**

15 **us in expediting an inspection, taking out some**

16 **incentives.**

17 **The same thing with the size back in the**

18 **processing facility. It wasn't -- it's one of**

19 **those rules where -- you're passing a rule to try**

20 **to manage a few. The lawful fish houses wouldn't**

21 **be concerned. But we could still do oyster**

22 **enforcement, undersize enforcement, just**

23 **recommendations that were passed up the chain.**

24 **Q.** Did you believe FWC was unable to police oyster

25 size limitations without those regulations?

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1 **A. No.**

2 **Q.** Did you believe existing oyster regulations were

3 inadequate in allowing you to effectively enforce?

4 **A. No, I do not.**

5 **Q.** Based on your experience in Carrabelle and in

6 other offices, how common is it for you to

7 advocate for additional regulations?

8 **A. It's rather common. Enforcement -- there's a**

9 **process; and, you know, we're encouraged to --**

10 **any agency, any law enforcement organization**

11 **that's not looking to improve, become more**

12 **efficient, add tools to our toolbox -- as we**

13 **often say in the law enforcement world, you know,**

14 **you need to be constantly seeking improvement and**

15 **looking for other options and being more**

16 **efficient.**

17 **Q.** And Georgia's counsel asked you some questions

18 about tab 3. Will you turn your attention to

19 that document?

20 It's GX-662. Are you there?

21 **A. I'm there.**

22 **Q.** I believe you testified that this is -- this

23 first page is an e-mail attaching Law Enforcement

24 Perspective on the Oyster Issues in Apalachicola.

25 And that's a document you wrote. Correct?

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1 **A. I submitted it. It was a collaborative effort.**

2 **Q.** And Georgia's counsel read the paragraph under

3 the heading Undersized Oysters. Do you remember

4 that?

5 **A. I do.**

6 **Q.** The first sentence is, it is a well-known fact

7 that there is -- that there has always been

8 harvesting of undersized oysters in Apalachicola

9 Bay. The bay was in a healthy state several

10 years ago and could sustain the taking of a

11 certain percentage of undersize product.

12 However, several factors have affected the bay in

13 the past years.

14 What were the factors you were referring to

15 there?

16 **A. The lack of fresh water, the intrusion of -- like**

17 **I mentioned, seeing those mounds and mounds of**

18 **oyster drills at processing facilities, and, you**

19 **know, not only processors that are taking product**

20 **from the public bars, but also individuals who**

21 **have leases who managed their own harvest. We**

22 **saw similar things happening to the leaseholders**

23 **that didn't have overharvest because they're**

24 **managing their harvest. They were having the**

25 **same die-off as the public bars were having.**

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1 **Q.** And the section is entitled Undersized Oysters,

2 and under it you're discussing the health of the

3 bay. Is that because the harvest of undersized

4 oysters had become a problem because of the

5 health of the bay?

6 **A. No. That's -- the second sentence -- you know,**

7 **the bay was dying. It didn't matter whether it**

8 **was a legal-size oyster or a sub-legal-size**

9 **oyster.**

10 **Q.** And Georgia's counsel directed your attention to

11 several -- at least two recommendations on the

12 next page. Do you remember that?

13 **A. Yes.**

14 **Q.** And if you will flip to the first page of this

15 document, you will recall it's dated August 26,

16 2013?

17 **A. Yes.**

18 **Q.** And we just discussed Operation Black Pearl. You

19 testified earlier that that was in October 2013.

20 Right?

21 **A. Yes.**

22 **Q.** And that's after this document. Correct?

23 **A. Yes.**

24 **Q.** What, if any, effect did Operation Black Pearl

25 have on your belief that these regulations were

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1 necessary or appropriate?

2 **A. It validated that the rumors -- I know it's a**

3 **childish quote, but a Chicken Little. I think**

4 **most everybody knows who Chicken Little is,**

5 **screaming that the world is coming to an end. It**

6 **validated that what we were hearing, again, was**

7 **just limited to a small group of individuals.**

8 **So would recommendation No. 1 take some of**

9 **the incentive away from these individuals? Yes.**

10 **But likely they wouldn't then go -- they would**

11 **likely then change their behavior and go get**

12 **illegal product from an illegal area under the**

13 **cover of darkness and limit risk of being caught.**

14 **And we have a remedy to catch them that way, too.**

15 **So based upon the numbers and the percentages**

16 **of individuals we actually inspected that had**

17 **undersized, you know, it validated that it's not**

18 **this global, broad-brush idea. It's limited to a**

19 **small group of individuals.**

20 **Q. Georgia's counsel wrote some statistics up in**

21 **front of you. I just want to discuss those for a**

22 **moment. So the statistics from 2010 and '11 and**

23 **'12, do any of those suggest to you that the**

24 **harvest of undersized oysters was widespread?**

25 **A. No.**

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1 **Q. Do any of those statistics cause you concern?**

2 **A. No.**

3 **Q. Does the slightly higher percentage in 2012**

4 **suggest that undersized oyster harvesting was the**

5 **result of the oyster collapse?**

6 **A. I don't have percentages on the board here. It's**

7 **total numbers of citations.**

8 **Q. Are those numbers consistent with your view that**

9 **the issue was primarily limited to the small**

10 **group of repeat offenders you have discussed?**

11 **A. It does. And I believe there was an e-mail in**

12 **here somewhere saying that we wrote more**

13 **undersized cases than we have in years past,**

14 **being the physical year of 2010, 38 cases. Well,**

15 **that's when people were being compressed to some**

16 **of the smaller bars, and it actually shows**

17 **effective enforcement.**

18 **If this is when the trend is happening, the**

19 **BP oil spill, there's this, you know, "get it**

20 **while you can" mentality, to go from four arrests**

21 **in 2012 to this "get it while you can" mentality**

22 **in 2010, showing a difference of 38, to me it**

23 **shows that we were out there catching people.**

24 **It also shows physical year 2012 for**

25 **undersized, that matches the trend that we were**

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1 **seeing, the fact that there's no more product on**

2 **the reef, that people are going elsewhere,**

3 **closed, prohibited waters, night harvest to get**

4 **legal-size oysters, albeit that they are from**

5 **prohibited waters.**

6 **Q. In your view is there anything law enforcement**

7 **could have done to prevent the oyster decline in**

8 **2011 and 2012?**

9 **A. No, there is not.**

10 **Q. Why not?**

11 **A. We don't have control of things that are out of**

12 **our control. I have talked to -- through e-mails**

13 **and just conversation, and the volume of the**

14 **oyster drills, the failed efforts of the shelling**

15 **programs, it's really sad to see.**

16 **Q. If Georgia's position in this litigation is that**

17 **FWC mismanaged the oyster fishery in part because**

18 **of inadequate law enforcement, do you agree with**

19 **them?**

20 **A. I don't agree whatsoever. The Shellfish**

21 **Commission was one of the earliest law**

22 **enforcement agencies in Florida. Enforcement of**

23 **oysters, especially in Apalachicola Bay, is part**

24 **of our law enforcement culture.**

25 **I remember being a recruit in 1989 at the**

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1 **Academy and, you know, talking about Franklin**

2 **County and Apalachicola and East Point and**

3 **oysters. That enforcement philosophy begins at a**

4 **very young point in one's career. And to say --**

5 **Lieutenant Wood, who was born and raised in**

6 **Franklin County and who is now the captain of the**

7 **Carrabelle office, to say that he didn't care or**

8 **he didn't do enough or that none of my team or**

9 **the teams before me did enough, that's -- that's**

10 **agitating to me.**

11 **Q. Thank you for your time.**

12 **MR. ALLEN: Very briefly, your Honor.**

13 **REXCROSS-EXAMINATION**

14 **BY MR. ALLEN:**

15 **Q. Major Beaton, I want to thank you for your time**

16 **this morning. Very briefly a few questions.**

17 **I want to walk you through my statistics**

18 **here. Again, you testified that Black Pearl gave**

19 **you a good view of illegal harvesting in the bay.**

20 **Correct?**

21 **A. Yes.**

22 **Q. Okay. And you found a 7 percent violation rate.**

23 **Correct?**

24 **A. Correct.**

25 **Q. For Black Pearl?**

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1 **A. For undersize.**
 2 **Q.** And, again, in year 2010 we went through the
 3 numbers, and 7 percent in 2010 was 2,263. Yet,
 4 in fiscal year 2010 there were only 38 citations
 5 issued that year. That's correct, sir --
 6 **A. I think --**
 7 **Q.** -- that in fiscal year 2010 there were 38
 8 citations that year?
 9 **A. I think what you put up for 2010 were -- was it**
 10 **pounds?**
 11 **Q.** This is -- no, sir. This is number of trips.
 12 **A. Okay.**
 13 **Q.** 7 percent -- you know what a trip -- an oyster
 14 trip is, sir?
 15 **A. Yes.**
 16 **Q.** Okay. And it's not even counting users. This is
 17 just trips. This is just boats. 7 percent of
 18 32,330, again, is 2,263. Right, sir?
 19 **A. Yes.**
 20 **Q.** And in fiscal year 2010, there were 38 citations
 21 for the entire year for undersized oysters.
 22 Correct?
 23 **A. If that's what your statistics show, yes.**
 24 **Q.** Thank you.
 25 MR. ALLEN: No further questions.
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1 MR. FAWAL: Nothing from me, your Honor.
 2 SPECIAL MASTER LANCASTER: Help me here.
 3 There were 1,700, is that correct -- 1,700
 4 licensed harvesters?
 5 THE WITNESS: 1,700.
 6 SPECIAL MASTER LANCASTER: In 2012?
 7 THE WITNESS: In that general area, yes,
 8 sir.
 9 SPECIAL MASTER LANCASTER: And what
 10 percentage of those do you call the bad guys?
 11 THE WITNESS: I don't have -- I never
 12 assigned a specific percentage. Even though
 13 there were 1,700 licensed individuals, there
 14 would never be more than a few hundred boats
 15 on the bars at any given time.
 16 A lot of folks in the areas would pick
 17 the day to work, especially towards the end.
 18 They knew that it really wasn't worth going
 19 out day after day after day to only be able
 20 to get two bags. So if I were to -- just
 21 recalling the names that I called when I was
 22 up in Tallahassee and had to compile the end
 23 report for the FDA, that's one of the things
 24 we would look at. And I would say there were
 25 probably maybe 50 names that you would see
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1 frequently in the arrests.
 2 MR. ALLEN: Nothing further from
 3 Georgia, your Honor.
 4 MR. FAWAL: Nothing further from
 5 Florida.
 6 SPECIAL MASTER LANCASTER: You may step
 7 down.
 8 THE WITNESS: Thank you.
 9 MR. ALLEN: Your Honor, would you like
 10 to proceed with the next witness, or would
 11 you like to take a lunch?
 12 SPECIAL MASTER LANCASTER: If you give
 13 me the choice, we'll break.
 14 (Time Noted: 11:42 a.m.)
 15 (Recess Called)
 16 (Time Noted: 12:45 p.m.)
 17 MS. WINE: Your Honor, the State of
 18 Florida would like to call Mr. Eric Sutton to
 19 the stand. He is the assistant executive
 20 director for Florida Fish and Wildlife
 21 Conservation Commission.
 22 THE CLERK: Please raise your right
 23 hand.
 24 Do you solemnly swear that the testimony
 25 you shall give in the cause now in hearing
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1 shall be the truth, the whole truth, and
 2 nothing but the truth, so help you God?
 3 THE WITNESS: I do.
 4 THE CLERK: Thank you. If you could be
 5 seated, state your full name and spell your
 6 name for the record, please.
 7 THE WITNESS: My name is Phillip Eric
 8 Sutton, P H I L L I P, E R I C, S U T T O N.
 9 MS. WINE: Your Honor, may I approach
 10 the witness to provide him with a copy of his
 11 prefiled testimony?
 12 SPECIAL MASTER LANCASTER: Sure.
 13 DIRECT EXAMINATION
 14 BY MS. WINE:
 15 **Q.** Mr. Sutton, I have provided you with a copy of
 16 your prefiled direct testimony. Do you recognize
 17 that document?
 18 **A. I do.**
 19 **Q.** And, sir, do you adopt that as your testimony
 20 here today?
 21 **A. I do.**
 22 **MS. WINE: Thank you.**
 23 MR. ECHOLS: Good afternoon, your Honor.
 24 Barack Echols on behalf of the State of
 25 Georgia.
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1 CROSS-EXAMINATION

2 BY MR. ECHOLS:

3 Q. Good morning, Mr. Sutton.

4 A. Good morning.

5 Q. Good to see you again.

6 A. Good to see you.

7 Q. Now, Mr. Sutton, you are here today on behalf of

8 the State of Florida to testify to the roles and

9 responsibilities of the FWC; is that correct?

10 A. That's correct.

11 Q. And you also, sir, will detail the various

12 measures that the State of Florida has taken to

13 protect, conserve, and manage the oyster

14 resources in Apalachicola Bay?

15 A. As it relates to my direct testimony, yes, sir.

16 Q. And I believe you went on in your direct

17 testimony to explain that you will also describe

18 the actions that FWC took in response to the

19 historic oyster crash in 2012?

20 A. I do.

21 Q. And, sir, your position is the assistant

22 executive director of FWC?

23 A. That's correct.

24 Q. And you report to Mr. Nick Wiley; is that

25 correct?

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1 A. That's correct.

2 Q. And do you, in connection with Mr. Wiley, oversee

3 the operations of the FWC?

4 A. That's correct.

5 Q. You also state in your direct testimony, sir,

6 that you will be providing testimony about the

7 2012 to 2013 Florida Gulf Coast Disaster Report?

8 A. That's correct.

9 Q. And that's the disaster report that FWC put

10 together and submitted as part of the request for

11 a disaster declaration to the federal government.

12 Is that correct?

13 A. That is one reason. Correct.

14 Q. I'm sorry. What?

15 A. That is one reason, yes.

16 Q. Oh, sure. And the individuals involved in the --

17 strike that.

18 Two of the individuals involved in the

19 process of putting that report together were

20 Mr. Jim Estes and David Heil; is that right?

21 A. That's correct.

22 Q. Also in the course of putting that report

23 together, you have testified in your direct that

24 FWC considered the input from University of

25 Florida scientists. Is that right?

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1 A. That's correct.

2 Q. Similarly, during the course of the preparation

3 of the FWC report that was submitted as part of

4 the disaster request, FWC had some communications

5 with individuals at the federal government as

6 part of the -- of NOAA, the National Oceanic --

7 part of the Department of Commerce that is the

8 National Oceanic and Atmospheric Administration;

9 is that right?

10 A. Yes. They were part of the collaboration,

11 correct.

12 MR. ECHOLS: And for the court reporter

13 when we say NOAA, it's N O A A.

14 BY MR. ECHOLS:

15 Q. And you're here to testify to those aspects as

16 well?

17 A. Yes, sir.

18 MR. ECHOLS: If I could -- if I could,

19 your Honor, as has been our practice, I've

20 got a binder of documents.

21 A. Thank you.

22 Q. Sir, if I could direct you, please, to tab 1 of

23 this binder. And I'm not certain whether you

24 have seen this document yourself before, sir.

25 But I'll represent to you that this was --in the

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1 course of the litigation there's a discovery item

2 called an interrogatory by which Georgia asked

3 Florida questions about various aspects of the

4 case. And what you have here in tab 1 is

5 interrogatory No. 47, if you turn into the first

6 page. Are you there, sir?

7 A. I am.

8 Q. And in that response to interrogatory No. 47,

9 the -- first off, let me read what our question

10 to Florida was. It states, identify all persons

11 involved in the decision to request an oyster

12 fishery disaster in the Apalachicola Bay and all

13 persons involved in the drafting of such request.

14 Do you see that, sir?

15 A. I do.

16 Q. And then below, with the caveats that we lawyers

17 have to put into these things all the time about

18 objections, it states, to the best of Florida's

19 knowledge, the following persons were involved in

20 the decision to request the disaster declaration.

21 And it lists in the first instance from the

22 Governor's office, Andy Grayson and Rachel Cohen.

23 And is that an accurate statement, sir?

24 A. I believe it is.

25 Q. Then it goes down to the -- to FWC; and it

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1 identifies there Nick Wiley and Jim Estes. Is
 2 that also accurate?
 3 **A. That's correct.**
 4 **Q.** The interrogatory continues to state, to the best
 5 of Florida's knowledge, the following persons
 6 were involved in the drafting of the request or
 7 the provision of information to support it.
 8 And, again, you have Mr. Grayson from the
 9 Governor's office identified. And then you have
 10 to turn over to the next page, which is page 95
 11 numbered on the bottom. And there are a list of
 12 individuals from FWC identified here; and these
 13 are individuals who were involved in the drafting
 14 of the request or provision of information to
 15 support it, according to this response. We
 16 talked about already Nick Wiley and Jim Estes.
 17 Right?
 18 **A. Correct.**
 19 **Q.** And then there is a Bud Vielhauer?
 20 **A. Yes.**
 21 **Q.** And what position does Mr. -- or did
 22 Mr. Vielhauer hold at the time of the disaster
 23 request?
 24 **A. He's FWC's general counsel.**
 25 **Q.** And it goes on and mentions David Heil. And what

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1 position did Mr. Heil hold at that time?
 2 **A. Mr. Heil is or was -- he's now retired -- in our**
 3 **Marine Fisheries Management Division.**
 4 **Q.** Then there's three names following there, Luiz
 5 Barbieri, Jim Brown, and Steve Geiger. Is it
 6 your understanding that it's accurate that these
 7 individuals were all involved in the drafting of
 8 the disaster request or providing information in
 9 connection with it?
 10 **A. Yes. That's my understanding.**
 11 **Q.** And would you mind please telling the Court what
 12 positions they hold?
 13 **A. I'm unsure about Mr. Geiger's exact position.**
 14 **Luiz Barbieri is with our Fish and Wildlife**
 15 **Institute, and Jim Brown was at the time our head**
 16 **of law enforcement.**
 17 **Q.** Okay. Then we go down to the Florida Department
 18 of Agriculture and Consumer Services. And when
 19 we were here on Friday, for shorthand we were
 20 referring to that as DACS. Is it all right if we
 21 use that shorthand?
 22 **A. Yes, sir.**
 23 **Q.** And you will see we have got Mr. Kal
 24 Knickerbocker, Paul Zachiek -- if I'm saying it
 25 correctly -- and Chris Brooks. And are all of

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1 those individuals still currently employed by
 2 DACS?
 3 **A. I do not know the status of their current**
 4 **employment with DACS, if they're still there,**
 5 **retired, or moved on.**
 6 **Q.** How about Kal Knickerbocker?
 7 **A. I don't know for certain. I believe so.**
 8 **Q.** And then we can skip down past the Department of
 9 Environmental Protection. At the very bottom
 10 bullet there you have the U.S. Department of
 11 Commerce, and it identifies Roy Crabtree and
 12 Steve Branstetter. Are those two of the
 13 individuals with the federal government who were
 14 part of NOAA who were involved in communications
 15 relating to Florida's disaster request?
 16 **A. Yes. I believe they -- they both were.**
 17 **Q.** Now, let me ask you, sir, you are not identified
 18 as having been one of the people who was involved
 19 in the drafting of the request or the provision
 20 of information to support it. Were you not
 21 involved, sir?
 22 **A. I was not involved in the drafting of it, no,**
 23 **sir.**
 24 **Q.** And how about as far as providing information to
 25 support the disaster request; were you involved

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1 in that?
 2 **A. Not providing information, no.**
 3 **Q.** Were you involved at all, sir?
 4 **A. I likely would have been involved in my position**
 5 **in any major agency document, reviewing it,**
 6 **commenting, or giving my opinion. To the extent**
 7 **on this one, I'm not sure back then.**
 8 **Q.** You don't have specific recollection of having
 9 provided input to this -- the FWC report or the
 10 disaster request?
 11 **A. It's unclear. I mean, I don't have direct**
 12 **recollection. But as a senior staff member, it's**
 13 **not -- you know, it's not uncommon to be shown**
 14 **documents or provide input from the perspective**
 15 **of the position I was in at the time.**
 16 **Q.** Very good.
 17 MR. ECHOLS: Can we put up briefly,
 18 please -- we've got a -- just a slide
 19 identifying some of the individuals in this
 20 interrogatory, slide 1.
 21 BY MR. ECHOLS:
 22 **Q.** Now, I believe, sir, we went through these names.
 23 All of these individuals were identified by
 24 Florida as having taken part in the drafting or
 25 the provision of information relating to the

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1 disaster request.

2 Now, Nick Wiley, is he currently employed by

3 the State of Florida?

4 **A. Well, he's employed by the Florida Fish and**

5 **Wildlife Commission as a state agency; and he's**

6 **the executive director.**

7 **Q.** And he holds that position today?

8 **A. He does.**

9 **Q.** But he's not testifying with respect to these

10 issues?

11 **A. I don't believe -- I don't believe so.**

12 **Q.** You're going to provide the testimony?

13 **A. That's correct. I'm --**

14 **Q.** And you weren't 100 percent sure whether Kal

15 Knickerbocker currently remains in his position

16 as the head of DACS. But at least during the

17 time period that the request was being drafted,

18 he was the division director of DACS. Correct?

19 **A. That's correct.**

20 **Q.** Mr. Heil you mentioned had retired in 2016. He

21 was a FWC fisheries section leader, and he played

22 a fairly significant part in drafting the FWC

23 disaster report. Would you agree with me?

24 **A. I would agree.**

25 **Q.** And Mr. Heil, when I deposed him in February, was

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1 also working, I believe, as a consultant for the

2 State of Florida. Do you know if he's currently

3 working as a consultant?

4 **A. I don't know the status. I don't think so.**

5 **Q.** In any event, Mr. Heil is not going to provide

6 testimony in this trial concerning the FWC

7 report?

8 **A. That's correct.**

9 **Q.** And then we have Mr. Estes. Is Mr. Estes still

10 the deputy director of Marine Fisheries

11 Management at FWC?

12 **A. Yes.**

13 **Q.** And how -- what's the reporting relationship

14 between you and Mr. Estes? Is it lateral or do

15 you report up to him?

16 **A. No. I report directly to Nick Wiley. And each**

17 **of the divisions of fisheries, both fresh,**

18 **marine, law enforcement, research, and our**

19 **habitat and species division all report to me.**

20 **By that -- and Jim would report to the director**

21 **of marine fisheries who reports to me.**

22 **Q.** Okay. Mr. Estes reports to someone who reports

23 to you?

24 **A. Correct.**

25 **Q.** Oh, very good. And he currently is employed by

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1 FWC?

2 **A. Yes, sir.**

3 **Q.** But he's not -- and he's identified in the

4 interrogatory as having played a part in drafting

5 the FWC report. Is that accurate?

6 **A. That is.**

7 **Q.** But you're going to provide the testimony about

8 this as opposed to Mr. Estes?

9 **A. I'm -- on behalf of FWC, yes, sir.**

10 **Q.** Very good. Now, I would like to, if we could,

11 please, sir, talk about some of the things that

12 FWC does and did during this time period with

13 respect to management of the oyster fishery. All

14 right?

15 **A. Okay.**

16 **Q.** And you testified in your direct that FWC is the

17 management agency for the oyster fishery charged

18 with adopting regulations and modifying old

19 regulations to properly manage and conserve

20 wildlife resources. Is that right?

21 **A. Yes. That's correct.**

22 **Q.** Sure. And I can direct you to -- I'm looking at

23 paragraph 14.

24 **A. Thank you.**

25 **Q.** Sure. And similarly, you go a couple more

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1 paragraphs down into 16; and you state, do you

2 not, that it's a critically important part of

3 FWC's role to manage the oyster fishery?

4 **A. That's correct.**

5 **Q.** And that FWC in the course of managing the oyster

6 fishery deploys the full scope of its authority

7 to ensure that this unique natural resource is

8 protected. Right?

9 **A. Correct. That's my statement, yes, sir.**

10 **Q.** Now, when Mr. Berrigan was here -- were you here

11 on Friday?

12 Were you here on Friday when Mr. Berrigan

13 testified?

14 **A. I was in briefly. I was in here briefly.**

15 **Q.** Okay. Well, one of the things we spent a bit of

16 time on was the 2012 disaster request that had

17 the DACS report attached to the Governor's

18 letter. And I'm going to try not to repeat

19 things at all that we dealt with with

20 Mr. Berrigan. And so if we could, I would like

21 to go back earlier in time to talk about some of

22 the orders that FWC entered with respect to

23 management of the fishery after the BP oil spill.

24 Okay?

25 **A. Okay.**

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1 Q. To make this, hopefully, a little less painful,
 2 what we have done, instead of going Order by
 3 Order by Order, is if you will look to tab 2,
 4 please -- and you'll see at tab 2 we have GX-1304
 5 which has a brownish heading at the top. Do you
 6 see that, sir?

7 A. I do.

8 Q. Okay. And what this is, as you will see, is a
 9 printout in the FWC website listing the rule
 10 history. And since there are a number of orders
 11 that were entered along the way, I thought it
 12 might be a little simpler if you turn back,
 13 please, to the page that at the very bottom says
 14 13 of 17.

15 A. Okay. I'm there.

16 Q. Okay. And is it correct, sir, that on this page
 17 we have a running chronology of some of the
 18 orders that FWC entered with respect to the
 19 oyster fishery?

20 This should be the page that at the very top
 21 says Rule History: H-P. And then the first
 22 entry says Oysters. And you go across; and it
 23 says, effective October 7, 2001?

24 A. Correct. I see that.

25 Q. Okay. Very good. What -- now, the BP oil spill
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1 was in April 2010. Right?

2 A. Yes.

3 Q. So I'm starting there. So if we can skip down
 4 one, two, three -- to the fourth one, this would
 5 appear to be -- and correct me if this is
 6 wrong -- the first Executive Order that FWC
 7 entered after the BP oil spill with respect to
 8 the oyster fishery?

9 A. Correct.

10 MR. ECHOLS: And if we could pull that
 11 up, please.

12 BY MR. ECHOLS:

13 Q. Since we'll be looking at a number of these, if
 14 we just describe the format at the top; and then
 15 we won't have to repeat it.

16 Could you explain just the basic terminology,
 17 the way this is set forth in the first two lines
 18 here of the description?

19 A. Sir, are you referring to Oysters, Apalachicola
 20 Bay, Executive Order.

21 Q. Yes, sir. If you could just sort of walk across
 22 for the Court, so we'll just do it once; and we
 23 won't have to do it for each of the other ones,
 24 at least that part.

25 A. Okay. These are Orders that are granted to the
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1 executive director and designees that allow for
 2 changes in regulations for the Florida
 3 Constitution. And the codification you see here
 4 is -- references the order to which they were
 5 done. Like, for instance, No. 10-19 should
 6 reflect 2010, the 19th Order issued for that
 7 year, and then references the statute on which
 8 the regulation is based, and then its effective
 9 and expiration term.

10 Q. Got it. So in particular on this one where we
 11 have effective May 20, 2010, and then expired
 12 June 1, 2010, this would have been in place for
 13 that 10 days or so. Is that right?

14 A. Yeah. I believe -- yes, 10-plus.

15 Q. 10 or 11?

16 A. Right.

17 Q. Right. Let me just read this here. It says,
 18 opened the summer harvest season for oysters in
 19 Apalachicola Bay to relieve economic hardships on
 20 the commercial fishing industry that may have
 21 occurred in the area due to the BP Deepwater
 22 Horizon oil spill.

23 Would you explain, please, sir, what is meant
 24 here by to relieve economic hardships on the
 25 commercial fishing industry that may have
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1 occurred in the area due to the BP oil spill?

2 A. I'll do my best to summarize my understanding of
 3 that. The proceeding was the entire coast of the
 4 Gulf was under some duress or potential threat
 5 from the actual oil entering in there. And as
 6 part of that, there were some measures taken to
 7 allow for folks to harvest in this time period on
 8 a -- on a -- in areas that may have typically not
 9 been harvested until winter or summer, depending.
 10 Most -- most of that is because of public safety
 11 issues of summer or winter laws.

12 Q. And is it right the summer season generally is
 13 June, July, and August; and then the winter
 14 season begins in September. Is that right?

15 A. September 1.

16 Q. And there are, as you said, certain oyster bars
 17 will be designated as being able to be harvested
 18 only in one season and not during the other?

19 A. Correct. For public safety, human health safety
 20 issues.

21 Q. And, likewise, the break between having an oyster
 22 bar harvested during one of the seasons gives the
 23 oyster bar an opportunity to recover from the
 24 harvesting, too. Does it not?

25 A. I -- I would stick with saying that the reason
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1 **why they're generally closed is for mostly public**
 2 **health and safety reasons.**
 3 **Q.** Okay. It has nothing to do with the recovery of
 4 the resources?
 5 **A. The summer and winter bars really are not related**
 6 **to recovery of the population.**
 7 **Q.** Okay. Let's go down, if we could, please, to the
 8 next Order. So this Order we just read was dated
 9 May 20; and, you know, the oil spill was April
 10 21. This Order here says it's effective June 5,
 11 2010; and let me read it here.
 12 Opened harvest for oysters in Apalachicola
 13 Bay on Saturdays to relieve economic hardships on
 14 the commercial fishing industry that may have
 15 occurred in the area due to the BP Deepwater
 16 Horizon oil spill.
 17 Is it correct, sir, that this Order was
 18 changing the normal time when -- or period during
 19 which harvest could take place to make Saturdays
 20 available to harvest, whereas, otherwise you
 21 couldn't?
 22 **A. I would -- I would want to refer back to the**
 23 **original statute; but based on this language, I**
 24 **think it's a safe assumption that this was**
 25 **opening Saturdays when it may have otherwise not**

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1 **been per rule.**
 2 **Q.** And similar, as you testified earlier, that's
 3 given the concerns because of the BP oil spill.
 4 Right?
 5 **A. The -- what was thought to be an imminent threat.**
 6 **Q.** And if we go down one more Order, please, so here
 7 we've got an Order effective June 18. And it
 8 says, opened harvest for oysters in Apalachicola
 9 Bay seven days a week and opened the winter
 10 harvesting areas to help relieve economic
 11 hardships on the commercial fishing industry that
 12 may have occurred in the area due to the BP
 13 Deepwater Horizon oil spill.
 14 So here we were just talking about the winter
 15 bars and the summer bars. And is it correct that
 16 what this Order is doing is opening winter
 17 harvesting areas that normally wouldn't be opened
 18 until September 1, but it's opening them here
 19 effective June 18. Is that right?
 20 **A. That's correct.**
 21 **Q.** And so normally there would have been a period of
 22 June, July, and August when nobody would be able
 23 to legally harvest those bars; is that right?
 24 **A. That's correct.**
 25 **Q.** And in this instance, that period of -- of relief

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1 from harvest pressure is being removed?
 2 **A. I'm sorry, sir. What's the question?**
 3 **Q.** I'm sorry. So based on this Order then, rather
 4 than these oyster bars -- based on this Order
 5 then, rather than the oyster bars being free of
 6 harvesting for these three months, now the
 7 oystermen would harvest them during June, July
 8 and August?
 9 **A. Yes, because typically for health safety reasons**
 10 **they will not be.**
 11 **Q.** Let me ask you, if I could, about the next Order,
 12 which does not apply -- tell me if I'm
 13 incorrect -- doesn't apply to Apalachicola Bay.
 14 Would you please -- this refers to Pensacola Bay.
 15 Do you see that?
 16 **A. Yes, sir.**
 17 **Q.** And we have also here -- and I guess just for
 18 simplicity, I'll read it. It says, opened areas
 19 for harvest in the Escambia and Santa Rosa
 20 Counties in order to relieve economic hardships,
 21 and continuing on, as had been there previously.
 22 Now, Escambia and Santa Rosa Counties
 23 don't entail Apalachicola Bay; do they?
 24 **A. No, sir. They're geographically distinct.**
 25 **Q.** And -- but there's oyster harvesting in those

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1 counties as well?
 2 **A. Yes. Yes, there is.**
 3 **Q.** And like FWC did with respect to Apalachicola
 4 Bay, it also opened these areas in these other
 5 counties to allow oystermen to fish in those
 6 areas because of the potential threat of the oil
 7 spill. Is that right?
 8 **A. Yes, for the same reasons I mentioned earlier.**
 9 **Q.** I think we can skip the next one below, which
 10 allows fishermen to be able to stow tongs on
 11 their vessels. And if we could, go to the
 12 next one that says, effective September 1.
 13 And this particular Order says that, effective
 14 September 1, it allows the commercial harvest of
 15 oysters in Apalachicola Bay, Florida, seven days
 16 per week.
 17 Now, this was a standard Order; right? This
 18 was not an expansion of the harvesting windows,
 19 or was it?
 20 **A. I believe for the same principles, it was an**
 21 **expansion of the allowable harvest times.**
 22 **Q.** I'm sorry. Did you say it was an expansion?
 23 **A. I believe it is, to the best of my recollection**
 24 **again, without referring back to the rule.**
 25 **Q.** Okay. Let me -- if we could, please, turn to --

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1 so this Order is effective September 1, 2011. If
 2 you wouldn't mind turning briefly to tab 3 in
 3 your binder, sir --

4 **A. Okay.**

5 **Q.** -- and you will see the -- at the top there, sir,
 6 that this is the oyster resource assessment
 7 report for Apalachicola Bay, 2011. Do you see
 8 that?

9 **A. I do.**

10 **Q.** And these are the resource assessment reports
 11 that DACS puts together and then makes available
 12 to FWC for consideration in establishing any
 13 harvesting limitations; is that right?

14 **A. The reports do vary in format; but the standard
 15 protocol is utilized to assess oysters that
 16 inform us as the regulators. Correct.**

17 **Q.** And if we look down, please, to the last sentence
 18 of the first paragraph, do you see it says, this
 19 report summarizes oyster resource surveys
 20 conducted by the Division of Aquaculture from
 21 2009 through September 2011. Right?

22 **A. Yes, sir.**

23 **Q.** And September 2011, that's the same time frame as
 24 the last Order that we were looking at. Right?

25 **A. Yes.**

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1 **Q.** Now, I'm not sure if you were here for this part
 2 of Mr. Berrigan's testimony; but he explained
 3 that these are public documents. They even get
 4 published in the newspaper and the like?

5 **A. I would defer to Mr. Berrigan on how it's
 6 distributed, sir.**

7 **Q.** Okay. Would you agree at least that the -- these
 8 documents prepared by DACS, including their
 9 resource assessments, are available to FWC; are
 10 they not?

11 **A. Yes, they are.**

12 **Q.** If you wouldn't mind looking, please, to page 3
 13 of this document, and if you could go down to the
 14 paragraph that begins, production estimates, are
 15 you with me?

16 **A. Yes, sir.**

17 **Q.** If you would go to the third sentence of that
 18 paragraph beginning although production
 19 estimates; and it says, although production
 20 estimates exceeded 300 bags per acre on both reef
 21 complexes, estimated oyster population parameters
 22 on Cat Point Bar and Dry Bar suggest that stocks
 23 are not sufficiently abundant at this time to
 24 support intense commercial harvesting throughout
 25 the winter harvesting season.

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1 It's correct, as we just discussed, that the
 2 winter harvesting season typically begins at
 3 September 1?

4 **A. Correct.**

5 **Q.** And is this the type of information that FWC
 6 would consider in determining what restrictions,
 7 if any, to place on harvesting seasons?

8 **A. We utilize the DACS protocols to inform us.
 9 Correct.**

10 **Q.** And would that -- the DACS protocols and format
 11 include this type of information that is set
 12 forth here stating that the estimated oyster
 13 population parameters suggest that stocks are not
 14 sufficiently abundant at this time to support
 15 intense commercial harvesting throughout the
 16 winter harvesting season?

17 **A. It states that -- usually the line is 300 bags
 18 per acre on commercial harvesting. So I'm
 19 unclear as to why they draw that conclusion.**

20 **Q.** But it would be within FWC's authority if it
 21 determined that it made sense to impose
 22 restrictions on the harvesting based on the
 23 information that is being provided to it by DACS?

24 **A. Yes. We review their information in making a
 25 determination.**

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1 **Q.** If we could turn to the next page, page 4,
 2 please, and I'm only going to do one sentence in
 3 this. As I said, I don't want to repeat things
 4 here.

5 At the very, very bottom of this page there's
 6 a sentence that begins however, and then it
 7 continues onto page 5. It states, however, it
 8 remains uncertain whether oyster populations on
 9 Cat Point and East Hole Bars can sustain
 10 concentrated harvesting effort for the remainder
 11 of the winter harvesting season.

12 And, again, I ask you, sir, is this the type
 13 of information that DACS would provide to assist
 14 FWC in determining whether to impose any limits
 15 on harvesting availability?

16 **A. Yes. The reports are utilized to make the
 17 determination of harvesting.**

18 **MR. ECHOLS:** Can we move to our
 19 demonstrative, please, slide 2.

20 **MS. WINE:** Your Honor, I would just note
 21 that we spoke with Georgia's counsel
 22 yesterday and asked to exchange
 23 demonstratives or any compilation. They did
 24 share with us a few. This was not among what
 25 they shared with us. I haven't reviewed it

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1 yet. I just wanted to note that for the
 2 record.
 3 MR. ECHOLS: Judge, this may be my
 4 misunderstanding. Under the Case Management
 5 Order there is no requirement to share
 6 demonstratives at all. But as a courtesy,
 7 given that we had this discussion with
 8 Mr. Berrigan about data files, I did identify
 9 and provide to counsel some of the data
 10 files, even the bar charts that would be
 11 anticipated to use.
 12 As you can see from this, this is a list
 13 of dates. I could write it on a flip chart,
 14 but that would take me a lot longer.
 15 MS. WINE: Just to be clear, we offered
 16 to exchange all demonstratives, whether or
 17 not compilations, however defined, prior to
 18 each witness's testimony. As I'm hearing
 19 Georgia's counsel, they are refusing to do
 20 that; and we're just noting that for the
 21 record, your Honor.
 22 MR. ECHOLS: May I proceed, your Honor?
 23 BY MR. ECHOLS:
 24 Q. And, sir, so what I've just done here is simply
 25 to list the documents, the Executive Orders, with

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1 the dates that we've gone through so far up at
 2 least until the September 2011. And do you see
 3 how this follows through from the May Order of
 4 2010 after the BP oil spill to the two Orders in
 5 June, and then we just left off here at the
 6 September Order and the DACS report. Correct?
 7 A. That would -- it appears. I haven't seen this
 8 before. But, yes, it appears to follow what we
 9 just went through.
 10 Q. And you do -- please feel free to look back into
 11 tab 2 on the page that we were where there are
 12 listed all of the Orders relating to regulation
 13 of the oyster fishery.
 14 A. Okay. Thank you. I would like to do that.
 15 Q. Yes, please.
 16 MR. ECHOLS: And for the Court, we're back
 17 looking at the same time -- and we don't need to
 18 put it on the screen -- that page 13 of 17, which
 19 was that list of the Executive Orders.
 20 BY MR. ECHOLS:
 21 Q. Yes, sir?
 22 A. I do see some of those that we referenced and
 23 placed here that correspond to the dates.
 24 Q. Very good. Is it accurate, based on your review,
 25 whether of the chart or of the underlying

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1 information, that despite the fact that in
 2 September 2011 we had the warnings in the DACS
 3 report that Cat Point and East Hole may not be
 4 able to sustain intense or concentrated
 5 harvesting through the winter season, that there
 6 was no Order subsequently entered prior to the
 7 collapse which restricted harvesting of those
 8 bars?
 9 A. I recall uncertain if it could sustain commercial
 10 harvest.
 11 Q. I think that's -- I apologize. That's not what I
 12 said.
 13 That might not be or that it was uncertain
 14 that Cat Point and East Point -- I'm sorry -- Cat
 15 Point and East Hole would be able to sustain
 16 intensive or concentrated farming, that that was
 17 uncertain.
 18 Is it accurate, sir, that after that point in
 19 September 2011, FWC did not put in place any
 20 Executive Order limiting the harvest on those
 21 bars at least up until August 2012?
 22 A. I'm sorry. Can you restate the question, please?
 23 Q. Sure. We have the September 2011 DACS report.
 24 You recall that?
 25 A. The one we just referenced; correct.

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1 Q. Yes, sir. And that report said that it was
 2 uncertain whether Cat Point and East Hole would
 3 be able to sustain intensive or concentrated
 4 harvesting through the winter harvesting season.
 5 Do you recall that?
 6 A. I do.
 7 Q. And at the same time, September 2011, we have the
 8 FWC Order allowing harvest of seven days per
 9 week. Is that accurate?
 10 A. That's correct.
 11 Q. Subsequent to September 2011 when the DACS report
 12 noted this uncertainty, is it accurate that FWC
 13 did not enter any Orders restricting harvesting
 14 on Cat Point and East Hole at least up until the
 15 collapse?
 16 A. I think -- I think I would probably state that
 17 there was a progression of Orders that followed
 18 the dates beyond your graph here.
 19 Q. Yes, sir. I will get to those.
 20 A. Yes.
 21 Q. So this part of the chart is just going up to the
 22 collapse when it was identified in August 2012.
 23 And at least up until that point when the fishery
 24 collapsed, FWC did not enter any Orders that
 25 imposed any restrictions on the abilities of

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1 oystermen to fish at Cat Point or East Hole or
 2 any other oyster bar?
 3 **A. They -- that's correct; but -- they were allowed**
 4 **within the existing regulations and bag limits**
 5 **and size limits, et cetera.**
 6 **Q.** Correct. And those existing regulations being 20
 7 bags per person and the 3-inch size limit.
 8 Right?
 9 **A. With some tolerance in undersize allowance.**
 10 **Q.** Right, with the tolerance for those that were
 11 attached and a 5 percent additional, I believe,
 12 if it's --
 13 **A. 5 percent, that's correct.**
 14 **Q.** -- in the bag?
 15 All right. Let's go back then to --
 16 MR. ECHOLS: And we can take this down.
 17 BY MR. ECHOLS:
 18 **Q.** Let's go back then, please, to our list of the
 19 Orders in tab 2 where we were before. And if we
 20 could go down, please, one more Order. And this
 21 would be the line item about two-thirds of the
 22 way down that states effective June 1, 2012.
 23 Are you with me, sir, which is on this page 13
 24 of 17.
 25 **A. I'm there. I'm having difficulty finding it.**

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1 **Excuse me.**
 2 **Q.** Yes. Those kind of all run together.
 3 **A. Effective June 1, 2012.**
 4 **Q.** Yes, sir.
 5 **A. Thank you.**
 6 **Q.** Okay. And when we look at this effective June 1,
 7 2012, Order, it states, allow oyster harvest
 8 seven days a week, year-round in Apalachicola Bay
 9 by removing language that prohibits harvest of
 10 oysters on Fridays and Saturdays June 1 through
 11 August 31 and Saturdays and Sundays September 1
 12 through November 15.
 13 Do you see that?
 14 **A. I do.**
 15 **Q.** Does that mean, sir, that before this Order was
 16 entered in June 2012, it was the case that in the
 17 summer harvesting season, oysters were previously
 18 not permitted to be harvested on Fridays and
 19 Saturdays?
 20 **A. Again, counsel, I would want to review back to**
 21 **the statute; but it would imply that through this**
 22 **title. Correct.**
 23 **Q.** And then similarly, the part below, at least
 24 referring to the first month-and-a-half of the
 25 winter season, it would suggest that normally

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1 oystermen would not be able to harvest on
 2 Saturdays and Sundays during that first part of
 3 the winter harvesting season; but this Order is
 4 taking away that limitation?
 5 **A. That's what it states, yes.**
 6 **Q.** And what at this point in time, sir, was the
 7 conservation rationale that FWC was employing for
 8 allowing these additional days of harvesting,
 9 given the warnings that were present in the DACS
 10 report of the condition of the oyster resource?
 11 **A. I'm sorry. Can you state the question a little**
 12 **more succinctly, please?**
 13 **Q.** Sure. FWC is responsible with properly managing
 14 and conserving wildlife resources?
 15 **A. That's correct.**
 16 **Q.** And what was the conservation rationale at this
 17 point in time given the warning about the status
 18 of the oyster resource? What conservation
 19 rationale drove FWC to make these additional days
 20 of harvesting available here in June 2012?
 21 **A. Well, there's -- there's a number of factors that**
 22 **would weigh into that. One is how the oystermen**
 23 **are -- what they're harvesting, what -- what they**
 24 **were getting out there. Part of the rationale is**
 25 **here is with the collapse and with the -- you**

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1 **know, the loss of the proper environment, it**
 2 **was -- they needed to go and harvest those**
 3 **oysters; or they would likely suffer mortality.**
 4 **So I think it was in response to those factors.**
 5 **Q.** But at this point in time we had not yet had the
 6 August 2012 DACS report that brought to FWC's
 7 attention the dire status of the oyster resource.
 8 Correct?
 9 **A. I believe that -- the dates do not align.**
 10 **Correct.**
 11 **Q.** All right. So here we are -- we're in June 2012.
 12 And the last piece of information, at least in
 13 the official state documents that's been provided
 14 to FWC, is the September 2011 DACS report which
 15 warns that Cat Point and East Hole, the two most
 16 commercially-productive oyster bars in
 17 Apalachicola Bay, may not be able -- it was
 18 uncertain whether they would be able to sustain
 19 intensive and concentrated harvesting. Right?
 20 **A. It did report it was uncertain.**
 21 **Q.** And given that uncertainty and the management
 22 responsibility that FWC had to conserve and
 23 manage the wildlife resources, why is FWC opening
 24 up additional days of harvesting here in
 25 mid-2012?

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1 **A. Again, there's a number of factors that could**
 2 **play into that; and I'm not absolutely certain of**
 3 **those details. But it's based on, you know, the**
 4 **information we get from the protocol, what's**
 5 **going on with the market, what's going on with**
 6 **other environmental conditions. That's the best**
 7 **answer I have for you, counsel, on that.**
 8 **Q.** Would it be fair to say that it's not -- since
 9 we're talking about additional harvesting days,
 10 it's not designed for a conservation purpose?
 11 **A. I don't think that's a fair statement.**
 12 **Q.** Let's go down one more Order, if we could,
 13 please. Now, is it correct, sir, that in order
 14 to harvest oysters in Apalachicola Bay, you need
 15 to have a license?
 16 **A. Yes. You have to have a saltwater product**
 17 **license as well as a special Apalachicola Bay**
 18 **license.**
 19 **Q.** And I think you were here and we were both here
 20 when Major Beaton was testifying a moment ago
 21 about the number of licenses that were available,
 22 were issued during this period. Do you recall
 23 that testimony?
 24 **A. I recall the -- generally the testimony. I don't**
 25 **recall verbatim.**

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1 **Q.** Sure. And this particular Order here that's
 2 effective -- that's effective on July 1, 2012, is
 3 it correct that the way the Court should
 4 interpret this is this is providing an additional
 5 two weeks to oystermen to be able to apply to get
 6 a license in order to harvest in Apalachicola
 7 Bay?
 8 **A. Is this the one that's highlighted on the screen,**
 9 **sir?**
 10 **Q.** Yes, sir. It says, extended the licensing period
 11 for the 2011-2012 saltwater product license
 12 associated with the Apalachicola Bay oyster
 13 harvesting license from June 30, 2012, until
 14 July 13, 2012. Right?
 15 **A. Correct.**
 16 **Q.** So normally the ability to get one of these
 17 saltwater product licenses would cut off June 30;
 18 is that right?
 19 **A. I take that from the language here, yes.**
 20 **Q.** But the Executive Orders that FWC entered gave
 21 fishermen, oystermen, another two weeks to get a
 22 license?
 23 **A. That's correct.**
 24 **Q.** Making more time, more licenses available for
 25 people to be able to fish in Apalachicola Bay?

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1 **A. Is that a question, sir?**
 2 **Q.** Yes, sir.
 3 **A. It would allow the fishermen to have more time to**
 4 **utilize their license.**
 5 **Q.** Okay. We're up to August 2012. If I could ask
 6 you, please, to look to tab 5 in your binder.
 7 **A. Okay. I'm there.**
 8 MR. ECHOLS: And for the record, at
 9 tab 5 we have GX-426.
 10 BY MR. ECHOLS:
 11 **Q.** And as is always a bit of a hassle, it's a string
 12 of e-mails; and so to get the sequence, you have
 13 to go to the back end first and work your way
 14 forward.
 15 And so at least temporally the first e-mail,
 16 if you're with me, sir, would be from Leslie
 17 Palmer dated August 10, 2012, at 8:58 a.m. Are
 18 you with me?
 19 **A. Yes.**
 20 **Q.** And this e-mail is going to David Heil and
 21 Mr. Berrigan. Do you see that?
 22 **A. I do see it.**
 23 **Q.** Excuse me. And the subject line here is Draft
 24 Apalachicola Bay Oyster Resource Assessment.
 25 Who, sir, is Jessica McCawley?

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1 **A. Jessica is our director of Marine Fish**
 2 **Management.**
 3 **Q.** That's at FWC?
 4 **A. At FWC, correct.**
 5 **Q.** If we could go to the text of the e-mail from
 6 Ms. Palmer, who is identified here as the
 7 director of the Division of Aquaculture. And so
 8 we are here in August of 2012. And Ms. Palmer is
 9 writing to Jessica McCawley, wanted to make sure
 10 you see a draft copy of annual AB, Apalachicola
 11 Bay, oyster assessment report. Commissioner
 12 Putnam may call Nick Wiley about this so wanted
 13 to be -- to make sure you had a copy. We will be
 14 diving some of our new plants next week, which
 15 should be in better shape but certainly not by
 16 much. This has not yet been released to Franklin
 17 County as it is still in draft form. And we want
 18 to make sure you have a chance to review prior to
 19 release. Give me a call if you need more
 20 information or want to discuss further.
 21 And if you would look to the attachment, if
 22 you would confirm for me that it appears at least
 23 to be a draft of that August 2012 report that
 24 brought to FWC's attention the dire condition of
 25 the oyster resource?

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1 **A. I would agree this attachment appears to be a**
 2 **draft of that report.**
 3 **Q.** And, again, this is one of those resource
 4 assessment reports that DACS puts together,
 5 provides to FWC to assist it in managing the
 6 fishery?
 7 **A. Correct.**
 8 **Q.** If we could go up a couple of e-mails actually to
 9 the top, just to track this, you have got the
 10 e-mail to Ms. McCawley. Then this gets forwarded
 11 by Mr. Heil. And then it continues up the chain
 12 to -- at the very top you see we've got an e-mail
 13 from Jim Estes.
 14 **A. I'm sorry. I was reading some of the chain there**
 15 **to put it in proper context.**
 16 **Yes, sir. I'm sorry.**
 17 **Q.** No. And, of course, in any of these, feel free
 18 to direct me if it would assist the Court to
 19 understand what's taking place.
 20 **A. I'm sorry, sir. Go ahead.**
 21 **Q.** Are you with me on the top one now?
 22 **A. Yes.**
 23 **Q.** Okay. So at the very top now we've got Jim
 24 Estes, who is the assistant executive director
 25 of FWC; is that right?

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1 **A. No. Jim is the -- he's the deputy director for**
 2 **the Marine Fish division.**
 3 **Q.** Okay. Yes. Then we have Nick Wiley who is the
 4 executive director. Correct?
 5 **A. Yes, that's correct.**
 6 **Q.** Very good. If we could highlight what Jim is
 7 writing to Nick, cc'ing a couple of other folks,
 8 he writes, you may get a call from Commissioner
 9 Putnam about low numbers of oysters in
 10 Apalachicola Bay, lowest in 20 years in some
 11 areas. The commissioner may ask us to close the
 12 fishery on the weekends, which we can do per
 13 citing the statute below, or take more
 14 restrictive measures. I know you are busy today,
 15 but would you like to talk to me and/or David
 16 about this?
 17 Do you see that?
 18 **A. I do.**
 19 **Q.** And Commissioner Putnam, that would refer to the
 20 commissioner of the Department of Agriculture and
 21 Consumer Services?
 22 **A. That's correct.**
 23 **Q.** And it notes here that the commissioner may ask
 24 us, which I -- would you take that to be FWC?
 25 **A. I think that's a safe assumption.**

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1 **Q.** And would it be within the power of FWC at this
 2 time to close the fishery on weekends?
 3 **A. Sure. We have that authority to do that.**
 4 **Q.** And then Mr. Estes also says that the
 5 commissioner might ask that FWC take more
 6 restrictive measures. And under FWC's
 7 constitutional authority, they're able to impose
 8 restrictive measures to protect and conserve and
 9 manage the oyster resource. Right?
 10 **A. Yes. It's indicated there in our string of**
 11 **Executive Orders that restrict it beyond that --**
 12 **from this point forward.**
 13 **Q.** And here we have -- this is August 2012, right
 14 around the time of this DACS oyster assessment
 15 report being issued. Right?
 16 **A. This was the time it was being discovered about**
 17 **the collapse. Correct.**
 18 MR. ECHOLS: I'm sure I'm screwing
 19 something up here. Apologies.
 20 BY MR. ECHOLS:
 21 **Q.** All right. If we could go back, please, to the
 22 tab 2, which is our list of Executive Orders, on
 23 that page 13 of 17, and where we had left off was
 24 at the effective July 1 Order, which is about
 25 fourth from the bottom that would extend the

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1 licensing period. Do you recall that?
 2 **A. I do.**
 3 **Q.** And the next one in sequence goes down which is
 4 effective October 1, 2012. And would your
 5 understanding of the way these Orders work and
 6 are listed on the FWC website be that this is the
 7 sequential -- that this is the sequence by date
 8 as to when they're entered?
 9 **A. That's what our website intends to do.**
 10 **Q.** So now, the next one we have hit here is October
 11 2012. But the -- the report was transmitted --
 12 the draft report was transmitted to FWC in August
 13 2012. Do you recall that?
 14 **A. Yes.**
 15 **Q.** And so in -- we don't have an Order from August
 16 2012 that imposed any restrictions on oyster
 17 harvesting, nor an Order imposing any
 18 restrictions on oyster harvesting in September
 19 2012. Would you agree with me?
 20 **A. I would agree.**
 21 **Q.** Now, this Order actually says Bay County. And it
 22 states, lowered the commercial bag limit for
 23 oysters in Bay County from 20 to 10 60-pound bags
 24 per person or vessel, whichever is less, for the
 25 month of October.

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1 Do you see that?

2 **A. I do.**

3 **Q.** Now, so this Order, because it applies to Bay

4 County, does not impose any restriction on

5 harvesting in Apalachicola Bay. Is that right?

6 **A. I don't -- I don't believe so.**

7 **Q.** And Bay County is another area that has -- that

8 oyster harvesting takes place?

9 **A. Yes.**

10 **A map would be very beneficial; but, yes, the**

11 **county -- clearly for having restrictions,**

12 **there's oysters there.**

13 **Q.** And I take it that given that there are

14 restrictions being imposed by FWC that the Bay

15 County oyster resources is experiencing some

16 issues with their abundance as well. Would that

17 be a fair understanding?

18 **A. It would be fair we were getting some sort of**

19 **information for us to take an action, clearly.**

20 **Q.** And that's entirely within what the mandate of

21 FWC is, to take such actions to conserve and

22 manage the oyster resource regardless of the

23 county. Right?

24 **A. That's correct. It's statewide.**

25 **Q.** Statewide. And here we have a statewide, in

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1 fact, southeastern United States-wide drought

2 taking place. Is that your recollection?

3 **A. That's my understanding.**

4 **Q.** As this Order being entered at this point in time

5 in October 2012 would reflect, it may be a fair

6 reading that the Bay County oysters, which do not

7 depend on any flow from the Apalachicola River --

8 that the Bay County oysters as well are

9 experiencing some health or abundance issues?

10 **A. Again, sir, I'm not sure what data was provided**

11 **to -- for them to -- to put this Executive Order**

12 **in place. It may have been. There may have been**

13 **other factors as well.**

14 **Q.** But Executive Orders issued by FWC, FWC does not

15 enter into these Executive Orders lightly?

16 **A. No, we -- no. It's a very fluid process, and**

17 **we're able to respond depending on a number of**

18 **factors. And, you know, sometimes we'll issue an**

19 **Executive Order and get some more information and**

20 **rescind it or change it. As you can see, there's**

21 **a number of them.**

22 **Q.** And is it correct that Bay County is not

23 connected to the Apalachicola River?

24 **A. I -- I would hate to say; but I would like to see**

25 **a map exactly to make sure of my testimony**

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1 **given --**

2 **Q.** I'll make sure I get one; but we'll -- as we go

3 forward. I'm afraid I don't have it in my pocket

4 right now.

5 All right. Let's go --

6 **A. And if I may --**

7 **Q.** Sure.

8 **A. -- just to clarify, you know, I understand that**

9 **Bay County is in the Panhandle somewhere. But I**

10 **would want to be able to make sure -- it's**

11 **usually Wakulla and Franklin County are the ones**

12 **described with Apalachicola.**

13 **Q.** Sure.

14 **A. And there is another county, but --**

15 **Q.** But you did -- there was a point in time in

16 November that some restrictions were placed on

17 oyster harvesting in Apalachicola Bay; and I

18 believe you testified about this in your direct.

19 And in particular --

20 MR. ECHOLS: We can take that down.

21 BY MR. ECHOLS:

22 **Q.** In particular, if it helps to guide you along,

23 paragraph 52 of your written direct, sir.

24 **A. Thank you.**

25 **Yes, sir, I'm there.**

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1 **Q.** Very good. And in paragraph 52, you explain

2 here that FWC prohibited commercial harvesting in

3 the bay on Saturdays and Sundays beginning

4 November 17 through May 31 and that this

5 effectively reduced the opportunity to harvest

6 during the winter season by almost 30 percent.

7 Is that accurate?

8 **A. That's what my testimony is, yes, sir.**

9 **Q.** And then since the draft report was provided to

10 FWC in August, the first Order that went into

11 place limiting harvesting didn't happen in

12 September or October. It didn't take effect

13 until mid-November. Is that correct?

14 **A. That was our -- our first Executive Order;**

15 **correct.**

16 **Q.** And this Order did not restrict harvesting

17 completely. It simply limited harvesting to not

18 be able to take place on the weekends?

19 **A. Saturdays and Sundays.**

20 **Q.** Saturdays and Sundays.

21 This is after the Governor has -- this is

22 after the Governor has already written to the

23 U.S. Department of Commerce to request an oyster

24 fishery disaster declaration; is it not?

25 **A. I -- yes.**

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1 **Can we refer to that?**

2 **Q.** Absolutely, yes. If you wouldn't mind looking,

3 please, to tab 4 in your binder.

4 **A. Yes, correct. I couldn't recall if it was**

5 **September 5 or 6. It's September 6.**

6 **Q.** Right. And this is JX-77, which we spent some

7 time with Mr. Berrigan on; and so I don't want to

8 belabor it. But if we look at the first couple

9 of paragraphs here, do you see that Governor

10 Scott is writing to the federal government

11 stating, on behalf of Florida's oyster industry,

12 I respectfully request that you declare a

13 commercial fishery failure due to a fishery

14 resource disaster for Florida's oyster harvesting

15 areas in the Gulf of Mexico, particularly those

16 in Apalachicola Bay.

17 Do you see that?

18 **A. I do.**

19 **Q.** And we just looked at that Executive Order a bit

20 ago that applied to Bay County. And here, the

21 Governor's request is asking for a fishery

22 resource disaster in the harvesting areas in the

23 Gulf of Mexico. Do you understand that to be

24 broader than Apalachicola Bay?

25 **A. I understand it to say particularly those in**
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1 **Apalachicola Bay. This was the initial letter**

2 **to -- to ask the Department of Commerce to begin**

3 **looking into this.**

4 **Q.** Okay. Do you recall, in fact, that that was the

5 case, that the disaster declaration request

6 sought that a disaster -- fishery disaster be

7 declared for more than Apalachicola Bay, but to

8 also cover other counties in Florida?

9 **A. By the language alone, that would be a reasonable**

10 **conclusion. But I think the context clearly**

11 **states Apalachicola Bay is the main concern.**

12 **Q.** And separate and apart from this particular

13 letter, as I know you're going to provide

14 testimony about the FWC report and the dealings

15 with the federal government, it is true, is it

16 not, that the disaster declaration request to the

17 federal government covered all of the oyster

18 harvesting areas in the Panhandle or the Gulf

19 area of Florida, not just Apalachicola. Right?

20 **A. That's, by the way it's written, correct. It's**

21 **the Gulf of Mexico, particularly those in**

22 **Apalachicola Bay.**

23 **Q.** And if we go into the next paragraph, the last --

24 second to the last -- I'm sorry -- second

25 sentence, it states, recent oyster resource

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1 assessments indicate that the outlook for the

2 2012-2013 harvesting season is poor and unlikely

3 to sustain commercial harvesting levels.

4 And that would be information based on the

5 DACS resource assessments. Would that be your

6 read of that?

7 **A. That -- those assessments plus, I'm sure,**

8 **collaboration amongst a lot of the staff as well.**

9 **Q.** And when you say collaboration among staff, you

10 mean among FWC staff with DACS?

11 **A. There is collaboration with DACS and FWC and**

12 **others that may have expertise, including some of**

13 **the folks out on the water. That's what**

14 **Mr. Beaton was testifying to earlier.**

15 **Q.** In your written testimony in paragraph 39 --

16 **A. Yes, sir.**

17 **Q.** -- you state there, sir, when FWC looked at the

18 2012 data on oyster abundance at the major oyster

19 bars in the bay and compared it to prior years,

20 we knew immediately that the fishery was

21 experiencing a major collapse.

22 Is that accurate?

23 **A. Yes. And particularly if you -- the figure that**

24 **follows it demonstrates that visually.**

25 **Q.** And, sir, despite the fact that FWC knew

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1 immediately that there was a major collapse

2 taking place, it didn't enter any Orders

3 restricting harvest in Apalachicola Bay for

4 two-and-a-half more months?

5 **A. Those orders, as we've already discussed, were**

6 **entered into a couple months later. However, the**

7 **collapse had already occurred.**

8 **Q.** Although the collapse had already occurred, FWC

9 thought that it made sense to enter an Order

10 restricting harvesting on Saturdays and Sundays

11 during this winter season. Right?

12 **A. That's correct.**

13 **Q.** So there was still, I take it, a conservation

14 rationale for entering such an Order in

15 November 2012 when FWC issued it; was there not?

16 **A. The conservation effort would be twofold, if I**

17 **may. One would be to try to do progressive**

18 **management to allow for recovery of the bay. But**

19 **also as part of fisheries managers, you're often**

20 **responsible for equally distributing that amongst**

21 **the folks that would be out there harvesting. So**

22 **those are two points that would be considered in**

23 **an Executive Order, amongst others.**

24 **Q.** Let's go to a different kind of document than

25 what we have been looking at before. I'm going

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1 to keep this in a chronological date sequence.
 2 If you wouldn't mind, please, sir, turning to
 3 tab 6 in your binder.
 4 **A. Okay. I'm there.**
 5 MR. ECHOLS: And for the record, tab 6
 6 is JX-81.
 7 BY MR. ECHOLS:
 8 **Q.** And can you -- strike that.
 9 Now, JX-81, sir, as you see, is a PowerPoint
 10 presentation with the text below it on the pages.
 11 Right?
 12 **A. Yes. The slide notes; correct.**
 13 **Q.** Yes, the slide notes; that's right.
 14 And this is a presentation that FWC was
 15 giving to the Florida Fish and Wildlife
 16 Conservation Commission, the commissioners?
 17 **A. It appears that that's what it is, yes.**
 18 **Q.** And I think, as you explained in your direct
 19 testimony, there are seven commissioners of FWC
 20 that are appointed by the Governor?
 21 **A. Yes.**
 22 **Q.** And these commissioners meet approximately five
 23 times a year to get reports from staff?
 24 **A. That's correct.**
 25 **Q.** And you would expect that this would be one of
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1 these types of reports that FWC staff is
 2 providing to the commissioners?
 3 **A. It looks -- yes, it looks very similar to what**
 4 **would be presented to our commissioners.**
 5 **Q.** And at the bottom of this page, you can see that
 6 it has -- the authors are listed as Michelle
 7 Sempsrott, Mason Smith, and then we have David
 8 Heil and Jim Estes there. Right?
 9 **A. Correct.**
 10 **Q.** And are all of these -- we know David Heil; and
 11 we know Jim Estes. Are -- Ms. Sempsrott and
 12 Mr. Smith, are they also FWC employees?
 13 **A. I know who Mr. Smith is. Ms. Sempsrott's name**
 14 **doesn't necessarily -- I don't recollect. She**
 15 **very well could be.**
 16 **Q.** And if we go to the slide itself, you will see
 17 the title. It says Apalachicola Bay Issues --
 18 Oysters Review and Discussion and that it's dated
 19 December 5, 2012. And is it accurate with your
 20 recollection that Mr. Heil gave this
 21 presentation?
 22 **A. I don't know if Mr. Heil gave the presentation or**
 23 **if Mr. Estes did.**
 24 **Q.** But you would expect that one or either or both
 25 of them?
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1 **A. Well, actually, a lot of times in our Marine Fish**
 2 **issues, we -- our director, she may do it,**
 3 **Jessica McCawley. I'm not sure who the presenter**
 4 **was.**
 5 **Q.** If you can go, sir, in that paragraph -- so you
 6 have the update; and then you have the paragraph
 7 beginning in July 2012. It references the DACS
 8 survey. If you go to the next sentence beginning
 9 the purpose.
 10 **A. Okay.**
 11 **Q.** And it states there, sir, the purpose of this
 12 report is to provide an overview of the
 13 Apalachicola Basin and the importance of
 14 Apalachicola Bay oysters, review oyster
 15 management, and the findings of the FDACS
 16 monitoring report, and explain how the issue is
 17 impacting other counties along Florida's northern
 18 Gulf coast.
 19 And it is consistent with your recollection,
 20 is it not, sir, that the -- the drought was
 21 impacting other counties beyond Franklin County
 22 and their oyster populations?
 23 **A. I -- would you state that question again?**
 24 **Q.** Sure. It says on here that there's -- the report
 25 is going to explain how the issue is impacting
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1 other counties along Florida's northern Gulf
 2 coast. And it's accurate that other counties --
 3 outside of Franklin County where you have
 4 Apalachicola Bay, other counties were having
 5 problems with their oyster populations, too?
 6 **A. I -- I don't know enough about that to testify on**
 7 **that. I would think perhaps Mr. Berrigan or**
 8 **others that have spoken. But clearly in this**
 9 **PowerPoint it states that, you're correct, on the**
 10 **counties along Florida's northern Gulf coast. I**
 11 **don't know to what extent and what counties**
 12 **they're referring to.**
 13 **Q.** Okay. I think it's -- I think it's inside.
 14 We'll get to the page.
 15 **A. Okay.**
 16 **Q.** And this is the FWC presentation. Right?
 17 **A. Yes.**
 18 **Q.** We'll go to page 2 of the presentation.
 19 MR. ECHOLS: And with apologies, this is
 20 a black and white.
 21 BY MR. ECHOLS:
 22 **Q.** But I'm less interested in the slide, which has a
 23 picture -- a poor picture of Apalachicola River
 24 Basin. If we go to the bottom paragraph there,
 25 the paragraph beginning along the Chattahoochee,
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1 are you with me, sir?

2 **A. Yes.**

3 **Q.** It states here, along the Chattahoochee River

4 that flows through Georgia, there are four dams

5 that greatly affect the flow of the entire river

6 system down to the Apalachicola Bay system. The

7 largest is Buford Dam which forms Lake Lanier

8 located north of Atlanta. Lake Lanier accounts

9 for over 60 percent of the water storage in the

10 ACF Basin. Therefore, the amount of fresh water

11 released out of the reservoir affects Florida's

12 fisheries in the Apalachicola Bay system.

13 You are familiar, sir, with the fact that

14 there are these dams operated by the Army Corps

15 of Engineers up and down the Chattahoochee?

16 **A. Yes.**

17 **Q.** Where it says in the very last portion of this

18 sentence that -- after the semicolon, therefore,

19 the amount of fresh water released out of the

20 reservoir affects Florida's fisheries in the

21 Apalachicola Bay system, do you understand that

22 to refer to being released by the Army Corps of

23 Engineers?

24 **A. I suppose you could draw that conclusion.**

25 **Q.** Is there a different conclusion that you would

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1 draw?

2 **A. I -- well, I wasn't the author of this; and I**

3 **don't know. But a lot of times when staff writes**

4 **notes in presentations, sometimes they will**

5 **either overstate or make broad statements. And**

6 **so I'm a little hesitant to go to that succinct a**

7 **description of what this intends to convey.**

8 **Q.** One of the presenters here is Mr. Estes who

9 reports to someone above him who then reports to

10 you --

11 **A. Correct.**

12 **Q.** -- at FWC?

13 **A. Yes.**

14 **Q.** And it is a true statement, is it not, sir,

15 that -- that Corps releases of fresh water out of

16 the reservoir affect Florida's fisheries?

17 **A. It's true that the release of waters affect**

18 **Florida's waters which I think the presumption is**

19 **that would affect the fisheries.**

20 **Q.** If you wouldn't mind, we can turn in two pages.

21 I -- I would expect your counsel may, you know,

22 ask you questions about the next one; but I'm

23 just going to try to get through my part and let

24 her do that one.

25 The page I'm interested in next is -- just

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1 briefly to touch upon is the one that says Oyster

2 Management in Florida. It's page 4.

3 **A. Yes, sir.**

4 **Q.** And this is just very generic, I think along the

5 lines of what we have talked about before. As

6 far as the distribution of the responsibilities

7 among the agencies, FWC and FDACS, as you see on

8 the top slide -- probably it's just simplest

9 to -- the second paragraph down where it says,

10 FWC is responsible?

11 **A. Yes. I'm there.**

12 **Q.** Okay. FWC is responsible for issuing commercial

13 fishing licenses and establishing seasons,

14 harvest limits, that is, quotas and bag

15 possession limits, gear restrictions, and closed

16 areas. They also provide law enforcement to

17 enforce oyster harvesting regulations.

18 And all of that is correct; is it not?

19 **A. That's correct.**

20 **Q.** And if you go down two paragraphs, it starts with

21 FDACS restores. Do you see that, sir?

22 **A. I do.**

23 **Q.** And it says, FDACS restores oyster reefs annually

24 by depositing processed oyster shells on public

25 oyster reefs as part of an ongoing oyster

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1 resource development program. The oyster culture

2 program is assisted by laws which mandate that

3 FDACS improve, enlarge, and protect public oyster

4 reefs.

5 And that's accurate as well?

6 **A. That's what it states; correct.**

7 **Q.** And part of your direct testimony that you're

8 offering in this case and that you will be

9 explaining to the Court later is about the

10 restoration efforts that the State of Florida has

11 done with respect to the oyster reefs in

12 Apalachicola Bay. Right?

13 **A. Correct. To the extent I'm qualified, correct.**

14 **Q.** And that's something included in your direct

15 testimony about the amount of reshelling or

16 cultching that was done?

17 **A. As a general practice, correct.**

18 **Q.** Yes.

19 If we could go, please, into the next page,

20 page 5, and if we could go in the note -- the

21 slide notes below to the paragraph beginning,

22 stress factors. And for the sake of efficiency,

23 you know, I'll read this slowly so that it's done

24 now.

25 Stress factors leading to the poor condition

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1 of oyster reefs in Apalachicola Bay include

2 prolonged drought conditions and continuing low

3 river discharge rates, which in turn lead to

4 higher salinities in the bay.

5 And that's all accurate. Right?

6 **A. Correct.**

7 **Q.** Continuing, prolonged high salinity causes

8 physiological stress on the oysters and allows

9 for increased predation and dermo disease (dermo

10 disease is caused by a protozoan that

11 proliferates rapidly in higher salinities and can

12 cause extensive mortalities amongst the oyster

13 population).

14 And that's accurate, too. Right?

15 **A. Yes.**

16 **Q.** And these are things that happen during periods

17 of drought, and that's happened in prior

18 droughts?

19 **A. In higher salinities.**

20 **Q.** Higher salinities when there have been prior

21 droughts and less water coming into the bay?

22 **A. Certainly less water, correct.**

23 **Q.** And then the next sentence says, intensive

24 fishing effort on stressed oyster populations has

25 also been identified as a contributing factor to

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1 the markedly reduced standing stocks of juvenile,

2 sub-adult, and adults oysters.

3 And that's a true statement, too. Is it not?

4 **A. That's a statement that was in the report.**

5 **Q.** This -- this particular statement is not true

6 like the other two?

7 **A. It was identified as a contributing factor in the**

8 **report.**

9 **Q.** It is a true statement. Right?

10 **A. Well, it's a statement that should be considered.**

11 **Q.** Intensive fishing effort has also been identified

12 as a contributing factor. That was -- that was

13 correct; the official Florida state documents

14 identified intensive fishing effort as a

15 contributing factor to the markedly reduced

16 standing stocks of juvenile, sub-adult, and adult

17 oysters. Is that accurate?

18 **A. Yes, sir. I'm testifying that, yes, the FDACS**

19 **report did state that. Correct.**

20 **Q.** And that is here in December of 2012 what

21 Mr. Estes and Mr. Heil are telling the seven

22 commissioners who are appointed by the Governor

23 in this presentation to the commission. Right?

24 **A. This presentation, I assume that it was given to**

25 **the commission. There are times when staff**

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1 **doesn't necessarily read these verbatim. But**

2 **they are provided usually ahead of time. So it**

3 **would have been provided to our commission, at**

4 **least in written form.**

5 **Q.** And you would expect that FWC staff, including

6 Mr. Estes and Mr. Heil, intended to provide the

7 commission accurate information. Would you not?

8 **A. They would want to provide them with a thorough**

9 **and -- the points made in this report.**

10 **Q.** If we could, please, sir, turn to the next page,

11 page 6. And do you see, sir, that the slide at

12 the top says, Issue Larger Than Apalachicola.

13 And -- I wish I had a better picture. You were

14 asking for a map of counties. But it does

15 identify with a -- you know, not a very clear

16 map; but it does identify Bay, Wakulla, Levy,

17 Dixie, Escambia, Santa Rosa, Okaloosa, and Walton

18 Counties. Correct?

19 **A. It does.**

20 **Q.** And then the bullets below reflect the Governor's

21 request for a federal fishery disaster and

22 identify, as you were explaining before, that

23 there have been -- there had been at the time

24 reports of high oyster mortality?

25 **A. That's correct. That's what the presentation**

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1 **states; yes, sir.**

2 **Q.** And that's information that comes into FWC or

3 into DACS, and that is taken into account by FWC

4 in imposing limitations on oyster harvesting when

5 appropriate?

6 **A. When appropriate, correct.**

7 **Q.** And that's exactly what FWC decided, because you

8 see that last bullet, and we looked at the prior

9 Executive Order. It said Bay County requested

10 FWC lower bag limit, and FWC did that. Do you

11 remember that Executive Order we were looking at?

12 **A. Based on that Executive Order of Bay County and**

13 **then based on what staff is presenting to the**

14 **commission, that would be a -- that could be a**

15 **conclusion.**

16 **Q.** Well, is that your conclusion?

17 **A. Well, I understand an Executive Order was issued**

18 **to restrict it from 20 to 10. I'm not, you know,**

19 **familiar with exactly the conversation with Bay**

20 **County.**

21 **Q.** But based on everything you have seen so far,

22 that makes sense. The concerns were raised. Bay

23 County requested, and FWC responded.

24 **A. FWC responded, correct, in the Executive Order.**

25 **Q.** Okay. If we go to the notes in the slide notes

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1 below, it says, the issue at hand is not
 2 contained to the Apalachicola Bay system. Bay,
 3 Wakulla, Levy, Dixie, Escambia, Santa Rosa,
 4 Okaloosa, and Walton Counties have been reporting
 5 high mortality rates for oysters in their bays.
 6 Several years of drought combined with the
 7 increased freshwater flows in Wakulla, Dixie, and
 8 Levy Counties this year have severely stressed
 9 oyster populations in these counties. Bay County
 10 also requested FWC lower the bag limit for
 11 oysters in their county.

12 Does this refresh your recollection that
 13 there were environmental factors that also were
 14 affecting the oyster populations in these other
 15 counties outside of Apalachicola?

16 **A. Yes. I mean, it speaks to how sensitive it is --**
 17 **that oysters are to salinity, increased**
 18 **freshwater flows in one hand, decreased**
 19 **freshwater flows in the other.**

20 **Q.** And the issues with all of the oysters in all of
 21 these seven other counties were not related to
 22 flow coming down the Apalachicola River?

23 **A. They are not tied to it hydrologically.**

24 **Q.** That is that -- you've -- given that they're not
 25 hydrologically flowing to the Apalachicola River,

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1 any upstream consumption by Georgia of water, you
 2 know, off the Chattahoochee or the Flint couldn't
 3 have anything to do with the health issues of the
 4 oysters in these counties?

5 **A. I -- I don't know that I'm qualified for that**
 6 **statement. I can tell you that the watersheds**
 7 **are different than the Apalachicola Bay. So if**
 8 **it's low flows in Apalachicola Bay resulting in**
 9 **the crash, there's other environmental conditions**
 10 **for those that aren't hydrologically connected.**
 11 **I feel certain of that statement.**

12 **Q.** To put it simply, the low flows in the
 13 Apalachicola River did not cause the collapses or
 14 the issues of the oysters in any of these
 15 counties?

16 **A. They -- they couldn't have had an effect on those**
 17 **populations.**

18 **Q.** If we could go two more pages in -- and I'll just
 19 hit this quickly because I think it's covered --
 20 on page 8. And the slide at the top says,
 21 Governor Scott requested disaster relief.

22 The text at the bottom, the very last
 23 sentence in the notes states, in the request the
 24 Governor declared a commercial fishery failure
 25 due to a fishery resource disaster for Florida's

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1 oyster harvesting areas in the Gulf of Mexico,
 2 particularly those in Apalachicola Bay.

3 And that's consistent, sir, with what we were
 4 discussing before, that the disaster declaration
 5 applied to more than just Apalachicola Bay?

6 **A. Yes. It -- the Gulf states, particularly**
 7 **Apalachicola -- the Gulf counties. Excuse me.**

8 **Q.** I'm sorry, the Gulf counties.

9 If we could go then to the next page, page 9;
 10 and this is to confirm what we also were just
 11 touching upon for Bay County. On the bottom in
 12 the text there it says, FWC issued an Executive
 13 Order for Bay County for October 1 through 31,
 14 2012, lowering the bag limit for commercial
 15 oystermen from 20 to 10 60-pound bags per person
 16 or vessel, whichever was less.

17 It goes on to say, this change was requested
 18 by the Bay County Commission and Bay County
 19 oystermen to better sustain commercial oyster
 20 harvesting opportunities in the waters of Bay
 21 County.

22 Could you tell me, sir, what does it mean to,
 23 quote, better sustain commercial oyster
 24 harvesting opportunities in the waters of Bay
 25 County?

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1 **A. Well, if I may, I mean, I can render what I**
 2 **interpret that to mean. But, again, not being**
 3 **the author of this PowerPoint and having seen**
 4 **many and many and many PowerPoints produced by**
 5 **staff, that's a pretty compound statement, I**
 6 **believe, for me in court here to try and**
 7 **interpret what those now believe it to be.**

8 **But I'm happy to offer that they -- to say**
 9 **that when we were working with the county, the**
 10 **commissioners, the oystermen, they believed that**
 11 **this was an action that they -- they requested**
 12 **that we take.**

13 **Q.** There's nothing about this that troubles you; is
 14 there?

15 **A. No, no. I just -- I just know the staff well**
 16 **enough to know and work with them that sometimes**
 17 **the words themselves, they write them, may not --**
 18 **others may not be interpreting 100 percent**
 19 **correctly what they -- they believe it to be.**

20 **Q.** But at least as far as the way this worked out,
 21 this is all a positive thing. The concern is
 22 raised about the health of oysters in Bay County.
 23 They came to the commission. The commission did
 24 something.

25 **A. In working with the state, correct.**

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1 **Q.** Right. If we could look please at the -- page
 2 10. And this is the slide -- this refers to what
 3 we were just discussing in November. It says at
 4 the top, FWC closed weekend oyster harvesting.
 5 And if we go to the first paragraph of the
 6 notes, please, here we've got -- it's setting
 7 forth the FWC oyster rule. And it states the
 8 rule and then says -- it establishes that, if
 9 FDACS determines through its regular monitoring
 10 of the abundance of oyster resources on Cat Point
 11 Bar and East Hole Bar in Apalachicola Bay that
 12 such resources cannot sustain a harvest of 300
 13 bags of oysters per acre, the harvest of oysters
 14 for commercial purposes from the Bay on Saturday
 15 and Sunday of each week for the remainder of the
 16 period is prohibited. Therefore, based on
 17 FDACS's August 2012 report and the October 2012
 18 update assessment, the commission is required to
 19 close weekend harvest for the 2012/2013 harvest
 20 season on these winter harvesting reefs for the
 21 season that runs November 16, 2012, through May
 22 31, 2013.
 23 And is that an accurate understanding of how
 24 the code works, the FWC oyster rule, that based
 25 on that DACS assessment of the availability,

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1 abundance being less than 300 bags per acre, it
 2 was an automatic requirement that FWC had to
 3 close the harvesting on the weekends?
 4 **A. Yes. They -- 68B references the 300-bag**
 5 **threshold.**
 6 **Q.** And so actually this took place without FWC
 7 having to issue an Executive Order out of the
 8 ordinary because it's an automatic thing by
 9 statute. Right?
 10 **A. That would be -- appear to be what staff is**
 11 **citing.**
 12 **Q.** So separate and apart from this automatic
 13 requirement by statute which limited the weekend
 14 harvest of oysters in Apalachicola Bay, FWC of
 15 its own volition, within its own authority, did
 16 not enter any Orders at all restricting harvest
 17 in Apalachicola Bay at the end of 2012 here?
 18 **A. There were a series of Executive Orders beyond**
 19 **this point, however, restricting harvest.**
 20 **Q.** Right. But here in August 2012 FWC immediately,
 21 you have testified in your direct, knew that
 22 there was a fishery collapse. Right?
 23 **A. Yes.**
 24 **Q.** And so from August when FWC immediately knew
 25 there was a fishery collapse until the end of the

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1 year, it didn't enter a single Executive Order
 2 limiting harvesting except for the automatic one
 3 that kicked into place by statute?
 4 **A. Correct. The harvesting was -- yes, continued.**
 5 **Q.** If you wouldn't mind, sir, let's go to the very
 6 last page of this document.
 7 **A. I'm sorry, sir. Are you referring to the backup**
 8 **slides that --**
 9 **Q.** Yes, sir. The backup slides, yes. And I
 10 understand that they are listed as backup
 11 material that may not have been used in the
 12 presentation.
 13 **A. Correct.**
 14 **Q.** And do you have the table or, rather, the slide
 15 in the middle that says, average salinity at Cat
 16 Point Bar? Do you see that?
 17 **A. I do.**
 18 **Q.** And, unfortunately, we've got, like, gray and
 19 dark gray as opposed to what I expected would be
 20 red and blue. But if you look at the notes
 21 below, the second -- beginning the second
 22 sentence it says, the blue line represents the
 23 average salinity for the time period from 1992
 24 through 2006 prior to implementation of the
 25 revised interim operations plan, RIOP. And the

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1 red line represents the average salinity for the
 2 time period from 2007 through August 1, 2012,
 3 post implementation of the RIOP.
 4 And here then, I guess, is the definition of
 5 the RIOP. The RIOP defines the water management
 6 operations established by the Army Corps of
 7 Engineers -- Corps -- as a result of endangered
 8 species consultation with the U.S. Fish and
 9 Wildlife Service. Do you see that?
 10 **A. I do.**
 11 **Q.** And so here, what is being discussed in the
 12 backup slides, recognizing it's not clear whether
 13 the commission saw this or not, is that the
 14 document which defines the water management
 15 operations established by the Corps is being
 16 identified as having an effect on salinity in the
 17 bay at Cat Point Bar?
 18 **A. If I may read, please.**
 19 **Q.** Yes, absolutely.
 20 **A. And, I'm sorry, counsel. Your question?**
 21 **Q.** Would it be an accurate understanding or
 22 interpretation of this particular page that FWC
 23 staff is identifying the RIOP, the Corps's water
 24 management operations, as having an impact on
 25 salinity in the Bay at Cat Point Bar?

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1 **A. They're stating that there's the preimposed --**
 2 **this operation plan affected salinities.**
 3 **Q.** And this operation plan being the operation --
 4 the water management operation plan that the
 5 Corps operates under?
 6 **A. That's what staff is referring to, it appears.**
 7 **Q.** And that's accurate, right?
 8 I realize it's staff, but these are folks
 9 under you or lateral to you. These are accurate
 10 statements; are they not?
 11 **A. It certainly is what staff believes to be**
 12 **accurate; correct. I have no doubt to believe**
 13 **they wouldn't state their opinion to be accurate.**
 14 **Q.** And you believe it to be accurate; do you not?
 15 **A. I -- I believe they're accurately stating what**
 16 **they are describing in the figure.**
 17 **Q.** If you go to that next sentence that starts, the
 18 RIOP, it says, the RIOP describes the release
 19 schedule from Jim Woodruff Dam to the
 20 Apalachicola River. And continues, certain
 21 drought provisions require temporary deviation
 22 from the existing water control plan to provide
 23 for only minimum releases of 5,000 cubic feet per
 24 second, cfs, from Jim Woodruff Dam when specific
 25 triggers are met, that is, upstream reservoirs

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1 are below a specified minimum level, zone 4.
 2 Minimum flows are effective until upstream
 3 reservoir, that is, all federal reservoirs,
 4 storage levels return to high pool levels,
 5 zone 1.
 6 And that's also an accurate description of
 7 how the Army Corps of Engineers's drought
 8 operations occurs; is it not?
 9 **A. I'm not verbose with the RIOP. I want to be very**
 10 **careful with my testimony in --in making**
 11 **statements or interpretations from the plan on**
 12 **salinities and flows. I believe there are others**
 13 **testifying that probably would be better asked**
 14 **for the accuracy and statements on the Corps and**
 15 **their levels of water management.**
 16 **Q.** Well, at the most basic level though, you do know
 17 that there are drought operations that are
 18 triggered sometimes that the Corps has to follow.
 19 Right?
 20 **A. I -- yes, I'm sure there is.**
 21 **Q.** And those drought operations, you know, have a
 22 minimum flow requirement of the 5,000 cfs?
 23 **A. Again, I -- I wouldn't want to speculate on any**
 24 **of the details of this operation plan. I believe**
 25 **there will be others who testify that would**

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1 **probably speak better to that, sir.**
 2 **Q.** All right. But as a general matter, do you have
 3 a sense that the Corps can come out of drought
 4 operations when the upstream reservoirs have more
 5 water in them without assigning zone 1, 4, or
 6 anything like that?
 7 **A. I'm sorry. What's the question again?**
 8 **Q.** Sure. So you have agreed there are drought
 9 operations that you know the Corps enters into,
 10 you know, when triggered. Do you also have an
 11 understanding that the Corps can come out of
 12 drought operations and allow additional water to
 13 flow down when the upstream reservoirs are
 14 higher?
 15 **A. I would agree that would seem logical. But,**
 16 **again, I would -- I would definitely refer to**
 17 **someone else with expertise in that specific plan**
 18 **and operations.**
 19 MR. ECHOLS: I'm about to move to a
 20 different subject matter, your Honor. I
 21 don't know whether you think this is a good
 22 time, or if you would like me to go forward?
 23 SPECIAL MASTER LANCASTER: How much
 24 longer do you think you will be?
 25 MR. ECHOLS: Judge, we have a lot with

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1 Mr. Sutton. We'll be continuing through
 2 tomorrow.
 3 SPECIAL MASTER LANCASTER: Well, let's
 4 go on for a few minutes longer.
 5 MR. ECHOLS: Very good.
 6 BY MR. ECHOLS:
 7 **Q.** Okay. If you wouldn't mind, sir, turning to
 8 tab 7 of your binder.
 9 **A. Yes, sir. I'm there.**
 10 **Q.** And do you see, sir, earlier when we were talking
 11 about the Orders that had extended harvesting
 12 periods, you were letting me know that there were
 13 Orders subsequent to that which cut back on that.
 14 Do you recall that?
 15 **A. Yes.**
 16 **Q.** And here I believe we have one of those -- excuse
 17 me -- with JX-98. This is the Order No. EO
 18 13-32. Do you see that?
 19 **A. I do.**
 20 **Q.** And on the upper right-hand side of this Order it
 21 says, delayed opening of the season for
 22 commercial oyster harvest for Apalachicola Bay.
 23 Correct?
 24 **A. I see that; correct.**
 25 **Q.** If you would, please look -- well, you know what;

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1 let's just do this top paragraph there, if we
 2 could, please. And here it states, the Fish and
 3 Wildlife Conservation Commission of the State of
 4 Florida, acting under the authority of Article
 5 IV, Section 9 of the Florida Constitution, and
 6 acting through its executive director under
 7 Delegations of Authority, paragraph 17 and
 8 paragraph 22, hereby closes the commercial
 9 harvest of oysters beginning September 1, 2013,
 10 in Apalachicola Bay, Franklin County, Florida.
 11 This action is taken in order to conserve oyster
 12 resources throughout the entire bay.
 13 And does that accord with your recollection
 14 as you were describing to me; there were
 15 subsequent orders that restricted harvesting?
 16 **A. Yes. And this is post the crash, correct.**
 17 **Q.** Post the crash, correct.
 18 And would you agree with me, sir, that this
 19 is part of FWC exercising its management
 20 responsibility of the fishery?
 21 **A. Yes, in order to try to provide for recovery.**
 22 **Q.** And here we are -- you know, as you said, to
 23 provide for recovery. The oyster population has
 24 not rebounded here as of September 2013; has it?
 25 **A. No.**

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1 **Q.** And if we go down to the numbered paragraph 3, it
 2 states here, this Order shall take effect upon
 3 execution and shall expire when all harvesting
 4 areas in the bay are opened to harvest by the
 5 Florida Department of Agriculture and Consumer
 6 Services and such opening is announced on
 7 MyFWC.com or October 12, whichever is earlier.
 8 And that's a typical way to have these set up
 9 with an expiration of a pending Order?
 10 **A. Yes, it is.**
 11 **Q.** And if we go down to Mr. Wiley's signature, you
 12 see that this was entered into when signed and
 13 issued on the 30th day of August, 2013. Right?
 14 **A. Correct.**
 15 **Q.** And again, as stated at the top, this Order is
 16 designed and was entered by the Fish and Wildlife
 17 Commission to conserve oyster resources
 18 throughout the entire bay?
 19 **A. That's what it states in this sentence.**
 20 **Q.** Okay. And that's your understanding of the
 21 reason for the Order?
 22 **A. That's the primary reason.**
 23 **Q.** Was there another one?
 24 **A. Well, a lot of times in these Executive Orders**
 25 **there's a number of factors that go into it. And**

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1 **a lot of times it may not list some other factors**
 2 **that would be part of the consideration. But**
 3 **that clearly was in the summary statement.**
 4 **Q.** If you would, please, sir, turn to tab 8.
 5 **A. Okay.**
 6 **Q.** And so we had the Order entered August 31, 2013,
 7 to conserve oyster resources. And now at tab 8
 8 we have JX-99 which is entered September 3rd,
 9 2013. So that's four days later. And at the top
 10 you will see, please, that it has the Order
 11 number identified. And it says, rescinded
 12 delayed opening of the season for commercial
 13 oyster harvest for Apalachicola Bay.
 14 And the first paragraph there states, the
 15 Fish and Wildlife Conservation Commission of the
 16 State of Florida -- and I'll skip that part,
 17 going to the comma -- hereby rescinds the Order
 18 closing the commercial harvesting of oysters
 19 beginning September 1, 2013, in Apalachicola Bay,
 20 Franklin County, Florida, effective September 4,
 21 2013.
 22 So is it the case, sir, that this September 3
 23 Order undid basically the closing of the bay that
 24 we just read about in the prior Order?
 25 **A. Yes. It rescinds that Order that we referenced.**

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1 **Q.** So to the extent that that prior Order was
 2 closing the bay to conserve oyster resources
 3 throughout the entire bay, this Order undid that;
 4 and it's the -- the bay is now open again
 5 effective September 4, which is five days later?
 6 **A. That's correct.**
 7 **Q.** And can you tell me, sir, please, what was the
 8 conservation rationale of FWC to reopen the bay
 9 just three days later after it had closed it in
 10 order to conserve oyster resources?
 11 **A. Yes. If I -- if I may reference the prior**
 12 **Executive Order, I think it's important for that**
 13 **context. When we're going through, you know,**
 14 **such an impactful scenario here with the oysters**
 15 **and the impact it has for the community, a lot of**
 16 **time staff will recommend an Order of closure.**
 17 **Sometimes in some Executive Orders it may be size**
 18 **limits on fish. And staff believes that that's**
 19 **the prudent measure to take. And we'll take**
 20 **that. When we gather other data, other**
 21 **information, we find that that may be too**
 22 **impactful, too drastic.**
 23 **In this case the oyster crash has occurred.**
 24 **The mortality is occurring with the oysters. And**
 25 **I think that we have heard some testimony that**

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1 **probably speaks to that these oysters were likely**
 2 **to suffer mortality anyway and that a closure was**
 3 **not necessary and too impactful on those other**
 4 **factions. And it -- you could still have harvest**
 5 **and allow for recovery if environmental**
 6 **conditions were ideal.**
 7 Q. This is September 2013, sir. Right?
 8 A. Yes.
 9 Q. And here we have -- first you reference staff,
 10 that perhaps this was a staff recommendation?
 11 A. Due --
 12 Q. And --
 13 A. Sorry.
 14 Q. I'm sorry. I didn't mean to interrupt -- a staff
 15 recommendation that maybe was undone. But we do
 16 have both of these as signed Orders by Nick
 17 Wiley, the executive director of FWC. Correct?
 18 A. Correct.
 19 Q. So -- but the -- the collapse was identified in
 20 August 2012. Right?
 21 A. Correct.
 22 Q. And, you know, now we're a full year later in
 23 September 2013. And you just testified that --
 24 that your interpretation is that perhaps
 25 harvesting was still being allowed to take place

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1 because environmental conditions were stressing
 2 the oysters or something to that effect?
 3 A. **Well, what I'm saying is the conditions in the**
 4 **Bay are such that the recovery isn't occurring.**
 5 **The environmental conditions aren't there. A**
 6 **complete closure is unnecessarily harming other**
 7 **factions to allow for recovery.**
 8 Q. I've just got a slide here that I pulled off the
 9 internet. I don't know if you recall, sir; but
 10 beginning in February 2013, there was a lot of
 11 rain. And, in fact, this particular story
 12 reflects that as early as February 2013, you
 13 know, probably there was more rain than maybe you
 14 would have wanted. You had 6 inches of rain
 15 overnight. Do you have any recollection, sir,
 16 that 2013 was, in fact, one of the wetter years
 17 ever?
 18 A. **I seem to recall this flooding event in this area**
 19 **was pretty dramatic.**
 20 Q. So to the extent that there were concerns about
 21 stress on the oysters related to drought, that's
 22 not taking place here in 2013. Right?
 23 A. **No. We have an act here of a flooding event;**
 24 **that's right. I wouldn't think there's a drought**
 25 **with this flooding event.**

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1 Q. Right. And to the extent that the -- one of the
 2 goals of FWC is to assist in the recovery of the
 3 oyster population, it -- it's not the case that
 4 you need to harvest the oysters because they're
 5 going to die as a result of drought conditions?
 6 A. **I'm sorry? Say again, please.**
 7 Q. Sure. You said earlier that it may have been the
 8 case that the bay was opened back up after having
 9 been closed for two days was because the oysters
 10 were suffering mortality from negative
 11 environmental conditions. Well, to the extent
 12 that was taking place, it's not due to the
 13 drought and the low flows. Right?
 14 A. **Well, it's the result of a fishery collapse that**
 15 **hasn't recovered yet.**
 16 Q. Right. It hasn't recovered, and the reason that
 17 FWC closed, at least for the couple of days that
 18 it did, the bay was to conserve oyster resources
 19 throughout the entire bay. Right?
 20 A. **That's what the Executive Order states; yes, sir.**
 21 Q. Okay.
 22 MR. ECHOLS: You can take that down.
 23 BY MR. ECHOLS:
 24 Q. If you wouldn't mind, sir, turning to tab 9 of
 25 your binder. And we have, sir, another Executive

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1 Order, this one from May 12, 2014, if you'd look
 2 to the bottom right-hand corner with Director
 3 Wiley's signature. And at the top you see, sir,
 4 it states that this Order is management of two
 5 Apalachicola Bay harvesting areas for commercial
 6 oyster harvest. Do you see that?
 7 A. **I do.**
 8 Q. And that's -- as background, I don't know whether
 9 you recollect or not; but there was a single
 10 harvest area that had been closed by DACS for
 11 health purposes. And then this Order followed,
 12 I'll represent to you. If we -- if we go down to
 13 the sentence in the middle that says, in order --
 14 A. **Yes. I'm there.**
 15 Q. Okay. And so it's referring to these two
 16 particular harvesting areas, area 1601 and 1611.
 17 And it states, in order to ensure increased
 18 harvest effort in these three areas associated --
 19 I think there's a with missing -- associated with
 20 the closure of area 1642 does not lead to
 21 unsustainable harvest rates, these two areas will
 22 remain closed for the duration of the time that
 23 area 1642 is closed.
 24 Now, there are designations of different
 25 portions of bars as areas with numeric

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1 identifiers; is that right?

2 **A. That's my understanding.**

3 **Q.** And do you happen to know the 1601, 1611? Is

4 that Cat Point, East Hole, any idea?

5 **A. I would need to cross-reference that. I'm sorry.**

6 **Q.** But in any event, so we've area 1642, which was

7 closed for health reasons. And it states, in

8 order to ensure increased harvest effort does not

9 lead to unsustainable harvest rates. Could you

10 explain to the Court, please, what did FWC in

11 this official Executive Order mean by

12 unsustainable harvest rates?

13 **A. I'm just reading some of the context, sir.**

14 **Unsustainable harvest rates per statute would**

15 **reference to the thresholds that are established.**

16 **That's what's defined statutorily. I'm unclear**

17 **as to what the definition of staff would have**

18 **been or -- and the Executive Order is**

19 **unsustainable in this Executive Order**

20 **particularly.**

21 **Q.** In a very commonsense manner, would you agree

22 that this is saying that FWC is trying to protect

23 these two areas from being overfished while this

24 other area is closed for health reasons?

25 **A. I think that it's reasonable that we would be**

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1 **trying to manage the production and the**

2 **harvesting amongst the fishers and those that**

3 **depend on it.**

4 **Q.** And that's -- I mean, that's a beneficial or good

5 exercise of FWC's authority. Right?

6 **A. Yes, in certain circumstances.**

7 **Q.** And to -- this is an example of deploying the

8 full scope of FWC's authority to ensure that the

9 oyster natural resource is protected?

10 **A. In this particular instance based on the logic in**

11 **this Executive Order.**

12 **SPECIAL MASTER LANCASTER: Is this a**

13 **convenient time for a break, counsel?**

14 MR. ECHOLS: Yes, sir. Yes, your Honor.

15 (Time Noted: 2:40 p.m.)

16 (Recess Called)

17 (Time Noted: 2:52 p.m.)

18 BY MR. ECHOLS:

19 **Q.** Sir, if I could refer you please to your written

20 direct, paragraph 57, which is on page 18.

21 **A. Yes, sir.**

22 **Q.** And, again, along the lines as we have been

23 doing, identifying some of the Executive Orders

24 that FWC issued that restricted harvesting, you

25 refer here, sir, to a May 30, 2014, Order that

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1 the commissioner issued prohibiting commercial

2 and recreational oyster harvesting in East Hole

3 in the bay. Do you see that?

4 **A. I do.**

5 **Q.** And East Hole is one of the commercially

6 important and typically commercially productive

7 oyster bars. Correct?

8 **A. Of the public bars, correct.**

9 **Q.** Right. If you wouldn't mind, sir, in your binder

10 turning to tab 10, if you would take a look in

11 tab 10 and please confirm for me that this is the

12 Order you're referring to in paragraph 57?

13 **A. That's correct.**

14 **Q.** And you can see at the top here -- and,

15 unfortunately, small print -- it describes the

16 Order as restrictions for June 1, 2014, through

17 August 31, 2014, for commercial and recreational

18 oyster harvest from the Apalachicola Bay system.

19 If you go in that very first paragraph

20 four -- five lines down to the sentence that

21 begins these actions.

22 **A. Yes.**

23 **Q.** And there, if we can see that, it says, these

24 actions are being taken in order to conserve

25 oyster resources that have been depleted as a

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1 result of low flow conditions.

2 Now, this is May 30, 2014. Correct?

3 **A. That's correct.**

4 **Q.** And we just had the wettest -- one of the wettest

5 years on record in Florida in 2013. Is that

6 right?

7 **A. I don't know that statement to be correct or not,**

8 **sir.**

9 **Q.** Okay. We saw at least that there was the

10 flooding. And you recall it was a wet year.

11 Right?

12 **A. I recall the flood event.**

13 **Q.** And do you recall, too, that we were not in

14 drought conditions in 2014?

15 **A. I don't recall that we were.**

16 **Q.** And if you go to the -- continuing on there, it

17 states, the bag limit and prohibition of

18 commercial harvest on Fridays and Saturdays

19 actions are being taken to allocate the depleted

20 resource throughout the summer. These measures

21 will help ensure that more of the adult spawning

22 oysters will spawn throughout the summer thereby

23 increasing available spat in the bay for a longer

24 time period. The closure of East Hole during the

25 summer season is being done to help recover the

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<p>1270</p> <p>1 East Hole population of oysters that are showing 2 signs of recovering. 3 And is that, in fact, the reason for this 4 Executive Order being entered, at least in 5 part, to assist in the recovery of the oyster 6 population on East Hole, this commercially-important 7 bar, that are showing signs of recovery? 8 A. Certainly as it's written. So, yes, if that's 9 how it's written in the Executive Order, that's a 10 primary reason. 11 Q. And that would be consistent with your 12 understanding, you know, having worked for FWC 13 and working for Mr. Wiley, that this makes sense 14 to do, to close a bar for some period of time 15 while the oysters -- and if the oysters appear to 16 be in the process of recovery? 17 A. That's what the Executive Order states. I have 18 no reason to argue against that. 19 Q. Separate and apart from the Executive Order -- we 20 don't have to be tied to it -- but that's 21 consistent with your understanding as a FWC 22 official. Is it not? 23 A. My understanding as an FWC official is that's the 24 logic we utilized in doing this Executive Order. 25 Q. And as a very general matter, oyster bars can use THE REPORTING GROUP Mason & Lockhart</p>	<p>1272</p> <p>1 Q. And if you look at the bottom, the period of time 2 when this applies runs from June through 3 September. So that's the summer harvesting 4 season. Is that the way you would read that? 5 A. Yes. 6 Q. You testify in your written direct, sir, about 7 check stations. Do you recall that? 8 A. Yes. 9 Q. And would you mind describing in your own words 10 for the Court what a check station is? 11 A. Check stations are manned areas where the folks 12 will bring in the oysters; and then they have to 13 be measured and then -- with either law 14 enforcement or folks that are law enforcement 15 related to ensure that they're the right size. 16 And then they're tagged for the bag. 17 Q. And is the purpose of the check stations, 18 therefore, to ensure that oystermen are not 19 harvesting undersized oysters? 20 A. That's one of the tools in the law enforcement 21 toolbox. 22 Q. And would it be accurate as well that to the 23 extent that, you know, the oystermen have to have 24 their bags checked, this would help to ensure 25 that they're not taking more bags than they're THE REPORTING GROUP Mason & Lockhart</p>
<p>1271</p> <p>1 time to recover by being closed from time to 2 time. Can they not? 3 A. Certainly that's one of the methods you could 4 utilize. 5 Q. And then if you go down -- let's see -- to 6 paragraph No. 2, and tell me if you read this the 7 same way. I think this is broader than East 8 Hole. It says, notwithstanding anything to the 9 contrary -- and then cites the statute -- 10 beginning on June 1, 2014, and continuing through 11 August 31, 2014, commercial harvest for oysters 12 is prohibited on Friday and Saturday of each 13 week. 14 Now, do you read that, sir, to be in addition 15 to the East Hole closure, which appears to be 16 complete? 17 So harvesting can still take place in the 18 rest of the bay, but it cannot take place on 19 Friday and Saturday. Is that a correct reading 20 of that? 21 A. That's my interpretation. 22 Q. So there is -- at this point in time in May 2014, 23 some harvesting is still taking place. The bay 24 is not entirely closed. Right? 25 A. That's correct. THE REPORTING GROUP Mason & Lockhart</p>	<p>1273</p> <p>1 permitted to? 2 A. I think that's a reasonable conclusion. 3 Q. And in your paragraph 32 of your direct, you 4 mention -- actually, the way you state it is you 5 say, in the event of a serious fishery collapse, 6 for instance, FWC can require oyster monitoring 7 stations or check stations. 8 But, sir you don't have to have a fishery 9 collapse to put check stations in place; do you? 10 A. You wouldn't necessarily have to have that, no. 11 Q. That is something that's within the scope of the 12 authority of FWC; and it could, if it chose to do 13 that, at any point in time? 14 A. Yes. 15 Q. Can we look at the check station Order, please, 16 briefly at tab 12 of your binder. 17 MR. ECHOLS: And, I'm sorry. For the 18 record, this is FX -- Florida -- Exhibit 407. 19 A. Yes, sir. I'm there. 20 Q. Okay. And the title of the Order here is 21 Wholesale Dealer Reporting Requirements of Wild 22 Commercial Oysters Received From Saltwater 23 Product License Holders from the Apalachicola Bay 24 System, Franklin and Gulf Counties. So this is 25 applicable in Gulf County as well? THE REPORTING GROUP Mason & Lockhart</p>

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1 **A. Per the Order, correct.**
 2 MR. ECHOLS: And if we could just pull
 3 up, please, the paragraph numbered 1.
 4 BY MR. ECHOLS:
 5 **Q.** Now, this states here, beginning on November 1,
 6 2015, and continuing through March 31, 2016. Is
 7 that -- is that correct, sir, that these check
 8 stations are being put in place only by the end
 9 of last year?
 10 **A. That's correct.**
 11 **Q.** Even though the fishery collapse took place in or
 12 around August 2012 and there have been efforts to
 13 have the oyster resource recover through 2013,
 14 2014, 2015, the check stations only went in in
 15 November 2015?
 16 **A. That's correct.**
 17 **Q.** And the purpose of the check stations is to try
 18 to ensure that sub-legal, you know, illegal, too
 19 small oysters are not harvested?
 20 **A. Well, one --**
 21 **Q.** One purpose?
 22 **A. That would be one purpose.**
 23 **Q.** Another purpose is to ensure that oystermen are
 24 not harvesting too many oysters. Right?
 25 **A. Yes. And -- and per the testimony of Major**
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1 **Beaton, also it can be in response to a lot of**
 2 **folks out there in the community having --**
 3 **voicing concerns and wanting the law enforcement**
 4 **presence to assure there's not, you know, any**
 5 **drastic overharvesting or undersize.**
 6 **Q.** Was the concern of drastic overharvesting or
 7 undersize harvesting present during 2013 and
 8 2014?
 9 **A. Well, I -- I defer to Major Beaton's testimony**
 10 **from what he saw from law enforcement. But**
 11 **throughout the state I continuously hear concerns**
 12 **on a number of items; and it's up to our law**
 13 **enforcement to determine if that's, indeed,**
 14 **occurring or not.**
 15 **Q.** But at least with respect to the authority of
 16 FWC, there was nothing that prohibited FWC from
 17 putting into place check stations back in 2013
 18 during the collapse?
 19 **A. Nothing prohibited that, correct.**
 20 **Q.** And the way this check station process works, if
 21 you read through on this paragraph, you know,
 22 skipping some of the statutory references, the
 23 dealer must -- in the middle there, third
 24 sentence -- (a), only receive oysters specially
 25 identified by a State of Florida tag indicating
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1 the oysters passed through a monitoring station
 2 as defined by statute.
 3 And so that is the way it would operate. The
 4 oysterman comes off the water with the bags of
 5 oysters and has to go through a desk or a
 6 turnstile, whatever it might be, check in with
 7 the FWC enforcement person to get that bag
 8 tagged?
 9 **A. Yeah. They're actually all put out on the table;**
 10 **and they're measured and then tagged -- the bags**
 11 **are tagged.**
 12 **Q.** And then it goes on to say, (b), immediately
 13 prior to processing or selling, remove and store
 14 the State of Florida tags.
 15 So this way the dealer, the one that's buying
 16 the oysters, this is forcing them to ensure that
 17 the oysters are compliant with having gone
 18 through the check station. Right?
 19 They're the ones that have to take these tags
 20 and keep them?
 21 **A. Correct.**
 22 **Q.** And then it goes to say, (c), provide the State
 23 of Florida tags to commission-authorized
 24 personnel on a daily basis or as requested.
 25 And then further, upon request, provide
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1 commission-authorized personnel a daily
 2 accounting of the total number of pounds of wild
 3 oysters in the shell received from a saltwater
 4 products license holder. Right?
 5 **A. Correct.**
 6 **Q.** So this is a pretty good way, would you not
 7 agree, to ensure that sub-legal harvesting is
 8 being controlled or prevented and also that the
 9 oystermen are not harvesting more oysters than
 10 they should?
 11 **A. It's a very resource-intensive effort that -- to**
 12 **assure that folks -- I think as Major Beaton**
 13 **pointed out, that there's not major violations**
 14 **occurring, it would be prudent to employ this for**
 15 **extensive periods of time.**
 16 **Q.** And I think as Major Beaton also testified -- and
 17 I only caught the tail end of it -- is that this
 18 bay is the people's lives. It's so important to
 19 protect. You would agree with that. Right?
 20 **A. And I would on behalf of FWC as well.**
 21 **Q.** And -- and the resources of the Apalachicola --
 22 no, this is actually your testimony, this part.
 23 Resources of the Apalachicola Bay are so
 24 important, you would agree with that?
 25 **A. Absolutely.**
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1 **Q.** And expending the resources, as the State did at
 2 the end of last year, to put in place the check
 3 stations was a very good management tool of the
 4 fishery?

5 **A. I think if you look in the progression of the --**
 6 **what we have put in place after the crash to**
 7 **allow for a recovery, it's certainly a step and**
 8 **something to put in place for at least a period**
 9 **of time to validate the concerns on undersize or**
 10 **illegal harvest, as Major Beaton testified.**

11 **Q.** Now, the oyster population has not yet recovered
 12 today; has it, sir?

13 **A. It's my understanding it has not.**

14 **Q.** But the check stations are no longer in place?

15 **A. They were set to expire, I believe, in April of**
 16 **this year.**

17 **Q.** Right. And now, we're in --

18 **A. Correct.**

19 **Q.** -- November. So they're gone; the check stations
 20 aren't there anymore?

21 **A. My understanding is they are not.**

22 **Q.** Is there no longer a concern about protecting
 23 against the harvest of sub-legal oysters or the
 24 overharvest of oysters?

25 **A. There is always a concern that we're responsible**
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1 **for. However -- and, again, I would defer to the**
 2 **testimony of law enforcement on, you know, is it**
 3 **a valid situation? Is that actually occurring?**

4 **Q.** Is it FWC's assessment, therefore, that the --
 5 there is no -- or at least not the degree of
 6 unlawful sub-legal harvesting taking place to
 7 justify the resources of putting in place, you
 8 know, a couple people to man check stations?

9 **A. Well, it's -- I'm not sure. I think it's more**
 10 **than a couple of people. But my statement is --**
 11 **and I agree with law enforcement. I trust them**
 12 **when they -- when they suspect or follow up on**
 13 **items, that they're going to employ the**
 14 **techniques they need to to make sure it isn't**
 15 **rampant or beyond sort of a normal practice by**
 16 **the fishermen.**

17 **Q.** Was the -- did FWC engage in a specific
 18 cost-benefit analysis to make the determination
 19 that it would not pay for check stations to be in
 20 place now?

21 **A. I -- I don't know that there's a specific**
 22 **cost-benefit analysis to tell you that. I think**
 23 **it's the result of -- that you see from some of**
 24 **the law enforcement operations to say that there**
 25 **isn't rampant, you know, undersize or illegal**
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1 **harvest going on in -- at least in these areas of**
 2 **Apalachicola. I think Major Beaton's testimony**
 3 **stands on itself for that.**

4 **Q.** Now, rather than go through the more recent --
 5 you described in your direct testimony the Orders
 6 that have been entered in the last couple of
 7 years as well. And I'm not going to walk through
 8 those. But your --

9 MR. ECHOLS: With apologies to Ms. Wine,
 10 I did put them on a chart. So I would just
 11 refer to it briefly.

12 BY MR. ECHOLS:

13 **Q.** And so, sir, if you wouldn't mind just taking a
 14 look at this. As I said, I don't intend to spend
 15 any particular time on it; but it's just meant to
 16 be the corollary to the other chart that we used
 17 showing the Orders that extended or expanded
 18 harvesting opportunities. And then what I have
 19 done is walk through here a lot of the Orders
 20 that we just discussed and I think a couple later
 21 ones as well.

22 For instance, near the middle of this page on
 23 the slide No. 3, you can see the June 1, 2015,
 24 Order that says, closes East Hole, lowered
 25 commercial bag limits, and limits harvesting days
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1 through the summer harvesting season.
 2 Do you see that, sir?

3 **A. I do.**

4 MR. ECHOLS: And for the Court's
 5 convenience as well, I've got listed at the
 6 very bottom all the sources. These are all
 7 joint exhibits that have been entered here
 8 that reflect these various Orders except --
 9 except the 1304.

10 BY MR. ECHOLS:

11 **Q.** And you can see then going forward, just to use
 12 this as opposed to having to go back to other
 13 documents, there were a couple Orders -- and tell
 14 me if this accords with your recollection --
 15 entered.

16 So June 1 of this year, 2016, the
 17 second-to-last step, it says, my understanding is
 18 there is an Executive Order that lowers
 19 commercial bag limit, closes East Hole, limits
 20 harvest Friday to Sunday, expires August 31,
 21 2016.

22 Actually, that's the one that we were just
 23 looking at; isn't it, or no?

24 **A. I don't think so.**

25 **Q.** So it did happen for two years in a row. So in
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1 2015 East Hole was closed; and then in 2016, this
 2 year, that was done again. Correct?
 3 **A. Correct.**
 4 **Q.** This was a management conservation effort to, I
 5 take it, allow the resource, allow East Hole
 6 oysters to recover?
 7 **A. Yes. For recovery, correct.**
 8 **Q.** And then you've got in the September 1, 2016 --
 9 so just a couple of months ago here -- that
 10 harvest was prohibited Saturday and Sunday.
 11 Right?
 12 **A. Yes.**
 13 **May I ask on your chart, because it's not**
 14 **labeled, what does the red line on the left**
 15 **represent?**
 16 **Q.** This was back -- if you, like, held it to compare
 17 it to the other one, this -- that's sort of
 18 showing where the collapse took place.
 19 **A. Okay. I thought so. I wanted to make it clear.**
 20 **Q.** So you have all the Orders opening up the bay,
 21 and then you have the collapse; and then you have
 22 the series of Orders that impose some
 23 restrictions.
 24 **A. For recovery, correct.**
 25 **Q.** For recovery purposes.

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1 Now, I have a series of, I think, two or
 2 three other documents -- well, actually, if you
 3 would confirm for me, just looking at this chart
 4 and having gone through the Orders we've gone
 5 through, is it accurate that except for that
 6 two-day period or three-day period that got
 7 rescinded back in 2013, at no point in time since
 8 the collapse has the entire bay been closed from
 9 harvesting?
 10 **A. With the exception of those days, that's correct.**
 11 **Q.** That two or three-day period in September 2013.
 12 Correct?
 13 **A. Correct.**
 14 **Q.** And I take it there is harvesting, at least under
 15 some schedule, still taking place even at this
 16 time?
 17 **A. Three-bag limit.**
 18 **Q.** Three-bag limit?
 19 **A. One 5-gallon bucket recreational.**
 20 **Q.** And the oyster resource has not recovered yet;
 21 has it?
 22 **A. No, it has not.**
 23 **Q.** With apologies, I don't have these in the binder.
 24 So I'll just hand them all up at the same time.
 25 It's just four short documents.

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1 **A. Thank you.**
 2 **Q.** Okay. I apologize I didn't have them in the
 3 binder ahead of time. I thought that giving them
 4 as a group would make it a little easier to --
 5 and quicker to go through.
 6 I would like to take these in chronological
 7 order, if we could, please. And the first one,
 8 if you could pull out, is GX-559, which is dated
 9 April 6, 2013. Do you have that, sir?
 10 **A. I have it here.**
 11 **Q.** Okay. And you will see that GX-559 is an e-mail
 12 from Bill Pine. And do you know Mr. Pine, sir?
 13 **A. I know the name. I do not know him personally.**
 14 **Q.** And did you know that Bill Pine is Dr. Pine with
 15 the University of Florida?
 16 **A. That's my understanding, yes.**
 17 **Q.** And I take it you know as well that he was
 18 involved in the Oyster Recovery Task Force that
 19 was under the -- with the University and working
 20 with other stakeholders was looking into how can
 21 the oyster -- Apalachicola Bay oyster population
 22 recover?
 23 **A. I understand he was part of the team that put**
 24 **together a report that you referenced.**
 25 **Q.** Right. And even more broadly, there was the

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1 whole effort that the -- there was a University
 2 of Florida report on its own, too?
 3 **A. Correct. Yes.**
 4 **Q.** Right?
 5 **A. That's what I was referring to.**
 6 **Q.** Oh, sure. So here you have in April 2013
 7 Dr. Pine e-mailing Mr. Estes. And if we could
 8 go -- we can skip the first paragraph and look to
 9 the one that begins, I had.
 10 **A. May I have a chance to review this?**
 11 **Q.** Absolutely.
 12 **A. Thank you.**
 13 **Q.** At any time, sure.
 14 **A. Thank you. I have finished.**
 15 **Q.** Okay. So then in the first section -- I was
 16 going to ask you to refer to the section that is
 17 in the paragraph that begins I had, where
 18 Dr. Pine tells Mr. Estes, I had some of my first
 19 contact in a few months with some of the more
 20 Apalach locals the last few days. The stories of
 21 the scale of the illegal harvest that is ongoing,
 22 things like, quote, relay isn't going to be an
 23 option because there isn't going to be anywhere
 24 left to relay from, close quote, is really scary.
 25 If the spawning stock biomass for the entire bay,

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1 including the closed areas, is collapsed from a
 2 combination of environmental conditions and
 3 illegal harvest, it is going to make recovery
 4 much more -- much, much harder.
 5 Do you see that?
 6 **A. I do.**
 7 **Q.** And from time to time it is the case that
 8 Dr. Pine, other members of the Oyster Recovery
 9 Task Force, would communicate with FWC and
 10 express their opinions and in some cases concerns
 11 about what the status of the oyster resource was;
 12 is that correct?
 13 **A. Sure. We have dialogue -- we welcome any**
 14 **dialogue and opinions.**
 15 **Q.** And just like before when we had the Bay County
 16 Commissioners, they raised an issue with FWC; and
 17 FWC responded. Right?
 18 **A. In that situation, yes.**
 19 **Q.** And you understand that in this reference here to
 20 relay, you know, that relaying is a means that
 21 previously had been used to take oysters out of
 22 an area that was not permitted to be harvested
 23 and move them into an open bar, give them a
 24 chance to grow and then be available for
 25 harvesting?

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1 **A. To grow and also to filter feed and get through**
 2 **any contaminants that were health safety issues.**
 3 **Q.** And that's -- that was one method. We've got the
 4 shelling and cultching as a recovery and habitat
 5 restoration methodology. And this relaying is
 6 similarly another type of restoration effort.
 7 Right?
 8 **A. It's -- yes, it's a tool.**
 9 **Q.** And do you understand that to the extent there
 10 was illegal -- strike that.
 11 If there were illegal harvests taking place,
 12 that that could impact the recovery of the oyster
 13 population?
 14 **A. Do I understand that to be the case?**
 15 **Q.** Yes, sir.
 16 **A. Well, I understand that's what Mr. Pine is**
 17 **providing his opinion to Jim Estes on.**
 18 **Q.** And is that an opinion, sir, you disagree with?
 19 **A. Can we -- can we, just to be sure, read again,**
 20 **please, or point me to the proper --**
 21 **Q.** Sure. The last sentence that we were referring
 22 to, the if the spawning stock. So if the
 23 spawning stock biomass for the entire bay,
 24 including the closed areas, is collapsed from a
 25 combination of environmental conditions, and we

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1 have the drought -- except now in 2013 the
 2 drought is done -- and illegal harvest, it is
 3 going to make recovery much, much harder.
 4 And my question was do you understand it to
 5 be true that illegal harvest of the type that he
 6 is referring to, if it were to take place -- not
 7 saying that it is, but if it were to take place,
 8 that could make recovery harder?
 9 **A. Given what I understand about the biology and**
 10 **fecundity of oysters to have an effect from**
 11 **illegal harvest would have to be virtually**
 12 **uncontrolled and unenforced.**
 13 **And I believe that was the conclusion of the**
 14 **UF report as well ultimately. If we look at the**
 15 **timing, Mr. Pine is providing his opinion. And**
 16 **when, ultimately, it was all sorted out and the**
 17 **UF was able to review amongst their peers, I**
 18 **believe that's the conclusion they reached.**
 19 **Q.** It is. They did conclude that unless sub-legal
 20 harvest was unregulated and taking place at a
 21 large scale; correct?
 22 **A. Correct.**
 23 **Q.** And as he says in the first sentence in this note
 24 to Jim Estes -- the second sentence, quote, the
 25 stories of the scale of the illegal harvest that

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1 is ongoing -- and I'll leave out the in between
 2 part -- is really scary.
 3 Do you see that?
 4 **A. I do. I see that.**
 5 **Q.** Okay. And it is your understanding, is it not,
 6 sir, in accordance with what Dr. Pine, the
 7 tenured professor, part of the Oyster Recovery
 8 Task Force, that illegal harvest taking place at
 9 a large scale could impede the recovery of the
 10 oyster resource?
 11 **A. That's what Mr. -- Dr. Pine is saying here.**
 12 **Q.** And you agree with that; don't you?
 13 **A. I don't -- I don't know that I do. I don't --**
 14 **well, I think what the question here is the scale**
 15 **of harvest -- the level of scale of the harvest**
 16 **with oysters would be very high. So I don't -- I**
 17 **don't know what scale he's referring to. It's**
 18 **kind of qualitative here.**
 19 **Q.** Well, how about as far as, like, a general FWC
 20 position, even if it's not yours personally?
 21 Does FWC have a general position with respect to
 22 whether large-scale illegal harvest might impede
 23 the recovery of the oyster resource?
 24 **A. At its largest scale, perhaps. But, again, that**
 25 **would -- it would have to be an egregious**

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1 **operation, almost dredging-like, to remove all**
 2 **the oysters because one oyster alone produces**
 3 **literally millions of gametes.**
 4 **Q.** And that's the -- that's the biological and
 5 enforcement position that FWC takes?
 6 **A. Yes. This has been resilient for decades and**
 7 **recovered.**
 8 **And I think I would defer to Major Beaton on**
 9 **the opinion of the occurrence of undersize or**
 10 **illegal harvesting.**
 11 **Q.** And I take it you, yourself, are not an oyster
 12 biologist?
 13 **A. I am a -- I am a zoologist by training, which**
 14 **includes courses and work in population biology.**
 15 **But oysters are often held out to be the ultimate**
 16 **invertebrate that produces millions of gametes,**
 17 **not just a single one.**
 18 **Q.** And in your opinion, you know, as a zoologist
 19 with your science background, is that large-scale
 20 harvest of sub-legal oysters would not be a
 21 factor to impede the recovery of the oyster
 22 resource?
 23 **A. I believe what I am saying is that to the**
 24 **magnitude that would have to occur to not allow**
 25 **recovery in Apalachicola is -- is really high.**

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1 **That's a -- that scale is -- you would have to**
 2 **have a lot of people out there doing it in**
 3 **egregious ways, I believe is what my testimony**
 4 **was.**
 5 **Q.** Would it make sense when you receive reports or
 6 when Mr. Estes and FWC received reports at this
 7 point in time in April 2013 to put check stations
 8 in place?
 9 **A. I don't -- I would have to trust the staff in**
 10 **enforcement and the Executive Orders and the**
 11 **progressive measures we put in place as the**
 12 **responsible way to manage this.**
 13 **Q.** So there wouldn't have been anything wrong with
 14 putting check stations in place at this point in
 15 time?
 16 **A. I think I testified that there's nothing that**
 17 **could preclude us from doing that from an**
 18 **authority standpoint.**
 19 **Q.** If you credit what Dr. Pine is saying here, don't
 20 you think it probably would have been a good idea
 21 to put check stations in place?
 22 **A. I -- I defer to Major Beaton. I think he**
 23 **described very well what you're hearing, what**
 24 **you're seeing, and then the tools he employed.**
 25 **He's a sworn law enforcement officer and an**

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1 **expert in this particular area. I would defer to**
 2 **his testimony.**
 3 **Q.** But the check stations though, sir, Major Beaton
 4 doesn't have any authority as far as putting
 5 check stations in place. That has to be under
 6 signature of Nick Wiley, the executive director
 7 of FWC. Right?
 8 **A. That's correct.**
 9 **Q.** And so Major Beaton, I'm sure, does a fine job at
 10 what he does. But as far as FWC, would it not
 11 have made sense -- if you credit this, if you
 12 credit what Dr. Pine is saying that he's hearing,
 13 if it's true, wouldn't it have made sense for FWC
 14 and Nick Wiley, the executive director, to have
 15 issued that Order a couple of years earlier to
 16 protect against this?
 17 **A. I don't know that I would conclude that, that**
 18 **that's the proper measure to take based on an**
 19 **e-mail.**
 20 **Q.** Let's go down, if we could, to the bottom of that
 21 paragraph where he's got a sentence that runs
 22 into an arabic numeral 1. Do you see that?
 23 **A. I do.**
 24 **Q.** I'm going to skip the part about -- he's talking
 25 about reporting. But No. 1 there, the arabic

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1 numeral, says, shouldn't some consideration be
 2 given to reducing harvest now as the fishermen
 3 are getting paid to shell and then turn around
 4 and are fishing?
 5 And then he goes on to say, can we get an
 6 idea of the extent of illegal harvest now through
 7 some sort of enforcement surveys?
 8 Now, the shelling that he's referring to is
 9 one of those restoration activities. Right?
 10 **A. I -- I think that's a safe assumption that's what**
 11 **he's referring to.**
 12 **Q.** And shelling is a beneficial activity, a
 13 best-management practice, and important to assist
 14 the recovery of the oyster population. Correct?
 15 **A. It works when environmental conditions are good,**
 16 **yes.**
 17 **Q.** And one of the things that -- and environmental
 18 conditions in April 2013 now, they're great.
 19 They're awesome. There's plenty of water.
 20 Right?
 21 **A. Well, if you look at a system in that short of a**
 22 **temporal sense, I suppose you're correct. But**
 23 **that's not how you look at systems ecologically.**
 24 **Q.** Right. You probably would want to look at it for
 25 a longer period of time, like 2013, '14 and '15,

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1 all three of those years, when there were good
 2 flows coming down the Apalachicola. Would that
 3 be a more ecologically proper window to look at?
 4 **A. I think you -- I don't think I should define the**
 5 **scale here, sir. But it certainly is beyond one**
 6 **year.**
 7 **Q.** And so here Dr. Pine is asking Jim Estes,
 8 shouldn't some consideration be given to reducing
 9 harvest now?
 10 And this is in April 2013. Do you see that?
 11 **A. I do.**
 12 **Q.** And at least as of that time, you know, as of
 13 April 2013, we had not had -- except for the
 14 automatic, you know, rule that popped in in
 15 November, there hadn't been any Executive Order
 16 entered by Fish and Wildlife Commission to
 17 restrict harvesting?
 18 **A. Correct.**
 19 **Q.** If I could go chronologically, hopefully, here, I
 20 think the next one is GX-589. Do you have that,
 21 sir?
 22 **A. I do.**
 23 **Q.** Okay. Now, GX-589, you've got a couple of
 24 e-mails which, again, here means that you have to
 25 go to the bottom of the second page if you want

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1 to do it in sequence, which is probably the
 2 easiest thing to do here.
 3 And so again, this one, it's a May 10, 2013,
 4 e-mail from Dr. Bill Pine to Nick Wiley,
 5 executive director of FWC. Do you recognize
 6 that?
 7 **A. Yes.**
 8 **Q.** And he says -- after exchanging some
 9 pleasantries, if you go down to the third
 10 paragraph, he's saying to Nick, (1) make the
 11 3-inch minimum size rule apply universally, even
 12 to dealers, an asterisk, this way you eliminate
 13 the current legal market for an illegally
 14 harvested product.
 15 Now, that's what Major Beaton was testifying
 16 about just a little while back, that the rule at
 17 this point in time at FWC, at least as to the way
 18 the statutes were set up, allowed for issuing
 19 citations on the water. But if undersize product
 20 was found later at a dealer or something, that
 21 then there wasn't a provision to allow for
 22 issuing a citation. Is that right?
 23 **A. I would defer to Major Beaton.**
 24 **Q.** Does that sound accurate to you?
 25 **A. I would trust Major Beaton's testimony.**

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1 **Q.** Would you also agree that one of the
 2 responsibilities of FWC as a management agency is
 3 that it's charged with adopting new regulations
 4 and modifying old ones to properly manage and
 5 conserve wildlife resources?
 6 **A. Yes, I would agree with that.**
 7 **Q.** And if you go down to the number -- the arabic
 8 numeral 3 there, Dr. Pine says, close oyster bars
 9 that are restored to harvest until a minimum
 10 harvestable biomass, approximately 15 legal
 11 oysters per square meter, has established on that
 12 reef similar to what was done post-Hurricane
 13 Elena in 1986 in Apalachicola.
 14 Now, it is correct, is it not, that there was
 15 a decimation of the oyster population in
 16 Apalachicola back in the 1985-1986 time period.
 17 Right?
 18 **A. As I recall, there was some impact from Hurricane**
 19 **Elena. Correct.**
 20 **Q.** We had Hurricane Elena and Hurricane Kate?
 21 **A. Correct.**
 22 **Q.** And at that point in time the oyster population
 23 was almost basically wiped out. Right?
 24 **A. Yes. There was a lot of scouring -- scouring on**
 25 **the bars and some other impacts; but they quickly**

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1 **recovered.**
 2 **Q.** And part of what assisted that recovery is what
 3 Florida did at that time is they immediately
 4 closed the bay from harvesting for a period of --
 5 I believe it was about six months. Is that
 6 right?
 7 **A. I would need to refer to documents to verify the**
 8 **time period.**
 9 **Q.** But you do recall that the bay was closed
 10 entirely from harvesting after Hurricane Elena
 11 and decimation of the oyster population?
 12 **A. I'm sorry. I don't recall the exact period of**
 13 **time it was closed.**
 14 **Q.** Do you recall that after Hurricane Elena and the
 15 decimation of the oyster population is when
 16 Florida instituted check stations for the first
 17 time?
 18 **A. I recall some mention of that.**
 19 **Q.** And that was something that was done as part of
 20 the recovery effort to ensure that when
 21 harvesting was opened back up, that there would
 22 be check stations in place to ensure that the
 23 oysters in the process of recovering wouldn't be
 24 overfished, and sub-legal oysters wouldn't be
 25 taken. Right?

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1 **A. That very well could have been the management**
 2 **response and logic.**

3 **Q.** Do you recall also that after Hurricane Elena in
 4 this 1985-'86 time period, a topic we'll get to
 5 later, there was a massive reshelling program
 6 that Florida undertook?

7 **A. You said we were going to get to that later with**
 8 **the details and documents that I could refer to,**
 9 **sir?**

10 **Q.** Yes, probably tomorrow, the way it's going, yes.
 11 Do you recall that there was a massive
 12 reshelling program?

13 **A. I -- I know that there's been a lot of shelling**
 14 **for decades in the Apalachicola system.**

15 **Q.** You don't recall that there was a particular
 16 emphasis and heightened amount of shelling that
 17 was done because we had this disaster or
 18 decimation of the oyster population as part of,
 19 you know, FWC's concerted efforts to help the
 20 oyster population recover?

21 **A. I'm sure we could refer to the logs that we keep**
 22 **and validate that. I don't have any reason to**
 23 **believe there wasn't shelling efforts going on**
 24 **post-Hurricane Elena.**

25 **Q.** If you go down to the next part of Dr. Pine's
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1 e-mail there where he's got the asterisk --

2 **A. Yes.**

3 **Q.** And the asterisk here, he says, the quickest way
 4 to recovery of the fishery is to include closures
 5 as part of the management process. I know folks
 6 don't want to talk about that.

7 Do you and does FWC agree that one of the
 8 quickest ways to assist recovery of the fishery
 9 would be to include closures of the Bay to manage
 10 it?

11 **A. It depends on the situation. Closure is a very**
 12 **drastic measure to take. And a number of other**
 13 **considerations have to be considered including,**
 14 **in the case of Apalachicola, a closure is not**
 15 **going to matter if the environmental conditions**
 16 **aren't conducive to recovery.**

17 **Q.** Right. We're in 2013 now when environmental
 18 conditions are great. Right?

19 **A. I don't know that I'd characterize them as great.**

20 **Q.** And the -- is it FWC's position that closures are
 21 unhelpful to the recovery of the oyster resource
 22 when it's in the depleted state that it was here
 23 in 2013?

24 **A. Again, it depends on the situation. It depends**
 25 **on the fishery in question.**
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1 **Q.** I'm sorry, sir. I'm talking about the
 2 Apalachicola Bay fishery in May 2013.

3 **A. You know, I'm not sure a closure is going to have**
 4 **any additive value for the restrictions we placed**
 5 **on the commercial harvesting. The gain that you**
 6 **get biologically with our environmental**
 7 **conditions isn't going to be any more than what**
 8 **we have done collectively reducing the commercial**
 9 **bag limit, and it's still not being recovered.**
 10 **It's still not recovering.**

11 **Q.** With these biological conditions being the
 12 oysters that have millions and millions and
 13 millions of gametes and can recover quickly if
 14 they're given the chance?

15 **A. If they're given the right environmental**
 16 **conditions.**

17 **Q.** Let's go up to the -- a couple e-mails up,
 18 please. We've got Dr. Havens -- Karl Havens
 19 weighs in.
 20 And you're familiar with Dr. Havens as well
 21 as being a tenured professor at the University of
 22 Florida who was involved in the Oyster Recovery
 23 Task Force?

24 **A. Yes. I don't -- I don't know Dr. Havens**
 25 **personally; but I have seen he's one of the**
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1 **principal authors in the UF report.**

2 **Q.** And you have this e-mail May 10 -- so it's the
 3 same date, May 10 -- to Nick Wiley, executive
 4 director of FWC, and Jim Estes. And then you
 5 also have Jack Payne, who is a -- isn't he the
 6 head of that Marine Fisheries Research at the
 7 University of Florida?

8 **A. I don't know Jack's exact title; but he -- I**
 9 **think he's relatively high in the administrative**
 10 **level at the University.**

11 **Q.** And then Karl is responding to -- Dr. Havens,
 12 rather, is responding to Bill Pine's e-mail. And
 13 he says, Bill, this is solid advice and your
 14 attached write-up is outstanding. It seems like
 15 2013 and 2014 are critical years where the
 16 population could either start to recover or
 17 really crash, and the outcome is highly dependent
 18 on what the oyster harvesters do. I'm surprised
 19 you did not suggest a period of total closure of
 20 the bay this year. It strikes me that the
 21 outcome is balanced on the edge of a knife.
 22 Now, at this point in time in May 2013, there
 23 had not been issued by FWC any total closure of
 24 the bay from harvesting. Right?

25 **A. Right.**
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1 **Q.** And, actually, from this point in time up until
 2 the two or three-day period in September, that
 3 two or three-day period in September is the only
 4 time that there was a complete closure of the bay
 5 from harvesting. Correct?
 6 **A. I testified to that a few times, yes, sir.**
 7 **Q.** And that's continuing up until today, November
 8 2016?
 9 **A. There is a 3-bag per person limit today down from**
 10 **20.**
 11 **Q.** Do you agree that at this point in time in May
 12 2013 that the oyster population was in a very
 13 precarious position?
 14 **A. I would agree. It's in my direct testimony.**
 15 **Q.** And then let's go up, if we can, one more e-mail.
 16 And this one, apparently it looks like Mr. Wiley,
 17 Executive Director Wiley, drops the professors
 18 off the chain and is speaking just to Jim Estes.
 19 And he states, please talk to these guys next
 20 week and get them to chill out on the e-mail
 21 speculation about closing seasons. Help them
 22 understand there is a lot of stakeholder work to
 23 go down this path. Just having compelling
 24 science may not be enough. I don't believe they
 25 understand how we have to work through these

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1 things. Thanks.
 2 Do you have any understanding what Mr. Wiley
 3 is referring to when he says, just having
 4 compelling science may not be enough?
 5 **A. I think I can speak to that, yes.**
 6 **Q.** And you -- the science part would relate, would
 7 it not, to the biological recovery of the oyster
 8 resource?
 9 **A. I don't know that that's how I would characterize**
 10 **it. I would -- what I would say is the key word**
 11 **is compelling. I mean, there's -- sometimes you**
 12 **can take a snapshot look at one particular**
 13 **variable and then conclude through lots of**
 14 **assumptions that there's one way or only one way**
 15 **to react. And in this case, Mr. Wiley is saying**
 16 **there's a lot of factors to consider. You can't**
 17 **just say, this is what's happened; this is what**
 18 **you want to do.**
 19 **This is a preliminary reaction by these**
 20 **individuals, and it needs to be a little bit more**
 21 **thoroughly vetted and reviewed. I think that's a**
 22 **fair assessment of Mr. Wiley's e-mail and what he**
 23 **was speaking to.**
 24 **Q.** But it's actually not that preliminary at this
 25 point though, is it, because we're in May 2013?

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1 **A. Well, it's -- well, I should say the preliminary**
 2 **analysis of all the data and the recommendations**
 3 **by UF I don't believe have been finished at this**
 4 **point through the report.**
 5 **Q.** No. But actually, it was. In April 2013 -- the
 6 University of Florida issued its report in April
 7 2013, which then FWC, when we get to it tomorrow,
 8 cited. So the Florida research scientists had
 9 already gone through and issued their entire
 10 scientific report, which then FWC cited.
 11 **A. Yes. I -- I stand corrected. I apologize.**
 12 **This -- I get the chronology mixed up. There's a**
 13 **lot of dates.**
 14 **Q.** And regardless that FWC cited to these
 15 scientists' research in its own submission, at
 16 this point Mr. Wiley, as executive director, is
 17 asking Jim Estes to tell these tenured professors
 18 who studied the disaster and the collapse to,
 19 quote, chill out on the e-mail speculation about
 20 closing seasons. Right?
 21 **A. That's what he wrote.**
 22 **Q.** Let's go another one in, if we could, please, to
 23 June 2013, GX-601. And we have here another
 24 string of e-mails, and so for it to make sense
 25 we'll have to go back to front. And so to keep

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1 the dates straight, we've got Dr. Pine June 3,
 2 2013, e-mailing Jim Estes and Steve Geiger and a
 3 couple other folks. The subject here is Weekend
 4 AB Closure -- Apalachicola Bay closure.
 5 And we -- you testified earlier about at this
 6 point in time in June 2013, there was the --
 7 there was the Executive Order that prohibited
 8 harvest Friday to Saturday for the summer harvest
 9 season. Right?
 10 Do you recall that?
 11 **A. Can you reference that one again, please?**
 12 **Q.** Yes. We can look at the blue chart, or we can
 13 find the actual Order in the binder. It's up to
 14 you.
 15 **A. I would prefer the binder.**
 16 **Q.** Actually, it's in the joint testimony.
 17 Actually, I think you've got it in your
 18 direct testimony, which would be easier.
 19 **A. And it's the June 1, 2015?**
 20 **Q.** No. I'm sorry, 2013.
 21 **A. 2013.**
 22 **Q.** If I can refer you to paragraph 54, please, in
 23 your written direct.
 24 **A. Thank you.**
 25 **Yes. I'm there.**

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1 **Q.** And you will see in your written direct testimony
 2 it references the closure on Fridays and
 3 Saturdays through the summer harvest season.
 4 Right?
 5 **A. Correct.**
 6 **Q.** So then that takes us back to where we were with
 7 GX-601. And we're on the page then where -- the
 8 back page where Bill Pine -- Dr. Pine e-mails Jim
 9 Estes and says, hi, I hope you guys are well. I
 10 saw the FWC Executive Order where the weekends
 11 are now closed to oyster harvest on AB for the
 12 summer season only. I thought that these types
 13 of closures usually just displaced effort to the
 14 open days, not really reduce it. The only way I
 15 think that it would reduce effort is if a large
 16 proportion of the weekend harvest was done by
 17 folks that were fully employed in a higher wage
 18 position during the week. I don't think this is
 19 the case in Apalachicola.
 20 Do you understand Dr. Pine to be
 21 communicating at least his opinion to Mr. Estes
 22 that closing the bay only on weekends won't be
 23 sufficient to reduce effort because the people
 24 who would have harvested on the weekends are just
 25 going to harvest on the weekdays instead?

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1 **A. Yeah. He says the only way I think it would**
 2 **reduce effort -- I mean, yes, that seems to be**
 3 **his opinion.**
 4 **Q.** And then if we continue up the chain, we've got
 5 a very short response here from Mr. Estes to
 6 Bill Pine that says, the belief is closure of
 7 the two days will displace harvesting effort
 8 over time.
 9 Then Dr. Pine responds again up a little
 10 higher there where it's -- on the June 3, 2013,
 11 at 12:57 p.m. It starts, okay. Displace. Are
 12 you there?
 13 **A. Yes.**
 14 **Q.** And Dr. Pine is telling Mr. Estes, okay.
 15 Displace, but not reduce. If the goal is to
 16 conserve or increase spawning stock biomass, then
 17 you have to reduce. I know your options are
 18 limited, but my gut feeling is that this is going
 19 to have no benefit in terms of extending the
 20 season or spawning stock conservation.
 21 And is it correct that after that point in
 22 time of this communication to Mr. Estes, the only
 23 closure for the remainder of 2013 that took place
 24 was that two days in September 2013?
 25 **A. The entire bay closure?**

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1 **Q.** Yes, sir.
 2 **A. Yes.**
 3 **Q.** Then we've got Mr. Estes responds again on
 4 displacement. Let's go up to the top e-mail, if
 5 we could, please.
 6 Dr. Pine here is referring to some of the --
 7 Mr. Berrigan's research, I take it. And he says,
 8 quote, well, the earlier Berrigan work says that
 9 healthy Apalachicola Bay bars support 17 to 25
 10 legal oysters per square meter of habitat.
 11 That's why I'm curious if the monitoring is
 12 continuing to know what is out there. Based on
 13 the last data I saw from fall of 2012, DACS
 14 monitoring, those data did not suggest that there
 15 would be healthy oyster population out there now.
 16 That's why I'm a little surprised the fishery is
 17 open or if it is open, if there is anything to
 18 harvest.
 19 And it is correct that at this point in time,
 20 the fishery was open except for those weekend
 21 days; is that right?
 22 **A. That's correct.**
 23 **Q.** If we can go to GX-734, please, are you there
 24 with me, sir?
 25 **A. Yes, sir.**

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1 **Q.** Okay. And GX-734 you will see is not from
 2 Dr. Pine. It is a letter to Mr. Estes again, and
 3 we're a year later here. This is May 19, 2014.
 4 Do you see that?
 5 **A. I do.**
 6 **Q.** And you're familiar, I take it, with the
 7 Apalachicola Bay Oyster Dealers Association, at
 8 least generally?
 9 **A. Generally.**
 10 **Q.** Okay. And we've got -- from time to time the
 11 Apalachicola Bay Oyster Dealers Association would
 12 write to FWC and raise concerns or provide ideas
 13 for how it thought the management of the fishery
 14 could best take place. Would that be fair to
 15 say?
 16 **A. I'm sorry, counsel; I was reading. Can you**
 17 **please state that again?**
 18 **Q.** I'm sorry. I'll give you a second. Just go
 19 ahead.
 20 **A. Thank you. I appreciate that.**
 21 **Thank you.**
 22 **Q.** Okay. From time to time FWC might receive
 23 communications, correspondence from the
 24 Apalachicola Bay Oyster Dealers Association?
 25 **A. Clearly, yes.**

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1 **Q.** And they may express their opinion about the
 2 management options for the fishery?
 3 **A. Yes. There's plenty of folks expressing opinions**
 4 **on how we should manage the fishery; that's**
 5 **correct.**
 6 **Q.** And if you look here in the first paragraph in
 7 the letter to Mr. Estes, the Association here is
 8 telling FWC, Mr. Estes, in our continuing effort
 9 to preserve and protect our bay and natural
 10 resources, our organizations -- and they list the
 11 organizations there -- jointly recommend and
 12 encourage the following new Apalachicola Bay
 13 harvesting regulations be imposed and effective
 14 as soon as possible.
 15 And it goes down, and I'll skip the eight-bag
 16 limit bullet. The second bullet then says, close
 17 East Hole to summer harvesting, remain open for
 18 winter harvesting season only.
 19 Do you see that?
 20 **A. I do.**
 21 **Q.** And we're in May 2014. And at no point in 2014
 22 did FWC close East Hole to summer harvesting.
 23 Correct?
 24 **A. I don't -- yes, I don't recall describing that**
 25 **Order that did that at that point in time.**

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1 **Q.** And if we go down to the final paragraph, it
 2 states, we cannot place enough importance on the
 3 reasons for these requested new regulations and
 4 appreciate your favorable consideration. Our
 5 continued cooperation is vital as we all work
 6 together to do what is best for the survival of
 7 Apalachicola Bay. Feel free to contact any of us
 8 to discuss further if more information is needed
 9 or if there are any questions.
 10 And FWC did want the community, the dealer
 11 community, the oystermen community, to work with
 12 it in the effort to help the bay restore the
 13 oyster resource; did it not?
 14 **A. Sure. They're important stakeholders.**
 15 **Q.** But I take it that FWC analyzed and did a
 16 cost-benefit analysis and determined that the
 17 requests they were making for closing East Hole
 18 to summer harvesting did not make sense at this
 19 time in mid-2014?
 20 **A. That was -- we did not enact that management**
 21 **action at that point, no.**
 22 **Q.** It's the case, therefore, that FWC rejected the
 23 suggestion by the Apalachicola Bay Oyster Dealers
 24 Association?
 25 **A. I don't know that we rejected it. We take lots**

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1 **of input from others who come up with the**
 2 **management decision we believe fills our**
 3 **responsibilities. These are valued stakeholders,**
 4 **and that is what they provided along with**
 5 **Dr. Pine, along with a lot of others, all of us**
 6 **which want to see recovery of Apalachicola Bay.**
 7 **Q.** Okay. I want to change topics here, sir. And
 8 without -- without duplicating anything that was
 9 the subject of Major Beaton's testimony, it is
 10 the case that FWC has law enforcement
 11 responsibilities with respect to the size limits
 12 and bag limits and the like. Correct?
 13 **A. Yes. For many species, yes.**
 14 **Q.** And as we saw this morning, lots of times
 15 communications will go, you know, to folks like
 16 Major Beaton who are on the ground and enforcing.
 17 But from time to time communications will come to
 18 more senior people at FWC like Mr. Estes and
 19 Mr. Wiley raising concerns about enforcement
 20 issues. Would you agree with me?
 21 **A. Yes. We -- our agency is very receptive at all**
 22 **levels to get input.**
 23 **Q.** And I don't -- unless you tell me I need to, I
 24 won't go back to the August 2012 resource
 25 assessment report. But suffice it to say that in

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1 that report by DACS, there were concerns or
 2 observations that there was a degree of sub-legal
 3 and illegal harvesting taking place. Would you
 4 agree with that?
 5 **A. I recall he expressed that they had heard some**
 6 **concerns or thought there may be.**
 7 **Q.** And do you recall -- and I'm happy to look at it;
 8 I'm just trying to skip it if I can -- that there
 9 was a reference to size limits not being enforced
 10 as much after the BP oil spill?
 11 **A. I, along with you, appreciate you not wanting to**
 12 **go back; but I -- given all of the dates and the**
 13 **reports and the severity of this, I would -- I**
 14 **would like to, if we could, pull that up so I can**
 15 **do that.**
 16 **Q.** No problem. No problem at all.
 17 If we could then go to tab -- I believe it's
 18 4, tab 4 in your binder, please.
 19 **A. Yes, sir.**
 20 **Q.** And this is JX-77.
 21 **A. Yes. Thank you for obliging me. I appreciate**
 22 **it.**
 23 **Q.** No, no, at any time. At any time.
 24 And just to reorient ourselves, JX-77 is the
 25 Governor's letter which attaches Commissioner

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1 Putnam's letter which then attaches the August
 2 2012 DACS report.
 3 And it's in that report -- and I'll just pull
 4 out a single example. If you can go to page 8 of
 5 the DACS report.
 6 **A. Yes, sir. I'm on page 8.**
 7 **Q.** 8, okay. And I would refer you down to the
 8 paragraph in the middle that begins the practice.
 9 **A. Yes, I'm there.**
 10 **Q.** And that paragraph in Mr. Berrigan's report of
 11 August 2012 states, the practice of harvesting
 12 sub-legal oysters appears to be an extension of a
 13 "use it or lose it" attitude that prevailed
 14 during the fall and winter of 2010. Following
 15 the oil spill in April 2010, there was an
 16 acknowledged threat to oyster resources in
 17 Apalachicola Bay, and management policies were
 18 directed toward harvesting available resources in
 19 the face of a growing risk of loss.
 20 And then here is the part that I was
 21 specifically contemplating where it says,
 22 throughout the period when oil posed an
 23 unpredictable threat to the oyster fishery, less
 24 effort was directed toward enforcing size limits,
 25 perhaps yielding to the view that it would be

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1 more beneficial to harvest the available
 2 resource. But, unfortunately, many oystermen
 3 have continued the same harvesting practices that
 4 were allowed during the oil spill threat.
 5 Does that refresh your recollection, sir,
 6 that in this official Florida state report by
 7 DACS there was a -- a notation reflected that
 8 less effort was directed towards enforcing size
 9 limits?
 10 **A. Yes. I concur that what you just read is in that**
 11 **oyster assessment report.**
 12 **Q.** And then if we could flip then back in your
 13 binder to tab 13, please.
 14 **A. Yes, sir.**
 15 **Q.** Okay. We have, thankfully, a very short e-mail.
 16 Tab 13 is GX-341. And you will see this is dated
 17 July 2010. So we're in this period after the oil
 18 spill when we had a couple of the Orders that
 19 have extended harvest windows. And there's a
 20 Lynn Bannister e-mail to Nick Wiley, executive
 21 director. And if I recall correctly, Bill
 22 Nelson, he's a state senator?
 23 **A. He's a U.S. senator, sir.**
 24 **Q.** Oh, he's a U.S. senator. I'm sorry.
 25 So you have Ms. Bannister on behalf of U.S.

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1 Senator Bill Nelson to Nick Wiley. And she
 2 e-mails and says, Nick, I'm meeting with
 3 fishermen in Apalach now. They say undersized
 4 oysters are being taken, and no one is policing
 5 this. What do you know? Lynn.
 6 And is this the type of thing that we have
 7 talked about that you get reports from various
 8 sources from time to time of potential undersized
 9 oysters harvesting taking place; and sometimes
 10 those reports might go to Major Beaton, but
 11 sometimes they might come directly to the
 12 executive director from a U.S. senator staffer?
 13 **A. Yes. We -- we get -- and Ms. Bannister, she's**
 14 **great. She asks us a lot of questions, what**
 15 **she's hearing from constituents. Not just oyster**
 16 **sizes, but elsewhere. I have dealt with her**
 17 **before.**
 18 **Q.** If we could take a look at the next tab, tab 14.
 19 MR. ECHOLS: And tab 14, for the record,
 20 is GX-458.
 21 **A. Yes, sir. I'm there.**
 22 **Q.** Okay. And you will see here we've got -- at the
 23 bottom -- it's not clear to me who sent the
 24 bottom e-mail; so I won't -- well, actually, it
 25 gets forwarded up. So I guess we've got Bob Fish

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1 which, as you can tell from above, it says Bob
 2 Jones, executive director of the Southeastern
 3 Fisheries Association.
 4 Are you familiar with that association?
 5 **A. Yes, generally.**
 6 **Q.** And he's forwarding an e-mail up, again, to Nick
 7 Wiley. If we start at the bottom, an e-mail that
 8 has come in to him says, Bob, somehow we need to
 9 have introduced into the conversation the fact
 10 that there was and remains very little
 11 enforcement of the size limit on the water and at
 12 dockside. FWC has basically taken their ball and
 13 gone home ever since the industry had rules
 14 changed to keep the jackboots from stopping
 15 trucks and invading shops to check sizes of
 16 bagged oysters. Since they can't enforce easily,
 17 they seem to turn a blind eye to undersized
 18 oyster harvest. GOIC sent a letter several years
 19 ago urging FWC and DACS to address the issue, but
 20 to no avail.
 21 Do you know what GOIC is?
 22 **A. Not off the top of my head.**
 23 **Q.** But as you said, it's not an uncommon thing for
 24 concerns about enforcement to be raised with FWC?
 25 **A. No, no. We get that all over the state.**

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1 **Q.** And you will see that, you know, the
 2 confidentially, above there, sends the e-mail to
 3 Nick Wiley and says, I will not send this to
 4 anyone but you. But the point about so many
 5 small oysters being tonged is valid, and it does
 6 seem like a lack of law enforcement.
 7 And this is as of September 2012. So we're
 8 right in the very window when the oyster collapse
 9 has been identified. Is that right?

10 **A. This -- the e-mail date and that collapse**
 11 **correspond.**

12 **Q.** If we could go to the next tab, 15, please. And
 13 tab 15 is GX-465.

14 **A. Yes, sir.**

15 **Q.** All right. And we've got a string of e-mails,
 16 unfortunately. If you go to the second page,
 17 please, I don't know if you recall. Previously
 18 Dr. Pine had mentioned whether there could be
 19 some type of survey of undersize harvest in the
 20 e-mail we looked at?

21 **A. I recall him stating something like that.**

22 **Q.** Yes. So to skip that, I think at least it would
 23 relate to the topic at the bottom here, the
 24 middle bottom, Jim Estes's e-mail, September 21,
 25 to Bill Pine.

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1 And he's telling Dr. Pine and Dr. Havens, I
 2 doubt that they will be very forthcoming about
 3 the harvest or catch of undersized oysters but
 4 will ask. Have you seen the DACS report? They
 5 provide a rough size structure. If you do not
 6 have it, I will send it when I get back to office
 7 this afternoon.
 8 Dr. Pine then, above that, responds to
 9 Mr. Estes and Dr. Havens. Here we are in
 10 September 2012. So the August 2012 DACS report
 11 has come out already and is public. And he
 12 states -- and, in fact, at this point,
 13 September 21, it's been attached to the
 14 Governor's letter.

15 **A. The DACS report?**

16 **Q.** The DACS report, yes, sir.
 17 And it says -- he says, yes, I have the DACS
 18 report. We need some simple things. It would be
 19 really useful to say buy four or five bags of
 20 oysters and just measure them for the percent
 21 legal. If the stories from folks of only 10
 22 percent of the oysters that are being sold are
 23 legal size, then that might be part of the
 24 problem.
 25 And recognizing here that he is just

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1 referring to stories, so we don't know whether
 2 that's actually taking place.
 3 But if you go up one more e-mail from
 4 Mr. Estes, as he responds to Dr. Pine, at the top
 5 of that page he says, let's talk about this on
 6 Thursday. I am confident that the harvest of
 7 undersized oysters has gone up since the oysters
 8 have declined.
 9 And so at this point in time you have
 10 Mr. Estes of FWC the month after the August 2012
 11 report identifying the collapse telling Dr. Pine
 12 that he is confident that undersized oysters
 13 harvesting is taking place and has gone up.
 14 Right?

15 **A. That's -- that's what Jim is speculating to, yes.**

16 **Q.** Jim who reports indirectly to you?

17 **A. Correct.**

18 **Q.** And Jim who was one of the authors of the
 19 disaster request, the FWC report?

20 **A. Correct.**

21 **Q.** If we could look at tab 16, please.
 22 MR. ECHOLS: And tab 16 for the record
 23 is GX-497.
 24 BY MR. ECHOLS:
 25 **Q.** Are you there, sir?

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1 **A. I am. Sorry. Yes.**

2 **Q.** No problem.
 3 We've got -- at the bottom we've got Steve
 4 Geiger. And he's -- you can look on the back
 5 page. He is a research scientist with Fish and
 6 Wildlife. Is that correct?

7 **A. Yes.**

8 **Q.** Okay. So -- so we have Steve Geiger e-mailing
 9 Luiz Barbieri. He is also an FWC employee.
 10 Right?

11 **A. Yes.**

12 **Q.** He refers to the -- a meeting that Joe Shields
 13 from DACS attended. And then if you go to the
 14 second paragraph, he states -- the paragraph
 15 starting, the general impression, and it says,
 16 the general impression is that available resource
 17 is reduced from Pensacola through at least Cedar
 18 Key, though some good patches exist. Creek
 19 mouths often closed to harvest, and areas that
 20 are recently planted with shell seem to be more
 21 productive, a possible suggestion that they have
 22 seen less harvest pressure.
 23 And so here, again, we have the comment, the
 24 notation that the issue with the oyster resource
 25 is not just an Apalachicola Bay situation, right?

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1 So at least as being discussed among DACS and
 2 FWC, the issue runs from Pensacola through Cedar
 3 Key, places that have nothing to do with flows
 4 from the Apalachicola River. Correct?
 5 **A. Yeah. I'm -- I'm sorry, counsel. I would like**
 6 **to read the context of this.**
 7 **Q.** Oh, I didn't mean to rush you.
 8 **A. Okay. I wanted to make you were okay with that.**
 9 **Q.** No. And please stop me ahead of time. That's
 10 fine.
 11 **A. Thank you.**
 12 **Q.** Okay. I was referring in the second paragraph
 13 there, which we have highlighted, that it's -- is
 14 it consistent with your recollection of the facts
 15 that the issue with the health of the oyster
 16 resource was beyond just Apalachicola Bay. There
 17 were issues from Pensacola through at least Cedar
 18 Key?
 19 **A. At least in this period of time, that's what**
 20 **Dr. Geiger is reporting. Correct.**
 21 **Q.** And here we're in December 2012. So we have
 22 moved ahead a couple of months from the
 23 disaster or, rather -- I'm sorry -- from the DACS
 24 report. He also notes that areas recently
 25 planted with shell seem to be more productive,

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1 CERTIFICATE
 2 I, Claudette G. Mason, a Notary Public
 3 in and for the State of Maine, hereby certify
 4 that the foregoing pages are a correct
 5 transcript of my stenographic notes of the
 6 Proceedings.
 7 I further certify that I am a
 8 disinterested person in the event or outcome
 9 of the above-named cause of action.
 10 IN WITNESS WHEREOF, I subscribe my hand
 11 this 5th day of December, 2016.

/s/ Claudette G. Mason
 Claudette G. Mason, RMR, CRR
 Court Reporter

17 My Commission Expires
 June 9, 2019.

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1 possibly suggesting there was less harvest
 2 pressure.
 3 Is it -- recognizing that tomorrow we're
 4 going to talk about shelling, is it consistent
 5 with your understanding and FWC's understanding
 6 that shell planting can assist in creating a more
 7 productive reef, in particular if it's not being
 8 harvested at the same time?
 9 **A. If there is proper environmental conditions.**
 10 **Q.** Right. This is -- right here we're probably two
 11 months before the rains came. So then we go down
 12 into the paragraph that says --
 13 SPECIAL MASTER LANCASTER: Excuse me,
 14 counsel. Is this a convenient time to take a
 15 break?
 16 MR. ECHOLS: Sure. Whatever you would
 17 like, your Honor. Sure.
 18 SPECIAL MASTER LANCASTER: Until
 19 tomorrow.
 20 (Time Noted: 4:12 p.m.)
 21 (Proceeding adjourned to Tuesday,
 22 November 8, 2016, at 9:00 a.m.)
 23 (End of day)

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