

Capital Reporting Company
Hearing 11-19-2009

RECEIVED
NOV 23 2009

NOV 19 2009 10 35 1

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

-----: :
In re: : :
City & County of Honolulu : :
Sand Island Wastewater Treatment Plant : NPDES
Honouliuli Wastewater Treatment Plant : Appeal No.
: 09-01
NPDES Permit Nos. HI0020117 & HI0020877 : :
-----: :

Washington, D.C.

Thursday, November 19, 2009

The following pages constitute the oral arguments before the Environmental Appeals Board, held pursuant to notice, at the U.S. Environmental Protection Agency, 1201 Constitution Avenue, Northwest, Washington, D.C., before Erick M. Thacker, RPR, of Capital Reporting Company, a Notary Public in and for the District of Columbia, commencing at 3:00 p.m.

Capital Reporting Company
Hearing 11-19-2009

2	4
1 APPEARANCES	1 CONTENTS
2 On behalf of the Environmental Appeals Board:	2
3 Judge Edward E. Reich	3 ORAL ARGUMENT PAGE
4 Judge Charles J. Sheehan	3 By Mr. Salmons 5
5 Judge Kathie A. Stein	4 By Ms. Leith 5
6	5
7 On behalf of the U.S. Environmental Protection Agency:	6 REBUTTAL ARGUMENT
8 SUZETTE E. LEITH, ESQUIRE	7 By Mr. Salmons 6
9 Assistant Regional Counsel, Region 9	8
10 U.S. Environmental Protection Agency	9
11 75 Hawthorne Street	10
12 San Francisco, California 94105-3901	11
13 (415) 972-3884	12
14 - and -	13
15 STEPHEN J. SWEENEY, ESQUIRE	14
16 Office of General Counsel	15
17 U.S. Environmental Protection Agency	16
18 1200 Pennsylvania Avenue, Northwest	17
19 Mail Code 2355A	18
20 Washington, D.C. 20460	19
21 (202) 564-5491	20
22	21
	22
3	5
1 On behalf of the City & County of Honolulu:	1 PROCEEDINGS
2 DAVID B. SALMONS, ESQUIRE	2 MS. DURR: The Environmental Appeals Boards
3 ROBERT V. ZENER, ESQUIRE	3 for the United States Environmental Protection Agency
4 Bingham McCutchen, LLP	4 is now in session for oral argument. In re: City &
5 2020 K Street, Northwest	5 County of Honolulu, Sand Island Wastewater Treatment
6 Washington, D.C. 20006	6 Plant, Honouliuli Wastewater Treatment Plant, Permit
7 (202) 373-6000	7 Nos. HI0020117 and HI0020877, NDPES Appeal No.
8	8 09-01.
9 ALSO PRESENT:	8 Honorable Judges Edward Reich, Kathie Stein, Charles
10 Eurika Durr, Clerk of the Board	9 Sheehan presiding.
11	10 Will you please turn off all cell phones and
12 * * * * *	11 recording devices?
13	12 JUDGE STEIN: Good morning, counsel. Can
14	13 everyone hear me? If counsel could please state their
15	14 name for the record and the party they represent.
16	15 MR. SALMONS: Thank you, Your Honor. I'm
17	16 David Salmons. I represent the city and county of
18	17 Honolulu. This is Bob Zener.
19	18 MS. LEITH: I'm Suzette Leith for the EPA
20	19 Region 9. Can you hear me?
21	20 JUDGE STEIN: Actually, not very well.
22	21 MS. LEITH: I'm Suzette Leith from EPA Region
	22 9, Office of Regional Counsel, representing Region 9.

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">6</p> <p>1 With me is Stephen Sweeney from the Office of General 2 Counsel. 3 JUDGE STEIN: I believe that the city and 4 county of Honolulu is going to proceed first, and if I 5 understand correctly, you have 45 minutes for argument, 6 and are you reserving any time for rebuttal? 7 MR. SALMONS: Yes, Your Honor. We'd like to 8 reserve ten minutes for rebuttal. Thank you, Your 9 Honors. May it please the Board? I'm David Salmons, 10 and I will address the issues of mixing zones, the 11 application of Sections 301(h)(9) and (h)(2), the 12 region's refusal to consider disinfection to address 13 the bacteria exceedances at Honouliuli. 14 My colleague, Mr. Zener, will address specific 15 issues related to chlordane, Whole Effluent Toxicity, 16 bacteria, dieldrin, and the motion to supplement the 17 record. 18 If it pleases the board, I'd like to begin 19 with the issues of mixing zones. And to put that issue 20 in context, it's important to recall that for 20 years, 21 the region had permitted the plants at issue in this 22 case to operate without secondary treatment. And in</p>	<p style="text-align: right;">8</p> <p>1 me -- light extinction coefficient, turbidity and 2 dissolved oxygen. 3 And then it identified specific parameters 4 that needed to be met at the ZOM, and there it includes 5 total nitrogen, ammonium nitrogen, and some others. 6 What that leaves are what are the toxic substances. 7 And for those, the permit contains a specific dilution 8 factor that is to be used since those are not actually 9 measured at an area in the ambient waters; instead are 10 measurements that are taken at the end of the pipe -- 11 JUDGE SHEEHAN: You didn't challenge those 12 limits, did you, those findings? 13 MR. SALMONS: Well, I do think we did with 14 regard to this issue of whether the Zone of Initial 15 Dilution or the state approved mixing zone is relevant. 16 And I think it's important to remember -- and EPA's own 17 technical standards document bears this out -- that 18 when calculating the dilution factor for things like 19 chlordane and dieldrin and WET testing, you start with 20 some conception of what the mixing zone is, because the 21 goal is for that dilution factor to give you a result 22 that mirrors what would be a measurement at the edge of</p>
<p style="text-align: right;">7</p> <p>1 1988, it specifically stated in its tentative decisions 2 granting the waivers that the state's EPA approved 3 mixing zone or ZOM, rather than the federal mixing zone 4 or ZID, quote, takes precedence, close quote, in 5 determining compliance with all state water quality 6 standards, except for biochemical oxygen depletion and 7 total suspended solids, which are the specific 8 pollutants for which the secondary treatment waiver is 9 being sought. 10 The region suddenly changed that long-standing 11 view in its tentative decisions in these cases. But 12 its current position is both contrary to law and 13 arbitrary and capricious. 14 JUDGE STEIN: Am I correct however in 15 understanding that the ZOMs that were approved were 16 approved for only a subset of pollutants? 17 MR. SALMONS: Well, what I would say, Your 18 Honor, is that the permit that I believe you're 19 referring to, if you take, for example, the Honouliuli 20 permit -- this is at H-12-1172 in the record -- it 21 identifies specific parameters that had to be met at 22 the ZID, and it only included light efficient -- excuse</p>	<p style="text-align: right;">9</p> <p>1 the mixing zone, and so, to the extent that the 2 dilution factors that were actually applied by the 3 region in this case for those toxic substances differs 4 from the permit, and they do in each instance, their 5 differences in part, we believe, reflect this 6 distinction between using the mixing zone that's 7 approved by EPA by the state in using the ZID. And if 8 you look at the record, Your Honors, with regard to, 9 for example, chlordane and dieldrin and WET testing in 10 both Honouliuli and Sand Island final decisions, you'll 11 see that the region specifically says that the dilution 12 factor that they used was intended to measure those 13 pollutants at the ZID or to reflect the measure that 14 would -- 15 JUDGE STEIN: Is this argument now that 16 you're giving to us addressed in your briefs, or is 17 this yet a new argument that you're making as to why 18 some of these other pollutants may have ZOM-like 19 characteristics? 20 MR. SALMONS: Well, Your Honor, I don't think 21 it's a new argument. I think what I'm attempting to do 22 is respond to Your Honor's question as to whether our</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">10</p> <p>1 ZID/ZOM arguments that are clearly presented we believe 2 were made below and are made in our briefs, whether 3 those apply to only those pollutants that are 4 identified in the permit as being measured at the ZOM, 5 or if they also would incorporate these other toxic 6 substances. We think it's clear from the record that 7 that -- if there's a legal error, we're correct about 8 that, that the region was required to use the state EPA 9 approved mixing zone. 10 JUDGE SHEEHAN: But I think the region 11 challenges your assertion that the ZID argument for the 12 toxics was made in your comments below. Can you point 13 out in the record where you did make the ZID argument 14 in the comments, your comments? 15 MR. SALMONS: Certainly, Your Honor, and I 16 think this goes to an issue that the region is very 17 aggressive about, in our view, and that is reading our 18 comments very narrowly as to -- we would submit trying 19 to avoid meaningful review of what is fundamentally a 20 significant policy change that they have adopted in the 21 decisions in this case. 22 What happened was, once the tentative decision</p>	<p style="text-align: right;">12</p> <p>1 dramatically changed their position. And so what they 2 said was, you know, you made an unjustified change, and 3 it quotes the language from 1988 that says that the -- 4 quote, the ZOM would take precedence in determining 5 compliance with state water quality standards and that 6 the Zone of Initial Dilution would apply for parameters 7 only for which the applicant is requesting a variance, 8 i.e., BOD and TSS. 9 So the position that the region had previously 10 taken, which we believe is the position that's required 11 under the statute and the regulations, is that you have 12 to use the state approved mixing zone, and the only 13 possible exception is for the pollutants for which you 14 are seeking a modified permit, and that, in this case, 15 is BOD and suspended solids. 16 JUDGE REICH: Could I go back to the dilution 17 factor issue? I share a little bit of what I think was 18 Judge Stein's puzzlement about the argument, because 19 having read your briefs, I don't remember seeing it 20 being argued that way. I mean, clearly, you argued the 21 issue about which mixing zone was appropriate, but I 22 don't remember seeing this argument about the dilution</p>
<p style="text-align: right;">11</p> <p>1 came down and indicated that there was -- there were 2 going to be violations and that the waiver application 3 was going to be denied based on measurements at the 4 ZID 5 in response to that in our comments, and this is the -- 6 if the Court wants to follow along, this is at H-2-24 7 and -25 -- and what we said was that the tentative 8 decision reflects a change without explanation or 9 justification, a deviation from what the position was 10 taken in 1988, and then it quotes the position from 11 1988 which we believe is reflected in an appropriate 12 interpretation of the regulations -- 13 JUDGE SHEEHAN: It doesn't sound like you're 14 arguing the regulatory scheme, though, there; you're 15 just making a general assertion of error without 16 arguing the law? 17 MR. SALMONS: I'm sorry. I'm not sure I 18 understand. 19 JUDGE SHEEHAN: It doesn't sound like you're 20 arguing on the basis of regulations there. 21 MR. SALMONS: Well, I think that there was 22 still some question at this point, I believe, in the minds of Honolulu exactly why the region had so</p>	<p style="text-align: right;">13</p> <p>1 factor. Where in the permit is the dilution factor 2 specified, using either one? 3 MR. SALMONS: I don't have the responsive 4 permit handy, and I apologize for that. 5 JUDGE REICH: Are you saying that if one 6 looked at the dilution factor and knew what they were 7 looking at, that it is clearer that that dilution 8 factor has to correspond to measuring at the edge of 9 the ZOM rather than the ZID, that there's no question 10 that that's what was intended by the dilution factor? 11 MR. SALMONS: Well, Your Honor, if one were 12 to look -- if one were to look at the final decisions 13 in these cases -- and we can just go through them. I'm 14 happy to do that, and we can start with Honouliuli. 15 And if we look, for example, at chlordane -- this is 16 page 63 of the final decision for Honouliuli -- it says 17 that when the long-term efficient dilution value of 412 18 to 1 is applied to these three sample results, the 19 concentration of chlordane in the receiving water at 20 the ZID is calculated to be -- and then it provides the 21 specific calculation -- and that 412 to 1 is a 22 different dilution factor than was specified in the</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">14</p> <p>1 permit. 2 And so our point is that to the extent that 3 reflects an attempt to mirror the dilution at the ZID 4 as opposed to the state-approved ZOM, which we would 5 submit are inherent in the dilution factors that are 6 contained in the permit, that our argument about why 7 the ZOM controls applies to those pollutants as well. 8 And I would respectfully disagree that that's not clear 9 from our brief. I believe our brief was clear that our 10 arguments with regard to ZID/ZOM apply to all of the 11 pollutants in this case with the exception of bacteria. 12 JUDGE REICH: I think that was clear. What I 13 think was not clear was that one could determine that 14 there was, in fact, a mixing zone for pollutants other 15 than the ones specifically listed by looking at the 16 dilution factor. I don't believe that was clear. 17 MR. SALMONS: Well, and I guess what I would 18 say, Your Honor, is that if the Court agrees, if the 19 board agrees with our arguments with regard to the 20 state mixing zone and that the state mixing zone is the 21 appropriate mixing zone -- the EPA approved state 22 mixing zone -- is the appropriate mixing zone to use in</p>	<p style="text-align: right;">16</p> <p>1 argued. What we have argued, Your Honor, is that when 2 undertaking that (h)(9) analysis and asking the 3 question, will the discharge comply with the federal 4 criteria, that it doesn't make any sense to disregard 5 the state mixing zone which was approved by EPA 6 precisely with that criteria in mind. 7 JUDGE STEIN: But how do you square that with 8 the language of the regulation in 125.62, which clearly 9 makes reference to, "At the time the modification 10 becomes effective, the applicant's outfall and diffuser 11 must be located and designed to provide adequate 12 initial dilution, dispersion, and transport of 13 wastewater such that the discharge does not exceed at 14 and beyond the Zone of Initial Dilution?" 15 I see nothing in that regulation that gives 16 room for the argument that you're making, and when I 17 look at the 1994 preamble, when commentators suggested a 18 broader interpretation, EPA in the 1994 preamble spoke 19 to 20 that issue. So the difficulty I'm having with your 21 argument 22 is understanding how it can be squared with the language in the regulation and the '94 preamble.</p>
<p style="text-align: right;">15</p> <p>1 the 301(h)(9) analysis. Well, then the question 2 becomes, you know, how much of the region's 3 determinations are -- have to be reconsidered in light 4 of that legal error? 5 JUDGE REICH: In your view, since you 6 referenced (h)(9), as I read your argument, does (h)(9) 7 apply to anything beyond the pollutants for which a 8 waiver was requested? 9 MR. SALMONS: I think it does, Your Honor. 10 What I would say is that (h)(9) requires more broadly a 11 predictive judgment on the part of the region and the 12 EPA as to whether -- if the variance is permitted -- as 13 to whether the effluent that would be discharged at 14 that time would generally be in compliance with the 15 act's criteria. And the region agrees and I think 16 everyone concedes that the state water quality 17 standards which have been approved by EPA -- 18 JUDGE REICH: So that's not limited to BOD 19 and TSS in this case? 20 MR. SALMONS: I don't think that -- I don't 21 think that the (h)(9) analysis is limited only to BOD. 22 At least, that's certainly not a position we have</p>	<p style="text-align: right;">17</p> <p>1 happy to address that. Our position -- and we think 2 this is the best reading of the regulation -- is that 3 when -- when the regulation 125.62 makes reference to 4 all applicable water quality standards that that 5 reference to applicable is essentially defined in the 6 prior section of the regulation in 125.61, which said, 7 "There must exist a water quality standard or standards 8 applicable to the pollutant(s) for which a section 9 301(h) modified permit is requested" -- and it 10 identifies BOD, suspended solids, and pH -- 11 JUDGE REICH: Now I'm really confused. 12 JUDGE SHEEHAN: So BOD and TSS set the 13 bounds 14 for where measurement occurs -- 15 MR. SALMONS: Well -- 16 JUDGE SHEEHAN: -- in all -- for all 17 pollutants? 18 MR. SALMONS: Well, I think that the 19 requirement -- just to be clear, it's in Section .61 of 20 the regulations -- it doesn't say where those 21 measurements are to be taken. .62 of the regulations, 22 that provision says that the applicable water quality standards have to be satisfied at the ZID, and we're</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">18</p> <p>1 not disputing that in this case. What we are saying is 2 that applicable there doesn't mean all water quality 3 standards. It's a reference to the standards that are 4 applicable to the pollutants for which the waiver is 5 sought, so the rest are satisfied at the ZOM. 6 JUDGE REICH: Then if you can help me kind of 7 put this all together, because my understanding -- 8 correct me if you don't think it's right -- is that 9 125.62(a), in the language you're looking at, basically 10 is the language that's intended to implement (h)(9). 11 MR. SALMONS: Well, no, Your Honor, and I 12 think that is an important point. That is clearly not 13 correct. The language we're talking about that makes 14 reference to the satisfaction of all applicable water 15 quality standards at the ZID, that language goes back 16 for a decade or more before (h)(9) was even in the 17 statute. 18 And if the Court looks, for example, at the 19 1986 version of the regulations -- now, there's a 20 difference in numbering. It's .60 and 61 instead of 61 21 and 62, but what you'll find, Your Honor, is exactly 22 this same language that makes reference to all</p>	<p style="text-align: right;">20</p> <p>1 statement that makes reference to the ZID. (a)(1)(i) 2 says all applicable water quality standards, so those 3 have to be satisfied at the ZID. We read those as a 4 reference to the water quality standards that have just 5 been defined in .61. 6 JUDGE SHEEHAN: But didn't EPA in its '91 7 rulemaking tie 125.62(a)(1) to 301(h)(9), all of it? 8 MR. SALMONS: Well, I think it's difficult to 9 understand exactly what occurred at that time, to be 10 honest with you. And to be clear, this is not a model 11 of clarity. I will concede that. We're trying to do 12 the best we can with this, but I think given the 13 history of it, it's hard to read applicable as being 14 anything other than a reference to .61, which has been 15 defined as applicable. 16 And what they did after (h)(9) was added to 17 the statute, they amended it to say, if you do not have 18 approved state water quality standards, then you have 19 to apply -- you have to satisfy the federal criteria at 20 the ZID -- 21 JUDGE REICH: All right. So -- 22 MR. SALMONS: -- and we agreed with that.</p>
<p style="text-align: right;">19</p> <p>1 applicable water quality standards being satisfied at 2 the ZID when (h)(9) was not even in the statute, and I 3 don't think it's disputed -- 4 JUDGE REICH: But -- 5 MR. SALMONS: -- how the EPA construed 6 that -- 7 JUDGE REICH: So if I want to find in the 8 regulations where (h)(9) is implemented, where would I 9 find that? 10 MR. SALMONS: Well, what the -- what the EPA 11 did after (h)(9) was added to the statute in terms of 12 amendments to the regulations is in .62. It adds -- it 13 added (ii) to (a)(1). So it added the reference that 14 where there is not a state approved water quality 15 standard, you have to comply with the federal criteria, 16 and that carries back up to the reference to the ZID -- 17 at the ZID. And again we do not dispute -- 18 JUDGE REICH: So you're saying that A -- when 19 you talk about two, are you talking about (ii) or -- 20 MR. SALMONS: That's correct. So if -- for 21 example, in 40 CFR 125.62, (A) refers to physical 22 characteristics of the discharge. (a)(1) is the</p>	<p style="text-align: right;">21</p> <p>1 JUDGE STEIN: So (a)(ii) there, if I 2 understand what you're saying now, was, in fact, the 3 language added to address (h)(9)? 4 MR. SALMONS: Yes, Your Honor. 5 JUDGE REICH: Okay. That uses the word 6 "applicable," right? 7 MR. SALMONS: It does. Yes, Your Honor. 8 JUDGE REICH: It does? And you indicated 9 earlier that in your view, (h)(9) is not limited to TSS 10 and BOD, so presumably, the word "applicable" there has 11 broader meaning, so why should we read it in (i) right 12 above it more narrowly? 13 MR. SALMONS: Well -- 14 JUDGE REICH: It's the same word. 15 MR. SALMONS: Well, with respect, I think 16 that's because .61 defines it for you, and it defines 17 what are the applicable water quality standards that 18 have to be met at the ZID. Historically, that is 19 exactly the language that was here before (h)(9) was 20 even added to the statute, and everybody understood the 21 reference to all -- 22 JUDGE REICH: But being that you argue in</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">22</p> <p>1 your brief that if language is amended then you need to 2 kind of look at the language after it's amended and 3 assume that, you know, what was there before doesn't 4 necessarily carry forward, and it seems to me that if 5 you're looking for something that helps define what 6 applicable is in (i), then it is probably at least or 7 more logical to look at what's in (ii), then to go back 8 and look at 61, which is a different section all 9 together.</p> <p>10 MR. SALMONS: Well, I think the history of it 11 suggests that they're more connected than that, Your 12 Honor. And I guess I would say that, again, this is 13 not a model of regulatory clarity, and if you step back 14 and ask yourself, what is the point of (h)(9), the 15 point of (h)(9) is to insure that there's going to be 16 general compliance with the federal criteria.</p> <p>17 And the region has not come forward with any 18 suggestion -- and with respect, I don't think it's 19 possible that the state approved mixing zone satisfies 20 the criteria of the statute. That's precisely why it 21 was approved, and so the question then becomes, why 22 would you ignore that and why would you adopt a</p>	<p style="text-align: right;">24</p> <p>1 This is a quote from the technical manual. 2 It says that the Clean Water Act allows mixing 3 zones at the discretion of the state. EPA recommends 4 that states have a definitive statement in their 5 standards on whether or not mixing zones are allowed, 6 which was done here. Where mixing zone provisions are 7 part of the state standards, the state should describe 8 the procedures for defining mixing zones, which is 9 again, during the water quality standard approval 10 process, there's a procedure that's set forth for 11 defining the mixing zones in the --</p> <p>12 JUDGE STEIN: How do you square that with the 13 language in the '94 preamble, which specifically 14 refused to adopt the position that state standards were 15 going to trump the ZID? There's specific language. 16 There's a specific discussion in comments. EPA 17 responds to those comments, takes a position that 18 appears to me to be different than the position you're 19 arguing, and as far as I know, that issue wasn't 20 challenged.</p> <p>21 MR. SALMONS: Well, with respect, I don't 22 think that language is that clear, and I think there</p>
<p style="text-align: right;">23</p> <p>1 different --</p> <p>2 JUDGE SHEEHAN: But the ZOM was only 3 adopted 4 for certain pollutants, not for all pollutants, right 5 --</p> <p>6 MR. SALMONS: Well --</p> <p>7 JUDGE SHEEHAN: -- pollutant by pollutant 8 permit?</p> <p>9 MR. SALMONS: -- for all the pollutants that 10 are at issue here, we think the ZOM was a factor in 11 defining whether there's an exceedance or not for those 12 --</p> <p>13 JUDGE SHEEHAN: The ZOM is still set permit 14 by permit, right?</p> <p>15 MR. SALMONS: Well, there -- I'm sorry, I 16 couldn't hear you.</p> <p>17 JUDGE SHEEHAN: Under Hawaii standards, the 18 ZOM is set permit by permit?</p> <p>19 MR. SALMONS: The procedure -- and this is 20 again consistent with the technical support document 21 that the region relies on -- it specifies that as a 22 general matter with -- along with the state water quality standards -- in fact, this is at S-2-4161.</p>	<p style="text-align: right;">25</p> <p>1 are other statements around that time that cut the 2 other way. And then, again, I think that this comes 3 down to a question of what is at best, less than fully 4 clear regulatory language that is the result of 5 amendments over time as the act has changed. I think, 6 at a minimum, the region's position is that the term 7 "applicable" has changed over time, and it --</p> <p>8 JUDGE STEIN: Maybe the region made an error 9 in the earlier permit. I'm not sure that the language 10 in the regulation has changed, and when I look at -- I 11 think it's 125.62 through -- I don't know if it's 12 (a)(3) or (3) -- where it says that the requirements of 13 paragraphs (a)(1) and (2) apply in addition to and do 14 not waive or substitute for the requirements in 125.61.</p> <p>15 MR. SALMONS: Well, that's right, Your Honor, 16 but that is -- I mean, just again, to remind the Court, 17 romanette (ii), that's a reference to when there is no 18 state approved water quality standards. It's not a 19 reference --</p> <p>20 JUDGE STEIN: What about (a)(1)?</p> <p>21 MR. SALMONS: Well, (a)(1) is when there's a 22 reference to where there are state approved water</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">26</p> <p>1 quality standards, and it says you have to comply with 2 the applicable ones, you have to satisfy it at the ZID, 3 and we're discussing what applicable means. I do 4 think -- just again, I would urge the Court if -- to 5 the extent that there's some uncertainty with regard to 6 this regulatory language, I think the important thing 7 to do is to go back to the statute and to ask the 8 question, why would Congress want to disregard state 9 approved mixing zones when they have been carefully 10 designed by -- EPA's own technical document says this -- 11 through a multistep process that takes into account 12 precisely these same types of economic -- excuse me -- 13 environmental concerns.</p> <p>14 JUDGE STEIN: But as I read the legislative 15 history, what Congress said was that we are going to 16 allow for a waiver of secondary treatment in certain 17 carefully defined circumstances, and that there was 18 legislative history, if I recall -- and I can't recall 19 the specific piece of history -- that talked about that 20 this should not be interpreted expansively.</p> <p>21 And if you're going to allow a waiver from 22 requirements that otherwise apply to all facilities or</p>	<p style="text-align: right;">28</p> <p>1 this when it added the 301(h) process -- the entire 2 thrust is for the encouragement of, the development of, 3 and deference to EPA approved state water quality 4 standards. And the whole point of the waiver process 5 of 301(h) is to recognize that there are potentially 6 crushing cost burdens on jurisdictions along the 7 coastal areas, where the issue can be adequately 8 addressed through dilution.</p> <p>9 And Congress certainly was aware that mixing 10 zones are an inherent part of state water quality 11 standards. Everybody agrees. The region has made this 12 very clear that the reference to the federal criteria 13 in (h)(9) includes reliance on EPA approved water 14 quality standards, and with respect, I see no reason to 15 distinguish between state approved mixing zones and 16 state approved water quality standards. They've been 17 through essentially the same approval process.</p> <p>18 JUDGE STEIN: But as I understand the Hawaii 19 mixing zone concept, it's not -- it's site specific, 20 and it is pollutant specific, and it is limited in 21 time, so it's not that if you get a mixing zone for 22 permit one, you're entitled to permit -- a mixing zone</p>
<p style="text-align: right;">27</p> <p>1 all POTWs, isn't it rational that in order to obtain a 2 waiver that you might have to comply with potentially 3 more stringent criteria if you're going to be allowed 4 out of a major requirement? So I just don't see 5 Congress speaking to that issue.</p> <p>6 I see the statutory language, which is 7 consistent with the ZID. I see more explanation in the 8 ninety -- you know -- four regulations as to what was 9 intended by the ZID, and I don't see -- I think the 10 language of the reg as to what the ZID is is pretty 11 clear. I mean, I understand you've got an argument 12 about what is applicable and what's not applicable. I 13 have difficulty understanding some of the references to 14 metals and fecal coliform bacteria in the regs if your 15 definition of applicable applies.</p> <p>16 MR. SALMONS: Your Honor, if I may start to 17 address some of those concerns, and there are, I think 18 several in Your Honor's question there, and I would 19 start where I think Your Honor has started, with the 20 statute, and I would make the following two points.</p> <p>21 The first is that the entire thrust of the 22 Clean Water Act -- and Congress certainly understood</p>	<p style="text-align: right;">29</p> <p>1 in permit two. The way you're describing the mixing 2 zone it sounds like, you know, this applies to all 3 facilities under all circumstances, and I'm not sure 4 that's an accurate reflection of what the Hawaii mixing 5 zone --</p> <p>6 MR. SALMONS: Well, there are two steps to 7 the process, Your Honor, and I think, as you 8 understand. The first is the approval of the concept 9 of the mixing zone in the first instance through the 10 water quality standard approval process, and that's --</p> <p>11 JUDGE SHEEHAN: It's case by case. That's 12 Judge Stein's point.</p> <p>13 MR. SALMONS: First, there is the approval of 14 the water quality standards that include the procedures 15 for the mixing zone, then permit by permit --</p> <p>16 JUDGE STEIN: But the procedures or the 17 possibility of a mixing zone --</p> <p>18 MR. SALMONS: But they set forth the standard 19 for measuring the features of it and how the process 20 for determining it --</p> <p>21 JUDGE SHEEHAN: If they're saying that there 22 should be a ZOM.</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">30</p> <p>1 MR. SALMONS: Well, that's part of it, yes. 2 But here's what I would take away from that, Your 3 Honors, and I think that is important. And that is, 4 that if the region has concerns about the adequacy or 5 appropriateness of a state mixing zone, it is fully 6 able to address any concerns that it's not sufficiently 7 protective of environmental concerns through the 8 approval process of the water quality standard in the 9 first instance, and then through the specific permit 10 approval processes. There's no reason to give the 11 region now a third opportunity to come in and to say 12 that the state mixing zone is inadequate and to adopt 13 what is essentially a hybrid federal standard. 14 JUDGE SHEEHAN: Well, can the state change 15 its mind -- can the feds change their minds, if they 16 want? 17 MR. SALMONS: I'm sorry. I couldn't hear 18 you. 19 JUDGE SHEEHAN: Can the region change its 20 mind over time? 21 MR. SALMONS: Well, there are procedures to 22 do that through the water quality standard approval</p>	<p style="text-align: right;">32</p> <p>1 that there are, if you will, two types of mixing zones. 2 There are state approved mixing zones, and then there 3 are federal mixing zones, and the mixing zone should 4 follow the water quality standards. 5 JUDGE SHEEHAN: How about the fact that 6 125.58 (dd) defines ZID as the region of initial 7 mixing? 8 MR. SALMONS: I'm sorry? 9 JUDGE SHEEHAN: It seems like initial mixing 10 and ZID are the same thing. 11 MR. SALMONS: No, I don't think that's true, 12 and I don't think there's any suggestion in the 13 statutory text or its history -- 14 JUDGE SHEEHAN: Well, I'm quoting 58(dd), 15 125. 16 MR. SALMONS: I'm sorry. This is the 17 regulation you're talking about? 18 JUDGE SHEEHAN: Yes, right. 19 MR. SALMONS: Well, yes, the regulation 20 defines the ZID -- 21 JUDGE SHEEHAN: As the region of initial 22 mixing, back to (h)(9) arguably.</p>
<p style="text-align: right;">31</p> <p>1 process and through the permitting process. It hasn't 2 done so here, and there's been no suggestion in any of 3 the pleadings that Hawaii's mixing zone is inadequate 4 to protect environmental concerns or is inadequate to 5 fulfill the criteria of the Clean Water Act. And that, 6 after all, everybody agrees, is the whole point of 7 (h)(9). The question as to (h)(9) is, will the 8 discharge of effluent generally be in compliance with 9 federal criteria? 10 JUDGE REICH: (h)(9) uses the term "after 11 initial mixing." 12 MR. SALMONS: Yes, Your Honor. 13 JUDGE REICH: What is your understanding of 14 the word "initial" in the term "initial mixing." 15 MR. SALMONS: Well, we believe that is 16 intentionally broad to include both state approved 17 mixing zones when the mixing zone -- excuse me -- when 18 the state water quality standards are in existence and 19 a federal mixing zone when they are not. And so we 20 think Congress used the term "initial mixing" as 21 opposed to, you know, the Zone of Initial Dilution or 22 something like that precisely because it recognized</p>	<p style="text-align: right;">33</p> <p>1 MR. SALMONS: Well, I mean, again, I don't -- 2 I think that that's not the proper reading. 3 JUDGE SHEEHAN: Well, there seems to be a 4 correlation between (h)(9) and the ZID. 5 MR. SALMONS: Well, to be sure, there are 6 times when the ZID is the proper mixing zone under 7 (h)(9). We're not saying that you can never use the 8 ZID when you're applying an (h)(9) analysis -- 9 JUDGE REICH: No, but I think -- 10 MR. SALMONS: -- when there is no state 11 mixing zone, but the question is, what do you do when 12 there is an EPA approved state mixing zone? The same 13 would be true with regard to -- 14 JUDGE STEIN: And how do you -- 15 MR. SALMONS: I'm sorry. 16 JUDGE STEIN: How do you -- if you're right, 17 then how do you read the language in 125.62(a) broadly 18 enough to encompass the state mixing zone concept? My 19 problem is that your interpretation doesn't appear to 20 fit within the scope of 125.62(a) if we reject your 21 interpretation of the definition of applicable. 22 And I understand how it fits if we accept that</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">34</p> <p>1 applicable only applies to the pollutants for which you 2 are seeking a waiver, but if we were to reject that 3 point of view, how does your interpretation square with 4 125.62(a)? 5 MR. SALMONS: I'm -- I apologize. I'm having 6 a hard time following what part of my argument you're 7 knocking out that I have to respond to, and I don't -- 8 I just didn't follow -- 9 JUDGE STEIN: Let's assume, hypothetically, 10 that if the board were to conclude that applicable 11 water quality standards -- 12 MR. SALMONS: Right. 13 JUDGE STEIN: -- means basically all water 14 quality standards. 15 MR. SALMONS: So you agree that if you were 16 to hold that -- 17 JUDGE STEIN: (inaudible). 18 MR. SALMONS: Right. You'd have to satisfy 19 all water quality -- all applicable -- 20 JUDGE STEIN: Right. In other words, in 21 looking at the ZID language in 125.62, we're not just 22 looking at two pollutants.</p>	<p style="text-align: right;">36</p> <p>1 they had the same interpretation of the regulation that 2 we do, and we had always had our waiver applications 3 granted. 4 I'm not sure how we could conceivably have had 5 either standing or a ripe claim at that time to 6 challenge their adoption of that regulatory language on 7 the theory that they might someday change their 8 interpretation of it and it would come back to hurt us 9 20 years later. I mean, that's just -- to me, is just 10 -- 11 JUDGE SHEEHAN: Well, arguing the way it's 12 interpreted is different from whether it's valid or 13 not. 14 MR. SALMONS: Well, that -- but if -- 15 JUDGE SHEEHAN: If -- you were speaking of 16 regulation invalidity. 17 MR. SALMONS: Well, right. As I understood 18 Your Honor's question, they raised -- this statutory 19 provision that says you have to challenge certain 20 regulatory language within 120 days within its 21 adoption, and we didn't do that. If we're going to 22 make the argument that the regulations here are</p>
<p style="text-align: right;">35</p> <p>1 MR. SALMONS: Right. 2 JUDGE STEIN: We're looking at a broader set. 3 So how is it that your argument about the ZOM can fit 4 into the language about the ZID in 125.62(a) -- does 5 your argument rise or fall on our acceptance of your 6 argument about applicable? 7 MR. SALMONS: Well, I guess I would -- we 8 argue in two steps. One, we argue that applicable 9 ought not to be read the way the region does. 10 Historically, there's a problem with that since 11 applicable was there before (h)(9) was. We think that 12 it's a reference to 61. 13 If you were to disagree with that, then we 14 would argue that the regulation is inconsistent with 15 (h)(9), and if you were to disagree with that, then 16 obviously, on that issue, we would not prevail. 17 JUDGE SHEEHAN: Wasn't it the time to 18 challenge that long ago if the regulation is invalid? 19 MR. SALMONS: Well, you know, that's another 20 of what I would refer to as an aggressive assertion of 21 waiver on the part of the region. At the time they say 22 we would have been required to bring that challenge,</p>	<p style="text-align: right;">37</p> <p>1 invalid, and my only point is, we couldn't possibly 2 have brought that challenge at the time. We weren't 3 injured by the adoption of that regulatory language. 4 They would have come to court and said, no, we 5 interpret it the same way you do, and you haven't 6 been -- you know, there's no likelihood it's going to 7 be applied against you in some negative way. I think 8 that that just shows that that can't possibly be the 9 right reading of that statutory provision. I would 10 like to say, if I could, a few words about 11 disinfection, because -- 12 JUDGE REICH: Before you do, I have one last 13 question about how to read 125.62. If I understood 14 what you had said earlier, then applicable under (ii) 15 is broader than applicable under (i), and yet, the 16 language that Judge Stein read from earlier that talks 17 about discharge does not exceed at or beyond the zone 18 of initial dilution is -- seems to be a predicate for 19 both of those. There's a colon, and there's a one and 20 a two, so I don't understand why that does not say that 21 anything that falls into (ii) as well as (i) cannot 22 exceed at or beyond the Zone of Initial Dilution.</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">38</p> <p>1 MR. SALMONS: Well, I generally agree with 2 Your Honor on the structure of that provision. Where I 3 would differ, I think, from what was the premise of 4 your question, is that, again, we read (a)(1) to be a 5 reference to the applicable water quality standard -- 6 JUDGE REICH: I understand. 7 MR. SALMONS: (inaudible) -- at the (a)(2) -- 8 JUDGE REICH: -- more broadly. 9 MR. SALMONS: -- we read that as a reference 10 to federal criteria when there is no state approved 11 water quality standards. That's the only thing that 12 (a)(2) covers, and so it says you have to satisfy the 13 following things at the ZID, applicable water quality 14 standards, which we should say is .61 water quality 15 standards, and federal criteria if there is no state 16 approved standard. And again, we would agree with 17 that. 18 So I don't think we have a problem with the 19 plain terms of the regulation. I can understand that 20 this is not clear language and that reasonable minds 21 might disagree. I would then urge the Court to go back 22 to the statutory purpose and the general structure of</p>	<p style="text-align: right;">40</p> <p>1 And if there is a problem with the mixing zone 2 or some result that's not agreeable in the application 3 of it through permitting processes and others, the 4 region can come up with a tailored fix. It could say, 5 okay, you need to treat -- you know, more pretreatment 6 for this pollutant or something like that. Here, it's 7 an on-off trigger for potentially hundreds of millions 8 or billions of dollars cost, and I think that makes it a 9 very blunt instrument to change the standard, so -- 10 JUDGE STEIN: I have a couple questions 11 before you address your last point. 12 MR. SALMONS: Yes. 13 JUDGE STEIN: Is there anything in the record 14 that reflects whether or not Hawaii provided any kind 15 of state certification in conjunction with this waiver 16 or application for this particular waiver? 17 MR. SALMONS: Whether there was a state 18 certification, Your Honor? I'm not sure the answer. I 19 believe the answer to that -- and I will do my best to 20 look at the record when I sit down, Your Honor. I 21 believe the answer to that is that that would have been 22 the next step if the region had issued a tentative</p>
<p style="text-align: right;">39</p> <p>1 (h)(9) and to understand that state standards, EPA 2 approved state standards including mixing zones, are 3 exactly what are encouraged here, and that there are 4 other mechanisms for the region to deal with mixing 5 zones that may be problematic, and that this isn't 6 necessary to do so in an (h)(9) analysis where the real 7 question is, are you generally compliant with federal 8 criteria? 9 And then lastly -- and I think this goes to a 10 point that Your Honor made Judge Stein with regard 11 to -- with regard to the fact that you're seeking a 12 waiver of otherwise generally applicable requirements, 13 and I guess I view that the other way. It seems to me 14 that what Congress was clearly concerned with here were 15 potentially devastating and, at least at a minimum, 16 very significant costs that would be incurred by 17 multiple jurisdictions, and when -- precisely because 18 of their ability to mix and dilute the primary treated 19 effluent, there ought to be a lessening of the burden. 20 In those circumstances, it doesn't make sense, we would 21 argue, to have a more strict standard than would apply 22 generally to permit compliance and the like.</p>	<p style="text-align: right;">41</p> <p>1 decision that was favorable to the process. I believe 2 it's at that point that that's done, but I'm not 3 positive about that, so I will check. 4 JUDGE STEIN: My second question is with 5 regard to 125.62(a)(4), I believe, that talks about 6 evaluating compliance with (a)(1)(i), and (a)(2) based 7 on conditions reflecting maximum periods -- reflecting 8 periods of maximum stratification and during other 9 periods when discharge characteristics, water quality, 10 biological seasons or oceanographic conditions indicate 11 more critical situations may exist. 12 Could you explain how that particular 13 provision of the regulation squares with the arguments 14 you're making to us? 15 MR. SALMONS: Well, if I'm understanding you 16 correctly, Your Honor, I think it would apply -- that 17 that provision would apply when you're dealing with 18 the -- what we refer to as the applicable water quality 19 standards, i.e., BOD and suspended solids, and it would 20 apply when you're applying the federal criteria when 21 there's no state water quality standard that has been 22 approved, but it wouldn't apply otherwise, at least not</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">42</p> <p>1 by its terms. 2 JUDGE STEIN: And what does it mean? What do 3 you think this regulation means? 4 MR. SALMONS: I'm not entirely sure, Your 5 Honor. I'm not trying to (inaudible) -- 6 JUDGE STEIN: Okay. Well, I have a chance to 7 ask you -- 8 MR. SALMONS: -- it's not a regulation that 9 we have focused on, I think, to any great length, nor 10 has the region in any great length. 11 JUDGE REICH: Yeah, just trying to nail this 12 down in my mind -- if for 125.62(i), we look for 13 guidance as to what applicable means by looking back to 14 125.61; for (ii), where do you look for guidances as to 15 what the word applicable there means? 16 MR. SALMONS: Well, I think you don't really 17 have to, Your Honor, because I think there, the only 18 relevant question is whether there are EPA approved 19 water quality standards, and I think that'll usually be 20 clear. And it says that if there are -- excuse me -- 21 it says that if there are not EPA approved water 22 quality standards --</p>	<p style="text-align: right;">44</p> <p>1 thing I would say about that -- the critical thing I 2 would say about that is that the region takes the 3 position that because the application for the 301(h) 4 waiver did not specifically mention disinfection as an 5 alternative, that it, therefore, was relieved of any 6 obligation to consider it. 7 And I think the most -- the most clear and 8 straight forward reason as to why that's incorrect is 9 that 301(h)(9), as everyone agrees, requires a 10 predictive judgment as to what the water quality 11 standard will be under a waiver if it's granted in the 12 future, and the permit that was already in place for 13 Honouliuli specifically required the implementation of 14 disinfection. If the results of the Sand Island trial 15 were positive and if -- 16 JUDGE SHEEHAN: What about the .62 17 requirement that the applicant give a demonstration of 18 why it would work? 19 MR. SALMONS: Well, that's what Sand Island 20 -- 21 JUDGE SHEEHAN: But it's a different 22 facility.</p>
<p style="text-align: right;">43</p> <p>1 JUDGE REICH: I'm just trying to understand 2 the structure of the regulation -- 3 MR. SALMONS: Right. 4 JUDGE REICH: -- whether you think it's 5 relevant here or not. 6 JUDGE SHEEHAN: I had a question about 7 whether the measurement would occur at the ZID or the 8 ZOM under (ii). 9 MR. SALMONS: Well, our reading of (ii), Your 10 Honor, would yield the following result, which is that 11 if there is a state approved water quality standard, 12 (ii) doesn't apply, and you would measure that at the 13 ZOM. If there is not, the federal standard would 14 apply, and you would measure that at the federal mixing 15 zone or the ZID. So we would generally -- our reading 16 of this harmonizes in that way pretty consistently that 17 if -- that the mixing zone follows this standard. If 18 it's state, then it's state. If it's federal, it's 19 federal. 20 I would like to just say a few words 21 about disinfection, because we view that as a very 22 important part of this appeal, and I think the critical</p>	<p style="text-align: right;">45</p> <p>1 MR. SALMONS: It is a different facility, but 2 the permit -- and just to be clear, this is -- this is 3 pages 63 and -- excuse me. I'm reading the wrong 4 thing. This is from H1-189, which is the section of 5 the permit for Honouliuli. It says that "If the 6 results of the Sand Island monitoring program indicate 7 that disinfection of the Sand Island Wastewater 8 Treatment Plant effluent shall be required, 9 disinfection of the Honouliuli Wastewater Treatment 10 Plant shall also be required." 11 I gave you the wrong cite, Your Honor. That's 12 at H12-1228 of the record. So if the permit for 13 Honouliuli very clearly stated that if the results of 14 the Sand Island monitoring program are positive, 15 indicating the disinfection is going to be required at 16 Sand Island -- and, you know, this presupposes that you 17 have -- otherwise have bacteria violations, then you 18 must include disinfection at Honouliuli. And so for 19 that reason alone, without even getting into whether it 20 was required to amend the application or not, in making 21 that predictive judgment, we submit it's arbitrary and 22 capricious to ignore what is otherwise a clear permit</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">46</p> <p>1 requirement.</p> <p>2 If there are exceedances -- and we have arguments</p> <p>3 as to why the bacteria exceedances, in fact, don't exist,</p> <p>4 but</p> <p>5 if there are exceedances, we're already required given</p> <p>6 the positive result at Sand Island to include</p> <p>7 disinfection, and it's arbitrary and capricious to</p> <p>8 ignore that fact in making the 301(h) waiver</p> <p>9 determination. If there are no further questions, Your</p> <p>10 Honors --</p> <p>11 JUDGE STEIN: I'm going to ask one final</p> <p>12 question.</p> <p>13 MR. SALMONS: Yes.</p> <p>14 JUDGE STEIN: 125.61 refers to applicable</p> <p>15 water quality standards. 125.62(a)(1) refers to all</p> <p>16 applicable water quality standards. What in your mind</p> <p>17 is the difference between applicable and all</p> <p>18 applicable?</p> <p>19 MR. SALMONS: I don't see a difference</p> <p>20 between them, and I would point Your Honor to the fact</p> <p>21 that the same language -- as I understand it, the same</p> <p>22 language was in the regulations up until 1986 when</p> <p>(h)(9) wasn't in the statute, and it still had the same</p>	<p style="text-align: right;">48</p> <p>1 set forth specific criteria that a discharger had to</p> <p>2 meet in order to get a variance. They have to meet all</p> <p>3 these criteria.</p> <p>4 In other words, unless the region finds that</p> <p>5 the applicant meets all these criteria, there's just no</p> <p>6 authority for the EPA to grant a 301(h) variance.</p> <p>7 Here, the region analyzed mounds of data, and they</p> <p>8 found that there was multiple reasons why the variance</p> <p>9 couldn't be granted under 301(h)(9). Both discharges</p> <p>10 failed to meet water quality standards for toxicity,</p> <p>11 for chlordane, for dieldrin, for ammonia, and also that</p> <p>12 the Honouliuli discharge failed to meet standards for</p> <p>13 bacteria, and under 301(h)(2), that both discharges</p> <p>14 could interfere with the attainment of water quality --</p> <p>15 protective of aquatic life and recreation. So unless</p> <p>16 this board finds that all those regions were in error,</p> <p>17 the applicants still do not qualify for a variance, and</p> <p>18 the two decisions should be upheld.</p> <p>19 Turning, then -- I guess I will start with the</p> <p>20 ZID and the ZOM, which is where most of the briefs are.</p> <p>21 Although, as a preliminary, there is one overriding</p> <p>22 practical issue which Your Honors discussed, and that</p>
<p style="text-align: right;">47</p> <p>1 reference, and it was clearly understood as being a</p> <p>2 reference to the water quality standards that are</p> <p>3 identified in .61 as being applicable.</p> <p>4 And again, I would just emphasize that this is</p> <p>5 not a construction of the regulation that we have</p> <p>6 ginned up out of whole cloth. This is, in fact, how the</p> <p>7 region interpreted their regulations for a very long</p> <p>8 time. Thank you, Your Honors.</p> <p>9 JUDGE STEIN: I think, at this point, you're</p> <p>10 out of time.</p> <p>11 MR. SALMONS: That's fine.</p> <p>12 JUDGE STEIN: If you have any issues you need</p> <p>13 covered, you can cover it on rebuttal.</p> <p>14 MR. SALMONS: Very well.</p> <p>15 MS. LEITH: Good afternoon. I'm Suzette</p> <p>16 Leith with the Region 9 Office of Regional Counsel.</p> <p>17 There's a lot to talk about before I get into the ZID</p> <p>18 and ZOM, and maybe, if we have time, some of the other</p> <p>19 issues. I want to make one general comment about</p> <p>20 301(h) -- 301(h) in general and why this proceeding is</p> <p>21 different from the typical permit proceeding that comes</p> <p>22 here, and that is that in 301(h), Congress specifically</p>	<p style="text-align: right;">49</p> <p>1 is, from a practical standpoint, the legal issues may</p> <p>2 not even affect the final results here. One thing that</p> <p>3 we didn't get into before during City & County of</p> <p>4 Honolulu's argument is the fact that for ammonia and</p> <p>5 for bacteria at Honouliuli -- ammonia at both plants</p> <p>6 and bacteria at Honouliuli, the record shows</p> <p>7 exceedances at the ZOM as well as at the ZID, so even</p> <p>8 if the ZOM controlled for those, they still don't meet</p> <p>9 water quality standards.</p> <p>10 JUDGE STEIN: How do you respond to the</p> <p>11 argument that CCH made, which is that was not the basis</p> <p>12 for the region's decision? So if, in fact, we were to</p> <p>13 ground any decision by this board on the fact that</p> <p>14 there were exceedances at the ZOM as well, that's</p> <p>15 inconsistent with the record in this case.</p> <p>16 MS. LEITH: The decisions -- the final</p> <p>17 decisions do clearly indicate that water quality</p> <p>18 standards were not met at the ZOM, so I think under</p> <p>19 there's a casino case, I think that counsel for CCH</p> <p>20 cited, under that one, even if the case doesn't say</p> <p>21 specifically, this is an alternative ground, if that</p> <p>22 can be fairly discerned from the decision, then it can</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">50</p> <p>1 be upheld. And here, for example, the ZOM violations 2 at Sand Island -- all the violations, frankly, were at 3 the ZOM because there wasn't monitoring at the ZID, and 4 so it was clear that there were exceedances at the ZOM 5 and -- 6 JUDGE STEIN: Was that the basis for your 7 decision, the basis for the region's decision? 8 MS. LEITH: The basis for the region's 9 decision was that water quality standards would not be 10 attained. The region did emphasize the ZID, because 11 that's what the regulations say and that's what we were 12 analyzing, so -- 13 JUDGE SHEEHAN: To put a slightly finer point 14 on that, the water quality standards were to be 15 attained at the ZID or at the ZOM? 16 MS. LEITH: The main thing the region was 17 analyzing was, could water quality standards be 18 attained at the ZID. What the region also put in the 19 decisions was, moreover, they're not even attained at 20 the ZOM. And so, for example, CCH has raised the 21 issue, should the public be able to comment on that, 22 and our answer to that is that no, they shouldn't,</p>	<p style="text-align: right;">52</p> <p>1 MS. LEITH: Because the decision did 2 specifically say standards were not met at the ZOM, 3 even though the main thing -- you're right. The main 4 thing the region looked at is were they made -- met at 5 the ZID. There were also statements they were not met 6 at the ZOM, and if the standards aren't met at the ZOM, 7 then the waiver can't be granted. And to that extent, 8 the region did make the technical decision that the 9 exceedances at the ZOM were sufficient to come to a 10 conclusion that the standards could not be met. 11 The other issue for the other pollutants -- 12 the chlordane, dieldrin, toxicity was discussed a 13 little bit, and there was one question about the 14 dilution factor and where does that come from. It's 15 discussed at length in the final decisions how it was 16 calculated. I have the cite for the Honouliuli 17 decision. It's document H.1.2, pages H0123 discusses 18 how initial dilution is calculated, and it's things 19 like the depth of the outfall, the tides, the water 20 temperature, there are EPA approved models for how you 21 figure initial dilution. You don't start with the 22 physical ZID or ZOM and calculate back with the initial</p>
<p style="text-align: right;">51</p> <p>1 because the tentative decisions clearly indicated all 2 these exceedances at the ZOM, that could have been 3 commented on. 4 JUDGE REICH: Is there any level of technical 5 judgment that goes into looking at the data that 6 presumably showed exceedances at the ZOM in 7 determining 8 whether that data is conclusive enough or strong enough 9 to either grant or deny a waiver? 10 MS. LEITH: In general, is there technical 11 judgment used to decide whether standards are met with 12 a variety of data? I think the answer to that is yes, 13 and I think CCH did point out, for example, for 14 dissolved oxygen at one of the treatment plants, there 15 were a couple of violations maybe ten years ago, but 16 it's been clean ever since, and the region did discount 17 those violations and find that that standard had been 18 met -- 19 JUDGE REICH: So how do we know, even 20 though 21 there were allegedly, at least, violations at the ZOM 22 that they would have been substantial enough to have justified denial of the waiver if that's what you had</p>	<p style="text-align: right;">53</p> <p>1 dilution numbers. You factor in these other critical 2 factors, and I think there was also a question about -- 3 JUDGE REICH: But can I -- 4 MS. LEITH: Yeah. 5 JUDGE REICH: If I understood what was said 6 earlier, it sounded to me like I was hearing that the 7 permit did, in fact, specify a dilution factor and the 8 region, in fact, used a different dilution factor. Is 9 that an accurate or an inaccurate statement? 10 MS. LEITH: That is correct, and I'm not 11 really prepared to say exactly why. I know part of the 12 reason it was different was there was new data, for 13 example, weather data. Part of the reason it was 14 different is there are updated models, so there was a 15 new model used. I'm pretty sure, but I can't cite 16 chapter and verse on it, that it was not changing from 17 back calculating from a ZOM to back calculating from a 18 ZID. It was these other changes. 19 And as Your Honors pointed out, CCH has not 20 challenged the model that was used, the numbers that 21 EPA came up with, and the reasons for finding the 22 chlordane and dieldrin and effluent toxicity</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">54</p> <p>1 violations, at least as to the ZID and the ZOM. 2 So with that, in terms of the practical 3 issues -- getting to the legal issues, we've discussed 4 125.62(a) at length. There was a question about, did 5 EPA officially tie 125.62(a)(1) to 301(h)(9)? There's 6 a quotation in our brief on page 39 from the 1991 7 preamble to the proposed regs for 301(h) -- for the 8 changes to 301(h), which included 301(h)(9), and that 9 says "EPA interprets initial mixing to mean ZID 10 (proposal 125.62(a)(1))." There may even more clear 11 citations, but I couldn't find them in the few minutes 12 we had. So there is a tie to 125.62(a), and frankly, 13 if that doesn't interpret 301(h)(9), then I don't know 14 what does. 15 In terms of the word "applicable," I think 16 that's been discussed a lot, frankly. If EPA when they 17 wrote the regs had wanted to say 125.62 only applies to 18 BOD and TSS, they would have said it -- they wouldn't 19 have buried it in the word "applicable." I looked for 20 definitions. Applicable is not a term of art. In 21 301(h)(9), it's used all over. Applicable pretreatment 22 requirements, applicable requirements of this section,</p>	<p style="text-align: right;">56</p> <p>1 or the people who did the analysis, it just meant 2 standards that apply to this discharge, meaning it 3 doesn't include fresh water standards. It doesn't 4 include estuary standards or standards that might apply 5 to a bay over here rather than the ocean over here, and 6 that's kind of the easiest definition of applicable. 7 In terms of EPA's interpretation, I'll talk 8 about the inconsistencies with the region in a minute, 9 but the EPA headquarters -- EPA's national policy has 10 always interpreted (h)(9) to require meeting all water 11 quality standards at the ZID. Probably the clearest -- 12 the clearest sound bite on this is from the Amended 13 Technical Support Document, the ATSD, which came out 14 in 15 1994 along with the new regs. 16 This is essentially the bible for both 17 applicants and for regions who are analyzing these 18 decisions, and what it says specifically is compliance 19 with criteria and standards such as standards for 20 nutrients, toxic pollutants, and coliform bacteria 21 concentrations at the edge of the ZID is necessary, and 22 that's pretty clear. You don't just have to comply with BOD and TSS. You have to comply with all these</p>
<p style="text-align: right;">55</p> <p>1 applicable water quality standards. There is a 2 definition at 125.58(cc) that says water quality 3 standard means applicable water quality standards which 4 have been approved. 5 There's also a definition of applicable water 6 quality standards in the permit regs at 122.2. This 7 isn't 301(h), but 301(h) does require discharges to -- 8 discharges to show that they can meet the permit regs, 9 too, and what that definition says is, basically, 10 applicable standards means all state standards to which 11 a discharge is subject under the Clean Water Act. 12 JUDGE STEIN: Do you know why, given that the 13 term "applicable standards and limitations" was defined 14 expressly in 122.2, why there is no comparable, you 15 know, definition that applies to this waiver process? 16 MS. LEITH: I don't know, other than -- 17 JUDGE STEIN: Is there anything in the record 18 that will tell us? 19 MS. LEITH: I never found anything. I assume 20 it's just -- it was just not used as a term of art. It 21 just meant standards that apply. The way I interpreted 22 it when I first saw it and the way the permit writers</p>	<p style="text-align: right;">57</p> <p>1 other things. 2 And looking through the preambles I believe 3 Judge Stein mentioned, the preambles to the '94 regs -- 4 and I actually spent most of time looking back at the 5 preambles to the '91 proposed regs. There's an 6 emphasis on the full range of water quality standards. 7 There's discussion of toxic metals, carcinogens, all 8 this in terms of 125.62, so it's pretty clear that EPA 9 thought 125.62 means all standards that apply to -- 10 that apply to this discharge. 11 JUDGE REICH: Is there anything that explains 12 the logic -- if I look at (h)(9) and I'm looking at a 13 pollutant for which there is clearly a mixing zone, and 14 it's not a pollutant for which secondary standards is 15 relevant, why should my judgment as to secondary 16 standards for a totally different pollutant depend on 17 their meeting a more restrictive level for that 18 pollutant than they presumably have to meet for normal 19 compliance purposes? 20 I mean, presumably, in approving a mixing 21 zone, EPA made a judgment that it was acceptable 22 environmentally to not really measure compliance until</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">58</p> <p>1 you reached that point, so what is the logic of 2 worrying about the environmental effects between the 3 ZID and the ZOM for those pollutants? I just don't 4 understand, you know, what the purpose of it is and how 5 that purpose has any relation to second -- waiver of 6 secondary treatment or not. 7 MS. LEITH: Well, if the question is, why 8 would there be a more stringent standard under a 301(h) 9 analysis than there might be under -- 10 JUDGE REICH: For the pollutants that have 11 nothing to do with secondary treatment. 12 MS. LEITH: The answer to that, I believe, is 13 that when EPA promulgated its regs and EPA interpreted 14 the Congressional intent that, yes, you can have a 15 waiver of these specific technical standards, but 16 you've got to make darn sure that water quality's 17 protected, and in certain ways, the 301(h) regs are 18 more stringent than your standard permit regs. 19 One of these is this requirement for the ZID, 20 and there's even a quote in our brief that I don't have 21 off the top of my head from one of the early preambles 22 that in order to be protective, EPA's requiring that</p>	<p style="text-align: right;">60</p> <p>1 JUDGE STEIN: Where would we find that? 2 MS. LEITH: It's in the -- it's in the Hawaii 3 mixing zone regulations, and I don't have the exact 4 citation for where it is. It's about two-thirds of the 5 way through it. It's kind of buried in the middle of a 6 paragraph. The brief has the citation for where it's 7 found. So I think that that answers the question of 8 was the region doing anything inconsistent with state 9 mixing zone provisions, and certainly in Hawaii, no, 10 because state mixing zone provisions recognize that 11 under 301(h) conditions, the 301(h) regs are what 12 count. 13 JUDGE STEIN: You indicated that you were 14 going to address the so-called flip in the region's 15 position. Could you speak to that question? 16 MS. LEITH: Okay, couple of things. One is 17 that -- the Honouliuli tentative decision came out in 18 1988, and I think the permit came out in 1991. The 19 (h)(9) regs came into effect in 1994, so those were not 20 there when the Honouliuli decision was written. I will 21 acknowledge that the Sand Island decision also had a 22 mixing zone in it, and that was subsequent to that.</p>
<p style="text-align: right;">59</p> <p>1 standards be met not just under the conditions dictated 2 by the state, but under the most stringent conditions 3 possible. 4 Another example is the requirement in 301 -- I 5 mean 125.62, the one with the little I, about meeting 6 water quality criteria where there is no corresponding 7 state standard. That's something else you don't have 8 to do in your standard permit, but that's something 9 else that EPA when it promulgated its regs wanted to do 10 to ensure that even if secondary treatment was not 11 being required, water quality was still being 12 protected, because that's essentially what the Clean 13 Water Act is all about. 14 A couple other comments on the ZID and the 15 ZOM. There was discussion of Hawaii's mixing zone 16 provisions, and I just wanted to reiterate one thing we 17 pointed out in our brief, that the Hawaii mixing zone 18 provisions specifically say that a zone of mixing for 19 plants performing primary treatment must comply with 20 301(h). In other words, you can't have a mixing zone 21 that's inconsistent with what would be calculated under 22 301(h), so --</p>	<p style="text-align: right;">61</p> <p>1 The only answer I can give to that -- well, a couple 2 answers. One is, the region just didn't read the regs 3 and didn't read the TSD quite well enough, and what 4 really matters is what the regs say, what the national 5 policy is, and that's what the region followed in the 6 current decisions. 7 JUDGE SHEEHAN: Yes, and to focus on one of 8 the '94 rulemakings, I understood it from your briefs, 9 the '94 rulemaking tracked what occurred in '91 and 10 even back as far as 1979, so as early as '79, the ZID 11 was the line in the sand, so to speak, on these 12 matters, not only in '94. 13 MS. LEITH: It should have been. It wasn't 14 that clear. There was not a specific -- it wasn't that 15 clear that it was. It was also a different decision 16 that we were making, that the region was making back in 17 1988. There was -- there was less water quality data, 18 so there was a lot less analysis of water quality 19 standards, so to the extent that the region made the 20 wrong decision there, again, all I can say is, that's 21 true. It was the wrong decision. That's no reason why 22 the wrong decision should be made again now.</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">62</p> <p>1 JUDGE SHEEHAN: Although, to take it even 2 more recently in time or further forward in time, as I 3 understand it, in both Honouliuli and Sand Island TDDs, 4 the Region that the state quality water standards had 5 to be met at the ZOM for secondary treated effluent -- 6 no qualification, and then in the TDDs (sic) for each 7 facility, you said that the standards -- state 8 standards had to be met for -- at the ZOM for certain 9 discharges, so as late as the final actions here, you 10 seem to be thinking the ZOM for secondary treatment in 11 the TDDs and then the reference to secondary treatment 12 with that qualification was gone by the time of the 13 final decision. 14 JUDGE STEIN: And I thought the thing that 15 you were referring to referred to the ZID, not being 16 met at the ZOM but at the ZID -- 17 JUDGE SHEEHAN: ZOM... ZOM. 18 MS. LEITH: I'm not sure what you're 19 referring to. The two tentative decisions that were 20 issued in 2007 were totally consistent with the final 21 decisions that came out in 2009. I may have been 22 talking about the 1988 tentative decision, but the 2007</p>	<p style="text-align: right;">64</p> <p>1 dilution factor. 2 For bacteria, it was not mentioned at all, 3 because at the time the permits were issued, there were 4 no bacteria standards in effect more than 1,000 feet 5 from shore in Hawaii, so they -- there was frankly less 6 worrying about what the conditions were more than 7 1,000 feet from shore, which is where both the ZID and 8 the ZOM would be. That changed in 2004 with the EPA 9 promulgation of the Beach Act. The Beach Act rule 10 which set standards for those areas. 11 JUDGE SHEEHAN: I'm not sure if I understand 12 the answer. The ZOM -- let me restate it -- if the ZOM 13 were good enough for nutrients, et cetera, why wasn't 14 it good enough for chlordane and dieldrin and the 15 others? I thought that was Judge Stein's question. 16 I'm not sure why that distinction between one set of 17 pollutants versus another. 18 MS. LEITH: I don't know. I wasn't around 19 then. It may be that what CCH asked for was the ZOM 20 for particular pollutants. Under the Hawaii regs, it's 21 the discharger that asks, and I think it was because of 22 where the monitoring was and for the chlordane and</p>
<p style="text-align: right;">63</p> <p>1 tentative decisions clearly said that standards had to 2 be met at the ZID. 3 Just a couple more points about the prior 4 permits. The prior permits did have a zone of mixing 5 for certain things, including nutrients, but as I think 6 you all pointed out, the only standard that's at issue 7 here that had a zone of mixing in the prior permit was 8 ammonia, so to the extent the prior permits matter, it 9 would only be for ammonia, and the next step there 10 is -- and the ammonia standards were exceeded at the 11 ZOM as well as at the ZID, so -- any more questions? 12 JUDGE STEIN: Why was the ZID specified for 13 three pollutants in each of the two permits, but not 14 for other pollutants? 15 MS. LEITH: For the pollutants that were 16 measured in the effluent -- the ZID and the ZOM were 17 actually used as monitoring stations. For pollutants 18 that were measured in the effluent, such as chlordane 19 and dieldrin, there was no ZID and there was no ZOM 20 because what mattered was the initial dilution factor. 21 And what those permits did, essentially, is the -- the 22 actual permit requirements took into effect the</p>	<p style="text-align: right;">65</p> <p>1 dieldrin, the issue was initial dilution calculations 2 and modeling rather than a physical ZID or a ZOM, so -- 3 JUDGE STEIN: With respect to the ZOM mixing 4 zone for ammonia nitrogen -- which as you mentioned, 5 both permits in the case have a ZOM mixing zone for 6 ammonia nitrogen and this occurred in the prior 7 permit -- should those explicit requirements override 8 the region's understanding of 301(h) with respect to 9 where you measure compliance? 10 MS. LEITH: Compliance in the permit or -- 11 JUDGE STEIN: For the 301(h) purposes. 12 MS. LEITH: No. The permit requirements 13 should not control. What controls is what the law 14 says, what the reg says, and what the data say. For 15 example, there may be a permit -- well, for example, 16 with bacteria, there weren't violations of bacteria 17 because they didn't have the standards in the permit. 18 And the fact that there may not have been permit 19 violations shouldn't control, looking forward, whether 20 the discharges would comply with 301(h). 21 JUDGE STEIN: I had asked a question of CCH 22 regarding whether there was any certification by the</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">66</p> <p>1 state of Hawaii that could be found in the record with 2 respect to the application for a variance. 3 MS. LEITH: I don't think there was. That's 4 addressed towards the end of both the final decisions. 5 There's a section called compliance with other laws, 6 and in order to get a variance, you need a 7 certification from the state. You also need to show 8 that you comply with the Endangered Species Act, things 9 like that. 10 Basically, we took the position that unless 11 EPA's tentatively proposing to grant the variance, it's 12 really irrelevant whether or not there's a state 13 certification or not. I don't think there was, and I 14 don't think the region used that as a ground -- I'm 15 sure the region didn't use that as a ground for denial. 16 We have a lot of other issues, and I can just address 17 them sort of briefly. 18 JUDGE STEIN: Can I ask one more question -- 19 MS. LEITH: Sure. 20 JUDGE STEIN: -- before you move to your 21 other issues? 22 MS. LEITH: Sure.</p>	<p style="text-align: right;">68</p> <p>1 all these critical initial dilution factors, and then 2 frankly, EPA had decided to simplify it, so I think 3 that's what that all -- and that goes to the same issue 4 of the regs wanting to be very conservative and making 5 sure that standards will be met under the most -- what 6 are they called -- the most critical conditions. 7 JUDGE STEIN: [To other judges:] Before she 8 turns to other issues, do you folks have any other 9 questions? Okay. 10 MS. LEITH: There's discussion -- another 11 statutory construction issue about 301(h)(9) about 12 whether it refers to just EPA water quality criteria, 13 which is actually what the language says, or does it 14 also refer to water quality standards. I think CCH 15 essentially conceded that it refers to EPA water 16 quality standards, certainly -- and criteria where 17 there is no directly corresponding standard. 18 This is an issue that CCH has raised as to 19 chlordane, because frankly, the EPA-recommended 20 criterion for chlordane is a lot less stringent than 21 the Hawaii approved water quality standard. We think 22 that's pretty clear in the regs. Again,</p>
<p style="text-align: right;">67</p> <p>1 JUDGE STEIN: Another question that I had 2 posed to the city and county of Honolulu related to 3 helping me understand Section 125.62(a)(4), I 4 believe -- 5 MS. LEITH: Yeah. 6 JUDGE STEIN: -- and I'm struggling to 7 understand what that's all about. I didn't know if you 8 might be able to enlighten me as to what that provision 9 is supposed to mean. 10 MS. LEITH: It's not something that I focused 11 on. Looking at it today, it looks like what it's 12 referring to is critical initial dilution. That when 13 you figure the initial dilution, you look at, these are 14 the factors that we did look at in figuring the initial 15 dilution, and frankly, my understanding of the way it 16 used to work was instead of having a physical -- well, 17 right now, the technical support document talks about 18 how to calculate the ZID, and it's basically the depth 19 of the outfall and you use that or the depth of the 20 water and you use that as the radius around the 21 outfall. 22 It used to be, you'd calculate the ZID using</p>	<p style="text-align: right;">69</p> <p>1 125.62(a)(1)(i) standards, (i) -- (ii) is additional 2 water quality criteria. 3 I just wanted to mention a little bit about 4 CCH's request that the board consider new standards 5 which are part of some Hawaii legislation that was 6 passed a few months ago. This was after the two final 7 decisions, the Hawaii legislature passed a bill to 8 amend the water quality standards. These have not yet 9 been submitted to EPA. They're not the standards in 10 effect. You look at the definition of water quality 11 standards in 125.58(cc). It says water quality 12 standards are the approved water quality standards, so 13 frankly, these new standards that EPA has not even 14 received yet just are not relevant to this decision. 15 JUDGE REICH: Can I ask about water quality 16 standards as they relate to (h)(2) as opposed to 17 (h)(9)? If -- (h)(2), unlike (h)(9), doesn't contain 18 an explicit reference to initial mixing. If the 19 logic -- and correct me if it's not the logic -- of 20 looking at water quality standards in (h)(2) is an 21 assumption that the water quality standards are 22 protecting these various values, unless they're</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">70</p> <p>1 exceeded by definition, you're not complying with 2 (h)(2). Then, in that context, if there is a mixing 3 zone associated with a particular pollutant that the 4 state has adopted and EPA approved, why wouldn't, at 5 least in that context, you look at that standard with 6 the associated mixing zone, because presumably, EPA 7 has 8 again made a judgment there that there is no 9 unacceptable environmental harm if you do not meet the 10 standard until you reached the mixing zone? 11 MS. LEITH: Well, there again, I think EPA 12 regs for 125.62 do say at the ZID. I know the -- 13 JUDGE REICH: I'm going back to the statute. 14 MS. LEITH: So the -- but then again, under 15 (h)(2), it's these same regs, and I think they also do 16 mention the ZID, and it goes back to the same 17 requirement of being extra protective. The other point 18 to make, is, again, with Hawaii, there is not a 19 physical ZOM that Hawaii has not said standards don't 20 have to be met within X amount, X feet of the discharge 21 or anything like that. What Hawaii has is a process, 22 and it does not -- JUDGE REICH: But it has a process that has</p>	<p style="text-align: right;">72</p> <p>1 then that's not water quality which assures the 2 protection of a BIP. The way the -- 3 JUDGE SHEEHAN: When you say "aren't being 4 met," does that mean a single exceedance or weeks or 5 months? You did a lot of data gathering here, many of 6 them over many years, and I'm wondering where that line 7 is between, if you can help us understand it between 8 when compliance is sufficient and when noncompliance 9 is 10 sufficient that it means environmental harm as 11 understood by (h)(2). 12 MS. LEITH: That's similar to the same 13 question before. Is there ever a judgment call there? 14 And I think there may be, but I don't think we were 15 there here. For example, the toxicity numbers were so 16 bad. The toxicity standard was exceeded almost all the 17 time, and that's sufficient, I think, to say that you 18 don't have water quality which is protective of a BIP. 19 It may be -- it was probably a tougher call 20 for some of the other standards, but, again, it's kind 21 of a technical professional judgment call, and the 22 region made that call. It set out in the tentative decision why it made the call. It specifically</p>
<p style="text-align: right;">71</p> <p>1 led to a permit that has defined for at least certain 2 pollutants, a ZOM. 3 MS. LEITH: It did, and that ZOM was bigger 4 than the ZID, and looking back, we probably shouldn't 5 have approved it back then. 6 JUDGE SHEEHAN: And now that we're into 7 (h)(2)'s territory for a moment, getting to CCH's 8 argument about the fact that -- whether or not there's 9 harm, if there's noncompliance, and noncompliance 10 doesn't automatically mean environmental harm, and 11 (h)(2)'s focus, of course, was on harm, the balance of 12 indigenous population, recreational activities and so 13 on -- is it your position if there is a compliance 14 exceedance, there is automatic harm, (h)(2) type harm? 15 MS. LEITH: (h)(2) does say -- it does not 16 say it's simply current conditions. What it says is 17 you have to have water quality which assures 18 protection. So if you have standards that, for 19 example, if you're looking to the BIP, Balanced 20 Indigenous Population of fish, shellfish, aquatic life, 21 and wildlife, you look at aquatic life standards. If 22 there are aquatic life standards that aren't being met,</p>	<p style="text-align: right;">73</p> <p>1 discussed all the factors, and that was something the 2 public and CC -- including CCH could comment on. 3 JUDGE REICH: Well, is it accurate to say -- 4 as I think CCH does say -- that the only real 5 environmental harm that you relied on in making your 6 determination under (h)(2) was the failure to meet 7 water quality standards, or is there something beyond 8 that? 9 MS. LEITH: That was the primary basis for 10 the (h)(2) decisions. The region acknowledged that the 11 data were mixed. The region did carefully look at the 12 data, the biological data on existing conditions, and 13 looked at the water quality standards, including 14 toxicity. This is consistent with the regs, the 15 statute, the TSD. The region acknowledged that there 16 were not actual demonstrations of currently existing 17 harm. 18 It also pointed out there are just inherent 19 difficulties in biological sampling. For example, you 20 look at algae blooms. You might look at them once a 21 month, but that may not be when the algae's blooming. 22 It's hard to take biological samples all the time; you</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">74</p> <p>1 just can't do it. Fish tissue samples, the fish swim 2 in and out. You don't know which fish to sample. So 3 we acknowledge there was a certain amount -- there's 4 both an uncertainty regarding the biological data, and 5 then the water quality standards violations were so 6 clear that the region's decision was that (h)(2) was 7 not met.</p> <p>8 JUDGE SHEEHAN: You can see why that is a 9 not insubstantial issue, and it seems -- I'm looking at, 10 particularly, pages 52 and 53 of your brief. Your 11 findings, for example, on recreational fishing, 12 dieldrin and chlordane could contribute to 13 bioaccumulation, and with regard to the BIP, there are 14 uncertainties in the data, algal blooms could be 15 occurring -- very subjunctive phrasing -- when the 16 cost, literally, is a lot of money for CCH to have to 17 meet the standards. So it just sounds as if the region 18 is a bit tentative when the consequences of their 19 decision are enormous.</p> <p>20 MS. LEITH: Well, I don't know if tentative's 21 the word I'd use. It might be cautious. It might be 22 precise. I think the region was trying to avoid saying</p>	<p style="text-align: right;">76</p> <p>1 call it following the regs. The regs do say in -- I 2 think it's -- 125.62(c), for example, gets into 3 biological impact, and part one is water quality, and 4 part two is to show that a BIP exists. You have to do 5 both of those. There's guidance that EPA followed that 6 says in analyzing adverse effects to marine life, use 7 multiple lines of evidence, use chemical-specific, use 8 toxicity, and use biological data. And the region's 9 position is, just using one of those can't assure 10 protection. Again, it was being very conservative, and 11 that's how the region reads 301(h) and reads EPA's 12 position through its regs and through all its 13 preambles.</p> <p>14 Bacteria, a couple issues, geometric means, 15 CCH is challenging the region's finding that the 16 Honouliuli plant couldn't achieve the geometric mean 17 for bacteria, and again, what they're saying is -- 18 well, in one brief they said they're challenging the 19 response to comments and in one they're challenging the 20 finding itself. What they're really seeming to 21 challenge is the approach in the tentative decision 22 where the region, frankly, didn't have enough data to</p>
<p style="text-align: right;">75</p> <p>1 there is evidence that -- of unacceptable 2 concentrations in fish tissue, because there was not 3 any -- you're right. There was not any evidence of 4 that. However the way (h)(2) is written, you don't 5 have to have actual evidence. You need to protect the 6 water quality. And that's -- that's the way the Clean 7 Water Act is written. You don't just wait for fish 8 kills. Water quality standards are written to protect 9 against things like fish kills, and that's why we have 10 to look and see were these water quality standards 11 being met, and the finding was that they were not, so 12 we considered that very significant... very important.</p> <p>13 JUDGE SHEEHAN: I understand that water 14 quality is present and it's predictive, and predictive 15 is, by definition, not absolutely certain, but it still 16 seems as if there needs to be a certain rigor behind 17 the agency's decisions when the consequences are so 18 great for the regulated community. It just reads as if 19 the region didn't really know but just gave it a good 20 guess, and this is what it came up with.</p> <p>21 MS. LEITH: Again, I wouldn't call it a good 22 guess. I'd call it best professional judgment. I'd</p>	<p style="text-align: right;">77</p> <p>1 do a traditional geometric mean based on five or six 2 samples a month.</p> <p>3 The geometric mean is part of the standard 4 that has to be met, and all the region had was 5 generally one sample per month and sometimes even one 6 sample per quarter, so the region did what it could to 7 compare that data with the geometric mean. It looked 8 at individual numbers. It calculated annual means. It 9 calculated means at various depths, and all this 10 pointed to the geometric mean not being achievable.</p> <p>11 But probably most important there as we point 12 out in our brief, after the tentative decision came 13 out, between the tentative and the final decisions, 14 there were two more years of data where there was a lot 15 more monitoring. There were three to six samples a 16 month. Traditional geometric means could be 17 calculated, and it was not a close call. The 18 exceedances were frequent. There were often quite 19 large.</p> <p>20 For example, the geometric mean water quality 21 standard is 35 colony-forming units, or CFU, of 22 enterococcus for 100 milliliters. The results were</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">78</p> <p>1 often in the hundreds. A couple times, they were over 2 100 as compared to 35. So it was very clear where that 3 was not being met in the last two years, which 4 confirmed the findings before, even though the 5 geometric means were untraditional in those earlier 6 years.</p> <p>7 And again, I just wanted to point out here in 8 the reply what CCH is saying is that -- they don't seem 9 to be challenging that these geometric means did not 10 meet the bacteria standard. What they're saying is 11 there ought to be a remand so the region can explain it 12 better. And then, if you go back and look at the final 13 decisions, the region clearly explained that standards 14 were not being met in 2008 and in 2007, and I think 15 that's clear that standards were not being met. 16 There's no reason for a remand on that. That would be 17 just a way of delaying the process, frankly.</p> <p>18 The disinfection issue that was discussed 19 briefly by Mr. Salmons, one issue he raised was that 20 the Honouliuli permit said that -- basically, if Sand 21 Island requires disinfection, it will be required in 22 Honouliuli, and my reaction to that is, well, then they</p>	<p style="text-align: right;">80</p> <p>1 JUDGE SHEEHAN: I know what the regs say, but 2 it sounded like you were saying the regs need not be 3 met here.</p> <p>4 MS. LEITH: Yeah, I know. I can't remember 5 exactly what the permit said back in 1991. It may have 6 been something like Department of Health -- Hawaii 7 Department of Health can order it to go to 8 disinfection. I can't quite remember that. I think 9 that's in our brief somewhere. But in order to analyze 10 whether a treatment plant qualifies for a 301(h) 11 waiver, you have to look at the proposal of what the 12 treatment plan is going to be, and if it's something 13 different from what it is, they need to show that that 14 improved discharge will meet it. Disinfection --</p> <p>15 JUDGE SHEEHAN: But again, you seem to give a 16 green light -- your words were "will be," disinfection 17 will be used at Honouliuli if it works at Sand Island 18 without any need for that normal showing.</p> <p>19 MS. LEITH: I don't think one sentence in 20 the permit saying -- again, I'm not sure. I may have 21 misspoke when I said, well, I'm not exactly sure what 22 the permit said. But again, I don't think -- even if</p>
<p style="text-align: right;">79</p> <p>1 should have proposed it. And disinfection was required 2 at Sand Island starting in 1998. The 1998 permit 3 included a compliance schedule for Sand Island to 4 install disinfection equipment, so starting in 1998, 5 CCH should have proposed disinfection.</p> <p>6 JUDGE SHEEHAN: But if you already said that 7 in the Honouliuli permit that if Sand Island has it, 8 that facility is going to get it. It sounds like it 9 was already laid out. There was a path forward. You 10 had already stated your intention in the region and 11 that there was no need to go through the demonstration 12 process.</p> <p>13 MS. LEITH: We couldn't have approved it 14 without a demonstration. In order to have an approved 15 discharge under the EPA regs, you have to do -- you 16 have to do a lot of work.</p> <p>17 JUDGE SHEEHAN: But the Honouliuli permit 18 didn't say that. That was, I think, their point, that 19 it seemed to say that there's no need to produce the 20 demonstration, because if it's good in Sand Island, 21 it's going to be good here, end of discussion.</p> <p>22 MS. LEITH: I'm --</p>	<p style="text-align: right;">81</p> <p>1 it did, that certainly wouldn't waive the region's 2 requirement to analyze whether the proposed discharge 3 will meet standards, will meet the 301(h) requirements, 4 and it wouldn't waive the requirement in -- I think 5 it's 125.62(e) -- about if you're applying for an 6 improved discharge, you need to show it's thoroughly 7 planned and studied, lots of technical things.</p> <p>8 For example, there's different kinds of 9 disinfection. There's UV disinfection. There's 10 chlorination. The plant would have to decide which one 11 it was going to use, and I think the '88 permit 12 actually referred to chlorination, and then, as things 13 evolved in the 90s, they decided to go with UV in Sand 14 Island. And in terms of what you have to do to make a 15 showing of an improved discharge, I just wanted to 16 emphasize that CCH knew how to do this, because they 17 did it for Sand Island.</p> <p>18 If you look at the Sand Island administrative 19 record document S.19.32, it's a 421-page disinfection 20 study from January of 2000. The next document, 21 S.19.33, is a 98-page disinfection pilot study, so they 22 knew what they had to do, and to say that a -- a</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">82</p> <p>1 statement in their comments, EPA -- that disinfection 2 can address bacteria, to say that that is a proposal is 3 just totally not in keeping with the regs, and the 4 region just couldn't accept that as a proposal. It in 5 no way showed that CCH even wanted to disinfect or that 6 it would work.</p> <p>7 JUDGE STEIN: I had a question about whether 8 wet or dry water quality criteria applied for turbidity 9 and nutrients. I thought that the Honouliuli permit 10 specified that dry water quality applied, but in the 11 final decision document, the region notes that CCH 12 modified the receiving water designation from dry to 13 wet, so which ones now apply, and was the old permit 14 ever modified? I'm just trying to understand how this 15 works.</p> <p>16 MS. LEITH: Yeah. The -- so you're saying 17 the '88 permit or the '91 permit is different from the 18 decision here.</p> <p>19 JUDGE STEIN: It appears to be.</p> <p>20 MS. LEITH: I don't know if the permit was 21 modified. I know there was a change. There was some 22 changes, I think, in state water quality standards</p>	<p style="text-align: right;">84</p> <p>1 frankly, the urchin's a lot more relevant because it's 2 a native species, and it's a marine organism.</p> <p>3 So CCH isn't contesting that the tests, using 4 this urchin test, indicate exceedances, and they can't. 5 At Sand Island something like three-quarters of the 6 tests in the past ten years failed this test; at 7 Honouliuli, it was like 60 to 70 percent. The standard 8 was just not being met --</p> <p>9 JUDGE SHEEHAN: Well, I think, again -- I 10 agree I don't think their challenge is to the method 11 used to produce the results or that the protocol wasn't 12 subject to the inter-lab viability testing, and that 13 the West Coast manual which should govern here does 14 not 15 include this test method, so what is your response to 16 method used?</p> <p>17 MS. LEITH: To the method used, my first 18 response is I'd urge you all go back and look at the 19 response to comments, because there are 19 pages in 20 Sand Island and about 13 pages in Honouliuli -- 21 actually, I think I have that backwards. What CCH is 22 doing is criticizing the response to comments, and the region responded very comprehensively.</p>
<p style="text-align: right;">83</p> <p>1 during the 90s and/or CCH made some changes. I don't 2 remember that, frankly. I know it's discussed in the 3 tentative decision and in the final decision, so it may 4 be that wet was analyzed in '88 and dry was analyzed in 5 2007. That doesn't seem to be anything CCH has 6 contested, and I think they're the ones that did make 7 the change.</p> <p>8 Whole Effluent Toxicity, if we have some more 9 time, this is -- toxicity is one of the big problems 10 with both of these discharges. There's recurrent 11 failure to meet the standards for toxicity, and I won't 12 go into how the standard came about and how it's 13 analyzed, but I think it's clear from the briefs.</p> <p>14 There were two species that were analyzed for toxicity, 15 the flea and the urchin. The flea was a fresh water 16 flea, and the discharge passed the flea test. It 17 failed the urchin tests. Using multiple organisms is 18 what you're supposed to do. There's EPA guidance. 19 There's Hawaii guidance saying you really ought to use 20 three organisms so that you can make sure to protect 21 the most -- the most fragile of the organisms, the most 22 sensitive, and here it would be the urchin, and</p>	<p style="text-align: right;">85</p> <p>1 In terms of the questions you raised 2 concerning the fact that the EPA -- or that the urchin 3 test was not approved under Part 136 -- I think we 4 mentioned that in our brief, and in the response that's 5 kind of a red herring. Part 136 doesn't address 6 toxicity tests for marine organisms in the Pacific 7 Ocean. It just does not occupy the field there. 8 Interlaboratory testing is not required. It was done. 9 It -- what EPA said when they published the Whole 10 Effluent Toxicity promulgation, which standardized some 11 tests for East Coast and Gulf Coast species and fresh 12 water species, it said that interlaboratory testing was 13 a good tool, but it wasn't required.</p> <p>14 There are some published species that have not 15 undergone interlaboratory testing. The West Coast 16 method, there's nothing that says that a test has to be 17 included in the West Coast method. That's given as an 18 example of certain permits that are not officially 19 promulgated by EPA Headquarters -- I'm sorry, not 20 certain permits -- certain types of tests which are 21 acceptable on the West Coast.</p> <p>22 So on the West Coast, which would include</p>

Capital Reporting Company
Hearing 11-19-2009

86

1 Hawaii, it's basically left to the discretion of the
2 permit writer, and one of the points that EPA -- that
3 the region made in its response to comments is that
4 this urchin test has been pretty much the main test
5 that's used in Hawaii permits for the past ten years.
6 I see the red light. Should I explain a little bit
7 more or do we pass the baton to --
8 JUDGE STEIN: Why don't you just take about
9 two minutes, and then we'll wrap it up and give CCH a
10 little bit of extra time? So if you want to take two
11 minutes, and then we'll wrap things up.
12 MS. LEITH: Okay. I think -- just one more
13 thing on the comments regarding the urchin test. There
14 was also arguments about biological significance as
15 opposed to statistical significance. We addressed that
16 in the brief. The region bent over backwards to try
17 and address those comments. They tied -- they quoted
18 EPA studies about how WET tests accurately predict real
19 world effects. They did additional testing, this PMSD
20 procedure. And the other main point we make in the
21 briefs is essentially by saying this test and this
22 water quality standard -- this test doesn't predict

87

1 real world effects, essentially, CCH is challenging the
2 Hawaii water quality standard. Now, it's a little
3 complicated to get into, so I'll kind of leave that for
4 the briefs.
5 Dieldrin we haven't touched on at all,
6 basically, we've got a toxic pollutant violated nearly
7 all the time at both treatment plants. The bottom
8 line, the region analyzed a whole lot of data using an
9 EPA-approved method that was specified in the permit.
10 It was specified in the TSD. It also -- toxicity --
11 CCH is saying -- they're trying to discredit their own
12 data by doing these split samples that the region had a
13 lot of problems with, and they're trying to submit
14 additional data now where it too's late. That's kind
15 of the bottom line on that one --
16 JUDGE SHEEHAN: A question on that, that
17 Method 608 was used -- you're saying Method 8270
18 wasn't
19 used because it hadn't been approved, but as CCH points
20 out, 8270 was used in Port Loma, and it's good enough
21 for Port Loma, why wasn't it good enough here?
22 MS. LEITH: Actually, it wasn't used in Port
Loma. That was my mistake reading their brief. I

88

1 thought that's what they were saying, and then in their
2 reply brief, they said wait a minute, the region didn't
3 read very carefully it wasn't used in Port Loma.
4 Just bottom line, two things, a lot of what
5 CCH is getting at is delay. They're asking for remand
6 to consider standards that haven't been approved to
7 consider decisions EPA clearly made, to consider
8 proposals that weren't made, and there's lot of
9 language in our brief that EPA's interpretation of
10 301(h) is not meant to be a mechanism for delay, and
11 the board has recognized an interest in finality and
12 expedition. And then to reiterate the first comment
13 that in order to get a 301(h) waiver, you have to
14 demonstrate that all these criteria are met, and if you
15 don't demonstrate that they're all met, then the EPA
16 really doesn't have any authority to grant the waiver.
17 Thank you.
18 MR. SALMONS: Thank you, Your Honors. I will
19 try and be brief. I realize that we have gone over,
20 and I appreciate the Court's indulgence with the number
21 of issues we've had to cover.
22 If I could, I'd like to begin with some

89

1 statements that were made with regard to the findings
2 about ammonia nitrogen at Sand Island, and I think this
3 goes to the question of whether a remand would be
4 required if the Court were to agree with any of our
5 arguments. And I think this is very important, and so
6 if the Court were to refer to the Sand Island final
7 opinion at pages 62 through 64, you'll see the
8 discussion about ammonia nitrogen, and what it actually
9 found is that, in 1999, there are some exceedances at
10 the ZOM, and then otherwise, in later years, there are
11 very few, depending on how you do the geometric mean.
12 There's either only two, or there's a small
13 number that's slightly larger than that, but the
14 conclusion is that after -- between 2000 and 2006,
15 there were not nearly as numerous or as consistent
16 exceedances with regard to ammonium nitrogen as in
17 1999. And then comes the conclusion on 63 and 64 with
18 regard for ammonia nitrogen -- and this we think makes
19 clear they were not relying on those hand small number
20 of exceedances at the ZOM in actually denying the
21 waiver at request here.
22 What it says is that the Hawaii water quality

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">90</p> <p>1 criteria for ammonia nitrogen were exceeded in all 2 depths in 1999, and the data shows that the exceedances 3 of ammonia nitrogen criteria have persisted to a lesser 4 extent in all three depths of the water column. Excuse 5 me. It is likely that the number of exceedances at the 6 ZID, where 301(h) regulations require attainment of 7 water quality standards would be greater than the 8 exceedances found at the current monitoring stations; 9 therefore, the applicant has not demonstrated that it 10 can consistently attain state water quality standards 11 for ammonia nitrogen.</p> <p>12 We think that it's clear that it's not a small 13 number of exceedances at the ZOM on which they based 14 their denial of the request. It is the inference that 15 there must be more at the ZID; therefore, you -- we 16 predict you're not going to be able to meet the 17 standard. There has been no determination that if the 18 ZOM were all that were required that we wouldn't be 19 able to meet that ZOM going forward on a consistent 20 basis.</p> <p>21 And, in fact, the data shows that there were 22 relatively fewer exceedances in the more recent time</p>	<p style="text-align: right;">92</p> <p>1 region's argument, that as long as you don't meet one 2 of the water quality standards, the region has no 3 discretion to grant the waiver?</p> <p>4 MR. SALMONS: Well, I just think that that's 5 not a fair characterization given that what we're 6 talking about here are -- and again, we have a variety 7 of arguments that address the specific ones that I 8 haven't had a chance to get into, but even assuming 9 that some of those exist, it's not like every 10 exceedance automatically results in a determination: 11 you're not going to be able to comply with the standard 12 in the future. It's not perfection, and there's always 13 a judgment that's --</p> <p>14 JUDGE STEIN: Well, is the standard that 15 you're not going to be able to comply in the future or 16 that at the time of the decision you're not complying?</p> <p>17 MR. SALMONS: Well, the test -- I'm sorry. 18 The test is at the time that the waiver that you are 19 going to be discharging under the waiver, which would 20 be for the period of time, if it's granted, for the 21 five-year period that you'd be existing under the 22 waiver application. And so it is that sort of</p>
<p style="text-align: right;">91</p> <p>1 period, which I think brings up another point with 2 regard to the need for remand if we were to prevail on 3 any of our issues, and that is that if you look at the 4 conclusion for both of these decisions -- and 5 Honouliuli it's on page 99, and Sand Island it's on 6 page 82 -- they're essentially identical, except that 7 Honouliuli include bacteria, but otherwise, the 8 language is exactly the same.</p> <p>9 And it says that the decision to deny the 10 waiver application, quote, is based on findings that 11 the proposed discharge would exceed water quality 12 standards for bacteria, chlordane, dieldrin, Whole 13 Effluent Toxicity, and ammonia nitrogen. And then what 14 follows are, you know the statements which Your Honors 15 referred to before -- that it could lead to 16 bioaccumulation and the like. It's all based on those 17 exceedances of those standards, and it's a cumulative 18 determination. There's no way to tell on this record 19 if some category of those exceedances were taken out, 20 if bacteria, for example, was taken out at Honouliuli 21 or if --</p> <p>22 JUDGE STEIN: How do you respond to the</p>	<p style="text-align: right;">93</p> <p>1 predictive judgment, and I think that what you see 2 here -- and this is -- I think goes to a broader point.</p> <p>3 Honolulu has been discharging into these 4 waters with this effluent for decades, and there's no 5 physical evidence of any biological harm, so now we're 6 fighting about these standards, and we're doing it with 7 modified standards that reflect the state water quality 8 standard and the federal ZID, because the region has 9 decided -- I believe her terms were that they wanted to 10 tighten up the standards. They didn't think -- they 11 kind of regretted granting the state's mixing zone, but 12 that's not what this is about.</p> <p>13 Under (h)(9) -- first of all, there's no 14 reference to applicable under (h)(9). That comes in 15 the regulations. (h)(9) only refers to the federal 16 statutory criteria, and they have not posited any 17 explanation as to why the state mixing zone does not 18 fully comport with the federal criteria.</p> <p>19 The last thing I would just say is that 20 this -- all of these issues we've been discussing, we 21 think it's very clear that they were put at issue 22 during the comment period, and they're appropriate for</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">94</p> <p>1 a decision by this board. And again, these are 2 significant policy changes that have been adopted by 3 the region. It may be the case that they caught 4 Honolulu a little bit by surprise, but they did their 5 best to respond at the time. They said clearly that 6 you have to apply the ZOM for everything except for 7 BOD 8 and suspended solids, because that's the way you've 9 always done it and because that's what's required. 10 In our brief, we made clear that our arguments 11 with regard to ZID/ZOM apply to all of the pollutants 12 except for bacteria, which includes these pollutants 13 for which a dilution factor has been used, and with 14 regard to that, I would point the Court to the EPA's 15 technical support document, what my friend on the other 16 side referred to as their bible for these things, which 17 defines in the discussion, for example, of WET 18 testing -- and this is in the record at S02-4184. This 19 is from the technical support manual, and it says it 20 walks through step by step how do you determine the 21 dilution factor when you're doing the WET test, and 22 it's the same for these other toxics. And it says, Step 1, dilution determination.</p>	<p style="text-align: right;">96</p> <p>1 standards, including the state mixing zone, reflect the 2 federal criteria. Now, with regard to chlordane, the 3 federal chlordane standard also reflects that federal 4 criteria. And it's certainly the case that states can 5 adopt higher standards, you know, standards that are 6 higher than what the federal criteria would otherwise 7 require, but the only thing (h)(9) requires is 8 compliance with the federal criteria. 9 If the federal criteria made it more strict, 10 then Honolulu would be bound by that in showing that 11 the federal criteria was satisfied. If the federal 12 criteria shows that the state standard doesn't have to 13 be as strict as it is in order to comply with the 14 criteria, then all that the statute requires 15 satisfaction of is the criteria. Does that make sense? 16 JUDGE SHEEHAN: That clearly -- I'm not sure. 17 The chlordane in the state standard is stricter than in 18 the federal standard, so the state standard was tripped 19 up -- was not met for chlordane, as I understand it, 20 and your argument is, well, that's okay. Let's worry 21 about just the federal standard, which is looser, less 22 stringent. That's the one that should govern here.</p>
<p style="text-align: right;">95</p> <p>1 The initial step is to determine the dilution of the 2 effluent at the edge of the mixing zone, assuming the 3 state allows mixing zones. So we think that is clear 4 that part of the determination that was made to change 5 the dilution factor reflected this change by the region 6 that it's the federal ZID instead of the state mixing 7 zone that has to apply. 8 JUDGE SHEEHAN: To this -- to the point about 9 state versus federal standards and where the standards 10 are measured, I found it a little bit anomalous that 11 when you argued (h)(9), it was the state standards that 12 were supreme. They reigned, and federal standards 13 didn't come the into the picture. When you argued your 14 chlordane point, you seemed to say that, well, it 15 doesn't really matter what the state standards call 16 for; it's the federal standards that have to govern 17 here. So can you explain the seeming shift in 18 emphasis? 19 MR. SALMONS: I'm happy to, Your Honor, and I 20 think, in fact, that it's consistent. What (h)(9) 21 requires is compliance with the federal criteria of the 22 act, and the region -- everyone agrees that the state</p>	<p style="text-align: right;">97</p> <p>1 Don't worry about the state standard being -- 2 MR. SALMONS: In each -- 3 JUDGE SHEEHAN: -- not met. 4 MR. SALMONS: In each case, Your Honor, what 5 (h)(9) in our view requires is that you show that 6 you're going to be in compliance with the federal 7 criteria. That's what the statute requires, and I 8 think that everybody agrees with that. The point we 9 make with regard to state standards they agree with, 10 which is that those state standards are approved 11 specifically to comply with the federal criteria. 12 That's also true for the state mixing zones. 13 And there's no suggestion that the reason 14 there is a ZID is because state mixing zones are 15 unreliable or unprotective of environmental concerns, 16 and if the region actually felt that there was a 17 problem with the state mixing zone, it has ample 18 avenues of recourse to tighten it up. It doesn't need 19 the 301(h) waiver process as sort of a roaming grant of 20 authority to go through regardless of permits, 21 regardless of state water quality standards, and impose 22 a higher burden. But when -- with regard to chlordane,</p>

Capital Reporting Company
Hearing 11-19-2009

<p style="text-align: right;">98</p> <p>1 there is a specific federal numerical standard. That 2 standard, too, reflects the federal criteria of the 3 act, and so if you comply with the federal criteria -- 4 JUDGE SHEEHAN: Even if the state standard, 5 which is local, to meet local conditions, local 6 designated uses, is more stringent? 7 MR. SALMONS: That is our position, because 8 the statute requires compliance with federal criteria, 9 and I think there's no way to suggest that the federal 10 chlordane standard doesn't comport with the federal 11 criteria. And again, it's not inconsistent, I would 12 suggest, Your Honor, because if the federal standard 13 went the other direction -- if the federal standard 14 instead of being more lax than the state standard was 15 more stringent than the state standard, we would still 16 say, under (h)(9), you have to comply with the federal 17 standard in that instance, because that is what 18 reflects the federal criteria. That's what the statute 19 requires. Everybody agrees that the state -- as a 20 general matter, if there's no inconsistent federal 21 criteria, federal standard, everybody agrees that the 22 state approved standards and mixing zone are consistent</p>	<p style="text-align: right;">100</p> <p>1 is the technical support document that the region 2 referred to, which is also in the record, as evidence 3 of how these things were calculated, and that's what 4 I'm referring to when it says Step 1, you know, 5 determine the mixing zone, because that's what your 6 target is when you're doing the rest of the -- taking 7 the rest of the factors into account with regard to the 8 dilution factor. 9 And again, I think if you step back and ask, 10 what is the point of having the dilution factor, well, 11 for these toxics, you're measuring them at the end of 12 the pipe essentially, and everybody understands that 13 you have to dilute it somehow, and you have to have a 14 target in mind, you know, how much? And there are a 15 lot of things that go into it in terms of, you know, 16 assumptions about the plume, assumptions about 17 temperature, assumptions about the flow and tides, but 18 one of the key assumptions is, is there a mixing zone, 19 and if so, what's the edge of it, because that's what 20 you're shooting towards, and that's the best I've been 21 able to do to try to understand it. 22 And what -- the point I would make is that</p>
<p style="text-align: right;">99</p> <p>1 with the federal criteria, and therefore, they're a 2 good proxy for the federal criteria in doing the (h)(9) 3 analysis. 4 JUDGE REICH: Getting back to something you 5 were starting to talk about in terms of the dilution 6 factor -- and it seems both parties do agree that the 7 dilution factor that was used in the region's analysis 8 was different from the one in the permit. Counsel for 9 the region posited a number of possible reasons why 10 that was the case. You were, I think, starting to say 11 that it is clear -- were your words -- that it was, at 12 least in part, attributable to the change in the way 13 the mixing zone was used. When you say it is clear, 14 does that mean that it is clear on the record? Or is 15 there something documented in the record that explains 16 this change that would allow us to get at why this 17 change was made? 18 MR. SALMONS: There is discussion in -- the 19 short answer is it's not as clear in the decisional 20 documents as would be nice, but there is language in 21 both final decisions that discussed the dilution factor 22 and the change in the dilution factor, and then there</p>	<p style="text-align: right;">101</p> <p>1 both the region and our comments in responses and 2 briefing have focused on ZID/ZOM as a separate issue, 3 because it is a separate issue, but it relates, as we 4 have tried to make clear, to all the pollutants, except 5 for bacteria. We're not making it with regard to 6 bacteria. We have the disinfection argument there. 7 And it at a minimum, I think it's -- from the technical 8 documents clear that's part of how you determine the 9 dilution factor. And if it's not clear whether it 10 applies or not, then I think that would be an 11 appropriate thing to take up on remand as well. 12 JUDGE STEIN: Thanks. I just want to make 13 one comment in closing and that is that we've heard a 14 lot of argument today back and forth about issues that 15 were and weren't preserved, and we've obviously asked a 16 number of questions about the issues raised in the 17 briefs, and the board, of course, has made no 18 determination on the issue preservation question. And 19 our asking these questions doesn't imply that we're 20 leaning 21 in one direction or another, but we wanted to get a full 22 explanation of the arguments on the merits in the event 23 that we reach the merits on all of the issues that have</p>

Capital Reporting Company
Hearing 11-19-2009

102

1 been raised.

2 I also wanted to commend the parties on the
3 caliber of their briefs and on the caliber of their
4 argument. I thought that the briefs were very helpful,
5 lengthy, but they enabled us to understand the issues,
6 and we appreciate the lengthy argument this afternoon,
7 and at this point we stand adjourned. Thank you.

8 (Whereupon, the proceedings were
9 concluded at 5:00 p.m.)

10

11 * * * * *

12

13

14

15

16

17

18

19

20

21

22

103

1 CERTIFICATE OF NOTARY PUBLIC

2 I, ERICK M. THACKER, the officer before whom the
3 foregoing oral argument was taken, do hereby certify
4 that the testimony appearing in the foregoing oral
5 argument was taken by me in stenotype and thereafter
6 reduced to typewriting by me; that said transcription
7 is a true record of the proceedings; that I am neither
8 counsel for, related to, nor employed by any of the
9 parties to the action in which this was taken; and,
10 further, that I am not a relative or employee of any
11 counsel or attorney employed by the parties hereto, nor
12 financially or otherwise interested in the outcome of
13 this action.

14

15

16

17

18

19

20

21

22

My commission expires:

June 14, 2014

ERICK M. THACKER
Notary Public in and for the
District of Columbia

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company
Hearing 11-19-2009

103

1 CERTIFICATE OF NOTARY PUBLIC

2 I, ERICK M. THACKER, the officer before whom
3 foregoing oral argument was taken, do hereby certify
4 that the testimony appearing in the foregoing oral
5 argument was taken by me in stenotype and thereafter
6 reduced to typewriting by me; that said
7 is a true record of the proceedings; that I am
8 counsel for, related to, nor employed by any of the
9 parties to the action in which this was taken; and,
10 further, that I am not a relative or employee of any
11 counsel or attorney employed by the parties hereto,
12 financially or otherwise interested in the outcome
13 this action.

14 *Erick M. Thacker*

15 ERICK M. THACKER

16 Notary Public in and for the
17 District of Columbia

18
19
20
21 My commission expires:

22 June 14, 2014

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 1

<p><u>0</u> 09-01 1:6 5:7</p> <hr/> <p><u>1</u> 1 13:18,21 94:22 100:4 1,000 64:4,7 100 77:22 78:2 120 36:20 1200 2:18 1201 1:14 122.2 55:6,14 125 32:15 125.58 32:6 125.58(cc 55:2 69:11 125.61 17:6 25:14 42:14 46:13 125.62 16:8 17:3 19:21 25:11 34:21 37:13 54:17 57:8,9 59:5 70:11 125.62(a 18:9 33:17,20 34:4 35:4 54:4,12 125.62(a)(1 20:7 46:14 54:5,10 125.62(a)(1)(i 69:1 125.62(a)(4 41:5 67:3 125.62(c 76:2 125.62(e 81:5 125.62(i 42:12 13 84:19 136 85:3,5</p>	<p>14 103:22 19 1:10 84:18 1979 61:10 1986 18:19 46:21 1988 7:1 11:9,10 12:3 60:18 61:17 62:22 1991 54:6 60:18 80:5 1994 16:17,18 56:14 60:19 1998 79:2,4 1999 89:9,17 90:2</p> <hr/> <p><u>2</u> 2 25:13 20 6:20 36:9 2000 81:20 89:14 20006 3:6 2004 64:8 2006 89:14 2007 62:20,22 78:14 83:5 2008 78:14 2009 1:10 62:21 2014 103:22 202 2:21 3:7 2020 3:5 20460 2:20 2355A 2:19 25 11:6</p> <hr/> <p><u>3</u> 3 25:12 3:00 1:17</p>	<p>301 59:4 301(h 17:9 28:1,5 44:3 46:7 47:20,22 48:6 54:7,8 55:7 58:8,17 59:20,22 60:11 65:8,11,20 76:11 80:10 81:3 88:10,13 90:6 97:19 301(h)(2 48:13 301(h)(9 6:11 15:1 20:7 44:9 48:9 54:5,8,13,21 68:11 35 77:21 78:2 373-6000 3:7 39 54:6</p> <hr/> <p><u>4</u> 40 19:21 412 13:17,21 415 2:13 421-page 81:19 45 6:5</p> <hr/> <p><u>5</u> 5 4:3,4 5:00 102:9 52 74:10 53 74:10 564-5491 2:21 58(dd 32:14</p> <hr/> <p><u>6</u> 6 4:7 60 18:20 84:7</p>	<p>608 87:17 61 17:18 18:20 20:5,14 21:16 22:8 35:12 38:14 47:3 62 17:20 18:21 19:12 44:16 89:7 63 13:16 45:3 89:17 64 89:7,17</p> <hr/> <p><u>7</u> 70 84:7 75 2:11 79 61:10</p> <hr/> <p><u>8</u> 82 91:6 8270 87:17,19 88 81:11 82:17 83:4</p> <hr/> <p><u>9</u> 9 2:9 5:19,22 47:16 90s 81:13 83:1 91 20:6 57:5 61:9 82:17 94 16:21 24:13 57:3 61:8,9,12 94105-3901 2:12 972-3884 2:13 98-page 81:21 99 91:5</p> <hr/> <p><u>A</u> a)(1 19:13,22 25:13,20,21 38:4</p>
---	--	---	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 2

<p>a)(1)(i) 20:1 41:6 a)(2) 38:7,12 41:6 a)(3) 25:12 a)(ii) 21:1 ability 39:18 able 30:6 50:21 67:8 90:16,19 92:11,15 100:21 absolutely 75:15 accept 33:22 82:4 acceptable 57:21 85:21 acceptance 35:5 account 26:11 100:7 accurate 29:4 53:9 73:3 accurately 86:18 achievable 77:10 achieve 76:16 acknowledge 60:21 74:3 acknowledged 73:10,15 act 24:2 25:5 27:22 31:5 55:11 59:13 64:9 66:8 75:7 95:22 98:3 action 103:9,13 actions 62:9 activities 71:12 act's 15:15 actual 63:22 73:16 75:5 actually 5:20 8:8 9:2 57:4 63:17</p>	<p>68:13 81:12 84:20 87:21 89:8,20 97:16 added 19:11,13 20:16 21:3,20 28:1 addition 25:13 additional 69:1 86:19 87:14 address 6:10,12,14 17:1 21:3 27:17 30:6 40:11 60:14 66:16 82:2 85:5 86:17 92:7 addressed 9:16 28:8 66:4 86:15 adds 19:12 adequacy 30:4 adequate 16:11 adequately 28:7 adjourned 102:7 administrative 81:18 adopt 22:22 24:14 30:12 96:5 adopted 10:20 23:2 70:4 94:2 adoption 36:6,21 37:3 adverse 76:6 affect 49:2 afternoon 47:15 102:6 against 37:7 75:9 Agency 1:1,13 2:7,10,17 5:3 agency's 75:17</p>	<p>aggressive 10:17 35:20 ago 35:18 51:14 69:6 agreeable 40:2 agreed 20:22 algae 73:20 algae's 73:21 algal 74:14 allegedly 51:19 allow 26:16,21 99:16 allowed 24:5 27:3 allows 24:2 95:3 alone 45:19 already 44:12 46:4 79:6,9,10 alternative 44:5 49:21 am 7:14 103:7,10 ambient 8:9 amend 45:20 69:8 amended 20:17 22:1,2 56:12 amendments 19:12 25:5 ammonia 48:11 49:4,5 63:8,9,10 65:4,6 89:2,8,18 90:1,3,11 91:13 ammonium 8:5 89:16 amount 70:19 74:3 ample 97:17 analysis 15:1,21 16:2 33:8 39:6</p>	<p>56:1 58:9 61:18 99:3,7 analyze 80:9 81:2 analyzed 48:7 83:4,13,14 87:8 analyzing 50:12,17 56:16 76:6 and/or 83:1 annual 77:8 anomalous 95:10 answer 40:18,19,21 50:22 51:11 58:12 61:1 64:12 99:19 answers 60:7 61:2 anything 15:7 20:14 37:21 40:13 55:17,19 57:11 60:8 70:20 83:5 apologize 13:4 34:5 appeal 1:5 5:7 43:22 Appeals 1:1,12 2:2 5:2 appear 33:19 appearing 103:4 appears 24:18 82:19 applicable 17:4,5,8,21 18:2,4,14 19:1 20:2,13,15 21:6,10,17 22:6 25:7 26:2,3</p>
--	--	---	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 3

<p>27:12,15 33:21 34:1,10,19 35:6,8,11 37:14,15 38:5,13 39:12 41:18 42:13,15 46:13,15,16,17 47:3 54:15,19,20,21,2 2 55:1,3,5,10,13 56:6 93:14</p> <p>applicant 12:7 44:17 48:5 90:9</p> <p>applicants 48:17 56:16</p> <p>applicant's 16:10</p> <p>application 6:11 11:2 40:2,16 44:3 45:20 66:2 91:10 92:22</p> <p>applications 36:2</p> <p>applied 9:2 13:18 37:7 82:8,10</p> <p>applies 14:7 27:15 29:2 34:1 54:17 55:15 101:10</p> <p>apply 10:3 12:6 14:10 15:7 20:19 25:13 26:22 39:21 41:16,17,20,22 43:12,14 55:21 56:2,4 57:9,10 82:13 94:6,10 95:7</p> <p>applying 33:8 41:20 81:5</p> <p>appreciate 88:20 102:6</p> <p>approach 76:21</p>	<p>appropriate 11:10 12:21 14:21,22 93:22 101:11</p> <p>appropriateness 30:5</p> <p>approval 24:9 28:17 29:8,10,13 30:8,10,22</p> <p>approved 7:2,15,16 8:15 9:7 10:9 12:12 14:21 15:17 16:5 19:14 20:18 22:19,21 25:18,22 26:9 28:3,13,15,16 31:16 32:2 33:12 38:10,16 39:2 41:22 42:18,21 43:11 52:20 55:4 68:21 69:12 70:4 71:5 79:13,14 85:3 87:18 88:6 97:10 98:22</p> <p>approving 57:20</p> <p>aquatic 48:15 71:20,21,22</p> <p>arbitrary 7:13 45:21 46:6</p> <p>area 8:9</p> <p>areas 28:7 64:10</p> <p>aren't 52:6 71:22 72:3</p> <p>arguably 32:22</p> <p>argue 21:22 35:8,14 39:21</p> <p>argued 12:20 16:1 95:11,13</p> <p>arguing</p>	<p>11:13,15,19 24:19 36:11</p> <p>argument 4:2,6 5:4 6:5 9:15,17,21 10:11,13 12:18,22 14:6 15:6 16:16,19 27:11 34:6 35:3,5,6 36:22 49:4,11 71:8 92:1 96:20 101:6,14 102:4,6 103:3,5</p> <p>arguments 1:11 10:1 14:10,19 41:13 46:2 86:14 89:5 92:7 94:9 101:21</p> <p>art 54:20 55:20</p> <p>assertion 10:11 11:14 35:20</p> <p>Assistant 2:9</p> <p>associated 70:3,6</p> <p>assume 22:3 34:9 55:19</p> <p>assuming 92:8 95:2</p> <p>assumption 69:21</p> <p>assumptions 100:16,17,18</p> <p>assure 76:9</p> <p>assures 71:17 72:1</p> <p>ATSD 56:13</p> <p>attain 90:10</p> <p>attained 50:10,15,18,19</p> <p>attainment 48:14</p>	<p>90:6</p> <p>attempt 14:3</p> <p>attempting 9:21</p> <p>attorney 103:11</p> <p>attributable 99:12</p> <p>authority 48:6 88:16 97:20</p> <p>automatic 71:14</p> <p>automatically 71:10 92:10</p> <p>Avenue 1:14 2:18</p> <p>avenues 97:18</p> <p>avoid 10:19 74:22</p> <p>aware 28:9</p> <p>away 30:2</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>backwards 84:20 86:16</p> <p>bacteria 6:13,16 14:11 27:14 45:17 46:3 48:13 49:5,6 56:19 64:2,4 65:16 76:14,17 78:10 82:2 91:7,12,20 94:11 101:5,6</p> <p>bad 72:15</p> <p>balance 71:11</p> <p>Balanced 71:19</p> <p>based 11:3 41:6 77:1 90:13 91:10,16</p> <p>basically 18:9 34:13 55:9 66:10 67:18 78:20 86:1 87:6</p>
--	---	---	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 4

<p>basis 11:19 49:11 50:6,7,8 73:9 90:20</p> <p>baton 86:7</p> <p>bay 56:5</p> <p>Beach 64:9</p> <p>bears 8:17</p> <p>becomes 15:2 16:10 22:21</p> <p>begin 6:18 88:22</p> <p>behalf 2:2,7 3:1</p> <p>behind 75:16</p> <p>believe 6:3 7:18 9:5 10:1 11:10,21 12:10 14:9,16 31:15 40:19,21 41:1,5 57:2 58:12 67:4 93:9</p> <p>bent 86:16</p> <p>best 17:2 20:12 25:3 40:19 75:22 94:5 100:20</p> <p>better 78:12</p> <p>beyond 15:7 16:14 37:17,22 73:7</p> <p>bible 56:15 94:15</p> <p>bigger 71:3</p> <p>bill 69:7</p> <p>billions 40:8</p> <p>Bingham 3:4</p> <p>bioaccumulation 74:13 91:16</p> <p>biochemical 7:6</p> <p>biological 41:10 73:12,19,22 74:4</p>	<p>76:3,8 86:14 93:5</p> <p>BIP 71:19 72:2,17 74:13 76:4</p> <p>bit 12:17 52:13 69:3 74:18 86:6,10 94:4 95:10</p> <p>bite 56:12</p> <p>blooming 73:21</p> <p>blooms 73:20 74:14</p> <p>blunt 40:9</p> <p>board 1:1,12 2:2 3:10 6:9,18 14:19 34:10 48:16 49:13 69:4 88:11 94:1 101:17</p> <p>Boards 5:2</p> <p>Bob 5:17</p> <p>BOD 12:8,15 15:18,21 17:10,12 21:10 41:19 54:18 56:22 94:6</p> <p>bottom 87:7,15 88:4</p> <p>bound 96:10</p> <p>bounds 17:12</p> <p>brief 14:9 22:1 54:6 58:20 59:17 60:6 74:10 76:18 77:12 80:9 85:4 86:16 87:22 88:2,9,19 94:9</p> <p>briefing 101:2</p> <p>briefly 66:17</p>	<p>78:19</p> <p>briefs 9:16 10:2 12:19 48:20 61:8 83:13 86:21 87:4 101:17 102:3,4</p> <p>bring 35:22</p> <p>brings 91:1</p> <p>broad 31:16</p> <p>broader 16:18 21:11 35:2 37:15 93:2</p> <p>broadly 15:10 33:17 38:8</p> <p>brought 37:2</p> <p>burden 39:19 97:22</p> <p>burdens 28:6</p> <p>buried 54:19 60:5</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>calculate 52:22 67:18,22</p> <p>calculated 13:20 52:16,18 59:21 77:8,9,17 100:3</p> <p>calculating 8:18 53:17</p> <p>calculation 13:21</p> <p>calculations 65:1</p> <p>caliber 102:3</p> <p>California 2:12</p> <p>Capital 1:15</p> <p>capricious 7:13 45:22 46:6</p> <p>carcinogens 57:7</p> <p>carefully 26:9,17</p>	<p>73:11 88:3</p> <p>carries 19:16</p> <p>carry 22:4</p> <p>case 6:22 9:3 10:21 12:14 14:11 15:19 18:1 29:11 49:15,19,20 65:5 94:3 96:4 97:4 99:10</p> <p>cases 7:11 13:13</p> <p>casino 49:19</p> <p>category 91:19</p> <p>caught 94:3</p> <p>cautious 74:21</p> <p>CC 73:2</p> <p>CCH 49:11,19 50:20 51:12 53:19 64:19 65:21 68:14,18 73:2,4 74:16 76:15 78:8 79:5 81:16 82:5,11 83:1,5 84:3,20 86:9 87:1,11,18 88:5</p> <p>CCH's 69:4 71:7</p> <p>cell 5:10</p> <p>certain 23:3 26:16 36:19 58:17 62:8 63:5 71:1 74:3 75:15,16 85:18,20</p> <p>certainly 10:15 15:22 27:22 28:9 60:9 68:16 81:1 96:4</p> <p>CERTIFICATE 103:1</p>
--	---	--	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 5

<p>certification 40:15,18 65:22 66:7,13</p> <p>certify 103:3</p> <p>cetera 64:13</p> <p>CFR 19:21</p> <p>CFU 77:21</p> <p>challenge 8:11 35:18,22 36:6,19 37:2 76:21 84:10</p> <p>challenged 24:20 53:20</p> <p>challenges 10:11</p> <p>challenging 76:15,18,19 78:9 87:1</p> <p>chance 42:6 92:8</p> <p>change 10:20 11:7 12:2 30:14,15,19 36:7 40:9 82:21 83:7 95:4,5 99:12,16,17,22</p> <p>changed 7:10 12:1 25:5,7,10 64:8</p> <p>changes 53:18 54:8 82:22 83:1 94:2</p> <p>changing 53:16</p> <p>chapter 53:16</p> <p>characteristics 9:19 19:22 41:9</p> <p>characterization 92:5</p> <p>Charles 2:4 5:8</p> <p>check 41:3</p> <p>chemical-specific 76:7</p>	<p>chlordane 6:15 8:19 9:9 13:15,19 48:11 52:12 53:22 63:18 64:14,22 68:19,20 74:12 91:12 95:14 96:2,3,17,19 97:22 98:10</p> <p>chlorination 81:10,12</p> <p>circumstances 26:17 29:3 39:20</p> <p>citation 60:4,6</p> <p>citations 54:11</p> <p>cite 45:11 52:16 53:15</p> <p>cited 49:20</p> <p>city 1:4 3:1 5:4,16 6:3 49:3 67:2</p> <p>claim 36:5</p> <p>clarity 20:11 22:13</p> <p>clean 24:2 27:22 31:5 51:15 55:11 59:12 75:6</p> <p>clear 10:6 14:8,9,12,13,16 17:18 20:10 24:22 25:4 27:11 28:12 38:20 42:20 44:7 45:2,22 50:4 54:10 56:21 57:8 61:14,15 68:22 74:6 78:2,15 83:13 89:19 90:12 93:21 94:9 95:3 99:11,13,14,19 101:4,8,9</p>	<p>clearer 13:7</p> <p>clearest 56:11,12</p> <p>clearly 10:1 12:20 16:8 18:12 39:14 45:13 47:1 49:17 51:1 57:13 63:1 78:13 88:7 94:5 96:16</p> <p>Clerk 3:10</p> <p>close 7:4 77:17</p> <p>closing 101:13</p> <p>cloth 47:6</p> <p>Coast 84:13 85:11,15,17,21,2 2</p> <p>coastal 28:7</p> <p>Code 2:19</p> <p>coefficient 8:1</p> <p>coliform 27:14 56:19</p> <p>colleague 6:14</p> <p>colon 37:19</p> <p>colony-forming 77:21</p> <p>Columbia 1:17 103:17</p> <p>column 90:4</p> <p>comes 25:2 47:21 89:17 93:14</p> <p>commencing 1:17</p> <p>commend 102:2</p> <p>comment 47:19 50:21 73:2 88:12 93:22 101:13</p> <p>commented 51:3</p> <p>commentors 16:17</p>	<p>comments 10:12,14,18 11:4 24:16,17 59:14 76:19 82:1 84:18,21 86:3,13,17 101:1</p> <p>commission 103:21</p> <p>community 75:18</p> <p>Company 1:16</p> <p>comparable 55:14</p> <p>compare 77:7</p> <p>compared 78:2</p> <p>compliance 7:5 12:5 15:14 22:16 31:8 39:22 41:6 56:17 57:19,22 65:9,10 66:5 71:13 72:8 79:3 95:21 96:8 97:6 98:8</p> <p>compliant 39:7</p> <p>complicated 87:3</p> <p>comply 16:3 19:15 26:1 27:2 56:21,22 59:19 65:20 66:8 92:11,15 96:13 97:11 98:3,16</p> <p>complying 70:1 92:16</p> <p>comport 93:18 98:10</p> <p>comprehensively 84:22</p> <p>concede 20:11</p> <p>conceded 68:15</p> <p>concedes 15:16</p>
--	---	---	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 6

<p>conceivably 36:4</p> <p>concentration 13:19</p> <p>concentrations 56:20 75:2</p> <p>concept 28:19 29:8 33:18</p> <p>conception 8:20</p> <p>concerned 39:14</p> <p>concerning 85:2</p> <p>concerns 26:13 27:17 30:4,6,7 31:4 97:15</p> <p>conclude 34:10</p> <p>concluded 102:9</p> <p>conclusion 52:10 89:14,17 91:4</p> <p>conclusive 51:7</p> <p>conditions 41:7,10 59:1,2 60:11 64:6 68:6 71:16 73:12 98:5</p> <p>confirmed 78:4</p> <p>confused 17:11</p> <p>Congress 26:8,15 27:5,22 28:9 31:20 39:14 47:22</p> <p>Congressional 58:14</p> <p>conjunction 40:15</p> <p>connected 22:11</p> <p>consequences 74:18 75:17</p> <p>conservative 68:4 76:10</p>	<p>consider 6:12 44:6 69:4 88:6,7</p> <p>considered 75:12</p> <p>consistent 23:19 27:7 62:20 73:14 89:15 90:19 95:20 98:22</p> <p>consistently 43:16 90:10</p> <p>constitute 1:11</p> <p>Constitution 1:14</p> <p>construction 47:5 68:11</p> <p>construed 19:5</p> <p>contain 69:17</p> <p>contained 14:6</p> <p>contains 8:7</p> <p>contested 83:6</p> <p>contesting 84:3</p> <p>context 6:20 70:2,5</p> <p>contrary 7:12</p> <p>contribute 74:12</p> <p>control 65:13,19</p> <p>controlled 49:8</p> <p>controls 14:7 65:13</p> <p>correct 7:14 10:7 18:8,13 19:20 53:10 69:19</p> <p>correctly 6:5 41:16</p> <p>correlation 33:4</p> <p>correspond 13:8</p> <p>corresponding</p>	<p>59:6 68:17</p> <p>cost 28:6 40:8 74:16</p> <p>costs 39:16</p> <p>counsel 2:9,16 5:12,13,22 6:2 47:16 49:19 99:8 103:8,11</p> <p>count 60:12</p> <p>county 1:4 3:1 5:5,16 6:4 49:3 67:2</p> <p>couple 40:10 51:14 59:14 60:16 61:1 63:3 76:14 78:1</p> <p>course 71:11 101:17</p> <p>court 11:5 14:18 18:18 25:16 26:4 37:4 38:21 89:4,6 94:13</p> <p>Court's 88:20</p> <p>cover 47:13 88:21</p> <p>covered 47:13</p> <p>covers 38:12</p> <p>criteria 15:15 16:4,6 19:15 20:19 22:16,20 27:3 28:12 31:5,9 38:10,15 39:8 41:20 48:1,3,5 51:22 56:18 59:6 68:12,16 69:2 82:8 88:14 90:1,3 93:16,18 95:21 96:2,4,6,8,9,11,1 2,14,15 97:7,11</p>	<p>98:2,3,8,11,18,2 1 99:1,2</p> <p>criterion 68:20</p> <p>critical 41:11 43:22 44:1 53:1 67:12 68:1,6</p> <p>criticizing 84:21</p> <p>crushing 28:6</p> <p>cumulative 91:17</p> <p>current 7:12 61:6 71:16 90:8</p> <p>currently 73:16</p> <p>cut 25:1</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C 1:2,9,14 2:20 3:6</p> <p>darn 58:16</p> <p>data 48:7 51:5,7,11 53:12,13 61:17 65:14 72:5 73:11,12 74:4,14 76:8,22 77:7,14 87:8,12,14 90:2,21</p> <p>David 3:2 5:16 6:9</p> <p>days 36:20</p> <p>dd 32:6</p> <p>deal 39:4</p> <p>dealing 41:17</p> <p>decade 18:16</p> <p>decades 93:4</p> <p>decide 51:10 81:10</p> <p>decided 68:2 81:13 93:9</p> <p>decision 10:22</p>
--	---	---	--

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 7

<p>11:7 13:16 41:1 49:12,13,22 50:7,9 51:22 52:1,8,17 60:17,20,21 61:15,20,21,22 62:13,22 69:14 72:22 74:6,19 76:21 77:12 82:11,18 83:3 91:9 92:16 94:1</p> <p>decisional 99:19</p> <p>decisions 7:1,11 9:10 10:21 13:12 48:18 49:16,17 50:19 51:1 52:15 56:17 61:6 62:19,21 63:1 66:4 69:7 73:10 75:17 77:13 78:13 88:7 91:4 99:21</p> <p>deference 28:3</p> <p>define 22:5</p> <p>defined 17:5 20:5,15 26:17 55:13 71:1</p> <p>defines 21:16 32:6,20 94:16</p> <p>defining 23:10 24:8,11</p> <p>definition 27:15 33:21 55:2,5,9,15 56:6 69:10 70:1 75:15</p> <p>definitions 54:20</p> <p>definitive 24:4</p> <p>delay 88:5,10</p> <p>delaying 78:17</p>	<p>demonstrate 88:14,15</p> <p>demonstrated 90:9</p> <p>demonstration 44:17 79:11,14,20</p> <p>demonstrations 73:16</p> <p>denial 51:21 66:15 90:14</p> <p>denied 11:3</p> <p>deny 51:8 91:9</p> <p>denying 89:20</p> <p>Department 80:6,7</p> <p>depend 57:16</p> <p>depending 89:11</p> <p>depletion 7:6</p> <p>depth 52:19 67:18,19</p> <p>depths 77:9 90:2,4</p> <p>describe 24:7</p> <p>describing 29:1</p> <p>designated 98:6</p> <p>designation 82:12</p> <p>designed 16:11 26:10</p> <p>determination 46:8 73:6 90:17 91:18 92:10 94:22 95:4 101:18</p> <p>determinations 15:3</p> <p>determine 14:13</p>	<p>94:19 95:1 100:5 101:8</p> <p>determining 7:5 12:4 29:20 51:6</p> <p>devastating 39:15</p> <p>development 28:2</p> <p>deviation 11:8</p> <p>devices 5:11</p> <p>dictated 59:1</p> <p>dieldrin 6:16 8:19 9:9 48:11 52:12 53:22 63:19 64:14 65:1 74:12 87:5 91:12</p> <p>differ 38:3</p> <p>difference 18:20 46:16,18</p> <p>differences 9:5</p> <p>different 13:22 22:8 23:1 24:18 36:12 44:21 45:1 47:21 53:8,12,14 57:16 61:15 80:13 81:8 82:17 99:8</p> <p>differs 9:3</p> <p>difficult 20:8</p> <p>difficulties 73:19</p> <p>difficulty 16:19 27:13</p> <p>diffuser 16:10</p> <p>dilute 39:18 100:13</p> <p>dilution 8:7,15,18,21 9:2,11 12:6,16,22 13:1,6,7,10,17,2</p>	<p>2 14:3,5,16 16:12,14 28:8 31:21 37:18,22 52:14,18,21 53:1,7,8 63:20 64:1 65:1 67:12,13,15 68:1 94:12,20,22 95:1,5 99:5,7,21,22 100:8,10 101:9</p> <p>direction 98:13 101:20</p> <p>directly 68:17</p> <p>disagree 14:8 35:13,15 38:21</p> <p>discerned 49:22</p> <p>discharge 16:3,13 19:22 31:8 37:17 41:9 48:12 55:11 56:2 57:10 70:19 79:15 80:14 81:2,6,15 83:16 91:11</p> <p>discharged 15:13</p> <p>discharger 48:1 64:21</p> <p>discharges 48:9,13 55:7,8 62:9 65:20 83:10</p> <p>discharging 92:19 93:3</p> <p>discount 51:15</p> <p>discredit 87:11</p> <p>discretion 24:3 86:1 92:3</p> <p>discussed 48:22 52:12,15 54:3,16 73:1 78:18 83:2</p>
---	---	--	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 8

<p>99:21</p> <p>discusses 52:17</p> <p>discussing 26:3 93:20</p> <p>discussion 24:16 57:7 59:15 68:10 79:21 89:8 94:16 99:18</p> <p>disinfect 82:5</p> <p>disinfection 6:12 37:11 43:21 44:4,14 45:7,9,15,18 46:6 78:18,21 79:1,4,5 80:8,14,16 81:9,19,21 82:1 101:6</p> <p>dispersion 16:12</p> <p>dispute 19:17</p> <p>disputed 19:3</p> <p>disputing 18:1</p> <p>disregard 16:4 26:8</p> <p>dissolved 8:2 51:13</p> <p>distinction 9:6 64:16</p> <p>distinguish 28:15</p> <p>District 1:16 103:17</p> <p>document 8:17 23:19 26:10 52:17 56:13 67:17 81:19,20 82:11 94:14 100:1</p> <p>documented 99:15</p>	<p>documents 99:20 101:8</p> <p>dollars 40:8</p> <p>done 24:6 31:2 41:2 85:8 94:8</p> <p>dramatically 12:1</p> <p>dry 82:8,10,12 83:4</p> <p>during 24:9 41:8 49:3 83:1 93:22</p> <p>Durr 3:10 5:2</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier 21:9 25:9 37:14,16 53:6 78:5</p> <p>early 58:21 61:10</p> <p>easiest 56:6</p> <p>East 85:11</p> <p>economic 26:12</p> <p>edge 8:22 13:8 56:20 95:2 100:19</p> <p>Edward 2:3 5:8</p> <p>effect 60:19 63:22 64:4 69:10</p> <p>effective 16:10</p> <p>effects 58:2 76:6 86:19 87:1</p> <p>efficient 7:22 13:17</p> <p>effluent 6:15 15:13 31:8 39:19 45:8 53:22 62:5 63:16,18 83:8 85:10 91:13 93:4 95:2</p>	<p>either 13:2 36:5 51:8 89:12</p> <p>else 59:7,9</p> <p>emphasis 57:6 95:18</p> <p>emphasize 47:4 50:10 81:16</p> <p>employed 103:8,11</p> <p>employee 103:10</p> <p>enabled 102:5</p> <p>encompass 33:18</p> <p>encouraged 39:3</p> <p>encouragement 28:2</p> <p>Endangered 66:8</p> <p>enlighten 67:8</p> <p>enormous 74:19</p> <p>ensure 59:10</p> <p>enterococcus 77:22</p> <p>entire 27:21 28:1</p> <p>entirely 42:4</p> <p>entitled 28:22</p> <p>environmental 1:1,12,13 2:2,7,10,17 5:2,3 26:13 30:7 31:4 58:2 70:8 71:10 72:9 73:5 97:15</p> <p>environmentally 57:22</p> <p>EPA 5:18,21 7:2 9:7 10:8 14:21 15:12,17 16:5,18 19:5,10 20:6 24:3,16 28:3,13</p>	<p>33:12 39:1 42:18,21 48:6 52:20 53:21 54:5,9,16 56:9 57:8,21 58:13 59:9 64:8 68:2,12,15 69:9,13 70:4,6,10 76:5 79:15 82:1 83:18 85:2,9,19 86:2,18 88:7,15</p> <p>EPA-approved 87:9</p> <p>EPA- recommended 68:19</p> <p>EPA's 8:16 26:10 56:7,9 58:22 66:11 76:11 88:9 94:13</p> <p>equipment 79:4</p> <p>Erick 1:15 103:2,15</p> <p>error 10:7 11:14 15:4 25:8 48:16</p> <p>ESQUIRE 2:8,15 3:2,3</p> <p>essentially 17:5 28:17 30:13 56:15 59:12 63:21 68:15 86:21 87:1 91:6 100:12</p> <p>estuary 56:4</p> <p>et 64:13</p> <p>Eurika 3:10</p> <p>evaluating 41:6</p> <p>event 101:21</p>
--	---	---	--

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 9

<p>everybody 21:20 28:11 31:6 97:8 98:19,21 100:12</p> <p>everyone 5:13 15:16 44:9 95:22</p> <p>everything 94:6</p> <p>evidence 75:1,3,5 76:7 93:5 100:2</p> <p>evolved 81:13</p> <p>exact 60:3</p> <p>exactly 11:22 18:21 20:9 21:19 39:3 53:11 80:5,21 91:8</p> <p>example 7:19 9:9 13:15 18:18 19:21 50:1,20 51:12 53:13 59:4 65:15 71:19 72:14 73:19 74:11 76:2 77:20 81:8 85:18 91:20 94:16</p> <p>exceed 16:13 37:17,22 91:11</p> <p>exceedance 23:10 71:14 72:4 92:10</p> <p>exceedances 6:13 46:2,3,4 49:7,14 50:4 51:2,6 52:9 77:18 84:4 89:9,16,20 90:2,5,8,13,22 91:17,19</p> <p>exceeded 63:10 70:1 72:15 90:1</p> <p>except 7:6 91:6 94:6,11 101:4</p> <p>exception 12:13</p>	<p>14:11</p> <p>excuse 7:22 26:12 31:17 42:20 45:3 90:4</p> <p>exist 17:7 41:11 46:3 92:9</p> <p>existence 31:18</p> <p>existing 73:12,16 92:21</p> <p>exists 76:4</p> <p>expansively 26:20</p> <p>expedition 88:12</p> <p>expires 103:21</p> <p>explain 41:12 78:11 86:6 95:17</p> <p>explained 78:13</p> <p>explains 57:11 99:15</p> <p>explanation 11:7 27:7 93:17 101:21</p> <p>explicit 65:7 69:18</p> <p>expressly 55:14</p> <p>extent 9:1 14:2 26:5 52:7 61:19 63:8 90:4</p> <p>extinction 8:1</p> <p>extra 70:16 86:10</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facilities 26:22 29:3</p> <p>facility 44:22 45:1 62:7 79:8</p> <p>fact 14:14 21:2 23:22 32:5 39:11 46:3,7,19 47:6</p>	<p>49:4,12,13 53:7,8 65:18 71:8 85:2 90:21 95:20</p> <p>factor 8:8,18,21 9:12 12:17 13:1,6,8,10,22 14:16 23:9 52:14 53:1,7,8 63:20 64:1 94:12,20 95:5 99:6,7,21,22 100:8,10 101:9</p> <p>factors 9:2 14:5 53:2 67:14 68:1 73:1 100:7</p> <p>failed 48:10,12 83:17 84:6</p> <p>failure 73:6 83:11</p> <p>fair 92:5</p> <p>fairly 49:22</p> <p>fall 35:5</p> <p>falls 37:21</p> <p>favorable 41:1</p> <p>features 29:19</p> <p>fecal 27:14</p> <p>federal 7:3 16:3 19:15 20:19 22:16 28:12 30:13 31:9,19 32:3 38:10,15 39:7 41:20 43:13,14,18,19 93:8,15,18 95:6,9,12,16,21 96:2,3,6,8,9,11,1 8,21 97:6,11 98:1,2,3,8,9,10,1 2,13,16,18,20,21</p>	<p>99:1,2</p> <p>feds 30:15</p> <p>feet 64:4,7 70:19</p> <p>felt 97:16</p> <p>fewer 90:22</p> <p>field 85:7</p> <p>fighting 93:6</p> <p>figure 52:21 67:13</p> <p>figuring 67:14</p> <p>final 9:10 13:12,16 46:10 49:2,16 52:15 62:9,13,20 66:4 69:6 77:13 78:12 82:11 83:3 89:6 99:21</p> <p>finality 88:11</p> <p>financially 103:12</p> <p>finding 53:21 75:11 76:15,20</p> <p>findings 8:12 74:11 78:4 89:1 91:10</p> <p>finds 48:4,16</p> <p>fine 47:11</p> <p>finer 50:13</p> <p>first 6:4 27:21 29:8,9,13 30:9 55:22 84:16 88:12 93:13</p> <p>fish 71:20 74:1,2 75:2,7,9</p> <p>fishing 74:11</p> <p>fit 33:20 35:3</p> <p>fits 33:22</p> <p>five 77:1</p>
--	--	---	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 10

<p>five-year 92:21</p> <p>fix 40:4</p> <p>flea 83:15,16</p> <p>flip 60:14</p> <p>flow 100:17</p> <p>focus 61:7 71:11</p> <p>focused 42:9 67:10 101:2</p> <p>folks 68:8</p> <p>foregoing 103:3,4</p> <p>forth 24:10 29:18 48:1 101:14</p> <p>forward 22:4,17 44:8 62:2 65:19 79:9 90:19</p> <p>fragile 83:21</p> <p>Francisco 2:12</p> <p>frankly 50:2 54:12,16 64:5 67:15 68:2,19 69:13 76:22 78:17 83:2 84:1</p> <p>frequent 77:18</p> <p>fresh 56:3 83:15 85:11</p> <p>friend 94:14</p> <p>fulfill 31:5</p> <p>full 57:6 101:20</p> <p>fully 25:3 30:5 93:18</p> <p>fundamentally 10:19</p> <p>future 44:12 92:12,15</p> <hr/> <p style="text-align: center;">G</p> <hr/>	<p>gathering 72:5</p> <p>general 2:16 6:1 11:14 22:16 23:21 38:22 47:19,20 51:9 98:20</p> <p>generally 15:14 31:8 38:1 39:7,12,22 43:15 77:5</p> <p>geometric 76:14,16 77:1,3,7,10,16,2 0 78:5,9 89:11</p> <p>gets 76:2</p> <p>getting 45:19 54:3 71:7 88:5 99:4</p> <p>ginned 47:6</p> <p>given 20:12 46:4 55:12 85:17 92:5</p> <p>gives 16:15</p> <p>giving 9:16</p> <p>goal 8:21</p> <p>gone 62:12 88:19</p> <p>govern 84:13 95:16 96:22</p> <p>grant 48:6 51:8 66:11 88:16 92:3 97:19</p> <p>granted 36:3 44:11 48:9 52:7 92:20</p> <p>granting 7:2 93:11</p> <p>great 42:9,10 75:18</p> <p>greater 90:7</p> <p>green 80:16</p>	<p>ground 49:13,21 66:14,15</p> <p>guess 14:17 22:12 35:7 39:13 48:19 75:20,22</p> <p>guidance 42:13 76:5 83:18,19</p> <p>guidances 42:14</p> <p>Gulf 85:11</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>h)(2 6:11 69:16,17,20 70:2,14 71:14,15 72:10 73:6,10 74:6 75:4</p> <p>h)(2)'s 71:7,11</p> <p>h)(9 15:6,10,21 16:2 18:10,16 19:2,8,11 20:16 21:3,9,19 22:14,15 28:13 31:7,10 32:22 33:4,7,8 35:11,15 39:1,6 46:22 56:10 57:12 60:19 69:17 93:13,14,15 95:11,20 96:7 97:5 98:16 99:2</p> <p>H.1.2 52:17</p> <p>H0123 52:17</p> <p>H1-189 45:4</p> <p>H-12-1172 7:20</p> <p>H12-1228 45:12</p> <p>H-2-24 11:5</p> <p>hand 89:19</p>	<p>handy 13:4</p> <p>happened 10:22</p> <p>happy 13:14 17:1 95:19</p> <p>hard 20:13 34:6 73:22</p> <p>harm 70:8 71:9,10,11,14 72:9 73:5,17 93:5</p> <p>harmonizes 43:16</p> <p>haven't 37:5 87:5 88:6 92:8</p> <p>having 12:19 16:19 34:5 67:16 100:10</p> <p>Hawaii 23:16 28:18 29:4 40:14 59:17 60:2,9 64:5,20 66:1 68:21 69:5,7 70:17,18,20 80:6 83:19 86:1,5 87:2 89:22</p> <p>Hawaii's 31:3 59:15</p> <p>Hawthorne 2:11</p> <p>head 58:21</p> <p>headquarters 56:9 85:19</p> <p>Health 80:6,7</p> <p>hear 5:13,19 23:15 30:17</p> <p>heard 101:13</p> <p>hearing 53:6</p> <p>held 1:12</p> <p>help 18:6 72:7</p>
---	--	---	--

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 11

<p>helpful 102:4 helping 67:3 helps 22:5 hereby 103:3 here's 30:2 hereto 103:11 herring 85:5 HI0020117 1:6 5:7 HI0020877 1:6 5:7 higher 96:5,6 97:22 Historically 21:18 35:10 history 20:13 22:10 26:15,18,19 32:13 hold 34:16 honest 20:10 Honolulu 1:4 3:1 5:5,17 6:4 11:22 67:2 93:3 94:4 96:10 Honolulu's 49:4 Honor 5:15 6:7 7:18 9:20 10:15 13:11 14:18 15:9 16:1,22 18:11,21 21:4,7 22:12 25:15 27:16,19 29:7 31:12 38:2 39:10 40:18,20 41:16 42:5,17 43:10 45:11 46:19 95:19 97:4 98:12 Honorable 5:8 Honors 6:9 9:8</p>	<p>30:3 46:9 47:8 48:22 53:19 88:18 91:14 Honor's 9:22 27:18 36:18 Honouliuli 1:5 5:6 6:13 7:19 9:10 13:14,16 44:13 45:5,9,13,18 48:12 49:5,6 52:16 60:17,20 62:3 76:16 78:20,22 79:7,17 80:17 82:9 84:7,19 91:5,7,20 hundreds 40:7 78:1 hurt 36:8 hybrid 30:13 hypothetically 34:9</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>i.e 12:8 41:19 I'd 6:18 74:21 75:22 84:17 88:22 identical 91:6 identified 8:3 10:4 47:3 identifies 7:21 17:10 ignore 22:22 45:22 46:7 ii 19:13,19 22:7 25:17 37:14,21 42:14 43:8,9,12 69:1</p>	<p>I'll 56:7 87:3 I'm 5:15,18,21 6:9 9:21 11:16 13:13 16:19,22 17:11 23:14 25:9 29:3 30:17 32:8,14,16 33:15 34:5 36:4 40:18 41:2,15 42:4,5 43:1 45:3 46:10 47:15 53:10,15 57:12 62:18 64:11,16 66:14 67:6 70:12 72:6 74:9 79:22 80:20,21 82:14 85:19 92:17 95:19 96:16 100:4 impact 76:3 implement 18:10 implementation 44:13 implemented 19:8 imply 101:19 important 6:20 8:16 18:12 26:6 30:3 43:22 75:12 77:11 89:5 impose 97:21 improved 80:14 81:6,15 inaccurate 53:9 inadequate 30:12 31:3,4 inaudible 34:17 38:7 42:5 include 29:14 31:16 45:18 46:5 56:3,4 84:14</p>	<p>85:22 91:7 included 7:22 54:8 79:3 85:17 includes 8:4 28:13 94:11 including 39:2 63:5 73:2,13 96:1 inconsistencies 56:8 inconsistent 35:14 49:15 59:21 60:8 98:11,20 incorporate 10:5 incorrect 44:8 incurred 39:16 indicate 41:10 45:6 49:17 84:4 indicated 11:1 21:8 51:1 60:13 indicating 45:15 indigenous 71:12,20 individual 77:8 indulgence 88:20 inference 90:14 inherent 14:5 28:10 73:18 initial 8:14 12:6 16:12,14 31:11,14,20,21 32:6,9,21 37:18,22 52:18,21,22 54:9 63:20 65:1 67:12,13,14 68:1 69:18 95:1</p>
--	--	--	--

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 12

injured 37:3	45:6,7,14,16	60:2,4,5,6 64:20	43:1,4,6
install 79:4	46:5 50:2 60:21	66:11	44:16,21
instance 9:4 29:9	62:3 78:21	67:10,11,18	46:10,13 47:9,12
30:9 98:17	79:2,3,7,20	69:19 70:14	49:10 50:6,13
instead 8:9 18:20	80:17	71:16 72:19	51:4,18 53:3,5
67:16 95:6 98:14	81:14,17,18	73:22 75:14 76:2	55:12,17 57:3,11
instrument 40:9	84:5,19 89:2,6	79:20,21 80:12	58:10 60:1,13
insubstantial 74:9	91:5	81:5,6,19	61:7 62:1,14,17
insure 22:15	isn't 27:1 39:5	83:2,12,13	63:12 64:11,15
intended 9:12	55:7 84:3	84:1,2 86:1	65:3,11,21
13:10 18:10 27:9	issue 6:19,21 8:14	87:2,19 90:12	66:18,20 67:1,6
intent 58:14	10:16 12:17,21	91:5,16,17	68:7 69:15
intention 79:10	16:19 23:9 24:19	92:9,12,20 93:21	70:12,22 71:6
intentionally	27:5 28:7 35:16	94:21 95:6,16,20	72:3 73:3 74:8
31:16	48:22 50:21	96:4 98:11 99:19	75:13 79:6,17
interest 88:11	52:11 63:6 65:1	101:7,9	80:1,15 82:7,19
interested 103:12	68:3,11,18 74:9	I've 100:20	84:9 86:8 87:16
interfere 48:14	78:18,19 93:21		91:22 92:14 95:8
inter-lab 84:12	101:2,3,18		96:16 97:3 98:4
interlaboratory	issued 40:22 62:20	<hr/> J <hr/>	99:4 101:12
85:8,12,15	64:3	January 81:20	judges 5:8 68:7
interpret 37:5	issues 6:10,15,19	Judge 2:3,4,5	judgment 15:11
54:13	47:12,19 49:1	5:12,20 6:3 7:14	44:10 45:21
interpretation	54:3 66:16,21	8:11 9:15 10:10	51:5,10 57:15,21
11:11 16:18	68:8 76:14 88:21	11:12,18	70:7 72:12,20
33:19,21 34:3	91:3 93:20	12:16,18 13:5	75:22 92:13 93:1
36:1,8 56:7 88:9	101:14,16,22	14:12 15:5,18	June 103:22
interpreted 26:20	102:5	16:7 17:11,12,15	jurisdictions 28:6
36:12 47:7 55:21	it's 6:20 8:16 9:21	18:6 19:4,7,18	39:17
56:10 58:13	10:6 17:18	20:6,21	justification 11:8
interprets 54:9	18:3,8,20 19:3	21:1,5,8,14,22	justified 51:21
invalid 35:18 37:1	20:8,13 21:14	23:2,6,12,16	
invalidity 36:16	22:2,18 25:11,18	24:12 25:8,20	<hr/> K <hr/>
irrelevant 66:12	28:19,21 29:11	26:14 28:18	Kathie 2:5 5:8
Island 1:5 5:5 9:10	30:6 35:12	29:11,12,16,21	key 100:18
44:14,19	36:11,12 37:6	30:14,19	kills 75:8,9
	40:6 41:2 42:8	31:10,13	kinds 81:8
	43:4,18 44:11,21	32:5,9,14,18,21	knew 13:6
	45:21 46:6 51:15	33:3,9,14,16	81:16,22
	52:14,17,18	34:9,13,17,20	
	54:21 55:20	35:2,17 36:11,15	
	57:8,14	37:12,16 38:6,8	
		39:10 40:10,13	
		41:4 42:2,6,11	

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 13

<p>knocking 34:7</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>laid 79:9</p> <p>language 12:3 16:8,21 18:9,10,13,15,22 21:3,19 22:1,2 24:13,15,22 25:4,9 26:6 27:6,10 33:17 34:21 35:4 36:6,20 37:3,16 38:20 46:20,21 68:13 88:9 91:8 99:20</p> <p>large 77:19</p> <p>larger 89:13</p> <p>last 37:12 40:11 78:3 93:19</p> <p>lastly 39:9</p> <p>late 62:9 87:14</p> <p>later 36:9 89:10</p> <p>law 7:12 11:15 65:13</p> <p>laws 66:5</p> <p>lax 98:14</p> <p>lead 91:15</p> <p>leaning 101:19</p> <p>least 15:22 22:6 39:15 41:22 51:19 54:1 70:5 71:1 99:12</p> <p>leave 87:3</p> <p>leaves 8:6</p> <p>led 71:1</p> <p>legal 10:7 15:4</p>	<p>49:1 54:3</p> <p>legislation 69:5</p> <p>legislative 26:14,18</p> <p>legislature 69:7</p> <p>Leith 2:8 4:4 5:18,21 47:15,16 49:16 50:8,16 51:9 52:1 53:4,10 55:16,19 58:7,12 60:2,16 61:13 62:18 63:15 64:18 65:10,12 66:3,19,22 67:5,10 68:10 70:10,13 71:3,15 72:11 73:9 74:20 75:21 79:13,22 80:4,19 82:16,20 84:16 86:12 87:21</p> <p>length 42:9,10 52:15 54:4</p> <p>lengthy 102:5,6</p> <p>less 25:3 61:17,18 64:5 68:20 96:21</p> <p>lessening 39:19</p> <p>lesser 90:3</p> <p>Let's 34:9 96:20</p> <p>level 51:4 57:17</p> <p>life 48:15 71:20,21,22 76:6</p> <p>light 7:22 8:1 15:3 80:16 86:6</p> <p>likelihood 37:6</p> <p>likely 90:5</p> <p>limitations 55:13</p>	<p>limited 15:18,21 21:9 28:20</p> <p>limits 8:12</p> <p>line 61:11 72:6 87:8,15 88:4</p> <p>lines 76:7</p> <p>listed 14:15</p> <p>literally 74:16</p> <p>little 12:17 52:13 59:5 69:3 86:6,10 87:2 94:4 95:10</p> <p>LLP 3:4</p> <p>local 98:5</p> <p>located 16:11</p> <p>logic 57:12 58:1 69:19</p> <p>logical 22:7</p> <p>Loma 87:19,20,22 88:3</p> <p>long 35:18 47:7 92:1</p> <p>long-standing 7:10</p> <p>long-term 13:17</p> <p>looser 96:21</p> <p>lot 47:17 54:16 61:18 66:16 68:20 72:5 74:16 77:14 79:16 84:1 87:8,13 88:4,8 100:15 101:14</p> <p>lots 81:7</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Mail 2:19</p> <p>main 50:16 52:3</p>	<p>86:4,20</p> <p>major 27:4</p> <p>manual 24:1 84:13 94:18</p> <p>marine 76:6 84:2 85:6</p> <p>matter 23:21 63:8 95:15 98:20</p> <p>mattered 63:20</p> <p>matters 61:4,12</p> <p>maximum 41:7,8</p> <p>may 6:9 9:18 27:16 39:5 41:11 49:1 54:10 62:21 64:19 65:15,18 72:13,18 73:21 80:5,20 83:3 94:3</p> <p>maybe 25:8 47:18 51:14</p> <p>McCutchen 3:4</p> <p>mean 12:20 18:2 25:16 27:11 33:1 36:9 42:2 54:9 57:20 59:5 67:9 71:10 72:4 76:16 77:1,3,7,10,20 89:11 99:14</p> <p>meaning 21:11 56:2</p> <p>meaningful 10:19</p> <p>means 26:3 34:13 42:3,13,15 55:3,10 57:9 72:9 76:14 77:8,9,16 78:5,9</p> <p>meant 55:21 56:1 88:10</p>
---	--	--	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 14

<p>measure 9:12,13 43:12,14 57:22 65:9</p> <p>measured 8:9 10:4 63:16,18 95:10</p> <p>measurement 8:22 17:13 43:7</p> <p>measurements 8:10 11:3 17:20</p> <p>measuring 13:8 29:19 100:11</p> <p>mechanism 88:10</p> <p>mechanisms 39:4</p> <p>meet 48:2,10,12 49:8 55:8 57:18 70:8 73:6 74:17 78:10 80:14 81:3 83:11 90:16,19 92:1 98:5</p> <p>meeting 56:10 57:17 59:5</p> <p>meets 48:5</p> <p>mention 44:4 69:3 70:15</p> <p>mentioned 57:3 64:2 65:4 85:4</p> <p>merits 101:21,22</p> <p>met 7:21 8:4 21:18 49:18 51:10,17 52:2,4,5,6,10 59:1 62:5,8,16 63:2 68:5 70:19 71:22 72:4 74:7 75:11 77:4 78:3,14,15 80:3 84:8 88:14,15 96:19 97:3</p> <p>metals 27:14 57:7</p> <p>method</p>	<p>84:10,14,15,16 85:16,17 87:9,17</p> <p>middle 60:5</p> <p>milliliters 77:22</p> <p>millions 40:7</p> <p>mind 16:6 30:15,20 42:12 46:15 100:14</p> <p>minds 11:22 30:15 38:20</p> <p>minimum 25:6 39:15 101:7</p> <p>minute 56:8 88:2</p> <p>minutes 6:5,8 54:11 86:9,11</p> <p>mirror 14:3</p> <p>mirrors 8:22</p> <p>misspoke 80:21</p> <p>mistake 87:22</p> <p>mix 39:18</p> <p>mixed 73:11</p> <p>mixing 6:10,19 7:3 8:15,20 9:1,6 10:9 12:12,21 14:14,20,21,22 16:5 22:19 24:2,5,6,8,11 26:9 28:9,15,19,21,22 29:1,4,9,15,17 30:5,12 31:3,11,14,17,19 ,20 32:1,2,3,7,9,22 33:6,11,12,18 39:2,4 40:1 43:14,17 54:9 57:13,20 59:15,17,18,20</p>	<p>60:3,9,10,22 63:4,7 65:3,5 69:18 70:2,6,9 93:11,17 95:2,3,6 96:1 97:12,14,17 98:22 99:13 100:5,18</p> <p>model 20:10 22:13 53:15,20</p> <p>modeling 65:2</p> <p>models 52:20 53:14</p> <p>modification 16:9</p> <p>modified 12:14 17:9 82:12,14,21 93:7</p> <p>moment 71:7</p> <p>money 74:16</p> <p>monitoring 45:6,14 50:3 63:17 64:22 77:15 90:8</p> <p>month 73:21 77:2,5,16</p> <p>months 69:6 72:5</p> <p>moreover 50:19</p> <p>morning 5:12</p> <p>motion 6:16</p> <p>mounds 48:7</p> <p>move 66:20</p> <p>multiple 39:17 48:8 76:7 83:17</p> <p>multistep 26:11</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>nail 42:11</p>	<p>narrowly 10:18 21:12</p> <p>national 56:9 61:4</p> <p>native 84:2</p> <p>NDPES 5:7</p> <p>nearly 87:6 89:15</p> <p>necessarily 22:4</p> <p>necessary 39:6 56:20</p> <p>negative 37:7</p> <p>neither 103:7</p> <p>nice 99:20</p> <p>ninety 27:8</p> <p>nitrogen 8:5 65:4,6 89:2,8,16,18 90:1,3,11 91:13</p> <p>noncompliance 71:9 72:8</p> <p>nor 42:9 103:8,11</p> <p>normal 57:18 80:18</p> <p>Northwest 1:14 2:18 3:5</p> <p>Nos 1:6 5:7</p> <p>Notary 1:16 103:1,16</p> <p>notes 82:11</p> <p>nothing 16:15 58:11 85:16</p> <p>notice 1:13</p> <p>November 1:10</p> <p>NPDES 1:5,6</p> <p>numerical 98:1</p> <p>numerous 89:15</p>
--	---	---	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 15

<p>nutrients 56:19 63:5 64:13 82:9</p> <hr/> <p>O</p> <hr/> <p>obligation 44:6</p> <p>obtain 27:1</p> <p>obviously 35:16 101:15</p> <p>occupy 85:7</p> <p>occur 43:7</p> <p>occurred 20:9 61:9 65:6</p> <p>occurring 74:15</p> <p>occurs 17:13</p> <p>ocean 56:5 85:7</p> <p>oceanographic 41:10</p> <p>Office 2:16 5:22 6:1 47:16</p> <p>officer 103:2</p> <p>officially 54:5 85:18</p> <p>okay 21:5 40:5 42:6 60:16 68:9 86:12 96:20</p> <p>old 82:13</p> <p>ones 14:15 26:2 82:13 83:6 92:7</p> <p>on-off 40:7</p> <p>operate 6:22</p> <p>opinion 89:7</p> <p>opportunity 30:11</p> <p>opposed 14:4 31:21 69:16 86:15</p> <p>oral 1:11 4:2 5:4</p>	<p>103:3,4</p> <p>order 27:1 48:2 58:22 66:6 79:14 80:7,9 88:13 96:13</p> <p>organism 84:2</p> <p>organisms 83:17,20,21 85:6</p> <p>others 8:5 40:3 64:15</p> <p>otherwise 26:22 39:12 41:22 45:17,22 89:10 91:7 96:6 103:12</p> <p>ought 35:9 39:19 78:11 83:19</p> <p>outcome 103:12</p> <p>outfall 16:10 52:19 67:19,21</p> <p>override 65:7</p> <p>overriding 48:21</p> <p>oxygen 7:6 8:2 51:13</p> <hr/> <p>P</p> <hr/> <p>p.m 1:17 102:9</p> <p>Pacific 85:6</p> <p>page 4:2 13:16 54:6 91:5,6</p> <p>pages 1:11 45:3 52:17 74:10 84:18,19 89:7</p> <p>paragraph 60:6</p> <p>paragraphs 25:13</p> <p>parameters 7:21 8:3 12:6</p> <p>particular 40:16</p>	<p>41:12 64:20 70:3</p> <p>particularly 74:10</p> <p>parties 99:6 102:2 103:9,11</p> <p>party 5:14</p> <p>pass 86:7</p> <p>passed 69:6,7 83:16</p> <p>past 84:6 86:5</p> <p>path 79:9</p> <p>Pennsylvania 2:18</p> <p>people 56:1</p> <p>per 77:5,6</p> <p>percent 84:7</p> <p>perfection 92:12</p> <p>performing 59:19</p> <p>period 91:1 92:20,21 93:22</p> <p>periods 41:7,8,9</p> <p>permit 1:6 5:6 7:18,20 8:7 9:4 10:4 12:14 13:1,4 14:1,6 17:9 23:7,12,13,17 25:9 28:22 29:1,15 30:9 39:22 44:12 45:2,5,12,22 47:21 53:7 55:6,8,22 58:18 59:8 60:18 63:7,22 65:7,10,12,15,17 ,18 71:1 78:20 79:2,7,17 80:5,20,22 81:11 82:9,13,17,20</p>	<p>86:2 87:9 99:8</p> <p>permits 63:4,8,13,21 64:3 65:5 85:18,20 86:5 97:20</p> <p>permitted 6:21 15:12</p> <p>permitting 31:1 40:3</p> <p>persisted 90:3</p> <p>pH 17:10</p> <p>phones 5:10</p> <p>phrasing 74:15</p> <p>physical 19:21 52:22 65:2 67:16 70:18 93:5</p> <p>picture 95:13</p> <p>piece 26:19</p> <p>pilot 81:21</p> <p>pipe 8:10 100:12</p> <p>plain 38:19</p> <p>plan 80:12</p> <p>planned 81:7</p> <p>plant 1:5 5:6 45:8,10 76:16 80:10 81:10</p> <p>plants 6:21 49:5 51:13 59:19 87:7</p> <p>pleadings 31:3</p> <p>please 5:10,13 6:9</p> <p>pleases 6:18</p> <p>plume 100:16</p> <p>PMSD 86:19</p> <p>point 10:12 11:21 14:2 18:12</p>
---	---	---	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 16

<p>22:14,15 28:4 29:12 31:6 34:3 37:1 39:10 40:11 41:2 46:19 47:9 50:13 51:12 58:1 70:16 77:11 78:7 79:18 86:20 91:1 93:2 94:13 95:8,14 97:8 100:10,22 102:7</p> <p>pointed 53:19 59:17 63:6 73:18 77:10</p> <p>points 27:20 63:3 86:2 87:18</p> <p>policy 10:20 56:9 61:5 94:2</p> <p>pollutant 23:6 28:20 40:6 57:13,14,16,18 70:3 87:6</p> <p>pollutant(s) 17:8</p> <p>pollutants 7:8,16 9:13,18 10:3 12:13 14:7,11,14 15:7 17:16 18:4 23:3,8 34:1,22 52:11 56:19 58:3,10 63:13,14,15,17 64:17,20 71:2 94:10,11 101:4</p> <p>population 71:12,20</p> <p>Port 87:19,20,21 88:3</p> <p>posed 67:2</p> <p>posited 93:16 99:9</p> <p>position 7:12 11:8,9 12:1,9,10</p>	<p>15:22 17:1 24:14,17,18 25:6 44:3 60:15 66:10 71:13 76:9,12 98:7</p> <p>positive 41:3 44:15 45:14 46:5</p> <p>possibility 29:17</p> <p>possible 12:13 22:19 59:3 99:9</p> <p>possibly 37:1,8</p> <p>potentially 27:2 28:5 39:15 40:7</p> <p>POTWs 27:1</p> <p>practical 48:22 49:1 54:2</p> <p>preamble 16:17,18,21 24:13 54:7</p> <p>preambles 57:2,3,5 58:21 76:13</p> <p>precedence 7:4 12:4</p> <p>precise 74:22</p> <p>precisely 16:6 22:20 26:12 31:22 39:17</p> <p>predicate 37:18</p> <p>predict 86:18,22 90:16</p> <p>predictive 15:11 44:10 45:21 75:14 93:1</p> <p>preliminary 48:21</p> <p>premise 38:3</p> <p>prepared 53:11</p>	<p>present 3:9 75:14</p> <p>presented 10:1</p> <p>preservation 101:18</p> <p>preserved 101:15</p> <p>presiding 5:9</p> <p>presumably 21:10 51:6 57:18,20 70:6</p> <p>presupposes 45:16</p> <p>pretreatment 40:5 54:21</p> <p>pretty 27:10 43:16 53:15 56:21 57:8 68:22 86:4</p> <p>prevail 35:16 91:2</p> <p>previously 12:9</p> <p>primary 39:18 59:19 73:9</p> <p>prior 17:6 63:3,4,7,8 65:6</p> <p>probably 22:6 56:11 71:4 72:18 77:11</p> <p>problem 33:19 35:10 38:18 40:1 97:17</p> <p>problematic 39:5</p> <p>problems 83:9 87:13</p> <p>procedure 23:18 24:10 86:20</p> <p>procedures 24:8 29:14,16 30:21</p> <p>proceed 6:4</p> <p>proceeding 47:20,21</p>	<p>proceedings 102:8 103:7</p> <p>process 24:10 26:11 28:1,4,17 29:7,10,19 30:8 31:1 41:1 55:15 70:20,22 78:17 79:12 97:19</p> <p>processes 30:10 40:3</p> <p>produce 79:19 84:11</p> <p>professional 72:20 75:22</p> <p>program 45:6,14</p> <p>promulgated 58:13 59:9 85:19</p> <p>promulgation 64:9 85:10</p> <p>proper 33:2,6</p> <p>proposal 54:10 80:11 82:2,4</p> <p>proposals 88:8</p> <p>proposed 54:7 57:5 79:1,5 81:2 91:11</p> <p>proposing 66:11</p> <p>protect 31:4 75:5,8 83:20</p> <p>protected 58:17 59:12</p> <p>protecting 69:22</p> <p>protection 1:1,13 2:7,10,17 5:3 71:18 72:2 76:10</p> <p>protective 30:7 48:15 58:22 70:16 72:17</p>
---	---	---	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 17

<p>protocol 84:11</p> <p>provide 16:11</p> <p>provided 40:14</p> <p>provides 13:20</p> <p>provision 17:21 36:19 37:9 38:2 41:13,17 67:8</p> <p>provisions 24:6 59:16,18 60:9,10</p> <p>proxy 99:2</p> <p>public 1:16 50:21 73:2 103:1,16</p> <p>published 85:9,14</p> <p>purpose 38:22 58:4,5</p> <p>purposes 57:19 65:11</p> <p>pursuant 1:12</p> <p>puzzlement 12:18</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualification 62:6,12</p> <p>qualifies 80:10</p> <p>qualify 48:17</p> <p>quality 7:5 12:5 15:16 17:4,7,21 18:2,15 19:1,14 20:2,4,18 21:17 23:22 24:9 25:18 26:1 28:3,10,14,16 29:10,14 30:8,22 31:18 32:4 34:11,14,19 38:5,11,13,14 41:9,18,21 42:19,22 43:11</p>	<p>44:10 46:14,15 47:2 48:10,14 49:9,17 50:9,14,17 55:1,2,3,6 56:11 57:6 59:6,11 61:17,18 62:4 68:12,14,16,21 69:2,8,10,11,12, 15,20,21 71:17 72:1,17 73:7,13 74:5 75:6,8,10,14 76:3 77:20 82:8,10,22 86:22 87:2 89:22 90:7,10 91:11 92:2 93:7 97:21</p> <p>quality's 58:16</p> <p>quarter 77:6</p> <p>question 9:22 11:21 13:9 15:1 16:3 22:21 25:3 26:8 27:18 31:7 33:11 36:18 37:13 38:4 39:7 41:4 42:18 43:6 46:11 52:13 53:2 54:4 58:7 60:7,15 64:15 65:21 66:18 67:1 72:12 82:7 87:16 89:3 101:18</p> <p>questions 40:10 46:8 63:11 68:9 85:1 101:16,19</p> <p>quite 61:3 77:18 80:8</p> <p>quotation 54:6</p> <p>quote 7:4 12:4 24:1 58:20 91:10</p>	<p>quoted 86:17</p> <p>quotes 11:9 12:3</p> <p>quoting 32:14</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>radius 67:20</p> <p>raised 36:18 50:20 68:18 78:19 85:1 101:16 102:1</p> <p>range 57:6</p> <p>rather 7:3 13:9 56:5 65:2</p> <p>rational 27:1</p> <p>re 1:3 5:4</p> <p>reach 101:22</p> <p>reached 58:1 70:9</p> <p>reaction 78:22</p> <p>reading 10:17 17:2 33:2 37:9 43:9,15 45:3 87:22</p> <p>reads 75:18 76:11</p> <p>real 39:6 73:4 86:18 87:1</p> <p>realize 88:19</p> <p>really 17:11 42:16 53:11 57:22 61:4 66:12 75:19 76:20 83:19 88:16 95:15</p> <p>reason 28:14 30:10 44:8 45:19 53:12,13 61:21 78:16 97:13</p> <p>reasonable 38:20</p> <p>reasons 48:8 53:21 99:9</p>	<p>rebuttal 4:6 6:6,8 47:13</p> <p>recall 6:20 26:18</p> <p>received 69:14</p> <p>receiving 13:19 82:12</p> <p>recent 90:22</p> <p>recently 62:2</p> <p>recognize 28:5 60:10</p> <p>recognized 31:22 88:11</p> <p>recommends 24:3</p> <p>reconsidered 15:3</p> <p>record 5:14 6:17 7:20 9:8 10:6,13 40:13,20 45:12 49:6,15 55:17 66:1 81:19 91:18 94:17 99:14,15 100:2 103:7</p> <p>recording 5:11</p> <p>recourse 97:18</p> <p>recreation 48:15</p> <p>recreational 71:12 74:11</p> <p>recurrent 83:10</p> <p>red 85:5 86:6</p> <p>reduced 103:6</p> <p>refer 35:20 41:18 68:14 89:6</p> <p>reference 16:9 17:3,5 18:3,14,22 19:13,16 20:1,4,14 21:21 25:17,19,22</p>
--	--	---	--

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 18

<p>28:12 35:12 38:5,9 47:1,2 62:11 69:18 93:14</p> <p>referenced 15:6</p> <p>references 27:13</p> <p>referred 62:15 81:12 91:15 94:15 100:2</p> <p>referring 7:19 62:15,19 67:12 100:4</p> <p>refers 19:21 46:13,14 68:12,15 93:15</p> <p>reflect 9:5,13 93:7 96:1</p> <p>reflected 11:10 95:5</p> <p>reflecting 41:7</p> <p>reflection 29:4</p> <p>reflects 11:7 14:3 40:14 96:3 98:2,18</p> <p>refusal 6:12</p> <p>refused 24:14</p> <p>reg 27:10 65:14</p> <p>regard 8:14 9:8 14:10,19 26:5 33:13 39:10,11 41:5 74:13 89:1,16,18 91:2 94:10,13 96:2 97:9,22 100:7 101:5</p> <p>regarding 65:22 74:4 86:13</p> <p>regardless</p>	<p>97:20,21</p> <p>region 2:9 5:19,21,22 6:21 7:10 9:3,11 10:8,10,16 11:22 12:9 15:11,15 22:17 23:20 25:8 28:11 30:4,11,19 32:6,21 35:9,21 39:4 40:4,22 42:10 44:2 47:7,16 48:4,7 50:10,16,18 51:15 52:4,8 53:8 56:8 60:8 61:2,5,16,19 62:4 66:14,15 72:21 73:10,11,15 74:17,22 75:19 76:11,22 77:4,6 78:11,13 79:10 82:4,11 84:22 86:3,16 87:8,12 88:2 92:2 93:8 94:3 95:5,22 97:16 99:9 100:1 101:1</p> <p>Regional 2:9 5:22 47:16</p> <p>regions 48:16 56:16</p> <p>region's 6:12 15:2 25:6 49:12 50:7,8 60:14 65:8 74:6 76:8,15 81:1 92:1 99:7</p> <p>regretted 93:11</p> <p>regs 27:14 54:7,17 55:6,8 56:14 57:3,5</p>	<p>58:13,17,18 59:9 60:11,19 61:2,4 64:20 68:4,22 70:11,14 73:14 76:1,12 79:15 80:1,2 82:3</p> <p>regulated 75:18</p> <p>regulation 16:8,15,21 17:2,3,6 25:10 32:17,19 35:14,18 36:1,16 38:19 41:13 42:3,8 43:2 47:5</p> <p>regulations 11:11,19 12:11 17:19,20 18:19 19:8,12 27:8 36:22 46:21 47:7 50:11 60:3 90:6 93:15</p> <p>regulatory 11:13 22:13 25:4 26:6 36:6,20 37:3</p> <p>Reich 2:3 5:8 12:16 13:5 14:12 15:5,18 17:11 18:6 19:4,7,18 20:21 21:5,8,14,22 31:10,13 33:9 37:12 38:6,8 42:11 43:1,4 51:4,18 53:3,5 57:11 58:10 69:15 70:12,22 73:3 99:4</p> <p>reigned 95:12</p> <p>reiterate 59:16 88:12</p> <p>reject 33:20 34:2</p>	<p>relate 69:16</p> <p>related 6:15 67:2 103:8</p> <p>relates 101:3</p> <p>relation 58:5</p> <p>relative 103:10</p> <p>relatively 90:22</p> <p>relevant 8:15 42:18 43:5 57:15 69:14 84:1</p> <p>reliance 28:13</p> <p>relied 73:5</p> <p>relies 23:20</p> <p>relieved 44:5</p> <p>relying 89:19</p> <p>remand 78:11,16 88:5 89:3 91:2 101:11</p> <p>remember 8:16 12:19,22 80:4,8 83:2</p> <p>remind 25:16</p> <p>reply 78:8 88:2</p> <p>Reporting 1:15</p> <p>represent 5:14,16</p> <p>representing 5:22</p> <p>request 69:4 89:21 90:14</p> <p>requested 15:8 17:9</p> <p>requesting 12:7</p> <p>require 55:7 56:10 90:6 96:7</p> <p>required 10:8 12:10 35:22 44:13</p>
--	---	---	--

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 19

<p>45:8,10,15,20 46:4 59:11 78:21 79:1 85:8,13 89:4 90:18 94:8 requirement 17:18 27:4 44:17 46:1 58:19 59:4 70:16 81:2,4 requirements 25:12,14 26:22 39:12 54:22 63:22 65:7,12 81:3 requires 15:10 44:9 78:21 95:21 96:7,14 97:5,7 98:8,19 requiring 58:22 reserve 6:8 reserving 6:6 respect 21:15 22:18 24:21 28:14 65:3,8 66:2 respectfully 14:8 respond 9:22 34:7 49:10 91:22 94:5 responded 84:22 responds 24:17 response 11:4 76:19 84:14,17,18,21 85:4 86:3 responses 101:1 responsive 13:3 rest 18:5 100:6,7 restate 64:12 restrictive 57:17</p>	<p>result 8:21 25:4 40:2 43:10 46:5 results 13:18 44:14 45:6,13 49:2 77:22 84:11 92:10 review 10:19 rigor 75:16 ripe 36:5 rise 35:5 roaming 97:19 ROBERT 3:3 romanette 25:17 room 16:16 RPR 1:15 rule 64:9 rulemaking 20:7 61:9 rulemakings 61:8 <hr/>S<hr/>S.19.32 81:19 S.19.33 81:21 S02-4184 94:17 S-2-4161 23:22 Salmons 3:2 4:3,7 5:15,16 6:7,9 7:17 8:13 9:20 10:15 11:16,20 13:3,11 14:17 15:9,20 16:22 17:14,17 18:11 19:5,10,20 20:8,22 21:4,7,13,15 22:10 23:5,8,14,18 24:21 25:15,21</p>	<p>27:16 29:6,13,18 30:1,17,21 31:12,15 32:8,11,16,19 33:1,5,10,15 34:5,12,15,18 35:1,7,19 36:14,17 38:1,7,9 40:12,17 41:15 42:4,8,16 43:3,9 44:19 45:1 46:12,18 47:11,14 78:19 88:18 92:4,17 95:19 97:2,4 98:7 99:18 sample 13:18 74:2 77:5,6 samples 73:22 74:1 77:2,15 87:12 sampling 73:19 San 2:12 sand 1:5 5:5 9:10 44:14,19 45:6,7,14,16 46:5 50:2 60:21 61:11 62:3 78:20 79:2,3,7,20 80:17 81:13,17,18 84:5,19 89:2,6 91:5 satisfaction 18:14 96:15 satisfied 17:22 18:5 19:1 20:3 96:11 satisfies 22:19 satisfy 20:19 26:2</p>	<p>34:18 38:12 saw 55:22 schedule 79:3 scheme 11:13 scope 33:20 seasons 41:10 second 41:4 58:5 secondary 6:22 7:8 26:16 57:14,15 58:6,11 59:10 62:5,10,11 section 17:6,8,18 22:8 45:4 54:22 66:5 67:3 Sections 6:11 seeing 12:19,22 seeking 12:14 34:2 39:11 seem 62:10 78:8 80:15 83:5 seemed 79:19 95:14 seeming 76:20 95:17 seems 22:4 32:9 33:3 37:18 39:13 74:9 75:16 99:6 sense 16:4 39:20 96:15 sensitive 83:22 sentence 80:19 separate 101:2,3 session 5:4 several 27:18 share 12:17 Sheehan 2:4 5:9</p>
--	--	--	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 20

<p>8:11 10:10 11:12,18 17:12,15 20:6 23:2,6,12,16 29:11,21 30:14,19 32:5,9,14,18,21 33:3 35:17 36:11,15 43:6 44:16,21 50:13 61:7 62:1,17 64:11 71:6 72:3 74:8 75:13 79:6,17 80:1,15 84:9 87:16 95:8 96:16 97:3 98:4</p> <p>shellfish 71:20</p> <p>shift 95:17</p> <p>shooting 100:20</p> <p>shore 64:5,7</p> <p>short 99:19</p> <p>showed 51:6 82:5</p> <p>showing 80:18 81:15 96:10</p> <p>shows 37:8 49:6 90:2,21 96:12</p> <p>sic 62:6</p> <p>significance 86:14,15</p> <p>significant 10:20 39:16 75:12 94:2</p> <p>similar 72:11</p> <p>simplify 68:2</p> <p>simply 71:16</p> <p>single 72:4</p> <p>sit 40:20</p> <p>site 28:19</p>	<p>situations 41:11</p> <p>six 77:1,15</p> <p>slightly 50:13 89:13</p> <p>small 89:12,19 90:12</p> <p>so-called 60:14</p> <p>solids 7:7 12:15 17:10 41:19 94:7</p> <p>someday 36:7</p> <p>somehow 100:13</p> <p>somewhere 80:9</p> <p>sorry 11:16 23:14 30:17 32:8,16 33:15 85:19 92:17</p> <p>sort 66:17 92:22 97:19</p> <p>sought 7:9 18:5</p> <p>sound 11:12,18 56:12</p> <p>sounded 53:6 80:2</p> <p>sounds 29:2 74:17 79:8</p> <p>speak 60:15 61:11</p> <p>speaking 27:5 36:15</p> <p>species 66:8 83:14 84:2 85:11,12,14</p> <p>specific 6:14 7:7,21 8:3,7 13:21 24:15,16 26:19 28:19,20 30:9 48:1 58:15 61:14 92:7 98:1</p> <p>specifically 7:1 9:11 14:15 24:13</p>	<p>44:4,13 47:22 49:21 52:2 56:17 59:18 72:22 97:11</p> <p>specified 13:2,22 63:12 82:10 87:9,10</p> <p>specifies 23:20</p> <p>specify 53:7</p> <p>spent 57:4</p> <p>split 87:12</p> <p>spoke 16:18</p> <p>square 16:7 24:12 34:3</p> <p>squared 16:20</p> <p>squares 41:13</p> <p>stand 102:7</p> <p>standard 17:7 19:15 24:9 29:10,18 30:8,13,22 38:5,16 39:21 40:9 41:21 43:11,13,17 44:11 51:16 55:3 58:8,18 59:7,8 63:6 68:17,21 70:5,9 72:15 77:3,21 78:10 83:12 84:7 86:22 87:2 90:17 92:11,14 93:8 96:3,12,17,18,21 97:1 98:1,2,4,10,12,1 3,14,15,17,21</p> <p>standardized 85:10</p> <p>standards 7:6 8:17</p>	<p>12:5 15:17 17:4,7,22 18:3,15 19:1 20:2,4,18 21:17 23:16,22 24:5,7,14 25:18 26:1 28:4,11,14,16 29:14 31:18 32:4 34:11,14 38:11,14,15 39:1,2 41:19 42:19,22 46:14,15 47:2 48:10,12 49:9,18 50:9,14,17 51:10 52:2,6,10 55:1,3,6,10,13,2 1 56:2,3,4,11,18 57:6,9,14,16 58:15 59:1 61:19 62:4,7,8 63:1,10 64:4,10 65:17 68:5,14,16 69:1,4,8,9,11,12, 13,16,20,21 70:18 71:18,21,22 72:19 73:7,13 74:5,17 75:8,10 78:13,15 81:3 82:22 83:11 88:6 90:7,10 91:12,17 92:2 93:6,7,10 95:9,11,12,15,16 96:1,5 97:9,10,21 98:22</p> <p>standing 36:5</p> <p>standpoint 49:1</p> <p>start 8:19 13:14 27:16,19 48:19 52:21</p>
--	--	---	--

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 21

<p>started 27:19</p> <p>starting 79:2,4 99:5,10</p> <p>state 5:13 7:5 8:15 9:7 10:8 12:5,12 14:20,21 15:16 16:5 19:14 20:18 22:19 23:21 24:3,7,14 25:18,22 26:8 28:3,10,15,16 30:5,12,14 31:16,18 32:2 33:10,12,18 38:10,15 39:1,2 40:15,17 41:21 43:11,18 55:10 59:2,7 60:8,10 62:4,7 66:1,7,12 70:4 82:22 90:10 93:7,17 95:3,6,9,11,15,2 2 96:1,12,17,18 97:1,9,10,12,14, 17,21 98:4,14,15,19,22</p> <p>state-approved 14:4</p> <p>stated 7:1 45:13 79:10</p> <p>statement 20:1 24:4 53:9 82:1</p> <p>statements 25:1 52:5 89:1 91:14</p> <p>states 24:4 96:4</p> <p>state's 7:2 93:11</p> <p>States 1:1 5:3</p> <p>stations 63:17 90:8</p> <p>statistical 86:15</p> <p>statute 12:11</p>	<p>18:17 19:2,11 20:17 21:20 22:20 26:7 27:20 46:22 70:12 73:15 96:14 97:7 98:8,18</p> <p>statutory 27:6 32:13 36:18 37:9 38:22 68:11 93:16</p> <p>Stein 2:5 5:8,12,20 6:3 7:14 9:15 16:7 21:1 24:12 25:8,20 26:14 28:18 29:16 33:14,16 34:9,13,17,20 35:2 37:16 39:10 40:10,13 41:4 42:2,6 46:10,13 47:9,12 49:10 50:6 55:12,17 57:3 60:1,13 62:14 63:12 65:3,11,21 66:18,20 67:1,6 68:7 82:7,19 86:8 91:22 92:14 101:12</p> <p>Stein's 12:18 29:12 64:15</p> <p>stenotype 103:5</p> <p>step 22:13 40:22 63:9 94:19,22 95:1 100:4,9</p> <p>Stephen 2:15 6:1</p> <p>steps 29:6 35:8</p> <p>straight 44:8</p> <p>stratification 41:8</p> <p>Street 2:11 3:5</p>	<p>strict 39:21 96:9,13</p> <p>stricter 96:17</p> <p>stringent 27:3 58:8,18 59:2 68:20 96:22 98:6,15</p> <p>strong 51:7</p> <p>structure 38:2,22 43:2</p> <p>struggling 67:6</p> <p>studied 81:7</p> <p>studies 86:18</p> <p>subject 55:11 84:12</p> <p>subjunctive 74:15</p> <p>submit 10:18 14:5 45:21 87:13</p> <p>submitted 69:9</p> <p>subsequent 60:22</p> <p>subset 7:16</p> <p>substances 8:6 9:3 10:6</p> <p>substantial 51:20</p> <p>substitute 25:14</p> <p>suddenly 7:10</p> <p>sufficient 52:9 72:8,9,16</p> <p>sufficiently 30:6</p> <p>suggest 98:9,12</p> <p>suggested 16:17</p> <p>suggestion 22:18 31:2 32:12 97:13</p> <p>suggests 22:11</p> <p>supplement 6:16</p>	<p>support 23:19 56:13 67:17 94:14,18 100:1</p> <p>supposed 67:9 83:18</p> <p>supreme 95:12</p> <p>sure 11:16 25:9 29:3 33:5 36:4 40:18 42:4 53:15 58:16 62:18 64:11,16 66:15,19,22 68:5 80:20,21 83:20 96:16</p> <p>surprise 94:4</p> <p>suspended 7:7 12:15 17:10 41:19 94:7</p> <p>Suzette 2:8 5:18,21 47:15</p> <p>Sweeney 2:15 6:1</p> <p>swim 74:1</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tailored 40:4</p> <p>taking 100:6</p> <p>talk 19:19 47:17 56:7 99:5</p> <p>talked 26:19</p> <p>talking 18:13 19:19 32:17 62:22 92:6</p> <p>talks 37:16 41:5 67:17</p> <p>target 100:6,14</p> <p>TDDs 62:3,6,11</p> <p>technical 8:17 23:19 24:1 26:10</p>
--	--	---	--

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 22

<p>51:4,9 52:8 56:13 58:15 67:17 72:20 81:7 94:14,18 100:1 101:7</p> <p>temperature 52:20 100:17</p> <p>ten 6:8 51:14 84:6 86:5</p> <p>tentative 7:1,11 10:22 11:6 40:22 51:1 60:17 62:19,22 63:1 72:21 74:18 76:21 77:12,13 83:3</p> <p>tentatively 66:11</p> <p>tentative's 74:20</p> <p>term 25:6 31:10,14,20 54:20 55:13,20</p> <p>terms 19:11 38:19 42:1 54:2,15 56:7 57:8 81:14 85:1 93:9 99:5 100:15</p> <p>territory 71:7</p> <p>test 83:16 84:4,6,14 85:3,16 86:4,13,21,22 92:17,18 94:20</p> <p>testimony 103:4</p> <p>testing 8:19 9:9 84:12 85:8,12,15 86:19 94:17</p> <p>tests 83:17 84:3,6 85:6,11,20 86:18</p> <p>text 32:13</p>	<p>Thacker 1:15 103:2,15</p> <p>Thank 5:15 6:8 16:22 47:8 88:17,18 102:7</p> <p>Thanks 101:12</p> <p>that'll 42:19</p> <p>that's 9:6 12:10 13:10 14:8 15:18,22 18:10 19:20 21:16 22:20 24:10 25:15,17 29:4,10,11 30:1 32:11 33:2 35:19 36:9 38:11 40:2 41:2 44:8,19 45:11 47:11 49:14 50:11 51:21 54:16 56:6,21 59:7,8,12,21 61:5,20,21 63:6 66:3 67:7 68:3,22 72:1,11,16 75:6,9 76:11 78:15 80:9 85:4,17 86:5 87:14 88:1 89:13 92:4,13 93:12 94:7,8 96:20,22 97:7,12 98:18 100:3,5,19,20 101:8</p> <p>theory 36:7</p> <p>thereafter 103:5</p> <p>therefore 44:5 90:9,15 99:1</p> <p>there's 10:7 13:9 18:19 22:15</p>	<p>23:10 24:10,15,16 25:21 26:5 30:10 31:2 32:12 35:10 37:6,19 41:21 47:17 48:5 49:19 54:5 55:5 57:5,7 58:20 66:5,12 68:10 71:8,9 74:3 76:5 78:16 79:19 81:8,9 83:10,18,19 85:16 88:8 89:12 91:18 92:12 93:4,13 97:13 98:9,20</p> <p>they're 22:11 29:21 50:19 69:9,22 76:17,18,19,20 78:10 83:6 87:11,13 88:5,15 91:6 93:22 99:1</p> <p>They've 28:16</p> <p>third 30:11</p> <p>thoroughly 81:6</p> <p>three-quarters 84:5</p> <p>thrust 27:21 28:2</p> <p>Thursday 1:10</p> <p>tides 52:19 100:17</p> <p>tie 20:7 54:5,12</p> <p>tied 86:17</p> <p>tighten 93:10 97:18</p> <p>tissue 74:1 75:2</p> <p>today 67:11 101:14</p> <p>tool 85:13</p>	<p>too's 87:14</p> <p>top 58:21</p> <p>total 7:7 8:5</p> <p>totally 57:16 62:20 82:3</p> <p>touched 87:5</p> <p>tougher 72:18</p> <p>towards 66:4 100:20</p> <p>toxic 8:6 9:3 10:5 56:19 57:7 87:6</p> <p>toxicity 6:15 48:10 52:12 53:22 72:14,15 73:14 76:8 83:8,9,11,14 85:6,10 87:10 91:13</p> <p>toxics 10:12 94:21 100:11</p> <p>tracked 61:9</p> <p>traditional 77:1,16</p> <p>transcription 103:6</p> <p>transport 16:12</p> <p>treat 40:5</p> <p>treated 39:18 62:5</p> <p>treatment 1:5 5:5,6 6:22 7:8 26:16 45:8,9 51:13 58:6,11 59:10,19 62:10,11 80:10,12 87:7</p> <p>trial 44:14</p> <p>tried 101:4</p> <p>trigger 40:7</p>
--	---	--	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 23

<p>tripped 96:18</p> <p>true 32:11 33:13 61:21 97:12 103:7</p> <p>trump 24:15</p> <p>try 86:16 88:19 100:21</p> <p>trying 10:18 20:11 42:5,11 43:1 74:22 82:14 87:11,13</p> <p>TSD 61:3 73:15 87:10</p> <p>TSS 12:8 15:19 17:12 21:9 54:18 56:22</p> <p>turbidity 8:1 82:8</p> <p>turn 5:10</p> <p>Turning 48:19</p> <p>turns 68:8</p> <p>two-thirds 60:4</p> <p>type 71:14</p> <p>types 26:12 32:1 85:20</p> <p>typewriting 103:6</p> <p>typical 47:21</p> <hr/> <p style="text-align: center;">U</p> <p>U.S 1:13 2:7,10,17</p> <p>unacceptable 70:8 75:1</p> <p>uncertainties 74:14</p> <p>uncertainty 26:5 74:4</p> <p>undergone 85:15</p> <p>understand 6:5</p>	<p>11:17 20:9 21:2 27:11 28:18 29:8 33:22 37:20 38:6,19 39:1 43:1 46:20 58:4 62:3 64:11 67:3,7 72:7 75:13 82:14 96:19 100:21 102:5</p> <p>understanding 7:15 16:20 18:7 27:13 31:13 41:15 65:8 67:15</p> <p>understands 100:12</p> <p>understood 21:20 27:22 36:17 37:13 47:1 53:5 61:8 72:10</p> <p>undertaking 16:2</p> <p>United 1:1 5:3</p> <p>units 77:21</p> <p>unjustified 12:2</p> <p>unless 48:4,15 66:10 69:22</p> <p>unlike 69:17</p> <p>unprotective 97:15</p> <p>unreliable 97:15</p> <p>untraditional 78:5</p> <p>updated 53:14</p> <p>upheld 48:18 50:1</p> <p>urchin 83:15,17,22 84:4 85:2 86:4,13</p> <p>urchin's 84:1</p> <p>urge 26:4 38:21</p>	<p>84:17</p> <p>usually 42:19</p> <p>UV 81:9,13</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>valid 36:12</p> <p>value 13:17</p> <p>values 69:22</p> <p>variance 12:7 15:12 48:2,6,8,17 66:2,6,11</p> <p>variety 51:11 92:6</p> <p>various 69:22 77:9</p> <p>verse 53:16</p> <p>version 18:19</p> <p>versus 64:17 95:9</p> <p>viability 84:12</p> <p>view 7:11 10:17 15:5 21:9 34:3 39:13 43:21 97:5</p> <p>violated 87:6</p> <p>violations 11:2 45:17 50:1,2 51:14,16,19 54:1 65:16,19 74:5</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 75:7 88:2</p> <p>waive 25:14 81:1,4</p> <p>waiver 7:8 11:2 15:8 18:4 26:16,21 27:2 28:4 34:2 35:21 36:2 39:12 40:15,16 44:4,11 46:7 51:8,21 52:7 55:15</p>	<p>58:5,15 80:11 88:13,16 89:21 91:10 92:3,18,19,22 97:19</p> <p>waivers 7:2</p> <p>walks 94:19</p> <p>Washington 1:2,9,14 2:20 3:6</p> <p>wasn't 24:19 35:17 46:22 50:3 61:13,14 64:13,18 84:11 85:13 87:17,20,21 88:3</p> <p>wastewater 1:5 5:5,6 16:13 45:7,9</p> <p>water 7:5 12:5 13:19 15:16 17:4,7,21 18:2,14 19:1,14 20:2,4,18 21:17 23:21 24:2,9 25:18,22 27:22 28:3,10,13,16 29:10,14 30:8,22 31:5,18 32:4 34:11,13,19 38:5,11,13,14 41:9,18,21 42:19,21 43:11 44:10 46:14,15 47:2 48:10,14 49:9,17 50:9,14,17 52:19 55:1,2,3,5,11 56:3,10 57:6 58:16 59:6,11,13 61:17,18 62:4 67:20 68:12,14,15,21</p>
--	---	--	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010

Capital Reporting Company

Hearing 11-19-2009

Page 24

<p>69:2,8,10,11,12, 15,20,21 71:17 72:1,17 73:7,13 74:5 75:6,7,8,10,13 76:3 77:20 82:8,10,12,22 83:15 85:12 86:22 87:2 89:22 90:4,7,10 91:11 92:2 93:7 97:21</p> <p>waters 8:9 93:4</p> <p>ways 58:17</p> <p>weather 53:13</p> <p>We'd 6:7</p> <p>weeks 72:4</p> <p>we'll 86:9,11</p> <p>we're 10:7 17:22 18:13 20:11 26:3 33:7 34:21 35:2 36:21 46:4 71:6 92:5 93:5,6 101:5,19</p> <p>West 84:13 85:15,17,21,22</p> <p>wet 8:19 9:9 82:8,13 83:4 86:18 94:16,20</p> <p>we've 54:3 87:6 88:21 93:20 101:13,15</p> <p>Whereupon 102:8</p> <p>whether 8:14 9:22 10:2 15:12,13 23:10 24:5 36:12 40:14,17 42:18 43:4,7 45:19 51:7,10 65:19,22 66:12 68:12 71:8 80:10 81:2 82:7</p>	<p>89:3 101:9</p> <p>whole 6:15 28:4 31:6 47:6 83:8 85:9 87:8 91:12</p> <p>whom 103:2</p> <p>wildlife 71:21</p> <p>wondering 72:6</p> <p>work 44:18 67:16 79:16 82:6</p> <p>works 80:17 82:15</p> <p>world 86:19 87:1</p> <p>worry 96:20 97:1</p> <p>worrying 58:2 64:6</p> <p>wrap 86:9,11</p> <p>writer 86:2</p> <p>writers 55:22</p> <p>written 60:20 75:4,7,8</p> <p>wrong 45:3,11 61:20,21,22</p> <p>wrote 54:17</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yet 9:17 37:15 69:8,14</p> <p>yield 43:10</p> <p>you'll 9:10 18:21 89:7</p> <p>yourself 22:14</p> <p>you've 27:11 58:16 94:7</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zener 3:3 5:17 6:14</p>	<p>ZID 7:4,22 9:7,13 10:11,13 11:3 13:9,20 14:3 17:22 18:15 19:2,16,17 20:1,3,20 21:18 24:15 26:2 27:7,9,10 32:6,10,20 33:4,6,8 34:21 35:4 38:13 43:7,15 47:17 48:20 49:7 50:3,10,15,18 52:5,22 53:18 54:1,9 56:11,20 58:3,19 59:14 61:10 62:15,16 63:2,11,12,16,19 64:7 65:2 67:18,22 70:11,15 71:4 90:6,15 93:8 95:6 97:14</p> <p>ZID/ZOM 10:1 14:10 94:10 101:2</p> <p>ZOM 7:3 8:4 10:4 12:4 13:9 14:4,7 18:5 23:2,9,12,17 29:22 35:3 43:8,13 47:18 48:20 49:7,8,14,18 50:1,3,4,15,20 51:2,6,19 52:2,6,9,22 53:17 54:1 58:3 59:15 62:5,8,10,16,17 63:11,16,19 64:8,12,19</p>	<p>65:2,3,5 70:18 71:2,3 89:10,20 90:13,18,19 94:6</p> <p>ZOM-like 9:18</p> <p>ZOMs 7:15</p> <p>zone 7:3 8:14,15,20 9:1,6 10:9 12:6,12,21 14:14,20,21,22 16:5,14 22:19 24:6 28:19,21,22 29:2,5,9,15,17 30:5,12 31:3,17,19,21 32:3 33:6,11,12,18 37:17,22 40:1 43:15,17 57:13,21 59:15,17,18,20 60:3,9,10,22 63:4,7 65:4,5 70:3,6,9 93:11,17 95:2,7 96:1 97:17 98:22 99:13 100:5,18</p> <p>zones 6:10,19 24:3,5,8,11 26:9 28:10,15 31:17 32:1,2,3 39:2,5 95:3 97:12,14</p>
--	---	--	---

(866) 448 - DEPO

www.CapitalReportingCompany.com

© 2010