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Attorney for DEQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:)	
VIOLETIONS OF THE)	Case Nos. BER 2015-01 WQ
MONTANA WATER QUALITY)	and
ACT BY REFLECTIONS AT)	
COPPER RIDGE, LLC AT)	
REFLECTIONS AT COPPER)	
RIDGE SUBDIVISION,)	
BILLINGS, YELLOWSTONE)	
COUNTY, MONTANA; AND)	
)	
BY COPPER RIDGE)	BER 2015-02 WQ
DEVELOPMENT)	
CORPORATION AT COPPER)	
RIDGE SUBDIVISION,)	
BILLINGS, YELLOWSTONE)	
COUNTY, MONTANA)	
(MTR105376 AND MTR105377))	
(FID 2288 AND 2289) [DOCKET)	
NO. WQ-15-07 AND WQ-15-08].)	
)	

**DEQ'S RESPONSE TO COPPER RIDGE DEVELOPMENT
CORPORATION AND REFLECTIONS AT COPPER RIDGE, LLC's
MOTION TO STRIKE**

The Montana Department of Environmental Quality (“DEQ”), by and through undersigned counsel, hereby responds to the Motion to Strike filed herein by Reflections at Copper Ridge, LLC (“REF”) and Copper Ridge Development Corporation (“CR”). CR and REF move to strike what they deem to be “untimely exceptions” contained in DEQ’s Response to Exceptions to Hearing Examiner’s Order on Summary Judgment and Proposed Findings of Fact and Conclusions of Law Submitted by Copper Ridge Development Corporation and Reflections and Copper Ridge, LLC in case numbers BER 2015-01 WQ and BER 2015-02 WQ (“DEQ’s Response to CR and REF Exceptions”). More particularly, CR and REF move to strike the last paragraph of Section IV.A, page 27-28; all of Section IV.G, page 34; and all of Section IV.H, page 35 of DEQ’s Response to CR and REF Exceptions based on CR and REF’s contention that these sections contain late-filed exceptions to the Hearing Examiner’s Proposed Findings of Fact and Conclusions of Law submitted to the Board of Environmental Review (Proposed FOFCOL). However, DEQ has not filed exceptions, or raised arguments contrary to the Proposed FOFCOL in DEQ’s Response to CR and REF’s Exceptions and CR and REF’s Motion to Strike should be denied.

First, CR and REF assert the Proposed FOFCOL “establish that Violations 2 and 3 were each only a “minor deviation from the applicable

requirements,” and therefore of minor extent” and, contrary to this finding and conclusion by the Hearing Examiner, DEQ asserts Violations 2 and 3 are of major extent and gravity. CR and REF Motion to Strike at 3 (citing Proposed FOFCOL, p. 41 at ¶ 16; p. 43 at ¶ 24; and DEQ Response at 34, Section IV.G). CR and REF fail to recognize the Hearing Examiner’s conclusions that Violations 2 and 3 involved “minor deviation from the applicable requirements” pursuant to ARM 17.4.303(4)(c) was for purposes of determining an appropriate penalty. See Proposed FOFCOL at page 39. Proposed Conclusions of Law 7 through 36 pertain to the penalty calculations for Violations 2, 3, and 4 and not to the sufficiency of notice provided to CR and REF under §§ 75-5-611 and 75-5-617, MCA and under ARM Title 17, chapter 30, subchapter 20 (repealed March 19, 2016). CR and REF received violation letters that satisfied the notice requirements of § 75-5-617(2), MCA and § 75-5-611(1), MCA. Section 75-5-611(1), MCA provides an exception to the requirement that DEQ provide written notice to an alleged violator before seeking administrative penalties when DEQ seeks administrative penalties only for activities it believes and alleges are violations of § 75-5-605, MCA. ARM 17.30.2003 placed additional notice requirements on DEQ by requiring prior written notice of a violation unless DEQ was not seeking a penalty or was seeking a penalty only for activities it believed and alleged

were violations of § 75-5-605, MCA and a Class I violation as defined at ARM 17.30.2001(1) or a violation of major extent and gravity under ARM 17.4.303. Proposed Conclusions of Law No. 5 states the Hearing Examiner's determination that "DEQ provided legally sufficient notice of violations under the Montana Water Quality Act, Mont. Code Ann. §§ 75-5-611(2)(a)(ii), and 75-5-617, and under ARM 17.30.2003 (repealed 2016)." The Hearing Examiner's adjustments to the penalty calculation do not disturb this conclusion and DEQ does not take exception to the adjusted penalty.

Second, CR and REF misinterpret the Hearing Examiner's Proposed Finding of Fact No. 31, finding that CR and REF did not propose corrective action plans to address violations of the Montana Water Quality Act; and Proposed Conclusion of Law No. 28, holding that pursuant to the reasoning contained in the Orders on Summary Judgment DEQ established that CR and REF violated provisions of the General Permit in violation of § 75-5-605(1)(b), MCA, as findings and conclusions supporting their position that no compliance plan or schedule was violated. CR and REF's Motion to Strike, page 3. CR and REF then argue that DEQ makes a late-filed exception to the Proposed FOFCOL by arguing that the Hearing Examiner's determination that Violation 4 is a Class I violation is undisturbed. CR and REF's Motion to Strike, page 4; DEQ's Response to CR and REF's Exceptions, page 27. CR and REF's

argument fails because it conflates the Hearing Examiner's finding that a corrective action plan was never proposed by CR and REF, and approved by DEQ, to bring activities into compliance with requirements cited in DEQ's notice of violation letter with the Hearing Examiner's finding that Violation 4 is a Class I violation because it alleged violation of the permit compliance plans or schedules. Proposed FOFCOL, page 10, ¶ 31; page 44, ¶ 28. The Hearing Examiner's Proposed FOFCOL do not disturb the previous Hearing Examiner's Orders on Summary Judgment and DEQ does not take exception to the findings of fact and conclusions of law contained therein. See Proposed FOFCOL, page 12 (incorporating by reference the Orders on Summary Judgment).

Finally, for purposes of the penalty calculation, the Hearing Examiner determined that Violation 4 was of minor extent. Proposed FOFCOL, page 45, ¶ 31. CR and REF assert that DEQ filed a late exception by arguing, contrary to the findings and conclusions of the Hearing Examiner, that Violation 4 is of major extent. CR and REF Motion to Strike at 4 (citing Proposed FOFCOL, p. 45 at ¶ 31; and DEQ Response at 35, Section IV.H). As with Violations 2 and 3 above, CR and REF fail to recognize the Hearing Examiner's conclusions that Violations 4 involved "minor deviation from the applicable requirements" pursuant to ARM 17.4.303(4)(c) was for purposes

of determining an appropriate penalty. See Proposed FOFCOL at page 45. Proposed Conclusions of Law 7 through 36 pertain to the penalty calculations for Violations 2, 3, and 4 and not to the sufficiency of notice provided to CR and REF under §§ 75-5-611 and 75-5-617, MCA and under ARM Title 17, chapter 30, subchapter 20 (repealed March 19, 2016) or other aspects of this case. The Hearing Examiner's adjustments to the penalty calculation do not disturb this conclusion and DEQ does not take exception to the adjusted penalty for Violation 4.

DEQ has not raised late exceptions or arguments contrary to the Hearing Examiner's Proposed FOFCOL and request that the Board deny CR and REF's Motion to Strike in its entirety.

Respectfully submitted this 4th day of December, 2018.

A handwritten signature in blue ink that reads "Kirsten Bowers". The signature is written in a cursive style and is positioned above a horizontal line.

KIRSTEN BOWERS

Department of Environmental Quality
Attorney for the Department

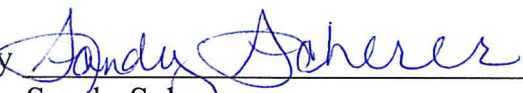
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2018, I caused to be served a true and correct copy of the foregoing document and any attachments for BER 2015-01 WQ and BER 2015-02 WQ to all parties or their counsel of record as set forth below:

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And by email to:
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By 

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