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Hearing 01-21-2010

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

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IN RE: : NPDES Appeal Nos.
MIRANT KENDALL, LLC : 06-12, 06-13, 09-04
MIRANT KENDALL STATION :
-----:

Washington, D.C.

Thursday, January 21, 2010

The following pages constitute the proceedings held in the above-captioned matter before the HONORABLE KATHIE A. STEIN, at the U.S. Environmental Protection Agency, 1201 Constitution Avenue, Northwest, Washington, D.C., before Natalia Kornilova, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at approximately 10:04 a.m.

Capital Reporting Company
Hearing 01-21-2010

<p style="text-align: right;">2</p> <p>1 APPEARANCES</p> <p>2 On behalf of the Plaintiff:</p> <p>3 RONALD FEIN, ESQ.</p> <p>4 Region I</p> <p>5 Boston, Massachusetts</p> <p>6 PETER SHELLEY, ESQ.</p> <p>7 Conservation Law Foundation</p> <p>8</p> <p>9 On behalf of Defendant Mirant Kendall:</p> <p>10 RALPH A. CHILD, ESQ.</p> <p>11 Mintz Levin Cohn Ferris Glovsky and Popeo, PC</p> <p>12 One Financial Center</p> <p>13 Boston, Massachusetts 02111</p> <p>14 (617) 348-3021</p> <p>15</p> <p>16 Also Present:</p> <p>17 MICHELLE WENZEL, ESQ., Counsel of the Board</p> <p>18 EURIKA DURR, Clerk of the Board</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p style="text-align: right;">4</p> <p>1 Counsel for Region I, EPA, and with me in the rear is David</p> <p>2 Webster, who's the manager of the Industrial Permits</p> <p>3 Branch.</p> <p>4 MR. SHELLEY: Peter Shelley, counsel for</p> <p>5 Conservation Law Foundation and Charles River Watershed</p> <p>6 Association.</p> <p>7 JUDGE STEIN: Thank you. We scheduled this status</p> <p>8 conference because I know that the parties have been</p> <p>9 working hard on trying to reach a resolution of what I</p> <p>10 understand is a fairly complex matter. At the same time,</p> <p>11 this matter has been on our docket in one form or another</p> <p>12 since October of 2006, and I know there have been various</p> <p>13 phases where various aspects of the permit have been</p> <p>14 withdrawn and new proposals on the table, but it would be</p> <p>15 particularly helpful to the board to get a summary, either</p> <p>16 from each of you or from a representative who speak for all</p> <p>17 of you as to where things stand now and where we think we</p> <p>18 need to go.</p> <p>19 Our goal here this morning is not to cut off</p> <p>20 productive settlement discussions, but to see if we can</p> <p>21 have a clear understanding of the endgame for a reasonable</p> <p>22 period of time in which to conclude if settlement is</p>
<p style="text-align: right;">3</p> <p>1 PROCEEDINGS</p> <p>2 JUDGE STEIN: Good morning, counsel. Before we go</p> <p>3 ahead and get started, let me make a couple of preliminary</p> <p>4 remarks. With me here is Ms. Michelle Wenzel, who is</p> <p>5 senior counsel to the Environmental Appeals Board and is</p> <p>6 the counsel assigned to this case. And I also wanted to</p> <p>7 request that people keep their shuffling of papers to a</p> <p>8 minimum. We have had some challenges hearing in the</p> <p>9 courtroom in the last couple of hearings that we held, and</p> <p>10 to help the court reporter, if everybody, including myself,</p> <p>11 could keep their shuffling of papers to a minimum, that</p> <p>12 would be appreciated.</p> <p>13 Secondly, it for any reason the court reporter</p> <p>14 can't hear what you are saying, I'm going to ask her to let</p> <p>15 me know so that you can go ahead and repeat yourselves so</p> <p>16 that we're sure that we get a clear and accurate</p> <p>17 transcript. If we could begin by having each counsel</p> <p>18 introduce themselves and the party that they represent, I</p> <p>19 would appreciate that.</p> <p>20 MR. CHILD: This is Ralph Child for Petitioner</p> <p>21 Mirant Kendall.</p> <p>22 MR. FEIN: Ron Fein, F-E-I-N, Assistant Regional</p>	<p style="text-align: right;">5</p> <p>1 possible or not and then figure out if we're on a</p> <p>2 settlement track or a litigation track. And, with that, I</p> <p>3 will --</p> <p>4 MR. FEIN: Your Honor?</p> <p>5 JUDGE STEIN: Yes?</p> <p>6 MR. FEIN: With your permission I'll remain seated</p> <p>7 for the benefit of staying near the microphone. The good</p> <p>8 news is that we can now report that we have made</p> <p>9 substantial progress in the preceding months. And, in</p> <p>10 particular, EPA, as well as the Massachusetts Department of</p> <p>11 Environmental Protection, which is an co-permitting agency</p> <p>12 with us although they're not a party to this appeal, have</p> <p>13 reached an agreement with the company on all of the</p> <p>14 substantive, important issues in a permit modification that</p> <p>15 would include the elements of both the Section 316(A)</p> <p>16 temperature variance and also the Section 316(B) cooling</p> <p>17 water intake structure requirements.</p> <p>18 We have not yet had time to reduce that agreement</p> <p>19 in principle to a final written text that everyone has</p> <p>20 circulated and signed off on, and I also want to leave to</p> <p>21 Mr. Shelley the fact that his clients have a slightly</p> <p>22 different position, but we have made enormous progress in</p>

Capital Reporting Company
Hearing 01-21-2010

<p style="text-align: right;">6</p> <p>1 being able to reach the agreement in principle on the 2 permit modification. There's still work left to be done, 3 both in terms of converting that to a written text which we 4 would then put out for public notice and there also remains 5 to be negotiated the terms of an administrative compliance 6 order, which would govern the schedule and interim 7 operating conditions and contingencies while the company 8 installs the technology for which we will be modifying the 9 permit. But having gotten past the major substantive 10 issues and the permit modification itself, we believe that 11 the hardest work is behind us and that -- I don't want to 12 say it's all downhill from here, but we can certainly see 13 the light at the end of the tunnel now. 14 JUDGE STEIN: Am I to understand that this 15 agreement in principle that the REACH IT and the permittee 16 have reached is beyond where you were when you submitted 17 your last request for extension of time? 18 MR. FEIN: Absolutely. And I'll allow Mr. Child 19 to modify that if he wants in any way, but I think at this 20 point we have -- with respect to the permit modification 21 itself as opposed to the administrative compliance order, 22 we have nothing left to negotiate with the company.</p>	<p style="text-align: right;">8</p> <p>1 based on the tenor of the discussions and, I think, the 2 good faith on the part of the company and EPA to reach a 3 three-part agreement, that we were able to join with EPA 4 and say we think that this will successfully resolve all 5 the issues. 6 JUDGE STEIN: Well, I'm obviously very, very 7 pleased to hear this, and I'm not insensitive to the fact 8 that these 316(A) and 316(B) issues are challenging. With 9 that in mind, what is your best estimate of the time that 10 you would need to reach closure on the agreement in 11 principle, come to an understanding of the permit language 12 to be proposed and have a permit application submitted? 13 MR. FEIN: Your Honor, this is Ron Fein from 14 Region 1 again. We think that within 3 1/2 months we can 15 get the final permit text agreed to and have the company 16 submit a permit application and reach an agreement in 17 principle on the terms of the administrative compliance 18 order. And what I would like to propose -- and with the 19 board's permission I will move now orally or I can follow 20 up with a written request -- is for an additional extension 21 of the stay for 3 1/2 months, but with a status report at 22 the end of that term for this purpose. At the end of that</p>
<p style="text-align: right;">7</p> <p>1 MR. CHILD: Your Honor, there were, since the last 2 request for an extension, extensive, intensive and 3 successful negotiations. 4 JUDGE STEIN: Okay. And could you tell us, Mr. 5 Shelley, where your client stands with respect to this 6 agreement in principle? Are there major issues, minor 7 issues? I mean, obviously we have had three different 8 parties to this appeal, and I don't know whether what we 9 have done has resolved, at least in principle, the issues 10 with one of the parties but not the other party or whether 11 you see room for productive progress that still needs to be 12 made. 13 MR. SHELLEY: Thank you, Your Honor. I would say 14 we're also very close to agreement on what is being 15 proposed for this facility. We do have some concerns with 16 the temperature endpoint that EPA will have in its new 17 permit, although those concerns we expect to be largely, if 18 not entirely, mitigated by the new technology that the 19 company is proposing to install. So I guess our position 20 right -- and the other issue that we want to see some more 21 flesh on the bones is around the interim compliance order 22 that will be developed with the company. But we think,</p>	<p style="text-align: right;">9</p> <p>1 period, assuming that we reach the agreement in principle 2 on the administrative compliance order, we would then need 3 an additional period of time to go through the public 4 notice on the permit modification itself and to reduce the 5 agreement in principle on the administrative order to a 6 writing, which would then be agreed to. And I don't want 7 to forecast exactly how long that latter phase would take, 8 but I think we can have this completely wrapped up by the 9 end of this calendar year. 10 JUDGE STEIN: I'd like to hear from the other 11 counsel as to their assessment of those proposed time 12 frames. 13 MR. CHILD: Your Honor, this is Ralph Child for 14 Mirant Kendall. We find those reasonable and certainly 15 join in the request. 16 MR. SHELLEY: Your Honor, Peter Shelley. I think 17 also that it's reasonable, assuming we're moving forward 18 productively, and I trust if any of us feel that the train 19 has come off the tracks at any point in that period, we 20 will be able to approach the board independently and try to 21 address any problems we have. 22 JUDGE STEIN: Now, would there be any benefit to a</p>

Capital Reporting Company
Hearing 01-21-2010

<p style="text-align: right;">10</p> <p>1 status conference part way through that 3 1/2 months, or a 2 status report, or do you feel that during the course of the 3 3 1/2 months you have enough incentive of your own to keep 4 things moving, that the Court's assistance would not be of 5 any additional benefit? I'm not interested in running up 6 bills for any clients or unnecessarily holding status 7 conferences or having reports, but if it would be helpful, 8 we're certainly open to that. 9 MR. SHELLEY: Your Honor, this is Peter Shelley. 10 I think that would be a good idea, actually, to have a 11 status report and potentially a conference, although I 12 think we can maybe wait on that until --schedule it 13 sometime shortly around this -- maybe the four-month period 14 that would allow us to report to the board on how well we 15 all did on this first set of tasks. 16 JUDGE STEIN: So you're suggesting that the report 17 and conference be at the end of the 3 1/2 months and not -- 18 MR. SHELLEY: I think that would make the most 19 sense. We have worked pretty well together. 20 MR. CHILD: This is Mr. Child. I guess I heard 21 the suggestion to be that there would be a status report at 22 the end of the 3 1/2 months.</p>	<p style="text-align: right;">12</p> <p>1 JUDGE STEIN: And I want to tell you that it's 2 very helpful to have all three of you in the same room. We 3 had some scheduling glitches in a status conference last 4 week where we didn't know that we were missing a party, so 5 I really appreciate your cooperation even in being there 6 together. It also enables us, if there is questions and 7 discussion back and forth, to reach resolution, and I 8 commend you on your progress thus far and I am looking 9 forward to a positive report at the end of the 3 1/2 10 months. And don't hesitate to enlist the board's help if 11 you feel that there is a role that we can play in moving 12 this to closure. 13 MR. SHELLEY: Thank you, Your Honor. 14 MR. CHILD: Thank you. 15 JUDGE STEIN: Thank you. And with that the status 16 conference is adjourned. 17 (Whereupon, at 10:18 a.m., the proceedings were 18 concluded.) 19 20 21 22</p>
<p style="text-align: right;">11</p> <p>1 JUDGE STEIN: Right. 2 MR. CHILD: And that's what I intended to propose, 3 Your Honor. 4 JUDGE STEIN: We will do that, and I think at that 5 point, depending on where you are, the board can assess 6 whether we'll simply schedule another status conference 7 after we get your report and figure out next steps from 8 there. I'm perfectly happy in the interest of time to take 9 the oral motion and the representations here as the basis 10 for the board's granting of a further order of stay and an 11 extension, and we will prepare such an order, which will 12 extend the -- probably extend the stay for about four 13 months and have a status report due in about 3 1/2 months, 14 and we will get that out to you in the next couple of days. 15 Is there anything -- I'm very, very pleased with 16 the progress, and let me just turn to Ms. Wenzel and see if 17 she has any questions before we adjourn the conference. 18 (No response) 19 JUDGE STEIN: Counsel, any further comments or 20 questions on your part? 21 MR. SHELLEY: No, Your Honor. 22 MR. CHILD: Nothing, Your Honor.</p>	<p style="text-align: right;">13</p> <p>1 CERTIFICATE OF NOTARY PUBLIC 2 3 I, Natasha Kornilova, the officer before whom the 4 foregoing hearing was taken, do hereby certify that the 5 witness whose testimony appears in the foregoing pages was 6 recorded by me and thereafter reduced to typewriting under 7 my direction; that said hearing is a true record of the 8 proceedings; that I am neither counsel for, related to, nor 9 employed by any of the parties to the action in which this 10 hearing was taken; and, further, that I am not a relative 11 or employee of any counsel or attorney employed by the 12 parties hereto, nor financially or otherwise interested in 13 the outcome of this action. 14 15 16 Natasha Kornilova 17 Notary Public in and for the 18 District of Columbia 19 20 My commission expires: 21 April 14, 201 22</p>

Capital Reporting Company
Hearing 01-21-2010

13

1 CERTIFICATE OF NOTARY PUBLIC

2

3 I, Natasha Kornilova, the officer before whom the
4 foregoing hearing was taken, do hereby certify that the
5 witness whose testimony appears in the foregoing pages was
6 recorded by me and thereafter reduced to typewriting under
7 my direction; that said hearing is a true record of the
8 proceedings; that I am neither counsel for, related to, nor
9 employed by any of the parties to the action in which this
10 hearing was taken; and, further, that I am not a relative
11 or employee of any counsel or attorney employed by the
12 parties hereto, nor financially or otherwise interested in
13 the outcome of this action.

14

15

Natalia Kornilova

16

Natasha Kornilova

17

Notary Public in and for the

18

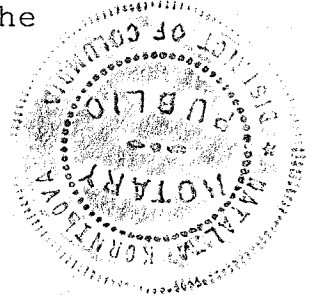
District of Columbia

19

20 My commission expires:

21 April 14, 201

22



Capital Reporting Company

Hearing 01-21-2010

Page 1

<p><u>0</u> 02111 2:14 06-12 1:6 06-13 1:6 09-04 1:6</p>	<p>above-captioned 1:14 Absolutely 6:18 accurate 3:16 action 13:9,13 actually 10:10</p>	<p>April 13:21 aspects 4:13 assess 11:5 assessment 9:11 assigned 3:6</p>	<p><u>C</u> calendar 9:9 Capital 1:17 case 3:6 Center 2:13</p>
<p><u>1</u> 1 2:4 4:1 8:14 1/2 8:14,21 10:1,3,17,22 11:13 12:9 10:04 1:19 10:18 12:17 1201 1:15 14 13:21</p>	<p>additional 8:20 9:3 10:5 address 9:21 adjourn 11:17 adjourned 12:16 administrative 6:5,21 8:17 9:2,5 agency 1:1,15 5:11 agreed 8:15 9:6</p>	<p>assistance 10:4 Assistant 3:22 Association 4:6 assuming 9:1,17 attorney 13:11 Avenue 1:16</p>	<p>certainly 6:12 9:14 10:8 CERTIFICATE 13:1 certify 13:4 challenges 3:8 challenging 8:8 Charles 4:5</p>
<p><u>2</u> 2006 4:12 201 13:21 2010 1:11 21 1:11</p>	<p>agreement 5:13,18 6:1,15 7:6,14 8:3,10,16 9:1,5 ahead 3:3,15 allow 6:18 10:14 am 6:14 12:8 13:8,10</p>	<p><u>B</u> based 8:1 basis 11:9 begin 3:17 beginning 1:18 behalf 2:2,10 behind 6:11 believe 6:10</p>	<p>Child 2:11 3:20 6:18 7:1 9:13 10:20 11:2,22 12:14 circulated 5:20 clear 3:16 4:21 Clerk 2:19 client 7:5</p>
<p><u>3</u> 3 8:14,21 10:1,3,17,22 11:13 12:9 316(A 5:15 8:8 316(B 5:16 8:8 348-3021 2:15</p>	<p>anything 11:15 appeal 1:5 5:12 7:8 Appeals 1:2 3:5 appears 13:5 application 8:12,16</p>	<p>benefit 5:7 9:22 10:5 best 8:9 beyond 6:16 bills 10:6 board 1:2 2:18,19 3:5 4:15 9:20 10:14 11:5</p>	<p>clients 5:21 10:6 close 7:14 closure 8:10 12:12 Cohn 2:12 Columbia 1:18 13:18 commend 12:8 comments 11:19 commission 13:20</p>
<p><u>6</u> 617 2:15</p>	<p>appreciate 3:19 12:5 appreciated 3:12 approach 9:20 approximately 1:19</p>	<p>board's 8:19 11:10 12:10 bones 7:21 Boston 2:5,14 Branch 4:3</p>	<p>company 1:17 5:13 6:7,22 7:19,22 8:2,15 completely 9:8</p>
<p><u>A</u> a.m 1:19 12:17 able 6:1 8:3 9:20</p>			

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Hearing 01-21-2010

Page 2

<p>complex 4:10</p> <p>compliance 6:5,21 7:21 8:17 9:2</p> <p>concerns 7:15,17</p> <p>conclude 4:22</p> <p>concluded 12:18</p> <p>conditions 6:7</p> <p>conference 4:8 10:1,11,17 11:6,17 12:3,16</p> <p>conferences 10:7</p> <p>Conservation 2:8 4:5</p> <p>constitute 1:13</p> <p>Constitution 1:16</p> <p>contingencies 6:7</p> <p>converting 6:3</p> <p>cooling 5:16</p> <p>cooperation 12:5</p> <p>co-permitting 5:11</p> <p>counsel 2:18 3:2,5,6,17 4:1,4 9:11 11:19 13:8,11</p> <p>couple 3:3,9 11:14</p> <p>course 10:2</p> <p>court 3:10,13</p> <p>courtroom 3:9</p> <p>Court's 10:4</p> <p>cut 4:19</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C 1:10,16</p> <p>David 4:1</p> <p>days 11:14</p>	<p>Defendant 2:10</p> <p>Department 5:10</p> <p>depending 11:5</p> <p>developed 7:22</p> <p>different 5:22 7:7</p> <p>direction 13:7</p> <p>discussion 12:7</p> <p>discussions 4:20 8:1</p> <p>District 1:18 13:18</p> <p>docket 4:11</p> <p>done 6:2 7:9</p> <p>downhill 6:12</p> <p>due 11:13</p> <p>during 10:2</p> <p>DURR 2:19</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>either 4:15</p> <p>elements 5:15</p> <p>employed 13:9,11</p> <p>employee 13:11</p> <p>enables 12:6</p> <p>endgame 4:21</p> <p>endpoint 7:16</p> <p>enlist 12:10</p> <p>enormous 5:22</p> <p>entirely 7:18</p> <p>Environmental 1:1,2,15 3:5 5:11</p> <p>EPA 4:1 5:10 7:16 8:2,3</p> <p>ESQ 2:3,7,11,18</p>	<p>estimate 8:9</p> <p>EURIKA 2:19</p> <p>everybody 3:10</p> <p>everyone 5:19</p> <p>exactly 9:7</p> <p>expect 7:17</p> <p>expires 13:20</p> <p>extend 11:12</p> <p>extension 6:17 7:2 8:20 11:11</p> <p>extensive 7:2</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facility 7:15</p> <p>fact 5:21 8:7</p> <p>fairly 4:10</p> <p>faith 8:2</p> <p>feel 9:18 10:2 12:11</p> <p>Fein 2:3 3:22 5:4,6 6:18 8:13</p> <p>F-E-I-N 3:22</p> <p>Ferris 2:12</p> <p>figure 5:1 11:7</p> <p>final 5:19 8:15</p> <p>Financial 2:13</p> <p>financially 13:12</p> <p>first 10:15</p> <p>flesh 7:21</p> <p>forecast 9:7</p> <p>foregoing 13:4,5</p> <p>form 4:11</p> <p>forth 12:7</p>	<p>forward 9:17 12:9</p> <p>Foundation 2:8 4:5</p> <p>four-month 10:13</p> <p>frames 9:12</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>glitches 12:3</p> <p>Glovsky 2:12</p> <p>goal 4:19</p> <p>gotten 6:9</p> <p>govern 6:6</p> <p>granting 11:10</p> <p>guess 7:19 10:20</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>happy 11:8</p> <p>hard 4:9</p> <p>hardest 6:11</p> <p>having 3:17 6:9 10:7</p> <p>hear 3:14 8:7 9:10</p> <p>heard 10:20</p> <p>hearing 3:8 13:4,7,10</p> <p>hearings 3:9</p> <p>held 1:13 3:9</p> <p>help 3:10 12:10</p> <p>helpful 4:15 10:7 12:2</p> <p>hereby 13:4</p> <p>hereto 13:12</p> <p>hesitate 12:10</p> <p>holding 10:6</p> <p>Honor 5:4 7:1,13</p>
---	---	---	---

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Capital Reporting Company

Hearing 01-21-2010

Page 3

<p>8:13 9:13,16 10:9 11:3,21,22 12:13</p> <p>HONORABLE 1:14</p> <hr/> <p>I</p> <p>I'd 9:10 idea 10:10 I'll 5:6 6:18 I'm 3:14 8:6,7 10:5 11:8,15 important 5:14 incentive 10:3 include 5:15 including 3:10 independently 9:20 Industrial 4:2 insensitive 8:7 install 7:19 installs 6:8 intake 5:17 intended 11:2 intensive 7:2 interest 11:8 interested 10:5 13:12 interim 6:6 7:21 introduce 3:18 issue 7:20 issues 5:14 6:10 7:6,7,9 8:5,8 it's 6:12 9:17 12:1</p>	<hr/> <p>J</p> <p>January 1:11 join 8:3 9:15 JUDGE 3:2 4:7 5:5 6:14 7:4 8:6 9:10,22 10:16 11:1,4,19 12:1,15</p> <hr/> <p>K</p> <p>KATHIE 1:14 Kendall 1:6,7 2:10 3:21 9:14 Kornilova 1:17 13:3,16</p> <hr/> <p>L</p> <p>language 8:11 largely 7:17 last 3:9 6:17 7:1 12:3 latter 9:7 Law 2:8 4:5 least 7:9 leave 5:20 Levin 2:12 light 6:13 litigation 5:2 LLC 1:6 long 9:7</p> <hr/> <p>M</p> <p>major 6:9 7:6 manager 4:2 Massachusetts</p>	<p>2:5,14 5:10 matter 1:14 4:10,11 maybe 10:12,13 mean 7:7 Michelle 2:18 3:4 microphone 5:7 mind 8:9 minimum 3:8,11 minor 7:6 Mintz 2:12 Mirant 1:6,7 2:10 3:21 9:14 missing 12:4 mitigated 7:18 modification 5:14 6:2,10,20 9:4 modify 6:19 modifying 6:8 months 5:9 8:14,21 10:1,3,17,22 11:13 12:10 morning 3:2 4:19 motion 11:9 move 8:19 moving 9:17 10:4 12:11 myself 3:10</p> <hr/> <p>N</p> <p>Natalia 1:17 Natasha 13:3,16 negotiate 6:22 negotiated 6:5</p>	<p>negotiations 7:3 neither 13:8 news 5:8 nor 13:8,12 Northwest 1:16 Nos 1:5 Notary 1:17 13:1,17 nothing 6:22 11:22 notice 6:4 9:4 NPDES 1:5</p> <hr/> <p>O</p> <p>obviously 7:7 8:6 October 4:12 officer 13:3 Okay 7:4 open 10:8 operating 6:7 opposed 6:21 oral 11:9 orally 8:19 order 6:6,21 7:21 8:18 9:2,5 11:10,11 otherwise 13:12 outcome 13:13</p> <hr/> <p>P</p> <p>pages 1:13 13:5 papers 3:7,11 particular 5:10 particularly 4:15 parties 4:8 7:8,10</p>
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Hearing 01-21-2010

Page 4

<p>13:9,12 party 3:18 5:12 7:10 12:4 past 6:9 PC 2:12 people 3:7 perfectly 11:8 period 4:22 9:1,3,19 10:13 permission 5:6 8:19 permit 4:13 5:14 6:2,9,10,20 7:17 8:11,12,15,16 9:4 Permits 4:2 permittee 6:15 Peter 2:7 4:4 9:16 10:9 Petitioner 3:20 phase 9:7 phases 4:13 Plaintiff 2:2 play 12:11 pleased 8:7 11:15 point 6:20 9:19 11:5 Popeo 2:12 position 5:22 7:19 positive 12:9 possible 5:1 potentially 10:11 preceding 5:9 preliminary 3:3</p>	<p>prepare 11:11 Present 2:17 pretty 10:19 principle 5:19 6:1,15 7:6,9 8:11,17 9:1,5 probably 11:12 problems 9:21 proceedings 1:13 12:17 13:8 productive 4:20 7:11 productively 9:18 progress 5:9,22 7:11 11:16 12:8 proposals 4:14 propose 8:18 11:2 proposed 7:15 8:12 9:11 proposing 7:19 Protection 1:1,15 5:11 public 1:18 6:4 9:3 13:1,17 purpose 8:22</p> <hr/> <p style="text-align: center;">Q</p> <p>questions 11:17,20 12:6</p> <hr/> <p style="text-align: center;">R</p> <p>Ralph 2:11 3:20 9:13 RE 1:5 reach 4:9 6:1,15 8:2,10,16 9:1</p>	<p>12:7 reached 5:13 6:16 really 12:5 rear 4:1 reason 3:13 reasonable 4:21 9:14,17 record 13:7 recorded 13:6 reduce 5:18 9:4 reduced 13:6 Region 2:4 4:1 8:14 Regional 3:22 related 13:8 relative 13:10 remain 5:6 remains 6:4 remarks 3:4 repeat 3:15 report 5:8 8:21 10:2,11,14,16,21 11:7,13 12:9 reporter 3:10,13 Reporting 1:17 reports 10:7 represent 3:18 representations 11:9 representative 4:16 request 3:7 6:17 7:2 8:20 9:15 requirements 5:17</p>	<p>resolution 4:9 12:7 resolve 8:4 resolved 7:9 respect 6:20 7:5 response 11:18 River 4:5 role 12:11 Ron 3:22 8:13 RONALD 2:3 room 7:11 12:2 running 10:5</p> <hr/> <p style="text-align: center;">S</p> <p>schedule 6:6 10:12 11:6 scheduled 4:7 scheduling 12:3 seated 5:6 Secondly 3:13 Section 5:15,16 senior 3:5 sense 10:19 settlement 4:20,22 5:2 Shelley 2:7 4:4 5:21 7:5,13 9:16 10:9,18 11:21 12:13 shortly 10:13 shuffling 3:7,11 signed 5:20 simply 11:6 slightly 5:21 sometime 10:13</p>
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Hearing 01-21-2010

Page 5

<p>speak 4:16</p> <p>stand 4:17</p> <p>stands 7:5</p> <p>started 3:3</p> <p>STATES 1:1</p> <p>STATION 1:7</p> <p>status 4:7 8:21 10:1,2,6,11,21 11:6,13 12:3,15</p> <p>stay 8:21 11:10,12</p> <p>staying 5:7</p> <p>STEIN 1:15 3:2 4:7 5:5 6:14 7:4 8:6 9:10,22 10:16 11:1,4,19 12:1,15</p> <p>steps 11:7</p> <p>structure 5:17</p> <p>submit 8:16</p> <p>submitted 6:16 8:12</p> <p>substantial 5:9</p> <p>substantive 5:14 6:9</p> <p>successful 7:3</p> <p>successfully 8:4</p> <p>suggesting 10:16</p> <p>suggestion 10:21</p> <p>summary 4:15</p> <p>sure 3:16</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table 4:14</p> <p>tasks 10:15</p> <p>technology 6:8</p>	<p>7:18</p> <p>temperature 5:16 7:16</p> <p>tenor 8:1</p> <p>term 8:22</p> <p>terms 6:3,5 8:17</p> <p>testimony 13:5</p> <p>text 5:19 6:3 8:15</p> <p>Thank 4:7 7:13 12:13,14,15</p> <p>that's 11:2</p> <p>themselves 3:18</p> <p>thereafter 13:6</p> <p>There's 6:2</p> <p>they're 5:12</p> <p>three-part 8:3</p> <p>Thursday 1:11</p> <p>thus 12:8</p> <p>track 5:2</p> <p>tracks 9:19</p> <p>train 9:18</p> <p>transcript 3:17</p> <p>true 13:7</p> <p>trust 9:18</p> <p>try 9:20</p> <p>trying 4:9</p> <p>tunnel 6:13</p> <p>turn 11:16</p> <p>typewriting 13:6</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S 1:15</p> <p>understand 4:10</p>	<p>6:14</p> <p>understanding 4:21 8:11</p> <p>UNITED 1:1</p> <p>unnecessarily 10:6</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>variance 5:16</p> <p>various 4:12,13</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 10:12</p> <p>Washington 1:10,16</p> <p>water 5:17</p> <p>Watershed 4:5</p> <p>Webster 4:2</p> <p>week 12:4</p> <p>we'll 11:6</p> <p>Wenzel 2:18 3:4 11:16</p> <p>we're 3:16 5:1 7:14 9:17 10:8</p> <p>Whereupon 12:17</p> <p>whether 7:8,10 11:6</p> <p>whom 13:3</p> <p>who's 4:2</p> <p>whose 13:5</p> <p>withdrawn 4:14</p> <p>witness 13:5</p> <p>work 6:2,11</p> <p>worked 10:19</p> <p>working 4:9</p> <p>wrapped 9:8</p>	<p>writing 9:6</p> <p>written 5:19 6:3 8:20</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yet 5:18</p> <p>yourselves 3:15</p>
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