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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of the Petitions of Teck)
Coal Limited and the Board of County)
Commissioners of Lincoln County,)
Montana, for review of ARM)
17.30.632(7)(a) pursuant to Mont. Code)
Ann. Section 75-5-203 - Stringency)
Review of Rule Pertaining to Selenium)
Standard for Lake Koocanusa)

TRANSCRIPT OF PROCEEDINGS - VIA ZOOM

Heard Via Zoom
February 25, 2022
1:30 p.m.

BEFORE CHAIRMAN STEVEN RUFFATTO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH, JULIA ALTEMUS
STACY AGUIRRE, and DAVID LEHNHERR

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A P P E A R A N C E S

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ATTORNEY APPEARING ON BEHALF OF TECK COAL:

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR RUFFATTO: Sandy, just for the
5 record, let's make sure we have a quorum again.

6 MS. MOISEY-SCHERER: Chair Ruffatto.

7 CHAIR RUFFATTO: Yes. I was across the
8 room for a second here, Sandy.

9 MS. MOISEY-SCHERER: Mr. Smith.

10 BOARD MEMBER SMITH: Here.

11 MS. MOISEY-SCHERER: Mr. Lehnherr.

12 BOARD MEMBER LEHNHERR: Here.

13 MS. MOISEY-SCHERER: Mr. Reiten.

14 BOARD MEMBER REITEN: Here.

15 MS. MOISEY-SCHERER: Mr. Simpson.

16 BOARD MEMBER SIMPSON: Here.

17 CHAIR RUFFATTO: Ms. Altemus.

18 BOARD MEMBER ALTEMUS: Here.

19 MS. MOISEY-SCHERER: Ms. Aguirre.

20 BOARD MEMBER AGUIRRE: Here.

21 MS. MOISEY-SCHERER: We have a quorum.

22 CHAIR RUFFATTO: Thank you so much,
23 Sandy.

24 Now we're going to go to Item (b), under
25 action items on Page 7. This is the stringency

1 review of the selenium rule for Lake Koochanusa,
2 BER No. 2021-04 and 08.

3 Teck Coal and Lincoln County have filed
4 petitions for review under Montana Code Annotated
5 75-5-203. I'm going to refer to that when I'm
6 talking to the stringency statute, and it's review
7 under the stringency statute of the .8 micrograms
8 per liter lake water column standard, and I'm
9 going to call that the .8 standard so I don't have
10 to try to spit that all out all the time. So
11 we're reviewing the .8 standard.

12 Interested parties have filed written
13 comments, and responses, and proposed decisions,
14 and they have made the oral comments at the public
15 meeting, and we're now ready to consider the
16 issues.

17 I want to thank everyone who made
18 comments. I think they were very helpful to
19 inform us, inform the Board of the issues and the
20 arguments on both sides.

21 Today it's my thought that we're not
22 going to make a final written decision for
23 approval today. What I think we should try to do
24 is to make some basic decisions, and then for the
25 next meeting we will have a proposed final written

1 decision for final approval.

2 We're also not going to have any oral
3 arguments or comments today as such, but the Board
4 members will be able to ask the interested
5 parties, if they're available, questions, and I
6 would think that those questions would be directed
7 primarily to the interested parties who made the
8 most substantive comments and responses and
9 proposed decisions. Is there any question, or
10 comment, or suggested changes to what I've
11 outlined as to how we might proceed today?

12 Dr. Lehnherr.

13 BOARD MEMBER LEHNHERR: Thank you,
14 Chairman Ruffatto. I just have a few comments,
15 and then a question, but not -- I sort of jumped
16 the gun there, I think. You're wanting comments
17 about your proposed approach to the issue, which I
18 think is fine. So whenever you get to a point
19 where you think we can have some comments and
20 questions, let me know. Thank you.

21 CHAIR RUFFATTO: All right. Thanks,
22 Doctor. At this point, I would like to ask Sandy
23 to put on our screen the questions that I believe
24 she received yesterday. Did you receive some
25 questions, Sandy?

1 MS. MOISEY-SCHERER: Yes, I did.

2 CHAIR RUFFATTO: Will you put those up,
3 please.

4 MS. MOISEY-SCHERER: (Complies)

5 CHAIR RUFFATTO: What shows on your
6 screen are what I'm suggesting the first two
7 questions that we take, and the first question is
8 what I would call the very basic question. If we
9 answer that question no, we're done. If we answer
10 that question yes, then we have to go to other
11 questions.

12 The way I'm going to approach this --
13 and again, please, Board members, if you have
14 other thoughts, please raise your hand or holler
15 out -- but I want to take question one first, and
16 that question is -- I'll read it.

17 Is the lake water column standard that
18 is .8 micrograms per liter -- which we'll call the
19 standard or the .8 standard -- more stringent than
20 the comparable Federal guideline? And that's
21 tracking language from the statute.

22 In order to help the Board get started
23 on the discussion, I'm going to ask two parties a
24 question to get us started, and -- to get us
25 started, and I would ask Teck Coal first and then

1 DEQ to take no more than four or five minutes to
2 state your position and your arguments as to how
3 this question ought to be answered. And I will
4 start with Teck Coal.

5 I think we should leave the question up
6 there for now, unless it's too distracting. So
7 can you proceed. First of all, I should ask. Who
8 is representing Teck Coal, if anyone?

9 MS. MARQUIS: Good afternoon, Chairman
10 Ruffatto, members of the Board. My name is Vicki
11 Marquis. I'm here today representing Teck Coal.

12 CHAIR RUFFATTO: And who is representing
13 DEQ?

14 MS. KELLY: Chairman Ruffatto, my name
15 is Myla Kelly. I'm the Manager of the Water
16 Quality Standards and Modeling Section. We also
17 have our legal expert on this topic with us, is
18 Kirsten Bowers. So both of us are available to
19 answer any questions.

20 MS. BOWERS: Good afternoon, Board
21 members. I'm here also. Kirsten Bowers.

22 CHAIR RUFFATTO: I guess I'm distracted
23 by this without seeing some faces. So Amy, would
24 you take this down and we'll put it up again
25 later. Excuse me, not Amy. Sandy. Would you

1 take it down so we can see faces better. All
2 right. Thank you.

3 No more than four or five minutes as to
4 your position on that basic question, only that
5 basic question, and we'll go from there.

6 MS. MARQUIS: Thank you, Chairman
7 Ruffatto, members of the Board. I appreciate your
8 diligence and the time and effort you've put into
9 this process, and your willingness to have an open
10 process that includes extensive public comment.

11 One thing that became clear through the
12 public comment is that nobody here disputes the
13 intention or the legislative history behind what
14 has been described as the stringency statute.

15 The legislative history and the statute
16 itself make it clear that it is to apply to all
17 standards, and DEQ and EPA have both confirmed
18 that it is a water quality standard, and it is
19 enforceable, and it will be used for terms of
20 assessing the water body.

21 So the water column standard of 0.8
22 micrograms per liter functions as a water quality
23 standard. The Board referred to it as a water
24 quality standard in its rulemaking; the rule
25 itself refers to it as a water quality standard;

1 and EPA and DEQ agree that it is a water quality
2 standard, so it does fall within the universe of
3 standards that must comply with the stringency
4 statute.

5 Now, the only arguments that have been
6 raised are about to what number that 0.8 should be
7 compared. Now, DEQ has told you that it really
8 should be compared to a range of numbers; but that
9 does not comply with Montana case law, nor does it
10 comply with the Federal guideline as it was
11 promulgated and portrayed to the public in their
12 public notice.

13 And we provided a copy of that public
14 notice with our comments, and I believe with our
15 original petition. It's 81 Federal Register
16 45285, page 45286. That's from July 13, 2016.
17 And I draw your attention to our Proposed Findings
18 17 and 18 for a little bit more detail on that.

19 Essentially what the EPA guideline did
20 is it proposes a number for the water column
21 standard, does not propose a range of numbers, it
22 proposes one number. That number is 1.5.
23 Mathematically that number is nearly two times
24 greater than the water standard that this Board
25 enacted which is 0.8. Therefore, the 0.8 is more

1 stringent than the Federal guideline.

2 Now, other people have argued that we
3 need to look at something different that applies
4 in this circumstance, but in the Pennaco case, the
5 District Court case that we referred to throughout
6 our petition, our comments, and our proposed
7 decision document, it's clear that in Montana what
8 we look to for the Federal guideline is the
9 numeric guideline for that parameter.

10 The parameter here is selenium. When
11 you look at the selenium guideline, the numeric
12 guideline proposed by EPA for lake systems, the
13 number is 1.5.

14 The fact that DEQ and others call this a
15 site specific standard, despite the fact that it
16 was not promulgated in compliance with the site
17 specific statute, does not exempt it from
18 compliance with the stringent statute.

19 0.8 is mathematically more stringent
20 than the EPA guideline of 1.5. There's no doubt
21 about that, and there's no credible dispute within
22 the comments. Thank you. I'm available to answer
23 questions you might have as well on that topic.

24 CHAIR RUFFATTO: Thank you, Ms. Marquis.
25 Who from DEQ would like to state your position and

1 your arguments in support of your position in less
2 than five minutes, please.

3 MS. KELLY: Chairman Ruffatto, my name
4 is Myla Kelly. I'm the manager of the Water
5 Quality Standards and Modeling Section, and thanks
6 for this opportunity.

7 I will just start off by noting that we
8 did, the Department did provide extensive comments
9 on this question throughout this process, so
10 hopefully you've all had an opportunity to read
11 through those, and read the oral arguments that we
12 provided, and I'll just do a brief summary so that
13 I'm not repeating anything.

14 So to note that the EPA 304(a) criteria
15 for selenium is the first criteria that is based
16 on fish tissue, and that's a very, very important
17 component to our discussions as we go forward.
18 This criteria, this EPA 304 criteria, is comprised
19 of multiple elements, three of which Montana
20 adopted as standards, and are codified in ARM
21 17.30.632.

22 So those three components include egg
23 ovary, muscle or whole body, and water column. So
24 these selenium standards are fish tissue based
25 standards, not water column based standards, which

1 really means that the standards account for all of
2 the dietary exposure and the bioaccumulation as
3 the primary pathway for selenium exposure.

4 So when the Department adopted the water
5 quality standards for Lake Koochanusa, the reason
6 why they are not more stringent than Federal
7 standards is for two really clear reasons. Number
8 one, the water column standard is translated from
9 the fish tissue standard using the exact site
10 specific procedures that are outlined in the
11 Federal guidelines.

12 And two, the Federal and Lake Koochanusa
13 water column standard is translated from the
14 Federal fish tissue criteria that's directly
15 linked to the egg ovary 15.1 milligrams per
16 kilogram value. So therefore, to be more
17 stringent than the Federal, the State would have
18 had to have used an egg ovary value less than the
19 15.1 milligrams per kilogram, and we did not do
20 that.

21 The Federal fish tissue criteria and
22 Montana's fish tissue standards are identical with
23 the translation consistent with Federal
24 recommended procedures. I think I'll stop there
25 and just be available for questions.

1 CHAIR RUFFATTO: Thank you, Ms. Kelly.
2 I appreciate both the comments and the answers to
3 the questions. Now I'm going to open it up to the
4 Board for questions to any of the interested
5 parties or for discussion.

6 Again, right now we want to only be
7 addressing the very first issue, and that is,
8 whether the .8 standard is more stringent than the
9 Federal guideline, and I'll start with Dr.
10 Lehnherr.

11 BOARD MEMBER LEHNHERR: Thank you,
12 Chairman Ruffatto. There is an issue that is
13 worth mentioning, but it probably doesn't matter
14 in the big picture, but I want to register a
15 complaint about how the January 31st public
16 hearing was held.

17 Public hearings are not a place for
18 debate. They're not a place to present both
19 sides. They're an opportunity to solicit public
20 input, and everyone gets the same amount of time
21 to speak.

22 Unfortunately, the Hearing Officer
23 allowed some people who had already spoken to
24 speak for an additional length of time, which was
25 highly inappropriate. That's not how public

1 hearings are supposed to go.

2 The people that were allowed to speak an
3 additional amount of time were a couple of
4 attorneys, and at least a couple of politicians,
5 and I suspect that if the people who followed the
6 rules and limited their time to speak would have
7 known they could speak more, that they might have
8 taken advantage of the opportunity.

9 Like I said, if it mattered more in the
10 big picture, I would probably seek to have those
11 comments that were inappropriate stricken from the
12 record, but as it is, this case involves --

13 If you look at the links on the BER
14 website involving this issue, there are over 5,000
15 pages of documents available for download and for
16 our evaluation, and in those 5,000 pages or over
17 5,000 pages of documents, it's very clear that the
18 decision to arrive at the 0.8 micrograms per liter
19 standard was arrived at after a very extensive
20 process, highly rigorous, involving dozens of
21 scientists, dozens of citizens, dozens or many
22 local officials.

23 And I think the evidence is clearly --
24 overwhelming is not too strong of a word -- is
25 overwhelmingly in favor of the validity of the 0.8

1 standard; and the EPA says that standard is not
2 more stringent than the Federal standard.

3 If anything, if you look at some of the
4 concerns about selenium standards, and adverse
5 affects to wildlife in the Lake Kooocanusa basin,
6 the question should be: Should the standard be
7 more stringent? But that's not what we're here to
8 deal with.

9 I would like to ask a question, because
10 in those several thousand pages of documents that
11 were available for our perusal, there was at least
12 one public comment that pointed out that British
13 Columbia, where Teck Coal actually operates and
14 resides, may be lowering its standard to very
15 close to 0.8. It may be lowering its standard to
16 0.8 micrograms per liter.

17 My question is: What, if any, effect
18 would that have on our decision? And what, if
19 any, effect would that have on Teck Coal's
20 decision to pursue changes in rulemaking in
21 Montana? Thank you.

22 CHAIR RUFFATTO: Dr. Lehnherr, who would
23 you like to direct those questions to?

24 BOARD MEMBER LEHNHERR: I guess maybe
25 both Ms. Marquis and the DEQ representatives. I'm

1 just -- someone may have more information
2 regarding the impact of that possible British
3 Columbia change. I don't know who would be in a
4 position to answer that.

5 CHAIR RUFFATTO: Ms. Marquis, would you
6 be in a position to respond?

7 MS. MARQUIS: I can, yes. Thank you,
8 Chairman Ruffatto, Dr. Lehnherr, members of the
9 Board.

10 So as I understand the question, I'm
11 just going to address the part about the British
12 Columbia water quality objective. Is that what
13 you want me to do?

14 BOARD MEMBER LEHNHERR: Yes, please.
15 Thank you.

16 MS. MARQUIS: Okay. Thank you. So it's
17 my understanding that British Columbia, the
18 important part here is that they have not released
19 a proposed water quality objective for public
20 comment or review or their process. I'm not a
21 Canadian attorney, so I can't speak to their
22 rulemaking or standard setting or water quality
23 objective setting process, so my knowledge of it
24 is limited.

25 But it's my understanding they have not

1 issued a proposal that would go through what is
2 analogous to our public review process at this
3 time. There has been talk of that.

4 One other thing that's important to
5 notice is a water quality objective may not be the
6 same as a water quality standard in Montana. They
7 may not be implemented in the same way.

8 I believe at the November meeting of the
9 Lake Koochanusa Monitoring and Research Committee,
10 a gentleman from the Province spoke about this,
11 and said that their water quality objective, when
12 and if it is changed, would not be used to make
13 impairment determinations or for enforcement.

14 Again, I would ask you to review those
15 meeting minutes that DEQ has, but that's my
16 understanding of what his testimony was or what
17 his presentation at that meeting was.

18 Right now the current water quality
19 objective for British Columbia is 2.0 micrograms
20 per liter. Now, I go through all that just to say
21 that's where the process is, and there isn't a lot
22 of detail in the public realm about what the water
23 quality objective would be, what it would be based
24 on, or how it would be implemented.

25 How that impacts this process is simple.

1 It doesn't. This process was brought forward
2 based on compliance with Montana State law. We're
3 looking at a Montana water quality standard, and
4 does it comply with Montana State law.

5 So nobody -- We didn't start this
6 process to say that the standard should be two, or
7 that it should be some other number. The process
8 was started to say, was started to point out that
9 the rulemaking did not comply with Montana State
10 law.

11 The rulemaking can be started over, and
12 it can be conducted in a manner that complies with
13 Montana State law, and it can reach whatever
14 number is appropriate.

15 So importantly, the existing water
16 quality objective in British Columbia is 2.0.
17 Whether that will change, it hasn't yet, it hasn't
18 been formally proposed for public review at this
19 time that I'm aware of.

20 What it means in terms of Teck's
21 regulation isn't clear, and doesn't impact this
22 process, which simply deals with: Is the water
23 quality standards set at 0.8 for Lake Koocanusa
24 more stringent than the Federal guideline, which
25 is 1.5? And we believe it is. Thank you.

1 CHAIR RUFFATTO: Thank you, Ms. Marquis.
2 Ms. Kelly, do you have a response to Dr.
3 Lehnherr's question?

4 MS. KELLY: I do. Yes, thank you,
5 Chairman Ruffatto, Dr. Lehnherr.

6 Montana DEQ in our standards program
7 continues to coordinate closely with British
8 Columbia, as we have through these past six years,
9 in the development of the standard. It was always
10 our goal and British Columbia's goal to in the end
11 come forward with a one lake/one number standard,
12 understanding that water quality and the
13 importance of a protective standard to protect
14 aquatic life doesn't stop at an international
15 boundary.

16 And as part of this continued
17 coordination with British Columbia, we had a
18 public meeting in November where we invite
19 stakeholders and members of this large stakeholder
20 group that we have been a part of for the last six
21 years, and working towards developing these
22 standards.

23 And at that time British Columbia did
24 come forward to publicly discuss their upcoming
25 water quality objective. That is part of our

1 meeting minute notes. They do intend to begin
2 that public process very soon.

3 The water column values that they have
4 proposed are .85. Those are functionally the same
5 as our Montana water quality standard. And their
6 fish tissue values I believe are 5.6, so those are
7 less than Montana's. Thank you.

8 CHAIR RUFFATTO: Thank you, Ms. Kelly.
9 Board Member Simpson.

10 BOARD MEMBER SIMPSON: Thank you, Mr.
11 Chairman. I'm going to start by making a motion
12 that the rule specifying .08 micrograms per liter
13 is more stringent than the 1.5 micrograms per
14 liter guideline specified by EPA, and my reasoning
15 for that is as follows, and --

16 CHAIR RUFFATTO: Dave. Let's get the
17 motion on the table, and then we'll follow up with
18 your reasoning. Is that okay?

19 BOARD MEMBER SIMPSON: Okay. Well, that
20 is the motion.

21 CHAIR RUFFATTO: I'm looking for a
22 second, if there is one.

23 BOARD MEMBER AGUIRRE: I'll second it.

24 CHAIR RUFFATTO: A motion has been made
25 and seconded that the .8 standard is more

1 stringent -- or maybe I should put it this way --
2 that this Board determine that the .8 standard is
3 more stringent than the comparable Federal
4 guideline. So let's discuss it. David.

5 BOARD MEMBER SIMPSON: If I can proceed.
6 Just to reiterate, the language of 75-5-203
7 specifies that the Board may not attempt to rule
8 or implement -- adopt a rule to implement
9 75-5-301, 75-5-302, 303, and 310, that is more
10 stringent than the comparable Federal regulations
11 or guidelines to address the same circumstances.

12 Keeping in mind that the EPA 1.5 is in
13 fact a guideline, so the language is the same. Of
14 course we have had a couple of petitions to review
15 this rule. I won't repeat that.

16 But in adopting the standard, the Board
17 did not complete the analysis and written finding
18 prescribed by 75-5-203(2), MCA, and instead
19 concluded that the new standard is not more
20 stringent than the EPA guideline because it was
21 developed using federally recommended site
22 specific procedures.

23 Now, as a matter of general practice,
24 the published EPA standards for water quality are
25 adopted or incorporated by reference in the DEQ

1 rules, and EPA -- requires justification to and
2 review and approval by EPA, and implicitly or
3 explicitly, use of EPA approved procedures to
4 develop a new standard. And further, EPA rarely,
5 if ever, rejects state standards that are more
6 stringent Federal standards.

7 Hence, use of EPA approved or
8 recommended procedures does not and cannot
9 substitute for compliance with 75-5-203(2) because
10 if it did, 203 would have no applicability, which
11 clearly was not the intent, that is, it would
12 become a moot question.

13 So the question before us is a
14 procedural one, that is: Did the Board comply
15 with 75-5-203, MCA? Simple math shows that the
16 new Montana standard of 0.8 micrograms per liter
17 for selenium is more stringent than the 2016 EPA
18 guideline of 1.5 micrograms. And as acknowledged,
19 this is acknowledged by EPA in their approval
20 letter that it is in fact more stringent.

21 So hence, I believe the Board erred in
22 cutting short its process, and relying on EPA
23 approved procedures to justify its determination
24 that the new standard is not more stringent, and
25 so failure to address 75-5-203 is a procedural

1 defect and must be cured.

2 Now, I have a number of technical
3 questions regarding the development of the
4 standard, but I will hold off on those until and
5 if we proceed further with this issue.

6 CHAIR RUFFATTO: Thank you, David.
7 Additional discussion? Board Member Smith.

8 BOARD MEMBER SMITH: Yes. Maybe to
9 simplify it a little bit. I'd like to -- whether
10 or not a case specific value is relevant in the
11 Federal standards. Like maybe if we could define
12 what the Federal standard is.

13 And Ms. Marquis mentioned some Supreme
14 Court rulings. I don't know if that's the answer
15 to this or not. I'd like to hear folks' thoughts
16 on that.

17 But I mean I think this is really
18 important that we include that into our decision
19 obviously, because if a case specific value does
20 follow the standards, then obviously the answer to
21 this question would change, and the specifics of
22 whether or not that number is the correct number
23 or not may not necessarily be relevant, as long as
24 they followed the -- which would be the entire
25 2016 EPA guidance document, if that were the case.

1 Does that make sense?

2 CHAIR RUFFATTO: I have to admit, Joe,
3 I'm not sure if I understand the question. But
4 maybe someone at DEQ or Ms. Marquis understands
5 the question enough to start to address it.

6 BOARD MEMBER SMITH: I'd like a little
7 bit more comment on whether or not a case specific
8 value is a part of the Federal guideline or not.

9 MS. KELLY: I can address that, Board
10 Member Smith, Chair Ruffatto. For selenium, which
11 is obviously what we're talking about today, in
12 EPA's recommended guidance, in their 304(a)
13 guidance, they have an entire appendix that's
14 referred to as Appendix K, in recognition that
15 selenium bioaccumulates, and does bioaccumulate
16 differently in aquatic life, depending on site
17 specific factors of a water body.

18 So if a state or a tribe wanted to
19 pursue a site specific criteria, because of the
20 uniqueness of the toxicity, and the accumulation
21 in aquatic life, EPA has taken the time and put
22 this procedure, the step-by-step process together.

23 That is part of their 304(a) criteria,
24 and that's Appendix K, "Translation of a selenium
25 fish tissue criterion element to a site specific

1 water column value," and that is part of their
2 national aquatic life ambient water quality
3 criteria.

4 So that particular document goes through
5 a step-wise process to derive a site specific
6 translation, and that's the process that we went
7 forward with using.

8 CHAIR RUFFATTO: Thank you, Ms. Kelly.
9 Ms. Marquis, did you want to respond to that?

10 MS. MARQUIS: Yes, please. Thank you.
11 Chairman Ruffatto, Board Member Smith, members of
12 the Board.

13 As we pointed out in our petition, the
14 stringency statute is triggered when EPA has a
15 Federal, has promulgated a Federal regulation or
16 approved a guideline.

17 It's important to note here that what
18 EPA has is not a Federal standard. It's a Federal
19 guideline. And yes, the Montana District Court
20 and the Supreme Court looked at this in the
21 Pennaco case that we have cited.

22 And in there, they said that what
23 matters is what is EPA's numeric guideline, what
24 is their guideline, what is the numeric value that
25 they attach to that guideline, and the numeric

1 value that EPA attaches to their guideline for
2 lake systems for selenium is 1.5.

3 Now, the fact that EPA allows for a
4 process for site specific standards as they do for
5 many of the parameters doesn't change the fact
6 that in Montana, the Montana law says essentially
7 if the number is more stringent than the Federal
8 guideline number, it must comply with the
9 stringency statute.

10 So if Lake Koochanusa does have some
11 special attributes that make it susceptible to
12 high bioaccumulation -- which to be clear, Teck
13 argues that it does not, and the record supports
14 that it does not -- but if it did, and if there
15 was some special situation at Lake Koochanusa, the
16 stringency statute allows for the Department, or
17 previous to this the Board, to go through and talk
18 about that threat, and talk about how the new
19 standard is necessary to mitigate that threat to
20 human health or the environment.

21 So the stringency statute does not say
22 you can't get to .8 if that's where you need to
23 be. It says you have to do it in a particular
24 fashion, and you have to provide the written
25 findings that support the need for such a

1 stringent standard, and site specific conditions
2 might be just what trigger that written finding or
3 support that written finding.

4 Again, those written findings were not
5 provided here, and the case law makes clear that
6 it's the number that EPA attaches to that Federal
7 guideline that matters. That number is 1.5. The
8 standard here is .8. It is more stringent. Thank
9 you.

10 CHAIR RUFFATTO: Ms. Bowers.

11 MS. BOWERS: Thank you, Chair Ruffatto
12 and members of the Board. I think Myla Kelly
13 provided a really good explanation, but I just
14 want to point out that the State stringency
15 statute applies when the State adopts a rule
16 that's more stringent than comparable Federal
17 regulations or guidelines.

18 And the Federal guidelines for lentic
19 waters is not strictly a number 1.5, and I think
20 to analyze this based on simple math, 1.5 versus
21 .8, is erroneous because the Federal guidelines
22 are based on fish tissue, and in particular the
23 egg ovary tissue standard of 15.1, which was the
24 basis of DEQ's criteria, and I think Myla
25 explained very well how that was derived.

1 And to be more stringent than Federal
2 guidelines, we would have had to have used an egg
3 ovary tissue criteria of less than 15.1.

4 CHAIR RUFFATTO: Thank you, Ms. Bowers.
5 Board Member Smith.

6 MS. MARQUIS: May I respond to that
7 briefly, please?

8 CHAIR RUFFATTO: I'm going to see what
9 Board Member Smith -- assuming you intentionally
10 have your hand up, Joe. Okay. Go ahead.

11 BOARD MEMBER SMITH: Maybe to simplify
12 the issue, I mean the question at hand is: Does
13 the .8 rule exceed the Federal guideline? The
14 question is: What is the Federal guideline? Is
15 it the entire 807 page document by the EPA that
16 determines selenium, or is it just the one table
17 that lists four different numbers? What is the
18 definition of the Federal guideline, so we can
19 figure out if we're exceeding it?

20 CHAIR RUFFATTO: All right. I would
21 just say, Joe, I think you have boiled the issue
22 down to the heart of it.

23 And so Ms. Marquis, you had your hand
24 up, and maybe you could first respond to Board
25 Member Smith, and then we'll give DEQ the chance

1 to respond.

2 MS. MARQUIS: Thank you, Chairman
3 Ruffatto, Board Member Smith, members of the
4 Board.

5 The Federal guideline is found in the
6 table that EPA presents in the Federal Register
7 where they promulgated the guideline, and in the
8 table that they present at the front of that 800
9 page document.

10 Now, they do say that there may be
11 situations where a site specific standard is
12 preferable, but that is not the numeric guideline
13 that they provide. Again, case law in Montana
14 says we look to the numeric value that the EPA
15 provides.

16 Another thing I want to clarify is while
17 the EPA guideline says that there may be
18 situations where a site specific standard could be
19 used, they don't say that the state has to do that
20 whenever possible.

21 Those words are important because that's
22 what the public was told in the initial
23 rulemaking. The public was told that the Federal
24 guideline is that whenever possible, you have to
25 enact a site specific standard.

1 You can comb through that 800 page
2 document, and you won't find that statement. What
3 you'll find is that EPA says it may be preferable
4 in cases that exhibit high bioaccumulation of
5 selenium. That threshold trigger to get to site
6 specific standards has never been shown, and
7 there's no proof of it in the record. So the fact
8 that EPA provides options does not change their
9 guideline. The guideline is the numeric value.
10 It's set at 1.5.

11 And I want to address the fish tissue
12 number for just a minute, and I'll point you to
13 the rule itself, Subparagraph (2). The second
14 sentence from the bottom of Subparagraph (2) says,
15 "When the aquatic ecosystem is in non-steady
16 state, both the fish tissue and the water column
17 standards apply."

18 The rule also says that Lake Koochanusa
19 is in non-steady state, so both the fish tissue
20 and the water column standards apply. It doesn't
21 say that one overrides the other, they both apply.
22 So if you don't have fish tissue data, and if your
23 water column sample exceeds the .8 standard, that
24 means that the lake is not meeting the standard.

25 So the water column standard is very

1 important here. You can't say that it doesn't
2 matter just because it was derived from the fish
3 tissue number. That's not the case. The water
4 column standard will be used for assessments, it
5 will be used for enforcement, it will be used for
6 permitting.

7 And there's evidence in the record that
8 the Board recognized that, and they even said
9 yeah, if there's a new development discharging
10 water to Lake Kocanusa, they could have to comply
11 with the standard of 0.8 micrograms per liter; or
12 if they're subject to nondegradation analysis,
13 they could have to comply with an even lower limit
14 of, I believe it was 0.12 micrograms per liter.

15 So the water column standard is
16 important. It's what is going to drive
17 assessments, enforcement, it's what will be
18 implemented in permitting. So regardless of what
19 led to that number, that's the number that is the
20 standard.

21 And let's not forget that EPA said in
22 their approval letter that the water quality
23 standard, the water column standard, is more
24 stringent than their Federal guideline, just like
25 in Pennaco where the Court relied on and found

1 conclusive EPA's statement.

2 Here EPA's statement that this standard
3 is more stringent is also conclusive, and says
4 that yes, it is more stringent, 0.8 is more
5 stringent than 1.5. Thank you.

6 CHAIR RUFFATTO: Thank you. I expect
7 that DEQ -- Well, I guess I would ask DEQ to
8 answer the question that I think is key, and
9 that's what Joe asked, and that is: What is the
10 comparable Federal guideline? Is it the 1.5 in
11 the table, or is it the 800 pages of the document
12 which lays out other alternatives?

13 MS. BOWERS: Chair Ruffatto and members
14 of the Board. I'll try to start that out.

15 It's DEQ's position that the comparable
16 Federal guidance is the aquatic life ambient water
17 quality criterion for selenium, the entire EPA
18 304(a) guidance document.

19 And that document actually provides a
20 range for lentic water bodies, and the range is
21 quite large, from .27 to 52.02 micrograms per
22 liter, and those numbers may be protective of
23 lentic water bodies, but it depends on site
24 specific environmental factors.

25 And the Board's reason statement in

1 support of the rule explains that the EPA selected
2 1.5 as a 20th percentile from the distribution of
3 the range that's protective of lentic water
4 bodies; and based on the 304(a) criteria found 1.5
5 would not be protective in Lake Kooconusa, and
6 that's why .8 was derived to protect fish tissue.

7 And I'm going to let Myla take over
8 because she's much better at explaining technical
9 aspects than I am.

10 CHAIR RUFFATTO: Thank you, Ms. Bowers.
11 Go ahead, Ms. Kelly.

12 MS. KELLY: Thank you, Chairman, members
13 of the Board.

14 I would just simply add -- I don't have
15 anything to add on the importance of the entirety
16 of the 304(a) criteria document for selenium as
17 the basis of what you should be looking at, and
18 again, that includes Appendix K, which is that
19 step-by-step process that the Department used in
20 order to establish the water column criteria.

21 And then I would agree with Ms. Marquis
22 that, yes, there are three components of the water
23 quality standard, as I mentioned before -- egg
24 ovary, muscle, and whole body and water column --
25 and all of those are very important.

1 The Federal selenium egg ovary criterion
2 of the 15.1 is that foundation of EPA's criteria
3 structure, and the water column criteria, again,
4 is translated from that egg ovary criteria. And
5 the purpose of that translation is to ensure that
6 our aquatic life is protected from any toxicity
7 from selenium.

8 CHAIR RUFFATTO: All right. Ms.
9 Marquis, if you're going to say something
10 different than what you've said before, go ahead.

11 MS. MARQUIS: Thank you. First I'm a
12 little -- I've not been in a situation like this
13 where another party has two people speaking
14 instead of one, but whatever works for the Board
15 and gets the information in front of you, that's
16 perfect.

17 I just want to point you -- and I cited
18 this before, but I have the exact language here
19 now.

20 In the Federal Register where EPA
21 promulgated their Federal guideline -- and that's
22 again 81 Federal Register 45285 to Page 45286 from
23 July 13th, 2016. They say, quote, "EPA's
24 recommended water quality criteria are
25 scientifically derived numeric values that protect

1 aquatic life or human health from the deleterious
2 effects of pollutants in ambient water," end
3 quote.

4 So there's a quote from EPA where they
5 say their water quality criteria are
6 scientifically derived numeric values. They don't
7 say their recommended water quality criteria is an
8 800 page document, or is a range of values that
9 you have to sift through and find. They say it is
10 a scientifically derived numeric value. Their
11 scientifically derived numeric value they say
12 protects 95 percent of fish species at 1.5.

13 Thank you for indulging me one more time
14 on that.

15 CHAIR RUFFATTO: Thank you, Ms. Marquis.
16 Board Member Lehnherr. Go ahead.

17 BOARD MEMBER LEHNHERR: Thank you. I
18 know Ms. Marquis, she's working for the Canadian
19 company Teck, and her job is to paint a picture
20 most favorable to Teck's desire not to have a
21 protective standard.

22 And I hate to contradict her, but if you
23 look at the second link on the BER page, there are
24 over 5,000 pages full of the reasoning for the
25 wisdom of the 0.8 micrograms per liter standard.

1 And there's also documentation where the EPA says
2 the standard is not more stringent than the
3 Federal standard.

4 What can you say beyond the extensive,
5 almost unprecedented documentation and work by,
6 like I say, dozens of scientists, and citizens,
7 and local officials that say that the 0.8 standard
8 is appropriate for Lake Kooconusa.

9 I feel like there's a train here headed
10 in a certain direction, and I'm sort of resigned
11 to that, but I think it's clear that 0.8 is not
12 more stringent than the Federal standard. Thank
13 you.

14 CHAIR RUFFATTO: Do any of the other
15 Board members have questions or comments?

16 BOARD MEMBER REITEN: I guess, Mr.
17 Chairman, members of the Board, I guess I would
18 strongly agree with Dr. Lehnherr, and the answer,
19 clearly to me the answer to that first question is
20 no, and it's not when you consider the
21 bioaccumulation in fish tissue.

22 Ultimately the goal of any of these kind
23 of regulations is to prevent harmful conditions on
24 fish and other wildlife, and it's clear that the
25 old 1.5 micrograms per liter standard has shown

1 not to provide this protection.

2 CHAIR RUFFATTO: Thank you, Board Member
3 Reiten. Ms. Marquis, I'm not going to call on
4 you. I mean I may, but I'm going let the Board
5 speak for awhile. Any more questions or comments
6 from the Board?

7 BOARD MEMBER AGUIRRE: Mr. Chairman,
8 when this came up a few Board meetings ago, I had
9 done some research, and I feel like we're
10 confusing two points in making this decision, and
11 we're confusing the actual, just focused fact of
12 whether that number is more stringent versus the
13 other side of it is what should it be to protect
14 the water.

15 I feel those are two separate issues.
16 Whatever would get put in a permit, and a
17 permittee would have to abide with, and that would
18 be some kind of negotiation in my mind between
19 Montana DEQ and that permittee.

20 And I still, I feel like we're confusing
21 the issues. And so we keep maybe staying
22 stationary on the matter, or not making progress.
23 So when I seconded the motion, I do that based on
24 really a straight up comparison of the numbers.
25 In my mind it is more stringent.

1 And again, I'm not basing the decision
2 on what it should be for Teck Coal. I'm basing
3 the decision on the number is more stringent.
4 That's where I'm at with this, and why I seconded
5 that motion so quickly.

6 CHAIR RUFFATTO: Thank you, Board Member
7 Aguirre. Board Member Simpson.

8 BOARD MEMBER SIMPSON: Thank you, Mr.
9 Chairman, and I think my colleague Board Member
10 Aguirre has made an excellent point here, and
11 which I guess is the starting point where I was
12 going to go.

13 She is correct. What we're deciding
14 here is whether or not the standard is more -- the
15 adopted State standard is more stringent than the
16 guideline, and if -- but as I said, I have a
17 number of technical questions that I won't get
18 into just yet, but I am not prepared to say
19 whether or not the .8 is or is not an appropriate
20 number.

21 And I think that if in fact it is
22 justified by the 5,000 pages of information that's
23 already been generated on this, it should be
24 fairly easy to make the written finding that's
25 specified in the statute.

1 That's really -- If we go, if we make
2 the determination that it is in fact more
3 stringent, then there are two options under the
4 statute. One is to repeal the rule, and go back
5 to the EPA guideline. The other is to justify the
6 standard.

7 And there's been a lot of work done on
8 it. It's very possible that it, and in fact
9 probable, that it can be justified based on the
10 work that's been done.

11 So I think it's important that we keep
12 those two issues separate. It's not that we're
13 repealing the standard. It is just that we're
14 making the determination of whether or not it is
15 more stringent.

16 CHAIR RUFFATTO: Thank you. It's been
17 an hour of this discussion. Let's take a ten
18 minute break or a nine minute break. We'll
19 reconvene at 2:40.

20 (Recess taken)

21 CHAIR RUFFATTO: We will reconvene the
22 meeting. Sandy, will you call roll again to make
23 sure we still have our quorum.

24 MS. MOISEY-SCHERER: Chairman Ruffatto.

25 CHAIR RUFFATTO: Here.

1 MS. MOISEY-SCHERER: Mr. Smith.

2 BOARD MEMBER SMITH: Here.

3 MS. MOISEY-SCHERER: Mr. Lehnherr.

4 BOARD MEMBER LEHNHERR: Here.

5 MS. MOISEY-SCHERER: Mr. Reiten.

6 BOARD MEMBER REITEN: Here.

7 MS. MOISEY-SCHERER: Mr. Simpson.

8 BOARD MEMBER SIMPSON: Here.

9 MS. MOISEY-SCHERER: Ms. Altemus.

10 BOARD MEMBER ALTEMUS: Here.

11 MS. MOISEY-SCHERER: Ms. Aguirre.

12 BOARD MEMBER AGUIRRE: Here.

13 MS. MOISEY-SCHERER: We have a quorum.

14 CHAIRMAN RUFFATO: Thank you so much,
15 Sandy.

16 I think we should continue with the
17 Board discussion. Mr. Simpson, do you
18 intentionally have your hand up, or did you leave
19 it up from before?

20 BOARD MEMBER SIMPSON: Sorry, Mr.
21 Chairman. I left it up from before.

22 CHAIR RUFFATTO: All right. Board
23 Member Altemus, you have your hand up, I believe.

24 BOARD MEMBER ALTEMUS: Yes. Thank you,
25 Mr. Chair, members of the Board.

1 I have to agree with Board Member
2 Simpson and Board Member Aguirre. To me a numeric
3 standard is very strict, it's measurable, and it's
4 enforceable. A guidance document is more
5 aspirational.

6 And I think to answer the question
7 that's before us, to me the answer is yes, that
8 the standard that we have, the numeric standard,
9 is more stringent than EPA's standard. So that is
10 where I would be voting. But thank you.

11 CHAIR RUFFATTO: Thank you, Julia. Any
12 more Board member discussion?

13 (No response)

14 CHAIR RUFFATTO: I will --

15 BOARD MEMBER SIMPSON: Not at this time,
16 Mr. Chairman.

17 CHAIR RUFFATTO: I will offer my
18 thoughts. I've had the benefit of everybody else
19 offering theirs, and I can agree --

20 Well, first of all, I can say that Dr.
21 Lehnherr and Board Member Reiten, I don't question
22 that you believe, and that it may be the right
23 standard, .8; but as has been pointed out by Board
24 Member Aguirre and others, that is not the
25 question before us.

1 The question before us is: What does
2 the Montana law require? And more specifically,
3 does this Board need to follow Montana law when it
4 makes rules? And to me, that is the question.

5 And to the specific question, I think
6 one needs to look no further than the statute to
7 answer it. The statute says, "There shall be no
8 rule more stringent than comparable Federal
9 guideline." The word "comparable" there is key to
10 me. The .8 standard and the 1.5 are comparable.

11 The .8 standard and some process, or
12 document, or procedure is not a comparable
13 standard. That's like trying to compare apples
14 and oranges. And so I will vote to approve this
15 motion, and I think the statute on its face
16 answers the question. Any more discussion?

17 (No response)

18 CHAIR RUFFATTO: Any more discussion?

19 (No response)

20 CHAIR RUFFATTO: Then I will call the
21 question. A motion has been made and seconded
22 that the water column standard of .8 micrograms
23 per liter is more stringent than the comparable
24 Federal guideline. All in favor, say aye.

25 (Response)

1 CHAIR RUFFATTO: Opposed.

2 (Response)

3 CHAIR RUFFATTO: Let's take a roll call
4 vote, please, Sandy.

5 MS. MOISEY-SCHERER: Chairman Ruffatto.

6 CHAIR RUFFATTO: Aye.

7 MS. MOISEY-SCHERER: Mr. Smith.

8 BOARD MEMBER SMITH: Aye.

9 MS. MOISEY-SCHERER: Mr. Lehnherr.

10 BOARD MEMBER LEHNHERR: Nay.

11 MS. MOISEY-SCHERER: Mr. Reiten.

12 BOARD MEMBER REITEN: Nay.

13 MS. MOISEY-SCHERER: Mr. Simpson.

14 BOARD MEMBER SIMPSON: Aye.

15 MS. MOISEY-SCHERER: Ms. Altemus.

16 BOARD MEMBER ALTEMUS: Aye.

17 MS. MOISEY-SCHERER: Ms. Aguirre.

18 BOARD MEMBER AGUIRRE: Aye.

19 CHAIR RUFFATTO: The motion passes.

20 Sandy, can you put up the question sheet again,
21 please.

22 MS. MOISEY-SCHERER: (Complies)

23 CHAIR RUFFATTO: We've answered the
24 first question yes, so now we need to address what
25 is the remedy or consequence of the failure of the

1 standard to comply with the stringency statute.

2 You can take it down again. I just
3 wanted to make sure we all knew what we were
4 talking about now.

5 To start this discussion off, I would
6 like to call on DEQ first, and then Ms. Marquis,
7 to give us in no less than -- or no more than four
8 or five minutes your position on this point, on
9 this question, and your arguments in favor of that
10 position. So we'll start with DEQ.

11 MS. BOWERS: Chair Ruffatto, members of
12 the Board, this is Kirsten Bowers. I'll address
13 this question on behalf of DEQ.

14 First of all, the Board of Environmental
15 Review cannot invalidate the rule. By its clear
16 language at Section 75-5-203 sub (4) sub(a), "A
17 person affected by a rule that the person believes
18 to be more stringent than comparable Federal
19 regulations or guidelines may petition the Board
20 to review the rule.

21 "If the Board determines that the rule
22 is more stringent than comparable Federal
23 regulations or guidelines, the Department shall
24 comply with this section by either revising the
25 rule to conform to the Federal regulations or

1 guidelines, or by making the written finding as
2 provided under Subsection (2) within a reasonable
3 period not to exceed eight months after receiving
4 the petition."

5 And the rule or the statute goes on to
6 say, "A petition under this section does not
7 relieve the petitioner of the duty to comply with
8 the challenged rule."

9 So the remedy for your determination
10 that the .8 standard is more stringent than
11 Federal is for DEQ to either revise the rule, or
12 to make the findings set forth in the stringency
13 statute.

14 CHAIR RUFFATTO: Thank you, Ms. Bowers.
15 Ms. Marquis, I assume you probably want to
16 respond.

17 MS. MARQUIS: Thank you, Chairman
18 Ruffatto, members of the Board.

19 The Board has authority to interpret,
20 apply, and enforce existing rules and laws. In
21 this case, the law that, or the rule that was
22 enacted, the standard that was enacted, was
23 enacted by the Board, and the record is the
24 Board's record.

25 So the Board is well situated, and the

1 Board has authority to interpret both the new
2 selenium rule and make decisions about how it can
3 be applied or enforced. This is expressly
4 provided in statute at 2-15-102 Subparagraph (10),
5 Montana Code Annotated.

6 So our suggested remedy is that the
7 Board utilize its authority, recognize that it has
8 made a mistake, that the rule is more stringent
9 than Federal, that none of the written findings
10 were completed, and further that the public was
11 misled and didn't have a comment -- have any
12 opportunity to comment on the stringency of the
13 rule because they weren't told that the rule was
14 more stringent than Federal.

15 So we believe that the Board has
16 authority, and should declare that the selenium
17 rule is invalid, it cannot be enforced, and
18 further to look at the record and find that it
19 does not support making the written findings, and
20 send this back to DEQ for further rulemaking.
21 Thank you.

22 CHAIR RUFFATTO: Board members,
23 questions, comments, discussion?

24 (No response)

25 CHAIR RUFFATTO: Or a motion. Dr.

1 Lehnherr.

2 BOARD MEMBER LEHNHERR: Thank you. I
3 just wanted to comment that if you look at the
4 stringency requirement, it's clear that -- Let's
5 say where I think it is an incorrect determination
6 that 0.8 is more stringent than the Federal
7 standard, based on not a table, but based on a
8 more complicated analysis that was done
9 exhaustively by the previous Board; regardless the
10 stringency regulation says that, or guidelines say
11 that -- does not say that a requirement or a
12 standard cannot be more stringent than Federal
13 regulations if certain procedures are followed,
14 and that guideline or that regulation outlines
15 what those steps are.

16 So that would be an option, and I would
17 say instead of jumping to an unnecessary step that
18 could endanger Lake Koochanusa and its associated
19 waterways, when there are good questions, valid
20 questions, about whether or not the 0.8 is
21 stringent enough, we should go back to square one,
22 and go through public hearings, and gather
23 information, and look at this again.

24 CHAIR RUFFATTO: Thank you, Doctor. Any
25 other comments, questions?

1 BOARD MEMBER SIMPSON: Mr. Chairman. I
2 guess I'm --

3 As far as the remedy or consequence,
4 under the statute, it seems to me that there are
5 two ways to go here. One is to essentially repeal
6 the rule and revert to the Federal standard; the
7 second choice is for the .8 standard to be
8 justified based on the written findings that are
9 required.

10 So it sounds as if it's the Department's
11 position that it is the Department's
12 responsibility to do that. I believe that's the
13 case.

14 I'm not sure that what the Board -- I'm
15 not sure of the Board's authority at this point,
16 given the change in responsibility as it has to do
17 with rulemaking, where that leaves us. Ms.
18 Marquis addressed that to some extent, but there
19 seems to be a conflict here, so I'm not sure how
20 we resolve it.

21 CHAIR RUFFATTO: Thank you, Board Member
22 Simpson. I'm going to ask Ms. Bowers a question
23 following up from Dr. Lehnherr's comments.

24 How does DEQ propose to deal with this
25 going forward?

1 MS. BOWERS: Chair Ruffatto, members of
2 the Board. Based on the Board's determination
3 today that the Lake Kooocanusa water column
4 standard is more stringent than Federal, the
5 Department would make the findings in 75-5-203 Sub
6 (2) and (3), and the Department believes it can do
7 that based on the rulemaking record.

8 CHAIR RUFFATTO: I want to follow up.
9 What Dr. Lehnherr said is that we need to initiate
10 rulemaking again to do that, and so my question
11 is: Is that the Department's intent?

12 MS. BOWERS: We've thought about this a
13 little bit, and I might defer to Myla again, but
14 we sort of -- and by "we," I mean the program and
15 I have talked, and we sort of outlined a process
16 that we think we would use to make the findings.

17 And yes, you're right. It would be a
18 public process. There would be opportunity for
19 the public to comment, and we would have to get it
20 done by the eight month timeline that's triggered
21 from the Lincoln County petition.

22 CHAIR RUFFATTO: Thank you. Any more
23 discussion?

24 BOARD MEMBER AGUIRRE: I'm not clear on,
25 Kirsten, what you just said you felt the

1 Department's action was. I apologize.

2 MS. BOWERS: No, that's okay. Board
3 Member Aguirre and other members of the Board.

4 So the Department, in response to the
5 determination that the water column standard is
6 more stringent, would make the findings that are
7 necessary in 75-5-203, and we would do that in a
8 public process where we would publish our
9 findings, and give the public opportunity to
10 comment on them.

11 CHAIR RUFFATTO: Did that answer your
12 question, Board Member Aguirre?

13 BOARD MEMBER AGUIRRE: I believe so. I
14 think my question then goes on to -- The public
15 hearing would just be focused on the findings
16 associated with the 0.8 standard, is that correct,
17 or does it go beyond what Board Member Altemus
18 questioned?

19 Which she had a very good point about
20 the fact that the standard has to be -- you know,
21 you have to have a way to demonstrate compliance,
22 and enforcement. And so I didn't know what
23 elements are in the public review, if there's sort
24 of like implementation standards, or it's just the
25 standard that you're looking at. Does that make

1 sense?

2 MS. BOWERS: Yes. Member Aguirre,
3 members of the Board.

4 So the process that DEQ has been
5 outlining would include written findings, and then
6 we would post those, and there would be a public
7 comment period on those, and a public hearing, and
8 we would finalize the findings, and we could
9 present them to the Board in June probably and
10 brief the Board on the findings.

11 CHAIR RUFFATTO: Any more discussion?

12 (No response)

13 CHAIR RUFFATTO: Let me offer my
14 thoughts. I believe --

15 BOARD MEMBER SIMPSON: Mr. Chairman.

16 CHAIR RUFFATTO: Go ahead.

17 BOARD MEMBER SIMPSON: If I can
18 interrupt, please. Excuse me.

19 My copy of the 75-5-203 I took off the
20 internet, and I didn't reproduce the one that you
21 sent out, so I don't know if it's different.

22 But under 203(2), it says, "The Board
23 may adopt a rule to implement this chapter that is
24 more stringent than comparable Federal regulations
25 or guidelines only if the Board makes a written

1 finding after a public hearing and public comment,
2 and based on evidence in the record that," etc.

3 Is that still the current language, or
4 has "Board" been changed to "the Department" as a
5 result of the statutory change?

6 CHAIR RUFFATTO: "Board" has been
7 changed to "the Department."

8 BOARD MEMBER AGUIRRE: My copy says
9 Department.

10 CHAIR RUFFATTO: Yes. I mean that part
11 has been changed.

12 BOARD MEMBER SIMPSON: It has been
13 changed?

14 CHAIR RUFFATTO: So it says, "The
15 Department makes a written finding after a public
16 hearing and public comment, based on evidence in
17 the record."

18 BOARD MEMBER SIMPSON: Okay. Thank you.

19 CHAIR RUFFATTO: My thought is this.
20 First of all, I tend to agree with the DEQ's
21 position here as opposed to Teck Coal's position,
22 but not quite, because I think it's very clear
23 that in order to comply with this statute, DEQ
24 will need to initiate new rulemaking, and that
25 point is very important to these questions.

1 As far as the point that Ms. Marquis
2 makes that we should declare the rule invalid, in
3 my opinion, the rule is invalid because it
4 violates Montana statute, but that happens by
5 operation of law, and not by reason of something
6 that this Board says in that regard.

7 So I think it is invalid, and cannot be
8 enforced, but I don't think it's our role to make
9 that declaration. What our role is to do is to do
10 what the statute said, and again, it's very clear
11 that the statute requires the Department, in my
12 mind, to initiate new rulemaking, so it's got a
13 proper notice, and a proper procedure through
14 rulemaking to get there. So that's my view. So
15 any more discussion?

16 BOARD MEMBER SIMPSON: Mr. Chairman, is
17 there a motion required here? I don't see one.

18 CHAIR RUFFATTO: No, a motion has not
19 been made, so you're right. We need to have a
20 motion.

21 I will make a motion that the answer to
22 this question is that the Department is obligated
23 to follow the statute, and that's the consequence,
24 and that in order to follow the statute, it must
25 initiate new rulemaking.

1 BOARD MEMBER SIMPSON: I'll second for
2 purpose of discussion.

3 CHAIR RUFFATTO: Dr. Lehnherr.

4 BOARD MEMBER LEHNHERR: I'm just a
5 little unclear about the motion. Is there some
6 way we could make it just a tad more succinct
7 somehow?

8 I think it sounds like there are sort of
9 two parts to it, that because the Board has
10 decided that the current standard is more
11 stringent, that it becomes sort of unenforceable
12 now, and the second part is that the Department
13 will initiate rulemaking.

14 I'm trying to think if there's some way
15 we could have the motion be a form that if it was
16 written, it would be pretty easy to see what the
17 motion was about.

18 CHAIR RUFFATTO: I appreciate your
19 comment. I will withdraw my motion if Board
20 Member Simpson will withdraw his second.

21 BOARD MEMBER SIMPSON: Yes, I'll
22 withdraw the second. But I do have a question.

23 CHAIR RUFFATTO: Go ahead. Ask the
24 question.

25 BOARD MEMBER SIMPSON: If the rule is

1 ultimately repealed as a result of this review,
2 that would be a Department function definitely.

3 If the -- and this is what I would
4 expect would happen is that the Department will
5 prepare the written findings to comply with 203.
6 Does the Board have any further role in this?

7 CHAIR RUFFATTO: I'm going to ask for a
8 response on that from Ms. Bowers, and I would like
9 -- and also Ms. Marquis.

10 MS. BOWERS: Chair Ruffatto, members of
11 the Board. The Board's only role here is to
12 answer the question whether the Lake Kooconusa
13 water column standard is more stringent than
14 comparable Federal regulations or guidelines.

15 The rest of the remedy is within the
16 jurisdiction of the Department, and that is to
17 either revise the rule to make it consistent with
18 Federal regulations or guidelines, or to make the
19 findings in 203.

20 And the statute is very clear that the
21 rule is not repealed, and that a petition under
22 the section does not relieve a petitioner from
23 compliance with the challenged rule.

24 CHAIR RUFFATTO: Thank you. Ms.
25 Marquis.

1 MS. MARQUIS: Thank you, Chair Ruffatto,
2 members of the Board.

3 We believe the Board has authority, as I
4 said earlier, to interpret, analyze, and enforce
5 existing rules and laws. So the Board in its
6 final agency action on this could make the
7 determinations about the rule's applicability or
8 its enforceability about the existing rules or the
9 existing record.

10 Once the Board reaches that final agency
11 action, we do agree that that, depending on what
12 that final agency action says, likely would end
13 the Board's role in these petitions.

14 What comes after that, I can't
15 speculate, in terms of whether it would draw the
16 Board back in or not, without knowing more about
17 what that process would be.

18 CHAIR RUFFATTO: Thank you. Does any
19 member -- Dr. Lehnerr, did you have a motion that
20 you think would be more succinct?

21 BOARD MEMBER LEHNERR: Not off the top
22 of my head, Chairman Ruffatto. I'd probably have
23 to sit down with a piece of paper for a minute or
24 two.

25 CHAIR RUFFATTO: I appreciate that.

1 Let's do this. Let's take a few minutes and do
2 that, and we'll see what we can come up with.

3 But I guess I want to say this, that if
4 -- I think this next step would be fairly easy if
5 DEQ would confirm to us that they plan to initiate
6 new rulemaking to implement the statute, because I
7 think that -- But what I hear DEQ saying is
8 they're not going to do that, they're going to do
9 something else.

10 And then I think the arguments that Ms.
11 Marquis are making become very appropriate,
12 because at that point, we aren't going to get to a
13 point where we have a rule that is compliant with
14 the statute, because we don't have a rulemaking
15 that is compliant with the statute.

16 So that's my concern here when we are
17 talking about this. I agree that it's primarily
18 in the Department's realm, but to not go through a
19 rulemaking or to rely on the existing rulemaking
20 is I think within the Board's purview.

21 So let's take a few minutes to think
22 about this. We're not going to take a break.
23 We'll just take a few minutes, and some of us try
24 to come up with a way to work out of this.

25 BOARD MEMBER AGUIRRE: Why don't we just

1 split it into two separate motions, or did we
2 already cover the first part of it?

3 CHAIR RUFFATTO: No, I don't think we
4 have. So what's your suggestion? Split what into
5 two?

6 BOARD MEMBER AGUIRRE: Split the
7 regulations more stringent than the Federal, which
8 I thought we already --

9 CHAIR RUFFATTO: Yes.

10 BOARD MEMBER AGUIRRE: -- went on record
11 with that, so then that doesn't need to be in
12 there anymore. So then it would just be a motion
13 for the desired action, which I feel like you
14 already stated that it has -- that Montana DEQ
15 needs to initiate new rulemaking.

16 CHAIR RUFFATTO: Good point. Let's
17 think about it a bit. I've got lots of hands
18 here. Board Member Simpson.

19 BOARD MEMBER SIMPSON: Mr. Chairman, as
20 a practical matter, it seems to me that the ideal
21 outcome here would be for the Department to go
22 through the process of preparing the written
23 findings, with that finding ultimately to be
24 affirmed by the Board, since this is in fact a
25 Board rule that predates the change in rulemaking

1 power.

2 Technically it's not a rule. It's
3 already a rule. We're not talking about making a
4 rule, we're talking about either retaining a rule
5 or not subject to the requirements of 75-5-203.

6 So I'm not sure where we stand legally
7 as far as having a role in the ultimate decision
8 here, but I believe as a practical matter, that's
9 the way it ought to be. I don't know that it's
10 possible we get there.

11 CHAIR RUFFATTO: Thank you. Board
12 Member Lehnherr.

13 BOARD MEMBER LEHNHERR: Thank you. I
14 tend to agree with Board Member Aguirre that two
15 motions may be appropriate. I think that might be
16 a good way to handle it, and end up with motions
17 that by themselves are fairly succinct.

18 The first motion could deal with what
19 the Board envisions for what we do, now that we've
20 decided that the 0.8 is more stringent than the
21 Federal standard.

22 The second motion could be to, as you
23 suggested, instruct the Department to initiate
24 rulemaking, because it seems like by looking at
25 75-5-203 that we would be talking about rulemaking

1 for a new standard. Thanks.

2 CHAIR RUFFATTO: Ms. Bowers.

3 MS. BOWERS: Chair Ruffatto, members of
4 the Board. Respectfully you have no rulemaking
5 authority as of July 1 of 2021. And I appreciate
6 your sentiments, but they're outside your
7 jurisdiction, and advisory only.

8 And I also want to point out that under
9 75-5-203, DEQ can adopt a rule that is more
10 stringent than Federal. We just have to make the
11 findings. And the Board is the same. The Board
12 was not prohibited from adopting a standard that
13 is more stringent than Federal, but if they did,
14 they had to make the findings.

15 So pursuant to these petitions, you have
16 now answered the question that the .8 water column
17 standard is more stringent than Federal, so it's
18 now up to DEQ to make the written findings or to
19 undertake rulemaking. And I can't -- sitting here
20 right now today I cannot commit to undertaking
21 rulemaking.

22 CHAIR RUFFATTO: Okay. I want to state
23 this. I think the Board erred, and I think it's
24 within the Board's purview to correct its error
25 and to do so completely, not in a partial way.

1 So let's put up -- Instead of trying to
2 resolve this question immediately, let's put up
3 that question sheet again, because there are a
4 number of questions that I think we need to get to
5 if we're going to -- If the Department is not
6 willing to commit to doing rulemaking, then we
7 need to deal with the rulemaking that we've
8 already conducted erroneously. So let's put up
9 that list of questions, Sandy.

10 MS. MOISEY-SCHERER: (Complies)

11 BOARD MEMBER AGUIRRE: I have a quick
12 question. Is that --

13 CHAIR RUFFATTO: Yes.

14 BOARD MEMBER AGUIRRE: For Ms. Bowers.
15 When you're looking at the 75-5-203, are you
16 looking at section or number item two, or are you
17 looking at item four when you're --

18 MS. BOWERS: Board Member Aguirre, and
19 members of the Board. I was reading from sub (4).

20 BOARD MEMBER AGUIRRE: Okay. So either
21 revising the rule to conform to the Federal
22 regulations or guidelines, or by making written
23 findings as provided under Subsection (2)?

24 MS. BOWERS: Correct. I just wanted to
25 be clear. Thank you.

1 CHAIR RUFFATTO: The reason I wanted to
2 put up these other questions -- and Sandy, can you
3 scroll down so we see Questions 3, 4, 5, 6, and 7.

4 Those are additional questions that were
5 presented by the petitions and argued by the
6 parties. We'll skip the Teck Coal standing one
7 for the time being.

8 But one of the points that was argued by
9 Teck, and really never refuted by DEQ, was that
10 the initial notice, at least the initial notice of
11 the rulemaking failed to comply with the
12 stringency statute, and I think the answer to that
13 is fairly clear that it did not.

14 And then the next question is: Does the
15 rulemaking record with respect to the standard
16 contain the evidence which would support a
17 finding?

18 Now, that evidence has to be in the
19 record, and not out there in these 5,000 pages in
20 order for it to comply with Montana law.

21 And then Item No. 7. There was a point
22 that was debated in the comments about whether
23 peer reviewed scientific studies are required to
24 make the findings.

25 So again, if the Board -- if DEQ would

1 commit to going through rulemaking, to me that
2 would answer five, six, it wouldn't answer seven,
3 but I don't know that we would feel like we would
4 need to answer that if they would commit to
5 rulemaking, because that's a question that they
6 would have to address in the process.

7 But if DEQ is not committing to
8 rulemaking, I think we have to answer these, and
9 declare the rulemaking either valid or invalid. I
10 think it's clearly invalid. So there's no way
11 that we could have a valid rule without a valid
12 rulemaking, and that's where I think the problem
13 is.

14 And I want to ask Ms. Bowers. Would you
15 be in a position at some point today, or in the
16 next period of time before the next meeting, to
17 either commit or say you're not going to commit to
18 rulemaking?

19 MS. BOWERS: Chair Ruffatto, members of
20 the Board. I'm not in a position today to commit
21 or not commit to rulemaking.

22 CHAIR RUFFATTO: Can I ask this
23 question. Are you, is DEQ committed to not going
24 through rulemaking? Because that would also help
25 our analysis.

1 MS. BOWERS: Chair Ruffatto, members of
2 the Board. I'm not sure we're not committed to
3 not doing rulemaking, but I think maybe this
4 discussion -- it's getting a little -- I think
5 you're really straying outside your jurisdiction
6 here, and I mean that respectfully. You're here
7 today to answer the stringency question, and then
8 the rest of the remedy is within the jurisdiction
9 of DEQ, including the findings.

10 You know, I respect your advice as to
11 whether the record can support the findings, but
12 the findings are really within the Department's
13 jurisdiction and not the Board's at this point.

14 CHAIR RUFFATTO: I appreciate your
15 statement and your position there. What that
16 overlooks is that we're talking about a rulemaking
17 that this Board conducted, and we made an error on
18 -- this Board made an error on that, and so that
19 gives us, in my view, the purview to address these
20 additional questions. So I disagree with your
21 statement.

22 So I think we need to take a break, and
23 come up with some motions that will -- that this
24 Board can agree on that will get this process
25 moving. So let's take a -- I don't want to --

1 Let's take a ten minute break, and we'll come back
2 and have some motions to present.

3 (Recess taken)

4 CHAIR RUFFATTO: Let's please reconvene.
5 Sandy, would it be possible for you to take that
6 screen down.

7 MS. MOISEY-SCHERER: (Complies)

8 CHAIR RUFFATTO: Thank you. By the way,
9 Sandy, I want to thank you for your great work
10 here and for keeping us going and on track.

11 MS. MOISEY-SCHERER: It's a pleasure,
12 sir.

13 CHAIR RUFFATTO: Can you, Sandy, call
14 roll again.

15 MS. MOISEY-SCHERER: Chairman Ruffatto.

16 CHAIR RUFFATTO: Here.

17 MS. MOISEY-SCHERER: Mr. Smith.

18 (No response)

19 MS. MOISEY-SCHERER: Mr. Smith.

20 (No response)

21 MS. MOISEY-SCHERER: Mr. Lehnherr.

22 BOARD MEMBER LEHNHERR: Here.

23 MS. MOISEY-SCHERER: Mr. Reiten.

24 (No response)

25 MS. MOISEY-SCHERER: Mr. Reiten.

1 (No response)

2 CHAIR RUFFATTO: Mr. Simpson.

3 BOARD MEMBER SIMPSON: Here.

4 MS. MOISEY-SCHERER: Ms. Altemus.

5 BOARD MEMBER ALTEMUS: Here.

6 MS. MOISEY-SCHERER: Ms. Aguirre.

7 BOARD MEMBER AGUIRRE: Here.

8 MS. MOISEY-SCHERER: We have a quorum.

9 CHAIR RUFFATTO: And I see that Joe is
10 here, too, Joe Smith, Board Member Smith.

11 BOARD MEMBER SMITH: I'm here now.

12 CHAIR RUFFATTO: I will expect Board
13 Member Reiten to show up soon, but we have a
14 quorum.

15 So I'm going to make a motion, and let's
16 understand that we're not -- we've made the basic
17 decision. I think we need to put this into a
18 decision document, so it's going to be finally
19 approved at the next meeting. So the motions that
20 we're going to make now, in my mind, are guidance
21 for whoever is drafting the final decision
22 document.

23 So on question No. 2, I will move that
24 the remedy is for DEQ to comply with 75-5-203, and
25 that it must do so by initiating rulemaking to

1 adopt a rule consistent with the stringency
2 statute because the Board's rulemaking was invalid
3 as to the .8 standard. Joe.

4 BOARD MEMBER SMITH: Can I ask a
5 question or do we need to wait for a second?

6 CHAIR RUFFATTO: Go ahead and ask the
7 question. Maybe the answer to your question will
8 produce a second.

9 BOARD MEMBER SMITH: I'm a little
10 confused still on why we need to push DEQ to
11 reintroduce into the rulemaking session. I mean
12 it seems like part four of 75-5-203 basically
13 states that the remedy is to basically go back
14 through No. 2 within eight months.

15 CHAIR RUFFATTO: The reason why I think
16 it does is because of the language of Subparagraph
17 (2) which says it makes the written findings after
18 a public hearing and public comment based on the
19 evidence in the record.

20 So that means it has to have an
21 appropriate notice to initiate that, and absent a
22 notice to initiate that process, the record is
23 invalid, and at least that's my view.

24 And those points were clearly addressed
25 in the briefing. The Teck Coal and Lincoln County

1 folks argued that the rulemaking was invalid
2 because it did not -- it was not initiated with
3 the statement required by the statute, and that is
4 that the rule they were trying to adopt was more
5 stringent than the Federal regulations, so the
6 whole rulemaking was premised on an incorrect
7 basic assumption, and so we need a valid
8 rulemaking to make a valid rule.

9 BOARD MEMBER AGUIRRE: So do we take a
10 position on that?

11 CHAIR RUFFATTO: Well, that's the
12 question. If we don't want to take that position,
13 then we could leave it up to DEQ to do whatever it
14 wants, but I think that because the Board made an
15 error, it's up to the Board to rectify that error.
16 But we don't have to.

17 And I'm going to say that my motion has
18 just died for lack of a second, and I will
19 entertain any other motions. Joe.

20 BOARD MEMBER SMITH: Just one more real
21 quick question. So what if we pass this motion,
22 but the DEQ doesn't follow it? Are there any
23 consequence of that, or to us specifically as the
24 Board?

25 CHAIR RUFFATTO: That all depends on

1 what creative lawyers do when they decide to
2 challenge what we've done or challenge what DEQ
3 does. I can't answer that question. I think it's
4 a quagmire out there, as I look down the road.

5 BOARD MEMBER AGUIRRE: I mean it feels
6 like your motion -- I felt like I wasn't ready for
7 you to throw it away, because I do feel like the
8 rulemaking is invalid.

9 CHAIR RUFFATTO: Maybe we can do better.
10 I'm probably trying to accomplish too much here,
11 okay? I'm going to state, I'm going to restate
12 the motion a little differently and narrower.

13 I will move that the remedy is for DEQ
14 to comply with the 75-5-203.

15 BOARD MEMBER SMITH: I'll second that.

16 CHAIR RUFFATTO: Discussion.

17 BOARD MEMBER SIMPSON: Mr. Chairman.

18 CHAIR RUFFATTO: Yes. Dave Simpson.

19 BOARD MEMBER SIMPSON: I'm sorry. I'm
20 trying to get my feeble mind around this question.

21 I gather from the point you just made,
22 Mr. Chairman, that you consider, in this situation
23 where the rule has already been adopted and found
24 to be deficient because of the procedure, that the
25 preparation of the written finding is still a

1 rulemaking function; is that the case?

2 CHAIR RUFFATTO: That would be my
3 thought, because this statute calls for that
4 written finding to be made in a rulemaking process
5 after a public hearing and public comment.

6 BOARD MEMBER SIMPSON: So what we're
7 proposing to do is to back up to the point before
8 the rule was formally adopted by the Board, and
9 comply with 203 by preparing the written finding,
10 but that will have to be done by the Department
11 since the Board is no longer in the role of
12 rulemaking.

13 And I also concur with your point that
14 since this is a Board rule, the Board must have
15 some role in correcting the error. It seems like
16 we're handing this over to the Department with no
17 further oversight, which from my standpoint is the
18 incorrect way to go.

19 CHAIR RUFFATTO: I appreciate that, but
20 I'll tell you my position on that is that once we
21 hand it over, having done what we can do to
22 correct our error, that the Legislature has handed
23 it to the Department, and it is within their
24 jurisdiction. So on that point I agree with Ms.
25 Bowers and DEQ.

1 I mean I don't know if there's some
2 other way it could end up with the Board. I
3 suppose it could on some permit application or
4 something like that.

5 But just on this rulemaking process, I
6 agree with DEQ, that once we get done with our
7 work on these petitions, it's all in DEQ's hands,
8 and the Legislature has decided to give that to
9 the Department and not to this Board.

10 BOARD MEMBER SIMPSON: The point was
11 made earlier that the Board could still, would
12 have a role as an advisory role. So the thing
13 I've been turning over in my mind is what would
14 that look like. I mean does the Board become a
15 part of the public where we go and testify at the
16 hearing, or what form could or would that take?

17 CHAIR RUFFATTO: Ms. Bowers, I think it
18 was you that suggested the possibility of an
19 advisory role.

20 MS. BOWERS: Yes, I think I used those
21 words.

22 But I had my hand up because I wanted to
23 point out that we did, DEQ did commit to making
24 the written findings after a public hearing, and I
25 heard one of the Board members say that that was

1 required by the statute, and DEQ agrees.

2 And DEQ is committed to following
3 75-5-203, particularly sub (4), and we have
4 started outlining a process for making the
5 necessary written findings. And I wanted to offer
6 up that one -- Potentially we could bring it to
7 the Board at the April meeting, the process, I
8 mean.

9 CHAIR RUFFATTO: Thank you, Ms. Bowers.
10 Ms. Marquis, you haven't raised your hand, but I
11 would like you to pitch in here if you have some
12 thoughts that might help us out.

13 MS. MARQUIS: I really don't have
14 anything new to add. I agree, as we argued, the
15 rulemaking record was deficient, and the
16 rulemaking itself is invalid, and the only way to
17 correct that is with a new rulemaking.

18 CHAIR RUFFATTO: Thank you. Was my
19 motion seconded? Joe, did you second it?

20 BOARD MEMBER SMITH: Yes, I did.

21 CHAIR RUFFATTO: Any more discussion?

22 Dr. Lehnherr. I apologize. You had
23 your hand up quite awhile ago.

24 BOARD MEMBER LEHNHERR: No problem.

25 Just a couple things.

1 I'm a little bit -- Ideally if there is
2 a substantive motion, we could get it in writing
3 just to avoid confusion. I'm wondering if Laurie
4 could perhaps read back what she has in the
5 transcript for the motion, just so I'm clear.

6 CHAIR RUFFATTO: I read it from my sheet
7 of paper here, so I could read it again.

8 BOARD MEMBER LEHNHERR: If you wouldn't
9 mind, Chairman Ruffatto. Thank you.

10 CHAIR RUFFATTO: I move that the
11 appropriate remedy is for DEQ to comply with MCA
12 75-5-203, and Joe seconded that.

13 BOARD MEMBER SIMPSON: Mr. Chairman.
14 Would it be appropriate to include in that motion,
15 since this appears to be previously unplowed
16 ground, if we could ask the Department as part of
17 that process to prepare a plan for, an
18 implementation plan for compliance with 203, and
19 to identify points during the process for
20 consultation with the Board as an advisor in an
21 advisory capacity.

22 CHAIR RUFFATTO: I am not prepared to
23 include that in my motion, and the reason I am not
24 prepared is because I don't think we have that
25 jurisdiction.

1 But let me say this, Dave. If this
2 motion passes or doesn't pass, you could make that
3 motion, and the Board could include that in the
4 record for sure. Any further discussion? Yes.
5 Dr. Lehnherr.

6 BOARD MEMBER LEHNHERR: Chairman
7 Ruffatto, sorry to ask about this, but I'm just a
8 little bit unclear at this point.

9 Our role in DEQ rulemaking is advisory,
10 as I understand it, and the purpose of your motion
11 is advisory; is that correct, or am I misreading
12 that?

13 CHAIR RUFFATTO: I have never said that
14 I believe that this Board has an advisory role in
15 rulemaking. Ms. Bowers suggested that. Maybe
16 we'll ask her. Do you think the Board has an
17 advisory role in rulemaking?

18 MS. BOWERS: Chair Ruffatto, members of
19 the Board, currently you have no role in
20 rulemaking, but the Department respects your
21 advice.

22 CHAIR RUFFATTO: All right. Thank you.
23 So Dr. Lehnherr, I would answer your question
24 then, based on that, that we do not have an
25 official role in rulemaking, but that the

1 Department would respect our advice if we decided
2 to offer some. Any more discussion?

3 (No response)

4 CHAIR RUFFATTO: All right. A motion
5 has been made and seconded that the remedy is for
6 the Department, DEQ, to comply with 75-5-203. All
7 in favor, say aye.

8 (Response)

9 CHAIR RUFFATTO: Opposed, nay.

10 (No response)

11 CHAIR RUFFATTO: The motion carries. I
12 think we should answer these other questions then,
13 and keep in mind that we're going to put together
14 a written decision which documents these things.

15 So the next question is -- Well, I will
16 take them in order here, just for ease. The next
17 question on the sheet that's been up there is:
18 Does Teck Coal, Limited have standing? I would
19 open that up for discussion among the Board. Dr.
20 Lehnherr.

21 BOARD MEMBER LEHNHERR: Thanks, Chairman
22 Ruffatto.

23 I would say that if Teck Coal was the
24 only one, the petitioner, then I would say that
25 75-5-203 didn't apply because there's no person

1 involved. Teck Coal is not -- a corporation is
2 not a person.

3 But I think probably even more
4 significant is the fact if you walked up to any
5 Montanan and said, "Should a foreign corporation
6 who doesn't even have a license to do business in
7 Montana, should a foreign corporation be allowed
8 to determine our air and water quality
9 standards?," I think you would be hard pressed to
10 find anyone who said that that corporation had a
11 right to have any role in determining Montana's
12 air and water standards.

13 So if wasn't for the presence of the
14 Libby or the Lincoln County Commissioners, I would
15 say we didn't have a person, anyone with any
16 standing in this case, but we do have the Lincoln
17 County Commissioners.

18 CHAIR RUFFATTO: Board Member Simpson.

19 BOARD MEMBER SIMPSON: Thank you, Mr.
20 Chair. What is the definition of a person under
21 the law as used in 203?

22 CHAIR RUFFATTO: I don't know, but my
23 guess is it includes entities, but that's just my
24 best guess. So I don't think -- I think Teck Coal
25 would be considered a person for purposes of this

1 statute, but that's just how "person" is commonly
2 used in the law.

3 I will ask Ms. Bowers to give DEQ's
4 position on this issue of Teck Coal's standing,
5 and just try to do it in about two minutes, and
6 then I'll ask Ms. Marquis.

7 MS. BOWERS: Thank you, Chair Ruffatto,
8 members of the Board.

9 First Teck Coal is a person under the
10 definitions under the Water Quality Act, because
11 they are -- it includes corporations, and it even
12 includes persons resident in Canada.

13 But they are not a person affected by
14 the Lake Koochanusa rule, and the statute at
15 75-5-203 sub (4) Sub(a) is clearly, standing is
16 clearly limited to a person affected by a rule
17 that the person believes to be more stringent than
18 comparable Federal regulations or guidelines.

19 And Teck Coal cannot be affected by the
20 Lake Koochanusa water column standard because that
21 standard only applies south of the international
22 border. It's limited to the Montana side of Lake
23 Koochanusa.

24 And Teck Coal argues that they are
25 affected because of speculation that the

1 Department's rule may put pressure on British
2 Columbia to adopt a similar rule, and that there
3 are some non-specific accusations that somehow
4 Teck was targeted by the rulemaking, but those are
5 all too speculative and too attenuated to
6 establish standing under the statute.

7 CHAIR RUFFATTO: Ms. Marquis, do you
8 want to address this?

9 MS. MARQUIS: Please. Thank you,
10 Chairman Ruffatto, members of the Board.

11 The definition of person in the statute
12 -- and this is found at 75-5-103 -- means the
13 State, a subdivision of the State, institution,
14 firm, corporation, partnership, individual, or
15 other entity, and includes persons resident in
16 Canada, end quote. So the statute specifically
17 includes Teck within that definition of persons.

18 Now, as Ms. Bowers correctly noted, the
19 statute says the petition process is limited to
20 persons affected by the rulemaking. And she said
21 that we've asserted a claim based on speculation,
22 and that's not true.

23 If you look to our citations that we
24 provided you, the Board's rulemaking record
25 specifically says this is only going to affect

1 Teck. The Board's rulemaking record says this
2 would be used to pressure British Columbia to set
3 a standard. British Columbia issues permits that
4 govern Teck. That is going to affect Teck Coal.

5 Probably one of the most egregious --
6 Probably one of the most on-point pieces of
7 evidence is the letter sent from DEQ's Director at
8 the time, Shaun McGrath, to the International
9 Joint Commission, and this letter is dated
10 December 31st, 2020.

11 And in there it is very clear that then
12 Director McGrath is asking the International Joint
13 Commission to get involved, and to use Montana's
14 newly promulgated standard against Teck Coal, and
15 against the coal mining operations in the Elk
16 Valley. The coal mining operations in the Elk
17 Valley are Teck Coal's coal mining operations.

18 It's very clear that not only did the
19 Board intend for the standard to impact Teck
20 directly or through British Columbia, but also DEQ
21 intended that this rule be used to affect Teck
22 Coal through the International Joint Commission.

23 Therefore Teck clearly has standing to
24 bring this petition before the Board.

25 CHAIR RUFFATTO: Thank you. Thank you

1 both. Do we have a motion on Teck Coal's
2 standing? Dave Simpson, do you have your hand up?

3 BOARD MEMBER SIMPSON: I do. I just had
4 a question, and this is just to follow up on the
5 statement made by Ms. Bowers earlier.

6 Am I to understand that the standard of
7 0.8 is applicable only south of the international
8 border, so therefore we must have two different
9 standards for the lake?

10 My understanding the whole purposes of
11 this process in cooperating with Canada and
12 developing the standard was to have a consistent
13 standard for the lake, but I gather that's not the
14 case.

15 MS. BOWERS: Board Member Simpson, and
16 members of the Board.

17 Currently there are two standards.
18 There's the Montana standard south of the
19 international border, and then BC's -- I don't
20 think they call them water quality standards. I
21 think they're called objectives or something like
22 that.

23 But theirs applies north of the border,
24 I think it's currently two micrograms per liter,
25 but they may be working toward adopting a lower

1 standard, and a standard that's closer to
2 Montana's.

3 BOARD MEMBER SIMPSON: I'll make a
4 motion -- sorry?

5 CHAIR RUFFATTO: Go ahead.

6 BOARD MEMBER SIMPSON: I was going to
7 say I'll make a motion that -- If we really need
8 to do that. I think it's pretty well defined
9 under the law -- but I believe Teck Coal does have
10 standing in this case, and I'll make a motion to
11 that effect.

12 CHAIR RUFFATTO: Do we have a second?

13 (No response)

14 CHAIR RUFFATTO: I would second that
15 motion. Discussion. Yes, Dr. Lehnherr.

16 BOARD MEMBER LEHNHERR: Thanks, Chairman
17 Ruffatto.

18 I understand that in the technical
19 jargon Teck Coal is considered to have standing,
20 but I will have to oppose the motion, just since
21 I'm a Montanan and voting for probably your
22 average Montanan who would disagree with that.
23 Thank you.

24 CHAIR RUFFATTO: Thank you, Doctor. Any
25 more discussion?

1 (No response)

2 CHAIR RUFFATTO: No more discussion.

3 I'll call the question. A motion has been made
4 that Teck Coal has standing under the stringency
5 statute. All in favor, say aye.

6 (Response)

7 CHAIR RUFFATTO: Opposed, nay.

8 BOARD MEMBER LEHNHERR: Nay.

9 COURT REPORTER: Who was the second nay?

10 CHAIR RUFFATTO: We'll call a roll call.

11 It was Jon Reiten, but we'll make sure we get it
12 on the record. Sandy, would you do a roll call
13 vote.

14 MS. MOISEY-SCHERER: Chairman.

15 CHAIR RUFFATTO: Yes.

16 MS. MOISEY-SCHERER: Mr. Smith.

17 BOARD MEMBER SMITH: Yes.

18 MS. MOISEY-SCHERER: Mr. Lehnherr.

19 BOARD MEMBER LEHNHERR: No.

20 MS. MOISEY-SCHERER: Mr. Reiten.

21 BOARD MEMBER REITEN: No.

22 MS. MOISEY-SCHERER: Mr. Simpson.

23 BOARD MEMBER SIMPSON: Aye.

24 MS. MOISEY-SCHERER: Ms. Altemus.

25 BOARD MEMBER ALTEMUS: Aye.

1 MS. MOISEY-SCHERER: Ms. Aguirre.

2 BOARD MEMBER AGUIRRE: Aye.

3 CHAIR RUFFATTO: The motion passes.

4 The next question is: Did the initial
5 notice of rulemaking with respect to the .8
6 standard fail to comply with the stringency
7 statute? I will ask -- oh, Dave, go ahead. If
8 you've got your hand up --

9 BOARD MEMBER SIMPSON: Oh, sorry. My
10 hand was still up from before, but I believe we've
11 already answered that.

12 CHAIR RUFFATTO: No, I don't think we
13 have. How do you think that we have answered
14 that?

15 BOARD MEMBER SIMPSON: By making the
16 determination that the standard of .8 is more
17 stringent than the guideline 1.5.

18 CHAIR RUFFATTO: All right. I
19 understand your point. I guess I am taking that a
20 step further -- what your point is -- is because
21 the notice required it to state that, that it was
22 invalid.

23 But we haven't really made that
24 determination yet. So I think we should make this
25 determination, so that when we prepare a written

1 decision, we have good grounds to state it. Does
2 that make sense to you?

3 BOARD MEMBER SIMPSON: Yes.

4 CHAIR RUFFATTO: Legal mumbo-jumbo is
5 what we're dealing with here, and I'm trying to
6 make sure we walk through it carefully.

7 BOARD MEMBER AGUIRRE: I'm going to make
8 a motion --

9 BOARD MEMBER SIMPSON: I think the word
10 is "quagmire."

11 CHAIR RUFFATTO: Go ahead, Stacy.

12 BOARD MEMBER AGUIRRE: I'm going to make
13 a motion that the initial notice of rulemaking
14 with respect to the standard failed to comply with
15 the stringency statute.

16 CHAIR RUFFATTO: Do we have a second?

17 BOARD MEMBER SIMPSON: I'll second it.

18 CHAIR RUFFATTO: Thank you, Board Member
19 Simpson. Discussion.

20 (No response)

21 CHAIR RUFFATTO: If there is no
22 discussion, I'll call the question. A motion has
23 been made and seconded that the initial notice of
24 rulemaking failed to comply with the stringency
25 statute. All in favor, say aye.

1 (Response)

2 CHAIR RUFFATTO: Opposed, nay.

3 (Response)

4 CHAIR RUFFATTO: Roll call.

5 MS. MOISEY-SCHERER: Chairman.

6 CHAIR RUFFATTO: Aye.

7 MS. MOISEY-SCHERER: Mr. Smith.

8 BOARD MEMBER SMITH: Aye.

9 MS. MOISEY-SCHERER: Mr. Lehnherr.

10 BOARD MEMBER LEHNHERR: Nay.

11 MS. MOISEY-SCHERER: Mr. Reiten.

12 BOARD MEMBER REITEN: Nay.

13 MS. MOISEY-SCHERER: Mr. Simpson.

14 BOARD MEMBER SIMPSON: Aye.

15 MS. MOISEY-SCHERER: Ms. Altemus.

16 BOARD MEMBER ALTEMUS: Aye.

17 MS. MOISEY-SCHERER: Ms. Aguirre.

18 BOARD MEMBER AGUIRRE: Aye.

19 CHAIR RUFFATTO: Motion passes.

20 The next question is: Does the

21 rulemaking record with respect to the .8 standard

22 contain evidence that would support the finding

23 required by the stringency statute?

24 And to kick this off, I will ask Ms.

25 Marquis to give us a couple of minutes of the

1 position that Teck Coal has and your basis for
2 that.

3 MS. MARQUIS: Thank you, Chairman
4 Ruffatto, and members of the Board.

5 As we pointed out in our briefing and
6 decision document that we proposed for the Board's
7 consideration, the record is barren of the
8 evidence that is required, and part of that is
9 based on the motion that just passed, which was
10 that there was no -- the rulemaking wasn't
11 initiated with any notice that the Board was
12 promulgating a standard that is more stringent
13 than Federal.

14 So just briefly to review the
15 requirements based on the statute -- and let me
16 pull that up quickly here -- there must be a
17 written finding based on evidence that, first of
18 all, the proposed standard or requirement protects
19 public health or the environment.

20 And here there's no evidence that it
21 will protect public health or the environment. In
22 fact, the evidence in the record suggests that the
23 background levels of selenium that are contributed
24 to by tributaries and other forces may be very
25 near, if not right at or above what the standard

1 is currently set at.

2 There's also evidence in the record that
3 there is no harm occurring, and so there is really
4 nothing right now that the rule would protect, or
5 protect anybody or anyone from.

6 The second requirement is that the State
7 standard or requirement to be imposed can mitigate
8 the harm to the public health or the environment.

9 And this is important because not only
10 is there no harm occurring, as evidenced by the
11 fish tissue data, there are no fish tissue,
12 credible fish tissue samples that currently exceed
13 any of the Federal, or now the State's fish tissue
14 standards.

15 I know that there's been a lot of
16 conclusory statements about what the data shows,
17 but if you look at the data and analyze it in
18 accordance with what the rule requires, there is
19 no conclusive data.

20 The rule requires that there has to be
21 at least a composite or an average of at least
22 five individual samples, and that equals one data
23 point. For most of the fish species for the egg
24 or the ovary data, there are not five samples.

25 It also requires that for the egg tissue

1 samples, they be collected from ripe ovaries, and
2 again, the record suggests that this didn't
3 happen, and the Board recognized that in the
4 record that there were problems with the
5 collection of the egg or the ovary data.

6 So there's no proof of harm, and there's
7 no proof that this standard can mitigate the harm.
8 Importantly, as the Board and DEQ have said, they
9 cannot regulate Teck, and they presume that all of
10 the selenium contributions are coming from Teck,
11 so there's no way that the standard can be
12 implemented in a manner that protects or mitigates
13 harm to the public health or the environment.

14 Again, we don't believe that there is
15 harm to the public health or the environment
16 occurring now, but even if there was, it's not
17 clear that this standard can mitigate such harm.

18 The third requirement is that the State
19 standard or requirement to be imposed has to be
20 achievable under current technology, and this is
21 very important, because there's no evidence in the
22 record of what the current technology can achieve.

23 What the Board's rulemaking record said
24 was it just depends on what Teck Coal does up in
25 Canada. That does not meet the requirement of the

1 statute. The statute puts an affirmative duty on
2 to -- then it was the Board, now it's the
3 Department -- to show that the standard is
4 achievable under current technology.

5 There was no discussion of what that
6 current technology is, or what it could achieve.
7 In fact, there were questions about whether
8 laboratories, the regular labs that people use to
9 analyze water quality standards, can even analyze
10 down to that level on a consistent basis.

11 And that was obvious when we talked
12 about the background selenium contributions,
13 because most of those samples were analyzed by a
14 lab that could only analyze down to .9 micrograms
15 per liter.

16 The fourth thing that's required is that
17 the written finding must reference pertinent
18 ascertainable and peer reviewed scientific studies
19 contained in the record.

20 And the reason for this -- and it was
21 clear in the legislative history that we printed
22 out -- was that there's a lot of conclusory
23 statements made, and a lot of speculation and
24 hypothesis.

25 And the Legislature, when they enacted

1 the stringency statute, they wanted to be sure
2 that they weren't reacting to emotional, or
3 speculative, or conclusory statements, and that
4 what they were doing was based on the real
5 science. So if the real science shows that a
6 standard more stringent is needed, then they want
7 proof of that.

8 And again, the record is barren of that
9 evidence, and nobody has really disputed that, and
10 nobody has been able to point to any record
11 citations where that evidence exists.

12 So Teck's position remains that there is
13 no evidence in the rulemaking record that would
14 support the required written findings. Thank you.

15 CHAIR RUFFATTO: Ms. Bowers, do you want
16 to offer the DEQ's position?

17 MS. BOWERS: Chair Ruffatto, members of
18 the Board.

19 I first want to point out that the
20 petitions were brought under the stringency
21 statute. The stringency statute has a very
22 specific remedy. It's provided in 75-5-203 sub
23 (4).

24 So these generalized comments that
25 rulemaking is somehow invalid are overridden by

1 the specific remedy provided in the statute. The
2 specific prevails over the general.

3 And all this discussion, all this
4 technical discussion is way beyond the scope of
5 where the Board needs to go today. You've made
6 the decision that .8 water column standard for
7 Lake Kooconusa is more stringent than comparable
8 Federal regulations or guidelines, and that's as
9 far as you need to go. The rest of the remedy is
10 up to the Department.

11 CHAIR RUFFATTO: Thank you, Ms. Bowers.
12 Do I have any motion or discussion?

13 BOARD MEMBER SIMPSON: Mr. Chairman, I'd
14 like to make few points if I could.

15 CHAIR RUFFATTO: Please do.

16 BOARD MEMBER SIMPSON: And this has to
17 do with the findings that are going to have to be
18 prepared. The findings are going to have to
19 justify the rule, and so I think to just assume
20 that the record that we have is going to justify
21 the rule may be overreaching more than a little.

22 And the reason I say that is there are a
23 lot of technical questions here, which again, we
24 may be getting the cart ahead of the horse, but I
25 think the questions are going to have to be

1 addressed in that finding if it's going to be a
2 valid finding.

3 Ms. Marquis has touched on some of the
4 points that I have on my list here, and first and
5 foremost was: What is the problem to be addressed
6 by the rule?

7 And rather than to go back and reiterate
8 what has already been stated, it's clear from the
9 record that the position that the fish in Lake
10 Koochanusa are being adversely affected by selenium
11 levels is extremely weak. I believe that's going
12 to have to be beefed up quite a bit in order to
13 justify the rule in the first place.

14 The second has to do with selenium
15 detection limits. The selenium standard is in the
16 range of one microgram per liter, or one part per
17 billion, and that's very near the detection limit
18 of .5 micrograms per liter using atomic absorption
19 spectrometry that I could gather from the
20 internet. That's the best information I could
21 come up with. I don't know if it's accurate.

22 But the DEQ7 standard reporting is now,
23 the reporting standard is one microgram per liter,
24 so clearly that's inadequate to analyze at 0.8
25 with confidence. Concentrations are extremely

1 low.

2 And just to show you the amounts we're
3 talking about, I wanted to make a point. You all
4 know what that is -- (indicating) -- it's a one
5 dollar bill. And in discussing water quality, we
6 often talk about parts per million.

7 So if you had a million of these, which
8 I would dearly like to have, and you spend \$1,000
9 a day shopping, your million dollars would last
10 you for about two years and nine months. If you
11 had a billion of these, and you spend at a rate of
12 \$1,000 a day, it would take you 2,730 years.

13 That's the amount of selenium that we're
14 talking about here. It's extremely low. And so I
15 think we need to have an affirmation that the
16 precision and degree of confidence in our
17 analytical method realistically allows the
18 imposition of such a standard, and I don't know
19 that we have that.

20 Another question along that same line is
21 whether or not there have been similar levels,
22 similar standards adopted by other states in other
23 circumstances. I didn't run across anything in
24 the portions of the record that I read that
25 indicated one way or another whether that's the

1 case, but it seems like we're dealing in standards
2 at a level that, at least from the evidence that
3 I've been able to find, have not been affirmed so
4 far.

5 Another issue is background, and this
6 also was an issue that was brought up by Ms.
7 Marquis, is the Elk River basin comprises about
8 1720 square miles, or about 19 percent of the Lake
9 Koozanusa catchment area of 8,985 square miles.

10 In order to predict impacts on the lake
11 from selenium entering the system from the Elk
12 River, accurate selenium data are required for the
13 Kootenai above its confluence with Elk River. I
14 don't know if such data exists or not.

15 According to information provided by
16 Teck there are some analyses that are limited by a
17 .9 detection limit, but without that information,
18 it's kind of hard to predict just what the impacts
19 of selenium that's originating at the Teck Coal
20 properties is likely to result in.

21 And there's just one other question
22 there, and I don't believe that it's a critical
23 factor in this case, but I think it's something
24 to recognize, and that is that State law states
25 that it's not necessary for wastes to be treated

1 to a purer condition than natural condition of the
2 receiving stream.

3 I recognize we're not talking about a
4 discharge here. We're talking about an in-stream
5 or an in-lake standard. But without some
6 understanding of what the natural condition of
7 impounded waters is in Lake Koocanusa, it's kind
8 of hard to justify a standard as low as what we're
9 talking about.

10 The next item on my list is the selenium
11 model. I went back and looked at the slide shows
12 that have been presented and the information
13 contained therein, as well as the EPA review.

14 And according to information provided by
15 Teck, the USGS model consistently over-predicted
16 measured fish selenium concentrations. Is that
17 the case? I don't know. But it sounds as if it's
18 a very conservative model.

19 And according to the EPA approval
20 letter, EPA recommends selecting fish species in
21 the aquatic system with the greatest selenium
22 sensitivity and bioaccumulation potential. So the
23 model selected by Montana was the more
24 conservative with the greatest bioaccumulation
25 potential presumably at altered levels.

1 Moreover, bioaccumulation values for all
2 species without empirical data were equated with
3 white sturgeon, which is described as the most
4 sensitive species in the system.

5 White sturgeon don't occur in Lake
6 Kooocanusa, but are present in the Kootenai River
7 below Kootenai Falls. White sturgeon are long
8 lived, and have been known to live 100 years or
9 more, which intuitively means a long time for
10 bioaccumulation to occur.

11 I couldn't find any data on this on the
12 bioaccumulation question, so I do have a question.
13 Is the use of white sturgeon bioaccumulation
14 values a reasonable assumption? I don't know, but
15 in short, the input data in my view were
16 ultra-conservative.

17 Mathematical modeling of natural systems
18 can be a valuable analytical and predictive tool,
19 but in order to construct and confirm a valid
20 model, several important criteria must be
21 considered.

22 Now, I've had some experience with
23 models, but not in the question of water quality
24 and bioaccumulation, but in other areas like
25 groundwater modeling.

1 But it's important to have a complete
2 understanding of the system being modeled, and so
3 that's my question. Is there a complete
4 understanding of the system sufficient to support
5 the model? Is the model calibrated to real world
6 conditions in Lake Koochanusa? There's some
7 indication that it's not.

8 Are input data reasonable and
9 verifiable, or are they overly conservative? And
10 have sensitivity runs been conducted? I
11 understand the impact of variations in input data.

12 The combination of a conservative model
13 that over-predicts measured concentrations,
14 combined with extremely conservative input
15 variables, can only result in artificially low
16 calculation of threshold selenium concentration.

17 I don't know if the 0.8 standard is
18 justified or not. I just -- I don't think there's
19 enough information here to justify, at least I
20 don't have enough information to make that
21 conclusion, but I think there are a lot of
22 questions.

23 Finally, based on the available data,
24 Lake Koochanusa is not impaired relative to EPA's
25 selenium standard of one and a half micrograms per

1 liter, since the average over a number of years
2 has been about one microgram per liter.

3 In addition to that, it doesn't appear
4 that the data available to date at least that
5 selenium concentrations in the lake are rising.
6 They seem to be relatively consistent.

7 So it looks like the application of a
8 new standard could result in an impairment
9 determination merely by a regulatory action.
10 Could an impairment determination severely limit
11 economic development in the future? It certainly
12 could.

13 So what would be the impact of an
14 impairment determination in general, and on Teck
15 in particular, although since Teck is not being
16 regulated by the State of Montana, that's really
17 something to be addressed by the authorities in
18 British Columbia.

19 But that goes through my long list. I'm
20 sorry to bore you with it, but my point is there
21 are a lot of questions in my mind based on the
22 information that's available as to whether or not
23 the determination of a 0.8 micrograms per liter is
24 reasonable and necessary.

25 And that's why I think that there are a

1 lot of issues that will need to be addressed in
2 this finding that's going to be prepared by the
3 Department, beyond what I have seen in the
4 products that have been produced so far.

5 CHAIR RUFFATTO: Thank you, Dave. Is
6 there any more discussion or a motion? Dr.
7 Lehnherr.

8 BOARD MEMBER LEHNHERR: Thank you,
9 Chairman Ruffatto.

10 I just want to respond rather briefly,
11 and I hate to contradict anyone, but the over
12 5,000 pages of documents from the previous Board's
13 analysis definitely shows a number of peer
14 reviewed studies that shows even adverse events,
15 and there were serious questions raised about
16 whether or not the 0.8 standard was strict enough.

17 It can be hard to grasp some scientific
18 concepts, and I think if you look at something
19 like the moon landing, say, I personally believe
20 we landed on the moon. Not everyone does. But
21 the moon is 240,000 miles away, and yet everything
22 came together, and you think, "Well, how could
23 that happen?"

24 You know, it seems like there were all
25 these huge numbers involved, and how could that

1 happen, and yet I think it shows that some very
2 unusual facts, and scientific findings, and some
3 of the methodologies used in science can have
4 significant results.

5 And from a medical standpoint, there are
6 adverse events in the human body on the magnitude
7 of parts per million, for example.

8 So we shouldn't take these numbers that
9 you think, "Well, boy, that's tiny." You know, a
10 micron, we talk about things that are a micron
11 wide. Well, I can't even see that, but tiny
12 little things like viruses can have significant
13 effects. So we shouldn't discount these numbers
14 that seem a little bit hard to understand.

15 And I just also want to remind -- I'm
16 sort of a broken record here about this over 5,000
17 pages -- but there were dozens of highly qualified
18 scientists, very knowledgeable in their field,
19 world class scientists, that made determinations
20 that guided the previous Board's actions.

21 And finally, I think it's telling that
22 British Columbia is looking at lowering their
23 standard to 0.85, very close to 0.8. So that says
24 something about what's going on in Lake Koochanusa,
25 and the standards that are best for that

1 ecosystem.

2 That's all I want to say. Thank you for
3 letting me comment.

4 CHAIR RUFFATTO: Thank you, Doctor.
5 Board Member Aguirre.

6 BOARD MEMBER AGUIRRE: Based on all this
7 discussion, which I feel was valuable to the point
8 of making a motion that the rulemaking record with
9 respect to the standard, whether that contains
10 evidence that would support the findings required
11 by the stringency statute, I move that it does
12 not, or make a motion that it does not contain --
13 the standard doesn't contain evidence that would
14 support the findings required by the stringency
15 statute on process.

16 CHAIR RUFFATTO: Thank you. Do we have
17 a second?

18 (No response)

19 CHAIR RUFFATTO: I will second that
20 motion. Discussion.

21 BOARD MEMBER SIMPSON: Mr. Chairman, I
22 do believe that the extensive record that's been
23 developed on this, that 50,000 pages or so, does
24 contain evidence that would support the findings
25 as it relates to -- I'll shuffle my papers here --

1 anyway, as it relates to the requirements for what
2 is supposed to be in the finding, that is, there
3 has to be a technical determination that certain
4 requirements have been fulfilled.

5 However, there's a question in my mind
6 as to whether the standard -- or whether the
7 rulemaking record is complete and accurate in all
8 respects, would be the best way to put it. That's
9 why I raised the list of questions that I raised.

10 I mean I'm not in a position to say
11 whether the .8 is right or wrong. I just don't
12 know. But I think based on the presentations that
13 I've seen --

14 And I admit I've not dug back into all
15 50,000 pages of what's been presented -- but I
16 have looked at the summary presentations that were
17 used to justify adoption of the rule, and that's
18 where my questions arise, is whether or not all of
19 these factors have been adequately addressed, that
20 is, not only is the standard justified, but can it
21 be applied with confidence, given the limitations
22 in our analytical methods.

23 Those are questions I don't have an
24 answer to, but I think in any finding they would
25 have to be addressed. So with respect to the

1 motion, I can't support a statement that says
2 there's no evidence to support the findings, but I
3 do feel that the findings need to be re-examined
4 in some respects.

5 CHAIR RUFFATTO: Thank you, David. I
6 would -- I'm going to state why I seconded the
7 motion.

8 I do not know the answer to all of the
9 questions that Board Member Simpson asked, but I
10 did go through all of the references that DEQ made
11 in arguing on this point, and all the references
12 that Teck Coal made.

13 And I could conclude from that -- I
14 assume they pointed to the most clear evidence --
15 and I could conclude from that that, number one,
16 they never addressed the point of achievable under
17 current technology, because it didn't address the
18 current technology.

19 I look at the evidence that was pointed
20 to regarding mitigation of harm, and the evidence
21 was not there. It was for the reasons that Ms.
22 Marquis stated.

23 Now, whether it protects public health
24 and the environment, I can't -- I didn't -- I
25 don't have the technical expertise to answer that

1 one.

2 So I'm going to propose a slight
3 amendment to the motion that might be helpful, and
4 we'll consider it a suggestion of a friendly
5 amendment, and that is to add the word "all the
6 findings," in other words, is there evidence to
7 support all the findings. I think it's clear that
8 there's not evidence to support some of the
9 findings, but we're not sure about others.

10 Is that amendment acceptable as a
11 friendly amendment, Board Member Aguirre?

12 BOARD MEMBER AGUIRRE: It is acceptable,
13 yes.

14 CHAIR RUFFATTO: And I second that
15 motion as amended. David, does that help to
16 answer your reluctance?

17 BOARD MEMBER SIMPSON: Yes.

18 CHAIR RUFFATTO: Any other discussion?

19 (No response)

20 CHAIR RUFFATTO: If there's no other
21 discussion, I'll call the question.

22 BOARD MEMBER LEHNHERR: Chairman
23 Ruffatto. Excuse me. Can you restate the motion,
24 again, please?

25 CHAIR RUFFATTO: I will.

1 BOARD MEMBER LEHNHERR: Thank you.

2 CHAIR RUFFATTO: A motion has been made
3 and seconded that the rulemaking record with
4 respect to the .8 standard does not contain the
5 evidence that would support all the findings
6 required by the stringency statute. Any more
7 discussion?

8 BOARD MEMBER LEHNHERR: Thank you.

9 CHAIR RUFFATTO: If there's no more
10 discussion, all in favor -- Well, let's just skip
11 to the roll call.

12 MS. MOISEY-SCHERER: Chairman.

13 CHAIR RUFFATTO: Aye.

14 MS. MOISEY-SCHERER: Mr. Smith.

15 BOARD MEMBER SMITH: Aye.

16 MS. MOISEY-SCHERER: Board Member
17 Lehnherr.

18 BOARD MEMBER LEHNHERR: Nay.

19 MS. MOISEY-SCHERER: Mr. Reiten.

20 BOARD MEMBER REITEN: Nay.

21 MS. MOISEY-SCHERER: Mr. Simpson.

22 BOARD MEMBER SIMPSON: Aye.

23 MS. MOISEY-SCHERER: Ms. Altemus.

24 BOARD MEMBER ALTEMUS: Aye.

25 MS. MOISEY-SCHERER: Ms. Aguirre.

1 BOARD MEMBER AGUIRRE: Aye.

2 CHAIR RUFFATTO: The motion passes. We
3 have one more question on this list, and there may
4 be others, and that question is: Does the
5 stringency statute require peer reviewed
6 scientific studies to support the findings
7 required by the stringency statute? And I will
8 turn this over, and I will let Ms. Bowers speak to
9 that first, if she is inclined to do so.

10 MS. BOWERS: Chair Ruffatto, members of
11 the Board. No, the findings do not require peer
12 reviewed scientific studies, but if they are in
13 the record, they must be cited to.

14 The statute at 75-5-203 sub (3) says,
15 "The written finding must reference pertinent,
16 ascertainable, and peer reviewed scientific
17 studies contained in the record that form the
18 basis for the Department's conclusion."

19 That doesn't say that a peer reviewed
20 scientific study is a prerequisite to adopting a
21 more stringent standard than Federal. And there
22 is some legislative history that supports that,
23 and that's cited in the record and in our
24 briefing.

25 But one thing that the Legislature

1 pointed to was that water quality rules are not
2 always about standards, water quality standards.
3 Sometimes they're procedural rules, and it makes
4 no sense that there would be a peer reviewed
5 scientific study for a procedural rule, like a
6 time frame or something, for example, that DEQ
7 could adopt that might be more stringent than a
8 Federal.

9 So I think to argue that peer reviewed
10 scientific studies have to be in the record is to
11 say that a rule, a more stringent than Federal
12 rule could never be adopted unless there was a
13 peer reviewed scientific study to support that,
14 and that simply is illogical.

15 CHAIR RUFFATTO: Thank you, Ms. Bowers.
16 Ms. Marquis, do you want to address that?

17 MS. MARQUIS: Yes. Thank you, Chair
18 Ruffatto, members of the Board.

19 I think the statute is clear, and if it
20 is interpreted as DEQ asks you to interpret it, it
21 means nothing. It just says that the Department
22 has to point to these studies. But what good is
23 that if they're not required to have the studies.

24 And the legislative history -- and I
25 highlighted this a little bit earlier in my last

1 response -- is clear as well. In there you'll see
2 the note that DEQ pointed to about, you know, the
3 peer reviewed scientific study should be required.

4 But Senator Brooke clarified that -- and
5 this is a quote -- she said, "The proponents made
6 it very clear that it should be in the bill, and
7 they demanded that decisions should be made on
8 peer reviewed scientific studies," end quote. And
9 then after that statement, the bill passed as it
10 was proposed with this language in there.

11 So the legislative history and the words
12 of the statute itself demonstrate that scientific
13 peer reviewed -- pertinent, ascertainable, and
14 peer reviewed scientific studies must be in the
15 record to support the standard.

16 And again, I'm going to point out that
17 this isn't for every water quality standard. This
18 is a special heightened requirement for those
19 situations where they want to set the standard
20 more stringent than Federal.

21 Some states don't allow that at all, but
22 Montana went to the extra trouble to say, "Yes,
23 you can do it if you meet these requirements," and
24 this is one of them, that it has to be based on
25 pertinent, ascertainable, and peer reviewed

1 scientific studies. Thank you.

2 CHAIR RUFFATTO: Any questions or
3 comments from the Board?

4 (No response)

5 CHAIR RUFFATTO: I have a question, and
6 I hope you don't get upset with this question, but
7 I want to ask Ms. Bowers and Ms. Marquis.

8 Why did neither of you address this
9 point in your decision, proposed decision
10 documents? I'll start with you, Ms. Marquis.

11 MS. MARQUIS: Perhaps it was an
12 oversight. I thought it was to be clear that this
13 is a requirement of the statute, that there must
14 be peer reviewed scientific studies in the record,
15 and it's clear that there are none. If there
16 were, we could have pointed to them, but there
17 aren't any.

18 At the end of the day, the Department's
19 derivation document was not peer reviewed, so it's
20 just not there. And that is wrapped up in the
21 finding that there is no evidence in the record to
22 support the written finding.

23 CHAIR RUFFATTO: Thank you. Ms. Bowers,
24 can you respond to my question? And maybe I know
25 the answer, but I'll let you state it.

1 MS. BOWERS: Chair Ruffatto, members of
2 the Board.

3 The issue of scientific peer reviewed
4 studies was briefed, but -- in the Department's
5 proposed decision. So we focused on the fact that
6 the Board previously conducted a stringency
7 review, and determined that the rule was not more
8 stringent than Federal, and so the findings were
9 not required. That's what we focused our proposed
10 decision on.

11 CHAIR RUFFATTO: I understand. Thank
12 you. Any discussion?

13 BOARD MEMBER SIMPSON: Yes, Mr.
14 Chairman. It seems to me that by its own language
15 203 does require reference to peer reviewed
16 scientific studies, so I'm a little unsure as to
17 why there's a question, that is, why it's
18 something that we perhaps need to have a motion
19 on.

20 CHAIR RUFFATTO: I can answer why I put
21 it on this list, and that's because the parties
22 briefed it, and they had conflicting arguments,
23 and so I put it on this list because it has been
24 argued in the briefs, so I thought it was
25 appropriate for us to consider the question.

1 And I will add that I tend to agree with
2 you that the statute seems pretty clear on its
3 face.

4 BOARD MEMBER SIMPSON: Is a motion
5 required, Mr. Chairman?

6 CHAIR RUFFATTO: Please.

7 BOARD MEMBER SIMPSON: Well, I would
8 move that, make a motion that the stringency
9 statute does require peer reviewed scientific
10 studies to support the findings required by the
11 stringency -- to support the findings that are
12 required under this section.

13 CHAIR RUFFATTO: Is there a second?

14 BOARD MEMBER AGUIRRE: I second.

15 CHAIR RUFFATTO: Who was that? I missed
16 it.

17 BOARD MEMBER AGUIRRE: It was Stacy.

18 CHAIR RUFFATTO: Okay. Thank you,
19 Stacy. I'm looking here. Thank you. Discussion.

20 (No response)

21 CHAIR RUFFATTO: Well, I will say this.
22 All of you are tired, as I am, but this I think is
23 an important question, because if we're wondering
24 whether or not the Board's record was valid or
25 not, this is an important question. So that is

1 why I put it on here. I support the motion. Any
2 more discussion?

3 (No response)

4 CHAIR RUFFATTO: There being no more
5 discussion, I'll call the question. A motion has
6 been made that the stringency statute requires
7 peer reviewed studies to support the required
8 findings, and we'll take a roll call vote. Sandy,
9 please proceed.

10 MS. MOISEY-SCHERER: Chairman.

11 CHAIR RUFFATTO: Yes.

12 MS. MOISEY-SCHERER: Mr. Smith.

13 BOARD MEMBER SMITH: Yes.

14 MS. MOISEY-SCHERER: Mr. Lehnherr.

15 BOARD MEMBER LEHNHERR: Yes.

16 MS. MOISEY-SCHERER: Mr. Reiten.

17 BOARD MEMBER REITEN: Yes.

18 MS. MOISEY-SCHERER: Mr. Simpson.

19 BOARD MEMBER SIMPSON: Yes.

20 MS. MOISEY-SCHERER: Ms. Altemus.

21 BOARD MEMBER ALTEMUS: Yes.

22 MS. MOISEY-SCHERER: Ms. Aguirre.

23 BOARD MEMBER AGUIRRE: Yes.

24 CHAIR RUFFATTO: Thank you. The motion
25 passes unanimously.

1 I believe that I have covered my points
2 on this matter. I will say that we will cause a
3 proposed decision to be prepared for the next
4 meeting to finalize the determinations that we've
5 made here. And so thank you all for your
6 patience, and for working through what has been a
7 very beneficial, but very difficult process.

8 Let me find my agenda. But before we
9 move on, does anybody have any further comments on
10 the selenium rule matter? If not, we will go to
11 the new contested case, and --

12 MS. MARQUIS: Mr. Chairman.

13 CHAIR RUFFATTO: Yes.

14 MS. MARQUIS: I apologize. I have to
15 just put one additional thing on the record.

16 Earlier in the Board's discussion today,
17 one of the Board members made a statement about
18 the motives of me and my client in bringing this
19 petition. I'm just compelled to say on the record
20 that judgments and statements about the motives of
21 my client and about me personally are beyond the
22 scope of what's in front of the Board.

23 And I do take my job very, very
24 seriously as a Montana lawyer. I took an oath as
25 an officer of the legal system, I take my

1 responsibility very seriously to pursue the truth,
2 and I know that I have a responsibility under that
3 oath to ensure the quality of justice.

4 So I don't take those statements
5 lightly, and I just wanted to correct that for the
6 record.

7 My client, Teck, if you want to know
8 about their motives, go on their website and look
9 at everything they've done to protect the
10 environment, including bringing online another
11 treatment facility just today that brings the
12 total capacity to treat water up into the tens of
13 millions of gallons. So I just want to say that
14 on the record. Thank you.

15 CHAIR RUFFATTO: Thank you, Ms. Marquis.
16 Anything else anybody wants to say on the selenium
17 rule?

18 (No response)

19 CHAIR RUFFATTO: If not, we'll move to
20 new contested cases.

21 (The proceedings were concluded

22 at 4:49 p.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 - 114 - 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 11th day of
March, 2022.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

<p style="text-align: center;"><u> </u> \$ <u> </u></p> <p>\$1,000 [2] 93:8, 93:12</p> <p style="text-align: center;"><u> </u> 0 <u> </u></p> <p>0.12 - 31:14 0.8 [26] 8:21, 9:6, 9:25, 9:25, 10:19, 14:18, 14:25, 15:15, 15:16, 18:23, 22:16, 31:11, 32:4, 35:25, 36:7, 36:11, 47:6, 47:20, 50:16, 59:20, 80:7, 92:24, 97:17, 98:23, 99:16, 100:23 0.85 - 100:23 08 [2] 4:2, 20:12</p> <p style="text-align: center;"><u> </u> 1 <u> </u></p> <p>1 - 60:5 1.5 [20] 9:22, 10:13, 10:20, 18:25, 20:13, 21:12, 22:18, 26:2, 27:7, 27:19, 27:20, 30:10, 32:5, 32:10, 33:2, 33:4, 35:12, 36:25, 42:10, 83:17 10 - 46:4 100 - 96:8 114 - 115:12 11th - 115:16 13 - 9:16 13th - 34:23 15.1 [5] 12:15, 12:19, 27:23, 28:3, 34:2 1500 - 2:5 17 - 9:18 17.30.632 - 11:21</p>	<p>17.30.632(7)(a) - 1:6 1720 - 94:8 18 - 9:18 19 - 94:8 1:30 - 1:14</p> <p style="text-align: center;"><u> </u> 2 <u> </u></p> <p>2 [8] 30:13, 30:14, 45:2, 49:6, 61:23, 66:23, 67:14, 67:17 2,730 - 93:12 2-15-102 - 46:4 2.0 [2] 17:19, 18:16 200901 - 2:10 2016 [4] 9:16, 22:17, 23:25, 34:23 2020 - 79:10 2021 - 60:5 2021-04 - 4:2 2022 [2] 1:13, 115:17 2024 - 115:22 203 [7] 22:10, 55:5, 55:19, 70:9, 73:18, 76:21, 110:15 203(2 - 51:22 20th - 33:2 240,000 - 99:21 25 - 1:13 27 - 32:21 2:40 - 39:19</p> <p style="text-align: center;"><u> </u> 3 <u> </u></p> <p>3 [3] 49:6, 62:3, 106:14 303 - 21:9 304 - 11:18 304(a [6] 11:14, 24:12, 24:23, 32:18, 33:4, 33:16 310 - 21:9 31st [3] 2:5, 13:15, 79:10</p> <p style="text-align: center;"><u> </u> 4 <u> </u></p> <p>4 [6] 44:16, 61:19, 62:3, 72:3, 77:15, 90:23</p>	<p>401 - 2:5 45285 [2] 9:16, 34:22 45286 [2] 9:16, 34:22 4:49 - 114:22</p> <p style="text-align: center;"><u> </u> 5 <u> </u></p> <p>5 [2] 62:3, 92:18 5,000 [8] 14:14, 14:16, 14:17, 35:24, 38:22, 62:19, 99:12, 100:16 5.6 - 20:6 50,000 [2] 101:23, 102:15 52.02 - 32:21 59101 - 2:5 59620 - 2:11</p> <p style="text-align: center;"><u> </u> 6 <u> </u></p> <p>6 - 62:3</p> <p style="text-align: center;"><u> </u> 7 <u> </u></p> <p>7 [3] 3:25, 62:3, 62:21 75-5-103 - 78:12 75-5-203 [23] 1:6, 4:5, 21:6, 22:15, 22:25, 44:16, 49:5, 50:7, 51:19, 59:5, 59:25, 60:9, 61:15, 66:24, 67:12, 69:14, 72:3, 73:12, 75:6, 75:25, 77:15, 90:22, 106:14 75-5-203(2 [2] 21:18, 22:9 75-5-301 - 21:9 75-5-302 - 21:9</p> <p style="text-align: center;"><u> </u> 8 <u> </u></p> <p>8 [29] 4:7,</p>	<p>4:9, 4:11, 6:18, 6:19, 13:8, 20:25, 21:2, 26:22, 27:8, 27:21, 28:13, 30:23, 33:6, 38:19, 41:23, 42:10, 42:11, 42:22, 45:10, 48:7, 60:16, 67:3, 83:5, 83:16, 85:21, 91:6, 102:11, 105:4 8,985 - 94:9 800 [4] 29:8, 30:1, 32:11, 35:8 807 - 28:15 81 [2] 9:15, 34:22 85 - 20:4</p> <p style="text-align: center;"><u> </u> 9 <u> </u></p> <p>9 [3] 89:14, 94:17, 115:22 95 - 35:12</p> <p style="text-align: center;"><u> </u> A <u> </u></p> <p>abide - 37:17 ability - 115:14 able [3] 5:4, 90:10, 94:3 absent - 67:21 absorption - 92:18 acceptable [2] 104:10, 104:12 accomplish - 69:10 accordance - 87:18 according [3] 94:15, 95:14, 95:19 account - 12:1 accumulation - 24:20 accurate [3] 92:21, 94:12, 102:7 accusations - 78:3 achievable [3] 88:20, 89:4,</p>	<p>103:16 achieve [2] 88:22, 89:6 acknowledged [2] 22:18, 22:19 across [2] 3:7, 93:23 Act - 77:10 action [7] 3:25, 50:1, 56:6, 56:11, 56:12, 58:13, 98:9 actions - 100:20 actual - 37:11 add [5] 33:14, 33:15, 72:14, 104:5, 111:1 addition - 98:3 additional [6] 13:24, 14:3, 23:7, 62:4, 64:20, 113:15 address [14] 16:11, 21:11, 22:25, 24:5, 24:9, 30:11, 43:24, 44:12, 63:6, 64:19, 78:8, 103:17, 107:16, 109:8 addressed [9] 48:18, 67:24, 92:1, 92:5, 98:17, 99:1, 102:19, 102:25, 103:16 addressing - 13:7 adequately - 102:19 admit [2] 24:2, 102:14 adopt [7] 21:8, 51:23, 60:9, 67:1, 68:4, 78:2, 107:7 adopted [8] 11:20, 12:4, 21:25, 38:15, 69:23, 70:8, 93:22, 107:12</p>	<p>adopting [4] 21:16, 60:12, 80:25, 106:20 adoption - 102:17 adopts - 27:15 advantage - 14:8 adverse [3] 15:4, 99:14, 100:6 adversely - 92:10 advice [3] 64:10, 74:21, 75:1 advisor - 73:20 advisory [8] 60:7, 71:12, 71:19, 73:21, 74:9, 74:11, 74:14, 74:17 affect [3] 78:25, 79:4, 79:21 affected [7] 44:17, 77:13, 77:16, 77:19, 77:25, 78:20, 92:10 affects - 15:5 affirmation - 93:15 affirmative - 89:1 affirmed [2] 58:24, 94:3 affixed - 115:16 afternoon [2] 7:9, 7:20 against [2] 79:14, 79:15 agency [3] 56:6, 56:10, 56:12 agenda - 113:8 agree [14] 9:1, 33:21, 36:18, 41:1, 41:19, 52:20, 56:11, 57:17, 59:14, 64:24, 70:24, 71:6, 72:14, 111:1</p>
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<p>agrees - 72:1 Aguirre [47] 1:19, 3:19, 3:20, 20:23, 37:7, 38:7, 38:10, 40:11, 40:12, 41:2, 41:24, 43:17, 43:18, 49:24, 50:3, 50:12, 50:13, 51:2, 52:8, 57:25, 58:6, 58:10, 59:14, 61:11, 61:14, 61:18, 61:20, 66:6, 66:7, 68:9, 69:5, 83:1, 83:2, 84:7, 84:12, 85:17, 85:18, 101:5, 101:6, 104:11, 104:12, 105:25, 106:1, 111:14, 111:17, 112:22, 112:23 ahead [11] 28:10, 33:11, 34:10, 35:16, 51:16, 54:23, 67:6, 81:5, 83:7, 84:11, 91:24 allow - 108:21 allowed [3] 13:23, 14:2, 76:7 allows [3] 26:3, 26:16, 93:17 already [10] 13:23, 38:23, 58:2, 58:8, 58:14, 59:3, 61:8, 69:23, 83:11, 92:8 Altemus [20] 1:18, 3:17, 3:18, 40:9, 40:10, 40:23, 40:24,</p>	<p>43:15, 43:16, 50:17, 66:4, 66:5, 82:24, 82:25, 85:15, 85:16, 105:23, 105:24, 112:20, 112:21 altered - 95:25 alternatives - 32:12 although - 98:15 ambient [3] 25:2, 32:16, 35:2 amended - 104:15 amendment [4] 104:3, 104:5, 104:10, 104:11 among - 75:19 amount [3] 13:20, 14:3, 93:13 amounts - 93:2 Amy [2] 7:23, 7:25 analogous - 17:2 analyses - 94:16 analysis [5] 21:17, 31:12, 47:8, 63:25, 99:13 analytical [3] 93:17, 96:18, 102:22 analyze [7] 27:20, 56:4, 87:17, 89:9, 89:9, 89:14, 92:24 analyzed - 89:13 Ann - 1:6 Annotated [2] 4:4, 46:5 answered [5] 7:3, 43:23, 60:16, 83:11, 83:13 answers [2] 13:2, 42:16 anymore - 58:12 anyway -</p>	<p>102:1 apologize [3] 50:1, 72:22, 113:14 appear - 98:3 APPEARING [2] 2:2, 2:7 appears - 73:15 appendix [4] 24:13, 24:14, 24:24, 33:18 apples - 42:13 applicability [2] 22:10, 56:7 applicable - 80:7 application [2] 71:3, 98:7 applied [2] 46:3, 102:21 applies [4] 10:3, 27:15, 77:21, 80:23 apply [6] 8:16, 30:17, 30:20, 30:21, 45:20, 75:25 appreciate [7] 8:7, 13:2, 54:18, 56:25, 60:5, 64:14, 70:19 approach [2] 5:17, 6:12 appropriate [9] 18:14, 36:8, 38:19, 57:11, 59:15, 67:21, 73:11, 73:14, 110:25 approval [6] 4:23, 5:1, 22:2, 22:19, 31:22, 95:19 approve - 42:14 approved [5] 22:3, 22:7, 22:23, 25:16, 66:19 April - 72:7 aquatic [9] 19:14, 24:16, 24:21, 25:2, 30:15, 32:16, 34:6, 35:1, 95:21 areas - 96:24</p>	<p>aren't [2] 57:12, 109:17 argue - 107:9 argued [6] 10:2, 62:5, 62:8, 68:1, 72:14, 110:24 argues [2] 26:13, 77:24 arguing - 103:11 arguments [9] 4:20, 5:3, 7:2, 9:5, 11:1, 11:11, 44:9, 57:10, 110:22 arise - 102:18 ARM [2] 1:5, 11:20 arrive - 14:18 arrived - 14:19 artificially - 97:15 ascertainable [4] 89:18, 106:16, 108:13, 108:25 asking - 79:12 asks - 107:20 aspects - 33:9 aspirational - 41:5 asserted - 78:21 assessing - 8:20 assessments [2] 31:4, 31:17 Assistant - 2:8 associated [2] 47:18, 50:16 assume [3] 45:15, 91:19, 103:14 assuming - 28:9 assumption [2] 68:7, 96:14 atomic - 92:18 attach - 25:25 attaches [2] 26:1, 27:6 attempt - 21:7 attention - 9:17</p>	<p>attenuated - 78:5 attorney [5] 2:2, 2:4, 2:7, 2:8, 16:21 attorneys - 14:4 attributes - 26:11 authorities - 98:17 authority [7] 45:19, 46:1, 46:7, 46:16, 48:15, 56:3, 60:5 available [9] 5:5, 7:18, 10:22, 12:25, 14:15, 15:11, 97:23, 98:4, 98:22 average [3] 81:22, 87:21, 98:1 avoid - 73:3 awhile [2] 37:5, 72:23 aye [22] 42:24, 43:6, 43:8, 43:14, 43:16, 43:18, 75:7, 82:5, 82:23, 82:25, 83:2, 84:25, 85:6, 85:8, 85:14, 85:16, 85:18, 105:13, 105:15, 105:22, 105:24, 106:1</p>	<p>became - 8:11 become [3] 22:12, 57:11, 71:14 becomes - 54:11 beefed - 92:12 begin - 20:1 behalf [3] 2:2, 2:7, 44:13 behind - 8:13 believes [3] 44:17, 49:6, 77:17 beneficial - 113:7 benefit - 41:18 BER [3] 4:2, 14:13, 35:23 best [5] 76:24, 92:20, 100:25, 102:8, 115:13 better [3] 8:1, 33:8, 69:9 beyond [5] 36:4, 50:17, 91:4, 99:3, 113:21 bill [3] 93:5, 108:6, 108:9 Billings - 2:5 billion [2] 92:17, 93:11 bioaccumulate - 24:15 bioaccumulates - 24:15 bioaccumulation [11] 12:2, 26:12, 30:4, 36:21, 95:22, 95:24, 96:1, 96:10, 96:12, 96:13, 96:24 bit [10] 9:18, 23:9, 24:7, 49:13, 58:17, 73:1, 74:8, 92:12, 100:14, 107:25 Board [288] 1:1, 1:4, 1:17, 3:10, 3:12, 3:14, 3:16, 3:18, 3:20, 4:19,</p>
B					
			<p>background [3] 86:23, 89:12, 94:5 barren [2] 86:7, 90:8 basic [6] 4:24, 6:8, 8:4, 8:5, 66:16, 68:7 basically [2] 67:12, 67:13 basin [2] 15:5, 94:7 basing [2] 38:1, 38:2 BC's - 80:19</p>		

5:3, 5:13, 6:13, 6:22, 7:10, 7:20, 8:7, 8:23, 9:24, 13:4, 13:11, 15:24, 16:9, 16:14, 20:9, 20:10, 20:19, 20:23, 21:2, 21:5, 21:7, 21:16, 22:14, 22:21, 23:7, 23:8, 24:6, 24:9, 25:11, 25:12, 26:17, 27:12, 28:5, 28:9, 28:11, 28:24, 29:3, 29:4, 31:8, 32:14, 33:13, 34:14, 35:16, 35:17, 36:15, 36:16, 36:17, 37:2, 37:4, 37:6, 37:7, 37:8, 38:6, 38:7, 38:8, 38:9, 40:2, 40:4, 40:6, 40:8, 40:10, 40:12, 40:17, 40:20, 40:22, 40:24, 40:25, 41:1, 41:2, 41:12, 41:15, 41:21, 41:23, 42:3, 43:8, 43:10, 43:12, 43:14, 43:16, 43:18, 44:12, 44:14, 44:19, 44:21, 45:18, 45:19, 45:23, 45:25, 46:1, 46:7, 46:15, 46:22, 47:2, 47:9, 48:1, 48:14, 48:21, 49:2,	49:24, 50:2, 50:3, 50:12, 50:13, 50:17, 51:3, 51:9, 51:10, 51:15, 51:17, 51:22, 51:25, 52:4, 52:6, 52:8, 52:12, 52:18, 53:6, 53:16, 54:1, 54:4, 54:9, 54:19, 54:21, 54:25, 55:6, 55:11, 56:2, 56:3, 56:5, 56:10, 56:16, 56:21, 57:25, 58:6, 58:10, 58:18, 58:19, 58:24, 58:25, 59:11, 59:13, 59:14, 59:19, 60:4, 60:11, 60:11, 60:23, 61:11, 61:14, 61:18, 61:19, 61:20, 62:25, 63:20, 64:2, 64:17, 64:18, 64:24, 65:22, 66:3, 66:5, 66:7, 66:10, 66:11, 66:12, 67:4, 67:9, 68:9, 68:14, 68:15, 68:20, 68:24, 69:5, 69:15, 69:17, 69:19, 70:6, 70:8, 70:11, 70:14, 70:14, 71:2, 71:9, 71:10, 71:11, 71:14, 71:25, 72:7, 72:20,	72:24, 73:8, 73:13, 73:20, 74:3, 74:6, 74:14, 74:16, 74:19, 75:19, 75:21, 76:18, 76:19, 77:8, 78:10, 79:19, 79:24, 80:3, 80:15, 80:16, 81:3, 81:6, 81:16, 82:8, 82:17, 82:19, 82:21, 82:23, 82:25, 83:2, 83:9, 83:15, 84:3, 84:7, 84:9, 84:12, 84:17, 84:18, 85:8, 85:10, 85:12, 85:14, 85:16, 85:18, 86:4, 86:11, 88:3, 88:8, 89:2, 90:18, 91:5, 91:13, 91:16, 99:8, 101:5, 101:6, 101:21, 103:9, 104:11, 104:12, 104:17, 104:22, 105:1, 105:8, 105:15, 105:16, 105:18, 105:20, 105:22, 105:24, 106:1, 106:11, 107:18, 109:3, 110:2, 110:6, 110:13, 111:4, 111:7, 111:14, 111:17, 112:13, 112:15, 112:17,	112:19, 112:21, 112:23, 113:17, 113:22 Board's [18] 32:25, 45:24, 48:15, 49:2, 55:11, 56:13, 57:20, 60:24, 64:13, 67:2, 78:24, 79:1, 86:6, 88:23, 99:12, 100:20, 111:24, 113:16 bodies [3] 32:20, 32:23, 33:4 body [5] 8:20, 11:23, 24:17, 33:24, 100:6 boiled - 28:21 border [4] 77:22, 80:8, 80:19, 80:23 bore - 98:20 bottom - 30:14 boundary - 19:15 Bowers [47] 2:8, 7:18, 7:20, 7:21, 27:10, 27:11, 28:4, 32:13, 33:10, 44:11, 44:12, 45:14, 48:22, 49:1, 49:12, 50:2, 51:2, 55:8, 55:10, 60:2, 60:3, 61:14, 61:18, 61:24, 63:14, 63:19, 64:1, 70:25, 71:17, 71:20, 72:9, 74:15, 74:18, 77:3, 77:7, 78:18, 80:5, 80:15, 90:15, 90:17, 91:11, 106:8,	106:10, 107:15, 109:7, 109:23, 110:1 Box - 2:10 break [5] 39:18, 39:18, 57:22, 64:22, 65:1 brief [2] 11:12, 51:10 briefed [2] 110:4, 110:22 briefing [3] 67:25, 86:5, 106:24 briefly [3] 28:7, 86:14, 99:10 briefs - 110:24 bring [2] 72:6, 79:24 bringing [2] 113:18, 114:10 brings - 114:11 British [16] 15:12, 16:2, 16:11, 16:17, 17:19, 18:16, 19:7, 19:10, 19:17, 19:23, 78:1, 79:2, 79:3, 79:20, 98:18, 100:22 broken - 100:16 Brooke - 108:4 brought [3] 18:1, 90:20, 94:6 <hr/> C <hr/> calculation - 97:16 calibrated - 97:5 can't [9] 16:21, 26:22, 31:1, 56:14, 60:19, 69:3, 100:11, 103:1, 103:24	Canada [4] 77:12, 78:16, 80:11, 88:25 Canadian [2] 16:21, 35:18 cannot [8] 22:8, 44:15, 46:17, 47:12, 53:7, 60:20, 77:19, 88:9 capacity [2] 73:21, 114:12 carefully - 84:6 carries - 75:11 cart - 91:24 case [22] 9:9, 10:4, 10:5, 14:12, 23:10, 23:19, 23:25, 24:7, 25:21, 27:5, 29:13, 31:3, 45:21, 48:13, 70:1, 76:16, 80:14, 81:10, 94:1, 94:23, 95:17, 113:11 cases [2] 30:4, 114:20 catchment - 94:9 cause - 113:2 certain [3] 36:10, 47:13, 102:3 certainly - 98:11 certify - 115:7 Chair [183] 3:4, 3:6, 3:7, 3:17, 3:22, 5:21, 6:2, 6:5, 7:12, 7:22, 10:24, 13:1, 15:22, 16:5, 19:1, 20:8, 20:16, 20:21, 20:24, 23:6, 24:2, 24:10, 25:8, 27:10, 27:11, 28:4, 28:8, 28:20, 32:6, 32:13, 33:10, 34:8,
---	---	---	---	--	--

35:15, 36:14, 37:2, 38:6, 39:16, 39:21, 39:25, 40:22, 40:25, 41:11, 41:14, 41:17, 42:18, 42:20, 43:1, 43:3, 43:6, 43:19, 43:23, 44:11, 45:14, 46:22, 46:25, 47:24, 48:21, 49:1, 49:8, 49:22, 50:11, 51:11, 51:13, 51:16, 52:6, 52:10, 52:14, 52:19, 53:18, 54:3, 54:18, 54:23, 55:7, 55:10, 55:24, 56:1, 56:18, 56:25, 58:3, 58:9, 58:16, 59:11, 60:2, 60:3, 60:22, 61:13, 62:1, 63:19, 63:22, 64:1, 64:14, 65:4, 65:8, 65:13, 65:16, 66:2, 66:9, 66:12, 67:6, 67:15, 68:11, 68:25, 69:9, 69:16, 69:18, 70:2, 70:19, 71:17, 72:9, 72:18, 72:21, 73:6, 73:10, 73:22, 74:13, 74:18, 74:22, 75:4, 75:9, 75:11, 76:18, 76:20, 76:22, 77:7, 78:7, 79:25, 81:5, 81:12,	81:14, 81:24, 82:2, 82:7, 82:10, 82:15, 83:3, 83:12, 83:18, 84:4, 84:11, 84:16, 84:18, 84:21, 85:2, 85:4, 85:6, 85:19, 90:15, 90:17, 91:11, 91:15, 99:5, 101:4, 101:16, 101:19, 103:5, 104:14, 104:18, 104:20, 104:25, 105:2, 105:9, 105:13, 106:2, 106:10, 107:15, 107:17, 109:2, 109:5, 109:23, 110:1, 110:11, 110:20, 111:6, 111:13, 111:15, 111:18, 111:21, 112:4, 112:11, 112:24, 113:13, 114:15, 114:19 Chairman [48] 1:16, 5:14, 7:9, 7:14, 8:6, 11:3, 13:12, 16:8, 19:5, 20:11, 25:11, 29:2, 33:12, 36:17, 37:7, 38:9, 39:24, 40:14, 40:21, 41:16, 43:5, 45:17, 48:1, 51:15, 53:16, 56:22, 58:19,	65:15, 69:17, 69:22, 73:9, 73:13, 74:6, 75:21, 78:10, 81:16, 82:14, 85:5, 86:3, 91:13, 99:9, 101:21, 104:22, 105:12, 110:14, 111:5, 112:10, 113:12 challenge [2] 69:2, 69:2 challenged [2] 45:8, 55:23 chance - 28:25 change [8] 16:3, 18:17, 23:21, 26:5, 30:8, 48:16, 52:5, 58:25 changed [5] 17:12, 52:4, 52:7, 52:11, 52:13 changes [2] 5:10, 15:20 chapter - 51:23 choice - 48:7 circumstance - 10:4 circumstances [2] 21:11, 93:23 citations [2] 78:23, 90:11 cited [4] 25:21, 34:17, 106:13, 106:23 citizens [2] 14:21, 36:6 claim - 78:21 clarified - 108:4 clarify - 29:16 Clark [2] 115:4, 115:7 class - 100:19 clear [32] 8:11, 8:16, 10:7, 12:7, 14:17, 18:21, 26:12, 27:5, 36:11, 36:24,	44:15, 47:4, 49:24, 52:22, 53:10, 55:20, 61:25, 62:13, 73:5, 79:11, 79:18, 88:17, 89:21, 92:8, 103:14, 104:7, 107:19, 108:1, 108:6, 109:12, 109:15, 111:2 clearly [9] 14:23, 22:11, 36:19, 63:10, 67:24, 77:15, 77:16, 79:23, 92:24 client [3] 113:18, 113:21, 114:7 close [2] 15:15, 100:23 closely - 19:7 closer - 81:1 coal [31] 1:4, 2:2, 4:3, 6:25, 7:4, 7:8, 7:11, 15:13, 38:2, 62:6, 67:25, 75:18, 75:23, 76:1, 76:24, 77:9, 77:19, 77:24, 79:4, 79:14, 79:15, 79:16, 79:17, 79:22, 81:9, 81:19, 82:4, 86:1, 88:24, 94:19, 103:12 Coal's [5] 15:19, 52:21, 77:4, 79:17, 80:1 Code [3] 1:6, 4:4, 46:5 codified - 11:20 colleague -	38:9 collected - 88:1 collection - 88:5 Columbia [15] 15:13, 16:3, 16:12, 16:17, 17:19, 18:16, 19:8, 19:17, 19:23, 78:2, 79:2, 79:3, 79:20, 98:18, 100:22 Columbia's - 19:10 column [27] 4:8, 6:17, 8:21, 9:20, 11:23, 11:25, 12:8, 12:13, 20:3, 25:1, 30:16, 30:20, 30:23, 30:25, 31:4, 31:15, 31:23, 33:20, 33:24, 34:3, 42:22, 49:3, 50:5, 55:13, 60:16, 77:20, 91:6 comb - 30:1 combination - 97:12 combined - 97:14 comes - 56:14 coming - 88:10 comment [18] 5:10, 8:10, 8:12, 15:12, 16:20, 24:7, 46:11, 46:12, 47:3, 49:19, 50:10, 51:7, 52:1, 52:16, 54:19, 67:18, 70:5, 101:3 comments [23] 4:13, 4:14, 4:18, 5:3, 5:8, 5:14, 5:16, 5:19, 9:14, 10:6, 10:22, 11:8, 13:2, 14:11,	36:15, 37:5, 46:23, 47:25, 48:23, 62:22, 90:24, 109:3, 113:9 commission [4] 79:9, 79:13, 79:22, 115:21 Commissioners [3] 1:5, 76:14, 76:17 commit [9] 60:20, 61:6, 63:1, 63:4, 63:17, 63:17, 63:20, 63:21, 71:23 committed [3] 63:23, 64:2, 72:2 Committee - 17:9 committing - 63:7 commonly - 77:1 company - 35:19 comparable [17] 6:20, 21:3, 21:10, 27:16, 32:10, 32:15, 42:8, 42:9, 42:10, 42:12, 42:23, 44:18, 44:22, 51:24, 55:14, 77:18, 91:7 compare - 42:13 compared [2] 9:7, 9:8 comparison - 37:24 compelled - 113:19 complaint - 13:15 complete [4] 21:17, 97:1, 97:3, 102:7 completed - 46:10 completely - 60:25 compliance [7] 10:16,
---	---	--	---	---	--

10:18, 18:2, 22:9, 50:21, 55:23, 73:18 compliant [2] 57:13, 57:15 complicated - 47:8 complies [5] 6:4, 18:12, 43:22, 61:10, 65:7 comply [24] 9:3, 9:9, 9:10, 18:4, 18:9, 22:14, 26:8, 31:10, 31:13, 44:1, 44:24, 45:7, 52:23, 55:5, 62:11, 62:20, 66:24, 69:14, 70:9, 73:11, 75:6, 83:6, 84:14, 84:24 component - 11:17 components [2] 11:22, 33:22 composite - 87:21 comprised - 11:18 comprises - 94:7 computer-aided - 115:11 concentration - 97:16 concentrations [4] 92:25, 95:16, 97:13, 98:5 concepts - 99:18 concern - 57:16 concerns - 15:4 conclude [2] 103:13, 103:15 concluded [2] 21:19, 114:21 conclusion [2] 97:21, 106:18 conclusive [3] 32:1, 32:3, 87:19 conclusory [3] 87:16,	89:22, 90:3 concur - 70:13 condition [3] 95:1, 95:1, 95:6 conditions [3] 27:1, 36:23, 97:6 conducted [5] 18:12, 61:8, 64:17, 97:10, 110:6 confidence [3] 92:25, 93:16, 102:21 confirm [2] 57:5, 96:19 confirmed - 8:17 conflict - 48:19 conflicting - 110:22 confluence - 94:13 conform [2] 44:25, 61:21 confused - 67:10 confusing [3] 37:10, 37:11, 37:20 confusion - 73:3 consequence [4] 43:25, 48:3, 53:23, 68:23 conservative [5] 95:18, 95:24, 97:9, 97:12, 97:14 consider [5] 4:15, 36:20, 69:22, 104:4, 110:25 consideration - 86:7 considered [3] 76:25, 81:19, 96:21 consistent [6] 12:23, 55:17, 67:1, 80:12, 89:10, 98:6 consistently - 95:15 construct - 96:19 consultation - 73:20 contain [7]	62:16, 85:22, 101:12, 101:13, 101:24, 105:4, 115:12 contained [3] 89:19, 95:13, 106:17 contains - 101:9 contested [2] 113:11, 114:20 continue - 40:16 continued - 19:16 continues - 19:7 contradict [2] 35:22, 99:11 contributed - 86:23 contributions [2] 88:10, 89:12 cooperating - 80:11 coordinate - 19:7 coordination - 19:17 corporation [5] 76:1, 76:5, 76:7, 76:10, 78:14 corporations - 77:11 correct [9] 23:22, 38:13, 50:16, 60:24, 61:24, 70:22, 72:17, 74:11, 114:5 correcting - 70:15 correctly - 78:18 couldn't - 96:11 County [9] 1:4, 1:5, 4:3, 49:21, 67:25, 76:14, 76:17, 115:4, 115:6 couple [5] 14:3, 14:4, 21:14,	72:25, 85:25 course - 21:14 Court [9] 1:23, 10:5, 23:14, 25:19, 25:20, 31:25, 82:9, 115:5, 115:20 cover - 58:2 covered - 113:1 creative - 69:1 credible [2] 10:21, 87:12 criteria [21] 11:14, 11:15, 11:18, 11:18, 12:14, 12:21, 24:19, 24:23, 25:3, 27:24, 28:3, 33:4, 33:16, 33:20, 34:2, 34:3, 34:4, 34:24, 35:5, 35:7, 96:20 criterion [3] 24:25, 32:17, 34:1 critical - 94:22 CRUTCHER [3] 1:22, 115:5, 115:19 cured - 23:1 current [9] 17:18, 52:3, 54:10, 88:20, 88:22, 89:4, 89:6, 103:17, 103:18 currently [5] 74:19, 80:17, 80:24, 87:1, 87:12 cutting - 22:22 <hr/> D <hr/> data [16] 30:22, 87:11, 87:16, 87:17, 87:19,	87:22, 87:24, 88:5, 94:12, 94:14, 96:11, 96:15, 97:8, 97:11, 97:23, 98:4 date [2] 96:2, 98:4 dated - 79:9 Dave [6] 20:16, 69:18, 74:1, 80:2, 83:7, 99:5 David [6] 1:17, 1:19, 21:4, 23:6, 103:5, 104:15 deal [4] 15:8, 48:24, 59:18, 61:7 dealing [2] 84:5, 94:1 deals - 18:22 dearly - 93:8 debate - 13:18 debated - 62:22 December - 79:10 decide - 69:1 decided [4] 54:10, 59:20, 71:8, 75:1 deciding - 38:13 decision [23] 4:22, 5:1, 10:7, 14:18, 15:18, 15:20, 23:18, 37:10, 38:1, 38:3, 59:7, 66:17, 66:18, 66:21, 75:14, 84:1, 86:6, 91:6, 109:9, 109:9, 110:5, 110:10, 113:3 decisions [5] 4:13, 4:24, 5:9, 46:2, 108:7 declaration - 53:9 declare [3]	46:16, 53:2, 63:9 defect - 23:1 defer - 49:13 deficient [2] 69:24, 72:15 define - 23:11 defined - 81:8 definitely [2] 55:2, 99:13 definition [4] 28:18, 76:20, 78:11, 78:17 definitions - 77:10 degree - 93:16 deleterious - 35:1 demand - 108:7 demonstrate [2] 50:21, 108:12 Department [35] 2:7, 2:10, 11:8, 12:4, 26:16, 33:19, 44:23, 49:5, 49:6, 50:4, 52:4, 52:7, 52:9, 52:15, 53:11, 53:22, 54:12, 55:2, 55:4, 55:16, 58:21, 59:23, 61:5, 70:10, 70:16, 70:23, 71:9, 73:16, 74:20, 75:1, 75:6, 89:3, 91:10, 99:3, 107:21 Department's [10] 48:10, 48:11, 49:11, 50:1, 57:18, 64:12, 78:1, 106:18, 109:18, 110:4 depending [2] 24:16, 56:11 depends [3] 32:23, 68:25, 88:24 DEQ [54] 7:1, 7:13, 8:17, 9:1, 9:7, 10:14,
---	--	--	---	--	---

10:25, 15:25, 17:15, 19:6, 21:25, 24:4, 28:25, 32:7, 32:7, 37:19, 44:6, 44:10, 44:13, 45:11, 46:20, 48:24, 51:4, 52:23, 57:5, 57:7, 58:14, 60:9, 60:18, 62:9, 62:25, 63:7, 63:23, 64:9, 66:24, 67:10, 68:13, 68:22, 69:2, 69:13, 70:25, 71:6, 71:23, 72:1, 72:2, 73:11, 74:9, 75:6, 79:20, 88:8, 103:10, 107:6, 107:20, 108:2 DEQ's [7] 27:24, 32:15, 52:20, 71:7, 77:3, 79:7, 90:16 DEQ7 - 92:22 derivation - 109:19 derive - 25:5 derived [7] 27:25, 31:2, 33:6, 34:25, 35:6, 35:10, 35:11 described [2] 8:14, 96:3 desire - 35:20 desired - 58:13 despite - 10:15 detail [2] 9:18, 17:22 detection [3] 92:15, 92:17, 94:17 determination [15] 22:23, 39:2, 39:14, 45:9, 47:5, 49:2, 50:5, 83:16, 83:24, 83:25, 98:9, 98:10,	98:14, 98:23, 102:3 determinations [4] 17:13, 56:7, 100:19, 113:4 determine [2] 21:2, 76:8 determined - 110:7 determines [2] 28:16, 44:21 determining - 76:11 develop - 22:4 developed [2] 21:21, 101:23 developing [2] 19:21, 80:12 development [4] 19:9, 23:3, 31:9, 98:11 died - 68:18 dietary - 12:2 differently [2] 24:16, 69:12 difficult - 113:7 diligence - 8:8 direct - 15:23 directed - 5:6 direction - 36:10 directly [2] 12:14, 79:20 Director [2] 79:7, 79:12 disagree [2] 64:20, 81:22 discharge - 95:4 discharging - 31:9 discount - 100:13 discuss [2] 19:24, 21:4 discussing - 93:5 discussion [41] 6:23, 13:5, 23:7, 39:17, 40:17, 41:12, 42:16, 42:18, 44:5, 46:23, 49:23, 51:11, 53:15, 54:2, 64:4, 69:16,	72:21, 74:4, 75:2, 75:19, 81:15, 81:25, 82:2, 84:19, 84:22, 89:5, 91:3, 91:4, 91:12, 99:6, 101:7, 101:20, 104:18, 104:21, 105:7, 105:10, 110:12, 111:19, 112:2, 112:5, 113:16 discussions - 11:17 dispute - 10:21 disputed - 90:9 disputes - 8:12 distracted - 7:22 distracting - 7:6 distribution - 33:2 District [2] 10:5, 25:19 Doctor [4] 5:22, 47:24, 81:24, 101:4 document [17] 10:7, 23:25, 25:4, 28:15, 29:9, 30:2, 32:11, 32:18, 32:19, 33:16, 35:8, 41:4, 42:12, 66:18, 66:22, 86:6, 109:19 documentation [2] 36:1, 36:5 documents [6] 14:15, 14:17, 15:10, 75:14, 99:12, 109:10 dollar - 93:5 dollars - 93:9 doubt - 10:20 download - 14:15 dozens [5] 14:20,	14:21, 14:21, 36:6, 100:17 Dr [19] 5:12, 13:9, 15:22, 16:8, 19:2, 19:5, 36:18, 41:20, 46:25, 48:23, 49:9, 54:3, 56:19, 72:22, 74:5, 74:23, 75:19, 81:15, 99:6 drafting - 66:21 draw [2] 9:17, 56:15 drive - 31:16 dug - 102:14 duty [2] 45:7, 89:1 <hr/> E <hr/> earlier [5] 56:4, 71:11, 80:5, 107:25, 113:16 ease - 75:16 easy [3] 38:24, 54:16, 57:4 economic - 98:11 ecosystem [2] 30:15, 101:1 effect [3] 15:17, 15:19, 81:11 effects [2] 35:2, 100:13 effort - 8:8 egg [11] 11:22, 12:15, 12:18, 27:23, 28:2, 33:23, 34:1, 34:4, 87:23, 87:25, 88:5 egregious - 79:5 eight [3] 45:3, 49:20, 67:14 either [7] 44:24, 45:11, 55:17, 59:4, 61:20, 63:9, 63:17 element - 24:25	elements [2] 11:19, 50:23 Elk [5] 79:15, 79:16, 94:7, 94:11, 94:13 emotional - 90:2 empirical - 96:2 enact - 29:25 enacted [5] 9:25, 45:22, 45:22, 45:23, 89:25 endanger - 47:18 enforce [2] 45:20, 56:4 enforceability - 56:8 enforceable [2] 8:19, 41:4 enforced [3] 46:3, 46:17, 53:8 enforcement [4] 17:13, 31:5, 31:17, 50:22 ensure [2] 34:5, 114:3 entering - 94:11 entertain - 68:19 entire [4] 23:24, 24:13, 28:15, 32:17 entirety - 33:15 entities - 76:23 entity - 78:15 environment [8] 26:20, 86:19, 86:21, 87:8, 88:13, 88:15, 103:24, 114:10 environmental [4] 1:1, 2:10, 32:24, 44:14 envisions - 59:19 EPA [43] 8:17, 9:1, 9:19, 10:12, 10:20, 11:14, 11:18, 15:1, 20:14, 21:12, 21:20,	21:24, 22:1, 22:2, 22:3, 22:4, 22:7, 22:17, 22:19, 22:22, 23:25, 24:21, 25:14, 25:18, 26:1, 26:3, 27:6, 28:15, 29:6, 29:14, 29:17, 30:3, 30:8, 31:21, 32:17, 33:1, 34:20, 35:4, 36:1, 39:5, 95:13, 95:19, 95:20 EPA's [8] 24:12, 25:23, 32:1, 32:2, 34:2, 34:23, 41:9, 97:24 equals - 87:22 equated - 96:2 erred [2] 22:21, 60:23 erroneous - 27:21 erroneously - 61:8 error [7] 60:24, 64:17, 64:18, 68:15, 68:15, 70:15, 70:22 ESQ [2] 2:3, 2:8 essentially [3] 9:19, 26:6, 48:5 establish [2] 33:20, 78:6 etc - 52:2 evaluation - 14:16 events [2] 99:14, 100:6 everybody - 41:18 everyone [3] 4:17, 13:20, 99:20 everything [2] 99:21, 114:9 evidence [30] 14:23, 31:7, 52:2, 52:16, 62:16, 62:18,
--	---	---	--	---	--

67:19, 79:7, 85:22, 86:8, 86:17, 86:20, 86:22, 87:2, 88:21, 90:9, 90:11, 90:13, 94:2, 101:10, 101:13, 101:24, 103:2, 103:14, 103:19, 103:20, 104:6, 104:8, 105:5, 109:21 evidenced - 87:10 exact [2] 12:9, 34:18 example [2] 100:7, 107:6 exceed [3] 28:13, 45:3, 87:12 exceeding - 28:19 exceeds - 30:23 excellent - 38:10 Excuse [3] 7:25, 51:18, 104:23 exempt - 10:17 exhaustively - 47:9 exhibit - 30:4 existing [6] 18:15, 45:20, 56:5, 56:8, 56:9, 57:19 exists [2] 90:11, 94:14 expect [3] 32:6, 55:4, 66:12 experience - 96:22 expert - 7:17 expertise - 103:25 expires - 115:21 explained - 27:25 explaining - 33:8 explains - 33:1 explanation -	27:13 explicitly - 22:3 exposure [2] 12:2, 12:3 expressly - 46:3 extensive [5] 8:10, 11:8, 14:19, 36:4, 101:22 extent - 48:18 extra - 108:22 extremely [4] 92:11, 92:25, 93:14, 97:14 <hr/> F <hr/> face [2] 42:15, 111:3 faces [2] 7:23, 8:1 facility - 114:11 factor - 94:23 factors [3] 24:17, 32:24, 102:19 facts - 100:2 fail - 83:6 failed [3] 62:11, 84:14, 84:24 failure [2] 22:25, 43:25 fairly [4] 38:24, 57:4, 59:17, 62:13 fall - 9:2 Falls - 96:7 fashion - 26:24 favor [7] 14:25, 42:24, 44:9, 75:7, 82:5, 84:25, 105:10 favorable - 35:20 February - 1:13 Federal [77] 6:20, 9:10, 9:15, 10:1, 10:8, 12:6, 12:11, 12:12, 12:14, 12:17, 12:21, 12:23, 13:9, 15:2, 18:24,	21:3, 21:10, 22:6, 23:11, 23:12, 24:8, 25:15, 25:15, 25:18, 25:18, 26:7, 27:6, 27:16, 27:18, 27:21, 28:1, 28:13, 28:14, 28:18, 29:5, 29:6, 29:23, 31:24, 32:10, 32:16, 34:1, 34:20, 34:21, 34:22, 36:3, 36:12, 42:8, 42:24, 44:18, 44:22, 44:25, 45:11, 46:9, 46:14, 47:6, 47:12, 48:6, 49:4, 51:24, 55:14, 55:18, 58:7, 59:21, 60:10, 60:13, 60:17, 61:21, 68:5, 77:18, 86:13, 87:13, 91:8, 106:21, 107:8, 107:11, 108:20, 110:8 federally - 21:21 feeble - 69:20 feel [9] 36:9, 37:9, 37:15, 37:20, 58:13, 63:3, 69:7, 101:7, 103:3 feels - 69:5 felt [2] 49:25, 69:6 field - 100:18 figure - 28:19 filed [2] 4:3, 4:12 final [7] 4:22, 4:25, 5:1, 56:6, 56:10, 56:12, 66:21 finalize [2] 51:8, 113:4	finally [3] 66:18, 97:23, 100:21 finding [23] 21:17, 27:2, 27:3, 38:24, 45:1, 52:1, 52:15, 58:23, 62:17, 69:25, 70:4, 70:9, 85:22, 86:17, 89:17, 92:1, 92:2, 99:2, 102:2, 102:24, 106:15, 109:21, 109:22 findings [48] 9:17, 26:25, 27:4, 45:12, 46:9, 46:19, 48:8, 49:5, 49:16, 50:6, 50:9, 50:15, 51:5, 51:8, 51:10, 55:5, 55:19, 58:23, 60:11, 60:14, 60:18, 61:23, 62:24, 64:9, 64:11, 64:12, 67:17, 71:24, 72:5, 90:14, 91:17, 91:18, 100:2, 101:10, 101:14, 101:24, 103:2, 103:3, 104:6, 104:7, 104:9, 105:5, 106:6, 106:11, 110:8, 111:10, 111:11, 112:8 fine - 5:18 firm - 78:14 fish [26] 11:16, 11:24, 12:9, 12:14,	12:21, 12:22, 20:6, 24:25, 27:22, 30:11, 30:16, 30:19, 30:22, 31:2, 33:6, 35:12, 36:21, 36:24, 87:11, 87:11, 87:12, 87:13, 87:23, 92:9, 95:16, 95:20 five [7] 7:1, 8:3, 11:2, 44:8, 63:2, 87:22, 87:24 focused [4] 37:11, 50:15, 110:5, 110:9 folks [2] 23:15, 68:1 follow [8] 20:17, 23:20, 42:3, 49:8, 53:23, 53:24, 68:22, 80:4 followed [3] 14:5, 23:24, 47:13 follows - 20:15 forces - 86:24 foregoing - 115:12 foreign [2] 76:5, 76:7 foremost - 92:5 forget - 31:21 formally [2] 18:18, 70:8 forth - 45:12 forward [6] 11:17, 18:1, 19:11, 19:24, 25:7, 48:25 foundation - 34:2 fourth - 89:16 frame - 107:6 friendly [2] 104:4, 104:11 front [3] 29:8, 34:15, 113:22 fulfilled - 102:4	full - 35:24 function [2] 55:2, 70:1 functionally - 20:4 functions - 8:22 future - 98:11 <hr/> G <hr/> gallons - 114:13 gather [4] 47:22, 69:21, 80:13, 92:19 general [4] 2:8, 21:23, 91:2, 98:14 generalized - 90:24 generated - 38:23 gentleman - 17:10 gets [2] 13:20, 34:15 given [2] 48:16, 102:21 gives - 64:19 goal [3] 19:10, 19:10, 36:22 goes [4] 25:4, 45:5, 50:14, 98:19 govern - 79:4 grasp - 99:17 greater - 9:24 greatest [2] 95:21, 95:24 ground - 73:16 grounds - 84:1 groundwater - 96:25 group - 19:20 guess [11] 7:22, 15:24, 32:7, 36:16, 36:17, 38:11, 48:2, 57:3, 76:23, 76:24, 83:19 guidance [7] 23:25, 24:12, 24:13, 32:16, 32:18, 41:4, 66:20 guided - 100:20
--	---	--	--	---	--

guideline [44] 6:20, 9:10, 9:19, 10:1, 10:8, 10:9, 10:11, 10:12, 10:20, 13:9, 18:24, 20:14, 21:4, 21:13, 21:20, 22:18, 24:8, 25:16, 25:19, 25:23, 25:24, 25:25, 26:1, 26:8, 27:7, 28:13, 28:14, 28:18, 29:5, 29:7, 29:12, 29:17, 29:24, 30:9, 30:9, 31:24, 32:10, 34:21, 38:16, 39:5, 42:9, 42:24, 47:14, 83:17	88:15, 88:17, 103:20 harmful - 36:23 Hart - 2:4 hasn't [2] 18:17, 18:17 hate [2] 35:22, 99:11 haven't [2] 72:10, 83:23 having [2] 59:7, 70:21 headed - 36:9 health [8] 26:20, 35:1, 86:19, 86:21, 87:8, 88:13, 88:15, 103:23 hear [2] 23:15, 57:7 heard [2] 1:12, 71:25 hearing [10] 13:16, 13:22, 50:15, 51:7, 52:1, 52:16, 67:18, 70:5, 71:16, 71:24 hearings [3] 13:17, 14:1, 47:22 heart - 28:22 heightened - 108:18 held - 13:16 Helena - 2:11 helpful [2] 4:18, 104:3 hence [2] 22:7, 22:21 hereby - 115:7 herein - 115:9 hereunto - 115:15 highlighted - 107:25 highly [3] 13:25, 14:20, 100:17 history [6] 8:13, 8:15, 89:21, 106:22, 107:24, 108:11 hold - 23:4 Holland - 2:4 holler - 6:14 hope - 109:6	hopefully - 11:10 horse - 91:24 hour - 39:17 However - 102:5 huge - 99:25 human [3] 26:20, 35:1, 100:6 hypothesis - 89:24 <hr/> I <hr/> ideal - 58:20 Ideally - 73:1 identical - 12:22 identify - 73:19 illogical - 107:14 immediately - 61:2 impact [5] 16:2, 18:21, 79:19, 97:11, 98:13 impacts [3] 17:25, 94:10, 94:18 impaired - 97:24 impairment [4] 17:13, 98:8, 98:10, 98:14 implement [4] 21:8, 21:8, 51:23, 57:6 implementation [2] 50:24, 73:18 implemented [4] 17:7, 17:24, 31:18, 88:12 implicitly - 22:2 importance [2] 19:13, 33:15 importantly [2] 18:15, 88:8 imposed [2] 87:7, 88:19 imposition - 93:18 impounded - 95:7 in-lake - 95:5 in-stream - 95:4 inadequate -	92:24 inappropriate [2] 13:25, 14:11 inclined - 106:9 include [6] 11:22, 23:18, 51:5, 73:14, 73:23, 74:3 includes [7] 8:10, 33:18, 76:23, 77:11, 77:12, 78:15, 78:17 including [2] 64:9, 114:10 incorporated - 21:25 incorrect [3] 47:5, 68:6, 70:18 indicated - 93:25 indicating - 93:4 indication - 97:7 individual [2] 78:14, 87:22 indulging - 35:13 inform [2] 4:19, 4:19 information [12] 16:1, 34:15, 38:22, 47:23, 92:20, 94:15, 94:17, 95:12, 95:14, 97:19, 97:20, 98:22 initial [6] 29:22, 62:10, 62:10, 83:4, 84:13, 84:23 initiate [10] 49:9, 52:24, 53:12, 53:25, 54:13, 57:5, 58:15, 59:23, 67:21, 67:22 initiated [2] 68:2, 86:11 initiating - 66:25 input [5]	13:20, 96:15, 97:8, 97:11, 97:14 instead [4] 21:18, 34:14, 47:17, 61:1 institution - 78:13 instruct - 59:23 intend [2] 20:1, 79:19 intended - 79:21 intent [2] 22:11, 49:11 intention - 8:13 intentionally [2] 28:9, 40:18 interested [4] 4:12, 5:4, 5:7, 13:4 international [7] 19:14, 77:21, 79:8, 79:12, 79:22, 80:7, 80:19 internet [2] 51:20, 92:20 interpret [4] 45:19, 46:1, 56:4, 107:20 interpreted - 107:20 interrupt - 51:18 intuitively - 96:9 invalid [13] 46:17, 53:2, 53:3, 53:7, 63:9, 63:10, 67:2, 67:23, 68:1, 69:8, 72:16, 83:22, 90:25 invalidate - 44:15 invite - 19:18 involved [3] 76:1, 79:13, 99:25 involves - 14:12 involving [2] 14:14, 14:20 isn't [3] 17:21, 18:21, 108:17 issue [11] 5:17, 13:7,	13:12, 14:14, 23:5, 28:12, 28:21, 77:4, 94:5, 94:6, 110:3 issued - 17:1 issues [7] 4:16, 4:19, 37:15, 37:21, 39:12, 79:3, 99:1 item [5] 3:24, 61:16, 61:17, 62:21, 95:10 items - 3:25 itself [5] 8:16, 8:25, 30:13, 72:16, 108:12 <hr/> J <hr/> January - 13:15 jargon - 81:19 job [2] 35:19, 113:23 Joe [10] 24:2, 28:10, 28:21, 32:9, 66:9, 66:10, 67:3, 68:19, 72:19, 73:12 Joint [3] 79:9, 79:12, 79:22 Jon [2] 1:18, 82:11 JOSEPH - 1:18 judgments - 113:20 Julia [2] 1:18, 41:11 July [3] 9:16, 34:23, 60:5 jumped - 5:15 jumping - 47:17 June - 51:9 jurisdiction [7] 55:16, 60:7, 64:5, 64:8, 64:13, 70:24, 73:25 justice - 114:3 justification - 22:1 justified [5] 38:22, 39:9, 48:8, 97:18, 102:20
---	--	---	---	--	---

<p>justify [8] 22:23, 39:5, 91:19, 91:20, 92:13, 95:8, 97:19, 102:17</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keeping [2] 21:12, 65:10 Kelly [14] 2:9, 7:14, 7:15, 11:3, 11:4, 13:1, 19:2, 19:4, 20:8, 24:9, 25:8, 27:12, 33:11, 33:12 key [2] 32:8, 42:9 kick - 85:24 kilogram [2] 12:16, 12:19 Kirsten [5] 2:8, 7:18, 7:21, 44:12, 49:25 knowing - 56:16 knowledge - 16:23 knowledgeable - 100:18 known [2] 14:7, 96:8 Koocanusa [27] 1:7, 4:1, 12:5, 12:12, 15:5, 17:9, 18:23, 26:10, 26:15, 30:18, 31:10, 33:5, 36:8, 47:18, 49:3, 55:12, 77:14, 77:20, 77:23, 91:7, 92:10, 94:9, 95:7, 96:6, 97:6, 97:24, 100:24 Kootenai [3] 94:13, 96:6, 96:7</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lab - 89:14 laboratories - 89:8 labs - 89:8</p>	<p>lack - 68:18 lake [36] 1:7, 4:1, 4:8, 6:17, 10:12, 12:5, 12:12, 15:5, 17:9, 18:23, 26:2, 26:10, 26:15, 30:18, 30:24, 31:10, 33:5, 36:8, 47:18, 49:3, 55:12, 77:14, 77:20, 77:22, 80:9, 80:13, 91:7, 92:9, 94:8, 94:10, 95:7, 96:5, 97:6, 97:24, 98:5, 100:24 lake/one - 19:11 landed - 99:20 landing - 99:19 language [9] 6:21, 21:6, 21:13, 34:18, 44:16, 52:3, 67:16, 108:10, 110:14 later - 7:25 Laurie [4] 1:22, 73:3, 115:5, 115:19 lauriecrutcher@g - 1:24 law [18] 2:4, 9:9, 18:2, 18:4, 18:10, 18:13, 26:6, 27:5, 29:13, 42:2, 42:3, 45:21, 53:5, 62:20, 76:21, 77:2, 81:9, 94:24 laws [2] 45:20, 56:5 lawyer - 113:24 lawyers - 69:1 lays - 32:12 least [9] 14:4, 15:11, 62:10, 67:23, 87:21, 87:21, 94:2,</p>	<p>97:19, 98:4 leave [3] 7:5, 40:18, 68:13 leaves - 48:17 led - 31:19 legal [3] 7:17, 84:4, 113:25 legally - 59:6 legislative [6] 8:13, 8:15, 89:21, 106:22, 107:24, 108:11 Legislature [4] 70:22, 71:8, 89:25, 106:25 Lehnerr [55] 1:19, 3:11, 3:12, 5:12, 5:13, 13:10, 13:11, 15:22, 15:24, 16:8, 16:14, 19:5, 35:16, 35:17, 36:18, 40:3, 40:4, 41:21, 43:9, 43:10, 47:1, 47:2, 49:9, 54:3, 54:4, 56:19, 56:21, 59:12, 59:13, 65:21, 65:22, 72:22, 72:24, 73:8, 74:5, 74:6, 74:23, 75:20, 75:21, 81:15, 81:16, 82:8, 82:18, 82:19, 85:9, 85:10, 99:7, 99:8, 104:22, 105:1, 105:8, 105:17, 105:18, 112:14, 112:15 Lehnerr's [2] 19:3, 48:23 length - 13:24 lentil [4] 27:18, 32:20, 32:23, 33:3</p>	<p>less [5] 11:1, 12:18, 20:7, 28:3, 44:7 let's [19] 3:5, 20:16, 21:4, 31:21, 39:17, 43:3, 47:4, 57:1, 57:1, 57:21, 58:16, 61:1, 61:2, 61:8, 64:25, 65:1, 65:4, 66:15, 105:10 letter [5] 22:20, 31:22, 79:7, 79:9, 95:20 letting - 101:3 level [2] 89:10, 94:2 levels [4] 86:23, 92:11, 93:21, 95:25 Lewis [2] 115:4, 115:6 Libby - 76:14 license - 76:6 lightly - 114:5 likely [2] 56:12, 94:20 limit [4] 31:13, 92:17, 94:17, 98:10 limitations - 102:21 limited [8] 1:4, 14:6, 16:24, 75:18, 77:16, 77:22, 78:19, 94:16 limits - 92:15 Lincoln [6] 1:5, 4:3, 49:21, 67:25, 76:14, 76:16 link - 35:23 linked - 12:15 links - 14:13 lists - 28:17 liter [23] 4:8, 6:18, 8:22, 14:18, 15:16, 17:20, 20:12, 20:14, 22:16, 31:11, 31:14,</p>	<p>32:22, 35:25, 36:25, 42:23, 80:24, 89:15, 92:16, 92:18, 92:23, 98:1, 98:2, 98:23 lived - 96:8 local [2] 14:22, 36:7 longer - 70:11 looking [10] 18:3, 20:21, 33:17, 50:25, 59:24, 61:15, 61:16, 61:17, 100:22, 111:19 looks - 98:7 lots - 58:17 low [4] 93:1, 93:14, 95:8, 97:15 lower [2] 31:13, 80:25 lowering [3] 15:14, 15:15, 100:22</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>magnitude - 100:6 makes [7] 27:5, 42:4, 51:25, 52:15, 53:2, 67:17, 107:3 making [13] 20:11, 37:10, 37:22, 39:14, 45:1, 46:19, 57:11, 59:3, 61:22, 71:23, 72:4, 83:15, 101:8 manager [3] 2:9, 7:15, 11:4 manner [2] 18:12, 88:12 March [2] 115:17, 115:22 Marquis [50] 2:3, 7:9, 7:11, 8:6,</p>	<p>10:24, 15:25, 16:5, 16:7, 16:16, 19:1, 23:13, 24:4, 25:9, 25:10, 28:6, 28:23, 29:2, 33:21, 34:9, 34:11, 35:15, 35:18, 37:3, 44:6, 45:15, 45:17, 48:18, 53:1, 55:9, 55:25, 56:1, 57:11, 72:10, 72:13, 77:6, 78:7, 78:9, 85:25, 86:3, 92:3, 94:7, 103:22, 107:16, 107:17, 109:7, 109:10, 109:11, 113:12, 113:14, 114:15 math [2] 22:15, 27:20 Mathematical - 96:17 mathematically [2] 9:23, 10:19 matter [9] 1:4, 13:13, 21:23, 31:2, 37:22, 58:20, 59:8, 113:2, 113:10 mattered - 14:9 matters [2] 25:23, 27:7 maybe [13] 15:24, 21:1, 23:8, 23:11, 24:4, 28:11, 28:24, 37:21, 64:3, 67:7, 69:9, 74:15, 109:24 MCA [3] 21:18, 22:15, 73:11 McGrath [2] 79:8, 79:12 means [7] 12:1, 18:20, 30:24, 67:20,</p>
--	---	--	---	--	--

78:12, 96:9, 107:21 measurable - 41:3 measured [2] 95:16, 97:13 medical - 100:5 meet [2] 88:25, 108:23 meeting [13] 4:15, 4:25, 17:8, 17:15, 17:17, 19:18, 20:1, 30:24, 39:22, 63:16, 66:19, 72:7, 113:4 meetings - 37:8 member [171] 3:10, 3:12, 3:14, 3:16, 3:18, 3:20, 5:13, 13:11, 15:24, 16:14, 20:9, 20:10, 20:19, 20:23, 21:5, 23:7, 23:8, 24:6, 24:10, 25:11, 28:5, 28:9, 28:11, 28:25, 29:3, 35:16, 35:17, 36:16, 37:2, 37:7, 38:6, 38:7, 38:8, 38:9, 40:2, 40:4, 40:6, 40:8, 40:10, 40:12, 40:20, 40:23, 40:24, 41:1, 41:2, 41:12, 41:15, 41:21, 41:24, 43:8, 43:10, 43:12, 43:14, 43:16, 43:18, 47:2, 48:1, 48:21, 49:24, 50:3, 50:12, 50:13, 50:17, 51:2, 51:15, 51:17, 52:8,	52:12, 52:18, 53:16, 54:1, 54:4, 54:20, 54:21, 54:25, 56:19, 56:21, 57:25, 58:6, 58:10, 58:18, 58:19, 59:12, 59:13, 59:14, 61:11, 61:14, 61:18, 61:20, 65:22, 66:3, 66:5, 66:7, 66:10, 66:11, 66:13, 67:4, 67:9, 68:9, 68:20, 69:5, 69:15, 69:17, 69:19, 70:6, 71:10, 72:20, 72:24, 73:8, 73:13, 74:6, 75:21, 76:18, 76:19, 80:3, 80:15, 81:3, 81:6, 81:16, 82:8, 82:17, 82:19, 82:21, 82:23, 82:25, 83:2, 83:9, 83:15, 84:3, 84:7, 84:9, 84:12, 84:17, 84:18, 85:8, 85:10, 85:12, 85:14, 85:16, 85:18, 91:13, 91:16, 99:8, 101:5, 101:6, 101:21, 103:9, 104:11, 104:12, 104:17, 104:22, 105:1, 105:8, 105:15,	105:16, 105:18, 105:20, 105:22, 105:24, 106:1, 110:13, 111:4, 111:7, 111:14, 111:17, 112:13, 112:15, 112:17, 112:19, 112:21, 112:23 members [39] 1:17, 5:4, 6:13, 7:10, 7:21, 8:7, 16:8, 19:19, 25:11, 27:12, 29:3, 32:13, 33:12, 36:15, 36:17, 40:25, 44:11, 45:18, 46:22, 49:1, 50:3, 51:3, 55:10, 56:2, 60:3, 61:19, 63:19, 64:1, 71:25, 74:18, 77:8, 78:10, 80:16, 86:4, 90:17, 106:10, 107:18, 110:1, 113:17 mentioned [2] 23:13, 33:23 mentioning - 13:13 merely - 98:9 method - 93:17 methodologies - 100:3 methods - 102:22 microgram [3] 92:16, 92:23, 98:2 micrograms [21] 4:7, 6:18, 8:22, 14:18, 15:16, 17:19, 20:12,	20:13, 22:16, 22:18, 31:11, 31:14, 32:21, 35:25, 36:25, 42:22, 80:24, 89:14, 92:18, 97:25, 98:23 micron [2] 100:10, 100:10 miles [3] 94:8, 94:9, 99:21 milligrams [2] 12:15, 12:19 million [4] 93:6, 93:7, 93:9, 100:7 millions - 114:13 mind [11] 21:12, 37:18, 37:25, 53:12, 66:20, 69:20, 71:13, 73:9, 75:13, 98:21, 102:5 mining [3] 79:15, 79:16, 79:17 minute [6] 20:1, 30:12, 39:18, 39:18, 56:23, 65:1 minutes [10] 7:1, 8:3, 11:2, 17:15, 44:8, 57:1, 57:21, 57:23, 77:5, 85:25 misled - 46:11 misreading - 74:11 missed - 111:15 mistake - 46:8 mitigate [4] 26:19, 87:7, 88:7, 88:17 mitigates - 88:12 mitigation - 103:20 model [8]	95:11, 95:15, 95:18, 95:23, 96:20, 97:5, 97:5, 97:12 modeled - 97:2 modeling [5] 2:9, 7:16, 11:5, 96:17, 96:25 models - 96:23 MOISEY-SCHERER [65] 3:6, 3:9, 3:11, 3:13, 3:15, 3:19, 3:21, 6:1, 6:4, 39:24, 40:1, 40:3, 40:5, 40:7, 40:9, 40:11, 40:13, 43:5, 43:7, 43:9, 43:11, 43:13, 43:15, 43:17, 43:22, 61:10, 65:7, 65:11, 65:15, 65:17, 65:19, 65:21, 65:23, 65:25, 66:4, 66:6, 66:8, 82:14, 82:16, 82:18, 82:20, 82:22, 82:24, 83:1, 85:5, 85:7, 85:9, 85:11, 85:13, 85:15, 85:17, 105:12, 105:14, 105:16, 105:19, 105:21, 105:23, 105:25, 112:10, 112:12, 112:14, 112:16, 112:18, 112:20, 112:22 Monitoring - 17:9	Mont - 1:6 Montana [36] 1:2, 1:5, 4:4, 9:9, 10:7, 11:19, 15:21, 17:6, 18:2, 18:3, 18:4, 18:9, 18:13, 19:6, 20:5, 22:16, 25:19, 26:6, 26:6, 29:13, 37:19, 42:2, 42:3, 46:5, 53:4, 58:14, 62:20, 76:7, 77:22, 80:18, 95:23, 98:16, 108:22, 113:24, 115:2, 115:7 Montana's [5] 12:22, 20:7, 76:11, 79:13, 81:2 Montanan [3] 76:5, 81:21, 81:22 month - 49:20 months [3] 45:3, 67:14, 93:10 moon [3] 99:19, 99:20, 99:21 moot - 22:12 Moreover - 96:1 motion [68] 20:11, 20:17, 20:20, 20:24, 37:23, 38:5, 42:15, 42:21, 43:19, 46:25, 53:17, 53:18, 53:20, 53:21, 54:5, 54:15, 54:17, 54:19, 56:19, 58:12, 59:18, 59:22, 66:15, 68:17, 68:21, 69:6, 69:12, 72:19, 73:2,
---	---	---	---	--	---

73:5, 73:14, 73:23, 74:2, 74:3, 74:10, 75:4, 75:11, 80:1, 81:4, 81:7, 81:10, 81:15, 81:20, 82:3, 83:3, 84:8, 84:13, 84:22, 85:19, 86:9, 91:12, 99:6, 101:8, 101:12, 101:20, 103:1, 103:7, 104:3, 104:15, 104:23, 105:2, 106:2, 110:18, 111:4, 111:8, 112:1, 112:5, 112:24 motions [7] 58:1, 59:15, 59:16, 64:23, 65:2, 66:19, 68:19 motives [3] 113:18, 113:20, 114:8 move [7] 66:23, 69:13, 73:10, 101:11, 111:8, 113:9, 114:19 moving - 64:25 MT [2] 2:5, 2:11 multiple - 11:19 mumbo-jumbo - 84:4 muscle [2] 11:23, 33:24 Myla [7] 2:9, 7:15, 11:4, 27:12, 27:24, 33:7, 49:13	N	9:12, 9:14, 17:5, 53:13, 62:10, 62:10, 67:21, 67:22, 83:5, 83:21, 84:13, 84:23, 86:11 noting - 11:7 November [2] 17:8, 19:18 numbers [8] 9:8, 9:21, 28:17, 32:22, 37:24, 99:25, 100:8, 100:13 numeric [14] 10:9, 10:11, 25:23, 25:24, 25:25, 29:12, 29:14, 30:9, 34:25, 35:6, 35:10, 35:11, 41:2, 41:8	O	13:22, 113:25 official - 74:25 officials [2] 14:22, 36:7 on-point - 79:6 online - 114:10 open [3] 8:9, 13:3, 75:19 operates - 15:13 operation - 53:5 operations [3] 79:15, 79:16, 79:17 opinion - 53:3 opportunity [7] 11:6, 11:10, 13:19, 14:8, 46:12, 49:18, 50:9 oppose - 81:20 opposed [5] 43:1, 52:21, 75:9, 82:7, 85:2 option - 47:16 options [2] 30:8, 39:3 oral [3] 4:14, 5:2, 11:11 oranges - 42:14 order [9] 6:22, 33:20, 52:23, 53:24, 62:20, 75:16, 92:12, 94:10, 96:19 original - 9:15 originating - 94:19 others [4] 10:14, 41:24, 104:9, 106:4 ought [2] 7:3, 59:9 outcome - 58:21 outlined [3] 5:11, 12:10, 49:15 outlines - 47:14 outlining [2] 51:5, 72:4 outside [2]	60:6, 64:5 ovaries - 88:1 ovary [10] 11:23, 12:15, 12:18, 27:23, 28:3, 33:24, 34:1, 34:4, 87:24, 88:5 over-predicted - 95:15 over-predicts - 97:13 overlooks - 64:16 overly - 97:9 overreaching - 91:21 overridden - 90:25 overrides - 30:21 oversight [2] 70:17, 109:12 overwhelming - 14:24 overwhelmingly - 14:25	P	5:7, 6:23, 13:5, 62:6, 110:21 partnership - 78:14 party - 34:13 pass [2] 68:21, 74:2 passed [2] 86:9, 108:9 passes [6] 43:19, 74:2, 83:3, 85:19, 106:2, 112:25 past - 19:8 pathway - 12:3 patience - 113:6 peer [21] 62:23, 89:18, 99:13, 106:5, 106:11, 106:16, 106:19, 107:4, 107:9, 107:13, 108:3, 108:8, 108:13, 108:14, 108:25, 109:14, 109:19, 110:3, 110:15, 111:9, 112:7 Pennaco [3] 10:4, 25:21, 31:25 per [28] 4:8, 6:18, 8:22, 12:15, 12:19, 14:18, 15:16, 17:20, 20:12, 20:13, 22:16, 31:11, 31:14, 32:21, 35:25, 36:25, 42:23, 80:24, 89:15, 92:16, 92:16, 92:18, 92:23, 93:6,
--	----------	--	----------	--	---	----------	---

97:25, 98:2, 98:23, 100:7 percent [2] 35:12, 94:8 percentile - 33:2 perfect - 34:16 perhaps [3] 73:4, 109:11, 110:18 period [3] 45:3, 51:7, 63:16 permit [2] 37:16, 71:3 permits - 79:3 permittee [2] 37:17, 37:19 permitting [2] 31:6, 31:18 personally [2] 99:19, 113:21 persons [4] 77:12, 78:15, 78:17, 78:20 Pertaining - 1:7 pertinent [4] 89:17, 106:15, 108:13, 108:25 perusal - 15:11 petition [11] 9:15, 10:6, 25:13, 44:19, 45:4, 45:6, 49:21, 55:21, 78:19, 79:24, 113:19 petitioner [3] 45:7, 55:22, 75:24 petitions [8] 1:4, 4:4, 21:14, 56:13, 60:15, 62:5, 71:7, 90:20 piece - 56:23 pieces - 79:6 pitch - 72:11 plan [3] 57:5, 73:17, 73:18 please [16] 6:3, 6:13, 6:14, 11:2, 16:14,	25:10, 28:7, 43:4, 43:21, 51:18, 65:4, 78:9, 91:15, 104:24, 111:6, 112:9 pleasure - 65:11 point [40] 5:18, 5:22, 18:8, 27:14, 30:12, 34:17, 38:10, 38:11, 44:8, 48:15, 50:19, 52:25, 53:1, 57:12, 57:13, 58:16, 60:8, 62:21, 63:15, 64:13, 69:21, 70:7, 70:13, 70:24, 71:10, 71:23, 74:8, 83:19, 83:20, 87:23, 90:10, 90:19, 93:3, 98:20, 101:7, 103:11, 103:16, 107:22, 108:16, 109:9 pointed [9] 15:12, 25:13, 41:23, 86:5, 103:14, 103:19, 107:1, 108:2, 109:16 points [7] 37:10, 62:8, 67:24, 73:19, 91:14, 92:4, 113:1 politicians - 14:4 pollutants - 35:2 portions - 93:24 portrayed - 9:11 position [24] 7:2, 8:4,	10:25, 11:1, 16:4, 16:6, 32:15, 44:8, 44:10, 48:11, 52:21, 52:21, 63:15, 63:20, 64:15, 68:10, 68:12, 70:20, 77:4, 86:1, 90:12, 90:16, 92:9, 102:10 possibility - 71:18 possible [6] 16:2, 29:20, 29:24, 39:8, 59:10, 65:5 post - 51:6 potential [2] 95:22, 95:25 Potentially - 72:6 power - 59:1 practical [2] 58:20, 59:8 practice - 21:23 precision - 93:16 predates - 58:25 predict [2] 94:10, 94:18 predictive - 96:18 preferable [2] 29:12, 30:3 premised - 68:6 preparation - 69:25 prepare [3] 55:5, 73:17, 83:25 prepared [7] 1:22, 38:18, 73:22, 73:24, 91:18, 99:2, 113:3 preparing [2] 58:22, 70:9 prerequisite - 106:20 prescribed - 21:18 presence - 76:13 present [5] 13:18, 29:8, 51:9, 65:2,	96:6 presentation - 17:17 presentations [2] 102:12, 102:16 presented [3] 62:5, 95:12, 102:15 presents - 29:6 pressed - 76:9 pressure [2] 78:1, 79:2 presumably - 95:25 presume - 88:9 prevails - 91:2 prevent - 36:23 previous [4] 26:17, 47:9, 99:12, 100:20 previously [2] 73:15, 110:6 primarily [2] 5:7, 57:17 primary - 12:3 printed - 89:21 probable - 39:9 probably [10] 13:13, 14:10, 45:15, 51:9, 56:22, 69:10, 76:3, 79:5, 79:6, 81:21 problem [3] 63:12, 72:24, 92:5 problems - 88:4 procedural [4] 22:14, 22:25, 107:3, 107:5 procedure [4] 24:22, 42:12, 53:13, 69:24 procedures [7] 12:10, 12:24, 21:22, 22:3, 22:8, 22:23, 47:13 proceed [5] 5:11, 7:7, 21:5, 23:5, 112:9	proceedings [6] 1:10, 3:1, 114:21, 115:8, 115:10, 115:13 process [40] 8:9, 8:10, 11:9, 14:20, 16:20, 16:23, 17:2, 17:21, 17:25, 18:1, 18:6, 18:7, 18:22, 20:2, 22:22, 24:22, 25:5, 25:6, 26:4, 33:19, 42:11, 49:15, 49:18, 50:8, 51:4, 56:17, 58:22, 63:6, 64:24, 67:22, 70:4, 71:5, 72:4, 72:7, 73:17, 73:19, 78:19, 80:11, 101:15, 113:7 produce - 67:8 produced - 99:4 products - 99:4 program [2] 19:6, 49:14 progress - 37:22 prohibited - 60:12 promulgated [6] 9:11, 10:16, 25:15, 29:7, 34:21, 79:14 promulgating - 86:12 proof [4] 30:7, 88:6, 88:7, 90:7 proper [2] 53:13, 53:13 properties - 94:20 proponents - 108:5 proposal - 17:1 propose [3] 9:21, 48:24, 104:2	proposed [17] 4:13, 4:25, 5:9, 5:17, 9:17, 10:6, 10:12, 16:19, 18:18, 20:4, 86:6, 86:18, 108:10, 109:9, 110:5, 110:9, 113:3 proposes [2] 9:20, 9:22 proposing - 70:7 protect [8] 19:13, 33:6, 34:25, 37:13, 86:21, 87:4, 87:5, 114:9 protected - 34:6 protection - 37:1 protective [5] 19:13, 32:22, 33:3, 33:5, 35:21 protects [4] 35:12, 86:18, 88:12, 103:23 provide [4] 11:8, 26:24, 29:13, 37:1 provided [12] 9:13, 11:12, 27:5, 27:13, 45:2, 46:4, 61:23, 78:24, 90:22, 91:1, 94:15, 95:14 provides [3] 29:15, 30:8, 32:19 Province - 17:10 public [48] 1:23, 4:14, 8:10, 8:12, 9:11, 9:12, 9:13, 13:15, 13:17, 13:19, 13:25, 15:12, 16:19, 17:2, 17:22, 18:18, 19:18, 20:2, 29:22, 29:23,
---	--	---	--	--	--

46:10, 47:22, 49:18, 49:19, 50:8, 50:9, 50:14, 50:23, 51:6, 51:7, 52:1, 52:1, 52:15, 52:16, 67:18, 67:18, 70:5, 70:5, 71:15, 71:24, 86:19, 86:21, 87:8, 88:13, 88:15, 103:23, 115:6, 115:20 publicly - 19:24 publish - 50:8 published - 21:24 pull - 86:16 purser - 95:1 purpose [3] 34:5, 54:2, 74:10 purposes [2] 76:25, 80:10 pursuant [2] 1:6, 60:15 pursue [3] 15:20, 24:19, 114:1 purview [3] 57:20, 60:24, 64:19 push - 67:10 puts - 89:1 <hr/> Q <hr/> quagmire [2] 69:4, 84:10 qualified - 100:17 quality [42] 2:9, 2:10, 7:16, 8:18, 8:22, 8:24, 8:25, 9:1, 11:5, 12:5, 16:12, 16:19, 16:22, 17:5, 17:6, 17:11, 17:18, 17:23, 18:3, 18:16, 18:23, 19:12, 19:25, 20:5, 21:24, 25:2,	31:22, 32:17, 33:23, 34:24, 35:5, 35:7, 76:8, 77:10, 80:20, 89:9, 93:5, 96:23, 107:1, 107:2, 108:17, 114:3 questioned - 50:18 quick [2] 61:11, 68:21 quickly [2] 38:5, 86:16 quite [4] 32:21, 52:22, 72:23, 92:12 quorum [6] 3:5, 3:21, 39:23, 40:13, 66:8, 66:14 quote [6] 34:23, 35:3, 35:4, 78:16, 108:5, 108:8 <hr/> R <hr/> raise - 6:14 raised [5] 9:6, 72:10, 99:15, 102:9, 102:9 range [7] 9:8, 9:21, 32:20, 32:20, 33:3, 35:8, 92:16 rarely - 22:4 rate - 93:11 rather [2] 92:7, 99:10 re-examined - 103:3 reach - 18:13 reaches - 56:10 reacting - 90:2 reading - 61:19 ready [2] 4:15, 69:6 real [4] 68:20, 90:4, 90:5, 97:5 realistically - 93:17 really [16] 9:7, 12:1, 12:7, 23:17,	27:13, 37:24, 39:1, 62:9, 64:5, 64:12, 72:13, 81:7, 83:23, 87:3, 90:9, 98:16 realm [2] 17:22, 57:18 reason [8] 12:5, 32:25, 53:5, 62:1, 67:15, 73:23, 89:20, 91:22 reasonable [4] 45:2, 96:14, 97:8, 98:24 reasoning [3] 20:14, 20:18, 35:24 reasons [2] 12:7, 103:21 receive - 5:24 received - 5:24 receiving [2] 45:3, 95:2 Recess [2] 39:20, 65:3 recognition - 24:14 recognize [3] 46:7, 94:24, 95:3 recognized [2] 31:8, 88:3 recommended [6] 12:24, 21:21, 22:8, 24:12, 34:24, 35:7 recommends - 95:20 reconvene [3] 39:19, 39:21, 65:4 record [56] 3:5, 14:12, 26:13, 30:7, 31:7, 45:23, 45:24, 46:18, 49:7, 52:2, 52:17, 56:9, 58:10, 62:15, 62:19, 64:11, 67:19, 67:22, 72:15, 74:4, 78:24, 79:1, 82:12, 85:21, 86:7, 86:22, 87:2, 88:2, 88:4,	88:22, 88:23, 89:19, 90:8, 90:10, 90:13, 91:20, 92:9, 93:24, 100:16, 101:8, 101:22, 102:7, 105:3, 106:13, 106:17, 106:23, 107:10, 108:15, 109:14, 109:21, 111:24, 113:15, 113:19, 114:6, 114:14, 115:13 rectify - 68:15 refer - 4:5 reference [4] 21:25, 89:17, 106:15, 110:15 references [2] 103:10, 103:11 referred [3] 8:23, 10:5, 24:14 refers - 8:25 refuted - 62:9 regard - 53:6 regarding [3] 16:2, 23:3, 103:20 regardless [2] 31:18, 47:9 register [5] 9:15, 13:14, 29:6, 34:20, 34:22 regular - 89:8 regulate - 88:9 regulated - 98:16 regulation [4] 18:21, 25:15, 47:10, 47:14 regulations [15] 21:10, 27:17, 36:23, 44:19, 44:23,	44:25, 47:13, 51:24, 55:14, 55:18, 58:7, 61:22, 68:5, 77:18, 91:8 regulatory - 98:9 reintroduce - 67:11 Reiten [22] 1:18, 3:13, 3:14, 36:16, 37:3, 40:5, 40:6, 41:21, 43:11, 43:12, 65:23, 65:25, 66:13, 82:11, 82:20, 82:21, 85:11, 85:12, 105:19, 105:20, 112:16, 112:17 reiterate [2] 21:6, 92:7 rejects - 22:5 relates [2] 101:25, 102:1 relative - 97:24 relatively - 98:6 released - 16:18 relevant [2] 23:10, 23:23 relied - 31:25 relieve [2] 45:7, 55:22 reluctance - 104:16 rely - 57:19 relying - 22:22 remains - 90:12 remedy [14] 43:25, 45:9, 46:6, 48:3, 55:15, 64:8, 66:24, 67:13, 69:13, 73:11, 75:5, 90:22, 91:1, 91:9 remind - 100:15	repeal [2] 39:4, 48:5 repealed [2] 55:1, 55:21 repealing - 39:13 repeat - 21:15 repeating - 11:13 reported - 115:10 Reporter [4] 1:23, 82:9, 115:5, 115:20 reporting [2] 92:22, 92:23 representatives - 15:25 representing [3] 7:8, 7:11, 7:12 reproduce - 51:20 require [5] 42:2, 106:5, 106:11, 110:15, 111:9 required [22] 48:9, 53:17, 62:23, 68:3, 72:1, 83:21, 85:23, 86:8, 89:16, 90:14, 94:12, 101:10, 101:14, 105:6, 106:7, 107:23, 108:3, 110:9, 111:5, 111:10, 111:12, 112:7 requirement [10] 47:4, 47:11, 86:18, 87:6, 87:7, 88:18, 88:19, 88:25, 108:18, 109:13 requirements [5] 59:5, 86:15, 102:1, 102:4, 108:23 requires [6] 22:1, 53:11, 87:18,
--	---	--	---	---	---

87:20, 87:25, 112:6 research [2] 17:9, 37:9 resident [2] 77:12, 78:15 resides - 15:14 resigned - 36:10 resolve [2] 48:20, 61:2 respect [9] 62:15, 64:10, 75:1, 83:5, 84:14, 85:21, 101:9, 102:25, 105:4 respectfully [2] 60:4, 64:6 respects [3] 74:20, 102:8, 103:4 respond [8] 16:6, 25:9, 28:6, 28:24, 29:1, 45:16, 99:10, 109:24 response [30] 19:2, 41:13, 42:17, 42:19, 42:25, 43:2, 46:24, 50:4, 51:12, 55:8, 65:18, 65:20, 65:24, 66:1, 75:3, 75:8, 75:10, 81:13, 82:1, 82:6, 84:20, 85:1, 85:3, 101:18, 104:19, 108:1, 109:4, 111:20, 112:3, 114:18 responses [2] 4:13, 5:8 responsibility [4] 48:12, 48:16, 114:1, 114:2 rest [3] 55:15, 64:8, 91:9 restate [2] 69:11, 104:23 result [5]	52:5, 55:1, 94:20, 97:15, 98:8 results - 100:4 retaining - 59:4 revert - 48:6 review [19] 1:1, 1:5, 1:7, 4:1, 4:4, 4:6, 16:20, 17:2, 17:14, 18:18, 21:14, 22:2, 44:15, 44:20, 50:23, 55:1, 86:14, 95:13, 110:7 reviewed [21] 62:23, 89:18, 99:14, 106:5, 106:12, 106:16, 106:19, 107:4, 107:9, 107:13, 108:3, 108:8, 108:13, 108:14, 108:25, 109:14, 109:19, 110:3, 110:15, 111:9, 112:7 reviewing - 4:11 revise [2] 45:11, 55:17 revising [2] 44:24, 61:21 rigorous - 14:20 ripe - 88:1 rising - 98:5 River [4] 94:7, 94:12, 94:13, 96:6 road - 69:4 role [17] 53:8, 53:9, 55:6, 55:11, 56:13, 59:7, 70:11, 70:15, 71:12, 71:12, 71:19, 74:9, 74:14,	74:17, 74:19, 74:25, 76:11 roll [8] 39:22, 43:3, 65:14, 82:10, 82:12, 85:4, 105:11, 112:8 room - 3:8 RPR [3] 1:22, 115:5, 115:19 RUFFATO - 40:14 Ruffatto [205] 1:16, 3:4, 3:6, 3:7, 3:17, 3:22, 5:14, 5:21, 6:2, 6:5, 7:10, 7:12, 7:14, 7:22, 8:7, 10:24, 11:3, 13:1, 13:12, 15:22, 16:5, 16:8, 19:1, 19:5, 20:8, 20:16, 20:21, 20:24, 23:6, 24:2, 24:10, 25:8, 25:11, 27:10, 27:11, 28:4, 28:8, 28:20, 29:3, 32:6, 32:13, 33:10, 34:8, 35:15, 36:14, 37:2, 38:6, 39:16, 39:21, 39:24, 39:25, 40:22, 41:11, 41:14, 41:17, 42:18, 42:20, 43:1, 43:3, 43:5, 43:6, 43:19, 43:23, 44:11, 45:14, 45:18, 46:22, 46:25, 47:24, 48:21, 49:1, 49:8, 49:22, 50:11, 51:11, 51:13,	51:16, 52:6, 52:10, 52:14, 52:19, 53:18, 54:3, 54:18, 54:23, 55:7, 55:10, 55:24, 56:1, 56:18, 56:22, 56:25, 58:3, 58:9, 58:16, 59:11, 60:2, 60:3, 60:22, 61:13, 62:1, 63:19, 63:22, 64:1, 64:14, 65:4, 65:8, 65:13, 65:15, 65:16, 66:2, 66:9, 66:12, 67:6, 67:15, 68:11, 68:25, 69:9, 69:16, 69:18, 70:2, 70:19, 71:17, 72:9, 72:18, 72:21, 73:6, 73:9, 73:10, 73:22, 74:7, 74:13, 74:18, 74:22, 75:4, 75:9, 75:11, 75:22, 76:18, 76:22, 77:7, 78:7, 78:10, 79:25, 81:5, 81:12, 81:14, 81:17, 81:24, 82:2, 82:7, 82:10, 82:15, 83:3, 83:12, 83:18, 84:4, 84:11, 84:16, 84:18, 84:21, 85:2, 85:4, 85:6, 85:19, 86:4, 90:15, 90:17, 91:11, 91:15, 99:5, 99:9, 101:4, 101:16, 101:19, 103:5, 104:14,	104:18, 104:20, 104:23, 104:25, 105:2, 105:9, 105:13, 106:2, 106:10, 107:15, 107:18, 109:2, 109:5, 109:23, 110:1, 110:11, 110:20, 111:6, 111:13, 111:15, 111:18, 111:21, 112:4, 112:11, 112:24, 113:13, 114:15, 114:19 rule [70] 1:7, 4:1, 8:24, 20:12, 21:7, 21:8, 21:15, 27:15, 28:13, 30:13, 30:18, 33:1, 39:4, 42:8, 44:15, 44:17, 44:20, 44:21, 44:25, 45:5, 45:8, 45:11, 45:21, 46:2, 46:8, 46:13, 46:13, 46:17, 48:6, 51:23, 53:2, 53:3, 54:25, 55:17, 55:21, 55:23, 57:13, 58:25, 59:2, 59:3, 59:4, 59:4, 60:9, 61:21, 63:11, 67:1, 68:4, 68:8, 69:23, 70:8, 70:14, 77:14, 77:16, 78:1, 78:2, 79:21, 87:4, 87:18, 87:20,	91:19, 91:21, 92:6, 92:13, 102:17, 107:5, 107:11, 107:12, 110:7, 113:10, 114:17 rule's - 56:7 rulemaking [74] 8:24, 15:20, 16:22, 18:9, 18:11, 29:23, 46:20, 48:17, 49:7, 49:10, 52:24, 53:12, 53:14, 53:25, 54:13, 57:6, 57:14, 57:19, 57:19, 58:15, 58:25, 59:24, 59:25, 60:4, 60:19, 60:21, 61:6, 61:7, 62:11, 62:15, 63:1, 63:5, 63:8, 63:9, 63:12, 63:18, 63:21, 63:24, 64:3, 64:16, 66:25, 67:2, 67:11, 68:1, 68:6, 68:8, 69:8, 70:1, 70:4, 70:12, 71:5, 72:15, 72:16, 72:17, 74:9, 74:15, 74:17, 74:20, 74:25, 78:4, 78:20, 78:24, 79:1, 83:5, 84:13, 84:24, 85:21, 86:10, 88:23, 90:13, 90:25, 101:8, 102:7, 105:3 rules [8]
--	--	---	--	--	--

14:6, 22:1, 42:4, 45:20, 56:5, 56:8, 107:1, 107:3 rulings - 23:14 run - 93:23 runs - 97:10	108:12, 108:14, 109:1, 109:14, 110:3, 110:16, 111:9 scientifically [4] 34:25, 35:6, 35:10, 35:11 scientists [4] 14:21, 36:6, 100:18, 100:19 scope [2] 91:4, 113:22 screen [3] 5:23, 6:6, 65:6 scroll - 62:3 seal - 115:16 seconded [10] 20:25, 37:23, 38:4, 42:21, 72:19, 73:12, 75:5, 84:23, 103:6, 105:3 section [10] 1:6, 2:9, 7:16, 11:5, 44:16, 44:24, 45:6, 55:22, 61:16, 111:12 seeing - 7:23 seek - 14:10 seem [2] 98:6, 100:14 seems [10] 48:4, 48:19, 58:20, 59:24, 67:12, 70:15, 94:1, 99:24, 110:14, 111:2 selected [2] 33:1, 95:23 selecting - 95:20 selenium [39] 1:7, 4:1, 10:10, 10:11, 11:15, 11:24, 12:3, 15:4, 22:17, 24:10, 24:15, 24:24, 26:2, 28:16, 30:5,	32:17, 33:16, 34:1, 34:7, 46:2, 46:16, 86:23, 88:10, 89:12, 92:10, 92:14, 92:15, 93:13, 94:11, 94:12, 94:19, 95:10, 95:16, 95:21, 97:16, 97:25, 98:5, 113:10, 114:16 Senator - 108:4 send - 46:20 sense [4] 24:1, 51:1, 84:2, 107:4 sensitive - 96:4 sensitivity [2] 95:22, 97:10 sent [2] 51:21, 79:7 sentiments - 60:6 separate [3] 37:15, 39:12, 58:1 serious - 99:15 seriously [2] 113:24, 114:1 session - 67:11 setting [2] 16:22, 16:23 seven - 63:2 several [2] 15:10, 96:20 severely - 98:10 shall [2] 42:7, 44:23 Shaun - 79:8 she's [2] 33:8, 35:18 sheet [4] 43:20, 61:3, 73:6, 75:17 shopping - 93:9 short [2] 22:22, 96:15 shorthand - 115:10	shouldn't [2] 100:8, 100:13 shown [2] 30:6, 36:25 shows [8] 6:5, 22:15, 87:16, 90:5, 95:11, 99:13, 99:14, 100:1 shuffle - 101:25 sides [2] 4:20, 13:19 sift - 35:9 significant [3] 76:4, 100:4, 100:12 similar [3] 78:2, 93:21, 93:22 simple [3] 17:25, 22:15, 27:20 simplify [2] 23:9, 28:11 simply [3] 18:22, 33:14, 107:14 Simpson [67] 1:17, 3:15, 3:16, 20:9, 20:10, 20:19, 21:5, 38:7, 38:8, 40:7, 40:8, 40:17, 40:20, 41:2, 41:15, 43:13, 43:14, 48:1, 48:22, 51:15, 51:17, 52:12, 52:18, 53:16, 54:1, 54:20, 54:21, 54:25, 58:18, 58:19, 66:2, 66:3, 69:17, 69:18, 69:19, 70:6, 71:10, 73:13, 76:18, 76:19, 80:2, 80:3, 80:15, 81:3, 81:6, 82:22, 82:23, 83:9, 83:15, 84:3,	84:9, 84:17, 84:19, 85:13, 85:14, 91:13, 91:16, 101:21, 103:9, 104:17, 105:21, 105:22, 110:13, 111:4, 111:7, 112:18, 112:19 sit - 56:23 site [15] 10:15, 10:16, 12:9, 21:21, 24:16, 24:19, 24:25, 25:5, 26:4, 27:1, 29:11, 29:18, 29:25, 30:5, 32:23 sitting - 60:19 situated - 45:25 situation [3] 26:15, 34:12, 69:22 situations [3] 29:11, 29:18, 108:19 six [3] 19:8, 19:20, 63:2 skip [2] 62:6, 105:10 slide - 95:11 slight - 104:2 Smith [35] 1:18, 3:9, 3:10, 23:7, 23:8, 24:6, 24:10, 25:11, 28:5, 28:9, 28:11, 28:25, 29:3, 40:1, 40:2, 43:7, 43:8, 65:17, 65:19, 66:10, 66:10, 66:11, 67:4, 67:9, 68:20, 69:15, 72:20, 82:16, 82:17, 85:7, 85:8,	105:14, 105:15, 112:12, 112:13 solicit - 13:19 somehow [3] 54:7, 78:3, 90:25 someone [2] 16:1, 24:4 sorry [6] 40:20, 69:19, 74:7, 81:4, 83:9, 98:20 sort [8] 5:15, 36:10, 49:14, 49:15, 50:23, 54:8, 54:11, 100:16 sounds [3] 48:10, 54:8, 95:17 south [3] 77:21, 80:7, 80:18 speak [8] 13:21, 13:24, 14:2, 14:6, 14:7, 16:21, 37:5, 106:8 speaking - 34:13 special [4] 2:8, 26:11, 26:15, 108:18 species [5] 35:12, 87:23, 95:20, 96:2, 96:4 specific [22] 10:15, 10:17, 12:10, 21:22, 23:10, 23:19, 24:7, 24:17, 24:19, 24:25, 25:5, 26:4, 27:1, 29:11, 29:18, 29:25, 30:6, 32:24, 42:5, 90:22, 91:1, 91:2 specifically [4] 42:2, 68:23, 78:16, 78:25
---	--	---	--	--	---

specifics - 23:21 specified [2] 20:14, 38:25 specifies - 21:7 specifying - 20:12 spectrometry - 92:19 speculate - 56:15 speculation [3] 77:25, 78:21, 89:23 speculative [2] 78:5, 90:3 spend [2] 93:8, 93:11 spit - 4:10 split [3] 58:1, 58:4, 58:6 spoke - 17:10 spoken - 13:23 square [3] 47:21, 94:8, 94:9 SS - 115:3 St - 2:5 Stacy [4] 1:19, 84:11, 111:17, 111:19 stakeholder - 19:19 stakeholders - 19:19 stand - 59:6 standard [149] 1:7, 4:8, 4:9, 4:11, 6:17, 6:19, 6:19, 8:18, 8:21, 8:23, 8:24, 8:25, 9:2, 9:21, 9:24, 10:15, 12:8, 12:9, 12:13, 13:8, 14:19, 15:1, 15:1, 15:2, 15:6, 15:14, 15:15, 16:22, 17:6, 18:3, 18:6, 19:9, 19:11, 19:13, 20:5, 20:25, 21:2, 21:16, 21:19, 22:4, 22:16, 22:24, 23:4, 23:12, 25:18,	26:19, 27:1, 27:8, 27:23, 29:11, 29:18, 29:25, 30:23, 30:24, 30:25, 31:4, 31:11, 31:15, 31:20, 31:23, 31:23, 32:2, 33:23, 35:21, 35:25, 36:2, 36:3, 36:7, 36:12, 36:25, 38:14, 38:15, 39:6, 39:13, 41:3, 41:8, 41:8, 41:9, 41:23, 42:10, 42:11, 42:13, 42:22, 44:1, 45:10, 45:22, 47:7, 47:12, 48:6, 48:7, 49:4, 50:5, 50:16, 50:20, 50:25, 54:10, 55:13, 59:21, 60:1, 60:12, 60:17, 62:15, 67:3, 77:20, 77:21, 79:3, 79:14, 79:19, 80:6, 80:12, 80:13, 80:18, 81:1, 81:1, 83:6, 83:16, 84:14, 85:21, 86:12, 86:18, 86:25, 87:7, 88:7, 88:11, 88:17, 88:19, 89:3, 90:6, 91:6, 92:15, 92:22, 92:23, 93:18, 95:5, 95:8, 97:17, 97:25, 98:8, 99:16,	100:23, 101:9, 101:13, 102:6, 102:20, 105:4, 106:21, 108:15, 108:17, 108:19 standards [39] 2:9, 7:16, 8:17, 9:3, 11:5, 11:20, 11:24, 11:25, 11:25, 12:1, 12:5, 12:7, 12:22, 15:4, 18:23, 19:6, 19:22, 21:24, 22:5, 22:6, 23:11, 23:20, 26:4, 30:6, 30:17, 30:20, 50:24, 76:9, 76:12, 80:9, 80:17, 80:20, 87:14, 89:9, 93:22, 94:1, 100:25, 107:2, 107:2 standing [11] 62:6, 75:18, 76:16, 77:4, 77:15, 78:6, 79:23, 80:2, 81:10, 81:19, 82:4 standpoint [2] 70:17, 100:5 start [10] 7:4, 11:7, 13:9, 18:5, 20:11, 24:5, 32:14, 44:5, 44:10, 109:10 started [7] 6:22, 6:24, 6:25, 18:8, 18:8, 18:11, 72:4 starting - 38:11 state [30] 1:2, 7:2, 10:25, 12:17, 18:2, 18:4, 18:9, 18:13, 22:5, 24:18, 27:14, 27:15,	29:19, 30:16, 30:19, 38:15, 60:22, 69:11, 78:13, 78:13, 83:21, 84:1, 87:6, 88:18, 94:24, 98:16, 103:6, 109:25, 115:2, 115:7 State's - 87:13 stated [3] 58:14, 92:8, 103:22 statement [11] 30:2, 32:1, 32:2, 32:25, 64:15, 64:21, 68:3, 80:5, 103:1, 108:9, 113:17 statements [5] 87:16, 89:23, 90:3, 113:20, 114:4 states [4] 67:13, 93:22, 94:24, 108:21 stationary - 37:22 statute [68] 4:6, 4:7, 6:21, 8:14, 8:15, 9:4, 10:17, 10:18, 25:14, 26:9, 26:16, 26:21, 27:15, 38:25, 39:4, 42:6, 42:7, 42:15, 44:1, 45:5, 45:13, 46:4, 48:4, 52:23, 53:4, 53:10, 53:11, 53:23, 53:24, 55:20, 57:6, 57:14, 57:15, 62:12, 67:2, 68:3, 70:3,	72:1, 77:1, 77:14, 78:6, 78:11, 78:16, 78:19, 82:5, 83:7, 84:15, 84:25, 85:23, 86:15, 89:1, 89:1, 90:1, 90:21, 90:21, 91:1, 101:11, 101:15, 105:6, 106:5, 106:7, 106:14, 107:19, 108:12, 109:13, 111:2, 111:9, 112:6 statutory - 52:5 staying - 37:21 step [3] 47:17, 57:4, 83:20 step-by-step [2] 24:22, 33:19 step-wise - 25:5 steps - 47:15 STEVEN - 1:16 stop [2] 12:24, 19:14 straight - 37:24 straying - 64:5 stream - 95:2 stricken - 14:11 strict [2] 41:3, 99:16 strictly - 27:19 stringency [36] 1:6, 3:25, 4:6, 4:7, 8:14, 9:3, 25:14, 26:9, 26:16, 26:21, 27:14, 44:1, 45:12, 46:12, 47:4, 47:10, 62:12, 64:7, 67:1, 82:4, 83:6, 84:15, 84:24, 85:23, 90:1,	90:20, 90:21, 101:11, 101:14, 105:6, 106:5, 106:7, 110:6, 111:8, 111:11, 112:6 stringent [68] 6:19, 10:1, 10:18, 10:19, 12:6, 12:17, 13:8, 15:2, 15:7, 18:24, 20:13, 21:1, 21:3, 21:10, 21:20, 22:6, 22:17, 22:20, 22:24, 26:7, 27:1, 27:8, 27:16, 28:1, 31:24, 32:3, 32:4, 32:5, 36:2, 36:12, 37:12, 37:25, 38:3, 38:15, 39:3, 39:15, 41:9, 42:8, 42:23, 44:18, 44:22, 45:10, 46:8, 46:14, 47:6, 47:12, 47:21, 49:4, 50:6, 51:24, 54:11, 55:13, 58:7, 59:20, 60:10, 60:13, 60:17, 68:5, 77:17, 83:17, 86:12, 90:6, 91:7, 106:21, 107:7, 107:11, 108:20, 110:8 strong - 14:24 strongly - 36:18 structure - 34:3 studies [17] 62:23, 89:18, 99:14, 106:6,
--	---	--	--	---	--

106:12, 106:17, 107:10, 107:22, 107:23, 108:8, 108:14, 109:1, 109:14, 110:4, 110:16, 111:10, 112:7	101:24, 103:1, 103:2, 104:7, 104:8, 105:5, 106:6, 107:13, 108:15, 109:22, 111:10, 111:11, 112:1, 112:7	6:25, 7:4, 7:8, 7:11, 15:13, 15:19, 26:12, 35:19, 38:2, 52:21, 62:6, 62:9, 67:25, 75:18, 75:23, 76:1, 76:24, 77:4, 77:9, 77:19, 77:24, 78:4, 78:17, 79:1, 79:4, 79:4, 79:14, 79:17, 79:19, 79:21, 79:23, 80:1, 81:9, 81:19, 82:4, 86:1, 88:9, 88:10, 88:24, 94:16, 94:19, 95:15, 98:14, 98:15, 103:12, 114:7	33:12, 34:11, 35:13, 35:15, 35:17, 36:12, 37:2, 38:6, 38:8, 39:16, 40:14, 40:24, 41:10, 41:11, 45:14, 45:17, 46:21, 47:2, 47:24, 48:21, 49:22, 52:18, 55:24, 56:1, 56:18, 59:11, 59:13, 61:25, 65:8, 65:9, 72:9, 72:18, 73:9, 74:22, 76:19, 77:7, 78:9, 79:25, 79:25, 81:23, 81:24, 84:18, 86:3, 90:14, 91:11, 99:5, 99:8, 101:2, 101:4, 101:16, 103:5, 105:1, 105:8, 107:15, 107:17, 109:1, 109:23, 110:11, 111:18, 111:19, 112:24, 113:5, 114:14, 114:15	50:23, 54:14, 63:10, 71:1, 75:25, 80:18, 86:20, 87:2, 87:15, 88:6, 88:6, 88:11, 88:21, 89:22, 94:21, 97:6, 97:18, 102:5, 103:2, 104:8, 104:20, 105:9, 110:17	12:21, 12:22, 20:6, 24:25, 27:22, 27:23, 28:3, 30:11, 30:16, 30:19, 30:22, 31:3, 33:6, 36:21, 87:11, 87:11, 87:12, 87:13, 87:25
sturgeon [4] 96:3, 96:5, 96:7, 96:13	supports [2] 26:13, 106:22	Teck's [3] 18:20, 35:20, 90:12	Teck's [3] 18:20, 35:20, 90:12	therefore [4] 9:25, 12:16, 79:23, 80:8	today [14] 4:21, 4:23, 5:3, 5:11, 7:11, 24:11, 49:3, 60:20, 63:15, 63:20, 64:7, 91:5, 113:16, 114:11
sub [7] 44:16, 49:5, 61:19, 72:3, 77:15, 90:22, 106:14	suppose - 71:3	telling - 100:21	telling - 100:21	therein - 95:13	tool - 96:18
sub(a) [2] 44:16, 77:15	supposed [2] 14:1, 102:2	ten [2] 39:17, 65:1	ten [2] 39:17, 65:1	they're [10] 5:5, 13:18, 13:19, 31:12, 57:8, 57:8, 60:6, 80:21, 107:3, 107:23	top - 56:21
subdivision - 78:13	Supreme [2] 23:13, 25:20	tend [3] 52:20, 59:14, 111:1	tend [3] 52:20, 59:14, 111:1	they've - 114:9	topic [2] 7:17, 10:23
subject [2] 31:12, 59:5	susceptible - 26:11	tens - 114:12	tens - 114:12	thing [7] 8:11, 17:4, 29:16, 71:12, 89:16, 106:25, 113:15	total - 114:12
Subparagraph [4] 30:13, 30:14, 46:4, 67:16	suspect - 14:5	terms [3] 8:19, 18:20, 56:15	terms [3] 8:19, 18:20, 56:15	things [5] 6:14, 23:15, 41:18, 51:14, 72:12	touched - 92:3
Subsection [2] 45:2, 61:23	system [6] 94:11, 95:21, 96:4, 97:2, 97:4, 113:25	testify - 71:15	testify - 71:15	thousand - 15:10	toward - 80:25
substantive [2] 5:8, 73:2	systems [3] 10:12, 26:2, 96:17	testimony - 17:16	testimony - 17:16	threat [2] 26:18, 26:19	towards - 19:21
substitute - 22:9	T	thank [94] 3:22, 4:17, 5:13, 5:20, 8:2, 8:6, 10:22, 10:24, 13:1, 13:11, 15:21, 16:7, 16:15, 16:16, 18:25, 19:1, 19:4, 20:7, 20:8, 20:10, 23:6, 25:8, 25:10, 27:8, 27:11, 28:4, 29:2, 32:5, 32:6, 33:10,	thank [94] 3:22, 4:17, 5:13, 5:20, 8:2, 8:6, 10:22, 10:24, 13:1, 13:11, 15:21, 16:7, 16:15, 16:16, 18:25, 19:1, 19:4, 20:7, 20:8, 20:10, 23:6, 25:8, 25:10, 27:8, 27:11, 28:4, 29:2, 32:5, 32:6, 33:10,	think's - 94:23	toxicity [2] 24:20, 34:6
succinct [3] 54:6, 56:20, 59:17	table [6] 20:17, 28:16, 29:6, 29:8, 32:11, 47:7	thanks [5] 5:21, 11:5, 60:1, 75:21, 81:16	thanks [5] 5:21, 11:5, 60:1, 75:21, 81:16	thoughts [5] 6:14, 23:15, 41:18, 51:14, 72:12	track - 65:10
sufficient - 97:4	tad - 54:6	themselves - 59:17	themselves - 59:17	throughout [2] 10:5, 11:9	tracking - 6:21
suggested [5] 5:10, 46:6, 59:23, 71:18, 74:15	taken [5] 14:8, 24:21, 39:20, 65:3, 115:8	there's [32] 10:20, 10:21, 30:7, 31:7, 31:9, 35:4, 36:1, 36:9, 39:7,	there's [32] 10:20, 10:21, 30:7, 31:7, 31:9, 35:4, 36:1, 36:9, 39:7,	threshold [2] 30:5, 97:16	train - 36:9
suggesting - 6:6	taking - 83:19			thousand - 15:10	transcribed - 115:11
suggestion [2] 58:4, 104:4	targeted - 78:4			threat [2] 26:18, 26:19	transcript [2] 1:10, 73:5
suggests [2] 86:22, 88:2	technical [8] 23:2, 33:8, 38:17, 81:18, 91:4, 91:23, 102:3, 103:25			threshold [2] 30:5, 97:16	transcription - 115:11
Suite - 2:5	Technically - 59:2			throughout [2] 10:5, 11:9	translated [3] 12:8, 12:13, 34:4
summary [2] 11:12, 102:16	technology [6] 88:20, 88:22, 89:4, 89:6, 103:17, 103:18			throw - 69:7	translation [4] 12:23, 24:24, 25:6, 34:5
support [26] 11:1, 26:25, 27:3, 33:1, 46:19, 62:16, 64:11, 85:22, 90:14, 97:4, 101:10, 101:14,	Teck [49] 1:4, 2:2, 4:3,			timeline - 49:20	treat - 114:12

<p>trouble - 108:22 true [2] 78:22, 115:13 truth - 114:1 turn - 106:8 turning - 71:13</p> <hr/> <p style="text-align: center;">U</p> <p>ultimate - 59:7 ultimately [3] 36:22, 55:1, 58:23 ultra-conservative - 96:16 unanimously - 112:25 unclear [2] 54:5, 74:8 understand [10] 16:10, 24:3, 66:16, 74:10, 80:6, 81:18, 83:19, 97:11, 100:14, 110:11 understanding [8] 16:17, 16:25, 17:16, 19:12, 80:10, 95:6, 97:2, 97:4 understands - 24:4 undertake - 60:19 undertaking - 60:20 unenforceable - 54:11 Unfortunately - 13:22 uniqueness - 24:20 universe - 9:2 unless [2] 7:6, 107:12 unnecessary - 47:17 unplowed - 73:15 unprecedented - 36:5 unsure - 110:16 unusual - 100:2 upcoming - 19:24</p>	<p>upset - 109:6 USGS - 95:15 using [5] 12:9, 21:21, 25:7, 92:18, 115:11 utilize - 46:7</p> <hr/> <p style="text-align: center;">V</p> <p>valid [9] 47:19, 63:9, 63:11, 63:11, 68:7, 68:8, 92:2, 96:19, 111:24 validity - 14:25 Valley [2] 79:16, 79:17 valuable [2] 96:18, 101:7 value [12] 12:16, 12:18, 23:10, 23:19, 24:8, 25:1, 25:24, 26:1, 29:14, 30:9, 35:10, 35:11 values [7] 20:3, 20:6, 34:25, 35:6, 35:8, 96:1, 96:14 variables - 97:15 variations - 97:11 verifiable - 97:9 versus [2] 27:20, 37:12 Via [2] 1:10, 1:12 Vicki [2] 2:3, 7:10 view [4] 53:14, 64:19, 67:23, 96:15 violates - 53:4 viruses - 100:12 vote [4] 42:14, 43:4, 82:13, 112:8 voting [2] 41:10, 81:21</p>	<hr/> <p style="text-align: center;">W</p> <p>wait - 67:5 walk - 84:6 walked - 76:4 wanted [10] 24:18, 44:3, 47:3, 61:24, 62:1, 71:22, 72:5, 90:1, 93:3, 114:5 wanting - 5:16 wants [2] 68:14, 114:16 wastes - 94:25 waters [2] 27:19, 95:7 waterways - 47:19 ways - 48:5 we'll [17] 6:18, 7:24, 8:5, 20:17, 28:25, 39:18, 44:10, 57:2, 57:23, 62:6, 65:1, 74:16, 82:10, 82:11, 104:4, 112:8, 114:19 we're [36] 3:24, 4:11, 4:15, 4:21, 5:2, 6:9, 15:7, 18:2, 24:11, 28:19, 37:9, 37:11, 37:20, 38:13, 39:12, 39:13, 57:22, 59:3, 59:4, 61:5, 64:2, 64:16, 66:16, 66:20, 70:6, 70:16, 75:13, 84:5, 93:2, 93:13, 94:1, 95:3, 95:4, 95:8, 104:9, 111:23 we've [9] 43:23, 49:12, 59:19, 61:7, 66:16, 69:2,</p>	<p>78:21, 83:10, 113:4 weak - 92:11 website [2] 14:14, 114:8 weren't [2] 46:13, 90:2 what's [4] 58:4, 100:24, 102:15, 113:22 whatever [4] 18:13, 34:14, 37:16, 68:13 whenever [3] 5:18, 29:20, 29:24 WHEREOF - 115:15 WHEREUPON - 3:1 whether [26] 13:8, 18:17, 23:9, 23:22, 24:7, 37:12, 38:14, 38:19, 39:14, 47:20, 55:12, 56:15, 62:22, 64:11, 89:7, 93:21, 93:25, 98:22, 99:16, 101:9, 102:6, 102:6, 102:11, 102:18, 103:23, 111:24 whoever - 66:21 whole [4] 11:23, 33:24, 68:6, 80:10 wide - 100:11 wildlife [2] 15:5, 36:24 willing - 61:6 willingness - 8:9 wisdom - 35:25 withdraw [3] 54:19, 54:20, 54:22 within [11] 9:2, 10:21, 45:2, 55:15,</p>	<p>57:20, 60:24, 64:8, 64:12, 67:14, 70:23, 78:17 WITNESS - 115:15 won't [3] 21:15, 30:2, 38:17 wondering [2] 73:3, 111:23 works - 34:14 worth - 13:13 wouldn't [2] 63:2, 73:8 wrapped - 109:20 writing - 73:2 written [34] 4:12, 4:22, 4:25, 21:17, 26:24, 27:2, 27:3, 27:4, 38:24, 45:1, 46:9, 46:19, 48:8, 51:5, 51:25, 52:15, 54:16, 55:5, 58:22, 60:18, 61:22, 67:17, 69:25, 70:4, 70:9, 71:24, 72:5, 75:14, 83:25, 86:17, 89:17, 90:14, 106:15, 109:22 wrong - 102:11</p> <hr/> <p style="text-align: center;">Y</p> <p>yeah - 31:9 yesterday - 5:24 yet [5] 18:17, 38:18, 83:24, 99:21, 100:1 you'll [2] 30:3, 108:1</p> <hr/> <p style="text-align: center;">Z</p> <p>Zoom [2] 1:10, 1:12</p>
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Selenium Rule Stringency Review – Questions To Be Addressed By BER

1. Is the lake water column standard (.8 µg/L) (the “Standard”) more stringent than the comparable federal guideline?

If yes, then:

2. What is the remedy/consequence of the failure to comply with the Stringency Statute?

Additional questions presented by the Petitions and argued by the interested parties:

3. Should the Board address any of the following questions?
4. Does Teck Coal Limited have standing?
5. Did the initial notice of rulemaking with respect to the Standard fail to comply with the Stringency Statute?
6. Does the rulemaking record with respect to the Standard contain evidence that would support the findings required by the Stringency Statute?
7. Does the Stringency Statute require peer-reviewed scientific studies to support the findings required by the Stringency Statute?

Montana Code Annotated 2021

TITLE 75. ENVIRONMENTAL PROTECTION

CHAPTER 5. WATER QUALITY

Part 2. Administrative Agencies

State Regulations No More Stringent Than Federal Regulations Or Guidelines

75-5-203. State regulations no more stringent than federal regulations or guidelines. (1) Except as provided in subsections (2) through (5) or unless required by state law, the department may not adopt a rule to implement **75-5-301**, **75-5-302**, **75-5-303**, or **75-5-310** that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The department may incorporate by reference comparable federal regulations or guidelines.

(2) The department may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the department makes a written finding after a public hearing and public comment and based on evidence in the record that:

- (a) the proposed state standard or requirement protects public health or the environment of the state; and
- (b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference pertinent, ascertainable, and peer-reviewed scientific studies contained in the record that forms the basis for the department's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) (a) A person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The department may charge a petition filing fee in an amount not to exceed \$250.

(b) A person may also petition the board for a rule review under subsection (4)(a) if the department adopts a rule in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted department rule.

(5) This section does not apply to a rule adopted under the emergency rulemaking provisions of **2-4-303(1)**.

History: En. Sec. 1, Ch. 471, L. 1995; amd. Sec. 2, Ch. 378, L. 2015; amd. Sec. 32, Ch. 324, L. 2021.