

**STATE OF MONTANA**  
**DEPARTMENT OF JUSTICE**  
**AGENCY LEGAL SERVICES BUREAU**



**Tim Fox**  
Attorney General

1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

**TO:** The Montana Board of Environmental Review

**FROM:** Sarah Clerget, Board Attorney

**RE:** In the matter of Violations of the Water Quality Act by Reflections at Copper Ridge, LLC at Reflections at Copper Ridge subdivision, Billings, Yellowstone County, Montana (MTR105376)[FID 2288, Docket No. WQ-15-07] and in the matter of violations of the Water Quality Act by Copper Ridge, Development Corporation at Copper Ridge subdivision, Billings, Yellowstone County, Montana. (MTR105377)[FID 2289, Docket No. WQ-15-08]

**DATE:** August 7, 2019

The purpose of this memo is to assist BER when reviewing a hearing examiner's proposed decision in a contested case proceeding.

The record before the Board consists of a written record and an opportunity for the parties to make oral arguments to the Board. Pursuant to the contested cases provisions of the Montana Administrative Procedures Act (MAPA), Mont. Code Ann. § 2-4-601 *et. seq.*, as the hearing examiner in this case, I issued the *Proposed Findings of Fact, Conclusions of Law to the BER on the Issue of Owner/Operator* (Remand Proposed Order) on July 8, 2019. DEQ filed exceptions to the Remand Proposed FOFCOL and Copper Ridge has filed a response.

In addition to the written materials, the parties can make oral arguments to the Board at the August 9<sup>th</sup> meeting.

Based on the written record and the oral arguments before the Board, it must decide, by seconded motion, what to do with my Remand Proposed Order. MAPA provides BER with the following options:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

Mont. Code Ann. § 2-4-621(3).

In other words, BER has three options regarding what action to take upon review of a hearing examiner's proposed order:

- (1) Accept the Remand Proposed FOFCOL in its entirety and adopt it as the Board's final order;
- (2) Accept the findings of fact in the Remand Proposed FOFCOL, but modify the conclusions of law or interpretations of administrative rules in either; or
- (3) Reject the Remand Proposed FOFCOL, review the entire record that was before the hearing examiner, find that the Remand Proposed FOFCOL is not supported by substantial evidence, and modify the findings of fact and conclusions of law in the proposed order accordingly.

When choosing among these three options, the Board should keep certain legal standards in mind. Regarding options (2) and (3), the agency may "correct a hearing examiner's incorrect conclusions of law" in a final order, without having to review the entire factual record. *Mont. Dept. Transp. v. Mont. Dept. Labor and Indus.*, 2016 MT 282, ¶ 23 (herein, *MDOT*); Mont. Code Ann. § 2-4-621(3). However, the agency is more constrained with regard to modifying findings of fact. The agency cannot discard a hearing examiner's factual findings. *Mayer v. Bd. of Psychologists*, 2014 MT 85, ¶¶ 7, 27-29. "Under MAPA, an agency may reject a hearing officer's findings of fact only if, upon review of the complete record, the agency first determines that the findings were not based upon competent substantial evidence." *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 25 ((internal quotations marks omitted; citing *Moran v. Shotgun Willies*, 270 Mont. 47, 51, 889 P.2d 1185, 1187 (1995), Mont. Code Ann. § 2-4-621(3)). "In reviewing findings of fact, the question is not whether there is evidence to support *different* findings, but whether competent substantial evidence supports the findings actually made." *Mayer*,

¶ 27 (citing *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 21 (emphasis supplied in *Knowles*)).

“An agency abuses its discretion if it modifies the findings of a hearing officer without first determining that the findings were not supported by substantial evidence.” *Stricker*, ¶ 25. “[A]n agency’s rejection or modification of a hearing officer’s findings cannot survive judicial review unless the court determines as a matter of law that the hearing examiner’s findings are not supported by substantial evidence.”<sup>1</sup> *Id.* (internal citations omitted). With regard to whether substantial credible evidence supports the factual findings, *Stricker* explained:

Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more [than] a mere scintilla of evidence but may be less than a preponderance. The evidence is viewed in the light most favorable to the prevailing party when determining whether findings are supported by substantial credible evidence.

*Stricker*, ¶ 26 (internal citations and quotations omitted); *see also Mayer*, ¶ 27 (quoting Black’s Law Dictionary 635, 636, 639, 640 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009)).

Members of the Board may therefore look at any portions of the underlying record in order to decide whether or not findings of facts are supported by “competent substantial evidence,” but once the Board determines that factual findings are not so supported, the Board must review the entire record before modifying any fact found by the Hearing Examiner.

Once a decision is made, BER may utilize the Board Secretary or Board Attorney to assist in drafting the final order memorializing the Board’s substantive decision, for the signature of the Board Chair. If the decision is dispositive (ending the case), then the aggrieved party may appeal to state District Court for review. If the Board’s decision is not dispositive, the Board can decide to retain jurisdiction of this matter or assign it to a hearings examiner for further proceedings.

---

<sup>1</sup> This standard should not be confused with the legal determination of whether the facts, as found, meet a party’s burden of proof by a preponderance of the evidence. *See Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2005 MT 96, P17-26.