

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

+ + + + +

ORAL ARGUMENT

IN RE: :

ARIZONA PUBLIC SERVICE CO., : NPDES Appeal No.

NPDES Permit No. NN0000019 : 19-06

Thursday,
September 3, 2020

Video-Teleconference

The above-entitled matter came on for
hearing, pursuant to notice, at 1:30 p.m. EDT

BEFORE:

THE HONORABLE AARON AVILA
Environmental Appeals Judge

THE HONORABLE MARY KAY LYNCH
Environmental Appeals Judge

THE HONORABLE KATHIE STEIN
Environmental Appeals Judge

APPEARANCES:**On Behalf of the Petitioners:**

JOHN BARTH, ESQ.
Attorney at Law
P.O. Box 409
Hygiene, CO 80533
303-774-8868
barthlawoffice@gmail.com

**On Behalf of the Environmental
Protection Agency Region IX:**

THOMAS HAGLER, ESQ.
DUSTIN MINOR, ESQ.
Environmental Protection Agency
of: Office of Regional Counsel
Region IX
75 Hawthorne Street
Mail Code ORC-2
San Francisco, CA 94105-3901
415-972-3945 (Hagler)
415-972-3888
hagler.tom@epa.gov
minor.dustin@epa.gov

and

ELISE O'DEA, ESQ.
Environmental Protection Agency
of: Office of General Counsel
1200 Pennsylvania Avenue, NW
Mail Code 2366A
Washington, D.C. 20460

202-564-4201

202-564-5477 fax

odea.elise@epa.gov

APPEARANCES (continued):

On Behalf of the Arizona Public Service
Company:

KERRY McGRATH, ESQ.
of: Hunton Andrews Kurth, LLP
2200 Pennsylvania Avenue, NW
Washington, D.C. 20037
202-955-1519
kmcgrath@huntonak.com

On Behalf of the Navajo Transitional Energy
Company, LLC:

RYEN L. GODWIN, ESQ.
of: Schwabe, Williamson & Wyatt, P.S.
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101
206-622-1711
rgodwin@schwabe.com

ALSO PRESENT:

Eurika Durr, Clerk of the Board
Jon Fleuchaus, Senior Counsel, EAB
Susan Gardinier Kimball, Senior Counsel, EAB

C-O-N-T-E-N-T-S

Presentation on Behalf of Petitioner14
Presentation on Behalf of Region IX and OGC. . . .34
Rebuttal on Behalf of Petitioner75

P-R-O-C-E-E-D-I-N-G-S

(1:30 p.m.)

JUDGE LYNCH: Good afternoon,
everyone. This is Judge Lynch, and I want to
start by thanking you for participating today.
And I trust everyone is doing well. We are going
to do another roll call in a moment, so that we
will have it on the record.

But I first wanted to provide you with
a few reminders for today's argument. And I
understand you may be somewhat tired of getting
instructions, but we think it would be useful to
do so.

So first, the Judges will keep our
cameras and microphones on for the duration of
the argument. The presenters will turn on their
camera and unmute their microphones when I ask
you to begin your portion of the argument.

And at the conclusion of your time, if
you would please once again turn off your camera
and mute your microphones. And the observers
will keep their microphones and cameras off for

1 the duration of the argument.

2 And if you haven't already done so, if
3 you would disconnect from any VPN connections.

4 So we do have a number of participants and
5 observers today, so let's now begin with a roll
6 call for the record.

7 And when I call your organization, if
8 you would please unmute your microphone and state
9 your name and affiliation and your role for
10 today's argument, and by that I mean whether
11 you're a presenter or an observer. So let's
12 start with petitioners, please.

13 MR. BARTH: Good morning. It's John
14 Barth, and I'm a presenter and also counsel for
15 the petitioners.

16 JUDGE LYNCH: Thank you. And if those
17 others who are here for petitioners, if you could
18 identify yourself, and who you're with in
19 particular, and your role today?

20 MR. GERHART: This is Matthew Gerhart.
21 I'm an attorney with Sierra Club, which is one of
22 the petitioners, and I'm an attendee today.

1 JUDGE LYNCH: Thank you. And then
2 Amigos Bravos?

3 MR. ZUPAN: This is Joe Zupan. I'm
4 Executive Director of Amigos Bravos, and a
5 petitioner.

6 JUDGE LYNCH: Thank you. And then San
7 Juan Citizens' Organization?

8 MR. BARTH: Judge Lynch, I saw Mike
9 Eisenfeld's name appear in Skype, but he hasn't
10 been able to communicate. So I don't know
11 whether he's having problems or not, but he may
12 be joining during the presentation.

13 JUDGE LYNCH: All right. And you have
14 the phone number to call for technical
15 difficulties. Correct?

16 MR. BARTH: Yes, and I forwarded that
17 to all of my clients. This is John Barth
18 speaking.

19 JUDGE LYNCH: All right. Yes. Thank
20 you, Mr. Barth. Hopefully he'll be able to
21 become operational. And I believe that's it for
22 petitioners. Then let's hear from Region IX and

1 OGC. First Region IX, please.

2 MR. HAGLER: Thank you, Your Honor.

3 Tom Hagler with Region IX. I'm a presenter.

4 JUDGE LYNCH: All right. Thank you.

5 MR. MINOR: And Dustin Minor, from

6 Region IX as well. I'm a presenter.

7 JUDGE LYNCH: Thank you.

8 MR. SHETH: This is Gary Sheth from

9 Region IX. I'm an observer.

10 JUDGE LYNCH: All right.

11 MS. VONVACANO: Marcela VonVacano,

12 Region IX, observer.

13 JUDGE LYNCH: Thank you. And then,

14 EPA OGC?

15 MS. O'DEA: Hi, Your Honor. This is

16 Elise O'Dea, and I'm a presenter.

17 JUDGE LYNCH: Thank you. And then for

18 APS, please?

19 MS. MCGRATH: Good afternoon, Your

20 Honor. This is Kerry McGrath for the permittee,

21 APS, and I am a presenter, and I am joined in the

22 room by Lauren Bachtel, who is an observer.

1 JUDGE LYNCH: Thank you. Anyone else
2 -- do you have anyone else from APS on?

3 MR. ALLMON: Yes, this is Jeff Allmon.

4 JUDGE LYNCH: Okay. Thank you. And
5 then, for NTEC?

6 MR. GODWIN: This is Ryen Godwin,
7 counsel for the Navajo Transitional Energy
8 Company, as amicus. We are here observing. And
9 nobody else is with me.

10 JUDGE LYNCH: Thank you. And then if
11 the court reporter could identify himself?

12 MR. WOJACK: This is Sam Wojack, the
13 court reporter.

14 JUDGE LYNCH: Thank you. And then,
15 for the Board, if the clerk could identify
16 herself for the record?

17 MS. DURR: Eurika Durr, clerk of the
18 Board.

19 JUDGE LYNCH: Thank you. And then we
20 have two senior counsel to the Board on today,
21 and if you could identify yourselves, starting
22 with Ms. Kimball?

1 MS. KIMBALL: This is Susan Gardinier
2 Kimball of the Environmental Appeals Board.

3 JUDGE LYNCH: Thank you.

4 MR. FLEUCHAUS: Jon Fleuchaus, also of
5 the Environmental Appeals Board.

6 JUDGE LYNCH: Thank you. And we have
7 outstanding technical assistance today, and so,
8 Ihab Mahmoud, if you could just identify yourself
9 for the record?

10 MR. MAHMOUD: Yes, this is Ihab
11 Mahmoud, and I'm here for tech support.

12 JUDGE LYNCH: Thank you. And then we
13 have two observers from the law firm of Beveridge
14 & Diamond, and if you could each identify
15 yourselves, that would be helpful.

16 MR. STILTON: Good afternoon, Judge
17 Lynch, this is Andrew Stilton from Beveridge &
18 Diamond.

19 JUDGE LYNCH: Thank you.

20 MR. DAVIS: Good afternoon, Your
21 Honor. It's Richard Davis from Beveridge &
22 Diamond.

1 JUDGE LYNCH: Well, thank you,
2 everyone, for that. I want to let you know that
3 this is the second time the Environmental Appeals
4 Board is conducting an oral argument by Skype.

5 And on behalf of the Board, I'd like
6 to say thank you for working with us to make this
7 happen, given the current circumstances. This is
8 the first time we have participants using visual
9 aids, and in advance I'd like to commend you for
10 your skill in that regard.

11 And I'd also like to thank you for
12 submitting those visual aids in advance. That
13 way, we'll have a backup system, if you will. We
14 anticipate things will go smoothly, but if we do
15 run into any technical difficulties, we'll deal
16 with it.

17 And as the clerk has already
18 announced, the Environmental Appeals Board is
19 hearing oral argument today on a petition for
20 review of a Clean Water Act permit that Region IX
21 issued to the Arizona Public Service Company for
22 the Four Corners Power Plant.

1 The petitioners are the Diné Citizens
2 Against Ruining the Environment, the San Juan
3 Citizens' Alliance, Amigos Bravos, the Center for
4 Biological Diversity, and the Sierra Club.

5 In today's argument, we'll proceed as
6 outlined in the Board's July 9th, 2020, order.
7 We will hear first from petitioners, then EPA
8 Region IX, and OGC, then APS, and finally the
9 petitioners, if they decide to reserve time for
10 rebuttal. And they may reserve up to ten minutes
11 of the allocated time for rebuttal.

12 The Board has allotted 60 minutes for
13 argument, as follows. The petitioners for 30
14 minutes -- and, Mr. Barth, when you begin your
15 argument, if you would please let us know if you
16 want to reserve any rebuttal time. And then
17 Region IX and OGC combined, 20 minutes, and APS,
18 ten minutes.

19 So, on behalf of the Board, I want to
20 express that we very much appreciate all the time
21 and effort each of you has expended to date in
22 connection with the briefing on the petition and

1 preparing for and participating in this oral
2 argument.

3 Oral argument is an important
4 opportunity for you to explain your contentions
5 and the issues, in this case. It's also an
6 opportunity for the Judges to explore with you
7 the contours of your arguments and the issues.

8 You should assume that we've read the
9 briefs and the record in this case, and therefore
10 we're likely to ask questions that are going to
11 assist us in our deliberations.

12 You should not assume that the Judges
13 have made up their minds about any of the issues
14 in a case, but instead, we're really using this
15 as an opportunity to listen, and to understand
16 your position, and to probe the legal and the
17 record support on which the Region based its
18 permitting decision in this case.

19 So as the clerk has stated, there's no
20 recording of any kind allowed. The court
21 reporter will be transcribing the oral argument,
22 and a transcript of the argument will be posted

1 to the docket in this matter. So we'll now
2 proceed with oral argument.

3 And, again, if you're not presenting
4 oral argument, please turn off your video and
5 mute your microphone. And also, just please be
6 aware, we do not have a timer that everyone can
7 see, but the clerk of the Board will verbally
8 inform you when you have five minutes remaining
9 in your allotted time, and also when your time
10 has expired.

11 Does anyone have any questions?

12 All right. So now, counsel for
13 petitioner, Mr. Barth, if you could please
14 proceed, and let us know if you want to reserve
15 rebuttal time.

16 MR. BARTH: Good afternoon. I'm John
17 Barth, counsel for the petitioners. Thank you
18 for granting our request for oral argument and
19 considering our petition for review. Petitioners
20 are reserving ten minutes for rebuttal.

21 As noted in our briefing, EPA's final
22 permit is based on multiple clear errors of law

1 and fact that must be corrected by the Board. My
2 presentation today will focus on three main
3 issues.

4 First, why EPA committed clear error
5 in its Reasonable Potential, RP, analysis, and in
6 setting effluent limitations for temperature and
7 total dissolved solids from Outfall 001. Second,
8 why EPA committed clear error in finding that
9 Morgan Lake is not a Water of the United States.

10 And three, why EPA committed clear
11 error in concluding that the Four Corners Power
12 Plant cooling system is a, quote, closed-cycle
13 recirculating system. We are seeking the
14 following relief from the Board.

15 First, we ask that the Board issue a
16 decision finding that the EPA committed clear
17 error on the issues in our petition. Second, we
18 ask that the Board vacate EPA's final permit and
19 remand it back to EPA to correct the errors,
20 consistent with the Board's opinion.

21 Third, we ask that EPA -- given that
22 EPA last issued a final and effective permit in

1 2001 for this facility, we ask that the Board
2 impose a tight remand schedule requiring EPA to
3 issue a revised draft permit within three months,
4 and a revised final permit within six months of
5 the Board's order.

6 This schedule is necessary, because as
7 you may remember, petitioners had to sue in
8 federal court to force EPA to issue a draft and
9 final permit. If you don't impose a schedule, it
10 will likely lead to more litigation over the
11 timing of the permit reissuance.

12 Finally, we ask that the Board deny
13 any future request by EPA for a voluntary remand
14 of this permit. The Board previously granted
15 EPA's request for a voluntary remand of this
16 permit only to have EPA issue a revised final
17 permit containing some of the same errors in the
18 previous permit.

19 Before I begin, I want to inform the
20 Board that petitioners have submitted four
21 argument exhibits. Let me know if you'd like to
22 review any of these exhibits during my

1 presentation. I'm now going to just briefly
2 describe what these exhibits are.

3 Exhibit 1 is a map, with the layout of
4 the Four Corners Power Plant facility, the
5 receiving waters, and other features. It does
6 contain color highlighting, which is mine, but
7 otherwise, the document is from the
8 Administrative Record.

9 Exhibit 2 is a map of some relevant
10 Navajo Nation EPA surface water sampling sites,
11 and their relationship to the receiving waters.
12 This document is not in the Administrative
13 Record. However, at this time, I'm not seeking
14 to introduce it into the Administrative Record.

15 Instead, I'm only offering it as a
16 demonstrative exhibit, in the event the Board
17 would like to see the relationship of these
18 surface water monitoring sites to the receiving
19 waters.

20 Exhibit 3 is a list and narrative
21 description of the location of the Navajo Nation
22 surface water monitoring sites. And this is

1 contained in Administrative Record -- and I'll
2 abbreviate, AR -- Number 27-B, which is that
3 Navajo Nation surface water monitoring data.

4 Exhibits 4 and 5 are EPA's approved
5 2007 Navajo Nation water quality standards.

6 Exhibit 4 is a table showing that No Name Wash,
7 the Chaco River, the San Juan River are all
8 designated Waters of the Navajo Nation, with
9 water quality classifications and standards.

10 All of these standards have been
11 approved by EPA. Exhibit 5 is the Navajo Nation
12 water quality standard for temperature that's
13 applicable to all waters on the Navajo Nation,
14 and also approved by EPA.

15 Exhibit 6 is an excerpt from the site
16 lease between the Navajo Nation and the power
17 plant operators, containing a total dissolved
18 solids, or TDS, water quality standard for
19 wastewater discharged into the San Juan River
20 from the power plant.

21 Again, all of these are in the
22 Administrative Record, except for Exhibit 2.

1 I'll now turn to the three main issues I
2 identified in my introduction.

3 First, I'll discuss why EPA committed
4 clear error in its Reasonable Potential analysis,
5 and in setting effluent limitations for
6 temperature and TDS from Outfall 001, which is
7 the outfall from Morgan Lake to downstream
8 receiving waters No Name Wash, the Chaco River,
9 and the San Juan River.

10 JUDGE AVILA: Mr. Barth? Before you
11 get there, I think I need a kind of common
12 ground. What definition -- what rule defining
13 the Waters of the United States do you think
14 applies here, and why?

15 MR. BARTH: Well, as we all know,
16 there have been three different Waters of the
17 United States rules issued since the final
18 permit.

19 So what I am going to suggest to the
20 Board, given the fact that this permit has never
21 been effective, and has been stayed the entire
22 time, we are requesting that the Board remand

1 this to EPA to apply the new April 2020 rule to
2 this permit.

3 As you know, the existing permit's
4 been in effect for 20 years. This one will be in
5 effect for five years. So I think it's important
6 to get it -- to have EPA apply the new rule,
7 which to date it has not done. However, it
8 doesn't really matter which of the three rules
9 you apply.

10 All of them would require Morgan Lake
11 to be considered a Water of the United States,
12 because it impounds jurisdictional waters from
13 the San Juan River, and has a significant
14 hydrologic connection to the San Juan River,
15 which is a traditional navigable water.

16 So no matter which one you apply, you
17 reach the same conclusion. It's a Water of the
18 United States.

19 JUDGE LYNCH: So Mr. Barth, you're
20 saying -- your position is that if the water is a
21 traditional navigable water, it cannot fall under
22 the exemption?

1 MR. BARTH: That's correct. The
2 purpose of the Clean Water Act is to interpret
3 these provisions broadly, not narrowly. The
4 exceptions to the Clean Water Act are what should
5 be interpreted narrowly.

6 And once a Water of the United States
7 is triggered, and it's a navigable water, it is
8 not removed from jurisdiction by a narrower
9 exception. And there's nothing contained in the
10 waste treatment system exception that says even
11 if it's a navigable water, it still can comply
12 with the waste treatment system exception.

13 JUDGE STEIN: Can I interrupt you for
14 a moment, Mr. Barth?

15 MR. BARTH: Sure.

16 JUDGE STEIN: Because the 2015
17 definition says, the following are not Waters of
18 the United States, even where they otherwise meet
19 the terms of Paragraphs 1(iv) through (viii) of
20 this definition. And under that is the waste
21 treatment systems exclusion.

22 So why doesn't -- why shouldn't we

1 reject your argument and determine that if we
2 think that the 2015 definition applies, and if we
3 think that it meets the waste treatment systems
4 exclusion, why shouldn't our decision be
5 controlled by that?

6 MR. BARTH: I believe -- my
7 recollection is Section 40 CFR 122.2 says that if
8 you have impoundments of jurisdictional waters,
9 it is a Water of the United States. And remember
10 that this facility has been in effect and been
11 operational for over 50 years.

12 EPA has never applied the waste
13 treatment system exclusion to this body of water.
14 It has always treated it as a receiving water.
15 The Navajo Mine coal mine NPDES permit, issued by
16 EPA, treats it as a receiving water, not as a
17 Water of the United States.

18 And in fact in 2018, when EPA issued
19 its draft permit, it stated in its response to
20 comments, quote, we are not applying the waste
21 treatment system exception to Morgan Lake. So
22 this is the first time in the 50-year history of

1 this facility that EPA has ever tried to apply
2 that exception to the facility.

3 JUDGE LYNCH: So Mr. Barth, are you
4 saying that the status of a water body can never
5 change?

6 MR. BARTH: It could change if there
7 was a physical change, but there's nothing in the
8 record that says there's been any physical change
9 to this water body to isolate it from navigable
10 waters, or to otherwise change its status.

11 JUDGE LYNCH: So if in, let's say,
12 1960, before the Clean Water Act, the facility
13 had a body of water that was a pond or a pool, on
14 their property, and then after the Clean Water
15 Act is enacted, they incorporated that body of
16 water in a Clean Water Act permit, and regulated
17 the discharges from it, that would have no impact
18 on the status of that water body?

19 MR. BARTH: I'm not sure I understand
20 your question. You know, we have a water body
21 here. Let's look at the one that's at issue.
22 It's a large lake. It's been identified by the

1 Navajo Nation in the water quality standards as a
2 Water of the Navajo Nation.

3 It has water quality standards and
4 classifications. Those have not been approved by
5 EPA, that's the one exception to the Navajo
6 Nation 2007 water quality standards.

7 The body of water is actually used --
8 there's primary physical contact, there's
9 secondary physical contact. There's aquatic life
10 criteria, there's boating, there's fishing,
11 there's hydrologic connection. And nothing has
12 changed since this body of water came into
13 existence.

14 And let me just add, as well, you'll
15 remember from our briefing that EPA's initial
16 finding was that Morgan Lake was created by the
17 damming of a jurisdictional water on the Navajo
18 Nation. So --

19 JUDGE LYNCH: So the provision --
20 excuse me. So the provision that Judge Stein
21 quoted from the 2015 definition of Waters of the
22 United States says, the following are not waters

1 of the United States, even if they otherwise meet
2 the terms of Paragraphs 1(iv) through (viii) of
3 this definition. What does that mean to you,
4 then?

5 MR. BARTH: Well, again, you know,
6 what I've seen in the 40 CFR Part 122, WOTUS
7 rule, says that if you're impounding
8 jurisdictional waters --

9 JUDGE LYNCH: Which one are you
10 reading from?

11 MR. BARTH: 2015.

12 JUDGE STEIN: But Mr. Barth, isn't
13 there a note that is in the 2015 version that
14 basically says that as of 1980 EPA suspended that
15 last sentence relating to impoundments?

16 MR. BARTH: So that rule, the
17 Perciasepe memo, or wherever it -- I'm sorry if
18 I'm torturing its name.

19 JUDGE STEIN: Perciasepe. I'm not
20 referring to the memo, I'm referring to the note
21 that's in the federal regulation.

22 JUDGE LYNCH: The 1980 regulation.

1 MR. BARTH: The definition is --

2 JUDGE LYNCH: The July 21st, 1980
3 regulation, suspended.

4 MR. BARTH: So the definition of
5 cooling water was removed, but --

6 JUDGE LYNCH: That was in 1982.

7 MR. BARTH: Right, but the --

8 JUDGE LYNCH: Judge Stein's asking
9 about 1980.

10 MR. BARTH: Okay.

11 JUDGE LYNCH: The 1980 rulemaking.

12 MR. BARTH: Yeah, I'm sorry. I'm not

13 --

14 JUDGE LYNCH: July 21, 1980.

15 MR. BARTH: -- familiar with the
16 distinction between the two.

17 JUDGE STEIN: I'm just asking about
18 the language, because in the version of the
19 federal register that I have, or the regulations,
20 the question that I'm asking relates to the fact
21 that I think that the language that you're
22 relating to concerning impoundments was suspended

1 by EPA in 1980.

2 So what I'm looking at is whether or
3 not this facility meets the definition of the
4 waste treatment system, because I don't think the
5 language you're pointing to is in effect.

6 MR. BARTH: Okay. Well, let me go
7 back to why it's not a waste treatment system.
8 Okay? So first of all, there's no evidence in
9 the record that this was designed to treat
10 pollutants before they're discharged in the
11 receiving waters.

12 There's nothing in the record -- and
13 let's look at -- this is important. Let's look
14 at EPA's -- let's look at the timeline here
15 first. EPA last issued this permit in 2001.
16 Since that time, the Navajo Nation has adopted
17 water quality standards, including a water
18 quality standard for temperature. Okay?

19 This will be the first time that the
20 agency's ever had to consider whether that
21 temperature requirement meets the water quality
22 standard. The effluent limit in the current

1 permit allows them to discharge between 90 and 95
2 degrees into receiving waters.

3 EPA has never evaluated whether that
4 complies with water quality standards. The waste
5 treatment exception assumes that the system was
6 not designed to meet water quality standards.

7 But we have no evidence in the record
8 here that this system was designed to meet that
9 water quality standard. And in fact it doesn't
10 meet that standard.

11 JUDGE AVILA: When you say, designed
12 to meet that water quality standard, are you
13 talking about the Navajo Nation's water quality
14 standard from Morgan Lake?

15 MR. BARTH: No, the water quality
16 standard for all receiving waters for
17 temperature, which is 90 -- right. And that
18 water quality standard says you may not increase
19 the ambient temperature downstream more than five
20 degrees for warm water, and two degrees for cold
21 water.

22 EPA's never evaluated whether that

1 effluent limit in the final permit meets that
2 standard. In fact, what they said is there's no
3 data to make that assessment, and that --

4 MS. DURR: Five minutes.

5 MR. BARTH: -- and that is a clear
6 error of fact. In AR 27-B, EPA had, at the time
7 it issued this permit, Navajo Nation water
8 quality data for the downstream receiving waters.

9 EPA did not apply that data in its
10 Reasonable Potential analysis, nor did they
11 provide any kind of rationale for why Morgan
12 Lake, the discharge from Morgan Lake, should
13 qualify as a waste treatment system, because it
14 complies with water quality standards downstream.
15 There's just, you know, this is --

16 JUDGE LYNCH: Which AR number is that,
17 Mr. Barth? This is Judge Lynch. What AR number
18 are you referring to?

19 MR. BARTH: AR 27-B. It's a --

20 JUDGE LYNCH: This is the argument you
21 were making in Footnote 57 on Page 17 of your
22 reply brief?

1 MR. BARTH: Well, we've made this
2 argument that EPA needs to --

3 JUDGE LYNCH: No, this specific
4 argument, based on this data. AR 27-B.

5 MR. BARTH: AR 27-B is Navajo Nation
6 water quality data that EPA should have
7 considered in its temperature Reasonable
8 Potential analysis and in its TDS Reasonable
9 Potential analysis.

10 JUDGE LYNCH: My question about it is
11 that when I was reviewing the record in this case
12 --

13 MR. BARTH: Yes.

14 JUDGE LYNCH: -- I don't see any
15 reference to that, or that argument, in your
16 comments on the permit.

17 MR. BARTH: Okay. I can tell you
18 where that is.

19 JUDGE LYNCH: The first time I see
20 this is in your reply brief.

21 MR. BARTH: So it's in our comment
22 letter, first of all, on the draft permit, which

1 is AR 20.1.a, at Page 39 and 40. It's also in
2 our petition for review on Page 15, Pages 34
3 through 35, 39, 40, 41, and 42.

4 And in fact we even reproduced the
5 temperature standard on Page 40 of our petition.
6 It's also in EPA's response to comments, which is
7 AR Number 26-D --

8 JUDGE LYNCH: Not these specific
9 stations that you're talking about. This
10 particular argument, the first time it shows up
11 is here in Footnote 57.

12 MR. BARTH: I think if you look at
13 what I was just referring to, you'll see that our
14 argument is that EPA needs to conduct a
15 Reasonable Potential analysis relying on
16 downstream receiving water data. So that data is
17 --

18 JUDGE LYNCH: I understand that.
19 That's -- right.

20 MR. BARTH: That data exists. EPA
21 said it did not exist at the time it issued its
22 permit. But remember, EPA relied on the same

1 Navajo Nation data in issuing its Reasonable
2 Potential analysis for mercury and selenium, but
3 then said the data didn't exist when it did its
4 Reasonable Potential analysis for temperature and
5 TDS.

6 JUDGE LYNCH: In terms of the -- I
7 have one question about the effluent limits.

8 MR. BARTH: Yes.

9 JUDGE LYNCH: Are the effluent limits
10 in the 2019 permit that's before us the same as
11 those in the 2001 permit? I have the 2001 in
12 front of me.

13 MR. BARTH: Yes, they largely are the
14 same. But remember, when EPA issued that permit,
15 it had not approved water quality standards for
16 the Navajo Nation.

17 JUDGE LYNCH: Yes, that wasn't my
18 question. I don't see a difference here, so --

19 MR. BARTH: But there's no -- there's
20 also nothing in the record from the 2001 permit.
21 There's no Reasonable Potential analysis in the
22 2001 permit saying that their temperature

1 effluent limit complies with downstream quality
2 standards.

3 (Simultaneous speaking.)

4 JUDGE LYNCH: -- not answering the
5 right question about the effluent limits, so --

6 MR. BARTH: So I want to make -- we've
7 talked a bit about the Reasonable Potential
8 analysis and the water quality effluent limits,
9 but I'd like to talk just briefly in the time
10 that I have left is why EPA's decision that the
11 Four Corners Power Plant cooling system is a
12 closed-cycle recirculating system is clear error.

13 If you look at the 2001 permit and
14 fact sheet for that permit, it applies 40 CFR
15 423.11(g) for once-through cooling water, which
16 it says is passed through the main cooling
17 condensers in a one or two passes --

18 MS. DURR: Time.

19 MR. BARTH: -- process of removing
20 heat. So in the 2001 permit and in the current
21 permit --

22 JUDGE LYNCH: You could just -- if you

1 would just finish your point, that would be --

2 MR. BARTH: So in both the 2001 permit
3 and the current permit, they are applying once-
4 through cooling water effluent limitation
5 guidelines for discharges into the lake, but then
6 they turn around and say it's not once-through
7 cooling water for purposes of Section 316(b) of
8 the Clean Water Act.

9 They can't have it both ways. They've
10 already determined that it's once-through cooling
11 water from a regulatory standpoint. They need to
12 live with that same finding for Section 316(b) of
13 the Clean Water Act.

14 JUDGE LYNCH: Thank you, Mr. Barth.
15 All right. If EPA Region IX and OGC could
16 proceed, but if you would let us know who is
17 addressing what issues in your argument?

18 MR. HAGLER: I'm sorry, Your Honor, my
19 screen was getting confused between the Skype
20 function and the exhibit that I was trying to put
21 up.

22 Tom Hagler with EPA Region IX. With

1 me today are Ms. O'Dea from OGC, and Mr. Minor,
2 also from Region IX. I think we'd probably like
3 to mainly leave time available for your
4 questions, because I know you probably have some.

5 And so I might abbreviate some of my
6 intended presentation, but our proposal is and
7 was to give you a short overview of the facility
8 and of how the permit actually works, and then
9 turn it over to Ms. O'Dea to discuss WOTUS and
10 waste treatment exemptions, and to Mr. Minor to
11 discuss the ELGs and 316(b) and then if we still
12 have time, come back to me for the rest of the
13 issues.

14 And if we don't get to the rest of the
15 issues, we will probably be willing to submit our
16 briefs on those. So I'll proceed until --

17 JUDGE LYNCH: All right.

18 MR. HAGLER: -- until you have a
19 question. I'm going to work off of the exhibit
20 that is a map of the whole facility. I think I
21 know how to do this, but you do have this in your
22 stack.

1 JUDGE LYNCH: Yes. Thank you.

2 MR. HAGLER: Let's see.

3 JUDGE LYNCH: I can't help you.

4 MS. O'DEA: Mr. Hagler, I just wanted
5 to note that your video's not on.

6 MR. HAGLER: It takes a second. Let
7 me know when it's on, if it shows up. Hold on.
8 It's not on. This is very slow. Now it says
9 it's sharing. Let me go through the process
10 again. Share window.

11 JUDGE LYNCH: There may be a delay.

12 MR. HAGLER: Select the window. Share
13 the window.

14 JUDGE LYNCH: There we go.

15 MR. HAGLER: Wait eight seconds. All
16 right. And I apologize, this is, on your screen,
17 what we found in our dry run that this is a very
18 small graphic, and you may just want to work off
19 the hard copy, if you have one there.

20 Anyway, this is the plant site. This
21 is the San Juan River at the top of the screen.
22 It goes downstream from your right to your left.

1 The Chaco River is on the bottom left of your
2 screen, goes downstream this direction, up, and
3 the confluence is a little bit off your screen up
4 there at the top left.

5 The plant was put there in around --
6 it was built in the 50s. It started operations
7 around 1961, 1962. It was installed on this
8 plateau between the two rivers, and they have
9 this lake that is used as the cooling pond for
10 the boilers, and the only water that's in that
11 Morgan Lake is water that's pumped up from the
12 San Juan River.

13 We have a pumping station here, it
14 goes through a pipeline about two miles into the
15 lake, here at Morgan Lake. The plant itself
16 cycles about 1.7 billion, with a b, gallons of
17 water daily between the cooling pond and the
18 plant.

19 The pumping plant brings in from
20 Morgan Lake an average of around 14 million
21 gallons daily, about one percent of the amount
22 that's cycled in and out of here. There's also

1 one other feature -- and then I'm going to make
2 this bigger, now.

3 I'm going to make this bigger now, so
4 you can see better. Maybe I'll go a little
5 bigger. What I'm trying to display here is --
6 this is the dam. There is a flume in the bottom
7 of the dam.

8 And for regulation purposes -- the way
9 the lake is regulated is either by adding more
10 water from the San Juan to top it off, or by
11 discharging some water through this flume out
12 into No Name Wash, which is this wash right here,
13 which they do approximately, on average, four
14 days a week, and they average about four million
15 gallons per day, discharging out of this flume.

16 A couple other features and then I'm
17 going to zero in on the plant itself. These are
18 the ash ponds that have been used over the 60
19 years this has been here. The only one currently
20 still in operation, I believe, is this one at the
21 bottom right, in blue.

22 And that one's scheduled to be closed,

1 I believe, in October of this year. Another
2 feature that we will talk about is our seeps, and
3 these were seeps that were along the canyon wall
4 roughly here. Those are south seeps, and I
5 believe the other ones are right about there, on
6 the north seeps.

7 I'm going to move up and go to the
8 black and white picture and try to blow it up a
9 little bit, so you can actually see it. So this
10 is the plant facility itself. The permit is
11 pretty darn simple.

12 We've got the one outfall, the one
13 formal outfall, which is on the dam that I just
14 showed you. And we have three internal outfalls.
15 Internal outfalls, you're allowed to use them
16 when you find that your dilution is so great that
17 it doesn't really -- it's impractical to actually
18 measure something if you can measure it at the
19 formal outfall, so you're allowed to go upstream
20 into the plant and identify internal outfalls.

21 We have two that are operational. We
22 have three that are permitted. One is not in

1 use. One of them is for units 4 and 5, which are
2 the only two boilers in use right now. That is
3 internal outfall 001A, and then another outfall,
4 01E, is for the combined waste treatment plant.

5 Those two combine in the discharge
6 canal, and are sent over to Morgan Lake, so the
7 discharge from those two internal outfalls
8 actually goes into Morgan Lake somewhere around
9 here.

10 And I think I showed you the rest of
11 the permit. I think we've been through it. The
12 first permit was written in 1983, additional ones
13 in 1988, 1993, 2001. I'm going to turn my -- no.
14 Yes. I think I will turn off my map.

15 And I think at that point, that's
16 enough of an overview that I'm going to turn it
17 over to --

18 JUDGE LYNCH: Can I ask you a
19 question? This is Judge Lynch.

20 MR. HAGLER: Yes.

21 JUDGE LYNCH: Based on the -- how did
22 you treat Morgan Lake in the 2001 permit, in

1 terms of whether or not it was a Water of the US,
2 or an exempt waste treatment system?

3 MR. HAGLER: I'm going to hand off
4 that question to Ms. O'Dea --

5 JUDGE LYNCH: Okay.

6 MR. HAGLER: -- if I may.

7 JUDGE LYNCH: Yes.

8 MR. HAGLER: May I do that?

9 JUDGE LYNCH: Sure. Yes.

10 MR. HAGLER: I'm going to turn this
11 off, so that we can actually do that. Let me get
12 rid of this. I'm trying to find a way to turn
13 myself off. Up here, I believe. Stop sharing.
14 And --

15 MS. O'DEA: Good afternoon, Your
16 Honor. This is Elise O'Dea. Can you hear and
17 see me?

18 JUDGE LYNCH: Yes. Thank you.

19 MS. O'DEA: Hi. So to answer your
20 question, Judge Lynch, the permits for this
21 facility have consistently regulated Morgan Lake
22 not as a Water of the United States.

1 So in the 2001 permit, to answer your
2 question directly, we regulated the final point
3 of discharge from Morgan Lake to downstream
4 jurisdictional waters.

5 And then as Tom explained, we had also
6 internal outfalls in the 2001 permit, given the
7 issue of dilution and monitoring parameters of
8 effluent limits at the final point of discharge
9 from Morgan Lake to the downstream jurisdictional
10 waters.

11 JUDGE LYNCH: Thank you. And --

12 JUDGE AVILA: Just, could I follow up
13 on that, Judge Lynch?

14 JUDGE LYNCH: Sure.

15 JUDGE AVILA: Just to be -- so was it
16 part -- did you conclude that it was subject to
17 the waste treatment system exclusion in 2001?

18 MS. O'DEA: So the interesting thing
19 about the waste treatment system exclusion, being
20 completely blunt with you all, is the exclusion
21 is not something that the agency has consistently
22 stated that it is relying on in its permits. And

1 that's provided for in the Grumbles 2006
2 Memorandum.

3 That's in the record at AR 14-E. And
4 there -- the guidance provided in that memo is
5 that we do not need to explicitly state that
6 we're relying on the exclusion.

7 And in fact it's quite common that
8 permits, where the waste treatment system is just
9 incorporated as a part of treating the
10 discharges, do not explicitly state that that
11 body of water is acting as a waste treatment
12 system.

13 All that's required is that we ensure
14 that the discharges are indeed being treated by
15 that system to meet the effluent limits under the
16 permit.

17 JUDGE AVILA: And if I wanted, I
18 guess, the evidence that it would be, even though
19 it wasn't explicitly said, a waste treatment
20 system exclusion, is the fact that there were
21 internal outfalls versus the -- I think you
22 called it the final point outfall?

1 That is consistent with it being a
2 waste treatment system. Right?

3 MS. O'DEA: Absolutely. It would be
4 inconsistent with the agency's practice to
5 regulate a discharge from one WOTUS to another.
6 So the fact that the structure of the permit has
7 consistently been that we have these internal
8 outfalls, but then the final point of discharge
9 that we consider when we are evaluating whether
10 the permit limits have been met is that discharge
11 point from Morgan Lake to the downstream
12 jurisdictional waters.

13 JUDGE AVILA: Thank you.

14 JUDGE STEIN: So let me ask you a
15 question, and I perhaps have not fully understood
16 the record, but I thought that in the 2018
17 permit, you declined to take a position on the
18 waste treatment exclusion. And now you have
19 taken a position.

20 So how is that consistent with what
21 you just told us, that it's always been subject
22 to the exclusion?

1 MS. O'DEA: Well, Your Honor, you are
2 correct that in the 2018 permit Region IX said
3 that it was not relying on the exclusion, and
4 instead evaluated that the lake was not a Water
5 of the United States, which in essence has the
6 same practical effect as not regulating that body
7 of water.

8 However, we did not disavow that the
9 exclusion could apply, and upon a further
10 analysis in the 2019 permit, following our
11 withdrawal of the 2018 permit, we found that this
12 body of water does indeed fall squarely within
13 the exclusion, and that's the appropriate
14 determination to make for this lake.

15 JUDGE LYNCH: I had a question, Ms.
16 O'Dea. If a water body is otherwise a
17 jurisdictional water, could it still fall under
18 the exemption?

19 MS. O'DEA: Yes. When it comes to the
20 waste treatment system exclusion, whether we're
21 looking at the 2015 rule, which applied to this
22 permit, or the 1980s regulations, and

1 particularly under the new rule, the Navigable
2 Waters Protection Rule, it is irrelevant whether
3 the body of water could otherwise fall within a
4 jurisdictional category.

5 The Perciasepe memo in particular --
6 which you all have mentioned, so I know that
7 you're aware of it -- makes that clear that the
8 regions have the discretion to find that the
9 exclusion applies to cooling ponds in particular,
10 regardless of uses of those ponds that may
11 indicate that they could be considered an
12 otherwise jurisdictional water.

13 JUDGE LYNCH: Do you have to first
14 undertake an analysis of whether it's a
15 jurisdictional water body?

16 MS. O'DEA: Under the guidance in the
17 Perciasepe memo, no. The memo lends the regions
18 the flexibility to decide on a case-by-case basis
19 whether to apply a waste treatment system
20 exclusion analysis or to apply a WOTUS
21 jurisdictional determination.

22 And that was as a result -- I'm sure

1 you're aware of this, but just to refresh your
2 memories -- of the ambiguity that was introduced
3 given the deletion of the parenthetical about
4 cooling ponds from the WOTUS definition in 1982.

5 JUDGE AVILA: So can I -- were you
6 done, Judge Lynch? I'm sorry.

7 JUDGE LYNCH: Yes. I have another
8 question, but go ahead with yours.

9 JUDGE AVILA: I just -- the waste
10 treatment system exclusion applies to, among
11 other things, treatment ponds or lagoons that
12 are, quote, designed to meet the requirements of
13 the Clean Water Act.

14 What do you understand the term,
15 designed to meet the requirements of the Clean
16 Water Act to mean in this context? I'm kind of
17 struggling with what work that does.

18 MS. O'DEA: It's a fair question, Your
19 Honor. And hopefully in the new revised
20 definition of WOTUS we've tried to make that more
21 clear.

22 But proceeding under the 2015 rule,

1 which in essence just continues the 80s version
2 of the exclusion, both courts including the 9th
3 Circuit and the Agency have considered that
4 language to be interpreted as meaning that the
5 system is treating discharges such that they will
6 meet Clean Water Act requirements, in this case
7 Section 402 permit requirements.

8 So in essence, to break it down, you
9 need to have a system that is actually providing
10 treatment, so here this cooling pond is
11 dissipating waste heat, so it's providing
12 treatment, and it needs to be designed to meet
13 the requirements of the Clean Water Act, meaning
14 that it is treating water, such that the
15 discharges are complying with these permit
16 requirements.

17 JUDGE AVILA: I don't know if this is
18 possible, but could you have a cooling pond that
19 doesn't discharge to a Water of the US? And then
20 how would you apply --

21 MS. O'DEA: There are isolated -- I'm
22 relatively certain that there are isolated

1 cooling ponds that do not have -- that don't
2 require a NPDES permit for discharges from them,
3 in which case this question wouldn't arise.

4 JUDGE AVILA: Okay.

5 JUDGE LYNCH: And then my other
6 question I had for you - this is Judge Lynch --
7 was whether the effluent standards limits in the
8 2019 permit are the same as those in the 2001
9 permit.

10 MS. O'DEA: That is my understanding,
11 although admittedly, being in headquarters and
12 not one of the regional attorneys, I welcome Mr.
13 Minor or Mr. Hagler to correct me if I am wrong.
14 But that's my understanding.

15 JUDGE LYNCH: Can one of them answer
16 my question? I'm looking at the 2001 permit and
17 I don't see a difference, but I'm asking because
18 I want to confirm my reading.

19 MR. HAGLER: I'm sorry. This is Tom
20 Hagler. What was the question here?
21 Specifically what were you looking for in the --

22 JUDGE LYNCH: Whether the effluent

1 limits in the 2019 permit are the same as those
2 in the 2001 permit?

3 MS. O'DEA: Your Honor, flipping
4 through my notes, I can confirm that that's the
5 case.

6 MR. HAGLER: Yes, that is my
7 understanding, too. We were relying on the old
8 effluent limitation guidelines numbers --

9 JUDGE LYNCH: Thank you.

10 MR. HAGLER: -- which are actually
11 very old.

12 JUDGE LYNCH: Thanks. Thank you. So
13 if you want to proceed with your argument, Region
14 IX, and/or OGC, however you divided it up?

15 MS. O'DEA: Well, Your Honor, I
16 realize we've taken a lot of time on the WOTUS
17 waste treatment system exclusion issues, so I do
18 want to defer to my colleagues, unless there are
19 any more question from the Board on those issues.

20 JUDGE LYNCH: I don't have any. Judge
21 Stein or Judge Avila?

22 JUDGE STEIN: Not on those issues, but

1 I do have a question about the effluent
2 limitation guidelines and whether the 1982 rule
3 is what is in effect as a result of the Fifth
4 Circuit decision or not. I'm interested in OGC's
5 slash Region's view of that.

6 MR. HAGLER: Your Honor, this is Tom
7 Hagler. That would be addressed by Mr. Minor.

8 MR. MINOR: Hello. Can you all hear
9 me and see me? I tried to get in and answer the
10 previous question about the permit limits and I
11 was having technical difficulties.

12 JUDGE LYNCH: You're fine now.

13 MR. HAGLER: Yes, you're fine.

14 MR. MINOR: Okay, great. This is
15 Dustin Minor from EPA Region IX and just give me
16 one moment, because I've lost all visual here. I
17 apologize.

18 JUDGE LYNCH: It's fine.

19 JUDGE STEIN: Yes, we can see you.

20 MR. MINOR: Okay, now I can see you
21 all. I can't see myself, but that's okay. Yes,
22 and it's actually -- what I was going to say is

1 related to your question, Your Honor.

2 So to answer the previous question,
3 the only difference in this permit from the prior
4 permit in terms of changes is that it provides,
5 pursuant to the revisions to the 2015 ELGs,
6 effluent limitations guidelines, that there shall
7 be no discharge of bottom ash transport water
8 starting December 31st of 2023.

9 So the levels are the same, prior to
10 that date, but then starting at that date there
11 is a difference in the permit. Would you mind
12 repeating your question? I'm sorry, I was so
13 flustered with the technology there.

14 JUDGE STEIN: So my question relates
15 to the effluent limitation guidelines and the
16 effect of the Fifth Circuit decision, and how EPA
17 reads that Fifth Circuit decision and whether, as
18 a result, they consider the '82 rule to be in
19 effect or not.

20 MR. MINOR: Thank you. Yes, I will
21 point out that the Fifth Circuit decision came
22 out in mid-April of 2019, and we put our permit

1 out for public comment in late April of 2019, so
2 the decision was right on the heels of putting
3 the permit out for comment.

4 And as Mr. Barth noted earlier, we
5 were trying to address his concerns in the
6 lawsuit that he filed to expedite issuance of the
7 permit. But that's just a background. So the
8 Fifth Circuit invalidated the best available
9 treatment technology, or BAT, for legacy bottom
10 ash transport waters.

11 So just to clarify, as I noted for
12 non-legacy bottom ash transport water, which is
13 really the same discharge, it's just defined by
14 the date of when it occurs, so the no-discharge
15 requirement that kicks in in December '23 --
16 well, bottom ash transport water after that is
17 non-legacy.

18 Bottom ash transport water discharged
19 between the effective date of this permit and --
20 or even in the existing permit, I guess -- till
21 December of 2023, is legacy bottom ash transport
22 water.

1 So the Fifth Circuit invalidated the
2 best available treatment technology standard for
3 legacy bottom ash transport water. So under
4 applicable standards, we go back to the existing
5 standards on the books, which are the standards -
6 -

7 JUDGE LYNCH: Which standards are
8 those?

9 MR. MINOR: -- of 1982.

10 JUDGE: What -- you said it's based --
11 why do you go back to '82?

12 MR. MINOR: Well, when a regulation is
13 invalidated, the previous regulation applies.

14 JUDGE LYNCH: Automatically? What are
15 you basing that on? What's your legal basis for
16 that?

17 MR. MINOR: I believe that is how the
18 agency has operated. If you'd like me to provide
19 some support for that, you know, following the
20 brief, I may, but also --

21 (Simultaneous speaking.)

22 JUDGE LYNCH: In 1982 --

1 MR. MINOR: -- they did invalidate the
2 BPT standard for legacy bottom ash transport
3 water, and that is still on the books, as well.
4 So there is an existing standard that wasn't
5 invalidated, because we were just creating a BAT
6 standard, so --

7 JUDGE AVILA: Do you -- but in, under
8 the -- I'm sorry to interrupt, but in the 1982
9 rule, do you understand the agency to have made a
10 BPT or BAT determination?

11 MR. MINOR: Well, we clearly made a
12 BPT determination, and if you look at the
13 regulations, it's under the BPT section of the
14 CFR. So we clearly made that determination. The
15 --

16 JUDGE AVILA: There's some confusing
17 language in there.

18 MR. MINOR: Excuse me?

19 JUDGE AVILA: There's some confusing
20 language that talks about, therefore we don't
21 feel like we need to do BAT, but that's not
22 really how the statute reads. It says you're

1 supposed to do BAT by 1989, right?

2 MR. MINOR: Yes. And, you know, the
3 permittee has argued that we've looked at this in
4 '82 and that by choosing not to select BAT in
5 '82, that was, in effect, a determination that is
6 still valid. And we --

7 MS. DURR: Time.

8 MR. MINOR: We evaluated that issue
9 and chose not to address it, and make a decision
10 one way or another whether that decision in '82
11 regarding BAT occupies the field or not. And,
12 you know, we determined that in this circumstance
13 -- if I may just continue briefly?

14 JUDGE LYNCH: Is two minutes enough?

15 MR. MINOR: Yes. Yes. What
16 petitioner is requesting is that we go back and
17 use our best professional judgement to make a
18 determination regarding legacy bottom ash
19 transport water, and what the Fifth Circuit
20 looked at was sediment ponds.

21 The facility is closing, as of next
22 month, the sediment pond, and its bottom ash

1 transport water will be in a holding tank, which
2 will then ultimately be used as part of a closed-
3 loop system by December of 2023. We determined
4 that they could not do that any sooner.

5 So if the permit were remanded and we
6 were to go back, we would have to require the
7 facility to look at all the information that's in
8 the regs for BAT determination, which would
9 include cost, ongoing changes at the facilities,
10 all the same information you would otherwise look
11 at.

12 And that would only cover the period
13 up to 2023, and if it took us, you know, six
14 months or a year to get the information from them
15 and then make a decision --

16 JUDGE LYNCH: If I could pause you,
17 because I have one legal question on what you're
18 saying, and just in the interest of time, if -- I
19 take it, your position is that the 1982 ELG is in
20 effect.

21 I think that's what you just said. If
22 that's the case, what's your position about

1 whether or not you have discretion to undertake a
2 BPJ analysis?

3 MR. MINOR: We believe we have
4 discretion not to, in this case.

5 JUDGE LYNCH: Are you prohibited? I
6 don't understand what you just said.

7 MR. MINOR: No, we're not prohibited.

8 JUDGE AVILA: So you have the
9 discretion to do it or to not do it.

10 MR. MINOR: Yes, and in this case we
11 determined that we would rather wait on the
12 national guidelines, so that we're not making a
13 site-specific determination that would come out
14 that would, you know, sort of supersede what
15 might be the best available technology as part of
16 a national rule for legacy bottom ash transport
17 water.

18 JUDGE LYNCH: All right.

19 JUDGE STEIN: If there's an ELG in
20 effect, where does your discretion come from?

21 MR. MINOR: Well, if the ELG is only
22 for BPT, then --

1 MS. DURR: Time.

2 MR. MINOR: -- we could do a BPJ
3 determination for best available technology.

4 JUDGE LYNCH: Well then what's your
5 position? What's the EPA's position about
6 whether it's BPT or BAT.

7 JUDGE AVILA: BAT.

8 JUDGE LYNCH: BAT.

9 MR. MINOR: Our position is that it's
10 clearly BPT. The regulations say that. And we
11 haven't taken a position as to whether it was in
12 effect a BAT determination in 1982 when we
13 determined not to do a -- we haven't decided that
14 yet. And that would be evaluated as part of the
15 national rulemaking.

16 JUDGE LYNCH: All right. Thank you.
17 So we're mindful that we had added about three
18 minutes -- and the clerk can correct me if I'm
19 off on that -- to EPA's time, so if others need
20 commensurate amount of additional time, we'll
21 grant that.

22 MS. DURR: Sure.

1 JUDGE LYNCH: Thank you.

2 MS. DURR: You're welcome.

3 JUDGE LYNCH: All right. Thank you.

4 And so let's proceed with APS.

5 MS. MCGRATH: Good afternoon, Your

6 Honors. Can you see and hear me?

7 JUDGE LYNCH: Now, yes.

8 JUDGE AVILA: Yes.

9 MS. MCGRATH: Okay. Thank you.

10 JUDGE AVILA: Yes. Thank you.

11 MS. MCGRATH: Hi, I'm Kerry McGrath
12 for the permittee, APS. There are a few points I
13 would like to make but if I could, I would like
14 to just start (audio interference) with the 1982
15 ELGs, and kind of pick up on the point that Mr.
16 Minor was making.

17 The 1982 ELGs, which as noted set a
18 BPT standard but declined to set a BAT standard,
19 are what is in effect now that the Fifth Circuit
20 has remanded the legacy wastewater provisions of
21 the 2015 rule, and I wanted to make a slight
22 correction.

1 You know, I think that the BPJ, the
2 best professional judgment analysis, is pretty
3 clear from the regulations is meant to be a gap
4 filler. There is -- when the ELGs are
5 inapplicable, when they haven't looked at a
6 particular pollutant.

7 But in this case there is no gap to
8 fill, and so it is our position that, you know,
9 of course, you know, EPA used its discretion to
10 not do a best professional judgement
11 determination, but our position is that it would
12 not have been appropriate to do so --

13 JUDGE AVILA: Why isn't there a gap as
14 to a BAT for this type of effluent and facility,
15 given that the Fifth Circuit vacated it and there
16 was supposed to be one by 1989?

17 MS. MCGRATH: Well, the timing, you
18 know, the -- as we noted, the 1982 regulations,
19 EPA looked at potentially a BAT and decided it
20 would not propose one at that time. The way that
21 the ELG regulations have been interpreted and
22 applied is that that decision in itself, it is

1 part of the ELG.

2 And so it's the determination not to
3 set a BAT. And, you know, as you note, the 2015
4 rule would have essentially made that those
5 numeric limits for total suspended solids and oil
6 and grease, the BAT for that legacy wastewater,
7 but in the absence of those provisions, the 1982
8 provisions are in effect.

9 JUDGE AVILA: I mean, it is a little
10 odd, isn't it, that you have the Fifth Circuit
11 saying that the record for the 2015 ELG BAT
12 determination didn't support impoundments, and
13 that there were things in the record suggesting
14 that there were alternative technologies other
15 than impoundment that should have been addressed,
16 and yet we're going back to impoundments?

17 MS. MCGRATH: Yes, I mean, the record
18 in that case was the court found was that the
19 record that was supporting that rulemaking did
20 not support the determination that -- as a new
21 BAT, for legacy wastewater, the record didn't
22 support the determination that surface

1 impoundments were appropriate.

2 It did not say that the agency could
3 not decide to use surface impoundments if it did
4 so based on an evaluation of the statutory
5 factors.

6 But I think that the key inquiry here
7 is, you know, the legacy wastewater is just, as
8 Mr. Minor said, the water that is generated until
9 you get to that applicability date where the new
10 bottom ash transport water technology is going to
11 be implemented.

12 And there's a recognition that it
13 takes some time to get to that place where you
14 implement that new technology. And that's what
15 this permit requires the permittee to do, is to,
16 you know, overhaul its systems and put a new
17 system in place to treat legacy bottom ash
18 transport, to treat bottom ash transport water
19 generated after that applicability date.

20 JUDGE AVILA: And this may not be a
21 fair question, since Mr. Minor is the one who
22 said it, but I thought I heard him say that

1 you're going to stop using the surface
2 impoundments within a certain date, and then use
3 some sort of surface --

4 MS. MCGRATH: Yes.

5 JUDGE AVILA: -- storage area? Is
6 that under the permit?

7 MS. MCGRATH: Yes. So, if I could, I
8 will share my screen and show you on this
9 exhibit, it might be useful. Okay. Are you able
10 to see that -- oh, it looks like it's still
11 connecting. Sorry.

12 JUDGE STEIN: Yes, we can see.

13 MS. MCGRATH: Okay. Great. So this
14 is an exhibit that has a schematic of the current
15 system as well as the three projects that APS
16 plans to undertake to comply with the legacy --
17 sorry, the bottom ash transport water
18 requirements from the 2015 rule, as well as the
19 related CCR, coal combustion residuals
20 requirements.

21 And so if you can see my pointer, the
22 current bottom ash from units 4 and 5 is sluiced

1 to the hydrovents. It goes through this pumping
2 system and this tank system where polymers are
3 added to help settle it out.

4 Then it goes into this concrete
5 channel and into this combined waste treatment
6 pond for additional treatment, and then
7 eventually out this internal Outfall 01E.

8 And so, as you know, Mr. Minor alluded
9 to, as part of this three-stage process to comply
10 with both the ELGs and the CCR rule, the Four
11 Corners Plant will close this combined waste
12 treatment pond, and the first step of that
13 process will be to build this bottom ash
14 transport water tank that will accept the bottom
15 ash transport water instead of this combined
16 waste treatment pond.

17 The second stage will be to close the
18 pond and this outfall, and then the third stage
19 would be to add this closed-loop system, this
20 recirculating system, and close this outfall, so
21 that the tank will -- the tank system will allow
22 for recycling, rather -- and meet that zero

1 liquid discharge limit.

2 JUDGE AVILA: And that last step has
3 to be done by December 31st, 2023?

4 MS. MCGRATH: Correct. Exactly. And
5 I'll stop the --

6 JUDGE LYNCH: I had a question about
7 the cooling water intake structure, but if the
8 other judges have more questions on the ELG, go
9 ahead and ask those first.

10 JUDGE AVILA: I don't.

11 JUDGE STEIN: I don't.

12 JUDGE LYNCH: All right. So on the
13 issue that Mr. Barth raised about whether the
14 structure is a closed-cycle or a once-through
15 system, he noted in his petition, on Page 53,
16 that in your 2005 permit application it appears
17 that you've referred to the system as a once-
18 through cooling system.

19 And my question is, well, explain
20 that. And if it was in fact -- if the structure
21 was operating as a once-through system, what
22 changes have you made to it to convert it, if you

1 will, to a closed system?

2 MS. MCGRATH: Thanks, Your Honor.

3 There have been later amendments to that
4 statement, so that statement was kind of pulled
5 out in isolation, doesn't give the full picture,
6 which is what EPA looked at, including the
7 revised 2013 application.

8 But to answer your question, between
9 that time frame and this application, there
10 wasn't a change, a major change to the intake
11 structure itself.

12 There was the shutdown of the first
13 three units, and, you know, I can't necessarily
14 speculate as to why it was called once-through
15 mistakenly in that application, but I think at
16 the time the regulations -- well, as the previous
17 Phase 1 and Phase 2 316(b) regulations were new
18 at that point.

19 And I think everyone was trying to
20 understand what is the relevant intake, what are
21 we talking about when we talk about the system,
22 and then, you know, looked like between the

1 correspondence, further correspondence between
2 the permittee and the agency, when they actually
3 looked at the San Juan River intake, and the
4 amount that was going through the system and how
5 the water was used and recirculated, that it made
6 more sense to treat it as a closed-cycle
7 recirculating system, because that is actually
8 what is happening.

9 JUDGE LYNCH: All right. Thank you.

10 JUDGE STEIN: So I have one additional
11 question.

12 MS. MCGRATH: Sure.

13 JUDGE STEIN: What happens to the BATW
14 in the new tanks? When they are full, is it
15 still pumped into Morgan Lake?

16 MS. MCGRATH: Sorry, do you mean under
17 -- when they put in the new system, the zero-
18 limit discharge?

19 JUDGE STEIN: Yes.

20 MS. MCGRATH: No, they do not -- they
21 will no longer be pumped into Morgan Lake. They
22 will be put into a closed-cycle recirculating

1 loop, where it is treated in the tank system and
2 then pumped back into the plant for reuse.

3 And that's actually part of the reason
4 that it's going to take until 2023 to complete
5 that project, because it's a pretty complicated
6 project to manage the amount of volume and get
7 the water quality and the chemical makeup exactly
8 right so that it can be recirculated through,
9 rather than discharged through an outfall.

10 JUDGE AVILA: But until December 31st,
11 2023, there will be discharges to Morgan Lake.

12 MS. DURR: Time.

13 MS. MCGRATH: Correct. There will be
14 a discharge through an internal outfall that will
15 then eventually go into Morgan Lake.

16 JUDGE AVILA: Yes. Sorry. Yes. I
17 was using shorthand, I apologize.

18 MS. MCGRATH: That's fine.

19 JUDGE LYNCH: Any other questions from
20 the other Judges?

21 JUDGE STEIN: So can you explain just
22 so I'm clear what happens --

1 JUDGE LYNCH: We'll add a few minutes
2 here. So go ahead.

3 JUDGE STEIN: I want to be clear on
4 what happens between 2020 and 2023.

5 MS. MCGRATH: Would it help to put the
6 diagram back up, or -- that might. Let me do
7 that. Let's see.

8 JUDGE AVILA: Well, isn't that where
9 you kind of used a settling tank, in part? But
10 there's still an outfall to the current channel,
11 that then goes to Outfall 01E? Internal Outfall
12 01E?

13 MC. MCGRATH: Yes, exactly. So the
14 combined waste treatment pond will be closed, and
15 it will be routed through the settling tank
16 system, and that maintains an internal outfall,
17 although a different location of internal
18 outfall.

19 And between that time frame and 2023
20 they will be installing this closed-loop system.
21 The blue line here represents the closed-loop
22 system. But it requires a lot of -- an entire

1 new system, essentially, that will run under the
2 power block, and recirculate the bottom ash
3 transport water in a closed-loop system.

4 So that process will take several
5 years. There's a lot that has to be done with
6 safety and making sure that -- you can only work
7 on certain parts of it at a time. It's also, you
8 know, right under the power block, so the units
9 cannot be running when they're doing that work,
10 so they have to do it during certain times.

11 So this process will take several
12 years, and let me just say that APS is really
13 working all hands on deck to meet that 2023
14 deadline. And it is going to be a tight fit to
15 get it in in that time frame, but they are, you
16 know, committed to doing that.

17 JUDGE AVILA: And in that tank, it's
18 just a settling tank, essentially. Right?
19 There's no treatment, and I took it from your
20 statement about it taking a long time to figure
21 out that what you're trying to do is get the
22 chemistry in that tank right so it can just be an

1 internal recirculation process. That's what's
2 going to take until 2023.

3 MS. MCGRATH: Exactly. There's
4 construct the system, and then once the system is
5 constructed, to get it just right in terms of
6 water flow and the chemistry.

7 JUDGE AVILA: And just to -- what's
8 called the settling basins on that? When will
9 the discharge -- when does that outfall close, or
10 is there --

11 MC. MCGRATH: This outfall will close
12 in 2023, once the system is up and running -- the
13 tank system is up and running.

14 JUDGE AVILA: So even when the tank
15 system is not a closed-loop system or thing, both
16 of those outfalls will be functioning?

17 MS. MCGRATH: So when the system is --
18 the tank system is up and running, this outfall
19 in the combined waste treatment pond area will be
20 closed.

21 And instead you'll have bottom ash
22 transport water discharged through this internal

1 outfall during that interim time frame between
2 the closure of the combined waste treatment pond
3 and when you get the bottom ash transport water
4 recirculating system up and running.

5 JUDGE AVILA: Okay.

6 JUDGE LYNCH: I have one final
7 question for you, Ms. McGrath. And I don't know
8 if you have this handy, but in petitioner's reply
9 brief on Page 9, he refers to a Form 2C, that's
10 associated with your 2005 permit application.

11 And petitioner, you know, is saying
12 that it's an indication that you admit Morgan
13 Lake -- the Morgan Lake cooling pond -- provides
14 no treatment. But I find the form confusing on
15 that point, or certainly not clear on that point.

16 I couldn't tell if this is indicating
17 that Morgan Lake provides no treatment, or that
18 the discharge from the cooling pond receives no
19 treatment. But do you have that document?

20 MS. MCGRATH: I know what that
21 document looks like. I don't have it right in
22 front of me, but I'm familiar with it. The 2005

1 version of that form, where there's a little
2 section where it says Treatment and I think it
3 says none in the 2005 version.

4 The 2013 version, the corrected and,
5 you know, more recent application, explains that
6 Morgan Lake provides treatment. But I don't
7 think that that was meant to suggest, in 2005,
8 that Morgan Lake was not providing treatment,
9 since its conception in the 60s and since the
10 power plant has been operating, it has been
11 providing treatment in the form of dissipating
12 heat and controlling total dissolved solids.

13 So I don't think there's any world in
14 which the plant would say that that lake is not
15 providing treatment, and I, you know, don't know
16 the reason for the error, but I do know that they
17 corrected it later and many times consistently
18 since then.

19 JUDGE LYNCH: Thank you. Any other
20 questions from the Judges?

21 JUDGE AVILA: None here. Thanks.

22 JUDGE STEIN: Not from me.

1 JUDGE LYNCH: All right. Thank you.
2 With that, we'll return to Mr. Barth for your
3 rebuttal. And we'll give you three additional
4 minutes to be commensurate with the time allotted
5 to the other parties.

6 MR. BARTH: Okay. Thank you.

7 JUDGE LYNCH: Yes.

8 MR. BARTH: So I want to go back to
9 Morgan Lake, whether it's a Water of the United
10 States or whether it's a treatment system. So
11 the final permit treats Morgan Lake both ways,
12 really.

13 What you have is a permit that
14 regulates discharges into the lake, for oil and
15 grease and chlorine, and then you have a permit,
16 the same permit, that treats it as a -- so, I'm
17 sorry -- treats it as a Water of the United
18 States for purposes of chlorine and oil and gas,
19 because it's basically regulating those
20 discharges before they reach the lake, and then
21 treats it as a treatment system when it
22 discharges temperature.

1 So EPA kind of wants to have it both
2 ways here. It's one or the other. It's either a
3 treatment system or it's not. And the reason
4 it's not a treatment system is for the reason
5 that Judge Avila said.

6 There's absolutely no evidence in the
7 record here that this was designed to comply with
8 the requirements of the Clean Water Act. And
9 here we have a new water quality standard for
10 temperature.

11 They can only discharge between 90 and
12 95 degrees, and there has been no evidence, and
13 EPA in this permit has not evaluated whether
14 there's a reasonable potential to violate the
15 downstream water quality standards for
16 temperature.

17 So there's no evidence that it
18 complies with the waste treatment system
19 requirements. So --

20 JUDGE LYNCH: Could I just pause you
21 for a moment, Mr. Barth?

22 MR. BARTH: Sure.

1 JUDGE LYNCH: So just explain to me
2 how you're defining, designed to meet the
3 requirements of the Clean Water Act?

4 MR. BARTH: Well, when that question
5 was asked to Ms. O'Dea, she did give the correct
6 answer, that its compliance with the requirements
7 of the Clean Water Act include water quality-
8 based effluent limits.

9 She didn't come out and say that, but
10 of course whenever you're evaluating a discharge
11 from a treatment system, what you're trying to
12 evaluate is whether that discharge is going to
13 comply with technology-based standards, and water
14 quality-based standard And --

15 JUDGE LYNCH: And at what point do you
16 look at design? So does it have to be when the
17 plant was first constructed?

18 MR. BARTH: Well, you look at -- the
19 first --

20 JUDGE LYNCH: Or is it a moving --

21 MR. BARTH: Yes, Judge Lynch, the
22 first time in its 50 plus years of operation that

1 they've ever asserted the waste treatment system
2 exemption is in this permit. So it needs to be
3 evaluated now.

4 And same with the water quality
5 standard. You have a new water quality standard.
6 This permit needs to be evaluated to see whether
7 that standard is violated.

8 JUDGE AVILA: Isn't there federal case
9 law that says that if a water body is
10 incorporated in an NPDES permit as part of a
11 treatment system, that's sufficient.

12 And I take part of what I read in the
13 response to comments in this case to say that
14 Morgan Lake is covered by an NPDES permit and
15 it's part of the treatment system. It's treating
16 waste heat.

17 And then we can debate about whether
18 the discharge from Morgan Lake, you know, whether
19 the effluent limitations for that are sufficient,
20 but under the federal case law, that's -- why
21 isn't that dispositive?

22 MR. BARTH: Because the permit itself

1 doesn't say it's a waste treatment system. It's
2 never said that. And this is only occurring --
3 you're only seeing this in the response to
4 comments, and in 2018 they said something
5 completely different. So yes, I mean --

6 JUDGE LYNCH: Where in 2018 are you
7 referring to?

8 MR. BARTH: The EPA's prior draft
9 permit and final permit that they issued for this
10 facility in 2018, that they completely withdrew
11 when we challenged that permit in front of the
12 EAB.

13 So in their response to comments in
14 2018, they said, we are not asserting the waste
15 treatment system exception for Morgan Lake. And
16 then in 2019 they reversed course and said they
17 were.

18 So EPA's been all over the map, but
19 one thing they haven't ever done is said that in
20 a permit, in the permit, that this is a waste
21 treatment system. They've regulated discharges
22 into the lake as though it's a Water of the

1 United States, and then they've regulated other
2 discharges going out of the lake.

3 So I just -- no deference here,
4 because EPA has been just all over the map. We
5 ask that you, you know, review this de novo, and
6 look at the history here. And you look at the
7 admissions by APS saying, yes, Morgan Lake is a
8 Water of the United States.

9 You've got the Nation treating it as a
10 Water of the United States. The thing that's
11 important to recognize here, this is not an
12 isolated pond where only pollution goes into.

13 This is a water that's used. People
14 are swimming in it, they're windsurfing in it,
15 they're fishing it, they're eating the fish that
16 they catch. You know, by not treating it as a
17 Water of the United States, we're, you know, not
18 only harming the beneficial uses, there's a human
19 health issue here. So please consider that when
20 you make your decision.

21 JUDGE LYNCH: Mr. Barth, I had a
22 question on the ELGs.

1 MR. BARTH: Yes.

2 JUDGE LYNCH: What's your position on
3 whether the 1982 ELGs are in effect?

4 MR. BARTH: So we don't agree with
5 what EPA stated. Our position on the legacy
6 bottom ash transport water has been well-briefed.
7 We rely on the briefing. But in essence, in
8 summary, we believe that basically both BPT and
9 BAT requirements currently apply.

10 And it needs to be done on a case-by-
11 case basis. As Judge Avila pointed out, the
12 decision from the Court basically said the
13 impoundments are not enough. So then you just
14 don't go back and say the impoundments are
15 enough. They need to do more and they need to do
16 it case-by-case analysis.

17 JUDGE LYNCH: Well, what about the
18 Paulsen case, which APS cites in its brief that
19 says you do go back to the prior rule?

20 MR. BARTH: We think that that case --
21 and we stated this in our briefing -- that that's
22 a very limited application of that case, and it

1 does not apply broadly, nor does it apply here.
2 But I'll just stand on what we said in our
3 briefing on that.

4 So now I'd just like to basically
5 quickly go back to the cooling water intake
6 structure. So let's just step back for a minute.
7 What we have here is, we have an admission by APS
8 that they withdraw 14.3 million gallons a day
9 from the San Juan River.

10 And we have a permit that allows them
11 to discharge 14.7 million gallons per day. When
12 you're withdrawing the same amount of water from
13 a river that you're discharging back into it,
14 that is, by definition, once-through cooling.

15 This is not a case where they withdraw
16 water for maybe one or two days, and then don't
17 withdraw any more for months, because they've got
18 cooling towers and a closed-cycle system, and
19 they're able to recycle it. They're discharging
20 the same amount back in that they withdraw.

21 And the other thing that's important
22 to recognize here is, the cooling water intake

1 structure at this facility is located in a
2 location where there's endangered species.
3 There's two endangered fish species. They
4 actually use this stretch of the river --

5 MS. DURR: Five minutes.

6 MR. BARTH: -- to stock and to
7 propagate these endangered species. If the Board
8 finds that this is not a closed-cycle system --
9 as it's not, it's open at both ends, it's both
10 open coming in and going out -- but if you find
11 that it's not a closed-cycle system, there are
12 all sort of requirements that kick in. They need
13 to --

14 JUDGE AVILA: Can I ask you about that
15 real quick? Don't they have an incidental take
16 statement for this, and reasonable and prudent
17 measures? I mean, don't they -- under the
18 Endangered Species Act, I mean, what more would
19 they do?

20 MR. BARTH: They would do what's
21 required under 316(b), and that's what I was just
22 getting into. They would have to do a source

1 water characterization, they'd have to do an
2 analysis of what their actual impingement and
3 entrainment is. To date, they haven't reported
4 any data on this.

5 So, you know, they -- if there's any
6 facility in freshwater that should be undertaking
7 the 316(b) requirements, it's this one. For gosh
8 sakes, we've got endangered species right there
9 in the river, and the Fish and Wildlife Service
10 is trying to use that stretch of the river to
11 keep these species alive.

12 JUDGE AVILA: Is 316(b) more
13 protective than the Endangered Species Act?

14 MR. BARTH: The biological opinion
15 acknowledged was that this cooling water intake
16 structure could be causing harm to these
17 endangered species. It recognized that. And so--

18 JUDGE AVILA: And they gave reasonable
19 and prudent measures, which we then incorporated
20 into the permit, and there's an incidental take
21 statement, that --

22 MR. BARTH: But the reasonable and

1 prudent measures are a pumping plan that don't
2 align with what the requirements of 316(b) are.
3 The pumping plan didn't do a source water
4 characterization. It didn't look at impingement
5 and entrainment data. It didn't look at
6 traveling --

7 JUDGE LYNCH: Mr. Barth, you
8 challenged the BO and Biological Opinion in
9 court, and did not prevail.

10 MR. BARTH: The reason we did not
11 prevail was not on substance, Your Honor, it was
12 because they found that Navajo Transitional
13 Energy Company has sovereign immunity and
14 couldn't be joined in the case, and therefore the
15 court never got to the merits.

16 JUDGE LYNCH: But I could ask you, but
17 there's no further challenge in court to make.

18 MR. BARTH: There is no current
19 challenge to the Biological Opinion, but I'm --

20 JUDGE LYNCH: -- forgetting about --
21 go ahead.

22 MR. BARTH: The point I'm getting to

1 is, look at the pumping plan. It's in the
2 record. Compare that pumping plan to the 316(b)
3 requirements, and when you do that, it doesn't
4 come close to covering the ground that the 316(b)
5 requirements do.

6 JUDGE LYNCH: On the sovereign
7 immunity --

8 MR. BARTH: Yes.

9 JUDGE LYNCH: -- I don't see where in
10 your comments you raise that argument on the
11 region's requirement to have NTEC waive their
12 sovereign immunity.

13 MR. BARTH: Your Honor, I don't have
14 the timeline in front of me. But that purchase
15 of that share occurred fairly late in time. I'm
16 not certain that we were aware of that when we
17 submitted our comment letter.

18 So it may be a newly raised issue, but
19 I don't remember when that purchase took place
20 and when we got knowledge of it.

21 JUDGE LYNCH: All right. Thank you.

22 MR. BARTH: Sure. I think that's all

1 I have. I do want to thank you all for
2 accommodating with this virtual oral argument.
3 I know that we raised -- petitioners raised a lot
4 of issues.

5 I really appreciate your attention to
6 those, and earlier I believe it was Judge Lynch
7 who said that the Board would give this close
8 scrutiny, and I really encourage you to do that.
9 You've got EPA contradicting itself left and
10 right in this permit.

11 They've contradicted themselves on
12 Waters of the United States, whether it's a waste
13 treatment system, whether it's once-through or
14 whether it's closed-cycle. Given all of EPA's
15 inconsistent positions, you should not give them
16 any deference, and you should really look at this
17 permit de novo and make the decisions that way.

18 So I'll close there. Thank you again
19 very much for your time.

20 JUDGE LYNCH: Thank you, Mr. Barth.
21 Do any of the other Judges have any additional
22 questions for the parties?

1 JUDGE AVILA: None here.

2 JUDGE STEIN: Not from me.

3 JUDGE LYNCH: Well, thank you, and I
4 really want to thank everyone involved for
5 working with the Board on making this oral
6 argument happen. It's really been very helpful,
7 and the discussion has been very helpful.

8 And thank you again for the
9 submissions, your work on the case, and your
10 participation, and your flexibility. And now we
11 have, you know, our first argument behind us
12 where we had visual aids. And so, again, I
13 commend you for your skill in that regard.

14 And with that, this case is submitted.
15 Thank you.

16 MS. DURR: These proceedings are now
17 adjourned. Thank you.

18 JUDGE LYNCH: Thank you.

19 JUDGE AVILA: Thank you.

20 JUDGE STEIN: Thank you.

21 (Whereupon, the above-entitled matter
22 went off the record at 2:59 p.m.)

A

AARON 1:15
abbreviate 18:2 35:5
able 7:10,20 64:9 82:19
above-entitled 1:12
 88:21
absence 62:7
absolutely 44:3 76:6
accept 65:14
accommodating 87:2
acknowledged 84:15
Act 11:20 21:2,4 23:12
 23:15,16 34:8,13
 47:13,16 48:6,13 76:8
 77:3,7 83:18 84:13
acting 43:11
actual 84:2
add 24:14 65:19 70:1
added 59:17 65:3
adding 38:9
additional 40:12 59:20
 65:6 68:10 75:3 87:21
address 53:5 56:9
addressed 51:7 62:15
addressing 34:17
adjourned 88:17
Administrative 17:8,12
 17:14 18:1,22
admission 82:7
admissions 80:7
admit 73:12
admittedly 49:11
adopted 27:16
advance 11:9,12
affiliation 6:9
afternoon 5:3 8:19
 10:16,20 14:16 41:15
 60:5
agency 1:2 2:7,9,16
 42:21 48:3 54:18 55:9
 63:2 68:2
agency's 27:20 44:4
agree 81:4
ahead 47:8 66:9 70:2
 85:21
aids 11:9,12 88:12
align 85:2
alive 84:11
Alliance 12:3
Allmon 9:3,3
allocated 12:11
allotted 12:12 14:9 75:4
allow 65:21
allowed 13:20 39:15,19
allows 28:1 82:10
alluded 65:8
alternative 62:14
ambient 28:19

ambiguity 47:2
amendments 67:3
amicus 9:8
Amigos 7:2,4 12:3
amount 37:21 59:20
 68:4 69:6 82:12,20
analysis 15:5 19:4
 29:10 30:8,9 31:15
 32:2,4,21 33:8 45:10
 46:14,20 58:2 61:2
 81:16 84:2
and/or 50:14
Andrew 10:17
Andrews 3:4
announced 11:18
answer 41:19 42:1
 49:15 51:9 52:2 67:8
 77:6
answering 33:4
anticipate 11:14
Anyway 36:20
apologize 36:16 51:17
 69:17
Appeal 1:7
Appeals 1:1,16,17,20
 10:2,5 11:3,18
appear 7:9
APPEARANCES 2:1
 3:1
appears 66:16
applicability 63:9,19
applicable 18:13 54:4
application 66:16 67:7
 67:9,15 73:10 74:5
 81:22
applied 22:12 45:21
 61:22
applies 19:14 22:2
 33:14 46:9 47:10
 54:13
apply 20:1,6,9,16 23:1
 29:9 45:9 46:19,20
 48:20 81:9 82:1,1
applying 22:20 34:3
appreciate 12:20 87:5
appropriate 45:13
 61:12 63:1
approved 18:4,11,14
 24:4 32:15
approximately 38:13
April 20:1 53:1
APS 8:18,21 9:2 12:8
 12:17 60:4,12 64:15
 71:12 80:7 81:18 82:7
aquatic 24:9
AR 18:2 29:6,16,17,19
 30:4,5 31:1,7 43:3
area 64:5 72:19

argued 56:3
argument 1:4 5:10,16
 5:18 6:1,10 11:4,19
 12:5,13,15 13:2,3,21
 13:22 14:2,4,18 16:21
 22:1 29:20 30:2,4,15
 31:10,14 34:17 50:13
 86:10 87:2 88:6,11
arguments 13:7
Arizona 1:7 3:2 11:21
ash 38:18 52:7 53:10,12
 53:16,18,21 54:3 55:2
 56:18,22 58:16 63:10
 63:17,18 64:17,22
 65:13,15 71:2 72:21
 73:3 81:6
asked 77:5
asking 26:8,17,20
 49:17
asserted 78:1
asserting 79:14
assessment 29:3
assist 13:11
assistance 10:7
associated 73:10
assume 13:8,12
assumes 28:5
attendee 6:22
attention 87:5
attorney 2:3 6:21
attorneys 49:12
audio 60:14
Automatically 54:14
available 35:3 53:8 54:2
 58:15 59:3
Avenue 2:17 3:4,9
average 37:20 38:13,14
Avila 1:15 19:10 28:11
 42:12,15 43:17 44:13
 47:5,9 48:17 49:4
 50:21 55:7,16,19 58:8
 59:7 60:8,10 61:13
 62:9 63:20 64:5 66:2
 66:10 69:10,16 70:8
 71:17 72:7,14 73:5
 74:21 76:5 78:8 81:11
 83:14 84:12,18 88:1
 88:19
aware 14:6 46:7 47:1
 86:16

B

b 37:16
Bachtel 8:22
back 15:19 27:7 35:12
 54:4,11 56:16 57:6
 62:16 69:2 70:6 75:8
 81:14,19 82:5,6,13,20

background 53:7
backup 11:13
Barth 2:3 6:13,14 7:8
 7:16,17,20 12:14
 14:13,16,17 19:10,15
 20:19 21:1,14,15 22:6
 23:3,6,19 25:5,11,12
 25:16 26:1,4,7,10,12
 26:15 27:6 28:15 29:5
 29:17,19 30:1,5,13,17
 30:21 31:12,20 32:8
 32:13,19 33:6,19 34:2
 34:14 53:4 66:13 75:2
 75:6,8 76:21,22 77:4
 77:18,21 78:22 79:8
 80:21 81:1,4,20 83:6
 83:20 84:14,22 85:7
 85:10,18,22 86:8,13
 86:22 87:20
barthlawoffice@gma...
 2:5
based 13:17 14:22 30:4
 40:21 54:10 63:4 77:8
basically 25:14 75:19
 81:8,12 82:4
basing 54:15
basins 72:8
basis 46:18 54:15 81:11
BAT 53:9 55:5,10,21
 56:1,4,11 57:8 59:6,7
 59:8,12 60:18 61:14
 61:19 62:3,6,11,21
 81:9
BATW 68:13
behalf 2:2,6 3:2,7 4:2,3
 4:4 11:5 12:19
believe 7:21 22:6 38:20
 39:1,5 41:13 54:17
 58:3 81:8 87:6
beneficial 80:18
best 53:8 54:2 56:17
 58:15 59:3 61:2,10
better 38:4
Beveridge 10:13,17,21
bigger 38:2,3,5
billion 37:16
biological 12:4 84:14
 85:8,19
bit 33:7 37:3 39:9
black 39:8
block 71:2,8
blow 39:8
blue 38:21 70:21
blunt 42:20
BO 85:8
Board 1:1 3:13 9:15,18
 9:20 10:2,5 11:4,5,18
 12:12,19 14:7 15:1,14

15:15,18 16:1,12,14
16:20 17:16 19:20,22
50:19 83:7 87:7 88:5
Board's 12:6 15:20 16:5
boating 24:10
body 22:13 23:4,9,13
23:15,18,20 24:7,12
43:11 45:6,12,16 46:3
46:15 78:9
boilers 37:10 40:2
books 54:5 55:3
bottom 37:1 38:6,21
52:7 53:9,12,16,18,21
54:3 55:2 56:18,22
58:16 63:10,17,18
64:17,22 65:13,14
71:2 72:21 73:3 81:6
Box 2:4
BPJ 58:2 59:2 61:1
BPT 55:2,10,12,13
58:22 59:6,10 60:18
81:8
Bravos 7:2,4 12:3
break 48:8
brief 29:22 30:20 54:20
73:9 81:18
briefing 12:22 14:21
24:15 81:7,21 82:3
briefly 17:1 33:9 56:13
briefs 13:9 35:16
brings 37:19
broadly 21:3 82:1
build 65:13
built 37:6

C

C-O-N-T-E-N-T-S 4:1
CA 2:11
call 5:7 6:6,7 7:14
called 43:22 67:14 72:8
camera 5:17,20
cameras 5:15,22
canal 40:6
canyon 39:3
case 13:5,9,14,18 30:11
48:6 49:3 50:5 57:22
58:4,10 61:7 62:18
78:8,13,20 81:11,18
81:20,22 82:15 85:14
88:9,14
case-by- 81:10
case-by-case 46:18
81:16
catch 80:16
category 46:4
causing 84:16
CCR 64:19 65:10
Center 12:3

certain 48:22 64:2 71:7
71:10 86:16
certainly 73:15
CFR 22:7 25:6 33:14
55:14
Chaco 18:7 19:8 37:1
challenge 85:17,19
challenged 79:11 85:8
change 23:5,6,7,8,10
67:10,10
changed 24:12
changes 52:4 57:9
66:22
channel 65:5 70:10
characterization 84:1
85:4
chemical 69:7
chemistry 71:22 72:6
chlorine 75:15,18
choosing 56:4
chose 56:9
Circuit 48:3 51:4 52:16
52:17,21 53:8 54:1
56:19 60:19 61:15
62:10
circumstance 56:12
circumstances 11:7
cites 81:18
Citizens 12:1
Citizens' 7:7 12:3
clarify 53:11
classifications 18:9
24:4
Clean 11:20 21:2,4
23:12,14,16 34:8,13
47:13,15 48:6,13 76:8
77:3,7
clear 14:22 15:4,8,10
15:16 19:4 29:5 33:12
46:7 47:21 61:3 69:22
70:3 73:15
clearly 55:11,14 59:10
clerk 3:13 9:15,17
11:17 13:19 14:7
59:18
clients 7:17
close 65:11,17,20 72:9
72:11 86:4 87:7,18
closed 38:22 67:1
70:14 72:20
closed- 57:2
closed-cycle 15:12
33:12 66:14 68:6,22
82:18 83:8,11 87:14
closed-loop 65:19
70:20,21 71:3 72:15
closing 56:21
closure 73:2

Club 6:21 12:4
coal 22:15 64:19
Code 2:11,17
cold 28:20
colleagues 50:18
color 17:6
combine 40:5
combined 12:17 40:4
65:5,11,15 70:14
72:19 73:2
combustion 64:19
come 35:12 58:13,20
77:9 86:4
comes 45:19
coming 83:10
commend 11:9 88:13
commensurate 59:20
75:4
comment 30:21 53:1,3
86:17
comments 22:20 30:16
31:6 78:13 79:4,13
86:10
committed 15:4,8,10,16
19:3 71:16
common 19:11 43:7
communicate 7:10
Company 3:2,7 9:8
11:21 85:13
Compare 86:2
complete 69:4
completely 42:20 79:5
79:10
compliance 77:6
complicated 69:5
complies 28:4 29:14
33:1 76:18
comply 21:11 64:16
65:9 76:7 77:13
complying 48:15
conception 74:9
concerning 26:22
concerns 53:5
conclude 42:16
concluding 15:11
conclusion 5:19 20:17
concrete 65:4
condensers 33:17
conduct 31:14
conducting 11:4
confirm 49:18 50:4
confluence 37:3
confused 34:19
confusing 55:16,19
73:14
connecting 64:11
connection 12:22 20:14
24:11

connections 6:3
consider 27:20 44:9
52:18 80:19
considered 20:11 30:7
46:11 48:3
considering 14:19
consistent 15:20 44:1
44:20
consistently 41:21
42:21 44:7 74:17
construct 72:4
constructed 72:5 77:17
contact 24:8,9
contain 17:6
contained 18:1 21:9
containing 16:17 18:17
contentions 13:4
context 47:16
continue 56:13
continued 3:1
continues 48:1
contours 13:7
contradicted 87:11
contradicting 87:9
controlled 22:5
controlling 74:12
convert 66:22
cooling 15:12 26:5
33:11,15,16 34:4,7,10
37:9,17 46:9 47:4
48:10,18 49:1 66:7,18
73:13,18 82:5,14,18
82:22 84:15
copy 36:19
Corners 11:22 15:11
17:4 33:11 65:11
correct 7:15 15:19 21:1
45:2 49:13 59:18 66:4
69:13 77:5
corrected 15:1 74:4,17
correction 60:22
correspondence 68:1,1
cost 57:9
counsel 2:9,16 3:14,14
6:14 9:7,20 14:12,17
couple 38:16
course 61:9 77:10
79:16
court 9:11,13 13:20
16:8 62:18 81:12 85:9
85:15,17
courts 48:2
cover 57:12
covered 78:14
covering 86:4
created 24:16
creating 55:5
criteria 24:10

current 11:7 27:22
33:20 34:3 64:14,22
70:10 85:18
currently 38:19 81:9
cycled 37:22
cycles 37:16

D

D.C 1:2 2:18 3:5
daily 37:17,21
dam 38:6,7 39:13
damming 24:17
darn 39:11
data 18:3 29:3,8,9 30:4
30:6 31:16,16,20 32:1
32:3 84:4 85:5
date 12:21 20:7 52:10
52:10 53:14,19 63:9
63:19 64:2 84:3
Davis 10:20,21
day 38:15 82:8,11
days 38:14 82:16
de 80:5 87:17
deadline 71:14
deal 11:15
debate 78:17
December 52:8 53:15
53:21 57:3 66:3 69:10
decide 12:9 46:18 63:3
decided 59:13 61:19
decision 13:18 15:16
22:4 33:10 51:4 52:16
52:17,21 53:2 56:9,10
57:15 61:22 80:20
81:12
decisions 87:17
deck 71:13
declined 44:17 60:18
defer 50:18
deference 80:3 87:16
defined 53:13
defining 19:12 77:2
definition 19:12 21:17
21:20 22:2 24:21 25:3
26:1,4 27:3 47:4,20
82:14
degrees 28:2,20,20
76:12
delay 36:11
deletion 47:3
deliberations 13:11
demonstrative 17:16
deny 16:12
describe 17:2
description 17:21
design 77:16
designated 18:8
designed 27:9 28:6,8

28:11 47:12,15 48:12
76:7 77:2
determination 45:14
46:21 55:10,12,14
56:5,18 57:8 58:13
59:3,12 61:11 62:2,12
62:20,22
determine 22:1
determined 34:10
56:12 57:3 58:11
59:13
diagram 70:6
Diamond 10:14,18,22
difference 32:18 49:17
52:3,11
different 19:16 70:17
79:5
difficulties 7:15 11:15
51:11
dilution 39:16 42:7
Diné 12:1
direction 37:2
directly 42:2
Director 7:4
disavow 45:8
discharge 28:1 29:12
40:5,7 42:3,8 44:5,8
44:10 48:19 52:7
53:13 66:1 68:18
69:14 72:9 73:18
76:11 77:10,12 78:18
82:11
discharged 18:19 27:10
53:18 69:9 72:22
discharges 23:17 34:5
43:10,14 48:5,15 49:2
69:11 75:14,20,22
79:21 80:2
discharging 38:11,15
82:13,19
disconnect 6:3
discretion 46:8 58:1,4,9
58:20 61:9
discuss 19:3 35:9,11
discussion 88:7
display 38:5
dispositive 78:21
dissipating 48:11 74:11
dissolved 15:7 18:17
74:12
distinction 26:16
Diversity 12:4
divided 50:14
docket 14:1
document 17:7,12
73:19,21
doing 5:6 71:9,16
downstream 19:7 28:19

29:8,14 31:16 33:1
36:22 37:2 42:3,9
44:11 76:15
draft 16:3,8 22:19 30:22
79:8
dry 36:17
duration 5:15 6:1
Durr 3:13 9:17,17 29:4
33:18 56:7 59:1,22
60:2 69:12 83:5 88:16
Dustin 2:8 8:5 51:15

E

EAB 3:14,14 79:12
earlier 53:4 87:6
eating 80:15
EDT 1:13
effect 20:4,5 22:10 27:5
45:6 51:3 52:16,19
56:5 57:20 58:20
59:12 60:19 62:8 81:3
effective 15:22 19:21
53:19
effluent 15:6 19:5 27:22
29:1 32:7,9 33:1,5,8
34:4 42:8 43:15 49:7
49:22 50:8 51:1 52:6
52:15 61:14 77:8
78:19
effort 12:21
eight 36:15
Eisenfeld's 7:9
either 38:9 76:2
ELG 57:19 58:19,21
61:21 62:1,11 66:8
ELGs 35:11 52:5 60:15
60:17 61:4 65:10
80:22 81:3
Elise 2:15 8:16 41:16
enacted 23:15
encourage 87:8
endangered 83:2,3,7
83:18 84:8,13,17
ends 83:9
Energy 3:7 9:7 85:13
ensure 43:13
entire 19:21 70:22
entrainment 84:3 85:5
Environment 12:2
Environmental 1:1,2,16
1:17,20 2:6,9,16 10:2
10:5 11:3,18
EPA 8:14 12:7 15:4,8
15:10,16,19,21,22
16:2,8,13,16 17:10
18:11,14 19:3 20:1,6
22:12,16,18 23:1 24:5
25:14 27:1,15 28:3
29:6,9 30:2,6 31:14
31:20,22 32:14 34:15
34:22 51:15 52:16
61:9,19 67:6 76:1,13
80:4 81:5 87:9
EPA's 14:21 15:18
16:15 18:4 24:15
27:14 28:22 31:6
33:10 59:5,19 79:8,18
87:14
error 15:4,8,11,17 19:4
29:6 33:12 74:16
errors 14:22 15:19
16:17
ESQ 2:3,8,8,15 3:3,8
essence 45:5 48:1,8
81:7
essentially 62:4 71:1
71:18
Eurika 3:13 9:17
evaluate 77:12
evaluated 28:3,22 45:4
56:8 59:14 76:13 78:3
78:6
evaluating 44:9 77:10
evaluation 63:4
event 17:16
eventually 65:7 69:15
evidence 27:8 28:7
43:18 76:6,12,17
exactly 66:4 69:7 70:13
72:3
exception 21:9,10,12
22:21 23:2 24:5 28:5
79:15
exceptions 21:4
excerpt 18:15
exclusion 21:21 22:4
22:13 42:17,19,20
43:6,20 44:18,22 45:3
45:9,13,20 46:9,20
47:10 48:2 50:17
excuse 24:20 55:18
Executive 7:4
exempt 41:2
exemption 20:22 45:18
78:2
exemptions 35:10
exhibit 17:3,9,16,20
18:6,11,15,22 34:20
35:19 64:9,14
exhibits 16:21,22 17:2
18:4
exist 31:21 32:3
existence 24:13
existing 20:3 53:20
54:4 55:4
exists 31:20

expedite 53:6
expended 12:21
expired 14:10
explain 13:4 66:19
 69:21 77:1
explained 42:5
explains 74:5
explicitly 43:5,10,19
explore 13:6
express 12:20

F

facilities 57:9
facility 16:1 17:4 22:10
 23:1,2,12 27:3 35:7
 35:20 39:10 41:21
 56:21 57:7 61:14
 79:10 83:1 84:6
fact 15:1 19:20 22:18
 26:20 28:9 29:2,6
 31:4 33:14 43:7,20
 44:6 66:20
factors 63:5
fair 47:18 63:21
fairly 86:15
fall 20:21 45:12,17 46:3
familiar 26:15 73:22
fax 2:20
feature 38:1 39:2
features 17:5 38:16
federal 16:8 25:21
 26:19 78:8,20
feel 55:21
field 56:11
Fifth 3:9 51:3 52:16,17
 52:21 53:8 54:1 56:19
 60:19 61:15 62:10
figure 71:20
filed 53:6
fill 61:8
filler 61:4
final 14:21 15:18,22
 16:4,9,16 19:17 29:1
 42:2,8 43:22 44:8
 73:6 75:11 79:9
finally 12:8 16:12
find 39:16 41:12 46:8
 73:14 83:10
finding 15:8,16 24:16
 34:12
finds 83:8
fine 51:12,13,18 69:18
finish 34:1
firm 10:13
first 5:9,14 8:1 11:8
 12:7 15:4,15 19:3
 22:22 27:8,15,19
 30:19,22 31:10 40:12

46:13 65:12 66:9
 67:12 77:17,19,22
 88:11
fish 80:15 83:3 84:9
fishing 24:10 80:15
fit 71:14
five 14:8 20:5 28:19
 29:4 83:5
Fleuchaus 3:14 10:4,4
flexibility 46:18 88:10
flipping 50:3
flow 72:6
flume 38:6,11,15
flustered 52:13
focus 15:2
follow 42:12
following 15:14 21:17
 24:22 45:10 54:19
follows 12:13
Footnote 29:21 31:11
force 16:8
forgetting 85:20
form 73:9,14 74:1,11
formal 39:13,19
forwarded 7:16
found 36:17 45:11
 62:18 85:12
four 11:22 15:11 16:20
 17:4 33:11 38:13,14
 65:10
frame 67:9 70:19 71:15
 73:1
Francisco 2:11
freshwater 84:6
front 32:12 73:22 79:11
 86:14
full 67:5 68:14
fully 44:15
function 34:20
functioning 72:16
further 45:9 68:1 85:17
future 16:13

G

gallons 37:16,21 38:15
 82:8,11
gap 61:3,7,13
Gardinier 3:14 10:1
Gary 8:8
gas 75:18
General 2:16
generated 63:8,19
Gerhart 6:20,20
getting 5:11 34:19
 83:22 85:22
give 35:7 51:15 67:5
 75:3 77:5 87:7,15
given 11:7 15:21 19:20

42:6 47:3 61:15 87:14
Godwin 3:8 9:6,6
gosh 84:7
grant 59:21
granted 16:14
granting 14:18
graphic 36:18
grease 62:6 75:15
ground 19:12 86:4
Grumbles 43:1
guess 43:18 53:20
guidance 43:4 46:16
guidelines 34:5 50:8
 51:2 52:6,15 58:12

H

Hagler 2:8,12 8:2,3
 34:18,22 35:18 36:2,4
 36:6,12,15 40:20 41:3
 41:6,8,10 49:13,19,20
 50:6,10 51:6,7,13
hagler.tom@epa.gov
 2:13
hand 41:3
hands 71:13
handy 73:8
happen 11:7 88:6
happening 68:8
happens 68:13 69:22
 70:4
hard 36:19
harm 84:16
harming 80:18
Hawthorne 2:10
he'll 7:20
headquarters 49:11
health 80:19
hear 7:22 12:7 41:16
 51:8 60:6
heard 63:22
hearing 1:13 11:19
heat 33:20 48:11 74:12
 78:16
heels 53:2
Hello 51:8
help 36:3 65:3 70:5
helpful 10:15 88:6,7
Hi 8:15 41:19 60:11
highlighting 17:6
history 22:22 80:6
Hold 36:7
holding 57:1
Honor 8:2,15,20 10:21
 34:18 41:16 45:1
 47:19 50:3,15 51:6
 52:1 67:2 85:11 86:13
HONORABLE 1:15,17
 1:19

Honors 60:6
hopefully 7:20 47:19
human 80:18
Hunton 3:4
hydrologic 20:14 24:11
hydrovents 65:1
Hygiene 2:4

I

identified 19:2 23:22
identify 6:18 9:11,15,21
 10:8,14 39:20
Ihab 10:8,10
immunity 85:13 86:7,12
impact 23:17
impingement 84:2 85:4
implement 63:14
implemented 63:11
important 13:3 20:5
 27:13 80:11 82:21
impose 16:2,9
impounding 25:7
impoundment 62:15
impoundments 22:8
 25:15 26:22 62:12,16
 63:1,3 64:2 81:13,14
impounds 20:12
impractical 39:17
inapplicable 61:5
incidental 83:15 84:20
include 57:9 77:7
including 27:17 48:2
 67:6
inconsistent 44:4 87:15
incorporated 23:15
 43:9 78:10 84:19
increase 28:18
indicate 46:11
indicating 73:16
indication 73:12
inform 14:8 16:19
information 57:7,10,14
 initial 24:15
inquiry 63:6
installed 37:7
installing 70:20
instructions 5:12
intake 66:7 67:10,20
 68:3 82:5,22 84:15
intended 35:6
interest 57:18
interested 51:4
interesting 42:18
interference 60:14
interim 73:1
internal 39:14,15,20
 40:3,7 42:6 43:21
 44:7 65:7 69:14 70:11

70:16,17 72:1,22
interpret 21:2
interpreted 21:5 48:4
 61:21
interrupt 21:13 55:8
introduce 17:14
introduced 47:2
introduction 19:2
invalidate 55:1
invalidated 53:8 54:1
 54:13 55:5
involved 88:4
irrelevant 46:2
isolate 23:9
isolated 48:21,22 80:12
isolation 67:5
issuance 53:6
issue 15:15 16:3,8,16
 23:21 42:7 56:8 66:13
 80:19 86:18
issued 11:21 15:22
 19:17 22:15,18 27:15
 29:7 31:21 32:14 79:9
issues 13:5,7,13 15:3
 15:17 19:1 34:17
 35:13,15 50:17,19,22
 87:4
issuing 32:1
IX 2:7,10 4:3 7:22 8:1,3
 8:6,9,12 11:20 12:8
 12:17 34:15,22 35:2
 45:2 50:14 51:15

J

Jeff 9:3
Joe 7:3
John 2:3 6:13 7:17
 14:16
joined 8:21 85:14
joining 7:12
Jon 3:14 10:4
Juan 7:7 12:2 18:7,19
 19:9 20:13,14 36:21
 37:12 38:10 68:3 82:9
judgement 56:17 61:10
judges 5:14 13:6,12
 66:8 69:20 74:20
 87:21
judgment 61:2
July 12:6 26:2,14
jurisdiction 21:8
jurisdictional 20:12
 22:8 24:17 25:8 42:4
 42:9 44:12 45:17 46:4
 46:12,15,21

K

KATHIE 1:19

KAY 1:17
keep 5:14,22 84:11
Kerry 3:3 8:20 60:11
key 63:6
kick 83:12
kicks 53:15
Kimball 3:14 9:22 10:1
 10:2
kmcgrath@huntonak...
 3:6
knowledge 86:20
Kurth 3:4

L

L 3:8
lagoons 47:11
lake 15:9 19:7 20:10
 22:21 23:22 24:16
 28:14 29:12,12 34:5
 37:9,11,15,15,20 38:9
 40:6,8,22 41:21 42:3
 42:9 44:11 45:4,14
 68:15,21 69:11,15
 73:13,13,17 74:6,8,14
 75:9,11,14,20 78:14
 78:18 79:15,22 80:2,7
language 26:18,21 27:5
 48:4 55:17,20
large 23:22
largely 32:13
late 53:1 86:15
Lauren 8:22
law 2:3 10:13 14:22
 78:9,20
lawsuit 53:6
layout 17:3
lead 16:10
lease 18:16
leave 35:3
left 33:10 36:22 37:1,4
 87:9
legacy 53:9,21 54:3
 55:2 56:18 58:16
 60:20 62:6,21 63:7,17
 64:16 81:5
legal 13:16 54:15 57:17
lends 46:17
let's 6:5,11 7:22 23:11
 23:21 27:13,13,14
 36:2 60:4 70:7 82:6
letter 30:22 86:17
levels 52:9
life 24:9
limit 27:22 29:1 33:1
 66:1 68:18
limitation 34:4 50:8
 51:2 52:15
limitations 15:6 19:5

52:6 78:19
limited 81:22
limits 32:7,9 33:5,8
 42:8 43:15 44:10 49:7
 50:1 51:10 62:5 77:8
line 70:21
liquid 66:1
list 17:20
listen 13:15
litigation 16:10
little 37:3 38:4 39:9
 62:9 74:1
live 34:12
LLC 3:7
LLP 3:4
located 83:1
location 17:21 70:17
 83:2
long 71:20
longer 68:21
look 23:21 27:13,13,14
 31:12 33:13 55:12
 57:7,10 77:16,18 80:6
 80:6 85:4,5 86:1
 87:16
looked 56:3,20 61:5,19
 67:6,22 68:3
looking 27:2 45:21
 49:16,21
looks 64:10 73:21
loop 57:3 69:1
lost 51:16
lot 50:16 70:22 71:5
 87:3

M

Mahmoud 10:8,10,11
Mail 2:11,17
main 15:2 19:1 33:16
maintains 70:16
major 67:10
makeup 69:7
making 29:21 58:12
 60:16 71:6 88:5
manage 69:6
map 17:3,9 35:20 40:14
 79:18 80:4
Marcela 8:11
MARY 1:17
matter 1:12 14:1 20:8
 20:16 88:21
Matthew 6:20
MC 70:13 72:11
McGRATH 3:3 8:19,20
 60:5,9,11,11 61:17
 62:17 64:4,7,13 66:4
 67:2 68:12,16,20
 69:13,18 70:5,13 72:3
 72:11,17 73:7,20
mean 6:10 25:3 47:16
 62:9,17 68:16 79:5
 83:17,18
meaning 48:4,13
meant 61:3 74:7
measure 39:18,18
measures 83:17 84:19
 85:1
meet 21:18 25:1 28:6,8
 28:10,12 43:15 47:12
 47:15 48:6,12 65:22
 71:13 77:2
meets 22:3 27:3,21
 29:1
memo 25:17,20 43:4
 46:5,17,17
Memorandum 43:2
memories 47:2
mentioned 46:6
mercury 32:2
merits 85:15
met 44:10
microphone 6:8 14:5
microphones 5:15,17
 5:21,22
mid-April 52:22
Mike 7:8
miles 37:14
million 37:20 38:14
 82:8,11
mind 52:11
mindful 59:17
minds 13:13
mine 17:6 22:15,15
Minor 2:8 8:5,5 35:1,10
 49:13 51:7,8,14,15,20
 52:20 54:9,12,17 55:1
 55:11,18 56:2,8,15
 58:3,7,10,21 59:2,9
 60:16 63:8,21 65:8
minor.dustin@epa.gov
 2:13
minute 82:6
minutes 12:10,12,14,17
 12:18 14:8,20 29:4
 56:14 59:18 70:1 75:4
 83:5
mistakenly 67:15
moment 5:7 21:14
 51:16 76:21
monitoring 17:18,22
 18:3 42:7
month 56:22
months 16:3,4 57:14
 82:17
Morgan 15:9 19:7 20:10
 22:21 24:16 28:14

29:11,12 37:11,15,20
 40:6,8,22 41:21 42:3
 42:9 44:11 68:15,21
 69:11,15 73:12,13,17
 74:6,8 75:9,11 78:14
 78:18 79:15 80:7
morning 6:13
move 39:7
moving 77:20
multiple 14:22
mute 5:21 14:5

N

name 6:9 7:9 18:6 19:8
 25:18 38:12
narrative 17:20
narrower 21:8
narrowly 21:3,5
Nation 17:10,21 18:3,5
 18:8,11,13,16 24:1,2
 24:6,18 27:16 29:7
 30:5 32:1,16 80:9
Nation's 28:13
national 58:12,16 59:15
Navajo 3:7 9:7 17:10,21
 18:3,5,8,11,13,16
 22:15 24:1,2,5,17
 27:16 28:13 29:7 30:5
 32:1,16 85:12
navigable 20:15,21
 21:7,11 23:9 46:1
necessarily 67:13
necessary 16:6
need 19:11 34:11 43:5
 48:9 55:21 59:19
 81:15,15 83:12
needs 30:2 31:14 48:12
 78:2,6 81:10
never 19:20 22:12 23:4
 28:3,22 79:2 85:15
new 20:1,6 46:1 47:19
 62:20 63:9,14,16
 67:17 68:14,17 71:1
 76:9 78:5
newly 86:18
NN000019 1:8
no-discharge 53:14
non-legacy 53:12,17
north 39:6
note 25:13,20 36:5 62:3
noted 14:21 53:4,11
 60:17 61:18 66:15
notes 50:4
notice 1:13
novo 80:5 87:17
NPDES 1:7,8 22:15
 49:2 78:10,14
NTEC 9:5 86:11

number 6:4 7:14 18:2
 29:16,17 31:7
numbers 50:8
numeric 62:5
NW 2:17 3:4

O

O'Dea 2:15 8:15,16 35:1
 35:9 36:4 41:4,15,16
 41:19 42:18 44:3 45:1
 45:16,19 46:16 47:18
 48:21 49:10 50:3,15
 77:5
observer 6:11 8:9,12,22
observers 5:21 6:5
 10:13
observing 9:8
occupies 56:11
occurred 86:15
occurring 79:2
occurs 53:14
OCG 12:17
October 39:1
odd 62:10
odea.elise@epa.gov
 2:21
offering 17:15
Office 2:9,16
OGC 4:3 8:1,14 12:8
 34:15 35:1 50:14
OGC's 51:4
oil 62:5 75:14,18
old 50:7,11
once 5:20 21:6 72:4,12
once- 34:3 66:17
once-through 33:15
 34:6,10 66:14,21
 67:14 82:14 87:13
one's 38:22
ones 39:5 40:12
ongoing 57:9
open 83:9,10
operated 54:18
operating 66:21 74:10
operation 38:20 77:22
operational 7:21 22:11
 39:21
operations 37:6
operators 18:17
opinion 15:20 84:14
 85:8,19
opportunity 13:4,6,15
oral 1:4 11:4,19 13:1,3
 13:21 14:2,4,18 87:2
 88:5
ORC-2 2:11
order 12:6 16:5
organization 6:7 7:7

outfall 15:7 19:6,7
 39:12,13,19 40:3,3
 43:22 65:7,18,20 69:9
 69:14 70:10,11,11,16
 70:18 72:9,11,18 73:1
outfalls 39:14,15,20
 40:7 42:6 43:21 44:8
 72:16
outlined 12:6
outstanding 10:7
overhaul 63:16
overview 35:7 40:16

P

P-R-O-C-E-E-D-I-N-G-S
 5:1
p.m 1:13 5:2 88:22
P.O 2:4
P.S 3:9
Page 29:21 31:1,2,5
 66:15 73:9
Pages 31:2
Paragraphs 21:19 25:2
parameters 42:7
parenthetical 47:3
part 25:6 42:16 43:9
 57:2 58:15 59:14 62:1
 65:9 69:3 70:9 78:10
 78:12,15
participants 6:4 11:8
participating 5:5 13:1
participation 88:10
particular 6:19 31:10
 46:5,9 61:6
particularly 46:1
parties 75:5 87:22
parts 71:7
passed 33:16
passes 33:17
Paulsen 81:18
pause 57:16 76:20
Pennsylvania 2:17 3:4
People 80:13
percent 37:21
Perciasepe 25:17,19
 46:5,17
period 57:12
permit 1:8 11:20 14:22
 15:18,22 16:3,4,9,11
 16:14,16,17,18 19:18
 19:20 20:2 22:15,19
 23:16 27:15 28:1 29:1
 29:7 30:16,22 31:22
 32:10,11,14,20,22
 33:13,14,20,21 34:2,3
 35:8 39:10 40:11,12
 40:22 42:1,6 43:16
 44:6,10,17 45:2,10,11

45:22 48:7,15 49:2,8
 49:9,16 50:1,2 51:10
 52:3,4,11,22 53:3,7
 53:19,20 57:5 63:15
 64:6 66:16 73:10
 75:11,13,15,16 76:13
 78:2,6,10,14,22 79:9
 79:9,11,20,20 82:10
 84:20 87:10,17
permit's 20:3
permits 41:20 42:22
 43:8
permitted 39:22
permittee 8:20 56:3
 60:12 63:15 68:2
permitting 13:18
petition 11:19 12:22
 14:19 15:17 31:2,5
 66:15
petitioner 4:2,4 7:5
 14:13 56:16 73:11
petitioner's 73:8
petitioners 2:2 6:12,15
 6:17,22 7:22 12:1,7,9
 12:13 14:17,19 16:7
 16:20 87:3
Phase 67:17,17
phone 7:14
physical 23:7,8 24:8,9
pick 60:15
picture 39:8 67:5
pipeline 37:14
place 63:13,17 86:19
plan 85:1,3 86:1,2
plans 64:16
plant 11:22 15:12 17:4
 18:17,20 33:11 36:20
 37:5,15,18,19 38:17
 39:10,20 40:4 65:11
 69:2 74:10,14 77:17
plateau 37:8
please 5:20 6:8,12 8:1
 8:18 12:15 14:4,5,13
 80:19
plus 77:22
point 34:1 40:15 42:2,8
 43:22 44:8,11 52:21
 60:15 67:18 73:15,15
 77:15 85:22
pointed 81:11
pointer 64:21
pointing 27:5
points 60:12
pollutant 61:6
pollutants 27:10
pollution 80:12
polymers 65:2
pond 23:13 37:9,17

48:10,18 56:22 65:6
65:12,16,18 70:14
72:19 73:2,13,18
80:12
ponds 38:18 46:9,10
47:4,11 49:1 56:20
pool 23:13
portion 5:18
position 13:16 20:20
44:17,19 57:19,22
59:5,5,9,11 61:8,11
81:2,5
positions 87:15
possible 48:18
posted 13:22
potential 15:5 19:4
29:10 30:8,9 31:15
32:2,4,21 33:7 76:14
potentially 61:19
power 11:22 15:11 17:4
18:16,20 33:11 71:2,8
74:10
practical 45:6
practice 44:4
preparing 13:1
PRESENT 3:12
presentation 4:2,3 7:12
15:2 17:1 35:6
presenter 6:11,14 8:3,6
8:16,21
presenters 5:16
presenting 14:3
pretty 39:11 61:2 69:5
prevail 85:9,11
previous 16:18 51:10
52:2 54:13 67:16
previously 16:14
primary 24:8
prior 52:3,9 79:8 81:19
probably 35:2,4,15
probe 13:16
problems 7:11
proceed 12:5 14:2,14
34:16 35:16 50:13
60:4
proceeding 47:22
proceedings 88:16
process 33:19 36:9
65:9,13 71:4,11 72:1
professional 56:17
61:2,10
prohibited 58:5,7
project 69:5,6
projects 64:15
propagate 83:7
property 23:14
proposal 35:6
propose 61:20

Protection 1:2 2:7,9,16
46:2
protective 84:13
provide 5:9 29:11 54:18
provided 43:1,4
provides 52:4 73:13,17
74:6
providing 48:9,11 74:8
74:11,15
provision 24:19,20
provisions 21:3 60:20
62:7,8
prudent 83:16 84:19
85:1
public 1:7 3:2 11:21
53:1
pulled 67:4
pumped 37:11 68:15,21
69:2
pumping 37:13,19 65:1
85:1,3 86:1,2
purchase 86:14,19
purpose 21:2
purposes 34:7 38:8
75:18
pursuant 1:13 52:5
put 34:20 37:5 52:22
63:16 68:17,22 70:5
putting 53:2

Q

qualify 29:13
quality 18:5,9,12,18
24:1,3,6 27:17,18,21
28:4,6,9,12,13,15,18
29:8,14 30:6 32:15
33:1,8 69:7 76:9,15
78:4,5
quality- 77:7
quality-based 77:14
question 23:20 26:20
30:10 32:7,18 33:5
35:19 40:19 41:4,20
42:2 44:15 45:15 47:8
47:18 49:3,6,16,20
50:19 51:1,10 52:1,2
52:12,14 57:17 63:21
66:6,19 67:8 68:11
73:7 77:4 80:22
questions 13:10 14:11
35:4 66:8 69:19 74:20
87:22
quick 83:15
quickly 82:5
quite 43:7
quote 15:12 22:20
47:12
quoted 24:21

R

raise 86:10
raised 66:13 86:18 87:3
87:3
rationale 29:11
reach 20:17 75:20
read 13:8 78:12
reading 25:10 49:18
reads 52:17 55:22
real 83:15
realize 50:16
reason 69:3 74:16 76:3
76:4 85:10
reasonable 15:5 19:4
29:10 30:7,8 31:15
32:1,4,21 33:7 76:14
83:16 84:18,22
rebuttal 4:4 12:10,11,16
14:15,20 75:3
receives 73:18
receiving 17:5,11,18
19:8 22:14,16 27:11
28:2,16 29:8 31:16
recirculate 71:2
recirculated 68:5 69:8
recirculating 15:13
33:12 65:20 68:7,22
73:4
recirculation 72:1
recognition 63:12
recognize 80:11 82:22
recognized 84:17
recollection 22:7
record 5:8 6:6 9:16 10:9
13:9,17 17:8,13,14
18:1,22 23:8 27:9,12
28:7 30:11 32:20 43:3
44:16 62:11,13,17,19
62:21 76:7 86:2 88:22
recording 13:20
recycle 82:19
recycling 65:22
reference 30:15
referred 66:17
referring 25:20,20
29:18 31:13 79:7
refers 73:9
refresh 47:1
regard 11:10 88:13
regarding 56:11,18
regardless 46:10
Region 2:7,10 4:3 7:22
8:1,3,6,9,12 11:20
12:8,17 13:17 34:15
34:22 35:2 45:2 50:13
51:15
region's 51:5 86:11
regional 2:9 49:12

regions 46:8,17
register 26:19
regs 57:8
regulate 44:5
regulated 23:16 38:9
41:21 42:2 79:21 80:1
regulates 75:14
regulating 45:6 75:19
regulation 25:21,22
26:3 38:8 54:12,13
regulations 26:19
45:22 55:13 59:10
61:3,18,21 67:16,17
regulatory 34:11
reissuance 16:11
reject 22:1
related 52:1 64:19
relates 26:20 52:14
relating 25:15 26:22
relationship 17:11,17
relatively 48:22
relevant 17:9 67:20
relied 31:22
relief 15:14
rely 81:7
relying 31:15 42:22
43:6 45:3 50:7
remaining 14:8
remand 15:19 16:2,13
16:15 19:22
remanded 57:5 60:20
remember 16:7 22:9
24:15 31:22 32:14
86:19
reminders 5:10
removed 21:8 26:5
removing 33:19
repeating 52:12
reply 29:22 30:20 73:8
reported 84:3
reporter 9:11,13 13:21
represents 70:21
reproduced 31:4
request 14:18 16:13,15
requesting 19:22 56:16
require 20:10 49:2 57:6
required 43:13 83:21
requirement 27:21
53:15 86:11
requirements 47:12,15
48:6,7,13,16 64:18,20
76:8,19 77:3,6 81:9
83:12 84:7 85:2 86:3
86:5
requires 63:15 70:22
requiring 16:2
reserve 12:9,10,16
14:14

reserving 14:20
residuals 64:19
response 22:19 31:6
 78:13 79:3,13
rest 35:12,14 40:10
result 46:22 51:3 52:18
return 75:2
reuse 69:2
reversed 79:16
review 11:20 14:19
 16:22 31:2 80:5
reviewing 30:11
revised 16:3,4,16 47:19
 67:7
revisions 52:5
rgodwin@schwabe.c...
 3:11
Richard 10:21
rid 41:12
river 18:7,7,19 19:8,9
 20:13,14 36:21 37:1
 37:12 68:3 82:9,13
 83:4 84:9,10
rivers 37:8
role 6:9,19
roll 5:7 6:5
room 8:22
roughly 39:4
routed 70:15
RP 15:5
Ruining 12:2
rule 19:12 20:1,6 25:7
 25:16 45:21 46:1,2
 47:22 51:2 52:18 55:9
 58:16 60:21 62:4
 64:18 65:10 81:19
rulemaking 26:11 59:15
 62:19
rules 19:17 20:8
run 11:15 36:17 71:1
running 71:9 72:12,13
 72:18 73:4
Ryen 3:8 9:6

S

safety 71:6
sakes 84:8
Sam 9:12
sampling 17:10
San 2:11 7:6 12:2 18:7
 18:19 19:9 20:13,14
 36:21 37:12 38:10
 68:3 82:9
saw 7:8
saying 20:20 23:4
 32:22 57:18 62:11
 73:11 80:7
says 21:10,17 22:7 23:8

24:22 25:7,14 28:18
 33:16 36:8 55:22 74:2
 74:3 78:9 81:19
schedule 16:2,6,9
scheduled 38:22
schematic 64:14
Schwabe 3:9
screen 34:19 36:16,21
 37:2,3 64:8
scrutiny 87:8
Seattle 3:10
second 11:3 15:7,17
 36:6 65:17
secondary 24:9
seconds 36:15
section 22:7 34:7,12
 48:7 55:13 74:2
sediment 56:20,22
seeing 79:3
seeking 15:13 17:13
seen 25:6
seeps 39:2,3,4,6
select 36:12 56:4
selenium 32:2
senior 3:14,14 9:20
sense 68:6
sent 40:6
sentence 25:15
September 1:10
Service 1:7 3:2 11:21
 84:9
set 60:17,18 62:3
setting 15:6 19:5
settle 65:3
settling 70:9,15 71:18
 72:8
share 36:10,12 64:8
 86:15
sharing 36:9 41:13
sheet 33:14
Sheth 8:8,8
short 35:7
shorthand 69:17
show 64:8
showed 39:14 40:10
showing 18:6
shows 31:10 36:7
shutdown 67:12
Sierra 6:21 12:4
significant 20:13
simple 39:11
Simultaneous 33:3
 54:21
site 18:15 36:20
site-specific 58:13
sites 17:10,18,22
six 16:4 57:13
skill 11:10 88:13

Skype 7:9 11:4 34:19
slash 51:5
slight 60:21
slow 36:8
sluiced 64:22
small 36:18
smoothly 11:14
so-- 84:17
solids 15:7 18:18 62:5
 74:12
somewhat 5:11
sooner 57:4
sorry 25:17 26:12 34:18
 47:6 49:19 52:12 55:8
 64:11,17 68:16 69:16
 75:17
sort 58:14 64:3 83:12
source 83:22 85:3
south 39:4
sovereign 85:13 86:6
 86:12
speaking 7:18 33:3
 54:21
species 83:2,3,7,18
 84:8,11,13,17
specific 30:3 31:8
Specifically 49:21
speculate 67:14
squarely 45:12
stack 35:22
stage 65:17,18
stand 82:2
standard 18:12,18
 27:18,22 28:9,10,12
 28:14,16,18 29:2 31:5
 54:2 55:2,4,6 60:18
 60:18 76:9 77:14 78:5
 78:5,7
standards 18:5,9,10
 24:1,3,6 27:17 28:4,6
 29:14 32:15 33:2 49:7
 54:4,5,5,7 76:15
 77:13
standpoint 34:11
start 5:5 6:12 60:14
started 37:6
starting 9:21 52:8,10
state 6:8 43:5,10
stated 13:19 22:19
 42:22 81:5,21
statement 67:4,4 71:20
 83:16 84:21
States 15:9 19:13,17
 20:11,18 21:6,18 22:9
 22:17 24:22 25:1
 41:22 45:5 75:10,18
 80:1,8,10,17 87:12
station 37:13

stations 31:9
status 23:4,10,18
statute 55:22
statutory 63:4
stayed 19:21
Stein 1:19 21:13,16
 24:20 25:12,19 26:17
 44:14 50:21,22 51:19
 52:14 58:19 64:12
 66:11 68:10,13,19
 69:21 70:3 74:22 88:2
 88:20
Stein's 26:8
step 65:12 66:2 82:6
Stilton 10:16,17
stock 83:6
stop 41:13 64:1 66:5
storage 64:5
Street 2:10
stretch 83:4 84:10
structure 44:6 66:7,14
 66:20 67:11 82:6 83:1
 84:16
struggling 47:17
subject 42:16 44:21
submissions 88:9
submit 35:15
submitted 16:20 86:17
 88:14
submitting 11:12
substance 85:11
sue 16:7
sufficient 78:11,19
suggest 19:19 74:7
suggesting 62:13
Suite 3:9
summary 81:8
supersede 58:14
support 10:11 13:17
 54:19 62:12,20,22
supporting 62:19
supposed 56:1 61:16
surface 17:10,18,22
 18:3 62:22 63:3 64:1
 64:3
Susan 3:14 10:1
suspended 25:14 26:3
 26:22 62:5
swimming 80:14
system 11:13 15:12,13
 21:10,12 22:13,21
 27:4,7 28:5,8 29:13
 33:11,12 41:2 42:17
 42:19 43:8,12,15,20
 44:2 45:20 46:19
 47:10 48:5,9 50:17
 57:3 63:17 64:15 65:2
 65:2,19,20,21 66:15

66:17,18,21 67:1,21
68:4,7,17 69:1 70:16
70:20,22 71:1,3 72:4
72:4,12,13,15,15,17
72:18 73:4 75:10,21
76:3,4,18 77:11 78:1
78:11,15 79:1,15,21
82:18 83:8,11 87:13
systems 21:21 22:3
63:16

T

table 18:6
taken 44:19 50:16
59:11
takes 36:6 63:13
talk 33:9 39:2 67:21
talked 33:7
talking 28:13 31:9
67:21
talks 55:20
tank 57:1 65:2,14,21,21
69:1 70:9,15 71:17,18
71:22 72:13,14,18
tanks 68:14
TDS 18:18 19:6 30:8
32:5
tech 10:11
technical 7:14 10:7
11:15 51:11
technologies 62:14
technology 52:13 53:9
54:2 58:15 59:3 63:10
63:14
technology-based
77:13
tell 30:17 73:16
temperature 15:6 18:12
19:6 27:18,21 28:17
28:19 30:7 31:5 32:4
32:22 75:22 76:10,16
ten 12:10,18 14:20
term 47:14
terms 21:19 25:2 32:6
41:1 52:4 72:5
thank 6:16 7:1,6,19 8:2
8:4,7,13,17 9:1,4,10
9:14,19 10:3,6,12,19
11:1,6,11 14:17 34:14
36:1 41:18 42:11
44:13 50:9,12 52:20
59:16 60:1,3,9,10
68:9 74:19 75:1,6
86:21 87:1,18,20 88:3
88:4,8,15,17,18,19,20
thanking 5:5
Thanks 50:12 67:2
74:21

they'd 84:1
things 11:14 47:11
62:13
third 15:21 65:18
THOMAS 2:8
thought 44:16 63:22
three 15:2,10 16:3 19:1
19:16 20:8 39:14,22
59:17 64:15 67:13
75:3
three-stage 65:9
Thursday 1:10
tight 16:2 71:14
till 53:20
timeline 27:14 86:14
timer 14:6
times 71:10 74:17
timing 16:11 61:17
tired 5:11
today 5:5 6:5,19,22
9:20 10:7 11:19 15:2
35:1
today's 5:10 6:10 12:5
told 44:21
Tom 8:3 34:22 42:5
49:19 51:6
top 36:21 37:4 38:10
torturing 25:18
total 15:7 18:17 62:5
74:12
towers 82:18
traditional 20:15,21
transcribing 13:21
transcript 13:22
Transitional 3:7 9:7
85:12
transport 52:7 53:10,12
53:16,18,21 54:3 55:2
56:19 57:1 58:16
63:10,18,18 64:17
65:14,15 71:3 72:22
73:3 81:6
traveling 85:6
treat 27:9 40:22 63:17
63:18 68:6
treated 22:14 43:14
69:1
treating 43:9 48:5,14
78:15 80:9,16
treatment 21:10,12,21
22:3,13,21 27:4,7
28:5 29:13 35:10 40:4
41:2 42:17,19 43:8,11
43:19 44:2,18 45:20
46:19 47:10,11 48:10
48:12 50:17 53:9 54:2
65:5,6,12,16 70:14
71:19 72:19 73:2,14

73:17,19 74:2,6,8,11
74:15 75:10,21 76:3,4
76:18 77:11 78:1,11
78:15 79:1,15,21
87:13
treats 22:16 75:11,16
75:17,21
tried 23:1 47:20 51:9
triggered 21:7
trust 5:6
try 39:8
trying 34:20 38:5 41:12
53:5 67:19 71:21
77:11 84:10
turn 5:16,20 14:4 19:1
34:6 35:9 40:13,14,16
41:10,12
two 9:20 10:13 26:16
28:20 33:17 37:8,14
39:21 40:2,5,7 56:14
82:16 83:3
type 61:14

U

U.S 1:2
ultimately 57:2
understand 5:11 13:15
23:19 31:18 47:14
55:9 58:6 67:20
understanding 49:10
49:14 50:7
understood 44:15
undertake 46:14 58:1
64:16
undertaking 84:6
United 15:9 19:13,17
20:11,18 21:6,18 22:9
22:17 24:22 25:1
41:22 45:5 75:9,17
80:1,8,10,17 87:12
units 40:1 64:22 67:13
71:8
unmute 5:17 6:8
upstream 39:19
use 39:15 40:1,2 56:17
63:3 64:2 83:4 84:10
useful 5:12 64:9
uses 46:10 80:18

V

vacate 15:18
vacated 61:15
valid 56:6
verbally 14:7
version 25:13 26:18
48:1 74:1,3,4
versus 43:21
video 14:4

video's 36:5
Video-Teleconference
1:11
view 51:5
viii 21:19 25:2
violate 76:14
violated 78:7
virtual 87:2
visual 11:8,12 51:16
88:12
volume 69:6
voluntary 16:13,15
VonVacano 8:11,11
VPN 6:3

W

WA 3:10
wait 36:15 58:11
waive 86:11
wall 39:3
wanted 5:9 36:4 43:17
60:21
wants 76:1
warm 28:20
wash 18:6 19:8 38:12
38:12
Washington 1:2 2:18
3:5
wasn't 32:17 43:19 55:4
67:10
waste 21:10,12,20 22:3
22:12,20 27:4,7 28:4
29:13 35:10 40:4 41:2
42:17,19 43:8,11,19
44:2,18 45:20 46:19
47:9 48:11 50:17 65:5
65:11,16 70:14 72:19
73:2 76:18 78:1,16
79:1,14,20 87:12
wastewater 18:19
60:20 62:6,21 63:7
waters 17:5,11,19 18:8
18:13 19:8,13,16
20:12 21:17 22:8
23:10 24:21,22 25:8
27:11 28:2,16 29:8
42:4,10 44:12 46:2
53:10 87:12
way 11:13 38:8 41:12
56:10 61:20 87:17
ways 34:9 75:11 76:2
week 38:14
welcome 49:12 60:2
well-briefed 81:6
went 88:22
white 39:8
Wildlife 84:9
Williamson 3:9

willing 35:15
window 36:10,12,13
windsurfing 80:14
withdraw 82:8,15,17,20
withdrawal 45:11
withdrawing 82:12
withdrew 79:10
Wojack 9:12,12
work 35:19 36:18 47:17
 71:6,9 88:9
working 11:6 71:13
 88:5
works 35:8
world 74:13
WOTUS 25:6 35:9 44:5
 46:20 47:4,20 50:16
wouldn't 49:3
written 40:12
wrong 49:13
Wyatt 3:9

X

Y

year 39:1 57:14
years 20:4,5 22:11
 38:19 71:5,12 77:22

Z

zero 38:17 65:22
zero- 68:17
Zupan 7:3,3

0

001 15:7 19:6
001A 40:3
01E 40:4 65:7 70:11,12

1

1(iv) 21:19 25:2
1.7 37:16
1:30 1:13 5:2
1200 2:17
122 25:6
122.2 22:7
14 4:2 37:20
14-E 43:3
14.3 82:8
14.7 82:11
1420 3:9
15 31:2
17 29:21
19-06 1:8
1960 23:12
1961 37:7
1962 37:7
1980 25:14,22 26:2,9,11
 26:14 27:1

1980s 45:22
1982 26:6 47:4 51:2
 54:9,22 55:8 57:19
 59:12 60:14,17 61:18
 62:7 81:3
1983 40:12
1988 40:13
1989 56:1 61:16
1993 40:13

2

2 17:9 18:22 67:17
2:59 88:22
20 12:17 20:4
20.1.a 31:1
2001 16:1 27:15 32:11
 32:11,20,22 33:13,20
 34:2 40:13,22 42:1,6
 42:17 49:8,16 50:2
20037 3:5
2005 66:16 73:10,22
 74:3,7
2006 43:1
2007 18:5 24:6
2013 67:7 74:4
2015 21:16 22:2 24:21
 25:11,13 45:21 47:22
 52:5 60:21 62:3,11
 64:18
2018 22:18 44:16 45:2
 45:11 79:4,6,10,14
2019 32:10 45:10 49:8
 50:1 52:22 53:1 79:16
202-564-4201 2:19
202-564-5477 2:20
202-955-1519 3:5
2020 1:10 12:6 20:1
 70:4
2023 52:8 53:21 57:3,13
 66:3 69:4,11 70:4,19
 71:13 72:2,12
20460 2:18
206-622-1711 3:10
21 26:14
21st 26:2
2200 3:4
23 53:15
2366A 2:17
26-D 31:7
27-B 18:2 29:6,19 30:4
 30:5
2C 73:9

3

3 1:10 17:20
30 12:13
303-774-8868 2:5
316(b) 34:7,12 35:11

67:17 83:21 84:7,12
 85:2 86:2,4
31st 52:8 66:3 69:10
34 4:3 31:2
3400 3:9
35 31:3
39 31:1,3

4

4 18:4,6 40:1 64:22
40 22:7 25:6 31:1,3,5
 33:14
402 48:7
409 2:4
41 31:3
415-972-3888 2:12
415-972-3945 2:12
42 31:3
423.11(g) 33:15

5

5 18:4,11 40:1 64:22
50 22:11 77:22
50-year 22:22
50s 37:6
53 66:15
57 29:21 31:11

6

6 18:15
60 12:12 38:18
60s 74:9

7

75 2:10 4:4

8

80533 2:4
80s 48:1
82 52:18 54:11 56:4,5
 56:10

9

9 73:9
90 28:1,17 76:11
94105-3901 2:11
95 28:1 76:12
98101 3:10
9th 12:6 48:2

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Arizona Public Service Co.

Before: US EPA/EAB

Date: 09-03-20

Place: teleconference

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
true and accurate record of the proceedings.



Court Reporter

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701