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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
APRIL 6, 2018)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
April 6, 2018
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT, DEXTER BUSBY,
and HILLARY HANSON.
CHRIS TWEETEN and JOHN FENTON (By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 CHAIR DEVENY: It is 9:00. Welcome
5 everybody to the Board of Environmental Review.
6 I'm Chris Deveny, Chair. Lindsay, I'll ask you to
7 take the roll call.

8 MS. FORD: Chris Deveny.

9 CHAIR DEVENY: Present.

10 MS. FORD: John Felton.

11 UNKNOWN SPEAKER: The following
12 participant has entered the conference. No names
13 are available.

14 MS. FORD: John Felton.

15 MR. FELTON: I'm here. Thank you.

16 UNKNOWN SPEAKER: The following
17 participant has entered the conference.

18 MR. OLSON: Alan Olson.

19 MS. FORD: Dexter Busby.

20 MR. BUSBY: Here.

21 MS. FORD: Hillary Hanson.

22 MS. HANSON: Here.

23 MS. FORD: Tim Warner.

24 (No response)

25 MS. FORD: Tim Warner.

1 (No response)

2 MS. FORD: John Dearment.

3 MR. DEARMENT: Here.

4 MS. FORD: Chris Tweeten.

5 MR. TWEETEN: Here.

6 MS. FORD: Tim Warner is the only one I
7 don't have present, so you have a quorum.

8 CHAIR DEVENY: Before we get started
9 today, on behalf of the Board, I'd like to offer
10 condolences to the DEQ staff on their recent loss
11 of their coworker, Chief Legal Counsel, and
12 friend, John North, who passed suddenly last
13 month.

14 John diligently served State government
15 and DEQ for many years, and he genuinely was a
16 very nice person. And I know several of us on the
17 Board were well acquainted with John, too, and
18 there is no question he's going to be missed by a
19 lot of people both professionally and personally.
20 So I just wanted to offer that.

21 MR. MATHIEUS: Thanks, Chris.

22 CHAIR DEVENY: With that, we should
23 identify the rest of the people in the room, and
24 then those on line. And so Sarah, if you'd like
25 to start.

1 MS. CLERGET: Sarah Clerget. I'm Board
2 attorney.

3 MS. SOLHEIM: Aleisha Solheim, paralegal
4 to Sarah Clerget.

5 MS. FORD: Lindsay Ford, Board
6 secretary.

7 MR. MATHIEUS: George Mathieus,
8 Department/Board liaison.

9 MR. DAVIS: Tim Davis, Water Quality
10 Division Administrator, DEQ.

11 MR. HAYES: Ed Hayes, Acting Chief Legal
12 Counsel, DEQ.

13 MR. LUCAS: Mark Lucas, DEQ attorney.

14 MS. KELLY: Myla Kelly, Water Quality
15 Standards.

16 MS. SCHAAR: Melissa Schaar, Water
17 Quality Standards.

18 MS. SHERER: Sandy Sherer, legal
19 secretary.

20 MS. HARBAGE: Rebecca Harbage, Air
21 Quality Bureau.

22 MS. ULRICH: Liz Ulrich, Air Quality
23 Bureau.

24 MR. PETTIT: Aaron Pettis, DEQ attorney.

25 MS. McLAUGHLIN: Joanna McLaughlin,

1 Water Protection Bureau.

2 MR. MEYER: John Meyer, Cottonwood
3 Environmental Law Center.

4 MS. COEFIELD: Sarah Coefield, Missoula
5 City-County Health Department.

6 MR. URBAN: Eric Urban, Water Quality
7 Planning Bureau Chief.

8 MS. MERKEL: Julie Merkel, DEQ Air
9 Quality Bureau.

10 MS. TRENK: Peggy Trenk with Treasure
11 State Resources Association.

12 MR. JOST: Rich Jost, DEQ Enforcement.

13 MS. Bawden: Susan Bawden, DEQ
14 Enforcement.

15 MR. KENNING: Jon Kenning, Water
16 Protection Bureau Chief.

17 MS. DUNNING: DarAnne Dunning, Northern
18 Plains Resource Council.

19 CHAIR DEVENY: Thank you. And now if we
20 could start with the people on the phone, if they
21 would please identify themselves if they wish.

22 MR. OLSON: Alan Olson, Montana
23 Petroleum Association.

24 CHAIR DEVENY: Next person.

25 (No response)

1 CHAIR DEVENY: Okay. I guess we don't
2 have any others. I would remind anybody that is
3 on the phone today to please remember to mute your
4 phones, so that we don't have a lot of
5 interference with our phone calls. And also when
6 you speak up, since we don't have a face to match
7 with your voice, that you identify yourselves.

8 And with that, we'll go ahead and review
9 the minutes. The Board has before them the
10 minutes of the February meeting. Are there any
11 additions or corrections to these minutes?

12 (No response)

13 CHAIR DEVENY: Seeing none, is there a
14 motion to approve the minutes?

15 MR. BUSBY: So moved.

16 CHAIR DEVENY: It has been moved. Is
17 there a second?

18 MS. HANSON: Second.

19 CHAIR DEVENY: It's been moved and
20 seconded. Any discussion?

21 (No response)

22 CHAIR DEVENY: Any public comment on the
23 minutes?

24 (No response)

25 CHAIR DEVENY: Hearing none, would Board

1 members please voice their vote. All those in ⁷
2 favor, say aye.

3 (Response)

4 CHAIR DEVENY: Any opposed?

5 (No response)

6 CHAIR DEVENY: Motion passes. The
7 meeting minutes are approved.

8 Next I will turn the meeting to Sarah,
9 and have her give the Board an update on the
10 briefing items, contested cases.

11 MS. CLERGET: So going through the
12 contested cases, the first 1(a) is CMG, which is a
13 new one that we just got, and that one is just
14 they're in settlement discussions, so it's just
15 stayed for a minute while that happens, and
16 they're going to give me an update and propose a
17 schedule.

18 CFAC. I'm still in the process of
19 reviewing the record. I have not issued an order
20 in that yet.

21 Copper Ridge and (c) and (d), those are
22 two cases being done together. We had a three day
23 hearing on that since the last time we met, and
24 the parties are currently in the process of
25 providing me with proposed findings of fact and

1 conclusions of law.

2 (e) is Wagoner. We're in the process of
3 scheduling the penalty phase of that case, and the
4 parties are in the midst of proposing me a
5 schedule for that.

6 In Westmoreland there is a stay, and
7 they have to provide me an update within thirty
8 days of the Supreme Court's decision that they're
9 waiting for.

10 Signal Peak Energy is proceeding
11 according to the scheduling order that I just
12 issued, so they're in early stages of that.

13 Western Energy, we just did a four day
14 hearing since the last meeting on that, and the
15 transcript just came in, so the parties are in the
16 process of providing me proposed findings of fact
17 and conclusions of law.

18 Montanore Minerals, there is a
19 scheduling order, and the parties are proceeding.
20 Again, we're in the sort of middle stage of that.
21 Probably will have some motions here shortly.

22 Laurel Refinery. There is a status
23 report, and they want to continue the stay, so I
24 for good cause issued an order allowing them to do
25 that. It will be stayed until August, and then

1 they're going to give me an update.

2 JR Civil is a new one that we just got
3 at the last meeting, I think, so we just had put a
4 scheduling order in place, and then they asked for
5 a stay, and so they're working on the settlement
6 agreement apparently, and they will be either
7 filing a status update or a motion to dismiss on
8 that case, and I think they have every thirty
9 days.

10 Then 3(a) is a matter for DEQ to give an
11 update on.

12 CHAIR DEVENY: Before we move to that,
13 do any of the Board members have questions of
14 Sarah regarding any of procedural matters on these
15 contested cases?

16 (No response)

17 CHAIR DEVENY: Hearing none, George, can
18 we turn to you on the Western Energy case.

19 MR. MATHIEUS: Yes. I think we'll get
20 an update from Legal.

21 MR. HAYES: Chair Deveny and other
22 members of the Board, my name is Ed Hayes. I'm
23 Acting Chief Legal Counsel for DEQ.

24 The update in regard to Western Energy
25 is that, as the Board recalls, the District Court

1 entered some adverse rulings on a number of issues
2 before the Court, and both Western Energy and DEQ
3 have filed an appeal of the District Court's
4 order.

5 The issues that DEQ are appealing focus
6 on the issue on ephemeral drainages; and then the
7 issue of representative sampling. So notices of
8 appeal have been filed with the Supreme Court.
9 Briefing schedule is in effect. I know DEQ and
10 Western Energy's first briefs will be due I think
11 April 26th, this month. So it will move quite
12 quickly under the briefing schedule.

13 CHAIR DEVENY: Okay. Thank you.
14 George, I'll go back to you. You had some other
15 briefing items from the Air Quality Bureau.

16 MR. MATHIEUS: Yes. Thank you, Chair.
17 I think Liz Ulrich is going to present to the
18 Board today on this briefing item.

19 MS. ULRICH: Good morning, Madam Chair,
20 members of the Board. For the record, my name is
21 Liz Ulrich. I am the Supervisor of the Analysis
22 and Planning Section within the Air Quality Bureau
23 for the Department. I'm here to review on two
24 future rulemakings that we'll be bringing before
25 the Board this year.

1 At the September 2017 Board meeting,
2 during the annual Air Quality Fee update, I
3 informed you that we hadn't increased operating
4 fees since 2009, and that one may occur in 2018.
5 So at your next meeting on June 8th, we will be
6 doing just that, asking you to approve a fee
7 increase that will allow us to collect sufficient
8 revenue to support our program.

9 On March 22nd we met with the Clean Air
10 Act Advisory Committee, our primary stakeholder
11 group, and identified our need to raise revenue
12 through increasing fees, both our operating fees
13 which are based on emissions, and some of our flat
14 fees. We are working with them to determine
15 equitable fee rates and how to align our funding
16 with areas of increased focus. We'll be having
17 further conversations with our stakeholders, and
18 plan on coming before you at the next Board
19 meeting with a fee increase they support.

20 We are well aware that we need to make
21 sure our bureau is operating efficiently before we
22 ask our stakeholders to increase fees. While
23 improvement is a continuous process, we did report
24 to the Clean Air Act Advisory Committee on some
25 efforts we've made to decrease our expenditures,

1 from streamlining internal processes, scrutinizing
2 the decision to fill or not fill vacancies, and
3 develop some programs that are more efficient.

4 Which leads me into the second
5 rulemaking that we'll be bringing this year. It
6 is an example of our efforts to operate more
7 efficiently.

8 We are working to streamline the air
9 quality permitting process for portable
10 facilities, including crushers and screens,
11 asphalt plants, and concrete batch plants. The
12 control requirements for these facilities are
13 nearly identical from permit to permit, and they
14 have not changed in many years.

15 However, the current case-by-case
16 permitting process can take up to three months.
17 We are looking to move away from case-by-case
18 permitting, and transition to a registration type
19 program, which will drastically reduce application
20 and modification time lines.

21 Considering that portable facilities
22 make up more than half of all active Montana air
23 quality permits, simplifying the process could
24 save a lot of time for both DEQ staff and the
25 companies that are required to get air quality

1 permits. These changes will ultimately take the
2 form of a new and revised rule that will be
3 presented to the Board later this year.

4 To date we've discussed the project with
5 the Clean Air Act Advisory Committee on several
6 occasions, with positive feedback from
7 stakeholders. We have also sought broader
8 involvement from companies that will be directly
9 affected by the changes through presentations to
10 the Montana Contractors Association, as well as
11 the opencut mine stakeholders.

12 We are currently in the process of
13 gathering feedback from stakeholders on the
14 technical details of how a registration program
15 will work. Our next steps include discussing the
16 potential program changes with EPA, as well as
17 with DEQ's legal team. We will also be drafting a
18 programmatic MEPA analysis to accompany the rule
19 package.

20 So these are two future rules that we're
21 going to be bringing before the Board. We
22 understand that they're pretty big substantial
23 rules, and we just wanted to give you a heads up
24 ahead of time, so that when we come to initiate,
25 it's not the first time you've heard about these.

1 And with that, are there any questions
2 about either of these rule packages?

3 CHAIR DEVENY: Do Board members have
4 questions of Liz?

5 (No response)

6 CHAIR DEVENY: Hearing and seeing none,
7 go on. Thank you, Liz, for the update. We'll
8 look forward to it. George, is there anything
9 else that DEQ wanted to update us on?

10 MR. MATHIEUS: No.

11 CHAIR DEVENY: With that, we will move
12 then to one of the main action items of today, and
13 that's the final rules on the MCA 75-5-222, which
14 are variances from water quality standards. And
15 if I could have a show of hands of people in the
16 room that plan to speak on that, it would be
17 helpful.

18 (Response)

19 CHAIR DEVENY: Just one. Could I get a
20 feel for those that are on the phone? I'd like to
21 get an idea of how many people are planning to
22 speak on the proposed air quality rules.

23 (No response)

24 CHAIR DEVENY: I'm sorry. Water rules.

25 (No response)

1 CHAIR DEVENY: Okay. I wanted to just
2 clarify that there was a change in the Board
3 packet that went out on Thursday. DEQ had
4 inadvertently put my signature on the rule, and I
5 had not yet approved the rule, so my signature was
6 taken off. And also for clarification, it was
7 indicated in the packet replacement that this was
8 a draft proposal, and that it has not yet been
9 approved. So I just wanted to make sure that that
10 was clear to everybody in the room. That was an
11 oversight on DEQ's part, and I'm sure that we
12 won't see that again.

13 With that, the way I thought I would do
14 this would be to take testimony and information
15 from DEQ, then open it up for public comment, and
16 then have a Board discussion. So with that, would
17 DEQ give an update.

18 MR. MATHIEUS: Myla Kelly is --

19 CHAIR DEVENY: Myla Kelly. Ms. Kelly.

20 MS. KELLY: Good morning, Madam Chair,
21 members of the Board. My name is Myla Kelly. I'm
22 a Section Supervisor within the Water Quality
23 Division at Montana DEQ.

24 In December we presented New Rule I to
25 the Board, and the Board decided to initiate

1 rulemaking to implement MCA 75-5-222 Sub (2).

2 That's the statute that states that if pollution
3 upstream of a discharger is due to anthropogenic
4 or human caused sources, that a variance from the
5 water quality standards may be appropriate in
6 certain circumstances.

7 Today DEQ is requesting adoption of that
8 rule, again referred to as New Rule I, that
9 describes the conditions under which those
10 variances from water quality standards may be
11 issued.

12 In the legislative session of 2015, MCA
13 75-5-222 was made into law which directed the
14 Board to adopt rules for implementation. To do
15 this, the Department convened a public stakeholder
16 work group comprised of representatives from
17 Montana of widely varying interests.

18 The work group has had 21 meetings thus
19 far, working on both Parts 1 and 2 of that
20 statute. We've worked collaboratively together
21 with the work group, responded to the work group's
22 suggestions and requests throughout the process,
23 all of that within the bounds of the directive
24 language of the statute, and then the Clean Water
25 Act as well.

1 In addition to working with our
2 stakeholder work group, we've worked hand in hand
3 with the US EPA to make sure that these rules met
4 the requirements of the Clean Water Act.

5 When the Board initiated rulemaking in
6 December, the public review and comment process
7 began, which included a public hearing and a
8 public comment period. One change to the rule was
9 proposed in response to those comments, and that
10 is a language change in Section 1 of the rule that
11 replaced, "The Department determines in writing
12 that the following conditions are met."

13 With respect to all comments pertaining
14 to whether New Rule I meets the Clean Water Act
15 requirements, we are confident that the rule is
16 consistent with applicable Federal regulations,
17 and most importantly we have had that assurance
18 provided from EPA, who is of course the
19 administrative authority of the Clean Water Act.

20 With respect to comments pertaining to
21 material contribution language, we again reiterate
22 that no material contribution is an additional
23 level of stringency that's above and beyond Clean
24 Water Act requirements, and it is a directive by
25 the statute itself.

1 And finally, with respect to comments
2 regarding changes from "may" to "shall."

3 UNKNOWN SPEAKER: The following
4 participant has entered the conference.

5 MR. NAGLE: Ken Nagle. (Phonetic)

6 MS. KELLY: We refer to Section 5 of New
7 Rule I, which states that, "If the Department
8 finds that the requirements of Section 1 and 2 are
9 met, and that a variance is needed, the Department
10 shall approve the variance after conducting a
11 public review process."

12 This provision balances the need for the
13 Department to carry out our regulatory authority,
14 while demonstrating to the applicant that a
15 variance will be approved when the required
16 conditions are met.

17 One last point. New Rule I outlines the
18 process of applying for a variance, so again, each
19 applicant seeking a variance under this rulemaking
20 will have to request an individual variance, which
21 requires the public review process, and it
22 requires approval by EPA.

23 So with that, we respectfully request
24 adoption of New Rule I in accordance with the
25 notice of adoption.

1 CHAIR DEVENY: Okay. Thank you. I
2 think unless Board members have burning questions
3 now, we will hold questions until after we have
4 public comment. So the individual that just
5 entered by phone, are you interested in providing
6 public comment on the Water Quality rule? I'm
7 just trying to get an idea of how many people are
8 commenting.

9 MR. NAGLE: This is Ken Nagle. I just
10 called. I was going to offer comment on the -- I
11 just had it.

12 CHAIR DEVENY: That's okay. We will
13 start with public comment on the Water Quality
14 proposed rule, and there was an individual here in
15 the room, and we will ask her to step forward and
16 speak on it.

17 UNKNOWN SPEAKER: The following
18 participant has entered the conference.

19 CHAIR DEVENY: Before you start, I'm
20 asking people to limit their comments to five
21 minutes if we could. And also if your testimony
22 is something that's already been provided, and the
23 Board has heard already in the hearing and other
24 times, we ask you not to be repetitive if that's
25 possible.

1 MS. DUNNING: Good morning, Madam Chair,
2 members of the Board. My name is DarAnne Dunning.
3 I'm a member of Northern Plains Resource Council.

4 For those of you who aren't familiar
5 with Northern Plains, it was formed by a group of
6 ranchers and landowners in southeastern Montana,
7 and we've worked to protect Montana's land
8 quality, and water quality, and agricultural way
9 of life for the past several decades in Montana.
10 I'm originally from southeastern Montana.

11 Northern Plains has previously submitted
12 written comments. I don't intend to completely go
13 over those comments today. Our written comments
14 that were submitted on February 9th, 2018 begin I
15 believe at Page 57 in your packet. We basically
16 today want to incorporate those concerns that were
17 previously raised because they were not addressed
18 by the Department in the rule.

19 And today there was one new issue that
20 was created by one amendment to the rule that I
21 wanted to raise, and I wanted to reemphasize I
22 guess what the major point of concern for Northern
23 Plains was with the proposed rule.

24 The new issue of concern was that the
25 Department has struck that "The Department must

1 determine in writing," which we understand to mean
2 that for the Department to issue a variance, it
3 would not be required to put its reasoning into
4 writing, or outline the analysis for why the
5 conditions would or would not have been met.

6 So in the interest of making sure that
7 the variance process is open, and the public has a
8 meaningful opportunity to understand and
9 participate in the process, we ask that this
10 change should be rejected.

11 Northern Plains' largest area of concern
12 with the new rule deals with the use of the term
13 "materially contribute" in what the Department
14 would analyze the impact of the variance that that
15 would have on the receiving water. And really the
16 heart of the Department's analysis in whether to
17 grant or deny a variance permit centers on whether
18 that discharge would materially contribute to the
19 degraded water condition.

20 And so despite the importance of this
21 term, the Department has both insisted on using
22 the term, but also that has not defined the term.
23 And we request that BER, that the Board reject the
24 rule, or at the very least not adopt a rule that
25 uses this new term of art without providing a

1 definition to guide the analysis on what would be
2 considered a material alteration of water quality.

3 The purpose of a rulemaking is not
4 simply to reiterate what the statute says. It is
5 to provide guidance to the agency, and also
6 certainty for the public in understanding how that
7 statute would be implemented. And by using this
8 term "materially contribute" without
9 clarification, it would allow whatever future
10 administrations deem to be minor non-material
11 increase in pollution, which could lead to further
12 degradation of Montana's Water Quality.

13 While many of the comments that were
14 received by the Board have focused on the impact
15 of variance to water quality across the state,
16 Northern Plains' concerns primarily focus on
17 protecting water quality for irrigators in
18 southeastern Montana, especially because this is
19 an area with a history of legacy coal mines, and
20 of coal bed methane or CBM discharges in the area.
21 It is also an area where we have a large threat of
22 future development of coal and CBM discharges.

23 One of our concerns is that in the
24 rulemaking, DEQ has stated that they would analyze
25 salinity, a primary concern from coal bed methane

1 discharges, less stringently than other
2 parameters. Northern Plains requested rule
3 modifications --

4 UNKNOWN SPEAKER: The following
5 participant has entered the conference.

6 MS. BILLS: Erin Bills. (Phonetic)

7 MS. DUNNING: To clarify, we'd request a
8 clarification of application of the variance to
9 CBM discharges. The Department failed to
10 incorporate that.

11 But there was one really important point
12 that we wanted to make for the record, and in
13 response to Comments 8 and 9 that the Department
14 raised, Northern Plains would like to remind the
15 Board that the Montana Supreme Court has
16 determined that whether or not the EPA has created
17 industry wide effluent limit guidelines, or ELG's,
18 for CBM discharges, the law does require them to
19 use best availability technology, or BAT.

20 We want to emphasize that DEQ's comment
21 is not accurate, that the law does require the use
22 of best available technology, and we want to make
23 sure that the variance process is not an exception
24 to the best available technology case law
25 requirements.

1 So thank you for your time today, and
2 for allowing the opportunity for public comment.
3 Thank you.

4 CHAIR DEVENY: Thank you. Are there
5 other individuals in this room that wanted to
6 speak on the rule change?

7 (No response)

8 CHAIR DEVENY: The proposed rule.
9 Excuse me.

10 (No response)

11 CHAIR DEVENY: With that, would
12 individuals on the phone who wanted to make public
13 comments on the proposed water quality rule
14 change, please speak up and identify themselves,
15 and we will have comment from you.

16 (No response)

17 CHAIR DEVENY: Is there anyone on the
18 phone that wishes to speak?

19 (No response)

20 CHAIR DEVENY: Hearing none, let's have
21 a Board discussion about what we've heard, and I
22 think it would be good for us to refer to the
23 proposed new rules and the comment section that
24 starts on Page 62 of the Board packet. q

25 MR. DEARMENT: Madam Chair, before we

1 begin, I'm going to recuse myself from the
2 discussion and vote on this one.

3 CHAIR DEVENY: Okay. And that was Board
4 member John Dearment who was recusing himself. So
5 we still have a quorum, don't we, Lindsay?

6 MS. FORD: Yes.

7 CHAIR DEVENY: Do any Board members have
8 any comments or questions that they'd like to ask
9 of DEQ, or the commenter, or otherwise make any
10 comments? Dexter.

11 MR. BUSBY: Madam Chair, I just want to
12 congratulate DEQ and the stakeholders. That's a
13 lot of meetings on one issue, and over a couple of
14 year period in time, and I think that speaks
15 positively of DEQ and the stakeholders that were
16 involved. Thank you.

17 CHAIR DEVENY: I have a question. I
18 would like DEQ to respond to the comments that the
19 person from Northern Plains made regarding the
20 best available technology aspects.

21 MS. KELLY: Thank you. Again, Myla
22 Kelly with the Water Quality Division. I might
23 refer this to another colleague, but just to get
24 things started, we did respond to that comment
25 with the response that in order to meet the

1 Federal regulations, the highest attainable
2 condition of the water body must be met, which we
3 consider to be analogous to the best available
4 technologies.

5 CHAIR DEVENY: With regard to -- I
6 believe she said the Supreme Court decision on
7 that?

8 MS. KELLY: With that, I would need to
9 refer to another colleague from DEQ. I'm not
10 versed on that.

11 MS. BOWERS: Well, I believe that --
12 this is Kirsten Bowers, Madam Chair, members of
13 the Board -- that case said that with regard to
14 CBM point dischargers they would have to use best
15 available technology, and we believe the rule is
16 consistent with that, in that it requires, as Myla
17 said, for the discharger to meet highest
18 attainable condition of the water body, and that
19 may include the greatest pollutant reduction
20 achievable, that's one of the conditions of the
21 variance, and we believe that would be consistent
22 with best available technology.

23 And the Department would use its best
24 professional judgment to make sure that is
25 achieved.

1 CHAIR DEVENY: And is there a reason you
2 didn't include that in the proposed rule?

3 MS. BOWERS: That language?

4 CHAIR DEVENY: Yes.

5 MS. BOWERS: We kept the language
6 consistent with the Federal regulation on
7 variances, which uses the greatest pollutant
8 reduction achievable, and also highest attainable
9 condition is the level that a discharger must
10 achieve if they're under a variance.

11 So we believe the language is consistent
12 with Federal law, and also would be consistent
13 with the State Supreme Court.

14 CHAIR DEVENY: Okay. Thank you. Board
15 members have any other questions?

16 MR. TWEETEN: Madam Chair, this is Chris
17 Tweeten. I have one.

18 CHAIR DEVENY: Okay, Chris, go ahead,
19 and then Hillary has one.

20 MR. TWEETEN: With respect to Ms.
21 Dunning's comment regarding the amendment in
22 Subsection (1) that strikes the language, "The
23 Department determines in writing," and replaces it
24 with "the following conditions are met," the
25 response to Comment 45 refers back to Comment 13.

1 Comment 13 doesn't say anything about
2 the deletion of the determination in writing
3 language about which Ms. Dunning commented. Could
4 someone from the Department explain how it is that
5 the requirement for a written determination was
6 being struck by this proposed amendment.

7 CHAIR DEVENY: Could we have someone
8 from DEQ talk to that change, the proposed change,
9 that deals with taking out the "not in writing,"
10 the "comment in writing," "approval in writing."

11 MS. KELLY: Sure. This is Myla Kelly.
12 So I just wanted to point to Section 6 of the
13 rule, which again states that, "The Department
14 submits the variance and any supporting
15 documentation and analysis to EPA." So all of
16 that does need to come in a written form, so it
17 would certainly be a written record.

18 And that's consistent with any
19 rulemaking that we do. That incorporates any
20 justification for the rulemaking, and it includes
21 any public comments, and record, and all of that
22 is submitted to EPA for approval. So there would
23 absolutely be a written record.

24 CHAIR DEVENY: Chris, does that answer
25 your question?

1 MR. TWEETEN: Madam Chair, I'm not sure.
2 Just one second here.

3 MS. CLERGET: Chris, for help, the full
4 rule is on Page 14 of the packet. That's the
5 Section 6.

6 MR. TWEETEN: I was looking back at the
7 comments on 45 language, which is on Page 72, I
8 guess it was.

9 I guess I'm concerned about the absence
10 of -- I mean what harm would be done by leaving
11 the "in writing" language in place? What's the
12 compelling need for making the change that's
13 discussed in the Department's response to Comment
14 35? I'm not sure I understand what the difference
15 is between the amended language and the original
16 language, and why there is a significant need to
17 make that change.

18 And I note that it doesn't seem to have
19 been made in response to any particular comment
20 that was made by a stakeholder, so I'm just
21 wondering what -- I mean it seems to me the
22 language as proposed was perfectly clear, and as
23 Ms. Dunning points out, the change --

24 UNKNOWN SPEAKER: The following
25 participant has entered the conference. No names

1 are available.

2 MR. TWEETEN: Excuse me -- the change to
3 "the following conditions are met" introduces an
4 element of ambiguity as to whether the
5 Department's initial decision on the variance has
6 to be written, or whether it should be verbal, and
7 then the written rationale for the change be
8 concocted later -- "concoct" is not the right word
9 -- be developed later after the -- or in the
10 process of preparing the submittal documents to
11 EPA. I think the original proposed language to me
12 appears to be preferable.

13 MS. KELLY: The Department again made
14 the change in response to comments, and we did not
15 think that the outcome, that there would be a
16 really a substantial difference in whether it was
17 "the Department determines in writing" or "the
18 following conditions are met."

19 And we thought that the outcome of those
20 two was really essentially analogous, but we would
21 certainly be willing to change that language to
22 say that "the Department determines in writing
23 that the following conditions are met," if that is
24 something that's acceptable to the Board.

25 MR. TWEETEN: I certainly think that

1 would be clearer for me.

2 CHAIR DEVENY: Okay.

3 MR. FELTON: This is John Felton. I was
4 going to make exactly that suggestion. I don't
5 think those two issues are mutually exclusively.
6 I think if we just use that language, it covers
7 both sides.

8 CHAIR DEVENY: Thank you, John. Any
9 other comments on this particular issue regarding
10 the changing of the language in Section 1?
11 Hillary.

12 MS. HANSON: I just have -- I guess I'm
13 getting a little confused, and maybe it is just
14 me, but the "may" versus "shall" in Section 1, I'm
15 just not sure where it landed. So I'm seeing like
16 on Page 32 it is changed to "shall," on Page 62
17 it's still "may," and I read the comments to feel
18 like it was staying in "may." Yes?

19 MS. KELLY: That's correct.

20 MS. HANSON: I just want to make sure I
21 understand what's being voted on.

22 MS. KELLY: That's correct.

23 CHAIR DEVENY: I had another question of
24 DEQ in regards to Ms. Dunning's comments about the
25 definition of material contributable. Could you

1 speak to that as well? Is this a new term, and
2 did you consider defining it?

3 MS. KELLY: The term is new, so there is
4 no definition of material contribution that we
5 have used as a Department. We thought long and
6 hard about trying to define that, and to write a
7 definition for that.

8 But because of the differing impacts of
9 different pollutants and how those would impact
10 different water bodies, there is just such a
11 landscape of differential impacts, I guess, that
12 it is really quite difficult to define, and it is
13 really on a case-by-case basis looking at the
14 particular water body, the particular pollutant,
15 the particular scenario. And we felt that it is
16 really only in that context that we could actually
17 accurately define material contribution.

18 CHAIR DEVENY: Doesn't that leave it
19 open to a lot of interpretation on the part of the
20 DEQ as to what that means then?

21 MS. KELLY: We did try and put some
22 bounds around that, and I think I presented to the
23 Board on some examples where we know that would be
24 where we can definitively say, "This would be a
25 material contribution."

1 So if the pollutant was going further
2 downstream, that would be a clear indication of
3 material contribution. So we did try to put some
4 bounds around what material contribution would
5 absolutely look like. But as far as a blanket
6 definition, it is very difficult to do that on an
7 umbrella basis.

8 CHAIR DEVENY: Were there any other
9 terms that are already defined that you could have
10 used in place of that?

11 MS. KELLY: It is possible, but again,
12 that was language that was directed by statute.
13 That was actually in the statute itself.

14 CHAIR DEVENY: Hillary.

15 MS. HANSON: How will you ensure
16 consistency then during that process in defining
17 that term?

18 MS. KELLY: Again, I think that will
19 just have to be on a case-by-case basis. The key
20 to this process is that it is an individual
21 variance, and so that will come again before the
22 Department, before the EPA, before the public
23 review process. So there will be adequate
24 opportunity for all of those parties to comment on
25 how we've defined and utilized "material

1 contribution."

2 CHAIR DEVENY: During a lot of your
3 stakeholder meetings, was this talked about a lot?

4 MS. KELLY: You know, interestingly we
5 worked together to put our guidance document
6 together, which actually set sort of those bounds
7 on material contribution, and there was not a lot
8 of -- In fact, there was many discussions as far
9 as what that meant, what those bounds are, but
10 that was the extent of it, and that was captured
11 in our guidance document.

12 CHAIR DEVENY: I'm a little
13 uncomfortable having a term in the rule that isn't
14 defined because it does leave it so wide open.
15 Any other comments by Board members at this time,
16 or George, did you have a comment?

17 MR. MATHIEUS: Madam Chair, yes, just
18 maybe I could just help just a little bit.

19 Just looking at the concept that's being
20 discussed on trying to attach a definition that's
21 broadly used across the state, I would just say
22 that it's somewhat analogous to our site specific
23 standards process, which recognizes that certain
24 conditions across the geography we have in Montana
25 would require a very specific and very in-depth

1 analysis of that situation; and what's good for
2 that situation wouldn't be for another.

3 So I guess in this case, for the
4 Department to have the ability -- what pollutant
5 is being discussed, how does it react in this
6 particular watershed, what are the uses -- that's
7 so variable across the state, and I think it is
8 difficult to apply a very specific definition to
9 such a broad usage.

10 CHAIR DEVENY: Dexter, you had a
11 comment.

12 MR. BUSBY: I think just form of a
13 comment. Since EPA did not have a particular
14 issue with the word "material change," I think
15 that makes me a lot more comfortable with the
16 terminology, because they recognize just what
17 George said, that it is specific to the water body
18 and the pollutant, not something that's very
19 generalized that you can grab a specific
20 definition for. So I'm not as uncomfortable as I
21 would have been if EPA would have challenged that
22 concept.

23 MS. KELLY: Again, this is an additional
24 level of stringency beyond the Clean Water Act
25 requirements.

1 MR. TWEETEN: Madam Chair, this is Chris
2 Tweeten again.

3 CHAIR DEVENY: Chris, and then Hillary
4 again. Go ahead, Chris.

5 MR. TWEETEN: With respect to
6 "materially contribute," I think it is a term that
7 actually confers or directs a lot of the inquiry
8 to the informed discretion of DEQ to determine
9 whether a contribution is material or not in a
10 particular case.

11 And the term "material," it seems to me,
12 is the equivalent of some other words that could
13 have been used, like for example "significant"
14 could have been used instead of "material." I'm
15 not saying it should be replaced with
16 "significant," I'm just saying that it seems to
17 exclude those contributions that are insignificant
18 or immaterial, but to require --

19 If DEQ were to make a finding of a
20 material contribution, a significant contribution,
21 a contribution that is the capable of calculation,
22 for example, as possible uses of that term; and
23 DEQ would be required, if it couldn't find
24 materiality as to a contribution and also grant
25 the variance at the same time.

1 So I think it provides an adequate basis
2 for judicial review. I think it expresses the
3 Board's intention that this be a matter that is
4 directed to DEQ's discretion, informed by the
5 record that's before it, and its expertise in
6 dealing with these kinds of matters; and hopefully
7 a reviewing Court would recognize that this is a
8 technical question that's particularly within the
9 competence of DEQ, and not try to substitute its
10 judgment as a Court for the technical
11 determination that DEQ were to make as the
12 question of materiality.

13 And I think this dovetails with the
14 "decision in writing" issue that we just talked
15 about, because I think it would be incumbent on
16 DEQ, in situations where this language is in
17 controversy, to include in its written decision a
18 discussion of materiality and an explanation of
19 those factors that led the Department to determine
20 that a certain contribution was or was not
21 material for purposes of this section of the rule.

22 So I think actually the language is
23 appropriate the way it is, and I agree with DEQ
24 that an attempt to define it might have some
25 unintended consequences down the road, in the

1 sense that you could craft your definition in a
2 way that might make it difficult to apply this
3 particular language in the context of a case that
4 might come up, the facts of which we can't even
5 speculate about right now.

6 And rather than make an attempt to give
7 further content to the rule, it would be just
8 developed on a case-by-case basis, and it would be
9 up to the reviewing Courts then to make sure that
10 DEQ applies this language in a manner that is
11 consistent from case to case, that's fair to the
12 applicants, and also true to the intention of the
13 Legislature when it put this language in the
14 statute.

15 So I think I'm pretty comfortable with
16 the language as it is; and even though it is not
17 defined, I think it is probably appropriate to
18 leave it the way it is.

19 CHAIR DEVENY: Okay. Hillary, you had a
20 comment.

21 MS. HANSON: I was just curious, and
22 maybe this goes more towards the representative
23 from Northern Plains, but at least in the comments
24 I had seen no other suggestions for words. Did
25 you guys receive any suggestions for how to

1 replace that or better define it?

2 MS. KELLY: No.

3 CHAIR DEVENY: Other comments or
4 questions by Board members?

5 MR. FELTON: This is John Felton. I
6 have sort of a question and a comment, if I could.

7 CHAIR DEVENY: Okay. Go ahead.

8 MR. FELTON: My comment first. I agree
9 on -- I feel comfortable with the "materiality"
10 language as it is. If you make that analogous to
11 a different place where that term is used, say, in
12 financial audits, what's material for, for
13 instance, a large non-profit hospital system, is
14 very different from what's material for a small
15 non-profit social service agency.

16 So I think it is to some extent a term
17 of art, but the requirement that DEQ demonstrate
18 that a condition is met or not met, I think I
19 agree with the previous, my colleague, that I
20 think that does address that.

21 My question is: I don't see in here any
22 mechanism -- and maybe it exists elsewhere, and I
23 should know this. So imagine that a waiver is
24 granted. Could a stakeholder, an affected
25 stakeholder appeal that to somewhere other than

1 Court; or if a waiver is not granted, could the
2 applicant appeal that?

3 So I'm wondering is there a Board appeal
4 process, or only appeal to a Court, from either
5 one of those situations?

6 CHAIR DEVENY: The question on appeal,
7 could somebody from DEQ address that.

8 MS. BOWERS: Madam Chair, members of the
9 Board, this is Kirsten Bowers, and yes, I believe
10 a stakeholder or a permittee applying for a
11 variance that was denied, or otherwise unhappy
12 with the variance, would appeal to District Court.

13 CHAIR DEVENY: So this Board does not
14 hear those appeals?

15 MS. BOWERS: No.

16 CHAIR DEVENY: Does that answer your
17 question, John?

18 MR. FELTON: It does. Thank you very
19 much.

20 MS. BOWERS: Let me clarify. If the
21 appeal were related to a permit decision, it would
22 come to the Board by the permittee. If the
23 permittee appealed their permit, which
24 incorporated a variance, it is possible you could
25 hear a variance issue.

1 MS. CLERGET: But I just want to
2 clarify. This is Sarah. I want to clarify that a
3 variance and permit are different things. So the
4 variance would have to be included in the permit.

5 MS. BOWERS: Yes, as a condition.

6 MS. CLERGET: Is that clear?

7 CHAIR DEVENY: And then it would come
8 before this Board?

9 MS. CLERGET: No. What she's saying is
10 if a variance -- this is Sarah again. If a
11 variance became part of a permit, and there was an
12 issue with the permit, then the permit issue would
13 come before this Board, and the variance might be
14 wrapped up in that. But if it is just a straight
15 variance decision, that is not going to be
16 appealed to this Board, like the permit stuff
17 does. Does that make sense?

18 CHAIR DEVENY: It does. Are Board
19 members clear on that?

20 MR. FELTON: This is John again. So is
21 it conceivable that you could have someone that
22 has an existing permit, who then requests a
23 variance. If there is an appeal of that variance,
24 that would go to Court, but if the permit
25 incorporated a variance, then the Board would hear

1 that? Is that how that works?

2 CHAIR DEVENY: I'll defer to Sarah.

3 MS. CLERGET: This is Sarah. Yes,
4 that's my understanding, and I think that's
5 consistent with what Kirsten said. She's nodding
6 at me, so I think we agree.

7 MR. FELTON: Thank you.

8 CHAIR DEVENY: Any other comments,
9 questions by the Board?

10 (No response)

11 CHAIR DEVENY: I just had one more, and
12 this comment came up from a lot of people who
13 testified at the hearing, and that was relating to
14 the history of the legislation, and whether or not
15 it was to be broadly implemented, or if it was
16 more specifically to be dealt with relating to
17 publicly owned water supplies, or the publicly
18 owned entities who had permits.

19 And I'm wondering. Could DEQ discuss
20 what your research into the legislative history
21 was, and how you came up with the determination
22 that it was more broad than just applying to
23 municipalities.

24 MS. BOWERS: Madam Chair, members of the
25 Board. DEQ found that the examples of a POTW was

1 used a lot in the Legislature. But the language
2 itself, and based on conversations with
3 Representative Keane, the legislation was not
4 intended to be limited to POTW's, but that was
5 used as an example of a discharger that could be
6 affected by an upstream contributor of
7 anthropogenic pollution.

8 So it was DEQ's conclusion that the
9 Senate Bill 325 and the statute is not limited to
10 certain users, it is limited to dischargers who
11 meet the conditions.

12 CHAIR DEVENY: And what sort of
13 legislative history research did you do to make
14 that determination?

15 MS. BOWERS: Well, we did read different
16 versions of the bill, and went back and looked at
17 some testimony. It would be very hard to draft a
18 rule that's limited to certain users.

19 CHAIR DEVENY: That was my next
20 question. Is there a way to do that within the
21 confines of meeting the EPA regulations?

22 MS. BOWERS: Our best conclusion was
23 that it was important to make the variance
24 consistent with Federal requirements, and that
25 limiting it to dischargers who meet the conditions

1 in Parts 1 and 2 of the rule, that would limit the
2 dischargers who would be eligible for variance.
3 That would be a pretty significant limitation.

4 CHAIR DEVENY: Okay. And it looks like
5 somebody else from -- Tim Davis from DEQ is --

6 MR. DAVIS: Madam Chair, members of the
7 Commission. Tim Davis. I'm the Water Quality
8 Division Administrator.

9 When we're looking at legislative
10 history, you also have to weigh that against the
11 plain reading of that statute itself, and the
12 plain reading of the statute is that if you meet
13 the conditions, then you can seek the variance.
14 So it is not --

15 The statute itself did not limit it to
16 POTW's or others, so we have to base our decision
17 on the variance on the plain reading of the
18 statute itself, unless that is unclear, then we
19 can go to legislative history.

20 CHAIR DEVENY: Thank you for clarifying
21 that. Any other questions or comments by Board
22 members?

23 (No response)

24 CHAIR DEVENY: What's the Board's
25 pleasure regards to these proposed Water Quality

1 rules?

2 MR. BUSBY: Question, Madam Chair.
3 Chris suggested we put that "in writing" language
4 in. I guess the question is: That would, just as
5 the term "in writing," two words that would be
6 added?

7 CHAIR DEVENY: I believe that if you
8 look on Page 62, I believe under Section 2, the
9 language that was originally there which reads,
10 "If the Department determines in writing," is what
11 we would go back to.

12 MS. HANSON: I think they said
13 "determines in writing that the following
14 conditions are met." I thought that was where we
15 landed.

16 MS. CLERGET: So if I'm hearing what you
17 guys say, all you would do is reject the change to
18 strike that language, and accept the change to
19 add, "the following conditions are met"? Does
20 that make sense? So you're accepting one of the
21 changes, and rejecting one of the other changes.

22 MR. TWEETEN: Madam Chair, this is
23 Chris. I think Sarah is correct. I think what
24 you would do is remove the strike out from the
25 language, "The Department determines in writing

1 that," and then insert the word "the" before
2 "following." Then it would read correctly, and I
3 think that would be the intention of an amendment
4 if I were to propose it certainly.

5 So I guess procedurally at this -- No
6 one has moved the adoption of the rules, so I
7 don't think we can move an amendment to the
8 proposed rule at this point.

9 CHAIR DEVENY: That's correct.

10 MR. TWEETEN: For those purposes, Madam
11 Chair, I'll move the adoption of the rule as
12 proposed by DEQ as found on Page 62 and following
13 of the packet materials.

14 CHAIR DEVENY: The motion has been
15 moved.

16 MR. TWEETEN: Then I'll move an
17 amendment.

18 CHAIR DEVENY: And is there a second on
19 this?

20 MR. TWEETEN: If there is a second to
21 that motion, I'll move --

22 CHAIR DEVENY: Is there a second?

23 MR. BUSBY: Second.

24 CHAIR DEVENY: We have a motion to
25 accept, approve the proposed rules, and there has

1 been a second.

2 MR. TWEETEN: Madam Chair, I move an
3 amendment to the draft rule as found on Page 62 of
4 the packet, and my amendment is to delete the
5 strike out of the words, "The Department
6 determines in writing that," and then to insert
7 the word "the" before the word "following," and
8 then adopt the underscored language as proposed by
9 the Department.

10 CHAIR DEVENY: I would second that
11 amendment to the motion. Is there any discussion
12 on the motion and/or the amendment to the motion?

13 MR. BUSBY: Just a quick question. Are
14 we referencing the right pages here?

15 MS. CLERGET: Yes, I think you're doing
16 fine.

17 MR. BUSBY: Okay. Because I know it is
18 on 14 and 15 where the proposed rule as it is is
19 set, so I'm --

20 MS. CLERGET: Yes. The notice of
21 adoption is what we're referring to, which is what
22 is eventually going to be the final document. So
23 you're okay.

24 MR. TWEETEN: This is the document that
25 the Department created following the hearing that

1 contains that part of it, the comments and the
2 response to comments that were required by MAPA,
3 so I think that's the appropriate place to be.

4 CHAIR DEVENY: Any discussion or
5 questions by Board members?

6 (No response)

7 CHAIR DEVENY: Hearing none, all in
8 favor of the amendment, signify by saying aye.

9 (Response)

10 CHAIR DEVENY: Any opposed to the
11 amendment?

12 (No response)

13 CHAIR DEVENY: The amendment passes.
14 All in favor of the proposed adoption of the Water
15 Quality Rule with the amendment, please signify by
16 saying aye.

17 (Response)

18 CHAIR DEVENY: Any opposed?

19 (No response)

20 CHAIR DEVENY: Motion passes. The rules
21 are passed with change. I think we will go ahead,
22 and let's take a break now.

23 (Recess taken)

24 (Mr. Tweeten not present)

25 CHAIR DEVENY: I think we'll go ahead

1 and get started again. Lindsay, would you check
2 with Board members to see who is all here.

3 MS. FORD: Chris Deveny.

4 CHAIR DEVENY: Here.

5 MS. FORD: John Felton.

6 MR. FELTON: Here.

7 MS. FORD: Dexter Busby.

8 MR. BUSBY: Here.

9 MS. FORD: Hillary Hanson.

10 MS. HANSON: Here.

11 MS. FORD: Tim Warner.

12 (No response)

13 MS. FORD: John Dearment.

14 MR. DEARMENT: Here.

15 MS. FORD: Chris Tweeten.

16 (No response)

17 CHAIR DEVENY: Somebody on line has
18 music playing, and it's very entertaining, but
19 it's a little distracting, so if you could turn it
20 off, that would be appreciated.

21 MS. CLERGET: I expect if they're on
22 hold, they're probably --

23 CHAIR DEVENY: Oh, okay. Hold music.
24 Are there other people in the room that came in
25 the second part of the meeting that haven't

1 identified themselves?

2 MR. CRONIN: I'm Chris Cronin, the
3 Opencut Mining Section Supervisor.

4 CHAIR DEVENY: Any other people?

5 (No response)

6 CHAIR DEVENY: Let's move on to the next
7 item on our agenda, which is a proposal from the
8 Missoula City-County Public Health Department, and
9 before I turn it over to Missoula, I'd like DEQ to
10 explain this procedure to us for how this is
11 works.

12 Chris, are you here yet?

13 (No response)

14 MS. ULRICH: So again, Madam Chair,
15 members of the Board, Liz Ulrich from the Air
16 Quality Bureau here at the Department, and I was
17 planning on providing some context for this
18 upcoming item on the agenda. Just a couple things
19 that I've prepared.

20 We have a number of local programs in
21 the state that have their own air quality
22 programs, including Missoula County. They
23 implement their air quality programs as approved
24 by the Board under Montana Code Annotated
25 75-2-301. And I saw on the Board, on the website

1 that there was a link to that MCA on there.

2 Local air program's purpose of the rule
3 is to protect and maintain local air resources.
4 We work closely with the air quality programs, and
5 in this case particularly Missoula County to
6 ensure that their programs are appropriate and
7 consistent with statute.

8 Contrary to the typical Board rulemaking
9 process where we have the initiation, hearing,
10 then an adoption at a later meeting, this is
11 simply we're asking Missoula County --

12 UNKNOWN SPEAKER: The following
13 participant has entered the conference. No names
14 are available.

15 MS. ULRICH: We're just going to ask you
16 to approve their rule revision. They go through
17 their own rule initiation and associated public
18 process, and you have that in your Board packet,
19 evidence of their lengthy and extensive process.

20 So if there is additional questions, I
21 guess maybe let's just see if we can field some of
22 those before I introduce Missoula County.

23 CHAIR DEVENY: Do Board members have
24 questions of the procedure that we'll use based on
25 what DEQ has just provided us with? Hillary.

1 MS. HANSON: I guess I just wanted to
2 understand a little bit about then the local
3 process. So am I reading it correctly Missoula
4 has to go through three places? And why is that?

5 MS. ULRICH: That's definitely their
6 local process.

7 MS. HANSON: Okay. So that's a local
8 piece.

9 MS. ULRICH: Yes.

10 MS. HANSON: It could just be the
11 Commissioners, and then it's brought before the
12 Board, etc.?

13 MS. ULRICH: Exactly.

14 UNKNOWN SPEAKER: The following
15 participant has entered the conference.

16 MR. TWEETEN: Chris Tweeten.

17 (Mr. Tweeten present)

18 CHAIR DEVENY: Welcome back, Chris.
19 We're in the middle of talking about the Missoula
20 City-County Public Health proposal for their air
21 quality regulations.

22 MS. ULRICH: Is there anything else for
23 the Department?

24 CHAIR DEVENY: Not right now. We may
25 have some questions for you later --

1 MS. ULRICH: So I would like to
2 introduce Sarah Coefield from Missoula County, and
3 she's going to go ahead and talk to you about the
4 rule revision.

5 MS. COEFIELD: Madam Chair, members of
6 the Board, thank you for your time. I'm Sarah
7 Coefield. I'm an Air Quality Specialist with the
8 Missoula City-County Health Department.

9 The Missoula City-County Health
10 Department -- which I'm just going to call the
11 department -- the department is requesting that
12 the Montana State Board of Environmental Review
13 approve a rule change and accompanying record of
14 adoption for the Missoula City-County Air
15 Pollution Control Program.

16 Specifically we're asking that the Board
17 approve the proposed changes to Rule 4.112 of the
18 that air pollution program.

19 UNKNOWN SPEAKER: The following
20 participant has entered the conference. No names
21 are available.

22 MS. COEFIELD: On July 20th of 2017, the
23 Missoula City-County Air Pollution Control Board
24 approved changes to Rule 4.112 of the Missoula
25 City-County Air Pollution Control Program.

1 However following that approval in July,
2 the department noticed that the Air Board acted
3 less than thirty days after the hearing was
4 publicly noticed, which was in violation of State
5 law, specifically MCA 75-2-301(13)(b), which
6 requires a local air program to have something
7 noticed for thirty days before the Board hold that
8 hearing.

9 To correct that conflict, the department
10 renoticed the hearing, and following that 30 day
11 notice, the Air Board held a second hearing on
12 September 21st, 2017, and this is why you have
13 records of adoption for two Air Board hearings in
14 your packet.

15 The Air Board approved the changes to
16 Rule 4.112 at the September hearing. The changes
17 were then approved by the Missoula Board of County
18 Commissioners on March 8th of 2018, and the
19 Missoula City Council on March 12th of 2018. You
20 can see the record for adoption for complete
21 details on that process.

22 All public notice requirements were met,
23 and processes accompanying those notice
24 requirements were followed for this rulemaking
25 process.

1 In the material sent earlier to the
2 Board, you will find written explanations for the
3 changes to Rule 4.112 are not more stringent than
4 existing State rules, and MCA 75-2-301(4) does not
5 apply to this rule change.

6 The Department undertook this rule
7 change in response to concerns US EPA identified
8 when reviewing our PM10 redesignation request and
9 limited maintenance plan. The EPA expressed
10 concerns that the Rule 4.112 in its current state
11 was too vague. Accordingly we revised 4.112 to
12 clarify and codify department actions during
13 wildfire smoke episodes.

14 This proposed revision does not alter
15 the original intent or substance of this rule. So
16 I'm available for any questions or comments you
17 may have. We're just here requesting you approve
18 the final steps so we can get it into our rule
19 package.

20 CHAIR DEVENY: Thank you, Sarah. I'd
21 like to ask DEQ if they feel that Missoula
22 followed the requirements in Subsection (4) for
23 ensuring that the standards are compatible with or
24 more stringent than those in the State rule.

25 MS. ULRICH: Yes, we've worked through

1 -- Madam Chair, members of the Board. The
2 Department, the State has worked through this
3 whole process with Missoula County and
4 concurrently with them, so we believe that they've
5 met all the requirements for their rule revision.

6 CHAIR DEVENY: Okay. Thank you. Are
7 there any questions from the Board members of Ms.
8 Coefield or DEQ regarding these air quality
9 changes for Missoula County? Hillary.

10 MS. HANSON: I just have a question.
11 You mentioned that this was part of a -- did you
12 say non-attainment? Are you guys trying to change
13 the designation of an area?

14 MS. COEFIELD: Sarah Coefield again. We
15 were designated non-attainment for PM10 back in
16 1989, and have not violated that standard since
17 basically 1989 or 1990. So several years ago we
18 started the process of redesignation to a
19 maintenance attainment for PM-10. That particular
20 process started years ago, but at the pace of EPA
21 reviewing things, we are just now in kind of the
22 final steps of that approval process.

23 Yes. We are still technically a PM10
24 non-attainment area until we have that final
25 approval.

1 CHAIR DEVENY: Any other questions or
2 comments by Board members?

3 (No response)

4 CHAIR DEVENY: Is there any public
5 comment on this proposal by Missoula County?

6 (No response)

7 CHAIR DEVENY: Anybody in the room?

8 (No response)

9 CHAIR DEVENY: Anybody on the phone want
10 to comment on this?

11 (No response)

12 CHAIR DEVENY: Hearing none, what's the
13 Board's pleasure?

14 MS. HANSON: I move that we accept the
15 rules.

16 CHAIR DEVENY: There has been a motion.
17 I'll second it for approving the proposed rules
18 from Missoula City-County Health Department. Any
19 discussion?

20 (No response)

21 CHAIR DEVENY: We'll vote.

22 MR. TWEETEN: If you need a second, I'll
23 second that.

24 CHAIR DEVENY: It has been seconded.

25 Thanks, Chris. We'll go ahead and vote then. All

1 those in favor, signify by saying aye.

2 (Response)

3 CHAIR DEVENY: Opposed.

4 (No response)

5 CHAIR DEVENY: None opposed, the motion
6 passes. Thank you, Missoula County. Continue the
7 good work.

8 Moving right along, we have some new
9 contested cases. Sarah, would you run us through
10 those.

11 MS. CLERGET: Sure. So there are three
12 new cases that you'll need to decide what you want
13 to do with. Again, your options as we've
14 discussed before are: You can keep everything
15 about the case; you can assign it to a Hearing
16 Examiner for procedural purposes only; or you can
17 assign it to a Hearing Examiner for both
18 procedural and substantive purposes, and then
19 you'll get a proposed decision at the end.

20 You can break that up any way you want
21 to, if you want to keep summary judgment, or if
22 you want to keep the hearing. So you are aware of
23 those options, but I think we need to take one
24 these one by one.

25 So the first case is the violation of

1 the Metal Mine Reclamation Act by Little Bear
2 Construction. And you have the material, the
3 notice of appeal, in your packet for this.

4 CHAIR DEVENY: 164.

5 MS. CLERGET: Thank you. Do we need
6 a --

7 MS. HANSON: I move we assign it to a
8 Hearing Examiner for the totality of the case.

9 CHAIR DEVENY: I'll second that. Any
10 Board discussion?

11 (No response)

12 CHAIR DEVENY: All those in favor of
13 assigning this case to Sarah in its entirety,
14 signify by saying aye.

15 (Response)

16 CHAIR DEVENY: Any opposed?

17 (No response)

18 CHAIR DEVENY: Motion carries. Go on to
19 the next case.

20 MS. CLERGET: The next one is Denial of
21 Motor Vehicle Wrecking Facility License MVWF-0376.
22 Same options.

23 MS. HANSON: I move we assign it to a
24 Hearing Examiner for the totality of the case.

25 CHAIR DEVENY: Is there a second?

1 MR. DEARMENT: I'll second.

2 CHAIR DEVENY: It's been moved and
3 seconded. Any discussion?

4 (No response)

5 MR. BUSBY: A quick question of Sarah.
6 Timing. Are you starting to become over worked,
7 under worked, or --

8 MS. CLERGET: So far it is manageable.
9 I will let you know when it is no longer
10 manageable.

11 MR. BUSBY: That's what I wanted to
12 hear.

13 MS. CLERGET: Pending budgetary
14 concerns.

15 CHAIR DEVENY: Any other discussion by
16 Board members?

17 (No response)

18 CHAIR DEVENY: Hearing none, we'll vote
19 on this motion. All those in favor of assigning
20 this case to Sarah in its totality, signify by
21 saying aye.

22 (Response)

23 CHAIR DEVENY: Any opposed?

24 (No response)

25 CHAIR DEVENY: Motion carries.

1 MS. CLERGET: The third is the
2 Revocation of the Cosa, for Fischer Land
3 Development Subdivision. The same options there.

4 MR. DEARMENT: Since Sarah's not too
5 busy, I'll move she can do the whole thing.

6 CHAIR DEVENY: In its totality?

7 MR. DEARMENT: Yes.

8 CHAIR DEVENY: It has been moved. I'll
9 second it. Any discussion?

10 (No response)

11 CHAIR DEVENY: Hearing none, all those
12 in favor, signify by saying aye.

13 (Response)

14 CHAIR DEVENY: Any opposed?

15 (No response)

16 CHAIR DEVENY: Hearing none, motion
17 carries.

18 * * * * *

19 (Oral Argument on Oil Fields Rock and Logistics,
20 BER 2016-11-OC at 10:27 a.m.
21 and reconvened at 11:03 a.m.)

22 * * * * *

23 CHAIR DEVENY: Next we have before us a
24 petition for rulemaking from the Cottonwood
25 Environmental Law Center, and the Gallatin

1 Wildlife Association.

2 This is kind of an unusual thing,
3 nothing that this Board has had before. So I'm
4 going to first ask DEQ to talk about the
5 procedures that the Board goes through when this
6 particular proposal was brought before them, and
7 then I'll ask for comments and a presentation by
8 Cottonwood Environmental Law Center.

9 MS. CLERGET: Would you like to put a
10 time limit on it?

11 CHAIR DEVENY: Let's talk about the
12 procedures first, and then I will ask Cottonwood
13 to limit their comments based on our meeting.

14 MR. MATHIEUS: Madam Chair, might I just
15 add that the Department also was planning on
16 providing you guys with some history of a petition
17 similar to this that was before a previous Board.
18 And so we thought that would be helpful to lay out
19 that history as well as the process, and then we
20 asked the petitioners if they could be here today
21 to answer questions, and help with some of this.
22 Thank you.

23 CHAIR DEVENY: Tim Davis from DEQ is
24 here.

25 MR. DAVIS: Madam Chair, members of the

1 Board, Tim Davis, Water Quality Division
2 Administrator at DEQ. I apologize for calling the
3 Board a commission earlier. I feel pretty bad
4 about that. But this was my first time speaking
5 in front of you, so I'll try to get it straight
6 going forward.

7 So I'm going to start by giving the
8 Board some history on the Outstanding Resource
9 Water statute, as well as the prior petition for
10 the Gallatin that is similar to this petition that
11 is before the Board right now, and then I'll walk
12 through kind of the process, too.

13 So the Outstanding Resource Water
14 designation offers the greatest level of
15 protection under nondegradation laws, and these
16 waters are to be afforded the greatest protection
17 feasible under law after a thorough examination,
18 and that's really the process piece, because they
19 are of such environmental, and ecological, and
20 economic value.

21 The protections that are afforded
22 Outstanding Resource Waters are: No permanent
23 change is allowed to water quality for new or
24 increased point source discharge, and this is a
25 higher bar than nonsignificance change; and an

1 application to degrade State waters that are
2 granted ORW designation may not be granted.

3 Any designation that the Board would
4 make, so if you decided to grant this petition --
5 after accepting it, after public comment, after
6 hearing, the Department conducting an EIS,
7 adopting the EIS, that's kind of the different
8 steps in the process. If the Board decided to
9 adopt the rule, then the rule can be approved by
10 the Board, but does not go into effect until the
11 Legislature has approved it. So it is kind of the
12 different, in summary, that's kind of the
13 different steps.

14 When this petition was previously
15 submitted to the Board, it was submitted in
16 December of 2001 by American Wildlands. In March
17 -- so it was December 2001. In March of 2002, the
18 Board received comments on the Outstanding
19 Resource Water petition, and directed DEQ to
20 prepare an EIS.

21 The EIS was delayed at that time until
22 DEQ could secure the funding to develop the EIS,
23 and subsequently the statute was changed to
24 require that the Petitioner pay for the estimated
25 costs for an EIS. The draft EIS was completed,

1 released for public comment September 2006; the
2 comment period closed in October 2006; and a final
3 EIS was adopted in January of 2007.

4 The Petitioners did ask from March 2007
5 to 2012, the Petitioners did ask the Board to
6 delay action on rulemaking every six months. And
7 because the Petitioners were working with several
8 organizations to develop a wastewater plan for the
9 region -- and this was the Big Sky area -- called
10 the Wastewater Solutions Forum, the Board agreed
11 to delay rulemaking between 2007 and 2012 as
12 Petitioners developed a plan, and attempted to
13 secure funding for wastewater improvements in the
14 area.

15 In December of 2012, at the request of
16 the interested parties, including the Petitioners
17 and DEQ, BER decided to not extend the rulemaking
18 another six months, and thereby terminated the
19 notice of rulemaking for that Outstanding Resource
20 Water petition.

21 DEQ did tell the Board at the time that
22 someone could petition the Board in the future,
23 but that the EIS would likely be outdated at that
24 point. It would need to be supplemented and
25 updated in any future rulemaking at that point. I

1 would just say that the final EIS was already five
2 years old when that rulemaking was allowed to
3 terminate.

4 So going forward, to give you an idea of
5 what we looked at in that EIS, the proposed
6 petition past and now was for designation of the
7 Outstanding Resource Water in the Gallatin River
8 starting at the northwest boundary of the
9 Yellowstone National Park, and ending at the
10 confluence of Spanish Peak, about 40 river miles.

11 The ORW designation requires a finding
12 that no other alternative exists that would
13 provide the same level of protection as the
14 proposed ORW section, and we did evaluate three
15 different alternatives in that EIS: A no action
16 alternative continue, which would essentially be
17 continuing to review impacts to the Gallatin on a
18 development by development basis; a cumulative
19 impacts analysis; and the Outstanding Resource
20 Water designation.

21 So in that EIS, we looked at the
22 hydrologic, and we looked a variety of factors --
23 hydrogeology, water quality, socioeconomic
24 considerations, land use and recreation impacts
25 assessed, aquatic life and habitats, fisheries,

1 vegetation, wildlife, air quality, cultural
2 resources, and esthetics.

3 So again, that EIS would now be, what,
4 eleven years old, so we have not yet gone through
5 the process to estimate what steps we would need
6 to take, or the costs that would need to -- or
7 estimate the costs for updating and supplementing
8 that EIS. That would be part of the process going
9 forward, and the Outstanding Resource Water rules
10 as well and the process as laid out under MCA
11 75-5-316.

12 And so at this point, we just wanted to
13 come before the Board, kind of lay out the general
14 process, explain the history that's taken place in
15 the past, and talk about the analysis that we
16 previously had done, and then invite the
17 Petitioners to address the Board to describe the
18 petition that they've submitted.

19 CHAIR DEVENY: Just one question, Tim.
20 So today if the Board decides to move forward,
21 would we assign this particular project I guess to
22 you to proceed with the parties, if we were to go
23 forward with it, or -- Sarah.

24 MS. CLERGET: I think the process is
25 outlined in 75-5-316, and I think Tim tried to lay

1 that out a little bit.

2 I think the first decision that has to
3 be made under 75-5-316(3)(a) is whether the
4 petition contains sufficient credible information.
5 So I think that's the determination that you guys
6 need to make, and you don't have to make it today
7 if you don't want to. There is not a timeline.

8 But I think you have to make that
9 determination. You can't delegate that to DEQ
10 necessarily. They can give you information, you
11 can ask them for information, but you need to make
12 that determination.

13 And then if not, we have to provide
14 reasons in writing under the statute. If yes, if
15 it does provide sufficient credible information,
16 then we have to decide whether to adopt the
17 petition under 75-5-316. If that happens, then
18 there is a public notice process that we have to
19 go through that BER has to administer. It can't
20 be DEQ.

21 And after that public process is done,
22 and you make the final determination about whether
23 to -- essentially you decide that you're going to
24 adopt it, then you go through the public process.
25 Then after the public process is done, you can

1 decide officially to adopt it.

2 Then we go through a rulemaking process,
3 which is the additional public notice period after
4 that. So all of that has to be administered by --
5 all of those processes have to be administered by
6 BER, although you can ask for information at any
7 stage from the parties or from DEQ. Does that
8 make sense?

9 CHAIR DEVENY: Yes.

10 MR. DAVIS: Madam Chair, if I may.
11 Thank you, Sarah. Our recommendation today is
12 that you don't make that determination as to
13 whether it meets the criteria, but we've
14 introduced the petition, the petition itself; hear
15 from the Petitioners, hear from the Department,
16 and then consider making that determination on the
17 criteria going forward at a future meeting.

18 CHAIR DEVENY: All right. Let's hear
19 from --

20 MR. MATHIEUS: Madam Chair, I'd just
21 like to provide a clarification, if you would, to
22 my statement earlier. I just want to be clear
23 that there was no requirement for the Petitioners
24 today that we just asked them to present or
25 anything of that nature. We just called them and

1 said, "It would be great if you guys could come.
2 The Board may have questions of you." I thought
3 that might help. I don't think I quite clearly
4 stated that previously. Thank you.

5 CHAIR DEVENY: That's good.

6 MR. DEARMENT: Madam Chair.

7 CHAIR DEVENY: Yes.

8 MR. DEARMENT: Mr. Davis, so you don't
9 want the Board to decide today. What will happen
10 in the interim before when we do decide?

11 MR. DAVIS: Madam Chair, Mr. Dearment.
12 That is where the Board would have to decide, as
13 Sarah laid it out, would have to decide whether
14 the petition meets the criteria. So you could
15 direct the Department to give you a recommendation
16 on that between this meeting and the next meeting,
17 but that is the Board's decision going forward.

18 MR. DEARMENT: Thank you.

19 MR. DAVIS: Sarah, does that fit with
20 what --

21 MS. CLERGET: Yes, I think you may be
22 conflating two of the steps. There is a first
23 step in 75-5-316(3)(a) whether the petition
24 contains sufficient credible information is the
25 first step. If that's a yes, then we go to the

1 more technical question of: Does it meet all of
2 the various technical requirements? Do you want
3 to accept it or reject it? So there are sort of
4 two steps in there. I just want to be clear.

5 MS. HANSON: So when we talk about the
6 petition in terms of being credible, etc., does
7 the petition include the EIS that's in here, or
8 are they two separate things?

9 MR. DAVIS: Madam Chair, Ms. Hanson. It
10 is does not include the EIS itself. The petition
11 submits the information that the Petitioners
12 believe meets the criteria, but also has the
13 substantial credible evidence. The EIS was
14 developed for the previous rulemaking itself by
15 the Department.

16 CHAIR DEVENY: Okay. Thank you, Tim.
17 We may have more questions. But now I'd like to
18 turn it over to folks from Cottonwood.

19 MR. MEYER: Madam Chair, members of the
20 Board. I'm nervous.

21 MS. CLERGET: Start with your name and
22 where you come from.

23 MR. MEYER: Thank you. My name is John
24 Meyer. I'm with Cottonwood Environmental Law
25 Center. I come from northwest Indiana. I was

1 born and raised in the midwest.

2 And that's part of the story of why I'm
3 here today, because in northwest Indiana, there is
4 steel mills, and there is a lot of industrial
5 infrastructure. And growing up in the woods, we
6 could play, and then eventually it all got
7 bulldozed down. The tree houses that I built as a
8 kid, they're not there anymore. These trees
9 aren't there. There is houses there now.

10 And that's happening today in Big Sky.
11 They're building houses there. And what happens
12 in the interim, and what's happening right now, is
13 that Big Sky evidently has asked engineers to
14 propose or develop a plan to discharge their
15 wastewater, their treated wastewater, into the
16 Gallatin River. And so I like to climb in the
17 Gallatin Canyon, and I like to swim in the
18 Gallatin River. I swam there last summer.

19 And the Minnesota agencies in charge of
20 pollution are concerned that when you discharge
21 wastewater, treated wastewater even, you get
22 pharmaceuticals in that wastewater, and there is
23 no treating that. And so I don't want my -- I'm
24 going to have kids. My kids and I don't want to
25 be swimming in the treated wastewater where there

1 is pharmaceuticals.

2 CHAIR DEVENY: Mr. Meyer, I'm going to
3 limit your comments to ten minutes, if you could
4 do that. And if you can really talk about the
5 petition and why your organizations are looking
6 for it, that would be great.

7 MR. MEYER: So we are here before you so
8 that we can maintain the water quality of the
9 Gallatin River, and we think the only way to do
10 that is to designate the Gallatin River as an
11 Outstanding Resource Water. We believe that our
12 petition meets the criteria to move forward as an
13 Outstanding Resource Water.

14 MS. CLERGET: Might I ask a question,
15 Madam Chair?

16 CHAIR DEVENY: Yes.

17 MS. CLERGET: Does your organization
18 understand the change in the statute about the
19 cost of the EIS?

20 MR. MEYER: My understanding is that the
21 Department of Environmental Quality used to pay
22 for the cost of the EIS, and since that original
23 EIS was issued, the statute has changed, and now
24 the Petitioner has to pay for the cost.

25 And so Cottonwood is a very small group.

1 We have lots of members across Montana and the US,
2 but we only have a few staff members, and so our
3 money goes towards petitions. It doesn't go
4 towards -- we don't have -- Honestly we're not
5 going to have the money. DEQ is saying that we're
6 going to need to do some supplemental
7 Environmental Impact Statement. We don't have the
8 money to pay for that. That's the short answer.

9 If we don't move forward with this, if
10 the DEQ says we need to supplement the
11 Environmental Impact Statement, that it falls on
12 us, this is done because we don't have the money
13 to do it.

14 MS. CLERGET: Do you understand that
15 that's the statute that says that, that it was a
16 change in the statute, and it is not a matter of
17 DEQ saying it? That's just what the statute says.

18 MR. MEYER: Yes.

19 MS. CLERGET: So if I understand what
20 you're saying right, then now that you have that
21 understanding about that you would have to pay for
22 that going forward, that you would have to
23 withdraw your petition based on that because
24 you're not going to be able to --

25 MR. MEYER: I know for a fact we don't

1 have the money to pay the Department of
2 Environmental Quality to supplement its
3 Environmental Impact Statement.

4 MS. CLERGET: Okay. I just thought the
5 Board might need that information.

6 CHAIR DEVENY: That's important. Any
7 other questions by Board members of Mr. Meyer?

8 MR. DEARMENT: I have one, Madam Chair.
9 Madam Chair, Mr. Meyer. There has been a
10 multi-year effort in Big Sky, or the Big Sky area,
11 to kind of deal with wastewater treatment issues
12 related to the build-out of Big Sky. Has your
13 organization participated in that?

14 MR. MEYER: We have. We've gone down to
15 meetings in Big Sky. We've hosted a forum in
16 Bozeman as well where the general manager of Big
17 Sky attended the Bozeman meeting as well. We've
18 participated, commented during the forum as well.

19 MR. DEARMENT: And are you pursuing this
20 listing because you're dissatisfied with the
21 outcome of that effort in part?

22 MR. MEYER: We're pursuing the
23 designation of the Gallatin River as an
24 Outstanding Resource Water to provide the river
25 with the most protective status it can get,

1 because this is one of the most amazing rivers in
2 the state, if not the country, if not the world.
3 People come here from over all over the world to
4 go fly fish, to go kayak, to go whitewater rafting
5 in the Gallatin River, and we want to protect it
6 to the extent that we can.

7 MR. DEARMENT: Madam Chair, Mr. Meyer,
8 one more question. Does that coalition of folks
9 that have been working in Big Sky, either in whole
10 or in part, individual organizations support this
11 effort that you're aware of?

12 MR. MEYER: Absolutely. There are
13 groups that -- I spoke with somebody yesterday who
14 is part of the coalition, and he said, "Good luck
15 talking to the Board tomorrow."

16 MR. DEARMENT: Thank you.

17 CHAIR DEVENY: So a little bit of
18 follow-up to both Sarah and John's question with
19 regard to funding any supplemental EIS. Have you
20 had any discussions with other groups about the
21 fact that the EIS may need to be updated and how
22 that could possibly be funded?

23 MR. MEYER: Your Honor, I just spoke
24 with Tim out in the hallway, and he said to me
25 that one of the main things that we see needs to

1 be supplemented is the criteria for water
2 protection right now. It has changed.

3 It used to be what's called a narrative
4 standard, and now it is a numeric standard. And
5 so narrative says whatever it says. It is permit
6 by permit. So if you want to discharge into the
7 Gallatin River, you have a narrative standard.
8 And if you want to discharge now, it is a numeric
9 standard. So here's the hard line is across the
10 state that applies to every river.

11 And so we don't understand why that
12 makes a difference. At the end of the day, we're
13 trying to protect the Gallatin River. So whether
14 you have a narrative standard or whether you have
15 a numeric standard shouldn't matter.

16 The only thing that needs to be
17 supplemented in the Environmental Impact Statement
18 is that the fact that there is more and more homes
19 being built that want to discharge waste into our
20 water. I don't understand what else would need to
21 be supplemented in the Environmental Impact
22 Statement.

23 CHAIR DEVENY: So you haven't had any
24 discussions about any funding that would be
25 forthcoming from the Petitioners or their

1 supporters?

2 MR. MEYER: No, Your Honor. No. I was
3 just informed in the hallway fifteen minutes ago
4 that the DEQ was thinking that they needed to
5 supplement their EIS.

6 CHAIR DEVENY: Thank you. Other
7 questions from Board members?

8 MR. BUSBY: I have a quick question.

9 CHAIR DEVENY: Dexter.

10 MR. BUSBY: If I understand you
11 correctly -- and you can tell me I'm all wet or
12 not -- but ultimately your goal is to minimize or
13 stop development in Big Sky?

14 MR. MEYER: No. Our goal is to protect
15 the water quality in the Gallatin River.

16 MR. BUSBY: I understand that. You
17 stated that. But you keep coming back to Big Sky
18 and development in Big Sky is going to cause you
19 difficulty on maintaining water quality. I think
20 you'll find folks at DEQ may dispute that a little
21 bit.

22 But ultimately if you get -- you feel if
23 you get this designation, you'll have better
24 control on development in Big Sky or -- I guess
25 I'm not sure what your ultimate -- because Big Sky

1 looks like on the map to be the big discharger
2 into the Gallatin in this area. So is that what
3 you're worried about?

4 MR. MEYER: We're worried that Big Sky
5 has issued a request for proposal for an
6 engineering firm to design a way to discharge
7 treated wastewater into the Gallatin River.

8 MR. BUSBY: So you want to stop that?

9 MR. MEYER: We don't want treated
10 wastewater discharging into the Gallatin River. I
11 don't think anybody in Montana wants treated
12 wastewater discharging into the Gallatin River.
13 Mr. Dearment, do you?

14 MR. DEARMENT: Madam Chair, Mr. Meyer.
15 I'm prepared to answer that. The water is going
16 somewhere. There are quite a few houses there
17 already. I guess I'm reluctant to foreclose on
18 any potential options down there sitting here
19 today. I think that would require a pretty
20 thorough analysis of the impacts and the other
21 options.

22 MR. MEYER: The Department of
23 Environmental Quality has already done the
24 analysis, and they had actually chosen an
25 alternative that would designate the Gallatin

1 River as an Outstanding Resource Water.

2 MR. DEARMENT: Madam Chair, Mr. Meyer.
3 I'm not familiar with that history. I don't know
4 if the Department can speak to that or not or
5 would like to.

6 CHAIR DEVENY: Could the Department
7 speak to the Environmental Impact Statement, the
8 likelihood that it will need to be updated or not.

9 MR. DAVIS: Madam Chair, members of the
10 Board, again, Tim Davis. I grabbed Mr. Meyer
11 before this item came up on the Board's agenda
12 just to give him a heads up that, "A," what we
13 were planning to do today was to give a history,
14 talk about the process, talk about the fact that
15 the law does require -- as Sarah pointed out --
16 that an EIS, that any estimated cost for an EIS as
17 part of the petition process would need to be
18 borne by the Petitioners themselves.

19 I did tell him that we've not done an
20 estimate yet of what that cost would be. We
21 haven't gotten into that level of detail. Simply
22 saying that it is an eleven year old EIS, and that
23 there have been changes, including going from a
24 narrative nutrient criteria to a numeric nutrient
25 criteria. We believe that could change the

1 analysis that was done. Clearly the demographic
2 data and other data that was used back to develop
3 the 2007 final EIS needs to be updated.

4 So we haven't done an estimate at this
5 point. Before we could work on it, we would need
6 to do an estimate, and the Petitioner would have
7 to pay the cost.

8 CHAIR DEVENY: Can you give us a general
9 idea what sort of effort it would take for you to
10 come up with an estimate? Is that going to be a
11 tremendous amount of work? Even if it was just
12 ballpark. I'm not asking you to do it now. If we
13 gave you time between now and the next meeting --

14 MR. DAVIS: I would be happy to. That's
15 what I was going to ask, rather than -- Madam
16 Chair, I asked some of my staff --

17 CHAIR DEVENY: I apologize. I put you
18 on the spot.

19 MR. DAVIS: We could get you a ballpark,
20 Madam Chair, of what we think it would take.

21 MS. CLERGET: Madam Chair, I just want
22 to be clear. It was the statute that requires the
23 EIS. It is not optional.

24 CHAIR DEVENY: Oh, I wasn't aware of
25 that.

1 MR. DAVIS: So we can get, Madam Chair,
2 we can get you a general estimate in the future.

3 CHAIR DEVENY: Before we go on with
4 further Board discussion, I believe we have to
5 open this to public comment; is that right? So I
6 would like to ask if there is anybody else in the
7 room or on the phone that would like to comment on
8 this particular proposal for designating the
9 Gallatin River as an Outstanding Resource Water.
10 There's somebody here. If you could state your
11 name.

12 MR. LEWIS: It's Greg Lewis. I'm with
13 Montana Fly Fishing Magazine. We have 10,000
14 subscribers world wide, and lot of them, 2,500 of
15 them have already signed an online petition in
16 favor of this designating the Gallatin River an
17 Outstanding Resource Water. I live in Big Sky
18 full time. It took me three hours to get here
19 today.

20 What we're seeing up there as far as
21 development is significant. I don't know if
22 you've been up there in awhile, but it is -- If
23 Environmental Impact Statement, EIS, means
24 impacting the environment, what was twelve years
25 ago is twelve times worse on the river.

1 So the streams in Big Sky are impaired,
2 if I'm not mistaken. They are designated as
3 impaired by the State. And to learn that even
4 though the stakeholders held this meeting, we
5 still know that Ron Edwards, Gallatin River Task
6 Force, and some of those members are still
7 pursuing direct discharge permits. Within a year
8 we anticipate you will have those.

9 That needs to stop. We need to declare
10 this river an outstanding resource. It needs some
11 protective designation, and it needs it now. We
12 can't wait any longer. I would appreciate if you
13 would give it some consideration, moving it
14 forward.

15 And I'd also be curious to know how much
16 it would cost to -- if we have to do the
17 environmental impact assessment or whatever it is.
18 I may be able to come up with those funds. So
19 thank you for your time.

20 CHAIR DEVENY: Thank you. Further
21 questions or discussion by the Board?

22 MR. FELTON: This is John Felton. I
23 have a question if I could.

24 CHAIR DEVENY: Go ahead, John.

25 MR. FELTON: With respect to the EIS, we

1 have one that's now twelve years old, and we've
2 just heard from someone who lives in the area that
3 issues are twelve times worse. I understand
4 that's not a numeric thing.

5 But would the expectation be that the
6 EIS would be done de novo, in other words, you
7 start completely over; or is it reasonable from
8 the Department's perspective to have something
9 that's twelve years old, eleven or twelve years
10 old updated?

11 CHAIR DEVENY: I'll put that question to
12 Tim Davis of DEQ. Could the EIS possibly be
13 updated rather than having to start the whole EIS
14 process over?

15 MR. DAVIS: Madam Chair, I don't
16 anticipate us redoing, starting de novo. But what
17 we'll do when we do look at an estimate for the
18 Board is we'll look at, we'll go over the existing
19 eleven year old EIS's, and discuss what would need
20 to be updated, and how much work do we think that
21 would take.

22 MR. FELTON: Okay. Thank you.

23 CHAIR DEVENY: Thanks, John. I'd like
24 to suggest that the Board postpone making a
25 decision on this today, ask DEQ to make an

1 estimate on what the cost of the EIS would be, and
2 communicate that cost to the parties; and at a
3 future Board meeting, if it is possible to get it
4 on the next one, or at least next one or two, have
5 both parties come first with the estimate of the
6 amount, and then the parties indicating whether or
7 not they have the capability of funding the EIS,
8 which if it is not funded would be a hindrance for
9 the Board to put a lot of effort into it. And I'd
10 like to ask Sarah if that seems legal to do that.

11 MS. CLERGET: I think that seems
12 reasonable. I just want you to keep in mind the
13 decisions that you have to make by the statute.
14 So the first decision is: "The Board shall
15 initially review a petition against the criterion
16 --" identified in (3)(c) "-- to determine whether
17 the petition contains sufficient credible
18 information for the Board to accept the petition."
19 So that's the decision point.

20 So although the information about the
21 EIS might be helpful, just remember that that's
22 what you're deciding.

23 CHAIR DEVENY: But don't have to decide
24 that today.

25 MS. CLERGET: No, absolutely not.

1 CHAIR DEVENY: I understand that.

2 MS. HANSON: But am I correct, Sarah,
3 what I heard you say earlier that to some extent
4 we need to know if that EIS piece can be funded.
5 Otherwise the petition should be --

6 UNKNOWN SPEAKER: The following
7 participant has entered the conference.

8 MS. HANSON: Is that not totally true?
9 I guess I was just thinking -- I understand what
10 you're saying from the statute first step, but it
11 seems like an essential component of even knowing
12 whether this petition should be in front of us for
13 action.

14 MS. CLERGET: I think that's more a
15 question for the Petitioners -- that's more
16 whether the Petitioners want to withdraw their
17 petition based on that information is I think the
18 more practical useful piece, as opposed to how
19 much that piece goes into the initial review
20 decision.

21 CHAIR DEVENY: So unless there is
22 further discussion by Board members, I would make
23 what I just suggested as a motion, that we ask DEQ
24 to make a cost estimate before, if possible, the
25 next Board meeting, and to meet with the

1 Petitioners to discuss that, and we use that
2 information to make our required decision.

3 MR. TWEETEN: Madam Chair, this is Chris
4 Tweeten. I wonder if I might -- First of all, let
5 me second your motion, and then if I might speak
6 to the motion.

7 CHAIR DEVENY: Go ahead.

8 MR. TWEETEN: Having read through the
9 statute several times, it is a complicated
10 statute, and it proposes a kind of rulemaking.
11 The decision to designate or not designate has to
12 be done by rule or by rulemaking. And if we wish
13 to designate, we do it by adopting a rule to that
14 effect, which then is subject to legislative
15 review, and is not effective until the Legislature
16 has reviewed it.

17 So there is a two stage, as I read the
18 statute, there is a two stage process that the
19 Board follows in cases like this. First, we have
20 to make a decision whether to accept or reject the
21 petition. And the statute contains notice of
22 hearing requirements before that determination can
23 be made, and that determination then has to be
24 made in writing, with reference to information
25 that was presented during the notice of hearing

1 process. And it's sort like of a mini-rulemaking
2 in and of itself.

3 And the second stage, if at that stage
4 we reject the petition, then the matter is over.
5 It's the final agency action and subject to
6 judicial review, I guess, under the provisions of
7 MAPA.

8 If we accept the petition, then there is
9 a further process that takes place, and that is
10 the process where the EIS comes into play. So it
11 is only after we've decided whether to accept the
12 petition that the EIS even becomes material.

13 So it seems to me we're very early in
14 this multi-stage process right now, and I don't
15 think we have enough information at this stage to
16 decide whether or on its face the petition makes a
17 case for designation or not. And so I think we
18 can carry that over, and take that up on its
19 merits at our next meeting, leading to a
20 determination by the Board as to whether we accept
21 or reject the petition, remembering that
22 acceptance is not the same thing as initiating
23 rulemaking.

24 If we decide to accept the petition at
25 our June meeting, the next step would be to go

1 through the EIS process, assuming that the
2 Petitioners are able to make the financial
3 contributions that are required under the statute
4 to meet their obligations to pay for the EIS. And
5 once the EIS is completed, then we would decide
6 whether or not we want to initiate rulemaking, and
7 adopt a rule designating the river as an
8 Outstanding Resource Water.

9 So I think being at this very early
10 stage, I'm in favor of carrying this matter over
11 until the next meeting, and conducting an inquiry
12 at that point as to whether we want to reject the
13 petition off the top, or whether we want to go
14 forward with the notice and comment process that's
15 set forth in the statute, as the next step before
16 deciding whether to accept the petition.

17 I don't know if that is clear to
18 everybody, and Sarah, I'm not sure you would agree
19 with me that that's what the statute says; but it
20 seems to me that's what it says. And so given
21 that procedural outline, I'm not ready to decide
22 today whether there is a grounds for rejecting
23 this petition at this point.

24 MS. CLERGET: May I, Madam Chair?

25 CHAIR DEVENY: Go ahead, Sarah.

1 MS. CLERGET: Chris, just one
2 clarification of what you said. I think I agree
3 with everything you said about the two steps
4 coming. I believe there is an initial first step
5 that is contained in (3)(a) that is the initial
6 review decision, to determine whether the petition
7 contains sufficient credible information, that
8 occurs before the decision to accept or reject the
9 petition.

10 So that's the only modification I would
11 make, and that would be the determination. The
12 initial review would be the decision I would
13 suggest the Board make at the next meeting.

14 CHAIR DEVENY: That was my
15 understanding.

16 MR. TWEETEN: Right. And I agree with
17 that, Sarah. But I think the only decision we can
18 make after initial review is to reject the
19 petition. If we don't decide to reject the
20 petition, then that notice and comment process is
21 triggered before we decide whether to accept it.

22 MS. CLERGET: Correct.

23 MR. TWEETEN: Am I correct on that?

24 MS. CLERGET: Yes, I agree.

25 MR. TWEETEN: So I think we're on the

1 same page there. Madam Chair, I support your
2 motion, and I think at our June meeting we should
3 have an action item on the agenda to make that
4 initial determination under (3)(a) of the statute,
5 and whether we want to trigger it going forward of
6 this notice and comment process, and make the
7 ultimate determination of whether to accept or
8 reject.

9 CHAIR DEVENY: I would agree with that.
10 There is a motion before the Board. Is there any
11 other discussion?

12 (No response)

13 CHAIR DEVENY: Any other clarification
14 or discussion?

15 (No response)

16 CHAIR DEVENY: Let's vote on the motion,
17 which I think you all know what it is. Let's just
18 vote on it. All those in favor, please say aye.

19 (Response)

20 CHAIR DEVENY: Any opposed?

21 (No response)

22 CHAIR DEVENY: Motion carries. Dexter
23 has a comment.

24 MR. BUSBY: Just a quick and easy
25 comment. This is actually to Sarah. Could you

1 put together just a little one page outline of the
2 process that we need to go through on this thing
3 starting with the next meeting, please?

4 MS. CLERGET: Sure.

5 MR. BUSBY: Because I think I understand
6 it, but I'm not absolutely sure, and it is an
7 involved process.

8 MS. CLERGET: Yes, I can do that.

9 CHAIR DEVENY: That's a good suggestion.
10 Thank you, Dexter. Aleisha. Okay. Let's
11 continue on to Board Counsel update. Sarah.

12 MS. CLERGET: Just one quick practical
13 question here for you guys. Going forward you saw
14 in my memo on the Oil Field case that was in front
15 of you today that there was a reference if anybody
16 had anything they wanted to look at in the record,
17 to contact Aleisha.

18 And I expected decisions coming in front
19 of you. Going forward there may be times where in
20 order to decide whether or not you want to accept,
21 reject, or modify my orders, you want to look at
22 something in the record. This is probably going
23 to be true as the records get bigger on the bigger
24 cases, even more when the parties are arguing
25 specific portions of the record.

1 So the practical question for you is how
2 would you like those records, especially when
3 they're big? So for example, some of these cases
4 we're talking about book case worth of a record.

5 The options I've thought about are we
6 can make the record available in hard copy in, for
7 example, the conference room in my office, and you
8 can come look at any part of it that you want at
9 any time.

10 The other option is we can give you all
11 a thumb drive -- assuming it will usually fit on a
12 thumb drive -- we can give you a thumb drive that
13 has the whole record, so you can pick what parts
14 you want to look at.

15 We can file transfer service it to you
16 with the State, which is like a cloud service, but
17 the problem with the State file transfer service
18 is that it will have to be done in multiple
19 different sections, given the way that the file
20 transfer service works. And so you'll probably be
21 getting several emails about that, and so there
22 are just some issues with the file transfer
23 service.

24 And then the other option is that we can
25 continue to just say, "Let Aleisha know if you

1 want to see anything." You can email Aleisha, and
2 she can email it back to you. If it's too big to
3 email, she can file transfer just the portion of
4 the record that you want to see.

5 So it's sort of what your pleasure is
6 going forward with these cases making the record
7 available to you.

8 CHAIR DEVENY: I'm thinking that
9 different Board members might have different
10 preferences, so are all those options available?

11 MS. CLERGET: I think the one that would
12 cover all of those options would be to say going
13 forward that you contact Aleisha and let her know
14 which of those options you would prefer.

15 I just want to make it clear mostly that
16 in my orders, I'm going to tell parties not to
17 attach things to their exceptions briefs, and I
18 want to make it clear to everybody that anything
19 that you see cited in a brief, you have the
20 ability to go look at in the way that's most easy
21 for you to do that.

22 CHAIR DEVENY: I appreciate that. Do
23 Board members have any questions or comments about
24 that?

25 MS. HANSON: I think the only comment I

1 would make is while I appreciated being in your
2 office, coming from out of town, I think that
3 would be difficult to do and get here in time to
4 review it. So my preference would be one of the
5 electronic, probably my preference is flash drive,
6 just because it takes away the need to get into
7 systems. But I guess I would say at least one
8 electronic option I think is needed.

9 MS. CLERGET: That's all for Counsel
10 update.

11 CHAIR DEVENY: Great. Thank you. All
12 right. Is there any comment from the general
13 public about any issues that weren't discussed
14 here today already? And contested cases are
15 definitely off limits.

16 (No response)

17 CHAIR DEVENY: Anybody on the phone?

18 MR. SECKINGER: My name is Josh
19 Seckinger. (Phonetic) I'm a Cottonwood member
20 and Montana fishing guide licensed --

21 CHAIR DEVENY: I'm sorry, but according
22 to our attorney, our comment period was over for
23 that particular agenda item, so we're not able to
24 let you comment now.

25 MR. SECKINGER: Okay.

1 CHAIR DEVENY: This public comment
2 period is for issues that were not previously
3 discussed at the Board meeting.

4 MR. TWEETEN: Madam Chair, I'd just
5 point out for the commenter's benefit, though,
6 that if at our next meeting we determine not to
7 reject the petition on its face, you're going to
8 have plenty of opportunities to get your views in
9 the record.

10 MR. SECKINGER: Thank you.

11 MR. TWEETEN: And the statute. So I
12 think we're only saying that for today's purposes
13 we're done with that issue, but you're going to
14 have all kinds of opportunities to speak and --

15 MR. SECKINGER: I understand that.

16 CHAIR DEVENY: Thank you for clarifying
17 that, Chris. Okay. Hearing no other comments
18 from any of the other general public, we'll move
19 into adjournment. Motion for that?

20 MR. BUSBY: I will move it.

21 CHAIR DEVENY: I'll second it. Any
22 discussion on adjournment?

23 (No response)

24 CHAIR DEVENY: All in favor, signify by
25 saying aye.

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(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Meeting is adjourned.

(The proceedings were concluded

at 11:50 a.m.)

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STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 97 - pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this _____ day of _____, 2018.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2020.

1	3	9	achieve - 27:10	16:14, 21:24, 47:8, 64:9, 68:16, 68:24, 69:1, 89:7	4:3, 92:10, 92:17, 93:25, 94:1, 94:13
1 [7] 16:19, 17:10, 18:8, 27:22, 31:10, 31:14, 44:1 1(a - 7:12 10,000 - 82:13 10:27 - 61:20 111 - 1:10 11:03 - 61:21 11:50 - 97:6 12th - 54:19 13 [2] 27:25, 28:1 14 [2] 29:4, 47:18 15 - 47:18 1520 - 1:11 164 - 59:4 1989 [2] 56:16, 56:17 1990 - 56:17	3(a - 9:10 3)(a [2] 90:5, 91:4 3)(c - 85:16 30 - 54:10 32 - 31:16 325 - 43:9 35 - 29:14	9 [2] 23:13, 98:22 97 - 98:12 9:00 [2] 1:14, 2:4 9th - 20:14	achieved - 26:25 acquainted - 3:17 across [6] 22:15, 34:21, 34:24, 35:7, 74:1, 77:9 Act [10] 11:10, 11:24, 13:5, 16:25, 17:4, 17:14, 17:19, 17:24, 35:24, 59:1 acted - 54:2 Acting [2] 4:11, 9:23 action [6] 14:12, 65:6, 66:15, 86:13, 88:5, 91:3 actions - 55:12 active - 12:22 add [2] 45:19, 62:15 added - 45:6 addition - 17:1 additional [4] 17:22, 35:23, 51:20, 69:3 additions - 6:11 address [3] 39:20, 40:7, 67:17 addressed - 20:17 adequate [2] 33:23, 37:1 adjourned - 97:4 adjournment [2] 96:19, 96:22 administer - 68:19 administered [2] 69:4, 69:5 administrations - 22:10 administrative - 17:19 Administrator [3] 4:10, 44:8, 63:2 adopt [8]	adopted - 65:3 adopting [2] 64:7, 87:13 adoption [11] 16:7, 18:24, 18:25, 46:6, 46:11, 47:21, 48:14, 51:10, 53:14, 54:13, 54:20 adverse - 10:1 Advisory [3] 11:10, 11:24, 13:5 affected [3] 13:9, 39:24, 43:6 affixed - 98:16 afforded [2] 63:16, 63:21 against [2] 44:10, 85:15 agencies - 72:19 agency [3] 22:5, 39:15, 88:5 agenda [5] 50:7, 50:18, 80:11, 91:3, 95:23 agree [9] 37:23, 39:8, 39:19, 42:6, 89:18, 90:2, 90:16, 90:24, 91:9 agreed - 65:10 agreement - 9:6 agricultural - 20:8 ahead [12] 6:8, 13:24, 27:18, 36:4, 39:7, 48:21, 48:25, 53:3, 57:25, 83:24, 87:7, 89:25 Alan [2] 2:18, 5:22 Aleisha [6]	align - 11:15 allow [2] 11:7, 22:9 allowed [2] 63:23, 66:2 allowing [2] 8:24, 24:2 already [8] 19:22, 19:23, 33:9, 66:1, 79:17, 79:23, 82:15, 95:14 alter - 55:14 alteration - 22:2 alternative [3] 66:12, 66:16, 79:25 alternatives - 66:15 although [2] 69:6, 85:20 amazing - 76:1 ambiguity - 30:4 amended - 29:15 amendment [14] 20:20, 27:21, 28:6, 46:3, 46:7, 46:17, 47:3, 47:4, 47:11, 47:12, 48:8, 48:11, 48:13, 48:15 American - 64:16 amount [2] 81:11, 85:6 analogous [4] 26:3, 30:20, 34:22, 39:10 analysis [12] 10:21, 13:18, 21:4, 21:16, 22:1, 28:15, 35:1, 66:19, 67:15, 79:20, 79:24, 81:1 analyze [2] 21:14, 22:24 and/or - 47:12 Annotated - 50:24 annual - 11:2
2	4	A			
2 [5] 16:1, 16:19, 18:8, 44:1, 45:8 2,500 - 82:14 2001 [2] 64:16, 64:17 2002 - 64:17 2006 [2] 65:1, 65:2 2007 [4] 65:3, 65:4, 65:11, 81:3 2009 - 11:4 2012 [3] 65:5, 65:11, 65:15 2015 - 16:12 2016-11-OC - 61:20 2017 [3] 11:1, 53:22, 54:12 2018 [7] 1:6, 1:13, 11:4, 20:14, 54:18, 54:19, 98:17 2020 - 98:22 20th - 53:22 21 - 16:18 21st - 54:12 22nd - 11:9 26th - 10:11	4 - 55:22 4.112 [6] 53:17, 53:24, 54:16, 55:3, 55:10, 55:11 40 - 66:10 45 [2] 27:25, 29:7	a.m [4] 1:14, 61:20, 61:21, 97:6 Aaron - 4:24 ability [3] 35:4, 94:20, 98:14 able [4] 74:24, 83:18, 89:2, 95:23 absence - 29:9 absolutely [5] 28:23, 33:5, 76:12, 85:25, 92:6 accept [15] 45:18, 46:25, 57:14, 71:3, 85:18, 87:20, 88:8, 88:11, 88:20, 88:24, 89:16, 90:8, 90:21, 91:7, 92:20 acceptable - 30:24 acceptance - 88:22 accepting [2] 45:20, 64:5 accompany - 13:18 accompanying [2] 53:13, 54:23 accordance - 18:24 according [2] 8:11, 95:21 Accordingly - 55:11 accurate - 23:21 accurately - 32:17 achievable [2] 26:20, 27:8	4		
	5				
	5 - 18:6 57 - 20:15				
	6				
	6 [4] 1:6, 1:13, 28:12, 29:5 62 [5] 24:24, 31:16, 45:8, 46:12, 47:3				
	7				
	72 - 29:7 75-2-301 - 50:25 75-2-301(13)(b) - 54:5 75-2-301(4 - 55:4 75-5-222 [3] 14:13, 16:1, 16:13 75-5-316 [3] 67:11, 67:25, 68:17 75-5-316(3)(a) [2] 68:3, 70:23				
	8				
	8 - 23:13 8th [2] 11:5, 54:18				

<p>anthropogenic [2] 16:3, 43:7 anticipate [2] 83:8, 84:16 anymore - 72:8 apologize [2] 63:2, 81:17 apparently - 9:6 appeal [11] 10:3, 10:8, 39:25, 40:2, 40:3, 40:4, 40:6, 40:12, 40:21, 41:23, 59:3 appealed [2] 40:23, 41:16 appealing - 10:5 appeals - 40:14 appears - 30:12 applicable - 17:16 applicant [3] 18:14, 18:19, 40:2 applicants - 38:12 application [3] 12:19, 23:8, 64:1 applies [2] 38:10, 77:10 apply [3] 35:8, 38:2, 55:5 applying [3] 18:18, 40:10, 42:22 appreciate [2] 83:12, 94:22 appreciated [2] 49:20, 95:1 appropriate [5] 16:5, 37:23, 38:17, 48:3, 51:6 approval [6] 18:22, 28:10, 28:22, 54:1, 56:22, 56:25 approve [8] 6:14, 11:6, 18:10, 46:25, 51:16, 53:13,</p>	<p>53:17, 55:17 approved [10] 7:7, 15:5, 15:9, 18:15, 50:23, 53:24, 54:15, 54:17, 64:9, 64:11 approving - 57:17 April [3] 1:6, 1:13, 10:11 aquatic - 66:25 areas - 11:16 aren't [2] 20:4, 72:9 arguing - 92:24 Argument - 61:19 art [2] 21:25, 39:17 asking [5] 11:6, 19:20, 51:11, 53:16, 81:12 aspects - 25:20 asphalt - 12:11 assessed - 66:25 assessment - 83:17 assign [5] 58:15, 58:17, 59:7, 59:23, 67:21 assigning [2] 59:13, 60:19 associated - 51:17 Association [4] 5:11, 5:23, 13:10, 62:1 assuming [2] 89:1, 93:11 assurance - 17:17 attach [2] 34:20, 94:17 attainable [3] 26:1, 26:18, 27:8 attainment - 56:19 attempt [2] 37:24, 38:6 attempted - 65:12</p>	<p>attended - 75:17 attorney [4] 4:2, 4:13, 4:24, 95:22 audits - 39:12 August - 8:25 authority [2] 17:19, 18:13 availability - 23:19 available [14] 2:13, 23:22, 23:24, 25:20, 26:3, 26:15, 26:22, 30:1, 51:14, 53:21, 55:16, 93:6, 94:7, 94:10 Avenue - 1:11 awhile - 82:22 aye [9] 7:2, 48:8, 48:16, 58:1, 59:14, 60:21, 61:12, 91:18, 96:25</p> <hr/> <p style="text-align: center;">B</p> <p>bad - 63:3 balances - 18:12 ballpark [2] 81:12, 81:19 bar - 63:25 base - 44:16 basically [2] 20:15, 56:17 BAT - 23:19 batch - 12:11 Bawden [2] 5:13, 5:13 Bear - 59:1 became - 41:11 become - 60:6 becomes - 88:12 bed [2] 22:20, 22:25 begin [2] 20:14, 25:1 behalf - 3:9 benefit - 96:5 BER [5] 21:23, 61:20, 65:17, 68:19, 69:6 best [10] 23:19, 23:22,</p>	<p>23:24, 25:20, 26:3, 26:14, 26:22, 26:23, 43:22, 98:13 better [2] 39:1, 78:23 beyond [2] 17:23, 35:24 bigger [2] 92:23, 92:23 bill [2] 43:9, 43:16 Bills [2] 23:6, 23:6 bit [5] 34:18, 52:2, 68:1, 76:17, 78:21 blanket - 33:5 Board [128] 1:1, 1:5, 1:18, 2:5, 3:9, 3:17, 4:1, 4:5, 6:9, 6:25, 7:9, 9:13, 9:22, 9:25, 10:18, 10:20, 10:25, 11:1, 11:18, 13:3, 13:21, 14:3, 15:2, 15:16, 15:21, 15:25, 15:25, 16:14, 17:5, 19:2, 19:23, 20:2, 21:23, 22:14, 23:15, 24:21, 24:24, 25:3, 25:7, 26:13, 27:14, 30:24, 32:23, 34:15, 39:4, 40:3, 40:9, 40:13, 40:22, 41:8, 41:13, 41:16, 41:18, 41:25, 42:9, 42:25, 44:21, 48:5, 49:2, 50:15, 50:24, 50:25, 51:8, 51:18, 51:23, 52:12, 53:6, 53:12, 53:16, 53:23, 54:2, 54:7, 54:11, 54:13, 54:15, 54:17, 55:2, 56:1, 56:7, 57:2, 59:10, 60:16, 62:3,</p>	<p>62:5, 62:17, 63:1, 63:3, 63:8, 63:11, 64:3, 64:8, 64:10, 64:15, 64:18, 65:5, 65:10, 65:21, 65:22, 67:13, 67:17, 67:20, 70:2, 70:9, 70:12, 71:20, 75:5, 75:7, 76:15, 78:7, 80:10, 82:4, 83:21, 84:18, 84:24, 85:3, 85:9, 85:14, 85:18, 86:22, 86:25, 87:19, 88:20, 90:13, 91:10, 92:11, 94:9, 94:23, 96:3 Board's [5] 37:3, 44:24, 57:13, 70:17, 80:11 bodies - 32:10 body [4] 26:2, 26:18, 32:14, 35:17 book - 93:4 born - 72:1 borne - 80:18 boundary - 66:8 bounds [5] 16:23, 32:22, 33:4, 34:6, 34:9 Bowers [12] 26:11, 26:12, 27:3, 27:5, 40:8, 40:9, 40:15, 40:20, 41:5, 42:24, 43:15, 43:22 Bozeman [2] 75:16, 75:17 break [2] 48:22, 58:20 brief - 94:19 briefing [5] 7:10, 10:9, 10:12, 10:15, 10:18 briefs [2] 10:10, 94:17 bringing [3] 10:24, 12:5,</p>	<p>13:21 broad [2] 35:9, 42:22 broader - 13:7 broadly [2] 34:21, 42:15 brought [2] 52:11, 62:6 budgetary - 60:13 build-out - 75:12 building [2] 1:10, 72:11 built [2] 72:7, 77:19 bulldozed - 72:7 bureau [10] 4:21, 4:23, 5:1, 5:7, 5:9, 5:16, 10:15, 10:22, 11:21, 50:16 burning - 19:2 Busby [21] 1:18, 2:19, 2:20, 6:15, 25:11, 35:12, 45:2, 46:23, 47:13, 47:17, 49:7, 49:8, 60:5, 60:11, 78:8, 78:10, 78:16, 79:8, 91:24, 92:5, 96:20 busy - 61:5</p> <hr/> <p style="text-align: center;">C</p> <p>calculation - 36:21 calling - 63:2 can't [4] 38:4, 68:9, 68:19, 83:12 Canyon - 72:17 capability - 85:7 capable - 36:21 captured - 34:10 carries [4] 59:18, 60:25, 61:17, 91:22 carry [2] 18:13, 88:18</p>
---	---	--	--	---	---

<p>carrying - 89:10</p> <p>case [21] 8:3, 9:8, 9:18, 23:24, 26:13, 35:3, 36:10, 38:3, 38:11, 38:11, 51:5, 58:15, 58:25, 59:8, 59:13, 59:19, 59:24, 60:20, 88:17, 92:14, 93:4</p> <p>case-by-case [5] 12:15, 12:17, 32:13, 33:19, 38:8</p> <p>cases [11] 7:10, 7:12, 7:22, 9:15, 58:9, 58:12, 87:19, 92:24, 93:3, 94:6, 95:14</p> <p>cause [2] 8:24, 78:18</p> <p>caused - 16:4</p> <p>CBM [5] 22:20, 22:22, 23:9, 23:18, 26:14</p> <p>Center [4] 5:3, 61:25, 62:8, 71:25</p> <p>centers - 21:17</p> <p>certain [5] 16:6, 34:23, 37:20, 43:10, 43:18</p> <p>certainly [4] 28:17, 30:21, 30:25, 46:4</p> <p>certainty - 22:6</p> <p>certify - 98:7</p> <p>CFAC - 7:18</p> <p>Chair [214] 1:17, 2:4, 2:6, 2:9, 3:8, 3:22, 5:19, 5:24, 6:1, 6:13, 6:16, 6:19, 6:22, 6:25, 7:4, 7:6, 9:12, 9:17, 9:21, 10:13, 10:16, 10:19, 14:3, 14:6, 14:11,</p>	<p>14:19, 14:24, 15:1, 15:19, 15:20, 19:1, 19:12, 19:19, 20:1, 24:4, 24:8, 24:11, 24:17, 24:20, 24:25, 25:3, 25:7, 25:11, 25:17, 26:5, 26:12, 27:1, 27:4, 27:14, 27:16, 27:18, 28:7, 28:24, 29:1, 31:2, 31:8, 31:23, 32:18, 33:8, 33:14, 34:2, 34:12, 34:17, 35:10, 36:1, 36:3, 38:19, 39:3, 39:7, 40:6, 40:8, 40:13, 40:16, 41:7, 41:18, 42:2, 42:8, 42:11, 42:24, 43:12, 43:19, 44:4, 44:6, 44:20, 44:24, 45:2, 45:7, 45:22, 46:9, 46:11, 46:14, 46:18, 46:22, 46:24, 47:2, 47:10, 48:4, 48:7, 48:10, 48:13, 48:18, 48:20, 48:25, 49:4, 49:17, 49:23, 50:4, 50:6, 50:14, 51:23, 52:18, 52:24, 53:5, 55:20, 56:1, 56:6, 57:1, 57:4, 57:7, 57:9, 57:12, 57:16, 57:21, 57:24, 58:3, 58:5, 59:4, 59:9, 59:12, 59:16, 59:18, 59:25, 60:2, 60:15, 60:18, 60:23, 60:25, 61:6, 61:8, 61:11, 61:14, 61:16, 61:23, 62:11, 62:14,</p>	<p>62:23, 62:25, 67:19, 69:9, 69:10, 69:18, 69:20, 70:5, 70:6, 70:7, 70:11, 71:9, 71:16, 71:19, 73:2, 73:15, 73:16, 75:6, 75:8, 75:9, 76:7, 76:17, 77:23, 78:6, 78:9, 79:14, 80:2, 80:6, 80:9, 81:8, 81:16, 81:17, 81:20, 81:21, 81:24, 82:1, 82:3, 83:20, 83:24, 84:11, 84:15, 84:23, 85:23, 86:1, 86:21, 87:3, 87:7, 89:24, 89:25, 90:14, 91:1, 91:9, 91:13, 91:16, 91:20, 91:22, 92:9, 94:8, 94:22, 95:11, 95:17, 95:21, 96:1, 96:4, 96:16, 96:21, 96:24, 97:2, 97:4</p> <p>challenged - 35:21</p> <p>change [28] 15:2, 17:8, 17:10, 21:10, 24:6, 24:14, 28:8, 28:8, 29:12, 29:17, 29:23, 30:2, 30:7, 30:14, 30:21, 35:14, 45:17, 45:18, 48:21, 53:13, 55:5, 55:7, 56:12, 63:23, 63:25, 73:18, 74:16, 80:25</p> <p>changed [5] 12:14, 31:16, 64:23, 73:23, 77:2</p> <p>changes [13] 13:1, 13:9, 13:16, 18:2, 45:21, 45:21,</p>	<p>53:17, 53:24, 54:15, 54:16, 55:3, 56:9, 80:23</p> <p>changing - 31:10</p> <p>charge - 72:19</p> <p>check - 49:1</p> <p>Chief [5] 3:11, 4:11, 5:7, 5:16, 9:23</p> <p>chosen - 79:24</p> <p>Chris [25] 1:17, 1:20, 2:6, 2:8, 3:4, 3:21, 27:16, 27:18, 28:24, 29:3, 36:1, 36:3, 36:4, 45:3, 45:23, 49:3, 49:15, 50:2, 50:12, 52:16, 52:18, 57:25, 87:3, 90:1, 96:17</p> <p>circumstances - 16:6</p> <p>cited - 94:19</p> <p>City - 54:19</p> <p>City-County [9] 5:5, 50:8, 52:20, 53:8, 53:9, 53:14, 53:23, 53:25, 57:18</p> <p>Civil - 9:2</p> <p>clarification [6] 15:6, 22:9, 23:8, 69:21, 90:2, 91:13</p> <p>clarify [6] 15:2, 23:7, 40:20, 41:2, 41:2, 55:12</p> <p>clarifying [2] 44:20, 96:16</p> <p>Clark [2] 98:4, 98:7</p> <p>Clean [9] 11:9, 11:24, 13:5, 16:24, 17:4, 17:14, 17:19, 17:23, 35:24</p> <p>clear [11] 15:10, 29:22, 33:2, 41:6, 41:19, 69:22,</p>	<p>71:4, 81:22, 89:17, 94:15, 94:18</p> <p>clearer - 31:1</p> <p>clearly [2] 70:3, 81:1</p> <p>Clerget [41] 4:1, 4:1, 4:4, 7:11, 29:3, 41:1, 41:6, 41:9, 42:3, 45:16, 47:15, 47:20, 49:21, 58:11, 59:5, 59:20, 60:8, 60:13, 61:1, 62:9, 67:24, 70:21, 71:21, 73:14, 73:17, 74:14, 74:19, 75:4, 81:21, 85:11, 85:25, 86:14, 89:24, 90:1, 90:22, 90:24, 92:4, 92:8, 92:12, 94:11, 95:9</p> <p>climb - 72:16</p> <p>closed - 65:2</p> <p>closely - 51:4</p> <p>cloud - 93:16</p> <p>CMG - 7:12</p> <p>coal [4] 22:19, 22:20, 22:22, 22:25</p> <p>coalition [2] 76:8, 76:14</p> <p>Code - 50:24</p> <p>codify - 55:12</p> <p>Coefield [9] 5:4, 5:4, 53:2, 53:5, 53:7, 53:22, 56:8, 56:14, 56:14</p> <p>collaboratively - 16:20</p> <p>colleague [3] 25:23, 26:9, 39:19</p> <p>collect - 11:7</p> <p>comes - 88:10</p> <p>comfortable [3] 35:15, 38:15, 39:9</p> <p>coming [5] 11:18, 78:17, 90:4, 92:18, 95:2</p> <p>comment [45]</p>	<p>6:22, 15:15, 17:6, 17:8, 19:4, 19:6, 19:10, 19:13, 23:20, 24:2, 24:15, 24:23, 25:24, 27:21, 27:25, 27:25, 28:1, 28:10, 29:13, 29:19, 33:24, 34:16, 35:11, 35:13, 38:20, 39:6, 39:8, 42:12, 57:5, 57:10, 64:5, 65:1, 65:2, 82:5, 82:7, 89:14, 90:20, 91:6, 91:23, 91:25, 94:25, 95:12, 95:22, 95:24, 96:1</p> <p>commented [2] 28:3, 75:18</p> <p>commenter - 25:9</p> <p>commenter's - 96:5</p> <p>commenting - 19:8</p> <p>comments [35] 17:9, 17:13, 17:20, 18:1, 19:20, 20:12, 20:13, 20:13, 22:13, 23:13, 24:13, 25:8, 25:10, 25:18, 28:21, 29:7, 30:14, 31:9, 31:17, 31:24, 34:15, 38:23, 39:3, 42:8, 44:21, 48:1, 48:2, 55:16, 57:2, 62:7, 62:13, 64:18, 73:3, 94:23, 96:17</p> <p>commission [3] 44:7, 63:3, 98:21</p> <p>Commissioners [2] 52:11, 54:18</p> <p>Committee [3] 11:10, 11:24, 13:5</p>
---	--	---	--	---	--

<p>communicate - 85:2 companies [2] 12:25, 13:8 compatible - 55:23 compelling - 29:12 competence - 37:9 complete - 54:20 completed [2] 64:25, 89:5 completely [2] 20:12, 84:7 complicated - 87:9 component - 86:11 comprised - 16:16 computer-aided - 98:11 conceivable - 41:21 concept [2] 34:19, 35:22 concern [4] 20:22, 20:24, 21:11, 22:25 concerned [2] 29:9, 72:20 concerns [6] 20:16, 22:16, 22:23, 55:7, 55:10, 60:14 concluded - 97:5 conclusion [2] 43:8, 43:22 conclusions [2] 8:1, 8:17 concoct - 30:8 concocted - 30:8 concrete - 12:11 concurrently - 56:4 condition [6] 21:19, 26:2, 26:18, 27:9, 39:18, 41:5 conditions [15] 16:9, 17:12, 18:16, 21:5, 26:20, 27:24, 30:3, 30:18, 30:23,</p>	<p>34:24, 43:11, 43:25, 44:13, 45:14, 45:19 condolences - 3:10 conducting [3] 18:10, 64:6, 89:11 conference [11] 2:12, 2:17, 18:4, 19:18, 23:5, 29:25, 51:13, 52:15, 53:20, 86:7, 93:7 confers - 36:7 confident - 17:15 confines - 43:21 conflating - 70:22 conflict - 54:9 confluence - 66:10 confused - 31:13 congratulate - 25:12 consequences - 37:25 consider [3] 26:3, 32:2, 69:16 consideration - 83:13 considerations - 66:24 considered - 22:2 Considering - 12:21 consistency - 33:16 consistent [11] 17:16, 26:16, 26:21, 27:6, 27:11, 27:12, 28:18, 38:11, 42:5, 43:24, 51:7 Construction - 59:2 contact [2] 92:17, 94:13 contain - 98:12 contained - 90:5 contains [6]</p>	<p>48:1, 68:4, 70:24, 85:17, 87:21, 90:7 content - 38:7 contested [5] 7:10, 7:12, 9:15, 58:9, 95:14 context [3] 32:16, 38:3, 50:17 continue [5] 8:23, 58:6, 66:16, 92:11, 93:25 continuing - 66:17 continuous - 11:23 Contractors - 13:10 Contrary - 51:8 contributable - 31:25 contribute [4] 21:13, 21:18, 22:8, 36:6 contribution [15] 17:21, 17:22, 32:4, 32:17, 32:25, 33:3, 33:4, 34:1, 34:7, 36:9, 36:20, 36:20, 36:21, 36:24, 37:20 contributions [2] 36:17, 89:3 contributor - 43:6 control [5] 12:12, 53:15, 53:23, 53:25, 78:24 controversy - 37:17 convened - 16:15 conversations [2] 11:17, 43:2 Copper - 7:21 correct [8] 31:19, 31:22, 45:23, 46:9, 54:9, 86:2, 90:22, 90:23 corrections -</p>	<p>6:11 correctly [3] 46:2, 52:3, 78:11 Cosa - 61:2 cost [10] 73:19, 73:22, 73:24, 80:16, 80:20, 81:7, 83:16, 85:1, 85:2, 86:24 costs [3] 64:25, 67:6, 67:7 Cottonwood [8] 5:2, 61:24, 62:8, 62:12, 71:18, 71:24, 73:25, 95:19 couldn't - 36:23 Council [3] 5:18, 20:3, 54:19 Counsel [5] 3:11, 4:12, 9:23, 92:11, 95:9 County [12] 50:22, 51:5, 51:11, 51:22, 53:2, 54:17, 56:3, 56:9, 57:5, 58:6, 98:4, 98:6 couple [2] 25:13, 50:18 course - 17:18 Court [15] 1:23, 9:25, 10:2, 10:8, 23:15, 26:6, 27:13, 37:7, 37:10, 40:1, 40:4, 40:12, 41:24, 98:5, 98:20 Court's [2] 8:8, 10:3 Courts - 38:9 cover - 94:12 covers - 31:6 coworker - 3:11 craft - 38:1 created [3] 20:20, 23:16, 47:25 credible [7]</p>	<p>68:4, 68:15, 70:24, 71:6, 71:13, 85:17, 90:7 criteria [8] 69:13, 69:17, 70:14, 71:12, 73:12, 77:1, 80:24, 80:25 criterion - 85:15 Cronin [2] 50:2, 50:2 crushers - 12:10 CRUTCHER [3] 1:22, 98:5, 98:19 cultural - 67:1 cumulative - 66:18 curious [2] 38:21, 83:15 current [2] 12:15, 55:10 currently [2] 7:24, 13:12</p>	<p>D</p> <p>DarAnne [2] 5:17, 20:2 data [2] 81:2, 81:2 date - 13:4 Davis [20] 4:9, 4:9, 44:5, 44:6, 44:7, 62:23, 62:25, 63:1, 69:10, 70:8, 70:11, 70:19, 71:9, 80:9, 80:10, 81:14, 81:19, 82:1, 84:12, 84:15 de [2] 84:6, 84:16 deal - 75:11 dealing - 37:6 deals [2] 21:12, 28:9 dealt - 42:16 Dearment [21] 1:18, 3:2, 3:3, 24:25, 25:4, 49:13, 49:14, 60:1, 61:4, 61:7, 70:6, 70:8,</p>	<p>70:11, 70:18, 75:8, 75:19, 76:7, 76:16, 79:13, 79:14, 80:2 decades - 20:9 December [5] 15:24, 17:6, 64:16, 64:17, 65:15 decide [16] 58:12, 68:16, 68:23, 69:1, 70:9, 70:10, 70:12, 70:13, 85:23, 88:16, 88:24, 89:5, 89:21, 90:19, 90:21, 92:20 decided [5] 15:25, 64:4, 64:8, 65:17, 88:11 decides - 67:20 deciding [2] 85:22, 89:16 decision [23] 8:8, 12:2, 26:6, 30:5, 37:14, 37:17, 40:21, 41:15, 44:16, 58:19, 68:2, 70:17, 84:25, 85:14, 85:19, 86:20, 87:2, 87:11, 87:20, 90:6, 90:8, 90:12, 90:17 decisions [2] 85:13, 92:18 declare - 83:9 decrease - 11:25 deem - 22:10 defer - 42:2 define [5] 32:6, 32:12, 32:17, 37:24, 39:1 defined [5] 21:22, 33:9, 33:25, 34:14, 38:17 defining [2] 32:2, 33:16 definitely [2] 52:5, 95:15</p>
--	---	---	---	---	--	--

<p>definition [9] 22:1, 31:25, 32:4, 32:7, 33:6, 34:20, 35:8, 35:20, 38:1</p> <p>definitively - 32:24</p> <p>degradation - 22:12</p> <p>degrade - 64:1</p> <p>degraded - 21:19</p> <p>delay [2] 65:6, 65:11</p> <p>delayed - 64:21</p> <p>delegate - 68:9</p> <p>delete - 47:4</p> <p>deletion - 28:2</p> <p>demographic - 81:1</p> <p>demonstrate - 39:17</p> <p>demonstrating - 18:14</p> <p>Denial - 59:20</p> <p>denied - 40:11</p> <p>deny - 21:17</p> <p>department [54] 5:5, 10:23, 16:15, 17:11, 18:7, 18:9, 18:13, 20:18, 20:25, 20:25, 21:2, 21:13, 21:21, 23:9, 23:13, 26:23, 27:23, 28:4, 28:13, 30:13, 30:17, 30:22, 32:5, 33:22, 35:4, 37:19, 45:10, 45:25, 47:5, 47:9, 47:25, 50:8, 50:16, 52:23, 53:8, 53:10, 53:11, 53:11, 54:2, 54:9, 55:6, 55:12, 56:2, 57:18, 62:15, 64:6, 69:15, 70:15, 71:15, 73:21, 75:1, 79:22, 80:4,</p>	<p>80:6</p> <p>Department's [4] 21:16, 29:13, 30:5, 84:8</p> <p>Department/board - 4:8</p> <p>DEQ [66] 3:10, 3:15, 4:10, 4:12, 4:13, 4:24, 5:8, 5:12, 5:13, 9:10, 9:23, 10:2, 10:5, 10:9, 12:24, 14:9, 15:3, 15:15, 15:17, 15:23, 16:7, 22:24, 25:9, 25:12, 25:15, 25:18, 26:9, 28:8, 31:24, 32:20, 36:8, 36:19, 36:23, 37:9, 37:11, 37:16, 37:23, 38:10, 39:17, 40:7, 42:19, 42:25, 44:5, 46:12, 50:9, 51:25, 55:21, 56:8, 62:4, 62:23, 63:2, 64:19, 64:22, 65:17, 65:21, 68:9, 68:20, 69:7, 74:5, 74:10, 74:17, 78:4, 78:20, 84:12, 84:25, 86:23</p> <p>DEQ's [5] 13:17, 15:11, 23:20, 37:4, 43:8</p> <p>describe - 67:17</p> <p>describes - 16:9</p> <p>design - 79:6</p> <p>designate [5] 73:10, 79:25, 87:11, 87:11, 87:13</p> <p>designated [2] 56:15, 83:2</p> <p>designating [3] 82:8, 82:16, 89:7</p> <p>designation</p>	<p>[11] 56:13, 63:14, 64:2, 64:3, 66:6, 66:11, 66:20, 75:23, 78:23, 83:11, 88:17</p> <p>despite - 21:20</p> <p>detail - 80:21</p> <p>details [2] 13:14, 54:21</p> <p>determination [17] 28:2, 28:5, 37:11, 42:21, 43:14, 68:5, 68:9, 68:12, 68:22, 69:12, 69:16, 87:22, 87:23, 88:20, 90:11, 91:4, 91:7</p> <p>determine [7] 11:14, 21:1, 36:8, 37:19, 85:16, 90:6, 96:6</p> <p>determined - 23:16</p> <p>determines [8] 17:11, 27:23, 30:17, 30:22, 45:10, 45:13, 45:25, 47:6</p> <p>develop [5] 12:3, 64:22, 65:8, 72:14, 81:2</p> <p>developed [4] 30:9, 38:8, 65:12, 71:14</p> <p>development [8] 22:22, 61:3, 66:18, 66:18, 78:13, 78:18, 78:24, 82:21</p> <p>Deveny [171] 1:17, 2:4, 2:6, 2:8, 2:9, 3:8, 3:22, 5:19, 5:24, 6:1, 6:13, 6:16, 6:19, 6:22, 6:25, 7:4, 7:6, 9:12, 9:17, 9:21, 10:13, 14:3, 14:6, 14:11, 14:19, 14:24, 15:1,</p>	<p>15:19, 19:1, 19:12, 19:19, 24:4, 24:8, 24:11, 24:17, 24:20, 25:3, 25:7, 25:17, 26:5, 27:1, 27:4, 27:14, 27:18, 28:7, 28:24, 31:2, 31:8, 31:23, 32:18, 33:8, 33:14, 34:2, 34:12, 35:10, 36:3, 38:19, 39:3, 39:7, 40:6, 40:13, 40:16, 41:7, 41:18, 42:2, 42:8, 42:11, 43:12, 43:19, 44:4, 44:20, 44:24, 45:7, 46:9, 46:14, 46:18, 46:22, 46:24, 47:10, 48:4, 48:7, 48:10, 48:13, 48:18, 48:20, 48:25, 49:3, 49:4, 49:17, 49:23, 50:4, 50:6, 51:23, 52:18, 52:24, 55:20, 56:6, 57:1, 57:4, 57:7, 57:9, 57:12, 57:16, 57:21, 57:24, 58:3, 58:5, 59:4, 59:9, 59:12, 59:16, 59:18, 59:25, 60:2, 60:15, 60:18, 60:23, 60:25, 61:6, 61:8, 61:11, 61:14, 61:16, 61:23, 62:11, 62:23, 67:19, 69:9, 69:18, 70:5, 70:7, 71:16, 73:2, 73:16, 75:6, 76:17, 77:23, 78:6, 78:9, 80:6, 81:8, 81:17, 81:24, 82:3, 83:20, 83:24, 84:11,</p>	<p>84:23, 85:23, 86:1, 86:21, 87:7, 89:25, 90:14, 91:9, 91:13, 91:16, 91:20, 91:22, 92:9, 94:8, 94:22, 95:11, 95:17, 95:21, 96:1, 96:16, 96:21, 96:24, 97:2, 97:4</p> <p>Dexter [8] 1:18, 2:19, 25:10, 35:10, 49:7, 78:9, 91:22, 92:10</p> <p>difference [3] 29:14, 30:16, 77:12</p> <p>differential - 32:11</p> <p>differing - 32:8</p> <p>difficult [5] 32:12, 33:6, 35:8, 38:2, 95:3</p> <p>difficulty - 78:19</p> <p>diligently - 3:14</p> <p>direct [2] 70:15, 83:7</p> <p>directed [4] 16:13, 33:12, 37:4, 64:19</p> <p>directive [2] 16:23, 17:24</p> <p>directly - 13:8</p> <p>directs - 36:7</p> <p>discharge [9] 21:18, 63:24, 72:14, 72:20, 77:6, 77:8, 77:19, 79:6, 83:7</p> <p>discharger [5] 16:3, 26:17, 27:9, 43:5, 79:1</p> <p>dischargers [4] 26:14, 43:10, 43:25, 44:2</p> <p>discharges [5] 22:20, 22:22, 23:1, 23:9, 23:18</p> <p>discharging</p>	<p>[2] 79:10, 79:12</p> <p>discretion [2] 36:8, 37:4</p> <p>discuss [3] 42:19, 84:19, 87:1</p> <p>discussed [7] 13:4, 29:13, 34:20, 35:5, 58:14, 95:13, 96:3</p> <p>discussing - 13:15</p> <p>discussion [18] 6:20, 15:16, 24:21, 25:2, 37:18, 47:11, 48:4, 57:19, 59:10, 60:3, 60:15, 61:9, 82:4, 83:21, 86:22, 91:11, 91:14, 96:22</p> <p>discussions [4] 7:14, 34:8, 76:20, 77:24</p> <p>dismiss - 9:7</p> <p>dispute - 78:20</p> <p>dissatisfied - 75:20</p> <p>distracting - 49:19</p> <p>District [3] 9:25, 10:3, 40:12</p> <p>Division [5] 4:10, 15:23, 25:22, 44:8, 63:1</p> <p>document [4] 34:5, 34:11, 47:22, 47:24</p> <p>documentation - 28:15</p> <p>documents - 30:10</p> <p>dovetails - 37:13</p> <p>downstream - 33:2</p> <p>draft [4] 15:8, 43:17, 47:3, 64:25</p> <p>drafting - 13:17</p> <p>drainages - 10:6</p>
--	--	--	---	---	--

<p>drastically - 12:19</p> <p>drive [4] 93:11, 93:12, 93:12, 95:5</p> <p>due [2] 10:10, 16:3</p> <p>Dunning [7] 5:17, 5:17, 20:1, 20:2, 23:7, 28:3, 29:23</p> <p>Dunning's [2] 27:21, 31:24</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier [4] 55:1, 63:3, 69:22, 86:3</p> <p>East - 1:11</p> <p>easy [2] 91:24, 94:20</p> <p>ecological - 63:19</p> <p>economic - 63:20</p> <p>Ed [2] 4:11, 9:22</p> <p>Edwards - 83:5</p> <p>effect [3] 10:9, 64:10, 87:14</p> <p>effective - 87:15</p> <p>efficient - 12:3</p> <p>efficiently [2] 11:21, 12:7</p> <p>effluent - 23:17</p> <p>effort [5] 75:10, 75:21, 76:11, 81:9, 85:9</p> <p>efforts [2] 11:25, 12:6</p> <p>EIS [43] 64:6, 64:7, 64:20, 64:21, 64:22, 64:25, 64:25, 65:3, 65:23, 66:1, 66:5, 66:15, 66:21, 67:3, 67:8, 71:7, 71:10, 71:13, 73:19, 73:22, 73:23, 76:19, 76:21,</p>	<p>78:5, 80:16, 80:16, 80:22, 81:3, 81:23, 82:23, 83:25, 84:6, 84:12, 84:13, 85:1, 85:7, 85:21, 86:4, 88:10, 88:12, 89:1, 89:4, 89:5</p> <p>EIS's - 84:19</p> <p>either [4] 9:6, 14:2, 40:4, 76:9</p> <p>electronic [2] 95:5, 95:8</p> <p>element - 30:4</p> <p>eleven [4] 67:4, 80:22, 84:9, 84:19</p> <p>ELG's - 23:17</p> <p>eligible - 44:2</p> <p>elsewhere - 39:22</p> <p>email [3] 94:1, 94:2, 94:3</p> <p>emails - 93:21</p> <p>emissions - 11:13</p> <p>emphasize - 23:20</p> <p>ending - 66:9</p> <p>Energy [5] 8:10, 8:13, 9:18, 9:24, 10:2</p> <p>Energy's - 10:10</p> <p>Enforcement [2] 5:12, 5:14</p> <p>engineering - 79:6</p> <p>engineers - 72:13</p> <p>ensure [2] 33:15, 51:6</p> <p>ensuring - 55:23</p> <p>entered [12] 2:12, 2:17, 10:1, 18:4, 19:5, 19:18, 23:5, 29:25, 51:13, 52:15, 53:20, 86:7</p> <p>entertaining - 49:18</p> <p>entirety -</p>	<p>59:13</p> <p>entities - 42:18</p> <p>environment - 82:24</p> <p>environmental [19] 1:1, 2:5, 5:3, 53:12, 61:25, 62:8, 63:19, 71:24, 73:21, 74:7, 74:11, 75:2, 75:3, 77:17, 77:21, 79:23, 80:7, 82:23, 83:17</p> <p>EPA [15] 13:16, 17:3, 17:18, 18:22, 23:16, 28:15, 28:22, 30:11, 33:22, 35:13, 35:21, 43:21, 55:7, 55:9, 56:20</p> <p>ephemeral - 10:6</p> <p>episodes - 55:13</p> <p>equitable - 11:15</p> <p>equivalent - 36:12</p> <p>Eric - 5:6</p> <p>Erin - 23:6</p> <p>especially [2] 22:18, 93:2</p> <p>essential - 86:11</p> <p>essentially [3] 30:20, 66:16, 68:23</p> <p>esthetics - 67:2</p> <p>estimate [11] 67:5, 67:7, 80:20, 81:4, 81:6, 81:10, 82:2, 84:17, 85:1, 85:5, 86:24</p> <p>estimated [2] 64:24, 80:16</p> <p>etc [2] 52:12, 71:6</p> <p>evaluate - 66:14</p> <p>eventually [2] 47:22, 72:6</p> <p>everybody [4]</p>	<p>2:5, 15:10, 89:18, 94:18</p> <p>everything [2] 58:14, 90:3</p> <p>evidence [2] 51:19, 71:13</p> <p>evidently - 72:13</p> <p>exactly [2] 31:4, 52:13</p> <p>examination - 63:17</p> <p>Examiner [4] 58:16, 58:17, 59:8, 59:24</p> <p>example [6] 12:6, 36:13, 36:22, 43:5, 93:3, 93:7</p> <p>examples [2] 32:23, 42:25</p> <p>exception - 23:23</p> <p>exceptions - 94:17</p> <p>exclude - 36:17</p> <p>exclusively - 31:5</p> <p>Excuse [2] 24:9, 30:2</p> <p>existing [3] 41:22, 55:4, 84:18</p> <p>exists [2] 39:22, 66:12</p> <p>expect - 49:21</p> <p>expectation - 84:5</p> <p>expected - 92:18</p> <p>expenditures - 11:25</p> <p>expertise - 37:5</p> <p>expires - 98:21</p> <p>explain [3] 28:4, 50:10, 67:14</p> <p>explanation - 37:18</p> <p>explanations - 55:2</p> <p>expressed - 55:9</p> <p>expresses - 37:2</p> <p>extend - 65:17</p> <p>extensive -</p>	<p>51:19</p> <p>extent [4] 34:10, 39:16, 76:6, 86:3</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [3] 6:6, 88:16, 96:7</p> <p>facilities [3] 12:10, 12:12, 12:21</p> <p>Facility - 59:21</p> <p>factors [2] 37:19, 66:22</p> <p>facts - 38:4</p> <p>failed - 23:9</p> <p>fair - 38:11</p> <p>falls - 74:11</p> <p>familiar [2] 20:4, 80:3</p> <p>favor [11] 7:2, 48:8, 48:14, 58:1, 59:12, 60:19, 61:12, 82:16, 89:10, 91:18, 96:24</p> <p>feasible - 63:17</p> <p>February [2] 6:10, 20:14</p> <p>Federal [5] 17:16, 26:1, 27:6, 27:12, 43:24</p> <p>fee [4] 11:2, 11:6, 11:15, 11:19</p> <p>feedback [2] 13:6, 13:13</p> <p>feel [6] 14:20, 31:17, 39:9, 55:21, 63:3, 78:22</p> <p>fees [5] 11:4, 11:12, 11:12, 11:14, 11:22</p> <p>felt - 32:15</p> <p>Felton [17] 2:10, 2:14, 2:15, 31:3, 31:3, 39:5, 39:5, 39:8, 40:18, 41:20, 42:7, 49:5, 49:6, 83:22, 83:22, 83:25, 84:22</p> <p>FENTON -</p>	<p>1:20</p> <p>field [2] 51:21, 92:14</p> <p>Fields - 61:19</p> <p>fifteen - 78:3</p> <p>file [5] 93:15, 93:17, 93:19, 93:22, 94:3</p> <p>filed [2] 10:3, 10:8</p> <p>filing - 9:7</p> <p>fill [2] 12:2, 12:2</p> <p>final [10] 14:13, 47:22, 55:18, 56:22, 56:24, 65:2, 66:1, 68:22, 81:3, 88:5</p> <p>finally - 18:1</p> <p>financial [2] 39:12, 89:2</p> <p>finding [2] 36:19, 66:11</p> <p>findings [2] 7:25, 8:16</p> <p>finds - 18:8</p> <p>fine - 47:16</p> <p>firm - 79:6</p> <p>Fischer - 61:2</p> <p>fish - 76:4</p> <p>fisheries - 66:25</p> <p>fishing [2] 82:13, 95:20</p> <p>fit [2] 70:19, 93:11</p> <p>five [2] 19:20, 66:1</p> <p>flash - 95:5</p> <p>flat - 11:13</p> <p>fly [2] 76:4, 82:13</p> <p>focus [3] 10:5, 11:16, 22:16</p> <p>focused - 22:14</p> <p>folks [3] 71:18, 76:8, 78:20</p> <p>follow-up - 76:18</p> <p>followed [2] 54:24, 55:22</p> <p>follows - 87:19</p> <p>Force - 83:6</p> <p>Ford [20] 2:8, 2:10, 2:14,</p>
--	--	---	---	---	--

<p>2:19, 2:21, 2:23, 2:25, 3:2, 3:4, 3:6, 4:5, 4:5, 25:6, 49:3, 49:5, 49:7, 49:9, 49:11, 49:13, 49:15 foreclose - 79:17 foregoing - 98:12 formed - 20:5 forth - 89:15 forthcoming - 77:25 forum [3] 65:10, 75:15, 75:18 forward [19] 14:8, 19:15, 63:6, 66:4, 67:9, 67:20, 67:23, 69:17, 70:17, 73:12, 74:9, 74:22, 83:14, 89:14, 91:5, 92:13, 92:19, 94:6, 94:13 front [4] 63:5, 86:12, 92:14, 92:18 full [2] 29:3, 82:18 funded [3] 76:22, 85:8, 86:4 funding [6] 11:15, 64:22, 65:13, 76:19, 77:24, 85:7 funds - 83:18 future [9] 10:24, 13:20, 22:9, 22:22, 65:22, 65:25, 69:17, 82:2, 85:3</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>Gallatin [22] 61:25, 63:10, 66:7, 66:17, 72:16, 72:17, 72:18, 73:9, 73:10, 75:23, 76:5, 77:7,</p>	<p>77:13, 78:15, 79:2, 79:7, 79:10, 79:12, 79:25, 82:9, 82:16, 83:5 gathering - 13:13 gave - 81:13 general [6] 67:13, 75:16, 81:8, 82:2, 95:12, 96:18 generalized - 35:19 genuinely - 3:15 geography - 34:24 George [6] 4:7, 9:17, 10:14, 14:8, 34:16, 35:17 given [2] 89:20, 93:19 giving - 63:7 goal [2] 78:12, 78:14 goes [4] 38:22, 62:5, 74:3, 86:19 gone [2] 67:4, 75:14 gotten - 80:21 government - 3:14 grab - 35:19 grabbed - 80:10 grant [3] 21:17, 36:24, 64:4 granted [4] 39:24, 40:1, 64:2, 64:2 greatest [4] 26:19, 27:7, 63:14, 63:16 Greg - 82:12 grounds - 89:22 group [7] 11:11, 16:16, 16:18, 16:21, 17:2, 20:5, 73:25 group's - 16:21 groups [2] 76:13, 76:20 growing - 72:5</p>	<p>guess [17] 6:1, 20:22, 29:8, 29:9, 31:12, 32:11, 35:3, 45:4, 46:5, 51:21, 52:1, 67:21, 78:24, 79:17, 86:9, 88:6, 95:7 guidance [3] 22:5, 34:5, 34:11 guide [2] 22:1, 95:20 guidelines - 23:17 guys [7] 38:25, 45:17, 56:12, 62:16, 68:5, 70:1, 92:13</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>habitats - 66:25 hadn't - 11:3 half - 12:22 hallway [2] 76:24, 78:3 hands - 14:15 Hanson [23] 1:19, 2:21, 2:22, 6:18, 31:12, 31:20, 33:15, 38:21, 45:12, 49:9, 49:10, 52:1, 52:7, 52:10, 56:10, 57:14, 59:7, 59:23, 71:5, 71:9, 86:2, 86:8, 94:25 happen - 70:9 happening [2] 72:10, 72:12 happens [3] 7:15, 68:17, 72:11 happy - 81:14 Harbage [2] 4:20, 4:20 harm - 29:10 haven't [4] 49:25, 77:23, 80:21, 81:4 having [4] 11:16, 34:13,</p>	<p>84:13, 87:8 Hayes [4] 4:11, 4:11, 9:21, 9:22 he's - 3:18 heads [2] 13:23, 80:12 Health [6] 5:5, 50:8, 52:20, 53:8, 53:9, 57:18 hear [7] 40:14, 40:25, 41:25, 60:12, 69:14, 69:15, 69:18 heard [6] 1:10, 13:25, 19:23, 24:21, 84:2, 86:3 hearing [31] 6:25, 7:23, 8:14, 9:17, 14:6, 17:7, 19:23, 24:20, 42:13, 45:16, 47:25, 48:7, 51:9, 54:3, 54:8, 54:10, 54:11, 54:16, 57:12, 58:15, 58:17, 58:22, 59:8, 59:24, 60:18, 61:11, 61:16, 64:6, 87:22, 87:25, 96:17 hearings - 54:13 heart - 21:16 held [2] 54:11, 83:4 Helena - 1:12 helpful [3] 14:17, 62:18, 85:21 here's - 77:9 hereby - 98:7 herein - 98:9 hereunto - 98:15 higher - 63:25 highest [3] 26:1, 26:17, 27:8 Hillary [10] 1:19, 2:21, 27:19, 31:11, 33:14, 36:3, 38:19, 49:9,</p>	<p>51:25, 56:9 himself - 25:4 hindrance - 85:8 history [12] 22:19, 42:14, 42:20, 43:13, 44:10, 44:19, 62:16, 62:19, 63:8, 67:14, 80:3, 80:13 hold [4] 19:3, 49:22, 49:23, 54:7 homes - 77:18 Honestly - 74:4 Honor [2] 76:23, 78:2 hopefully - 37:6 hospital - 39:13 hosted - 75:15 hours - 82:18 houses [4] 72:7, 72:9, 72:11, 79:16 However [2] 12:15, 54:1 human - 16:4 hydrogeology - 66:23 hydrologic - 66:22</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea [4] 14:21, 19:7, 66:4, 81:9 identical - 12:13 identified [4] 11:11, 50:1, 55:7, 85:16 identify [4] 3:23, 5:21, 6:7, 24:14 imagine - 39:23 immaterial - 36:18 impact [11] 21:14, 22:14, 32:9, 74:7, 74:11, 75:3, 77:17, 77:21, 80:7, 82:23,</p>	<p>83:17 impacting - 82:24 impacts [6] 32:8, 32:11, 66:17, 66:19, 66:24, 79:20 impaired [2] 83:1, 83:3 implement [2] 16:1, 50:23 implementation - 16:14 implemented [2] 22:7, 42:15 importance - 21:20 importantly - 17:17 improvement - 11:23 improvements - 65:13 in-depth - 34:25 inadvertently - 15:4 include [6] 13:15, 26:19, 27:2, 37:17, 71:7, 71:10 included [2] 17:7, 41:4 includes - 28:20 including [4] 12:10, 50:22, 65:16, 80:23 incorporate [2] 20:16, 23:10 incorporated [2] 40:24, 41:25 incorporates - 28:19 increase [4] 11:7, 11:19, 11:22, 22:11 increased [3] 11:3, 11:16, 63:24 increasing - 11:12 incumbent - 37:15 Indiana [2] 71:25, 72:3 indicated -</p>
--	---	--	---	--	--

15:7 indicating - 85:6 indication - 33:2 individual [5] 18:20, 19:4, 19:14, 33:20, 76:10 individuals [2] 24:5, 24:12 industrial - 72:4 industry - 23:17 information [16] 15:14, 68:4, 68:10, 68:11, 68:15, 69:6, 70:24, 71:11, 75:5, 85:18, 85:20, 86:17, 87:2, 87:24, 88:15, 90:7 informed [4] 11:3, 36:8, 37:4, 78:3 infrastructure - 72:5 initial [7] 30:5, 86:19, 90:4, 90:5, 90:12, 90:18, 91:4 initially - 85:15 initiate [3] 13:24, 15:25, 89:6 initiated - 17:5 initiating - 88:22 initiation [2] 51:9, 51:17 inquiry [2] 36:7, 89:11 insert [2] 46:1, 47:6 insignificant - 36:17 insisted - 21:21 instance - 39:13 instead - 36:14 intend - 20:12 intended -	43:4 intent - 55:15 intention [3] 37:3, 38:12, 46:3 interest - 21:6 interested [2] 19:5, 65:16 interestingly - 34:4 interests - 16:17 interference - 6:5 interim [2] 70:10, 72:12 internal - 12:1 interpretation - 32:19 introduce [2] 51:22, 53:2 introduced - 69:14 introduces - 30:3 invite - 67:16 involved [2] 25:16, 92:7 involvement - 13:8 irrigators - 22:17 isn't - 34:13 issue [13] 10:6, 10:7, 20:19, 20:24, 21:2, 25:13, 31:9, 35:14, 37:14, 40:25, 41:12, 41:12, 96:13 issued [6] 7:19, 8:12, 8:24, 16:11, 73:23, 79:5 issues [8] 10:1, 10:5, 31:5, 75:11, 84:3, 93:22, 95:13, 96:2 item [6] 10:18, 50:7, 50:18, 80:11, 91:3, 95:23 items [3] 7:10, 10:15, 14:12 itself [10] 17:25, 33:13, 43:2, 44:11,	44:15, 44:18, 69:14, 71:10, 71:14, 88:2 <hr/> J January - 65:3 Joanna - 4:25 John [21] 1:18, 1:20, 2:10, 2:14, 3:2, 3:12, 3:14, 3:17, 5:2, 25:4, 31:3, 31:8, 39:5, 40:17, 41:20, 49:5, 49:13, 71:23, 83:22, 83:24, 84:23 John's - 76:18 Jon - 5:15 Josh - 95:18 Jost [2] 5:12, 5:12 JR - 9:2 judgment [3] 26:24, 37:10, 58:21 judicial [2] 37:2, 88:6 Julie - 5:8 July [2] 53:22, 54:1 June [3] 11:5, 88:25, 91:2 justification - 28:20 <hr/> K kayak - 76:4 Keane - 43:3 Kelly [23] 4:14, 4:14, 15:18, 15:19, 15:19, 15:20, 15:21, 18:6, 25:21, 25:22, 26:8, 28:11, 28:11, 30:13, 31:19, 31:22, 32:3, 32:21, 33:11, 33:18, 34:4, 35:23, 39:2 Ken [2] 18:5, 19:9 Kenning [2] 5:15, 5:15	kept - 27:5 key - 33:19 kid - 72:8 kids [2] 72:24, 72:24 kinds [2] 37:6, 96:14 Kirsten [3] 26:12, 40:9, 42:5 knowing - 86:11 <hr/> L laid [2] 67:10, 70:13 landed [2] 31:15, 45:15 landowners - 20:6 landscape - 32:11 language [31] 16:24, 17:10, 17:21, 27:3, 27:5, 27:11, 27:22, 28:3, 29:7, 29:11, 29:15, 29:16, 29:22, 30:11, 30:21, 31:6, 31:10, 33:12, 37:16, 37:22, 38:3, 38:10, 38:13, 38:16, 39:10, 43:1, 45:3, 45:9, 45:18, 45:25, 47:8 largest - 21:11 later [5] 13:3, 30:8, 30:9, 51:10, 52:25 Laurel - 8:22 LAURIE [3] 1:22, 98:5, 98:19 law [14] 5:3, 8:1, 8:17, 16:13, 23:18, 23:21, 23:24, 27:12, 54:5, 61:25, 62:8, 63:17, 71:24, 80:15 laws - 63:15 lay [3] 62:18, 67:13, 67:25	lead - 22:11 leading - 88:19 leads - 12:4 learn - 83:3 least [4] 21:24, 38:23, 85:4, 95:7 leave [3] 32:18, 34:14, 38:18 leaving - 29:10 led - 37:19 legacy - 22:19 legal [7] 3:11, 4:11, 4:18, 9:20, 9:23, 13:17, 85:10 legislation [2] 42:14, 43:3 legislative [6] 16:12, 42:20, 43:13, 44:9, 44:19, 87:14 Legislature [4] 38:13, 43:1, 64:11, 87:15 lengthy - 51:19 less [2] 23:1, 54:3 let's [9] 24:20, 48:22, 50:6, 51:21, 62:11, 69:18, 91:16, 91:17, 92:10 level [6] 17:23, 27:9, 35:24, 63:14, 66:13, 80:21 Lewis [4] 82:12, 82:12, 98:4, 98:6 liaison - 4:8 License - 59:21 licensed - 95:20 likelihood - 80:8 likely - 65:23 limit [7] 19:20, 23:17, 44:1, 44:15, 62:10, 62:13, 73:3 limitation -	44:3 limited [5] 43:4, 43:9, 43:10, 43:18, 55:9 limiting - 43:25 limits - 95:15 Lindsay [4] 2:6, 4:5, 25:5, 49:1 lines - 12:20 link - 51:1 listing - 75:20 lives - 84:2 Liz [6] 4:22, 10:17, 10:21, 14:4, 14:7, 50:15 local [7] 50:20, 51:2, 51:3, 52:2, 52:6, 52:7, 54:6 Logistics - 61:19 longer [2] 60:9, 83:12 looking [6] 12:17, 29:6, 32:13, 34:19, 44:9, 73:5 looks [2] 44:4, 79:1 loss - 3:10 lots - 74:1 Lucas [2] 4:13, 4:13 luck - 76:14 <hr/> M Madam [44] 10:19, 15:20, 20:1, 24:25, 25:11, 26:12, 27:16, 29:1, 34:17, 36:1, 40:8, 42:24, 44:6, 45:2, 45:22, 46:10, 47:2, 50:14, 53:5, 56:1, 62:14, 62:25, 69:10, 69:20, 70:6, 70:11, 71:9, 71:19, 73:15, 75:8, 75:9, 76:7, 79:14, 80:2,
---	---	---	---	---	---

80:9, 81:15, 81:20, 81:21, 82:1, 84:15, 87:3, 89:24, 91:1, 96:4 Magazine - 82:13 main [2] 14:12, 76:25 maintain [2] 51:3, 73:8 maintaining - 78:19 maintenance [2] 55:9, 56:19 major - 20:22 makes [3] 35:15, 77:12, 88:16 making [5] 21:6, 29:12, 69:16, 84:24, 94:6 manageable [2] 60:8, 60:10 manager - 75:16 manner - 38:10 map - 79:1 MAPA [2] 48:2, 88:7 March [7] 11:9, 54:18, 54:19, 64:16, 64:17, 65:4, 98:22 Mark - 4:13 match - 6:6 material [22] 17:21, 17:22, 22:2, 31:25, 32:4, 32:17, 32:25, 33:3, 33:4, 33:25, 34:7, 35:14, 36:9, 36:11, 36:14, 36:20, 37:21, 39:12, 39:14, 55:1, 59:2, 88:12 materiality [4] 36:24, 37:12, 37:18, 39:9 materially [4] 21:13, 21:18, 22:8, 36:6	materials - 46:13 Mathieus [10] 3:21, 4:7, 4:7, 9:19, 10:16, 14:10, 15:18, 34:17, 62:14, 69:20 matter [6] 9:10, 37:3, 74:16, 77:15, 88:4, 89:10 matters [2] 9:14, 37:6 maybe [5] 31:13, 34:18, 38:22, 39:22, 51:21 MCA [7] 14:13, 16:1, 16:12, 51:1, 54:5, 55:4, 67:10 McLaughlin [2] 4:25, 4:25 meaningful - 21:8 means [2] 32:20, 82:23 meant - 34:9 mechanism - 39:22 meet [8] 25:25, 26:17, 43:11, 43:25, 44:12, 71:1, 86:25, 89:4 meeting [30] 1:5, 6:10, 7:7, 7:8, 8:14, 9:3, 11:1, 11:5, 11:19, 43:21, 49:25, 51:10, 62:13, 69:17, 70:16, 70:16, 75:17, 81:13, 83:4, 85:3, 86:25, 88:19, 88:25, 89:11, 90:13, 91:2, 92:3, 96:3, 96:6, 97:4 meetings [4] 16:18, 25:13, 34:3, 75:15 meets [5] 17:14, 69:13, 70:14, 71:12, 73:12	Melissa - 4:16 member [3] 20:3, 25:4, 95:19 members [39] 1:18, 7:1, 9:13, 9:22, 10:20, 14:3, 15:21, 19:2, 20:2, 25:7, 26:12, 27:15, 34:15, 39:4, 40:8, 41:19, 42:24, 44:6, 44:22, 48:5, 49:2, 50:15, 51:23, 53:5, 56:1, 56:7, 57:2, 60:16, 62:25, 71:19, 74:1, 74:2, 75:7, 78:7, 80:9, 83:6, 86:22, 94:9, 94:23 memo - 92:14 mentioned - 56:11 MEPA - 13:18 merits - 88:19 Merkel [2] 5:8, 5:8 met [18] 7:23, 11:9, 17:3, 17:12, 18:9, 18:16, 21:5, 26:2, 27:24, 30:3, 30:18, 30:23, 39:18, 39:18, 45:14, 45:19, 54:22, 56:5 Metal - 59:1 Metcalf - 1:10 methane [2] 22:20, 22:25 Meyer [25] 5:2, 5:2, 71:19, 71:23, 71:24, 73:2, 73:7, 73:20, 74:18, 74:25, 75:7, 75:9, 75:14, 75:22, 76:7, 76:12, 76:23, 78:2, 78:14, 79:4, 79:9, 79:14, 79:22, 80:2, 80:10	middle [2] 8:20, 52:19 midst - 8:4 midwest - 72:1 miles - 66:10 mills - 72:4 mind - 85:12 mine [2] 13:11, 59:1 Minerals - 8:18 mines - 22:19 mini-rulemaking - 88:1 minimize - 78:12 Mining - 50:3 Minnesota - 72:19 minor - 22:10 minute - 7:15 minutes [9] 6:9, 6:10, 6:11, 6:14, 6:23, 7:7, 19:21, 73:3, 78:3 missed - 3:18 Missoula [23] 5:4, 50:8, 50:9, 50:22, 51:5, 51:11, 51:22, 52:3, 52:19, 53:2, 53:8, 53:9, 53:14, 53:23, 53:24, 54:17, 54:19, 55:21, 56:3, 56:9, 57:5, 57:18, 58:6 mistaken - 83:2 modification [2] 12:20, 90:10 modifications - 23:3 modify - 92:21 money [5] 74:3, 74:5, 74:8, 74:12, 75:1 Montana [21] 1:2, 1:12, 5:22, 12:22, 13:10, 15:23, 16:17, 20:6, 20:9, 20:10,	22:18, 23:15, 34:24, 50:24, 53:12, 74:1, 79:11, 82:13, 95:20, 98:2, 98:7 Montana's [2] 20:7, 22:12 Montanore - 8:18 month [2] 3:13, 10:11 months [3] 12:16, 65:6, 65:18 morning [3] 10:19, 15:20, 20:1 mostly - 94:15 motion [24] 6:14, 7:6, 9:7, 46:14, 46:21, 46:24, 47:11, 47:12, 47:12, 48:20, 57:16, 58:5, 59:18, 60:19, 60:25, 61:16, 86:23, 87:5, 87:6, 91:2, 91:10, 91:16, 91:22, 96:19 motions - 8:21 Motor - 59:21 move [19] 9:12, 10:11, 12:17, 14:11, 46:7, 46:11, 46:16, 46:21, 47:2, 50:6, 57:14, 59:7, 59:23, 61:5, 67:20, 73:12, 74:9, 96:18, 96:20 moved [7] 6:15, 6:16, 6:19, 46:6, 46:15, 60:2, 61:8 moving [2] 58:8, 83:13 multi-stage - 88:14 multi-year - 75:10 multiple - 93:18 municipalities - 42:23	music [2] 49:18, 49:23 mute - 6:3 mutually - 31:5 MVWF-0376 - 59:21 Myla [7] 4:14, 15:18, 15:19, 15:21, 25:21, 26:16, 28:11 myself - 25:1 <hr/> N <hr/> Nagle [4] 18:5, 18:5, 19:9, 19:9 named - 98:9 names [4] 2:12, 29:25, 51:13, 53:20 narrative [5] 77:3, 77:5, 77:7, 77:14, 80:24 National - 66:9 nature - 69:25 nearly - 12:13 necessarily - 68:10 needed [3] 18:9, 78:4, 95:8 needs [6] 76:25, 77:16, 81:3, 83:9, 83:10, 83:11 nervous - 71:20 nice - 3:16 nodding - 42:5 non-attainment [3] 56:12, 56:15, 56:24 non-material - 22:10 non-profit [2] 39:13, 39:15 nondegradation - 63:15 none [11] 6:13, 6:25, 9:17, 14:6, 24:20, 48:7, 57:12, 58:5, 60:18, 61:11, 61:16 nonsignificance
---	--	---	---	--	---

<p>- 63:25 North - 3:12 Northern [11] 5:17, 20:3, 20:5, 20:11, 20:22, 21:11, 22:16, 23:2, 23:14, 25:19, 38:23 northwest [3] 66:8, 71:25, 72:3 notarial - 98:16 Notary [3] 1:23, 98:6, 98:20 note - 29:18 nothing - 62:3 notice [14] 18:25, 47:20, 54:11, 54:22, 54:23, 59:3, 65:19, 68:18, 69:3, 87:21, 87:25, 89:14, 90:20, 91:6 noticed [3] 54:2, 54:4, 54:7 notices - 10:7 novo [2] 84:6, 84:16 numeric [5] 77:4, 77:8, 77:15, 80:24, 84:4 nutrient [2] 80:24, 80:24</p>	<p>Olson [4] 2:18, 2:18, 5:22, 5:22 online - 82:15 open [5] 15:15, 21:7, 32:19, 34:14, 82:5 opencut [2] 13:11, 50:3 operate - 12:6 operating [3] 11:3, 11:12, 11:21 opportunities [2] 96:8, 96:14 opportunity [3] 21:8, 24:2, 33:24 opposed [11] 7:4, 48:10, 48:18, 58:3, 58:5, 59:16, 60:23, 61:14, 86:18, 91:20, 97:2 option [3] 93:10, 93:24, 95:8 optional - 81:23 options [10] 58:13, 58:23, 59:22, 61:3, 79:18, 79:21, 93:5, 94:10, 94:12, 94:14 Oral - 61:19 order [8] 7:19, 8:11, 8:19, 8:24, 9:4, 10:4, 25:25, 92:20 orders [2] 92:21, 94:16 organization [2] 73:17, 75:13 organizations [3] 65:8, 73:5, 76:10 original [4] 29:15, 30:11, 55:15, 73:22 originally [2] 20:10, 45:9 ORW [3] 64:2, 66:11, 66:14 others [2] 6:2,</p>	<p>44:16 otherwise [3] 25:9, 40:11, 86:5 outcome [3] 30:15, 30:19, 75:21 outdated - 65:23 outline [3] 21:4, 89:21, 92:1 outlined - 67:25 outlines - 18:17 outstanding [16] 63:8, 63:13, 63:22, 64:18, 65:19, 66:7, 66:19, 67:9, 73:11, 73:13, 75:24, 80:1, 82:9, 82:17, 83:10, 89:8 oversight - 15:11 owned [2] 42:17, 42:18</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>pace - 56:20 package [2] 13:19, 55:19 packages - 14:2 packet [10] 15:3, 15:7, 20:15, 24:24, 29:4, 46:13, 47:4, 51:18, 54:14, 59:3 pages [2] 47:14, 98:12 paralegal - 4:3 parameters - 23:2 Park - 66:9 participant [10] 2:12, 2:17, 18:4, 19:18, 23:5, 29:25, 51:13, 52:15, 53:20, 86:7 participate - 21:9</p>	<p>participated [2] 75:13, 75:18 particular [14] 29:19, 31:9, 32:14, 32:14, 32:15, 35:6, 35:13, 36:10, 38:3, 56:19, 62:6, 67:21, 82:8, 95:23 particularly [2] 37:8, 51:5 parties [13] 7:24, 8:4, 8:15, 8:19, 33:24, 65:16, 67:22, 69:7, 85:2, 85:5, 85:6, 92:24, 94:16 passed [2] 3:12, 48:21 passes [4] 7:6, 48:13, 48:20, 58:6 past [3] 20:9, 66:6, 67:15 pay [8] 64:24, 73:21, 73:24, 74:8, 74:21, 75:1, 81:7, 89:4 Peak [2] 8:10, 66:10 Peggy - 5:10 penalty - 8:3 Pending - 60:13 perfectly - 29:22 period [6] 17:8, 25:14, 65:2, 69:3, 95:22, 96:2 permanent - 63:22 permit [15] 12:13, 12:13, 21:17, 40:21, 40:23, 41:3, 41:4, 41:11, 41:12, 41:12, 41:16, 41:22, 41:24, 77:5, 77:6 permits [4] 12:23, 13:1, 42:18, 83:7 permittee [3]</p>	<p>40:10, 40:22, 40:23 permitting [3] 12:9, 12:16, 12:18 personally - 3:19 perspective - 84:8 pertaining [2] 17:13, 17:20 petition [46] 61:24, 62:16, 63:9, 63:10, 64:4, 64:14, 64:19, 65:20, 65:22, 66:6, 67:18, 68:4, 68:17, 69:14, 69:14, 70:14, 70:23, 71:6, 71:7, 71:10, 73:5, 73:12, 74:23, 80:17, 82:15, 85:15, 85:17, 85:18, 86:5, 86:12, 86:17, 87:21, 88:4, 88:8, 88:12, 88:16, 88:21, 88:24, 89:13, 89:16, 89:23, 90:6, 90:9, 90:19, 90:20, 96:7 Petitioner [3] 64:24, 73:24, 81:6 petitioners [16] 62:20, 65:4, 65:5, 65:7, 65:12, 65:16, 67:17, 69:15, 69:23, 71:11, 77:25, 80:18, 86:15, 86:16, 87:1, 89:2 petitions - 74:3 Petroleum - 5:23 Pettis - 4:24 PETTIT - 4:24 pharmaceuticals</p>	<p>18:5, 23:6, 95:19 pick - 93:13 piece [5] 52:8, 63:18, 86:4, 86:18, 86:19 places - 52:4 plain [3] 44:11, 44:12, 44:17 Plains [11] 5:18, 20:3, 20:5, 20:11, 20:23, 21:11, 22:16, 23:2, 23:14, 25:19, 38:23 plan [6] 11:18, 14:16, 55:9, 65:8, 65:12, 72:14 planning [6] 5:7, 10:22, 14:21, 50:17, 62:15, 80:13 plants [2] 12:11, 12:11 play [2] 72:6, 88:10 playing - 49:18 please [7] 5:21, 6:3, 7:1, 24:14, 48:15, 91:18, 92:3 pleasure [3] 44:25, 57:13, 94:5 plenty - 96:8 PM-10 - 56:19 PM10 [3] 55:8, 56:15, 56:23 point [15] 18:17, 20:22, 23:11, 26:14, 28:12, 46:8, 63:24, 65:24, 65:25, 67:12, 81:5, 85:19, 89:12, 89:23, 96:5 spoiled - 80:15 points - 29:23 pollutant [6] 26:19, 27:7, 32:14, 33:1,</p>
---	---	--	---	--	--

<p>35:4, 35:18 pollutants - 32:9 pollution [8] 16:2, 22:11, 43:7, 53:15, 53:18, 53:23, 53:25, 72:20 portable [2] 12:9, 12:21 portion - 94:3 portions - 92:25 positive - 13:6 positively - 25:15 possible [6] 19:25, 33:11, 36:22, 40:24, 85:3, 86:24 possibly [2] 76:22, 84:12 postpone - 84:24 potential [2] 13:16, 79:18 POTW - 42:25 POTW's [2] 43:4, 44:16 practical [3] 86:18, 92:12, 93:1 prefer - 94:14 preferable - 30:12 preference [2] 95:4, 95:5 preferences - 94:10 prepare - 64:20 prepared [3] 1:22, 50:19, 79:15 preparing - 30:10 present [6] 2:9, 3:7, 10:17, 48:24, 52:17, 69:24 presentation - 62:7 presentations - 13:9 presented [4] 13:3, 15:24, 32:22, 87:25 previous [3] 39:19, 62:17,</p>	<p>71:14 previously [6] 20:11, 20:17, 64:14, 67:16, 70:4, 96:2 primarily - 22:16 primary [2] 11:10, 22:25 prior - 63:9 probably [6] 8:21, 38:17, 49:22, 92:22, 93:20, 95:5 problem - 93:17 procedural [4] 9:14, 58:16, 58:18, 89:21 procedurally - 46:5 procedure [2] 50:10, 51:24 procedures [2] 62:5, 62:12 proceed - 67:22 proceeding [2] 8:10, 8:19 proceedings [6] 1:8, 2:1, 97:5, 98:8, 98:10, 98:13 process [62] 7:18, 7:24, 8:2, 8:16, 11:23, 12:9, 12:16, 12:23, 13:12, 16:22, 17:6, 18:11, 18:18, 18:21, 21:7, 21:9, 23:23, 30:10, 33:16, 33:20, 33:23, 34:23, 40:4, 51:9, 51:18, 51:19, 52:3, 52:6, 54:21, 54:25, 56:3, 56:18, 56:20, 56:22, 62:19, 63:12, 63:18, 64:8, 67:5, 67:8, 67:10, 67:14, 67:24, 68:18, 68:21, 68:24, 68:25, 69:2, 80:14, 80:17,</p>	<p>84:14, 87:18, 88:1, 88:9, 88:10, 88:14, 89:1, 89:14, 90:20, 91:6, 92:2, 92:7 processes [3] 12:1, 54:23, 69:5 professional - 26:24 professionally - 3:19 program [8] 11:8, 12:19, 13:14, 13:16, 53:15, 53:18, 53:25, 54:6 program's - 51:2 programmatic - 13:18 programs [6] 12:3, 50:20, 50:22, 50:23, 51:4, 51:6 project [2] 13:4, 67:21 proposal [7] 15:8, 50:7, 52:20, 57:5, 62:6, 79:5, 82:8 propose [3] 7:16, 46:4, 72:14 proposed [27] 7:25, 8:16, 14:22, 17:9, 19:14, 20:23, 24:8, 24:13, 24:23, 27:2, 28:6, 28:8, 29:22, 30:11, 44:25, 46:8, 46:12, 46:25, 47:8, 47:18, 48:14, 53:17, 55:14, 57:17, 58:19, 66:5, 66:14 proposes - 87:10 proposing - 8:4 protect [5] 20:7, 51:3, 76:5, 77:13, 78:14 protecting -</p>	<p>22:17 protection [6] 5:1, 5:16, 63:15, 63:16, 66:13, 77:2 protections - 63:21 protective [2] 75:25, 83:11 provide [7] 8:7, 22:5, 66:13, 68:13, 68:15, 69:21, 75:24 provided [3] 17:18, 19:22, 51:25 provides - 37:1 providing [6] 7:25, 8:16, 19:5, 21:25, 50:17, 62:16 provision - 18:12 provisions - 88:6 public [36] 1:23, 6:22, 15:15, 16:15, 17:6, 17:7, 17:8, 18:11, 18:21, 19:4, 19:6, 19:13, 21:7, 22:6, 24:2, 24:12, 28:21, 33:22, 50:8, 51:17, 52:20, 54:22, 57:4, 64:5, 65:1, 68:18, 68:21, 68:24, 68:25, 69:3, 82:5, 95:13, 96:1, 96:18, 98:6, 98:20 publicly [3] 42:17, 42:17, 54:4 purpose [2] 22:3, 51:2 purposes [5] 37:21, 46:10, 58:16, 58:18, 96:12 pursuing [3] 75:19, 75:22, 83:7</p>	<p style="text-align: center;">Q</p> <p>quality [48] 4:9, 4:14, 4:17, 4:21, 4:22, 5:6, 5:9, 10:15, 10:22, 11:2, 12:9, 12:23, 12:25, 14:14, 14:22, 15:22, 16:5, 16:10, 19:6, 19:13, 20:8, 20:8, 22:2, 22:12, 22:15, 22:17, 24:13, 25:22, 44:7, 44:25, 48:15, 50:16, 50:21, 50:23, 51:4, 52:21, 53:7, 56:8, 63:1, 63:23, 66:23, 67:1, 73:8, 73:21, 75:2, 78:15, 78:19, 79:23 quick [5] 47:13, 60:5, 78:8, 91:24, 92:12 quickly - 10:12 quite [4] 10:11, 32:12, 70:3, 79:16 quorum [2] 3:7, 25:5</p> <p style="text-align: center;">R</p> <p>rafting - 76:4 raise [2] 11:11, 20:21 raised [3] 20:17, 23:14, 72:1 ranchers - 20:6 rates - 11:15 rather [3] 38:6, 81:15, 84:13 rationale - 30:7 react - 35:5 reading [4] 44:11, 44:12, 44:17, 52:3</p>	<p>reads - 45:9 ready - 89:21 really [9] 21:15, 23:11, 30:16, 30:20, 32:12, 32:13, 32:16, 63:18, 73:4 reason - 27:1 reasonable [2] 84:7, 85:12 reasoning - 21:3 reasons - 68:14 Rebecca - 4:20 recalls - 9:25 receive - 38:25 received [2] 22:14, 64:18 receiving - 21:15 recent - 3:10 Recess - 48:23 Reclamation - 59:1 recognize [2] 35:16, 37:7 recognizes - 34:23 recommendation [2] 69:11, 70:15 reconvened - 61:21 record [19] 7:19, 10:20, 23:12, 28:17, 28:21, 28:23, 37:5, 53:13, 54:20, 92:16, 92:22, 92:25, 93:4, 93:6, 93:13, 94:4, 94:6, 96:9, 98:13 records [3] 54:13, 92:23, 93:2 recreation - 66:24 recuse - 25:1 recusing - 25:4 redesignation [2] 55:8, 56:18</p>
--	---	---	---	---	---

redoing - 84:16	42:13, 42:16	[14] 12:12, 17:4, 17:15, 17:24, 18:8, 23:25, 35:25, 43:24, 54:22, 54:24, 55:22, 56:5, 71:2, 87:22	59:11, 59:15, 59:17, 60:4, 60:17, 60:22, 60:24, 61:10, 61:13, 61:15, 91:12, 91:15, 91:19, 91:21, 95:16, 96:23, 97:1, 97:3	82:7, 93:7 RPR [3] 1:22, 98:5, 98:19	run - 58:9
reduce - 12:19	65:1	reluctant - 79:17	rest - 3:23	S	
reduction [2] 26:19, 27:8	79:17	remembering - 88:21	revenue [2] 11:8, 11:11	rule [62] 13:2, 13:18, 14:2, 15:4, 15:5, 15:24, 16:8, 16:8, 17:8, 17:10, 17:14, 17:15, 18:7, 18:17, 18:24, 19:6, 19:14, 20:18, 20:20, 20:23, 21:12, 21:24, 21:24, 23:2, 24:6, 24:8, 24:13, 26:15, 27:2, 28:13, 29:4, 34:13, 37:21, 38:7, 43:18, 44:1, 46:8, 46:11, 47:3, 47:18, 48:15, 51:2, 51:16, 51:17, 53:4, 53:13, 53:17, 53:24, 54:16, 55:3, 55:5, 55:6, 55:10, 55:15, 55:18, 55:24, 56:5, 64:9, 64:9, 87:12, 87:13, 89:7	salinity - 22:25
reemphasize - 20:21	88:21	remind [2] 6:2, 23:14	review [19] 1:1, 2:5, 6:8, 10:23, 17:6, 18:11, 18:21, 33:23, 37:2, 53:12, 66:17, 85:15, 86:19, 87:15, 88:6, 90:6, 90:12, 90:18, 95:4	rule [62] 13:2, 13:18, 14:2, 15:4, 15:5, 15:24, 16:8, 16:8, 17:8, 17:10, 17:14, 17:15, 18:7, 18:17, 18:24, 19:6, 19:14, 20:18, 20:20, 20:23, 21:12, 21:24, 21:24, 23:2, 24:6, 24:8, 24:13, 26:15, 27:2, 28:13, 29:4, 34:13, 37:21, 38:7, 43:18, 44:1, 46:8, 46:11, 47:3, 47:18, 48:15, 51:2, 51:16, 51:17, 53:4, 53:13, 53:17, 53:24, 54:16, 55:3, 55:5, 55:6, 55:10, 55:15, 55:18, 55:24, 56:5, 64:9, 64:9, 87:12, 87:13, 89:7	sampling - 10:7
refer [4] 18:6, 24:22, 25:23, 26:9	6:2, 23:14	removes [2] 18:21, 18:22, 26:16, 54:6, 66:11, 81:22	reviewed - 87:16	rule [62] 13:2, 13:18, 14:2, 15:4, 15:5, 15:24, 16:8, 16:8, 17:8, 17:10, 17:14, 17:15, 18:7, 18:17, 18:24, 19:6, 19:14, 20:18, 20:20, 20:23, 21:12, 21:24, 21:24, 23:2, 24:6, 24:8, 24:13, 26:15, 27:2, 28:13, 29:4, 34:13, 37:21, 38:7, 43:18, 44:1, 46:8, 46:11, 47:3, 47:18, 48:15, 51:2, 51:16, 51:17, 53:4, 53:13, 53:17, 53:24, 54:16, 55:3, 55:5, 55:6, 55:10, 55:15, 55:18, 55:24, 56:5, 64:9, 64:9, 87:12, 87:13, 89:7	Sandy - 4:18
reference [2] 87:24, 92:15	45:24	research [2] 42:20, 43:13	reviewing [5] 7:19, 37:7, 38:9, 55:8, 56:21	Sarah [32] 3:24, 4:1, 4:4, 5:4, 7:8, 9:14, 41:2, 41:10, 42:2, 42:3, 45:23, 53:2, 53:6, 55:20, 56:14, 58:9, 59:13, 60:5, 60:20, 67:23, 69:11, 70:13, 70:19, 76:18, 80:15, 85:10, 86:2, 89:18, 89:25, 90:17, 91:25, 92:11	
referencing - 47:14	54:10	resource [18] 5:18, 20:3, 63:8, 63:13, 63:22, 64:19, 65:19, 66:7, 66:19, 67:9, 73:11, 73:13, 75:24, 80:1, 82:9, 82:17, 83:10, 89:8	revised [2] 13:2, 55:11	Sarah's - 61:4	
referred - 16:8	19:24	resources [3] 5:11, 51:3, 67:2	revision [4] 51:16, 53:4, 55:14, 56:5	save - 12:24	
referring - 47:21	replaced [2] 17:11, 36:15	respect [6] 17:13, 17:20, 18:1, 27:20, 36:5, 83:25	Revocation - 61:2	saying [16] 36:15, 36:16, 41:9, 48:8, 48:16, 58:1, 59:14, 60:21, 61:12, 74:5, 74:17, 74:20, 80:22, 86:10, 96:12, 96:25	
refers - 27:25	replacement - 15:7	respectfully - 18:23	Rich - 5:12	says [8] 22:4, 74:10, 74:15, 74:17, 77:5, 77:5, 89:19, 89:20	
Refinery - 8:22	replaces - 27:23	respond [2] 25:18, 25:24	Ridge - 7:21	scenario - 32:15	
regard [4] 9:24, 26:5, 26:13, 76:19	report [2] 8:23, 11:23	responded - 16:21	river [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7	Schaar [2] 4:16, 4:16	
regarding [6] 9:14, 18:2, 25:19, 27:21, 31:9, 56:8	reported - 98:10	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	Revocation - 61:2	schedule [4] 7:17, 8:5, 10:9, 10:12	
Regard [4] 9:24, 26:5, 26:13, 76:19	Reporter [3] 1:23, 98:5, 98:20	responded - 16:21	Rich - 5:12	scheduling [4] 8:3, 8:11, 8:19, 9:4	
regarding [6] 9:14, 18:2, 25:19, 27:21, 31:9, 56:8	representative [3] 10:7, 38:22, 43:3	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	Ridge - 7:21	screens - 12:10	
regards [2] 31:24, 44:25	representatives - 16:16	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	river [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7	scrutinizing - 12:1	
region - 65:9	request [7] 18:20, 18:23, 21:23, 23:7, 55:8, 65:15, 79:5	responded - 16:21	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7	seal - 98:16	
registration [2] 12:18, 13:14	requesting [3] 16:7, 53:11, 55:17	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7	Seckinger [5] 95:18, 95:19, 95:25, 96:10,	
regulation - 27:6	requests [2] 16:22, 41:22	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
regulations [4] 17:16, 26:1, 43:21, 52:21	require [7] 23:18, 23:21, 34:25, 36:18, 64:24, 79:19, 80:15	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
regulatory - 18:13	required [7] 12:25, 18:15, 21:3, 36:23, 48:2, 87:2, 89:3	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
reiterate [2] 17:21, 22:4	required [7] 12:25, 18:15, 21:3, 36:23, 48:2, 87:2, 89:3	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
reject [13] 21:23, 45:17, 71:3, 87:20, 88:4, 88:21, 89:12, 90:8, 90:18, 90:19, 91:8, 92:21, 96:7	requirement [3] 28:5, 39:17, 69:23	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
rejected - 21:10	requirements	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
rejecting [2] 45:21, 89:22	requirements	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
related [2] 40:21, 75:12	requirements	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
relating [2]	requirements	response [62] 2:24, 3:1, 5:25, 6:12, 6:21, 6:24, 7:3, 7:5, 9:16, 14:5, 14:18, 14:23, 14:25, 17:9, 23:13, 24:7, 24:10, 24:16, 24:19, 25:25, 27:25, 29:13, 29:19, 30:14, 42:10, 44:23, 48:2, 48:6, 48:9, 48:12, 48:17, 48:19, 49:12, 49:16, 50:5, 50:13, 55:7, 57:3, 57:6, 57:8, 57:11, 57:20, 58:2, 58:4,	River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
			River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
			River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
			River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
			River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
			River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25, 83:5, 83:10, 89:7		
			River [23] 66:7, 66:10, 72:16, 72:18, 73:9, 73:10, 75:23, 75:24, 76:5, 77:7, 77:10, 77:13, 78:15, 79:7, 79:10, 79:12, 80:1, 82:9, 82:16, 82:25,		

<p>96:15 seconded [3] 6:20, 57:24, 60:3 secretary [2] 4:6, 4:19 section [14] 10:22, 15:22, 17:10, 18:6, 18:8, 24:23, 28:12, 29:5, 31:10, 31:14, 37:21, 45:8, 50:3, 66:14 sections - 93:19 secure [2] 64:22, 65:13 seeing [4] 6:13, 14:6, 31:15, 82:20 seek - 44:13 seeking - 18:19 seem - 29:18 seems [8] 29:21, 36:11, 36:16, 85:10, 85:11, 86:11, 88:13, 89:20 Senate - 43:9 sense [4] 38:1, 41:17, 45:20, 69:8 sent - 55:1 separate - 71:8 September [4] 11:1, 54:12, 54:16, 65:1 served - 3:14 service [6] 39:15, 93:15, 93:16, 93:17, 93:20, 93:23 session - 16:12 settlement [2] 7:14, 9:5 several [7] 3:16, 13:5, 20:9, 56:17, 65:7, 87:9, 93:21 shall [5] 18:2, 18:10, 31:14, 31:16, 85:14 she's [3] 41:9, 42:5, 53:3 Sherer [2]</p>	<p>4:18, 4:18 short - 74:8 shorthand - 98:10 shortly - 8:21 shouldn't - 77:15 sides - 31:7 Signal - 8:10 signature [2] 15:4, 15:5 signed - 82:15 significant [6] 29:16, 36:13, 36:16, 36:20, 44:3, 82:21 signify [7] 48:8, 48:15, 58:1, 59:14, 60:20, 61:12, 96:24 similar [2] 62:17, 63:10 simplifying - 12:23 simply [3] 22:4, 51:11, 80:21 site - 34:22 sitting - 79:18 situation [2] 35:1, 35:2 situations [2] 37:16, 40:5 six [2] 65:6, 65:18 Sixth - 1:11 Sky [17] 65:9, 72:10, 72:13, 75:10, 75:10, 75:12, 75:15, 75:17, 76:9, 78:13, 78:17, 78:18, 78:24, 78:25, 79:4, 82:17, 83:1 smoke - 55:13 social - 39:15 socioeconomic - 66:23 Solheim [2] 4:3, 4:3 Solutions - 65:10 somebody [5] 40:7, 44:5, 49:17, 76:13, 82:10 someone [5] 28:4, 28:7,</p>	<p>41:21, 65:22, 84:2 somewhat - 34:22 somewhere [2] 39:25, 79:16 sorry [2] 14:24, 95:21 sort [8] 8:20, 34:6, 39:6, 43:12, 71:3, 81:9, 88:1, 94:5 sought - 13:7 source - 63:24 sources - 16:4 southeastern [3] 20:6, 20:10, 22:18 Spanish - 66:10 speak [12] 6:6, 14:16, 14:22, 19:16, 24:6, 24:14, 24:18, 32:1, 80:4, 80:7, 87:5, 96:14 SPEAKER [10] 2:11, 2:16, 18:3, 19:17, 23:4, 29:24, 51:12, 52:14, 53:19, 86:6 speaking - 63:4 speaks - 25:14 Specialist - 53:7 specific [6] 34:22, 34:25, 35:8, 35:17, 35:19, 92:25 specifically [3] 42:16, 53:16, 54:5 speculate - 38:5 spoke [2] 76:13, 76:23 spot - 81:18 SS - 98:3 staff [4] 3:10, 12:24, 74:2, 81:16 stage [8]</p>	<p>8:20, 69:7, 87:17, 87:18, 88:3, 88:3, 88:15, 89:10 stages - 8:12 stakeholder [8] 11:10, 16:15, 17:2, 29:20, 34:3, 39:24, 39:25, 40:10 stakeholders [8] 11:17, 11:22, 13:7, 13:11, 13:13, 25:12, 25:15, 83:4 standard [7] 56:16, 77:4, 77:4, 77:7, 77:9, 77:14, 77:15 standards [7] 4:15, 4:17, 14:14, 16:5, 16:10, 34:23, 55:23 start [8] 3:25, 5:20, 19:13, 19:19, 63:7, 71:21, 84:7, 84:13 started [5] 3:8, 25:24, 49:1, 56:18, 56:20 starting [4] 60:6, 66:8, 84:16, 92:3 starts - 24:24 state [23] 1:2, 3:14, 5:11, 22:15, 27:13, 34:21, 35:7, 50:21, 53:12, 54:4, 55:4, 55:10, 55:24, 56:2, 64:1, 76:2, 77:10, 82:10, 83:3, 93:16, 93:17, 98:2, 98:7 stated [3] 22:24, 70:4, 78:17 statement [8] 69:22, 74:7, 74:11, 75:3, 77:17, 77:22, 80:7, 82:23</p>	<p>states [3] 16:2, 18:7, 28:13 status [3] 8:22, 9:7, 75:25 statute [35] 16:2, 16:20, 16:24, 17:25, 22:4, 22:7, 33:12, 33:13, 38:14, 43:9, 44:11, 44:12, 44:15, 44:18, 51:7, 63:9, 64:23, 68:14, 73:18, 73:23, 74:15, 74:16, 74:17, 81:22, 85:13, 86:10, 87:9, 87:10, 87:18, 87:21, 89:3, 89:15, 89:19, 91:4, 96:11 stay [3] 8:6, 8:23, 9:5 stayed [2] 7:15, 8:25 staying - 31:18 steel - 72:4 step [7] 19:15, 70:23, 70:25, 86:10, 88:25, 89:15, 90:4 steps [9] 13:15, 55:18, 56:22, 64:8, 64:13, 67:5, 70:22, 71:4, 90:3 stop [3] 78:13, 79:8, 83:9 straight [2] 41:14, 63:5 streamline - 12:8 streamlining - 12:1 streams - 83:1 strike [3] 45:18, 45:24, 47:5 strikes - 27:22 stringency [2]</p>	<p>17:23, 35:24 stringent [2] 55:3, 55:24 stringently - 23:1 struck [2] 20:25, 28:6 stuff - 41:16 Sub - 16:1 Subdivision - 61:3 subject [2] 87:14, 88:5 submits [2] 28:14, 71:11 submittal - 30:10 submitted [6] 20:11, 20:14, 28:22, 64:15, 64:15, 67:18 subscribers - 82:14 Subsection [2] 27:22, 55:22 subsequently - 64:23 substance - 55:15 substantial [3] 13:22, 30:16, 71:13 substantive - 58:18 substitute - 37:9 suddenly - 3:12 sufficient [6] 11:7, 68:4, 68:15, 70:24, 85:17, 90:7 suggest [2] 84:24, 90:13 suggested [2] 45:3, 86:23 suggestion [2] 31:4, 92:9 suggestions [3] 16:22, 38:24, 38:25 summary [2] 58:21, 64:12 summer - 72:18 Supervisor [3] 10:21, 15:22, 50:3 supplement [3] 74:10,</p>
--	---	--	---	--	--

75:2, 78:5 supplemental [2] 74:6, 76:19 supplemented [4] 65:24, 77:1, 77:17, 77:21 supplementing - 67:7 supplies - 42:17 support [4] 11:8, 11:19, 76:10, 91:1 supporters - 78:1 supporting - 28:14 Supreme [5] 8:8, 10:8, 23:15, 26:6, 27:13 Susan - 5:13 swam - 72:18 swim - 72:17 swimming - 72:25 system - 39:13 systems - 95:7	21:12, 21:21, 21:22, 21:22, 21:25, 22:8, 32:1, 32:3, 33:17, 34:13, 36:6, 36:11, 36:22, 39:11, 39:16, 45:5 terminate - 66:3 terminated - 65:18 terminology - 35:16 terms [2] 33:9, 71:6 testified - 42:13 testimony [4] 2:2, 15:14, 19:21, 43:17 thank [36] 2:15, 5:19, 10:13, 10:16, 14:7, 19:1, 24:1, 24:3, 24:4, 25:16, 25:21, 27:14, 31:8, 40:18, 42:7, 44:20, 53:6, 55:20, 56:6, 58:6, 59:5, 62:22, 69:11, 70:4, 70:18, 71:16, 71:23, 76:16, 78:6, 83:19, 83:20, 84:22, 92:10, 95:11, 96:10, 96:16 Thanks [3] 3:21, 57:25, 84:23 themselves [4] 5:21, 24:14, 50:1, 80:18 There's - 82:10 thereby - 65:18 they'd - 25:8 they're [13] 7:14, 7:16, 8:8, 8:12, 9:1, 9:5, 13:22, 27:10, 49:21, 49:22, 72:8, 72:11, 93:3	they've [2] 56:4, 67:18 thing [6] 61:5, 62:2, 77:16, 84:4, 88:22, 92:2 thinking [3] 78:4, 86:9, 94:8 third - 61:1 thirty [4] 8:7, 9:8, 54:3, 54:7 thorough [2] 63:17, 79:20 though [3] 38:16, 83:4, 96:5 threat - 22:21 throughout - 16:22 thumb [3] 93:11, 93:12, 93:12 Thursday - 15:3 thus - 16:18 Tim [15] 2:23, 2:25, 3:6, 4:9, 44:5, 44:7, 49:11, 62:23, 63:1, 67:19, 67:25, 71:16, 76:24, 80:10, 84:12 timeline - 68:7 Timing - 60:6 to-wit - 2:2 today [25] 3:9, 6:3, 10:18, 14:12, 16:7, 20:13, 20:16, 20:19, 24:1, 62:20, 67:20, 68:6, 69:11, 69:24, 70:9, 72:3, 72:10, 79:19, 80:13, 82:19, 84:25, 85:24, 89:22, 92:15, 95:14 today's - 96:12 tomorrow - 76:15 top - 89:13 totality [4] 59:8, 59:24,	60:20, 61:6 totally - 86:8 towards [3] 38:22, 74:3, 74:4 town - 95:2 transcribed - 98:11 transcript [2] 1:8, 8:15 transcription - 98:11 transfer [5] 93:15, 93:17, 93:20, 93:22, 94:3 transition - 12:18 Treasure - 5:10 treated [6] 72:15, 72:21, 72:25, 79:7, 79:9, 79:11 treating - 72:23 treatment - 75:11 tree - 72:7 trees - 72:8 tremendous - 81:11 Trenk [2] 5:10, 5:10 tried - 67:25 trigger - 91:5 triggered - 90:21 true [4] 38:12, 86:8, 92:23, 98:12 turn [5] 7:8, 9:18, 49:19, 50:9, 71:18 Tweeten [33] 1:20, 3:4, 3:5, 27:16, 27:17, 27:20, 29:1, 29:6, 30:2, 30:25, 36:1, 36:2, 36:5, 45:22, 46:10, 46:16, 46:20, 47:2, 47:24, 48:24, 49:15, 52:16, 52:16, 52:17, 57:22, 87:3, 87:4, 87:8, 90:16, 90:23,	90:25, 96:4, 96:11 twelve [6] 82:24, 82:25, 84:1, 84:3, 84:9, 84:9 type - 12:18 typical - 51:8	<hr/> U <hr/> Ulrich [14] 4:22, 4:22, 10:17, 10:19, 10:21, 50:14, 50:15, 51:15, 52:5, 52:9, 52:13, 52:22, 53:1, 55:25 ultimate [2] 78:25, 91:7 ultimately [3] 13:1, 78:12, 78:22 umbrella - 33:7 unclear - 44:18 uncomfortable [2] 34:13, 35:20 underscored - 47:8 understand [18] 13:22, 21:1, 21:8, 29:14, 31:21, 52:2, 73:18, 74:14, 74:19, 77:11, 77:20, 78:10, 78:16, 84:3, 86:1, 86:9, 92:5, 96:15 understanding [5] 22:6, 42:4, 73:20, 74:21, 90:15 undertook - 55:6 unhappy - 40:11 unintended - 37:25 UNKNOWN [10] 2:11, 2:16, 18:3, 19:17, 23:4, 29:24, 51:12, 52:14, 53:19,	86:6 unless [3] 19:2, 44:18, 86:21 unusual - 62:2 upcoming - 50:18 update [14] 7:9, 7:16, 8:7, 9:1, 9:7, 9:11, 9:20, 9:24, 11:2, 14:7, 14:9, 15:17, 92:11, 95:10 updated [7] 65:25, 76:21, 80:8, 81:3, 84:10, 84:13, 84:20 updating - 67:7 upstream [2] 16:3, 43:6 Urban [2] 5:6, 5:6 usage - 35:9 useful - 86:18 users [2] 43:10, 43:18 uses [4] 21:25, 27:7, 35:6, 36:22 using [3] 21:21, 22:7, 98:11 usually - 93:11 utilized - 33:25
<hr/> T <hr/>					<hr/> V <hr/>	
taken [5] 2:2, 15:6, 48:23, 67:14, 98:8 takes [2] 88:9, 95:6 taking - 28:9 Task - 83:5 team - 13:17 technical [5] 13:14, 37:8, 37:10, 71:1, 71:2 technically - 56:23 technologies - 26:4 technology [6] 23:19, 23:22, 23:24, 25:20, 26:15, 26:22 telephone - 1:20 ten - 73:3 term [16]					vacancies - 12:2 vague - 55:11 value - 63:20 variable - 35:7 variance [37] 16:4, 18:9, 18:10, 18:15, 18:18, 18:19, 18:20, 21:2, 21:7, 21:14, 21:17, 22:15, 23:8, 23:23, 26:21, 27:10, 28:14, 30:5, 33:21, 36:25,	

<p>40:11, 40:12, 40:24, 40:25, 41:3, 41:4, 41:10, 41:11, 41:13, 41:15, 41:23, 41:23, 41:25, 43:23, 44:2, 44:13, 44:17 variances [3] 14:14, 16:10, 27:7 variety - 66:22 various - 71:2 varying - 16:17 vegetation - 67:1 Vehicle - 59:21 verbal - 30:6 versed - 26:10 versions - 43:16 versus - 31:14 views - 96:8 violated - 56:16 violation [2] 54:4, 58:25 voice [2] 6:7, 7:1 vote [7] 7:1, 25:2, 57:21, 57:25, 60:18, 91:16, 91:18 voted - 31:21</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wagoner - 8:2 wait - 83:12 waiting - 8:9 waiver [2] 39:23, 40:1 walk - 63:11 wanted [15] 3:20, 13:23, 14:9, 15:1, 15:9, 20:21, 20:21, 23:12, 24:5, 24:12, 28:12, 52:1, 60:11, 67:12, 92:16 wants - 79:11 Warner [4] 2:23, 2:25,</p>	<p>3:6, 49:11 waste - 77:19 wastewater [13] 65:8, 65:10, 65:13, 72:15, 72:15, 72:21, 72:21, 72:22, 72:25, 75:11, 79:7, 79:10, 79:12 waters [3] 63:16, 63:22, 64:1 watershed - 35:6 we'd - 23:7 we'll [15] 6:8, 9:19, 10:24, 11:16, 12:5, 14:7, 48:25, 51:24, 57:21, 57:25, 60:18, 84:17, 84:18, 84:18, 96:18 we're [22] 8:2, 8:20, 13:20, 44:9, 47:21, 51:11, 51:15, 52:19, 53:16, 55:17, 74:4, 74:5, 75:22, 77:12, 79:4, 82:20, 88:13, 90:25, 93:4, 95:23, 96:12, 96:13 we've [16] 11:25, 13:4, 16:20, 17:2, 20:7, 24:21, 33:25, 55:25, 58:13, 69:13, 75:14, 75:15, 75:17, 80:19, 84:1, 88:11 website - 50:25 weigh - 44:10 Welcome [2] 2:4, 52:18 weren't - 95:13 Western [5] 8:13, 9:18, 9:24, 10:2, 10:10 Westmoreland - 8:6 wet - 78:11 what's [9]</p>	<p>29:11, 31:21, 35:1, 39:12, 39:14, 44:24, 57:12, 72:12, 77:3 whatever [3] 22:9, 77:5, 83:17 WHEREOF - 98:15 WHEREUPON - 2:1 whether [35] 17:14, 21:16, 21:17, 23:16, 30:4, 30:6, 30:16, 36:9, 42:14, 68:3, 68:16, 68:22, 69:13, 70:13, 70:23, 77:13, 77:14, 85:6, 85:16, 86:12, 86:16, 87:20, 88:11, 88:16, 88:20, 89:6, 89:12, 89:13, 89:16, 89:22, 90:6, 90:21, 91:5, 91:7, 92:20 whitewater - 76:4 whole [5] 56:3, 61:5, 76:9, 84:13, 93:13 wide [3] 23:17, 34:14, 82:14 widely - 16:17 wildfire - 55:13 Wildlands - 64:16 wildlife [2] 62:1, 67:1 willing - 30:21 wish [2] 5:21, 87:12 wishes - 24:18 withdraw [2] 74:23, 86:16 within [7] 8:7, 10:22, 15:22, 16:23, 37:8, 43:20, 83:7 WITNESS - 98:15</p>	<p>won't - 15:12 wonder - 87:4 wondering [3] 29:21, 40:3, 42:19 woods - 72:5 works [3] 42:1, 50:11, 93:20 worried [2] 79:3, 79:4 worse [2] 82:25, 84:3 worth - 93:4 wouldn't - 35:2 wrapped - 41:14 Wrecking - 59:21 writing [20] 17:11, 21:1, 21:4, 27:23, 28:2, 28:9, 28:10, 28:10, 29:11, 30:17, 30:22, 37:14, 45:3, 45:5, 45:10, 45:13, 45:25, 47:6, 68:14, 87:24 written [10] 20:12, 20:13, 28:5, 28:16, 28:17, 28:23, 30:6, 30:7, 37:17, 55:2</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yellowstone - 66:9 yesterday - 76:13 yet [6] 7:20, 15:5, 15:8, 50:12, 67:4, 80:20 you'd - 3:24 you'll [5] 58:12, 58:19, 78:20, 78:23, 93:20 yourselves - 6:7</p>
--	---	--	--