

Date: September 28, 2006

Case: Before the Environmental Appeals Board In Re General
Motors Automotive North America

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Page 2

1 Transcript of proceedings on Thursday, September
2 28, 2006, in Washington, DC, before the
3 Environmental Appeals Board, United States
4 Environmental Protection Agency, East Building, 1201
5 Constitution Avenue, N.W., Room 1152, at 10:36 a.m.,
6 before Victoria L. Wilson, a Notary Public within
7 and for the District of Columbia, when were present
8 on behalf of the respective parties:
9
10 HEARING PANEL:
11 JUDGE KATHIE A. STEIN
12 JUDGE SCOTT C. FULTON
13 JUDGE EDWARD E. REICH
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21
22 -- continued --

Page 3

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Page 4

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Page 5

1 PROCEEDINGS
2 THE CLERK: Environmental Appeals Board of
3 the United States Environmental Protection Agency is
4 now in session for oral argument in re General
5 Motors Automotive - North America, Docket Number
6 RCRA-05-2004-0001, Appeal Number RCRA (3008) 06-02.
7 The Article Judges are Scott C. Fulton, Kathie A.
8 Stein, Edward E. Reich presiding.
9 Please be seated.
10 JUDGE STEIN: Good morning, Counsel.
11 We are hearing argument this morning in
12 the matter of General Motors Automotive pursuant to
13 the Board's order of July 25th, 2006.
14 As outlined in that order, each side will
15 have 30 minutes for argument and GM, as the
16 appellant, shall proceed first and may reserve 5
17 minutes of the balance of its time for rebuttal.
18 Region V will proceed second.
19 As the parties are aware, GM has requested
20 that some of the material in the record of this case
21 be designated as confidential business information.
22 For purposes of the oral argument, it is my

Page 6

1 understanding that the parties do not intend to
2 refer to confidential business information.
3 However, in the event that a question posed by the
4 Board should call for or you would find it helpful
5 to refer to confidential business information,
6 please so advise the Board before answering and we
7 will then ask you to defer the answer to that
8 question until the end of the hearing; we will close
9 the hearing, clear the courtroom, disconnect any
10 parties connected remotely, in order that we may
11 preserve the confidentiality of anything that's
12 alleged to be claimed to be confidential business
13 information.
14 As I'm sure the parties know, this is an
15 important and technically complex case and we look
16 forward to hearing your perspectives, and while I'm
17 sure that we will benefit from your prepared
18 remarks, as I'm sure you know, the primary value of
19 oral argument to the Board is in bringing full
20 further clarity to our understanding of the
21 arguments presented. So we trust that you will be
22 responsive to our questions the best you can,

Page 7

1 although you should assume the Board is generally
2 familiar with the briefs.
3 Let us begin by asking counsel for GM to
4 identify themselves for the record, followed by
5 counsel for Region V.
6 MR. KYLE: Thank you, your Honor. My name
7 is John Kyle with Barnes & Thornburg representing
8 General Motors. I will be presenting the oral
9 argument. With me here at counsel table is my
10 associate, Mike Scanlon, from Barnes & Thornburg,
11 and Michelle Fisher from General Motors Corporation.
12 Thank you.
13 JUDGE STEIN: Thank you.
14 MS. PEACEMAN: Thank you, your Honor. I
15 am Karen Peaceman, Associate Regional Counsel in
16 Region V. I will be presenting EPA's argument this
17 morning. With me at counsel table is Chris
18 McCulloch, Branch Chief in OECA, and Pete Raack,
19 also in OECA.
20 JUDGE STEIN: Before you begin, does GM
21 intend to reserve time for rebuttal?
22 MR. KYLE: Yes, your Honor. We had, in

Page 8

1 prior calls, asked if we could reserve 7 minutes
2 instead of 5 minutes. We would like to reserve 7
3 minutes, if we may.
4 JUDGE STEIN: That would be fine.
5 MR. KYLE: Thank you.
6 JUDGE STEIN: Why don't you proceed.
7 MR. KYLE: The parties agree that the
8 issue in this case, the main issue in this case for
9 you to decide, is whether GM's contaminated purge
10 solvent or purge mixture is a spent material under
11 EPA's rule. Under EPA, it's identical to Ohio and
12 Michigan's, in this case, so we can refer to them
13 all as the same.
14 I understand that we are here to have a
15 conversation and I look forward to your questions.
16 I would like to try to at least make three
17 preliminary points to try to lay a foundation and
18 maybe clarify something that has come up.
19 First, I want to make a preliminary point
20 about the findings of fact from Judge Gunning.
21 Second, I want to talk for a moment about the word
22 "purpose" in the definition of "spent material."

Page 9

1 And, third, I want to try to eliminate some
2 ambiguity or confusion in the relationship between
3 our regulatory arguments and our statutory
4 arguments.
5 The first topic I want to discuss is Judge
6 Gunning's findings of fact. And I thought if I laid
7 that up there, that it would appear. There is a
8 dollar bill. That's not my findings of fact.
9 (Laughter.)
10 This case is not about money, your Honor,
11 it is about the principle.
12 I am at a loss. I don't know what --
13 JUDGE STEIN: I think technical assistance
14 is on its way.
15 JUDGE FULTON: I was going to say, what
16 exactly is your point, Mr. Kyle?
17 (Laughter)
18 MR. KYLE: Can we start again?
19 These are excerpts from Judge Gunning's
20 decision in the findings of fact portion, and we
21 believe these are the dispositive facts in this
22 case.

Page 10

1 Number 1, purge solvent is expressly
2 formulated to perform solvent functions in the
3 manifolds and the associated applicators, as well as
4 downstream of the applicators. It is expressly
5 formulated to perform intended solvent functions
6 both upstream and downstream.
7 JUDGE REICH: Can I ask you a question
8 about that?
9 MR. KYLE: Sure.
10 JUDGE REICH: I realize you want to get
11 your main points across but it is directly on point
12 of fact.
13 If I understand Judge Gunning's decision
14 and the briefs, it seems like in one of the three
15 facilities that are involved before us, there is, at
16 least arguably, some material added with the express
17 purpose of facilitating the movement of the purge
18 mixture through the system and into the tanks, but
19 for two of the facilities, it does not appear that
20 the purge solvent is formulated any differently than
21 it would be if it were just performing the function
22 of cleaning the manifolds and the associated

Page 11

1 equipment. And if that is correct, is there any
2 legal significance to whether or not the purge
3 solvent is formulated in a different manner than it
4 would be formulated if its sole function was to
5 clean the manifolds and the associated equipment?
6 MR. KYLE: Yes, factually, your question
7 is right. It is a paint called 2-K isocyanate. It
8 is used at the Orion facility. Alcohol is added to
9 the purge mixture at that site to end cap, to
10 prevent the two components, the 2-K components, from
11 combining to form a nice hard finish on top of the
12 automobile. The other technology at the other two
13 facilities is xylene technology, which is a
14 different chemistry reaction but still forms that
15 same hard material. The purge solvent is not
16 formulated differently at the other two facilities
17 because the composition of the purge solvent at the
18 other two facilities is sufficient to perform the
19 purpose of ensuring that these lines and this
20 equipment downstream do not clog and that the
21 equipment continues to use -- to be used as
22 designed. We do not believe there is any legal

Page 12

1 significance to this particular wrinkle of this case
2 because the -- you know, Judge Gunning spend two
3 weeks listening to all this testimony and sorting
4 through the credibility of witnesses and her
5 conclusion was that the purge solvent, generally,
6 not just the purge solvent at one facility or the
7 others, but the purge solvent for all three
8 facilities is specifically, her words, expressly
9 formulated to perform these solvent functions, to
10 perform this solvent purpose.
11 The purpose of the solvent, the purge
12 solvent, is to dissolve, solubilize, mobilize,
13 dilute paint solids and to clean equipment that
14 comes in contact with paint solids, whether it is
15 upstream or downstream of the applicators. That is
16 its sole singular purpose. It differentiates us
17 from the Howmet case where we had a lot of
18 discussion about single purpose and multiple uses.
19 Here we have -- it's expressly formulated material.
20 It is expressly formulated to perform functions
21 downstream. There is -- the record in this case
22 is -- that evidence is not contradictory. There is

Page 13

1 no evidence in this record to contradict this first
2 finding of fact that it is expressly formulated to
3 perform these solvent functions downstream.
4 JUDGE REICH: Just so that I understand
5 the implication of that, does that essentially mean
6 that, in your view, from a legal standpoint, debates
7 about when the end capping occurs is, essentially,
8 irrelevant?
9 MR. KYLE: It is. It is interesting but
10 it is irrelevant.
11 The purpose of both sides -- both types of
12 technology is to make sure that that paint doesn't
13 harden downstream and you accomplish that purpose
14 with the existing formulation at those facilities of
15 the purge solvent.
16 JUDGE REICH: Thank you.
17 MR. KYLE: The second finding that I want
18 to draw attention to is that the purge mixture,
19 because it contains paint solids, leaves a residue
20 on the pipes and equipment downstream. This system
21 was developed downstream of the applicators for --
22 for -- back in the late seventies, the automotive

Page 14

1 companies said we have to quit discarding this purge
2 mixture. It has value. It can be kept. It can be
3 reclaimed and beneficially reused. And so they
4 turned to their engineers and they said design me a
5 system that will allow me to capture and save and
6 reuse this material. So the engineers went off and
7 at this point in time automation has come about and
8 we have these fast-paced lines. We are painting
9 hundreds of vehicles a day. We have got this purge
10 solvent that has to occur in 7 to 10 seconds so that
11 it doesn't slow down the production.

12 So these smart engineers came up with this
13 system and this system consists of a series of -- of
14 pieces of equipment downstream of the applicator
15 that works in an integrated fashion with the
16 painting operation. It is all one continuous
17 uninterrupted process. And these pieces of -- the
18 engineers said there is a lot of solvency left in
19 this purge mixture. I'm going to expressly design a
20 system that uses that continued solvency to make
21 this system work.

22 And -- and so this system downstream of

Page 15

1 the applicators has all kinds of pieces of
2 equipment. It has valves and flanges and purge pots
3 and applicators and pipes. This purge mixture will
4 leave a residue on that equipment and -- and if that
5 residue is allowed to build up, bad things will
6 happen. That's what Dr. Kendall, EPA's witness,
7 said, as well as our witnesses, and it is
8 un rebuttable.

9 JUDGE REICH: Prior to this system, how
10 did you dispose of the purge mixture?

11 MR. KYLE: The purge mixture was simply
12 discarded directly into the water booths at most of
13 these facilities, just it was thrown away.

14 I'm sorry.

15 JUDGE STEIN: Why don't you finish your
16 answer to Judge Reich.

17 MR. KYLE: I think I had.

18 Did I answer your question, sir?

19 JUDGE REICH: I think you did, yes.

20 JUDGE STEIN: If instead of the
21 configuration of downstream pipes that you currently
22 have, the storage tank was located immediately

Page 16

1 adjacent or outside of the upstream painting
2 operation, so that once the cleaning of the paint
3 manifolds was complete, the material went directly
4 to the storage tank, would GM still maintain that
5 the purge solvent was in use? And, if so, why?

6 MR. KYLE: That is a great question.

7 When they developed this system between
8 the paint applicators in the paint booths and the
9 storage tank -- this relates to what I call the
10 geography issue. When you are thinking about this
11 case, you have to think about it in the geographic
12 locations of the life cycle of purge solvent, if you
13 will. While the purge solvent is at our facility,
14 it is our belief and our view that that purge
15 solvent continues to perform this function.

16 Now, once it is taken off site -- and I am
17 going to get to your answer, I promise -- your
18 question.

19 Once this material is sent off site, we
20 are not contending that that material is -- is no
21 longer spent. At that point, the purge solvent has
22 performed the purpose for which GM had it

Page 17

1 formulated. So, now, once it's sent off site, we do
2 not claim here that that is not a spent material.

3 So while it is at our site, from the paint
4 applicators to the purge mixture storage tank, that
5 stretch of -- of equipment has to be continuously
6 cleaned. It is never completely cleaned but it is
7 clean enough to make sure that the equipment can
8 still flow and be used.

9 Now, once it is in the storage tank at
10 these facilities, we don't have this continuous
11 movement and all of this equipment. Once it's in
12 the storage tanks at these facilities, we still
13 believe it is not spent. We still believe that
14 the -- and the testimony is that the purpose of the
15 purge solvent is to allow this paint to be not set
16 up in this tank but allow it -- there is an agitator
17 in the bottom of it and the solvent and the paint
18 solids that are in there, the solvent keeps those in
19 suspension so that it can be removed; otherwise, it
20 would seize up in that tank.

21 So our view is that -- to answer your
22 question -- if the -- if the tank were right there,

Page 18

1 it is still performing that function, that -- its
2 intended function of ensuring that the -- that it is
3 still solubilizing, dissolving, suspending, and it
4 is actively doing these things per our engineering
5 design.
6 Now, I will admit to you that different
7 people have drawn the line at different places. The
8 State of Michigan has said that once it enters the
9 purge mixture storage tank, that's the point of
10 generation. I will admit to you that historically
11 General Motors Corporation managed that material in
12 the -- in that last tank as a RCRA hazardous waste
13 and, in fact, it is still doing that today but in
14 that -- the -- if you look at it geographically,
15 from the paint applicators to the purge mixture
16 storage tank, it is continuously actively performing
17 these functions. We believe that it continually
18 actively performs those same functions in the tank
19 and they are necessary because if they weren't being
20 performed, this system would not work as designed.
21 JUDGE REICH: In your briefs and even in
22 the argument so far this morning, you talk about the

Page 19

1 cleaning function that the purge mixture is
2 performing as it goes through this system but it
3 sounds, if I'm understanding you correctly, like you
4 would be arguing that because it solubilizes the
5 purge mixture, it would still not be spent whether
6 it was performing a cleaning function or not. Is
7 that a correct interpretation?
8 MR. KYLE: It is still performing the
9 solvent function of solubilizing, et cetera, in the
10 purge mixture storage tank to prevent these same
11 solids from falling out of solution and clogging.
12 So to that extent, it is keeping the purge mixture
13 storage tank clean enough so that it can be removed.
14 In that stretch of equipment between the applicators
15 and the purge mixture storage tank, it is a slightly
16 different active function and all of this is part of
17 the design. It was designed to have these uses,
18 this use.
19 JUDGE REICH: But that other slightly
20 different cleaning function doesn't seem to be a
21 prerequisite to your viewing this as continued to be
22 in use.

Page 20

1 MR. KYLE: We think it is the combination
2 of all of these solubilizing, mobilizing, diluting,
3 which is part of cleaning. That is going on in this
4 entire stretch that we are talking about, from the
5 paint applicators through the purge mixture storage
6 tank. Those functions are actively being performed
7 to make this engineering design work. If those
8 functions are not actively performed, this designed
9 system will not work. It will clog and it will
10 cause either an interruption or a slowdown or, worse
11 yet, a stoppage of the painting. It is all part of
12 the continuous process.
13 Go ahead.
14 JUDGE STEIN: Since the material is
15 ultimately being reclaimed and there are taken to no
16 dispute, the reclamation itself is subject to RCRA
17 regulation; am I correct on that?
18 MR. KYLE: That gets to the statutory
19 argument, which I'm happy to answer, but it sounds
20 like you have something else you want to go to right
21 now.
22 JUDGE STEIN: I guess what I am struggling

Page 21

1 with is why, once it's in the storage tank, isn't it
2 simply storage prior to reclamation, which seems
3 more akin to sort of a processing antecedent to
4 reclamation and necessarily a production process?
5 And I may be mentioning your regulatory and
6 statutory reference in my question but what I am
7 really trying to get at is once it is in the storage
8 tank, why isn't it just being stored for a
9 regulated, essentially waste management, activity
10 which includes reclamation of recycled materials?
11 MR. KYLE: While it is in the storage
12 tank, the man -- the design of the system and the
13 manufacturer of the purge solvent combine to say I
14 need this purge solvent to perform this function in
15 that tank. I also need it to perform this function
16 from the time it exits the applicator until the time
17 it goes into the tank. We -- we are not going to
18 argue with you that the use is -- takes on a
19 different cast, if you will, in this continuous
20 movement of material between the applicators and the
21 tank. Our -- this material between the applicators
22 and the tank has to continue to -- it is performing

Page 22

1 its function. It is being used and that process is
2 a continuous industrial process -- and I really am
3 getting -- this is the last piece -- and -- and
4 under the holdings from the D.C. Circuit, we know
5 that if a material is used in a continuous
6 industrial process, we know that that's not part of
7 the waste disposal problem.

8 Now, in our view, once it gets into the
9 tank, that's where the material can stop moving and
10 not adversely affect the painting. That's the
11 end -- in our view, the manufacturing process ends
12 at the point that it goes into the purge mixture
13 storage tank. So we can understand and appreciate
14 the distinction between the use of the solvent
15 between the applicators and the time it goes into
16 the tank and the use of the solvent in the tank.

17 JUDGE STEIN: Do the regulations speak to
18 the question of what a use is? It strikes me that,
19 as you read the transcript, people seem to be using
20 "use" in its ordinary common lay person's use of
21 the -- no pun intended -- use of the word "use," but
22 as I look at the regulations, there does appear to

Page 23

1 be a definition of "used" or "reused" and I don't
2 believe that either party has spoken to it or, if
3 they have spoken to that question, I'm not familiar
4 with where they have, and I'm referring to 261.1, I
5 believe it is C(5), which defines -- which says the
6 material is used or reused, and then it has two
7 small subpoints, and I don't know if you are
8 familiar with the continuing provision.

9 MR. KYLE: Yes.

10 JUDGE STEIN: If you could speak to that
11 issue.

12 MR. KYLE: Yes. The terms "used" or
13 "reused" that are in Section 5 are really then
14 picked up in Section 261.2(E)(ii). 261.2(E)(ii),
15 that's where that phrase "used or reused" comes.
16 And we believe that the definition that you have
17 focused on, "used or reused," is the defining of
18 that -- those three words as used in that section.

19 Section E is not the section that we are
20 here trying to interpret today. Now, obviously, it
21 talks about the word "used or reused," but there
22 they are talking about it being used or reused as an

Page 24

1 effective substitute for a commercial product.
2 Here, we don't have the same phrase "used or reused"
3 in the definition of "spent material." All we have
4 is the common everyday use of that word.

5 And the -- the history of that rule, in
6 our view, made it pretty clear. What they said --
7 when they deleted the word "original" -- they
8 originally said this has to be used for its original
9 purpose and as a result of processing can no longer
10 serve the purpose for which it was intended, the
11 original purpose. They took the word "original"
12 out. And in the Preamble, I think they made it very
13 clear that what they wanted to allow -- and your
14 questions in Howmet went to this -- what they really
15 wanted to allow was if you can use a material for --
16 for -- in on setting and then you can use that
17 material again without reclaiming it, legitimately
18 using that material for a second purpose, that's not
19 a waste; that is a product continuing to perform its
20 function, its purpose, its use.

21 And I think we kind of fall in on each
22 other when we try to figure out, well, is the word

Page 25

1 "use" or "produce" or "function"? How do these
2 terms all interreact? We believe the plain language
3 of this definition -- which, since we are talking
4 about that, I will go ahead and put it up -- we
5 think that the word "use" in this is really very --
6 just very common use. And the Preamble said that if
7 you -- that it is not a waste, it is just the
8 continued use of a solvent if you can use it in the
9 circuit board and then you can use it to degrease.

10 So the whole notion here about this second use is,
11 we believe, in the common everyday parlance.

12 There is one related point that we want to
13 make. In the Howmet case, there was a lot of debate
14 about singular purpose and multiple uses, and we
15 provided you authority in our brief that says the
16 canon of statutory construction of the singular
17 equals the plural and the plural equals the
18 singular. We did not find in time to put in that
19 brief, but this is EPA's RCRA rule, this is 260.3.
20 As used -- as used in Parts 260 through 265, which,
21 of course, includes what we are talking about, words
22 in the singular include the plural and words in the

Page 26

1 plural include the singular. This is also a canon
2 of statutory construction that 1 USC 1, so it must
3 have been the first and most important thing that
4 they decided to put in our U.S. Code. Properly
5 viewed, with this -- I mean this is dispositive.
6 This is how these rules are supposed to be read in
7 our view. Properly viewed, then, that word really
8 means once it has -- it is a material that can no
9 longer serve the purposes for which it was produced.
10 So a material can be used for a lot of
11 different uses. It can be produced for a lot of
12 different purposes. Our case involves -- is much
13 simpler than Howmet. Our case involves one purpose.
14 Judge Gunning properly found it is expressly
15 formulated to be -- to be used upstream and
16 downstream of the applicator. That is our singular
17 purpose. And it -- and she went on to find with the
18 rest of these -- these facts that it, in fact, is
19 used in that fashion, because of the residue that
20 builds up, and what she found in number 3 here, the
21 solvent in the purge mixture still possesses some
22 cleaning capacity and performs cleaning functions

Page 27

1 downstream of the applicator. And these cleaning
2 functions are not something that is trivial. These
3 cleaning functions are essential to this design
4 system working like it works. It is essential to be
5 able to paint hundreds of cars a day.
6 And so when you look back at the
7 definition, what we have here is we have a material
8 that has been produced to perform functions up and
9 downstream; it has been used and, as a result of
10 that initial use in the applicators, it's
11 contaminated with paint. As a result of that
12 contamination, the question then becomes can it
13 nonetheless perform the purpose for which it was
14 produced. Judge Gunning found it can and does
15 continue to perform the purpose for which it was
16 produced downstream.
17 Now, you might ask -- these findings of
18 fact are the dispositive findings in this case.
19 These are the four facts upon which this case needs
20 and should be decided. We could not have written
21 these findings any better. And where -- so where
22 did we go wrong? How did we lose? Well, the reason

Page 28

1 was that Judge Gunning said these downstream
2 purposes are secondary. She adopted the predominant
3 purpose test. And I can see that I'm out of time.
4 JUDGE STEIN: Continue.
5 MR. KYLE: The predominant purpose test
6 has no room in this rule. With all due respect to
7 Judge Gunning, that is clear legal error. This rule
8 is plain and unambiguous on its face. It is -- as
9 applied to these facts, in particular. And both --
10 there is one thing EPA and we agree on is that the
11 predominant purpose test has no place here.
12 The rule is plain and unambiguous. The
13 judge's job is to apply that rule, the plain meaning
14 of that rule, to our facts; and when you do that,
15 the purge solvent is not spent while it is at our
16 facility. And the predominant purpose test results
17 in rewriting the rule. The predominant purpose test
18 says can no longer serve the predominant purpose for
19 which it was produced. That's not what this rule
20 says. That's not what the Preamble is all about.
21 That's inconsistent with the intent behind this
22 entire rule.

Page 29

1 The -- the idea behind the rule is to
2 allow continued uses. And it doesn't work. EPA and
3 the judge said, well, you could take this purge
4 mixture out of your pipes and you could go clean
5 other equipment. Well, how is that cleaning of the
6 other equipment -- they said that's okay. How is
7 the cleaning of that other equipment clearly not
8 secondary to the primary predominant purpose of
9 cleaning the applicators? They said that the
10 Safety-Kleen case is fine, with that use where
11 Safety-Kleen takes it and cleans drums at its
12 facility. How is that second use clearly not
13 secondary to the predominant use by the Safety-Kleen
14 customer? So this predominant purpose test has
15 no -- no room -- there is no basis for it in the
16 words of the rule; the rule needs to be applied as
17 written and it has -- it is inconsistent with the
18 legislative history; it creates results that don't
19 fit and, as EPA said, and I think it was footnote 30
20 of their brief, the API-2 court really didn't adopt
21 a predominant purpose test. So I'm -- I think
22 I'm -- go ahead. Sorry.

Page 30

1 JUDGE FULTON: I want to make sure you get
2 your 7 minutes of rebuttal.
3 MR. KYLE: And, your Honor, I'm happy to
4 stand here and talk about this all day long. I love
5 this. It is your time so you tell me when to sit
6 down and I will sit down.
7 JUDGE FULTON: It is a very interesting
8 case. I think I would like to hear a little bit
9 about your -- I think I'm interested in your
10 statutory argument and whether you think there is a
11 line to be drawn here.
12 MR. KYLE: Thank you.
13 JUDGE FULTON: In GM's view, in view of
14 the fact that this material is reclaimed and
15 ultimately reused in your process, is there a line?
16 Does it ever become a waste?
17 MR. KYLE: Yes. And thank you go for
18 letting me address that.
19 EPA's rules -- EPA's jurisdiction is,
20 obviously, defined by the statute. It only has the
21 powers that Congress has granted and we all know
22 that.

Page 31

1 We believe fundamentally that EPA rules
2 must be interpreted consistently with the meaning of
3 that statute. The D.C. Circuit has had several
4 occasions, and you have read all of these cases,
5 where it struggled with what does "discard" mean.
6 And what they have said is that if it -- in
7 particular, if you have a material that continues to
8 be used in a continuous industrial process -- which
9 is certainly what we have here, it is not part of
10 the waste disposal problem -- and if it is not -- I
11 mean this is not part of the waste disposal problem,
12 why this material is in our system attached to our
13 paint applicators, that's not -- that's not what
14 Congress is worried about. And so the line may be
15 drawn at the tank or the line may be drawn after the
16 tank, but while it is there, the statutory argument
17 is that material is -- is not discarded, it is not
18 thrown away, it is not abandoned, it is not disposed
19 of. So, while at our plant, the statutory argument
20 is you have to interpret spent material consistent
21 with those facts and those decisions.
22 Now, when the material goes off site, it

Page 32

1 is still not abandoned, disposed of, or thrown away.
2 The evidence in this record is indisputed that none
3 of those common words occur with this. It is
4 carefully saved; it is carefully managed; it has
5 value. We get an economic credit for every gallon
6 of purge mixture that is reclaimed and turned into
7 reconstituted purge solvent. So, in our view, the
8 definition of spent material can't be used to -- to
9 call that material that is never thrown away,
10 disposed of, or abandoned, can't turn that into a
11 waste without violating the statute.
12 Now, EPA says that that is attacking the
13 rule and that we are time barred from doing that.
14 That is not the case here. This very rule was
15 already appealed back in the AMC-1 decision. This
16 1985 rule was appealed and the D.C. Circuit said it
17 is overly broad to the extent that it sweeps into
18 its net materials that are not, in fact, discarded
19 by being thrown away, abandoned, or disposed of.
20 And in the intervening 20 years since the '87
21 decision, EPA has never gone back and conformed this
22 rule to -- to meet the dictates of that decision.

Page 33

1 So we are not here newly challenging a rule out of
2 time, the rule was already challenged and found to
3 be wanting because it was overly broad.
4 So, in our view, where this -- so it is
5 not a spent material while it is at our plant. Once
6 it exits our plant, the spent material argument is
7 not one that we are making because it is -- it
8 served the purpose for which it was produced for GM.
9 Once it goes off site, the statutory argument kicks
10 in. Now, the statutory argument underlies the
11 regulatory argument but it is not the primary. You
12 can decide this case while it is at our plant on the
13 rule.
14 Once it goes off site, we believe that
15 this rule is overly broad and the -- and because it
16 is not, in fact, discarded within the meaning of the
17 D.C. Circuit, here's where we believe waste is
18 produced. This purge mixture continues to move --
19 it is driven -- excuse me -- I meant that by
20 'move' -- it is transported to the reclamation
21 facility. At the reclamation facility, you, in
22 essence, get two products. You get new solvent and

Page 34

1 you get still bottoms. Now, the new solvent, EPA,
2 Mr. Barrett Benson, acknowledged in his testimony,
3 their expert, that that new solvent is clearly a
4 product. EPA has no jurisdiction over that product.
5 That is clear. We believe that, properly construed,
6 the place at which a waste is first produced is when
7 the still bottoms are generated because that is the
8 first place where you really have the opportunity
9 for that to be discarded.
10 Now, those still bottoms -- some of those
11 still bottoms today, because American industry is
12 getting more and more ingenious and there are people
13 that have figured out ways to take those still
14 bottoms and sell them to a paint company and they
15 can make a lower grade of paint out of them because
16 they still have the resins in it and they still have
17 the pigments in it, they still have all the things
18 that you use to make paint. So those still bottoms,
19 if they are burned for energy recovery, that's
20 discarded, in our view. But if they happen to be
21 used to make paint, it is still -- it is never
22 discarded, it is never thrown away. So properly

Page 35

1 construed under the statute, the first time that a
2 real waste, a real discarded material is created is
3 at the reclamation facility.
4 Now, people will say, well, wait a minute.
5 You are going to allow all this material to get
6 driven all over the nation's highways and not be
7 able to regulate it under RCRA. Well, that's
8 exactly what's happening with Safety-Kleen's
9 material. It's being driven all over the nation's
10 highways, it is not a RCRA hazardous waste, and we
11 have no in evidence this record of any issues and
12 the guy from Safety-Kleen who is in charge of this
13 program testified. And it is -- and even if RCRA
14 doesn't apply to that transportation to the
15 reclamation facility, it is still heavily regulated
16 activity. It is a hazardous material under DOT
17 regulations and those are very stringent
18 regulations. If there is any spill of that material
19 in transport, there are still reporting requirements
20 and clean-up requirements.
21 So under the statute, you are not -- if
22 you read it the way we have suggested, you are not

Page 36

1 leaving this big unregulated loophole out there and
2 that's where we believe, properly construed, a waste
3 is first produced.
4 JUDGE FULTON: And even at the reclamation
5 facility, the activities prior to the actual act of
6 treatment, the reclaiming treatment, would also be
7 outside, out of EPA's regulatory obligation at a
8 storage facility?
9 MR. KYLE: Maybe.
10 JUDGE FULTON: Well, it would seem that
11 that's what the theory is.
12 MR. KYLE: I think that that is the proper
13 conclusion, yes. It doesn't mean it is not a
14 regulated activity, it means it wouldn't be
15 regulated under RCRA.
16 But we don't need to -- in our view, this
17 case is all about this material when it is at the GM
18 facilities. That's really what this case is about.
19 But the statutory analysis has been -- has been
20 provided both for that geographic segment at our
21 facility, as well as off site, and so, I think, in
22 completeness, GM has been complying with the

Page 37

1 hazardous waste rules at the purge mixture storage
2 tank throughout. There -- I think there is one very
3 small minor violation that was noted for lack of an
4 integrity assessment at one of the purge mixture
5 storage tanks. So if you agree with us that it is
6 not a solid waste, not spent material until the time
7 it enters the purge mixture storage tank, this case
8 is done because there is no violation, with this one
9 little exception, at the purge mixture storage tank.
10 And GM has been manifesting this off site, to these
11 off site facilities, in complete compliance with it.
12 So those are the facts in the record before you.
13 JUDGE FULTON: Then you --
14 JUDGE STEIN: Go ahead.
15 JUDGE FULTON: If that's the case, then at
16 the end of the day, if it is determined that the
17 agency's view here prevails, what would that mean on
18 the ground for GM? It sounds like you have got near
19 compliance with a lot of these things already. What
20 would change? What would happen?
21 MR. KYLE: What really changes is --
22 JUDGE FULTON: What's at issue?

Page 38

1 MR. KYLE: What is at issue is EPA
2 reaching up into our manufacturing facility, all the
3 way into the middle of our plant, all the way up
4 into the paint booth to regulate from the applicator
5 all the way downstream to the purge mixture storage
6 tank. And the rule that was at issue, that caused
7 this to really become the problem that it is, was a
8 rule called Subpart BB.
9 JUDGE FULTON: Right. Which is no
10 longer --
11 MR. KYLE: That is correct.
12 JUDGE FULTON: -- virtually increasing the
13 matter at issue, anyway.
14 MR. KYLE: That is correct. But there are
15 other --
16 JUDGE FULTON: Back to my question, what
17 are the on-the-ground implications of an adverse
18 decision to you-all? What would you have to do
19 differently?
20 MR. KYLE: Well, the -- you would require
21 daily inspections of all of the pipes leading from
22 the purge -- from the paint booths all the way to

Page 39

1 this purge mixture storage tank. You would have to
2 have certified secondary containment. You have to
3 keep records. You have to train your people to do
4 all of these different RCRA things. There is a
5 whole panoply of inspections and recordkeeping. And
6 the thing that is so surreal to us, your Honor, is
7 that if you go into these plants, this stretch of
8 pipe can go hundreds and hundreds and hundreds of
9 feet between the paint booths and the purge mixture
10 storage tank. This isn't just like from here over
11 to the edge of the room. This is, like, maybe a
12 half a mile at Orion, and these pipes are up in the
13 ceiling, and the really odd thing is that you have
14 got, like, all -- you can see it in the record,
15 there are these pictures of these pipes that are up
16 there and there may be, like, 30 different pipes all
17 built of the same material, all going in the same
18 direction, and one of them carries purge mixture,
19 and so now -- and it is maybe as high as the
20 ceiling. And so now we have to inspect that on a
21 daily basis and we have to keep records of that and,
22 you know, the other stuff that's in that -- those

Page 40

1 lines is paint, which -- and it has the same exact
2 kind of environmental issue in terms of what would
3 the risk be. And so we have to not only find that
4 line, we have to inspect it every day, we have to
5 write a record about it, we have to have training
6 programs about it, and we then get regulators that
7 come in and they walk from way out at our purge
8 mixture storage tank all the way back into our paint
9 room and say, well, are you doing this, are you
10 doing this here, are you worried about this, and is
11 it just an unnecessary regulatory burden upon
12 business. It serves no purpose.
13 And, remember, if there is any leak from
14 these, this -- this activity is already regulated.
15 This activity is regulated under the Clean Air Act.
16 If any emissions at any point of this occur, they
17 are all regulated under the Title 5 permit. Any
18 spill or release of liquid coming out of this is
19 subject to a whole panoply of regulatory
20 requirements to clean it up, I mean once it -- if it
21 spills on the floor, it is a waste, because it is
22 not performing an intended purpose. So it gets --

Page 41

1 it gets handled like a waste. It is cleaned up, it
2 is -- if it is a spill that requires reporting, it
3 is reported. So it is all of these recordkeeping
4 and daily inspection burdens that serve no purpose
5 to protect human health and the environment.
6 The United States of America is not going
7 to be any better off by having these people in these
8 factories walking this one line every single day.
9 It takes a person to do this, like, you have got to
10 have, like, one guy doing this for a big chunk of
11 every single day.
12 JUDGE FULTON: Are there implications in
13 terms of permitting? Would you need to get a RCRA
14 permit of any kind?
15 MR. KYLE: Well, if EPA's -- if EPA --
16 that is a very good question. Because in their
17 complaint in this matter, they said you are doing
18 this without a permit. We would now have to get a
19 RCRA TSD permit for all of -- for that one line
20 going from -- because they said, their complaint is,
21 that we have been engaged in this activity and it is
22 in the system for longer than 90 days, in some

September 28, 2006
Before the Environmental Appeals Board In Re General Motors Automotive North America

Page 42

1 cases, and, therefore, we are storing a RCRA
2 hazardous waste and we need a RCRA TSD permit. Now,
3 that would --
4 JUDGE STEIN: Storing it in pipes or
5 storing it in the tank?
6 MR. KYLE: They are saying in the pipes.
7 JUDGE STEIN: Because of the residue
8 that's there.
9 MR. KYLE: That is correct, and the
10 recirculation.
11 JUDGE FULTON: In other words, everything
12 downstream from the --
13 MR. KYLE: Point of generation. And that
14 would be just -- that is the logical end point of
15 this exercise is to require a RCRA permit for this
16 and that's -- you know, at the tank, a RCRA permit
17 isn't required because we get that out of there in
18 less than 90 days. We make darn sure that we get
19 that material out of there because we don't want to
20 have to deal with being a RCRA TSD facility. I
21 represent TSD facilities. That is one of the most
22 complicated cumbersome regulatory programs that

Page 43

1 exists in environmental law. And we now want to
2 have that -- to watch -- to regulate this one pipe
3 going out to the purge mixture storage tank. It
4 makes no sense.
5 JUDGE STEIN: I'm having difficulty
6 understanding why it is you need a TSD permit if, in
7 fact, this waste is -- this material is considered
8 by EPA to be waste because it is ignitable. How
9 would the residue that's on the pipes be hazardous
10 waste? If I recall my RCRA correctly, under the
11 mixture rule, it doesn't apply to characteristic
12 hazardous wastes. Am I missing something here?
13 MR. KYLE: Well, EPA's claim -- first of
14 all, I have difficulty following this complaint and
15 the implications of that but it is in the complaint
16 so we can all go read what they said. As I
17 understand the argument, in some of these facilities
18 with the recirculation loop, there can be molecules
19 of this purge mixture, the contaminated purge
20 solvent, staying in that loop. You can't tell which
21 molecule got in and what day it left. It is not
22 physically possible. So the argument is that it is

Page 44

1 because they are in that loop for that period of
2 time for greater than 90 days that you need a
3 permit.
4 Now, I -- I have never been one to try to
5 make the case for EPA on such matters and we would,
6 obviously, think that this would be a ridiculous
7 result and would try everything we can but this is
8 one of the implications of regulating this as a
9 hazardous waste from the paint booths downstream.
10 JUDGE FULTON: Just one more question. I
11 thought it was interesting in your brief when you
12 mentioned, at the beginning of your argument, as
13 well, this idea that up until the 1970s, this purge
14 mixture was essentially discarded, treated as a
15 waste, I guess, you would agree with that. And
16 there is the testimony of Mr. Wasniak, if I'm
17 pronouncing that correctly, I thought that was very
18 interesting, as well, where he worked back through
19 how this material, this purge mixture, had been
20 managed before the creation of this reclamation
21 capacity. And it is sort of harkening back to the
22 D.C. Circuit's suggestion that, at bottom, what we

Page 45

1 should be concerned about here is the waste disposal
2 problem. Should we not be informed and in some way
3 by the historical practice here? I mean the agency
4 has argued that -- that the system that we are
5 discussing, the system of pipes and conveyances, is
6 really a vehicle for managing heretofore discarded
7 material. Why should we not see this as just an
8 intricate system of hazardous waste management?
9 MR. KYLE: Very good. I'm going to start
10 at the back and work to the front of your question.
11 By the way, it is fun to read Mr. Wasniak's
12 testimony because this gentleman has been designing
13 these things since the sixties and so he has seen it
14 all and really he knows this field.
15 Part of the problem with the EPA argument,
16 oh, it is just a waste conveyance system, it is
17 nothing more than a waste conveyance system -- that
18 has a certain sound bite appeal to it but it doesn't
19 have anything to do with this rule. It is unmoored
20 from the text of this rule. This rule is the focus
21 here. EPA never really analyzes the rule, it never
22 focuses on the purge solvent, and it never completes

Page 46

1 the analysis of this rule. It breaks off that it is
2 a waste conveyance system or the purge mixture is
3 just seeing itself, things that are unmoored from
4 this rule, for what we have to do here is understand
5 that they created this system so that this material
6 did not have to be discarded, number one. Number
7 two, once they decided to do that, these people
8 created a system that is very sophisticated, it is
9 very intricate, it is integral to purging, 7 to 10
10 seconds, happening fast. It is all part of that
11 continuous process. And they said, okay, I am going
12 to -- I am going to utilize the functional solvency
13 in our purge mixture to make this engineered design
14 work.
15 And so you can't just say, oh, it is a
16 waste conveyance system. You have got to look at
17 the rule and analyze the pieces of rule and when you
18 do that with the facts, you go, it is not spent.
19 Now, one other point. I can't remember if
20 the -- I can get this. There is an EPA letter from
21 1981, it is one of our exhibits, I will make sure I
22 give it to you on -- when -- next time you have to

Page 47

1 listen to me -- and it talks about a material that
2 was expressly produced to be used in sewers and it
3 said that that material is not a waste because it is
4 being used for its intended purpose. So even in --
5 I mean the paint is a waste. There is no doubt
6 about that. But it is a combin -- so what we have
7 here is just like in the Safety-Kleen case. You
8 have got a solvent with gunk in it from cleaning the
9 parts. But if that gunk isn't so much that it -- it
10 saturates the solvent, that solvent can be used for
11 the next purpose. Same thing here. It is a
12 combination of a product performing its intended
13 function and a waste. The mixture rule does not
14 apply to such a thing. The mixture rule only
15 applies to a combination of a solid waste and a
16 listed waste. Here we have not even a listed waste,
17 just waste paint, plus a product performing the
18 solvent purpose. That is not a -- that combination
19 is not a waste, just like the combination of solvent
20 and gunk in Safety-Kleen or solvent and dirt in the
21 circuit boards. Yes, it has a waste in there but so
22 long as the product can continue to perform the

Page 48

1 purpose for which it was produced, it is not waste,
2 it is simply a product continuing to be used for its
3 intended purpose.
4 JUDGE STEIN: How do you respond to EPA's
5 argument that what's happening here is solvents just
6 doing what solvents do? I think they gave some
7 examples of Superfund sites when your solvent is on
8 ground and you still have some solubilizing going
9 on.
10 MR. KYLE: I'm glad you raised that. This
11 has -- this has no relevance to what we have here.
12 A drum of solvent waste at a Superfund site still
13 possesses solvency and there is still that retaining
14 of that solvent function. But that solvent was not
15 produced to perform that use or that purpose.
16 That's not the purpose of that solvent.
17 The purpose of our solvent -- and, again,
18 back to geography -- between our applicators and our
19 purge mixture storage tank, it is not merely
20 possessing -- and EPA entered into a stipulation
21 here that -- that is very important. They come
22 before you now and they say, oh, the solvent in the

Page 49

1 purge mixture just exists, it just retains solvent
2 properties, these passive verbs. That's not what's
3 going on here and it is not what Judge Gunning
4 found. Here's the stipulation. Here's what they
5 said in our stipulation, paragraph 37. They say the
6 solvent in the purge mixture -- obviously, our purge
7 solvent -- helps to perform the following functions.
8 This is their stipulation. Performs is an active
9 verb. And let's look at them. It solubilizes, so
10 that -- it solubilizes the paint solids into
11 solution, so we are talking about this residue. It
12 solubilizes the residue into solution so it can be
13 carried away. It mobilizes the -- the solids into
14 -- in suspension and it keeps the lines open for
15 flow to the purge mixture tanks. Keeps the lines
16 open for flow. These are active purpose -- active
17 uses. This is what they stipulated to.
18 They cannot come now here before you and
19 renege on this stipulation and say, oh, it just --
20 it just exists. It just possesses properties. They
21 stipulated that it performs a use and that use is
22 important. It is essential to being able to paint

September 28, 2006
Before the Environmental Appeals Board In Re General Motors Automotive North America

Page 50

1 hundreds of vehicles a day.
2 JUDGE STEIN: Okay. Thank you.
3 EPA?
4 Thank you, Mr. Kyle.
5 MR. KYLE: Thank you.
6 JUDGE STEIN: Don't worry, Ms. Peaceman.
7 We have lots of the questions for you, also.
8 MS. PEACEMAN: Thank you.
9 JUDGE STEIN: So you will have plenty of
10 time.
11 MS. PEACEMAN: Good morning.
12 May it please the Board. Again, my name
13 is Karen Peaceman and I am here from EPA Region V.
14 I'm associate regional counsel there. And I am
15 joined at counsel table by Chris McCulloch and Pete
16 Raack, both in headquarters office of OECA.
17 It is really important to really remember
18 what this case is about. This case is about GM's
19 management of the material generated after they
20 clean their painting equipment as it moves from the
21 paint booth to the hazardous waste storage tanks.
22 It is a point of generation case.

Page 51

1 I would also like to address a question I
2 believe the board put to Mr. Kyle, which is what we
3 really change here at the end of the day if you rule
4 in favor of EPA. Keep in mind that all that EPA is
5 asking for is for GM to comply with RCRA. We are
6 not asking them to change the system. We are not
7 asking them to retrofit these lines and move them,
8 change them in any way. What we are asking GM to do
9 is to do daily inspections, to keep logs of those
10 inspections, to provide secondary containment for
11 these -- this piping system outside of the building
12 for those storage tanks that are outside of the
13 building and to comply with the BB requirements
14 where applicable, which require marking and
15 monitoring, and that is to further our goal and our
16 requirement in protecting human health and the
17 environment.
18 JUDGE STEIN: Are you asking them to get a
19 TSD permit?
20 MS. PEACEMAN: They do not need a TSD
21 permit so long as they store material for less than
22 90 days and comply with the requirements for the

Page 52

1 exemption for the permit, which would include
2 following the Subpart J requirements and Subpart BB
3 requirements where applicable.
4 JUDGE STEIN: But you are not taking the
5 position that a TSD permit is needed for the pipes
6 because there is a residue in the pipes and there is
7 unreached molecule when it came out?
8 MS. PEACEMAN: No, we are not parsing the
9 material in the pipes quite that precisely. They
10 would only need a permit if they stored for more
11 than 90 days.
12 JUDGE FULTON: Do you have any idea how
13 often they empty the big tank?
14 MS. PEACEMAN: I believe we have a
15 stipulation to that, your Honor, that was a range of
16 time, a pretty big -- a pretty big range. It was
17 all less than 90 days but I think it ranged from as
18 few days as about a week to much closer to the 88
19 days, something like that. These are large -- I
20 believe these are 40,000-gallon tanks, many of them.
21 They probably range in size. I believe there are
22 exact figures in the record, at least will give you

Page 53

1 some borders for that.
2 JUDGE FULTON: I guess it would be the
3 time of -- that the -- the duration of time from
4 the -- from the time the paint leaves the paint shop
5 until the time it leaves the storage tank.
6 MS. PEACEMAN: That is correct, and it is
7 my understanding that the amount of time that it is
8 in the piping prior to the time that it gets to the
9 storage tanks would be a matter of days.
10 JUDGE FULTON: Including what's in the
11 purge pot? The purge pot is regularly emptied?
12 MS. PEACEMAN: That's correct. During
13 ongoing production, it is emptied on a regular
14 basis. To the extent that there is material in the
15 purge pots during the shutdown, I don't know, when
16 it's shut down for two weeks, let's say, or even a
17 month, I don't know if they leave those purge pots
18 empty. It is my understanding that the
19 recirculation, however, does continue to go 24 hours
20 a day 7 days a week, but as long as the storage
21 tanks were emptied within 90 days, I don't believe
22 they would need a permit.

Page 54

1 JUDGE FULTON: Now, has the agency
2 encountered any problems in the release scenarios
3 with these particular kinds of operations in the
4 automotive industry?
5 MS. PEACEMAN: I'm not entirely sure what
6 your Honor means by "problems." We have -- even in
7 this case, when -- as we went through the process of
8 this enforcement action, through GM's own documents,
9 and those are well referenced in the brief, there
10 were -- they were conducting -- for some period of
11 time, they were doing something that they called
12 "observations." It was something short of an
13 inspection. And they were documenting -- to some
14 extent, they were documenting those. In their own
15 records, they demonstrate that there were, in fact,
16 leaks of purge mixture. I believe there are some
17 documentation at one of the facilities that there
18 was sort of a larger leak. They cleaned it up.
19 They cleaned it up but it did leak. And it is our
20 belief that if they were inspecting as they should
21 be on a daily basis with an actual inspector who's
22 job duty it was to have responsibility for looking

Page 55

1 at these lines and was also looking not just for
2 when it leaks but for the precursor to a leak, which
3 is really important under RCRA, you are looking for
4 corrosion, you are looking for rust, you are looking
5 for bulging so that, hopefully, you are going to
6 catch the -- you are going to catch a leak before it
7 happens, before these lines, which are 30 feet in
8 the air overhead, long walkways where people are
9 going about their daily business working, not
10 knowing that it is possible for purge mixture to
11 fall on their heads.
12 Three reasons compel -- EPA believes
13 compel this board to affirm the presiding officer's
14 holding that the purge mixture is a spent material
15 when it leaves the paint manifolds and applicators.
16 First, the solvent in the purge mixture fits
17 squarely within the regulatory definition of a spent
18 material. Second, GM's own expert testimony
19 confirms that the settlement does not serve any
20 purpose after cleaning the paint manifolds and
21 applicators. Third, GM's position could create a
22 loophole in RCRA that may undermine the protection

Page 56

1 of the environment intended by Congress.
2 EPA asks this board to do just what the
3 presiding officer in this case did: Step back, look
4 at this operation as a whole, see the forest for the
5 trees; the entire piping system downstream of the
6 paint booth is nothing more than a waste conveyance
7 system. If GM continued to put this material into
8 the water bath or into drums or totes as they did in
9 the 1970s and 1980s, we would -- I don't think we
10 would be here today. We would all understand that
11 material was waste.
12 JUDGE STEIN: Let me interrupt you for a
13 moment because it seems to me, then, the change that
14 they made from the nineties, that GM has now moved
15 to a place where they are reclaiming the material,
16 which from an environmental perspective one would
17 think is a good idea and may well also be
18 economically beneficial to GM but certainly from an
19 environmental perspective seems beneficial. So
20 simply to refer to the nineties because that's how
21 they did it doesn't really strike me as the right
22 way to look at this.

Page 57

1 Let me continue. If, instead of doing
2 what they do, GM, let's say, released the purge
3 solvent from Safety-Kleen and when GM was done with
4 it at the end of the paint manifold, Safety-Kleen
5 picked up that material, drug it around on the roads
6 and then brought it back and gave it back to GM to
7 use in the downstream reference process, wouldn't
8 that be regulated?
9 MS. PEACEMAN: Let me answer your premise
10 first and then the question. EPA is not quarreling
11 with the concept of reclamation. It is a good thing
12 to do. We believe it serves the environment. It
13 also serves GM. The reason for looking historically
14 is only that the material, what we are talking
15 about, the material in the pipes, that which we seek
16 to regulate, is the same material.
17 That being said, if Safety-Kleen were to
18 take it, drive it around, bring it back and put it
19 only into the downstream lines to be used as a
20 cleaner, we may have a different result in this case
21 but that doesn't happen. The situation you
22 articulate is much closer to what Safety-Kleen --

Page 58

1 what Safety-Kleen does at its facilities where it
2 takes used solvent and it cleans out other drums.
3 The one striking difference, though, here, in your
4 hypothetical, if it were exactly the same material
5 and they were putting it back into the pipes and it
6 is not dissolving anything new, there is no
7 additional contaminants, it is not making the
8 material downstream any cleaner, it is just keeping
9 in solution and in suspension that which was already
10 suspended. So I'm going to change my answer. I
11 really think we would have the same case.
12 JUDGE STEIN: Well, where in the
13 regulations does it require that you be dissolving
14 something new?
15 MS. PEACEMAN: The regulations -- the
16 language in the -- the most pertinent regulation at
17 issue here is the definition of a spent material,
18 which is a material that's been produced and as a
19 result of contamination, it can no longer serve that
20 purpose without that processing. So here we have
21 a -- a purge solvent that's been produced to clean
22 paint manifolds. If you didn't need to clean the

Page 59

1 paint manifolds, you wouldn't have the purge solvent
2 on site.
3 JUDGE REICH: You have just, basically,
4 built into your question the whole issue. I mean if
5 you assume that that's the one and only and singular
6 purpose, then maybe what you say flows from that.
7 But I don't think GM would concede that that is, in
8 fact, the singular purpose for which the purge
9 solvent is produced.
10 MS. PEACEMAN: EPA is not articulating
11 that the only thing that this solvent could be used
12 for legitimately is to clean manifolds and paint
13 applicators. So if it were used to clean other
14 equipment, like it is in the Safety-Kleen scenario,
15 that would be acceptable to EPA. But when you
16 look -- you have to -- each case is going to have
17 its own facts. In this particular case, when you
18 look at the purpose for which this was produced, we
19 believe it was produced for a cleaning function.
20 When you look at -- okay, what does that mean? What
21 does cleaning really mean? It means dissolving and
22 suspending the -- the materials that are in the

Page 60

1 paint and that doesn't happen downstream. There is
2 nothing that lowers the viscosity of the paint.
3 There is nothing that -- it doesn't -- it doesn't
4 mean any more saturated or any more dirty.
5 JUDGE REICH: So resolubilizing the
6 residue you do not think is a cleaning function?
7 MS. PEACEMAN: That's correct. We don't
8 think that's a cleaning function any more than to
9 the extent that there is some resolubilization that
10 occurs in the storage tanks. We don't believe
11 that's cleaning. There is resolubilization and
12 resuspension and the maintenance of that
13 solubilization in the tanker trucks on the way to
14 the TSD. We don't believe that's cleaning. As it
15 is sitting in the hazardous waste tanks at the TSD
16 facilities, it continues to keep it in solution. We
17 don't think that's cleaning.
18 JUDGE STEIN: And where in the record
19 would I find evidence to that effect? I mean I
20 saw -- I have seen the findings of fact of the ALJ;
21 I have seen testimony from GM witnesses about the
22 purpose for which it was manufactured and what it

Page 61

1 does. Where in the record is EPA's rebuttal case a
2 case that it doesn't perform a cleaning function?
3 Where should I look to find that?
4 MS. PEACEMAN: You should look -- there --
5 there are many, many references to this in our brief
6 but the two that I would bring to your attention
7 now, first, their expert witness, Mr. Warren, who
8 was the designer of the purge solvent from PPG, he
9 said, on June 24th, at pages 229 to 230, he said the
10 purge mixture -- the solvent component of the purge
11 mixture does not reduce paint viscosity further; it
12 only maintains viscosity reduction already achieved
13 upstream. That was echoed -- actually, it was
14 probably said first by our expert witness, Dr.
15 Kendall, who is a Ph.D. chemist at NAIOC, and he
16 says that the dilution just continues in a steady
17 state. And that was said June 21st at pages 48 to
18 49.
19 There is nothing new added to the purge
20 mixture. There isn't anything else for it to
21 dissolve. This was addressed squarely when Sonny
22 Sasserville at headquarters was responding to Region

Page 62

1 V. This issue had come up beginning in the late
2 1990s.
3 JUDGE REICH: Let me ask about that and
4 going back to the question that I asked earlier, as
5 I remember what she said, she said for it not to be
6 spent, it, basically, had to dissolve additional
7 contaminants. Going back to the question, are
8 you -- as to the residue, are you saying it doesn't
9 dissolve those contaminants or are you saying that
10 they are not additional contaminants?
11 MS. PEACEMAN: I am saying that they are
12 not additional contaminants and I'm also saying what
13 happens in those lines is it is like a sewage
14 system. You are going to have many additions of
15 waste into a sewage system. The new slug of waste,
16 if you will, may well dissolve what has settled out
17 in a previous slug of waste but there is really no
18 doubt that all of it is waste.
19 JUDGE REICH: All right. But if it
20 dissolves contaminants, then I go back and look at
21 is it dissolving additional contaminants during its
22 course now.

Page 63

1 MS. PEACEMAN: That's correct.
2 JUDGE REICH: Is your answer no because
3 the contaminants it's dissolving are of the same
4 character as the additional waste coming through?
5 MS. PEACEMAN: Yes.
6 JUDGE REICH: And where is -- going back
7 to Judge Stein's question, where is the legal
8 support for the interpretation that that's how we
9 have to interpret "additional," even assuming that
10 that's the right criteria in the first place? Why
11 is not "additional" just more of the same?
12 MS. PEACEMAN: Because you are looking at
13 the reason why the solvent is being used and if it
14 isn't -- it has to be -- once it's been used for its
15 purpose, it has to be used for something new. It
16 has to do something new, some new function, in order
17 for it not to be considered spent. It can have --
18 JUDGE REICH: If you had purge solvent
19 that somehow -- they started using a different purge
20 solvent starting now and somehow, for some chemical
21 reason, once it was used to clean manifolds and the
22 associated equipment but before it went through this

Page 64

1 whole system, it ceased to lose -- it ceased to have
2 solvent functions and, therefore, it could not
3 dissolve the materials that are in the system?
4 Would that present a problem over time? Would you,
5 in fact, potentially have a buildup over time that
6 could create a clog.
7 MS. PEACEMAN: It probably would create a
8 problem and GM may well then have to have engineered
9 a different solution. It is important to understand
10 that these -- that the purge solvent was not created
11 to manage downstream waste. The downstream piping
12 system was put there to manage the purge mixture,
13 which inevitably results from cleaning the
14 equipment. It is sort of a chicken and an egg.
15 JUDGE REICH: But there is, it seems to me
16 from what you are saying, unquestionably a need that
17 occurs downstream that this purge solvent is
18 satisfying.
19 MS. PEACEMAN: The -- it may be helpful
20 that there is solubilization and resuspension of the
21 same material in the lines but it is important to
22 remember -- this is also pretty well documented in

Page 65

1 the transcript concerning the Orion facility, I
2 believe it was in the 1980s, they had problems with
3 clogging in that system. Using the purge mixture
4 just as they have it now, you know, give or take, it
5 was essentially the same purge mixture, and they
6 noticed that they had problems with clogging, so it
7 wasn't accomplishing the function that they say that
8 it needs to accomplish, so they were trying to
9 decide who to do about that. One option that
10 occurred to them was to add a virgin purge solvent
11 as a chaser, if you will, to try to help flush this
12 through. They, in the end, decided not to do that
13 for a variety of reasons, and then their engineers
14 realized that upstream of the paint booths, they
15 have a recirculation system for the paint, the raw
16 paint that goes to the paint booth. They keep the
17 red circulating and the green circulating and so
18 forth until they need those actual colors so that
19 the paint doesn't settle out. They thought, well,
20 it is not settling out upstream, so let's see if we
21 can't mirror that system downstream. So they put in
22 recirculation at Orion and, low and behold, that did

Page 66

1 the trick. They now have recirculation at Orion and
2 recirculation is the trend in the industry.
3 So the purge solvent in this purge mixture
4 by itself does not move the material from point A to
5 point B. It is really the movement that comes from
6 gravity, from the agitation in the purge pots, from
7 the agitation that comes from the recirculation, as
8 well as the volume of the waste itself. That's
9 another benefit of recirculation. You create
10 additional volume in the lines and then you have
11 waste pushing waste to the hazardous waste storage
12 tanks.
13 JUDGE REICH: When you say it doesn't do
14 it by itself, but does it make it easier for this --
15 for the material to move?
16 MS. PEACEMAN: If there is --
17 JUDGE REICH: It is not exclusive, is it
18 not a contributing factor to the ability to move
19 this waste through the system?
20 MS. PEACEMAN: Yes, in the same way that
21 water in a sewage pipe makes it easier for waste to
22 be carried along. The fact that there is a liquid

Page 67

1 material will help waste move along. That
2 doesn't -- the ability of a waste line to keep
3 moving does not change the material into somehow
4 part of the production process. They don't produce
5 cars downstream. They don't manufacture anything
6 downstream of these lines. The purge solvent is
7 created simply to clean the painting equipment and
8 then they had to manage it. They had to figure out
9 what to do with it and kudos to them for reclaiming
10 it. This is just a reclaim recovery system.
11 JUDGE STEIN: But what if we were to look
12 at this as GM has decided to reclaim this product
13 and in order to have material that can be reclaimed,
14 they have to keep the lines unclogged. Why is the
15 fact that the purge solvent -- mixture downstream
16 performs some function, perhaps not the exclusive
17 function in keeping those lines flowing, why is that
18 illegitimate? Why is that not a use?
19 MS. PEACEMAN: Because it is not
20 performing -- it is not doing anything -- anything
21 new. The mixture exists inevitably as a result of
22 the cleaning. There is --

Page 68

1 JUDGE STEIN: Isn't more new? In other
2 words, I mean you are looking at doing something new
3 but I look at the -- I look at Safety-Kleen and I
4 don't see anything in the Safety-Kleen situation
5 that says that the solvent that was used for one
6 function in place two -- at place one can't be used
7 for the same function at place two. I mean they are
8 mixing solvents from all different kinds of
9 equipment. I don't see a restriction that says you
10 can't do that. I don't see why in the GM situation
11 the fact that you are dissolving more of the same
12 can't be looked at as additional.
13 MS. PEACEMAN: Well, in the Safety-Kleen
14 situation, it is fairly implicit, as they are taking
15 drums from a variety of places, emptying them out
16 and then cleaning other drums with it, that there
17 are going to be new contaminants. That's, also -- I
18 will take you back to the Preamble. The example we
19 gave in the Preamble was a cleaning first circuit
20 boards and then used as a metal degreaser, again,
21 implicit different contaminants.
22 The purpose that GM has for the purge

Page 69

1 solvent in the paint booth is to -- is to clean --
2 the cleaning is done by suspending and dissolving
3 materials. Given that it is the same material, what
4 goes into those lines at the paint booth is exactly
5 the same as what goes into the storage tanks. There
6 is nothing being added to it. That purge solvent
7 isn't becoming any more saturated, it isn't becoming
8 any dirtier, if you will, it is just a state of
9 being. That's just how it -- how it exists and it
10 would be the same whether you were putting it into a
11 tote or a drum or a water bath, and the fact that it
12 is put in pipes should not confuse this board as to
13 what the material is. It is generated as a result
14 of cleaning manufacturing equipment and then it is
15 just a waste management problem. It is just
16 plumbing.
17 JUDGE STEIN: If we were looking at the
18 text of the regulation and trying to figure out what
19 the words "use" mean, and I think it is 261.1 -- the
20 definition of the spent material Mr. Kyle had
21 earlier -- do you agree with Mr. Kyle that the
22 definition of "used" and "reused" under Sub 5 does

Page 70

1 not have any bearing on the interpretation of this
2 regulation?
3 MS. PEACEMAN: I would agree that that's
4 not really what this case is about. It is my
5 understanding that when you look at the regulation,
6 in the definition of "discard," and you are going to
7 find several different circumstances -- it's in
8 261.2 -- of materials that can be discarded. One of
9 those that is spelled out is if it is recycled.
10 Then within recycling, there are spent materials.
11 There is -- there is the table, Table 1, and that
12 refers -- on the left-hand side of the table, it is
13 going to have a number of different items, including
14 spent materials, which is what EPA contends the
15 purge mixture is in this case. On the right-hand
16 side of the chart, it is different -- different
17 activities that are occurring next. When the next
18 activity is reclamation, which is what is happening
19 in our argument in this case, then it is a spent
20 material that is regulated under the regulations.
21 If it were being used, for example --
22 JUDGE STEIN: Let me just interrupt you

Page 71

1 for a second because I'm looking at the definition
2 of "spent material" and the definition of "spent
3 material," it is the material that's being used, and
4 my question is where is the definition of "used" and
5 can I look to this other reference to "used" or
6 "reused" to help inform the definition in "spent
7 material" of what "used" means? I'm trying to
8 figure out what purpose is; I'm trying to figure out
9 what use is. Mr. Kyle argued that "used" has no
10 application -- "used" or "reused" language has no
11 application to the "spent materials" definition and
12 what I am trying to figure out is whether EPA agrees
13 with that or not.
14 MS. PEACEMAN: Yes, we -- we agree -- when
15 you look at the different circumstances of used/
16 reused, what that's talking about is how can it be
17 used so that it is not considered to be discarded
18 under the regulations because -- there could be a
19 spent material but because of how it is being used,
20 it is not being regulated as discarded.
21 In this case, because the spent material
22 is next going to be reclaimed, it is our view that

Page 72

1 it is discarded under the regulations.
2 JUDGE STEIN: So I shouldn't look to that
3 to tell me what used is.
4 MS. PEACEMAN: That's correct.
5 JUDGE STEIN: What else should I look to?
6 MS. PEACEMAN: The best help that I can
7 give you is to start with the Preamble.
8 JUDGE STEIN: I have read the Preamble.
9 MS. PEACEMAN: From there, you can look at
10 Safety-Kleen; you can look at Brenntag; you can look
11 at Howmet; you can look at Royster; and then you
12 can -- eventually people will be able to look at GM.
13 You have to -- it is a fact specific question.
14 Every case is going to be a little bit different.
15 In this case, the use that GM articulated was fairly
16 clear as to what's going on in the manifold and we
17 agree with them there. This case, it is not an
18 instance where, like, in Howmet we were arguing
19 about whether uses were too similar to each other,
20 whether they were similar or not or different or
21 not. What EPS is saying in this case, there is no
22 use downstream. It is simply maintaining the same

Page 73

1 contaminants in solution, in what's moving it,
2 what's keeping it clog-free.
3 The cleaning that they articulate is
4 really nothing more than the ability to keep those
5 lines flowing, to keep them clog-free, and what they
6 have to have in order to do that is the motion, it
7 is the energy, it is the force, and when they didn't
8 have -- when that wasn't good enough, they added
9 more. They have created a situation where there is
10 enough volume to push the waste. That's what they
11 are using it for.
12 JUDGE FULTON: You have mentioned that all
13 these cases are fact intensive and I understand
14 that. What's striking, though, is how dramatically
15 the landscape changes with the relatively small
16 change in facts. I assume that if the reclaimer
17 that GM is using, having legitimate prereclamation
18 solvent based use for this material and the solvents
19 were actually being used in that fashion, that we
20 wouldn't be here right now.
21 MS. PEACEMAN: That's correct and, in
22 fact, there is one of GM's competitors in the

Page 74

1 automotive industry that does just that. They take
2 their purge mixture as is and they take it -- it is
3 not to Safety-Kleen, it is a competitor of
4 Safety-Kleen's, and they use it, and they are not
5 regulating that.

6 JUDGE FULTON: Is there sort of a
7 principal reason for elevating reuse over
8 reclamation as a policy priority, because that seems
9 essentially to be at the core what the Agency is
10 doing here.

11 MS. PEACEMAN: I'm not sure that I'm
12 qualified to speak to all of the policy behind this
13 but it is -- it is my understanding that -- there is
14 a tremendous concern throughout the regulations
15 about material that's going to be reclaimed, the
16 notion being that once you are done with it and the
17 next thing that's going to happen is a reclamation,
18 it presents a whole panoply of dangers that we are
19 concerned about and that we need to regulate.

20 JUDGE FULTON: The problem is what happens
21 at the GM facility doesn't look very different from
22 what happens at the Honda facility, but the Honda

Page 75

1 facility is not regulated because it is subject to a
2 subsequent reuse, so what happens on the ground at
3 these facilities looks virtually the same, just one
4 is subject to RCRA and one is not.

5 MS. PEACEMAN: Unfortunately, that can
6 often happen with RCRA. In the Preamble, in the
7 1985 Preamble, there was a discussion about -- about
8 this use and reuse and about the need to first look
9 at what the material is and then what's happening
10 next and it -- it can be complicated. There is --
11 if this were simple, perhaps we would not be here
12 today, but I think it is important to remember that
13 at the end of the day, it is really not that
14 complicated. This is a waste management system.
15 This is plumbing. These are pipes that they put in
16 to take the material from paint booth to the
17 hazardous waste storage tanks. That was their
18 choice. They could have put the tanks closer; they
19 wouldn't have needed the piping and I don't think we
20 would be here today. They have chosen to reclaim it
21 and while EPA has no quarrel with that and supports
22 that, it doesn't change what is in those lines. If

Page 76

1 it were -- if the fact that a spent solvent that
2 could continue to solubilize was not a waste, there
3 would be little need for the definition of ancillary
4 equipment in the regulations. There would be a
5 whole host of piping systems throughout automobile
6 plants and other painting operations if any time you
7 have a spent solvent that somebody wants to reclaim,
8 which is the trend today, and that's a good trend,
9 but any time you wish to reclaim something, if it
10 has some solvent properties, that means it is not a
11 waste, that would really turn our regulations on
12 their head.

13 I just want to remind the Board that but
14 for the need to clean the painting equipment, there
15 would -- oh, I'm out of time.

16 JUDGE STEIN: Continue.

17 MS. PEACEMAN: -- there would be no -- no
18 purge solvent. They use it a single time to clean
19 the painting equipment. It doesn't go back in. It
20 doesn't recirculate. It doesn't pick up any
21 additional contaminants. It's not dissolving
22 anything new on the way to the storage tanks. As

Page 77

1 Margaret Winkler, one of their expert witnesses,
2 testified, the purge mixture, it is the purge
3 mixture, and the reclamation of a spent material is
4 a form of recycling that is legally considered
5 discard under the regulations. The purge solvent is
6 not made for its downstream use; rather, the piping
7 system was put in to handle the waste that is
8 generated from the cleaning.

9 The -- the solubilization that is
10 continuing in the purge mixture, it is just a state
11 of being. It is just existence. It is not doing
12 anything -- anything new. There is no new
13 ingredient downstream short of the situation at
14 Orion, which, as we discussed in the brief, has
15 finished its job in the paint booth itself.

16 JUDGE REICH: If something is designed for
17 a particular purpose, then why is existence
18 incompatible with use? I mean if it is designed to
19 exist in a certain way that carries out a certain
20 purpose, then why does it happen that it only exists
21 means that it is not being used?

22 MS. PEACEMAN: I guess you have to look at

Page 78

1 the facts of each case. In this case, there was --
2 there were statements that it was used, that it was
3 produced for the downstream purpose. But there --
4 EPA is hard pressed to understand how they could
5 have created a purge solvent that would not retain
6 its solvent properties downstream, how -- and the
7 mere retention of solvent properties is not a
8 requirement -- I mean a solvent does not have to be
9 completely spent in order to be considered to be
10 spent under the regulations. Even Marshall
11 Williams, their expert, said RCRA does not require
12 that a solvent be completely depleted under the
13 regulations to be considered spent.

14 JUDGE STEIN: You have taken the position
15 in your briefs that the predominant purpose test
16 that was applied by the ALJ is not correct and, yet,
17 I hear in your argument -- perhaps, I'm putting
18 words in your mouth -- that the first use of this
19 purge solvent is legitimate in the Government's eyes
20 but the second alleged use is not. Why, then, did
21 the ALJ err in using the predominant purpose test.

22 MS. PEACEMAN: Your Honor, our position is

Page 79

1 that there is no second use downstream. It is not a
2 question of whether or not it is legitimate or
3 illegitimate, our position is there is no use.
4 There is simply a state of being of -- of the
5 solvent. It retains --

6 JUDGE STEIN: Let's assume that we were to
7 disagree with you, at least hypothetically for
8 purposes of my question --

9 MS. PEACEMAN: Yes, ma'am.

10 JUDGE STEIN: -- and that there is some
11 function, which would appear to be consistent with
12 at least some of the testimonies and the findings of
13 the ALJ, that there is some use that these materials
14 perform downstream. But, yet, I see the Government
15 arguing that the predominant purpose test is
16 inappropriate and I want to be sure and understand
17 why.

18 MS. PEACEMAN: The Government believes the
19 predominant purpose is inappropriate because, first,
20 it was taken -- it was taken out of API-2 context,
21 which was a case dealing with rule making, it was
22 dealing with the definition of "discard," not

Page 80

1 dealing with the definition of "spent."
2 The problem with predominant purpose is
3 that it would force people to sort of choose between
4 various uses and try to decide what is the main use
5 and what is the -- the second most important use and
6 that is not what the regulations or the -- in the
7 life to the regulations that we put in the Preamble
8 was all about. So in the circuit board example, for
9 instance, would we say that the metal degreasing is
10 the secondary use and, therefore, not okay? We
11 clearly said that was an acceptable second use. In
12 Safety-Kleen, that second use, which perhaps is not
13 the predominant use, we say it is okay. We are not
14 looking for people that have to sort of choose
15 between various uses and decide which is the most
16 important. Sometimes you don't know what the use
17 will be at the outside -- outset of an operation.
18 So while it may have -- it may have proved helpful
19 to Judge Gunning here, I think there is tremendous
20 danger in adopting this test in cases other than
21 this one.

22 JUDGE STEIN: Are purpose and use the same

Page 81

1 in the Government's view, as used in the
2 regulations?

3 MS. PEACEMAN: I believe they are the same
4 for purposes of this case. I don't know if there
5 would be a case where I would feel differently but
6 in terms of this case, we do not believe that it's
7 been used downstream, we don't believe that it is
8 being produced for downstream.

9 JUDGE FULTON: Just a little bit different
10 area here. I notice in looking at the Michigan
11 regulations that there is provision for case by case
12 determinations relating to recycled materials,
13 basically, a case by case kind of exemption. And I
14 think it is implied by your brief but I'm assuming
15 that your position is that -- that Mr. Nash's letter
16 to GM does not -- doesn't rise to the level of a
17 director's determination.

18 MS. PEACEMAN: That's correct.

19 JUDGE FULTON: Okay. That this is
20 something less formal than that.

21 MS. PEACEMAN: That's correct.

22 JUDGE FULTON: Okay. If it -- if there

Page 82

1 was a director's determination, would EPA be bound
2 by that?
3 MS. PEACEMAN: I would have to look at
4 whether or not it was properly issued. But
5 presuming that it was properly issued, if they had
6 the authority -- if we had delegated to them
7 properly the authority to make that exemption, I'm
8 not sure -- if they have that in their regulations
9 but we don't have it in ours, I'm not sure that we
10 would -- it would be part of the program that we
11 have delegated to them. I believe we can only
12 delegate that which we can do ourselves and unless
13 we have that same provision, I'm not sure it would
14 be a proper delegation but --
15 JUDGE FULTON: So you would have to go
16 back and look at the authorization of the program
17 and see whether there was coverage or not.
18 MS. PEACEMAN: That's correct.
19 JUDGE FULTON: But assuming there was
20 coverage and it provided that kind of case-by-case
21 authority and was properly executed, I guess it
22 would serve to modify the requirement at that point;

Page 83

1 right?
2 MS. PEACEMAN: If all of those conditions
3 were met, your Honor.
4 JUDGE STEIN: There was a reference in
5 some of the materials I have seen about settlements
6 with a number of other car manufacturers. Are any
7 of those settlements in the record of this case or
8 is this just extra record information that we
9 shouldn't concern ourselves with?
10 MS. PEACEMAN: It is my understanding that
11 at the end of the day, the actual CAPOS in those
12 other cases were not made as exhibits to this
13 hearing but there was testimony at a few different
14 points during -- during the hearing to those
15 settlements and I believe in the record there is a
16 letter from -- from Steve Shimborg that will
17 address -- that is essentially the settlement offer
18 that was made to the industry, including to GM, so
19 you would have that before you. That's in the
20 record.
21 JUDGE STEIN: Additional question: I
22 believe you talked at one point about the

Page 84

1 ramifications of this particular case, and if the
2 Board were to conclude that based on the record of
3 this particular case, that we were to disagree with
4 the Government and find that, in fact, this material
5 was not spent until it reached the storage tank,
6 what, if any, broad ramifications would such a
7 ruling have for the program?
8 MS. PEACEMAN: It would mean that the
9 entire system of piping, purge pots, valves,
10 connectors, which goes for hundreds of feet would be
11 unregulated. There would then be the potential for
12 leaks and releases that are undetected that would
13 impact human health and the environment. There are
14 going to be piping systems like this. First, you
15 are going to have piping systems like this in the
16 automobile industry; you are going to have them in
17 the light -- in the light truck industry; you are
18 going to have them any time or potentially any time
19 there is a painting operation, whether it is of farm
20 equipment or any -- anything else that needs to be
21 painted; it may also occur any time there is a spent
22 solvent that is on its way to being reclaimed and it

Page 85

1 has to first go through a piping system but there --
2 the facility in question says, oh, well, it keeps it
3 in solution so that's really performing a function,
4 and I think it would really close to eviscerate the
5 need for -- the definition of ancillary equipment in
6 the regulations, at least as applied to spent
7 solvent. The regulations define that whole piping
8 system upstream of the tank as a part of what is
9 regulated under RCRA and it would do away with --
10 JUDGE STEIN: As a part of the downstream
11 tank?
12 MS. PEACEMAN: Correct. It is within the
13 definition of the tank system.
14 JUDGE STEIN: Any upstream pipe.
15 MS. PEACEMAN: Those aren't the exact
16 words of the regulation but it -- essentially,
17 ancillary equipment will cover all of the -- all of
18 the piping and all of the equipment that is
19 ancillary to the tank.
20 JUDGE STEIN: Does the Clean Air Act cover
21 that?
22 MS. PEACEMAN: The Clean Air Act will

Page 86

1 cover -- will cover some of it. There is some
2 overlap. That's, in part, why the BB regulations
3 have been changed. I'm not sure that the air
4 requirements are completely identical.

5 I would remind the Board that since what
6 we -- what's in the tanks seems even more
7 unquestionably to be hazardous waste, that seemed to
8 be the gravamen against GM's case, at least
9 according to the presiding officer, since what went
10 into the tanks isn't anything different. What came
11 through the pipes and what goes into the tanks, it
12 is really all the same stuff. It is easy to see
13 that it is really all waste.

14 To conclude, I would just again like to
15 urge the Board to step back and see the forest for
16 the trees. You have to look at this operation as a
17 whole. The system is nothing more than a waste
18 conveyance system. There is no manufacturing that
19 goes on downstream of the paints booths. All they
20 have done is engineer a waste delivery system so
21 that they can recover solvent. The fact that they
22 want to recover the solvent does not change the

Page 87

1 status of the purge mixture. It can be used one
2 time to clean and thereafter it is too contaminated
3 with paint solvents to clean and, in fact, it
4 doesn't clean the downstream piping.

5 If there are no more questions, thank you
6 for your time.

7 JUDGE STEIN: Thank you, Ms. Peaceman.
8 MR. KYLE: Just a moment while I try to
9 collect my thoughts so this will happen in some kind
10 of logical sequence.

11 The document that I mentioned to you is
12 Respondent's Exhibit 187. That was the use of the
13 material that was in a waste system. So I told you
14 I would find it. I did.

15 Let's start with this conversation. Judge
16 Reich asked a question, why -- why is it that
17 continuing to clean the same materials is not a
18 legitimate cleaning function. Why is cleaning -- I
19 think you said that isn't cleaning more cleaning
20 additional. Maybe it was a couple of questions.
21 Very important question. In Howmet, the United
22 States EPA came before you at page 59 of the oral

Page 88

1 argument and Ms. Chester said that if it can be
2 used -- I'm quoting -- "If it can be used by the
3 entity or another entity in the same fashion, then
4 it wasn't spent." That's what we are doing. We are
5 using this purge solvent in the same fashion. So
6 the arguments that have been presented here today
7 are consistent with the arguments that were
8 presented to your Honors in that case.

9 This question about where do you get this
10 test about the need to clean additional
11 constituents, there is no basis for that other than
12 it was made up in the Sasserville letter. And
13 the -- a product that can continue to be used as a
14 product without being reclaimed is not subject to
15 EPA's jurisdiction under RCRA. It is a product and
16 it is -- they don't have jurisdiction over products.

17 You asked what -- what is the -- where
18 would I find evidence in the record -- I think this
19 was Judge Stein -- where would I find evidence in
20 the record that there isn't any cleaning going on
21 downstream. Because they just say, well, there is
22 no cleaning. And where would I find support for

Page 89

1 this? With all due respect to Ms. Peaceman, that
2 answer was very misleading. She cited Warren, our
3 expert, and said, well, it -- it doesn't reduce the
4 paint's viscosity any more so it is not cleaning. I
5 urge you to read Mr. Warren's testimony. Viscosity
6 is only one of the many things. Yeah, it doesn't
7 change the viscosity but Warren repeatedly said it
8 solubilizes, it mobilizes, it dilutes, which the
9 judge found is an inherent part of cleaning. There
10 is no dispute in this record that this material
11 cleans downstream and they stipulated to it. They
12 cannot come in here and say this material is not
13 being used. That material is clearly being used and
14 the fact that it is being used in the same fashion
15 is just continued use. It is serving the purpose.

16 She urges you to stand back and look at
17 the forest for the trees. This is not a forest for
18 the trees case. This is a case about looking at the
19 facts and applying this definition. This is the
20 only thing this case is about, the definition of
21 spent material to this -- these facts. You can't
22 just stand back and say, oh, forest and trees, and

Page 90

1 not finish the argument. You have got to finish the
 2 analysis.
 3 When you look at the words of the rule,
 4 you look at the in facts that have been found, this
 5 material continues to -- to perform the purpose for
 6 which it was produced downstream.
 7 JUDGE STEIN: Mr. Kyle --
 8 MR. KYLE: Yes, ma'am. Sorry.
 9 JUDGE STEIN: Let me ask you a question.
 10 Would you say that the use of the purge solvent or
 11 purge mixture downstream is identical to or the same
 12 as the upstream use or not?
 13 MR. KYLE: Well, it certainly is similar.
 14 I mean the question is is the purge solvent used
 15 upstream different than the purge solvent used
 16 downstream. It is clearly a similar -- I mean it is
 17 the continued use. You are relying upon that
 18 solvent to clean. Now, you are cleaning in a
 19 different area. You are cleaning something new.
 20 Now, they say, well, you are not really cleaning
 21 anything new because you are just cleaning more of
 22 the same. Well, that doesn't make any sense. You

Page 91

1 don't just clean constituents. You are trying to
 2 clean something. You are trying to -- like, you
 3 know, you are washing your hands. You are not just
 4 washing your hands just for fun; you are taking soap
 5 and force and water and you are -- and the both of
 6 those together, the force -- we don't just put soap
 7 on our hands and just say, well, okay, they are
 8 clean. You know, we put soap on our hands and we
 9 apply force. So downstream we have force. As she
 10 said, we don't disagree with that. So it is
 11 cleaning in a different place. It doesn't have the
 12 air chop that it has in the manifolds, so that's a
 13 slight difference. And it is cleaning to help a
 14 different portion of our engineering design function
 15 as designed. I think that's the difference.
 16 So chemically there are similar things
 17 going on but there is a difference. You have got
 18 these what are called soft settled residues in the
 19 pipes downstream. You don't have that upstream
 20 because that's always paint, always painting, there
 21 is nothing that settles out there. So downstream,
 22 this purge solvent comes along and, as they

Page 92

1 stipulated, resolubilizes this into solution. So
 2 there are some differences, Judge.
 3 Did that answer your question?
 4 JUDGE STEIN: That answers my question.
 5 MR. KYLE: I guess I would like to get a
 6 stipulation, if I could, on the record that we don't
 7 need a TSD permit for these things. You know, the
 8 record evidence in this case would -- would stand
 9 for the proposition that no one can tell you how
 10 long a molecule of purge mixture is in the purge
 11 reclaimed system. And I think the testimony of
 12 Chaput is, in some cases, some of those molecules
 13 could be there for months; we don't know. So if we
 14 could get a stipulation today that we don't need a
 15 RCRA TSD permit for these pipes, that would be
 16 great, but I don't think that's what your record
 17 before you is and I doubt seriously that
 18 Ms. Peaceman has the authority to render such a
 19 binding stipulation here today.
 20 You can't just look at this case as a
 21 waste conveyance system. Judge Gunning, it is --
 22 they came before you. It is their burden to prove

Page 93

1 that this material is a spent material from the time
 2 it enters the applicators. That's their burden. We
 3 showed you these facts. Judge Gunning got those
 4 facts right. When you apply the plain language of
 5 this rule to those facts, you don't need to resort
 6 to forest and the trees. It is very simple. There
 7 is no doubt that this purge solvent continues to
 8 perform the intended solvent functions at General
 9 Motors facilities. They didn't carry their burden
 10 and they cannot win.
 11 JUDGE STEIN: Under 261.3(F), Section 1.
 12 MR. KYLE: We have all these. 261 -- I'm
 13 sorry -- point 3?
 14 JUDGE STEIN: Actually, 261.2(F),
 15 documentation of claim that materials are not solid
 16 waste or conditionally exempt, which I think would
 17 suggest that in showing that GM carries a particular
 18 burden, not, you know, your general burden of
 19 persuasion that they make a good case, but it does
 20 suggest to me that in terms of establishing that a
 21 certain material is not a solid waste, that that
 22 burden would go to GM, and if you could comment on

Page 94

1 that.

2 MR. KYLE: Yes. Thank you.

3 I didn't read this very recently but I

4 have read it in connection with this case.

5 This Section F I don't really think

6 directly applies to us here because what we are

7 saying here is that if we raise a claim that a

8 material is not a solid waste, we must demonstrate

9 that there is a known market or disposition for that

10 material and that we meet the terms of the exclusion

11 or the exemption. We are not arguing that we

12 meet -- this isn't a case where we are saying we

13 meet an exemption, this is a case where it is their

14 prima facie case. They have to prove it is a spent

15 material and they didn't.

16 Now, with respect to demonstrate that

17 there is a known market, again, this gets back to

18 that geography issue. If it is -- if you were to

19 determine that it is a spent material when we take

20 it out of the tank and send it off on the road, then

21 we wouldn't have to do any demonstrating that there

22 is a known market because at that point you would

Page 95

1 have determined that it is a spent material.

2 Upstream of where we take it out of our tank, there

3 is -- you know, I think the record does contain

4 plenty of demonstration that there is a need for

5 this material. We put on plenty of evidence as to

6 that need. So it doesn't exactly fit, your Honor, I

7 don't think. Now, maybe -- maybe you have read this

8 better than I have.

9 JUDGE STEIN: There is a provision that

10 talks about demonstrating the material is not a

11 waste and I think I was focussing on that portion of

12 the language more than the specific market of a

13 recycling market.

14 MR. KYLE: Yes, and I think, at least the

15 way I read that, your Honor, is that if we are in a

16 case where we raise a claim that a material is not a

17 waste and that we meet the terms of an exemption or

18 exclusion, that's "and" in there. It is not a waste

19 and we meet the terms of an exemption or exclusion.

20 So I think that's the proper way but I admit you got

21 me on the fly there so that's the best I can come up

22 with right now.

Page 96

1 JUDGE FULTON: Just one other question.

2 Would you agree with Ms. Peaceman that the Nash

3 letter, although it may stand as an interpretive

4 statement of sorts, from the State of Michigan, is

5 not a director's determination under the regs?

6 MR. KYLE: No, we do not -- it is not an

7 interpretation under the section that you cited on a

8 case by case. Is that your question?

9 JUDGE FULTON: Yes.

10 MR. KYLE: Yes, it is not that. This is

11 just them applying their rule to these facts and

12 saying this is not a spent material until it gets

13 into the tank.

14 JUDGE FULTON: Okay.

15 MR. KYLE: Thank you very much.

16 JUDGE STEIN: We will stand adjourned.

17 Thank you, Counsel. The arguments were excellent

18 and we have our work cut out for us.

19 MR. KYLE: Thank you.

20 THE CLERK: All rise. This session of the

21 Environmental Appeals Board now stands adjourned.

22 (Whereupon, at 12:17 p.m., the hearing was

Page 97

1 adjourned.)

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A				
abandoned 31:18 32:1,10,19	68:12 76:21 83:21 87:20 88:10	61:12 although 7:1 96:3	59:13 93:2 applied 28:9 29:16 78:16 85:6	Automotive 5:12 automobile 11:12 76:5 84:16
ability 66:18 67:2 73:4	additions 62:14 address 30:18 51:1 83:17	always 91:20,20 ambiguity 9:2	applies 47:15 94:6 apply 28:13 35:14 43:11 47:14 91:9 93:4	automotive 1:9 4:13 5:5 13:22 54:4 74:1
able 27:5 35:7 49:22 72:12	addressed 61:21 adjacent 16:1	AMC-1 32:15 America 1:10 4:13 5:5 41:6	applying 89:19 96:11	Avenue 2:5
about 8:20,21 9:10 9:11 10:8 12:18 13:7 14:7 16:10 16:11 18:22 20:4 23:21,22 25:4,10 25:14,21 28:20 30:4,9 31:14 36:17,18 40:5,6 40:10 45:1 47:1,6 49:11 50:18,18 52:18 55:9 57:15 60:21 62:3 65:9 70:4 71:16 72:19 74:15,19 75:7,7,8 80:8 83:5,22 88:9 88:10 89:18,20 95:10	adjoined 96:16 96:21 97:1 admit 18:6,10 95:20 adopt 29:20 adopted 28:2 adopting 80:20 adverse 38:17 adversely 22:10 advise 6:6 affect 22:10 affirm 55:13 after 31:15 50:19 55:20 again 9:18 24:17 48:17 50:12 68:20 86:14 94:17	American 34:11 amount 53:7 analysis 36:19 46:1 90:2 analyze 46:17 analyzes 45:21 ancillary 76:3 85:5 85:17,19 another 66:9 88:3 answer 6:7 15:16 15:18 16:17 17:21 20:19 57:9 58:10 63:2 89:2 92:3 answering 6:6 answers 92:4 antecedent 21:3 anything 6:11 45:19 58:6 61:20 67:5,20,20 68:4 76:22 77:12,12 84:20 86:10 90:21 anyway 38:13 API-2 29:20 79:20 appeal 1:8 5:6 45:18 appealed 32:15,16 Appeals 1:1 2:3 5:2 96:21 appear 9:7 10:19 22:22 79:11 APPEARANCES 3:1 4:1 appellant 5:16 applicable 51:14 52:3 application 71:10 71:11 applicator 14:14 21:16 26:16 27:1 38:4 applicators 10:3,4 12:15 13:21 15:1 15:3 16:8 17:4 18:15 19:14 20:5 21:20,21 22:15 27:10 29:9 31:13 48:18 55:15,21	argued 45:4 71:9 arguing 19:4 72:18 79:15 94:11 argument 5:4,11 5:15,22 6:19 7:9 7:16 18:22 20:19 30:10 31:16,19 33:6,9,10,11 43:17,22 44:12 45:15 48:5 70:19 78:17 88:1 90:1 arguments 6:21 9:3 9:4 88:6,7 96:17 around 57:5,18 Article 5:7 articulate 57:22 73:3 articulated 72:15 articulating 59:10 asked 8:1 62:4 87:16 88:17 asking 7:3 51:5,6,7 51:8,18 asks 56:2 assessment 37:4 assistance 9:13 associate 7:10,15 50:14 associated 10:3,22 11:5 63:22 assume 7:1 59:5 73:16 79:6 assuming 63:9 81:14 82:19 attached 31:12 attacking 32:12 attention 13:18 61:6 authority 25:15 82:6,7,21 92:18 authorization 82:16 automation 14:7	aware 5:19 away 15:13 31:18 32:1,9,19 34:22 49:13 85:9 a.m 2:5
acceptable 59:15 80:11	agency 1:2 2:4 3:7 5:3 45:3 54:1 74:9 agency's 37:17 agitation 66:6,7 agitator 17:16 agree 8:7 28:10 37:5 44:15 69:21 70:3 71:14 72:17 96:2 agrees 71:12 ahead 20:13 25:4 29:22 37:14 air 40:15 55:8 85:20,22 86:3 91:12 akin 21:3 Alcohol 11:8 ALJ 60:20 78:16 78:21 79:13 alleged 6:12 78:20 allow 14:5 17:15,16 24:13,15 29:2 35:5 allowed 15:5 along 66:22 67:1 91:22 already 32:15 33:2 37:19 40:14 58:9	arguing 19:4 72:18 79:15 94:11 argument 5:4,11 5:15,22 6:19 7:9 7:16 18:22 20:19 30:10 31:16,19 33:6,9,10,11 43:17,22 44:12 45:15 48:5 70:19 78:17 88:1 90:1 arguments 6:21 9:3 9:4 88:6,7 96:17 around 57:5,18 Article 5:7 articulate 57:22 73:3 articulated 72:15 articulating 59:10 asked 8:1 62:4 87:16 88:17 asking 7:3 51:5,6,7 51:8,18 asks 56:2 assessment 37:4 assistance 9:13 associate 7:10,15 50:14 associated 10:3,22 11:5 63:22 assume 7:1 59:5 73:16 79:6 assuming 63:9 81:14 82:19 attached 31:12 attacking 32:12 attention 13:18 61:6 authority 25:15 82:6,7,21 92:18 authorization 82:16 automation 14:7	back 13:22 27:6 32:15,21 38:16 40:8 44:18,21 45:10 48:18 56:3 57:6,6,18 58:5 62:4,7,20 63:6 68:18 76:19 82:16 86:15 89:16,22 94:17 bad 15:5 balance 5:17 Barnes 4:6 7:7,10 barred 32:13 Barrett 34:2 based 73:18 84:2 basically 59:3 62:6 81:13 basis 29:15 39:21 53:14 54:21 88:11 bath 56:8 69:11 BB 38:8 51:13 52:2 86:2 bearing 70:1 become 30:16 38:7 becomes 27:12 becoming 69:7,7 before 1:1 2:2,6 6:6 7:20 10:15 37:12 44:20 48:22 49:18 55:6,7 63:22 83:19 87:22 92:17,22 begin 7:3,20 beginning 44:12 62:1 behalf 2:8 3:13 4:12 behind 28:21 29:1 74:12 behold 65:22	
accomplish 13:13 65:8	against 86:8	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
accomplishing 65:7	agency 1:2 2:4 3:7 5:3 45:3 54:1 74:9	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
according 86:9	agency's 37:17	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
achieved 61:12	agitation 66:6,7	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
acknowledged 34:2	agitator 17:16	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
across 10:11	agree 8:7 28:10 37:5 44:15 69:21 70:3 71:14 72:17 96:2	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
act 36:5 40:15 85:20,22	agrees 71:12	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
action 54:8	ahead 20:13 25:4 29:22 37:14	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
active 19:16 49:8 49:16,16	air 40:15 55:8 85:20,22 86:3 91:12	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
actively 18:4,16,18 20:6,8	akin 21:3	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
activities 36:5 70:17	Alcohol 11:8	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
activity 21:9 35:16 36:14 40:14,15 41:21 70:18	ALJ 60:20 78:16 78:21 79:13	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
actual 36:5 54:21 65:18 83:11	alleged 6:12 78:20	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
actually 61:13 73:19 93:14	allow 14:5 17:15,16 24:13,15 29:2 35:5	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
add 65:10	allowed 15:5	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
added 10:16 11:8 61:19 69:6 73:8	along 66:22 67:1 91:22	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5
additional 58:7 62:6,10,12,21 63:4,9,11 66:10	already 32:15 33:2 37:19 40:14 58:9	API-2 29:20 79:20	arguing 19:4 72:18 79:15 94:11	B 66:5

<p>being 18:19 20:6,15 21:8 22:1 23:22 32:19 35:9 42:20 47:4 49:22 57:17 63:13 69:6,9 70:21 71:3,19,20 73:19 74:16 77:11,21 79:4 81:8 84:22 88:14 89:13,13,14</p> <p>belief 16:14 54:20</p> <p>believe 9:21 11:22 17:13,13 18:17 23:2,5,16 25:2,11 31:1 33:14,17 34:5 36:2 51:2 52:14,20,21 53:21 54:16 57:12 59:19 60:10,14 65:2 81:3,6,7 82:11 83:15,22</p> <p>believes 55:12 79:18</p> <p>beneficial 56:18,19</p> <p>beneficially 14:3</p> <p>benefit 6:17 66:9</p> <p>Benson 34:2</p> <p>best 6:22 72:6 95:21</p> <p>better 27:21 41:7 95:8</p> <p>between 9:2 16:7 19:14 21:20,21 22:14,15 39:9 48:18 80:3,15</p> <p>big 36:1 41:10 52:13,16,16</p> <p>bill 9:8</p> <p>binding 92:19</p> <p>bit 30:8 72:14 81:9</p> <p>bite 45:18</p> <p>board 1:1 2:3 5:2 6:4,6,19 7:1 25:9 50:12 51:2 55:13 56:2 69:12 76:13 80:8 84:2 86:5,15 96:21</p> <p>boards 47:21 68:20</p> <p>Board's 5:13</p> <p>booth 38:4 50:21 56:6 65:16 69:1,4 75:16 77:15</p> <p>booths 15:12 16:8 38:22 39:9 44:9 65:14 86:19</p>	<p>borders 53:1</p> <p>both 10:6 13:11,11 28:9 36:20 50:16 91:5</p> <p>bottom 17:17 44:22</p> <p>bottoms 34:1,7,10 34:11,14,18</p> <p>Boulevard 3:9</p> <p>bound 82:1</p> <p>Branch 7:18</p> <p>breaks 46:1</p> <p>Brenntag 72:10</p> <p>brief 25:15,19 29:20 44:11 54:9 61:5 77:14 81:14</p> <p>briefs 7:2 10:14 18:21 78:15</p> <p>bring 57:18 61:6</p> <p>bringing 6:19</p> <p>broad 32:17 33:3 33:15 84:6</p> <p>brought 57:6</p> <p>build 15:5</p> <p>building 2:4 51:11 51:13</p> <p>builds 26:20</p> <p>buildup 64:5</p> <p>built 39:17 59:4</p> <p>bulging 55:5</p> <p>burden 40:11 92:22 93:2,9,18,18,22</p> <p>burdens 41:4</p> <p>burned 34:19</p> <p>business 5:21 6:2,5 6:12 40:12 55:9</p> <p style="text-align: center;">C</p> <p>C 2:12 5:1,7</p> <p>call 6:4 16:9 32:9</p> <p>called 11:7 38:8 54:11 91:18</p> <p>calls 8:1</p> <p>came 14:12 52:7 86:10 87:22 92:22</p> <p>canon 25:16 26:1</p> <p>cap 11:9</p> <p>capacity 26:22 44:21</p> <p>CAPOS 83:11</p> <p>capping 13:7</p> <p>capture 14:5</p> <p>car 83:6</p> <p>carefully 32:4,4</p> <p>carried 49:13 66:22</p>	<p>carries 39:18 77:19 93:17</p> <p>carry 93:9</p> <p>cars 27:5 67:5</p> <p>case 5:20 6:15 8:8,8 8:12 9:10,22 12:1 12:17,21 16:11 25:13 26:12,13 27:18,19 29:10 30:8 32:14 33:12 36:17,18 37:7,15 44:5 47:7 50:18 50:18,22 54:7 56:3 57:20 58:11 59:16,17 61:1,2 70:4,15,19 71:21 72:14,15,17,21 78:1,1 79:21 81:4 81:5,6,11,11,13 81:13 83:7 84:1,3 86:8 88:8 89:18 89:18,20 92:8,20 93:19 94:4,12,13 94:14 95:16 96:8 96:8</p> <p>cases 31:4 42:1 73:13 80:20 83:12 92:12</p> <p>case-by-case 82:20</p> <p>cast 21:19</p> <p>catch 55:6,6</p> <p>cause 20:10</p> <p>caused 38:6</p> <p>ceased 64:1,1</p> <p>ceiling 39:13,20</p> <p>certain 45:18 77:19 77:19 93:21</p> <p>certainly 31:9 56:18 90:13</p> <p>certified 39:2</p> <p>cetera 19:9</p> <p>challenged 33:2</p> <p>challenging 33:1</p> <p>change 37:20 51:3 51:6,8 56:13 58:10 67:3 73:16 75:22 86:22 89:7</p> <p>changed 86:3</p> <p>changes 37:21 73:15</p> <p>Chaput 92:12</p> <p>character 63:4</p> <p>characteristic 43:11</p> <p>charge 35:12</p> <p>chart 70:16</p>	<p>chaser 65:11</p> <p>chemical 63:20</p> <p>chemically 91:16</p> <p>chemist 61:15</p> <p>chemistry 11:14</p> <p>Chester 88:1</p> <p>Chicago 3:10</p> <p>chicken 64:14</p> <p>Chief 7:18</p> <p>choice 75:18</p> <p>choose 80:3,14</p> <p>chop 91:12</p> <p>chosen 75:20</p> <p>Chris 7:17 50:15</p> <p>CHRISTINE 3:4</p> <p>chunk 41:10</p> <p>circuit 22:4 25:9 31:3 32:16 33:17 47:21 68:19 80:8</p> <p>Circuit's 44:22</p> <p>circulating 65:17 65:17</p> <p>circumstances 70:7 71:15</p> <p>cited 89:2 96:7</p> <p>claim 17:2 43:13 93:15 94:7 95:16</p> <p>claimed 6:12</p> <p>clarify 8:18</p> <p>clarity 6:20</p> <p>clean 11:5 12:13 17:7 19:13 29:4 40:15,20 50:20 58:21,22 59:12 59:13 63:21 67:7 69:1 76:14,18 85:20,22 87:2,3,4 87:17 88:10 90:18 91:1,2,8</p> <p>cleaned 17:6,6 41:1 54:18,19</p> <p>cleaner 57:20 58:8</p> <p>cleaning 10:22 16:2 19:1,6,20 20:3 26:22,22 27:1,3 29:5,7,9 47:8 55:20 59:19,21 60:6,8,11,14,17 61:2 64:13 67:22 68:16,19 69:2,14 73:3 77:8 87:18 87:18,19,19 88:20,22 89:4,9 90:18,19,20,21 91:11,13</p> <p>cleans 29:11 58:2</p>	<p>89:11</p> <p>clean-up 35:20</p> <p>clear 6:9 24:6,13 28:7 34:5 72:16</p> <p>clearly 29:7,12 34:3 80:11 89:13 90:16</p> <p>CLERK 5:2 96:20</p> <p>clog 11:20 20:9 64:6</p> <p>clogging 19:11 65:3 65:6</p> <p>clog-free 73:2,5</p> <p>close 6:8 85:4</p> <p>closer 52:18 57:22 75:18</p> <p>Code 26:4</p> <p>collect 87:9</p> <p>colors 65:18</p> <p>Columbia 2:7</p> <p>combin 47:6</p> <p>combination 20:1 47:12,15,18,19</p> <p>combine 21:13</p> <p>combining 11:11</p> <p>come 8:18 14:7 40:7 48:21 49:18 62:1 89:12 95:21</p> <p>comes 12:14 23:15 66:5,7 91:22</p> <p>coming 40:18 63:4</p> <p>comment 93:22</p> <p>commercial 24:1</p> <p>common 22:20 24:4 25:6,11 32:3</p> <p>companies 14:1</p> <p>company 34:14</p> <p>compel 55:12,13</p> <p>competitor 74:3</p> <p>competitors 73:22</p> <p>complaint 41:17,20 43:14,15</p> <p>complete 16:3 37:11</p> <p>completely 17:6 78:9,12 86:4</p> <p>completeness 36:22</p> <p>completes 45:22</p> <p>complex 6:15</p> <p>compliance 37:11 37:19</p> <p>complicated 42:22 75:10,14</p> <p>comply 51:5,13,22</p> <p>complying 36:22</p> <p>component 61:10</p>
---	---	---	---	---

components 11:10 11:10	contamination 27:12 58:19	cover 85:17,20 86:1 86:1	definition 8:22 23:1 23:16 24:3 25:3 27:7 32:8 55:17 58:17 69:20,22 70:6 71:1,2,4,6 71:11 76:3 79:22 80:1 85:5,13 89:19,20	differentiates 12:16
composition 11:17	contending 16:20	coverage 82:17,20	degrease 25:9	differently 10:20 11:16 38:19 81:5
concede 59:7	contends 70:14	create 55:21 64:6,7 66:9	degreaser 68:20	difficulty 43:5,14
concept 57:11	context 79:20	created 35:2 46:5,8 64:10 67:7 73:9 78:5	degreasing 80:9	dilute 12:13
concern 74:14 83:9	continually 18:17	creates 29:18	delegate 82:12	dilutes 89:8
concerned 45:1 74:19	continue 21:22 27:15 28:4 47:22 53:19 57:1 76:2 76:16 88:13	creation 44:20	delegated 82:6,11	diluting 20:2
concerning 65:1	continued 2:22 3:1 3:22 4:1 14:20 19:21 25:8 29:2 56:7 89:15 90:17	credibility 12:4	delegation 82:14	dilution 61:16
conclude 84:2 86:14	continues 11:21 16:15 31:7 33:18 60:16 61:16 90:5 93:7	credit 32:5	deleted 24:7	direction 39:18
conclusion 12:5 36:13	continuing 23:8 24:19 48:2 77:10 87:17	criteria 63:10	demonstrate 54:15 94:8,16	directly 10:11 15:12 16:3 94:6
conditionally 93:16	continuous 14:16 17:10 20:12 21:19 22:2,5 31:8 46:11	cumbersome 42:22	demonstrating 94:21 95:10	director's 81:17 82:1 96:5
conditions 83:2	continuously 17:5 18:16	currently 15:21	demonstration 95:4	dirt 47:20
conducting 54:10	contradict 13:1	customer 29:14	depleted 78:12	dirtier 69:8
confidential 5:21 6:2,5,12	contradictory 12:22	cut 96:18	design 14:4,19 18:5 19:17 20:7 21:12 27:3 46:13 91:14	dirty 60:4
confidentiality 6:11	conveyance 45:16 45:17 46:2,16 56:6 86:18 92:21	cycle 16:12	designated 5:21	disagree 79:7 84:3 91:10
configuration 15:21	conveyances 45:5	C(5) 23:5	designed 11:22 18:20 19:17 20:8 77:16,18 91:15	discard 31:5 70:6 77:5 79:22
confirms 55:19	core 74:9	D	designer 61:8	discarded 15:12 31:17 32:18 33:16 34:9,20,22 35:2 44:14 45:6 46:6 70:8 71:17 71:20 72:1
conformed 32:21	Corporation 7:11 18:11	D 5:1	designing 45:12	discarding 14:1
confuse 69:12	correct 11:1 19:7 20:17 38:11,14 42:9 53:6,12 60:7 63:1 72:4 73:21 78:16 81:18,21 82:18 85:12	daily 38:21 39:21 41:4 51:9 54:21 55:9	determination 81:17 82:1 96:5	disconnect 6:9
confusion 9:2	corrosion 55:4	danger 80:20	determinations 81:12	discuss 9:5
Congress 30:21 31:14 56:1	counsel 3:6 5:10 7:3,5,9,15,17 50:14,15 96:17	dangers 74:18	determine 94:19	discussed 77:14
connected 6:10	course 25:21 62:22	darn 42:18	determined 37:16 95:1	discussing 45:5
connection 94:4	court 29:20	day 14:9 27:5 30:4 37:16 40:4 41:8 41:11 43:21 50:1 51:3 53:20 75:13 83:11	developed 13:21 16:7	discussion 12:18 75:7
connectors 84:10	courtroom 6:9	days 41:22 42:18 44:2 51:22 52:11 52:17,18,19 53:9 53:20,21	designed 11:22 18:20 19:17 20:8 77:16,18 91:15	disposal 22:7 31:10 31:11 45:1
considered 43:7 63:17 71:17 77:4 78:9,13		DC 1:18 2:2	designing 45:12	dispose 15:10
consistent 31:20 79:11 88:7		deal 42:20	determinations 81:12	disposed 31:18 32:1,10,19
consistently 31:2		dealing 79:21,22 80:1	determine 94:19	disposition 94:9
consists 14:13		debate 25:13	determined 37:16 95:1	dispositive 9:21 26:5 27:18
constituents 88:11 91:1		debates 13:6	developed 13:21 16:7	dispute 20:16 89:10
Constitution 2:5		decide 8:9 33:12 65:9 80:4,15	dictates 32:22	dissolve 12:12 61:21 62:6,9,16 64:3
construction 25:16 26:2		decided 26:4 27:20 46:7 65:12 67:12	difference 58:3 91:13,15,17	dissolves 62:20
construed 34:5 35:1 36:2		decision 9:20 10:13 32:15,21,22 38:18	differences 92:2	dissolving 18:3 58:6,13 59:21 62:21 63:3 68:11 69:2 76:21
contact 12:14		decisions 31:21	different 11:3,14 18:6,7 19:16,20 21:19 26:11,12 39:4,16 57:20 63:19 64:9 68:8 68:21 70:7,13,16 70:16 71:15 72:14,20 74:21 81:9 83:13 86:10 90:15,19 91:11 91:14	distinction 22:14
contain 95:3		defer 6:7		District 2:7
containment 39:2 51:10		define 85:7		Docket 1:12 5:5
contains 13:19		defined 30:20		document 87:11
contaminants 58:7 62:7,9,10,12,20 62:21 63:3 68:17 68:21 73:1 76:21		defines 23:5		documentation
contaminated 8:9 27:11 43:19 87:2		defining 23:17		

54:17 93:15 documented 64:22 documenting 54:13 54:14 documents 54:8 doing 18:4,13 32:13 40:9,10 41:10,17 48:6 54:11 57:1 67:20 68:2 74:10 77:11 88:4 dollar 9:8 done 37:8 57:3 69:2 74:16 86:20 DOT 35:16 doubt 47:5 62:18 92:17 93:7 down 14:11 30:6,6 53:16 downstream 10:4,6 11:20 12:15,21 13:3,13,20,21 14:14,22 15:21 26:16 27:1,9,16 28:1 38:5 42:12 44:9 56:5 57:7,19 58:8 60:1 64:11 64:11,17 65:21 67:5,6,15 72:22 77:6,13 78:3,6 79:1,14 81:7,8 85:10 86:19 87:4 88:21 89:11 90:6 90:11,16 91:9,19 91:21 Dr 15:6 61:14 dramatically 73:14 draw 13:18 drawn 18:7 30:11 31:15,15 drive 57:18 driven 33:19 35:6,9 drug 57:5 drum 48:12 69:11 drums 29:11 56:8 58:2 68:15,16 due 28:6 89:1 duration 53:3 during 53:12,15 62:21 83:14,14 duty 54:22 D.C 1:3 22:4 31:3 32:16 33:17 44:22	E 2:13 5:1,1,8 23:19 each 5:14 24:21 59:16 72:19 78:1 earlier 62:4 69:21 easier 66:14,21 East 2:4 easy 86:12 echoed 61:13 economic 32:5 economically 56:18 edge 39:11 Edward 2:13 5:8 effect 60:19 effective 24:1 egg 64:14 either 20:10 23:2 elevating 74:7 eliminate 9:1 emissions 40:16 emptied 53:11,13 53:21 empty 52:13 53:18 emptying 68:15 encountered 54:2 end 6:8 11:9 13:7 22:11 37:16 42:14 51:3 57:4 65:12 75:13 83:11 ends 22:11 energy 34:19 73:7 enforcement 54:8 engaged 41:21 engineer 86:20 engineered 46:13 64:8 engineering 18:4 20:7 91:14 engineers 14:4,6,12 14:18 65:13 enough 17:7 19:13 73:8,10 ensuring 11:19 18:2 entered 48:20 enters 18:8 37:7 93:2 entire 20:4 28:22 56:5 84:9 entirely 54:5 entity 88:3,3 environment 41:5 51:17 56:1 57:12 84:13 environmental 1:1	1:2 2:3,4 3:7 5:2 5:3 40:2 43:1 56:16,19 96:21 EPA 3:13 8:11 28:10 29:2,19 31:1 32:12,21 34:1,4 38:1 41:15 43:8 44:5 45:15 45:21 46:20 48:20 50:3,13 51:4,4 55:12 56:2 57:10 59:10,15 70:14 71:12 75:21 78:4 82:1 87:22 EPA's 7:16 8:11 15:6 25:19 30:19 30:19 36:7 41:15 43:13 48:4 61:1 88:15 EPS 72:21 equals 25:17,17 equipment 11:1,5 11:20,21 12:13 13:20 14:14 15:2 15:4 17:5,7,11 19:14 29:5,6,7 50:20 59:14 63:22 64:14 67:7 68:9 69:14 76:4 76:14,19 84:20 85:5,17,18 err 78:21 error 28:7 ESQ 3:3,4,5 4:3,4,5 essence 33:22 essential 27:3,4 49:22 essentially 13:5,7 21:9 44:14 65:5 74:9 83:17 85:16 establishing 93:20 et 19:9 even 18:21 35:13 36:4 47:4,16 53:16 54:6 63:9 78:10 86:6 event 6:3 eventually 72:12 ever 30:16 every 32:5 40:4 41:8,11 72:14 everyday 24:4 25:11 everything 42:11 44:7	evidence 12:22 13:1 32:2 35:11 60:19 88:18,19 92:8 95:5 eviscerate 85:4 exact 40:1 52:22 85:15 exactly 9:16 35:8 58:4 69:4 95:6 example 68:18 70:21 80:8 examples 48:7 excellent 96:17 exception 37:9 excerpts 9:19 exclusion 94:10 95:18,19 exclusive 66:17 67:16 excuse 33:19 executed 82:21 exempt 93:16 exemption 52:1 81:13 82:7 94:11 94:13 95:17,19 exercise 42:15 Exhibit 87:12 exhibits 46:21 83:12 exist 77:19 existence 77:11,17 existing 13:14 exists 43:1 49:1,20 67:21 69:9 77:20 exits 21:16 33:6 expert 34:3 55:18 61:7,14 77:1 78:11 89:3 express 10:16 expressly 10:1,4 12:8,19,20 13:2 14:19 26:14 47:2 extent 19:12 32:17 53:14 54:14 60:9 extra 83:8 eyes 78:19	37:11 42:21 43:17 54:17 58:1 60:16 75:3 93:9 facility 11:8 12:6 16:13 28:16 29:12 33:21,21 35:3,15 36:5,8,21 38:2 42:20 65:1 74:21,22 75:1 85:2 fact 8:20 9:6,8,20 10:12 13:2 18:13 26:18 27:18 30:14 32:18 33:16 43:7 54:15 59:8 60:20 64:5 66:22 67:15 68:11 69:11 72:13 73:13,22 76:1 84:4 86:21 87:3 89:14 factor 66:18 factories 41:8 facts 9:21 26:18 27:19 28:9,14 31:21 37:12 46:18 59:17 73:16 78:1 89:19 89:21 90:4 93:3,4 93:5 96:11 factually 11:6 fairly 68:14 72:15 fall 24:21 55:11 falling 19:11 familiar 7:2 23:3,8 far 18:22 farm 84:19 fashion 14:15 26:19 73:19 88:3 88:5 89:14 fast 46:10 fast-paced 14:8 favor 51:4 feel 81:5 feet 39:9 55:7 84:10 few 52:18 83:13 field 45:14 figure 24:22 67:8 69:18 71:8,8,12 figured 34:13 figures 52:22 find 6:4 25:18 26:17 40:3 60:19 61:3 70:7 84:4 87:14 88:18,19 88:22
E			F	
			F 94:5 face 28:8 facie 94:14 facilitating 10:17 facilities 10:15,19 11:13,16,18 12:8 13:14 15:13 17:10,12 36:18	

<p>finding 13:2,17 findings 8:20 9:6,8 9:20 27:17,18,21 60:20 79:12 fine 8:4 29:10 finish 11:11 15:15 90:1,1 finished 77:15 first 5:16 8:19 9:5 13:1 26:3 34:6,8 35:1 36:3 43:13 55:16 57:10 61:7 61:14 63:10 68:19 75:8 78:18 79:19 84:14 85:1 Fisher 4:5 7:11 fit 29:19 95:6 fits 55:16 flanges 15:2 floor 40:21 flow 17:8 49:15,16 flowing 67:17 73:5 flows 59:6 flush 65:11 fly 95:21 focus 45:20 focused 23:17 focusses 45:22 focussing 95:11 followed 7:4 following 43:14 49:7 52:2 footnote 29:19 force 73:7 80:3 91:5,6,9,9 forest 56:4 86:15 89:17,17,22 93:6 form 11:11 77:4 formal 81:20 forms 11:14 formulated 10:2,5 10:20 11:3,4,16 12:9,19,20 13:2 17:1 26:15 formulation 13:14 forth 65:18 forward 6:16 8:15 found 26:14,20 27:14 33:2 49:4 89:9 90:4 foundation 8:17 four 27:19 from 6:17 7:10,11 8:20 9:19 11:10 12:17 13:6 17:3 18:15 19:11 20:4</p>	<p>21:16 22:4 32:13 35:12 38:4,21,22 39:10 40:7,13 41:20 42:12 44:9 45:20 46:3,20 47:8 50:13,20 52:17 53:3,4 56:14,16,18 57:3 59:6 60:21 61:8 64:13,16 66:4,5,6 66:6,7 68:8,15 72:9 74:21 75:16 77:8 83:16,16 93:1 96:4 front 45:10 full 6:19 Fulton 2:12 5:7 9:15 30:1,7,13 36:4,10 37:13,15 37:22 38:9,12,16 41:12 42:11 44:10 52:12 53:2 53:10 54:1 73:12 74:6,20 81:9,19 81:22 82:15,19 96:1,9,14 fun 45:11 91:4 function 10:21 11:4 16:15 18:1,2 19:1 19:6,9,16,20 21:14,15 22:1 24:20 25:1 47:13 48:14 59:19 60:6 60:8 61:2 63:16 65:7 67:16,17 68:6,7 79:11 85:3 87:18 91:14 functional 46:12 functions 10:2,5 12:9,20 13:3 18:17,18 20:6,8 26:22 27:2,3,8 49:7 64:2 93:8 fundamentally 31:1 further 6:20 51:15 61:11</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 5:1 gallon 32:5 gave 48:6 57:6 68:19 general 1:8 4:12 5:4,12 7:8,11 18:11 93:8,18</p>	<p>generally 7:1 12:5 generated 34:7 50:19 69:13 77:8 generation 18:10 42:13 50:22 gentleman 45:12 geographic 16:11 36:20 geographically 18:14 geography 16:10 48:18 94:18 gets 20:18 22:8 40:22 41:1 53:8 94:17 96:12 getting 22:3 34:12 give 46:22 52:22 65:4 72:7 Given 69:3 glad 48:10 GM 5:15,19 7:3,20 16:4,22 33:8 36:17,22 37:10 37:18 51:5,8 56:7 56:14,18 57:2,3,6 57:13 59:7 60:21 64:8 67:12 68:10 68:22 72:12,15 73:17 74:21 81:16 83:18 93:17,22 GM's 8:9 30:13 50:18 54:8 55:18 55:21 73:22 86:8 go 20:13,20 25:4 27:22 29:4,22 30:17 37:14 39:7 39:8 43:16 46:18 53:19 62:20 76:19 82:15 85:1 93:22 goal 51:15 goes 19:2 21:17 22:12,15 31:22 33:9,14 65:16 69:4,5 84:10 86:11,19 going 9:15 14:19 16:17 20:3 21:17 35:5 39:17 41:6 41:20 43:3 45:9 46:11,12 48:8 49:3 55:5,6,9 58:10 59:16 62:4 62:7,14 63:6 68:17 70:6,13</p>	<p>71:22 72:14,16 74:15,17 84:14 84:15,16,18 88:20 91:17 gone 32:21 good 5:10 41:16 45:9 50:11 56:17 57:11 73:8 76:8 93:19 Government 79:14 79:18 84:4 Government's 78:19 81:1 grade 34:15 granted 30:21 gravamen 86:8 gravity 66:6 great 16:6 92:16 greater 44:2 green 65:17 ground 37:18 48:8 75:2 guess 20:22 44:15 53:2 77:22 82:21 92:5 gunk 47:8,9,20 Gunning 8:20 12:2 26:14 27:14 28:1 28:7 49:3 80:19 92:21 93:3 Gunning's 9:6,19 10:13 guy 35:12 41:10</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 39:12 handle 77:7 handled 41:1 hands 91:3,4,7,8 happen 15:6 34:20 37:20 57:21 60:1 74:17 75:6 77:20 87:9 happening 35:8 46:10 48:5 70:18 75:9 happens 55:7 62:13 74:20,22 75:2 happy 20:19 30:3 hard 11:11,15 78:4 harden 13:13 harkening 44:21 having 41:7 43:5 73:17 hazardous 18:12 35:10,16 37:1</p>	<p>42:2 43:9,12 44:9 45:8 50:21 60:15 66:11 75:17 86:7 head 76:12 headquarters 50:16 61:22 heads 55:11 health 41:5 51:16 84:13 hear 30:8 78:17 hearing 2:10 5:11 6:8,9,16 83:13,14 96:22 heavily 35:15 help 65:11 67:1 71:6 72:6 91:13 helpful 6:4 64:19 80:18 helps 49:7 her 12:4,8 heretofore 45:6 high 39:19 highways 35:6,10 historical 45:3 historically 18:10 57:13 history 24:5 29:18 holding 55:14 holdings 22:4 Honda 74:22,22 Honor 7:6,14,22 9:10 30:3 39:6 52:15 54:6 78:22 83:3 95:6,15 Honors 88:8 hopefully 55:5 host 76:5 hours 53:19 Howmet 12:17 24:14 25:13 26:13 72:11,18 87:21 human 41:5 51:16 84:13 hundreds 14:9 27:5 39:8,8,8 50:1 84:10 hypothetical 58:4 hypothetically 79:7</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 29:1 44:13 52:12 56:17 identical 8:11 86:4 90:11 identify 7:4</p>
--	--	--	---	--

ignitable 43:8	57:1	23:10 26:14	keep 39:3,21 51:4,9	law 43:1
III 4:3	integral 46:9	27:14 28:1,4,7	60:16 65:16 67:2	lay 8:17 22:20
illegitimate 67:18	integrated 14:15	29:3 30:1,7,13	67:14 73:4,5	leading 38:21
79:3	integrity 37:4	36:4,10 37:13,14	keeping 19:12 58:8	leak 40:13 54:18,19
Illinois 3:10	intend 6:1 7:21	37:15,22 38:9,12	67:17 73:2	55:2,6
immediately 15:22	intended 10:5 18:2	38:16 41:12 42:4	keeps 17:18 49:14	leaks 54:16 55:2
impact 84:13	22:21 24:10	42:7,11 43:5	49:15 85:2	84:12
implication 13:5	40:22 47:4,12	44:10 48:4 49:3	Kendall 15:6 61:15	least 8:16 10:16
implications 38:17	48:3 56:1 93:8	50:2,6,9 51:18	kept 14:2	52:22 79:7,12
41:12 43:15 44:8	intensive 73:13	52:4,12 53:2,10	kicks 33:9	85:6 86:8 95:14
implicit 68:14,21	intent 28:21	54:1 56:12 58:12	kind 24:21 40:2	leave 15:4 53:17
implied 81:14	interested 30:9	59:3 60:5,18 62:3	41:14 81:13	leaves 13:19 53:4,5
important 6:15	interesting 13:9	62:19 63:2,6,7,18	82:20 87:9	55:15
26:3 48:21 49:22	30:7 44:11,18	64:15 66:13,17	kinds 15:1 54:3	leaving 36:1
50:17 55:3 64:9	interpret 23:20	67:11 68:1 69:17	68:8	left 14:18 43:21
64:21 75:12 80:5	31:20 63:9	70:22 72:2,5,8	know 6:14,18 9:12	left-hand 70:12
80:16 87:21	interpretation 19:7	73:12 74:6,20	12:2 22:4,6 23:7	legal 11:2,22 13:6
inappropriate	63:8 70:1 96:7	76:16 77:16	30:21 39:22	28:7 63:7
79:16,19	interpreted 31:2	78:14 79:6,10	42:16 53:15,17	legally 77:4
include 25:22 26:1	interpretive 96:3	80:19,22 81:9,19	65:4 80:16 81:4	legislative 29:18
52:1	interreact 25:2	81:22 82:15,19	91:3,8 92:7,13	legitimate 73:17
includes 21:10	interrupt 56:12	83:4,21 85:10,14	93:18 95:3	78:19 79:2 87:18
25:21	70:22	85:20 87:7,15	knowing 55:10	legitimately 24:17
including 53:10	interruption 20:10	88:19 89:9 90:7,9	known 94:9,17,22	59:12
70:13 83:18	intervening 32:20	92:2,4,21 93:3,11	knows 45:14	less 42:18 51:21
incompatible 77:18	intricate 45:8 46:9	93:14 95:9 96:1,9	kudos 67:9	52:17 81:20
inconsistent 28:21	involved 10:15	96:14,16	Kyle 4:3 7:6,7,22	Let 7:3 56:12 57:1
29:17	involves 26:12,13	Judges 5:7	8:5,7 9:16,18	57:9 62:3 70:22
increasing 38:12	irrelevant 13:8,10	judge's 28:13	10:9 11:6 13:9,17	90:9
Indiana 4:8	isocyanate 11:7	July 5:13	15:11,17 16:6	letter 46:20 81:15
Indianapolis 4:8	issue 8:8,8 16:10	June 61:9,17	19:8 20:1,18	83:16 88:12 96:3
indisputed 32:2	23:11 37:22 38:1	jurisdiction 30:19	21:11 23:9,12	letting 30:18
industrial 22:2,6	38:6,13 40:2	34:4 88:15,16	28:5 30:3,12,17	let's 49:9 53:16
31:8	58:17 59:4 62:1	just 10:21 12:6	36:9,12 37:21	57:2 65:20 79:6
industry 34:11 54:4	94:18	13:4 15:13 21:8	38:1,11,14,20	87:15
66:2 74:1 83:18	issued 82:4,5	25:6,7 39:10	41:15 42:6,9,13	level 81:16
84:16,17	issues 35:11	40:11 42:14	43:13 45:9 48:10	life 16:12 80:7
inevitably 64:13	items 70:13	44:10 45:7,16	50:4,5 51:2 69:20	light 84:17,17
67:21		46:3,15 47:7,17	69:21 71:9 87:8	like 8:2,16 10:14
inform 71:6	J	47:19 48:5 49:1,1	90:7,8,13 92:5	19:3 20:20 27:4
information 5:21	J 52:2	49:19,20,20 55:1	93:12 94:2 95:14	30:8 37:18 39:10
6:2,5,13 83:8	Jackson 3:9	56:2 58:8 59:3	96:6,10,15,19	39:11,14,16 41:1
informed 45:2	job 28:13 54:22	61:16 63:11 65:4		41:9,10 47:7,19
ingenious 34:12	77:15	67:10 69:8,9,15	L	51:1 52:19 59:14
ingredient 77:13	John 4:3 7:7	69:15 70:22 74:1	L 1:22 2:6 3:3	62:13 72:18
inherent 89:9	john.kyle@btlaw...	75:3 76:13 77:10	lack 37:3	84:14,15 86:14
initial 27:10	4:10	77:11 81:9 83:8	laid 9:6	91:2 92:5
inspect 39:20 40:4	joined 50:15	86:14 87:8 88:21	landscape 73:15	line 18:7 30:11,15
inspecting 54:20	judge 2:11,12,13	89:15,22 90:21	language 25:2	31:14,15 40:4
inspection 41:4	5:10 7:13,20 8:4	91:1,3,4,6,7	58:16 71:10 93:4	41:8,19 67:2
54:13	8:6,20 9:5,13,15	92:20 96:1,11	95:12	lines 11:19 14:8
inspections 38:21	9:19 10:7,10,13		large 52:19	40:1 49:14,15
39:5 51:9,10	12:2 13:4,16 15:9	K	larger 54:18	51:7 55:1,7 57:19
inspector 54:21	15:15,16,19,20	Karen 3:3 7:15	last 18:12 22:3	62:13 64:21
instance 72:18 80:9	18:21 19:19	50:13	late 13:22 62:1	66:10 67:6,14,17
instead 8:2 15:20	20:14,22 22:17	Kathie 2:11 5:7	Laughter 9:9,17	69:4 73:5 75:22

<p>liquid 40:18 66:22 listed 47:16,16 listen 47:1 listening 12:3 little 30:8 37:9 72:14 76:3 81:9 LLP 4:6 located 15:22 locations 16:12 logical 42:14 87:10 logs 51:9 long 30:4 47:22 51:21 53:20 55:8 92:10 longer 16:21 24:9 26:9 28:18 38:10 41:22 58:19 look 6:15 8:15 18:14 22:22 27:6 46:16 49:9 56:3 56:22 59:16,18 59:20 61:3,4 62:20 67:11 68:3 68:3 70:5 71:5,15 72:2,5,9,10,10,11 72:12 74:21 75:8 77:22 82:3,16 86:16 89:16 90:3 90:4 92:20 looked 68:12 looking 54:22 55:1 55:3,4,4 57:13 63:12 68:2 69:17 71:1 80:14 81:10 89:18 looks 75:3 loop 43:18,20 44:1 loophole 36:1 55:22 lose 27:22 64:1 loss 9:12 lot 12:17 14:18 25:13 26:10,11 37:19 lots 50:7 love 30:4 low 65:22 lower 34:15 lowers 60:2</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M 4:3 made 24:6,12 56:14 77:6 83:12,18 88:12 main 8:8 10:11</p>	<p>80:4 maintain 16:4 maintaining 72:22 maintains 61:12 maintenance 60:12 make 8:16,19 13:12 14:20 17:7 20:7 25:13 30:1 34:15 34:18,21 42:18 44:5 46:13,21 66:14 82:7 90:22 93:19 makes 43:4 66:21 making 33:7 58:7 79:21 man 21:12 manage 64:11,12 67:8 managed 18:11 32:4 44:20 management 21:9 45:8 50:19 69:15 75:14 managing 45:6 manifesting 37:10 manifold 57:4 72:16 manifolds 10:3,22 11:5 16:3 55:15 55:20 58:22 59:1 59:12 63:21 91:12 manner 11:3 manufacture 67:5 manufactured 60:22 manufacturer 21:13 manufacturers 83:6 manufacturing 22:11 38:2 69:14 86:18 many 52:20 61:5,5 62:14 89:6 Margaret 77:1 market 94:9,17,22 95:12,13 marking 51:14 Marshall 78:10 material 5:20 8:10 8:22 10:16 11:15 12:19 14:6 16:3 16:19,20 17:2 18:11 20:14 21:20,21 22:5,9</p>	<p>23:6 24:3,15,17 24:18 26:8,10 27:7 30:14 31:7 31:12,17,20,22 32:8,9 33:5,6 35:2,5,9,16,18 36:17 37:6 39:17 42:19 43:7 44:19 45:7 46:5 47:1,3 50:19 51:21 52:9 53:14 55:14,18 56:7,11,15 57:5 57:14,15,16 58:4 58:8,17,18 64:21 66:4,15 67:1,3,13 69:3,13,20 70:20 71:2,3,3,7,19,21 73:18 74:15 75:9 75:16 77:3 84:4 87:13 89:10,12 89:13,21 90:5 93:1,1,21 94:8,10 94:15,19 95:1,5 95:10,16 96:12 materials 21:10 32:18 59:22 64:3 69:3 70:8,10,14 71:11 79:13 81:12 83:5 87:17 93:15 matter 5:12 38:13 41:17 53:9 matters 44:5 may 5:16 6:10 8:3 21:5 31:14,15 39:16 50:12 55:22 56:17 57:20 62:16 64:8 64:19 80:18,18 84:21 96:3 maybe 8:18 36:9 39:11,19 59:6 87:20 95:7,7 ma'am 79:9 90:8 McCULLOCH 3:4 7:18 50:15 mean 13:5 26:5 31:5,11 36:13 37:17 40:20 45:3 47:5 59:4,20,21 60:4,19 68:2,7 69:19 77:18 78:8 84:8 90:14,16 meaning 28:13 31:2 33:16 means 26:8 36:14</p>	<p>54:6 59:21 71:7 76:10 77:21 meant 33:19 meet 32:22 94:10 94:12,13 95:17 95:19 mentioned 44:12 73:12 87:11 mentioning 21:5 mere 78:7 merely 48:19 Meridian 4:7 met 83:3 metal 68:20 80:9 MICHAEL 4:4 michael.scanlon... 4:11 Michelle 4:5 7:11 Michigan 18:8 81:10 96:4 Michigan's 8:12 middle 38:3 might 27:17 Mike 7:10 mile 39:12 mind 51:4 minor 37:3 minute 35:4 minutes 5:15,17 8:1 8:2,3 30:2 mirror 65:21 misleading 89:2 missing 43:12 mixing 68:8 mixture 8:10 10:18 11:9 13:18 14:2 14:19 15:3,10,11 17:4 18:9,15 19:1 19:5,10,12,15 20:5 22:12 26:21 29:4 32:6 33:18 37:1,4,7,9 38:5 39:1,9,18 40:8 43:3,11,19 44:14 44:19 46:2,13 47:13,14 48:19 49:1,6,15 54:16 55:10,14,16 61:10,11,20 64:12 65:3,5 66:3 67:15,21 70:15 74:2 77:2,3,10 87:1 90:11 92:10 mobilize 12:12 mobilizes 49:13 89:8</p>	<p>mobilizing 20:2 modify 82:22 molecule 43:21 52:7 92:10 molecules 43:18 92:12 moment 8:21 56:13 87:8 money 9:10 monitoring 51:15 month 53:17 months 92:13 more 21:3 34:12,12 44:10 45:17 52:10 56:6 60:4,4 60:8 63:11 68:1 68:11 69:7 73:4,9 86:6,17 87:5,19 89:4 90:21 95:12 morning 5:10,11 7:17 18:22 50:11 most 15:12 26:3 42:21 58:16 80:5 80:15 motion 73:6 Motors 1:8 4:12 5:5,12 7:8,11 18:11 93:9 mouth 78:18 move 33:18,20 51:7 66:4,15,18 67:1 moved 56:14 movement 10:17 17:11 21:20 66:5 moves 50:20 moving 22:9 67:3 73:1 much 26:12 47:9 52:18 57:22 96:15 multiple 12:18 25:14 must 26:2 31:2 94:8</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 5:1 NAIOC 61:15 name 7:6 50:12 Nash 96:2 Nash's 81:15 nation's 35:6,9 near 37:18 necessarily 21:4 necessary 18:19 need 21:14,15</p>
---	---	--	--	--

<p>36:16 41:13 42:2 43:6 44:2 51:20 52:10 53:22 58:22 64:16 65:18 74:19 75:8 76:3,14 85:5 88:10 92:7,14 93:5 95:4,6 needed 52:5 75:19 needs 27:19 29:16 65:8 84:20 net 32:18 never 17:6 32:9,21 34:21,22 44:4 45:21,21,22 new 33:22 34:1,3 58:6,14 61:19 62:15 63:15,16 63:16 67:21 68:1 68:2,17 76:22 77:12,12 90:19 90:21 newly 33:1 next 46:22 47:11 70:17,17 71:22 74:17 75:10 nice 11:11 nineties 56:14,20 none 32:2 nonetheless 27:13 North 1:9 4:13 5:5 Notary 2:6 noted 37:3 nothing 45:17 56:6 60:2,3 61:19 69:6 73:4 86:17 91:21 notice 81:10 noticed 65:6 notion 25:10 74:16 number 5:5,6 10:1 26:20 46:6,6 70:13 83:6 N.W 2:5</p> <hr/> <p style="text-align: center;">O</p> <p>O 5:1 obligation 36:7 observations 54:12 obviously 23:20 30:20 44:6 49:6 occasions 31:4 occur 14:10 32:3 40:16 84:21 occurred 65:10 occurring 70:17 occurs 13:7 60:10</p>	<p>64:17 odd 39:13 OECA 7:18,19 50:16 off 14:6 16:16,19 17:1 31:22 33:9 33:14 36:21 37:10,11 41:7 46:1 94:20 offer 83:17 office 3:6 50:16 officer 56:3 86:9 officer's 55:13 often 52:13 75:6 oh 45:16 46:15 48:22 49:19 76:15 85:2 89:22 Ohio 8:11 okay 29:6 46:11 50:2 59:20 80:10 80:13 81:19,22 91:7 96:14 once 16:2,16,19 17:1,9,11 18:8 21:1,7 22:8 26:8 33:5,9,14 40:20 46:7 63:14,21 74:16 one 10:14 12:6 14:16 25:12 26:13 28:10 33:7 37:2,4,8 39:18 41:8,10,19 42:21 43:2 44:4,8,10 46:6,19,21 54:17 56:16 58:3 59:5 65:9 68:5,6 70:8 73:22 75:3,4 77:1 80:21 83:22 87:1 89:6 92:9 96:1 ongoing 53:13 only 30:20 40:3 47:14 52:10 57:14,19 59:5,11 61:12 77:20 82:11 89:6,20 on-the-ground 38:17 open 49:14,16 operation 14:16 16:2 56:4 80:17 84:19 86:16 operations 54:3 76:6 opportunity 34:8 option 65:9</p>	<p>oral 5:4,22 6:19 7:8 87:22 order 5:13,14 6:10 63:16 67:13 73:6 78:9 ordinary 22:20 original 24:7,8,11 24:11 originally 24:8 Orion 11:8 39:12 65:1,22 66:1 77:14 other 11:12,12,16 11:18 19:19 24:22 29:5,6,7 38:15 39:22 42:11 46:19 58:2 59:13 68:1,16 71:5 72:19 76:6 80:20 83:6,12 88:11 96:1 others 12:7 otherwise 17:19 ourselves 82:12 83:9 out 19:11 24:12,22 28:3 29:4 33:1 34:13,15 36:1,7 40:7,18 42:17,19 43:3 52:7 58:2 62:16 65:19,20 67:8 68:15 69:18 70:9 71:8,8,12 76:15 77:19 79:20 91:21 94:20 95:2 96:18 outlined 5:14 outset 80:17 outside 16:1 36:7 51:11,12 80:17 over 34:4 35:6,9 39:10 64:4,5 74:7 88:16 overhead 55:8 overlap 86:2 overly 32:17 33:3 33:15 own 54:8,14 55:18 59:17</p> <hr/> <p style="text-align: center;">P</p> <p>P 5:1 page 87:22 pages 61:9,17 paint 11:7 12:13,14 13:12,19 16:2,8,8</p>	<p>17:3,15,17 18:15 20:5 27:5,11 31:13 34:14,15 34:18,21 38:4,22 39:9 40:1,8 44:9 47:5,17 49:10,22 50:21 53:4,4 55:15,20 56:6 57:4 58:22 59:1 59:12 60:1,2 61:11 65:14,15 65:16,16,19 69:1 69:4 75:16 77:15 87:3 91:20 painted 84:21 painting 14:8,16 16:1 20:11 22:10 50:20 67:7 76:6 76:14,19 84:19 91:20 paints 86:19 paint's 89:4 PANEL 2:10 panoply 39:5 40:19 74:18 paragraph 49:5 parlance 25:11 parsing 52:8 part 19:16 20:3,11 22:6 31:9,11 45:15 46:10 67:4 82:10 85:8,10 86:2 89:9 particular 12:1 28:9 31:7 54:3 59:17 77:17 84:1 84:3 93:17 parties 2:8 5:19 6:1 6:10,14 8:7 parts 25:20 47:9 party 23:2 passive 49:2 Peaceman 3:3 7:14 7:15 50:6,8,11,13 51:20 52:8,14 53:6,12 54:5 57:9 58:15 59:10 60:7 61:4 62:11 63:1,5 63:12 64:7,19 66:16,20 67:19 68:13 70:3 71:14 72:4,6,9 73:21 74:11 75:5 76:17 77:22 78:22 79:9 79:18 81:3,18,21 82:3,18 83:2,10</p>	<p>84:8 85:12,15,22 87:7 89:1 92:18 96:2 peaceman.karen... 3:12 people 18:7 22:19 34:12 35:4 39:3 41:7 46:7 55:8 72:12 80:3,14 per 18:4 perform 10:2,5 11:18 12:9,10,20 13:3 16:15 21:14 21:15 24:19 27:8 27:13,15 47:22 48:15 49:7 61:2 79:14 90:5 93:8 performed 16:22 18:20 20:6,8 performing 10:21 18:1,16 19:2,6,8 21:22 40:22 47:12,17 67:20 85:3 performs 18:18 26:22 49:8,21 67:16 perhaps 67:16 75:11 78:17 80:12 period 44:1 54:10 permit 40:17 41:14 41:18,19 42:2,15 42:16 43:6 44:3 51:19,21 52:1,5 52:10 53:22 92:7 92:15 permitting 41:13 person 41:9 person's 22:20 perspective 56:16 56:19 perspectives 6:16 persuasion 93:19 pertinent 58:16 Pete 7:18 50:15 PETER 3:5 phrase 23:15 24:2 physically 43:22 Ph.D 61:15 pick 76:20 picked 23:14 57:5 pictures 39:15 piece 22:3 pieces 14:14,17 15:1 46:17</p>
---	---	---	--	--

<p>pigments 34:17 pipe 39:8 43:2 66:21 85:14 pipes 13:20 15:3,21 29:4 38:21 39:12 39:15,16 42:4,6 43:9 45:5 52:5,6 52:9 57:15 58:5 69:12 75:15 86:11 91:19 92:15 pipng 51:11 53:8 56:5 64:11 75:19 76:5 77:6 84:9,14 84:15 85:1,7,18 87:4 place 28:11 34:6,8 56:15 63:10 68:6 68:6,7 91:11 places 18:7 68:15 plain 25:2 28:8,12 28:13 93:4 plant 31:19 33:5,6 33:12 38:3 plants 39:7 76:6 please 5:9 6:6 50:12 plenty 50:9 95:4,5 plumbing 69:16 75:15 plural 25:17,17,22 26:1 plus 47:17 point 8:19 9:16 10:11 14:7 16:21 18:9 22:12 25:12 40:16 42:13,14 46:19 50:22 66:4 66:5 82:22 83:22 93:13 94:22 points 8:17 10:11 83:14 policy 74:8,12 portion 9:20 91:14 95:11 posed 6:3 position 52:5 55:21 78:14,22 79:3 81:15 possesses 26:21 48:13 49:20 possessing 48:20 possible 43:22 55:10 pot 53:11,11 potential 84:11</p>	<p>potentially 64:5 84:18 pots 15:2 53:15,17 66:6 84:9 powers 30:21 PPG 61:8 practice 45:3 Preamble 24:12 25:6 28:20 68:18 68:19 72:7,8 75:6 75:7 80:7 precisely 52:9 precursor 55:2 predominant 28:2 28:5,11,16,17,18 29:8,13,14,21 78:15,21 79:15 79:19 80:2,13 preliminary 8:17 8:19 premise 57:9 prepared 6:17 prereclamation 73:17 prerequisite 19:21 present 2:7 64:4 presented 6:21 88:6,8 presenting 7:8,16 presents 74:18 preserve 6:11 presiding 5:8 55:13 56:3 86:9 pressed 78:4 presuming 82:5 pretty 24:6 52:16 52:16 64:22 prevails 37:17 prevent 11:10 19:10 previous 62:17 prima 94:14 primary 6:18 29:8 33:11 principal 74:7 principle 9:11 prior 8:1 15:9 21:2 36:5 53:8 priority 74:8 probably 52:21 61:14 64:7 problem 22:7 31:10 31:11 38:7 45:2 45:15 64:4,8 69:15 74:20 80:2 problems 54:2,6</p>	<p>65:2,6 proceed 5:16,18 8:6 proceedings 1:17 2:1 process 14:17 20:12 21:4 22:1,2 22:6,11 30:15 31:8 46:11 54:7 57:7 67:4 processing 21:3 24:9 58:20 produce 25:1 67:4 produced 26:9,11 27:8,14,16 28:19 33:8,18 34:6 36:3 47:2 48:1,15 58:18,21 59:9,18 59:19 78:3 81:8 90:6 product 24:1,19 34:4,4 47:12,17 47:22 48:2 67:12 88:13,14,15 production 14:11 21:4 53:13 67:4 products 33:22 88:16 program 35:13 82:10,16 84:7 programs 40:6 42:22 promise 16:17 pronouncing 44:17 proper 36:12 82:14 95:20 properly 26:4,7,14 34:5,22 36:2 82:4 82:5,7,21 properties 49:2,20 76:10 78:6,7 proposition 92:9 protect 41:5 protecting 51:16 protection 1:2 2:4 3:7 5:3 55:22 prove 92:22 94:14 proved 80:18 provide 51:10 provided 25:15 36:20 82:20 provision 23:8 81:11 82:13 95:9 Public 2:6 pun 22:21 purge 8:9,10 10:1</p>	<p>10:17,20 11:2,9 11:15,17 12:5,6,7 12:11 13:15,18 14:1,9,19 15:2,3 15:10,11 16:5,12 16:13,14,21 17:4 17:15 18:9,15 19:1,5,10,12,15 20:5 21:13,14 22:12 26:21 28:15 29:3 32:6,7 33:18 37:1,4,7,9 38:5,22 39:1,9,18 40:7 43:3,19,19 44:13,19 45:22 46:2,13 48:19 49:1,6,6,15 53:11 53:11,15,17 54:16 55:10,14 55:16 57:2 58:21 59:1,8 61:8,10,10 61:19 63:18,19 64:10,12,17 65:3 65:5,10 66:3,3,6 67:6,15 68:22 69:6 70:15 74:2 76:18 77:2,2,5,10 78:5,19 84:9 87:1 88:5 90:10,11,14 90:15 91:22 92:10,10 93:7 purging 46:9 purpose 8:22 10:17 11:19 12:10,11 12:16,18 13:11 13:13 16:22 17:14 24:9,10,11 24:18,20 25:14 26:13,17 27:13 27:15 28:3,5,11 28:16,17,18 29:8 29:14,21 33:8 40:12,22 41:4 47:4,11,18 48:1,3 48:15,16,17 49:16 55:20 58:20 59:6,8,18 60:22 63:15 68:22 71:8 77:17 77:20 78:3,15,21 79:15,19 80:2,22 89:15 90:5 purposes 5:22 26:9 26:12 28:2 79:8 81:4 pursuant 5:12</p>	<p>push 73:10 pushing 66:11 put 25:4,18 26:4 51:2 56:7 57:18 64:12 65:21 69:12 75:15,18 77:7 80:7 91:6,8 95:5 putting 58:5 69:10 78:17 p.m 96:22</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified 74:12 quarrel 75:21 quarreling 57:10 question 6:3,8 10:7 11:6 15:18 16:6 16:18 17:22 21:6 22:18 23:3 27:12 38:16 41:16 44:10 45:10 51:1 57:10 59:4 62:4,7 63:7 71:4 72:13 79:2,8 83:21 85:2 87:16,21 88:9 90:9,14 92:3,4 96:1,8 questions 6:22 8:15 24:14 50:7 87:5 87:20 quit 14:1 quite 52:9 quoting 88:2</p> <hr/> <p style="text-align: center;">R</p> <p>R 5:1 Raack 3:5 7:18 50:16 raise 94:7 95:16 raised 48:10 ramifications 84:1 84:6 range 52:15,16,21 ranged 52:17 rather 77:6 raw 65:15 RCRA 1:7 5:6 18:12 20:16 25:19 35:7,10,13 36:15 39:4 41:13 41:19 42:1,2,15 42:16,20 43:10 51:5 55:3,22 75:4 75:6 78:11 85:9 88:15 92:15</p>
---	---	---	---	--

<p>RCRA-05-2004-... 1:13 5:6 re 1:6 5:4 reached 84:5 reaching 38:2 reaction 11:14 read 22:19 26:6 31:4 35:22 43:16 45:11 72:8 89:5 94:3,4 95:7,15 real 35:2,2 realize 10:10 realized 65:14 really 21:7 22:2 23:13 24:14 25:5 26:7 29:20 34:8 36:18 37:21 38:7 39:13 45:6,14,21 50:17,17 51:3 55:3 56:21 58:11 59:21 62:17 66:5 70:4 73:4 75:13 76:11 85:3,4 86:12,13 90:20 94:5 reason 27:22 57:13 63:13,21 74:7 reasons 55:12 65:13 rebuttal 5:17 7:21 30:2 61:1 recall 43:10 recently 94:3 recirculate 76:20 recirculation 42:10 43:18 53:19 65:15,22 66:1,2,7 66:9 reclaim 67:10,12 75:20 76:7,9 reclaimed 14:3 20:15 30:14 32:6 67:13 71:22 74:15 84:22 88:14 92:11 reclaimer 73:16 reclaiming 24:17 36:6 56:15 67:9 reclamation 20:16 21:2,4,10 33:20 33:21 35:3,15 36:4 44:20 57:11 70:18 74:8,17 77:3 reconstituted 32:7 record 5:20 7:4</p>	<p>12:21 13:1 32:2 35:11 37:12 39:14 40:5 52:22 60:18 61:1 83:7,8 83:15,20 84:2 88:18,20 89:10 92:6,8,16 95:3 recordkeeping 39:5 41:3 records 39:3,21 54:15 recover 86:21,22 recovery 34:19 67:10 recycled 21:10 70:9 81:12 recycling 70:10 77:4 95:13 red 65:17 reduce 61:11 89:3 reduction 61:12 refer 6:2,5 8:12 56:20 reference 21:6 57:7 71:5 83:4 referenced 54:9 references 61:5 referring 23:4 refers 70:12 Region 3:8 5:18 7:5 7:16 50:13 61:22 regional 3:6 7:15 50:14 regs 96:5 regular 53:13 regularly 53:11 regulate 35:7 38:4 43:2 57:16 74:19 regulated 21:9 35:15 36:14,15 40:14,15,17 57:8 70:20 71:20 75:1 85:9 regulating 44:8 74:5 regulation 20:17 58:16 69:18 70:2 70:5 85:16 regulations 22:17 22:22 35:17,18 58:13,15 70:20 71:18 72:1 74:14 76:4,11 77:5 78:10,13 80:6,7 81:2,11 82:8 85:6 85:7 86:2</p>	<p>regulators 40:6 regulatory 9:3 21:5 33:11 36:7 40:11 40:19 42:22 55:17 Reich 2:13 5:8 10:7 10:10 13:4,16 15:9,16,19 18:21 19:19 59:3 60:5 62:3,19 63:2,6,18 64:15 66:13,17 77:16 87:16 related 25:12 relates 16:9 relating 81:12 relationship 9:2 relatively 73:15 release 40:18 54:2 released 57:2 releases 84:12 relevance 48:11 relying 90:17 remarks 6:18 remember 40:13 46:19 50:17 62:5 64:22 75:12 remind 76:13 86:5 remotely 6:10 removed 17:19 19:13 render 92:18 renege 49:19 repeatedly 89:7 reported 1:21 41:3 reporting 35:19 41:2 represent 42:21 representing 7:7 requested 5:19 require 38:20 42:15 51:14 58:13 78:11 required 42:17 requirement 51:16 78:8 82:22 requirements 35:19,20 40:20 51:13,22 52:2,3 86:4 requires 41:2 reserve 5:16 7:21 8:1,2 residue 13:19 15:4 15:5 26:19 42:7 43:9 49:11,12 52:6 60:6 62:8</p>	<p>residues 91:18 resins 34:16 resolubilization 60:9,11 resolubilizes 92:1 resolubilizing 60:5 resort 93:5 respect 28:6 89:1 94:16 respective 2:8 respond 48:4 Respondent's 87:12 responding 61:22 responsibility 54:22 responsive 6:22 rest 26:18 restriction 68:9 result 24:9 27:9,11 44:7 57:20 58:19 67:21 69:13 results 28:16 29:18 64:13 resuspension 60:12 64:20 retain 78:5 retaining 48:13 retains 49:1 79:5 retention 78:7 retrofit 51:7 reuse 14:6 74:7 75:2,8 reused 14:3 23:1,6 23:13,15,17,21 23:22 24:2 30:15 69:22 71:6,10,16 rewriting 28:17 ridiculous 44:6 right 11:7 17:22 20:20 38:9 56:21 62:19 63:10 73:20 83:1 93:4 95:22 right-hand 70:15 rise 81:16 96:20 risk 40:3 road 94:20 roads 57:5 room 2:5 28:6 29:15 39:11 40:9 Royster 72:11 rule 8:11 24:5 25:19 28:6,7,12 28:13,14,17,19 28:22 29:1,16,16</p>	<p>32:13,14,16,22 33:1,2,13,15 38:6 38:8 43:11 45:19 45:20,20,21 46:1 46:4,17,17 47:13 47:14 51:3 79:21 90:3 93:5 96:11 rules 26:6 30:19 31:1 37:1 ruling 84:7 rust 55:4</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 5:1 Safety-Kleen 29:10 29:11,13 35:12 47:7,20 57:3,4,17 57:22 58:1 59:14 68:3,4,13 72:10 74:3 80:12 Safety-Kleen's 35:8 74:4 same 8:13 11:15 18:18 19:10 24:2 39:17,17 40:1 47:11 57:16 58:4 58:11 63:3,11 64:21 65:5 66:20 68:7,11 69:3,5,10 72:22 75:3 80:22 81:3 82:13 86:12 87:17 88:3,5 89:14 90:11,22 Sasserville 61:22 88:12 satisfying 64:18 saturated 60:4 69:7 saturates 47:10 save 14:5 saved 32:4 saw 60:20 saying 42:6 62:8,9 62:11,12 64:16 72:21 94:7,12 96:12 says 23:5 25:15 28:18,20 32:12 61:16 68:5,9 85:2 Scanlon 4:4 7:10 scenario 59:14 scenarios 54:2 Scott 2:12 5:7 seated 5:9 second 5:18 8:21 13:17 24:18 25:10 29:12</p>
--	---	---	--	--

<p>55:18 71:1 78:20 79:1 80:5,11,12 secondary 28:2 29:8,13 39:2 51:10 80:10 seconds 14:10 46:10 section 23:13,14,18 23:19,19 93:11 94:5 96:7 see 28:3 39:14 45:7 56:4 65:20 68:4,9 68:10 79:14 82:17 86:12,15 seeing 46:3 seek 57:15 seem 19:20 22:19 36:10 seemed 86:7 seems 10:14 21:2 56:13,19 64:15 74:8 86:6 seen 45:13 60:20,21 83:5 segment 36:20 seize 17:20 sell 34:14 send 94:20 sense 43:4 90:22 sent 16:19 17:1 September 1:19 2:1 sequence 87:10 series 14:13 seriously 92:17 serve 24:10 26:9 28:18 41:4 55:19 58:19 82:22 served 33:8 serves 40:12 57:12 57:13 serving 89:15 session 5:4 96:20 set 17:15 setting 24:16 settle 65:19 settled 62:16 91:18 settlement 55:19 83:17 settlements 83:5,7 83:15 settles 91:21 settling 65:20 seventies 13:22 several 31:3 70:7 sewage 62:13,15 66:21</p>	<p>sewers 47:2 Shimburg 83:16 shop 53:4 short 54:12 77:13 showed 93:3 showing 93:17 shut 53:16 shutdown 53:15 side 5:14 70:12,16 sides 13:11 significance 11:2 12:1 similar 72:19,20 90:13,16 91:16 simple 75:11 93:6 simpler 26:13 simply 15:11 21:2 48:2 56:20 67:7 72:22 79:4 since 20:14 25:3 32:20 45:13 86:5 86:9 single 12:18 41:8 41:11 76:18 singular 12:16 25:14,16,18,22 26:1,16 59:5,8 sir 15:18 sit 30:5,6 site 11:9 16:16,19 17:1,3 31:22 33:9 33:14 36:21 37:10,11 48:12 59:2 sites 48:7 sitting 60:15 situation 57:21 68:4,10,14 73:9 77:13 sixties 45:13 size 52:21 slight 91:13 slightly 19:15,19 slow 14:11 slowdown 20:10 slug 62:15,17 small 23:7 37:3 73:15 smart 14:12 soap 91:4,6,8 soft 91:18 sole 11:4 12:16 solid 37:6 47:15 93:15,21 94:8 solids 12:13,14 13:19 17:18</p>	<p>19:11 49:10,13 solubilization 60:13 64:20 77:9 solubilize 12:12 76:2 solubilizes 19:4 49:9,10,12 89:8 solubilizing 18:3 19:9 20:2 48:8 solution 19:11 49:11,12 58:9 60:16 64:9 73:1 85:3 92:1 solvency 14:18,20 46:12 48:13 solvent 8:10 10:1,2 10:5,20 11:3,15 11:17 12:5,6,7,9 12:10,11,12 13:3 13:15 14:10 16:5 16:12,13,15,21 17:15,17,18 19:9 21:13,14 22:14 22:16 25:8 26:21 28:15 32:7 33:22 34:1,3 43:20 45:22 47:8,10,10 47:18,19,20 48:7 48:12,14,14,16 48:17,22 49:1,6,7 55:16 57:3 58:2 58:21 59:1,9,11 61:8,10 63:13,18 63:20 64:2,10,17 65:10 66:3 67:6 67:15 68:5 69:1,6 73:18 76:1,7,10 76:18 77:5 78:5,6 78:7,8,12,19 79:5 84:22 85:7 86:21 86:22 88:5 90:10 90:14,15,18 91:22 93:7,8 solvents 48:5,6 68:8 73:18 87:3 some 5:20 9:1 10:16 26:21 34:10 41:22 43:17 45:2 48:6,8 53:1 54:10,13,16 60:9 63:16,20 67:16 76:10 79:10,12,13 83:5 86:1,1 87:9 92:2 92:12,12 somebody 76:7</p>	<p>somehow 63:19,20 67:3 something 8:18 20:20 27:2 43:12 52:19 54:11,12 58:14 63:15,16 68:2 76:9 77:16 81:20 90:19 91:2 Sometimes 80:16 Sonny 61:21 sophisticated 46:8 sorry 15:14 29:22 90:8 93:13 sort 21:3 44:21 54:18 64:14 74:6 80:3,14 sorting 12:3 sorts 96:4 sound 45:18 sounds 19:3 20:19 37:18 South 4:7 speak 22:17 23:10 74:12 specific 72:13 95:12 specifically 12:8 spelled 70:9 spend 12:2 spent 8:10,22 16:21 17:2,13 19:5 24:3 28:15 31:20 32:8 33:5,6 37:6 46:18 55:14,17 58:17 62:6 63:17 69:20 70:10,14,19 71:2 71:2,6,11,19,21 76:1,7 77:3 78:9 78:10,13 80:1 84:5,21 85:6 88:4 89:21 93:1 94:14 94:19 95:1 96:12 spill 35:18 40:18 41:2 spills 40:21 spoken 23:2,3 squarely 55:17 61:21 stand 30:4 89:16,22 92:8 96:3,16 standpoint 13:6 stands 96:21 start 9:18 45:9 72:7 87:15 started 63:19 starting 63:20</p>	<p>state 18:8 61:17 69:8 77:10 79:4 96:4 statement 96:4 statements 78:2 States 1:2 2:3 5:3 41:6 87:22 status 87:1 statute 30:20 31:3 32:11 35:1,21 statutory 9:3 20:18 21:6 25:16 26:2 30:10 31:16,19 33:9,10 36:19 staying 43:20 steady 61:16 Stein 2:11 5:8,10 7:13,20 8:4,6 9:13 15:15,20 20:14,22 22:17 23:10 28:4 37:14 42:4,7 43:5 48:4 50:2,6,9 51:18 52:4 56:12 58:12 60:18 67:11 68:1 69:17 70:22 72:2 72:5,8 76:16 78:14 79:6,10 80:22 83:4,21 85:10,14,20 87:7 88:19 90:7,9 92:4 93:11,14 95:9 96:16 Stein's 63:7 step 56:3 86:15 Steve 83:16 still 11:14 16:4 17:8 17:12,13 18:1,3 18:13 19:5,8 26:21 32:1 34:1,7 34:10,11,13,16 34:16,17,18,21 35:15,19 48:8,12 48:13 stipulated 49:17,21 89:11 92:1 stipulation 48:20 49:4,5,8,19 52:15 92:6,14,19 stop 22:9 stoppage 20:11 storage 15:22 16:4 16:9 17:4,9,12 18:9,16 19:10,13 19:15 20:5 21:1,2 21:7,11 22:13</p>
--	--	--	--	--

36:8 37:1,5,7,9 38:5 39:1,10 40:8 43:3 48:19 50:21 51:12 53:5,9,20 60:10 66:11 69:5 75:17 76:22 84:5 store 51:21 stored 21:8 52:10 storing 42:1,4,5 Street 4:7 stretch 17:5 19:14 20:4 39:7 strike 56:21 strikes 22:18 striking 58:3 73:14 stringent 35:17 struggled 31:5 struggling 20:22 stuff 39:22 86:12 Sub 69:22 subject 20:16 40:19 75:1,4 88:14 Subpart 38:8 52:2 52:2 subpoints 23:7 subsequent 75:2 substitute 24:1 sufficient 11:18 suggest 93:17,20 suggested 35:22 suggestion 44:22 Superfund 48:7,12 support 63:8 88:22 supports 75:21 supposed 26:6 sure 6:14,17,18 10:9 13:12 17:7 30:1 42:18 46:21 54:5 74:11 79:16 82:8,9,13 86:3 surreal 39:6 suspended 58:10 suspending 18:3 59:22 69:2 suspension 17:19 49:14 58:9 sweeps 32:17 system 10:18 13:20 14:5,13,13,20,21 14:22 15:9 16:7 18:20 19:2 20:9 21:12 27:4 31:12 41:22 45:4,5,8,16 45:17 46:2,5,8,16 51:6,11 56:5,7 62:14,15 64:1,3	64:12 65:3,15,21 66:19 67:10 75:14 77:7 84:9 85:1,8,13 86:17 86:18,20 87:13 92:11,21 systems 76:5 84:14 84:15 <hr/> T <hr/> T 4:4,5 table 7:9,17 50:15 70:11,11,12 take 29:3 34:13 57:18 65:4 68:18 74:1,2 75:16 94:19 95:2 taken 16:16 20:15 78:14 79:20,20 takes 21:18 29:11 41:9 58:2 taking 52:4 68:14 91:4 talk 8:21 18:22 30:4 talked 83:22 talking 20:4 23:22 25:3,21 49:11 57:14 71:16 talks 23:21 47:1 95:10 tank 15:22 16:4,9 17:4,9,16,20,22 18:9,12,16,18 19:10,13,15 20:6 21:1,8,12,15,17 21:21,22 22:9,13 22:16,16 31:15 31:16 37:2,7,9 38:6 39:1,10 40:8 42:5,16 43:3 48:19 52:13 53:5 84:5 85:8,11,13 85:19 94:20 95:2 96:13 tanker 60:13 tanks 10:18 17:12 37:5 49:15 50:21 51:12 52:20 53:9 53:21 60:10,15 66:12 69:5 75:17 75:18 76:22 86:6 86:10,11 technical 9:13 technically 6:15 technology 11:12	11:13 13:12 tell 30:5 43:20 72:3 92:9 terms 23:12 25:2 40:2 41:13 81:6 93:20 94:10 95:17,19 test 28:3,5,11,16,17 29:14,21 78:15 78:21 79:15 80:20 88:10 testified 35:13 77:2 testimonies 79:12 testimony 12:3 17:14 34:2 44:16 45:12 55:18 60:21 83:13 89:5 92:11 text 45:20 69:18 thank 7:6,12,13,14 8:5 13:16 30:12 30:17 50:2,4,5,8 87:5,7 94:2 96:15 96:17,19 their 14:4 29:20 34:3 41:16,20 49:8 50:20 54:14 55:9,11 61:7 65:13 74:2 75:17 76:12 77:1 78:11 82:8 92:22 93:2,9 94:13 96:11 themselves 7:4 theory 36:11 thing 26:3 28:10 39:6,13 47:11,14 57:11 59:11 74:17 89:20 things 15:5 18:4 34:17 37:19 39:4 45:13 46:3 89:6 91:16 92:7 think 9:13 15:17,19 16:11 20:1 24:12 24:21 25:5 29:19 29:21 30:8,9,10 36:12,21 37:2 44:6 48:6 52:17 56:9,17 58:11 59:7 60:6,8,17 69:19 75:12,19 80:19 81:14 85:4 87:19 88:18 91:15 92:11,16 93:16 94:5 95:3,7 95:11,14,20	thinking 16:10 third 9:1 55:21 Thornburg 4:6 7:7 7:10 though 58:3 73:14 thought 9:6 44:11 44:17 65:19 thoughts 87:9 three 8:16 10:14 12:7 23:18 55:12 through 10:18 12:4 19:2 20:5 25:20 44:18 54:7,8 63:4 63:22 65:12 66:19 85:1 86:11 throughout 37:2 74:14 76:5 thrown 15:13 31:18 32:1,9,19 34:22 Thursday 1:19 2:1 time 5:17 7:21 14:7 21:16,16 22:15 25:18 28:3 30:5 32:13 33:2 35:1 37:6 44:2 46:22 50:10 52:16 53:3 53:3,4,5,7,8 54:11 64:4,5 76:6 76:9,15,18 84:18 84:18,21 87:2,6 93:1 Title 40:17 today 18:13 23:20 34:11 56:10 75:12,20 76:8 88:6 92:14,19 together 91:6 told 87:13 top 11:11 topic 9:5 tote 69:11 totes 56:8 train 39:3 training 40:5 transcript 1:17 2:1 22:19 65:1 transport 35:19 transportation 35:14 transported 33:20 treated 44:14 treatment 36:6,6 trees 56:5 86:16 89:17,18,22 93:6 tremendous 74:14	80:19 trend 66:2 76:8,8 trick 66:1 trivial 27:2 truck 84:17 trucks 60:13 trust 6:21 try 8:16,17 9:1 24:22 44:4,7 65:11 80:4 87:8 trying 21:7 23:20 65:8 69:18 71:7,8 71:12 91:1,2 TSD 41:19 42:2,20 42:21 43:6 51:19 51:20 52:5 60:14 60:15 92:7,15 turn 32:10 76:11 turned 14:4 32:6 two 10:19 11:10,12 11:16,18 12:2 23:6 33:22 46:7 53:16 61:6 68:6,7 types 13:11 <hr/> U <hr/> ultimately 20:15 30:15 unambiguous 28:8 28:12 unlogged 67:14 under 8:10,11 22:4 35:1,7,16,21 36:15 40:15,17 43:10 55:3 69:22 70:20 71:18 72:1 77:5 78:10,12 85:9 88:15 93:11 96:5,7 underlies 33:10 undermine 55:22 understand 8:14 10:13 13:4 22:13 43:17 46:4 56:10 64:9 73:13 78:4 79:16 understanding 6:1 6:20 19:3 43:6 53:7,18 70:5 74:13 83:10 undetected 84:12 Unfortunately 75:5 uninterrupted 14:17 United 1:2 2:3 5:3 41:6 87:21
---	--	--	---	--

<p>unless 82:12 unmoored 45:19 46:3 unnecessary 40:11 unquestionably 64:16 86:7 unreached 52:7 unrebuttable 15:8 unregulated 36:1 84:11 until 6:8 21:16 37:6 44:13 53:5 65:18 84:5 96:12 upstream 10:6 12:15 16:1 26:15 61:13 65:14,20 85:8,14 90:12,15 91:19 95:2 urge 86:15 89:5 urges 89:16 USC 26:2 use 11:21 16:5 19:18,22 21:18 22:14,16,18,20 22:20,21,21 24:4 24:15,16,20 25:1 25:5,6,8,8,9,10 27:10 29:10,12 29:13 34:18 48:15 49:21,21 57:7 67:18 69:19 71:9 72:15,22 73:18 74:4 75:8 76:18 77:6,18 78:18,20 79:1,3 79:13 80:4,5,10 80:11,12,13,16 80:22 87:12 89:15 90:10,12 90:17 used 11:8,21 17:8 22:1,5 23:1,6,12 23:15,17,18,21 23:22 24:2,8 25:20,20 26:10 26:15,19 27:9 31:8 32:8 34:21 47:2,4,10 48:2 57:19 58:2 59:11 59:13 63:13,14 63:15,21 68:5,6 68:20 69:22 70:21 71:3,4,5,7 71:9,10,15,17,19 72:3 73:19 77:21 78:2 81:1,7 87:1</p>	<p>88:2,2,13 89:13 89:13,14 90:14 90:15 uses 12:18 14:20 19:17 25:14 26:11 29:2 49:17 72:19 80:4,15 using 22:19 24:18 63:19 65:3 73:11 73:17 78:21 88:5 utilize 46:12 U.S 3:7,13 26:4</p> <hr/> <p style="text-align: center;">V</p> <p>V 3:8 5:18 7:5,16 50:13 62:1 value 6:18 14:2 32:5 valves 15:2 84:9 variety 65:13 68:15 various 80:4,15 vehicle 45:6 vehicles 14:9 50:1 verb 49:9 verbs 49:2 very 24:12 25:5,6 30:7 32:14 35:17 37:2 41:16 44:17 45:9 46:8,9 48:21 74:21 87:21 89:2 93:6 94:3 96:15 Victoria 1:22 2:6 view 13:6 16:14 17:21 22:8,11 24:6 26:7 30:13 30:13 32:7 33:4 34:20 36:16 37:17 71:22 81:1 viewed 26:5,7 viewing 19:21 violating 32:11 violation 37:3,8 virgin 65:10 virtually 38:12 75:3 viscosity 60:2 61:11,12 89:4,5,7 volume 66:8,10 73:10</p> <hr/> <p style="text-align: center;">W</p> <p>wait 35:4 walk 40:7 walking 41:8 walkways 55:8 want 8:19,21 9:1,5</p>	<p>10:10 13:17 20:20 25:12 30:1 42:19 43:1 76:13 79:16 86:22 wanted 24:13,15 wanting 33:3 wants 76:7 Warren 61:7 89:2 89:7 Warren's 89:5 washing 91:3,4 Washington 1:3,18 2:2 Wasniak 44:16 Wasniak's 45:11 wasn't 65:7 73:8 88:4 waste 18:12 21:9 22:7 24:19 25:7 30:16 31:10,11 32:11 33:17 34:6 35:2,10 36:2 37:1 37:6 40:21 41:1 42:2 43:7,8,10 44:9,15 45:1,8,16 45:17 46:2,16 47:3,5,13,15,16 47:16,17,19,21 48:1,12 50:21 56:6,11 60:15 62:15,15,17,18 63:4 64:11 66:8 66:11,11,11,19 66:21 67:1,2 69:15 73:10 75:14,17 76:2,11 77:7 86:7,13,17 86:20 87:13 92:21 93:16,21 94:8 95:11,17,18 wastes 43:12 watch 43:2 water 15:12 56:8 66:21 69:11 91:5 way 9:14 35:22 38:3,3,5,22 40:7 40:8 45:2,11 51:8 56:22 60:13 66:20 76:22 77:19 84:22 95:15,20 ways 34:13 week 52:18 53:20 weeks 12:3 53:16 well 10:3 15:7 24:22 27:22 29:3</p>	<p>29:5 35:4,7 36:10 36:21 38:20 40:9 41:15 43:13 44:13,18 54:9 56:17 58:12 62:16 64:8,22 65:19 66:8 68:13 85:2 88:21 89:3 90:13,20,22 91:7 went 14:6 16:3 24:14 26:17 54:7 63:22 86:9 were 2:7 10:21 17:22 53:21 54:10,10,11,13 54:14,15,20 57:17 58:4,5 59:13 65:8 67:11 69:10,17 70:21 72:18,19,20 73:19 75:11 76:1 78:2 79:6 83:3,12 84:2,3 88:7 94:18 96:17 weren't 18:19 West 3:9 while 6:16 16:13 17:3 21:11 28:15 31:16,19 33:5,12 75:21 80:18 87:8 whole 25:10 39:5 40:19 56:4 59:4 64:1 74:18 76:5 85:7 86:17 Williams 78:11 Wilson 1:22 2:6 win 93:10 Winkler 77:1 wish 76:9 witness 15:6 61:7 61:14 witnesses 12:4 15:7 60:21 77:1 word 8:21 22:21 23:21 24:4,7,11 24:22 25:5 26:7 words 12:8 23:18 25:21,22 29:16 32:3 42:11 68:2 69:19 78:18 85:16 90:3 work 14:21 18:20 20:7,9 29:2 45:10 46:14 96:18 worked 44:18 working 27:4 55:9</p>	<p>works 14:15 27:4 worried 31:14 40:10 worry 50:6 worse 20:10 wouldn't 36:14 57:7 59:1 73:20 75:19 94:21 wrinkle 12:1 write 40:5 written 27:20 29:17 wrong 27:22</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:5,15 xylene 11:13</p> <hr/> <p style="text-align: center;">Y</p> <p>Yeah 89:6 years 32:20 you-all 38:18</p> <hr/> <p style="text-align: center;">0</p> <p>06-02 1:8 5:6</p> <hr/> <p style="text-align: center;">1</p> <p>1 10:1 26:2,2 70:11 93:11 10 14:10 46:9 10:36 2:5 11 4:7 1152 2:5 12:17 96:22 1201 2:4 187 87:12 1970s 44:13 56:9 1980s 56:9 65:2 1981 46:21 1985 32:16 75:7 1990s 62:2</p> <hr/> <p style="text-align: center;">2</p> <p>2-K 11:7,10 20 32:20 2006 1:19 2:2 5:13 21st 61:17 229 61:9 230 61:9 231-7387 4:9 24 53:19 24th 61:9 25th 5:13 260 25:20 260.3 25:19 261 93:12</p>
---	--	--	--	--

<p>261.1 23:4 69:19 261.2 70:8 261.2(E)(ii) 23:14 23:14 261.2(F) 93:14 261.3(F) 93:11 265 25:20 28 1:19 2:2</p> <hr/> <p>3</p> <p>3 26:20 93:13 30 5:15 29:19 39:16 55:7 3008 1:7 5:6 312 3:11 317 4:9 353-5751 3:11 37 49:5</p> <hr/> <p>4</p> <p>40,000-gallon 52:20 46204-3535 4:8 48 61:17 49 61:18</p> <hr/> <p>5</p> <p>5 5:16 8:2 23:13 40:17 69:22 59 87:22</p> <hr/> <p>6</p> <p>60604-3590 3:10</p> <hr/> <p>7</p> <p>7 8:1,2 14:10 30:2 46:9 53:20 77 3:9</p> <hr/> <p>8</p> <p>87 32:20 88 52:18</p> <hr/> <p>9</p> <p>90 41:22 42:18 44:2 51:22 52:11,17 53:21</p>				
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