BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of: Notice of
appeal and request for hearing
by the Western Sugar Cooperative
Regarding its Montana Pollutant
Discharge Elimination System
Permit No. MT0000281

CASE NO.
BER 2020-05 WQ

TRANSCRIPT OF THE PROCEEDINGS - ORAL ARGUMENT
(VIA ZOOM)

October 16, 2026
9:05 a.m.

BEFORE CHAIR DAVID SIMPSON,
BOARD MEMBERS JULIA ALTEMUS, JENNIFER RANKOSKY,
and JOSEPH SMITH

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WHEREUPON, the proceedings were had as follows:

CHAIR SIMPSON: Next matter, this is, this is one that I think we're going to need to discuss a little bit: In the matter of notice of appeal for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281, issued October 29th, 2020, BER 2020-05 WQ.

On October 1st, Western Sugar Cooperative filed a motion for second amendment of the Board's May 3rd, 2024 final agency action, seeking to extend its November 1, 2026 deadline to submit its MPDES permit supplemental renewal application to April 1, 2027. DEQ -- That petition was in your package, by the way. DEQ opposes this request. Briefing is not complete.

Yesterday we received DEQ's brief in opposition. Briefing is not yet complete, but that November 1 deadline is only a couple of weeks away. That will occur before we have another meeting. So what I wanted to ask is that if we could have the parties brief the Board on what this is all about. And I guess, you know, having, having read both documents, I think I have a general feel for it, but it all looks rather complex to me; complex technically, if nothing else.

So I would ask Western Sugar to take a few minutes, hopefully no more than five or ten minutes, to brief us on

where we are today and how we got here.

MS. MARQUIS: Thank you, Chairman Simpson and members of the Board. Thank you very much for hearing this this morning, despite the fact that it's not completely briefed and you received DEQ's brief yesterday. Western Sugar, we appreciate the time to address the Board this morning. We don't need to file a reply brief for your consideration.

The issue is really pretty simple. We had settled this case knowing that we were getting into some complex modeling requirements to figure out what is going on under the facility in terms of groundwater. We also had a surface water issue, and the Department had some concerns about groundwater discharges being the functional equivalent of surface water discharges.

I'm happy to report that Western Sugar has done all of the technical work for that last piece to make sure that the groundwater discharges are not functioning as the equivalent of a surface water discharge. Now, DEQ has not reviewed that and approved that, so they might reach a different conclusion. But as we agreed in our settlement document, and it's in the Final Board Agency Action, Item 6.b, that Western Sugar would submit the results of the fate and transport studies and Western Sugar's own interpretation of the functional equivalent analysis.

Now, that's for the surface water discharges.

Western Sugar hired a reputable national consulting firm to start the modeling, and, mind you, we didn't have the consulting firms advising on the length of time that this modeling would take. And as they got into it, it became very complex, and the first consulting firm hit some roadblocks and some limitations on their end, and so the modeling needed to transition to a different consultant. That was Hydrometrics, a local consultant here in Montana. They were brought on a little over a year ago.

They've been working very diligently. I hope you've had a chance to review the affidavit from Greg Bryce that was in your packet explaining just how much work they've really put into this. And when they took the project on, their recommendation was for a 14-month extension. That would go through July of 2027. DEQ would only agree to a 6-month extension, so that's what was proposed to you at the last time that this came up in front of the Board, and Western Sugar was really stuck. Their consultant said they need 14 months, DEQ said they would only allow 6 months. We said, well, we'll try, we'll do what we can in 6 months.

And so Western Sugar has done that, and I'm happy to report that they do have the surface water portion in

shape such that it can be submitted by November 1st. I'm also happy to report that they've shortened up their original time estimate for the groundwater portion. That can be submitted by April 1st, 2027, instead of July.

I know that's still not something that satisfies the Department, but really, this is a technical issue and I'm relying on the technical experts. We've had two large consulting firms in on this, and when they say we really can't get this done any quicker than we're doing, that's just -- that is a fact to consider. And so that's why we, we went to DEQ again and asked for an extension to April 1st.

DEQ was unwilling to allow that, so that's why we end up bringing this to the Board. And Western Sugar -- You know, I've read the Department's response brief, discussed it with my client. Western Sugar acknowledges that, you know, the settlement agreement allows them to propose their interpretation of the data and that DEQ then has their own work to do to come up with their own interpretation. We all understand that. We understood that when we signed the first settlement agreement.

And so we're willing to produce to DEQ what we have by November 1st, which is the surface water portion, but the groundwater portion will not be done until April 1st. And we can -- You know, in DEQ's response brief, they seem to

not want that bifurcated submission, so Western Sugar is happy to submit everything to the Department by April 1st, or they can submit what they have by November 1st and then follow up with the rest by April 1st and work with DEQ in the interim to answer questions and gather additional data.

One of the things that has been limiting here is the sugar beet processing facility only operates seasonally. So to collect data during the operation, which is the data that they need to inform the permit limits, they're limited to from September to about February or March of each year; there's a limited window to collect the data. And, of course, a larger dataset will be more helpful.

So initially, that is what put the deadline out far, is they wanted to get two campaign seasons worth of data. And so I just want to assure the Board that it's not the case that Western has been dragging their feet. They've been doing everything they can. That's one of the reasons why I apologize for the number of pages we submitted to the Board with the field activities report, but we wanted to be sure that the Board knew -- or Western Sugar really wanted to be sure that the Board knew they have been doing a lot of work on this and they really are going as fast as they can.

So Western Sugar is happy to, as I said, submit

everything they have complete now by November 1st with the follow-on submittal by April 1st, or submit everything by April 1st. But really, that's the technical limits of what they, they can do.

CHAIR SIMPSON: Thank you, Ms. Marquis. We'll hold off on questions until we hear from DEQ.

MR. MOSER: Good morning, Chairman Simpson and members of the Board. Kurt Moser, and I represent DEQ in this matter.

I think, like, one of the interesting things about this case is that, I mean, it's dismissed; right? And so, like, you know, the parties at the beginning, I mean, we agreed, we agreed to a certain settlement, the Board adopted that as its final order, and then last spring Western Sugar approached DEQ, as Ms. Marquis indicated, and wanted an extension.

Now, the consideration of that extension was based largely upon the materials that were provided with this motion. So something like, I don't know, like 270 out of 286 pages that were part of that packet was something that already existed prior to the Board's last determination that 6 months was what they had to complete this process and had to submit all of the information by November 1st. So the new information, you could say, is really contained in the affidavit, for the most part, which is way at the

end of the, end of the packet.

Now, DEQ objects to the extension because we've already considered that information, obviously, and it's part of a settlement, and this is a dismissed case, so -- However, if the Board uses its authority to, to change this and decides that the -- that it's warranted to provide until the April 1st date, to move the November 1st date, 2026, to April 20 -- April 1st, 2027, then DEQ would say please do not bifurcate this case. Okay?

Because the, the considerations between groundwater and surface water are fundamental to, to DEQ's determinations. And, in fact, DEQ has specific deadlines following their submittal of this information, and splitting these things into two would not be good. Now, if, if Western Sugar wants to submit the information that they have early, you know, the surface water information early, that's fine, as long as none of those -- that all of DEQ's deadlines get moved after April 1st to the same intervals that are currently existing.

So, like, right now, initially, when we came to the Board last spring when we agreed to the extension, we moved their, their submittal date from May 1st of 2026 to November 1st of 2026. So with moving that date to April 1st, then DEQ's dates would then move from January 1st, 2027, to -- for DEQ to review and supplement

and request any additional information as needed, that January 1st, 2027 date would have to move to June 1st, 2027.

And then DEQ has another obligation in this settlement agreement, and that is to produce a tentative determination based on this information, and essentially putting a draft permit document out for public consideration. And so that was originally supposed to be by December 1st, 2026. That deadline was moved to June 1st, 2027, when this matter was addressed earlier this year by the Board. That date would have to be moved to December 1st, 2027, in order to accommodate DEQ's -- to provide DEQ with the same amount of time to produce the draft permit.

Now, as a note on this, on I guess why did we come in and, and open sort of a -- ask the Board to make an amendment to their, essentially their judgement in a dismissed case, that was because we had specific deadlines in the Board's order that directed us to do things. And so we came to the Board and sort of noticed the Board, said, hey, we're, we're fixing to do this change and we want to know what you think because we want to make sure we're not doing anything that runs afoul of this order; and if you think it's necessary to change the order, and you did, you know, do so. Because we don't want to be --

you know, we don't want to be operating in contravention to that order.

So DEQ obviously had dates, and if we had agreed to an extension, any extension without asking the Board or least informing the Board about it, then, obviously, we're taking a risk that now we are -- you know, DEQ is not abiding by the order. So we didn't want to do that. That's why we agreed to, to come back to the Board and do that.

Now, again, this time DEQ is not agreeing to the extension. However, if the Board does, does agree that an extension is appropriate, we think this matter really needs to stay together, because that's how the whole agreement was contemplated. You know, the idea between -- the idea about, you know, whether or not these groundwater discharges are the functional equivalent, you know, that's really the basis of the whole, the whole settlement. Like we want -- we took a step back, we said, okay, we've got this new Maui case, we've got to figure this out.

(Court reporter clarification.)

MR. MOSER: We have this new Maui case that we've got to figure out. It's a U.S. Supreme Court case about how you want to treat discharges that first go into the ground but ultimately express themselves in surface water. And if they are --

(Court reporter interruption.)

MR. MOSER: Discharges that go into the ground and ult -- first but ultimately express themselves into surface waters. And, and if they meet a certain test, which is an analysis that you look at under the Maui case from the U.S. Supreme Court, then you can treat those -- or you have to treat those as surface water discharges and subject them to surface water discharging, discharge requirements, which are different, you know, than if it's just a pure groundwater discharge.

And so because all those considerations are being made at the same time, we don't believe you can bifurcate this case that way. Even if ultimately there's two applications, we need to make that -- DEQ needs to make its considerations at the same time. So...

CHAIR SIMPSON: Thank you, Mr. Moser.

Anything further, Ms. Marquis?

MS. MARQUIS: Western Sugar is not opposed to keeping all the deadlines together and adjusting them all as Mr. Moser specified, with the June 1st, 2027 deadline to request additional information and the tentative decision by December 1st, 2027. Western has never been opposed to that. We understand that the Department has those deadlines, and those would have to be stretched out. You know, it's just a -- they're all linked together, so

to move one you necessarily move the others, and Western Sugar is not opposed to that.

CHAIR SIMPSON: Thank you.

Any questions from the Board?

BOARD MEMBER RANKOSKY: It seems like the DEQ kind of gave us a resolution to follow, so I'm, you know, unsure why we wouldn't just abide by that for that request. I mean, that's my general opinion. They have to do -- if they have to do groundwater monitoring, groundwater monitoring can't be done before April 1st. At least in our area, you can't do groundwater monitoring; you have to go all the way to June. So it makes more sense just to --

CHAIR SIMPSON: Thank you, Jen. Is that a motion?

BOARD MEMBER RANKOSKY: Yeah, it's a motion to accept DEQ's proposal at the end of that brief, their, their alternative of what they would -- or for alternative dates, I guess.

CHAIR SIMPSON: Which would essentially be, if I understand correctly, to defer both the groundwater and surface water analyses until the April 1 deadline and then extend the succeeding deadlines accordingly. Is that, that accurate?

BOARD MEMBER RANKOSKY: I feel like it is. Or

DEQ could talk to the dates better. I wasn't writing them down like he was.

MR. MOSER: Yes, if the -- I mean, Chairman Simpson, members of the Board, yes, if the Board believes that extension is warranted, in other words, moving their submittal date, the combined submittal date from November 1st, 2026, to April 1st, 2027, then DEQ's deadline, I believe that would be in the -- well, the settlement agreement -- I don't want to get the -- The Board's order is really what we're talking about, but it adopts the settlement agreement and it actually puts those provisions within it.

But the, the order is a little bit harder to follow, so it's going to be a little harder to follow I think because of the way we did it. But like essentially, then after the submittal on April 1st, 2027, DEQ would have essentially two months to review the supplements and request additional information by June 1st, 2027. And then the date by which DEQ would issue a new tentative determination would be -- in a draft permit and a public notice would be moved from June 1st, 2027, until December 1st, 2027.

CHAIR SIMPSON: Thank you, Mr. Moser.

The motion has been made. Is there a second?

BOARD MEMBER ALTEMUS: Second.

CHAIR SIMPSON: I believe it was seconded by Julia; is that right? Thank you.

Discussion.

BOARD MEMBER SMITH: I have a question for Mr. Moser with DEQ. So basically, we're delaying the deadlines and you folks want specific dates rather than bifurcating. I mean, what other options do we have here? Is there anything else that we should be considering otherwise? I mean, I understand that Western Sugar is continuing to operate right now. Like what -- is there anything else that we should be considering here?

MR. MOSER: Chairman Simpson, Board Member Smith, and members of the Board, you know, I mean, the motion has been made, right, so to basically open up this case and, and make another amendment to the Board's order. So, I mean, your choices are you just, you can deny it, you can choose not to act on it at all. I mean, the motion is -- or you can, you know, do this -- I mean, or as the DEQ has requested, if you don't deny the request, then please do this other thing in the alternative.

And so right now there's a motion on the table to do that. But like -- but certainly you could, you could deny it, in which case, then, they would, they would have to submit all their materials by November 1st, we'd have two months to kind of go back and forth on some of the

information, and then, and then we'd move through the, you know, move through the process. And, you know, that's -- And then it would work that way. I mean, I -- And so that would be the one option. I mean, that isn't really the motion before you, but that's -- I mean, if you're thinking that they should -- if you're opposed to that, then you could do that, you know, I mean, but -- you know, if you're opposed to further delay.

So, I mean, I do think, you know, delay is not -- In this case, we have worked with this permit for quite a long time. As you see on your docket, this case originally was a permit that was issued in, I think at the end of 2020. Okay? I mean -- and so, you know, and the permit that's in place now was issued in 2009. Okay?

So, like, MPDES permits are generally supposed to be renewed every five years. Now, that doesn't usually happen because usually you have an administratively continued permit. Our goal is to get them two years, so to renew a permit after it's been applied for for two years. So this one is pretty old.

The idea behind updating permits is to kind of get them up to snuff, and, you know, like a 2009 permit, things have changed at the site, you know, and that's -- You know, I mean, we need to update things and, and that's why they have limits on how long you can have a permit.

So it's definitely something we want to get taken care of and move forward on and not continuing to delay. But, you know, if the Board thinks an additional period is appropriate, then, you know -- And just, I guess I would say please don't allow any further extensions.

CHAIR SIMPSON: Further discussion or questions from the Board?

BOARD MEMBER SMITH: I guess my only other question, Chair Simpson, is, you know, when this was presented here at the beginning of the discussion, I guess it sounded like to me that we were just going to get a bit of a case explanation from both parties. I guess I didn't have the takeaway that we were actually going to make a decision today. Was that, was that your intent, to just kind of get a briefing, or was it for us to actually make a board decision today?

CHAIR SIMPSON: Well, my initial -- excuse me. My initial thought on this was to, anticipating that we would be receiving a reply from Western Sugar, is to stay the deadline until our next meeting, in which case we would make a final decision. But since Western Sugar has waived the reply, we're in a position to make a decision now, I believe.

Is that correct, Dana?

MS. HUPP: That is correct, that they have waived

their right to reply. I think the complication here, as you noted, is the November 1st deadline. So, you know, there's, there's a variety of options. You could, you know, extend the deadline for -- you know, out to past the next meeting so you could consider this more fully at the December meeting; or you could at this point just rule on, on the request.

CHAIR SIMPSON: Thank you, Dana.

Any other comments, questions --

BOARD MEMBER RANKOSKY: I have a question on the, on the timeline. When they were told to groundwater monitor, when was the last time that they were told to groundwater monitor? Is there anybody that can answer that? Like when was -- when were they informed that they needed to give the, to do the groundwater monitoring, and why did they miss the deadline? It's in spring that they should have been doing the groundwater monitoring; right?

MR. MOSER: Chairman Simpson, Board Member Rankosky, I mean, the parties entered into a settlement agreement in 2024, and so the agreement was sort of like -- it basically -- I mean, I'm, I'm sort of, sort of like estimating this, but it basically was two growing seasons to conduct, to collect information or so. And last spring Western Sugar asked for another, another, like, full growing season and wanted an extension until

July of '27 to submit this information.

So the parties, you know, agreed to a six-month, I mean, even though, you know, Western obviously wanted more, but -- And that's what we did. So, like, there has been opportunity to do sampling, you know. So it's just that they wanted more time. They had difficulties with their, with I guess the product that they got from their previous consultant. I mean, you know, so these are some of those considerations. But I just want to be clear, like it's not like we said you don't get any time, you know, to sample groundwater. They've had time to do groundwater, they're just saying they need, they need more.

BOARD MEMBER RANKOSKY: Can they answer why they didn't do it this last spring if they knew this extension -- or they knew that this deadline was coming up?

MS. MARQUIS: Board Member Rankosky and members of the Board, Vicki Marcus for Western Sugar again. It's not the case that the monitoring wasn't done. The monitoring -- in fact, Western Sugar has done more monitoring than the settlement agreement required.

In the Board's final agency action, it gives a brief summary of what happened, and, as Mr. Moser had said, Western Sugar did appeal their permit on November 23rd,

2020. We went through a lot of discovery and a lot of prehearing motions practice, and we were able to settle that, and we came to the Board in April of 2024 with a request for an order to adopt the settlement.

Now, that settlement agreement had specific deadlines, and one of the deadlines was DEQ wanted to see a design for the study that would be done and a design for the modeling, so that took some time to put the design together and, and get the DEQ's approval. And there was some back-and-forth between the technical folks at Western and the technical folks at DEQ on the design of the fate and transport studies and the groundwater flow models. So that took some time. Western Sugar did -- at the same time, they did all of the required monitoring beginning with the 2024 to 2025 campaign, so they've been doing all of the monitoring.

The issue isn't with the lack of monitoring results. More monitoring, as you know, is, is always better. The issue -- And it isn't a, a delay. The issue is with constructing the model. The geochemistry in the groundwater is very complex, is what I'm told. And again, that's why we attached the affidavit from Mr. Bryce. And it's with constructing the model.

The first consulting firm was constructing a model, and, as they got further into that, it was very clear that

that model could not be calibrated. There were too many unknowns. It was too complex. And as we explained in an earlier filing with the Board before the last time we were here, it was with -- there was -- the site conceptual model was not done appropriately before the numeric model was started, and so they had to sort of back up and gather more information to more appropriately inform the site conceptual model to then lead into the numerical model.

And that's the work that was just reinitiated a year ago by Hydrometrics. So it's not the lack of monitoring. It's the complexity of the model and being able to calibrate the model.

BOARD MEMBER RANKOSKY: Okay. Thank you.

CHAIR SIMPSON: Thank you, Ms. Marquis.

Does that answer your question, Jen?

BOARD MEMBER RANKOSKY: Yeah.

CHAIR SIMPSON: I guess I would comment that after having read through the materials that were filed by, by Western Sugar, that this is a very -- very complex hydrologic system from the standpoint of, you know, what is required for the permit.

I don't claim to know anything at all about the process of making sugar from sugar beets, but I guess I would comment that this facility is right in town. It's on the south side of Billings across the, across the

interstate from the Yellowstone River. And since it's in urban semi -- well, it's in an urban area, I'm assuming -- I don't know, but I'm assuming that there are other potential sources of, of groundwater contamination, for lack of a better word, I don't know. I don't know if that's the case or not.

But I guess overall, my feeling is that this has gone on since 2020. A four-month -- actually 2024 since the settlement agreement a couple years ago. So I think adding another growing season can't do anything but be helpful. And as I understand it, just as Ms. Marquis stated, is that the problems were with calibration of the model. And as I understand it, again from the submittal, Hydrometrics has identified some gaps in the data that they're working on getting filled before updating the model.

So I guess my own feeling is that in order to proceed from this point, the, the option that makes sense is to collect the additional information and get the best information possible in order to provide a basis for constructing the amended permit and go from there. I don't think four months, or five months I guess it is, is going to make all that much difference.

BOARD MEMBER RANKOSKY: I think with that being said, I, I don't disagree with you on that, but I can

understand where if they come to us again and say, hey, can we have another four -- you know, another four months, that's where the frustration is going to be. Like that's where I would draw the line.

Like you can't continue to ask for forgiveness; like you need to get to the end result. And that's where I would caution them, is, like, that's -- It's getting delayed, and I can understand the frustration for DEQ. They're meeting what they need to meet, and then they keep on asking for more.

CHAIR SIMPSON: I certainly understand your position, and I think there's merit to that, that position as well. I mean, one of the, one of the great frustrations to me in the board activities overall over the years is the continuing delays. And in this case, I don't, I don't believe that it's a matter of delaying for the sake of delay. I believe that, you know, the analysis is more complex and hence taking longer than originally anticipated. But if we find ourselves up against the wall again in five months, I guess we're going to have, have to consider what to do next. That's assuming that, assuming that this motion passes.

Further discussion, questions.

(No response.)

CHAIR SIMPSON: It's been moved and seconded that

the, the deadline of November 1st, 2026, be deferred five months until April 1st of 2027 and that the succeeding schedule be moved forward five months accordingly. I think that's a reasonable statement of the motion. All in favor say aye.

(Response.)

CHAIR SIMPSON: Opposed.

(No response.)

CHAIR SIMPSON: Motion carries unanimously.

Thank you very much. And Dana, I presume we'll be issuing a order on this specifying those deadlines.

MS. HUPP: Chairman Simpson, if I could ask that Ms. Marquis actually submit a proposed deadline after consulting with the Department, I think that would be helpful.

MS. MARQUIS: Absolutely. Thank you very much. I can do that. A proposed order is what you're looking for, Ms. Hupp?

MS. HUPP: That's correct.

MS. MARQUIS: Yes. I will do that.

CHAIR SIMPSON: All right. Thank you very much, everyone.

(The proceedings concluded at 9:39 a.m.)

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COURT REPORTER'S CERTIFICATE

STATE OF MONTANA)
ss.
COUNTY OF LEWIS AND CLARK)

I, CHERYL A. ROMSA, Court Reporter, residing in Helena, Montana, do hereby certify:

That the foregoing proceedings were reported by me in shorthand and later transcribed into typewriting; and that the foregoing transcript of the proceedings consisting of -24- pages of typewritten material constitute a full, true, and accurate transcript of my stenotype notes of the proceedings had and taken in the above-entitled matter at the time and place hereinbefore mentioned to the best of my ability.

DATED this the 29th day of October, 2026.

/s/Cheryl A. Romsa
CHERYL A. ROMSA

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'27 [1] - 19:1

1

1 [4] - 3:10, 3:12, 3:16, 13:22
14 [1] - 5:21
14-month [1] - 5:16
1st [39] - 3:8, 6:1, 6:4, 6:12, 6:23, 6:24, 7:2, 7:3, 7:4, 8:1, 8:2, 8:3, 8:23, 9:7, 9:8, 9:18, 9:22, 9:23, 9:24, 9:25, 10:2, 10:9, 10:10, 10:12, 12:20, 12:22, 13:10, 14:7, 14:16, 14:18, 14:21, 14:22, 15:24, 18:2, 24:1, 24:2

2

20 [1] - 9:8
2009 [2] - 16:14, 16:22
2020 [4] - 3:7, 16:13, 20:1, 22:8
2020-05 [1] - 3:7
2024 [5] - 3:9, 18:20, 20:3, 20:15, 22:8
2025 [1] - 20:15
2026 [7] - 3:11, 9:8, 9:22, 9:23, 10:9, 14:7, 24:1
2027 [17] - 3:12, 5:17, 6:4, 9:8, 9:25, 10:2, 10:3, 10:10, 10:12, 12:20, 12:22, 14:7, 14:16, 14:18, 14:21, 14:22, 24:2
23rd [1] - 19:25
270 [1] - 8:19
286 [1] - 8:20
29th [1] - 3:7

3

3rd [1] - 3:9

6

6 [3] - 5:22, 5:23, 8:22
6-month [1] - 5:18
6.b [1] - 4:23

9

9:39 [1] - 24:23

A

a.m [1] - 24:23
abide [1] - 13:7
abiding [1] - 11:7
able [2] - 20:2, 21:11
absolutely [1] - 24:16
accept [1] - 13:17
accommodate [1] - 10:12
accordingly [2] - 13:23, 24:4
accurate [1] - 13:24
acknowledges [1] - 6:16
act [1] - 15:17
Action [1] - 4:22
action [2] - 3:10, 19:23
activities [2] - 7:20, 23:14
adding [1] - 22:10
additional [6] - 7:5, 10:1, 12:21, 14:18, 17:3, 22:19
address [1] - 4:6
addressed [1] - 10:10
adjusting [1] - 12:19
administratively [1] - 16:17
adopt [1] - 20:4
adopted [1] - 8:14
adopts [1] - 14:11
advising [1] - 5:4
affidavit [3] - 5:13, 8:25, 20:22
afoul [1] - 10:23
agency [2] - 3:10, 19:23
Agency [1] - 4:22
ago [3] - 5:11, 21:10, 22:9
agree [2] - 5:17, 11:11
agreed [7] - 4:21, 8:13, 9:21, 11:3, 11:8, 19:2
agreeing [1] - 11:10
agreement [11] - 6:17, 6:21, 10:5, 11:14, 14:9, 14:11, 18:20, 19:22, 20:5, 22:9
allow [3] - 5:21, 6:13, 17:5
allows [1] - 6:17
ALTEMUS [1] - 14:25
alternative [3] - 13:18, 15:20
amended [1] - 22:21
amendment [3] - 3:9, 10:17, 15:15
amount [1] - 10:13
analyses [1] - 13:22
analysis [3] - 4:25, 12:5, 23:18
answer [4] - 7:5, 18:13, 19:14, 21:15
anticipated [1] - 23:19
anticipating [1] - 17:18
apologize [1] - 7:19
appeal [2] - 3:4, 19:25
application [1] - 3:12
applications [1] - 12:14
applied [1] - 16:19
appreciate [1] - 4:6
approached [1] - 8:15
appropriate [2] - 11:12, 17:4
appropriately [2] - 21:5, 21:7
approval [1] - 20:9
approved [1] - 4:20
April [19] - 3:12, 6:4, 6:12, 6:24, 7:2, 7:4, 8:2, 8:3, 9:7, 9:8, 9:18, 9:24, 13:10, 13:22, 14:7, 14:16, 20:3, 24:2
area [2] - 13:11, 22:2
assuming [4] - 22:2, 22:3, 23:22
assure [1] - 7:16
attached [1] - 20:22
authority [1] - 9:5
aye [1] - 24:5

B

back-and-forth [1] - 20:10
based [2] - 8:17, 10:6
basis [2] - 11:17, 22:20
became [1] - 5:6
beet [1] - 7:8
beets [1] - 21:23
beginning [3] - 8:12, 17:10, 20:14
behind [1] - 16:21
believes [1] - 14:4
BER [1] - 3:7
best [1] - 22:19
better [3] - 14:1, 20:18, 22:5
between [3] - 9:10, 11:14, 20:10
bifurcate [2] - 9:9, 12:12
bifurcated [1] - 7:1
bifurcating [1] - 15:7
Billings [1] - 21:25
bit [3] - 3:3, 14:13, 17:11
Board [33] - 3:19, 4:3, 4:6, 4:22, 5:19, 6:14, 7:16, 7:20, 7:21, 7:22, 8:8, 8:13, 9:5, 9:21, 10:11, 10:16, 10:20, 11:4, 11:5, 11:8, 11:11, 13:4, 14:4, 15:12, 15:13, 17:3, 17:7, 18:18, 19:19, 20:3, 21:3
board [3] - 17:16, 19:18, 23:14
Board's [6] - 3:9, 8:21, 10:19, 14:10, 15:15, 19:23
brief [9] - 3:15, 3:19, 3:25, 4:5, 4:7, 6:15, 6:25, 13:17, 19:23
briefed [1] - 4:5
Briefing [1] - 3:14
briefing [2] - 3:16, 17:15
bringing [1] - 6:14
brought [1] - 5:10
Bryce [2] - 5:13, 20:22

C

calibrate [1] - 21:12
calibrated [1] - 21:1
calibration [1] - 22:12
campaign [2] - 7:15, 20:15
care [1] - 17:1
carries [1] - 24:9
case [20] - 4:10, 7:17, 8:11, 9:4, 9:9, 10:18, 11:19, 11:21, 11:22, 12:5, 12:13, 15:14, 15:23, 16:10, 16:11, 17:12, 17:20, 19:20, 22:6, 23:15
caution [1] - 23:7
certain [2] - 8:13, 12:4
certainly [2] - 15:22, 23:11
CHAIR [18] - 3:2, 8:5, 12:16, 13:3, 13:14, 13:20, 14:23, 15:1, 17:6, 17:17, 18:8, 21:14, 21:17, 23:11, 23:25, 24:7, 24:9, 24:21
chance [1] - 5:13
change [3] - 9:5, 10:21, 10:24
changed [1] - 16:23
choices [1] - 15:16
choose [1] - 15:17
claim [1] - 21:22
clarification [1] - 11:20
clear [2] - 19:9, 20:25
client [1] - 6:16
collect [4] - 7:9, 7:12, 18:23, 22:19
combined [1] - 14:6
coming [1] - 19:16
comment [2] - 21:17, 21:24
comments [1] - 18:9
complete [4] - 3:14, 3:16, 8:1, 8:22
completely [1] - 4:5
complex [8] - 3:22, 4:10, 5:6, 20:21, 21:2, 21:19, 23:18
complexity [1] - 21:11
complication [1] - 18:1
conceptual [2] - 21:4, 21:8
concerns [1] - 4:13
concluded [1] - 24:23
conclusion [1] - 4:21
conduct [1] - 18:23
consider [3] - 6:10, 18:5, 23:21
consideration [3] - 4:8, 8:17, 10:8
considerations [4] - 9:10, 12:11, 12:15, 19:9
considered [1] - 9:3

considering [2] - 15:8, 15:11
constructing [4] - 20:20, 20:23, 20:24, 22:21
consultant [4] - 5:9, 5:20, 19:8
consulting [6] - 5:2, 5:4, 5:6, 6:8, 20:24, 24:14
contained [1] - 8:24
contamination [1] - 22:4
contemplated [1] - 11:14
continue [1] - 23:5
continued [1] - 16:18
continuing [3] - 15:10, 17:2, 23:15
contravention [1] - 11:1
Cooperative [2] - 3:5, 3:8
correct [3] - 17:24, 17:25, 24:19
correctly [1] - 13:21
couple [2] - 3:17, 22:9
course [1] - 7:13
Court [4] - 11:20, 11:22, 12:1, 12:6

D

Dana [3] - 17:24, 18:8, 24:10
data [7] - 6:18, 7:6, 7:9, 7:12, 7:15, 22:14
dataset [1] - 7:13
date [9] - 9:7, 9:8, 9:22, 9:23, 10:2, 10:11, 14:6, 14:19
dates [5] - 9:24, 11:3, 13:19, 14:1, 15:6
deadline [14] - 3:11, 3:16, 7:14, 10:9, 12:20, 13:22, 14:8, 17:20, 18:2, 18:4, 18:16, 19:16, 24:1, 24:13
deadlines [10] - 9:12, 9:18, 10:18, 12:19, 12:24, 13:23, 15:6, 20:5, 20:6, 24:11
December [5] - 10:9, 10:12, 12:22, 14:22, 18:6
decides [1] - 9:6
decision [5] - 12:22, 17:14, 17:16, 17:21, 17:22
defer [1] - 13:21
deferred [1] - 24:1
definitely [1] - 17:1
delay [5] - 16:8, 16:9, 17:2, 20:19, 23:17
delayed [1] - 23:8
delaying [2] - 15:5, 23:16
delays [1] - 23:15
deny [3] - 15:16, 15:19, 15:22
Department [5] - 4:13, 6:6, 7:2, 12:23, 24:14
Department's [1] - 6:15
DEQ [32] - 3:12, 3:13, 4:19, 5:17, 5:21, 6:11, 6:13, 6:18, 6:22, 7:4, 8:6, 8:8, 8:15, 9:2, 9:8, 9:12, 9:25, 10:4, 10:13, 11:3, 11:6, 11:10, 12:14, 13:5, 14:1, 14:16, 14:19, 15:5, 15:18, 20:6, 20:11, 23:8
DEQ's [10] - 3:15, 4:5, 6:25, 9:11, 9:18, 9:24, 10:12, 13:17, 14:7, 20:9
design [4] - 20:6, 20:7, 20:8, 20:11
despite [1] - 4:4
determination [3] - 8:21, 10:6, 14:20
determinations [1] - 9:12
difference [1] - 22:23
different [3] - 4:21, 5:8, 12:9
difficulties [1] - 19:6
diligently [1] - 5:12
directed [1] - 10:19
disagree [1] - 22:25
Discharge [1] - 3:6
discharge [3] - 4:19, 12:8, 12:10
discharges [8] - 4:14, 4:15, 4:18, 5:1, 11:16, 11:23, 12:2, 12:7
discharging [1] - 12:8
discovery [1] - 20:1
discuss [1] - 3:3
discussed [1] - 6:15
discussion [4] - 15:3, 17:6, 17:10, 23:23
dismissed [3] - 8:11, 9:4, 10:18
docket [1] - 16:11
document [2] - 4:22, 10:7
documents [1] - 3:21
done [9] - 4:16, 5:24, 6:9, 6:24, 13:10, 19:20, 19:21, 20:7, 21:5
down [1] - 14:2
draft [3] - 10:7, 10:14, 14:20
dragging [1] - 7:17
draw [1] - 23:4
during [1] - 7:9

E

early [2] - 9:16, 9:17
Elimination [1] - 3:6
end [7] - 5:7, 6:13, 9:1, 13:17, 16:13, 23:6
entered [1] - 18:19
equivalent [4] - 4:15, 4:19, 4:25, 11:16
essentially [5] - 10:6, 10:17, 13:20, 14:15, 14:17
estimate [1] - 6:3
estimating [1] - 18:22
excuse [1] - 17:17
existed [1] - 8:21
existing [1] - 9:19
experts [1] - 6:7
explained [1] - 21:2
explaining [1] - 5:14
explanation [1] - 17:12
express [2] - 11:24, 12:3
extend [3] - 3:10, 13:23, 18:4
extension [14] - 5:16, 5:18, 6:11, 8:16, 8:17, 9:2, 9:21, 11:4, 11:11, 11:12, 14:5, 18:25, 19:16
extensions [1] - 17:5

F

facility [3] - 4:12, 7:8, 21:24
fact [4] - 4:4, 6:10, 9:12, 19:21
far [1] - 7:14
fast [1] - 7:23
fate [2] - 4:24, 20:11
favor [1] - 24:5
February [1] - 7:11
feet [1] - 7:17
few [1] - 3:24
field [1] - 7:20
figure [3] - 4:11, 11:19, 11:22
file [1] - 4:7
filed [2] - 3:8, 21:18
filing [1] - 21:3
filled [1] - 22:15
Final [1] - 4:22
final [4] - 3:10, 8:14, 17:21, 19:23
fine [1] - 9:17
firm [3] - 5:3, 5:6, 20:24
firms [2] - 5:4, 6:8
first [5] - 5:6, 6:21, 11:23, 12:3, 20:24
five [6] - 3:25, 16:16, 22:22, 23:20, 24:2, 24:3
fixing [1] - 10:21
flow [1] - 20:12
folks [3] - 15:6, 20:10, 20:11
follow [5] - 7:4, 8:2, 13:6, 14:13, 14:14
follow-on [1] - 8:2
following [1] - 9:13
follows [1] - 3:1
forgiveness [1] - 23:5
forth [2] - 15:25, 20:10
forward [2] - 17:2, 24:3
four [4] - 22:8, 22:22, 23:2
four-month [1] - 22:8
front [1] - 5:19
frustration [2] - 23:3, 23:8
frustrations [1] - 23:14
full [1] - 18:25
fully [1] - 18:5
functional [3] - 4:14, 4:25, 11:16
functioning [1] - 4:18
fundamental [1] - 9:11

G

gaps [1] - 22:14
gather [2] - 7:5, 21:6
general [2] - 3:21, 13:8
generally [1] - 16:15
geochemistry [1] - 20:20
goal [1] - 16:18
great [1] - 23:13
Greg [1] - 5:13
ground [2] - 11:24, 12:2
groundwater [21] - 4:12, 4:14, 4:18, 6:3, 6:24, 9:10, 11:15, 12:10, 13:9, 13:10, 13:11, 13:21, 18:11, 18:13, 18:15, 18:17, 19:11, 19:12, 20:12, 20:21, 22:4
growing [3] - 18:22, 18:25, 22:10
guess [14] - 3:20, 10:15, 13:19, 17:4, 17:8, 17:10, 17:12, 19:7, 21:17, 21:23, 22:7, 22:17, 22:22, 23:20

H

happy [5] - 4:16, 5:24, 6:2, 7:2, 7:25
harder [2] - 14:13, 14:14
hear [1] - 8:6
hearing [2] - 3:4, 4:3
helpful [3] - 7:13, 22:11, 24:15
hence [1] - 23:18
hired [1] - 5:2
hit [1] - 5:6
hold [1] - 8:6
hope [1] - 5:12
hopefully [1] - 3:25
Hupp [1] - 24:18
HUPP [3] - 17:25, 24:12, 24:19
hydrologic [1] - 21:20
Hydrometrics [3] - 5:9, 21:10, 22:14

I

idea [3] - 11:14,

11:15, 16:21
identified [1] - 22:14
indicated [1] - 8:15
inform [2] - 7:10, 21:7
information [16] - 8:23, 8:24, 9:3, 9:13, 9:15, 9:16, 10:1, 10:6, 12:21, 14:18, 16:1, 18:23, 19:1, 21:7, 22:19, 22:20
informed [1] - 18:14
informing [1] - 11:5
initial [2] - 17:17, 17:18
instead [1] - 6:4
intent [1] - 17:14
interesting [1] - 8:10
interim [1] - 7:5
interpretation [3] - 4:25, 6:18, 6:20
interruption [1] - 12:1
interstate [1] - 22:1
intervals [1] - 9:19
issue [7] - 4:9, 4:13, 6:6, 14:19, 20:17, 20:19
issued [3] - 3:6, 16:12, 16:14
issuing [1] - 24:11
Item [1] - 4:23

J

January [2] - 9:25, 10:2
Jen [2] - 13:14, 21:15
judgement [1] - 10:17
Julia [1] - 15:2
July [3] - 5:17, 6:4, 19:1
June [6] - 10:2, 10:10, 12:20, 13:12, 14:18, 14:21

K

keep [1] - 23:9
keeping [1] - 12:19
kind [4] - 13:6, 15:25, 16:21, 17:15
knowing [1] - 4:10
Kurt [1] - 8:8

L

lack [3] - 20:17, 21:10, 22:5
large [1] - 6:7
largely [1] - 8:18
larger [1] - 7:13
last [9] - 4:17, 5:19, 8:14, 8:21, 9:21, 18:12, 18:24, 19:15, 21:3
lead [1] - 21:8
least [2] - 11:4, 13:11
length [1] - 5:4
limitations [1] - 5:7
limited [2] - 7:11, 7:12
limiting [1] - 7:7
limits [3] - 7:10, 8:3, 16:25
line [1] - 23:4
linked [1] - 12:25
local [1] - 5:9
look [1] - 12:5
looking [1] - 24:17
looks [1] - 3:22

M

March [1] - 7:11
Marcus [1] - 19:19
Marquis [5] - 8:5, 8:15, 12:17, 21:14, 24:13
marquis [1] - 22:11
MARQUIS [5] - 4:2, 12:18, 19:18, 24:16, 24:20
materials [3] - 8:18, 15:24, 21:18
matter [6] - 3:2, 3:4, 8:9, 10:10, 11:12, 23:16
Maui [3] - 11:19, 11:21, 12:5
mean [22] - 8:11, 8:12, 13:8, 14:3, 15:7, 15:9, 15:13, 15:16, 15:17, 15:18, 16:3, 16:4, 16:5, 16:7, 16:9, 16:13, 16:24, 18:19, 18:21, 19:3, 19:8, 23:13
meet [2] - 12:4, 23:9
meeting [5] - 3:18, 17:20, 18:5, 18:6, 23:9
Member [3] - 15:12, 18:18, 19:18
members [5] - 4:3, 8:8, 14:4, 15:13, 19:18
merit [1] - 23:12
might [1] - 4:20
mind [1] - 5:3
minutes [2] - 3:24, 3:25
miss [1] - 18:16
model [12] - 20:20, 20:23, 20:24, 21:1, 21:5, 21:8, 21:11, 21:12, 22:13, 22:16
modeling [5] - 4:11, 5:3, 5:5, 5:8, 20:8
models [1] - 20:12
monitor [2] - 18:12, 18:13
monitoring [13] - 13:9, 13:10, 13:11, 18:15, 18:17, 19:20, 19:21, 19:22, 20:14, 20:16, 20:17, 20:18, 21:10
Montana [2] - 3:5, 5:10
month [2] - 19:2, 22:8
months [12] - 5:21, 5:22, 5:23, 8:22, 14:17, 15:25, 22:22, 23:2, 23:20, 24:2, 24:3
morning [3] - 4:4, 4:7, 8:7
MOSER [6] - 8:7, 11:21, 12:2, 14:3, 15:12, 18:18
Moser [6] - 8:8, 12:16, 12:20, 14:23, 15:5, 19:24
most [1] - 8:25
motion [12] - 3:9, 8:19, 13:15, 13:16, 14:24, 15:13, 15:17, 15:21, 16:5, 23:22, 24:5, 24:9
motions [1] - 20:2
move [8] - 9:7, 9:24, 10:2, 13:1, 16:1, 16:2, 17:2
moved [7] - 9:18, 9:22, 10:9, 10:11, 14:21, 23:25, 24:3
moving [2] - 9:23, 14:5
MPDES [2] - 3:11, 16:15
MT0000281 [1] - 3:6

N

national [1] - 5:2
necessarily [1] - 13:1
necessary [1] - 10:24
need [10] - 3:3, 4:7, 5:21, 7:10, 12:14, 16:24, 19:12, 23:6, 23:9
needed [3] - 5:8, 10:1, 18:15
needs [2] - 11:13, 12:14
never [1] - 12:22
new [4] - 8:24, 11:19, 11:21, 14:19
next [4] - 3:2, 17:20, 18:5, 23:21
none [1] - 9:17
note [1] - 10:15
noted [1] - 18:2
nothing [1] - 3:23
notice [2] - 3:4, 14:21
noticed [1] - 10:20
November [14] - 3:10, 3:16, 6:1, 6:23, 7:3, 8:1, 8:23, 9:7, 9:23, 14:7, 15:24, 18:2, 19:25, 24:1
number [1] - 7:19
numeric [1] - 21:5
numerical [1] - 21:8

O

objects [1] - 9:2
obligation [1] - 10:4
obviously [4] - 9:3, 11:3, 11:5, 19:3
occur [1] - 3:17
October [2] - 3:7, 3:8
old [1] - 16:20
open [2] - 10:16, 15:14
operate [1] - 15:10
operates [1] - 7:8
operating [1] - 11:1
operation [1] - 7:9
opinion [1] - 13:8
opportunity [1] - 19:5
opposed [6] - 12:18, 12:23, 13:2, 16:6, 16:8, 24:7
opposes [1] - 3:13
opposition [1] - 3:15
option [2] - 16:4, 22:18
options [2] - 15:7, 18:3
order [15] - 8:14, 10:12, 10:19, 10:23, 10:24, 11:2, 11:7, 14:10, 14:13, 15:15, 20:4, 22:17, 22:20, 24:11, 24:17
original [1] - 6:3
originally [3] - 10:8, 16:12, 23:19
otherwise [1] - 15:9
ourselves [1] - 23:19
overall [2] - 22:7, 23:14
own [4] - 4:24, 6:19, 22:17

P

package [1] - 3:13
packet [3] - 5:14, 8:20, 9:1
pages [2] - 7:19, 8:20
part [3] - 8:20, 8:25, 9:4
parties [5] - 3:19, 8:12, 17:12, 18:19, 19:2
passes [1] - 23:22
past [1] - 18:4
period [1] - 17:3
Permit [1] - 3:6
permit [15] - 3:11, 7:10, 10:7, 10:14, 14:20, 16:10, 16:12, 16:14, 16:18, 16:19, 16:22, 16:25, 19:25, 21:21, 22:21
permits [2] - 16:15, 16:21
petition [1] - 3:13
piece [1] - 4:17
place [1] - 16:14
point [2] - 18:6, 22:18
Pollutant [1] - 3:5
portion [4] - 5:25, 6:3, 6:23, 6:24
position [3] - 17:22, 23:12
possible [1] - 22:20
potential [1] - 22:4
practice [1] - 20:2
prehearing [1] - 20:2

presented [1] - 17:10
presume [1] - 24:10
pretty [2] - 4:9, 16:20
previous [1] - 19:8
problems [1] - 22:12
proceed [1] - 22:17
proceedings [2] - 3:1, 24:23
process [3] - 8:22, 16:2, 21:23
processing [1] - 7:8
produce [3] - 6:22, 10:5, 10:13
product [1] - 19:7
project [1] - 5:15
proposal [1] - 13:17
propose [1] - 6:17
proposed [3] - 5:18, 24:13, 24:17
provide [3] - 9:7, 10:13, 22:20
provided [1] - 8:18
provisions [1] - 14:12
public [2] - 10:7, 14:20
pure [1] - 12:10
put [3] - 5:15, 7:14, 20:8
puts [1] - 14:11
putting [1] - 10:7

Q

questions [6] - 7:5, 8:6, 13:4, 17:6, 18:9, 23:23
quicker [1] - 6:9
quite [1] - 16:10

R

Rankosky [2] - 18:19, 19:18
RANKOSKY [8] - 13:5, 13:16, 13:25, 18:10, 19:14, 21:13, 21:16, 22:24
rather [2] - 3:22, 15:6
reach [1] - 4:20
read [3] - 3:20, 6:15, 21:18
really [13] - 4:9, 5:15, 5:20, 6:6, 6:8, 7:21, 7:23, 8:3, 8:24, 11:12, 11:17, 14:10, 16:4
reasonable [1] - 24:4
reasons [1] - 7:18
received [2] - 3:15, 4:5
receiving [1] - 17:19
recommendation [1] - 5:16
regarding [1] - 3:5
reinitiated [1] - 21:9
relying [1] - 6:7
renew [1] - 16:19
renewal [1] - 3:12
renewed [1] - 16:16
reply [4] - 4:7, 17:19, 17:22, 18:1
report [4] - 4:16, 5:25, 6:2, 7:20
reporter [2] - 11:20, 12:1
represent [1] - 8:8
reputable [1] - 5:2
request [8] - 3:14, 10:1, 12:21, 13:8, 14:18, 15:19, 18:7, 20:4
requested [1] - 15:19
required [3] - 19:22, 20:14, 21:21
requirements [2] - 4:11, 12:9
resolution [1] - 13:6
response [4] - 6:15, 6:25, 23:24, 24:8
Response [1] - 24:6
rest [1] - 7:4
result [1] - 23:6
results [2] - 4:23, 20:17
review [3] - 5:13, 9:25, 14:17
reviewed [1] - 4:20
risk [1] - 11:6
River [1] - 22:1
roadblocks [1] - 5:7
rule [1] - 18:6
runs [1] - 10:23

S

sake [1] - 23:17
sample [1] - 19:11
sampling [1] - 19:5
satisfies [1] - 6:5
schedule [1] - 24:3
season [2] - 18:25, 22:10
seasonally [1] - 7:8
seasons [2] - 7:15, 18:23
second [3] - 3:9, 14:24, 14:25
seconded [2] - 15:1, 23:25
see [2] - 16:11, 20:6
seeking [1] - 3:10
seem [1] - 6:25
semi [1] - 22:2
sense [2] - 13:13, 22:18
September [1] - 7:11
settle [1] - 20:2
settled [1] - 4:9
settlement [14] - 4:21, 6:17, 6:21, 8:13, 9:4, 10:4, 11:17, 14:9, 14:11, 18:19, 19:22, 20:4, 20:5, 22:9
shape [1] - 6:1
shortened [1] - 6:2
side [1] - 21:25
signed [1] - 6:21
simple [1] - 4:9
SIMPSON [18] - 3:2, 8:5, 12:16, 13:3, 13:14, 13:20, 14:23, 15:1, 17:6, 17:17, 18:8, 21:14, 21:17, 23:11, 23:25, 24:7, 24:9, 24:21
Simpson [7] - 4:2, 8:7, 14:4, 15:12, 17:9, 18:18, 24:12
site [3] - 16:23, 21:4, 21:7
six [1] - 19:2
six-month [1] - 19:2
SMITH [2] - 15:4, 17:8
Smith [1] - 15:12
snuff [1] - 16:22
so.. [1] - 12:15
sort [6] - 10:16, 10:20, 18:20, 18:21, 21:6
sounded [1] - 17:11
sources [1] - 22:4
south [1] - 21:25
specific [4] - 9:12, 10:18, 15:6, 20:5
specified [1] - 12:20
specifying [1] - 24:11
splitting [1] - 9:14
spring [5] - 8:14, 9:21, 18:16, 18:24, 19:15
standpoint [1] - 21:20
start [1] - 5:3
started [1] - 21:6
statement [1] - 24:4
stay [2] - 11:13, 17:19
step [1] - 11:18
still [1] - 6:5
stretched [1] - 12:24
stuck [1] - 5:20
studies [2] - 4:24, 20:12
study [1] - 20:7
subject [1] - 12:8
submission [1] - 7:1
submit [11] - 3:11, 4:23, 7:2, 7:3, 7:25, 8:2, 8:23, 9:15, 15:24, 19:1, 24:13
submittal [7] - 8:2, 9:13, 9:22, 14:6, 14:16, 22:13
submitted [3] - 6:1, 6:4, 7:19
succeeding [2] - 13:23, 24:3
Sugar [27] - 3:5, 3:8, 3:24, 4:6, 4:16, 4:23, 5:2, 5:20, 5:24, 6:14, 6:16, 7:1, 7:21, 7:25, 8:15, 9:15, 12:18, 13:2, 15:9, 17:19, 17:21, 18:24, 19:19, 19:21, 19:25, 20:13, 21:19
sugar [3] - 7:8, 21:23
Sugar's [1] - 4:24
summary [1] - 19:24
supplement [1] - 9:25
supplemental [1] - 3:11
supplements [1] - 14:17
supposed [2] - 10:8, 16:15
Supreme [2] - 11:22, 12:6
surface [13] - 4:13, 4:15, 4:19, 5:1, 5:25, 6:23, 9:11, 9:16, 11:24, 12:4, 12:7, 12:8, 13:22
system [1] - 21:20
System [1] - 3:6

T

table [1] - 15:21
takeaway [1] - 17:13
technical [6] - 4:17, 6:6, 6:7, 8:3, 20:10, 20:11
technically [1] - 3:22
ten [1] - 3:25
tentative [3] - 10:5, 12:21, 14:19
terms [1] - 4:12
test [1] - 12:4
themselves [2] - 11:24, 12:3
they've [5] - 5:12, 5:14, 6:2, 19:11, 20:15
They've [1] - 7:17
thinking [1] - 16:6
thinks [1] - 17:3
timeline [1] - 18:11
today [3] - 4:1, 17:14, 17:16
together [4] - 11:13, 12:19, 12:25, 20:9
took [4] - 5:15, 11:18, 20:8, 20:13
town [1] - 21:24
transition [1] - 5:8
transport [2] - 4:24, 20:12
treat [3] - 11:23, 12:6, 12:7
try [1] - 5:22
two [9] - 6:7, 7:15, 9:14, 12:13, 14:17, 15:25, 16:18, 16:20, 18:22

U

U.S [2] - 11:22, 12:6
ult [1] - 12:3
ultimately [3] - 11:24, 12:3, 12:13
unanimously [1] - 24:9
under [2] - 4:11, 12:5
understood [1] - 6:20
unknowns [1] - 21:2
unsure [1] - 13:7
unwilling [1] - 6:13
up [10] - 5:19, 6:2, 6:14, 6:19, 7:4, 15:14, 16:22, 19:17, 21:6, 23:19
update [1] - 16:24
updating [2] - 16:21, 22:15
urban [2] - 22:2
uses [1] - 9:5

V

variety [1] - 18:3
Vicki [1] - 19:19

W

waived [2] - 17:22, 17:25
wall [1] - 23:20
wants [1] - 9:15
warranted [2] - 9:6, 14:5
water [12] - 4:13, 4:15, 4:19, 5:1, 5:25, 6:23, 9:11, 9:16, 11:24, 12:7, 12:8, 13:22
waters [1] - 12:4
weeks [1] - 3:17
Western [31] - 3:5, 3:8, 3:24, 4:6, 4:16, 4:23, 4:24, 5:2, 5:20, 5:24, 6:14, 6:16, 7:1, 7:17, 7:21, 7:25, 8:15, 9:15, 12:18, 13:2, 15:9, 17:19, 17:21, 18:24, 19:3, 19:19, 19:21, 19:25, 20:10, 20:13, 21:19
western [1] - 12:22
WHEREUPON [1] - 3:1
whole [3] - 11:13, 11:17
willing [1] - 6:22
window [1] - 7:12
word [1] - 22:5
words [1] - 14:5
worth [1] - 7:15
WQ [1] - 3:7
writing [1] - 14:1

Y

year [4] - 5:11, 7:12, 10:11, 21:9
years [5] - 16:16, 16:18, 16:20, 22:9, 23:15
Yellowstone [1] - 22:1
Yesterday [1] - 3:15
yesterday [1] - 4:5