

Capital Reporting Company
Oral Argument - 10.29.09

Page 101

1 record that here are the limits. These limits,
2 along with other limits, will get us to water
3 quality standards on this water body. They don't
4 say that. And I think part of it is because
5 they don't know if they can really get there. And
6 under this statute, clearly, because the standard
7 needs to be attainable, that's the conclusion the
8 Agency needs to make. If they can't conclude that
9 those standards are attainable under this statute,
10 they're supposed to revisit and revise those
11 standards.

12 JUDGE SHEEHAN: But don't they say in
13 the fact sheet that the limit of five for nitrogen
14 will therefore achieve the water quality
15 standards? They say it.

16 MR. ANDES: And when that issue was
17 questioned in the response to the comments, the
18 standards are not nearly as unequivocal. The
19 standards in response to comments don't even say
20 in any word we really know that we're going to
21 attain the standard. If they don't know that,
22 they can't just impose requirements on discharge

Capital Reporting Company
Oral Argument - 10.29.09

Page 102

1 and say, well, it will get us there. That could
2 be under another statute, but under this statute,
3 that's not way it works.

4 JUDGE SHEEHAN: You seem to be saying
5 that unless there's some absolute bullet-proof
6 guarantee, which is probably impossible in any
7 scenario, the Region has to tie its hands and sit.

8 MR. ANDES: Well, we would say not that
9 there has to be a bullet-proof guarantee, we would
10 say nowhere in this record -- nowhere in this
11 record does the Agency say we're going to get the
12 water quality standards in this watershed and
13 here's how. Instead they say -- they say a lot of
14 times, well, it's a really big problem and Upper
15 Blackstone is a significant contributor. Granted,
16 something needs to be done. The issue we have
17 here is, is what they did -- something that has
18 rational support that it will result in a
19 attaining water quality standards. I simply don't
20 see where they concluded that, even with all this
21 information.

22 I would also point out as to aluminum,

Capital Reporting Company
Oral Argument - 10.29.09

Page 103

1 because to me the key issue there, as I think
2 we've seen this morning, is the Agency recognized
3 that they have the data. When they take out the
4 344, there's no limit. The rest of the data are
5 much, much lower than 344. I think we just need
6 to go back to the comments because it's clear that
7 what we did in comments was we said, first, that
8 the Agency has selectively used the District's
9 data, leaving out data from 2004, a portion of
10 2005, most of 2006, half of 2007, and most of
11 2008. That selective use of the data allowed them
12 to form an erroneous conclusion. So that
13 paragraph, we basically say go back, review your
14 dataset properly, and do a new analysis. Our
15 second paragraph then went on to say, by the way,
16 if you look at all the data, even with the 344, we
17 are always under -- consistently below the ambient
18 levels in the Blackstone River. And there's no
19 varying ambient conditions. A separate point
20 where we said, well, look at all the dataset,
21 we're under ambient levels, how could se be
22 causing to contributing to a violation?

Capital Reporting Company
Oral Argument - 10.29.09

Page 104

1 The first point we raised in the
2 comments was you selectively used data. Stop
3 that. So in their response to comments, they
4 said, fine, we're going to consider more data.
5 Here's a new analysis we've run, and we didn't mix
6 in the 344. And our response was, well, okay,
7 that's a new analysis. We didn't think to say, by
8 the way, when you do the new analysis, follow all
9 your own guidance. Don't include outliers. Do
10 the various other data manipulation techniques
11 which you ordinarily do. I guess if we had to put
12 that in context of the time, we would insert some
13 boilerplates saying follow their own guidance. We
14 didn't think we needed to do that. So we think we
15 did reserve the issue. They submitted a new
16 analysis. We reviewed it. It's clear that it
17 rests on one data point and that data point should
18 be excluded, and then there would be no limit.
19 Thank you.

20 JUDGE WOLGAST: Thank you very much for
21 your arguments. They were very helpful. The case
22 is now submitted.

Capital Reporting Company
Oral Argument - 10.29.09

1 (Whereupon, at 11:55 a.m. the
2 proceedings were concluded.)

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Capital Reporting Company
Oral Argument - 10.29.09

Page 106

1 CERTIFICATE OF NOTARY PUBLIC

2

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

15

16

Constance H. Rhodes

17

18

CONSTANCE HUNT RHODES

19

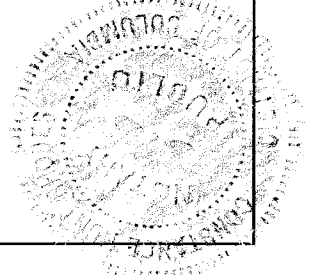
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Capital Reporting Company
Oral Argument - 10.29.09

A			
Abatement 1:5 3:2 4:6 18:10	13:14 15:11 16:3 17:19 19:19 22:10 28:8 31:16 48:7	allocation 22:18 allowed 7:5 11:10 43:2 67:14 103:11	100:19 101:16 102:8
aberrational 86:17	Additionally 68:6 83:8 88:8	allows 16:7 42:4 43:8 54:9 100:10	ANNA 1:18
ability 78:2	address 32:21 47:21 48:4 51:17 52:16,18	alluded 67:8 87:13	annual 70:17
able 25:18 57:20 77:17 78:8 100:22	52:19 54:1 55:12 60:13 78:3,3,19 83:14 90:9 95:21	alternatives 78:6	answer 36:16 37:9 43:22 58:8 92:14 94:3
above-entitled 1:12	addressed 30:10 51:9 51:19 58:21 90:21 92:21 98:2	altogether 24:18	anthropogenic 88:22
absence 87:21	addressing 48:5 51:14 58:13,16	aluminum 23:2,3 32:1,4,6 37:21 38:3 38:7 55:13 83:3,4,5 83:8,13,15,22 84:12 84:20 85:14 86:22 87:15,19 88:4,10,16 89:1,5,10 102:22	anticipated 9:15
absolute 102:5	adequate 64:20 99:5	Amanda 2:11 55:10 83:2	anticipating 59:7 74:11
absolutely 34:12 96:3	admission 24:11	ambient 35:1 36:18 38:6 88:22 103:17 103:19,21	anyway 26:22
abuse 41:12,18	admitted 32:8	amend 39:6	apart 34:5 62:1,6
acceptable 9:9	adopted 7:13	amendment 11:11	apologies 80:20
accepted 65:15	adopting 92:6 93:21	amicus 6:4 60:22	apologize 16:13
access 72:4	affairs 3:12 79:5	amoeba 77:9	Appeal 1:6 4:7
account 5:18 20:1 59:12 61:17 65:10 87:2	affirmative 58:3 59:1 59:5 60:5	amount 93:13	appealed 39:4
accounted 56:5	agency 1:1 2:9 4:4 20:3,16 22:5 25:22 28:16 32:3,6,16 33:6,16 35:14 36:22 39:18 46:3 53:3 81:10,16 98:19 99:14 101:8 102:11 103:2,8	amounts 38:2	Appeals 1:1 4:2
accounts 6:12 61:7	Agency's 24:10 27:15	analog 13:22 56:17 56:17 97:15	appended 68:3
accumulated 58:13	ago 30:16 78:21	analysis 8:11 9:20 14:1 17:9 26:4,13 33:19,21 34:3,3,10 35:7 46:15 61:13 63:14,17 81:13 87:5 87:10 91:3 97:17,17 103:14 104:5,7,8,16	applicable 40:19 59:3
accurately 84:9 85:13	agree 54:5,7 90:15,16 96:15	Andes 3:3 18:8,9 19:17 20:9,22 21:21 22:14,22 24:7,9 25:12 26:11 27:13 28:20 29:10 30:1 31:3,18,22 33:3 34:12 36:5,10 37:11 37:18,22 38:13,16 95:18,20 96:18 97:1	application 26:9 48:20,22 49:1,5,6 50:1 53:10
achieve 59:19 96:12 96:14,19 101:14	agreement 39:14 42:1 44:5		applied 21:15 29:1 41:19 49:4 85:22 98:17
achieving 94:4	ahead 16:14 20:3,16		apply 14:5 15:5 19:5 28:18 41:8,15,17 49:11,16 51:4 53:5 57:11 66:21 79:11 81:17 87:22 90:12
acid 88:4,7,8	albeit 77:3		applying 40:1 58:17 61:18
acknowledged 56:4	allege 37:20		approach 16:8,17 17:1,2 39:22 55:16 56:3 61:1 67:9 76:20 82:12 83:16 83:20
acknowledging 64:3 68:8	alleged 11:11 17:10 34:8 91:5		approaches 67:10
Act 15:5 16:7 19:4 24:21 46:5 50:22 70:4 72:12 81:19 93:19	alleviate 64:8		appropriate 5:18 12:8 13:18,21 16:16 95:6 97:6
action 47:10,11 90:1 90:1 106:10,14	allocated 43:11		appropriately 6:22
active 51:14			appropriateness
actively 20:1			
actual 45:3,5 86:8			
adapt 36:8			
addition 39:10 46:19 58:10 62:11 68:17			
additional 5:18 12:4			

<p>83:15,19 approximately 9:14 arbitrary 20:16 area 9:2,9 13:6,7 38:3 areas 85:22 arguably 9:3 37:6 argue 94:6 argued 69:16 91:5 argument 1:13 4:5,17 4:18 11:11 13:21 17:8 22:6 23:7,14 23:15,16,22 25:3,11 26:7 27:14 28:22 33:21 34:19 35:2,22 38:22 49:10 54:11 67:1 69:13 83:18 85:10 87:12 88:3,16 90:10,16 106:4 arguments 4:15 23:8 73:2 96:11 104:21 arrived 10:7 articulate 40:18 articulated 54:8 84:10 aside 23:1 38:6 65:5 71:17 asked 34:9,9 85:5 asking 19:5 57:8,9 96:15,18,20 aspiration 8:18 Assebet 69:7 assert 40:11 89:13 assertion 85:17 assertions 10:13 associated 52:3 95:2 96:22 attain 25:16 42:5 93:3 96:2 98:4,8,21 99:13 101:21 attainable 101:7,9 attained 19:11 96:6 attaining 102:19 attainment 8:4 11:7 19:14</p>	<p>attention 67:7 attenuation 65:2,6 Attleboro 14:9,12 22:15 23:1,12,14,16 24:12 26:8,16 27:5 55:17 56:1,4 63:5 65:5 66:6 87:17 91:6 92:9,18 93:6 94:21 95:4 attorney 5:10 106:12 August 31:6 authority 46:3,10 50:2 52:4 53:2 54:13 73:7 75:13 78:8,18,22 79:3,7 80:16 authorized 49:5 69:18 available 17:3 20:12 28:9 54:21 68:12 avenue 1:14 17:3 average 83:10 84:12 84:19 88:16 aware 19:2 27:8 52:17 axle 71:11,14 a.m 1:17 105:1</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>B 48:19 53:9 back 32:7 33:17 35:2 53:18 63:13 76:8 78:7 86:15 103:6,13 backdrop 15:21 background 18:12 87:14 88:10,19 89:9 backtrack 68:15 backwash 89:6 balance 38:8 57:4 bank 100:12 Barnes 3:4 based 9:10,13 12:21 15:4,14 16:5 24:14 25:4 44:15 57:7</p>	<p>69:5 83:10 84:11 86:4 90:2 basically 27:15 36:17 49:21 103:13 basis 10:22 12:5 13:17 15:19 20:18 20:21 25:1,6 26:10 27:16 33:13 84:10 85:13,20 86:2 98:4 99:1 100:4,6 Bay 6:2,7,11,13,15 24:3 28:2 64:19 66:10 89:18 bed 89:22 beds 6:5 12:13 behalf 2:2,9,17 3:1,9 10:16 45:12 95:21 behavior 9:10 21:13 24:4 believe 16:4 19:17,21 20:2,9,13,17,19 23:7,10 24:17 26:11 34:22 38:1 39:22 40:22 41:11,18,22 42:7,14,22 43:2,12 43:16,21 44:16 45:2 45:4 54:8 60:3,11 60:14 62:16 64:16 65:15 67:2 79:7 82:11,19,20 90:17 93:4 believed 23:11 best 13:22 43:21 61:16 64:4,17 65:3 better 59:19 99:9,21 beyond 18:18 36:10 70:11 71:15 86:20 big 70:16 76:21 102:14 bigger 16:22 biological 21:13 bit 59:19,20 Blackstone 1:5 3:1 4:5 6:12 18:10</p>	<p>25:18 27:19 29:22 34:21 45:20 47:12 68:10 74:10 76:17 76:19 77:5 81:4 83:6 87:16 88:5 89:7,10 102:15 103:18 Blackstone's 76:18 blank 45:3,5 Board 1:1 4:3,13 5:14 11:10 14:12 16:6 17:22 38:22 45:22 53:17 57:18 62:22 82:16,22 85:1 85:4 87:13 88:14 89:13,14 90:7 92:19 93:11 94:22 95:2 Board's 15:9 57:14 87:17 91:6 92:3,19 93:6 bodies 22:17 body 21:12 29:18 49:17 101:3 boilerplates 104:13 Book 14:17 17:9 28:18 29:8,13 borne 48:18 Boston 2:15 3:14 bottom-line 62:7 boundaries 74:3 Bowditch 2:19 brass 62:7 break 37:7 brief 6:4 7:11 10:16 40:6,12 44:2 60:22 61:5 65:3,7 68:16 briefing 11:2 briefly 65:1,12 68:18 93:16 briefs 23:20 30:17 77:13 bring 53:3,13 54:9 93:7 broadly 46:7 68:22</p>
--	--	---	--

<p>brought 48:13 67:6 bullet 12:14 bullet-proof 102:5,9 bunch 28:4 burden 83:21 86:16</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 4:1 calculated 61:21 67:12 calibrated 61:12 68:7 call 29:8 48:9,11 63:10 callibrated 64:12 calling 74:8 candid 61:15 capable 94:4 capacity 6:10 75:10 89:20 Cape 10:3,3 Capital 1:15 capricious 20:17 care 78:9 79:5 81:15 careful 32:4 carefully 23:6 32:17 33:8 case 9:4,5 15:10 16:9 19:15 21:22 23:4 26:9 57:15 63:11,15 73:9 80:16,18 83:14 86:11 104:21 cases 9:16 57:19 63:6 63:7 cat 54:16 catch 16:2 54:17 cause 83:11 84:3 caused 86:21 88:4 causing 103:22 caution 93:10 cell 4:9 certain 32:10,10 33:13 35:16 78:3 certainly 36:7 37:8 46:11 50:20 52:17</p>	<p>68:10 99:6 certainty 20:4 92:18 CERTIFICATE 106:1 certify 106:5 cetera 20:7 challenge 44:21 68:16,19 challenged 82:18 challenging 33:2 72:4 changing 86:21 characterizations 62:3 characterize 62:7 CHARLES 1:18 charts 36:13,16 chemical 21:12 Cherry 45:14 Chicago 3:7 choice 17:12 58:5 63:18 choose 81:16 chose 35:11 64:9 Chris 5:9 89:16 CHRISTOPHER 2:3 chronic 83:7 circumstances 87:8 citation 60:8 76:5 94:16 citations 16:12 62:9 90:6 93:7 cite 46:12 95:14 cited 6:2 12:4,10 13:16 14:13 38:1 60:16 98:11,13,14 cities 45:8 47:21 51:4 51:6 69:13 70:11 71:12,16 72:17 74:8 78:2 80:8 citing 28:21 city 23:17 45:13 74:22 80:10,14 89:2 89:3,4 civilly 97:20</p>	<p>claim 18:22 93:15 claimed 39:9 claims 31:1 46:5 49:8 Clean 46:5 70:4 81:18 93:18 clear 7:1 16:8 19:11 26:7 33:9 34:20 36:12 38:5 39:9 40:11 41:3 44:14 51:5 56:15 59:4 63:5 75:20 89:14 90:2 92:17 93:9,21 103:6 104:16 clearly 6:15 11:3 21:5 26:3 29:15 84:2,9 85:19 101:6 CLF 24:16 28:22 38:1 56:19 57:5 60:17 68:18,21 69:10 CLF's 5:14 22:5 68:16 Clinic 5:12 clinical 65:22 closed 95:7 closure 12:16 95:1 CMR 55:1 Cod 10:3 code 8:3 colleague 55:10 collected 22:10 85:6 85:14 86:8 88:13 collection 70:3 72:13 74:4,15 79:10 collections 46:8 Columbia 106:20 come 21:20 26:2 33:19 35:17 54:17 59:22 64:15 73:4 74:17 90:13 comes 67:1 76:17 79:8 coming 43:17 61:2 77:21</p>	<p>commencing 1:17 comment 17:11 33:6 33:16 56:20 65:8 68:21 69:2 85:19 commentary 68:2 commented 26:18 comments 17:18 24:1 33:5 34:4,13 37:14 44:22 45:5 60:9 67:5 84:5 85:4,8 86:3,6,12,13 93:12 94:15,17 95:8 98:10 101:17,19 103:6,7 104:2,3 commission 106:21 commitments 15:11 committed 40:6,8 41:3 Commonwealth 1:16 66:12 67:6 community 69:16 Company 1:15 compared 22:16 compelling 69:13 complete 31:5,10,15 49:1 completed 18:14 31:5 31:6 completely 6:6 88:21 compliance 6:20 39:13 42:2 44:5 54:14 57:20 59:15 59:22 64:16 84:17 88:1 comply 39:20 comprehensive 14:1 22:18 concede 12:2 41:7 conceded 33:22 conceivably 41:13 concentration 41:9 41:14,19 42:5,21 43:1,7,19,20 44:15 65:13 66:7,10,16</p>
--	---	---	--

67:13 86:22 87:1 88:17,19 concentrations 66:1 83:5,8 84:13 87:15 88:10 89:10 concern 17:16,18 33:14 63:4 64:8 92:16 94:2,7,7 conclude 96:11,17 101:8 concluded 32:19 56:16 57:4,6 102:20 105:2 conclusion 17:14 43:4,17 44:14 56:8 57:14 61:3 99:16 101:7 103:12 conclusions 12:6 21:3 22:12 56:12 61:8 91:1 conclusory 98:12 condition 13:7 58:19 61:9 conditions 9:20 11:19 12:14 13:4 58:11 71:3 86:21 103:19 conducted 9:19 confidence 22:7,8,11 conform 17:20 confronted 69:10 97:12 confused 80:20 Congress 2:13 connected 47:4 connection 50:21 connects 47:7,8 72:7 consent 53:6 54:7 conservation 2:2,4 4:16 5:1,6,10 18:20 41:21 47:5 89:17 consider 26:19,21 43:18 68:22 87:4,9 100:11 104:4 consideration 44:4	considered 33:10,11 33:18 73:11 considering 33:12 40:9 consistent 8:22 13:6 13:8 15:9 53:12 54:4 57:16,22 59:16 60:17 consistently 84:16 103:17 Constance 1:15 106:3,18 Constitution 1:13 constructed 98:3 construe 57:22 consultation 90:13 contention 96:7 contest 36:22 contested 35:9 37:1 contesting 72:1 context 13:3 14:5 104:12 continues 60:20 76:16 contrary 39:9 40:5 96:11 contribute 52:1 77:4 83:12 84:3 contributed 73:20 contributing 103:22 contribution 15:12 contributions 8:13 contributor 102:15 control 21:15 66:1 74:16 78:11 98:16 controlled 51:1 controlling 17:4 77:21 controls 5:17 91:10 conveyance 47:16 70:7 conveyances 72:15 conveyed 50:5 cooperation 75:11	corner 31:20 67:20 68:13 corpus 100:17 correct 7:13 13:18 34:7 51:12 53:20 72:22 77:15 79:6 82:15 96:17 correcting 16:3 correctly 63:16 correlation 36:15 corroborating 12:22 13:15 14:13 90:22 91:3,18,20 cost 16:19 94:7 costs 94:5 cost-efficient 17:1 counsel 18:9 45:10 60:17 67:21 91:12 92:14 106:9,12 country 28:5 coupled 8:10 course 56:14 COURT 42:20 50:6 59:9 73:14 94:9 covering 74:5 covers 70:4,5,6 Cox 2:18 45:9,10 48:1,10 49:13,18 50:4,7,19 51:12 52:10,14 54:3,20 co-counsel 5:11 38:18 co-permits 45:22 co-permittee 47:20 49:7 69:12 72:8 75:1 76:12 80:11 81:14 co-permittees 46:4 53:4,5 54:2,9 55:5,6 55:12 68:14 71:13 74:9,13 75:8 81:5 82:10 co-permitting 45:15 53:17 54:6	crafted 64:6 crafting 66:5 create 86:16 criminally 97:21 criteria 7:13 14:19 29:9 37:5 41:1 42:18 87:16,19 88:1 100:9 criterion 83:7,9 88:11,18 critical 99:19 Crocker 38:19 cross-checked 86:7 current 97:9 cuts 61:18
D			
D 2:18 4:1			
dangerous 100:15			
data 12:13 14:1,4 31:7,7,12 32:5,7,9,9 32:10,11,14,16 33:2 33:7,9,11,11,12,13 33:14,17 34:9,11,16 34:20 35:3,4,8,16 35:18,20 37:2,18 56:18,18,19 59:11 84:1,5,8,20,22 85:3 85:6,7,11,14,17 86:8,13,15,17 87:6 87:7,9 88:13,15 90:11,18 92:20 100:8,19,21 103:3,4 103:9,9,11,16 104:2 104:4,10,17,17			
database 34:14,15 35:12			
dataset 84:15 103:14 103:20			
dates 83:10			
David 5:11			
DCMS4 57:15 63:2 63:14			
DCR 47:6,6			

Capital Reporting Company
Oral Argument - 10.29.09

<p>deal 15:7 37:2 51:20 dealing 22:16 30:15 63:8 64:10 December 60:14 decided 14:12 54:5 decision 13:2 14:9 15:10 22:15 25:9 43:16 65:5 91:6 92:18 93:6 94:21 define 61:19 81:19 defined 46:18 50:9 defining 72:18 definitely 26:15 definition 46:6,11 70:3 71:22 75:14 76:2 82:3 definitions 50:21 79:9 definitive 11:13 12:6 21:14,17 98:16 deliver 45:18 delivery 26:14,17 99:18 DEM 10:15,16 13:16 13:17 92:6 demonstrate 84:2 demonstrated 88:9 89:9 demonstrates 84:6 DEM's 13:11 deny 89:14 DEP 21:6 37:13 52:18 90:4 Department 3:9 4:19 38:20 44:8 47:5 deposition 106:10 describe 85:20 described 58:7 design 13:13 92:12 designated 13:5 designed 99:7 desired 84:19 detailed 62:10 details 65:2</p>	<p>determination 68:12 87:14,22 determinations 12:8 87:21 determine 20:4 63:12 determined 11:5 29:5 84:11 determines 37:13 develop 20:18,21 57:7 74:16 75:2 developed 12:19 20:11 25:20,21 28:8 28:11,16 100:3 developing 15:14 development 62:10 87:18 deveopment 65:6 devices 4:10 Dewey 2:19 dialog 26:1 differ 25:11 86:2 difference 27:1,2 32:14 65:3 differences 21:8 56:13 57:1 60:21 65:1 different 22:15 23:4 23:15 25:1,8 35:3 41:4 50:6 58:9 61:17 63:15,19 81:12 84:1,15 differently 50:8 64:6 difficult 78:20 difficulty 30:20 diffident 59:17 direct 36:15 57:6 59:2 62:18 directly 28:18 74:17 74:22 disappearance 89:22 disappeared 6:5 discharge 5:22 21:16 43:12 45:19 46:17 46:22 47:16 48:14</p>	<p>50:8,9,14,19 52:2 53:13 66:9 67:13 73:15,21 74:1,1,2 76:11,12,13,15,18 76:19,22 77:4 78:19 83:7,9 84:17 86:19 88:20 98:17 101:22 discharged 69:6 discharger 29:21 49:11,15,16,18,21 49:22 50:2 51:1 73:8,17 discharges 47:9 48:22 50:15 78:20 89:6,20 discharging 43:10,11 47:11 48:18 50:12 52:3 73:3,5,20 75:22 94:19 95:4 discretion 11:11 14:4 21:19 39:1 41:8,9 41:13,19 44:17 90:10 92:22 discussed 14:8 90:19 discussing 83:3 discussion 16:19,20 92:18 dismissed 21:3 88:21 disposed 23:12 dispute 39:5 77:18 disputing 77:20 dissolve 69:8 distinct 71:8 distinction 74:21 District 1:5 3:2 4:6 4:18,22 5:22 18:7 18:10 19:1,6,12 29:20 30:4 34:9 45:4,10,12,14,16,18 45:20,21 46:21 47:1 47:9,9 48:2,2 49:2,3 49:6 50:11 52:1,6,6 52:21 67:22 68:3,8 69:15,16,22 70:18</p>	<p>70:20 71:10 74:10 76:17 78:1,4,7,18 78:22 82:13 83:9,20 83:22 84:6,7 85:2,5 86:14,16,19 88:6,9 88:11,14,20 89:1,8 94:2,3 95:22,22 96:14 97:2,11 98:3 98:7 106:20 Districts 75:10 District's 19:20 50:16 67:18 72:7 73:10 74:2 83:6,11 84:12 84:17,19 85:10,14 85:16 86:12,19 88:3 88:16,20 97:20 103:8 dividing 21:22 DMPL 22:19 document 25:15 70:19 90:8 93:11 documentation 67:3 documenting 67:11 documents 14:16 38:1 44:9,10 66:11 100:9,10 doing 31:10 32:18 34:2 50:11 64:4 dominant 6:14 29:21 downstream 10:11 37:7 67:3 76:13 draft 39:2 82:14 drafted 39:7,11 dramatic 6:16 drawing 45:3,5 drinking 89:4 Drive 3:5 drop 61:14 dropped 97:18 Durr 3:17 4:2 D.C 1:2,10,14</p>
E			
E 2:1,1 4:1,1			

Capital Reporting Company
Oral Argument - 10.29.09

<p>earlier 31:19 51:16 65:21 81:2 87:13 98:13 99:18 100:6 East 2:5 Ecoregional 14:18 ecosystem 12:14 edited 56:19 eelgrass 6:5 12:13 89:22 effect 28:18 43:6 44:9 54:10 effective 78:15 effectively 78:12 efficiencies 42:6 efficiency 16:19 effluent 9:1 15:4,15 16:5 39:6 43:12 65:7,19 69:6 73:15 84:1,12,20 87:4 effort 17:22 efforts 31:2 68:8 eight 16:22 31:5 69:1 70:21 71:11,16 electrical 70:6 eliminate 15:11 employed 106:9,12 employee 106:12 encountering 21:11 encouraging 41:21 52:19 endorsing 61:1 Energy 3:12 enforce 74:21 enforcement 48:14 54:15 engage 26:1 36:19 engineers 34:15 England 2:12 enhance 92:10 Enironmental 4:2 enormous 27:1 enrichment 9:2,13 ensure 10:8 57:20 59:15,21 60:11</p>	<p>61:10 84:17 88:1 entered 39:15 68:16 enters 48:15 entire 67:5 74:6 entities 54:5 71:1,8 73:2,11 77:3,4,14 entitled 29:9,11 48:20 98:3 entity 48:17 50:4,11 53:7 70:14 72:9 80:10 Environment 4:19 environmental 1:1,1 2:9 3:10,12 4:3 5:12 38:20 44:8 52:12,14 55:21 92:11 environmentally 100:15 EPA 2:12 10:2,7 19:12 21:6 24:1,16 25:5,10 26:19 27:16 28:10 31:7,7 36:14 39:12,13 41:20 43:16 44:16 46:5,11 47:13 49:7 52:5,19 53:4,6 54:9,13,21 55:5 82:9 90:3 92:14 93:8 94:14 95:8 96:7 98:7,11 100:16 EPA's 6:3 29:9 46:15 70:4 equals 9:5 13:19 equipment 70:6 99:5 equivalent 58:1 equivocal 15:16 equivocation 16:15 erred 83:21 erroneous 103:12 error 26:10 39:9 40:11 41:3 44:14 89:14 errors 32:8 ESQUIRE 2:3,10,11</p>	<p>2:18 3:3,11 essence 21:3 32:3 estuaries 12:17 et 20:7 Eurika 3:17 evaluate 10:9 35:4 67:10 evaluated 32:8,9,17 84:1,15 86:13 evaluating 32:8 evaluation 7:21 10:20 12:5,9 16:18 16:20 32:4 35:20 69:5 90:20 evidence 38:2 68:7 90:22 91:3,18,20 96:13 evolved 69:18 exactly 33:8 examination 27:21 28:1 29:14 examined 51:19 example 21:8 38:5 100:1 exceed 83:9 87:15 88:11 exception 65:13,16 exceptions 40:16 excess 6:16 67:16 exclude 32:10,13,14 84:20 85:3 87:6 excluded 32:18 35:5 104:18 excluding 33:13 34:18 35:8 excuse 68:14 82:20 exercise 39:1 44:17 57:10 92:21 exhibit 62:14 66:15 68:4 exhibits 62:15 existing 9:22 13:3 exists 79:4 89:1 expected 9:17</p>	<p>expecting 59:6 experiment 9:10,14 9:19 experiments 6:22 12:7 13:18 14:11 93:1 expertise 14:6 57:11 90:12 experts 56:8,16 61:2 64:1 expired 67:14 expires 106:21 explain 10:5 57:21 66:19 67:8 77:1 88:6 explained 69:4 explanation 62:17 86:2,3,20 express 41:1 expressed 39:12 40:15,20 65:18 expresses 66:15 expression 41:22 65:14 expressly 66:10 extent 51:14 67:21 91:17 extrapolated 41:4 extreme 59:13,14</p> <hr/> <p style="text-align: center;">F</p> <p>face 11:12 20:6 61:15 91:4 93:19 96:8 100:14 faced 11:9 facilitator 75:10 facilities 31:11 66:9 70:1,5 92:8,8 facility 5:19 6:10,12 6:18 8:12 15:7 16:10 18:13 30:7 32:5 39:15 42:2 43:9,11 45:18 70:8 77:22 81:3 89:5</p>
--	---	--	---

Capital Reporting Company
Oral Argument - 10.29.09

94:11,18,19 95:3,4	fill 22:20	forward 66:8	56:20,20 63:21
facility's 15:12	financial 51:15	found 22:19	gives 46:8
facing 58:7,18	financially 106:13	foundation 2:2,4	giving 38:21
fact 7:2 12:2 16:21	find 8:6 31:20 56:11	4:16 5:1,7,10 18:20	glaring 17:18
18:14 20:11,14	60:4 94:16	83:4 89:17	go 14:9 16:14 18:19
23:21 25:12 30:5,7	finding 87:17	four 38:12,13 45:12	35:16 37:5 57:5,6
31:4,14 34:21 37:6	findings 21:5	45:16,20 46:21 49:3	70:10,10 76:8 78:7
59:18 61:6 62:12	fine 38:15 78:16	69:6 100:9	80:18 95:12 97:18
63:21 76:15 77:2	104:4	fourteen 27:10	100:20 103:6,13
88:21 91:13 96:11	finish 16:14	four-year 56:15	goal 13:7,9
98:11,13,14 99:9	first 4:17 23:1 25:15	frames 4:14	goes 10:12 41:22 47:6
100:16 101:13	32:9 39:4 85:18	frankly 63:11	50:12 91:3,6 92:22
factor 26:16	87:12 95:21 103:7	Fred 18:9	going 18:12,17 20:10
factors 12:4,10 55:19	104:1	FREDERIC 3:3	26:22 29:14 31:17
65:11	fishkills 89:21	free-flowing 17:10	34:2 35:19 43:20
facts 5:15,20 17:4	fits 77:2 80:17	front 56:1 58:6 60:7	52:7 55:11 60:18,19
62:5,8	five 5:13 7:8 9:5	FSOs 77:22	61:19 63:13 70:12
factual 11:2 15:19	16:21 18:11 38:10	full 68:22	83:14 101:20
fact-based 67:9	38:14 59:18 60:10	fully 9:22 86:12,13	102:11 104:4
fail 75:2 84:8	62:6 90:13 93:14	functional 57:22	Gold 14:17 17:9
failed 33:1 54:21	94:20 95:2 101:13	fundamental 34:17	28:18 29:8,13
fails 40:18	flag 60:1	84:14	good 4:12 5:8 18:8
fairly 59:17	flexibility 43:9	funding 48:5	21:20 23:21 31:9
fall 34:11 73:10	flexible 55:14	further 12:7 23:13	38:17 45:9 55:8
Fallon 3:11 38:17,18	flow 82:1 84:13 85:22	38:9 44:20 69:4	56:11 83:1
41:10,15 42:7,14,22	flows 13:12 50:16	96:7 106:11	governs 55:2
43:8 45:2	86:8 92:12	Furthermore 88:3	gradient 9:13
falls 71:22 92:12	flushing 12:1 23:10	future 87:3	grant 5:14 39:1 44:18
far 70:9 80:16	57:2 91:11,14,16	F18A 62:18	Granted 102:15
favor 93:19,20	flushing-rate 23:9	F51 60:4 62:18	grants 51:16
feasibility 96:21	focus 67:2	F6 59:2 62:18 98:12	great 62:21,21 78:5
feasible 97:8	follow 4:14 59:9		greater 42:5 82:12
federal 40:4,9,10	104:8,13	G	grounds 85:2
81:10,16	followed 4:21 42:8,9	G 4:1	guarantee 97:5,8
feed 79:1	43:3,14,15 84:9	gap 22:20	102:6,9
feeds 81:3	following 13:1 79:19	gathered 19:18	guardian 78:18
feel 32:13 38:22 78:5	footnote 94:22 95:3	general 79:10	guess 7:19 10:14
feeling 37:22	Ford 55:10	generate 21:14	15:18 59:9 104:11
feels 95:22	foregoing 106:4	generated 98:16	guidance 14:20 17:20
fell 36:18	foremost 87:12	generating 61:13	39:13 66:11 75:15
felt 35:14 37:15 38:1	form 49:5 103:12	getting 31:13	100:9,11,17 104:9
51:7	forth 32:7 39:21	give 18:12 64:5	104:13
Field 9:7	40:12 44:4 53:10	given 14:2 17:3 21:10	guidances 32:18 76:1
filed 10:16	55:20 85:13	22:20 28:7 31:4	guidelines 10:2 12:17

H			
H 1:15	HUNT 106:3,18	64:1	30:14 31:16 33:18
half 103:10	hypothetical 79:14	incertainty 11:12	37:15 90:18 97:3,6
hand 30:2	hypothetically 47:19	include 34:2 35:13	99:15,16 100:17
handled 81:7 82:2	I	46:12 62:3 71:3	102:21
handling 80:20 82:1	ideally 72:17	79:15 82:9 104:9	inherent 14:2 56:2
hands 20:8 42:20	identified 56:5 57:1	included 33:15 34:10	initial 26:17 33:3,6
102:7	58:19 67:17	35:6 71:12	34:19 35:2,10
happened 41:11	identify 61:17	includes 46:7,7 82:3	initially 18:15 34:13
happy 82:21	identifying 64:10	including 18:14	inject 7:5
Hatteras 10:4	ignore 57:9,9	19:19 24:15 29:13	inordinantly 85:10
hear 18:6 30:18 45:8	Illinois 3:7	31:13 32:18 33:14	inquiry 76:9
heard 18:22 97:15,16	imagine 23:6 79:22	34:5 35:9,16,18,20	insert 11:10 104:12
heavily 88:11	immediately 11:5	55:20 81:20 89:2	insist 100:13
heavy 83:21	impact 21:9	97:7	installed 99:5
help 42:12	impaired 6:1 89:19	inclusion 83:17	instance 60:16 78:6
helpful 104:21	impairment 20:7,14	incorporate 99:22	instruct 87:4
helping 52:20	66:21 100:14	increased 9:6	interactions 21:11
HELWEG 83:1	impairments 55:22	incremental 16:7	interest 44:11 82:16
85:12 86:4	67:4,12	independent 39:19	82:22
Helwig 2:11 55:10,12	implement 13:10	indicate 5:20 8:11	interested 75:15
83:2	92:1	21:7 66:22	106:14
high 38:7 77:21	implementation 5:16	indicated 10:7 16:18	interpret 14:4
higher 9:5	7:4 16:17 92:6	93:2	interpretation 13:11
high-flow 85:11	implemented 11:4	indicates 6:16 9:20	interpreted 66:7
historical 12:13	19:5	11:3,18,18 19:8	interpreting 66:3
Holden 45:13 47:7	implementing 17:15	65:17	interprets 76:2
homes 70:11	implied 40:5	indicating 60:10	introduce 5:3
honor 18:8 31:3 45:3	importance 62:21,21	70:20	investigate 48:6
58:2 59:8 61:3,22	important 94:13,21	indication 91:15	investigation 68:9
62:11,16 64:20 67:7	impose 29:13 43:20	indicator 6:8	involved 54:2
67:8 69:20 70:13	55:6 74:8 79:10	individual 70:11	in-stream 67:13
71:7,20 72:10 73:18	98:6 101:22	83:10	Island 7:12,18,20 8:8
74:19 76:6 77:7	imposed 96:2	individually 79:2	9:11 10:6,8,10,13
78:12 81:6 82:1,6	imposing 60:10	industrial 80:5 81:3	10:15,16,17,17 11:1
82:12,20 85:12 86:4	imposition 39:11	81:8,11,20,21 82:4	11:6 13:16,16 21:6
95:21 100:20	40:3	infiltration 47:21	36:3 37:7 40:7,19
HONORABLE 1:18	impossible 102:6	51:7	42:18 44:7 60:22
Honors 83:1	improper 40:3	inflow 47:21 51:7	66:7 90:4 92:5
hospital 72:6,12,13	improperly 41:4	information 12:22	93:13 95:12
72:15 79:13,15,22	improvement 92:11	13:3,15 14:13 15:14	Island's 6:4 40:22
80:6	improvements 31:13	15:19,20 19:19,19	65:22 93:12
house 72:20	inaccurate 85:19	20:3,12 22:4,10	isolation 57:12 60:19
	inartful 58:4 63:9,18	24:2 25:15,19,21	63:22
		28:8,11 29:12,17	issuance 10:22

issue 18:19 19:16 23:6,9,10,10 24:12 26:15 27:4 29:1,2 30:2 32:1 33:1 36:11,20 37:4 39:19 45:15,22 51:9,20 52:16 53:2,17 54:15 59:10 62:20 63:2,6 63:11 65:12 67:6 68:1 69:13,18 85:1 89:15 94:10 97:13 98:1 99:19,20 101:16 102:16 103:1 104:15	37:3,17,19 38:10,15 41:7,12 42:3,11 43:5 44:20 45:7 47:18 48:8 49:10,15 49:20 50:14 51:3,21 52:12 53:20 54:10 57:13 59:15 60:6 61:4 62:1,13,19 64:13,21 66:19 69:12 70:9 71:9 72:6,11,21 73:1,19 74:7,20 75:5,13 76:8,9 77:1,8,12 78:1,14 79:13,14,20 80:2,3,3,9 81:1,9,18 82:3,7,17 85:9 86:1 90:9 93:16 94:1 95:15,18 96:10,20 100:5 101:12 102:4 104:20	kinds 92:2 know 5:4 17:2 19:9 19:10 21:7 22:3 23:20 52:1,2 59:12 82:7,14 97:12 98:19 101:5,20,21 known 7:6 20:7	22:11 24:21 27:22 29:13 36:21,22 levels 9:2,5,8,9,14 29:5 34:21,22 35:1 35:1 36:13,17,18 38:7 77:21 103:18 103:21
issued 12:16 30:16 42:2 44:9,10 53:22 69:17 81:10 82:9,14	JUDGES 1:18 judgment 57:10 61:16 64:5,14,14,18 65:4 100:13	lack 63:17 land 63:11 land-use 12:19 language 57:16,18 58:1 59:1,6,16 60:5 60:7,12 64:7 66:4 75:16 92:13 93:5,21	liable 97:21 lieu 67:9 light 72:2 100:16 limit 6:13,17 7:4,8 8:14,22 9:16 11:3,5 13:10,11 14:2,14 15:8 18:19 19:1,3 20:4 24:20 25:2,10 25:17 26:5 27:2,3 28:19 32:6,20 33:10 36:9 39:7,8,11 41:8 57:7 58:11 60:10,19 61:21 62:6 64:5,15 64:18 67:14 68:15 68:18 69:3 83:13,15 83:16,22 84:16 86:11 90:4,14 91:21 94:4,11,18 95:6,10 96:4,13,14 97:1 98:4,6 99:1,7,7,10 101:13 103:4 104:18
Issuers 75:17	July 34:12	large 77:18 larger 92:7 95:3 largest 89:3 lastly 9:11 87:11 late 61:4 67:1 68:5 88:12 lateral 72:20 law 2:2,4 4:16 5:1,6,9 5:10,12,12,16 17:5 18:20 37:4 39:9 40:2,12 41:3 44:15 52:11 54:4,8 71:15 71:19 77:9,13 89:17	limitation 15:4,15 16:5 41:2 44:6 65:7 65:20 limitations 14:3 40:14,20 44:11 65:18 limited 36:2 51:15 limits 7:2 9:21 17:19 18:18 19:6 20:19 26:2 27:6 28:13,15 28:16 31:15 65:14 66:5,14 68:17,20,20 69:1 91:22 96:9 98:21,21 99:2,3 100:2 101:1,1,2
issues 11:21 18:21 23:2,3,5 26:12 28:12 33:4 51:8,17 52:3 75:12 78:9 83:15 96:22	judgment 57:10 61:16 64:5,14,14,18 65:4 100:13	laws 65:16 leach 88:5 leaching 38:3 leading 71:13 leaves 53:8 76:16 leaving 103:9 left 27:9 legal 54:4,11 71:1 73:6 77:17 78:17,17 legally 71:16,21 79:16 legislature 78:8 lend 61:13 let's 30:18 55:15 58:8 level 8:22 21:15,18	
issuing 19:18 51:22 74:9	kind 48:9		
I&I 48:4,5,7 51:17,20 52:16 70:17 72:4 74:16 77:21 78:3 79:1,5			
J	K		
J 2:11	Karen 2:10 38:19 55:8		
January 106:22	KATHIE 1:19		
joined 5:11 55:9	Kendall 88:12,17		
Judge 4:12 7:10,17 8:3,17 10:5 11:16 13:20 14:15,22 15:22 16:14 17:6 18:4,6 19:15 20:6 20:20 21:17 22:14 24:5,8 25:8 26:6 27:10 28:17 29:7,20 30:13 31:18 32:21 34:7 35:22 36:6	Kester 23:19,20 key 12:4,20 90:3,19 91:19 103:1 Kilian 2:3 5:8,9 7:14 7:19 8:7,19 10:14 11:21 14:7,21 15:1 16:4,15 17:13 18:5 89:16,17 90:15 93:17 94:6,12 95:17		

Capital Reporting Company
Oral Argument - 10.29.09

limit-of-technology 5:17 12:12	72:20 77:5	51:13 71:14,18	57:4,8 60:19 61:18
line 21:22 47:4,6,7,7 47:8,14,15 48:14	maintain 74:14	MA0102369 1:7 4:7	91:1,8 93:1 96:8
lines 45:17 47:1,3 55:3	maintenance 71:5 78:11	McGuire 2:10 55:8,9 58:2 60:2,8 61:11	97:15
linguistic 62:2	major 32:11 94:19	62:9,15 63:20 64:17	met 6:9 7:7,12 40:9 61:20 97:9,11 98:20
list 13:2 82:21	majority 69:8	64:22 66:22 69:14	method 43:3
liter 9:2 32:12 67:15 67:16	making 32:2 48:16	70:13 71:20 72:9,18	methodology 84:9
litigants 4:15	Management 44:8	72:22 73:8,17,22	mg/l 9:15 10:1 11:5 33:2
little 59:19,20	mandatory 40:1,13 43:18	74:11 75:2,7 76:5	micrograms 32:12 67:15,15
live 47:2	manholes 70:22	76:20 77:6,11,15	midst 31:9
LLP 2:19 3:4	manipulation 104:10	78:4 79:6,18,21	miles 51:18 70:21 88:13
load 14:1	manner 20:17 39:5,8 76:3 78:3	80:12 81:6,22 82:6 82:11,19	mill 80:7
loading 12:19 13:6 56:20 61:19	Manual 42:4 44:3 75:17,21	mean 20:15 22:16 30:15,17 34:16	Millbury 45:14 76:19
loads 8:22 13:8 15:8 21:10	Marlboro 57:15	46:18 72:10 74:20	Millbury's 76:15
located 82:20	Marlborough 55:18 58:8,9 59:14,21 63:3	75:19 77:9,10 79:22 80:4	milligrams 9:1
logic 81:4	Marlborough-East... 15:10	meaning 77:6	milliliter 27:2,3
longer 100:13	mass 40:16,21 41:6 41:14 42:16,19 43:1	Mears 5:11	million 18:15 97:9
long-standing 39:12	43:6,8,18 44:16	measure 41:2,20 42:17,19	minds 25:11
look 25:3 29:9,11,12 33:7,7 34:3,14,15 34:19 37:9 52:5,6 70:14 91:7,10 98:10 103:16,20	65:13,19	measurement 40:21 41:5,6 65:19	minimum 9:14 10:1 39:20
looked 29:4,4,17 32:16 33:20 35:3 65:9 85:14	Massachusetts 2:15 2:21 3:9,14 4:19 12:17,19 36:1 37:3 37:11 38:19 39:16 40:4,6 47:5 53:22 66:3 69:7 77:8,13 78:7 82:13 87:19 89:3	mechanism 48:12,13 53:15 54:21 81:16	mini-spokes 71:15
looking 29:7 33:4,9 34:18 52:15,22 60:5 62:16 64:2 71:18	MassDEP 3:10 39:4 66:15 87:13	mechanisms 48:5	minute 33:22 35:19
lot 11:16 27:17 75:18 78:5 97:5 102:13	MassDEP's 65:21	meet 9:22 10:2 27:4 40:7 58:12,21 97:3 97:8 99:8	minutes 4:17,18,20 4:20,21 5:2,13 18:11 27:11,12 31:19 38:11,12,13 38:14 55:14 95:19
low 84:13 85:22 99:8	materials 6:3 10:21 100:12	meeting 37:12 51:10 94:11 97:21	mischaracterize 86:6
lower 9:17 88:18 95:6 99:12 103:5	mathematical 61:12 64:12	members 45:13,16,21 46:21 48:2 49:3	miscommunication 86:5
low-flow 85:15 86:9	matter 1:12 5:15 7:16 10:19 15:21 17:16 39:7 40:2 49:8	mention 54:22,22	missed 68:16
M		mentioned 99:18	missing 31:2,3 46:15 65:20
MacDara 3:11 38:18		MEP 98:18	misspoke 31:19
main 2:20 5:19 23:13		mere 47:14	mistake 54:17
		merits 86:16	mitigate 93:19
		MERL 6:22 9:10,13 9:18 11:17 12:3,7 13:17 14:10 21:2 24:14 25:4 26:9 44:7,21 56:10,16,21	mitigating 91:17 93:20
			mix 104:5
			model 12:2,3,19 20:11 21:14 22:7

Capital Reporting Company
Oral Argument - 10.29.09

23:14,18,19,20,21 25:4 26:9 55:19 56:2,11,13 57:2,11 58:17 60:22 61:12 64:12 67:19,22 91:8 98:15 modeling 21:11 68:9 models 25:21 68:3 modification 44:19 55:13 modified 50:22 moment 78:21 monies 51:17 monitor 31:21 monitoring 16:2 58:15 69:9 months 84:13 85:15 86:9 Montpelier 2:7 morning 4:12,15 5:8 18:8 38:17 45:9,11 55:8 83:1 103:2 most-impaired 95:5 mouse 54:16 mouth 59:22 move 20:3,16 moving 66:8 multiple 84:1 municipal 81:20 82:4 municipalities 2:17 4:21 48:3,4 51:13 52:17,19,20 55:2 70:2 74:4 76:11 79:1 81:17 municipality 72:20 80:22	narrative 40:19 41:1 42:18 65:22 66:2,4 66:8 national 29:12 37:5 66:11 87:15,22 nationally 27:18 natural 21:9 57:2 58:18 88:10 naturally 10:1 34:22 36:13,17,20 37:14 37:15,21 83:17 87:11,14,20 88:7,8 89:11 navigable 46:19 48:15 50:10 51:2 53:14 nearly 101:18 near-term 92:10 necessary 7:3 25:17 58:12,21 59:18 64:18 93:2 need 20:17 24:22 25:1 30:4 53:5,6,6 72:2 85:1 103:5 needed 13:4 19:6,9 29:6 33:10 57:19 96:2,4,12 98:4,8,21 99:13 104:14 Needless 6:9 needs 25:20 30:10 51:19 79:4 98:2,7 99:11 101:7,8 102:16 neither 106:8 net 16:1 network 16:2 never 33:4 34:1 49:4 49:4,5 76:15 97:2 97:12 Nevertheless 88:15 new 2:12 33:18,20,21 34:3 103:14 104:5,7 104:8,15 nine 66:8 95:19	nitrogen 5:17 6:1,10 6:13,14 7:8,21 8:13 14:22 15:1,12 18:1 18:21 19:14 20:13 20:22 21:15 23:5 26:13 27:22 28:14 29:15 39:8,10,11 41:5 44:6,11 55:15 62:11,18 66:13,14 66:18 89:20 98:16 99:2,7,9 101:13 nitrogen-loads 5:19 nominalist 59:20 non-delegated 39:16 non-TMDL 15:2 normal 76:14 North 3:5 Northwest 1:14 NOS 1:6 Notary 1:16 106:1,19 notation 91:12 note 92:17 94:8 95:6 noted 85:4 notes 8:6 94:22 notice 1:13 51:6 noticed 17:11 notion 91:20 notwithstanding 26:8 no-WWTF 9:4 NPDES 1:6,7 4:6,7 39:5,17 number 4:6 8:18 10:7 10:11 27:16 28:1,2 28:3 29:14,19 34:5 61:14 64:15 65:10 70:2 71:11 97:7,18 97:20,21 99:20 numbers 4:7 27:18 28:4,12 31:8 99:8 99:12,13 numeric 58:10 numerous 88:21 Nutrient 14:18,19	nutrients 55:11 66:2
O			
O 4:1			
objected 66:5			
obligation 59:5			
observed 9:10			
obtain 6:19 7:3 75:11			
obviously 55:18			
occasion 63:1			
occur 86:9 87:1,2			
occurrence 72:3			
occurring 34:22			
36:14,17,21 37:14			
37:16,21 48:7 56:17			
83:18 87:12,14,20			
88:7,9 89:11 97:16			
occurs 10:1 38:5			
October 1:11			
offered 68:11 86:20			
Office 3:12			
officer 106:3			
officials 97:20			
offsets 5:18			
oft-repeated 16:12			
OGC 55:11			
oh 28:21 34:12 35:6			
35:13 68:14			
okay 18:5 22:7 26:6			
27:19 35:6 81:1			
104:6			
old 99:3			
once 93:3			
online 30:7			
operate 43:9 74:14			
74:18			
operated 47:4 72:19			
77:3			
operating 18:16			
69:22 70:1,2			
operation 47:15 55:3			
71:4 78:11			
operative 46:16			
operator 46:14			

N

N 2:1 4:1
name 18:9 38:17 45:9
named 40:16
Naragansett 6:15
Narragansett 6:2,7
6:11,13 89:18

Capital Reporting Company
Oral Argument - 10.29.09

<p>operators 45:17 46:9 opinion 6:21 25:9 26:8 65:4 opportunity 30:14,22 38:21 opposed 41:20 76:13 opposition 61:5 oral 1:12 4:4 106:4 order 4:13,22 17:20 39:13 42:1 44:5 49:11 51:20 52:11 53:18 59:18 93:3 ordinarily 104:11 original 18:18 19:20 30:19 31:14 50:17 ortho 69:9 outcome 7:7 84:19 106:14 outfall 74:2 76:18 outlier 32:12 outliers 32:19 34:18 35:14 104:9 outline 65:8 outlined 65:2 output 57:8 67:20 outputs 61:18 outset 17:14 outside 54:12 overestimate 21:9 overflows 72:4 overturn 27:6 over-predict 56:21 57:5 91:15 over-prediction 91:14 over-predicts 97:17 owned 47:4 77:3 80:14,19 owner 46:14 owners 45:17 46:9 ownership 47:14,14 owning 70:1,2 owns 53:7 80:22 O&M 71:2 72:2,2</p>	<p>79:11</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 2:1,1 3:3 4:1 page 8:7,16,20 9:11 12:8 13:13 60:16 61:5 68:19 69:1 85:19 90:6,7 91:21 92:5,9 pages 56:19 91:2,21 93:14 panel 63:3,3 paper 80:6 paragraph 103:13,15 part 30:9 52:5 71:21 72:16 73:11,12,15 74:18 77:18 80:12 94:3 101:4 participant 49:7 particular 26:14 58:12 particularly 22:4 24:18 28:7 parties 52:15,22 53:3 106:10,13 parts 26:12 pause 56:7 penalize 43:10 people 64:2 percent 6:12 13:12 26:18,21,22 perception 7:6 perfect 11:19 12:2,3 24:6,8,10 perform 31:17 performance 19:20 performed 22:19 permit 1:7 4:6 7:2 18:18,18 19:16,18 19:21 20:18 24:20 25:2 30:9,16,19 32:6 39:2,5,7,21 40:4,7 42:3 44:3,18 46:1 48:20 49:8</p>	<p>51:6,22 53:10 58:16 58:19 61:14 66:6 67:14 69:10 71:3 74:9 75:4,17,20,21 79:2,16 96:9 97:19 97:19 99:4,4,10,11 100:7 permits 11:1 39:19 53:21 54:2 55:17 66:9 69:17,19 75:9 80:21 82:9,14 93:13 permitted 73:9 74:1 permittee 46:14 48:17 86:5 permitting 39:17,18 43:15 46:10,17 47:13 53:15 55:5 67:7 permit's 40:17 permit-type 63:7 person 48:21 perspective 6:9 15:2 15:9 Peter 55:10 petition 5:14 17:16 68:4,19 69:15 petitioning 45:12,16 45:20 46:21 49:3 phased 17:2 92:6 phones 4:9 phosphate 69:9 phosphorus 14:21 17:8,15,19 20:13 23:2,3 27:14,17 28:9,14,19 29:5,6 29:18,21 31:8 58:13 66:5,18 68:15 69:3 69:5,8 99:2,6,8,10 physical 21:14 23:18 56:2 58:17 98:15 physically 96:19 97:11 pick 27:18 picked 29:19 35:11</p>	<p>76:10 picking 28:5 34:4 pipe 50:12 76:16 pipes 50:21 70:6,12 piping 72:7 place 11:13,16 44:6 places 98:11 plan 16:17 75:3 planned 18:16 plans 74:16 plant 9:16 13:12 28:14 73:10 76:17 81:4 plants 6:18 11:4 16:22,22 92:11 play 30:11 please 4:9,11 5:3 plus 15:10 37:6 38:13 point 8:5 12:15 15:22 19:9 22:3 29:22 32:12,14,22 33:2 34:11,16 35:18 36:10 39:3 41:16 44:7,22 46:20,22 47:10,11 48:16,18 49:18 51:1 53:14 60:13 62:4 70:10 73:18 76:3,10 78:21 81:2,9 83:6 84:14 84:22 85:3,7,18 86:15,17 87:7,9 88:20 90:16 94:13 99:17 100:21 102:22 103:19 104:1,17,17 pointed 68:6 pointing 75:14 points 9:7 13:1 23:8 32:2 35:16 85:21 86:8 policies 39:12 policy 40:10 41:20,22 44:3,17 policy-ridden 78:16</p>
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