

BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES

U.S. ENVIRONMENTAL PROTECTION AGENCY
SPRINGFIELD, MO

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IN THE MATTER OF:	:	
	:	
NEW PRIME, INC.,	:	
	:	
Respondent.	:	RCRA-08-2020-0007
	:	

Volume II

Tuesday,
October 25, 2022

The above-entitled matter came on for
hearing, pursuant to notice, at 8:00 a.m. CDT

BEFORE:

THE HONORABLE CHRISTINE COUGHLIN
Administrative Law Judge

APPEARANCES:

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CONTENTS

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Kristin McNeill	20	197	304	312
Stephan Drake	316	349	360	

EXHIBIT NO.		MARK	RECD
Complainant			
66	Pages 13-53 of CEX66 (Appendix 1)	61	63
67	Resume of Kristin McNeill		
4	Corrected EPA explanation of proposed penalty assessment for respondent	34	34
3	EJSCREEN Report for the Prime Facility (Utah)		168
Claimant			
4	EPA's explanation of the proposed penalty assessment (separate from CEX4 Corrected)		201

4

1 P-R-O-C-E-E-D-I-N-G-S
 2 8:04 a.m.
 3 JUDGE COUGHLIN: Good morning,
 4 everyone. We are back. We're convening Day 2 of
 5 the New Prime hearing. It is Tuesday, October
 6 25th, same location. We're getting started a
 7 little past 8:00, 8:07, I'd say.
 8 So everyone's present that I can see
 9 in terms of counsel representing Region and New
 10 Prime. Before we get started, just one quick
 11 follow-up from yesterday.
 12 So I was chatting a little bit with
 13 Michael and Alyssa about the best way to preserve
 14 the email communication, a copy of which Mr.
 15 McKay presented to me and to Ms. Jackson
 16 regarding the audio recordings.
 17 So what I thought I would do is, and
 18 I wanted to put this on the record so that the
 19 transcript reflects the actions I'm going to take
 20 to preserve this for any review of my decision,
 21 my ruling, all that.
 22 So what I was going to do is it's a

6

1 MS. JACKSON: Yes, Your Honor.
 2 MR. MCKAY: Yes, ma'am.
 3 JUDGE COUGHLIN: Okay, great. So
 4 that's what I'll do, and the transcript
 5 identifies it. And we're ready to get started
 6 unless there's anything you all need to discuss
 7 with me first.
 8 MR. MCKAY: I have one matter to
 9 bring, if I may.
 10 JUDGE COUGHLIN: Sure. Yes.
 11 MR. MCKAY: And good morning.
 12 JUDGE COUGHLIN: Good morning.
 13 MR. MCKAY: I'd like to address the
 14 issue of demonstrative exhibits.
 15 JUDGE COUGHLIN: Okay.
 16 MR. MCKAY: As this Court will recall
 17 from yesterday when Dr. Miller was on the stand.
 18 The Government provided to us for the first time
 19 during the middle of his testimony multiple-page
 20 demonstrative exhibits, which my co-counsel was
 21 forced to try and understand and digest and
 22 utilize in both listening to his testimony and

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1 two-page document, and I was going to scan it and
 2 send it to Mary Angeles, who's the paralegal in
 3 our office, to then upload to into our case
 4 tracking system, which is where all of your
 5 submissions ultimately go and that our office
 6 utilizes for essentially the reproduction of what
 7 would have been a paper record into an electronic
 8 record that we now use.
 9 And it's my understanding the
 10 Environmental Appeals Board does the same or
 11 utilizes the same system. So what I was going to
 12 do was have her upload this. I was going to name
 13 it Hearing Document, Emails Between Counsel for
 14 Parties Regarding Discs of Audio Recordings.
 15 That way should it ever need to be
 16 reviewed in context for our colloquy yesterday,
 17 it's preserved. And should the case go beyond
 18 the EAB, the administrative record, it's my
 19 understanding contains all of this. So it would
 20 be preserved for any type of review at that level
 21 as well by an Article III Court. Is that
 22 acceptable to everybody?

7

1 then preparing to cross examine him.
 2 Today, we received from the Government
 3 that it was emailed at 7:41. Two additional
 4 multiple-page demonstrative exhibits, one 23
 5 pages, one 17 pages, concerning a witness that
 6 they intend to call today, their penalty witness.
 7 And I submit that that's not
 8 consistent with that this Court's order was,
 9 which is I understood it was to provide
 10 demonstrative exhibits in the morning, but I
 11 understood it to be the morning of the start of
 12 the trial.
 13 And so again, Mr. Ryan is now in the
 14 very unenviable position of trying to sort of
 15 collect our things, get organized, get set up for
 16 today and then digest these lengthy demonstrative
 17 exhibits that have clearly been prepared well in
 18 advance of the hearing and provide it to us, we
 19 submit at the last minute.
 20 It causes unfair prejudice to Prime,
 21 and I submit it should not be allowed. And we
 22 object to the Government's use of those two

1 demonstrative exhibits for that reason.
 2 JUDGE COUGHLIN: Okay, all right.
 3 Thank you.
 4 MR. MCKAY: Thank you.
 5 JUDGE COUGHLIN: Thank you for
 6 bringing that to my attention. I guess I was
 7 under the impression that any use of
 8 demonstratives would be presented on Day 1 of
 9 hearing in the morning so that there was time for
 10 everyone to review them.
 11 And obviously, that's not what has
 12 transpired, even with regard to yesterday's set
 13 of testimony.
 14 So would the Region like to respond
 15 before I talk about solutions?
 16 MR. FIGUR: Yes, thank you.
 17 JUDGE COUGHLIN: Okay.
 18 MR. FIGUR: It was our understanding
 19 that they were to be provided on the morning of
 20 testimony, and so that's why we provided them
 21 yesterday. We acknowledged immediately that that
 22 wasn't done for the one demonstrative for Dr.

1 regard to the demonstratives you were intending
 2 to use today, I assume all of that information is
 3 contained in CX4 corrected, the explanation of
 4 the penalty calculation. It's not new
 5 information.
 6 MR. FIGUR: So the first demonstrative
 7 is essentially an aid to help walk through the
 8 RCRA civil penalty policy.
 9 JUDGE COUGHLIN: Okay.
 10 MR. FIGUR: The second is in aid of
 11 Exhibit 4 corrected. It elaborates a little bit
 12 on and provides some support for Exhibit 4
 13 corrected, in addition to helping walk through.
 14 That's it.
 15 JUDGE COUGHLIN: Okay. But the bottom
 16 line is that information, there isn't anything
 17 new in there. It's what I already would be able
 18 to glean from looking at the RCRA penalty policy,
 19 the updated memos. I think 2010, 2020, there
 20 were updated memos with regard to it. And CX4
 21 corrected.
 22 MR. FIGUR: That is correct, Your

1 Miller.
 2 Today this morning, we provided the
 3 two demonstrative. The first demonstrative will
 4 essentially aid the Court as Ms. McNeill walks
 5 through the penalty policy. The second one is
 6 designed to aid the Court as Ms. McNeill walks
 7 through each penalty.
 8 JUDGE COUGHLIN: Okay. Well, I
 9 suppose one solution would be this. As I
 10 understand it, and I'll ask you both with regard
 11 to yesterday and today.
 12 With regard to Dr. Miller, the
 13 demonstratives that were used. I think one was
 14 four or five pages, the other was one or two. I
 15 don't remember specifically now.
 16 That same information, and I think Mr.
 17 Ryan asked this question in the very beginning
 18 with one of the first tables that was displayed.
 19 All of that information from the demonstrative is
 20 in Dr. Miller's report, correct?
 21 MR. FIGUR: That is correct.
 22 JUDGE COUGHLIN: Okay. And with

1 Honor, specifically with regard to the first on.
 2 With regard to the second demonstrative, and we
 3 were going to address this directly with the
 4 Court when we got there, we weren't certain of
 5 the status of certain exhibits that are in
 6 support of Exhibit 4 corrected and whether they
 7 would be admitted or not.
 8 And so we were going to offer the
 9 Court either the option to quickly read through
 10 testimony by not jumping back and forth from the
 11 demonstrative to an exhibit and back again, and
 12 we took selected pages out of the exhibits, which
 13 are now entered into evidence.
 14 So since they're in evidence, we were
 15 going to offer to jump back and forth or identify
 16 specifically where they came from to facilitate
 17 moving through the testimony more efficiently.
 18 Everything in that demonstrative is
 19 about Exhibit 4 corrected, and it either can
 20 bring in or we can move outside and go directly
 21 to the exhibit that's been admitted for the exact
 22 same information that's in the demonstrative. We

12

1 were going to leave your discretion to tell us
 2 how you prefer we proceed during testimony.
 3 JUDGE COUGHLIN: Okay. I think given
 4 this, it would just be best to dispense with
 5 demonstratives. I appreciate the attempt to aid,
 6 but if it's creating complication, then it's not
 7 really serving its purpose. So we'll just rely
 8 on the exhibits, and I don't have a problem
 9 flipping between exhibits.
 10 New Prime, do you?
 11 MR. MCKAY: No, ma'am.
 12 JUDGE COUGHLIN: Okay, so we'll just
 13 do that. So forget the demonstratives, and I'm
 14 not really going to worry about the
 15 demonstratives from Dr. Miller's testimony
 16 yesterday either since that information is
 17 contained in his report, and that's what I'll be
 18 looking at in coming to a decision on penalty.
 19 MR. FIGUR: Thank you, Your Honor.
 20 MR. MCKAY: Yes, sir. Yes, ma'am.
 21 JUDGE COUGHLIN: Okay.
 22 (Laughter.)

14

1 choices.
 2 We could either do an extraction of
 3 the drum logs and have Ms. McNeill testify to
 4 attempt to get them admitted and then testify to
 5 them, or we can wait until Dr. Katellis
 6 testifies, have her address admission of her
 7 report including the drum logs, and then bring
 8 Ms. McNeill back at the end of Dr. Katellis's
 9 testimony.
 10 JUDGE COUGHLIN: Well, yes.
 11 Go ahead, Mr. Ryan.
 12 MR. RYAN: Yes, Your Honor. They have
 13 the burden of proof. Part of the prima facie
 14 case, they have to get in the evidence to support
 15 the case. I think chosen to put on Dr. Katellis
 16 as a rebuttal witness not as a case-in-chief,
 17 that's their tactical decision. They need to
 18 live with it.
 19 JUDGE COUGHLIN: Okay. Is there a way
 20 to -- you said it's CX66, right?
 21 MR. FIGUR: Correct.
 22 JUDGE COUGHLIN: So is there a way to

13

1 JUDGE COUGHLIN: That's all right. No
 2 offense, no offense.
 3 MR. MCKAY: None intended.
 4 JUDGE COUGHLIN: No, no, I understand.
 5 Okay, so are we all squared away then
 6 to proceed?
 7 MR. FIGUR: We are.
 8 JUDGE COUGHLIN: Okay, great.
 9 MR. FIGUR: Your Honor, we have one
 10 more preliminary matter for this morning.
 11 JUDGE COUGHLIN: Okay, no problem.
 12 MR. FIGUR: We're trying to figure out
 13 how to proceed based on the conversation
 14 yesterday. Dr. Katellis's expert report is
 15 Complainant's Exhibit 66. Attachment 8 of that
 16 report is the drum logs from the NEIC field
 17 personnel that she received directly from the
 18 field personnel.
 19 Dr. Katellis is not testifying until
 20 rebuttal, so her report will not be addressed for
 21 admission until she testifies. However, Ms.
 22 McNeill has review the drum logs. So we have two

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1 carve out the drum logs as a whether you want to
 2 call it a subset of 66 rather than a new exhibit
 3 number or something like that in order to deal
 4 with it separately with a different witness who
 5 can appropriately sufficiently testify about it
 6 irrespective of Dr. Katellis.
 7 MR. FIGUR: We could do that. We'll
 8 refer to it as Appendix A to Exhibit 66.
 9 JUDGE COUGHLIN: Okay. Is it
 10 identified as that? Can you tell me the page
 11 number for (simultaneous speaking) --
 12 MR. FIGUR: Can you please pull up 66.
 13 JUDGE COUGHLIN: I'm kind of scrolling
 14 through it now. Oh, I see the drum log logbook,
 15 yes. It looks like it begins on Page 13.
 16 MR. FIGUR: Yes, Your Honor. We also
 17 did create hard copies, even though they're not
 18 going to be as useful as a new exhibit. We are
 19 happy to provide Counsel with a hard copy of the
 20 drum logs, which we marked as a new exhibit, but
 21 they're still essentially the drum logs. So we
 22 can provide them a hard copy right now, even

16

1 though they're in 66, they can look at them
 2 electronically or in paper.
 3 JUDGE COUGHLIN: Okay, that would be
 4 great.
 5 So that's a replica, right? Of what's
 6 here in 66.
 7 MR. FIGUR: It is an exact replica,
 8 Your Honor.
 9 JUDGE COUGHLIN: Okay. All right,
 10 great. And 13 through -- is it all the way to
 11 the end, or -- he's scrolling here trying to --
 12 MR. FIGUR: Yes, please scroll to the
 13 end.
 14 JUDGE COUGHLIN: Oh, you've got it up.
 15 Sorry.
 16 MR. FIGUR: Yes, it goes through Page
 17 53 to the end.
 18 JUDGE COUGHLIN: Okay.
 19 MR. MCKAY: Counsel, I think
 20 you handed us Exhibit 78.
 21 MR. FIGUR: Correct. We mark it in
 22 case it was going to be addressed through as a

18

1 JUDGE COUGHLIN: Sure. She's your
 2 next witness, right?
 3 MR. FIGUR: Correct.
 4 JUDGE COUGHLIN: yes, that's fine.
 5 MR. FIGUR: Okay.
 6 JUDGE COUGHLIN: That's fine. I would
 7 say conceptually treat it like it's a separate
 8 exhibit, but I'm just going to deal with it as
 9 Pages 13 to 53 of the 66. As long as the
 10 record's clear what is being admitted or not, I
 11 think it's fine.
 12 MR. FIGUR: Thank you.
 13 JUDGE COUGHLIN: If the rest of 66 is
 14 not admitted, anyone reviewing and when I review
 15 and have the transcript, I'll know what's been
 16 admitted, and I'm going to confirm all that with
 17 everybody before we finish anyway as to what's in
 18 and what's out.
 19 MR. FIGUR: Thank you, Your Honor.
 20 JUDGE COUGHLIN: Sure.
 21 MR. FIGUR: At this time, Complainant
 22 calls Ms. McNeill.

17

1 new exhibit, but it is Pages 13 through 53 of
 2 Complainant's 66.
 3 JUDGE COUGHLIN: So I think rather
 4 than getting bogged down and renumbering or
 5 anything like that, I think it's fine if we're
 6 treating this as a simply a section of that
 7 exhibit.
 8 The entirety of the exhibit may or not
 9 come in, but you can just deal with the drum log
 10 section. We'll refer to as Pages 13 to 53 of
 11 CX66, kind of carve it out as a separate part of
 12 the exhibit and deal with it that way.
 13 MR. FIGUR: Thank you, Your Honor. I
 14 just want to clarify, we are prepared to address
 15 admissibility. Would you like the witness to do
 16 that?
 17 JUDGE COUGHLIN: You're prepared to
 18 address it --
 19 MR. FIGUR: Admissibility of the log
 20 books for purposes of Ms. McNeill's testimony.
 21 JUDGE COUGHLIN: Through her?
 22 MR. FIGUR: Yes.

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1 JUDGE COUGHLIN: Okay.
 2 (Pause.)
 3 JUDGE COUGHLIN: Good morning, if you
 4 could please raise your right hand.
 5 WHEREUPON,
 6 KRISTIN MCNEILL
 7 was called for examination by Counsel for the
 8 Complainant, having been first duly sworn,
 9 assumed the witness stand, was examined and
 10 testified as follows:
 11 JUDGE COUGHLIN: Okay, the witness has
 12 been sworn. I apologize here. I meant to point
 13 this out, too. Would it be helpful to the
 14 parties if we quickly reviewed what has been
 15 admitted from yesterday and what has not? Or
 16 basically just what's been admitted from
 17 yesterday versus leaving it all until the end of
 18 the hearing, or would you just like to wait and
 19 leave until the end of the hearing?
 20 MR. FIGUR: Your Honor, we have what
 21 we believe is an accurate record for our own use.
 22 JUDGE COUGHLIN: Okay.

20

1 MR. MCKAY: I would defer to the court
2 on this, Your Honor.
3 JUDGE COUGHLIN: Okay. Well, I'll
4 just wait until the end so I don't take up time
5 now. I'm taking notes, and I have the benefit of
6 two smart attorneys with me to have my back, too.
7 They're keeping notes as well. We'll just work
8 with it at the end.
9 MR. FIGUR: Thank you.
10 DIRECT EXAMINATION
11 BY MR. FIGUR:
12 Q Good morning, Ms. McNeill. Can you
13 please state your name?
14 A Kristin McNeill.
15 Q What is your educational background?
16 A I have a bachelor of science and a
17 bachelor of arts in liberal arts with a focus on
18 forest ecology and chemistry from the Evergreen
19 State College. And then I went to graduate
20 school at Western Washington University and have
21 a master's in science, environmental science,
22 with a focus in environmental toxicology and

22

1 Act.
2 Q What are your responsibilities as a
3 RCRA inspector and enforcement officer?
4 A I conduct RCRA inspections and develop
5 enforcement cases, which consists of determining
6 violations and calculating penalties.
7 Q Do you conduct these responsibilities
8 for all of RCRA?
9 A I focus mainly on RCRA Subtitle C,
10 which is the hazardous waste program.
11 Q Can you please bring up 67?
12 (Pause.)
13 Q Can you please scroll up.
14 A I can see that. It's okay.
15 MS. TRIBETT: Oh, I have to turn
16 witness on.
17 THE WITNESS: Thank you.
18 (Pause.)
19 THE WITNESS: Got it, thank you.
20 BY MR. FIGUR:
21 Q Can you please scroll again?
22 Ms. McNeill, do you recognize this

21

1 chemistry.
2 JUDGE COUGHLIN: One second. You're
3 soft-spoken, which is fine. I just want to make
4 sure it's getting picked up.
5 Can you hear? Okay, great.
6 Go right ahead. That's okay.
7 THE WITNESS: No problem.
8 BY MR. FIGUR:
9 Q Ms. McNeill, what work have you done
10 since getting your master's degree?
11 A I started working in EPA's Region 10
12 Seattle Office in 2009. For the first two years,
13 I was a multimedia inspector and then in 2011, I
14 moved to the RCRA Enforcement Program to be a
15 RCRA inspector, an enforcement officer. I've
16 been doing that since 2011. Again, starting in
17 Region 10 and in Region 8.
18 Q How long have you been in Region 8?
19 A For about four years.
20 Q For the record, what does RCRA stand
21 for?
22 A The Resource Conservation and Recovery

23

1 document?
2 A Yes, I do.
3 Q What is it? A
4 It's my r, sum,.
5 Q Did you prepare this document?
6 A I did.
7 Q Is it a true and correct copy?
8 A Yes, it is.
9 MR. FIGUR: Your Honor, Complainant
10 moves to enter Complainant's Exhibit 67.
11 JUDGE COUGHLIN: Any objection?
12 MR. RYAN: I believe it was already
13 stipulated to, Your Honor.
14 JUDGE COUGHLIN: Yes, 67 was
15 stipulated to.
16 MR. FIGUR: Stipulated, thank you.
17 JUDGE COUGHLIN: But not -- right,
18 with regard to authenticity and admissibility.
19 MR. FIGUR: I know, Judge.
20 JUDGE COUGHLIN: Okay, all right.
21 MR. FIGUR: Thank you.
22 JUDGE COUGHLIN: It's already in.

1 BY MR. FIGUR:

2 Q Ms. McNeill, can you tell us a little
3 bit about RCRA Subtitle C, please.

4 A Yes. RCRA Subtitle C is a
5 comprehensive regulatory program that provides
6 for the safe management of hazardous waste from
7 cradle to grave, which means there are
8 requirements from the time the waste is generated
9 through transport, storage, disposal.

10 It includes waste management, but
11 ensures, again, the safe storage of hazardous
12 waste and safe transport, safe disposal. There
13 are facility requirements such as hazardous waste
14 training for employees and developing a
15 contingency plan in case of a release.

16 There are notification and records
17 requirements such as using a hazardous waste
18 manifest, notifying EPA or the state agencies
19 about hazardous waste activities. And then also
20 if the facility is a treatment, storage and
21 disposal facility, the requirement to get a
22 permit.

1 Q Thank you. Let's talk a little bit
2 about how you became involved in this matter.
3 What was your first involvement in this matter?

4 A So sometime after the pre-hearing
5 exchange began, I was asked if I could step in as
6 the EPA's penalty witness to describe the
7 proposed penalty if necessary.

8 Q What did you do to first assess
9 whether you could step in as Complainant's
10 penalty witness in this matter?

11 A I looked at the complaint. I looked
12 at the penalty, the explanation for the
13 calculated -- proposed penalty calculation,
14 excuse me. I might just call the penalty
15 justification. And the information that those
16 documents were based on.

17 Q What did you look for in the
18 complaint?

19 A In the complaint, I mainly focused on
20 the alleged violations, the alleged counts, just
21 to assess if I thought that I would recommend
22 pursuing the same counts.

1 Q Can you please explain a little bit
2 more about this part of the enforcement process?

3 A Yes. When an inspector observes
4 non-compliance, they review the regulations and
5 determine if there's a potential violation, and
6 then recommend if formal enforcement should be
7 pursued and on which potential violations.

8 Q Thank you. Can you please briefly
9 remind us what the five counts are?

10 A Yes. The first count was failure to
11 make hazardous waste determination. The second
12 was failure to prepare a manifest. The third,
13 storage of hazardous waste without a permit. The
14 fourth count is failure to properly manage
15 hazardous waste containers. And then the fifth
16 is failure to get an EPA ID number.

17 Q Thank you. What was your assessment
18 of the allegations Complainant chose to pursue in
19 the complaint?

20 A So Prime's non-compliance was
21 complete. They didn't follow any of the
22 hazardous waste requirements throughout the whole

1 time that they managed the waste. So there are
2 definitely additional counts that could have been
3 alleged, but we decided to focus on five of the
4 more fundamental RCRA requirements. And so I
5 think it fairly represents their non-compliance,
6 even though we just selected five of the more
7 fundamental counts.

8 Q Can you please give us an example or
9 two of other allegations that could have been
10 made here?

11 MR. RYAN: Objection, Your Honor.

12 JUDGE COUGHLIN: Hold on.

13 Okay, go ahead.

14 MR. RYAN: EPA filed a complaint on
15 five counts of RCRA. Now, we're trying to talk
16 about counts they didn't bring, which we could
17 not possibly know what those are. I mean,
18 really, this is beyond the scope of what this
19 witness should be testifying about.

20 JUDGE COUGHLIN: Yes, I agree. I'm
21 sustaining the objection. We're focusing on
22 what's been alleged, what's been found, what the

1 Respondent's been found liable for in those five
 2 counts.
 3 MR. FIGUR: I will not argue, but I
 4 would like to make one note for the record.
 5 JUDGE COUGHLIN: Please.
 6 MR. FIGUR: And that is that they have
 7 brought into question whether or not our penalty
 8 calculation is fair under the circumstances. And
 9 I believe that the decisions we make from the
 10 beginning -- the Agency makes from the beginning
 11 of the enforcement process though to today are
 12 what matter in their entirety. I'm trying to
 13 overrule or trying to change your objection.
 14 JUDGE COUGHLIN: That's okay.
 15 MR. FIGUR: I just want to note that
 16 for the record.
 17 JUDGE COUGHLIN: Yes. Totally fine.
 18 Mr. Ryan, if you would like to make a
 19 comment, you can. I've ruled, and I'm standing
 20 by that ruling. I'm not going to expand beyond
 21 what's been -- what the Respondent's been found
 22 liable for. So we're going to stick to the five

1 facilities, they're required to manage hazardous
 2 waste in the same manner. So we're basically
 3 looking for the same types of things at all the
 4 facilities.
 5 Q Can you elaborate on the types of
 6 things you do look for when you're on an
 7 inspection?
 8 A Sure. We generally look at how the
 9 hazardous waste is managed. So we're looking for
 10 things such as the drums are labeled as hazardous
 11 waste, if they're marked with an accumulation
 12 start date, if they are closed, if they're kept
 13 in good condition.
 14 We also do a records review, so we
 15 look at hazardous waste training logs. We look
 16 at weekly inspection logs. We review the
 17 facility's contingency plan. We look at the
 18 manifest.
 19 That's not a comprehensive list. We
 20 look at a lot of different things. Also if the
 21 facility is a permitted treatment, storage and
 22 disposal facility. We do look at how and where

1 counts before me.
 2 MR. FIGUR: Thank you, Your Honor.
 3 JUDGE COUGHLIN: Okay.
 4 BY MR. FIGUR:
 5 Q We weren't trying to do that.
 6 Turning back to the RCRA program again
 7 for a moment. Why does EPA conduct RCRA
 8 inspections?
 9 A EPA conducts RCRA inspections to
 10 ensure that hazardous waste is safely managed
 11 throughout the entire process. Basically, as I
 12 said, it's a cradle to the grave program to
 13 prevent and detect any releases of hazardous
 14 waste.
 15 Q Do you conduct RCRA inspections?
 16 A I do.
 17 Q What types of facilities do you
 18 inspect?
 19 A I inspect all kinds of facilities from
 20 auto body shops to universities, manufacturing
 21 facilities, treatment, storage, and disposal
 22 facilities. But at every one of those

1 the waste is managed as well as any additional
 2 requirements, documents they're required to
 3 maintain.
 4 Q Why do you look at how hazardous waste
 5 is being stored?
 6 A We look at how hazardous waste is
 7 being stored, again, because that's the basis of
 8 the RCRA program is safe storage of hazard waste.
 9 We're ensuring that the facility is safely and
 10 legally managing their hazard waste and storing
 11 it properly.
 12 Q Have you inspected Respondent's Salt
 13 Lake City facility?
 14 A I have not.
 15 Q Has anybody from EPA inspected the
 16 facility?
 17 A Yes. As we know the CID performed an
 18 inspection on August 2nd, 2016, and then NEIC
 19 performed the sampling event August 24th of 2016.
 20 And I reviewed the reports from both of those
 21 inspections.
 22 Q Is it unusual for you to be the

1 enforcement officer for a facility you didn't
 2 inspect?
 3 A No, it's not. So most RCRA inspectors
 4 are also enforcement officers. For all the years
 5 that I was in Region 10, it was the practice of
 6 the RCRA program there to assign a different
 7 enforcement officer than the inspector who did
 8 the inspection, so we kind of switched reports.
 9 So it's not unusual for me to take an enforcement
 10 case at a facility I didn't inspect.
 11 Q What did you do next after you became
 12 comfortable with the counts that were in the
 13 complaint?
 14 A I reviewed basically more of the
 15 documents related to the case. I took another
 16 look at the complaint, looked a little bit more
 17 deeply into the penalty justification, the
 18 calculation of proposed penalty. Again, I looked
 19 at, at that point, any of the exhibits that have
 20 been submitted and other documents that are
 21 related to the case.
 22 Q Please bring up Exhibit 4 corrected.

1 the RCRA penalty policy to evaluate the
 2 case-specific information and develop an
 3 appropriate penalty for each of the counts.
 4 (Whereupon, CX04 Corrected was marked
 5 as Complainant's Exhibit No. 4 Corrected for
 6 identification.)
 7 Q Does this version of the document
 8 accurately reflect Complainant's proposed
 9 penalty?
 10 A Yes, it does.
 11 Q Is this a true and correct copy?
 12 A Yes, it is.
 13 MR. FIGUR: Your Honor, at this time,
 14 Complainant moves to admit Complainant's Exhibit
 15 4 corrected.
 16 JUDGE COUGHLIN: Any objection from
 17 New Prime?
 18 MR. RYAN: No objections, Your Honor.
 19 JUDGE COUGHLIN: All right. CX04
 20 corrected is admitted into evidence.
 21 (Whereupon, CX04 Corrected was
 22 received into evidence as Complainant's Exhibit

1
 2 (Pause.)
 3 Q Please scroll through.
 4 (Pause.)
 5 Q Thank you.
 6 Are you familiar with this document?
 7 A I am.
 8 Q Can you tell us a little about it?
 9 A Yes, this is EPA's explanation of the
 10 proposed penalties assessment. Basically, this
 11 is what I refer to as the penalty justification.
 12 MR. RYAN: I'm sorry. For the record,
 13 is this EX04 corrected?
 14 MR. FIGUR: Correct.
 15 MR. RYAN: Thank you.
 16 BY MR. FIGUR:
 17 Q Can you tell us a little bit more
 18 about this document?
 19 A Yes. This document was developed by
 20 my predecessor on this case. It was basically,
 21 as I said, as inspectors and enforcement
 22 officers, determine the violations and then use

1 No. 4 corrected.)
 2
 3 BY MR. FIGUR:
 4 Q Thank you.
 5 Ms. McNeill, please explain how even
 6 though Ms. Jacobson drafted the proposed penalty
 7 for Complainant you are able to testify to
 8 Complainant's proposed penalty today?
 9 A In looking at the calculation of the
 10 proposed penalty and the facts of the case, I
 11 agree with my predecessor's assessment of the
 12 facts and the approach that she took in
 13 calculating the penalty.
 14 We as a team have a process that we
 15 follow, which is to basically follow the penalty
 16 policy when calculating penalties. And so since
 17 I agree with her approach and analysis of the
 18 facts, I'm comfortable with the calculation of
 19 the proposed penalty.
 20 Q Thank you. Let's turn to the process
 21 for calculating proposed penalties. After EPA
 22 determines which violations to pursue with a

36

1 formal enforcement action, what does the Agency
2 do next?

3 A We consider the two statutory factors,
4 which are the seriousness of the violation and
5 the good faith efforts to comply with the
6 applicable requirements.

7 Q How does EPA assess the two factors as
8 proposed penalties are calculated?

9 A So EPA developed the RCRA civil
10 penalty policy to address those two statutory
11 factors. The seriousness of the violation is
12 considered in the gravity component, which is
13 made up of potential for harm and extent of
14 deviation. And then good faith efforts to comply
15 is considered as a standalone adjustment factor.

16 Q For the record, which version of the
17 penalty policy was used?

18 A We used the 2003 version of the
19 penalty policy, a small part of which was amended
20 in 2020.

21 Q What steps generally does the Agency
22 follow when calculating a proposed penalty under

37

1 the policy?

2 A Again, we follow the penalty policy to
3 the letter. So the four steps in the penalty
4 policy are to determine the gravity, which I said
5 earlier is the potential for harm and extent of
6 deviation.

7 The second step is to use those two
8 factors in the penalty matrix. The second part
9 is to look at the multi-day component, if there's
10 a multi-day component.

11 Then we apply any of the adjustment
12 factors, which are listed in the penalty policy.
13 And then apply any economic benefit.

14 Q Thank you. Can you please describe
15 how gravity is calculated?

16 A Yes. As I said, the gravity is made
17 up of potential for harm and extent of deviation.
18 Potential for harm is further broken down into
19 harm to human health and the environment and harm
20 to the RCRA program.

21 With potential for harm, we are
22 charged with evaluating the potential for harm.

38

1 There doesn't have to be an actual release or
2 exposure in order for there to be a potentially
3 substantial or major potential for harm.

4 Q Can you please describe how potential
5 for harm to human health and the environment is
6 analyzed?

7 A Yes. So potential for harm to human
8 health and the environment, we basically look at
9 the probability of exposure and then the
10 potential seriousness of the contamination that
11 may occur.

12 Q How do you assess harm to the
13 regulatory program?

14 A Harm to the program is evaluated based
15 on how fundamental the requirement is to the
16 integrity of the RCRA program.

17 Q After you look at both of those
18 factors, what do you do next under the policy?

19 A At that point, we determine if the
20 overall potential for harm is major, moderate or
21 minor. Again, these are defined in the penalty
22 policy.

39

1 Major potential for harm occurs when
2 there is considered to be a substantial risk of
3 exposure, so human health and the environment.
4 And it's an and/or definition. So and/or if
5 there's a substantial risk of harm to the
6 regulatory program.

7 Moderate potential for harm is if
8 there's considered to be a significant either
9 harm to human health and/or harm to the program.

10 And then minor potential for harm is
11 when there would be a relatively low or a small
12 risk.

13 Q Now, let's turn to extent of
14 deviation. How is that analyzed?

15 A Extent of deviation is basically
16 looking at the extent of the deviation. How far
17 away from the requirement the violation occurred.
18 So again, there's major, moderate and minor
19 designations.

20 A major designation is considered when
21 the extent of deviation from the requirement is
22 complete, mainly if most or the most important

40

1 aspects of the requirement are not met.
2 The moderate extent of deviation is
3 when some of the requirements are implemented as
4 intended.

5 And a low extent of deviation or
6 minor, excuse me, would be when most of the
7 requirements are met as intended.

8 Q Thank you. After you analyze the
9 extent of deviation and the potential for harm,
10 what's the next step under the policy?

11 A So I will say this is when the
12 demonstrative would be helpful because I need you
13 to envision a penalty matrix.

14 JUDGE COUGHLIN: This is what we have.

15 THE WITNESS: Yes, other (simultaneous
16 speaking) --

17 JUDGE COUGHLIN: It should be captured
18 in the exhibits.

19 THE WITNESS: Yes, so in the 2003
20 penalty policy, there is a penalty matrix. That
21 is the original penalty matrix that we work from.
22 And again as I said, there's a major, moderate

41

1 and a minor potential for harm in extent of
2 deviations.

3 So if you make -- there's basically a
4 nine-cell. And within each cell is a range of
5 penalty amounts for each of those designations
6 where they intersect.

7 JUDGE COUGHLIN: One second. Do you
8 have a way to pull up the policies so if she
9 needs to see a section of it, she can just turn
10 to it since we're not using demonstratives?

11 Would that aid you?

12 THE WITNESS: Yes.

13 JUDGE COUGHLIN: Okay.

14 Because we have --

15 MR. FIGUR: The policy.

16 JUDGE COUGHLIN: Yes, that's actually
17 -- I took judicial notice of that, I believe.

18 MR. FIGUR: Yes. Thank you, Your
19 Honor.

20 JUDGE COUGHLIN: Yes.

21 MR. FIGUR: Can you please scroll
22 steadily.

42

1 JUDGE COUGHLIN: Just for clarity,
2 we're talking about the 2003 RCRA policy that
3 we're looking at right now?

4 THE WITNESS: Yes.

5 JUDGE COUGHLIN: Okay. Well, actually
6 I wasn't asking the witness. I'm asking
7 (simultaneous speaking) that's okay.

8 MR. FIGUR: I want to clarify that
9 we're bringing up the one from the website,
10 directly from the website. So this is the 2020.
11 This is the 2003 policy, but on the webpage
12 there's also the 2020 amendment. This is from
13 the 2003 policy link on the webpage.

14 MR. RYAN: Just to clarify, the most
15 recent amendments are unrelated to this case?

16 MR. FIGUR: Generally speaking,
17 they're not, but they're ancillary.

18 MR. RYAN: Because we have here the
19 2003 policy, not the amendments.

20 MS. JACKSON: I apologize. I did a
21 lot of the preliminary exchange, I just wanted to
22 speak to that. We have the inflation matrices in

43

1 our pre-hearing exchange. So the inflation memos
2 just address the numbers that are in the
3 matrices. Otherwise, the bulk of the policy
4 applies. I just want to --

5 MR. RYAN: I agree.

6 JUDGE COUGHLIN: Yes, that's what I
7 wanted to clarify because -- and I didn't meant
8 to cut you off, Mr. Figur. I'm sorry. But this
9 is important because I want to make sure I'm on
10 the same and we're all on the same page.

11 So what I understood I took judicial
12 notice of was the 2003 RCRA policy. And then the
13 penalty explanation made reference to a 2010 memo
14 that was an update with respect to numbers based
15 on the date, and a 2020 update that made further
16 adjustments to the numbers also from a certain
17 date.

18 Those are the three things I believe
19 I took judicial notice of, correct?

20 MS. JACKSON: Yes, that's my
21 understanding.

22 MR. RYAN: That's my understanding as

44

1 well.

2 JUDGE COUGHLIN: Okay, good. So we're

3 all on the same page. But for purposes of the

4 witnesses' testimony, can I just look at the 2003

5 RCRA policy?

6 MR. FIGUR: Absolutely, Your Honor.

7 JUDGE COUGHLIN: Okay. I saved a copy

8 of that when I was reviewing and preparing for

9 the hearing, so I can refer to that as well.

10 Because I took notice of it, it's not an exhibit.

11 MR. FIGUR: Yes.

12 JUDGE COUGHLIN: New Prime, do you

13 have that available to you to look at?

14 MR. RYAN: I have the 2003 penalty

15 policy here, Your Honor.

16 JUDGE COUGHLIN: Okay. So I think

17 we're all talking about the same thing. The

18 updates were simply adjustments to the numbers,

19 not to the text or rationale for the penalty.

20 MR. FIGUR: Correct.

21 JUDGE COUGHLIN: Okay. So just give

22 me one quick second here to pull it up as well.

46

1 --

2 MR. RYAN: That's my understanding as

3 well, Your Honor. Thank you.

4 JUDGE COUGHLIN: Okay, all right.

5 Great. We're all on the same page.

6 Can you see it (simultaneous

7 speaking). Okay, perfect.

8 Please go ahead, Mr. Figur.

9 BY MR. FIGUR:

10 Q Thank you. Returning to your

11 description of what happens after the potential

12 for harm and extent of deviation are analyzed,

13 what do you do next? What does the Agency do?

14 A As I said, we basically look at the

15 updated version, including numbers adjusted for

16 inflation of this matrix. The penalty policies

17 are descriptive, so there are certain factors

18 that the RCRA practitioners are charged with

19 evaluating to determine the place in the matrix

20 cell.

21 Those include the size and

22 sophistication of the violator. It includes the

45

1 MR. RYAN: And just if I could

2 clarify, Your Honor.

3 JUDGE COUGHLIN: Sure.

4 MR. RYAN: Correct me if I'm wrong.

5 What we're looking at now on the screen is the

6 2003 penalty policy matrix. What page is this?

7 Page (simultaneous speaking) --

8 MR. FIGUR: Can you please scroll up?

9 MR. RYAN: -- and the numbers in that

10 matrix have been updated to comply with the 2020

11 inflation amount. Is that correct?

12 MR. FIGUR: That's correct.

13 MR. RYAN: But otherwise, this

14 document is the same as the 2003 RCRA penalty

15 policy?

16 MR. FIGUR: That is also correct.

17 MR. RYAN: Thank you.

18 MR. FIGUR: I would like to note we

19 used the earlier inflation adjustment for Counts

20 1 and 2, which Ms. McNeill will get to, and the

21 subsequent 2020 adjustment for Counts 3 through

22 5. I just want to be clear on that. I thought

47

1 seriousness of the violation. Also the efforts

2 of remediation or the degree of cooperation among

3 other factors.

4 Q Let's turn to the next step, which is

5 whether or not a multi-day penalty is going to be

6 proposed.

7 JUDGE COUGHLIN: Mr. Figur, may I

8 interrupt?

9 Q (Simultaneous speaking) --

10 JUDGE COUGHLIN: I have some

11 questions, and I don't want to interrupt your

12 presentation. But as the witness is discussing

13 some of the areas for which I just wanted

14 clarification. Do you mind if I interrupt you?

15 MR. FIGUR: Not at all, Your Honor.

16 JUDGE COUGHLIN: I want to make sure

17 that I'm understanding some of the terms and the

18 concepts. So to that end, I wanted to ask you

19 with regard to the extent of deviation. Is the

20 focus on the actions of the violator, what the

21 violator did or did not do, when evaluating that

22 factor of extent of deviation? Or does it

48

1 encompass something else?
 2 THE WITNESS: It's mainly what they
 3 did or did not do. So there's requirements that
 4 need to be met, so it's what steps were taken or
 5 what actions were taken in order to attempt to
 6 meet that requirement.
 7 So like I said, the best example of a
 8 moderate extent of deviation is if you look a
 9 violation -- I'm sorry, I'm trying to think of a
 10 good example.
 11 If you look at a label and it might
 12 say hazardous waste, but it doesn't have some of
 13 the other information. They took some steps to
 14 meet that requirement, they didn't get all of it.
 15 So that would be kind of a moderate. So they
 16 took some steps, but they didn't communicate
 17 anything.
 18 If there's no label at all, then they
 19 took no steps to meet that requirement. So that
 20 would be considered a major extent of deviation.
 21 JUDGE COUGHLIN: Okay. So what I'm
 22 looking at then is what did the violator do or

50

1 these two kind of feed into each other.
 2 THE WITNESS: Right.
 3 JUDGE COUGHLIN: I'm just trying to
 4 kind of parse through to help myself when I'm
 5 reviewing everything where my focus should be.
 6 My understanding from reviewing
 7 sections, and tell me if I'm wrong, but my
 8 understanding with reviewing certain sections of
 9 the penalty policy was when you're talking about
 10 harm to the program, you're looking at what the
 11 actual requirements was that was violated.
 12 THE WITNESS: Mm-hmm.
 13 JUDGE COUGHLIN: And when you're
 14 looking at the extent of the deviation, you're
 15 looking at the actions or inaction by the
 16 violator.
 17 THE WITNESS: That's a fair analysis.
 18 I would agree.
 19 JUDGE COUGHLIN: Okay. One other
 20 quick question. I don't know if I can put my
 21 fingers on it in the policy. At one point I
 22 thought I read that essentially all the

49

1 didn't do, what were the actions taken or not
 2 taken.
 3 THE WITNESS: Mm-hmm.
 4 JUDGE COUGHLIN: Okay. With regard to
 5 harm to the RCRA program, is the focus there on
 6 the actual violation or the requirement that was
 7 violated as opposed to any activity by the
 8 violator? The actions (simultaneous speaking) if
 9 you understand my question.
 10 THE WITNESS: I do.
 11 JUDGE COUGHLIN: (Simultaneous
 12 speaking) my focus is to be.
 13 THE WITNESS: Yes, so potential harm
 14 to the program is more focused on the violation.
 15 It does take into account their actions because
 16 their actions are what caused the violation. So
 17 in some ways, it does.
 18 But it's focused more on what that
 19 violation was, how fundamental it is to the RCRA
 20 program, and then how far away from that their
 21 actions were. Sorry, I'm conflating.
 22 JUDGE COUGHLIN: I mean, I realize

51

1 requirements are fundamental to RCRA, which left
 2 me wondering how then does one exercise
 3 discretion in determining what's major, moderate
 4 and minor if they're all fundamental?
 5 THE WITNESS: Right.
 6 JUDGE COUGHLIN: Okay. Can you help
 7 me understand it?
 8 (Laughter.)
 9 THE WITNESS: Yes. I agree somewhat
 10 that they're all fundamental because they're all
 11 important. But there are certain aspects that
 12 are for more of the basis for the RCRA program.
 13 So having a permit to storage
 14 hazardous waste or notifying the regulators that
 15 hazardous waste activities are occurring in a
 16 certain location, making a waste determination.
 17 Those things are kind of the basis for RCRA.
 18 If you don't do those, you're out of
 19 the whole program, and therefore you're just
 20 completely unregulated. There's no way to ensure
 21 that that hazardous waste is being managed
 22 properly at all.

52

1 In contrast with a facility that,
2 again for example, might be managing hazardous
3 waste under RCRA but not meeting some of the
4 requirements of the program.

5 So they've met those larger overlying
6 more fundamental requirements, but then they
7 maybe aren't -- I go back to labeling; it's just
8 the easiest example, but properly labeling or
9 something like that.

10 While labeling is fundamental, it
11 doesn't hold the weight that those other
12 violations would have.

13 JUDGE COUGHLIN: Okay, all right.
14 Thank you.

15 Please go ahead.

16 BY MR. FIGUR:

17 Q Thank you, Your Honor.

18 Let's turn to the next step and an
19 assessment of whether multi-day penalties might
20 be imposed. Would you like the multi-day penalty
21 matrix?

22 A Sure, that would be great.

54

1 based on case-specific information, that can be
2 extended beyond the 180 days.

3 The calculation of a multi-day penalty
4 is based on the gravity component. So again, you
5 can see there is a matrix. It's evaluated the
6 same way. Let me rewind. Determining where in
7 the matrix and then where in the matrix cell
8 follows the gravity component.

9 So if the gravity is considered to be
10 a moderate potential for harm, major extent of
11 deviation, then the multi-day will follow suit.
12 And if it's in the middle of the box, the
13 multi-day will be also.

14 Q Once the position in the box is
15 determined, can you please describe the
16 adjustment factors that are then applied to the
17 gravity component?

18 A Yes. There's six adjustment factors.
19 The first is good faith efforts to comply.
20 There's also degree of willfulness or negligence,
21 history of non-compliance, ability to pay,
22 environmental projects, and then other unique

53

1 Q Can you please scroll down to the --
2 it's a ways.

3 (Pause.)

4 Q Thank you, that is perfect.

5 A Actually, no, no. Keep going. The
6 gravity matrix is in there twice.

7 (Pause.)

8 A Okay, there we go.

9 JUDGE COUGHLIN: So we're on Page 39
10 (simultaneous speaking) --

11 BY MR. FIGUR:

12 Q 39 and 113.

13 Okay, so please describe the analysis
14 to determine whether a multi-day penalty will be
15 proposed.

16 A So if a violation continues for more
17 than one day, we evaluate --

18 (Pause.)

19 A I'm waiting for you to catch up. We
20 evaluate if a multi-day component is appropriate
21 to add to the penalty. So generally, the penalty
22 policy caps multi-day penalties at 180 days. But

55

1 factors.

2 Q Can you please describe a little bit
3 about good faith efforts to comply?

4 A So good faith efforts to comply
5 focuses mainly on if the non-compliance was
6 identified or if corrective actions were taken
7 before the Agency identifies the violation. The
8 policy states that no downward adjustment should
9 be considered.

10 The good faith efforts to comply
11 primarily consists of just coming back into
12 compliance because returning to compliance is
13 basically expected after the Agency identifies
14 the violation. There should also be no downward
15 adjustment for a lack of knowledge about the
16 requirements.

17 Q Can you please describe a little about
18 the willfulness or negligence factor.

19 A Willfulness and negligence focuses on
20 if the violator had full control over the events
21 constituting the violation. The foreseeability
22 of the violation, if the violator knew or should

56

1 have known about the hazards associated with the
2 conduct.

3 Again, knew or should have known
4 about the legal requirements that were violated.
5 And then if they took any reasonable precautions
6 to prevent the violation.

7 Q Can you please briefly describe the
8 history of non-compliance?

9 A Yes. For histories of non-compliance,
10 the penalty policy states that it's for an upward
11 adjustment only. So basically if the violator is
12 a first-time violator, there's just no upwards
13 adjustment.

14 If they have a history of
15 non-compliance, there's a potential for an
16 upwards adjustment. In this case, we had no
17 information regarding history of non-compliance
18 at Prime, so we did not apply any adjustment
19 factors for the history of non-compliance to any
20 of the counts.

21 JUDGE COUGHLIN: One quickie. Why is
22 it only an upward adjustment? So someone doesn't

57

1 get credit for not having any prior violations?

2 THE WITNESS: Basically, yes.

3 JUDGE COUGHLIN: What's the rationale?

4 THE WITNESS: I didn't write the
5 penalty policy.

6 JUDGE COUGHLIN: (Simultaneous
7 speaking) I'm just trying to flesh it all out so
8 I understand.

9 THE WITNESS: Absolutely. It's a fair
10 question. Basically, it's just the leveled
11 playing field concept. So we kind of start with
12 the assumption that facilities wouldn't have
13 violations to begin with. So then if they do
14 have that history, then we add the upwards
15 adjustment.

16 JUDGE COUGHLIN: So they're expected
17 to be in compliance?

18 THE WITNESS: Yes.

19 JUDGE COUGHLIN: And then if they
20 haven't, then you can --

21 THE WITNESS: Yes.

22 JUDGE COUGHLIN: -- rationale to bump

58

1 it up. Okay, thank you.

2 BY MR. FIGUR:

3 Q What about the ability to pay factor?

4 A So ability to pay is basically just as
5 it sounds. If a violator has an ability to pay
6 issue or inability to pay, they can make the
7 claim. In this case, Prime did not make a claim
8 concerning ability to pay, so there were no
9 adjustment factors applied for that, for any of
10 the counts.

11 Q And environmental projects?

12 A Environmental projects is the same.
13 Basically, there can be an adjustment if the
14 violator, Respondent, offers to take on an
15 environmental project. But in this case, that
16 wasn't discussed, so there was no adjustment for
17 environmental projects applied to any of the
18 counts.

19 Q Generally, is that a litigation factor
20 or a settlement?

21 A That's a settlement.

22 Q What about other unique factors as

59

1 expressed in the policy?

2 A Other unique factors includes a
3 component for a downwards adjustment for up to
4 ten percent. However, the adjustment factor is
5 specific to only -- for settlement purposes only.
6 So cooperation is discussed in different
7 locations, but that one is clarified to be only
8 for settlement. And so no adjustment for other
9 unique factors was applied to any of the counts
10 for this.

11 JUDGE COUGHLIN: I'm sorry, I just
12 want to make sure I heard you correctly. For the
13 unique factors, that is a tool used during
14 settlement negotiations to justify a downward
15 departure or a discount of ten percent?

16 THE WITNESS: Yes.

17 JUDGE COUGHLIN: Okay.

18 BY MR. FIGUR:

19 Q How does the Agency approach economic
20 benefit?

21 A Economic benefit, the Agency is
22 mandated to recoup any significant economic

60

1 benefit that was gained through non-compliance.
2 It's essentially to eliminate an economic
3 incentive to non-compliance.

4 Q Have you reviewed documents that have
5 become available after you agreed to testify to
6 Complainant's proposed penalty?

7 A I did. As time progressed, I reviewed
8 more of the documents that were available and
9 delved into the documents in more detail. So
10 that included exhibits that were submitted by
11 both parties as well as the motion in terms of
12 how they made the decision, the order on the
13 motion, and then the other related pleadings and
14 records.

15 Q Thank you. We'll get to the details
16 later as we discuss each count if necessary. But
17 generally speaking, did any of the additional
18 information you reviewed cause you to consider
19 revising the proposed penalty on behalf of
20 Complainant?

21 A No. Everything I reviewed bolstered
22 Complainant's proposed penalty.

61

1 Q Please bring up Complainant's Exhibit
2 66, Page 13.

3 (Pause.)

4 Q Please scroll.

5 (Pause.)

6 Q Ms. McNeill, do you recognize this
7 portion of Complainant's Exhibit 66?

8 A I do. This is the drum log that NEIC
9 maintained when they were on-site at the Salt
10 Lake City facility on August 24th, 2016.

11 (Whereupon, Drum Logs, Pages 13
12 through 53 of Complainant's Exhibit 66 was marked
13 as Complainant's Exhibit 66 for identification.)

14 Q How do you recognize it?

15 A This is Appendix 1 to Dr. Katellis's
16 expert report.

17 Q Do you know how this logbook came into
18 Dr. Katellis's possession?

19 A Yes, she got it from the NEIC field
20 staff who were performing that inspection.

21 Q Does Dr. Katellis also work for NEIC?

22 A Yes, she does.

62

1 Q Is this a true and correct copy --

2 A Yes.

3 Q -- of the logbook?

4 A Yes, it is.

5 Q Complainant now moves to enter Pages
6 13 through 53 of Complainant's Exhibit 66, which
7 also is known as Appendix 1 or Attachment 1.

8 MR. RYAN: I would object, Your Honor.
9 It's a partial document -- this is part of the
10 report that was prepared by a witness who was on
11 EPA's witness list but is not testifying now. We
12 had some cross examination prepared for that
13 witness, but he's not here because they've chosen
14 to bring him. This is an excerpt from a document
15 that we prepared.

16 JUDGE COUGHLIN: Okay.

17 Ms. McNeill, I think you touched on
18 this. You identified -- just a preliminary
19 question before I rule. You identified that this
20 section of this exhibit is also an appendix to
21 Dr. Katellis's report. But how did you actually
22 receive this information?

63

1 THE WITNESS: Just as an appendix to
2 her report.

3 JUDGE COUGHLIN: And that's something
4 that you reviewed?

5 THE WITNESS: Yes, it is.

6 JUDGE COUGHLIN: Okay. What I'm going
7 to do is I'm going to allow it to come in. I'm
8 going to admit it.

9 (Whereupon, the Pages 13 through 53 of
10 Complainant's Exhibit 66 was received into
11 evidence as Complainant's No. 66.)

12 JUDGE COUGHLIN: Respondent can
13 question this witness. And if you end up
14 presenting Dr. Katellis, obviously, a cross of
15 her. But I'm going to allow it. As I've said
16 before, you can always make arguments as to the
17 amount of weight I should afford the evidence.

18 I'm not concerned about the fact that
19 it's a portion of an exhibit. That was my idea,
20 actually. I've done that before when portions of
21 an exhibit are not admissible but other portions
22 are depending on what the exhibit is.

64

1 For clarity, however, I just want to
2 emphasize that only the drum log book consisting
3 of Pages 13 through 53 of CX66 are admitted into
4 evidence over objection. No other portion of 66
5 is coming in at this point in time.

6 BY MR. FIGUR:

7
8 Q Thank you, Your Honor.
9 Can you please tell us why this drum
10 log book -- what is it important that you learned
11 from the drum log book?

12 A Yes. In reviewing the drum log, I
13 noted several factors that would come into play
14 in calculating -- could come into play
15 calculating the proposed penalty.

16 That is that according to NEIC field
17 staff's observations, they noted specific
18 information about each of the drums as they
19 stapled into their inspection.

20 They noted that 19 of the 20 drums
21 that the bungs had blown. So 19 of the 20 drums
22 that were determined to be hazardous waste were

65

1 open the entire time they were managed by Prime.
2 NEIC also noted that 19 of the 20
3 drums were between three-quarters to
4 seven-eighths full. So again, the drums were
5 nearly full of hazardous waste the entire that
6 they were managed by Prime.

7 And the NEIC staff also noted all of
8 32, which included the 20 drums to be hazardous,
9 for chromium, which is in line with the yellow
10 primer that all of those drums were noted to be
11 in poor condition. They were all noted to be
12 rested, and they were all noted to be burnt.

13 Just taking into account the condition
14 of the drums the entire time that they were
15 managed by Prime from the point of the fire until
16 August 2nd when CID performed their inspection.

17 JUDGE COUGHLIN: One quick question to
18 clarify something as I was looking at the
19 exhibit. Page 13 has the identifier of drum
20 logbook, and then there's an if-found-return-to
21 page. When I'm looking Pages 15, I'm using the
22 Adobe page numbers here.

66

1 MR. FIGUR: Thank you.

2 JUDGE COUGHLIN: Fifteen through
3 twenty-one are line sheets of paper with nothing
4 on them. I assume that's deliberate?

5 MR. FIGUR: It is, Your Honor. That's
6 why I was taking a second before responding to
7 Counsel. He thought that this would be as
8 complete -- at least it's my impression that this
9 was a complete set of the logbook as created by
10 the NEIC inspectors at the time. So we believe
11 Dr. Katellis may be able to testify more directly
12 to this, but they are intended to be included.

13 MR. RYAN: I'm sorry, Your Honor. I'm
14 having a hard time hearing (simultaneous
15 speaking) --

16 JUDGE COUGHLIN: I know, it's loud.
17 I am too.

18 MR. FIGUR: I can speak up, Your
19 Honor.

20 JUDGE COUGHLIN: Thanks. Sorry about
21 that. I guess you can either suffer with heat or
22 cool can't hear. I'm not sure I understood the

67

1 answer. Are these pages that I just referenced
2 deliberately blank, or is there supposed to be
3 something on them that isn't?

4 MR. FIGUR: We believe that they're
5 deliberately blank.

6 JUDGE COUGHLIN: Okay, all right.
7 Thank you. I just wanted to clarify that. Thank
8 you. Please, go ahead.

9 MR. FIGUR: Your Honor, we're about to
10 turn to Count 1 specifically. I just would like
11 to check in with you're comfortable with us
12 continuing, checking in on a break, or --

13 JUDGE COUGHLIN: Oh, would you all
14 like a break?

15 MR. RYAN: I'm good to go, Your Honor,
16 but I'm still having a hard time hearing Counsel.

17 JUDGE COUGHLIN: Okay.

18 MR. RYAN: I can barely what he's
19 saying. I apologize.

20 JUDGE COUGHLIN: No, no. I'm glad you
21 let me know.

22 MR. FIGUR: I can lean forward, Your

68

1 Honor, if that helps. I just don't want you to
2 get the wrong impression.
3 JUDGE COUGHLIN: I understand. It's
4 not a very tall mic either. I'm just trying to
5 think of a solution. Is there anything to put
6 under that to lift it up, or is it mounted on the
7 podium?
8 MR. FIGUR: It is mounted. I really
9 don't want anybody to think I'm posturing or
10 posing, but I'm happy to try and stay closer to
11 the microphone.
12 JUDGE COUGHLIN: Yes, it's going to be
13 extended questioning, and I'm worried about the
14 comfort of you having to hunch over. I certainly
15 appreciate the podium, but would it be easier for
16 you to sit at the table and then the mic close to
17 you while you question?
18 MR. FIGUR: I think being here without
19 having the podium in between is better.
20 JUDGE COUGHLIN: Okay.
21 MR. FIGUR: If this turns out to be a
22 problem, I'll just let you know, but I do

70

1 MR. RYAN: Back to Counsel's original
2 question, I'm good going or we can take a break.
3 JUDGE COUGHLIN: What would you like
4 to do?
5 MR. FIGUR: We're prepared to
6 continue.
7 JUDGE COUGHLIN: Okay, let's go ahead.
8 BY MR. FIGUR:
9 Q Okay, Ms. McNeill, let's turn to the
10 penalty calculation for each count. Can you
11 please briefly describe Count 1?
12 A Yes, Count 1 was the failure to make
13 a hazardous waste determination. As I briefly
14 described earlier, waste determinations are
15 fundamental to the RCRA program. They were the
16 first steps that need to occur for waste to be
17 properly managed under RCRA.
18 In this case, Prime did not make a
19 hazardous waste determination the entire time
20 they managed the waste, which was around a
21 ten-month period.
22 MR. FIGUR: Excuse me. Can you please

69

1 appreciate the consideration.
2 JUDGE COUGHLIN: Okay, all right.
3 Mr. Ryan, let me know if you still
4 can't hear.
5 (Pause.)
6 JUDGE COUGHLIN: It is loud, and it's
7 right here. It's over my head, too.
8 (Pause.)
9 JUDGE COUGHLIN: We're going to try to
10 adjust the thermostat. I don't know if we
11 actually can without a tool.
12 (Pause.)
13 JUDGE COUGHLIN: Meanwhile, Michael's
14 checking on --
15 COURT REPORTER: (Simultaneous
16 speaking) a little bit of trouble.
17 JUDGE COUGHLIN: -- the sensitivity of
18 the volume on the mics if that can be adjusted,
19 too. It is quite loud. I agree wholeheartedly.
20 Q Yes.
21 JUDGE COUGHLIN: Okay, that helped.
22 We'll see what can be done about the mics, too.

71

1 bring up Complainant's Exhibit 17, Page 11. This
2 exhibit has been entered into evidence.
3 MR. RYAN: I'm sorry, which exhibit
4 number is that?
5 MR. FIGUR: Seventeen, Page 11.
6 MR. RYAN: Thank you.
7 (Pause.)
8 BY MR. FIGUR:
9 Q Thank you.
10 Continue, Ms. McNeill.
11 A Thank you. Prime had a number of
12 pieces of information in their possession
13 beginning the night of the fire and then in the
14 weeks ensuing that would have strongly indicated
15 that hazardous waste determination should be
16 performed.
17 The first piece of information is that
18 there was a flammable placard on the trailer
19 carrying the original load. This would indicate
20 to anyone who saw the trailer that there were
21 hazardous materials on that trailer, which if
22 that material became a waste, there would be

72

1 likely indication that it would be hazardous
2 waste based on the fact that it was a hazardous
3 material.

4 JUDGE COUGHLIN: I just want to
5 interject with one quick question. You may or
6 may not be able to answer this because it's more
7 substantive in nature, so just tell me if you're
8 not able to.

9 THE WITNESS: Okay.

10 JUDGE COUGHLIN: When you mention if
11 it becomes a waste, can you explain that more and
12 at what point something becomes a waste?

13 THE WITNESS: Yes, thank you for
14 asking.

15 Part of making a hazardous waste
16 determination is that it should occur at the
17 point where something becomes a solid waste. And
18 so a waste is considered to be something
19 discarded, not able to be used.

20 Once something becomes a solid waste,
21 which in this case would have been the night of
22 the fire because the paint was no longer able to

73

1 be used at that point, a hazardous waste
2 determination is required to be made.
3 JUDGE COUGHLIN: Is there another step
4 in between when something becomes a solid waste,
5 making it discardable or unusable, to hazardous
6 waste?

7 THE WITNESS: That would be the result
8 of the waste determination. So a waste
9 determination can be based on generator
10 knowledge, or it can be made through analytical
11 analysis.

12 JUDGE COUGHLIN: So that is on the
13 generator to determine?

14 THE WITNESS: Yes, it is.

15 JUDGE COUGHLIN: Whether it's now
16 become hazardous waste or just waste that isn't
17 hazardous? Okay.

18 THE WITNESS: Yes, that's the
19 generator's responsibility.

20 JUDGE COUGHLIN: Okay, all right.

21 Thank you. Please go ahead.

22 BY MR. FIGUR:

74

1 Q Thank you.

2 You mentioned that Prime had three
3 pieces of information. You already discussed the
4 first, and that's the placards.

5 A Yes, they actually had a number of
6 pieces of information. The second would be the
7 bill of lading that accompany the load. That
8 bill of lading also stated that the material was
9 flammable and had a -- as the placard is UN 1263
10 is -- DOT is considered to be a DOT Hazard Class
11 3 flammable material. So the paint was
12 considered to be that, and that was stated on the
13 bill of lading.

14 The bill of lading also noted the
15 primer contained a reportable quantity of
16 strontium chromate. So the bill of lading was on
17 the truck the night of the fire. It was actually
18 used in part by the emergency responders. Also
19 information about the bill of lading was in
20 Prime's computer system.

21 So anyone who had looked up
22 information about the shipment would have known

75

1 that it contained that UN 1263 flammable paint.
2 The third piece of information, I believe there's
3 actually more than three. The third piece of
4 information is in the October and November
5 timeframe.

6 The Idaho State Department of
7 Environmental Quality approached Prime about
8 doing a second cleanup of the fire site. Because
9 during the fire, some of the paint had leaked
10 onto the ground, and it wasn't completely cleaned
11 up during the first cleanup. And that soil that
12 was removed from the fire site was -- a hazardous
13 waste determination was made on that.

14 It was determined to be hazardous for
15 chromium, which is consistent with the
16 ingredients of the primer. So again, that was
17 communicated to Prime, but they didn't take that
18 into account and applied that knowledge to the
19 drums that have been taken to Salt Lake City.

20 JUDGE COUGHLIN: Sorry to jump in.

21 MR. FIGUR: Not at all.

22 JUDGE COUGHLIN: Easier than trying to

1 go back after a while.
 2 Who made the determination that the
 3 remnants on the side of the road were hazardous?
 4 THE WITNESS: DEQ contacted Prime, and
 5 they hired an environmental consultant
 6 contractor. And that contractor, upon DEQ's
 7 request, made a hazardous waste determination on
 8 the soil.
 9 JUDGE COUGHLIN: Do you know the name
 10 of that contractor?
 11 THE WITNESS: It was H2O. It's the
 12 one who did the waste determination.
 13 JUDGE COUGHLIN: Okay, thank you.
 14 MR. FIGUR: Your Honor, yes, may I ask
 15 a question or two.
 16 JUDGE COUGHLIN: Sure.
 17 BY MR. FIGUR:
 18 Q Can you clarify DEQ, please?
 19 A Yes, that's the Idaho State Department
 20 of Environmental Quality.
 21 Q Thank you. You said H2O did the
 22 sampling. Were there any other Prime contractors

1 that they believe that the SDS sheets were on the
 2 truck with the bill of lading. As I said, I
 3 delved more into detail on all of the information
 4 related to the case, and I wasn't able to find
 5 the source of that information. However, I did
 6 confirm that Prime did have the SDS sheets on
 7 November 25th, 2015.
 8 JUDGE COUGHLIN: How did you know that
 9 they had them on that date?
 10 THE WITNESS: There was an email from
 11 PPG to Prime on November 25th with the SDS
 12 sheets. I believe it's CX39 that contains that
 13 information.
 14 JUDGE COUGHLIN: Okay, thank you.
 15 Please go ahead, Mr. Figur.
 16 BY MR. FIGUR:
 17 Q Thank you.
 18 Just would like to spend a few more
 19 seconds on SDSs and the statement that the
 20 materials are hazardous. Can you please explain
 21 why that may not translate directly to hazardous
 22 waste?

1 involved in that process?
 2 A Also Premium Environmental Services.
 3 I believe Prime contracted them as well, and they
 4 were in communication with H2O.
 5 JUDGE COUGHLIN: Was this all in
 6 connection with the second cleanup?
 7 THE WITNESS: Yes, it was.
 8 JUDGE COUGHLIN: Okay, all right.
 9 Thank you.
 10 BY MR. FIGUR:
 11 Q You said there were more than three
 12 (simultaneous speaking). Can you tell us about
 13 any others?
 14 A Yes, I can. The next piece of
 15 information that came into Prime's possession was
 16 the safety data sheets or the SDSs for all four
 17 of the products that were originally on the load.
 18 All four of the SDS sheets state on the very
 19 first page that all four materials were
 20 considered hazardous by OSHA.
 21 I'll make a quick note that in the
 22 original, or CX4 corrected, EPA had made a note

1 A Right. So the SDS sheets are for the
 2 material as a product. Again, before it became a
 3 waste. That describes the hazard that -- I want
 4 to say hazardous-ness of the material as a
 5 product. But it does describe the safe storage
 6 -- there are safe storage indications for it as a
 7 product as well.
 8 Q But just because a product is
 9 determined on the SDS, does that necessarily mean
 10 that it automatically is hazardous?
 11 A It does not. That's why the hazardous
 12 waste determination comes into play.
 13 JUDGE COUGHLIN: I'm sorry, but I
 14 really need to understand this. So if it's a
 15 tool or a resource that a generator can use to
 16 refer to in making a hazardous waste
 17 determination, what is the SDS used for for
 18 purposes of informing whether or not something
 19 that has become a waste and is no longer a usable
 20 product hazardous waste?
 21 THE WITNESS: It is one of the pieces
 22 of information that a generator could rely on.

80

1 They could have looked at the SDS and said, well,
 2 the product is considered hazardous by OSHA, so
 3 will therefore manage it as a hazardous waste.
 4 And that could count as a hazardous
 5 waste determination. In this case, they didn't
 6 do that.
 7 JUDGE COUGHLIN: Okay. All right,
 8 thank you.
 9 BY MR. FIGUR:
 10 Q I'd like to just follow up a little
 11 bit on that point. Can you please bring up
 12 Complainant's Exhibit 32?
 13 (Pause.)
 14 Q Scroll to -- excuse me for one second,
 15 Your Honor.
 16 (Pause.)
 17 Q Please scroll to Page 31. Thank you.
 18 This has been entered into evidence.
 19 Can you please identify this first page?
 20 A Yes, this is the safety data sheet for
 21 the universal urethane yellow primer.
 22 Q Before we dig into this just a little

82

1 potentially contribute to the chromium
 2 concentration.
 3 Q And in this particular circumstance,
 4 might there be other ingredients in the product
 5 that once the product is a waste might also
 6 exhibit -- cause this to become a hazardous waste
 7 under RCRA?
 8 A Yes. There are also a number of
 9 solvents in this ingredient list. That would
 10 potentially cause the material to be an ignitable
 11 hazardous waste.
 12 Q Thank you.
 13 JUDGE COUGHLIN: One quick
 14 housekeeping point, the fan is much lower. I'm
 15 hearing better. I assume everybody else is, too.
 16 But Michael checked, thank you, on whether there
 17 was some capacity with adjusting the mic volume,
 18 and there is.
 19 So each microphone can be turned up in
 20 the audio control tab at the top of the wireless
 21 control panel that I believe you're using, Ms.
 22 Tribett.

81

1 bit, can you please remind us what the two
 2 options are when a person generates a solid
 3 waste, what their next step for the hazardous
 4 waste determination. What are their two options?
 5 A Basically to use generator knowledge,
 6 which includes information such as the safety
 7 data sheet or perform an analysis on the waste.
 8 JUDGE COUGHLIN: So like sample it?
 9 THE WITNESS: Yes.
 10 MR. FIGUR: Yes.
 11 JUDGE COUGHLIN: Thank you.
 12 BY MR. FIGUR:
 13 Q can you scroll to Section 3, which was
 14 briefly reviewed yesterday.
 15 Might this section of an SDS help
 16 inform whether knowledge or sampling might be
 17 appropriate?
 18 A Yes. This is the ingredients that are
 19 present in the product. In this case, you can
 20 see that it's between 10 and 25 percent strontium
 21 chromate. And there's also a barium chromate
 22 component at the bottom that would also

83

1 (Pause.)
 2 MS. TRIBBET: It's as high as it goes.
 3 JUDGE COUGHLIN: Okay.
 4 MR. FIGUR: Is this better?
 5 JUDGE COUGHLIN: I'm able to hear you.
 6 I mean, just turning that fan off -- it did a lot
 7 for me.
 8 How's Prime, are you okay?
 9 MR. MCKAY: Same.
 10 JUDGE COUGHLIN: Okay.
 11 MR. FIGUR: Thank you.
 12 JUDGE COUGHLIN: Absolutely.
 13 MR. FIGUR: I will try to continue and
 14 speak up.
 15 JUDGE COUGHLIN: Okay.
 16 BY MR. FIGUR:
 17 Q Let's turn back to the pieces of
 18 information that Prime had in its possession.
 19 You've already run through four of them, and can
 20 you remember any others?
 21 A Yes. I do want to mention that while
 22 we acknowledge that Prime did not have the SDS

84

1 sheets the night of the fire, they did have the
2 bill of lading. Which again as I said contained
3 information that the primer contained chromium
4 and also that the products were flammable
5 hazardous waste.

6 One other piece of information that I
7 noticed when reviewing all the exhibits and
8 pleadings is that apparently at some point the
9 shop manager at the Salt Lake City facility asked
10 for information about the drums and received the
11 bill of lading.

12 It looks like he didn't receive the
13 SDS sheets. So someone on-site did have
14 information that this waste was potentially
15 hazardous. It wasn't just the people in
16 Springfield.

17 JUDGE COUGHLIN: How do you know that?

18 THE WITNESS: That was in one of the
19 -- I believe it was one of the pleadings.

20 JUDGE COUGHLIN: Okay.

21

22 BY MR. FIGUR:

85

1 Q I can --

2 A Correct me if I'm wrong.

3 Q We can refresh her recollection, Your
4 Honor, with the Respondent's pre-hearing
5 exchange.

6 A Thank you.

7 Q Can you tell us a little bit more
8 about where that came from in Respondent's
9 pre-hearing exchange and whether you know the
10 shop manager's name?

11 A I do. Yes, I believe his name is Mr.
12 Curtis. I just point that out as a piece of
13 information that, again, someone actually in Salt
14 Lake City had some information about the
15 potential that this was hazardous.

16 MR. RYAN: Your Honor, she's
17 testifying based on a pleading, not on the actual
18 document, so I would object that they don't have
19 any basis for her testimony here. If they want
20 to cite to actual documentation, then that'll be
21 fine.

22 JUDGE COUGHLIN: Okay.

86

1 MR. FIGUR: Your Honor, I'll note that
2 Mr. Curtis is on the list of witnesses that
3 Respondent said was likely to testify, and
4 they're not calling Mr. Curtis.

5 MR. RYAN: Again, she's testifying
6 based on pleadings that the Counsel has filed.
7 I'm going to object on that ground that she
8 should be testifying on the actual documentary or
9 other testimony. As to Mr. Curtis, he would be
10 testifying after her.

11 JUDGE COUGHLIN: Yes. Is the document
12 -- you referenced pleadings. Are we talking
13 about one of Respondent's exhibits that's been
14 stipulated to that's in evidence?

15 MR. FIGUR: Your Honor, this is in the
16 pre-hearing exchange document itself explaining
17 the expected testimony of witnesses that they're
18 planning to call.

19 JUDGE COUGHLIN: Go ahead.

20 MR. RYAN: I'm submitting she
21 testified that she was relying on Complainant's
22 pre-hearing -- excuse me, pre-hearing, yes, which

87

1 is, again, that's a pleading. (Simultaneous
2 speaking) documents.

3 JUDGE COUGHLIN: Right. Yes, I
4 understand the objection. I'll sustain it. If
5 it's referencing an exhibit that's in evidence,
6 certainly. But yes, not a pleading.

7 I'm confined. Once I open a hearing,
8 my decision is going to be based on the
9 evidentiary record, which is distinct from the
10 case record that encompasses pleadings and other
11 submissions.

12 So I won't be referring to anything
13 outside of what has been presented at this
14 evidentiary hearing in the form of testimonial
15 evidence and documentary evidence that's admitted
16 into evidence. That's why, okay. I'll sustain
17 the objection, please go ahead.

18 BY MR. FIGUR:

19 Q Thank you.

20 Can we turn now to the calculation of
21 the potential for harm?

22 Again, what's the first step?

1 A The first step in potential for harm
 2 -- going back really quick. So potential for
 3 harm and extent of deviation from the gravity
 4 component. Potential for harm is further broken
 5 down into harm to human health and the
 6 environment and the harm to the regulatory
 7 program.
 8 Those, again, address the seriousness
 9 of the violation, which is one of the two
 10 statutory factors. So looking first at the
 11 potential for harm to human health and the
 12 environment based on the failure to make a waste
 13 determination.
 14 So failing to make a waste
 15 determination, as I said, is a fundamental part
 16 of the RCRA program. Failing to make a waste
 17 determination, as I kind of alluded to, it is the
 18 first critical first step of basically entering a
 19 material into the RCRA hazardous waste management
 20 program.
 21 So if that step isn't done, waste can
 22 be easily mismanaged. It can be improperly

1 all over it and was ruined. He noted that his
 2 truck got paint on it, and then he washed the
 3 paint off of his truck when he got back to the
 4 yard.
 5 I just give that -- it just hit home
 6 as a really good example of what can happen when
 7 a waste determination isn't made because they
 8 didn't know that paint was hazardous. It just
 9 got everywhere. It went on the ground, it went
 10 on the truck, it went on his clothes.
 11 That's just an example of the
 12 potential of a harm that can occur when a waste
 13 determination isn't made.
 14 Q Ms. McNeill, I'd like to clarify. You
 15 didn't consider this information specifically --
 16 A No.
 17 Q -- you're using this as just an
 18 example of --
 19 A Yes.
 20 Q -- what can happen?
 21 A Yes, exactly.
 22 JUDGE COUGHLIN: One quick question.

1 transported. It can be improperly stored. In
 2 this case, both of those things occurred.
 3 So the waste was transported from
 4 Boise, Idaho, to Salt Lake City, Utah, which is
 5 over 300 miles on public roadways without a
 6 manifest because, as I said, based on the fact
 7 that a hazardous waste determination hadn't been
 8 made.
 9 It was also stored at the Salt Lake
 10 City facility for over 300 days without anyone
 11 knowing it was hazardous. Another one of the
 12 exhibits included a good real world example of
 13 what can happen when a hazardous waste
 14 determination isn't made.
 15 Mr. McCallo, who was one of the
 16 drivers who was trying to clean up the fire site
 17 at the initial time, so right after the fire. In
 18 his investigative activity report, for his
 19 interview, he said that they were trying to clean
 20 up the waste really quickly, that the drums were
 21 leaking everywhere, that they were making a mess.
 22 He noted that his clothing got paint

1 Again, based on your position with what you do in
 2 evaluating cases and coming to a proposed penalty
 3 on behalf of the Region bringing the action.
 4 When a situation like here where
 5 there's sort of this emergency environment.
 6 There's things on fire. It seemed like various
 7 municipalities are involved trying to put out the
 8 fire. And then ensuing discussions about what to
 9 do with the remnants and cleanup and all these
 10 things happening.
 11 I'm trying to get a sense of
 12 practically speaking at what point, if you know,
 13 if you can speak to this. If you can't, just
 14 tell me. At what point is that generator
 15 responsible for making that assessment while all
 16 this is going on?
 17 THE WITNESS: Right, yes. EPA did
 18 take that into account. We started our analysis
 19 for calculating the proposed penalty starting
 20 basically the morning after the fire is when we
 21 consider that once the emergency situation had
 22 been resolved, the fire was out, that's the point

1 in time where there was recognition this is a
 2 solid waste.
 3 That's the point in time where the
 4 generator is responsible for making that waste
 5 determination and then moving forward there with
 6 the proper management.
 7 JUDGE COUGHLIN: Okay, thank you.
 8 Please, go ahead.
 9 BY MR. FIGUR:
 10 Q Thank you.
 11 I'd like to follow up on that direct
 12 point. So our penalty calculation doesn't
 13 consider the night of the fire, correct? We
 14 wanted to look ahead --
 15 A Yes. The penalty calculation does not
 16 encompass the night of the fire.
 17 Q But could Prime had done anything the
 18 night of the fire to either make a hazardous
 19 waste determination or address the hazardousness
 20 of the materials. And if so, what could they
 21 have done?
 22 A Yes. As I said, they had the bill of

1 harm to human health and the environment and harm
 2 to the program, was determined to be major.
 3 Q Did Prime make a hazardous waste
 4 determination at any point?
 5 A No, they did not. They managed the
 6 waste for over 300 days but did not make a waste
 7 determination.
 8 Q How does Complainant view the extent
 9 of Prime's deviation from the requirement to make
 10 a hazardous waste determination?
 11 A Extent of deviation was also major.
 12 Making a waste determination is relatively
 13 straightforward. It's either something you do or
 14 you don't do. In this case, it was never done,
 15 so it was a complete deviation from the
 16 requirement to do a hazardous waste
 17 determination. Therefore, it was determined to
 18 be major.
 19 Q Once you turn to the penalty matrix
 20 cell, what do you do next?
 21 A As I said, potential for harm and
 22 extent of deviation make up the gravity

1 lading. At the bottom of the bill of lading was
 2 a note that says, in case of emergency to call
 3 Chemtrack. So this was PPG's bill of lading, so
 4 it's their basically emergency response
 5 contractor, I guess.
 6 Prime also had in place protocols to
 7 call their own environmental contractor, who's
 8 Premium Environmental Services. They didn't call
 9 either of those and said they chose to rely on a
 10 tow truck driver who was at the scene.
 11 Q Turning back to Count 1, can you
 12 please describe how region to region looked at
 13 the potential for harm to the RCRA program for
 14 failing to make a hazardous waste determination?
 15 A Yes. As I said a number of times now,
 16 making a waste determination is what the critical
 17 first step to the proper management of hazardous
 18 waste.
 19 In this case, that wasn't done, so
 20 that fundamentally undermines the integrity of
 21 the RCRA program, substantially undermines. And
 22 the overall potential for harm, including both

1 component, which addresses the statutory factor
 2 of the seriousness of the violation. Those two
 3 factors also inform the place in -- which cell in
 4 the penalty matrix to derive the penalty from.
 5 Q How did Complainant determine which
 6 amount in the cell should be proposed?
 7 A As I said, the penalty policy
 8 instructs us to take certain factors into
 9 account. Those include the seriousness of the
 10 violation, the degree of cooperation, size and
 11 sophistication of the violator, among others.
 12 In this case, we determined the
 13 penalty should not be at the top of the matrix
 14 cell because of Prime's general cooperation with
 15 CID when they arrived and did the inspection
 16 August 2nd and then because the waste was
 17 eventually disposed of as hazardous waste at a
 18 treatment, storage and disposal facility.
 19 The penalty was also determined to not
 20 be at the bottom of the matrix cell on Prime's
 21 size and sophistication because they are a
 22 national large shipping company. They have the

1 resources to make a hazardous waste
 2 determination.
 3 Also on the fact that they made no
 4 attempt to properly make a waste determination
 5 and properly manage the waste over the 300 days
 6 that they were managing the waste. And so
 7 therefore, a penalty at the mid-point of the cell
 8 was selected, which was \$32,915.

9 Q Are there any other factors that you
 10 considered or the complainant considered while
 11 placing this in the middle of the box with
 12 information that came later to his attention?

13 A No, nothing is coming to mind.

14 JUDGE COUGHLIN: I'm sorry, I didn't
 15 hear.

16 THE WITNESS: I said nothing is coming
 17 to mind.

18 JUDGE COUGHLIN: Okay.

19 BY MR. FIGUR:

20 Q Can you please explain why EPA used
 21 the 2009 version of the matrix?

22 A Yes. As we discussed, there's kind of

1 two versions of -- I didn't say this earlier.
 2 But the reason that we use the two different
 3 penalty matrices is because there was a change in
 4 the inflation amount on November 2nd, 2015.

5 So because the violations in this case
 6 kind of straddle that. Some occurred before,
 7 some after. That's why we've having to use these
 8 two different penalty matrices.

9 In this case, Prime could have made a
 10 hazardous waste determination as early as, as I
 11 said, the day after the fire, which was before
 12 November 2nd, 2015. So that's why the 2009
 13 matrix was used for this count.

14 Q Please describe Complainant's analysis
 15 of whether a multi-day penalty should be assessed
 16 for Count 1?

17 A Well, Prime did have the opportunity
 18 to make a hazardous waste determination over the
 19 300 days that they were managing the waste. We
 20 consider the totality of the circumstances and
 21 determined that a multi-day factor should not be
 22 applied to this count.

1 Q And as you testified, EPA did not make
 2 any adjustments for the history of
 3 non-compliance, ability to pay, environmental
 4 projects or other unique factors. Could you
 5 please describe the adjustments that Complainant
 6 made for good faith efforts to comply?

7 A Yes. For good faith efforts to
 8 comply, as I said, I keep referring back to the
 9 penalty policy because as I said, we really do
 10 look at that.

11 So because the penalty policy
 12 instructs us to -- for considering good faith
 13 efforts to comply to take into account if the
 14 non-compliance was identified or if corrective
 15 actions were taken before the agency discovers
 16 the violation.

17 So in this case, no downward
 18 adjustment was made because the violation was
 19 discovered by CID. There were also -- excuse me,
 20 I've got to remember the second one. There was
 21 also no downward adjustment made for primarily
 22 coming into compliance.

1 Because as I said, once EPA identifies
 2 a violation, basically there's an expectation
 3 that they will make an attempt to come back into
 4 compliance. There was also no downward
 5 adjustment made because of lack of knowledge of
 6 the requirement.

7 Q Did (simultaneous speaking) take into
 8 consideration --

9 MR. RYAN: I apologize, Your Honor.
 10 It will be two hours by 10:00. We can keep
 11 going. I would just suggest that we go another
 12 ten minutes and then take a break. I apologize
 13 for interrupting.

14 JUDGE COUGHLIN: Yes. I assume the
 15 questioning's going to be still extensive, so is
 16 that a good breaking point for you? Or would now
 17 be -- you tell me.

18 MR. FIGUR: Why don't we wrap up Count
 19 1, and then it should be approximately hopefully
 20 ten minutes.

21 JUDGE COUGHLIN: Okay.

22 MR. RYAN: That's fine. I'm sorry.

100

1 I apologize for interrupting. (Simultaneous
2 speaking) --

3 MR. FIGUR: Not at all, not at all.

4 JUDGE COUGHLIN: That's okay. It's
5 all right.

6 BY MR. FIGUR:

7 Q You did mention that EPA took into
8 consideration Prime's cooperation. Could you
9 please discuss that a little bit?

10 A Yes. As I said, cooperation is called
11 out to be evaluated in different parts of the
12 penalty policy. So it can be taken into account
13 in good faith efforts to comply. It can be taken
14 into account when determining the place in the
15 matrix cell.

16 So in this case, we did take into
17 account Prime's general cooperation with CID into
18 account when determining the place in the matrix
19 cell. So basically adding a downward adjustment
20 for the good faith efforts to comply adjustment
21 factor would basically be a second, an additional
22 downward adjustment based on the same

101

1 information.

2 Another point in that is that the
3 adjustment factors basically are adjusted up and
4 down by a certain percentage. So applying it
5 across the board, downward adjustment could have
6 potentially actually not giving them as large of
7 a credit as we did when moving the penalty down
8 from the top of the matrix box to the middle, the
9 mid-point of the cell.

10 MR. FIGUR: Would you like further
11 clarification on that, Your Honor?

12 JUDGE COUGHLIN: I'll think about it.
13 If I need to, I'll ask later on.

14 BY MR. FIGUR:

15 Q I could follow up on then.

16 You said Prime generally cooperated.
17 Can you please explain what you mean by generally
18 cooperated?

19 A Yes. When CID inspected the facility
20 on August 2nd, they noted that they were allowed
21 to inspect the trailer, but they were not allowed
22 to conduct any interviews or review any documents

102

1 that were associated with the burnt trailer.

2 Q Let's turn to willfulness and
3 negligence factor now. Can you please describe
4 how the Region analyzed that factor?

5 A Yes. As I said, we follow the penalty
6 policy which prescribes certain factors to take
7 into account when looking at the willfulness or
8 negligence. The first of those is if the
9 violator had full control over the violation.

10 In this case, Prime was the generator.
11 So making a waste determination and then ensuring
12 the safe transport, storage, treatment and
13 disposal of the hazardous waste was their
14 responsibility. So that was taken into account.

15 We're also charged with considering if
16 they knew or should have known about the hazards
17 and they knew or should have known about the
18 legal requirements. In this case, Prime did
19 have, as I said, a number of pieces of
20 information in their possession which included
21 the bill of lading and the SDS sheets.

22 As I acknowledged, they didn't get the

103

1 SDS sheets until the end of November, but they
2 still didn't make a waste determination for the
3 next eight months that the waste was stored in
4 Salt Lake City.

5 Q Did they make a waste determination
6 after IDEQ informed them that or after IDEQ
7 contacted them?

8 A No, they did not. Even after IDEQ had
9 been in contact during the October and November
10 regarding, as I said, the fact that paint has
11 spilled from the drums onto the ground at the
12 fire site. And then H2O made the waste
13 determination in mid-November. That knowledge
14 was not applied to the drums that had been sent
15 to Salt Lake City.

16 JUDGE COUGHLIN: This was all in
17 connection with the second claim, what's referred
18 to as the second?

19 THE WITNESS: Yes.

20 JUDGE COUGHLIN: Thank you.

21 BY MR. FIGUR:

22 Q Did you see any evidence that Prime

1 took reasonable precautions?
 2 A No. They have the ability to make a
 3 waste determination throughout any of the 300
 4 days but basically ignored all the information
 5 that they had in their possession that would have
 6 led them to that making that waste determination.
 7 Therefore, a ten percent increase in willfulness
 8 or negligence was applied.
 9 Q Did Complainant make an economic
 10 benefit calculation for Count 1? And if so, how?
 11 A We did. Because the material had been
 12 through the fire, at that point it was material.
 13 It had become a waste at that time. We decided
 14 that it was reasonable to assume that Prime would
 15 have chosen to take samples and perform an
 16 analysis rather than relying on the SDS sheets.
 17 We followed the process that EPA's
 18 NEIC inspectors did when they sampled and ran
 19 analysis on the material when they performed
 20 their inspection. They sampled all 32 of the
 21 drums by XRF, and then determined that 20 of them
 22 contained strontium chromate, consistent with the

1 point we used the 2009 matrix for this count.
 2 The statutory maximum at that time was \$37,500.
 3 So even with the economic benefit, we
 4 couldn't go above that. So only about \$1,300 of
 5 the economic benefit was actually applied in this
 6 case. So it didn't actually end up being a
 7 significant amount of the penalty.
 8 JUDGE COUGHLIN: Just one quick
 9 question. I realized you used the multiplier
 10 eight because (simultaneous speaking) --
 11 THE WITNESS: (Simultaneous speaking)
 12 --
 13 JUDGE COUGHLIN: Could it have been
 14 one in terms of evaluating economic benefit? I
 15 know that the Agency chose to sample eight --
 16 THE WITNESS: Right.
 17 JUDGE COUGHLIN: -- but did it have to
 18 be eight? Could it have been one or two? I
 19 mean, if the generator had done it itself.
 20 THE WITNESS: Right. Yes. I'll just
 21 say yes. It could have been. It depends on if
 22 you want to get a representative sample knowing

1 primer.
 2 They then sampled eight of the drums
 3 to run TCLP, Toxicity Characteristic Leaching
 4 Procedure, on eight of the drums. So we used,
 5 EPA used, the 2000 Unit Cost Compendium to
 6 determine the cost of TCLP analysis.
 7 Q And that is Complainant's Exhibit 1,
 8 which is stipulated and admitted.
 9 A That's basically a guidance document
 10 that contains just a whole bunch of different
 11 costs for certain requirements. So in that, the
 12 Unit Cost Compendium, it states the cost for a
 13 TCLP analysis -- and again, and that was in 2000
 14 dollars.
 15 So in 2000, it would have been \$791.
 16 That was adjusted for inflation. In 2022
 17 dollars, it would have been \$1,350 per sample.
 18 So multiplying that by eight would be \$10,800.
 19 So that was the economic benefit.
 20 However, because the gravity along
 21 with the ten percent increase for willfulness
 22 brought the penalty up to \$36,207, and at that

1 that there were 32 total drums, 20 of which were
 2 determined to carry the strontium chromate. Yes.
 3 I mean, they also could have sampled all 20 of
 4 the drums to determine if they actually all did
 5 contain the chromium.
 6 JUDGE COUGHLIN: I guess in terms of
 7 just trying to -- I realize in the scheme of the
 8 entire penalty, we're not talking about huge
 9 money here --
 10 THE WITNESS: Right.
 11 JUDGE COUGHLIN: -- relative to that.
 12 But just for me to have an understanding. I get
 13 why you used eight because that's what the Agency
 14 used in sampling.
 15 But since this is relating to Count 1
 16 in terms of making a hazardous waste
 17 determination, what I'm wondering is whether a
 18 generator could have sampled one drum, for
 19 example, and that would have been sufficient from
 20 your perspective in terms of compliance.
 21 Is there a special number, or does it
 22 not matter in that regard?

1 THE WITNESS: Right. No, you're
 2 correct. They could have sampled one.
 3 (Simultaneous speaking) --
 4 JUDGE COUGHLIN: And that would have
 5 been okay for Count 1 in terms of the making the
 6 hazardous waste determination?
 7 THE WITNESS: Yes.
 8 JUDGE COUGHLIN: Okay, all right.
 9 That's helpful. Thanks.
 10 Please go ahead.
 11 THE WITNESS: Your Honor, can I follow
 12 up on that (simultaneous speaking) just a second?
 13 JUDGE COUGHLIN: Absolutely.
 14 BY MR. FIGUR:
 15 Q What's the purpose of making a
 16 hazardous waste determination?
 17 A To determine if a solid waste is a
 18 hazardous waste.
 19 Q Who's responsible for that?
 20 A The generator is responsible for that.
 21 Q What if the generator makes a
 22 hazardous waste determination that turns out to

1 more substantive in nature, so if not just tell
 2 me.
 3 THE WITNESS: Right. I don't believe
 4 so, but it's not, as you said, it's not my
 5 specific area of expertise to know.
 6 JUDGE COUGHLIN: Okay, all right.
 7 I'll just leave it there, unless you want to
 8 follow up. Go right ahead.
 9 MR. FIGUR: If it would aid the Court,
 10 we can walk briefly through a hypothetical that
 11 is unrelated to a number of drums. Maybe
 12 different drums -- if not talking about here. I
 13 could briefly walk her through how EPA might look
 14 at what turns out to be an inaccurate hazardous
 15 waste determination and how we would walk through
 16 the -- first of all, whether to determine it's
 17 worth pursuing enforcement, and then how it might
 18 be viewed under the policy because the
 19 responsibility is to make an accurate hazardous
 20 waste determination.
 21 So the variability in the
 22 circumstances matters, but it also perhaps might

1 be inaccurate?
 2 A It's still their responsibility to
 3 properly manage the waste.
 4 Q Is it fair to say that the generator
 5 take enough samples to develop confidence in
 6 their determination?
 7 A Yes, I would agree with that.
 8 Q The confidence level is where the
 9 question of how much the sample lies?
 10 A Right.
 11 Q Let's turn back to very briefly the --
 12 go ahead.
 13 JUDGE COUGHLIN: I don't want to spend
 14 a lot of time on this, but do you know if, based
 15 on your experience alone, is there some number in
 16 the industry that -- I'm just trying to think
 17 about this on a practical level. I'm trying to
 18 get a sense of what should a generator do.
 19 If one sample could potentially be
 20 inaccurate, is there a certain number that is
 21 customary in the industry for sampling purposes?
 22 If you know that question. I realize it's a bit

1 aid the Court if Ms. McNeill could elaborate on
 2 how different circumstances might lead to
 3 different numbers if the Agency chooses to pursue
 4 failure to make a hazardous waste determination
 5 on the basis that a determination was inaccurate.
 6 (Simultaneous speaking) --
 7 JUDGE COUGHLIN: Okay. Thank you.
 8 Mr. Ryan.
 9 MR. RYAN: Your Honor, I'm not going
 10 to get in the way of Your Honor's questioning. I
 11 would object to this line of questioning as
 12 repetitive. We're beating a dead horse. It's
 13 come in many times in different ways.
 14 Also as we pointed out from the very
 15 beginning, we admitted liability. We never
 16 contested that strontium chromate was a
 17 constituent of all of these drums. We never
 18 contested what the bill of lading says or the SDS
 19 supplies.
 20 It's well known what was in these
 21 drums. Taking multiple samples would have
 22 achieved nothing. With that, thank you.

112

1 JUDGE COUGHLIN: Okay. I understand.
2 I appreciate the offer. I don't think it's
3 necessary. I didn't ask for purposes of getting
4 into hypothetical situations. I simply wanted to
5 know.

6 I know that they used eight as the
7 multiplier because that's how many EPA sampled.
8 I just wanted to know whether there was some
9 magic number in there as to what it would be, and
10 I have an answer to that. So I don't really feel
11 the need to get into it further.

12 MR. FIGUR: Thank you.

13 JUDGE COUGHLIN: No problem. Please,
14 go right ahead.

15 BY MR. FIGUR:

16 Q Let's turn back to the economic
17 benefit calculation. Would you like to -- sorry.
18 Can you please tell the Court what you found when
19 you looked a little more closely at the economic
20 benefit calculation?

21 A Yes. When I looked more closely at
22 the unit cost compendium, I happened to notice

113

1 that there were different options for the TCLP
2 analysis. One of them was designated to be a
3 full analysis. Another was designated to be full
4 analysis, less pesticides and herbicides.

5 And there was a difference in cost
6 between the two. In the original calculation,
7 the full analysis has been used, as I said, was
8 the \$791. Because we wouldn't expect to find
9 herbicides and pesticides in the paint, the cost
10 for that was \$556.

11 Again, in 2000 dollars. So I would
12 have recommended using the slightly less
13 expensive TCLP analysis. If we did translate
14 that to 2022 dollars, it would have been \$956 per
15 sample, which multiplied out if we used the eight
16 samples was \$7,648. So the difference of about
17 \$3,000 overall.

18 But as I said because we hit the
19 statutory max for this count, only about \$1,300
20 of the actual economic benefit was applied. I
21 just wanted to point that out as a potential
22 something that could have potentially changed

114

1 from the original calculator proposed penalty to
2 when I looked more deeply into the details.

3 MR. FIGUR: Thank you.

4 We're done with Count 1 now, Your
5 Honor.

6 JUDGE COUGHLIN: Okay, all right.
7 Great. So it's 10:05. How much of a break would
8 you all like? Is 15 enough? Do you need more
9 than that?

10 MR. RYAN: That's plenty, Your Honor.

11 JUDGE COUGHLIN: Okay, great. Is that
12 good with you all?

13 MR. FIGUR: Yes.

14 JUDGE COUGHLIN: Okay. So I'll see
15 you all back here at 10:20.

16 MR. FIGUR: Thank you, Your Honor.

17 (Whereupon, the above-entitled matter
18 went off the record at 10:05 a.m. and resumed at
19 10:22 a.m.)

20 JUDGE COUGHLIN: Back on record after
21 a break 10:25, I don't know, maybe that clock is
22 different than my watch. I have 10:22. I think

115

1 we're more or less on time. Please go ahead, Mr.
2 Figur with your questioning.

3 BY MR. FIGUR: Thank you, Your Honor.

4 Q Ms. McNeill, let's turn now to count
5 two. Can you please briefly describe count two?

6 A Count two was failure to prepare a
7 manifest. Manifests are important because, as I
8 talked about RCRA is a cradle to grave management
9 program. So, in addition to the generator having
10 requirements, there are also requirements of the
11 transporter and one of those is a manifest,
12 maintaining manifests to track the loads of
13 hazardous waste.

14 In this case, Prime transported the
15 hazardous waste from Boise, Idaho to Salt Lake
16 City, Utah, which is a distance of over 300 miles
17 along public roadways with no manifest.

18 Q And just to clarify, did Prime
19 transport this themselves or did the offer the
20 trailer for transport?

21 A They offered the hazardous waste for
22 transporting.

1 Q And who is responsible for completing
 2 the manifest?
 3 A It's the generator.
 4 Q Thank you. So, what does the manifest
 5 actually do?
 6 A It allows for the tracking of
 7 hazardous waste. So, it includes information
 8 about the generator and the designated facility,
 9 which is generally the treatment, storage and
 10 disposal facility. The manifest is also signed
 11 along the way. It basically acts as chain of
 12 custody. The generator signs when they
 13 relinquish the hazardous waste to the
 14 transporter. If there are multiple transporters,
 15 each of the transporters along the way sign the
 16 manifest and then the treatment, storage and
 17 disposal or the designed facility also signs the
 18 manifest and completes the loop by returning a
 19 signed copy to the generator to verify that they
 20 have received that waste.
 21 Q Overall, can you please describe how
 22 a complainant viewed the potential for harm for

1 in this photo is the burned trailer, on that
 2 trailer were thousands of pounds of hazardous
 3 waste. As I mentioned, when I looked at NEIC's
 4 drum log, it confirmed that 19 of the 20 drums
 5 were open, had open bungholes. Nineteen of the
 6 20 drums were nearly full of hazardous waste and
 7 all of the drums were in poor condition. This
 8 represents the way that the hazardous waste was
 9 transported over 300 miles.
 10 Also, as I said, I looked at the
 11 investigative activity reports and according to
 12 the folks at Brett's Towing, Prime had not told
 13 them that there was any paint on this trailer,
 14 much less that it was potentially hazardous waste
 15 that they were transporting.
 16 Brett's Towing, as a company, does
 17 have a hazardous waste transporter ID number;
 18 however, we saw no evidence that the driver
 19 actually was HAZMAT certified. He didn't know
 20 that he was transporting paint that was
 21 potentially hazardous. We also saw no evidence
 22 that the load was placarded when it was driven

1 count two?
 2 A Yes, count two, the potential for harm
 3 was determined to be major.
 4 Q Please bring up Complainant's Exhibit
 5 57, page 6, that would be Exhibit 57 and this
 6 exhibit is admitted. Page 6 please. Ms.
 7 McNeill, can you please describe this photo?
 8 A Yes. This was a burned trailer on
 9 BMW's flatbed truck being loaded from the site of
 10 the fire. So, this is not the actual shipment
 11 from Boise to Salt Lake City; however, it's a
 12 fair representation and it is likely that the
 13 trailer at that point in time looked just like
 14 this.
 15 Q When you say at that point in time,
 16 can you please explain what you mean by that?
 17 A Yes, I'm sorry. I mean as it was
 18 transported between Boise and Salt Lake City.
 19 Q Can you please describe how
 20 Complainant evaluated the potential for harm to
 21 human health and the environment for county two?
 22 A Yes, so while what we can mainly see

1 for over 300 miles.
 2 Q And why is this important to the
 3 hazardous waste manifest?
 4 A Along with no placarding, there was no
 5 manifest that accompanied this load, so if
 6 anything had occurred, if there was an accident
 7 or another fire along the way, none of the
 8 emergency responders would have known and so
 9 there was a substantial potential for harm to the
 10 driver, any potential emergency responders, even
 11 anybody driving next to this truck on the
 12 highway, if anything had happened.
 13 Q And, Ms. McNeill, how does Complainant
 14 view the potential for harm to the program in
 15 Prime's failure to prepare a manifest?
 16 A Right, so manifests are another one of
 17 those fundamental requirement of the RCRA program
 18 and that's because they're so important with that
 19 tracking of the cradle to grave, throughout the
 20 transport of hazardous waste. In this case,
 21 again, it's a straightforward requirement,
 22 something that's done or not done and there was

1 no manifest for the transport of this material,
 2 of his hazardous waste, so it was a complete
 3 deviation of the requirement and determined to be
 4 major extent of deviation.

5 Q So, go ahead, Your Honor.

6 JUDGE COUGHLIN: One quick question,
 7 when you have one of these requirements that's
 8 either they did it or they didn't, how do you
 9 then exercise discretion and account for
 10 categorizing that as minor, moderate, major?

11 MS. MCNEILL: Right, so an example, we
 12 take everything back to the penalty policy
 13 basically and so looking at the definition of
 14 major extent of deviation is something that's not
 15 met, a requirement that's not met or most of the
 16 requirement is not met. In this case, there was
 17 no manifest at all, so it was a full complete
 18 deviation from the requirement.

19 In the case of an example that might
 20 be a moderate extent of deviation, so in the case
 21 where some of the requirements are met as
 22 intended and others aren't. In the case of a

1 so fundamental to the RCRA program that they
 2 could result in a substantial potential for harm
 3 overall. Failing to prepare a manifest is
 4 actually given in the title of penalty policy as
 5 an example of one of those examples.

6 Q And how does transportation of
 7 hazardous waste, the waste in transport differ
 8 from waste at a facility going from one facility
 9 to the next where the waste -- how is
 10 transportation different than having the waste
 11 sitting a facility?

12 A I think there's a greater potential
 13 for harm because the waste is being moved from
 14 one place to another. So, having management
 15 requirements such as having the drums be closed
 16 and in good condition, are even more critical.

17 Q You've identified the potential for
 18 harm and extent of deviation as major for this
 19 count. What's the next step once you move to the
 20 matrix?

21 A Again, we go to the penalty policy and
 22 the gravity, which is potential for harm and

1 manifest, it might be if there was a manifest,
 2 but it wasn't signed or if there was a manifest,
 3 but it didn't have complete information,
 4 something like that.

5 In this case, because there wasn't a
 6 manifest at all, that means that there was a
 7 substantial deviation.

8 JUDGE COUGHLIN: Okay. Understood.
 9 Thank you.

10 BY MR. FIGUR:

11 Q And just turning briefly back to
 12 potential for harm to the program, you did
 13 mention that it is a fundamental requirement of
 14 the program. Is there anything else you'd like
 15 to add to the complainant's analysis?

16 A Yes, in looking at potential for harm
 17 to the program, as I said, we go back to the
 18 penalty policy. The penalty policy actually
 19 gives examples of certain violations that may not
 20 obviously appear to give rise to a substantial
 21 potential for harm to the program, but the
 22 penalty policy says that certain requirements are

1 extent of deviation, as I said, those constitute
 2 the seriousness of the violation. To take into
 3 account for that statutory factor, the
 4 seriousness of the violation. In this case, they
 5 were both determined to be major, so that informs
 6 which box in the penalty matrix cell to direct
 7 the penalty from.

8 Q And how did complainant determine
 9 which amount in the cell should be proposed for
 10 count two?

11 A Consistent with the information that
 12 was used to determine the place in the box for
 13 count one, we took into account Prime's general
 14 cooperation with CID's investigation and also the
 15 point that the waste was eventually disposed of
 16 as hazardous at a TSD. We determined the penalty
 17 would not be at the bottom of the box because
 18 taking into account Prime's size and
 19 sophistication, the fact that they're a large
 20 national shipping company. Also, taking into
 21 account that they're a shipping company, but
 22 failed to take into account any shipping

1 documentation that could have been associated
 2 with this load.
 3 Q And that led to the selection of?
 4 A Mid point of the cell, which for this
 5 count was 32,915 dollars.
 6 Q And can you please describe
 7 complainant's analysis of whether a multi-day
 8 penalty should have been proposed or shouldn't
 9 have been proposed?
 10 MR. RYAN: I'm sorry, I didn't hear
 11 that, can you repeat?
 12 MR. FIGUR: Yes, sorry. I'll speak up
 13 a bit.
 14 MR. RYAN: Thank you.
 15 BY MR. FIGUR:
 16 Q Can you please describe complainant's
 17 analysis of whether a multi-day penalty should be
 18 proposed for count two?
 19 A EPA generally views the preparation of
 20 a manifest to be a one-time event and so no
 21 multi-day component was proposed for this.
 22 Q Can you please turn to the adjustment

1 no economic benefit was applied.
 2 Q And taking into account all of the
 3 information you just told us, what is
 4 complainant's total proposed penalty for count
 5 two? And I can bring up Complainant's Exhibit 4
 6 Corrected, if you need it.
 7 A No, that's fine. I've got it, it's
 8 okay. (Simultaneous speaking.) It's 36,307
 9 dollars.
 10 Q And does anything you have read more
 11 recently or learned more recently cause you to
 12 consider, reconsider or consider recalculating
 13 this amount? Apologies.
 14 A No, I did consider the fact that when
 15 the penalty was initially calculated, EPA
 16 believed that the SDS sheets were part of the
 17 shipping papers that were on the truck with bill
 18 of lading and if that would have any impact on
 19 this count. However, because the bill of lading
 20 contained the information stating that the waste
 21 was flammable, excuse me, the material was
 22 flammable and contained the strontium chromate,

1 factors that were applied?
 2 A So, as I said, we took Prime's
 3 cooperation into account in determining the place
 4 in the matrix cell, so no additional adjustment
 5 was made for good faith efforts to comply. We
 6 did, consistent with count one, add an upward
 7 adjustment of 10 percent for willfulness or
 8 negligence. That was based on the same
 9 information presented in count one. However, we
 10 did also consider the additional detail that
 11 Prime did not inform the towing company that
 12 there was paint on the trailer, much less
 13 potentially hazardous waste being there.
 14 Therefore, there was an overall 10 percent
 15 increase for willfulness or negligence.
 16 Q And were any other adjustment factors
 17 applied?
 18 A No.
 19 Q Did complainant make an economic
 20 benefit calculation for count two?
 21 A No, we considered economic benefit,
 22 but the benefit was determined to be minimal, so

1 there should have been some kind of shipping
 2 papers or, in this case the manifest, should
 3 accompany this load. So, that didn't change the
 4 calculation.
 5 Q Thank you. Moving to count three.
 6 Can you please briefly describe count three?
 7 A Count three is storage of hazardous
 8 waste without a permit. Any facility that
 9 receives and stores hazardous waste is required
 10 to get a RCRA permit. In this case, Prime
 11 received and stored 20 drums of hazardous waste
 12 and stored them for approximately a 10-month
 13 period without getting an EPA permit.
 14 Q Can you please describe how
 15 complainant views the potential for harm for
 16 count three?
 17 A The potential for harm for count three
 18 was determined to be moderate.
 19 Q Can you please explain how that
 20 determination was made?
 21 A Yes, so again when determining the
 22 potential for harm, we look at harm to human

1 health and the environment and harm to the
 2 program.
 3 Q Let's turn to how you evaluated or the
 4 complainant evaluated the potential for harm to
 5 human health and the environment for count three.
 6 A Okay. For count three storage without
 7 a permit, we considered the fact that none of the
 8 storage requirements were met. So, none of the
 9 hazardous waste management requirements were met.
 10 Q So, what might some of that hazardous
 11 waste management requirements have been?
 12 A Right, so the drums were not labeled.
 13 They were not marked with accumulation start
 14 date. They were not closed. As I said, 19 of
 15 the 20 were open because they didn't have the
 16 bung covers anymore. These containers were also
 17 noted to be in poor condition. None of those
 18 physical waste management requirements were met.
 19 Also, there's no evidence that any of the
 20 facility management requirements were met, so at
 21 the time that the waste was stored at the Salt
 22 Lake City facility, there was no evidence that

1 places where they're mentioned in the SDS. About
 2 two-thirds of the way down the page right now,
 3 for storage it says, store locked up. Store in a
 4 well ventilated place and keep cool.
 5 Q Okay.
 6 A Also, there's a response for if
 7 inhaled what you should do.
 8 Q Right. Let's look at the storage
 9 requirements. Are those the only one that you
 10 recollect in the SDS O?
 11 A No, there's also other requirements
 12 through, as I said, throughout the SDS that state
 13 that the material should be labeled. It should
 14 be stored tightly closed, again, in a well
 15 ventilated place. Also dry and cool. It should
 16 be stored at temperatures not exceeding 95
 17 degrees Fahrenheit. Also that vapors should not
 18 be inhaled or breathed in.
 19 Q To be clear, are these applicable to
 20 the product or?
 21 A These are applicable to the product,
 22 but also good things to take into account when

1 the employees had received hazardous waste
 2 training, that they were conducting weekly
 3 inspections to detect any potential releases of
 4 hazardous waste. There was no contingency plan
 5 that would inform an emergency response if there
 6 was a release. So, none of those facility
 7 requirements were met.
 8 Q Thank you. Can you please bring up
 9 Complainant's Exhibit 32? I'm going to have to
 10 get the precise page number. Let's go to 31 to
 11 start with. Good.
 12 MR. RYAN: I'm sorry, did you say page
 13 31 out of Exhibit 32?
 14 BY MR. FIGUR: Yes.
 15 Q Can you please confirm that this is
 16 the first page of the Safety Data Sheet from the
 17 Universal (audio interference) primer?
 18 A Yes it is.
 19 Q Okay, please scroll down slowly to the
 20 section entitled, Storage Requirements.
 21 A There's O, can you stop? The safe
 22 storage indications, there are several different

1 managing the waste as well and none of these
 2 requirements were met while the waste was stored
 3 for 300 days.
 4 Q And are there similarities between
 5 these requirements and the RCRA requirements?
 6 A Yes, there are. A number of them
 7 overlap, such as being labeled, tightly closed.
 8 Q Thank you. To your knowledge, is
 9 there any evidence of actual harm from this
 10 manner of storage?
 11 A EPA does acknowledge that there was
 12 actual harm, evidence of actual harm. However,
 13 the penalty policy states that violators rarely
 14 have control over whether their pollution causes
 15 actual harm or not and that they shouldn't be
 16 rewarded with a downward adjustment or a credit
 17 in penalty because there was not an actual harm.
 18 Those are often hard to -- can be hard to prove,
 19 so we're charged with evaluating the potential
 20 for harm.
 21 Q And when looking for harm to human
 22 health and the environment, could this be

1 considered minor?
 2 A No. No, storage of hazardous waste,
 3 especially in the condition that these drums were
 4 would not cause a relatively low potential for
 5 harm to human health and the environment.
 6 Because they were open, they were volatilizing,
 7 workers could be potentially be exposed.
 8 Because the drums were in rusty poor condition,
 9 there's a potential for harm for release in the
 10 environment.
 11 Q And how does EPA view the potential
 12 for harm to the RCRA program?
 13 A Again, and I repeat this, getting a
 14 RCRA permit is fundamental to the RCRA program.
 15 I repeat that because like I said, we kind of
 16 boiled the noncompliance down to kind of the most
 17 fundamental counts that applied over the period
 18 of the noncompliance and the extent of
 19 noncompliance, so I apologize every time I say's
 20 fundamental to the RCRA program, but these counts
 21 are all form the very basis of the RCRA program.
 22 Getting a permit to store hazardous waste, if you

1 Q And how did the agency calculate the
 2 position in the moderate major cell?
 3 A Right, so we used the same factors
 4 because, again, the penalty policy for transport
 5 what factors to apply or to consider and so in
 6 this case it was not at the top of the box
 7 because of Prime's integral cooperation with
 8 EPA's DID and because the waste was eventually
 9 disposed of properly as hazardous at a treatment
 10 storage and disposal facility. Also, it wasn't
 11 at the bottom of the box because of Prime's size
 12 and sophistication, the fact that they are a
 13 large national company and also the fact that
 14 they made no attempts to get a RCRA permit and
 15 properly store the hazardous waste in the over
 16 300 days that they were managing the waste in
 17 Salt Lake City.
 18 Q Do the communications from Idaho DEQ
 19 factor in at all?
 20 A Yeah, at some point, like I said,
 21 while the waste was being stored in Salt Lake,
 22 DEQ was in communication with Prime regarding the

1 don't get a permit there's definitely the chance
 2 that waste can be mismanaged because, as we saw
 3 in this case, the storage requirements were not
 4 being met.
 5 Q So, considering the potential for harm
 6 to the program and potential for harm to human
 7 health and the environment together --
 8 A Right so there was a significant harm
 9 in this case to human health and the environment
 10 and harm to the RCRA program, so the potential
 11 for harm was determined to be moderate.
 12 Q And now let's turn to the extent of
 13 the deviation. How did complainant, you, apprise
 14 the extent of Prime's deviation?
 15 A A standard deviation was determined to
 16 be major, again, because there was no attempt
 17 made to get the hazardous waste permit, neither
 18 EPA nor, in this case it would have been, Utah
 19 Department of Environmental Equality. Neither
 20 agency ever issued a permit for this facility,
 21 therefore, it was a complete deviation from the
 22 requirement and it was determined to be major.

1 fact that the waste from the second clean up had
 2 been determined to be hazardous by Prime's
 3 contractor. So, that knowledge was not applied
 4 to the waste that was being stored in Salt Lake
 5 City.
 6 Q What did that result in in the box?
 7 A Overall the selection of the placement
 8 in the matrix box was at the mid point of the
 9 cell which was 16,767 dollars. This one gets
 10 complicated so I might need help.
 11 Q Yeah, would you mind bringing up
 12 Complainant's Exhibit 4 Corrected, please? This
 13 has been admitted. Can you please scroll, I
 14 believe it's page two or three, the summary box
 15 or no? Would that be helpful?
 16 A Yes, we can look at the summary, that
 17 would be fine. Also, the per account table is
 18 also --
 19 Q Oh right, the per account table, so
 20 please continue to scroll.
 21 A It's count four so closer to the
 22 bottom.

136

1 Q We're at count three.

2 A Oh I'm sorry, count three. Thank you,
3 everyone.

4 Q We all want to go to lunch soon.
5 (Laughter.)

6 MR. RYAN: I'm sorry, what page are we
7 on?

8 MR. FIGUR: We're getting there. The
9 count three, there it is. It's 13 of 20.

10 MR. RYAN: Thank you.

11 BY MR. FIGUR:

12 Q Go ahead and move the box, there you
13 go. Thank you. So, again, what number was
14 selected in the box?

15 A Right, so as you can see the gravity
16 based penalty, which was the first row, was
17 determined to be at the middle of the penalty
18 matrix cell, which was 16,776 dollars.

19 Q Please describe complainant's analysis
20 of whether a multi-day penalty should be applied.

21 A So for this count, it was clear that
22 the waste was stored at Salt Lake City without a

137

1 permit from October 1, 2015, through when CID
2 visited and inspected the facility on August 2nd,
3 2016 which is a period of over 300 days. Because
4 the penalty policy prescribes, sorry I meant to
5 say this earlier, a multi-day is based on the
6 gravity component. If there's, for example, a
7 major potential for harm, major extended
8 deviation, a multi-day penalty is considered to
9 be mandatory if there was continuing violation.
10 In this case, it was a module potential for harm,
11 major extended deviation in which the penalty
12 policy prescribes that it's presumed appropriate
13 to apply a multi-day factor unless there are case
14 specific factors that would cause EPA to not
15 apply the multi-day.

16 In this case, there were no case
17 specific factors so EPA did apply a multi-day
18 component. As I said before, the penalty policy
19 also generally caps the multi-day at 180 days;
20 however, in this case, the violation did occur
21 for longer than 180 days, but we did use
22 discretion to not -- we are allowed to assess a

138

1 multi-day penalty for longer than the 180 days,
2 but we decided to not use that discretion to
3 escalate the penalty for the multi-day component.
4 I was going to say something else, let me think
5 for a second. Go ahead.

6 Q Where in the box did you --

7 A Yeah, again consistent with the
8 gravity, we used the moderate major cell of the
9 multi-day penalty matrix and we looked at a mid
10 point of the penalty cell, which was 2,295
11 dollars. I will also note, because the majority
12 of this violation occurred after that November 2,
13 2015, date where the inflation adjustment
14 changed, we applied the 2020 inflation adjustment
15 in the penalty matrix that was applied reflected
16 with that adjustment.

17 So, that heavy effect of changing the
18 range -- if it helps (audio interference) -- so I
19 could give you the penalty inflation adjustment
20 number, it was 1.60451 percent and that's applied
21 to the 2003 policy numbers. The range for the
22 multi-day penalty cell for moderate major, I

139

1 believe, was up to like 3,383 dollars.
2 (Simultaneous speaking.) The point is the center
3 of the cell was 2,295. This is what I was going
4 to say earlier, when you calculate the penalties
5 applied for 180 days, the first day of that is
6 assessed as under the gravity penalty matrix and
7 then remaining 179 days are under the continuing
8 multi-day matrix. The first day was the 16,767,
9 the remaining 179 days were the 2,295, which
10 multiplied out is 410,805 dollars. Therefore,
11 the total gravity based penalty was 427,572.

12 Q And can you please describe --

13 A Excuse me, I'm sorry.

14 JUDGE COUGHLIN: Do you have water?

15 MS. MCNEILL: I do.

16 JUDGE COUGHLIN: Okay.

17 MS. MCNEILL: I just, you know. We'll
18 all have some lunch. (Laughter.)

19 JUDGE COUGHLIN: If you need more,
20 just let us know.

21 MS. MCNEILL: Thank you.

22 JUDGE COUGHLIN: Go ahead.

140

1 BY MR. FIGUR:

2 Q Can you please describe complainant's
3 analysis of the adjustment factors?

4 A Yes. Again, for this count, there was
5 no additional adjustment applied for the good
6 faith efforts to comply because that was taken
7 into account in determining the point in the
8 matrix cell. Again consistent with count one, we
9 applied a 10 percent increase for willfulness or
10 negligence. In this case, we did look at the
11 additional detail and the fact that the waste was
12 stored for an extensive period of time, over 300
13 days, without a permit and so that added into the
14 calculation of the 10 percent upwards adjustment
15 for willfulness and negligence for this count.

16 Q And what did that result in?

17 A The increase was added and, thank you
18 for having the numbers, added 42,757 dollars, so
19 therefore, the total base penalty was 470,329
20 dollars.

21 Q And did complainant make an economic
22 benefit calculation for count three as proposed?

141

1 A After review, EPA determined that the
2 economic benefit gained through noncompliance for
3 this count was determined to be minimal and so no
4 economic benefit was applied.

5 Q In taking into account all of the
6 information you've just shared about count three,
7 what's complainant's total proposed penalty for
8 count three?

9 A 470,329 dollars.

10 Q Does any information received after
11 this exhibit that's being displayed right now,
12 Complainant's Exhibit 4 Corrected, was submitted
13 that causes you to consider recalculating this
14 amount?

15 A Yes, so at some point when I was
16 delving more deeply into the details of the case,
17 I looked at Google Earth, which allows you to
18 review satellite aerial photos over time and
19 going back in history.

20 Q Ms. Tribett, please bring up
21 Complainant's Exhibit 74, page one. Please
22 scroll.

142

1 MR. RYAN: We have an objection, Your
2 Honor. This testimony appears to be going to the
3 direction of what penalty should have been
4 considered that wasn't. I would say that's again
5 outside the bounds or corners of exhibit CX-4.
6 If we're talking about what they have pled, not
7 what they could plea.

8 JUDGE COUGHLIN: Okay.

9 MR. RYAN: For that reason, I would
10 object to any of this testimony.

11 JUDGE COUGHLIN: Okay. I'm going to
12 rule on that. I have one quick question. At
13 what point did you start looking at Google Earth
14 and considering other things? Like the date is
15 really what I'm asking.

16 MS. MCNEILL: Right, so I actually
17 included that, June 24, 2022 is when I was
18 looking, pulling these images.

19 JUDGE COUGHLIN: And why?

20 MS. MCNEILL: Just to inform myself on
21 how -- see if I could figure out any additional
22 information about how the trailer was stored over

143

1 the entire period of time that was it was on site
2 in Salt Lake City.

3 JUDGE COUGHLIN: Okay. No revisions
4 were made to CX-4 Corrected, however, right?

5 MS. MCNEILL: Correct.

6 JUDGE COUGHLIN: Okay. I'm going to
7 sustain the objection.

8 MR. FIGUR: Your Honor --

9 JUDGE COUGHLIN: Yes, you can
10 certainly make a comment for the record.

11 MR. FIGUR: Yes and we might make an
12 offer of proof as well.

13 JUDGE COUGHLIN: Okay, absolutely.

14 MR. FIGUR: But what we'd like to do
15 is explain that even though we have this new
16 information, we're not proposing an additional --
17 a change to the penalty calculation and that, if
18 I may, that it just bolsters the case.

19 JUDGE COUGHLIN: Mr. Ryan?

20 MR. RYAN: Your Honor, again, they're
21 saying that there maybe could have been other
22 violations they didn't bring and that's again

144

1 beyond the scope of this case. We're not talking
2 about those. We're talking about what's in 404,
3 not what they contemplated, but didn't bring,
4 especially when they've known this for over a
5 year and made no changes to CX-4.

6 JUDGE COUGHLIN: Okay. Do you wish to
7 --

8 MR. FIGUR: Again --

9 JUDGE COUGHLIN: Say something else?

10 MR. FIGUR: Your Honor, we're not
11 trying to support a change to the penalty
12 calculation. This information could be seen to
13 bolster the basis for the agency's approach.

14 JUDGE COUGHLIN: Understood. However,
15 it's not accounted for in CX-4 Corrected. Is
16 that right? Is there any reference to this
17 additional information in CX-4 Corrected?

18 MS. MCNEILL: No, there's not.

19 JUDGE COUGHLIN: Okay. My ruling
20 stands. Do you wish to make any further offer?

21 MR. FIGUR: At this time, Your Honor,
22 I'd like to make a brief offer of proof.

145

1 JUDGE COUGHLIN: Okay.

2 MR. FIGUR: And, it will entail my
3 requesting that we scroll slowly through the
4 exhibit, but we will only address a few pages.

5 JUDGE COUGHLIN: Okay.

6 MR. FIGUR: So please scroll to page
7 two. What we would like to show with this
8 photograph is the facility as it existed before
9 the trailer arrived and the construction began.
10 Just for orientation, the top of the photo is
11 north.

12 JUDGE COUGHLIN: Okay.

13 MR. FIGUR: Positioning states that.
14 This will take the longest and then the rest of
15 it will be --

16 JUDGE COUGHLIN: No problem at all.

17 MR. RYAN: I have an objection, Your
18 Honor. Under part 22, Offer of Proof, I can read
19 it directly, but it says it shall be a very brief
20 summary, summary not page by page, description of
21 what the offer of the evidence would have proved.
22 I think I would object to going through this page

146

1 by page like this and laying it out.

2 JUDGE COUGHLIN: Okay. Well, I mean
3 we only just got started, so how long do you
4 think this is going to take?

5 MR. FIGUR: Two, three minutes, Your
6 Honor.

7 JUDGE COUGHLIN: Go right ahead.

8 MR. FIGUR: Okay, thank you.

9 JUDGE COUGHLIN: I'll overrule the
10 objection. Go right ahead.

11 MR. FIGUR: Thank you. And to the
12 east is what at the time is an undeveloped lot.
13 Please go to page six. This is a close up of the
14 corner of what used to be the developed lot and
15 construction on what is now undeveloped to the
16 east. The trailers are now in the photo in the
17 corner of what used to be the developed lot.
18 Please go to page 10.

19 This is a photo at a later time
20 shortly -- so the first photo was in May, the
21 next is June and it shows construction in the
22 area. Please go to page 14. This is a close up

147

1 of the trailer in July of 2016, July 8th to be
2 precise, and it is uncovered and in a certain
3 location. Please go to page 17. This is a photo
4 from the end of the July that shows that the
5 trailer has been moved and tarped and that ends
6 my offer of proof.

7 JUDGE COUGHLIN: All right, thank you.

8 I think it's clear, but because the witness
9 testified that she looked at Google Earth June
10 24, 2022, I'm assuming that's the date that these
11 photos represent. Is that correct?

12 MS. MCNEILL: Well, these photos were
13 viewed on June 24, 2022. They go back in time
14 and so they represent the period of time in which
15 the trailer was stored at that time, just to shed
16 light on the storage.

17 JUDGE COUGHLIN: Okay, so in terms of
18 when you kind of collected this, we're talking
19 about June 24, 2022?

20 MS. MCNEILL: Yes.

21 JUDGE COUGHLIN: Okay, all right,
22 thank you.

1 BY MR. FIGUR:
 2 Q And is June 24, 2022, after this
 3 court's ruling on the motion for accelerated
 4 decision?
 5 A Yes, it was.
 6 Q Just, sorry, to circle back on the
 7 offer of proof for one more second, were you
 8 intending to use this exhibit to propose a change
 9 to Complainant's Exhibit 4 Corrected?
 10 MR. RYAN: Objection, again, we're not
 11 talking about changing the exhibit or bringing in
 12 new violations, we're talking about what's in the
 13 exhibit which is CX-4 itself.
 14 MR. FIGUR: Your Honor, we're not.
 15 What we're establishing here is that there are no
 16 new proposed violations and there is no proposed
 17 change to the penalty. What we are trying to
 18 establish is if this would be useful to bolster
 19 the existing penalty analysis.
 20 JUDGE COUGHLIN: Yeah, I understand.
 21 I think you've covered that already, but my
 22 ruling stands. I am reluctant to consider

1 in terms of pointing out if I'm denying it or
 2 granting it, pointing out where either the
 3 deficiencies or the support is. But it's never
 4 to be construed as a request, at least any order
 5 I issue, as a request for more information or
 6 supplemental information to be brought into the
 7 case. That's not my intention and I think we
 8 addressed that to the extent that there had been
 9 an interpretation different to that to what I was
 10 intended, so I don't know if that's part of where
 11 you're going with this, but I just wanted to
 12 reiterate, I wasn't seeking more information.
 13 I'm seeking information that the agency
 14 considered when they proposed the penalty they
 15 did, the rationale for it and reviewing that and
 16 nothing outside of that.
 17 MR. FIGUR: Thank you, Your Honor.
 18 JUDGE COUGHLIN: Okay, is there
 19 anything else that you wanted to add, though,
 20 just for the purpose of the record?
 21 MR. FIGUR: I think that the record
 22 will be complete on the proposed exhibit itself.

1 something that the agency didn't consider when
 2 they did their evaluation to propose this penalty
 3 because it's got to stop somewhere or else things
 4 can keep coming in and being presented well after
 5 the fact and I don't think that that is
 6 appropriate and I won't consider that. So, I'll
 7 consider what the agency considered when they
 8 came up with the explanation of the proposed
 9 penalty and what's been covered. I'm not going
 10 to consider additional information subsequent to
 11 that point. I guess for clarity, I think that
 12 this was pointed out in one of my orders
 13 subsequent to the accelerated decision, order
 14 accelerated decision, but there was no intention
 15 from this tribunal to seek out additional
 16 information.
 17 When I rule on an accelerated decision
 18 motion, it's always a little tricky from my
 19 standpoint, because I need to be detailed in my
 20 explanation as to whether or not to grant the
 21 motion, but I'm not in an advocacy role. So, I
 22 try to strike a good balance between those things

1 I would like to take a half step back and after
 2 you ruled on the motion if we had or developed
 3 new information, are you recommending then that
 4 complainant should submit a second corrected
 5 exhibit with new exhibits, since you're
 6 explaining that your ruling was misunderstood.
 7 Is that how we should have done this?
 8 JUDGE COUGHLIN: I'm not --
 9 MR. FIGUR: And I realize that that's
 10 not the right place for this. (Simultaneous
 11 speaking.)
 12 JUDGE COUGHLIN: I'm not really sure
 13 I understand. Okay. Hold --
 14 MR. FIGUR: I withdraw the question.
 15 JUDGE COUGHLIN: No, no, it's okay.
 16 I'm not (Simultaneous speaking.)
 17 MR. FIGUR: I was only asking for
 18 clarification for future purposes when we engage
 19 in administrative litigation.
 20 JUDGE COUGHLIN: Okay.
 21 MR. FIGUR: So, this is not germane to
 22 this case. I was just asking for -- you were

1 clarifying process, I was asking additional
 2 questions. I withdraw the question.
 3 JUDGE COUGHLIN: Okay. Well, I don't,
 4 you know, (Simultaneous speaking.) I don't want
 5 to take up time here, but I also don't, you know,
 6 I want you have, I hope, a better understanding
 7 not a confused understanding of what my
 8 standpoint is, but Mr. Ryan, did you have an
 9 objection?
 10 MR. RYAN: No, he's withdrawn the
 11 question, Your Honor, so I'll sit down.
 12 JUDGE COUGHLIN: Okay, all right. I
 13 mean just as a general principal my role here is
 14 not an advocacy. I consider what the parties
 15 present and I am confined by that and it's
 16 appropriate to be confined by that, because it's
 17 not my role to look for things outside of the
 18 record or to solicit more information. So, to
 19 the extent an order I issue speaks to the
 20 opportunity for a fuller development of the
 21 record at a hearing, when a witness can testify,
 22 when a respondent can present witnesses to talk

1 A I do know that when CAD arrived on
 2 site on August 2, 2016, at that point in time
 3 there was a tarp over the burn drums on the
 4 trailer.
 5 Q Okay, thank you. Ms. McNeill, we're
 6 going to turn to count four now. And can you
 7 please briefly describe count for?
 8 A Yes.
 9 JUDGE COUGHLIN: Oh, before you get
 10 there.
 11 MR. FIGUR: Yeah.
 12 JUDGE COUGHLIN: I just want some
 13 history. You had explained with regard to count
 14 three why the circumstances would not indicate
 15 that this was minor in terms of gravity. Were
 16 there any factors that you considered that led
 17 you to conclude it should not be major?
 18 MS. MCNEILL: There were a couple and
 19 that was that we weren't aware of any waterways
 20 that if there had been a release the hazardous
 21 waste could have been released to. I believe I'm
 22 blanking which part of the penalty policy, but

1 about the penalty the agency has proposed and
 2 whether it's appropriate and my de novo look at
 3 that, that's my role.
 4 I just don't want that to be
 5 misconstrued as I'm asking you to bring in other
 6 stuff, because that's not my position. I'm here
 7 as a judge. I'm an impartial adjudicator. I'm
 8 not here on behalf of EPA and I'm not here on
 9 behalf of the respondent. I'm appointed by EPA,
 10 but I'm not an advocate for the agency.
 11 MR. FIGUR: Apologies, Your Honor,
 12 thank you. All of that is very helpful and
 13 clarifying --
 14 JUDGE COUGHLIN: Okay.
 15 MR. FIGUR: And appreciated.
 16 JUDGE COUGHLIN: All right. Please go
 17 ahead.
 18 BY MR. FIGUR:
 19 Q So, let's turn back for a second to
 20 the storage as we understood it, as we were
 21 calculating the penalty. Where did we obtain
 22 that information? Do you recollect.

1 there is a part that states we should take into
 2 account the environmental sensitivity of the
 3 area. Then also, I don't know, I'm forgetting --
 4 BY MR. FIGUR:
 5 Q Would it help to refresh your
 6 recollection to look at Complainant's Exhibit 4
 7 Corrected in the discussion of or --
 8 A Sure.
 9 Q Would it not be helpful?
 10 A It would. I know -- I'm pretty sure
 11 there's just one sentence that I'm looking for.
 12 Q Can you please scroll back up?
 13 A Actually, we're in the potential for
 14 harm section.
 15 Q Oh, we are?
 16 A Yep. If you scroll down, oh there you
 17 go.
 18 MR. RYAN: I'm sorry, for the record,
 19 where are we? (Simultaneous speaking.)
 20 MS. TRIBETT: Page 14.
 21 MR. FIGUR: Page 14 of 20.
 22 MS. MCNEILL: Thank you, I appreciate

1 that. So, there it says also taken into account
2 right above the extent of deviation section
3 begins is other factors that were taken into
4 account, which include the volume of waste. As I
5 said, the lack of nearby waterways and the fact
6 that the storage of the trailer was on a paved
7 surface, therefore, it was determined to be
8 moderate.

9 BY MR. FIGUR:

10 Q And is that a complete list of all the
11 factors that were considered or were these --

12 A No.

13 Q Was it a complete list?

14 A No, we take into account a number of
15 factors. That's just what was written.

16 JUDGE COUGHLIN: Volume of waste
17 stored. Are we talking about the amount paint in
18 the drums? Or the number? When I hear volume I
19 think of the amount of paint as opposed to the
20 number of drums, but --

21 MS. MCNEILL: Okay, so essentially
22 both.

1 We were also kind of exercising some discretion
2 on taking that into account. Like I said, we
3 considered if the drums were full of waste at the
4 time of the violation and so not having that 100
5 percent certain at the time, we were kind of
6 exercising some discretion in using that as a
7 factor to determine the moderate potential for
8 harm.

9 JUDGE COUGHLIN: Okay. And then what
10 about the reference to the storage of the trailer
11 on a paved surface? Can you elaborate a little
12 bit about what that signifies from your
13 perspective as to how you categorize this?

14 MS. MCNEILL: Right, so a paved
15 surface, if there had been a release, is
16 generally more or is more protective than if it
17 had been stored just like in a dirt lot. So, it
18 kind of is at least slightly more protective than
19 just storage on the ground. So, having the paved
20 surface would have potentially somewhat mitigated
21 a release if there had been one.

22 JUDGE COUGHLIN: Okay. Thank you.

1 JUDGE COUGHLIN: Okay.

2 MS. MCNEILL: The fact that these
3 drums were, again, according to the NEIC drum
4 log, 19 of the 20 were determined to have
5 three-quarters to seven-eighths were full so
6 that's something we always consider, too, is if
7 we're looking at a drum, did it actually have
8 hazardous waste in it at the time of the
9 violation and so in this case, yes, they all were
10 nearly full, almost all of them were nearly full
11 of hazardous waste. Then, the fact that there
12 were 20 drums of the waste, so it was -- I can't
13 do that math in my head, but 20 times
14 approximately 55 gallons is how much waste was
15 being stored over the course of the 10 months.

16 JUDGE COUGHLIN: Okay. And so this
17 was what you considered in choosing moderate
18 versus major?

19 MS. MCNEILL: Yeah, so just the fact
20 that, actually when this was calculated, we were
21 not aware that all of the drums were as full as
22 they were and so also taking that into account.

1 BY MR. FIGUR: Thank you.

2 Q Turning now to count four.

3 A Okay.

4 Q Can you please briefly describe count
5 four?

6 A Yes, so count four was failure to
7 properly manage containers of hazardous waste.
8 Containers of hazardous waste are required to be
9 kept closed, except when waste is being added or
10 removed and should not be stored, handled or
11 opened in a way that would potentially cause the
12 container to rupture or leak. In this case, as I
13 said, the drum log confirmed that all of the
14 containers of hazardous waste were in poor
15 condition and compromised condition after having
16 been through the fire. So, also because they
17 were rusty, there was a greater likelihood of
18 release from the compromised drums.

19 Also, they weren't stored in a way
20 that would prevent releases. They were just
21 stored on the burn trailer for almost a year.

22 Q And can you please describe how

160

1 complainant viewed the potential for harm for
2 count four?

3 A Yes, potential for harm for count four
4 was determined to be major.

5 Q And can you please describe how
6 complainant evaluated the potential for harm to
7 human health and the environment?

8 A Right, so I keep going back to the
9 drum log, but it confirmed a number of things
10 that we had sought when EPA originally calculated
11 the penalty. So, we wanted to represent certain
12 -- how many of the bungs had been blown. There
13 were a number of references from people saying
14 several, all, some of the bungs had been blown
15 out of the drums at the time of the fire. The
16 drum log confirmed that 19 of the 20 drums were
17 open while they were being managed at the Salt
18 Lake City facility. It also confirmed that,
19 again, like I was just saying that, you know, 19
20 of the 20 of them were determined to be nearly
21 full of hazardous waste over the time they were
22 stored. Also, confirmed through NEIC's direct

161

1 observation of the drums that the drums were
2 considered to be in poor condition and that they
3 were rusted and burned from being through the
4 fire.

5 So, taking into account the condition
6 of the drums, the fact that they were opened
7 causes substantial potential for harm to human
8 health and the environment. Basically the open
9 drums and the volatilizing, any workers in that
10 area could have been exposed to the vapors and
11 then having the drums in poor condition caused a
12 substantial potential for harm that there may be
13 a release to the environment because the drums
14 were compromised.

15 Q Ms. Tribbett, can you please bring up
16 Complainant's Exhibit 14, page 24? Sorry, that's
17 Exhibit 14, page 24. Can you please briefly
18 describe what's in this photograph?

19 A Yes, this is drum number six, one of
20 the drums that was sampled by NEIC and I just
21 wanted to include this as a --

22 Q Sorry.

162

1 A Include this as an illustration of the
2 condition of the drums. You can see that it's
3 rusted. You can see, it's a little hard to see,
4 but at the top you can see that it's dented on
5 the top one-third of the drum. (Simultaneous
6 speaking.)

7 JUDGE COUGHLIN: I'm sorry, which drum
8 did you say this was?

9 MS. MCNEILL: It's number six.

10 JUDGE COUGHLIN: Okay, thank you. You
11 can tell that by something on the photo?

12 MS. MCNEILL: Yeah, the upper right
13 corner of the drum has a 06 in white --

14 JUDGE COUGHLIN: Oh, okay.

15 MS. MCNEILL: Written on it.

16 JUDGE COUGHLIN: (Laughter.) I was
17 looking at some of the stamping, okay.

18 MS. MCNEILL: Oh, yeah, yeah.

19 JUDGE COUGHLIN: Thank you.

20 BY MR. FIGUR:

21 Q And is there also stamping in the
22 bottom left corner?

163

1 A Yes. Yes, there is. It's also in
2 green at the bottom left. It says drum 06.

3 JUDGE COUGHLIN: Okay, thank you.

4 BY MR. FIGUR:

5 Q And, Ms. Tribbett, please bring up
6 Complainant's Exhibit 30, page 13. And Exhibit
7 30 also is admitted, not stipulated. Can you
8 please describe what's in this photograph?

9 A Yes, so this is how the drums were
10 stored at the facility. Again, it illustrates
11 the condition of the storage. The fact that they
12 were stored on the burned trailer, on a non-flat
13 surface for the 300 days that they were stored
14 and that's all exhibited.

15 Q Thank you. Ms. Tribbett, please move
16 to page 11. Can you please describe this
17 photograph?

18 A Yes, this is the last photo, but just
19 again illustrating the condition of the
20 containers. As you can see in this photo, most
21 of the bungs are open, knowing that also that
22 almost all the drums were almost full of

1 hazardous waste, just the fact that these were
 2 stored open, full, in poor condition, just kind
 3 of out in the corner of the facility for a year.
 4 None of the drum storage conditions
 5 were met. As I said initially, the requirement
 6 is that they're kept closed and obviously these
 7 drums were open. The requirement is also that
 8 they shouldn't be stored in a manner that would
 9 cause the rupture or release of hazardous waste.
 10 They weren't stored protectively. This wasn't a
 11 low access corner of the facility. You know, the
 12 fact that the drums were stored on a non-flat
 13 surface.
 14 JUDGE COUGHLIN: Can you just repeat
 15 what you said before that about where they were
 16 stored on the facility? I didn't totally get it
 17 there.
 18 MS. MCNEILL: So they were in a corner
 19 of the facility, and then there was construction
 20 occurring. And the vehicles were driving past
 21 the area where these drums were stored.
 22 JUDGE COUGHLIN: And how do you know

1 with a lower penalty because there was no actual
 2 harm. And therefore, that's why we evaluate the
 3 potential for harm.
 4 MR. FIGUR: Can you please bring up
 5 Exhibit 3 corrected. Actually, can you please
 6 bring up Exhibit 3 first.
 7 JUDGE COUGHLIN: I don't have the CX3
 8 corrected on this list.
 9 MR. FIGUR: Okay.
 10 JUDGE COUGHLIN: Hold on, let me check
 11 here something.
 12 MR. RYAN: I'm not aware of any CX3 --
 13 JUDGE COUGHLIN: Yeah, I don't have
 14 the CX3 corrected in the folder, either. I think
 15 I printed this from your most recent version.
 16 MR. FIGUR: Fair enough, Your Honor.
 17 Please bring up Complainant's Exhibit 3.
 18 Thank you. Can you please scroll
 19 through the document?
 20 Thank you. Do you recognize this
 21 document, Ms. McNeill?
 22 MS. MCNEILL: I do. This is a report

1 that?
 2 MS. MCNEILL: You can see, in a number
 3 of these photos, the construction occurring in
 4 the background.
 5 JUDGE COUGHLIN: Okay.
 6 MR. FIGUR: And is the location
 7 described in any reports that you've read?
 8 MS. MCNEILL: I mean, I'm pretty sure
 9 in any of these reports that the drums were
 10 stored in the northeast corner of the facility
 11 which is where the photo was taken.
 12 MR. FIGUR: Okay. And again, you've
 13 already testified that the Agency has no evidence
 14 of the actual harm from storage presented in the
 15 drums. Can you please remind us what the penalty
 16 policy says about that?
 17 THE WITNESS: Yes. So, again, you
 18 know, we do acknowledge that there was no
 19 evidence of actual harm. But however, the
 20 penalty policy does caution polluters aren't
 21 often able to control if there's an actual harm
 22 or an actual release and shouldn't be rewarded

1 from EPA's EJSCREEN, environmental justice
 2 screening tool.
 3 BY MR. FIGUR:
 4 Q And is it a true and accurate copy of
 5 what was submitted to the Court?
 6 A It is.
 7 Q And have you recently looked at this
 8 exhibit?
 9 A I have. And when I looked again I
 10 noted that, on Page 2 in that big blank rectangle
 11 at the top of the page, is supposed to be, and
 12 was on the initial report, a map of the area that
 13 the report was based on. So somehow the map did
 14 not get saved on the copy.
 15 Q We apologize for that, but this is the
 16 exhibit that we would like to consider. And so
 17 I'm going to ask you again. Is this a true and
 18 accurate copy?
 19 A Yes.
 20 Q Other than the back piece is missing?
 21 A Yes.
 22 Q Thank you. Complainant moves to enter

1 Exhibit 3 into evidence.
 2 JUDGE COUGHLIN: Any objection?
 3 MR. RYAN: No objection, as long as
 4 we're not going to have testimony about the part
 5 of the document that's not there.
 6 JUDGE COUGHLIN: No. I mean, it is
 7 what it is. That's what I'm looking at too, and
 8 that's the exhibit as it is. So it would be
 9 admitted in this form.
 10 MR. RYAN: Yeah, in this form, I have
 11 no objection, Your Honor.
 12 JUDGE COUGHLIN: Okay. So CX3 is
 13 admitted.
 14 (Whereupon, the above-referred to
 15 document was received into evidence as
 16 Complainant's Exhibit No. 3.)
 17 MR. FIGUR: And when this report was
 18 run, how did the Agency run the report?
 19 MS. MCNEILL: We use EPA's EJSCREEN
 20 tool which is a screening tool to evaluate
 21 environmental justice concerns for a given area.
 22 MR. FIGUR: And what area did you or

1 did Complainant input to get this report?
 2 MS. MCNEILL: So this report was based
 3 on the census block in which the Salt Lake City
 4 facility is located in.
 5 MR. FIGUR: The Agency could have run
 6 this program using a radius instead, correct?
 7 MS. MCNEILL: Yes. So EJ Screen is
 8 also a mapping tool. And so it can evaluate --
 9 EASE is a nationally consistent dataset to
 10 evaluate demographic and environmental indicators
 11 for a given area. That area can be, like I said,
 12 a census block, it can also be a radius around a
 13 certain point. But we generally use the census
 14 block. So that's what was used for this report.
 15 JUDGE COUGHLIN: Ma'am, can you just,
 16 EJ is --
 17 MS. MCNEILL: Environmental justice,
 18 apologies.
 19 JUDGE COUGHLIN: Thank you.
 20 MS. MCNEILL: I've been trying to say
 21 the whole thing, but it just comes out. Sorry.
 22 JUDGE COUGHLIN: No problem.

1 MR. FIGUR: Thank you, Your Honor.
 2 Without describing what actually would
 3 be in this box, had the exhibit been submitted
 4 complete, can you at least describe generally
 5 what would be in the box?
 6 MR. RYAN: Objection. We can't have
 7 a description of what's in a box we haven't seen.
 8 I'm sorry.
 9 JUDGE COUGHLIN: I mean, I agree.
 10 I'll sustain the objection. I mean, this is --
 11 MR. FIGUR: That's fine.
 12 JUDGE COUGHLIN: In all candor, this
 13 is stuff that needed to be cleaned up well before
 14 now. And that's on the region. So go ahead.
 15 MR. FIGUR: Thank you, Your Honor. So
 16 can you tell us a little bit about EJScreen?
 17 MS. MCNEILL: Right. So that's, as I
 18 said, it's a screening tool that looks at the
 19 demographic in environmental indicators. It
 20 brings them together to evaluate environmental
 21 justice impacts on a certain area.
 22 And like I said, in this case, we

1 looked at the census block that the facility is
 2 located in. The screening tool uses the dataset
 3 to evaluate the environmental justice concerns of
 4 an area compared to the regional and national
 5 averages and comes up with a percentile for the
 6 11 indices. Can you scroll up?
 7 BY MR. FIGUR:
 8 A Can you please scroll up? That's
 9 fine.
 10 Q The table at the top, I'm not going to
 11 get into great detail in this, I promise, but you
 12 can see the table at the top lists all of the
 13 indices.
 14 Again, that brings together
 15 demographic and environmental justice,
 16 environmental indicators, not environmental
 17 justice. And there's the -- you can see it has a
 18 percentile compared to the state EPA regions and
 19 the national percentiles.
 20 In this case, we looked at the state
 21 percentiles, because that reflects the local area
 22 where the facility is located. And you can see

172

1 that all of them were over the 80 percent mark.
2 And 80 percent is generally what the agency uses
3 to determine if an area has environmental justice
4 concerns.

5 Q And so how would you characterize,
6 based on this data, the area, the census block
7 that was searched?

8 A Right. So that is located in a mainly
9 industrial area. The, you know, homes,
10 residences are relatively far from the facility
11 itself. However, there are people who work in
12 that industrial facility on a daily basis. And
13 so they are considered under the potential
14 impacts.

15 Q And can you please describe the
16 general weight given to this information in
17 calculation of the potential for harm to human
18 health and the environment for Count 4?

19 A Right. So this is actually, it's a
20 relatively small part, it's super small. It's
21 something definitely to consider this facility
22 already had, you know, environmental impacts from

173

1 other stressors. But it just shows that, you
2 know, having these open drums of hazardous waste
3 being stored for nearly a year, ten months, just
4 contributes to the stressors on an already
5 overburdened area.

6 Q Thank you. And how did Complainant
7 view the potential for harm to the RCRA program
8 from Prime's failure to properly manage the
9 drums?

10 A Again, proper management of containers
11 is fundamental to the RCRA program. So
12 substantial, excuse me, let me take that back.
13 So the potential for harm from not meeting these
14 drum storage requirements substantially
15 undermines the RCRA program, because they were
16 stored, you know, open and in poor condition for
17 an extended period of time.

18 Q And how did Complainant view the
19 extent of deviation?

20 A Because it met the storage requirement
21 permit in this case, as we discussed, the
22 definition for a major extended deviation would

174

1 be when none of the requirements are met as
2 intended. So in this case, there was a complete
3 deviation from the requirements and, therefore, a
4 major extended deviation.

5 Q And again, turning to the penalty
6 matrix, what's the next step that the Agency
7 took?

8 A Right. So again, we considered
9 potential for harm, and extended deviation, the
10 seriousness of the violation, and we used those
11 two factors to figure out which matrix cell to
12 look at for the proposed penalty.

13 Q And how did Complainant determine
14 which amount in the cell should be proposed?

15 A Again, as consistent with the other
16 counts, we considered the fact that Prime was
17 totally cooperative with CID's inspection. And
18 we considered the fact that the waste was
19 eventually disposed of as hazardous at a
20 treatment diversion facility.

21 We also took into account -- sorry,
22 those are the reasons the penalty was not at the

175

1 top of the box. It was also not at the bottom of
2 the box because of Prime's size, and
3 sophistication, and the fact that they're a large
4 national company, and also the fact that no
5 attempts were made over the course of the 300
6 days that the waste was stored at the facility to
7 properly manage the containers.

8 Q Please return to Complainant's
9 corrected Exhibit 4. And please scroll back up,
10 I think. Oh no, this is Count 3, yeah, so please
11 scroll down. We're in Count 3 right now. Count
12 4, thank you.

13 And so for this count, what was the
14 proposed gravity penalty?

15 A Thank you. So the proposed gravity
16 penalty was \$39,712 which is the mid-point of the
17 matrix cell.

18 Q And can you please describe
19 Complainant's analysis of whether a multi-day
20 penalty should be imposed, should be proposed,
21 sorry?

22 A Right. So in this case, again, while

1 the waste was stored for over 300 days with the
 2 containers in poor condition, we kind of, like,
 3 we looked at the totality of the circumstances
 4 and determined that a multi-day factor should not
 5 be applied. That includes the fact that when
 6 this document -- when this kind of penalty was
 7 originally calculated, we didn't have the log.

8 And so we weren't 100 percent sure,
 9 and we like to be 100 percent sure, that the
 10 drum, the open bungs on the drums that were
 11 discussed, and seen in photos at the fire site,
 12 were the same drums that were open at the Salt
 13 Lake City facility. And so we did not consider
 14 there to be a multi-day for that reason.

15 Q Please describe the Claimant's
 16 analysis of the adjustment factors.

17 A For Count 4, again, we did not add an
 18 additional adjustment for good faith efforts to
 19 comply, because their cooperation was taken into
 20 account in determining the place the matrix cell.

21 We again, consistent with Count 1,
 22 applied a ten percent increase for willfulness

1 and negligence based on the same factors for
 2 Count 1.

3 Q And did you consider any other factors
 4 in relation to the count?

5 A Yes. So, part of the considerations
 6 for this count, for the willfulness and the
 7 negligence, was also the fact that IDEQ, Idaho
 8 State Department of Environmental Quality, had
 9 contacted Prime about the fact that they need
 10 cleanup of the fire site.

11 Q And we previously looked at the SDSs.
 12 Did you consider that?

13 A Yes. For this count also, the SDS
 14 sheets specified safe storage conditions for this
 15 material when it's a product. And not only were
 16 the containers in poor condition, but none of the
 17 safe storage requirements for the SDS was
 18 indicated on the SDS or the format.

19 Q Did Complainant --

20 A Oh --

21 Q Go ahead.

22 A I'm sorry. The fact also that, you

1 know, Prime had in their possession the SDS
 2 sheets starting at the end of November. However,
 3 they still failed to properly manage these
 4 containers for another eight months after they
 5 did receive the SDS sheets which, you know, again
 6 strongly indicated that the material in those
 7 drums would have been hazardous material if not a
 8 hazardous waste.

9 Q And what did that lead to in terms of
 10 an adjustment?

11 A That factor, in addition to the others
 12 discussed in Count 1, added to a ten percent
 13 increase for willfulness and negligence.

14 Q And did Complainant reap an economic
 15 benefit calculation for Count 4?

16 A We did, however it was determined to
 17 be minimal in comparison to gravity. So economic
 18 benefit was not proposed for this count.

19 Q And taking into account all of this
 20 information you just told us about Count 4, what
 21 is Complainant's total proposed penalty for Count
 22 4?

1 A \$43,683.

2 Q Okay. We're about to turn to Count 5.
 3 That is the last count. I do want to check in to
 4 make sure that everybody's still doing fine. And
 5 I think we'd like to perhaps continue and finish
 6 it out. But we want to check in with the Court.

7 JUDGE COUGHLIN: Sure. Mr. Ryan?

8 MR. RYAN: I would say let's push
 9 through and finish at 5:00. And then we can do
 10 cross after lunch.

11 JUDGE COUGHLIN: Okay. All right,
 12 sounds good.

13 One quick question, this is kind of
 14 more of a general question. Because you've been
 15 very clear as to where consideration for good
 16 faith was factored in the assessment here. And
 17 I've understood, I think through each of these
 18 counts, where you've identified it contributed to
 19 selecting the mid-range of the proper matrix.

20 And I'm just wondering, based on your
 21 experience in doing this work, is that the
 22 typical approach that's taken as opposed to

1 considering it after that gravity-base amount is
 2 selected?
 3 MS. MCNEILL: Right. It can actually
 4 be taken into account in either place.
 5 JUDGE COUGHLIN: Okay.
 6 MS. MCNEILL: I'm trying to -- I'm
 7 reviewing the penalty policy in my head.
 8 JUDGE COUGHLIN: If there's something,
 9 if there's a variable that you want to draw my
 10 attention to, it's fine. It's just that --
 11 MS. MCNEILL: No.
 12 JUDGE COUGHLIN: -- I understood what
 13 your testimony has been. It's just, you know, as
 14 I look at this layout it appears after that. And
 15 so --
 16 MS. MCNEILL: Right.
 17 JUDGE COUGHLIN: And I know you've
 18 testified that there are some options there, but
 19 it appears at different points in the penalty
 20 policy. So I'm not questioning your decision,
 21 I'm just trying to get a sense of that's kind of
 22 routinely what the office does when they're

1 looking at a county, since it appears to be --
 2 MS. MCNEILL: Right.
 3 JUDGE COUGHLIN: --- after that matrix
 4 number's been decided.
 5 MS. MCNEILL: Right. So I think, in
 6 a discussion of one the factors to include in
 7 determining the point in the penalty matrix, it
 8 specifically -- the factor includes the degree of
 9 cooperation.
 10 And so I would say that's slightly
 11 different than the good faith efforts to comply.
 12 Because that, again, is kind of looking at that
 13 part. It includes, you know, the fact that the
 14 violation is identified and, you know,
 15 corrective actions are taken before any agency
 16 identifies the violation.
 17 JUDGE COUGHLIN: Okay.
 18 MS. MCNEILL: Also, you know, no
 19 adjustments for not knowing about the requirement
 20 and no downward adjustments for just coming back
 21 into the plan. And so those factors don't really
 22 apply here. Because the Agency identified the

1 violation. You know, they came back into the
 2 plan, but everybody said that's expected after
 3 the Agency identifies the violation.
 4 And the lack of knowledge, you know,
 5 you can't give a downward adjustment for not
 6 knowing, violate or not knowing the right
 7 requirement. And so it was more appropriate in
 8 this case to consider that degree of cooperation
 9 in the penalty matrix cell, because the factors
 10 for good faith efforts to comply just didn't
 11 really fit. So to give them a credit for
 12 cooperating, we used as a part of the
 13 determination of the matrix level to select the
 14 penalty.
 15 JUDGE COUGHLIN: Okay. Thank you,
 16 that's helpful. Please go ahead.
 17 MR. FIGUR: Thank you. So moving on
 18 to Count 5, can you please briefly describe Count
 19 5?
 20 MS. MCNEILL: Yes. Count 5 is failure
 21 to get an EPA identification number. EPA
 22 identification numbers are required for everyone

1 who, sorry, I'm distracted by this drawing.
 2 Everyone who generates, transports, recycles,
 3 treats, stores, disposes of hazardous waste,
 4 they're required to get an ID number by notifying
 5 the state or EPA of the hazardous waste
 6 activities that are occurring at a given
 7 location.
 8 ID numbers are location specific, not
 9 company specific. And so it alerts the
 10 regulators, I mean, either it can be EPA or the
 11 state environmental agency, that there are
 12 hazardous waste activities occurring at a given
 13 location.
 14
 15 And so in this case, neither EPA nor
 16 the Utah State Department of Environmental
 17 Quality was notified that hazardous waste
 18 activities were occurring at that location,
 19 because Prime didn't notify them in order to get
 20 an identification number. But those things kind
 21 of go together. You notify the agency, and then
 22 they give you an ID number, so just to clarify

184

1 that for you.

2 BY MR. FIGUR:

3 Q Thank you. Can you please describe
4 how the Complainant viewed the potential for harm
5 for Count 5?

6 A Yes. So the potential for harm for
7 Count 5 was determined to be major.

8
9 Q And can you please describe how
10 Complainant evaluated the potential for harm to
11 human health and the environment in Count 5?

12 A Yes. So over the period of time,
13 which was almost 300 days that the hazardous
14 waste was being stored at Prime, neither EPA nor
15 the State Environmental Agency knew that
16 hazardous waste was being stored there.

17
18 And so because there was no knowledge,
19 there was no reason to know that they should be
20 conducting inspections. And inspections, like I
21 said, are the way that the agencies, the state
22 and federal, ensure that waste is being properly

185

1 stored in a safe manner.

2 Q And can you please explain how
3 Complainant viewed the potential for harm to the
4 RCRA program?

5 A Yes. Consistent with the other
6 counts, this requirement is fundamental to the
7 RCRA Program. As I said, you know, without this
8 ID number, without notifying the state or EPA,
9 the regulators don't know if the hazardous waste
10 is being managed on that site.

11 Also, again, this is one of the
12 examples the penalty policy gives for violations
13 that may not obviously appear to cause a
14 substantial potential for harm to the program.
15 But they are still fundamental to the program
16 itself, that failing to get an ID number
17 substantially undermines the RCRA program. So
18 therefore, in this case, the potential for harm
19 to the program was substantial.

20 Q And can you please explain EPA's view
21 of the extent of Prime's deviation from the
22 requirement?

186

1 Q Yes. Again, there was no attempt made
2 by Prime to obtain an EPA ID number. So there
3 was a complete deviation from the requirement and
4 therefore extent of deviation was determined to
5 be major.

6 Q Again, what's the next step after
7 determination on gravity and extent, I mean,
8 determination on each component of gravity?

9 A This is where we use potential for
10 harm and extended deviation to determine the cell
11 and matrix, penalty matrix for which you derive
12 the penalties.

13 Q And how did Complainant determine
14 which amount in the cell should be proposed?

15 A Again, I believe we have described in
16 the penalty justification that this accounts for
17 all of the pre-sentencing information. So
18 apologies for repeating, but in this case, you
19 know, the penalty was determined to not be at the
20 top of the box, because of Prime's general
21 cooperation with CID, and also because the waste
22 was eventually disposed of as hazardous at a TSC.

187

1 It wasn't at the bottom of the box
2 because of Prime's size and sophistication and
3 also because no attempt was made to get an ID
4 number on the over 300 days that the waste was
5 stored onsite.

6 Q Are there any other factors that were
7 considered, so for this count of proposed gravity
8 penalty, sorry, the proposed gravity is?

9 A It was at the midpoint of the matrix
10 cell which was \$39,712.

11 Q And can you please describe
12 Complainant's analysis of whether the multi-day
13 penalty should be proposed?

14 A Yes. So again, there was the
15 opportunity to get an ID number on the over 300
16 days that the waste was being stored onsite.
17 However, that action was not taken. And we did
18 look at the totality of the circumstances. And
19 while the waste was stored for 300 days, they
20 could have gotten an ID number any one of those
21 days. Getting an ID number is generally viewed
22 to be a one-time event. So no multi-day factor

1 was applied.
 2 Q And again, was that a discretionary
 3 decision?
 4 A Yes, it was.
 5 Q And please describe Complainant's
 6 analysis of the adjustments under the policy?
 7 A Right. So again, for this count, the
 8 good faith efforts to comply was not -- no
 9 additional adjustment was made for good faith
 10 efforts to comply as an adjustment factor for
 11 willfulness and negligence. Again, a ten percent
 12 increase was applied based on the same factors
 13 for Count 1.
 14 Q Are there any other additional factors
 15 relating specifically to this count that were
 16 considered?
 17 A Yes. So for this count, in addition
 18 there were a couple of details that were also
 19 applied contributing to the willfulness or
 20 negligence. That's the fact that Prime has an
 21 EPA ID number for their facility here in
 22 Springfield, and also the fact that in the

1 communications with Idaho DEQ about the cleanup,
 2 second cleanup of the fire site, Prime
 3 contractors contacted Idaho State DEQ to get an
 4 ID number for the fire site in order to ship what
 5 was determined to be hazardous waste that was
 6 cleaned up from the fire site.
 7 So there was knowledge, you know,
 8 through those two examples that an EPA ID number
 9 is something that they should have been getting
 10 while storing the waste in Salt Lake City.
 11 Q And what was the proposed adjustment,
 12 if any?
 13 A That was the ten percent adjustment,
 14 upward adjustment.
 15 Q And did Complainant make an economic
 16 benefit calculation for Count 5?
 17 A I have notice that it was determined
 18 to be minimal compared to the gravity penalty for
 19 Count 5, so none was proposed.
 20 Q And taking into account all of the
 21 information that you just told us about Count 5,
 22 what is Complainant's total proposed penalty for

1 Count 5?
 2 A \$43,683.
 3 Q Can you please now summarize
 4 Complainant's total proposed penalty? Perhaps go
 5 to that second page please.
 6 MR. RYAN: Like I said, page of
 7 Exhibit CX4 --
 8 (Simultaneous Speaking.)
 9 MR. FIGUR: Yes, soon as we get there,
 10 we'll be going to the table, the summary table.
 11 MR. RYAN: There you go.
 12 MR. FIGUR: Thank you, we are now at
 13 Page 5 of 20 of Complainant's Exhibit 4,
 14 corrected.
 15 Can you please summarize Complainant's
 16 total proposed penalty, Ms. McNeill?
 17 MS. MCNEILL: Yes. So EPA used RCRA's
 18 general penalty policy to, as I said, take into
 19 account the number of factors, cases that have
 20 information for all of the violations, and
 21 arrived at a total proposed penalty of \$631,402.
 22 Q Thank you. And Ms. McNeill, you've

1 mentioned a number of places where Complainant
 2 exercised discretion in calculating the proposed
 3 penalty. Did Complainant exercise at any point
 4 in a way that would make the penalty higher?
 5 A Other than applying the adjustment
 6 factor for willfulness and negligence, no.
 7 Q And can you please recap the ways in
 8 which Complainant chose to make the final penalty
 9 lower?
 10 A Yes. So there were a number of ways.
 11 So again, while Prime's noncompliance was
 12 complete, there were a number of other counts
 13 that we could have alleged. However, we focused
 14 on these five most fundamental requirements of
 15 the RCRA Program.
 16 We also only applied a multi-day
 17 factor for one of the counts when could have
 18 potentially alleged multi-days for additional
 19 counts. We also chose to use discretion to not
 20 assess a multi-day penalty for greater than 180
 21 days.
 22 We also chose to use the penalty

1 policy, the penalty matrix in the penalty policy,
 2 rather than the statutory maximum for Counts 3 to
 3 5. So that automatically reduces the potential
 4 maximum penalty from \$101,000 down to about
 5 \$44,000.

6 I think there's one more. The fact
 7 that Prime could have made a waste determination
 8 at any point. It had to do with using the -- we
 9 used the 2009 matrix for Count 1 rather than the
 10 2020 matrix, even though they also could have
 11 made a waste determination on days after that
 12 November 2nd, 2013, cut off.

13 Q Thank you, Ms. McNeill.

14 A Yes.

15 Q No further questions at this time.

16 A Okay.

17 JUDGE COUGHLIN: I have just one quick
 18 question. It's not all that significant, but
 19 with regard to getting the EPA ID number in Count
 20 5, I thought that I had noted somewhere that New
 21 Prime ultimately got it. I noted, like, April of
 22 2020 after disposal took place. And I know that

1 shipped off. I believe it was the Missouri ID
 2 number. And so the manifest was actually
 3 corrected in April of 2020 to be updated to
 4 reflect the ID number for the Salt Lake City
 5 facility.

6 And EPA actually compelled Prime to
 7 get the EPA ID number at that point in time to
 8 reflect that hazardous waste had, at one point,
 9 been managed at that location, but was location
 10 specific. But it was so far after the time that
 11 waste was stored there, that's why I say they
 12 didn't get an ID number. I guess I actually
 13 should have clarified that they didn't get an ID
 14 number while the waste was being stored at the
 15 facility.

16 At that point, since the waste was far
 17 gone, it didn't really have an impact, because
 18 there was no way, while the waste was being
 19 stored, for the regulators to know that waste was
 20 present there. And that was a point of the ID
 21 number, is to have current knowledge of what's
 22 occurring at a location rather than four years in

1 at different points you said that they never did.

2 THE WITNESS: Right, so --

3 JUDGE COUGHLIN: So please, go ahead

4 if you want to speak to that, and just maybe

5 provide some clarification --

6 THE WITNESS: Yes.

7 JUDGE COUGHLIN: -- or elaboration for

8 my benefit.

9 THE WITNESS: Yes. No, and I do

10 appreciate you bringing that out. I meant to

11 mention that there was an EPA ID number that was

12 gotten for the Salt Lake facility. However it

13 was, as you said, April of 2020 which was

14 approximately four years after the waste had been

15 shipped off.

16 So at that point, so EPA ID numbers

17 are also, as I said, they're instrumental,

18 because all of the different facilities that

19 manage --- have their space along that cradle to

20 grave process are required to get an ID number.

21 The incorrect ID number was used on

22 the manifest when the waste was originally

1 the past knowledge.

2 JUDGE COUGHLIN: Understood. Thank

3 you.

4 MS. MCNEILL: Thanks.

5 JUDGE COUGHLIN: Do you have anything

6 else you'd like to ask?

7 MR. FIGUR: No, thank you.

8 JUDGE COUGHLIN: Okay, all right.

9 We're right about at noon. So seems like a good

10 time to break for lunch. And we'll come back at

11 1:00. That works?

12 MR. RYAN: That works for us, Your

13 Honor.

14 JUDGE COUGHLIN: Okay, great, thank

15 you so much.

16 MR. FIGUR: Thank you, Your Honor.

17 JUDGE COUGHLIN: We'll see you then.

18 (Whereupon, the above-entitled matter

19 went off the record at 11:59 a.m. and resumed at

20 1:04 p.m.)

21 JUDGE COUGHLIN: Okay, we are back on

22 record just a few minutes past 1:00 and after a

196

1 lunch break. I think we left off just before New
 2 Prime was to cross examine. Are we ready to get
 3 started?
 4 MR. RYAN: I am, Your Honor.
 5 JUDGE COUGHLIN: Okay, great.
 6 MR. RYAN: Your Honor, just really
 7 quickly I'm embarrassed to say I didn't stand
 8 when you left the courtroom before lunch. And I
 9 apologize for that.
 10 JUDGE COUGHLIN: Oh.
 11 MR. RYAN: I suffer from a litigator's
 12 obsession with -- I apologize.
 13 JUDGE COUGHLIN: No problem. I didn't
 14 even notice. I was focused on getting out the
 15 door and eating. But thank you. I appreciate
 16 it.
 17 MR. RYAN: I noticed it after you
 18 left. So thank you very much. And also, I'd
 19 like to apologize in advance. I'm going to --
 20 I'm an old school paper lawyer. And I'm going to
 21 be fumbling. And we have a lot of, because of
 22 the complexity of the EPA RCRA penalty policy,

197

1 there's going to be a lot of looking at multiple
 2 documents at once.
 3 So I'm going to have to be flipping
 4 back and forth. And Mr. McKay has very kindly
 5 offered to help me with the electronic version of
 6 it. So if there's a bit of fumbling there, I
 7 apologize in advance. We're more on us to be
 8 efficient here.
 9 Could you, Mr. McKay, could you pull
 10 up Exhibit CX04.
 11 JUDGE COUGHLIN: Mr. Ryan, are we
 12 talking about CX4 corrected?
 13 MR. RYAN: No, I'm pulling up CX4, the
 14 original CX4.
 15 JUDGE COUGHLIN: Okay.
 16 MR. RYAN: It was not moved into
 17 evidence, so I just want to take care of that
 18 now.
 19 JUDGE COUGHLIN: Okay.
 20 CROSS EXAMINATION
 21 BY MR. RYAN:
 22 Q And can the Witness see that?

198

1 A Yes, I can.
 2 Q So I apologize, Ms. McNeill. Do you
 3 go by Ms. McNeill?
 4 A Yes.
 5 Q Ms. McNeill, I'm Mark Ryan. I
 6 represent Prime. I believe you and I may have
 7 worked together 20 years ago when I was at EPA.
 8 Do you recognize CX4 which is in front
 9 of you?
 10 A Yes, I do.
 11 Q And have you seen this document
 12 before?
 13 A Yes, I have.
 14 Q And is this -- this is a prior version
 15 of what's now known as CX4 corrected. Is that
 16 correct?
 17 A Yes.
 18 MR. RYAN: Now, Your Honor I move to
 19 admit Exhibit CX4.
 20 MR. FIGUR: Your Honor, before
 21 admitting, we don't object to the admission of
 22 this, but we do not want this referenced as

199

1 Complainant's Exhibit. Complainant's proposed
 2 penalty is in CX04 corrected.
 3 JUDGE COUGHLIN: Okay. Do you want to
 4 give it another reference?
 5 MR. FIGUR: Yes.
 6 JUDGE COUGHLIN: I mean, you're not
 7 objecting to its submission, you just don't want
 8 it captioned as CX.
 9 MR. FIGUR: Yes. As long as everybody
 10 understands that, Your Honor, we have no
 11 objection.
 12 JUDGE COUGHLIN: Okay.
 13 MR. RYAN: I'm not sure I understand.
 14 JUDGE COUGHLIN: So leave it as CX 4
 15 but with your reiteration that it's not what the
 16 Agency is putting forward as it's penalty.
 17 MR. FIGUR: That's correct, thank you.
 18 JUDGE COUGHLIN: Okay, I understand.
 19 MR. RYAN: And I agree with that.
 20 JUDGE COUGHLIN: Okay. Sure, that's
 21 fine. But I don't have a copy of it. I could
 22 probably refer to it. Does the court reporter

200

1 have a copy? The court reporter's going to need
 2 a copy of it.
 3 MR. RYAN: It should have been
 4 supplied with the pre-hearing exchange documents
 5 that were put into the folder.
 6 JUDGE COUGHLIN: Yeah, but what the
 7 court reporter's got are those final exhibits
 8 that Respondent supplied and Complainant
 9 supplied. And that does not include pre-hearing
 10 exchange documents --
 11 MR. FIGUR: Okay. Your Honor --
 12 JUDGE COUGHLIN: --- necessarily.
 13 MR. FIGUR: Your Honor, it has been
 14 supplied but we're happy to do it again. But it
 15 was not included in our initial ruling, because
 16 it's not one of the exhibits we planned to enter
 17 into evidence. We were asked to put it into the
 18 folder, to the exhibit folder. We did so.
 19 JUDGE COUGHLIN: Oh, you did?
 20 MR. FIGUR: Yes.
 21 JUDGE COUGHLIN: Okay. Well, then one
 22 second. Oh, gee, here -- no, oh yeah, here it

202

1 Q And were you involved in the
 2 preparation of CX04?
 3 A No, but the way that it was written
 4 was the same way that I would consider a penalty.
 5 Q Again, that wasn't not my question,
 6 you personally were not involved in the
 7 preparation of CX4?
 8 A No, I was not.
 9 Q Okay. And were you involved in the
 10 preparation of CX04 corrected?
 11 A No, I was not.
 12 Q So just for the record, so you became
 13 involved after CX04 corrected was generated?
 14 A Yes.
 15 Q And would you agree that the penalty
 16 policy analysis I'm showing in CX04 corrected is
 17 the EPA's position on the penalty in this case?
 18 A The corrected version is, yes.
 19 Q And I believe you stated that you
 20 believe that CX04 corrected is correct, isn't
 21 that correct?
 22 A Yes.

201

1 is. I'm sorry, my fault. It's there. My
 2 apologies. So strike everything I just said.
 3 Okay, so the court reporter's got it.
 4 I have it. And CX4 is admitted into evidence
 5 without objection
 6 (Whereupon, the above-referred to
 7 document was received into evidence as
 8 Claimant's Exhibit No. 4.)
 9 MR. RYAN: Thank you.
 10 Now, Ms. McNeill, CX4 was the penalty
 11 policy analysis that was in effect at the time
 12 the complaint was filed in this case. Isn't that
 13 correct?
 14 MS. MCNEILL: Yes.
 15 BY MR. RYAN:
 16 Q And you subsequently, or someone at
 17 EPA subsequently made corrections to CX4 which
 18 resulted in CX04 corrected. Isn't that right?
 19 A Yes.
 20 Q So just to be clear, you did not write
 21 CX04, did you?
 22 A No, I did not.

203

1 Q I'm going to ask you a couple of
 2 questions based on a motion that was filed by
 3 EPA, a paper copy if the EPA here.
 4 May I approach, Your Honor?
 5 JUDGE COUGHLIN: Yes.
 6 MR. RYAN: I will not be moving this
 7 into evidence. This is the plea I'm looking at
 8 is captioned motion to amend Complainant's
 9 pre-hearing exchange dated April 18th, 2022.
 10 Do you have that in front of you, Ms.
 11 McNeill?
 12 THE WITNESS: I do.
 13 MR. RYAN: Could you please turn to
 14 Page 2 of that document?
 15 THE WITNESS: Yes.
 16 MR. FIGUR: Your Honor, we'd like to
 17 make the same objection that Counsel made while
 18 we were on direct testimony, that Ms. McNeill is
 19 looking straight at a pleading and talking about
 20 it as part of cross examination. It's virtually
 21 the same thing. So we object to this question.
 22 JUDGE COUGHLIN: Okay, understood.

204

1 And, Mr. Ryan?
 2 MR. RYAN: I'm not introducing any
 3 evidence through this document as they attempted
 4 to do through their pre-hearing exchange
 5 references. I'm testing this witness' capacity
 6 to testify using arguments they've made in their
 7 briefs.
 8 MR. FIGUR: We continue the objection,
 9 Your Honor. Thank you, the testimony is
 10 1:12:03. The fact is, is that what we were
 11 trying to do when we were looking at one of their
 12 pleadings is pretty much precisely what's
 13 happening here. So we don't see any significant
 14 difference in the approach, citing to the legal
 15 pleading versus citing to a witness who might
 16 testify seems pretty much the same.
 17 MR. RYAN: I'm offering no evidence,
 18 there's no evidence here in this document, Your
 19 Honor.
 20 JUDGE COUGHLIN: Can you ask your
 21 questions without referencing the pleading?
 22 MR. RYAN: Sure.

206

1 MR. RYAN: Ms. McNeill's testimony is
 2 not expected to differ in any material respect
 3 from the testimony that Ms. Jacobson would have
 4 given.
 5 MR. FIGUR: Your Honor, I'd just to
 6 like to acknowledge that you asked him to ask the
 7 question without referring to the exhibit, and
 8 yet he's reading straight from the pleading, and
 9 yet he's reading straight from it.
 10 MR. RYAN: I'm not referencing the
 11 pleading here, Your Honor, but I did read from
 12 it.
 13 JUDGE COUGHLIN: Okay.
 14 MR. FIGUR: Your Honor, the content of
 15 his question appears to be fine with us, it's
 16 just the approach he's taking to asking the
 17 question. Ms. McNeill has already testified to
 18 essentially these questions. So we've already
 19 asked, and she's stated it on direct. If he
 20 wants to frame it to reference direct, that seems
 21 appropriate to us.
 22 JUDGE COUGHLIN: I'll sustain the

205

1 JUDGE COUGHLIN: Okay, I think that
 2 would be a good solution.
 3 MR. RYAN: EPA has represented in the
 4 past that you recall a prior witness who has read
 5 the records for the penalty calculation and
 6 agrees with the conclusions made. Do you agree
 7 with that statement?
 8 MS. MCNEILL: Yes.
 9 MR. RYAN: And EPA has also
 10 represented in the past that your testimony is
 11 not expected to differ in any material respect
 12 from the testimony that Ms. Jacobson would have
 13 given.
 14 MR. FIGUR: Your Honor, is he citing
 15 to testimony today, or he is citing to the plea
 16 agreement?
 17 JUDGE COUGHLIN: Mr. Ryan?
 18 MR. RYAN: I am asking her, based on
 19 representations by EPA in the past, if she would
 20 agree with the statement.
 21 JUDGE COUGHLIN: And what was the
 22 statement again?

207

1 objection.
 2 MR. RYAN: Ms. McNeill, is your
 3 testimony, let me step back. You know Ms.
 4 Jacobson, correct?
 5 THE WITNESS: Yes, I do.
 6 BY MR. RYAN:
 7 Q And you work with her?
 8 A I do.
 9 Q In Region 8?
 10 A Yes.
 11 Q And you've coordinated with her on
 12 your testimony today?
 13 A No, I have not.
 14 Q Well, you've coordinated with her on
 15 your analysis of the case?
 16 A Yes.
 17 Q You've talked to her?
 18 A Yes.
 19 Q And you've looked at the evidence that
 20 she collected?
 21 A Yes.
 22 Q And do you feel that your testimony

1 today differs in any material respect from what
 2 she would have testified?
 3 A No.
 4 Q How about any respect?
 5 A Related to the facts?
 6 Q Related to the penalty policy?
 7 MR. FIGUR: Your Honor, this is a
 8 highly speculative question that he's asking, was
 9 it 100 percent precision whether the two of them
 10 would utter the same words in response to each
 11 question. This isn't quite relevant.
 12 You've already testified, I mean,
 13 sorry, Ms. McNeill has already testified that she
 14 has adopted the proposed penalty and that she can
 15 testify to it, and she has testified to it. And
 16 whether it would be precisely what Ms. Jacobson
 17 would have said or not is actually not relevant
 18 at this time.
 19 MR. RYAN: Well, if I may, Your Honor
 20 --
 21 JUDGE COUGHLIN: To respond to that?
 22 MR. RYAN: Yes.

1 that was not cited in CX4 corrected?
 2 A Yes, I did so from a different
 3 exhibit.
 4 Q Okay. And is there any other evidence
 5 you considered in preparation for today that was
 6 not cited this morning, to your testimony?
 7 A No.
 8 Q Now you've never been to the site,
 9 have you, in Salt Lake City? And when I say the
 10 site I mean the Prime, the New Prime, Inc. Salt
 11 Lake City terminal?
 12 A I have not inspected the site.
 13 Q Have you been to the site at all?
 14 A I drove past it.
 15 Q And about when was that?
 16 A When I was on an inspection trip in
 17 Salt Lake City in August of 2022.
 18 Q But you did not go inside the site?
 19 A No.
 20 Q Did you observe that was a chain link
 21 fence surrounding the site?
 22 A I don't recall seeing a chain link

1 JUDGE COUGHLIN: I mean, I think it's
 2 calling for some speculation on her part, because
 3 how can she really testify as to what Ms.
 4 Jacobson would have thought or evaluated. I
 5 mean, but go ahead and respond further, if you
 6 wish?
 7 MR. RYAN: Your Honor, I'll move on.
 8 JUDGE COUGHLIN: Okay. Or if you want
 9 to ask a different way, that's fine too. But
 10 I'll sustain the objection.
 11 MR. RYAN: Now you made references
 12 throughout your testimony earlier today to
 13 evidence that you reviewed. And you started to
 14 admit some CID documents and other things. Was
 15 there any evidence you reviewed that is not
 16 referenced in, other than the aerial photos that
 17 we discussed, is not referenced in Exhibit CX4
 18 corrected?
 19 MS. MCNEILL: Can you rephrase that?
 20 BY MR. RYAN:
 21 Q Sure. In order to, in preparing for
 22 your testimony today, did you rely on evidence

1 fence around the entire site.
 2 Q Okay. But the area where the trailer
 3 that was at issue in this case, where it was
 4 stored, were you able to see that?
 5 A No, I wasn't.
 6 Q Do you know what the security is like
 7 at the site?
 8 A I do not.
 9 Q And do you know how many employees who
 10 were employed there in 2015 and '16?
 11 A No, I do not.
 12 Q And do you know what those employees
 13 in 2015 and '16 did?
 14 A No.
 15 Q And do you know how often employees
 16 went past from wherever they're working, went
 17 past the area where the trailer was stored?
 18 A I don't have a way to know that.
 19 Q And you, again in your direct
 20 testimony this morning, you cited evidence of
 21 construction near the site. Do you recall that?
 22 A Yes.

212

1 Q And you testified that trucks were
2 driving by the storage site for the trailer. Do
3 you remember that?

4 A Yes.

5 Q But that was based on a photo you saw
6 from the
7 1:19:51?

8 A Yes, several of the photos showed
9 construction in the background near where the
10 trailer was.

11 Q You don't have any independent
12 knowledge of trucks driving specifically by that
13 storage site, do you?

14 A No.

15 Q You're just assuming because there was
16 construction nearby that trucks were driving by?

17 MR. MCKAY: I'm sorry, will you please
18 answer audibly?

19 JUDGE COUGHLIN: Yeah, did you answer?
20 I didn't hear your answer to that?

21 THE WITNESS: No, I didn't realize it
22 was a question.

213

1 MR. RYAN: Okay. Let me repeat the
2 question. So you don't have any independent --
3 you were assuming, excuse me, you were assuming
4 the trucks were driving by because there was
5 construction next door?

6 THE WITNESS: Yes.

7 BY MR. RYAN:

8 Q Let's turn to the RCRA penalty policy.
9 That penalty policy is a policy, correct, not
10 law?

11 A Correct.

12 Q And it's never been published in the
13 Federal Register?

14 A No.

15 Q And it's never been submitted to --
16 sent out for public comment?

17 A Not to my knowledge.

18 Q So essentially this is EPA's view of
19 what the two RCRA statutory penalty factors mean
20 in the EPA's opinion?

21 A I didn't write the penalty policy. In
22 there it states that it addresses the statutory

214

1 factors in addition to a number of others.

2 Q But there's no other, I mean, this is
3 EPA's interpretation of RCRA Section 3008,
4 correct?

5 A I'm not certain if it's the correct
6 citation in the document.

7 Q I'll move on. In order to be a
8 penalty, we took several hours this morning, I
9 believe, almost four, a little over four, going
10 over the penalty policy calculation and how it
11 was performed originally by Ms. Jacobson.

12 A Right. Essentially the explanation of
13 the proposed penalty assessment, I didn't assess
14 the penalty policy itself.

15 Q Okay, fair enough. So Exhibit CX4
16 corrected, and you spent some four hours
17 explaining to the Court how that was done. And
18 that's a fairly complicated analysis, isn't it?

19 A If you're not familiar with RCRA and
20 the penalty policy, but I've been using it for 11
21 years so --

22 Q So you have 11 years' experience with

215

1 it. But for someone who doesn't have 11 years'
2 experience with it, you'd agree it's fairly
3 complicated?

4 A I think it's pretty straight forward.
5 I mean, like I said, we really tie back to the
6 exact factors that we're charged with evaluating
7 in the penalty policy and stuff like that
8 1:22:55.

9 Q Okay. But in order to make the
10 analysis you made, you have to consider -- you
11 considered quite a number documents, didn't you?

12 A Yes, but we also used that penalty
13 policy to develop penalties for just a one-time
14 inspection without --

15 Q Okay, that wasn't my question. In
16 other words, to perform the penalty policy
17 analysis that was the basis for Exhibit CX4
18 corrected, you had to look at a lot of documents,
19 didn't you.

20 A For this case, yes, I looked at a lot
21 of the documents.

22 Q So you had reviewed CX4, correct, the

216

1 original penalty policy calculation?
 2 A Yes.
 3 Q And then you looked at CX4 corrected.
 4 A Yes.
 5 Q And you looked at the 2003 RCRA
 6 penalty policy?
 7 A Yes.
 8 Q And did you consider the Complainant
 9 as well?
 10 A I did but, I mean, we focused on the
 11 allegations in the complaint.
 12 Q Okay. And then there was the 2020
 13 memo entitled "Amendment to EPA Civil Penalty
 14 Policies," to account for inflation. Do you
 15 recall that?
 16 A I'm not sure that's the exact title,
 17 but yes. There was an inflation memo --
 18 (Simultaneous Speaking.)
 19 Q We'll call it the 2020 inflation memo.
 20 A Yes.
 21 Q And I believe that's referenced in
 22 Exhibit CX4 corrected. And there's the 2010 memo

218

1 corrected are based on the published inflation
 2 adjusted numbers in Part 19?
 3 A Yes.
 4 Q And then there's also the 1990 EPA
 5 memo by James Strock documenting penalty
 6 calculations and justifications of EPA
 7 enforcement actions which is cited at Page 8 of
 8 the penalty policy. Did you consider that?
 9 A Could you repeat the title?
 10 Q Yeah, it's the 1990 EPA memo by James
 11 Strock on documenting penalty calculation and
 12 justification of EPA enforcement actions.
 13 A Yes. I don't believe that I reviewed
 14 that document directly, but I'm somewhat familiar
 15 with that memo.
 16 Q So there's a lot of stuff one has to
 17 take in to make these calculations, isn't it?
 18 A Yes.
 19 Q And you stated you've got 11 years'
 20 experience here. Someone who has just violated
 21 the law and wants to know what they're up against
 22 with EPA, it wouldn't be easy for them to piece

217

1 as well.
 2 A Yes. The 2010 memo is, I believe,
 3 from, like, January of 2010, so it's actually an
 4 amendment to the 2009. So that's why we were
 5 referencing the 2009 matrix.
 6 Q Okay. So there are two inflation
 7 memos that have to be considered as well?
 8 A Yes.
 9 Q And then there's the RCRA statutory
 10 penalty factors.
 11 A Yes.
 12 Q And then there's 40CFR Part 19,
 13 correct?
 14 A I'm not familiar with Part 19.
 15 Q Part 19 is the applicable inflation
 16 adjustments for the statutory penalty factors.
 17 A Oh, okay. I didn't look at Part 19
 18 specifically. I did look at the memos that were
 19 published that reflected the evidence for
 20 inflation.
 21 Q So you agree though that the statutory
 22 maximum penalties that are cited in Exhibit CX4

219

1 this together, would it?
 2 A In any communication we cite the
 3 penalty policy and give that to any informants as
 4 a reference.
 5 Q So you give this 38-page,
 6 single-spaced, the 42-page, single-spaced, plus
 7 attachments, to someone. And it's your position
 8 this would be easy for someone to understand?
 9 A Like I said, the factors to be taken
 10 into account are straightforward, I believe.
 11 Q And there was a lot of talk about
 12 discretion during your testimony. And I think
 13 your Counsel finished up his direct examination
 14 of you talking about discretion. And you would
 15 agree, would you not, that a person, the EPA
 16 employee who's applying the EPA penalty policy
 17 has a fair amount of discretion, has a lot of
 18 discretion in applying the policy, don't they?
 19 MR. FIGUR: Your Honor, that question
 20 asks for characterizing. It can -- a lot of
 21 discretion can be a lot to one person and not a
 22 lot to another person.

1 If he could rephrase the question
 2 without trying to quantify or qualify. I just
 3 object to the form of the question because it is
 4 not actually meaningful without context.
 5 JUDGE COUGHLIN: Okay. I'll sustain
 6 the objection, if you can just rephrase.
 7 BY MR. RYAN:
 8 Q You discussed exercising discretion?
 9 A Yes.
 10 Q And do you understand the difference
 11 between a little discretion and a lot of
 12 discretion?
 13 A Yes.
 14 Q Okay. And you think, and would you
 15 agree that the EPA employees, such as yourself,
 16 who apply this penalty policy have a lot of
 17 discretion in how they apply it?
 18 A No. No.
 19 Q Okay. Would you agree that different
 20 EPA employees would reach different conclusions
 21 upon the same policy?
 22 A Potentially slightly different, but

1 sense to ask. If the specific context could be
 2 provided for a lot of different EPA compliance
 3 officers or what type of disagreement they might
 4 be having; otherwise this question is actually
 5 just out of context. It makes no sense.
 6 MR. RYAN: I respectfully disagree,
 7 Your Honor.
 8 JUDGE COUGHLIN: I think if you could
 9 just rephrase the question a little bit it might
 10 clear up some of those points.
 11 So, I'll sustain the objection and
 12 just ask you to rephrase.
 13 MR. RYAN: Let's try it this way. Mr.
 14 McKay, could you pull up Exhibit 2003, please?
 15 And go to Page 15. This is the 2003 RCRA penalty
 16 policy. Thank you.
 17 For the record, we're looking at Page
 18 15 of the 2003 RCRA penalty policy that was, the
 19 Court has taken judicial notice of.
 20 BY MR. RYAN:
 21 Q You gave testimony earlier today that
 22 -- on the differences between moderate, major and

1 when we are looking at the facts of a case, you
 2 know, like I mentioned several times there's
 3 definitions of everything in the penalty policy
 4 and it gives specific factors to be taken into
 5 account for each of those, each of the steps.
 6 And so, while RCRA practitioners may
 7 come out slightly different, I think over all it
 8 would be a pretty similar outcome when applying
 9 the penalty policy to the same set of facts.
 10 Q But you would agree, would you not,
 11 that different EPA penalty witnesses such as
 12 yourself won't always agree on how to apply it?
 13 A Sorry, I'm stuck on penalty witnesses.
 14 Most times, most of the times we're not penalty
 15 witnesses.
 16 Q Okay. Let me rephrase the question.
 17 So, you would agree, would you not, that many
 18 RCRA enforcement officers, such as yourself, will
 19 often disagree on how to apply the facts to a
 20 penalty policy at any given case?
 21 MR. FIGUR: Again, Your Honor, this is
 22 a type of speculative question that doesn't make

1 minor. Do you recall that?
 2 A Yes.
 3 Q And for a major violation, defer you
 4 there to the heading, Major, there in the middle
 5 of the page, requires showing of substantial
 6 risk. Do you agree with that?
 7 A Yes.
 8 Q And for moderate, significant risk?
 9 A Yes.
 10 Q And then for minor it's relatively low
 11 risk?
 12 A Yes.
 13 Q So you, as the RCRA penalty officer
 14 have -- you're required to differentiate between
 15 substantial, significant and relatively low.
 16 Correct?
 17 A Yes.
 18 Q And those are judgment calls.
 19 Correct?
 20 A They take into -- they're based -- the
 21 decisions are based on the facts, the case
 22 specific information. Not so they're based on

224

1 facts surrounding a case.

2 Q And you are making a judgment based on
3 how you view the facts of that case?

4 A Yes. I'm taking into account, you
5 know, knowledge of the case facts.

6 Q Yes but again, you're making a
7 judgment of what is substantial versus
8 significant, versus low, relatively low?

9 A Yes.

10 Q And can we go to Page 36 of the
11 penalty policy, please?

12 MR. FIGUR: Your Honor, can we -- I'm
13 sorry, Your Honor. Can we ask that they
14 reference the PDF page number? We're struggling
15 to keep up because we can't see the PDF number on
16 the screen now, the PDF page number. And I'm
17 trying to look on a closer computer.

18 MR. RYAN: I only have the actual page
19 numbers from the document. I don't have the PDF
20 numbers. I'm sorry.

21 MR. FIGUR: That's okay. We'll just
22 look -- if you don't mind slowing down until we

225

1 get there, that'll be great. Thank you.

2 JUDGE COUGHLIN: Can you also make it
3 bigger? No?

4 MR. RYAN: Is that possible?

5 MR. MCKAY: Oh, sorry.

6 JUDGE COUGHLIN: Yeah, and, you know,
7 not a big deal because I don't really want to
8 interrupt you here. I just -- I'm pulling up the
9 2003 policy and what you had, I think, it was on
10 15 for some reason is on my 16.

11 I mean it's close enough that I can
12 locate it. I'm just not altogether sure why
13 there's even a difference in the actual page
14 number at the bottom. I'm not talking about the
15 PDF or the numbering.

16 MR. RYAN: Right. Yeah.

17 JUDGE COUGHLIN: But I mean, I trust
18 we are working off the same document. I see the
19 same text. It's just for whatever reason and
20 what I have, it's Page 16. So, I only mention
21 that for the record in case anybody's following
22 along, if there's a minor discrepancy, who knows

226

1 why.

2 MR. RYAN: Okay. Thank you.

3 JUDGE COUGHLIN: Are you all following
4 along?

5 MR. FIGUR: We are now. Thank you,
6 Your Honor.

7 JUDGE COUGHLIN: Okay. All right,
8 great. Please continue.

9 MR. MCKAY: And I think the PDF number
10 appears to be in the upper left-hand corner.

11 COURT REPORTER: It still doesn't
12 match.

13 MR. MCKAY: Your Honor, I can make
14 whatever you want larger or so.

15 MR. RYAN: Okay. So, yeah, could you
16 enlarge, on Page 36 of the document, the 2003
17 guidance, which is in front of the witness right
18 now, Subheading B, decree of willfulness and/or
19 negligence?

20 JUDGE COUGHLIN: Thank you.

21 MR. RYAN: Can you see that better
22 now, Ms. McNeill?

227

1 MS. MCNEILL: Yes, Thank you.

2 BY MR. RYAN:

3 Q And this, I believe you testified to
4 this earlier, this requires an adjustment upwards
5 of some percentage based on the respondent's
6 willfulness and/or negligence. Is that correct?

7 A Yes.

8 Q Okay. And again, it goes up 10
9 percent or more. Correct?

10 A Yes. It does.

11 Q And when you consider these factors
12 that are set out here on these -- with these
13 bullets under Section B, on Page 36 of the 2003
14 guidance, you consider these factors in assessing
15 whether it's a 10 percent or more adjustment.
16 Correct?

17 A Yes. I believe the range of
18 percentages, they were able to increase it as
19 stated in the adjustment factor section.

20 Q Okay. But, again, in coming up with
21 your 10 percent or more adjustment you looked at
22 these factors. Correct?

1 A Yes.
 2 Q And you have to apply these factors to
 3 the facts of the case. Correct?
 4 A Yes.
 5 Q And you make a judgment in your
 6 opinion as a RCRA penalty person on what --
 7 whether there should be an adjustment for 10
 8 percent or more?
 9 A I make a decision based on the facts
 10 of the case.
 11 Q And in order to make that decision you
 12 have to figure -- you have to understand what
 13 degree of willfulness you're assessing, don't
 14 you?
 15 A Or negligence. The adjustment factor
 16 includes both degree of willfulness and/or
 17 negligence?
 18 Q Okay. Well, let's just talk about
 19 willfulness first and then we'll talk about
 20 negligence. Do you have to -- you have to assess
 21 what degree of negligence or willfulness is
 22 involved, don't you?

1 A Yes.
 2 Q So, there's economic benefit?
 3 A Yes.
 4 Q And there's gravity?
 5 A Yes.
 6 Q Is there anything else?
 7 A No.
 8 Q Okay. So, according to your memo
 9 CX-04 Corrected, there was \$10,800 in economic
 10 benefit and I understand you've since reassessed
 11 that. We'll go over that later. And if I did my
 12 math correctly, that's 2 percent of 631,402.
 13 Would you agree with that?
 14 A I don't know. I can't do that math
 15 off the top of my head.
 16 Q Would you like a calculator?
 17 A If you want to give me one.
 18 MR. RYAN: Do you have a -- Your
 19 Honor, do you see the Hewlett-Packard
 20 calculators?
 21 MR. FIGUR: Your Honor, if counsel is
 22 trying to get the witness to state to a

1 A Yes.
 2 Q And the same thing for negligence?
 3 A Yes.
 4 Q And those are judgment calls on your
 5 part. Correct?
 6 A Based on cases and the information.
 7 Q Now, the case that's before us today,
 8 and it's New Prime, Inc., is, by your
 9 calculations, is mostly a gravity case. Correct?
 10 A Yes.
 11 Q Let me step back. There's two
 12 components of a penalty. There's economic
 13 benefit, which is the money saved by the
 14 Respondent for not complying with the law and
 15 then there's the gravity. Do you agree with
 16 that?
 17 A I think it's a generalization because
 18 the gravity is just based on the potential for
 19 harm and the extent of deviation. That also adds
 20 the results of the multiday and I guess in the
 21 adjustment factors you were --
 22 Q But that's all gravity?

1 percentage, one number to another and Counsel has
 2 calculated it correctly, I think we'll just
 3 accept Counsel's, his number. We don't have to
 4 get calculators out.
 5 JUDGE COUGHLIN: Okay. It's really
 6 for the witness to say, but do you want to just
 7 accept Mr. Ryan's representation of the
 8 percentage?
 9 THE WITNESS: Yes.
 10 JUDGE COUGHLIN: Okay.
 11 MR. RYAN: Okay.
 12 BY MR. RYAN:
 13 Q So, you agree that most of the penalty
 14 here is gravity?
 15 A Yes.
 16 Q And gravity is -- a penalty is
 17 calculated based on penalty factors that are set
 18 out in the penalty policy, the 2003 penalty
 19 policy?
 20 A Yes.
 21 Q Now, you would agree that the economic
 22 benefit is -- the calculation of the economic

1 benefit, not whether it should apply, but the
 2 calculation of the economic benefit itself is a
 3 fairly objective number. Isn't it?
 4 A Yes. Yes.
 5 Q So, you look at the, for example, in
 6 this case you look at the avoiding cost of doing
 7 the analysis and then you multiply it times the
 8 number of samples and you come up with a number
 9 that was -- it was the economic benefit, the
 10 money saved by this Respondent, according to the
 11 EPA, for not complying with law. Would you agree
 12 with that?
 13 A Yes.
 14 Q Okay. And that's a fairly objective
 15 number. Do you agree?
 16 A Yes.
 17 Q And now in gravity, though, gravity is
 18 more subjective. Wouldn't you agree?
 19 A To an extent.
 20 Q And again, it goes back to the
 21 discretion issue we discussed before, that
 22 compliance officers such as yourself have

1 morning in your direct examination, Ms. McNeill
 2 about the -- let me get my language correct --
 3 the potential for harm. Do you recall that?
 4 A Yes.
 5 Q And how that played an important role
 6 in how an enforcement officer, such as yourself,
 7 calculates the pen rate. Do you recall that?
 8 A Yes.
 9 Q And I'm going to refer you to the
 10 last, the full paragraph on Page 1 of CX-04
 11 Corrected. Now, you see there where it says EPA
 12 determines the potential harm, the potential for
 13 harm based on the risk of exposure and the harm
 14 to the RCRA regulatory program? Do you see that?
 15 A Yes.
 16 Q And that's what you were testifying
 17 about this morning. Correct?
 18 A Yes. We just -- we generally phrase
 19 risk of exposure to harm, potential for harm to
 20 human health and the environment.
 21 Q Okay. And you testified about
 22 potential harm to human health and the

1 discretion to apply the policy?
 2 A I don't know if I agree that we have
 3 full discretion.
 4 Q I didn't say full discretion. I said
 5 you have discretion. Don't you?
 6 A (No audible response.)
 7 Q It's a simple question.
 8 A Yeah, but it's not a simple answer
 9 because, you know, we're taking into account the
 10 penalty policy and the case specific facts. So
 11 --
 12 Q But you testified numerous times this
 13 morning that you exercise discretion.
 14 A Yes.
 15 Q Okay. So, you do have discretion?
 16 A We do.
 17 Q Okay.
 18 MR. RYAN: Can you go to our Exhibit
 19 CX-04 Corrected, please? And go to Page 1.
 20 BY MR. RYAN:
 21 Q Okay. Before we go into that, that
 22 document you gave a fair amount of testimony this

1 environment this morning?
 2 A Yes.
 3 Q And the next sentence says, EPA
 4 measures the risk of exposure, which is
 5 referenced there in the first sentence, by
 6 evaluating the probability of exposure and the
 7 potential seriousness of contamination. Do you
 8 see that?
 9 A Yes.
 10 Q Okay. Where, and I didn't hear in
 11 your testimony this morning about probability of
 12 exposure. And I don't see it mentioned anywhere
 13 -- well, let me rephrase that.
 14 That probability of exposure is not
 15 mentioned in Exhibit CX-04 Corrected, is it?
 16 A We talk about potential for harm to
 17 human health and the environment and any of the
 18 probability exposure would be a concerning to
 19 like open germ volatizing that people are
 20 breathing --
 21 Q Okay.
 22 A -- any possibility that humans would

1 come into contact. So, we may not have used that
 2 exact phrase, but it is addressed.
 3 Q But you would admit, would you not,
 4 that the probability of exposure was not analyzed
 5 in Exhibit CX-04 Corrected?
 6 A It was.
 7 Q Can you show me?
 8 A I mean, as far as taking into account,
 9 as I said, the potential -- the probability or
 10 exposure. It's to -- if a human is coming into
 11 contact how -- with the hazardous waste. So,
 12 with the probability of exposure to hazardous
 13 waste or hazardous waste constituents.
 14 Q Now --
 15 A More likely it is that they may -- can
 16 come into contact.
 17 Q Okay. Now, I don't see any reference
 18 to likelihood of the, of these -- anyone at the
 19 Prime facility coming into contact with this --
 20 with the paint. Is that discussed in this memo?
 21 A We generally consider if workers would
 22 come into harm, excuse me, come into contact.

1 evidence, that was reviewed in this memo, showing
 2 the probability of exposure preventing workers at
 3 the Prime Salt Lake City facility, do you?
 4 A So I would say that we don't -- again,
 5 that we don't necessarily use the phrase
 6 probability to the exposure because that's what
 7 we term harm to human health and the environment.
 8 So if there is not the phrase
 9 probability of exposure throughout the document
 10 that's because we used another phrase to describe
 11 that factor. And we do take into account, you
 12 know, the -- how the trailer was stored.
 13 The fact that -- I mean there are
 14 workers at the facility and there is a likelihood
 15 there is -- that they would come into contact
 16 with that.
 17 Q Okay. I think we're going in circles
 18 here. But you have no direct evidence of workers
 19 coming into contact with this on any kind of
 20 basis, do you?
 21 A I don't have evidence of actual
 22 exposure, as I acknowledged, but we're charged

1 Q Okay. But you testified earlier that
 2 you assumed workers were back there, but you had
 3 no direct evidence. Correct?
 4 A Correct, but it's -- I mean, it's a
 5 facility. So, it's a fair assumption that
 6 workers would be in different parts of the
 7 facility.
 8 Q But you don't know that for a fact, do
 9 you?
 10 A I don't know that for a fact.
 11 Q And so you could not have -- because
 12 you don't know that for a fact, you could not
 13 have assessed the probability of exposure, could
 14 you?
 15 A Based -- could you repeat the
 16 question?
 17 Q Yes. Your penalty policy analysis,
 18 Exhibit CX-04 Corrected, states that EPA measures
 19 the risk of exposure by evaluating the
 20 probability of exposure to the potential for
 21 serious contamination.
 22 My question to you is: You have no

1 with evaluating the potential for harm.
 2 Q Okay. So, but your potential for harm
 3 is based an assumption that workers went back to
 4 where that trailer was stored. Isn't that
 5 correct?
 6 A Not necessarily because not all the
 7 accounts are about when the drums were stored in
 8 Salt Lake City.
 9 Q Okay. Let's refer to Count 3, the
 10 storage of the drums in the Salt Lake City
 11 Terminal of Prime. You have no direct evidence
 12 of any workers coming into contact with that
 13 trailer, do you?
 14 A No. But again, we aren't looking for
 15 direct and actual harm.
 16 Q Okay. I'm not asking about direct and
 17 actual harm. I'm saying you have no evidence
 18 that workers were going back there, do you?
 19 A No. But I don't have evidence they
 20 were not going back there.
 21 Q And in looking at harm to human health
 22 and the environment there's nothing in this CX-04

240

1 Corrected that discusses the probability of
 2 exposure of any of these hypothetical contacts,
 3 is there?
 4 A We don't use that phrase, like I've
 5 said.
 6 Q Okay. But you do use the phrase in,
 7 right here, as we see, in Exhibit CX-04
 8 Corrected. That phrase is in your document,
 9 isn't it?
 10 A Right. But I'm explaining that we use
 11 a different phrase colloquially, as RCRA
 12 practitioners. We refer to that as harm to human
 13 -- potential for harm to human health and the
 14 environment.
 15 Q And let me refer you again to that
 16 second sentence on the bottom of Page 1 of
 17 Exhibit CX-04 Corrected. It says the EPA
 18 measures the risk of exposure by evaluating the
 19 probability of exposure and the potential
 20 seriousness of contamination.
 21 So you would agree that risk of
 22 exposure is a product of probability of exposure

242

1 that case there's a potential for environmental
 2 harm.
 3 Q Okay. Is it possible to cause
 4 environmental harm 500 miles away?
 5 A Five hundred miles away from?
 6 Q Wherever it's stored.
 7 MR. FIGUR: Your Honor, that's a bit
 8 speculative given the wide variety of violations
 9 that could possibly occur.
 10 MR. RYAN: It's a simple question
 11 about how close you have to get to evaluate it's
 12 fine, which is theirs, Your Honor.
 13 JUDGE COUGHLIN: I'm going to sustain
 14 the objection. I mean you're welcome to ask
 15 another question, but --
 16 MR. RYAN: Okay.
 17 BY MR. RYAN:
 18 Q Okay. if you're standing next to a
 19 toxic waste and you're right next to it, it's
 20 more likely you're going to be exposed. Correct?
 21 A Yes.
 22 Q Okay. And as you get further away

241

1 and the potential seriousness of an exposure.
 2 Would you agree to that?
 3 A Could you state that again?
 4 Q Yes.
 5 A Just that end part.
 6 Q Yeah. The EPA -- according to the
 7 sentence -- EPA considers risk of exposure the
 8 product of probability of exposure times how bad
 9 a thing is, the potential seriousness of
 10 contamination.
 11 A It says the EPA measures the risk of
 12 exposure by evaluating the probability of
 13 exposure and potential seriousness --
 14 Q Right.
 15 A -- of contamination. We're not
 16 multiplying anything.
 17 Q Okay. So if something is very
 18 dangerous and it's sitting in a pit in the desert
 19 500 miles away, is it posing any serious risk of
 20 contamination for someone 500 miles away?
 21 A Well, what we're evaluating though is
 22 harm to human health and the environment. So, in

243

1 from the toxic waste it's less likely you will be
 2 exposed. Correct?
 3 A Yes, but it -- I mean, it depends.
 4 There's so many other circumstances that depends
 5 on it.
 6 Q All things being equal. All things
 7 being equal. You have an open can of paint. If
 8 you're closer to it you're more likely to be
 9 exposed than if you're further away. Correct?
 10 A Yes.
 11 Q And the probability of exposure, as
 12 you use here in your memo, refers to the
 13 probability that you would be actually exposed to
 14 it, the likelihood you'd be exposed to this
 15 stuff. Isn't that correct?
 16 A Yes.
 17 Q Yeah. And all of your understanding
 18 of the probability of exposure here in the Prime
 19 case is based on assumptions. Isn't that
 20 correct?
 21 A Not -- I mean, if it's fair to make
 22 the assumption that there are workers at a

244

1 facility then, yes.

2 MR. RYAN: Can we go to Page 13 of 20
3 on this exhibit please, CX-04 corrected? This
4 will be the summary table for Count 3.

5 BY MR. RYAN:

6 Q Ms. McNeill, you recall discussing
7 this table this morning, don't you?

8 A Yes.

9 Q And that resulted in a gravity
10 proposed penalty for Count 3 of \$470,329.
11 Correct?

12 A Yes. That was the total penalty for
13 the Count 3.

14 Q Yes. And in order to -- let's go back
15 up to where it says multi-day penalty. Do you
16 see that?

17 A Yes.

18 Q And you testified how you came up with
19 the \$202,295 figure times 179 days for -- as the
20 midrange of the cell. Do you recall that?

21 A Yes.

22 Q And you arrived at that number by

245

1 taking the low number in the cell and the high
2 number in the cell dividing by two?

3 A Yes. My recollection is the low
4 number of the cell with the inflation adjuster
5 applied for that cell. In the 2020 matrix the
6 low point is \$706 and they high point is \$3,383.

7 Q So, the range is from \$706 to
8 3,000-some dollars?

9 A Yes.

10 Q Now, I'll represent to you that I have
11 done some math here and I'll be happy to hand you
12 a calculator if you -- if my math is wrong. But
13 I'm just going to ask you some math questions
14 here based on your experience as a RCRA
15 compliance officer.

16 So as a matter of math, you used the
17 low range of the moderate/major cell --

18 A Mm-hmm.

19 Q -- which I believe you said was \$706
20 and you multiplied it times 179 as you did here
21 on a multiday penalty by a different dollar
22 figure. But you multiply \$706 times 179 days, I

246

1 come up with \$126,374. Does that seem about
2 right to you?

3 A Yes. And I'm going to potentially
4 correct my statement because I don't have those
5 numbers in front of me. So, I am not a hundred
6 percent sure that is accurate for that penalty
7 cell.

8 Q Okay. Well, let's assume that \$706 is
9 the inflation adjusted number for the low end of
10 moderate/major in the RCRA penalty policy. And
11 if you multiply that times 179, I come up with
12 \$126,374. Does that sound roughly right?

13 A I'll take your word for it.

14 Q And that would -- that's remaining in
15 the same moderate/major cell that EPA is
16 proposing here?

17 A Yes.

18 Q And that's roughly \$300,000 less than
19 the \$470,000 that's proposed here. Correct?

20 A Yes.

21 Q So, choosing to go from moderate to
22 minor in the same cell can have a profound

247

1 difference in the ultimate penalty. Correct?

2 A I'm going to correct you. It's not
3 going from moderate to minor in the same cell.
4 The cell is the moderate potential for harm
5 matrix standard deviation penalty matrix cell.
6 Within that cell, we go from the top of the box
7 to the bottom of the box.

8 Q Okay.

9 A This represents the mid-point of the
10 cell.

11 Q Okay. So, going from the mid-point of
12 the cell, and I apologize. I was an EPA
13 enforcement attorney for 34 years and I'm used to
14 working with penalty policies, but this one's a
15 chore. So, I apologize if my terminology is
16 slightly wrong.

17 If the penalty is reflected in your
18 chart on Page 13 of CX-04 Corrected, you chose
19 the number of \$2,295 times 179 days to reach your
20 gravity -- the beginning of the reaching of your
21 gravity figure in that table. Correct?

22 A Can you say that again?

248

1 Q Let me rephrase. The \$2,295 figure in
2 Count 3 table --
3 A Yes.
4 Q -- that represents the mid-point on
5 the cell for moderate/major. Correct?
6 A Yes.
7 Q Okay. And if you chose the low end of
8 the cell, that would be the \$706 times 179, you
9 would come up with a penalty of roughly \$126,374.
10 Correct?
11 A Yes.
12 Q Okay. And my point is -- my question
13 to you is, that's a \$300,000 difference between
14 the mid-point of the cell and the bottom of the
15 cell. Correct?
16 A Yes.
17 Q And if we did the same math using the
18 minor potential for harm cell and those figures
19 are running from 177 to 1059 by my math. And if
20 we multiply -- let's say we took the mid-range of
21 the cell for minor -- you chose the mid-range of
22 the cell for moderate.

250

1 A Yes.
2 Q And if you use, again if you use the
3 middle range of the minor/major by my
4 calculations it would be about \$3,970.
5 A I don't have the matrix in front of
6 me. So I'm going to trust you on that.
7 Q Okay. So moving between the boxes --
8 moving within a box can have a big effect on the
9 penalty, can't it?
10 A Most often for multi-day.
11 Q Yeah. And it could even have a
12 significant impact on a single day, couldn't it?
13 You move from \$16,000 to \$3,970?
14 A Yep. Sure.
15 Q So, which box you choose to be in can
16 make a big difference in the penalty. Correct?
17 A Yes. But that's why the penalty
18 policy lays out all the definitions that it does,
19 to know what to take into consideration to reach
20 those points in the box.
21 Q But you agree that, depending how one
22 applies the policy, the numbers can vary?

249

1 If you chose the mid-range of the cell
2 for minor that would be \$618 times 139, according
3 to my math is \$110,576.
4 A Take your word for that too.
5 Q Those numbers sound roughly correct?
6 A Actually could you -- oh, the
7 mid-range. Yes.
8 Q And the same calculus would applied to
9 the one-day figure that's reflected in the top of
10 Count 3 table we are looking at right now on the
11 screen, the \$16,767.
12 In other words, you chose the
13 mid-point on the moderate/major cell for the
14 one-day matrix --
15 A Yes.
16 Q -- to reach that \$16,767?
17 A Yes.
18 Q And that number, if you use the low
19 end of that box, and we're not talking about one
20 day, you use the low end of that moderate/major
21 box that you used, you would come up with a
22 smaller number, would you not?

251

1 A Yes.
2 Q Now, turning you to the same exhibit.
3 MR. RYAN: Can we you go to Page 5,
4 please?
5 MR. FIGUR: Ms. McNeill, do you need
6 water or anything? Are you okay?
7 MS. MCNEILL: I'm good, thank you.
8 BY MR. RYAN:
9 Q Okay, looking at Complainant's Exhibit
10 4 Corrected, Page 5 of 20, summary of total
11 proposed penalty. Do you see that in front of
12 you?
13 A Yes.
14 Q Okay. Now, there are a number of
15 redline strikeouts here. Do you see those?
16 A I see two.
17 Q Okay. And I don't -- and I'm not sure
18 you testified about those during your direct, but
19 those were disclosed to us earlier, I'll
20 represent to you, as mistakes that were made and
21 had to be corrected. Are you familiar with
22 those?

252

1 A Yes.

2 Q So -- and I believe you testified on

3 direct this morning that the economic benefit

4 number, in your opinion, is also incorrect.

5 A It could, it could be viewed

6 differently.

7 Q Okay. So --

8 A Again, that only accounts for \$1,300

9 of the total penalty.

10 Q Wasn't my question. In your opinion

11 that \$10,800 number is wrong. Is that correct?

12 A Yes.

13 Q So those were three mistakes that were

14 made there. There were some other mistakes that

15 were referenced in -- else in the file and it was

16 disclosed as part of Exhibit CX-04. I'll come to

17 those in a minute.

18 But, now this \$631,402 proposed

19 penalty, is that the number that EPA has proposed

20 as the penalty in this case?

21 A Yes.

22 Q And have you reviewed the complaint in

254

1 the complaint wrong or is this wrong?

2 A The proposal in the complaint reflects

3 an economic benefit calculation that was

4 rescinded

5 Q Okay. So the complaint --

6 MR. FIGUR: I'm sorry. And again,

7 Your Honor, I understand that he wants to show

8 what he wants to show here, but the complaint is

9 a pleading and it's -- again, it's just a

10 pleading, so.

11 JUDGE COUGHLIN: Well, while I've

12 agreed with that argument for other pleadings,

13 this is the charging document. And so I think

14 for that reason, I'm less inclined to sustain

15 because it is the very document that has

16 initiated this proceeding. So I think it's okay

17 to refer to it for either side.

18 MR. FIGUR: Thank you, Your Honor

19 JUDGE COUGHLIN: So I'm overruling the

20 objection with that explanation.

21 Go ahead.

22 BY MR. RYAN:

253

1 this case?

2 A Yes. Again, I focused on the alleged

3 violations.

4 Q I'm sorry. Could you repeat that

5 please?

6 A Yes. But again, I focused on the

7 alleged violations sections, section.

8 MR. RYAN: Yeah. Do you have a copy

9 of the complaint handy?

10 (Whereupon, the above-entitled matter

11 went off the record at 1:53 p.m. and resumed at

12 2:06 p.m.)

13 MR. FIGUR: I think we know where

14 you're going so why don't you go ahead and

15 proceed.

16 BY MR. RYAN:

17 Q So paragraph 97 of the complaint

18 alleges that EPA proposes to assess a civil

19 penalty of \$639,675. And that's not what's here

20 in this memo, is it?

21 A No.

22 Q So the complaint, is the proposal in

255

1 Q So the figure of \$639,675 in the

2 complaint is incorrect?

3 A Sorry, I heard something.

4 JUDGE COUGHLIN: In the back of the

5 courtroom?

6 MS. MCNEILL: Yeah.

7 JUDGE COUGHLIN: Gentlemen -- Hi. I

8 know you're trying to speak lowly, and I

9 appreciate that but it's now so wonderfully quiet

10 in here without the fan blowing that we can hear

11 it and it's a little bit distracting. So I'm

12 going to ask you if you just want to have any

13 conversations, if you would step out so the

14 witness can focus. It's an important case,

15 important testimony.

16 UNIDENTIFIED SPEAKER: Yes, Ma'am, my

17 apologies.

18 JUDGE COUGHLIN: Thank you. No

19 worries. Thank you.

20 UNIDENTIFIED SPEAKER: I knew better

21 than that. Thank you.

22 JUDGE COUGHLIN: Okay. Please go

1 ahead.
 2 If you want to restate the question.
 3 MS. MCNEILL: Yeah. If you could.
 4 BY MR. RYAN:
 5 Q So my question to you, Ms. McNeill is,
 6 the \$639,675 allegation in paragraph 97 of the
 7 complaint, is that incorrect?
 8 A Yes, it is. It doesn't reflect the
 9 corrected amount in the proposed penalty.
 10 Q In paragraph 97, count three, alleges
 11 a \$478,602 figure for count three. Is that also
 12 not correct?
 13 A It's not because we initially
 14 considered an approximately \$8000 economic
 15 benefit for count three that was later revised
 16 and removed.
 17 Q Okay. So the number that was the
 18 total number in the original CX4, we can pull
 19 that up and compare it if you like, but I believe
 20 it's reflected here in the slide deck, was
 21 \$462,056. Do you agree?
 22 A Yes.

1 reflect the penalty calculation that's available
 2 to EPA at the time of the filing of the
 3 complaint.
 4 A Yes.
 5 Q So my question to you is, this 462,056
 6 number is different than the 478,602 in the
 7 complaint. One of them is wrong. Do you know
 8 which one is wrong?
 9 A To be honest, I -- so the 478
 10 reflected count three with that approximately
 11 \$8000 economic benefit. That was mistakenly
 12 subtracted twice which is where the 462 came
 13 from. The 470 is the accurate amount without --
 14 once we decided to remove that \$8000 economic
 15 benefit. So 470,329 is the correct number.
 16 Q And I'm looking at the statutory
 17 master Exhibit 3, excuse me, for count three.
 18 They've stricken out -- again, looking at the
 19 summary table on page 5 of Exhibit 4, corrected.
 20 The statutory max number was stricken out 37,500
 21 in place of 101,439,000. Do you see that?
 22 A Yes.

1 Q And that's different than the \$478,602
 2 in the complaint. Do you agree with that?
 3 A Yes.
 4 Q And this \$462,056 number that has been
 5 stricken in Exhibit 64, was that number -- was
 6 the number that EPA was using at the time it
 7 filed the complaint. Isn't that true?
 8 A The 462? Sorry?
 9 Q Yes.
 10 A I'm not 100 percent sure on that. And
 11 I don't want to speak --
 12 Q Let me rephrase the question. Before
 13 EPA files a complaint alleging violations of
 14 RCRA, it has it's penalty policy completed
 15 doesn't it?
 16 A Not penalty policy, but the penalty
 17 calculation, yes.
 18 Q Excuse me. Thank you. Thank you for
 19 correcting me. The penalty calculation's
 20 completed before you file the complaint.
 21 A Yes.
 22 Q And that complaint that's filed would

1 Q And that reflects a correction to an
 2 error in the table, doesn't it?
 3 A Yes. It's just is the different --
 4 the statutory max from the 2020 inflation
 5 adjustment rather than the 2009.
 6 Q Let's go to page 2 of Exhibit CX4,
 7 corrected.
 8 MR. RYAN: Mr. McKay, could you please
 9 highlight the -- oh, I can do this now. Could
 10 you please highlight the fourth paragraph that
 11 says for counts three, four, five. It starts off
 12 -- excuse me -- start with the previous one for
 13 counts one, two, and three. Why don't you
 14 include the next paragraph as well if you can.
 15 Thank you.
 16 BY MR. RYAN:
 17 Q So here we're looking at Exhibit 4,
 18 page 2 of 20. The corrected Exhibit 4. And
 19 would you agree that these, as originally
 20 written, Exhibit CX4, these red lines now, those
 21 were mistakes originally and are being corrected
 22 here?

1 A Yes.
 2 Q So you would agree that a number of
 3 mistakes were made in this penalty memo when it
 4 was originally prepared as a basis for the
 5 complaint in this case?
 6 A Considering the totality of the whole
 7 document and all the information that went into
 8 it, there were some minor mistakes that were
 9 corrected.
 10 Q But there were a number of mistakes.
 11 A There were a couple of mistakes.
 12 Q More than two, shall we count them up?
 13 And you would agree that professionals
 14 make mistakes?
 15 A Yes.
 16 Q Now looking at that paragraph there,
 17 we see -- you talked earlier about the 2010 and
 18 the 2020 penalty adjustment memos. Do you recall
 19 that testimony from this morning?
 20 A Yes.
 21 Q And it says here that, on the second
 22 paragraph that's blown up, it says, "For counts

1 JUDGE COUGHLIN: Yes.
 2 MR. RYAN: Could you turn to page 3 of
 3 this document? And could you please expand the
 4 area, the first paragraph under Roman Numeral 3.
 5 BY MR. RYAN:
 6 Q Okay. See the bold is in the
 7 original. I did not add this. This is a PDF
 8 that I downloaded from the EPA website. It says,
 9 "For violations occurring on or before November
 10 2nd, these multipliers listed in the December 6,
 11 2013, inflation adjustment memorandum --" And
 12 gives the long title. Do you see that?
 13 A Yes.
 14 Q And so this says on or before November
 15 2nd. Now we can go back down, back to Exhibit
 16 64, page 2.
 17 MR. RYAN: And could you please
 18 highlight that middle paragraph right there? The
 19 next one down. The next one. Yeah, that one.
 20 Thank you.
 21 BY MR. RYAN:
 22 Q Okay. Looking at CX4, it says, "That

1 three, four, and five which are alleged to have
 2 occurred on or after November 3rd, the penalty
 3 amounts have been calculated pursuant to
 4 adjustments made in the 2003 penalty matrices.
 5 Do you see that?
 6 A I see that.
 7 Q Now the 2020 penalty memo is slightly
 8 different than that, isn't it?
 9 A I don't have it in front of me, so I
 10 can't talk to it.
 11 Q Give me just a moment please.
 12 Now this -- we're going to have to
 13 flip back and forth between two documents here,
 14 so please bear with me and I apologize.
 15 MR. RYAN: Mr. McKay, could you pull
 16 up the January 15, 2020, EPA memo which is
 17 referenced for purposes of record, this is the
 18 link reference on page CX04 corrected in the
 19 middle of the page. This is linked to 2020
 20 matrices update.
 21 And I believe Your Honor took judicial
 22 notice of this document.

1 it should be on or before November 2nd." You
 2 would agree that's slightly off from the memo
 3 which says the 2010 are used on November 2nd or
 4 before, and after November 2nd. So it's just
 5 slightly different, isn't it?
 6 A By one day.
 7 Q Yeah. But that's incorrect, isn't it?
 8 A Oh, I'm sorry. Yes.
 9 JUDGE COUGHLIN: Mr. Ryan, you're
 10 comparing -- I want to make sure I'm following.
 11 So you're comparing in the 2020 memorandum, I'm
 12 not going to read the whole thing. "For
 13 violations occurring on or before November 2nd,
 14 2015." Comparing that to CX4, what you have
 15 excerpted here?
 16 MR. RYAN: Yes.
 17 JUDGE COUGHLIN: Alleged to have
 18 occurred on or after November 3, 2015?
 19 MR. RYAN: Yes.
 20 JUDGE COUGHLIN: Okay.
 21 MR. RYAN: It's a one-day difference,
 22 Your Honor, but it is a difference.

1 MS. MCNEILL: And I believe one says
 2 -- I can't see them both, I appreciate that you
 3 can -- but one says on or before November 2nd,
 4 and one says on or after the 3rd. So kind of the
 5 same principle.
 6 JUDGE COUGHLIN: That -- yeah. Well
 7 we can -- I'll deal with the language as it says.
 8 I just wanted to make sure I was comparing the
 9 things that you were intending to compare.
 10 MR. RYAN: Okay. So let's go to page
 11 5 of the 2020 amendment. Okay. And under A,
 12 could you highlight that paragraph under A
 13 please? We're on page 5, for the record, we're
 14 on page 5 of the 2020 penalty adjustment memo
 15 that's referenced on page 4 of -- excuse me --
 16 page 2 of Exhibit 4 corrected.
 17 BY MR. RYAN:
 18 Q And you see there where -- and feel
 19 free to read this whole paragraph -- but I would
 20 like to address your attention to the middle of
 21 the paragraph where it says, "Multiple penalty
 22 adjustment cycles should only be used when

1 Correct?
 2 A Yes.
 3 Q Okay. But your penalty analysis only
 4 applies the higher penalty numbers after November
 5 3rd to this analysis, don't they?
 6 A Yes. Because the bulk of the penalty
 7 occurred after that date.
 8 Q But some of it occurred before that
 9 date?
 10 A Yes. We could have used the 2009 memo
 11 for that one month.
 12 Q Yeah. But you didn't, did you?
 13 A We did not.
 14 Q And that would have lowered the total
 15 maximum penalty, wouldn't it have?
 16 A By a slight amount.
 17 Q But it would have lowered it?
 18 A Yes.
 19 MS. MCNEILL: Can I say something? I
 20 was just going to propose that we break for lunch
 21 soon in the near future.
 22 JUDGE COUGHLIN: Okay. Do you need --

1 violations occurred on or before November 2nd and
 2 after November 2nd. Do you see that?
 3 A Yes.
 4 Q And the allegations in the complaint,
 5 I'll represent to you, reading from paragraph 83
 6 of the complaint, count 3, storage without a
 7 permit. Paragraph 83 of the complaint says,
 8 "between October 1st, 2015, and August 3rd, 2016,
 9 respondent stored at least 20 burn drums of
 10 hazardous waste at the facility."
 11 So the allegation of the complaint is
 12 that the violations occurred starting October
 13 1st. Do you agree with that?
 14 A I agree with that, but they extended
 15 until August of 2016.
 16 Q Correct. I would agree with that.
 17 But they started the hazardous material, the
 18 paint, was trucked on October 1st down to Salt
 19 Lake City and stored. Do you agree with that?
 20 A That's when storage began.
 21 Q Yeah. And so the allegations in the
 22 complaint begin before November 2nd, 2015.

1 MS. MCNEILL: In the next 10, 15
 2 minutes.
 3 MR. RYAN: Now would be fine, Your
 4 Honor.
 5 MS. MCNEILL: Now is fine.
 6 JUDGE COUGHLIN: Okay. You want to
 7 take a break now?
 8 MS. MCNEILL: Yeah. That would be
 9 wonderful. Thank you.
 10 JUDGE COUGHLIN: Sure. Is 15 good?
 11 MR. RYAN: I can do 10, but 15 is
 12 fine.
 13 JUDGE COUGHLIN: Do you want 10, 15?
 14 MS. MCNEILL: Ten is fine.
 15 JUDGE COUGHLIN: Okay. We'll do 10.
 16 So well, all right. It's --
 17 MS. MCNEILL: Right in between.
 18 JUDGE COUGHLIN: It's 2:25. We'll see
 19 you back at 2:35.
 20 MR. RYAN: 2:35?
 21 JUDGE COUGHLIN: Wait. Am I doing my
 22 math wrong? We're doing a 10-minute break,

1 right? 2:25 is 2:35. Am I good? I'm losing it.
 2 Okay. Thank you for the vote of confidence.
 3 I'll see you back in 10 minutes.
 4 MR. RYAN: Thank you, Your Honor.
 5 (Whereupon, the above entitled matter
 6 went off the record at 2:25 p.m. and resumed at
 7 2:39 p.m.)
 8 JUDGE COUGHLIN: We're back on the
 9 record after a brief break.
 10 Please go ahead, Mr. Ryan.
 11 MR. RYAN: Thank you, Your Honor.
 12 BY MR. RYAN:
 13 Q Referring you to Complainant's Exhibit
 14 4, corrected. Page 9.
 15 MR. RYAN: And could we please expand
 16 the middle paragraph that says, economic benefit?
 17 BY MR. RYAN:
 18 Q Now you testified earlier, Ms.
 19 McNeill, I think in response to questions from
 20 the Judge, about whether one sample could have
 21 been used instead of eight. Do you recall that?
 22 A Yes.

1 -- contain hazardous waste. But it's also
 2 reasonable to assume that Prime would have wanted
 3 -- decided to test the waste since they had been
 4 through a fire.
 5 Q Okay. So there are two reasonable
 6 approaches here. You would agree?
 7 A Yes.
 8 Q And EPA chose the more expensive one,
 9 that resulted in the \$10,000 -- the \$10,800
 10 economic benefit calculation.
 11 A The 10,800 was proposed, but as I said
 12 only about 1300 of it actually is part of the
 13 proposed penalty.
 14 Q That's not my question.
 15 A Okay. I'm just clarifying because
 16 10,800 was not proposed. I mean it was proposed,
 17 but it wasn't part of the penalty.
 18 Q If we go back to the table, it shows
 19 \$10,800 as the economic benefit. So that \$10,800
 20 is as reasonable as not doing the sampling,
 21 correct, according to this language in this memo?
 22 A Could you repeat that?

1 Q Now isn't it true that it would have
 2 been reasonable for Prime to have done no samples
 3 since they relied on the bill of lading and the
 4 SDS?
 5 A If they had made a hazardous waste
 6 determination, yes. They could have relied on
 7 that.
 8 Q Okay. So let's look at this expanded
 9 paragraph from Exhibit 4. It says, "Although the
 10 SDS --" The second -- I'm referring to the
 11 second sentence of that expanded paragraph under
 12 economic benefit.
 13 It says, "Although the SDS and other
 14 documents described above would service a
 15 reasonable basis for determining that the drums
 16 contain hazardous waste, it is also reasonable to
 17 assume --" and it goes on to talk about that.
 18 So you would agree, your document says
 19 it would be reasonable to rely on the SDS and
 20 other documents to make that determination?
 21 A It says they would serve as a
 22 reasonable basis for determining the drums have

1 Q According to the language in your
 2 CX04, it says, "Although the SDS and other
 3 documents described above would serve as a
 4 reasonable basis for determining that the drums
 5 contain hazardous waste." Would you agree that
 6 that would be a reasonable way to determine
 7 hazardous waste?
 8 A Yes. If a determination had been
 9 made.
 10 Q And that would have cost Prime
 11 nothing. A Correct.
 12 Q Now we've heard a lot of testimony
 13 about the criminal investigations proficiency ID
 14 investigating the crime in this case. And they
 15 showed up, and I believe you testified they did
 16 their first inspection on August 2nd, 2016. And
 17 a second follow-up inspection to collect samples
 18 on August 24th, 2016. Do you recall that?
 19 A Yes.
 20 Q And the CID learned of this first
 21 case. I think we heard from -- you were in the
 22 room when Investigator Callahan testified. I

1 believe testimony was that EPA learned of -- the
 2 CID learned of these potential RCRA violations in
 3 the last 2015, early 2016 timeframe. Do you
 4 recall that?
 5 A I don't know the exact dates. I'm not
 6 part of CID.
 7 Q My question is, you were here in the
 8 courtroom when Mr. Callahan testified. Do you
 9 remember that?
 10 A Yes.
 11 Q And he testified -- and you recall he
 12 testified it was sometime late 2015, early 2016
 13 that they became involved, CID?
 14 A That sounds correct, but I don't
 15 specifically recall what he said.
 16 Q And after the August 2nd inspection by
 17 CID, EPA issued a letter to Prime saying,
 18 preserve the evidence. Don't move it.
 19 A Yes.
 20 Q Do you recall that?
 21 And sometime later, EPA lifted that
 22 stay on disposal of the materials. And on

1 was hazardous waste illegally stored and was
 2 requiring Prime to keep it there. Correct?
 3 A At that point in time, hazardous waste
 4 determination had not been performed.
 5 Q That's not my question. My question
 6 is on August 2nd, EPA unequivocally knew the
 7 trailer with the drums was on the Salt Lake City
 8 facility, correct?
 9 A Yes.
 10 Q Okay. And they told, on August 3rd,
 11 EPA told Prime to keep it there, correct?
 12 A Yes. Because --
 13 Q And on September 19th, after EPA
 14 lifted that hold, Prime hired an appropriate
 15 contractor and disposed of it properly, correct?
 16 A Yes.
 17 Q So my question to you was, I'm not
 18 asking who's responsible, did as a matter of
 19 fact, EPA notify anyone whether state, local, or
 20 regional authorities, about the existence of a
 21 potential hazard on this site?
 22 A Not that I'm aware of.

1 September 19th, they were disposed of.
 2 A Yes. After NEIC made the hazardous
 3 waste determination.
 4 Q Yes. So that was on September 19th,
 5 2016. So it was entered for approximately six
 6 weeks, from August 2nd or August 3rd, when the
 7 hold letter went out to September 19th. That's
 8 approximately six weeks. Would you agree?
 9 A Yes.
 10 Q Okay. And would you agree, in that
 11 intervening six weeks, EPA never notified the
 12 town of Salt Lake City that there's a potential
 13 hazardous waste problem there?
 14 A I'm not aware of a notification.
 15 Q Okay. And did they notify local fire
 16 -- EPA never, in that six weeks between August
 17 2nd and when it was disposed of EPA never
 18 notified local fire department of a potential
 19 fire hazard. Did they?
 20 A It would have been Prime's
 21 responsibility as the generator.
 22 Q Yeah. But EPA was aware that there

1 Q And did EPA instruct Prime to put up
 2 any kind of barriers around it to prevent people
 3 from coming near it?
 4 A I was not, again, part of that
 5 investigation.
 6 Q To your knowledge did EPA ask anyone
 7 at Prime to barricade that thing off? The
 8 trailer off?
 9 A Not to my knowledge, but again, I
 10 wasn't there. So I feel like I'm --
 11 Q If you don't know, you don't know.
 12 A Okay. I don't know. Then I don't
 13 know.
 14 Q And did EPA issue kind of, any written
 15 warning to Prime that there's a potential
 16 hazardous situation on your lot, you need to
 17 protect your workers?
 18 A I don't know.
 19 Q Now on August 2nd. Let's see. EPA
 20 visited the site on August 2nd and again on
 21 August 24th. And do you know whether the EPA
 22 employees doing those inspections wore PPE?

1 Personal Protective Equipment?
 2 A I do not, no.
 3 Q Do you know whether they told anyone
 4 from Prime assisting them to wear PPE?
 5 A I do not know.
 6 Q Do you know when EPA first learned of
 7 this fire? The fire on September 27th, excuse
 8 me, 2015? Do you know when EPA first learned
 9 about that?
 10 A No.
 11 Q I'm going to refer you --
 12 MR. RYAN: I'm going to ask you to
 13 pull up Respondent's Exhibit 3 please. Go to
 14 page 2. And could you highlight the top quarter
 15 of that document?
 16 BY MR. RYAN:
 17 Q And I'll represent to you that this is
 18 from the Idaho state communications center.
 19 There was some discussion about this with Mr.
 20 Callahan. It was the EPA's version of this
 21 exhibit --
 22 MR. RYAN: Is this Exhibit CX10? For

1 the record.
 2 UNIDENTIFIED SPEAKER: Seven.
 3 MR. RYAN: Exhibit 7.
 4 BY MR. RYAN:
 5 Q We're now looking at Respondent's
 6 Exhibit 3. And referring you to the third line
 7 down there, do you see where it says, "9/27/2015
 8 4:45. That would be a.m., I assume. Matt Carr,
 9 EPA Region 10, main office acknowledge." Do you
 10 see that?
 11 A I do see that.
 12 Q And what do you understand that to
 13 mean?
 14 A That Matt Carr received some kind of
 15 communication.
 16 Q So you would agree that EPA was on
 17 notice of the fire as of 4:45 a.m. on September
 18 27th, 2015?
 19 A Yes.
 20 Q And to your knowledge, did anyone from
 21 EPA contact Prime about this fire right around
 22 this date?

1 A No. But there were plenty of other
 2 emergency responders that were --
 3 Q That wasn't my question. My question
 4 was did anyone -- to your knowledge, did anyone
 5 from EPA contact Prime around September 27th?
 6 A No.
 7 Q Okay.
 8 A Not to my knowledge.
 9 Q And did anyone in the aftermath of
 10 this fire, in the next two, three weeks, did
 11 anyone from EPA contact Prime to say, you've got
 12 a RCRA problem here?
 13 A I don't know
 14 Q Okay. And did anyone from Prime --
 15 excuse me. Did anyone from EPA in the aftermath
 16 of the fire, again in the September '15
 17 timeframe, did anyone from EPA contact Prime and
 18 say that a hazardous waste issue, some dangerous
 19 issue here. You need to be careful. Did anyone
 20 make that phone call or send that letter or
 21 email?
 22 A No. But the State Department of

1 Environmental Quality did.
 2 Q Again, I'm not asking you about
 3 Environmental Quality. I'm asking you about you,
 4 EPA.
 5 A Not to my knowledge.
 6 MR. RYAN: We can take this down now.
 7 BY MR. RYAN:
 8 Q Referring back to Complainant's
 9 Exhibit 4, corrected. You talked quite a bit
 10 before about the adjustment factors during your
 11 direct examination this morning. Do you recall
 12 that?
 13 A Yes.
 14 Q And so let's look at Complainant's
 15 Exhibit 4, corrected, at page 13. Count 3.
 16 Do you see that in front of you, Ms.
 17 McNeill?
 18 A Yes.
 19 Q And you see where you have Economic
 20 Benefit, and you have zero written?
 21 A Yes.
 22 Q And do you see where you have Good

280

1 Faith -- where it says, Good Faith, and you have
 2 N/A?
 3 A Yes.
 4 Q That means you're not applying good
 5 faith to this gravity based penalty calculation
 6 here, are you?
 7 A No. Based on the definition of good
 8 faith.
 9 Q Well again, my question is, you didn't
 10 give it zero. You said not applicable. N/A
 11 means not applicable, correct?
 12 A Right.
 13 Q Okay. So you gave zero to economic
 14 benefit, but for good faith you said not
 15 applicable.
 16 A Yes.
 17 Q And you did the same thing for history
 18 of non-compliance. You wrote not applicable.
 19 A Yes.
 20 Q And the same thing for Other Unique
 21 Factors. You wrote not applicable.
 22 A Yes.

282

1 A The penalty calculations such as this
 2 aren't always -- the details are not always
 3 shared with the Respondent.
 4 Q Okay. So you have a separate
 5 calculation using the 2003 penalty policy that
 6 you do separate from this, that results in a
 7 number you use for settlement purposes, correct?
 8 A I want to answer your question, but
 9 the explanation that I'm coming to in my head is
 10 that we start with an initial penalty
 11 calculation. Then when we are in settlement, we
 12 assess any new information and then at that point
 13 we would potentially revise the penalty based on
 14 that new information. Is that --
 15 Q I don't think you understand my
 16 question. Let me rephrase it.
 17 And just so we're clear, I'm not
 18 asking you to divulge any confidential settlement
 19 information in this case. I'm not asking you
 20 that. I'm talking hypothetically here. Okay.
 21 So you as a RCRA enforcement officer,
 22 you understand what your bottom line settlement

281

1 Q So you mentioned earlier too, that
 2 some of these factors are used for settlement
 3 purposes. Is that correct?
 4 A Yes.
 5 Q So EPA essentially does two analyses
 6 in every case, don't they? They do one penalty
 7 calculation memo, such as CX04 corrected to show
 8 to the judge. And then they do a second one for
 9 their internal settlement purposes, don't they?
 10 A Can you repeat -- sorry.
 11 Q Yeah. So EPA does two calculations in
 12 every case. One for the penalty memo that they
 13 show to the judge, and one for their internal
 14 settlement purposes, correct?
 15 A Yes. This is the first case that I've
 16 had that has had a judge, so I'm not 100 percent
 17 sure of this part.
 18 Q I'll rephrase the question. They do
 19 one penalty policy calculation to show to the
 20 Respondent, and they do a second penalty policy
 21 calculation they do to keep secret internally for
 22 settlement, correct?

283

1 number is going into our case, don't you?
 2 A So I don't -- I'm trying to think of
 3 how to say this. I don't generally have a bottom
 4 line settlement number. We follow the penalty
 5 policy and that's how we calculate our penalty
 6 and then we negotiate there based on the
 7 information provided by the Respondent.
 8 Q Okay. Things have changed since I
 9 left EPA.
 10 A It's a different program.
 11 Q It is a different program. Isn't it
 12 true that you have to have your bottom line
 13 settlement number approved before you can file a
 14 complaint?
 15 A Not to my knowledge.
 16 Q Okay. You admit though, that you have
 17 a bottom line settlement number at some point.
 18 A Not in RCRA. Not in my experience in
 19 RCRA. We don't consider a bottom line penalty.
 20 We calculate it according to the policy.
 21 Q Okay. But you would agree that the
 22 penalty policy instructs you to look at other

284

1 factors for purposes of settlement.
 2 A Yes. I would agree with that.
 3 Q And that policy instructs you to come
 4 up, look at the maximum penalty you can get in
 5 court, and then take into consideration other
 6 factors that you're not going to share
 7 necessarily with the Respondent to come up with a
 8 settlement number, doesn't it?
 9 A I'm not sure that's -- is there
 10 language that you want to show me that --
 11 Q Sure.
 12 MR. RYAN: Can we pull up the 2003
 13 penalty policy please? And can we go to page 40
 14 of that policy?
 15 MR. FIGUR: And is that the page
 16 number at the bottom of the page?
 17 UNIDENTIFIED SPEAKER: Yes. Page
 18 number at the bottom.
 19 MR. FIGUR: Thanks.
 20 MR. RYAN: I apologize. I'm old
 21 school, and I use pens, so I apologize.
 22 MR. FIGUR: I remember those days.

286

1 account any disproportionate resource outlay
 2 involved in litigating the case in case that it
 3 might avoid by entering into a settlement.
 4 Downward adjustments of the proposed penalty for
 5 settlement purposes may be warranted depending on
 6 the agency's assessment of these litigation
 7 considerations."
 8 Do you see that?
 9 A I do see that.
 10 MR. RYAN: And can we go to the next
 11 page? Page 41 of this 2003 guidance. Okay.
 12 Could you expand the two big paragraphs in the
 13 middle please? That's correct. Thank you.
 14 BY MR. RYAN:
 15 Q And here it says, "In addition to
 16 litigation risks, enforcement personnel can
 17 consider for purposes of an expedited settlement
 18 the cooperation of the facility throughout the
 19 compliance evaluation and enforcement process."
 20 Coming down to the next paragraph, and
 21 feel free to read all of this if you'd like.
 22 Second sentence of the second full paragraph of

285

1 MR. RYAN: Yeah. I'm now officially
 2 a senior citizen, so I'm allowed.
 3 BY MR. RYAN:
 4 Q Okay. Referring you to the first
 5 full paragraph on the bottom of page 40.
 6 MR. RYAN: Could you please expand
 7 that? Thank you.
 8 BY MR. RYAN:
 9 Q It says, "This policy shows an
 10 adjustment for factors which may arise on a case
 11 by case basis. When developing it's settlement
 12 position, EPA should evaluate every penalty with
 13 a view towards potential for protracted
 14 litigation and an attempt to ascertain the
 15 maximum penalty the Court or Administrative Law
 16 Judge is likely to award if the case proceeds to
 17 hearing or trial."
 18 Do you see that?
 19 A I do.
 20 Q And later in that paragraph it says,
 21 "Where the agency determines that significant
 22 litigative risks exist, it may also take into

287

1 this page 41 of the 2003 guidance, "While
 2 self-reporting and correction of violations
 3 qualifies as efforts to cooperation and attitude
 4 of the violator throughout the investigation
 5 enforcement process should be the focus under
 6 this factor."
 7 Do you see that?
 8 A I do. And to clarify, we're in the
 9 other unique factors adjustment factor?
 10 Q Yes. Correct.
 11 So you would agree, for the purposes
 12 of settlement, there are things you can take into
 13 consideration that you're not going to
 14 necessarily share with the other side, with the
 15 Respondent.
 16 A Yes.
 17 Q Okay. And then, one of those things
 18 might be litigation risk?
 19 A Yes.
 20 Q And your settlement numbers, by
 21 definition, are always lower than your number you
 22 put in your complaint, correct?

288

1 A Yes. But in this case --

2 Q I'm not asking in this case. I'm

3 saying in general.

4 A Can you repeat the question?

5 MR. FIGUR: Your Honor, that seems

6 overly broad. Is he asking on behalf of the

7 agency as a whole? On behalf of Region 8? On

8 behalf of Ms. McNeill and her experience? She

9 can't speak to the agency as a whole and all

10 settlements relating to all penalty members.

11 I'll object if he's asking for that.

12 JUDGE COUGHLIN: Okay. I'll sustain

13 the objection and if you rephrase. Thank you.

14 BY MR. RYAN:

15 Q In your experience, settlement numbers

16 are lower than the amount put in the complaint,

17 aren't they?

18 A This is the first case that I've had

19 that's had a complaint. Usually we settle. And

20 so I don't have the experience to --

21 Q Okay.

22 A -- say one way or the other.

290

1 don't they? They take into consideration these

2 factors on page 40, 41?

3 A Potentially, but that's a large amount

4 to change a penalty and I've never seen it done.

5 Q Again, not my question.

6 Now the penalty policy, and also your

7 analysis which is enshrined in Exhibit CS4

8 correct. There's a lot of discussion of good

9 faith. And you testified this morning under what

10 conditions you're allowed to make good faith

11 adjustments for the penalty.

12 A Yes.

13 Q What is your understanding of the term

14 good faith?

15 A It is one of the statutory factors.

16 And also, I mean, when determining good faith I

17 have always looked at basically the definition

18 the factor is called out to take into account

19 under the good faith efforts to apply adjustment

20 factors.

21 Q So I'm not asking you what the penalty

22 policy factors are. I'm asking you what is your

289

1 Q Would you say that, based on your

2 experience, 11 years' experience as a RCRA

3 compliance officer, that EPA settles for less

4 than they would get in court?

5 A I don't have the basis as a standard.

6 Q And would you agree with the statement

7 that the settlement numbers can be, in certain

8 cases, hundreds of thousands of dollars less than

9 what the EPA originally asks for?

10 MR. FIGUR: Your Honor, that's just

11 pure speculation.

12 MR. RYAN: I'm not asking for

13 speculation. I'm asking her based on her

14 experience.

15 MS. MCNEILL: I've never seen a case

16 --

17 JUDGE COUGHLIN: I'll overrule the

18 objection. You can answer.

19 MS. MCNEILL: I've never seen a case

20 settle for hundreds of thousands of dollars less.

21 BY MR. RYAN:

22 Q But EPA has that authority to do that,

291

1 understanding of what the term good faith means.

2 A God, sorry. Basically good faith

3 would be cooperating with EPA's inspection and

4 inspectors and throughout negotiations and

5 working to maintain compliance with the hazardous

6 waste requirements.

7 Q This morning during direct you said

8 that, and I think when asked by the Judge, you

9 said that an example of someone acting in good

10 faith would be someone who was violating RCRA,

11 discovered they were violating RCRA, and before

12 EPA showed up took corrective actions to come

13 into compliance. Is that a fair statement?

14 A That's one of the factors in the

15 penalty policy, yes.

16 Q So if someone honestly, sincerely,

17 does not know they're violating RCRA and as a

18 result takes no action because they had no idea

19 RCRA applied. Then EPA shows up and tells them

20 that it does, they get no credit for good faith?

21 A No. The good faith also specifies no

22 downward adjustment for lack of knowledge about

292

1 requirements.

2 Q So let me get this straight. So a
3 violator who knows they're violating takes
4 corrective action but doesn't come into
5 compliance, they get the good faith downward
6 adjustment. But somebody who sincerely didn't
7 know they were violating; they get no downward
8 adjustment. Is that correct?

9 A Could you say that again, the first
10 part?

11 Q The example you gave, someone who is
12 violating RCRA, realizes they're violating RCRA,
13 takes corrective action. That would be
14 considered good faith efforts to comply by your
15 definition.

16 A Yes.

17 Q But someone who sincerely had no idea
18 they were violating RCRA would get no downward
19 adjustment for good faith efforts to comply,
20 correct?

21 JUDGE COUGHLIN: Mr. Ryan, might I ask
22 a question too on this point?

294

1 direct you to the page and section, it's -- as
2 soon as I can have the mouse.

3 JUDGE COUGHLIN: Thank you for
4 clarifying that.

5 MR. RYAN: On page 35.

6 JUDGE COUGHLIN: Okay. Thank you.
7 And do you know whether or not the statute
8 defines that term?

9 MS. MCNEILL: I don't believe that it
10 does.

11 JUDGE COUGHLIN: Okay. Thank you.

12 That was all I had Mr. Ryan. Thank
13 you.

14 MR. RYAN: Might I have just a minute,
15 Your Honor?

16 JUDGE COUGHLIN: Sure.

17 MR. RYAN: I think I might be done.
18 Trying to short circuit my cross examination.

19 JUDGE COUGHLIN: Sure.

20 MR. RYAN: I might add now that we can
21 hear each other. Were also getting hot. It's a
22 Hobson's choice.

293

1 MR. RYAN: Please, Your Honor.

2 JUDGE COUGHLIN: Do you know, does the
3 2003 RCRA policy actually contain the definition
4 of good faith?

5 MS. MCNEILL: I don't believe it's
6 defined there.

7 JUDE COUGHLIN: Okay. So when you've
8 made reference to -- I think you said definition,
9 but if I'm misspeaking, I apologize. But when
10 you make reference to that term being explained
11 somehow in the policy. Where might I find that?

12 MS. MCNEILL: I appreciate your
13 question. I have probably used the word
14 definition when really I'm talking about how that
15 adjustment factor is defined rather than the
16 phrase, good faith efforts to comply, if that
17 makes sense.

18 JUDGE COUGHLIN: Okay.

19 MS. MCNEILL: Because there is an
20 adjustment factor that's called "Good Faith
21 Efforts to Comply." And so that's --

22 MR. RYAN: And Your Honor, if we can

295

1 JUDGE COUGHLIN: We can work on that.

2 MR. RYAN: I think listening is
3 better.

4 JUDGE COUGHLIN: Okay.

5 BY MR. RYAN:

6 Q Okay. Ms. McNeill, Region 7 gets
7 credit for filing enforcement actions, doesn't
8 it?

9 A Yes.

10 Q Yes. The answer's yes. And
11 internally you refer to those enforcement action
12 credits as "beans," don't you?

13 A Yes.

14 Q Yes. And the beans for each year are
15 tallied at the end of the fiscal year. Isn't
16 that correct?

17 MR. FIGUR: Your Honor, I just have to
18 check on the relevance here? I'm going to object
19 on the relevance until I hear -- unless you don't
20 want him to explain how this is relevant.

21 JUDGE COUGHLIN: Do you want to
22 explain how --

296

1 MR. RYAN: I think Prime's entitled to
2 explore what motivation was for them to file this
3 \$600,000 case. And I think my following
4 questions will enlighten on that.

5 JUDGE COUGHLIN: Okay. I'll overrule
6 based on that. GO ahead.

7 BY MR. RYAN:

8 Q So the beans are tallied each year at
9 the end of the fiscal year. Isn't that correct?

10 A Can I clarify one thing? You said
11 Region 7 in your question.

12 Q I'm sorry. I apologize. My mistake.
13 Region 8.

14 A Thank you. Because that threw me off.

15 Q No that was totally my mistake and I
16 apologize.

17 A I wasn't sure why you were asking
18 about that region.

19 Q So Region 8 tallies it's beans for the
20 year at the end of the fiscal year, correct?

21 A Yes. But Region 8 RCRA doesn't
22 generally take all that many enforcement actions.

297

1 We don't have a heavy focus on beans, enforcement
2 beans.

3 Q Wasn't my question. My question was
4 you collect -- you tally your beans at the end of
5 the fiscal year, correct?

6 A You know, I will honestly say in
7 Region 8, in the RCRA program, I've never
8 actually heard them talk about that, so.

9 Q You don't -- so you don't know?

10 A No. I don't think -- there's not the
11 focus on beans in the RCRA program.

12 Q Again, it's not my question about
13 focus.

14 A Okay.

15 Q I'm asking you a yes/no question.

16 A No. I have never heard the RCRA
17 program in Region 8 talk about enforcement beans
18 at the end of the year.

19 Q Not my question.

20 A Okay.

21 Q My question is, does EPA Region 8
22 tally it's beans for the year at the end of the

298

1 fiscal year?

2 A Yes. As far as I know.

3 Q And each fiscal year ends on September
4 30th, correct?

5 A Yes.

6 Q And the complaint in this case was
7 file September 17th, 2020, correct?

8 A Yes.

9 Q And that was 10 days prior to the
10 statute of limitations running out on this case,
11 wasn't it? Approximately?

12 A Yes. But the EPA, excuse me, CID
13 investigation played into that timeframe.

14 Q Again, I'm not asking you to explain
15 how. I'm just saying you filed your complaint 10
16 days before the end of the statute of
17 limitations, correct?

18 A Yes.

19 Q And 13 days before the end of your
20 fiscal year.

21 A Yes.

22 Q And EPA Region 8 has beans for filing

299

1 this case, don't they?

2 A On some level.

3 Q Yes or no. It's a yes or no question.

4 A As far as I know.

5 MR. RYAN: All right. May I have just
6 a moment, Your Honor?

7 JUDGE COUGHLIN: Yes.

8 BY MR. RYAN:

9 Q You discussed EJSscreen before, right?
10 Do you remember that this morning?

11 A Yes.

12 Q And EJSscreen was the application that
13 you used to determine the possible environmental
14 effects for the neighborhood where the Salt Lake
15 City yard is, correct?

16 A The area which includes some
17 neighborhoods.

18 Q And when you instructed EJSscreen to
19 give you data, how far did you draw your circle?

20 A I did not draw a circle.

21 Q Okay.

22 A We used a census block.

300

1 Q Okay. And the census block showed
2 that the nearest group of homes was how far away?
3 A I don't know exactly.
4 Q Now you're aware that EPA has warned
5 users of EJSCREEN, that there are limitations
6 where it's used, aren't you?
7 A Yes.
8 Q And that EPA's own website has several
9 admonishments to be careful how you use it.
10 Isn't that correct?
11 A I don't know the exact language.
12 Q I'm reading from EPA's website.
13 EJSCREEN was developed by EPA to highlight places
14 that may -- you can't reach for further review.
15 Additionally, it's important to understand that
16 EJSCREEN's not a detailed risk analysis. It is a
17 screening tool that examines some of the relevant
18 issues related to environmental justice and goes
19 on.
20 Therefore its initial results should
21 be supplemented with additional information and
22 local knowledge whenever appropriate for a more

302

1 game.
2 MR. FIGUR: Thank you.
3 MR. RYAN: I have no further
4 questions, Your Honor.
5 Thank you, Ms. McNeill for your time.
6 MS. MCNEILL: Thank you.
7 JUDGE COUGHLIN: Re-direct.
8 MR. FIGUR: Yes. Thank you.
9 JUDGE COUGHLIN: Are you okay? Do you
10 need a break at all?
11 MS. MCNEILL: No, I'm okay.
12 JUDGE COUGHLIN: Okay.
13 MR. FIGUR: Your Honor, I'd like to
14 keep this brief and in aid of that, I'd like to
15 spend a minute organizing and deciding what to
16 follow up on. Do you mind if I spend a minute
17 taking a look at my notes?
18 JUDGE COUGHLIN: Not at all. Do I
19 pronounce your last names, Figur or Figur?
20 MR. FIGUR: It's a great question,
21 Your Honor, you're welcome to pronounce it any
22 way you want.

301

1 complete picture of the location. Second
2 important limitations -- again, I'm reading from
3 the EPA's website. The second important
4 limitation is that EJSCREEN relies on demographic
5 and environmental estimates that involve
6 substantial uncertainty.
7 Are you aware of all those
8 limitations?
9 A Yes, as you read them.
10 MR. FIGUR: Your Honor, we're fine
11 with Counsel reading from a website. It is what
12 it is. Are we then welcome to read from theirs
13 if the need arises?
14 MR. RYAN: If they want to
15 cross-examine one of our witnesses with a Prime
16 website, then we can take that up when that
17 happens.
18 JUDGE COUGHLIN: Okay. Yeah. I mean,
19 publicly available so yeah.
20 MR. FIGUR: Thank you, Your Honor.
21 JUDGE COUGHLIN: I mean, absent of
22 some other type of an objection I would say fair

303

1 JUDGE COUGHLIN: Or it's your
2 preference.
3 MR. FIGUR: Figur is fine. Thank you.
4 JUDGE COUGHLIN: Would you like a
5 brief break to go over your notes?
6 MR. FIGUR: No, thank you, Your Honor.
7 It's just that it's on four pages. I'm going to
8 spread them out and then I'm going to try to
9 decide whether to follow up on some and then in
10 what order.
11 JUDGE COUGHLIN: Okay.
12 MR. FIGUR: It will take me a minute.
13 JUDGE COUGHLIN: Yes. Take your time.
14 MR. FIGUR: And Your Honor, I'd like
15 to start. I may move slowly from question to
16 question. And I apologize in advance if I appear
17 to be kind of slow. I just want to make sure I
18 get to everything we should and preferably in a
19 good order.
20 JUDGE COUGHLIN: Yeah. Take all the
21 time you need.
22 MR. FIGUR: Okay.

304

1 MR. RYAN: If you can speak up, that
2 would be great.
3 MR. FIGUR: I can.
4 JUDGE COUGHLIN: Ms. Tibbett, is the
5 volume cranked up?
6 MS. TIBBETT: Yes.
7 JUDGE COUGHLIN: Okay. Thank you.
8 MR. FIGUR: Since this is probably
9 going to be short, I'm going to lean in.
10 JUDGE COUGHLIN: Okay.
11 MR. FIGUR: But I don't want anybody
12 -- actually this is kind of nice and relaxing.
13 RE-DIRECT EXAMINATION
14 BY MR. FIGUR:
15 Q So Ms. McNeill, during cross you were
16 asked whether EPA generates two penalty
17 calculations and uses them for different
18 purposes.
19 Specifically for this matter, was that
20 done?
21 A No, it was not.
22 Q Can you explain in a little more

306

1 MS. MCNEILL: Yes.
2 JUDGE COUGHLIN: So yeah, just don't
3 even go there.
4 MS. MCNEILL: Can I just say we
5 presented that to Prime?
6 JUDGE COUGHLIN: Yes. That's fine.
7 MS. MCNEILL: Okay.
8 BY MR. FIGUR:
9 Q And you didn't have a secret second
10 number?
11 A No, we did not.
12 Q All right. You weren't on the case
13 when the complaint was filed, were you?
14 A Can you repeat?
15 Q You weren't on the case team when the
16 complaint was filed were you?
17 A I was not.
18 Q Do you have any idea whether anybody,
19 whether it was the case team, or the region got
20 lots of credit for the bean?
21 A No, I don't know.
22 Q Okay. Thanks. Let's turn to the

305

1 detail the single penalty calculation approach
2 that you took?
3 A Basically you know, as I have stated,
4 we follow the penalty policy to develop a
5 proposed -- to calculate the proposed penalty
6 according to the factors in the penalty policy.
7 We presented that -- I'm not sure how much I'm
8 allowed to talk about it. I'm not going to talk
9 about details. But we presented that to Prime.
10 JUDGE COUGHLIN: Yeah. Please be very
11 careful about anything to do with settlement.
12 MR. FIGUR: Right.
13 MS. MCNEILL: Okay.
14 JUDGE COUGHLIN: I think it's rule
15 408. I don't want to hear anything.
16 MS. MCNEILL: Yeah, yeah. No, I
17 won't.
18 JUDGE COUGHLIN: And I know that's not
19 what's being elicited. And I also recognize that
20 you mentioned not having been at a hearing
21 before. So it's just to protect the integrity
22 overall.

307

1 penalty policy for a minute. And we're going to
2 go into a few details just to recap.
3 A Sure.
4 Q During cross-examination, the penalty
5 policy was characterized as complex. Would you
6 say that the penalty policy is complex, or would
7 you say that it's detailed?
8 A I would say that it's detailed.
9 Q And let's take a look at the moment at
10 the risk of exposure which was discussed on cross
11 in some detail.
12 MR. FIGUR: And if we could turn to
13 the 13th hard-number page.
14 JUDGE COUGHLIN: Kate, can you share
15 that with me?
16 MS. TRIBETT: Oh, yeah.
17 JUDGE COUGHLIN: Thank you.
18 MR. FIGUR: Oh, that's the perfect
19 page. So keep going a little further down.
20 MS. TRIBETT: Yeah, I have to
21 overview.
22 MR. FIGUR: Oh, I'm sorry.

308

1 MR. RYAN: I'm sorry. Chuck, what
2 page are we on?

3 MR. FIGUR: It's the Risk of Exposure.
4 It's on page 13 although it looks like it's going
5 to be on page 14 for us. And page 20 of 113 in
6 the document in the file. So can you please go
7 down one more page when you're ready?

8 MR. RYAN: So page 13 of Exhibit 2003
9 penalty policy?

10 MR. FIGUR: Yes, thank you.

11 MR. RYAN: Thank you.

12 BY MR. FIGUR:

13 Q So you said that we colloquially refer
14 to risk of exposure as potential for harm. Can
15 you please walk through the policy? Or did you
16 not say that? I'm sorry if I misunderstood.

17 A No. I said generally I believe we --
18 excuse me. It's potential for harm to human
19 health and the environment. Not just potential
20 for harm.

21 So risk of exposure would be harm to
22 human health and the environment.

310

1 That's especially true for multi-day.
2 Because when you're multiplying times 179 it can
3 change pretty quickly. But if any of the factors
4 had reached -- had been determined to be at the
5 top of the box, or adjusted upwards to the --

6 For instance, I'm speaking of count 3,
7 adjusted upwards to a major potential for harm
8 and the majorness for mediation, the penalty
9 would have been considerably higher.

10 Q Thank you. Let's just walk through
11 one, maybe two more questions.

12 MR. FIGUR: Can you please bring up
13 Respondent's Exhibit 3? And I don't have -- And
14 Respondent's Exhibit 3 is stipulated. Can you
15 please go to page 2?

16 BY MR. FIGUR:

17 Q And when the snip was up on the screen
18 you saw the people who were listed. And what is
19 the title of that section? It wasn't up on the
20 snip before.

21 A It's just notifications.

22 Q Do you have any idea what notification

309

1 Q Thanks. And could you please just
2 walk us through this small section? Just the
3 very, very briefly?

4 A Do you want me to read it?

5 Q I withdraw the question.

6 A Okay.

7 Q So part of the cross-examination was
8 an examination of the different numbers at the
9 top and the bottom of different matrices, of
10 different boxes within the matrices with a focus
11 on the numbers that would be generated in the
12 boxes with the lower numbers. But wouldn't the
13 reverse be true?

14 So can you briefly explain what might
15 happen if we looked at the higher boxes?

16 A Yes. Using the penalty policy, again,
17 we use the factors that the penalty policy
18 prescribes to use in determining the place in the
19 matrix cells. And you know, there's a wide
20 variety. There can be variation depending on if
21 the penalty is at the top, the mid-point, or the
22 bottom of the box.

311

1 means in a HAZMAT incident?

2 A I do not.

3 Q And can you please look at the time
4 stamp for the notification to EPA Region 10?

5 A It was September 27, 2015, at 04:45.

6 Q And to your knowledge, was the
7 hazardous materials incident completed yet or was
8 the fire still going?

9 A My understanding is the fire was
10 likely still going at that point.

11 Q And are you aware of any follow-up by
12 any of the Idaho agencies with EPA about the
13 results and the outcome of the fire?

14 A Yes. The Idaho Department of
15 Environmental Quality contacted CID. I believe in
16 December -- I don't want to misspeak -- but they
17 contacted CID regarding this incident.

18 Q But how about at the -- during or is
19 there any information about follow-up the night
20 of, the morning after?

21 A No. Not as far as I have seen.

22 MR. FIGUR: Thank you, Your Honor. I

312

1 think I'll end my questions here.
 2 JUDGE COUGHLIN: Okay. All right.
 3 Thank you.
 4 MR. RYAN: May I have just one moment,
 5 Your Honor?
 6 JUDGE COUGHLIN: Sure.
 7 MR. RYAN: I have one short series of
 8 questions, Your Honor.
 9 JUDGE COUGHLIN: Sure.
 10 RE-CROSS EXAMINATION
 11 BY MR. RYAN:
 12 Q I believe on re-direct, Ms. McNeill,
 13 you were asked whether you were involved in the
 14 analysis of the penalty at the time that the
 15 complaint was issued. I believe you said no.
 16 A Correct.
 17 Q And was that Ms. Jacobson who was the
 18 original drafter as what we now know as Exhibit
 19 CX4 corrected?
 20 A Yes.
 21 Q And do you know why she's not here
 22 testifying about what she drafted?

314

1 the objection. Go ahead. You can answer.
 2 MS. MCNEILL: [REDACTED]
 3 MR. RYAN: Okay. Thank you very much.
 4 JUDGE COUGHLIN: Okay. All right.
 5 MR. FIGUR: Your Honor, that revealed
 6 PPI. I would like the record to be redacted for
 7 that small portion. I don't think that should be
 8 available to anybody who reviews the record or go
 9 beyond this room today frankly.
 10 JUDGE COUGHLIN: Okay. Any objection
 11 to that?
 12 MR. MCKAY: No, Your Honor.
 13 JUDGE COUGHLIN: Okay.
 14 We can redact that portion Mr. Morris.
 15 Okay. Thank you for your testimony.
 16 So --
 17 MS. MCNEILL: Sorry, Your Honor.
 18 JUDGE COUGHLIN: No, that's okay.
 19 Any other witnesses as part of your
 20 direct case?
 21 MR. FIGUR: Thank you. As part of our
 22 direct case and reserving the right to call Dr.

313

1 MR. FIGUR: Your Honor, we moved to
 2 substitute. That motion was granted. I don't
 3 see how this is relevant to the calculation of
 4 the penalty or anything else Ms. McNeill has
 5 testified to today.
 6 JUDGE COUGHLIN: Do you have a
 7 response before I rule?
 8 MR. RYAN: Your Honor, she works with
 9 Ms. McNeill -- excuse me, with Ms. Jacobson, she
 10 testified earlier. I'm just -- my client is
 11 trying to know why they substituted one for the
 12 other when the penalty was written by someone
 13 other than her.
 14 JUDGE COUGHLIN: Is that information
 15 going to help me in terms of reviewing and
 16 assessing a penalty in the case?
 17 MR. RYAN: It goes to the credibility
 18 of the witness, Your Honor. She's not the one
 19 that wrote the memo. And your shaking your head
 20 that this is between Your Honor and --
 21 JUDGE COUGHLIN: Yeah, I'm actually
 22 not -- All right. You know what, I'll overrule

315

1 Keteles, and Ms. McNeill, and also Mr. Callahan,
 2 unlikely, we now rest.
 3 JUDGE COUGHLIN: Okay. For rebuttal,
 4 right?
 5 MR. FIGUR: Yes. Thank you.
 6 JUDGE COUGHLIN: Okay. All right.
 7 So Respondent --
 8 MR. MCKAY: We're ready to proceed,
 9 Your Honor.
 10 JUDGE COUGHLIN: We're up to you.
 11 Okay. Are you ready to get started? Okay.
 12 Let's go.
 13 MR. MCKAY: I call Steve Drake.
 14 JUDGE COUGHLIN: Good afternoon, Mr.
 15 Drake. I need to place you under oath.
 16 MR. DRAKE: Yes, ma'am.
 17 JUDGE COUGHLIN: So if you wouldn't
 18 mind please standing and raising your right hand.
 19 WHEREUPON,
 20 STEPHAN DRAKE
 21 Was called for examination by Counsel for the
 22 Respondent, been first duly sworn, assumed the

316

1 witness stand, was examined and testified as
 2 follows:
 3 DIRECT EXAMINATION
 4 JUDGE COUGHLIN: All right. Thank you
 5 so much. Please have a seat.
 6 Go right ahead, Mr. McKay.
 7 MR. MCKAY: Thank you, Your Honor.
 8 BY MR. MCKAY:
 9 Q Sir, will you say your name and spell
 10 your last name for the record?
 11 A Stephan Drake. D-R-A-K-E.
 12 Q And where do you live, Mr. Drake?
 13 A Mobile, Alabama.
 14 Q All right. And what do you do for a
 15 living? How are you employed?
 16 A Truck driver. Own and operate a
 17 truck. Me and my wife, one-truck operation.
 18 Q Okay. So you're married?
 19 A Yes, sir.
 20 Q All right. And what's your wife's
 21 name?
 22 A Angela.

318

1 A We started July 2013 and left December
 2 2014 when we completed our obligation to repay
 3 for the free training and all that.
 4 Q And who did you go to work for after
 5 you left you left CR England?
 6 A Prime.
 7 Q Describe your experience working for
 8 CR England?
 9 A Well, taught not -- if you don't have
 10 anything good to say, don't say anything at all.
 11 It was very poor, but it got us where we wanted
 12 to be, so.
 13 Q How was it that you came to work for
 14 Prime?
 15 A During the time at CR England on the
 16 road, me and my wife both talked to drivers, you
 17 know, out there on the road a lot. And it seemed
 18 like Prime -- everybody we talked to from Prime
 19 was very positive. And so we made the decision
 20 to call them next.
 21 Q And so did you go through a training
 22 program with Prime?

317

1 Q All right. And is Angela also a --
 2 did you indicate also a truck driver?
 3 A Yes.
 4 Q Okay. Does she drive with you?
 5 A Yes. We drive team.
 6 Q How long have you been a truck driver?
 7 A We started in July of 2013.
 8 Q What did you do for work before you
 9 became a truck driver?
 10 A I was a director of information
 11 services at a hospital in Mobile.
 12 Q All right. And how about Angela, your
 13 wife, what did she do for work before becoming a
 14 truck driver?
 15 A She was a cardiac recovery nurse at
 16 the same hospital.
 17 Q Where did you first, or when you
 18 became a truck driver, who did you go to work
 19 for?
 20 A A company called CR England.
 21 Q All right. How long did you work for
 22 CR England?

319

1 A We went through their orientation
 2 program when we came over January 2015.
 3 Q Okay. Describe that.
 4 A It's like a Monday through Friday
 5 thing. Because we were already A Seats which
 6 means we already have experience and all that.
 7 And we had to go through all their safety
 8 programs and learn all their systems. Several.
 9 After you go through all the classes
 10 then you have to take several of these online
 11 tests where you sit in a training room and you
 12 have to pass all the tests and then you have to
 13 do a driving test which Prime did on simulators
 14 first and then I think there was an actual --
 15 well, we were A Seats, we didn't have to do the
 16 test in the real truck. But we did with CR
 17 England when we started.
 18 JUDGE COUGHLIN: Can you explain what
 19 that reference is, that you said you were
 20 already?
 21 MR. DRAKE: Well, we already had our
 22 CDL's plus over years' experience when we hired

1 in. So that's called an A Seat.
 2 JUDGE COUGHLIN: Okay.
 3 MR. DRAKE: Where as opposed to if you
 4 had your CDL but you didn't have any experience,
 5 you would have to go on a truck with an
 6 experienced trainer before you could be on a
 7 truck by yourself. Or if you had no CDL,
 8 nothing, you had to go through a longer extensive
 9 learning how to drive the truck.
 10 But when you had already driven for
 11 over a year, good records, they just give you one
 12 test to ensure you know how to drive a truck.
 13 JUDGE COUGHLIN: Okay. And that term
 14 was AC?
 15 MR. DRAKE: A Seat.
 16 JUDGE COUGHLIN: Okay.
 17 MR. DRAKE: Like a A,B and C seats.
 18 JUDGE COUGHLIN: Okay. Great. Thank
 19 you.
 20 MR. DRAKE: You work your way up.
 21 JUDGE COUGHLIN: Please, go ahead.
 22 BY MR. MCKAY:

1 those employee-type benefits. I don't know if
 2 that's defined as an employee or an independent
 3 contractor, but.
 4 Q Fair enough.
 5 A It feels as though you work with Prime
 6 through the process.
 7 Q At some point, did your status change
 8 where you obtained your own DOT number?
 9 A Yes. January of 2020 we had our truck
 10 paid off and got our -- applied, went through a
 11 very rigorous process to get our own authority.
 12 And now we are completely independent; but we
 13 stayed with Prime in the sense that they have a
 14 logistics side that's just for that.
 15 Owner/operators where the main
 16 difference is liability. We carry our own
 17 insurance and all that, but we still get our
 18 freight through Prime, and we still pull Prime's
 19 trailers.
 20 Q And this change where you then became
 21 the actual owner of the truck that you drive. Is
 22 that a program that you participated in through

1 Q Did your wife Angela go through that
 2 same orientation program with you?
 3 A Yes.
 4 Q Okay. And were you, during that
 5 orientation program, were you told and taught
 6 Prime's company philosophy?
 7 A Yes.
 8 Q All right. Do you know what that is?
 9 Are you able to say that?
 10 A Do your best. Do what's right. And
 11 treat others as you want to be treated.
 12 Q Okay. Was safety a point of emphasis
 13 at Prime?
 14 A Yes. With training and ever since.
 15 Q So when you started with Prime, were
 16 you an actual employee of Prime?
 17 A I don't know what kind of -- we, well
 18 we started as lease operators. We lease a truck
 19 through Success Leasing, and then we're our own
 20 LLC, but we lease our LLC back to Prime, run
 21 under their DOT authority, and it's essentially
 22 like you're employee. You get 401k's and all

1 Prime?
 2 A Yes. I mean, to get to where we own
 3 the truck. Yes. They have a regular lease, and
 4 they have an Ace lease. Regular lease, no money
 5 down, three-year lease. If you do everything
 6 right, complete the lease, there's monies that
 7 are put into escrow accounts plus matched by
 8 Prime and you get a bonus at the end.
 9 I think we got a \$26,000 bonus at end
 10 of the first lease which we used as a down
 11 payment on the second truck to go into their Ace
 12 lease, which at the end of the three years you
 13 get the truck for \$100 buyout or something like
 14 that.
 15 Q The program --
 16 A You get the title.
 17 Q The program seem fair to you? Worked
 18 out well for you?
 19 A Yeah. There's nothing that matches it
 20 in the industry. If you want to get to owning
 21 your own truck, I tell everybody Prime's got the
 22 best program to do that.

324

1 Q Let's go back to safety for a second.
 2 And you indicated that safety was a point of
 3 emphasis at Prime throughout your entire
 4 association at Prime. Do I have that right?
 5 A Oh, yes.
 6 Q Okay. Can you say more about that?
 7 A Well, they're -- you know, if you ever
 8 call them and say we don't feel safe to continue
 9 because of weather or anything like that, you
 10 know, it's always 10-4. Let us know when you can
 11 proceed. No -- never been pressured to keep
 12 going when we didn't feel safe to keep going.
 13 They constantly send out safety
 14 messages through the Qualcomm system and all
 15 that. Even when there's bad weather they'd send
 16 out messages that say, you know, we strive to get
 17 our loads on time but if you don't feel safe, you
 18 look after your ship. Shut down. Let us know.
 19 Q You never felt pressured to put your
 20 own safety, or your wife's safety, or the public
 21 at large's safety at risk?
 22 A No.

326

1 traveling up here?
 2 A Yes.
 3 MR. MCKAY: Do I need to say more
 4 about that, Your Honor? I just want to be
 5 transparent about that.
 6 JUDGE COUGHLIN: No, I appreciate it.
 7 I don't need to hear anything more.
 8 MR. MCKAY: Okay. All right. Very
 9 well.
 10 BY MR. MCKAY:
 11 Q At the time that you worked -- I'm
 12 going to ask you about an incident now. I'm
 13 going to ask you to go back in time some to
 14 September 27th of 2015. Do you recall that day?
 15 A Yes.
 16 Q Okay. Was there another significant
 17 event around about that same time?
 18 A Yes. My wife's birthday the 28th.
 19 Q What birthday was that for?
 20 A That's her 50th.
 21 Q Okay.
 22 A That's how I'll never forget the date.

325

1 Q Okay. Does Prime offer safety classes
 2 to their truck drivers?
 3 A Yes. I've been through it three times
 4 in my time.
 5 Q Okay. Prime ever suggest to you that
 6 you cut corners? Not do things right, maybe save
 7 the company some money?
 8 A No.
 9 Q You indicated you heard a lot of good
 10 things about Prime from other truck drivers
 11 before you went to work for Prime. Has Prime
 12 lived up to your expectations?
 13 A Yes. That's why I'm still here.
 14 Q Okay. And you actually -- I want to
 15 be clear about this -- you agreed to come up here
 16 from Mobile, Alabama to provide testimony today.
 17 Do I have that right?
 18 A Yes.
 19 Q Okay. And has Prime agreed to
 20 reimburse you for your travel cost and your loss
 21 of a couple days wages to accommodate your couple
 22 days your losing with work and your expense of

327

1 Q Okay. So on September 27th of 2015,
 2 were you -- did you own your own truck yet?
 3 A No. We were in or first leased truck
 4 that burned.
 5 Q Okay. And was there an occasion that
 6 caused you to pull over alongside the road at
 7 some point?
 8 A Yes.
 9 Q And whereabouts were you when you
 10 pulled over?
 11 A On I-84 west, maybe about an hour east
 12 of Boise, Idaho.
 13 Q Okay. And what type of load were you
 14 hauling?
 15 A PPG Paint HAZMAT load out of the
 16 Pittsburgh area. I forget the name of the exact
 17 town.
 18 Q Is that a load that you yourself had
 19 picked up?
 20 A Yes.
 21 Q Okay. Where was Angela at the time?
 22 A We were together. We're always

328

1 together on the road.
 2 Q Okay. And anybody else traveling with
 3 you? Or -- I know you've got some --
 4 A Two dogs at the time, yeah.
 5 Q How many did you say?
 6 A Two at the time.
 7 Q Okay. And you went to PPG's facility
 8 in Pittsburgh to pick up this load?
 9 A Yes.
 10 Q All right. And did you say that it
 11 was paint that you picked up?
 12 A Yes.
 13 Q All right. Who loaded the paint into
 14 your trailer?
 15 A It was a pre-loaded trailer. That
 16 shipper is always -- we picked up there a few
 17 times. It's pre-loaded. You bring in an empty
 18 trailer. They have the loaded trailer on a
 19 different Prime trailer with the product already
 20 on it, already sealed. And you just check in,
 21 give them your pick-up numbers, they tell you
 22 where to drop your empty, tell you which truck to

330

1 Q And do you need any sort of particular
 2 endorsement on your CDL, by that I mean your
 3 commercial driver's license --
 4 A Yes.
 5 Q -- to carry a HAZMAT load?
 6 A Yes. Yes. You have a HAZMAT
 7 endorsement.
 8 Q Did you have that endorsement?
 9 A Me and my wife did at the time, yes.
 10 Q Oh, okay.
 11 A We don't carry it anymore.
 12 Q You don't haul HAZMAT anymore?
 13 A No. We just -- after the incident in
 14 question here we decided we didn't want to
 15 anymore.
 16 Q Okay. All right. So let's talk then
 17 about the trip out to Idaho. Did you stop on
 18 occasion along the way to refuel or rest?
 19 A Yes.
 20 Q Okay.
 21 A If I recall right, that was a drop and
 22 hook load at the receiver too in Portland,

329

1 pick up, give you your bills of lading, and go
 2 through all the procedures there, and then take
 3 it and go.
 4 Q Was the load placarded?
 5 A Yes.
 6 Q All right. And does PPG take care of
 7 that placarding for you?
 8 A Yes.
 9 Q All right.
 10 A I can't remember if there were -- some
 11 of them will give you the placards and you would
 12 apply them on the trailer and sometimes they
 13 would already be on the trailer. I can't
 14 remember which in that case.
 15 Q But is that something that you do
 16 knowing that you were hauling a HAZMAT load. Do
 17 you confirm that the trailer is properly
 18 placarded?
 19 A Yes.
 20 Q And you mentioned a bill of lading.
 21 You said PPG provided you with a bill of lading?
 22 A Yes.

331

1 Oregon. So that means as soon as we get it there
 2 we can deliver it as opposed to a set time. So
 3 getting there early makes no difference. So
 4 whenever we get a load like that, we try to run
 5 it as fast as we can. But that doesn't mean
 6 speeding or anything, that means limited stops
 7 and continue moving because you make more money
 8 if you get there, get it delivered, get on the
 9 next load.
 10 Q Okay. And are you and Angela trading
 11 off driving then as you're traveling west?
 12 A Yes. She drives the days mostly and
 13 I drive the nights. And we alternate sleeping
 14 and driving. When we're on a load that can be
 15 expeditedly delivered we generally only stop for
 16 fuel, driver stops and 30-minute breaks.
 17 Q And when you stop, do you do anything
 18 to make sure that your semi and your trailer are
 19 still operational, appear safe and functional?
 20 A Oh, yeah. I always do a walk-around.
 21 Usually when I walk the dogs I get out and walk
 22 the dogs around the truck and give it the full

332

1 look over.

2 Q And do you maintain a log book that
3 allows you to track how many hours you're driving
4 as you travel?

5 A Yeah. We're on electronic logs. Have
6 been since we've started.

7 Q Okay. And you keep those up to date
8 on trips and including on a trip like this?

9 A Yes.

10 Q All right. So now going back to
11 September 27th of 2015. What is it that caused
12 you to pull over to the side of the road?

13 A I was -- it was middle of the night
14 sometime. Angela and the two dogs were all in
15 the back sleeping, and it was a routine night.
16 Going down and I saw glowing in my right
17 rear-view mirror and looked over and could tell
18 it was flames coming out of one of the wheels on
19 the trailer. So I immediately pulled over to the
20 shoulder.

21 Q Tell me what you did next.

22 A Well the fire got bigger quick. And

333

1 so I was just -- panic situation for me. I knew
2 we were carrying HAZMAT. I had no idea if it was
3 going to, you know, explode like in the movies.
4 So I, you know, first thought was the wife and
5 two dogs in the back. So I pulled the curtain
6 open and yelled, fire, fire, get up, we got to
7 get out. Get out. Get out.

8 And the two of us scrambled to get the
9 dogs out. The wife had to get dressed real
10 quick. And we all got out the passenger's side
11 of the truck and ran off to a safe distance. And
12 the only thing I grabbed out of the truck was my
13 phone because I knew I would need to call 9-1-1
14 as soon as we got clear.

15 Q Was that your first call, was to
16 9-1-1?

17 A Yes.

18 Q All right. And what did you convey to
19 9-1-1?

20 A That we had a -- that I was a truck
21 driver, I had a trailer fire on the side of the
22 road, location, and that it was HAZMAT material.

334

1 Q Okay. And were you -- did 9-1-1 in
2 response give you any specific direction or tell
3 you anything as you recall?

4 A That help was on the way.

5 Q Okay. And what did you do next?

6 A The next thing I really remember is
7 we're all standing on the side of the road. One
8 police officer showed up and we were standing
9 there, me, my wife, and the police officer.
10 Across the highway at that point, he'd blocked
11 traffic, watching it burn and it was going fast.

12 And it started burning at the back of
13 the trailer and the wind was blowing toward the
14 back of the trailer. So it had probably burnt a
15 quarter to a third of the way up the trailer
16 toward the tractor. And we were sitting there
17 thinking, you know, if it burns our tractor up,
18 at the time you know, it was just about
19 everything we had in that truck.

20 And so we were like, I think we can
21 save the truck. You know, by then I didn't feel
22 as nervous it was just going to blow up because I

335

1 had seen how it was burning. It looked like it
2 was just going to keep burning up. So I said to
3 the police man, I think I can go save my truck,
4 the tractor. And he said, well how long will it
5 take you? And I said, fast. And he said, well
6 if you're going to do it, do it right now.

7 So I ran across the street, cranked
8 the handle, fastest I've ever dropped a trailer,
9 and pulled the release lever, and got in and
10 started it up, put it in first gear, popped the
11 clutch, forgot to release the airlines and the
12 electrical lines, and they just popped off, and
13 pulled the tractor a couple hundred feet up.

14 And then at least that was a relief,
15 we had our home. Because that's your home on the
16 road. Bed and place to keep the dogs and
17 everything, so.

18 Q Yeah. Adrenaline was running while
19 this was happening.

20 A Yeah, very high, yes.

21 Q Okay. But you were able to get your
22 tractor --

336

1 A Yes.
 2 Q -- free of the trailer?
 3 A Free of the trailer, yes.
 4 Q Okay. And the fire that you described
 5 of the trailer, was an intense fire?
 6 A Oh, yeah. By the time I got the
 7 tractor released, flames were engulfing the
 8 entire back of the trailer well above the top of
 9 the trailer and it was the fastest, intensest
 10 fire I've ever watched.
 11 Q And was the fire, was it covering the
 12 entirety of the trailer and its load?
 13 A By the end it was, but at the time I
 14 released the tractor it was just at the back
 15 portion.
 16 Q Okay.
 17 A And then the barrels of paint started
 18 falling off the back and rolling into the grass
 19 and lighting the grass on fire. But by then the
 20 fire department was there managing it.
 21 Q Did you contact Prime headquarters
 22 while this was going on?

338

1 were okay. And I don't remember, it was seven
 2 years ago.
 3 Q Yeah.
 4 A A lot of detail. They were concerned.
 5 Q Concerned for your and Angela's
 6 safety?
 7 A Yeah. And I remember there was
 8 several calls throughout the night. So somebody
 9 else called me back shortly after the initial
 10 call to get information.
 11 Q And did you communicate to Prime that
 12 there were emergency responders that were on
 13 scene at some point?
 14 A Yes.
 15 Q Okay.
 16 A They requested pictures be sent to
 17 them and stuff like that throughout the course of
 18 the night.
 19 Q Okay. At some point, you indicated
 20 that law enforcement arrived on scene. At some
 21 point, did the fire department also arrive on
 22 scene?

337

1 A Yes.
 2 Q Okay. And where is Prime located?
 3 A Springfield, Missouri.
 4 Q Not where we are today.
 5 A Yes.
 6 Q Yeah. And so you called headquarters
 7 to report what was going on?
 8 A Yes. I believe the first thing I did
 9 after I called 9-1-1.
 10 Q Is there an emergency number that you
 11 can call, reach out to Prime in situations like
 12 this to say, you know, something's happening.
 13 A Yeah. There's always a 24-hour fleet
 14 manager and road assistance numbers. And I
 15 called -- I just, I think I just called my fleet
 16 manager and maybe road assist, but I called one
 17 of them. I think I called my fleet manager
 18 first.
 19 Q Okay. And tell me then about your
 20 communications with Prime.
 21 A I told them what had happened, that
 22 I'd called 9-1-1, and they were concerned that we

339

1 A Yeah. Very shortly after I got the
 2 tractor disconnected from the trailer fire trucks
 3 showed up.
 4 Q Okay. And I know this was seven years
 5 ago. So law enforcement, can you say whether the
 6 first person showed up was, for example, local
 7 law enforcement?
 8 A I believe so, yeah. I believe he was
 9 like a local city police officer.
 10 Q All right. And then at some point did
 11 a trooper with the Idaho State Police arrive?
 12 A Yes.
 13 Q All right. And were you involved in
 14 any discussions about the clean-up, or you know
 15 what was going to be done to clean up the effects
 16 of the fire?
 17 A Yes. At some point Prime notified me,
 18 I can't remember if that was through the
 19 messaging system, or what. I think it was
 20 through the Qualcomm messaging system that they
 21 had a company on the way to clean up the trailer,
 22 the mess.

340

1 Q Okay. And while this is going on, did
2 you have in your possession the bill of lading?
3 A Up until some point, the state
4 trooper, at some point, took everything. Our
5 permit books, and the bills of lading, and he had
6 everything in his possession for some time.
7 Q And so you provided the Idaho State
8 police officer, the Idaho State trooper with the
9 bill of lading for that hazardous materials load
10 you were carrying?
11 A Yes.
12 Q All right. And --
13 JUDGE COUGHLIN: Mr. McKay, who's
14 Brian? Brian? I think you had said Brian told
15 you company was on the way.
16 MR. MCKAY: I think maybe Prime.
17 MR. DRAKE: Prime.
18 JUDGE COUGHLIN: Oh, Prime. Prime
19 told you.
20 MR. DRAKE: Yes.
21 JUDGE COUGHLIN: That somebody was
22 coming to handle the trailer.

342

1 remember. But I remember him saying, well when
2 he gets here I want to see it. You know, maybe
3 he's gotten it, or he's going to have to show me
4 his HAZMAT certification before I'm going to let
5 him touch it. I said, okay. You're in charge.
6 Q Okay. And then at some point, did
7 individuals from B&W, or an individual from B&W
8 arrive on scene?
9 A Yes.
10 Q All right. And what did you observe
11 after the B&W individual arrived on scene?
12 A The state trooper and him had a
13 conversation a distance from me. I believe in
14 his police car that I couldn't hear.
15 Q How long did this conversation occur,
16 if you, you know if you had to say.
17 A Five, ten minutes.
18 Q Okay. So the trooper, the B&W
19 representative were in the troopers car talking,
20 communicating for five to ten minutes?
21 A Yes.
22 Q Okay. And what happened after that?

341

1 MR. DRAKE: Yeah. B&W Towing was
2 coming to remove the -- do the clean-up.
3 JUDGE COUGHLIN: Okay. Sorry. I
4 misunderstood.
5 BY MR. MCKAY:
6 Q And did you share that with the Idaho
7 State Police trooper that was on the scene? That
8 B&W was --
9 A Yes.
10 Q -- was coming to do the clean up?
11 A Yes. I told him when they notified
12 me, I told him B&W was coming to do the clean-up.
13 Q And what was the trooper's reaction to
14 that information?
15 A He said, B&W, I know that guy. He
16 doesn't have HAZMAT certification. He can't
17 touch this load.
18 Q Okay. And so at some point -- what
19 happened next?
20 A I said, well that's who's Prime's
21 sending. I'm sure they must think -- I think I
22 said I'd go back and ask Prime. I don't really

343

1 A Well, eventually the fire department,
2 after letting the trailer burn down and managing
3 the fire, turned it over to B&W for clean-up.
4 That was like going into the early morning hours.
5 Q So the fire department was there, and
6 the state trooper was there, and they turned the
7 scene over to B&W to clean up?
8 A Yes.
9 Q All right.
10 A The fire department left and at some
11 point it was just us, the state trooper, and the
12 B&W remaining at the scene.
13 Q And the state trooper permitted B&W to
14 clean up the scene?
15 A Yes.
16 Q And were there other individuals with
17 B&W that were also present besides the person who
18 was --
19 A I think it was two guys, yeah.
20 Q Okay.
21 A One guy was like the head in charge
22 kind of guy. He was the one that met with the

344

1 cop. And the other one was quiet in the
 2 background the whole time doing his job.
 3 Q Did the trooper perform an inspection
 4 of your vehicle, or I guess of your tractor --
 5 A Yes.
 6 Q -- and review all of your paperwork to
 7 make sure everything was in order and that you
 8 were doing things right?
 9 A Yes.
 10 Q Okay.
 11 A He did a full inspection.
 12 Q Okay. And was everything --
 13 everything checked out? Everything was in order?
 14 Your log book, everything?
 15 A Yes. He gave me one violation stating
 16 that because the trailer caught fire and burned
 17 to the ground, even though they can't inspect it
 18 to determine the problem, there must have been a
 19 problem. Therefore he gave me a violation which
 20 I strongly disagreed with. But it is what it is.
 21 Q So the only violation that the trooper
 22 found was, though obvious inspection, was review

346

1 there was something I should be violated for just
 2 because the trailer caught fire, but.
 3 Q Fair enough. Fair enough. To your
 4 knowledge, was the bill of lading provided to the
 5 representative from B&W Towing who was on scene?
 6 A Yes.
 7 Q How do you know that?
 8 A Because at some point after the police
 9 officer had returned everything to us and had
 10 done the inspection, he wanted a copy because he
 11 said he had to have a copy of the bill of lading
 12 just like we do in order to haul.
 13 So we didn't want to give him the
 14 actual bill of lading because we still needed it
 15 to file all our paperwork when we're done with a
 16 load. So he asked to take pictures of it with
 17 his cell phone. My wife got it out of the truck
 18 and let him take pictures of it.
 19 Q The B&W -- just to be clear, the B&W
 20 representative, he took pictures of the bill of
 21 lading and had that in his possession?
 22 A Yes.

345

1 of all your paperwork, was that your trailer
 2 caught fire.
 3 A That the trailer caught fire, there
 4 must have been something wrong with it.
 5 Q And you disagree with that because --
 6 why do you disagree with that?
 7 A Well, my experience since then, I know
 8 that you can blow a tire out in one of those
 9 trailers and have no indication inside the truck.
 10 And I don't know how many times we had stopped.
 11 We did the initial inspection of the trailer, and
 12 each time we stopped, we swapped drivers, we
 13 always reinspect the trailer. So there was
 14 nothing visible that I could see that indicated
 15 there was a problem with the trailer.
 16 And you know, it could have been two
 17 miles back, one tire blew out, didn't know it,
 18 and they can heat up going 65 miles an hour down
 19 the highway, can catch fire. So could have been
 20 a wheel bearing that looked good from a physical
 21 inspection but heated up and caught fire. So
 22 that's why I disagree with his assessment that

347

1 Q At some point, did you leave the fire
 2 scene?
 3 A Yes.
 4 Q When or how did that happen?
 5 A Oh, I don't remember the exact time,
 6 but it was daylight by then and the police
 7 officer told us finally, okay you're free to go.
 8 So we got back in our tractor and headed on to
 9 Boise and got a hotel room.
 10 Q And this trooper knew who you worked
 11 for, knew that you were driving for Prime. Is
 12 that right?
 13 A Yes. Yes.
 14 Q And the side of your truck said Prime?
 15 A Yes. That truck had the big Prime
 16 logo on the top and both doors.
 17 Q Okay. Was it your impression that
 18 Prime had things under control and was taking the
 19 steps that it needed to take in response to what
 20 emergency personnel was saying?
 21 A Yes. Yes.
 22 Q Okay. Where did you and Angela go

348

1 next?
 2 A Into Boise and got a hotel, I think at
 3 a Motel 6. We were very exhausted by that point
 4 and went to bed.
 5 Q Okay. Were you able to celebrate her
 6 birthday at some point?
 7 A Yeah. The next day we decided to
 8 just, since all this had happened, take us a
 9 little break. And we stayed the next day through
 10 her birthday. And I went birthday shopping and
 11 got her a cake and did a makeshift birthday
 12 celebration. And went back out to work the
 13 following day on the 29th.
 14 Q Okay. And still drive for Prime to
 15 this day?
 16 A Yes.
 17 MR. MCKAY: All right. I may be done,
 18 Your Honor.
 19 JUDGE COUGHLIN: Okay.
 20 MR. MCKAY: That's all I have.
 21 JUDGE COUGHLIN: All right.
 22 MR. MCKAY: Thank you.

350

1 Q All right. Well what I'm doing now is
 2 called cross-examination. And so I'm just asking
 3 you mostly yes or no questions. I'll try to be
 4 quick, and we'll see how it goes.
 5 A Okay.
 6 Q All right. So at the time of the
 7 fire, were you getting a paycheck from Prime or
 8 was the LLC getting the paycheck from Prime?
 9 A It went directly into my personal
 10 checking account then.
 11 Q Okay. All right. And what about now?
 12 A What about --
 13 Q What about today, presently?
 14 A Now it goes into my business account.
 15 Q Okay.
 16 A It's to Loads upon Trucking.
 17 Q Got it.
 18 A We pay ourselves a salary out of that
 19 account. We're much more sophisticated now.
 20 Q Well that's fantastic.
 21 Did you speak with an attorney about
 22 testifying today?

349

1 Thank you, Mr. Drake.
 2 CROSS EXAMINATION
 3 BY MR. FIGUR:
 4 Q Hi Mr. Drake, How are you?
 5 A Good, how are you?
 6 Q Good thanks. My name is Chuck Figur.
 7 I'm an attorney with the Environmental Protection
 8 Agency in Denver.
 9 A Nice to meet you.
 10 Q Nice to meet you too. You know,
 11 before we start the whole team, on behalf of the
 12 whole team, we just want to say it sounded like
 13 -- that night sounds terrifying, and we're glad
 14 that you, your wife, and the dogs all made it out
 15 safely.
 16 A Me too.
 17 Q It sounds like quite the incident.
 18 A Me too.
 19 Q Yeah. So have you been told about
 20 cross-examination? Have you ever testified
 21 before?
 22 A No, this is the first.

351

1 A Just Scott.
 2 Q Okay. And are Prime's attorneys --
 3 you have your own LLC, and are Prime's attorney's
 4 representing you or your LLC?
 5 A No.
 6 Q Or are they representing Prime?
 7 A Prime.
 8 Q Okay. Shortly after the fire, do you
 9 remember being interviewed by an investigator by
 10 the EPA?
 11 A Yes.
 12 Q Okay. And do you remember at any time
 13 being interviewed by an investigator for Prime?
 14 A Yes.
 15 Q Okay. Did you ever see any documents
 16 relating to those interviews?
 17 A No.
 18 Q Okay. And let's talk about the
 19 Qualcomm system for a second. You testified that
 20 Prime might have gotten in touch with you using
 21 the Qualcomm system. And I'm just wondering,
 22 when you use the Qualcomm system, is that a

352

1 written system or is it a verbal system?
 2 A Written. It's like email.
 3 Q It's written like email. And when you
 4 use the Qualcomm in your truck, are those
 5 recorded? Are those emails recorded?
 6 A It's my understanding that yes,
 7 nothing is ever -- even if you delete it it's
 8 kept in some master database somewhere.
 9 Q Okay. And do you have any idea if
 10 Prime has -- that that would be true for Prime,
 11 that Qualcomms that are sent or received are
 12 kept?
 13 A Yeah. There's been times when, you
 14 know, I had something where somebody has said
 15 something to me and I spoke to my fleet manager
 16 and he says, don't worry, everything's saved. If
 17 they told you that, I'll go find it. Or whatever
 18 type stuff. Little stuff.
 19 Q All right. So you've spoken about a
 20 few different police officers, and I just want to
 21 try to make sure that the next set of questions I
 22 ask you are about one specific one.

354

1 A I know I had initially on the 9-1-1
 2 call, the tractor was still connected to the
 3 truck, and I didn't have all the paperwork with
 4 me. And I had given them the wrong HAZMAT
 5 number. I had transposed a number or something.
 6 So when the fire -- the only thing I remember
 7 interacting with the fire department was
 8 clarifying when they got there and showing them
 9 that it's not 1260, it's 1206 or whatever it was,
 10 which I can't remember at this time.
 11 Q That's all right. And would you be
 12 surprised that their record reflects that that
 13 was corrected, you know, less than an hour into
 14 the incident?
 15 A Yeah.
 16 Q That the fire department knew the
 17 right UN number?
 18 A Yes. As soon as they arrived on site.
 19 Q Okay. Good. And so you never spoke
 20 directly to Chief Janousek, the chief if the fire
 21 department beyond that?
 22 A No.

353

1 So early on I believe you testified
 2 that there was a local police officer?
 3 A Yeah.
 4 Q And then at some point, an Idaho State
 5 police --
 6 A Yes.
 7 Q -- officer showed up. Okay. And
 8 would you recollect that that might be Sergeant
 9 Bonner?
 10 A Yes.
 11 Q Okay. And do you remember the chief
 12 of the King Hill rural fire department, he was
 13 there at the beginning of the scene? Is that
 14 right? Or at the beginning?
 15 A I remember a lot of firemen.
 16 Q Yeah.
 17 A I didn't have any real interaction
 18 with them.
 19 Q So you didn't --
 20 A Other than I think they asked me about
 21 the hazardous material that I was carrying.
 22 Q Okay. So --

355

1 Q Okay. And are you aware that when
 2 Chief Janousek left, that Sergeant Bonner became
 3 incident command?
 4 A He definitely appeared to be the man
 5 in charge from the minute he drove up to me. I
 6 wasn't told specifically who was -- you can just
 7 sense these things.
 8 Q Okay. Fair enough. And I just want
 9 to clarify, or just check in on a few things you
 10 said. And when Sergeant Bonner talked to you, he
 11 was telling you that the scene remained HAZMAT,
 12 right? That this was a HAZMAT scene, it needed
 13 to be cleaned up as a HAZMAT scene? That's what
 14 he was telling you?
 15 A Yeah.
 16 Q Okay.
 17 A In so many words, that was the
 18 understanding, yeah.
 19 Q Okay. And that is what you conveyed
 20 to Prime?
 21 A Yes. They were aware it was a HAZMAT.
 22 Q And when you were speaking with Prime,

356

1 Prime assured you that B&W could handle the
2 HAZMAT. Is that right?

3 A I don't remember specifically. I know
4 they knew it was a HAZMAT load, that they were
5 going to find someone to come dispose of it, and
6 if my memory serves right it was just a message
7 on the Qualcomm that said B&W Towing should
8 arrive in you know, however many minutes which
9 was how they always do it. If you've got a flat
10 tire, I'll call and tell them. I get a message
11 back that says so and so should arrive within one
12 hour.

13 Q Okay. And you don't remember whether
14 the conversations about B&W were via Qualcomm or
15 by your phone, correct?

16 A I think by the time they sent that,
17 that was just a Qualcomm message. I don't
18 remember any direct conversation beyond that,
19 specifically about B&W.

20 Q And did Mr. Derek who works for B&W
21 contact you while he was on his way to the scene?

22 A He may have. I don't recall.

358

1 had another flatbed trailer sitting in front of
2 our trailer and they were hooking things up,
3 making preparations to pull one on top of the
4 other and haul it off.

5 Q Okay. I bet that looked complicated.
6 When you left the scene, were you confused about
7 whether it was still a HAZMAT scene, or it was no
8 longer a HAZMAT scene?

9 A I don't think I gave it much thought.
10 It was no longer attached to my truck and my
11 responsibility.

12 Q That's fair enough. But when you left
13 the scene, did it appear -- and this is again
14 when you left the scene. Did it appear that
15 Sergeant Bonner was at all confused about whether
16 it was a HAZMAT scene?

17 A No.

18 Q Okay. In your recollection, he
19 believed it was still a HAZMAT scene.

20 MR. MCKAY: I think that's
21 mischaracterizing what he said. He said he
22 doesn't -- didn't have that conversation when he

357

1 Q Okay. So you don't remember if he got
2 in touch with you?

3 So you did hear Sergeant Bonner tell
4 Mr. Derek that it was a HAZMAT scene, and he
5 needed his endorsement or his certification after
6 he arrived, correct?

7 A No. I didn't hear. He told --
8 Sergeant Bonner told me that if he didn't show
9 his certification he wasn't going to allow him to
10 touch the load. And then I saw the two of them
11 having a conversation that I couldn't hear.

12 Q I see. Okay. Thank you. And then
13 you were released, and you have no idea how those
14 conversations turned out then?

15 A No. But B&W was cleaning up. You
16 know, the scene had been turned over to them by
17 the time I left, and they were working on getting
18 it.

19 Q And do you remember saying before to
20 -- well do you remember whether the clean-up had
21 started before you left?

22 A Yes. It had started. I think they

359

1 left.

2 MR. DRAKE: Yeah. I mean --

3 JUDGE COUGHLIN: Wait, what was the
4 question again? I'm sorry. I was taking a note,
5 so.

6 MR. FIGUR: Sure. So I don't remember
7 the precise wording of the question now. I tried
8 to rephrase it. But I was asking whether when
9 Mr. Drake left the scene, whether Sergeant Bonner
10 seemed confused about whether it was still a
11 HAZMAT scene or not a HAZMAT scene.

12 JUDGE COUGHLIN: You mean at the time
13 he was leaving?

14 MR. FIGUR: Yes. Well, not after he
15 got in the truck, but as he was preparing to
16 leave. He's being released.

17 BY Mr. FIGUR:

18 Q Well let me ask you this. Who
19 released you from the scene?

20 A Sergeant Bonner.

21 Q Okay.

22 A Once he said that to me initially,

360

1 that if B&W doesn't show me that he's certified,
2 he can't touch the HAZMAT, I never had any more
3 conversation about the HAZMAT portion of it again
4 with anyone.

5 Q Okay. Thank you.

6 MR. FIGUR: I think that's all, Your
7 Honor.

8 JUDGE COUGHLIN: Okay.

9 MR. FIGUR: Thank you.

10 JUDGE COUGHLIN: Just one second.

11 Any re-direct?

12 MR. MCKAY: Just very brief.

13 JUDGE COUGHLIN: Sure.

14 RE-DIRECT EXAMINATION

15 BY MR. MCKAY:

16 Q You know, it was very nice of
17 Government Counsel to say that we -- that they're
18 glad you're okay. And I think I can speak for
19 Prime and everybody here that we're all glad you
20 and Angela are okay, and we appreciate you coming
21 up here from Mobile to give testimony today.

22 A Yes, sir.

361

1 Q All right. Thank you.

2 MR. MCKAY: That's all I have, Your
3 Honor.

4 MR. DRAKE: Thank you.

5 JUDGE COUGHLIN: All right. Thank
6 you. Yes. I echo that.

7 Thank you, Mr. Drake.

8 MR. DRAKE: All right. Thank you.

9 JUDGE COUGHLIN: Yes, sir. Thank you.
10 Have a good day. Safe Travels.

11 We have just shy of a half an hour.

12 Is it, would you like to get started with
13 somebody? Would you prefer to wait? I don't
14 know who you're --

15 MR. MCKAY: Yes. I think it's going
16 to take me a little while to get hooked up and
17 get my exhibits all lined up.

18 JUDGE COUGHLIN: Okay.

19 MR. MCKAY: And given the time, it
20 might make sense to just start fresh in the
21 morning. I think we're making good pace here.

22 JUDGE COUGHLIN: Okay.

362

1 MR. MCKAY: And should be able to wrap
2 things up on schedule. So for what it's worth, I
3 suggest we break for the day.

4 JUDGE COUGHLIN: Okay.

5 And from the region?

6 MR. FIGUR: Your Honor, I think we're
7 okay with that. We'd just like to confirm at
8 this point the order of witnesses.

9 JUDGE COUGHLIN: Do you know who
10 you're calling next and in what order they'll be
11 in?

12 MR. MCKAY: So I'll reconfirm.

13 JUDGE COUGHLIN: Okay.

14 MR. MCKAY: So who we are calling
15 next? So Kelly O'Neill, Steve Field, Bill
16 Sprague, Brian Singleton, Dr. Walker. But I
17 think I previously said we're going to stand-by
18 that.

19 JUDGE COUGHLIN: Okay.

20 MR. MCKAY: Okay?

21 JUDGE COUGHLIN: All right. I guess
22 while we have a few minutes, let me do a quick

363

1 run-down with both sides. Because we have a lot
2 of exhibits. And you know, just to use a few
3 minutes now, let me just confirm we are all on
4 the same page if you don't mind. It shouldn't
5 take very long. I know everybody's probably
6 tired. But just a few minutes to do this.

7 So let me know when you're ready.

8 MR. MCKAY: We're ready, Your Honor.

9 JUDGE COUGHLIN: Okay.

10 And Mike and Alyssa, if you could just
11 kind of check and make sure I've got it here.

12 Region, are you ready too?

13 MS. JACKSON: Yes, Your Honor.

14 JUDGE COUGHLIN: Okay. So I'm just
15 going to begin with Complainant's. And I'm
16 including that which was stipulated to, just so I
17 don't get myself confused, okay?

18 So here's what's in: CX01, CX02,

19 CX03, CX04, CX04-corrected, CX06, CX07, CX08,

20 CX09, CX10, CX13 that was by stipulation, CX14,

21 CX15 also by stipulation, CX16, CX17, CX19, CX20,

22 CX22, CX23, CX24, CX25, CX26, CX27, CX28, CX29,

364

1 CX30, CX31. This next set was all by stipulation
 2 so it's redundant, but it's CX32 all the way
 3 through CX47, CX49, and CX50 also by stipulation.
 4 CX52, CX53, CX54, CX55, CX56, CX57, CX58, CX59,
 5 CX60, CX61, CX62, CX64-corrected that was by
 6 stipulation, CX65, CX67, CX75, CX76, and CX77.
 7 We all on the same page as far as
 8 Complainants?
 9 MS. JACKSON: Yes, Your Honor.
 10 JUDGE COUGHLIN: Okay.
 11 MR. RYAN: On 56, Your Honor, I think
 12 was only partial.
 13 JUDGE COUGHLIN: Yes, thank you.
 14 Thank you.
 15 MR. RYAN: It was just the drum logs.
 16 JUDGE COUGHLIN: Thank you for
 17 pointing that out. I have it in my notes versus
 18 on my sheet. So let me -- and there were
 19 specific pages. My memory is 13 to 53 of CX66 is
 20 what was admitted, is that right?
 21 MS. JACKSON: That was my memory as
 22 well, but I can double check.

366

1 you all think?
 2 MR. MCKAY: I think we're moving
 3 along, but maybe we could just play that somewhat
 4 by ear tomorrow.
 5 JUDGE COUGHLIN: Okay.
 6 MR. MCKAY: If that would be okay?
 7 MR. FIGUR: Apologies, Your Honor, we
 8 were discussing a couple of the exhibits that we
 9 weren't 100 percent clear on. I missed the
 10 question.
 11 JUDGE COUGHLIN: Oh, just about lunch.
 12 Any preference? We can see how it goes tomorrow,
 13 whether to do an abbreviated lunch. Are you all
 14 prepared though if we do? You'll be able to
 15 accommodate that?
 16 MR. FIGUR: Yes.
 17 MR. MCKAY: Yes, Your Honor.
 18 JUDGE COUGHLIN: Okay. Hopefully it
 19 won't be necessary. All right. I'll see you all
 20 back at 8:00 a.m. and I'm just going to take a
 21 minute to pack up, but please don't chat with me
 22 while I do.

365

1 JUDGE COUGHLIN: Okay. I'm looking at
 2 my notes which are not a transcription, but --
 3 MR. FIGUR: I have it, Your Honor. It
 4 is 13 to 53.
 5 JUDGE COUGHLIN: Okay. So let me add
 6 then to what has been admitted pages 13 through
 7 53 of CX66 but only that section.
 8 Okay. Is that it Alyssa? All right.
 9 And then with regard to Respondents,
 10 I think we're really -- it's still just what was
 11 stipulated to, right? So I won't repeat all that
 12 because we went through that already. I don't
 13 think anything has been moved in besides what has
 14 been stipulated to, right?
 15 MR. MCKAY: That's right.
 16 JUDGE COUGHLIN: Okay. All right. So
 17 I'll just leave that be. Unless you want me to
 18 reiterate it? No. Okay. All right. So all set
 19 on 8:00 a good starting time?
 20 MR. MCKAY: Yes, ma'am.
 21 JUDGE COUGHLIN: And in terms of
 22 lunch, should we abbreviate it or how -- what do

367

1 Have a good night. See you soon.
 2 We're in recess until then.
 3 (Whereupon, the above-entitled matter
 4 went off the record at 4:34 p.m.)
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 10
 11
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 13
 14
 15
 16
 17
 18
 19
 20
 21
 22

A			
A,B 320:17	258:13	adds 229:19	152:14
a.m 1:16 4:2 114:18,19	accurately 34:8	adjudicator 153:7	advocate 153:10
195:19 277:8,17	Ace 323:4,11	adjust 69:10	aerial 141:18 209:16
366:20	achieved 111:22	adjusted 46:15 69:18	afford 63:17
abbreviate 365:22	acknowledge 83:22	101:3 105:16 218:2	aftermath 278:9,15
abbreviated 366:13	131:11 165:18 206:6	246:9 310:5,7	afternoon 315:14
ability 54:21 58:3,4,5,8	277:9	adjuster 245:4	agencies 24:18 184:21
98:3 104:2	acknowledged 8:21	adjusting 82:17	311:12
able 10:17 35:7 66:11	102:22 238:22	adjustment 36:15 37:11	agency 1:2 2:11,13
72:6,8,19,22 78:4	Act 22:1	45:19,21 54:16,18	28:10 36:1,21 46:13
83:5 165:21 211:4	acting 291:9	55:8,15 56:11,13,16	55:7,13 59:19,21
227:18 321:9 335:21	action 36:1 91:3 187:17	56:18,22 57:15 58:9	98:15 106:15 107:13
348:5 362:1 366:14	291:18 292:4,13	58:13,16 59:3,4,8	111:3 133:20 134:1
above-entitled 1:15	295:11	98:18,21 99:5 100:19	149:1,7 150:13 153:1
114:17 195:18 253:10	actions 4:19 47:20 48:5	100:20,22 101:3,5	153:10 165:13 168:18
367:3	49:1,8,15,16,21 50:15	124:22 125:4,7,16	169:5 172:2 174:6
above-referred 168:14	55:6 98:15 181:15	131:16 138:13,14,16	181:15,22 182:3
201:6	218:7,12 291:12	138:19 140:3,5,14	183:11,21 184:15
absent 301:21	295:7 296:22	176:16,18 178:10	199:16 285:21 288:7
absolutely 44:6 57:9	activities 24:19 51:15	182:5 188:9,10	288:9 349:8
83:12 108:13 143:13	183:6,12,18	189:11,13,14 191:5	agency's 144:13 286:6
AC 320:14	activity 49:7 89:18	227:4,15,19,21 228:7	ago 198:7 338:2 339:5
accelerated 148:3	118:11	228:15 229:21 259:5	agree 27:20 35:11,17
149:13,14,17	acts 116:11	260:18 262:11 264:14	43:5 50:18 51:9 69:19
accept 231:3,7	actual 38:1 49:6 50:11	264:22 279:10 285:10	109:7 170:9 199:19
acceptable 5:22	85:17,20 86:8 113:20	287:9 290:19 291:22	202:15 205:6,20
access 164:11	117:10 131:9,12,12	292:6,8,19 293:15,20	215:2 217:21 219:15
accident 119:6	131:15,17 165:14,19	adjustments 43:16	220:15,19 221:10,12
accommodate 325:21	165:21,22 166:1	44:18 98:2,5 181:19	221:17 223:6 229:15
366:15	224:18 225:13 238:21	181:20 188:6 217:16	230:13 231:13,21
accompanied 119:5	239:15,17 319:14	261:4 286:4 290:11	232:11,15,18 233:2
accompany 74:7 127:3	321:16 322:21 346:14	administrative 1:1,22	240:21 241:2 250:21
account 49:15 65:13	add 53:21 57:14 121:15	5:18 151:19 285:15	256:21 257:2 259:19
75:18 91:18 95:9	125:6 150:19 176:17	admissibility 17:15,19	260:2,13 263:2
98:13 100:12,14,17	262:7 294:20 365:5	23:18	265:13,14,16,19
100:18 102:7,14	added 140:13,17,18	admissible 63:21	269:18 270:6 271:5
120:9 123:3,13,18,21	159:9 178:12	admission 13:21 14:6	273:8,10 277:16
123:22 125:3 126:2	adding 100:19	198:21	283:21 284:2 287:11
130:22 135:17,19	addition 10:13 115:9	admit 34:14 63:8	289:6
140:7 141:5 155:2	178:11 188:17 214:1	198:19 209:14 236:3	agreed 60:5 254:12
156:1,4,14 157:22	286:15	283:16	325:15,19
158:2 161:5 174:21	additional 7:3 27:2 31:1	admitted 11:7,21 14:4	agreement 205:16
176:20 178:19 180:4	60:17 100:21 125:4	18:10,14,16 19:15,16	agrees 205:6
189:20 190:19 216:14	125:10 140:5,11	34:20 64:3 87:15	ahead 14:11 21:6 27:13
219:10 221:5 224:4	142:21 143:16 144:17	105:8 111:15 117:6	46:8 52:15 67:8 70:7
233:9 236:8 238:11	149:10,15 152:1	135:13 163:7 168:9	73:21 78:15 86:19
286:1 290:18 350:10	176:18 188:9,14	168:13 201:4 364:20	87:17 92:8,14 108:10
350:14,19	191:18 300:21	365:6	109:12 110:8 112:14
accounted 144:15	Additionally 300:15	admitting 198:21	115:1 120:5 136:12
accounts 186:16 239:7	address 6:13 11:3 14:6	admonishments 300:9	138:5 139:22 146:7
252:8 323:7	17:14,18 36:10 43:2	Adobe 65:22	146:10 153:17 170:14
accumulation 30:11	88:8 92:19 145:4	adopted 208:14	177:21 182:16 193:3
128:13	264:20	Adrenaline 335:18	209:5 253:14 254:21
accurate 19:21 110:19	addressed 13:20 16:22	advance 7:18 196:19	256:1 268:10 296:6
167:4,18 246:6	150:8 236:2	197:7 303:16	314:1 316:6 320:21
	addresses 95:1 213:22	advocacy 149:21	aid 9:4,6 10:7,10 12:5

- 41:11 110:9 111:1
302:14
- airlines** 335:11
- Alabama** 316:13 325:16
- alerts** 183:9
- allegation** 256:6 265:11
- allegations** 26:18 27:9
216:11 265:4,21
- alleged** 25:20,20 27:3
27:22 191:13,18
253:2,7 261:1 263:17
- alleges** 253:18 256:10
- alleging** 257:13
- allow** 63:7,15 357:9
- allowed** 7:21 101:20,21
137:22 285:2 290:10
305:8
- allows** 116:6 141:17
332:3
- alluded** 88:17
- alongside** 327:6
- alternate** 331:13
- altogether** 225:12
- Alyssa** 4:13 363:10
365:8
- amend** 203:8
- amended** 36:19
- amendment** 42:12
216:13 217:4 264:11
- amendments** 42:15,19
- amount** 45:11 63:17
95:6 97:4 106:7 123:9
126:13 141:14 156:17
156:19 174:14 180:1
186:14 219:17 233:22
256:9 258:13 266:16
288:16 290:3
- amounts** 41:5 261:3
- analyses** 281:5
- analysis** 35:17 50:17
53:13 73:11 81:7
91:18 97:14 104:16
104:19 105:6,13
113:2,3,4,7,13 121:15
124:7,17 136:19
140:3 148:19 175:19
176:16 187:12 188:6
201:11 202:16 207:15
214:18 215:10,17
232:7 237:17 266:3,5
290:7 300:16 312:14
- analytical** 73:10
- analyze** 40:8
- analyzed** 38:6 39:14
46:12 102:4 236:4
- ancillary** 42:17
- and/or** 39:4,4,9 226:18
227:6 228:16
- Angela** 316:22 317:1,12
321:1 327:21 331:10
332:14 347:22 360:20
- Angela's** 338:5
- Angeles** 5:2
- answer** 67:1 72:6
112:10 212:18,19,20
233:8 282:8 289:18
314:1
- answer's** 295:10
- anybody** 31:15 68:9
119:11 304:11 306:18
314:8 328:2
- anybody's** 225:21
- anymore** 128:16 330:11
330:12,15
- anyway** 18:17
- apologies** 126:13
153:11 169:18 186:18
201:2 255:17 366:7
- apologize** 19:12 42:20
67:19 99:9,12 100:1
132:19 167:15 196:9
196:12,19 197:7
198:2 247:12,15
261:14 284:20,21
293:9 296:12,16
303:16
- apparently** 84:8
- Appeals** 5:10
- appear** 121:20 185:13
303:16 331:19 358:13
358:14
- APPEARANCES** 2:1
- appeared** 355:4
- appears** 142:2 180:14
180:19 181:1 206:15
226:10
- appendix** 3:10 15:8
61:15 62:7,20 63:1
- applicable** 36:6 130:19
130:21 217:15 280:10
280:11,15,18,21
- application** 299:12
- applied** 54:16 58:9,17
59:9 75:18 97:22
103:14 104:8 106:5
113:20 125:1,17
126:1 132:17 135:3
136:20 138:14,15,20
139:5 140:5,9 141:4
176:5,22 188:1,12,19
191:16 245:5 249:8
291:19 322:10
- applies** 43:4 250:22
266:4
- apply** 37:11,13 56:18
134:5 137:13,15,17
181:22 220:16,17
221:12,19 228:2
232:1 233:1 290:19
329:12
- applying** 101:4 191:5
219:16,18 221:8
280:4
- appointed** 153:9
- appreciate** 12:5 68:15
69:1 112:2 155:22
193:10 196:15 255:9
264:2 293:12 326:6
360:20
- appreciated** 153:15
- apprise** 133:13
- approach** 35:12,17
59:19 144:13 179:22
203:4 204:14 206:16
305:1
- approached** 75:7
- approaches** 270:6
- appropriate** 34:3 53:20
81:17 137:12 149:6
152:16 153:2 182:7
206:21 274:14 300:22
- appropriately** 15:5
- approved** 283:13
- approximately** 99:19
127:12 157:14 193:14
256:14 258:10 273:5
273:8 298:11
- April** 192:21 193:13
194:3 203:9
- area** 110:5 146:22
155:3 161:10 164:21
167:12 168:21,22
169:11,11 170:21
171:4,21 172:3,6,9
173:5 211:2,17 262:4
299:16 327:16
- areas** 47:13
- argue** 28:3
- argument** 254:12
- arguments** 63:16 204:6
- arises** 301:13
- arrive** 338:21 339:11
342:8 356:8,11
- arrived** 95:15 145:9
154:1 190:21 244:22
338:20 342:11 354:18
357:6
- Article** 5:21
- arts** 20:17,17
- ascertain** 285:14
- asked** 9:17 25:5 84:9
200:17 206:6,19
291:8 304:16 312:13
346:16 353:20
- asking** 42:6,6 72:14
142:15 151:17,22
152:1 153:5 205:18
206:16 208:8 239:16
274:18 279:2,3
282:18,19 288:2,6,11
289:12,13 290:21,22
296:17 297:15 298:14
350:2 359:8
- asks** 219:20 289:9
- aspects** 40:1 51:11
- assess** 25:8,21 36:7
38:12 137:22 191:20
214:13 228:20 253:18
282:12
- assessed** 97:15 139:6
237:13
- assessing** 227:14
228:13 313:16
- assessment** 3:14,21
26:17 33:10 35:11
52:19 91:15 179:16
214:13 286:6 345:22
- assign** 32:6
- assist** 337:16
- assistance** 337:14
- assisting** 276:4
- associated** 56:1 102:1
124:1
- association** 324:4
- assume** 10:2 66:4
82:15 99:14 104:14
246:8 269:17 270:2
277:8
- assumed** 19:9 237:2
315:22
- assuming** 147:10
212:15 213:3,3
- assumption** 57:12
237:5 239:3 243:22
- assumptions** 243:19
- assured** 356:1
- attached** 358:10
- Attachment** 13:15 62:7
- attachments** 219:7
- attempt** 12:5 14:4 48:5
96:4 99:3 133:16
186:1 187:3 285:14
- attempted** 204:3
- attempts** 134:14 175:5

attention 8:6 96:12
180:10 264:20
attitude 287:3
attorney 247:13 349:7
350:21
attorney's 351:3
attorneys 20:6 351:2
audible 233:6
audibly 212:18
audio 4:16 5:14 82:20
129:17 138:18
August 31:18,19 61:10
65:16 95:16 101:20
137:2 154:2 210:17
265:8,15 271:16,18
272:16 273:6,6,16
274:6,10 275:19,20
275:21
authenticity 23:18
authorities 274:20
authority 289:22
321:21 322:11
auto 29:20
automatically 79:10
192:3
available 44:13 60:5,8
258:1 301:19 314:8
averages 171:5
avoid 286:3
avoiding 232:6
award 285:16
aware 154:19 157:21
166:12 273:14,22
274:22 300:4 301:7
311:11 355:1,21

B

B 226:18 227:13
B&W 341:1,8,12,15
342:7,7,11,18 343:3,7
343:12,13,17 346:5
346:19,19 356:1,7,14
356:19,20 357:15
360:1
bachelor 20:16,17
back 4:4 11:10,11,15
14:8 20:6 29:6 52:7
55:11 70:1 76:1 83:17
88:2 90:3 93:11 98:8
99:3 109:11 112:16
114:15,20 120:12
121:11,17 141:19
147:13 148:6 151:1
153:19 155:12 160:8
167:20 173:12 175:9
181:20 182:1 195:10

195:21 197:4 207:3
215:5 229:11 232:20
237:2 239:3,18,20
244:14 255:4 261:13
262:15,15 267:19
268:3,8 270:18 279:8
321:20 324:1 326:13
332:10,15 333:5
334:12,14 336:8,14
336:18 338:9 341:22
345:17 347:8 348:12
356:11 366:20
background 20:15
165:4 212:9 344:2
bad 241:8 324:15
balance 149:22
barely 67:18
barium 81:21
barrels 336:17
barricade 275:7
barriers 275:2
base 140:19
based 13:13 25:16
38:14 43:14 54:1,4
72:2 73:9 85:17 86:6
87:8 88:12 89:6 91:1
100:22 109:14 125:8
136:16 137:5 139:11
167:13 169:2 172:6
177:1 179:20 188:12
203:2 205:18 212:5
218:1 223:20,21,22
224:2 227:5 228:9
229:6,18 231:17
234:13 237:15 239:3
243:19 245:14 280:5
280:7 282:13 283:6
289:1,13 296:6
basically 19:16 29:11
30:2 32:14 33:10,20
35:15 38:8 39:15 41:3
46:14 55:13 56:11
57:2,10 58:4,13 81:5
88:18 91:20 93:4 99:2
100:19,21 101:3
104:4 105:9 116:11
120:13 161:8 290:17
291:2 305:3
basis 31:7 51:12,17
85:19 111:5 132:21
144:13 172:12 215:17
238:20 260:4 269:15
269:22 271:4 285:11
289:5
bean 306:20
beans 295:12,14 296:8

296:19 297:1,2,4,11
297:17,22 298:22
bear 261:14
bearing 345:20
beating 111:12
becoming 317:13
bed 335:16 348:4
began 25:5 145:9
265:20
beginning 9:17 28:10
28:10 71:13 111:15
247:20 353:13,14
begins 15:15 156:3
behalf 2:2,10 60:19
91:3 153:8,9 288:6,7
288:8 349:11
believe 19:21 23:12
28:9 41:17 43:18
66:10 67:4 75:2 77:3
78:1,12 82:21 84:19
85:11 110:3 135:14
139:1 154:21 186:15
194:1 198:6 202:19
202:20 214:9 216:21
217:2 218:13 219:10
227:3,17 245:19
252:2 256:19 261:21
264:1 271:15 272:1
293:5 294:9 308:17
311:15 312:12,15
337:8 339:8,8 342:13
353:1
believed 126:16 358:19
benefit 20:5 37:13
59:20,21 60:1 104:10
105:19 106:3,5,14
112:17,20 113:20
125:20,21,22 126:1
140:22 141:2,4
178:15,18 189:16
193:8 229:13 230:2
230:10 231:22 232:1
232:2,9 252:3 254:3
256:15 258:11,15
268:16 269:12 270:10
270:19 279:20 280:14
benefits 322:1
BENJAMIN 2:7
best 4:13 12:4 48:7
321:10 323:22
bet 358:5
better 68:19 82:15 83:4
152:6 226:21 255:20
295:3
beyond 5:17 27:18
28:20 54:2 144:1

314:9 354:21 356:18
big 167:10 225:7 250:8
250:16 286:12 347:15
bigger 225:3 332:22
bill 74:7,8,13,14,16,19
78:2 84:2,11 92:22
93:1,3 102:21 111:18
126:17,19 269:3
329:20,21 340:2,9
346:4,11,14,20
362:15
bills 329:1 340:5
birthday 326:18,19
348:6,10,10,11
bit 4:12 10:11 24:3 25:1
26:1 32:16 33:17 55:2
69:16 80:11 81:1 85:7
100:9 109:22 124:13
158:12 170:16 197:6
222:9 242:7 255:11
279:9
blank 67:2,5 167:10
blanking 154:22
blew 345:17
block 169:3,12,14
171:1 172:6 299:22
300:1
blocked 334:10
blow 334:22 345:8
blowing 255:10 334:13
blown 64:21 160:12,14
260:22
BMW's 117:9
board 5:10 101:5
body 29:20
bogged 17:4
boiled 132:16
Boise 2:8 89:4 115:15
117:11,18 327:12
347:9 348:2
bold 262:6
bolster 144:13 148:18
bolstered 60:21
bolsters 143:18
Bonner 353:9 355:2,10
357:3,8 358:15 359:9
359:20
bonus 323:8,9
book 64:2,10,11 332:2
344:14
books 17:20 340:5
bottom 10:15 81:22
93:1 95:20 123:17
134:11 135:22 162:22
163:2 175:1 187:1
225:14 240:16 247:7

248:14 282:22 283:3
283:12,17,19 284:16
284:18 285:5 309:9
309:22
bounds 142:5
box 2:4,8 54:12,14
96:11 101:8 123:6,12
123:17 134:6,11
135:6,8,14 136:12,14
138:6 170:3,5,7 175:1
175:2 186:20 187:1
247:6,7 249:19,21
250:8,15,20 309:22
310:5
boxes 250:7 309:10,12
309:15
break 67:12,14 70:2
99:12 114:7,21
195:10 196:1 266:20
267:7,22 268:9
302:10 303:5 348:9
362:3
breaking 99:16
breaks 331:16
breathed 130:18
breathing 235:20
Brett's 118:12,16
Brian 340:14,14,14
362:16
brief 144:22 145:19
268:9 302:14 303:5
360:12
briefly 26:8 56:7 70:11
70:13 81:14 109:11
110:10,13 115:5
121:11 127:6 154:7
159:4 161:17 182:18
309:3,14
briefs 204:7
bring 6:9 11:20 14:7
22:11 27:16 32:22
61:1 62:14 71:1 80:11
117:4 126:5 129:8
141:20 143:22 144:3
153:5 161:15 163:5
166:4,6,17 310:12
328:17
bringing 8:6 42:9 91:3
135:11 148:11 193:10
brings 170:20 171:14
broad 288:6
broken 37:18 88:4
brought 28:7 105:22
150:6
bulk 43:3 266:6
bullets 227:13

bump 57:22
bunch 105:10
bung 128:16
bungholes 118:5
bungs 64:21 160:12,14
163:21 176:10
burden 14:13
burn 154:3 159:21
265:9 334:11 343:2
burned 117:8 118:1
161:3 163:12 327:4
344:16
burning 334:12 335:1,2
burns 334:17
burnt 65:12 102:1
334:14
business 350:14
buyout 323:13

C

C 22:9 24:3,4 320:17
CAD 154:1
cake 348:11
calculate 134:1 139:4
283:5,20 305:5
calculated 25:13 36:8
37:15 126:15 157:20
160:10 176:7 231:2
231:17 261:3
calculates 234:7
calculating 22:6 35:13
35:16,21 36:22 64:14
64:15 91:19 153:21
191:2
calculation 10:4 25:13
28:8 32:18 35:9,18
54:3 70:10 87:20
92:12,15 104:10
112:17,20 113:6
125:20 127:4 140:14
140:22 143:17 144:12
172:17 178:15 189:16
205:5 214:10 216:1
218:11 231:22 232:2
254:3 257:17 258:1
270:10 280:5 281:7
281:19,21 282:5,11
305:1 313:3
calculation's 257:19
calculations 218:6,17
229:9 250:4 281:11
282:1 304:17
calculator 114:1 230:16
245:12
calculators 230:20
231:4

calculus 249:8
call 7:6 15:2 25:14
86:18 93:2,7,8 216:19
278:20 314:22 315:13
318:20 324:8 333:13
333:15 337:11 338:10
354:2 356:10
Callahan 271:22 272:8
276:20 315:1
called 19:7 100:10
290:18 293:20 315:21
317:20 320:1 337:6,9
337:15,15,16,17,22
338:9 350:2
calling 86:4 209:2
362:10,14
calls 18:22 223:18
229:4 338:8
candor 170:12
capacity 82:17 204:5
caps 53:22 137:19
captioned 199:8 203:8
captured 40:17
car 342:14,19
cardiac 317:15
care 197:17 329:6
careful 278:19 300:9
305:11
Carr 277:8,14
carry 107:2 322:16
330:5,11
carrying 71:19 333:2
340:10 353:21
carve 15:1 17:11
case-in-chief 14:16
case-specific 34:2 54:1
cases 22:5 91:2 190:19
229:6 289:8
catch 53:19 345:19
categorize 158:13
categorizing 120:10
caught 344:16 345:2,3
345:21 346:2
cause 60:18 82:6,10
126:11 132:4 137:14
159:11 164:9 185:13
242:3
caused 49:16 161:11
327:6 332:11
causes 7:20 131:14
141:13 161:7
caution 165:20
CDL 320:4,7 330:2
CDL's 319:22
CDT 1:16
celebrate 348:5

celebration 348:12
cell 41:4 46:20 54:7
94:20 95:3,6,14,20
96:7 100:15,19 101:9
123:6,9 124:4 125:4
134:2 135:9 136:18
138:8,10,22 139:3
140:8 174:11,14
175:17 176:20 182:9
186:10,14 187:10
244:20 245:1,2,4,5,17
246:7,15,22 247:3,4,5
247:6,10,12 248:5,8
248:14,15,18,21,22
249:1,13 346:17
cells 309:19
census 169:3,12,13
171:1 172:6 299:22
300:1
center 139:2 276:18
certain 11:4,5 43:16
46:17 50:8 51:11,16
95:8 101:4 102:6
105:11 109:20 121:19
121:22 147:2 158:5
160:11 169:13 170:21
214:5 289:7
certainly 68:14 87:6
143:10
certification 341:16
342:4 357:5,9
certified 118:19 360:1
CEX4 3:22
CEX66 3:9
chain 116:11 210:20,22
chance 133:1
change 28:13 97:3
127:3 143:17 144:11
148:8,17 290:4 310:3
322:7,20
changed 113:22 138:14
283:8
changes 144:5
changing 138:17
148:11
Characteristic 105:3
characterize 172:5
characterized 307:5
characterizing 219:20
charge 342:5 343:21
355:5
charged 37:22 46:18
102:15 131:19 215:6
238:22
charging 254:13
CHARLES 2:12

- chart** 247:18
chat 366:21
chatting 4:12
check 67:11 166:10
 179:3,6 295:18
 328:20 355:9 363:11
 364:22
checked 82:16 344:13
checking 67:12 69:14
 350:10
chemistry 20:18 21:1
Chemtrack 93:3
chief 353:11 354:20,20
 355:2
choice 294:22
choices 14:1
choose 250:15
chooses 111:3
choosing 157:17
 246:21
chore 247:15
chose 26:18 93:9
 106:15 191:8,19,22
 247:18 248:7,21
 249:1,12 270:8
chosen 14:15 62:13
 104:15
CHRISTINE 1:21
chromate 74:16 81:21
 81:21 104:22 107:2
 111:16 126:22
chromium 65:9 75:15
 82:1 84:3 107:5
Chuck 308:1 349:6
CID 31:17 65:16 95:15
 98:19 100:17 101:19
 137:1 186:21 209:14
 271:20 272:2,6,13,17
 298:12 311:15,17
CID's 123:14 174:17
circle 148:6 299:19,20
circles 238:17
circuit 294:18
circumstance 82:3
circumstances 28:8
 97:20 110:22 111:2
 154:14 176:3 187:18
 243:4
citation 214:6
cite 85:20 219:2
cited 210:1,6 211:20
 217:22 218:7
citing 204:14,15 205:14
 205:15
citizen 285:2
city 31:13 61:10 75:19
 84:9 85:14 89:4,10
 103:4,15 115:16
 117:11,18 128:22
 134:17 135:5 136:22
 143:2 160:18 169:3
 176:13 189:10 194:4
 210:9,11,17 238:3
 239:8,10 265:19
 273:12 274:7 299:15
 339:9
civil 10:8 36:9 216:13
 253:18
claim 58:7,7 103:17
Claimant 3:18
Claimant's 176:15
 201:8
clarification 47:14
 101:11 151:18 193:5
clarified 59:7 194:13
clarify 17:14 42:8,14
 43:7 45:2 65:18 67:7
 76:18 90:14 115:18
 183:22 287:8 296:10
 355:9
clarifying 152:1 153:13
 270:15 294:4 354:8
clarity 42:1 64:1 149:11
Class 74:10
classes 319:9 325:1
clean 89:16,19 135:1
 339:15,21 341:10
 343:7,14
clean-up 339:14 341:2
 341:12 343:3 357:20
cleaned 75:10 170:13
 189:6 355:13
cleaning 357:15
cleanup 75:8,11 77:6
 91:9 177:10 189:1,2
clear 18:10 45:22
 130:19 136:21 147:8
 179:15 201:20 222:10
 282:17 325:15 333:14
 346:19 366:9
clearly 7:17
client 313:10
clock 114:21
close 68:16 146:13,22
 225:11 242:11
closed 30:12 122:15
 128:14 130:14 131:7
 159:9 164:6
closely 112:19,21
closer 68:10 135:21
 224:17 243:8
clothes 90:10
clothing 89:22
clutch 335:11
co-counsel 6:20
collect 7:15 271:17
 297:4
collected 147:18
 207:20
College 20:19
colloquially 240:11
 308:13
colloquy 5:16
come 17:9 63:7 64:13
 64:14 99:3 111:13
 195:10 221:7 232:8
 236:1,16,22,22
 238:15 246:1,11
 248:9 249:21 252:16
 284:3,7 291:12 292:4
 325:15 356:5
comes 79:12 169:21
 171:5
comfort 68:14
comfortable 32:12
 35:18 67:11
coming 12:18 55:11
 64:5 91:2 96:13,16
 98:22 149:4 181:20
 227:20 236:10,19
 238:19 239:12 275:3
 282:9 286:20 332:18
 340:22 341:2,10,12
 360:20
command 355:3
comment 28:19 143:10
 213:16
commercial 330:3
communicate 48:16
 338:11
communicated 75:17
communicating 342:20
communication 4:14
 77:4 134:22 219:2
 277:15
communications
 134:18 189:1 276:18
 337:20
company 95:22 118:16
 123:20,21 125:11
 134:13 175:4 183:9
 317:20 321:6 325:7
 339:21 340:15
compare 256:19 264:9
compared 171:4,18
 189:18
comparing 263:10,11
 263:14 264:8
comparison 178:17
compelled 194:6
compendium 105:5,12
 112:22
complainant 3:7 18:21
 19:8 23:9 26:18 34:14
 35:7 60:20 62:5 94:8
 95:5 96:10 98:5 104:9
 116:22 117:20 119:13
 123:8 125:19 127:15
 128:4 133:13 140:21
 151:4 160:1,6 167:22
 169:1 173:6,18
 174:13 177:19 178:14
 184:4,10 185:3
 186:13 189:15 191:1
 191:3,8 200:8 216:8
complainant's 13:15
 17:2 23:10 25:9 34:5
 34:8,14,22 35:8 60:6
 60:22 61:1,7,12,13
 62:6 63:10,11 71:1
 80:12 86:21 97:14
 105:7 117:4 121:15
 124:7,16 126:4,5
 129:9 135:12 136:19
 140:2 141:7,12,21
 148:9 155:6 161:16
 163:6 166:17 168:16
 175:8,19 178:21
 187:12 188:5 189:22
 190:4,13,15 199:1,1
 203:8 251:9 268:13
 279:8,14 363:15
Complainants 364:8
complaint 25:11,18,19
 26:19 27:14 32:13,16
 201:12 216:11 252:22
 253:9,17,22 254:1,2,5
 254:8 255:2 256:7
 257:2,7,13,20,22
 258:3,7 260:5 265:4,6
 265:7,11,22 283:14
 287:22 288:16,19
 298:6,15 306:13,16
 312:15
complete 26:21 39:22
 66:8,9 94:15 120:2,17
 121:3 133:21 150:22
 156:10,13 170:4
 174:2 186:3 191:12
 301:1 323:6
completed 257:14,20
 311:7 318:2
completely 51:20 75:10
 322:12

completes 116:18
completing 116:1
complex 307:5,6
complexity 196:22
compliance 55:12,12
 57:17 98:22 99:4
 107:20 222:2 232:22
 245:15 286:19 289:3
 291:5,13 292:5
complicated 135:10
 214:18 215:3 358:5
complication 12:6
comply 36:5,14 45:10
 54:19 55:3,4,10 98:6
 98:8,13 100:13,20
 125:5 140:6 176:19
 181:11 182:10 188:8
 188:10 292:14,19
 293:16,21
complying 229:14
 232:11
component 36:12 37:9
 37:10 53:20 54:4,8,17
 59:3 81:22 88:4 95:1
 124:21 137:6,18
 138:3 186:8
components 229:12
comprehensive 24:5
 30:19
compromised 159:15
 159:18 161:14
computer 74:20 224:17
concentration 82:2
concept 57:11
concepts 47:18
conceptually 18:7
concerned 63:18
 337:22 338:4,5
concerning 7:5 58:8
 235:18
concerns 168:21 171:3
 172:4
conclude 154:17
conclusions 205:6
 220:20
condition 30:13 65:11
 65:13 118:7 122:16
 128:17 132:3,8
 159:15,15 161:2,5,11
 162:2 163:11,19
 164:2 173:16 176:2
 177:16
conditions 164:4
 177:14 290:10
conduct 22:4,7 29:7,15
 56:2 101:22

conducting 129:2
 184:20
conducts 29:9
confidence 109:5,8
 268:2
confidential 282:18
confined 87:7 152:15
 152:16
confirm 18:16 78:6
 129:15 329:17 362:7
 363:3
confirmed 118:4
 159:13 160:9,16,18
 160:22
conflating 49:21
confused 152:7 358:6
 358:15 359:10 363:17
connected 354:2
connection 77:6 103:17
Conservation 21:22
consider 36:3 60:18
 90:15 91:21 92:13
 97:20 125:10 126:12
 126:12,14 134:5
 141:13 148:22 149:1
 149:6,7,10 152:14
 157:6 167:16 172:21
 176:13 177:3,12
 182:8 202:4 215:10
 216:8 218:8 227:11
 227:14 236:21 283:19
 286:17
considerably 310:9
consideration 69:1
 99:8 100:8 179:15
 250:19 284:5 287:13
 290:1
considerations 177:5
 286:7
considered 36:12,15
 39:2,8,20 48:20 54:9
 55:9 72:18 74:10,12
 77:20 80:2 96:10,10
 125:21 128:7 132:1
 137:8 142:4 149:7
 150:14 154:16 156:11
 157:17 158:3 161:2
 172:13 174:8,16,18
 187:7 188:16 210:5
 215:11 217:7 256:14
 292:14
considering 98:12
 102:15 133:5 142:14
 180:1 260:6
considers 241:7
consistent 7:8 75:15

104:22 123:11 125:6
 138:7 140:8 169:9
 174:15 176:21 185:5
consisting 64:2
consists 22:5 55:11
constantly 324:13
constituent 111:17
constituents 236:13
constitute 123:1
constituting 55:21
construction 145:9
 146:15,21 164:19
 165:3 211:21 212:9
 212:16 213:5
construed 150:4
consultant 76:5
contact 103:9 236:1,11
 236:16,19,22 238:15
 238:19 239:12 277:21
 278:5,11,17 336:21
 356:21
contacted 76:4 103:7
 177:9 189:3 311:15
 311:17
contacts 240:2
contain 107:5 269:16
 270:1 271:5 293:3
contained 10:3 12:17
 74:15 75:1 84:2,3
 104:22 126:20,22
container 159:12
containers 26:15
 128:16 159:7,8,14
 163:20 173:10 175:7
 176:2 177:16 178:4
contains 5:19 78:12
 105:10
contamination 38:10
 235:7 237:21 240:20
 241:10,15,20
contemplated 144:3
content 206:14
CONTENTS 3:1
contested 111:16,18
context 5:16 220:4
 222:1,5
contingency 24:15
 30:17 129:4
continue 70:6 71:10
 83:13 135:20 179:5
 204:8 226:8 324:8
 331:7
continues 53:16
continuing 67:12 137:9
 139:7
contracted 77:3

contractor 76:6,6,10
 93:5,7 135:3 274:15
 322:3
contractors 76:22
 189:3
contrast 52:1
contribute 82:1
contributed 179:18
contributes 173:4
contributing 188:19
control 55:20 82:20,21
 102:9 131:14 165:21
 347:18
convening 4:4
conversation 13:13
 342:13,15 356:18
 357:11 358:22 360:3
conversations 255:13
 356:14 357:14
convey 333:18
conveyed 355:19
cool 66:22 130:4,15
cooperated 101:16,18
cooperating 182:12
 291:3
cooperation 47:2 59:6
 95:10,14 100:8,10,17
 123:14 125:3 134:7
 176:19 181:9 182:8
 186:21 286:18 287:3
cooperative 174:17
coordinated 207:11,14
cop 344:1
copies 15:17
copy 4:14 15:19,22
 23:7 34:11 44:7 62:1
 116:19 167:4,14,18
 199:21 200:1,2 203:3
 253:8 346:10,11
corner 146:14,17
 162:13,22 164:3,11
 164:18 165:10 226:10
corners 142:5 325:6
correct 9:20,21 10:22
 14:21 16:21 18:3 23:7
 33:14 34:11 43:19
 44:20 45:4,11,12,16
 62:1 85:2 92:13 108:2
 143:5 147:11 169:6
 198:16 199:17 201:13
 202:20,21 207:4
 213:9,11 214:4,5
 215:22 217:13 223:16
 223:19 227:6,9,16,22
 228:3 229:5,9 234:2
 234:17 237:3,4 239:5

- 242:20 243:2,9,15,20
244:11 246:4,19
247:1,2,21 248:5,10
248:15 249:5 250:16
252:11 256:12 258:15
265:16 266:1 270:21
271:11 272:14 274:2
274:8,11,15 280:11
281:3,14,22 282:7
286:13 287:10,22
290:8 292:8,20
295:16 296:9,20
297:5 298:4,7,17
299:15 300:10 312:16
356:15 357:6
corrected 3:12,22 10:3
10:11,13,21 11:6,19
32:22 33:13 34:4,5,15
34:20,21 35:1 77:22
126:6 135:12 141:12
143:4 144:15,17
148:9 151:4 155:7
166:5,8,14 175:9
190:14 194:3 197:12
198:15 199:2 201:18
202:10,13,16,18,20
209:18 210:1 214:16
215:18 216:3,22
218:1 230:9 233:19
234:11 235:15 236:5
237:18 240:1,8,17
244:3 247:18 251:10
251:21 256:9 258:19
259:7,18,21 260:9
261:18 264:16 268:14
279:9,15 281:7
312:19 354:13
correcting 257:19
correction 259:1 287:2
corrections 201:17
corrective 55:6 98:14
181:15 291:12 292:4
292:13
correctly 59:12 230:12
231:2
cost 105:5,6,12,12
112:22 113:5,9 232:6
271:10 325:20
costs 105:11
counsel 2:13 4:9 5:13
15:19 16:19 19:7 66:7
67:16 86:6 203:17
219:13 230:21 231:1
301:11 315:21 360:17
Counsel's 70:1 231:3
counts 25:20,22 26:9
27:2,7,15,16 28:2
29:1 32:12 34:3 45:19
45:21 56:20 58:10,18
59:9 132:17,20
174:16 179:18 185:6
191:12,17,19 192:2
259:11,13 260:22
county 117:21 181:1
couple 154:18 188:18
203:1 260:11 325:21
325:21 335:13 366:8
course 157:15 175:5
338:17
court 5:21 6:16 9:4,6
11:4,9 20:1 69:15
110:9 111:1 112:18
167:5 179:6 199:22
200:1,7 201:3 214:17
222:19 226:11 284:5
285:15 289:4
court's 7:8 148:3
courtroom 196:8 255:5
272:8
covered 148:21 149:9
covering 336:11
covers 128:16
CR 317:20,22 318:5,8
318:15 319:16
cradle 24:7 29:12 115:8
119:19 193:19
cranked 304:5 335:7
create 15:17
created 66:9
creating 12:6
credibility 313:17
credit 57:1 101:7
131:16 182:11 291:20
295:7 306:20
credits 295:12
crime 271:14
criminal 271:13
critical 88:18 93:16
122:16
cross 3:2 7:1 62:12
63:14 179:10 196:2
197:20 203:20 294:18
304:15 307:10 349:2
cross-examination
307:4 309:7 349:20
350:2
cross-examine 301:15
CS4 290:7
current 194:21
curtain 333:5
Curtis 85:12 86:2,4,9
custody 116:12
customary 109:21
cut 43:8 192:12 325:6
CX 199:8,14
CX-04 230:9 233:19
234:10 235:15 236:5
237:18 239:22 240:7
240:17 244:3 247:18
252:16
CX-4 142:5 143:4 144:5
144:15,17 148:13
CX01 363:18
CX02 363:18
CX03 363:19
CX04 34:4,19,21 197:10
199:2 201:18,21
202:2,10,13,16,20
261:18 271:2 281:7
363:19
CX04-corrected 363:19
CX06 363:19
CX07 363:19
CX08 363:19
CX09 363:20
CX10 276:22 363:20
CX13 363:20
CX14 363:20
CX15 363:21
CX16 363:21
CX17 363:21
CX19 363:21
CX20 363:21
CX22 363:22
CX23 363:22
CX24 363:22
CX25 363:22
CX26 363:22
CX27 363:22
CX28 363:22
CX29 363:22
CX3 166:7,12,14 168:12
CX30 364:1
CX31 364:1
CX32 364:2
CX39 78:12
CX4 10:3,20 77:22
190:7 197:12,13,14
198:8,15,19 201:4,10
201:17 202:7 209:17
210:1 214:15 215:17
215:22 216:3,22
217:22 256:18 259:6
259:20 262:22 263:14
312:19
CX47 364:3
CX49 364:3
CX50 364:3
CX52 364:4
CX53 364:4
CX54 364:4
CX55 364:4
CX56 364:4
CX57 364:4
CX58 364:4
CX59 364:4
CX60 364:5
CX61 364:5
CX62 364:5
CX64-corrected 364:5
CX65 364:6
CX66 14:20 17:11 64:3
364:19 365:7
CX67 364:6
CX75 364:6
CX76 364:6
CX77 364:6
cycles 264:22
-
- D**
-
- D-R-A-K-E** 316:11
daily 172:12
dangerous 241:18
278:18
data 77:16 80:20 81:7
129:16 172:6 299:19
database 352:8
dataset 169:9 171:2
date 30:12 43:15,17
78:9 128:14 138:13
142:14 147:10 266:7
266:9 277:22 326:22
332:7
dated 203:9
dates 272:5
day 4:4 8:8 53:17 97:11
139:5,8 249:20
250:12 263:6 326:14
348:7,9,13,15 361:10
362:3
daylight 347:6
days 53:22 54:2 89:10
94:6 96:5 97:19 104:4
131:3 134:16 137:3
137:19,21 138:1
139:5,7,9 140:13
163:13 175:6 176:1
184:13 187:4,16,19
187:21 191:21 192:11
244:19 245:22 247:19
284:22 298:9,16,19
325:21,22 331:12
de 153:2
dead 111:12

- deal** 15:3 17:9,12 18:8
225:7 264:7
- December** 262:10
311:16 318:1
- decide** 303:9
- decided** 27:3 104:13
138:2 181:4 258:14
270:3 330:14 348:7
- deciding** 302:15
- decision** 4:20 12:18
14:17 60:12 87:8
148:4 149:13,14,17
180:20 188:3 228:9
228:11 318:19
- decisions** 28:9 223:21
- deck** 256:20
- decree** 226:18
- deeply** 32:17 114:2
141:16
- defer** 20:1 223:3
- deficiencies** 150:3
- defined** 38:21 293:6,15
322:2
- defines** 294:8
- definitely** 27:2 133:1
172:21 355:4
- definition** 39:4 120:13
173:22 280:7 287:21
290:17 292:15 293:3
293:8,14
- definitions** 221:3
250:18
- degree** 21:10 47:2
54:20 95:10 181:8
182:8 228:13,16,21
- degrees** 130:7
- delete** 352:7
- deliberate** 66:4
- deliberately** 67:2,5
- deliver** 331:2
- delivered** 331:8,15
- delved** 60:9 78:3
- delving** 141:16
- demographic** 169:10
170:19 171:15 301:4
- demonstrative** 6:14,20
7:4,10,16 8:1,22 9:3,3
9:19 10:6 11:2,11,18
11:22 40:12
- demonstratives** 8:8
9:13 10:1 12:5,13,15
41:10
- dented** 162:4
- Denver** 2:15 349:8
- denying** 150:1
- department** 75:6 76:19
133:19 177:8 183:16
273:18 278:22 311:14
336:20 338:21 343:1
343:5,10 353:12
354:7,16,21
- departure** 59:15
- depending** 63:22
250:21 286:5 309:20
- depends** 106:21 243:3
243:4
- DEQ** 76:4,18 134:18,22
189:1,3
- DEQ's** 76:6
- Derek** 356:20 357:4
- derive** 95:4 186:11
- describe** 25:6 37:14
38:4 53:13 54:15 55:2
55:17 56:7 70:11 79:5
93:12 97:14 98:5
102:3 115:5 116:21
117:7,19 124:6,16
127:6,14 136:19
139:12 140:2 154:7
159:4,22 160:5
161:18 163:8,16
170:4 172:15 175:18
176:15 182:18 184:3
184:9 187:11 188:5
238:10 318:7 319:3
- described** 70:14 165:7
186:15 269:14 271:3
336:4
- describes** 79:3
- describing** 170:2
- description** 46:11
145:20 170:7
- descriptive** 46:17
- desert** 241:18
- designated** 113:2,3
116:8
- designation** 39:20
- designations** 39:19
41:5
- designed** 9:6 116:17
- detail** 60:9 78:3 125:10
140:11 171:11 305:1
307:11 338:4
- detailed** 149:19 300:16
307:7,8
- details** 60:15 114:2
141:16 188:18 282:2
305:9 307:2
- detect** 29:13 129:3
- determination** 26:11
51:16 70:13,19 71:15
72:16 73:2,8,9 75:13
76:2,7,12 79:12,17
80:5 81:4 88:13,15,17
89:7,14 90:7,13 92:5
92:19 93:14,16 94:4,7
94:10,12,17 96:2,4
97:10,18 102:11
103:2,5,13 104:3,6
107:17 108:6,16,22
109:6 110:15,20
111:4,5 127:20
182:13 186:7,8 192:7
192:11 269:6,20
271:8 273:3 274:4
- determinations** 70:14
- determine** 26:5 33:22
37:4 38:19 46:19
53:14 73:13 95:5
105:6 107:4 108:17
110:16 123:8,12
158:7 172:3 174:13
186:10,13 271:6
299:13 344:18
- determined** 54:15
64:22 75:14 79:9 94:2
94:17 95:12,19 97:21
104:21 107:2 117:3
120:3 123:5,16
125:22 127:18 133:11
133:15,22 135:2
136:17 141:1,3 156:7
157:4 160:4,20 176:4
178:16 184:7 186:4
186:19 189:5,17
310:4
- determines** 35:22
234:12 285:21
- determining** 22:5 51:3
54:6 100:14,18 125:3
127:21 140:7 176:20
181:7 269:15,22
271:4 290:16 309:18
- develop** 22:4 34:2
109:5 215:13 305:4
- developed** 33:19 36:9
146:14,17 151:2
300:13
- developing** 24:14
285:11
- development** 152:20
- deviation** 36:14 37:6,17
39:14,15,16,21 40:2,5
40:9 46:12 47:19,22
48:8,20 50:14 54:11
88:3 94:9,11,15,22
120:3,4,14,18,20
121:7 122:18 123:1
133:13,14,15,21
137:8,11 156:2
173:19,22 174:3,4,9
185:21 186:3,4,10
229:19 247:5
- deviations** 41:2
- differ** 122:7 205:11
206:2
- difference** 113:5,16
204:14 220:10 225:13
247:1 248:13 250:16
263:21,22 322:16
331:3
- differences** 222:22
- different** 15:4 30:20
32:6 59:6 97:2,8
100:11 105:10 110:12
111:2,3,13 113:1
114:22 122:10 129:22
150:9 180:19 181:11
193:1,18 209:9 210:2
220:19,20,22 221:7
221:11 222:2 237:6
240:11 245:21 257:1
258:6 259:3 261:8
263:5 283:10,11
304:17 309:8,9,10
328:19 352:20
- differentiate** 223:14
- differently** 252:6
- differs** 208:1
- dig** 80:22
- digest** 6:21 7:16
- direct** 3:2 20:10 92:11
123:6 160:22 203:18
206:19,20 211:19
219:13 234:1 237:3
238:18 239:11,15,16
251:18 252:3 279:11
291:7 294:1 314:20
314:22 316:3 356:18
- direction** 142:3 334:2
- directly** 11:3,20 13:17
42:10 66:11 78:21
145:19 218:14 350:9
354:20
- director** 317:10
- dirt** 158:17
- disagree** 221:19 222:6
345:5,6,22
- disagreed** 344:20
- disagreement** 222:3
- discardable** 73:5
- discarded** 72:19
- disclosed** 251:19
252:16

- disconnected** 339:2
discount 59:15
discovered 98:19
 291:11
discovers 98:15
discrepancy 225:22
discretion 12:1 51:3
 120:9 137:22 138:2
 158:1,6 191:2,19
 219:12,14,17,18,21
 220:8,11,12,17
 232:21 233:1,3,4,5,13
 233:15
discretionary 188:2
Discs 5:14
discuss 6:6 60:16
 100:9
discussed 58:16 59:6
 74:3 96:22 173:21
 176:11 178:12 209:17
 220:8 232:21 236:20
 299:9 307:10
discusses 240:1
discussing 47:12 244:6
 366:8
discussion 155:7 181:6
 276:19 290:8
discussions 91:8
 339:14
dispense 12:4
displayed 9:18 141:11
disposal 24:9,12,21
 29:21 30:22 95:18
 102:13 116:10,17
 134:10 192:22 272:22
dispose 356:5
disposed 95:17 123:15
 134:9 174:19 186:22
 273:1,17 274:15
disposes 183:3
disproportionate 286:1
distance 115:16 333:11
 342:13
distinct 87:9
distracted 183:1
distracting 255:11
diversion 174:20
dividing 245:2
divulge 282:18
document 5:1,13 23:1,5
 33:6,18,19 34:7 45:14
 62:9,14 85:18 86:11
 86:16 105:9 166:19
 166:21 168:5,15
 176:6 198:11 201:7
 203:14 204:3,18
 214:6 218:14 224:19
 225:18 226:16 233:22
 238:9 240:8 254:13
 254:15 260:7 261:22
 262:3 269:18 276:15
 308:6
documentary 86:8
 87:15
documentation 85:20
 124:1
documenting 218:5,11
documents 25:16 31:2
 32:15,20 60:4,8,9
 87:2 101:22 197:2
 200:4,10 209:14
 215:11,18,21 261:13
 269:14,20 271:3
 351:15
dogs 328:4 331:21,22
 332:14 333:5,9
 335:16 349:14
doing 21:16 75:8 179:4
 179:21 232:6 267:21
 267:22 270:20 275:22
 344:2,8 350:1
dollar 245:21
dollars 105:14,17
 113:11,14 124:5
 126:9 135:9 136:18
 138:11 139:1,10
 140:18,20 141:9
 245:8 289:8,20
door 196:15 213:5
doors 347:16
DOT 74:10,10 321:21
 322:8
double 364:22
downloaded 262:8
downward 55:8,14
 59:14 98:17,21 99:4
 100:19,22 101:5
 131:16 181:20 182:5
 286:4 291:22 292:5,7
 292:18
downwards 59:3
Dr 6:17 8:22 9:12,20
 12:15 13:14,19 14:5,8
 14:15 15:6 61:15,18
 61:21 62:21 63:14
 66:11 314:22 362:16
drafted 35:6 312:22
drafter 312:18
Drake 3:3 315:13,15,16
 315:20 316:11,12
 319:21 320:3,15,17
 320:20 340:17,20
 341:1 349:1,4 359:2,9
 361:4,7,8
draw 180:9 299:19,20
drawing 183:1
dressed 333:9
drive 317:4,5 320:9,12
 322:21 331:13 348:14
driven 118:22 320:10
driver 93:10 118:18
 119:10 316:16 317:2
 317:6,9,14,18 331:16
 333:21
driver's 330:3
drivers 89:16 318:16
 325:2,10 345:12
drives 331:12
driving 119:11 164:20
 212:2,12,16 213:4
 319:13 331:11,14
 332:3 347:11
drop 328:22 330:21
dropped 335:8
drove 210:14 355:5
drum 13:16,22 14:3,7
 15:1,14,20,21 17:9
 61:8,11 64:2,9,11,12
 65:19 107:18 118:4
 157:3,7 159:13 160:9
 160:16 161:19 162:5
 162:7,13 163:2 164:4
 173:14 176:10 364:15
drums 30:10 64:18,20
 64:21 65:3,4,8,10,14
 75:19 84:10 89:20
 103:11,14 104:21
 105:2,4 107:1,4
 110:11,12 111:17,21
 118:4,6,7 122:15
 127:11 128:12 132:3
 132:8 154:3 156:18
 156:20 157:3,12,21
 158:3 159:18 160:15
 160:16 161:1,1,6,9,11
 161:13,20 162:2
 163:9,22 164:7,12,21
 165:9,15 173:2,9
 176:10,12 178:7
 239:7,10 265:9
 269:15,22 271:4
 274:7
dry 130:15
duly 19:8 315:22
-
- E**
-
- EAB** 5:18
ear 366:4
earlier 37:5 45:19 70:14
 97:1 137:5 139:4
 209:12 222:21 227:4
 237:1 251:19 260:17
 268:18 281:1 313:10
early 97:10 272:3,12
 331:3 343:4 353:1
Earth 141:17 142:13
 147:9
EASE 169:9
easier 68:15 75:22
easiest 52:8
easily 88:22
east 146:12,16 327:11
easy 218:22 219:8
eating 196:15
echo 361:6
ecology 20:18
economic 37:13 59:19
 59:21,22 60:2 104:9
 105:19 106:3,5,14
 112:16,19 113:20
 125:19,21 126:1
 140:21 141:2,4
 178:14,17 189:15
 229:12 230:2,9
 231:21,22 232:2,9
 252:3 254:3 256:14
 258:11,14 268:16
 269:12 270:10,19
 279:19 280:13
educational 20:15
effect 138:17 201:11
 250:8
effects 299:14 339:15
efficient 197:8
efficiently 11:17
efforts 36:5,14 47:1
 54:19 55:3,4,10 98:6
 98:7,13 100:13,20
 125:5 140:6 176:18
 181:11 182:10 188:8
 188:10 287:3 290:19
 292:14,19 293:16,21
eight 103:3 105:2,4,18
 106:10,15,18 107:13
 112:6 113:15 178:4
 268:21
either 11:9,19 12:16
 14:2 39:8 66:21 68:4
 92:18 93:9 94:13
 120:8 150:2 166:14
 180:4 183:10 254:17
EJ 169:7,16
EJScreen 3:15 167:1
 168:19 170:16 299:9

- 299:12,18 300:5,13
301:4
EJSCREEN's 300:16
elaborate 30:5 111:1
158:11
elaborates 10:11
elaboration 193:7
electrical 335:12
electronic 5:7 197:5
332:5
electronically 16:2
elicited 305:19
eliminate 60:2
email 4:14 78:10 278:21
352:2,3
emailed 7:3
emails 5:13 352:5
embarrassed 196:7
emergency 74:18 91:5
91:21 93:2,4 119:8,10
129:5 278:2 337:10
338:12 347:20
emphasis 321:12 324:3
emphasize 64:2
employed 211:10
316:15
employee 219:16
321:16,22 322:2
employee-type 322:1
employees 24:14 129:1
211:9,12,15 220:15
220:20 275:22
empty 328:17,22
encompass 48:1 92:16
encompasses 87:10
endorsement 330:2,7,8
357:5
ends 147:5 298:3
enforcement 21:14,15
22:3,5 26:2,6 28:11
32:1,4,7,9 33:21 36:1
110:17 218:7,12
221:18 234:6 247:13
282:21 286:16,19
287:5 295:7,11
296:22 297:1,17
338:20 339:5,7
engage 151:18
England 317:20,22
318:5,8,15 319:17
engulfing 336:7
enlarge 226:16
enlighten 296:4
enshrined 290:7
ensuing 71:14 91:8
ensure 29:10 51:20
184:22 320:12
ensures 24:11
ensuring 31:9 102:11
entail 145:2
enter 23:10 62:5 167:22
200:16
entered 11:13 71:2
80:18 273:5
entering 88:18 286:3
entire 29:11 65:1,5,14
70:19 107:8 143:1
211:1 324:3 336:8
entirety 17:8 28:12
336:12
entitled 129:20 216:13
268:5 296:1
environment 37:19
38:5,8 39:3 88:6,12
91:5 94:1 117:21
128:1,5 131:22 132:5
132:10 133:7,9 160:7
161:8,13 172:18
184:11 234:20 235:1
235:17 238:7 239:22
240:14 241:22 308:19
308:22
environmental 1:2 2:10
2:13 5:10 20:21,22
54:22 58:11,12,15,17
75:7 76:5,20 77:2
93:7,8 98:3 133:19
155:2 167:1 168:21
169:10,17 170:19,20
171:3,15,16,16 172:3
172:22 177:8 183:11
183:16 184:15 242:1
242:4 279:1,3 299:13
300:18 301:5 311:15
349:7
envision 40:13
EPA's 3:20 21:11 25:6
33:9 62:11 104:17
134:8 167:1 168:19
185:20 202:17 213:18
213:20 214:3 276:20
291:3 300:8,12 301:3
equal 243:6,7
Equality 133:19
Equipment 276:1
error 259:2
escalate 138:3
escrow 323:7
especially 132:3 144:4
310:1
ESQ 2:3,7,12,12
essentially 5:6 9:4 10:7
15:21 50:22 60:2
156:21 206:18 213:18
214:12 281:5 321:21
establish 148:18
establishing 148:15
estimates 301:5
evaluate 34:1 53:17,20
166:2 168:20 169:8
169:10 170:20 171:3
242:11 285:12
evaluated 38:14 54:5
100:11 117:20 128:3
128:4 160:6 184:10
209:4
evaluating 37:22 46:19
47:21 91:2 106:14
131:19 215:6 235:6
237:19 239:1 240:18
241:12,21
evaluation 149:2
286:19
event 31:19 124:20
187:22 326:17
events 55:20
eventually 95:17
123:15 134:8 174:19
186:22 343:1
Evergreen 20:18
everybody 5:22 18:17
82:15 182:2 199:9
318:18 323:21 360:19
everybody's 179:4
363:5
everyone's 4:8
everything's 352:16
evidence 11:13,14
14:14 34:20,22 63:11
63:17 64:4 71:2 80:18
86:14 87:5,15,15,16
103:22 118:18,21
128:19,22 131:9,12
145:21 165:13,19
168:1,15 197:17
200:17 201:4,7 203:7
204:3,17,18 207:19
209:13,15,22 210:4
211:20 217:19 237:3
238:1,18,21 239:11
239:17,19 272:18
evidentiary 87:9,14
EX04 33:13
exact 11:21 16:7 215:6
216:16 236:2 272:5
300:11 327:16 347:5
exactly 90:21 300:3
examination 19:7 20:10
62:12 197:20 203:20
219:13 234:1 279:11
294:18 304:13 309:8
312:10 315:21 316:3
349:2 360:14
examine 7:1 196:2
examined 19:9 316:1
examines 300:17
example 27:8 48:7,10
52:2,8 89:12 90:6,11
90:18 107:19 120:11
120:19 122:5 137:6
232:5 291:9 292:11
339:6
examples 121:19 122:5
185:12 189:8
exceeding 130:16
excerpt 62:14
excerpted 263:15
exchange 25:5 42:21
43:1 85:5,9 86:16
200:4,10 203:9 204:4
excuse 25:14 40:6
70:22 80:14 86:22
98:19 126:21 139:13
173:12 213:3 236:22
257:18 258:17 259:12
264:15 276:7 278:15
298:12 308:18 313:9
exercise 51:2 120:9
191:3 233:13
exercised 191:2
exercising 158:1,6
220:8
exhausted 348:3
evidence 163:14
exhibits 6:14,20 7:4,10
7:17 8:1 11:5,12 12:8
12:9 32:19 40:18
60:10 84:7 86:13
89:12 151:5 200:7,16
361:17 363:2 366:8
exist 285:22
existed 145:8
existence 274:20
existing 148:19
expand 28:20 262:3
268:15 285:6 286:12
expanded 269:8,11
expect 113:8
expectation 99:2
expectations 325:12
expected 55:13 57:16
86:17 182:2 205:11
206:2
expedited 286:17

expeditedly 331:15	186:4,7 229:19	59:13 64:13 88:10	311:21 364:7
expense 325:22	232:19	95:3,8 96:9 98:4	fast 331:5 334:11 335:5
expensive 113:13	extraction 14:2	101:3 102:6 125:1,16	fastest 335:8 336:9
270:8		134:3,5 137:14,17	fault 201:1
experience 109:15	F	140:3 154:16 156:3	federal 184:22 213:13
179:21 214:22 215:2	facie 14:13	156:11,15 174:11	feed 50:1
218:20 245:14 283:18	facilitate 11:16	176:16 177:1,3 181:6	feel 112:10 207:22
288:8,15,20 289:2,2	facilities 29:17,19,21	181:21 182:9 187:6	264:18 275:10 286:21
289:14 318:7 319:6	29:22 30:1,4 57:12	188:12,14 190:19	324:8,12,17 334:21
319:22 320:4 345:7	193:18	213:19 214:1 215:6	feels 322:5
experienced 320:6	facility 3:16 24:13,20	217:10,16 219:9	feet 335:13
expert 13:14 61:16	24:21 30:21,22 31:9	221:4 227:11,14,22	felt 324:19
expertise 110:5	31:13,16 32:1,10 52:1	228:2 229:21 231:17	fence 210:21 211:1
explain 26:1 35:5 72:11	61:10 84:9 89:10	279:10 280:21 281:2	field 13:16,18 57:11
78:20 96:20 101:17	95:18 101:19 116:8	284:1,6 285:10 287:9	61:19 64:16 362:15
117:16 127:19 143:15	116:10,17 122:8,8,11	290:2,15,20,22	Fifteen 66:2
185:2,20 295:20,22	127:8 128:20,22	291:14 305:6 309:17	fifth 26:15
298:14 304:22 309:14	129:6 133:20 134:10	310:3	figur.charles@epa.gov
319:18	137:2 145:8 160:18	facts 35:10,12,18 208:5	2:16
explained 154:13	163:10 164:3,11,16	221:1,9,19 223:21	figure 13:12 142:21
293:10	164:19 165:10 169:4	224:1,3,5 228:3,9	174:11 228:12 244:19
explaining 86:16 151:6	171:1,22 172:10,12	233:10	245:22 247:21 248:1
214:17 240:10	172:21 174:20 175:6	Fahrenheit 130:17	249:9 255:1 256:11
explanation 3:12,20	176:13 188:21 193:12	failed 123:22 178:3	figures 248:18
10:3 25:12 33:9 43:13	194:5,15 236:19	failing 88:14,16 93:14	file 252:15 257:20
149:8,20 214:12	237:5,7 238:3,14	122:3 185:16	283:13 296:2 298:7
254:20 282:9	244:1 265:10 274:8	failure 26:10,12,14,16	308:6 346:15
explode 333:3	286:18 328:7	70:12 88:12 111:4	filed 27:14 86:6 201:12
explore 296:2	facility's 30:17	115:6 119:15 159:6	203:2 257:7,22
exposed 132:7 161:10	fact 63:18 72:2 89:6	173:8 182:20	298:15 306:13,16
242:20 243:2,9,13,14	96:3 103:10 123:19	fair 28:8 50:17 57:9	files 257:13
exposure 38:2,9 39:3	126:14 128:7 134:12	109:4 117:12 166:16	filing 258:2 295:7
234:13,19 235:4,6,12	134:13 135:1 140:11	214:15 219:17 233:22	298:22
235:14,18 236:4,10	149:5 156:5 157:2,11	237:5 243:21 291:13	final 191:8 200:7
236:12 237:13,19,20	157:19 161:6 163:11	301:22 322:4 323:17	finally 347:7
238:2,6,9,22 240:2,18	164:1,12 174:16,18	346:3,3 355:8 358:12	find 78:4 113:8 293:11
240:19,22,22 241:1,7	175:3,4 176:5 177:7,9	fairly 27:5 214:18 215:2	352:17 356:5
241:8,12,13 243:11	177:22 181:13 188:20	232:3,14	fine 17:5 18:4,6,11 21:3
243:18 307:10 308:3	188:22 192:6 204:10	faith 36:5,14 54:19 55:3	28:17 85:21 99:22
308:14,21	237:8,10,12 238:13	55:4,10 98:6,7,12	126:7 135:17 170:11
expressed 59:1	274:19	100:13,20 125:5	171:9 179:4 180:10
extended 54:2 68:13	factor 36:15 47:22	140:6 176:18 179:16	199:21 206:15 209:9
137:7,11 173:17,22	55:18 58:3,19 59:4	181:11 182:10 188:8	242:12 267:3,5,12,14
174:4,9 186:10	95:1 97:21 100:21	188:9 280:1,1,5,8,14	301:10 303:3 306:6
265:14	102:3,4 123:3 134:19	290:9,10,14,16,19	fingers 50:21
extensive 99:15 140:12	137:13 158:7 176:4	291:1,2,10,20,21	finish 18:17 179:5,9
320:8	178:11 181:8 187:22	292:5,14,19 293:4,16	finished 219:13
extent 36:13 37:5,17	188:10 191:6,17	293:20	fire 65:15 71:13 72:22
39:13,15,16,21 40:2,5	227:19 228:15 238:11	falling 336:18	74:17 75:8,9,12 84:1
40:9 41:1 46:12 47:19	287:6,9 290:18	familiar 33:6 214:19	89:16,17 91:6,8,20,22
47:22 48:8,20 50:14	293:15,20	217:14 218:14 251:21	92:13,16,18 97:11
54:10 88:3 94:8,11,22	factored 179:16	fan 82:14 83:6 255:10	103:12 104:12 117:10
120:4,14,20 122:18	factors 36:3,7,11 37:8	fantastic 350:20	119:7 159:16 160:15
123:1 132:18 133:12	37:12 38:18 46:17	far 39:16 49:20 172:10	161:4 176:11 177:10
133:14 150:8 152:19	47:3 54:16,18 55:1	194:10,16 236:8	189:2,4,6 270:4
156:2 173:19 185:21	56:19 58:9,22 59:2,9	298:2 299:4,19 300:2	273:15,18,19 276:7,7

- 277:17,21 278:10,16
311:8,9,13 332:22
333:6,6,21 336:4,5,10
336:11,19,20 338:21
339:2,16 343:1,3,5,10
344:16 345:2,3,19,21
346:2 347:1 350:7
351:8 353:12 354:6,7
354:16,20
firemen 353:15
first 6:7,18 9:3,18 10:6
11:1 19:8 21:12 25:3
25:8 26:10 54:19
70:16 71:17 74:4
75:11 77:19 80:19
87:22 88:1,10,18,18
93:17 102:8 110:16
129:16 136:16 139:5
139:8 146:20 166:6
228:19 235:5 262:4
271:16,20 276:6,8
281:15 285:4 288:18
292:9 315:22 317:17
319:14 323:10 327:3
333:4,15 335:10
337:8,18 339:6
349:22
first-time 56:12
fiscal 295:15 296:9,20
297:5 298:1,3,20
fit 182:11
five 9:14 26:9 27:3,6,15
28:1,22 191:14 242:5
259:11 261:1 342:17
342:20
flames 332:18 336:7
flammable 71:18 74:9
74:11 75:1 84:4
126:21,22
flat 356:9
flatbed 117:9 358:1
fleet 337:13,15,17
352:15
flesh 57:7
flip 261:13
flipping 12:9 197:3
focus 20:17,22 22:9
27:3 47:20 49:5,12
50:5 255:14 287:5
297:1,11,13 309:10
focused 25:19 49:14,18
191:13 196:14 216:10
253:2,6
focuses 55:5,19
focusing 27:21
folder 166:14 200:5,18
200:18
folks 118:12
follow 26:21 35:15,15
36:22 37:2 54:11
80:10 92:11 101:15
102:5 108:11 110:8
283:4 302:16 303:9
305:4
follow-up 4:11 271:17
311:11,19
followed 104:17
following 225:21 226:3
263:10 296:3 348:13
follows 19:10 54:8
316:2
forced 6:21
foreseeability 55:21
forest 20:18
forget 12:13 326:22
327:16
forgetting 155:3
forgot 335:11
form 87:14 132:21
168:9,10 220:3
formal 26:6 36:1
format 177:18
forth 11:10,15 197:4
261:13
forward 67:22 92:5
199:16 215:4
found 27:22 28:1,21
112:18 344:22
four 9:14 21:19 37:3
77:16,18,19 83:19
135:21 154:6 159:2,5
159:6 160:2,3 193:14
194:22 214:9,9,16
259:11 261:1 303:7
fourth 26:14 259:10
frame 206:20
frankly 314:9
free 264:19 286:21
318:3 336:2,3 347:7
freight 322:18
fresh 361:20
Friday 319:4
front 198:8 203:10
226:17 246:5 250:5
251:11 261:9 279:16
358:1
fuel 331:16
full 55:20 65:4,5 102:9
113:3,3,7 118:6
120:17 157:5,10,10
157:21 158:3 160:21
163:22 164:2 233:3,4
234:10 285:5 286:22
331:22 344:11
fuller 152:20
fumbling 196:21 197:6
functional 331:19
fundamental 27:4,7
38:15 49:19 51:1,4,10
52:6,10 70:15 88:15
119:17 121:13 122:1
132:14,17,20 173:11
185:6,15 191:14
fundamentally 93:20
further 37:18 43:15
88:4 101:10 112:11
144:20 192:15 209:5
242:22 243:9 300:14
302:3 307:19
future 151:18 266:21
-
- G**
-
- gained** 60:1 141:2
gallons 157:14
game 302:1
gear 335:10
gee 200:22
general 95:14 100:17
123:13 152:13 172:16
179:14 186:20 190:18
288:3
generalization 229:17
generally 30:8 36:21
42:16 53:21 58:19
60:17 101:16,17
116:9 124:19 137:19
158:16 169:13 170:4
172:2 187:21 234:18
236:21 283:3 296:22
308:17 331:15
generated 24:8 202:13
309:11
generates 81:2 183:2
304:16
generator 73:9,13
79:15,22 81:5 91:14
92:4 102:10 106:19
107:18 108:20,21
109:4,18 115:9 116:3
116:8,12,19 273:21
generator's 73:19
Gentlemen 255:7
germ 235:19
germane 151:21
getting 4:6 17:4 21:4,10
112:3 127:13 132:13
132:22 136:8 187:21
189:9 192:19 196:14
294:21 331:3 350:7,8
357:17
give 27:8 44:21 90:5
121:20 138:19 182:5
182:11 183:22 199:4
219:3,5 230:17
261:11 280:10 299:19
320:11 328:21 329:1
329:11 331:22 334:2
346:13 360:21
given 12:3 122:4
168:21 169:11 172:16
183:6,12 205:13
206:4 221:20 242:8
354:4 361:19
gives 121:19 185:12
221:4 262:12
giving 101:6
glad 67:20 349:13
360:18,19
gleam 10:18
glowing 332:16
God 291:2
Google 141:17 142:13
147:9
gotten 187:20 193:12
342:3 351:20
Government 6:18 7:2
360:17
Government's 7:22
grabbed 333:12
graduate 20:19
grant 149:20
granted 313:2
granting 150:2
grass 336:18,19
grave 24:7 29:12 115:8
119:19 193:20
gravity 36:12 37:4,15
37:16 53:6 54:4,8,9
54:17 88:3 94:22
105:20 122:22 136:15
137:6 138:8 139:6,11
154:15 175:14,15
178:17 186:7,8 187:7
187:8 189:18 229:9
229:15,18,22 230:4
231:14,16 232:17,17
244:9 247:20,21
280:5
gravity-base 180:1
greater 122:12 159:17
191:20
green 163:2
ground 75:10 86:7 90:9
103:11 158:19 344:17

group 300:2
guess 8:6 66:21 93:5
 107:6 149:11 194:12
 229:20 344:4 362:21
guidance 105:9 226:17
 227:14 286:11 287:1

H

H2O 76:11,21 77:4
 103:12
half 151:1 361:11
hand 19:4 245:11
 315:18
handed 16:20
handle 335:8 340:22
 356:1
handled 159:10
handy 253:9
happen 89:13 90:6,20
 309:15 347:4
happened 112:22
 119:12 337:21 341:19
 342:22 348:8
happening 91:10
 204:13 335:19 337:12
happens 46:11 301:17
happy 15:19 68:10
 200:14 245:11
hard 15:17,19,22 66:14
 67:16 131:18,18
 162:3
hard-number 307:13
haul 330:12 346:12
 358:4
hauling 327:14 329:16
hazard 31:8,10 74:10
 79:3 273:19 274:21
hazardous-ness 79:4
hazardousness 92:19
hazards 56:1 102:16
HAZMAT 118:19 311:1
 327:15 329:16 330:5
 330:6,12 333:2,22
 341:16 342:4 354:4
 355:11,12,13,21
 356:2,4 357:4 358:7,8
 358:16,19 359:11,11
 360:2,3
head 69:7 157:13 180:7
 230:15 282:9 313:19
 343:21
headed 347:8
heading 223:4
headquarters 336:21
 337:6
health 37:19 38:5,8

39:3,9 88:5,11 94:1
 117:21 128:1,5
 131:22 132:5 133:7,9
 160:7 161:8 172:18
 184:11 234:20,22
 235:17 238:7 239:21
 240:13 241:22 308:19
 308:22 314:2
hear 21:5 66:22 69:4
 83:5 96:15 124:10
 156:18 212:20 235:10
 255:10 294:21 295:19
 305:15 326:7 342:14
 357:3,7,11
heard 59:12 255:3
 271:12,21 297:8,16
 325:9
hearing 1:16 4:5 5:13
 7:18 8:9 19:18,19
 44:9 66:14 67:16
 82:15 87:7,14 152:21
 285:17 305:20
heat 66:21 345:18
heated 345:21
heavy 138:17 297:1
help 10:7 50:4 51:6
 81:15 135:10 155:5
 197:5 313:15 334:4
helped 69:21
helpful 19:13 40:12
 108:9 135:15 153:12
 155:9 182:16
helping 10:13
helps 68:1 138:18
herbicides 113:4,9
Hewlett-Packard
 230:19
Hi 255:7 349:4
high 83:2 245:1,6
 335:20
higher 191:4 266:4
 309:15 310:9
highlight 259:9,10
 262:18 264:12 276:14
 300:13
highly 208:8
highway 119:12 334:10
 345:19
Hill 353:12
hired 76:5 274:14
 319:22
histories 56:9
history 54:21 56:8,14
 56:17,19 57:14 98:2
 141:19 154:13 280:17
hit 90:5 113:18

Hobson's 294:22
hold 27:12 52:11
 151:13 166:10 273:7
 274:14
home 90:5 335:15,15
homes 172:9 300:2
honest 258:9
honestly 291:16 297:6
Honor's 111:10
HONORABLE 1:21
hook 330:22
hooked 361:16
hooking 358:2
hope 152:6
hopefully 99:19 366:18
horse 111:12
hospital 317:11,16
hot 294:21
hotel 347:9 348:2
hour 327:11 345:18
 354:13 356:12 361:11
hours 99:10 214:8,16
 332:3 343:4
housekeeping 82:14
How's 83:8
huge 107:8
human 37:19 38:5,7
 39:3,9 88:5,11 94:1
 117:21 127:22 128:5
 131:21 132:5 133:6,9
 160:7 161:7 172:17
 184:11 234:20,22
 235:17 236:10 238:7
 239:21 240:12,13
 241:22 308:18,22
humans 235:22
hunch 68:14
hundred 242:5 246:5
 335:13
hundreds 289:8,20
hypothetical 110:10
 112:4 240:2
hypothetically 282:20

I

I-84 327:11
ID 2:8 26:16 118:17
 183:4,8,22 185:8,16
 186:2 187:3,15,20,21
 188:21 189:4,8
 192:19 193:11,16,20
 193:21 194:1,4,7,12
 194:13,20 271:13
Idaho 75:6 76:19 89:4
 115:15 134:18 177:7
 189:1,3 276:18

311:12,14 327:12
 330:17 339:11 340:7
 340:8 341:6 353:4
idea 63:19 291:18
 292:17 306:18 310:22
 333:2 352:9 357:13
identification 34:6
 61:13 182:21,22
 183:20
identified 15:10 55:6
 62:18,19 98:14
 122:17 179:18 181:14
 181:22
identifier 65:19
identifies 6:5 55:7,13
 99:1 181:16 182:3
identify 11:15 80:19
IDEQ 103:6,6,8 177:7
if-found-return-to
 65:20
ignitable 82:10
ignored 104:4
II 1:10
III 5:21
illegally 274:1
illustrates 163:10
illustrating 163:19
illustration 162:1
images 142:18
immediately 8:21
 332:19
impact 126:18 194:17
 250:12
impacts 170:21 172:14
 172:22
impartial 153:7
implemented 40:3
important 39:22 43:9
 51:11 64:10 115:7
 119:2,18 234:5
 255:14,15 300:15
 301:2,3
imposed 52:20 175:20
impression 8:7 66:8
 68:2 347:17
improperly 88:22 89:1
inability 58:6
inaccurate 109:1,20
 110:14 111:5
inaction 50:15
incentive 60:3
incident 311:1,7,17
 326:12 330:13 349:17
 354:14 355:3
inclined 254:14
include 46:21 95:9

156:4 161:21 162:1
181:6 200:9 259:14
included 60:10 65:8
66:12 89:12 102:20
142:17 200:15
includes 24:10 46:22
59:2 81:6 116:7 176:5
181:8,13 228:16
299:16
including 14:7 46:15
93:22 332:8 363:16
incorrect 193:21 252:4
255:2 256:7 263:7
increase 104:7 105:21
125:15 140:9,17
176:22 178:13 188:12
227:18
independent 212:11
213:2 322:2,12
indicate 71:19 154:14
317:2
indicated 71:14 177:18
178:6 324:2 325:9
338:19 345:14
indication 72:1 345:9
indications 79:6 129:22
indicators 169:10
170:19 171:16
indices 171:6,13
individual 342:7,11
individuals 342:7
343:16
industrial 172:9,12
industry 109:16,21
323:20
inflation 42:22 43:1
45:11,19 46:16 97:4
105:16 138:13,14,19
216:14,17,19 217:6
217:15,20 218:1
245:4 246:9 259:4
262:11
inform 81:16 95:3
125:11 129:5 142:20
informants 219:3
information 9:16,19
10:2,5,16 11:22 12:16
25:15 34:2 48:13 54:1
56:17 60:18 62:22
64:18 71:12,17 74:3,6
74:19,22 75:2,4 77:15
78:3,5,13 79:22 81:6
83:18 84:3,6,10,14
85:13,14 90:15 96:12
101:1 102:20 104:4
116:7 121:3 123:11

125:9 126:3,20 141:6
141:10 142:22 143:16
144:12,17 149:10,16
150:5,6,12,13 151:3
152:18 153:22 172:16
178:20 186:17 189:21
190:20 223:22 229:6
260:7 282:12,14,19
283:7 300:21 311:19
313:14 317:10 338:10
341:14
informed 103:6
informing 79:18
informs 123:5
ingredient 82:9
ingredients 75:16
81:18 82:4
inhaled 130:7,18
initial 89:17 167:12
200:15 282:10 300:20
338:9 345:11
initially 126:15 164:5
256:13 354:1 359:22
initiated 254:16
input 169:1
inside 210:18 345:9
inspect 29:18,19 32:2
32:10 101:21 344:17
inspected 31:12,15
101:19 137:2 210:12
inspection 30:7,16
31:18 32:8 61:20
64:19 65:16 95:15
104:20 174:17 210:16
215:14 271:16,17
272:16 291:3 344:3
344:11,22 345:11,21
346:10
inspections 22:4 29:8,9
29:15 31:21 129:3
184:20,20 275:22
inspector 21:13,15 22:3
26:3 32:7
inspectors 32:3 33:21
66:10 104:18 291:4
instance 310:6
instruct 275:1
instructed 299:18
instructs 95:8 98:12
283:22 284:3
instrumental 193:17
insurance 322:17
integral 134:7
integrity 38:16 93:20
305:21
intend 7:6

intended 13:3 40:4,7
66:12 120:22 150:10
174:2
intending 10:1 148:8
264:9
intense 336:5
intensest 336:9
intention 149:14 150:7
interacting 354:7
interaction 353:17
interference 129:17
138:18
interject 72:5
internal 281:9,13
internally 281:21
295:11
interpretation 150:9
214:3
interrupt 47:8,11,14
225:8
interrupting 99:13
100:1
intersect 41:6
intervening 273:11
interview 89:19
interviewed 351:9,13
interviews 101:22
351:16
introducing 204:2
investigating 271:14
investigation 123:14
275:5 287:4 298:13
investigations 271:13
investigative 89:18
118:11
investigator 271:22
351:9,13
involve 301:5
involved 25:2 77:1 91:7
202:1,6,9,13 228:22
272:13 286:2 312:13
339:13
involvement 25:3
irrespective 15:6
issue 6:14 58:6 150:5
152:19 211:3 232:21
275:14 278:18,19
issued 133:20 272:17
312:15
issues 300:18

J

Jackson 2:12 4:15 6:1
42:20 43:20 363:13
364:9,21
jackson.laurianne@e...

2:16
Jacobson 35:6 205:12
206:3 207:4 208:16
209:4 214:11 312:17
313:9
James 218:5,10
Janousek 354:20 355:2
January 217:3 261:16
319:2 322:9
job 344:2
JUDE 293:7
JUDGES 1:1
judgment 223:18 224:2
224:7 228:5 229:4
judicial 41:17 43:11,19
222:19 261:21
July 147:1,1,4 317:7
318:1
jump 11:15 75:20
jumping 11:10
June 142:17 146:21
147:9,13,19 148:2
justice 167:1 168:21
169:17 170:21 171:3
171:15,17 172:3
300:18
justification 25:15
32:17 33:11 186:16
218:12
justifications 218:6
justify 59:14

K

Kate 307:14
Katellis 13:19 14:5,15
15:6 61:21 63:14
66:11
Katellis's 13:14 14:8
61:15,18 62:21
keep 53:5 98:8 99:10
130:4 149:4 160:8
224:15 274:2,11
281:21 302:14 307:19
324:11,12 332:7
335:2,16
keeping 20:7
Kelly 362:15
kept 30:12 159:9 164:6
352:8,12
Keteles 315:1
kindly 197:4
kinds 29:19
King 353:12
knew 55:22 56:3 102:16
102:17 184:15 255:20
274:6 333:1,13

347:10,11 354:16
356:4
knowing 89:11 106:22
163:21 181:19 182:6
182:6 329:16
knowledge 55:15 73:10
75:18 81:5,16 99:5
103:13 131:8 135:3
182:4 184:18 189:7
194:21 195:1 212:12
213:17 224:5 275:6,9
277:20 278:4,8 279:5
283:15 291:22 300:22
311:6 346:4
known 56:1,3 62:7
74:22 102:16,17
111:20 119:8 144:4
198:15
knows 225:22 292:3
Kristin 3:3,11 19:6
20:14

L

label 48:11,18
labeled 30:10 128:12
130:13 131:7
labeling 52:7,8,10
lack 55:15 99:5 156:5
182:4 291:22
lading 74:7,8,13,14,16
74:19 78:2 84:2,11
93:1,1,3 102:21
111:18 126:18,19
269:3 329:1,20,21
340:2,5,9 346:4,11,14
346:21
Lake 31:13 61:10 75:19
84:9 85:14 89:4,9
103:4,15 115:15
117:11,18 128:22
134:17,21 135:4
136:22 143:2 160:18
169:3 176:13 189:10
193:12 194:4 210:9
210:11,17 238:3
239:8,10 265:19
273:12 274:7 299:14
language 234:2 264:7
270:21 271:1 284:10
300:11
large 95:22 101:6
123:19 134:13 175:3
290:3
large's 324:21
larger 52:5 226:14
late 272:12

Laughter 12:22 51:8
136:5 139:18 162:16
LAURIANNE 2:12
law 1:1,22 2:3 213:10
218:21 229:14 232:11
285:15 338:20 339:5
339:7
lawyer 196:20
laying 146:1
layout 180:14
lays 250:18
Leaching 105:3
lead 111:2 178:9
leak 159:12
leaked 75:9
leaking 89:21
lean 67:22 304:9
learn 319:8
learned 64:10 126:11
271:20 272:1,2 276:6
276:8
learning 320:9
lease 321:18,18,20
323:3,4,4,5,6,10,12
leased 327:3
Leasing 321:19
leave 12:1 19:19 110:7
199:14 347:1 359:16
365:17
leaving 19:17 359:13
led 104:6 124:3 154:16
left 51:1 162:22 163:2
196:1,8,18 283:9
318:1,5,5 343:10
355:2 357:17,21
358:6,12,14 359:1,9
left-hand 226:10
legal 56:4 102:18
204:14
legally 31:10
lengthy 7:16
let's 25:1 35:20 39:13
47:4 52:18 70:7,9
83:17 102:2 109:11
112:16 115:4 128:3
129:10 130:8 133:12
153:19 179:8 213:8
222:13 228:18 239:9
244:14 246:8 248:20
259:6 264:10 269:8
275:19 279:14 306:22
307:9 310:10 315:12
324:1 330:16 351:18
letter 37:3 272:17 273:7
278:20
letting 343:2

level 5:20 109:8,17
182:13 299:2
leveled 57:10
lever 335:9
liability 111:15 322:16
liable 28:1,22
liberal 20:17
license 330:3
lies 109:9
lift 68:6
lifted 272:21 274:14
light 147:16
lighting 336:19
likelihood 159:17
236:18 238:14 243:14
limitation 301:4
limitations 298:10,17
300:5 301:2,8
limited 331:6
line 10:16 65:9 66:3
111:11 277:6 282:22
283:4,12,17,19
lined 361:17
lines 259:20 335:12
link 42:13 210:20,22
261:18
linked 261:19
list 30:19 62:11 82:9
86:2 156:10,13 166:8
listed 37:12 262:10
310:18
listening 6:22 295:2
lists 171:12
litigating 286:2
litigation 58:19 151:19
285:14 286:6,16
287:18
litigative 285:22
litigator's 196:11
little 4:7,12 10:11 24:2
25:1 26:1 32:16 33:8
33:17 55:2,17 69:16
80:10,22 85:7 100:9
112:19 149:18 158:11
162:3 170:16 214:9
220:11 222:9 255:11
304:22 307:19 348:9
352:18 361:16
live 14:18 316:12
lived 325:12
living 316:15
LLC 321:20,20 350:8
351:3,4
LLP 2:7
load 71:19 74:7 77:17
118:22 119:5 124:2

127:3 327:13,15,18
328:8 329:4,16 330:5
330:22 331:4,9,14
336:12 340:9 341:17
346:16 356:4 357:10
loaded 117:9 328:13,18
350:16
local 171:21 273:15,18
274:19 300:22 339:6
339:9 353:2
locate 225:12
located 169:4 171:2,22
172:8 337:2
location 4:6 51:16
147:3 165:6 183:7,8
183:13,18 194:9,9,22
301:1 333:22
locations 59:7
locked 130:3
log 15:14 17:9,19 61:8
64:2,10,11,12 118:4
157:4 159:13 160:9
160:16 176:7 332:2
344:14
logbook 15:14 61:17
62:3 65:20 66:9
logistics 322:14
logo 347:16
logs 13:16,22 14:3,7
15:1,20,21 30:15,16
61:11 332:5 364:15
long 18:9 21:18 146:3
168:3 199:9 262:12
317:6,21 335:4
342:15 363:5
longer 72:22 79:19
137:21 138:1 320:8
358:8,10
longest 145:14
look 16:1 25:17 30:6,8
30:15,15,17,20,22
31:4,6 32:16 37:9
38:8,17 44:4,13 46:14
48:8,11 92:14 98:10
110:13 127:22 130:8
135:16 140:10 152:17
153:2 155:6 174:12
180:14 187:18 215:18
217:17,18 224:17,22
232:5,6 269:8 279:14
283:22 284:4 302:17
307:9 311:3 324:18
332:1
looked 25:11,11 32:16
32:18 74:21 80:1

93:12 112:19,21
 114:2 117:13 118:3
 118:10 138:9 141:17
 147:9 167:7,9 171:1
 171:20 176:3 177:11
 207:19 215:20 216:3
 216:5 227:21 290:17
 309:15 332:17 335:1
 345:20 358:5
looking 10:18 12:18
 30:3,9 35:9 39:16
 42:3 45:5 48:22 50:10
 50:14,15 65:18,21
 88:10 102:7 120:13
 121:16 131:21 142:13
 142:18 155:11 157:7
 162:17 168:7 181:1
 181:12 197:1 203:7
 203:19 204:11 221:1
 222:17 239:14,21
 249:10 251:9 258:16
 258:18 259:17 260:16
 262:22 277:5 365:1
looks 15:15 84:12
 170:18 308:4
loop 116:18
losing 268:1 325:22
loss 325:20
lot 30:20 42:21 83:6
 109:14 146:12,14,17
 158:17 196:21 197:1
 215:18,20 218:16
 219:11,17,20,21,22
 220:11,16 222:2
 271:12 275:16 290:8
 318:17 325:9 338:4
 353:15 363:1
lots 306:20
loud 66:16 69:6,19
low 39:11 40:5 132:4
 164:11 223:10,15
 224:8,8 245:1,3,6,17
 246:9 248:7 249:18
 249:20
lower 82:14 166:1
 191:9 287:21 288:16
 309:12
lowered 266:14,17
lowly 255:8
lunch 136:4 139:18
 179:10 195:10 196:1
 196:8 266:20 365:22
 366:11,13

M

ma'am 6:2 12:11,20

169:15 255:16 315:16
 365:20
magic 112:9
main 277:9 322:15
maintain 31:3 291:5
 332:2
maintained 61:9
maintaining 115:12
major 38:3,20 39:1,18
 39:20 40:22 48:20
 51:3 54:10 94:2,11,18
 117:3 120:4,10,14
 122:18 123:5 133:16
 133:22 134:2 137:7,7
 137:11 138:8,22
 154:17 157:18 160:4
 173:22 174:4 184:7
 186:5 222:22 223:3,4
 310:7
majority 138:11
majorness 310:8
makeshift 348:11
making 51:16 72:15
 73:5 79:16 89:21
 91:15 92:4 93:16
 94:12 102:11 104:6
 107:16 108:5,15
 224:2,6 358:3 361:21
man 335:3 355:4
manage 26:14 30:1
 80:3 96:5 109:3 159:7
 173:8 175:7 178:3
 193:19
managed 27:1 29:10
 30:9 31:1 51:21 65:1
 65:6,15 70:17,20 94:5
 160:17 185:10 194:9
management 24:6,10
 88:19 92:6 93:17
 115:8 122:14 128:9
 128:11,18,20 173:10
manager 84:9 337:14
 337:16,17 352:15
manager's 85:10
managing 31:10 52:2
 96:6 97:19 131:1
 134:16 336:20 343:2
mandated 59:22
mandatory 137:9
manifest 24:18 26:12
 30:18 89:6 115:7,11
 115:17 116:2,4,10,16
 116:18 119:3,5,15
 120:1,17 121:1,1,2,6
 122:3 124:20 127:2
 193:22 194:2

manifests 115:7,12
 119:16
manner 30:2 131:10
 164:8 185:1
manufacturing 29:20
map 167:12,13
mapping 169:8
mark 2:3,3 3:5 16:21
 172:1 198:5
marked 15:20 30:11
 34:4 61:12 128:13
married 316:18
Mary 5:2
master 258:17 352:8
master's 20:21 21:10
match 226:12
matched 323:7
matches 323:19
material 71:22 72:3
 74:8,11 79:2,4 82:10
 88:19 104:11,12,19
 120:1 126:21 130:13
 177:15 178:6,7
 205:11 206:2 208:1
 265:17 333:22 353:21
materials 71:21 77:19
 78:20 92:20 272:22
 311:7 340:9
math 157:13 230:12,14
 245:11,12,13,16
 248:17,19 249:3
 267:22
matrices 42:22 43:3
 97:3,8 261:4,20 309:9
 309:10
matrix 37:8 40:13,20,21
 45:6,10 46:16,19
 52:21 53:6 54:5,7,7
 94:19 95:4,13,20
 96:21 97:13 100:15
 100:18 101:8 106:1
 122:20 123:6 125:4
 135:8 136:18 138:9
 138:15 139:6,8 140:8
 174:6,11 175:17
 176:20 179:19 181:3
 181:7 182:9,13
 186:11,11 187:9
 192:1,9,10 217:5
 245:5 247:5,5 249:14
 250:5 309:19
Matt 277:8,14
matter 1:6,15 6:8 13:10
 25:2,3,10 28:12
 107:22 114:17 195:18
 245:16 253:10 268:5

274:18 304:19 367:3
matters 110:22
max 113:19 258:20
 259:4
maximum 106:2 192:2
 192:4 217:22 266:15
 284:4 285:15
McCallo 89:15
McKay 2:7,7 4:15 6:2,8
 6:11,13,16 8:4 12:11
 12:20 13:3 16:19 20:1
 83:9 197:4,9 212:17
 222:14 225:5 226:9
 226:13 259:8 261:15
 314:12 315:8,13
 316:6,7,8 320:22
 326:3,8,10 340:13,16
 341:5 348:17,20,22
 358:20 360:12,15
 361:2,15,19 362:1,12
 362:14,20 363:8
 365:15,20 366:2,6,17
McNeill's 17:20 206:1
mean 27:17 49:22 79:9
 83:6 101:17 106:19
 107:3 117:16,17
 146:2 152:13 165:8
 168:6 170:9,10
 183:10 186:7 199:6
 208:12 209:1,5
 210:10 213:19 214:2
 215:5 216:10 225:11
 225:17 236:8 237:4
 238:13 242:14 243:3
 243:21 270:16 277:13
 290:16 301:18,21
 323:2 330:2 331:5
 359:2,12
meaningful 220:4
means 24:7 121:6
 280:4,11 291:1 311:1
 319:6 331:1,6
meant 19:12 43:7 137:4
 193:10
measures 235:4 237:18
 240:18 241:11
mediation 310:8
meet 48:6,14,19 349:9
 349:10
meeting 52:3 173:13
members 288:10
memo 43:13 216:13,17
 216:19,22 217:2
 218:5,10,15 230:8
 236:20 238:1 243:12
 253:20 260:3 261:7

261:16 263:2 264:14
266:10 270:21 281:7
281:12 313:19
memorandum 262:11
263:11
memory 356:6 364:19
364:21
memos 10:19,20 43:1
217:7,18 260:18
mention 72:10 83:21
100:7 121:13 193:11
225:20
mentioned 74:2 118:3
130:1 191:1 221:2
235:12,15 281:1
305:20 329:20
mess 89:21 339:22
message 356:6,10,17
messages 324:14,16
messaging 339:19,20
met 40:1,7 48:4 52:5
120:15,15,16,21
128:8,9,18,20 129:7
131:2 133:4 164:5
173:20 174:1 343:22
mic 68:4,16 82:17
Michael 4:13 82:16
Michael's 69:13
microphone 68:11
82:19
mics 69:18,22
mid 124:4 135:8 138:9
mid-November 103:13
mid-point 96:7 101:9
175:16 247:9,11
248:4,14 249:13
309:21
mid-range 179:19
248:20,21 249:1,7
middle 6:19 54:12
96:11 101:8 136:17
223:4 250:3 261:19
262:18 264:20 268:16
286:13 332:13
midpoint 187:9
midrange 244:20
Mike 363:10
miles 89:5 115:16 118:9
119:1 241:19,20
242:4,5 345:17,18
Miller 6:17 9:1,12
Miller's 9:20 12:15
mind 47:14 96:13,17
135:11 224:22 302:16
315:18 363:4
minimal 125:22 141:3

178:17 189:18
minor 38:21 39:10,18
40:6 41:1 51:4 120:10
132:1 154:15 223:1
223:10 225:22 246:22
247:3 248:18,21
249:2 260:8
minor/major 250:3
minute 7:19 252:17
294:14 302:15,16
303:12 307:1 355:5
366:21
minutes 99:12,20 146:5
195:22 267:2 268:3
342:17,20 356:8
362:22 363:3,6
mirror 332:17
mischaracterizing
358:21
misconstrued 153:5
mismanaged 88:22
133:2
missed 366:9
missing 167:20
Missouri 194:1 337:3
misspeak 311:16
misspeaking 293:9
mistake 296:12,15
mistakenly 258:11
mistakes 251:20
252:13,14 259:21
260:3,8,10,11,14
misunderstood 151:6
308:16 341:4
mitigated 158:20
MO 1:2
Mobile 316:13 317:11
325:16 360:21
moderate 38:20 39:7,18
40:2,22 48:8,15 51:3
54:10 120:10,20
127:18 133:11 134:2
138:8,22 156:8
157:17 158:7 222:22
223:8 246:21 247:3,4
248:22
moderate/major 245:17
246:10,15 248:5
249:13,20
module 137:10
moment 29:7 261:11
299:6 307:9 312:4
Monday 319:4
money 107:9 229:13
232:10 323:4 325:7
331:7

monies 323:6
month 266:11
months 103:3 157:15
173:3 178:4
morning 4:3 6:11,12
7:10,11 8:9,19 9:2
13:10 19:3 20:12
91:20 210:6 211:20
214:8 233:13 234:1
234:17 235:1,11
244:7 252:3 260:19
279:11 290:9 291:7
299:10 311:20 343:4
361:21
Morris 314:14
Motel 348:3
motion 60:11,13 148:3
149:18,21 151:2
203:2,8 313:2
motivation 296:2
mounted 68:6,8
mouse 294:2
move 11:20 122:19
136:12 163:15 198:18
209:7 214:7 250:13
272:18 303:15
moved 21:14 122:13
147:5 197:16 313:1
365:13
moves 23:10 34:14
62:5 167:22
movies 333:3
moving 11:17 92:5
101:7 127:5 182:17
203:6 250:7,8 331:7
366:2
mr@ryankuehler.com
2:5
multi-day 37:9,10 47:5
52:19,20 53:14,20,22
54:3,11,13 97:15,21
124:7,17,21 136:20
137:5,8,13,15,17,19
138:1,3,9,22 139:8
175:19 176:4,14
187:12,22 191:16,20
244:15 250:10 310:1
multi-days 191:18
multiday 229:20 245:21
multimedia 21:13
multiple 111:21 116:14
197:1 264:21
multiple-page 6:19 7:4
multiplied 113:15
139:10 245:20
multiplier 106:9 112:7

multipliers 262:10
multiply 232:7 245:22
246:11 248:20
multiplying 105:18
241:16 310:2
municipalities 91:7

N

N/A 280:2,10
name 5:12 20:13 76:9
85:10,11 316:9,10,21
327:16 349:6
names 302:19
national 95:22 123:20
134:13 171:4,19
175:4
nationally 169:9
nature 72:7 110:1
near 211:21 212:9
266:21 275:3
nearby 156:5 212:16
nearest 300:2
nearly 65:5 118:6
157:10,10 160:20
173:3
necessarily 79:9
200:12 238:5 239:6
284:7 287:14
necessary 25:7 60:16
112:3 366:19
need 5:15 6:6 14:17
40:12 48:4 70:16
79:14 101:13 112:11
114:8 126:6 135:10
139:19 149:19 177:9
200:1 251:5 266:22
275:16 278:19 301:13
302:10 303:21 315:15
326:3,7 330:1 333:13
needed 170:13 346:14
347:19 355:12 357:5
needs 41:9
negligence 54:20 55:18
55:19 102:3,8 104:8
125:8,15 140:10,15
177:1,7 178:13
188:11,20 191:6
226:19 227:6 228:15
228:17,20,21 229:2
negotiate 283:6
negotiations 59:14
291:4
NEIC 13:16 31:18 61:8
61:19,21 64:16 65:2,7
66:10 104:18 157:3
161:20 273:2

NEIC's 118:3 160:22
neighborhood 299:14
neighborhoods 299:17
neither 133:17,19
 183:15 184:14
nervous 334:22
never 94:14 111:15,17
 150:3 193:1 210:8
 213:12,15 273:11,16
 273:17 289:15,19
 290:4 297:7,16
 324:11,19 326:22
 354:19 360:2
NEVIN 2:7
new 1:7 2:2 4:5,9 10:4
 10:17 12:10 15:2,18
 15:20 17:1 34:17
 44:12 143:15 148:12
 148:16 151:3,5
 192:20 196:1 210:10
 229:8 282:12,14
nice 304:12 349:9,10
 360:16
night 71:13 72:21 74:17
 84:1 92:13,16,18
 311:19 332:13,15
 338:8,18 349:13
 367:1
nights 331:13
nine-cell 41:4
Nineteen 118:5
non-compliance 26:4
 26:20 27:5 54:21 55:5
 56:8,9,15,17,19 60:1
 60:3 98:3,14 280:18
non-flat 163:12 164:12
noncompliance 132:16
 132:18,19 141:2
 191:11
noon 195:9
north 145:11
northeast 165:10
note 28:4,15 45:18
 77:21,22 86:1 93:2
 138:11 359:4
noted 64:13,17,20 65:2
 65:7,10,11,12 74:14
 89:22 90:1 101:20
 128:17 167:10 192:20
 192:21
notes 20:5,7 302:17
 303:5 364:17 365:2
notice 1:16 41:17 43:12
 43:19 44:10 112:22
 189:17 196:14 222:19
 261:22 277:17

noticed 84:7 196:17
notification 24:16
 273:14 310:22 311:4
notifications 310:21
notified 183:17 273:11
 273:18 339:17 341:11
notify 183:19,21 273:15
 274:19
notifying 24:18 51:14
 183:4 185:8
November 75:4 78:7,11
 97:4,12 103:1,9
 138:12 178:2 192:12
 261:2 262:9,14 263:1
 263:3,4,13,18 264:3
 265:1,2,22 266:4
novo 153:2
number's 181:4
numbering 225:15
numbers 43:2,14,16
 44:18 45:9 46:15
 65:22 111:3 138:21
 140:18 182:22 183:8
 193:16 218:2 224:19
 224:20 246:5 249:5
 250:22 266:4 287:20
 288:15 289:7 309:8
 309:11,12 328:21
 337:14
Numeral 262:4
numerous 233:12
nurse 317:15

O

O 129:21 130:10
O'Neill 362:15
oath 315:15
object 7:22 62:8 85:18
 86:7 111:11 142:10
 145:22 198:21 203:21
 220:3 288:11 295:18
objecting 199:7
objection 23:11 27:11
 27:21 28:13 34:16
 64:4 87:4,17 142:1
 143:7 145:17 146:10
 148:10 152:9 168:2,3
 168:11 170:6,10
 199:11 201:5 203:17
 204:8 207:1 209:10
 220:6 222:11 242:14
 254:20 288:13 289:18
 301:22 314:1,10
objections 34:18
objective 232:3,14
obligation 318:2
observation 161:1
observations 64:17
observe 210:20 342:10
observes 26:3
obsession 196:12
obtain 153:21 186:2
obtained 322:8
obvious 344:22
obviously 8:11 63:14
 121:20 164:6 185:13
occasion 327:5 330:18
occur 38:11 70:16
 72:16 90:12 137:20
 242:9 342:15
occurred 39:17 89:2
 97:6 119:6 138:12
 261:2 263:18 265:1
 265:12 266:7,8
occurring 51:15 164:20
 165:3 183:6,12,18
 194:22 262:9 263:13
occurs 39:1
October 1:12 4:5 75:4
 103:9 137:1 265:8,12
 265:18
offense 13:2,2
offer 11:8,15 112:2
 115:19 143:12 144:20
 144:22 145:18,21
 147:6 148:7 325:1
offered 115:21 197:5
offering 204:17
offers 58:14
office 1:1 2:13 5:3,5
 21:12 180:22 277:9
officer 21:15 22:3 32:1
 32:7 223:13 234:6
 245:15 282:21 289:3
 334:8,9 339:9 340:8
 346:9 347:7 353:2,7
officers 32:4 33:22
 221:18 222:3 232:22
 352:20
officially 285:1
old 196:20 284:20
on-site 61:9 84:13
once 54:14 72:20 82:5
 87:7 91:21 94:19 99:1
 122:19 197:2 258:14
 359:22
one's 247:14
one-day 249:9,14
 263:21
one-third 162:5
one-time 124:20 187:22
 215:13

one-truck 316:17
online 319:10
onsite 187:5,16
open 65:1 87:7 118:5,5
 128:15 132:6 160:17
 161:8 163:21 164:2,7
 173:2,16 176:10,12
 235:19 243:7 333:6
opened 159:11 161:6
operate 316:16
operation 316:17
operational 331:19
operators 321:18
opinion 213:20 228:6
 252:4,10
opportunity 97:17
 152:20 187:15
opposed 49:7 156:19
 179:22 320:3 331:2
option 11:9
options 81:2,4 113:1
 180:18
order 7:8 15:3 38:2 48:5
 60:12 149:13 150:4
 152:19 183:19 189:4
 209:21 214:7 215:9
 228:11 244:14 303:10
 303:19 344:7,13
 346:12 362:8,10
orders 149:12
Oregon 331:1
organized 7:15
organizing 302:15
orientation 145:10
 319:1 321:2,5
original 40:21 70:1
 71:19 77:22 113:6
 114:1 197:14 216:1
 256:18 262:7 312:18
originally 77:17 160:10
 176:7 193:22 214:11
 259:19,21 260:4
 289:9
OSHA 77:20 80:2
outcome 221:8 311:13
outlay 286:1
outside 11:20 87:13
 142:5 150:16 152:17
overall 38:20 93:22
 113:17 116:21 122:3
 125:14 135:7 305:22
overburdened 173:5
overlap 131:7
overly 288:6
overlying 52:5
overrule 28:13 146:9

289:17 296:5 313:22
overruling 254:19
overview 307:21
owner 322:21
Owner/operators
 322:15
owning 323:20

P

P-R-O-C-E-E-D-I-N-G-S
 4:1

p.m 195:20 253:11,12
 268:6,7 367:4

P.O 2:4,8

pace 361:21

pack 366:21

pages 3:9 7:5,5 9:14
 11:12 17:1,10 18:9

61:11 62:5 63:9 64:3
 65:21 67:1 145:4

303:7 364:19 365:6

paid 322:10

paint 72:22 74:11 75:1

75:9 89:22 90:2,3,8

103:10 113:9 118:13

118:20 125:12 156:17

156:19 236:20 243:7

265:18 327:15 328:11
 328:13 336:17

panel 82:21

panic 333:1

paper 5:7 16:2 66:3

196:20 203:3

papers 126:17 127:2

paperwork 344:6 345:1
 346:15 354:3

paragraph 234:10

253:17 256:6,10

259:10,14 260:16,22

262:4,18 264:12,19

264:21 265:5,7

268:16 269:9,11

285:5,20 286:20,22

paragraphs 286:12

paralegal 5:2

parse 50:4

part 14:13 17:11 26:2

36:19 37:8 62:9 72:15

74:18 88:15 126:16

145:18 150:10 154:22

155:1 168:4 172:20

177:5 181:13 182:12

203:20 209:2 217:12

217:14,15,17 218:2

229:5 241:5 252:16

270:12,17 272:6

275:4 281:17 292:10
 309:7 314:19,21

partial 62:9 364:12

participated 322:22

particular 82:3 330:1

parties 5:14 19:14

60:11 152:14

parts 100:11 237:6

pass 319:12

passenger's 333:10

Pause 19:2 22:12,18

33:2,4 53:3,7,18 61:3

61:5 69:5,8,12 71:7

80:13,16 83:1

paved 156:6 158:11,14

158:19

pay 54:21 58:3,4,5,6,8

98:3 350:18

paycheck 350:7,8

payment 323:11

PDF 224:14,15,16,19

225:15 226:9 262:7

pen 234:7

penalties 22:6 33:10

35:16,21 36:8 52:19

53:22 139:4 186:12

215:13 217:22

pens 284:21

people 84:15 160:13

172:11 235:19 275:2

310:18

percent 59:4,15 81:20

104:7 105:21 125:7

125:14 138:20 140:9

140:14 158:5 172:1,2

176:8,9,22 178:12

188:11 189:13 208:9

227:9,15,21 228:8

230:12 246:6 257:10

281:16 366:9

percentage 101:4 227:5

231:1,8

percentages 227:18

percentile 171:5,18

percentiles 171:19,21

perfect 46:7 53:4

307:18

perform 81:7 104:15

215:16 344:3

performed 31:17,19

65:16 71:16 104:19

214:11 274:4

performing 61:20

period 70:21 127:13

132:17 137:3 140:12

143:1 147:14 173:17

184:12

permit 24:22 26:13

51:13 127:8,10,13

128:7 132:14,22

133:1,17,20 134:14

137:1 140:13 173:21

265:7 340:5

permitted 30:21 343:13

person 81:2 219:15,21

219:22 228:6 339:6

343:17

personal 276:1 350:9

personally 202:6

personnel 13:17,18

286:16 347:20

perspective 107:20

158:13

pesticides 113:4,9

philosophy 321:6

phone 278:20 333:13

346:17 356:15

photo 117:7 118:1

145:10 146:16,19,20

147:3 162:11 163:18

163:20 165:11 212:5

photograph 145:8

161:18 163:8,17

photos 141:18 147:11

147:12 165:3 176:11

209:16 212:8

phrase 234:18 236:2

238:5,8,10 240:4,6,8

240:11 293:16

physical 128:18 345:20

pick 328:8 329:1

pick-up 328:21

picked 21:4 327:19

328:11,16

picture 301:1

pictures 338:16 346:16

346:18,20

piece 71:17 75:2,3

77:14 84:6 85:12

167:20 218:22

pieces 71:12 74:3,6

79:21 83:17 102:19

pit 241:18

Pittsburgh 327:16

328:8

placard 71:18 74:9

placarded 118:22 329:4

329:18

placarding 119:4 329:7

placards 74:4 329:11

place 46:19 93:6 95:3

100:14,18 122:14

123:12 125:3 130:4

130:15 151:10 176:20

180:4 192:22 258:21

309:18 315:15 335:16

placement 135:7

places 130:1 191:1

300:13

placing 96:11

plan 24:15 30:17 129:4

181:21 182:2

planned 200:16

planning 86:18

play 64:13,14 79:12

366:3

played 234:5 298:13

playing 57:11

plea 142:7 203:7 205:15

pleading 85:17 87:1,6

203:19 204:15,21

206:8,11 254:9,10

pleadings 60:13 84:8

84:19 86:6,12 87:10

204:12 254:12

pled 142:6

plenty 114:10 278:1

PLLC 2:3

plus 219:6 319:22

323:7

podium 68:7,15,19

point 19:12 32:19 38:19

50:21 64:5 65:15

72:12,17 73:1 80:11

82:14 84:8 85:12

91:12,14,22 92:3,12

94:4 99:16 101:2

104:12 106:1 113:21

117:13,15 123:15

124:4 134:20 135:8

138:10 139:2 140:7

141:15 142:13 149:11

154:2 169:13 181:7

191:3 192:8 193:16

194:7,8,16,20 245:6,6

248:12 274:3 282:12

283:17 292:22 311:10

321:12 322:7 324:2

327:7 334:10 338:13

338:19,21 339:10,17

340:3,4 341:18 342:6

343:11 346:8 347:1

348:3,6 353:4 362:8

pointed 111:14 149:12

pointing 150:1,2 364:17

points 180:19 193:1

222:10 250:20

police 334:8,9 335:3

- 339:9,11 340:8 341:7
342:14 346:8 347:6
352:20 353:2,5
policies 41:8 46:16
216:14 247:14
polluters 165:20
pollution 131:14
poor 65:11 118:7
128:17 132:8 159:14
161:2,11 164:2
173:16 176:2 177:16
318:11
popped 335:10,12
portion 61:7 63:19 64:4
314:7,14 336:15
360:3
portions 63:20,21
Portland 330:22
posing 68:10 241:19
position 7:14 54:14
91:1 134:2 153:6
202:17 219:7 285:12
Positioning 145:13
positive 318:19
possession 61:18
71:12 77:15 83:18
102:20 104:5 178:1
340:2,6 346:21
possibility 235:22
possible 225:4 242:3
299:13
possibly 27:17 242:9
posturing 68:9
potentially 38:2 82:1,10
84:14 101:6 109:19
113:22 118:14,21
125:13 132:7 158:20
159:11 191:18 220:22
246:3 282:13 290:3
pounds 118:2
PPE 275:22 276:4
PPG 78:11 327:15
329:6,21
PPG's 93:3 328:7
PPI 314:6
practical 109:17
practically 91:12
practice 32:5
practitioners 46:18
221:6 240:12
pre-hearing 25:4 43:1
85:4,9 86:16,22,22
200:4,9 203:9 204:4
pre-loaded 328:15,17
pre-sentencing 186:17
precautions 56:5 104:1
precise 129:10 147:2
359:7
precisely 204:12
208:16
precision 208:9
predecessor 33:20
predecessor's 35:11
prefer 12:2 361:13
preferably 303:18
preference 303:2
366:12
prejudice 7:20
preliminary 13:10
42:21 62:18
Premium 77:2 93:8
preparation 124:19
202:2,7,10 210:5
preparations 358:3
prepare 23:5 26:12
115:6 119:15 122:3
prepared 7:17 17:14,17
62:10,12,15 70:5
260:4 366:14
preparing 7:1 44:8
209:21 359:15
prescribes 102:6 137:4
137:12 309:18
present 4:8 81:19
152:15,22 194:20
343:17
presentation 47:12
presented 4:15 8:8
87:13 125:9 149:4
165:14 305:7,9 306:5
presenting 63:14
presently 350:13
preserve 4:13,20
272:18
preserved 5:17,20
pressured 324:11,19
presumed 137:12
pretty 155:10 165:8
204:12,16 215:4
221:8 310:3
prevent 29:13 56:6
159:20 275:2
preventing 238:2
previous 259:12
previously 177:11
362:17
prima 14:13
primarily 55:11 98:21
Prime's 26:20 74:20
77:15 94:9 95:14,20
100:8,17 119:15
123:13,18 125:2
133:14 134:7,11
135:2 173:8 175:2
185:21 186:20 187:2
191:11 273:20 296:1
321:6 322:18 323:21
341:20 351:2,3
primer 65:10 74:15
75:16 80:21 84:3
105:1 129:17
principal 152:13
principle 264:5
printed 166:15
prior 57:1 198:14 205:4
298:9
probability 38:9 235:6
235:11,14,18 236:4,9
236:12 237:13,20
238:2,6,9 240:1,19,22
241:8,12 243:11,13
243:18
probably 199:22 293:13
304:8 334:14 363:5
problem 12:8 13:11
21:7 68:22 112:13
145:16 169:22 196:13
273:13 278:12 344:18
344:19 345:15
Procedure 105:4
procedures 329:2
proceed 12:2 13:6,13
253:15 315:8 324:11
proceeding 254:16
proceeds 285:16
process 26:2 28:11
29:11 35:14,20 77:1
104:17 152:1 193:20
286:19 287:5 322:6
322:11
product 79:2,5,7,8,20
80:2 81:19 82:4,5
130:20,21 177:15
240:22 241:8 328:19
products 77:17 84:4
professionals 260:13
proficiency 271:13
profound 246:22
program 21:14 22:10
24:5 29:6,12 31:8
32:6 37:20 38:13,14
38:16 39:6,9 49:5,14
49:20 50:10 51:12,19
52:4 70:15 88:7,16,20
93:13,21 94:2 115:9
119:14,17 121:12,14
121:17,21 122:1
128:2 132:12,14,20
132:21 133:6,10
169:6 173:7,11,15
185:4,7,14,15,17,19
191:15 234:14 283:10
283:11 297:7,11,17
318:22 319:2 321:2,5
322:22 323:15,17,22
programs 319:8
progressed 60:7
project 58:15
projects 54:22 58:11,12
58:17 98:4
promise 171:11
pronounce 302:19,21
proof 14:13 143:12
144:22 145:18 147:6
148:7
proper 92:6 93:17
173:10 179:19
properly 26:14 31:11
51:22 52:8 70:17 96:4
96:5 109:3 134:9,15
159:7 173:8 175:7
178:3 184:22 274:15
329:17
proposal 253:22 254:2
propose 148:8 149:2
266:20
proposed 3:13,21 25:7
25:13 32:18 33:10
34:8 35:6,8,10,19,21
36:8,22 47:6 53:15
60:6,19,22 64:15 91:2
91:19 95:6 114:1
123:9 124:8,9,18,21
126:4 140:22 141:7
148:16,16 149:8
150:14,22 153:1
174:12,14 175:14,15
175:20 178:18,21
186:14 187:7,8,13
189:11,19,22 190:4
190:16,21 191:2
199:1 208:14 214:13
244:10 246:19 251:11
252:18,19 256:9
270:11,13,16,16
286:4 305:5,5
proposes 253:18
proposing 143:16
246:16
protect 275:17 305:21
Protection 1:2 2:11,13
349:7
protective 158:16,18
276:1

protectively 164:10
protocols 93:6
protracted 285:13
prove 131:18
proved 145:21
provide 7:9,18 15:19,22
 193:5 325:16
provided 6:18 8:19,20
 9:2 222:2 283:7
 329:21 340:7 346:4
provides 10:12 24:5
public 89:5 115:17
 213:16 324:20
publicly 301:19
published 213:12
 217:19 218:1
pull 15:12 41:8 44:22
 197:9 222:14 256:18
 261:15 276:13 284:12
 322:18 327:6 332:12
 358:3
pulled 327:10 332:19
 333:5 335:9,13
pulling 142:18 197:13
 225:8
pure 289:11
purpose 12:7 108:15
 150:20
purposes 17:20 44:3
 59:5 79:18 109:21
 112:3 151:18 261:17
 281:3,9,14 282:7
 284:1 286:5,17
 287:11 304:18
pursuant 1:16 261:3
pursue 26:18 35:22
 111:3
pursued 26:7
pursuing 25:22 110:17
push 179:8
put 4:18 14:15 50:20
 68:5 91:7 200:5,17
 275:1 287:22 288:16
 323:7 324:19 335:10
putting 199:16

Q

Qualcomm 324:14
 339:20 351:19,21,22
 352:4 356:7,14,17
Qualcomms 352:11
qualifies 287:3
qualify 220:2
Quality 75:7 76:20
 177:8 183:17 279:1,3
 311:15

quantify 220:2
quantity 74:15
quarter 276:14 334:15
question 9:17 28:7 49:9
 50:20 57:10 62:19
 63:13 65:17 68:17
 70:2 72:5 76:15 90:22
 106:9 109:9,22 120:6
 142:12 151:14 152:2
 152:11 179:13,14
 192:18 202:5 203:21
 206:7,15,17 208:8,11
 212:22 213:2 215:15
 219:19 220:1,3
 221:16,22 222:4,9
 233:7 237:16,22
 242:10,15 248:12
 252:10 256:2,5
 257:12 258:5 270:14
 272:7 274:5,5,17
 278:3,3 280:9 281:18
 282:8,16 288:4 290:5
 292:22 293:13 296:11
 297:3,3,12,15,19,21
 299:3 302:20 303:15
 303:16 309:5 330:14
 359:4,7 366:10
questioning 68:13
 111:10,11 115:2
 180:20
questioning's 99:15
questions 47:11 152:2
 192:15 203:2 204:21
 206:18 245:13 268:19
 296:4 302:4 310:11
 312:1,8 350:3 352:21
quick 4:10 44:22 50:20
 65:17 72:5 77:21
 82:13 88:2 90:22
 106:8 120:6 142:12
 179:13 192:17 332:22
 333:10 350:4 362:22
quickie 56:21
quickly 11:9 19:14
 89:20 196:7 310:3
quiet 255:9 344:1
quite 69:19 208:11
 215:11 279:9 349:17

R

r,sum 23:4
radius 169:6,12
raise 19:4
raising 315:18
ran 104:18 333:11
 335:7

range 41:4 138:18,21
 227:17 245:7,17
 250:3
rarely 131:13
rate 234:7
rationale 44:19 57:3,22
 150:15
RCRA 10:8,18 21:14,15
 21:20 22:3,4,8,9 24:3
 24:4 27:4,15 29:6,7,9
 29:15 31:8 32:3,6
 34:1 36:9 37:20 38:16
 42:2 43:12 44:5 45:14
 46:18 49:5,19 51:1,12
 51:17 52:3 70:15,17
 82:7 88:16,19 93:13
 93:21 115:8 119:17
 122:1 127:10 131:5
 132:12,14,14,20,21
 133:10 134:14 173:7
 173:11,15 185:4,7,17
 191:15 196:22 213:8
 213:19 214:3,19
 216:5 217:9 221:6,18
 222:15,18 223:13
 228:6 234:14 240:11
 245:14 246:10 257:14
 272:2 278:12 282:21
 283:18,19 289:2
 291:10,11,17,19
 292:12,12,18 293:3
 296:21 297:7,11,16
RCRA's 190:17
RCRA-08-2020-0007
 1:8
RE-CROSS 312:10
re-direct 302:7 304:13
 312:12 360:11,14
reach 220:20 247:19
 249:16 250:19 300:14
 337:11
reached 310:4
reaching 247:20
reaction 341:13
read 11:9 50:22 126:10
 145:18 165:7 205:4
 206:11 263:12 264:19
 286:21 301:9,12
 309:4
reading 206:8,9 265:5
 300:12 301:2,11
ready 6:5 196:2 308:7
 315:8,11 363:7,8,12
real 89:12 319:16 333:9
 353:17
realize 49:22 107:7

109:22 151:9 212:21
realized 106:9
realizes 292:12
reap 178:14
rear-view 332:17
reason 8:1 97:2 142:9
 176:14 184:19 225:10
 225:19 254:14
reasonable 56:5 104:1
 104:14 269:2,15,16
 269:19,22 270:2,5,20
 271:4,6
reasons 174:22 314:2
reassessed 230:10
rebuttal 13:20 14:16
 315:3
recalculating 126:12
 141:13
recall 6:16 205:4
 210:22 211:21 216:15
 223:1 234:3,7 244:6
 244:20 260:18 268:21
 271:18 272:4,11,15
 272:20 279:11 326:14
 330:21 334:3 356:22
recap 191:7 307:2
RECD 3:5
receive 62:22 84:12
 178:5
received 7:2 13:17
 34:22 63:10 84:10
 116:20 127:11 129:1
 141:10 168:15 201:7
 277:14 352:11
receiver 330:22
receives 127:9
recess 367:2
recognition 92:1
recognize 22:22 61:6
 61:14 166:20 198:8
 305:19
recollect 130:10 153:22
 353:8
recollection 85:3 155:6
 245:3 358:18
recommend 25:21 26:6
recommended 113:12
recommending 151:3
reconfirm 362:12
reconsider 126:12
record 4:18 5:7,8,18
 19:21 21:20 28:4,16
 33:12 36:16 87:9,10
 114:18,20 143:10
 150:20,21 152:18,21
 155:18 195:19,22

- 202:12 222:17 225:21
253:11 261:17 264:13
268:6,9 277:1 314:6,8
316:10 354:12 367:4
record's 18:10
recorded 352:5,5
recordings 4:16 5:14
records 24:16 30:14
60:14 205:5 320:11
recoup 59:22
recovery 21:22 317:15
RECROSS 3:2
rectangle 167:10
recycles 183:2
red 259:20
redact 314:14
redacted 314:6
REDIRECT 3:2
redline 251:15
reduces 192:3
redundant 364:2
refer 15:8 17:10 33:11
44:9 79:16 199:22
234:9 239:9 240:12
240:15 254:17 276:11
295:11 308:13
reference 43:13 144:16
158:10 199:4 206:20
219:4 224:14 236:17
261:18 293:8,10
319:19
referenced 67:1 86:12
198:22 209:16,17
216:21 235:5 252:15
261:17 264:15
references 160:13
204:5 209:11
referencing 87:5
204:21 206:10 217:5
referred 103:17
referring 87:12 98:8
206:7 268:13 269:10
277:6 279:8 285:4
refers 243:12
reflect 34:8 194:4,8
256:8 258:1
reflected 138:15 217:19
247:17 249:9 256:20
258:10
reflects 4:19 171:21
254:2 259:1 354:12
refresh 85:3 155:5
refuel 330:18
regard 8:12 9:10,12
10:1,20 11:1,2 23:18
47:19 49:4 107:22
154:13 192:19 365:9
regarding 4:16 5:14
56:17 103:10 134:22
311:17
region 2:11,14 4:9 8:14
21:11,17,17,18 32:5
91:3 93:12,12 102:4
170:14 207:9 277:9
288:7 295:6 296:11
296:13,18,19,21
297:7,17,21 298:22
306:19 311:4 362:5
363:12
regional 2:13 171:4
274:20
regions 171:18
Register 213:13
regular 323:3,4
regulations 26:4
regulators 51:14
183:10 185:9 194:19
regulatory 24:5 38:13
39:6 88:6 234:14
reimburse 325:20
reinspect 345:13
reiterate 150:12 365:18
iteration 199:15
related 32:15,21 60:13
78:4 208:5,6 300:18
relating 107:15 188:15
288:10 351:16
relation 177:4
relative 107:11
relatively 39:11 94:12
132:4 172:10,20
223:10,15 224:8
relaxing 304:12
release 24:15 38:1
129:6 132:9 154:20
158:15,21 159:18
161:13 164:9 165:22
335:9,11
released 154:21 336:7
336:14 357:13 359:16
359:19
releases 29:13 129:3
159:20
relevance 295:18,19
relevant 208:11,17
295:20 300:17 313:3
relied 269:3,6
relief 335:14
relies 301:4
relinquish 116:13
reluctant 148:22
rely 12:7 79:22 93:9
209:22 269:19
relying 86:21 104:16
remained 355:11
remaining 139:7,9
246:14 343:12
remediation 47:2
remember 9:15 83:20
98:20 212:3 272:9
284:22 299:10 329:10
329:14 334:6 338:1,7
339:18 342:1,1 347:5
351:9,12 353:11,15
354:6,10 356:3,13,18
357:1,19,20 359:6
remind 26:9 81:1
165:15
remnants 76:3 91:9
remove 258:14 341:2
removed 75:12 159:10
256:16
renumbering 17:4
reply 318:2
repeat 124:11 132:13
132:15 164:14 213:1
218:9 237:15 253:4
270:22 281:10 288:4
306:14 365:11
repeating 186:18
repetitive 111:12
rephrase 209:19 220:1
220:6 221:16 222:9
222:12 235:13 248:1
257:12 281:18 282:16
288:13 359:8
replica 16:5,7
report 3:15 9:20 12:17
13:14,16,20 14:7
61:16 62:10,21 63:2
89:18 166:22 167:12
167:13 168:17,18
169:1,2,14 337:7
reportable 74:15
reporter 69:15 199:22
226:11
reporter's 200:1,7
201:3
reports 31:20 32:8
118:11 165:7,9
represent 147:11,14
160:11 198:6 245:10
251:20 265:5 276:17
representation 117:12
231:7
representations 205:19
representative 106:22
342:19 346:5,20
represented 205:3,10
representing 4:9 351:4
351:6
represents 27:5 118:8
247:9 248:4
reproduction 5:6
request 76:7 150:4,5
requested 338:16
requesting 145:3
required 30:1 31:2 73:2
127:9 159:8 182:22
183:4 193:20 223:14
requirement 24:21
38:15 39:17,21 40:1
48:6,14,19 49:6 94:9
94:16 99:6 119:17,21
120:3,15,16,18
121:13 133:22 164:5
164:7 173:20 181:19
182:7 185:6,22 186:3
requirements 24:8,13
24:17 26:22 27:4 31:2
36:6 40:3,7 48:3
50:11 51:1 52:4,6
55:16 56:4 102:18
105:11 115:10,10
120:7,21 121:22
122:15 128:8,9,11,18
128:20 129:7,20
130:9,11 131:2,5,5
133:3 173:14 174:1,3
177:17 191:14 291:6
292:1
requires 223:5 227:4
requiring 274:2
rescinded 254:4
reserving 314:22
residences 172:10
resolved 91:22
resource 21:22 79:15
286:1
resources 96:1
respect 43:14 205:11
206:2 208:1,4
respectfully 222:6
respond 8:14 208:21
209:5
respondent 1:8 3:14
58:14 63:12 86:3
152:22 153:9 200:8
229:14 232:10 265:9
281:20 282:3 283:7
284:7 287:15 315:7
315:22
respondent's 28:1,21
31:12 85:4,8 86:13

227:5 276:13 277:5
310:13,14
Respondents 365:9
responders 74:18
119:8,10 278:2
338:12
responding 66:6
response 93:4 129:5
130:6 208:10 233:6
268:19 313:7 334:2
347:19
responsibilities 22:2,7
responsibility 73:19
102:14 109:2 110:19
273:21 358:11
responsible 91:15 92:4
108:19,20 116:1
274:18
rest 18:13 145:14 315:2
330:18
restate 256:2
rested 65:12
result 73:7 122:2 135:6
140:16 291:18
resulted 201:18 244:9
270:9
results 229:20 282:6
300:20 311:13
Resume 3:11
resumed 114:18 195:19
253:11 268:6
return 175:8
returned 346:9
returning 46:10 55:12
116:18
revealed 314:5
reverse 309:13
review 4:20 5:20 8:10
13:22 18:14 26:4
30:14,16 101:22
141:1,18 300:14
344:6,22
reviewed 5:16 19:14
31:20 32:14 60:4,7,18
60:21 63:4 81:14
209:13,15 215:22
218:13 238:1 252:22
reviewing 18:14 44:8
50:5,6,8 64:12 84:7
150:15 180:7 313:15
reviews 314:8
revise 282:13
revised 256:15
revising 60:19
revisions 143:3
rewarded 131:16

165:22
rewind 54:6
rigorous 322:11
rise 121:20
risk 39:2,5,12 223:6,8
223:11 234:13,19
235:4 237:19 240:18
240:21 241:7,11,19
287:18 300:16 307:10
308:3,14,21 324:21
risks 285:22 286:16
road 76:3 318:16,17
327:6 328:1 332:12
333:22 334:7 335:16
337:14,16
roadways 89:5 115:17
role 149:21 152:13,17
153:3 234:5
rolling 336:18
Roman 262:4
room 271:22 314:9
319:11 347:9
roughly 246:12,18
248:9 249:5
routine 332:15
routinely 180:22
row 136:16
ruined 90:1
rule 62:19 142:12
149:17 305:14 313:7
ruled 28:19 151:2
ruling 4:21 28:20
144:19 148:3,22
151:6 200:15
run 83:19 105:3 168:18
168:18 169:5 321:20
331:4
run-down 363:1
running 248:19 298:10
335:18
rupture 159:12 164:9
rural 353:12
rusted 161:3 162:3
rusty 132:8 159:17
Ryan's 231:7

S

safe 24:6,11,12,12 31:8
79:5,6 102:12 129:21
177:14,17 185:1
324:8,12,17 331:19
333:11 361:10
safely 29:10 31:9
349:15
safety 77:16 80:20 81:6
129:16 319:7 321:12

324:1,2,13,20,20,21
325:1 338:6
salary 350:18
Salt 31:12 61:9 75:19
84:9 85:13 89:4,9
103:4,15 115:15
117:11,18 128:21
134:17,21 135:4
136:22 143:2 160:17
169:3 176:12 189:10
193:12 194:4 210:9
210:10,17 238:3
239:8,10 265:18
273:12 274:7 299:14
sample 81:8 105:17
106:15,22 109:9,19
113:15 268:20
sampled 104:18,20
105:2 107:3,18 108:2
112:7 161:20
samples 104:15 109:5
111:21 113:16 232:8
269:2 271:17
sampling 31:19 76:22
81:16 107:14 109:21
270:20
satellite 141:18
save 325:6 334:21
335:3
saved 44:7 167:14
229:13 232:10 352:16
saw 71:20 118:18,21
133:2 212:5 310:18
332:16 357:10
say's 132:19
saying 67:19 143:21
160:13,19 239:17
272:17 288:3 298:15
342:1 347:20 357:19
says 93:2 111:18
121:22 130:3 145:19
156:1 163:2 165:16
234:11 235:3 240:17
241:11 244:15 259:11
260:21,22 262:8,14
262:22 263:3 264:1,3
264:4,7,21 265:7
268:16 269:9,13,18
269:21 271:2 277:7
280:1 285:9,20
286:15 352:16 356:11
scan 5:1
scene 93:10 338:13,20
338:22 341:7 342:8
342:11 343:7,12,14
346:5 347:2 353:13

355:11,12,13 356:21
357:4,16 358:6,7,8,13
358:14,16,19 359:9
359:11,11,19
schedule 362:2
scheme 107:7
school 20:20 196:20
284:21
science 20:16,21,21
scope 27:18 144:1
Scott 2:7 351:1
scrambled 333:8
screen 45:5 169:7
224:16 249:11 310:17
screening 167:2 168:20
170:18 171:2 300:17
scroll 16:12 22:13,21
33:3 41:21 45:8 53:1
61:4 80:14,17 81:13
129:19 135:13,20
141:22 145:3,6
155:12,16 166:18
171:6,8 175:9,11
scrolling 15:13 16:11
SDS 77:18 78:1,6,11
79:1,9,17 80:1 81:15
83:22 84:13 102:21
103:1 104:16 111:18
126:16 130:1,10,12
177:13,17,18 178:1,5
269:4,10,13,19 271:2
SDSs 77:16 78:19
177:11
sealed 328:20
searched 172:7
seat 316:5 320:1,15
seats 319:5,15 320:17
Seattle 21:12
second 9:5 10:10 11:2
21:2 26:11 37:7,8
41:7 44:22 66:6 74:6
75:8 77:6 80:14 98:20
100:21 103:17,18
108:12 135:1 138:5
148:7 151:4 153:19
189:2 190:5 200:22
240:16 260:21 269:10
269:11 271:17 281:8
281:20 286:22,22
301:1,3 306:9 323:11
324:1 351:19 360:10
seconds 78:19
secret 281:21 306:9
section 17:6,10 41:9
62:20 81:13,15
129:20 155:14 156:2

214:3 227:13,19
 253:7 294:1 309:2
 310:19 365:7
sections 50:7,8 253:7
security 211:6
seeing 210:22
seek 149:15
seeking 150:12,13
seen 144:12 170:7
 176:11 198:11 289:15
 289:19 290:4 311:21
 335:1
select 182:13
selected 11:12 27:6
 96:8 136:14 180:2
selecting 179:19
selection 124:3 135:7
self-reporting 287:2
semi 331:18
send 5:2 278:20 324:13
 324:15
sending 341:21
senior 285:2
sense 91:11 109:18
 180:21 222:1,5
 293:17 322:13 355:7
 361:20
sensitivity 69:17 155:2
sent 103:14 213:16
 338:16 352:11 356:16
sentence 155:11 235:3
 235:5 240:16 241:7
 269:11 286:22
separate 3:22 17:11
 18:7 282:4,6
separately 15:4
September 273:1,4,7
 274:13 276:7 277:17
 278:5,16 298:3,7
 311:5 326:14 327:1
 332:11
Sergeant 353:8 355:2
 355:10 357:3,8
 358:15 359:9,20
series 312:7
serious 237:21 241:19
seriousness 36:4,11
 38:10 47:1 88:8 95:2
 95:9 123:2,4 174:10
 235:7 240:20 241:1,9
 241:13
serve 269:21 271:3
serves 356:6
service 269:14
services 77:2 93:8
 317:11

serving 12:7
set 7:15 8:12 66:9 221:9
 227:12 231:17 331:2
 352:21 364:1 365:18
settle 288:19 289:20
settlement 58:20,21
 59:5,8,14 281:2,9,14
 281:22 282:7,11,18
 282:22 283:4,13,17
 284:1,8 285:11 286:3
 286:5,17 287:12,20
 288:15 289:7 305:11
settlements 288:10
settles 289:3
seven 277:2 338:1
 339:4
seven-eighths 65:4
 157:5
Seventeen 71:5
shaking 313:19
share 284:6 287:14
 307:14 341:6
shared 141:6 282:3
shed 147:15
sheet 80:20 81:7
 129:16 364:18
sheets 66:3 77:16,18
 78:1,6,12 79:1 84:1
 84:13 102:21 103:1
 104:16 126:16 177:14
 178:2,5
ship 189:4 324:18
shipment 74:22 117:10
shipped 193:15 194:1
shipper 328:16
shipping 95:22 123:20
 123:21,22 126:17
 127:1
shop 84:9 85:10
shopping 348:10
shops 29:20
short 294:18 304:9
 312:7
shortly 146:20 338:9
 339:1 351:8
shoulder 332:20
show 145:7 236:7 254:7
 254:8 281:7,13,19
 284:10 342:3 357:8
 360:1
showed 212:8 271:15
 291:12 300:1 334:8
 339:3,6 353:7
showing 202:16 223:5
 238:1 354:8
shows 146:21 147:4

173:1 270:18 285:9
 291:19
Shut 324:18
shy 361:11
side 76:3 254:17 287:14
 322:14 332:12 333:10
 333:21 334:7 347:14
sides 363:1
sign 116:15
signed 116:10,19 121:2
significant 39:8 59:22
 106:7 133:8 192:18
 204:13 223:8,15
 224:8 250:12 285:21
 326:16
signifies 158:12
signs 116:12,17
similar 221:8
similarities 131:4
simple 233:7,8 242:10
simply 17:6 44:18
 112:4
simulators 319:13
simultaneous 15:11
 40:15 42:7 45:7 46:6
 47:9 49:8,11 53:10
 57:6 66:14 69:15
 77:12 87:1 99:7 100:1
 106:10,11 108:3,12
 111:6 126:8 139:2
 151:10,16 152:4
 155:19 162:5 190:8
 216:18
sincerely 291:16 292:6
 292:17
single 250:12 305:1
single-spaced 219:6,6
Singleton 362:16
sir 12:20 316:9,19
 360:22 361:9
sit 68:16 152:11 319:11
site 75:8,12 89:16
 103:12 117:9 143:1
 154:2 176:11 177:10
 185:10 189:2,4,6
 210:8,10,12,13,18,21
 211:1,7,21 212:2,13
 274:21 275:20 354:18
sitting 122:11 241:18
 334:16 358:1
situation 91:4,21
 275:16 333:1
situations 112:4 337:11
six 54:18 146:13 161:19
 162:9 273:5,8,11,16
size 46:21 95:10,21

123:18 134:11 175:2
 187:2
sleeping 331:13 332:15
slide 256:20
slight 266:16
slightly 113:12 158:18
 181:10 220:22 221:7
 247:16 261:7 263:2,5
slow 303:17
slowing 224:22
slowly 129:19 145:3
 303:15
small 36:19 39:11
 172:20,20 309:2
 314:7
smaller 249:22
smart 20:6
smckay@nbmlaw.com
 2:9
snip 310:17,20
soft-spoken 21:3
soil 75:11 76:8
solicit 152:18
solid 72:17,20 73:4
 81:2 92:2 108:17
solution 9:9 68:5 205:2
solutions 8:15
solvents 82:9
somebody 292:6 338:8
 340:21 352:14 361:13
something's 337:12
somewhat 51:9 158:20
 218:14 366:3
soon 136:4 190:9
 266:21 294:2 331:1
 333:14 354:18 367:1
sophisticated 350:19
sophistication 46:22
 95:11,21 123:19
 134:12 175:3 187:2
sorry 16:15 33:12 43:8
 48:9 49:21 59:11
 66:13,20 71:3 75:20
 79:13 96:14 99:22
 112:17 117:17 124:10
 124:12 129:12 136:2
 136:6 137:4 139:13
 148:6 155:18 161:16
 161:22 162:7 169:21
 170:8 174:21 175:21
 177:22 183:1 187:8
 201:1 208:13 212:17
 221:13 224:13,20
 225:5 253:4 254:6
 255:3 257:8 263:8
 281:10 291:2 296:12

- 307:22 308:1,16
314:17 341:3 359:4
sort 7:14 91:5 330:1
sought 160:10
sound 246:12 249:5
sounded 349:12
sounds 58:5 179:12
272:14 349:13,17
source 78:5
space 193:19
speak 42:22 66:18
83:14 91:13 124:12
193:4 255:8 257:11
288:9 304:1 350:21
360:18
SPEAKER 255:16,20
277:2 284:17
speaking 15:11 40:16
42:7,16 45:7 46:7
47:9 49:8,12 53:10
57:7 60:17 66:15
69:16 77:12 87:2
91:12 99:7 100:2
106:10,11 108:3,12
111:6 126:8 139:2
151:11,16 152:4
155:19 162:6 190:8
216:18 310:6 355:22
speaks 152:19
special 107:21
specific 59:5 64:17
110:5 137:14,17
183:8,9 194:10 221:4
222:1 223:22 233:10
334:2 352:22 364:19
specifically 9:15 11:1
11:16 67:10 90:15
181:8 188:15 212:12
217:18 272:15 304:19
355:6 356:3,19
specified 177:14
specifies 291:21
speculation 209:2
289:11,13
speculative 208:8
221:22 242:8
speeding 331:6
spell 316:9
spend 78:18 109:13
302:15,16
spent 214:16
spilled 103:11
spoke 352:15 354:19
spoken 352:19
Sprague 362:16
spread 303:8
- Springfield** 1:2 84:16
188:22 337:3
squared 13:5
staff 61:20 65:7
staff's 64:17
stage 183:11
stamp 311:4
stamping 162:17,21
stand 6:17 19:9 21:20
196:7 316:1
stand-by 362:17
standalone 36:15
standard 133:15 247:5
289:5
standing 28:19 242:18
315:18 334:7,8
standpoint 149:19
152:8
stands 144:20 148:22
stapled 64:19
start 7:11 30:12 57:11
128:13 129:11 142:13
259:12 282:10 303:15
349:11 361:20
started 4:6,10 6:5 21:11
91:18 146:3 196:3
209:13 265:17 315:11
317:7 318:1 319:17
321:15,18 332:6
334:12 335:10 336:17
357:21,22 361:12
starting 21:16 91:19
178:2 265:12 365:19
starts 259:11
state 20:13,19 24:18
75:6 76:19 77:18
130:12 171:18,20
177:8 183:5,16
184:15,21 185:8
189:3 230:22 241:3
274:19 276:18 278:22
339:11 340:3,7,8
341:7 342:12 343:6
343:11,13 353:4
stated 74:8,12 202:19
206:19 218:19 227:19
305:3
statement 78:19 205:7
205:20,22 246:4
289:6 291:13
states 55:8 56:10
105:12 131:13 145:13
155:1 213:22 237:18
stating 126:20 344:15
status 11:5 322:7
statute 294:7 298:10,16
- statutory** 36:3,10 88:10
95:1 106:2 113:19
123:3 192:2 213:19
213:22 217:9,16,21
258:16,20 259:4
290:15
stay 68:10 272:22
stayed 322:13 348:9
steadily 41:22
step 25:5,9 37:7 40:10
47:4 52:18 73:3 81:3
87:22 88:1,18,21
93:17 122:19 151:1
174:6 186:6 207:3
229:11 255:13
Stephan 3:3 315:20
316:11
steps 36:21 37:3 48:4
48:13,16,19 70:16
221:5 347:19
Steve 315:13 362:15
sticked 28:22
stipulated 23:13,15,16
86:14 105:8 163:7
310:14 363:16 365:11
365:14
stipulation 363:20,21
364:1,3,6
stop 129:21 149:3
330:17 331:15,17
stopped 345:10,12
stops 331:6,16
storage 24:9,11,20
26:13 29:21 30:21
31:8 51:13 79:5,6
95:18 102:12 116:9
116:16 127:7 128:6,8
129:20,22 130:3,8
131:10 132:2 133:3
134:10 147:16 153:20
156:6 158:10,19
163:11 164:4 165:14
173:14,20 177:14,17
212:2,13 239:10
265:6,20
store 130:3,3 132:22
134:15
stored 31:5,7 89:1,9
103:3 127:11,12
128:21 130:14,16
131:2 134:21 135:4
136:22 140:12 142:22
147:15 156:17 157:15
158:17 159:10,19,21
160:22 163:10,12,13
164:2,8,10,12,16,21
- 165:10 173:3,16
175:6 176:1 184:14
184:16 185:1 187:5
187:16,19 194:11,14
194:19 211:4,17
238:12 239:4,7 242:6
265:9,19 274:1
stores 127:9 183:3
storing 31:10 189:10
straddle 97:6
straight 203:19 206:8,9
215:4 292:2
straightforward 94:13
119:21 219:10
street 2:14 335:7
stressors 173:1,4
stricken 257:5 258:18
258:20
strike 149:22 201:2
strikeouts 251:15
strive 324:16
Strock 218:5,11
strongly 71:14 178:6
344:20
strontium 74:16 81:20
104:22 107:2 111:16
126:22
struggling 224:14
stuck 221:13
stuff 153:6 170:13
215:7 218:16 243:15
338:17 352:18,18
Subheading 226:18
subjective 232:18
submission 199:7
submissions 5:5 87:11
submit 7:7,19,21 151:4
submitted 32:20 60:10
141:12 167:5 170:3
213:15
submitting 86:20
subsequent 45:21
149:10,13
subsequently 201:16
201:17
subset 15:2
substantial 38:3 39:2,5
119:9 121:7,20 122:2
161:7,12 173:12
185:14,19 223:5,15
224:7 301:6
substantially 93:21
173:14 185:17
substantive 72:7 110:1
substitute 313:2
substituted 313:11

Subtitle 22:9 24:3,4
subtracted 258:12
Success 321:19
suffer 66:21 196:11
sufficient 107:19
sufficiently 15:5
suggest 99:11 325:5
 362:3
suit 54:11
summarize 190:3,15
summary 135:14,16
 145:20,20 190:10
 244:4 251:10 258:19
super 172:20
supplemental 150:6
supplemented 300:21
supplied 200:4,8,9,14
supplies 111:19
support 10:12 11:6
 14:14 144:11 150:3
suppose 9:9
supposed 67:2 167:11
surface 156:7 158:11
 158:15,20 163:13
 164:13
surprised 354:12
surrounding 210:21
 224:1
sustain 87:4,16 143:7
 170:10 206:22 209:10
 220:5 222:11 242:13
 254:14 288:12
sustaining 27:21
swapped 345:12
switched 32:8
sworn 19:8,12 315:22
system 5:4,11 74:20
 324:14 339:19,20
 351:19,21,22 352:1,1
systems 319:8

T

tab 82:20
table 68:16 135:17,19
 171:10,12 190:10,10
 244:4,7 247:21 248:2
 249:10 258:19 259:2
 270:18
tables 9:18
tactical 14:17
taken 48:4,5 49:1,2
 55:6 75:19 98:15
 100:12,13 102:14
 140:6 156:1,3 165:11
 176:19 179:22 180:4
 181:15 187:17 219:9

221:4 222:19
takes 291:18 292:3,13
talk 8:15 25:1 27:15
 152:22 219:11 228:18
 228:19 235:16 261:10
 269:17 297:8,17
 305:8,8 330:16
 351:18
talked 115:8 207:17
 260:17 279:9 318:16
 318:18 355:10
talking 42:2 44:17 50:9
 86:12 107:8 110:12
 142:6 144:1,2 147:18
 148:11,12 156:17
 197:12 203:19 219:14
 225:14 249:19 282:20
 293:14 342:19
tall 68:4
tallied 295:15 296:8
tallies 296:19
tally 297:4,22
tarp 154:3
tarped 147:5
taught 318:9 321:5
TCLP 105:3,6,13 113:1
 113:13
team 35:14 306:15,19
 317:5 349:11,12
tell 12:1 15:10 24:2 33:8
 33:17 50:7 64:9 72:7
 77:12 85:7 91:14
 99:17 110:1 112:18
 162:11 170:16 323:21
 328:21,22 332:17,21
 334:2 337:19 356:10
 357:3
telling 355:11,14
tells 291:19
temperatures 130:16
ten 59:4,15 99:12,20
 104:7 105:21 173:3
 176:22 178:12 188:11
 189:13 267:14 342:17
 342:20
ten-month 70:21
term 238:7 290:13
 291:1 293:10 294:8
 320:13
terminal 210:11 239:11
terminology 247:15
terms 4:9 47:17 60:11
 106:14 107:6,16,20
 108:5 147:17 150:1
 154:15 178:9 313:15
 365:21

terrifying 349:13
test 270:3 319:13,16
 320:12
testified 19:10 86:21
 98:1 147:9 165:13
 180:18 206:17 208:2
 208:12,13,15 212:1
 227:3 233:12 234:21
 237:1 244:18 251:18
 252:2 268:18 271:15
 271:22 272:8,11,12
 290:9 313:5,10 316:1
 349:20 351:19 353:1
testifies 13:21 14:6
testify 14:3,4 15:5 35:7
 60:5 66:11 86:3
 152:21 204:6,16
 208:15 209:3
testifying 13:19 27:19
 62:11 85:17 86:5,8,10
 234:16 312:22 350:22
testimonial 87:14
testimony 6:19,22 8:13
 8:20 11:10,17 12:2,15
 14:9 17:20 44:4 85:19
 86:9,17 142:2,10
 168:4 180:13 203:18
 204:9 205:10,12,15
 206:1,3 207:3,12,22
 209:12,22 210:6
 211:20 219:12 222:21
 233:22 235:11 255:15
 260:19 271:12 272:1
 314:15 325:16 360:21
testing 204:5
tests 319:11,12
text 44:19 225:19
thanks 66:20 108:9
 195:4 284:19 306:22
 309:1 349:6
theirs 242:12 301:12
thermostat 69:10
they'd 324:15
things 7:15 30:3,6,10
 30:20 43:18 51:17
 89:2 91:6,10 130:22
 142:14 149:3,22
 152:17 160:9 183:20
 209:14 243:6,6 264:9
 283:8 287:12,17
 325:6,10 344:8
 347:18 355:7,9 358:2
 362:2
third 26:12 75:2,3 277:6
 334:15
thought 4:17 25:21

45:22 50:22 66:7
 192:20 209:4 333:4
 358:9
thousands 118:2 289:8
 289:20
three 43:18 74:2 75:3
 77:11 127:5,6,7,16,17
 128:5,6 135:14 136:1
 136:2,9 140:22 141:6
 141:8 146:5 154:14
 252:13 256:10,11,15
 258:10,17 259:11,13
 261:1 278:10 323:12
 325:3
three-quarters 65:3
 157:5
three-year 323:5
threw 296:14
Tibbett 304:4,6
tie 215:5
tightly 130:14 131:7
timeframe 75:5 272:3
 278:17 298:13
times 93:15 111:13
 157:13 221:2,14,14
 232:7 233:12 241:8
 244:19 245:20,22
 246:11 247:19 248:8
 249:2 310:2 325:3
 328:17 345:10 352:13
tire 345:8,17 356:10
tired 363:6
title 122:4 216:16 218:9
 262:12 310:19 323:16
today 7:2,6,16 9:2,11
 10:2 28:11 35:8
 205:15 207:12 208:1
 209:12,22 210:5
 222:21 229:7 313:5
 314:9 325:16 337:4
 350:13,22 360:21
told 118:12 126:3
 178:20 189:21 274:10
 274:11 276:3 321:5
 337:21 340:14,19
 341:11,12 347:7
 349:19 352:17 355:6
 357:7,8
tomorrow 366:4,12
tool 59:13 69:11 79:15
 167:2 168:20,20
 169:8 170:18 171:2
 300:17
top 82:20 95:13 101:8
 134:6 145:10 162:4,5
 167:11 171:10,12

175:1 186:20 230:15
 247:6 249:9 276:14
 309:9,21 310:5 336:8
 347:16 358:3
total 107:1 126:4
 139:11 140:19 141:7
 178:21 189:22 190:4
 190:16,21 244:12
 251:10 252:9 256:18
 266:14
totality 97:20 176:3
 187:18 260:6
totally 28:17 164:16
 174:17 296:15
touch 341:17 342:5
 351:20 357:2,10
 360:2
touched 62:17
tow 93:10
towing 118:12,16
 125:11 341:1 346:5
 356:7
town 273:12 327:17
toxic 242:19 243:1
Toxicity 105:3
toxicology 20:22
track 115:12 332:3
tracking 5:4 116:6
 119:19
tractor 334:16,17 335:4
 335:13,22 336:7,14
 339:2 344:4 347:8
 354:2
trading 331:10
traffic 334:11
trailer 71:18,20,21
 101:21 102:1 115:20
 117:8,13 118:1,2,13
 125:12 142:22 145:9
 147:1,5,15 154:4
 156:6 158:10 159:21
 163:12 211:2,17
 212:2,10 238:12
 239:4,13 274:7 275:8
 328:14,15,18,18,19
 329:12,13,17 331:18
 332:19 333:21 334:13
 334:14,15 335:8
 336:2,3,5,8,9,12
 339:2,21 340:22
 343:2 344:16 345:1,3
 345:11,13,15 346:2
 358:1,2
trailers 146:16 322:19
 345:9
trainer 320:6

training 24:14 30:15
 129:2 318:3,21
 319:11 321:14
transcript 4:19 6:4
 18:15
transcription 365:2
translate 78:21 113:13
transparent 326:5
transpired 8:12
transport 24:9,12
 102:12 115:19,20
 119:20 120:1 122:7
 134:4
transportation 122:6
 122:10
transported 89:1,3
 115:14 117:18 118:9
transporter 115:11
 116:14 118:17
transporters 116:14,15
transporting 115:22
 118:15,20
transports 183:2
transposed 354:5
travel 325:20 332:4
traveling 326:1 328:2
 331:11
Travels 361:10
treat 18:7 321:11
treated 321:11
treating 17:6
treatment 24:20 29:21
 30:21 95:18 102:12
 116:9,16 134:9
 174:20
treats 183:3
trial 7:12 285:17
TRIBBET 83:2
Tribbett 161:15 163:5
 163:15
Tribett 22:15 82:22
 141:20 155:20 307:16
 307:20
tribunal 149:15
tricky 149:18
tried 359:7
trip 210:16 330:17
 332:8
trips 332:8
trooper 339:11 340:4,8
 341:7 342:12,18
 343:6,11,13 344:3,21
 347:10
trooper's 341:13
troopers 342:19
trouble 69:16

truck 74:17 78:2 90:2,3
 90:10 93:10 117:9
 119:11 126:17 316:16
 316:17 317:2,6,9,14
 317:18 319:16 320:5
 320:7,9,12 321:18
 322:9,21 323:3,11,13
 323:21 325:2,10
 327:2,3 328:22
 331:22 333:11,12,20
 334:19,21 335:3
 345:9 346:17 347:14
 347:15 352:4 354:3
 358:10 359:15
trucked 265:18
Trucking 350:16
trucks 212:1,12,16
 213:4 339:2
true 23:7 34:11 62:1
 167:4,17 257:7 269:1
 283:12 309:13 310:1
 352:10
trust 225:17 250:6
try 6:21 68:10 69:9
 83:13 149:22 222:13
 303:8 331:4 350:3
 352:21
trying 7:14 13:12 16:11
 27:15 28:12,13 29:5
 48:9 50:3 57:7 68:4
 75:22 89:16,19 91:7
 91:11 107:7 109:16
 109:17 144:11 148:17
 169:20 180:6,21
 204:11 220:2 224:17
 230:22 255:8 283:2
 294:18 313:11
TSC 186:22
TSD 123:16
Tuesday 1:11 4:5
turn 22:15 35:20 39:13
 41:9 47:4 52:18 67:10
 70:9 83:17 87:20
 94:19 102:2 109:11
 112:16 115:4 124:22
 128:3 133:12 153:19
 154:6 179:2 203:13
 213:8 262:2 306:22
 307:12
turned 82:19 343:3,6
 357:14,16
turning 29:6 83:6 93:11
 121:11 159:2 174:5
 251:2
turns 68:21 108:22
 110:14

twenty-one 66:3
twice 53:6 258:12
two 7:3,22 9:3,14 13:22
 20:6 21:12 27:9 36:3
 36:7,10 37:7 50:1
 76:15 81:1,4 88:9
 95:2 97:1,2,8 99:10
 106:18 113:6 115:5,5
 115:6 117:1,2,21
 123:10 124:18 125:20
 126:5 135:14 145:7
 146:5 174:11 189:8
 208:9 213:19 217:6
 229:11 245:2 251:16
 259:13 260:12 261:13
 270:5 278:10 281:5
 281:11 286:12 304:16
 310:11 328:4,6
 332:14 333:5,8
 343:19 345:16 357:10
two-page 5:1
two-thirds 130:2
type 5:20 221:22 222:3
 301:22 327:13 352:18
types 29:17 30:3,5
typical 179:22

U

U.S 1:2
ultimate 247:1
ultimately 5:5 192:21
UN 74:9 75:1 354:17
uncertainty 301:6
uncovered 147:2
undermines 93:20,21
 173:15 185:17
understand 6:21 9:10
 13:4 49:9 51:7 57:8
 68:3 79:14 87:4 112:1
 148:20 151:13 199:13
 199:18 219:8 220:10
 228:12 230:10 254:7
 277:12 282:15,22
 300:15
understanding 5:9,19
 8:18 43:21,22 46:2
 47:17 50:6,8 107:12
 152:6,7 243:17
 290:13 291:1 311:9
 352:6 355:18
understands 199:10
understood 7:9,11
 43:11 66:22 121:8
 144:14 153:20 179:17
 180:12 195:2 203:22
undeveloped 146:12,15

unenviable 7:14
unequivocally 274:6
unfair 7:20
UNIDENTIFIED 255:16
 255:20 277:2 284:17
unique 54:22 58:22
 59:2,9,13 98:4 280:20
 287:9
unit 105:5,12 112:22
universal 80:21 129:17
universities 29:20
University 20:20
unregulated 51:20
unrelated 42:15 110:11
unusable 73:5
unusual 31:22 32:9
update 43:14,15 261:20
updated 10:19,20 45:10
 46:15 194:3
updates 44:18
upload 5:3,12
upper 162:12 226:10
upward 56:10,22 125:6
 189:14
upwards 56:12,16
 57:14 140:14 227:4
 310:5,7
urethane 80:21
usable 79:19
use 5:8 7:22 8:7 10:2
 19:21 33:22 37:7
 79:15 81:5 97:2,7
 137:21 138:2 148:8
 168:19 169:13 186:9
 191:19,22 238:5
 240:4,6,10 243:12
 249:18,20 250:2,2
 282:7 284:21 300:9
 309:17,18 351:22
 352:4 363:2
useful 15:18 148:18
users 300:5
uses 171:2 172:2
 304:17
Usually 288:19 331:21
Utah 3:16 89:4 115:16
 133:18 183:16
utilize 6:22
utilizes 5:6,11
utter 208:10

V

vapors 130:17 161:10
variability 110:21
variable 180:9
variation 309:20

variety 242:8 309:20
various 91:6
vary 250:22
vehicle 344:4
vehicles 164:20
ventilated 130:4,15
verbal 352:1
verify 116:19
version 34:7 36:16,18
 46:15 96:21 166:15
 197:5 198:14 202:18
 276:20
versions 97:1
versus 19:17 157:18
 204:15 224:7,8
 364:17
view 94:8 119:14
 132:11 173:7,18
 185:20 213:18 224:3
 285:13
viewed 110:18 116:22
 147:13 160:1 184:4
 185:3 187:21 252:5
views 124:19 127:15
VIII 2:11
violate 182:6
violated 49:7 50:11
 56:4 218:20 346:1
violating 291:10,11,17
 292:3,7,12,12,18
violation 26:5 36:4,11
 39:17 47:1 48:9 49:6
 49:14,16,19 53:16
 55:7,14,21,22 56:6
 88:9 95:2,10 98:16,18
 99:2 102:9 123:2,4
 137:9,20 138:12
 157:9 158:4 174:10
 181:14,16 182:1,3
 223:3 344:15,19,21
violations 22:6 25:20
 26:7 33:22 35:22
 52:12 57:1,13 97:5
 121:19 143:22 148:12
 148:16 185:12 190:20
 242:8 253:3,7 257:13
 262:9 263:13 265:1
 265:12 272:2 287:2
violator 46:22 47:20,21
 48:22 49:8 50:16
 55:20,22 56:11,12
 58:5,14 95:11 102:9
 287:4 292:3
violators 131:13
virtually 203:20
visible 345:14

visited 137:2 275:20
volatilizing 132:6 161:9
volatizing 235:19
volume 1:10 69:18
 82:17 156:4,16,18
 304:5
vote 268:2

W

WA 2:4
wages 325:21
wait 14:5 19:18 20:4
 267:21 359:3 361:13
waiting 53:19
walk 10:7,13 110:10,13
 110:15 308:15 309:2
 310:10 331:21,21
walk-around 331:20
Walker 362:16
walks 9:4,6
wanted 4:18 42:21 43:7
 47:13,18 67:7 92:14
 112:4,8 113:21
 150:11,19 160:11
 161:21 264:8 270:2
 318:11 346:10
wants 206:20 218:21
 254:7,8
warned 300:4
warning 275:15
warranted 286:5
washed 90:2
Washington 20:20
wasn't 8:22 42:6 58:16
 75:10 78:4 84:15
 93:19 121:2,5 134:10
 142:4 150:12 164:10
 187:1 202:5 211:5
 215:15 252:10 270:17
 275:10 278:3 296:17
 297:3 298:11 310:19
 355:6 357:9
watch 114:22
watched 336:10
watching 334:11
water 139:14 251:6
waterways 154:19
 156:5
way 4:13 5:15 14:19,22
 16:10 17:12 41:8
 51:20 54:6 111:10
 116:11,15 118:8
 119:7 130:2 159:11
 159:19 184:21 191:4
 194:18 202:3,4 209:9
 211:18 222:13 271:6
 288:22 302:22 320:20
 330:18 334:4,15
 339:21 340:15 356:21
 364:2
ways 49:17 53:2 111:13
 191:7,10
wear 276:4
weather 324:9,15
webpage 42:11,13
website 42:9,10 262:8
 300:8,12 301:3,11,16
weekly 30:16 129:2
weeks 71:14 273:6,8,11
 273:16 278:10
weight 52:11 63:17
 172:16
welcome 242:14 301:12
 302:21
went 20:19 90:9,9,10
 114:18 195:19 211:16
 211:16 239:3 253:11
 260:7 268:6 273:7
 319:1 322:10 325:11
 328:7 348:4,10,12
 350:9 365:12 367:4
weren't 11:4 29:5
 154:19 159:19 164:10
 176:8 306:12,15
 366:9
west 327:11 331:11
Western 20:20
wheel 345:20
wheels 332:18
whereabouts 327:9
white 162:13
wholeheartedly 69:19
wide 242:8 309:19
wife 316:17 317:13
 318:16 321:1 330:9
 333:4,9 334:9 346:17
 349:14
wife's 316:20 324:20
 326:18
willfulness 54:20 55:18
 55:19 102:2,7 104:7
 105:21 125:7,15
 140:9,15 176:22
 177:6 178:13 188:11
 188:19 191:6 226:18
 227:6 228:13,16,19
 228:21
wind 334:13
wireless 82:20
wish 144:6,20 209:6
withdraw 151:14 152:2
 309:5

withdrawn 152:10
Withrop 2:4
witness 3:2 7:5,6 14:16
 15:4 17:15 18:2 19:9
 19:11 21:7 22:16,17
 22:19 25:6,10 27:19
 40:15,19 41:12 42:4,6
 47:12 48:2 49:3,10,13
 50:2,12,17 51:5,9
 57:2,4,9,18,21 59:16
 62:10,11,13 63:1,5,13
 72:9,13 73:7,14,18
 76:4,11 77:7 78:10
 79:21 81:9 84:18
 91:17 96:16 103:19
 106:11,16,20 107:10
 108:1,7,11 110:3
 147:8 152:21 165:17
 193:2,6,9 197:22
 203:12,15 204:15
 205:4 207:5 212:21
 213:6 226:17 230:22
 231:6,9 255:14
 313:18 316:1
witness' 204:5
witnesses 86:2,17
 152:22 221:11,13,15
 301:15 314:19 362:8
witnesses' 44:4
wonderful 267:9
wonderfully 255:9
wondering 51:2 107:17
 179:20 351:21
word 246:13 249:4
 293:13
wording 359:7
words 208:10 215:16
 249:12 355:17
wore 275:22
work 20:7 21:9 40:21
 61:21 172:11 179:21
 207:7 295:1 317:8,13
 317:18,21 318:4,13
 320:20 322:5 325:11
 325:22 348:12
worked 198:7 323:17
 326:11 347:10
workers 132:7 161:9
 236:21 237:2,6 238:2
 238:14,18 239:3,12
 239:18 243:22 275:17
working 21:11 211:16
 225:18 247:14 291:5
 318:7 357:17
works 195:11,12 313:8
 356:20

world 89:12
worried 68:13
worries 255:19
worry 12:14 352:16
worth 110:17 362:2
wouldn't 57:12 113:8
 218:22 232:18 266:15
 309:12 315:17
wrap 99:18 362:1
write 57:4 201:20
 213:21
written 156:15 162:15
 202:3 259:20 275:14
 279:20 313:12 352:1
 352:2,3
wrong 45:4 50:7 68:2
 85:2 245:12 247:16
 252:11 254:1,1 258:7
 258:8 267:22 345:4
 354:4
wrote 280:18,21 313:19
Wynkoop 2:14

X

XRF 104:21

Y

yard 90:4 299:15
year 144:5 159:21
 164:3 173:3 295:14
 295:15 296:8,9,20,20
 297:5,18,22 298:1,3
 298:20 320:11
years 21:12,19 32:4
 193:14 194:22 198:7
 214:21 247:13 323:12
 338:2 339:4
years' 214:22 215:1
 218:19 289:2 319:22
yelled 333:6
yellow 65:9 80:21
yes/no 297:15
yesterday 4:11 5:16
 6:17 8:21 9:11 12:16
 13:14 19:15,17 81:14
yesterday's 8:12

Z

zero 279:20 280:10,13

0

04:45 311:5
06 162:13 163:2

1

1,300 106:4 113:19

252:8
1,350 105:17
1.60451 138:20
1:00 195:11,22
1:04 195:20
1:12:03 204:10
1:19:51 212:7
1:22:55 215:8
1:53 253:11
10 21:11,17 32:5 81:20
 125:7,14 140:9,14
 146:18 157:15 227:8
 227:15,21 228:7
 267:1,11,13,15 268:3
 277:9 298:9,15 311:4
10-4 324:10
10-minute 267:22
10-month 127:12
10,000 270:9
10,800 105:18 230:9
 252:11 270:9,11,16
 270:19,19
10:00 99:10
10:05 114:7,18
10:20 114:15
10:22 114:19,22
10:25 114:21
100 158:4 176:8,9 208:9
 257:10 281:16 323:13
 366:9
101,000 192:4
101,439,000 258:21
1059 248:19
11 71:1,5 163:16 171:6
 214:20,22 215:1
 218:19 289:2
11:59 195:19
110,576 249:3
113 53:12 308:5
1206 354:9
126,374 246:1,12 248:9
1260 354:9
1263 74:9 75:1
13 15:15 16:10 17:1,10
 18:9 61:2,11 62:6
 63:9 64:3 65:19 136:9
 163:6 244:2 247:18
 279:15 298:19 308:4
 308:8 364:19 365:4,6
13-53 3:9
1300 270:12
139 249:2
13th 307:13
14 146:22 155:20,21
 161:16,17 308:5
15 65:21 114:8 222:15

222:18 225:10 261:16
 267:1,10,11,13
 278:16
1595 2:14
16 211:10,13 225:10,20
16,000 250:13
16,767 135:9 139:8
 249:11,16
16,776 136:18
168 3:15
17 7:5 71:1 147:3
177 248:19
179 139:7,9 244:19
 245:20,22 246:11
 247:19 248:8 310:2
17th 298:7
180 53:22 54:2 137:19
 137:21 138:1 139:5
 191:20
18th 203:9
19 64:20,21 65:2 118:4
 128:14 157:4 160:16
 160:19 217:12,14,15
 217:17 218:2
197 3:3
1990 218:4,10
19th 273:1,4,7 274:13
1st 265:8,13,18

2

2 4:4 45:20 138:12
 154:2 167:10 203:14
 230:12 259:6,18
 262:16 264:16 276:14
 310:15
2,295 138:10 139:3,9
 247:19 248:1
2:06 253:12
2:25 267:18 268:1,6
2:35 267:19,20 268:1
2:39 268:7
20 3:3 64:20,21 65:2,8
 104:21 107:1,3 118:4
 118:6 127:11 128:15
 136:9 155:21 157:4
 157:12,13 160:16,20
 190:13 198:7 244:2
 251:10 259:18 265:9
 308:5
2000 105:5,13,15
 113:11
2003 36:18 40:19 42:2
 42:11,13,19 43:12
 44:4,14 45:6,14
 138:21 216:5 222:14
 222:15,18 225:9

226:16 227:13 231:18
 261:4 282:5 284:12
 286:11 287:1 293:3
 308:8
2009 21:12 96:21 97:12
 106:1 192:9 217:4,5
 259:5 266:10
201 3:20
2010 10:19 43:13
 216:22 217:2,3
 260:17 263:3
2011 21:13,16
2013 192:12 262:11
 317:7 318:1
2014 318:2
2015 78:7 97:4,12 137:1
 138:13 211:10,13
 263:14,18 265:8,22
 272:3,12 276:8
 277:18 311:5 319:2
 326:14 327:1 332:11
2016 31:18,19 61:10
 137:3 147:1 154:2
 265:8,15 271:16,18
 272:3,12 273:5
202,295 244:19
2020 10:19 36:20 42:10
 42:12 43:15 45:10,21
 138:14 192:10,22
 193:13 194:3 216:12
 216:19 245:5 259:4
 260:18 261:7,16,19
 263:11 264:11,14
 298:7 322:9
2022 1:12 105:16
 113:14 142:17 147:10
 147:13,19 148:2
 203:9 210:17
208-343-1000 2:9
22 145:18
23 7:4
24 142:17 147:10,13,19
 148:2 161:16,17
24-hour 337:13
24th 31:19 61:10
 271:18 275:21
25 1:12 81:20
25th 4:6 78:7,11
26,000 323:9
27 311:5
2772 2:8
27th 276:7 277:18
 278:5 326:14 327:1
 332:11
28th 326:18
29th 348:13

2nd 31:18 65:16 95:16
 97:4,12 101:20 137:2
 192:12 262:10,15
 263:1,3,4,13 264:3
 265:1,2,22 271:16
 272:16 273:6,17
 274:6 275:19,20

3

3 3:15 45:21 74:11
 81:13 166:5,6,17
 168:1,16 175:10,11
 192:2 239:9 244:4,10
 244:13 248:2 249:10
 258:17 262:2,4
 263:18 265:6 276:13
 277:6 279:15 310:6
 310:13,14
3,000 113:17
3,000-some 245:8
3,383 139:1 245:6
3,970 250:4,13
30 163:6,7
30-minute 331:16
300 89:5,10 94:6 96:5
 97:19 104:3 115:16
 118:9 119:1 131:3
 134:16 137:3 140:12
 163:13 175:5 176:1
 184:13 187:4,15,19
300,000 246:18 248:13
3006 2:4
3008 214:3
303-312-6312 2:15
304 3:3
30th 298:4
31 80:17 129:10,13
312 3:3
316 3:3
32 65:8 80:12 104:20
 107:1 129:9,13
32,915 96:8 124:5
34 3:12,12 247:13
349 3:3
35 294:5
36 224:10 226:16
 227:13
36,207 105:22
36,307 126:8
360 3:3
37,500 106:2 258:20
38-page 219:5
39 53:9,12
39,712 175:16 187:10
3rd 261:2 264:4 265:8
 266:5 273:6 274:10

4

4 3:12,20 10:11,12 11:6
 11:19 32:22 34:5,15
 35:1 126:5 135:12
 141:12 148:9 155:6
 172:18 175:9,12
 176:17 178:15,20,22
 190:13 199:14 201:8
 251:10 258:19 259:17
 259:18 264:15,16
 268:14 269:9 279:9
 279:15
4:34 367:4
4:45 277:8,17
40 284:13 285:5 290:2
401k's 321:22
404 144:2
408 305:15
40CFR 217:12
41 286:11 287:1 290:2
410,805 139:10
42-page 219:6
42,757 140:18
427,572 139:11
43,683 179:1 190:2
44,000 192:5
462 257:8 258:12
462,056 256:21 257:4
 258:5
470 258:13
470,000 246:19
470,329 140:19 141:9
 244:10 258:15
478 258:9
478,602 256:11 257:1
 258:6

5

5 45:22 179:2 182:18,19
 182:20 184:5,7,11
 189:16,19,21 190:1
 190:13 192:3,20
 251:3,10 258:19
 264:11,13,14
5:00 179:9
500 241:19,20 242:4
509-557-5447 2:5
50th 326:20
53 16:17 17:1,10 18:9
 61:12 62:6 63:9 64:3
 364:19 365:4,7
55 157:14
556 113:10
56 364:11
57 117:5,5

6

6 117:5,6 262:10 348:3
600,000 296:3
61 3:9
618 249:2
63 3:9
631,402 190:21 230:12
 252:18
639,675 253:19 255:1
 256:6
64 257:5 262:16
65 345:18
66 3:9 13:15 15:2,8,12
 16:1,6 17:2 18:9,13
 61:2,7,12,13 62:6
 63:10,11 64:4
67 3:11 22:11 23:10,14

7

7 277:3 295:6 296:11
7,648 113:16
7:41 7:3
706 245:6,7,19,22 246:8
 248:8
74 141:21
78 16:20
791 105:15 113:8

8

8 2:14 13:15 21:17,18
 207:9 218:7 288:7
 296:13,19,21 297:7
 297:17,21 298:22
8:00 1:16 4:7 365:19
 366:20
8:04 4:2
8:07 4:7
80 172:1,2
8000 256:14 258:11,14
80202-1129 2:15
83 265:5,7
83701 2:8
8th 147:1

9

9 268:14
9-1-1 333:13,16,19
 334:1 337:9,22 354:1
9/27/2015 277:7
95 130:16
956 113:14
97 253:17 256:6,10
98862 2:4