

Capital Reporting Company
Hearing 11-19-2009

65

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

Capital Reporting Company
Hearing 11-19-2009

66

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.

Capital Reporting Company
Hearing 11-19-2009

67

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

Capital Reporting Company
Hearing 11-19-2009

68

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,

Capital Reporting Company
Hearing 11-19-2009

69

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

Capital Reporting Company
Hearing 11-19-2009

70

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 has
7 again made a judgment there that there is no
8 unacceptable environmental harm if you do not meet the
9 standard until you reached the mixing zone?

10 MS. LEITH: Well, there again, I think EPA
11 regs for 125.62 do say at the ZID. I know the --

12 JUDGE REICH: I'm going back to the statute.

13 MS. LEITH: So the -- but then again, under
14 (h)(2), it's these same regs, and I think they also do
15 mention the ZID, and it goes back to the same
16 requirement of being extra protective. The other point
17 to make, is, again, with Hawaii, there is not a
18 physical ZOM that Hawaii has not said standards don't
19 have to be met within X amount, X feet of the discharge
20 or anything like that. What Hawaii has is a process,
21 and it does not --

22 JUDGE REICH: But it has a process that has

Capital Reporting Company
Hearing 11-19-2009

71

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,

Capital Reporting Company
Hearing 11-19-2009

72

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 is
9 sufficient that it means environmental harm as
10 understood by (h)(2).

11 MS. LEITH: That's similar to the same
12 question before. Is there ever a judgment call there?
13 And I think there may be, but I don't think we were
14 there here. For example, the toxicity numbers were so
15 bad. The toxicity standard was exceeded almost all the
16 time, and that's sufficient, I think, to say that you
17 don't have water quality which is protective of a BIP.

18 It may be -- it was probably a tougher call
19 for some of the other standards, but, again, it's kind
20 of a technical professional judgment call, and the
21 region made that call. It set out in the tentative
22 decision why it made the call. It specifically

Capital Reporting Company
Hearing 11-19-2009

73

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

Capital Reporting Company
Hearing 11-19-2009

74

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.

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.

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

Capital Reporting Company
Hearing 11-19-2009

75

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.

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.

21 MS. LEITH: Again, I wouldn't call it a good
22 guess. I'd call it best professional judgment. I'd

Capital Reporting Company
Hearing 11-19-2009

76

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.

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

Capital Reporting Company
Hearing 11-19-2009

77

1 do a traditional geometric mean based on five or six
2 samples a month.

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.

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.

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

Capital Reporting Company
Hearing 11-19-2009

78

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.

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.

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

Capital Reporting Company
Hearing 11-19-2009

79

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.

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.

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.

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.

22 MS. LEITH: I'm --

Capital Reporting Company
Hearing 11-19-2009

80

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.

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 --

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.

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

Capital Reporting Company
Hearing 11-19-2009

81

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.

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.

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

Capital Reporting Company
Hearing 11-19-2009

82

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.

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.

16 MS. LEITH: Yeah. The -- so you're saying
17 the '88 permit or the '91 permit is different from the
18 decision here.

19 JUDGE STEIN: It appears to be.

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

Capital Reporting Company
Hearing 11-19-2009

83

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.

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.
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

Capital Reporting Company
Hearing 11-19-2009

84

1 frankly, the urchin's a lot more relevant because it's
2 a native species, and it's a marine organism.

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 --

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 not
14 include this test method, so what is your response to
15 method used?

16 MS. LEITH: To the method used, my first
17 response is I'd urge you all go back and look at the
18 response to comments, because there are 19 pages in
19 Sand Island and about 13 pages in Honouliuli --
20 actually, I think I have that backwards. What CCH is
21 doing is criticizing the response to comments, and the
22 region responded very comprehensively.

Capital Reporting Company
Hearing 11-19-2009

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.

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.

22 So on the West Coast, which would include

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

Capital Reporting Company
Hearing 11-19-2009

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 Dieltrin 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 wasn't
18 used because it hadn't been approved, but as CCH points
19 out, 8270 was used in Port Loma, and it's good enough
20 for Port Loma, why wasn't it good enough here?

21 MS. LEITH: Actually, it wasn't used in Port
22 Loma. That was my mistake reading their brief. I

Capital Reporting Company
Hearing 11-19-2009

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

Capital Reporting Company
Hearing 11-19-2009

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

90

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.

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.

21 And, in fact, the data shows that there were
22 relatively fewer exceedances in the more recent time

Capital Reporting Company
Hearing 11-19-2009

91

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.

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 --

22 JUDGE STEIN: How do you respond to the

Capital Reporting Company
Hearing 11-19-2009

92

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?

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 --

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?

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

Capital Reporting Company
Hearing 11-19-2009

1 predictive judgment, and I think that what you see
2 here -- and this is -- I think goes to a broader point.

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.

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.

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

Capital Reporting Company
Hearing 11-19-2009

94

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 BOD
7 and suspended solids, because that's the way you've
8 always done it and because that's what's required.

9 In our brief, we made clear that our arguments
10 with regard to ZID/ZOM apply to all of the pollutants
11 except for bacteria, which includes these pollutants
12 for which a dilution factor has been used, and with
13 regard to that, I would point the Court to the EPA's
14 technical support document, what my friend on the other
15 side referred to as their bible for these things, which
16 defines in the discussion, for example, of WET
17 testing -- and this is in the record at S02-4184. This
18 is from the technical support manual, and it says it
19 walks through step by step how do you determine the
20 dilution factor when you're doing the WET test, and
21 it's the same for these other toxics.

22 And it says, Step 1, dilution determination.

Capital Reporting Company
Hearing 11-19-2009

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

Capital Reporting Company
Hearing 11-19-2009

96

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.

Capital Reporting Company
Hearing 11-19-2009

97

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,

Capital Reporting Company
Hearing 11-19-2009

98

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

Capital Reporting Company
Hearing 11-19-2009

99

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

Capital Reporting Company
Hearing 11-19-2009

100

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

Capital Reporting Company
Hearing 11-19-2009

101

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 leaning
20 in one direction or another, but we wanted to get a full
21 explanation of the arguments on the merits in the event
22 that we reach the merits on all of the issues that have

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.)

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Capital Reporting Company
Hearing 11-19-2009

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 *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

Capital Reporting Company
Hearing 11-19-2009
Page 1

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

Capital Reporting Company
Hearing 11-19-2009
Page 2

<p>25:13,20,21 38:4 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</p>	<p>actually 5:20 8:8 9:2 57:4 63:17 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</p>	<p>2:7,10,17 5:3 agency's 75:17 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</p>	<p>ample 97:17 analysis 15:1,21 16:2 33:8 39:6 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</p>
---	--	---	---

Capital Reporting Company
Hearing 11-19-2009
Page 3

<p>20:2,13,15 21:6,10,17 22:6 25:7 26:2,3 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 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 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>
---	---	---	---

Capital Reporting Company
Hearing 11-19-2009
Page 4

<p>basically 18:9 34:13 55:9 66:10 67:18 78:20 86:1 87:6</p> <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</p>	<p>74:13 91:16</p> <p>biochemical 7:6</p> <p>biological 41:10 73:12,19,22 74:4 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</p>	<p>86:16 87:22 88:2,9,19 94:9</p> <p>briefing 101:2</p> <p>briefly 66:17 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 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</p>
--	---	--	---

Capital Reporting Company
Hearing 11-19-2009
Page 5

<p>60:9 68:16 81:1 96:4</p> <p>CERTIFICATE 103:1</p> <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>chlordan 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</p>	<p>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>
--	---	---	---

Capital Reporting Company

Hearing 11-19-2009

Page 6

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

(866) 448 - DEPO

www.CapitalReportingCompany.com

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Capital Reporting Company

Hearing 11-19-2009

Page 7

<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 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</p>	<p>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</p>	<p>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 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 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</p>
---	---	--	---

(866) 448 - DEPO

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© 2010

Capital Reporting Company
Hearing 11-19-2009
Page 8

<p>93:3 discount 51:15 discredit 87:11 discretion 24:3 86:1 92:3 discussed 48:22 52:12,15 54:3,16 73:1 78:18 83:2 99:21 discusses 52:17 discussing 26:3 93:20 discussion 24:16 57:7 59:15 68:10 79:21 89:8 94:16 99:18 disinfect 82:5 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 dispersion 16:12 dispute 19:17 disputed 19:3 disputing 18:1 disregard 16:4 26:8 dissolved 8:2 51:13 distinction 9:6 64:16 distinguish 28:15</p>	<p>District 1:16 103:17 document 8:17 23:19 26:10 52:17 56:13 67:17 81:19,20 82:11 94:14 100:1 documented 99:15 documents 99:20 101:8 dollars 40:8 done 24:6 31:2 41:2 85:8 94:8 dramatically 12:1 dry 82:8,10,12 83:4 during 24:9 41:8 49:3 83:1 93:22 Durr 3:10 5:2 <hr/>E<hr/>earlier 21:9 25:9 37:14,16 53:6 78:5 early 58:21 61:10 easiest 56:6 East 85:11 economic 26:12 edge 8:22 13:8 56:20 95:2 100:19 Edward 2:3 5:8 effect 60:19 63:22 64:4 69:10 effective 16:10 effects 58:2 76:6</p>	<p>86:19 87:1 efficient 7:22 13:17 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 either 13:2 36:5 51:8 89:12 else 59:7,9 emphasis 57:6 95:18 emphasize 47:4 50:10 81:16 employed 103:8,11 employee 103:10 enabled 102:5 encompass 33:18 encouraged 39:3 encouragement 28:2 Endangered 66:8 enlighten 67:8 enormous 74:19 ensure 59:10 enterococcus 77:22 entire 27:21 28:1 entirely 42:4 entitled 28:22 environmental 1:1,12,13 2:2,7,10,17 5:2,3</p>	<p>26:13 30:7 31:4 58:2 70:8 71:10 72:9 73:5 97:15 environmentally 57:22 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 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 EPA-approved 87:9 EPA- recommended 68:19 EPA's 8:16 26:10 56:7,9 58:22 66:11 76:11 88:9 94:13 equipment 79:4 Erick 1:15 103:2,15 error 10:7 11:14 15:4 25:8 48:16 ESQUIRE 2:8,15 3:2,3 essentially 17:5 28:17 30:13</p>
---	---	---	---

Capital Reporting Company
Hearing 11-19-2009
Page 9

<p>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> <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</p>	<p>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 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 style="width: 50%; margin: 10px auto;"/> <p style="text-align: center;">F</p> <hr style="width: 50%; margin: 10px auto;"/> <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 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</p>	<p>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 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</p>
---	--	---	--

Capital Reporting Company
Hearing 11-19-2009
Page 10

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

Capital Reporting Company

Hearing 11-19-2009

Page 11

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

(866) 448 - DEPO

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Capital Reporting Company

Hearing 11-19-2009

Page 12

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

(866) 448 - DEPO

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Capital Reporting Company
Hearing 11-19-2009
Page 13

<p>June 103:22</p> <p>jurisdictions 28:6 39:17</p> <p>justification 11:8</p> <p>justified 51:21</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kathie 2:5 5:8</p> <p>key 100:18</p> <p>kills 75:8,9</p> <p>kinds 81:8</p> <p>knew 13:6 81:16,22</p> <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</p>	<p>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 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 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</p>
---	--	--	---

Capital Reporting Company
Hearing 11-19-2009
Page 14

<p>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> <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</p>	<p>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 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 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</p>	<p>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>nailed 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>
---	---	---	--

Capital Reporting Company
Hearing 11-19-2009
Page 15

<p>nor 42:9 103:8,11 normal 57:18 80:18 Northwest 1:14 2:18 3:5 Nos 1:6 5:7 Notary 1:16 103:1,16 notes 82:11 nothing 16:15 58:11 85:16 notice 1:13 November 1:10 NPDES 1:5,6 numerical 98:1 numerous 89:15 nutrients 56:19 63:5 64:13 82:9</p> <hr/> <p style="text-align: center;">O</p> <p>obligation 44:6 obtain 27:1 obviously 35:16 101:15 occupy 85:7 occur 43:7 occurred 20:9 61:9 65:6 occurring 74:15 occurs 17:13 ocean 56:5 85:7 oceanographic 41:10 Office 2:16 5:22 6:1 47:16</p>	<p>officer 103:2 officially 54:5 85:18 okay 21:5 40:5 42:6 60:16 68:9 86:12 96:20 old 82:13 ones 14:15 26:2 82:13 83:6 92:7 on-off 40:7 operate 6:22 opinion 89:7 opportunity 30:11 opposed 14:4 31:21 69:16 86:15 oral 1:11 4:2 5:4 103:3,4 order 27:1 48:2 58:22 66:6 79:14 80:7,9 88:13 96:13 organism 84:2 organisms 83:17,20,21 85:6 others 8:5 40:3 64:15 otherwise 26:22 39:12 41:22 45:17,22 89:10 91:7 96:6 103:12 ought 35:9 39:19 78:11 83:19 outcome 103:12 outfall 16:10 52:19 67:19,21</p>	<p>override 65:7 overriding 48:21 oxygen 7:6 8:2 51:13</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m 1:17 102:9 Pacific 85:6 page 4:2 13:16 54:6 91:5,6 pages 1:11 45:3 52:17 74:10 84:18,19 89:7 paragraph 60:6 paragraphs 25:13 parameters 7:21 8:3 12:6 particular 40:16 41:12 64:20 70:3 particularly 74:10 parties 99:6 102:2 103:9,11 party 5:14 pass 86:7 passed 69:6,7 83:16 past 84:6 86:5 path 79:9 Pennsylvania 2:18 people 56:1 per 77:5,6 percent 84:7 perfection 92:12 performing 59:19 period 91:1</p>	<p>92:20,21 93:22 periods 41:7,8,9 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 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 permitted 6:21 15:12 permitting 31:1 40:3 persisted 90:3 pH 17:10 phones 5:10 phrasing 74:15 physical 19:21 52:22 65:2 67:16 70:18 93:5 picture 95:13</p>
---	---	---	---

Capital Reporting Company
Hearing 11-19-2009
Page 16

<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 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</p>	<p>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 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</p>	<p>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</p>
---	---	--	---

Capital Reporting Company
Hearing 11-19-2009
Page 17

<p>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> <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</p>	<p>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 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</p>
---	---	---	---

Capital Reporting Company
Hearing 11-19-2009
Page 18

<p>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 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 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</p>	<p>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 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</p>	<p>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>
--	--	---	--

Capital Reporting Company
Hearing 11-19-2009
Page 19

<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 45:8,10,15,20 46:4 59:11 78:21 79:1 85:8,13 89:4 90:18 94:8</p> <p>requirement 17:18 27:4 44:17 46:1 58:19 59:4 70:16 81:2,4</p> <p>requirements 25:12,14 26:22 39:12 54:22 63:22 65:7,12 81:3</p> <p>requires 15:10 44:9 78:21 95:21 96:7,14 97:5,7</p>	<p>98:8,19</p> <p>requiring 58:22</p> <p>reserve 6:8</p> <p>reserving 6:6</p> <p>respect 21:15 22:18 24:21 28:14 65:3,8 66:2</p> <p>respectfully 14:8</p> <p>respond 9:22 34:7 49:10 91:22 94:5</p> <p>responded 84:22</p> <p>responds 24:17</p> <p>response 11:4 76:19 84:14,17,18,21 85:4 86:3</p> <p>responses 101:1</p> <p>responsive 13:3</p> <p>rest 18:5 100:6,7</p> <p>restate 64:12</p> <p>restrictive 57:17</p> <p>result 8:21 25:4 40:2 43:10 46:5</p> <p>results 13:18 44:14 45:6,13 49:2 77:22 84:11 92:10</p> <p>review 10:19</p> <p>rigor 75:16</p> <p>ripe 36:5</p> <p>rise 35:5</p> <p>roaming 97:19</p> <p>ROBERT 3:3</p> <p>romanette 25:17</p>	<p>room 16:16</p> <p>RPR 1:15</p> <p>rule 64:9</p> <p>rulemaking 20:7 61:9</p> <p>rulemakings 61:8</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S.19.32 81:19</p> <p>S.19.33 81:21</p> <p>S02-4184 94:17</p> <p>S-2-4161 23:22</p> <p>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 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</p>	<p>95:19 97:2,4 98:7 99:18</p> <p>sample 13:18 74:2 77:5,6</p> <p>samples 73:22 74:1 77:2,15 87:12</p> <p>sampling 73:19</p> <p>San 2:12</p> <p>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</p> <p>satisfaction 18:14 96:15</p> <p>satisfied 17:22 18:5 19:1 20:3 96:11</p> <p>satisfies 22:19</p> <p>satisfy 20:19 26:2 34:18 38:12</p> <p>saw 55:22</p> <p>schedule 79:3</p> <p>scheme 11:13</p> <p>scope 33:20</p> <p>seasons 41:10</p> <p>second 41:4 58:5</p> <p>secondary 6:22 7:8 26:16 57:14,15 58:6,11 59:10 62:5,10,11</p> <p>section 17:6,8,18</p>
--	---	--	---

Capital Reporting Company
Hearing 11-19-2009
Page 20

<p>22:8 45:4 54:22 66:5 67:3</p> <p>Sections 6:11</p> <p>seeing 12:19,22</p> <p>seeking 12:14 34:2 39:11</p> <p>seem 62:10 78:8 80:15 83:5</p> <p>seemed 79:19 95:14</p> <p>seeming 76:20 95:17</p> <p>seems 22:4 32:9 33:3 37:18 39:13 74:9 75:16 99:6</p> <p>sense 16:4 39:20 96:15</p> <p>sensitive 83:22</p> <p>sentence 80:19</p> <p>separate 101:2,3</p> <p>session 5:4</p> <p>several 27:18</p> <p>share 12:17</p> <p>Sheehan 2:4 5:9 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</p>	<p>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 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 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</p>
--	---	---	--

Capital Reporting Company
Hearing 11-19-2009
Page 21

<p>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> <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</p>	<p>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 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</p>	<p>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</p>
--	---	---	---

Capital Reporting Company
Hearing 11-19-2009
Page 22

<p>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 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</p>	<p>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</p>	<p>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 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</p>	<p>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>
--	---	--	---

Capital Reporting Company
Hearing 11-19-2009
Page 23

<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> <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> <hr/> <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 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</p>	<p>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 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 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>
---	--	--	--

Capital Reporting Company
Hearing 11-19-2009
Page 24

<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 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</p>	<p>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 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</p>	<p>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 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>
--	---	--	---

Capital Reporting Company

Hearing 11-19-2009

Page 25

<p>ZOMs 7:15</p> <p>zone 7:3</p> <p>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</p> <p>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>			
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