BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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 )

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENTS

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
APPEARANCES

APPEARING ON BEHALF OF THE BOARD OF ENVIRONMENTAL REVIEW:

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Special Assistant Attorney General
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WHEREUPON, the following proceedings were had:

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

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

CHAIRMAN RUFFATO: Here.

MS. WITTENBERG: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. WITTENBERG: Board Member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. WITTENBERG: Board Member Hanson.

BOARD MEMBER HANSON: Here.

MS. WITTENBERG: Board Member Reiten.

(No response)

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

BOARD MEMBER SMITH: Here.

MS. WITTENBERG: Board Member Altemus.

(No response)

MS. WITTENBERG: Julia, are you back on?
MS. WITTENBERG: We do have a quorum, Chairman.

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

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

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

(No response)

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

(No response)

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

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

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

And I'm reading from the proposed decision.

"Violation of 75-5-605 by discharging stormwater associated with construction activity without a discharge permit; violation of 75-5-605," and then two ARM cites, "by placing waste where it will cause pollution in violation
of 75-5-605 by violating terms and conditions of a
general permit."

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

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

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

CHAIRMAN RUFFATO: Yes, we did.
MS. ORR: So DEQ will have 20 minutes to make its presentation of its exceptions, then Copper Ridge and Copper Ridge Development Corporation will have 30 minutes to make its presentation as well as a rebuttal, and then DEQ will have ten minutes to provide its rebuttal.

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

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

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

(No response)

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

(No response)

CHAIRMAN RUFFATO: Hearing none, I
believe that Kirsten Bowers will be making the presentation for DEQ; is that correct, Ms. Bowers?

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

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

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

After considering the first proposed finding of fact and conclusions of law on the issue of owner/operator and the parties' exceptions, the BER failed to pass a motion to approve that finding of fact and conclusions of law, and it remanded both the cases to the Hearing Examiner to take additional evidence regarding four excluded photographs, including maps created
from the photographs and maps of the areas covered
by the permits, and determine if the additional
evidence changes the proposed finding of fact and
conclusion of law.

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

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

There is a case on point, a Montana
Supreme Court case, Baldridge versus Board of
Trustees at 264 Montana 199, and in that case, a
Hearing Examiner was similarly instructed to
consider all evidence before her and make a
determination, but the Hearing Examiner issued a
second finding of fact and conclusion of law that
looked very much like the first.
And the Supreme Court said the proper recourse is for the Board to remand the case again to the Hearing Examiner with instructions to follow the Board's remand order.

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

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

Additionally, the second proposed finding of fact and conclusions of law was issued by the Hearing Examiner after reviewing an incomplete record, and without benefit of live testimony of witnesses because the original Hearing Examiner is no longer available to Agency Legal Services.
And under MAPA, if the person who conducted the hearing becomes unavailable to the agency, proposed findings of fact may be prepared by a person who has read the record, but only if the demeanor of witnesses is considered immaterial by all parties. That's in MAPA at 2-4-622 sub (1).

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

Additionally, the second proposed finding of fact and conclusion of law is almost identical to the first proposed finding of fact and conclusion of law. And the differences between the two really are in language citing to the Hearing Examiner's decision on the motion in limine, and DEQ takes exception to the Hearing Examiner's finding fault with DEQ for bringing what is called an entirely new theory of the case
with entirely new evidence which should have been brought six years ago.

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

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

The construction activities were
undertaken under a common plan of development with
the eventual goal of the sale of individual lots
for residential home construction.

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

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

After the February 2019 Board meeting,
the Board determined there was a dispute of fact
on the issue whether Copper Ridge and Reflections
were owner or operators, and they reversed the
previous, even previous to the previous Hearing
Examiner’s orders on summary judgment, and those orders on summary judgment found that Copper Ridge and Reflections were owner/operators. So the original evidentiary hearings in this case did not focus on the issue of owner/operator because that had already been decided on summary judgment.

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

So that’s what I call Remand One. On February 8th, 2019 this case was remanded to the Hearing Examiner for further evidence on the issue of whether Copper Ridge and Reflections were owner/operators under the Water Quality Act as interpreted by the Board at that time to mean that Copper Ridge and Reflections were owners or operators of construction activity at the time of the unpermitted discharges.
So pursuant to that first remand, the Hearing Examiner determined the evidentiary record lacked sufficient evidence on the question whether Copper Ridge and Reflections are owners or operators with respect to the violations, and the Hearing Examiner further determined that the parties were permitted to supplement their evidentiary record on the issue of owner/operator, and so a second evidentiary hearing was held in June of 2019 to supplement the record.

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

And DEQ's supplemental disclosures included a series of six photographs, four of which were the subject of the Copper Ridge and Reflections motion in limine. And then on June 4th, 2019, before the second evidentiary hearing, the Board's Hearing Examiner granted Copper Ridge
and Reflections motions in limine, in part by not allowing DEQ to use or enter any photographs that are not either publicly available or attached to the violation letter that was issued September 23rd, 2013.

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

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

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

So then Remand Two occurred, and the consolidated contested cases were remanded to the
Hearing Examiner again to take additional evidence related to the excluded photographs.

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

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

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

But there remain issues of fact related to the conditions of the lots owned by Copper Ridge and Reflections as shown in the photographs,
and questions of fact related to whether the areas
of ground disturbance shown in those photographs
was covered by previously issued MPDES permits,
and an evidentiary hearing on the four photographs
is necessary to complete the record regarding
these questions.

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

The Supreme Court has provided that a
reviewing Court does not remand a matter when the
outcome would be a repetition of the original
decision. There must be a significant probability
that the original decision would change, or
there's a need to create a better record for review.

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

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

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

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

MS. MARQUIS: Yes, Mr. Chair. Good morning. Mr. Chairman, members of the Board, my name is Vicki Marquis. I'm an attorney with Holland and Hart in Billings, Montana. I'm here today representing the Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC.
The client representative Mr. Landy Leep sends his regrets that he could not join us today. He had some scheduling difficulties.

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

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

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

We're here today asking you to adopt the Hearing Examiner's findings and conclusions, and to issue the proposed order as the final agency action in these contested cases. Now, I realize
the contested cases might seem complicated,
especially when you look at the docket sheet. It
has close to 200 entries on it. But in some
respects that is a good thing because it means
that there's been a lot of work done already on
these cases.

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

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

The Hearing Examiner, your Judge, has
had several opportunities to consider and weigh
the evidence, and find the facts, and reach
conclusions based on those facts, and offer you a
solid proposed order.

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

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

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

I noted on the standard of review, which
was an item of discussion earlier in your meeting,
in our exceptions or response to the exceptions,
we provided some case law that talks about the
point that Ms. Orr and Chairman Ruffato were
discussing earlier today about how to review the findings, and you'll find this on Page 186 and Page 187 of your Board packet.

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

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

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

Now, the Board has already hired your Hearing Examiner to do the heavy lifting here, to go through and sift through all of the evidence, and do the preponderance of the evidence weighing,
and come up with proposed findings. The Board's job today isn't to reweigh that evidence. That's why you delegated this to your Hearings Officer.

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

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

I'd like to go through a little bit of a background, because this case does have such a history. I noted at the last meeting in your Board packets there was some notation that the goal is to have a hearing within 120 days. And as you can see, this case has been in full litigation
for six years. It's pretty long.

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

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

MS. WITTMENBERG: I certainly can give it a try. Go ahead.

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

MS. WITTMENBERG: Okay. I'm looking here right quick.

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

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

MS. WITTMENBERG: Vicki, can you try it?

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

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

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

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

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

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

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

Now, this is sort of the new area that
attention was drawn to this sort of midway through
the litigation. And again, Exhibit C, which is
admitted evidence, verifies that their
construction permit coverage began in April of
2013, and the notice of termination which was confirmed by DEQ was provided in March of 2014.

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

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

CHAIRMAN RUFFATO: Yes, it is.

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

So here you can see that the permit coverage -- this was that first Phase 2, that orange section on the previous PDF we looked at -- began in 2007, ended in 2009 when the construction was completed, and then they moved
into those other phases, two of Reflections which was the blue area we saw previously; Phases 3 and 4 in Copper Ridge which is yellow and purple that we saw earlier. That construction was done and completed, the permit was completed and terminated confirmed by DEQ in 2012.

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

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

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

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

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

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

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

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

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

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

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

Here in 2015 and 2016, it looks a little
barren, but in that period of time there was a lot
of discovery. You know, we asked for all of the
evidence that the Department has regarding to the
violations, and we didn't receive any of those
photographs that are at issue here today.

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

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

We challenged that in front of the
Board, and as Kirsten noted, the Board overruled
that Hearing Examiner's interpretation, and said
that the owner/operator speaks for the person who
owns, operates, or supervises the project at the
time of the discharge. So again, that's in
September of 2013.

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

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

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

But now, DEQ has provided a long citation in their exceptions to a narrative from Board Member Tweeten at the time, and he said, "Go back, and the parties can make what they want of the photographs, and they might not change the Hearing Examiner's mind, but take a look at them."

Essentially what he said. "They might not be probative, but they're relevant."

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

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

We attached the photos to our motion for
summary judgment, and that's how they're in
evidence today. They are part of the record, and
they are evidence that the Hearing Examiner looked
at. We provided them in our motion for summary
judgment.

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

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

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

CHAIRMAN RUFFATO: Yes, it is.

MS. MARQUIS: So this is one photograph
that the Department was concerned about, and this
is already in the record, and we see this at
Finding of Fact 139. And the second photograph is
And you'll notice that the sequence of these photographs has changed, and the last time this was in front of the Board, the Department argued about photograph one, the first photograph which is this photograph; and now the Department wants to argue about the second photograph. This is one that we never received until that first remand.

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

DEQ said there were no problems with the previously permitted areas, which included this one. And importantly Findings 46, and 47, and 81, and 83, where the Hearing Examiner cites directly to Mr. Freeland's testimony where he says he saw
no construction activity in the area, he had no
details of construction activity, he didn't know
where the property lines were.

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

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

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

So here, this road here is Western
Bluffs Boulevard, and it's looking east. And this
photograph here, the next one is near Lot 13
looking across Western Bluffs Boulevard, looking
southeast. This photograph everyone agrees is
taken near Lot 32 looking south.

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

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

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

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

But we do know from the permit that the
disturbance area includes material fill areas, and those material fill areas are shown by these lines that sort of parallel the road, and they're shown -- they move from the left to the right along Lots 30, 31, 32, 33, and 34.

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

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

So as you can see, the photographs are part of the evidence that the Hearing Examiner
considered. There is competent substantial evidence supporting all of the findings. Most of them are based on direct testimony from DEQ's witnesses.

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

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

So we feel that the Hearing Examiner's
findings, and conclusions, and proposed order
should be adopted by the Board. Thank you.

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

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

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

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

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

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

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

And it was actually the first photo, not
the second photo, that was excluded by the Hearing Examiner. The second photo, which also -- one and two show Lot 15, but from different vantage points. And the second photo is already in the record and attached to another exhibit, and that exhibit was the Hearing Examiner's violation letter.

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

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

Ms. Marquis alludes to the very big storm that occurred in Billings right before the
DEQ's compliance inspector's inspection, and that's true. The inspector did go out after a very big storm. But perhaps some of the impacts could have been mitigated in this case if Copper Ridge and Reflections had had permit coverage and appropriate BMP's in place.

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

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

DEQ was operating under a different interpretation of owner/operator, and focused on control, and that's why in deposition testimony DEQ witnesses said that at least in part, they pursued Copper Ridge and Reflections because of
signage at the subdivision indicating that it was a Copper Ridge Subdivision.

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

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

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

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

(Recess taken)

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

MS. WITTENBERG: Chairman Ruffato.

CHAIRMAN RUFFATO: Here.

MS. WITTENBERG: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. WITTENBERG: Board Member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. WITTENBERG: Board Member Hanson.

BOARD MEMBER HANSON: Here.

MS. WITTENBERG: Board Member Reiten.

BOARD MEMBER REITEN: Here.

MS. WITTENBERG: Board Member Smith.
BOARD MEMBER SMITH: Here.

MS. WITTENBERG: And Board Member Altemus.

(No response)

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

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

MS. WITTENBERG: So we have a quorum.

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

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

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

MS. MARQUIS: I would be happy to. Give me one second. The map with the colors on it? Is
that what you're asking for?

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

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

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

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

MS. MARQUIS: That is correct.

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

MS. MARQUIS: That is correct.

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

MS. MARQUIS: Correct.

BOARD MEMBER SIMPSON: Can you indicate where on the map is the area of issue as far as ownership, and that is the point the violation is
presumed to have occurred.

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

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

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

And you've heard the Department talk about Lot 15. That Lot 15 is in this Phase 2 of Reflections. And I'd like to point out that while
Ms. Bowers said that two of those photographs are of Lot 15, there is no evidence that one of them is on Lot 15, and the only evidence that the first photo was taken on Lot 15 isn't clear, and the Hearing Examiner heard all of that evidence and confirmed that it wasn't taken at Lot 15. It wasn't clear that it was taken at Lot 15. The second photograph, there is no evidence to say that it was taken at Lot 15.

BOARD MEMBER SIMPSON: Where is Lot 15?

MS. MARQUIS: I actually think my text box might be covering Lot 15. I think it's --

(indicating) --

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

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

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

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

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

So Mr. Leep's testimony, and the documents that we provided from their contractors that did the work, acknowledging when the work was completed and asking for final payment for the work, and the permit documents showing when the permits were terminated and confirmed by DEQ, all indicate and prove that the construction that Copper Ridge and Reflections did was done and
complete and over with before the storm.

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

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

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

Now, you notice the permit didn't terminate until March 24th, 2014, because that's when they had to ensure that they had reached the requirement for stabilization of the disturbed
area, and that was again confirmed by DEQ in 2014. Does that answer your question?

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

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

BOARD MEMBER SIMPSON: Thank you very much.

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

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

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

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

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

We're here to consider the FOFCOL that
Hearing Examiner Doud gave to us, and I don't know
where -- so that's what we're here to consider.
I'm not sure that we were given what we asked for
with just this additional FOFCOL, and I'm not
really sure where to go from here. I do wish that
we'd had a clear presentation back in August 2019. But maybe Ms. Bowers can address -- I don't have the transcript from that meeting in front of me. Maybe she can address what the Board was asking for beyond just consideration of the four photographs.

MS. BOWERS: Board Member Lehnherr, Chair Ruffato, members of the Board, I'll try. And I think the answer to one of your questions is I don't think the second proposed finding of fact and conclusions of law did give the Board what they asked for in August of 2019. At the Board meeting, I think it was in the transcript at about Page 222, and I don't have the transcript right in front of me to read exactly from it.

But the Board did instruct the Hearing Examiner to take further evidence on the four photographs, and that included maps created from the photographs, and then any responsive evidence that Copper Ridge and Reflections might have; and then to determine if that evidence changes the proposed finding of fact and conclusions of law that was in front of you in August; and let the Board know if it changes, and if not just to
submit a memo to the Board stating that the proposed finding of fact and conclusions of law should not change.

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

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

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

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

BOARD MEMBER LEHNHERR: Thank you.

CHAIRMAN RUFFATO: Thank you, Dr.
Lehnerr and Ms. Bowers. Any more questions from the Board?

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

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

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

BOARD MEMBER SIMPSON: Who would have to
hold that permit? Because by that time the
property ownership has changed.

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

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

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

BOARD MEMBER SIMPSON: Thank you.

CHAIRMAN RUFFATO: Any more questions
from the Board?

(No response)

CHAIRMAN RUFFATO: If not, I have a few
questions. I would like to ask Ms. Marquis the
question of how you would address the point that has been made by DEQ that the Hearing Examiner did not follow the wording of the remand.

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

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

So not only do you have his discussion, which would function I presume similar to a memo -- I can't speak for Hearing Examiner Doud. I don't want to presume to do that -- but you have I believe all of the elements that the Board said they wanted in a memo, you have in a better form, because you have findings that are based on the previously excluded photographs; you have
conclusions that are drawn from that; and you have
discussion of that in a document that you can
approve as your final agency action.

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

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

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

So essentially that remand, so it was
certainly viewed on our part, and based on the
scheduling order that resulted after the remand,
and our joint amendment to the scheduling order,
it was viewed as a bit of a reset. So much like
when the Board delegates authority of the case at
the beginning of the case, the remand sort of
reset this, and delegated authority back to the
Hearing Examiner to process the case again.

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

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

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

And so the evidence is in the record,
and the Hearing Examiner considered it and said it's not disputed, and it doesn't matter to the ultimate conclusions in the proposed order.

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

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

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

So it's not the case where here the
Hearing Examiner could have just issued an order on summary judgment, and sent that up to the Board. That doesn't give the Board anything by which it can reach a final agency action. So by sending a proposed finding, conclusion, and order, that incorporates and encapsulates his order on summary judgment.

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

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

CHAIRMAN RUFFATO: Yes, that does.

Thank you. Ms. Bowers, following along those same lines, I would ask you what the authority and function of the Hearing Examiner following the remand was or should have been, in DEQ's view.
MS. BOWERS: Thank you, Chair Ruffato, members of the Board. In DEQ's view, the Hearing Examiner should have taken the additional evidence related to the excluded photographs as directed by the Board's remand order, and then reconsidered the proposed findings of fact and conclusions of law.

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

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

CHAIRMAN RUFFATO: Thank you, Ms. Bowers. I'm going to ask a follow-up question. On the motion for summary judgment, in the briefing on that, did DEQ have the opportunity to
submit to the Board -- or excuse me -- submit to
the Hearing Examiner evidence which would create a
material issue of fact? Did DEQ have an
opportunity to present some evidence in that
briefing?

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

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

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

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

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

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

So whatever was disputed by the Board, or whatever the questions they had by the Board, the parties had an opportunity to gather that evidence to support their version of the pictures, to support what they felt the pictures proved, and provide that to the other party. So there is a body of evidence that each of the parties provided back and forth.
Based on that universe of evidence, we moved into the phase of litigation for dispositive motions, and we presented a motion on summary judgment, and attached evidence. The Department had the affirmative duty to do the very same thing, and they didn't attach any evidence.

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

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

This is not like the case in Baldridge where the Board requested a hearing specifically. The Board didn't request a hearing specifically in this case.

And that's why you see that language in
the Board’s motion about the memo. The Board said, "Just send us a memo." It was really more of an informal thing, "Just go look at the pictures, and consider what the parties have to say about the pictures." The parties each had an opportunity to say what they wanted to say about the pictures, the photographs, and that resulted in the proposal that’s in front of you today.

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

(No response)

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

(No response)

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

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

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

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

But the two steps are first to consider what I'm referring to as the evidentiary issue, or as DEQ puts it, the failure to follow the Board's order, and that would be the first question. I think if we decide that in favor of DEQ, our
deliberations today would be over because that should result in a remand.

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

(Board Member Hanson not present)

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

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

CHAIRMAN RUFFATO: Thank you, Katherine.

Board members, do you have any comments or
questions? And now I'm just talking about the process, and not necessarily the details. And Dr. Lehnherr, you raised your hand?

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

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

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

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

BOARD MEMBER LEHNHERR: Like I was
saying, I was somewhat restating what Chairman Ruffato was saying. But I guess my primary point was regarding if we rejected the FOFCOL, findings of fact, conclusions of law in its entirety, and then where we could go after that.

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

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

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

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

BOARD MEMBER SIMPSON: Mr. Chairman,
Dave Simpson. The subject of the remand -- and please correct me if I'm wrong -- but the inclusion of the photographs; is that correct?

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

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

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

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

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

BOARD MEMBER SIMPSON: I was under the impression that the reason they had been excluded was because they were taken after the fact. But the situation was that they were taken at an
appropriate time, they just somehow escaped being included as evidence?

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

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

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

    BOARD MEMBER SIMPSON: Mr. Chairman, Dave Simpson. I have someplace else I need to be
later in the day, so I'd like to keep going until we're done.

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

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

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

BOARD MEMBER REITEN: I would like to keep going.

CHAIRMAN RUFFATO: Thank you, Mr. Reiten.

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

CHAIRMAN RUFFATO: Let's take a ten minute break now, and then when we come back we will start our deliberations in earnest and see
where we can go. We will reconvene at 12:21.

(Recess taken)

CHAIRMAN RUFFATO: Joyce, would you take roll again.

MS. WITTENBERG: Sure. Chairman Ruffato.

CHAIRMAN RUFFATO: Here.

MS. WITTENBERG: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. WITTENBERG: Board Member Simpson.

(No response)

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

(No response)

CHAIRMAN RUFFATO: Board Member Reiten.

BOARD MEMBER REITEN: Here.

MS. WITTENBERG: Board Member Smith.

BOARD MEMBER SMITH: Here.

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

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

BOARD MEMBER SIMPSON: I'm back. Sorry.

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

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

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

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

But a subsidiary question is whether or not DEQ had the opportunity but failed to submit additional evidence relative to the four excluded
photographs. I have to say I'm stepping over a point that the parties disagreed on, and that is whether or not the photographs were in evidence. Personally I believe that they were in evidence and were properly considered, but that's something -- (inaudible) --

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

CHAIRMAN RUFFATO: Is there a second to that motion?

BOARD MEMBER REITEN: I'll second it.

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

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

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

CHAIRMAN RUFFATO: If I could state a motion that I think might present better in the
record, is that okay?

BOARD MEMBER SIMPSON: Please.

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

BOARD MEMBER SIMPSON: Okay.

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

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

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

BOARD MEMBER REITEN: I second that.

CHAIRMAN RUFFATO: Mr. Lehnherr.

BOARD MEMBER LEHNHERR: Chairman
Ruffato, I'm just wondering. Would it be easier
to just have a motion accepting the FOFCOL?
Because by doing that, then we are -- everyone in
favor of that motion is basically saying what your
motion is saying. Just a thought or a question.
Thank you.

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

(No response)

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

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

CHAIRMAN RUFFATO: I agree with your
points, Mr. Simpson. And Dr. Lehnherr, I agree
with your point that that might get us to a
solution quicker, but there may be an appeal of
this, and I would think that it would be better if
the Board had directly addressed the primary
question presented by DEQ, rather than have it to
be implied. Does that make sense?

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

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

(No response)

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

(Response)

CHAIRMAN RUFFATO: Opposed.

BOARD MEMBER LEHNHERR: Nay.

CHAIRMAN RUFFATO: So help me out here.

I think it's four to one, correct?

MS. WITTENBERG: Yes, Chairman.

CHAIRMAN RUFFATO: And it's my
understanding that four votes is a majority of the
overall Board, and therefore the motion passes.

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

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

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

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

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

CHAIRMAN RUFFATO: Is there a second to that motion?

BOARD MEMBER SMITH: I'll second.

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

Discussion.

BOARD MEMBER SIMPSON: This is Dave Simpson again. It seems I've been doing most of
the talking here, so I'll gladly defer to anyone else. I have some thoughts on this I'd like to go through, but I defer to any other Board Member who has any comment.

CHAIRMAN RUFFATO: Please proceed, Mr. Simpson.

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

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

So then the visit from DEQ I believe was precipitated by a request from the City of Billings, which was concerned about sediment that had washed into their drain system. So there clearly was a request, and an emphasis on finding
-- It just seemed to me like there was a need to
go out and find a violation somewhere. This is a
situation that is not unfamiliar to me, but I
digress.

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

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

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

So what happened was the lots were sold
to individuals, individuals to build homes on.
And what I saw in the photographs was homes under construction, various stages of construction, from foundations being dug, to construction, active construction going on.

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

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

And the question of any lots that had not been yet sold, and were still in the ownership of the development companies, would not have had construction going on on them because Copper Ridge and Reflections are not home construction. They
are not into home construction, they're into subdivision development.

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

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

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

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

I had a real difficult time just getting a feel for that. And I realize that's not
directly what we're asking, so -- but that's the
bottom line, I think. And some of this -- all of
the other arguments that we've had to go through,
none of them really addressed that. So that's
just a comment.

CHAIRMAN RUFFATO: Thank you, Board
Member Reiten. Any other Board members? Dr.
Lehn herr.

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

CHAIRMAN RUFFATO: Thank you, Dr.
Lehn herr. Any other Board members?

BOARD MEMBER SMITH: Yes, this is Joe.
Mr. Simpson, you made a comment about the lots,
and the ownership of the lots, and who is
responsible for the SWIP permit once the lots are
under construction versus when the bare land is
developed, sell as bare land. You'd asked a question about that earlier, and I think DEQ disagreed with you, that because it's a development, that all of that is contained as one project.

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

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

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

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

Now, if the Department intended for the developers to continue to be responsible for a sediment control during the home construction
phase, they would not or should not have terminated those permits. And all but one were terminated, and it was terminated the following spring.

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

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

BOARD MEMBER SMITH: Thank you. I agree with you, Mr. Simpson. I just want to I guess clarify that I guess you disagreed with the opinion earlier from DEQ that because these lots are all within the same development, that that
entire project, including each individual home
construction, should be included in the same SWIP
permit; is that correct?

BOARD MEMBER SIMPSON: That's correct.

That's been in my mind a sticking point here
because I'm aware of that requirement in the rule,
but it obviously wasn't applied here. Termination
of these permits.

CHAIRMAN RUFFATO: Thank you both.

Additional questions, comments, observations from
the Board?

(No response)

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

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

But keep in mind that the standards are
a bit different. The findings of fact we could only adjust if, number one, we reviewed the whole record -- which I don't think any of us would be looking forward to, but we would do it if it was required -- and if we found that there was no substantial competent evidence to support the findings.

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

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

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

(No response)

CHAIRMAN RUFFATO: A motion has been
made and seconded that the findings of fact, conclusions of law, and order be accepted as proposed by the Hearing Examiner. All in favor, say aye.

(Response)

CHAIRMAN RUFFATO: Contrary, same sign.

BOARD MEMBER LEHNHERR: Aye.

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

(No response)

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

BOARD MEMBER SIMPSON: Mr. Chairman.

Excuse me. I think were you -- did you have something, Ms. Orr?

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

It will be a simple paragraph that today
was the hearing, and this was the motion, and this was the resolution of the Board, and the findings of fact and conclusions of law are accepted in their entirety. That's what it would say. And that way that would be the end point for this juncture.

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

(No response)

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

(The proceedings were concluded at 12:50 p.m.)

* * * * *
CERTIFICATE

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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