

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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IN THE MATTER OF: ) CASE NO.  
VIOLATIONS OF THE WATER ) BER 2015-01 WQ  
QUALITY ACT BY REFLECTIONS )  
AT COPPER RIDGE, LLC, AT )  
REFLECTIONS AT COPPER RIDGE )  
SUBDIVISION, BILLINGS, )  
YELLOWSTONE COUNTY )

and: )  
IN THE MATTER OF: ) CASE NO.  
VIOLATIONS OF THE WATER ) BER 2015-02 WQ  
QUALITY ACT BY COPPER RIDGE )  
DEVELOPMENT CORPORATION AT )  
COPPER RIDGE SUBDIVISION, )  
BILLINGS, YELLOWSTONE COUNTY )

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TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENTS

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Via Zoom  
April 23, 2021  
10:10 a.m.

BEFORE CHAIR STEVEN RUFFATO, JON REITEN,  
DAVID SIMPSON, DAVID LEHNHERR, JOE SMITH,  
and HILLARY HANSON

PREPARED BY: LAURIE CRUTCHER, RPR  
COURT REPORTER, NOTARY PUBLIC

## A P P E A R A N C E S

1  
2 APPEARING ON BEHALF OF THE BOARD OF ENVIRONMENTAL  
3 REVIEW:

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9 ATTORNEY APPEARING ON BEHALF OF THE APPELLANT:

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15 ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT:

16 MS. KIRSTEN BOWERS, ESQ.  
17 Special Assistant Attorney General  
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20 Helena, MT 59620  
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1           WHEREUPON, the following proceedings were  
2 had:

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4           CHAIRMAN RUFFATO: It is 10:10, and I  
5 will reconvene the meeting. And to make sure we  
6 have a quorum, Joyce, would you call the roll of  
7 the Board.

8           MS. WITTENBERG: Sure. I see we do have  
9 Laurie Crutcher back on, our Court Reporter, so  
10 that's good. Chairman Ruffato.

11           CHAIRMAN RUFFATO: Here.

12           MS. WITTENBERG: Board Member Lehnherr.

13           BOARD MEMBER LEHNHERR: Here.

14           MS. WITTENBERG: Board Member Simpson.

15           BOARD MEMBER SIMPSON: Here.

16           MS. WITTENBERG: Board Member Hanson.

17           BOARD MEMBER HANSON: Here.

18           MS. WITTENBERG: Board Member Reiten.

19           (No response)

20           MS. WITTENBERG: He must not be back on  
21 yet. Board Member Smith.

22           BOARD MEMBER SMITH: Here.

23           MS. WITTENBERG: Board Member Altemus.

24           (No response)

25           MS. WITTENBERG: Julia, are you back on?

1 (No response)

2 MS. WITTENBERG: We do have a quorum,  
3 Chairman.

4 BOARD MEMBER REITEN: Reiten is here. I  
5 just had it on mute. Sorry.

6 MS. WITTENBERG: Chairman, we do have a  
7 quorum. And I also thought we should note for the  
8 record that since we did roll this morning, we  
9 have had George Mathieus and Sarah Clerget of DEQ  
10 both join the meeting.

11 CHAIRMAN RUFFATO: Thank you. Is there  
12 anyone else other than those two who have joined  
13 the meeting, who have joined that were not  
14 introduced at the beginning?

15 (No response)

16 CHAIRMAN RUFFATO: Okay. I'm going to  
17 circle back to Julia. I know she sent an email  
18 this morning that said she was going to leave  
19 early. I had the sense it was at 11:00. We're  
20 not there yet. Julia, are you on?

21 (No response)

22 CHAIRMAN RUFFATO: Nevertheless we will  
23 proceed, and maybe she will join us. We do have a  
24 quorum. We're now to the action items on the  
25 Board agenda. I'm going to ask Katherine to

1 introduce this case initially.

2 MS. ORR: Okay. Mr. Chairman, members  
3 of the Board. What you have before you is a  
4 decision of whether you want to adopt the Hearing  
5 Examiner's proposed findings of fact and  
6 conclusions of law. I think the way it's  
7 captioned here, "Hearing Examiner's Second  
8 Proposed Findings of Fact and Conclusions of Law  
9 to the BER on the Issue of Owner and Operator."

10 And this is a final disposition of a  
11 case where there was an administrative order  
12 issued to both of these parties, Copper Ridge  
13 Development Corporation and Reflections at Copper  
14 Ridge. The violations were a violation of the  
15 Administrative Rules of Montana, and there's a  
16 cite, "by conducting construction activities prior  
17 to submitting a notice of intent at Reflections at  
18 Copper Ridge and Copper Ridge Subdivisions."

19 And I'm reading from the proposed  
20 decision.

21 "Violation of 75-5-605 by discharging  
22 stormwater associated with construction activity  
23 without a discharge permit; violation of  
24 75-5-605," and then two ARM cites, "by placing  
25 waste where it will cause pollution in violation

1 of 75-5-605 by violating terms and conditions of a  
2 general permit."

3 And this is a case that, as you can  
4 gather from the record here, has been in existence  
5 before a Hearing Examiner since 2015, and there  
6 have been various machinations of proposed  
7 rulings, then remands, then decisions regarding  
8 whether or not photographs and maps should be  
9 included in the record; and finally we have an  
10 amalgamation basically from the previous hearings  
11 and a proposal for a decision here before the  
12 Board; and then also exceptions were filed by the  
13 attorneys for Reflections at Copper Ridge and  
14 Copper Ridge Development Corporation, as well as  
15 DEQ.

16 And the parties -- we've had  
17 communication about how we would present, how the  
18 presentation of their exceptions would occur  
19 before the Board, and at this time, we could  
20 launch into that.

21 The way the timing of it is designed is  
22 that Copper Ridge and Copper Ridge Reflections has  
23 30 minutes to make its presentation. And we said  
24 DEQ would go first, did we?

25 CHAIRMAN RUFFATO: Yes, we did.

1 MS. ORR: So DEQ will have 20 minutes to  
2 make its presentation of its exceptions, then  
3 Copper Ridge and Copper Ridge Development  
4 Corporation will have 30 minutes to make its  
5 presentation as well as a rebuttal, and then DEQ  
6 will have ten minutes to provide its rebuttal.

7 Mr. Chair, I didn't know if you wanted  
8 to launch right into those exceptions, but we can  
9 if that's your wish.

10 CHAIRMAN RUFFATO: Thank you, Katherine.  
11 It was my thought that we would launch right into  
12 the oral arguments per the schedule that you have  
13 outlined -- DEQ for 20 minutes; Copper Ridge and  
14 Reflections for 30 minutes; DEQ for then ten  
15 minute rebuttal. At that point, we would have  
16 questions from the Board to the parties, and that  
17 would be followed by our deliberations.

18 Is there any questions from the Board  
19 about this process, or objections, or points,  
20 comments they want to make?

21 (No response)

22 CHAIRMAN RUFFATO: Any questions from  
23 the parties about this process?

24 (No response)

25 CHAIRMAN RUFFATO: Hearing none, I

1 believe that Kirsten Bowers will be making the  
2 presentation for DEQ; is that correct, Ms. Bowers?

3 MS. BOWERS: Yes, that's correct,  
4 Chairman Ruffato, members of the Board.

5 In your packet you have what looks like  
6 200 pages of materials, so you can probably tell  
7 that these two contested cases have been going on  
8 a long time. And it is two cases. The Copper  
9 Ridge Development Corporation case is BER 2015-02,  
10 and the Reflections at Copper Ridge case is BER  
11 2015-01.

12 And to get right to the point, DEQ's  
13 primary objections to the second proposed findings  
14 of fact and conclusions of law on the issue of  
15 owner/operator is that it entirely ignored the  
16 BER's remand instructions that were issued during  
17 its August 9th, 2019 meeting.

18 After considering the first proposed  
19 finding of fact and conclusions of law on the  
20 issue of owner/operator and the parties'  
21 exceptions, the BER failed to pass a motion to  
22 approve that finding of fact and conclusions of  
23 law, and it remanded both the cases to the Hearing  
24 Examiner to take additional evidence regarding  
25 four excluded photographs, including maps created



1 from the photographs and maps of the areas covered  
2 by the permits, and determine if the additional  
3 evidence changes the proposed finding of fact and  
4 conclusion of law.

5 And the BER gave further instruction  
6 that if the additional evidence does not change  
7 the proposed finding of fact and conclusion of  
8 law, that the Hearing Examiner was to submit a  
9 memo stating that conclusion to the Board.

10 So the second proposed finding of fact  
11 and conclusion of law is now presented without  
12 considering the four photographs and the related  
13 evidence, and the evidentiary record in these two  
14 cases is incomplete. So the second proposed  
15 finding of fact and conclusion of law on the issue  
16 of owner/operator should be rejected just as the  
17 first one was.

18 There is a case on point, a Montana  
19 Supreme Court case, Baldrige versus Board of  
20 Trustees at 264 Montana 199, and in that case, a  
21 Hearing Examiner was similarly instructed to  
22 consider all evidence before her and make a  
23 determination, but the Hearing Examiner issued a  
24 second finding of fact and conclusion of law that  
25 looked very much like the first.

1           And the Supreme Court said the proper  
2 recourse is for the Board to remand the case again  
3 to the Hearing Examiner with instructions to  
4 follow the Board's remand order.

5           A final order must be well reasoned, and  
6 the findings of fact must be accompanied by a  
7 concise and explicit statement of the underlying  
8 facts supporting the statements based exclusively  
9 on the evidence in the record.

10           The Hearing Examiner determined in the  
11 second proposed finding of fact and conclusion of  
12 law that the four previously excluded photographs  
13 do not change the calculus in the matter, but  
14 that's not supported by evidence in the record  
15 because the Hearing Examiner has not received the  
16 photos, and has not taken the evidence related to  
17 those photos as directed by the Board's remand  
18 order.

19           Additionally, the second proposed  
20 finding of fact and conclusions of law was issued  
21 by the Hearing Examiner after reviewing an  
22 incomplete record, and without benefit of live  
23 testimony of witnesses because the original  
24 Hearing Examiner is no longer available to Agency  
25 Legal Services.

1           And under MAPA, if the person who  
2 conducted the hearing becomes unavailable to the  
3 agency, proposed findings of fact may be prepared  
4 by a person who has read the record, but only if  
5 the demeanor of witnesses is considered immaterial  
6 by all parties. That's in MAPA at 2-4-622 sub  
7 (1).

8           And DEQ for one does not agree that the  
9 demeanor of witnesses is immaterial in this case.  
10 In fact, there is conflicting testimony by  
11 witnesses between DEQ's inspector Dan Freeland,  
12 and Copper Ridge and Reflections at Copper Ridge's  
13 representative Landy Leep. So the Hearing  
14 Examiner must complete the record by taking both  
15 physical and testimonial evidence on the four  
16 excluded photographs.

17           Additionally, the second proposed  
18 finding of fact and conclusion of law is almost  
19 identical to the first proposed finding of fact  
20 and conclusion of law. And the differences  
21 between the two really are in language citing to  
22 the Hearing Examiner's decision on the motion in  
23 limine, and DEQ takes exception to the Hearing  
24 Examiner's finding fault with DEQ for bringing  
25 what is called an entirely new theory of the case

1 with entirely new evidence which should have been  
2 brought six years ago.

3 DEQ notes that it was the Hearing  
4 Examiner and the Board who changed the theory of  
5 this case, not DEQ. Until the Board's remand  
6 decision on the owner/operator issue in February  
7 2019, DEQ was proceeding in this case and other  
8 similar cases under its long held interpretation  
9 of the definition of owner/operator at 75-5-103  
10 Sub (2)(6) under the Montana Water Quality Act,  
11 that Reflections and Copper Ridge were owners or  
12 operators because they controlled or supervised a  
13 point source.

14 So DEQ relied on evidence that  
15 Reflections and Copper Ridge were the original  
16 owners and operators because they were developers  
17 of the subdivisions, and they controlled  
18 construction activities that included clearing,  
19 grading, excavation, stockpiling earth materials,  
20 and placement or removal of earth materials  
21 performed during their construction project. This  
22 resulted in disturbance of equal to or greater  
23 than one acre of total land area at the respective  
24 subdivisions.

25 The construction activities were

1 undertaken under a common plan of development with  
2 the eventual goal of the sale of individual lots  
3 for residential home construction.

4 So it isn't fair now to find fault with  
5 DEQ for failing to provide the photos in response  
6 to discovery requests for evidence supporting its  
7 conclusions that Copper Ridge and Reflections were  
8 owner/operators, when those conclusions were based  
9 on the evidence that Copper Ridge and Reflections  
10 controlled development, and not their ownership  
11 within the subdivision.

12 Additionally, DEQ's original inspection,  
13 which was conducted in September of 2013, was more  
14 concerned about the downgradient portion of the  
15 subdivisions, and that's why the original photos  
16 concentrated in that portion of the subdivision,  
17 and the reason DEQ was focused in the downgradient  
18 portion of the subdivisions was because that's  
19 where the discharges to State waters were  
20 occurring.

21 After the February 2019 Board meeting,  
22 the Board determined there was a dispute of fact  
23 on the issue whether Copper Ridge and Reflections  
24 were owner or operators, and they reversed the  
25 previous, even previous to the previous Hearing

1 Examiner's orders on summary judgment, and those  
2 orders on summary judgment found that Copper Ridge  
3 and Reflections were owner/operators. So the  
4 original evidentiary hearings in this case did not  
5 focus on the issue of owner/operator because that  
6 had already been decided on summary judgment.

7 The Board further rejected the July  
8 16th, 2018 proposed finding of fact and conclusion  
9 of law to the extent it had incorporated the  
10 orders on summary judgment finding Copper Ridge  
11 and Reflections were owner/operators, and they  
12 remanded the matter for further evidentiary  
13 hearing concerning whether Copper Ridge and  
14 Reflections at the time of the violations were the  
15 owner or in control of construction activity at  
16 the subdivisions.

17 So that's what I call Remand One. On  
18 February 8th, 2019 this case was remanded to the  
19 Hearing Examiner for further evidence on the issue  
20 of whether Copper Ridge and Reflections were  
21 owner/operators under the Water Quality Act as  
22 interpreted by the Board at that time to mean that  
23 Copper Ridge and Reflections were owners or  
24 operators of construction activity at the time of  
25 the unpermitted discharges.

1           So pursuant to that first remand, the  
2 Hearing Examiner determined the evidentiary record  
3 lacked sufficient evidence on the question whether  
4 Copper Ridge and Reflections are owners or  
5 operators with respect to the violations, and the  
6 Hearing Examiner further determined that the  
7 parties were permitted to supplement their  
8 evidentiary record on the issue of owner/operator,  
9 and so a second evidentiary hearing was held in  
10 June of 2019 to supplement the record.

11           And it was in preparation for that  
12 hearing that DEQ disclosed some additional photos  
13 and documents to Copper Ridge and Reflections.  
14 Copper Ridge and Reflections filed two motions in  
15 limine arguing, among other things, that DEQ  
16 should not be allowed to introduce the  
17 photographic evidence because it was not provided  
18 in DEQ's notice of violations to Copper Ridge and  
19 Reflections.

20           And DEQ's supplemental disclosures  
21 included a series of six photographs, four of  
22 which were the subject of the Copper Ridge and  
23 Reflections motion in limine. And then on June  
24 4th, 2019, before the second evidentiary hearing,  
25 the Board's Hearing Examiner granted Copper Ridge

1 and Reflections motions in limine, in part by not  
2 allowing DEQ to use or enter any photographs that  
3 are not either publicly available or attached to  
4 the violation letter that was issued September  
5 23rd, 2013.

6 Then the second evidentiary hearing was  
7 held, and again followed by post hearing briefing  
8 and arguments before the Board on August 9th,  
9 2019.

10 The Hearing Examiner's first proposed  
11 findings of fact and conclusions of law on the  
12 issue of owner/operator found DEQ failed to meet  
13 its burden of proof to establish Copper Ridge and  
14 Reflections were owner/operators at the time of  
15 the violations set forth in both the September  
16 23rd, 2013 violation letters and the March 27th,  
17 2015 administrative orders.

18 So then at its August 9th, 2019 meeting,  
19 the Board considered the Hearing Examiner's first  
20 proposed finding of fact and conclusions of law on  
21 the owner/operator issue, and determined that the  
22 motion in limine excluding the four photographs  
23 was not properly granted.

24 So then Remand Two occurred, and the  
25 consolidated contested cases were remanded to the



1 Hearing Examiner again to take additional evidence  
2 related to the excluded photographs.

3 So there are still questions of fact  
4 regarding evidence related to these excluded  
5 photographs on the issue whether Copper Ridge and  
6 Reflections are owners or operators of  
7 construction activity at the subdivisions at the  
8 time of the violations.

9 Based on the Board's second remand  
10 instructions, summarily submitting the second  
11 proposed finding of fact and conclusions of law  
12 before you today which is nearly identical to the  
13 first proposed finding of fact and conclusions of  
14 law, is inappropriate.

15 The Hearing Examiner states that the  
16 findings of fact and conclusions of law  
17 incorporate direction from the Board to consider  
18 the four previously excluded photographs, and  
19 determine whether they serve to fulfill DEQ's  
20 burden to establish by a preponderance of the  
21 evidence that Copper Ridge and Reflections were  
22 owner/operators.

23 But there remain issues of fact related  
24 to the conditions of the lots owned by Copper  
25 Ridge and Reflections as shown in the photographs,

1 and questions of fact related to whether the areas  
2 of ground disturbance shown in those photographs  
3 was covered by previously issued MPDES permits,  
4 and an evidentiary hearing on the four photographs  
5 is necessary to complete the record regarding  
6 these questions.

7 Under the Board's August 9th, 2019  
8 remand or the second remand, DEQ was permitted to  
9 present photographs that were excluded by the  
10 order on motions in limine, and DEQ was permitted  
11 to present additional evidence related to Lot 15  
12 because one of the excluded photographs depicts  
13 Lot 15. Additionally, there are aerial  
14 photographs and superimposed maps providing the  
15 location of the four photographs in the areas  
16 covered by previously issued permits that would  
17 have been within the record. All of this evidence  
18 is relevant material and probative that DEQ would  
19 have offered had the photographs not been  
20 excluded.

21 The Supreme Court has provided that a  
22 reviewing Court does not remand a matter when the  
23 outcome would be a repetition of the original  
24 decision. There must be a significant probability  
25 that the original decision would change, or

1 there's a need to create a better record for  
2 review.

3 This is a rule from Northern Plains  
4 Resource Council versus Board of Natural Resources  
5 and Conservation, 181 Montana 500, a 1979 case.

6 The purpose of the remand was to hear  
7 everything on the general subject of the excluded  
8 photographs that would have been introduced at the  
9 evidentiary hearing had the photographs been in  
10 evidence, and complete the record in this matter.

11 The BER should reject the second  
12 proposed finding of fact and conclusions of law  
13 because the Hearing Examiner failed to complete  
14 the record and consider the relevant evidence, and  
15 the BER should remand with instructions to  
16 consider the excluded photographs and any related  
17 evidence. I'll reserve any time for rebuttal.

18 CHAIRMAN RUFFATO: Thank you, Ms.  
19 Bowers. Ms. Marquis, are you ready to proceed?

20 MS. MARQUIS: Yes, Mr. Chair. Good  
21 morning. Mr. Chairman, members of the Board, my  
22 name is Vicki Marquis. I'm an attorney with  
23 Holland and Hart in Billings, Montana. I'm here  
24 today representing the Copper Ridge Development  
25 Corporation and Reflections at Copper Ridge, LLC.

1           The client representative Mr. Landy Leep  
2 sends his regrets that he could not join us today.  
3 He had some scheduling difficulties.

4           First of all, I'd like to address what  
5 Ms. Bowers just told the Board. Rest assured that  
6 the Hearing Examiner did consider those previously  
7 excluded photographs, and did consider the entire  
8 record, and we see that in the Hearing Examiner's  
9 proposed findings of fact and conclusions of law.

10           On Page 10 there's an affirmative  
11 statement that he had read and considered the  
12 entire record. Pages 42 to 43 provide numerous  
13 findings about the previously excluded  
14 photographs. That couldn't happen if those  
15 photographs were not part of the evidence that is  
16 in front of the Hearing Examiner and available to  
17 the Board.

18           Also on Page 49 of the proposal from the  
19 Hearing Examiner, he provides a discussion of the  
20 excluded photographs, and why they don't matter,  
21 and don't change the calculates here.

22           We're here today asking you to adopt the  
23 Hearing Examiner's findings and conclusions, and  
24 to issue the proposed order as the final agency  
25 action in these contested cases. Now, I realize

1 the contested cases might seem complicated,  
2 especially when you look at the docket sheet. It  
3 has close to 200 entries on it. But in some  
4 respects that is a good thing because it means  
5 that there's been a lot of work done already on  
6 these cases.

7 As you know, these cases were originally  
8 delegated to a Hearing Examiner for adjudication  
9 including a hearing. That's at that last end of  
10 the spectrum that Ms. Orr described to you today  
11 in terms of what the Hearing Examiner can provide  
12 for you.

13 And as noted in your meeting materials  
14 at your last meeting, your Hearing Examiner  
15 functions as the Board's Judge. It is the Hearing  
16 Examiner's job to find the facts. And because  
17 this case, unlike most, has bounced back and forth  
18 from the Hearing Examiner, from the Board to the  
19 Hearing Examiner, back to the Board, back to the  
20 Hearing Examiner, back to the Board, back to the  
21 Hearing Examiner, and then one more iteration of  
22 that, and here we are today.

23 The Hearing Examiner, your Judge, has  
24 had several opportunities to consider and weigh  
25 the evidence, and find the facts, and reach

1 conclusions based on those facts, and offer you a  
2 solid proposed order.

3           Additionally, the Board has already done  
4 a lot of work on this case. This is the fourth  
5 time that the Board has considered the merits of  
6 this case, and the Board has already provided a  
7 key, an interpretation of a key legal term -- and  
8 Ms. Bowers touched on this -- it's the owner or  
9 operator terminology that's used in the  
10 regulations.

11           The Board also made a key determination  
12 about the burden of proof in these contested cases  
13 where the Department has asserted a Water Quality  
14 Act violation.

15           Additionally, the last time this matter  
16 was before the Board, the Board approved findings  
17 of fact numbers one through 42, and nothing has  
18 disturbed that approval, and those findings in the  
19 document that's before you today, the proposal,  
20 are very much the same.

21           I noted on the standard of review, which  
22 was an item of discussion earlier in your meeting,  
23 in our exceptions or response to the exceptions,  
24 we provided some case law that talks about the  
25 point that Ms. Orr and Chairman Ruffato were

1 discussing earlier today about how to review the  
2 findings, and you'll find this on Page 186 and  
3 Page 187 of your Board packet.

4 The case is Blaine County versus  
5 Stricker or Striker -- I'm sorry if I'm  
6 pronouncing that wrong. The case is 2017 MT 80.  
7 And at Paragraph 25, the Supreme Court makes clear  
8 that the agency must first determine that the  
9 findings were not based on competent substantial  
10 evidence.

11 And then in Paragraph 26, the Montana  
12 Supreme Court says that, "Substantial evidence is  
13 --" and this is a quote -- "evidence that a  
14 reasonable mind might accept as adequate to  
15 support a conclusion." So that's the standard for  
16 you to consider today.

17 Substantial evidence sounds like a heavy  
18 consideration, but it's really not. It is just  
19 what the Supreme Court said it is. Can a  
20 reasonable mind rely on that evidence to support  
21 the finding?

22 Now, the Board has already hired your  
23 Hearing Examiner to do the heavy lifting here, to  
24 go through and sift through all of the evidence,  
25 and do the preponderance of the evidence weighing,

1 and come up with proposed findings. The Board's  
2 job today isn't to reweigh that evidence. That's  
3 why you delegated this to your Hearings Officer.

4 The question before you is also not  
5 whether there's evidence that might support a  
6 different finding. The question before you today  
7 is whether the evidence and the findings presented  
8 by the Hearing Examiner are supported by competent  
9 substantial evidence. Is there evidence that a  
10 reasonable mind can rely upon to reach that  
11 finding? And the answer for every one of the  
12 findings before you today is yes. And much of  
13 that evidence is drawn directly from testimony  
14 from DEQ's witnesses, and DEQ's own documentation.

15 So we ask the Board to accept the  
16 findings as they're presented, and when you do  
17 that, the only valid conclusions are those that  
18 are presented in the Hearing Examiner's proposal.  
19 We ask you to adopt the proposed order as final.

20 I'd like to go through a little bit of a  
21 background, because this case does have such a  
22 history. I noted at the last meeting in your  
23 Board packets there was some notation that the  
24 goal is to have a hearing within 120 days. And as  
25 you can see, this case has been in full litigation



1 for six years. It's pretty long.

2 So if I may share my screen, and show a  
3 demonstrative. Will that be appropriate if I do  
4 that? And the demonstrative I'm going to show is  
5 Exhibit SSS which was submitted with our responses  
6 to the exceptions.

7 CHAIRMAN RUFFATO: Are we capable of  
8 allowing Ms. Marquis to share the screen?

9 MS. WITTENBERG: I certainly can give it  
10 a try. Go ahead.

11 MS. MARQUIS: On my end it's telling me  
12 that the host has disabled participant screen  
13 sharing.

14 MS. WITTENBERG: Okay. I'm looking here  
15 right quick.

16 MS. SIDNER: This is Regan. I'm the  
17 host, and I'm seeing if I can allow that.

18 CHAIRMAN RUFFATO: I didn't hear what  
19 Regan said. Is she working on it? Is that what's  
20 going on?

21 MS. WITTENBERG: Vicki, can you try it?

22 MS. MARQUIS: It does look like I'm able  
23 to share my screen now. Let me -- Can you all see  
24 what is a PDF file with several colors in it? At  
25 the bottom right it's labeled Exhibit SSS.

1                   CHAIRMAN RUFFATO: Yes, I can see it.

2                   MS. MARQUIS: So the last time this was  
3 in front of the Board, I believe Board Member  
4 Lehnherr asked. He noted it would be helpful to  
5 see a map that has both subdivisions, and get some  
6 type of graphic indication of where the  
7 subdivisions are, and what permit coverage  
8 existed, and when. And so this is our attempt.  
9 It's not for any evidentiary purposes. This is  
10 just a demonstrative exhibit to give you a graphic  
11 indication of the subdivisions' location and the  
12 permit that existed at the time.

13                   So on the right here is the Reflections  
14 at Copper Ridge Subdivision. This straight line  
15 here that goes from the top to the bottom is a  
16 boundary between the Reflections Subdivision on  
17 the right and the Copper Ridge Subdivision on the  
18 left.

19                   The subdivisions are developed in  
20 phases, and we're only talking about a few phases  
21 of the subdivisions in this enforcement action.  
22 Phases 2 and 3 of Reflections are shown in blue  
23 and green; Phases 2, 3 and 4 of Copper Ridge are  
24 shown in orange, yellow, and purple.

25                   I'd like to just highlight that this

1 orange area is where the construction started, and  
2 you can see that in this text box in the center  
3 I've drawn your attention to, Exhibit A, which is  
4 admitted evidence, showing that there's stormwater  
5 coverage for construction. The permit coverage  
6 started in 2007. It was terminated and confirmed  
7 by the Department in 2009.

8 After that, construction moved into  
9 Reflections Phase 2. Again, I'll draw your  
10 attention to the center of the text box which  
11 points to admitted evidence, which is Exhibit B,  
12 stating that their permit coverage began in 2012,  
13 was terminated and confirmed by the Department in  
14 December of that same year.

15 Over here in Copper Ridge, Phases 3 and  
16 4 were developed at the same time in 2012, and  
17 under the same permit coverage. So again, their  
18 permit coverage began in June of 2012, was  
19 terminated and confirmed by the Department in  
20 December of that same year.

21 Now, this is sort of the new area that  
22 attention was drawn to this sort of midway through  
23 the litigation. And again, Exhibit C, which is  
24 admitted evidence, verifies that their  
25 construction permit coverage began in April of

1 2013, and the notice of termination which was  
2 confirmed by DEQ was provided in March of 2014.

3 I'd like to now talk about a timeline.  
4 I know you have Exhibit A provided by the Hearing  
5 Examiner, and it goes through the timeline in  
6 terms of this process in front of the Board. I  
7 wanted to give you a graphic indication of the  
8 timeline that includes the permit coverage in  
9 there.

10 So I hope you can all see this timeline  
11 that goes -- it has a ribbon in the middle that  
12 goes from 2007 to 2021. Is that visible on your  
13 end?

14 CHAIRMAN RUFFATO: Yes, it is.

15 MS. MARQUIS: Great. Thank you. Again,  
16 this isn't for evidentiary purposes, and we have  
17 citations to all of the sources of the events on  
18 here with the exception of the storm, and that was  
19 taken from DEQ Exhibit 14, which also is admitted  
20 into evidence.

21 So here you can see that the permit  
22 coverage -- this was that first Phase 2, that  
23 orange section on the previous PDF we looked at  
24 -- began in 2007, ended in 2009 when the  
25 construction was completed, and then they moved

1 into those other phases, two of Reflections which  
2 was the blue area we saw previously; Phases 3 and  
3 4 in Copper Ridge which is yellow and purple that  
4 we saw earlier. That construction was done and  
5 completed, the permit was completed and terminated  
6 confirmed by DEQ in 2012.

7 Here we have when they began work on  
8 Phase 3 initiated that permit coverage.

9 And then we had this crazy storm. If  
10 you were in Billings, you might remember this. It  
11 occurred in September, September 7th of 2013. It  
12 was a massive storm, and it caused a lot of  
13 problems, not just at the Billings west end, but  
14 throughout the Billings area.

15 In fact in DEQ Exhibit 14, which is a  
16 newspaper article, you'll see that NorthWestern  
17 Energy noted that they had 5,000 customers without  
18 power, and that extended all the way from the west  
19 end of Billings to Billings Heights, and then all  
20 the way out to Lockwood. So pretty extensive  
21 area. It dropped 2.1 inches of rain in 45  
22 minutes, and this of course at the end of the  
23 summer when things were dry, and vegetation was  
24 starting to die, dry up. So it caused a lot of  
25 problems, just in the subdivisions, but throughout

1 Billings.

2 That newspaper article prompted DEQ to  
3 go out and do an inspection, which they did two  
4 days later -- we see that here on September 9th --  
5 resulted in the violation letter which started an  
6 enforcement action.

7 And in this time span here in the  
8 remainder of 2013 and 2014, I don't have all of  
9 the events on here. It would just be far too  
10 busy. There were letters back and forth from  
11 Copper Ridge and Reflections to the Department  
12 asking for more information, trying to identify  
13 which violations occurred in which subdivisions.

14 Here we see in 2014, construction in  
15 Phase 3, that north area that was shown in green,  
16 was completed, and that coverage was terminated  
17 and confirmed by the Department.

18 Now, as part of the compliance actions  
19 that the Department required, they required the  
20 subdivisions to take out permit coverage for home  
21 building activities, and the subdivisions didn't  
22 agree with that because they don't do home  
23 building. They put in the streets, and the  
24 utilities, and do some other work, prepare the  
25 lots, sell the lots, and then other people build

1 the houses.

2 So they balked at that, but the  
3 Department had an enforcement action against them  
4 threatening millions of dollars in penalties. And  
5 so of course, Copper Ridge and Reflections  
6 submitted the permit applications.

7 And then so here we see Copper Ridge and  
8 Reflections doing what's asked of them. They did  
9 have some violations noted of those permits that  
10 they were required to get that they didn't think  
11 they needed to get.

12 Those are encapsulated in alleged  
13 Violation 4, and they're sort of paperwork  
14 violations, although I think there was one  
15 violation about a best management practice which  
16 could be like a -- (inaudible) -- or a swale or  
17 something not being tacked down appropriately.

18 Nonetheless they did what they could to  
19 fix those, and the Department agreed that all of  
20 the violations, all the compliance actions had  
21 been conducted. But then in March of 2015, they  
22 received -- (inaudible) -- compliance penalty  
23 orders that triggered an appeal and really started  
24 these contested cases.

25 Here in 2015 and 2016, it looks a little

1 barren, but in that period of time there was a lot  
2 of discovery. You know, we asked for all of the  
3 evidence that the Department has regarding to the  
4 violations, and we didn't receive any of those  
5 photographs that are at issue here today.

6 We also took depositions, expensive  
7 depositions, and we asked the Department for all  
8 of the evidence that they had proving violations,  
9 and there was no mention of the photographs, and  
10 no mention really even of that northern Phase 3 of  
11 the Reflections subdivision.

12 So we said, "Well, the facts are  
13 undisputed, and they don't support us being the  
14 owner/operator," so we moved for summary judgment,  
15 and we lost on that. The Hearing Examiner looked  
16 at some contracts that existed prior to the  
17 September storm, and looked at the permits that  
18 existed afterwards, and said, "No, you are an  
19 owner/operator."

20 We challenged that in front of the  
21 Board, and as Kirsten noted, the Board overruled  
22 that Hearing Examiner's interpretation, and said  
23 that the owner/operator speaks for the person who  
24 owns, operates, or supervises the project at the  
25 time of the discharge. So again, that's in



1 September of 2013.

2 So the Board decided to remand this  
3 action, and then the Hearing Examiner said, "Well,  
4 we need more evidence on the owner or operator  
5 issue," and that happened in this time span here.  
6 And when we went for more discovery and asked the  
7 Department for more documents, that's really when  
8 -- that's the first time we got to see those  
9 photographs.

10 And so we made a motion in limine to  
11 exclude. There are statutory provisions about the  
12 notice that has to be provided to Respondents when  
13 violations are alleged against them, and we didn't  
14 feel that the allegations that DEQ was now  
15 proposing in that new area with the new  
16 photographs had ever been noticed.

17 The Hearing Examiner agreed, excluded  
18 the photographs. The Board overruled that, but in  
19 doing so, the Board did adopt the first 42  
20 findings of fact, overruled the motion in limine,  
21 and remanded back to the Hearing Examiner just --  
22 we're still on the owner/operator issue. That's  
23 why I call this the remand within the remand --  
24 and they wanted to know do the photos change the  
25 findings and conclusions. They did ask the

1 Hearing Examiner to take additional evidence.

2 But now, DEQ has provided a long  
3 citation in their exceptions to a narrative from  
4 Board Member Tweeten at the time, and he said, "Go  
5 back, and the parties can make what they want of  
6 the photographs, and they might not change the  
7 Hearing Examiner's mind, but take a look at them."  
8 Essentially what he said. "They might not be  
9 probative, but they're relevant."

10 So after that it went to the Hearing  
11 Examiner. We had a scheduling order issued that  
12 included a deadline for dispositive motions,  
13 including motions on summary judgment. And you'll  
14 see at Docket No. 124 on the docket sheet for  
15 these cases where the parties filed a joint motion  
16 to amend the scheduling order, agreeing to a  
17 deadline by which dispositive motions could be  
18 filed. Those include summary judgment motions.

19 So when we looked at all of the  
20 discovery that we'd received from the Department,  
21 we said, "There's nothing really here that changes  
22 the findings and the conclusions that were before  
23 the Board." So we filed a motion for summary  
24 judgment. We made what we could of the photos.

25 We attached the photos to our motion for

1 summary judgment, and that's how they're in  
2 evidence today. They are part of the record, and  
3 they are evidence that the Hearing Examiner looked  
4 at. We provided them in our motion for summary  
5 judgment.

6 DEQ had then an affirmative duty to come  
7 back with some evidence of their own and explain  
8 what the photographs mean. And DEQ has told you  
9 today that there is additional evidence, but they  
10 didn't have the opportunity to explain them, but  
11 that's not correct. They could have. In fact  
12 they had an affirmative duty to do so on summary  
13 judgment, and they just provided no evidence at  
14 all.

15 So let's talk about the photos again. I  
16 apologize. I'm going to share my screen one more  
17 time if I may just to look at the photographs.

18 So here you should have a document in  
19 front of you that has the photographs. Is that  
20 appearing on your end?

21 CHAIRMAN RUFFATO: Yes, it is.

22 MS. MARQUIS: So this is one photograph  
23 that the Department was concerned about, and this  
24 is already in the record, and we see this at  
25 Finding of Fact 139. And the second photograph is

1 this one.

2           And you'll notice that the sequence of  
3 these photographs has changed, and the last time  
4 this was in front of the Board, the Department  
5 argued about photograph one, the first photograph  
6 which is this photograph; and now the Department  
7 wants to argue about the second photograph. This  
8 is one that we never received until that first  
9 remand.

10           But there's no evidence that this is on  
11 any property owned by Reflections. And what we do  
12 have is DEQ wants to allege that this is evidence  
13 of Lot 15, but if you look at the evidence the  
14 Hearing Examiner relied upon -- and this is at  
15 Finding of Fact 16 -- they relied on testimony,  
16 and photos, and field notes from Dan Freeland;  
17 relied on testimony from Landy Leep; relied on  
18 correspondence showing when the construction was  
19 completed in this area of the subdivision; also  
20 relied on Findings of Fact 41 and 42.

21           DEQ said there were no problems with the  
22 previously permitted areas, which included this  
23 one. And importantly Findings 46, and 47, and 81,  
24 and 83, where the Hearing Examiner cites directly  
25 to Mr. Freeland's testimony where he says he saw

1 no construction activity in the area, he had no  
2 details of construction activity, he didn't know  
3 where the property lines were.

4 Keep in mind there is a City-owned  
5 right-of-way in here. He didn't know where the  
6 property lines were, couldn't identify them. And  
7 he didn't see any equipment or any other  
8 construction area. And it was unclear what  
9 material was on which lots and where Lot 15 was.

10 Now, the next photographs the Department  
11 talks about are in Phase 3 of Reflections, which  
12 is that north area which was the green shaded area  
13 in the demonstrative I showed you.

14 The Department agrees that these  
15 photographs were taken in the areas of Lots 11,  
16 12, 13, and 32 of Reflections, and we see this in  
17 Finding of Fact 53 mentions the photographs. And  
18 then we see it again in the later findings that  
19 are provided specific to the newly, the new  
20 evidence in these photographs.

21 So here, this road here is Western  
22 Bluffs Boulevard, and it's looking east. And this  
23 photograph here, the next one is near Lot 13  
24 looking across Western Bluffs Boulevard, looking  
25 southeast. This photograph everyone agrees is

1 taken near Lot 32 looking south.

2 And so I'm going to show you a map of  
3 the subdivision, and here's where this matters.

4 DEQ has disagreed with the extent of the  
5 permit coverage, but in our briefing, we pointed  
6 you to pages in the general permit where it refers  
7 to the site, and really that's the only boundary  
8 that is agreed upon by the permittee and confirmed  
9 by the Department, and it's shown here where it  
10 says "boundary area" in the top left, and it's  
11 depicted in this sort of darker dashed line that  
12 extends around, and includes the full width of all  
13 of the lots.

14 And here you see this green area at the  
15 bottom is a BMP that was installed across the  
16 entire width of that phase of the subdivision.

17 Now, DEQ would like to argue, or they  
18 have argued that the site area doesn't matter, and  
19 we disagree with that. But even if you accept  
20 their argument saying that it's the disturbance  
21 area that matters, please note that the  
22 disturbance area has not been defined. There's  
23 been no boundary of it, other than there's an  
24 estimate of the acreage that it includes.

25 But we do know from the permit that the

1 disturbance area includes material fill areas, and  
2 those material fill areas are shown by these lines  
3 that sort of parallel the road, and they're shown  
4 -- they move from the left to the right along Lots  
5 30, 31, 32, 33, and 34.

6 Additionally we know that there's  
7 material fill areas here in Lot 10, 11, and 12 by  
8 the lines. There's also some over here at the  
9 bend in the road before the road that cuts up to  
10 the cul de sac, and then over here on the far left  
11 of the line.

12 So this is the area where those photos  
13 were taken, and you can see if you were looking  
14 generally east and southeast, you're looking at  
15 those disturbance areas. So at most, what those  
16 photographs show is the permitted activity,  
17 because keep in mind that that permit was active  
18 at the time that DEQ did the inspection, it was  
19 active at the time of the storm event, and there's  
20 been no permit violations cited by DEQ. They  
21 allege that there's unpermitted activity, but at  
22 most, those excluded photographs show permitted  
23 activity.

24 So as you can see, the photographs are  
25 part of the evidence that the Hearing Examiner

1 considered. There is competent substantial  
2 evidence supporting all of the findings. Most of  
3 them are based on direct testimony from DEQ's  
4 witnesses.

5 Ms. Bowers mentioned that when a new  
6 Hearing Examiner steps in, there's a different  
7 mechanism, but that's not the case here because  
8 the findings that were based on the testimony at  
9 the hearing are the exact same findings that were  
10 proposed by the Hearing Examiner who presided over  
11 that evidentiary hearing. So the demeanor of  
12 witnesses is not an issue of concern here because  
13 the Hearing Examiner who presided over the hearing  
14 presented those same findings to the Board.

15 What this Hearing Examiner has done is  
16 exactly what the Board asked it to do. It went  
17 back, gave the parties an opportunity to make what  
18 they would of the photos. And we agreed we would  
19 have dispositive motions on summary judgment; we  
20 submitted our motion on summary judgment; made  
21 what we think is fair of the photographs. What do  
22 they show? The Department came back with no  
23 evidence, and still today has pointed to no  
24 evidence.

25 So we feel that the Hearing Examiner's



1 findings, and conclusions, and proposed order  
2 should be adopted by the Board. Thank you.

3 CHAIRMAN RUFFATO: Thank you, Ms.  
4 Marquis. Ms. Bowers, I believe you have 12  
5 minutes left for rebuttal.

6 MS. BOWERS: Thank you. A lot of time  
7 was spent on summary judgment, so I'll start with  
8 that. And the burden on summary judgment is for  
9 the moving party to first come forward and  
10 demonstrate that there's an absence of genuine  
11 issue of material fact, and that the moving party  
12 is entitled to judgment as matter of law.

13 There hasn't been a ruling on summary  
14 judgment, but the Department's position was that  
15 Copper Ridge and Reflections did not meet that  
16 burden and they were not entitled to judgment as a  
17 matter of law because there were questions of  
18 material fact pursuant to the plain language of  
19 the Board's remand order.

20 It's kind of unclear what happened to  
21 the first proposed finding of fact and conclusions  
22 of law, in that if the Board intended to  
23 completely void it and start over with a new  
24 proposed finding of fact after the second remand  
25 hearing -- and Ms. Marquis raised some questions

1 about that.

2 But the remand order asked the Hearing  
3 Examiner to consider the four excluded photos and  
4 any additional related evidence, and then to  
5 decide if the original proposed finding of fact  
6 and conclusions of law on the issue of  
7 owner/operator should be changed, and if so, to  
8 tell the Board how it should be changed; and if  
9 not, to submit a memo to the Board. And that's  
10 not what happened here. The Hearing Examiner just  
11 basically repackaged the proposed finding of fact  
12 and conclusions of law, and resubmitted it without  
13 taking the additional evidence.

14 It's true the Hearing Examiner concludes  
15 that the four excluded photos would not change the  
16 calculus in this matter, but he doesn't explain  
17 what he bases that on.

18 DEQ did attach the four excluded photos  
19 here, materials, and I believe they start on Page  
20 122. And as Ms. Marquis said, we flipped two of  
21 the photographs -- it was an accident -- in  
22 compiling the exhibit, but it's not a mistake that  
23 prejudices the parties because the exhibit has  
24 never been admitted, for one thing.

25 And it was actually the first photo, not

1 the second photo, that was excluded by the Hearing  
2 Examiner. The second photo, which also -- one and  
3 two show Lot 15, but from different vantage  
4 points. And the second photo is already in the  
5 record and attached to another exhibit, and that  
6 exhibit was the Hearing Examiner's violation  
7 letter.

8 One thing that the parties agree on, and  
9 I think probably the Board and the Hearing  
10 Examiners agree on, is that this case has gone for  
11 a long time, and it's a lot for you guys,  
12 especially the new members to get a handle on, and  
13 I appreciate your attention today.

14 Another issue that is still unresolved  
15 is the issue of permit coverage, and that was one  
16 area that the Board remanded for some additional  
17 testimony. So Copper Ridge and Reflections  
18 arguments are that the coverage covered the entire  
19 area, the entire phases in the subdivisions; and  
20 DEQ's argument is that the coverage for road  
21 construction and utility installation was only  
22 partial coverage. That's something that maybe we  
23 could have provided more evidence for you on.

24 Ms. Marquis alludes to the very big  
25 storm that occurred in Billings right before the

1 DEQ's compliance inspector's inspection, and  
2 that's true. The inspector did go out after a  
3 very big storm. But perhaps some of the impacts  
4 could have been mitigated in this case if Copper  
5 Ridge and Reflections had had permit coverage and  
6 appropriate BMP's in place.

7 There was some allusion or allegation  
8 that DEQ threatened million of dollars in  
9 penalties, and that's the only reason Copper Ridge  
10 and Reflections got the permit coverage that they  
11 did, when they weren't really the owner/operator,  
12 and that's not true. There was no penalty  
13 assessed in this case, and no threatened penalty,  
14 until two years after the inspection when the  
15 administrative orders were issued.

16 DEQ did turn over all of the evidence it  
17 had in support of its violation letters and  
18 administrative orders, and all of the evidence it  
19 considered in its determination that Copper Ridge  
20 and Reflections were owner/operators.

21 DEQ was operating under a different  
22 interpretation of owner/operator, and focused on  
23 control, and that's why in deposition testimony  
24 DEQ witnesses said that at least in part, they  
25 pursued Copper Ridge and Reflections because of

1 signage at the subdivision indicating that it was  
2 a Copper Ridge Subdivision.

3 Finally with regard to the two photos  
4 that depict Lot 15, and the stockpile that was in  
5 place on that lot, it's important to remember what  
6 phase construction was in at the time. There was  
7 no obvious property line, there was no marked  
8 address, and the inspector used GPS on his phone  
9 to mark where he was standing. That's why he took  
10 two photographs from two different angles, so that  
11 he could pinpoint the location of that lot.

12 Also just to point out the former Board  
13 Member Tweeten's comments, he did indicate that he  
14 felt the additional photos and related evidence  
15 was relevant evidence that should have been  
16 considered by the Hearing Examiner. He didn't  
17 make any conclusions on whether it would change  
18 the proposed finding of fact and conclusions of  
19 law at all. That is up to the discretion of the  
20 Hearing Examiner.

21 DEQ objects to the second proposed  
22 finding of fact and conclusions of law before you  
23 today, simply because it doesn't consider the  
24 complete record in this case, and doesn't comply  
25 with the Board's remand order. So again, thanks

1 for your time.

2 CHAIRMAN RUFFATO: Thank you, Ms.  
3 Bowers, and thank you both for your excellent  
4 presentations. It is now 11:12. I'm going to  
5 call a break from the meeting for ten minutes. We  
6 will reconvene at 11:23, and at that time, we will  
7 have the Board members pose any questions they  
8 have to Ms. Bowers and Ms. Marquis. So we're in  
9 recess and going to reconvene in ten minutes.  
10 Thank you.

11 (Recess taken)

12 CHAIRMAN RUFFATO: I believe it's been  
13 ten minutes. Joyce, would you please take the  
14 roll call to make sure we still have a quorum.

15 MS. WITTENBERG: Chairman Ruffato.

16 CHAIRMAN RUFFATO: Here.

17 MS. WITTENBERG: Board Member Lehnherr.

18 BOARD MEMBER LEHNHERR: Here.

19 MS. WITTENBERG: Board Member Simpson.

20 BOARD MEMBER SIMPSON: Here.

21 MS. WITTENBERG: Board Member Hanson.

22 BOARD MEMBER HANSON: Here.

23 MS. WITTENBERG: Board Member Reiten.

24 BOARD MEMBER REITEN: Here.

25 MS. WITTENBERG: Board Member Smith.

1 BOARD MEMBER SMITH: Here.

2 MS. WITTENBERG: And Board Member  
3 Altemus.

4 (No response)

5 MS. WITTENBERG: I believe she had to  
6 get off at eleven, so --

7 CHAIRMAN RUFFATO: Yes. I received a  
8 chat message from her saying she was leaving.

9 MS. WITTENBERG: So we have a quorum.

10 CHAIRMAN RUFFATO: I also will just  
11 point out, so that everyone knows that Board  
12 Member Hanson has to leave at noon, so we don't  
13 have a lot of time left before Board Member Hanson  
14 has to leave, but I will also point out that we  
15 will still have a quorum at that point if we don't  
16 lose anybody else.

17 At this point, I would like to open it  
18 up to the Board members to ask questions of Ms.  
19 Bowers and Ms. Marquis.

20 BOARD MEMBER SIMPSON: Mr. Chairman,  
21 Dave Simpson. I have several questions for Ms.  
22 Marquis, please. First of all, could you put your  
23 map back on the screen, please.

24 MS. MARQUIS: I would be happy to. Give  
25 me one second. The map with the colors on it? Is

1 that what you're asking for?

2 BOARD MEMBER SIMPSON: Yes, the  
3 subdivision map with the colors.

4 MS. MARQUIS: Make sure I've got that up  
5 there. Okay. Can you see it now?

6 BOARD MEMBER SIMPSON: I can. Thank  
7 you. Thank you so much for providing this. I  
8 have to say that reading through all of that  
9 documentation without benefit of a map was the  
10 most mind numbing experience I can remember in a  
11 recent times.

12 But first of all, I gather from this map  
13 that at the time of the issuance of the Notice of  
14 Violation, or notices, that Phase 3 is the only  
15 one which had not been terminated.

16 MS. MARQUIS: That is correct.

17 BOARD MEMBER SIMPSON: So there was an  
18 active permit on the Phase 3 area.

19 MS. MARQUIS: That is correct.

20 BOARD MEMBER SIMPSON: And the issue  
21 behind the violation is unpermitted activity.

22 MS. MARQUIS: Correct.

23 BOARD MEMBER SIMPSON: Can you indicate  
24 where on the map is the area of issue as far as  
25 ownership, and that is the point the violation is



1 presumed to have occurred.

2 MS. MARQUIS: Mr. Chairman, Board Member  
3 Simpson. This has been our struggle throughout a  
4 lot of this litigation, and when I came into the  
5 case -- I wasn't initially on this case at the  
6 beginning -- but when I came in, I spent a lot of  
7 time looking for just that thing.

8 And the best evidence I could point you  
9 to is Exhibit 16, which was a DEQ exhibit that  
10 showed their photo locations. And this goes to  
11 some of the communication we had back and forth  
12 between Copper Ridge and Reflections and the  
13 Department after they received the violation  
14 letter, and they had asked where were the  
15 violations exactly.

16 And to the best of our ability, what we  
17 could pinpoint it to were the photographs that  
18 were provided attached to the inspection report  
19 that was attached to the Notice of Violation. And  
20 those photographs, the locations of those were  
21 primarily in sort of this -- I'd like to say this  
22 center area of Reflections Phase 2.

23 And you've heard the Department talk  
24 about Lot 15. That Lot 15 is in this Phase 2 of  
25 Reflections. And I'd like to point out that while

1 Ms. Bowers said that two of those photographs are  
2 of Lot 15, there is no evidence that one of them  
3 is on Lot 15, and the only evidence that the first  
4 photo was taken on Lot 15 isn't clear, and the  
5 Hearing Examiner heard all of that evidence and  
6 confirmed that it wasn't taken at Lot 15. It  
7 wasn't clear that it was taken at Lot 15. The  
8 second photograph, there is no evidence to say  
9 that it was taken at Lot 15.

10 BOARD MEMBER SIMPSON: Where is Lot 15?

11 MS. MARQUIS: I actually think my text  
12 box might be covering Lot 15. I think it's --  
13 (indicating) --

14 BOARD MEMBER SIMPSON: So it is in Phase  
15 2 area.

16 MS. MARQUIS: It is in Phase 2. I think  
17 it's on the inside of this curve here, but I could  
18 pull up a different exhibit if you would like me  
19 to. It would take me a few minutes.

20 BOARD MEMBER SIMPSON: Thank you, but I  
21 don't think that's necessary. But it is in Phase  
22 2. Now, this is an area that has been terminated,  
23 and presumably at the time of the NOV, there was  
24 home construction going on there, that is, the  
25 infrastructure construction was complete, which is

1 what the subject of the permit was, and now the  
2 area is involved in home construction.

3 MS. MARQUIS: That's correct. And I  
4 don't want to mislead you to think it was just  
5 Reflections Phase 2. Some of those photographs  
6 were also taken over here in Copper Ridge Phase 3  
7 and 4.

8 And as I said earlier, those were all  
9 covered under the same construction stormwater  
10 general permit; and there is evidence in testimony  
11 that the construction activity that Reflections  
12 and Copper Ridge were responsible for was  
13 completed and done well before 2013, and in fact  
14 it had to be completed, and the area had to reach  
15 a certain level of stabilization in order for them  
16 to be able to terminate the permit. And DEQ  
17 confirmed the permit termination.

18 So Mr. Leep's testimony, and the  
19 documents that we provided from their contractors  
20 that did the work, acknowledging when the work was  
21 completed and asking for final payment for the  
22 work, and the permit documents showing when the  
23 permits were terminated and confirmed by DEQ, all  
24 indicate and prove that the construction that  
25 Copper Ridge and Reflections did was done and

1 complete and over with before the storm.

2 BOARD MEMBER SIMPSON: Thank you. In  
3 the Phase 3 area, the stormwater permit for  
4 Reflections was still in effect. Was the  
5 construction of the infrastructure still in  
6 progress there, or was it complete? And along  
7 with that, was there any home construction in that  
8 area at the time?

9 MS. MARQUIS: I cannot see as to whether  
10 there was some construction in that area. I have  
11 to think that it was. And I believe if you look  
12 at proposed Finding of Fact 19C -- or I'm sorry --  
13 18C, and there's the testimony from Mr. Leep.

14 And he testified that the last  
15 construction activity in Phase 3 of Reflections  
16 was completed on July 30th, 2013; the final plat  
17 was signed on April 19th, 2013, which conveyed the  
18 roads, and the rights-of-ways, and the easements,  
19 and the park land to the City of Billings. So  
20 their work was done and they were out of there by  
21 the end of July 2013.

22 Now, you notice the permit didn't  
23 terminate until March 24th, 2014, because that's  
24 when they had to ensure that they had reached the  
25 requirement for stabilization of the disturbed

1 area, and that was again confirmed by DEQ in 2014.  
2 Does that answer your question?

3 BOARD MEMBER SIMPSON: Yes, it does. So  
4 please confirm my understanding. So that before  
5 the NOV, the infrastructure construction in the  
6 entire area was complete, and only in the Phase 3  
7 area that the permit had not been terminated.  
8 Also the infrastructure had been turned over, the  
9 streets, and so on had been turned over to the  
10 City of Billings at that time.

11 MS. MARQUIS: That is correct. I  
12 apologize for my interruption. That is all  
13 correct, Board Member Simpson.

14 BOARD MEMBER SIMPSON: Thank you very  
15 much.

16 CHAIRMAN RUFFATO: Additional questions  
17 from the Board? Mr. Lehnherr.

18 BOARD MEMBER LEHNHERR: Thank you,  
19 Chairman Ruffato. Shortly after I joined the  
20 Board, I had the pleasure of being at the August  
21 2019 meeting, which was a rather long meeting in  
22 Helena. Both parties made presentations. And  
23 Board Member Simpson I think probably would have  
24 felt as he feels now.

25 I think the case is very unclear, and

1 confusing, and certainly the Board at that August  
2 meeting felt the same way. And I'm at a bit of a  
3 loss as to where to go from here. It's almost a  
4 case of trees keeping us from seeing the forest.

5 I think that the Board did ask --  
6 rejected that FOFCOL at the time, and did ask for  
7 more than just consideration of the four  
8 photographs; but the Board was also seeking  
9 clarification of -- I believe the Board felt that  
10 both parties could have made things more  
11 understandable and clear through the use of, say,  
12 a couple of the items that Ms. Marquis presented  
13 -- the color map and the timeline, for example.  
14 Things like that would have helped. And I think  
15 that's what the Board was asking for.

16 And maybe Ms. Bowers alluded to what the  
17 Board was asking for, and maybe Ms. Bowers can  
18 comment on that. She mentioned a memo. Maybe she  
19 can clarify what the Board actually asked for.

20 We're here to consider the FOFCOL that  
21 Hearing Examiner Doud gave to us, and I don't know  
22 where -- so that's what we're here to consider.  
23 I'm not sure that we were given what we asked for  
24 with just this additional FOFCOL, and I'm not  
25 really sure where to go from here. I do wish that

1 we'd had a clear presentation back in August 2019.

2 But maybe Ms. Bowers can address -- I  
3 don't have the transcript from that meeting in  
4 front of me. Maybe she can address what the Board  
5 was asking for beyond just consideration of the  
6 four photographs.

7 MS. BOWERS: Board Member Lehnherr,  
8 Chair Ruffato, members of the Board, I'll try.

9 And I think the answer to one of your  
10 questions is I don't think the second proposed  
11 finding of fact and conclusions of law did give  
12 the Board what they asked for in August of 2019.  
13 At the Board meeting, I think it was in the  
14 transcript at about Page 222, and I don't have the  
15 transcript right in front of me to read exactly  
16 from it.

17 But the Board did instruct the Hearing  
18 Examiner to take further evidence on the four  
19 photographs, and that included maps created from  
20 the photographs, and then any responsive evidence  
21 that Copper Ridge and Reflections might have; and  
22 then to determine if that evidence changes the  
23 proposed finding of fact and conclusions of law  
24 that was in front of you in August; and let the  
25 Board know if it changes, and if not just to

1 submit a memo to the Board stating that the  
2 proposed finding of fact and conclusions of law  
3 should not change.

4 BOARD MEMBER LEHNHERR: And David  
5 Lehnherr again, if I may ask one additional or  
6 bring up one additional point, and then I won't  
7 keep talking.

8 But I'm wondering, for example. Ms.  
9 Marquis presented the colored map and the  
10 timeline. I'm just wondering how much we can  
11 consider those items when we consider the FOFCOL  
12 that is on our agenda.

13 MS. BOWERS: Board Member Lehnherr,  
14 members of the Board, that's a good question. And  
15 first of all, Ms. Marquis presented those exhibits  
16 as demonstrative exhibits, so they're not part of  
17 the record, they're not evidence in this case, so  
18 they can't be considered.

19 And DEQ would present evidence that is  
20 different. They would present a map that looks  
21 different than the one that you saw today, I'll  
22 just say that. I don't know if that helps answer  
23 your question.

24 BOARD MEMBER LEHNHERR: Thank you.

25 CHAIRMAN RUFFATO: Thank you, Dr.



1 Lehnherr and Ms. Bowers. Any more questions from  
2 the Board?

3 BOARD MEMBER SIMPSON: Mr. Chairman,  
4 this is Dave Simpson again. One more question, I  
5 presume from Ms. Bowers, although whoever can  
6 answer it. This has to do with the applicability  
7 of the stormwater rules.

8 And it's clear to me what the  
9 responsibility of Copper Ridge and Reflections is  
10 in the process. But my understanding is that  
11 disturbances less than an acre don't require  
12 stormwater permitting; and that therefore, home  
13 construction -- which typically would be less than  
14 an acre -- is not subject to those rules; is that  
15 correct?

16 MS. BOWERS: Board Member Simpson,  
17 members of the Board. It's correct that  
18 construction activity that is less than one acre  
19 does not require a permit, but there's also in the  
20 definition if you're part of a common plan of  
21 development, so even if your home building lot is  
22 less than an acre, but you're part of a bigger  
23 common plan of development that is greater than an  
24 acre, you have to have permit coverage.

25 BOARD MEMBER SIMPSON: Who would have to

1 hold that permit? Because by that time the  
2 property ownership has changed.

3 MS. BOWERS: That's correct. Board  
4 Member Simpson, members of the Board. So there  
5 would have to be a plan in place to transfer  
6 permit coverage, and DEQ sees a lot of different  
7 permutations of that. Sometimes the original  
8 developer will just hold the permit, and sometimes  
9 they assign it.

10 BOARD MEMBER SIMPSON: So I gather in  
11 this case that's in all but one section of the  
12 subdivision, the permits have been terminated  
13 after completion of infrastructure, that with home  
14 building in progress, there was no active  
15 stormwater permit in place.

16 MS. BOWERS: Board Member Simpson,  
17 that's correct. That's DEQ's position that there  
18 was no permit coverage for the home building  
19 activity.

20 BOARD MEMBER SIMPSON: Thank you.

21 CHAIRMAN RUFFATO: Any more questions  
22 from the Board?

23 (No response)

24 CHAIRMAN RUFFATO: If not, I have a few  
25 questions. I would like to ask Ms. Marquis the

1 question of how you would address the point that  
2 has been made by DEQ that the Hearing Examiner did  
3 not follow the wording of the remand.

4 MS. MARQUIS: Mr. Chairman, thank you  
5 for the question. The Hearing Examiner did follow  
6 the remand. The Board asked the Hearing Examiner  
7 to take additional evidence. The Hearing Examiner  
8 is going to take additional evidence that has to  
9 be reflected somewhere in the findings.

10 And so if he would have sent you a memo  
11 just saying it doesn't change the findings, there  
12 would maybe be a record that he had considered  
13 them; but what he's giving you now is a more  
14 robust record. He's giving you the findings that  
15 were in front of the Board previously, plus he's  
16 added I think seven or eight findings specific to  
17 the previously excluded photos.

18 So not only do you have his discussion,  
19 which would function I presume similar to a memo  
20 -- I can't speak for Hearing Examiner Doud. I  
21 don't want to presume to do that -- but you have I  
22 believe all of the elements that the Board said  
23 they wanted in a memo, you have in a better form,  
24 because you have findings that are based on the  
25 previously excluded photographs; you have

1 conclusions that are drawn from that; and you have  
2 discussion of that in a document that you can  
3 approve as your final agency action.

4 So there was additional evidence taken,  
5 and that's why it's cited in the findings, and now  
6 you have a very good record in front of you. Does  
7 that answer your question, Mr. Chairman?

8 CHAIRMAN RUFFATO: In part. I would  
9 like to follow up then with: What is the role of  
10 the Hearing Examiner in the process following  
11 remand in relationship to the Board's directions  
12 on remand?

13 MS. MARQUIS: The remand order was much  
14 as Ms. Bowers explained it, and there were no  
15 limitations on the process that could be followed.  
16 And so the remand -- and this came up in a  
17 previous remand where the Board spent a lot of  
18 time talking about what is the Hearing Examiner  
19 going to do, what could the Hearing Examiner do,  
20 could they take additional evidence.

21 So essentially that remand, so it was  
22 certainly viewed on our part, and based on the  
23 scheduling order that resulted after the remand,  
24 and our joint amendment to the scheduling order,  
25 it was viewed as a bit of a reset. So much like

1 when the Board delegates authority of the case at  
2 the beginning of the case, the remand sort of  
3 reset this, and delegated authority back to the  
4 Hearing Examiner to process the case again.

5 And so the Hearing Examiner did that by  
6 setting a scheduling order that included some  
7 discovery, included dispositive motions, and  
8 included an option for an evidentiary hearing.

9 We didn't get to the evidentiary hearing  
10 because as you know, Mr. Chairman, summary  
11 judgment is a procedural issue that is available  
12 in all cases. It's efficient, and it saves time  
13 and expense of going through an evidentiary  
14 hearing, when the purpose of an evidentiary  
15 hearing is to find the facts. And if the Hearing  
16 Examiner can figure out that facts are not  
17 disputed, there's no need to go through that  
18 expensive hearing.

19 That's what happened in this case, and  
20 it doesn't mean that there wasn't an option to  
21 consider additional evidence, and that's why we  
22 had discovery beforehand, and that's why we had a  
23 dispositive motion was to look at the evidence and  
24 say, "Do we have a dispute here or not?"

25 And so the evidence is in the record,

1 and the Hearing Examiner considered it and said  
2 it's not disputed, and it doesn't matter to the  
3 ultimate conclusions in the proposed order.

4 CHAIRMAN RUFFATO: Thank you, Ms.  
5 Marquis. One follow-up question then. You're  
6 referring to the motion for summary judgment. I  
7 don't find an order on the motion for summary  
8 judgment or a disposition of that motion. How  
9 would you explain that, and what it means, it  
10 ought to mean to the Board?

11 MS. MARQUIS: Thank you for the  
12 question, Mr. Chairman. We wondered the same  
13 thing when we came in. And again, I can't speak  
14 for Hearing Examiner Doud, but when you think  
15 about it, if he had issued an order on summary  
16 judgment, it would have required findings, a  
17 proposed findings, conclusion, and order to be  
18 sent to the Board ultimately.

19 And we saw this process occur earlier in  
20 2017 and 2018, where there was a summary judgment,  
21 summary judgment order, ended up that there were  
22 disputed facts, there was an evidentiary hearing,  
23 and then the whole package went to the Board as a  
24 proposed findings and conclusion.

25 So it's not the case where here the

1 Hearing Examiner could have just issued an order  
2 on summary judgment, and sent that up to the  
3 Board. That doesn't give the Board anything by  
4 which it can reach a final agency action. So by  
5 sending a proposed finding, conclusion, and order,  
6 that incorporates and encapsulates his order on  
7 summary judgment.

8 Again, you've got findings of fact,  
9 which is something that occurs on summary  
10 judgment; you have conclusions of law, which  
11 happen on summary judgment; and you've got a good  
12 discussion portion, again, which all of that would  
13 be in a summary judgment order.

14 In this case, I don't see a reason to  
15 duplicate, have a summary judgment order, and a  
16 new proposed findings, conclusion, and order,  
17 because without the proposed findings, and  
18 conclusion, and order, there's no final agency  
19 action document. Does that answer your question,  
20 Mr. Chairman?

21 CHAIRMAN RUFFATO: Yes, that does.  
22 Thank you. Ms. Bowers, following along those same  
23 lines, I would ask you what the authority and  
24 function of the Hearing Examiner following the  
25 remand was or should have been, in DEQ's view.

1 MS. BOWERS: Thank you, Chair Ruffato,  
2 members of the Board. In DEQ's view, the Hearing  
3 Examiner should have taken the additional evidence  
4 related to the excluded photographs as directed by  
5 the Board's remand order, and then reconsidered  
6 the proposed findings of fact and conclusions of  
7 law.

8 DEQ disagrees with Copper Ridge and  
9 Reflections' position that that evidence is  
10 already in the record somehow. There has been no  
11 evidentiary hearing. And as you pointed out,  
12 there has been no order on summary judgment, so we  
13 can't say that as a matter of law the Hearing  
14 Examiner decided Copper Ridge and Reflections  
15 should prevail in this case, and that there are no  
16 questions of material fact.

17 So DEQ's position is that the proposed  
18 finding of fact and conclusions of law, the second  
19 one that's now before you, should be rejected  
20 because it doesn't give the Board what it asked  
21 for when it remanded the issue.

22 CHAIRMAN RUFFATO: Thank you, Ms.  
23 Bowers. I'm going to ask a follow-up question.  
24 On the motion for summary judgment, in the  
25 briefing on that, did DEQ have the opportunity to



1 submit to the Board -- or excuse me -- submit to  
2 the Hearing Examiner evidence which would create a  
3 material issue of fact? Did DEQ have an  
4 opportunity to present some evidence in that  
5 briefing?

6 MS. BOWERS: Chair Ruffato, members of  
7 the Board. So as I explained before, in a motion  
8 for summary judgment, the moving party has to show  
9 that there are no material issues of fact and they  
10 should prevail as a matter of law.

11 And DEQ's position was that Copper Ridge  
12 and Reflections did not do that, and could not do  
13 that, because of the plain language of the Board's  
14 remand order saying that there were material  
15 issues of fact related to the four photos, and  
16 that those should be included in the record. And  
17 that's what DEQ pointed out in its response to the  
18 motion.

19 CHAIRMAN RUFFATO: Thank you, Ms.  
20 Bowers. I'm going to flip back to Ms. Marquis,  
21 and I wanted to ask you how you would respond, how  
22 you do respond to Ms. Bowers' points with respect  
23 to the Baldrige case, which as she pointed out  
24 seemed to have some bearing on this, on the issue.

25 It was Baldrige versus Board of

1 Trustees, and if I recall correctly, Ms. Bowers  
2 said that in that case, the Supreme Court said  
3 that when the Board says, "Go back for a hearing.  
4 You've got to have a hearing," and they can't  
5 restate the statement of facts.

6 MS. MARQUIS: Mr. Chairman, in this  
7 case, the Board did not say, "Go back and have a  
8 hearing." The Board said, "Go back and look at  
9 the pictures. The pictures should not have been  
10 excluded. Look at the pictures, take additional  
11 evidence relating to the pictures."

12 Now, the Board in August felt that there  
13 were questions about the pictures. Keep in mind  
14 that was August of 2019. So we had not quite a  
15 year before summary judgment, but we had several  
16 months of discovery where the parties produced  
17 additional evidence back and forth to each other.

18 So whatever was disputed by the Board,  
19 or whatever the questions they had by the Board,  
20 the parties had an opportunity to gather that  
21 evidence to support their version of the pictures,  
22 to support what they felt the pictures proved, and  
23 provide that to the other party. So there is a  
24 body of evidence that each of the parties provided  
25 back and forth.

1           Based on that universe of evidence, we  
2 moved into the phase of litigation for dispositive  
3 motions, and we presented a motion on summary  
4 judgment, and attached evidence. The Department  
5 had the affirmative duty to do the very same  
6 thing, and they didn't attach any evidence.

7           All of that evidence in that time we had  
8 between August 2019 and July of 2020, when we  
9 argued for summary judgment, that's when all that  
10 evidence should have been gathered and produced to  
11 the other side, and analyzed by each party, and  
12 then we move forward, and see if it presents a  
13 disputed fact. If we could do summary judgment,  
14 we do that to avoid an evidentiary hearing.

15           So it's not correct to say that just  
16 because the Board said they need to take  
17 additional evidence that there had to be a  
18 hearing. There was additional evidence exchanged  
19 between the parties. They had an opportunity to  
20 present that to the Hearing Examiner.

21           This is not like the case in Baldrige  
22 where the Board requested a hearing specifically.  
23 The Board didn't request a hearing specifically in  
24 this case.

25           And that's why you see that language in

1 the Board's motion about the memo. The Board  
2 said, "Just send us a memo." It was really more  
3 of an informal thing, "Just go look at the  
4 pictures, and consider what the parties have to  
5 say about the pictures." The parties each had an  
6 opportunity to say what they wanted to say about  
7 the pictures, the photographs, and that resulted  
8 in the proposal that's in front of you today.

9 CHAIRMAN RUFFATO: Thank you. If I  
10 could have a few minutes to look through my notes,  
11 and if the other Board members would consider any  
12 further questions, we will conclude this question  
13 period in a few minutes.

14 (No response)

15 CHAIRMAN RUFFATO: I have no further  
16 questions. Does any other member of the Board  
17 have questions?

18 (No response)

19 CHAIRMAN RUFFATO: If not, I think now  
20 we move towards deliberations. During  
21 deliberations, I expect that it will be a  
22 discussion among the Board members. In the right  
23 circumstances I suppose we could have questions  
24 presented to the parties, but in general, my  
25 thinking is that we should have asked those

1 questions, and the deliberations should be among  
2 us.

3 So at this point, I want to make a few  
4 comments, and then I want to ask a question. I  
5 think the overall question that we need to address  
6 is whether or not we accept the findings and  
7 conclusions, or whether we modify them, or we  
8 reject and remand.

9 DEQ is asking for a rejection and  
10 remand, and Copper Ridge is asking for acceptance.  
11 There is some points in the papers filed that  
12 maybe both parties would suggest some, what I  
13 would probably consider some minor changes, but it  
14 seems to me that -- and we can discuss this --  
15 those minor changes are probably not material.

16 And then I want to say that I think this  
17 deliberative process should have two steps, and  
18 after I make these statements, I would ask  
19 Katherine to correct me, and then I would like  
20 comments from the Board.

21 But the two steps are first to consider  
22 what I'm referring to as the evidentiary issue, or  
23 as DEQ puts it, the failure to follow the Board's  
24 order, and that would be the first question. I  
25 think if we decide that in favor of DEQ, our

1 deliberations today would be over because that  
2 should result in a remand.

3 If we decide that question in favor of  
4 Copper Ridge and Reflections, then we would move  
5 to the next step, and that would be to consider  
6 the question of whether we accept, or modify, or  
7 reject the findings and conclusions.

8 (Board Member Hanson not present)

9 CHAIRMAN RUFFATO: Katherine, please  
10 correct any misstatements I made there, but that's  
11 my thinking. Have you had a chance to think about  
12 my question, or do you want a chance to think  
13 about my question?

14 MS. ORR: I agree with your  
15 distillation. I think the Department has raised  
16 some legal issues, for example, whether or not the  
17 demeanor of the witness had to have been observed  
18 by this Hearing Examiner. There was an exchange  
19 on that, so that came up. But I think that is  
20 properly addressed when you're looking at the  
21 conclusions of law, and that was my only  
22 observation on that. So yes, I think you've  
23 framed it nicely.

24 CHAIRMAN RUFFATO: Thank you, Katherine.  
25 Board members, do you have any comments or

1 questions? And now I'm just talking about the  
2 process, and not necessarily the details. And Dr.  
3 Lehnherr, you raised your hand?

4 BOARD MEMBER LEHNHERR: Yes, thank you,  
5 Chairman Ruffato. I guess sort of restating some  
6 of what you said, we could accept the FOFCOL, we  
7 could accept the findings of fact, and then alter  
8 the conclusions of law.

9 If we did reject the FOFCOL, I assume  
10 there would be an option for the parties to again,  
11 as opposed to remanding to another Hearing  
12 Officer, there would be an option -- as much as I  
13 would be hesitant to say it -- to have the parties  
14 come before the Board again. I guess I meant that  
15 as a question. I'm sorry.

16 CHAIRMAN RUFFATO: And I haven't thought  
17 about that question, and I don't have an answer.  
18 I think the Board has a lot of authority and a lot  
19 of latitude in what it does, but probably.  
20 Katherine, do you have a response?

21 MS. ORR: I wanted first to be able to  
22 understand the question, Mr. Chairman. Board  
23 Member Lehnherr, can you repeat your question? It  
24 seems two fold.

25 BOARD MEMBER LEHNHERR: Like I was

1 saying, I was somewhat restating what Chairman  
2 Ruffato was saying. But I guess my primary point  
3 was regarding if we rejected the FOFCOL, findings  
4 of fact, conclusions of law in its entirety, and  
5 then where we could go after that.

6 I guess there would be the option of a  
7 third Hearing Officer being involved, but wouldn't  
8 there also be the option of having the parties  
9 come before the Board again to present the cases  
10 they each have?

11 MS. ORR: Okay. Mr. Chairman, Board  
12 Member Lehnherr. Yes, I think you'd have the  
13 latitude to have the parties come before you  
14 directly, and you have the latitude to have  
15 another Hearing Officer.

16 If I may make an editorial comment. It  
17 may be more complicating to have another Hearing  
18 Officer, given the re-reviews all the time. So  
19 just commenting on that.

20 CHAIRMAN RUFFATO: Thank you, Katherine,  
21 and thank you, Dr. Lehnherr. Any other questions  
22 from the Board? There's a lot more to discuss.  
23 I'm not suggesting we're even close to deciding  
24 anything. But just on the process.

25 BOARD MEMBER SIMPSON: Mr. Chairman,



1 Dave Simpson. The subject of the remand -- and  
2 please correct me if I'm wrong -- but the  
3 inclusion of the photographs; is that correct?

4 CHAIRMAN RUFFATO: That's correct, as  
5 far as I understand it.

6 BOARD MEMBER SIMPSON: And the  
7 photographs were taken at some time after the NOV  
8 was issued, at least that's my understanding; is  
9 that correct?

10 CHAIRMAN RUFFATO: I'm going to ask --  
11 That wasn't my understanding, so maybe that's a  
12 good point to turn to Ms. Bowers and have her  
13 answer that question.

14 MS. BOWERS: Yes. Thank you, Chair  
15 Ruffato, and Board Member Simpson, members of the  
16 Board.

17 The photos at issue were taken at the  
18 time of Dan Freeland's inspection on September  
19 9th, 2013. They just weren't attached to the  
20 violation letter and included in the original  
21 hearing, evidentiary hearing.

22 BOARD MEMBER SIMPSON: I was under the  
23 impression that the reason they had been excluded  
24 was because they were taken after the fact. But  
25 the situation was that they were taken at an

1 appropriate time, they just somehow escaped being  
2 included as evidence?

3 MS. BOWERS: That is correct. They  
4 weren't included.

5 BOARD MEMBER SIMPSON: Second point. As  
6 far as the photographs go, I'm not clear as to  
7 what they add to consideration of this violation.  
8 I mean what I see are I see water, I see mud, and  
9 I see homes under construction. And I'm just not  
10 sure what other conclusion the Hearing Examiner  
11 might have reached had they been included in the  
12 record.

13 CHAIRMAN RUFFATO: Board Member Simpson,  
14 that is a good question, and that is something  
15 that we have to talk about. I would like -- if  
16 there weren't any more questions on the process, I  
17 would like to move now to the question of what is  
18 the Board's practice of taking a lunch break. Is  
19 it the practice of the Board to take a lunch break  
20 at this point, or is it the Board's practice to  
21 not take a lunch break? And addition to that, I  
22 would just like to say do the Board members have  
23 some thoughts on this point?

24 BOARD MEMBER SIMPSON: Mr. Chairman,  
25 Dave Simpson. I have someplace else I need to be

1 later in the day, so I'd like to keep going until  
2 we're done.

3 CHAIRMAN RUFFATO: Joyce, I saw you  
4 unmute. What is the practice?

5 MS. WITTENBERG: It has been whatever  
6 the pleasure of the Board is. If you're wanting  
7 to just keep plowing through, and just take the  
8 occasional break for our Court Reporter, that  
9 works just fine.

10 CHAIRMAN RUFFATO: We'll either take a  
11 break now of ten minutes or a break now of 45  
12 minutes for lunch. Mr. Simpson has suggested he'd  
13 like to keep plowing through. That's also my  
14 preference, but does anybody else have any  
15 preferences they would like to express? Board  
16 members.

17 BOARD MEMBER REITEN: I would like to  
18 keep going.

19 CHAIRMAN RUFFATO: Thank you, Mr.  
20 Reiten.

21 BOARD MEMBER SMITH: I'd also say I'm  
22 fully able to keep going if we can.

23 CHAIRMAN RUFFATO: Let's take a ten  
24 minute break now, and then when we come back we  
25 will start our deliberations in earnest and see

1 where we can go. We will reconvene at 12:21.

2 (Recess taken)

3 CHAIRMAN RUFFATO: Joyce, would you take  
4 roll again.

5 MS. WITTENBERG: Sure. Chairman  
6 Ruffato.

7 CHAIRMAN RUFFATO: Here.

8 MS. WITTENBERG: Board Member Lehnherr.

9 BOARD MEMBER LEHNHERR: Here.

10 MS. WITTENBERG: Board Member Simpson.

11 (No response)

12 MS. WITTENBERG: Board Member Simpson,  
13 if you're there, you're muted.

14 (No response)

15 CHAIRMAN RUFFATO: Board Member Reiten.

16 BOARD MEMBER REITEN: Here.

17 MS. WITTENBERG: Board Member Smith.

18 BOARD MEMBER SMITH: Here.

19 MS. WITTENBERG: That's four. We have a  
20 quorum. I know Hillary and Julia are both gone.

21 CHAIRMAN RUFFATO: Four is all we need,  
22 right? Okay. We will proceed, and Mr. Simpson  
23 will catch up, I'm sure. So as I stated before, I  
24 believe that the first question we need to address  
25 is DEQ's primary point, and that is whether -- Mr.

1 Simpson. Thank you.

2 BOARD MEMBER SIMPSON: I'm back. Sorry.

3 CHAIRMAN RUFFATO: As I said before, I  
4 think the first question we need to address is  
5 DEQ's primary point, and that is the question of  
6 whether or not the Hearing Examiner complied with  
7 the Board's remand; and in conjunction with that,  
8 whether the DEQ had the opportunity but failed to  
9 submit additional evidence.

10 Before we start deliberations, I think  
11 it would be good to have a motion on the floor,  
12 and I'm prepared to offer a motion, but I would  
13 defer to any Board member that has a motion that  
14 they would propose.

15 BOARD MEMBER SIMPSON: Mr. Chairman,  
16 Dave Simpson. I'm not sure I understand what kind  
17 of a motion you're asking for.

18 CHAIRMAN RUFFATO: I'm asking for a  
19 motion on the question of whether or not the  
20 Hearing Examiner complied or failed to comply with  
21 the Board's August 9th, 2020 remand order. That's  
22 primarily the question.

23 But a subsidiary question is whether or  
24 not DEQ had the opportunity but failed to submit  
25 additional evidence relative to the four excluded

1 photographs. I have to say I'm stepping over a  
2 point that the parties disagreed on, and that is  
3 whether or not the photographs were in evidence.  
4 Personally I believe that they were in evidence  
5 and were properly considered, but that's something  
6 -- (inaudible) --

7 BOARD MEMBER SIMPSON: Mr. Chairman,  
8 I'll make that motion to that effect.

9 CHAIRMAN RUFFATO: Is there a second to  
10 that motion?

11 BOARD MEMBER REITEN: I'll second it.

12 CHAIRMAN RUFFATO: Thank you, Mr.  
13 Reiten. I'm going to state the motion as I  
14 understand it. Board Member Simpson has moved  
15 that the Board concludes --

16 Excuse me. I'm going to back up. Board  
17 Member Simpson, is your motion that the Hearing  
18 Examiner complied or did not comply?

19 BOARD MEMBER SIMPSON: My motion is that  
20 the Hearing Examiner did comply with the Board's  
21 directive to consider including the photographs in  
22 the record. I believe that's what the question  
23 was.

24 CHAIRMAN RUFFATO: If I could state a  
25 motion that I think might present better in the

1 record, is that okay?

2 BOARD MEMBER SIMPSON: Please.

3 CHAIRMAN RUFFATO: And then I'll ask you  
4 to confirm it.

5 BOARD MEMBER SIMPSON: Okay.

6 CHAIRMAN RUFFATO: Board Member Simpson  
7 moves that the Board conclude that the Hearing  
8 Examiner complied with the Board's remand order,  
9 that the four excluded photographs were considered  
10 by the Hearing Examiner, and that the DEQ was  
11 given the opportunity and failed to present  
12 evidence relating -- additional evidence relating  
13 to the four excluded photographs. Is that  
14 consistent with what you're thinking, Mr. Simpson?

15 BOARD MEMBER SIMPSON: Yes, that's  
16 consistent with what I'm thinking, but stated much  
17 more eloquently.

18 CHAIRMAN RUFFATO: Mr. Reiten, you were  
19 the second. Do you --

20 BOARD MEMBER REITEN: I second that.

21 CHAIRMAN RUFFATO: Mr. Lehnherr.

22 BOARD MEMBER LEHNHERR: Chairman  
23 Ruffato, I'm just wondering. Would it be easier  
24 to just have a motion accepting the FOFCOL?  
25 Because by doing that, then we are -- everyone in

1 favor of that motion is basically saying what your  
2 motion is saying. Just a thought or a question.  
3 Thank you.

4 CHAIRMAN RUFFATO: It is a good  
5 question, and I would entertain comments,  
6 discussions on that point.

7 (No response)

8 BOARD MEMBER SIMPSON: Mr. Chairman,  
9 separating questions is not something that I had  
10 considered, but on the other hand I'm not an  
11 attorney. And I really think that in a lot of  
12 ways the function of the Board is to cut through  
13 the legalese and come to terms with the important  
14 points of the matter.

15 And this whole process -- it's been --  
16 assigning a percentage is hard, but I would say  
17 it's been 95 percent process and 5 percent  
18 product. So I'm just stating my opinion that I  
19 don't think the photographs are even relevant, but  
20 I think they were properly considered by the  
21 Hearing Examiner.

22 CHAIRMAN RUFFATO: I agree with your  
23 points, Mr. Simpson. And Dr. Lehnherr, I agree  
24 with your point that that might get us to a  
25 solution quicker, but there may be an appeal of



1 this, and I would think that it would be better if  
2 the Board had directly addressed the primary  
3 question presented by DEQ, rather than have it to  
4 be implied. Does that make sense?

5 BOARD MEMBER LEHNHERR: I understand  
6 that. Everything we say is of course being  
7 recorded, and going into a transcript, including  
8 any discussion we have. But I understand. I  
9 think we're sort of going to end up in the same  
10 place regardless, so I just present it as an  
11 option.

12 CHAIRMAN RUFFATO: It was a reasonable  
13 option, but the motion on the table is as stated.  
14 Any more discussion on the motion?

15 (No response)

16 CHAIRMAN RUFFATO: In that case, all in  
17 favor of the motion, say aye.

18 (Response)

19 CHAIRMAN RUFFATO: Opposed.

20 BOARD MEMBER LEHNHERR: Nay.

21 CHAIRMAN RUFFATO: So help me out here.  
22 I think it's four to one, correct?

23 MS. WITTENBERG: Yes, Chairman.

24 CHAIRMAN RUFFATO: And it's my  
25 understanding that four votes is a majority of the

1 overall Board, and therefore the motion passes.

2 Katherine, am I correct in what I've stated?

3 MS. ORR: I had to unmute. Mr. Chair,  
4 yes, you are correct.

5 CHAIRMAN RUFFATO: Let the record be  
6 known that Katherine gave me a thumbs up.

7 Since we have decided that issue, then  
8 we go to the issue that Dr. Lehnherr suggested we  
9 go to, and that is whether we accept, or reject,  
10 or modify the findings of fact and conclusions of  
11 law. I will entertain a motion on that point.

12 BOARD MEMBER SIMPSON: Mr. Chairman,  
13 Dave Simpson again. I will make a motion that we  
14 accept the Hearing Examiner's findings of fact,  
15 conclusions of law, and order.

16 CHAIRMAN RUFFATO: Is there a second to  
17 that motion?

18 BOARD MEMBER SMITH: I'll second.

19 CHAIRMAN RUFFATO: A motion has been  
20 made and seconded that the Board accept the  
21 findings of fact, and conclusions of law, and  
22 order proposed by the Hearing Examiner.  
23 Discussion.

24 BOARD MEMBER SIMPSON: This is Dave  
25 Simpson again. It seems I've been doing most of

1 the talking here, so I'll gladly defer to anyone  
2 else. I have some thoughts on this I'd like to go  
3 through, but I defer to any other Board Member who  
4 has any comment.

5 CHAIRMAN RUFFATO: Please proceed, Mr.  
6 Simpson.

7 BOARD MEMBER SIMPSON: This whole -- I  
8 guess I'll just start out by saying that it  
9 astonishes me that here we are -- depending on how  
10 you look at it -- six to eight years later still  
11 discussing a sediment spill.

12 And I would observe from the record that  
13 there was a major rainfall event in the few days  
14 prior to the issuance of this notice, and by  
15 major, it was again, according to the record, 2.1  
16 inches. I don't believe the record stated in what  
17 period of time, but it obviously came down pretty  
18 fast. And in a situation like that, with water  
19 running everywhere, sedimentation -- erosion and  
20 sedimentation is inevitable.

21 So then the visit from DEQ I believe was  
22 precipitated by a request from the City of  
23 Billings, which was concerned about sediment that  
24 had washed into their drain system. So there  
25 clearly was a request, and an emphasis on finding

1 -- It just seemed to me like there was a need to  
2 go out and find a violation somewhere. This is a  
3 situation that is not unfamiliar to me, but I  
4 digress.

5 I guess the way I read the facts is that  
6 at the time of the rainfall event, and the  
7 subsequent notice of violation, Copper Ridge and  
8 Reflections had completed their work on the  
9 subdivision development, that is, the roads and  
10 infrastructure; and four of the five, I think  
11 there were five sections of the subdivision, the  
12 stormwater permits had been terminated, leaving  
13 only the one in the northeast, which memory serves  
14 is area No. 3.

15 And again, at that time the work had  
16 been completed; the streets, etc., had been turned  
17 over to the City of Billings; and the sale of lots  
18 and construction of homes was in progress.

19 The responsibility of Copper Ridge and  
20 Reflections therefore was complete in all but one  
21 of the areas, and the work there was complete.  
22 And the termination was issued the following  
23 spring.

24 So what happened was the lots were sold  
25 to individuals, individuals to build homes on.

1 And what I saw in the photographs was homes under  
2 construction, various stages of construction, from  
3 foundations being dug, to construction, active  
4 construction going on.

5 With that kind of a rainfall event --  
6 Let me back up. I think we established that the  
7 individual homeowners, individual property owners,  
8 because their disturbances were less than an acre,  
9 were not subject to the stormwater review,  
10 stormwater requirements. But with a lot of soil  
11 exposed, the rainfall event of that magnitude,  
12 erosion and sedimentation was inevitable. And any  
13 BMP's in place -- and my understanding is that  
14 there were BMP's in place -- but they would  
15 certainly be overwhelmed by that kind of flow.

16 So I think that goes to the question of  
17 construction activity, what construction activity  
18 was taking place was being done on the individual  
19 lots by individual homeowners who weren't subject  
20 to the stormwater rule.

21 And the question of any lots that had  
22 not been yet sold, and were still in the ownership  
23 of the development companies, would not have had  
24 construction going on on them because Copper Ridge  
25 and Reflections are not home construction. They

1 are not into home construction, they're into  
2 subdivision development.

3 So in order for there to be a violation  
4 here, there has to be both ownership and  
5 construction, I don't think in progress by the  
6 entity. I don't think either one of those from  
7 the record was in place. And so I'm afraid the  
8 situation we have is a major rainfall event, a lot  
9 of sedimentation unavoidable; but to hold the  
10 Copper Ridge and Reflections responsible for any  
11 violation here isn't consistent with their  
12 ownership and construction status.

13 CHAIRMAN RUFFATO: Thank you, Mr.  
14 Simpson. Any other comments by Board members?

15 BOARD MEMBER REITEN: Chairman Ruffato,  
16 this is Jon Reiten. I more or less agree with  
17 that.

18 One of the things that I found absent  
19 from everything that I read was any idea of the  
20 extent of the problem caused by this material that  
21 had run off, or that had apparently affected the  
22 stormwater drainage system of the City of Billings  
23 or off into other lots or streets or whatever.

24 I had a real difficult time just getting  
25 a feel for that. And I realize that's not

1 directly what we're asking, so -- but that's the  
2 bottom line, I think. And some of this -- all of  
3 the other arguments that we've had to go through,  
4 none of them really addressed that. So that's  
5 just a comment.

6 CHAIRMAN RUFFATO: Thank you, Board  
7 Member Reiten. Any other Board members? Dr.  
8 Lehnherr.

9 BOARD MEMBER LEHNHERR: Thank you,  
10 Chairman Ruffato. I have to stand in opposition  
11 to the motion. Just in summary, I don't think the  
12 Hearing Examiner for this FOFCOL adequately  
13 considered the four photographs or additional  
14 evidence, and most importantly did not promulgate  
15 the clarification that the Board asked for when  
16 this issue was considered back in August of 2019  
17 and remanded to another Hearing Officer. Thank  
18 you.

19 CHAIRMAN RUFFATO: Thank you, Dr.  
20 Lehnherr. Any other Board members?

21 BOARD MEMBER SMITH: Yes, this is Joe.  
22 Mr. Simpson, you made a comment about the lots,  
23 and the ownership of the lots, and who is  
24 responsible for the SWIP permit once the lots are  
25 under construction versus when the bare land is

1 developed, sell as bare land. You'd asked a  
2 question about that earlier, and I think DEQ  
3 disagreed with you, that because it's a  
4 development, that all of that is contained as one  
5 project.

6 I know that that's not always the case,  
7 because I've seen it not be the case, so I'm just  
8 curious on if you had some other information that  
9 you were basing that on or what.

10 BOARD MEMBER SIMPSON: All I'm doing --  
11 Mr. Chairman, members of the Board.

12 CHAIRMAN RUFFATO: Yes, Mr. Simpson, go  
13 ahead.

14 BOARD MEMBER SIMPSON: I'm basing that  
15 on my understanding of how these developers  
16 operate, Copper Ridge and Reflections -- there are  
17 two at issue here -- in that they applied for a  
18 stormwater permit for their infrastructure  
19 construction, that included roads, curbs, gutters,  
20 sidewalks, sewers, electric power, water service,  
21 etc., and once that work was completed, then they  
22 applied for a termination.

23 Now, if the Department intended for the  
24 developers to continue to be responsible for a  
25 sediment control during the home construction



1 phase, they would not or should not have  
2 terminated those permits. And all but one were  
3 terminated, and it was terminated the following  
4 spring.

5 So I think the understanding here is  
6 that from the standpoint of the developers, their  
7 responsibility extended through the subdivision  
8 development process; and the home construction,  
9 since the ownership of the lots changed in order  
10 to allow the home construction obviously, then  
11 they are no longer responsible. And because each  
12 of those home construction projects is less than  
13 an acre, they're not individually subject to the  
14 rules.

15 So if there's a problem here, it's  
16 something that needs to be addressed either in  
17 rule or in the administration of the rule, but for  
18 this particular situation, the permits were  
19 terminated based on completion of the  
20 infrastructure. That's my view of it.

21 BOARD MEMBER SMITH: Thank you. I agree  
22 with you, Mr. Simpson. I just want to I guess  
23 clarify that I guess you disagreed with the  
24 opinion earlier from DEQ that because these lots  
25 are all within the same development, that that

1 entire project, including each individual home  
2 construction, should be included in the same SWIP  
3 permit; is that correct?

4 BOARD MEMBER SIMPSON: That's correct.  
5 That's been in my mind a sticking point here  
6 because I'm aware of that requirement in the rule,  
7 but it obviously wasn't applied here. Termination  
8 of these permits.

9 CHAIRMAN RUFFATO: Thank you both.  
10 Additional questions, comments, observations from  
11 the Board?

12 (No response)

13 CHAIRMAN RUFFATO: First of all, I want  
14 to thank the technical folks who I can see why you  
15 would view the record we were asked to review as  
16 mind numbing. Only lawyers could really  
17 appreciate the work that went into that, and the  
18 process that it took.

19 And I guess I want to go back to the  
20 discussion we had this morning about what our  
21 responsibilities are, what we're supposed to be  
22 doing here. First of all, the motion as it stands  
23 is to approve the entire findings, and  
24 conclusions, and order as presented.

25 But keep in mind that the standards are

1 a bit different. The findings of fact we could  
2 only adjust if, number one, we reviewed the whole  
3 record -- which I don't think any of us would be  
4 looking forward to, but we would do it if it was  
5 required -- and if we found that there was no  
6 substantial competent evidence to support the  
7 findings.

8 My view is that, from what we see, I  
9 have confidence that there is competent evidence  
10 to support all of the findings.

11 Going to the conclusions of law, the  
12 standard that we were presented this morning is  
13 that we can change the conclusions of law without  
14 reviewing the entire record.

15 I've spent a lot of time on both the  
16 findings and the conclusions, and I think the  
17 conclusions are tight, and well written, and I  
18 think that they are supported by the findings of  
19 fact. I think the Hearing Examiner did a good job  
20 of reasoning through the process. I know that  
21 it's confusing, and hard to follow, but I think he  
22 did a good job doing that. So that's my comments.  
23 Any more comments?

24 (No response)

25 CHAIRMAN RUFFATO: A motion has been

1 made and seconded that the findings of fact,  
2 conclusions of law, and order be accepted as  
3 proposed by the Hearing Examiner. All in favor,  
4 say aye.

5 (Response)

6 CHAIRMAN RUFFATO: Contrary, same sign.

7 BOARD MEMBER LEHNHERR: Aye.

8 CHAIRMAN RUFFATO: Motion carries four  
9 to one with Board Member Lehnherr dissenting. I  
10 think that concludes that agenda item. If I'm  
11 mistaken, I'd appreciate it if someone would point  
12 that out.

13 (No response)

14 CHAIRMAN RUFFATO: I think we have a few  
15 minutes before we --

16 BOARD MEMBER SIMPSON: Mr. Chairman.  
17 Excuse me. I think were you -- did you have  
18 something, Ms. Orr?

19 MS. ORR: I did. Thank you. I unmuted  
20 on my end. I think there needs to be a short  
21 write-up by the Board itself on behalf of the  
22 Board about this decision, and I can do that for  
23 you. And with your endorsement, I can submit it  
24 to the Chairman, and the Chairman can sign it.

25 It will be a simple paragraph that today

1 was the hearing, and this was the motion, and this  
2 was the resolution of the Board, and the findings  
3 of fact and conclusions of law are accepted in  
4 their entirety. That's what it would say. And  
5 that way that would be the end point for this  
6 juncture.

7 CHAIRMAN RUFFATO: I think that's a  
8 great idea, and I will ask you to do that, unless  
9 there's some objection by a Board member, and then  
10 we can discuss it.

11 (No response)

12 CHAIRMAN RUFFATO: All right. Thank  
13 you, Katherine. I appreciate it. I will look  
14 forward to looking at that.

15 (The proceedings were concluded

16 at 12:50 p.m. )

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STATE OF MONTANA )  
 : SS.  
COUNTY OF LEWIS & CLARK )

I, LAURIE CRUTCHER, RPR, Court Reporter,  
Notary Public in and for the County of Lewis &  
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing - 93 - pages contain a true  
record of the proceedings to the best of my  
ability.

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my notarial seal this 26th day of  
April, 2021.

\_\_\_\_\_  
LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2024.

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