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PUBLIC HEARING - FEBRUARY 16, 2023 - BEFORE  
THE OFFICE OF ADMINISTRATIVE HEARINGS OF THE  
STATE OF MINNESOTA

In the Matter of the Water Quality Standard -  
Class 2 Use Designation Rules

OAH DOCKET NO.: 23-9003-37415

Met, pursuant to Notice via WebEx  
teleconference, at 2:00 in the afternoon on February 16,  
2023

BEFORE: Judge Suzanne Todnem

REPORTER: Julie A. Rixe

1 THE JUDGE: All right. Welcome and thank  
2 you everyone for joining this public hearing in the  
3 matter of the planned amendments to rules governing  
4 Water Quality Standards Use Classification 2,  
5 Minnesota Rules Chapter 7050. This is OAH Docket  
6 Number 23-9003-37415. I will note that the OAH  
7 docket number is an important piece of information,  
8 so please take note of it. I will give you a moment  
9 to write it down if you would like, but it will also  
10 appear on a later slide.

11 All right. Next slide. My name is  
12 Suzanne Todnem and I am an administrative law judge  
13 at the Office of Administrative Hearings. A little  
14 information about OAH or the Office of  
15 Administrative Hearings is that OAH conducts  
16 impartial hearings like this one today. We are an  
17 independent agency from the other -- from the agency  
18 presenting today and from all other parties to this  
19 proceeding.

20 This hearing is an opportunity for the  
21 agency and the public to share and receive  
22 information from each other. And, most importantly,  
23 this is the opportunity for the public to provide  
24 additional comments.

25 Next slide. So your participation

1 matters. Public participation is an essential part  
2 of rulemaking. The collective wisdom of the public  
3 supplements the wisdom of the agency, resulting in a  
4 better process and a better product. So thank you  
5 all for participating here today.

6 Next slide. Thank you. I will be  
7 looking at three key issues. As you can see on the  
8 slide, the first issue is does the agency have legal  
9 authority to adopt the rules. Second, has the  
10 agency fulfilled all relevant legal and procedural  
11 requirements to promulgate the rules. And, third,  
12 has the agency demonstrated the need and  
13 reasonableness of each portion of the proposed rule.

14 Next slide. So a high-level review of  
15 the road map for today. First the agency will make  
16 an affirmative presentation of facts and that might  
17 include exhibits, remarks or other testimony, and  
18 then the public will have an opportunity to comment.

19 Next slide. So, again, more specifically  
20 about the hearing. My role is to assure that  
21 everyone is treated fairly and impartially. And in  
22 addition to the agency presentation and exhibits,  
23 the public may speak here today and also have an  
24 opportunity to provide comments in writing for  
25 20 days following this hearing. You may refer any

1 questions you have to agency representatives today  
2 as well.

3 Next slide. So presenting on behalf of  
4 the agency today is Will Bouchard, the lead  
5 scientist; Michelle Janson, legal counsel; and Mary  
6 Lynn, the rule coordinator. The agency will be  
7 offering exhibits into the record today and they are  
8 available online at the website provided.

9 There are two ways to submit your  
10 comments. First are oral comments today at this  
11 hearing and, second, in writing. If you do choose  
12 to submit written comments, you can submit them  
13 electronically through the eComments website, by  
14 U.S. mail or by fax. If you do choose to comment in  
15 writing, please include that docket number that I  
16 referenced earlier and that we'll, again, hear on a  
17 later slide. I do encourage all members of the  
18 public to submit comments, either oral or written,  
19 and I also encourage comments to include specific  
20 changes if you have them.

21 Next slide. So all comments will be  
22 reviewed regardless of the submission method, but  
23 eComments is the preferred method just from an  
24 organizational standpoint. So there is that website  
25 to see step-by-step instructions on how to submit

1 eComments.

2 So if you would like to call in today or  
3 comment today, you can do so by indicating in the  
4 WebEx chat expressing your interest to comment. Or  
5 if you are appearing by telephone, you can press  
6 star 3 on your telephone to let the host know that  
7 you are interested in commenting. And after you  
8 have concluded your comments, if you press star 3  
9 again, you will be removed from the queue. Or if  
10 you change your mind before commenting, you can  
11 always remove yourself from the queue.

12 I will quick add that if you do -- if you  
13 are participating by telephone, when it is your turn  
14 to speak we will identify you by the -- by some of  
15 the digits in your phone number.

16 All right. So per remote etiquette, we  
17 ask that you please turn on your cameras when it is  
18 your turn to speak. If time is an issue, then we  
19 will limit initial comments to five minutes. I  
20 guess I don't know -- All right. So we'll have to  
21 gauge that once we have an indication of how many  
22 commenters we have today.

23 Next slide. When providing your  
24 comments, we ask that you speak clearly and slowly.  
25 We do have a court reporter here today recording

1 this hearing, so please be sure to speak clearly and  
2 slowly and spell out any technical terms or  
3 acronyms. Be sure to spell them when you first  
4 introduce them.

5 Next slide. So while the public is  
6 encouraged and requested to participate, just as a  
7 reminder this is a legal proceeding, so I expect  
8 courteous and respectful behavior. As much as we  
9 want to be welcoming, that is consistent with  
10 respectful behavior.

11 All right. Next slide. As a reminder,  
12 there will be other ways to comment. Following the  
13 hearing, like I said, you can submit written  
14 comments through the E-comments portal, by U.S. mail  
15 or by fax. You will have until March 8th, 2023 at  
16 4:30 p.m. to submit those written comments.

17 Next slide. So I just want to mention  
18 that what is most helpful to me is if you focus your  
19 comments on the three questions that I have to  
20 address, which are, again, what is the agency's  
21 legal authority, does the agency comply with the  
22 legal and procedural requirements, and the need for  
23 and the reasonableness of the rule.

24 Again, the time to comment following the  
25 hearing is 4:30 p.m. on March 8, 2023. I will note

1 that there will be a strict adherence to the  
2 4:30 p.m. deadline in the interest of fairness. So  
3 if you submit your comment at 4:31, it will not be  
4 considered. Please be on time.

5 Thank you. Following initial comments  
6 there will then be a rebuttal period and that is an  
7 opportunity to address or rebut anything already in  
8 the record. The rebuttal period is not the time to  
9 raise new issues or arguments. The rebuttal period  
10 will end at 4:30 p.m. on March 15th, 2023. And,  
11 again, we'll have strict adherence to the 4:30 p.m.  
12 deadline.

13 All right. Following the rebuttal  
14 period, I will have 30 days to issue my report. It  
15 is possible that an extension could be granted if,  
16 for example, my caseload requires it or if there are  
17 a large number of comments, but at this time an  
18 extension is not anticipated.

19 Next slide. And just as a reminder for  
20 lobbyists, you must register with the Campaign  
21 Finance and Public Disclosure Board. And all  
22 questions about registration should be directed to  
23 that board.

24 All right. At this time we will have --  
25 I will turn the hearing over to the agency panel for

1 their presentation.

2 MS. JANSON: Thank you, Your Honor. My  
3 name is Michelle Janson, M-I-C-H-E-L-L-E,  
4 J-A-N-S-O-N. I am a staff attorney with the  
5 Minnesota Pollution Control Agency, referred to as  
6 MPCA, address at 520 Lafayette Road North, St. Paul,  
7 Minnesota 55155.

8 I am appearing in this rule proceeding on  
9 behalf of the Minnesota Pollution Control Agency.  
10 As you stated, the Minnesota Pollution Control  
11 Agency is proposing amendments to rules governing  
12 water quality standards, specifically Class 2 use  
13 designations.

14 First I would like to introduce the MPCA  
15 staff here today who will be making a presentation  
16 about the proposed rule amendments and are available  
17 to respond to questions as needed. Dr. Will  
18 Bouchard is a research scientist in the Water  
19 Quality Standards Unit of the MPCA's Environmental  
20 Analysis and Outcomes Division. Mr. Bouchard is the  
21 lead scientist for the proposed rules.

22 After introduction of the hearing  
23 exhibits, Mr. Bouchard will make a presentation on  
24 the proposed rule amendments. Mary Lynn is also  
25 present, although right now off camera. She is the



1 MPCA rule coordinator for this rulemaking. Ms. Lynn  
2 manages the administrative proceedings -- procedures  
3 aspects of the rule and is the point of contact for  
4 process-related questions.

5 Before the presentation I would like to  
6 submit into the hearing record the hearing exhibits.  
7 The exhibits are posted on the agency's website.  
8 The purpose of these documents is, as you outlined,  
9 to document the legal authority of the Minnesota  
10 Pollution Control Agency to adopt the proposed rule,  
11 demonstrate that the agency has fulfilled all  
12 relevant legal and procedural requirements for  
13 promulgating the rule, and demonstrating that each  
14 portion of the proposed rule is needed and is  
15 reasonable.

16 I will quickly review the exhibits and  
17 relate each exhibit to one of the three purposes I  
18 just mentioned. There is an index of the exhibits  
19 at the front of the hearing exhibits.

20 Exhibit C contains the text of the  
21 proposed rule amendments.

22 Exhibit D contains the Statement of Need  
23 and Reasonableness, also called the SONAR, that was  
24 published with the rule. The SONAR documents the  
25 statutory authority of the Minnesota Pollution

1 Control Agency to adopt the proposed rule. The MPCA  
2 has legal authority to promulgate and revise water  
3 quality rules and water quality standards under  
4 Minnesota Statute 115.03, Subd. 1 and Minnesota  
5 Statute 115.44.

6 The SONAR in Exhibit D also demonstrates  
7 that each portion of the proposed rule is needed and  
8 is reasonable. The SONAR includes both a general  
9 description of why the rule is needed and reasonable  
10 and detailed descriptions of why each proposed rule  
11 part is needed and reasonable.

12 Many of the other exhibits demonstrate  
13 that the agency has fulfilled all relevant, legal  
14 and procedural requirements. These include  
15 Exhibit A, the initial Request for Comments that  
16 started the formal rulemaking process; Exhibit C,  
17 the revisor's approval of the proposed rule;  
18 Exhibit E, the certificate verifying submission of  
19 the SONAR to the legislative reference library;  
20 Exhibit F, the Notice of Hearing as mailed, as  
21 posted electronically on the MPCA website and as  
22 published in the state register; Exhibit G, the  
23 Certificate of Mailing, the Notice of Hearing and  
24 the certificate of accuracy of the mailing list;  
25 Exhibit H, the certificate of additional notice and

1 evidence of implementation of the additional notice  
2 plan; Exhibit K, evidence of compliance with  
3 requirements to notify legislators, the Department  
4 of Agriculture and municipalities. And also in  
5 Exhibit K, the approval by the commissioner of  
6 Management and Budget of the agency's fiscal  
7 analysis of the impacts of the rules.

8 Exhibit I includes copies of comments on  
9 the proposed rule that were received by the MPCA  
10 during the prehearing comment period.

11 At this time the MPCA will also introduce  
12 Exhibit L-1, which is now added to the hearing  
13 record materials. This exhibit is a copy of the  
14 slides from the presentation MPCA will be making  
15 today at the hearing.

16 Now Mr. Bouchard will make a presentation  
17 outlining the proposed rule amendments and  
18 summarizing the need for and reasonableness of the  
19 proposed rule amendment. The presentation will take  
20 about 30 minutes. I'll also bring back Mary Lynn  
21 into camera view.

22 I have nothing further, Your Honor.  
23 Thank you.

24 THE JUDGE: Thank you.

25 MR. BOUCHARD: Thank you, Your Honor. My

1 name is Will Bouchard, W-I-L-L, B-O-U-C-H-A-R-D.  
2 I'm the lead scientist on this rulemaking and I'm  
3 going to give an overview of what's included within  
4 this rule.

5 So as a way of presentation outline, the  
6 first thing I'll do is I'll hand this over to Mary  
7 Lynn, the rule coordinator, to talk about the rule  
8 amendment process and schedule. I'll reiterate the  
9 MPCA's statutory authority to adopt these rules.  
10 I'll provide an overview of water quality standards,  
11 in particular putting these specific rule amendments  
12 in the broader context of the water quality  
13 standards framework. I'll provide an overview of  
14 the rule amendments and then discuss the process for  
15 reviewing and making recommendations on beneficial  
16 uses. Finally, I'll talk about public participation  
17 and stakeholder involvement.

18 So I'll hand it over to Mary Lynn.

19 MS. LYNN: Hello. As Will said, my name  
20 is Mary Lynn, L-Y-N-N, and I just have a couple of  
21 slides here to go through regarding the rulemaking  
22 process.

23 On this slide, this is a very high-level  
24 chart, so I'll just sort of hone in on the boxes a  
25 bit explaining for those who might be new to the

1 rulemaking process. The green boxes indicate where  
2 we have our conversations and communications with  
3 the Governor's Office and that happens at four  
4 points during the rulemaking process.

5 Before we publish the proposed rules, the  
6 Governor's Office reviews and approves them and  
7 gives us the go-ahead to proceed with publication of  
8 proposed rules. After the comment period and the  
9 hearing, we identify any rule changes that may be  
10 made as a result of the comment period in the  
11 hearing and we provide those to the Governor's  
12 Office in the final rule form. And then at the very  
13 end there is the Governor's veto period, where the  
14 Governor has 14 days to review the rules.

15 The next piece is the public comment and  
16 participation, and those are highlighted in the  
17 yellow and the blue boxes. I'll note, though, that  
18 not identified on the graph is what happens before  
19 that first Governor's Office notice, and that is  
20 what we refer to as our rulemaking development  
21 phase. And that's where PCA staff will engage in  
22 outreach activities and stakeholder meetings to  
23 share information and data and discuss possible  
24 rulemaking.

25 Then we move on to the request for

1 comments. For this rule we published the request  
2 for comments in April of 2021 and got our web page  
3 for this rulemaking up and running. And at that  
4 time we posted the use designation changes we were  
5 looking at as well as the supporting technical  
6 information, the TSD, technical support documents,  
7 were made available.

8 The next piece for this rulemaking was  
9 the Notice of Hearing. We had our comment period  
10 that started December 12, 2022 and went through  
11 February 3rd, where we had accepted comments on the  
12 proposed rules. And the SONAR and other information  
13 were available at that time as well. And then also  
14 during this public hearing, we will take comments,  
15 either orally or written, after the hearing is over,  
16 so during the post-hearing comment period.

17 Another piece of the process is our  
18 communications with the Office of Administrative  
19 Hearings. That sort of lighter-colored box in the  
20 middle is at the point in the process where the  
21 Judge will review the rule record and comments and  
22 the MPCA's preliminary response to comments and  
23 rebuttal response.

24 Once the Judge has finished their review,  
25 they issue their report on the rules and then the

1 MPCA will take action on the rules based on the ALJ  
2 report. And at that point, after that, the PCA will  
3 prepare an order adopting rules.

4 Lastly, OAH will file the adopted rules  
5 with the Secretary of State. And then the  
6 Governor's Office is notified of the rules and  
7 that's where that 14-day veto period kicks in. And  
8 then lastly is the notice of adopted rule that's  
9 published in the State Register.

10 Next. This slide indicates our timeline  
11 for going forward. As Judge Todnem indicated in her  
12 slides, the post-hearing comment period will end on  
13 March 8th and the rebuttal period ending on  
14 March 15th at 4:30 p.m. both days, not a minute  
15 later. And then the ALJ report and then our -- we  
16 hope to publish the adopted rules in summer of 2023.  
17 And then because these are water quality rules, we  
18 will submit the entire rule package on to EPA for  
19 review and approval, and we expect that to happen in  
20 the fall of 2023.

21 That's all.

22 MR. BOUCHARD: Okay. Thank you, Mary.

23 One of the requirements of the Minnesota  
24 Administrative Procedures Act is that the agency  
25 proposing rules must have statutory authority to

1 adopt the rules. For this rulemaking the MPCA has  
2 state statutory authority and is also required by  
3 federal law to adopt the rule.

4 As part of the cooperative federal  
5 instruction of the Clean Water Act, states are  
6 required to establish water quality standards. The  
7 Minnesota statutory authority for the MPCA to  
8 classify waters by beneficial uses is in Minnesota  
9 Statutes Chapter 115. Also in Chapter 115 is the  
10 authority for the MPCA to adopt or alter water  
11 quality standards and to a perform all acts  
12 necessary to implement water quality standards.

13 So what are water quality standards.  
14 Well, they address three main questions. The first  
15 one is what and who are we protecting. So those are  
16 the beneficial uses and they include things like  
17 drinking water, aquatic life, recreation. And  
18 that's really what this rule is focused on.

19 The second part is what conditions are  
20 protective and those are the standards. So in order  
21 to have, for example, healthy aquatic life, what  
22 conditions do you need to maintain to protect that  
23 aquatic life. An example of that would be something  
24 like dissolved oxygen. So what level of dissolved  
25 oxygen is necessary for a healthy fish community,



1 for example.

2 The third part is how do we maintain high  
3 water quality and that's anti-degradation. So for  
4 those waters that are doing better than the minimum  
5 goal, how do we maintain that better-than-minimum  
6 condition.

7 Again, this rule is only focused on those  
8 beneficial uses. It does not amend narrative or  
9 numeric standards or the anti-degradation rules.

10 Now, even though we're only talking about  
11 one part of water quality standards, the beneficial  
12 uses are very important because the management of  
13 these waters flows from these beneficial uses. Once  
14 we can define what those beneficial uses are, that  
15 then determines what standards are applied, how the  
16 anti-degradation framework is implemented, as well  
17 as all the other water quality management actions  
18 that take place, such as permitting or total maximum  
19 daily loads. So it's very important and necessary  
20 that we get these use designations correct.

21 In Minnesota we have seven beneficial use  
22 classes. Just a note that these use classes do not  
23 imply a priority ranking. So Class 1 is not  
24 necessarily better than Class 2. They're just  
25 different uses that are protected.

1           It is also important to note that  
2 multiple beneficial uses apply to individual water  
3 bodies. So, for example, a water body designated as  
4 a Class 2 is also protected for Classes 3, 4, 5 and  
5 6. So these uses are not exclusive of each other.  
6 They're just a series of different types of  
7 beneficial uses that waters may support within the  
8 state.

9           For this rule we're just talking about  
10 aquatic life and that's in Class 2. Now, even  
11 though this is just part of one of the seven  
12 beneficial uses, it's one of the most important  
13 beneficial uses. It protects the fish, insects,  
14 mussels, plants, as well as the ecosystem services  
15 that they provide. It also applies to just about  
16 every water in the state. And it's often one of the  
17 most sensitive beneficial uses. So because of this  
18 broad scope and its sensitivity, a lot of the work  
19 that's done by the MPCA and other partners that are  
20 concerned with protecting and restoring water  
21 quality, a lot of that comes from the protection of  
22 aquatic life.

23           So let's zero in a little bit more on the  
24 Class 2. And Class 2 is subdivided into subclasses  
25 and also tiered aquatic life uses. And this is

1 allowable through the Clean Water Act. The Clean  
2 Water Act allows states to adopt subcategories and  
3 set appropriate criteria to reflect the very needs  
4 of such subcategories. And, in fact, the Clean  
5 Water Act uses the example of the difference between  
6 cold water and warm water fisheries, and that's  
7 similar to one of the subclasses that we have under  
8 Class 2.

9 So we divide Class 2 into four subclasses  
10 and these are based on the natural habitat types.  
11 So what types of habitat, biology, water quality do  
12 these habitats naturally support and what are the  
13 standards that are necessary to protect these  
14 specific types of habitats.

15 So we have Class 2A, which is for cold  
16 water habitat. That protects lakes and streams.  
17 There's Class 2Bd and Class 2B. These are both warm  
18 and cool water habitats. Again, these apply only to  
19 lakes and streams.

20 The difference between 2Bd and 2B is that  
21 2Bd is also protected as a source of drinking water,  
22 so it's also assigned a drinking water standard  
23 through Class 1.

24 And then, finally, we have Class 2D,  
25 wetlands, which is not part of this rule.

1           So these subclasses are further  
2           subdivided into tiers. And these tiered aquatic  
3           life uses are based on the biological potential, so  
4           what is the highest aquatic life use that these  
5           streams can meet. They include exceptional, general  
6           and modified use. And these only apply to streams.  
7           I'll talk about these in a little more detail in a  
8           moment to explain what these three tiers mean and  
9           how they're determined.

10           More broadly what's in these rule  
11           amendments, if we were to distill it down, a  
12           designation of a set of aquatic life use designation  
13           -- a designation of aquatic life uses based on  
14           biological potential, and that includes both the  
15           biological potential as defined by the natural  
16           habitat type and also by the highest attainable  
17           biological condition that these streams can meet.

18           The technical details are described in  
19           the technical support document. This describes why  
20           the MPCA is proposing these rules, how we went about  
21           reviewing these use designations, and then provides  
22           specific details for each of the individual streams  
23           that support the use designation.

24           This document itself is almost 200 pages.  
25           It includes two appendices as well as numerous

1 supplemental documents. So, necessarily, I can't go  
2 into all of the details in here, but I'll give an  
3 overview of what's included. If you're looking for  
4 this document, it's in Hearing Exhibit D as SONAR  
5 Exhibit S-18.

6 So this rule includes a total of 232 use  
7 designations. The reason why these designations are  
8 being proposed are for one of two reasons. The  
9 first is MPCA monitoring. So as we monitor streams  
10 around the state and we review that data, the first  
11 thing we do is we review it to determine if the use  
12 designation is correct because, again, it's  
13 important that we assign the correct use designation  
14 so that the appropriate standards are assigned and  
15 we can make appropriate decisions regarding whether  
16 or not those streams are meeting or not meeting  
17 goals. So that's where a subset of these  
18 designations were identified through this MPCA  
19 monitoring.

20 Another set are due to DNR rule changes.  
21 So the DNR has recently changed their trout waters  
22 list. And whenever possible we want to align our  
23 use designations with the DNR's, with complementary  
24 use goals.

25 So we've looked at the DNR rule changes.

1 We've examined the data and made determinations  
2 where the evidence supports it. We're proposing  
3 changes to align our use designations with the DNR's  
4 because particularly it's useful if we have the same  
5 goals and objectives in terms of protecting these  
6 waters. When the rule is adopted, the use  
7 designations will be in Minnesota Rule 7050.0470 and  
8 they will be in documents incorporated by reference.

9 So this is a map showing where these use  
10 designations are located around the state. We can  
11 divide these 232 use designations into two types.  
12 One type is the cold water and warm water  
13 designations, which are based on that natural water  
14 body type. So that's the subclasses that I was  
15 discussing earlier.

16 The second part are the tiered aquatic  
17 life uses. And these are based on biological  
18 potential and that includes the exceptional, general  
19 and modified uses. We'll talk about each of these  
20 individually now.

21 So warm and cold water habitat reviews.  
22 These are a based on assigning accurate designations  
23 of thermal habitat types based on what these waters  
24 naturally support. So thermal habitat designation  
25 is based on the biological communities that they

1 support or they should support. So are these  
2 naturally cold water habitats that support organisms  
3 that require cool water to survive or is it a warm  
4 water habitat that has warm water adapted species.

5 The thermal designations need to be  
6 correct because the biological assessment tools  
7 differ between these two types of water. So if we  
8 have it incorrectly assigned, for example, if we  
9 assign a cold -- or we assign a warm water  
10 designation to a cold water stream, we may  
11 erroneously determine that that stream is impaired  
12 or not impaired because our expectations of what a  
13 healthy cold water community looks like versus a  
14 warm water community is different. So this gets to  
15 the importance and the need for adopting this rule  
16 to avoid making errors in terms of the impairment  
17 status and then subsequent errors in how these  
18 waters are being managed.

19 The process for reviewing the thermal  
20 habitat is based on a review of all available  
21 historical and contemporary data. We look at MPCA  
22 biomonitoring data when it's available. This  
23 includes the fish and the macro invertebrates,  
24 temperature data. Whenever possible we collect data  
25 using temperature loggers, which continuously

1 measure the temperature within a stream over a  
2 summer, sometimes multiple summers. And then DNR  
3 data, which often gives us more of a historical  
4 perspective of what the condition of this water is.  
5 And this can include biology, often fisheries data,  
6 temperature data, stocking records, field surveys  
7 and so forth.

8           Once the MPCA has reviewed these data, we  
9 make a preliminary determination as to what the  
10 designations should be. We have discussions with  
11 the DNR because they may have additional perspective  
12 on these designations. In most cases we agree on  
13 the status of these waters.

14           In some cases our use designations may  
15 differ, but that largely has to do with differences  
16 in our management goals as well as differences in  
17 the rules that govern us. Specifically, the MPCA  
18 needs to follow Clean Water Act requirements.

19           One of those requirements is existing  
20 use, and this is defined in the Clean Water Act as,  
21 existing uses are those uses actually attained in  
22 the water body on or after November 28, 1975.

23           So these reviews are not only looking at  
24 what the current status of these waters are, but  
25 what that status was going back to that existing use



1 date. So if a cold water stream was present in, for  
2 example, 1995 and then was degraded to the point  
3 where it now only supports warm water species, that  
4 existing use would be a cold water stream and we  
5 would retain or designate that stream as a cold  
6 water habitat.

7 Another consideration that the Clean  
8 Water Act requires is determining whether or not a  
9 water body can be feasibly restored. So even if a  
10 cold water habitat existed before 1975 but it no  
11 longer -- it's no longer extant, if it could be  
12 restored feasibly, then we would also designate it  
13 as a cold water habitat.

14 So these are a couple of the  
15 considerations that are essential to these reviews.  
16 And this is part of the review not just for the cold  
17 water and warm water reviews, but also part of the  
18 tiered aquatic life use reviews, which we'll move to  
19 next.

20 So tiered aquatic life uses. These are  
21 beneficial use goals based on the biological  
22 potential of these streams.

23 So historically we used a  
24 one-size-fits-all approach for determining whether  
25 or not the biology was healthy in a stream. So you

1 can see the dotted line here. That represents a  
2 threshold. So a biological community scoring above  
3 that line would be considered healthy. A community  
4 below that line would be unhealthy. And this is  
5 right along a gradient of biological conditions. So  
6 the upper end of this chart, the high biological  
7 condition, that represents a biological community  
8 that's close to being natural or undisturbed,  
9 whereas on the lower end, in the low biological  
10 condition, this is a highly degraded community that  
11 looks very little like what a natural community  
12 would look like. It doesn't provide much in terms  
13 of ecosystem services and it certainly doesn't meet  
14 our aquatic life use goals or those of the Clean  
15 Water Act.

16 So using this threshold there's a fair  
17 bit of space above that line. So if we had a really  
18 high-quality system like the Brule River in Northern  
19 Minnesota, this is a river that has very good water  
20 quality. It has excellent fish and macro  
21 invertebrate communities. It's close to that  
22 natural or undisturbed state.

23 This one-size-fits-all framework, if this  
24 stream was degraded down to that line, which is  
25 equivalent to the Clean Water Act interim goal,

1 sometimes referred to as fishable, swimmable, that  
2 may not trigger a need to restore that water because  
3 it's still meeting that goal. It's still above the  
4 line, even though we have lost a fair degree of  
5 biological condition.

6 We have other systems like the Wild Rice  
7 River, which it's still doing good. It has healthy  
8 fish and biology. It meets that Clean Water Act  
9 interim goal, but it's not in that natural state.  
10 There is some degradation, but it still provides  
11 most of the ecosystem services that a good stream or  
12 healthy stream would provide. And the structure and  
13 the function of the community is -- of the  
14 biological community is still there, but it's not,  
15 like I said, close to natural, but it would be  
16 considered to be meeting under the Clean Water Act  
17 framework.

18 Now, this one-size-fits-all goal probably  
19 works okay for this type of stream because if it's  
20 degraded somewhat, it would probably go below that  
21 line, which would trigger a need to restore that.  
22 It would be listed as impaired and a strategy would  
23 need to be developed to bring that back up above the  
24 line.

25 We have a third type of stream, County

1 Ditch 34, which doesn't meet that interim goal. And  
2 the reason it doesn't meet is because it's  
3 maintained for drainage.

4 And in these ditch systems you lack the  
5 habitat diversity that you need to support a diverse  
6 biological community. So it doesn't have a  
7 diversity of flows or substrates. And so even with  
8 good water quality it's precluded from meeting that  
9 general use or that Clean Water Act interim goal.  
10 So there's a lot of diversity in the types of stream  
11 habitats we have in the state in terms of what the  
12 highest attainable biological condition is.

13 So in 2017 we adopted tiered aquatic life  
14 uses. So now we have three different options for  
15 assigning that highest attainable use for these  
16 water bodies. There's the exceptional use goal for  
17 these really high-quality waters that are near the  
18 natural condition. There's a general use goal for  
19 these good -- these good streams that have  
20 reasonably healthy biological communities, and then  
21 a modified use goal for ditches that are limited by  
22 the habitat.

23 Now, how this works in practice is if  
24 that exceptional use water was degraded down below  
25 that exceptional use goal, it now becomes impaired

1 and needs to be restored back above that line to  
2 that exceptional use. So this differs from the  
3 previous framework, where that degradation might  
4 have been allowed because it was still meeting that  
5 Clean Water Act interim goal. But now because we've  
6 lost that use, it would need to be restored.

7 The same would be true of general use or  
8 modified use goal streams. So once we've  
9 established what that highest use is, if that use is  
10 degraded and it goes below that threshold, it  
11 becomes impaired and then a strategy needs to be  
12 developed to restore the biology back to those  
13 established highest attainable uses.

14 So what the strategy does is it allows us  
15 to identify what that highest attainable use is,  
16 lock that in and prevent it from degrading. If it  
17 does degrade below that line, then it triggers an  
18 impairment status and it needs to be restored.

19 Now, it doesn't prevent waters from  
20 moving up, though. So over time if technology is  
21 improved in water treatment or habitat restoration,  
22 such that these waters begin to meet the next tier  
23 up, then that becomes the new tier that is assigned  
24 to them and they can now not go back down. So it  
25 locks in these highest uses. And over time as water

1 quality improves, we lock in better uses as water  
2 quality improves so overall water quality in the  
3 state improves.

4 So how do we make decisions regarding  
5 which of these three tiers a stream falls into. It  
6 starts with the biology. So if the biology is  
7 exceptional, if it meets those exceptional use  
8 biological goals, then we would designate it as an  
9 exceptional use. Because it's meeting that  
10 exceptional use or has demonstrated that it can meet  
11 that exceptional use since the existing use date,  
12 November 28th, 1975, it's an attainable use. We  
13 have evidence that it attained it and so that's the  
14 use that it would be assigned.

15 If it doesn't meet that exceptional use  
16 goal, then we would ask, well, does it at least meet  
17 the general use goal. If the answer is yes, then we  
18 would designate it as a general use. And this  
19 includes ditches. We have ditches in the state that  
20 meet the general use. So ditches don't  
21 automatically get put into a modified use because  
22 they're a ditch. They have to demonstrate that the  
23 highest attainable use for that system is a modified  
24 use.

25 If the answer is no, it doesn't at least

1 meet the general use, then that would trigger a use  
2 attainability analysis. And this was required by  
3 the Clean Water Act to determine what that highest  
4 attainable use is.

5 So the first step is to review the  
6 habitat. Is the habitat legally altered and is it  
7 poor enough that it's limiting the biology. It's  
8 preventing it from meeting that general use. If the  
9 answer is no, then we would designate it a general  
10 use.

11 So, for example, a stream with a natural  
12 channel. The channel hasn't been altered. So it's  
13 not legally-altered habitat, so it would be a  
14 general use. Or we have ditches in the state that  
15 have good habitat. So even if they're not meeting  
16 the general use currently, they have habitat that  
17 demonstrates that they should be able to meet that  
18 and there's likely some other stressor that's  
19 limiting its ability to meet that general use. So  
20 it would be designated as a general use.

21 If the answer is yes, though, it is  
22 maintained for drainage legally and it is feasibly  
23 -- and the habitat is limiting, then we would ask is  
24 the general use an existing use or is it feasibly  
25 attainable. If the answer is yes, then it would go

1 to a general use. So examples of this would be a  
2 stream that was ditched after November 28th, 1975,  
3 the existing use date. That would not be eligible  
4 for a modified use. That would need to be  
5 designated as a general use.

6 Another question would be whether or not  
7 it's feasibly attainable. Can it be restored. So  
8 an example this would be a relatively short ditch  
9 reach, maybe a tenth of a mile long within an  
10 otherwise largely intact watershed. Well, that  
11 represents something that could be restored, and so  
12 we would designate that as a general use. But if  
13 it's not an existing use or it's not feasibly  
14 attainable, then we could designate it as a modified  
15 use. So the Clean Water Act requires that we go  
16 through this structured process to demonstrate what  
17 the highest attainable use is within these waters.

18 There are additional details in the  
19 Technical Guidance Document. This is Hearing  
20 Exhibit D, as SONAR Exhibit S-23. I'm only giving  
21 you a very high-level overview of this process.  
22 There are additional details on how the MPCA goes  
23 about reviewing the use designation in this  
24 document.

25 So just to summarize what's in this rule



1 and what isn't in this rule or what it does or what  
2 it does not do, the proposed amendments will result  
3 in more accurate and representative aquatic life use  
4 designations. So, for example, assigning the  
5 correct designation based on what the natural  
6 habitat type is. Is it a cold-water habitat or is  
7 it a warm-water habitat.

8 It will document uses to provide  
9 protection from backsliding. So we can identify  
10 what those highest attainable uses are, get those  
11 uses locked in in order to prevent degradation of  
12 those waters.

13 The amendments will also provide  
14 protections for high-quality water so we can  
15 identify those exceptional use waters and develop  
16 protection strategies to keep them there.

17 The amendments will also set appropriate  
18 goals for waters that are affected by legal  
19 historical impacts. This is ditching, for example.  
20 These waters, because of that ditching, are unable  
21 to meet the general use goal because of the limiting  
22 habitat through these legacy impacts, but they still  
23 have a goal that they need to meet. There's still a  
24 goal assigned to them because when the water quality  
25 is good in these systems, they can still meet a

1 biological use goal, just not the general use goal.

2 So moving on to what the amendments do  
3 not do, they do not change numeric or narrative  
4 standards or anti-degradation rules. It only  
5 changes the use designations. The amendments do not  
6 designate any use class other than Class 2, although  
7 I need to note there's a caveat here that anytime we  
8 designate a Class 2A water, it automatically assigns  
9 a Class 1B drinking water designation to that water.  
10 So any of these waters being designated cold water  
11 would also be assigned the 1B, and this is part of  
12 Minnesota rules in Chapter 7050.

13 It does not remove the Class 1 drinking  
14 water designation from any waters. So those waters  
15 that would go from a Class 2A to a Class 2B would  
16 retain the Class 1B designation and be designated a  
17 Class 2Bd.

18 The amendments do not create prohibitions  
19 on maintaining waters for drainage under Minnesota  
20 Statute 103E. And, finally, they do not remove  
21 existing or feasibly attainable beneficial uses.

22 So as I mentioned before, this is an  
23 important consideration as part of all of these  
24 reviews and is necessary to be consistent with the  
25 requirements of the Clean Water Act. It cannot

1 remove an existing use. If an existing use is  
2 attained on or after November 28th, 1975, even if it  
3 is not currently being attained, that use needs to  
4 be maintained. Or if we can feasible restore that  
5 water body to that higher use, then that also needs  
6 to be a consideration and we need to maintain that  
7 higher use if it can be restored.

8 We've received some comments on the  
9 proposed rules through a couple of venues. This  
10 includes a Request for Comments that was published  
11 in 2021, the triennial review and the notice of  
12 hearing on the proposed rule.

13 We've heard some general support for the  
14 need to review and make changes to use designations.  
15 Of course, the agency agrees with that. That's the  
16 reason why we're proposing these rules. We heard  
17 some specific requests to clarify use designations  
18 and provide additional information.

19 For example, there was a request to  
20 provide a list of the permits that were upstream or  
21 adjacent to exceptional use -- proposed exceptional  
22 use waters. We posted that as an additional notice  
23 and that is Exhibit K-8. We'll also provide  
24 additional comments in our written comments to  
25 provide the requested information.

1           We have heard some concerns with the  
2           technical information, in that it's generally not  
3           sufficient. At this time I'll just say that the  
4           information that we provided to support these use  
5           designations exceeds that of what we provided in  
6           previous similar rules. So in the 2017 tiered  
7           aquatic life uses rule and the 2020 aquatic life  
8           uses rule, which is very similar to this, those  
9           rules were both approved by the EPA and adopted in  
10          Minnesota rule.

11          The data that we've provided here is  
12          similar to that, although it's actually more  
13          detailed. Based on some comments that we heard in  
14          the Request for Comments in 2021 and the triennial  
15          review, we've added additional technical  
16          information. And this is because we want this  
17          information to be understandable and usable, even if  
18          it goes beyond what's minimally required by the  
19          agency.

20          We also heard comments related to the  
21          need for coordination with other agencies and  
22          tribes. And the agency agrees it's important that  
23          we coordinate with other entities that have a stake  
24          or are interested in or participate in water quality  
25          management in the state. So whenever possible we do

1 coordinate with other agencies involved in water  
2 quality management. The ability to share data,  
3 information, perspectives, interests, goals on these  
4 use designations and other water quality standards  
5 is very important. Ultimately, in doing so, that  
6 improves the efficiency of the work that we do and  
7 also lends itself to better outcomes in terms of  
8 meeting the needs and the interests of other  
9 parties.

10 So with that, I'll just provide my  
11 contact information and the contact information for  
12 Mary Lynn, the rule coordinator, as well as the link  
13 that will take you to the rule web page at the MPCA  
14 that includes all of the information, the  
15 supplemental documentation that we've discussed here  
16 in this presentation.

17 And with that I will thank you and turn  
18 it back to you, Judge Todnem.

19 THE JUDGE: Thank you, Mr. Bouchard.  
20 That was very helpful.

21 I will quick note that the exhibits that  
22 were offered into the record are received.

23 And so now I will just remind the  
24 participants that they can express their interest to  
25 comment by sending a message in the chat or by

1 pressing star 3 if you are participating by phone.  
2 I do encourage the public to comment in favor of or  
3 against any particular part of the rule. Again,  
4 your public comments are important and appreciated.

5 All right. Do we have any commenters so  
6 far?

7 MS. IZZO: No one has yet requested to  
8 speak, Judge.

9 THE JUDGE: All right. Anyone interested  
10 in commenting? Any comments from the public?

11 All right. Hearing and seeing none, I  
12 will confirm with the agency. Is that correct?

13 MS. IZZO: This is Katie Izzo, K-A-T-I-E,  
14 I-Z-Z-O, of the MPCA.

15 We've had a request to share the  
16 PowerPoint presentation.

17 MS. LYNN: This is Mary Lynn and I can  
18 address that question. We plan to post the  
19 PowerPoint from this hearing on the rule website.  
20 It may take a day or two, but it will be available  
21 on the rule website.

22 THE JUDGE: And just to confirm, the  
23 agency did express the intent to submit the agency's  
24 PowerPoint as an exhibit?

25 MS. LYNN: That's correct.

1 THE JUDGE: All right.

2 All right. Anyone interested in  
3 providing any comments today?

4 All right. Hearing none, if we could go  
5 to the comment deadline reminder slide, I will just  
6 remind the public that initial comments, written  
7 comments, can be submitted by 4:30 p.m. on  
8 March 8th. There are three ways to submit those,  
9 through the eComments website, by U.S. mail or by  
10 fax. And the rebuttal period will close on  
11 March 15th also at 4:30 p.m. Be sure to include  
12 Docket Number 23-9003-37415 on any comments  
13 submitted.

14 All right. And then the last slide. I  
15 just want to say thank you to everyone for attending  
16 this hearing and thank you to the agency for  
17 providing your presentation.

18 And I guess just one last check. There  
19 has not been any new expression for -- to comment?

20 MS. IZZO: No new requests, Your Honor.

21 THE JUDGE: Then we are adjourned. Thank  
22 you very much.

23 (Hearing concluded at 2:55 p.m.)

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STATE OF MINNESOTA )  
 )                ss.  
COUNTY OF DAKOTA )

REPORTER'S CERTIFICATE

I, Julie Rixe, do hereby  
certify that the above and foregoing transcript,  
consisting of the preceding 39 pages is a  
correct transcript of my stenographic notes, and is  
a full, true and complete transcript of the  
proceedings to the best of my ability.

Dated February 21, 2023

/s/Julie Rixe  
JULIE RIXE  
Stenographic Court Reporter



	<p><b>28:13;36:9</b> <b>adopting (2)</b> 15:3;23:15 <b>affected (1)</b> 33:18 <b>affirmative (1)</b> 3:16 <b>again (10)</b> 3:19;4:16;5:9;6:20, 24;7:11;17:7;19:18; 21:12;38:3 <b>against (1)</b> 38:3 <b>agencies (2)</b> 36:21;37:1 <b>agency (28)</b> 2:17,17,21;3:3,8,10, 12,15,22;4:1,4,6;6:21; 7:25;8:5,9,11;9:10, 11;10:1,13;15:24; 35:15;36:19,22; 38:12,23;39:16 <b>agency's (4)</b> 6:20;9:7;11:6; 38:23 <b>agree (1)</b> 24:12 <b>agrees (2)</b> 35:15;36:22 <b>Agriculture (1)</b> 11:4 <b>align (2)</b> 21:22;22:3 <b>ALJ (2)</b> 15:1,15 <b>allowable (1)</b> 19:1 <b>allowed (1)</b> 29:4 <b>allows (2)</b> 19:2;29:14 <b>almost (1)</b> 20:24 <b>along (1)</b> 26:5 <b>alter (1)</b> 16:10 <b>altered (2)</b> 31:6,12 <b>although (3)</b> 8:25;34:6;36:12 <b>always (1)</b> 5:11 <b>amend (1)</b> 17:8 <b>amendment (2)</b> 11:19;12:8 <b>amendments (15)</b> 2:3;8:11,16,24; 9:21;11:17;12:11,14; 20:11;33:2,13,17; 34:2,5,18 <b>Analysis (3)</b></p>	<p><b>8:20;11:7;31:2</b> <b>anticipated (1)</b> 7:18 <b>anti-degradation (4)</b> 17:3,9,16;34:4 <b>appear (1)</b> 2:10 <b>appearing (2)</b> 5:5;8:8 <b>appendices (1)</b> 20:25 <b>applied (1)</b> 17:15 <b>applies (1)</b> 18:15 <b>apply (3)</b> 18:2;19:18;20:6 <b>appreciated (1)</b> 38:4 <b>approach (1)</b> 25:24 <b>appropriate (4)</b> 19:3;21:14,15; 33:17 <b>approval (3)</b> 10:17;11:5;15:19 <b>approved (1)</b> 36:9 <b>approves (1)</b> 13:6 <b>April (1)</b> 14:2 <b>aquatic (18)</b> 16:17,21,23;18:10, 22,25;20:2,4,12,13; 22:16;25:18,20; 26:14;28:13;33:3; 36:7,7 <b>arguments (1)</b> 7:9 <b>around (2)</b> 21:10;22:10 <b>aspects (1)</b> 9:3 <b>assessment (1)</b> 23:6 <b>assign (3)</b> 21:13;23:9,9 <b>assigned (7)</b> 19:22;21:14;23:8; 29:23;30:14;33:24; 34:11 <b>assigning (3)</b> 22:22;28:15;33:4 <b>assigns (1)</b> 34:8 <b>assure (1)</b> 3:20 <b>attainability (1)</b> 31:2 <b>attainable (14)</b> 20:16;28:12,15; 29:13,15;30:12,23;</p>	<p><b>31:4,25;32:7,14,17; 33:10;34:21</b> <b>attained (4)</b> 24:21;30:13;35:2,3 <b>attending (1)</b> 39:15 <b>attorney (1)</b> 8:4 <b>authority (10)</b> 3:9;6:21;9:9,25; 10:2;12:9;15:25;16:2, 7,10 <b>automatically (2)</b> 30:21;34:8 <b>available (7)</b> 4:8;8:16;14:7,13; 23:20,22;38:20 <b>avoid (1)</b> 23:16</p>	<p><b>biomonitoring (1)</b> 23:22 <b>bit (3)</b> 12:25;18:23;26:17 <b>blue (1)</b> 13:17 <b>Board (2)</b> 7:21,23 <b>bodies (2)</b> 18:3;28:16 <b>body (5)</b> 18:3;22:14;24:22; 25:9;35:5 <b>both (5)</b> 10:8;15:14;19:17; 20:14;36:9 <b>Bouchard (9)</b> 4:4;8:18,20,23; 11:16,25;12:1;15:22; 37:19 <b>B-O-U-C-H-A-R-D (1)</b> 12:1 <b>box (1)</b> 14:19 <b>boxes (3)</b> 12:24;13:1,17 <b>bring (2)</b> 11:20;27:23 <b>broad (1)</b> 18:18 <b>broader (1)</b> 12:12 <b>broadly (1)</b> 20:10 <b>Brule (1)</b> 26:18 <b>Budget (1)</b> 11:6</p>
			<p style="text-align: center;"><b>B</b></p> <p><b>back (7)</b> 11:20;24:25;27:23; 29:1,12,24;37:18 <b>backsliding (1)</b> 33:9 <b>based (13)</b> 15:1;19:10;20:3,13; 22:13,17,22,23,25; 23:20;25:21;33:5; 36:13 <b>becomes (3)</b> 28:25;29:11,23 <b>begin (1)</b> 29:22 <b>behalf (2)</b> 4:3;8:9 <b>behavior (2)</b> 6:8,10 <b>below (5)</b> 26:4;27:20;28:24; 29:10,17 <b>beneficial (15)</b> 12:15;16:8,16;17:8, 11,13,14,21;18:2,7, 12,13,17;25:21;34:21 <b>better (6)</b> 3:4,4;17:4,24;30:1; 37:7 <b>better-than-minimum (1)</b> 17:5 <b>beyond (1)</b> 36:18 <b>biological (20)</b> 20:3,14,15,17; 22:17,25;23:6;25:21; 26:2,5,6,7,9;27:5,14; 28:6,12,20;30:8;34:1 <b>biology (8)</b> 19:11;24:5;25:25; 27:8;29:12;30:6,6; 31:7</p>	
				<p style="text-align: center;"><b>C</b></p> <p><b>call (1)</b> 5:2 <b>called (1)</b> 9:23 <b>camera (2)</b> 8:25;11:21 <b>cameras (1)</b> 5:17 <b>Campaign (1)</b> 7:20 <b>can (25)</b> 3:7;4:12;5:3,5,10; 6:13;17:14;20:5,17; 21:15;22:10;24:5; 25:9;26:1;29:24; 30:10;32:7;33:9,14, 25;35:4,7;37:24; 38:17;39:7 <b>caseload (1)</b> 7:16 <b>cases (2)</b> 24:12,14</p>

<p><b>caveat (1)</b> 34:7</p> <p><b>certainly (1)</b> 26:13</p> <p><b>certificate (4)</b> 10:18,23,24,25</p> <p><b>change (2)</b> 5:10;34:3</p> <p><b>changed (1)</b> 21:21</p> <p><b>changes (8)</b> 4:20;13:9;14:4; 21:20,25;22:3;34:5; 35:14</p> <p><b>channel (2)</b> 31:12,12</p> <p><b>Chapter (4)</b> 2:5;16:9,9;34:12</p> <p><b>chart (2)</b> 12:24;26:6</p> <p><b>chat (2)</b> 5:4;37:25</p> <p><b>check (1)</b> 39:18</p> <p><b>choose (2)</b> 4:11,14</p> <p><b>clarify (1)</b> 35:17</p> <p><b>Class (23)</b> 8:12;17:23,24;18:4, 10,24,24;19:8,9,15, 17,17,23,24;34:6,6,8, 9,13,15,15,16,17</p> <p><b>classes (3)</b> 17:22,22;18:4</p> <p><b>Classification (1)</b> 2:4</p> <p><b>classify (1)</b> 16:8</p> <p><b>Clean (16)</b> 16:5;19:1,1,4; 24:18,20;25:7;26:14, 25;27:8,16;28:9;29:5; 31:3;32:15;34:25</p> <p><b>clearly (2)</b> 5:24;6:1</p> <p><b>close (4)</b> 26:8,21;27:15; 39:10</p> <p><b>cold (15)</b> 19:6,15;22:12,21; 23:2,9,10,13;25:1,4,5, 10,13,16;34:10</p> <p><b>cold-water (1)</b> 33:6</p> <p><b>collect (1)</b> 23:24</p> <p><b>collective (1)</b> 3:2</p> <p><b>comment (18)</b> 3:18;4:14;5:3,4; 6:12,24;7:3;11:10; 13:8,10,15;14:9,16;</p>	<p>15:12;37:25;38:2; 39:5,19</p> <p><b>commenters (2)</b> 5:22;38:5</p> <p><b>commenting (3)</b> 5:7,10;38:10</p> <p><b>comments (37)</b> 2:24;3:24;4:10,10, 12,18,19,21;5:8,19, 24;6:14,16,19;7:5,17, 10:15;11:8;14:1,2,11, 14,21,22;35:8,10,24, 24;36:13,14,20;38:4, 10;39:3,6,7,12</p> <p><b>commissioner (1)</b> 11:5</p> <p><b>communications (2)</b> 13:2;14:18</p> <p><b>communities (3)</b> 22:25;26:21;28:20</p> <p><b>community (11)</b> 16:25;23:13,14; 26:2,3,7,10,11;27:13, 14;28:6</p> <p><b>complementary (1)</b> 21:23</p> <p><b>compliance (1)</b> 11:2</p> <p><b>comply (1)</b> 6:21</p> <p><b>concerned (1)</b> 18:20</p> <p><b>concerns (1)</b> 36:1</p> <p><b>concluded (2)</b> 5:8;39:23</p> <p><b>condition (8)</b> 17:6;20:17;24:4; 26:7,10;27:5;28:12, 18</p> <p><b>conditions (3)</b> 16:19,22;26:5</p> <p><b>conducts (1)</b> 2:15</p> <p><b>confirm (2)</b> 38:12,22</p> <p><b>consideration (3)</b> 25:7;34:23;35:6</p> <p><b>considerations (1)</b> 25:15</p> <p><b>considered (3)</b> 7:4;26:3;27:16</p> <p><b>consistent (2)</b> 6:9;34:24</p> <p><b>contact (3)</b> 9:3;37:11,11</p> <p><b>contains (2)</b> 9:20,22</p> <p><b>contemporary (1)</b> 23:21</p> <p><b>context (1)</b> 12:12</p> <p><b>continuously (1)</b></p>	<p>23:25</p> <p><b>Control (5)</b> 8:5,9,10;9:10;10:1</p> <p><b>conversations (1)</b> 13:2</p> <p><b>cool (2)</b> 19:18;23:3</p> <p><b>cooperative (1)</b> 16:4</p> <p><b>coordinate (2)</b> 36:23;37:1</p> <p><b>coordination (1)</b> 36:21</p> <p><b>coordinator (4)</b> 4:6;9:1;12:7;37:12</p> <p><b>copies (1)</b> 11:8</p> <p><b>copy (1)</b> 11:13</p> <p><b>counsel (1)</b> 4:5</p> <p><b>County (1)</b> 27:25</p> <p><b>couple (3)</b> 12:20;25:14;35:9</p> <p><b>course (1)</b> 35:15</p> <p><b>court (1)</b> 5:25</p> <p><b>courteous (1)</b> 6:8</p> <p><b>create (1)</b> 34:18</p> <p><b>criteria (1)</b> 19:3</p> <p><b>current (1)</b> 24:24</p> <p><b>currently (2)</b> 31:16;35:3</p>	<p><b>defined (2)</b> 20:15;24:20</p> <p><b>degradation (3)</b> 27:10;29:3;33:11</p> <p><b>degrade (1)</b> 29:17</p> <p><b>degraded (6)</b> 25:2;26:10,24; 27:20;28:24;29:10</p> <p><b>degrading (1)</b> 29:16</p> <p><b>degree (1)</b> 27:4</p> <p><b>demonstrate (4)</b> 9:11;10:12;30:22; 32:16</p> <p><b>demonstrated (2)</b> 3:12;30:10</p> <p><b>demonstrates (2)</b> 10:6;31:17</p> <p><b>demonstrating (1)</b> 9:13</p> <p><b>Department (1)</b> 11:3</p> <p><b>described (1)</b> 20:18</p> <p><b>describes (1)</b> 20:19</p> <p><b>description (1)</b> 10:9</p> <p><b>descriptions (1)</b> 10:10</p> <p><b>designate (9)</b> 25:5,12;30:8,18; 31:9;32:12,14;34:6,8</p> <p><b>designated (5)</b> 18:3;31:20;32:5; 34:10,16</p> <p><b>designation (14)</b> 14:4;20:12,12,13, 23;21:12,13;22:24; 23:10;32:23;33:5; 34:9,14,16</p> <p><b>designations (23)</b> 8:13;17:20;20:21; 21:7,7,18,23;22:3,7, 10,11,13,22;23:5; 24:10,12,14;33:4; 34:5;35:14,17;36:5; 37:4</p> <p><b>detail (1)</b> 20:7</p> <p><b>detailed (2)</b> 10:10;36:13</p> <p><b>details (5)</b> 20:18,22;21:2; 32:18,22</p> <p><b>determination (1)</b> 24:9</p> <p><b>determinations (1)</b> 22:1</p> <p><b>determine (3)</b> 21:11;23:11;31:3</p>	<p><b>determined (1)</b> 20:9</p> <p><b>determines (1)</b> 17:15</p> <p><b>determining (2)</b> 25:8,24</p> <p><b>develop (1)</b> 33:15</p> <p><b>developed (2)</b> 27:23;29:12</p> <p><b>development (1)</b> 13:20</p> <p><b>differ (2)</b> 23:7;24:15</p> <p><b>difference (2)</b> 19:5,20</p> <p><b>differences (2)</b> 24:15,16</p> <p><b>different (4)</b> 17:25;18:6;23:14; 28:14</p> <p><b>differs (1)</b> 29:2</p> <p><b>digits (1)</b> 5:15</p> <p><b>directed (1)</b> 7:22</p> <p><b>Disclosure (1)</b> 7:21</p> <p><b>discuss (2)</b> 12:14;13:23</p> <p><b>discussed (1)</b> 37:15</p> <p><b>discussing (1)</b> 22:15</p> <p><b>discussions (1)</b> 24:10</p> <p><b>dissolved (2)</b> 16:24,24</p> <p><b>distill (1)</b> 20:11</p> <p><b>Ditch (4)</b> 28:1,4;30:22;32:8</p> <p><b>ditched (1)</b> 32:2</p> <p><b>ditches (5)</b> 28:21;30:19,19,20; 31:14</p> <p><b>ditching (2)</b> 33:19,20</p> <p><b>diverse (1)</b> 28:5</p> <p><b>diversity (3)</b> 28:5,7,10</p> <p><b>divide (2)</b> 19:9;22:11</p> <p><b>Division (1)</b> 8:20</p> <p><b>DNR (5)</b> 21:20,21,25;24:2, 11</p> <p><b>DNR's (2)</b> 21:23;22:3</p>
			<b>D</b>	

<p><b>Docket (4)</b> 2:5,7;4:15;39:12 <b>document (7)</b> 9:9;20:19,24;21:4; 32:19,24;33:8 <b>documentation (1)</b> 37:15 <b>documents (5)</b> 9:8,24;14:6;21:1; 22:8 <b>done (1)</b> 18:19 <b>dotted (1)</b> 26:1 <b>down (5)</b> 2:9;20:11;26:24; 28:24;29:24 <b>Dr (1)</b> 8:17 <b>drainage (3)</b> 28:3;31:22;34:19 <b>drinking (5)</b> 16:17;19:21,22; 34:9,13 <b>due (1)</b> 21:20 <b>during (4)</b> 11:10;13:4;14:14, 16</p>	<p><b>entities (1)</b> 36:23 <b>Environmental (1)</b> 8:19 <b>EPA (2)</b> 15:18;36:9 <b>equivalent (1)</b> 26:25 <b>erroneously (1)</b> 23:11 <b>errors (2)</b> 23:16,17 <b>essential (2)</b> 3:1;25:15 <b>establish (1)</b> 16:6 <b>established (2)</b> 29:9,13 <b>etiquette (1)</b> 5:16 <b>even (8)</b> 17:10;18:10;25:9; 27:4;28:7;31:15;35:2; 36:17 <b>everyone (3)</b> 2:2;3:21;39:15 <b>evidence (4)</b> 11:1,2;22:2;30:13 <b>examined (1)</b> 22:1 <b>example (13)</b> 7:16;16:21,23;17:1; 18:3;19:5;23:8;25:2; 31:11;32:8;33:4,19; 35:19 <b>examples (1)</b> 32:1 <b>exceeds (1)</b> 36:5 <b>excellent (1)</b> 26:20 <b>exceptional (15)</b> 20:5;22:18;28:16, 24,25;29:2;30:7,7,9, 10,11,15;33:15;35:21, 21 <b>exclusive (1)</b> 18:5 <b>exhibit (21)</b> 9:17,20,22;10:6,15, 16,18,20,22,25;11:2, 5,8,12,13;21:4,5; 32:20,20;35:23;38:24 <b>exhibits (11)</b> 3:17,22;4:7;8:23; 9:6,7,16,18,19;10:12; 37:21 <b>existed (1)</b> 25:10 <b>existing (11)</b> 24:19,21,25;25:4; 30:11;31:24;32:3,13; 34:21;35:1,1</p>	<p><b>expect (2)</b> 6:7;15:19 <b>expectations (1)</b> 23:12 <b>explain (1)</b> 20:8 <b>explaining (1)</b> 12:25 <b>express (2)</b> 37:24;38:23 <b>expressing (1)</b> 5:4 <b>expression (1)</b> 39:19 <b>extant (1)</b> 25:11 <b>extension (2)</b> 7:15,18</p>	<p>3:8,15;4:10;6:3; 8:14;12:6;13:19; 16:14;21:9,10;31:5 <b>fiscal (1)</b> 11:6 <b>fish (5)</b> 16:25;18:13;23:23; 26:20;27:8 <b>fishable (1)</b> 27:1 <b>fisheries (2)</b> 19:6;24:5 <b>five (1)</b> 5:19 <b>flows (2)</b> 17:13;28:7 <b>focus (1)</b> 6:18 <b>focused (2)</b> 16:18;17:7 <b>follow (1)</b> 24:18 <b>following (5)</b> 3:25;6:12,24;7:5,13 <b>form (1)</b> 13:12 <b>formal (1)</b> 10:16 <b>forth (1)</b> 24:7 <b>forward (1)</b> 15:11 <b>four (2)</b> 13:3;19:9 <b>framework (5)</b> 12:13;17:16;26:23; 27:17;29:3 <b>front (1)</b> 9:19 <b>fulfilled (3)</b> 3:10;9:11;10:13 <b>function (1)</b> 27:13 <b>further (2)</b> 11:22;20:1</p>	<p>32:20 <b>go-ahead (1)</b> 13:7 <b>goal (20)</b> 17:5;26:25;27:3,9, 18;28:1,9,16,18,21, 25;29:5,8;30:16,17; 33:21,23,24;34:1,1 <b>goals (9)</b> 21:17,24;22:5; 24:16;25:21;26:14; 30:8;33:18;37:3 <b>goes (3)</b> 29:10;32:22;36:18 <b>good (8)</b> 26:19;27:7,11;28:8, 19,19;31:15;33:25 <b>govern (1)</b> 24:17 <b>governing (2)</b> 2:3;8:11 <b>Governor (1)</b> 13:14 <b>Governor's (6)</b> 13:3,6,11,13,19; 15:6 <b>gradient (1)</b> 26:5 <b>granted (1)</b> 7:15 <b>grasp (1)</b> 13:18 <b>green (1)</b> 13:1 <b>guess (2)</b> 5:20;39:18 <b>Guidance (1)</b> 32:19</p>
<b>E</b>		<b>F</b>		
<p><b>earlier (2)</b> 4:16;22:15 <b>eComments (4)</b> 4:13,23;5:1;39:9 <b>E-comments (1)</b> 6:14 <b>ecosystem (3)</b> 18:14;26:13;27:11 <b>efficiency (1)</b> 37:6 <b>either (2)</b> 4:18;14:15 <b>electronically (2)</b> 4:13;10:21 <b>eligible (1)</b> 32:3 <b>encourage (3)</b> 4:17,19;38:2 <b>encouraged (1)</b> 6:6 <b>end (5)</b> 7:10;13:13;15:12; 26:6,9 <b>ending (1)</b> 15:13 <b>engage (1)</b> 13:21 <b>enough (1)</b> 31:7 <b>entire (1)</b> 15:18</p>		<p><b>fact (1)</b> 19:4 <b>facts (1)</b> 3:16 <b>fair (2)</b> 26:16;27:4 <b>fairly (1)</b> 3:21 <b>fairness (1)</b> 7:2 <b>fall (1)</b> 15:20 <b>falls (1)</b> 30:5 <b>far (1)</b> 38:6 <b>favor (1)</b> 38:2 <b>fax (3)</b> 4:14;6:15;39:10 <b>feasible (1)</b> 35:4 <b>feasibly (7)</b> 25:9,12;31:22,24; 32:7,13;34:21 <b>February (1)</b> 14:11 <b>federal (2)</b> 16:3,4 <b>field (1)</b> 24:6 <b>file (1)</b> 15:4 <b>final (1)</b> 13:12 <b>Finally (3)</b> 12:16;19:24;34:20 <b>Finance (1)</b> 7:21 <b>finished (1)</b> 14:24 <b>first (11)</b></p>	<p><b>gauge (1)</b> 5:21 <b>general (23)</b> 10:8;20:5;22:18; 28:9,18;29:7;30:17, 18,20;31:1,8,9,14,16, 19,20,24;32:1,5,12; 33:21;34:1;35:13 <b>generally (1)</b> 36:2 <b>gets (1)</b> 23:14 <b>gives (2)</b> 13:7;24:3 <b>giving (1)</b></p>	
			<b>G</b>	<b>H</b>
				<p><b>habitat (25)</b> 19:10,11,16;20:16; 22:21,23,24;23:4,20; 25:6,10,13;28:5,22; 29:21;31:6,6,13,15, 16,23;33:6,6,7,22 <b>habitats (5)</b> 19:12,14,18;23:2; 28:11 <b>hand (2)</b> 12:6,18 <b>happen (1)</b> 15:19 <b>happens (2)</b> 13:3,18 <b>healthy (8)</b> 16:21,25;23:13; 25:25;26:3;27:7,12; 28:20 <b>hear (1)</b> 4:16 <b>heard (5)</b></p>

<p>35:13,16;36:1,13, 20 <b>hearing (30)</b> 2:2,20;3:20,25; 4:11;6:1,13,25;7:25; 8:22;9:6,6,19;10:20, 23;11:12,15;13:9,11; 14:9,14,15;21:4; 32:19;35:12;38:11, 19;39:4,16,23 <b>Hearings (4)</b> 2:13,15,16;14:19 <b>Hello (1)</b> 12:19 <b>helpful (2)</b> 6:18;37:20 <b>high (2)</b> 17:2;26:6 <b>higher (2)</b> 35:5,7 <b>highest (12)</b> 20:4,16;28:12,15; 29:9,13,15,25;30:23; 31:3;32:17;33:10 <b>high-level (3)</b> 3:14;12:23;32:21 <b>highlighted (1)</b> 13:16 <b>highly (1)</b> 26:10 <b>high-quality (3)</b> 26:18;28:17;33:14 <b>historical (3)</b> 23:21;24:3;33:19 <b>historically (1)</b> 25:23 <b>hone (1)</b> 12:24 <b>Honor (4)</b> 8:2;11:22,25;39:20 <b>hope (1)</b> 15:16 <b>host (1)</b> 5:6</p>	<p><b>implement (1)</b> 16:12 <b>implementation (1)</b> 11:1 <b>implemented (1)</b> 17:16 <b>imply (1)</b> 17:23 <b>importance (1)</b> 23:15 <b>important (10)</b> 2:7;17:12,19;18:1, 12;21:13;34:23; 36:22;37:5;38:4 <b>importantly (1)</b> 2:22 <b>improved (1)</b> 29:21 <b>improves (4)</b> 30:1,2,3;37:6 <b>include (8)</b> 3:17;4:15,19;10:14; 16:16;20:5;24:5; 39:11 <b>included (2)</b> 12:3;21:3 <b>includes (10)</b> 10:8;11:8;20:14,25; 21:6;22:18;23:23; 30:19;35:10;37:14 <b>incorporated (1)</b> 22:8 <b>incorrectly (1)</b> 23:8 <b>independent (1)</b> 2:17 <b>index (1)</b> 9:18 <b>indicate (1)</b> 13:1 <b>indicated (1)</b> 15:11 <b>indicates (1)</b> 15:10 <b>indicating (1)</b> 5:3 <b>indication (1)</b> 5:21 <b>individual (2)</b> 18:2;20:22 <b>individually (1)</b> 22:20 <b>information (16)</b> 2:7,14,22;13:23; 14:6,12;35:18,25; 36:2,4,16,17;37:3,11, 11,14 <b>initial (4)</b> 5:19;7:5;10:15; 39:6 <b>insects (1)</b> 18:13 <b>instruction (1)</b></p>	<p>16:5 <b>instructions (1)</b> 4:25 <b>intact (1)</b> 32:10 <b>intent (1)</b> 38:23 <b>interest (3)</b> 5:4,7;2;37:24 <b>interested (4)</b> 5:7;36:24;38:9; 39:2 <b>interests (2)</b> 37:3,8 <b>interim (5)</b> 26:25;27:9;28:1,9; 29:5 <b>into (11)</b> 4:7;9:6;11:21; 18:24;19:9;20:2;21:2; 22:11;30:5,21;37:22 <b>introduce (3)</b> 6:4;8:14;11:11 <b>introduction (1)</b> 8:22 <b>invertebrate (1)</b> 26:21 <b>invertebrates (1)</b> 23:23 <b>involved (1)</b> 37:1 <b>involvement (1)</b> 12:17 <b>issue (4)</b> 3:8;5:18;7:14; 14:25 <b>issues (2)</b> 3:7;7:9 <b>IZZO (4)</b> 38:7,13,13;39:20 <b>I-Z-Z-O (1)</b> 38:14</p>	<p>38:13 <b>keep (1)</b> 33:16 <b>key (1)</b> 3:7 <b>kicks (1)</b> 15:7</p> <p style="text-align: center;"><b>L</b></p> <p><b>L-1 (1)</b> 11:12 <b>lack (1)</b> 28:4 <b>Lafayette (1)</b> 8:6 <b>lakes (2)</b> 19:16,19 <b>large (1)</b> 7:17 <b>largely (2)</b> 24:15;32:10 <b>last (2)</b> 39:14,18 <b>Lastly (2)</b> 15:4,8 <b>later (3)</b> 2:10;4:17;15:15 <b>law (2)</b> 2:12;16:3 <b>lead (3)</b> 4:4;8:21;12:2 <b>least (2)</b> 30:16,25 <b>legacy (1)</b> 33:22 <b>legal (11)</b> 3:8,10;4:5;6:7,21, 22;9:9,12;10:2,13; 33:18 <b>legally (2)</b> 31:6,22 <b>legally-altered (1)</b> 31:13 <b>legislative (1)</b> 10:19 <b>legislators (1)</b> 11:3 <b>lends (1)</b> 37:7 <b>level (1)</b> 16:24 <b>library (1)</b> 10:19 <b>life (18)</b> 16:17,21,23;18:10, 22,25;20:3,4,12,13; 22:17;25:18,20; 26:14;28:13;33:3; 36:7,7 <b>lighter-colored (1)</b> 14:19 <b>likely (1)</b></p>	<p>31:18 <b>limit (1)</b> 5:19 <b>limited (1)</b> 28:21 <b>limiting (4)</b> 31:7,19,23;33:21 <b>line (10)</b> 26:1,3,4,17,24;27:4, 21,24;29:1,17 <b>link (1)</b> 37:12 <b>list (3)</b> 10:24;21:22;35:20 <b>listed (1)</b> 27:22 <b>little (4)</b> 2:13;18:23;20:7; 26:11 <b>loads (1)</b> 17:19 <b>lobbyists (1)</b> 7:20 <b>located (1)</b> 22:10 <b>lock (2)</b> 29:16;30:1 <b>locked (1)</b> 33:11 <b>locks (1)</b> 29:25 <b>loggers (1)</b> 23:25 <b>long (1)</b> 32:9 <b>longer (2)</b> 25:11,11 <b>look (2)</b> 23:21;26:12 <b>looked (1)</b> 21:25 <b>looking (4)</b> 3:7;14:5;21:3; 24:23 <b>looks (2)</b> 23:13;26:11 <b>lost (2)</b> 27:4;29:6 <b>lot (3)</b> 18:18,21;28:10 <b>low (1)</b> 26:9 <b>lower (1)</b> 26:9 <b>Lynn (12)</b> 4:6;8:24;9:1;11:20; 12:7,18,19,20;37:12; 38:17,17,25 <b>L-Y-N-N (1)</b> 12:20</p>
<b>I</b>		<b>J</b>		
<p><b>identified (2)</b> 13:18;21:18 <b>identify (5)</b> 5:14;13:9;29:15; 33:9,15 <b>impacts (3)</b> 11:7;33:19,22 <b>impaired (5)</b> 23:11,12;27:22; 28:25;29:11 <b>impairment (2)</b> 23:16;29:18 <b>impartial (1)</b> 2:16 <b>impartially (1)</b> 3:21</p>		<p><b>Janson (3)</b> 4:5;8:2,3 <b>J-A-N-S-O-N (1)</b> 8:4 <b>joining (1)</b> 2:2 <b>JUDGE (13)</b> 2:1,12;11:24;14:21, 24;15:11;37:18,19; 38:8,9,22;39:1,21</p>		
		<b>K</b>		
		<p><b>K-8 (1)</b> 35:23 <b>Katie (1)</b> 38:13 <b>K-A-T-I-E (1)</b></p>		<b>M</b>

<p><b>macro (2)</b> 23:23;26:20</p> <p><b>mail (3)</b> 4:14;6:14;39:9</p> <p><b>mailed (1)</b> 10:20</p> <p><b>Mailing (2)</b> 10:23,24</p> <p><b>main (1)</b> 16:14</p> <p><b>maintain (4)</b> 16:22;17:2,5;35:6</p> <p><b>maintained (3)</b> 28:3;31:22;35:4</p> <p><b>maintaining (1)</b> 34:19</p> <p><b>making (4)</b> 8:15;11:14;12:15; 23:16</p> <p><b>managed (1)</b> 23:18</p> <p><b>Management (6)</b> 11:6;17:12,17; 24:16;36:25;37:2</p> <p><b>manages (1)</b> 9:2</p> <p><b>many (2)</b> 5:21;10:12</p> <p><b>map (2)</b> 3:15;22:9</p> <p><b>March (7)</b> 6:15,25;7:10;15:13, 14;39:8,11</p> <p><b>Mary (9)</b> 4:5;8:24;11:20; 12:6,18,20;15:22; 37:12;38:17</p> <p><b>materials (1)</b> 11:13</p> <p><b>matter (1)</b> 2:3</p> <p><b>matters (1)</b> 3:1</p> <p><b>maximum (1)</b> 17:18</p> <p><b>may (9)</b> 3:23,25;13:9;18:7; 23:10;24:11,14;27:2; 38:20</p> <p><b>maybe (1)</b> 32:9</p> <p><b>mean (1)</b> 20:8</p> <p><b>measure (1)</b> 24:1</p> <p><b>meet (16)</b> 20:5,17;26:13;28:1, 2;29:22;30:10,15,16, 20;31:1,17,19;33:21, 23,25</p> <p><b>meeting (10)</b> 21:16,16;27:3,16; 28:8;29:4;30:9;31:8,</p>	<p>15;37:8</p> <p><b>meetings (1)</b> 13:22</p> <p><b>meets (2)</b> 27:8;30:7</p> <p><b>members (1)</b> 4:17</p> <p><b>mention (1)</b> 6:17</p> <p><b>mentioned (2)</b> 9:18;34:22</p> <p><b>message (1)</b> 37:25</p> <p><b>method (2)</b> 4:22,23</p> <p><b>Michelle (2)</b> 4:5;8:3</p> <p><b>M-I-C-H-E-L-L-E (1)</b> 8:3</p> <p><b>middle (1)</b> 14:20</p> <p><b>might (3)</b> 3:16;12:25;29:3</p> <p><b>mile (1)</b> 32:9</p> <p><b>mind (1)</b> 5:10</p> <p><b>minimally (1)</b> 36:18</p> <p><b>minimum (1)</b> 17:4</p> <p><b>Minnesota (18)</b> 2:5;8:5,7,9,10;9:9, 25;10:4,4,15;23;16:7, 8;17:21;22:7;26:19; 34:12,19;36:10</p> <p><b>minute (1)</b> 15:14</p> <p><b>minutes (2)</b> 5:19;11:20</p> <p><b>modified (8)</b> 20:6;22:19;28:21; 29:8;30:21,23;32:4, 14</p> <p><b>moment (2)</b> 2:8;20:8</p> <p><b>monitor (1)</b> 21:9</p> <p><b>monitoring (2)</b> 21:9,19</p> <p><b>more (7)</b> 3:19;18:23;20:7,10; 24:3;33:3;36:12</p> <p><b>most (6)</b> 2:22;6:18;18:12,17; 24:12;27:11</p> <p><b>move (2)</b> 13:25;25:18</p> <p><b>moving (2)</b> 29:20;34:2</p> <p><b>MPCA (22)</b> 8:6,14;9:1;10:1,21; 11:9,11,14;15:1;16:1,</p>	<p>7,10;18:19;20:20; 21:9,18;23:21;24:8, 17;32:22;37:13;38:14</p> <p><b>MPCA's (3)</b> 8:19;12:9;14:22</p> <p><b>much (3)</b> 6:8;26:12;39:22</p> <p><b>multiple (2)</b> 18:2;24:2</p> <p><b>municipalities (1)</b> 11:4</p> <p><b>mussels (1)</b> 18:14</p> <p><b>must (2)</b> 7:20;15:25</p>	<p>37:21</p> <p><b>Notice (9)</b> 10:20,23,25;11:1; 13:19;14:9;15:8; 35:11,22</p> <p><b>notified (1)</b> 15:6</p> <p><b>notify (1)</b> 11:3</p> <p><b>November (4)</b> 24:22;30:12;32:2; 35:2</p> <p><b>Number (6)</b> 2:6,7;4:15;5:15; 7:17;39:12</p> <p><b>numeric (2)</b> 17:9;34:3</p> <p><b>numerous (1)</b> 20:25</p>	<p>15:3;16:20;33:11</p> <p><b>organisms (1)</b> 23:2</p> <p><b>organizational (1)</b> 4:24</p> <p><b>otherwise (1)</b> 32:10</p> <p><b>out (1)</b> 6:2</p> <p><b>Outcomes (2)</b> 8:20;37:7</p> <p><b>outline (1)</b> 12:5</p> <p><b>outlined (1)</b> 9:8</p> <p><b>outlining (1)</b> 11:17</p> <p><b>outreach (1)</b> 13:22</p> <p><b>over (7)</b> 7:25;12:6,18;14:15; 24:1;29:20,25</p> <p><b>overall (1)</b> 30:2</p> <p><b>overview (5)</b> 12:3,10,13;21:3; 32:21</p> <p><b>oxygen (2)</b> 16:24,25</p>	
		<b>N</b>			
		<p><b>name (4)</b> 2:11;8:3;12:1,19</p> <p><b>narrative (2)</b> 17:8;34:3</p> <p><b>natural (11)</b> 19:10;20:15;22:13; 26:8,11,22;27:9,15; 28:18;31:11;33:5</p> <p><b>naturally (3)</b> 19:12;22:24;23:2</p> <p><b>near (1)</b> 28:17</p> <p><b>necessarily (2)</b> 17:24;21:1</p> <p><b>necessary (5)</b> 16:12,25;17:19; 19:13;34:24</p> <p><b>need (18)</b> 3:12;6:22;9:22; 11:18;16:22;23:5,15; 27:2,21,23;28:5;29:6; 32:4;33:23;34:7;35:6, 14;36:21</p> <p><b>needed (5)</b> 8:17;9:14;10:7,9,11</p> <p><b>needs (8)</b> 19:3;24:18;29:1,11, 18;35:3,5;37:8</p> <p><b>new (5)</b> 7:9;12:25;29:23; 39:19,20</p> <p><b>Next (17)</b> 2:11,25;3:6,14,19; 4:3,21,5;23;6:5,11, 17;7:19;13:15;14:8; 15:10;25:19;29:22</p> <p><b>none (2)</b> 38:11;39:4</p> <p><b>North (1)</b> 8:6</p> <p><b>Northern (1)</b> 26:18</p> <p><b>note (8)</b> 2:6,8;6:25;13:17; 17:22;18:1;34:7;</p>	<b>O</b>	<p><b>OAH (5)</b> 2:5,6,14,15;15:4</p> <p><b>objectives (1)</b> 22:5</p> <p><b>off (1)</b> 8:25</p> <p><b>offered (1)</b> 37:22</p> <p><b>offering (1)</b> 4:7</p> <p><b>Office (8)</b> 2:13,14;13:3,6,12, 19;14:18;15:6</p> <p><b>often (3)</b> 18:16;24:3,5</p> <p><b>once (5)</b> 5:21;14:24;17:13; 24:8;29:8</p> <p><b>one (14)</b> 2:16;9:17;15:23; 16:15;17:11;18:11, 12,16;19:7;21:8; 22:12;24:19;38:7; 39:18</p> <p><b>one-size-fits-all (3)</b> 25:24;26:23;27:18</p> <p><b>online (1)</b> 4:8</p> <p><b>only (8)</b> 17:7,10;19:18;20:6; 24:23;25:3;32:20; 34:4</p> <p><b>opportunity (5)</b> 2:20,23;3:18,24;7:7</p> <p><b>options (1)</b> 28:14</p> <p><b>oral (2)</b> 4:10,18</p> <p><b>orally (1)</b> 14:15</p> <p><b>order (3)</b></p>	<p style="text-align: center;"><b>P</b></p> <p><b>package (1)</b> 15:18</p> <p><b>page (2)</b> 14:2;37:13</p> <p><b>pages (1)</b> 20:24</p> <p><b>panel (1)</b> 7:25</p> <p><b>part (14)</b> 3:1;10:11;16:4,19; 17:2,11;18:11;19:25; 22:16;25:16,17; 34:11,23;38:3</p> <p><b>participants (1)</b> 37:24</p> <p><b>participate (2)</b> 6:6;36:24</p> <p><b>participating (3)</b> 3:5;5:13;38:1</p> <p><b>participation (4)</b> 2:25;3:1;12:16; 13:16</p> <p><b>particular (2)</b> 12:11;38:3</p> <p><b>particularly (1)</b> 22:4</p> <p><b>parties (2)</b> 2:18;37:9</p> <p><b>partners (1)</b> 18:19</p> <p><b>Paul (1)</b></p>

<p>8:6 <b>PCA (2)</b> 13:21;15:2 <b>per (1)</b> 5:16 <b>perform (1)</b> 16:11 <b>period (14)</b> 7:6,8,9,14;11:10; 13:8,10,13;14:9,16; 15:7,12,13;39:10 <b>permits (1)</b> 35:20 <b>permitting (1)</b> 17:18 <b>perspective (2)</b> 24:4,11 <b>perspectives (1)</b> 37:3 <b>phase (1)</b> 13:21 <b>phone (2)</b> 5:15;38:1 <b>piece (4)</b> 2:7;13:15;14:8,17 <b>place (1)</b> 17:18 <b>plan (2)</b> 11:2;38:18 <b>planned (1)</b> 2:3 <b>plants (1)</b> 18:14 <b>please (5)</b> 2:8;4:15;5:17;6:1; 7:4 <b>pm (9)</b> 6:16,25;7:2,10,11; 15:14;39:7,11,23 <b>point (4)</b> 9:3;14:20;15:2; 25:2 <b>points (1)</b> 13:4 <b>Pollution (5)</b> 8:5,9,10;9:10,25 <b>poor (1)</b> 31:7 <b>portal (1)</b> 6:14 <b>portion (3)</b> 3:13;9:14;10:7 <b>possible (5)</b> 7:15;13:23;21:22; 23:24;36:25 <b>post (1)</b> 38:18 <b>posted (4)</b> 9:7;10:21;14:4; 35:22 <b>post-hearing (2)</b> 14:16;15:12 <b>potential (5)</b></p>	<p>20:3,14,15;22:18; 25:22 <b>PowerPoint (3)</b> 38:16,19,24 <b>practice (1)</b> 28:23 <b>precluded (1)</b> 28:8 <b>preferred (1)</b> 4:23 <b>prehearing (1)</b> 11:10 <b>preliminary (2)</b> 14:22;24:9 <b>prepare (1)</b> 15:3 <b>present (2)</b> 8:25;25:1 <b>presentation (13)</b> 3:16,22;8:1,15,23; 9:5;11:14,16,19;12:5; 37:16;38:16;39:17 <b>presenting (2)</b> 2:18;4:3 <b>press (2)</b> 5:5,8 <b>pressing (1)</b> 38:1 <b>prevent (3)</b> 29:16,19;33:11 <b>preventing (1)</b> 31:8 <b>previous (2)</b> 29:3;36:6 <b>priority (1)</b> 17:23 <b>probably (2)</b> 27:18,20 <b>procedural (4)</b> 3:10;6:22;9:12; 10:14 <b>procedures (2)</b> 9:2;15:24 <b>proceed (1)</b> 13:7 <b>proceeding (3)</b> 2:19;6:7;8:8 <b>proceedings (1)</b> 9:2 <b>process (12)</b> 3:4;10:16;12:8,14, 22;13:1,4;14:17,20; 23:19;32:16,21 <b>process-related (1)</b> 9:4 <b>product (1)</b> 3:4 <b>prohibitions (1)</b> 34:18 <b>promulgate (2)</b> 3:11;10:2 <b>promulgating (1)</b> 9:13</p>	<p><b>proposed (22)</b> 3:13;8:16,21,24; 9:10,14,21;10:1,7,10, 17;11:9,17,19;13:5,8; 14:12;21:8;33:2;35:9, 12,21 <b>proposing (5)</b> 8:11;15:25;20:20; 22:2;35:16 <b>protect (2)</b> 16:22;19:13 <b>protected (3)</b> 17:25;18:4;19:21 <b>protecting (3)</b> 16:15;18:20;22:5 <b>protection (3)</b> 18:21;33:9,16 <b>protections (1)</b> 33:14 <b>protective (1)</b> 16:20 <b>protects (2)</b> 18:13;19:16 <b>provide (15)</b> 2:23;3:24;12:10,13; 13:11;18:15;26:12; 27:12;33:8,13;35:18, 20,23,25;37:10 <b>provided (4)</b> 4:8;36:4,5,11 <b>provides (2)</b> 20:21;27:10 <b>providing (3)</b> 5:23;39:3,17 <b>public (17)</b> 2:2,21,23;3:1,2,18, 23;4:18;6:5;7:21; 12:16;13:15;14:14; 38:2,4,10;39:6 <b>publication (1)</b> 13:7 <b>publish (2)</b> 13:5;15:16 <b>published (5)</b> 9:24;10:22;14:1; 15:9;35:10 <b>purpose (1)</b> 9:8 <b>purposes (1)</b> 9:17 <b>put (1)</b> 30:21 <b>putting (1)</b> 12:11</p>	<p>36:24;37:2,4 <b>queue (2)</b> 5:9,11 <b>quick (2)</b> 5:12;37:21 <b>quickly (1)</b> 9:16</p> <p style="text-align: center;"><b>R</b></p> <p><b>raise (1)</b> 7:9 <b>ranking (1)</b> 17:23 <b>reach (1)</b> 32:9 <b>really (3)</b> 16:18;26:17;28:17 <b>reason (3)</b> 21:7;28:2;35:16 <b>reasonable (4)</b> 9:15;10:8,9,11 <b>reasonableness (4)</b> 3:13;6:23;9:23; 11:18 <b>reasonably (1)</b> 28:20 <b>reasons (1)</b> 21:8 <b>rebut (1)</b> 7:7 <b>rebuttal (7)</b> 7:6,8,9,13;14:23; 15:13;39:10 <b>receive (1)</b> 2:21 <b>received (3)</b> 11:9;35:8;37:22 <b>recently (1)</b> 21:21 <b>recommendations (1)</b> 12:15 <b>record (6)</b> 4:7;7:8;9:6;11:13; 14:21;37:22 <b>recording (1)</b> 5:25 <b>records (1)</b> 24:6 <b>recreation (1)</b> 16:17 <b>refer (2)</b> 3:25;13:20 <b>reference (2)</b> 10:19;22:8 <b>referenced (1)</b> 4:16 <b>referred (2)</b> 8:5;27:1 <b>reflect (1)</b> 19:3 <b>regarding (3)</b> 12:21;21:15;30:4</p>	<p><b>regardless (1)</b> 4:22 <b>register (3)</b> 7:20;10:22;15:9 <b>registration (1)</b> 7:22 <b>reiterate (1)</b> 12:8 <b>relate (1)</b> 9:17 <b>related (1)</b> 36:20 <b>relatively (1)</b> 32:8 <b>relevant (3)</b> 3:10;9:12;10:13 <b>remarks (1)</b> 3:17 <b>remind (2)</b> 37:23;39:6 <b>reminder (4)</b> 6:7,11;7:19;39:5 <b>remote (1)</b> 5:16 <b>remove (4)</b> 5:11;34:13,20;35:1 <b>removed (1)</b> 5:9 <b>report (4)</b> 7:14;14:25;15:2,15 <b>reporter (1)</b> 5:25 <b>representative (1)</b> 33:3 <b>representatives (1)</b> 4:1 <b>represents (3)</b> 26:1,7;32:11 <b>Request (7)</b> 10:15;13:25;14:1; 35:10,19;36:14;38:15 <b>requested (3)</b> 6:6;35:25;38:7 <b>requests (2)</b> 35:17;39:20 <b>require (1)</b> 23:3 <b>required (4)</b> 16:2,6;31:2;36:18 <b>requirements (9)</b> 3:11;6:22;9:12; 10:14;11:3;15:23; 24:18,19;34:25 <b>requires (3)</b> 7:16;25:8;32:15 <b>research (1)</b> 8:18 <b>respectful (2)</b> 6:8,10 <b>respond (1)</b> 8:17 <b>response (2)</b> 14:22,23</p>
		<b>Q</b>		
		<p><b>Quality (26)</b> 2:4,8;12,19;10:3,3; 12:10,12;15:17;16:6, 11,12,13;17:3,11,17; 18:21;19:11;26:20; 28:8;30:1,2,2;33:24;</p>		

<p><b>restoration (1)</b> 29:21 <b>restore (4)</b> 27:2,21;29:12;35:4 <b>restored (8)</b> 25:9,12;29:1,6,18; 32:7,11;35:7 <b>restoring (1)</b> 18:20 <b>result (2)</b> 13:10;33:2 <b>resulting (1)</b> 3:3 <b>retain (2)</b> 25:5;34:16 <b>review (14)</b> 3:14;9:16;13:14; 14:21,24;15:19; 21:10,11;23:20; 25:16;31:5;35:11,14; 36:15 <b>reviewed (2)</b> 4:22;24:8 <b>reviewing (4)</b> 12:15;20:21;23:19; 32:23 <b>reviews (7)</b> 13:6;22:21;24:23; 25:15,17,18;34:24 <b>revise (1)</b> 10:2 <b>revisor's (1)</b> 10:17 <b>Rice (1)</b> 27:6 <b>right (16)</b> 2:1,11;5:16,20; 6:11;7:13,24;8:25; 26:5;38:5,9,11;39:1,2, 4,14 <b>River (3)</b> 26:18,19;27:7 <b>road (2)</b> 3:15;8:6 <b>role (1)</b> 3:20 <b>rule (55)</b> 3:13;4:6;6:23;8:8, 16,24;9:1,3,10,13,14, 21,24;10:1,7,9,10,17; 11:9,17,19;12:4,7,7, 11,14;13:9,12;14:1, 21;15:8,18;16:3,18; 17:7;18:9;19:25; 20:10;21:6,20,25; 22:6,7;23:15;32:25; 33:1;35:12;36:7,8,10; 37:12,13;38:3,19,21 <b>rulemaking (12)</b> 3:2;9:1;10:16;12:2, 21;13:1,4,20,24;14:3, 8;16:1 <b>rules (31)</b></p>	<p>2:3,5;3:9,11;8:11, 21;10:3;11:7;12:9; 13:5,8,14;14:12,25; 15:1,3,4,6,16,17,25; 16:1;17:9;20:20; 24:17;34:4,12;35:9, 16;36:6,9 <b>running (1)</b> 14:3  <b>S</b>  <b>S-18 (1)</b> 21:5 <b>S-23 (1)</b> 32:20 <b>same (2)</b> 22:4;29:7 <b>schedule (1)</b> 12:8 <b>scientist (4)</b> 4:5;8:18,21;12:2 <b>scope (1)</b> 18:18 <b>scoring (1)</b> 26:2 <b>Second (4)</b> 3:9;4:11;16:19; 22:16 <b>Secretary (1)</b> 15:5 <b>seeing (1)</b> 38:11 <b>sending (1)</b> 37:25 <b>sensitive (1)</b> 18:17 <b>sensitivity (1)</b> 18:18 <b>series (1)</b> 18:6 <b>services (3)</b> 18:14;26:13;27:11 <b>set (4)</b> 19:3;20:12;21:20; 33:17 <b>seven (2)</b> 17:21;18:11 <b>share (4)</b> 2:21;13:23;37:2; 38:15 <b>short (1)</b> 32:8 <b>showing (1)</b> 22:9 <b>similar (4)</b> 19:7;36:6,8,12 <b>slide (19)</b> 2:10,11,25;3:6,8,14, 19;4:3,17,21;5:23; 6:5,11,17;7:19;12:23; 15:10;39:5,14 <b>slides (3)</b></p>	<p>11:14;12:21;15:12 <b>slowly (2)</b> 5:24;6:2 <b>sometimes (2)</b> 24:2;27:1 <b>somewhat (1)</b> 27:20 <b>SONAR (8)</b> 9:23,24;10:6,8,19; 14:12;21:4;32:20 <b>sort (2)</b> 12:24;14:19 <b>source (1)</b> 19:21 <b>space (1)</b> 26:17 <b>speak (6)</b> 3:23;5:14,18,24; 6:1;38:8 <b>species (2)</b> 23:4;25:3 <b>specific (5)</b> 4:19;12:11;19:14; 20:22;35:17 <b>specifically (3)</b> 3:19;8:12;24:17 <b>spell (2)</b> 6:2,3 <b>St (1)</b> 8:6 <b>staff (3)</b> 8:4,15;13:21 <b>stake (1)</b> 36:23 <b>stakeholder (2)</b> 12:17;13:22 <b>standard (1)</b> 19:22 <b>Standards (18)</b> 2:4,8;12,19;10;3; 12:10,13;16:6,11,12, 13,20;17:9,11,15; 19:13;21:14;34:4; 37:4 <b>standpoint (1)</b> 4:24 <b>star (3)</b> 5:6,8;38:1 <b>started (2)</b> 10:16;14:10 <b>starts (1)</b> 30:6 <b>state (15)</b> 10:22;15:5,9;16:2; 18:8,16;21:10;22:10; 26:22;27:9;28:11; 30:3,19;31:14;36:25 <b>stated (1)</b> 8:10 <b>Statement (1)</b> 9:22 <b>states (2)</b> 16:5;19:2</p>	<p><b>status (5)</b> 23:17;24:13,24,25; 29:18 <b>Statute (3)</b> 10:4,5;34:20 <b>Statutes (1)</b> 16:9 <b>statutory (5)</b> 9:25;12:9;15:25; 16:2,7 <b>step (1)</b> 31:5 <b>step-by-step (1)</b> 4:25 <b>still (9)</b> 27:3,3,7,10,14; 29:4;33:22,23,25 <b>stocking (1)</b> 24:6 <b>strategies (1)</b> 33:16 <b>strategy (3)</b> 27:22;29:11,14 <b>stream (16)</b> 23:10,11;24:1;25:1, 4,5,25;26:24;27:11, 12,19,25;28:10,30;5; 31:11;32:2 <b>streams (11)</b> 19:16,19;20:5,6,17, 22;21:9,16;25:22; 28:19;29:8 <b>stressor (1)</b> 31:18 <b>strict (2)</b> 7:1,11 <b>structure (1)</b> 27:12 <b>structured (1)</b> 32:16 <b>subcategories (2)</b> 19:2,4 <b>subclasses (5)</b> 18:24;19:7,9;20:1; 22:14 <b>Subd (1)</b> 10:4 <b>subdivided (2)</b> 18:24;20:2 <b>submission (2)</b> 4:22;10:18 <b>submit (12)</b> 4:9,12,12,18,25; 6:13,16;7:3;9:6; 15:18;38:23;39:8 <b>submitted (2)</b> 39:7,13 <b>subsequent (1)</b> 23:17 <b>subset (1)</b> 21:17 <b>substrates (1)</b> 28:7</p>	<p><b>sufficient (1)</b> 36:3 <b>summarize (1)</b> 32:25 <b>summarizing (1)</b> 11:18 <b>summer (2)</b> 15:16;24:2 <b>summers (1)</b> 24:2 <b>supplemental (2)</b> 21:1;37:15 <b>supplements (1)</b> 3:3 <b>support (12)</b> 14:6;18:7;19:12; 20:19,23;22:24;23:1, 1,2;28:5;35:13;36:4 <b>supporting (1)</b> 14:5 <b>supports (2)</b> 22:2;25:3 <b>sure (3)</b> 6:1,3;39:11 <b>surveys (1)</b> 24:6 <b>survive (1)</b> 23:3 <b>Suzanne (1)</b> 2:12 <b>swimmable (1)</b> 27:1 <b>system (2)</b> 26:18;30:23 <b>systems (3)</b> 27:6;28:4;33:25  <b>T</b>  <b>talk (4)</b> 12:7,16;20:7;22:19 <b>talking (2)</b> 17:10;18:9 <b>technical (8)</b> 6:2;14:5,6;20:18, 19;32:19;36:2,15 <b>technology (1)</b> 29:20 <b>telephone (3)</b> 5:5,6,13 <b>temperature (4)</b> 23:24,25;24:1,6 <b>tenth (1)</b> 32:9 <b>terms (6)</b> 6:2;22:5;23:16; 26:12;28:11;37:7 <b>testimony (1)</b> 3:17 <b>thermal (4)</b> 22:23,24;23:5,19 <b>third (3)</b> 3:11;17:2;27:25</p>
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<p><b>though (6)</b> 13:17;17:10;18:11; 27:4;29:20;31:21</p> <p><b>three (8)</b> 3:7;6:19;9:17; 16:14;20:8;28:14; 30:5;39:8</p> <p><b>threshold (3)</b> 26:2,16;29:10</p> <p><b>tier (2)</b> 29:22,23</p> <p><b>tiered (7)</b> 18:25;20:2;22:16; 25:18,20;28:13;36:6</p> <p><b>tiers (3)</b> 20:2,8;30:5</p> <p><b>timeline (1)</b> 15:10</p> <p><b>today (16)</b> 2:16,18;3:5,15,23; 4:1,4,7,10;5:2,3,22, 25:8,15;11:15;39:3</p> <p><b>Todnem (3)</b> 2:12;15:11;37:18</p> <p><b>tools (1)</b> 23:6</p> <p><b>total (2)</b> 17:18;21:6</p> <p><b>treated (1)</b> 3:21</p> <p><b>treatment (1)</b> 29:21</p> <p><b>tribes (1)</b> 36:22</p> <p><b>triennial (2)</b> 35:11;36:14</p> <p><b>trigger (3)</b> 27:2,21;31:1</p> <p><b>triggers (1)</b> 29:17</p> <p><b>trout (1)</b> 21:21</p> <p><b>true (1)</b> 29:7</p> <p><b>TSD (1)</b> 14:6</p> <p><b>turn (5)</b> 5:13,17,18;7:25; 37:17</p> <p><b>two (6)</b> 4:9;20:25;21:8; 22:11;23:7;38:20</p> <p><b>type (6)</b> 20:16;22:12,14; 27:19,25;33:6</p> <p><b>types (8)</b> 18:6;19:10,11,14; 22:11,23;23:7;28:10</p>	<p><b>unable (1)</b> 33:20</p> <p><b>under (4)</b> 10:3;19:7;27:16; 34:19</p> <p><b>understandable (1)</b> 36:17</p> <p><b>undisturbed (2)</b> 26:8,22</p> <p><b>unhealthy (1)</b> 26:4</p> <p><b>Unit (1)</b> 8:19</p> <p><b>up (4)</b> 14:3;27:23;29:20, 23</p> <p><b>upper (1)</b> 26:6</p> <p><b>upstream (1)</b> 35:20</p> <p><b>usable (1)</b> 36:17</p> <p><b>Use (93)</b> 2:4;8:12;14:4; 17:20,21,22;20:4,6, 12,21,23;21:6,11,13, 23,24;22:3,6,9,11; 24:14,20,25;25:4,18, 21;26:14;28:9,15,16, 18,21,24,25;29:2,6,7, 8,9,9,15;30:7,9,10,11, 11,12,14,15,17,18,20, 21,23,24;31:1,1,4,8, 10,14,16,19,20,24,24; 32:1,3,4,5,12,13,15, 17,23;33:3,15,21; 34:1,1,5,6;35:1,1,3,5, 7,14,17,21,22;36:4; 37:4</p> <p><b>used (1)</b> 25:23</p> <p><b>useful (1)</b> 22:4</p> <p><b>uses (33)</b> 12:16;16:8,16;17:8, 12,13,14,25;18:2,5,7, 12,13,17,25;19:5; 20:3,13;22:17,19; 24:21,21;25:20; 28:14;29:13,25;30:1; 33:8,10,11;34:21; 36:7,8</p> <p><b>using (2)</b> 23:25;26:16</p>	<p><b>veto (2)</b> 13:13;15:7</p> <p><b>view (1)</b> 11:21</p>	<p><b>W</b></p> <p><b>warm (10)</b> 19:6,17;22:12,21; 23:3,4,9,14;25:3,17</p> <p><b>warm-water (1)</b> 33:7</p> <p><b>Water (87)</b> 2:4;8:12,18;10:2,3; 12:10,12;15:17;16:5, 6,10,12,13,17;17:3, 11,17;18:2,3,16,20; 19:1,2,5,6,6,11,16,18, 21,22;22:12,12,13,21; 23:2,3,4,4,7,9,10,13, 14;24:4,18,20,22; 25:1,3,4,6,8,9,10,13, 17,17;26:15,19,25; 27:2,8,16;28:8,9,16, 24;29:5,21,25;30:1,2; 31:3;32:15;33:14,24; 34:8,9,9,10,14,25; 35:5;36:24;37:1,4</p> <p><b>waters (23)</b> 16:8;17:4,13;18:7; 21:21;22:6,23;23:18; 24:13,24;28:17; 29:19,22;32:17; 33:12,15,18,20;34:10, 14,14,19;35:22</p> <p><b>watershed (1)</b> 32:10</p> <p><b>way (1)</b> 12:5</p> <p><b>ways (3)</b> 4:9;6:12;39:8</p> <p><b>web (2)</b> 14:2;37:13</p> <p><b>WebEx (1)</b> 5:4</p> <p><b>website (8)</b> 4:8,13,24;9:7; 10:21;38:19,21;39:9</p> <p><b>Welcome (1)</b> 2:1</p> <p><b>welcoming (1)</b> 6:9</p> <p><b>wetlands (1)</b> 19:25</p> <p><b>what's (5)</b> 12:3;20:10;21:3; 32:25;36:18</p> <p><b>whenever (3)</b> 21:22;23:24;36:25</p> <p><b>whereas (1)</b> 26:9</p> <p><b>Wild (1)</b> 27:6</p>	<p><b>W-I-L-L (1)</b> 12:1</p> <p><b>wisdom (2)</b> 3:2,3</p> <p><b>within (5)</b> 12:3;18:7;24:1; 32:9,17</p> <p><b>work (2)</b> 18:18;37:6</p> <p><b>works (2)</b> 27:19;28:23</p> <p><b>write (1)</b> 2:9</p> <p><b>writing (3)</b> 3:24;4:11,15</p> <p><b>written (7)</b> 4:12,18;6:13,16; 14:15;35:24;39:6</p>	<p>34:6</p> <p><b>2:55 (1)</b> 39:23</p> <p><b>20 (1)</b> 3:25</p> <p><b>200 (1)</b> 20:24</p> <p><b>2017 (2)</b> 28:13;36:6</p> <p><b>2020 (1)</b> 36:7</p> <p><b>2021 (3)</b> 14:2;35:11;36:14</p> <p><b>2022 (1)</b> 14:10</p> <p><b>2023 (5)</b> 6:15,25;7:10;15:16, 20</p> <p><b>232 (2)</b> 21:6;22:11</p> <p><b>23-9003-37415 (2)</b> 2:6;39:12</p> <p><b>28 (1)</b> 24:22</p> <p><b>28th (3)</b> 30:12;32:2;35:2</p> <p><b>2A (3)</b> 19:15;34:8,15</p> <p><b>2B (3)</b> 19:17,20;34:15</p> <p><b>2Bd (4)</b> 19:17,20,21;34:17</p> <p><b>2D (1)</b> 19:24</p>
				<p><b>Y</b></p>	
				<p><b>yellow (1)</b> 13:17</p>	
				<p><b>Z</b></p>	
				<p><b>zero (1)</b> 18:23</p>	
				<p><b>1</b></p>	
				<p><b>1 (4)</b> 10:4;17:23;19:23; 34:13</p> <p><b>103E (1)</b> 34:20</p> <p><b>115 (2)</b> 16:9,9</p> <p><b>115.03 (1)</b> 10:4</p> <p><b>115.44 (1)</b> 10:5</p> <p><b>12 (1)</b> 14:10</p> <p><b>14 (1)</b> 13:14</p> <p><b>14-day (1)</b> 15:7</p> <p><b>15th (3)</b> 7:10;15:14;39:11</p> <p><b>1975 (5)</b> 24:22;25:10;30:12; 32:2;35:2</p> <p><b>1995 (1)</b> 25:2</p> <p><b>1B (3)</b> 34:9,11,16</p>	<p><b>3</b></p>
					<p><b>3 (4)</b> 5:6,8;18:4;38:1</p> <p><b>30 (2)</b> 7:14;11:20</p> <p><b>34 (1)</b> 28:1</p> <p><b>3rd (1)</b> 14:11</p>
					<p><b>4</b></p>
					<p><b>4 (1)</b> 18:4</p> <p><b>4:30 (8)</b> 6:16,25;7:2,10,11; 15:14;39:7,11</p> <p><b>4:31 (1)</b> 7:3</p>
					<p><b>5</b></p>
				<p><b>2</b></p>	<p><b>5 (1)</b> 18:4</p> <p><b>520 (1)</b> 8:6</p> <p><b>55155 (1)</b></p>
				<p><b>2 (10)</b> 2:4;8:12;17:24; 18:4,10,24,24;19:8,9;</p>	
	<p><b>V</b></p>				
	<p><b>venues (1)</b> 35:9</p> <p><b>verifying (1)</b> 10:18</p> <p><b>versus (1)</b> 23:13</p>				



8:7				
<b>6</b>				
<b>6 (1)</b> 18:5				
<b>7</b>				
<b>7050 (2)</b> 2:5;34:12 <b>7050.0470 (1)</b> 22:7				
<b>8</b>				
<b>8 (1)</b> 6:25 <b>8th (3)</b> 6:15;15:13;39:8				