

1
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3
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STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION
No. WQCC 14-05 (R)

IN THE MATTER OF:
PROPOSED AMENDMENTS TO
STANDARDS FOR INTERSTATE
AND INTRASTATE SURFACE
WATERS, 20.6.4 NMAC

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 16th day of
October, 2015, this matter came on for hearing before
Morris Chavez, Hearing Officer, and the Water Quality
Control Commission, at the State Capitol Building, Room
307, 490 Old Santa Fe Trail, Santa Fe, New Mexico, at
the hour of 9:06 a.m.

Volume 4

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I N D E X

	PAGE
RACHEL CONN	
Direct Examination by	780
Mr. Schlenker-Goodrich	
Cross Examination by Ms. Chappelle	815
Cross Examination by the Commission	833
Redirect Examination by	880
Mr. Schlenker-Goodrich	
CHARLES L. NYLANDER	
Direct Examination by Ms. McCaleb	890
Cross Examination by Ms. Becker	898
KRISTINE PINTADO, SHELLY LEMON and BRYAN DAIL	
Direct Examination of Bryan Dail	903
by Mr. Verheul	
Direct Examination of Kristine Pintado	916
by Ms. Becker	
Direct Examination of Shelly Lemon	939
by Ms. Becker	
Cross Examination by Ms. McCaleb	955
Cross Examination by	
Mr. Schlenker-Goodrich	961
Cross Examination by Mr. Rose	968
Cross Examination by the Commission	972

E X H I B I T S

ADMITTED

NMED (Direct):

Exhibit 1. James Hogan Testimony 915

Exhibit 2. New Mexico Environment Department, 915

Surface Water Quality Bureau's Petition

to Amend the Surface Water Quality

Standards (20.6.4 NMAC) and Request for

Hearing

Exhibit 3. James Hogan Resume 915

Exhibit 4. Public Notices for Triennial 915

review Scoping Period

Exhibit 5. EPA Letter of Preliminary 915

Triennial Review Recommendations,

December 4, 2013

Exhibit 6. SWQB Response to EPA Preliminary 915

Recommendations, February 19, 2014

Exhibit 7. Public Notice for Triennial 915

Review Public Discussion Draft and

Public Comment Period, April 1, 2014

Exhibit 8. Triennial Review Scoping Period 915

Public Comments and SWQB Responses

Exhibit 9. Triennial Discussion Draft Public 915

Comments and SWQB Responses

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E X H I B I T S (Continued)

ADMITTED

NMED (Direct) (Continued):

Exhibit 10. Letter of Notice to Small 915

Business Regulatory Advisory Commission,

July 2, 2014

Exhibit 11. Affidavits for Legal Notices 915

of Public Hearing for Triennial Review

Exhibit 12. Triennial Review Web Sites - 915

SWQB and WQCC

Exhibit 13. Kristine Pintado Testimony 915

Exhibit 14. Kristine Pintado Resume 915

Exhibit 15. SWQB Memo on MPN 915

Exhibit 16. 40 CFR 131.13 915

Exhibit 17. USEPA Nutrients Fact Sheet 915

Exhibit 18. SWQB Assessment Protocol for 915

Nutrients

Exhibit 19. EPA Letter of Comments to SWQB 915

2013 Triennial Review Public Discussion

Draft

Exhibit 20. 40 CFR 131.10(g)(1)-(6) 915

Exhibit 21. Temporary Standard Tables 1 and 915

2 (with explanatory notes)

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E X H I B I T S (Continued)

ADMITTED

NMED (Direct) (Continued):

Exhibit 22. EPA WQS Regulations Advance 915

Notice of Public Rulemaking ("ANPRM"):

Water Quality Standards, July 7, 1998,

63 FR 36760-61

Exhibit 23. EPA Proposed Water Quality 915

Standards Regulatory Clarifications

Proposed Rule, September 4, 2013,

78 FR Page 54544-45

Exhibit 24. 40 CFR 131.21 915

Exhibit 25. 40 CFR 131.20 915

Exhibit 26. 40 CFR 122.44(d)(I)(ii) 915

Exhibit 27. EPA Record of Decision ("ROD"), 915

January 23, 2001

Exhibit 28. EPA Final Rule Pesticide General 915

Permit, November 7, 2011, 76 FR 68750-56

Exhibit 29. New Mexico Department of Game 915

and Fish ("NMDG&F") Memo, March 22, 2014

Exhibit 30. Comparison of the EPA Pesticide 915

General Permit ("PGP") vs. 20.6.4.16

NMAC

Exhibit 31. Chino Mines HP UAA "Application 915

of the HP to STSIU Drainages"

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E X H I B I T S (Continued)

ADMITTED

NMED (Direct) (Continued):

Exhibit 32. Chino Mines Submittal Letter, 915
April, 2011

Exhibit 33. SWQB E-mail to Chino Mines, 915
June, 2011

Exhibit 34. Correspondence SWQB and Chino 915
Mines

Exhibit 35. EPA Letter of Technical Review to 915
SWQB: Chino Mines HP UAA

Exhibit 36. Chino Mines Responses to Comments 915
("RTC"), November, 2014

Exhibit 37. USEPA Fact Sheet for Recreational 915
Criteria 2012

Exhibit 38. USEPA Bacteria Criteria 1986 915

Exhibit 39. Jodey Kougioulis Testimony - 915
Hydrology Protocol ("HP") and HP UAAs
for Nonperennial Waters

Exhibit 40. Jodey Kougioulis Resume 915

Exhibit 41. Mulatto Canyon Field Sheet 915

Exhibit 42. HP UAAs Nonperennial Waters 915

Exhibit 43. HP UAAs Nonperennial Waters 915
Response to Comments

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1 E X H I B I T S (Continued)

2 ADMITTED

3 NMED (Direct) (Continued):

4 Exhibit 44. HP UAAs Nonperennial Waters 915

5 USEPA Transmittal Letter

6 Exhibit 45. HP UAAs Nonperennial Waters 915

7 USEPA Approval Letter

8 Exhibit 46. Deborah Sarabia Testimony - 915

9 HP-based UAAs for Four Southern New

10 Mexico Waters and the Animas River UAA

11 Exhibit 47. Deborah Sarabia Resume 915

12 Exhibit 48. HP-Based UAA for Four Southern 915

13 New Mexico Waters

14 Exhibit 49. Signed Field Evaluation Cover 915

15 Sheets for HP-based UAA: Four Southern

16 New Mexico Waters

17 Exhibit 50. Animas River UAA Final DRAFT 915

18 Exhibit 51. Public Notice of Meeting and 915

19 Comment Period for HP-Based UAA: Four

20 Southern New Mexico Waters

21 Exhibit 52. Written Comments Received on 915

22 HP-Based UAA: Four Southern New Mexico

23 Waters

24

25

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E X H I B I T S (Continued)

ADMITTED

NMED (Direct) (Continued):

Exhibit 53. EPA Technical Approval of 915

HP-Based UAA: Four Southern New Mexico
Waters

Exhibit 54. Notice of Public Meeting and 915

Request for Public Comment, November 20,
2013

Exhibit 55. Written Comments Received and 915

SWQB Responses

Exhibit 56. EPA Technical Approval of the 915

Animas River UAA

Exhibit 57. Bryan Dail Testimony 915

Exhibit 58. Bryan Dail Resume 915

Exhibit 59. USGS Map of the Gila River Near 915

Gila Hot Springs

Exhibit 60. Road Map of the Gila River Near 915

Gila Hot Springs

Exhibit 61. Specific Conductance of Select 915

Hot Springs in the Gila Area

Exhibit 62. Specific Conductance of Major 915

Gila River Tributaries

Exhibit 63. Specific Conductance of Select 915

Gila River Tributaries

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E X H I B I T S (Continued)

ADMITTED

NMED (Direct) (Continued):

Exhibit 64. Gila Segment Memo, March 6, 2014 915

Exhibit 65. Mimbres River UAA 915

Exhibit 66. Resume of Shelly Lemon 915

NMED (Rebuttal):

Exhibit 1. James Hogan Rebuttal Testimony 915

Exhibit 2. Review of Clean Water Act ("CWA") 915

101(a) Uses - Contact Recreation Uses
for Selected Segments

Exhibit 3. 2008-09 Triennial Review, Statement 915

of Reasons, pp. 1, 81-83 and 143, Water
Quality Control Commission ("WQCC"),
October 14, 2010

Exhibit 4. EPA Approval of Revisions to New 915

Mexico's Standards for Interstate and
Intrastate Surface Waters, 20.6.4 NMAC,
December 29, 2006

Exhibit 5. Record of Decision ("ROD") EPA 915

Approval of Revisions to New Mexico's
Standards for Interstate and Intrastate
Surface Waters, 20.6.4 NMAC, December 29,
2006

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E X H I B I T S (Continued)

ADMITTED

NMED (Rebuttal) (Continued):

Exhibit 6. Record of Decision ("ROD") EPA 915

Approval of Revisions to New Mexico's
Standards for Interstate and Intrastate
Surface Waters, 20.6.4 NMAC, April 18,
2011

Exhibit 7. Kristine Pintado Rebuttal 915

Testimony

Exhibit 8. EPA Region 8 Action on Multiple 915

Sets of Temporary Modifications for
Arsenic, letter dated June 20, 2013

Exhibit 9. Decision of the General Counsel 915

on Matters of Law Pursuant to 40 CFR
Section 125.36(m), No. 58

Exhibit 10. Technical Guidance Manual for 915

Application and Review of Section
301(c) Variance Requests, p. 3; EPA
(M. Prothro) memo, August 21, 1984

Exhibit 11. Jodey Kougioulis Rebuttal 915

Testimony

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E X H I B I T S (Continued)

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NMED (Rebuttal) (Continued):

Exhibit 12. Ambient Water Quality Criterion 915

for Selenium - Freshwater 20114; Fact
Sheet EPA Office of Water 820-F-14-005,
May, 2014

Exhibit 13. E-mail Correspondence; Peabody 915

Exhibit 8, (Cochran Testimony) 2009

Triennial Review WQCC 08-13(R)

Exhibit 14. Bryan Dail Rebuttal Testimony 915

Exhibit 15. Prehearing Testimony of Steven 915

P. Canton, GEI Consultants, Inc., on
Behalf of Colorado Mining Association
in the Matter of the Adoption of
Revisions to the Basic Standards and
Methodologies or Surface Water,
Regulation #31(5 CCR 1002-31)

Exhibit 16. EPA Region 6 Review of Metals 915

Criteria; Comments on Derivation of the
Equation-based Aluminum Criteria, letter
Dated December 6, 2011

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E X H I B I T S (Continued)

ADMITTED

NMED (Rebuttal) (Continued):

Exhibit 17. Comments on Freeport-McMoRan Chino 915

Mines Company's Draft Petition to Amend

Surface Water Quality Standards (NMAC

20.6.4) and Request for Hearing (letter);

K. Pintado (SWQB) to G. Chappelle

(Gallagher & Kennedy), September 15, 2013

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1 MR. CHAVEZ: We are back on the record.

2 It is October 16th, 2015. WQCC 14-05(R).

3 We have Amigos Bravos who can continue.

4 MR. SCHLENKER-GOODRICH: Good morning,
5 Mr. Hearing Officer, Mr. Chairman, Commissioners.

6 My name is Erik Schlenker-Goodrich. I'm with
7 the Western Environmental Law Center, representing
8 Amigos Bravos.

9 As an initial matter, I want to note that
10 yesterday we segmented our case dealing with Amigos
11 Bravos' proposed changes to the -- to New Mexico's
12 aluminum standards.

13 Today what we are going to do is go through
14 the remainder of our case. A primary issue in our case
15 deals with the Department's temporary standards
16 proposal.

17 On this point, Amigos Bravos submitted on
18 Monday proposed changes that -- with the intent to
19 constructively inform and improve the Department's
20 temporary standards proposal.

21 Yesterday the Hearing Officer had excluded
22 that proposed -- those proposed changes on the basis
23 that they were evidence.

24 There's been some discussion before the
25 parties today regarding that, and our intent today is to

1 work through those proposed changes as our -- as part of
2 our rebuttal testimony, to provide the basis for those
3 changes and to link those to the prefiled written and
4 rebuttal testimony that Amigos Bravos has provided.

5 It is also our understanding that we will be
6 entitled to submit these proposed changes as part of our
7 closing arguments, as all of the parties are entitled to
8 do.

9 With that, I'll turn it over to the Hearing
10 Officer for clarification of where we're at.

11 MR. CHAVEZ: Thank you very much.

12 So I think he's correct, that the supplemented
13 proposed changes were mistakenly treated as evidence.
14 Since they are not evidence, proposed in the -- but
15 proposed as a logical outgrowth of this hearing, it will
16 be objected to still by NMED on the basis of timeliness,
17 which I'm going to let them address, but they will not
18 be excluded.

19 The items that were attached, those exhibits
20 were ruled upon yesterday, and those are admitted.
21 We're talking just about the supplemented proposed
22 changes.

23 MR. SCHLENKER-GOODRICH: And, Mr. Hearing
24 Officer, for clarification on that point, to be very
25 clear, this is with regard to our Monday filing and

1 Section III of our Monday filing entitled Proposed
2 Changes to the New Mexico Environment Department's
3 Proposal to Adopt Temporary Standards, 20.6.4.10F and H
4 NMAC.

5 MR. CHAVEZ: Mr. Verheul.

6 MR. VERHEUL: Mr. Hearing Officer, I
7 appreciate the opportunity to address this.

8 We renew our objection based on the timeliness
9 of this. There was a September 14th deadline for filing
10 of notices of intent, which, of course, was an
11 interesting situation.

12 There had already been a prior deadline, but
13 based on the roughly six- or seven-month delay of this
14 hearing actually happening, there's a second deadline
15 just in case any new parties wanted to come in. None
16 did.

17 The Department, of course, filed its latest
18 version, a second amended petition. We filed that on
19 September 4th, in order to give the Commission and all
20 the other parties notice of the work that we had done in
21 those intervening six months to try to come to agreement
22 on a lot of the issues.

23 And so we simply renew our objection based on
24 timeliness. We feel that the September 14th due date
25 for NOIs could have been met and should have been met.

1 MR. CHAVEZ: Thank you.

2 And that objection is noted, and I share the
3 same concern with Amigos Bravos filing this essentially
4 the day before the hearing and -- but at the same time,
5 we have addressed the issue. That information will not
6 be excluded.

7 And you may proceed with your case.

8 MR. SCHLENKER-GOODRICH: Thank you,
9 Mr. Hearing Officer.

10 RACHEL CONN

11 having been previously duly sworn or affirmed, was
12 examined and testified further in direct and
13 rebuttal as follows:

14 DIRECT EXAMINATION

15 BY MR. SCHLENKER-GOODRICH:

16 Q. Good morning, Ms. Conn.

17 A. Good morning.

18 Q. Could you please state your name again for the
19 record.

20 A. My name is Rachel Conn.

21 MR. SCHLENKER-GOODRICH: And just to be clear,
22 Ms. Conn was sworn in?

23 THE REPORTER: Yes.

24 MR. SCHLENKER-GOODRICH: Great.

25 Q. First question, Ms. Conn, Amigos Bravos -- oh.

1 As an initial matter -- let me step back very
2 briefly -- that I want to note that with regard to the
3 Amigos Bravos affirmative case and proposed changes,
4 that we have resolved issues dealing with the piscicide
5 issue. This was noted in our Monday filing, as well.

6 So with that, Amigos Bravos has withdrawn its
7 proposed changes, objections and written testimony
8 submitted with regard to the piscicide issue.

9 And Amigos Bravos appreciates the Department's
10 willingness to entertain changes that made us able to
11 support or at least not oppose the piscicide proposal.

12 And that in addition, there was resolution of
13 Amigos Bravos' proposed changes regarding Segment 128,
14 and so with that resolution, Amigos Bravos has withdrawn
15 its proposed changes and written testimony submitted for
16 that proposal.

17 And that the two primary issues -- that there
18 are three issues that remain, the aluminum one, which I
19 mentioned before, the temporary standards proposal, and
20 then also issues with Chino Mines' site-specific
21 proposal for criteria.

22 With that, I'll turn back to start with the
23 temporary standards proposal.

24 Ms. Conn, again, Amigos Bravos objects to the
25 Department's proposal for adoption of a temporary

1 standards provision; is that correct?

2 A. Yes, it is.

3 Q. Specifically, Amigos Bravos does not believe a
4 temporary standards proposal is necessary, correct?

5 A. Correct.

6 Q. Can you explain the basis for Amigos Bravos'
7 position?

8 A. I have not seen NMED, the Department, give a
9 credible reason why these standards are needed. The
10 Department has said that it is because of the
11 application of the nutrient general criteria --

12 MR. WATERS: Hello.

13 MR. CHAVEZ: Hold on one moment.

14 MR. TONGATE: Hey, John, can you put your
15 phone on mute.

16 MR. WATERS: I've got it on mute. You guys
17 actually went to mute on me for a few seconds. I don't
18 know why. But it's back.

19 MR. CHAVEZ: Mr. Chairman, do we know if these
20 microphones are somehow connected to the phone?

21 I think it's going to be very difficult for
22 them to hear.

23 MS. CASTANEDA: I turned the volume up this
24 morning to make sure --

25 MR. TONGATE: Can you guys hear?

1 MR. WATERS: I can now.

2 MS. DEROSE-BAMMAN: And so can I.

3 MR. SCHLENKER-GOODRICH: Can we bring it --

4 MR. CHAVEZ: Yeah. We're going to try to move
5 it over here.

6 There's going to be some portions that the
7 people on the phone just can't hear.

8 (Discussion off the record.)

9 MR. CHAVEZ: Thank you.

10 Let's proceed.

11 Q. (BY MR. SCHLENKER-GOODRICH) Ms. Conn, you
12 were expressing concerns with Amigos Bravos' -- you were
13 expressing Amigos Bravos' concerns with the Department's
14 temporary standards proposal.

15 Could you continue, please?

16 A. Yes. We don't believe that the Department has
17 demonstrated a need for this provision. We have yet to
18 see a credible reason why these standards are needed.

19 The Department has said it's because of the
20 application of the nutrient general criteria at
21 20.6.4.13E, yet this standard has been in place for a
22 long time, this general nutrient criteria, more than 15
23 years, and, therefore, dischargers have already been
24 given a lot of time to get into compliance. Why should
25 they be given more time?

1 In addition, I have not seen evidence that
2 NMED has exhausted other mechanisms that already exist
3 for applying their nutrient general criteria, such as
4 corrective actions or compliance schedules, as per
5 20.6.4.12G NMAC.

6 I'm not aware of any permit being denied or
7 revoked because a discharger could not meet effluent
8 standards. And as a practical matter, I am also not
9 aware of any restoration project that has been halted or
10 not implemented because of the need of -- because they
11 needed a variance from water quality standards.

12 Q. Ms. Conn, Amigos Bravos also has concerns that
13 the temporary -- excuse me -- also has expressed
14 concerns with regard to new or increased discharges into
15 a water body segment that may be subject to a temporary
16 standard; is that correct?

17 A. Yes. I do not see anywhere in NMED's proposal
18 a mechanism to limit this temporary standard, only to
19 existing discharges. Under NMED's proposed language, a
20 temporary standard once adopted could apply broadly to a
21 specific -- would apply broadly to a specific water body
22 and, therefore, would be applicable to both existing
23 discharges and new discharges that will come along into
24 that water body.

25 Therefore, a temporary standard once adopted

1 by the Commission should apply only to new and increased
2 discharges.

3 Q. I'm sorry, Ms. Conn.

4 Can you clarify that? That the temporary
5 standard proposal should apply only to new or increased
6 discharges or only to existing discharges?

7 A. Excuse me. Sorry. Therefore, a temporary
8 standard once adopted by this Commission could
9 potentially apply to new or increased discharges.

10 This is problematic because it could create a
11 situation where a new discharger or discharges could
12 come along after the temporary standard has been
13 approved and start discharging into the water body using
14 weaker effluent limits based on the temporary standard.

15 This in reality represents an increase of
16 pollution into the water body because weaker effluent
17 limits result in increased pollution.

18 In fact, the issuance of a temporary standard
19 could have the unintended consequence of attracting
20 dischargers to a water body by setting up a standard in
21 associated effluent limits that are less expensive to
22 meet and thus are more attractive to dischargers.

23 NMED's proposal does include a boilerplate
24 provision required by the Clean Water Act rules
25 providing that adoption of a temporary standard will not

1 cause the further impairment or loss of an existing use,
2 yet the mechanics of the NMED's proposal provide no such
3 assurances and indeed compel the opposite conclusion,
4 that temporary standards could, even if unintentionally,
5 cause the further impairment or loss of an existing use.

6 And I think we heard testimony both from
7 Mr. Nylander and Ms. Pintado that there could indeed be
8 increased discharges at least at the beginning of a
9 temporary standards -- implementation of a temporary
10 standard.

11 In effect, NMED's boilerplate language
12 forbidding the further impairment or loss of an existing
13 use is disconnected from how NMED's proposal for
14 temporary standards would operate in practice.

15 To explain, it is impossible to determine at
16 the time of adoption of a temporary standard whether or
17 not the temporary standard will or will not cause the
18 further impairment or loss of an existing use. This is
19 because, as proposed, NMED's temporary standards would
20 apply broadly to a water body, without any limitations
21 on the applicability of the temporary standard to new
22 discharges.

23 Therefore, any new discharges or dischargers
24 could come along after the temporary standard has been
25 approved and start discharging into the water body.

1 Q. So, Ms. Conn, to summarize, there are -- you
2 have concerns that the temporary standard could cause
3 further harm to already impaired waters, making
4 achievement of original water quality standards far more
5 difficult, thus undermining the very basis for the
6 temporary standard.

7 A. Correct. In addition to not limiting the
8 applicability of temporary standards to existing
9 discharges, NMED's temporary standards proposal would
10 most likely be utilized primarily in impaired waters.
11 Therefore, if adopted, NMED's proposal could allow new
12 or increased discharges of impaired parameters into
13 impaired waters, thus directly contributing to
14 violations of water quality standards.

15 Accordingly, if the Commission moves forward
16 with adopting a temporary standard provision, that
17 provision should expressly prohibit the use of temporary
18 standards where those standards would allow or otherwise
19 justify new, increased or continued discharges into
20 impaired waters.

21 Q. Now, Ms. Conn, your testimony -- your prefiled
22 written testimony supports all the positions that you
23 have just described orally; is that correct?

24 A. Correct.

25 Q. And specifically these positions are more

1 fully stated in your prefiled written direct testimony
2 with the notice of -- Amigos Bravos' notice of intent on
3 pages 6 to 8?

4 A. Correct.

5 Q. And also in your rebuttal testimony on pages 9
6 to 17?

7 A. Correct.

8 Q. Could I ask you to turn to your rebuttal
9 testimony on page 9.

10 A. Yeah.

11 Q. And specifically I just want to very quickly
12 walk you through.

13 In subsection A, you note that temporary
14 standards -- that Amigos Bravos views temporary
15 standards are unnecessary because flexibility to achieve
16 water quality standards is already afforded through
17 compliance schedules, on page 9?

18 A. Are we on the direct or rebuttal?

19 Q. The rebuttal testimony.

20 A. Sorry.

21 Yes.

22 Q. And then in subsection B, that temporary
23 standards if adopted should not apply to impaired
24 waters?

25 A. Yes.

1 Q. And in that provision, you noted specific
2 concerns regarding existing discharges into water body
3 segments that may be subject to temporary standards?

4 A. Yes.

5 Q. And then on page 11, in subsection C, you note
6 concerns regarding temporary standards and that they
7 should not be allowed for new or increased discharges?

8 A. Correct.

9 Q. And on page 12, in subsection D, you note that
10 temporary standards should not apply where
11 technology-based effluent limits would secure compliance
12 with existing permanent standards?

13 A. Yes.

14 Q. And also on page 12, in subsection E, that
15 temporary standards if adopted should be subject to a
16 three-year time limit?

17 A. Correct.

18 Q. And that reflects a general concern with the
19 length of time that a temporary standard may or may not
20 be in place?

21 A. Correct.

22 Q. And then on page 13, in subsection F, that it
23 should include more robust public participation
24 elements, in particular a public hearing, an explicit
25 public hearing requirement?

1 A. Correct.

2 Q. And then on the bottom of page 13, in
3 subsection D, Amigos Bravos contends that any temporary
4 standards proposal if adopted should place the burden to
5 justify that standard squarely on the proponent?

6 A. I have it as subsection G.

7 Q. I'm sorry. You're correct.

8 Subsection G on the bottom of page 13?

9 A. Yes.

10 Q. And then turning to page 15, subsection H,
11 that Amigos Bravos contends that a temporary standards
12 proposal if adopted should be subjected to a condition
13 that failure to comply with permit conditions would
14 result in termination of a temporary standard?

15 A. Correct.

16 Q. And then in subsection I, you express concerns
17 about San Juan Water Commission's position regarding
18 temporary standards?

19 A. Correct.

20 Q. Thank you, Ms. Conn.

21 All of these concerns again underlie Amigos
22 Bravos' opposition to the Department's proposal?

23 A. Yes.

24 Q. Now, notwithstanding Amigos Bravos' opposition
25 to the Department's proposal, Amigos Bravos has proposed

1 constructive changes to the Department's temporary
2 standards proposal to address these concerns; is that
3 correct?

4 A. That's correct. I think that we proposed --
5 at least in our testimony, we suggested that what needed
6 to be changed in the standards, in our actual prefiled
7 rebuttal testimony, and then on Monday we provided the
8 actual language that reflected those suggestions that
9 were included in our prefiled direct and rebuttal
10 testimony.

11 Q. So the proposed changes that were filed on
12 this Monday were an outgrowth of Amigos Bravos' prefiled
13 written direct and rebuttal testimony.

14 A. Correct.

15 Q. And they were also an outgrowth of the
16 Department's own positions where Amigos Bravos
17 identified a disconnect between the Department's
18 prefiled written and direct testimony and the
19 Department's September 4th second amended petition which
20 provided additional changes to the proposed temporary
21 standards?

22 A. Correct.

23 Q. Now, turning to those proposed changes, the
24 specific proposed changes that Amigos Bravos has
25 recommended, can you summarize your proposed changes to

1 F.(1)(b)?

2 And I would refer, to track along on this,
3 this is Amigos Bravos' Monday filing, this is that
4 Section III, proposed changes.

5 A. Yes.

6 Q. For 20.6.4.10.F.

7 And, Ms. Conn, just to be clear, the language
8 in here tracks precisely the language in the
9 Department's second amended petition submitted on
10 September 4th, correct?

11 A. Correct.

12 Q. With proposed additions identified in blue
13 underline --

14 A. Correct.

15 Q. -- and proposed deletions in red
16 strike-through?

17 A. Yes.

18 Q. Thank you, Ms. Conn.

19 You may proceed with explaining the proposed
20 changes to F.(1)(b).

21 A. Amigos Bravos proposes changes to ensure
22 reasonable progress is made towards achieving the
23 original standard. As the Department's -- Department's
24 witness, Christine Pintado, explains in her direct
25 testimony at 9-89, the petition for a temporary water

1 quality standard will of necessity contain a work plan
2 with controls or other limitations tightening over time,
3 which shows progress towards achieving the original
4 criterion.

5 As Ms. Pintado further explains at 10-89, a
6 temporary standard should also identify interim
7 milestones to ensure reasonable progress is made toward
8 meeting the original water quality standard.

9 This is also, of course, implicit in the very
10 notion of temporary standard. However, while this may
11 be the case, the Department's intent to ensure
12 reasonable progress is not explicit in the Department's
13 proposed language for adoption of temporary standards.

14 Amigos Bravos thus proposes to add the
15 language "ensures reasonable and expeditious progress"
16 to achieve the original standard. We also think that
17 adding the language "minimum time necessary" to achieve
18 the original standard would also be appropriate.

19 And Amigos Bravos also proposes changes to
20 ensure that the temporary standard and specifically the
21 work plan used to justify it complies with New Mexico's
22 antidegradation protections by adding the requirement
23 that the temporary standard complies with New Mexico's
24 antidegradation procedures at 20.6.4.8.

25 Q. Now, Ms. Conn, with regard to your language

1 saying that Amigos Bravos would be amendable to
2 insertion of a temporal component of minimum time
3 necessary, this is based on Ms. Pintado's rebuttal
4 testimony on page 21, correct?

5 A. Yes.

6 Q. Let me confirm that it is rebuttal and not the
7 opening. I'm sorry.

8 A. I think it's the rebuttal, but --

9 Q. I will continue.

10 Ms. Conn, now turning to subsection F.(5), can
11 you summarize your proposed changes to subsection F.(5)?

12 Oh, I'm sorry. Let me rewind. I missed my
13 place in my questions. I apologize.

14 Can you summarize your proposed changes to
15 subsection F.(2)?

16 A. Yes. This relates to specific dischargers in
17 the work plan and temporary standards having a temporal
18 limit on the temporary standards provision.

19 So Section 5.3 of EPA's Water Quality
20 Standards Handbook and EPA's guidance on variances
21 requires that variances -- which here, you know,
22 we're -- I think we're all clear that the temporary
23 standard proposal is a variance -- and associated
24 documentation or work plan properly accounts for all
25 discharges within a specific water quality segment.

1 Thus, Amigos Bravos proposes to make sure that
2 a discharger can only apply a temporary standard to its
3 operations if it is, in fact, properly accounted for in
4 the work plan submitted in support of the petition for a
5 temporary standard.

6 Otherwise, dischargers that are not accounted
7 for by the work plan could take advantage of the
8 temporary standard and undermine if not preclude
9 achievement of the original standard because they are
10 not accounted for in the work plan.

11 Amigos Bravos' proposed changes to this
12 section on this point should be read in conjunction with
13 Amigos Bravos' proposed changes to subsection (5) --
14 F.(5), which provide that the work plan must, in fact,
15 identify and account for all discharges that would be
16 subject to the temporary standard.

17 Amigos Bravos also proposes a 10-year limit to
18 the application of a temporary standard. The current
19 proposal has no limit, and, therefore, a temporary
20 standard could be in place for 20, 50, 100, 200 years,
21 the -- you know, in effect becoming a permanent
22 standard.

23 EPA was considering a 10-year limit in its new
24 rulemaking. In fact, its draft rule had that provision,
25 a 10-year limit. While EPA ultimately decided not to

1 move forward with that requirement at this time, it may
2 do so in the future.

3 In addition, the Department in their April,
4 2014 discussion draft originally proposed a three-year
5 time limit on temporary standards.

6 The Commission certainly has the authority to
7 set a time limit on -- for a variance -- variances here
8 in New Mexico, and we believe that setting such a limit
9 would be prudent, especially since, one, we have not
10 been given adequate examples by the Department of why a
11 temporary standard is needed; two, the Department has
12 not demonstrated harm to dischargers if the temporary
13 standard is not, in fact, enacted; and three, this is a
14 new provision that has the potential to negatively
15 impact water quality, especially if there are problems
16 with implementation, and, therefore, caution should be
17 used when adopting this proposal.

18 Therefore, Amigos Bravos believes it would be
19 prudent, given that this is a substantial change to the
20 water quality standards, to limit the provision to 10
21 years.

22 And again, if you -- on page 12 and 13 of my
23 prefiled rebuttal testimony, we provide outlines why we
24 thought there should be a time limit. We were proposing
25 at the time a three-year -- revert back to the

1 three-year limit. At this time, we're recommending a
2 10-year limit as per EPA -- what EPA was considering in
3 their draft guidance.

4 Q. And at the very least, Ms. Conn, to be clear,
5 and the proposed change for F.(1)(b), at the very least,
6 have a provision mandating, very explicitly and
7 consistent with what the Department has testified on,
8 that it should be limited to the minimum time necessary.

9 A. Correct.

10 Q. Can you summarize your proposed changes to
11 subsection F.(5)?

12 A. Amigos Bravos proposes to make temporary
13 standards work plans available for the public, not just
14 NMED, for review and comment. This provision would help
15 to identify and resolve problems with a work plan before
16 a temporary standard is submitted to the Commission for
17 approval.

18 This would help streamline and at the least
19 eliminate key issues involving the Commission's
20 consideration for any temporary standard proposal.

21 Amigos Bravos also proposes, consistent with
22 its proposed changes for F.(2), that the work plan
23 account for and provide steps and requirements for all
24 discharges and dischargers that discharge within the
25 segment for which a temporary standard proposal is

1 proposed.

2 Amigos Bravos' proposed language reflects
3 EPA's guidance for variances that apply to multiple
4 discharges, specifically EPA publication Number EPA
5 820-F-13-012. It's a March, 2013 discharge. And
6 that -- March, 2013 publication.

7 And that is the exhibit that we had in our
8 supplemental. I think it's not been brought into the
9 record.

10 Q. It was --

11 A. It's our Supplemental K, but it's the San Juan
12 Water Commission's exhibit at C-2.

13 I also reference this guidance on page 7 of my
14 written prefiled testimony.

15 Q. And the Department itself referenced this
16 guidance document, as well, did it not?

17 A. Correct.

18 Q. Ms. Conn, can you summarize your proposed
19 changes to subsection F.(7) of the temporary standards
20 proposal?

21 A. Amigos Bravos finds the proposed --
22 Department's proposed language of appropriate public
23 participation far too vague, creating uncertain
24 expectations and requirements for the proponent of a
25 temporary standard, and thus risking unnecessary

1 attention and conflict between the proponent of a
2 temporary standard and the public.

3 We propose to clarify that public
4 participation means a 30-day public review and comment
5 period before a temporary standards proposal is
6 submitted to the Commission for consideration, and a
7 public hearing to take place before the Commission.

8 The Department has indicated that it is their
9 intention and their reading of their proposal that it
10 already does require a 30-day hearing, but I think that
11 there's sufficient confusion in reading the plain
12 language of the rule that that is not clear when you
13 read the rule, that a 30-day -- that a public hearing
14 is, in fact, required.

15 Q. And, Ms. Conn, just very quickly on that
16 point, if it's not clear to you -- you are very familiar
17 with understanding water quality standards and the Clean
18 Water Act and the interplay between the two; is that
19 correct?

20 A. Correct.

21 Q. Do you think that it would be confusing for a
22 member of the public to know that they were allowed to
23 have a public hearing requirement if it was not
24 contained in the temporary standards provision?

25 A. Yes. I think it would be confusing for the

1 public.

2 I also want to note on this that this is
3 directly linked to page 13 of my rebuttal testimony
4 where I talk about meeting the 30-day public comment
5 period and a -- and a public hearing.

6 Q. Ms. Conn, can you now shift to subsection
7 F.(8) and summarize Amigos Bravos' proposed changes to
8 that subsection of the proposed temporary standards
9 proposal?

10 A. Amigos Bravos proposes to clarify when the
11 petitioner must submit a report to the Commission,
12 proposing to require that such reports must be submitted
13 90 days prior to the deadline to submit proposed changes
14 to water quality standards for each triennial review.

15 This allows other parties to propose changes
16 to the temporary standards.

17 Further, Amigos Bravos' proposed changes
18 alleviate the risk of inconsistent reporting
19 requirements inherent to the Department's proposal,
20 which vaguely provides that the report will be submitted
21 in accord with the reporting schedule stipulated in a
22 temporary standard itself.

23 So there could be different reporting
24 requirements for different dischargers, and there's --
25 the EPA requires that there is -- that there's a certain

1 amount of review that occurs, and if -- and if there was
2 a provision that required that it happen before every
3 triennial review, and that there was time for -- for
4 public review of that temporary standard, that would --
5 that would meet the EPA requirement in their new rule
6 for variances.

7 Q. And that would provide clarity to the public
8 and enable the public that if they had concerns
9 regarding the temporary standard proposal and how it was
10 being implemented to submit proposed changes to the
11 Commission?

12 A. Correct.

13 Q. Ms. Conn, can you now turn to subsection --
14 actually it's a new section. I believe it's 12.H. This
15 is the subsection H regarding inclusion of the temporary
16 standard provision into discharge permits.

17 A. Correct.

18 Q. Can you summarize your proposed changes to
19 subsection H?

20 A. Amigos Bravos proposes to limit the
21 application of a temporary standard to discharges
22 existing at the time a temporary standard is proposed
23 and adopted, as per our other proposed changes.

24 This would ensure that a temporary standard
25 would not incentivize new or increased dischargers

1 targeting water bodies with temporary standards. This
2 also ensures that progress is made toward achievement of
3 the original standard given that any new or increased
4 discharges would not be encompassed by the work plan
5 provided for in F.(4) -- in F.(5). Excuse me.

6 Indeed, it is reasonable to conclude that any
7 new or increased discharges, if not identified and
8 accounted for in a work plan, would undermine that work
9 plan by changing the timing, location and magnitude of
10 discharges in the water quality segment subject to the
11 water -- subject to the temporary standard.

12 And I'd like to note that page 7 of my direct
13 and page 11 of my rebuttal testimony very specifically
14 goes towards wanting to limit this to existing
15 discharges, and this is a logical outgrowth of that
16 direct testimony -- prefiled direct testimony.

17 Q. And broadly ensuring that subsection H would
18 ensure enforceability in not just 402 permits but also
19 in 404 permits?

20 A. Oh, correct. Yes. So this section we propose
21 that if you have a temporary standard, that the work
22 plan and the requirements in the work plan would apply
23 to all Clean Water Act permits.

24 Q. Ms. Conn, with all of these proposed
25 changes -- and to summarize, these proposed changes are

1 a constructive attempt by Amigos Bravos to take
2 everything that it had filed with its prefiled written
3 and rebuttal -- direct and rebuttal testimony and to put
4 that in a format to improve the temporary standards
5 proposal; is that correct?

6 A. Correct. These are -- these are not new
7 concerns by Amigos Bravos. These are all -- all these
8 concerns that are -- that we're addressing in these
9 proposed changes were outlined in our prefiled direct
10 and rebuttal testimony, very specifically saying that if
11 the Department passes -- if you look at the prefiled
12 rebuttal testimony, there's a lot of language that says
13 if the Commission moves forward with a temporary
14 standards provision they should include this component.

15 And what we did on Monday was simply provide
16 the actual wording, rule change wording to those already
17 recommended changes.

18 Q. Now, turning to Mr. Nylander's testimony,
19 Mr. Nylander states on page 12 of his direct written
20 testimony, and this is again on the temporary standards
21 proposal, that EPA and the Department would most likely
22 use temporary standards on existing discharges.

23 Does the proposed temporary standards language
24 actually limit temporary standards to existing
25 discharges?

1 A. No. There's no provision in the Department's
2 proposal that ensures this. And I believe we heard
3 yesterday from Mr. Nylander that he agreed that there
4 was not such a provision.

5 And therefore, I would contend that the San
6 Juan Water Commission is wrong to state that Amigos
7 Bravos has somehow misconstrued the Department's
8 proposal. While Amigos Bravos certainly hopes the
9 temporary standards would not lead to new or additional
10 discharges, there is, again, nothing in the language of
11 the temporary standard proposal that guarantees this.

12 Q. So there's confusion overall between the
13 parties regarding this point.

14 A. Correct.

15 Q. The San Juan Water Commission and the
16 Department have both referred to the now final EPA water
17 quality standards rule, that's at 80 Federal Register
18 51020, dated August 21st, 2015; is that correct?

19 A. Yes.

20 Q. Have you reviewed this rule?

21 A. Yes.

22 Q. Are the requirements -- and this rule deals in
23 particular with water quality variances?

24 A. Correct.

25 Q. Which --

1 A. Part of the rule does. Yes.

2 Q. Part of the rule.

3 And the variance procedures in there, that is
4 effectively a temporary standard, or a temporary
5 standard is effectively a water quality variance for
6 purposes of EPA review?

7 A. Yes.

8 Q. Have you -- are there requirements for
9 variances in the new rule that are not addressed in the
10 Department's proposal for temporary standards?

11 A. Yes. First of all, the rule at 131.14(b)(6)
12 requires that states and authorized tribes adopt a
13 provision specifying that the water quality standard
14 variance will no longer be the applicable water quality
15 standard for Clean Water Act purposes if they do not
16 conduct a required re-evaluation or do not submit the
17 results of the re-evaluation to EPA within 30 days of
18 completion.

19 The rule also establishes that if a state or
20 authorized tribe does not re-evaluate the water quality
21 standard variance or does not submit the results to EPA
22 within 30 days, the underlying designated use and
23 criterion become the applicable water quality standard
24 for the permittee or water body specified in the water
25 quality standard variance, without EPA, the states or

1 authorized tribes taking any additional action.

2 So it's an immediate thing that doesn't
3 require any further action by this Commission or by --
4 or by EPA, that the original standard goes into place
5 automatically if certain requirements are not met.

6 In such case, subsequent NPDES water quality
7 standard-based effluent limits for the associated permit
8 must be based on the underlying, the original designated
9 use and criterion, rather than the highest attainable
10 condition, even if the originally specified variance
11 term has not expired.

12 While the Department has included a provision
13 that requires a review of the temporary standard, it has
14 not included language as per the EPA rule that revokes
15 the temporary standard for Clean Water Act purposes if
16 the required review does not occur.

17 And again, we have prefiled written testimony
18 on this issue. We -- at the bottom of page 14 and 15 of
19 our rebuttal, we suggest that there be revoking of the
20 temporary standard if certain conditions are not met.

21 Q. Ms. Conn, is the Department's proposal --

22 A. I just --

23 Q. I'm sorry.

24 A. Actually, there's a couple other parts of the
25 new rule we --

1 Q. Please continue on this.

2 A. Okay.

3 Second, the new rule at 131.14(a)(4) states
4 that -- that states may not adopt a water quality
5 standard variance if the designated use and criterion
6 addressed by the variance can be achieved by
7 implementing technology-based effluent limits.

8 The Department's proposal -- proposed language
9 does not include such a requirement.

10 We suggest that -- specifically provide
11 testimony on this very issue, on page 12 of our
12 rebuttal. We -- you know, we heard yesterday that
13 there's some confusion about this, that there's some
14 parties believe that, in fact, the proposed language
15 does, in fact, require this.

16 I don't see where that is in the -- in the
17 plain language of the Department's rule.

18 Third, the rule, if you go to page 51036 of
19 the proposed rule, does not allow variances to lower
20 currently attained ambient water quality except for
21 restoration projects. And this goes to Amigos Bravos'
22 main concern that variances should not apply to new or
23 increased discharges.

24 Q. Ms. Conn, if changes are not made to the
25 Department's proposal to account for the final water

1 quality standards rule, do you think that that could
2 compromise EPA's ability to approve the New Mexico's
3 temporary standards proposal?

4 A. Well, I think that -- yes. If it doesn't
5 incorporate all the requirements in the new rule,
6 variance rule, it could.

7 Q. Now, Ms. Conn, I'd like to now turn to Chino
8 Mines' petition for site-specific criteria.

9 Before I do, I wanted to ask if you had any
10 final comments for the record regarding the Department's
11 temporary standards proposal.

12 Did you leave anything out, or did I fail to
13 ask you anything on --

14 A. I think we covered it all.

15 Q. Thank you.

16 Now, regarding Chino Mines' petition for
17 site-specific criteria, the provision in terms of -- the
18 petition requirements in 20.6.4.10D(3)(c) read, quote,
19 unquote, "A petition for the adoption of site-specific
20 criteria shall: describe the methods used to notify and
21 solicit input from potential stakeholders and from the
22 general public to the affected area, and present and
23 respond to the public input received"; is that correct?

24 A. Correct.

25 Q. This provision contains two separate parts,

1 correct?

2 First, that the petition must describe methods
3 to notify and solicit input from stakeholders and the
4 public?

5 A. Yes. That's the first part.

6 Q. And second, that the petition must
7 specifically present and respond to the public input
8 received?

9 A. Yes. That the petitioner must present and
10 respond, yes. That's the second part.

11 Q. In Amigos Bravos' view, did Chino Mines comply
12 with these requirements?

13 A. Well, based on the information that we
14 received yesterday -- two days ago -- I forget what day
15 it was -- the new information we received, we do believe
16 that they complied with the first part. They described
17 the methods that they use to notify and solicit input
18 from the public. So they provided their public notice
19 and the meeting minutes.

20 We do not believe that they met the
21 requirements of the second part, which is to present and
22 respond to the public input received. Notably, we don't
23 know what public input was received, except for a brief
24 kind of bulleted list of eight questions, and there was
25 a, you know, one-sentence response to only two of those

1 questions.

2 In addition, in those meeting notes, it says
3 that there's -- written comment could be submitted, and
4 it provided a place to submit written comment, and
5 nowhere have we seen if there were written comments by
6 the public received, and if so, were there responses to
7 those written comments. Nowhere do we see responses to
8 the additional six questions that were provided in the
9 one meeting notes.

10 And then there were the two other meeting
11 notes which didn't summarize any public input or
12 response to that public input.

13 So we would say that we -- this lack of
14 information compels the conclusion that Chino has not
15 complied with 20.6.4.10D(3)(c) NMAC or demonstrated
16 stakeholder engagement sufficient to justify the
17 promulgation by this Commission of site-specific
18 criteria.

19 Moreover, Chino has made it difficult for this
20 Commission, Amigos Bravos and other parties, including
21 the Department, to identify issues of potential concern
22 to stakeholders and members of the public in the
23 immediate vicinity of Chino Mines and the water bodies
24 in question.

25 Thus, adoption of Chino's proposed change, in

1 addition to not on its face complying with
2 20.6.4.10D(3)(c) risks the exclusion of local voices and
3 input and, as a consequence, the arbitrary and
4 capricious adoption of its proposed change by this
5 Commission.

6 Q. Now, Ms. Conn, I'd like to turn to aluminum,
7 but a separate issue from Amigos Bravos' proposed
8 changes to the hardness-based aluminum criteria. And
9 this deals specifically with what aluminum criteria
10 apply for waters with a pH below 6.5.

11 And if I understand it right, the discussion
12 yesterday dealing with aluminum referred to the aluminum
13 standard in a pH range from 6.5 to 9, correct?

14 A. Yes. And I have expressed this concern on
15 page 8 of my direct testimony.

16 Q. And specifically on this point, in your direct
17 written testimony on the bottom of page 8, you express
18 concerns with the Department proposal to include
19 language in 20.6.4.900I NMAC, explaining that EPA has
20 disapproved the hardness-based aluminum criteria in
21 waters where the pH is less than 6.5, correct?

22 A. Yes.

23 Q. Can you briefly state your concerns with the
24 Department's proposal?

25 A. It's confusing. The language does not clearly

1 express what aluminum criteria applies to waters with a
2 pH of 6.4. There's no mention of any specific numeric
3 criteria that actually apply.

4 This makes it hard for the public -- for Clean
5 Water Act purposes even. Even for federal purposes,
6 there's no clarification about what those numbers
7 actually are, what those standards are.

8 Presumably they're the 304(a) criteria that
9 EPA will be utilizing when doing Clean Water Act
10 permits, but there's no indication from the language the
11 Department proposes what those numbers actually are for
12 the public or for the discharger, for the regulated
13 entity to have any idea about what kind of permit limits
14 they may be looking at.

15 It also makes it hard for -- second, while
16 it's not clear from the proposed language, the
17 Department's testimony suggests that the hardness-based
18 criteria will apply for state purposes, so for non-Clean
19 Water Act purposes -- that for state purposes the
20 hardness-based criteria will apply to waters with a pH
21 of 6.5 or less.

22 And this brings up serious questions about if
23 EPA has serious concerns that the -- the hardness-based
24 criteria is not protective for waters with a pH of 6.5
25 or less, where is the justification from the Department,

1 the scientific basis that it is indeed protective for
2 state purposes?

3 In summary, Amigos Bravos does not think the
4 hardness-based criteria will be protective for state
5 purposes, and we do not believe that the Department has
6 provided any scientific justification to show otherwise.

7 Q. Fundamentally, to ensure adequate protection
8 for aquatic species, Amigos Bravos would recommend that
9 the state use the EPA-recommended 304(a) aluminum
10 criteria for all waters where the pH is less than 6.5,
11 and that this is based on credible scientific evidence,
12 and would remedy concerns that the hardness-based
13 aluminum criteria again at -- in waters where the pH is
14 less than 6.5 are substantially underprotective of
15 aquatic species, correct?

16 A. Correct. And we also recommend that the
17 standards clearly state what those standards are,
18 instead of referring to 304(a) criteria or -- so that
19 the public and the regulated industries can know what
20 standard applies.

21 Q. So fundamentally, this is a matter of both
22 clarity and protection of aquatic species.

23 A. Correct.

24 MR. SCHLENKER-GOODRICH: No further questions,
25 Ms. Conn.

1 And that concludes our direct testimony --
2 direct and rebuttal testimony.

3 MR. CHAVEZ: Thank you.

4 At this time, I would like to move to NMED.

5 Do you have any cross-examination?

6 MR. VERHEUL: We don't have any questions for
7 this witness, Mr. Hearing Officer, but we'd like to
8 clarify that based on timeliness of their submittal of
9 their proposed revisions to our proposal, we reserve the
10 right to provide a response in posthearing pleadings to
11 these new proposals.

12 MR. CHAVEZ: Any objection to that?

13 MR. SCHLENKER-GOODRICH: No objection. It's
14 my understanding that's what all parties are entitled to
15 do.

16 MR. CHAVEZ: No problem.

17 San Juan?

18 MS. MCCALED: No questions.

19 Thank you.

20 MR. CHAVEZ: Chevron?

21 MR. ROSE: No questions, Mr. Hearing Officer.

22 MR. CHAVEZ: Thank you.

23 Freeport?

24 MS. CHAPPELLE: Just a few, Your Honor.

25 MR. CHAVEZ: Okay.

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CROSS EXAMINATION

BY MS. CHAPPELLE:

Q. Good morning, Ms. Conn.

A. Good morning.

Q. How are you?

A. I'm well.

How are you today?

Q. Doing well. Thanks.

I just have a couple clarifying questions.

Do you recall the testimony or the line of cross-examination from Mr. Schlenker-Goodrich on Wednesday with respect to the portion of your direct testimony pertaining to Freeport's community involvement process?

A. Do I -- are you asking about a specific line of questioning?

Q. Do you -- do you recall that? Were you in the room?

A. I was in the room.

Q. Thank you.

And do you recall him asking the question of our witness, Mr. Fulton, whether or not Freeport's petition had been included in the general notice procedures of the triennial review itself?

A. I don't know if I specifically recall that,

1 but I believe you that he did ask that.

2 Q. And would it surprise you to -- or maybe I
3 should -- do you recall the answer Mr. Fulton gave, and
4 would you like -- if you don't, would you like me to
5 remind you of that answer?

6 A. The question is whether the petition was
7 included in the notice about the triennial review?

8 Well, I assume that it was, because all
9 parties' proposed changes were part of that notice. So
10 yes.

11 Q. So as part of that notice, is the public then
12 given the opportunity to provide comment?

13 A. Yes.

14 Q. And do you recall comments being provided from
15 the public with respect to, say, some of the HP protocol
16 issues?

17 A. You mean that there -- no. I don't recall
18 that.

19 Q. So just to give you an example, if you
20 wouldn't mind turning to the direct testimony of
21 Ms. Pintado, just as an example.

22 Some of her exhibits contain comments from the
23 public with respect to various portions of the HP
24 protocol.

25 A. So is this for the HP protocol in general or

1 its application to the Chino Mines' proposal?

2 Q. Just in general, just as an example of how
3 comments are received through the triennial review
4 process.

5 A. Yeah. Well, we have commented on it. So I
6 don't know if I need to actually --

7 MR. SCHLENKER-GOODRICH: Ms. Chappelle, could
8 you clarify what you're referring to in Ms. Pintado's
9 testimony, what page?

10 MS. CHAPPELLE: I think the witness already
11 testified she is aware there were public comments
12 provided as part of the triennial review process in
13 general.

14 Q. Is that correct?

15 A. There were public comments as part of the
16 triennial review. There were public comments as part of
17 the hydrology protocol adoption or approval. I don't
18 see how that relates specifically to site-specific of
19 public comment --

20 Q. I haven't asked that question yet. So if you
21 wouldn't mind just answering the questions.

22 Thank you.

23 So would it surprise you to learn that, in
24 fact, the Department did not receive any public comment
25 with respect to site-specific criteria?

1 MR. SCHLENKER-GOODRICH: Objection. That asks
2 her to speculate. It seems more that counsel is
3 submitting evidence into the record and testifying. I
4 don't know if my client has any basis to really answer
5 that given the premise.

6 MR. CHAVEZ: Can you rephrase that question?

7 MS. CHAPPELLE: Sure.

8 I mean, I asked her would it surprise her.

9 So let me redirect, let me rephrase that.

10 Q. If public comment were received by the
11 Department with respect to any element of the triennial
12 review process, would it -- would it be likely that the
13 Department would have given the rest of the parties
14 notice of that comment?

15 MR. SCHLENKER-GOODRICH: Objection. I'm not
16 sure that my client has a basis to answer that question.

17 MS. CONN: Well, I think --

18 MR. CHAVEZ: I'm going to allow her to answer
19 the question, please.

20 MS. CONN: I do believe that the other -- we
21 were given copies of -- I think the Department's
22 discussion draft and some of their responses, I believe.
23 I'm not quite sure at this point.

24 But then the Commission receives comments, and
25 I have not been given notice of any Commission comments

1 on the triennial review. I assume that there's --
2 there's written comments that the public can send to the
3 Commission, and that's not shared with all the parties.

4 Q. (BY MS. CHAPPELLE) And I didn't ask that
5 question.

6 But I did ask the question if the Department
7 received public comments on any aspect of the triennial
8 review process, what your opinion would be about whether
9 or not the rest of the parties would likely receive
10 notice of that, given the nature of the triennial review
11 process.

12 A. I -- I guess so. I'm not sure that it would
13 necessarily -- it's necessarily required. I think that
14 I've seen in other filings by the Department where
15 they -- they've included direct reference to -- to
16 public comments that they've solicited and received.
17 I've seen that in previous filings. I don't know if
18 it's a requirement as part of the process that they have
19 to provide that.

20 Q. Did Amigos Bravos receive notice that there
21 were any public comments received by the Department as
22 part of the triennial review process pertaining to
23 Chino's petition?

24 A. I don't recall.

25 Q. So turning now to your testimony, Ms. Conn,

1 you indicate -- and I'm just clarifying -- you just
2 testified to this, as well -- that Chino has made it
3 difficult for this Commission, Amigos Bravos and other
4 parties, including NMED, to identify issues of potential
5 concern to stakeholders and members of the public in the
6 immediate vicinity of the Chino Mines and the water
7 bodies in question; is that correct?

8 A. That's correct. I did say that, because I
9 think that --

10 Q. That's all I asked. I asked if that was
11 correct.

12 A. Okay.

13 Q. Thank you.

14 And so do you have additional evidence to
15 indicate -- to back up this statement?

16 And I'm not asking for your thought process on
17 it. I'm asking for actual evidence that Chino made it
18 difficult.

19 MR. SCHLENKER-GOODRICH: Objection. I think
20 that question has been asked and answered to the degree
21 that Amigos Bravos' position is that it is the burden on
22 the petitioner for a site-specific change to very
23 specifically present and respond to that testimony, and
24 that is the basis of Ms. Conn's testimony.

25 So I believe that question has been asked and

1 answered.

2 MS. CHAPPELLE: With all due respect, I have
3 not asked that question, about burden. I have asked
4 with respect to this specific statement whether or not
5 Amigos Bravos has any independent knowledge or evidence
6 indicating the truth of that statement.

7 MS. CONN: We -- the truth of what statement?
8 Can you rephrase?

9 MS. CHAPPELLE: That Chino has, and I quote,
10 made it difficult for this Commission and other
11 stakeholders to understand the underlying issues.

12 MR. SCHLENKER-GOODRICH: My objection remains,
13 because the Amigos Bravos petition is that that is based
14 on Chino Mines' failure to actually present and respond
15 to testimony. So it's not based on -- it's based on
16 Chino Mines' obligation to present that. That is the
17 basis of that statement in Ms. Conn's testimony.

18 MR. CHAVEZ: Objection --

19 MR. SCHLENKER-GOODRICH: And it's been asked
20 and answered.

21 MR. CHAVEZ: Objection noted. I'm going to
22 allow the question. I think we need some clarification
23 here.

24 MS. CONN: Well, I said I think it is
25 difficult because we don't know what the answers are to

1 those at least six other questions that were in the
2 meeting notes, and we don't know if there were other
3 questions asked, you know, at those meetings and the
4 subsequent meetings.

5 Q. (BY MS. CHAPPELLE) So it was difficult for me
6 reading your testimony to understand that the only
7 reason you cite for the statement that Chino made it
8 difficult is because Chino didn't include the questions
9 asked and the answers in its petition.

10 So is that your testimony today, that the only
11 evidence that Chino made it difficult is that? Is there
12 anything else?

13 A. We -- I think that our testimony is that they
14 did not provide the questions asked or the input. Yes.
15 As you said --

16 Q. Please answer my question, because there's a
17 nexus there.

18 I'm asking --

19 MR. SCHLENKER-GOODRICH: Objection. I think
20 she's attempting to answer that question, and you're not
21 allowing her to.

22 MS. CHAPPELLE: Then let me please clarify my
23 question, because I don't think the lead-in was
24 indicating an answer to my question.

25 MR. SCHLENKER-GOODRICH: You didn't allow her

1 to complete it, though.

2 MS. CHAPPELLE: So, Mr. --

3 MR. CHAVEZ: You can rephrase that question
4 so --

5 MS. CHAPPELLE: I will. Thank you so much.

6 MR. CHAVEZ: -- for clarity.

7 Q. (BY MS. CHAPPELLE) Ms. Conn, is there any
8 other evidence besides your assertion that the petition
9 is deplete because it didn't include the actual
10 questions and answers -- is there any other evidence
11 aside from that that backs up your statement that Chino
12 made it difficult for stakeholders to identify issues of
13 potential concerns?

14 A. I don't think the burden of proof is on me to
15 provide evidence of what stakeholder input was provided
16 and what kind of responses and answers were provided by
17 Chino. I don't think that that's the burden of proof of
18 Amigos Bravos, to go out and comment before you and
19 provide evidence that there was somehow input that
20 wasn't provided in your own petition.

21 I believe it's a requirement of your petition
22 to actually present and respond to public input
23 received.

24 MS. CHAPPELLE: So I'm requesting direction on
25 getting an answer to this question, because if someone

1 makes a statement regardless of burden, which we can
2 disagree about from a legal perspective, making a
3 statement does require some backup to it, and once a
4 statement is made with respect to the veracity of that
5 statement and the weight that statement should be
6 provided, it then turns to the person making that
7 statement to be able to back that up.

8 And that's all my question is seeking.

9 So I would like an answer on that question.

10 MR. SCHLENKER-GOODRICH: I would object on the
11 basis that, as I said before, Amigos Bravos' position on
12 this is a legal position. That is, that the burden of
13 proof is on the petitioner to demonstrate that they have
14 presented and responded to testimony.

15 Amigos Bravos' position, as Ms. Conn has
16 already answered, I think repeatedly -- and with due
17 respect, I think -- Ms. Conn is not an attorney, and I
18 think Ms. Chappelle is attempting to trap her with an
19 answer to make a legal conclusion on this issue, that
20 Amigos Bravos' petition is that the petition must
21 present and respond to the questions.

22 The difficulty where Ms. Conn said that there
23 was difficulty in understanding this process is based on
24 there's nothing in the petition, and she answered that
25 apparently she is not aware of other information out

1 there.

2 So I believe that the question has been asked
3 and answered.

4 MR. CHAVEZ: I would like to allow the witness
5 to answer the question to the extent she knows, instead
6 of -- instead of arguing with Ms. Chappelle about who
7 she believes or what she believes the burden should be.

8 Answer the question to the best ability that
9 you know to answer.

10 MS. CONN: Okay. To the best of my ability
11 from what's been presented, I know -- only know that
12 there were eight questions asked by the public, two of
13 which were answered.

14 Q. (BY MS. CHAPPELLE) So your answer is that
15 there's no more other independent evidence or knowledge
16 that you have; is that correct?

17 A. I think I just answered it to the -- what I've
18 seen from your petition, what's provided in your
19 petition is that there were eight questions asked by
20 the -- by the public as per the meeting notes. Two of
21 those were -- provide a very brief, one-sentence answer,
22 in those meeting notes.

23 And that's all that I have seen of public
24 input on this matter.

25 Q. Thank you, Ms. Conn.

1 And I apologize for the direct nature of my
2 questions, but, you know, I take it very seriously when
3 someone makes a claim that another entity has literally
4 made it difficult --

5 MR. SCHLENKER-GOODRICH: Objection.

6 Is Ms. Chappelle introducing testimony or
7 asking a question?

8 MR. CHAVEZ: If you can just please proceed
9 with the questions.

10 MS. CHAPPELLE: I will. I was just trying to
11 explain the direct nature and to let her know that
12 there's nothing personal here. It's just a professional
13 discourse.

14 MR. SCHLENKER-GOODRICH: Appreciate it.

15 Q. (BY MS. CHAPPELLE) Now, going back, Ms. Conn,
16 to yesterday -- I mean to Wednesday's cross of -- by
17 Mr. Schlenker-Goodrich -- Goodwrench -- I apologize.

18 MR. SCHLENKER-GOODRICH: Goodrich.

19 MS. CHAPPELLE: I had it right the first time.
20 Every time I'm saying okay, say it right.

21 MR. SCHLENKER-GOODRICH: It's intentional.

22 Q. (BY MS. CHAPPELLE) Going back to that, the
23 cross-examination delved further into those questions
24 that were noted in the minutes.

25 Do you recall that line of questioning?

1 A. Yes. I would also note it was hard to follow
2 that line of questioning because we had just received --
3 and I actually didn't even get a copy of those notes.
4 My attorney did. And so he was following it, reading
5 it, where I did not have a copy of that.

6 And I think that's one of our main problems
7 with it --

8 Q. And I --

9 A. -- is that it wasn't --

10 Q. I apologize.

11 A. -- provided as part of the --

12 Q. I haven't actually asked a question yet.

13 And just to note, the minutes we're talking
14 about in which those questions were provided to
15 Mr. Schlenker-Goodwrench on --

16 MR. SCHLENKER-GOODRICH: Goodrich.

17 Q. (BY MS. CHAPPELLE) -- Goodrich Friday before.

18 MR. SCHLENKER-GOODRICH: With --

19 MS. CONN: There was one meeting note. But I
20 thought you were moving on to the other meeting notes
21 that weren't provided on Friday.

22 MS. CHAPPELLE: No.

23 MS. CONN: You're still on --

24 Q. (BY MS. CHAPPELLE) Ms. Conn, we're still on
25 that meeting. Yes.

1 A. The September 16th meeting.

2 Q. Yes.

3 A. Okay. So I --

4 MR. SCHLENKER-GOODRICH: So can I ask for
5 clarification, that you're referring to the
6 September 16th meetings -- the meeting notes; is that
7 correct.

8 MS. CHAPPELLE: That, I believe, is what
9 Ms. Conn is referring to in terms of the questions posed
10 and the answers.

11 MS. CONN: Yes. Yes.

12 Q. (BY MS. CHAPPELLE) Is that correct?

13 A. Yes. That's the one I'm referring to.

14 I thought you were moving on to the yellow
15 highlighted one that we just saw for the first time --

16 Q. No.

17 A. -- this week.

18 Q. Glad we're clarified.

19 So with respect to that line of
20 cross-examination by Mr. Schlenker-Goodrich, do you
21 recall Mr. Fulton's answer with respect to those minutes
22 summarizing those questions and answers?

23 A. Yes. I think he -- he was there at the
24 meeting, as he stated, and that he said that he thought
25 that the meeting notes summarized. So yes, to answer

1 your question.

2 Q. Do you recall that he expanded upon that and
3 actually answered that the limited notes didn't actually
4 reflect the full discussion of question and answer that
5 occurred at that meeting?

6 A. Yeah. I think he mentioned that there was --
7 you know, it wasn't -- I assume there would be. It was
8 a very short, bulleted list. So yes. I -- I do recall
9 that.

10 Q. So I just want -- thank you, Ms. Conn.

11 And I just wanted to clarify your testimony
12 that it did appear based on Mr. Fulton's testimony that
13 there was fairly substantial back and forth discussion
14 on those points.

15 Is that an accurate statement based on his
16 testimony?

17 A. I don't know if it would be substantial, but I
18 agree that there was -- there was additional
19 conversation about these issues that weren't recorded in
20 the meeting notes.

21 Q. Do you recall Mr. Fulton and Dr. Meyer
22 indicating that the presentation presented to the
23 Commission was in substantial part the same presentation
24 provided at that meeting?

25 A. Yeah.

1 Q. So would you characterize the presentation
2 provided as thorough to this Commission?

3 A. Yeah. I thought that the PowerPoint was
4 informative.

5 Q. So with that, would it be fair, then, to say
6 that the presentation to the CWG meeting in question
7 would also have been thorough if, in fact, that
8 presentation was used?

9 A. Yes. I think that the -- you know, that
10 was -- this is talking about information that Chino gave
11 to the public. This isn't addressing our concern, which
12 is that Chino present a response to the public input
13 that they received.

14 MS. CHAPPELLE: With all due respect, I'd
15 really like the witness to focus on just answering my
16 question.

17 MR. SCHLENKER-GOODRICH: Yeah.

18 And I would ask my own client just be very
19 concise in responding to the direct question.

20 MS. CONN: Okay.

21 MR. CHAVEZ: Thank you.

22 MS. CONN: So --

23 MR. CHAVEZ: Reask the question.

24 MS. CONN: Yes. There was a presentation. I
25 thought it was informative.

1 Does that get at your question, that that --

2 MS. CHAPPELLE: Yes. Thank you, Ms. Conn.

3 MS. CONN: It was a good format, and I liked
4 the tea and the -- you did the same thing that I thought
5 that helped really communicate what was going on.

6 MS. CHAPPELLE: Yes. We are all of the Pacman
7 generation, and they explained it. So that was helpful,
8 I thought, as well.

9 Okay. One last couple quick questions.

10 And I note that we will likely be dealing with
11 this issue as a legal matter, in terms of construing the
12 rule.

13 Q. Ms. Conn, I just want you to go back to the
14 rule real quick, if you wouldn't mind.

15 And just for the record, we are talking about
16 NMAC 20.6.4.10D(2)(c).

17 A. Yes. I'm here.

18 Q. Okay.

19 So is it fair to say that different --
20 different folks can look at wording and construe it
21 differently?

22 A. Yes. I think that that happens often in --
23 that people look at the same wording and construe it
24 differently.

25 Q. So looking at this, is it also possible -- and

1 you've already read this into the record so I don't want
2 to, you know, make everyone listen to that one more
3 time.

4 But is it possible that when you have a clause
5 in the -- in the beginning of a sentence that's a
6 compound sentence -- is it possible that first clause
7 can modify the following clauses, especially if they're
8 linked with an "and" statement?

9 MR. SCHLENKER-GOODRICH: Objection. I think
10 Ms. Chappelle is asking Ms. Conn to provide a legal
11 statutory construction response.

12 MS. CHAPPELLE: I'm actually going back to
13 English grammar and just normal layperson's ability to
14 look at a sentence and come up with alternative
15 construction.

16 MS. CONN: I think that all I can tell you is
17 what I read when I look at this, what it means to me. I
18 can't begin to guess what it means to everyone else.

19 Q. (BY MS. CHAPPELLE) So just as an aside, and
20 again to continue to have a little bit of humor infused
21 with this, I recently had to teach my son, who is in
22 eighth grade, you know, figure out how to deal with
23 compound fragments.

24 And so what I'm asking you to do is just to
25 give your opinion, Ms. Conn, about whether it's possible

1 that that initial phrase, "describe the methods used
2 to," can potentially modify the remaining clauses in
3 that sentence. I'm not asking you to change your
4 opinion. I'm just asking you to tell me if that's
5 possible.

6 A. Obviously, you said that that's how you've
7 read the language so I guess it is possible. So that --
8 that's not the way that I read that language.

9 Q. And I'm not asking you to change your opinion,
10 because we will be dealing with that in, obviously,
11 posthearing briefing.

12 With that, I thank you all for your time, and
13 I appreciate your answers to my questions.

14 Thank you, Ms. Conn.

15 MR. CHAVEZ: Thank you very much.

16 I'd now like to go to the Commission for any
17 questions of this witness.

18 Mr. Chairman, members of the Commission.

19 MR. DOMINGUEZ: Thank you, Mr. Hearing
20 Officer.

21 CROSS EXAMINATION

22 BY THE COMMISSION:

23 MR. DOMINGUEZ: Going to Commission questions.

24 Go ahead, Commissioner Hutchinson.

25 MR. HUTCHINSON: Good morning, Ms. Conn.

1 MS. CONN: Good morning, Mr. Chairman, members
2 of the Commission.

3 MR. HUTCHINSON: You've stated your testimony
4 indicates you believe temporary standards will result in
5 increased water degradation; is that correct?

6 MS. CONN: I'm worried that it could. Yes.

7 MR. HUTCHINSON: Do you have the final rule
8 from EPA before you?

9 MS. CONN: Yes.

10 MR. HUTCHINSON: Could you go to page 51037.

11 MS. CONN: Yes.

12 MR. HUTCHINSON: And down in the right-hand
13 corner of that -- it's after
14 Section 131.14(b)(2)(i)(A)(2).

15 MS. CONN: Um-hum.

16 MR. HUTCHINSON: Could you read that sentence
17 there?

18 MS. CONN: The one that starts with "EPA added
19 this new factor"?

20 MR. HUTCHINSON: Yes, ma'am.

21 MS. CONN: Okay.

22 "EPA added this new factor for when states and
23 authorized tribes wish to obtain a water quality
24 standard variance because they expect a time-limited
25 exceedance of a criterion when removing a dam or during

1 significant wetlands, lake, or stream
2 reconfiguration/restoration efforts."

3 Would you like me to continue?

4 MR. HUTCHINSON: And could you -- yeah. Go
5 ahead and continue, because it adds a little bit.

6 MS. CONN: "EPA includes 'lake' in the
7 regulatory language for this factor, on the basis of
8 public comments suggesting that the rule also apply to
9 lake restoration activities."

10 MR. HUTCHINSON: And that's good. Thank you.

11 Does that indicate to you that EPA was
12 anticipating that discharges were going to result in
13 increased water degradation?

14 MS. CONN: I -- Mr. Chairman, Commissioner
15 Hutchinson, yes. I think that the EPA very specifically
16 said that -- that only on -- for new restoration -- for
17 restoration projects would increased degradation be
18 allowed. The rule very clearly states that -- that
19 degradation won't be allowed for other factors, except
20 for restoration projects.

21 My concern is that the Department's proposed
22 rule does not make that clarification, that increased --
23 new or increased discharges would only be acceptable
24 from restoration projects.

25 MR. HUTCHINSON: Does Amigos Bravos engage in

1 stream restoration, water -- watershed restoration, et
2 cetera, or other activities that may have a purpose such
3 as EPA anticipated?

4 MS. CONN: Commissioner Hutchinson, yes. We
5 do do restoration projects. We have done them for many
6 years, many decades. We've engaged in restoration
7 projects.

8 And we have never seen a need for a water
9 quality standard variance for restoration projects.

10 MR. HUTCHINSON: But in those years that
11 you've been accomplishing this, what has been the
12 standard that EPA apply to dredge and fill -- or maybe
13 the Army Corps of Engineers along with EPA -- what was
14 there added to -- towards dredge and fill and other
15 activities that may be involved in restoration work?

16 MS. CONN: So for -- restoration work does
17 indeed require a dredge and fill permit, in some cases.
18 Often the restoration work that Amigos Bravos does has
19 not required a dredge and fill -- a 404 permit. But
20 there are restoration activities that do sometimes
21 require a 404 permit.

22 Does that answer your question?

23 MR. HUTCHINSON: No. I was going to the
24 attitude and regulatory atmosphere prior to, let's say,
25 the last five years towards dredge and fill

1 applications.

2 MS. CONN: Well, my experience is that the
3 Army Corps of Engineers is usually pretty responsive to
4 wanting to do restoration projects and work with groups
5 to -- to get the -- the required permits in place.

6 MR. HUTCHINSON: Okay.

7 And are there other national permits that the
8 Corps has used that govern those?

9 MS. CONN: Yeah.

10 The general permits?

11 MR. HUTCHINSON: Yeah.

12 MS. CONN: Yes.

13 MR. HUTCHINSON: Okay.

14 Have you seen any indication that the Army
15 Corps of Engineers was proposing to change those or
16 increase regulatory oversight over dredge and fill
17 operations?

18 MS. CONN: I know that some of the general
19 permits have been up for renewal in recent years, but I
20 don't know the specifics about intent to --

21 MR. HUTCHINSON: Okay. Thank you.

22 If there were temporary standards established
23 for these activities, or maybe under -- even in an NPDES
24 permitted entity, would the Department be precluded from
25 using other methods to ensure protection of water

1 quality such as what you described in your testimony
2 this morning?

3 MS. CONN: I'm not sure -- Commissioner
4 Hutchinson, I'm not sure I quite understand your
5 question.

6 You're asking if the Department -- if the
7 temporary standards proposal was passed, would the
8 Department be precluded from --

9 MR. HUTCHINSON: Correct.

10 MS. CONN: Doing what exactly?

11 MR. HUTCHINSON: From using other methods to
12 ensure protection of water quality.

13 MS. CONN: Oh, you mean like compliance
14 schedules and --

15 MR. HUTCHINSON: Correct.

16 MS. CONN: No. They would not.

17 MR. HUTCHINSON: And so if a -- if a permitted
18 entity under a temporary standard violated the work plan
19 or other provisions that were added by the Commission,
20 could they be brought into compliance?

21 MS. CONN: I would hope that the Department
22 would act. The Department has not -- has yet to act in
23 terms of the potential violations of the new -- the
24 narrative nutrient standard that currently exists. So I
25 haven't seen much evidence of that.

1 But I -- the Department certainly would have
2 the authority to do that, to take action.

3 MR. HUTCHINSON: Would the adoption of the
4 ability to create temporary standards preclude an entity
5 seeking other avenues to either do restoration work
6 or -- or maybe get a relaxation of their discharge
7 permit conditions?

8 MS. CONN: No. I don't think that it would
9 stop --

10 MR. HUTCHINSON: Okay.

11 MS. CONN: -- stop that.

12 MR. HUTCHINSON: Under the recently adopted
13 EPA rule, does that allow increased discharges under
14 variances, or in this case temporary standards?

15 MS. CONN: The new EPA rule does not allow a
16 water quality standard -- I'm quoting from page 51036 of
17 the new rule, on the last column, kind of almost halfway
18 down.

19 It says the -- the new rule -- "Ensure that
20 states and authorized tribes use water quality standards
21 variances that continue to make water quality progress,
22 the rule does not allow a water quality standard
23 variance to lower currently attained ambient water
24 quality, except in circumstances where a water quality
25 standard variance will allow short-term lowering

1 necessary for restoration activities."

2 So this gets at your previous question, as
3 well. What I'm concerned about is that the proposed
4 rule doesn't incorporate this in -- it's not
5 communicating this, that the only situation where a
6 lowering from ambient water quality would be allowed
7 would be in the case of restoration activities.

8 MR. HUTCHINSON: So if the Commission adopted
9 a standard that was a temporary standard, that allowed
10 for an additional discharge, do you think EPA would
11 approve that?

12 MS. CONN: I would hope not, but I think we
13 could save a lot of time if we just make it clear in our
14 language that the only case that would be allowed for
15 lowering the current water quality conditions in a -- in
16 a stream would be if it was for a restoration activity.

17 MR. HUTCHINSON: Moving on, did you hear
18 Mr. Nylander's testimony -- I believe it was in a
19 response to one of my questions -- concerning how the
20 Commission would be required to conduct a hearing to
21 adopt new standards for temporary standards -- or adopt
22 temporary standards as standards?

23 MS. CONN: Yes. Yes, I did.

24 MR. HUTCHINSON: Would you agree with that
25 interpretation?

1 MS. CONN: Yes. I do agree with that
2 interpretation. I do -- I would like to see it clearly
3 stated in the rule so that the public is clear on that.
4 I don't think it is clear in the rule that indeed the
5 public is entitled to a public hearing.

6 But I -- I think -- thank you, Commissioner,
7 for making that clear with your questions. I'd agree.

8 MR. HUTCHINSON: Okay. Let's go to this --
9 the proposed changes that was submitted on the 12th.

10 And let's go to the -- I'll just use the
11 10F.(b) suggested change.

12 MS. CONN: Okay.

13 MR. HUTCHINSON: And that first change that
14 you're proposing there complies with antidegradation
15 protections in 20.6.4.8 NMAC.

16 MS. CONN: Um-hum.

17 MR. HUTCHINSON: Isn't that rather redundant,
18 given the existing construction of that section?

19 MS. CONN: I would like to see that in here.
20 And I don't know. I don't necessarily see how it's
21 redundant -- with the beginning part of that sentence,
22 which says "The proposed temporary standards represent
23 the highest degree of protection feasible in the
24 short-term"? Redundant to that part of the sentence?

25 MR. HUTCHINSON: Well, could we -- could the

1 Commission adopt a standard that didn't comply with the
2 antidegradation protections?

3 MS. CONN: I would hope not. I -- no. I
4 mean, we -- hopefully, we would be objecting and EPA
5 would -- would have comments on that. So I think --

6 MR. HUTCHINSON: I would hope you would, too.
7 I would hope anybody. I would hope that the Department
8 would object if the Commission were attempting to do
9 something like that.

10 And then let's go to number (2).

11 MS. CONN: Yep.

12 MR. HUTCHINSON: And this starts with "A
13 temporary standard."

14 Again, is -- given the construction of the
15 revised section here by the Department on their
16 September 4th submittal, isn't this where it starts
17 after the comma and your addition -- isn't that again
18 redundant?

19 Because the original language says "A
20 temporary standard shall apply to specific pollutants
21 and specific water body segments."

22 MS. CONN: I think what we're getting to in
23 this concern is that you can have a petitioner proposing
24 the temporary standard, and they're the -- the proponent
25 is the one that puts together the work plan. And

1 there's nothing that is clear that that work plan has to
2 address anything besides what that petitioner can do, or
3 is doing.

4 And so concerned about having just the work
5 plan address one discharger in the water body when once
6 the temporary standard -- because it's a water body,
7 specific temporary standard would then apply to all
8 dischargers.

9 And so we wanted to be clear that a temporary
10 standard shall only be -- apply to dischargers and
11 discharges that are included -- specifically included in
12 the work plan so that there are conditions and steps
13 that will be taken by each polluting entity within a
14 water body segment to go -- to reach -- to make progress
15 towards the original water quality standard.

16 MR. HUTCHINSON: And you don't think that
17 subsection F.(5) properly addresses that concern?

18 MS. CONN: No, we don't. We -- we do when we
19 add our proposed language as per F.(5).

20 MR. HUTCHINSON: And if that suggested
21 language for F.(5) were included, would this be
22 required?

23 MS. CONN: Yes.

24 MR. HUTCHINSON: Still -- you still think this
25 section under (2) would still be required?

1 MS. CONN: No. I don't necessarily think it
2 would have to be required.

3 MR. HUTCHINSON: Okay. Thank you.

4 And then continuing in (2), the last sentence
5 that you're suggesting starting with "A temporary
6 standard shall be approved for the minimum time," since
7 this is a standard that would be before the Commission,
8 would it not be reviewable at every triennial review?

9 MS. CONN: I'm sorry, Commissioner Hutchinson.

10 MR. HUTCHINSON: Okay.

11 MS. CONN: Which place are you?

12 MR. HUTCHINSON: I'm still on -- I'm still on
13 (2), but it's following that first addition at --
14 starting at "and," and then there's a period, and then
15 says "A temporary standard shall be approved."

16 MS. CONN: Okay.

17 MR. HUTCHINSON: So would we have to have a
18 minimum time, because it's even less than what you're
19 suggesting, because every three years every standard has
20 to be reviewed for -- for its efficacy.

21 MS. CONN: So I think what we're getting at
22 here is that while the temporary standard or the
23 variance has to be reviewed at each triennial review,
24 the temporary standard itself is -- doesn't have a time
25 limit. The time limit of the temporary standard could

1 be 50 years.

2 And so while it's reviewed, it's not
3 necessarily ended. There's no -- there's no sunset
4 period, or there's no requirement for a time limit on
5 those.

6 So you could just come before the Commission
7 with a report every three years, but there's no -- it
8 could go on forever.

9 What I'm suggesting is that especially since
10 this is a new -- or what Amigos Bravos is suggesting is
11 that especially since this is a new procedure, which I
12 note is a new position for the state and the Department,
13 where we had previously seen the Department has opposed
14 such language in the past, I think, so that there's --
15 you know, there's different -- there's a lot of
16 different positions on this -- on having variances in
17 our water quality standards, and we haven't seen a
18 consistent position in the Department itself on this,
19 that I think it would be prudent to proceed with caution
20 when adopting something new like this and to -- and to
21 set some limitations on it as we see how it unfolds.

22 MR. HUTCHINSON: Wouldn't you as an advocacy
23 and monitoring organization want to be pretty much on
24 top of any temporary permit that may have been issued?

25 MS. CONN: We would -- we would want to be.

1 Whether we would have the resources to do so is another
2 question. We would want to be on top of every NPDES
3 permit that's issued in the state, but we do not --
4 certainly do not have the resources to review those and
5 monitor -- monitor those.

6 So while it would be a goal of Amigos Bravos
7 to participate in a public component of the process,
8 it's -- it depends on our resources and capacity.

9 MR. HUTCHINSON: And even in a limited
10 capacity, if you notice that a temporary permit weren't
11 being executed according to its work plan, would you not
12 come before this Commission with a request to alter or
13 do away with that temporary standard?

14 MS. CONN: I suppose we would, though it --
15 again, it's a matter of resources for both Amigos Bravos
16 and other members of the public, I think, to -- I don't
17 know if this Commission would consider it a
18 rulemaking -- not necessarily a rulemaking, but a change
19 in the standards, to change a temporary standard or to
20 end a temporary standard, and if that would, in fact,
21 require a hearing, and the burden of that -- making that
22 petition falls -- the cost of that petition and
23 subsequent hearing falls on the petitioner.

24 So that -- that's one reason why I think it's
25 very important that the -- the review come up before the

1 triennial review and an already ongoing public process,
2 so that when the public has concerns, they aren't
3 required to -- you know, to hire an attorney and to pay
4 for the court reporter and to pay for the whole hearing
5 process, to express those concerns with -- with a
6 temporary standard.

7 MR. HUTCHINSON: That's understandable,
8 certainly.

9 Would you be able to report a noted violation
10 in your monitoring to the Environment Department?

11 MS. CONN: Yes. We could certainly report it
12 to the Environment Department.

13 And I think this also goes -- some of your
14 questions, Commissioner Hutchinson, also goes towards
15 our proposal to have -- be more specific about when the
16 report on the -- on the temporary standard is due before
17 the Commission, to give an adequate time for the public
18 to review to see if, in fact, the conditions of the
19 temporary standard have been met.

20 MR. HUTCHINSON: Okay. Let's go to the H,
21 your proposed changes to H.

22 MS. CONN: Yes.

23 MR. HUTCHINSON: Your last suggested change in
24 H, that last added sentence, wouldn't that negate the
25 intent of a temporary standard?

1 MS. CONN: No, because it's not saying that
2 all temporary standards shall not be included in a Clean
3 Water Act permit. It's only for new or increased
4 discharges into a water body.

5 MS. DEROSE-BAMMAN: Pardon me.

6 Would you rephrase -- I cannot hear
7 Commissioner Hutchinson's questions.

8 So could you say the question again so I know
9 what Ms. Conn is responding to?

10 MR. HUTCHINSON: Can you -- so I'll ask again
11 so you can ask her.

12 Would the last suggested change negate the
13 intent of a temporary standard?

14 MS. CONN: Commissioner DeRose-Bamman,
15 Commissioner Hutchinson's question was that in
16 20.6.4.12H, would the last proposed standard -- proposed
17 change by Amigos Bravos negate the purpose of a
18 temporary standard.

19 I'm getting a nod from Commissioner Hutchinson
20 that that is indeed his question.

21 And --

22 MS. DEROSE-BAMMAN: Okay.

23 MS. CONN: -- I can restate my question -- my
24 answer, which was that no, I -- excuse me? Commissioner
25 DeRose-Bamman?

1 MS. DEROSE-BAMMAN: I was just saying yes,
2 please do restate your response.

3 Thank you.

4 MS. CONN: Thank you.

5 My response was no, I don't think it does,
6 because it -- it is this -- this proposed language
7 change, the last one in H, is limited to new or
8 increased discharges. So it -- it's only new or
9 increased discharges that couldn't be included in Clean
10 Water Act permits.

11 MR. HUTCHINSON: So if I were conducting a
12 restoration that involved dredge and fill, your new
13 language would seem, to me, that it didn't -- wouldn't
14 allow that.

15 MS. CONN: And I think your -- Commissioner
16 Hutchinson, I think you're correct. I think that that
17 is a deficiency in our proposed language, and we would
18 be amendable to saying except for the language directly
19 from the rule that says except for restoration projects.

20 MR. HUTCHINSON: And maybe there would be
21 other exceptions, if we could cite from EPA's
22 explanation, let's say, in their narrative or what their
23 intent was?

24 MS. CONN: I believe it was limited to
25 restoration projects. They gave some specific examples

1 of what types of restoration projects those would be,
2 and that would certainly seem appropriate to me.

3 MR. HUTCHINSON: But isn't the state -- I
4 shouldn't say state.

5 Isn't the Environment Department's apparent
6 intent is -- is that we would allow for a temporary
7 standard deviation for other purposes as -- as well, as
8 long as we were moving towards attainment?

9 MS. CONN: I don't see how causing more
10 pollution in a stream is moving towards attainment of
11 the original standard. So I guess I would be --

12 MR. HUTCHINSON: I would -- I would hope
13 you're correct. Okay.

14 And then what -- just for clarity of
15 everything, what does subsection F fall into? What
16 section of our rules?

17 MS. CONN: Into our standard --

18 MR. HUTCHINSON: The overarching section?
19 Isn't it Section 10?

20 MS. CONN: Yes.

21 MR. HUTCHINSON: Okay.

22 And so we're all agreed that what we're
23 talking about here is adding another ability to -- or
24 another potential standard that can be created, but if
25 it's under Section 10, would it not have to follow all

1 the procedures required for a new standard?

2 MS. CONN: Commissioner Hutchinson, you mean
3 like a public hearing and --

4 MR. HUTCHINSON: Correct.

5 MS. CONN: -- and public -- I would hope so.

6 MR. HUTCHINSON: And then a quick follow-up to
7 that, does the Department provide discussion drafts for
8 public review prior to hearings started, sometimes years
9 before?

10 MS. CONN: They certainly do in the triennial
11 review proceedings. We get -- it's a lengthy process
12 which starts with a public -- as you mentioned,
13 Commissioner, a public discussion draft.

14 MR. HUTCHINSON: Okay. Thank you.

15 Mr. Chairman, that's all I have.

16 MR. DOMINGUEZ: Commissioner Pattison.

17 MR. PATTISON: Yes. Thank you, Mr. Chairman.

18 You have stated that you object to temporary
19 standards because variances -- provision for variances
20 would be better or just as well.

21 Is that a correct interpretation?

22 MS. CONN: Restate that again? That
23 because --

24 MR. PATTISON: If I heard correctly, you have
25 stated that you object to temporary standards, and one

1 of the alternatives you suggest or advocate is that
2 variances would be better.

3 MS. CONN: Mr. Chairman, Commissioner
4 Pattison, I believe that temporary standards are
5 variances. So they're the functional equivalent, in my
6 mind, that they're the same thing. So --

7 MR. PATTISON: Okay.

8 MS. CONN: We --

9 MR. PATTISON: You say that the suggestion for
10 temporary standards does not provide for a public
11 hearing?

12 MS. CONN: In the plain language of F, it --
13 it talks about appropriate public participation and
14 Commission approval, but it doesn't -- it doesn't
15 specifically say that there would be a hearing. And
16 that's -- that's our concern.

17 I understand from what Commissioner Hutchinson
18 has brought forth today, as well as from conversations
19 with the Department, that they believe that a public
20 hearing would be required as the language stands now.
21 And I -- you know, I certainly would hope it would be.

22 I guess what our -- our position here is that
23 it's not clear from the plain language that's provided
24 in -- in the temporary standards proposal at F, when you
25 read it.

1 MR. PATTISON: Do we not have provisions
2 presently for variances under the rules and law and so
3 forth?

4 MS. CONN: We don't currently have variances
5 within our water quality standards. This would be a
6 first variance procedure. I do believe that under the
7 Water Quality Act -- I don't know how the -- the
8 specific citation that legally provide -- allowed for by
9 the state law.

10 MR. PATTISON: Well, I guess the -- recently
11 we had the hearings on the Dairy Rule, and the reason
12 that that was brought about, my understanding is, that
13 because there were hundreds of variances applied for
14 from particular dairymen, and they were -- the questions
15 needed to be resolved on a more permanent basis.

16 Now, are those different variances than what
17 you are advocating here?

18 MS. CONN: So those are variances -- well,
19 we're not advocating for a variance. The Department is
20 advocating for the variance procedures. We're
21 advocating to not have a variance procedure in the water
22 quality standards.

23 The proposed variance procedures that the
24 Department is proposing here at 20.6.4.10F are different
25 than the procedures, Commissioner Pattison, I think that

1 you're talking about, which relate to groundwater
2 variances and the regulations that are associated with
3 groundwater protection.

4 MR. PATTISON: Thank you.

5 What is your connection with Amigos Bravos?

6 MS. CONN: I am the executive director --
7 interim executive director, and I'm the projects
8 director for Amigos Bravos.

9 MR. PATTISON: Mr. Hearing Officer, my next
10 questions, I'm not sure they apply specifically to this
11 presentation, but I believe they apply to the hearing in
12 general, and they concern public pre -- public
13 presentations and questions and so forth.

14 Is it apropos to ask those questions at this
15 time?

16 MR. CHAVEZ: I would leave that up to
17 Mr. Schlenker-Goodrich. If you ask the question --

18 MR. SCHLENKER-GOODRICH: I would welcome the
19 questions from you, Commissioner Pattison. I think
20 that's perfectly appropriate, if they are general
21 questions that Ms. Conn could potentially help the
22 Commission out on.

23 I guess my only concern would be typically
24 with a witness providing technical testimony, it's
25 limited to the nature of their testimony. So if it gets

1 too far afield, it may -- you know, Ms. Conn hasn't
2 prepared, hasn't researched particular issues.

3 But I would welcome the questions, and to the
4 degree she can answer, she can answer to the best of her
5 ability.

6 MR. PATTISON: Thank you.

7 Yesterday at the end of the hearing, the last
8 part of the hearing, we had testimony from --
9 presentations, whatever you -- however you would term
10 it -- from several members of the public.

11 And those -- well -- and I don't mean this in
12 the area of criticism or anything, but as I was leaving
13 the hearing, after it closed, there were these same
14 presenters and -- from the public were gathered in
15 the -- just outside the door, in that area.

16 And as I -- I had to ask for -- to excuse me
17 as I went by, but as I did, I noted on the table or
18 bench there was a check.

19 And I got to wondering what was the purpose of
20 that check, because the first or second presenter from
21 the public was standing there as if she was
22 expecting something. This is all speculation on my
23 part.

24 But when we hear from witnesses, experts, from
25 Chevron, Freeport, et cetera, we know who is paying them

1 to do that. And it's all well and good. But in my
2 mind, presenters from the public would be from the
3 public.

4 And I guess direct question, does Amigos
5 Bravos compensate presenters from the public?

6 MS. CONN: So to answer your -- your question
7 there, the -- the checks that were there on that
8 table -- see, I'm -- because I'm down here instead of up
9 at the office, the woman who was standing -- not the
10 woman who gave the presentation, but the woman who was
11 handing me the checks to sign is my -- is my staff
12 member, and so she was bringing checks down for me to
13 sign for office business, though one of those checks was
14 for food.

15 We also are the fiscal sponsor of a grant that
16 provides the -- the support for that youth council that
17 came. So we're the fiscal sponsor for a separate group
18 that receive a grant to -- to bring together the youth
19 council.

20 And as part of that, we provide some snacks
21 for the youth council. As part of the fiscal
22 sponsorship, we have that grant that -- so I'm
23 writing -- I wrote a check for some money for snacks for
24 the youth as part of that grant that supports that youth
25 council.

1 So that was the other -- that was the other
2 check --

3 MR. PATTISON: Okay.

4 MS. CONN: -- that was there, to clarify that.

5 MR. PATTISON: Okay. Thank you. I appreciate
6 that explanation, and I understood in my own mind at the
7 time that there were certainly various reasons for the
8 checks being there and could be.

9 But it's due to the similarity of a dozen
10 members of the public, and in particular on the
11 temporary standards -- they're all opposed. It made me
12 wonder if they were truly representing the public or
13 Amigos Bravos.

14 MS. CONN: Commissioner Pattison, we do send
15 out action alerts about our concerns to our members with
16 our concerns outlined in the action alert. So that
17 language that you heard again and again was communicated
18 to our members who support our organization, that these
19 are -- these are things that we have identified.

20 You know, that's a service we provide to our
21 members, is to follow these issues and to -- and to
22 bring up issues of concern on water quality issues
23 across the state.

24 And so we did provide that these are concerns
25 that we have, and we let people know that there was a

1 public comment opportunity.

2 MR. PATTISON: All right.

3 MS. CONN: So --

4 MR. PATTISON: Thank you. I appreciate your
5 explanation.

6 And thank you, Mr. Hearing Officer, for
7 allowing my wandering questions.

8 That's all.

9 MR. DOMINGUEZ: Commissioner Sayer.

10 MR. SAYER: Yeah. Just a few quick questions.

11 First, I was wondering if I could get a check
12 for snacks.

13 MS. CONN: Shall we all go out afterwards and
14 get some coffee, some peanuts?

15 MR. HUTCHINSON: Or maybe just a snack right
16 now.

17 MR. SCHLENKER-GOODRICH: We'll bring M&Ms next
18 time and distribute them.

19 MR. SAYER: I guess a question -- my first
20 question -- real question is juxtaposing a compliance
21 schedule with the temporary standard as it's been
22 proposed. So this new scheme. I understand, you know,
23 generally at a certain high level there's a great degree
24 of functional similarity between a compliance schedule
25 and a temporary standard.

1 I'm wondering if you can -- well, can you just
2 explain to me from your position the differences,
3 practical, substantive differences, between the
4 compliance schedule and the temporary standards?

5 MS. CONN: Well, at -- thank you, Commissioner
6 Sayer, for the question.

7 The biggest difference between them is that a
8 compliance schedule is shorter. I mean, not
9 necessarily. It depends on what the temporary
10 standard -- you know, if there is a time limit on the
11 temporary standard.

12 But as we mentioned, there's no language in
13 the provisions that require any set time limit on a
14 temporary standard. So it can be very long.

15 Compliance schedules are -- need to show
16 compliance within a permit term. So it's compliance
17 by -- which is a five -- typically a five-year term. So
18 there -- there is -- it's a much shorter schedule, a
19 much shorter time period.

20 And I think where some of our concerns arise
21 is that the nutrients -- the narrative nutrient standard
22 that's been in place has been in place for 15 years. So
23 even if a permit was written today with a compliance
24 schedule, that would have been 18 years to get into
25 compliance with a standard, which we think is more than

1 enough time.

2 So that's some of our concerns.

3 MR. SAYER: Okay.

4 Second question, and this -- this should have
5 been asked yesterday. Mr. Schlenker-Goodrich brought
6 this up a little bit, and you've responded. So if you
7 can't answer, that's fine.

8 But in the context of the proposed -- your
9 proposed revision to the aluminum standard, as I heard
10 testimony yesterday, the position that I seem to --
11 seemed to be communicated by Chevron's expert was that
12 the hardness-based standard was, put it colloquially,
13 the wave of the future.

14 What's Amigos Bravos' general position on
15 that?

16 MS. CONN: We do not believe that is the case.
17 From the indications that we've received from EPA,
18 meaning there's some -- a number of articles that are
19 out there, Inside EPA articles -- you know, it's hard --
20 you can't, you know, have a crystal ball to know exactly
21 what's going on in the future, but you can use some of
22 the information gathered from places like Inside EPA
23 where they do articles on what EPA is doing, and it
24 seems to indicate that the Department -- that the EPA
25 may be moving to even perhaps a more protective standard

1 than the current 304(a) criteria.

2 So no. I don't think that that hardness-based
3 criteria is the wave of the future for aluminum. And if
4 it was, if hardness is taken into account in a
5 current -- in a future criteria, I think it would be
6 very much mitigated by the -- all these other factors
7 that influence -- as our expert testified, influence
8 aluminum toxicity at a much greater level.

9 So I'd be concerned. I mean, we have -- we
10 have aluminum levels in streams with hardnesses of 150
11 that are, you know, 3,000s -- thousands of times --
12 thousands of micrograms per liter, whereas the
13 EPA-recommended criteria is 87 and 750.

14 So it's -- we're talking about a large
15 difference in what we have now and what the 304(a)
16 criteria are, and very large also from what -- a
17 difference between what's -- what the current
18 hardness-based criteria is. The levels we typically see
19 with the hardness levels we have in our streams, at
20 least the ones that Amigos Bravos monitors around the
21 Taos area, we often see a hardness at 100 to 180.

22 So those are very high levels of aluminum.
23 That's very different from what we're seeing as
24 recommended in the literature, US Fish and Wildlife
25 Service for mussels, would be protective of mussels.

1 MR. SAYER: And last question, in your
2 exchange with counsel for Chino Mines, I -- I didn't
3 leave a great deal of certainty as to the circumstances,
4 and as I read relevant regulation 20.6.4.10D(3)(c), I do
5 think that the petitioner does need to provide certain
6 information with their petition.

7 And as I understand it, Amigos Bravos asks for
8 additional information specifically with their questions
9 that were asked, the answers that were given. What I
10 wasn't clear on was the resolution of that.

11 Were answers given? Were your questions
12 answered? Did you get the information that came from
13 the hearings, the meetings, that Chino Mines
14 administered?

15 MS. CONN: I think the additional information
16 answered our question about the methods that Chino Mines
17 used to solicit the public input, and I think they
18 clearly showed that they -- you know, the methods that
19 they used and they -- there's a public notice in the
20 paper, and they showed copies of those in their
21 submittal at the hearing just this week.

22 And then -- but we did not think that their
23 submittal showed -- clearly responded to the public
24 input that was received, the questions that were
25 received. You know, all we were given were these

1 bulleted lists of eight questions that public asked at
2 one meeting, that the public asked at one meeting, and
3 we only got -- there was a very short answer to two of
4 those eight questions.

5 So we don't think that they -- they met the
6 requirements of responding to the public input. That
7 was provided.

8 MR. SAYER: Thank you.

9 MR. DOMINGUEZ: Commissioner Dawson.

10 MR. DAWSON: Thank you, Mr. Chairman,
11 Mr. Hearing Officer.

12 Ms. Conn, in reading 20.6.4.10, it states that
13 regarding -- regarding the temporary standard, it says
14 if the petitioner cannot demonstrate that sufficient
15 progress is made to the Commission, the Commission may
16 revoke approval of a temporary standard or provide
17 additional conditions to the approval of the temporary
18 standard.

19 When I read that, I kind of interpret it as
20 the -- that leaves the Commission the ability to provide
21 conditions of approval and they -- we -- if we wanted to
22 provide a hundred conditions of approval, then that
23 would be -- you know, we could -- we can provide as many
24 as we want.

25 Would you agree with that statement?

1 MS. CONN: Yes, I would.

2 MR. DAWSON: Okay.

3 That's the only question I have.

4 Thank you.

5 MR. DOMINGUEZ: I'm going to move up closer to
6 the phone.

7 MS. CONN: Oh.

8 MR. DOMINGUEZ: So that we can go to the two
9 Commissioners that are joining us by conference phone.

10 Commissioner DeRose-Bamman, do you have
11 questions for Ms. Conn?

12 MS. DEROSE-BAMMAN: Yes, I do.

13 MR. DOMINGUEZ: Okay.

14 MS. DEROSE-BAMMAN: Thank you, Mr. -- am I
15 speaking loud enough?

16 MR. DOMINGUEZ: Yes. Yeah. Speak as loud as
17 you can so that everybody else can hear.

18 MS. DEROSE-BAMMAN: Okay. Thank you.

19 One of the questions that
20 Mr. Schlenker-Goodrich mentioned, I didn't hear the
21 whole thing so I'll review as much as I can and ask
22 Ms. Conn to -- if you remember.

23 This was the beginning when you -- you were
24 referring to your rebuttal testimony from basically
25 pages 9 through 15. And it was prefaced by saying new,

1 increased or blank discharges to impaired waters. I
2 didn't get that third category of discharge.

3 Do you recall?

4 MS. CONN: You're specifically, Commissioner
5 DeRose-Bamman, asking about the question that
6 Mr. Schlenker-Goodrich asked me?

7 MS. DEROSE-BAMMAN: Yes. The question had
8 prefaced the discussion of your rebuttal testimony, page
9 9 through 15.

10 MS. CONN: Okay.

11 I'm not quite sure that I am remembering that
12 specific question. I think that it -- was this in
13 regard to the impaired waters?

14 MS. DEROSE-BAMMAN: Yeah. New, increased or
15 something discharges to impaired waters. I just
16 couldn't discern what was said about that third category
17 of discharges.

18 MS. CONN: I think that the categories of
19 discharges we're talking about is new or increased
20 discharges. I don't think --

21 MS. DEROSE-BAMMAN: Okay.

22 MS. CONN: -- that there was a third category
23 that -- that we were talking about.

24 MR. SCHLENKER-GOODRICH: Commissioner
25 DeRose-Bamman, this is Erik Schlenker-Goodrich.

1 There were two sections I was reading from
2 Ms. Conn's subsection headers, and these may be what you
3 are asking about.

4 One was on page 10 of her rebuttal, and I'm
5 reading from Ms. Conn's rebuttal testimony header B,
6 Temporary Standards, If Adopted, Should Not Apply To
7 Impaired Waters. So that would be discharges into
8 impaired waters under a temporary standard.

9 And then C, Temporary -- on page 11, Temporary
10 Standards, If Adopted, Should Not Be Allowed For New Or
11 Increased Discharges.

12 So that -- that may be what you were referring
13 to in terms of my questions.

14 MS. DEROSE-BAMMAN: Okay.

15 MS. CONN: I think that the answer is that
16 it's just those two categories.

17 MS. DEROSE-BAMMAN: Okay.

18 MS. CONN: That's my understanding.

19 MS. DEROSE-BAMMAN: So what is a new
20 discharge -- charger?

21 THE REPORTER: Could you repeat the question,
22 please.

23 MS. CONN: What is a new discharger?

24 Is that correct, Commissioner DeRose-Bamman?

25 MS. DEROSE-BAMMAN: That is correct. Thank

1 you for translating.

2 MS. CONN: So a new discharger -- a new
3 discharge or discharger?

4 MS. DEROSE-BAMMAN: I'm just stating back what
5 you're saying. No. (Unintelligible).

6 THE REPORTER: Excuse me. I'm having a very
7 hard time understanding her.

8 MS. CONN: So I think we're trying to get at
9 what is a new discharge, new or increased discharge. So
10 a new discharge would be a discharge that wasn't
11 existing at the time the temporary standard was adopted.

12 MS. DEROSE-BAMMAN: Temporary discharge?

13 MS. CONN: I think that the -- you know, the
14 applicability of the temporary standard is really, you
15 know, in terms of its regulatory -- yes. I think that
16 that's what we're talking about here.

17 MS. DEROSE-BAMMAN: Okay.

18 What is meaning -- what is meant by increased
19 discharge?

20 MS. CONN: That you would have a -- a current
21 discharger, permitted discharge -- discharger increase
22 the level of their discharges.

23 MS. DEROSE-BAMMAN: Okay.

24 Now, in some -- or in all cases, are all
25 pollutants permitted in a -- (unintelligible).

1 THE REPORTER: I need the question again.

2 MR. CHAVEZ: Mr. Chairman -- hold on.

3 Mr. Chairman, we're having a very difficult
4 time. I can't understand what she's saying, and, more
5 importantly, the court reporter cannot. So, you know,
6 I'm going to have to make a decision.

7 MR. HUTCHINSON: Could we move it right next
8 to the court reporter?

9 MR. CHAVEZ: I think just it's very difficult
10 to understand the line of questioning. And we could be
11 here, you know, until lunch trying to understand. And
12 I'm not trying to cut off the line of questioning, but
13 it makes it difficult for any objections, rulings, if I
14 can't understand her, and the court reporter cannot.

15 MR. SCHLENKER-GOODRICH: Amigos Bravos would
16 welcome depending if any of the Commissioners on the
17 phone have specific questions -- they could put those in
18 writing, and we could get an answer back very promptly
19 from Ms. Conn in writing so that it's in the record, if
20 that would be appropriate. We will be willing -- I
21 think we would be willing to do that.

22 MR. CHAVEZ: I'm not sure if that would be
23 appropriate.

24 But do you want to --

25 MR. DOMINGUEZ: I -- I agree, Mr. Hearing

1 Officer, that it is just -- the technical difficulties
2 of trying to do parts of this by conference phone, I
3 think, limits the abilities of all the parties.

4 So not to -- not to limit Commissioner Waters
5 or DeRose-Bamman, but I think you guys may just have to
6 go to the transcript to get clarification on things
7 and --

8 MR. CHAVEZ: If you could just let them know
9 we're not going to be able to take any more questions.

10 MR. DOMINGUEZ: Yes.

11 That's the point that we're at, Commissioner
12 Waters and Commissioner DeRose-Bamman, that we'll have
13 to forego your line of questioning, and hopefully, from
14 the transcript or the other questions from
15 Commissioners, you'll be able to extract what
16 information you need.

17 So I think we're -- we'll have to -- we'll
18 have to forego your questioning.

19 MR. WATERS: Mr. Chairman, if you can hear me,
20 I'm assuming you're having difficulty in hearing the two
21 that are on the line.

22 MR. DOMINGUEZ: Correct.

23 MR. WATERS: I don't have any questions.
24 Actually, my question was asked by a prior Commissioner.
25 So I'm good right now.

1 MR. DOMINGUEZ: Okay. But, yeah, the court
2 reporter is having a real difficult time.

3 MR. CHAVEZ: Mr. Chairman, we have a potential
4 solution.

5 MR. LONGWORTH: Mr. Chairman --

6 MS. DEROSE-BAMMAN: And I have several more
7 questions to ask. So my -- the transition of my voice,
8 is that coming through --

9 MR. DOMINGUEZ: Correct.

10 MS. DEROSE-BAMMAN: -- not clearly?

11 MR. DOMINGUEZ: Correct. It's just it's
12 not -- not clear enough where the court reporter can get
13 everything accurate as --

14 MR. CHAVEZ: Mr. -- Mr. Chairman, would
15 anybody object if we had kind of a translator, if she
16 was to call and give questions translated on the record,
17 but we know it's -- the source of that is coming from
18 her on the phone?

19 MS. MCCALED: Mr. Hearing Officer, I was going
20 to suggest that perhaps Mr. Schlenker-Goodrich could
21 repeat the question as he hears it for the record.

22 MR. SCHLENKER-GOODRICH: I could do that, as
23 well. My voice carries.

24 MS. MCCALED: If that will not interfere with
25 his train of thought or objections.

1 MR. CHAVEZ: Let's try that first, and then if
2 not, we'll have her call in, translate the question that
3 way.

4 MR. DOMINGUEZ: Okay.

5 Commissioner DeRose-Bamman, go ahead with
6 your -- your question, and speak up as -- as loud as
7 possible, and we'll give this a try.

8 MS. DEROSE-BAMMAN: Thank you, Mr. Chairman.

9 So my first question which Ms. Conn had
10 responded to (unintelligible) discharge.

11 The second question, what is an increased
12 discharge?

13 MR. SCHLENKER-GOODRICH: The question is what
14 is an increased discharge?

15 MS. CONN: Is when a current discharger
16 increases the levels of pollutants that they are
17 discharging.

18 MS. DEROSE-BAMMAN: And two minutes ago, did
19 you reference something about above a permitted level?

20 MR. SCHLENKER-GOODRICH: And the question is a
21 few minutes ago, you referenced if this could be above
22 permitted levels.

23 Is that correct?

24 MS. CONN: Yes. I -- I'm not quite sure what
25 specifically, Commissioner, you're referring to that I

1 said that a new discharge -- could you be more specific
2 with your question?

3 MS. DEROSE-BAMMAN: Before we had the
4 conversation about whether my -- whether my questions
5 could be heard, I believe you did answer the question
6 about what an increased discharge was.

7 MS. CONN: Yes.

8 MS. DEROSE-BAMMAN: And you had said what --
9 anything discharged above a permitted level.

10 And then I started to ask the question not --
11 are all pollutants that could be the subject of a
12 temporary standard already permitted in permits?

13 MR. SCHLENKER-GOODRICH: The question is are
14 all -- I'm sorry. I completely lost that.

15 Are all pollutants subject to a permitted
16 discharge?

17 MS. DEROSE-BAMMAN: Actually listed in the
18 permit.

19 MR. SCHLENKER-GOODRICH: Are all pollutants
20 subject to the temporary standard listed in the permit?

21 MS. CONN: No. It's not necessarily the case
22 that all permitted discharges on a temporary -- as I
23 understand what you're getting at is that if you could
24 have a temporary standard apply to a water body segment
25 and there could be dischargers that don't have a

1 reasonable potential to discharge that specific
2 pollutant so it wouldn't be listed in the permit.

3 Commissioner, am I putting words in your mouth
4 about what your question was, or did that address your
5 question?

6 MS. DEROSE-BAMMAN: That's one example of why
7 a parameter may not have a specific limit in a discharge
8 permit. Correct.

9 So then how do you come up with increased
10 discharge?

11 MR. SCHLENKER-GOODRICH: So how do you come up
12 with increased discharge?

13 MS. CONN: So it could be an increased
14 discharge of the parameter that is the -- the -- that is
15 the subject of the temporary standard.

16 So you -- Commissioner DeRose-Bamman, is your
17 question referring to if there's a permit -- there may
18 be a permittee that's discharging the parameter, but
19 they're not necessarily -- have an effluent limit,
20 because there wasn't a reasonable potential under that
21 permit so there's no effluent limit -- how do we know
22 what the current -- what would be an increase from that
23 if we weren't measuring it or if there wasn't an
24 effluent limit at the time the temporary standard was
25 adopted?

1 MS. DEROSE-BAMMAN: The term "increased" -- I
2 think there is going to be difficulty with including the
3 term "increased discharge" in this language if we don't
4 define it, because -- and I don't think -- I think
5 that's going to severely limit the application -- the
6 potential benefit of this language if you do include
7 that term, increase, or if we, as the Commission,
8 include that.

9 So I'm just trying to understand what you
10 meant by it, because you're the one proposing to include
11 it in there, and to see if there's -- if it meshed.

12 MR. SCHLENKER-GOODRICH: I think the --

13 MS. DEROSE-BAMMAN: It's not always clear what
14 the level is.

15 MR. SCHLENKER-GOODRICH: The question is there
16 may be difficulty including the term "increased
17 discharge" without defining that term.

18 MS. CONN: Yes, Commissioner DeRose-Bamman.
19 Thank you for that question.

20 You know, there -- I think what we're trying
21 to get at is clearly stated in the new rule, which I
22 read earlier in response to a question from Commissioner
23 Hutchinson. It's at 51036, which states that the rule
24 does not allow a water quality standard variance to
25 lower currently attained ambient water quality.

1 So, you know, I think that that -- that is
2 something to take into consideration in terms of our
3 proposals about whether it's necessary to -- to define
4 what increased is or perhaps to -- to track the language
5 of this rule more closely to get at maintaining that
6 current ambient water quality.

7 I'd note, actually, I think this is why it's
8 really productive to have these conversations about our
9 proposed changes here in the hearing so we can get to
10 some clarity and perhaps propose even better language
11 that would address your concerns.

12 MS. DEROSE-BAMMAN: Okay. Thank you.

13 Why do you not want this language to apply to
14 impaired waters and to allow a temporary standard to be
15 applied for an impaired water?

16 MR. SCHLENKER-GOODRICH: Why do you not want
17 this standard to apply to impaired waters?

18 MS. CONN: I think that our testimony is
19 that -- my testimony was that we did not want there to
20 be new or increased discharges in impaired waters. It
21 wasn't that it wouldn't apply to impaired waters, but
22 that there wouldn't be new or increased discharges to
23 impaired waters.

24 I guess that gets back into some of the
25 questions about your previous questions, but that was

1 the intent of the testimony and our proposal.

2 MS. DEROSE-BAMMAN: Okay.

3 And for -- I mean, for the narrative, it
4 hasn't really been implemented in too many segments. I
5 believe, though, it's been around for 15 years.

6 Have you seen it implemented in many permits?

7 MR. SCHLENKER-GOODRICH: The question is for
8 narrative, and I'm assuming general nutrient --
9 narrative nutrient criteria that these have not been
10 implemented in -- in water body segments yet.

11 MS. CONN: Or permits.

12 MR. SCHLENKER-GOODRICH: Or in permits in
13 those water body segments.

14 Forgive me.

15 MS. CONN: Was that correct, Commissioner
16 DeRose-Bamman? Was that a correct expression of your
17 question?

18 MS. DEROSE-BAMMAN: I -- I think so. Let me
19 rephrase it. I'm having trouble also hearing it read
20 back to me.

21 But the -- you had said earlier that the
22 narrative between criterion was -- has been around for
23 15 years and so you really don't think it's appropriate
24 because dischargers have more time to comply with it. I
25 believe that's what I understood your -- your statement

1 was.

2 MR. SCHLENKER-GOODRICH: So the --

3 MS. DEROSE-BAMMAN: So -- but how many -- are
4 you aware of how many permits or, you know, true
5 translations have that narrative criterion been applied
6 to in permits -- permitted situations in the state?

7 MR. SCHLENKER-GOODRICH: The general narrative
8 nutrient criteria has been around for 15 years.

9 Do you know how many permits this general
10 nutrient criteria has been built into?

11 MS. CONN: So I think that that's a good part
12 of our concern, is that there -- that the Department
13 hasn't utilized the tools that they have at their
14 disposal now. So I don't see the necessity for adopting
15 a new tool when we haven't even gone down the route of
16 trying to utilize the tools that we do have, such as 401
17 certification, building -- you know, attempting to -- to
18 clarify, to build in a nutrient criteria into permits.

19 MR. CHAVEZ: Erik, can you tell her to hold
20 on?

21 I want to take a five-minute break, because I
22 cannot still hear half the questions, and I know she
23 asks long questions, and you're paraphrasing --

24 MR. SCHLENKER-GOODRICH: It's difficult for me
25 to do that.

1 MR. CHAVEZ: And it's really not doing the
2 question justice.

3 So let's take a five-minute break, go off the
4 record.

5 (Proceedings in recess from 11:19 a.m. to
6 11:27 a.m.)

7 MR. CHAVEZ: All right. We're back on the
8 record.

9 And if we can continue, Mr. Chairman.
10 Any more questions from the Commission?

11 MR. DOMINGUEZ: Thank you, Mr. Hearing
12 Officer.

13 I have got one follow-up question, and I'll
14 see if any other Commissioners have anything.

15 Thank you, Ms. Conn, for your patience through
16 our technical difficulties there.

17 I just have one quick question to hopefully
18 provide some clarity for me.

19 Regarding the time limits on the temporary
20 standards, when you were discussing that, you had talked
21 about that in EPA's draft rule they had a -- I believe a
22 10-year time limit in there.

23 Did I hear you correct, that when EPA came out
24 with their final rule, they had taken out the time limit
25 section? Is that correct?

1 MS. CONN: Mr. Chairman, yes, that's correct.

2 MR. DOMINGUEZ: Did EPA provide rationale as
3 to why they took out the time limit?

4 MS. CONN: There -- there is some provided,
5 Mr. Chairman, in the -- in the documentation. If you
6 can be patient with me, I can find it.

7 MR. DOMINGUEZ: Just from a general sense, do
8 you have a -- recall?

9 MS. CONN: They got a lot of comments, I
10 think, from the general public, both in support and in
11 opposition to it, and what I'm recalling is having
12 summarized that and that they ultimately decided to --
13 to not put a limit. But I don't remember -- I could
14 find it if you'd like.

15 MR. DOMINGUEZ: No. That's quite all right.
16 I was mainly wanting to get it clear in my mind that it
17 was in there. Okay.

18 Commissioners, any follow-up questions?

19 Seeing none, Mr. Hearing Officer, that's all
20 the questions from the Commission.

21 Thank you.

22 MR. CHAVEZ: Thank you, members of the
23 Commission.

24 I'll now -- I will now go back to Amigos
25 Bravos for any redirect.

1 MR. SCHLENKER-GOODRICH: Thank you,
2 Mr. Hearing Officer.

3 Thank you, Mr. Chairman, Commissioners.

4 REDIRECT EXAMINATION

5 BY MR. SCHLENKER-GOODRICH:

6 Q. A few questions on redirect, Ms. Conn.

7 I want to start with Commissioner Rose --
8 Commissioner DeRose-Bamman's questions regarding new or
9 increased discharges.

10 As a general proposition, new or increased
11 discharge is sort of a common term of art relative to
12 the Clean Water Act and Water Quality Act compliance?

13 A. Yes. It is a very common term. It's actually
14 included quite a bit in the Department's continuing
15 planning process, implementation of the antidegradation
16 procedures. So it's a commonly used phrase and commonly
17 implemented in terms of implementation of the antideg
18 procedures.

19 Q. And so in that context, an example of a new
20 discharge would be a new facility that was being
21 constructed on a water body segment that, for our
22 purposes, is subject to a temporary standard.

23 A. Yes.

24 Q. And that new facility would postdate the
25 Commission's approval of the temporary standard.

1 A. Yes.

2 Q. Yet was not accounted for when the Commission
3 considered the temporary standard.

4 A. Correct.

5 Q. And then an increased discharge would be, say,
6 an expansion of an existing facility, say, by 100
7 percent, and so there would be an increased discharge
8 from that facility of 100 percent of what it was. So
9 maybe they were discharging 100 milligrams of something
10 and they would go to 200 milligrams of something, over a
11 certain time period.

12 A. Right, depending also on their -- their flow,
13 the loading capacity. So it would be a relationship
14 between those -- the concentration and the -- the flow
15 which would get at the total load.

16 Q. If I could have you turn to Amigos Bravos'
17 proposed changes for F.(1)(b), for the temporary
18 standards proposal.

19 A. Um-hum.

20 Q. Commissioner Hutchinson was asking about
21 whether or not the inclusion of language regarding
22 compliance with antidegradation provisions in 20.6.4.8
23 NMAC would be redundant?

24 A. Correct.

25 Q. Do you perceive -- is the basis of Amigos

1 Bravos' recommendation that the language that you have
2 recommended for strike-through, which is, quote,
3 unquote, "limit the further degradation of water quality
4 to the minimum necessary" does not mirror the
5 antidegradation protections that are in Section 8 of the
6 water quality standards?

7 A. Yes. Section 8 of the antidegradation
8 procedures has three different tiers of protections, and
9 not all of them mirror the minimum necessary, that you
10 have ONRWs which have no degradation. So I -- it would
11 be clear to have the language that we provided, which
12 says "complies with antidegradation protections,"
13 instead of the -- the language that's currently proposed
14 by the Department, which is limits the further
15 degradation of water to the minimum necessary.

16 Q. Is it your position, as well, that the
17 Department's current language on that could at least
18 inadvertently create a conflict between the temporary
19 standards provision and the antidegradation provisions?

20 A. Correct. That's why we are proposing to have
21 "complies with antidegradation protections" very clearly
22 stated there and strike through the Department's
23 language to avoid any such confusion.

24 Q. I want to also ask questions pivoting off
25 Commissioner Hutchinson's questions concerning the

1 interplay between subsections F.(5) and F.(2) regarding
2 identification of specific discharges.

3 Now, first turning to subsection F.(5), F.(5)
4 deals with the development of a work plan, correct?

5 A. Correct.

6 Q. And so the basis for Amigos Bravos' change is
7 to ensure that the work plan actually identifies and
8 accounts for each of the existing discharges in a water
9 body segment being proposed for a temporary standard,
10 correct?

11 A. Yes.

12 Q. And the difference with subsection F.(2) is
13 that F.(2) is really -- it's the legal standard for what
14 a temporary standard actually applies to; is that
15 correct?

16 A. Yes, that's correct.

17 Q. So this makes it clear that -- in F.(5) that
18 we want to -- that Amigos Bravos wants to ensure that
19 the work plan identifies and assesses all dischargers,
20 correct? But that in F.(2), that the standard is
21 actually only applied to the specific dischargers --

22 A. Correct.

23 Q. -- that are identified?

24 A. Yes.

25 Q. Staying with subsection F.(2) and the proposed

1 language for minimum time necessary and the interplay
2 between that language and the renewal periods,
3 Commissioner Hutchinson asked questions about whether or
4 not the fact that the temporary standard would be
5 approved at each renewal period, which, as I understand
6 it, is each subsequent triennial review, might provide a
7 sufficient level of protection.

8 My first question on this is how long are
9 those renewal periods generally between triennial
10 reviews?

11 A. So it's typically about six years, but it --
12 the way that the -- our experience of the process is
13 it's a three-year process that happens every three
14 years. I think -- so we were talking about that earlier
15 with -- but that -- that's the way that it works out.
16 It's a three-year process that happens every three
17 years. So it's typically about six years between actual
18 triennial reviews.

19 Q. So the language for minimum time necessary,
20 that could apply to, for example, a situation where a
21 temporary standard could be designed to achieve the
22 original standard within, say, eight years, and so in
23 that situation, the first renewal period would be
24 appropriate, but then extending it to, say, the next
25 renewal period, that might be twelve years, might be

1 four years more than is the minimum time necessary to
2 achieve the original standard?

3 A. Well, I think that the -- the temporary
4 standard isn't necessarily as per the Department's
5 language renewed at every triennial review. The
6 temporary standard has a -- has a time frame that is
7 expressed when the temporary standard is adopted. It's
8 reviewed every triennial review but not specifically
9 renewed at every triennial review.

10 Q. So you could have a situation where in my
11 prior example where, say, the temporary standard is
12 designed to achieve the original standard in eight
13 years, you would have the first review at six years,
14 correct?

15 A. (Nods head.)

16 Q. And assuming everything was going well, then
17 the temporary standard would sunset two years later, at
18 year eight.

19 A. Correct.

20 Q. But to extend that out to, say, the next
21 renewal period could leave an additional four years to
22 comply with the original standard that aren't actually
23 necessary.

24 I guess I'm saying this in a confusing way.

25 There's a distinction between the time between

1 renewal periods and what would be the minimum time
2 necessary for a temporary standard to achieve the
3 original standard.

4 A. Correct. I think -- correct.

5 Q. I want to turn to subsection F.(5).

6 Commissioner Hutchinson mentioned that
7 typically the Department will release discussion drafts
8 of proposals to the public for review; is that correct?

9 A. Correct.

10 Q. And do you find that that release by the
11 Department of those discussion drafts can be very
12 helpful for crafting better proposals that would be
13 either -- whether they're approved directly by the
14 Department within their authority or be brought to the
15 Commission for approval; is that correct?

16 A. They're very helpful to the public.

17 Q. And so is that the basis in F.(5) for the
18 inclusion of the requirement to include the public in
19 the review and comment of a work plan for a temporary
20 discharge -- for a temporary standard?

21 A. Yes. Because it wouldn't be -- necessarily be
22 included in the Department's discussion draft, because
23 it's the petitioner of the -- of the temporary standard
24 that's going to be providing that -- that report -- or
25 that work plan. I'm sorry. I'm confusing two things.

1 It's both the report that happens once the
2 temporary standard has already been provided, but also
3 the proposed work plan.

4 So it would be very helpful to the public to
5 have the same requirements for that to be released to
6 the public to review prior to adoption -- or prior to
7 hearing on -- for adoption of that temporary standard.

8 Q. So this would -- I'm sorry.

9 So this would effectively codify the
10 Department's current practice, say, releasing a
11 discussion draft or in this case a work plan regarding a
12 temporary standard proposal.

13 A. Correct.

14 Q. And then it would ensure that because it may
15 be somebody else other than the Department who is
16 proposing a temporary standard, like a permitted
17 facility, to make sure that that permitted facility is
18 also carrying out that best practice of engaging the
19 public with these early discussion drafts or work plans.

20 A. Yes. It would be very helpful to the public
21 to be able to follow that and review draft work plans.

22 MR. SCHLENKER-GOODRICH: No further questions.

23 MR. CHAVEZ: Thank you.

24 I'd now like to go out to the audience.

25 Is there any member of the audience that would

1 like to cross-examine this witness?

2 Seeing none, thank you, Mr. Schlenker --
3 Schlenker-Goodrich.

4 MR. SCHLENKER-GOODRICH: Thank you,
5 Mr. Hearing Officer.

6 MR. CHAVEZ: Appreciate it.

7 MR. SCHLENKER-GOODRICH: Thank you,
8 Mr. Chairman, Commissioners.

9 MR. CHAVEZ: So at this point, we're going to
10 move to rebuttal in reverse order.

11 Excuse me.

12 Chevron.

13 MR. ROSE: Mr. Hearing Officer, we've already
14 presented our rebuttal through Dr. Gensemer yesterday.

15 MR. CHAVEZ: Thank you.

16 Amigos Bravos.

17 MR. SCHLENKER-GOODRICH: Same, Mr. Hearing
18 Officer. All of our rebuttal has been presented.

19 MR. CHAVEZ: Thank you.

20 San Juan.

21 MS. MCCALEB: Thank you, Mr. Hearing Officer.

22 We've already presented all of our rebuttal
23 except with regard to the Amigos Bravos proposal.

24 MR. CHAVEZ: Thank you.

25 Freeport.

1 MS. CHAPPELLE: Our rebuttal has been
2 presented.

3 Thank you.

4 MS. MCCALED: So, Mr. Hearing Officer, we did
5 want to present our rebuttal to Amigos Bravos.

6 MR. CHAVEZ: Oh, my apologies. Yes.

7 MS. MCCALED: I probably made that confusing
8 the way I stated it. I'm sorry.

9 MR. CHAVEZ: Not a problem.
10 You may proceed.

11 MS. MCCALED: Thank you.

12 Thank you, Mr. Hearing Officer, Mr. Chairman,
13 members of the Commission.

14 San Juan Water Commission has already
15 presented its rebuttal testimony on every issue other
16 than the filing that was made by Amigos Bravos this past
17 Monday, which has been addressed just now with the
18 Commission.

19 So this rebuttal should be quite quick,
20 hopefully.

21
22
23
24
25

1 CHARLES L. NYLANDER

2 having been previously duly sworn or affirmed, was
3 examined and testified further in rebuttal as
4 follows:

5 DIRECT EXAMINATION

6 BY MS. MCCALED:

7 Q. Mr. Nylander, Ms. Conn, during her testimony
8 today, noted that one of the Amigos Bravos objections to
9 the temporary standards proposal put forth by the Bureau
10 is that she is unaware of any current need for this
11 tool.

12 Do you recall that testimony?

13 A. Yes, I do.

14 Q. Do you agree that there is not any current
15 need for this tool or that the temporary standards
16 proposal should not be adopted unless an existing
17 current need can be shown?

18 A. No, I don't. I don't agree with their
19 position on this.

20 Q. Would you agree that it's prudent to have any
21 tool that might be necessary to address future needs?

22 A. Yes.

23 Q. And has EPA expressed that same position in
24 the preamble to the new rule?

25 A. Yes, they have.

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1 Q. And could you please turn to that rule at 80
2 Federal Register 51035?

3 A. Yes.

4 Q. And could you please provide the language that
5 you believe supports the conclusion that it's important
6 to have a tool like the temporary standards proposal put
7 forward by the Bureau.

8 A. Yes. On page 51035, middle column -- I'll
9 read just a few passages.

10 EPA says "This rule establishes an explicit
11 regulatory framework for the adoption of water quality
12 standard variances that states and authorized tribes can
13 use to implement adaptive management approaches to
14 improve water quality. States and authorized tribes can
15 face substantial uncertainty as to what designated use
16 may ultimately be attainable in their waters.
17 Pollutants that impact such waters can result from
18 large-scale land use changes -- can be the result of
19 large-scale land use changes, extreme weather events, or
20 environmental stressors related to climate change that
21 can hinder restoration and the maintenance of water
22 quality. In addition, pollutants can be persistent in
23 the environment and, in some cases, lack economically
24 feasible control options."

25 Further down that column, the last bit here is

1 "While EPA has long recognized that water quality
2 standards variances as an available tool, the final rule
3 provides regulatory certainty to states and authorized
4 tribes, the regulated community, and the public that
5 water quality standards variances are a legal water
6 quality standard tool." (As read.)

7 Q. Mr. Nylander, in that language, one of the
8 situations where EPA notes it would be useful to have
9 the tool of a temporary standard is an environmental
10 stressor; is that correct?

11 A. Yes.

12 Q. Would an example of that perhaps be the Cerro
13 Grande fire and the environmental problems that were
14 caused by that fire?

15 A. Yes, absolutely.

16 Q. And would something like this temporary
17 standards proposal be a tool that would be used to
18 address the environmental issues that were caused by
19 that fire?

20 A. Yes. In that situation where you have a large
21 wildfire that really disrupts the watershed, there may
22 be a need to do watershed restoration work, and you may
23 need to have a temporary relief from a criteria that
24 might be affected in those water bodies.

25 Q. Mr. Nylander, Ms. Conn also testified that

1 Amigos Bravos opposes the temporary standards proposal
2 because of a concern that it will increase pollution.

3 Did you hear that testimony?

4 A. I did.

5 Q. And is there language that the EPA has been
6 provide -- has provided that also addresses that
7 concern?

8 A. Yes, there is.

9 Q. Could you please read that language into the
10 record.

11 A. Again, this is a quote from the Federal
12 Register, August 21st, 2015, page 51035, the far right
13 column, middle of the page.

14 "Water quality standard variances serve the
15 national goal in section 101(a)(2) of the Act and the
16 ultimate objective of the Clean Water Act to restore and
17 maintain the chemical, physical, and biological
18 integrity of the Nation's waters because water quality
19 standard variances are narrow in scope and duration and
20 are designed to make progress toward water quality
21 goals."

22 A little bit further down, "Also, by requiring
23 the highest attainable condition to be identified and
24 applicable throughout the term of the water quality
25 standard variance, the final rule provides a mechanism

1 to make incremental progress toward the ultimate water
2 quality objective for the water body and toward the
3 restoration and maintenance of the chemical, physical,
4 and biological integrity of the Nation's waters."

5 Finally in this regard, on the next page,
6 51036, the right-hand column, the middle of the page.

7 "To ensure that states and authorized tribes
8 use water quality standard variances that continue to
9 make water quality progress, the rule does not allow a
10 water quality standard variance to lower currently
11 attained ambient water quality, except in circumstances
12 where a water quality standard variance will allow
13 short-term lowering necessary for restoration activities
14 consistent with section 131.14(b)(2)(i)(A)(2)."

15 And furthermore, I just note in this regard
16 that the Commission's water quality standards under the
17 antidegradation policy, that would be 20.6.4.10.(4)
18 (sic), that language states that this antidegradation
19 policy does not prohibit activities that may result in
20 degradation in surface waters of the state when such
21 activities will result in restoration or maintenance of
22 the chemical, physical or biological integrity of the
23 water.

24 So this antidegradation language says you can
25 have a short-term disruption in water quality to

1 accomplish a larger goal.

2 Q. Thank you, Mr. Nylander.

3 I would like to turn to just two more specific
4 concerns that have been addressed by Amigos Bravos with
5 respect to some of the language they have proposed that
6 the Commission include in any temporary standards rule
7 that it would adopt.

8 And Amigos Bravos has requested that the work
9 plan be approved by the Commission.

10 Isn't it true that the work plan would be part
11 of the petition package that comes before this -- this
12 Commission?

13 A. Yes. It is true that according to the
14 Department's proposed language the petition would have
15 to have attached to it the proposed work plan. And all
16 of that would come before the Commission in a public
17 hearing setting for their deliberation and review.

18 And they would also be able to condition the
19 final petition language with conditions and progress
20 reporting schedules that may be more frequent than --
21 they can change that frequency when they get new
22 information on how the work plan is actually being
23 implemented. So they have a lot of control.

24 Q. So would it -- would you agree, then, that, in
25 essence, when the petition comes before the Commission,

1 that it would have the opportunity to modify the work
2 plan if it thought it was necessary to do so?

3 A. Yes. I think that the Commission would look
4 to the Department for any recommendations they might
5 have, and then if they -- the Commission had their own
6 recommendations, they could, by the language in the
7 proposal, modify the final work plan.

8 Q. Mr. Nylander, Amigos Bravos has also proposed
9 that the public have access and the possibility to
10 review the work plan before the petition is submitted to
11 the Water Quality Control Commission.

12 Did you hear that testimony?

13 A. I did.

14 Q. And isn't it true that because a temporary
15 standard will be a water quality standard, any petition
16 will necessarily come to this Commission for review and
17 approval as any other water quality standard would?

18 A. Yes. That a temporary standard and -- and the
19 petition to request a temporary standard application
20 would be, in fact, a water quality standard change
21 request, and it would always have to come before the
22 Commission.

23 Q. And in compliance with the Water Quality
24 Control Commission's rulemaking procedures, therefore,
25 the petition and the work plan would be available for

1 public review in advance of any hearing on the petition.

2 A. That is correct.

3 Q. Thank you.

4 I don't have any other questions, Mr. Hearing
5 Officer examiner.

6 MR. CHAVEZ: Thank you very much.

7 A couple quick questions.

8 So because we're getting near 12 o'clock, and
9 I know we possibly have some -- I want to take some
10 closing public comment, and I believe we have
11 cross-examination of this witness on rebuttal, do we
12 want to break for lunch?

13 I'm just going to ask the parties.

14 Or do we want to continue through?

15 Because I -- to be honest, I can't tell how
16 long, you know, this will -- this will go.

17 MR. SCHLENKER-GOODRICH: Mr. Hearing Officer,
18 I'd note, because I would be the one anticipated to do
19 cross, that we don't have any cross-examination
20 questions on Mr. Nylander's rebuttal testimony. So that
21 may speed some of the decision-making.

22 MR. CHAVEZ: Okay.

23 NMED, will you have some cross?

24 MR. VERHEUL: We do, but I believe at most we
25 have one or two clarifying questions.

1 MR. CHAVEZ: Okay.

2 Chevron?

3 MR. ROSE: No questions.

4 MR. CHAVEZ: Freeport?

5 MS. CHAPPELLE: No questions.

6 MR. CHAVEZ: And I'm going to anticipate some
7 questions from the Commission?

8 MR. DOMINGUEZ: Limited questions from the
9 Commission.

10 MR. CHAVEZ: Okay. So let's -- let's try to
11 proceed and wrap up, if possible, and if it -- if it
12 gets too long, we'll break for lunch. But let's --
13 we'll go ahead and proceed.

14 So, NMED, why don't you -- you have the floor
15 for cross.

16 CROSS EXAMINATION

17 BY MS. BECKER:

18 Q. Thank you, Mr. Nylander.

19 I actually couldn't do better rebuttal.

20 So I just wanted to make certain when you were
21 reading into the record from page 51036, if you would
22 turn with me, there was a section that I believe was
23 responsive to earlier questions by Commissioner
24 Hutchinson, and I just want to make sure that citation
25 got read into the record correctly, because it's a very

1 valuable one.

2 Are you with me on page 51036 on that third
3 column?

4 A. Yes, I am.

5 Q. And do you recall that you read into the
6 record the sentence beginning with "To ensure that
7 states"?

8 A. That is exactly where I started.

9 Q. Okay.

10 And would you agree with me that that citation
11 reads at the close of that sentence section
12 131.14(b)(2)(i)(A)(2)?

13 A. Yes. I think that is the correct -- I might
14 have misspoken on that.

15 Q. It's tiny print. Certainly --

16 A. Yeah. It's hard to print, and I'm kind of --
17 my vision isn't that good.

18 Q. Thank you.

19 That was all I had.

20 MR. CHAVEZ: Thank you.

21 And for clarification, Chevron and Freeport,
22 you do not have any.

23 MR. ROSE: No.

24 MR. CHAVEZ: I'd like to now move to the
25 Commission for any questions.

1 MR. DOMINGUEZ: Commissioner Pattison.

2 MR. PATTISON: Commissioner, I don't have a
3 question concerning this presentation, but a question
4 just before we adjourn.

5 MR. CHAVEZ: Okay.

6 So having said that, I'd like to move to the
7 public.

8 Is there any questions -- cross on this
9 rebuttal from the public?

10 All right. Seeing none, the witness is
11 excused.

12 MS. MCCALED: Thank you.

13 MR. CHAVEZ: So now that we are very close to
14 the conclusion of this hearing, would you like to ask
15 your question now, Commissioner?

16 MR. PATTISON: Yes, Mr. Chairman. Thank you.

17 It appears to me that the inclusion of playa
18 lakes -- and as you're aware, I've asked questions about
19 this in the past, in this hearing -- and prairie
20 potholes, mud holes, water in an alley, et cetera, and
21 the considerations of these water bodies by the EPA as
22 waters of the United States, intentions would -- we
23 should have probably included as a separate category
24 these types of waters and their consideration by the
25 Environment Department, et cetera.

1 Because when you include these in all
2 nonperennial waters, there -- without separate
3 consideration, intermittent waters, for example,
4 ephemeral waters won't apply. And a general
5 consideration or rule would handicap the owners of the
6 lands that these waters appear on.

7 So as a suggestion, Mr. Hearing Officer, I
8 would suggest to the Environment Department to take this
9 under consideration for future triennial reviews,
10 pending, of course, what happens to the EPA waters of
11 the United States in the court.

12 Thank you, Mr. Chairman.

13 MR. CHAVEZ: Thank you, Commissioner.

14 MR. PATTISON: Mr. Commissioner.

15 MR. CHAVEZ: Okay. In closing, I would like
16 to once again -- oh.

17 MR. ROSE: I thought the Department -- did you
18 have rebuttal?

19 MR. VERHEUL: We have rebuttal testimony.

20 MR. ROSE: That's what I thought.

21 MR. CHAVEZ: My apologies.

22 NMED, please.

23 MR. VERHEUL: We have what we think is going
24 to be in ballpark 45 minutes of questioning of our
25 witnesses on rebuttal testimony, and then we've been

1 told by multiple parties that they will have
2 cross-examination of our witnesses.

3 I don't know if that impacts how you want to
4 schedule the rest of the -- the next couple hours.

5 MR. CHAVEZ: Having heard that, I think we're
6 going to go ahead and break for lunch.

7 But I'll take any comment.

8 Commissioner?

9 MR. TONGATE: Public comment? Before lunch
10 or --

11 MR. CHAVEZ: Before lunch. Yeah. I think we
12 are going to end up breaking for lunch.

13 Is there anybody from the public that would
14 like to make comment at this time?

15 All right. Seeing none, it's 11:59, we'll see
16 you back here at 1 o'clock.

17 (Proceedings in recess from 11:59 a.m. to
18 1:04 p.m.)

19 MR. CHAVEZ: Back on the record.

20 You may call your witnesses for rebuttal.

21 MR. VERHEUL: Thank you, Mr. Hearing Officer.

22 We'd like to call our three witnesses,
23 Dr. Bryan Dail, Ms. Shelly Lemon, Ms. Kris Pintado.

24 And, Mr. Hearing Officer, if we could clarify,
25 our fourth witness, Jodey Kougioulis, is not presenting

1 any rebuttal testimony, but the question has been
2 raised, since he testified as to the HP UAAs, if the
3 Commission needed him for any clarification of any of
4 those matters.

5 MR. CHAVEZ: And, Mr. Chairman, it doesn't
6 look like they do.

7 MR. VERHEUL: Great. Thank you.

8 MR. CHAVEZ: Thank you.

9 You may proceed.

10 MR. VERHEUL: Thank you.

11 Good afternoon, Chairman Dominguez and
12 Commissioners.

13 KRISTINE PINTADO, SHELLY LEMON and BRYAN DAIL
14 having been previously duly sworn or affirmed, were
15 examined and testified further in rebuttal as
16 follows:

17 DIRECT EXAMINATION OF BRYAN DAIL

18 BY MR. VERHEUL:

19 Q. Dr. Dail, you already testified so we can
20 forego the introductions, and you've already stated, I
21 believe, that you've prepared rebuttal testimony for
22 this hearing.

23 Do you recall that is Bureau Exhibit 14?

24 A. 14, yes. Correct.

25 Q. Now, you've already presented your rebuttal

1 testimony with regard to Freeport-McMoRan for the Chino
2 Mine smelter tailings and soil investigation unit.

3 A. Yes.

4 Q. Let's move on, then, to other rebuttal
5 testimony.

6 What is the Bureau's position regarding the
7 proposal by Amigos Bravos to revert to the 1988 aluminum
8 guidance criteria?

9 A. Well, the Department opposes this proposal,
10 and it's for several reasons.

11 As noted in detail in my written testimony,
12 aforementioned Exhibit Number 14, the mitigating effects
13 of hardness are -- are certainly demonstrated to afford
14 some protections to aquatic life, and there's a
15 substantial body of peer-reviewed evidence to support
16 this, including a scientific investigation by Amigos
17 Bravos' own witness.

18 It is also the case that EPA is in the final
19 stages of developing an update to the 1988 criteria
20 document, which will contain a hardness component, we
21 think, that, while it might suggest a different
22 hardness-dependent equation, places New Mexico's current
23 criteria more in alignment with the current science and
24 understanding regarding aluminum toxicity.

25 Reversion to the 1988 guidance, which is

1 proposed, would be moving backward to a time when much
2 less was known. When EPA considered and approved New
3 Mexico's hardness-dependent criteria, they wrote New
4 Mexico noting -- and this is our Exhibit Number 16 in
5 rebuttal testimony -- quote, "EPA considers the
6 hardness-dependent equations for aluminum to be an
7 improvement" -- I'll say again -- "an improvement over
8 the existing criteria" -- 1988 guidance -- for waters
9 within the pH 6.5 to 9.

10 This limitation of applicability is important
11 as it captures the pH of waters hospitable to sensitive
12 species according to the EPA Red Book, which has been
13 mentioned as the water criteria document from 1976 and
14 has been mentioned several times.

15 Amigos Bravos addresses the fact that New
16 Mexico waters that fall are outside this pH range;
17 however, most of them are inhospitable to sensitive
18 species and would be considered impaired for reasons of
19 pH alone.

20 Q. Dr. Dail, I'm going to stop you there just
21 briefly.

22 You've testified, I believe, already, but how
23 many water bodies are there that you're aware of in the
24 State of New Mexico with pH below -- below 6.5?

25 A. Below 6.5 -- I think we've entered that into

1 the record is the -- is Sulphur Creek, part of the Jemez
2 complex, which has very low pH.

3 Q. Okay.

4 Please proceed.

5 A. An additional concern Amigos Bravos has are
6 the shortcomings of certain peer-reviewed data sets that
7 went into the New Mexico formula. One criticized for
8 inclusion, the aforementioned Kimball report, is also in
9 the 1988 guidance. Therefore, a reversion to that does
10 not fix the problem, or the perceived problem.

11 Another is Biesinger and Christensen, a 1972
12 Great Lakes study, that Professor Gundersen criticized
13 for rather than using laboratory water -- sorry, I don't
14 have any displays -- used Great Lakes water to try to do
15 a toxicological study that was more sort of real world,
16 and it was criticized because in 1972 the chemistry of
17 the Great Lakes was not that good.

18 There were plenty of toxic metals that were
19 present at levels that could cause harm, but to include
20 such a study, I would think, would actually have skewed
21 the hardness-dependent protection numbers to being more
22 protective because there were other toxics present.

23 A number of studies were cited by Amigos
24 Bravos and Professor Gundersen that they insisted should
25 go into the New Mexico hardness-based calculation;

1 however, there are pitfalls to using these examples
2 well.

3 One that has already been indicated is that
4 abstracts from meeting presentations which indicate
5 greater sensitivity for certain species of aluminum have
6 not undergone that peer review. Dr. Gensemer was a
7 co-author on those abstracts and could not clarify that
8 these were going to be anytime soon undergoing peer
9 review.

10 All considered, it was not demonstrated that
11 inclusion would significantly impact the current
12 hardness-dependent calculator. For example, a more
13 compelling case could have been made if the impacts of
14 inclusion or noninclusion of certain studies would have
15 affected the hardness-dependent limits, and these were
16 not depicted.

17 Q. And why -- why is that a problem, Dr. Dail?

18 A. What's worrisome at this -- about this
19 problem -- about this issue is that at low water
20 hardness, a condition that does occur frequently in New
21 Mexico waters, a reversion to the 1988 criteria document
22 indicated less protection than the existing criteria.

23 And this is explained a little bit further in
24 Table 1 of my written rebuttal testimony.

25 In closing, several doubts were raised

1 regarding the development of New Mexico's
2 hardness-dependent aluminum criteria; however, the
3 impacts of inclusion or removal of criticized studies
4 were not demonstrated, and thus only doubt was generated
5 and not new information.

6 What could be demonstrated is that there are
7 waters with low hardness that are sufficiently
8 protective with the current criteria but that would be
9 harmed by a reversion to the 1988 guidance. New Mexico
10 is likely to consider any new guidance that EPA has
11 forthcoming, but it is almost certain that hardness will
12 be a part of that criteria.

13 For these reasons, and because EPA noted that
14 the current aluminum criteria represent an improvement
15 over the 1988 criteria, we strongly advise the
16 Commission to reject the Amigos Bravos proposal.

17 Q. Dr. Dail, I want to clarify a few things that
18 have come up during the hearing.

19 You were here for Dr. Gundersen's testimony
20 yesterday; is that right?

21 A. That is correct.

22 Q. And you recall that he had made the statement
23 both in his written testimony and, I believe, verbally
24 that New Mexico had the -- I believe it was the weakest
25 aluminum standards in the country?

1 A. Yes, in both written and verbal testimony.

2 Q. It was brought to Dr. Gundersen's attention
3 that there were 24 states that did not have an aluminum
4 standard.

5 A. About that, Counselor, I reviewed the EPA's
6 repository for the state standards, and 24 states did
7 not have an aluminum criteria on the book at all.

8 Q. If a state does not have an aluminum standard,
9 are there any protections to aquatic life from aluminum
10 toxicity?

11 A. There are not.

12 Q. Just to clarify another point, at pH below
13 6.5, so let's say pH 6.4, in New Mexico, right now, what
14 aluminum standard would apply to those waters?

15 A. EPA will evaluate those waters for compliance
16 using the chronic criteria from their '88 guidance
17 document, the 87 micrograms of aluminum per liter.

18 Q. Dr. Dail, you were here yesterday, I believe,
19 for the public comment from a Mr. Jon Klingel?

20 A. Yes.

21 Q. Is there a scientific explanation for the New
22 Mexico aluminum standard appearing to be less rigorous,
23 as was the comment of Mr. Klingel?

24 A. Well, I would say that -- or let me -- let me
25 begin again.

1 Amigos Bravos provided a list of mussel
2 species that were thought to be endemic in New Mexico
3 from the BISON-M web site, which covers New Mexico
4 species, yet it fails to explain the relevance of that
5 documentation. Ostensibly, they meant to show that the
6 game and fish study of some mussel or mussels endemic to
7 West Virginia were sensitive to aluminum.

8 This was also in Mr. Klingel's -- in his
9 nontechnical public comment, who noted that mussel and
10 gastropod invertebrates are present in New Mexico
11 waters, and indeed they are. Gastropods were included
12 in EPA's 1988 criteria document, as well, or studies
13 that use gastropods to look at aluminum sensitivity.

14 Aluminum guidance at that time showed very low
15 sensitivities among these gastropod studies. In
16 specific, it showed greater than 23,400 micrograms of
17 aluminum per liter. They could still not determine
18 LC 50. If we recall, the LC 50 is that lethal
19 concentration that kills half of the test subjects.

20 So in the '88 guidance when it says greater
21 than 23,400 micrograms per liter, it means they don't
22 know what the LC 50 is because they haven't reached it
23 yet and that was the highest amount of aluminum that
24 they used.

25 For example, New Mexico's criteria as it

1 stands now, even at the highest hardness protection
2 component, doesn't come even close to that number.

3 Thus, not all invertebrates are sort of
4 created equal, if you will, in regards to aluminum
5 sensitivity. New Mexico, of course, is paying attention
6 to any information regarding aluminum sensitivity,
7 especially regarding endemic species to New Mexico.

8 To suggest that some genera, as Mr. Klingel
9 did, found in West Virginia -- or -- I'm sorry --
10 Professor Gundersen did, found in West Virginia are also
11 found in New Mexico waters is a very weak point and does
12 not go to the question of sensitivities of the species
13 list, I believe Exhibit 11, provided by Amigos Bravos.

14 Q. I believe that was Exhibit L.

15 A. L. Sorry. You're right. Correct. Thank
16 you.

17 Q. Thank you, Dr. Dail.

18 Do you recall yesterday my cross-examination
19 of Dr. Gundersen?

20 A. Yes, I do.

21 Q. And do you recall that I questioned
22 Dr. Gundersen as to the underprotections that a
23 reversion to the 1988 guidance for aluminum would
24 dictate?

25 A. Yes.

1 Q. And Dr. Gundersen replied that --

2 A. I can certainly paraphrase him.

3 Q. Go ahead.

4 A. Yeah. He said in the hardness scale as
5 provided by New Mexico Administrative Code on surface
6 water qualities, only one part of the hardness scale
7 does the acute hardness-dependent aluminum criteria
8 offer more protection than the 1988 guidance.

9 Is this the quote you're referring to?

10 Q. Yeah.

11 And when you say the acute hardness-dependent
12 aluminum criteria --

13 A. Yeah.

14 Q. -- that's the -- that's what's currently in
15 place; is that right?

16 A. Correct, Counselor.

17 Q. All right.

18 Go on.

19 A. If I could refer you to that document, which
20 is 20.6.4.900 section I subsection (3), there is a table
21 included in the New Mexico Administrative Code which is
22 there as example for some of the numbers if plugged into
23 the metals hardness-dependent equations would result
24 from the calculation.

25 There's stepwise increments in that table.

1 And it starts with a five increment in terms of total
2 hardness, which is measured as milligrams, a calcium
3 carbonate equivalent per liter in the water column, and
4 then it jumps tenfold -- by steps of tenfold.

5 Well, obviously, natural waters don't obey
6 that sort of behavior. So any number you can pick, you
7 know, 30.2, 26.9, 118.7, could be plugged into that
8 equation and deliver you information about water
9 hardness for that particular water body.

10 And this is important, because many waters in
11 New Mexico would indeed be exceeded. It's not just one
12 point on the scale that represents a greater
13 protectiveness of the hardness dependence scale.

14 For example, waters afforded less protection
15 by reversion to older criteria include the Rio Grande
16 near Algodones; the Santa Rosa Lake; the headwaters of
17 the Santa Fe River above McClure Reservoir; the Jemez
18 River near Battleship Rock and a number of its
19 tributaries, including the East Jemez and Redondo Creek;
20 the Rio Hondo; headwaters of the Rio Puerco; Rio
21 Vallecitos; Rio de los Pinos; the Rio Cebolla, which
22 feeds into Fenton Lake after it passes through the Seven
23 Springs Fish Hatchery; the Rio de las Vacas; the
24 headwaters of the Rio Chama; and both Middle and West
25 Forks of the Gila River.

1 Many of these, using the hardness-dependent
2 aluminum calculator, would have twice the protection of
3 a reversion to the 1988 guidance.

4 Q. So to be clear, those water bodies that you
5 just named, Dr. Dail, if -- if we revert -- if this
6 Commission chooses to revert to the 1988 aluminum
7 criteria as proposed by Amigos Bravos, these water
8 bodies would be afforded significantly lower protections
9 from aluminum toxicity.

10 A. That is correct.

11 And let me make sure I'm understood. These
12 are water bodies that have been assessed for hardness
13 and aluminum and many other criteria since 2011. I'll
14 remind you that the state works its way through water
15 bodies and surveys every eight years. So I'm just
16 talking about water bodies that have been measured in
17 the last four or five years.

18 So there's certainly to be more that would
19 lose the protections at low hardness if a reversion to
20 the 1988 guidance document was approved by this
21 Commission.

22 Q. Dr. Dail, yesterday you -- yeah, I think it
23 was yesterday -- you -- you adopted your written
24 rebuttal testimony as your sworn testimony; is that
25 right?

1 A. Yes, I did, Counsel.

2 MR. VERHEUL: At this point, as a matter of
3 formality, I would like to move all the Bureau's
4 exhibits, Mr. Hearing Officer, move that they be
5 admitted.

6 MR. CHAVEZ: Any objection?

7 Seeing none, those are in for the record.

8 What letter are we going to start at? Are
9 those -- it's in your prefiled --

10 MR. VERHEUL: It's all in the prefiled.

11 MR. CHAVEZ: Do you have the number of them?

12 MR. VERHEUL: I believe it's 1 through 66.

13 It's -- yeah, Bureau Exhibits 1 through 66 on direct,
14 and on rebuttal -- I apologize. I don't have those with
15 me.

16 MR. CHAVEZ: I just want to make it clear for
17 the record.

18 MR. VERHEUL: 1 through 17 rebuttal exhibits.

19 MR. CHAVEZ: So 1 through 66 --

20 MR. VERHEUL: Direct and 1 through 17
21 rebuttal.

22 MR. CHAVEZ: 1 through 17 rebuttal.

23 Thank you.

24 (Exhibits NMED 1 through 66 direct and 1
25 through 17 rebuttal admitted into evidence.)

1 Q. (BY MR. VERHEUL) Dr. Dail, do you have any
2 additional rebuttal testimony?

3 A. No, sir.

4 Q. Thank you.

5 I'd like to ask my co-counsel at this time to
6 question our additional witnesses.

7 MS. BECKER: I'll begin with you, Ms. Pintado.

8 DIRECT EXAMINATION OF KRISTINE PINTADO

9 BY MS. BECKER:

10 Q. You previously testified on direct, did you
11 not?

12 A. Yes.

13 Q. And you're the water quality standards
14 coordinator for the Surface Water Quality Bureau of the
15 Department?

16 A. Yes.

17 Q. Okay.

18 And would you just remind the Commission what
19 your primary responsibilities are?

20 A. To oversee the search and development of
21 updates to the water quality standards and to
22 participate fully in the required triennial review.

23 Q. And is your rebuttal testimony -- was that
24 prefiled at Rebuttal Exhibit 7?

25 A. Yes.

1 Q. Okay.

2 And you do adopt that testimony today?

3 A. Yes, I do.

4 Q. Great.

5 And would you just highlight for the
6 Commission a brief overview of your testimony?

7 A. Sure. I will present rebuttal to other
8 parties' testimonies on the Bureau's proposals regarding
9 Section 10.

10 Q. And as a result of the changing nature of the
11 discussion over the last few days, are we -- does that
12 Section 10 -- does that mean primarily you're talking
13 about the temporary standards?

14 A. Correct.

15 Q. And do you have any corrections or additions
16 to your rebuttal testimony that you would like to make
17 known?

18 A. Yes. Since the rebuttal testimony was
19 originally filed with the Commission, the Bureau worked
20 with other parties on their particular concerns
21 regarding additional changes to Sections 10 and 16 of
22 the Bureau's petition. These changes were discussed in
23 my oral and prefiled testimony and are in second amended
24 petition filed on September 4, 2015.

25 Today I will emphasize significant rebuttal to

1 others' proposals regarding the temporary standard
2 procedure in Section 10.

3 Q. And with that, does the temporary standards
4 procedure as proposed by the Department weaken standards
5 to allow increased pollution and make impairment worse,
6 as was suggested by Amigos Bravos?

7 A. No.

8 Q. Why is that?

9 A. For new or more stringent water quality
10 standards, if the permittee has not had such a limit,
11 then actually it -- and it's now incorporated, then that
12 pollutant would be controlled, whereas it wasn't before,
13 and you would expect it to go down.

14 Q. What type of -- what type of review is
15 required in the New Mexico standard that may or may not
16 be in the final rule as recently released by EPA?

17 A. Antidegradation, I think, is not specifically
18 mentioned in the rule.

19 Q. But is it contained with -- in which rule?
20 Let's be clear.

21 A. Oh, I'm sorry. You asked about the federal
22 rule.

23 Q. Right.

24 So is the antidegradation a component of the
25 state's proposed temporary standard?

1 A. As a water quality standard, which temporary
2 standard would be adopted as a water quality standard,
3 it would be subject to antideg review.

4 Q. And in terms of review, there was comments
5 by -- or rather testimony -- excuse me -- by Amigos
6 Bravos that the review period is the triennial review
7 period, which sometimes goes six years.

8 Do you recall that testimony?

9 A. Yes.

10 Q. And how often are temporary standards if
11 adopted by the Commission and subsequently sought by the
12 Department -- how often would they have to be reviewed
13 according to the petition?

14 A. Every triennial review.

15 Q. And what is the general time frame for a
16 triennial review, in your experience?

17 A. In my experience, it's within three to five
18 years.

19 Q. Okay.

20 And is it still the opinion of the Department
21 that this would be a necessary and beneficial tool for
22 the Department?

23 A. Yes.

24 Q. And why is that?

25 A. It gives, for example, in the case of

1 nutrients, nutrient controls that have not been
2 previously in place. Municipalities would have an
3 opportunity to tailor their compliance with such
4 controls over time.

5 Q. What if -- and I recognize this is a
6 hypothetical, but if we follow the line of questioning
7 that was asked, where temporary standards are adopted, a
8 petitioner applies and receives a temporary standard, if
9 the Commission- and EPA-approved conditions of that
10 temporary standard are not being met in a permit, or if
11 sufficient progress is not demonstrated in those
12 required progress reports, or not being made subject to
13 the monitoring of the original water quality standard,
14 what happens?

15 A. It could be subject to revocation or
16 additional conditions.

17 Q. What happens if it's revoked?

18 A. The temporary standard effectively expires,
19 and the underlying original criterion and use becomes
20 the basis for any water quality-based effluent limits.

21 Q. So as proposed right now, does the Environment
22 Department's petition for the temporary standard allow
23 for new or increased discharges to a water body?

24 A. Yes.

25 Q. Why is that?

1 A. Because the Department can see good reasons to
2 allow for new and increased dischargers when in -- for
3 example, there are increases in a population in a
4 community, when tying in unsewered or previously
5 unsewered communities. I think postfire restoration was
6 mentioned previously.

7 But significantly -- another significant
8 reason is that that review for a new or increased -- and
9 increased discharger -- or increased discharger is
10 really a part of the permit process.

11 Q. To the extent the testimony of Mr. Nylander
12 still suggested that the Commission consider the final
13 rule in its entirety as promulgated by EPA, the variance
14 in its entirety, why is it important to distinguish what
15 New Mexico has proposed from other variance processes
16 currently allowed by the New Mexico Water Quality Act?

17 A. The San Juan Water Commission testified that
18 temporary standards should instead be called variances
19 and should be granted by the Commission using permit
20 variance authority under the state Water Quality Act;
21 however, the variance under the state Water Quality Act
22 is an exemption applied to an individual from compliance
23 with the state's pollution requirements and is not
24 applicable to water quality standards.

25 The Bureau has already stated in rebuttal

1 testimony and reiterates today why this is not
2 appropriate.

3 First, a temporary standard would apply to a
4 particular water body and not to an individual.

5 Second, a temporary standard would be
6 consistent with the Commission's authority to adopt
7 water quality standards under the Water Quality Act.

8 Third, the federal Clean Water Act regulations
9 authorize states to adopt procedures for temporary water
10 quality standards.

11 Fourth, the EPA will implement temporary
12 standards in a federal permit only if they are adopted
13 in the water quality standards.

14 Fifth and finally, NPDES permits are federally
15 issued and not subject to the Commission's variance
16 authority under the state Water Quality Act.

17 In sum, this procedure outlines a framework in
18 the water quality standards so temporary water quality
19 standards may be adopted and implemented as allowed
20 under the federal Clean Water Act and the authorities of
21 the state Water Quality Act.

22 Q. And, Ms. Pintado, you heard testimony as it
23 related to temporary standards versus compliance
24 schedules, did you not?

25 A. Yes.

1 Q. And you are also aware that UAA is what the
2 Surface Water Quality Bureau would consider one of the
3 tools in the toolbox?

4 A. Yes.

5 Q. So why is it necessary to demonstrate a
6 designated use is not attainable? Doesn't that mean
7 that the use should just be revised for a temporary
8 standard?

9 A. No. The appropriate demonstration is that the
10 water quality standard is not attainable today, but it
11 would be attainable in the future. For example,
12 progress would be made to attain the water quality
13 standard given time and effective treatment
14 technologies.

15 Q. Now, the testimony of Amigos Bravos was that,
16 in essence, a temporary standard could become permanent
17 because there was no end cap on the length of time.

18 Is it your understanding that the temporary
19 standard is, in fact, a permanent standard?

20 A. No.

21 Q. What about Ms. Conn's statement that a
22 temporary standard could last 200 years? Is that even
23 conceivable?

24 A. No.

25 Q. Why not?

1 A. Because it would be subject to review every
2 three years. I cannot imagine a temporary standard to
3 justify that timeline.

4 Q. Is it the requirement of the temporary
5 standard that it only be as long as necessary to -- to
6 allow the temporary standard to resume the original
7 underlying standard?

8 A. Yes.

9 Q. Okay.

10 And does the Water Quality Act require that
11 the highest attainable condition be achieved?

12 A. The federal rule and -- yes.

13 Q. Is the federal rule adopted within your
14 temporary standard?

15 A. Actually, we have referenced it. Yes.

16 Q. And would you just highlight that for me now,
17 please.

18 A. That's in F.(1), paragraph (1).

19 Q. Okay.

20 I believe Ms. Conn also identified that EPA at
21 one point had considered possibly a time cap for -- for
22 variances at three years.

23 Are you familiar with that testimony?

24 A. Yes.

25 Q. Is that what you understand to be true?

1 A. The federal rule had a time cap of ten years.
2 In our discussion draft, which was released back in
3 December of 2014, it was three years. Yes.

4 Q. And what did the final rule -- as a result of
5 this rebuttal conversation, I just want to be clear.

6 What is the position of EPA for the final rule
7 on what the end cap should be for variances?

8 A. In terms of timeline, there is no cap. It
9 should be as long as necessary.

10 Q. And is that the language that is used within
11 the Department's proposed rule?

12 A. We say in the near term.

13 Q. And what do you understand that to mean?

14 A. Only as long as necessary.

15 Q. Okay.

16 In response to some of AB's testimony and
17 proposed changes, there is a suggestion that there be
18 additional public participation.

19 What is the public participation for adopting
20 a temporary standard?

21 A. It is the same as for adopting a water quality
22 standard.

23 Q. So if I understand correctly, if the
24 Commission were to adopt the temporary standard as
25 proposed by the Department, that procedure would be in

1 place, and any petition to have a temporary standard is,
2 in fact, a rule change?

3 A. Correct.

4 Q. And are rule changes before this Commission
5 subject to the regulatory procedural rules of 20.1.3
6 NMAC?

7 A. Yes.

8 Q. And let's discuss just a little bit about the
9 work plan.

10 I believe Ms. Conn's testimony was that a work
11 plan would be very helpful to the public to be viewed in
12 advance of the Commission hearing on any temporary
13 standard.

14 Does the Department's proposed temporary
15 standard provide for that?

16 A. Sure. As a water quality standard, and work
17 plan is submitted with the petition, it would be public
18 noticed and posted for public review, just as for a
19 water quality standard.

20 Q. And why is a work plan required with the
21 petition?

22 A. The San Juan Water Commission testified that
23 the work plan requirements were not clear and
24 unnecessary.

25 To the contrary, the work plan and petition

1 together serve many purposes.

2 First, they demonstrate to the Commission that
3 a temporary standard is justified as allowable under the
4 Clean Water Act and scientifically defensible under the
5 state Water Quality Act.

6 Second, tasks and timelines to reduce the
7 pollutant would be identified in the work plan to gauge
8 progress for subsequent reviews by the Commission, such
9 as required in a triennial review.

10 Third and finally, the work plan for a
11 temporary standard adopted by the Commission and
12 approved by EPA served -- would serve as enforceable
13 conditions in the associated federal permits.

14 Q. Okay.

15 And as a petition to this Commission, could
16 the temporary standard be applied to both impaired and
17 nonimpaired water bodies?

18 A. Yes.

19 Q. And why is there no distinction there?

20 A. Because it would be incorporated into the
21 permit, and if -- if it were an impaired water, for
22 example, and a TMDL had already been drafted and that
23 endpoint identified, the temporary standard would be
24 allowed to be placed in a permit associated with that
25 particular TMDL.

1 Q. Should the temporary standard procedure
2 specify it does not apply where technology-based limits
3 would secure compliance with the underlying standards?

4 A. I think that language would be unnecessary
5 because of the reference to the federal rule.

6 Q. Okay.

7 And do you have in front of you a copy of the
8 proposed changes Amigos Bravos submitted earlier this
9 week?

10 A. Yes. Just give me a second.

11 Q. What I'd like to propose we do is just very
12 briefly walk through this, and to the extent that your
13 questions that you've already responded to me have
14 identified what the Department's position would be on
15 whether to incorporate or reject the proposed changes, I
16 would like you to attempt to very briefly identify that.

17 So for example, if you'll turn with me, their
18 proposed changes begin in 10F, Temporary Standards, and
19 I believe the first change is in paragraph (1)(b).

20 Do you see that?

21 A. Yes.

22 Q. What would the Department's position be as it
23 relates to "complies with antidegradation protections in
24 20.6.4.8 NMAC," the addition of that language?

25 A. I find it superfluous because it would already

1 be subject to antidegradation review. But it doesn't
2 hurt to be redundant, I guess.

3 Q. Did you hear the testimony -- rebuttal
4 testimony of Mr. Nylander that he, in fact, understood
5 that was also to be the case, that antideg was a
6 component for temporary standards?

7 A. Yes.

8 Q. Okay.

9 What about the remainder of language in that
10 paragraph (b), "ensures reasonable and expeditious
11 progress"?

12 A. I find that clear -- unclear and vague. I
13 wouldn't know how to describe that --

14 Q. To measure that length of progress?

15 A. Right.

16 Q. Okay.

17 Let's just move, then, to paragraph (2).
18 There's some additional proposed language there
19 regarding specific discharges subject to the work plan,
20 a listing of those discharges.

21 Is that something that you think would be
22 necessary for this rule to be adopted?

23 A. No.

24 Q. Why not?

25 A. Again, it is a part of the federal requirement

1 and as part of the submission.

2 Q. Okay.

3 And if the -- again, this is a -- I recognize
4 this is a hypothetical, but if an applicant were to
5 submit a work plan with its petition to the Department
6 and did not identify all the discharges in that water
7 body, would the Department have a duty to identify those
8 to the Commission?

9 A. We would.

10 Q. What about the time frame contained in there?

11 Again, it looks like a ten-year time frame.

12 Do you believe you've already addressed
13 temporary standards as having a tailored time component?

14 A. I believe that would be an arbitrary timeline,
15 and it should fit the temporary standard.

16 Q. Okay.

17 Let's see. I believe the next change, then,
18 of additional language is paragraph (5).

19 Do you see the addition of the language "and
20 the public" as it relates to submitting the part -- the
21 work plan to the Department?

22 A. Oh.

23 Q. "And the public for review and comment"?

24 A. Yes.

25 Q. Do you find that language necessary for

1 inclusion into the Department's petition?

2 A. No.

3 Q. And why is that?

4 A. First of all, it's not precluded that a
5 petitioner could seek outreach and public involvement,
6 involvement at any point in development of that work
7 plan.

8 But as part of a water quality standards
9 procedure, it would be part of -- the public review is
10 part of that process.

11 Q. Okay.

12 And I'm just going to hit this now, but,
13 again, if the temporary standard was adopted by the
14 Commission and subsequently a petitioner was successful
15 in gaining approval from -- from this Commission for a
16 temporary standard, where would that be located in the
17 standards for interstate and intrastate surface waters?

18 A. They would be described in the classified
19 segments in the water quality standards in Sections 97
20 through 899.

21 Q. So there would be specific mention of the
22 temporary standard in the water body in which it's
23 located.

24 A. That's right.

25 Q. Okay.

1 Let's just continue with paragraph (5), then.

2 There's additional language that "The work
3 plan shall identify and account for each individual
4 discharge."

5 I believe this is -- we've already addressed
6 this point.

7 Is there anything further as to why you would
8 want to add the language that Amigos Bravos has
9 recommended or has -- has sought through -- through the
10 introduction of their testimony of their witnesses?

11 A. No.

12 Q. Okay.

13 Then let's just move to paragraph (6).

14 They're seeking to add additional "and
15 associated work plan" language.

16 Is that necessary?

17 A. No.

18 Q. Paragraph (7), temporary standards, they're
19 adding -- proposing to add language about work plans
20 that have to be adopted.

21 That's just -- and maybe -- is the work plan
22 adopted, or is it the petition that is adopted by this
23 Commission, in the case of a successful applicant for a
24 temporary standard?

25 A. It's all adopted.

1 Q. Okay. So the petition necessarily includes
2 the work plan.

3 A. Correct.

4 Q. Okay.

5 And if an applicant sought to make changes to
6 the work plan, how would that work?

7 A. He would have -- they would have to present a
8 petition to the Commission.

9 Q. The Department can't on its own seek to make
10 changes to a temporary standard without the Commission's
11 approval?

12 A. No.

13 Q. Without EPA's approval?

14 A. Correct.

15 Q. Okay.

16 Paragraph (8) -- we're almost through, I
17 believe, this -- these proposed changes -- there's
18 language here being proposed for addition about "ninety
19 days prior to the deadline to submit proposed changes to
20 the water quality standards in each succeeding triennial
21 review."

22 Is that language necessary?

23 A. No.

24 Q. Is that not -- or I should ask. Why is it not
25 necessary?

1 A. That kind of language is already covered in
2 the Water Quality Management Plan for water quality
3 standards rulemaking.

4 Q. Okay.

5 I believe those are all the changes to F, and
6 I'm just going to ask you to look at additional proposed
7 languages on their following page. It's in Section 12,
8 paragraph H.

9 There's proposed language to add -- to strike
10 through "NPDES" and add "Clean Water Act," for
11 permitting?

12 Is that -- what is your response to that
13 proposed change?

14 A. I would find that an acceptable change.

15 Q. You would find -- okay.

16 A. Right.

17 Q. So maybe you could describe why that would be
18 a beneficial change.

19 A. Because that would include not only point
20 source discharge permits but also the federal 404 dredge
21 and fill permit certifications.

22 Q. Okay.

23 And there's an additional change there, it
24 says -- additional language regarding "for discharges
25 existing at the time the temporary standard was approved

1 and adopted and subject to a commission approved work
2 plan."

3 What do you think about that language?

4 A. I again -- I don't think that's necessary.

5 Q. And why is the Department not finding that
6 necessary language?

7 A. Because, first of all, we don't make that
8 determination, and it's just -- it would disallow some
9 positive benefits of the temporary standard to the
10 watershed.

11 Q. So in essence, if that language is added, does
12 it preclude some future use by an applicant? Is that --
13 am I understanding what you're saying?

14 A. Yes.

15 Q. And could you give any example?

16 A. For example, if a community were previously
17 not tied into a treatment system, that would be a new
18 discharger.

19 Q. So is it -- is it the Bureau's position that
20 the changes proposed by Amigos Bravos, but for the
21 change that you just identified in H, which would be
22 valuable regarding Clean Water Act permits, you know, in
23 sum total -- but for that change, are they necessary to
24 the Department's petition for the temporary standard?

25 A. No.

1 Q. Furthermore, is it your position that they're
2 even beneficial?

3 A. No.

4 Q. Ms. Pintado, who does the Bureau anticipate is
5 likely to be an applicant for a temporary standard if
6 adopted by this Commission?

7 A. Municipalities primarily.

8 Q. Why is that?

9 A. Because of the adoption by the Department to
10 incorporate the narrative nutrient criteria primarily,
11 or in anticipation of new or more stringent EPA
12 recommendations for criteria, which we see on the
13 horizon.

14 Q. Did you have an opportunity to review the most
15 recent nontechnical filing that was submitted into the
16 record by the Village of Ruidoso and Ruidoso Downs?

17 A. Yes, I did.

18 MS. BECKER: With that, Commission, I'm going
19 to ask that you take note that there was the submittal
20 of a filing -- I believe -- is that October 13,
21 Ms. Pintado?

22 MS. PINTADO: Yes.

23 MS. BECKER: Earlier in the week.

24 Q. And do you have a copy in front of you,
25 Ms. Pintado?

1 A. I did. I think --

2 MS. BECKER: I would ask that you take
3 administrative notice that that has been submitted to
4 the hearing clerk for nontechnical testimony.

5 MS. LEMON: I have to find it.

6 Q. (BY MS. BECKER) Do you recall generally the
7 contents of that submittal by the Village of Ruidoso and
8 Ruidoso Downs?

9 A. Yes.

10 Q. Okay.

11 And what is your understanding of the
12 nontechnical testimony, the bases for why they would
13 have submit -- not why, but what they were stating in
14 their submission?

15 A. They were very supportive of a temporary
16 standard.

17 Q. And why is that?

18 A. For nutrients in particular.

19 Q. Okay.

20 So they might be first in -- you know, first
21 in line, or, in essence, they're expressing support
22 because they would like to take advantage of this?

23 A. Correct.

24 Q. Okay.

25 A. Found it. We have located the exhibit.

1 Q. I'll ask that question.

2 A. Do you want me to read anything from it?

3 "It would assist our communities as we work
4 with the Department to improve water quality in the Rio
5 Ruidoso."

6 Q. Okay.

7 Is that -- to the extent you know, does the
8 Village of Ruidoso already have a permit allowing them
9 to discharge?

10 A. Yes.

11 Q. And why would they need a temporary -- again,
12 I'm not speaking to their necessary example, but why
13 would a system that already has a permit seek a
14 temporary standard?

15 A. Because they cannot meet their permit limits.

16 (Simultaneous discussion.)

17 MR. CHAVEZ: Does he have a comment?

18 MR. DAIL: He was finishing a sentence. No
19 comment.

20 MR. CHAVEZ: Okay. Thank you.

21 MS. BECKER: With that, I would like to turn
22 to the rebuttal testimony of Ms. Shelly Lemon.

23 MR. HUTCHINSON: Mr. Hearing Officer, just
24 because you have that microphone on the telephone
25 receiver there, it doesn't -- it doesn't pick up any

1 sound unless the button is held down.

2 MS. PINTADO: So should I just take it off?

3 MR. HUTCHINSON: Yeah.

4 MS. PINTADO: Okay. Thank you.

5 MR. HUTCHINSON: It's not doing anything.

6 MR. CHAVEZ: You may proceed.

7 MS. BECKER: Okay. Thank you.

8 DIRECT EXAMINATION OF SHELLY LEMON

9 BY MS. BECKER:

10 Q. Ms. Lemon, did you prepare rebuttal testimony
11 for this triennial review?

12 A. No. As the acting bureau chief, I'm adopting
13 Dr. Hogan's written rebuttal testimony that was
14 previously filed as Rebuttal Exhibit 1.

15 Q. And have you familiarized yourself with
16 Dr. Hogan's testimony?

17 A. Yes.

18 Q. Okay.

19 And have -- do you have any changes to make to
20 it?

21 A. No.

22 Q. Do you adopt it as if it were your own?

23 A. I do.

24 Q. With that, I wanted to address Commissioner
25 Patterson's -- Pattison's -- excuse me -- concerns about

1 playa lakes.

2 Is there any change in the water quality
3 standards that are being proposed today by the
4 Commission in the triennial -- or -- excuse me -- by the
5 Department in this triennial review to playa lakes that
6 would result by this petition?

7 A. No.

8 Q. Okay. So there is no change or no impact to
9 playa lakes as a result of this petition.

10 A. No.

11 Q. Okay.

12 With that, I would like you to rebut the San
13 Juan Water Commission's testimony provided by
14 Mr. Nylander regarding designated uses.

15 Did you hear his testimony?

16 A. I did.

17 Q. Okay.

18 What is your response to that?

19 A. Revoking the rebuttable presumption is to undo
20 the purpose of the federal Clean Water Act. And that's
21 exactly what the San Juan Water Commission suggests that
22 you do. The EPA has clearly stated that limited aquatic
23 life and secondary contact recreation do not meet
24 fishable/swimmable goals.

25 The San Juan Water Commission is incorrect in

1 stating that the rebuttable presumption adopted by this
2 Commission in 2009 could be reverted back to the
3 pre-2009 designated uses for secondary contact
4 recreation without performing a UAA.

5 Furthermore, the San Juan Water Commission
6 supplied no evidence supporting their statements about
7 unreasonable transactional costs or damage caused by the
8 2009 action.

9 This Commission considered related arguments
10 during the past two triennial reviews and as a result
11 adopted an approach approved by EPA that resolves the
12 use attainability in ephemeral waters.

13 Q. Are UAAs for ephemeral streams unreasonable,
14 costly, unnecessary or burdensome?

15 A. No. The Bureau does not agree that UAAs place
16 an unreasonable cost burden on the state and its
17 citizens. In fact, the Bureau currently has an
18 expeditious and cost-effective approach that meets state
19 and federal regulations. The Bureau's hydrology
20 protocol can be applied to determine if a stream may be
21 classified as ephemeral in accordance with the process
22 in subsection 15C.

23 For example, the HP was applied to 18 streams
24 for a total cost of \$25,000 in contractor expenses.
25 That's a -- essentially a cost of less than \$1,500 per

1 UAA plus staff time. This is not an unreasonable
2 financial burden as the results were used to demonstrate
3 the appropriate and attainable standards in these
4 streams, which are also associated with 13 NPDES
5 permits, for use in all aspects of the Clean Water Act.

6 Q. And why is Mr. Nylander's proposal of keeping
7 secondary contact designated use but applying this
8 primary contact criteria -- is that even appropriate?

9 A. It's not.

10 Q. Why not?

11 A. The federal regulation that was recently
12 adopted in August, 2015 clearly states that in order to
13 have a non-101(a)(2) use you need to have a use
14 attainability analysis. And EPA has clearly stated that
15 secondary contact is not a 101(a)(2) use.

16 Q. So if I understood you correct -- your answer,
17 raising the criteria does not provide for the highest
18 attainable use.

19 A. That's correct, because he -- Mr. Nylander was
20 suggesting that the secondary contact designated use
21 remain as secondary contact. EPA does not consider that
22 a 101(a)(2) use. Therefore, a use attainability
23 analysis would be needed to designate that as secondary
24 contact.

25 Q. What prompts the Department to find a water

1 body to have primary contact? How do you -- how do you
2 as a Bureau decide what waters to look at and decide if
3 it's got primary contact?

4 A. EPA presumes that everything -- all waters are
5 fishable/swimmable.

6 Q. And does the EPA adoption -- I believe there
7 was testimony, and I believe Mr. Nylander's reliance on
8 EPA's adoption of the -- of secondary contact would
9 satisfy the UAA requirement of the Clean Water Act.

10 Is that your understanding?

11 A. Can you rephrase that?

12 Q. Okay. Let me see if I got -- got it right.

13 I understood Mr. Nylander's rebuttal testimony
14 to be that EPA had, in essence, approved secondary
15 contact for these nine segments and, therefore, a UAA
16 was not required.

17 Is that your understanding?

18 A. No. In the recent federal regulation, again,
19 it was clarified in Section 131.10(j) that a state must
20 conduct a use attainability analysis as described in
21 131.3(g) and paragraph (g) of this section whenever the
22 state designates for the first time or has previously
23 designated for a water body uses that do not include the
24 uses specified in Section 101(a)(2) of the act.

25 So in essence, even though it was previously

1 classified as secondary contact, a use attainability
2 analysis would be required to keep that designation.

3 Q. And is that what -- and remind the Commission,
4 what did the Department do? Did the Department stick --
5 find a UAA, or did the Department raise it up for
6 primary contact?

7 A. We did not find a UAA for the nine segments
8 that we are proposing to designate as primary contact.

9 Q. Okay.
10 Did you also file rebuttal testimony through
11 the filings of Dr. Hogan that you've adopted that speak
12 to this?

13 A. Yes.

14 Q. And what is that specifically? Is that -- I'm
15 referencing what was filed as NMED Rebuttal Exhibit 4.

16 A. This is -- Rebuttal Exhibit 4 is a letter from
17 EPA to the Department regarding the -- their approval of
18 the 2009 -- or 2005 triennial review. That was when we
19 proposed the limited aquatic life and secondary contact
20 uses for ephemeral streams.

21 And EPA did not approve those as based on the
22 rebuttable presumption because they are not considered
23 101(a)(2) uses.

24 Q. And so has EPA consistently applied the
25 rebuttable presumption to New Mexico's water quality

1 standards since that time?

2 A. They have.

3 Q. And it's your understanding that that's still
4 the requirement for the state to comply with rebuttable
5 presumption?

6 A. It is.

7 Q. Okay.

8 Why were those nine -- why did the Department
9 just petition those nine water segments to go from
10 secondary to primary contact?

11 A. When we did our review for this triennial
12 review process, we're required to review all of the
13 standards, and we found these nine water quality
14 segments that had secondary contact. They were the only
15 remaining water quality segments that were in our
16 standards that did not have a use attainability analysis
17 to designate the use as secondary contact.

18 We reviewed the information. We tried to
19 locate any use attainability analyses that may be
20 associated with these nine segments. There was no such
21 analyses.

22 So based on the rebuttable presumption and
23 also the information we gathered through the Bureau's
24 water quality surveys and field notes, we evaluated
25 these nine segments and thought it appropriate and

1 protective for them to be primary contact.

2 Q. So if the Commission adopts the nine segments
3 for primary contact as you have submitted in your
4 petition, will all the waters that are within your
5 jurisdiction in State of New Mexico be primary contact,
6 unless they have a UAA in place?

7 A. That is correct.

8 Q. Okay.

9 Do you keep a running list for the -- rather
10 does the Bureau keep a running list of items to present
11 for the next triennial review?

12 A. Yes, we do.

13 Q. Did you hear Commissioner Pattison's comment
14 to the Bureau about a topic possibly for the next
15 presentment?

16 A. Yes.

17 Q. And you took that into consideration?

18 A. Yes.

19 Q. Okay.

20 In response to Commissioner Hutchinson's
21 comment that he hoped the Department would object if
22 the -- if the Commission at a subsequent time -- you
23 know, again, if this were all approved and there was a
24 successful applicant who was petitioning for a temporary
25 standard -- if the Commission were going to approve

1 something that violated the antidegradation policy, how
2 would the Bureau address that?

3 A. I mean, it's our responsibility to go through
4 that process to ensure that the antidegradation policy
5 and implementation procedures are occurring. So we take
6 that very seriously, and we would -- obviously, I would
7 hope that -- the same thing that Commissioner Hutchinson
8 does, that, you know, somebody would -- well, the
9 Department would be active in that regard.

10 Q. Is the -- is the Department required to uphold
11 the antidegradation policy?

12 A. We certainly are.

13 Q. And currently you're acting bureau chief; is
14 that correct?

15 A. I am.

16 Q. Okay.

17 You were present for the testimony of
18 Ms. Conn?

19 A. I was.

20 Q. Okay.

21 Would you speak to the purpose of compliance
22 schedules as they already exist within your rules and
23 temporary standards? Could you speak to what purposes
24 those two serve?

25 A. A compliance schedule is essentially something

1 that's included in an NPDES permit to allow a discharger
2 to meet their effluent limits. And it usually deals
3 with the available technology and the operation and
4 maintenance that is required to get the plant operating
5 efficiently and effectively so that they can meet those
6 limits.

7 The difference between the compliance schedule
8 and our temporary standards proposal is the temporary
9 standard proposal is for a situation in which the
10 technology may be available, but it's not going to be
11 able to meet the effluent limits that are prescribed
12 either through a TMDL or through a new water quality
13 standard.

14 And so given that information, a temporary
15 standard allows more time to come into compliance for
16 the technology essentially to catch up or to allow the
17 community to implement different procedures that would
18 help eventually for them to achieve.

19 So it gives them -- it's more prescriptive and
20 based on what that petitioner really needs in order to
21 come into compliance. It's not necessarily just, you
22 know, operation and maintenance, whereas a compliance
23 schedule would be more for that type of situation.

24 Q. For a municipality -- this is a
25 hypothetical -- that has an existing NPDES permit, why

1 would a temporary standard be better than a compliance
2 schedule to meet a new or revised water quality
3 standard?

4 A. A temporary standard would be tailored to the
5 specific municipality, and they would be -- the
6 entity -- they're developing the work plan, they're
7 describing what they can do over time to meet the
8 standard, and they're developing their plan of action.

9 In a compliance schedule situation, it is the
10 EPA that is determining what the compliance schedule
11 will be through the NPDES permitting process.

12 Q. Do you recall Ms. Conn's statement that most
13 temporary standards would be sought for already impaired
14 waters?

15 A. Possibly, sure.

16 Q. Okay.

17 Is it -- is it -- what I'm trying to get at is
18 is it the Department's expectation or anticipation that
19 the temporary standard is primarily for impaired waters?

20 A. Is that our intention?

21 That's not our intention.

22 Q. And do you have reason to believe that it
23 makes a difference whether they're impaired or not
24 impaired?

25 A. No. It's to meet the water quality standard,

1 to ensure that water quality is met in all waters of the
2 state.

3 Q. And did you -- do you recall Ms. Conn's
4 statement that an unintended consequence of the
5 temporary standard might be to attract dischargers to a
6 water body where they weren't otherwise attracted? Did
7 you hear that testimony?

8 A. I did.

9 Q. And how do you respond to that?

10 A. The temporary standard does not preclude
11 multiple dischargers. Through the public participation
12 process and also through Department and Commission
13 review, those dischargers would be evaluated to
14 determine if they qualify for the temporary standard.

15 In situations where the temporary standard is
16 implemented and then, you know, some entity sees, oh,
17 there's a temporary standard there, that new discharger
18 or potentially new discharger would still have to go
19 through EPA review, reasonable, potential,
20 antidegradation, in order to ensure that any new or
21 increased discharge would not further impact the stream.

22 Q. As a -- as a bureau chief for the Surface
23 Water Quality Bureau, how would you control the process
24 such that if there was a successful applicant for a
25 temporary standard, that new dischargers to that same

1 water body wouldn't benefit from that temporary
2 standard, they're not -- you know, unintended benefit?

3 A. All federally permitted discharges have to go
4 through state certification through Section 401 of the
5 Clean Water Act. Through state certification, we can
6 essentially put in conditions of certification. We can
7 reject the permit if we feel it doesn't meet our water
8 quality standards, or we can provide comments that would
9 improve the permit.

10 Q. Does the final rule provide for that?

11 A. State certification -- Section 401 of the
12 Clean Water Act provides for state certification.

13 Q. And I'm going to -- do you have, by chance, a
14 copy of the final EPA rule in front of you?

15 A. I do.

16 Q. Would you please turn with me to page 51038.

17 A. Yes.

18 Q. Do you see the sentence beginning -- in the
19 first column, about a third of the way down, beginning
20 "By adopting"?

21 A. Yes.

22 Q. Would you please read that for the record.

23 A. "By adopting a water quality standards
24 variance, the state or authorized tribe lays the
25 groundwork for issuing a certification (possibly with

1 conditions, as per Clean Water Act section 401(d)) that
2 allows a federal license or permit to be issued."

3 Q. Please continue.

4 A. "Without a water quality standards variance,
5 the state or authorized tribe's only options might be to
6 deny certification which -- which prevents issuance of
7 the federal license or permit, or waive certification
8 and allow the license or permit to be issued without
9 conditions."

10 You want me to stop there?

11 Q. I think that's enough.

12 Does this -- does this indicate the harm that
13 potentially exists if the Commission does not adopt the
14 temporary standard?

15 A. It does.

16 Q. And what is that exactly?

17 A. I mean, if -- if we don't have this option, it
18 essentially -- like it says, it lays the groundwork for
19 state certification, and it allows us to provide for
20 better permitting and permit, I guess, conditions and --
21 what am I thinking of -- requirements in our state.

22 Q. So I think I'm about wrapping up here. The
23 last couple questions just have to do with this concept
24 of that Amigos Bravos is petitioning for new discharge
25 language.

1 Does the Surface Water Quality Bureau already
2 take into consideration the amount of dischargers into a
3 water body?

4 A. We do.

5 Q. Do you, in fact, know how many discharge
6 permits there are in the State of New Mexico?

7 A. There are approximately 130.

8 Q. And what does -- why is it your understanding
9 that -- that the temporary standard as proposed does not
10 include that language, regarding new discharges?

11 A. Well, as Ms. Pintado pointed out, I mean,
12 there are situations where there may be new or increased
13 discharges, situations where a community doesn't have a
14 centralized wastewater treatment facility and they are
15 creating a new way or implementing -- you know, they're
16 growing so much that they need a way to deal with their
17 waste, and so they're building a new facility. They're
18 capturing those septic tanks that may be providing
19 nonpoint source pollution.

20 So there are situations where, you know, it
21 might be a community that currently doesn't have a
22 wastewater treatment plant, but they are trying to get a
23 centralized system online, or, like in the case of Santa
24 Fe, it's growing, they're looking at capturing, you
25 know, part of the county, those septic tanks, and they

1 may be having an increased discharge.

2 And so those situations, you know, happen,
3 they need to provide some flexibility. A temporary
4 standard, you know, as written would not preclude them
5 from asking for a temporary standard to meet water
6 quality standards.

7 Q. And in addition to just human growth, were
8 there also concepts of natural disaster that were
9 indicated that would be very fitting for this?

10 A. Yeah.

11 Q. Okay.

12 Has the state implemented the narrative
13 nutrient criteria in the water quality standards or in
14 the NPDES certification process?

15 A. We have implemented the narrative nutrient
16 standard and TMDL documents, and also that includes
17 waste load allocations for permitted facilities. There
18 are -- I don't know off the top of my head, but there
19 are a handful of facilities currently in the state that
20 have nutrient limits in their NPDES permit.

21 And we have also used the antidegradation
22 policy and implementation procedures to implement
23 nutrient effluent limits for a municipality based upon
24 the antidegradation policy.

25 Q. With that, Ms. Lemon, is there anything that I

1 failed to ask or that needs to be addressed on rebuttal?

2 A. No, I don't believe so.

3 Q. Okay.

4 MR. VERHEUL: With that, the Department rests,
5 Mr. Hearing Officer.

6 MR. CHAVEZ: Thank you, sir.

7 Ms. McCaleb, San Juan, do you have any
8 questions for these witnesses?

9 MS. MCCALED: Yes, I do.

10 Thank you.

11 CROSS EXAMINATION

12 BY MS. MCCALED:

13 MS. MCCALED: Good afternoon.

14 Ms. Pintado, I would like to ask you a few
15 questions just to make sure that there is no confusion
16 about the San Juan Water Commission's final position in
17 this triennial review about the temporary standards
18 proposal.

19 In your testimony just a while ago, you
20 testified concerning the Water Commission's original
21 direct testimony of proposing that the Commission adopt
22 the temporary standards under its authority in the
23 state's Water Quality Act, its variance authority; is
24 that correct?

25 MS. PINTADO: Yes.

1 MS. MCCALED: And you just provided about five
2 reasons why that shouldn't occur, correct?

3 MS. PINTADO: Yes.

4 MS. MCCALED: And were you here for
5 Mr. Nylander's direct oral testimony?

6 MS. PINTADO: Yes.

7 MS. MCCALED: And did you hear him testify
8 that the San Juan Water Commission no longer proposes
9 that the Water Quality Control Commission use its
10 variance authority to adopt the temporary standards?

11 MS. PINTADO: No.

12 MS. MCCALED: So if the San Juan Water
13 Commission has withdrawn that position and indicated
14 through testimony that this Water Quality Control
15 Commission should adopt the temporary standards proposal
16 as a water quality standard, you would no longer have
17 the concerns you just testified about; is that correct?

18 MS. PINTADO: Yes.

19 MS. MCCALED: And you also testified
20 concerning -- testimony just now concerning the San Juan
21 Water Commission's original objections to the work plan;
22 is that correct?

23 MS. PINTADO: Yes.

24 MS. MCCALED: And were you here -- or did you
25 hear Mr. Nylander testify that should the Water Quality

1 Control Commission decide to adopt the narrower
2 temporary standard rule that has been proposed by the --
3 by the Bureau, that the San Juan Water Commission no
4 longer has those concerns and supports the adoption of
5 your proposal as written?

6 MS. PINTADO: I think I heard most of that. I
7 did not specifically hear the part about the work plan.
8 But yes.

9 MS. MCCALED: So if there is testimony on the
10 record that San Juan Water Commission supports adoption
11 of the Bureau's proposal as written, should this
12 Commission decide to follow the narrow -- or the
13 narrower approach, would your concerns be alleviated?

14 MS. PINTADO: Yes.

15 MS. MCCALED: Thank you.

16 My next questions, I believe, are for
17 Ms. Lemon.

18 Ms. Lemon, did you hear Mr. Nylander's
19 testimony, his oral testimony here about the purpose of
20 the San Juan Water Commission's testimony on the
21 rebuttable presumption issue?

22 MS. LEMON: I did.

23 MS. MCCALED: And that the San Juan Water
24 Commission was inviting the Water Quality Control
25 Commission to explore the possibility of -- with

1 revoking its adoption of the rebuttable presumption?

2 MS. LEMON: I did.

3 MS. MCCALEB: And you just testified that the
4 rebuttable presumption applies to the waters of the
5 state, correct?

6 MS. LEMON: Yes, as part of the Clean Water
7 Act.

8 MS. MCCALEB: And the rebuttable presumption
9 applies in New Mexico essentially through 20.6.4.98
10 NMAC, which applies to all nonperennial waters; is that
11 correct?

12 Let me restate that.

13 MS. LEMON: Thank you.

14 MS. MCCALEB: Under 20.6.4.98, which applies
15 to nonperennial waters, is it correct that the
16 fishable/swimmable uses are applied to those waters
17 based upon the rebuttable presumption unless there is a
18 UAA showing that that is improper?

19 MS. LEMON: I would say all waters of the
20 state are presumed fishable/swimmable unless a UAA
21 demonstrates otherwise.

22 MS. MCCALEB: Okay. So yes. I don't think we
23 have any disagreement that perennial waters are
24 fishable/swimmable waters.

25 But with regard to ephemeral waters or -- or

1 other intermittent waters, nonperennial waters, the same
2 fishable/swimmable requirements apply based on the
3 rebuttable presumption; is that correct?

4 MS. LEMON: For intermittent, yes.

5 MS. MCCALED: And are all nonperennial
6 streams -- is it your testimony that all nonperennial
7 streams are subject to the Clean Water Act?

8 MS. LEMON: I would say nonperennial streams
9 could be subject to the Clean Water Act as a water of
10 the state and water of the US.

11 MS. MCCALED: But isn't it true that you're
12 applying the rebuttable presumption of the Clean Water
13 Act to all non -- to all nonperennial waters in the
14 state?

15 MS. LEMON: Theoretically.

16 MS. MCCALED: And isn't it true that the
17 Department is actually challenging right now the scope
18 of EPA's jurisdiction, especially over ephemeral waters?

19 MS. LEMON: For waters of the US, but
20 currently that's in a stay, and so the old waters of the
21 US rule is in place.

22 MS. MCCALED: Do you agree that all ephemeral
23 streams in New Mexico are actually fishable?

24 MS. LEMON: They're not fishable.

25 MS. MCCALED: And that's because they only

1 contain water in response to rain events?

2 MS. LEMON: Yes.

3 MS. MCCALEB: And yet New Mexico, because of
4 the imposition of the rebuttable presumption, is
5 assuming that they are fishable and applying the
6 Section 101(a)(2) designated uses and associated
7 criteria; is that correct?

8 MS. LEMON: No. Our ephemeral designation is
9 97 for ephemeral waters, and that is limited aquatic
10 life, and it's not a fishable use.

11 MS. MCCALEB: I left out a step of my -- step
12 of my question there, then.

13 You are assuming that waters are not ephemeral
14 and, therefore, are fishable and swimmable unless you
15 have done a UAA to prove otherwise; is that correct?

16 MS. LEMON: Can you restate that?

17 MS. MCCALEB: Sure.

18 By application of Section 98, which applies to
19 intermittent waters --

20 MS. LEMON: Correct.

21 MS. MCCALEB: -- it is assumed that all
22 nonperennial waters fall into that category unless a UAA
23 has been performed that allows you to classify them as
24 ephemeral; is that correct?

25 MS. LEMON: Yes. Nonperennial waters are

1 assumed to be 98 unless proven otherwise.

2 MS. MCCALED: And that assumption is -- the
3 underpinning of Section 20.6.4.98 is the assumption that
4 all nonperennial waters are subject to the Clean Water
5 Act; is that correct?

6 MS. LEMON: It -- yes.

7 MS. MCCALED: Okay.

8 MS. LEMON: Section 101(a)(2).

9 MS. MCCALED: Thank you.

10 MS. LEMON: Um-hum.

11 MR. CHAVEZ: Amigos, do you have any questions
12 for this witness -- these witnesses?

13 CROSS EXAMINATION

14 BY MR. SCHLENKER-GOODRICH:

15 MR. SCHLENKER-GOODRICH: Good afternoon.

16 First, let me extend my appreciation for the
17 responses that the Department has provided on rebuttal.
18 I think it's very much clarified and focus the nature of
19 a variety of your proposals, and I think that will help
20 both in terms of all the parties' closing arguments, but
21 also in ensuring a more reasoned and informed decision.
22 So I very much appreciate the Department's responses.

23 I just have a few questions here which will,
24 hopefully, end the day, other than the Commission's
25 questions.

1 The first question I wanted to ask dealt with
2 the interplay between compliance schedules and with the
3 temporary standards proposal.

4 As I understand it, the Department's position
5 is that a compliance schedule would be the proper tool
6 to provide a Clean Water Act permittee with time to
7 comply with the water quality standard if that water
8 quality standard can be achieved within the five-year
9 NPDES permit cycle; is that accurate?

10 MS. LEMON: I wouldn't say within the five
11 years. Compliance schedules are at -- normally between
12 one and three years. If they're over one year, then the
13 permittee has to meet certain milestones, and that's
14 prescribed in the permit. So it's usually between one
15 and three years.

16 MR. SCHLENKER-GOODRICH: But typically within
17 the lifetime of that permit?

18 MS. LEMON: That is correct.

19 MR. SCHLENKER-GOODRICH: And then, conversely,
20 a temporary standard would be the proper tool where the
21 aquatic water quality standard has not been incorporated
22 into an NPDES permit through effluent limits and where
23 efforts to modify and update those facilities would take
24 longer than the life of a permit?

25 MS. LEMON: Not necessarily. A temporary

1 standard could also be less than five years. But it is
2 based on one of those six factors that Ms. Pintado spoke
3 about with the proposal. As opposed to just needing
4 time to get their operation and maintenance functioning
5 properly, a temporary standard has to meet the
6 requirement of one of those six factors in 131.10(g).

7 (G)?

8 MS. PINTADO: Yes.

9 MS. LEMON: Thank you.

10 So it's a little bit different reason for both
11 of these tools.

12 MR. SCHLENKER-GOODRICH: Understood.

13 Let's assume that a temporary standard is
14 approved for a particular water body segment.

15 If an existing facility on that water body
16 segment already holds a discharge permit and is already
17 meeting effluent limits, can that discharger take
18 advantage of a temporary standard and seek to lower its
19 effluent limits when its permit comes up for renewal?

20 MS. LEMON: As -- as the bureau chief, I mean,
21 through our state certification process, we would not
22 encourage that or approve that. I mean, we have the
23 ability, as I stated previously, through state
24 certification to put conditions on permits, and we have
25 been conditioning permits. So I would not anticipate

1 that happening.

2 MR. SCHLENKER-GOODRICH: So that would be
3 either a basis that to clarify for a 401 certification
4 where you would prohibit that from happening or the
5 Department's opposition to that discharger relying on
6 the temporary standard or even petitioning for a
7 temporary standard for that water body --

8 MS. LEMON: I mean, they could petition,
9 certainly, anyone can petition, but they have to prove
10 their case in front of this Commission, and the
11 Commission has to adopt it.

12 MR. SCHLENKER-GOODRICH: And --

13 MS. LEMON: So that would be their burden of
14 proof to say, you know, why they would qualify for a
15 temporary standard. If they are currently meeting that
16 effluent limit, I don't see how they could qualify.

17 MR. SCHLENKER-GOODRICH: Thank you.

18 Would conditions imposed by the condition on
19 the approval of a temporary standard be articulated in
20 the standards themselves that are included in -- I can't
21 remember what the sections were -- I think it was --

22 MS. PINTADO: 97 through 899. We have
23 placeholders for all of them.

24 MR. SCHLENKER-GOODRICH: So would those
25 conditions be in those sections explicitly?

1 MS. PINTADO: That's the way I understand it.
2 Yes.

3 MR. SCHLENKER-GOODRICH: Assuming that's the
4 way you understand it, if there's a sort of lack of
5 clarity regarding that, would the Department be
6 amendable to making that clear?

7 MS. PINTADO: I believe it would -- it should
8 be very clear in the petition what the conditions are,
9 and upon approval by EPA, you know, after Commission
10 approval, those would be very clear. But we would make
11 that available. Sure.

12 MR. SCHLENKER-GOODRICH: So -- and assuming
13 that if once they're in the standards, then that ensures
14 that in the context of, say, a 402 or 404 permit, those
15 conditions would, in fact, become enforceable.

16 MS. PINTADO: Right.

17 MR. SCHLENKER-GOODRICH: And if the conditions
18 weren't then articulated in the standards, then there
19 may be a risk that they wouldn't be translated into the
20 Clean Water Act permits and then a risk that they
21 wouldn't be enforceable, except in the context of, say,
22 a subsequent Commission review of that temporary
23 standard.

24 MS. PINTADO: I'm not sure if I understand
25 your question.

1 I see it -- well, reframing it in my mind
2 anyway, and I might appreciate some clarification from
3 you, it's similar to a UAA process where we adopt
4 with -- it's usually a criterion change or a use change
5 or both. The whole UAA doesn't go in the segment, but
6 the interpretation of that would stand in the UAA and
7 the approval process.

8 MR. SCHLENKER-GOODRICH: I guess,
9 fundamentally, it's the intent of the Department with
10 its proposal that conditions imposed by the Commission
11 would be translated into enforceable terms and
12 conditions in the Clean Water Act permits.

13 MS. PINTADO: Correct.

14 MR. SCHLENKER-GOODRICH: I want to turn now to
15 perhaps your favorite subject, the upgrade of the
16 segments to primary contact.

17 I believe that you testified that if not
18 upgraded the Department would have to prepare a use
19 attainability analysis; is that correct?

20 MS. LEMON: That's correct.

21 MR. SCHLENKER-GOODRICH: And would this cause
22 what you would view as unnecessary transaction costs on
23 the Department?

24 MS. LEMON: Conducting a UAA?

25 We don't feel that a UAA is necessary.

1 MR. SCHLENKER-GOODRICH: And so --

2 MS. LEMON: For -- go ahead.

3 MR. SCHLENKER-GOODRICH: I guess if EPA then
4 made you go through that process of doing the UAAs,
5 those would be -- that would be an unnecessary
6 transaction cost, because you don't think they're
7 necessary in the first place.

8 MS. LEMON: That's correct.

9 MR. SCHLENKER-GOODRICH: And then my final
10 question is with regard to the Clean Water Act 101(a)(2)
11 uses.

12 Throughout this hearing, we've been referring
13 to these as fishable/swimmable uses; is that correct?

14 MS. LEMON: Yes.

15 MR. SCHLENKER-GOODRICH: But is that a
16 shorthand characterization?

17 MS. LEMON: It is.

18 MR. SCHLENKER-GOODRICH: And does -- do Clean
19 Water Act 101(a)(2) uses encompass other protections,
20 not just me jumping into the water for a swim or fishing
21 for trout?

22 MS. LEMON: They include --

23 MS. PINTADO: Yes.

24 MS. LEMON: -- subcategories of aquatic life
25 except for limited aquatic life and primary contact

1 recreation.

2 MR. SCHLENKER-GOODRICH: So that would include
3 protections for aquatic life like shellfish and
4 macroinvertebrates?

5 MS. LEMON: That's correct.

6 MR. SCHLENKER-GOODRICH: Thank you.

7 No further questions.

8 MR. CHAVEZ: Thank you.

9 Chevron, any questions?

10 MR. ROSE: Just a couple.

11 CROSS EXAMINATION

12 BY MR. ROSE:

13 MR. ROSE: Mr. Hearing Officer, my questions
14 are directed at Dr. Dail, but if other folks have
15 information that would be appropriate for them to
16 answer.

17 Dr. Dail, do you recall whether the -- the
18 aluminum criteria that's been referenced -- I think it's
19 1988 aluminum criteria -- are those criteria an exhibit
20 in this proceeding?

21 MR. DAIL: I'm not sure I can answer that. I
22 know that the cover page by reference is in our exhibit.

23 MR. ROSE: And, Mr. Hearing Officer, would --
24 since we've referenced the criteria document a number of
25 times, I couldn't remember whether anyone, including

1 myself, had offered it as an exhibit, and since a
2 reference is to it, I think it would be appropriate, if
3 it's not an exhibit, for the Commission to take notice
4 of it. And I thought perhaps Dr. Dail might be familiar
5 with whether it had been offered in this proceeding.

6 But that's the purpose of the question. And I
7 know counsel is sort of busily looking through the list,
8 and maybe they can find it, but I couldn't find it. I
9 wasn't sure. So --

10 MS. PINTADO: Please.

11 MR. CHAVEZ: Would anybody have any objection
12 to that?

13 MR. SCHLENKER-GOODRICH: No.

14 MR. CHAVEZ: So yeah. I think that's fine.
15 Take notice.

16 But would we have the document itself?

17 MR. ROSE: Yeah. I think the document's
18 available -- I mean, it's available. We can
19 certainly -- if it isn't an exhibit, we can work with
20 the Department to provide copies.

21 MR. CHAVEZ: I would like to do that.

22 MR. DAIL: Counsel Rose, I have a paper copy,
23 but I'm certain you're meaning an electronic one.

24 MR. ROSE: I think we have to offer a paper
25 one eventually, copy it for the -- for the Commissioners

1 so that they can read it. I don't think --

2 MR. CHAVEZ: I think that would be totally
3 appropriate if we do have it.

4 MS. LEMON: We do.

5 MR. ROSE: I take it, Dr. Dail, you have a
6 handy-dandy copy -- you have a copy of it handy.

7 MR. DAIL: I do so.

8 MR. ROSE: You can -- you can show the
9 audience.

10 Were you here during testimony from Amigos
11 Bravos concerning their proposed proposal to the
12 aluminum -- change to the aluminum standard?

13 The reference has been back to the 1988
14 criteria, but my recollection is they proposed a
15 specific number.

16 MR. DAIL: Yes, sir. I was present and heard
17 that.

18 MR. ROSE: And I think you testified on this
19 in your direct testimony, in your written rebuttal, but
20 do the -- do the -- the federal -- they purport to
21 accept the federal criteria over the range of
22 hardnesses -- or over the pH range that we're talking
23 about, correct?

24 MR. DAIL: Over the pH range.

25 MR. ROSE: Do you recall whether the federal

1 criteria document and its recommended criteria for
2 aluminum has an applicable pH range?

3 MR. DAIL: Yes, sir. It's the same as New
4 Mexico's current hardness-dependent formula, which is
5 the pH range 6.5 to 9.

6 MR. ROSE: And under the criteria document,
7 are -- is there an EPA criteria for aluminum for pH less
8 than 6.5?

9 MR. DAIL: No, sir, there's not.

10 MR. ROSE: Okay. I have no further questions.

11 MR. CHAVEZ: Thank you.

12 Freeport, do you have any questions?

13 I'm assuming none.

14 Before we go to questions of the Commission --
15 or let's take a five-minute break and come back, and
16 then I think that should be enough to conclude the
17 hearing, because I know I've got some questions here the
18 Commissioner has sent in.

19 But let's take a five-minute break.

20 Thank you.

21 (Proceedings in recess from 2:33 p.m. to
22 2:41 p.m.)

23 MR. CHAVEZ: We're going back on the record.

24 At this time, I would like to see -- ask for
25 any questions from the Commission.

1 Mr. Chairman, members of the Commission.

2 MR. DOMINGUEZ: Before we get to us, I noticed
3 that Freeport was back in the room now.

4 MR. CHAVEZ: Thank you, Mr. Chairman.

5 MS. CHAPPELLE: My apologies.

6 We have no questions for these witnesses.

7 MR. CHAVEZ: Thank you for that clarification.

8 MS. CHAPPELLE: Thank you, Mr. Chairman.

9 MR. CHAVEZ: Mr. Chairman, back to you.

10 MR. DOMINGUEZ: Thank you, Mr. Hearing
11 Officer.

12 We'll now go to Commission questions.

13 CROSS EXAMINATION

14 BY THE COMMISSION:

15 MR. DOMINGUEZ: Commissioner Longworth.

16 MR. LONGWORTH: Thank you, Mr. Chairman.

17 I'm not sure who to direct this to. So
18 whoever is the appropriate expert to answer, feel free.

19 Some things were said in the rebuttal that --
20 you know, that didn't -- didn't add up for me, and so
21 I'll seek some clarification here.

22 MR. TONGATE: Can you speak up, please?

23 MR. LONGWORTH: I'll speak up.

24 So there are nine sections that are going to
25 be classified as primary that are currently secondary,

1 and it's my understanding from the testimony and the
2 rebuttal basically EPA said, my words, that since there
3 hasn't been a UAA done you have to change those to
4 primary.

5 Is that -- do I have that more or less right?

6 MS. LEMON: Federal regulation states that.

7 MR. LONGWORTH: Okay.

8 The question then I have is -- well, then
9 follow-up, make sure I understand the response to the
10 question about UAAs were -- I heard they're like \$1,500
11 to do a UAA or -- you know, essentially an
12 inconsequential cost, that they don't really cost
13 anything, so the cost is not a not -- nonprohibitive,
14 there's no -- doing a UAA is not cost prohibitive.

15 Is that -- did I understand that testimony
16 correct?

17 MS. LEMON: It does cost something, but part
18 of that cost -- that's part of our job, is to make sure
19 that we're applying the most appropriate and protective
20 criteria, and a UAA is part of that process.

21 MR. LONGWORTH: Okay. So it's not something
22 that's outside the normal scope of work.

23 And it's my understanding no UAAs have been
24 done in these sections and that's why they're being sent
25 to primary.

1 MS. LEMON: That's correct.

2 MR. LONGWORTH: Do UAAs provide any useful
3 information one way or the other, whether or not they're
4 a primary or a secondary?

5 MS. LEMON: A UAA would be if we were planning
6 to designate the water body as secondary contact. So we
7 wouldn't do a UAA to designate for primary contact.

8 MR. LONGWORTH: I -- I guess -- okay. Thanks.

9 So the only time you would think to do a UAA
10 is if you were to try to go from a primary down to a
11 secondary, you would never think to try to do a UAA to
12 keep a secondary a secondary.

13 Do I have that -- do I understand that right?

14 MS. LEMON: No. If you are trying to
15 designate a use that is a non-101(a)(2) use, then you
16 must conduct a UAA.

17 MR. LONGWORTH: Okay.

18 MS. LEMON: So if these segments were
19 secondary, and they should be secondary, then a UAA
20 would be conducted to determine and evaluate that.

21 MR. LONGWORTH: Okay. I'm not quite sure I
22 understand that, but fair enough.

23 So I guess my final question, then, is --
24 well, maybe not my final question. Since there's really
25 no -- I mean -- well, let me say this.

1 My understanding is the agency's perspective
2 is they did -- I heard testimony just now that there's
3 field notes and then private -- previously there's some
4 level of investigation has been completed to come to the
5 conclusion that this is a primary -- that this should
6 have a primary designation; is that correct?

7 MS. LEMON: Yes.

8 MR. LONGWORTH: So there was some
9 investigations done to figure out this should be primary
10 other than the fact that federal statute has to be
11 primary.

12 MS. LEMON: Yes.

13 MR. LONGWORTH: So what would it -- and UAAs
14 essentially are part of your daily book of business.

15 MS. LEMON: It's part of our responsibilities.
16 Yes.

17 MR. LONGWORTH: Okay.

18 And I'm just curious as to why a UAA was not
19 done to assess whether or not secondary would be
20 appropriate for some of these reaches -- and maybe not
21 all of them, but some that I'm familiar with, given
22 to -- given the fact that they could be ephemeral, they
23 could be intermittent, they could be in gray areas.

24 And I look at it to -- to ensure that, you
25 know, we just didn't unnecessarily flip them to primary

1 standard.

2 MR. DAIL: Commissioner Longworth, if I could
3 get you to restate that.

4 Are you asking what other evidence in addition
5 to the fact that they need to revert to that did the --
6 did the Bureau gather in support of this provision --
7 this proposal?

8 MR. LONGWORTH: So let me ask the question
9 again.

10 It's my understanding that there's been field
11 notes, some Internet searches, and then just by federal
12 law these have to be considered primary, because they do
13 not have any UAAs.

14 MR. DAIL: Yeah. Well, in most instances, I
15 did -- I wrote the memo in support of these proposed
16 changes, and I worked with quite a few people with our
17 Bureau, but also members of our Bureau that had perhaps
18 moved on to other bureaus, such as Groundwater Bureau,
19 that were key on surveys of these water bodies.

20 We also consulted with our staff in Silver
21 City regarding how these parts of the river are used.
22 In many cases, you may find evidences of Swim At Risk
23 signs, but those are indicative of the fact that people
24 are using these water bodies in this way.

25 All of them are essentially perennial water

1 bodies, and all of them showed some kind of use, even if
2 that use is not necessarily advisable. Those
3 protections need to be in place. They're required by
4 law. So we over -- in an overabundance of caution
5 investigated those uses and were able to attribute those
6 uses to those water bodies.

7 MR. LONGWORTH: So you, in essence, did -- now
8 I'm really confused.

9 So you did some -- more than just go out and
10 do some field notes and Internet searches and other
11 thing, Swim At Your Own Risk.

12 Let me ask on that. Why do you think it says
13 Swim At Your Own Risk?

14 MR. DAIL: I think this -- for instance --

15 MR. LONGWORTH: Let me rephrase.

16 Why do you think it says Swim At Your Own
17 Risk?

18 I think that says that we're talking about
19 above Caballo and below Elephant Butte.

20 MR. DAIL: Also below Sumner, I believe --

21 MR. LONGWORTH: Below Sumner, too.

22 MR. DAIL: -- is the one place that I've seen
23 that sign.

24 MR. LONGWORTH: Okay. That's --

25 MR. DAIL: And of course, there's a lot of

1 camp sites there right below the dam. Obviously, a dam
2 release could make swimming quite a bit hazardous at
3 that spot. But it is used in that way.

4 MR. LONGWORTH: Okay.

5 And so a dam -- essentially, a dam release has
6 nothing to do with quality issues.

7 MR. DAIL: Correct.

8 MR. LONGWORTH: Okay.

9 So what I'm getting at if you've done all this
10 work, why do you do it in the format of a UAA that would
11 then result in a conclusion that it's not a UAA?

12 MR. DAIL: Well, this was an overabundance of
13 our -- you know, it is the case that a UAA is not
14 necessary to revert back to primary contact use.

15 MR. LONGWORTH: Right.

16 MR. DAIL: That's not required.

17 MR. LONGWORTH: Right.

18 MR. DAIL: In fact, on the face of it, the
19 research I did was not required.

20 MR. LONGWORTH: Right. No. I understand it's
21 not required to do that.

22 I'm asking why, since it had been current,
23 it's been always in this thing, in this secondary use
24 category -- why the agency chose not to investigate this
25 from the standpoint of a UAA to ensure that the

1 secondary isn't the more appropriate designation,
2 because, as you said, they didn't -- the agency doesn't
3 have to do anything, by federal law it has to be
4 primary.

5 MR. DAIL: Correct.

6 MR. LONGWORTH: A UAA hasn't been done.

7 MR. DAIL: And these are existing uses, and
8 you cannot remove an existing use by UAA or other FIAT.

9 MR. LONGWORTH: Okay. Well -- so now I'm
10 confused.

11 Is it because of the use or because of the
12 statute?

13 MS. LEMON: It's both. We -- through our
14 requirement to evaluate the standards every three years,
15 during our evaluation of these nine segments -- because
16 we did a search for which water quality segments are
17 currently non-101(a)(2) uses. Okay. We found these
18 nine segments. They had secondary contact, which is
19 considered a non-101(a)(2) use.

20 So we said is there any supporting
21 documentation to determine that these are indeed
22 secondary contact? There was no supporting
23 documentation.

24 So we did further investigation. The
25 investigation and evidence that we found supported

1 primary contact designation as opposed to secondary
2 contact. Had we found evidence in existing uses to
3 support secondary, we would have gone the UAA route to
4 designate these properly as secondary contact.

5 MR. LONGWORTH: So you -- you did rule -- you
6 did do some research, you didn't rely on the statute in
7 and of itself.

8 MS. LEMON: That's correct. That's Mr. Dail's
9 memo.

10 MR. DAIL: In essence, it's not just let's do
11 our duty and look at these. That duty was to figure out
12 whether maybe we would have to write a UAA on some of
13 these water bodies for that reason, that it would remain
14 secondary contact.

15 MR. LONGWORTH: And I'm still confused by
16 this, because, I mean -- so for example, in the Caballo
17 to Elephant Butte reach, so if we were to go below
18 Elephant Butte Dam right now --

19 MR. DAIL: Yes.

20 MR. LONGWORTH: -- could you swim there?

21 MR. DAIL: Actually, I believe the releases
22 have been slowed, and I do know that the evidence in
23 support of that reversion to a primary contact use was
24 the fact that people were using inner tubes, like
25 tire -- inflatable inner tubes, to go down that stretch

1 of the reach.

2 MR. LONGWORTH: But if we start getting into
3 really semantics and concerns with the actual area
4 you're defining, is that entire reach open to the
5 public?

6 MR. DAIL: Perhaps not. I -- I could not tell
7 you.

8 MR. LONGWORTH: So --

9 MR. DAIL: But within the segment those uses
10 were occurring.

11 MR. LONGWORTH: Well, I'm certain they're not
12 occurring below Elephant Butte for quite a ways, because
13 they're not owned by -- they're owned by the
14 reclamation, and they have dam releases, and they can't
15 have people swimming there. It's illegal.

16 MR. DAIL: That use may be illegal, but it's
17 probably ought to be a protected use. In my estimation,
18 it should be.

19 MR. LONGWORTH: Well, fair enough.

20 But there was no UAA to determine whether or
21 not it should or should not be the primary or secondary.
22 It's just there was a general review done, and you saw
23 some inner tubes. And I understand that. I mean,
24 there's certainly some truth about that.

25 But my point -- question is I'm just not

1 really -- I'm still confused, and I'm not really
2 comfortable with how we got there. And that's just my
3 perspective and where I'm coming from in these
4 questions.

5 I appreciate there's a statutory requirement.
6 I'm just not understanding why -- you know, I'm just not
7 understanding how in depth we got into the UAA issue to
8 see if primary was really necessary. And it sounds to
9 me like that it was, well, the statutory says so,
10 let's -- and then there's a little extra work done.
11 Fair enough.

12 And I think that's -- that's probably about
13 the answer to my question.

14 So, Mr. Chairman, thank you.

15 MR. DAIL: Thank you.

16 MR. DOMINGUEZ: Commissioner Hutchinson.

17 MR. HUTCHINSON: Okay. This is going to the
18 changes to ephemeral and the actual listing of those
19 segments. And maybe all three of you will be able to
20 chime in on this, but -- and this is more concerning the
21 harm that may fall to the state, federal land managers,
22 private property owners, local governments, et cetera.
23 And more going to the 401 certification.

24 There was a reading from page 1 -- 51038 that
25 went to that point on the 401 certification. And I --

1 in listening to that, I think my concerns became
2 greater, because if it takes a UAA on all of these
3 nonclassified -- I'm going to call them nonclassified
4 segments -- that's a lot of UAAs.

5 Were you present during Mr. Nylander's
6 testimony concerning this area of questioning?

7 MS. BECKER: I believe this is a question for
8 Ms. Lemon.

9 MR. HUTCHINSON: Or any of the panel, but
10 mostly, I guess, Ms. Lemon.

11 MS. LEMON: Mr. Chairman and Commissioner
12 Hutchinson, yes, I was.

13 MR. HUTCHINSON: And I should have asked this
14 question of -- of Mr. Nylander, but I seem to have heard
15 an in -- a -- two statements that he made, that there
16 was 100,000 miles or 100,000 segments, and I think he
17 interchanged those two -- two things.

18 Would that be a close estimate of how many
19 segments we might have in the state?

20 MS. LEMON: Mr. Chairman, Commissioner
21 Hutchinson, we certainly agree that there are a lot of
22 nonperennial waters in the State of New Mexico; however,
23 this process is designed to be action driven for areas
24 where a UAA would be required for an NPDES permit, for
25 example. If you notice the segments that we're asking

1 to be classified as ephemeral, 13 of them are associated
2 with NPDES permits.

3 So it is designed -- I mean, our approach is
4 when it's needed, we will do it. We're not going to
5 necessarily do a statewide, unless that is something
6 that is required and needed, but we are focusing on the
7 areas of concern, the areas that need further
8 regulation, and that's where we are applying these UAAs.

9 MR. HUTCHINSON: If we are -- if we are
10 looking at this as on an as-needed basis, and let's say
11 I'm a county government, and I'm going to cross one of
12 these -- I'll call them nonclassified segments -- I'm
13 going to cross one of these with a county road, and
14 because of maybe the frequency of flash flood events,
15 I'm going to put a culvert in there. And now I'm going
16 to go to several ifs.

17 If the EPA is successful in having their WOTUS
18 rule upheld, they are contending that those are waters
19 of the US, and therefore would require a 404 permit
20 which would require state certification under 401.

21 This statement that was read into the record
22 says that absent a classification of those otherwise,
23 the state wouldn't be -- wouldn't issue a 401 positive
24 on it.

25 So there I am, I'm county government, trying

1 to put this in for the safety and welfare of the public,
2 and yet now I can't even -- I can't even get the permit,
3 I can't get the 401 certification, because you can't
4 issue it.

5 I see that as -- as a significant problem and
6 a significant cost beyond the \$1,500 to do a UAA.

7 But if we assume -- and going to more ifs
8 here -- that there are 100,000 segments or 100,000
9 miles, but let's use 100,000 segments, which seems to be
10 maybe low to me, that's \$150 million at 1,500 each. And
11 I don't know that we'd have to do that as an action item
12 on every single one of them, but it could quickly become
13 cost prohibitive.

14 MS. LEMON: I'm sorry, Commissioner
15 Hutchinson.

16 Are you referring to the water quality
17 standard variance language that was read, or are we
18 talking about the hydro protocol UAA -- like I'm not --
19 I'm not following. I'm sorry.

20 MR. HUTCHINSON: Okay. Well, let's go to
21 that, because that's what that section was essentially
22 talking about.

23 It would -- in order to create impetus for an
24 action on the part of the Department, then the county's
25 going to have to come to here and apply for a temporary

1 standard, in order to --

2 MS. LEMON: Not -- no.

3 MR. HUTCHINSON: -- in order to get a class --
4 or get a temporary standard to -- to put the culvert in,
5 in order to get 401 certification.

6 MS. LEMON: No. That process would be the
7 same as it is right now. I -- I still don't understand
8 where there's a connection.

9 (Discussion off the record.)

10 MS. BECKER: I'm advising my client to see if
11 they could better address when a temporary standard
12 would be necessary in this example or why it would not
13 be necessary in this example.

14 MS. PINTADO: Sure. The language in the
15 federal rule speaks to during a restoration procedure
16 possibly being proposed that may require 404 dredge and
17 fill permit. States normally would certify to that
18 action if any conditions needed to be added.

19 If the action was going to temporarily in the
20 restoration process cause some degradation, that -- that
21 would be allowed up to a point. I -- right?

22 MS. LEMON: (Nods head.)

23 MS. PINTADO: Okay.

24 I don't do dredge and fill permits here, but
25 that's my understanding what that means.

1 That's -- if it were significant, say a dam
2 removal that would cause significant, you know,
3 degradation, but that process was beneficial to a
4 community, then, you know, we might want to consider
5 having a temporary standard so it could be certified, or
6 to -- I'm sorry. I shouldn't say it like that.

7 It could still be certified and allowed, but a
8 temporary standard put in place would give them
9 milestones to achieve. It's not that it's required.

10 MR. HUTCHINSON: Okay. Let's move away from
11 the idea that you might be applying for a -- for a
12 temporary standard.

13 The stream that the county is trying to put
14 this culvert in is classified as fishable or swimmable,
15 even though it may not be. And if -- and again, we're
16 going to the if.

17 If EPA's successful in having their new WOTUS
18 upheld, then there would be required a permit to get
19 that culvert in; is that not correct?

20 MS. PINTADO: I can't speak to that. I'm
21 sorry. I'm not an expert on the WOTUS.

22 MS. LEMON: Or 404.

23 MS. PINTADO: Or 404.

24 MR. HUTCHINSON: Okay.

25 Are you familiar with the party here in Santa

1 Fe County that was prosecuted for cleaning an arroyo and
2 that it is one of those classified segments?

3 MS. PINTADO: No. I'm sorry. I'm not really.

4 MR. HUTCHINSON: Okay.

5 It's -- it's that exact type of mischief that
6 really troubles me, because they were facing a
7 compliance order from EPA. EPA felt that they had the
8 jurisdiction and enforceable capacity, and so who knows
9 when or who they would attempt to enforce that on.

10 And so I think we are possibly setting
11 ourselves up for a lot of mischief and potential
12 problem.

13 With that, I -- Mr. Chairman, I --

14 MR. VERHEUL: If I might respond and clarify,
15 Commissioner Hutchinson, I think you've just articulated
16 just one of the many examples why the Department is
17 currently opposing the EPA's implementation of the
18 waters of the US rule.

19 MR. HUTCHINSON: And I understand that, too.

20 Thank you.

21 MR. DOMINGUEZ: Commissioner Pattison.

22 MR. PATTISON: Thank you, Mr. Chairman.

23 Earlier in your rebuttal, Ms. Lemon, you
24 responded to a question -- excuse me -- a question from
25 Ms. Becker regarding the -- any changes as far as playa

1 lakes are concerned, and there -- and you responded no,
2 they're not in this document.

3 And I agree; however, there are implied or
4 secondary effects on playa lakes, I believe. And one of
5 those would be on page 2, line 12, the definition of
6 closed basin.

7 And that, I believe, is -- isn't that new
8 language?

9 MS. PINTADO: Yes.

10 MS. LEMON: Yes. That is new language.

11 MR. PATTISON: Is -- does a playa lake fall
12 under a closed -- classified as a closed basin or -- is
13 it a closed basin?

14 MS. LEMON: I believe the definition in the
15 standards was read previously by Mr. Kougioulis as a
16 shallow closed basin lake.

17 MR. PATTISON: So it is. Okay.

18 MS. LEMON: (Nods head.)

19 MR. PATTISON: Then any -- is the term "closed
20 basin" used otherwise in this document than just the
21 definition?

22 MR. DAIL: It is in regard to the Mimbres,
23 which is a river that lacks connectivity. It kind of
24 peters out near Deming.

25 MR. PATTISON: Okay.

1 MR. DAIL: In reference to that, that's the
2 Mimbres closed basin.

3 MR. PATTISON: And I understand that is a
4 closed basin.

5 MR. DAIL: Yes. And it's a river.

6 And then there's the Tularosa closed basin, as
7 well.

8 MR. PATTISON: In the use in this document,
9 though, is that specifically for those two, or does it
10 refer to closed basin -- apply to closed basins in
11 general?

12 MR. DAIL: Well, I wouldn't -- I would have to
13 point out that it -- you know, the playa lakes is
14 perhaps a type of closed basin.

15 Is that where we're going?

16 MR. PATTISON: Yes.

17 MR. DAIL: Yes. And the Department focuses,
18 you know, largely on these perennial waters such as the
19 Mimbres and Tularosa in terms of water quality.

20 MR. PATTISON: But they wouldn't have a side
21 effect on a playa lake, or would they?

22 MR. DAIL: I think, as Ms. Lemon pointed out,
23 in most regards that these probably wouldn't undergo
24 scrutiny unless there was an action.

25 Is that correct, Ms. Lemon?

1 MS. LEMON: Yes.

2 MR. PATTISON: Okay.

3 In use of the terms "nonperennial waters," I
4 assume that playa lakes are -- and prairie potholes are
5 part of that definitions?

6 MS. LEMON: Mr. Chairman and Commissioner
7 Pattison, playa lakes are a category of nonperennial,
8 they can also be perennial.

9 MR. PATTISON: Okay.

10 If you had a reference in here that would
11 apply to all nonperennial waters, then they would
12 apply -- that would have an application to playa lakes,
13 correct?

14 MS. LEMON: That is correct.

15 MR. PATTISON: Okay.

16 MS. LEMON: And that has not changed.

17 MR. PATTISON: It doesn't happen here in this
18 document?

19 MS. LEMON: We did not propose any changes to
20 that --

21 MR. PATTISON: Okay.

22 MS. LEMON: -- in these proposals.

23 MR. PATTISON: Thank you.

24 The question as far as aquatic life was
25 concerned, I believe the Amigos Bravos asked about that,

1 but is there aquatic life in playa lakes?

2 MS. LEMON: Mr. Chairman, Commissioner
3 Pattison, yes, there -- there are aquatic life. It
4 depends on the playa lake, but playa lakes do have
5 aquatic life.

6 MR. PATTISON: Okay.

7 Is -- are there references in this document
8 that mention aquatic life that would have or would not
9 have an application to playa lakes?

10 MS. LEMON: We have -- Mr. Chairman,
11 Commissioner Pattison, we have aquatic life designations
12 or subcategories of aquatic life for all categories of
13 surface waters.

14 MR. PATTISON: Okay. That -- that answers
15 that question.

16 How about the interpretation of the term
17 "ephemeral waters"? Does that apply to playa lakes or
18 not?

19 MS. LEMON: It may apply to playa lakes.
20 Again, it depends on the specific lake in question.
21 There are ephemeral playa lakes.

22 MR. PATTISON: I suspect there are.

23 MS. LEMON: Yes. I would suspect there are,
24 too.

25 MR. PATTISON: But there are other playa lakes

1 that don't have any water in them for maybe more than a
2 year or two.

3 Okay. On page 2, item number 6, a new
4 definition for irrigation storage, and that means
5 storage water to supply the needs of beneficial plants.

6 And if you had -- and I believe there are
7 instances where a farmer can -- when he gets extra
8 rainfall and it accumulates in a playa lake, will take
9 advantage of that water and irrigate with it rather than
10 pump from their own well.

11 Is that term -- would it apply to that
12 situation, where you had a playa lake for storage of
13 water that you would subsequently irrigate with?

14 MS. LEMON: Mr. Chair, Commissioner Pattison,
15 it's a possibility. I mean, if they're storing
16 irrigation water, it seems to fit this definition.

17 MR. PATTISON: Okay.

18 Mr. Chairman and Ms. Lemon, the purpose in my
19 asking these questions goes to the second question that
20 Ms. Becker asked you about looking into my suggestions,
21 because a -- the maybe thousand playa lakes in New
22 Mexico or more, those land owners on which those playa
23 lakes occur need to know what their situation is.

24 So these implied or secondary applications of
25 the various parts of these standards need to be so that

1 those people can know where they stand -- I'm sorry.

2 MS. LEMON: Sorry.

3 Mr. Chair, Commissioner Pattison, I just
4 wanted to also emphasize that irrigation and irrigation
5 storage are designated uses that are applied or
6 designated to classified waters of the state.

7 So in the case of the intermittent category or
8 unclassified water, it does not have a designated use of
9 irrigation storage. So if your playa lake is not in
10 Section 101 through 899, like specifically named in
11 those classified segments, the irrigation storage
12 designated use would not apply.

13 MR. PATTISON: Okay.

14 MS. LEMON: Because it's not a designated use
15 for those segments, for that intermittent or ephemeral
16 segment.

17 So that concern may or may not apply. It
18 depends on if those playa lakes are specifically named
19 in the classified segments that have irrigation storage
20 as a designated use.

21 So just because it's here doesn't mean it's
22 applied to all waters, is what I'm getting at.

23 MR. PATTISON: Okay. All right.

24 Well, thank you for that further
25 clarification.

1 That brings up the -- another question about
2 the cattle feedlot where the runoff runs into a playa
3 lake.

4 And how does that fit in with these standards?

5 MS. LEMON: I -- I don't know if I can answer
6 that question.

7 MR. PATTISON: Well, I appreciate that, and --
8 because it doesn't occur but one time that I know of.
9 So -- and maybe that's the only time in the whole --
10 whole State of New Mexico. But it does -- it does
11 happen.

12 What is a UAA?

13 And I've read the -- what the acronym stands
14 for, but tell me what it is and what it's kind of used
15 for.

16 MR. DAIL: Well, of course, the use
17 attainability analysis, which you already understand
18 what it stands for, is essentially a tool to determine
19 the proper uses of a body of water.

20 So it's a scientific investigation, if you
21 will, and it requires a preponderance of evidence
22 collected along several lines to support or in some
23 cases remove a designated use if that use is deemed not
24 attainable for the six reasons that are in 131.10(g) of
25 the federal administrative code.

1 MR. PATTISON: Okay.

2 In the instance where a playa lake is used for
3 livestock watering --

4 MR. DAIL: Yes.

5 MR. PATTISON: -- and -- how did it apply to
6 that, or would it?

7 MR. DAIL: If it's -- if it's an unnamed -- I
8 think Ms. Lemon may have covered this by saying that
9 it's an unnamed body of water and it doesn't necessarily
10 cover the terms of those protections for livestock
11 watering. I'm sure it's used that way.

12 MR. PATTISON: Yes, sir.

13 In other words, if --

14 MR. DAIL: Oh, excuse me.

15 I'm being reminded that that is a protected
16 use of -- intermittent -- if it's an intermittent playa
17 lake, it is a livestock watering designated use, which
18 is a default use for that.

19 MR. PATTISON: Yeah.

20 So would there be an occasion where a UAA
21 would be applied for a farmer to continue to use his
22 playa lake for livestock watering?

23 MR. DAIL: If it is an intermittent playa
24 lake, it's a protected use. I don't see a circumstance
25 where the farmer would have to write a UAA to continue

1 that use. It's an existing use.

2 MR. PATTISON: And that would not occur in, as
3 Commissioner Hutchinson mentioned, the federal EPA's
4 waters of the US regulations?

5 And I --

6 MR. DAIL: I don't feel confident to speak on
7 that regulatory issue.

8 MR. PATTISON: Okay.

9 And I'm sorry. That is -- I'm trying to look
10 into the future, and that's my purpose.

11 MR. DAIL: Understood.

12 MS. LEMON: Mr. Chair, Commissioner Pattison,
13 I believe in that instance the use attainability
14 analysis would be used to remove the livestock watering
15 use which wouldn't be the case if it's an existing use.
16 If it's existing, or it's designated, then that use is
17 protected.

18 MR. PATTISON: Okay. All right.

19 Well -- and again, I appreciate your
20 willingness to look into further categorizing playa
21 lakes, prairie potholes, so that implied applications do
22 not occur as much as possible.

23 Thank you, Mr. Chairman.

24 MR. DOMINGUEZ: Commissioner Dawson.

25 MR. DAWSON: Thank you, Mr. Chairman,

1 Mr. Hearing Officer.

2 I believe, Ms. Lemon, you stated that -- is
3 there 18 streams that have UAAs?

4 Is that -- or was that you, Dr. Dail?

5 MS. LEMON: Mr. Kougioulis might be more -- he
6 conducted the UAA and provided the document.

7 Is it okay for him --

8 MR. CHAVEZ: Pardon? Would you repeat that?

9 MS. LEMON: Mr. Kougioulis conducted the use
10 attainability analysis on these -- for this line of
11 questioning.

12 MR. CHAVEZ: Okay.

13 MS. LEMON: Is it okay if he comes up here and
14 answers these questions?

15 MR. CHAVEZ: Absolutely.

16 MS. LEMON: Okay. Kougioulis.

17 MR. KOUGIOULIS: Commissioner Dawson, could --
18 would you repeat the question for me?

19 MR. DAWSON: Yes.

20 I believe I heard -- I thought it was from
21 Ms. Lemon, it might have been from Dr. Dail --
22 apparently there's 18 streams that have UAAs; is that
23 correct?

24 MR. KOUGIOULIS: I think the way -- so it
25 would -- originally the UAA, a singular UAA as a

1 package, was submitted -- or was looked at with 18
2 stream segments.

3 MR. DAWSON: Oh, okay.

4 MR. KOUGIOULIS: Because of the way we segment
5 and create or divide sections, it turned out that one of
6 those or two of those stream segments needed to be
7 divided. So it ended up being 20 stream segments that
8 were submitted to EPA Region 6 in a singular UAA.

9 MR. DAWSON: Okay.

10 Do you have an idea -- estimate on how much
11 time it takes for them to do a UAA?

12 MR. KOUGIOULIS: For EPA to review?

13 MR. DAWSON: Yes, or for the process -- to
14 complete or process a UAA.

15 MR. KOUGIOULIS: The process of a UAA is very
16 much dependent on the particular complexity. It can be
17 very simple, and it can be more complex. It is a
18 site-specific process, but at the same time, if you look
19 at the evaluation criteria that we have, some
20 conclusions you may reach very soon in the process,
21 other ones may require that you look further. And then
22 again, it may elevate you to another level where you
23 have to look further.

24 The whole thing is designed to end up with a
25 satisfactory conclusion and that you demonstrate and

1 discuss that in the UAA.

2 So it is conditional, but they by no means
3 have to be burdensome.

4 MR. DAWSON: So it could -- it could take a
5 considerable length of time, I mean, it could take a
6 year or two maybe, or do you --

7 MR. KOUGIOULIS: Oh, I would not -- I mean,
8 maybe Chris could -- they could talk about the Chino
9 UAA, which I think is probably one of the more
10 complicated UAAs that you may come across.

11 I can speak to the ones in which I helped
12 prepare the particular package that went to UAA -- EPA,
13 and those were not that complicated.

14 MR. DAWSON: Do you -- do you have a rough
15 idea about how many of those UAAs were applied for with
16 requested water quality standard changes?

17 MR. KOUGIOULIS: Specific to the hydro
18 protocol or just UAAs in general?

19 MR. DAWSON: UAAs in general.

20 MR. KOUGIOULIS: I can tell you of my
21 knowledge of the hydro protocol. We have three UAAs.

22 How many UAAs in general have we submitted or
23 gone through us to EPA Region 6, not just HP?

24 MS. PINTADO: Oh, gosh. I'd have to add them
25 up. But over the past three years -- seven -- seven

1 packages, and they -- some of them address multiple
2 water bodies. As in the case of the HP UAAs Jodey was
3 speaking of -- Mr. Kougioulis was speaking of, there
4 were 18, ended up being 20. We did Galisteo Creek,
5 Santa Fe River, and four nonperennial waters that you
6 discussed.

7 MR. KOUGIOULIS: Yes. For the closed basins,
8 the Tularosa Valley and the Mimbres and also the Pecos
9 River basin. Those were four segments in one singular
10 UAA.

11 But these, again, I'm referring to the HP. We
12 have other reasons why you may do a UAA, as Dr. Dail's
13 testimony about the Mimbres and -- or -- sorry -- the
14 Animas --

15 MS. PINTADO: Animas.

16 MR. KOUGIOULIS: -- the Animas was a UAA of a
17 different type.

18 MR. DAWSON: In your language regarding
19 temporary standards, do you have any idea about how long
20 that might take the process to process?

21 MS. PINTADO: I -- really I don't, but I know
22 the rulemaking process can take up to six months. So
23 you would add that onto however long it would take to
24 develop a petition.

25 MR. DAWSON: Okay.

1 That's all the questions I have.

2 Thank you.

3 MR. DOMINGUEZ: Mr. Longworth -- or
4 Commissioner Longworth, I believe you had a follow-up
5 question.

6 MR. LONGWORTH: Yeah, I do. I'm still stuck
7 on these nine sections.

8 So the section between Caballo and Elephant
9 Butte, is there springs in that section?

10 MR. DAIL: I couldn't speak to that.

11 MR. LONGWORTH: So there are hot springs.

12 MR. DAIL: Hot springs?

13 MR. LONGWORTH: I don't know what the quality
14 of that water is, but I suspect it's highly mineralized,
15 and I don't know what the standards --

16 MR. DAIL: Certainly.

17 MR. LONGWORTH: Is there only one NPDES permit
18 that's going to be impacted by this, and that being
19 T or C?

20 I think that was the testimony I heard.

21 MR. DAIL: That's --

22 MS. LEMON: That's correct.

23 MR. DAIL: -- my knowledge. Yes.

24 MR. LONGWORTH: So when the reservoir is not
25 running, the only sources of water in this segment is

1 from the inflow from springs, that are hot springs, are
2 coming out of this -- you know, out of the ground.

3 MS. LEMON: And the wastewater treatment
4 plant.

5 MR. LONGWORTH: And the wastewater treatment
6 plant.

7 So wastewater treatment has to then go to
8 primary standards even though the spring inflow may not
9 be at primary standards.

10 MS. LEMON: Mr. Chair and Commissioner
11 Longworth, I did look at the E. coli data for each of
12 these facilities, and with their technology to remove
13 bacteria, which is UV radiation, they can meet the
14 primary contact. They're actually below already these
15 primary contact criteria.

16 MR. LONGWORTH: But that may be -- but it's
17 different than what's may be in the river anyway.

18 So let me give you an example. If any of
19 these private operations discharge to the river, do they
20 need an NPDES permit?

21 MS. LEMON: If any of the -- excuse me. I
22 didn't --

23 MR. LONGWORTH: So in this town that used to
24 be called -- now Truth or Consequences, used to be
25 called Hot Springs, there's a number of various

1 commercial hot spring operations there where they have
2 welled up or well water that's hot, and people come and
3 they visit, and there might be discharges that they have
4 to the waters of the state.

5 Would they require an NPDES permit?

6 MS. LEMON: They currently do not require an
7 NPDES permit. And I'm not sure if their operation is
8 just flow-through or if it's going into the sewer system
9 to be collected by the Truth or Consequences facility.
10 But currently they do not, and EPA is not requiring an
11 NPDES permit.

12 MR. LONGWORTH: Why is that?

13 MS. LEMON: I am not sure. I can't answer
14 that question.

15 MR. LONGWORTH: So the only thing that is
16 going to be impacted by this is then the Truth or
17 Consequences, and you're testifying they're -- the
18 only -- okay. That's --

19 The only entity that's going to be impacted by
20 the change from secondary to primary in the stretch from
21 Caballo to Elephant Butte Dam is the T or C wastewater
22 treatment plant NPDES permit.

23 MS. LEMON: That's correct.

24 MR. LONGWORTH: And they're in compliance with
25 the primary standard.

1 MS. LEMON: That's correct.

2 MR. LONGWORTH: Okay. Thank you.

3 MR. DOMINGUEZ: Okay. I'm going to try to do
4 my best impression of Commissioner Waters. So bear with
5 me.

6 I think most of this questioning is probably
7 directed to Ms. Pintado, although -- talking about
8 temporary standards, you had indicated it was likely
9 municipalities might be setting up --

10 MS. PINTADO: Yes.

11 MR. DOMINGUEZ: -- first place in line.

12 So with that in mind -- and to preface this,
13 he's referencing in the case of -- of Ruidoso, Ruidoso
14 Downs, it's his understanding that they currently have
15 one of the most advanced municipal water -- wastewater
16 plants in the nation with respect to nutrient treatment
17 and yet they are still not able to meet the standards
18 for the stream.

19 So under the current rules, what can
20 communities like this do to address the standards?

21 MS. PINTADO: If the -- if the standard needed
22 to be addressed or changed, then we would consider
23 maybe -- I'm sorry. It may be a site-specific criterion
24 might be appropriate for their situation, or they could
25 also consider a temporary standard.

1 MR. DOMINGUEZ: Okay.

2 So under the -- under the --

3 MS. PINTADO: I'm sorry.

4 MR. DOMINGUEZ: -- current rule --

5 MS. PINTADO: Correct. I'm sorry.

6 MR. DOMINGUEZ: -- where they basically come
7 down to that they have to continue to make improvements
8 to the plants in order to meet the standards, and if
9 they fail to do that, is there the potential of fines
10 for not meeting the standards?

11 MS. PINTADO: Mr. Chairman, I think that's
12 correct.

13 MR. DAIL: Chairman Dominguez, if I may, it's
14 certainly not the only option, given Ruidoso has a
15 state-of-the-art system. It's also the case that a
16 significant load of nutrients is -- are available
17 upstream to them. And there are options for nonpoint
18 source management and federal dollars to support that
19 type of remediation, as well.

20 MR. DOMINGUEZ: Okay.

21 So now looking at the proposed revisions, with
22 a community or wastewater treatment plant like the one
23 we just talked about, would the temporary standards
24 potentially be a pathway in order to continue operation
25 that they do not now have until the treatment plant can

1 reach a level technically or economically in order to
2 eventually reach those standards?

3 So probably a short way of asking that was
4 would these temporary standards be a mechanism where
5 that treatment plant can continue to make advances with
6 the ultimate goal that they would get there to the
7 original standards?

8 MS. PINTADO: Mr. Chairman, yes.

9 MR. DOMINGUEZ: Okay.

10 MR. WATERS: Thank you, Mr. Chairman.

11 MR. DOMINGUEZ: You're welcome. Yours would
12 have taken less time had you asked them.

13 Additional questions from the Commission?

14 Seeing none, Mr. Hearing Officer, that
15 concludes questions from the Commission.

16 MR. CHAVEZ: Thank you, Mr. Chairman.

17 Are there any members of the audience that
18 have any questions for these witnesses?

19 Seeing none, I would like to go back to NMED
20 for any redirect.

21 MR. VERHEUL: We have none.

22 MR. CHAVEZ: All right. You may excuse your
23 witnesses.

24 In closing, I would once again like to ask if
25 there is anybody in the audience that at this time would

1 like to provide any nontechnical public comment.

2 Seeing none, I would like to take a moment to
3 discuss the posthearing process.

4 At the conclusion of this hearing, the record
5 is going to remain open only for posthearing submittals
6 designated by the Hearing Officer.

7 Once the notice of transcript is filed, it
8 will outline the schedule for posthearing submittals.
9 These posthearing submittals will consist of the final
10 or a portion of a draft rule consistent with
11 evidentiary -- with the evidentiary record, proposed
12 statements of reasons referencing the evidentiary record
13 and written closing arguments.

14 Once all of these submittals have been
15 received and the Hearing Officer has completed a draft
16 recommendation for the Commission, the parties will have
17 an opportunity to comment on the Hearing Officer's
18 proposed recommendation.

19 As a note, Commission deliberation and
20 consideration on the proposed rule will most likely not
21 occur until January, 2016 at the earliest.

22 Also, I would recommend that to the extent
23 possible the parties consider working together to submit
24 proposed joint statements of reasons.

25 Having said that, do the parties have any

1 questions, concerns or suggestions?

2 Seeing none, Mr. Chairman, members of the
3 Commission, any final comments?

4 MR. DOMINGUEZ: Mr. Hearing Officer, on the
5 behalf of the Commission, we would like to thank the
6 parties for their participation, your perspective in
7 giving us guidance on where to head with this.

8 And we truly value the collaboration that has
9 occurred prior to this hearing, where you were able to
10 hit some -- some medium grounds. So we deeply
11 appreciate that.

12 And we would also encourage you to continue
13 that collaboration prior to our deliberations.

14 I would also like to thank the Commissioners
15 for abandoning their real jobs to come here and spend
16 time, and also appreciate the fact that you guys -- a
17 number of you have abandoned your families for the week
18 in order to undertake this important task.

19 So it's pretty much a thankless job, but I at
20 least wanted to thank you on behalf of Chairman Ryan,
21 also.

22 With that, Mr. Hearing Officer --

23 MR. PATTISON: Mr. Chairman.

24 MR. DOMINGUEZ: Commissioner Pattison.

25 MR. PATTISON: Pardon me for interrupting, but

1 I'd like to say that you're never too old to learn, and
2 the learning opportunities are infinite, and I've
3 learned a bunch in this week.

4 MR. DOMINGUEZ: Okay. Thank you, Commissioner
5 Pattison.

6 With that, Mr. Hearing Officer, we will turn
7 it back to you to conclude.

8 MR. CHAVEZ: Thank you, Mr. Chairman, members
9 of the Commission.

10 I would like to thank the Commission and court
11 reporter and all the parties for their time and
12 professionalism.

13 And as a point of personal preference, I've
14 learned new meaning to the term "I have just a few
15 questions."

16 With that, Mr. Chairman, this hearing has
17 concluded.

18 MR. DOMINGUEZ: Thank you.

19 And I would be remiss to not thank our Hearing
20 Officer for herding cats for four days.

21 MR. PATTISON: Thank you. Yes.

22 (Proceedings adjourned at 3:37 p.m.)
23
24
25

1 STATE OF NEW MEXICO)
2) ss.
3 COUNTY OF BERNALILLO)
4
5

6 I, CHERYL ARREGUIN, the officer before whom the
7 foregoing proceeding was taken, do hereby certify that
8 the witnesses whose testimony appears in the foregoing
9 transcript were duly sworn or affirmed; that I
10 personally recorded the testimony by machine shorthand;
11 that said transcript is a true record of the testimony
12 given by said witnesses; that I am neither attorney nor
13 counsel for, nor related to or employed by any of the
14 parties to the action in which this proceeding is taken,
15 and that I am not a relative or employee of any attorney
16 or counsel employed by the parties hereto or financially
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'88 ^[2] - 909:16, 910:20 'lake' ^[1] - 835:6			3 ^[4] - 767:10, 773:12, 774:19, 912:20 3,000s ^[1] - 861:11 30 ^[3] - 769:21, 805:17, 805:22 30-day ^[4] - 799:4, 799:10, 799:13, 800:4 30.2 ^[1] - 913:7 301(c) ^[1] - 774:19 304(a) ^[5] - 812:8, 813:9, 813:18, 861:1, 861:15 307 ^[1] - 762:19 31 ^[1] - 769:24 31(5) ^[1] - 775:18 32 ^[1] - 770:4 325 ^[1] - 764:20 33 ^[1] - 770:6 338-3945 ^[1] - 763:12 34 ^[1] - 770:8 35 ^[1] - 770:10 36 ^[1] - 770:12 36760-61 ^[1] - 769:7 37 ^[1] - 770:14 38 ^[1] - 770:16 383-2063 ^[1] - 763:18 39 ^[1] - 770:17 3:37 ^[1] - 1010:22	
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08-13(R) ^[1] - 775:10			4 ^[8] - 762:23, 767:11, 767:15, 769:10, 773:16, 917:24, 944:15, 944:16 40 ^[7] - 768:14, 768:21, 769:12, 769:13, 769:14, 770:20, 774:15 401 ^[10] - 877:16, 951:4, 951:11, 964:3, 982:23, 982:25, 984:20, 984:23,	
1		2		
1 ^[17] - 767:4, 767:20, 768:22, 773:8, 773:13, 902:16, 907:24, 915:12, 915:13, 915:18, 915:19, 915:20, 915:22, 915:24, 939:14, 982:24 1 ^[1] - 924:18 1(b) ^[1] - 928:19 1,500 ^[1] - 985:10 10 ^[10] - 768:4, 774:17, 796:20, 850:19, 850:25, 866:4, 917:9, 917:12, 917:21, 918:2 10-89 ^[1] - 793:5 10-year ^[5] - 795:17, 795:23, 795:25, 797:2, 878:22 100 ^[5] - 795:20, 861:21, 881:6, 881:8, 881:9 100,000 ^[5] - 983:16, 985:8, 985:9 1002-31 ^[1] - 775:18 101 ^[1] - 994:10 101(a) ^[1] - 773:10 101(a)(2) ^[8] - 893:15, 942:15, 942:22, 943:24, 944:23, 960:6, 967:10, 967:19 101(a)(2) ^[1] - 961:8 10F ^[1] - 928:18 10F.(b) ^[1] - 841:11 11 ^[6] - 768:7, 774:21, 789:5,	2 ^[9] - 767:5, 768:6, 768:23, 773:9, 843:25, 844:4, 844:13, 989:5, 993:3 2 ^[2] - 842:10, 929:17 20 ^[6] - 768:21, 772:8, 774:13, 795:20, 999:7, 1001:4 20.1.3 ^[1] - 926:5 20.6.4 ^[6] - 762:7, 767:8, 773:18, 773:23, 774:7, 776:7 20.6.4.10 ^[1] - 863:12 20.6.4.10.(4) ^[1] - 894:17 20.6.4.10.F ^[1] - 792:6 20.6.4.10D(2)(c) ^[1] - 831:16 20.6.4.10D(3)(c) ^[4] - 808:18, 810:15,			

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<p>985:3, 986:5 401(d) [1] - 952:1 402 [2] - 802:18, 965:14 404 [9] - 802:19, 836:19, 836:21, 934:20, 965:14, 984:19, 986:16, 987:22, 987:23 41 [1] - 770:21 42 [1] - 770:22 43 [1] - 770:23 44 [1] - 771:4 45 [2] - 771:6, 901:24 46 [1] - 771:8 47 [1] - 771:11 48 [1] - 771:12 49 [1] - 771:14 490 [1] - 762:19 4th [4] - 779:19, 791:19, 792:10, 842:16</p>	<p style="text-align: center;">6</p> <p>6 [9] - 767:16, 773:4, 774:4, 775:19, 775:22, 788:3, 993:3, 999:8, 1000:23 6 [1] - 932:13 6.4 [2] - 812:2, 909:13 6.5 [13] - 811:10, 811:13, 811:21, 812:21, 812:24, 813:10, 813:14, 905:9, 905:24, 905:25, 909:13, 971:5, 971:8 60 [1] - 772:18 602 [1] - 764:10 61 [1] - 772:20 613-4197 [1] - 764:11 62 [1] - 772:22 63 [2] - 769:7, 772:24 64 [1] - 773:4 65 [1] - 773:5 6565 [1] - 763:10 66 [5] - 773:6, 915:12, 915:13, 915:19, 915:24 667-7512 [1] - 765:6 68750-56 [1] - 769:18</p>	<p>87048-2540 [1] - 764:16 87110 [1] - 763:11 87501 [3] - 763:17, 764:5, 764:21 87545 [1] - 765:6 87571 [1] - 764:10 880 [1] - 766:8 888-6600 [1] - 764:16 890 [1] - 766:11 898 [1] - 766:12 899 [3] - 931:20, 964:22, 994:10</p>	<p>775:12, 775:19, 776:4 916 [1] - 766:16 920 [1] - 763:11 939 [1] - 766:18 955 [1] - 766:20 961 [1] - 766:22 968 [1] - 766:23 97 [3] - 931:19, 960:9, 964:22 972 [1] - 766:24 98 [2] - 960:18, 961:1 982-3873 [1] - 764:21 982-9523 [1] - 764:5 9:06 [1] - 762:20</p>	<p>797:23, 807:25, 861:4, 932:3 accounted [5] - 795:3, 795:6, 795:10, 802:8, 881:2 accounts [2] - 794:24, 883:8 accumulates [1] - 993:8 accurate [3] - 829:15, 870:13, 962:9 achieve [9] - 788:15, 793:16, 793:17, 884:21, 885:2, 885:12, 886:2, 948:18, 987:9 achieved [3] - 807:6, 924:11, 962:8 achievement [3] - 787:4, 795:9, 802:2 achieving [2] - 792:22, 793:3 acronym [1] - 995:13 Act [46] - 773:9, 785:24, 799:18, 802:23, 805:15, 806:15, 812:5, 812:9, 812:19, 848:3, 849:10, 853:7, 880:12, 893:15, 893:16, 921:16, 921:20, 921:21, 922:7, 922:8, 922:16, 922:20, 922:21, 924:10, 927:4, 927:5, 934:10, 935:22, 940:20, 942:5, 943:9, 951:5, 951:12, 952:1, 955:23, 958:7, 959:7, 959:9, 959:13, 961:5, 962:6, 965:20, 966:12, 967:10, 967:19 act [3] - 838:22, 943:24 acting [2] - 939:12, 947:13 action [15] - 806:1, 806:3, 839:2, 857:15, 857:16, 941:8, 949:8, 983:23, 985:11, 985:24, 986:18, 986:19, 990:24, 1011:14, 1011:17 Action [1] - 774:11 actions [1] - 784:4 active [1] - 947:9 activities [10] - 835:9, 836:2, 836:15, 836:20, 837:23,</p>
<p style="text-align: center;">5</p> <p>5 [4] - 767:13, 773:20, 795:13, 932:1 5 [1] - 930:18 5.3 [1] - 794:19 50 [6] - 771:17, 795:20, 845:1, 910:18, 910:22 505 [6] - 763:12, 763:18, 764:5, 764:16, 764:21, 765:6 51 [1] - 771:18 51020 [1] - 804:18 51035 [3] - 891:2, 891:8, 893:12 51036 [6] - 807:18, 839:16, 874:23, 894:6, 898:21, 899:2 51037 [1] - 834:10 51038 [2] - 951:16, 982:24 52 [1] - 771:21 53 [1] - 772:4 54 [1] - 772:7 54544-45 [1] - 769:11 55 [1] - 772:10 56 [1] - 772:12 57 [1] - 772:14 575 [1] - 764:11 58 [2] - 772:15, 774:16 59 [1] - 772:16</p>	<p style="text-align: center;">7</p> <p>7 [8] - 767:18, 769:6, 769:18, 774:9, 798:13, 802:12, 916:24, 932:18 750 [1] - 861:13 76 [1] - 769:18 78 [1] - 769:11 780 [1] - 766:4</p>	<p style="text-align: center;">9</p> <p>9 [10] - 767:23, 774:14, 788:5, 788:9, 788:17, 811:13, 864:25, 865:9, 905:9, 971:5 9-89 [1] - 792:25 90 [1] - 800:13 903 [1] - 766:14 915 [83] - 767:4, 767:5, 767:10, 767:11, 767:13, 767:16, 767:18, 767:21, 767:23, 768:4, 768:7, 768:9, 768:11, 768:12, 768:13, 768:14, 768:15, 768:16, 768:18, 768:21, 768:22, 769:4, 769:8, 769:12, 769:13, 769:14, 769:15, 769:17, 769:19, 769:21, 769:24, 770:4, 770:6, 770:8, 770:10, 770:12, 770:14, 770:16, 770:17, 770:20, 770:21, 770:22, 770:23, 771:4, 771:6, 771:8, 771:11, 771:12, 771:14, 771:17, 771:18, 771:21, 772:4, 772:7, 772:10, 772:12, 772:14, 772:15, 772:16, 772:18, 772:20, 772:22, 772:24, 773:4, 773:5, 773:6, 773:8, 773:9, 773:12, 773:16, 773:20, 774:4, 774:9, 774:11, 774:14, 774:17, 774:21, 775:4, 775:8, 775:11,</p>	<p style="text-align: center;">A</p> <p>a.m [4] - 762:20, 878:5, 878:6, 902:17 A187 [1] - 765:5 AB's [1] - 925:16 abandoned [1] - 1009:17 abandoning [1] - 1009:15 abilities [1] - 869:3 ability [9] - 808:2, 825:8, 825:10, 832:13, 839:4, 850:23, 855:5, 863:20, 963:23 able [12] - 781:10, 824:7, 847:9, 869:9, 869:15, 887:21, 895:18, 948:11, 977:5, 982:19, 1005:17, 1009:9 absent [1] - 984:22 absolutely [2] - 892:15, 998:15 abstracts [2] - 907:4, 907:7 accept [1] - 970:21 acceptable [2] - 835:23, 934:14 access [1] - 896:9 accomplish [1] - 895:1 accomplishing [1] - 836:11 accord [1] - 800:21 accordance [1] - 941:21 according [4] - 846:11, 895:13, 905:12, 919:13 accordingly [1] - 787:15 account [5] - 795:15,</p>	

KATHY TOWNSEND COURT REPORTERS

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(505) 243-5018 - Fax (505) 243-3606

<p>840:1, 840:7, 894:13, 894:19, 894:21</p> <p>activity [1] - 840:16</p> <p>actual [8] - 791:6, 791:8, 803:16, 820:17, 823:9, 884:17, 981:3, 982:18</p> <p>acute [2] - 912:7, 912:11</p> <p>adaptive [1] - 891:13</p> <p>add [10] - 793:14, 843:19, 932:8, 932:14, 932:19, 934:9, 934:10, 972:20, 1000:24, 1001:23</p> <p>added [7] - 834:18, 834:22, 836:14, 838:19, 847:24, 935:11, 986:18</p> <p>adding [4] - 793:17, 793:22, 850:23, 932:19</p> <p>addition [14] - 781:12, 784:1, 787:7, 796:3, 810:2, 811:1, 842:17, 844:13, 891:22, 928:24, 930:19, 933:18, 954:7, 976:4</p> <p>additional [25] - 791:20, 804:9, 806:1, 810:8, 820:14, 829:18, 840:10, 862:8, 862:15, 863:17, 885:21, 906:5, 916:2, 916:6, 917:21, 920:16, 925:18, 929:18, 930:18, 932:2, 932:14, 934:6, 934:23, 934:24, 1007:13</p> <p>additions [2] - 792:12, 917:15</p> <p>address [14] - 778:17, 779:7, 791:2, 843:2, 843:5, 873:4, 875:11, 890:21, 892:18, 939:24, 947:2, 986:11, 1001:1, 1005:20</p> <p>addressed [9] - 780:5, 805:9, 807:6, 889:17, 895:4, 930:12, 932:5, 955:1, 1005:22</p> <p>addresses [3] - 843:17, 893:6, 905:15</p> <p>addressing [2] -</p>	<p>803:8, 830:11</p> <p>adds [1] - 835:5</p> <p>adequate [3] - 796:10, 813:7, 847:17</p> <p>adjourn [1] - 900:4</p> <p>adjourned [1] - 1010:22</p> <p>administered [1] - 862:14</p> <p>administrative [2] - 937:3, 995:25</p> <p>Administrative [2] - 912:5, 912:21</p> <p>ADMITTED [10] - 767:2, 768:2, 769:2, 770:2, 771:2, 772:2, 773:2, 774:2, 775:2, 776:2</p> <p>admitted [3] - 778:20, 915:5, 915:25</p> <p>adopt [18] - 805:12, 807:4, 840:21, 842:1, 895:7, 917:2, 922:6, 922:9, 925:24, 939:22, 952:13, 955:21, 956:10, 956:15, 957:1, 964:11, 966:3</p> <p>Adopt [1] - 779:3</p> <p>Adopted [2] - 866:6, 866:10</p> <p>adopted [35] - 784:20, 784:25, 785:8, 787:11, 788:23, 789:15, 790:4, 790:12, 801:23, 839:12, 840:8, 867:11, 873:25, 885:7, 890:16, 914:23, 919:2, 919:11, 920:7, 922:12, 922:19, 924:13, 927:11, 929:22, 931:13, 932:20, 932:22, 932:25, 935:1, 936:6, 941:1, 941:11, 942:12, 944:11</p> <p>adopting [9] - 787:16, 796:17, 845:20, 877:14, 925:19, 925:21, 939:12, 951:20, 951:23</p> <p>Adoption [1] - 775:15</p> <p>adoption [18] - 781:25, 785:25, 786:16, 793:13, 808:19, 810:25,</p>	<p>811:4, 817:17, 839:3, 887:6, 887:7, 891:11, 936:9, 943:6, 943:8, 957:4, 957:10, 958:1</p> <p>adopts [1] - 946:2</p> <p>advance [2] - 897:1, 926:12</p> <p>Advance [1] - 769:4</p> <p>advanced [1] - 1005:15</p> <p>advances [1] - 1007:5</p> <p>advantage [4] - 795:7, 937:22, 963:18, 993:9</p> <p>advisable [1] - 977:2</p> <p>advise [1] - 908:15</p> <p>advising [1] - 986:10</p> <p>Advisory [1] - 768:5</p> <p>advocacy [1] - 845:22</p> <p>advocate [1] - 852:1</p> <p>advocating [4] - 853:17, 853:19, 853:20, 853:21</p> <p>affected [3] - 808:22, 892:24, 907:15</p> <p>Affidavits [1] - 768:7</p> <p>affirmed [4] - 780:11, 890:2, 903:14, 1011:9</p> <p>afford [1] - 904:13</p> <p>afforded [3] - 788:16, 913:14, 914:8</p> <p>afield [1] - 855:1</p> <p>aforementioned [2] - 904:12, 906:8</p> <p>afternoon [3] - 903:11, 955:13, 961:15</p> <p>afterwards [1] - 858:13</p> <p>agency [2] - 978:24, 979:2</p> <p>agency's [1] - 975:1</p> <p>ago [4] - 809:14, 871:18, 871:21, 955:19</p> <p>agree [15] - 829:18, 840:24, 841:1, 841:7, 863:25, 868:25, 890:14, 890:18, 890:20, 895:24, 899:10, 941:15, 959:22, 983:21, 989:3</p> <p>agreed [2] - 804:3, 850:22</p> <p>agreement [1] - 779:21</p> <p>ahead [7] - 833:24, 835:5, 871:5, 898:13,</p>	<p>902:6, 912:3, 967:2</p> <p>Alamos [3] - 765:2, 765:5, 765:6</p> <p>Albuquerque [1] - 763:11</p> <p>alert [1] - 857:16</p> <p>alerts [1] - 857:15</p> <p>Algodones [1] - 913:16</p> <p>alignment [1] - 904:23</p> <p>alleviate [1] - 800:18</p> <p>alleviated [1] - 957:13</p> <p>alley [1] - 900:20</p> <p>allocations [1] - 954:17</p> <p>allow [24] - 787:11, 787:18, 807:19, 818:18, 821:22, 822:25, 825:4, 839:13, 839:15, 839:22, 839:25, 849:14, 850:6, 874:24, 875:14, 894:9, 894:12, 918:5, 920:22, 921:2, 924:6, 948:1, 948:16, 952:8</p> <p>allowable [1] - 927:3</p> <p>Allowed [1] - 866:10</p> <p>allowed [13] - 789:7, 799:22, 835:18, 835:19, 840:6, 840:9, 840:14, 853:8, 921:16, 922:19, 927:24, 986:21, 987:7</p> <p>allowing [3] - 822:21, 858:7, 938:8</p> <p>allows [5] - 800:15, 948:15, 952:2, 952:19, 960:23</p> <p>almost [3] - 839:17, 908:11, 933:16</p> <p>alone [1] - 905:19</p> <p>alter [1] - 846:12</p> <p>alternative [1] - 832:14</p> <p>alternatives [1] - 852:1</p> <p>Aluminum [1] - 775:21</p> <p>aluminum [50] - 777:12, 781:18, 811:6, 811:8, 811:9, 811:12, 811:20, 812:1, 813:9, 813:13, 860:9, 861:3, 861:8, 861:10, 861:22, 904:7, 904:24, 905:6, 907:5, 908:2, 908:14,</p>	<p>908:25, 909:3, 909:7, 909:8, 909:9, 909:14, 909:17, 909:22, 910:7, 910:13, 910:14, 910:17, 910:23, 911:4, 911:6, 911:23, 912:7, 912:12, 914:2, 914:6, 914:9, 914:13, 968:18, 968:19, 970:12, 971:2, 971:7</p> <p>ambient [6] - 807:20, 839:23, 840:6, 874:25, 875:6, 894:11</p> <p>Ambient [1] - 775:4</p> <p>Amend [2] - 767:7, 776:5</p> <p>amendable [3] - 794:1, 849:18, 965:6</p> <p>amended [4] - 779:18, 791:19, 792:9, 917:23</p> <p>AMENDMENTS [1] - 762:5</p> <p>Americas [1] - 763:10</p> <p>amigos [1] - 961:11</p> <p>Amigos [112] - 764:7, 777:3, 777:8, 777:10, 777:17, 778:4, 780:3, 780:25, 781:3, 781:6, 781:9, 781:13, 781:14, 781:24, 782:3, 782:6, 783:12, 783:13, 784:12, 788:2, 788:14, 790:3, 790:11, 790:21, 790:24, 790:25, 791:12, 791:16, 791:24, 792:3, 792:21, 793:14, 793:19, 794:1, 795:1, 795:11, 795:13, 795:17, 796:18, 797:12, 797:21, 798:2, 798:21, 800:7, 800:10, 800:17, 801:20, 803:1, 803:7, 804:6, 804:8, 807:21, 809:11, 810:20, 811:7, 813:3, 813:8, 819:20, 820:3, 820:21, 821:5, 821:13, 823:18, 824:11, 824:15, 824:20, 835:25, 836:18, 845:10, 846:6, 846:15, 848:17, 854:5, 854:8, 856:4, 857:13,</p>
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KATHY TOWNSEND COURT REPORTERS

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(505) 243-5018 - Fax (505) 243-3606

<p>860:14, 861:20, 862:7, 868:15, 879:24, 881:16, 881:25, 883:6, 883:18, 888:16, 888:23, 889:5, 889:16, 890:8, 893:1, 895:4, 895:8, 896:8, 904:7, 904:16, 905:15, 906:5, 906:23, 908:16, 910:1, 911:13, 914:7, 918:6, 919:5, 923:15, 928:8, 932:8, 935:20, 952:24, 970:10, 991:25</p> <p>amount [3] - 801:1, 910:23, 953:2</p> <p>analyses [2] - 945:19, 945:21</p> <p>analysis [9] - 942:14, 942:23, 943:20, 944:2, 945:16, 966:19, 995:17, 997:14, 998:10</p> <p>AND [1] - 762:6</p> <p>ANDREWS [1] - 764:19</p> <p>Animas [6] - 771:10, 771:17, 772:13, 1001:14, 1001:15, 1001:16</p> <p>ANPRM [1] - 769:5</p> <p>answer [36] - 816:3, 816:5, 818:4, 818:16, 818:18, 822:16, 822:20, 822:24, 823:25, 824:9, 824:19, 825:5, 825:8, 825:9, 825:14, 825:21, 828:21, 828:25, 829:4, 836:22, 848:24, 855:4, 856:6, 860:7, 863:3, 866:15, 868:18, 872:5, 942:16, 968:16, 968:21, 972:18, 982:13, 995:5, 1004:13</p> <p>answered [11] - 820:20, 821:1, 821:20, 824:16, 824:24, 825:3, 825:13, 825:17, 829:3, 862:12, 862:16</p> <p>answering [2] - 817:21, 830:15</p> <p>answers [11] - 821:25, 822:9,</p>	<p>823:10, 823:16, 828:10, 828:22, 833:13, 862:9, 862:11, 992:14, 998:14</p> <p>anticipate [3] - 898:6, 936:4, 963:25</p> <p>anticipated [2] - 836:3, 897:18</p> <p>anticipating [1] - 835:12</p> <p>anticipation [2] - 936:11, 949:18</p> <p>antideg [3] - 880:17, 919:3, 929:5</p> <p>antidegradation [24] - 793:22, 793:24, 841:14, 842:2, 880:15, 881:22, 882:5, 882:7, 882:12, 882:19, 882:21, 894:17, 894:18, 894:24, 918:17, 918:24, 928:23, 929:1, 947:1, 947:4, 947:11, 950:20, 954:21, 954:24</p> <p>anytime [1] - 907:8</p> <p>anyway [2] - 966:2, 1003:17</p> <p>apologies [3] - 889:6, 901:21, 972:5</p> <p>apologize [5] - 794:13, 826:1, 826:17, 827:10, 915:14</p> <p>apparent [1] - 850:5</p> <p>appear [2] - 829:12, 901:6</p> <p>appearing [1] - 909:22</p> <p>applicability [4] - 786:21, 787:8, 867:14, 905:10</p> <p>applicable [6] - 784:22, 805:14, 805:23, 893:24, 921:24, 971:2</p> <p>applicant [7] - 930:4, 932:23, 933:5, 935:12, 936:5, 946:24, 950:24</p> <p>Application [2] - 769:24, 774:18</p> <p>application [10] - 782:11, 783:20, 795:18, 801:21, 817:1, 874:5, 896:19, 960:18, 991:12, 992:9</p> <p>applications [3] -</p>	<p>837:1, 993:24, 997:21</p> <p>applied [14] - 853:13, 875:15, 877:5, 883:21, 921:22, 927:16, 941:20, 941:23, 944:24, 958:16, 994:5, 994:22, 996:21, 1000:15</p> <p>applies [9] - 812:1, 813:20, 883:14, 920:8, 958:4, 958:9, 958:10, 958:14, 960:18</p> <p>Apply [1] - 866:6</p> <p>apply [43] - 784:20, 784:21, 785:1, 785:5, 785:9, 786:20, 788:23, 789:10, 795:2, 798:3, 802:22, 807:22, 811:10, 812:3, 812:18, 812:20, 835:8, 836:12, 842:20, 843:7, 843:10, 854:10, 854:11, 872:24, 875:13, 875:17, 875:21, 884:20, 901:4, 909:14, 922:3, 928:2, 959:2, 985:25, 990:10, 991:11, 991:12, 992:17, 992:19, 993:11, 994:12, 994:17, 996:5</p> <p>applying [7] - 784:3, 942:7, 959:12, 960:5, 973:19, 984:8, 987:11</p> <p>appreciate [13] - 779:7, 826:14, 833:13, 857:5, 858:4, 888:6, 961:22, 966:2, 982:5, 995:7, 997:19, 1009:11, 1009:16</p> <p>appreciates [1] - 781:9</p> <p>appreciation [1] - 961:16</p> <p>approach [4] - 941:11, 941:18, 957:13, 984:3</p> <p>approaches [1] - 891:13</p> <p>appropriate [22] - 793:18, 798:22, 850:2, 852:13, 854:20, 868:20, 868:23, 876:23, 884:24, 922:2, 923:9, 942:3, 942:8, 945:25,</p>	<p>968:15, 969:2, 970:3, 972:18, 973:19, 975:20, 979:1, 1005:24</p> <p>approval [18] - 797:17, 817:17, 852:14, 863:16, 863:17, 863:21, 863:22, 880:25, 886:15, 896:17, 931:15, 933:11, 933:13, 944:17, 964:19, 965:9, 965:10, 966:7</p> <p>Approval [6] - 771:7, 772:4, 772:12, 773:16, 773:21, 774:5</p> <p>approve [5] - 808:2, 840:11, 944:21, 946:25, 963:22</p> <p>approved [17] - 785:13, 786:25, 844:6, 844:15, 884:5, 886:13, 895:9, 905:2, 914:20, 920:9, 927:12, 934:25, 935:1, 941:11, 943:14, 946:23, 963:14</p> <p>April [4] - 767:20, 770:5, 774:7, 796:3</p> <p>apropos [1] - 854:14</p> <p>aquatic [19] - 813:8, 813:15, 813:22, 904:14, 909:9, 940:22, 944:19, 960:9, 962:21, 967:24, 967:25, 968:3, 991:24, 992:1, 992:3, 992:5, 992:8, 992:11, 992:12</p> <p>arbitrary [2] - 811:3, 930:14</p> <p>Area [1] - 772:21</p> <p>area [6] - 808:22, 855:12, 855:15, 861:21, 981:3, 983:6</p> <p>areas [4] - 975:23, 983:23, 984:7</p> <p>arguing [1] - 825:6</p> <p>arguments [4] - 778:7, 941:9, 961:20, 1008:13</p> <p>arise [1] - 859:20</p> <p>Army [3] - 836:13, 837:3, 837:14</p> <p>ARREGUIN [1] - 1011:6</p> <p>arroyo [1] - 988:1</p> <p>Arsenic [1] - 774:13</p>	<p>art [2] - 880:11, 1006:15</p> <p>articles [3] - 860:18, 860:19, 860:23</p> <p>articulated [3] - 964:19, 965:18, 988:15</p> <p>as-needed [1] - 984:10</p> <p>aside [2] - 823:11, 832:19</p> <p>aspect [1] - 819:7</p> <p>aspects [1] - 942:5</p> <p>assertion [1] - 823:8</p> <p>assess [1] - 975:19</p> <p>assessed [1] - 914:12</p> <p>assesses [1] - 883:19</p> <p>Assessment [1] - 768:16</p> <p>assist [1] - 938:3</p> <p>Assistant [1] - 763:16</p> <p>associated [11] - 785:21, 794:23, 806:7, 854:2, 927:13, 927:24, 932:15, 942:4, 945:20, 960:6, 984:1</p> <p>Association [1] - 775:14</p> <p>assume [6] - 816:8, 819:1, 829:7, 963:13, 985:7, 991:4</p> <p>assumed [2] - 960:21, 961:1</p> <p>assuming [8] - 869:20, 876:8, 885:16, 960:5, 960:13, 965:3, 965:12, 971:13</p> <p>assumption [2] - 961:2, 961:3</p> <p>assurances [1] - 786:3</p> <p>atmosphere [1] - 836:24</p> <p>attached [2] - 778:19, 895:15</p> <p>attain [1] - 923:12</p> <p>attainability [11] - 941:12, 942:14, 942:22, 943:20, 944:1, 945:16, 945:19, 966:19, 995:17, 997:13, 998:10</p> <p>attainable [10] - 806:9, 891:16,</p>
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<p>893:23, 923:6, 923:10, 923:11, 924:11, 942:3, 942:18, 995:24 attained [4] - 807:20, 839:23, 874:25, 894:11 attainment [2] - 850:8, 850:10 attempt [3] - 803:1, 928:16, 988:9 attempting [4] - 822:20, 824:18, 842:8, 877:17 attention [3] - 799:1, 909:2, 911:5 attitude [1] - 836:24 attorney [5] - 824:17, 827:4, 847:3, 1011:12, 1011:15 Attorney [2] - 764:8, 765:4 Attorneys [4] - 763:10, 764:4, 764:15, 764:20 attract [1] - 950:5 attracted [1] - 950:6 attracting [1] - 785:19 attractive [1] - 785:22 attribute [1] - 977:5 audience [5] - 887:24, 887:25, 970:9, 1007:17, 1007:25 August [4] - 774:20, 804:18, 893:12, 942:12 author [1] - 907:7 authorities [1] - 922:20 authority [9] - 796:6, 839:2, 886:14, 921:20, 922:6, 922:16, 955:22, 955:23, 956:10 authorize [1] - 922:9 authorized [11] - 805:12, 805:20, 806:1, 834:23, 839:20, 891:12, 891:14, 892:3, 894:7, 951:24, 952:5 automatically [1] - 806:5 available [9] - 797:13, 892:2, 896:25, 948:3, 948:10, 965:11,</p>	<p>969:18, 1006:16 avenues [1] - 839:5 avoid [1] - 882:23 aware [8] - 784:6, 784:9, 817:11, 824:25, 877:4, 900:18, 905:23, 923:1</p> <p style="text-align: center;">B</p> <p>backs [1] - 823:11 backup [1] - 824:3 backward [1] - 905:1 bacteria [1] - 1003:13 Bacteria [1] - 770:16 ball [1] - 860:20 ballpark [1] - 901:24 BAMMAN [33] - 763:4, 783:2, 848:5, 848:22, 849:1, 864:12, 864:14, 864:18, 865:7, 865:14, 865:21, 866:14, 866:17, 866:19, 866:25, 867:4, 867:12, 867:17, 867:23, 870:6, 870:10, 871:8, 871:18, 872:3, 872:8, 872:17, 873:6, 874:1, 874:13, 875:12, 876:2, 876:18, 877:3 Bamman [12] - 848:14, 848:25, 864:10, 865:5, 865:25, 866:24, 869:5, 869:12, 871:5, 873:16, 874:18, 876:16 Bamman's [1] - 880:8 based [41] - 771:9, 771:15, 775:21, 779:8, 779:13, 779:23, 785:14, 789:11, 794:3, 806:7, 806:8, 807:7, 809:13, 811:8, 811:20, 812:17, 812:20, 812:23, 813:4, 813:11, 813:12, 814:8, 821:13, 821:15, 824:23, 829:12, 829:15, 860:12, 861:2, 861:18, 906:25, 920:20, 928:2, 944:21, 945:22, 948:20, 954:23,</p>	<p>958:17, 959:2, 963:2 Based [4] - 771:12, 771:19, 771:22, 772:5 bases [1] - 937:12 Basic [1] - 775:16 basin [11] - 989:6, 989:12, 989:13, 989:16, 989:20, 990:2, 990:4, 990:6, 990:10, 990:14, 1001:9 basins [2] - 990:10, 1001:7 basis [19] - 777:22, 778:2, 778:16, 782:6, 787:5, 813:1, 818:4, 818:16, 820:24, 821:17, 824:11, 835:7, 853:15, 881:25, 883:6, 886:17, 920:20, 964:3, 984:10 Battleship [1] - 913:18 BE [1] - 762:15 bear [1] - 1005:4 became [1] - 983:1 Becker [5] - 766:12, 766:17, 766:19, 988:25, 993:20 BECKER [13] - 763:15, 898:17, 916:7, 916:9, 936:18, 936:23, 937:2, 937:6, 938:21, 939:7, 939:9, 983:7, 986:10 become [4] - 805:23, 923:16, 965:15, 985:12 becomes [1] - 920:19 becoming [1] - 795:21 BEFORE [1] - 762:2 begin [4] - 832:18, 909:25, 916:7, 928:18 beginning [7] - 786:8, 832:5, 841:21, 864:23, 899:6, 951:18, 951:19 behalf [2] - 1009:5, 1009:20 Behalf [1] - 775:14 behavior [1] - 913:6 believes [3] - 796:18, 825:7 below [12] - 811:10, 905:24, 905:25, 909:12, 977:19, 977:20, 977:21,</p>	<p>978:1, 980:17, 981:12, 1003:14 bench [1] - 855:18 beneficial [5] - 919:21, 934:18, 936:2, 987:3, 993:5 benefit [3] - 874:6, 951:1, 951:2 benefits [1] - 935:9 BERNALILLO [1] - 1011:3 best [5] - 825:8, 825:10, 855:4, 887:18, 1005:4 better [8] - 851:20, 852:2, 875:10, 886:12, 898:19, 949:1, 952:20, 986:11 between [22] - 791:17, 799:1, 799:18, 804:12, 858:24, 859:3, 859:7, 861:17, 876:22, 881:14, 882:18, 883:1, 884:2, 884:9, 884:17, 885:25, 948:7, 962:2, 962:11, 962:14, 1002:8 beyond [1] - 985:6 Biesinger [1] - 906:11 biggest [1] - 859:7 biological [3] - 893:17, 894:4, 894:22 BISON [1] - 910:3 BISON-M [1] - 910:3 bit [10] - 832:20, 835:5, 860:6, 880:14, 891:25, 893:22, 907:23, 926:8, 963:10, 978:2 blank [1] - 865:1 blue [1] - 792:12 bodies [18] - 802:1, 810:23, 820:7, 892:24, 900:21, 905:23, 914:4, 914:8, 914:12, 914:15, 914:16, 927:17, 976:19, 976:24, 977:1, 977:6, 980:13, 1001:2 body [38] - 784:15, 784:21, 784:24, 785:13, 785:16, 785:20, 786:20, 786:25, 789:2, 805:24, 842:21, 843:5, 843:6, 843:14, 848:4, 872:24,</p>	<p>876:10, 876:13, 880:21, 883:9, 894:2, 904:15, 913:9, 920:23, 922:4, 930:7, 931:22, 943:1, 943:23, 950:6, 951:1, 953:3, 963:14, 963:15, 964:7, 974:6, 995:19, 996:9 boilerplate [2] - 785:23, 786:11 Book [1] - 905:12 book [2] - 909:7, 975:14 bottom [4] - 790:2, 790:8, 806:18, 811:17 Box [2] - 764:15, 765:5 Bravos [85] - 764:7, 777:3, 777:8, 777:17, 778:4, 780:3, 780:25, 781:3, 781:6, 781:9, 781:14, 781:24, 782:3, 784:12, 788:14, 790:3, 790:11, 790:25, 791:16, 791:24, 792:21, 793:14, 793:19, 794:1, 795:1, 795:17, 796:18, 797:12, 797:21, 798:21, 800:10, 801:20, 803:1, 803:7, 804:7, 804:8, 810:20, 813:3, 813:8, 819:20, 820:3, 821:5, 821:13, 823:18, 835:25, 836:18, 845:10, 846:6, 846:15, 848:17, 854:5, 854:8, 856:5, 857:13, 861:20, 862:7, 868:15, 879:25, 883:18, 888:16, 888:23, 889:5, 889:16, 890:8, 893:1, 895:4, 895:8, 896:8, 904:7, 905:15, 906:5, 906:24, 908:16, 910:1, 911:13, 914:7, 918:6, 919:6, 923:15, 928:8, 932:8, 935:20, 952:24, 970:11, 991:25 Bravos' [27] - 777:11, 781:13, 782:6, 783:12, 783:13, 788:2, 790:22, 790:24, 791:12, 792:3,</p>
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<p>795:11, 795:13, 798:2, 800:7, 800:17, 807:21, 809:11, 811:7, 820:21, 824:11, 824:15, 824:20, 860:14, 881:16, 882:1, 883:6, 904:17 break [7] - 877:21, 878:3, 897:12, 898:12, 902:6, 971:15, 971:19 breaking [1] - 902:12 brief [3] - 809:23, 825:21, 917:6 briefing [1] - 833:11 briefly [5] - 781:2, 811:23, 905:21, 928:12, 928:16 bring [4] - 783:3, 856:18, 857:22, 858:17 bringing [1] - 856:12 brings [2] - 812:22, 995:1 broadly [4] - 784:20, 784:21, 786:20, 802:17 brought [7] - 798:8, 838:20, 852:18, 853:12, 860:5, 886:14, 909:2 BRYAN [3] - 766:13, 903:13, 903:17 Bryan [5] - 766:14, 772:14, 772:15, 775:11, 902:23 build [1] - 877:18 Building [2] - 762:18, 763:17 building [2] - 877:17, 953:17 built [1] - 877:10 bulleted [3] - 809:24, 829:8, 863:1 bunch [1] - 1010:3 burden [12] - 790:4, 820:21, 821:3, 823:14, 823:17, 824:1, 824:12, 825:7, 846:21, 941:16, 942:2, 964:13 burdensome [2] - 941:14, 1000:3 Bureau [22] - 890:9, 891:7, 903:23, 915:13, 916:14, 917:19, 921:25, 923:2, 936:4, 941:15, 941:17, 943:2,</p>	<p>946:10, 946:14, 947:2, 950:23, 953:1, 957:3, 976:6, 976:17, 976:18 bureau [4] - 939:12, 947:13, 950:22, 963:20 Bureau's [9] - 767:6, 904:6, 915:3, 917:8, 917:22, 935:19, 941:19, 945:23, 957:11 bureaus [1] - 976:18 busily [1] - 969:7 Business [1] - 768:5 business [2] - 856:13, 975:14 BUTCH [1] - 763:3 Butte [6] - 977:19, 980:17, 980:18, 981:12, 1002:9, 1004:21 button [1] - 939:1 BY [26] - 780:15, 783:11, 815:2, 819:4, 822:5, 823:7, 825:14, 826:15, 826:22, 827:17, 827:24, 828:12, 832:19, 833:22, 880:5, 890:6, 898:17, 903:18, 916:1, 916:9, 937:6, 939:9, 955:12, 961:14, 968:12, 972:14</p>	<p>Capitol [1] - 762:18 capricious [1] - 811:4 captures [1] - 905:11 capturing [2] - 953:18, 953:24 carbonate [1] - 913:3 carries [1] - 870:23 carrying [1] - 887:18 case [27] - 777:10, 777:14, 779:15, 780:7, 781:3, 793:11, 806:6, 839:14, 840:7, 840:14, 860:16, 872:21, 887:11, 904:18, 907:13, 919:25, 929:5, 932:23, 953:23, 964:10, 978:13, 994:7, 997:15, 1001:2, 1005:13, 1006:15 cases [5] - 836:17, 867:24, 891:23, 976:22, 995:23 CASTANEDA [1] - 782:23 catch [1] - 948:16 categories [3] - 865:18, 866:16, 992:12 categorizing [1] - 997:20 category [8] - 865:2, 865:16, 865:22, 900:23, 960:22, 978:24, 991:7, 994:7 cats [1] - 1010:20 cattle [1] - 995:2 caused [3] - 892:14, 892:18, 941:7 causing [1] - 850:9 caution [3] - 796:16, 845:19, 977:4 CCR [2] - 775:18, 1011:20 Cebolla [1] - 913:21 Center [2] - 764:9, 777:7 centralized [2] - 953:14, 953:23 Cerro [1] - 892:12 certain [14] - 800:25, 806:5, 806:20, 858:23, 862:5, 881:11, 898:20, 906:6, 907:5, 907:14, 908:11, 962:13, 969:23, 981:11 certainly [21] - 796:6,</p>	<p>804:8, 839:1, 846:4, 847:8, 847:11, 850:2, 851:10, 852:21, 857:7, 899:15, 904:13, 912:2, 914:18, 947:12, 964:9, 969:19, 981:24, 983:21, 1002:16, 1006:14 certainty [2] - 862:3, 892:3 certification [19] - 877:17, 951:4, 951:5, 951:6, 951:11, 951:12, 951:25, 952:6, 952:7, 952:19, 954:14, 963:21, 963:24, 964:3, 982:23, 982:25, 984:20, 985:3, 986:5 certifications [1] - 934:21 certified [2] - 987:5, 987:7 certify [2] - 986:17, 1011:7 cetera [5] - 836:2, 855:25, 900:20, 900:25, 982:22 CFR [6] - 768:14, 768:21, 769:12, 769:13, 769:14, 774:15 chair [4] - 993:14, 994:3, 997:12, 1003:10 Chair [1] - 763:3 Chairman [50] - 777:5, 782:19, 833:18, 834:1, 835:14, 851:15, 851:17, 852:3, 863:10, 868:2, 868:3, 869:19, 870:3, 870:5, 870:14, 871:8, 878:9, 879:1, 879:5, 880:3, 888:8, 889:12, 900:16, 901:12, 903:5, 903:11, 972:1, 972:4, 972:8, 972:9, 972:16, 982:14, 983:11, 983:20, 988:13, 988:22, 991:6, 992:2, 992:10, 993:18, 997:23, 997:25, 1006:11, 1007:8, 1007:10, 1007:16, 1009:2, 1009:20, 1010:8, 1010:16</p>	<p>chairman [2] - 1006:13, 1009:23 challenging [1] - 959:17 Chama [1] - 913:24 chance [1] - 951:13 change [37] - 796:19, 797:5, 803:16, 810:25, 811:4, 820:22, 833:3, 833:9, 837:15, 841:11, 841:13, 846:18, 846:19, 847:23, 848:12, 848:17, 849:7, 883:6, 891:20, 895:21, 896:20, 926:2, 928:19, 930:17, 934:13, 934:14, 934:18, 934:23, 935:21, 935:23, 940:2, 940:8, 966:4, 970:12, 973:3, 1004:20 changed [3] - 791:6, 991:16, 1005:22 changes [69] - 777:11, 777:18, 777:22, 778:1, 778:3, 778:6, 778:13, 778:22, 781:3, 781:7, 781:10, 781:13, 781:15, 791:1, 791:11, 791:20, 791:23, 791:24, 791:25, 792:4, 792:20, 792:21, 793:19, 794:11, 794:14, 795:11, 795:13, 797:10, 797:22, 798:19, 800:7, 800:13, 800:15, 800:17, 801:10, 801:18, 801:23, 802:25, 803:9, 803:17, 807:24, 811:8, 816:9, 841:9, 847:21, 875:9, 881:17, 891:18, 891:19, 917:21, 917:22, 925:17, 926:4, 928:8, 928:15, 928:18, 933:5, 933:10, 933:17, 933:19, 934:5, 935:20, 939:19, 976:16, 982:18, 988:25, 991:19, 1000:16 Changes [1] - 779:2 changing [2] - 802:9,</p>
--	--	---	---	---

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110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>917:10 Chappelle [7] - 766:6, 776:8, 817:7, 824:18, 825:6, 826:6, 832:10 CHAPPELLE [33] - 764:3, 814:24, 815:2, 817:10, 818:7, 819:4, 821:2, 821:9, 822:5, 822:22, 823:2, 823:5, 823:7, 823:24, 825:14, 826:10, 826:15, 826:19, 826:22, 827:17, 827:22, 827:24, 828:8, 828:12, 830:14, 831:2, 831:6, 832:12, 832:19, 889:1, 898:5, 972:5, 972:8 characterization [1] - 967:16 characterize [1] - 830:1 charger [1] - 866:20 CHARLES [2] - 766:10, 890:1 Chavez [1] - 762:17 CHAVEZ [91] - 763:9, 763:9, 777:1, 778:11, 779:5, 780:1, 782:13, 782:19, 783:4, 783:9, 814:3, 814:12, 814:16, 814:20, 814:22, 814:25, 818:6, 818:18, 821:18, 821:21, 823:3, 823:6, 825:4, 826:8, 830:21, 830:23, 833:15, 854:16, 868:2, 868:9, 868:22, 869:8, 870:3, 870:14, 871:1, 877:19, 878:1, 878:7, 879:22, 887:23, 888:6, 888:9, 888:15, 888:19, 888:24, 889:6, 889:9, 897:6, 897:22, 898:1, 898:4, 898:6, 898:10, 899:20, 899:24, 900:5, 900:13, 901:13, 901:15, 901:21, 902:5, 902:11, 902:19, 903:5, 903:8, 915:6, 915:11, 915:16, 915:19, 915:22, 938:17, 938:20, 939:6, 955:6, 961:11,</p>	<p>968:8, 969:11, 969:14, 969:21, 970:2, 971:11, 971:23, 972:4, 972:7, 972:9, 998:8, 998:12, 998:15, 1007:16, 1007:22, 1010:8 check [5] - 855:18, 855:20, 856:23, 857:2, 858:11 checks [5] - 856:7, 856:11, 856:12, 856:13, 857:8 chemical [3] - 893:17, 894:3, 894:22 chemistry [1] - 906:16 CHERYL [1] - 1011:6 Chevron [7] - 764:18, 814:20, 855:25, 888:12, 898:2, 899:21, 968:9 Chevron's [1] - 860:11 chief [4] - 939:12, 947:13, 950:22, 963:20 chime [1] - 982:20 Chino [33] - 764:2, 770:4, 770:6, 770:8, 770:11, 770:12, 776:4, 781:20, 808:7, 808:16, 809:11, 810:14, 810:19, 810:23, 817:1, 820:2, 820:6, 820:17, 821:9, 821:14, 821:16, 822:7, 822:8, 822:11, 823:11, 823:17, 830:10, 830:12, 862:2, 862:13, 862:16, 904:1, 1000:8 chino [1] - 769:24 Chino's [2] - 810:25, 819:23 chooses [1] - 914:6 chose [1] - 978:24 Chris [1] - 1000:8 Christensen [1] - 906:11 Christine [1] - 792:24 chronic [1] - 909:16 circumstance [1] - 996:24 circumstances [3] - 839:24, 862:3, 894:11 citation [3] - 853:8, 898:24, 899:10 cite [2] - 822:7,</p>	<p>849:21 cited [1] - 906:23 citizens [1] - 941:17 City [1] - 976:21 claim [1] - 826:3 clarification [13] - 778:10, 778:24, 812:6, 821:22, 828:5, 835:22, 869:6, 899:21, 903:3, 966:2, 972:7, 972:21, 994:25 Clarifications [1] - 769:9 clarified [3] - 828:18, 943:19, 961:18 clarify [15] - 785:4, 799:3, 800:10, 814:8, 817:8, 822:22, 829:11, 857:4, 877:18, 902:24, 907:7, 908:17, 909:12, 964:3, 988:14 clarifying [3] - 815:9, 820:1, 897:25 clarity [7] - 801:7, 813:22, 823:6, 850:14, 875:10, 878:18, 965:5 class [1] - 986:3 classification [1] - 984:22 classified [11] - 931:18, 941:21, 944:1, 972:25, 984:1, 987:14, 988:2, 989:12, 994:6, 994:11, 994:19 classify [1] - 960:23 clause [2] - 832:4, 832:6 clauses [2] - 832:7, 833:2 Clean [34] - 773:9, 785:24, 799:17, 802:23, 805:15, 806:15, 812:4, 812:9, 812:18, 848:2, 849:9, 880:12, 893:16, 922:8, 922:20, 927:4, 934:10, 935:22, 940:20, 942:5, 943:9, 951:5, 951:12, 952:1, 958:6, 959:7, 959:9, 959:12, 961:4, 962:6, 965:20, 966:12, 967:10, 967:18 cleaning [1] - 988:1 clear [30] - 778:25, 780:21, 792:7, 794:22, 797:4,</p>	<p>799:12, 799:16, 812:16, 840:13, 841:3, 841:4, 841:7, 843:1, 843:9, 852:23, 862:10, 870:12, 874:13, 879:16, 882:11, 883:17, 914:4, 915:16, 918:20, 925:5, 926:23, 929:12, 965:6, 965:8, 965:10 clearly [12] - 811:25, 813:17, 835:18, 841:2, 862:18, 862:23, 870:10, 874:21, 882:21, 940:22, 942:12, 942:14 clerk [1] - 937:4 client [4] - 818:4, 818:16, 830:18, 986:10 climate [1] - 891:20 close [4] - 899:11, 900:13, 911:2, 983:18 closed [14] - 855:13, 989:6, 989:12, 989:13, 989:16, 989:19, 990:2, 990:4, 990:6, 990:10, 990:14, 1001:7 closely [1] - 875:5 closer [1] - 864:5 closing [7] - 778:7, 897:10, 901:15, 907:25, 961:20, 1007:24, 1008:13 co [2] - 907:7, 916:5 co-author [1] - 907:7 co-counsel [1] - 916:5 Cochran [1] - 775:9 code [1] - 995:25 Code [2] - 912:5, 912:21 codify [1] - 887:9 coffee [1] - 858:14 coli [1] - 1003:11 collaboration [2] - 1009:8, 1009:13 collected [2] - 995:22, 1004:9 colloquially [1] - 860:12 Colorado [1] - 775:14 column [8] - 839:17, 891:8, 891:25, 893:13, 894:6, 899:3, 913:3, 951:19</p>	<p>comfortable [1] - 982:2 coming [4] - 870:8, 870:17, 982:3, 1003:2 comma [1] - 842:17 Comment [3] - 767:20, 771:19, 772:8 comment [27] - 797:14, 799:4, 800:4, 810:3, 810:4, 816:12, 817:19, 817:24, 818:10, 818:14, 823:18, 858:1, 886:19, 897:10, 902:7, 902:9, 902:14, 909:19, 909:23, 910:9, 930:23, 938:17, 938:19, 946:13, 946:21, 1008:1, 1008:17 commented [1] - 817:5 comments [21] - 808:10, 810:5, 810:7, 816:14, 816:22, 817:3, 817:11, 817:15, 817:16, 818:24, 818:25, 819:2, 819:7, 819:16, 819:21, 835:8, 842:5, 879:9, 919:4, 951:8, 1009:3 Comments [9] - 767:22, 767:24, 768:18, 770:12, 770:24, 771:21, 772:10, 775:20, 776:4 commercial [1] - 1004:1 COMMISSION [3] - 762:2, 833:22, 972:14 commission [1] - 935:1 Commission [141] - 762:18, 763:2, 764:13, 766:7, 766:24, 768:5, 773:14, 779:19, 785:1, 785:8, 787:15, 796:6, 797:16, 799:6, 799:7, 800:11, 801:11, 803:13, 804:6, 804:15, 806:3, 810:17, 810:20, 811:5, 818:24, 818:25, 819:3, 820:3, 821:10, 829:23, 830:2, 833:16, 833:18, 833:23, 834:2, 838:19, 840:8,</p>
--	--	---	--	--

KATHY TOWNSEND COURT REPORTERS

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(505) 243-5018 - Fax (505) 243-3606

<p>840:20, 842:1, 842:8, 844:7, 845:6, 846:12, 846:17, 847:17, 852:14, 854:22, 863:15, 863:20, 874:7, 878:10, 879:20, 879:23, 881:2, 886:15, 889:13, 889:14, 889:18, 895:6, 895:9, 895:12, 895:16, 895:25, 896:3, 896:5, 896:11, 896:16, 896:22, 898:7, 898:9, 899:25, 903:3, 908:16, 914:6, 914:21, 916:18, 917:6, 917:19, 919:11, 920:9, 921:12, 921:17, 921:19, 925:24, 926:4, 926:12, 926:22, 927:2, 927:8, 927:11, 927:15, 930:8, 931:14, 931:15, 932:23, 933:8, 936:6, 936:18, 940:4, 940:21, 940:25, 941:2, 941:5, 941:9, 944:3, 946:2, 946:22, 946:25, 950:12, 952:13, 955:21, 956:8, 956:9, 956:13, 956:15, 957:1, 957:3, 957:10, 957:12, 957:24, 957:25, 964:10, 964:11, 965:9, 965:22, 966:10, 969:3, 971:14, 971:25, 972:1, 972:12, 1007:13, 1007:15, 1008:16, 1008:19, 1009:3, 1009:5, 1010:9, 1010:10, 1011:22</p> <p>Commission's ^[15] - 790:17, 797:19, 798:12, 880:25, 894:16, 896:24, 922:6, 922:15, 933:10, 940:13, 955:16, 955:20, 956:21, 957:20, 961:24</p> <p>commissioner ^[1] - 901:14</p> <p>Commissioner ^[78] - 833:24, 835:14, 836:4, 838:3, 841:6, 844:9, 847:14, 848:7,</p>	<p>848:14, 848:15, 848:19, 848:24, 849:15, 851:2, 851:13, 851:16, 852:3, 852:17, 853:25, 854:19, 857:14, 858:9, 859:5, 863:9, 864:10, 865:4, 865:24, 866:24, 869:4, 869:11, 869:12, 869:24, 871:5, 871:25, 873:3, 873:16, 874:18, 874:22, 876:15, 880:7, 880:8, 881:20, 882:25, 884:3, 886:6, 898:23, 900:1, 900:2, 900:15, 901:13, 902:8, 939:24, 946:13, 946:20, 947:7, 971:18, 972:15, 976:2, 982:16, 983:11, 983:20, 985:14, 988:15, 988:21, 991:6, 992:2, 992:11, 993:14, 994:3, 997:3, 997:12, 997:24, 998:17, 1002:4, 1003:10, 1005:4, 1009:24, 1010:4</p> <p>Commissioners ^[11] - 777:5, 864:9, 868:16, 869:15, 878:14, 879:18, 880:3, 888:8, 903:12, 969:25, 1009:14</p> <p>common ^[2] - 880:11, 880:13</p> <p>commonly ^[2] - 880:16</p> <p>communicate ^[1] - 831:5</p> <p>communicated ^[2] - 857:17, 860:11</p> <p>communicating ^[1] - 840:5</p> <p>communities ^[3] - 921:5, 938:3, 1005:20</p> <p>community ^[9] - 815:13, 892:4, 921:4, 935:16, 948:17, 953:13, 953:21, 987:4, 1006:22</p> <p>Company ^[1] - 764:2</p> <p>Company's ^[1] - 776:5</p> <p>Comparison ^[1] - 769:21</p> <p>compel ^[1] - 786:3</p>	<p>compelling ^[1] - 907:13</p> <p>compels ^[1] - 810:14</p> <p>compensate ^[1] - 856:5</p> <p>complete ^[2] - 823:1, 999:14</p> <p>completed ^[2] - 975:4, 1008:15</p> <p>completely ^[1] - 872:14</p> <p>completion ^[1] - 805:18</p> <p>complex ^[2] - 906:2, 999:17</p> <p>complexity ^[1] - 999:16</p> <p>compliance ^[37] - 783:24, 784:4, 788:17, 789:11, 838:13, 838:20, 858:20, 858:24, 859:4, 859:8, 859:15, 859:16, 859:23, 859:25, 880:12, 881:22, 896:23, 909:15, 920:3, 921:22, 922:23, 928:3, 947:21, 947:25, 948:7, 948:15, 948:21, 948:22, 949:1, 949:9, 949:10, 962:2, 962:5, 962:11, 988:7, 1004:24</p> <p>complicated ^[2] - 1000:10, 1000:13</p> <p>complied ^[2] - 809:16, 810:15</p> <p>complies ^[6] - 793:21, 793:23, 841:14, 882:12, 882:21, 928:23</p> <p>comply ^[7] - 790:13, 809:11, 842:1, 876:24, 885:22, 945:4, 962:7</p> <p>complying ^[1] - 811:1</p> <p>component ^[8] - 794:2, 803:14, 846:7, 904:20, 911:2, 918:24, 929:6, 930:13</p> <p>compound ^[2] - 832:6, 832:23</p> <p>compromise ^[1] - 808:2</p> <p>conceivable ^[1] - 923:23</p> <p>concentration ^[2] -</p>	<p>881:14, 910:19</p> <p>concept ^[1] - 952:23</p> <p>concepts ^[1] - 954:8</p> <p>concern ^[20] - 780:3, 789:18, 807:22, 810:21, 811:14, 820:5, 830:11, 835:21, 842:23, 843:17, 852:16, 854:12, 854:23, 857:22, 877:12, 893:2, 893:7, 906:5, 984:7, 994:17</p> <p>concerned ^[5] - 840:3, 843:4, 861:9, 989:1, 991:25</p> <p>concerning ^[9] - 840:19, 882:25, 900:3, 955:20, 956:20, 970:11, 982:20, 983:6</p> <p>concerns ^[35] - 783:12, 783:13, 784:12, 784:14, 787:2, 789:2, 789:6, 790:16, 790:21, 791:2, 801:8, 803:7, 803:8, 811:18, 811:23, 812:23, 813:12, 823:13, 847:2, 847:5, 857:15, 857:16, 857:24, 859:20, 860:2, 875:11, 895:4, 917:20, 939:25, 956:17, 957:4, 957:13, 981:3, 983:1, 1009:1</p> <p>concise ^[1] - 830:19</p> <p>conclude ^[3] - 802:6, 971:16, 1010:7</p> <p>concluded ^[1] - 1010:17</p> <p>concludes ^[2] - 814:1, 1007:15</p> <p>conclusion ^[9] - 786:3, 810:14, 824:19, 891:5, 900:14, 975:5, 978:11, 999:25, 1008:4</p> <p>conclusions ^[1] - 999:20</p> <p>condition ^[7] - 790:12, 806:10, 893:23, 895:18, 907:20, 924:11, 964:18</p> <p>conditional ^[1] - 1000:2</p>	<p>conditioning ^[1] - 963:25</p> <p>conditions ^[26] - 790:13, 806:20, 839:7, 840:15, 843:12, 847:18, 863:17, 863:21, 863:22, 895:19, 920:9, 920:16, 927:13, 951:6, 952:1, 952:9, 952:20, 963:24, 964:18, 964:25, 965:8, 965:15, 965:17, 966:10, 966:12, 986:18</p> <p>conduct ^[4] - 805:16, 840:20, 943:20, 974:16</p> <p>Conductance ^[3] - 772:20, 772:22, 772:24</p> <p>conducted ^[3] - 974:20, 998:6, 998:9</p> <p>conducting ^[2] - 849:11, 966:24</p> <p>conference ^[2] - 864:9, 869:2</p> <p>confident ^[1] - 997:6</p> <p>confirm ^[1] - 794:6</p> <p>conflict ^[2] - 799:1, 882:18</p> <p>confused ^[4] - 977:8, 979:10, 980:15, 982:1</p> <p>confusing ^[6] - 799:21, 799:25, 811:25, 885:24, 886:25, 889:7</p> <p>confusion ^[5] - 799:11, 804:12, 807:13, 882:23, 955:15</p> <p>conjunction ^[1] - 795:12</p> <p>CONN ^[111] - 766:3, 780:10, 818:17, 818:20, 821:7, 821:24, 825:10, 827:19, 827:23, 828:11, 830:20, 830:22, 830:24, 831:3, 832:16, 834:1, 834:6, 834:9, 834:11, 834:15, 834:18, 834:21, 835:6, 835:14, 836:4, 836:16, 837:2, 837:9, 837:12, 837:18, 838:3, 838:10, 838:13, 838:16,</p>
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KATHY TOWNSEND COURT REPORTERS

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<p>838:21, 839:8, 839:11, 839:15, 840:12, 840:23, 841:1, 841:12, 841:16, 841:19, 842:3, 842:11, 842:22, 843:18, 843:23, 844:1, 844:9, 844:11, 844:16, 844:21, 845:25, 846:14, 847:11, 847:22, 848:1, 848:14, 848:23, 849:4, 849:15, 849:24, 850:9, 850:17, 850:20, 851:2, 851:5, 851:10, 851:22, 852:3, 852:8, 852:12, 853:4, 853:18, 854:6, 856:6, 857:4, 857:14, 858:3, 858:13, 859:5, 860:16, 862:15, 864:1, 864:7, 865:4, 865:10, 865:18, 865:22, 866:15, 866:18, 866:23, 867:2, 867:8, 867:13, 867:20, 871:15, 871:24, 872:7, 872:21, 873:13, 874:18, 875:18, 876:11, 876:15, 877:11, 879:1, 879:4, 879:9</p> <p>Conn [57] - 780:16, 780:20, 780:22, 780:25, 781:24, 783:11, 784:12, 785:3, 787:1, 787:21, 790:20, 792:7, 792:18, 793:25, 794:10, 797:4, 798:18, 799:15, 800:6, 801:13, 802:24, 806:21, 807:24, 808:7, 811:6, 813:25, 815:3, 819:25, 823:7, 824:15, 824:17, 824:22, 825:25, 826:15, 827:24, 828:9, 829:10, 831:2, 831:13, 832:10, 832:25, 833:14, 833:25, 848:9, 854:21, 855:1, 863:12, 864:11, 864:22, 868:19, 871:9, 878:15, 880:6, 890:7, 892:25,</p>	<p>924:20, 947:18</p> <p>Conn's [8] - 820:24, 821:17, 866:2, 866:5, 923:21, 926:10, 949:12, 950:3</p> <p>connected [1] - 782:20</p> <p>connection [2] - 854:5, 986:8</p> <p>connectivity [1] - 989:23</p> <p>consequence [3] - 785:19, 811:3, 950:4</p> <p>Consequences [3] - 1003:24, 1004:9, 1004:17</p> <p>consider [9] - 846:17, 908:10, 921:12, 923:2, 942:21, 987:4, 1005:22, 1005:25, 1008:23</p> <p>considerable [1] - 1000:5</p> <p>consideration [10] - 797:20, 799:6, 875:2, 900:24, 901:3, 901:5, 901:9, 946:17, 953:2, 1008:20</p> <p>considerations [1] - 900:21</p> <p>considered [9] - 881:3, 905:2, 905:18, 907:10, 924:21, 941:9, 944:22, 976:12, 979:19</p> <p>considering [2] - 795:23, 797:2</p> <p>considers [1] - 905:5</p> <p>consist [1] - 1008:9</p> <p>consistent [6] - 797:7, 797:21, 845:18, 894:14, 922:6, 1008:10</p> <p>consistently [1] - 944:24</p> <p>constructed [1] - 880:21</p> <p>construction [4] - 832:11, 832:15, 841:18, 842:14</p> <p>constructive [2] - 791:1, 803:1</p> <p>constructively [1] - 777:19</p> <p>construe [2] - 831:20, 831:23</p> <p>construing [1] - 831:11</p> <p>Consultants [1] -</p>	<p>775:13</p> <p>consulted [1] - 976:20</p> <p>contact [36] - 940:23, 941:3, 942:7, 942:8, 942:15, 942:20, 942:21, 942:24, 943:1, 943:3, 943:8, 943:15, 944:1, 944:6, 944:8, 944:19, 945:10, 945:14, 945:17, 946:1, 946:3, 946:5, 966:16, 967:25, 974:6, 974:7, 978:14, 979:18, 979:22, 980:1, 980:2, 980:4, 980:14, 980:23, 1003:14, 1003:15</p> <p>Contact [1] - 773:10</p> <p>contain [4] - 793:1, 816:22, 904:20, 960:1</p> <p>contained [3] - 799:24, 918:19, 930:10</p> <p>contains [1] - 808:25</p> <p>contend [1] - 804:5</p> <p>contending [1] - 984:18</p> <p>contends [2] - 790:3, 790:11</p> <p>contents [1] - 937:7</p> <p>context [4] - 860:8, 880:19, 965:14, 965:21</p> <p>continue [19] - 777:3, 783:15, 794:9, 807:1, 832:20, 835:3, 835:5, 839:21, 878:9, 894:8, 897:14, 932:1, 952:3, 996:21, 996:25, 1006:7, 1006:24, 1007:5, 1009:12</p> <p>continued [1] - 787:19</p> <p>Continued [20] - 764:1, 765:1, 768:1, 768:3, 769:1, 769:3, 770:1, 770:3, 771:1, 771:3, 772:1, 772:3, 773:1, 773:3, 774:1, 774:3, 775:1, 775:3, 776:1, 776:3</p> <p>continuing [2] - 844:4, 880:14</p> <p>contractor [1] - 941:24</p> <p>contrary [1] - 926:25</p> <p>contributing [1] -</p>	<p>787:13</p> <p>CONTROL [1] - 762:2</p> <p>control [3] - 891:24, 895:23, 950:23</p> <p>Control [9] - 762:18, 763:2, 773:14, 896:11, 896:24, 956:9, 956:14, 957:1, 957:24</p> <p>controlled [1] - 918:12</p> <p>controls [3] - 793:2, 920:1, 920:4</p> <p>conversation [3] - 829:19, 872:4, 925:5</p> <p>conversations [2] - 852:18, 875:8</p> <p>conversely [1] - 962:19</p> <p>coordinator [1] - 916:14</p> <p>copies [3] - 818:21, 862:20, 969:20</p> <p>copy [9] - 827:3, 827:5, 928:7, 936:24, 951:14, 969:22, 969:25, 970:6</p> <p>corner [1] - 834:13</p> <p>Corps [4] - 836:13, 837:3, 837:8, 837:15</p> <p>Corrales [1] - 764:16</p> <p>correct [143] - 778:12, 782:1, 782:4, 782:5, 784:16, 787:7, 787:23, 787:24, 788:4, 788:7, 789:8, 789:17, 789:21, 790:1, 790:7, 790:15, 790:19, 791:3, 791:4, 791:14, 791:22, 792:10, 792:11, 792:14, 794:4, 797:9, 798:17, 799:19, 799:20, 801:12, 801:17, 802:20, 803:5, 803:6, 804:14, 804:18, 804:24, 808:23, 808:24, 809:1, 811:13, 811:21, 813:15, 813:16, 813:23, 817:14, 820:7, 820:8, 820:11, 825:16, 828:7, 828:12, 834:5, 838:9, 838:15, 849:16, 850:13, 851:4, 851:21, 866:24, 866:25, 869:22, 870:9,</p>	<p>870:11, 871:23, 873:8, 876:15, 876:16, 878:23, 878:25, 879:1, 881:4, 881:24, 882:20, 883:4, 883:5, 883:10, 883:15, 883:16, 883:20, 883:22, 885:14, 885:19, 886:4, 886:8, 886:9, 886:15, 887:13, 892:10, 897:2, 899:13, 903:24, 908:21, 911:15, 912:16, 914:10, 917:14, 926:3, 933:3, 933:14, 937:23, 942:16, 942:19, 946:7, 947:14, 955:24, 956:2, 956:17, 956:22, 958:5, 958:11, 958:15, 959:3, 960:7, 960:15, 960:20, 960:24, 961:5, 962:18, 966:13, 966:19, 966:20, 967:8, 967:13, 968:5, 970:23, 973:16, 974:1, 975:6, 978:7, 979:5, 980:8, 987:19, 990:25, 991:13, 991:14, 998:23, 1002:22, 1004:23, 1005:1, 1006:5, 1006:12</p> <p>corrections [1] - 917:15</p> <p>corrective [1] - 784:4</p> <p>correctly [3] - 851:24, 898:25, 925:23</p> <p>Correspondence [2] - 770:8, 775:8</p> <p>cost [14] - 846:22, 941:16, 941:18, 941:24, 941:25, 967:6, 973:12, 973:13, 973:14, 973:17, 973:18, 985:6, 985:13</p> <p>cost-effective [1] - 941:18</p> <p>costly [1] - 941:14</p> <p>costs [2] - 941:7, 966:22</p> <p>council [4] - 856:16, 856:19, 856:21, 856:25</p> <p>counsel [7] - 818:2,</p>
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KATHY TOWNSEND COURT REPORTERS

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<p>862:2, 916:5, 969:7, 969:22, 1011:13, 1011:16</p> <p>Counsel [3] - 765:4, 774:14, 915:1</p> <p>Counselor [2] - 909:5, 912:16</p> <p>Counsels [1] - 763:16</p> <p>country [1] - 908:25</p> <p>COUNTY [1] - 1011:3</p> <p>County [1] - 988:1</p> <p>county [5] - 953:25, 984:11, 984:13, 984:25, 987:13</p> <p>county's [1] - 985:24</p> <p>couple [7] - 806:24, 815:9, 831:9, 897:7, 902:4, 952:23, 968:10</p> <p>course [7] - 779:10, 779:17, 793:9, 901:10, 911:5, 977:25, 995:16</p> <p>court [8] - 847:4, 868:5, 868:8, 868:14, 870:1, 870:12, 901:11, 1010:10</p> <p>cover [2] - 968:22, 996:10</p> <p>Cover [1] - 771:14</p> <p>covered [3] - 808:14, 934:1, 996:8</p> <p>covers [1] - 910:3</p> <p>crafting [1] - 886:12</p> <p>create [5] - 785:10, 839:4, 882:18, 985:23, 999:5</p> <p>created [2] - 850:24, 911:4</p> <p>creating [2] - 798:23, 953:15</p> <p>credible [3] - 782:9, 783:18, 813:11</p> <p>Creek [3] - 906:1, 913:19, 1001:4</p> <p>Criteria [4] - 770:15, 770:16, 775:20, 775:21</p> <p>criteria [75] - 781:21, 782:11, 783:20, 783:22, 784:3, 808:8, 808:17, 808:20, 810:18, 811:8, 811:9, 811:20, 812:1, 812:3, 812:8, 812:18, 812:20, 812:24, 813:4, 813:10, 813:13, 813:18, 817:25, 861:1, 861:3, 861:5, 861:13,</p>	<p>861:16, 861:18, 876:9, 877:8, 877:10, 877:18, 892:23, 904:8, 904:19, 904:23, 905:3, 905:8, 905:13, 907:21, 907:22, 908:2, 908:8, 908:12, 908:14, 908:15, 909:7, 909:16, 910:12, 910:25, 912:7, 912:12, 913:15, 914:7, 914:13, 936:10, 936:12, 942:8, 942:17, 954:13, 960:7, 968:18, 968:19, 968:24, 970:14, 970:21, 971:1, 971:6, 971:7, 973:20, 999:19, 1003:15</p> <p>Criterion [1] - 775:4</p> <p>criterion [10] - 793:4, 805:23, 806:9, 807:5, 834:25, 876:22, 877:5, 920:19, 966:4, 1005:23</p> <p>criticism [1] - 855:12</p> <p>criticized [4] - 906:7, 906:12, 906:16, 908:3</p> <p>Cross [5] - 766:6, 766:7, 766:12, 766:21, 766:23</p> <p>CROSS [7] - 815:1, 833:21, 898:16, 955:11, 961:13, 968:11, 972:13</p> <p>cross [18] - 766:20, 766:24, 814:5, 815:11, 826:16, 826:23, 828:20, 888:1, 897:11, 897:19, 897:23, 898:15, 900:8, 902:2, 911:18, 984:11, 984:13</p> <p>cross-examination [8] - 814:5, 815:11, 826:23, 828:20, 897:11, 897:19, 902:2, 911:18</p> <p>cross-examine [1] - 888:1</p> <p>crystal [1] - 860:20</p> <p>culvert [4] - 984:15, 986:4, 987:14, 987:19</p> <p>curious [1] - 975:18</p> <p>current [23] - 795:18, 840:15, 861:1, 861:5, 861:17, 867:20,</p>	<p>871:15, 873:22, 875:6, 882:17, 887:10, 890:10, 890:14, 890:17, 904:22, 904:23, 907:11, 908:8, 908:14, 971:4, 978:22, 1005:19, 1006:4</p> <p>cut [1] - 868:12</p> <p>CWA [1] - 773:9</p> <p>CWG [1] - 830:6</p> <p>cycle [1] - 962:9</p> <p style="text-align: center;">D</p> <p>DAIL [49] - 766:13, 903:13, 903:17, 938:18, 968:21, 969:22, 970:7, 970:16, 970:24, 971:3, 971:9, 976:2, 976:14, 977:14, 977:20, 977:22, 977:25, 978:7, 978:12, 978:16, 978:18, 979:5, 979:7, 980:10, 980:19, 980:21, 981:6, 981:9, 981:16, 982:15, 989:22, 990:1, 990:5, 990:12, 990:17, 990:22, 995:16, 996:4, 996:7, 996:14, 996:23, 997:6, 997:11, 1002:10, 1002:12, 1002:16, 1002:21, 1002:23, 1006:13</p> <p>Dail [20] - 766:14, 772:14, 772:15, 775:11, 902:23, 903:19, 905:20, 907:17, 908:17, 909:18, 911:17, 914:5, 914:22, 916:1, 968:14, 968:17, 969:4, 970:5, 998:4, 998:21</p> <p>Dail's [2] - 980:8, 1001:12</p> <p>daily [1] - 975:14</p> <p>Dairy [1] - 853:11</p> <p>dairymen [1] - 853:14</p> <p>dam [7] - 834:25, 978:1, 978:5, 981:14, 987:1</p> <p>Dam [2] - 980:18, 1004:21</p>	<p>damage [1] - 941:7</p> <p>dandy [1] - 970:6</p> <p>data [2] - 906:6, 1003:11</p> <p>date [1] - 779:24</p> <p>dated [3] - 774:13, 775:22, 804:18</p> <p>Dawson [3] - 863:9, 997:24, 998:17</p> <p>DAWSON [12] - 863:10, 864:2, 997:25, 998:19, 999:3, 999:9, 999:13, 1000:4, 1000:14, 1000:19, 1001:18, 1001:25</p> <p>days [7] - 800:13, 805:17, 805:22, 809:14, 917:11, 933:19, 1010:20</p> <p>de [4] - 764:4, 764:20, 913:21, 913:23</p> <p>deadline [5] - 779:9, 779:12, 779:14, 800:13, 933:19</p> <p>deal [3] - 832:22, 862:3, 953:16</p> <p>dealing [5] - 777:10, 781:4, 811:12, 831:10, 833:10</p> <p>deals [5] - 777:15, 804:22, 811:9, 883:4, 948:2</p> <p>dealt [1] - 962:1</p> <p>Deborah [2] - 771:8, 771:11</p> <p>decades [1] - 836:6</p> <p>December [5] - 767:15, 773:19, 773:23, 775:22, 925:3</p> <p>decide [4] - 943:2, 957:1, 957:12</p> <p>decided [2] - 795:25, 879:12</p> <p>Decision [4] - 769:15, 773:20, 774:4, 774:14</p> <p>decision [3] - 868:6, 897:21, 961:21</p> <p>decision-making [1] - 897:21</p> <p>deemed [1] - 995:23</p> <p>deeply [1] - 1009:10</p> <p>default [1] - 996:18</p> <p>defensible [1] - 927:4</p> <p>deficiency [1] - 849:17</p> <p>define [2] - 874:4,</p>	<p>875:3</p> <p>defining [2] - 874:17, 981:4</p> <p>definition [5] - 989:5, 989:14, 989:21, 993:4, 993:16</p> <p>definitions [1] - 991:5</p> <p>degradation [10] - 834:5, 835:13, 835:17, 835:19, 882:3, 882:10, 882:15, 894:20, 986:20, 987:3</p> <p>degree [4] - 820:20, 841:23, 855:4, 858:23</p> <p>Del [1] - 764:9</p> <p>delay [1] - 779:13</p> <p>deletions [1] - 792:15</p> <p>deliberation [2] - 895:17, 1008:19</p> <p>deliberations [1] - 1009:13</p> <p>deliver [1] - 913:8</p> <p>delved [1] - 826:23</p> <p>Deming [1] - 989:24</p> <p>demonstrate [6] - 824:13, 863:14, 923:5, 927:2, 942:2, 999:25</p> <p>demonstrated [8] - 783:17, 796:12, 810:15, 904:13, 907:10, 908:4, 908:6, 920:11</p> <p>demonstrates [1] - 958:21</p> <p>demonstration [1] - 923:9</p> <p>denied [1] - 784:6</p> <p>deny [1] - 952:6</p> <p>Department [95] - 763:14, 765:2, 767:5, 769:19, 779:17, 782:8, 782:10, 783:16, 783:19, 796:3, 796:10, 796:11, 797:7, 798:15, 799:8, 803:11, 803:21, 804:16, 806:12, 810:21, 811:18, 812:11, 812:25, 813:5, 817:24, 818:11, 818:13, 819:6, 819:14, 819:21, 837:24, 838:6, 838:8, 838:21, 838:22, 839:1, 842:7,</p>
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KATHY TOWNSEND COURT REPORTERS

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<p>842:15, 845:12, 845:13, 845:18, 847:10, 847:12, 851:7, 852:19, 853:19, 853:24, 860:24, 877:12, 882:14, 886:7, 886:11, 886:14, 887:15, 896:4, 900:25, 901:8, 901:17, 904:9, 916:15, 918:4, 919:12, 919:20, 919:22, 921:1, 925:25, 930:5, 930:7, 930:21, 933:9, 935:5, 936:9, 938:4, 940:5, 942:25, 944:4, 944:5, 944:17, 945:8, 946:21, 947:9, 947:10, 950:12, 955:4, 959:17, 961:17, 965:5, 966:9, 966:18, 966:23, 969:20, 985:24, 988:16, 990:17</p> <p>Department's [50] - 777:15, 777:19, 779:2, 781:9, 781:25, 783:13, 790:22, 790:25, 791:1, 791:16, 791:17, 791:19, 792:9, 792:23, 793:11, 793:12, 798:22, 800:19, 804:1, 804:7, 805:10, 806:21, 807:8, 807:17, 807:25, 808:10, 811:24, 812:17, 818:21, 835:21, 850:5, 880:14, 882:17, 882:22, 885:4, 886:22, 887:10, 895:14, 920:22, 925:11, 926:14, 928:14, 928:22, 931:1, 935:24, 949:18, 961:22, 962:4, 964:5</p> <p>dependence [1] - 913:13</p> <p>dependent [13] - 904:22, 905:3, 905:6, 906:21, 907:12, 907:15, 908:2, 912:7, 912:11, 912:23, 914:1, 971:4, 999:16</p> <p>depicted [1] - 907:16</p> <p>deplete [1] - 823:9</p>	<p>depth [1] - 982:7</p> <p>Derivation [1] - 775:20</p> <p>DeRose [14] - 763:4, 848:14, 848:25, 864:10, 865:5, 865:25, 866:24, 869:5, 869:12, 871:5, 873:16, 874:18, 876:16, 880:8</p> <p>DEROSE [32] - 783:2, 848:5, 848:22, 849:1, 864:12, 864:14, 864:18, 865:7, 865:14, 865:21, 866:14, 866:17, 866:19, 866:25, 867:4, 867:12, 867:17, 867:23, 870:6, 870:10, 871:8, 871:18, 872:3, 872:8, 872:17, 873:6, 874:1, 874:13, 875:12, 876:2, 876:18, 877:3</p> <p>DeRose-Bamman [13] - 763:4, 848:14, 848:25, 864:10, 865:5, 865:25, 866:24, 869:5, 869:12, 871:5, 873:16, 874:18, 876:16</p> <p>DEROSE-BAMMAN [32] - 783:2, 848:5, 848:22, 849:1, 864:12, 864:14, 864:18, 865:7, 865:14, 865:21, 866:14, 866:17, 866:19, 866:25, 867:4, 867:12, 867:17, 867:23, 870:6, 870:10, 871:8, 871:18, 872:3, 872:8, 872:17, 873:6, 874:1, 874:13, 875:12, 876:2, 876:18, 877:3</p> <p>DeRose-Bamman's [1] - 880:8</p> <p>describe [5] - 808:20, 809:2, 833:1, 929:13, 934:17</p> <p>described [5] - 787:23, 809:16, 838:1, 931:18, 943:20</p> <p>describing [1] - 949:7</p> <p>designate [7] - 942:23, 944:8,</p>	<p>945:17, 974:6, 974:7, 974:15, 980:4</p> <p>designated [21] - 805:22, 806:8, 807:5, 891:15, 923:6, 940:14, 941:3, 942:7, 942:20, 943:23, 960:6, 994:5, 994:6, 994:8, 994:12, 994:14, 994:20, 995:23, 996:17, 997:16, 1008:6</p> <p>designates [1] - 943:22</p> <p>designation [5] - 944:2, 960:8, 975:6, 979:1, 980:1</p> <p>designations [1] - 992:11</p> <p>designed [6] - 884:21, 885:12, 893:20, 983:23, 984:3, 999:24</p> <p>detail [1] - 904:11</p> <p>determination [1] - 935:8</p> <p>determine [8] - 786:15, 910:17, 941:20, 950:14, 974:20, 979:21, 981:20, 995:18</p> <p>determining [1] - 949:10</p> <p>develop [1] - 1001:24</p> <p>developing [3] - 904:19, 949:6, 949:8</p> <p>development [4] - 883:4, 908:1, 916:20, 931:6</p> <p>deviation [1] - 850:7</p> <p>dictate [1] - 911:24</p> <p>difference [6] - 859:7, 861:15, 861:17, 883:12, 948:7, 949:23</p> <p>differences [2] - 859:2, 859:3</p> <p>different [15] - 800:23, 800:24, 831:19, 831:20, 845:15, 845:16, 853:16, 853:24, 861:23, 882:8, 904:21, 948:17, 963:10, 1001:17, 1003:17</p> <p>differently [2] - 831:21, 831:24</p> <p>difficult [17] -</p>	<p>782:21, 787:5, 810:19, 820:3, 820:18, 821:10, 821:25, 822:5, 822:8, 822:11, 823:12, 826:4, 868:3, 868:9, 868:13, 870:2, 877:24</p> <p>difficulties [2] - 869:1, 878:16</p> <p>difficulty [5] - 824:22, 824:23, 869:20, 874:2, 874:16</p> <p>Direct [10] - 766:4, 766:11, 766:14, 767:3, 768:3, 769:3, 770:3, 771:3, 772:3, 773:3</p> <p>DIRECT [5] - 780:14, 890:5, 903:17, 916:8, 939:8</p> <p>direct [34] - 766:16, 766:18, 780:12, 788:1, 788:18, 791:9, 791:13, 791:18, 792:24, 802:12, 802:16, 803:3, 803:9, 803:19, 811:15, 811:16, 814:1, 814:2, 815:12, 816:20, 819:15, 826:1, 826:11, 830:19, 856:4, 915:13, 915:20, 915:24, 916:10, 955:21, 956:5, 970:19, 972:17</p> <p>directed [2] - 968:14, 1005:7</p> <p>direction [1] - 823:24</p> <p>directly [4] - 787:13, 800:3, 849:18, 886:13</p> <p>director [3] - 854:6, 854:7, 854:8</p> <p>disagree [1] - 824:2</p> <p>disagreement [1] - 958:23</p> <p>disallow [1] - 935:8</p> <p>disapproved [1] - 811:20</p> <p>disaster [1] - 954:8</p> <p>discern [1] - 865:16</p> <p>discharge [42] - 797:24, 798:5, 801:16, 839:6, 840:10, 865:2, 866:20, 867:3, 867:9, 867:10, 867:12, 867:19, 867:21, 871:10, 871:12, 871:14, 872:1, 872:6, 872:16, 873:1, 873:7,</p>	<p>873:10, 873:12, 873:14, 874:3, 874:17, 880:11, 880:20, 881:5, 881:7, 886:20, 932:4, 934:20, 938:9, 950:21, 952:24, 953:5, 954:1, 963:16, 1003:19</p> <p>discharged [1] - 872:9</p> <p>discharger [19] - 784:7, 785:11, 795:2, 812:12, 843:5, 866:23, 867:2, 867:3, 867:21, 871:15, 921:9, 935:18, 948:1, 950:17, 950:18, 963:17, 964:5</p> <p>dischargers [22] - 783:23, 785:20, 785:22, 786:23, 794:16, 795:6, 796:12, 797:24, 800:24, 801:25, 843:8, 843:10, 872:25, 876:24, 883:19, 883:21, 921:2, 950:5, 950:11, 950:13, 950:25, 953:2</p> <p>Discharges [1] - 866:11</p> <p>discharges [59] - 784:14, 784:19, 784:23, 785:2, 785:6, 785:9, 785:11, 786:8, 786:22, 786:23, 787:9, 787:12, 787:19, 789:2, 789:7, 794:25, 795:15, 797:24, 798:4, 801:21, 802:4, 802:7, 802:10, 802:15, 803:22, 803:25, 804:10, 807:23, 835:12, 835:23, 839:13, 843:11, 848:4, 849:8, 849:9, 865:1, 865:15, 865:17, 865:19, 865:20, 866:7, 867:22, 872:22, 875:20, 875:22, 880:9, 883:2, 883:8, 920:23, 929:19, 929:20, 930:6, 934:24, 951:3, 953:10, 953:13, 1004:3</p> <p>discharging [5] -</p>
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785:13, 786:25, 871:17, 873:18, 881:9 disconnect [1] - 791:17 disconnected [1] - 786:13 discourse [1] - 826:13 discuss [3] - 926:8, 1000:1, 1008:3 discussed [2] - 917:22, 1001:6 discussing [1] - 878:20 discussion [18] - 777:24, 796:4, 811:11, 818:22, 829:4, 829:13, 851:7, 851:13, 865:8, 886:7, 886:11, 886:22, 887:11, 887:19, 917:11, 925:2, 938:16, 986:9 Discussion [4] - 767:19, 767:23, 768:19, 783:8 displays [1] - 906:14 disposal [1] - 877:14 disruption [1] - 894:25 disrupts [1] - 892:21 distinction [2] - 885:25, 927:19 distinguish [1] - 921:14 distribute [1] - 858:18 divide [1] - 999:5 divided [1] - 999:7 document [18] - 798:16, 904:20, 905:13, 907:21, 909:17, 910:12, 912:19, 914:20, 968:24, 969:16, 971:1, 971:6, 989:2, 989:20, 990:8, 991:18, 992:7, 998:6 document's [1] - 969:17 documentation [5] - 794:24, 879:5, 910:5, 979:21, 979:23 documents [1] - 954:16 DOLAN [1] - 765:3 dollars [1] - 1006:18 Dominguez [2] - 903:11, 1006:13 DOMINGUEZ [42] -	763:3, 833:19, 833:23, 851:16, 858:9, 863:9, 864:5, 864:8, 864:13, 864:16, 868:25, 869:10, 869:22, 870:1, 870:9, 870:11, 871:4, 878:11, 879:2, 879:7, 879:15, 898:8, 900:1, 972:2, 972:10, 972:15, 982:16, 988:21, 997:24, 1002:3, 1005:3, 1005:11, 1006:1, 1006:4, 1006:6, 1006:20, 1007:9, 1007:11, 1009:4, 1009:24, 1010:4, 1010:18 done [11] - 779:20, 836:5, 960:15, 973:3, 973:24, 975:9, 975:19, 978:9, 979:6, 981:22, 982:10 door [1] - 855:15 doubt [1] - 908:4 doubts [1] - 907:25 down [13] - 834:12, 839:18, 856:8, 856:12, 877:15, 891:25, 893:22, 918:13, 939:1, 951:19, 974:10, 980:25, 1006:7 Downs [3] - 936:16, 937:8, 1005:14 dozen [1] - 857:9 Dr [28] - 829:21, 888:14, 902:23, 903:19, 905:20, 907:6, 907:17, 908:17, 908:19, 909:2, 909:18, 911:17, 911:19, 911:22, 912:1, 914:5, 914:22, 916:1, 939:13, 939:16, 944:11, 968:14, 968:17, 969:4, 970:5, 998:4, 998:21, 1001:12 DRAFT [1] - 771:17 Draft [4] - 767:19, 767:23, 768:20, 776:5 draft [12] - 795:24, 796:4, 797:3, 818:22, 851:13, 878:21, 886:22, 887:11, 887:21, 925:2, 1008:10, 1008:15	drafted [1] - 927:22 drafts [4] - 851:7, 886:7, 886:11, 887:19 Drainages [1] - 769:25 dredge [10] - 836:12, 836:14, 836:17, 836:19, 836:25, 837:16, 849:12, 934:20, 986:16, 986:24 Drive [1] - 763:16 driven [1] - 983:23 due [6] - 779:24, 821:2, 824:16, 830:14, 847:16, 857:9 duly [4] - 780:11, 890:2, 903:14, 1011:9 duration [1] - 893:19 during [8] - 834:25, 890:7, 908:18, 941:10, 970:10, 979:15, 983:5, 986:15 duty [3] - 930:7, 980:11	825:12, 825:19, 863:1, 863:4, 884:22, 885:12, 885:18, 914:15 eighth [1] - 832:22 either [4] - 839:5, 886:13, 948:12, 964:3 electronic [1] - 969:23 element [1] - 818:11 elements [1] - 789:24 Elephant [6] - 977:19, 980:17, 980:18, 981:12, 1002:8, 1004:21 elevate [1] - 999:22 eliminate [1] - 797:19 emphasize [2] - 917:25, 994:4 employed [2] - 1011:13, 1011:16 employee [1] - 1011:15 enable [1] - 801:8 enacted [1] - 796:13 encompass [1] - 967:19 encompassed [1] - 802:4 encourage [2] - 963:22, 1009:12 end [7] - 846:20, 855:7, 902:12, 923:17, 925:7, 961:24, 999:24 ended [3] - 845:3, 999:7, 1001:4 endemic [3] - 910:2, 910:6, 911:7 endpoint [1] - 927:23 Energy [1] - 765:2 enforce [1] - 988:9 enforceability [1] - 802:18 enforceable [5] - 927:12, 965:15, 965:21, 966:11, 988:8 engage [1] - 835:25 engaged [1] - 836:6 engagement [1] - 810:16 engaging [1] - 887:18 Engineers [3] - 836:13, 837:3, 837:15 English [1] - 832:13 ensure [19] - 792:21, 793:7, 793:11,	793:20, 801:24, 802:18, 813:7, 837:25, 838:12, 883:7, 883:18, 887:14, 894:7, 899:6, 947:4, 950:1, 950:20, 975:24, 978:25 Ensure [1] - 839:19 ensures [5] - 793:15, 802:2, 804:2, 929:10, 965:13 ensuring [2] - 802:17, 961:21 entered [1] - 905:25 entertain [1] - 781:10 entire [1] - 981:4 entirety [2] - 921:13, 921:14 entitled [5] - 778:6, 778:7, 779:1, 814:14, 841:5 entity [9] - 812:13, 826:3, 837:24, 838:18, 839:4, 843:13, 949:6, 950:16, 1004:19 environment [1] - 891:23 Environment [9] - 763:14, 767:5, 779:2, 847:10, 847:12, 850:5, 900:25, 901:8, 920:21 Environmental [2] - 764:9, 777:7 environmental [4] - 891:20, 892:9, 892:13, 892:18 EPA [106] - 767:13, 767:16, 768:18, 769:4, 769:8, 769:15, 769:17, 769:21, 770:10, 772:4, 772:12, 773:16, 773:20, 774:4, 774:11, 774:19, 775:6, 775:19, 795:23, 795:25, 797:2, 798:4, 800:25, 801:5, 803:21, 804:16, 805:6, 805:17, 805:21, 805:25, 806:4, 806:14, 811:19, 812:9, 812:23, 813:9, 834:8, 834:18, 834:22, 835:6, 835:11, 835:15, 836:3, 836:12, 836:13, 839:13,
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KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>839:15, 840:10, 842:4, 860:17, 860:19, 860:22, 860:23, 860:24, 861:13, 878:23, 879:2, 890:23, 891:10, 892:1, 892:8, 893:5, 900:21, 901:10, 904:18, 905:2, 905:5, 905:12, 908:10, 908:13, 909:15, 918:16, 920:9, 921:13, 922:11, 924:20, 925:6, 927:12, 936:11, 940:22, 941:11, 942:14, 942:21, 943:4, 943:6, 943:14, 944:17, 944:21, 944:24, 949:10, 950:19, 951:14, 965:9, 967:3, 971:7, 973:2, 984:17, 988:7, 999:8, 999:12, 1000:12, 1000:23, 1004:10</p> <p>EPA's [14] - 794:19, 794:20, 798:3, 808:2, 849:21, 878:21, 909:5, 910:12, 933:13, 943:8, 959:18, 987:17, 988:17, 997:3</p> <p>EPA-approved [1] - 920:9</p> <p>EPA-recommended [2] - 813:9, 861:13</p> <p>ephemeral [18] - 901:4, 941:12, 941:13, 941:21, 944:20, 958:25, 959:18, 959:22, 960:8, 960:9, 960:13, 960:24, 975:22, 982:18, 984:1, 992:17, 992:21, 994:15</p> <p>equal [1] - 911:4</p> <p>Equation [1] - 775:21</p> <p>equation [2] - 904:22, 913:8</p> <p>Equation-based [1] - 775:21</p> <p>equations [2] - 905:6, 912:23</p> <p>equivalent [2] - 852:5, 913:3</p> <p>ERIK [1] - 764:8</p> <p>Erik [3] - 777:6,</p>	<p>865:25, 877:19</p> <p>eriksg@ westernlaw.org [1] - 764:11</p> <p>especially [7] - 796:9, 796:15, 832:7, 845:9, 845:11, 911:7, 959:18</p> <p>essence [8] - 895:25, 923:16, 935:11, 937:21, 943:14, 943:25, 977:7, 980:10</p> <p>essentially [13] - 780:3, 941:25, 947:25, 948:16, 951:6, 952:18, 958:9, 973:11, 975:14, 976:25, 978:5, 985:21, 995:18</p> <p>established [1] - 837:22</p> <p>establishes [2] - 805:19, 891:10</p> <p>estimate [2] - 983:18, 999:10</p> <p>estimation [1] - 981:17</p> <p>et [5] - 836:1, 855:25, 900:20, 900:25, 982:22</p> <p>evaluate [4] - 805:20, 909:15, 974:20, 979:14</p> <p>evaluated [2] - 945:24, 950:13</p> <p>Evaluation [1] - 771:14</p> <p>evaluation [4] - 805:16, 805:17, 979:15, 999:19</p> <p>events [3] - 891:19, 960:1, 984:14</p> <p>eventually [3] - 948:18, 969:25, 1007:2</p> <p>evidence [24] - 777:23, 778:13, 778:14, 784:1, 813:11, 818:3, 820:14, 820:17, 821:5, 822:11, 823:8, 823:10, 823:15, 823:19, 825:15, 838:25, 904:15, 915:25, 941:6, 976:4, 979:25, 980:2, 980:22, 995:21</p> <p>evidences [1] - 976:22</p> <p>evidentiary [3] -</p>	<p>1008:11, 1008:12</p> <p>exact [1] - 988:5</p> <p>exactly [5] - 838:10, 860:20, 899:8, 940:21, 952:16</p> <p>EXAMINATION [13] - 780:14, 815:1, 833:21, 880:4, 890:5, 898:16, 903:17, 916:8, 939:8, 955:11, 961:13, 968:11, 972:13</p> <p>examination [8] - 814:5, 815:11, 826:23, 828:20, 897:11, 897:19, 902:2, 911:18</p> <p>Examination [13] - 766:4, 766:6, 766:7, 766:8, 766:11, 766:12, 766:14, 766:16, 766:18, 766:20, 766:21, 766:23, 766:24</p> <p>examine [1] - 888:1</p> <p>examined [3] - 780:12, 890:3, 903:15</p> <p>examiner [1] - 897:5</p> <p>example [27] - 816:19, 816:21, 817:2, 873:6, 880:19, 884:20, 885:11, 892:12, 901:3, 907:12, 910:25, 912:22, 913:14, 919:25, 921:3, 923:11, 927:22, 928:17, 935:15, 935:16, 938:12, 941:23, 980:16, 983:25, 986:12, 986:13, 1003:18</p> <p>examples [4] - 796:10, 849:25, 907:1, 988:16</p> <p>exceedance [1] - 834:25</p> <p>exceeded [1] - 913:11</p> <p>except [10] - 807:20, 809:23, 835:19, 839:24, 849:18, 849:19, 888:23, 894:11, 965:21, 967:25</p> <p>exceptions [1] - 849:21</p> <p>exchange [1] - 862:2</p> <p>excluded [3] - 777:21, 778:18, 780:6</p>	<p>exclusion [1] - 811:2</p> <p>excuse [13] - 784:13, 785:7, 802:5, 848:24, 855:16, 888:11, 919:5, 939:25, 940:4, 988:24, 996:14, 1003:21, 1007:22</p> <p>Excuse [1] - 867:6</p> <p>excused [1] - 900:11</p> <p>executed [1] - 846:11</p> <p>executive [2] - 854:6, 854:7</p> <p>exemption [1] - 921:22</p> <p>exhausted [1] - 784:2</p> <p>exhibit [9] - 773:8, 798:7, 798:12, 937:25, 968:19, 968:22, 969:1, 969:3, 969:19</p> <p>Exhibit [92] - 767:4, 767:5, 767:10, 767:11, 767:13, 767:16, 767:18, 767:21, 767:23, 768:4, 768:7, 768:9, 768:11, 768:12, 768:13, 768:14, 768:15, 768:16, 768:18, 768:21, 768:22, 769:4, 769:8, 769:12, 769:13, 769:14, 769:15, 769:17, 769:19, 769:21, 769:24, 770:4, 770:6, 770:8, 770:10, 770:12, 770:14, 770:16, 770:17, 770:20, 770:21, 770:22, 770:23, 771:4, 771:6, 771:8, 771:11, 771:12, 771:14, 771:17, 771:18, 771:21, 772:4, 772:7, 772:10, 772:12, 772:14, 772:15, 772:16, 772:18, 772:20, 772:22, 772:24, 773:4, 773:5, 773:6, 773:9, 773:12, 773:16, 773:20, 774:4, 774:9, 774:11, 774:14, 774:17, 774:21, 775:4, 775:8, 775:9, 775:11, 775:12, 775:19, 776:4, 903:23,</p>	<p>904:12, 905:4, 911:13, 911:14, 916:24, 939:14, 944:15, 944:16</p> <p>Exhibits [2] - 915:13, 915:24</p> <p>exhibits [4] - 778:19, 816:22, 915:4, 915:18</p> <p>exist [2] - 784:2, 947:22</p> <p>existing [30] - 784:19, 784:22, 785:6, 786:1, 786:5, 786:12, 786:18, 787:8, 789:2, 789:12, 801:22, 802:14, 803:22, 803:24, 841:18, 867:11, 881:6, 883:8, 890:16, 905:8, 907:22, 934:25, 948:25, 963:15, 979:7, 979:8, 980:2, 997:1, 997:15, 997:16</p> <p>exists [2] - 838:24, 952:13</p> <p>expanded [1] - 829:2</p> <p>expansion [1] - 881:6</p> <p>expect [2] - 834:24, 918:13</p> <p>expectation [1] - 949:18</p> <p>expectations [1] - 798:24</p> <p>expecting [1] - 855:22</p> <p>expeditious [3] - 793:15, 929:10, 941:18</p> <p>expenses [1] - 941:24</p> <p>expensive [1] - 785:21</p> <p>experience [4] - 837:2, 884:12, 919:16, 919:17</p> <p>expert [4] - 860:11, 861:7, 972:18, 987:21</p> <p>experts [1] - 855:24</p> <p>expired [1] - 806:11</p> <p>Expires [2] - 1011:20, 1011:22</p> <p>expires [1] - 920:18</p> <p>explain [5] - 782:6, 786:15, 826:11, 859:2, 910:4</p> <p>explained [2] - 831:7, 907:23</p> <p>explaining [2] -</p>
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792:19, 811:19 explains [2] - 792:24, 793:5 explanation [4] - 849:22, 857:6, 858:5, 909:21 explanatory [1] - 768:23 explicit [3] - 789:24, 793:12, 891:10 explicitly [2] - 797:6, 964:25 explore [1] - 957:25 express [4] - 790:16, 811:17, 812:1, 847:5 expressed [4] - 784:13, 811:14, 885:7, 890:23 expressing [3] - 783:12, 783:13, 937:21 expression [1] - 876:16 expressly [1] - 787:17 extend [2] - 885:20, 961:16 extending [1] - 884:24 extent [5] - 825:5, 921:11, 928:12, 938:7, 1008:22 extra [2] - 982:10, 993:7 extract [1] - 869:15 extreme [1] - 891:19	facilities [4] - 954:17, 954:19, 962:23, 1003:12 facility [10] - 880:20, 880:24, 881:6, 881:8, 887:17, 953:14, 953:17, 963:15, 1004:9 facing [1] - 988:6 Fact [3] - 768:15, 770:14, 775:5 fact [28] - 785:18, 795:3, 795:14, 795:24, 796:13, 799:14, 807:14, 807:15, 817:24, 830:7, 846:20, 847:18, 884:4, 896:20, 905:15, 923:19, 926:2, 929:4, 941:17, 953:5, 965:15, 975:10, 975:22, 976:5, 976:23, 978:18, 980:24, 1009:16 factor [3] - 834:19, 834:22, 835:7 factors [4] - 835:19, 861:6, 963:2, 963:6 fail [2] - 808:12, 1006:9 failed [1] - 955:1 fails [1] - 910:4 failure [2] - 790:13, 821:14 fair [5] - 830:5, 831:19, 974:22, 981:19, 982:11 fairly [1] - 829:13 fall [5] - 850:15, 905:16, 960:22, 982:21, 989:11 falls [2] - 846:22, 846:23 familiar [5] - 799:16, 924:23, 969:4, 975:21, 987:25 familiarized [1] - 939:15 families [1] - 1009:17 far [6] - 787:4, 798:23, 855:1, 893:12, 988:25, 991:24 farmer [3] - 993:7, 996:21, 996:25 favorite [1] - 966:15 Fe [9] - 762:19, 763:17, 764:5,	764:21, 913:17, 953:24, 988:1, 1001:5 feasible [2] - 841:23, 891:24 February [1] - 767:17 Federal [3] - 804:17, 891:2, 893:11 federal [30] - 812:5, 918:21, 922:8, 922:12, 922:20, 924:12, 924:13, 925:1, 927:13, 928:5, 929:25, 934:20, 940:20, 941:19, 942:11, 943:18, 952:2, 952:7, 970:20, 970:21, 970:25, 973:6, 975:10, 976:11, 979:3, 982:21, 986:15, 995:25, 997:3, 1006:18 federally [2] - 922:14, 951:3 feedlot [1] - 995:2 feeds [1] - 913:22 felt [1] - 988:7 Fenton [1] - 913:22 few [12] - 782:17, 814:24, 858:10, 871:21, 880:6, 891:9, 908:17, 917:11, 955:14, 961:23, 976:16, 1010:14 FIAT [1] - 979:8 Field [2] - 770:21, 771:14 field [4] - 945:24, 975:3, 976:10, 977:10 fifth [1] - 922:14 figure [3] - 832:22, 975:9, 980:11 file [1] - 944:10 filed [9] - 779:17, 779:18, 791:11, 803:2, 917:19, 917:24, 939:14, 944:15, 1008:7 filings [9] - 778:25, 779:1, 779:9, 780:3, 781:5, 792:3, 889:16, 936:15, 936:20 filings [3] - 819:14, 819:17, 944:11 fill [10] - 836:12, 836:14, 836:17, 836:19, 836:25, 837:16, 849:12, 934:21, 986:17, 986:24	Final [2] - 769:17, 771:17 final [22] - 804:16, 807:25, 808:10, 834:7, 878:24, 892:2, 893:25, 895:19, 896:7, 904:18, 918:16, 921:12, 925:4, 925:6, 951:10, 951:14, 955:16, 967:9, 974:23, 974:24, 1008:9, 1009:3 finally [3] - 894:5, 922:14, 927:10 financial [1] - 942:2 financially [1] - 1011:16 fine [2] - 860:7, 969:14 finer [1] - 1006:9 finishing [1] - 938:18 fire [3] - 892:13, 892:14, 892:19 first [33] - 780:25, 805:11, 809:2, 809:5, 809:16, 826:19, 828:15, 832:6, 841:13, 844:13, 853:6, 855:20, 858:11, 858:19, 871:1, 871:9, 883:3, 884:8, 884:23, 885:13, 922:3, 927:2, 928:19, 931:4, 935:7, 937:20, 943:22, 951:19, 961:16, 962:1, 967:7, 1005:11 fiscal [3] - 856:15, 856:17, 856:21 fish [1] - 910:6 Fish [3] - 769:20, 861:24, 913:23 fishable [6] - 959:23, 959:24, 960:5, 960:10, 960:14, 987:14 fishable/ swimmable [7] - 940:24, 943:5, 958:16, 958:20, 958:24, 959:2, 967:13 fit [3] - 930:15, 993:16, 995:4 fitting [1] - 954:9 five [14] - 836:25, 859:17, 877:21, 878:3, 913:1, 914:17, 919:17, 956:1, 962:8,	962:10, 963:1, 971:15, 971:19 five-minute [4] - 877:21, 878:3, 971:15, 971:19 five-year [2] - 859:17, 962:8 fix [1] - 906:10 flash [1] - 984:14 flexibility [2] - 788:15, 954:3 flip [1] - 975:25 flood [1] - 984:14 floor [1] - 898:14 flow [3] - 881:12, 881:14, 1004:8 flow-through [1] - 1004:8 focus [2] - 830:15, 961:18 focuses [1] - 990:17 focusing [1] - 984:6 folks [2] - 831:20, 968:14 follow [11] - 827:1, 850:25, 851:6, 857:21, 878:13, 879:18, 887:21, 920:6, 957:12, 973:9, 1002:4 follow-up [5] - 851:6, 878:13, 879:18, 973:9, 1002:4 following [5] - 827:4, 832:7, 844:13, 934:7, 985:19 follows [3] - 780:13, 890:4, 903:16 food [1] - 856:14 FOR [1] - 762:6 forbidding [1] - 786:12 forego [3] - 869:13, 869:18, 903:20 foregoing [2] - 1011:7, 1011:8 forever [1] - 845:8 forget [1] - 809:14 forgive [1] - 876:14 Forks [1] - 913:25 formality [1] - 915:3 format [3] - 803:4, 831:3, 978:10 formula [2] - 906:7, 971:4 forth [5] - 829:13, 852:18, 853:3, 854:13, 890:9 forthcoming [1] - 908:11
F				
F.(1) [1] - 924:18 F.(1)(b) [3] - 792:1, 797:5, 881:17 F.(1)(b) [1] - 792:20 F.(2) [7] - 794:15, 797:22, 883:1, 883:12, 883:13, 883:20, 883:25 F.(4) [1] - 802:5 F.(5) [11] - 794:10, 794:11, 795:14, 797:11, 843:17, 843:21, 883:1, 883:3, 883:17, 886:17 F.(5) [3] - 802:5, 843:19, 886:5 F.(7) [1] - 798:19 F.(8) [1] - 800:7 face [3] - 811:1, 891:15, 978:18				

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110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

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<p>forward [4] - 787:15, 796:1, 803:13, 891:7</p> <p>Four [4] - 771:9, 771:12, 771:15, 772:5</p> <p>four [8] - 771:19, 771:22, 885:1, 885:21, 914:17, 1001:5, 1001:9, 1010:20</p> <p>fourth [2] - 902:25, 922:11</p> <p>FR [3] - 769:7, 769:11, 769:18</p> <p>fragments [1] - 832:23</p> <p>frame [4] - 885:6, 919:15, 930:10, 930:11</p> <p>framework [2] - 891:11, 922:17</p> <p>Francis [1] - 763:16</p> <p>free [1] - 972:18</p> <p>Freeport [10] - 764:2, 776:4, 814:23, 855:25, 888:25, 898:4, 899:21, 904:1, 971:12, 972:3</p> <p>Freeport's [2] - 815:13, 815:22</p> <p>Freeport-McMoRan [3] - 764:2, 776:4, 904:1</p> <p>frequency [2] - 895:21, 984:14</p> <p>frequent [1] - 895:20</p> <p>frequently [1] - 907:20</p> <p>Freshwater [1] - 775:5</p> <p>Friday [2] - 827:17, 827:21</p> <p>front [4] - 928:7, 936:24, 951:14, 964:10</p> <p>full [1] - 829:4</p> <p>fully [2] - 788:1, 916:22</p> <p>Fulton [3] - 815:22, 816:3, 829:21</p> <p>Fulton's [2] - 828:21, 829:12</p> <p>functional [2] - 852:5, 858:24</p> <p>functioning [1] - 963:4</p> <p>fundamentally [3] - 813:7, 813:21, 966:9</p> <p>furthermore [3] - 894:15, 936:1, 941:5</p> <p>future [10] - 796:2,</p>	<p>860:13, 860:21, 861:3, 861:5, 890:21, 901:9, 923:11, 935:12, 997:10</p> <p style="text-align: center;">G</p> <p>gaining [1] - 931:15</p> <p>Galisteo [1] - 1001:4</p> <p>GALLAGHER [1] - 764:3</p> <p>Gallagher [1] - 776:9</p> <p>game [1] - 910:6</p> <p>Game [1] - 769:19</p> <p>gastropod [2] - 910:10, 910:15</p> <p>gastropods [2] - 910:11, 910:13</p> <p>gather [1] - 976:6</p> <p>gathered [3] - 855:14, 860:22, 945:23</p> <p>gauge [1] - 927:7</p> <p>GEI [1] - 775:13</p> <p>genera [1] - 911:8</p> <p>general [28] - 782:11, 783:20, 783:22, 784:3, 789:18, 808:22, 815:23, 816:25, 817:2, 817:13, 837:10, 837:18, 854:12, 854:20, 860:14, 876:8, 877:7, 877:9, 879:7, 879:10, 880:10, 901:4, 919:15, 981:22, 990:11, 1000:18, 1000:19, 1000:22</p> <p>General [4] - 763:16, 769:17, 769:22, 774:14</p> <p>generally [3] - 858:23, 884:9, 937:6</p> <p>generated [1] - 908:4</p> <p>generation [1] - 831:7</p> <p>Gensemer [2] - 888:14, 907:6</p> <p>GERMAINE [1] - 764:3</p> <p>germaine.</p> <p>chappelle@gknet.com [1] - 764:6</p> <p>Gila [9] - 772:16, 772:17, 772:18, 772:19, 772:21, 772:23, 772:25, 773:4, 913:25</p>	<p>given [22] - 783:24, 783:25, 796:10, 796:19, 802:3, 816:12, 818:5, 818:13, 818:21, 818:25, 819:10, 841:18, 842:14, 862:9, 862:11, 862:25, 923:13, 948:14, 975:21, 975:22, 1006:14, 1011:12</p> <p>glad [1] - 828:18</p> <p>goal [4] - 846:6, 893:15, 895:1, 1007:6</p> <p>goals [2] - 893:21, 940:24</p> <p>GOODRICH [77] - 764:8, 777:4, 778:23, 780:8, 780:15, 780:21, 780:24, 783:3, 783:11, 813:24, 814:13, 817:7, 818:1, 818:15, 820:19, 821:12, 821:19, 822:19, 822:25, 824:10, 826:5, 826:14, 826:18, 826:21, 827:16, 827:18, 828:4, 830:17, 832:9, 854:18, 858:17, 865:24, 868:15, 870:22, 871:13, 871:20, 872:13, 872:19, 873:11, 874:12, 874:15, 875:16, 876:7, 876:12, 877:2, 877:7, 877:24, 880:1, 880:5, 887:22, 888:4, 888:7, 888:17, 897:17, 961:14, 961:15, 962:16, 962:19, 963:12, 964:2, 964:12, 964:17, 964:24, 965:3, 965:12, 965:17, 966:8, 966:14, 966:21, 967:1, 967:3, 967:9, 967:15, 967:18, 968:2, 968:6, 969:13</p> <p>Goodrich [17] - 766:5, 766:9, 766:22, 777:6, 815:11, 826:17, 826:18, 827:16, 827:17, 828:20, 854:17, 860:5, 864:20, 865:6,</p>	<p>865:25, 870:20, 888:3</p> <p>Goodwrench [2] - 826:17, 827:15</p> <p>gosh [1] - 1000:24</p> <p>govern [1] - 837:8</p> <p>government [2] - 984:11, 984:25</p> <p>governments [1] - 982:22</p> <p>grade [1] - 832:22</p> <p>grammar [1] - 832:13</p> <p>Grande [2] - 892:13, 913:15</p> <p>grant [4] - 856:15, 856:18, 856:22, 856:24</p> <p>granted [1] - 921:19</p> <p>gray [1] - 975:23</p> <p>great [5] - 780:24, 858:23, 862:3, 903:7, 917:4</p> <p>Great [3] - 906:12, 906:14, 906:17</p> <p>greater [6] - 861:8, 907:5, 910:16, 910:20, 913:12, 983:2</p> <p>ground [1] - 1003:2</p> <p>grounds [1] - 1009:10</p> <p>Groundwater [1] - 976:18</p> <p>groundwater [2] - 854:1, 854:3</p> <p>groundwork [2] - 951:25, 952:18</p> <p>group [1] - 856:17</p> <p>groups [1] - 837:4</p> <p>growing [2] - 953:16, 953:24</p> <p>growth [1] - 954:7</p> <p>guarantees [1] - 804:11</p> <p>guess [18] - 819:12, 832:18, 833:7, 850:11, 852:22, 853:10, 854:23, 856:4, 858:19, 875:24, 885:24, 929:2, 952:20, 966:8, 967:3, 974:8, 974:23, 983:10</p> <p>guidance [19] - 794:20, 797:3, 798:3, 798:13, 798:16, 904:8, 904:25, 905:8, 906:9, 908:9, 908:10, 909:16, 910:14, 910:20, 911:23, 912:8, 914:3, 914:20, 1009:7</p>	<p>Guidance [1] - 774:17</p> <p>Gundersen [6] - 906:12, 906:24, 911:10, 911:19, 911:22, 912:1</p> <p>Gundersen's [2] - 908:19, 909:2</p> <p>guys [4] - 782:16, 782:25, 869:5, 1009:16</p> <p style="text-align: center;">H</p> <p>half [2] - 877:22, 910:19</p> <p>halfway [1] - 839:17</p> <p>halted [1] - 784:9</p> <p>hand [2] - 834:12, 894:6</p> <p>Handbook [1] - 794:20</p> <p>handful [1] - 954:19</p> <p>handicap [1] - 901:5</p> <p>handing [1] - 856:11</p> <p>handy [2] - 970:6</p> <p>handy-dandy [1] - 970:6</p> <p>hard [6] - 812:4, 812:15, 827:1, 860:19, 867:7, 899:16</p> <p>hardness [39] - 811:8, 811:20, 812:17, 812:20, 812:23, 813:4, 813:12, 860:12, 861:2, 861:4, 861:18, 861:19, 861:21, 904:13, 904:20, 904:22, 905:3, 905:6, 906:21, 906:25, 907:12, 907:15, 907:20, 908:2, 908:7, 908:11, 911:1, 912:4, 912:6, 912:7, 912:11, 912:23, 913:2, 913:9, 913:13, 914:1, 914:12, 914:19, 971:4</p> <p>hardness-based [11] - 811:8, 811:20, 812:17, 812:20, 812:23, 813:4, 813:12, 860:12, 861:2, 861:18, 906:25</p> <p>hardness-dependent [12] - 904:22, 905:3, 905:6, 906:21, 907:12, 907:15, 908:2, 912:7,</p>
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<p>912:11, 912:23, 914:1, 971:4 hardnesses [2] - 861:10, 970:22 harm [5] - 787:3, 796:12, 906:19, 952:12, 982:21 harmed [1] - 908:9 Harold [1] - 763:17 Hatchery [1] - 913:23 hazardous [1] - 978:2 head [5] - 885:15, 954:18, 986:22, 989:18, 1009:7 header [1] - 866:5 headers [1] - 866:2 headwaters [3] - 913:16, 913:20, 913:24 hear [21] - 782:22, 782:25, 783:7, 840:17, 848:6, 855:24, 864:17, 864:20, 869:19, 877:22, 878:23, 893:3, 896:12, 929:3, 940:15, 946:13, 950:7, 956:7, 956:25, 957:7, 957:18 heard [16] - 786:6, 804:2, 807:12, 851:24, 857:17, 860:9, 872:5, 902:5, 922:22, 957:6, 970:16, 973:10, 975:2, 983:14, 998:20, 1002:20 hearing [42] - 762:16, 778:15, 779:14, 780:4, 789:24, 789:25, 799:7, 799:10, 799:13, 799:23, 800:5, 840:20, 841:5, 846:21, 846:23, 847:4, 851:3, 852:11, 852:15, 852:20, 854:11, 855:7, 855:8, 855:13, 862:21, 869:20, 875:9, 876:19, 887:7, 895:17, 897:1, 900:14, 900:19, 903:22, 908:18, 926:12, 937:4, 967:12, 971:17, 1008:4, 1009:9, 1010:16 Hearing [48] -</p>	<p>762:17, 763:8, 767:9, 768:8, 776:7, 777:5, 777:21, 778:9, 778:23, 779:6, 780:9, 814:7, 814:21, 833:19, 854:9, 858:6, 863:11, 868:25, 870:19, 878:11, 879:19, 880:2, 888:5, 888:13, 888:17, 888:21, 889:4, 889:12, 897:4, 897:17, 901:7, 902:21, 902:24, 915:4, 938:23, 955:5, 968:13, 968:23, 972:10, 998:1, 1007:14, 1008:6, 1008:15, 1008:17, 1009:4, 1009:22, 1010:6, 1010:19 hearings [3] - 851:8, 853:11, 862:13 hears [1] - 870:21 held [1] - 939:1 hello [1] - 782:12 help [5] - 797:14, 797:18, 854:21, 948:18, 961:19 helped [2] - 831:5, 1000:11 helpful [6] - 831:7, 886:12, 886:16, 887:4, 887:20, 926:11 herding [1] - 1010:20 hereby [1] - 1011:7 hereto [1] - 1011:16 high [2] - 858:23, 861:22 highest [7] - 806:9, 841:23, 893:23, 910:23, 911:1, 924:11, 942:17 highlight [2] - 917:5, 924:16 highlighted [1] - 828:15 highly [1] - 1002:14 hinder [1] - 891:21 hire [1] - 847:3 hit [2] - 931:12, 1009:10 Hogan [4] - 767:4, 767:10, 773:8, 944:11 Hogan's [2] - 939:13, 939:16 hold [3] - 782:13, 868:2, 877:19 holds [1] - 963:16 holes [1] - 900:20</p>	<p>Hondo [1] - 913:20 honest [1] - 897:15 Honor [1] - 814:24 hope [10] - 838:21, 840:12, 842:3, 842:6, 842:7, 850:12, 851:5, 852:21, 947:7 hoped [1] - 946:21 hopefully [5] - 842:4, 869:13, 878:17, 889:20, 961:24 hopes [1] - 804:8 horizon [1] - 936:13 hospitable [1] - 905:11 Hot [4] - 772:17, 772:19, 772:21, 1003:25 hot [5] - 1002:11, 1002:12, 1003:1, 1004:1, 1004:2 hour [1] - 762:20 hours [1] - 902:4 HOWARD [1] - 763:4 HOYT [1] - 763:7 HP [23] - 769:24, 769:25, 770:11, 770:18, 770:22, 770:23, 771:4, 771:6, 771:9, 771:12, 771:15, 771:19, 771:22, 772:5, 816:15, 816:23, 816:25, 903:2, 941:23, 1000:23, 1001:2, 1001:11 HP-based [6] - 771:9, 771:12, 771:15, 771:19, 771:22, 772:5 hum [4] - 834:15, 841:16, 881:19, 961:10 human [1] - 954:7 humor [1] - 832:20 hundred [1] - 863:22 hundreds [1] - 853:13 hurt [1] - 929:2 HUTCHINSON [70] - 763:4, 833:25, 834:3, 834:7, 834:10, 834:12, 834:16, 834:20, 835:4, 835:10, 835:25, 836:10, 836:23, 837:6, 837:11, 837:13, 837:21, 838:9, 838:11, 838:15, 838:17,</p>	<p>839:3, 839:10, 839:12, 840:8, 840:17, 840:24, 841:8, 841:13, 841:17, 841:25, 842:6, 842:12, 843:16, 843:20, 843:24, 844:3, 844:10, 844:12, 844:17, 845:22, 846:9, 847:7, 847:20, 847:23, 848:10, 849:11, 849:20, 850:3, 850:12, 850:18, 850:21, 851:4, 851:6, 851:14, 858:15, 868:7, 938:23, 939:3, 939:5, 982:17, 983:9, 983:13, 984:9, 985:20, 986:3, 987:10, 987:24, 988:4, 988:19 Hutchinson [22] - 833:24, 835:15, 836:4, 838:4, 844:9, 847:14, 848:19, 849:16, 851:2, 852:17, 874:23, 881:20, 884:3, 886:6, 898:24, 947:7, 982:16, 983:12, 983:21, 985:15, 988:15, 997:3 Hutchinson's [4] - 848:7, 848:15, 882:25, 946:20 hydro [3] - 985:18, 1000:17, 1000:21 hydrology [2] - 817:17, 941:19 Hydrology [1] - 770:18 hypothetical [3] - 920:6, 930:4, 948:25</p>	<p>identifies [2] - 883:7, 883:19 identify [10] - 793:6, 795:15, 797:15, 810:21, 820:4, 823:12, 928:16, 930:6, 930:7, 932:3 ifs [2] - 984:16, 985:7 Ill [2] - 779:1, 792:4 illegal [2] - 981:15, 981:16 imagine [1] - 924:2 immediate [3] - 806:2, 810:23, 820:6 impact [5] - 796:15, 891:17, 907:11, 940:8, 950:21 impacted [3] - 1002:18, 1004:16, 1004:19 impacts [3] - 902:3, 907:13, 908:3 Impaired [1] - 866:7 impaired [23] - 787:3, 787:10, 787:12, 787:13, 787:20, 788:23, 865:1, 865:13, 865:15, 866:8, 875:14, 875:15, 875:17, 875:20, 875:21, 875:23, 905:18, 927:16, 927:21, 949:13, 949:19, 949:23, 949:24 impairment [5] - 786:1, 786:5, 786:12, 786:18, 918:5 impetus [1] - 985:23 implement [4] - 891:13, 922:11, 948:17, 954:22 implementation [7] - 786:9, 796:16, 880:15, 880:17, 947:5, 954:22, 988:17 implemented [11] - 784:10, 801:10, 876:4, 876:6, 876:10, 880:17, 895:23, 922:19, 950:16, 954:12, 954:15 implementing [2] - 807:7, 953:15 implicit [1] - 793:9 implied [3] - 989:3, 993:24, 997:21 important [6] - 846:25, 891:5,</p>
--	---	---	---	---

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>905:10, 913:10, 921:14, 1009:18 importantly [1] - 868:5 imposed [2] - 964:18, 966:10 imposition [1] - 960:4 impossible [1] - 786:15 impression [1] - 1005:4 improper [1] - 958:18 improve [5] - 777:19, 803:4, 891:14, 938:4, 951:9 improvement [3] - 905:7, 908:14 improvements [1] - 1006:7 IN [1] - 762:5 inadvertently [1] - 882:18 Inc [2] - 764:18, 775:13 incentivize [1] - 801:25 include [20] - 785:23, 789:23, 803:14, 807:9, 811:18, 822:8, 823:9, 874:6, 874:8, 874:10, 886:18, 895:6, 901:1, 906:19, 913:15, 934:19, 943:23, 953:10, 967:22, 968:2 included [18] - 791:9, 806:12, 806:14, 815:23, 816:7, 819:15, 843:11, 843:21, 848:2, 849:9, 880:14, 886:22, 900:23, 910:11, 912:21, 948:1, 964:20 includes [3] - 835:6, 933:1, 954:16 including [7] - 810:20, 820:4, 874:2, 874:16, 904:16, 913:19, 968:25 inclusion [9] - 801:15, 881:21, 886:18, 900:17, 906:8, 907:11, 907:14, 908:3, 931:1 inconsequential [1] - 973:12 inconsistent [1] -</p>	<p>800:18 incorporate [4] - 808:5, 840:4, 928:15, 936:10 incorporated [3] - 918:11, 927:20, 962:21 incorrect [1] - 940:25 increase [6] - 785:15, 837:16, 867:21, 873:22, 874:7, 893:2 Increased [1] - 866:11 increased [52] - 784:14, 785:1, 785:5, 785:9, 785:17, 786:8, 787:12, 787:19, 789:7, 801:25, 802:3, 802:7, 807:23, 834:5, 835:13, 835:17, 835:22, 835:23, 839:13, 848:3, 849:8, 849:9, 865:1, 865:14, 865:19, 867:9, 867:18, 871:11, 871:14, 872:6, 873:9, 873:12, 873:13, 874:1, 874:3, 874:16, 875:4, 875:20, 875:22, 880:9, 880:10, 881:5, 881:7, 918:5, 920:23, 921:2, 921:8, 921:9, 950:21, 953:12, 954:1 increases [2] - 871:16, 921:3 increment [1] - 913:1 incremental [1] - 894:1 increments [1] - 912:25 indeed [10] - 786:3, 786:7, 802:6, 813:1, 836:17, 841:4, 848:20, 910:11, 913:11, 979:21 independent [2] - 821:5, 825:15 indicate [6] - 820:1, 820:15, 835:11, 860:24, 907:4, 952:12 indicated [6] - 799:8, 907:3, 907:22, 954:9, 956:13, 1005:8 indicates [1] - 834:4 indicating [3] - 821:6, 822:24, 829:22 indication [2] -</p>	<p>812:10, 837:14 indications [1] - 860:17 indicative [1] - 976:23 individual [3] - 921:22, 922:4, 932:3 industries [1] - 813:19 infinite [1] - 1010:2 inflatable [1] - 980:25 inflow [2] - 1003:1, 1003:8 influence [2] - 861:7 inform [1] - 777:19 information [21] - 780:5, 809:13, 809:15, 810:14, 824:25, 830:10, 860:22, 862:6, 862:8, 862:12, 862:15, 869:16, 895:22, 908:5, 911:6, 913:8, 945:18, 945:23, 948:14, 968:15, 974:3 informative [2] - 830:4, 830:25 informed [1] - 961:21 infused [1] - 832:20 inherent [1] - 800:19 inhospitable [1] - 905:17 initial [3] - 777:9, 781:1, 833:1 inner [3] - 980:24, 980:25, 981:23 input [19] - 808:21, 808:23, 809:3, 809:7, 809:17, 809:22, 809:23, 810:11, 810:12, 811:3, 822:14, 823:15, 823:19, 823:22, 825:24, 830:12, 862:17, 862:24, 863:6 insertion [1] - 794:2 Inside [2] - 860:19, 860:22 insisted [1] - 906:24 instance [3] - 977:14, 996:2, 997:13 instances [2] - 976:14, 993:7 instead [6] - 813:18, 825:5, 825:6, 856:8, 882:13, 921:18 integrity [3] - 893:18, 894:4, 894:22</p>	<p>intent [12] - 777:18, 777:25, 779:10, 788:2, 793:11, 837:20, 847:25, 848:13, 849:23, 850:6, 876:1, 966:9 intention [3] - 799:9, 949:20, 949:21 intentional [1] - 826:21 intentions [1] - 900:22 interchanged [1] - 983:17 interested [1] - 1011:17 interesting [1] - 779:11 interfere [1] - 870:24 interim [2] - 793:6, 854:7 intermittent [10] - 901:3, 959:1, 959:4, 960:19, 975:23, 994:7, 994:15, 996:16, 996:23 Internet [2] - 976:11, 977:10 interplay [4] - 799:18, 883:1, 884:1, 962:2 interpret [1] - 863:19 interpretation [5] - 840:25, 841:2, 851:21, 966:6, 992:16 interrupting [1] - 1009:25 interstate [1] - 931:17 INTERSTATE [1] - 762:6 Interstate [3] - 773:17, 773:22, 774:6 intervening [1] - 779:21 intrastate [1] - 931:17 INTRASTATE [1] - 762:6 Intrastate [3] - 773:18, 773:22, 774:6 introducing [1] - 826:6 introduction [1] - 932:10 introductions [1] - 903:20 invertebrates [2] - 910:10, 911:3 investigate [1] -</p>	<p>978:24 investigated [1] - 977:5 investigation [6] - 904:2, 904:16, 975:4, 979:24, 979:25, 995:20 investigations [1] - 975:9 inviting [1] - 957:24 involved [2] - 836:15, 849:12 involvement [3] - 815:13, 931:5, 931:6 involving [1] - 797:19 irrigate [2] - 993:9, 993:13 irrigation [7] - 993:4, 993:16, 994:4, 994:9, 994:11, 994:19 issuance [2] - 785:18, 952:6 issue [16] - 777:14, 780:5, 781:5, 781:8, 806:18, 807:11, 811:7, 824:19, 831:11, 889:15, 907:19, 957:21, 982:7, 984:23, 985:4, 997:7 issued [5] - 845:24, 846:3, 922:15, 952:2, 952:8 issues [18] - 779:22, 781:4, 781:17, 781:18, 781:20, 797:19, 810:21, 816:16, 820:4, 821:11, 823:12, 829:19, 855:2, 857:21, 857:22, 892:18, 978:6 issuing [1] - 951:25 IT [1] - 762:15 item [2] - 985:11, 993:3 items [2] - 778:19, 946:10 itself [7] - 798:15, 800:22, 815:24, 844:24, 845:18, 969:16, 980:7</p>
J				
<p>James [3] - 767:4, 767:10, 773:8 JANE [1] - 763:4</p>				

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>January [2] - 769:16, 1008:21</p> <p>Jemez [3] - 906:1, 913:17, 913:19</p> <p>jmccaleb@taylor-mccaleb.com [1] - 764:17</p> <p>job [2] - 973:18, 1009:19</p> <p>jobs [1] - 1009:15</p> <p>Jodey [5] - 770:17, 770:20, 774:21, 902:25, 1001:2</p> <p>JOHN [3] - 763:5, 763:6, 763:15</p> <p>John [1] - 782:14</p> <p>john.verheul@state.nm.us [1] - 763:19</p> <p>joining [1] - 864:9</p> <p>joint [1] - 1008:24</p> <p>JOLENE [1] - 764:14</p> <p>Jon [1] - 909:19</p> <p>Juan [23] - 764:13, 790:17, 798:11, 804:6, 804:15, 814:17, 888:20, 889:14, 921:17, 926:22, 940:13, 940:21, 940:25, 941:5, 955:7, 955:16, 956:8, 956:12, 956:20, 957:3, 957:10, 957:20, 957:23</p> <p>July [2] - 768:6, 769:6</p> <p>jumping [1] - 967:20</p> <p>jumps [1] - 913:4</p> <p>June [2] - 770:7, 774:13</p> <p>jurisdiction [3] - 946:5, 959:18, 988:8</p> <p>justice [1] - 878:2</p> <p>justification [2] - 812:25, 813:6</p> <p>justified [1] - 927:3</p> <p>justify [5] - 787:19, 790:5, 793:21, 810:16, 924:3</p> <p>juxtaposing [1] - 858:20</p> <p>K</p> <p>KATHRYN [1] - 763:15</p> <p>kathryn.becker@state.nm.us [1] -</p>	<p>763:18</p> <p>keep [4] - 944:2, 946:9, 946:10, 974:12</p> <p>keeping [1] - 942:6</p> <p>Kennedy [1] - 776:9</p> <p>KENNEDY [1] - 764:3</p> <p>key [2] - 797:19, 976:19</p> <p>kills [1] - 910:19</p> <p>Kimball [1] - 906:8</p> <p>kind [11] - 809:24, 812:13, 823:16, 839:17, 863:19, 870:15, 899:16, 934:1, 977:1, 989:23, 995:14</p> <p>Klingel [3] - 909:19, 909:23, 911:8</p> <p>Klingel's [1] - 910:8</p> <p>knowledge [4] - 821:5, 825:15, 1000:21, 1002:23</p> <p>known [2] - 905:2, 917:17</p> <p>knows [2] - 825:5, 988:8</p> <p>KOUGIOULIS [10] - 998:17, 998:24, 999:4, 999:12, 999:15, 1000:7, 1000:17, 1000:20, 1001:7, 1001:16</p> <p>Kougioulis [9] - 770:17, 770:20, 774:21, 902:25, 989:15, 998:5, 998:9, 998:16, 1001:3</p> <p>Kris [1] - 902:23</p> <p>KRISTINE [3] - 766:13, 903:13, 916:8</p> <p>Kristine [4] - 766:16, 768:11, 768:12, 774:9</p> <p>L</p> <p>Laboratory [2] - 765:4, 765:5</p> <p>laboratory [1] - 906:13</p> <p>lack [3] - 810:13, 891:23, 965:4</p> <p>lacks [1] - 989:23</p> <p>Lake [2] - 913:16, 913:22</p> <p>lake [15] - 835:1, 835:9, 989:11, 989:16, 990:21, 992:4, 992:20, 993:8,</p>	<p>993:12, 994:9, 995:3, 996:2, 996:17, 996:22, 996:24</p> <p>lakes [21] - 900:18, 940:1, 940:5, 940:9, 989:1, 989:4, 990:13, 991:4, 991:7, 991:12, 992:1, 992:4, 992:9, 992:17, 992:19, 992:21, 992:25, 993:21, 993:23, 994:18, 997:21</p> <p>Lakes [3] - 906:12, 906:14, 906:17</p> <p>land [4] - 891:18, 891:19, 982:21, 993:22</p> <p>lands [1] - 901:6</p> <p>language [92] - 784:19, 786:11, 791:8, 792:7, 792:8, 793:13, 793:15, 793:17, 793:25, 798:2, 798:22, 799:12, 803:12, 803:23, 804:10, 806:14, 807:8, 807:14, 807:17, 811:19, 811:25, 812:10, 812:16, 833:7, 833:8, 835:7, 840:14, 842:19, 843:19, 843:21, 845:14, 849:6, 849:13, 849:17, 849:18, 852:12, 852:20, 852:23, 857:17, 859:12, 874:3, 874:6, 875:4, 875:10, 875:13, 881:21, 882:1, 882:11, 882:13, 882:17, 882:23, 884:1, 884:2, 884:19, 885:5, 891:4, 892:7, 893:5, 893:9, 894:18, 894:24, 895:5, 895:14, 895:19, 896:6, 925:10, 928:4, 928:24, 929:9, 929:18, 930:18, 930:19, 930:25, 932:2, 932:8, 932:15, 932:19, 933:18, 933:22, 934:1, 934:9, 934:24, 935:3, 935:6, 935:11, 952:25, 953:10, 985:17, 986:14, 989:8, 989:10, 1001:18</p>	<p>languages [1] - 934:7</p> <p>large [5] - 861:14, 861:16, 891:18, 891:19, 892:20</p> <p>large-scale [2] - 891:18, 891:19</p> <p>largely [1] - 990:18</p> <p>larger [1] - 895:1</p> <p>LARRY [1] - 763:3</p> <p>las [1] - 913:23</p> <p>last [16] - 831:9, 836:25, 839:17, 844:4, 847:23, 847:24, 848:12, 848:16, 849:7, 855:7, 862:1, 891:25, 914:17, 917:11, 923:22, 952:23</p> <p>latest [1] - 779:17</p> <p>law [5] - 853:2, 853:9, 976:12, 977:4, 979:3</p> <p>Law [9] - 763:10, 764:4, 764:8, 764:9, 764:15, 764:20, 765:4, 774:15, 777:7</p> <p>layperson's [1] - 832:13</p> <p>lays [2] - 951:24, 952:18</p> <p>LC [3] - 910:18, 910:22</p> <p>lead [2] - 804:9, 822:23</p> <p>lead-in [1] - 822:23</p> <p>learn [2] - 817:23, 1010:1</p> <p>learned [2] - 1010:3, 1010:14</p> <p>learning [1] - 1010:2</p> <p>least [10] - 781:11, 786:8, 791:5, 797:4, 797:5, 797:18, 822:1, 861:20, 882:17, 1009:20</p> <p>leave [4] - 808:12, 854:16, 862:3, 885:21</p> <p>leaves [1] - 863:20</p> <p>leaving [1] - 855:12</p> <p>left [1] - 960:11</p> <p>Legal [1] - 768:7</p> <p>legal [7] - 824:2, 824:12, 824:19, 831:11, 832:10, 883:13, 892:5</p> <p>legally [1] - 853:8</p> <p>LEMON [87] - 766:13, 903:13, 937:5, 939:8, 957:22,</p>	<p>958:2, 958:6, 958:13, 958:19, 959:4, 959:8, 959:15, 959:19, 959:24, 960:2, 960:8, 960:16, 960:20, 960:25, 961:6, 961:8, 961:10, 962:10, 962:18, 962:25, 963:9, 963:20, 964:8, 964:13, 966:20, 966:24, 967:2, 967:8, 967:14, 967:17, 967:22, 967:24, 968:5, 970:4, 973:6, 973:17, 974:1, 974:5, 974:14, 974:18, 975:7, 975:12, 975:15, 979:13, 980:8, 983:11, 983:20, 985:14, 986:2, 986:6, 986:22, 987:22, 989:10, 989:14, 989:18, 991:1, 991:6, 991:14, 991:16, 991:19, 991:22, 992:2, 992:10, 992:19, 992:23, 993:14, 994:2, 994:14, 995:5, 997:12, 998:5, 998:9, 998:13, 998:16, 1002:22, 1003:3, 1003:10, 1003:21, 1004:6, 1004:13, 1004:23, 1005:1</p> <p>lemon [11] - 939:10, 954:25, 957:17, 983:8, 983:10, 988:23, 990:22, 990:25, 993:18, 998:2, 998:21</p> <p>Lemon [6] - 766:18, 773:6, 902:23, 938:22, 957:18, 996:8</p> <p>length [4] - 789:19, 923:17, 929:14, 1000:5</p> <p>lengthy [1] - 851:11</p> <p>less [16] - 785:21, 811:21, 812:21, 812:25, 813:10, 813:14, 844:18, 905:2, 907:22, 909:22, 913:14, 941:25, 963:1, 971:7, 973:5, 1007:12</p> <p>lethal [1] - 910:18</p> <p>letter [5] - 774:13, 775:21, 776:7, 915:8, 944:16</p>
---	--	--	--	--

KATHY TOWNSEND COURT REPORTERS

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<p>Letter [7] - 767:13, 768:4, 768:18, 770:4, 770:10, 771:5, 771:7</p> <p>level [10] - 858:23, 861:8, 867:22, 871:19, 872:9, 874:14, 884:7, 975:4, 999:22, 1007:1</p> <p>levels [7] - 861:10, 861:18, 861:19, 861:22, 871:16, 871:22, 906:19</p> <p>License [1] - 1011:20</p> <p>license [3] - 952:2, 952:7, 952:8</p> <p>life [16] - 904:14, 909:9, 940:23, 944:19, 960:10, 962:24, 967:24, 967:25, 968:3, 991:24, 992:1, 992:3, 992:5, 992:8, 992:11, 992:12</p> <p>lifetime [1] - 962:17</p> <p>likely [9] - 787:10, 803:21, 818:12, 819:9, 831:10, 908:10, 936:5, 1005:8, 1008:20</p> <p>limit [35] - 784:18, 789:16, 794:18, 795:17, 795:19, 795:23, 795:25, 796:5, 796:7, 796:8, 796:20, 796:24, 797:1, 797:2, 801:20, 802:14, 803:24, 844:25, 845:4, 859:10, 859:13, 869:4, 873:7, 873:19, 873:21, 873:24, 874:5, 878:22, 878:24, 879:3, 879:13, 882:3, 918:10, 964:16</p> <p>limitation [1] - 905:10</p> <p>limitations [3] - 786:20, 793:2, 845:21</p> <p>limited [12] - 797:8, 829:3, 834:24, 846:9, 849:7, 849:24, 854:25, 898:8, 940:22, 944:19, 960:9, 967:25</p> <p>limiting [1] - 787:7</p> <p>limits [22] - 785:14, 785:17, 785:21, 789:11, 806:7, 807:7,</p>	<p>812:13, 869:3, 878:19, 882:14, 907:15, 920:20, 928:2, 938:15, 948:2, 948:6, 948:11, 954:20, 954:23, 962:22, 963:17, 963:19</p> <p>line [14] - 815:10, 815:15, 826:25, 827:2, 828:19, 868:10, 868:12, 869:13, 869:21, 920:6, 937:21, 989:5, 998:10, 1005:11</p> <p>lines [1] - 995:22</p> <p>link [1] - 778:3</p> <p>linked [2] - 800:3, 832:8</p> <p>list [7] - 809:24, 829:8, 910:1, 911:13, 946:9, 946:10, 969:7</p> <p>listed [3] - 872:17, 872:20, 873:2</p> <p>listen [1] - 832:2</p> <p>listening [1] - 983:1</p> <p>listing [2] - 929:20, 982:18</p> <p>lists [1] - 863:1</p> <p>liter [5] - 861:12, 909:17, 910:17, 910:21, 913:3</p> <p>literally [1] - 826:3</p> <p>literature [1] - 861:24</p> <p>livestock [5] - 996:3, 996:10, 996:17, 996:22, 997:14</p> <p>LLC [1] - 765:2</p> <p>load [3] - 881:15, 954:17, 1006:16</p> <p>loading [1] - 881:13</p> <p>local [2] - 811:2, 982:22</p> <p>locate [1] - 945:19</p> <p>located [3] - 931:16, 931:23, 937:25</p> <p>location [1] - 802:9</p> <p>logical [2] - 778:15, 802:15</p> <p>Longworth [5] - 972:15, 976:2, 1002:3, 1002:4, 1003:11</p> <p>LONGWORTH [44] - 763:5, 870:5, 972:16, 972:23, 973:7, 973:21, 974:2, 974:8, 974:17, 974:21, 975:8, 975:13,</p>	<p>975:17, 976:8, 977:7, 977:15, 977:21, 977:24, 978:4, 978:8, 978:15, 978:17, 978:20, 979:6, 979:9, 980:5, 980:15, 980:20, 981:2, 981:8, 981:11, 981:19, 1002:6, 1002:11, 1002:13, 1002:17, 1002:24, 1003:5, 1003:16, 1003:23, 1004:12, 1004:15, 1004:24, 1005:2</p> <p>look [18] - 803:11, 831:20, 831:23, 832:14, 832:17, 896:3, 903:6, 910:13, 934:6, 943:2, 975:24, 980:11, 997:9, 997:20, 999:18, 999:21, 999:23, 1003:11</p> <p>looked [1] - 999:1</p> <p>looking [7] - 812:14, 831:25, 953:24, 969:7, 984:10, 993:20, 1006:21</p> <p>looks [1] - 930:11</p> <p>Los [3] - 765:2, 765:5, 765:6</p> <p>lose [1] - 913:21</p> <p>lose [1] - 914:19</p> <p>loss [4] - 786:1, 786:5, 786:12, 786:18</p> <p>lost [1] - 872:14</p> <p>loud [3] - 864:15, 864:16, 871:6</p> <p>LOUIS [1] - 764:19</p> <p>low [6] - 906:2, 907:19, 908:7, 910:14, 914:19, 985:10</p> <p>lower [6] - 807:19, 839:23, 874:25, 894:10, 914:8, 963:18</p> <p>lowering [4] - 839:25, 840:6, 840:15, 894:13</p> <p>Irose@montand.com [1] - 764:22</p> <p>lunch [7] - 868:11, 897:12, 898:12, 902:6, 902:9, 902:11, 902:12</p>	<p>ma'am [1] - 834:20</p> <p>machine [1] - 1011:10</p> <p>macroinvertebrates [1] - 968:4</p> <p>magnitude [1] - 802:9</p> <p>mail [2] - 770:6, 775:8</p> <p>main [2] - 807:22, 827:6</p> <p>maintain [1] - 893:17</p> <p>maintaining [1] - 875:5</p> <p>maintenance [6] - 891:21, 894:3, 894:21, 948:4, 948:22, 963:4</p> <p>Major [1] - 772:22</p> <p>Management [1] - 934:2</p> <p>management [2] - 891:13, 1006:18</p> <p>managers [1] - 982:21</p> <p>mandating [1] - 797:6</p> <p>Manual [1] - 774:17</p> <p>Map [2] - 772:16, 772:18</p> <p>March [4] - 769:20, 773:4, 798:5, 798:6</p> <p>Matter [1] - 775:15</p> <p>MATTER [1] - 762:5</p> <p>matter [9] - 762:16, 777:9, 781:1, 784:8, 813:21, 825:24, 831:11, 846:15, 915:2</p> <p>Matters [1] - 774:15</p> <p>matters [1] - 903:4</p> <p>MATTHIAS [1] - 763:5</p> <p>MCCALEB [37] - 814:18, 870:19, 870:24, 888:21, 889:4, 889:7, 889:11, 890:6, 900:12, 955:9, 955:12, 955:13, 956:1, 956:4, 956:7, 956:12, 956:19, 956:24, 957:9, 957:15, 957:23, 958:3, 958:8, 958:14, 958:22, 959:5, 959:11, 959:16, 959:22, 959:25, 960:3, 960:11, 960:17, 960:21, 961:2, 961:7, 961:9</p> <p>McCaleb [5] -</p>	<p>764:14, 764:14, 766:11, 766:20, 955:7</p> <p>McClure [1] - 913:17</p> <p>McMoRan [3] - 764:2, 776:4, 904:1</p> <p>mean [28] - 816:17, 818:8, 826:16, 838:13, 842:4, 851:2, 855:11, 859:8, 861:9, 876:3, 917:12, 923:6, 925:13, 947:3, 952:17, 953:11, 963:20, 963:22, 964:8, 969:18, 974:25, 980:16, 981:23, 984:3, 993:15, 994:21, 1000:5, 1000:7</p> <p>meaning [4] - 860:18, 867:18, 969:23, 1010:14</p> <p>means [7] - 799:4, 832:17, 832:18, 910:21, 986:25, 993:4, 1000:2</p> <p>meant [3] - 867:18, 874:10, 910:5</p> <p>measure [1] - 929:14</p> <p>measured [2] - 913:2, 914:16</p> <p>measuring [1] - 873:23</p> <p>mechanics [1] - 786:2</p> <p>mechanism [3] - 784:18, 893:25, 1007:4</p> <p>mechanisms [1] - 784:2</p> <p>medium [1] - 1009:10</p> <p>meet [18] - 784:7, 785:22, 801:5, 938:15, 940:23, 948:2, 948:5, 948:11, 949:2, 949:7, 949:25, 951:7, 954:5, 962:13, 963:5, 1003:13, 1005:17, 1006:8</p> <p>meeting [26] - 793:8, 800:4, 809:19, 810:2, 810:9, 810:10, 822:2, 825:20, 825:22, 827:19, 827:20, 827:25, 828:1, 828:6, 828:24, 828:25, 829:5, 829:20, 829:24, 830:6, 863:2, 907:4, 963:17, 964:15, 1006:10</p>
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<p>Meeting [2] - 771:18, 772:7</p> <p>meetings [4] - 822:3, 822:4, 828:6, 862:13</p> <p>meets [1] - 941:18</p> <p>member [3] - 799:22, 856:12, 887:25</p> <p>members [17] - 810:22, 820:5, 833:18, 834:1, 846:16, 855:10, 857:10, 857:15, 857:18, 857:21, 879:22, 889:13, 972:1, 976:17, 1007:17, 1009:2, 1010:8</p> <p>memo [3] - 774:20, 976:15, 980:9</p> <p>Memo [3] - 768:13, 769:20, 773:4</p> <p>mention [3] - 812:2, 931:21, 992:8</p> <p>mentioned [11] - 781:19, 829:6, 851:12, 859:12, 864:20, 886:6, 905:13, 905:14, 918:18, 921:6, 997:3</p> <p>meshed [1] - 874:11</p> <p>met [9] - 779:25, 806:5, 806:20, 809:20, 847:19, 863:5, 920:10, 950:1</p> <p>Metals [1] - 775:19</p> <p>metals [2] - 906:18, 912:23</p> <p>Methodologies [1] - 775:17</p> <p>methods [8] - 808:20, 809:2, 809:17, 833:1, 837:25, 838:11, 862:16, 862:18</p> <p>MEXICO [2] - 762:1, 1011:1</p> <p>Mexico [49] - 762:19, 763:11, 763:14, 763:17, 764:5, 764:10, 764:16, 764:21, 765:6, 767:5, 769:19, 771:10, 771:13, 771:16, 771:20, 771:22, 772:5, 779:2, 796:8, 905:4, 905:16, 905:24, 906:7, 906:25, 907:21, 908:9, 908:24, 909:13, 909:22,</p>	<p>910:2, 910:3, 910:10, 911:5, 911:7, 911:11, 912:5, 912:21, 913:11, 918:15, 921:15, 921:16, 946:5, 953:6, 958:9, 959:23, 960:3, 983:22, 993:22, 995:10</p> <p>Mexico's [13] - 773:17, 773:21, 774:5, 777:11, 793:21, 793:23, 808:2, 904:22, 905:3, 908:1, 910:25, 944:25, 971:4</p> <p>Meyer [1] - 829:21</p> <p>micrograms [4] - 861:12, 909:17, 910:16, 910:21</p> <p>microphone [1] - 938:24</p> <p>microphones [1] - 782:20</p> <p>middle [3] - 891:8, 893:13, 894:6</p> <p>Middle [1] - 913:24</p> <p>might [24] - 884:6, 884:25, 890:21, 892:24, 896:4, 899:13, 904:21, 937:20, 950:5, 952:5, 953:21, 966:2, 969:4, 983:19, 987:4, 987:11, 988:14, 998:5, 998:21, 1001:20, 1004:3, 1005:9, 1005:24</p> <p>miles [2] - 983:16, 985:9</p> <p>milestones [3] - 793:7, 962:13, 987:9</p> <p>milligrams [3] - 881:9, 881:10, 913:2</p> <p>million [1] - 985:10</p> <p>Mimbres [6] - 773:5, 989:22, 990:2, 990:19, 1001:8, 1001:13</p> <p>mind [9] - 816:20, 817:21, 831:14, 852:6, 856:2, 857:6, 879:16, 966:1, 1005:12</p> <p>Mine [1] - 904:2</p> <p>mineralized [1] - 1002:14</p> <p>Mines [14] - 764:2, 769:24, 770:4, 770:6, 770:9, 770:11,</p>	<p>770:12, 776:5, 809:11, 810:23, 820:6, 862:2, 862:13, 862:16</p> <p>Mines' [6] - 781:20, 808:8, 808:16, 817:1, 821:14, 821:16</p> <p>minimum [12] - 793:17, 794:2, 797:8, 844:6, 844:18, 882:4, 882:9, 882:15, 884:1, 884:19, 885:1, 886:1</p> <p>Mining [2] - 764:18, 775:14</p> <p>minute [4] - 877:21, 878:3, 971:15, 971:19</p> <p>minutes [7] - 809:19, 826:24, 827:13, 828:21, 871:18, 871:21, 901:24</p> <p>mirror [2] - 882:4, 882:9</p> <p>mischievous [2] - 988:5, 988:11</p> <p>misconstrued [1] - 804:7</p> <p>missed [1] - 794:12</p> <p>misspoken [1] - 899:14</p> <p>mistakenly [1] - 778:13</p> <p>mitigated [1] - 861:6</p> <p>mitigating [1] - 904:12</p> <p>mo@ saucedochavez.com [1] - 763:12</p> <p>Modifications [1] - 774:12</p> <p>modify [5] - 832:7, 833:2, 896:1, 896:7, 962:23</p> <p>moment [2] - 782:13, 1008:2</p> <p>Monday [9] - 777:18, 778:25, 779:1, 781:5, 791:7, 791:12, 792:3, 803:15, 889:17</p> <p>money [1] - 856:23</p> <p>monitor [2] - 846:5</p> <p>monitoring [3] - 845:23, 847:10, 920:13</p> <p>monitors [1] - 861:20</p> <p>MONTGOMERY [1] - 764:19</p> <p>month [1] - 779:13</p> <p>months [2] - 779:21, 1001:22</p>	<p>moreover [1] - 810:19</p> <p>morning [9] - 777:4, 780:16, 780:17, 782:24, 815:3, 815:4, 833:25, 834:1, 838:2</p> <p>Morris [1] - 762:17</p> <p>MORRIS [1] - 763:9</p> <p>most [13] - 787:10, 803:21, 897:24, 905:17, 936:14, 949:12, 957:6, 973:19, 976:14, 990:23, 1005:6, 1005:15, 1008:20</p> <p>mostly [1] - 983:10</p> <p>mouth [1] - 873:3</p> <p>move [14] - 783:4, 796:1, 814:4, 864:5, 868:7, 888:10, 899:24, 900:6, 904:4, 915:3, 915:4, 929:17, 932:13, 987:10</p> <p>moved [1] - 976:18</p> <p>moves [2] - 787:15, 803:13</p> <p>moving [7] - 827:20, 828:14, 840:17, 850:8, 850:10, 860:25, 905:1</p> <p>MPN [1] - 768:13</p> <p>MR [499] - 763:3, 763:3, 763:4, 763:5, 763:5, 763:6, 763:6, 763:7, 763:9, 763:15, 764:8, 764:19, 765:3, 777:1, 777:4, 778:11, 778:23, 779:5, 779:6, 780:1, 780:8, 780:15, 780:21, 780:24, 782:12, 782:13, 782:14, 782:16, 782:19, 782:25, 783:1, 783:3, 783:4, 783:9, 783:11, 813:24, 814:3, 814:6, 814:12, 814:13, 814:16, 814:20, 814:21, 814:22, 814:25, 817:7, 818:1, 818:6, 818:15, 818:18, 820:19, 821:12, 821:18, 821:19, 821:21, 822:19, 822:25, 823:3, 823:6, 824:10, 825:4, 826:5, 826:8, 826:14, 826:18, 826:21, 827:16, 827:18, 828:4,</p>	<p>830:17, 830:21, 830:23, 832:9, 833:15, 833:19, 833:23, 833:25, 834:3, 834:7, 834:10, 834:12, 834:16, 834:20, 835:4, 835:10, 835:25, 836:10, 836:23, 837:6, 837:11, 837:13, 837:21, 838:9, 838:11, 838:15, 838:17, 839:3, 839:10, 839:12, 840:8, 840:17, 840:24, 841:8, 841:13, 841:17, 841:25, 842:6, 842:12, 843:16, 843:20, 843:24, 844:3, 844:10, 844:12, 844:17, 845:22, 846:9, 847:7, 847:20, 847:23, 848:10, 849:11, 849:20, 850:3, 850:12, 850:18, 850:21, 851:4, 851:6, 851:14, 851:16, 851:17, 851:24, 852:7, 852:9, 853:1, 853:10, 854:4, 854:9, 854:16, 854:18, 855:6, 857:3, 857:5, 858:2, 858:4, 858:9, 858:10, 858:15, 858:17, 858:19, 860:3, 862:1, 863:8, 863:9, 863:10, 864:2, 864:5, 864:8, 864:13, 864:16, 865:24, 868:2, 868:7, 868:9, 868:15, 868:22, 868:25, 869:8, 869:10, 869:19, 869:22, 869:23, 870:1, 870:3, 870:5, 870:9, 870:11, 870:14, 870:22, 871:1, 871:4, 871:13, 871:20, 872:13, 872:19, 873:11, 874:12, 874:15, 875:16, 876:7, 876:12, 877:2, 877:7, 877:19, 877:24, 878:1, 878:7, 878:11, 879:2, 879:7, 879:15, 879:22, 880:1, 880:5, 887:22, 887:23, 888:4, 888:6, 888:7,</p>
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888:9, 888:13, 888:15, 888:17, 888:19, 888:24, 889:6, 889:9, 897:6, 897:17, 897:22, 897:24, 898:1, 898:3, 898:4, 898:6, 898:8, 898:10, 899:20, 899:23, 899:24, 900:1, 900:2, 900:5, 900:13, 900:16, 901:13, 901:14, 901:15, 901:17, 901:19, 901:20, 901:21, 901:23, 902:5, 902:9, 902:11, 902:19, 902:21, 903:5, 903:7, 903:8, 903:10, 903:18, 915:2, 915:6, 915:10, 915:11, 915:12, 915:16, 915:18, 915:19, 915:20, 915:22, 916:1, 938:17, 938:18, 938:20, 938:23, 939:3, 939:5, 939:6, 955:4, 955:6, 961:11, 961:14, 961:15, 962:16, 962:19, 963:12, 964:2, 964:12, 964:17, 964:24, 965:3, 965:12, 965:17, 966:8, 966:14, 966:21, 967:1, 967:3, 967:9, 967:15, 967:18, 968:2, 968:6, 968:8, 968:10, 968:12, 968:13, 968:21, 968:23, 969:11, 969:13, 969:14, 969:17, 969:21, 969:22, 969:24, 970:2, 970:5, 970:7, 970:8, 970:16, 970:18, 970:24, 970:25, 971:3, 971:6, 971:9, 971:10, 971:11, 971:23, 972:2, 972:4, 972:7, 972:9, 972:10, 972:15, 972:16, 972:22, 972:23, 973:7, 973:21, 974:2, 974:8, 974:17, 974:21, 975:8, 975:13, 975:17, 976:2, 976:8, 976:14, 977:7, 977:14, 977:15, 977:20,	977:21, 977:22, 977:24, 977:25, 978:4, 978:7, 978:8, 978:12, 978:15, 978:16, 978:17, 978:18, 978:20, 979:5, 979:6, 979:7, 979:9, 980:5, 980:10, 980:15, 980:19, 980:20, 980:21, 981:2, 981:6, 981:8, 981:9, 981:11, 981:16, 981:19, 982:15, 982:16, 982:17, 983:9, 983:13, 984:9, 985:20, 986:3, 987:10, 987:24, 988:4, 988:14, 988:19, 988:21, 988:22, 989:11, 989:17, 989:19, 989:22, 989:25, 990:1, 990:3, 990:5, 990:8, 990:12, 990:16, 990:17, 990:20, 990:22, 991:2, 991:9, 991:15, 991:17, 991:21, 991:23, 992:6, 992:14, 992:22, 992:25, 993:17, 994:13, 994:23, 995:7, 995:16, 996:1, 996:4, 996:5, 996:7, 996:12, 996:14, 996:19, 996:23, 997:2, 997:6, 997:8, 997:11, 997:18, 997:24, 997:25, 998:8, 998:12, 998:15, 998:17, 998:19, 998:24, 999:3, 999:4, 999:9, 999:12, 999:13, 999:15, 1000:4, 1000:7, 1000:14, 1000:17, 1000:19, 1000:20, 1001:7, 1001:16, 1001:18, 1001:25, 1002:3, 1002:6, 1002:10, 1002:11, 1002:12, 1002:13, 1002:16, 1002:17, 1002:21, 1002:23, 1002:24, 1003:5, 1003:16, 1003:23, 1004:12, 1004:15, 1004:24, 1005:2, 1005:3, 1005:11, 1006:1,	1006:4, 1006:6, 1006:13, 1006:20, 1007:9, 1007:10, 1007:11, 1007:16, 1007:21, 1007:22, 1009:4, 1009:23, 1009:24, 1009:25, 1010:4, 1010:8, 1010:18, 1010:21 MS ^[347] - 763:4, 763:15, 764:3, 764:14, 765:5, 782:23, 783:2, 814:18, 814:24, 815:2, 817:10, 818:7, 818:17, 818:20, 819:4, 821:2, 821:7, 821:9, 821:24, 822:5, 822:22, 823:2, 823:5, 823:7, 823:24, 825:10, 825:14, 826:10, 826:15, 826:19, 826:22, 827:17, 827:19, 827:22, 827:23, 827:24, 828:8, 828:11, 828:12, 830:14, 830:20, 830:22, 830:24, 831:2, 831:3, 831:6, 832:12, 832:16, 832:19, 834:1, 834:6, 834:9, 834:11, 834:15, 834:18, 834:21, 835:6, 835:14, 836:4, 836:16, 837:2, 837:9, 837:12, 837:18, 838:3, 838:10, 838:13, 838:16, 838:21, 839:8, 839:11, 839:15, 840:12, 840:23, 841:1, 841:12, 841:16, 841:19, 842:3, 842:11, 842:22, 843:18, 843:23, 844:1, 844:9, 844:11, 844:16, 844:21, 845:25, 846:14, 847:11, 847:22, 848:1, 848:5, 848:14, 848:22, 848:23, 849:1, 849:4, 849:15, 849:24, 850:9, 850:17, 850:20, 851:2, 851:5, 851:10, 851:22, 852:3, 852:8, 852:12, 853:4, 853:18, 854:6, 856:6, 857:4, 857:14,	858:3, 858:13, 859:5, 860:16, 862:15, 864:1, 864:7, 864:12, 864:14, 864:18, 865:4, 865:7, 865:10, 865:14, 865:18, 865:21, 865:22, 866:14, 866:15, 866:17, 866:18, 866:19, 866:23, 866:25, 867:2, 867:4, 867:8, 867:12, 867:13, 867:17, 867:20, 867:23, 870:6, 870:10, 870:19, 870:24, 871:8, 871:15, 871:18, 871:24, 872:3, 872:7, 872:8, 872:17, 872:21, 873:6, 873:13, 874:1, 874:13, 874:18, 875:12, 875:18, 876:2, 876:11, 876:15, 876:18, 877:3, 877:11, 879:1, 879:4, 879:9, 888:21, 889:1, 889:4, 889:7, 889:11, 890:6, 898:5, 898:17, 900:12, 916:7, 916:9, 936:18, 936:22, 936:23, 937:2, 937:5, 937:6, 938:21, 939:2, 939:4, 939:7, 939:9, 955:9, 955:12, 955:13, 955:25, 956:1, 956:3, 956:4, 956:6, 956:7, 956:11, 956:12, 956:18, 956:19, 956:23, 956:24, 957:6, 957:9, 957:14, 957:15, 957:22, 957:23, 958:2, 958:3, 958:6, 958:8, 958:13, 958:14, 958:19, 958:22, 959:4, 959:5, 959:8, 959:11, 959:15, 959:16, 959:19, 959:22, 959:24, 959:25, 960:2, 960:3, 960:8, 960:11, 960:16, 960:17, 960:20, 960:21, 960:25, 961:2, 961:6, 961:7, 961:8, 961:9, 961:10, 962:10, 962:18, 962:25, 963:8, 963:9, 963:20, 964:8, 964:13, 964:22,	965:1, 965:7, 965:16, 965:24, 966:13, 966:20, 966:24, 967:2, 967:8, 967:14, 967:17, 967:22, 967:23, 967:24, 968:5, 969:10, 970:4, 972:5, 972:8, 973:6, 973:17, 974:1, 974:5, 974:14, 974:18, 975:7, 975:12, 975:15, 979:13, 980:8, 983:7, 983:11, 983:20, 985:14, 986:2, 986:6, 986:10, 986:14, 986:22, 986:23, 987:20, 987:22, 987:23, 988:3, 989:9, 989:10, 989:14, 989:18, 991:1, 991:6, 991:14, 991:16, 991:19, 991:22, 992:2, 992:10, 992:19, 992:23, 993:14, 994:2, 994:14, 995:5, 997:12, 998:5, 998:9, 998:13, 998:16, 1000:24, 1001:15, 1001:21, 1002:22, 1003:3, 1003:10, 1003:21, 1004:6, 1004:13, 1004:23, 1005:1, 1005:10, 1005:21, 1006:3, 1006:5, 1006:11, 1007:8 mud ^[1] - 900:20 Mulatto ^[1] - 770:21 multiple ^[4] - 798:3, 902:1, 950:11, 1001:1 Multiple ^[1] - 774:11 municipal ^[1] - 1005:15 municipalities ^[3] - 920:2, 936:7, 1005:9 municipality ^[3] - 948:24, 949:5, 954:23 mussel ^[3] - 910:1, 910:6, 910:9 mussels ^[3] - 861:25, 910:6 must ^[10] - 795:14, 800:11, 800:12, 806:8, 809:2, 809:6, 809:9, 824:20, 943:19, 974:16 mute ^[3] - 782:15, 782:16, 782:17
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N	necessity [2] - 793:1, 877:14	880:20, 880:24, 890:24, 895:21, 908:5, 908:10, 918:9, 920:23, 921:2, 921:8, 935:17, 936:11, 948:12, 949:2, 950:17, 950:18, 950:20, 950:25, 952:24, 953:10, 953:12, 953:15, 953:17, 987:17, 989:7, 989:10, 993:3, 1010:14	811:19, 831:16, 841:15, 881:23, 926:6, 928:24, 958:10	normally [2] - 962:11, 986:17
name [3] - 777:6, 780:18, 780:20 named [3] - 914:5, 994:10, 994:18 narrative [12] - 838:24, 849:22, 859:21, 876:3, 876:8, 876:9, 876:22, 877:5, 877:7, 936:10, 954:12, 954:15 narrow [2] - 893:19, 957:12 narrower [2] - 957:1, 957:13 nation [1] - 1005:16 Nation's [2] - 893:18, 894:4 national [2] - 837:7, 893:15 National [2] - 765:2, 765:5 natural [2] - 913:5, 954:8 nature [6] - 819:10, 826:1, 826:11, 854:25, 917:10, 961:18 Near [2] - 772:16, 772:18 near [5] - 897:8, 913:16, 913:18, 925:12, 989:24 necessarily [18] - 819:13, 841:20, 844:1, 845:3, 846:18, 859:9, 872:21, 873:19, 885:4, 886:21, 896:16, 933:1, 948:21, 962:25, 977:2, 984:5, 996:9 necessary [37] - 782:4, 793:17, 794:3, 797:8, 840:1, 875:3, 882:4, 882:9, 882:15, 884:1, 884:19, 885:1, 885:23, 886:2, 890:21, 894:13, 896:2, 919:21, 923:5, 924:5, 925:9, 925:14, 929:22, 930:25, 932:16, 933:22, 933:25, 935:4, 935:6, 935:23, 938:12, 966:25, 967:7, 978:14, 982:8, 986:12, 986:13	need [24] - 783:17, 784:10, 817:6, 821:22, 836:8, 859:15, 862:5, 868:1, 869:16, 890:10, 890:15, 890:17, 892:22, 892:23, 938:11, 942:13, 953:16, 954:3, 976:5, 977:3, 984:7, 993:23, 993:25, 1003:20 needed [14] - 782:9, 783:18, 784:11, 791:5, 796:11, 853:15, 903:3, 942:23, 984:4, 984:6, 984:10, 986:18, 999:6, 1005:21 needing [1] - 963:3 needs [4] - 890:21, 948:20, 955:1, 993:5 negate [3] - 847:24, 848:12, 848:17 negatively [1] - 796:14 never [3] - 836:8, 974:11, 1010:1 NEW [2] - 762:1, 1011:1 new [93] - 779:15, 784:14, 784:23, 785:1, 785:5, 785:9, 785:11, 786:21, 786:23, 787:11, 787:19, 789:7, 795:23, 796:14, 801:5, 801:14, 801:25, 802:3, 802:7, 803:6, 804:9, 805:9, 806:25, 807:3, 807:22, 808:5, 809:15, 814:11, 834:19, 834:22, 835:16, 835:23, 838:23, 839:15, 839:17, 839:19, 840:21, 845:10, 845:11, 845:12, 845:20, 848:3, 849:7, 849:8, 849:12, 851:1, 858:22, 864:25, 865:14, 865:19, 866:19, 866:23, 867:2, 867:9, 867:10, 872:1, 874:21, 875:20, 875:22, 877:15, 880:8, 880:10, 880:19,	New [63] - 762:19, 763:11, 763:14, 763:17, 764:5, 764:10, 764:16, 764:21, 765:6, 767:5, 769:19, 771:9, 771:13, 771:16, 771:20, 771:22, 772:5, 773:16, 773:21, 774:5, 777:11, 779:2, 793:21, 793:23, 796:8, 808:2, 866:10, 904:22, 905:2, 905:3, 905:15, 905:24, 906:7, 906:25, 907:20, 908:1, 908:9, 908:24, 909:13, 909:21, 910:2, 910:3, 910:10, 910:25, 911:5, 911:7, 911:11, 912:5, 912:21, 913:11, 918:15, 921:15, 921:16, 944:25, 946:5, 953:6, 958:9, 959:23, 960:3, 971:3, 983:22, 993:21, 995:10 next [11] - 854:9, 858:17, 868:7, 884:24, 885:20, 894:5, 902:4, 930:17, 946:11, 946:14, 957:16 nexus [1] - 822:17 nine [12] - 943:15, 944:7, 945:8, 945:9, 945:13, 945:20, 945:25, 946:2, 972:24, 979:15, 979:18, 1002:7 ninety [1] - 933:18 NMAC [17] - 762:7, 767:8, 769:23, 773:18, 773:23, 774:7, 776:6, 779:4, 784:5, 810:15,	NMDG&F [1] - 769:20 NMED [23] - 767:3, 768:3, 769:3, 770:3, 771:3, 772:3, 773:3, 773:7, 774:3, 775:3, 776:3, 778:16, 782:8, 784:2, 797:14, 814:4, 820:4, 897:23, 898:14, 901:22, 915:24, 944:15, 1007:19 NMED's [9] - 784:17, 784:19, 785:23, 786:2, 786:11, 786:13, 786:19, 787:9, 787:11 NOIs [1] - 779:25 non [2] - 812:18, 959:13 non-101(a)(2) [4] - 942:13, 974:15, 979:17, 979:19 non-Clean [1] - 812:18 nonclassified [3] - 983:3, 984:12 none [12] - 779:15, 879:19, 888:2, 900:10, 902:15, 915:7, 971:13, 1007:14, 1007:19, 1007:21, 1008:2, 1009:2 nonimpaired [1] - 927:17 noninclusion [1] - 907:14 Nonperennial [5] - 770:19, 770:22, 770:23, 771:4, 771:6 nonperennial [16] - 901:2, 958:10, 958:15, 959:1, 959:5, 959:6, 959:8, 959:13, 960:22, 960:25, 961:4, 983:22, 991:3, 991:7, 991:11, 1001:5 nonpoint [2] - 953:19, 1006:17 nonprohibitive [1] - 973:13 nontechnical [5] - 910:9, 936:15, 937:4, 937:12, 1008:1 normal [2] - 832:13, 973:22	Northeast [1] - 763:10 notably [1] - 809:22 NOTARY [1] - 1011:19 note [17] - 777:9, 781:2, 788:13, 789:5, 789:9, 800:2, 802:12, 827:1, 827:13, 827:19, 831:10, 845:12, 875:7, 894:15, 897:18, 936:19, 1008:19 noted [11] - 780:2, 781:5, 789:1, 821:21, 826:24, 847:9, 855:17, 890:8, 904:11, 908:13, 910:9 notes [18] - 768:23, 810:2, 810:9, 810:11, 822:2, 825:20, 825:22, 827:3, 827:20, 828:6, 828:25, 829:3, 829:20, 892:8, 945:24, 975:3, 976:11, 977:10 nothing [5] - 804:10, 824:24, 826:12, 843:1, 978:6 Notice [5] - 767:18, 768:4, 769:5, 771:18, 772:7 notice [19] - 779:20, 788:2, 809:18, 815:23, 816:7, 816:9, 816:11, 818:14, 818:25, 819:10, 819:20, 846:10, 862:19, 937:3, 969:3, 969:15, 983:25, 1008:7 noticed [2] - 926:18, 972:2 Notices [2] - 767:11, 768:7 notices [1] - 779:10 notify [3] - 808:20, 809:3, 809:17 noting [1] - 905:4 notion [1] - 793:10 notwithstanding [1] - 790:24 November [3] - 769:18, 770:13, 772:8 nowhere [2] - 810:5, 810:7 NPDES [21] - 806:6,

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>837:23, 846:2, 922:14, 934:10, 942:4, 948:1, 948:25, 949:11, 954:14, 954:20, 962:9, 962:22, 983:24, 984:2, 1002:17, 1003:20, 1004:5, 1004:7, 1004:11, 1004:22</p> <p>number ^[12] - 842:10, 860:18, 906:23, 911:2, 913:6, 913:18, 915:11, 968:24, 970:15, 993:3, 1003:25, 1009:17</p> <p>Number ^[4] - 798:4, 904:12, 905:4, 1011:20</p> <p>numbers ^[4] - 812:6, 812:11, 906:21, 912:22</p> <p>numeric ^[1] - 812:2</p> <p>nutrient ^[18] - 782:11, 783:20, 783:22, 784:3, 838:24, 859:21, 876:8, 876:9, 877:8, 877:10, 877:18, 920:1, 936:10, 954:13, 954:15, 954:20, 954:23, 1005:16</p> <p>nutrients ^[4] - 859:21, 920:1, 937:18, 1006:16</p> <p>Nutrients ^[2] - 768:15, 768:17</p> <p>NYLANDER ^[2] - 766:10, 890:1</p> <p>Nylander ^[15] - 786:7, 803:19, 804:3, 890:7, 892:7, 892:25, 895:2, 896:8, 898:18, 921:11, 929:4, 940:14, 942:19, 956:25, 983:14</p> <p>Nylander's ^[9] - 803:18, 840:18, 897:20, 942:6, 943:7, 943:13, 956:5, 957:18, 983:5</p>	<p>842:8, 851:18, 851:25, 870:15, 946:21</p> <p>objected ^[1] - 778:16</p> <p>objecting ^[1] - 842:4</p> <p>objection ^[16] - 779:8, 779:23, 780:2, 814:12, 814:13, 818:1, 818:15, 820:19, 821:12, 821:18, 821:21, 822:19, 826:5, 832:9, 915:6, 969:11</p> <p>objections ^[5] - 781:7, 868:13, 870:25, 890:8, 956:21</p> <p>objective ^[2] - 893:16, 894:2</p> <p>objects ^[1] - 781:24</p> <p>obligation ^[1] - 821:16</p> <p>obtain ^[1] - 834:23</p> <p>obviously ^[5] - 833:6, 833:10, 913:5, 947:6, 978:1</p> <p>occasion ^[1] - 996:20</p> <p>occur ^[8] - 806:16, 907:20, 956:2, 993:23, 995:8, 997:2, 997:22, 1008:21</p> <p>occurred ^[2] - 829:5, 1009:9</p> <p>occurring ^[3] - 947:5, 981:10, 981:12</p> <p>occurs ^[1] - 801:1</p> <p>October ^[4] - 762:16, 773:15, 777:2, 936:20</p> <p>OF ^[8] - 762:1, 762:5, 762:13, 903:17, 916:8, 939:8, 1011:1, 1011:3</p> <p>offer ^[2] - 912:8, 969:24</p> <p>offered ^[2] - 969:1, 969:5</p> <p>Office ^[4] - 764:15, 765:4, 765:5, 775:6</p> <p>office ^[2] - 856:9, 856:13</p> <p>Officer ^[44] - 762:17, 763:8, 777:5, 777:21, 778:10, 778:24, 779:6, 780:9, 814:7, 814:21, 833:20, 854:9, 858:6, 863:11, 869:1, 870:19, 878:12, 879:19, 880:2, 888:5, 888:13, 888:18, 888:21,</p>	<p>889:4, 889:12, 897:5, 897:17, 901:7, 902:21, 902:24, 915:4, 938:23, 955:5, 968:13, 968:23, 972:11, 998:1, 1007:14, 1008:6, 1008:15, 1009:4, 1009:22, 1010:6, 1010:20</p> <p>officer ^[1] - 1011:6</p> <p>Officer's ^[1] - 1008:17</p> <p>often ^[5] - 831:22, 836:18, 861:21, 919:10, 919:12</p> <p>old ^[2] - 959:20, 1010:1</p> <p>Old ^[1] - 762:19</p> <p>older ^[1] - 913:15</p> <p>once ^[11] - 784:20, 784:25, 785:8, 824:3, 843:5, 887:1, 901:16, 965:13, 1007:24, 1008:7, 1008:14</p> <p>one ^[61] - 781:18, 782:13, 796:9, 809:25, 810:9, 825:21, 827:6, 827:19, 828:13, 828:15, 831:9, 832:2, 834:18, 840:19, 842:25, 843:5, 846:24, 849:7, 851:25, 856:13, 863:2, 864:19, 866:4, 873:6, 874:10, 878:13, 878:17, 890:8, 892:7, 897:18, 897:25, 899:1, 906:7, 907:3, 912:6, 913:11, 923:2, 924:21, 962:12, 962:14, 963:2, 963:6, 969:23, 969:25, 974:3, 977:22, 984:11, 984:13, 985:12, 988:2, 988:16, 989:4, 995:8, 999:5, 1000:9, 1001:9, 1002:17, 1005:15, 1006:22</p> <p>one-sentence ^[2] - 809:25, 825:21</p> <p>ones ^[3] - 861:20, 999:21, 1000:11</p> <p>ongoing ^[1] - 847:1</p> <p>online ^[1] - 953:23</p> <p>ONRWs ^[1] - 882:10</p> <p>open ^[2] - 981:4, 1008:5</p>	<p>opening ^[1] - 794:7</p> <p>operate ^[1] - 786:14</p> <p>operating ^[1] - 948:4</p> <p>operation ^[5] - 948:3, 948:22, 963:4, 1004:7, 1006:24</p> <p>operations ^[4] - 795:3, 837:17, 1003:19, 1004:1</p> <p>opinion ^[5] - 819:8, 832:25, 833:4, 833:9, 919:20</p> <p>opportunities ^[1] - 1010:2</p> <p>opportunity ^[7] - 779:7, 816:12, 858:1, 896:1, 920:3, 936:14, 1008:17</p> <p>oppose ^[1] - 781:11</p> <p>opposed ^[4] - 845:13, 857:11, 963:3, 980:1</p> <p>opposes ^[2] - 893:1, 904:9</p> <p>opposing ^[1] - 988:17</p> <p>opposite ^[1] - 786:3</p> <p>opposition ^[4] - 790:22, 790:24, 879:11, 964:5</p> <p>option ^[2] - 952:17, 1006:14</p> <p>options ^[3] - 891:24, 952:5, 1006:17</p> <p>oral ^[3] - 917:23, 956:5, 957:19</p> <p>orally ^[1] - 787:23</p> <p>order ^[14] - 779:19, 888:10, 942:12, 948:20, 950:20, 985:23, 986:1, 986:3, 986:5, 988:7, 1006:8, 1006:24, 1007:1, 1009:18</p> <p>organization ^[2] - 845:23, 857:18</p> <p>original ^[24] - 787:4, 792:23, 793:3, 793:8, 793:16, 793:18, 795:9, 802:3, 806:4, 806:8, 842:19, 843:15, 850:11, 884:22, 885:2, 885:12, 885:22, 886:3, 920:13, 920:19, 924:6, 955:20, 956:21, 1007:7</p> <p>originally ^[4] - 796:4, 806:10, 917:19,</p>	<p>998:25</p> <p>ostensibly ^[1] - 910:5</p> <p>others' ^[1] - 918:1</p> <p>otherwise ^[9] - 787:18, 795:6, 813:6, 950:6, 958:21, 960:15, 961:1, 984:22, 989:20</p> <p>ought ^[1] - 981:17</p> <p>ourselves ^[1] - 988:11</p> <p>outgrowth ^[4] - 778:15, 791:12, 791:15, 802:15</p> <p>outline ^[1] - 1008:8</p> <p>outlined ^[2] - 803:9, 857:16</p> <p>outlines ^[2] - 796:23, 922:17</p> <p>outreach ^[1] - 931:5</p> <p>outside ^[3] - 855:15, 905:16, 973:22</p> <p>overabundance ^[2] - 977:4, 978:12</p> <p>overall ^[1] - 804:12</p> <p>overarching ^[1] - 850:18</p> <p>oversee ^[1] - 916:20</p> <p>oversight ^[1] - 837:16</p> <p>overview ^[1] - 917:6</p> <p>own ^[9] - 791:16, 823:20, 830:18, 857:6, 896:5, 904:17, 933:9, 939:22, 993:10</p> <p>Own ^[3] - 977:11, 977:13, 977:16</p> <p>owned ^[2] - 981:13</p> <p>owners ^[3] - 901:5, 982:22, 993:22</p>
P				
<p>p.m ^[4] - 902:18, 971:21, 971:22, 1010:22</p> <p>PA ^[3] - 764:3, 764:14, 764:19</p> <p>package ^[3] - 895:11, 999:1, 1000:12</p> <p>packages ^[1] - 1001:1</p> <p>Pacman ^[1] - 831:6</p> <p>page ^[40] - 788:9, 788:17, 789:5, 789:9, 789:14, 789:22, 790:2, 790:8, 790:10,</p>				

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<p>794:4, 796:22, 798:13, 800:3, 802:12, 802:13, 803:19, 806:18, 807:11, 807:18, 811:15, 811:17, 817:9, 834:10, 839:16, 865:8, 866:4, 866:9, 891:8, 893:12, 893:13, 894:5, 894:6, 898:21, 899:2, 934:7, 951:16, 968:22, 982:24, 989:5, 993:3</p> <p>PAGE [1] - 766:2 Page [1] - 769:11 pages [3] - 788:3, 788:5, 864:25 panel [1] - 983:9 paper [3] - 862:20, 969:22, 969:24 paragraph [11] - 924:18, 928:19, 929:10, 929:17, 930:18, 932:1, 932:13, 932:18, 933:16, 934:8, 943:21 parameter [3] - 873:7, 873:14, 873:18 parameters [1] - 787:12 paraphrase [1] - 912:2 paraphrasing [1] - 877:23 pardon [3] - 848:5, 998:8, 1009:25 Parkway [1] - 763:10 part [46] - 778:1, 778:6, 805:1, 805:2, 809:5, 809:10, 809:16, 809:21, 816:9, 816:11, 817:12, 817:15, 817:16, 819:18, 819:22, 827:11, 829:23, 841:21, 841:24, 855:8, 855:23, 856:20, 856:21, 856:24, 877:11, 895:10, 906:1, 908:12, 912:6, 921:10, 929:25, 930:1, 930:20, 931:8, 931:9, 931:10, 953:25, 957:7, 958:6, 973:17, 973:18, 973:20, 975:14, 975:15, 985:24, 991:5 participate [2] - 846:7, 916:22</p>	<p>participation [8] - 789:23, 798:23, 799:4, 852:13, 925:18, 925:19, 950:11, 1009:6 particular [13] - 789:24, 804:23, 853:14, 855:2, 857:10, 913:9, 917:20, 922:4, 927:25, 937:18, 963:14, 999:16, 1000:12 parties [24] - 777:25, 778:7, 779:15, 779:20, 800:15, 804:13, 807:14, 810:20, 814:14, 818:13, 819:3, 819:9, 820:4, 869:3, 897:13, 902:1, 917:20, 1008:16, 1008:23, 1008:25, 1009:6, 1010:11, 1011:14, 1011:16 parties' [3] - 816:9, 917:8, 961:20 parts [5] - 806:24, 808:25, 869:2, 976:21, 993:25 party [1] - 987:25 Paseo [3] - 764:4, 764:9, 764:20 passages [1] - 891:9 passed [1] - 838:7 passes [2] - 803:11, 913:22 past [5] - 845:14, 889:16, 900:19, 941:10, 1000:25 pathway [1] - 1006:24 patience [1] - 878:15 patient [1] - 879:6 Patterson's [1] - 939:25 Pattison [15] - 851:16, 852:4, 853:25, 854:19, 857:14, 900:1, 988:21, 991:7, 992:3, 992:11, 993:14, 994:3, 997:12, 1009:24, 1010:5 PATTISON [50] - 763:7, 851:17, 851:24, 852:7, 852:9, 853:1, 853:10, 854:4, 854:9, 855:6, 857:3, 857:5, 858:2, 858:4,</p>	<p>900:2, 900:16, 901:14, 988:22, 989:11, 989:17, 989:19, 989:25, 990:3, 990:8, 990:16, 990:20, 991:2, 991:9, 991:15, 991:17, 991:21, 991:23, 992:6, 992:14, 992:22, 992:25, 993:17, 994:13, 994:23, 995:7, 996:1, 996:5, 996:12, 996:19, 997:2, 997:8, 997:18, 1009:23, 1009:25, 1010:21 Pattison's [2] - 939:25, 946:13 pay [2] - 847:3, 847:4 paying [2] - 855:25, 911:5 PC [1] - 763:9 Peabody [1] - 775:8 peanuts [1] - 858:14 Pecos [1] - 1001:8 peer [4] - 904:15, 906:6, 907:6, 907:8 peer-reviewed [2] - 904:15, 906:6 pending [1] - 901:10 people [9] - 783:7, 831:23, 857:25, 976:16, 976:23, 980:24, 981:15, 994:1, 1004:2 per [14] - 784:4, 797:2, 801:23, 806:14, 825:20, 843:19, 861:12, 885:4, 909:17, 910:17, 910:21, 913:3, 941:25, 952:1 Peralta [2] - 764:4, 764:20 perceive [1] - 881:25 perceived [1] - 906:10 percent [2] - 881:7, 881:8 perennial [4] - 958:23, 976:25, 990:18, 991:8 perfectly [1] - 854:20 performed [1] - 960:23 performing [1] - 941:4 perhaps [10] - 860:25, 870:20, 875:4, 875:10,</p>	<p>892:12, 966:15, 969:4, 976:17, 981:6, 990:14 period [12] - 799:5, 800:5, 844:14, 845:4, 859:19, 881:11, 884:5, 884:23, 884:25, 885:21, 919:6, 919:7 Period [4] - 767:12, 767:20, 767:21, 771:19 periods [3] - 884:2, 884:9, 886:1 permanent [5] - 789:12, 795:21, 853:15, 923:16, 923:19 Permit [2] - 769:18, 769:22 permit [58] - 784:6, 790:13, 806:7, 812:13, 836:17, 836:19, 836:21, 839:7, 845:24, 846:3, 846:10, 848:3, 859:16, 859:23, 872:18, 872:20, 873:2, 873:8, 873:17, 873:21, 920:10, 921:10, 921:19, 922:12, 927:21, 927:24, 934:21, 938:8, 938:13, 938:15, 948:1, 948:25, 951:7, 951:9, 952:2, 952:7, 952:8, 952:20, 954:20, 962:9, 962:14, 962:17, 962:22, 962:24, 963:16, 963:19, 965:14, 983:24, 984:19, 985:2, 986:17, 987:18, 1002:17, 1003:20, 1004:5, 1004:7, 1004:11, 1004:22 permits [30] - 801:16, 802:18, 802:19, 802:23, 812:10, 837:5, 837:7, 837:10, 837:19, 849:10, 872:12, 876:6, 876:11, 876:12, 877:4, 877:6, 877:9, 877:18, 922:14, 927:13, 934:20, 935:22, 942:5, 953:6, 963:24,</p>	<p>963:25, 965:20, 966:12, 984:2, 986:24 permitted [15] - 837:24, 838:17, 867:21, 867:25, 871:19, 871:22, 872:9, 872:12, 872:15, 872:22, 877:6, 887:16, 887:17, 951:3, 954:17 permittee [5] - 805:24, 873:18, 918:10, 962:6, 962:13 permitting [3] - 934:11, 949:11, 952:20 persistent [1] - 891:22 person [1] - 824:6 personal [2] - 826:12, 1010:13 personally [1] - 1011:10 perspective [4] - 824:2, 975:1, 982:3, 1009:6 pertaining [2] - 815:13, 819:22 Pesticide [2] - 769:17, 769:21 peters [1] - 989:24 petition [59] - 779:18, 791:19, 792:9, 792:25, 795:4, 808:8, 808:16, 808:18, 808:19, 809:2, 809:6, 815:23, 816:6, 819:23, 821:13, 822:9, 823:8, 823:20, 823:21, 824:20, 824:24, 825:18, 825:19, 846:22, 862:6, 895:11, 895:14, 895:19, 895:25, 896:10, 896:15, 896:19, 896:25, 897:1, 917:22, 917:24, 919:13, 920:22, 926:1, 926:17, 926:21, 926:25, 927:15, 930:5, 931:1, 932:22, 933:1, 933:8, 935:24, 940:6, 940:9, 945:9, 946:4, 964:8, 964:9, 965:8, 1001:24 Petition [2] - 767:6, 776:5 petitioner [14] -</p>
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KATHY TOWNSEND COURT REPORTERS

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<p>800:11, 809:9, 820:22, 824:13, 842:23, 843:2, 846:23, 862:5, 863:14, 886:23, 920:8, 931:5, 931:14, 948:20</p> <p>petitioning [3] - 946:24, 952:24, 964:6</p> <p>PGP [1] - 769:22</p> <p>pH [21] - 811:10, 811:13, 811:21, 812:2, 812:20, 812:24, 813:10, 813:13, 905:9, 905:11, 905:16, 905:19, 905:24, 906:2, 909:12, 909:13, 970:22, 970:24, 971:2, 971:5, 971:7</p> <p>phone [8] - 782:15, 782:20, 783:7, 864:6, 864:9, 868:17, 869:2, 870:18</p> <p>phrase [2] - 833:1, 880:16</p> <p>physical [3] - 893:17, 894:3, 894:22</p> <p>pick [2] - 913:6, 938:25</p> <p>Pinos [1] - 913:21</p> <p>PINTADO [38] - 766:13, 903:13, 916:8, 936:22, 939:2, 939:4, 955:25, 956:3, 956:6, 956:11, 956:18, 956:23, 957:6, 957:14, 963:8, 964:22, 965:1, 965:7, 965:16, 965:24, 966:13, 967:23, 969:10, 986:14, 986:23, 987:20, 987:23, 988:3, 989:9, 1000:24, 1001:15, 1001:21, 1005:10, 1005:21, 1006:3, 1006:5, 1006:11, 1007:8</p> <p>Pintado [19] - 766:16, 768:11, 768:12, 774:9, 776:8, 786:7, 792:24, 793:5, 816:21, 902:23, 916:7, 922:22, 936:4, 936:21, 936:25, 953:11, 955:14, 963:2, 1005:7</p> <p>Pintado's [2] - 794:3,</p>	<p>817:8</p> <p>piscicide [3] - 781:4, 781:8, 781:11</p> <p>pitfalls [1] - 907:1</p> <p>pivoting [1] - 882:24</p> <p>place [23] - 783:21, 789:20, 790:4, 794:13, 795:20, 799:7, 806:4, 810:4, 837:5, 844:11, 859:22, 912:15, 920:2, 926:1, 941:15, 946:6, 959:21, 967:7, 977:3, 977:22, 987:8, 1005:11</p> <p>placed [1] - 927:24</p> <p>placeholders [1] - 964:23</p> <p>places [2] - 860:22, 904:22</p> <p>plain [4] - 799:11, 807:17, 852:12, 852:23</p> <p>Plan [1] - 934:2</p> <p>plan [58] - 793:1, 793:21, 794:17, 794:24, 795:4, 795:7, 795:10, 795:14, 797:15, 797:22, 802:4, 802:8, 802:9, 802:22, 838:18, 842:25, 843:1, 843:5, 843:12, 846:11, 883:4, 883:7, 883:19, 886:19, 886:25, 887:3, 887:11, 895:9, 895:10, 895:15, 895:22, 896:2, 896:7, 896:10, 896:25, 926:9, 926:11, 926:17, 926:20, 926:23, 926:25, 927:7, 927:10, 929:19, 930:5, 930:21, 931:7, 932:3, 932:15, 932:21, 933:2, 933:6, 935:2, 949:6, 949:8, 956:21, 957:7</p> <p>planning [2] - 880:15, 974:5</p> <p>plans [4] - 797:13, 887:19, 887:21, 932:19</p> <p>plant [8] - 948:4, 953:22, 1003:4, 1003:6, 1004:22, 1006:22, 1006:25, 1007:5</p> <p>plants [3] - 993:5,</p>	<p>1005:16, 1006:8</p> <p>playa [32] - 900:17, 940:1, 940:5, 940:9, 988:25, 989:4, 989:11, 990:13, 990:21, 991:4, 991:7, 991:12, 992:1, 992:4, 992:9, 992:17, 992:19, 992:21, 992:25, 993:8, 993:12, 993:21, 993:22, 994:9, 994:18, 995:2, 996:2, 996:16, 996:22, 996:23, 997:20</p> <p>pleadings [1] - 814:10</p> <p>plenty [1] - 906:18</p> <p>plugged [2] - 912:22, 913:7</p> <p>plus [1] - 942:1</p> <p>point [22] - 777:17, 778:24, 795:12, 799:16, 804:13, 811:16, 818:23, 869:11, 888:9, 909:12, 911:11, 913:12, 915:2, 924:21, 931:6, 932:6, 934:19, 981:25, 982:25, 986:21, 990:13, 1010:13</p> <p>pointed [2] - 953:11, 990:22</p> <p>points [1] - 829:14</p> <p>policy [7] - 894:17, 894:19, 947:1, 947:4, 947:11, 954:22, 954:24</p> <p>pollutant [3] - 873:2, 918:12, 927:7</p> <p>pollutants [8] - 842:20, 867:25, 871:16, 872:11, 872:15, 872:19, 891:17, 891:22</p> <p>polluting [1] - 843:13</p> <p>pollution [7] - 785:16, 785:17, 850:10, 893:2, 918:5, 921:23, 953:19</p> <p>population [1] - 921:3</p> <p>portion [2] - 815:12, 1008:10</p> <p>portions [2] - 783:6, 816:23</p> <p>posed [1] - 828:9</p> <p>position [24] - 782:7, 790:17, 820:21,</p>	<p>824:11, 824:12, 824:15, 845:12, 845:18, 852:22, 859:2, 860:10, 860:14, 882:16, 890:19, 890:23, 904:6, 925:6, 928:14, 928:22, 935:19, 936:1, 955:16, 956:13, 962:4</p> <p>positions [4] - 787:22, 787:25, 791:16, 845:16</p> <p>positive [2] - 935:9, 984:23</p> <p>possibility [3] - 896:9, 957:25, 993:15</p> <p>possible [10] - 831:25, 832:4, 832:6, 832:25, 833:5, 833:7, 871:7, 898:11, 997:22, 1008:23</p> <p>possibly [7] - 897:9, 924:21, 946:14, 949:15, 951:25, 986:16, 988:10</p> <p>Post [2] - 764:15, 765:5</p> <p>postdate [1] - 880:24</p> <p>posted [1] - 926:18</p> <p>postfire [1] - 921:5</p> <p>posthearing [6] - 814:10, 833:11, 1008:3, 1008:5, 1008:8, 1008:9</p> <p>potential [14] - 796:14, 808:21, 810:21, 820:4, 823:13, 838:23, 850:24, 870:3, 873:1, 873:20, 874:6, 950:19, 988:11, 1006:9</p> <p>potentially [6] - 785:9, 833:2, 854:21, 950:18, 952:13, 1006:24</p> <p>potholes [3] - 900:20, 991:4, 997:21</p> <p>PowerPoint [1] - 830:3</p> <p>pp [1] - 773:13</p> <p>practical [2] - 784:8, 859:3</p> <p>practice [3] - 786:14, 887:10, 887:18</p> <p>prairie [3] - 900:19, 991:4, 997:21</p> <p>pre [1] - 854:12</p> <p>pre-2009 [1] - 941:3</p>	<p>preamble [1] - 890:24</p> <p>precisely [1] - 792:8</p> <p>preclude [5] - 795:8, 839:4, 935:12, 950:10, 954:4</p> <p>precluded [3] - 837:24, 838:8, 931:4</p> <p>preface [1] - 1005:12</p> <p>prefaced [2] - 864:25, 865:8</p> <p>preference [1] - 1010:13</p> <p>prefiled [18] - 778:3, 787:21, 788:1, 791:6, 791:9, 791:12, 791:18, 796:23, 798:14, 802:16, 803:2, 803:9, 803:11, 806:17, 915:9, 915:10, 916:24, 917:23</p> <p>Prehearing [1] - 775:12</p> <p>Preliminary [2] - 767:13, 767:16</p> <p>premise [1] - 818:5</p> <p>prepare [3] - 939:10, 966:18, 1000:12</p> <p>prepared [2] - 855:2, 903:21</p> <p>preponderance [1] - 995:21</p> <p>prescribed [2] - 948:11, 962:14</p> <p>prescriptive [1] - 948:19</p> <p>present [20] - 808:22, 809:7, 809:9, 809:21, 820:23, 821:14, 821:16, 823:22, 824:21, 830:12, 889:5, 906:19, 906:22, 910:10, 917:7, 933:7, 946:10, 947:17, 970:16, 983:5</p> <p>presentation [9] - 829:22, 829:23, 830:1, 830:6, 830:8, 830:24, 854:11, 856:10, 900:3</p> <p>presentations [3] - 854:13, 855:9, 907:4</p> <p>presented [9] - 824:14, 825:11, 829:22, 888:14, 888:18, 888:22, 889:2, 889:15, 903:25</p> <p>presenter [1] -</p>
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<p>855:20 presenters [3] - 855:14, 856:2, 856:5 presenting [1] - 902:25 presently [1] - 853:2 presentment [1] - 946:15 presumably [1] - 812:8 presumed [1] - 958:20 presumes [1] - 943:4 presumption [14] - 940:19, 941:1, 944:22, 944:25, 945:5, 945:22, 957:21, 958:1, 958:4, 958:8, 958:17, 959:3, 959:12, 960:4 pretty [3] - 837:3, 845:23, 1009:19 prevents [1] - 952:6 previous [3] - 819:17, 840:2, 875:25 previously [15] - 780:11, 845:13, 890:2, 903:14, 916:10, 920:2, 921:4, 921:6, 935:16, 939:14, 943:22, 943:25, 963:23, 975:3, 989:15 primarily [5] - 787:10, 917:12, 936:7, 936:10, 949:19 primary [38] - 777:14, 781:17, 916:19, 942:8, 943:1, 943:3, 944:6, 944:8, 945:10, 946:1, 946:3, 946:5, 966:16, 967:25, 972:25, 973:4, 973:25, 974:4, 974:7, 974:10, 975:5, 975:6, 975:9, 975:11, 975:25, 976:12, 978:14, 979:4, 980:1, 980:23, 981:21, 982:8, 1003:8, 1003:9, 1003:14, 1003:15, 1004:20, 1004:25 print [2] - 899:15, 899:16 private [3] - 975:3, 982:22, 1003:19 problem [8] - 814:16, 889:9, 906:10, 907:17, 907:19,</p>	<p>985:5, 988:12 problematic [1] - 785:10 problems [4] - 796:15, 797:15, 827:6, 892:13 procedural [1] - 926:5 procedure [10] - 845:11, 853:6, 853:21, 918:2, 918:4, 922:17, 925:25, 928:1, 931:9, 986:15 procedures [15] - 793:24, 805:3, 815:24, 851:1, 853:20, 853:23, 853:25, 880:16, 880:18, 882:8, 896:24, 922:9, 947:5, 948:17, 954:22 proceed [11] - 780:7, 783:10, 792:19, 826:8, 845:19, 889:10, 898:11, 898:13, 903:9, 906:4, 939:6 proceeding [4] - 968:20, 969:5, 1011:7, 1011:14 Proceedings [4] - 878:5, 902:17, 971:21, 1010:22 proceedings [1] - 851:11 PROCEEDINGS [1] - 762:13 process [45] - 815:14, 817:4, 817:12, 818:12, 819:8, 819:11, 819:18, 819:22, 820:16, 824:23, 846:7, 847:1, 847:5, 851:11, 880:15, 884:12, 884:13, 884:16, 921:10, 931:10, 941:21, 945:12, 947:4, 949:11, 950:12, 950:23, 954:14, 963:21, 966:3, 966:7, 967:4, 973:20, 983:23, 986:6, 986:20, 987:3, 999:13, 999:14, 999:15, 999:18, 999:20, 1001:20, 1001:22, 1008:3 processes [1] -</p>	<p>921:15 productive [1] - 875:8 professional [1] - 826:12 professionalism [1] - 1010:12 Professor [3] - 906:12, 906:24, 911:10 progress [19] - 792:22, 793:3, 793:7, 793:12, 793:15, 802:2, 839:21, 843:14, 863:15, 893:20, 894:1, 894:9, 895:19, 920:11, 920:12, 923:12, 927:8, 929:11, 929:14 prohibit [3] - 787:17, 894:19, 964:4 prohibitive [2] - 973:14, 985:13 project [1] - 784:9 projects [12] - 807:21, 835:17, 835:20, 835:24, 836:5, 836:7, 836:9, 837:4, 849:19, 849:25, 850:1, 854:7 promptly [1] - 868:18 prompts [1] - 942:25 promulgated [1] - 921:13 promulgation [1] - 810:17 proof [4] - 823:14, 823:17, 824:13, 964:14 proper [3] - 962:5, 962:20, 995:19 properly [5] - 794:24, 795:3, 843:17, 963:5, 980:4 property [1] - 982:22 proponent [4] - 790:5, 798:24, 799:1, 842:24 proposal [76] - 777:16, 777:20, 781:11, 781:16, 781:19, 781:21, 781:23, 781:25, 782:4, 783:14, 784:17, 785:5, 785:23, 786:2, 786:13, 787:9, 787:11, 790:4, 790:12, 790:22,</p>	<p>790:25, 791:2, 794:23, 795:19, 796:17, 797:20, 797:25, 798:20, 799:5, 799:9, 800:9, 800:19, 801:9, 803:5, 803:21, 804:2, 804:8, 804:11, 805:10, 806:21, 807:8, 807:25, 808:3, 808:11, 811:18, 811:24, 814:9, 817:1, 838:7, 847:15, 852:24, 876:1, 881:18, 887:12, 888:23, 890:9, 890:16, 891:6, 892:17, 893:1, 896:7, 904:7, 904:9, 908:16, 942:6, 948:8, 948:9, 955:18, 956:15, 957:5, 957:11, 962:3, 963:3, 966:10, 970:11, 976:7 Proposal [1] - 779:3 proposals [8] - 814:11, 875:3, 886:8, 886:12, 917:8, 918:1, 961:19, 991:22 propose [6] - 799:3, 800:15, 802:20, 875:10, 928:11, 991:19 Proposed [3] - 769:8, 769:10, 779:1 proposed [120] - 777:11, 777:18, 777:22, 778:1, 778:6, 778:13, 778:14, 778:15, 778:21, 781:3, 781:7, 781:13, 781:15, 784:19, 786:19, 790:25, 791:4, 791:11, 791:20, 791:23, 791:24, 791:25, 792:4, 792:12, 792:15, 792:19, 793:13, 794:11, 794:14, 795:11, 795:13, 796:4, 797:5, 797:10, 797:22, 798:1, 798:2, 798:18, 798:21, 798:22, 800:7, 800:8, 800:13, 800:17, 801:10, 801:18, 801:22, 801:23, 802:24, 802:25, 803:9, 803:23, 807:8,</p>	<p>807:14, 807:19, 810:25, 811:4, 811:7, 812:16, 814:9, 816:9, 835:21, 840:3, 841:9, 841:22, 843:19, 847:21, 848:16, 849:6, 849:17, 853:23, 858:22, 860:8, 860:9, 875:9, 881:17, 882:13, 883:9, 883:25, 887:3, 895:5, 895:14, 895:15, 896:8, 905:1, 914:7, 918:4, 918:25, 920:21, 921:15, 925:11, 925:17, 925:25, 926:14, 928:8, 928:15, 928:18, 929:18, 933:17, 933:18, 933:19, 934:6, 934:9, 934:13, 935:20, 940:3, 944:19, 953:9, 957:2, 970:11, 970:14, 976:15, 986:16, 1006:21, 1008:11, 1008:18, 1008:20, 1008:24 PROPOSED [1] - 762:5 proposes [11] - 792:21, 793:14, 793:19, 795:1, 795:17, 797:12, 797:21, 800:10, 801:20, 812:11, 956:8 proposing [12] - 796:24, 800:12, 837:15, 841:14, 842:23, 853:24, 874:10, 882:20, 887:16, 932:19, 944:8, 955:21 proposition [1] - 880:10 prosecuted [1] - 988:1 protected [4] - 981:17, 996:15, 996:24, 997:17 protection [13] - 813:7, 813:22, 837:25, 838:12, 841:23, 854:3, 884:7, 906:21, 907:22, 911:1, 912:8, 913:14, 914:2 protections [16] - 793:22, 841:15, 842:2, 882:5, 882:8,</p>
---	--	--	---	---

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

882:12, 882:21, 904:14, 909:9, 914:8, 914:19, 928:23, 967:19, 968:3, 977:3, 996:10 protective [9] - 812:24, 813:1, 813:4, 860:25, 861:25, 906:22, 908:8, 946:1, 973:19 protectiveness [1] - 913:13 prothro [1] - 774:20 protocol [8] - 816:15, 816:24, 816:25, 817:17, 941:20, 985:18, 1000:18, 1000:21 Protocol [2] - 768:16, 770:18 prove [2] - 960:15, 964:9 proven [1] - 961:1 provide [42] - 778:2, 786:2, 795:14, 796:23, 797:23, 801:7, 803:15, 807:10, 814:10, 816:12, 819:19, 822:14, 823:15, 823:19, 825:21, 832:10, 851:7, 852:10, 853:8, 856:20, 857:20, 857:24, 862:5, 863:16, 863:20, 863:22, 863:23, 878:18, 879:2, 884:6, 891:4, 893:6, 926:15, 942:17, 951:8, 951:10, 952:19, 954:3, 962:6, 969:20, 974:2, 1008:1 provided [33] - 778:4, 791:7, 791:20, 802:5, 809:18, 810:4, 810:8, 813:6, 816:14, 817:12, 823:15, 823:16, 823:20, 824:6, 825:18, 827:11, 827:14, 827:21, 829:24, 830:2, 852:23, 863:7, 879:4, 882:11, 887:2, 893:6, 910:1, 911:13, 912:5, 940:13, 956:1, 961:17, 998:6 provides [5] - 800:20, 856:16, 892:3, 893:25, 951:12	providing [4] - 785:25, 854:24, 886:24, 953:18 provision [25] - 782:1, 783:17, 785:24, 787:16, 787:17, 789:1, 794:18, 795:24, 796:14, 796:20, 797:6, 797:14, 799:24, 801:2, 801:16, 803:14, 804:1, 804:4, 805:13, 806:12, 808:17, 808:25, 851:19, 882:19, 976:6 provisions [5] - 838:19, 853:1, 859:13, 881:22, 882:19 prudent [4] - 796:9, 796:19, 845:19, 890:20 Public [12] - 767:11, 767:18, 767:19, 767:20, 767:22, 767:23, 768:8, 768:19, 769:5, 771:18, 772:7, 772:8 public [119] - 789:23, 789:24, 789:25, 797:13, 798:22, 799:2, 799:3, 799:4, 799:7, 799:13, 799:22, 799:23, 800:1, 800:4, 800:5, 801:4, 801:7, 801:8, 808:22, 808:23, 809:4, 809:7, 809:18, 809:22, 809:23, 810:6, 810:11, 810:12, 810:22, 812:4, 812:12, 813:19, 816:11, 816:15, 816:23, 817:11, 817:15, 817:16, 817:19, 817:24, 818:10, 819:2, 819:7, 819:16, 819:21, 820:5, 823:22, 825:12, 825:20, 825:23, 830:11, 830:12, 835:8, 841:3, 841:5, 846:7, 846:16, 847:1, 847:2, 847:17, 851:3, 851:5, 851:8, 851:12, 851:13, 852:10, 852:13, 852:19, 854:12, 855:10,	855:14, 855:21, 856:2, 856:3, 856:5, 857:10, 857:12, 858:1, 862:17, 862:19, 862:23, 863:1, 863:2, 863:6, 879:10, 886:8, 886:16, 886:18, 887:4, 887:6, 887:19, 887:20, 892:4, 895:16, 896:9, 897:1, 897:10, 900:7, 900:9, 902:9, 902:13, 909:19, 910:9, 925:18, 925:19, 926:11, 926:17, 926:18, 930:20, 930:23, 931:5, 931:9, 950:11, 981:5, 985:1, 1008:1 PUBLIC [1] - 1011:19 publication [2] - 798:4, 798:6 Pueblo [1] - 764:9 Puerco [1] - 913:20 pump [1] - 993:10 purport [1] - 970:20 purpose [9] - 836:2, 848:17, 855:19, 940:20, 947:21, 957:19, 969:6, 993:18, 997:10 purposes [14] - 805:6, 805:15, 806:15, 812:5, 812:18, 812:19, 813:2, 813:5, 850:7, 880:22, 927:1, 947:23 Pursuant [1] - 774:15 put [14] - 782:14, 803:3, 860:12, 868:17, 879:13, 890:9, 891:6, 951:6, 963:24, 984:15, 985:1, 986:4, 987:8, 987:13 puts [1] - 842:25 putting [1] - 873:3	793:1, 793:8, 794:25, 796:15, 796:20, 799:17, 800:14, 802:10, 804:17, 804:23, 805:5, 805:13, 805:14, 805:20, 805:23, 805:25, 806:6, 807:4, 807:20, 808:1, 834:23, 836:9, 838:1, 838:12, 839:16, 839:20, 839:21, 839:22, 839:24, 840:6, 840:15, 843:15, 845:17, 853:5, 853:22, 857:22, 874:24, 874:25, 875:6, 882:3, 882:6, 891:11, 891:14, 891:22, 892:1, 892:5, 892:6, 893:14, 893:18, 893:20, 893:24, 894:2, 894:8, 894:9, 894:10, 894:11, 894:12, 894:16, 894:25, 896:15, 896:17, 896:20, 916:13, 916:21, 918:9, 919:1, 919:2, 920:13, 920:20, 921:24, 922:7, 922:10, 922:13, 922:18, 923:10, 923:12, 925:21, 926:16, 926:19, 931:8, 931:19, 933:20, 934:2, 938:4, 940:2, 944:25, 945:13, 945:15, 945:24, 948:12, 949:2, 949:25, 950:1, 951:8, 951:23, 952:4, 954:6, 954:13, 956:16, 962:7, 962:8, 962:21, 978:6, 979:16, 985:16, 990:19, 1000:16, 1002:13 Quality [32] - 762:17, 763:2, 767:6, 767:7, 769:6, 769:8, 773:14, 775:4, 776:6, 794:19, 853:7, 880:12, 896:11, 896:23, 916:14, 921:16, 921:20, 921:21, 922:7, 922:16, 922:21, 923:2, 924:10, 927:5, 934:2, 950:23, 953:1,	955:23, 956:9, 956:14, 956:25, 957:24 quality-based [1] - 920:20 questioned [1] - 911:21 questioning [12] - 815:16, 826:25, 827:2, 868:10, 868:12, 869:13, 869:18, 901:24, 920:6, 983:6, 998:11, 1005:6 questions [109] - 794:13, 809:24, 810:1, 810:8, 812:22, 813:24, 814:6, 814:18, 814:21, 815:9, 817:21, 822:1, 822:3, 822:8, 822:14, 823:10, 824:21, 825:12, 825:19, 826:2, 826:9, 826:23, 827:14, 828:9, 828:22, 831:9, 833:13, 833:17, 833:23, 840:19, 841:7, 847:14, 848:7, 853:14, 854:10, 854:13, 854:14, 854:19, 854:21, 855:3, 858:7, 858:10, 862:8, 862:11, 862:24, 863:1, 863:4, 864:11, 864:19, 866:13, 868:17, 869:9, 869:14, 869:23, 870:7, 870:16, 872:4, 875:25, 877:22, 877:23, 878:10, 879:18, 879:20, 880:6, 880:8, 882:24, 882:25, 884:3, 887:22, 897:4, 897:7, 897:20, 897:25, 898:3, 898:5, 898:7, 898:8, 898:23, 899:25, 900:8, 900:18, 928:13, 952:23, 955:8, 955:15, 957:16, 961:11, 961:23, 961:25, 968:7, 968:9, 968:13, 971:10, 971:12, 971:14, 971:17, 971:25, 972:6, 972:12, 982:4, 993:19, 998:14, 1002:1, 1007:13,
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110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

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1007:15, 1007:18, 1009:1, 1010:15 quick [7] - 831:9, 831:14, 851:6, 858:10, 878:17, 889:19, 897:7 quickly [3] - 788:11, 799:15, 985:12 quite [11] - 818:23, 838:4, 865:11, 871:24, 879:15, 880:14, 889:19, 974:21, 976:16, 978:2, 981:12 quote [6] - 808:18, 821:9, 882:2, 893:11, 905:5, 912:9 quoting [1] - 839:16	893:9, 898:25, 899:5, 938:2, 951:22, 970:1, 984:21, 985:17, 989:15, 995:13 reading [9] - 799:9, 799:11, 822:6, 827:4, 863:12, 866:1, 866:5, 898:21, 982:24 reads [1] - 899:11 real [5] - 831:14, 858:20, 870:2, 906:15, 1009:15 reality [1] - 785:15 really [22] - 818:4, 830:15, 831:5, 867:14, 875:8, 876:4, 876:23, 878:1, 883:13, 892:21, 921:10, 948:20, 973:12, 974:24, 977:8, 981:3, 982:1, 982:8, 988:3, 988:6, 1001:21 reask [1] - 830:23 reason [9] - 782:9, 783:18, 822:7, 846:24, 853:11, 921:8, 949:22, 963:10, 980:13 reasonable [9] - 792:22, 793:7, 793:12, 793:15, 802:6, 873:1, 873:20, 929:10, 950:19 reasoned [1] - 961:21 Reasons [1] - 773:13 reasons [10] - 857:7, 904:10, 905:18, 908:13, 921:1, 956:2, 995:24, 1001:12, 1008:12, 1008:24 rebut [1] - 940:12 rebuttable [14] - 940:19, 941:1, 944:22, 944:25, 945:4, 945:22, 957:21, 958:1, 958:4, 958:8, 958:17, 959:3, 959:12, 960:4 rebuttal [77] - 778:2, 778:4, 780:13, 788:5, 788:8, 788:18, 788:19, 791:7, 791:9, 791:13, 794:3, 794:6, 794:8, 796:23, 800:3, 802:13, 803:3, 803:10, 803:12, 806:19, 807:12, 814:2, 864:24, 865:8,	866:4, 866:5, 888:10, 888:14, 888:18, 888:22, 889:1, 889:5, 889:15, 889:19, 890:3, 897:11, 897:20, 898:19, 900:9, 901:18, 901:19, 901:25, 902:20, 903:1, 903:15, 903:21, 903:25, 904:4, 905:5, 907:24, 914:24, 915:14, 915:18, 915:21, 915:22, 915:25, 916:2, 916:23, 917:7, 917:16, 917:18, 917:25, 921:25, 925:5, 929:3, 938:22, 939:10, 939:13, 943:13, 944:10, 955:1, 961:17, 970:19, 972:19, 973:2, 988:23 Rebuttal [12] - 773:7, 773:8, 774:3, 774:9, 774:21, 775:3, 775:11, 776:3, 916:24, 939:14, 944:15, 944:16 recalling [1] - 879:11 receive [4] - 817:24, 819:9, 819:20, 856:18 received [19] - 808:23, 809:8, 809:14, 809:15, 809:22, 809:23, 810:6, 817:3, 818:10, 819:7, 819:16, 819:21, 823:23, 827:2, 830:13, 860:17, 862:24, 862:25, 1008:15 Received [2] - 771:21, 772:10 receiver [1] - 938:25 receives [2] - 818:24, 920:8 recent [3] - 837:19, 936:15, 943:18 recently [5] - 832:21, 839:12, 853:10, 918:16, 942:11 recess [3] - 878:5, 902:17, 971:21 reclamation [1] - 981:14 recognize [2] - 920:5, 930:3 recognized [1] -	892:1 recollection [1] - 970:14 recommend [3] - 813:8, 813:16, 1008:22 recommendation [3] - 882:1, 1008:16, 1008:18 recommendations [3] - 896:4, 896:6, 936:12 Recommendations [2] - 767:14, 767:17 recommended [8] - 791:25, 803:17, 813:9, 861:13, 861:24, 882:2, 932:9, 971:1 recommending [1] - 797:1 reconfiguration/ restoration [1] - 835:2 Record [3] - 769:15, 773:20, 774:4 record [31] - 777:1, 780:19, 783:8, 798:9, 808:10, 818:3, 831:15, 832:1, 868:19, 870:16, 870:21, 878:4, 878:8, 893:10, 898:21, 898:25, 899:6, 902:19, 906:1, 915:7, 915:17, 936:16, 951:22, 957:10, 971:23, 984:21, 986:9, 1008:4, 1008:11, 1008:12, 1011:11 recorded [2] - 829:19, 1011:10 recreation [3] - 940:23, 941:4, 968:1 Recreation [1] - 773:10 Recreational [1] - 770:14 Red [1] - 905:12 red [1] - 792:15 REDIRECT [1] - 880:4 redirect [4] - 818:9, 879:25, 880:6, 1007:20 Redirect [1] - 766:8 Redondo [1] - 913:19 reduce [1] - 927:6 redundant [6] -	841:17, 841:21, 841:24, 842:18, 881:23, 929:2 refer [3] - 792:2, 912:19, 990:10 reference [9] - 798:13, 819:15, 871:19, 928:5, 968:22, 969:2, 970:13, 990:1, 991:10 referenced [5] - 798:15, 871:21, 924:15, 968:18, 968:24 references [1] - 992:7 referencing [3] - 944:15, 1005:13, 1008:12 referred [2] - 804:16, 811:12 referring [13] - 813:18, 817:8, 828:5, 828:9, 828:13, 864:24, 866:12, 871:25, 873:17, 912:9, 967:12, 985:16, 1001:11 reflect [1] - 829:4 reflected [1] - 791:8 reflects [2] - 789:18, 798:2 reframing [1] - 966:1 regard [14] - 778:25, 781:2, 781:8, 784:14, 793:25, 865:13, 888:23, 894:5, 894:15, 904:1, 947:9, 958:25, 967:10, 989:22 regarding [35] - 777:25, 781:13, 789:2, 789:6, 790:17, 801:9, 801:15, 804:13, 808:10, 808:16, 863:13, 878:19, 880:8, 881:21, 883:1, 887:11, 904:6, 904:24, 908:1, 911:6, 911:7, 917:8, 917:21, 918:1, 929:19, 934:24, 935:22, 940:14, 944:17, 953:10, 965:5, 976:21, 988:25, 1001:18 regardless [1] - 824:1 regards [2] - 911:4,
R				
RACHEL [2] - 766:3, 780:10 Rachel [1] - 780:20 radiation [1] - 1003:13 rain [1] - 960:1 rainfall [1] - 993:8 raise [1] - 944:5 raised [2] - 903:2, 907:25 raising [1] - 942:17 range [7] - 811:13, 905:16, 970:21, 970:22, 970:24, 971:2, 971:5 rather [6] - 806:9, 841:17, 906:13, 919:5, 946:9, 993:9 rational [1] - 879:2 re [3] - 805:16, 805:17, 805:20 re-evaluate [1] - 805:20 re-evaluation [2] - 805:16, 805:17 reach [7] - 843:14, 980:17, 981:1, 981:4, 999:20, 1007:1, 1007:2 reached [1] - 910:22 reaches [1] - 975:20 read [25] - 795:12, 799:13, 808:18, 832:1, 832:17, 833:7, 833:8, 834:16, 852:25, 862:4, 863:19, 874:22, 876:19, 891:9, 892:6,				

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>990:23 Region [4] - 774:11, 775:19, 999:8, 1000:23 Register [3] - 804:17, 891:2, 893:12 regulated [3] - 812:12, 813:19, 892:4 Regulation [1] - 775:18 regulation [5] - 862:4, 942:11, 943:18, 973:6, 984:8 Regulations [1] - 769:4 regulations [4] - 854:2, 922:8, 941:19, 997:4 regulatory [8] - 835:7, 836:24, 837:16, 867:15, 891:11, 892:3, 926:5, 997:7 Regulatory [2] - 768:5, 769:9 reiterates [1] - 922:1 reject [3] - 908:16, 928:15, 951:7 relate [1] - 854:1 related [4] - 891:20, 922:23, 941:9, 1011:13 relates [4] - 794:16, 817:18, 928:23, 930:20 relationship [1] - 881:13 relative [2] - 880:11, 1011:15 relaxation [1] - 839:6 release [4] - 886:7, 886:10, 978:2, 978:5 released [3] - 887:5, 918:16, 925:2 releases [2] - 980:21, 981:14 releasing [1] - 887:10 relevance [1] - 910:4 relevant [1] - 862:4 reliance [1] - 943:7 relief [1] - 892:23 rely [1] - 980:6 relying [1] - 964:5 remain [4] - 781:18, 942:21, 980:13, 1008:5 remainder [2] - 777:14, 929:9 remaining [2] -</p>	<p>833:2, 945:15 remains [1] - 821:12 remediation [1] - 1006:19 remedy [1] - 813:12 remember [4] - 864:22, 879:13, 964:21, 968:25 REMEMBERED [1] - 762:15 remembering [1] - 865:11 remind [4] - 816:5, 914:14, 916:18, 944:3 reminded [1] - 996:15 remiss [1] - 1010:19 removal [2] - 908:3, 987:2 remove [4] - 979:8, 995:23, 997:14, 1003:12 removing [1] - 834:25 renew [2] - 779:8, 779:23 renewal [9] - 837:19, 884:2, 884:5, 884:9, 884:23, 884:25, 885:21, 886:1, 963:19 renewed [2] - 885:5, 885:9 repeat [4] - 866:21, 870:21, 998:8, 998:18 repeatedly [1] - 824:16 rephrase [8] - 818:6, 818:9, 821:8, 823:3, 848:6, 876:19, 943:11, 977:15 replied [1] - 912:1 report [9] - 800:11, 800:20, 845:7, 847:9, 847:11, 847:16, 886:24, 887:1, 906:8 reporter [7] - 847:4, 868:5, 868:8, 868:14, 870:2, 870:12, 1010:11 REPORTER [4] - 780:23, 866:21, 867:6, 868:1 reporting [4] - 800:18, 800:21, 800:23, 895:20 reports [2] - 800:12, 920:12 repository [1] - 909:6 represent [2] -</p>	<p>841:22, 908:14 representing [2] - 777:7, 857:12 represents [2] - 785:15, 913:12 Request [3] - 767:8, 772:8, 776:7 request [3] - 846:12, 896:19, 896:21 requested [2] - 895:8, 1000:16 requesting [1] - 823:24 Requests [1] - 774:19 require [16] - 799:10, 800:12, 806:3, 807:15, 824:3, 836:17, 836:21, 846:21, 859:13, 924:10, 984:19, 984:20, 986:16, 999:21, 1004:5, 1004:6 required [33] - 785:24, 799:14, 801:2, 805:16, 806:16, 819:13, 836:19, 837:5, 840:20, 843:22, 843:25, 844:2, 847:3, 851:1, 852:20, 916:22, 918:15, 920:12, 926:20, 927:9, 943:16, 944:2, 945:12, 947:10, 948:4, 977:3, 978:16, 978:19, 978:21, 983:24, 984:6, 987:9, 987:18 requirement [17] - 789:25, 793:22, 796:1, 799:23, 801:5, 807:9, 819:18, 823:21, 845:4, 886:18, 924:4, 929:25, 943:9, 945:4, 963:6, 979:14, 982:5 requirements [18] - 797:23, 798:24, 800:19, 800:24, 802:22, 804:22, 805:8, 806:5, 808:5, 808:18, 809:12, 809:21, 863:6, 887:5, 921:23, 926:23, 952:21, 959:2 requires [5] - 794:21, 800:25, 805:12, 806:13, 995:21</p>	<p>requiring [2] - 893:22, 1004:10 research [2] - 978:19, 980:6 researched [1] - 855:2 reserve [1] - 814:9 reservoir [1] - 1002:24 Reservoir [1] - 913:17 resolution [3] - 781:12, 781:14, 862:10 resolve [1] - 797:15 resolved [2] - 781:4, 853:15 resolves [1] - 941:11 resources [4] - 846:1, 846:4, 846:8, 846:15 respect [14] - 815:12, 816:15, 816:23, 817:25, 818:11, 821:2, 821:4, 824:4, 824:17, 828:19, 828:21, 830:14, 895:5, 1005:16 respond [10] - 808:23, 809:7, 809:10, 809:22, 820:23, 821:14, 823:22, 824:21, 950:9, 988:14 responded [7] - 824:14, 860:6, 862:23, 871:10, 928:13, 988:24, 989:1 responding [3] - 830:19, 848:9, 863:6 Response [2] - 767:16, 770:24 response [15] - 809:25, 810:12, 814:10, 830:12, 832:11, 840:19, 849:2, 849:5, 874:22, 925:16, 934:12, 940:18, 946:20, 960:1, 973:9 Responses [4] - 767:22, 767:24, 770:12, 772:11 responses [6] - 810:6, 810:7, 818:22, 823:16, 961:17, 961:22 responsibilities [2] - 916:19, 975:15 responsibility [1] -</p>	<p>947:3 responsive [2] - 837:3, 898:23 rest [3] - 818:13, 819:9, 902:4 restate [6] - 848:23, 849:2, 851:22, 958:12, 960:16, 976:3 restoration [33] - 784:9, 807:21, 835:9, 835:16, 835:17, 835:20, 835:24, 836:1, 836:5, 836:6, 836:9, 836:15, 836:16, 836:18, 836:20, 837:4, 839:5, 840:1, 840:7, 840:16, 849:12, 849:19, 849:25, 850:1, 891:21, 892:22, 894:3, 894:13, 894:21, 921:5, 986:15, 986:20 restore [1] - 893:16 rests [1] - 955:4 result [15] - 785:17, 790:14, 834:4, 835:12, 891:17, 891:18, 894:19, 894:21, 912:23, 917:10, 925:4, 940:6, 940:9, 941:10, 978:11 results [3] - 805:17, 805:21, 942:2 Resume [6] - 767:10, 768:12, 770:20, 771:11, 772:15, 773:6 resume [1] - 924:6 reverse [1] - 888:10 reversion [9] - 904:25, 906:9, 907:21, 908:9, 911:23, 913:15, 914:3, 914:19, 980:23 revert [6] - 796:25, 904:7, 914:5, 914:6, 976:5, 978:14 reverted [1] - 941:2 review [74] - 767:12, 797:14, 799:4, 800:14, 801:1, 801:3, 801:4, 805:6, 806:13, 806:16, 815:24, 816:7, 817:3, 817:12, 817:16, 818:12, 819:1, 819:8, 819:10, 819:22, 844:8, 844:23, 846:4, 846:25, 847:1, 847:18, 851:8,</p>
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KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>851:11, 864:21, 884:6, 885:5, 885:8, 885:9, 885:13, 886:8, 886:19, 887:6, 887:21, 895:17, 896:10, 896:16, 897:1, 907:6, 907:9, 916:22, 918:14, 919:3, 919:4, 919:6, 919:14, 919:16, 921:8, 924:1, 926:18, 927:9, 929:1, 930:23, 931:9, 933:21, 936:14, 939:11, 940:5, 944:18, 945:11, 945:12, 946:11, 950:13, 950:19, 955:17, 965:22, 981:22, 999:12</p> <p>Review [12] - 767:14, 767:19, 767:21, 768:8, 768:9, 768:19, 770:10, 773:9, 773:12, 774:18, 775:10, 775:19</p> <p>reviewable [1] - 844:8</p> <p>reviewed [10] - 804:20, 844:20, 844:23, 845:2, 885:8, 904:15, 906:6, 909:5, 919:12, 945:18</p> <p>reviews [5] - 884:10, 884:18, 901:9, 927:8, 941:10</p> <p>revised [3] - 842:15, 923:7, 949:2</p> <p>revision [1] - 860:9</p> <p>revisions [2] - 814:9, 1006:21</p> <p>Revisions [4] - 773:16, 773:21, 774:5, 775:16</p> <p>revocation [1] - 920:15</p> <p>revoke [1] - 863:16</p> <p>revoked [2] - 784:7, 920:17</p> <p>revokes [1] - 806:14</p> <p>revoking [3] - 806:19, 940:19, 958:1</p> <p>rewind [1] - 794:12</p> <p>right-hand [2] - 834:12, 894:6</p> <p>rigorous [1] - 909:22</p> <p>Rio [9] - 913:15, 913:20, 913:21, 913:23, 913:24, 938:4</p> <p>risk [3] - 800:18,</p>	<p>965:19, 965:20</p> <p>Risk [4] - 976:22, 977:11, 977:13, 977:17</p> <p>risking [1] - 798:25</p> <p>risks [1] - 811:2</p> <p>river [5] - 976:21, 989:23, 990:5, 1003:17, 1003:19</p> <p>River [13] - 771:10, 771:17, 772:13, 772:16, 772:18, 772:23, 772:25, 773:5, 913:17, 913:18, 913:25, 1001:5, 1001:9</p> <p>road [1] - 984:13</p> <p>Road [1] - 772:18</p> <p>robust [1] - 789:23</p> <p>Rock [1] - 913:18</p> <p>ROD [3] - 769:15, 773:20, 774:4</p> <p>room [3] - 815:18, 815:19, 972:3</p> <p>Room [1] - 762:18</p> <p>Rosa [1] - 913:16</p> <p>Rose [3] - 766:23, 880:7, 969:22</p> <p>ROSE [19] - 764:19, 814:21, 888:13, 898:3, 899:23, 901:17, 901:20, 968:10, 968:12, 968:13, 968:23, 969:17, 969:24, 970:5, 970:8, 970:18, 970:25, 971:6, 971:10</p> <p>rough [1] - 1000:14</p> <p>roughly [1] - 779:13</p> <p>route [2] - 877:15, 980:3</p> <p>RTC [1] - 770:13</p> <p>Ruidoso [9] - 936:16, 937:7, 937:8, 938:5, 938:8, 1005:13, 1006:14</p> <p>rule [76] - 795:24, 799:12, 799:13, 801:5, 803:16, 804:17, 804:20, 804:22, 805:1, 805:2, 805:9, 805:11, 805:19, 806:14, 806:25, 807:3, 807:17, 807:18, 807:19, 808:1, 808:5, 808:6, 831:12, 831:14, 834:7, 835:8, 835:18, 835:22, 839:13, 839:15,</p>	<p>839:17, 839:19, 839:22, 840:4, 841:3, 841:4, 849:19, 874:21, 874:23, 875:5, 878:21, 878:24, 890:24, 891:1, 891:10, 892:2, 893:25, 894:9, 895:6, 901:5, 918:16, 918:18, 918:19, 918:22, 921:13, 924:12, 924:13, 925:1, 925:4, 925:6, 925:11, 926:2, 926:4, 928:5, 929:22, 951:10, 951:14, 957:2, 959:21, 980:5, 984:18, 986:15, 988:18, 1006:4, 1008:10, 1008:20</p> <p>Rule [3] - 769:10, 769:17, 853:11</p> <p>ruled [1] - 778:20</p> <p>rulemaking [6] - 795:24, 846:18, 896:24, 934:3, 1001:22</p> <p>Rulemaking [1] - 769:5</p> <p>rules [6] - 785:24, 850:16, 853:2, 926:5, 947:22, 1005:19</p> <p>rulings [1] - 868:13</p> <p>Runnels [1] - 763:17</p> <p>running [3] - 946:9, 946:10, 1002:25</p> <p>runoff [1] - 995:2</p> <p>runs [1] - 995:2</p> <p>Ryan [1] - 1009:20</p>	<p>Sarabia [2] - 771:8, 771:11</p> <p>satisfactory [1] - 999:25</p> <p>satisfy [1] - 943:9</p> <p>SAUCEDO [1] - 763:9</p> <p>save [1] - 840:13</p> <p>saw [2] - 828:15, 981:22</p> <p>Sayer [2] - 858:9, 859:6</p> <p>SAYER [6] - 763:5, 858:10, 858:19, 860:3, 862:1, 863:8</p> <p>scale [6] - 891:18, 891:19, 912:4, 912:6, 913:12, 913:13</p> <p>schedule [16] - 800:21, 858:21, 858:24, 859:4, 859:8, 859:18, 859:24, 902:4, 947:25, 948:7, 948:23, 949:2, 949:9, 949:10, 962:5, 1008:8</p> <p>schedules [9] - 784:4, 788:17, 838:14, 859:15, 895:20, 922:24, 947:22, 962:2, 962:11</p> <p>scheme [1] - 858:22</p> <p>Schlenker [16] - 766:5, 766:9, 766:22, 777:6, 815:11, 826:17, 827:15, 828:20, 854:17, 860:5, 864:20, 865:6, 865:25, 870:20, 888:2, 888:3</p> <p>SCHLENKER [77] - 764:8, 777:4, 778:23, 780:8, 780:15, 780:21, 780:24, 783:3, 783:11, 813:24, 814:13, 817:7, 818:1, 818:15, 820:19, 821:12, 821:19, 822:19, 822:25, 824:10, 826:5, 826:14, 826:18, 826:21, 827:16, 827:18, 828:4, 830:17, 832:9, 854:18, 858:17, 865:24, 868:15, 870:22, 871:13, 871:20, 872:13, 872:19, 873:11, 874:12, 874:15, 875:16, 876:7,</p>	<p>876:12, 877:2, 877:7, 877:24, 880:1, 880:5, 887:22, 888:4, 888:7, 888:17, 897:17, 961:14, 961:15, 962:16, 962:19, 963:12, 964:2, 964:12, 964:17, 964:24, 965:3, 965:12, 965:17, 966:8, 966:14, 966:21, 967:1, 967:3, 967:9, 967:15, 967:18, 968:2, 968:6, 969:13</p> <p>Schlenker- Goodrich [14] - 766:5, 766:9, 766:22, 777:6, 815:11, 826:17, 828:20, 854:17, 860:5, 864:20, 865:6, 865:25, 870:20, 888:3</p> <p>SCHLENKER- GOODRICH [77] - 764:8, 777:4, 778:23, 780:8, 780:15, 780:21, 780:24, 783:3, 783:11, 813:24, 814:13, 817:7, 818:1, 818:15, 820:19, 821:12, 821:19, 822:19, 822:25, 824:10, 826:5, 826:14, 826:18, 826:21, 827:16, 827:18, 828:4, 830:17, 832:9, 854:18, 858:17, 865:24, 868:15, 870:22, 871:13, 871:20, 872:13, 872:19, 873:11, 874:12, 874:15, 875:16, 876:7, 876:12, 877:2, 877:7, 877:24, 880:1, 880:5, 887:22, 888:4, 888:7, 888:17, 897:17, 961:14, 961:15, 962:16, 962:19, 963:12, 964:2, 964:12, 964:17, 964:24, 965:3, 965:12, 965:17, 966:8, 966:14, 966:21, 967:1, 967:3, 967:9, 967:15, 967:18, 968:2, 968:6, 969:13</p> <p>Schlenker-</p>
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KATHY TOWNSEND COURT REPORTERS

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<p>Goodwrench ^[1] - 827:15</p> <p>science ^[1] - 904:23</p> <p>scientific ^[6] - 813:1, 813:6, 813:11, 904:16, 909:21, 995:20</p> <p>scientifically ^[1] - 927:4</p> <p>scope ^[3] - 893:19, 959:17, 973:22</p> <p>Scoping ^[2] - 767:12, 767:21</p> <p>scrutiny ^[1] - 990:24</p> <p>search ^[2] - 916:20, 979:16</p> <p>searches ^[2] - 976:11, 977:10</p> <p>second ^[17] - 779:14, 779:18, 791:19, 792:9, 807:3, 809:6, 809:10, 809:21, 812:15, 855:20, 860:4, 871:11, 917:23, 922:5, 927:6, 928:10, 993:19</p> <p>secondary ^[35] - 940:23, 941:3, 942:7, 942:15, 942:20, 942:21, 942:23, 943:8, 943:14, 944:1, 944:19, 945:10, 945:14, 945:17, 972:25, 974:4, 974:6, 974:11, 974:12, 974:19, 975:19, 978:23, 979:1, 979:18, 979:22, 980:1, 980:3, 980:4, 980:14, 981:21, 989:4, 993:24, 1004:20</p> <p>seconds ^[1] - 782:17</p> <p>section ^[19] - 795:12, 801:14, 802:20, 841:18, 842:15, 843:25, 850:16, 850:18, 878:25, 893:15, 894:14, 898:22, 899:11, 912:20, 943:21, 952:1, 985:21, 1002:8, 1002:9</p> <p>Section ^[23] - 774:16, 774:18, 779:1, 792:4, 794:19, 834:14, 850:19, 850:25, 882:5, 882:7, 917:9, 917:12, 918:2, 934:7, 943:19,</p>	<p>943:24, 951:4, 951:11, 960:6, 960:18, 961:3, 961:8, 994:10</p> <p>sections ^[7] - 866:1, 964:21, 964:25, 972:24, 973:24, 999:5, 1002:7</p> <p>Sections ^[2] - 917:21, 931:19</p> <p>secure ^[2] - 789:11, 928:3</p> <p>Security ^[1] - 765:2</p> <p>see ^[32] - 783:18, 784:17, 807:16, 810:7, 817:18, 841:2, 841:19, 841:20, 845:21, 847:18, 850:9, 856:8, 861:18, 861:21, 874:11, 877:14, 878:14, 902:15, 921:1, 928:20, 930:17, 930:19, 936:12, 943:12, 951:18, 964:16, 966:1, 971:24, 982:8, 985:5, 986:10, 996:24</p> <p>seeing ^[10] - 861:23, 879:19, 888:2, 900:10, 902:15, 915:7, 1007:14, 1007:19, 1008:2, 1009:2</p> <p>seek ^[5] - 931:5, 933:9, 938:13, 963:18, 972:21</p> <p>seeking ^[3] - 824:8, 839:5, 932:14</p> <p>seem ^[4] - 849:13, 850:2, 860:10, 983:14</p> <p>sees ^[1] - 950:16</p> <p>Segment ^[2] - 773:4, 781:13</p> <p>segment ^[15] - 784:15, 794:25, 797:25, 802:10, 843:14, 872:24, 880:21, 883:9, 963:14, 963:16, 966:5, 981:9, 994:16, 999:4, 1002:25</p> <p>segmented ^[1] - 777:10</p> <p>segments ^[35] - 789:3, 842:21, 876:4, 876:10, 876:13, 931:19, 943:15, 944:7, 945:9, 945:14, 945:15, 945:20,</p>	<p>945:25, 946:2, 966:16, 974:18, 979:15, 979:16, 979:18, 982:19, 983:4, 983:16, 983:19, 983:25, 984:12, 985:8, 985:9, 988:2, 994:11, 994:15, 994:19, 999:2, 999:6, 999:7, 1001:9</p> <p>Segments ^[1] - 773:11</p> <p>Select ^[2] - 772:20, 772:24</p> <p>Selected ^[1] - 773:11</p> <p>Selenium ^[1] - 775:5</p> <p>semantics ^[1] - 981:3</p> <p>send ^[2] - 819:2, 857:14</p> <p>sense ^[1] - 879:7</p> <p>sensitive ^[3] - 905:11, 905:17, 910:7</p> <p>sensitivities ^[2] - 910:15, 911:12</p> <p>sensitivity ^[4] - 907:5, 910:13, 911:5, 911:6</p> <p>sent ^[2] - 971:18, 973:24</p> <p>sentence ^[15] - 809:25, 825:21, 832:5, 832:6, 832:14, 833:3, 834:16, 841:21, 841:24, 844:4, 847:24, 899:6, 899:11, 938:18, 951:18</p> <p>separate ^[5] - 808:25, 811:7, 856:17, 900:23, 901:2</p> <p>September ^[11] - 769:10, 776:9, 779:9, 779:19, 779:24, 791:19, 792:10, 828:1, 828:6, 842:16, 917:24</p> <p>septic ^[2] - 953:18, 953:25</p> <p>serious ^[2] - 812:22, 812:23</p> <p>seriously ^[2] - 826:2, 947:6</p> <p>serve ^[4] - 893:14, 927:1, 927:12, 947:24</p> <p>served ^[1] - 927:12</p> <p>service ^[1] - 857:20</p> <p>Service ^[1] - 861:25</p> <p>set ^[3] - 796:7,</p>	<p>845:21, 859:13</p> <p>Sets ^[1] - 774:12</p> <p>sets ^[1] - 906:6</p> <p>setting ^[5] - 785:20, 796:8, 895:17, 988:10, 1005:9</p> <p>seven ^[3] - 779:13, 1000:25</p> <p>Seven ^[1] - 913:22</p> <p>seven-month ^[1] - 779:13</p> <p>several ^[7] - 855:10, 870:6, 904:10, 905:14, 907:25, 984:16, 995:22</p> <p>severely ^[1] - 874:5</p> <p>sewer ^[1] - 1004:8</p> <p>shall ^[8] - 808:20, 842:20, 843:10, 844:6, 844:15, 848:2, 858:13, 932:3</p> <p>shallow ^[1] - 989:16</p> <p>share ^[1] - 780:2</p> <p>shared ^[1] - 819:3</p> <p>Sheet ^[4] - 768:15, 770:14, 770:21, 775:6</p> <p>Sheets ^[1] - 771:15</p> <p>shellfish ^[1] - 968:3</p> <p>SHELLY ^[3] - 766:13, 903:13, 939:8</p> <p>Shelly ^[4] - 766:18, 773:6, 902:23, 938:22</p> <p>shift ^[1] - 800:6</p> <p>short ^[7] - 829:8, 839:25, 841:24, 863:3, 894:13, 894:25, 1007:3</p> <p>short-term ^[4] - 839:25, 841:24, 894:13, 894:25</p> <p>shortcomings ^[1] - 906:6</p> <p>shorter ^[3] - 859:8, 859:18, 859:19</p> <p>shorthand ^[2] - 967:16, 1011:10</p> <p>show ^[4] - 813:6, 859:15, 910:5, 970:8</p> <p>showed ^[6] - 862:18, 862:20, 862:23, 910:14, 910:16, 977:1</p> <p>showing ^[1] - 958:18</p> <p>shown ^[1] - 890:17</p> <p>shows ^[1] - 793:3</p> <p>sic ^[1] - 894:18</p> <p>side ^[1] - 990:20</p> <p>sign ^[3] - 856:11, 856:13, 977:23</p> <p>signed ^[1] - 771:14</p> <p>significant ^[8] -</p>	<p>835:1, 917:25, 921:7, 985:5, 985:6, 987:1, 987:2, 1006:16</p> <p>significantly ^[3] - 907:11, 914:8, 921:7</p> <p>signs ^[1] - 976:23</p> <p>Silver ^[1] - 976:20</p> <p>similar ^[1] - 966:3</p> <p>similarity ^[2] - 857:9, 858:24</p> <p>simple ^[1] - 999:17</p> <p>simply ^[2] - 779:23, 803:15</p> <p>Simultaneous ^[1] - 938:16</p> <p>single ^[1] - 985:12</p> <p>singular ^[3] - 998:25, 999:8, 1001:9</p> <p>site ^[11] - 781:20, 808:8, 808:17, 808:19, 810:17, 817:18, 817:25, 820:22, 910:3, 999:18, 1005:23</p> <p>site-specific ^[10] - 781:20, 808:8, 808:17, 808:19, 810:17, 817:18, 817:25, 820:22, 999:18, 1005:23</p> <p>sites ^[1] - 978:1</p> <p>Sites ^[1] - 768:9</p> <p>situation ^[13] - 779:11, 785:11, 840:5, 884:20, 884:23, 885:10, 892:20, 948:9, 948:23, 949:9, 993:12, 993:23, 1005:24</p> <p>situations ^[7] - 877:6, 892:8, 950:15, 953:12, 953:13, 953:20, 954:2</p> <p>six ^[12] - 779:13, 779:21, 810:8, 822:1, 884:11, 884:17, 885:13, 919:7, 963:2, 963:6, 995:24, 1001:22</p> <p>skewed ^[1] - 906:20</p> <p>slowed ^[1] - 980:22</p> <p>Small ^[1] - 768:4</p> <p>smelter ^[1] - 904:2</p> <p>snack ^[1] - 858:15</p> <p>snacks ^[3] - 856:20, 856:23, 858:12</p> <p>soil ^[1] - 904:2</p> <p>solicit ^[4] - 808:21, 809:3, 809:17, 862:17</p>
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<p>solicited ^[1] - 819:16</p> <p>solution ^[1] - 870:4</p> <p>someone ^[2] - 823:25, 826:3</p> <p>sometimes ^[3] - 836:20, 851:8, 919:7</p> <p>son ^[1] - 832:21</p> <p>soon ^[2] - 907:8, 999:20</p> <p>sorry ^[28] - 785:3, 785:7, 788:20, 790:7, 794:7, 794:12, 806:23, 844:9, 872:14, 886:25, 887:8, 889:8, 906:13, 911:9, 911:15, 918:21, 985:14, 985:19, 987:6, 987:21, 988:3, 994:1, 994:2, 997:9, 1001:13, 1005:23, 1006:3, 1006:5</p> <p>sort ^[6] - 880:11, 906:15, 911:3, 913:6, 965:4, 969:7</p> <p>sought ^[4] - 919:11, 932:9, 933:5, 949:13</p> <p>sound ^[1] - 939:1</p> <p>sounds ^[1] - 982:8</p> <p>source ^[4] - 870:17, 934:20, 953:19, 1006:18</p> <p>sources ^[1] - 1002:25</p> <p>Southern ^[6] - 771:9, 771:12, 771:15, 771:20, 771:22, 772:5</p> <p>speaking ^[4] - 864:15, 938:12, 1001:3</p> <p>speaks ^[1] - 986:15</p> <p>species ^[10] - 813:8, 813:15, 813:22, 905:12, 905:18, 907:5, 910:2, 910:4, 911:7, 911:12</p> <p>specific ^[40] - 781:20, 784:21, 789:1, 791:24, 794:16, 794:25, 808:8, 808:17, 808:19, 810:17, 812:2, 815:15, 817:18, 817:25, 820:22, 821:4, 842:20, 842:21, 843:7, 847:15, 849:25, 853:8, 865:12, 868:17, 872:1, 873:1, 873:7,</p>	<p>883:2, 883:21, 895:3, 910:16, 929:19, 931:21, 949:5, 970:15, 992:20, 999:18, 1000:17, 1005:23</p> <p>Specific ^[3] - 772:20, 772:22, 772:24</p> <p>specifically ^[28] - 782:3, 787:25, 788:11, 793:20, 798:4, 802:13, 803:10, 807:10, 809:7, 811:9, 811:16, 815:25, 817:18, 820:23, 835:15, 843:11, 852:15, 854:10, 862:8, 865:4, 871:25, 885:8, 918:17, 944:14, 957:7, 990:9, 994:10, 994:18</p> <p>specifics ^[1] - 837:20</p> <p>specified ^[3] - 805:24, 806:10, 943:24</p> <p>specify ^[1] - 928:2</p> <p>specifying ^[1] - 805:13</p> <p>speculate ^[1] - 818:2</p> <p>speculation ^[1] - 855:22</p> <p>speed ^[1] - 897:21</p> <p>spend ^[1] - 1009:15</p> <p>sponsor ^[2] - 856:15, 856:17</p> <p>sponsorship ^[1] - 856:22</p> <p>spot ^[1] - 978:3</p> <p>spring ^[2] - 1003:8, 1004:1</p> <p>Springs ^[5] - 772:17, 772:19, 772:21, 913:23, 1003:25</p> <p>springs ^[5] - 1002:9, 1002:11, 1002:12, 1003:1</p> <p>squarely ^[1] - 790:5</p> <p>ss ^[1] - 1011:2</p> <p>St ^[1] - 763:16</p> <p>staff ^[3] - 856:11, 942:1, 976:20</p> <p>stages ^[1] - 904:19</p> <p>stakeholder ^[2] - 810:16, 823:15</p> <p>stakeholders ^[6] - 808:21, 809:3, 810:22, 820:5, 821:11, 823:12</p>	<p>stand ^[2] - 966:6, 994:1</p> <p>standard ^[283] - 783:21, 784:16, 784:18, 784:20, 784:25, 785:5, 785:8, 785:12, 785:14, 785:18, 785:20, 785:25, 786:10, 786:16, 786:17, 786:21, 786:24, 787:2, 787:6, 787:16, 789:19, 790:5, 790:14, 792:23, 793:1, 793:6, 793:8, 793:10, 793:16, 793:18, 793:20, 793:23, 794:23, 795:2, 795:5, 795:8, 795:9, 795:16, 795:18, 795:20, 795:22, 796:11, 796:13, 797:16, 797:20, 797:25, 798:25, 799:2, 800:22, 801:4, 801:9, 801:16, 801:21, 801:22, 801:24, 802:3, 802:11, 802:21, 804:11, 805:4, 805:5, 805:13, 805:15, 805:21, 805:23, 805:25, 806:4, 806:7, 806:13, 806:15, 806:20, 807:5, 811:13, 813:20, 834:24, 836:9, 836:12, 838:18, 838:24, 839:16, 839:22, 839:25, 840:9, 842:1, 842:13, 842:20, 842:24, 843:6, 843:7, 843:10, 843:15, 844:6, 844:7, 844:15, 844:19, 844:22, 844:24, 844:25, 846:13, 846:19, 846:20, 847:6, 847:16, 847:19, 847:25, 848:13, 848:16, 848:18, 850:7, 850:11, 850:17, 850:24, 851:1, 858:21, 858:25, 859:10, 859:11, 859:14, 859:21, 859:25, 860:9, 860:12, 860:25, 863:13, 863:16, 863:18,</p>	<p>866:8, 867:11, 867:14, 872:12, 872:20, 872:24, 873:15, 873:24, 874:24, 875:14, 875:17, 880:22, 880:25, 881:3, 883:9, 883:13, 883:14, 883:20, 884:4, 884:21, 884:22, 885:2, 885:4, 885:6, 885:7, 885:11, 885:12, 885:17, 885:22, 886:2, 886:3, 886:20, 886:23, 887:2, 887:7, 887:12, 887:16, 891:12, 892:6, 892:9, 893:14, 893:19, 893:25, 894:8, 894:10, 894:12, 896:15, 896:17, 896:18, 896:19, 896:20, 909:4, 909:8, 909:14, 909:22, 918:1, 918:15, 918:25, 919:1, 919:2, 920:8, 920:10, 920:13, 920:18, 920:22, 922:3, 922:5, 923:8, 923:10, 923:13, 923:16, 923:19, 923:22, 924:2, 924:5, 924:6, 924:7, 924:14, 925:20, 925:22, 925:24, 926:1, 926:13, 926:15, 926:16, 926:19, 927:3, 927:11, 927:16, 927:23, 928:1, 930:15, 931:13, 931:16, 931:22, 932:24, 933:10, 934:25, 935:9, 935:24, 936:5, 937:16, 938:14, 946:25, 948:9, 948:13, 948:15, 949:1, 949:3, 949:4, 949:8, 949:19, 949:25, 950:5, 950:10, 950:14, 950:15, 950:17, 950:25, 951:2, 952:14, 953:9, 954:4, 954:5, 954:16, 956:16, 957:2, 962:7, 962:8, 962:20, 962:21, 963:1, 963:5, 963:13, 963:18, 964:6, 964:7, 964:15,</p>	<p>964:19, 965:23, 970:12, 976:1, 985:17, 986:1, 986:4, 986:11, 987:5, 987:8, 987:12, 1000:16, 1004:25, 1005:21, 1005:25</p> <p>Standard ^[1] - 768:22</p> <p>standard-based ^[1] - 806:7</p> <p>Standards ^[13] - 767:8, 769:6, 769:9, 773:17, 773:22, 774:6, 775:16, 776:6, 779:3, 794:20, 866:6, 866:10, 928:18</p> <p>STANDARDS ^[1] - 762:6</p> <p>standards ^[168] - 777:12, 777:15, 777:20, 781:19, 781:23, 782:1, 782:4, 782:9, 783:14, 783:18, 784:8, 784:11, 786:4, 786:9, 786:14, 786:19, 787:4, 787:8, 787:9, 787:14, 787:18, 788:14, 788:15, 788:16, 788:23, 789:3, 789:6, 789:10, 789:12, 789:15, 790:4, 790:11, 790:18, 791:2, 791:6, 791:21, 793:13, 794:17, 794:18, 796:5, 796:20, 797:13, 798:19, 799:5, 799:17, 799:24, 800:8, 800:14, 800:16, 802:1, 803:4, 803:14, 803:20, 803:22, 803:23, 803:24, 804:9, 804:17, 805:10, 808:1, 808:3, 808:11, 812:7, 813:17, 834:4, 837:22, 838:7, 839:4, 839:14, 839:20, 840:21, 840:22, 841:22, 845:17, 846:19, 848:2, 851:19, 851:25, 852:4, 852:10, 852:24, 853:5, 853:22, 857:11, 859:4, 878:20, 881:18, 882:6,</p>
---	---	---	--	--

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882:19, 890:9, 890:15, 891:6, 892:2, 892:5, 892:17, 893:1, 894:16, 895:6, 908:25, 909:6, 916:13, 916:21, 917:13, 918:3, 918:4, 918:10, 919:10, 920:7, 921:18, 921:24, 922:7, 922:10, 922:12, 922:13, 922:18, 922:19, 922:23, 928:3, 929:6, 930:13, 931:8, 931:17, 931:19, 932:18, 933:20, 934:3, 940:3, 942:3, 945:1, 945:13, 945:16, 947:23, 948:8, 949:13, 951:8, 951:23, 952:4, 954:6, 954:13, 955:17, 955:22, 956:10, 956:15, 962:3, 964:20, 965:13, 965:18, 979:14, 989:15, 993:25, 995:4, 1001:19, 1002:15, 1003:8, 1003:9, 1005:8, 1005:17, 1005:20, 1006:8, 1006:10, 1006:23, 1007:2, 1007:4, 1007:7 standing [2] - 855:21, 856:9 standpoint [1] - 978:25 stands [4] - 852:20, 911:1, 995:13, 995:18 start [6] - 781:22, 785:13, 786:25, 880:7, 915:8, 981:2 started [3] - 851:8, 872:10, 899:8 starting [2] - 844:5, 844:14 starts [5] - 834:18, 842:12, 842:16, 851:12, 913:1 state [55] - 780:18, 804:6, 805:19, 811:23, 812:18, 812:19, 813:2, 813:4, 813:9, 813:17, 845:12, 846:3, 850:3, 850:4, 853:9, 857:23, 877:6, 894:20, 909:6, 909:8, 914:14, 921:20, 921:21,	922:16, 922:21, 927:5, 941:16, 941:18, 943:19, 943:22, 945:4, 950:2, 951:4, 951:5, 951:11, 951:12, 951:24, 952:5, 952:19, 952:21, 954:12, 954:19, 958:5, 958:20, 959:10, 959:14, 963:21, 963:23, 982:21, 983:19, 984:20, 984:23, 994:6, 1004:4, 1006:15 STATE [2] - 762:1, 1011:1 State [6] - 762:18, 905:24, 946:5, 953:6, 983:22, 995:10 state's [3] - 918:25, 921:23, 955:23 state-of-the-art [1] - 1006:15 statement [22] - 820:15, 821:4, 821:6, 821:7, 821:17, 822:7, 823:11, 824:1, 824:3, 824:4, 824:5, 824:7, 829:15, 832:8, 863:25, 876:25, 908:22, 923:21, 949:12, 950:4, 984:21 Statement [1] - 773:12 statements [4] - 941:6, 983:15, 1008:12, 1008:24 States [3] - 765:2, 900:22, 901:11 states [22] - 803:19, 805:12, 805:25, 807:3, 807:4, 834:22, 835:18, 839:20, 863:12, 874:23, 891:12, 891:14, 892:3, 894:7, 894:18, 899:7, 909:3, 909:6, 922:9, 942:12, 973:6, 986:17 statewide [1] - 984:5 stating [3] - 867:4, 937:13, 941:1 statute [3] - 975:10, 979:12, 980:6 statutory [3] - 832:11, 982:5, 982:9 stay [1] - 959:20 staying [1] - 883:25 step [3] - 781:1,	960:11 steps [3] - 797:23, 843:12, 913:4 stepwise [1] - 912:25 Steven [1] - 775:12 stick [1] - 944:4 still [20] - 778:16, 827:23, 827:24, 843:24, 843:25, 844:12, 877:22, 910:17, 919:20, 921:12, 945:3, 950:18, 980:15, 982:1, 986:7, 987:7, 1002:6, 1005:17 stipulated [1] - 800:21 stop [4] - 839:9, 839:11, 905:20, 952:10 storage [7] - 993:4, 993:5, 993:12, 994:5, 994:9, 994:11, 994:19 storing [1] - 993:15 stream [11] - 835:1, 836:1, 840:16, 850:10, 941:20, 950:21, 987:13, 999:2, 999:6, 999:7, 1005:18 streamline [1] - 797:18 streams [12] - 861:10, 861:19, 941:13, 941:23, 942:4, 944:20, 959:6, 959:7, 959:8, 959:23, 998:3, 998:22 stressor [1] - 892:10 stressors [1] - 891:20 stretch [2] - 980:25, 1004:20 strike [4] - 792:16, 882:2, 882:22, 934:9 strike-through [2] - 792:16, 882:2 stringent [2] - 918:9, 936:11 strongly [1] - 908:15 STSIU [1] - 769:25 stuck [1] - 1002:6 studies [5] - 906:23, 907:14, 908:3, 910:12, 910:15 study [4] - 906:12, 906:15, 906:20, 910:6 subcategories [2] - 967:24, 992:12 subject [24] - 784:15,	789:3, 789:15, 795:16, 802:10, 802:11, 872:11, 872:15, 872:20, 873:15, 880:22, 919:3, 920:12, 920:15, 922:15, 924:1, 926:5, 929:1, 929:19, 935:1, 959:7, 959:9, 961:4, 966:15 subjected [1] - 790:12 subjects [1] - 910:19 submission [2] - 930:1, 937:14 submit [11] - 778:6, 800:11, 800:13, 801:10, 805:16, 805:21, 810:4, 930:5, 933:19, 937:13, 1008:23 Submittal [1] - 770:4 submittal [6] - 814:8, 842:16, 862:21, 862:23, 936:19, 937:7 submittals [4] - 1008:5, 1008:8, 1008:9, 1008:14 submitted [20] - 777:17, 781:8, 781:15, 792:9, 795:4, 797:16, 799:6, 800:12, 800:20, 810:3, 841:9, 896:10, 926:17, 928:8, 936:15, 937:3, 946:3, 999:1, 999:8, 1000:22 submitting [2] - 818:3, 930:20 subsection [32] - 788:13, 788:22, 789:5, 789:9, 789:14, 789:22, 790:3, 790:6, 790:8, 790:10, 790:16, 794:10, 794:11, 794:15, 795:13, 797:11, 798:19, 800:6, 800:8, 801:13, 801:15, 801:19, 802:17, 843:17, 850:15, 866:2, 883:3, 883:12, 883:25, 886:5, 912:20, 941:22 subsections [1] - 883:1 subsequent [7] - 806:6, 822:4, 846:23, 884:6, 927:8, 946:22, 965:22	subsequently [3] - 919:11, 931:14, 993:13 substantial [6] - 796:19, 829:13, 829:17, 829:23, 891:15, 904:15 substantially [1] - 813:14 substantive [1] - 859:3 succeeding [1] - 933:20 successful [6] - 931:14, 932:23, 946:24, 950:24, 984:17, 987:17 sufficient [5] - 799:11, 810:16, 863:14, 884:7, 920:11 sufficiently [1] - 908:7 suggest [7] - 806:19, 807:10, 852:1, 870:20, 901:8, 904:21, 911:8 suggested [7] - 791:5, 841:11, 843:20, 847:23, 848:12, 918:6, 921:12 suggesting [6] - 835:8, 844:5, 844:19, 845:9, 845:10, 942:20 suggestion [3] - 852:9, 901:7, 925:17 suggestions [3] - 791:8, 993:20, 1009:1 suggests [2] - 812:17, 940:21 Suite [2] - 763:11, 764:10 Sulphur [1] - 906:1 sum [2] - 922:17, 935:23 summarize [10] - 787:1, 791:25, 794:11, 794:14, 797:10, 798:18, 800:7, 801:18, 802:25, 810:11 summarized [2] - 828:25, 879:12 summarizing [1] - 828:22 summary [1] - 813:3 Sumner [2] - 977:20, 977:21 sunset [2] - 845:3, 885:17 superfluous [1] -
--	--	--	---	--

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<p>928:25 supplemental ^[1] - 798:8 Supplemental ^[1] - 798:11 supplemented ^[2] - 778:12, 778:21 supplied ^[1] - 941:6 supply ^[1] - 993:5 support ^[13] - 781:11, 795:4, 856:16, 857:18, 879:10, 904:15, 937:21, 976:6, 976:15, 980:3, 980:23, 995:22, 1006:18 supported ^[1] - 979:25 supporting ^[3] - 941:6, 979:20, 979:22 supportive ^[1] - 937:15 supports ^[5] - 787:22, 856:24, 891:5, 957:4, 957:10 suppose ^[1] - 846:14 Sur ^[1] - 764:9 surface ^[4] - 894:20, 912:5, 931:17, 992:13 Surface ^[11] - 767:6, 767:7, 773:18, 773:23, 774:7, 775:17, 776:6, 916:14, 923:2, 950:22, 953:1 SURFACE ^[1] - 762:6 surprise ^[3] - 816:2, 817:23, 818:8 surveys ^[3] - 914:15, 945:24, 976:19 suspect ^[3] - 992:22, 992:23, 1002:14 Swim ^[4] - 976:22, 977:11, 977:13, 977:16 swim ^[2] - 967:20, 980:20 swimmable ^[2] - 960:14, 987:14 swimming ^[2] - 978:2, 981:15 sworn ^[6] - 780:11, 780:22, 890:2, 903:14, 914:24, 1011:9 SWQB ^[12] - 767:16, 767:22, 767:24, 768:10, 768:13, 768:16, 768:18,</p>	<p>770:6, 770:8, 770:11, 772:11, 776:8 system ^[5] - 935:17, 938:13, 953:23, 1004:8, 1006:15</p> <p style="text-align: center;">T</p> <p>Table ^[1] - 907:24 table ^[4] - 855:17, 856:8, 912:20, 912:25 Tables ^[1] - 768:22 tailings ^[1] - 904:2 tailor ^[1] - 920:3 tailored ^[2] - 930:13, 949:4 talks ^[1] - 852:13 tanks ^[2] - 953:18, 953:25 Taos ^[2] - 764:10, 861:21 targeting ^[1] - 802:1 task ^[1] - 1009:18 tasks ^[1] - 927:6 TAYLOR ^[1] - 764:14 tdolan@lanl.gov ^[1] - 765:7 tea ^[1] - 831:4 teach ^[1] - 832:21 Technical ^[4] - 770:10, 772:4, 772:12, 774:17 technical ^[3] - 854:24, 869:1, 878:16 technically ^[1] - 1007:1 technologies ^[1] - 923:14 technology ^[7] - 789:11, 807:7, 928:2, 948:3, 948:10, 948:16, 1003:12 technology-based ^[3] - 789:11, 807:7, 928:2 telephone ^[3] - 763:4, 763:6, 938:24 temporal ^[2] - 794:2, 794:17 temporarily ^[1] - 986:19 Temporary ^[7] - 768:22, 774:12, 779:3, 866:6, 866:9, 928:18 temporary ^[295] - 777:15, 777:20, 781:19, 781:23, 781:25, 782:4,</p>	<p>783:14, 784:13, 784:15, 784:18, 784:20, 784:25, 785:4, 785:7, 785:12, 785:14, 785:18, 785:25, 786:4, 786:9, 786:14, 786:16, 786:17, 786:19, 786:21, 786:24, 787:2, 787:6, 787:8, 787:9, 787:16, 787:17, 788:13, 788:14, 788:22, 789:3, 789:6, 789:10, 789:15, 789:19, 790:3, 790:11, 790:14, 790:18, 791:1, 791:20, 792:25, 793:6, 793:10, 793:13, 793:20, 793:23, 794:17, 794:18, 794:22, 795:2, 795:5, 795:8, 795:16, 795:18, 795:19, 796:5, 796:11, 796:12, 797:12, 797:16, 797:20, 797:25, 798:19, 798:25, 799:2, 799:5, 799:24, 800:8, 800:16, 800:22, 801:4, 801:9, 801:15, 801:21, 801:22, 801:24, 802:1, 802:11, 802:21, 803:4, 803:13, 803:20, 803:22, 803:23, 803:24, 804:9, 804:11, 805:4, 805:10, 806:13, 806:15, 806:20, 808:3, 808:11, 834:4, 837:22, 838:7, 838:18, 839:4, 839:14, 840:9, 840:21, 840:22, 841:22, 842:13, 842:20, 842:24, 843:6, 843:7, 843:9, 844:5, 844:15, 844:22, 844:24, 844:25, 845:24, 846:10, 846:13, 846:19, 846:20, 847:6, 847:16, 847:19, 847:25, 848:2, 848:13, 848:18, 850:6, 851:18, 851:25, 852:4, 852:10,</p>	<p>852:24, 857:11, 858:21, 858:25, 859:4, 859:9, 859:11, 859:14, 863:13, 863:16, 863:17, 866:8, 867:11, 867:12, 867:14, 872:12, 872:20, 872:22, 872:24, 873:15, 873:24, 875:14, 878:19, 880:22, 880:25, 881:3, 881:17, 882:18, 883:9, 883:14, 884:4, 884:21, 885:3, 885:6, 885:7, 885:11, 885:17, 886:2, 886:19, 886:20, 886:23, 887:2, 887:7, 887:12, 887:16, 890:9, 890:15, 891:6, 892:9, 892:16, 892:23, 893:1, 895:6, 896:14, 896:18, 896:19, 917:13, 918:1, 918:3, 918:25, 919:1, 919:10, 920:7, 920:8, 920:10, 920:18, 920:22, 921:18, 922:3, 922:5, 922:9, 922:11, 922:18, 922:23, 923:7, 923:16, 923:18, 923:22, 924:2, 924:4, 924:6, 924:14, 925:20, 925:24, 926:1, 926:12, 926:14, 927:3, 927:11, 927:16, 927:23, 928:1, 929:6, 930:13, 930:15, 931:13, 931:16, 931:22, 932:18, 932:24, 933:10, 934:25, 935:9, 935:24, 936:5, 937:15, 938:11, 938:14, 946:24, 947:23, 948:8, 948:14, 949:1, 949:4, 949:13, 949:19, 950:5, 950:10, 950:14, 950:15, 950:17, 950:25, 951:1, 952:14, 953:9, 954:3, 954:5, 955:17, 955:22, 956:10, 956:15, 957:2, 962:3, 962:20, 962:25, 963:5, 963:13,</p>	<p>963:18, 964:6, 964:7, 964:15, 964:19, 965:22, 985:25, 986:4, 986:11, 987:5, 987:8, 987:12, 1001:19, 1005:8, 1005:25, 1006:23, 1007:4 ten ^[2] - 925:1, 930:11 ten-year ^[1] - 930:11 tenfold ^[2] - 913:4 term ^[21] - 806:11, 839:25, 841:24, 855:9, 859:16, 859:17, 874:1, 874:3, 874:7, 874:16, 874:17, 880:11, 880:13, 893:24, 894:13, 894:25, 925:12, 989:19, 992:16, 993:11, 1010:14 termination ^[1] - 790:14 terms ^[16] - 808:17, 828:9, 831:11, 838:23, 866:13, 867:15, 875:2, 880:17, 913:1, 919:4, 925:8, 961:20, 966:11, 990:19, 991:3, 996:10 test ^[1] - 910:19 testified ^[20] - 780:12, 797:7, 817:11, 820:2, 861:7, 890:3, 892:25, 903:2, 903:15, 903:19, 905:22, 916:10, 921:17, 926:22, 955:20, 956:17, 956:19, 958:3, 966:17, 970:18 testify ^[2] - 956:7, 956:25 testifying ^[2] - 818:3, 1004:17 testimonies ^[1] - 917:8 testimony ^[139] - 778:2, 778:4, 781:7, 781:15, 786:6, 787:21, 787:22, 788:1, 788:5, 788:9, 788:19, 791:5, 791:7, 791:10, 791:13, 791:18, 792:25, 794:4, 796:23, 798:14, 800:3,</p>
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KATHY TOWNSEND COURT REPORTERS

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<p>802:13, 802:16, 803:3, 803:10, 803:12, 803:18, 803:20, 806:17, 807:11, 811:15, 811:17, 812:17, 814:1, 814:2, 815:10, 815:13, 816:20, 817:9, 819:25, 820:23, 820:24, 821:15, 821:17, 822:6, 822:10, 822:13, 824:14, 826:6, 829:11, 829:12, 829:16, 834:3, 838:1, 840:18, 854:24, 854:25, 855:8, 860:10, 864:24, 865:8, 866:5, 875:18, 875:19, 876:1, 889:15, 890:7, 890:12, 893:3, 896:12, 897:20, 901:19, 901:25, 903:1, 903:21, 904:1, 904:5, 904:11, 905:5, 907:24, 908:19, 908:23, 909:1, 914:24, 916:2, 916:23, 917:2, 917:6, 917:16, 917:18, 917:23, 919:5, 919:8, 921:11, 922:1, 922:22, 923:15, 924:23, 925:16, 926:10, 929:3, 929:4, 932:10, 937:4, 937:12, 938:22, 939:10, 939:13, 939:16, 940:13, 940:15, 943:7, 943:13, 944:10, 947:17, 950:7, 955:19, 955:21, 956:5, 956:14, 956:20, 957:9, 957:19, 957:20, 959:6, 970:10, 970:19, 973:1, 973:15, 975:2, 983:6, 1001:13, 1002:20, 1011:8, 1011:10, 1011:11</p> <p>Testimony [11] - 767:4, 768:11, 770:17, 771:8, 772:14, 773:8, 774:10, 774:22, 775:9, 775:11, 775:12</p> <p>thankless [1] - 1009:19</p>	<p>THE [8] - 762:2, 762:5, 780:23, 833:22, 866:21, 867:6, 868:1, 972:14</p> <p>themselves [1] - 964:20</p> <p>theoretically [1] - 959:15</p> <p>therefore [16] - 783:23, 784:22, 784:25, 785:7, 786:23, 787:11, 795:19, 796:16, 796:18, 804:5, 896:24, 906:9, 942:22, 943:15, 960:14, 984:19</p> <p>they've [2] - 819:15, 819:16</p> <p>thinking [1] - 952:21</p> <p>third [8] - 807:18, 865:2, 865:16, 865:22, 899:2, 922:8, 927:10, 951:19</p> <p>thorough [2] - 830:2, 830:7</p> <p>thousand [1] - 993:21</p> <p>thousands [2] - 861:11, 861:12</p> <p>three [24] - 781:18, 789:16, 796:4, 796:13, 796:25, 797:1, 844:19, 845:7, 882:8, 884:13, 884:16, 902:22, 919:17, 924:2, 924:22, 925:3, 962:12, 962:15, 979:14, 982:19, 1000:21, 1000:25</p> <p>three-year [6] - 789:16, 796:4, 796:25, 797:1, 884:13, 884:16</p> <p>throughout [2] - 893:24, 967:12</p> <p>tied [1] - 935:17</p> <p>tiers [1] - 882:8</p> <p>tightening [1] - 793:2</p> <p>time-limited [1] - 834:24</p> <p>timeline [3] - 924:3, 925:8, 930:14</p> <p>timelines [1] - 927:6</p> <p>timeliness [4] - 778:16, 779:8, 779:24, 814:8</p> <p>timing [1] - 802:9</p>	<p>TIMOTHY [1] - 765:3</p> <p>tiny [1] - 899:15</p> <p>tire [1] - 980:25</p> <p>TMDL [4] - 927:22, 927:25, 948:12, 954:16</p> <p>TO [1] - 762:5</p> <p>today [13] - 777:13, 777:25, 815:7, 822:10, 852:18, 859:23, 890:8, 917:2, 917:25, 922:1, 923:10, 940:3</p> <p>together [4] - 842:25, 856:18, 927:1, 1008:23</p> <p>TONGATE [5] - 763:3, 782:14, 782:25, 902:9, 972:22</p> <p>took [2] - 879:3, 946:17</p> <p>tool [13] - 877:15, 890:11, 890:15, 890:21, 891:6, 892:2, 892:6, 892:9, 892:17, 919:21, 962:5, 962:20, 995:18</p> <p>toolbox [1] - 923:3</p> <p>tools [4] - 877:13, 877:16, 923:3, 963:11</p> <p>top [3] - 845:24, 846:2, 954:18</p> <p>topic [1] - 946:14</p> <p>total [4] - 881:15, 913:1, 935:23, 941:24</p> <p>totally [1] - 970:2</p> <p>toward [5] - 793:7, 802:2, 893:20, 894:1, 894:2</p> <p>towards [9] - 792:22, 793:3, 802:14, 836:14, 836:25, 843:15, 847:14, 850:8, 850:10</p> <p>town [1] - 1003:23</p> <p>toxic [1] - 906:18</p> <p>toxicity [4] - 861:8, 904:24, 909:10, 914:9</p> <p>toxicological [1] - 906:15</p> <p>toxics [1] - 906:22</p> <p>track [2] - 792:2, 875:4</p> <p>tracks [1] - 792:8</p> <p>Trail [1] - 762:19</p> <p>train [1] - 870:25</p> <p>transaction [2] - 966:22, 967:6</p> <p>transactional [1] - 941:7</p>	<p>TRANSCRIPT [1] - 762:13</p> <p>transcript [5] - 869:6, 869:14, 1008:7, 1011:9, 1011:11</p> <p>transition [1] - 870:7</p> <p>translate [1] - 871:2</p> <p>translated [3] - 870:16, 965:19, 966:11</p> <p>translating [1] - 867:1</p> <p>translations [1] - 877:5</p> <p>translator [1] - 870:15</p> <p>Transmittal [1] - 771:5</p> <p>trap [1] - 824:18</p> <p>treated [1] - 778:13</p> <p>treatment [12] - 923:13, 935:17, 953:14, 953:22, 1003:3, 1003:5, 1003:7, 1004:22, 1005:16, 1006:22, 1006:25, 1007:5</p> <p>tribe [2] - 805:20, 951:24</p> <p>tribe's [1] - 952:5</p> <p>tribes [8] - 805:12, 806:1, 834:23, 839:20, 891:12, 891:14, 892:4, 894:7</p> <p>tributaries [1] - 913:19</p> <p>Tributaries [2] - 772:23, 772:25</p> <p>tried [1] - 945:18</p> <p>triennial [37] - 800:14, 801:3, 815:24, 816:7, 817:3, 817:12, 817:16, 818:11, 819:1, 819:7, 819:10, 819:22, 844:8, 844:23, 847:1, 851:10, 884:6, 884:9, 884:18, 885:5, 885:8, 885:9, 901:9, 916:22, 919:6, 919:14, 919:16, 927:9, 933:20, 939:11, 940:4, 940:5, 941:10, 944:18, 945:11, 946:11, 955:17</p> <p>Triennial [10] - 767:11, 767:14, 767:18, 767:21, 767:23, 768:8, 768:9,</p>	<p>768:19, 773:12, 775:10</p> <p>trouble [1] - 876:19</p> <p>troubles [1] - 988:6</p> <p>trout [1] - 967:21</p> <p>true [8] - 877:4, 895:10, 895:13, 896:14, 924:25, 959:11, 959:16, 1011:11</p> <p>truly [2] - 857:12, 1009:8</p> <p>truth [3] - 821:6, 821:7, 981:24</p> <p>Truth [3] - 1003:24, 1004:9, 1004:16</p> <p>try [9] - 779:21, 783:4, 871:1, 871:7, 898:10, 906:14, 974:10, 974:11, 1005:3</p> <p>trying [14] - 826:10, 867:8, 868:11, 868:12, 869:2, 874:9, 874:20, 877:16, 949:17, 953:22, 974:14, 984:25, 987:13, 997:9</p> <p>tubes [3] - 980:24, 980:25, 981:23</p> <p>Tularosa [3] - 990:6, 990:19, 1001:8</p> <p>turn [16] - 778:9, 781:22, 788:8, 801:13, 808:7, 811:6, 881:16, 886:5, 891:1, 895:3, 898:22, 928:17, 938:21, 951:16, 966:14, 1010:6</p> <p>turned [2] - 782:23, 999:5</p> <p>turning [7] - 790:10, 791:23, 794:10, 803:18, 816:20, 819:25, 883:3</p> <p>turns [1] - 824:6</p> <p>twelve [1] - 884:25</p> <p>twice [1] - 914:2</p> <p>two [28] - 781:17, 796:11, 799:18, 808:25, 809:14, 809:25, 810:10, 825:12, 825:20, 863:3, 864:8, 866:1, 866:16, 869:20, 871:18, 885:17, 886:25, 895:3, 897:25, 941:10, 947:24, 983:15,</p>
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<p>983:17, 990:9, 993:2, 999:6, 1000:6</p> <p>tying [1] - 921:4</p> <p>type [7] - 918:14, 948:23, 988:5, 990:14, 1001:17, 1006:19</p> <p>types [2] - 850:1, 900:24</p> <p>typically [7] - 854:23, 859:17, 861:18, 884:11, 884:17, 886:7, 962:16</p> <p style="text-align: center;">U</p> <p>UAA [69] - 769:24, 770:11, 771:10, 771:12, 771:15, 771:17, 771:19, 771:22, 772:5, 772:13, 773:5, 923:1, 941:4, 942:1, 943:9, 943:15, 944:5, 944:7, 946:6, 958:18, 958:20, 960:15, 960:22, 966:3, 966:5, 966:6, 966:24, 966:25, 973:3, 973:11, 973:14, 973:20, 974:5, 974:7, 974:9, 974:11, 974:16, 974:19, 975:18, 978:10, 978:11, 978:13, 978:25, 979:6, 979:8, 980:3, 980:12, 981:20, 982:7, 983:2, 983:24, 985:6, 985:18, 995:12, 996:20, 996:25, 998:6, 998:25, 999:8, 999:11, 999:14, 999:15, 1000:1, 1000:9, 1000:12, 1001:10, 1001:12, 1001:16</p> <p>UAAs [26] - 770:18, 770:22, 770:23, 771:4, 771:6, 771:9, 903:2, 941:13, 941:15, 967:4, 973:10, 973:23, 974:2, 975:13, 976:13, 983:4, 984:8, 998:3, 998:22, 1000:10, 1000:15, 1000:18, 1000:19, 1000:21, 1000:22, 1001:2</p>	<p>ultimate [3] - 893:16, 894:1, 1007:6</p> <p>ultimately [3] - 795:25, 879:12, 891:16</p> <p>um-hum [4] - 834:15, 841:16, 881:19, 961:10</p> <p>unaware [1] - 890:10</p> <p>uncertain [1] - 798:23</p> <p>uncertainty [1] - 891:15</p> <p>unclassified [1] - 994:8</p> <p>unclear [1] - 929:12</p> <p>under [28] - 784:19, 837:23, 838:18, 839:12, 839:13, 843:25, 850:25, 853:2, 853:6, 866:8, 873:20, 894:16, 901:9, 921:20, 921:21, 922:7, 922:16, 922:20, 927:3, 927:4, 955:22, 958:14, 971:6, 984:20, 989:12, 1005:19, 1006:2</p> <p>undergo [1] - 990:23</p> <p>undergoing [1] - 907:8</p> <p>undergone [1] - 907:6</p> <p>underlie [1] - 790:21</p> <p>underline [1] - 792:13</p> <p>underlying [6] - 805:22, 806:8, 821:11, 920:19, 924:7, 928:3</p> <p>undermine [2] - 795:8, 802:8</p> <p>undermining [1] - 787:5</p> <p>underpinning [1] - 961:3</p> <p>underprotections [1] - 911:22</p> <p>underprotective [1] - 813:14</p> <p>understandable [1] - 847:7</p> <p>understood [8] - 857:6, 876:25, 914:11, 929:4, 942:16, 943:13, 963:12, 997:11</p> <p>undertake [1] - 1009:18</p>	<p>undo [1] - 940:19</p> <p>unfolds [1] - 845:21</p> <p>unintelligible [1] - 871:10</p> <p>Unintelligible [1] - 867:5</p> <p>unintelligible [1] - 867:25</p> <p>unintended [3] - 785:19, 950:4, 951:2</p> <p>unintentionally [1] - 786:4</p> <p>unit [1] - 904:2</p> <p>United [3] - 765:2, 900:22, 901:11</p> <p>unless [10] - 890:16, 939:1, 946:6, 958:17, 958:20, 960:14, 960:22, 961:1, 984:5, 990:24</p> <p>unnamed [2] - 996:7, 996:9</p> <p>unnecessarily [1] - 975:25</p> <p>unnecessary [7] - 788:15, 798:25, 926:24, 928:4, 941:14, 966:22, 967:5</p> <p>unquote [2] - 808:19, 882:3</p> <p>unreasonable [4] - 941:7, 941:13, 941:16, 942:1</p> <p>unsewered [2] - 921:4, 921:5</p> <p>up [44] - 782:23, 785:20, 812:22, 820:15, 823:11, 824:7, 832:14, 837:19, 846:25, 851:6, 854:16, 856:8, 857:22, 860:6, 864:5, 871:6, 873:9, 873:11, 878:13, 879:18, 898:11, 902:12, 908:18, 938:25, 944:5, 948:16, 952:22, 963:19, 972:20, 972:22, 972:23, 973:9, 986:21, 988:11, 995:1, 998:13, 999:7, 999:24, 1000:25, 1001:4, 1001:22, 1002:4, 1004:2, 1005:9</p> <p>update [2] - 904:19, 962:23</p> <p>updates [1] - 916:21</p> <p>upgrade [1] - 966:15</p>	<p>upgraded [1] - 966:18</p> <p>upheld [2] - 984:18, 987:18</p> <p>uphold [1] - 947:10</p> <p>upstream [1] - 1006:17</p> <p>US [7] - 861:24, 959:10, 959:19, 959:21, 984:19, 988:18, 997:4</p> <p>useful [2] - 892:8, 974:2</p> <p>USEPA [5] - 768:15, 770:14, 770:16, 771:5, 771:7</p> <p>Uses [2] - 773:10</p> <p>uses [19] - 940:14, 941:3, 943:23, 943:24, 944:20, 944:23, 958:16, 960:6, 967:11, 967:13, 967:19, 977:5, 977:6, 979:7, 979:17, 980:2, 981:9, 994:5, 995:19</p> <p>USGS [1] - 772:16</p> <p>utilize [1] - 877:16</p> <p>utilized [2] - 787:10, 877:13</p> <p>utilizing [1] - 812:9</p> <p>UV [1] - 1003:13</p> <p style="text-align: center;">V</p> <p>Vacas [1] - 913:23</p> <p>vague [2] - 798:23, 929:12</p> <p>vaguely [1] - 800:20</p> <p>Vallecitos [1] - 913:21</p> <p>Valley [1] - 1001:8</p> <p>valuable [2] - 899:1, 935:22</p> <p>value [1] - 1009:8</p> <p>Variance [1] - 774:19</p> <p>variance [36] - 784:11, 794:23, 796:7, 805:3, 805:5, 805:14, 805:21, 805:25, 806:10, 807:5, 807:6, 808:6, 834:24, 836:9, 839:23, 839:25, 844:23, 853:6, 853:19, 853:20, 853:21, 853:23, 874:24, 893:25, 894:10, 894:12,</p>	<p>921:13, 921:15, 921:20, 921:21, 922:15, 951:24, 952:4, 955:23, 956:10, 985:17</p> <p>variances [31] - 794:20, 794:21, 796:7, 798:3, 801:6, 804:23, 805:9, 807:19, 807:22, 839:14, 839:21, 845:16, 851:19, 852:2, 852:5, 853:2, 853:4, 853:13, 853:16, 853:18, 854:2, 891:12, 892:2, 892:5, 893:14, 893:19, 894:8, 921:18, 924:22, 925:7</p> <p>variety [1] - 961:19</p> <p>various [4] - 816:23, 857:7, 993:25, 1003:25</p> <p>veracity [1] - 824:4</p> <p>verbal [1] - 909:1</p> <p>verbally [1] - 908:23</p> <p>VERHEUL [19] - 763:15, 779:6, 814:6, 897:24, 901:19, 901:23, 902:21, 903:7, 903:10, 903:18, 915:2, 915:10, 915:12, 915:18, 915:20, 916:1, 955:4, 988:14, 1007:21</p> <p>Verheul [2] - 766:15, 779:5</p> <p>version [1] - 779:18</p> <p>versus [1] - 922:23</p> <p>vicinity [2] - 810:23, 820:6</p> <p>view [2] - 809:11, 966:22</p> <p>viewed [1] - 926:11</p> <p>views [1] - 788:14</p> <p>VIGIL [1] - 763:6</p> <p>Village [3] - 936:16, 937:7, 938:8</p> <p>violated [2] - 838:18, 947:1</p> <p>violation [1] - 847:9</p> <p>violations [2] - 787:14, 838:23</p> <p>Virginia [3] - 910:7, 911:9, 911:10</p> <p>vision [1] - 899:17</p> <p>visit [1] - 1004:3</p> <p>voice [2] - 870:7, 870:23</p>
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KATHY TOWNSEND COURT REPORTERS

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<p>voices ^[1] - 811:2 volume ^[1] - 782:23 Volume ^[1] - 762:23 vs ^[1] - 769:22</p> <p style="text-align: center;">W</p> <p>waive ^[1] - 952:7 walk ^[2] - 788:12, 928:12 wandering ^[1] - 858:7 wants ^[1] - 883:18 waste ^[2] - 953:17, 954:17 wastewater ^[8] - 953:14, 953:22, 1003:3, 1003:5, 1003:7, 1004:21, 1005:15, 1006:22 WATER ^[1] - 762:2 water ^[199] - 769:6, 784:11, 784:15, 784:21, 784:24, 785:13, 785:16, 785:20, 786:20, 786:25, 787:4, 787:14, 788:16, 789:2, 792:25, 793:8, 794:25, 796:15, 796:20, 799:17, 800:14, 802:1, 802:10, 802:11, 804:16, 804:23, 805:5, 805:13, 805:14, 805:20, 805:23, 805:24, 806:6, 807:4, 807:20, 807:25, 810:23, 820:6, 834:5, 834:23, 835:13, 836:1, 836:8, 837:25, 838:12, 839:16, 839:20, 839:21, 839:22, 839:23, 839:24, 840:6, 840:15, 842:21, 843:5, 843:6, 843:14, 843:15, 845:17, 848:4, 853:5, 853:21, 857:22, 872:24, 874:24, 874:25, 875:6, 875:15, 876:10, 876:13, 880:21, 882:3, 882:6, 882:15, 883:8, 891:11, 891:14, 891:21, 892:1, 892:5, 892:24, 893:14, 893:18, 893:20, 893:24,</p>	<p>894:1, 894:2, 894:8, 894:9, 894:10, 894:11, 894:12, 894:16, 894:23, 894:25, 896:15, 896:17, 896:20, 900:20, 900:21, 905:13, 905:23, 906:13, 906:14, 907:19, 912:6, 913:3, 913:8, 913:9, 914:4, 914:7, 914:12, 914:14, 914:16, 916:13, 916:21, 918:9, 919:1, 919:2, 920:13, 920:20, 920:23, 921:24, 922:4, 922:7, 922:9, 922:13, 922:18, 923:10, 923:12, 925:21, 926:16, 926:19, 927:17, 927:21, 930:6, 931:8, 931:19, 931:22, 933:20, 934:2, 938:4, 940:2, 942:25, 943:23, 944:25, 945:9, 945:13, 945:15, 945:24, 948:12, 949:2, 949:25, 950:1, 950:6, 951:1, 951:7, 951:23, 952:4, 953:3, 954:5, 954:13, 956:16, 959:9, 959:10, 960:1, 962:7, 962:21, 963:14, 963:15, 964:7, 967:20, 974:6, 976:19, 976:24, 976:25, 977:6, 979:16, 980:13, 985:16, 990:19, 993:1, 993:5, 993:9, 993:13, 993:16, 994:8, 995:19, 996:9, 1000:16, 1001:2, 1002:14, 1002:25, 1004:2, 1005:15 Water ^[88] - 762:17, 763:2, 764:13, 767:6, 767:7, 769:8, 773:9, 773:13, 775:4, 775:6, 775:17, 776:6, 785:24, 790:17, 794:19, 798:12, 799:18, 802:23, 804:6, 804:15, 805:15, 806:15, 812:5, 812:9, 812:19, 848:3, 849:10, 853:7, 880:12, 889:14,</p>	<p>893:16, 896:11, 896:23, 916:14, 921:16, 921:17, 921:20, 921:21, 922:7, 922:8, 922:16, 922:20, 922:21, 923:2, 924:10, 926:22, 927:4, 927:5, 934:2, 934:10, 935:22, 940:13, 940:20, 940:21, 940:25, 941:5, 942:5, 943:9, 950:23, 951:5, 951:12, 952:1, 953:1, 955:16, 955:20, 955:23, 956:8, 956:9, 956:12, 956:14, 956:21, 956:25, 957:3, 957:10, 957:20, 957:23, 957:24, 958:6, 959:7, 959:9, 959:12, 961:4, 962:6, 965:20, 966:12, 967:10, 967:19 watering ^[5] - 996:3, 996:11, 996:17, 996:22, 997:14 WATERS ^[8] - 762:7, 763:6, 782:12, 782:16, 783:1, 869:19, 869:23, 1007:10 Waters ^[18] - 770:19, 770:22, 770:23, 771:4, 771:6, 771:10, 771:13, 771:16, 771:20, 771:23, 772:6, 773:18, 773:23, 774:7, 866:7, 869:4, 869:12, 1005:4 waters ^[86] - 787:3, 787:10, 787:13, 787:20, 788:24, 811:10, 811:21, 812:1, 812:20, 812:24, 813:10, 813:13, 865:1, 865:13, 865:15, 866:8, 875:14, 875:17, 875:20, 875:21, 875:23, 891:16, 891:17, 893:18, 894:4, 894:20, 900:22, 900:24, 901:2, 901:3, 901:4, 901:6, 901:10, 905:8, 905:11, 905:16, 907:21, 908:7, 909:14, 909:15, 910:11,</p>	<p>911:11, 913:5, 913:10, 913:14, 931:17, 941:12, 943:2, 943:4, 946:4, 949:14, 949:19, 950:1, 958:4, 958:10, 958:15, 958:16, 958:19, 958:23, 958:24, 958:25, 959:1, 959:13, 959:18, 959:19, 959:20, 960:9, 960:13, 960:19, 960:22, 960:25, 961:4, 983:22, 984:18, 988:18, 990:18, 991:3, 991:11, 992:13, 992:17, 994:6, 994:22, 997:4, 1001:5, 1004:4 watershed ^[4] - 836:1, 892:21, 892:22, 935:10 wave ^[2] - 860:13, 861:3 ways ^[1] - 981:12 weak ^[1] - 911:11 weaken ^[1] - 918:4 weaker ^[2] - 785:14, 785:16 weakest ^[1] - 908:24 weather ^[1] - 891:19 web ^[1] - 910:3 Web ^[1] - 768:9 Wednesday ^[1] - 815:12 Wednesday's ^[1] - 826:16 week ^[6] - 828:17, 862:21, 928:9, 936:23, 1009:17, 1010:3 weight ^[1] - 824:5 welcome ^[4] - 854:18, 855:3, 868:16, 1007:11 welfare ^[1] - 985:1 welled ^[1] - 1004:2 West ^[4] - 910:7, 911:9, 911:10, 913:24 Western ^[2] - 764:9, 777:7 wetlands ^[1] - 835:1 whereas ^[3] - 861:12, 918:12, 948:22 whole ^[6] - 847:4, 864:21, 966:5, 995:9, 995:10, 999:24</p>	<p>wildfire ^[1] - 892:21 Wildlife ^[1] - 861:24 willing ^[2] - 868:20, 868:21 willingness ^[2] - 781:10, 997:20 wish ^[1] - 834:23 withdrawn ^[3] - 781:6, 781:14, 956:13 witness ^[14] - 792:24, 814:7, 815:22, 817:10, 825:4, 830:15, 833:17, 854:24, 888:1, 897:11, 900:10, 902:25, 904:17, 961:12 witnesses ^[14] - 855:24, 901:25, 902:2, 902:20, 902:22, 916:6, 932:10, 955:8, 961:12, 972:6, 1007:18, 1007:23, 1011:8, 1011:12 woman ^[3] - 856:9, 856:10 wonder ^[1] - 857:12 wondering ^[3] - 855:19, 858:11, 859:1 wording ^[4] - 803:16, 831:20, 831:23 words ^[3] - 873:3, 973:2, 996:13 works ^[2] - 884:15, 914:14 world ^[1] - 906:15 worried ^[1] - 834:6 worrisome ^[1] - 907:18 worse ^[1] - 918:5 WOTUS ^[3] - 984:17, 987:17, 987:21 WQCC ^[5] - 762:3, 768:10, 773:14, 775:10, 777:2 WQS ^[1] - 769:4 wrap ^[1] - 898:11 wrapping ^[1] - 952:22 write ^[2] - 980:12, 996:25 writing ^[3] - 856:23, 868:18, 868:19 Written ^[2] - 771:21, 772:10 written ^[29] - 778:3, 781:7, 781:15, 787:22, 788:1, 791:13, 791:18,</p>
--	---	--	--	---

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798:14, 803:2,
803:19, 806:17,
810:3, 810:4, 810:5,
810:7, 811:17, 819:2,
859:23, 904:11,
907:24, 908:23,
909:1, 914:23,
939:13, 954:4, 957:5,
957:11, 970:19,
1008:13
wrote ^[3] - 856:23,
905:3, 976:15

Y

year ^[13] - 789:16,
796:4, 796:25, 797:1,
859:17, 884:13,
884:16, 885:18,
930:11, 962:8,
962:12, 993:2, 1000:6
years ^[42] - 783:23,
795:20, 796:21,
836:6, 836:10,
836:25, 837:19,
844:19, 845:1, 845:7,
851:8, 859:22,
859:24, 876:5,
876:23, 877:8,
884:11, 884:14,
884:17, 884:22,
884:25, 885:1,
885:13, 885:17,
885:21, 914:15,
914:17, 919:7,
919:18, 923:22,
924:2, 924:22, 925:1,
925:3, 962:11,
962:12, 962:15,
963:1, 979:14,
1000:25
yellow ^[1] - 828:14
yesterday ^[17] -
777:10, 777:21,
778:20, 804:3,
807:12, 809:14,
811:12, 826:16,
855:7, 860:5, 860:10,
888:14, 908:20,
909:18, 911:18,
914:22, 914:23
yourself ^[1] - 939:15
youth ^[5] - 856:16,
856:18, 856:21,
856:24

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