



P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: [www.deq.state.mt.us](http://www.deq.state.mt.us)

## **AGENDA**

### **TELECONFERENCE MEETING**

**THURSDAY, NOVEMBER 3, 2011**

**12:00 P.M.**

**METCALF BUILDING, ROOM 136/137**

**1520 EAST SIXTH AVENUE, HELENA, MONTANA**

***NOTE:** It is expected that most or all available Board members will be participating via teleconference. The Board attorney and secretary will be present at the location stated above. Interested persons, members of the public, and the media are welcome to attend at the location stated above. Members of the public and press also may join Board members with prior arrangement. Contact information for the Board members is available from the Board Secretary at (406) 444-2544 or at <http://www.deq.mt.gov/ber/index.asp>. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone or by e-mail at [jwittenberg@mt.gov](mailto:jwittenberg@mt.gov) no later than 24 hours prior to the meeting to advise her of the nature of the accommodation you need.*

#### **I. Action Item**

**In the matter of the request for hearing regarding the revocation of certificate of approval ES#34-93-C1-4 for the Fort Yellowstone Subdivision, Park County, BER 2009-20/22 SUB.** On June 22, 2011, a hearing took place for the Motion for Summary Judgment, Cross Motion for Summary Judgment, and Motion to Strike. On September 9, 2011, the hearing examiner issued a *Recommended Order on Summary Judgment*. The parties may propose that the Board make minor modifications to that order. The Board will take action on the recommended order and proposed modifications.

#### **II. General Public Comment**

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda of the meeting. Individual contested case proceedings are not public matters on which the public may comment.

#### **III. Adjournment**

1                                   **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**  
2                                   **OF THE STATE OF MONTANA**

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3 **IN THE MATTER OF:**  
4 **THE REQUEST FOR HEARING**  
5 **REGARDING THE REVOCATION OF**  
6 **CERTIFICATE OF APPROVAL ES#34-**  
7 **93-C1-4 FOR THE FORT**  
8 **YELLOWSTONE SUBDIVISION, PARK**  
9 **COUNTY**

**CASE NO. BER 2009-20 SUB**  
**BER 2009-22 SUB**

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10                                   **ORDER OF THE BOARD ADOPTING RECOMMENDED ORDER ON**  
11 **MOTION FOR SUMMARY JUDGMENT WITH MINOR CHANGE TO**  
12 **THE PROPOSED ORDER**

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13                                   **BACKGROUND**

14                                   On October 14, 2009, Counsel for Mr. and Ms. Berg, Appellants and  
15 developers of the Fort Yellowstone Subdivision, requested a contested case hearing  
16 before the Board of Environmental Review (“Board”) regarding the Notice of  
17 Revocation, Fort Yellowstone Subdivision, Park County, Sanitation in Subdivisions  
18 Act Complaint (CVID#11671) (“revocation”) issued by the Department of  
19 Environmental Quality (Department) on October 2, 2009. On November 2, 2009,  
20 the Appellants and affected property owners, Mr. John J. McInerney, Bob G. Haney  
21 and Marwin E. Hofer filed an appeal of the Department’s revocation. On December  
22 21, 2005, the Department of Environmental Quality (“Department”) filed a Motion  
23 for Partial Summary Judgment regarding Flying J’s basis for requested action as set  
24 forth in its Petition for Review. These appeals of the revocation were consolidated  
25 on January 25, 2010.

26                                   On April 15, 2011, the Department filed a Motion for Summary Judgment  
27 alleging that the facts are undisputed that a violation of Mont. Code Ann. § 76-4-130  
occurred. This section provides that a person may not construct or use a facility that  
deviates from a COSA (Certificate of Subdivision Approval) without Department  
approval of the deviation. The Department established that there was a deviation

1 from the terms of the COSA because the water main constructed to connect with  
2 units at the bottom of the slope (on the subdivision) was disconnected -as to Fort  
3 Yellowstone Subdivision's subdivision approval- without Department approval of  
4 the deviation through an amended COSA.

5 On September 12, 2011, the Hearing Examiner issued an Order on Motion  
6 for Summary Judgment ("Order") with a recommendation to grant the Department's  
7 Motion for Summary Judgment on the basis that the undisputed facts are that an  
8 unapproved deviation from the COSA occurred . The Hearing Examiner's Order is  
9 a ruling on a Motion for Summary Judgment filed by the Department. Pursuant to  
10 Mont. Code Ann. § 2-4-621, when in a contested case, a majority of the deciding  
11 entity, in this case the Board who renders a final decision has not heard the case, the  
12 decision, if adverse to a party to a proceeding, may not be made until a proposal for  
13 decision is served upon the parties and an opportunity is afforded to each party  
14 adversely affected to file exceptions, present brief and oral argument to the Board.

15 The Hearing Examiner's Order On Motion for Summary Judgment is a final  
16 decision for the purposes of Mont. Code Ann. § 2-4-621(1). This Order identifies the  
17 procedure for filing exceptions.

18 On September 19, 2011, Intervenor, Gardiner-Park County Water District  
19 ("District") filed "Exceptions to the September 12, 2011 Order." Proposed Order on  
20 Motion for Summary Judgment." On the basis that the language implied that the  
21 disconnection of the water main was done by the District without Department  
22 approval, the Intervenor took exception to the underlined language (below) in the  
23 proposed Order on Motion for Summary Judgment on page 2, lines 8 through 12  
24 that reads:

25 Based on the record and an admission at the hearing on oral argument from  
26 the Berg's that there was a deviation from the terms of the COSA (Certificate  
27 of Subdivision Approval) because the water main constructed to connect with  
units at the bottom of the slope was disconnected without Department

1 approval it is recommended that summary judgment be granted and the  
2 COSA be revoked.

3 The Bergs responded that they agree with the exception to the language on  
4 September 20, 2011. The Department responded that the exception to the language is  
5 well taken and suggested the alternative underlined language to remove any  
6 ambiguity:  
7

8  
9 Based on the record and an admission at the hearing on oral argument from  
10 the Bergs that there was a deviation from the terms of the COSA (Certificate  
11 of Subdivision Approval) because the water main constructed to connect  
12 with units at the bottom of the slope was disconnected without Department  
13 approval through an amended COSA, it is recommended that the summary  
14 judgment be granted and the COSA be revoked.

15 No exceptions were filed by Appellants, Hofer, McInerny and Haney.  
16 For further clarification as suggested by the District , the following language makes  
17 it clear that the District did not effect any disconnection and reconnection without  
18 Department approval.

19 Based on the record and an admission at the hearing on oral argument from  
20 the Bergs that there was a deviation from the terms of the COSA (Certificate  
21 of Subdivision Approval) because the water main constructed to connect with  
22 units at the bottom of the slope was disconnected without Department  
23 approval as to Fort Yellowstone Subdivision's Certificate of Subdivision  
24 Approval through an amended COSA, it is recommended that the summary  
25 judgment be granted and the COSA be revoked.

### 26 ORDER

27 There being good reason, the Board adopts the Hearing Examiner's proposed  
Order on Motion for Summary Judgment with the added language of "as to Fort  
Yellowstone Subdivision's Certificate of Subdivision Approval through an amended  
COSA" as referenced above. The Board hereby adopts the Department's Motion

1 for Summary Judgment with addition of the above underlined language, "...as to  
2 Fort Yellowstone Subdivision's Certificate of Subdivision Approval through an  
3 amended COSA..." and awards the relief requested by the Department, namely  
4 revocation of the COSA E.S. 34-93-C1-4 for the Fort Yellowstone Subdivision with  
5 the exception of site #12 to be effective upon signature of this Order.

6 DATED this \_\_\_\_ day of September .  
7  
8

9 \_\_\_\_\_  
10 JOSEPH W. RUSSELL  
11 Chairman  
12 Board of Environmental Review

13 c: Ms. Katherine Orr  
14 Mr. James E. Madden  
15 Mr. Karl Knuchel  
16 Mr. Thomas D. Shea, Jr.  
17 Ms. Brenda R. Gilbert  
18 Ms. Signe Lahren  
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1 Thomas D. Shea, Jr.  
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5 Phone: (406) 587-3950  
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7 toddshea@shealawoffice.net  
8 Attorney for Gardiner-Park County Water District

9 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
10 OF THE STATE OF MONTANA

11	IN THE MATTER OF:	)	CASE NO. BER 2009-20 SUB
12	THE REQUEST FOR HEARING	)	CASE NO. BER 2009-22 SUB
13	REGARDING THE REVOCATION OF	)	
14	CERTIFICATE OF APPROVAL ES#34-	)	<b>RESTATEMENT OF EXCEPTIONS TO</b>
15	93-C1-4 FOR THE FORT	)	<b>THE DEQ'S SEPTEMBER 12, 2011</b>
16	YELLOWSTONE SUBDIVISION, PARK	)	<b>PROPOSED ORDER ON SUMMARY</b>
17	COUNTY	)	<b>JUDGMENT</b>

18 Gardiner-Park County Water District ("Gardiner-Park") respectfully submits this  
19 additional filing in advance of the hearing before the Board of Environmental Review on  
20 November 3, 2011.

21 As to the procedural history of this matter, on September 12, 2011 the DEQ  
22 issued a proposed Order on Motion for Summary Judgment. On September 19, 2011.  
23 Gardiner-Park filed an Exceptions to the September 12, 2011 Order. On September  
24 21, 2011, the Bergs filed a Response to the Exceptions filed by Gardiner-Park noting  
25 that they had no objections to the Gardiner-Park's exceptions. On September 22, 2011  
the DEQ then submitted a Response to Gardiner-Park's exceptions and Gardiner-Park  
submitted a reply on September 22, 2011.

1 On September 23, 2011, a hearing before the Board was held as to the  
2 exceptions. After the hearing, the parties were encouraged to confer and submit agreed  
3 upon language to the DEQ but the parties have not done so.

4 Gardiner-Park reiterates its exceptions filed on September 19<sup>th</sup> and September  
5 22<sup>nd</sup>. In addition, Gardiner-Park respectfully points out that the DEQ's proposed  
6 language that the disconnection was "without Department approval through an  
7 amended COSA" sidesteps the issue surrounding the exceptions. That is, Gardiner-  
8 Park disconnected the old water main with the DEQ's approval. The clear support for  
9 this was attached to Gardiner-Park's September 22<sup>nd</sup> submission. No party has  
10 submitted any arguments or documentation rebutting the point that Gardiner-Park  
11 disconnected the old main with the DEQ's approval.  
12

13 In view of all of the above, Gardiner-Park respectfully reiterates its September  
14 22<sup>nd</sup> request that the statement that Gardiner-Park disconnected the water main without  
15 Department approval be deleted from the Order. In addition, Gardiner-Park respectfully  
16 requests that the Order be amended to reflect and incorporate the fact that the DEQ  
17 approved the disconnection and relocation of the water main by Gardiner-Park.  
18

19 Respectfully submitted this 31<sup>st</sup> day of October, 2011.  
20

21  
22 /s/ Todd Shea  
23 Todd Shea  
24 Attorney for Intervenor Gardiner-Park Water District  
25



1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, hereby certify that on the 31st day of October, 2011, a true  
3 and correct copy of the foregoing document was served upon the following individuals  
4 by E-mail and U.S. Mail to the following parties:

5 Katherine J. Orr  
6 Hearing Examiner  
7 Agency Legal Services Bureau  
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9 P.O. Box 201440  
10 Helena, MT 59620-1440

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Law Offices of Karl Knuchel  
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Livingston, MT 59047

11 Brenda R. Gilbert  
12 Signe Lahren  
13 Kendra Anderson  
14 Swandal, Douglass & Gilbert, P.C.  
15 119 South Third Street  
16 Livingston, MT 59047

Jim Madden  
Department of Environmental Quality  
PO Box 200901  
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Joyce Wittenberg  
Secretary, Bd. Of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
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17 /s/ Todd Shea  
18 \_\_\_\_\_  
19 Todd Shea

1 KARL KNUCHEL  
116 West Callender  
2 P.O. Box 953  
3 Livingston, MT 59047  
(406) 222-0135  
4 ATTORNEY FOR MAX BERG AND SUE BERG

5  
6 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
7 OF THE STATE OF MONTANA

8  
9 IN THE MATTER OF: ) CASE NO. BER 2009-20 SUB  
10 THE REQUEST FOR HEARING ) CASE NO. BER 2009-22 SUB  
11 REGARDING THE REVOCATION OF )  
12 CERTIFICATE OF APPROVAL ES#34- ) **NOTICE OF BERGS' OBJECTIONS**  
13 93-C1-4 FOR THE FORT ) **THE PROPOSED RESTATEMENT**  
14 YELLOWSTONE SUBDIVISION, PARK ) **PROPOSED BY GARDINER-PARK**  
15 COUNTY ) **COUNTY WATER DISTRICT**  
16 )

17 COME NOW the Bergs, by and through their attorney of record, Karl Knuchel, and  
18 hereby notify DEQ that they object to the proposed modification of the Hearing Officer's order on  
19 summary judgment as proposed by the Gardiner-Park County Water District's counsel.

20 First of all, his exceptions misstate the record in its entirety. The record was clear  
21 that while Gardiner-Park County Water District had permission to install a new water main in  
22 accord with DEQ rules, the Gardiner-Park County Water District did not have permission as part of  
23 its application to disconnect the water main that provided water service to the entire project.

24 To now try and restate the record that Gardiner-Park County Water District had  
25 permission to disconnect the original water main is disingenuous if not outright misleading.

26 The record is complete and the application filed by the Gardiner-Park County Water  
27 District and the approvals granted by DEQ simply do not allow for the disconnection of the  
28 original water main by the Gardiner-Park County Water District.

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DATED this \_\_\_\_ day of November, 2011.

By \_\_\_\_\_  
KARL KNUCHEL

**CERTIFICATE OF SERVICE**

I hereby certify that I served a full, true and accurate copy of the foregoing document on the \_\_\_\_ day of November, 2011, to the following named person:

\_\_\_\_\_ by personal service

  X   by depositing a copy of same in the mail box maintained at the Clerk of Court's office in the Park County Courthouse in Livingston, Montana for the following attorney

**Brenda Gilbert & Signe Lahren**

  X   by e-mail

[korr@mt.gov](mailto:korr@mt.gov)  
[sdgattorney@qwestoffice.net](mailto:sdgattorney@qwestoffice.net) and [signe@montana.com](mailto:signe@montana.com)  
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  X   by depositing a copy of same in the United States Mail, postage prepaid, and addressed as follows:

KATHERINE J. ORR  
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THOMAS D. SHEA  
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JOYCE WITTENBERG  
SECRETARY – BD. OF ENVIRONMENTAL REVIEW  
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**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

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**IN THE MATTER OF:  
THE REQUEST FOR HEARING  
REGARDING THE REVOCATION OF  
CERTIFICATE OF APPROVAL ES#34-  
93-C1-4 FOR THE FORT  
YELLOWSTONE SUBDIVISION, PARK  
COUNTY**

**CASE NO. BER 2009-20 SUB  
BER 2009-22 SUB**

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**ORDER ON MOTION FOR SUMMARY JUDGMENT**

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The Department of Environmental Quality (“Department”) filed “DEQ Motion for Summary Judgment” on April 15, 2011. On April 15, 2011, Intervenor Gardiner-Park County Water and Sewer District (“Gardiner-Park”) filed a “Motion to Strike Appellants’ Defense and Enter Judgment in Favor of the DEQ on its Revocation Action.” On April 28, 2011, Appellants filed “Appellants, John J. McInerney, Bob G. Haney and Marwin E. Hofer’s Response to DEQ’s Motion for Summary Judgment.” On April 29, 2011, Appellants, Max and Sue Berg, filed “Berg’s Combined Response to DEQ’s Motion for Summary Judgment and Gardiner-Park County Water District’s Motion to Strike Appellant’s Defense and Enter Judgment in Favor of DEQ.” This filing contains a cross motion for summary judgment. The Department filed its “DEQ Reply Brief in Support of DEQ’s Motion for Summary Judgment and Response Brief to Appellant Berg’s Cross Motion for Summary Judgment” on May 13, 2011, together with a Request for Oral Argument. The Intervenor, Gardiner-Park, filed a “Reply Brief in Support of Gardiner-Park’s Motion to Enter Judgment in Favor of the DEQ on its Revocation Action” on May 13, 2011. On May 25, 2011, Intervenor, Gardiner-Park filed a Motion to Strike regarding Appellants’ (Berg’s) response brief. Oral argument was held on June 22, 2011.

1 **INTRODUCTION**

2 The Department argues in its brief and oral argument concerning its Motion  
3 for Summary Judgment that the facts are undisputed that a violation of Mont. Code  
4 Ann. § 76-4-130 occurred and the Board of Environmental Review (Board) should  
5 rule as matter of law the Sanitation Act Certificate of Subdivision Approval for the  
6 Fort Yellowstone subdivision (COSA) issued to the Bergs should be revoked  
7 pursuant to Mont. Code Ann. § 76-4-108(5) with the exception of subdivision site  
8 #12. Based on the record and an admission at the hearing on oral argument from the  
9 Berg’s that there was a deviation from the terms of the COSA because the water  
10 main constructed to connect with units at the bottom of the slope was disconnected  
11 without Department approval, it is recommended that summary judgment be granted  
12 and the COSA be revoked.

13 **UNDISPUTED FACTS**

14 The undisputed facts in this case are that Fort Yellowstone subdivision is a  
15 four-lot subdivision in Park County. The subdivision is located on Highway 89  
16 overlooking the Yellowstone River, a mile north of Gardiner, Montana. An  
17 application for a proposed subdivision consisting of 24 condominium units on lot 1,  
18 a 10-acre parcel and commercial units on each of the remaining 3 lots was submitted  
19 to the Department in 1992. Water and sewer were to be supplied by the Gardiner-  
20 Park County public water and sewer districts (District). The sewer main was in  
21 existence at the time of the application and a water main extension needed to be  
22 constructed by the developer to serve the subdivision. The Department issued a  
23 COSA on October 4, 1993. The Department approved plans show that the water  
24 main would be located on a steep slope between the highway and the river, a road  
25 would be built between the water main and the river to provide access to the  
26 condominium units along the river and, to stabilize the slope above the road cut, the  
27 approved plans show construction of a retaining wall between the road and the

1 water main. The water main and the road were installed in the time frame of 1994-  
2 1996. The water main was activated by the District. No service connections were  
3 made to the main that was installed. The retaining wall has never been installed.  
4 Because of the threat of erosion which could expose the water main and cause it to  
5 fail which in turn could cause the sewer main serving the towns of Gardiner and  
6 Mammoth to fail, the District, in 2007 disconnected the Fort Yellowstone water  
7 main and replaced it with a new main at the top of the slope next to Highway 89.

8 On October 2, 2009, the Department issued a letter of intent to revoke the  
9 Fort Yellowstone COSA. The letter stating that the water system for the subdivision  
10 had not been constructed in accordance with the plans approved by the Department,  
11 was sent to the Bergs and to McNerny and Haney who are public record owners of  
12 building sites in the subdivision. The grounds of the proposed revocation are that  
13 the Bergs violated Mont. Code Ann. § 76-4-130 which states that a person may not  
14 construct or use a facility that deviates from a COSA without Department approval  
15 of the deviation. The deviations from the COSA are that the retaining wall for the  
16 Fort Yellowstone water main has not been installed and the originally approved  
17 water main for Fort Yellowstone has been disconnected and is no longer available  
18 for service.

19 **COLLATERAL PROCEDURAL MATTERS**

20 On April 15, 2011, the Intervenor filed a “Motion to Strike Appellants’  
21 Defense and Enter Judgment in Favor of the DEQ on its Revocation Action.” The  
22 Intervenor argues that the revocation should be upheld and the defense of the Berg’s  
23 asserted in a discovery response (that a Park County Planner had agreed with the  
24 Bergs that the retaining wall did not need to be built until the lots were sold that  
25 were affected by the area where the wall would be constructed) should be stricken  
26 since it did not represent the view of the “reviewing authority” under Mont. Code  
27 Ann. § 76-4-130.

1 The Appellants, Mr. McInerney, Mr. Haney and Mr. Hofer in their response  
2 to the Department's Motion for Summary Judgment dated April 28, 2011, argue that  
3 there are genuine issues of fact and they are entitled to relief in the form of an order  
4 resolving the revocation and addressing requirements to restore Appellants'  
5 (McInerney, Haney and Hofer) rights and use of their property such that they could  
6 be provided with marketable title as represented when they purchased their property.

7 On May 25, 2011, the Intervenor filed a Motion to Strike the Appellants'  
8 (Bergs) cross motion for summary judgment on the basis that it was untimely.

9 As to these matters, the recommended ruling of granting the Department's  
10 Motion for Summary Judgment and awarding the relief of revoking the COSA  
11 issued to the Fort Yellowstone Subdivision addresses these responses.

12 At the hearing, Counsel for the Bergs stated that their cross motion for  
13 summary judgment would be based on a finding that the retaining wall referenced in  
14 the plans was related to road as opposed to stabilization for the water and sewer. As  
15 stated below, the Hearing Examiner does not make this finding or a finding that the  
16 failure to construct the retaining wall is a basis to award summary judgment.  
17 Therefore, the Bergs' cross-motion for summary judgment is denied.

18 **STANDARD OF REVIEW**

19 Summary judgment should be granted where there are no genuine issues of  
20 material fact and the moving party is entitled to judgment as a matter of law. Mont.  
21 R. Civ. P. 56 (c). Summary judgment motions may be entertained in the  
22 administrative context. See In the Matter of Peila, 249 Mont. 242; 815 P.2d 139  
23 (1991). The rationale for a summary judgment disposition is that the parties are  
24 afforded the opportunity to present evidence and arguments at the summary  
25 judgment stage through briefing and presentation of sworn evidence and if there are  
26 no material factual issues then as matter of economy there is no need for an  
27



1 evidentiary hearing and the case may be resolved as a matter of law. Klock v. Town  
2 of Cascade, 284 Mont. 167; 943 P.2d 1262. (1997)

### 3 **DISCUSSION**

4 This case is ripe for summary judgment disposition because there is no  
5 disputed issue of fact as to the unauthorized deviation from the approved COSA  
6 wherein the originally Department approved water main was disconnected and is no  
7 longer in service. The Appellants in their brief agreed to the undisputed facts as to  
8 the non-existence of the retaining wall and as to disconnection of the water main at  
9 the bottom of the slope. Appellants stated at the hearing that they did not dispute  
10 that the disconnection of the water main below occurred, that the construction of a  
11 new water main at the top of the subdivision on Highway 89 constituted a deviation  
12 from the approved plans and that this deviation would be a basis for revocation of  
13 the subdivision approval. On this basis alone, the revocation of the COSA (with the  
14 exception of site #12 which has separately approved plans) should be upheld.

15 Montana Code Annotated § 76-4-130 prohibits a person from constructing or  
16 using a water or sewer facility that deviates from the certificate of subdivision  
17 approval until the reviewing authority (the Department) has approved the deviation.  
18 Here, it is undisputed that the Department approved main was disconnected and a  
19 new main, not approved for the Fort Yellowstone subdivision was installed in a  
20 different location. The plans approved by the 1993 COSA do not show the  
21 subdivision water main in its current location at the top of the slope along Highway  
22 89. Montana Code Annotated § 76-4-108(5) authorizes the Department to revoke  
23 the COSA if a violation has occurred. When as here there is an appeal to the Board,  
24 the Board may determine if there are grounds to uphold the revocation. There is no  
25 dispute that there are grounds to uphold the revocation.

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**RECOMMENDED ORDER**

The Hearing Examiner recommends that the Board enter an Order granting the Department’s Motion for Summary Judgment and awarding the relief requested by the Department, namely revocation of the COSA E.S. #34-93-C1-4 for the Fort Yellowstone subdivision with the exception of site #12.

**PROCEDURE FOR FILING EXCEPTIONS**

Because the Board will be issuing a final decision on this recommended disposition the parties pursuant to Mont. Code Ann. § 2-4-621 may file written exceptions and present brief and oral argument to the Board on their exceptions prior to the time the Board members make their final decision. The parties are given until September 16, 2011. Any party seeking to file exceptions and present oral argument before the Board on September 23, 2011, must by September 13, 2011, file a notice with the Hearing Examiner and the Board Secretary that they will be filing exceptions.

DATED this \_\_\_\_\_ day of September, 2011.

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KATHERINE J. ORR  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Order on Motion for Summary Judgment to be mailed to:

Ms. Joyce Wittenberg  
Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
**(original)**

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