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DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, FEBRUARY 8, 2019
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

NOTE: Interested persons, members of the public, and the media are welcome to attend at the location stated above. 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 Lindsay.Ford@mt.gov no later than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the December 7, 2018 meeting minutes.

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner

a. **In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC**. This matter has been stayed at the request of the parties since July 23, 2018. In December 2018, Ms. Clerget held a scheduling conference to place this matter back on a litigation schedule. Ms. Clerget issued an Amended Scheduling Order on January 8, 2019 and the parties are proceeding accordingly.

b. **In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB**. This matter has been stayed since July 24, 2018. The parties have stated in their Status Reports that they have come to an agreement in principle and are working toward finalizing the terms of their agreement. A status conference is set for February 11, 2019.

c. **In the matter of violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), BER 2017-02 OC.** On December 20, 2018, the parties filed a Stipulation of Dismissal requesting that this matter be dismissed pursuant to Rule 41(a)(1)(A)(ii) of the Montana Rules of Civil Procedure. This matter was dismissed with prejudice.

d. **In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM**. This matter has been proceeding

pursuant to a scheduling order issued May 31, 2018. The parties participated in a scheduling conference on January 22, 2019, at which they indicated the matter is in the final stages of settlement. The parties will submit either a notice of stipulation or status report by February 7, 2019.

2. Non-enforcement cases assigned to the Hearings Examiner

   a. **In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** This matter has been stayed since March 28, 2018, pending the Montana Supreme Court decision in *MEIC and Sierra Club v. DEQ and Western Energy*. The parties will file a status report within 30 days of the Supreme Court's decision, which has not yet occurred.

   b. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.** On December 14, 2018 MEIC filed a Motion requesting an extension of time in which to file a motion for summary judgment. Hearing examiner Clerget issued an Order granting that motion the same day. The parties were given until February 1, 2019 in which to file a motion for summary judgment.

   c. **In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.** Ms. Clerget conducted a four-day hearing in this matter that concluded on March 22, 2018. After several extensions, the parties submitted their post-hearing filings on September 27, 2018. On October 23, 2018, Western Energy filed a notice of bankruptcy. On November 16, 2018, the parties held a status conference and agreed that the bankruptcy filing does not stay this proceeding. Ms. Clerget is reviewing the filings and will issue a Proposed Order. This matter will be before the Board at its April 2019 meeting.

   d. **In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER2017-03 WQ.** A two-day hearing on this matter was held on December 3-4, 2018. Ms. Clerget issued a Scheduling Order setting the deadlines for post-hearing submissions on January 9, 2019. The parties are currently working on their proposed FOFCOLs and responses, and oral argument on those proposed FOFCOLs is set for March 22, 2019.

   e. **In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.** This matter has been stayed since March 14, 2018. This appeal began with six distinct issues and only one remains. The remaining issue is tied to a rule regarding permit modifications that DEQ currently has out for public comment, and there is a pending permit modification that may affect the continuation of this case. Also, the parties have indicated settlement is possible. On September 13, 2018, Ms. Clerget granted a six month stay until February 25, 2019.

f. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision. BER 2018-05 OC**. Ms. Clerget issued the Scheduling Order on September 20, 2018. On January 3, 2019, counsel for Golden West Properties filed an unopposed motion to modify the scheduling order. The motion was granted on January 8, 2019, and the parties are proceeding according to that schedule.

g. **In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, Montana, BER 2014-06 WQ.** The parties appeared before the Board at its October 2018 meeting for oral argument on the proposed Findings of Fact and Conclusions of law. At the meeting, the parties reached a settlement and the Board stayed the case until February 2019.

3. Contested Cases not assigned to a Hearing Examiner

a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ**. On April 9, 2014, the hearings examiner issued Order Granting the Joint Unopposed Motion for Partial Remand of Permit to Department of Environmental Quality and for Suspension of Proceedings. This matter was stayed while action proceeded. On March 14, 2016, the Judge issued Order on Summary Judgment invalidating the permit renewal and modification and remanding the matter for consideration consistent with the opinion. On January 25, 2018, the Department of Environmental Quality entered a Stipulated Judgement resolving the issue of attorney's fees. The Department of Environmental Quality and Western Energy have appealed the District Court's Order on Summary Judgment to the Montana Supreme Court and the matter is now fully briefed. The Parties are awaiting request for oral argument and/or final Order of the Montana Supreme Court.

III. ACTION ITEMS

A. APPEAL, AMEND, OR ADOPT FINAL RULES

1. **The department requests that the board extend the comment period by 45 days for proposed amendments to Administrative Rules of Montana (ARM) pertaining to ground water standards incorporated by reference into Department Circular DEQ-7.** The board initiated rulemaking for the affected board rules at its December 7, 2018 regular meeting.

   Public Comment.

B. NEW CONTESTED CASE

1. **In the Matter of: Notice of Appeal and Request for Hearing by CHS, Inc. Regarding Issuance of MPDES Permit No. MT0000264, BER 2019-01 WQ.** On January 3, 2019, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for the totality of the case.

   Public Comment.

C. ACTION ON CONTESTED CASES

1. **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 (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ**. On July 16, 2018, Ms. Clerget issued her Proposed Findings of Fact Conclusions of Law and a separate order on exceptions. Copper Ridge and Reflections at Copper Ridge submitted their exceptions to the Proposed Order on September 17, 2018. DEQ filed its response on October 31, 2018. This matter was fully briefed and before the Board for oral argument at the December meeting, but the Board lacked a quorum. The Board requested additional briefing from the parties on the owner/operator issue, which the parties have submitted. The Board will hear additional oral argument and then this matter is ripe for decision by the Board.

IV. BOARD COUNSEL UPDATE

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

V. 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.

VI. ADJOURNMENT

DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
MINUTES

December 7, 2018

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, December 7, 2018, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

Board Members Present in person: Chairperson Christine Deveny, John DeArment,

Board Members Present by Phone: Chris Tweeten, Dexter Busby, Tim Warner

Board Members Absent: John Felton, Hillary Hanson

Board Attorney Present: Sarah Clerget, Attorney General's Office (AGO)

Board Liaison Present: George Mathieus

Board Secretary Present: Lindsay Ford

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Sandy Scherer, Ed Hayes, Mark Lucas, Kirsten Bowers, Aaron Pettis, Sarah Christopherson, Kurt Moser, Nick Whitaker, Norm Mullen – LEGAL; Dan Freeland, Mindy McCarthy, Eric Sivers, Jason Garber, Jon Dilliard, Rachel Clark, Myla Kelly, Tim Davis, Eric Regensburger, Eric Urban, Jon Kenning, Mike Suplee, Darryl Barton, Joanna McLaughlin, Haley Sir, Derek Fleming, Emilie Erich Hoffman – WQD; Chad Anderson, Susan Bawden – ENF; Amy Steinmetz – WMRD; Julie Merkel, Rebecca Harbage, Liz Ulrich, Ed Warner, Shawn Juers, Carl Anderson, Ed Coleman, Dave Klemp, Chris Cronin, Chris Dorrington – AEMD

Interested & Other Persons Present: Wade Steer – Western Energy Co.; John Martin, Vicki Marquis – Holland and Hart; Greg Brice – Hydrometrics; Steve Story – DNRC Board of Water Well Contractors; John Tietz, Brian Thompson – BKBH; Landy Leep – Copper Ridge Development; Shiloh Hernandez – Western Environmental Law Center; Anne Hedges – MEIC;

Roll was called: two Board members were present in person and three Board members were present via teleconference, providing a quorum.

I.A. Administrative Items – Review and Approve Minutes

I.A.1. **October 5, 2018 Meeting Minutes**

Mr. DeArment MOVED to approve the meeting minutes. Chairperson Deveny SECONDED. The motion PASSED unanimously.

I.B.1. **Establish the 2019 Meeting Schedule**

Mr. DeArment MOVED to approve the 2019 meeting schedule. Chairperson Deveny SECONDED. The motion PASSED unanimously.

II.A.1. Briefing Items – Enforcement Cases assigned to the Hearing Examiner

II.A.1.a. **In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC.**

Ms. Clerget said the parties are working out the technical details of the case and CMG will file a notice of dismissal once the parties have reached an agreement.

II.A.1.b. **In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.**

Ms. Clerget stated the stay is still in place as the parties work on their settlement terms.

II.A.1.c. **In the matter of violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), BER 2017-02 OC.**

Ms. Clerget said a stipulation for dismissal will be filed soon.

II.A.1.d. **In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM.**

Ms. Clerget stated there's a scheduling order in place and the parties are proceeding accordingly.

II.A.2. Briefing Items – Non-Enforcement Cases Assigned to a Hearing Examiner

II.A.2.b. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.**

Ms. Clerget said she extended all pretrial motions pending an issue that's before the District Court.

II.A.2.c. **In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.**

Ms. Clerget stated she has the proposed findings of facts and conclusions of law from the parties and will have a decision to the Board soon.

II.A.2.d. **In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER 2017-03 WQ.**

Ms. Clerget held a trial earlier in the week and the parties are working their proposed findings of facts and conclusions of law.

II.A.2.e. **In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.**

Ms. Clerget stated there is a six month stay in place until February 25, 2019.

II.A.2.f. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision. BER 2018-05 OC.**

Ms. Clerget has issued a scheduling order and the parties are proceeding accordingly.

I.A.3. Briefing Items – Contested Cases Not Assigned to a Hearing Examiner

II.A.3.a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.**

Ms. Bowers stated Western Energy filed an unopposed motion for an extension of the due date to file the reply brief. The motion was granted and briefs are due January 2019. The matter is still before the Montana Supreme Court.

III.A. Action Items – APPEAL, AMEND, OR ADOPT FINAL RULES:

III.A.1. **The Department will propose that the Board initiate rulemaking to add six human health ground water criteria into department Circular DEQ-7: diallate; dioxane, 1,4-; iron; manganese; perfluorooctane sulfonate (PFOS); and perfluorooctanoic acid (PFOA.)**

Dr. Suplee briefed the Board and answered questions.

Chairperson Deveny opened the floor for public comment.

Mr. Brice asked the Board to delay any decision on initiating the rulemaking and stated his concerns.

Dr. Suplee, Mr. Mathieus, Tim Davis, Eric Urban answered questions.

Mr. Busby MOVED to continue with rulemaking for four of the criteria: dialliate, dioxane 1, 4, and perfluorooctane and have a separate rulemaking for the other two: manganese and iron. Mr. Tweeten SECONDED for purpose of discussion. The motion FAILED to pass on a 1-4 vote.

Mr. DeArment MOVED to initiate rulemaking as requested by the Department and to assign the Board attorney as the Hearings Examiner for purposes of conducting a rulemaking hearing. Chairperson Deveny SECONDED. The motions PASSED on a 4-1 vote.

III.A.2. **The Department will propose that the Board initiate rulemaking to establish an air quality registration program for portable sources of emissions by amending and adopting the following air quality rules in ARM Title 17, Chapter 8:**

a. **Amend ARM 17.8.744 to provide a general exclusion from the requirement to obtain a Montana air quality permit for facilities that register with the department in accordance with the proposed new rules.**
b. **Adopt New Rules I-IX to establish a registration process, applicability criteria, and rules of operation for certain portable sources of emissions.**

Ms. Harbage briefed the Board and answered questions.

Chairperson Deveny opened the floor for public comment.

Mr. Thompson thanked the Air Quality Bureau for the hard work and outreach to stakeholders urged the Board to approve the rulemaking.

Mr. DeArment MOVED to initiate rulemaking as requested by the Department and to assign the Board attorney as the Hearings Examiner for purposes of conducting a rulemaking hearing and to change the date Ms. Harbage requested in the notice. Chairperson Deveny SECONDED. The motion PASSED unanimously.

III.A.3. **The Department will propose that the Board initiate rulemaking for proposed amendments to Administrative Rules of Montana (ARM) 17.30.1001, 17.30.1334, 17.38.101 and Department Circulars DEQ-1, DEQ-2, and DEQ-3. The amendments include adding or updating a citation to New Rule I. The 2017 Legislature required the Department to initiate rulemaking to implement HB 368 - establishing the minimum setback distance between a well and a lagoon. New Rule I implements HB 368 and establishes the minimum setback through Department rulemaking. New Rule I will be initiated concurrently with the Board rulemaking.**

Mr. Regensburger briefed the Board and answered questions.

Chairperson Deveny opened the floor for public comment. None were offered.

Mr. Tweeten MOVED to initiate rulemaking as requested by the Department and to assign the Board attorney as the Hearings Examiner for purposes of conducting a rulemaking hearing. The motion PASSED unanimously.

III.A.4. **The Department will propose that the Board adopt amendments to Administrative Rules of Montana (ARM) 17.30.103, 17.30.106, 17.30.108 and 17.30.109 regarding 401 Certification.**

Mr. Garber briefed the Board and answered questions.

Chairperson Deveny opened the floor for public comment. None were offered.

Chairperson Deveny MOVED to adopt the amendments to the Administrative Rules of Montana pertaining to the 401 certifications. Mr. DeArment SECONDED. The motion PASSED unanimously.

III.B. Action on Contested Cases

III.B.1. **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 (MTR105376), BER 2015-01 WQ and in the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.**

The Board heard oral arguments from parties on Copper Ridge's Motion to Strike. Chairperson Deveny MOVED to deny the motion to strike. Mr. Tweeten SECONDED, the motion PASSED unanimously. The Board began oral arguments on the issue of owner/operator, then broke for lunch. Upon returning from the lunch break there was not a quorum to continue to hear the case so oral arguments were postponed.

IV. Board Counsel Update

Ms. Clerget had no updates.

V. General Public Comment

None were offered.

VI. Adjournment

Chairperson Deveny MOVED to adjourn. Mr. DeArment SECONDED. Chairperson Deveny adjourned the meeting at 1:10 p.m.

Board of Environmental Review December 7, 2018, minutes approved:

_____

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

_____

DATE

BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR PROPOSED AMENDMENT OF RULE

Agenda Item # III.A.1.

Agenda Item Summary – Because the proposed rulemaking has generated more comments than anticipated, the department requests that the board extend the comment period for proposed amendments to Administrative Rules of Montana (ARM) pertaining to ground water standards incorporated by reference into Department Circular DEQ-7. The department is requesting the close of the comment period to be extended by 45 days, from February 8 to March 25, 2018. The date, time, and place of the public hearing to remain the same. The board initiated rulemaking for the affected board rules at its December 7, 2018 regular meeting. The proposed amendments were published on December 21, 2017, MAR Notice 17-403, at pages 2446-54 of the 2018 Montana Administrative Register, Issue Number 24. The department also intends to extend the comment period for the affected department rules.

List of Affected Board Rules –The proposed amended notice concerns Board rules adopted under authority of § 82-4-204, Montana Code Annotated (MCA), at ARM Title 17, chapter 24, subchapter 6, specifically ARM 17.24.645 and ARM 17.24.646; § 75-5-301, MCA, at ARM Title 17, chapter 30, subchapter 5, specifically ARM 17.30.502; §§ 75-5-201 & 75-5-301, MCA, at ARM Title 17, chapter 30, part 6, specifically ARM 17.30.619; §§ 75-5-301 & 75-5-303, at ARM Title 17, chapter 30, subchapter 7, specifically ARM 17.30.702; §§ 75-5-201 & 75-5-401, MCA, at ARM Title 17, chapter 30, subchapter 10, pertaining to the incorporation of ground water standards by reference into Department Circular DEQ-7.

List of Affected Department Rules – The proposed amended notice concerns department rules adopted under the authority of § 76-4-104, MCA, at ARM Title 17, chapter 36, subchapter 3, specifically ARM 17.36.345; §§ 75-10-702 75-10-704, MCA, at ARM Title 17, chapter 55, subchapter 1, specifically ARM 17.55.109; §§ 75-11-319 & 75-11-505, MCA, at ARM Title 17, chapter 56, subchapters 5 and 6, specifically ARM 17.56.507 & ARM 17.56.608, pertaining to ground water standards incorporated by reference into Department Circular DEQ-7.

Affected Parties Summary –The parties affected by the proposed extension of the comment period will have an additional 45 days to provide comment on the proposed amendments to Department Circular DEQ-7 and the related incorporations by reference.

Background – The proposed Department Circular DEQ-7 can be viewed on the department's website at http://deq.mt.gov/water/drinkingwater/standards. The reasons for the modifications are set forth in MAR Notice 17-403, at pages 2446-54 of the 2018 Montana Administrative Register, Issue Number 24.

Hearing Information – The Board appointed Sarah Clerget as hearing officer, to conduct a public hearing on February 5, 2019, to take public comment on the proposed amendment of rule.

Board Options – The Board may:

1. Extend the comment period of the rulemaking for the affected Board rules and issue the attached amended notice and extension of comment period;

2. Determine that the amended notice is not appropriate and decline to extend the comment period; or
3. Modify the notice.

DEQ Recommendation – The Department recommends that the Board extend the comment period for this rulemaking for the affected Board rules, as proposed in the attached amended notice. The proposed rulemaking has generated more comments than anticipated and for that reason the board should find it necessary to extend the comment period for an additional 45 days. The date, time, and place of the public hearing remain the same.

Enclosures –

1. Draft Administrative Register Amended Notice and Extension of Comment Period on Proposed Amendment of Administrative Rules of Montana 17.24.645, 17.24.646, 17.30.502, 17.30.619, 17.30.702, 17.30.1001, 17.36.345, 17.55.109, 17.56.507, and 17.56.608.
2. Notice of Public Hearing on Proposed Amendment, MAR Notice No. 17-403, pages 2446-54 of the 2018 Montana Administrative Register, Issue Number 24 (Dec. 21, 2018).

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.645, 17.24.646, 17.30.502, 17.30.619, 17.30.702, 17.30.1001, 17.36.345, 17.55.109, 17.56.507, and 17.56.608, pertaining to ground water standards incorporated by reference into Department Circular DEQ-7	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (RECLAMATION) (WATER QUALITY) (SUBDIVISIONS) (CECRA) (UNDERGROUND STORAGE TANKS)

TO: All Concerned Persons

1. On February 5, 2019, at 2:00 p.m., the Board of Environmental Review and the Department of Environmental Quality will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board and department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer, Legal Secretary, no later than 5:00 p.m., January 29, 2019, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.24.645 GROUND WATER MONITORING (1) through (5) remain the same.

(6) Methods of sample collection, preservation, and sample analysis must be conducted in accordance with 40 CFR Part 136 titled "Guidelines Establishing Test Procedures for the Analysis of Pollutants" (July 2015) and the department's document titled "Department Circular DEQ-7, Montana Numeric Water Quality Standards," ~~May 2017~~ [effective month and year of this rule amendment] edition. Copies of Department Circular DEQ-7 are available at the Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901. Sampling and analyses must include a quality assurance program acceptable to the department.

(7) and (8) remain the same.

AUTH: 82-4-204, MCA

IMP: 82-4-231, 82-4-232, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.24.646 SURFACE WATER MONITORING (1) through (5) remain the same.

(6) Methods of sample collection, preservation, and sample analysis must be conducted in accordance with 40 CFR Part 136 titled "Guidelines Establishing Test Procedures for the Analysis of Pollutants" (July 2015) and Part 434 titled "Coal Mining Point Source Category BPT, BAT, BCT Limitations and New Source Performance Standards" (January 2002), and the ~~May 2017~~ [effective month and year of this rule amendment] edition of the department's document titled "Department Circular DEQ-7, Montana Numeric Water Quality Standards." Copies of 40 CFR Part 136, 40 CFR 434, and Department Circular DEQ-7 are available at the Department of Environmental Quality, 1520 E. 6th Ave., P.O. Box 200901, Helena, MT 59620-0901. Sampling and analyses must include a quality assurance program acceptable to the department.

(7) remains the same.

AUTH: 82-4-204, MCA
IMP: 82-4-231, 82-4-232, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.30.502 DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, and ARM Title 17, chapter 30, subchapters 6 and 7, apply throughout this subchapter:

(1) through (13) remain the same.

(14) The board adopts and incorporates by reference Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters. Copies of Department Circular DEQ-7 are available from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-5-301, MCA
IMP: 75-5-301, MCA

REASON: The board and the department are proposing to revise Circular

DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.30.619 INCORPORATIONS BY REFERENCE (1) The board adopts and incorporates by reference the following state and federal requirements and procedures as part of Montana's surface water quality standards:

(a) Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality criteria for toxic, carcinogenic, bioconcentrating, radioactive, and harmful parameters and also establishes human health-based water quality criteria for the following specific nutrients with toxic effects:

(i) through (3) remain the same.

AUTH: 75-5-201, 75-5-301, MCA
IMP: 75-5-301, 75-5-313, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.30.702 DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter (Note: 75-5-103, MCA, includes definitions for "base numeric nutrient standards," "degradation," "existing uses," "high quality waters," "mixing zone," and "parameter"):

(1) through (26) remain the same.

(27) The board adopts and incorporates by reference:

(a) Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality standards for toxic, carcinogenic, bioconcentrating, radioactive, and harmful parameters and also establishes human health-based water quality standards for the following specific nutrients with toxic effects:

(i) through (e) remain the same.

AUTH: 75-5-301, 75-5-303, MCA
IMP: 75-5-303, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.30.1001 DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter:

(1) remains the same.

(2) "DEQ-7" means Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality standards for toxic, carcinogenic, radioactive, bioconcentrating, nutrient, and harmful parameters.

(a) The board adopts and incorporates by reference Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters.

(3) through (17) remain the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-301, 75-5-401, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.36.345 ADOPTION BY REFERENCE (1) For purposes of this chapter, the department adopts and incorporates by reference the following documents. All references to these documents in this chapter refer to the edition set out below:

(a) through (d) remain the same.

(e) Department Circular DEQ-7, "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition);

(f) through (2) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.55.109 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the department adopts and incorporates by reference:

(a) Department Circular DEQ-7, "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition);

(b) through (5) remain the same.

AUTH: 75-10-702, 75-10-704, MCA
IMP: 75-10-702, 75-10-704, 75-10-711, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.56.507 ADOPTION BY REFERENCE (1) For purposes of this subchapter, the department adopts and incorporates by reference:

(a) Department Circular DEQ-7, "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition);

(b) through (3) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.56.608 ADOPTION BY REFERENCE (1) For purposes of this subchapter, the department adopts and incorporates by reference:

(a) Department Circular DEQ-7, "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition);

(b) through (3) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: The proposed revised Department Circular DEQ-7 can be viewed on the department's website at http://deq.mt.gov/water/drinkingwater/standards. A copy of the proposed revised circular also may be obtained by contacting Mike Suplee at (406) 444-0831. Modifications to the circular and the reasons for the modifications are as follows:

Addition of new human health criteria: The board and the department are proposing to revise Department Circular DEQ-7 to provide human health groundwater criteria for the following: diallate; dioxane, 1,4-; iron; manganese; perfluorooctane sulfonate (PFOS); and perfluorooctanoic acid (PFOA). The proposed criteria concentrations are as follows: diallate, 5.5 µg/L; dioxane, 1,4-, 3 µg/L; iron, 4,000 µg/L; manganese, 100 µg/L; PFOS, 0.07 µg/L, PFOA, 0.07 µg/L.

The diallate criterion will provide the department's Hazardous Materials Program of

the Waste Management and Remediation Division a clean-up standard for hazardous waste permitted facilities. Standards for dioxane, 1,4-, PFOS, PFOA, and iron are also considered important criteria to the Waste Management and Remediation Division as cleanup endpoints for remedial activities carried out by that division. Further, standards for Dioxane, 1,4-, PFOS, and PFOA are included in EPA Office of Water Health Advisories.

Scientific research has demonstrated that excessive manganese levels can have neurobehavioral and neurocognitive impacts on infants (0-6 months). The new proposed criterion was derived for this most-sensitive population. Manganese is considered an important criterion to the Waste Management and Remediation Division as a cleanup endpoint.

The human health groundwater criteria were derived using U.S. Environmental Protection Agency (EPA) equations for human health criteria (EPA, 2000) and there are different equations for toxins and carcinogens. The criteria were derived assuming that exposure is through drinking water only (no accounting for exposure through consumption of fish is made). For example:

Toxic Criterion (µg/L) = {[RfD (mg/kg-day) x RSC x average body weight (kg)]/drinking water intake (L/day)} x 1000 µg/mg

where the RfD is a value derived from the no effects or lowest observable effects concentration (NOAEL or LOAEL, respectively), and RSC is the relative source contribution to account for potential exposure from other environmental media. EPA generally recommends an RSC of 0.2 (i.e., 20 percent of a person's exposure is from drinking water). The default drinking water intake rate for adults is 2.4 L/day and the default body weight is 80 kg, both of which are in DEQ-7 (see page 5). For some criteria, sensitive sub-populations required different body weight and drinking assumptions than the defaults, and these are detailed below where appropriate.

Citations to several technical documents are made below; the list of these documents may be found at the end of this section.

The department derived the diallate criterion using a cancer slope factor of 0.061 mg/kg-day from the EPA Health Effects Assessment Summary Table (HEAST) database (https://epa-heast.ornl.gov/heast.php), default adult weight and drinking water intake rates, and Montana's cancer risk factor of $1x\ 10^{-5}$ (per 75-5-301, MCA). Dioxane, 1,4- was derived using the IRIS 2013 cancer slope factor (0.1 mg/kg-day), default adult weight and drinking water intake rates, and Montana's cancer risk factor of $1x\ 10^{-5}$. PFOS and PFOA criteria are from EPA (2016a; 2016b; 2018) and were derived for the most sensitive population, lactating women. For them, the 90th percentile for drinking water intake was 3.6 L/day and they have a lower assumed body weight (67 kg) than the overall population. The iron criterion was calculated using a RfD (0.592 mg/kg-day) derived from EPA (2006) and the default adult weight and drinking water intake rates.

For manganese (a toxin), the department used a RfD of 0.025 mg/kg-day. The RfD was derived using literature toxicology studies (Kern *et al*., 2010; Kern *et al*., 2011; Beaudin *et al*., 2013) and a 1000-fold uncertainty factor (UF_A = 10, UF_H = 10, UF_L = 10), where UF_A is uncertainty due to interspecies variability to account for extrapolating from laboratory animals to humans, UF_H is for intraspecies variability to account for variability in the responses within the human population because of intrinsic and extrinsic factors, and UF_L is applied because a LOAEL and not a NOAEL was used in the derivation (EPA, 1993). The average body weight of infants zero to <6 months old was used (6.47 kg; Table 8-1, EPA, 2011) and the 90th percentile drinking water ingestion for infants zero to <6 months was 0.966 L/day (Table 3-15, EPA, 2011). The RSC was calculated by subtracting the manganese infants receive from formula (21 CFR 107.100) from the LOAEL to give a RSC of 0.833 (rounded to 0.8 per EPA guidance). Accounting for significant figures (1 in this case), the department derived a water quality standard of 100 µg/L.

Criteria Stringency Compared to Federal Guidelines: Five of the proposed criteria (diallate; dioxane, 1,4-; iron; PFOS; and PFOA) are equivalent to comparable federally recommended guidelines (EPA, 2006; HEAST; EPA, 2018). The proposed manganese criterion is more stringent than comparable federal guidelines. EPA recommends a criterion of 300 µg/L (EPA, 2004; EPA, 2018) based on studies of dietary intake of manganese. But more recent peer-reviewed scientific studies (Kern *et al*., 2010; Kern *et al*., 2011; Beaudin *et al*., 2013), based on dose-response effects on new-born and adult rats, indicate that the criterion should be 100 µg/L (the value proposed by the board). Rat studies were reviewed in EPA (2004) but the quality of those studies was not considered adequate to derive a criterion. The more recent scientific works are considered high quality according to EPA Region VIII's drinking water toxicologist (Bob Benson, personal communication, 11/8/2018). As addressed above, the proposed manganese criterion is necessary to mitigate harm to the public health, specifically zero to <6 months old infants. Further, it is achievable under current technology. At the municipal scale, dissolved manganese can be removed by several technologies (e.g., oxidation/physical separation) which can achieve concentrations of 40 µg/L.

Footnote (40): The board proposes the addition of footnote (40) to DEQ-7, which references the Montana Administrative Register (MAR) for instances where the derivation of a DEQ-7 human-health criterion is documented in MAR Notice No. 17-403. Human health standards are normally flagged in DEQ-7 to indicate which information source they were derived from; for example, many are flagged "HA," meaning they were derived from nationally-recommended EPA Health Advisory documents. However, the iron and manganese criteria discussed above were derived by the department. If the proposed iron and manganese criteria are adopted as human health standards in DEQ-7, then footnote (40) would reference this MAR notice.

Footnote (41): The board proposes new footnote (41), which clarifies that the sum of PFOA and PFOS shall not exceed the individual standards for each.

References Cited: Technical documents cited above are provided here:

EPA. 1993. Reference Dose (RfD): Description and Use in Health Risk Assessments.
Background Document 1A. https://www.epa.gov/iris/reference-dose-rfd-description-and-use-health-risk-assessments.

EPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. Technical Support Document. Volume 1: Risk Assessment. Office of Water, Office of Science and Technology. EPA-822-B-00-005.

EPA. 2006. Provisional Peer Reviewed Toxicity Values and Iron and Compounds (CASRN 7439-89-6), Derivation of Subchronic and Chronic Oral RfDs. Superfund Health Risk Technical Support Center, National Center for Environmental Assessment, Office of Research and Development, U.S. Environmental Protection Agency, Cincinnati, OH 45268.

EPA. 2011. Exposure Factors Handbook: 2011 Edition. Office of Research and Development. EPA/600/R-090/052F.

EPA. 2016a. Drinking Water Health Advisory for Perfluorooctane Sulfonate (PFOS). Office of Water. EPA 822-R-16-004.

EPA. 2016b. Health Effects Support Document for Perfluorooctanoic Acid (PFOA). Office of Water. EPA 822-R-16-003.

EPA. 2018. 2018 Edition of the Drinking Water Standards and Health Advisories Tables. Office of Water. EPA 822-F-18-001.

Kern, C., G. Stanwood and D.R. Smith. 2010. Pre-weaning Manganese Exposure Causes Hyperactivity, Disinhibition, and Spatial Learning and Memory Deficits Associated with Altered Dopamine Receptor and Transporter Levels. *Synapse* 64: 363-378.

Kern, C. and D.R. Smith. 2011. Pre-weaning Mn Exposure Leads to Prolonged Astrocyte Activation and Lasting Effects on the Dopaminergic System in Adult Male Rats. *Synapse* 65: 532-544.

Beaudin, S. A., S. Nisam and D.R. Smith. 2013. Early Life Versus Lifelong Oral Manganese Exposure Differently Impairs Skilled Forelimb Performance in Adult Rats. *Neurotoxicology and Teratology* 38: 36-45.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to

(406) 444-4386; or e-mailed to sscherer@mt.gov, no later than 5:00 p.m. February 8, 2019. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. The board and department maintain a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy, wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

6. Sarah Clerget, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. With regard to the requirements of 2-4-111, MCA, the board and the department have determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by:

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

BOARD OF ENVIRONMENTAL REVIEW

BY: */s/ Christine Deveny*
CHRISTINE DEVENY
Chairman

DEPARTMENT OF ENVIRONMENTAL QUALITY

BY: */s/ Shaun McGrath*
SHAUN McGRATH
Director

Certified to the Secretary of State, December 11, 2018.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.645, 17.24.646, 17.30.502, 17.30.619, 17.30.702, 17.30.1001, 17.36.345, 17.55.109, 17.56.507, and 17.56.608, pertaining to ground water standards incorporated by reference into Department Circular DEQ-7	)	AMENDED NOTICE AND EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT (RECLAMATION) (WATER QUALITY) (SUBDIVISIONS) (CECRA) (UNDERGROUND STORAGE TANKS)

TO: All Concerned Persons

1. On December 21, 2018, the Board of Environmental Review and the Department of Environmental Quality published MAR Notice 17-403 pertaining to the public hearing on proposed amendment of the above-referenced rule at page 2446 of the 2018 Montana Administrative Register, Issue Number 24.

2. The board and department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Myla Kelly no later than 5:00 p.m., March 18, 2019, to advise us of the nature of the accommodation that you need. Please contact Myla Kelly at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-3939; fax (406) 444-4386; or e-mail MKelly2@mt.gov.

3. The proposed rulemaking has generated more comments than anticipated. For that reason, the board and department are extending the comment period for an additional 45 days. The date, time, and place of the public hearing remain the same.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to sscherer@mt.gov, no later than 5:00 p.m. March 25, 2019. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ BY: */s/*

EDWARD HAYES
Rule Reviewer

CHRISTINE DEVENY
Chairman

DEPARTMENT OF ENVIRONMENTAL QUALITY

BY: */s/*
SHAUN McGRATH
Director

Certified to the Secretary of State, _____, 2019.

DEQ
Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Sarah Clerget, Hearing Examiner
Board of Environmental Review

FROM: Lindsay Ford, Board Secretary
P.O. Box 200901
Helena, MT 59620-0901

DATE: January 3, 2019

SUBJECT: Board of Environmental Review Case No. BER 2019-01 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY CHS, INC. REGARDING ISSUANCE OF MPDES PERMIT NO. MT0000264	Case No. BER 2019-01 WQ

The BER has received the attached request for hearing.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Kurt Moser
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Jon Kenning, Bureau Chief
Water Protection Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

William W. Mercer
Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street
Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
Telephone: (406) 252-2166
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wwmercer@hollandhart.com
vamarquis@hollandhart.com

ATTORNEYS FOR CHS, INC.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: **THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY CHS, INC. REGARDING ISSUANCE OF MPDES PERMIT NO. MT0000264**	**CAUSE NO. BER 2019-_____-WQ** **NOTICE OF APPEAL**

Pursuant to Mont. Code Ann. § 75-5-403(2) and Admin R. Mont. 17.30.1370(4), CHS, Inc., as the permit applicant, appeals the issuance of, and requests a hearing before the Board of Environmental Review ("Board") on, the Montana Pollutant Discharge Elimination System ("MPDES") Permit No. MT0000264 ("Permit") issued to CHS, Inc. by the Montana Department of Environmental Quality ("DEQ"). The Board has authority to hear contested case appeals of DEQ's MPDES permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ. CHS, Inc. has raised issues with the Permit on multiple occasions with DEQ, submitted written comments to the draft Permit, and now timely appeals the Permit, which was issued December 7, 2018.

I. Permit Provisions

CHS, Inc. appeals the following sections of the Permit:

1. Part I(A);

2. Part I(B);

3. Part I(C)(1);

4. Part I(C)(2);

5. Part I(C)(3);

6. Part I(D); and

7. Part I(E)(1).

II. **Basis for Appeal**

CHS, Inc. objects to the Permit on multiple grounds.

1. DEQ improperly denied mixing zones for Outfalls 001, 002 and 003. This basis for appeal applies to Part I(A).

2. DEQ improperly set the final numeric effluent limitation for Arsenic. This basis for appeal applies to Part I(B).

3. DEQ required improper and inappropriate Required Reporting Values (RRVs) for Hydrogen Sulfide. This basis for appeal applies to Part I(C)(1).

4. DEQ required an improper and inappropriate number of daily composite sample collections. This basis for appeal applies to Part I(C)(1).

5. DEQ required improper and inappropriate hydrogen sulfide monitoring. This basis for appeal applies to Parts I(C)(1) and I(C)(3).

6. DEQ required improper and inappropriate Whole Effluent Toxicity (WET) monitoring. This basis for appeal applies to Part I(C)(2).

7. DEQ addressed Total Residual Chlorine (TRC) monitoring requirements in its Response to Comments but failed to adequately address interference by manganese oxide and

failed to incorporate appropriate changes to the TRC monitoring requirements in the Permit. This basis for appeal applies to Parts I(C)(1) and I(D).

8. DEQ required an improper and inappropriate compliance schedule for arsenic since a firm date for setting the non-anthropogenic standard has not been established. This basis for appeal applies to Part I(E)(1).

DATED this 3rd day of January, 2019.

William W. Mercer
Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street
Suite 1500
P.O. Box 639
Billings, Montana 59103-0639

ATTORNEYS FOR CHS, INC.

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of January, 2019, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Lindsay Ford **(original)** Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 Lindsay.Ford@mt.gov	[ ] U.S. Mail [X] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Kurt R. Moser Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 KMoser2@mt.gov	[X] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Jon Kenning, Bureau Chief Montana Department of Environmental Quality Water Protection Bureau P.O. Box 200901 Helena, MT 59620-0901 jkenning@mt.gov	[X] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail

Victoria A. Marquis

11827270_1

Major Industrial
Permit No.: MT0000264

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

AUTHORIZATION TO DISCHARGE UNDER THE
MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with Montana Water Quality Act, Title 75, Chapter 5, Montana Code Annotated (MCA) and the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1251 *et seq.*,

CHS, Inc.

is authorized to discharge from its **Laurel Refinery**

located at **802 Highway 212 South, Laurel, MT,**

to receiving waters named, **Italian Drain and Yellowstone River**

in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein. Authorization for discharge is limited to those outfalls specifically listed in the permit.

This permit shall become effective: **November 1, 2015.**

This permit and the authorization to discharge shall expire at midnight, **October 31, 2020.**

FOR THE MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

Jon Kenning, Chief
Water Protection Bureau
Water Quality Division

Modification Date: January 1, 2019

TABLE OF CONTENTS

I. EFFLUENT LIMITATIONS, MONITORING REQUIREMENTS & OTHER CONDITIONS

A. Description of Discharge Points and Mixing Zone

The authorization to discharge provided under this permit is limited to those outfalls specially designated below as discharge locations. Discharges at any location not authorized under an MPDES permit is a violation of the Montana Water Quality Act and could subject the person(s) responsible for such discharge to penalties under the Act. Knowingly discharging from an unauthorized location or failing to report an unauthorized discharge within a reasonable time from first learning of an unauthorized discharge could subject such person to criminal penalties as provided under Section 75-5-632 of the Montana Water Quality Act.

Outfall	Description
001	**Location:** At the end of the pipe/ditch, discharging into the Italian Drain, located at 45°39'28" N latitude, 108°45'09" W longitude. **Mixing Zone:** None. **Treatment Works**: Refinery wastewater treatment plant.
002	**Location (Future):** Lower port primary diffuser, discharging into the Yellowstone River, located at 45°39'22.32" N latitude, 108°45'10.86" W longitude. **Mixing Zone:** None. There are no effluent limits that require a mixing zone. **Treatment Works**: Refinery wastewater treatment plant.
003	**Location (Future):** Upper port secondary diffuser, discharging into the Yellowstone River, located at 45°39'22.32" N latitude, 108°45'10.86" W longitude. **Mixing Zone:** None. There are no effluent limits that require a mixing zone. **Treatment Works**: Refinery wastewater treatment plant.

B. Effluent Limitations

Interim Effluent Limits – Outfall 001 Italian Ditch

Beginning on the effective date of this permit and lasting through **October 31, 2019**, the quality of effluent discharged from Outfall 001 by the facility shall, at a minimum, meet the limitations as set forth below:

Outfall 001 - Interim Numeric Discharge Limitations (1)			
Parameter	**Units**	**Maximum Daily**	**Average Monthly**
5-Day Biochemical Oxygen Demand (BOD_5)	lb/day	620	331
Net Total Suspended Solids (net TSS)	lb/day	532	339
Chemical Oxygen Demand (COD)	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	lb/day	418	191
Sulfide	lb/day	3.9	1.8
Chromium, Total Recoverable	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
pH	s.u.	Between 6.0 and 9.0, all times	
Whole Effluent Toxicity, Acute, LC_{50}	% effluent	No acute toxicity (2)	

Footnotes:
(1) See Definitions section at end of permit for explanation of terms.
(2) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from Outfall 001 at any time there is discharge from Outfall 002 or Outfall 003.

Final Effluent Limits Outfall 001- Italian Ditch

Beginning **November 1, 2019**, until the end of the permit, CHS Laurel Refinery will be required to meet the following effluent limits at Outfall 001:

Outfall 001 - Final Numeric Discharge Limitations (1)			
Parameter	**Units**	**Effluent Limits**	
		Maximum Daily	**Average Monthly**
5-Day Biochemical Oxygen Demand (BOD_5)	lb/day	620	331
Net Total Suspended Solids (net TSS)	lb/day	532	339
Chemical Oxygen Demand (COD)	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	mg/L	3.8	1.2
	lb/day	418	191
Nitrate + Nitrite	mg/L	10	10
Fluoride	mg/L	4.0	4.0
Sulfide	lb/day	3.9	1.8
Arsenic, TR	µg/L	10	10
Chromium, TR	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
Selenium, TR	µg/L	8.2	4.1
pH	s.u.	Between 6.0 and 9.0, all times	
Whole Effluent Toxicity, Acute, LC_{50}	% effluent	No acute toxicity (2)	

Footnote: TR = Total Recoverable
(1) See Definitions section at end of permit for explanation of terms.
(2) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from Outfall 001 at any time there is discharge from Outfall 002 or Outfall 003.

Outfalls 002 / 003 – Yellowstone River

Effective upon commencement of discharge through the diffuser Outfalls 002 / 003 until the end of the permit, CHS Laurel Refinery will be required to meet the following effluent limits:

Diffuser Outfalls 002 / 003 - Final Effluent Limits			
Parameter	**Units**	**Effluent Limits**	
		Maximum Daily	**Average Monthly**
5-Day Biochemical Oxygen Demand (BOD_5)	lb/day	620	331
Net Total Suspended Solids (net TSS)	lb/day	532	339
Chemical Oxygen Demand (COD)	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	lb/day	418	191
Sulfide	lb/day	3.9	1.8
Arsenic, TR (1)	µg/L	11.3	11.3
Chromium, TR	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
pH	s.u.	Between 6.0 and 9.0, all times	
Whole Effluent Toxicity, Acute, LC_{50}	% effluent	No acute toxicity (2)	

Footnote: TR = Total Recoverable
(1) Effective **November 1, 2022**.
(2) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from the diffuser (Outfalls 002 or 003) at any time there is discharge from Outfall 001.

C. Monitoring Requirements

1. *Outfalls 001 and 002/003*

Self-monitoring of effluent shall be conducted, following final treatment, at the following locations, unless another location is requested by CHS and approved by DEQ in writing:

- Outfall 001 – at the flow meter & sampling location; and
- Outfalls 002/003 – diffuser discharge monitored at the outlet of the discharge pumps prior to the forced main.

Samples will reflect the nature of the discharge. Samples shall be collected, preserved and analyzed in accordance with approved procedures listed in 40 CFR 136. Data supplied by CHS must either have a detection or meet the Required Reporting Value (RRV), which is the detection level that must be achieved as listed in Circular DEQ-7. The RRV is DEQ's best determination of a level of analysis that can be achieved by the majority of the commercial, university, or governmental laboratories using EPA-approved methods or methods approved by DEQ.

At a minimum, the following constituents shall be monitored at the frequencies and with the types of measurements indicated; samples or measurements shall be representative of the volume and nature of the monitored discharge.

Effluent Monitoring Requirements for Outfall 001 and Outfalls 002/003 (1)

Parameter	Units	Monitoring Frequency	Type	RRV (2)	Reporting Requirement
Flow	MGD	Continuous	Instantaneous(3)	--	Daily Max & Mo Avg
BOD_5	mg/L	2/Week (4)	Composite	--	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg
TSS – Intake Water	mg/L	2/Week (4)	Composite	--	None
TSS – Effluent Gross	mg/L	2/Week (4)	Composite	--	None
TSS – Net (5)	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg
COD	mg/L	2/Week (4)	Composite	--	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg
Oil and Grease	mg/L	2/Week (4)	Grab	1	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg
Phenol	µg/L	1/Week	Grab	10	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg
Ammonia (as N)	mg/L	2/Week (4)	Composite	0.07	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg
Sulfide, Total	µg/L	1/Week	Composite	40 (6)	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg
Sulfide, Dissolved	µg/L	1/Week	Composite (7)	--	Daily Max & Mo Avg
Hydrogen Sulfide (H_2S)	µg/L	1/Week	Calculated (7)	20	Daily Max & Mo Avg
Chromium, TR	µg/L	1/Week	Composite	10	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg

Effluent Monitoring Requirements for Outfall 001 and Outfalls 002/003 (1)					
Parameter	Units	Monitoring Frequency	Type	RRV (2)	Reporting Requirement
Chromium, Hexavalent	µg/L	1/Week	Composite	2	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Daily Max & Mo Avg
pH	s.u.	1/Day	Instantaneous	--	Daily Min & Daily Max
Fluoride	mg/L	2/Year (4,8) 1/Month	Composite	0.2	Daily Max & Mo Avg
Arsenic, TR	µg/L	2/Year (4,8) 1/Month	Composite	1	Daily Max & Mo Avg
Selenium, TR	µg/L	2/Year (4,8) 1/Month	Composite	1	Daily Max & Mo Avg
Aluminum, Dissolved	µg/L	2/Year (3)	Composite	9	Report
Cyanide, Total	µg/L	2/Year (3)	Grab	3	Report
Iron, TR	µg/L	2/Year (3)	Composite	20	Report
Lead, TR	µg/L	2/Year (3)	Composite	0.3	Report
Mercury, TR	µg/L	2/Year (3)	Composite	0.005	Report
Total Residual Chlorine	mg/L	1/Month	Grab	0.1	Report
Manganese Oxide (9)	µg/L	1/Month	Grab	1	Report
Nitrate + Nitrite (Nov 1 – July 31)	mg/L	2/Year (4,8) 1/Month	Composite	0.02	Daily Max & Mo Avg
Nitrate + Nitrite (Aug 1 – Oct 31)	mg/L	1/Week (10)	Composite	0.02	Daily Max & Mo Avg
Total Kjeldahl Nitrogen	mg/L	1/Week (10)	Composite	0.225	Mo Avg
TN (11)	lb/day	1/Month (10)	Calculated	--	Mo Avg
TP	mg/L	1/Month (10)	Composite	0.003	Mo Avg
	lb/day	1/Month (10)	Calculated	--	Mo Avg
Temperature	degrees C	1/Week	Instantaneous	0.1	Daily Max & Mo Avg
Whole Effluent Toxicity, Acute	% Effluent	1/Quarter(12)	Grab	--	Pass/Fail

Footnotes:

(1) The effluent monitoring location must be after all treatment has been completed (*i.e.*, downstream from all treatment units, and prior to entry to the receiving waters). Monitoring is only required during times with discharge.

(2) Analytical methods must have sufficient sensitivity to either detect the parameter with quantified results (including J-flagged) or report a non-detect with a method detection level at or below the RRV.

(3) Requires recording device or totalizer.

(4) Samples required 2/week must be taken at least two days apart, and samples required 2/year must be taken at least four months apart with the first in the first half of the year and the second in the second half of the year.

(5) Mass-based net TSS calculated by first determining mass-based net TSS discharge on a daily basis, then determining daily maximum and monthly average for the month.

(6) RRV based on Energy Labs Reporting Level.

(7) H_2S calculated based on dissolved sulfide concentrations and pH in accordance with Standard Methods Method 4500-S^{2-} unless another method is proposed and accepted by DEQ. Nondetect at the RRV is considered compliance with the H_2S effluent limit.

(8) Monitoring for nitrate+nitrite, arsenic, selenium, and fluoride is required twice a year until October 31, 2019. Beginning November 1, 2019, monitoring will be required monthly.

(9) Monitoring for manganese oxide is only for discharges from Outfall 001.

(10) Monitoring required only during the summer season of August 1 – October 31st.

(11) TN is the sum of Nitrate+Nitrite and TKN.

(12) Two species WET test conducted quarterly during periods with discharge (for Outfalls 001 and Outfalls 002/003) unless reduced monitoring is approved by DEQ under Part I.C.2. At minimum, failure of any acute WET test requires that the permittee comply with the Permit's Special Conditions.

Composite samples shall, as a minimum, be composed of two or more discrete aliquots (samples) of equal volume and time collected in a 24-hour period until November 1, 2019. After this date, composite samples shall, as a minimum, be composed of four or more discrete aliquots (samples) of equal volume. The aliquots shall be combined in a single container for analysis (simple composite). The time between the collection of the first sample and the last sample shall not be less than six (6) hours nor more than 24 hours

2. *Whole Effluent Toxicity Monitoring – Acute Toxicity*

Starting immediately upon the effective date of this permit, the permittee shall, at least once each calendar quarter, conduct an acute static renewal toxicity test on a grab sample of the effluent. Testing will employ two species per quarter and will consist of 5 effluent concentrations (100, 50, 25, 12.5, 6.25 percent effluent) and a control. Dilution water and the control shall consist of the receiving water.

The toxicity tests shall be conducted in general accordance with the procedures set out in the latest revision of *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*, EPA-821-R-02-012 and the *Region VIII EPA NPDES Acute Test Conditions - Static Renewal Whole Effluent Toxicity Test* testing protocols. The permittee shall conduct an acute 48-hour static renewal toxicity test using *Ceriodaphnia sp.* and an acute 96-hour static renewal toxicity test using fathead minnows (*Pimephales promelas*). The control of pH in the toxicity test utilizing CO_2 enriched atmospheres is allowed to prevent rising pH drift. The target pH selected must represent the pH value of the receiving water at the time of sample collection.

Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration. If more than 10 percent control mortality occurs, the test is considered invalid and shall be repeated until satisfactory control survival is achieved unless a specific individual exception is granted by the Department. This exception may be granted if less than 10 percent mortality was observed at the dilutions containing high effluent concentrations.

If acute toxicity occurs in a routine test, an additional test shall be conducted within 14 days of the date of the initial sample. Should acute toxicity occur in the second test, accelerated testing shall occur once a month for the affected species. If no acute toxicity occurs for six (6) consecutive months for the affected species, CHS shall notify DEQ and the WET testing will revert back to a frequency of once each calendar quarter. In all cases, the results of all toxicity tests must be submitted to the Department in accordance with Part II of this permit.

Failure to initiate, or conduct an adequate Toxicity Identification Evaluation / Toxicity Reduction Evaluation (TIE/TRE), or delays in the conduct of such tests, shall not be considered a justification for noncompliance with the whole effluent toxicity limits contained in Part I.B of this permit. A TRE plan needs to be submitted

to the permitting authority within 45 days after confirmation of the continuance of the effluent toxicity.

The quarterly results from the laboratory shall be reported along with the DMR form submitted for the end of the reporting calendar quarter (e.g., whole effluent results for the reporting quarter ending March 31 shall be reported with the March DMR due April 28th with the remaining quarterly reports submitted with the June, September, and December DMR's). The format for the laboratory report shall be consistent with the latest revision of the EPA form *Region VIII Guidance for Acute Whole Effluent Reporting*, and shall include all chemical and physical data as specified.

If the results for eight consecutive quarters of testing indicate no acute toxicity, the permittee may request a reduction to semi-annual acute toxicity testing on two species. The Department may approve or deny the request based on the results and other available information without an additional public notice. If the request is approved, the test procedures are to be the same as specified above for the test species.

3. *Upstream Monitoring*

As a minimum, the following constituents shall be monitored for the Yellowstone River at the frequency and with the type of measurement indicated. Results must be provided on the DMRs. CHS must use a sufficiently sensitive method to detect the parameters at or above the RRV as specified in Circular DEQ-7 or DEQ-12A; if this is not possible for any of the samples an explanation must be provided. Upstream Monitoring Requirements as specified in this section shall be conducted through **October 30, 2020**.

Upstream Monitoring Requirements

Parameter	Units	Monitoring Frequency	Type	Reporting Level
Sulfide, Dissolved	µg/L	1/Quarter	Grab	--
Hydrogen Sulfide (H_2S)	µg/L	1/Quarter	Calculated (1)	20
pH	s.u.	1/Quarter	Instantaneous/Grab	0.1
Total Nitrogen (2)	µg/L	1/Month (3)	Grab or Calculated	0.245

Footnotes:
(1) Calculate H_2S based on dissolved sulfide concentrations and pH in accordance with Standard Methods Method 4500-S2-, unless another method is proposed and accepted by DEQ.
(2) TN can be determined by either the persulfate method or the sum of Nitrate + Nitrite and TKN.
(3) Monitoring required only during the summer season of August 1 – October 31st.

CHS shall submit a topo map or aerial photo indicating where the monitoring locations will be prior to taking the first sample. If the sample location is changed, CHS shall submit a revised monitoring location prior to taking the next sample.

D. Special Conditions

1. *Toxicity Identification Evaluation / Toxicity Reduction Evaluation (TIE/TRE)*

Should acute toxicity be detected in the required resample, a TIE-TRE shall be undertaken by the permittee to establish the cause of the toxicity, locate the source(s) of the toxicity, and develop control or treatment for the toxicity. Failure to initiate or conduct an adequate TIE-TRE, or delays in the conduct of such tests, shall not be considered a justification for noncompliance with the whole effluent toxicity limits contained in Part I.B of this permit. A TRE plan needs to be submitted to the Department within 45 days after confirmation of the continuance of effluent toxicity (resample).

2. *Notification Regarding Outfalls 001 and 002 / 003*

CHS Laurel Refinery currently discharges through Outfall 001. Therefore, the permit monitoring requirements are currently required only for Outfall 001 and discharge is not allowed through Outfall 002 and/or Outfall 003. Once CHS completes construction of the diffuser, notification to DEQ of the planned change in discharge location is required, in writing, at least 30 days in advance of re-directing the discharge. Upon such a notification, CHS will be authorized to discharge through the diffuser (Outfalls 002 and/or 003) and not Outfall 001 in accordance with this permit, without further permitting activities.

CHS will be required to notify DEQ of future outfall changes between Outfalls 001 and 002/003 as follows:

- Planned maintenance activities: notify DEQ in writing 30 days prior to changing the outfall used for discharge, including which outfall will be used and the expected starting and ending dates; and
- Emergencies: notify DEQ verbally within 24-hours and in writing seven days after changing the outfall used for discharge.

3. *Storm Water Management*

CHS Laurel Refinery has two outfalls for storm water which are currently covered under Montana storm water industrial general permit (GP) authorization MTR000099. In a DEQ letter to CHS dated August 13, 2018, DEQ required CHS Laurel Refinery to evaluate whether discharge from the two storm water outfalls that are currently authorized under the GP should be classified as "contaminated" and permitted under this individual MPDES permit or "uncontaminated" and eligible to remain authorized under the GP by no later than September 20, 2018. CHS complied with that requirement. Any further activities will be addressed separately.

E. Compliance Schedule

1. CHS shall meet the final effluent limits as follows:
   - Arsenic, total recoverable – November 1, 2022

- All other parameters – November 1, 2019

CHS Laurel Refinery shall submit an annual report addressing work performed and anticipated work to be completed to meet the final effluent limits. The annual report must be post-marked no later than January 28th of each year, and include actions taken in the previous year and planned actions for the upcoming year.

II. MONITORING, RECORDING AND REPORTING REQUIREMENTS

A. Representative Sampling

Samples taken in compliance with the monitoring requirements established under Part I of the permit shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge.

B. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under Part 136, Title 40 of the Code of Federal Regulations, unless other test procedures have been specified in this permit. All flow-measuring and flow-recording devices used in obtaining data submitted in self-monitoring reports must indicate values within 10 percent of the actual flow being measured.

C. Penalties for Tampering

The Montana Water Quality Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

D. Reporting of Monitoring Results

Monitoring results must be reported within a Discharge Monitoring Report (DMR). Monitoring results must be submitted electronically (NetDMR web-based application) no later than the 28th day of the month following the end of the monitoring period. Whole effluent toxicity (biomonitoring) results must be reported with copies of the laboratory analysis report on forms from the most recent version of EPA Region VIII's "Guidance for Whole Effluent Reporting." If no discharge occurs during the entire reporting period, "No Discharge" must be reported within the respective DMR.

All other reports must be signed and certified in accordance with Part IV.G 'Signatory Requirements' of this permit and submitted to DEQ at the following address:

Montana Department of Environmental Quality
Water Protection Bureau
PO Box 200901
Helena, Montana 59620-0901
Phone: (406) 444-5546

E. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of the permit must be submitted to the Department in either electronic or paper format and be postmarked no later than 14 days following each schedule date unless otherwise specified in the permit.

F. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using approved analytical methods as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency shall also be indicated.

G. Records Contents

Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;
2. The initials or name(s) of the individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The time analyses were initiated;
5. The initials or name(s) of individual(s) who performed the analyses;
6. References and written procedures, when available, for the analytical techniques or methods used; and
7. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

H. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Department at any time. Data collected on site, copies of Discharge Monitoring Reports, and a copy of this MPDES permit must be maintained on site during the duration of activity at the permitted location.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The permittee shall report any serious incidents of noncompliance as soon as possible, but no later than twenty-four (24) hours from the time the permittee first became aware of the circumstances. The report shall be made to the Water Protection Bureau at (406) 444-5546 or the Office of Disaster and Emergency Services at (406) 324-4777. The following examples are considered serious incidents:
   a. Any noncompliance which may seriously endanger health or the environment;
   b. Any unanticipated bypass which exceeds any effluent limitation in the permit (See Part III.G of this permit, "Bypass of Treatment Facilities"); or

c. Any upset which exceeds any effluent limitation in the permit (see Part III.H of this permit, "Upset Conditions").

2. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:

   a. a description of the noncompliance and its cause;

   b. the period of noncompliance, including exact dates and times;

   c. the estimated time noncompliance is expected to continue if it has not been corrected; and

   d. steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

3. The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Protection Bureau, by phone, (406) 444-5546.

4. Reports shall be submitted to the addresses in Part II.D of this permit, "Reporting of Monitoring Results".

J. Other Noncompliance Reporting

Instances of noncompliance not required to be reported within 24 hours shall be reported at the time that monitoring reports for Part II.D of this permit are submitted. The reports shall contain the information listed in Part II.I.2 of this permit.

K. Inspection and Entry

The permittee shall allow the head of the Department or the Director, or an authorized representative thereof, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance, any substances or parameters at any location.

III. COMPLIANCE RESPONSIBILITIES

A. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. The permittee shall give the Department or the Regional Administrator advance notice of any planned changes at the permitted facility or of an activity which may result in permit noncompliance.

B. Penalties for Violations of Permit Conditions

The Montana Water Quality Act provides that any person who violates a permit condition of the Act is subject to civil or criminal penalties not to exceed $10,000 per day of such violation. Any person who willfully or negligently violates permit conditions of the Act is subject to a fine of not more than $50,000 per day of violation, or by imprisonment for not more than 2 years, or both, for subsequent convictions. MCA 75-5-611(a) also provides for administrative penalties not to exceed $10,000 for each day of violation and up to a maximum not to exceed $100,000 for any related series of violations. Except as provided in permit conditions on Part III.G of this permit, "Bypass of Treatment Facilities" and Part III.H of this permit, "Upset Conditions", nothing in this permit shall be construed to relieve the permittee of the civil or criminal penalties for noncompliance.

C. Need to Halt or Reduce Activity not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

D. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit. However, the permittee shall operate, as a minimum, one complete set of each main line unit treatment process whether or not this process is needed to achieve permit effluent compliance.

F. Removed Substances

Collected screenings, grit, solids, sludges, or other pollutants removed in the course of treatment shall be disposed of in such a manner so as to prevent any pollutant from entering any waters of the state or creating a health hazard.

G. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Parts III.G.2 and III.G.3 of this permit.

2. Notice:

   a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least 10 days before the date of the bypass.

   b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required under Part II.I of this permit, "Twenty-four Hour Reporting".

3. Prohibition of bypass:

   a. Bypass is prohibited and the Department may take enforcement action against a permittee for a bypass, unless:

      1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

      2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

      3) The permittee submitted notices as required under Part III.G.2 of this permit.

   b. The Department may approve an anticipated bypass, after considering its adverse effects, if the Department determines that it will meet the three conditions listed above in Part III.G.3.a of this permit.

H. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with technology based permit effluent limitations if the requirements of Part III.H.2 of this permit are met. No determination made

during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review (i.e. Permittees will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with technology-based permit effluent limitations).

2. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

   a. An upset occurred and that the permittee can identify the cause(s) of the upset;

   b. The permitted facility was at the time being properly operated;

   c. The permittee submitted notice of the upset as required under Part II.I of this permit, "Twenty-four Hour Notice of Noncompliance Reporting"; and

   d. The permittee complied with any remedial measures required under Part III.D of this permit, "Duty to Mitigate".

3. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

I. Toxic Pollutants

The permittee shall comply with effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

J. Changes in Discharge of Toxic Substances

Notification shall be provided to the Department as soon as the permittee knows of, or has reason to believe:

1. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

   a. One hundred micrograms per liter (100 µg/L);

   b. Two hundred micrograms per liter (200 µg/L) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/L) for 2,4-dinitrophenol and for 2-methyl-4, 6-dinitrophenol; and one milligram per liter (1 mg/L) for antimony;

   c. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or

d. The level established by the Department in accordance with 40 CFR 122.44(f).

2. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

   a. Five hundred micrograms per liter (500 µg/L);

   b. One milligram per liter (1 mg/L) for antimony;

   c. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or

   d. The level established by the Department in accordance with 40 CFR 122.44(f).

IV. GENERAL REQUIREMENTS

A. Planned Changes

The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when the alteration or addition could significantly change the nature or increase the quantity of pollutant discharged. This notification applies to pollutants which are not subject to effluent limitations in the permit.

B. Anticipated Noncompliance

The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

C. Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

D. Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application must be submitted at least 180 days before the expiration date of this permit.

E. Duty to Provide Information

The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine whether cause exists for revoking, modifying and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit.

F. Other Information

When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to the Department, it shall promptly submit such facts or information with a narrative explanation of the circumstances of the omission or incorrect submittal and why they weren't supplied earlier.

G. Signatory Requirements

All applications, reports or information submitted to the Department or the EPA shall be signed and certified.

1. All permit applications shall be signed as follows:

   a. For a corporation: by a responsible corporate officer;

   b. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively;

c. For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official.

2. All reports required by the permit and other information requested by the Department shall be signed by a person described above or by a duly authorized representative of that person. A person is considered a duly authorized representative only if:

   a. The authorization is made in writing by a person described above and submitted to the Department; and

   b. The authorization specified either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or an individual occupying a named position.)

3. Changes to authorization. If an authorization under Part IV.G.2 of this permit is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part IV.G.2 of this permit must be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.

4. Certification. Any person signing a document under this section shall make the following certification:

> "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

H. Penalties for Falsification of Reports

The Montana Water Quality Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction be punished by a fine of not more that $25,000 per violation, or by imprisonment for not more than six months per violation, or by both.

I. Availability of Reports

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public

inspection at the offices of the Department. As required by the Clean Water Act, permit applications, permits and effluent data shall not be considered confidential.

J. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Clean Water Act.

K. Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges.

L. Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

M. Transfers

This permit may be automatically transferred to a new permittee if:

1. The current permittee notifies the Department at least 30 days in advance of the proposed transfer date;
2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them;
3. The Department does not notify the existing permittee and the proposed new permittee of an intent to revoke or modify and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in Part IV.M.2 of this permit; and
4. Required annual and application fees have been paid.

N. Fees

The permittee is required to submit payment of an annual fee as set forth in ARM 17.30.201. If the permittee fails to pay the annual fee within 90 days after the due date for the payment, the Department may:

1. Impose an additional assessment computed at the rate established under ARM 17.30.201; and,
2. Suspend the processing of the application for a permit or authorization or, if the nonpayment involves an annual permit fee, suspend the permit, certificate or authorization for which the fee is required. The Department may lift suspension at any time up to one year after the suspension occurs if the holder has paid all outstanding fees, including all penalties, assessments and interest imposed under this sub-section. Suspensions are limited to one year, after which the permit will be terminated.

O. Reopener Provisions

This permit may be reopened and modified (following proper administrative procedures) to include the appropriate effluent limitations (and compliance schedule, if necessary), or other appropriate requirements if one or more of the following events occurs:

1. Water Quality Standards: The water quality standards of the receiving water(s) to which the permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit.
2. Water Quality Standards are Exceeded: If it is found that water quality standards or trigger values in the receiving stream are exceeded either for parameters included in the permit or others, the department may modify the effluent limits or water management plan.
3. TMDL or Wasteload Allocation: TMDL requirements or a wasteload allocation is developed and approved by the Department and/or EPA for incorporation in this permit.
4. Water Quality Management Plan: A revision to the current water quality management plan is approved and adopted which calls for different effluent limitations than contained in this permit.
5. Toxic Pollutants: A toxic standard or prohibition is established under Section 307(a) of the Clean Water Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit.
6. Toxicity Limitation: Change in the whole effluent protocol, or any other conditions related to the control of toxicants have taken place, or if one or more of the following events have occurred:
    a. Toxicity was detected late in the life of the permit near or past the deadline for compliance.
    b. The TRE/TIE results indicated that compliance with the toxic limits will require an implementation schedule past the date for compliance.
    c. The TRE/TIE results indicated that the toxicant(s) represent pollutant(s) that may be controlled with specific numerical limits.
    d. Following the implementation of numerical controls on toxicants, a modified whole effluent protocol is needed to compensate for those toxicants that are controlled numerically.
    e. The TRE/TIE revealed other unique conditions or characteristics which, in the opinion of the Department, justify the incorporation of unanticipated special conditions in the permit.

V. DEFINITIONS

1. **"Act"** means the Montana Water Quality Act, Title 75, chapter 5, MCA.

2. **"Administrator"** means the administrator of the United States Environmental Protection Agency.

3. **"Acute Toxicity"** occurs when 50 percent or more mortality is observed for either species (See Part I.C of this permit) at any effluent concentration. Mortality in the control must simultaneously be 10 percent or less for the effluent results to be considered valid.

4. **"Arithmetic Mean" or "Arithmetic Average"** for any set of related values means the summation of the individual values divided by the number of individual values.

5. **"Average Monthly Limitation"** means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

6. **"Bypass"** means the intentional diversion of waste streams from any portion of a treatment facility.

7. **"Chronic Toxicity"** means when the survival, growth, or reproduction, as applicable, for either test species, at the effluent dilution(s) designated in this permit (see Part I.C.), is significantly less (at the 95 percent confidence level) than that observed for the control specimens.

8. **"Composite samples"** means a sample composed of four or more discrete aliquots (samples). The aggregate sample will reflect the average quality of the water or wastewater in the compositing or sample period. Composite sample may be composed of constant volume aliquots collected at regular intervals (simple composite) or flow proportioned.

9. **"Daily Discharge"** means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.

10. **"Daily Maximum Limit"** means the maximum allowable discharge of a pollutant during a calendar day. Expressed as units of mass, the daily discharge is cumulative mass discharged over the course of the day. Expressed as a concentration, it is the arithmetic average of all measurements taken that day.

11. **"Department"** means the Montana Department of Environmental Quality (DEQ). Established by 2-15-3501, MCA.

12. **"Director"** means the Director of the Montana Department of Environmental Quality.

13. **"Discharge"** means the injection, deposit, dumping, spilling, leaking, placing, or failing to remove any pollutant so that it or any constituent thereof may enter into state waters, including ground water.

14. **"EPA"** means the United States Environmental Protection Agency.

15. **"Federal Clean Water Act"** means the federal legislation at 33 USC 1251, *et seq*.

16. **"Grab Sample"** means a sample which is taken from a waste stream on a one-time basis without consideration of flow rate of the effluent or without consideration for time.

17. **"Instantaneous Maximum Limit"** means the maximum allowable concentration of a pollutant determined from the analysis of any discrete or composite sample collected, independent of the flow rate and the duration of the sampling event.

18. **"Instantaneous Measurement"**, for monitoring requirements, means a single reading, observation, or measurement.

19. **"Minimum Level"** (ML) of quantitation means the lowest level at which the entire analytical system gives a recognizable signal and acceptable calibration point for the analyte, as determined by the procedure set forth at 40 CFR 136. In most cases the ML is equivalent to the Required Reporting Value (RRV) unless otherwise specified in the permit. (ARM 17.30.702(22))

19. **"Mixing zone"** means a limited area of a surface water body or aquifer where initial dilution of a discharge takes place and where certain water quality standards may be exceeded.

20. **"Nondegradation"** means the prevention of a significant change in water quality that lowers the quality of high-quality water for one or more parameters. Also, the prohibition of any increase in discharge that exceeds the limits established under or determined from a permit or approval issued by the Department prior to April 29, 1993.

21. **"Regional Administrator"** means the administrator of Region VIII of EPA, which has jurisdiction over federal water pollution control activities in the state of Montana.

22. **"Severe property damage"** means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

23. **"TIE"** means a toxicity identification evaluation.

24. **"TMDL"** means the total maximum daily load limitation of a parameter, representing the estimated assimilative capacity for a water body before other designated uses are adversely affected. Mathematically, it is the sum of wasteload allocations for point sources, load allocations for non-point and natural background sources, and a margin of safety.

25. **"TRE"** means a toxicity reduction evaluation.

26. **"TSS"** means the pollutant parameter total suspended solids.

27. **"Upset"** means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

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: November 30, 2018

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 *Proposed Findings of Fact, Conclusions of Law and Order* (Proposed Order) on July 16, 2018. I also issued an Order on Exceptions that same day.

My Proposed Order depends on prior decisions made by the previous hearing examiner, Andres Haladay, based on Summary Judgement motions before him. Mr. Haladay issued his Summary Judgment order on August 1, 2017. Copper Ridge has taken exceptions to both my Proposed Order and Mr. Haladay's Summary Judgment order. The Board's materials for the December 7th meeting therefore include not only my Proposed Order, but also Mr. Haladay's Order on Summary Judgment, Copper Ridge's Exceptions Brief, and DEQ's Response Brief. Additionally, on November 26, 2018 (after DEQ filed its response), Copper Ridge filed an additional Motion to Strike portions of DEQ's response brief as untimely. That Motion is currently pending before the Board, and it is therefore also included in the Board materials.

In addition to the written materials, the parties can make oral arguments to the Board at the December 7th meeting.

Based on the written record and the oral arguments before the Board, it must decide, by seconded motion, what to do with my 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 Order on Summary Judgment and Proposed Order in their entirety and adopt them as the Board's final order;

(2) Accept the findings of fact in the Order on Summary judgment and Proposed Order, but modify the conclusions of law or interpretations of administrative rules in either; or

(3) Reject the Order on Summary judgment and/or the Proposed Order, review the entire record that was before the hearing examiner, find that the Proposed Order is not supported by substantial evidence, and modify the findings of fact and conclusions of law in the proposed order accordingly. This could mean a modified order on summary judgment, an order denying summary judgment and ordering a hearing, or some combination of the two.

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."[1] *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 memoralizing the Board's substantive decision, for the

[1] 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. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2005 MT 96, P17-26.

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.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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]

CASE NO. BER 2015-02 WQ

ORDER ON SUMMARY JUDGMENT

The Parties have filed cross motions for summary judgment and have had the opportunity for oral argument. Both Motions for Summary Judgment are granted in part and denied in part. A hearing is still necessitated in this matter, and a Scheduling Order is issued in conjunction with this Order, setting forth the process going forward.

FACTS

1. On September 9, 2013, DEQ conducted a compliance evaluation inspection at the Reflections at Copper Ridge (Reflections) and Copper Ridge Subdivisions.

2. DEQ documented areas with construction activity that it believed were not authorized under General Permit MTR 100000. DEQ observed clearing, grading, excavation, soil stockpiles, concrete washout areas, and sediment tracking on streets. DEQ documented that the subdivisions did not have Best Management Practices (BMPs) in place to control or mitigate the discharge of pollutants associated with storm water runoff from construction at the subdivisions.

3. On September 23, 2013, DEQ sent a Violation Letter to Gary Oakland of the Copper Ridge Development Corporation.

4. The letter stated "The Montana Department of Environmental Quality

(DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action."

5. The letter documented conditions observed at Copper Ridge and Reflections, on September 9, 2013.

6. DEQ conducted a CEI of construction disturbance observed within the respective subdivisions and the impact on storm water discharge into Cove Ditch.

7. DEQ concluded:

> Based on the facility site inspection and the documentation reviewed, the DEQ has determined that Copper Ridge Development Corporation is in violation of the following provisions of the Montana Water Quality Act:
>
> - Unauthorized discharge of wastes to state waters without a valid permit is a violation of 75-5-605(2)(c) of the Montana Code Annotated (MCA).
> - Causing pollution of state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters is a violation of 75-5-605(1)(1) [sic] MCA.

8. DEQ explained it was "initiating a formal enforcement action," and requested Copper Ridge Development Corporation complete corrective actions by October 18, 2013. DEQ further explained:

> this letter of violation is intended to inform Copper Ridge Development of the formal enforcement action and require corrective actions to demonstrate compliance with the Montana Water Quality Act. If Copper Ridge Development Corporation believes the facts stated in this letter are inaccurate or the necessary corrective actions are not achievable by the required dates please contact me upon receipt of this letter. DEQ will take into consideration any documentation that indicates the violations did not occur, or that they occurred differently than described above.

9. On December 17, 2013, DEQ received a Notice of Intent (NOI) and Storm Water Pollution Prevention Plan (SWPPP) from both Copper Ridge and Reflections.

10. Section C of the NOI and SWPPP forms provides for the

"Owner/Operator" to provide information.

11. On both the NOI and SWPPP, Reflections identified itself as the "Owner/Operator."

12. On the NOI, Reflections described the construction activity as "construction of new single-family homes and the necessary landscaping to complete the third and fourth filing of the Copper Ridge subdivision. A material stockpiling area (containing the proposed concrete washout area) in the area of the Fifth filing as well as five lots in the first filing that have not yet achieved final stabilization have also been included in this SWPPP area."

13. On both the NOI and SWPPP, Copper Ridge identified itself as the "Owner/Operator."

14. On the NOI, Copper Ridge described its construction activity as "construction of new single-family homes and the necessary landscaping to complete the first, second and third filing of the Reflection at Copper Ridge subdivision."

15. On the SWPPP, Copper Ridge described the project as "construction of single-family homes and establishment of vegetation.

16. On October 21, 2014, DEQ conducted a phase I storm water CEI inspection for Copper Ridge and Reflections at Copper Ridge.

17. On December 9, 2014, DEQ sent Violation Letters to Copper Ridge and Reflections at Copper Ridge, by certified mail.

18. The Violation Letters noted a violation for "[f]ailure to conduct inspections at required intervals in violation of § 75-5-605(1)(b), MCA, Administrative Rules of Montana (ARM) 17.30.1342(a), and Part 2.3 of the General Permit for Storm Water Discharges Associated with Construction Activity."

19. The Violation Letters also noted a violation for "[f]ailure to retain and

make available records listed in 2.5 of Permit No. MTR100000, including the complete signed NOI and the latest signed SWPPP in violation of Section 75-5-605(1)(b), MCA, ARM 17.30.1342(a), and Part 2.5 of Permit No. MTR100000."

20. The Violation Letters also noted a violation for "[f]ailure to maintain a SWPPP that describes the intended sequence of construction activity; that provides an implementation schedule; and that clearly describes the relationship between each phase of construction and the best management practices (BMPs) to be employed in violation of Section 75-5-605(1)(b), MCA, ARM 17.30.1342(a), and Part 3 of Permit No. MTR100000."

21. Finally the Violation Letters noted a violation for "[f]ailure to properly design, install and maintain effective BMPs in violation of § 75-5-605(1)(b), MCA, ARM 17.30.1342(1), and Parts 2.1, 3.1 and 3.7 of Permit No. MTR 100000."

22. The Violation Letters concluded:

> The purpose of this letter is to provide you with notice that you are in violation of the Montana Water Quality Act, rules adopted under that act, and permit requirements, all of which require your compliance. If you fail to respond to this letter by addressing the above-listed violations in a timely manner, you may be subject to administrative or civil enforcement actions to compel compliance and seek penalties.

23. On March 27, 2015, DEQ served Reflections at Copper Ridge and Copper Ridge with respective Administrative Compliance and Penalty Orders.

24. The respective Penalty Orders identified four violations by Copper Ridge and Reflections at Copper Ridge.

25. First, DEQ stated the subdivisions "violated ARM 17.30.1105 from 2006 until December 23, 2013, by conducting construction activities that discharged storm water to state waters prior to submitting an NOI."

26. Second, DEQ stated the subdivisions "violated 75-5-605(2)(c), MCA,

from at least 2006 to December 23, 2013 by illicitly discharging water associated with construction activities to state water without a permit."

27. Third, DEQ stated the subdivisions "violated Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settleable solids, and other debris above levels that are naturally occurring in the state surface waters."

28. Fourth, DEQ stated the subdivisions violated "75-5-605(1)(b), MCA," for violating conditions of the General Permit.

29. Additional facts are interposed, as necessary, throughout resolution of the individual arguments.

ANALYSIS

The parties have filed cross-motions for summary judgment. Copper Ridge and Reflections moved for summary judgment on the following bases:

1. All alleged violations should be dismissed because neither Copper Ridge nor Reflections constitute an owner or operator.
2. All alleged violations should be dismissed because Copper Ridge and Reflections did not discharge to state waters without a permit.
3. The third alleged violation should be dismissed because Copper Ridge and Reflections did not place waste where it would cause pollution.
4. All alleged violations should be dismissed because DEQ did not comply with mandatory notice provisions.
5. DEQ cannot assess administrative penalties because it did not comply with mandatory notice provisions.

DEQ has moved for partial summary judgment to establish liability for all four alleged violations. DEQ has not moved for summary judgment regarding appropriate corrective action and penalty amounts.

I. DEQ MET ITS NOTICE REQUIREMENTS WITH REGARD TO THE

SECOND, THIRD AND FOURTH ALLEGED VIOLATIONS AGAINST COPPER RIDGE AND REFLECTIONS.

Copper Ridge and Reflections have argued DEQ did not comply with Mont. Code Ann. §§ 75-5-617, 75-5-611 and ARM 17.30.2003 (now repealed). The analysis will begin with these three statutes because, if Copper Ridge's Motion is granted no further substantive analysis will be required for the respective alleged violation.

A. The September 23, 2013 and December 9, 2014 Letters Satisfied the Requirements of Mont. Code Ann. § 75-5-617(2).

Reflections and Copper Ridge argue DEQ did not issue a letter notifying them of alleged violations as required by Mont. Code Ann. § 75-5-617(2). Montana Code Ann. § 75-5-617(1) provides that whenever DEQ finds a person in violation of Title 75, Chapter Five, "a rule adopted under this chapter, or a condition or limitation in a permit, authorization, or order issued under this chapter, the department shall initiate an enforcement response." An enforcement response includes administrative or judicial penalties under Mont. Code Ann. § 75-5-611. Mont. Code Ann. § 75-5-617(1)(d). Mont. Code Ann. § 75-5-617(2) places a notice limitation on enforcement responses: "Unless an alleged violation represents an imminent threat to human health, safety, or welfare or to the environment, the department shall first issue a letter notifying the person of the violation and requiring compliance. If the person fails to respond to the conditions in the department's letter, then the department shall take further action as provided in subsection (1)." Based on the plain language of this statute, DEQ may not bring an administrative proceeding for penalties unless the notice requirements are met.

On September 23, 2013, DEQ notified Copper Ridge and Reflections at Copper Ridge of three of the four alleged violations that form the basis for administrative penalties in this matter: (1) conducting construction activities that discharged storm water into state waters prior to submitting an NOI, discharging

water associated with construction activities to state water without a permit, and (3) placing waste where it will cause pollution. The September 23, 2013 letter notified Copper Ridge and Reflections at Copper Ridge that part of the corrective action was to "implement and maintain the SWPPP in accordance with the general permit for Storm Water Discharges Associated with Construction Activity." Furthermore, Copper Ridge and Reflections at Copper Ridge were to "[c]omply with the provision of the general permit for Storm Water Discharges Associated with Construction Activity." In addition, Reflections and Copper Ridge were instructed to implement BMPs to control pollutants associated with construction activity,

On December 9, 2014, DEQ notified Copper Ridge and Reflections at Copper Ridge of observed non-compliance with the General Permit for Storm Water Discharges Associated with Construction Activity. DEQ also notified Copper Ridge and Reflections at Copper Ridge that they had failed to design, install and maintain effective BMPs. Despite DEQ's finding of non-compliance with the corrective actions requested in the September 23, 2013 Letter, DEQ gave Copper Ridge and Reflections further time to correct these alleged violations.

Based on the foregoing, DEQ complied with Mont. Code Ann. § 75-5-617(2). On two occasions, DEQ provided Reflections and Copper Ridge with notices of violation and conditions of compliance. DEQ's violation letters notified Copper Ridge and Reflections the Department considered them out of compliance with their storm water discharge permit obligations, notified them of the salient statutes, permit provisions and administrative rules, and informed them of the necessary corrective action. DEQ complied with Mont. Code Ann. § 75-5-617(2) and was permitted to undertake an enforcement response as provided in Mont. Code Ann. § 75-5-617(1).

B. Compliance with Mont. Code Ann. § 75-5-611.

Reflections and Copper Ridge next argue DEQ did not comply with the procedural provisions of Mont. Code Ann. § 75-5-611 and cannot pursue administrative penalties. Mont. Code Ann. § 75-5-611(1) provides:

> When the department has reason to believe that a violation of this chapter, a rule adopted under this chapter, or a condition of a permit or authorization required by a rule adopted under this chapter has occurred, it may have a written notice letter served personally or by certified mail on the alleged violator or the violator's agent.

The written notice letter must state specific information. Mont. Code Ann. § 75-5-611(1)(a-e). DEQ may not assess an administrative penalty until the specific provisions of Mont. Code Ann. § 75-5-611(1)(a-e) have been satisfied. Mont. Code Ann. § 75-5-611(1)(e). It is undisputed DEQ did not provide a written notice letter to Reflections or Copper Ridge prior to issuing the Administrative Order and Notice of Violation.

However, Mont. Code Ann. § 75-5-611(2) provides an exception to the above notice rule. Mont. Code Ann. § 75-5-611(2)(a)(ii) provides, "[t]he department may issue an administrative notice and order in lieu of the notice letter provided under subsection (1) if the department's action... seeks an administrative penalty only for an activity that it believes and alleges has violated or is violating 75-5-605." Therefore, if the alleged violations in DEQ's Administrative Compliance and Penalty Order only seek penalties for activities DEQ believes and alleges violate Mont. Code Ann. § 75-5-605, DEQ will have complied with the procedural provisions of Mont. Code Ann § 75-5-611. The Department has alleged four violations against Copper Ridge and Reflections respectively. Three of the alleged violations satisfy Mont. Code Ann. § 75-5-611(2)(a)(ii) on their face: the second, third and fourth.

C. The Second, Third and Fourth Violations Alleged Violations of

Mont. Code Ann. § 75-5-605.

DEQ's second alleged violation states Copper Ridge and Reflections "violated 75-5-605(2)(c), MCA, from at least 2006 to December 23, 2013 by illicitly discharging water associated with construction activities to state water without a permit." This is a facial allegation of a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

DEQ's fourth alleged violation states that Copper Ridge and Reflections, "violated 75-5-605(1)(b), MCA, by violating provisions of the general permit. Like the second violation, discussed above, this is a facial allegation of a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

DEQ's third alleged violation states Copper Ridge and Reflections "violated Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settleable solids, and other debris above levels that are naturally occurring in the state surface waters." Regardless the references to administrative rules, this alleges a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

D. The First Alleged Violation Did Not Allege a Violation of Mont. Code Ann. § 75-5-605.

DEQ's first alleged violation states Copper Ridge and Reflections "violated ARM 17.30.1105 from 2006 until December 23, 2013, by conducting construction activities that discharged storm water to state waters prior to submitting an NOI."

DEQ asserts "ARM 17.30.1105 provides storm water permit requirements and violation of ARM 17.30.1105 is a violation of § 75-5-605." DEQ asserts, "[v]iolation of ARM 17.30.1105, discharge without a permit, is the act prohibited by § 75-5-605(2), MCA."

A violation of ARM 17.30.1105 is not a violation of § 75-5-605. When ARM 17.30.1105 was promulgated, the only statutes cited as authority were Mont. Code Ann. §§ 75-5-201 and 75-5-401. More importantly, the only implementing statute cited was 75-5-401. Had DEQ or the BER intended violations of ARM 17.30.1105 to constitute violations of Mont. Code Ann. § 75-5-605, it could have been explicitly stated. In the absence of a reference to Mont. Code Ann. § 75-5-605, it does not appear a violation of ARM 17.30.1105 constitutes a violation of § 75-5-605.

Furthermore, Mont. Code Ann. § 75-5-611(1) provides "when the department has reason to believe that a violation of this chapter, *a rule adopted* under this chapter or…" (emphasis added). There is no question that ARM 17.30.1105 was adopted pursuant to Mont. Code Ann. §§ 75-5-201 and 75-5-401. ARM 17.30.1105 was not adopted pursuant to Mont. Code Ann. § 75-5-605. This makes alleged violations of ARM 17.30.1105 subject to the general notice requirement under 75-5-611(1), *prior* to seeking an administrative penalty.

Moreover, DEQ's argument is basically that a violation of Mont. Code Ann. § 75-5-605(2)(c) is identical to a violation of ARM 17.30.1105(1)(a). A cursory reading of the two provisions demonstrates they are not identical. Moreover, if DEQ's argument was accepted, it would essentially permit duplicative violations, allowing DEQ to bring a violation of Mont. Code Ann. § 75-5-605 twice: once for a violation of Mont. Code Ann. § 75-5-605(2)(c) and once for violation of ARM 17.30.1105(1)(a). This would be superfluous or redundant charge stacking, does not make sense, and would attempt to work-around any statutory caps on maximum

damages. *See* Mont. Code Ann. § 75-5-611(9)(d).

Based on the foregoing, DEQ was required to comply with Mont. Code Ann. § 75-5-611(1)(a-e) to provide Copper Ridge and Reflections notice of the alleged violations of ARM 17.30.1105. The exception under Mont. Code Ann. § 75-5-611(2)(a)(ii) did not apply because a violation of 17.30.1105 is not a violation of Mont. Code Ann. § 75-5-605. As a result "an administrative penalty may not be assessed until the provision of [Mont. Code Ann. § 75-5-611(1)] have been complied with." DEQ may not seek an administrative penalty for violation of ARM 17.30.1105.

E. DEQ's Second, Third and Fourth Alleged Violations, all Allege Violations of Major Extent and Gravity, Class I Violations, or Both.

Copper Ridge and Reflections moved for Summary Judgment based on DEQ's failure to comply with notice requirements contained in ARM 17.30.2003. DEQ served the Notices of Violation and Administrative penalty in March of 2015. At that time ARM 17.30.2003 was in effect. ARM 17.30.2003 was repealed on March 19, 2016. The procedures set forth in ARM 17.30.2003 applied to initiation of an administrative proceeding against Copper Ridge and Reflections.

ARM 17.30.2003 imposed greater requirements on DEQ than Mont. Code Ann. § 75-5-611. Instead of merely parroting the exception contained in Mont. Code Ann. § 75-5-611(2)(a)(ii), this administrative rule imposed additional requirements before DEQ could seek an administrative penalty for violations of Mont. Code Ann. § 75-5-605. Subsection 7 provided:

> In lieu of the notice letter under (2), the department may issue an administrative notice together with an administrative order if the department's action:
>
> (a) does not involve assessment of an administrative penalty; or
>
> (b) seeks an administrative penalty only for an activity that the

> department believes and alleges was or is a violation of 75-5-605, MCA, and the violation was or is:
> (i) a class I violation as described in ARM 17.30.2001(1); or
> (ii) a violation of major extent and gravity as described in ARM 17.4.303.

ARM 17.30.2003(7). Even for alleged violations of Mont. Code Ann. § 75-5-605, DEQ was required to provide prior notice unless DEQ alleged (1) a class I violation, or (2) a violation of major extent and gravity.

DEQ's second alleged violation alleged a violation of major extent and gravity, and a Class I violation. DEQ's third alleged violation alleged a violation of major extent and gravity. The fourth alleged a Class I violation. The first alleged violation will not be addressed because it did not allege a violation of Mont. Code Ann. § 75-5-605.

F. Violation 2 Alleged a Violation of Major Extent and Gravity and a Class I Violation.

DEQ alleged a violation of Mont. Code Ann. § 75-5-605(2)(c) for "discharging storm water into the state waters without a permit." DEQ explained the basis for its Extent and Gravity analysis. It determined the Extent and Gravity factor was .85, which constitutes a violation of major gravity and extent.

Furthermore, at the time this proceeding was filed, it was a Class I violation to discharge waste into state waters without a permit. ARM 17.30.2001(1)(b) (now repealed). DEQ's second alleged violation alleged both a Class I violation and a violation of major extent and gravity. As a result, ARM 17.30.2003(7) did not impose any additional notice requirements before issuing the Administrative Compliance and Penalty Orders.

G. Violation 3 Alleged a Violation of Major Extent and Gravity

DEQ's Notice of Violation and Administrative Penalty alleged a violation of Mont. Code Ann. § 75-5-605(1)(a) for placing waste where it will cause pollution. DEQ explained the basis for its Gravity and Extent analysis. It determined the

Extent and Gravity factor was .85, which constitutes a violation of major Extent and Gravity. Therefore, DEQ's second alleged violation alleged a violation of major Extent and Gravity. As a result, ARM 17.30.2003(7) did not impose any additional notice requirements before issuing the Administrative Compliance and Penalty Orders.

H. Violation 4 Alleged a Class I Violation.

The Administrative Compliance and Penalty Orders asserted a violation of Mont. Code Ann. § 75-5-605(1)(b) for a host of sections in the general permit. At the time DEQ issued the Administrative Compliance and Penalty Orders it was a Class I violation to "violate a permit compliance plan or schedule." ARM 17.30.2001(1)(d) (Repealed March 19, 2016). All of the alleged violations of the permit are violations of a permit compliance plan or schedule. This is an alleged violation of a Class I violation. As a result, ARM 17.30.2003(7) did not impose any additional notice requirements before issuing the Administrative Compliance and Penalty Orders.

II. COPPER RIDGE AND REFLECTIONS ARE OWNERS OR OPERATORS.

"Any person who discharges or proposes to discharge storm water from a point source must obtain coverage under an MPDES general permit or another MPDES permit for discharges…associated with construction activity." ARM 17.30.1105(1)(a). "A person who discharges or proposes to discharge storm water associated with construction activity shall submit to the department a notice of intent (NOI) as provided in this rule." ARM 17.30.1115(1). The NOI must be signed by either the owner or operator, or both. ARM 17.30.1115(1)(a). The phrase, "storm water discharge associated with construction activity" is defined as:

> a discharge of storm water from construction activities including

> clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more.

ARM 17.30.1102(28). "Owner or operator," is defined as "a person who owns, leases, operates, controls or supervises a point source." Mont. Code Ann. § 75-5-103(26). The parties disagree regarding whether Copper Ridge or Reflections is an owner or operator.

Reflections and Copper Ridge propose too narrow a definition of Owner and operator, generally limiting their arguments to ownership, lease and operations. Mont. Code Ann. § 75-5-103(26) also defines a owner or operator as someone who "controls or supervises a point source." Furthermore, Copper Ridge and Reflections focus too heavily on construction of homes, rather than the more expansive statutory definition of "storm water discharge associated with construction activity."

Reflections and Copper Ridge were the original owners and developers of all land in their respective subdivisions. Construction activities, including clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects, resulted in disturbance equal to or greater than one acre of total land area at the respective subdivisions. These construction activities were initiated in 2006, in the respective subdivisions. These construction activities were undertaken with the eventual goal of the sale of individual lots for residential home construction.

Copper Ridge and Reflections admit that they entered into at least one contract that required "all excess material from pipe and bedding displacement shall be left on site." Therefore, not only did Copper Ridge and Reflections have supervision and control over the actions of third parties, they acted on their ability to

instruct others how to engage in stockpiling of materials, an act expressly contained in the definition of "construction activities." This put Copper Ridge and Reflections in a position of either control or supervision with regard to the terms of sale of any individual lot for construction of residential homes. Any argument to the contrary ignores the common sense and practical reality of development of a residential subdivision. The mere fact that neither Copper Ridge nor Reflections exercised supervision or control over the contractual terms of the sale of land, does not change the fact that they had the power to supervise or control land with regard to storm water discharges. In addition, on September 9, 2013, DEQ observed "clearing, grading, excavation, soil stockpiles, concrete washout areas, and tracking on streets."

Moreover, Reflections and Copper Ridge conceded their owner or operator status when they filed their December 23, 2013, SWPPs and NOIs, respectively. Both Reflections and Copper Ridge expressly acknowledged they were the owner or operator for construction activities. The affidavit produced by Landy Leep does not create a material dispute of fact. Leep attempts to characterize the intent behind his signature on the SWPPPs and the NOIs. However, the documents themselves are undisputed for the purposes of summary judgment and the admissions made by Copper Ridge and Reflections that they were the owners or operators. Based on the foregoing, Reflections and Copper Ridge were owners or operators with regard to construction activities at their respective subdivisions.

III. DEQ HAS ESTABLISHED COPPER RIDGE AND REFLECTIONS DISCHARGED STORM WATER TO STATE WATERS WITHOUT A PERMIT.

It is "unlawful to carry on any of the following activities without a current permit from the department…discharge sewage, industrial wastes or other wastes into any state waters." Mont. Code Ann. § 75-5-605(2)(c). DEQ has alleged Copper Ridge and Reflections violated this statute by "discharging storm water

associated with construction activities to state water without a permit" from at least 2006 to December 23, 2013. The parties dispute whether storm water detention ponds are treated as State waters and whether overspills from the detention ponds, to state waters, constitutes a discharge into state waters.

This is all beside the point. DEQ has provided an affidavit of Dan Freeland who conducted the September 9, 2013 CEIs at Reflections and Copper Ridge. Freeland stated that he "documented and observed discharges of storm water from Reflections at Copper Ridge and from Copper Ridge subdivisions through *direct overland flow* and through swales, storm drains and drainage ditches into Cove Ditch, which is state water." (emphasis added). Freeland's personal observations have not been disputed on summary judgment.

Regardless the Parties' disputes over state waters and the effect of the overfilling of the detention ponds, there is no dispute that Freeland documented and observed discharges of storm water that traveled over land, into Cove Ditch, a state water. As a result, DEQ has established Reflections and Copper Ridge discharged storm water into state waters, without a permit, a violation of Mont. Code Ann. § 75-5-605(2)(c). DEQ is entitled to summary judgment on its second alleged violation.

IV. THERE IS A DISPUTE OF MATERIAL FACT REGARDING THE ALLEGED VIOLATION OF MONT. CODE ANN. § 75-5-605(1)(a).

"It is unlawful to…cause pollution, as defined in 75-5-103, of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters…" Mont. Code Ann. § 75-5-605(1)(a). DEQ alleged both Reflections and Copper Ridge violated this statute, from at least May 2012, to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settable solids and other debris above levels that are naturally

occurring in state surface waters. Copper Ridge and Reflections argue that there is no evidence that Copper Ridge or Reflections placed waste within the subdivisions and DEQ lacks an expert to testify that the waste could cause pollution.

There is sufficient evidence that Reflections and Copper Ridge placed or caused to be placed wastes. On September 9, 2013, Dan Freeland observed stockpiling of materials, concrete washout, sediment waste tracked onto impervious surfaces, sediment and debris on the bank of Cove Ditch, accumulated sediment on the sidewalk and grass area of the city park areas, and sediments on the streets and storm drains throughout Reflections and Copper Ridge. All of this meets the definition of "other wastes" contained in Mont. Code Ann. § 75-5-103(24).

In addition, DEQ does not necessarily require expert testimony to establish the placement of wastes could cause pollution. In pertinent part, "pollution" is defined as:

> (i) contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or
> (ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

Mont. Code Ann. § 75-5-103(30).

Expert testimony is often required when the subject matter is outside of the common experience of the trier of fact and the expert testimony will assist the trier of fact in determining the issue or understanding the evidence. *Dubiel v. Mont. DOT*, 2012 MT 35, 364 Mont. 175, 272 P.3d 66. However, in a MAPA contested case proceeding, "[n]otice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge." Mont. Code Ann. § 2-4-612(6). In addition, the

"agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." Mont. Code Ann. § 2-4-612(7).

Based on the definition of "pollution" and Mont. Code Ann. § 2-4-612(6) and (7), there is no per se requirement that DEQ identify an expert. DEQ's exhibits and the testimony of its personnel, with their specialized knowledge, appears to be sufficient to provide evidence of alleged pollution, as defined by statute. DEQ is not required to present expert testimony in order to establish Reflections or Copper Ridge placed, or caused to be placed, waste in a manner that could cause pollution of state waters.

That said, DEQ has not met its burden to establish it is entitled to judgment as a matter of law. The first prong of "pollution" requires DEQ to establish some form of alteration of state waters "that exceeds that permitted by Montana water quality standards." Mont. Code Ann. § 75-5-103(30)(i). DEQ has not provided any evidence of permitted water quality standards at this time. As a result, DEQ has not established pollution under the first prong of the definition.

The second prong of "pollution" requires DEQ to establish that a substance has entered state water that will either create a nuisance or "render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife." Mont. Code Ann. § 75-5-103(30)(ii). While DEQ has established the placement of waste, DEQ has not identified the facts to establish or explain how this waste will create a nuisance or otherwise cause the harm required in the definition of "pollution." As a result, DEQ is not entitled to summary judgment on this alleged violation.

V. DEQ IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON ITS CLAIM THAT COPPER RIDGE AND REFLECTIONS VIOLATED THE CONDITIONS OF THE GENERAL PERMIT.

DEQ's fourth alleged violation is that Reflections and Copper Ridge violated Mont. Code Ann. § 75-5-605(1)(b), for violating provisions contained within the General Permit. As a threshold matter, Reflections and Copper Ridge cannot rely on their defense that they are not an owner or operator. Reflections and Copper Ridge provided their respective SWPPPs and NOIs in December of 2013. Resolution of this alleged violation is separate and distinct from the alleged violations in the absence of a permit. Although Reflections and Copper Ridge constituted owners or operators, that legal determination is not necessary for the resolution of this fourth alleged violation.

As of December 17, 2013, Reflections and Copper Ridge agreed to follow the terms and conditions of the General Permit. It is undisputed they entered the NOIs and SWPPPs and undertook the obligations contained in the general permit. Therefore, even if one accepted Reflections and Copper Ridge's argument as true – that they are not owners or operators – this alleged violation could still proceed because they agreed to abide by the provisions of the general permit. Their alleged violations of any specific provisions are divorced from their status as an owner or operator.

DEQ provided undisputed testimony that on October 21, 2014, Dan Freeland and Chris Romankiewicz conducted a CEI as Reflections and Copper Ridge. Freeland and Romankiewicz observed:

(1) the SWPPP administrator failed to conduct site inspection every seven days in accordance with the inspection schedule in the SWPPP, a violation of Section 2.3 of the general permit.

(2) The SWPPP had not been developed in accordance with good engineering practices and had not been updated to reflect current onsite conditions, a violation of Sections 3.1.1 and 3.1.3 of the general permit.

(3) The SWPPP administrator had failed to maintain records at the site where they could be made available to the DEQ Inspectors upon request, a violation of Section 2.5 of the general permit.

(4) Best management practices were not implemented to control and mitigate discharges of sediment and other pollutants from construction related activities, violations of Sections 2.1.1 and 2.1.4 of the general permit.

Freeland and Romankiewicz's observations were memorialized in (1) a December 9, 2014 letter to Reflections and Copper Ridge, (2) an MPDES Compliance Inspection report for each subdivision, and (3) a Storm Water Construction Inspection Report for each subdivision.

Copper Ridge and Reflections have not disputed Freeland and Romankiewicz's observations and factual allegations. DEQ has met its burden to establish violations of provisions of the General Permit, a violation of Mont. Code Ann. § 75-5-605(1)(b). DEQ is entitled to partial summary judgment on the fourth alleged violation in the Administrative Compliance and Penalty Order.

CONCLUSION

Both parties' cross Motions for Summary Judgment are granted in part and denied in part:

(1) Copper Ridge and Reflections' Motions are GRANTED with regard to its argument that DEQ cannot seek administrative penalties for a violation of ARM 17.30.1105.

(2) Copper Ridge and Reflections' Motions for summary judgment are DENIED in all other aspects.

(3) DEQ's Motion for Partial Summary Judgment is GRANTED with regard to the violations of Mont. Code Ann. § 75-5-605(2)(c), discharge of waste into state waters and 75-5-605(1)(b), violation of provisions set forth in a permit.

(4) DEQ's Motion for Partial Summary Judgment is DENIED with regard to alleged violation of ARM 17.30.1105.

(5) DEQ's Motion for Partial Summary Judgment is DENIED with regard to alleged violation of 75-5-605(1)(a).

DATED this 1st day of August, 2017.

/s/ Andres Haladay
ANDRES HALADAY
Hearing Examiner
Agency Legal Services Bureau
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CERTIFICATE OF SERVICE

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

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DATED: August 1, 2017 /s/ Andres Haladay

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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]	**CASE NO. BER 2015-01 WQ**
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE, DEVELOPMENT CORPORTATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105377) [FID 2289, DOCKET NO. WQ-15-08]	**CASE NO. BER 2015-02 WQ**

HEARING EXAMINER'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW TO THE BER

On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC (CR/REF) filed a Notice of Appeal and Request for Hearing based on the Administrative Compliance and Penalty Orders (AOs) issued by Department of Environmental Quality (DEQ). A three-day hearing was held February 26-28, 2018. This matter is fully briefed and ready for disposition.

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INTRODUCTION

This case has been frustrating for many reasons. First, the factual record provided by both parties—even after summary judgment briefing and a three-day hearing—often left the undersigned struggling to answer questions vital to the case. Second, neither party came to this proceeding with clean enough hands to justify either awarding or avoiding a penalty. DEQ's performance—including its inspections, record-keeping, notices, communication, enforcement decisions, follow up, and the evidence, testimony, and explanations provided at the hearing—were difficult to understand and in some instances inadequate. CR/REF, however, were not much better, often seeming to at least passively use DEQ's inaction as an excuse to shirk their responsibility and care for the environment, without proactively ensuring they had the requisite coverage (or clearance) from DEQ for their operations. For these reasons, the undersigned has struggled to find any satisfactory resolution to this case that might deter such conduct in the future by both sides.

FINDINGS OF FACT

1. Copper Ridge, and Reflections at Copper Ridge, are two subdivisions located in the City of Billings, Yellowstone County, Montana (collectively, Copper Ridge Subdivisions or CR/REF). Joint Stipulated Facts (JSF) ¶ 1.

2. The City of Billings is the owner and operator of a municipal separate storm sewer system (MS4). The City is authorized to discharge storm water to state waters under the Montana Pollutant Discharge Elimination System ("MPDES") General Permit for Storm Water Discharge Associated with Small Municipal Separate Storm Sewer Systems (General Permit No. MTR040000). The City MS4 conveys storm water to state surface water through publicly owned storm water conveyance and drainage systems. The City MS4 ultimately discharges storm water to the Yellowstone River, a state water. JSF ¶ 2.

3. The Department of Environmental Quality (DEQ or Department) issues the MPDES General Permit for Storm Water Discharges Associated with Construction Activity (General Permit No. MTR100000). Unless administratively extended, General Permit No. MTR 100000 is issued for five-year periods. Relevant to this matter, General Permit No. MTR100000 was effective January 1, 2013, through December 31, 2017. JSF ¶ 3.

4. On March 26, 2013, the City contacted DEQ to request assistance in addressing noncompliance with storm water requirements at Copper Ridge. DEQ informed the City that construction activities at Copper Ridge were not covered by General Permit No. MTR100000. JSF ¶ 4.

5. The construction activities permitted under previous MPDES permit authorizations at CR/REF included construction of water, sanitary sewer, and

storm drainage utilities, and street and sidewalk improvements and the Storm Water Pollution Prevention Plans (SWPPP) associated with these permits did not included controls for construction activity on residential lots. Ex. A at 3; Ex. B at 3; Ex. C at 4; Hearing Transcript (Tr.) Vol. II (February 27, 2018), 62:4, 102:8 – 21; DEQ Proposed Findings of Fact (DEQ) ¶ 12; CR/REF Response to DEQ's Finding of Fact (CR Resp.) ¶ 1.

6. DEQ terminated the previous permit for construction activity in the Copper Ridge Subdivisions (MTR104590) in December 2012 without first notifying Copper Ridge. JSF ¶ 5.

7. Ground disturbance at the Copper Ridge Subdivisions each involve greater than one acre including all areas that are part of a "larger common plan of development or sale," as that phrase is used in General Permit No. MTR100000 and in ARM 17.30.1102(28). JSF ¶ 8.

8. On September 7, 2013, there was a significant storm event in and around Billings, MT. Ex. 14.

9. The following day, the Billings Gazette published a story about the effects of the storm that included some discussion of the conditions in the Copper Ridge Subdivisions during and after the storm. Ex. 14; Tr. Vol. I (February 26, 2018) 50:25-53:03.

10. Based on the Gazette's report, DEQ compliance inspector Dan Freeland decided to visit CR/REF and conduct an inspection. Tr. Vol. I 50:25-53:03.

11. Two days after the storm event Freeland conducted an inspection of the Copper Ridge Subdivisions. JSF ¶ 6.

12. During the September 9, 2013 inspection, DEQ observed and documented sediment tacking on the streets and concrete waste washed on to the ground. Tr. Vol. I, 54:21-56:4, 73:10-19, 74:1-6, 74:14-20, 74:24-75:8, 173:16-20; Ex. 15; CR/REF Proposed Findings of Fact (CR) ¶ 16; DEQ ¶ 16.

13. DEQ also observed and documented (with photographs provided a the hearing) stockpiled waste soil and areas of ground disturbance uncontrolled by Best Management Practices (BMPs) to mitigate contact with storm water; evidence that sediment and construction debris had been washed with storm water from the subdivisions toward Cove Ditch; evidence that concrete waste had been washed on to the ground with no containment; sediment in the storm drains, in the streets and on the sidewalks as a result of uncontrolled storm water discharges. Ex. 2 at DEQ 000039 – 000040, DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Tr. Vol. I, 71:2 – 77:18; DEQ ¶ 19; CR Resp. ¶ 1.

14. On September 23, 2013, DEQ sent CR, through Gary Oakland, a letter. JSF ¶ 7; Ex. 2.

15. The letter stated, "The Montana Department of Environmental Quality (DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action." Tr. Vol. I, 65:24–66:8; Ex. 2 at DEQ 000038 – DEQ 000040; DEQ ¶ 18; CR Resp ¶ 1.

16. In a September 27, 2013 letter, CR/REF provided clarification to DEQ regarding ownership information and sought to distinguish the violations based on the separate subdivisions, CR and REF. Ex. 12; Tr. Vol. I, 79:21-80:15, 83:8-83:16; CR ¶ 2; DEQ ¶¶ 20, 22.

17. In an October 8, 2013 letter responding to CR/REF's September 27, 2013 correspondence, Mr. Freeland explained that, based on his September 9, 2013 inspection, DEQ determined that the Copper Ridge Subdivisions were part of a greater common plan of development and one violation letter was adequate to address the violations at both subdivisions. Tr. Vol. I, 80:19-81:24; Ex. O; DEQ ¶ 21; CR Resp. ¶ 1.

18. CR/REF responded with letter on October 29, 2013 regarding ownership and again sought to distinguish the violations based on the separate subdivisions. Ex. 15; CR ¶ 2; DEQ ¶¶ 20, 22.

19. On November 8, 2013, DEQ issued another letter, which stated that violations at the CR were distinguishable from violations at REF. JSF ¶ 9

20. Within a timeframe acceptable to DEQ, Copper Ridge and Reflections at Copper Ridge each took the corrective action identified in the September 23, 2013 and November 8, 2013 letters from DEQ. JSF ¶ 10

21. On December 23, 2013, DEQ received Notice of Intent and SWPPPs from CR/REF (collectively, NOI package). DEQ Exs. 3-6; JSF ¶ 8; Tr. Vol. II, 59:9-21, 60:11-18.

22. On January 8, 2014, DEQ sent confirmation letters to REF issuing Permit No. MTR105376 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at REF, and to CR issuing Permit No. MTR105377 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at CR. JSF ¶ 11.

23. Permit No. MTR105376 and Permit No. MTR105377 were effective from the date DEQ received the NOI Package on December 23, 2013. Ex. 3; Ex. 4; Tr. Vol. I 95:23-96:10.

24. On March 7, 2014, Inspector Freeland sent an email to inspection and enforcement employees of DEQ stating, "I did not get to a lot of the new construction at [CR]. But I did document and photograph a few lots under construction and in one case there was a berm around the site and sand bags. There was also a house under construction which had straw bales on the perimeter. Appears to be an effort to control runoff from the individual lots I observed." Ex. V.

25. On October 21, 2014, DEQ conducted a scheduled inspection of CR/REF. JSF ¶ 12; Tr. Vol. I, 100:11-100:20; Ex. 7 at DEQ 000113; Tr. Vol. I, 105:24-106:3; Ex. 8 at DEQ 000125.

26. On December 9, 2014, DEQ sent CR/REF letters that notified CR/REF of the alleged MPDES Permit violations observed and documented by DEQ Inspectors during the October 21, 2014 inspection and requested corrective action to address the violations. JSF ¶¶ 13, 14; Ex. 7; Ex. 8.

27. In December 2014, Copper Ridge and Reflections at Copper Ridge requested an extension from DEQ in order to respond to DEQ's December 9, 2014 letter of violation and inspection report; DEQ granted the extension by letter dated December 23, 2014. Ex. X.

28. On January 8, 2015, the Copper Ridge Subdivisions submitted a letter with corrective action and updates to their SWPPP to DEQ. Ex. Y.

29. Within a timeframe acceptable to DEQ, CR/REF each took the corrective action identified in the December 9, 2014 letters from DEQ and submitted an updated SWPPP to DEQ. JSF ¶15.

30. DEQ acknowledged the responses by CR/REF to the violations at the subdivisions noted during the October 21, 2014 inspection and identified in the December 9, 2014 letters. Tr. Vol. I, 112:7-120:8; Ex. 18; Ex.19; DEQ ¶ 30; CR Resp. ¶ 1.

31. CR/REF did not propose "corrective action plans" to address violations of the Montana Water Quality Act. Tr. Vol. III (February 28, 2018), 119:11; DEQ ¶ 31, CR Resp. ¶ 1.

32. On February 6, 2015, DEQ sent CR an acknowledgment letter indicating receipt of CR's response letter of January 8, 2015. DEQ indicated that there was further compliance assistance needed and outlined three specific areas for improvement. Ex. 18; Tr. Vol. I, 65:24 – 66; Ex. 2 at DEQ 000038 – DEQ 000040.

33. On February 9, 2015, DEQ sent REF an acknowledgment letter indicating receipt of REF's response letter dated January 8, 2015. DEQ indicated that there was further compliance assistance needed, mainly paperwork errors to be corrected. Ex. 19.

34. DEQ seeks penalties for the violations noted in the December 9, 2014 letter. Ex. 9; Ex. 10; CR ¶ 11; DEQ ¶ 32.

35. DEQ issued AOs on March 27, 2015, identifying the following alleged violations of the Montana Water Quality Act at CR/REF:

(1) Violation of Administrative Rules of Montana (ARM) 17.30.1105 by conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions;

(2) Violation of § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit;

(3) Violation of § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM l 7.30.629(2)(f) by placing waste where it will cause pollution; and

(4) Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000.

JSF ¶ 16; AO.

36. Each of the AOs assesses a penalty and has a penalty calculation worksheet attached. Tr. Vol. I, 215:19 – 216:5; Ex. 9 at DEQ 000154 – 000155, DEQ 000157; Ex. 10 at DEQ 000184 – 000185, DEQ 000187; DEQ ¶ 34; CR Resp. ¶ 1.

37. At the hearing, DEQ agreed that the number of days of violation for Violation 2 could be adjusted down to 19 days based on the precipitation events noted in the most current National Oceanic and Atmospheric Administration

(NOAA) weather service data. Ex. 20; Tr. Vol. III, 8:8-21, 17:6-10, 33:21-35:2; CR ¶ 32; DEQ ¶ 55.

38. The NOAA data shows eight days between September 23, 2013 and December 23, 2013 when there were precipitation events greater than 0.25 inches. Ex. 20.

DISCUSSION

A. Summary Judgment Findings (including Owner/Operator)

The prior hearing examiner made a number of findings based on the briefing and evidence presented at summary judgment. For brevity's sake, those findings and conclusions, with the underlying reasoning, are not reproduced in their entirety here; instead, the *Order on Summary Judgment* (Aug. 1, 2017) is attached to this decision and incorporated herein by reference. The main legal conclusions were as follows:

i. CR/REF were "owners or operators" for the purpose of obtaining permit coverage for the discharge of storm water at their respective developments. (Section II.)

ii. (Violation 1) DEQ did not provide adequate notice regarding a violation of ARM 17.30.1105 – and therefore no violation of that ARM can be shown and DEQ cannot seek administrative penalties based on such a violation. (Section I(D).)

iii. (Violation 2) DEQ has established that CR/REF Discharged storm water to state waters without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c). (Section III.)

iv. (Violation 4) DEQ has established that CR/REF violated provisions contained within its general permit in violation of Mont. Code Ann. § 75-5-605(1)(b). (Section V.)

Or. S.J. Despite a motion to reconsider, the undersigned did not disturb the previous hearing examiner's rulings. *Order on Motions in Limine*, at 6-8 (Feb. 22, 2018).

Based on those prior orders, the remaining issues to be decided by the undersigned at the hearing were:

i. The burden and standard of proof.

ii. (Violation 2) The appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules.

iii. (Violation 3) An issue of fact regarding whether CR/REF placed any wastes where they will cause pollution of any state waters in violation of Mont. Code Ann. § 75-5-605(1)(a). If such a violation occurred, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules. (*See Or. S.J.*, Section IV.)

iv. (Violation 4) The appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules.

Or. S.J., at 11-14.

The findings and conclusions contained herein necessarily depend upon the findings and conclusions of the prior hearing examiner set out in that order.

B. Burden and Standard of Proof

At the hearing, there was some disagreement among the parties and the undersigned about the burden and standard of proof applicable to this proceeding and the parties were accordingly requested to brief the issue as part of their post-hearing filings. The parties have agreed that the applicable standard of proof is the preponderance standard. DEQ ¶ 68; CR ¶ 7 The parties disagree, however, about who has the burden of proof, each pointing to the other. For the reasons set forth below, the undersigned concludes that CR/REF have the burden of proof.

CR and REF have brought (through the Notice of Appeal (NOA)) this "appeal" of DEQ's AO, "pursuant to Mont. Code Ann. § 75-5-611(4)." NOA at 1. CR and REF are therefore, by their own admission, analogous to an appellant and DEQ the appellee. Using as a guide the burden analysis set forth in *MEIC v. DEQ*, 2005 MT 96,[1] in this case CR/REF are in the same position as MEIC was in. Here, "[t]he claim [CR/REF] assert[s] before the Board [is] that the Department's decision … violated Montana law." *Id.* at ¶16. Therefore, CR/REF, like MEIC,

[1] BER's statutory authority varies widely between different subject matter areas. The *MEIC* decision concerned an air quality permitting case brought pursuant to Mont. Code Ann. § 75-2-211, and the holding of that case is not directly precedential to, for example, a Water Quality Act enforcement action brought pursuant to Mont. Code Ann. § 75-5-611(4). In other words, the *MEIC* decision does not mean that DEQ will never bear the burden of proof in a case before the BER. The position of the parties and BER must be determined from the specific statutory authority at issue in each case.

are "the party asserting the claim at issue[,]" and have "challenged the Department's decision … by requesting a contested case hearing before the Board." *Id.* at ¶15. DEQ is the same position here as it was in *MEIC* of responding to the challenge; so too, is BER in the same position of deciding the merits of the challenge. *Id.* at ¶¶ 6-8, 10-16.

In the present case, Mont. Code Ann. § 75-5-611(4) states that if DEQ "does not require an alleged violator to appear before [BER] for a public hearing, the alleged violator may request the board to conduct the hearing … within a reasonable time" after a timely request. The statute requires that, after the hearing, BER "shall make findings and conclusions that explain its decision" (*id.*, at (6)(a)), and "explain how it determined the amount of the administrative penalty," if any (*id.*, at (6)(d)). The statute also requires that "[i]f the board determines that a violation has not occurred, it shall declare the department's notice void." *Id.*, at (6)(e).

DEQ's AO stated that "this Order becomes effective upon signature of the Department." AO at ¶108. Therefore, the AO in this case is effective from its issuance unless CR/REF provides BER with a reason to "declare [it] void." Although the statute is silent on the burden and standard of proof, its plain meaning indicates that the BER is reviewing an action taken by DEQ (similar to an appellee) and challenged by CR/REF (similar to an appellant). Most importantly

to the *MEIC* analysis, absent CR/REF's appeal or challenge, and were CR/REF to present no evidence at the hearing, BER would have no reason to "declare the department's notice void" and DEQ's AO would remain final.

BER's authority and the position of the parties in this instance is therefore sufficiently similar to reach the same conclusion as in the *MEIC* case: "[i]f no challenge had been made" to DEQ's AO (*i.e.*, by CR/REF's NOA) or if "no evidence were presented at the contested case hearing establishing that [DEQ's action] violated the law, the Board would have no basis on which to determine the Department's decision was legally invalid." *MEIC*, at ¶16. CR/REF is "the party asserting a claim for relief" before BER and, pursuant to Mont. Code Ann. §§ 26-1-401 and -402, "bears the burden of producing evidence in support of that claim." *Id.* at ¶14. Based on the reasoning set out in *MEIC*, therefore, "as the party asserting the claim at issue, [CR/REF] ha[s] the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." *Id.* at ¶16.

CR/REF argue that this case is distinguishable from *MEIC* because of language contained in subsection (3) of Mont. Code Ann. § 75-5-611, which states:

> In a notice and order given under subsection (1), the department may require the alleged violator to appear before the board for a public hearing and to answer the charges. The hearing must be held no sooner than 15 days after service of the notice and order, except that the board may set an earlier date for hearing if it is requested to do so by the

> alleged violator. The board may set a later date for hearing at the request of the alleged violator if the alleged violator shows good cause for delay.

CR/REF argue that "'[T]he hearing' provided in subsection 4 refers to the same hearing in subsection 3 – the hearing where the alleged violator will answer the charges" and "[a]n alleged violator appearing before this Board to 'answer the charges' cannot bear the burden of proof because he will not know what to answer until the Department presents the charges." CR ¶¶ 1-2.

This argument is legally and factually unpersuasive for a number of reasons. First, by its own admission (in the NOA), CR/REF have requested this hearing pursuant to subsection (4) and not subsection (3) of the statute. Second, by its plain language subsection (3) contemplates a separate hearing from that described in subsection (4), and a hearing that is different in kind—namely an extremely expedited one. CR/REF did not request such a hearing in their NOA, and instead specifically requested a hearing "within a reasonable time after completion of discovery and resolution of any pre-hearing motion" (NOA at 1), this is not the hearing (or type of expedited hearing) contemplated by subsection (3).[2] Finally,

[2] It also appears that subsection (3) is referring a notice letter "given under subsection (1)" rather than to an AO (issued under subsection (2)) and there is no dispute that in this case the department issued an AO pursuant to subsection (2). As there was no argument on this point, however, and subsection (3) also refers to a "notice and order," perhaps contemplating subsection (1) and (2), the undersigned has not based the conclusion on this point.

even if "the hearing" referred to in subsection (4) were the same as a hearing conducted pursuant to subsection (3), nothing in the statute's requirement that CR/REF "answer the charges" changes the position of the parties or the analysis of the burden based on the *MEIC* case, as set forth above.

Contrary to CR/REF's assertion, the AO contains "the charges" presented by the department and to which CR/REF must respond. The parties agree that the AO in this case was issued and was in effect on the date it was signed. Therefore, CR/REF received notice of "the charges" with the AO and, absent any "answer" on CR/REF's part at the hearing, those "charges" would remain in effect. The statutory requirement (were it applicable) that CR/REF "answer the charges" therefore does not shift the burden to DEQ for the purpose of this hearing and CR/REF's argument to the contrary is unconvincing.

For all these reasons, CR/REF bear the burden of establishing by a preponderance of the evidence that "a violation has not occurred" and that BER must "declare the department's notice void" (Mont. Code Ann. § 75-5-611(6)(e)) or "the facts essential to a determination that the Department's decision violated the law" (*MEIC* at ¶16).

C. Notice

CR/REF have argued that DEQ cannot assess administrative penalties on any of the alleged violations because DEQ did not provide CR/REF adequate

notice before issuing the AOs, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-617 and ARM 17.30.2003 (repealed 2016). These laws (each and together) require DEQ to issue notice letters that meet certain requirements prior to issuing AOs, unless the violations alleged by the AO meet certain thresholds of seriousness.[3] Mont. Code Ann. §§ 75-5-611(2), -617(2); ARM 17.30.2003(7). If the AO's contain sufficiently serious allegations, however, then DEQ may proceed directly to an AO without sending a notice letter. Mont. Code Ann. §§ 75-5-611(1)(e), -617(2); ARM 17.30.2003(7).

The prior hearing examiner found that "[i]t is undisputed DEQ did not provide a written notice letter to Reflections or Copper Ridge prior to issuing the Administrative Order and Notice of Violation." *Or. S.J.*, at 8:10-12. For this reason, Violation 1 was dismissed, but Violations 2, 3, and 4 were allowed to remain because the three remaining allegations are serious enough to allow DEQ to proceed directly to an AO, pursuant to Mont. Code Ann. § 75-5-611(2)(a)(ii). *Id.*

In prehearing briefing and at the hearing, CR/REF made a slightly nuanced argument along these same lines, based on ARM 17.30.2003(5) (repealed 2016). ARM 17.30.2003(5) (repealed 2016) states that

[3] *E.g.*, violations of Mont. Code Ann. § 75-5-605, violations that present "imminent threat to human health, safety, or welfare or to the environment" or violations of "Class I" or "major extent and gravity".

> the department may not assess a penalty for a violation cited in the notice letter if the violator submits to the department in writing within the time specified in the notice letter: (a) a response signed by the violator certifying that its activity was, or is now, in compliance with all requirements cited in the notice letter; or [a corrective action plan].

CR/REF argued that because they (by DEQ's own admission, JSF ¶¶ 10, 15) adequately responded to all of DEQ's letters, within the timeframe allowed by DEQ, that subsection (5) prevented the assessment of any of the penalties contained in the AO. The record was not clear whether this argument was squarely before the previous hearing examiner and so the undersigned allowed limited argument and evidence on it at the hearing. *See Or. MIL*, at [cite].

It is true that CR/REF responded to all of DEQ's letters within DEQ's specified timeframe, and that by DEQ's own admission the responses were adequate. JSF, ¶¶ 10, 15. Specifically, CR/REF ultimately responded to DEQ's December 9, 2014 (and September 23, 2013, and November 8, 2013), letters on January 8, 2015 (Ex. Y) and then DEQ responded to CR/REF on February 6 and 8, 2015 (Ex. 18 and 19) and issued the AO on March 27, 2015. Tr. Vol I, 214:16-19; 215:6-11. However, it has already been determined that none of these correspondences from DEQ constituted "notice letters" because none of them contained all the requisite parts pursuant to Mont. Code Ann. § 75-5-611(1)(a)-(e). *Or. S.J.*, at 8:10-12. Because none of DEQ's correspondence constituted a notice letter, it follows as a matter of law that none of CR/REF's responses can constitute

the "response [to] … the notice letter" contemplated by ARM 17.30.2003(5). CR/REF's arguments regarding ARM 17.30.2003(5) are therefore unavailing. The only applicable section of ARM 17.30.2003 is subsection (7), which allows DEQ to proceed directly to an AO on violations, like the three remaining here, which meet the threshold level of seriousness.[4]

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[4] This conclusion does not ease all of the discomfort regarding DEQ's correspondence and ARM 17.30.2003. DEQ's argument is that any correspondence beyond an AO on cases that meet the seriousness thresholds are, essentially, a bonus or courtesy unrequired by law. While perhaps technically true, the undersigned is sympathetic to CR/REF's position that DEQ's correspondence created substantial, justifiable confusion.

Although these correspondence failed to meet the technical requirements of a "notice letter" (which seems inadvertent on DEQ's part, given that it originally charged Violation 1); any recipient could have construed the letters as intended to be "notice letters" within the meaning of subsection (2). There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence, as contemplated by subsection (5). CR/REF's frustration is understandable—it responded to and complied with all of DEQ's demands in the correspondence, only to receive an AO three months later. Had DEQ been more precise in its correspondence (as it should have been), subsection (5) would have acted to prevent any penalty absent some additional evidence from DEQ. It does not seem fair that DEQ should, in effect, be rewarded for its own failures to write (what it intended to be) a "notice letter."

That said, CR/REF have also benefited (by a dismissal of Violation 1) from the conclusion that none of the correspondence constituted a "notice letter." CR/REF go beyond arguing in the alternative when trying to assert both that *none* of DEQ's correspondence constituted a "notice letter" (and thus the dismissal of Violation 1 was justified) and that CR/REF adequately responded to *all* the "notice letters" (attempting to justify, now, dismissal of the remaining violations). Either DEQ's correspondence constituted "notice letters" within the meaning of Mont. Code Ann. § 75-5-611(1)(a)-(e), or it did not.

As it has already been decided that the correspondence did not so-constitute (and the benefit of that conclusion already conferred), the undersigned must be satisfied. And as the ARM has now been repealed, a contrary conclusion would have little or no deterrent effect on DEQ's future correspondence pursuant to that ARM.

D. Method for Calculating Penalties

Each of the Administrative Orders assesses a penalty and has a penalty calculation worksheet attached tracking the Administrative Rules on penalties. ARMs 17.4.301-308; *see also* Tr. Vol. I, 215:19 – 216:5; Ex. 9, DEQ 000154 - 000155; DEQ 000157; Ex. 10, DEQ 000184 – 000185, DEQ 000187. The method used to calculate any penalty for a violation is identical, pursuant to the steps set out in ARM 17.4.303.

Several of those steps, however, are in applicable to this situation. First, a base penalty may be decreased by up to 10% based on the "amounts voluntarily expended" (AVE). ARM 17.4.304(4). But here there was no evidence of amounts CR/REF expended beyond what was required to come into compliance and therefore this factor is not relevant here. *See also* Tr. Vol. I, 219:7 – 219:12.

Second, the total penalty may be adjusted if the violator has been issued an Order for violations of the Water Quality Act within the past three years or if the violator enjoyed an economic benefit through noncompliance. ARM 17.4.306; ARM 17.4.307. However, DEQ has not alleged any prior history for CR/REF and did not assess any economic benefit for violations 2-4, so neither of these penalty factors should be considered. Ex. 9, 157-166; Ex. 10, 187-196.

E. Violation Two

The previous hearing examiner concluded CR/REF were owner/operators requiring permit coverage. In other words, all discharges of storm water that occurred before CR/REF had permit coverage (prior to December 23, 2013) were necessarily in violation of Mont. Code Ann. § 75-5-605(2)(c).

Discharges of storm water are determined to occur whenever there is a storm event that results in of 0.25 inches or greater precipitation ("precipitation events"). Tr. Vol. II, 32:15-25, 33:1-12. Therefore, every day on which there was a precipitation event *and* on which CR/REF did not have a permit, CR/REF discharged storm water without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c). Tr. Vol III 104:10-16; 108:7-16 DEQ is only allowed, however, to "look back" for two years from the date of the AO (March 27, 2015) when counting the number of days that storm water was discharged. Tr. Vol. I, 225:14-25.

DEQ originally counted the number of days when there was a precipitation event between March 27, 2013 and December 23, 2013, to reach a total number of 21 days of storm water discharges without a permit. Tr. Vol. I, 225:14-226:3. However, DEQ apparently counted days based on precipitation data posted on the NOAA website, which was not as accurate as the certified NOAA data that they produced on the third day of the hearing. Tr. Vol. III, 33:10-36:20. When faced

with this data DEQ adjusted downward the number of days to a total of 19 days, instead of 21. Tr. Vol. III, 33:21-35:2.

However, CR/REF continues to dispute knowing they were (or could be determined to be by this proceeding) owner/operators required to have permit coverage. From the debate on this issue during summary judgment, it is clear that CR/REF at least had a non-frivolous, good faith legal basis to believe that they were not owner/operators requiring permit coverage. Based on the circumstances here, it is not fair n this instance to charge CR/REF with violations for discharges without a permit before DEQ told them affirmatively that they needed to have permit coverage. DEQ told CR/REF on September 23, 2013, that they needed permit coverage;[5] but, it then took until December 23, 2013, for CR/REF to comply. CR/REF can therefore only reasonably be penalized for the discharges of storm water (precipitation events) that occurred between September 23, 2013 and December 23, 2013. According to the certified NOAA data, there were eight precipitation events between those dates. Ex. 20. This calculation eliminates 11 days with precipitation events which occurred before DEQ's September 23, 2013 letter.

[5] As discussed *supra*, while this correspondence may not have been a "notice letter" within the meaning of the applicable laws and rules, it certainly informed CR/REF that DEQ believed permit coverage was required.

The nature of Violation 3 must be classified "as one that harms or has the potential to harm human health or the environment…." ARM 17.4.303(1), (5); ARM 17.4.302(6); Mont. Code Ann. § 75-5-605(2)(c). Violation 2 must be found to have a "major gravity" because it harmed or has the "potential for harm to human health or the environment…" and because "construction or operation without a required permit or approval" is a given example of a major gravity pursuant to ARM 17.4.303(5)(a).

There was no evidence presented at the hearing on the "volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit," which are the other factors to consider when determining the extent of a violation for the purpose of calculating a penalty. ARM 75.4.303(4). Therefore, the only remaining consideration for the extent of the violation is the "duration of the violation." *Id.* DEQ alleged that 19 days constituted a "major deviation from the applicable requirements" necessitating a major extent finding. This argument is strained. However, eight days of discharge between the time DEQ told CR/REF that they needed permit coverage and the time they obtained it is closer to a "minor deviation from the applicable requirements." *Id.* Adjusting the days of violation therefore also causes a downward adjustment of the extent finding to a "minor extent", which changes the base penalty from $8,500 per day, per entity, to $5,500 per day, per entity.

DEQ also premises their 30% upward adjustment for "circumstances" on the fact that, "As a large and experienced developer, [CR/REF] was aware that storm water discharges without a permit are prohibited by law" and therefore they should have known to get permit coverage. Ex. 9; Ex. 10; Tr. Vol. I, 222:18-223:6; Vol. III, 96:22-97:3. As noted above, there is at least a (continuing) debate between the parties about whether or not CR/REF was an owner/operator requiring permit coverage and those arguments are not frivolous. CR/REF got permit coverage (under protest) once DEQ told them it was needed. Ex. 3; Ex. 4. These circumstances do not warrant a 30% increase in the base penalty for CR/REF. They also, however, do not warrant a 10% decrease in the base penalty for good faith and cooperation, because if CR/REF had been proactive as contemplated by ARM 75.4.304(3), they could have sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage and done more to get the permit faster after learning DEQ felt it was needed.

For all these reasons, a base penalty, with no adjustments, of $5,500 per day is an appropriate penalty. The per day penalty multiplied by eight days of violation (for eight precipitation events between September 23, 2013 and December 23, 2013), comes to a total penalty of $44,000 per entity, or a total of $88,000 for both CR and REF for Violation 2.

F. Violation Three

The prior hearing examiner concluded "[t]here is sufficient evidence that Reflections and Copper Ridge placed or caused to be placed wastes" within the meaning of Mont. Code Ann. §§ 75-5-605(1)(a) and 75-5-103(24) (defining "other wastes"). *Or. S.J.*, at 17:4-5. This was based on the evidence presented by DEQ's inspector, Dan Freeland, regarding his observations at an unscheduled inspection of CR/REF on September 9, 2013. *Id.* at 17:5-10. However, at summary judgment DEQ failed to show that the waste CR/REF placed would cause "pollution" as defined by Mont. Code Ann. § 75-5-103(30), thus, leaving the issue for resolution at the hearing.

At the hearing, DEQ convincingly argued that because of the definition of pollution, any *unpermitted* discharge to state waters of storm water that includes "other wastes" (as defined by Mont. Code Ann. § 75-5-103(24)) constitutes pollution. Tr. Vol I 29:16-30:22, Vol. III, 110:1-113:09. Specifically, "'Pollution' means: (i) contamination or other alteration of the physical, chemical, or biological properties of state waters *that exceeds that permitted* by Montana water quality standards." Mont. Code Ann. § 75-5-103(30). When an entity has no permit to discharge storm water, all storm water discharges to a state water that contain waste are necessarily "exceeding that permitted." DEQ contends that permits themselves, and the BMPs they require, are what regulate the amount of waste that

is discharged in storm water. Tr. Vol. I, 29:16-30:22; Vol. III, 110:1-113:9. The assumption is that, if the BMPs are in place and working as they should, then the amount of waste (if any) that ends up in state waters through storm water discharges is permitted (*i.e.*, is of an amount that DEQ has determined is not going to harm human health or the environment or alter any applicable water quality standards). For this reason, numeric standards for the amount of waste are essentially irrelevant—either an entity is controlling waste through its permit and BMPs, or it is not. However, not all unpermitted storm water discharges are necessarily a violation of Mont. Code Ann. § 75-5-605(1)(a), because there must be the additional fact proven of an entity "plac[ing] or caus[ing] to be placed any wastes where they will" combine with storm water to cause unpermitted discharges and therefore "pollution."[6] Mont. Code Ann. § 75-5-103(30).

As stated above and in the *Order on Summary Judgment*, it has been established that CR/REF placed waste where it could cause pollution and that there were eight days of precipitation that could have caused storm water discharges between the time CR/REF had notice of the need for permit coverage and when it

[6] If this were not the case, having an unpermitted storm water discharge would simultaneously violate two sections of Mont. Code Ann. § 75-5-605 and would result in superfluous or redundant charge stacking, and would offer a work-around any statutory caps on maximum damages. *See* Mont. Code Ann. § 75-5-611(9)(d).

was obtained. Or. SJ at 17:4-5; Ex. 20. DEQ also offered additional evidence at the hearing (namely the observations and documentation of Inspector Freedland from September 9, 2013) that discharges of storm water from CR/REF containing waste flowed from CR/REF into Cove Ditch, a tributary to the Yellowstone River, and a state water. Ex. 16; Tr. Vol. I, 143:16-21; Vol. III, 97:16-20. CR/REF did not meet their burden to show that "no violation occurred," *i.e.*, that no waste was placed by CR/REF and no (or fewer) discharges of storm water occurred than alleged by DEQ. DEQ's assumption therefore stands. After CR/REF was found to be placing waste (on September 9, 2013) and before they had permit coverage[7] (on December 23, 2013), all of the storm water discharges were unpermitted and therefore placed waste into state waters in an amount "*that exceeds that permitted*[,]" Per Mont. Code Ann. § 75-5-103(30). Or. SJ at 17:4-5; Ex. 20; Ex. 16; Tr. Vol. I 29:16-30:22

As previously determined, there were eight days where precipitation occurred that might cause storm water discharges between September 23, 2013,

[7] As discussed further below, it is unclear from the record (with the exception of one day on which DEQ actually inspected) whether BMPs were in place after CR/REF had permit coverage. As this essentially constructive definition of "pollution" depends only on *unpermitted* discharges (rather than discharges made in violation of a permit) any time period after CR/REF were permitted would require additional, affirmative evidence of the amounts of waste that exceeded those contemplated by the permits.

and December 23, 2013. Therefore, CR/REF is found to have placed waste where it would cause pollution via unpermitted storm water discharges for eight days.

Similar to the previous violation, the nature of Violation 3 is classified "as one that harms or has the potential to harm human health or the environment…." ARM 17.4.303(1), (5); ARM 17.4.302(6); Mont. Code Ann. § 75-5-605(2)(c). Violation 3 must also be found to have a "major gravity" because the "release of a regulated substance that causes harm or poses a serious potential to harm human health or the environment" and "exceedance of a maximum containment level or water quality standard" are given examples of a major gravity pursuant to ARM 17.4.303(5)(a).

As in the prior violation, the only evidence presented at the hearing regarding the extent of Violation 3 concerned the "duration of the violation." ARM 75.4.303(4). DEQ alleged that 730 days of violation (representing every day in the maximum two-year statute of limitation) constituted a "major deviation from the applicable requirements" necessitating a major extent finding. However, an adjustment to eight days of violation constitutes a "minor deviation from the applicable requirements." *Id.* This adjustment of the days of violation also adjusts downward the extent finding to a "minor extent". Per the matrix, this makes the base penalty 0.55, or $5,500 per entity, per violation. As with the prior violation, no adjustments to the base or total penalty are appropriate for these circumstances,

good faith, AVE, or economic benefit. ARMs 75.4.304, 306, 307. The total penalty is therefore $44,000 per entity, or a total of $88,000 for both CR and REF for Violation 3.

G. Violation Four

The prior hearing examiner concluded based on observations by DEQ during the October 21, 2014 inspection (and the documentation memorializing it) that CR/REF violated the terms and conditions of their general permit in four ways: (1) the SWPPP administrator failed to conduct site inspection every seven days (Permit Section 2.3); (2) the SWPPP had not been or updated appropriately (Permit Sections 3.1.1 and 3.1.3); (3) the SWPPP administrator had failed to maintain records at the site (Permit Section 2.5); and (4) BMPs were not implemented to control and mitigate discharges of sediment and other pollutants (Permit Sections 2.1.1 and 2.1.4). *Or. S.J.*, 19-20. These findings were consistent with evidence presented at the hearing. JSF ¶ 12; Tr. Vol. I, 100:11-100:20; Ex. 7 at DEQ 000113; Tr. Vol. I. 105:24-106:3; Ex. 8 at DEQ 000125.

CR/REF correctly characterized all but the fourth violation of the permit as paperwork violations. Tr. Vol. III 43:6-53:12. While these violations are certainly important (particularly, for example, regular inspections),[8] they probably do not

[8] Hopefully it is not lost on CR/REF that (as discussed further below) had they done and documented regular inspections as required by the permit, and had those inspections

meet the threshold of seriousness contemplated by ARM 17.30.2003(7) (repealed 2016). As discussed above and in the *Order on Summary Judgment*, Violation 4 has only survived to this stage is because it (at least at the time) met the threshold level of seriousness to overcome DEQ's failure to provide a "notice letter." *See supra*, Secton C. It is therefore appropriate to focus on the fourth violation involving BMPs for the purpose of assessing a penalty, as this was the only violation that had the potential to harm human health and the environment. *See* Mont. Code Ann. § 75-5-605(1)(b); ARM 17.30.2003(7) (repealed 2016).

DEQ presented adequate evidence at the hearing to establish that when DEQ performed its scheduled inspection on October 21, 2014, CR/REF did not have BMPs in place and thus was not in compliance with the permit. Tr. Vol. I, 100:11-102:21 The specific BMPs were those intended to control storm water discharges: "Filtrexx Sediment Control, earthen berms, stabilized construction entrance, and preserving existing vegetation." Ex. 7 at DEQ000119; Tr. Vol. I, 125:5-13.

Based on that October inspection DEQ charged CR/REF with a violation for every day between the time CR/REF received permit coverage (December 23, 2013) and the date of the inspection (October 21, 2014), which resulted in 303

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showed that BMPs were appropriately in place, supplying those inspection records at the hearing (or at summary judgment) would have easily met their burden to show that "a violation has not occurred." Mont. Code Ann. § 75-5-611(6)(e).

days of violation. Ex. 9; Ex. 10; Tr. Vol. I, 229:12-23. Even when pointedly asked by the undersigned, however, DEQ could point to *no evidence* in the record that BMPs were *not* in place for the ten months between December 2013 and October 2014. Tr. Vol III 112:6-23. DEQ argued instead that because BMPs were not in place in October, it was appropriate to *assume* that they were never put in place. This assumption, however, was contradicted by DEQ's own inspector, Dan Freeland, who stated in an email to other DEQ employees on March 7, 2014, that while driving through CR/REF there were at least some of BMPs (straw bales and a berm) in place and that there "[a]ppear[ed] to be an effort to control runoff from the individual lots I observed." Ex. V.

For its part, CR/REF also provided no evidence that all of the BMPs required by the permit (including the four discussed by DEQ) *were* in place for those ten months. CR/REF had Marshall Phil, their SWPPP administrator on the stand at the hearing, and there was some testimony that there were more SWPP inspections than were documented. Tr. Vol. III, 50:15-51:14. However, CR/REF never provided for that period any inspection reports, photographs, testimony, or any other evidence that affirmatively demonstrated that the BMPs DEQ alleged were not in place were in fact in use. Marshall Phil, the SWPPP administrator for CR/REF, during his testimony could only state that a "good majority" of BMPs were onsite and installed correctly, without providing any further detail. Tr. Vol.

III 53:13-15. CR/REF alluded to (and DEQ even admitted that) perhaps a storm event could have wiped out BMPs just prior to the October inspection (Tr. Vol. III, 111:25-112:5); and provided vague evidence that sometimes children removed stakes from the Filtrexx controls to have sword fights. Tr. Vol III., 52:18-53:6 This evidence is insufficient to meet CR/REF's burden to show that "a violation has not occurred" (Mont. Code Ann. § 75-5-611(6)(e)) or that DEQ's penalty assessment of 303 days "violated the law" (*MEIC* at ¶16).

CR/REF did provide evidence, however (consistent with their position that they are not owner/operators) that they did not own (at least some of) the lots on which DEQ noted a lack of BMPs. Ex. Y. In their January 8, 2015 letter[9] CR/REF stated that its SWPPP administrator, Marshall Phil for Blue Line Engineering, "makes certain statements" in the attached corrective actions to the effect of,

> concerning BMPs to be repaired or installed on subdivision lots not owned by [CR/REF]. We will communicate your observations to these other property owners. Again, we do not own these lots and have no right to enter these properties.

Ex. Y at 1. The attached corrective actions from Mr. Phil then confusingly state both that BMPs are being put in place currently—*e.g.*, "[t]he site is currently in and the process of implementing the Filtrexx Sediment Control BMP…" (Ex. Y at 5)—

[9] CR/REF's January 8, 2015 letter responded to DEQ's December 9, 2014 letter notifying them of violations, which were based (in part) on DEQ's October 2014 inspection. JSF ¶¶ 12-15.

and that "[i]nstallation of additional BMPs and modification of existing BMPs … have yet to be performed. Weather has not permitted any installation or modification to BMPs. All BMP installation and modification will commence in the spring" (*id.*, at 2).

From the above quoted letter and the testimony at the hearing, it is entirely unclear to the undersigned whether or not BMPs were in place as of January 2015, were going to be put in place in the spring of 2015, or ever could be put in place based on CR/REF's ownership access.

DEQ, however, apparently believed that CR/REF's January 2015 communication was satisfactory regarding BMPs (and everything else) because it stipulated prior to hearing that "[w]ithin a timeframe acceptable to the Department, the Copper Ridge Subdivisions each took the corrective action identified in the December 9, 2014 Notices of Violation...." JSF ¶15. In seeming conflict with this stipulation, however, DEQ responded to CR/REF's letter in February 2015[10] by stating

> [i]n your response, you state the installation and modification of [BMPs] has not been completed and will not be completed until spring 2015. This delay is unacceptable, [BMPs] must be installed and maintained immediately to control the discharge of pollutants per Parts 2.1, 2.3.5, and 3.7 of the Permit.[11]

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[10] To CR on February 6 and to REF on February 9, 2015. Ex 18; Ex. 19.

[11] This response is only contained in DEQ's response to CR, not the response to REF. *Compare* Ex. 18 *with* Ex. 19.

Ex. 18 at 1-2. There was no further communication between the parties until DEQ issued the March 27, 2015 AO. In other words, CR/REF never responded (in almost two months) to DEQ's statement that BMPs must be put in place immediately; CR/REF gave no further argument about the weather or ownership preventing them from doing so. DEQ also apparently was not concerned enough (based on CR/REF's January communication or any of their other conduct) to do another site inspection after October of 2014 to check whether any BMPs were actually in place.

Yet, curiously, DEQ only charged CR/REF with penalty days of violations for the 303 days between December 2013 and October 2014, and not for any time after October 21, 2014. Ex. 9 at 9 (DEQ 000165); Ex. 10 at 9 (DEQ000195). It therefore appears DEQ believed (or was comfortable assuming) that after the October 2014 inspection, CR/REF had BMPs in place, despite CR/REF's communication in January of 2015 indicating BMPs were *not* in place and may never be in place in some areas. Ex. Y. The undersigned is thus unclear whether DEQ either understood or was really concerned about the status of the BMPs at CR/REF after the October 21, 2014 inspection.

For all these reasons, the undersigned has struggled to determine the number of penalty days to be assessed for CR/REF's failure to implement the provisions of

the permit.[12] Ultimately, the only thing that is clear from the evidence (or lack thereof) presented at the hearing is that on at least October 21, 2014, when DEQ put "eyes on" CR/REF, four BMPs required by the permit (which CR/REF had agreed to abide by) were not in place. The only penalty day that should clearly be assessed for a violation of the permit is therefore October 21, 2014.

Similar to the previous violations, there was no evidence presented at the hearing on the "volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit," which are the other factors to consider when determining the extent of a violation for the purpose of calculating a penalty. ARM 75.4.303(4). Therefore, the only remaining consideration for the extent of the violation is the duration. *Id.* DEQ alleged that ten months (between December 2013 and October 2014) constituted a "major deviation from the applicable requirements" necessitating a major extent finding. However, an adjustment to only one day of violating the permit constitutes a "minor deviation from the applicable requirements." *Id.* This adjustment of the days of violation, therefore also adjusts downward the extent finding to a "minor extent". A "failure to construct or operate in accordance with a permit or

[12] Whatever the penalty calculation, a final resolution of the owner/operator question by the Board seems the thing most likely to confer a meaningful penalty (or lack thereof) and future deterrent for both DEQ and CR/REF for these myriad failures.

approval" is by definition a "moderate gravity" finding. ARM 17.4.303(5)(b).[13] Per the matrix, this makes the base penalty 0.40, or $4,000 per entity, per violation. As with the prior violations, no adjustments to the base or total penalty are appropriate for circumstances, good faith, AVE, or economic benefit. ARMs 75.4.304, 306, 307. This makes the final penalty $4,000 per entity or $8,000 total for both CR/REF.

CONCLUSIONS OF LAW

1. BER has jurisdiction to hear this matter pursuant to its authority under Mont. Code Ann. § 75-5-611(4)-(9), and the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6 (MAPA).

2. DEQ is authorized under Mont. Code Ann. § 75-5-211 to administer the provisions of the Montana Water Quality Act, Title 75, Chapter 5, Mont. Code Ann. ("WQA"). The permit program administered by DEQ is implemented through rules adopted by the BER. Mont. Code Ann. §§ 75-5-401 and 75-5-402.

3. DEQ's AO, issued March 27, 2015, meets the requirements of Mont. Code Ann. § 75-5-611(1)-(2).

4. Pursuant to the reasoning stated in the *Order on Summary Judgment* at Section II (Aug. 1, 2017), CR/REF were "owners or operators" for the purpose

[13] DEQ's citation on their penalty calculation forms (Exs. 9 and 10) incorrectly cites ARM 17.4.304(5)(b)(ii) instead of ARM 17.4.303(5)(b)(ii).

of obtaining permit coverage for the discharge of storm water at their respective developments.

5. 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).

6. At the hearing, CR and REF had the burden of proving, by a preponderance of the evidence, that "a violation has not occurred" and the BER must "declare the department's notice void" (Mont. Code Ann. § 75-5-611(6)(e)) or that "the facts essential to a determination that the Department's decision violated the law" (*MEIC* at ¶16).

Findings Relating to All Penalties

7. The total penalty may be adjusted if the violator has been issued an Order for violations of the Water Quality Act within the past three years, however DEQ has not alleged any prior history for CR/REF so this factor is not relevant. ARM 17.4.306; *see also* Tr. Vol. I, 218:4 – 218:11; Ex. 9, DEQ 000166; Ex. 10, DEQ 000196.

8. The total penalty may be increased if the violator enjoyed an economic benefit through noncompliance, however DEQ has not assessed any economic benefit for violations 2-4, and therefore this factor is not relevant. ARM 17.4.307; *see also* Tr. Vol. I, 218:12 – 218:20; Ex. 9; Ex. 10.

9. DEQ treated CR and REF as separate violators under Mont. Code Ann. § 75-5-611 and initiated two separate enforcement actions in the above-captioned matters after considering evidence that each company is a separate legal entity, and each conducted separate development activities. Additionally, CR and REF obtained separate permit authorizations and submitted separate SWPPPs covering development activities at their respective subdivisions. Based on the evidence presented at the hearing and summary judgment, CR and REF are separate legal entities and therefore subject to separate penalties. [cites]

10. Based on Mont. Code Ann. § 75-5-611(9)(a) the penalty for each violator is limited to "not more than $10,000 for each day of each violation" and "the maximum penalty may not exceed $100,000 for any related series of violations." As separate cases and entities (though considered together at the hearing and herein) therefore, CR/REF together may not be subject to more than $20,000 per day or $200,000 total in penalties. *Id.*

Violation One

11. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section I(D), DEQ did not provide adequate notice regarding its first alleged violation against CR/REF—a violation of ARM 17.30.1105—and therefore no violation of that ARM can be shown and DEQ cannot seek administrative penalties based on such a violation.

Violation Two

12. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section III, DEQ has established that CR/REF discharged storm water to state waters without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c).

13. Based on the evidence presented at the hearing, and as set forth above, the requisite penalty calculation (set forth below), and pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and ARMs 17.4.301-308, the appropriate assessment of penalties for Violation 2 is $44,000 per entity, or $88,000 total for CR/REF.

14. The nature of this violation is classified as harming or having "the potential to harm human health or the environment…." ARMs 17.4.302(6), 17.4.303(1).

15. The gravity of the violation is major because it harmed or has the "potential for harm to human health or the environment…" and because "construction or operation without a required permit or approval" is a specific example of a major gravity pursuant to ARM 17.4.303(5)(a).

16. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely "the duration of the violation." ARM 17.4.303(4). As the duration of the violation is eight days, "it constitutes a minor deviation from the applicable requirements." *Id.*, at (4)(c).

17. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.55 or $5,500, per violation.

18. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

19. The number of days of the violation is eight because that is the number of days between when CR/REF had notice that DEQ required permit coverage (September 23, 2013) and before they got permit coverage (December 23, 2013), and on which there was a precipitation event of 0.25 inches or greater as shown by the NOAA data. This number of days is also reasonable because the multiplication of days for the continuing violation "results in a penalty that is higher than … necessary to provide an adequate deterrent" and the Board "may reduce the number of days of violation." ARM 17.4.305(2). It is also reasonably adjusted "as justice may require." ARM 17.4.308.

Violation Three

20. Based on the evidence presented at the hearing, and as set forth above, CR/REF placed wastes where they will cause pollution of any state waters in violation of Mont. Code Ann. § 75-5-605(1)(a).

21. Based on the evidence presented at the hearing, and as set forth above, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611,

75-5-1001, and ARMs 17.4.301-308, is $44,000 per entity, or $88,000 total for CR/REF.

22. The nature of this violation is classified as harming or having "the potential to harm human health or the environment…." ARMs 17.4.302(6), 17.4.303(1).

23. The gravity of this violation is major because the "release of a regulated substance that causes harm or poses a serious potential to harm human health or the environment" and "exceedance of a maximum containment level or water quality standard" are specified examples of a major gravity pursuant to ARM 17.4.303(5)(a).

24. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely "the duration of the violation." ARM 17.4.303(4). As the duration of the violation is eight days, "it constitutes a minor deviation from the applicable requirements." *Id.* at (4)(c).

25. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.55 or $5,500, per violation.

26. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

27. The number of days of the violation is eight because that is the number of days between when CR/REF had notice that DEQ required permit

coverage (September 23, 2013) and before they got permit coverage (December 23, 2013), and on which there was a precipitation event of 0.25 inches or greater as shown by the NOAA data. This number of days is also reasonable because the multiplication of days for the continuing violation "results in a penalty that is higher than … necessary to provide an adequate deterrent" and the Board "may reduce the number of days of violation." ARM 17.4.305(2). It is also reasonably adjusted "as justice may require." ARM 17.4.308.

Violation Four

28. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section V, DEQ has established that CR/REF violated provisions contained within its general permit in violation of Mont. Code Ann. § 75-5-605(1)(b).

29. Based on the evidence presented at the hearing, and as set forth above, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and ARMs 17.4.301-308, is $4,000 per entity, or $8,000 total for CR and REF.

30. The nature of this violation is classified as harming or having "the potential to harm human health or the environment…." ARMs 17.4.302(6), 17.4.303(1).

31. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely "the duration of the violation…." ARM 17.4.303(4). As the duration of the violation is one day, "it constitutes a minor deviation from the applicable requirements." ARM 17.4.303(4)(c).

32. The gravity of the violation is moderate because it includes a "failure to construct or operate in accordance with a permit or approval." ARM 17.4.303(5)(b).

33. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.4 or $4,000, per entity, per violation.

34. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

35. The number of days of the violation is one because that is the number of days on which there is any evidence that four BMPs were not in place in violation of the requirements of the permit. This number of days is also reasonable because the multiplication of days for the continuing violation "results in a penalty that is higher than … necessary to provide an adequate deterrent" and the Board "may reduce the number of days of violation." ARM 17.4.305(2). It is also reasonably adjusted "as justice may require." ARM 17.4.308.

Total Penalties

36. The combined total of penalties for Violations 2, 3, and 4 is $92,000 per entity, or $184,000 total for CR and REF.

DATED this 16th day of July, 2018.

/s/Sarah Clerget
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Hearing Examiner
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Post-Hearing Submissions to be mailed to:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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]	)	Case No. BER 2015-01-WQ
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]	)	Case No. BER 2015-02-WQ

EXCEPTIONS TO HEARING EXAMINER'S ORDER ON SUMMARY JUDGMENT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Copper Ridge Development Corporation (Copper Ridge) and Reflections at Copper Ridge, LLC (Reflections) respectfully submit these Exceptions for the Board of Environmental Review (Board) to consider when determining the most appropriate final Order in this enforcement case.

I. INTRODUCTION

The Proposed Findings of Fact and Conclusions of Law (Proposed FOFCOL) submitted to this Board on July 16, 2018 relies on an incorrect burden of proof. For this reason alone, the Board may find that "the proceedings on which the findings were based did not comply with essential requirements of law." § 2-4-621(3), MCA. This case should therefore be remanded back to the Hearing Examiner for consideration using the correct burden of proof.

However, even if the Board accepts the Findings of Fact in the Proposed FOFCOL and the Order on Summary Judgment, it should modify the proposed conclusions and void the Department of Environmental Quality's (DEQ's) Administrative Compliance and Penalty Order because DEQ has not and cannot meet its burden of proving that Copper Ridge and Reflections committed the alleged violations. § 75-5-611(6)(e), MCA.

Even if this Board finds that Copper Ridge and Reflections committed the alleged violations, the proposed findings of fact do not support the assessed penalty

amounts. Therefore, justice demands that the penalty amounts be adjusted to zero, which this Board may do without a full record review. § 2-4-621(3), MCA.

Finally, a review of the complete record will reveal facts that contradict and add more accurate context to the proposed findings, proving that the proposed findings are not based upon "competent substantial evidence" and should therefore be modified. § 2-4-621(3), MCA.

For perspective, the total penalty proposed in this case ($184,000) is greater than the *annual* amount of penalties deposited in the General Fund and Special Revenue Accounts for Water Quality Act cases for all but one of the last six fiscal years - 2011 ($23, 255), 2012 ($333,350), 2013 ($72,495), 2014 ($58,578), 2015 ($119,891) and 2016 ($123,505).[1] In this case, Copper Ridge and Reflections did nothing wrong. In fact, the proposed findings of fact demonstrate their repeated compliance with all of DEQ's requests. Yet, DEQ persists in this enforcement action, forcing these two corporations to continue, at great expense, this legal battle.

II. BACKGROUND

Copper Ridge and Reflections are developers who appropriately planned and developed two subdivisions on the west end of Billings – all in accordance with the

[1] Department of Environmental Quality, Annual Amounts of Penalties Deposited in General Fund and Special Revenue Accounts FY 2011 through FY 2016, available at http://deq.mt.gov/portals/112/deqadmin/enf/documents/Reports/FY16/Penalties_collected-2011-2016.pdf (accessed September 13, 2018).

Montana Subdivision and Platting Act and all other legal requirements, including the Montana Water Quality Act. It is undisputed that Copper Ridge and Reflections had appropriate stormwater permit coverage for their construction activities as the developers of the subdivisions. It is also undisputed that DEQ terminated that permit coverage – effectively telling Copper Ridge and Reflections that they no longer needed permit coverage.

More than a year later, in September 2013, the Billings area experienced an unprecedented significant storm that pummeled the area with 2.10 inches of rain in just 45 minutes. Not surprisingly, the storm triggered flash flooding that literally turned streets into rivers. Along with the rain came wind gusts of up to 73 mph – strong enough to break trees and power poles and leave thousands of Billings residents without power.

That was just the storm that DEQ had been waiting for because, despite the City of Billings' request to address stormwater concerns on the west end of Billings *six months earlier*, DEQ waited for a storm that would create conditions for a stronger case – one that would be sure to create violations and compel compliance. But Copper Ridge and Reflections, with a proven track record of compliance, did not need such compulsion. Nor did they need or deserve the resulting $200,000 penalty first assessed against them. As any prudent corporation would do, Copper Ridge and Reflections challenged the DEQ enforcement action,

questioning how DEQ found them liable for such violations. DEQ has never responded with facts that specifically tie any of the violations to any property owned or operated by Copper Ridge and Reflections. Nor has DEQ explained its purported authority to hold Copper Ridge and Reflections responsible for violations that, in all likelihood, originated on residential lots owned by others.

DEQ has failed at every step of this enforcement action. First, they failed to take proactive enforcement action in response to concerns raised by the City of Billings six month prior to the alleged violations - action that could have prevented the alleged discharges. Then DEQ failed to realize the magnitude and disastrous force of the storm, which overwhelmed nearly every stormwater system in the area. Instead, DEQ used the disastrous storm to initiate an unwarranted enforcement action against a compliant developer. DEQ failed to document exactly where the violations originated and failed to document the exact property and property owners responsible for the discharges and placement of wastes. Instead, DEQ looked only to the biggest target in the neighborhood – the developer who simply drew the boundaries, developed the infrastructure (all in accordance with all legal requirements), and sold the individual lots for residential homes to be built. DEQ also failed to document any pollution or harm that may have resulted from the disastrous storm's impact to Cove Ditch, an irrigation canal on the Billings west end. Further, DEQ failed to provide the statutorily and regulatory

notices for this enforcement action and assessed inappropriate and unsupportable penalties that simply ignore the facts of this case.

This Board should not reward DEQ's failures with an inappropriate Administrative Compliance and Penalty Order in this case. The regulated public, as well as Copper Ridge and Reflections, deserve better. The law demands better.

Of all the enforcement actions pending or needing to be pursued throughout this state, this one is an abomination. This enforcement action inappropriately penalizes the wrong party – the compliant subdivision developer – for a natural disaster. DEQ's action cannot withstand this Board's scrutiny. There is no proof that Copper Ridge and Reflections committed the alleged violations. Even if this Board determines or has any question whether Copper Ridge and Reflections did commit the alleged violations, penalties cannot be assessed for those violations because DEQ failed to follow the proper notice requirements and failed to assess the penalty amounts in compliance with its regulatory requirements. As illustrated by key facts provided herein, which contradict and provide more accurate context for the proposed findings, a review of the full record will reveal that the proposed findings are "not based upon competent substantial evidence" because no "reasonable mind" can accept them as adequate to support either the alleged violations or the substantial penalty assessment. The proposed finding should therefore be rejected or modified. § 2-4-621(3), MCA.

III. STANDARD OF REVIEW

When faced with an Administrative Compliance and Penalty Order, the alleged violator may request a hearing before the Board. "After a hearing, the board shall make findings and conclusions that explain its decision. ... If the board determines that a violation has not occurred, it shall declare the department's notice void." § 75-5-611(6)(a) and (e). In a contested case hearing such as this, where the full Board has chosen not to hear the case and has assigned it to a Hearing Examiner, the Hearing Examiner proposes findings and conclusions to the Board, then the Board decides whether to adopt, modify or reject the findings and/or conclusions:

> The agency [Board] 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.

§ 2-4-621(3), MCA. While rejecting or modifying the findings of fact calls "for an explanation as required by § 2-4-621(3), MCA;" rejecting and modifying the proposed conclusions of law does not. *Key West, Inc. v. Winkler*, 2004 MT 186, ¶ 21, 322 Mont. 184, 95 P.3d 666. The substantial evidence required to reject or

modify the proposed findings "is evidence that a reasonable mind might accept as adequate to support a conclusion." *State Pers. Div., Dep't of Admin. v. Child Support Investigators*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305 (citation omitted).

IV. ARGUMENT

This action should be remanded for consideration under the correct burden of proof. Alternatively, the Board should modify the proposed conclusions and void DEQ's Administrative Compliance and Penalty Order in its entirety because none of DEQ's alleged violations or assessed penalties are supported by the proposed facts. Finally, if this Board has further doubt, it can consider the entire record before it, easily determine that key facts are missing and reject or modify the proposed findings of fact because no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties.

A. DEQ Must Bear the Burden of Proof in an Enforcement Case.

Copper Ridge and Reflections disagree with the holding that Copper Ridge and Reflections have the burden of proving their compliance with the Montana Water Quality Act. Proposed FOFCOL, pp. 14-18. As the innocent party being charged as guilty of violating the Water Quality Act, Copper Ridge and Reflections should have the right, under the United States Constitution's due process clause, to be considered innocent until proven guilty. *See In Re Winship*, 397 U.S. 358, 363,

90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970) ("the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law."). Although this is not a criminal case, this contested case is similar because it is an enforcement action under the Water Quality Act, specifically §§ 75-5-611 and 75-5-617, MCA, which allow DEQ to initiate an enforcement response when it "has reason to believe that a violation" of the law has occurred. Indeed, DEQ's enforcement action alleges that Copper Ridge and Reflections acted in violation of the Water Quality Act and DEQ therefore requests relief, or punishment, in the form of an Administrative Compliance and Penalty Order. Under the due process clause, it is only fair that Copper Ridge and Reflections be presumed innocent of the alleged violation until DEQ proves their guilt. The due process requirements of the United State Constitution demand that the government bear the burden of proof in enforcement actions such as this case.

Additionally, DEQ is in exactly the same position as the plaintiff in *MEIC v. DEQ*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, upon which the Proposed FOFCOL relies – "MEIC filed a petition and affidavit with the Board alleging that the Department approved the permit *in violation of Montana statutes and administrative regulations*, and requesting the following relief..." MEIC, ¶ 15. In that case, the Board first required evidence from MEIC "necessary to establish the

facts essential to a determination that the Department's decision *violated the law*." *MEIC*, ¶ 16 (emphasis added).

Here, DEQ is, just like the plaintiff in *MEIC* - the one claiming that there has been a violation of the law. Copper Ridge and Reflections are not, as the Proposed FOFCOL stated, the ones asserting that DEQ's decision "violated Montana law." Proposed FOFCOL, p. 14. Rather, Copper Ridge and Reflections are defending themselves against the allegations and answering "the charges" levied against them by DEQ. § 75-5-611(3) (the alleged violator may be required to appear "before the board for a public hearing to answer charges.").

Federal statutes, rules and administrative case law specific to the federal Clean Water Act all agree that in an enforcement action such as this, it is the government who bears the burden of proving a violation of law has occurred and that the relief sought is appropriate. The federal Administrative Procedure Act requires that the "proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Here, DEQ claims authority to issue a "notice and order" under § 75-5-611, MCA; however, that order is not final, as evidenced by the alleged violator's ability to request a hearing and have the Board "determine[] that a violation has occurred," "issue an appropriate order" or "determine that a violation has not occurred," and "declare the department's notice void." §§ 75-5-611(6)(b) and (e),

MCA.[2] DEQ's administrative notice and order is a request for the Board to issue an order against the alleged violator. Unless the alleged violator fails to request a hearing, the notice and order does not become final without further agency action. Once the alleged violator requests a hearing, the order is taken off the automatic track to become final and is instead placed before the Board to issue the final order. Here, DEQ is the "proponent" of an order and as such, has the "burden of proof." 5 U.S.C. § 556(d).

The administrative procedures for federal enforcement of these same types of violations under the Clean Water Act requires:

> (a) The **complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate**. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.
> (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

40 C.F.R. § 22.24 (emphasis added). Cases heard by the EPA's Environmental Appeals Board (EAB), which is analogous to this Board, have resoundingly held

[2]Indeed, the statute, when read in total, contemplates that any violations alleged by the Department are not final until either 1) a hearing is not required by the Department and the alleged violator fails to request one or 2) the alleged violator requests a hearing and the Board issues findings and conclusions. Until one of those points is reached, the violations are merely alleged and the order is not final. §§ 75-5-611(3) – 75-5-611(6), MCA.

that when the government alleges a violation, the government must prove every element of that violation. *In re Henry Stevenson and Parkwood Land Co.*, 16 E.A.D. 151, 158 (EAB 2013) ("the Region [EPA] bears the burden of demonstrating that the alleged violation occurred" and "the Region [EPA] must show, by a preponderance of the evidence, that the factual prerequisites exist for finding a violation of the applicable regulatory requirements." (*citing In re Bricks, Inc.*, 11 E.A.D. 224, 233 (EAB 2003) (rejecting an administrative law judge's findings of fact because the Region had failed to demonstrate that the facts were supported by a preponderance of the evidence); *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 (EAB 2004) (explaining preponderance of the evidence standard); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (same)).

Here, DEQ is the "complainant" who must prove that the violations occurred as set forth in their notice and order, and Copper Ridge and Reflections are the "respondents" who then have the burden of presenting defenses to the allegations.

The Proposed FOFCOL mistakenly views Copper Ridge and Reflections as "the party asserting a claim for relief" and concludes that §§ 26-1-401 and -402, MCA require Copper Ridge and Reflections to bear the burden of proof. That is wrong because clearly DEQ is the party asserting a claim for relief via its Administrative Compliance and Penalty Order.

Having DEQ bear the burden of proof in an enforcement proceeding complies with § 26-1-401, MCA because, prior to the order being final (either by lapse of the alleged violator's opportunity to request a hearing or by action of the Board), DEQ is only alleging violations that it has "reason to believe" occurred. § 75-5-611(1), MCA. Therefore, "if no evidence were given on either side," DEQ's allegations go unsupported, the Board has no evidence upon which to "determine[] that a violation has occurred" and therefore cannot "issue an appropriate order." §§ 26-1-401; 75-5-611(6)(b), MCA. Since DEQ's claim that a violation has occurred would be defeated in the absence of any evidence from either side, the plain reading of § 26-1-401 illustrates that DEQ bears the burden of producing evidence as to each particular fact that proves the alleged violation.

Having DEQ bear the burden of producing evidence also comports with the traditional notions of justice and fairness by placing the burden on the party bringing the claim and requesting relief. Here, it is DEQ who brings the claim that Copper Ridge and Reflections have violated the law and it is DEQ who requests relief in the form of a penalty payment. Copper Ridge and Reflections are not raising a claim, they are defending against DEQ's claims. Requiring the alleged violator to prove his innocence, or compliance, before any proof of the alleged violations is formally presented at a hearing before the Board, essentially requires the alleged violator to prove a negative – that no violation occurred. This is unfair

and would impose an undue burden on the regulated public because DEQ would "solely possess the relevant information pertaining to the activities." *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 32, 326 Mont. 174, 108 P.3d 469. Until the case has gone through discovery and has been presented as the case in chief before the Board, the alleged violator cannot know for certain the extent or scope of evidence that DEQ will bring to bear against him. To require Copper Ridge and Reflections to prove that no violation occurred, without first having DEQ present its proof of the alleged violations, prejudices Copper Ridge and Reflections and requires the impossible – to prove a negative and to defend against allegations not yet articulated or proven.

The United States Constitution, Montana case law and statutes, as well as federal statutes, regulations and case law all emphasize that it is the government who bears the burden of proving a violation of law. Therefore, it is necessary that DEQ bear the burden of proof in this enforcement action. The notions of justice and fairness to the regulated public also require that when DEQ alleges a violation of the law, it must bear the burden of proving "each fact the existence or nonexistence of which is essential to the claim for relief." § 26-1-402, MCA. Here, it is DEQ who alleges a violation of law, just as the plaintiff did in *MEIC v. DEQ*; therefore, it is DEQ who must prove, by a preponderance of the evidence, every element of each violation and every element of the requested penalty.

Because the Proposed FOFCOL relied on the wrong burden of proof, this Board should reject the proposed findings and conclusions, in their entirety, because "the proceeding on which the findings were based did not comply with essential requirements of law." § 2-4-621(3), MCA. The entire case should be remanded back to the Hearing Examiner for review and consideration using the correct burden of proof.

B. The Facts Do Not Support the Violations Alleged.

Alternatively, this Board may examine the proposed findings of fact and reach different conclusions of law, without remanding this case back to the Hearing Examiner and without examining the complete record. § 2-4-621(3), MCA. Both the law and logic require that the Board modify the conclusions, even if it chooses not to reject or modify the proposed findings.

Neither the proposed findings nor the facts presented in the Order on Summary Judgment support a conclusion that Copper Ridge and Reflections discharged wastes to state waters without a permit, that Copper Ridge and Reflections placed or caused to be placed wastes where they will cause pollution, or that Copper Ridge and Reflections committed either of those violations over multiple days. Therefore, this Board may accept the proposed findings but modify the proposed conclusions to exonerate Copper Ridge and Reflections of DEQ's unproven allegations.

1. DEQ has Failed to, and Indeed Cannot, Prove that Copper Ridge and Reflections Own or Operate the Source of the Discharge, are Persons who Discharged Stormwater, or that Copper Ridge and Reflections Placed or Caused to be Placed Any Wastes.

Th Hearing Examiner relies on the previous Order on Summary Judgment for the conclusion that "CR/REF were 'owners or operators' for the purpose of obtaining permit coverage for the discharge of storm water at their respective developments." Proposed FOFCOL, pp. 38-39, ¶ 4. The Order on Summary Judgment concluded that Copper Ridge and Reflections were owners or operators who "discharge[d] or propose[d] to discharge storm water associated with construction activity" Order on SJ, p. 13 (*citing* ARM 17.30.1115(1). Pages 14 through 15 of the Order describe the operative facts relied upon:

1) Copper Ridge and Reflections were the original owners and developers of the subdivisions. *Id.*, p. 14.

2) Copper Ridge and Reflections' construction activities within the subdivision that would be subject to permitting requirements began with the initial development in 2006 and "were undertaken with the eventual goal of the sale of individual lots for residential home construction." *Id.*

3) Copper Ridge and Reflections entered into one contract that instructed that excavated materials should remain on site. *Id.*

4) Copper Ridge and Reflections "conceded their owner or operator status when they filed their December 23, 2013 SWPPs and NOIs." *Id.*, p. 15.

Even if all of those facts are taken as true, they do not support liability for what can be charged as a $10,000 per day violation of the Water Quality Act.

A subdivision "means a division of land or land so divided that creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed." § 76-4-102(17), MCA. Such is the case here – both the statutes and the Order affirm that Copper Ridge and Reflections, as the developers, intended to sell the individual lots for subsequent construction of residential homes *by someone other than Copper Ridge and Reflections*.

DEQ administers the Montana Subdivision and Platting Act, which contains specific requirements for stormwater systems:

> The rules and standards must provide the basis for approving subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal. The rules and standards must be related to:
>
> (a) size of lots;
> (b) contour of land;
> (c) porosity of soil;
> (d) ground water level;
> (e) distance from lakes, streams, and wells;
> (f) type and construction of private water and sewage facilities; and
> (g) other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.

§ 76-4-104(2), MCA. The "rules must further provide for: ... standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways." § 76-4-104(6)(e), MCA.

DEQ has authority to enforce the subdivision provisions, including those dealing with stormwater, but DEQ has not pursued any enforcement action against Copper Ridge and Reflections, as the developers, for any violation of the Montana Subdivision and Platting Act, including the requirements for stormwater. Indeed, no one has even alleged that Copper Ridge and Reflections failed to meet the Montana Subdivision and Platting Act's statutory or regulatory requirements for stormwater. In fact, DEQ admits that Copper Ridge and Reflections had valid stormwater permit coverage for their development of the subdivisions. Proposed FOFCOL, pp. 4-5, ¶ 5. DEQ went so far as to terminate that coverage without noting *any* violations. *Id.*, p. 5, ¶ 6; p. 22 (noting that "DEQ has not alleged any prior history" of Water Quality Act violations for Copper Ridge and Reflections). Thus, all of the evidence (or lack thereof) indicates that Copper Ridge and Reflections, as the subdivision developers, did *everything* that they were supposed to do in terms of stormwater.

Of course, those permits for the development of the subdivisions did not include "controls for construction activity on residential lots" because those lots were "sold, rented, leased or otherwise conveyed" *out of* Copper Ridge and

Reflections' ownership and control – just as the subdivision statutes envision and in-line with the noted "eventual goal of the sale of individual lots for residential home construction." *Id.*, p. 5, ¶ 5; Order on SJ, p. 14; § 76-4-102(17), MCA. The record is clear that Copper Ridge and Reflections were not involved in, nor intended to be involved in, construction activities on the individual lots.

This enforcement action kicked off with an inspection in September of 2013 – seven years after the development of the subdivisions and one year after DEQ was apparently so satisfied with Copper Ridge and Reflections' compliance with stormwater permit requirements during the developers' construction activities that they terminated the permit coverage – essentially telling Copper Ridge and Reflections that stormwater coverage for the subdivision developer was no longer necessary. Again, no violations of either the Water Quality Act or the Montana Subdivision and Platting Act were alleged against Copper Ridge and Reflections, the subdivision developers.

Neither the Proposed FOFCOL nor the Order on Summary Judgment articulated where, within the subdivisions, the discharges originated. The origin of the discharge is critical to the violation cited here because, for stormwater discharges associated with construction activity, it is the disturbance caused by the construction that is the regulated point source. ARM 17.30.1102(28).

DEQ has not described, with specificity, the location of the "disturbance" where the discharges originated. However, it is more likely than not, given the following facts, that the disturbances were on individual lots:

- Development began in 2006, but the discharges were not observed until 2013. Order on SJ, p. 14; p. 1, Facts ¶¶ 1 and 2.
- "[T]he eventual goal" of the subdivisions was "the sale of individual lots for residential home construction." Order on SJ, p. 14.
- DEQ terminated Copper Ridge's and Reflections' permit coverage of the developers' construction activities, outside of the individual lots, which did not include "controls for construction activity on residential lots." Proposed FOFCOL, pp. 4-5, Findings of Fact ¶¶ 5-6.
- After the violations were alleged, DEQ required Copper Ridge and Reflections to file corrective SWPPPs and NOIs for "construction of new single-family homes." Order on SJ, p. 3, Facts ¶ 14.

It is unlikely that DEQ would terminate Copper Ridge's and Reflections' permit coverage if it believed that the disturbances were still occurring due to the developer's permitted construction activities outside of the individual lots. It is also unlikely that a developer would delay completing development of its substantial investment and delay its "eventual goal" of selling individual lots for seven years (the time between initiation of the development and the DEQ

inspection). Further, it is expected that DEQ would require permit coverage for the specific construction activity that caused the violation – the "construction of new single-family homes" – for which Copper Ridge and Reflections applied in response to the requirements in DEQ's violation letters. Therefore, it is more likely than not that the sources of the discharges at issue in this enforcement action were *disturbances on individual lots*. DEQ's observed "tracking on streets" does nothing to change this conclusion because it is not clear what "tracking" is or how it qualifies as a "construction activity" specifically tied to a Copper Ridge or Reflections construction project. ARM 17.30.1104(28) ("For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects.").

If the discharges originated from construction projects on the individual lots, as is more likely than not in the case here, then Copper Ridge and Reflections cannot be held liable for those discharges because they are neither the owner nor the operator of the individual lots, nor were they responsible for any construction projects on the individual lots. The Order on Summary Judgment also relied on one contract that is obviously related to the developer's construction activities in accordance with their responsibilities as developers under the Montana Subdivision and Platting Act. Order on SJ, p. 14. Any degree of "supervision and control" that

may be portrayed in that contract is limited to the developer's construction activities outside of the individual lots pursuant to the approved Subdivision Certificate only, and does not apply to homebuilding construction activities on individual lots.

Further, the Hearing Examiner stated that the same contract "put Copper Ridge and Reflections in a position of either control or supervision with regard to the terms of the sale of any individual lot for construction of residential homes," and that Copper Ridge and Reflections "had the power to supervise or control land with regard to storm water discharges" and should have "exercised supervision or control over the contractual terms of the sale of land." Order on SJ, p. 15. No authority is cited for this position and in fact, none can be found.

The Subdivision laws govern the developer's responsibilities with regard to subsequent purchasers and only require that:

> The developer or owner of an approved subdivision shall provide each purchaser of property within the subdivision with a copy of the plat or certificate of survey and the certificate of subdivision approval specifying the approved locations of water supply, storm water drainage, and sewage disposal facilities. Each subsequent seller of property within the subdivision shall include within the instruments of transfer a reference to the conditions of the certificate of subdivision approval. A written verification of notice that is signed by both the seller and the purchaser and is recorded with the county clerk and recorder constitutes conclusive evidence of compliance with this section for that transaction.

§ 76-4-113, MCA. The idea that the developer must somehow "supervise and control" the use of land after it is purchased by someone else defies logic and is inconsistent with the very terms of property ownership. In fact, after the developer sells the lots and provides the information required by § 76-4-113, MCA, the lot owner becomes subject to the requirements of the Subdivision Certificate, including any covenants, conditions or restrictions imposed through the Subdivision Certificate. *See generally*, *Eastgate Village Water and Sewer Assoc. v. Davis*, 2008 MT 141, 343 Mont. 108, 183 P.3d 873. The previous owner of the lot, the developer in this case, no longer has authority over that land.

Nor would it be appropriate for the previous owner (even if the previous owner is the developer) to retain authority over that land for purposes of Water Quality Act or Montana Subdivision and Platting Act requirements. The Legislature specifically vested authority to administer the Water Quality Act in DEQ, not any previous landowner. § 75-5-211, MCA ("Except as otherwise provided, the department [of environmental quality] is responsible for administration of this chapter."). Nothing in the Water Quality Act vests authority in a previous landowner or developer to enforce any Water Quality Act requirements, including stormwater discharge requirements. Further, nothing in the Montana Subdivision and Platting Act gives the developer enforcement authority. § 76-4-108, MCA ("If the reviewing authority has reason to believe that

a violation of this part or a rule adopted or an order issued under this part has occurred, the reviewing authority may have written notice and an order served personally or by certified mail on the alleged violator or the alleged violator's agent."). Copper Ridge and Reflections retained no authority over stormwater discharges from the individual lots.

After complying with the Montana Subdivision and Platting Act, being granted a Subdivision Certificate and relaying the required information to the subsequent landowner, Copper Ridge and Reflections, as the developers, had done everything required of them under the law. Copper Ridge and Reflections, as the developers, have no authority to go beyond those requirements to control stormwater discharges associated with construction activities taking place on land they no longer own. Indeed, to do so would likely constitute trespass and subject Copper Ridge and Reflections to civil liability. *Davis v. Westphal*, 2017 MT. 276, ¶ 15, 389 Mont. 251, 405 P.3d 73 ("Because the legal harm is the interference with another's right to *exclusive possession of property*, an unauthorized tangible presence on the property of another constitutes a trespass regardless of whether the intrusion caused any other harm.") (emphasis added). Although not included as a proposed finding, the Proposed FOFCOL acknowledges testimony presented on this very issue:

> From the above quoted letter and the testimony at the hearing, it is entirely unclear to the undersigned whether or not BMPs [Best

> Management Practices for stormwater control] were in place as of January 2015, were going to be put in place in the spring of 2015, or ever could be put in place based on CR/REF's ownership access.

Proposed FOFCOL, p. 35. Trespass and liability concerns prevent Copper Ridge and Reflections from enforcing any stormwater requirements on land they no longer own.

The Order on Summary Judgment also relies on the fact that Copper Ridge and Reflections signed SWPPPs and NOIs, as *required* by DEQ, *after* the violations were alleged, as proof that Copper Ridge and Reflections were owners or operators. Order on SJ, pp. 2 – 3, ¶¶ 8 – 15. However, Copper Ridge and Reflections submitted (and still maintain) those SWPPPs and NOIs *under protest*. Proposed FOFCOL, p. 26. Surely DEQ cannot mean that documents it requires for compliance, and which are submitted under protest, somehow prove liability for the very violation that is the subject of the enforcement action. Not only is the timing wrong (using a later completed document to prove liability for an earlier violation), but the end result is absurd. If this Board approves this as an acceptable enforcement strategy, then DEQ can merely cite violations as it pleases, *without proof of liability*, in hopes of garnering some documented signature later that would prove liability. The law demands more. *In re Henry Stevenson*, 16 E.A.D. at 158.

None of the facts relied upon in the Order on Summary Judgment support a conclusion that Copper Ridge and Reflections are owners or operators of any individual lots. The preponderance of the evidence cannot, therefore, support any conclusion that Copper Ridge and Reflections discharged stormwater without a permit. At most, DEQ has proven that discharges originated somewhere in the subdivision or in an adjacent upgradient subdivision. Given that the violation at issue here demands that the discharge be tied to some construction activity's "disturbance," and given that there are multiple property owners within and adjacent to each subdivision, DEQ cannot just summarily assign the violation to Copper Ridge and Reflections without affirmatively demonstrating that Copper Ridge and Reflections own the disturbed land where the discharge originated. ARM 17.30.1102(28); § 26-1-402, MCA.

Therefore, given the facts as provided in the Order on Summary Judgment and in the Proposed FOFCOL, the preponderance of the evidence only leads to a conclusion that discharges occurred from construction projects somewhere in the subdivision or in an adjacent upgradient subdivision. There is no evidence, and indeed it is unlikely, that the discharges originated from any of Copper Ridge and Reflections' property. Therefore, Copper Ridge and Reflections cannot be held liable for the discharges.

Similarly, DEQ has failed to prove that Copper Ridge and Reflections "*place[d] or cause[d] to be placed* any wastes where they will cause pollution of any state waters" § 75-5-605(1)(a) (emphasis added). Although the Order on Summary Judgment found that all of the materials observed by DEQ on September 9, 2013 meet "the definition of 'other wastes' contained in Mont. Code Ann. § 75-5-103(24)," what's missing is any proof that Copper Ridge and Reflections "placed or caused" those wastes to be placed. Order, p. 17. The fact that wastes are present in a subdivision is no different than the fact that wastes are present in a municipality, in a parking lot, alongside a county road, on a river bank, or in any other public space. DEQ must do more than identify the developer who established the boundaries of the subdivision in which it finds wastes. The facts presented to this Board are devoid of any proof that Copper Ridge and Reflections handled any wastes, moved any wastes, created any wastes, placed any wastes, or caused any wastes to be placed. To the extent that DEQ seeks to hold Copper Ridge and Reflections responsible for wastes placed by others in conjunction with construction projects on individual lots (which, as explained above is the most likely interpretation of the facts provided), Copper Ridge and Reflections cannot be held responsible for the actions of private landowners over whom they have no control, also as explained above.

If any doubt remains about Copper Ridge's and Reflections' innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.

2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.

3. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed* discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

4. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or

testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

5. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

6. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

7. DEQ acknowledges that sediment has other sources and there is "no way [...] to know where the sediment would have come from." Hearing Transcript, Vol. 1, 158:1 – 14.

8. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed

FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged Violation 2. § 2-4-621(3), MCA.

2. DEQ Failed to Prove that any Wastes Will Cause Pollution.

Violation 3 was alleged against Copper Ridge and Reflections as a violation of § 75-5-601(1), MCA, which makes it unlawful to:

> (a) cause pollution, as defined in 75-5-103, of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters.

§ 75-5-601(1)(a), MCA.

DEQ must prove every element of the violation, including "pollution" which is defined as:

> (i) contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or
>
> (ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

§ 75-5-103(30), MCA.

As noted in the Order on Summary Judgment, DEQ failed to meet its burden:

> … to establish "some form of alteration of state waters 'that exceeds that permitted by Montana water quality standards.'" DEQ has not

> provided any evidence of permitted water quality standards at this time. As a result, DEQ has not established pollution under the first prong of the definition.

Order on SJ, p. 18 (*citing* § 75-5-103(30)(i)). DEQ also failed to meet the second prong of the definition of pollution:

> While DEQ has established the placement of waste, DEQ has not identified the facts to establish or explain how this waste will create a nuisance or otherwise cause the harm required in the definition of 'pollution.'

Order on SJ, p. 18.

Nothing has changed. The Proposed FOFCOL includes no proposed findings or conclusions regarding any "alteration of state waters" let alone any alteration that "exceeds that permitted by Montana water quality standards." § 75-5-103(30)(i), MCA. Nor are there any proposed findings or conclusions regarding a nuisance or harm that meets the definition of pollution.

The Proposed FOFCOL tries to rationalize around the requirement by stating "[w]hen an entity has no permit to discharge storm water, all storm water discharges to a state water that contain waste are necessarily 'exceeding that permitted.' " Proposed FOFCOL, p. 27. But this language omits the operative phrase "... exceeding that permitted by Montana water quality standards" and fails to recognize that a stormwater general permit is not a water quality standard that

has been promulgated by the Board.[3] The Proposed FOFCOL's logic seems to be that because there was no permit, there must have been a discharge that exceeded that permitted by Montana water quality standards. But that is the analysis for whether there was a discharge without a permit, which is the completely separate Violation 2 cited by DEQ. *See* § 75-5-605(2)(c), MCA ("it is unlawful to carry on any of the following activities without a current permit from the department … discharge …other wastes into any state waters.").

Here, the operative analysis is not whether there was a discharge without a permit, but whether the discharge caused an alteration "that exceeds that permitted by Montana Water Quality Standards." § 75-5-103(30), MCA. "Pollution" is an element that must be proven by a preponderance of the evidence in order for DEQ to meet its burden of proving Violation 3. § 26-1-402, MCA.

The Proposed FOFCOL imputes the analysis for a violation of discharge without a permit into the analysis for a violation of placement of wastes. The two are not the same and, contrary to the Proposed FOFCOL's assertion that "numeric standards for the amount of waste are essentially irrelevant," Montana's water quality standards do matter and must guide any analysis of whether or not

[3] The Board is tasked by the Legislature to "formulate and adopt standards of water quality" and has promulgated "[s]pecific surface water quality standards, along with general provisions … [that] protect the beneficial water uses." (§ 75-5-301(2), MCA.) ARM 17.30.620. None of the proposed findings or conclusions identify which water quality standard is alleged to have been exceeded such that the placement of wastes actually caused or would have caused pollution.

"pollution" was or would be caused by the placement of waste. §§ 75-5-605(1)(a); 75-5-103(30), MCA. The statute requires, as noted in the Order on Summary Judgment, that DEQ prove that the placement of wastes would cause "pollution." Without such proof, DEQ fails to meet its burden of proving the violation. Because there is no finding of fact that any placement of waste caused any "alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards," DEQ has not met the burden of proving that the first prong of pollution was met.

Regarding the second prong of pollution, which "requires DEQ to establish that a substance has entered state water that will either create a nuisance or 'render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife,' " again, there are no findings or conclusions in the Proposed FOFCOL establishing that a nuisance was or could have been created or that the waters were or could have been rendered harmful, detrimental or injurious to any use. Order on SJ, p. 18.

In fact, the Proposed FOFCOL notes that there was no evidence on the "volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit." Proposed FOFCOL, p. 25. That evidentiary void means that DEQ has failed to meet its burden of proving "pollution;" therefore, Copper Ridge and Reflections cannot be found to have

"place[d] or cause[d] to be placed wastes where they would cause pollution." § 75-5-605(1)(a). Violation 3 cannot stand.

The analysis provided to the Board simply equates a violation for discharging without a permit to a violation of placement of wastes where they will cause pollution. Practically speaking, if that rationale stands, then every unpermitted discharge could be charged as both an unpermitted discharge under § 75-5-605(2)(c) and as a placement of wastes where they will cause pollution under § 75-5-605(1)(a). Not only does that prejudice the regulated public by alleviating DEQ of the burden of proving an element of the violation (pollution), it also leads to an unjust result because it exposes the regulated public to duplicative, costly violations.

If any doubt remains about Copper Ridge's and Reflections' innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

2. DEQ acknowledges that sediment has other sources and there is "no way [...] to know where the sediment would have come from." Hearing Transcript, Vol. 1, 158:1 – 14.

3. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

4. DEQ did not observe or take water quality measurements of Cove Ditch and has no evidence of alterations of the water's turbidity, taste or color. Nor does DEQ have any evidence of floating debris. Hearing Transcript, Vol. 1, 175:3 – 176:4; 200:21 – 24.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged Violation 3. § 2-4-621(3), MCA.

3. DEQ has Failed to Prove Any Subsequent Days of Violation.

The sole basis for concluding that there were eight days of violation for both Violation 2 and Violation 3 is "NOAA data [that] shows eight days between September 23, 2013 and December 23, 2013 when there were precipitation events greater than 0.25 inches." Proposed FOFCOL, p. 12, ¶ 38; p. 24; p. 42, ¶ 19; pp. 43-44, ¶ 27. Nothing in the statute allows DEQ to allege violations based on precipitation events. For Violation 2, the statute is clear – it is "unlawful to …discharge … wastes into any state waters." § 75-5-605(2)(c), MCA. The statute affirmatively requires that a discharge occur in order for there to be a violation. Charging days of violations based on precipitation events rather than actual discharges is unlawful.

For the same reasons, the daily penalties for Violation 3 are wrong. The statute at issue in Violation 3 requires that the placement of wastes "will cause pollution of any state waters." § 75-5-605(1)(a), MCA. Nothing in the precipitation records demonstrates that pollution will be caused. In fact, the precipitation records do not consider the terrain, the proximity to state waters, the exact location of the precipitation, or the duration and intensity of the precipitation. All of those factors, and more, need to be considered before any logical conclusion can be reached as to when a placement of wastes "*will* cause pollution of state waters."

If DEQ is allowed to penalize the regulated public based on weather data, how can the regulated public be expected to comply with the law? The regulated public (and likely no one) can accurately forecast the weather. Weather cannot be an element of a violation. In fact, the elements of the violations are clearly spelled out in statute and do not include weather. They include affirmative "discharges" and placement of wastes that "will cause pollution" – neither of which can be proven by looking at a precipitation record. DEQ cannot ignore the statutory elements of the violations, cannot insert different elements into the statutes, and cannot "conform [the statute] to what may be a prevailing practice actually at odds with what the [statutes] clearly and unambiguously require." *Busch v. Atkinson*, 278 Mont. 478, 483, 925 P.2d 874, 877 (1996); § 1-2-101, MCA.

There is no evidence of a discharge or a placement of wastes that will cause pollution on any of the eight days cited for either Violation 2 or Violation 3. As a matter of law, the daily penalties for these violations cannot stand. Because DEQ has relied on an unlawful method of alleging violations, the Proposed Conclusions of Law No. 19 and No. 27 must be modified to reflect, at most, one day of violation.

Further, because the time period in which those eight days occur (September 23, 2013 and December 23, 2013) is the "timeframe acceptable to DEQ" in which Copper Ridge and Reflections were allowed to complete the

required compliance tasks, DEQ cannot now seek penalties for noncompliance during that timeframe. Proposed FOFCOL, p. 8, ¶¶ 20, 21; § 75-5-617(2), MCA ("*If the person fails* to respond to the conditions in the department's letter, then the department shall take further action."). Here, all parties agree that Copper Ridge and Reflections responded appropriately "to the conditions in the departments letters;" therefore, no further enforcement action, including assessment of penalties, may be taken and certainly no penalties may be assessed during the timeframe DEQ provided Copper Ridge and Reflections to complete the compliance tasks.

If any doubt remains about Copper Ridge's and Reflection's innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed*

discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

2. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

3. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

4. When calculating the penalties, DEQ calculated the number days based only on weather data collected in 24-hour increments. Any 24-hour period when a quarter-inch or more of rain was measured by the weather station was considered a day of violation regardless of whether or not a discharge actually occurred. Hearing Transcript, Vol. 1, 224:13 – 25, 256:23 – 257:25.

5. When calculating the penalties, DEQ calculated the number days without considering that no placement of waste or discharges were observed on any day before or after September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

6. DEQ acknowledges that sediment has other sources and there is "no way [...] to know where the sediment would have come from." Hearing Transcript, Vol. 1, 158:1 – 14.

7. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged daily violations. § 2-4-621(3), MCA.

4. DEQ Failed to Prove that Violations 2 and 3 Occurred at <u>Each</u> Subdivision.

DEQ maintains that Copper Ridge and Reflections are two separate subdivisions. Proposed FOFCOL, p. 3, ¶ 1. It is physically and legally impossible for the subdivisions to overlap each other. They occupy separate and distinct portions of land and are owned by separate and distinct corporations. Therefore, each violation must be separately established for each subdivision. But DEQ conducted one site inspection and documented alleged violations of stormwater discharging from one combined "construction activity." Without distinguishing

between the two subdivisions, DEQ issued one violation letter, based on the fact that the subdivisions were "part of a larger common plan of development" (i.e.: one construction activity) such that "one violation letter was adequate to address the violations." Proposed FOFCOL, p. 7, ¶ 17; p. 5, ¶ 7 (*citing* ARM 17.30.1102(28)).

The phrase "part of a larger common plan of development" is not defined in the rules; rather, it is used to define the term "construction activity" as used in the basis for the alleged violations - "storm water discharge associated with construction activity." DEQ's initial citation alleged that the "construction activity" in this case is the "larger common plan of development," or both subdivisions together. ARM 17.30.1102(28) ("Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more."). It is the "storm water discharge associated with [the larger common plan of development – i.e.: both subdivisions combined as one construction activity]" that DEQ alleged constituted the violation. Because DEQ cited the violations as occurring due to one combined construction activity, at most only one penalty may be assessed.

Nothing in the proposed findings distinguishes the violations as between the two separate subdivisions. *See* Proposed FOFCOL, p. 6, ¶¶ 12, 13; p. 9, ¶ 26.

After the initial Violation Letter, DEQ provided only a statement, with no supporting facts or analysis, that the violations were distinguishable. Proposed FOFCOL, p. 8, ¶ 19. Indeed, the facts alleged to constitute the violations were never separated or identified by subdivision. *See* Proposed FOFCOL, p. 6, ¶¶ 12, 13; p. 9, ¶ 26. For the penalty calculations, each of the three violations is analyzed without regard for, and even without reference to, the separate subdivisions. But then the assessment is just summarily multiplied by two and charged against both subdivisions. Proposed FOFCOL, pp. 22-38; p. 41, ¶ 13; pp. 42-43, ¶ 21; p. 44; ¶ 29.

DEQ cannot have it both ways. They cannot investigate, document, and send a notice letter for just one set of violations when it is convenient for them and then, without explanation and without separating the facts and tying each fact to a specific allegation against a specific subdivision, just double everything, including the penalties. Because DEQ initiated this action with one set of facts alleging violations against one "common plan of development" and because DEQ has never distinguished the facts as they apply to each subdivision, DEQ may not simply double every penalty for every violation. If any penalty is assessed, it should only be a single penalty amount of each violation. The Proposed Conclusions of Law Nos. 13, 21, 29, and 36 must be revised to reflect, at most, a singular penalty.

If any doubt remains about Copper Ridge's and Reflection's innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. On November 8, 2013, DEQ issued a "617 Letter of Violation – Clarification" to Copper Ridge Development Corporation. Although the letter indicated that DEQ intended to pursue separate formal enforcement actions against each subdivision, neither that letter nor the September 23, 2013 letter was addressed to REF, the owner of the Reflections at Copper Ridge subdivision. The November 8, 2013 letter provided the same information, cited the same violations, and required the same compliance and corrective actions as did the September 23, 2013 letter, but moved the compliance deadline to December 15, 2013. Ex. 17; The Parties' Joint Stipulated Facts, ¶ 9.

2. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed*

discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

3. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

4. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged violations. § 2-4-621(3), MCA.

C. Even if the Violations Stand, the Penalty Assessments are Wrong.

The notice requirements and statutorily-required penalty factors dictate that, based on the findings and conclusions in the Proposed FOFCOL, no penalties can be assessed for any of the violations.

1. Section 75-5-617(2) and ARM 17.30.2003(5) Preclude Assessment of Penalties in this Case.

As described in the Proposed FOFCOL, there is "discomfort regarding DEQ's correspondence and ARM 17.30.2003" which "created substantial, justifiable confusion." Proposed FOFCOL, p. 21, fn 4.

> [A]ny recipient could have construed the letters as intended to be "notice letters" within the meaning of subsection (2) [of ARM 17.30.2003]. There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence, as contemplated by subsection (5) [of ARM 17.30.2003]. CR/REF's frustration is understandable – it responded to and complied with all of DEQ's demands in the correspondence, only to receive an AO three months later. … It does not seem fair that DEQ should, in effect, be rewarded for its own failures to write (what it intended to be) a "notice letter."

Id.

It is clear that, had the Proposed FOFCOL concluded that ARM 17.30.2003(5) applied, it would preclude DEQ from seeking penalties for the remaining violations. Both § 75-5-617 and ARM 17.30.2003(5) **do** apply to this case and preclude DEQ from seeking penalties for the remaining violations.

There are two types of notices – notice under § 75-5-611 and notice under § 75-5-617. As explained in the Order on Summary Judgment, § 75-5-617 "provides that whenever DEQ finds a person in violation … the department shall initiate an enforcement response" and that "enforcement response includes administrative or judicial penalties under Mont. Code Ann. § 75-5-611," which has

separate, additional notice provisions. Order on SJ, p. 6 (*citing* § 75-5-617(1)(d), MCA). In effect, § 75-5-617 authorizes an enforcement response and § 75-5-611 explains that enforcement response. Compliance with § 75-5-611 does not absolve DEQ of the requirements of § 75-5-617. In fact, DEQ must comply with § 75-5-617 before proceeding to § 75-5-611.

Also as correctly noted in the Order on Summary Judgment, § 75-5-617 requires that DEQ may only proceed to one of the allowable enforcement responses if it satisfies specific notice requirements **and** "[i]f the person fails to respond to the conditions in the department's letter." Order on SJ, p. 6 (*citing* § 75-5-617(2), MCA); *see also* ARM 17.30.2003(5).

"There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence." Copper Ridge and Reflections did "respond to the conditions in the department's letter;" therefore, "DEQ may not bring an administrative proceeding for penalties." Proposed FOFCOL, p. 8, ¶ 20; p. 10, ¶ 29; Order on SJ, p. 6 (*citing* § 75-5-617(2), MCA).

The Proposed FOFCOL alleges that Copper Ridge and Reflections cannot "assert both that *none* of DEQ's correspondence constituted a 'notice letter' … and that CR/REF adequately responded to *all* the 'notice letters.' " Proposed FOFCOL, p. 21, fn. 4 (emphasis in original). But keep in mind that there are two statutes governing different types of notice - §§ 75-5-611 and 75-5-617. Copper

Ridge and Reflections proposed that "[b]oth the September 23, 2013 and the November 8, 2013 letters were issued pursuant to § 75-5-617 and the rules promulgated pursuant to that statute." Copper Ridge and Reflections' Proposed FOFCOL, p. 4, FOF ¶ 4; p. 13, COL ¶ 1. Copper Ridge and Reflections do not argue that none of the notice provisions were met, only that, as agreed in the Order on Summary Judgment, the notice provisions of § 75-5-611 were not met.

DEQ's notices constituted notice letters under § 75-5-617 and ARM 17.30.2003(1), and Copper Ridge and Reflections adequately responded to those notice letters. Proposed FOCOL, p. 8, ¶ 20; p. 10, ¶29. Therefore, § 75-5-617(2) and ARM 17-30-2003(5) prohibit DEQ from seeking administrative penalties for those violations. Section 75-5-611 was never invoked in this case and DEQ had no authority to issue any Administrative Compliance and Penalty Order.

Because the previous Hearing Examiner concluded that the provisions of § 75-5-617(2) apply and because all parties agree that "Copper Ridge and Reflections at Copper Ridge each took the corrective action identified in the [notice letters]," no administrative penalties may be sought in this case. § 75-5-617(2), MCA; ARM 17.30.2003(5). Proposed Conclusions of Law Nos. 13, 21, 29, and 36 are void and the remaining Proposed Conclusion of Law regarding penalties, including Nos. 7 through 10, 14 through 19, 22 through 27, and 30 through 35, are unnecessary.

2. Additionally, ARM 17.30.2003(7) Precludes Assessment of Penalties for Violations 3 and 4.

DEQ is only allowed to pursue an administrative penalty for violations that are either "(i) a class I violation as described in ARM 17.30.2001(1); or (ii) a violation of major extent and gravity as described in ARM 17.4.303." Order on SJ, pp. 11-12 (*citing* ARM 17.30.2003(7)).

The previous Order on Summary Judgment did not rule that Violation 3 was a Class I violation. Order on SJ, pp. 12-13. Indeed, it cannot be a Class I violation because ARM 17.30.2001(2)(c) which clearly classes "placement of wastes in a location that will cause pollution of state waters" as a *Class II* violation. Further, because the current Proposed FOFCOL concludes that a proper analysis of Violation 3 reveals that it is only of "minor extent," Violation 3 does not meet the 17.30.2003(7) criteria for assessing a penalty without proper notice under § 75-5-611. Proposed FOFCOL, p. 30. The Order on Summary Judgment held, and the Proposed FOFCOL has not disturbed the holding, that there was no adequate notice under § 75-5-611. Because there was insufficient notice under § 75-5-611 and because Violation 3 no longer meets the criteria of ARM 17.30.2003(7), a penalty may not be assessed. This is another reason why the Proposed Conclusion of Law No. 21 is void and Proposed Conclusion of Law Nos. 22 through 27 are unnecessary.

Violation 4 was characterized in the Order on Summary Judgment as a "viola[tion] [of] a permit compliance plan or schedule" which meets the criteria for a Class I violation. Order on SJ, p. 13; Admin. R. Mont. 17.30.2001(1)(d). However, as testimony from DEQ revealed, Violation 4 never alleged a violation of a permit compliance plan or schedule. Proposed FOFCOL, p. 10, ¶ 31. Therefore, the sole basis for asserting that Violation 4 was a Class I violation was erroneous.

Because violation 4 is no longer a Class I violation and because the Proposed FOFCOL finds that it is not of major extent and gravity, it no longer meets the criteria in ARM 17.30.2003(7) for assessment of a penalty without the proper notice under § 75-5-611. The Order on Summary Judgment held, and the Proposed FOFCOL has not disturbed the holding, that there was no adequate notice under § 75-5-611. Because there was insufficient notice under § 75-5-611 and because Violation 4 no longer meets the criteria of ARM 17.30.2003(7) a penalty may not be assessed.

3. Other Matters as Justice May Require Dictate that the Penalties for Violations 2 and 3 be Reduced to Zero.

When determining an appropriate penalty amount, DEQ "*shall* take into account … other matters that justice may require." § 75-1-1001(1)(g) (emphasis added). However, the Proposed FOFCOL only mentions this required penalty factor in terms of calculating the number of days of violation, which is a separate

penalty consideration pursuant to ARM 17.4.305. Proposed FOFCOL, pp. 42, 44, ¶¶ 19, 27. Because the Proposed FOFCOL fails to consider "other matters that justice may require," as it must under the statute, "the proceeding on which the findings were based did not comply with the essential requirements of law." § 2-4-621(3).

The Proposed FOFCOL fails to make any findings with respect to "other matters that justice may require." The Proposed FOFCOL doesn't even offer a finding that there are *no* "other matters that justice may require." Even if it had, that finding would not be supported by "competent substantial evidence" in light of the following evidence to the contrary:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.

2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.

3. Although DEQ was aware of potential issues at the Subdivisions and other subdivisions in that area as early as March 2013, an inspection was not performed until September 2013, after a sudden and disastrous storm, in order to "catch" Copper Ridge and Reflections. Enforcement of unpermitted construction activity, without a potential discharge to state waters, is not a priority and DEQ

prefers enforcement during a storm event when a discharge is likely and will provide a "stronger case." Hearing Transcript, Vol. 1, 50:25 – 51:6; 191:4 – 193:17; 200:25 – 201:15; 142:24 – 143:6; 49:16 – 50:6; Ex. 14.

4. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

5. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not know and did not consider the lack of control that Copper Ridge and Reflections had over the homebuilding construction activities within the Subdivisions or the lack of control that Copper Ridge and Reflections had over the private property owners in the Subdivisions. Hearing Transcript, Vol. 1, 251:17 – 252:12; Vol. 2, 73:12 – 20, 80:3 – 81:18; Vol. 2, 90:1 – 15, 110:1 – 12.

6. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider that the occurrence and magnitude of the September 2013 storm was not foreseeable. Exs. 9, 10. "The burst of rain happened so quickly". Within 45 minutes "an unofficial total of 2.10 inches fell just west of [Billings]" causing flash flooding. "Saturday's total was five times the total month-to-date rainfall average." Ex. 14, pp. 2-3.

7. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider the stormwater design of the Subdivisions, or that Copper Ridge and Reflections had hired professional outside consultants to ensure compliance and had required contractors to obtain discharge permits and employ BMPs. Hearing Transcript, Vol. 1, 253:5 -22; Vol. 2, 8 – 16, 103:23 – 104:23; Exs. 9, 10, G.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections. § 2-3-261(3), MCA.

Even using the proposed findings as presented, the penalties cannot stand. Even though the City of Billings specifically requested that DEQ address storm water compliance issues at Copper Ridge and even though DEQ told the City of Billings that Copper Ridge did not have permit coverage for the storm water discharges, DEQ delayed for nearly six months, and purposely waited until after a "significant storm event" had resulted in alleged discharges to complete an inspection. Proposed FOFCOL, p. 4, ¶ 4; pp. 5-6, ¶¶ 8-11. DEQ also knew that Copper Ridge had previously obtained storm water permit coverage. *Id.*, pp. 4-5, ¶

5. In fact, DEQ had terminated that coverage without noting any violations. *Id.*, p. 5, ¶ 6; p. 22. So DEQ had no reason to think that Copper Ridge and Reflections were unwilling or unable to obtain permit coverage if they had been asked to do so prior to the September 2013 storm. It is not fair to penalize Copper Ridge and Reflections for discharges that could have been avoided if DEQ had responded appropriately and timely to the City's concerns.

It also is not fair for DEQ to wait for six months, until a "significant storm event" that was sure to cause problems occurred before conducting the inspection and requesting that Copper Ridge and Reflections obtain permit coverage. DEQ could have easily contacted Copper Ridge and Reflections immediately after the City first asked them to do so in March 2013 but chose not to. There is no reason to believe that, had DEQ notified Copper Ridge and Reflections of the need for a permit in March of 2013, as first requested by the City of Billings, that Copper Ridge and Reflections would not have had appropriate permit coverage in place six months later when the "significant storm event" occurred. Copper Ridge and Reflections' previous successful permit coverage and their timely permit submission in response to DEQ's requests suggests that it is more likely than not that Copper Ridge and Reflections would have promptly responded to DEQ's request for a permit application, had such a request been timely made.

Instead, DEQ waited until a discharge was certain, and then inspected the subdivision. For all its posturing about the importance of protecting state waters, DEQ itself failed to protect state waters by failing to timely respond to the City's call for an inspection and by specifically waiting until *after* a "significant storm event" to inform the regulated public of the need for a permit. As the Proposed FOFCOL acknowledges:

> CR/REF at least had a non-frivolous, good faith legal basis to believe that they were not owner/operators requiring permit coverage. Based on the circumstances here, it is not fair [i]n this instance to charge CR/REF with violations for discharges without a permit before DEQ told them affirmatively that they needed to have permit coverage.

Proposed FOFCOL, p. 24.

Those circumstances are significant enough to be documented in the Proposed FOFCOL, yet they were not considered in terms of the penalty calculation. Proposed FOFCOL, p. 4, ¶ 4; pp. 5-6, ¶¶ 6-11; p. 22. The Proposed FOFCOL notes, at its very opening:

> DEQ's performance – including its inspections, record-keeping, notices communication, enforcement decisions, follow up, and the evidence, testimony, and explanations provided at hearing – were difficult to understand and in some instances inadequate.

Proposed FOFCOL, p. 3. Those documented issues are "other matters as justice may require" and demand that the penalty for Violations 2 and 3 be reduced down to zero. The regulated public should not pay the price for DEQ's delay and

inaction in the face of a potential discharge to state waters. The Proposed Conclusions of Law ¶¶ 13 and 21 must be modified to reflect zero penalty.

4. All of the Penalties Should be Reduced for Good Faith and Cooperation.

The Proposed FOFCOL asserts that Copper Ridge and Reflections "could have sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage [i.e.: before the September 9, 2013 inspection that noted a violation] and done more to get the permit faster after learning DEQ felt it was needed." Apparently, those are reasons why no decrease of the base penalty is warranted for good faith and cooperation pursuant to Admin. R. Mont. 17.4.304(3). But the Proposed FOFCOL refers to none of the good faith and cooperation criteria that must be included in DEQ's consideration of this penalty factor:

> (a) the violator's promptness in reporting and correcting the violation, and in mitigating the impacts of the violation;
> (b) the extent of the violator's voluntary and full disclosure of the facts related to the violation; and
> (c) the extent of the violator's assistance in the department's investigation and analysis of the violation.

ARM 17.4.304(3).

All of those criteria are forward looking, *after* the violation has occurred. Therefore, it is improper to discount the good faith and cooperation of Copper Ridge and Reflections based on what they did or did not do *before* the violation was issued. Indeed, the assertion that Copper Ridge and Reflections "could have

sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage" contradicts an earlier statement that "it is clear that CR/REF at least had a non-frivolous, good faith legal basis to believe that that they were not owner/operators requiring permit coverage" at least until "DEQ told CR/REF on September 23, 2013 that they needed permit coverage." Proposed FOCOL, p. 24. Because the rule requires consideration of actions that occur *after* the violation has been alleged, not before, and because the Proposed FOFCOL acknowledges that prior to DEQ alleging a violation against Copper Ridge and Reflections, that Copper Ridge and Reflections had good reason to believe that they did not require permit coverage, the assertion that no discount should be given for good faith and cooperation should be voided.

Further, there is no evidence anywhere in the record that Copper Ridge and Reflections "could have sought guidance from DEQ sooner" or that they could have done anything "more to get the permit faster," as asserted in the Proposed FOFCOL. These phrases, which are relied upon for the mistaken premise that Copper Ridge and Reflections did not act in good faith and did not cooperate, are not actual proposed findings; therefore, the Board cannot be certain that they are based on "competent substantial evidence" and cannot rely upon them for any conclusion.

DEQ "*shall* take into account …the [alleged] violator's good faith and cooperation." § 75-1-1001, MCA. From the Findings of Fact that are proposed, it is clear that:

- Copper Ridge and Reflections had appropriate permit coverage for all of *their* work, as the developers of the subdivision, including "construction of water, sanitary sewer, and storm drainage utilities, and street and sidewalk improvements." Proposed FOFCOL, pp. 4 – 5, ¶ 5.
- DEQ terminated that coverage without notifying Copper Ridge and Reflections. Proposed FOFCOL, p. 5, ¶ 6.
- "Within a timeframe acceptable to DEQ, Copper Ridge and Reflections at Copper Ridge each took the corrective actions" required in each of the violation letters received from DEQ. Proposed FOFCOL, pp. 8, 10, ¶¶ 20, 29.

In fact, the permitting process included *legitimate* (as acknowledged in the Proposed FOFCOL, p. 24) confusion and necessary clarification regarding ownership and permitting needs. Also, the permitting process took place in the winter, when discharges were unlikely and installation of BMPs was hampered by weather. Even so, Copper Ridge and Reflections were able to come into compliance by December 23, 2013 – just three months after DEQ's violation letter

was sent to them. Nothing in the evidence indicates that this timeframe was unreasonable or that Copper Ridge and Reflections could have done anything "more to get the permit faster." The blatant failure to consider any good faith and cooperation proves that the base penalty was not properly adjusted.

Indeed, the record shows a consistent on-going dialogue between the parties, with Copper Ridge and Reflections taking the appropriate corrective actions "[w]ithin a timeframe acceptable to DEQ." Proposed FOCOL, p. 8, ¶ 20; p. 10, ¶ 29. Further, the record shows that Copper Ridge and Reflections had made "an effort to control runoff" including installation of "a berm around the site and sand bags" as well as "straw bales on the perimeter." Proposed FOCOL, p. 9, ¶ 24. Because the conclusion that no adjustment was warranted for "good faith and cooperation" was not based on any facts and is contradicted even within the Proposed FOFCOL, the proposed conclusions regarding the penalties should be modified to include a 10-percent reduction, in consideration of Copper Ridge and Reflections' good faith and cooperation.

5. All of the Penalties Should be Reduced in Consideration of Amounts Voluntarily Expended.

The Proposed FOFCOL asserts that "there was no evidence of amounts CR/REF expended beyond what was required to come into compliance." Proposed FOFCOL, p. 22. This was not, but likely should have been, a proposed finding because without such a finding, this Board cannot appropriately determine, as they

must, whether there was an "amount voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation." § 75-1-1001, MCA (requiring that DEQ "shall take into account the following factors…").

Considering the Proposed FOFCOL's statement above ("no evidence of amounts CR/REF expended beyond what was required to come into compliance") as a proposed finding, this Board can easily determine that it is not supported by "competent substantial evidence." § 2-4-621(3), MCA. The only citation provided in the Proposed FOFCOL is to DEQ's recitation of the penalty factors, not to any relevant facts of this case. The record is clear:

> When calculating the penalties, DEQ did not consider amounts voluntarily expended by Copper Ridge and Reflections to hire professional outside consultants for permit compliance and administration. Landy Leep testified that Copper Ridge and Reflections hired a professional consultant and have paid at least $18,000 for "storm water management erosion control."

Hearing Transcript, Vol. 1, 258:11 –16; Vol. 2, 8 – 16; Vol. 2, 72:8 – 16; 113:18 – 114:4; Exs. 9, 10, G.

What the agency failed to acknowledge is that Copper Ridge and Reflections did not have to hire a professional consultant, they could have done the work internally. They could have had someone less qualified, and less expensive, do the work. Instead, they hired a professional consultant to ensure that the work was done correctly and completely. Hiring an independent third-party professional

gives the agency some assurances and confidence that the regulated entity will come into compliance. Therefore, it is wholly appropriate for DEQ to acknowledge this extra effort and expense. There is no requirement that exact amounts be expended in order to qualify for consideration of the 10-percent decrease in the base penalty allowed by Admin. R. Mont. 17.4.304(4).

Here, the agency didn't even consider the evidence in front of them – that Copper Ridge and Reflections hired a professional consultant to prepare the permit package and ensure compliance. The Proposed FOFCOL fails to acknowledge that the NOIs and SWPPPs were submitted by Mr. Marshall Phil, P.E., Senior Engineer with Blue Line Engineering. Proposed FOFCOL, p. 21. Nothing in the rules or statutes requires Copper Ridge and Reflections to hire a professional consultant. The fact that Copper Ridge and Reflections hired Blue Line Engineering, qualifies as "amounts voluntarily expended" to be considered under the rule.

Because the Proposed FOFCOL's conclusion regarding a required penalty factor is not based on any fact that is supported by competent substantial evidence, the conclusion regarding the penalty must be modified. § 2-4-621(3), MCA.

D. The Findings Presented to the Board are not Based on "Competent Substantial Evidence."

The proposed findings are missing several key facts that illustrate the egregiousness of DEQ's behavior in this case and are essential to reaching the proper decision. Although this problem is alluded to in the Introduction to the

Proposed FOFCOL, the following facts are not, but should be, included in any Order issued by this Board:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.

2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.

3. On November 8, 2013, DEQ issued a "617 Letter of Violation – Clarification" to Copper Ridge Development Corporation. Although the letter indicated that DEQ intended to pursue separate formal enforcement actions against each subdivision, neither that letter nor the September 23, 2013 letter was addressed to REF, the owner of the Reflections at Copper Ridge subdivision. The November 8, 2013 letter provided the same information, cited the same violations, and required the same compliance and corrective actions as did the September 23, 2013 letter, but moved the compliance deadline to December 15, 2013. Ex. 17; The Parties' Joint Stipulated Facts, ¶ 9.

4. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed* discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

5. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

6. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

7. Although DEQ was aware of potential issues at the Subdivisions and other subdivisions in that area as early as March 2013, an inspection was not performed until September 2013, after a sudden and disastrous storm, in order to "catch" Copper Ridge and Reflections. Enforcement of unpermitted construction activity, without a potential discharge to state waters, is not a priority and DEQ prefers enforcement during a storm event when a discharge is likely and will provide a "stronger case." Hearing Transcript, Vol. 1, 50:25 – 51:6; 191:4 – 193:17; 200:25 – 201:15; 142:24 – 143:6; 49:16 – 50:6; Ex. 14.

8. When calculating the penalties, DEQ did not consider that the alleged discharge occurred only during a significant storm event that also overwhelmed developed areas outside the Subdivisions with sediment, or that the alleged discharges were to an irrigation ditch that naturally carries high levels of sediment.

Exs. 9, 10, 14; Hearing Transcript, Vol. 1, 143:19 – 23, 146:14 – 147:2, 242:12 – 243:6; Vol. 2, 92:5 – 11.

9. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

10. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not know and did not consider the lack of control that Copper Ridge and Reflections had over the homebuilding construction activities within the Subdivisions or the lack of control that Copper Ridge and Reflections had over the private property owners in the Subdivisions. Hearing Transcript, Vol. 1, 251:17 – 252:12; Vol. 2, 73:12 – 20, 80:3 – 81:18; Vol. 2, 90:1 – 15, 110:1 – 12.

11. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider that the occurrence and magnitude of the September 2013 storm was not foreseeable. Exs. 9, 10. "The burst of rain happened so quickly". Within 45 minutes "an unofficial total of 2.10 inches fell just west of [Billings]" causing flash flooding. "Saturday's total was five times the total month-to-date rainfall average." Ex. 14, pp. 2-3.

12. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider the stormwater design of

the Subdivisions, or that Copper Ridge and Reflections had hired professional outside consultants to ensure compliance and had required contractors to obtain discharge permits and employ BMPs. Hearing Transcript, Vol. 1, 253:5 -22; Vol. 2, 8 – 16, 103:23 – 104:23; Exs. 9, 10, G.

13. When calculating the penalties, DEQ did not consider amounts voluntarily expended by Copper Ridge and Reflections to hire professional outside consultants for permit compliance and administration. Landy Leep testified that Copper Ridge and Reflections hired a professional consultant and have paid at least $18,000 for "storm water management erosion control." Hearing Transcript, Vol. 1, 258:11 –16; Vol. 2, 8 – 16; Vol. 2, 72:8 – 16; 113:18 – 114:4; Exs. 9, 10, G.

14. When calculating the penalties, DEQ calculated the number days based only on weather data collected in 24-hour increments. Any 24-hour period when a quarter-inch or more of rain was measured by the weather station was considered a day of violation regardless of whether or not a discharge actually occurred. Hearing Transcript, Vol. 1, 224:13 – 25, 256:23 – 257:25.

15. When calculating the penalties, DEQ calculated the number days without considering that no placement of waste or discharges were observed on any day before or after September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

16. DEQ acknowledges that sediment has other sources and there is "no way [...] to know where the sediment would have come from." Hearing Transcript, Vol. 1, 158:1 – 14.

17. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

18. DEQ did not observe or take water quality measurements of Cove Ditch and has no evidence of alterations of the water's turbidity, taste or color. Nor does DEQ have any evidence of floating debris. Hearing Transcript, Vol. 1, 175:3 – 176:4; 200:21 – 24.

19. After submitting the required NOIs and SWPPPs and completing the required corrective action, Copper Ridge and Reflections asked for verification that they were no longer in violation. DEQ responded that it did not know. DEQ asserted only that violations would be assessed at a future compliance evaluation inspection. Hearing Transcript, Vol. 1, 186:8 – 187:12; Ex. U.

20. DEQ then found and cited violations for deficiencies in the NOIs and SWPPPs, including documentation failures that could have been spotted and addressed if DEQ had provided the assistance Copper Ridge and Reflections requested earlier. The deficiencies included failure to document inspections, failure to have signed SWPPPs available, and failure to maintain SWPPPs that

describe the construction activity, implementation schedule, and relationship between phases of construction and BMPs. Hearing Transcript, Vol. 1, 100:11 – 104:11; Ex. 7.

21. DEQ acknowledged that SWPPPs for each of the Subdivisions were "signed and certified by Landy Leep" and were received at the Department on December 23, 2013. Nonetheless, DEQ cited Copper Ridge and Reflections for "[f]ailure to retain and make available [...]" the latest signed SWPPPs and have assessed penalties for that alleged violation. Hearing Transcript, Vol. 1, 94:1 – 9, 95:9 – 15, 97:21 – 98:2; Vol. 2, 43:6 – 25; Exs. 3, 4, 5, 9, 10.

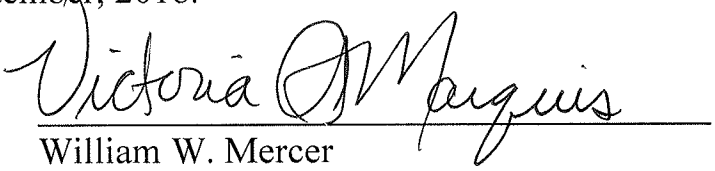
22. None of the permit violations alleged in Violation 4 posed a threat to human health or to the environment and the majority of issues noted are "paperwork issue[s]." Yet, DEQ characterized the nature of the violations as having the potential to harm human health and the environment. Hearing Transcript, Vol. 1, 264:20 – 22, 266:3 – 17; Exs. 9, 10.

A review of the record will reveal that the above findings contradict and provide important context for this contested case. Without the above facts, the Proposed FOFCOL cannot be said to be "based on competent substantial evidence." Therefore, the Proposed FOFCOL should be modified to include the above findings.

V. CONCLUSION

DEQ has failed to carry its burden of proof in this enforcement action. The proposed findings do not support the alleged violations or the assessed penalties. There simply is no proof that Copper Ridge and Reflections discharged anything, that they placed wastes or that even if they did place wastes, that those wastes caused or would cause pollution. DEQ must prove every element of every violation in accordance with the Water Quality Act. They have failed to prove that Copper Ridge and Reflections did anything wrong, have failed to prove that discharges occurred, that any pollution occurred or was even possible, and that any of the multiple days of violation alleged actually occurred. Further, DEQ failed to comply with statutory notice provisions and failed to consider statutorily required penalty factors. Therefore, this Board should modify the Proposed FOFCOL and void DEQ's Administrative Compliance and Penalty Order in its entirety.

DATED this 17th day of September, 2018.



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CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following persons by e-mail and United States mail, postage prepaid on the date herein.

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DATED this 17th day of September, 2018.

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA; AND BY COPPER RIDGE 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].	)	Case Nos. BER 2015-01 WQ BER 2015-02 WQ

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 AT COPPER RIDGE, LLC

The Montana Department of Environmental Quality ("DEQ"), by and through undersigned counsel, hereby responds to Reflections at Copper Ridge, LLC ("REF") and Copper Ridge Development Corporation ("CR") Exceptions to Hearing Examiner's Order on Summary Judgment and Proposed Findings of Fact and Conclusions of Law in case numbers BER 2015-01 WQ and BER 2015-02 WQ ("CR and REF Exceptions").

I. Introduction

Pursuant to § 75-5-611(4), Montana Code Annotated (MCA), REF and CR appealed the Administrative Compliance and Penalty Orders (Administrative Orders) issued by DEQ on March 27, 2015, for violations of the Montana Water Quality Act (WQA), § 75-5-101, MCA *et seq* at Reflections at Copper Ridge subdivision (BER 2015-01 WQ) and at Copper Ridge subdivision (BER 2015-02 WQ). The Administrative Orders alleged four violations under the Montana Water Quality Act and administrative rules adopted thereunder and assessed administrative penalties pursuant to the § 75-1-1001, MCA, Administrative Rules of Montana (ARM) Title 17, Chapter 4, subchapter 3; and §§ 75-5-601 through 75-5-641, MCA.

Pursuant to the parties' cross motions for summary judgment, the Hearing Examiner issued Orders on Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ on August 1, 2017 (Orders on Summary Judgment), concluding:

a. CR and REF motions for summary judgment are granted regarding their argument that DEQ cannot seek penalties for conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions (Violation 1) and DEQ's motions for summary judgment are denied regarding Violation 1. The Hearing Examiner found that DEQ did not meet the notice requirements § 75-5-611(1)(a) – (e) to provide CR and REF notice of violation of Violation 1 and, as a result, DEQ may not seek an administrative penalty for alleged violation of ARM 17.30.1105;

b. The hearing examiner determined that CR and REF violated § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit (Violation 2). DEQ's motions for summary judgment are granted regarding Violation 2;

c. The hearing examiner determined that CR and REF violated § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR100000 (Violation 4). DEQ's motions for summary judgment are granted regarding Violation 4; and

d. The Hearing Examiner found there are material facts in dispute as to whether CR and REF placed waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA (Violation 3). DEQ's motions for summary judgment are denied regarding Violation 3.

The Orders on Summary Judgment are attached to the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law (FOFCOL) submitted to the Board of Environmental Review (BER) on July 16, 2018. The Orders on Summary Judgment also determined that CR and REF are owners or operators based, in part, on findings that CR and REF were the original owners and developers of all land in the subdivisions and initiated construction activities

that included clearing, grading, excavation, stockpiling earthen materials, and placement of and removal of earthen materials resulting in land disturbances at each subdivision of equal to or greater than one acre. *See* Order on Summary Judgment entered in BER 2015-01 WQ on page 14; and Order on Summary Judgment entered in BER 2015-02 WQ on page 14.

February 26 through February 28, 2018, a consolidated case hearing to determine the remaining issues, after the Orders on Summary Judgment, in BER 2015-01 WQ and BER 2015-02 WQ was held before the BER's Hearing Examiner. The two remaining issues after the Orders on Summary Judgment are: 1) the liability of CR and REF for Violation 3 (placing waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA; and 2) the appropriate corrective actions and administrative penalties for Violation 2, 3, and 4 set forth in the Administrative Orders. CR and REF, through counsel, have filed exceptions to the Hearing Examiner's Proposed FOFCOL for BER's consideration in determining its final Order in Cause Nos. BER 2015-01 WQ and BER 2015-02 WQ. CR and REF's Exceptions fall into the following categories:

1. The Hearing Examiner incorrectly placed the burden of proof on CR and REF to present evidence demonstrating by a preponderance of

evidence that DEQ's Administrative Orders issued against CR and REF violated the law.

2. The Hearing Examiner should have determined that DEQ has not proven, by a preponderance of evidence, the occurrence of Violations 2, 3, and 4 alleged in DEQ's Administrative Orders issued against CR and REF.

3. The Hearing Examiner should have adjusted the administrative penalties assessed in the Administrative Orders to assess zero dollars against CR and REF.

DEQ submits the following responses to CR and REF's Exceptions and requests that BER reject the Exceptions and arguments raised by CR and REF and adopt the Hearing Examiner's proposed FOFCOL.

II. The Hearing Examiner Applied the Correct Burden and Standard of Proof (Proposed FOFCOL pages 14 - 18. CR and REF Exceptions to Proposed FOFCOL pages: 1, 7 – 14).

The Hearing Examiner appropriately relied on the Montana Supreme Court's holding in *MEIC v. DEQ*, applied statutory rules of evidence to this contested case hearing, and determined "the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side; in addition a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." *MEIC v. DEQ*, 2005 MT

96, ¶¶ 13 – 14; 326 Mont. 502, 506-507; 112 P.3d 964, 966-967. CR and REF misinterpret the Montana Supreme Court's holding in *MEIC v. DEQ*, which involved MEIC's request for a contested case hearing in its challenge of an air quality permit issued by DEQ to a developer proposing to build a coal-fired power plant in a Class I Area. Class I Areas are designated for special protections under the federal Clean Air Act. 42 USC § 7491. In the MEIC case, as in CR and REF's appeal of DEQ's Administrative Orders, if no challenge had been made, DEQ's administrative decision would stand. MEIC, as the party seeking relief through overturning DEQ's permitting decision, had the burden of presenting evidence that DEQ's issuance of the air quality permit violated the law. In the case now before the Board, CR and REF have the burden to present evidence that DEQ's issuance of AOs against CR and REF are legally insufficient and should be void. *MEIC v. DEQ*, 2005 MT at ¶ 16; 326 Mont. at 507; 112 P.3d at 967 (interpreting §§ 26-1-401 and 402, MCA). *MEIC v. DEQ* stands for the proposition that the party requesting relief from an agency decision bears the burden of producing evidence in support of its claims. *Id.*

CR and REF argue the Montana Supreme Court's holding in *MEIC v. DEQ* requires the claimant in an administrative case, alleging a violation of law, to bear the burden of proof. CR and REF argue MEIC bore the burden

of proof in its challenge of DEQ's air quality permit because it was alleging DEQ violated the law in issuing permit. In the case presently before the BER, CR and REF argue, because DEQ is alleging that CR and REF violated the WQA by failing to conduct construction-related activities in accordance with storm water requirements, DEQ bears the burden of proof. CR and REF's argument is contrary to standard civil process in which the party asserting a claim bears the burden of proof. Here, CR and REF claim to be adversely affected by DEQ's administrative enforcement decision and request relief from the Administrative Orders. CR and REF bear the burden of proof to demonstrate by a preponderance of evidence that they are entitled to the requested relief, the alleged violations did not occur, and the Administrative Orders should be declared void. § 75-5-611(5)(e), MCA.

Absent the request for contested case appeal by CR and REF, the Administrative Orders issued to CR and REF are DEQ's final agency decision. CR and REF's state "DEQ's administrative notice and order is a request for the Board to issue an order against the alleged violator. Unless the alleged violator fails to request a hearing, the notice and order does not become final without further agency action." CR and REF Exceptions, page 10. CR and REF's exception is counter to the clear language in § 75-5-611(5)(e), MCA, which states "if the board determines that a violation has not

occurred, it shall declare the department's notice void." Without such declaration by the Board, DEQ's Administrative Orders stand. CR and REF are appealing DEQ's Administrative Orders before the BER and have the burden to show the alleged violations did not occur and the Board should act to modify or void the Administrative Orders.

CR and REF further state "without placing the burden of proof on DEQ, the alleged violator cannot know the extent or scope of evidence that DEQ will bring to bear against him." CR and REF Exceptions, page 12. However, the Hearing Examiner correctly determined that the Administrative Orders "contain "the charges" presented by the department and to which CR/REF must respond." Hearing Examiner's Proposed FOFCOL, page 18. The Hearing Examiner also correctly held the contested case hearing was held pursuant to CR and REF's request for hearing under § 75-5-611(4), MCA and not under § 75-5-611(3), MCA to "answer the charges" in a notice given under § 75-5-611(1), MCA. Hearing Examiner's Proposed FOFCOL, pages 16 - 17.

DEQ set forth its case against CR and REF in the Administrative Orders issued under § 75-5-611(2), MCA. DEQ's evidence in support of the Administrative Orders is detailed in the September 23, 2013 Notice of Violation, which notified CR and REF that DEQ was initiating formal enforcement action for violations of the Montana Water Quality Act observed

by DEQ Inspector Dan Freeland during his September 9, 2013 compliance inspection. The September 23, 2013 Notice of Violation included evidence of unpermitted discharges from the subdivisions to state surface water and no best management practices (BMPs) in place to control storm water discharges from the subdivisions. Hearing Transcript Vol. I, 65:24 – 66:8, Exhibit 2, DEQ 000038 – DEQ 000040. On November 8, 2013, in response to written requests from CR and REF, DEQ issued a second notice of violation that distinguished violations at the Copper Ridge Subdivision from violations at the Reflections at Copper Ridge subdivision. *Joint Stipulated Facts*, Fact No. 9; Hearing Transcript, Vol. I, 85:2 – 92:18; Exhibit 17, Exhibit 2, DEQ00046 (Photo 6), DEQ00050 (Photos 16, 17, and 18). DEQ provided CR and REF with sufficient notice of the substantial, credible evidence upon which the Administrative Orders are based; evidence which CR and REF failed to meet its burden to refute in the contested case hearing.

While admitting this is a civil and not a criminal case, CR and REF argue, since this case involves enforcement for violations of the Montana Water Quality Act, application of due process restrictions that apply in criminal cases are reasonable in this case. CR and REF Exceptions, pages 7 - 8. CR and REF argue, under the due process clause, they are entitled to "be presumed innocent of the alleged violation until DEQ proves their guilt." CR

and REF Exceptions, page 8. However, there are no life, liberty, or property interests at stake that give rise to the same level of due process protection expected by an alleged violator in a criminal case.

Here, CR and REF requested a hearing under § 75-5-611(4), MCA and that statutory provision allows an alleged violator to submit a written request for hearing within thirty days after service of a notice and order under § 75-5-611(2), MCA. The hearing contemplated by § 75-5-611(4), MCA is a contested case appeal to BER and is held under MAPA contested case provisions found at Title 2, chapter 4, part 6, MCA. See § 75-5-611(4), MCA. CR and REF further argue BER should consider provisions under the federal Administrative Procedure Act (APA), which assign the burden of proof to the "proponent of a rule or order." 5 U.S.C. § 556(d). The hearing required by law in this case was a contested case appeal under § 75-5-611(4), MCA. See for example *Johansen v. State*, 1998 MT 51, ¶ 22; 288, Mont. 39; 955 P.2d 653, 658 (the agency's enabling/authorizing statute dictates the type of hearing required). CR and REF had a full and fair opportunity to present their case in a trial-type hearing before the Hearing Examiner held pursuant to § 75-5-611(4), MCA. Under § 75-5-611(6)(b), MCA, upon a determination that the alleged violations occurred, the BER shall issue an appropriate order for

the prevention, abatement, or control of pollution, the assessment of administrative penalties, or both.

The Hearing Examiner conducted a contested case hearing under § 75-5-611(4), MCA, properly received evidence, entered findings based on the preponderance of the evidence presented, and then entered conclusions of law based on those findings. The Hearing Examiner correctly found that the Administrative Orders issued to CR and REF set forth the allegations to which CR and REF must respond. Hearing Examiner's Proposed FOFCOL, page 18. The Hearing Examiner correctly held that the party seeking to overturn the administrative decision of the agency bears the burden of proof. *See Myers v. Mont. Dept. of Transportation*, 2010 Mont. Dist. LEXIS 366, ¶10 (citing § 26-1-401, MCA). The initial burden of producing evidence is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against that party in the absence of further evidence. *Id.* CR and REF are the parties that would be defeated if no evidence were given on either side because DEQ's decision contained in the Administrative Orders would stand. CR and REF seek to overturn those decisions. In the contested case hearing held before the Board's Hearing Examiner, DEQ and CR and REF each called witnesses and presented evidence in the form of testimony and exhibits. The

Hearing Examiner correctly found CR and REF bear the burden of presenting evidence necessary to establish that the violations alleged in the Administrative Orders did not occur; or that the violations occurred, but the Administrative Orders violated the law; or the administrative penalties and corrective actions assessed against CR and REF are inappropriate. Hearing Examiner's Proposed FOFCOL, page 18; § 75-5-611(6)(e), MCA; *MEIC*, 2005 MT at ¶ 16; 326 Mont. at 507; 112 P.3d at 967. Regardless of who had the burden of proof in this case, the preponderance of evidence demonstrates that CR and REF violated the WQA at the subdivisions. *Myers*, 2010 Mont. Dist. LEXIS at ¶13 (when the evidence is overwhelming and conclusive, it does not matter who has the burden of proof).

III. DEQ ESTABLISHED THE OCCURRENCE OF VIOLATIONS 2, 3, AND 4 ALLEGED IN THE ADMINISTRATIVE COMPLIANCE AND PENALTY ORDERS ISSUED AGAINST CR AND REF BY A PREPONDERANCE OF EVIDENCE.

A. The Orders on Summary Judgment are the Law of This Case and Establish That REF is the Owner and Operator of Reflections at Copper Ridge Subdivision and CR is the Owner and Operator of Copper Ridge Subdivision.

An owner or operator under the WQA is "a person who owns, leases, operates, controls, or supervises a point source." § 75-5-103(26), MCA. The Hearing Examiner correctly determined, based on the undisputed material facts in the record and as a matter of law, CR and REF were the "owners or operators"

of point source discharges from the subdivisions. *See* Hearing Examiners Proposed FOFCOL, page 38; Orders on Summary Judgment Cause No. BER 2015-01 WQ, pages 13 – 15; Cause No. BER 2015-02 WQ, pages 13 – 15. The Hearing Examiner's determinations in the Orders on Motions for Summary Judgment were based on evidence that CR was the original owner, operator, developer, and subdivider of the Copper Ridge subdivision and REF was the original owner, operator, developer, and subdivider of the Reflections at Copper Ridge subdivision. Orders on Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ, page 14. This conclusion is further supported by evidence in the record of the contested case hearing that REF owned and controlled development on 100 percent of the property in the Reflections at Copper Ridge subdivision and CR owned and controlled development on 100 percent of the property in the Copper Ridge subdivision. Hearing Transcript, Vol. II, 66:21 – 67:17; 102:22 – 104:23.

CR and REF try to counter the evidence in the record with a discussion of their history of compliance with the Montana Subdivision and Platting Act. This discussion is outside the administrative record for Cause Nos. BER 2015-01 WQ and BER 2015-02 WQ and has no bearing on whether CR and REF are owners or operators of point source discharges of storm water from their

subdivisions for purposes of § 75-5-103 (26), MCA. CR and REF Exceptions, pages 16 - 29.

B. DEQ Established by a Preponderance of Evidence that CR and REF Discharged Storm Water from Reflections at Copper Ridge and Copper Ridge Subdivisions to State Surface Waters Through Overland Flow and Through the City of Billings Municipal Separate Storm Sewer System (MS4) Without an MPDES Permit in Violation of the Montana Water Quality Act § 75-5-605(2)(c), MCA (Violation 2).

Relying on the affidavit of DEQ's Inspector, Dan Freeland, who conducted compliance evaluation inspections (CEIs) at the subdivisions on September 9, 2013, documenting unpermitted discharges of storm water from Reflections at Copper Ridge and from Copper Ridge, the Hearing Examiner determined that CR and REF were responsible for unpermitted discharges of storm water from the subdivisions to state waters. *See* Orders on Summary Judgment Cause No. BER 2015-01 WQ, pages 15 - 16; Cause No. BER 2015-02 WQ, pages 15 - 16. The Hearing Examiner correctly determined that Dan Freeland's observations were undisputed by CR and REF on motions for summary judgment. *Id.*

CR and REF argue that the precise location of these observed discharges from the subdivisions were not described and the disturbances were likely from individual lots, which upon sale to individual homebuilders, CR and REF no longer own or operate. CR and REF Exceptions, pages 18 – 29. CR and REF

appear to base their argument that the discharges were from individual lots on the following facts: 1.) previous discharge permit authorizations were issued to construction contractors hired by CR and REF under General Permit No. MTR100000 for road and utility work; 2.) these previous permit authorizations covered storm water discharges associated with the development and construction of street improvements and construction and installation of utilities including water, sanitary sewer, and storm sewer in the subdivisions; and 3.) the previous permit authorizations would have reached final stabilization resulting in permit termination by 2013, and could not have been the source of discharges. *See* Hearing Transcript Vol. I, 133:23 – 139:25, Exhibit A (MPDES Permit No. MTR 102807 issued to JTL Group, Inc.), Exhibit B (MPDES Permit No. MTR 104590 issued to H.L. Ostermiller Construction), and Exhibit C (MPDES Permit No. MTR 104993 issued to CMG Construction, Inc.), CR and REF Exceptions, page 19. The road and utility permit authorizations, issued to construction contractors, for road and utility development being conducted within the boundaries of the subdivisions, were terminated by DEQ upon submission of notices of termination by the named owners or operators on those permits and certification that the permitted projects had reached final stabilization. Hearing Transcript Vol. I, 202:7 – 17. *Joint Stipulated Fact* 5. The

construction activities permitted under the road and utility construction MPDES permit authorizations at Copper Ridge and Reflections at Copper Ridge subdivisions included construction of water, sanitary sewer, and storm drainage utilities, and street and sidewalk improvements. The Storm Water Pollution Prevention Plans (SWPPPs) associated with these permit authorizations did not include best management practices (BMPs) or controls for construction activity on residential lots. Therefore, once the storm water discharge permit authorizations for road improvements and utility installation terminated, there was no permit coverage for homebuilding on the residential lots and no plan in place by the subdivision developers, CR and REF, to obtain such coverage. *See* Exhibit A, page 3; Exhibit B, page 3; and Exhibit C, page 4. *See* Hearing Transcript Vol. II, 62:4, 102:8 - 21. CR and REF do not take exception to the Hearing Examiner's proposed FOFCOL ¶¶ 12 and 13, which lists DEQ Inspector Freeland's observations during his September 9, 2013 CEI including sediment discharges onto streets, sidewalks, and other common areas; uncontained waste stockpiles; and evidence that sediment and construction debris had been "washed with storm water from the subdivisions to state surface waters." CR and REF seem to assert that these discharges are from the residential lots and are not their responsibility. Hearing Examiner's Proposed FOFCOL ¶¶ 12 and 13, page 6; CR and REF Exceptions, page 19.

CR and REF cannot defend their failure to obtain storm water discharge permit coverage for construction activities at the subdivisions by claiming, after they planned and developed the subdivision, upon the sale of individual residential lots within the subdivision, they are not an owner or operator associated with construction activities on those lots. *See* CR and REF Exceptions, pages 20 – 21. Storm water discharge associated with construction activity must be covered by a Montana Pollutant Discharge Elimination System (MPDES) Permit. ARM 17.30.1105. "Storm water discharge associated with construction activity" is defined as "a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more. ARM 17.30.1102(28). The plan in a common plan of development is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot.

Friends of Maha'Ulepu, Inc. v. Hawaii Dairy Farms, LLC, 224 F.Supp.3d 1094 (U.S. Dist. Court Dist. Hawaii 2016). In his testimony, DEQ Inspector Dan Freeland explained that he determined Copper Ridge subdivision and Reflections at Copper Ridge subdivision were a common plan of development or sale based on the signs identifying the subdivisions, the company website advertising the developments, and the company's advertising brochures. Hearing Transcript Vol. I, 67:16 – 25.

A "larger common plan of development or sale" is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. Thus, if a distinct activity has been identified by the time the discharge permit application would be submitted, that distinct activity is included as part of a larger common plan. *Friends of Maha'Ulepu*, 224 F.Supp.3d at 1108. CR and REF admitted in hearing testimony that the common plan of development included improvements necessary to get the subdivision approved by the City of Billings, then subdivide and start selling residential lots. Hearing Transcript Vol. II, 66:21 - 67:17. CR and REF further admitted the use of the property prior to CR and REF's initiation of development and construction activity was agricultural. Hearing Transcript Vol. II, 110:18 - 23. The common plan of development for the Copper Ridge and Reflections at Copper

Ridge subdivisions included grading, contouring, road building, utility installation, development of storm water retainage ponds, and other common areas, as well as the design and planning of residential lots for eventual sale to homebuilders. Hearing Transcript Vol. II, 105:15 – 111:6. CR and REF did not properly permit storm water discharges associated with construction activity at the subdivisions until December 23, 2013, when they each submitted a Notice of Intent requesting authorization to discharge storm water associated with construction activity under General Permit No. MTR100000. REF was issued Permit No. MTR105376 and CR was issued Permit No, MTR105377 authorizing each entity to discharge storm water associated with construction activity at their respective subdivisions. *Joint Stipulated Facts*, Fact No. 11; Hearing Transcript, Vol. I, 92:20 – 100:10; Exhibit 4, DEQ 00057; and Exhibit 5, DEQ 000083. CR and REF were obligated under the WQA to permit all construction activities that were part of the larger common plan of development or sale at Copper Ridge and Reflections at Copper Ridge subdivisions. § 75-5-401, MCA; ARM 17.30.1105.

Construction activity is the regulated point source that must be permitted when it meets the definition at ARM 17.30.1102(28). Ground disturbance at each of the above-named subdivisions involves more than one acre including all areas that are part of a "larger common plan of development

or sale," as that phrase is used in General Permit No. MTR100000 and in ARM 17.30.1102(28). *Stipulated Facts*, Fact No. 8. It is not necessary, as CR and REF assert, for DEQ to show who placed, or who caused waste to be placed in the subdivisions. CR and REF Exceptions at 28. The Hearing Examiner correctly held that CR and REF violated the WQA by discharging storm water associated with construction activity without a permit (Violation 2). *See* Orders on Motions for Summary Judgment in Cause No. BER 2015-01 WQ, pages 15 – 16, and in Cause No. BER 2015-02, pages 15 – 16.

Any precipitation event of .25 inches or greater in a 24-hour period will cause an unpermitted discharge of pollutants including sediment, construction debris, and other waste materials from Copper Ridge and Reflections at Copper Ridge subdivision. Storm water runoff will enter Cove Ditch and public storm drainage systems. Additionally, surface runoff flows overland toward Cove Ditch and through storm drainage systems until it ultimately flows offsite to the Yellowstone River. Hearing Transcript Vol 1, 66:20; 148:11; Exhibit 2, DEQ 000038. Water quality may be impacted by sediment and construction debris during these precipitation events. Hearing Transcript Vol 1, 54:21 – 56:4; Exhibit 15. The Hearing Examiner's determination that CR and REF should only be charged with precipitation events between September 23, 2013, the date CR and REF were put on notice that they needed

MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage is reasonable for purposes of calculating an administrative penalty. See Hearing Examiner's Proposed FOFCOL at page 24.

DEQ has established by a preponderance of evidence that CR and REF violated the Montana Water Quality Act by discharging pollutants to state waters from a point source without MPDES permit authorization. The BER should accept the Hearing Examiner's proposed FOFCOL supporting CR and REF's liability for Violation 2.

C. DEQ Established by a Preponderance of Evidence that CR and REF Placed Waste Where it Will Cause Pollution of State Waters in Violation of the Montana Water Quality Act at § 75-5-605(1)(a), MCA (Violation 3).

The Hearing Examiner correctly determined, based on the September 9, 2013 inspection conducted by DEQ Inspector Dan Freeland, that CR and REF placed or caused to be placed waste through unpermitted and uncontrolled discharges of storm water to state water. Dan Freeland documented, in writing and in photographs, substantial, credible evidence of stockpiled materials without protection to control contact with storm water, unmanaged concrete washout sites, sediment tracked onto impervious surfaces, sediment and debris on the banks of Cove Ditch, sediment on sidewalks and grassy common areas, and sediment in streets and built up in

and near the storm drains. Exhibit 2, DEQ 000038 – DEQ 000040, DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Hearing Transcript Vol I, 71:2 – 77:18. The Hearing Examiner found uncontroverted evidence that CR and REF placed waste or caused waste to be placed where it may cause pollution. Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 16 - 18, and in Cause No. BER 2015-02, pages 16 – 18.

After the contested case hearing, the Hearing Examiner correctly found that CR and REF placed waste where it will cause pollution of state waters, in violation of § 75-5-605(1)(a), MCA, by contributing sediment and other pollutants from unpermitted construction activities in the subdivisions, causing uncontrolled sediment, oil, solids, and other debris to be placed where it will impact state surface waters, including Cove Ditch. Hearing Examiner's Proposed FOFCOL, pages 27 – 31 supported by Exhibit 2, DEQ 000039 – 000040; DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Hearing Transcript Vol I, 71:2 – 77:18. In his testimony, Dan Freeland explained that he observed grass laid down

indicating the direction of storm water flow from the subdivisions toward Cove Ditch. Hearing Transcript Volume I, 72:15-22.

CR and REF disputes the Hearing Examiner's Proposed FOFCOL that unpermitted discharges are necessarily "exceeding that permitted by Montana water quality standards" and, therefore, causing "pollution" as that term is defined at § 75-5-103(30), MCA. CR and REF Exception, pages 29-34. CR and REF fail to acknowledge that not all water quality standards are numeric. DEQ Inspector Dan Freeland's documented evidence that sediment and other pollutants, contributed by CR and REF's unpermitted construction activities at the subdivisions, caused floating debris and other waste materials to be placed in and near Cover Ditch where it would impact state surface waters in violation of ARM 17.30.637(1). Because CR and REF conducted construction activity without a permit that required installation of BMPs and pollution prevention measures that meet engineering standards and specifications for control and mitigation of discharges of sediment and other pollutants from the construction activities at the subdivisions, waste, including sediment and construction debris, was placed where it will cause pollution of state waters in violation of ARM 17.30.637(5). Violation of the general prohibitions at ARM 17.30.637 are violations of Montana water quality standards.

DEQ has established by a preponderance of evidence that CR and REF violated the Montana Water Quality Act by placing waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA. The BER should accept the Hearing Examiner's proposed FOFCOL supporting CR and REF's liability for Violation 3.

The Hearing Examiner's determination that CR and REF should only be charged with eight days of violation based on precipitation events between September 23, 2013, the date they were put on notice that they needed MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage is reasonable for purposes of calculating an administrative penalty for Violation 3. *See* Hearing Examiner's Proposed FOFCOL at pages 29 - 30.

D. DEQ Established by a Preponderance of Evidence that CR and REF Violated the Terms and Conditions of General Permit MTR100000 (Violation 4).

The Hearing Examiner properly determined that CR and REF violated terms and conditions of General Permit MTR100000 at the subdivisions, based on undisputed evidence documented in an inspection reported summarizing the findings of DEQ Inspectors Dan Freeland and Chris Romankiewicz after conducting inspections of the subdivisions on October 21, 2014. Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 19 -

20, and in Cause No. BER 2015-02, pages 19 – 20. CR and REF have not filed an exception to the Hearing Examiners' conclusions regarding Violation 4 and the BER should accept the Hearing Examiners' Orders on Summary Judgment and proposed FOFCOL supporting CR and REF's liability for Violation 4.

The Hearing Examiner's determination that CR and REF should only be charged with one day of violation based on the date DEQ observed the violations of the General Permit conditions is reasonable for purposes of calculating an administrative penalty for Violation 4. *See* Hearing Examiner's Proposed FOFCOL at pages 31 - 38.

IV. The Hearing Examiner's Proposed Administrative Penalties are Appropriate to Address CR and REF's Violations of the Montana Water Quality Act at Reflections at Copper Ridge and Copper Ridge Subdivisions.

The administrative penalties are assessed pursuant to the statutory penalty factors in § 75-1-1001, MCA; in ARM Title 17, chapter 4, subchapter 3; and subject to DEQ's authority under § 75-5-601 through § 75-5-641 MCA. The administrative penalties are assessed for the related series of violations, stemming from failure to obtain MPDES permit coverage, at each subdivision. Under §§ 75-5-611(9)(a), MCA the penalty is capped at $100,000 for each related series of violations.

A. DEQ is not Prevented from Assessing Administrative Penalties Under §§ 75-5-611, 75-5-617, MCA, or ARM Title 17, chapter 30, subchapter 20 (repealed March 19, 2016).

CR and REF overstate their confusion with regard to DEQ's violation letters sent to CR and REF on September 23, 2013. CR and REF Exceptions, page 44. The violation letters satisfied § 75-5-617(2), MCA. *See* Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 6 - 7, and in Cause No. BER 2015-02, pages 6 – 7. Under § 75-5-617(2), MCA DEQ is not foreclosed from pursuing administrative penalties when the recipient of a letter issued under § 75-5-617(2), MCA responds as alleged by CR and REF. CR and REF Exceptions, page 46. Enforcement response actions under § 75-5-617, MCA include issuance of a letter; issuance of an order; judicial action; or an action seeking administrative or judicial penalties. In this case, DEQ initiated an enforcement response under § 75-5-611, MCA after providing CR and REF with notice under § 75-5-617, MCA.

Section 75-5-611(1), MCA requires written notice to an alleged violator before seeking administrative penalties. There is an exception for such notice when DEQ seeks administrative penalties only for activities it believes and alleges are violations of § 75-5-605, MCA. § 75-5-611(2)(a)(ii), MCA (emphasis added). Violations 2, 3, and 4 meet this notice exception. *See*

Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ page 8, and in Cause No. BER 2015-02, page 8.

ARM 17.30.2003 (repealed 2016) imposed additional notice requirements on DEQ. Under ARM 17.30.2003 prior notice of a violation was required unless DEQ was not seeking an administrative penalty, or was seeking an administrative penalty only for activities it believed and alleged were violations of § 75-5-605, MCA, and the violations were a class I violation as described in ARM 17.30.2001(1) or a violation of major extent and gravity under ARM 17.4.303. DEQ met the notice requirements in ARM 17.30.2003 for Violation 2 (violation of § 75-5-605, MCA; major extent and gravity; class I), for Violation 3 (violation of § 75-5-605, MCA; major extent and gravity), and for Violation 4 (violation of § 75-5-605, MCA; class I). *Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 11-13, and in Cause No. BER 2015-02, pages 11-13.*

DEQ is not precluded from assessing administrative penalties for Violation 3 as asserted by CR and REF because DEQ believed and alleged Violation 3 was a violation of § 75-5-605, MCA and a violation of major extent and gravity under ARM 17.4.303, which satisfies ARM 17.30.2003(7). CR and REF Exceptions, page 47. The Hearing Examiner's Proposed Conclusion of Law is correct and not void based on CR and REF's misreading of ARM 17.30.2003.

DEQ is not precluded from assessing administrative penalties for Violation 4 as asserted by CR and REF because DEQ believed and alleged Violation 4 was a violation of § 75-5-605, MCA and the Hearing Examiner's determination that Violation 4 is a Class I violation is undisturbed. CR and

REF's Exceptions at 48; Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ page 13, and in Cause No. BER 2015-02, page 13. The Hearing Examiner determined that Violation 4 was a violation of a permit compliance plan or schedule. Some of the violations observed by DEQ's Inspectors during the October 2014 inspection of the subdivisions involved failure by CR and REF to conduct inspections in accordance with the schedules imposed under the permit. A Class I violation satisfies ARM 17.30.2003(7).

B. DEQ appropriately determined the days of violation for Violation 2 by considering NOAA precipitation data, for Violation 3 by considering evidence of ground disturbance and uncontrolled placement of waste, and for Violation 4 by considering lack of adequate permit implementation from the date CR and REF submitted NOIs.

It was reasonable for DEQ and the Hearing Examiner to consider the National Oceanic and Atmospheric Administration (NOAA) weather service data to determine the days of violation for Violation 2, discharging without a permit. Hearing Examiner's Proposed FOFCOL, page 23 – 26, CR and REF Exceptions at 23. Use of NOAA precipitation data is supported by the inspection schedule set forth in the General Permit requiring the SWPPP administrator to conduct routine inspections every fourteen days along with post-storm inspections within 24 hours of the end of a rainfall event of 0.25 inches or greater. DEQ Exhibit 1, DEQ000013. DEQ reasonably considered

a storm event resulting in .25 inches or more precipitation within 24 hours likely to result in discharges from the subdivisions and CR and REF presented no substantial evidence to counter this determination.

DEQ appropriately considered evidence of ground disturbance at the subdivisions, limited by the two-year statute of limitations for penalty actions, for days of violation for Violation 3. Hearing Transcript, Vol. I, 228:7 – 15. CR and REF presented no substantial evidence to counter these determinations. The Hearing Examiner has determined that CR and REF should only be charged with eight days of violation for Violation 3 based on precipitation events between September 23, 2013, the date they were put on notice that they needed MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage. DEQ believes eight days of violation is reasonable for purposes of calculating an administrative penalty for Violation 3. *See* Hearing Examiner's Proposed FOFCOL at pages 29 - 30.

C. DEQ Provided Adequate Notice Under the WQA for Violations at Copper Ridge Subdivision and for Violations at Reflections at Copper Ridge Subdivision.

CR and REF allege DEQ failed to notify CR separately of each violation at Copper Ridge Subdivision and REF separately of each violation at Reflections at Copper Ridge Subdivision. CR and REF Exceptions 39 – 43. This assertion is not supported by evidence in the record and is contrary

to the parties' joint stipulated fact 7, which provides that the September 23, 2013 violation letter was sent to both CR and to REF and joint stipulated fact 9, which provides DEQ sent a separate violation letter dated November 8, 2013 that separated violations associated with the Copper Ridge subdivision. DEQ provided the November 8, 2013 letter to CR in response to a written request from Landy Leep in a letter to Dan Freeland, dated September 27, 2013, in which Mr. Leep explained that Copper Ridge subdivision and Reflections at Copper Ridge subdivision were separate real estate developments, owned and operated by separate legal entities. Mr. Leep requested two separate violation letters to "clarify which alleged violations pertain to Copper Ridge Development Corporation and which apply to Reflections at Copper Ridge, LLC." Hearing Transcript, Vol. I, 79:21 - 80:15; 83:18 – 86:3, Exhibit 12, DEQ 000202; Exhibit 17. Prior to sending the November 8, 2013 violation letter, DEQ Compliance Inspector Dan Freeland explained to Mr. Leep that DEQ considered Copper Ridge and Reflections at Copper Ridge subdivisions as part of one greater common plan of development and the September 23, 2013 violation letter was adequate to address the violations at both subdivisions. Hearing Transcript, Vol. I, 80:19 – 81:24; Exhibit O. Mr. Leep insisted the two subdivisions are separate and distinct, and that CR and REF should respond to DEQ's enforcement action

separately. Hearing Transcript, Vol. I. 83:8 – 83:16; Ex 13. In response to Mr. Leep's request, the November 8, 2013 letter distinguished violations at the Copper Ridge Subdivision from violations at the Reflections at Copper Ridge subdivision. *Stipulated Facts*, Fact No. 9. The September 23, 2013 letter served as notice to REF of the violations at Reflections at Copper Ridge subdivision. DEQ Exhibit 2, DEQ 000038. The November 8, 2013 letter provided notice to CR of the violations at Copper Ridge Subdivision. CR and REF insisted on two separate enforcement actions, which resulted in two separate related series of violations, each with a maximum administrative penalty of $100,000. § 75-5-611(9), MCA.

D. DEQ was not foreclosed from taking further enforcement action after CR and REF addressed the violations in the September 23, 2013, and November 8, 2013 violation letters by obtaining coverage under the General Permit for discharges from the Copper Ridge and Reflections at Copper Ridge subdivisions.

The parties stipulated that "Within a timeframe acceptable to the Department, CR and REF each took the corrective action identified in the September 23, 2013 and November 8, 2013 Notices of Violation." *Stipulated Facts*, Fact No. 10. DEQ agrees that, within an acceptable timeframe, CR and REF obtained coverage under the General Permit for construction activity at Copper Ridge and Reflections at Copper Ridge subdivisions. This fulfilled one of the corrective actions identified in the September 23, 2013, and

November 8, 2013 Notices of Violation. Hearing Transcript Vol. 1; 95:23 – 96:10, 100:3 – 100:10. CR and REF Exceptions, page 44; referencing Hearing Examiner Proposed FOFCOL, page 21, and footnote 4 (In footnote 4 the Hearing Examiner expressed some discomfort over the clarity of DEQ's correspondence with CR and REF and the application of ARM 17.30.2003 (repealed 2016). Footnote 4 is not, however a proposed finding of fact).

E. DEQ was not foreclosed from taking further enforcement action after CR and REF addressed the violations in the December 9, 2014 violation letters by submitting an updated Storm Water Pollution Prevention Plan under the General Permit for discharges from the Copper Ridge and Reflections at Copper Ridge subdivisions.

On October 21, 2014, DEQ conducted a scheduled compliance inspection of the Copper Ridge and the Reflections at Copper Ridge subdivisions. *Stipulated Facts*, Fact No. 12; Hearing Transcript Vol. 1; 100:11 – 101:23; Exhibit 7, DEQ000113; Hearing Transcript Vol. 1; 105:24 – 106:3; Exhibit 8, DEQ000125. During the October 21, 2014 inspection, DEQ observed and documented several MPDES Permit violations at the subdivisions. On December 9, 2014, the Department sent CR and REF notices of violation and required corrective action to address the violations. *Stipulated Facts*, Nos. 13 and 14; Hearing Transcript, Vol 1, 103:25 - 105:21; Exhibit 7, DEQ000113; Hearing Transcript, Vol 1, 106:7 - 107:11; and Exhibit 8, DEQ000125. The parties stipulated that "Within a timeframe

acceptable to the Department, CR and REF each took the corrective action identified in the December 9, 2014 Notices of Violation and submitted an updated SWPPP to DEQ." *Stipulated Facts*, Fact No. 15; Hearing Transcript, Vol 1, 108:19 - 110:3; Exhibit Y. Submission of the updated SWPPP by CR and REF did not correct all violations noted during the October 21, 2014 inspection, but DEQ determined the response was adequate. Hearing Transcript, Vol 1, 112:7 – 120:8; Exhibit 18 and Exhibit 19. At no time did CR and REF propose corrective action plans to address violations of the Montana Water Quality Act at Copper Ridge and Reflections at Copper Ridge subdivisions. Hearing Transcript, Vol. III, 119:11. Because there had been significant violations of the Montana Water Quality Act at Copper Ridge and Reflections at Copper Ridge subdivisions, CR and REF were referred to DEQ's Enforcement Division for further action. Hearing Transcript, Vol. I, 108:17, 120 :11, 121:13.

F. DEQ planned its compliance inspection to coincide with a storm event in order to observe discharges from the subdivisions.

CR and REF assert DEQ was aware of potential problems at the subdivisions as early as March 2013, but waited for a "disastrous and sudden" storm in September 2013 to "catch" CR and REF. CR and REF Exceptions, page 49. Dan Freeland explained in his testimony that after the City notified

him of noncompliance with MS4 storm permit requirements at the subdivisions, he checked an EPA database and discovered the subdivisions had no MPDES permit coverage for construction activities. Dan then determined to inspect the subdivisions during a storm event to better identify and document unpermitted discharges. This was designed to make a stronger case and convince the non-compliant owner/operator they needed permit coverage. Hearing Transcript Volume I, 48:21 – 50:19.

G. DEQ properly determined Violation 2 and Violation 3 are major extent and gravity based on the degree of deviation from requirements and the seriousness of the violations.

Discharging without a permit, Violation 2, and placing a waste where it will cause pollution, Violation 3, have the potential to harm human health or the environment. Hearing Testimony, Volume I, 217:7 – 10. In determining extent of a violation, DEQ may consider the duration of the violation. ARM 17.4.303(4). A violation has major gravity if it causes harm or poses serious potential to harm human health or the environment. ARM 17.4.303(4). DEQ properly determined Violation 2 and 3 are of major extent and gravity based on the duration and the seriousness of the violations. DEQ Exhibit 9, DEQ000160 – 163; DEQ Exhibit 10, DEQ000190 – 193. In addition, the Orders on Summary Judgment determined Violation 2 and 3 are major extent and gravity. Orders on Summary Judgment 11 – 13.

H. DEQ properly determined Violation 4 was of major extent and moderate gravity and the Hearing Examiner in Orders on Summary Judgment determined Violation 4 was a Class I Violation.

Violation 4, violating terms and conditions of General Permit No. MTR100000 is of moderate gravity. ARM 17.4.303(5)(b)(ii). DEQ considered the duration of the violation in its determination that the violation was of major extent. ARM 17.4.303(4); Hearing Testimony, Volume I, 222:7 – 14. The Orders on Summary Judgment determined Violation 4 is a Class I violation. Orders on Summary Judgment 13.

I. CR and REF provide no evidence of voluntary expenditures that are above and beyond what is necessary to comply with their WQA obligations.

CR and REF suggest they should be credited with voluntary expenditures made to "hire a professional outside consultant to complete permitting compliance and administration." REF and CR Exceptions, page 58. However, these expenditures merely met CR and REF's obligations to comply with the WQA and DEQ's penalty rules allow a decrease of up to 10 percent for amounts voluntarily expended beyond what is required by law or by order. ARM 17.4.304(4); Hearing Testimony, Volume I, 219:7 – 12.

J. CR and REF provide no evidence that the penalties should be further reduced for good faith and cooperation.

CR and REF argue they should be credited with good faith and cooperation and suggest they are entitled to a ten percent reduction. REF and

CR Exceptions, page 54, 57. CR and REF provide no evidence of "promptness in reporting and correcting the violation, and in mitigating the impacts of the violation; the extent of . . . voluntary and full disclosure of the facts related to the violation; and the extent of . . . assistance in the department's investigation and analysis of the violation." ARM 17.4.304(a) – (c).

V. Conclusion

The Hearing Examiner's findings of fact are supported by substantial evidence in the record and should be adopted by BER as its final order. § 2-4-621(3), MCA; Blaine County v. Stricker, 2017 MT 80, ¶25; 387 Mont 202, 211; 493 P.3d 159, 165. The proceedings on which the proposed finding of fact are based complied with essential requirements of law. The Hearing Examiner's conclusions of law, which include the recommended administrative penalty of $92,000 for the related series of WQA violations at each subdivision totaling $184,000 for violations at both Copper Ridge and Reflections at Copper Ridge subdivisions, should be adopted by the BER as it final order. § 2-4-621(3), MCA; and § 75-5-611(9), MCA.

WHEREFORE, DEQ requests that the Board reject CR and REF's Exceptions and adopt the Hearing Examiners' Orders on Motions for Summary Judgment and Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted this 31st day of October, 2018.

KIRSTEN BOWERS
Department of Environmental Quality
Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 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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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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]	Case No. BER 2015-01-WQ
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]	Case No. BER 2015-02-WQ

REFLECTIONS AT COPPER RIDGE, LLC'S AND COPPER RIDGE DEVELOPMENT CORP.'S SPECIAL BRIEFING ON THE TERM "OWNER OR OPERATOR"

I. INTRODUCTION

Nearly four years ago, on March 27, 2015, the Department of Environmental Quality (the "Department") issued Administrative Compliance and Penalty Orders to both Copper Ridge Development Corp. ("Copper Ridge") and Reflections at Copper Ridge, LLC ("Reflections") for violations allegedly discovered during inspections conducted in September 2013 and October 2014. Hearing Exs. 10 and 11. The Department initially sought millions of dollars in penalties from each corporation - an unprecedented amount. Hearing Trans., Vol. 1, 269:14 - 24; Vol. 3, 81:10 - 16; CR/Ref Exceptions Br., p. 1, fn 1 (referring to the Department's total annual penalty deposits for each of the last six fiscal years). Copper Ridge and Reflections timely appealed the Department's enforcement decision. The case proceeded through discovery and summary judgment, resulting in an Order on Summary Judgment issued August 1, 2017 ("SJ Order").

A hearing was then held February 26 through February 28, 2018. Post hearing briefing was completed and the Hearing Examiner issued Proposed Findings of Fact & Conclusions of Law on July 16, 2018 ("Proposed FOFCOL"). On September 17, 2018, Copper Ridge and Reflections filed Exceptions to both the

Order on Summary Judgment and the Proposed Findings of Fact and Conclusions of Law ("CR/Ref Exceptions Br"). The Department did not file exceptions, but did file a Response to the Exceptions on October 31, 2018 ("Dept. Response Br.").

The matter was set before the Board of Environmental Review ("Board") for oral argument on December 7, 2018. Oral argument began at 11:00 AM with five Board members present; however, Board Member DeArment recused himself; therefore, only the minimum quorum of four Board Members participated in the abbreviated oral argument. Oral Arg. Trans., 4:8 - 15. After approximately one hour of argument, the Board recessed for a brief lunch break, after which only three participating Board Members were available. Therefore, even though the oral argument had been set well in advance and even though Copper Ridge and Reflections had prepared for and traveled to the Board for oral argument, the Board suddenly, and without explanation, no longer had a quorum present to decide this case.

The Board asked if Copper Ridge and Reflections would allow Board Member DeArment to participate in the case, so that it could "move along today." Oral Arg. Trans. 64:15 - 18. Noting that Board Member DeArment was the Department's Water Quality Division Administrator at the time this enforcement action was initiated, Copper Ridge and Reflections declined to waive their objection to Board Member DeArment's participation. Oral Arg. Trans., 64:19 -

23. The Board then asked whether the parties would be amenable to continuing without a quorum, with final agency action to be taken at the next Board meeting. Oral Arg. Trans., 64:5 - 10; 66:6 - 7. Noting their frustration with the inability to complete the oral argument during the time specifically set for it and the unanticipated need to make another appearance before the Board at a subsequent meeting, Copper Ridge and Reflections declined to proceed without a quorum. Oral Arg. Trans., 66:8 - 14. The Department agreed not to proceed further without a quorum. Oral Arg. Trans., 67:4 - 7. The parties agreed to provide additional briefing on the singular issue of whether Copper Ridge and Reflections were "owners or operators" as that term is defined in the Montana Water Quality Act and its implementing rules, and to return for oral argument at a subsequent Board meeting. Oral Arg. Trans., 66:15 - 67:3.

Copper Ridge and Reflections submit this brief, in satisfaction of their obligation to provide additional argument on the singular issue of whether they meet the definition of "owners or operators." It is undisputed that Copper Ridge and Reflections were owners of construction activity that was properly permitted and completed prior to December 2012. Joint Stipulated Facts, ¶ 5. By that point in time - December 2012 - Copper Ridge and Reflections had ceased their construction activity in the subdivisions. The violations at issue here were alleged to have occurred in September 2013 - well after Copper Ridge and Reflections had

ceased construction activities. Therefore, Copper Ridge and Reflections cannot be held liable as owners or operators in this case.

Copper Ridge and Reflections argue, as they did in their Exceptions Brief, that the burden of proof must be correctly established before any findings in either the Order on Summary Judgment or the Proposed Findings of Fact and Conclusions can be affirmed or denied. CR/Ref Exceptions Br., pp. 7-14.

II. STANDARD OF REVIEW

The "owner or operator" issue was decided on summary judgment. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). The moving party has the initial burden of establishing the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law. *Russell v. Masonic Home of Montana, Inc.*, 2006 MT 286, ¶ 9, 334 Mont. 351, 147 P.3d 216. The burden then shifts to the non-moving party to present substantial evidence essential to one or more elements of its case in order to raise a genuine issue of material fact. *Id.*

This Board should reject the SJ Order's determination of the "owner or operator" issue because it was based on disputed facts and because the Department is not entitled to judgment as a matter of law.

III. ARGUMENT

There is no evidence that Copper Ridge or Reflections discharged any waste or placed any waste where it would cause pollution.[1] CR/Ref SJ Br., pp. 11-12; CR/Ref Exceptions Br., pp. 27 - 28 ("DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions" *citing* Hearing Trans., Vol. 1, 159:6 - 11; 162:25-163:7; 164:3 - 10; 261:16-19.). Instead, both the previous Hearing Examiner and the Department take the attenuated position that Copper Ridge's and Reflections' identity as the original developers of the subdivisions makes them responsible for all discharges from, and placement of wastes within, the geographic footprint of the subdivisions - regardless of property ownership. SJ Order, p. 16 (concluding that discharges occurred at the subdivisions and "[a]s a result, DEQ has established Reflections and Copper Ridge discharged storm water into state waters, without a permit, a violation of Mont. Code Ann. § 75-5-605(2)(c)."); Order, p. 17 (concluding that evidence of wastes in the subdivisions is "sufficient evidence that Reflections and Copper Ridge placed or caused to be placed wastes.") *See also* Dept. SJ Br., p. 3 (referring only to "construction activity in the area of Reflections at Copper Ridge and Copper Ridge subdivisions."); Dept. SJ Ex. 3, p. 2 (Department inspector

[1] The Department inaccurately described the alleged placed wastes as "their stockpiles" and "their concrete washout areas," implying that "their" referred to Copper Ridge and Reflections. Oral Arg. Trans., 59:6 - 11. To the contrary, there is no evidence that Copper Ridge or Reflections owned, leased, operated, controlled or supervised those stockpiles or concrete washout areas. CR/Ref SJ Br., pp. 11-12; CR/Ref Exceptions Br., pp. 27-29.

"documented areas within the subdivisions that were disturbed."). But this attenuated approach ignores the very language of the laws and rules and stretches the definition of "owner or operator" too far.

A. IT IS UNDISPUTED THAT COPPER RIDGE AND REFLECTIONS DID NOT OWN, LEASE OR OPERATE INDIVIDUAL LOTS AND THAT THEY DID NOT ENGAGE IN HOMEBUILDING CONSTRUCTION ACTIVITIES.

The Department, Copper Ridge and Reflections agree that an " '[o]wner or operator' means a person who owns, leases, operates, controls, or supervises a point source" and that the "[c]onstruction activity is the regulated point source." Mont. Code Ann. § 75-5-103(26) (2015); Admin. R. Mont. 17.30.1102(28); Dept. Response Br., p. 19; CR/Ref Exceptions Br., p. 18. Assuming *arguendo* that the evidence gathered by the Department on September 9, 2013 equates to a discharge of wastes to state waters and placement of waste where it would cause pollution of state waters, then in order to hold Copper Ridge and Reflections liable, it must also be proven that on that date, September 9, 2013, Copper Ridge and Reflections owned, leased, operated, controlled or supervised the construction activity that resulted in the alleged discharge and alleged placement of wastes. Admin. R. Mont. 17.30.1102(28); § 75-5-605, MCA.

As an initial matter, the Department admits that the construction activity was homebuilding, but does not establish the exact location of the homebuilding construction activity. Hearing Ex. 2 (Violation Letter describes active

construction, specifically "construction of single family homes" occurring "throughout the facility site;" lack of Best Management Practices ("BMPs") "in areas of new construction of single family homes;" sediment tracking "within areas of active construction;" and a concrete washout located "at single family home construction."). The only assertion is that the homebuilding construction activities were within the geographic footprint of the subdivisions. SJ Order, p. 1.

While it is undisputed that Copper Ridge and Reflections originally developed the subdivisions, their construction activities in the subdivisions were properly permitted and ended before their permit was terminated in December 2012 - all prior to the alleged violations. Joint Stip. Fact ¶ 5; CR/Ref SJ Br., p. 10; CR/Ref SJ Ex. C, ¶¶ 5 - 8; CR/Ref Exceptions Br., pp. 18-19. It is undisputed that Copper Ridge and Reflections did not engage in homebuilding activities; rather, they sold the lots to individuals who then constructed homes on the individual lots. CR/Ref SJ Br., p. 10; CR/Ref SJ Ex. C, ¶¶ 5 - 8; CR/Ref Exceptions Br., p. 27 ("Copper Ridge and Reflections do not construct homes in the Subdivisions." *citing* Hearing Trans., Vol. 2, 59:22 - 60:7, 61:4 - 7, 66:17 - 20). Therefore, it is undisputed that, at the time of the alleged 2013 violations, Copper Ridge and Reflections did not own, lease or operate the homebuilding construction activities alleged to have caused the violations nor did they own the properties on which the construction was conducted. *See also* Proposed FOFCOL p. 34. ("CR/Ref did

provide evidence, however (consistent with their position that they are not owner/operators), that they did not own (at least some of) the lots.")

B. COPPER RIDGE AND REFLECTIONS DID NOT CONTROL OR SUPERVISE THE HOMEBUILDING CONSTRUCTION ACTIVITIES ALLEGED TO HAVE CAUSED THE VIOLATIONS.

Since it is undisputed that Copper Ridge and Reflections did not own, lease, or operate the homebuilding construction activities alleged to have caused the violations, the question becomes: did Copper Ridge and Reflections control or supervise the homebuilding construction activities alleged to have caused the violations? Relying on evidence not connected to the alleged violations and evidence submitted under protest as a result of this enforcement action (with its threat of millions of dollars in penalties), the Hearing Examiner incorrectly concluded that Copper Ridge and Reflections "had the power to supervise or control land[2] with regard to storm water discharges." SJ Order, p. 15.

The Hearing Examiner relies on the fact that Copper Ridge and Reflections were the original owners and developers of the subdivisions. SJ Order, p. 14. Because it is undisputed that the discharges and placement of waste originated from homebuilding construction activities and that Copper Ridge and Reflections

[2] Neither the Department nor the Hearing Examiner pointed to evidence establishing the location of the land or the parcels of property where the discharges or wastes originated. The evidence only suggests that discharges originated, and wastes were placed within, the geographic footprint of the subdivisions. SJ Order, p. 1. All photo evidence gathered by the Department is on property that Copper Ridge and Reflections did not own. The Department did not examine any deed or title or make any effort to determine who owned the specific lots where the construction activities were taking place. CR/Ref SJ Br., pp. 6 - 11 (*citing* the Department's deposition testimony.).

did not themselves engage in homebuilding construction activities, this fact will only support a theory of control or supervision if there is something in the relationship between the developers and the homebuilders that would require the developers to exert control or supervision over the homebuilders.[3]

The fact that the developer, Copper Ridge and Reflections in this case, initiated development of the geographic subdivisions with "the eventual goal of the sale of individual lots for residential home construction" does not, and cannot confer any control or supervisory power upon the developers. SJ Order, p. 14. Indeed, a subdivision, by definition, indicates a goal to sell, rent, lease, or otherwise convey title to or possession of individual lots to new individual owners. § 76-4-102(17), MCA. Copper Ridge's and Reflections' compliance with the Montana Subdivision and Platting Act does not support finding that such compliance equates to supervision or control over the lots after their conveyance to new individual owners. Nor can it support liability for violations of the Montana Water Quality Act.

Here, the fact that Copper Ridge and Reflections were the developers (and preceding owners) only establishes a seller-purchaser relationship between Copper Ridge and Reflections, as the developers, and the lot owners. But is there

[3] Absent a relationship or connection, the developers would need some grant of regulatory authority over the homebuilders in order to control or supervise the homebuilders' stormwater management. As explained below, only the Department has been granted that authority. § 75-5-211, MCA.

something about that seller-purchaser relationship, and that contract between the subdivision developers and the lot owner, that would support the developers' control or supervision over the homebuilding construction activities? The Board has asked "[w]ould it not be possible for the developer in conveying the lot to the new owner to include in that conveyance some sort of covenant on the part of the new owner to allow the developer to supervise to assure that there aren't any violations of the permits that have been issued with respect to the subdivision regarding, say stormwater runoff?" Oral Arg. Trans., 30:15 - 22. Aside from the impossibility of administering such an open-ended and vague requirement, for this theory to support a violation, there must be something more than a "possibility." There must be some prohibition that was not followed or some requirement that was violated to support this enforcement action. § 75-5-605, MCA, (listing prohibited activities); § 75-5-611, MCA, (authorizing administrative actions and penalties "[w]hen the department has reason to believe that a violation" has occurred.); § 75-5-617, MCA, (authorizing certain enforcement response when "the department finds that a person is in violation.").

Here, the only relevant requirements are those imposed by the Department through the Montana Water Quality Act and the Montana Subdivision and Platting Act. The Water Quality Act imposes no duties upon a developer when conveying property to individual lot owners, but the Subdivision and Platting Act does. It

requires that "[t]he developer or owner of an approved subdivision shall provide each purchaser of property within the subdivision with a copy of the plat or certificate of survey and the certificate of subdivision approval specifying the approved locations of water supply, storm water drainage, and sewage disposal facilities." § 76-4-113, MCA. After the developer sells the lot, the new lot owner becomes subject to the requirements of the Subdivision Certificate, including any covenants, conditions or restrictions imposed through the Subdivision Certificate. *See Eastgate Village Water and Sewer Assoc. v. David*, 2008 MT 14, 343 Mont. 108, 183 P3d 873. At that point, the developer is no longer responsible for the lot's compliance with the subdivision requirements and no longer has control or supervision over the lot via the Subdivision and Platting Act. Therefore, as soon as Copper Ridge and Reflections conveyed the individual lots to new owners, Copper Ridge and Reflections were no longer responsible for the sold lots. Copper Ridge and Reflections have no requirement to control or supervise the homebuilding construction activities (or any activities) on individual lots after those lots are conveyed to individual owners.

The Department, the Hearing Examiner, and the Board may all be tempted to extend the developers' liability beyond the point in time when an individual lot is sold. In fact, the Department's deposition testimony establishes that extension of liability to the developers was a "recommendation" that "makes it, yes, easier"

to administer the permitting process. CR/Ref SJ Br., Ex. B, 25:3 - 26:6. The Department agreed that it is not a statutory requirement. *Id.*

For any extension of developer liability, ask yourself what mechanism supports continued liability? What document, relationship, law or rule requires control beyond the point of purchase? Simply put, there is none. Nothing in the subdivision requirements, nothing in the conveyance, nothing in the Water Quality Act, and nothing in the relationship between the developer and the lot owners requires, or even supports, continued control and supervision beyond the point of purchase.

Next, the Hearing Examiner cites to "at least one contract that required 'all excess material from pipe and bedding displacement shall be left on site' " as proof that "Copper Ridge and Reflections have supervision and control over the actions of third parties" and that they "acted on their ability to instruct others how to engage in stockpiling of materials, an act expressly contained in the definition of 'construction activities.' " SJ Order, pp. 14-15. Although the Hearing Examiner does not cite the specific contract, the language comes from the Department's Summary Judgment Exhibits 1 and 2, specifically Copper Ridge's and Reflections' responses to Request for Admission No. 11. Copper Ridge's response, in its entirety is:

> Copper Ridge objects because the request seeks information **related to a contract that was for a project that did not include**

homebuilding, and the request is therefore not relevant to the Department's claims or reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding that objection, Copper Ridge states that it does not know whether there was any excess material, and it denies that it directed contractors to distribute excess material. Copper Ridge admits that it hired Sanderson Stewart to prepare contracts, including Contract 365 [sic][4], for the installation of roads and utilities and to oversee and direct **non-homebuilding construction activity** within the Subdivision. Copper Ridge admits that Addendum No. 2 to Contract 365 [sic] states the following:

Copper Ridge 3rd and 4th Filing: Distribute excess material first over Lots 35-39. Once lots are sufficiently filled, the Engineer will direct as to where any remaining excess material will be distributed on the site.

Reflections at Copper Ridge 2nd Filing: Distribute excess material first over Lots 21-23 of Block 3 and then over the area just north of Butte Ridge Drive. Once lots and areas are sufficiently filled, the Engineer will direct as to where any remaining excess material will be distributed on the sites.

For bidding purposes, use the following areas in determining seeding quantities:

1. Copper Ridge 3rd and 4th Filing: 6 acres
2. Reflections at Copper Ridge 2nd Filing: 5 acres

Dept. Br. in Response to Mtn. for SJ, Ex. 2 (emphasis added).

Reflections' response, in its entirety is:

Reflections objects because the request seeks information related to a **contract that was for a project that did not include homebuilding,** and the request is therefore not relevant to the Department's claims or reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding that objection, Reflections states that it does not know whether there was any excess material, and it denies that it

[4] Although the response refers to "Contract 365" the request for admission asked about Contract 635. The reference to Contract 365 is assumed to be a typo.

> directed contractors to distribute excess material. Reflections admits that it hired Sanderson Stewart to prepare contracts, including Contract 635, for the installation of roads and utilities and to oversee and direct **non-homebuilding construction activity** within the Subdivision. Reflections admits that Addendum No. 1 to Contract 635 states "All excess material from pipe and bedding displacement shall be left on site."

Dept. Br. in Response to Mtn. for SJ, Ex. 1 (emphasis added).

Notably, Copper Ridge and Reflections objected for the very same reason that this Board should overrule the Hearing Examiner's conclusions - nothing that either developer did had anything to do with the homebuilding that allegedly caused the violations. The Hearing Examiner's reliance on the discovery responses, over objection, with no resolution of that objection, is procedurally improper and illustrates that the issue was disputed, meaning it cannot serve as the basis for summary judgment. This is yet another reason why this Board should overrule the SJ Order's conclusion on the "owner or operator" issue.

The cited contracts were not for homebuilding. CR/Ref Combined SJ Resp. and Reply Br., p. 9 *citing* SJ Ex. C (Affidavit of L. Leep "CR purchased land, subdivided it, arranged for roads and utilities to be installed, and then sold lots."); Ex. G (Construction Activity permitted by Copper Ridge described as "[i]nstallation of new water, sanitary sewer, and storm drainage utilities and new street surfacing and sidewalk improvements."); and Ex. H (Construction Activity permitted by Copper Ridge described as "[c]onstruction of new streets and utilities

for residential housing."); *see also* Hearing Exs. H, I and M (cover page of Contract 635 titled "To Provide Water, Sanitary Sewer, Storm Drain, and Street Improvements..."). Therefore, the contract relied upon in the SJ Order was for the developers' lawfully permitted road-building and utility installation construction - not for homebuilding, which is the source of the alleged violations. Further, it is undisputed that the contracted work was properly permitted and completed. Those Construction Stormwater permits were terminated with no notice to Copper Ridge and Reflections (and with no indication of any Water Quality Act violation) in December 2012 - a full *nine months prior to* the alleged violations at issue in this case. Joint Stipulated Facts, ¶ 5. Similarly, the Department's reliance on testimony from Mr. Landy Leep that Copper Ridge and Reflections owned all of the property is wrong because that testimony is referencing the 2006-2012 timeframe *prior* to conveyance of the individual lots to individual owners for homebuilding. Hearing Trans., Vol. II, ("As we developed our property - At the time we're developing, it's all - - we own it 100 percent;" we "[s]ubdivide it, then we start selling lots;" "I was not involved in the home-building;" "I had a SWPPP that covered my activity as the owner and operator while building roads and utilities and parks.").

The SJ Order's reliance upon the discovery responses cannot support a conclusion that Copper Ridge or Reflections controlled or supervised any

homebuilding in either subdivision because: (i) the discovery responses illustrate a disputed fact; (ii) the contracts did not cover homebuilding; (iii) the contracted work was finished well before the September 2013 alleged violations; and (iv) the contracts only exhibit control over road-building and utility installation, which were completed in compliance with all Water Quality Act laws and released from permitting needs in December 2012.

Next, the Hearing Examiner relies on the fact that Copper Ridge and Reflections ultimately, in response to requirements placed upon them by the Department, signed permit paperwork as the owner or operator. SJ Order, p. 15. As explained in Copper Ridge and Reflections' Exceptions Brief, it is undisputed that the permits were filed under protest, well after the violations were alleged, and only in response to the Department's enforcement action (with its threat of millions of dollars in penalties). CR/Ref Exceptions Br., p. 24; Proposed FOFCOL, p. 26. As such, the documents do not establish liability for the alleged violations.

C. THE DEPARTMENT HAS OTHER, MORE APPROPRIATE MEANS TO ENSURE COMPLIANCE WITH THE WATER QUALITY ACT.

The Department concedes that the discharges are not beyond the Department's ability to regulate and that it can regulate individual homeowners. Oral Arg. Trans., 36:14-15. Analysis of the operative statute, § 75-5-605, MCA, reveals that there is no requirement that the developer, and not the individual lot owner, be held liable for discharges from the lots. In fact, the terms "owner or

operator," "storm water discharge associated with construction activity" and "larger common plan of development" are not found anywhere in § 75-5-605, MCA. Therefore, anyone who discharges to state waters or places wastes where they will cause pollution may be found liable under § 75-5-605, MCA, regardless of their relationship to the property and regardless of what activities they are conducting. The Department should more appropriately focus its enforcement actions on the persons actually causing the discharges and actually placing wastes where they will cause pollution. Nothing in the statute prevents them from doing so; in fact, the statute prevents them from establishing liability for anyone other than the discharger or the person who places the wastes.

The Department argues that "[t]he problem here is that there was no permit. There was nothing." Oral Arg. Trans., 36:15-17. But that speaks to a failure to obtain a permit in violation of Admin. R. Mont. 17.30.1102 - the violation that has already been dismissed in this action. SJ Order, pp. 9-11. What the Department seems to want is a mechanism by which a developer must continue to maintain a permit for stormwater discharges associated with construction activity for an open-ended period of time and for activities and land it does not own, control, or supervise. But what if an individual buys a lot but does not initiate homebuilding for one, five, ten or more years? Would the developer be required to maintain stormwater permit coverage for that entire time? Or to re-initiate coverage at the

whim of the lot owner? What if the lot owner initially builds a house, then several years later builds out-buildings? Again, must the developer monitor property it no longer owns, *ad infinitum*, and re-initiate permit coverage, or ensure that someone does, all at the whim of the lot owner? The laws and rules (and common sense) say no. There is nothing that requires the sort of open-ended, impossible permit coverage that the Department seeks. CR/Ref SJ Br., p. 11 ("Only persons who propose to discharge storm water associated with construction activity must obtain a discharge permit, and neither CR nor REF proposed to discharge storm water from land that they did not own or that was associated with construction activity with which they were not involved." *See* ARM 17.30.1115; CR/Ref SJ Br., Ex. C at ¶ 4.).

The Department implies that the developer must also keep permits in place and be liable for discharges from upgradient discharges "from a totally different development." Oral Arg. Trans., 59:2 - 11. But that it not what the rule requires. Only "[a] person who discharges or proposes to discharge storm water associated with construction activity shall submit to the department a notice of intent ("NOI") as provided in this rule." ARM 17.30.1115. Upgradient discharges that merely flow through the subdivision are not anything that Copper Ridge or Reflections discharges or proposes to discharge. The Department's argument fails as a matter of law.

The Department also implies that there is a "larger common plan of development" that must be permitted and, therefore, because Copper Ridge and Reflections had a plan to develop the subdivisions, they are must obtain a permit. This argument fails for a number of reasons. First, the term "larger common plan of development" does not equate to a "point source" that must be permitted. The construction activity is the point source. Second, the Department's reliance on *Friends of Maha'Ulepu, Inc. v. Hawai'i Dairy Farms* is misplaced because in that case it was undisputed that only one party owned all of the property and was conducting all of the construction activities. *Friends of Maha'Ulepu, Inc. v. Hawai'i Dairy Farms*, did not involve multiple property owners and multiple parties conducting construction activities, as is the case here. *Friends of Maha'Ulepu Inc. v. Hawai'i Dairy Farms*, 224 F.Supp.3d 1094.

Third, even if Copper Ridge or Reflections conducted any activity that required a permit, it would only establish a violation Admin. R. Mont. 17.30.1105 for failure to have a permit - the very violation that has already been dismissed in this case. To prove the violations at issue here, which are all violations of § 75-5-605, MCA, the Department would also have to prove that it was specifically Copper Ridge's and Reflections' construction activities that caused a discharge to state waters and caused the placement of wastes where they will cause pollution. But the Department has no evidence that anything Copper Ridge or Reflections did

caused a discharge or placed wastes where they would cause pollution. CR/Ref SJ Br., pp. 11-12; CF/Ref Exceptions Br., pp. 27-29.

The Department and this Board have intimated that Copper Ridge and Reflections, as the developers, could have extended their road-building and utility installation permit to cover homebuilding and then transferred it to the homebuilders. Oral Arg. Trans., 52:11-18. This analysis fails for several reasons. First, the standard is not whether the developers "could have" done something, the standard for enforcement is whether the laws or rules required the alleged violator to do something that they failed to do or prohibited them from doing something that they did. Whether or not they could have done any number of things is irrelevant. For a violation to stand, it must be proven that the alleged violator failed to do something that it was required to do or committed some prohibited act. §§§ 75-5-605; MCA, 75-5-611; MCA, 75-5-617, MCA. As much as the Department, the Hearing Examiner, or this Board may desire to hold a developer liable for discharges originating from property and activities that the developer no longer owns or controls, but within the geographic footprint of the subdivision, there simply is nothing in the laws or rules that requires such open-ended oversight and liability.

To the extent that the Department, the Hearing Examiner or this Board desire to create, de facto, a regulatory scheme that inserts the developer as a party

liable for all discharges and all wastes throughout the entire geographic subdivision for the entire length of time that homebuilding occurs, there is no mechanism in law or rule to do so. Doing so would add another layer, similar to the MS4 municipal stormwater system, but with liability (and enforcement authority) vested in a private corporation. The Water Quality Act does not contemplate or support such an addition. CR/Ref Exceptions Br., p. 22 (citing § 75-5-211, MCA, giving responsibility for administration of the Water Quality Act to the Department; therefore, private corporations such as Copper Ridge and Reflects cannot enforce stormwater control requirements on any other entity or landowners.).

Additionally, there is no mechanism for the permit transfer scheme advocated by the Department. As explained above, there is no relationship between the developer and the homebuilder that would serve as the basis for that transfer. The permits are expensive and include the payment of fees, engineering support, drafting and approval of an appropriate Storm Water Pollution Prevention Plan ("SWPPP"), and technical field work to ensure compliance. A transfer implies that some compensation is provided by the entity receiving the benefit of the already funded, engineered, and compliant permit. Yet, there may be no seller-purchaser relationship between the developer and the homebuilder that could precipitate or require such a transfer.

The Department argues that the permit transfer provisions provided in the administrative rules address the transfer of liability from the developer to the homebuilder. Oral Arg. Trans., 54: 1-9. This is incorrect. Admin. R. Mont. 17.30.1117 limits transfers to a "new or revised owner or operator of a facility or activity." Here, there is no facility being permitted. Instead, the "activity" permitted was roadbuilding and utility installation - not homebuilding. The permitted "activity" - the road building and utility installation - was finished and therefore no permitted "activity" remained that could have been transferred.

Further, the mechanics of a permit transfer to the homebuilders are unworkable. The developer held one permit, but each subdivision could have many individual lots - presumably with many different homebuilders constructing homes at different times. To whom and when would the transfer take place? And what happens when a lot owner changes homebuilders or the lot ownership and homebuilders change? Must the developer remain mired in the contractual relationships to which he is not a party, in order to ensure that further permit transfers occur? Compliance with such a hypothetical regulatory requirement is unworkable at best and likely impossible.

Finally, any scheme that holds the developers liable for construction activities and stormwater controls on property that the developer does not own or control is precluded by trespass issues. Proposed FOFCOL, p. 35 (noting that "it is

entirely unclear" if BMPs "ever could be put in place based on CR/REF's ownership access"); Davis v. Westphal, 2017 MT 276, ¶ 15, 389 Mont. 351, 405 P.3d 73 ("Because the legal harm is the interference with another's right to exclusive possession of property, an unauthorized tangible presence on the property of another constitutes trespass regardless of whether the intrusion caused any other harm."). The Department counters that Copper Ridge and Reflections "provided no evidence in this hearing or in briefing that they ever asked a lot owner to access the lot to install BMPs." Oral Arg. Trans., 36: 8-10. That is precisely the point - in order to avoid being liable for trespass, Copper Ridge and Reflections must seek permission from the lot owners to install and maintain BMPs - proving that Copper Ridge and Reflections do not own, lease, operate, control or supervise the lots or the construction activities on the lots. Therefore, Copper Ridge and Reflections are not the "owner or operators" of the point sources at issue in this case.

IV. CONCLUSION

Because the Order on Summary Judgment relied upon facts that do not support finding Copper Ridge and Reflections liable as "owners or operators," it must be overruled. Further, enforcement of violations of § 75-5-605, MCA should be aimed at the person who discharges the waste to state waters or places waste where it will cause pollution. Enforcement of such violations against a developer

for discharges and placement of waste that originate outside of or somewhere in the geographic footprint of the subdivision, without analysis of who caused the discharge or placed the waste, ignores the elements of the statute and stretches the enforcement beyond the bounds of the Montana Water Quality Act and its implementing rules. The SJ Order's conclusions regarding the "owner or operator" issue should be rejected by this Board.

DATED this 17th day of January, 2019.

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ATTORNEYS FOR REFLECTIONS AT COPPER RIDGE, LLC AND COPPER RIDGE DEVELOPMENT CORP.

CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following persons by e-mail and United States mail, postage prepaid on the date herein.

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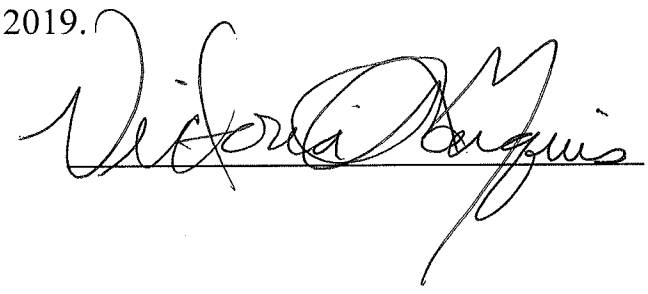
DATED this 17th day of January, 2019.



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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA; AND	Case Nos. BER 2015-01 WQ
BY COPPER RIDGE 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].	BER 2015-02 WQ

DEQ'S SUPPLEMENTAL BRIEF FOR JANUARY 24, 2019 HEARING REGARDING WHETHER COPPER RIDGE DEVELOPMENT CORPORATION AND REFLECTIONS AT COPPER RIDGE, LLC ARE OWNERS OR OPERATORS OF POINT SOURCES AT THE COPPER RIDGE AND REFLECTIONS AT COPPER RIDGE SUBDIVISIONS

On August 1, 2017, the Hearing Examiner issued Orders on the parties' cross motions for summary judgment in Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ (Orders on Summary Judgment). In the Orders on Summary Judgment, the Hearing Examiner determined that Copper Ridge Development Corporation (CR) and Reflections at Copper Ridge, LLC. (REF) are owners or operators of point sources. This determination was based, in part, on findings that CR and REF were the original owners and developers of all land in the Copper Ridge subdivision and the Reflections at Copper Ridge subdivision (collectively referred to as the Subdivisions) and had initiated construction activities, including clearing, grading, excavating, stockpiling earthen materials, and placing and removing earthen materials resulting in land disturbances at each subdivision of equal to or greater than one acre. *See* Order on Summary Judgment entered in BER 2015-01 WQ on page 14; and Order on Summary Judgment entered in BER 2015-02 WQ on page 14.

On February 26 through February 28, 2018, the Hearing Examiner held a consolidated case hearing to determine the remaining issues. CR and REF filed exceptions to the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law (FOFCOL) and DEQ responded to those exceptions. At its meeting held on December 7, 2018, the Board of Environmental Review (BER) considered whether it would accept, accept with modifications, or

reject the proposed FOFCOL and the Orders on Summary Judgment. The BER requested further analysis of the definition of owner/operator under the Montana Water Quality Act (WQA).

For the reasons stated herein, CR and REF are owners or operators of construction activities at the Subdivisions. As owners and operators of construction activities at the subdivisions, CR and REF are responsible for ensuring that all phases of construction have MPDES permit coverage until final stabilization is achieved.

1. Regulatory and Factual Background.

To protect the nation's surface waters from polluted storm water runoff, the United States Environmental Protection Agency (the EPA) requires National Pollutant Discharge Elimination System (NPDES) permit coverage to implement practices to control polluted storm water runoff from construction sites and to reduce resulting adverse impacts to water quality and aquatic habitat. Owners and operators of construction sites that disturb equal to or greater than one acre of land must obtain NPDES permit coverage. *See* 40 CFR § 122.26(b)(15). The EPA has delegated its authority to administer the NPDES permit program within the State of Montana to DEQ.

Under that delegation, DEQ issues MPDES permits for "point source" discharges of pollutants to state waters including permits authorizing storm

water discharges associated with construction activity. *See* Section 75-5-401, MCA and Title 17, chapter 30, subchapters 11, 12, and 13, Administrative Rules of Montana. Under ARM 17.30.1105(1)(a), a person who discharges or proposes to discharge storm water from a point source associated with construction activity is required to obtain coverage under an MPDES general permit or an MPDES individual permit.

"Storm water discharge associated with construction activity" is defined as follows:

> "Storm water discharge associated with construction activity" means a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of the rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more. ARM 17.30.1102(28).

A "larger common plan of development or sale" is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under a plan. If a distinct activity has been identified by the time the discharge permit application is submitted, that distinct activity is included as part of a larger common plan. *Friends of Maha'Ulepu*, 224 F.Supp.3d at 1108.

In November of 1992, DEQ issued an MPDES General Permit for Storm Water Discharges Associated with Construction Activity (the General Permit) having a fixed term of five years. DEQ has reissued the General Permit in 1997, 2002, 2006, 2012 and 2018. The General Permit requires owners and operators to identify sources of pollutants and to implement and maintain best management practices (BMPs) to reduce the potential discharge of identified pollutants from the construction site in the event of a storm. *See* DEQ Hearing Exhibit 1, pages DEQ000021 - 24. Owners and operators authorized to discharge under the General Permit must achieve technology-based effluent limits through development and implementation of a Storm Water Pollution Prevention Plan (SWPPP) that describes storm water pollution controls, or best management practices (BMPs). DEQ Hearing Exhibit 1, page DEQ000011. BMPs may include such pollution controls as silt fences, detention basins, street sweeping to remove mud and dirt tracking in streets, and other erosion and sediment controls. DEQ Hearing Exhibit 1, pages DEQ000011 -16.

Owners and operators who discharge or propose to discharge storm water associated with construction may file a Notice of Intent (NOI) to be covered by the General Permit. *See* DEQ Hearing Exhibit 1; ARM 17.30.1115(4). In December of 2013, CR and REF submitted to DEQ a Notice of Intent to be

covered by the 2012 General Permit. Orders on Summary Judgment, Finding of Fact No. 9.

CR and REF admitted at the hearing that the common plan of development for the Subdivisions included improvements necessary to get subdivision approval by the City of Billings and, then, the subdivision and selling of residential lots. Hearing Transcript Vol. II, 66:21 - 67:17. The common plan of development included grading, contouring, road building, utility installation, development of storm water retainage ponds, and other common areas, as well as the design and planning of residential lots. Hearing Transcript Vol. II, 105:15 – 111:6. Finally, DEQ Inspector Dan Freeland testified that he determined that the Subdivisions were common plans of development or sale based on the signs identifying the subdivisions, the company website advertising the developments, and the company's advertising brochures. Hearing Transcript Vol. I, 67:16 – 25.

2. <u>Supplemental Analysis of the Definition of Owner/Operator under the Montana WQA.</u>

An owner or operator under the WQA is "a person who owns, leases, operates, controls, or supervises a point source." § 75-5-103(26), MCA. The Hearing Examiner initially determined that CR and REF proposed too narrow a definition of "owner and operator," limiting their arguments to ownership, lease and operations. Additionally, the Hearing Examiner determined that CR and

REF focused too heavily on construction of homes, rather than the more expansive statutory definition of "storm water discharge associated with construction activity." Finally, the Hearing Examiner focused on the ability of CR and REF to exercise supervision and control through its contractual relationships with construction contractors developing water, sanitary sewer, storm drain, and street improvements for the subdivisions as follows:

> Reflections and Copper Ridge were the original owners and developers of all land in their respective subdivisions. Construction activities, including clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects, resulted in disturbance equal to or greater than one acre of total land area at the respective subdivisions. These construction activities were initiated in 2006, in the respective subdivisions. These construction activities were undertaken with the eventual goal of the sale of individual lots for residential home construction.
>
> Copper Ridge and Reflections admit that they entered into at least one contract that required "all excess material from pipe and bedding displacement shall be left on site." Therefore, not only did Copper Ridge and Reflections have supervision and control over the actions of third parties, they acted on their ability to instruct others how to engage in stockpiling of materials, an act expressly contained in the definition of "construction activities." This put Copper Ridge and Reflections in a position of either control or supervision with regard to the terms of sale of any individual lot for construction of residential homes. Any argument to the contrary ignores the common sense and practical reality of development of a residential subdivision. The mere fact that neither Copper Ridge nor Reflections exercised supervision or control over the contractual terms of the sale of land, does not change the fact that they had the power to supervise or control land with regard to storm water discharges . . . .
>
> Moreover, Reflections and Copper Ridge conceded their owner or operator status when they filed their December 23, 2013, SWPPs and

> NOIs, respectively. Both Reflections and Copper Ridge expressly acknowledged they were the owner or operator for construction activities . . . . *See* Orders on Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ, pp. 14-15.

The Hearing Examiner properly focused on the contractual relationship between CR and REF and their construction contractors in determining whether they were "owners or operators." In fact, the contractual relationship between a developer and a general contractor is carried forward in the direction given in the General Permit Fact Sheet in determining the entity that is considered an owner or operator. The General Permit Fact Sheet provides as follows:

> In order to provide additional clarification, for the purposes of obtaining authorization under this permit, the following entities are considered an owner or operator":
>
> - In order to provide additional clarification, for the purposes of obtaining authorization under this permit, the following entities are considered an owner or operator":
> - Owner or Developer-an owner or developer who is operating as the site manager or otherwise has supervision and control over the site, either directly or **through a contract with an entity such as those listed below**;
>
> - General Contractor or Subcontractor-a contractor **with contractual responsibility and operational control** (including SWPPP implementation) to address the impacts construction activities may have on storm water quality; or
>
> - Other Designated Agents/Contractors-other agents with contractual responsibility and operation control to address the impacts construction activities may have on storm water quality. 2012 General Permit Fact Sheet, page 4 (Emphasis added.). The 2012 General Permit Fact Sheet is attached hereto as Exhibit 1 and by this reference is incorporated herein.

Under this direction, exactly who is considered an owner/operator is largely controlled by how the developer chooses to structure the contracts with the general contractors hired to design and/or build the project. A general contractor is not an owner or operator under the General Permit unless it has contractually assumed the responsibility to comply with the terms of the General Permit in the construction on the individual lots. Thus, developers are required to ensure the requirements of the General Permit are satisfied either by themselves or through entering into a contract with the builder to take over compliance with the General Permit.

The directions given in the General Permit to determine who is an owner/operator is consistent with the following direction given by the EPA in determining who is required to obtain coverage under an NPDES permit:

> In many instances, there may be more than one party at a site performing tasks related to operational control and more than one operator may need to submit an NOI. Depending on the site and the relationship between the parties (e.g., owner, developer, general contractor), there can either be a single party acting as site operator and consequently responsible for obtaining permit coverage, or there can be two or more operators all needing permit coverage. Exactly who is considered an operator is largely controlled by how the *owner* of the project chooses to structure the contracts with the *contractors* hired to design and/or build the project. The following are three general operator scenarios (variations on any of these three are possible, especially as the number of owners and contractors increases);
>
> - *Owner as sole permittee.* The property owner designs the structures for the site, develops and implements the SWPPP, and serves as

general contractor (or has an on-site representative with full authority to direct day-to-day operations). The owner may be the only party that needs permit coverage under these circumstances. Everyone else on the site may be considered subcontractors and might not need permit coverage.

- *Contractor as sole permittee*. The property owner hires one company (i.e., a contractor to design the project and oversee all aspects of the construction project, including preparation and implementation of the SWPPP and compliance with the permit (e.g., a *turnkey* project). Here, the contractor would likely be the only party needing a permit. It is under this scenario that an individual having a personal residence built for his own use (e.g., not those to be sold for profit or used as rental property) would not be considered an operator. However, individual property owners would meet the definition of operator and may require permit coverage if they perform general contracting duties for construction of their personal residences.

- *Owner and contractor as co-permittees*. The owner retains control over any changes to site plans, SWPPPs, or stormwater conveyance or control designs; but the contractor is responsible for overseeing actual earth disturbing activities and daily implementation of SWPPP and other permit conditions. In this case, which is the most common scenario, both parties may need to apply for permit coverage. (*Developing your Stormwater Pollution Prevention Plan – A Guide for Construction Sites*, EPA, May 2007, pp. 6-7 (EPA-833-R-06-004) Page 1 and page 6 is attached hereto as Exhibit 2 and by this reference is incorporated herein.)

Under this EPA direction, the only scenario under which the owner of a project is not required to maintain coverage under the permit is the second one. That scenario requires the owner of the project to hire a contractor to design the project and to oversee all aspects of the construction project, including preparation and implementation of the SWPPP and compliance with the permit. This is analogous to the direction found in the General Permit, providing that a

builder in not an "owner or operator" unless it contractually assumes the developer's responsibility to comply with the General Permit for all aspects of the project.

The guidance provided by other states in implementing their EPA delegated authority to control polluted storm water runoff from construction sites follows suit, either requiring the owner of the project to contractually convey its obligations under the General Permit to the individual builder or at least require the owner of the project to advise the individual builder of the obligations under the General Permit and to ensure that the individual builder submits its own NOI to be covered under the General Permit. ("The NOI is required from the individual builder when coverage under the construction general permit is transferred from the developer of the common plan to the individual builder. If a transfer is not performed, then the stormwater permit requirements pertaining to the builders activities are the responsibility of the developer." *Larger Common Plan Permitting Guidance Document*, North Dakota Department of Health, December 2007, pp. 1-2; *See also* "If an operator obtains a permit for a development, and then the operator (permittee) sells off lots or parcels within that development, permit coverage must be continued on those lots until a Notice of Termination (NOT) . . . is submitted. . . . In cases where permit responsibilities for individual lot(s) will be terminated after sale

of the lot, the permittee shall inform the individual lot owner of the obligations under this permit and ensure that the Individual Lot NOI application is submitted to Ohio EPA." *General Permit Authorization for Storm Water Discharges Associated with Construction Activity under the National Pollutant Discharge Elimination System*, Ohio Environmental Protection Agency, April 23, 2018, p. 6.) The *Larger Common Plan Permitting Guidance Document*, North Dakota Department of Health, December 2007 is attached hereto as Exhibit 3 and by this reference is incorporated herein. Page 1 and page 6 of the *General Permit Authorization for Storm Water Discharges Associated with Construction Activity under the National Pollutant Discharge Elimination System*, Ohio Environmental Protection Agency, April 23, 2018 is attached hereto as Exhibit 4 and by this reference is incorporated herein.

The Hearing Examiner properly determined that CR and REF were owners or operators, having the authority to supervise and control storm water discharge associated with construction activity even after individual lots were sold. As a factual matter relied on by the Hearing Examiner, CR and REF acted within this authority by instructing others on how to stockpile materials, an activity expressly falling within the definition of construction activities. Moreover, CR and REF had the ability to contractually convey their obligations under the General Permit to other parties, but did not do so. Therefore, the

obligations to comply with the General Permit as owners or operators remained with CR and REF. To hold otherwise would allow construction activities on individual lots that are less than one acre of total land area but are part of a larger common plan of development or sale without coverage by a General or individual permit, in violation of ARM 17.30.1105(1)(a).

In arguing against the BER's adoption of the proposed order, CR and REF assert that once individual lots are sold to third parties, CR and REF are no longer owners or operators. CR and REF do not cite any authority under the statutes, rules, guidance or case law dealing with MPDES or NPDES permits to support their position. Rather, they rely, in part, on the factual assertion that they don't "own the land," "lease the land," or "operate the land." It is this narrow definition of "owner operator" that was rejected by the Hearing Examiner. CR and REF further assert that they don't "supervise anything that's going on on that land." Transcript of the December 7 Hearing, page 26, Lines 11 – 18. CR and REF's position overlooks the fact that they have, in fact, exerted such control by entering into at least one contract with a third party directing the third party's disposal of excess material derived during construction activities. Finally, CR and REF ignore their capacity to control stormwater discharge form construction activities even after the individual lots

are sold by contractually obligating third parties to comply with the obligations set forth in the General Permit.

3. The Subdivision Act Does Not Regulate Storm Water Discharges Associated with Construction Activity

CR and REF attempt to counter the evidence in the record by pointing to their history of compliance with the Montana Subdivision and Platting Act. This discussion is outside the administrative record for Cause Nos. BER 2015-01 WQ and BER 2015-02 WQ and has no bearing on whether CR and REF are owners or operators of point source discharges of storm water from their subdivisions for purposes of the WQA. *See* CR and REF Exceptions, pages 16 – 29, Transcript of the December 7, 2018 Hearing, page 25: lines 6 thorough 12.

The Montana Subdivision Act controls water supply, sewage disposal, and solid waste disposal in individual developments to protect water quality for public water supply, domestic and other beneficial uses. *See* § 76-4-101, MCA *et seq*. Storm water drainage is regulated under the Subdivision Act to ensure the development will be constructed in accordance with minimum design standards. *See* DEQ Circular 8, page 6. Compliance with the Montana Subdivision and Platting Act ensures that the **completed development** will have adequate drainage, but does not obviate the need to obtain General Permit coverage and comply with the WQA **during construction** of the subdivision. Compliance with the General Permit is still necessary to ensure

construction activities associated with development of the subdivision meet the requirement of the WQA.

At the December 7, 2018 Hearing, CR and REF cited *Eastgate Village Water and Sewer Association v. Davis, 2008 MT 141; 343 Mont. 108; 183 P.3d 873*, for the proposition that once property is purchased by a third party, the developer's obligations to comply with the Subdivision Act became requirements of the third party and are no longer that of the developer. Transcript of the December 7, 2018 Hearing, page 31: lines 6 thorough 12. CR and REF's reliance on *Eastgate Village* is misplaced.

The issue in *Eastgate Village* dealt with a subdivision (Eastgate Village) just east of East Helena. The Eastgate Village Water and Sewer Association (Association) is responsible for supplying adequate potable water to the homes located in the subdivision. During a drought in the summer of 2003 and with some subdivision residents exploring the possibility of drilling private wells, the Association banned private wells in Eastgate Village for all purposes. One subdivision resident proceeded to drill a private well despite the ban. The Association filed a declaratory action seeking a judgment that the rule prohibiting construction of private wells was valid and enforceable. *Id.*, ¶¶ *8-15.* The Montana Supreme Court determined that the rule banning private wells was within the rulemaking authority of the Association in "all matters necessary

or incidental" to the use and utilization of water and handling of sewage "generally relating to the maintenance, repairs, preservation and operation of the sewer and water systems." *Id.*, ¶ 29. The Court further determined that the rule banning private wells was reasonable, being adopted by the Association to prevent contamination of Eastgate Village's public water supply. Contamination could occur simply by connecting the untreated private well with the hose bib on the house. *Id.*, ¶¶ *31-38.*

Thus, *Eastgate Village* simply addressed the Association's ability to enact a ban on the drilling of private wells within a subdivision. There is no discussion in *Eastgate Village* that supports CR and REF's assertion that when lots are sold in a subdivision for development by third parties, requirements under the Subdivision Act are transferred from the developer of the subdivision to the third-party acquiring the individual lot.

4. Discharges from the Subdivisions that Flow to the Municipal Separate Storm Sewer System are Subject to Regulation under the Montana Water Quality Act Including the General Permit

The City of Billings ("the City") is the owner and operator of a municipal separate storm sewer system (MS4). The City is authorized to discharge storm water to state waters under the Montana Pollutant Discharge Elimination System ("MPDES") General Permit for Storm Water Discharge Associated with Small Municipal Separate Storm Sewer Systems (General

Permit No. MTR040000). The City MS4 conveys storm water to state surface water through publicly owned storm water conveyance and drainage systems and the City MS4 ultimately discharges storm water to the Yellowstone River, state water.

Storm water from the subdivisions discharges through catch basin inlets, swales, pipes, detention ponds, and overland flow to Cove Ditch and its tributary drainages, which are state water; and to the Billings MS4 which consists of storm drains and other conveyances that discharge to state water. Discharges from the subdivisions to the Billings MS4 are discharges to state waters. The MS4 General Permit, and the City of Billings authorization to discharge under that Permit, require certain minimum control measures including implementation and enforcement of a program to reduce pollutants in storm water runoff from construction activities that result in land disturbance of greater than or equal to one acre. *See* General Permit MTR040000, page 21, Billings Authorization MTR040001. Storm water from construction activities within the MS4 must be controlled to meet the MS4's General Permit requirements.

Conclusion

REF and CR meet the federal and state definition of owners and operators of the construction activities at the subdivisions because they

exercised authority and control over planning and development of the subdivisions. As owners and operators, REF and CR are responsible for compliance with the WQA and the administrative rules adopted thereunder at ARM Title 17, Chapter 30 related to storm water discharges associated with construction activities at the subdivisions including the requirement to obtain coverage under the General Permit and insure that all phases of construction and development within the subdivisions are covered under the General Permit until final stabilization is reached and the permit authorizations are terminated.

WHEREFORE, DEQ requests that the Board adopt the Hearing Examiner's Orders on Motions for Summary Judgment and Proposed Findings of Fact and Conclusions of Law regarding the findings and conclusions that CR and REF are owners and operators of construction activity at Copper Ridge and Reflection at Copper Ridge subdivisions.

Respectfully submitted this 17th day of January, 2019.

KIRSTEN BOWERS
Department of Environmental Quality
Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2019, 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:

[ ] U.S. Mail, postage prepaid
[X] Electronic Mail
[ ] Facsimile Transmission
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By Sandy Scherer
Sandy Scherer
Legal Secretary

Montana Department of Environmental Quality
Permitting and Compliance Division
Montana Pollutant Discharge Elimination System (MPDES)

Fact Sheet

General Permit for Storm Water Discharges Associated with Construction Activity

MPDES Permit Number: MTR100000

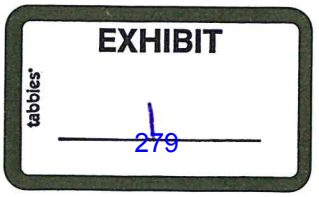
I. Status of Permit

This Fact Sheet supports the renewal of the existing MPDES "General Permit for Storm Water Discharges Associated with Construction Activity" (General Permit) which is required by the Administrative Rules of Montana (ARM) 17.30.1341(6) to have a fixed term not to exceed five years. MTR100000 was originally issued on November 17, 1992 and expired on August 31, 1997. The General Permit was then reissued on May 19, 1997 with an expiration date of August 31, 2002, and reissued again with an effective date of June 8, 2002 and an expiration date of December 31, 2006. MTR100000 was then reissued with the latest General Permit which was effective on April 16, 2007 and had an expiration date of December 31, 2011. The Department is proposing to reissue a fifth generation of this General Permit, and as required by ARM 17.30.1371, this document is the "Fact Sheet" for this reissued General Permit.

The Department will also complete a Programmatic Review / Environmental Assessment for the General Permit to fulfill its responsibilities under the Montana Environmental Policy Act (MEPA). The Department will provide an opportunity for public comment on the draft General Permit and draft Programmatic Environmental Assessment in accordance with ARM 17.30.1373.

This General Permit is issued by the Department under the authority of 75-5-402, Montana Code Annotated (MCA) and Sections 402 and 303 of the Federal Clean Water Act. ARM 17.30.1105 requires any person who discharges or proposes to discharge "storm water discharge associated with construction activity", as defined in ARM 17.30.1102(28), to get MPDES permit coverage.

Regulated construction activity storm water discharges are relatively shorter and finite MPDES permit authorizations, typically lasting from one to three years, as they pertain to the actual construction of something. At any given time, there are many hundreds of construction activities which require storm water discharges to be covered under this General Permit. Consequently, in addition to new authorizations under the General Permit during the next five-year General Permit



term, there are also hundreds of existing permittees required to renew their permit coverage under this General Permit as their construction projects are not yet completed (achieved "final stabilization" of disturbed areas as defined in ARM 17.30.1102(5)).

II. Description of Discharge and Discharging Facilities

This General Permit is applicable to storm water discharges associated with construction activity within the State of Montana, excluding Indian Reservations. "Storm water" is defined in ARM 17.30.1102(27). "Storm water discharge associated with construction activity" is defined in ARM 17.30.1102(28). For regulated activities under this definition, the term includes construction-related disturbance equal to or greater than one acre due to clearing, grading, excavating, stockpiling earth materials, and other placement or removal of earth material performed during construction projects through to final stabilization.

Without adequate control, based on Department experience and information related to construction sites, typical storm water discharges may contain pollutants which pose a threat to receiving state surface waters. Construction activities typically disturb the site's stabilizing vegetative cover and expose the remaining soil more to erosive elements such as rainfall and snowmelt runoff. Consequently, storm water runoff from construction activities may carry higher than normal loadings of sediment, but also other pollutants such as those from wastes, fueling, and/or washing at the construction site. The primary pollutant generated at construction sites is sediment including, total suspended solids, turbidity, and siltation. Pollutant concentrations may vary considerably with respect to construction sites, storm events, and location. Typically, sediment runoff rates from construction sites are 10 to 20 times greater than those from agricultural lands, and 1,000 to 2,000 times greater than those of forestlands (EPA 833-F-00-013, January, 2000). During a short period of time, construction activity can contribute more sediment to streams than is naturally deposited over several decades.

Sediment and other materials are defined as "other wastes" in 75-5-103(19), MCA. "Pollutant", is defined in ARM 17.30.1102(19) as dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural wastes discharged into water. The terms "sewage", "industrial waste", and "other wastes" as defined in 75-5-103, MCA, are interpreted as having the same meaning as pollutant. The Montana Water Quality Act (MWQA) prohibits the discharge of these wastes to state waters without a current permit from the Department, as stated in 75-5-605(2), MCA.

III. Coverage

Pursuant to 75-5-402, MCA and requirements found in ARM Title 17, Chapter 30, Subchapters 11, 12, and 13, the Department regulates storm water discharges associated with construction activities. Specifically, ARM 17.30.1105(1)(a) requires MPDES permit coverage for "storm water discharge associated with construction activity" as defined in ARM 17.30.1102(28). Additionally, point source discharges could require MPDES permit coverage under ARM 17.30.1105(1)(e) or (f) if the Department determines that storm water controls are needed based on Waste Load Allocations that are part of Total Maximum Daily Loads (TMDLs) that address the pollutants of concern, or if the Department determines the discharge causes or contributes to an exceedance of applicable water quality standards.

Part 1.1 of the General Permit contains eligibility requirements. Based on the aforementioned statutes and rules, this includes a description of the two determining criteria (acreage of construction-related ground disturbance and discharge to state surface waters) which would trigger the need for coverage under the General Permit. In order to help the regulated community evaluate these two criteria and better avoid potential compliance problems which may result from not obtaining authorization under the General Permit when necessary, the Department has included additional explanation regarding these potential factors in Part 1.1. This will also help improve efficiency for both the regulated community and Department in obtaining necessary authorizations by further minimizing questions and uncertainties, while serving to capture a higher percentage of "storm water discharges associated with construction activity" requiring authorization and thereby potentially avoiding additional third-party complaints and/or non-filer compliance and enforcement issues. Along these same lines, further clarifying information is also provided regarding support activities for a construction project. Additionally, by placing such critical information up-front in the first few pages (Parts 1.1. and 1.2.) of the General Permit itself, it is more likely to be recognized and effectively acted upon by the regulated community.

"Larger common plan of development or sale" is defined in Part 5 of this permit. For purposes of interpreting this definition, a "plan" is considered to be any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, engineering plan sheet, permit application, zoning request, computer design, report/plan, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating that construction activities may occur within a specific geographic area. A common plan includes all support activities and areas of disturbance that were created exclusively for, and are a direct result of, the construction activity.

For clarification with respect to residential subdivisions and development, individual residential lots that are part of a larger common plan of development or sale are not required to maintain active permit coverage once all of the conditions below are met:

- The individual lot has been sold to a homeowner for private residential use;
- The lot is less than one acre of disturbed area;
- Construction activities on the individual lot that were conducted by the permittee for the larger development are completed;
- A certificate of occupancy (or equivalent) has been awarded to the homeowner; and
- The SWPPP for the permittee for the larger development has been updated to indicate the individual lot has reached final stabilization.

Part 1.1 of the General Permit also contains requirements which clarify allowable storm water discharges and allowable non-storm water discharges. Although the storm water regulated under this General Permit is typically rainfall or snowmelt runoff generated due to a particular "wet weather" precipitation event, there are some types of non-storm water discharges which are conventionally allowed to be discharged with the storm water, provided such a discharge is not subject to MPDES discharge permitting separately. The allowable non-storm water discharges stated in this General Permit are similar to those allowed under other MPDES storm water general permits to ensure compatibility and coordination in areas where regulated storm water discharges may co-exist, such as for regulated small municipal separate storm sewer systems in Montana's seven largest urban areas.

Part 1.2 of the General Permit contains requirements for how an "owner or operator", as defined in 75-5-103, MCA, obtains authorization under the General Permit based on the aforementioned statutes and rules. For the purposes of this permit, the "owner or operator" of the "storm water discharge associated with construction activity" which obtains authorization under this permit is identified as the "permittee". Consequently, the term "permittee" is used throughout the permit.

In order to provide additional clarification, for the purposes of obtaining authorization under this permit, the following entities are considered an owner or operator:

- Owner or Developer – an owner or developer who is operating as the site manager or otherwise has supervision and control over the site, either directly or through a contract with an entity such as those listed below;
- General Contractor or Subcontractor – a contractor with contractual responsibility and operational control (including SWPPP implementation) to address the impacts construction activities may have on storm water quality; or
- Other Designated Agents / Contractors – other agents with contractual responsibility and operational control to address the impacts construction activities may have on storm water quality.

Part 1.2. also contains typical requirements pertaining to the continuation of the General Permit if it is not reissued or replaced prior to it's expiration date based on ARM 17.30.1313, and it contains requirements pertaining to modification of an NOI based on new fee rule requirements contained in ARM 17.30.201.

Parts 1.3 and 1.4 of the General Permit contain requirements pertaining to the ongoing use and protocol for terminating permit coverage using the standard Department "Notice of Termination" (NOT) Form, and requirements for transferring General Permit coverage using the Department's ongoing standard "Permit Transfer Notification" (PTN) Form.

Through the authority of ARM 17.30.1105(5), certain construction activity discharges may qualify for a waiver instead of needing storm water discharge permitting under an MPDES permit. To help the regulated community understand and recognize this potential option, this "Storm Water Rainfall Erosivity Waiver" option is mentioned in Part 1.5. of the General Permit.

To elaborate, ARM 17.30.1105(5)(a) provides this waiver option for an owner or operator of a construction project which has a "storm water discharge associated with construction activity" (as defined in ARM 17.30.1102(28)), and a total construction-related disturbance of less than five acres of total land area, and which results in the construction activity having a Rainfall Erosivity Factor ("R" in the Revised Universal Soil Loss Equation - RUSLE) of less than five, as determined using a Department-approved method.

This form is used for construction activities (projects) which will initiate construction-related ground disturbance and achieve final stabilization within the same calendar year between the dates of March 1st and November 30th. Construction projects which initiate in, but do not achieve final stabilization in, this same period within a single calendar year are not eligible for this waiver.

A separate Rainfall Erosivity Waiver Form must be provided for each construction activity qualifying for the waiver. All portions of the construction activity's work which are part of the "larger common plan of development or sale" must be included in the determination stated on the Rainfall Erosivity Waiver Form. In other words, the waiver is available on a development-wide basis only, not for individual filings, phases, or other portions of the "larger common plan of development or sale".

Coverage under the permit is required if the construction project's R Factor ever becomes greater than five due to changes, or anticipated changes, in the project's construction period, such as due to unexpected delays. Also, if the overall construction project or "larger common plan of development or sale" becomes, or is anticipated to become, five or more acres of construction-related

disturbance, the project no longer qualifies for the Rainfall Erosivity Waiver.

Based on the Department's experience in permitting storm water discharges associated with construction activity in Montana, it needs to be emphasized that the vast majority of construction activities performed in Montana will likely not qualify for using this waiver form. This is primarily because, in addition to the earthwork and building phases, most construction projects depend on natural rainfall to establish vegetation and can take months or longer to achieve final stabilization.

For further information about the "Storm Water Rainfall Erosivity Waiver Form" and it's limitations, the General Permit refers to the Department's storm water construction webpage through the Department's website at: http://www.deq.mt.gov.

IV. Receiving Waters and Applicable Standards

Storm water discharges associated with construction activity regulated by this General Permit cover discharge of storm waters to state surface waters. Surface waters are defined in ARM 17.30.1102(32). Intermittent and ephemeral watercourses and drainages are state surface waters in accordance with 75-5-103(29), MCA.

The Montana Water Quality Act requires that permits issued pursuant to Title 17, Chapter 30, Subchapter 11 and 13 comply with the Montana surface water quality standards found in Subchapter 6.

New or increased sources (ARM 17.30.702(16)), must comply with Montana's Nondegradation Policy (75-5-303, MCA), and rules (ARM 17.30.701 et. seq.). Nondegradation requirements are discussed in Part VII of this Fact Sheet.

V. Effluent Limitations and Related Permit Conditions

Section 402 of the Montana Water Quality Act (75-5-402, MCA) authorizes the Department to regulate the discharges of sewage, industrial and other wastes into state surface waters. Pursuant to ARM 17.30.1201, the Department is required to establish effluent limitations, treatment standards, and other requirements for point sources discharging wastes to state waters. The Montana Board of Environmental Review has not adopted minimum treatment requirements for storm water discharges associated with construction activity. The discharge of sewage or industrial wastes is not allowed under the General Permit.

The General Permit is exclusive to "other wastes" as defined under 75-5-103(19) MCA, resulting from regulated activities, and receive, at a minimum, treatment to

restore and maintain the quality of surface waters (ARM 17.30.635(1), 75-5-305, MCA).

A. Technology-Based Effluent Limits (TBELs)

Sediment, turbidity, total suspended solids, and other parameters can potentially be increased through such construction activity storm water discharges. As stated in the Montana Water Quality Act it is not necessary that wastes be treated to conditions purer than the receiving waters as long as minimum treatment requirements have been set (75-5-306, MCA). As the effluent characteristics of storm water runoff can be highly variable and unpredictable, ARM 17.30.1345(1) and 17.30.1344 provide for the use of Best Management Practices (BMPs) where effluent limitations are infeasible. Based upon best professional judgement, the use of BMPs is the most appropriate type of control for this point source category. BMPs should be the most cost-effective means of removing the pollutants, or eliminating and/or minimizing contact between pollutants and storm water discharges associated with construction activity.

Based on the above, the Department has concluded that the most prudent, reasonable land, soil and water conservation practices, to protect surface waters of the state will be achieved through BMP-oriented narrative effluent limitations, and the development and implementation of a "Storm Water Pollution Prevention Plan" (SWPPP) as defined in ARM 17.30.1102(31). SWPPP submittal is a required component of the NOI Package pursuant to 75-5-401(1)(c) and the consequent ARM 17.30.1115(3). This SWPPP identifies site characteristics, potential pollutants, and various BMPs to minimize or prevent pollutants from entering storm water runoff and/or receiving state surface waters. The General Permit will require the permittee to develop and maintain BMPs and storm water management controls in accordance with a SWPPP (Parts 2 and 3 of the General Permit).

In the December 1, 2009 "Federal Register", the federal U.S. Environmental Protection Agency (EPA) promulgated new regulations entitled "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category" (informally called the "C & D ELGs"). In the July 1, 2010 40 CFR publication, these are found under Subchapter N entitled "Effluent Limitations and Guidelines." These include 40 CFR Parts 450.21, 450.22, 450.23, and 450.24. These are generally incorporated by reference for use in MPDES permitting through the authority in ARM 17.30.1207. Consequently, most of these requirements, as presented and explained in the aforementioned Federal Register, were included in this General Permit.

More specifically, in this General Permit, narrative TBELs reflecting the "best practicable technology currently available" (BPT) found in 40 CFR Part

450.21 were literally brought in through Part 2.2. of the General Permit. These requirements are primarily oriented around BMPs.

40 CFR Part 450.22(c), (d), (e), (f), (g), and (h) were also brought into this General Permit in Part 2.2. as they refer back to Part 450.21. 40 CFR Part 450.22 requirements are "effluent limitations reflecting the best available technology economically achievable" (BAT). 40 CFR Part 450.22(a) and (b) were not brought into this General Permit at this time, as explained below.

40 CFR Part 450.23 was similarly brought into this General Permit in Part 2.2. as it also refers back to Part 450.21. Part 450.23 requirements are "effluent limitations reflecting the best conventional pollutant control technology" (BCT).

40 CFR Part 450.24 requirements are "new source performance standards reflecting the best available demonstrated control technology" (NSPS). This refers back to Part 450.22, which as explained below, resulted in only 40 CFR Parts 450.22 (c), (d), (e), (f), (g), and (h) being included in the General Permit.

Turbidity monitoring requirements brought in through 40 CFR Part 450.22(a) and (b), and the respective portion of Part 450.24, will be brought into General Permit MTR100000 at a later date. 40 CFR Part 450.22(a) and (b) pertain to turbidity monitoring, a numerical turbidity effluent limit, and an exemption for turbidity monitoring. This delay is because the numeric turbidity limit of 280 NTU stated in Part 450.22(a)(1) is undergoing litigation, reevaluation, and potential revision at this time at the federal EPA level. Without fixed and established federal requirements for this turbidity monitoring from the federal EPA, the Department considered it prudent to wait until these requirements are firmly determined before such requirements are included in General Permit MTR100000. There is a significant amount of effort in establishing a turbidity monitoring program with an enforceable limit for the Department and regulated community, and the Department needs to have more certainty with respect to these requirements to ensure a productive, efficient, and worthwhile effort for all involved.

In keeping with some more contemporary and recently issued similar permits from the EPA and other states, and in order to help ensure better compliance/enforceability with respect to these more strict TBELs and BMP requirements brought about through the incorporation of the federal C & D ELGs, the Department has included various improvements with respect to self-inspections, corrective actions, and the SWPPP in this General Permit.

B. Water Quality Based Effluent Limits

Based on ARM Title 12, Chapter 30, Subchapter 6, and with the exception of storm water discharges associated with construction activity into an ephemeral stream (defined in ARM 17.30.602(12)), for construction activity storm water discharges there are a few more pertinent water quality standards identified in Subchapter 6 which apply to state surface waters classified as A-Closed, A-1, B-1, B-2, B-3, C-1, C-2, I, and C-3 (ARM 17.30.621 through 629). In summary, these include:

1. No increases are allowed above naturally occurring concentrations of sediment or suspended sediment (except as permitted in 75-5-318, MCA), settleable solids, oils, or floating solids, which will or are likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife."

2. Standards pertinent to turbidity (defined in ARM 17.30.602(38)) for the above classifications range from no increase above naturally occurring turbidity to maximum increases of ten nephelometric turbidity units above naturally occurring turbidity, except as permitted in 75-5-318, MCA.

3. General Prohibitions found in ARM 17.30.637 including state surface waters being free from certain specified undesirable or harmful conditions, measures ensuring waste discharges and activities conducted will not potentially violate water quality standards, various BMP performance standards, and ephemeral stream treatment requirements.

Water quality standards found in ARM 17.30.621 through 629 do not apply to ephemeral streams.

It is the Department's position that Montana's surface water quality standards, including those stated above, can be maintained through compliance with the General Permit's TBELs, the development and implementation of a SWPPP, and other conditions in the General Permit. SWPPP requirements document various information about site characteristics including hydrology, potential sources of pollutants such as disturbed ground or wastes/products, and BMPs to minimize consequent pollutants in storm water runoff. The SWPPP allows for an iterative approach to BMP implementation whereby BMP effectiveness is tracked and evaluated through self-inspections, and corrective actions and improvements are made as necessary. The BMPs help minimize or

eliminate the generation or migration of pollutants to receiving state surface waters.

Part 2.3 of this General Permit does not authorize storm water discharges that the Department determines will cause, or have a reasonable potential to cause or contribute to an exceedance of applicable water quality standards. If the regulated storm water discharge causes or contributes to an exceedance of applicable water quality standards, the Department will notify the permittee that additional storm water controls are necessary or terminate coverage under the General Permit and require an MPDES individual permit.

Furthermore, requirements are incorporated into the General Permit in Part 3.11. to address listed impaired waterbodies and their pollutants of concern, with or without approved Total Maximum Daily Loads (TMDLs), under Section 303(d) of the Clean Water Act. More specifically, depending on whether the storm water discharges into a listed impaired receiving surface water(s), the permittee's SWPPP may need to include a section describing how the SWPPP will control discharges of pollutants of concern (for which the listed waterbody is impaired) and ensure storm water discharges will not cause or contribute to instream exceedances of water quality standards. This SWPPP must specifically identify BMPs that will collectively control the potential discharges of pollutants of concern. Information on impaired waterbodies may be obtained from the Department website: http://cwaic.mt.gov/.

If a TMDL has been approved for any waterbody into which the permittee discharges storm water, and the TMDL considered and addressed MPDES-regulated storm water discharges, then the Department must incorporate the Waste Load Allocation (WLA), as applicable, into the permit as required by 75-5-703, MCA.

Typically, the WLA is assumed to be accomplished by ensuring compliance with this General Permit for pertinent construction projects with authorized storm water discharges. In other words, with respect to addressing storm water discharges to a 303(d) listed or impaired water body, the Department believes General Permit requirements, including TBELs, SWPPP, self-inspections, and corrective action requirements, will typically be sufficient in addressing erosion and sediment control and other pollutant concerns.

C. Inspection, Corrective Action, Recordkeeping, and Reporting Requirements

Part 2.3. of the General Permit provides inspection requirements which the permittee's SWPPP Administrator must conduct during the effective period of the particular permit authorization. Self-inspections are a critical tool in evaluating and keeping track of BMP effectiveness, and consequently, in minimizing or preventing pollutant discharge from a site through storm water runoff. Proper BMP implementation through the SWPPP and these self-inspections are also critical in helping to ensure compliance with the TBELs stated in Part 2.1. of the General Permit.

As these inspections typically require site-specific knowledge and experience related to the requirements in this General Permit and associated BMPs, the Department is requiring self-inspections to be conducted by a "SWPPP Administrator" which meets the requirements in Part 3.2. of the General Permit. The SWPPP Administrator requirements in Part 3.2. include training requirements which will be phased in during the first year of the effective General Permit cycle in order to provide the regulated community more time to obtain this training.

In Part 2.3. inspection requirements, this General Permit includes an option for permittees to select either weekly routine inspections, or biweekly routine inspections in conjunction with post-storm event inspections after a certain-sized rainfall event or certain snowmelt events. It also includes a reduction in inspection frequency for inactive construction activity sites.

Regarding the size of a storm event which triggers the need for a post-storm event inspection, based on field evidence, it was clear that on many construction projects a relatively smaller storm event can cause significant problems with respect to BMPs and erosion/sediment control. In part, this is due to Montana's semi-arid climate, less vegetation, more topography, harder growing conditions for vegetation, more erosive soils, and unpredictability with respect to storm event size and duration over broader areas. Given the above factors, the requirement for post-storm event inspections was reduced from a 0.5-inch to 0.25-inch rainfall event, and a requirement was also added to strengthen these inspections with respect to snowmelt events.

Additionally, based on Department experience and inspections, it was evident there was a need to generally improve and expand self-inspection requirements. More requirements were necessary with respect to ensuring quality and completeness, including the inspection scope, documenting inspections, and ensuring corrective action was taken and documented where necessary. In particular, it was important to strengthen requirements with respect to BMP maintenance, replacement, and/or failures, as over the years the Department has observed that the

maintenance of BMPs has often been a problem area in ensuring compliance with the General Permit. Consequently, Part 2.3. of the General Permit contains some new requirements to better accomplish this. Inspection and BMP maintenance procedures must be documented in the SWPPP as required by Part 3.10. of the permit.

Other requirements in Parts 2.5 and 2.6. include ongoing and improved measures for keeping specified permit-related documentation at the site, and to notify the Department of a change in the SWPPP Administrator designated by the permittee. To elaborate, the Department has continued to experience problems and compliance issues with permittees not retaining the required documentation and/or having it readily available at the site. Consequently, the SWPPP Administrator must now be solely responsible for this recordkeeping requirement, and ensuring such documentation is readily available at the site. Depending on the particular construction project, the availability of the SWPPP Administrator, and/or whether office trailers or similar options exist at the actual site for retaining this required site documentation, other measures may need to be considered including the use of secure lock-boxes for the retention of such documentation at the site.

D. Special Conditions - Storm Water Pollution Prevention Plan Requirements

A Storm Water Pollution Prevention Plan (SWPPP), as defined in ARM 17.30.1102(31), must be developed for each facility or activity covered by this General Permit. A SWPPP is required directly through 75-5-401(1)(c) MCA and ARM 17.30.1115(3). As described above, the primary purpose of the SWPPP is to identify pertinent site characteristics, sources of pollution to storm water, and to implement BMPs to prevent pollutant migration to surface waters. Another important function of the SWPPP is to help ensure compliance with the effluent limitations in Part 2 of the General Permit. The BMPs selected in the SWPPP need to eliminate or minimize contamination of storm water runoff at their source and/or remove pollutants before discharge into state surface waters. Facilities must implement the provisions of the SWPPP required under this part as a condition of this permit (75-5-303 (3)(d), MCA). SWPPPs are intended to be "living documents", to be updated and accommodate "as-built" field changes, and to reflect current conditions and activities at the site. Periodic evaluation and ongoing improvements to the BMPs at the site can only help improve the quality of storm water runoff.

SWPPP BMPs must be developed using good standard engineering practices. They must include requirements stated in the General Permit. The SWPPP must be signed in accordance with ARM 17.30.1323 and the requirements stated in the General Permit.

The SWPPP requirements contained within MTR100000 have not changed significantly during the previous four five-year cycles of this General Permit. However, due to a number of factors, the Department has incorporated new improvements into the SWPPP during this General Permit reissuance cycle. These factors include:

- the promulgation of the new 2010 requirements (narrative TBELs) contained within the federal C & D ELGs;
- to ensure better compliance with respect to General Permit requirements
- to ensure more effective implementation of BMPs; and
- to generally contemporize and bring SWPPP requirements more in-line with similar permits from EPA and other permits within the region.

Consequently, based on historical EPA/State permits, guidance, and experience, the SWPPP has evolved over the past 20 years to contain the following elements within this General Permit:

1. SWPPP General Requirements;
2. SWPPP Administrator Requirements (including training);
3. Construction Activity and BMP Schedule and Phasing;
4. Site Description;
5. Site Map;
6. Identification and Summary of Potential Pollutant Sources;
7. Description of Best Management Practices (BMPs)
    - Structural BMPs for Erosion and Sediment Control
    - Non-Structural BMPs for Erosion and Sediment Control
    - Materials Handling
    - Dedicated Concrete or Asphalt Batch Plants
    - Waste Management and Disposal, Including Concrete Washout
    - Stabilization Measures
    - Minimize Ground Disturbance
    - Ground Water Dewatering
    - Operational Controls
    - Spill Prevention and Response Procedures
    - Off-Site Vehicle Trucking of Sediment
    - Local Sediment and Erosion Control Requirements;
8. Final Stabilization;

9. Post-Construction Storm Water Management;
10. Inspection and BMP Maintenance Procedures;
11. Water Quality Controls for Discharges to Impaired Waterbodies; and
12. SWPPP Revisions and Updates.

E. Standard Conditions and Definitions

Based on ARM 17.30.1342, standard conditions pertaining to all MPDES permits are included in Part 4 of this General Permit. Part 5 of the General Permit contains general definitions and abbreviations associated with the MPDES permit program and this General Permit

VI. Mixing Zones

A mixing zone is an area where the effluent mixes with the receiving water and certain water quality standards may be exceeded (ARM 17.30.502(6)). Because the General Permit regulates the discharge of pollutants through the development and implementation of technology-based controls (TBELs, BMPs, and SWPPP), a mixing zone is not applicable. As stated in Section V.B., facilities which cause a contribution to a violation of water quality standards must apply for an MPDES Individual Permit.

VII. Nondegradation

The activities covered by this General Permit have been determined to be non-significant based on 75-5-303 (3)(d) MCA, and 75-5-317(2)(b) MCA, whereas the SWPPP requirement stipulates that the SWPPP and associated BMPs will be implemented prior to the commencement of regulated activities covered under this General Permit. The SWPPP requirement also includes provision for the ongoing inspections and evaluation of BMPs to eliminate or minimize pollutants contained in storm water runoff. If the applicant provides information that indicates the proposed discharge will not meet conditions of ARM 17.30.715(1), the Department will require the operator to amend the SWPPP in order to comply with Montana's Nondegradation Policy and rules.

VIII. Total Maximum Daily Loads (TMDL)

On September 21, 2000, a U.S. District Judge issued an order stating that until all necessary total maximum daily loads (TMDLs) under Section 303(d) of the Clean Water Act are established for a particular water quality limited segment (WQLS), the State is not to issue any new permits or increase permitted discharges under the MPDES program. The order was issued in the lawsuit *Friends of the Wild Swan v. U.S. EPA, et al.,* CV 97-35-M-DWM, District of

Montana, Missoula Division. The Department finds that the renewal and re-issuance of this General Permit does not conflict with the order, because: (1) it is not a new permit, and (2) the permit prohibits storm water discharges that cause or contribute to a violation of water quality standards.

IX. Procedure for Coverage under the General Permit

Through the authority of 75-5-401(1)(c), and the rule requirements in ARM 17.30.1115, the Department uses a "Notice of Intent" (NOI) system to regulate this type of storm water discharge. Through the submittal of an NOI, the owner or operator acknowledges eligibility for coverage under this permit and agrees to comply with the conditions of this permit for their particular "storm water discharge associated with construction activity". ARM 17.30.1115 contains the procedures to be utilized with respect to this NOI-based system.

In order to obtain coverage under the General Permit, an "owner or operator" (as defined in 75-5-103(25)), must submit a complete "NOI Package" to the Department. The NOI Package collectively contains the information required through ARM 17.30.1115. A NOI Package includes the standard NOI form provided by the Department, a SWPPP, and the permit application fee based on ARM 17.30.201. Forms and information pertaining to this are available through the Department's website at http://deq.mt.gov.

The NOI form must be completed by the owner or operator of the construction project. The owner or operator means a person who owns, leases, operates, controls, or supervises a point source. A person includes the state, a political subdivision of the state, institution, firm, corporation, partnership, individual, other entity (75-5-103(23), MCA). Persons completing an NOI form, other than an individual, must comply with the signatory requirements in ARM 17.30.1323 and Part 4.15. of the General Permit. The owner or operator assumes responsibility for all storm water discharges at the site.

The Department performs a completeness check of each NOI Package when it is received. This includes a check for completion of items on the NOI form, a check to ensure the SWPPP was provided and is signed as required in the General Permit, and a check to ensure the appropriate fee amount has been submitted.

Based on ARM 17.30.1115(4), authorization to discharge under the General Permit is effective upon receipt by the Department of the complete NOI Package. In order to ensure storm water discharges from the construction site are properly regulated prior to their occurrence, and due to the unpredictability associated with storm water (rainfall and snowmelt) discharges, the Department requires this NOI Package to be submitted prior to the initiation of construction activities at the site.

The NOI Package is not complete and the source is not covered under the General Permit until the Department receives the complete NOI Package (including fees).

Coverage under the General Permit remains in effect until the permittee submits a Notice of Termination (NOT) stating that the site has achieved final stabilization. The NOT form must be signed by the owner or operator or other authorized person in accordance with Part 4.15. of the General Permit. The permittee is responsible for payment of annual fees for each calendar year in which the source is covered under the General Permit.

For all permittees renewing continued coverage under MTR100000, they are not required to submit a new or an amended SWPPP, however, a valid SWPPP must be maintained at the site. They are just required to submit a complete renewal NOI form and a renewal application fee, if applicable, based on ARM 17.30.201.

X. References/ Information Sources

(1) Administrative Rules of Montana Title 17, Chapter 30 *et seq.*
(2) Montana Code Annotated Title 75, Chapters 5, Subchapters 1 through 6
(3) Code of Federal Regulations 40 CFR Parts 122 through 133, and Part 450
(4) Federal Register, Tuesday December 1, 2009 (federal C & D ELGs)
(5) Montana DEQ MPDES Permit No. MTR100000, effective date April 16, 2007
(6) Colorado Department of Public Health and Environment, Colorado Discharge Permit System Permit No. COR-030000, effective date July 1, 2007
(7) Wyoming Department of Environmental Quality, Wyoming Pollutant Discharge Elimination System Permit No. WYR10-0000, effective date May 9, 2011
(8) EPA Spring 2011 Draft NPDES General Permit for Discharges from Construction Activities
(9) EPA 2012 Final NPDES General Permit for Discharges from Construction Activities

Prepared by: Brian Heckenberger, DEQ Water Protection Bureau - July 2012.

Developing Your Stormwater Pollution Prevention Plan

A Guide for Construction Sites

EPA-833-R-06-004
May 2007

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B. Who Is Required to Get NPDES Permit Coverage?

Construction site *operators* are responsible for obtaining NPDES permit coverage for their stormwater discharges. Each state has its own definition of the term *operator*. Operators may include owners (e.g., developers), general contractors, independent subcontractors, government officials, companies, or corporations. This section reflects EPA's understanding of most NPDES permit requirements for stormwater discharges throughout the country. You should, of course, consult your construction general permit for the requirements that apply to you. In some cases, states have defined the operator as a single entity, usually the land owner or easement holder. In other states, several entities may meet the definition of operator. For instance, the owner may control the project's plans and specifications, and the general contractor may control the site's day-to-day operations. In such cases, both may be defined as operators. If a site has multiple operators, they may cooperate on the development and implementation of a single SWPPP. Operators generally obtain coverage under an NPDES permit, often by filing a form called a Notice of Intent (NOI).

Figure 4. Use signage to help educate construction staff.

EPA's Construction General Permit (which applies only where EPA is the permitting authority—see Chapter 2 Section A) defines operator as any party that:

- Has control over the construction plans and specifications

  and/or

- Has day-to-day operational control of the site, including activities necessary to implement the SWPPP

Regardless of whether or not the operator is a corporation or governmental entity, someone must direct the SWPPP's preparation and implementation and apply for NPDES permit coverage for the stormwater discharges. In most cases, this will be a high-level official, such as a corporate officer, manager or elected official, or a principal executive officer. For specific instructions, refer to the appropriate NPDES stormwater permit.

Multiple Operators

In many instances, there may be more than one party at a site performing tasks related to *operational control* and more than one operator may need to submit an NOI. Depending on the site and the relationship between the parties (e.g., owner, developer, general contractor), there can either be a single party acting as site operator and consequently responsible for obtaining permit coverage, or there can be two or more operators all needing permit coverage. Exactly who is considered an operator is largely controlled by how the *owner* of the project chooses to structure the contracts with the *contractors* hired to design and/or build the project. The following are three general operator scenarios (variations on any of these three are possible, especially as the number of owners and contractors increases):

- *Owner as sole permittee.* The property owner designs the structures for the site, develops and implements the SWPPP, and serves as general contractor (or has an on-site representative with full authority to direct day-to-day operations). The owner may be the only party that needs permit coverage under these circumstances. Everyone else on the site may be considered subcontractors and might not need permit coverage.

- *Contractor as sole permittee*. The property owner hires one company (i.e., a contractor) to design the project and oversee all aspects of the construction project, including preparation and implementation of the SWPPP and compliance with the permit (e.g., a *turnkey* project). Here, the contractor would likely be the only party needing a permit. It is under this scenario that an individual having a personal residence built for his own use (e.g., not those to be sold for profit or used as rental property) would not be considered an operator. However, individual property owners would meet the definition of *operator* and may require permit coverage if they perform general contracting duties for construction of their personal residences.
- *Owner and contractor as co-permittees*. The owner retains control over any changes to site plans, SWPPPs, or stormwater conveyance or control designs; but the contractor is responsible for overseeing actual earth disturbing activities and daily implementation of SWPPP and other permit conditions. In this case, which is the most common scenario, both parties may need to apply for permit coverage.

However, you are probably not an operator and subsequently would not need permit coverage if one of the following is true:

- You are a subcontractor hired by, and under the supervision of, the owner or a general contractor (i.e., if the contractor directs your activities on-site, you probably are not an operator)
- The operator of the site has indicated in the SWPPP that someone other than you (or your subcontractor) is reponsible for your activities as they relate to stormwater quality (i.e., another operator has assumed responsibility for the impacts of your construction activities). This is typically the case for many, if not most, utility service line installations.

In addition, *owner* typically refers to the party that owns the structure being built. Ownership of the land where construction is occurring does not necessarily imply the property owner is an operator (e.g., a landowner whose property is being disturbed by construction of a gas pipeline). Likewise, if the erection of a structure has been contracted for, but possession of the title or lease to the land or structure does not to occur until after construction, the would-be owner may not be considered an operator (e.g., having a house built by a residential homebuilder).

Transferring Ownership

In many residential developments, an overall developer applies for the stormwater permit coverage, conducts grading activities, and installs the basic infrastructure (e.g., utilities, roads). Individual lots are then sold to builders who then construct the houses. Unless the developer is still responsible for stormwater on these individual lots (which is typically not the case), it is likely that the builder will need to apply for NPDES permit coverage for stormwater discharges during home construction.

Subcontractors

It is typically a good idea to include specific contract language requiring subcontractors to implement appropriate stormwater controls. Subcontractors should be trained on appropriate BMPs and requirements in the SWPPP and should not disturb or remove BMPs. Some contractors will include specific penalties in subcontractor agreements to ensure subcontractors do not damage or remove BMPs.

Take a Closer Look...

Erosion Control vs. Sediment Control

When developing a SWPPP, it is important to understand the difference between erosion control and sediment control. Erosion control measures (e.g., mulch, blankets, mats, vegetative cover) protect the soil surface and prevent soil particles from being dislodged and carried away by wind or water. Sediment control measures remove soil particles after they have been dislodged (typically through settling or filtration). It is usually easier and less expensive to prevent erosion than it is to control sedimentation.

What does this mean to me?

You should try to use erosion control BMPs as the primary means of preventing stormwater contamination, and sediment control techniques to capture any soil that does get eroded. Because no one technique is 100 percent effective, a good SWPPP will use both kinds of BMPs in combination for the best results.

NORTH DAKOTA
DEPARTMENT *of* HEALTH

LARGER COMMON PLAN PERMITTING GUIDANCE DOCUMENT
(12/07)

The North Dakota Department of Health (NDDoH) has developed new guidance for permitting construction activity within a larger common plan of development or sale. The construction stormwater general permit, NDR10-0000, defines a larger common plan as:

> "a contiguous area where multiple separate and distinct land disturbing activities may be taking place at different times, on different schedules, but under one proposed plan. One plan is broadly defined to include design, permit application, advertisement or physical demarcation indicating that land-disturbing activities may occur."

Examples of larger common plans include residential subdivisions, commercial developments, or industrial parks.

Beginning January 1, 2008:

- A Notice of Intent (Application) or NOI to obtain coverage under the general permit is required from each individual builder within separate and distinct common plans. By submitting a NOI, each builder is responsible for complying with the terms and conditions of the general permit including the development of a site-specific Stormwater Pollution Prevention (SWPP) plan and inspection records. The NOI must be submitted to the North Dakota Department of Health before construction activity begins.

  An individual builder is considered the owner/operator of the site as defined in the general permit.

- The NOI is required from the individual builder when coverage under the construction general permit is transferred from the developer of the common plan to the individual builder. If a transfer is not performed, then the stormwater permit requirements pertaining to the builder's activities are the responsibility of the developer. If an option to buy exists on the property, the developer may not transfer coverage.

  The following provides further explanation of the transfer process:

  1. The developer sells off property to a builder*.

  2. The developer amends the SWPP plan to exclude those areas which have been sold to a builder.

  3. The builder then applies for coverage under the general permit for the purchased property, or if coverage already exists, amends the existing SWPP plan and site map for that common plan to include the property.

* If the builder does not obtain a permit and the developer does not have documentation requiring the builder to apply for permit coverage or comply with environmental regulations as part of the property sale, the developer is responsible for stormwater discharges from the sold lots.

- A NOI is required from an individual builder once coverage is transferred and before construction activity begins. **Once coverage has been granted to the builder, activity which disturbs additional acreage within the common plan will not require the submittal of another NOI. Instead, all activity conducted by the builder within the common plan is covered under the initial NOI.**

- The builder shall keep and maintain a list of their active construction sites within the common plan as part of the SWPP plan. The SWPP plan shall also indicate the locations of any site-specific BMP.

- The submittal of one Notice of Intent for construction activity within a larger common plan eliminates the individual builder's requirement to submit an annual location report to the Department at the end of the reporting period. However, an annual report is still required for small construction activities that are not part of a larger common plan.

The permitting requirement applies to all common plans of development or sale within the State of North Dakota. This includes but is not limited to industrial, commercial and residential construction activity.

In order to terminate coverage, a builder must submit a Notice of Termination (NOT) to the NDDoH. Termination of coverage within a larger common plan of development may be achieved by:

- Achieving final stabilization on all properties for which the builder is responsible.

- Transferring permit coverage to another builder who has purchased the property; similar to the initial transfer between the developer and the builder.

- For residential construction only, temporary erosion protection and down gradient perimeter control for individual lots has been completed and the residence has been transferred to the homeowner. Additionally, the builder has distributed a "homeowner fact sheet" to the homeowner informing them of the need for, and benefits of, final stabilization.

There may be instances where the covered property within a larger common plan has achieved final stabilization, but no additional construction activity is anticipated. In those instances a builder may choose to maintain or terminate coverage at their own discretion. If coverage has been terminated and a parcel of property is sold to a new builder, the new builder must obtain coverage before construction activity begins.

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Effective Date: April 23, 2018
Expiration Date: April 22, 2023

The Effective Date is the Entered Directors Journal

OHIO ENVIRONMENTAL PROTECTION AGENCY

GENERAL PERMIT AUTHORIZATION FOR STORM WATER DISCHARGES ASSOCIATED WITH CONSTRUCTION ACTIVITY UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Water Pollution Control Act, as amended (33 U.S.C. Section 1251 et. seq. hereafter referred to as "the Act") and the Ohio Water Pollution Control Act [Ohio Revised Code ("ORC") Chapter 6111], dischargers of storm water from sites where construction activity is being conducted, as defined in Part I.B of this permit, are authorized by the Ohio Environmental Protection Agency, hereafter referred to as "Ohio EPA," to discharge from the outfalls at the sites and to the receiving surface waters of the state identified in their Notice of Intent ("NOI") application form on file with Ohio EPA in accordance with the conditions specified in Parts I through VII of this permit.

It has been determined that a lowering of water quality of various waters of the state associated with granting coverage under this permit is necessary to accommodate important social and economic development in the state of Ohio. In accordance with OAC 3745-1-05, this decision was reached only after examining a series of technical alternatives, reviewing social and economic issues related to the degradation, and considering all public and intergovernmental comments received concerning the proposal.

This permit is conditioned upon payment of applicable fees, submittal of a complete NOI application form, development (and submittal, if applicable) of a complete Storm Water Pollution Prevention Plan (SWP3) and written approval of coverage from the director of Ohio EPA in accordance with Ohio Administrative Code ("OAC") Rule 3745-38-02.

Craig W. Butler
Director

Total Pages: 60

I certify this is a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency.

By: [signature] Date: 4-23-18

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The director will send written notification that an alternative NPDES permit is required. This notice shall include a brief statement of the reasons for this decision, an application form and a statement setting a deadline for the operator to file the application. If an operator fails to submit an application in a timely manner as required by the director under this paragraph, then coverage, if in effect, under this permit is automatically terminated at the end of the day specified for application submittal.

2. Operators may request an individual NPDES permit. Any owner or operator eligible for this permit may request to be excluded from the coverage of this permit by applying for an individual permit. The owner or operator shall submit an individual application with reasons supporting the request to the director in accordance with the requirements of 40 CFR 122.26. If the reasons adequately support the request, the director shall grant it by issuing an individual NPDES permit.

3. When an individual NPDES permit is issued to an owner or operator otherwise subject to this permit or the owner or operator is approved for coverage under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit or the date of approval for coverage under the alternative general permit, whichever the case may be.

D. Permit requirements when portions of a site are sold

If an operator obtains a permit for a development, and then the operator (permittee) sells off lots or parcels within that development, permit coverage must be continued on those lots until a Notice of Termination (NOT) in accordance with Part IV.B is submitted. For developments which require the use of centralized sediment and erosion controls (i.e., controls that address storm water runoff from one or more lots) for which the current permittee intends to terminate responsibilities under this permit for a lot after sale of the lot to a new owner and such termination will either prevent or impair the implementation of the controls and therefore jeopardize compliance with the terms and conditions of this permit, the permittee will be required to maintain responsibility for the implementation of those controls. For developments where this is not the case, it is the permittee's responsibility to temporarily stabilize all lots sold to individual lot owners unless an exception is approved in accordance with Part III.G.4. In cases where permit responsibilities for individual lot(s) will be terminated after sale of the lot, the permittee shall inform the individual lot owner of the obligations under this permit and ensure that the Individual Lot NOI application is submitted to Ohio EPA.

E. Authorization

1. Obtaining authorization to discharge. Operators that discharge storm water associated with construction activity must submit an NOI application form and Storm Water Pollution Prevention Plan (SWP3) if located within the Big Darby Creek watershed or portions of the Olentangy watershed in accordance with the requirements of Part I.F of this permit to obtain authorization to discharge under this general permit. As required under OAC Rule 3745-38-06(E), the director, in response to the NOI submission, will notify the applicant in writing that he/she has or has not been granted general permit coverage to discharge storm water associated with construction activity under the terms and conditions of this permit or that the applicant must apply for an individual NPDES permit or coverage under an alternate general NPDES permit as described in Part I.C.1.