BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: ) CASE NO.
COLUMBIA FALLS ALUMINUM ) BER 2014-06 WQ
COMPANY'S (CFAC) APPEAL OF )
MONTANA POLLUTANT DISCHARGE )
ELIMINATION SYSTEM PERMIT NO.)
MT0030066 )

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
October 5, 2018
10:34 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS DEXTER BUSBY,
HILLARY HANSON, JOHN FENTON; and
CHRIS TWEETEN (By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR
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## Exhibits

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WHEREUPON, the following proceedings were had:

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(Board member John Dearment present)

CHAIR DEVENY: We'll go ahead and get started. Meranda, would you please take roll call again, and we'd like to find out, if Chris Tweeten is still on, when he joined the meeting.

MS. BASS: Chris Deveny.

CHAIR DEVENY: Here.

MS. BASS: Chris Tweeten.

BOARD MEMBER TWEETEN: Madam Chair, I'm still on.

CHAIR DEVENY: Chris, do you remember what time you joined the meeting? We'd like to get that in our record.

BOARD MEMBER TWEETEN: I think it was seven minutes after the hour. Shortly after you started.

MS. BASS: Dexter Busby.

BOARD MEMBER BUSBY: I'm here.

MS. BASS: Hillary Hanson.

BOARD MEMBER HANSON: Here.

MS. BASS: John Dearment.
BOARD MEMBER DEARMENT:  Here.

MS. BASS:  John Felton.

BOARD MEMBER FELTON:  Here.

MS. BASS:  Tim Warner.

(No response)

CHAIR DEVENY:  Our next agenda item is to hear oral arguments on the Columbia Falls Aluminum Company's appeal of DEQ's permit, and then to make consideration on the findings of facts, conclusions, and order. And so with that, I'd like Sarah to maybe just give an introduction to the process today.

MS. HANSON:  Start with --

MS. CLERGET:  This is Sarah Clerget for the record. And before the meeting today, Hillary Hanson brought to my attention that she may have a potential conflict, and I wanted to bring it to the attention of the parties. Now that Chris is on the phone, it is less of an issue because we would have a quorum even without her. But she's indicated that she is on the --

BOARD MEMBER HANSON:  CFAC Community Liaison Panel.

MS. CLERGET:  She has indicated she hasn't heard anything about this particular issue,
and doesn't feel that it would affect her
decision, but we think it's important to raise it
for the parties, and find out if they have any
cause determination that she should recuse
herself.

And in the absence of that, are the
parties willing to waive -- I don't think there is
a conflict to waive, but if you feel there is a
conflict, are you willing to waive it?

MS. LAUGHNER:  Cathy Laughner for
record, representing CFAC.  No objection, no
comment, and I will waive it.

MR. MOSER:  DEQ has no objection to
having Board member Hanson hear this matter.

MS. CLERGET:  Thank you.  So that dealt
with, we can have Hillary participate and issue a
decision with other Board members.

MR. DEARMENT:  Madam Chair, may I
interrupt, if this is a good time to say this.  I
am going to recuse myself.

MS. CLERGET:  Yes.  Thank you.  We've
talked about that in previous meetings.  So with
that settled, I want to bring your attention to
the proposed decision in the packet, which I'm
sure you've all seen, from me.  And I want to
clarify quickly my position for the Board. Although I was the Hearing Examiner, which in this case involved reviewing the record rather than holding the hearing myself, I want to clarify that I am in my capacity here today here as your Board Counsel, so whatever the Hearing Examiner may have done, I don't want anybody to feel like they can't openly -- I have no ego in this.

And the only thing for me is that any decision that the Board makes is as insulated as possible against future challenges at the District Court or Supreme Court level.

So I want to be clear that I'm here to answer questions about the law or the process, and to the extent that it is helpful, I can answer some questions about the decision, although I'm going to be very careful not to advocate for any position. I want the parties to do any advocacy.

But I do think it is helpful to have the Hearing Examiner here to clarify any points of law or points of fact, to the extent that you're wondering where a fact came from in the record or something like that.

And the last point of housekeeping is
that Aleisha is here, and as you've seen, we have
this big screen behind you. So we brought the
entire record with us, so if there is any portion
of the record, anything that you guys want to see
that is cited, or that you want to look at, we can
project it up on the screen for you as part of
this discussion.

So you have my proposed decision, which
is to remand back to the DEQ for the purposes of
Outfall 006. You've seen the exceptions briefed
by both DEQ and CFAC. They're here to oral argue
today. I just remind you of your options which
are in the memo that accompanies the entire
packet, which are that:

You can modify the findings of fact. If
you choose to modify the findings of fact, for the
purposes of today, what that will mean is that you
have to put off a decision until the next meeting
while every single person reviews the entire
record. There cannot be any modification of facts
unless every person on the Board reviews the
record in its entirety, at which point then you
can modify the fact.

That can only happen if you determine
today that the facts presented in the proposed
order are not supported by substantial evidence in
the record. You can look at whatever you need to
to make that determination as part of the record.
You don't have to review the entire record in
order to decide that it is not based on
substantial evidence, but you do have to review
the entire record before you modify any finding of
fact.

BOARD MEMBER TWEETEN: Madam Chair, can
I interrupt for just a second? Because I think
maybe we can cut through some of the material
that's in the parties' exceptions.

CHAIR DEVENY: Chris, I think we're
planning to do that, so if you could just let
Sarah continue. We'll see if we handle what I
think you're going to say, and then if not, please
bring it up at that time.

BOARD MEMBER TWEETEN: Well, Madam
Chair, my comment goes directly to the point that
Sarah just made regarding the reviewing of the
entire record and so forth.

CHAIR DEVENY: Go ahead.

BOARD MEMBER TWEETEN: Thank you.
Sarah, sorry to interrupt you. Both parties have
taken exception to a number of Sarah's findings
based on the fact that Sarah's findings express
particular numeric values in micrograms -- or in
milligrams rather than micrograms because she
didn't use the appropriate Greek letter or
character to express those particular numeric
values.

CHAIR DEVENY: Excuse me, Chris.

BOARD MEMBER TWEETEN: I believe that
those are technical errors that can be corrected
without being considered rejection of those
findings of fact. And so at the appropriate
moment down the road, I'm going to suggest that we
would -- and hopefully both parties will consent
to this -- that we simply consider Sarah's
proposed decision modified to insert the
appropriate Greek letter designation in place of
the letter "M," which means milligrams, as opposed
to micrograms.

MS. CLERGET: We're aware of that.

BOARD MEMBER TWEETEN: So hopefully the
parties wouldn't spend much time on those.

CHAIR DEVENY: Okay, Chris. Thank you.
Sarah, would you please continue.

MS. CLERGET: I think Chris is correct,
and I have a list of those findings of fact that
have incorrect typos, and then there are also some citations that are incorrect, which as Chris just outlined I believe are essentially typographical errors or errors that don't affect the substance.

And so if you were to -- whatever your decision is, this list is available for you if you would like to include it in a modification of the facts that's non-substantive. So you don't have to, as Chris said, review the record in order to do that.

The proposed conclusions of law however are essentially yours to do with as you will. You don't have to review the entire record in order to modify conclusions of law, particularly any interpretation of the Administrative Rules or application of the Administrative Rules to the facts.

You can modify those at will, and the only thing is that any modification that you do obviously needs to be done in writing, so we have to put them forth with enough particularity that I can articulate in a written decision later.

So I think that covers all of the housekeeping, and unless you have any further questions, we can turn it over to the parties.
CHAIR DEVENY: I think that's fine. So at this point we'll start the oral argument. Do either of you have a preference who goes first?

MS. LAUGHNER: I think we go first.

MR. MOSER: Yes, I think CFAC goes first.

CHAIR DEVENY: I'm not going to put a time limit on you because we didn't allow you an extension as you requested, but I ask you to be as concise as possible, and if I feel like we're running way over time, I may ask you to cut things off.

MS. LAUGHNER: For the record, my name is Catherine Laughner with Browning, Kaleczyc representing Columbia Falls Aluminum Company. Thank you for the opportunity to provide argument, and I want to make a point of thanking Sarah, because we think she worked really hard in reading a lot of material, and wading through it, and really working to understand it.

We appealed the permit in 2014 because CFAC wants to be in compliance, and since 2014, there has been a lot of activity at the site. And Steve Wright, the Environmental Manager, is here, and if you guys have questions maybe at the end,
he can tell you what the current status is if you're curious. He's available here and willing to come down here, and answer your questions.

CFAC wants to be in compliance, and would really like to consolidate all of the activity up there, and move forward with consistent oversight.

So with that, John Tietz is going to give you oral argument.

MR. TIETZ: Good morning, Madam Chair, members of the Board. My name is John Tietz with Browning, Kaleczyc, Berry and Hoven, here on behalf of Columbia Falls Aluminum.

I'm presuming that everybody has read through -- hopefully not the copious amounts of materials that are there -- but at least the background that was provided in the Hearing Examiner order, which pretty well sets forth the procedural background and the historical permitting background for CFAC.

And so I'm not going to go into great deal with respect to the background, but I want to make sure, for the point of my argument, the playing field of what has happened at CFAC over time.
And so in 1984, CFAC was issued a groundwater discharge permit for discharges to the groundwater. That was then replaced in 1994 by the surface water, the first MPDES permit, the surface water discharge permit, and that remained in place through a repermitting process in 1999, when that permit was reissued, but was actually substantively different than the 1994 permit.

And then in 2003, when the 1999 permit was at its expiration date, CFAC made application to renew that permit, requested for the continuation of the mixing zones, both the groundwater mixing zone and the surface water mixing zone.

That permitting application was not considered by DEQ at that time. It was administratively continued, and remained continued until 2013, when the Department picked that application back up, made some requests of CFAC with respect to additional information. That was provided to the Department.

And then in 2014, a permit, a draft permit was issued, went through the comment process, and then a final permit was issued. And so it's that 2014 final permit that changed the
1999 permit substantively and fairly significantly, that bred the current appeal. And so that by way of very brief overview of the permit is to where we got to today.

And my presentation is not going to be lengthy, but CFAC does not object to the proposed order by the Hearing Examiner remanding to DEQ the rewrite for the 006 outfall. We agree that the permit needs to be rewritten so that CFAC can maintain compliance. That is foremost in CFAC's intent is to become compliant, remain in compliance with the permit, and to comply with the Water Quality Act and the Clean Water Act.

So we believe that the remand back with respect to all of the elements expressed by the Hearing Examiner in the order with respect to Outfall 006, that that needs to be as described in her order.

The order, however, fails to address the treatment by the pond system, and we included that in our exceptions. So the pond system historically received discharges from Outfalls 007 and 009. And we appealed the permit because previously, in the previous permit, in the 1999
permit, the treatment effects of percolation of water from those ponds into the groundwater was recognized in the permit for being in compliance with those discharges.

In the new permit, that percolation treatment was not recognized, and the permit set forth numeric limits end of pipe going into the pond, and those limits are frankly -- CFAC cannot right now meet those numeric limits.

DEQ did not provide a compliance schedule, even though this was a significant departure from the prior permit, the 1999 permit, that recognized that percolation treatment. And so CFAC gets put in a position where they can't maintain compliance with the permit. They're immediately out of compliance when that would go into effect, because that end of pipe numeric standard they can't meet.

And so we would request that the Hearing Examiner's order be amended to include a rewrite, or at least a reconsideration of the pond treatment, either to provide for a compliance schedule so that CFAC can maintain compliance and have a period to bring those numeric standards into effect; or to reconsider the treatment
effects of the percolation from the ponds.

And so that would be really the only issue with the Hearing Examiner's order that we would ask that the Board change, would be that remand to consider those issues. The ponds, there were findings of fact with respect to ponds, but there were never any conclusions in the order, so really that's the sole aspect there.

Now I have I guess a procedural question. Part of this also is my presentation is addressing DEQ's objections, or their exceptions and their briefing with respect to violations of 17.30.1311 and 17.30.1376 that the Hearings Examiner found in her order. Do you want me to make my presentation with respect to those now, or should I wait until after DEQ presumably argues its position on those matters? I'm not sure how you want to handle that.

MS. CLERGET: I think rebuttal might make more sense to the Board members, but if anybody disagrees.

CHAIR DEVENY: Let's go with rebuttal then.

MR. TIETZ: Okay. Then I will end my presentation there, and let Mr. Moser go.
MR. MOSER: Good morning, Madam Chair and members of the Board. My name is Kurt Moser, and I represent DEQ in this permit appeal case.

As Mr. Tietz explained in his opening statement here today, the case before you today concerns the appeal of an MPDES permit that DEQ issued related to CFAC’s industrial production of aluminum, and we issued that permit in 2014.

When DEQ issued the permit, it acted under the premise that CFAC could restart its aluminum production operations at any time. Because CFAC continued to represent that to DEQ, DEQ processed and issued the 2014 permit with that understanding.

Now, since the time that the MPDES permit was issued, many things have changed at the site. CFAC has now permanently closed and dismantled its aluminum production facility, and is engaging in remedial activities related to the site’s designation as a federal Superfund site. That designation occurred in September of 2016, about two months before we had the contested case hearing in November of 2016.

The Hearing Examiner’s proposed decision remands the permit to DEQ with instructions to
re-examine and rewrite the permit for Outfall 006. That's the outfall that's designated in the permit that discharges to the Flathead River.

While DEQ is not taking exception to the general concept of remand, particularly in light of the changed circumstances at the site, it does take exception to two central legal conclusions in the proposed decision.

First, the proposed decision's application of ARM 17.30.1311 sub (1), finding that DEQ cannot issue a permit that requires a permittee to immediately comply with effluent limits when it has information -- as we have here -- that the permittee will not be able to meet those limits immediately.

Secondly, the proposed decision's finding that DEQ did not provide required notice under ARM 17.30.1376 concerning DEQ's addition of Figure 2 to the 2014 permit. That figure, it's a diagram showing the final surface water mixing zones that were contained in the permit.

ARM 17.30.1311 is a permitting regulation that is entitled "Prohibitions," and it contains various subsections that prohibits the issuance of a discharge permit in different
situations.

But the proposed decision specifically bases some of its conclusions upon Subsection (1), which states, "No permit may be issued when the conditions of the permit do not provide for compliance with the applicable requirements of the Act," which is the Montana Water Quality Act, "or rules adopted under the Act."

The proposed decision concludes that CFAC's past monitoring data shows that it will be immediately in non-compliance with the permit's effluent limits for cyanide, and basically saying that therefore DEQ violated this provision and issued an unlawful permit because it has failed to provide for compliance.

DEQ disagrees with this interpretation. DEQ's interpretation of this rule is that it is prohibited from issuing a permit that does not have conditions that comply with the Montana Water Quality Act and its rules. Those rules require DEQ to impose water quality based effluent limits for cyanide when there is reasonable potential to cause or contribute to a violation of water quality standards.

Here the record is clear there is not
only reasonable potential to violate, but that CFAC's known discharges consistently exceed applicable cyanide standards by a significant amount.

Upon remand, this interpretation of this rule could potentially not allow DEQ to impose necessary effluent limits, and that would be in conflict with both State and Federal law.

This interpretation confuses DEQ's responsibilities when issuing discharge permits with those of CFAC. CFAC must comply with water quality standards. DEQ provides for compliance with the Montana Water Quality Act and its rules by writing a permit that contains limits that will protect water quality. If DEQ fails to include those limits in a permit, that is precisely how it violates ARM 17.30.1311 sub (1).

We are prohibited under that rule from issuing a permit that does not contain water quality based effluent limits when reasonable potential exists, irrespective of a discharger's ability to comply.

Now, it is unlawful under Montana statute and the Clean Water Act to discharge industrial waste into any State waters without a
permit. Discharging pollutants into waters of the state is not a right, it is an exception to the general rule that no discharges of pollutants are allowed. This decision seems to make it right, at least the interpretation of ARM 17.30.1311 sub (1).

Now, because this Board's decision effectively becomes the Agency's decision when it becomes final, it is also important to consider I think this point, and that is an Agency's interpretation of a rule is incorrect if it is plainly inconsistent with the spirit of the rule.

Interpreting a rule that is designed to protect water quality in a manner that first defers to the discharger's inability to meet water quality standards clearly violates the spirit of that rule.

Now, the proposed decision also suggests that DEQ must consider a compliance schedule as a result of its violation of ARM 17.30.1311, but this is also incorrect. As DEQ stated in its exceptions that it filed last Friday, ARM 17.30.1350 is the compliance schedule rule, and DEQ is not required to issue a compliance schedule in a permit simply because a discharger cannot
meet its legal obligations.

It is discretionary. DEQ -- that is a consideration if they can't meet it, that is perhaps the factor No. 1; but there are other considerations that are inherent when granting a compliance schedule.

Now, a compliance schedule is defined in rule as a schedule of remedial measures included in permit, including an enforceable sequence of interim requirements, for example, actions, operations, or milestone events leading to compliance with the Montana Water Quality Act and requirements thereunder.

Therefore, before DEQ can even consider a compliance schedule for a particular pollutant, it would have to make a reasonable finding that an enforceable sequence of interim requirements will lead to compliance with all necessary effluent limits.

As the record shows, CFAC never requested a compliance schedule here, and never proposed any interim measures it would take to meet the final effluent limits for cyanide. That's because CFAC wanted to continue the terms of the 1999 permit, which did not contain any
effluent limits for cyanide at all. CFAC did not propose to control these discharges. They wanted to continue them essentially without limitation.

Under those circumstances it was not reasonable for DEQ to establish any compliance schedule because there was no plan or future date for compliance.

When you establish a compliance schedule in a permit, you have to put a date certain that those limits will be met. It can't be speculative, it has to be definite, and you need to have those remedial -- you need to have those interim measures established that will get you to that effluent limit, which again, those effluent limits have to be in permits to comply with Federal and State law.

Even assuming upon remand that CFAC is now willing to work towards compliance with final effluent limitations and to establish a compliance schedule, DEQ believes that the Board's basis for a remand would center more upon ARM 17.30.1350, which is the compliance schedule rule, and not ARM 17.30.1311 as stated in the proposed decision.

Again, DEQ is prohibited under ARM 17.30.1311 from issuing a permit that does not
contain required effluent limits. A permit must contain such limits irrespective of a discharger's ability to meet those limits. Discharging pollutants into State waters is an exception, it is not the rule, and dischargers have no continuing right to discharge pollutants in perpetuity because they are unable to meet those standards.

So DEQ would ask that the Board reject the proposed decision's reliance upon 17.30.1311 sub (1). We believe it's misplaced.

The second area that DEQ takes exception with is ARM 17.30.1376. The proposed decision also faulted DEQ because it added a diagram to the final permit. That diagram was entitled Figure 2, and it shows that the established surface water mixing zones contained in the final version of the 2014 permit, even though it was not included with the draft permit.

As DEQ explained in its exceptions, ARM 17.30.1376 provides DEQ discretion to renotice a permit if it receives public comments that raise substantial new questions. The mixing zones shown in Figure 2 were already authorized through the
draft permit.

And even if those narrative descriptions that were contained in that permit did not provide a great level of clarity, the public comment process specifically contemplates that changes may be made to a final permit, provided such changes are explained in the required responses to comments.

Figure 2 did not provide any substantial changes from the mixing zones that had been described in the draft permit, and it was created based upon the comments received from CFAC. We explained those changes in the response to comments that's in the record. And so DEQ could ask that the proposed decision's reliance upon 17.30.1376 as a basis for the remand would be rejected by the Board.

Now, I'm also at the same place that Mr. Tietz was at, and that is this hearing is also not just an oral argument hearing on our exceptions, but the opportunity to provide a response to the exceptions, objections or exceptions of the other party. So in order to make a record, I can go through a rather laborious process right now of reading these. I don't know --
We were told that this is what we needed to do, that I can provide that in writing instead. I don't know what CFAC thinks about doing that. Otherwise, I would just provide my specific responses, and this is basically just to create a record, so --

MS. CLERGET: I think you could hear a response from CFAC on that proposal.

MR. TIETZ: So just so that I'm clear, Kurt, you're proposing just going through your response to our comments now or our exceptions?

MR. MOSER: Yes, just to basically make a record.

MS. CLERGET: How long is it?

MR. MOSER: Maybe ten minutes, maybe fifteen minutes.

MS. CLERGET: Unless the Board feels otherwise, I think it would probably be best to put in the record, unless the Board or CFAC agrees that submitting it written and attaching it to the record would be preferable. I think probably to be safe, we should probably just read it into the record, if everybody is amenable to that.

MR. TIETZ: That's fine.

MR. MOSER: So these are DEQ's response
to CFAQ objections.

    MS. CLERGET: Actually, Kurt, I'm sorry. I'm going to stop you. It might make more sense, since we told CFAC to wait for rebuttal, to let CFAC make their argument, and then read that in during rebuttal. Does that make sense?

    MR. MOSER: Sure.

    MS. CLERGET: Is that okay with everybody?

    CHAIR DEVENY: It seems to make sense to me.

    MS. CLERGET: I'm sorry to jump in quickly.

    MR. TIETZ: I guess a point of clarification. Are you planning on responding to CFAC's exceptions? Is that what you're reading in?

    MR. MOSER: Yes.

    MR. TIETZ: I'll start then with my rebuttal of DEQ's arguments with respect to the violation of 17.30.1311 and 17.30.1376.

    Oddly enough, with respect to DEQ's arguments about 17.30.1311 sub (1) and the finding of the Hearings Examiner that they violated that in not providing a permit that CFAC could comply
with, we actually agree with most of what Mr. Moser just explained.

However, DEQ makes the assertion that they have to write a permit that complies with the Water Quality Act; that's absolutely true. They have to provide effluent limits; that's absolutely true. But they say "irrespective of the discharger's ability to comply."

And that's a statement that DEQ is bringing into the statute or the rule that is simply not there. There is no basis for and no citation that DEQ makes for that addition to the rule. So the rule states that no permit may be issued when the conditions of the permit do not provide for compliance with the applicable requirements of the Act, the rules adopted under the Act.

So the DEQ's position is they have to set effluent limits in the permit, and as I say, that is true. And in their briefing, DEQ cites to the federal rule on that requirement which is found at 40 CFR 122.44(d) sub (ii), which says that effluent limits must be provided in the permit.

However, DEQ then is essentially saying
that effluent limits are numeric limits, numeric
effluent limits, at the point of discharge, and
that's not the case. 40 CFR 122.2 defines
effluent limitation as, "Any restriction imposed
by the director on quantities, discharge rates,
and concentrations of pollutants which are
discharged from point sources into waters of the
United States."

That is also reiterated in DEQ's own
rules at 17.30.1202 sub (13), which states that,
"Effluent limitation means any restriction or
prohibition imposed by the Department on
quantities, discharge rates, and concentrations of
chemical, physical, biological, and other
constituents, that are discharged from point
sources other than new sources into State waters,
including schedules of compliance."

So while it is true that DEQ has to
include effluent limits, it is not true that they
have to be numeric effluent limits at the point of
discharge. There are other mechanisms that DEQ
can use to set those effluent limits that a
discharger can comply with.

And the fact that it is not a numeric
standard is set forth or supported within the
federal regulation that was cited by DEQ at 40 CFR 122.44(k), which provides for best management practices. And what that regulation states is that, "Best management practices may be instituted to control or abate the discharge of pollutants when," sub (3), "numeric effluent limitations are infeasible."

And so in situations such as Outfall 006, where you have groundwater expressing to surface water, that gives you the ability to use BMP, best management practices, to regulate those effluents, to constitute an effluent limit to remain in compliance with the Clean Water Act.

So the other aspect is that because they have other opportunities -- one, mixing zones. Mixing zones allow for essentially a discharge, a numeric discharge into waters that exceed the limits, but they meet the limit by a certain, after a certain dilution period. There is also the ability, as Mr. Moser was talking about, compliance schedules.

So DEQ has at its disposal a tool box of alternatives that it could put into a permit that would provide for compliance, that would give a discharger the ability to comply with the permit,
while still meeting the Water Quality Act, the Clean Water Act, and the requirements that DEQ has to meet.

DEQ is treating it as an either/or. Either we comply with the Clean Water Act and the Water Quality Act, or we have to let them just discharge willy-nilly, and that's not the case. There are certainly mechanisms to provide for compliance, to provide a discharger with the ability to comply with the permit that's issued by DEQ, that complies with all the requirements in the Water Quality Act and the Clean Water Act, and still give them the ability to meet that compliance.

And DEQ has not made a substantive argument as to why they shouldn't have to create a permit that a discharger has to -- that they can comply with. That's the point of the Water Quality Act, it's the point of the Clean Water Act, is to bring dischargers into compliance with the Act; and provide --

Specifically when DEQ knows that a discharger is going to be in violation the moment that permit goes into effect, I think they have an obligation under the rule to provide for a
mechanism for that discharger to be able to come into compliance, not just immediately be out of compliance. And that's what the rule means.

And so I don't think the Department gets a pass on the rule just because they have to meet the Water Quality Act. They do. They have to meet the Water Quality Act, but they also have to provide the discharger with the ability to meet the Water Quality Act as well.

With respect to 17.30.1376, the Hearing Examiner found that DEQ violated that rule because the Department didn't provide an opportunity for the public and CFAC to comment on a figure that was in the final permit. And the statute requires that if the Department makes basically a substantive change to an aspect of the permit, that public comment is then either reopened or they have to modify the permit, and DEQ didn't do that in this circumstance.

DEQ argues that the public comment wasn't necessary in this case because it was merely an illustration of the mixing zones that were described in the 2014 fact sheet. And Mr. Moser pointed out that they did respond to, discussed in response to comments, which were
issued with a final permit that they addressed that.

However, the actual response to comment -- and I don't have the exhibit number for the response to comments, if you wanted to put it up, but I can read it in, and I will do so.

The comment had to do with the mixing zones, and the fact that mixing zones were not included in the permit. So DEQ's response here is that, "There are two independent aspects related to granting of a mixing zone which are discussed in Part 4(d) of the fact sheet."

One, "Delineation of the mixing zone, including relevant considerations for groundwater and/or surface water boundaries regulated by ARM 17.30 subchapter 5;" and two, "Setting of available dilution flow on a parameter specific basis to be used in determining reasonable potential to exceed standards and, if necessary, develop effluent limits at the end of pipe."

The comment then goes on to say, "As part of this permit renewal, the groundwater mixing zone characteristics were summarized in Table 22 Page 30 of the fact sheet. This data was the basis for the allowable dilution flow used for
calculating effluent limits in Part 4(e)," which was the second part of the two aspects.

It goes on to state, "However, DEQ did not provide a delineation of the mixing zones in the draft. Through this response to comments, DEQ is adding a groundwater mixing zone delineation for the three outfalls. A new figure was added to the final permit, which shows the groundwater mixing zones delineation for the three outfalls."

"DEQ developed a mixing zone delineation using groundwater flow direction based on the 1998 mixing zone study potentiometric map, and newly released EPA potentiometric contour map dated February 17th, 2014. The western boundary of the Outfall 007 groundwater mixing zone was limited to the previous southwestern boundary extent for the groundwater mixing zone presented in the 1998 mixing zone study."

At any rate, so their own comment indicates that there was something substantive to that delineation. It wasn't just a depiction of what was articulated narratively in the fact sheet with the draft permit. There actually was a substantive change. They did something in this response to comments that they didn't do in the
fact sheet, that they didn't do in the permit.

And so CFAC didn't get the opportunity to comment on that, and the public didn't have an opportunity to comment. And the question I think at this point is: How do you rectify that? Well, I think we're going back to remand to the Department, and there is going to be a rewrite, and that figure can be included in the public comment that's going to come off the rewrite, and so we would be offered the opportunity to comment on that at that time.

But I think the Hearings Examiner's conclusion that there was a violation of the rule is correct.

With respect to DEQ's exceptions, I think I've addressed the two primary concerns CFAC has for their exceptions in their brief. So I'll just quickly go through the other exceptions that they filed.

Finding of Fact No. 26. This is what was discussed with the units, that the order included a concentration in milligrams per liter rather than micrograms per liter, so we agree with DEQ's exception for Finding of Fact No. 26. Same for Finding of Fact No. 29. Same for Finding of
Fact No. 30. Same for Finding of Fact No. 31.

Finding of Fact No. 60 goes to the issue of Exhibit 2 depicting the surface water mixing zone. That's what I just discussed, so we're on the record there.

Actually I believe these are the two that the reference in the Hearing Examiner's order to the exhibit numbers was incorrect, and so we agree that those need to be corrected.

Finding of Fact No. 64, again, that's a units issue. We agree with that.

Finding of Fact No. 118, I don't think we have any argument with respect to the purposes that DEQ included Exhibits 1 and 2 from the prior 1990 permit, though I think it created confusion.

Finding of Fact No. 120 is the issue with respect to the public's ability to comment on Figure 2, and that's been addressed.

Finding of Fact No. 125, again, that's a concentration issue for milligrams versus micrograms, and we would agree with that.

And then with respect to the DEQ's objections to the conclusions of law is what I've already discussed in our oral argument, so that would be it for me.
MR. MOSER: Just to quickly respond, to rebut from some of the argument from Mr. Tietz.

Mr. Tietz is correct that you can't put narrative effluent limits or something called Best Management Practices in place instead of numeric effluent limits in certain circumstances. There must be a finding that numeric effluent limits are infeasible.

But one of the most important findings you must make if you decide to do any effluent limit, whether it's a BMP type effluent limit or a numeric effluent limit, is that the water quality standards are met in the waterway. And what we have here is significant evidence that they're not being met, and at least the criteria for cyanide are being exceeded by a significant degree.

And in this case, we have numeric limits, and it was not infeasible to apply numeric effluent limits in this case.

So specific to the exceptions, I would also say that to the extent CFAC's objections and DEQ's, I think we have I believe identified the same issues with the citations to the incorrect units of concentration. In most cases this was a micrograms per liter versus milligrams per liter
issue. I won't go through those specifically, but we agree that those could be changed. It was just an oversight.

There was also a comment concerning Finding of Fact 60 that Mr. Tietz raised. This issue does not specifically address the Exhibit 2 issue from the 2014 permit that we discussed about public notice. This one specifically, it just reverses the two, reverses these two exhibits that were part of the 1999 permit simply, and that's the issue there, so --

And as far as CFAC's specific, the ones we will address, first of all, CFAC's general objection. CFAC made a general objection that the order must rule on each proposed Finding of Fact based upon Montana Code Annotated 2-4-623 sub (4). The Montana Supreme Court has ruled on this issue and has disagreed in State ex rel. Montana Wilderness Association versus the Board of Natural Resources and Conservation, that's 2000 Montana 11 1982.

The Court found that that provision of MAPA does not require a separate and express ruling on each -- requiring finding as long as the Agency's decision is clear.
And that case also cited an earlier case, the Montana Consumer Counsel versus Public Service Commission, 168 Montana 180 from 1975, basically saying that if the proposed decision clearly adopts one fact, it doesn't adopt the other fact, it clearly is rejecting that other fact, and therefore the proposed decision doesn't have to explicitly address every proposed finding in an order.

Here the proposed decision adopts certain facts and clearly omits others, so there is no error in that regard.

In CFAC's introduction of its objections, it states that through special conditions, DEQ required CFAC to investigate site hydrology and institute best management practices. It then cites its own application to establish this.

It is important to remember that CFAC's application for a permit is not a regulatory document, cannot be relied upon to establish permit conditions. The MPDES permits that are contained within the record are the ones that, are the regulatory documents that establish any conditions, and they also contain the best
evidence of their content and meaning.

CFAC's citations to American Wildlands versus Browner are really irrelevant in this context. There are rules, we clearly have rules that allow mixing zones under the appropriate circumstances in Montana. DEQ is certainly not disputing that mixing zones are afforded certain dischargers in certain situations.

CFAC's objection to the Finding of Fact No. 34, the groundwater permit did not allow discharges to surface water. It was a groundwater permit. That's referring to the 1984 groundwater permit. If it allowed discharges to surface water, an MPDES permit would have been required; that's a surface water discharge permit, and groundwater discharge permit is not an MPDES permit. That 1984 groundwater permit is in the record, and it speaks for itself.

CFAC's objection to Finding of Fact No. 35. "There was no mixing zone granted in the 1984 groundwater permit." The permit is in the record and it speaks for itself.

DEQ also briefed this issue in its post hearing legal issue brief that was filed, and that's contained in the record, and is dated
December 12th, 2016.

   CFAC's objection to Finding of Fact No. 41, "The proposed decision correctly concluded that the 1994 permit did not contain any designated mixing zones, surface or groundwater, acute or chronic." The permits speak for themselves.

   The proposed decision also correctly concluded that neither DEQ nor the Montana Department of Health and Environmental Sciences issued a surface water discharge permit to CFAC or ARCO. This is supported by the hearing record, the permits, and is further supported by DEQ's post hearing legal issue brief. Again, that's the -- there was no surface water -- did not issue a surface water discharge permit when it issued the groundwater discharge permit.

   CFAC's objection to Finding of Fact No. 51, the March 31st, 1997 letter that CFAC references speaks for itself. It is contained in the record, and it is the best evidence of its content and meaning.

   CFAC's objection to Finding of Fact No. 62. Finding of Fact No. 62 is not incomplete. It describes a mixing zone, does not describe a
CFAC's objections to Finding of Fact No. 63. Finding of Fact No. 63 describes mixing zone considerations made in the development of the 1999 permit, and is not incomplete. The statement of basis for the 1999 permit speaks for itself, and contains the best evidence of its content and meaning.

CFAC's objections to Finding of Fact No. 66. This finding of fact describes conditions from the fact sheet that describe the rationale of conditions contained in the 1999 MPDES permit considering mixing zones. The EA is not a regulatory document. The Environmental Assessment document is not a regulatory document for purposes of regulating the discharges of pollutants to surface water. It is developed for purposes of compliance with the Montana Environmental Policy Act.

Furthermore, CFAC's additional conclusions concerning the Environmental Assessment should be disregarded because that EA speaks for itself, and contains the best evidence
of its content and meaning.

CFAC's objections to Finding of Fact No. 68. The finding does not misstate the conclusions contained within the statement of basis for the 1999 permit. The statement of basis is contained within the record, and contains the best evidence of its content and meaning.

Furthermore, CFAC's citations to the 1994 groundwater permit and the 1994 MPDES permit are incorrect because they do not establish any mixing zones, and CFAC's citation to a tentative draft permit from 1997 creates no binding requirements.

CFAC's objections to Finding of Fact No. 69. CFAC's objections to this finding is not supported by the 1984 groundwater permit or the 1994 MPDES permit. Furthermore, the 1997 tentative draft CFAC cites to creates no binding conditions, and should be disregarded.

CFAC's objections to Finding of Fact No. 108. This Finding of Fact correctly summarizes the cited material in DEQ's responses to comments. CFAC's attempt to add legal conclusions here to a finding of fact are erroneous and should be disregarded.
CFAC furthermore cites to a prohibition regulation, ARM 17.30.1311 Sub(7), for new sources and new dischargers. This reference is unsupported by the record, and does not apply here.

CFAC's objections to Finding of Fact No. 112 should be disregarded. Finding of Fact No. 112 accurately represents the cited record.

In-stream monitoring is not compliance monitoring for effluent discharges.

CFAC's objections to Finding of Fact No. 116 should be disregarded. Finding of Fact No. 116 accurately represents the cited record.

CFAC's objection to Finding of Fact No. 117 should be disregarded. Finding of Fact No. 117 accurately represents the cited record.

CFAC's objections to Conclusion of Law No. 4. The proposed decision's conclusions concerning Outfall 007 and 009 are correct, and CFAC's objections here should be disregarded.

Furthermore, CFAC's conclusions concerning mixing zones should be disregarded, based upon the hearing record, the various discharge permits, and DEQ's post hearing legal issue brief dated December 12th, 2016.
CFAC's objection to Conclusion of Law No. 7. CFAC's conclusions concerning mixing zones should be disregarded based upon the hearing record, the various discharge permits, and DEQ's post hearing legal issue brief dated December 12th, 2016.

CFAC's Conclusion of Law No. 8. CFAC's objections should be disregarded. Conclusion of Law No. 8 contains a reasoned opinion and cites authority.

CFAC's objection to Conclusion of Law No. 17 should be disregarded. Conclusion of Law No. 17 is correct. Cyanide is a toxic chemical under DEQ's Circular 7.

CFAC's objection to Conclusion of Law No. 27 should be disregarded. Conclusion of Law No. 27 accurately summarizes the cited rules.

CFAC's objection to Conclusion of Law No. 28. CFAC's objection should be disregarded. Conclusion of Law No. 28 accurately summarizes the cited rules. See also DEQ's brief in opposition to CFAC's motion for partial summary judgment dated January 4th, 2016, which was successful.

CFAC's objection to Conclusion of Law No. 29 should be disregarded. Conclusion of Law
No. 29 is supported by the hearing record, the permits themselves, which are the binding regulatory documents, and is further supported by DEQ's post hearing legal issue brief dated December 12th, 2016.

CFAC's objection to Conclusion of Law No. 30 should be disregarded. Conclusion of Law No. 30 accurately summarizes the cited materials, and is supported by the cited authority and reasoning contained therein.

CFAC's objection to Conclusion of Law No. 35 should be disregarded. Conclusion of Law No. 35 accurately summarizes the rules cited in the text of the paragraph.

CFAC's objection to Conclusion of Law No. 36 should be disregarded. Conclusion of Law No. 36 accurately summarizes the cited rule. See also DEQ's post hearing legal issue brief dated December 12th, 2016.

CFAC's objection to Conclusions of Law No. 37 should be disregarded. Conclusion of Law No. 37 accurately summarizes the cited rules. See also DEQ's post hearing legal issue brief dated December 12th, 2016.

CFAC's objection to Conclusion of Law
No. 41 should be disregarded. Regardless of its composition as a conclusion of fact or law, the conclusion is accurately based upon the record.

CFAC's objection to Conclusion of Law No. 42 should be disregarded. The conclusion is accurately based upon the entire record.

CFAC's objection to Conclusion of Law No. 51 should be disregarded. The conclusion is accurately based upon the entire record.

CFAC's objection to Conclusion of Law No. 55 should be disregarded. Regardless of its composition as a conclusion of fact or law, the conclusion is accurately based upon the entire record.

CFAC's remaining objections to the proposed order should be disregarded. The proposed order properly found DEQ complied with all requirements in its regulation of Outfalls 007 and 009. See also DEQ's exceptions to proposed findings of fact, conclusions of law and order for arguments concerning ARM 17.30.1311 sub(1) and our oral argument here today.

Again, for purposes of this hearing, DEQ asks the Board to find that DEQ did not violate 17.30.1311 sub (1) by requiring CFAC to
immediately comply with necessary water quality standards. If there is a mechanism whereby that matter can be resolved, it potentially could be resolved through the issuance of a compliance schedule, but the facts in the record did not support the issuance of a compliance schedule.

DEQ further asks the Board to find that it did not violate ARM 17.30.1376 by adding Figure 2 to the final version of the MPDES permit.

CHAIR DEVENY: Well, it might be a good time to take a break. Why don't we reconvene at 12:30.

MS. CLERGET: I just want to be clear that nobody is going to talk about this off the record, right?

CHAIR DEVENY: Okay.

MS. CLERGET: We may check with Chris that he can get back on.

CHAIR DEVENY: Chris, are you still on?

BOARD MEMBER TWEETEN: Yes, Madam Chair. I'm having a little trouble hearing you. Are you about to break for lunch? Is that what I understood?

CHAIR DEVENY: That's what we're thinking of, and we're just debating --
BOARD MEMBER TWEETEN: Could I make a request of the parties. I guess there is a blizzard of objections to the finding of facts from both parties, and understanding that if we sustain any of those objections, then -- leaving aside the technical ones that I talked about before -- but any substantive changes that the parties are suggesting to the findings of fact require all of the non-recused members of the Board to review the entire record, all the transcripts, all of the exhibits.

And it doesn't seem to me that many of those findings of fact objections are pertinent to the rather limited legal issues that have been presented by the parties with respect to this proposed decision.

I'd like to ask the parties during the lunch break to look at their objections to findings of fact, and identify those that are in fact material to the legal arguments that they're making regarding the proposed decision; and then come back and identify those for us.

And by implication that would mean that anything that they don't come back and identify can be considered to be immaterial with respect to
the legal issues, and not something that the Board would have to review the entire record in order to correct.

Am I making sense? Because I just think that many of these issues with respect to the finding of facts have not been connected by the parties to the particular legal issues that they raise with respect to the Hearing Examiner's proposed decision. They're just sort of out there in the abstract as things that the parties are suggesting that the Hearing Examiner has either misstated or stated mistakenly, or have omitted perhaps.

And I think the parties have to understand the burden that they're placing on the Board, if they expect us to go back and make all of those corrections. And I would like to put the burden back on the parties to come back after lunch, and tell us which of those objections to the findings of fact are really material things that we need to consider in order to decide the legal issues that are presented.

And my intention would be to suggest that the Board in fact disregard any of those objections to the findings of fact that aren't
material with respect to the issues that are raised here.

Otherwise it seems to me we're all going to have to go back and spend many, many hours reading transcripts, and looking at exhibits, and so on and so forth, in trying to sort this mess out. And I don't want to do that unless we absolutely have to in order to dispose of this matter.

CHAIR DEVENY: Thank you for that, Chris. I'm going to ask Sarah for her opinion on that for the Board to consider.

MS. CLERGET: I think that sounds like a good question for the parties, but they're indicating that they may have a comment which may be helpful at this point.

CHAIR DEVENY: Mr. Moser.

MR. MOSER: Madam Chair, members of the Board, Mr. Tietz and I just had a conversation, and we were wondering if we could potentially have a discussion with Sarah I guess off the record for about five minutes or so, or ten minutes, just to kind of discuss some of the things that Mr. Tweeten just raised, in hopes of maybe facilitating this.
MS. CLERGET: I think if that would facilitate this, I think that's possible, and we will come back and report to the Board what we discussed so that the Board is aware. So I think we can do that during the lunch break and then come back with either, as Chris suggests, a statement from the parties, or perhaps a statement from me, if we can resolve it in our conference.

CHAIR DEVENY: Okay. That sounds good. Chris, are you able to join us this afternoon?

BOARD MEMBER TWEETEN: I think so, sure, for a period of time. I have an obligation tonight that starts at 5:00 Central time, which is 4:00 your time. So hopefully we'll be finished with this by then.

CHAIR DEVENY: I think we're all in agreement for that. Let's go ahead and reconvene at 12:30 here today. That will give the folks to have time to talk, and for us to have lunch and digest. And remember, no talking to one another about these issues. With that, Chris, did you have something to add? Are you okay?

BOARD MEMBER TWEETEN: (No response)

CHAIR DEVENY: We'll have lunch now and reconvene.
(Lunch recess taken)

CHAIR DEVENY: I'd like to reconvene this meeting. Would you just check for Chris. And you could show for the record that everybody else is here.

MS. BASS: I believe he's on the phone. Do you want me to call his name?

CHAIR DEVENY: Chris, are you on?

BOARD MEMBER TWEETEN: I am.

CHAIR DEVENY: I think we're all back then. We can go ahead, and get started. Sarah, do you want to report on --

MS. CLERGET: Yes. So I met with the parties over the lunch break, and we have a list of the corrections. So what we're going to propose to do is I, as the Hearing Examiner, am going to withdraw the proposed order that I gave you in the packet, and correct it in the following ways that are on a list that we're going to put up on the Board here. And Chris, we'll read through that list for you on the phone.

But essentially Points 1 through 12 on the list are corrections to the units being incorrect, and the exhibits being incorrectly cited.
And then No. 13 on the list is a modification of my proposed fact No. 68. I'm taking out four words, so that proposed Finding of Fact No. 68 will now read, "The 1999 permit thus allowed CFAC discharges of cyanide in exceedence of the water quality standards within the mixing zone, which included basically the entire plant for the groundwater, and the back water and main channels of Flathead River for surface water, with the justification that CFAC could not control the discharges, and there was no anticipated impact."

And then I am changing my proposed fact No. 118 to read, "The February --" I'm taking out three words so that it reads, "The February 2014 fact sheet distributed for public comment included Exhibit 1 and 2, the figures of the groundwater and surface water mixing zones from the 1999 permit."

So I am, as the Hearing Examiner, resubmitting those findings of fact and my proposed order to you with those changes, and I would therefore ask -- and the parties and I have discussed this, and the parties have stipulated to these changes in my proposed order.

And my understanding from the parties is
that with these changes, they do not believe that they believe that the findings of fact are based on competent substantial evidence.

So the standard for whether the Board can modify findings of fact, according to 2-4-621, Montana Code Annotated, is that, "The Board may not reject or modify the findings of fact unless the Agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence."

So it is my understanding from the parties, which they can reiterate on the record, that they are not arguing that the findings of fact as presented in my current proposed order are not based on competent substantial evidence. And I would ask that the parties make a record about that, please.

MR. TIETZ: This is John Tietz for CFAC. That's correct.

MR. MOSER: This is Kurt Moser for DEQ. That's correct, what the Hearing Examiner stated.

MS. CLERGET: And the corrections are on the list in front of you, as I described to you, Chris.
So Chris, I believe that that answers your question. The parties are not advocating that the Board review the record in its entirety. They have disagreements with the findings of fact, but do not believe that those rise to the level of undermining the substantial credible evidence that the facts are based on. Does that make sense to everybody?

Chris, does that answer your question?

BOARD MEMBER TWEETEN: Madam Chair, this is Chris. Yes, Sarah. I want to thank you and the Counsel for the parties for your diligent work in this area. I think you relieved the Board of a substantial potential burden here, and I for one am very grateful, and I think other Board members probably share my feelings with respect to that, so thanks very much for your good work.

MS. CLERGET: That leaves us with the conclusions of law. So --

CHAIR DEVENY: I think maybe for purposes of just getting through these findings of facts, I think I'd like to just have a motion that gets us to where we are with the findings of fact, and deal with the conclusions of law separately.

MS. CLERGET: That makes sense.
CHAIR DEVENY: So I would like to move that the Board accepts the Hearing Examiner's proposed findings of fact, with the modifications that have been outlined orally, and that are on the board and the fact sheet.

MS. CLERGET: Which we will attach to the record. Do you want to mark it? We'll attach it to the record as Exhibit A to this hearing transcript.

CHAIR DEVENY: Is there a second to my motion?

BOARD MEMBER HANSON: Second.

CHAIR DEVENY: All those in favor, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Motion passes, so the findings of fact have been approved. So let's move on then to the conclusions of law. And the Board members have an opportunity now to ask any questions they might have of either of the parties.

(Whereupon, Exhibit A was marked for identification)
BOARD MEMBER TWEETEN: Madam Chair, this is Chris again.

CHAIR DEVENY: Go ahead.

BOARD MEMBER TWEETEN: May I ask Counsel for both sides, the Department and CFAC, just picking the low hanging fruit first here.

Can you identify for me anything that's shown in the exhibit, I think it is the photograph of the mixing zones, the aerial photograph, the drone photograph, or whatever it is, whatever is depicted in there that is not found in the recital that was in the proposed findings of fact that was available for the public to comment on?

What's the difference between the exhibit and the narrative findings with respect to the description of the mixing zone?

MR. MOSER: This is Kurt Moser with DEQ. The physical pictures were not, the physical pictures themselves were not in the draft permit that went out for public notice. They were added in response to comment, and they are narratively described within the permit itself, and there were exhibits that were cited in our brief from the record that explain that.

If one were to look at the 2014 permit
itself, it does explain mixing zone. It does have reference to the mixing zones, but it is also contained within the fact sheet for the 2014 permit which was issued in February, because we issue fact sheets with draft permits now. And we don't modify the fact sheets later. They are modified by the responses to comments.

So the administrative record sort of in a tighter sense of this permit is the draft permit, the fact sheet, and the public comments which modifies the fact sheet to the extent any changes are made. So it is explained in those references that are in our brief.

CHAIR DEVENY: Is it possible to show this up on the board for the Board members?

MS. CLERGET: Yes. (Complies) So this is -- I think it is 22. The final fact sheet, was it 22?

MR. MOSER: This should be D-12 at 29 to 31. So that's Department's Exhibit 12.

MS. CLERGET: So this is exhibit Figure 2 attached to the 2014 permit; do the parties agree?

MR. MOSER: Yes.

MR. TIETZ: Yes.
MR. MOSER: And if you want it in color. Did you get it in color? You can get it on -- that's Exhibit 30, DEQ's Exhibit 30. But this is what was attached to the final permit. It was not attached to the draft.

MR. TIETZ: Could we put up the actual fact sheet, too?

MS. CLERGET: Sure.

MR. TIETZ: That would be Page 30 of the fact sheet.

MR. MOSER: I think if you look at what we cited in our exceptions briefs was Pages 29 to 31 on the fact sheet, which is D-12.

MS. CLERGET: Where in D-12 is it narratively described?

MR. TIETZ: Page 30, I believe.

MR. MOSER: On Pages 29 to 31. That was the citation that's in the brief.

So starting on Page 29 of the fact sheet, it explains, I guess, the history of the mixing zones, what DEQ intended on doing, changes, general changes that it was going to be making to the mixing zones.

Then it talks about surface water mixing zones starting on Page 30. And then it talks
about acute mixing zones and chronic mixing zones.

MS. CLERGET: Here you go, guys. The fact sheet is on the left on the board. For the purposes of the record, this is DEQ-12 at Pages 29 to 31, or 29 to 30. And on the right is exhibits that were attached to the final permit, which is --

MS. SOLEM: DEQ Exhibit 30.

MS. CLERGET: Chris, I apologize that you can't see these. But what is on the right is a color photo with some delineations on it and some text, and then on the left is the narrative fact sheet that was put out for public comment.

BOARD MEMBER TWEETEN: I guess my question is -- understanding that a picture is worth a thousand words. If the photograph actually has something on it that is substantially in addition to or different from the material that was put out for public comment, that would be one thing.

If the photograph is largely cumulative of the narrative that was put out for public comment, I don't see why this is a problem. So that's really why I'm asking the question; and not having it up in front of me, I'm not in a position
to really say much about that, other than to say that that's why I raised the question.

I understand the importance of the right of public participation and so forth, but on the other hand, the simple fact that there is a photograph that was not available for public comment by itself doesn't really tell me much. So that's the reason why I asked the question, and maybe you can enlighten me a little bit about why this is an important issue.

MR. MOSER: This is Kurt again, and I'm sure Mr. Tietz would like to have an opportunity to talk about this as well. But just to -- if we want to go through the references that we're referencing in the brief, the exceptions, this is, now you see this is where we're talking about the surface water mixing zones on Page 30, some conclusions about acute and chronic life standards.

Then going to Page 31, we're talking about the acute mixing zone, the chronic mixing zone, and there are two other documents where we were discussing this as well.

Obviously the permit itself, the draft permit on Pages 3 to 4 -- that's D-15 if you want
to show that. That's Pages 3 and 4. You can see related, these mixing zones are related to specific outfalls, and so you can see here there is additional description here based upon the outfalls.

So you can see, you know, it says mixing zones granting chronic dilution of 10 percent. No acute dilution. You can see with the various outfalls, there is listed descriptions, and it continues on to the bottom of Page 4.

And then the other important part that we've argued, that DEQ has argued is an important part of the process of following our rules is the responses to comments. And in this case we cited responses to comment at Pages 3 and 4, and this would be D-18.

MS. CLERGET: I don't think it is 18.

MR. MOSER: D-18.

MS. CLERGET: The responses to comments?

MR. MOSER: Yes, it is the proposed responses to comments. It is like DEQ --

MS. SOLEM: 19?

MR. MOSER: I guess that cite is wrong.

MS. SOLEM: Three and four.

MR. MOSER: Pages 3 and 4, not Comments
3 and 4. So starting -- if we go -- keep going down a little bit.

MS. CLERGET: Comment No. 28, is that what you're looking for?

MR. MOSER: I was looking for 28. It is where we discussed -- I apologize. That citation is incorrect. It is D-19 above. I guess I got it right in the earlier reference to it, D-19 and 13 up above in my brief talking about Comment No. 28.

This is where we're explaining why we did what we did, why we added the diagrams, and explains that we had gotten this comment. This comment was from CFAC. So we had added it to provide more information.

And I guess in addition, whether or not it is substantially changing just -- and I'll let Mr. Tietz talk after this, I think, but -- What we've concluded and what we've argued is that it wasn't substantial, it wasn't a substantial change such that it would necessitate going back out for public notice.

And so we don't think a substantial change occurred from what we did in the draft materials to what ultimately happened. And we also think DEQ is afforded the ability to make
changes, and that's important, because there are
some changes that can be made as a result of
receiving comments.

If things aren't quite as clear as
someone would like them to be, we can make -- we
do things like that. So it is not simply a matter
of making a change that's a clerical error or
something like that. We can make changes that are
important changes.

It is just we decide if they're very
substantial or not, and based upon the way the
rules are written, we do have a fair amount of
discretion to make those changes, and it is an
important amount of discretion to have, and that's
why we raised this issue, because the Agency does
need that kind of discretion, because going
through the administrative process, it is
important to have that ability.

So I'll conclude then and I'll let Mr.
Tietz talk.

CHAIR DEVENY: Mr. Tietz, would you like
to comment on --

MR. TIETZ: Yes, please. Could we go
back to the fact sheet at Page 30.

So essentially what happened was that
the draft permit came out with a fact sheet, and it included the depictions of the mixing zones from the 1999 permit. And those appeared to be, to at least these reviewers, that that was what the mixing zone was going to be in the new permit. And then once the final permit came out you have Figure 2, which was obviously significantly different than the exhibits that were there.

The issue here is that Figure 2 was a depiction of the actual delineation of the parameters of the mixing zone. And you have to read 29, 30, 31 in the draft, or in the fact sheet, but nowhere in there does it describe narratively the delineation of the mixing zone.

It talks about the flow; it talks about the amount of water; you've got your hydrogeology; about what your transmissivity is, and the other aspects of groundwater flow through the area. And that's one component of delineating the mixing zone, as setting the available dilution flow on a parameter specific basis.

But the other aspect is that you have to delineate the boundaries of the mixing zone, and nowhere in that, in either the 29, 30, 31 discussion of the mixing zones, nor in the
description of the individual outfalls, is there actually a narrative description of the delineation of the mixing zone. The only delineation comes out in this drawing after the permit has been issued.

And so what the methodology for actually drawing these lines on the map, to depict where the mixing zone is, where the edges are, where your compliance points are, the first point that that information was conveyed to the public or to CFAC was when Figure 2 was issued as part of the final permit.

So I mean there is a lot of description of mixing zone, but there is no narrative description of what those delineated boundaries are of that mixing zone except for Figure 2. And CFAC and the public never had the opportunity to comment on the appropriateness or how these delineations were made because it wasn't put in the permit until the final.

CHAIR DEVENY: Questions from the Board.

BOARD MEMBER HANSON: I have a question just to make sure I'm following this correctly.

So there was a figure that was provided with the fact sheet that showed mixing zones that
were different?

MR. TIETZ: Yes, and those actually came
up earlier.

MS. CLERGET: We can show them to you if
you want.

BOARD MEMBER TWEETEN: Madam Chair, this
is Chris again. So Mr. Tietz, what areas of
concern or controversy did the public find out
about for the first time when the photograph came
out that are at all significant or material with
respect to this decision?

MR. TIETZ: Well, it has to do with the
fact of being able to look at that, the
determination of the boundaries, and look at that
in the context of the mixing zone and what was
being proposed. I can't specifically discuss what
the technical aspects of that are. I'm afraid I
can't. Steve may be able to lend some insight to
that.

But the reality is that the delineation
was never available for comment, and I think that
that aspect alone violates the statute that they
should have that ability. Sorry.

So the depiction on the left is what was
included in the fact sheet, and that was a
depiction of the mixing zones from the 1999 permit. And so the depiction of the mixing zone for the surface water, and there is a similar depiction of the groundwater mixing zone, that one, that were included in the fact sheet.

And that was one of the issues we discussed with the Findings of Fact, and what the purpose of those was, and that was an issue that DEQ was trying to demonstrate in that fact sheet.

But those were the drawings that were included in the fact sheet as compared to the figure that was included in the permit.

BOARD MEMBER TWEETEN: What did CFAC find out for the first time when it saw the photograph?

MR. TIETZ: Where the boundaries of the mixing zone were, so where in the river the mixing zone was included, where in -- well, there wasn't a groundwater mixing zone. So it was where in the river the boundaries of that mixing zone were, how far down it went, what sections of the river were included within the mixing zone, so where the compliance points were for the mixing zone.

BOARD MEMBER TWEETEN: And is that all?

CHAIR DEVENY: John, you had a question
BOARD MEMBER TWEETEN: Excuse me, Madam Chair. I'm not -- I have another question for Mr. Tietz. Was that all?

MR. TIETZ: Just a moment.

BOARD MEMBER TWEETEN: The identification of the boundaries of the mixing zone, is that the only thing that was new about the photograph that you didn't know before?

MR. TIETZ: Correct.

BOARD MEMBER TWEETEN: How does that relate to the arguments that you're making with respect to your exceptions to this order?

MR. TIETZ: The exception to the order is that the Hearings Examiner found that DEQ violated the rule with respect to not providing public comment and the opportunity to comment before the permit went final on what the delineation of the mixing zone was.

And so we're supporting the Hearing Examiner's finding that the failure to allow for public comment and CFAC's comment as to the respective -- the delineation of the mixing zone prior to the permit going final was they weren't provided with that ability to comment, and so that
was a violation of 17.30.1376, because we believe that's a substantive change that warranted public comment.

BOARD MEMBER TWEETEN: Why does CFAC have standing to make that argument?

MS. CLERGET: Chris, sorry. This is Sarah. I'm just going to jump in here. DEQ is making that argument, not CFAC. DEQ is making the argument that the Hearing Examiner's conclusion of law is incorrect.

BOARD MEMBER TWEETEN: We're being told that the public was denied its right to participate, but nobody from the public is here making that argument.

MR. TIETZ: CFAC was also --

BOARD MEMBER TWEETEN: I don't know why either DEQ or CFAC has standing to make that argument on behalf of the public. If somebody from the public was upset because they didn't have a right to comment, why aren't they here? Why haven't they filed a lawsuit in District Court?

And hasn't the time for making arguments under the right of public participation passed? As I recall it, the period of limitation for making those arguments is relatively short. Why
are we bothered by this argument now if nobody
from the public has even felt aggrieved enough to
show up?

    MS. CLERGET: Chris, this is Sarah. I
guess I want to be clear. I made a conclusion of
law that the permit as issued violated the ARMs
that required DEQ to put the permit before the
public and allow them to comment on it, the public
and CFAC.

    So DEQ has taken issue with my
conclusion of law, which was part of my remand
decision, that these exhibits, by not being
included until the final draft -- or the final
permit, were violative of that ARM. So DEQ has
taken exception with that conclusion of law.

    BOARD MEMBER TWEETEN: I understand that
now, but my question is still the same. The right
that you're arguing about is a right that belongs
to the public.

    MR. TIETZ: May I? So --

    BOARD MEMBER TWEETEN: Nobody from the
public is here, and I've tried to find out from
CFAC how the failure to include this photograph
has affected their rights, and I guess I still
haven't heard much that I find very persuasive
that CFAC was severely prejudiced by the fact that
they didn't see this photograph until later.

So why does the Board have to deal with
this argument at this point, when it doesn't sound
like a member of the public isn't here, and it
doesn't sound to me like CFAC has been prejudiced?

CHAIR DEVENY: Mr. Tietz, did you have a
comment?

MR. TIE TETZ: I would just say that the
rule says that the comment period, if there is a
substantive change, the comment period can be
reopened to give interested persons an opportunity
to comment of the information argument submitted.

So obviously clearly CFAC is an
interested person. This doesn't just run to the
public, it runs to CFAC as well. And the question
is whether or not the change is a substantive
change that warranted CFAC's ability to comment on
it at the time, and I don't believe that what our
post hoc rationalization of what our potential
impact was now is relevant. The question is what
was done at the time, and whether that was a
substantive change that warranted opening up,
reopening of public comment.
BOARD MEMBER TWEETEN: But I don't think the Board has the authority, and I think that MAPA is fairly clear on this point, that administrative action shouldn't be set aside without a showing of prejudice on the part of somebody. Like I said, I haven't heard that from anybody.

Let's assume that you're right, and let's assume that the Department technically violated the rule. Why isn't that harmless error? Why should we set aside the rule, or set aside the Department's decision in the permit, based on an allegation of a violation that doesn't seem to have been prejudicial to anybody? At least nobody is in front of the Board right now.

CHAIR DEVENY: I don't think we have an answer to your question, Chris, so perhaps -- Sarah, did you have a comment?

MS. CLERGET: No.

CHAIR DEVENY: John Felton has on this related --

BOARD MEMBER TWEETEN: I guess Madam Chair --

CHAIR DEVENY: Just a second.

BOARD MEMBER TWEETEN: When we get to the point of taking up this particular exception,
I'm going to suggest that it be rejected on the grounds that the mistake, if made, was immaterial.


BOARD MEMBER FELTON: Thank you. I'm trying to figure out what I think might be the materiality piece of this. So first of all, I have to get a little --

The mixing zone picture with the outline of the actual mixing zone, I presume that at the downstream end of that is where compliance must be met; is true or false?

MR. TIETZ: That's correct.

BOARD MEMBER FELTON: On the 19 --

CHAIR DEVENY: DEQ is saying that's false.

MR. MOSE: We can wait. I mean if you want to hear me talk about it, I mean Mr. Tietz is up there, so --

MR. TIETZ: So the mixing zone, the intention of the mixing zone is it allows for dilution of a parameter. So a parameter can go into the water body above the standard, and it needs to meet the standard at the end of the mixing zone.
BOARD MEMBER FELTON: That was my question. So when we look at Outfall 006 chronic mixing zone outlined in yellow, presumably at the downstream end of that, then compliance needs to be met; is that true?

MR. TIETZ: That is my understanding of the mixing zone, yes.

BOARD MEMBER FELTON: Does DEQ think that's true or is that not true?

MR. MOSER: This was actually an issue that came up in these proceedings, because the way that it was treated in 1999, it was different than the way it is treated today.

More importantly, you monitor at the outfall location, and the concentration that you're allowed essentially creates the allowable size of the mixing zone, but the compliance point is the end of the pipe. That's where you monitor.

Now, yes, there is a mixing zone that's allowed, but that is not where we -- we don't take compliance measurements at the end of the mixing zone.

Now, in the 1999 permit, it was different. But in the way DEQ operates in the more modern era, the effluent limits are set based
-- sort of you back calculate to the effluent limits.

And so the important thing -- and this didn't change from the draft to the final -- is the effluent limits that were coming out of the end of the pipe. So that's the part that matters. From our perspective, that's what we consider the actual compliance point for effluent limits.

Now, there is a delineation, and I believe CFAC wanted a delineation, because as stated in -- or wanted more certainty on that based on the public comment.

BOARD MEMBER FELTON: So if the point of compliance is at the end of the pipe, what becomes magical about the end line of the mixing zone? Can you move the mixing zone? This is obviously 30 miles downstream from where it is here.

MR. MOSER: Hopefully not, but here's an issue, though. If we monitor -- The reason we don't do it like that anymore is that if we monitored at the end of the mixing zone, there is nothing to enforce, because we can't prove that the chemical came from that pipe. We can only prove that there's an exceedence of water quality standards. So enforcement is extremely difficult.
MR. TIEZ: Can I clarify?

BOARD MEMBER FELTON: I'm trying to understand what the end of the mixing zone means.

MR. TIEZ: I think I can --

BOARD MEMBER TWEETEN: But Madam Chair, that's all well and good, but the time for delineating that argument in CFAC's exceptions and briefing has long passed, and I don't remember seeing that argument explained in any of the papers that were filed in front of the Hearing Examiner with respect to prejudice, and the Hearing Examiner certainly didn't make any sort of finding with respect to prejudice.

I don't think -- I think it's way too late for CFAC to come in and decide what their prejudice is at this point during the hearing. I mean they're having an argument with DEQ now about a point that DEQ has never heard before today, as far as I can tell from the papers, at least the papers that I reviewed.

So I guess that doesn't solve my problem with respect to this allegation. And I think that CFAC had its opportunity to identify prejudice and give DEQ an opportunity to argue it in the papers before this hearing started, and they didn't take
advantage of that opportunity, as far as I can
tell, unless I'm missing something in the papers
that we've seen up until today.

So I think it is too late to come in
front of us during the hearing, and suddenly
decide that this is the reason why this is
material. DEQ and CFAC should have been arguing
this in their paperwork, and they didn't. So as
far as I can tell, there is no issue here for us
to review at this point.

CHAIR DEVENY: Sarah, did you have a
comment?

MS. CLERGET: I guess I want to clarify.
Chris, this was a point that was argued at the
hearing. There was evidence presented about the
facts that this was not -- that the exhibit not
being included until the 2014 final permit, there
was evidence presented by CFAC about how that
affected them, and there was evidence presented by
DEQ about the same arguments that you've heard
here today about that it was included enough that
they should have been on notice.

So it was an issue at the hearing. I
made a finding of fact that the exhibit was not
included, and I did not make findings of fact or
conclusions of law about prejudice specifically, although the conclusion of law stating that the inclusion of Exhibit 2 in the 2014 final permit is violative of the ARM requiring that the public be allowed and CFAC be allowed to comment on this exhibit.

I mean the fact that I found that as a conclusions of law indicates what I thought about the fact that I found that it was not included, and how that materially affected the rights of CFAC and the public.

CHAIR DEVENY: John, did you have any -- I don't think we want to belabor the technical issues of the diagrams because they were discussed during the hearing, but I do want to make sure you're clear on --

BOARD MEMBER FELTON: I am. Thank you.

CHAIR DEVENY: I'm wondering if we could keep this conversation about this particular matter in mind, and move on to maybe discuss a couple of the other points. Chris, are you comfortable with that, or would you rather hammer this out a little longer?

BOARD MEMBER TWEETEN: I think we've pretty much said all there needs to be said about
CHAIR DEVENY: I would like to go to the conclusions of law and look at under 4(a), where the conclusions of law said that the permit does not provide for compliance as required by the ARM. And DEQ, in my opinion, gave some compelling evidence as to why they are not required to in their permit provide for compliance. And I'd like to hear from Mr. Tietz a little bit of response to that, and then again further from Mr. Moser.

MR. TIETZ: So I guess I'm not clear exactly what your question is.

CHAIR DEVENY: Did you agree that the permit does not provide for compliance as required by the ARM, the finding of -- the conclusion of law?

MR. TIETZ: I do.

CHAIR DEVENY: And what do you base that on?

MR. TIETZ: So as I described in my prior argument, I think that the permit obviously has to comply with the Water Quality Act. There is no question about that. The permit has to set effluent limits. That's correct.
The issue is whether or not the permit issued by DEQ has to provide for compliance, provide a mechanism for the discharger to be in compliance. Can DEQ issue a permit that under known circumstances put the discharger into immediate non-compliance? The discharger has no ability to comply with the permit the moment it becomes effective.

And we believe that the rule requires DEQ to draft a permit that complies with the Water Quality Act, that provides for effluent limits, but also creates a situation where a discharger can be in compliance; and whether that means provide for a compliance schedule --

Which DEQ has the ability to do, although DEQ has argued that CFAC didn't ask for it. They gave us a compliance schedule for ammonia discharges that we didn't ask for, but they included that.

So our position is that the permit that is issued has to provide a road to compliance. It can't just shut the gate off and say, "Here's your permit. You're out of compliance, and now you're getting fined for being out of compliance." I think it has to give the permittee a road to
CHAIR DEVENY: Does that mean then that DEQ would be required to issue all permits with giving whoever applies for that permit the ability to comply?

MR. TIETZ: I would think that would be implicit in the regulations that they have the ability to comply, particularly in this situation where it is a long standing situation. There have been multiple permits. The 1999 permit had certain parameters, it had certain elements to it, that significantly changed in the 2014 permit.

DEQ knew that CFAC couldn't comply with those new elements to the permit, and yet it didn't provide any mechanism for CFAC to be able to achieve compliance, whether that would be a compliance schedule, or BMP's, or other types of situations.

And so we believe that the rule requires DEQ to provide a permit that a discharger can comply with, without violating the Water Quality Act. I mean in no circumstances are we saying that DEQ should violate the Water Quality Act. It can't. The permit must comply with the Water Quality Act.
But there can be mechanisms that DEQ has the authority and the latitude to draft a permit in a way that gets the permittee to be able to achieve compliance, that it is a possibility. Giving a permit that's impossible to comply with from the very get-go seemed to be in violation of what the rule states.

CHAIR DEVENY: And if I recall correctly, there was a lot of material to review, but CFAC asked to have a mixing zone, but didn't ask for -- but didn't suggest doing anything else to come into compliance, and didn't ask for a compliance schedule.

MR. TIETZ: Correct, that CFAC did not ask for a compliance schedule with respect to the mixing zone.

I'm going to take this back to another issue that has been kind of underlying this entire case, which has to do with whether or not DEQ has to request information for the mixing zone, and admit information to evaluate the mixing zone. This was part of the summary judgment brief or motion that we submitted and that was denied.

But the 1999 permit included the mixing zone, the surface water mixing zone for cyanide,
and that was requested to continue in the 2003 application, it was included in the 2013 information reapplication, and there was never any request from DEQ, no indication from DEQ that the mixing zone was at risk.

CFAC had provided a full blown mixing zone study in 1998 that the 1999 permit was based upon, and CFAC was under the impression that that mixing zone had been established by DEQ as a proper mixing zone in the river.

And when we went through the whole new permitting process, there was never any indication, there was never any request from DEQ that CFAC needed to provide anything more to demonstrate that the mixing zone was still appropriate, or that it was correct, until we got the permit, or the draft permit that indicated no mixing zone was going to be issued.

And so we never had the opportunity, quite frankly, to understand that it was going to change, that we could have requested a compliance schedule. It was just that the mixing zone was now inappropriate, and that was part of the comments that CFAC made was with respect to the that mixing zone, and what information was -- that
no information was requested.

So the short answer is no, CFAC never requested a compliance schedule for the mixing zone.

CHAIR DEVENY: Mr. Moser, would you like to respond to Mr. Tietz's statements.

MR. MOSER: Yes, Madam Chair. So here we're talking about an issue of how to interpret a specific rule, and obviously DEQ disagrees with the interpretation that's contained within the proposed decision, because we believe that the permit limits themselves are how you get compliance with the Act. And so that is how we read it. In other words, we can't issue a permit that doesn't have those limits in it.

Now, if a compliance schedule was put into a permit, you still would have those final effluent limits in the permit. You may have interim effluent limits that you are moving towards getting those final effluent limits, but nonetheless, they would be in the permit. They wouldn't be effective until the date that that occurs.

If the Board decides that that's something that DEQ has to look at on remand, there
are definitely different things that are occurring because of the changed circumstances when this gets remanded.

But the conclusion that we must in all circumstances issue a permit that basically whitewashes what's going on, and say, "This is what we're going to do. We're just going to allow you to comply," we can't do that. I mean that specifically violates 17.30.1311 sub (1).

I guess that's the point that we've made, and I think we also argued it in our brief as well.

CHAIR DEVENY: In your exceptions brief, I think you did. What about the allegation that you never informed CFAC about the change between the 1999 permit and the 2014 requirements that were going to go into the permit?

MR. MOSER: I don't think that the findings of fact that are in the order before the Board indicate that. I do think the record indicates and the transcript indicates that we did have discussions with CFAC about a lot of issues, that things were going to change this time around when we issued the permit.

We had discussions about
recharacterizing the nature of Outfall 006, and so many of their issues relate to that. Mr. Tietz noted that, made a comment that we weren't going to provide a mixing zone. Obviously we provided many mixing zones, but the mixing zone we didn't provide was an acute mixing zone for cyanide, because the agency determined that that was not in the interests of protecting the river.

And as the findings show, EPA actually recommends that you do not give an acute mixing zone for toxic substances. Again, this is a toxic substance, and it's cyanide. And there was a lot of testimony on the record about cyanide. We had experts on both sides that discussed that, and to the extent that that's been recapped, I mean it is in the order. So --

CHAIR DEVENY: Do Board members have any questions? I'd like to stick to the issue of the permit does not provide for compliance.

BOARD MEMBER BUSBY: I've got a couple of things I'd like to clear up in my own mind related to that. And I don't care which one of you answers. Was CFAC in compliance with the permit that they had previously, and totally in compliance, or
substantially in compliance? I don't care what
term you use.

MR. MOSER: I think the proposed order
makes certain findings on that, and so I feel I
guess a little hesitant to say it. I think that
they were substantially in compliance with the
previous permit. There weren't any --

BOARD MEMBER BUSBY: And that was --

MR. MOSER: But remember there weren't
any limits, so I mean there were no limits on
cyanide in the previous permit. So --

BOARD MEMBER BUSBY: I understand that,
but as far as the permit is concerned, they were
substantially in compliance. Okay.

MR. MOSER: I believe that's the case.

MR. DEXTER: In the new permit, which
was issued in 2014, if I understand this
correctly --

MR. MOSER: Yes.

BOARD MEMBER BUSBY: -- you changed the
location of the compliance point. And the
previous one was at the -- where? At the end of
the mixing zone? Just tell me if I'm all wet on
what I think I understand.

MR. MOSER: That's accurate.
BOARD MEMBER BUSBY: So what you do with the permit is you went from black over here to white with no in between; is that correct? In other words, you went from compliance here to --

MR. MOSER: I would agree there was significant differences between the two permits, yes. I don't know if I'd quite characterize it like that, but yes, there was significant differences.

BOARD MEMBER BUSBY: There is significant differences, but there was no compliance -- and I think Mr. Tietz answered this for me -- there was no compliance schedule to go from Point A to Point B on the permit itself?

MR. MOSER: Well, there are. I mean there are in some cases, yes, and some no. But what we're talking about I think primarily is the discharge --

BOARD MEMBER BUSBY: So I'm trying to get from Point A, the 1999 permit that was effective to 2014, and the Point B is the 2014 forward. In DEQ's mind, there was a black and white cut date on that; and this point you had to have your compliance at this point, and 2009 -- or the 1999 permit, the cut point was different, or
that compliance point, however you want to put it, was different. But this change made a tremendous
difference as far as CFAC was concerned in the limitations they're allowed.

MR. MOSER: Yes, it did.

BOARD MEMBER BUSBY: Was DEQ aware that there was no way they could meet the new permit limits?

MR. MOSER: In the development of this permit, DEQ asked CFAC to try to characterize the nature of their discharges, particularly from the old landfills that are located on the site, which has been identified as one of the primary sources of the cyanide fluoride. Now, it is not the only source, so -- and this is where some of this gets somewhat confusing.

But the difference that was in this permit was that DEQ no longer included that as a point source or as a source for the discharge, because that is upgradient. It is basically those are -- I don't want to get this -- it's either the side or above where the location of the plant is.

That was no longer included as a source, but DEQ attempted to have them characterize this, in other words, or pump and treat it, to get a
leachate collection system, pump and treat that to a wastewater treatment plant.

These discussions were being had. CFAC just said, "We don't want to do that. We want 1999." That's basically where we are. So that's sort of been a common theme throughout this, the proceedings, was that they very much wanted what they had in 1999, and we were going to make a change.

So it wasn't a surprise, I think. We had a long process of talking about this, at least when we began to actively pick up the permit again in 2013, that there was a time to think about this.

CHAIR DEVENY: One follow-up.

BOARD MEMBER BUSBY: And just a real quick follow-up. When they made application in 2013 or whenever you started this, they said the plant was going to restart; is that correct? They thought it would?

MR. MOSER: They said that they wanted to basically treat it like it could restart. I mean they weren't saying that they definitely would restart. They never said that. But basically, it could begin again, and so that's how
we processed the application.

BOARD MEMBER BUSBY: As an operating facility.

MR. MOSER: Right. And I mean that's not uncommon. We have to do that. I mean sometimes people have to get permits before they even discharge anything, and so then they have their permits in order before they start their discharge.

BOARD MEMBER BUSBY: Thank you.

BOARD MEMBER HANSON: I just want to make sure I understand, and I may be like super understating your point, but I guess I want to make sure I'm understanding it.

So when you talk, you know, when 17.30.1311 specifically calls to provide for compliance, from your interpretation, what you're saying is, "We allowed them to provide for compliance by giving them a number that they needed to comply with"?

MR. MOSER: No.

BOARD MEMBER HANSON: Why not?

MR. MOSER: We have to -- I'm sorry. So what we're saying is that the conditions of the permit must provide for compliance with the Act.
So we have to -- Those conditions that are in the permit, those limits, must comply with the Act.

So in this case, with something like cyanide, we have a rule that's adopted in State law, 40 CFR 122.4(d), which says that there's reasonable potential to cause or contribute to a violation of a water quality standard or criteria, we must have limits for that in the permit. So we have to do that.

And we interpret this to say we are prohibited from issuing a permit that doesn't have those limits in there.

CHAIR DEVENY: I have a question while we're kind of on this. If CFAC had requested a compliance order after they saw the draft permit application in 2013, would you have been compelled, or would you have had the discretion to work with them to develop a compliance schedule for the cyanide?

MR. MOSER: I certainly think we would have considered it. I mean I can't go back in time for sure, but I mean like that, but certainly if somebody says, "We want to do this." But then again, as I said in my opening statement, we would have to be able to say, "You can get to that limit
in so long," and then we'd have to have these interim steps that we could ensure that they're making that progress to get there.

Because we were sort of on opposite ends of the spectrum with this permit, I mean under the facts here, that that's not reasonable. But if during the permit development we had said, "Okay, we're going to do this," or "We're going to --" because I mean we're talking there's a feasibility issue here. There is a feasibility issue.

And if there simply isn't any way that -- I mean without doing more. And again, we talked to them about doing more, collecting the water that's coming out of the landfills, pumping and treating that. That was an example of that. There is other things that they could do.

Everything, though, obviously involves a lot of money, so --

But certainly we would have looked at those things, and had they desired that, and also if they had provided information that we could actually get to the number eventually.

CHAIR DEVENY: I kind of feel like we've discussed this third point -- first point, No. A, quite a bit. Are people comfortable maybe moving
MR. TIETZ: Can I just respond to just a couple things?

CHAIR DEVENY: Sure. Go ahead.

MR. TIETZ: One, I think that Mr. Moser was talking about the characterization of Outfall 006, and the opportunities CFAC had to respond to that. I think there were many conversations that went on there.

I think that Mr. Moser maybe slightly mischaracterized how that interactive went on. Steve Wright is here. If the Board wants to hear from him, he could describe what those discussions were.

But there were many discussions about Outfall 006, and there was a lot of discussion about that with respect to Outfall 006. I wasn't privy to a lot of those, so I can't give you much detail there, but I know there was a lot of discussion about that.

Mr. Moser continues to talk about the requirement to set effluent limits in the permit, and I don't disagree with that. And he also just said that the permit has to have effluent limits that mirror the Water Quality Act. I've said this
numerous times. We absolutely agree with that.
That's without question true.

But effluent limits don't mean numeric standards at the end of the pipe. They can mean other things. He was just talking about leachate collection, he was talking about pump and treat. Those are best management practices. Those were available to the Department. They could have provided for those in the permit, and they didn't.

And so there is no requirement -- I mean it is DEQ policy to set a numeric effluent limit at the end of the pipe. That's not a requirement under the rule. They could set the permit -- or the limit at the end of the mixing zone as it was in the prior permit.

So I don't have the specific -- but there was a finding of fact with respect to the mixing zone. And as the process went through, the DEQ permit writer had made a determination that the mixing zone should have continued. And throughout the process, if you look at the evolution of the draft permit, and how the permit writer viewed the mixing zone, until the very, very end of the process, she had a mixing zone in there for cyanide as it had been in the 1999
permit.

MS. LAUGHER: No. 126.

MR. TIETZ: So Finding of Fact No. 126. And so it wasn't until the very end, right before the draft permit was issued, and for unknown reasons, it suddenly switched and the mixing zone was gone. I never have received much of an explanation about why that happened, but throughout that process, the permit writer had felt that the mixing zone was appropriate, and that it should have continued, and then it was no longer in the permit.

CHAIR DEVENY: Further questions on this topic? Chris, are you still with us?

BOARD MEMBER TWEETEN: Yes, I am.

CHAIR DEVENY: Okay. I'd like to talk about No. B, "The permit describes Outfall 006 as a single location, which did not comport with the reality that there are many discrete and diffuse seeps in the area of the back water channel along the river bank."

And this is an item why our Hearings Officer found that DEQ was -- why CFAC met the burden that DEQ did not have preponderance of the evidence; is that correct?
MS. CLERGET: That the permit violated
the law, I think.

CHAIR DEVENY: That the permit violated
the law. Excuse me. So there was a lot of
information in here about Outfall 006, and I would
really like somebody to sort of clarify the
description of that.

And I understand that the permit has a
single latitude longitude description, but that
CFAC also had told DEQ that the description was
incorrect. And I guess I'd like DEQ to kind of
speak to this particular item.

MR. MOSER: Thank you, Madam Chair. DEQ
has not found an exception to that holding in this
ruling. We have not filed an exception. So that
is why I believe that the matter will be remanded
for further recharacterization of that outfall.
So --

CHAIR DEVENY: Now I think we're getting
somewhere. So based on what I'm hearing, in terms
of the conclusion of law, I'm thinking that based
on what DEQ has said regarding "A," and based on
what has been said about "C," not in my mind being
a huge substantial issue, that I think I would
disagree with those two conclusions of law, but I
do think I would agree with No. B. And --

MS. CLERGET: I just want to be clear.

You're talking about conclusion of law 4(a) and
(b) and (c)?

CHAIR DEVENY: Yes. So remind us again,
Sarah, of what we do with the conclusions of law.
We either approve them or change them?

MS. CLERGET: Yes, you can reject,
modify, or adopt them. And if you are going to
modify or reject them, you need to make a written
finding, so you can either do it yourself, or you
can order me to do it; and if you order me to do
it, then I need some direction.

So if you're forming a motion, then
those are -- but those are your options.

CHAIR DEVENY: I would like to put a
motion before this Board that we accept the
conclusion of law letter No. B, "The permit
describes Outfall 006 as a single location which
does not comport with the reality that there are
many discrete and diffuse seeps in the area of the
back water channel along the river bank."

And along with that motion, that we
reject letters "A" and "C," with the rationale
that I don't think that I don't believe that "C"
was really substantial. And No. A I believe does not provide for compliance. It is sort of taken out of context to what the ARM states, and I don't feel comfortable with saying that they were out of compliance for that -- or that the permit did not provide for compliance as a reason for DEQ to be out of -- what word am I looking for?

MS. CLERGET: That the permit violates the law.

CHAIR DEVENY: That the permit violates the law. So if that's not too muddled. Anybody care to discuss that, or have a second? We need a second before we can discuss it.

BOARD MEMBER BUSBY: Can I make just a comment on that?

CHAIR DEVENY: I think we need a second before we can comment.

BOARD MEMBER BUSBY: Probably do.

CHAIR DEVENY: It hasn't been seconded.

BOARD MEMBER FELTON: I'll second, just so we can --

BOARD MEMBER TWEETEN: Madam Chair, this is Chris. I'll second.

CHAIR DEVENY: Okay. Thank you. Now we'll have discussion.
BOARD MEMBER BUSBY: I'm not sure it violates the law, but it certainly isn't the letter of the law either. I think DEQ, when they make a substantial change to a permit, I think they have to provide a method to -- not a specific method, but an opportunity for compliance.

When you issue a permit, that automatically puts the permittee in noncompliance. I'm not sure that doesn't violate the law in itself. So I'm not sure it is in violation of the law, but I think issuing the permit without recognizing that they're purposely putting the permittee in non-compliance, I'm not sure that part isn't in violation.

CHAIR DEVENY: John.

BOARD MEMBER FELTON: Thank you. So first, I was willing to second it. I'm a little confused. Is the only -- This is more for Sarah. I'm not sure. Is the only conclusion of law Item 4?

MS. CLERGET: No. They're all conclusions of law.

BOARD MEMBER FELTON: They're all conclusions of law. So are we going to have to then, based on this motion, go through and do
every single -- do we have to address them all and not hold one out?

MS. CLERGET: You can address this one, and then address the rest of them if you want. But ultimately you have to address all of them, yes.

BOARD MEMBER FELTON: So then my other question was: Early on when Mr. Moser was making his discussion, way back last century whenever we started this discussion, there was a lot of discussion about -- My impression was that DEQ was really questioning more that this ARM is an incorrect citation, that it really should be 1350. So I wasn't entirely clear, based on DEQ's presentation, if they're contesting that the permit is incorrect because it doesn't provide for compliance, or if they're contesting that the citation is wrong, or that you're saying it is entirely okay. I'm a little confused as to really what it is that you were saying earlier on.

CHAIR DEVENY: Thank you, John.

MR. MOSER: Madam Chair, Board member Felton. The point we were making there, and we did -- it would be incorrect to say you have to have a compliance schedule every time you know
they're going to be out of compliance, but that doesn't mean that you can't look at it further with more information.

If the Agency has more information, I believe you could have the Agency take that into consideration upon the remand, and see if we can work with a compliance schedule.

The danger in saying that just because you're out of compliance you have to get a compliance schedule, it neglects the fact that there are many other factors that come into play when you grant a compliance schedule, like will they ever be able to meet it. Is there a series of actions that we can put in a permit that will get them to that limit? Those things are -- that's important, too.

So it is not just -- I'm not arguing that DEQ didn't follow 17.30.1350, the compliance schedule rule. Based upon the facts in the record, we don't think that there was evidence to even do a compliance schedule, based upon what we had, but --

But yes. Our central, more of a central focus is certainly on the interpretation of 17.30.1311 sub (1), because we think that that has
pretty big repercussions if that's something that's held and is interpreted that way.

BOARD MEMBER FELTON: Can I follow up on this?

CHAIR DEVENY: Yes.

BOARD MEMBER FELTON: So is there a difference from DEQ's perspective if I am an existing permittee, and the conditions of the permit are going to change, or I'm a brand new applicant for a permit, which I think is --

So if we're going to set from a DEQ perspective, "You must comply with this standard," does it matter if I've previously been permitted or if I'm brand new?

MR. MOSER: Well, it can in the issuance of a compliance schedule. I mean it can't for the issuance of -- of effluent levels, you still have to put the effluent limits. But it is a consideration, depending on if the limit changes, it is a consideration for a compliance schedule. So it is one of the criteria.

But again, you still have to have an end date, and you still have to have a series of events to get there. So yes, I mean it's a consideration. It would be different, yes, for
those circumstances.

BOARD MEMBER FELTON: Was it considered in this case? Did DEQ consider -- "We have an existing permitted entity. We're going to change things a bit. Should we --" Was there consideration of a compliance schedule, or was it like, "When this permit ends, you're at this level, and when this starts the next day, you must be somewhere else"?

MR. MOSER: I think based upon the facts in this record, there wasn't enough evidence to say we were going to get there. And there wasn't anything that we were going to -- a series of actions that we could get to get that final compliance date, where they would meet the effluent limits, because --

So the answer is no, but the reason is because it is such a different -- it is a very different -- it is like the way it was treated in 1999 was very different than the way it was treated in 2014, that's true. I mean there is no doubt about that.

But because the applicant wanted it to be like 1999, it didn't really provide us the opportunity to investigate the compliance
BOARD MEMBER FELTON: So my last question then is: Was the 2014 permit infeasible? Was it DEQ's belief that CFAC could not comply with that permit?

MR. MOSER: Well, that's, No. 1, feasibility is not supposed to be considered when putting in water quality based effluent limits. There is a case that I cited in my brief on that issue.

Feasibility does come into play with technology based effluent limits, but that's not what we're talking about there. We're talking about water quality based, I mean that protects fish and aquatic life uses, something that protects human health, that's in the river. So what's your question again?

BOARD MEMBER FELTON: I'm just trying to understand if it was possible for CFAC to be compliant with the 2014 permit.

MR. MOSER: As I explained, we did have discussions with CFAC about pumping and treating. Mr. Tietz said it was a BMP. It really isn't a BMP. If you collect the effluent on the bottom of a landfill that's seeping cyanide, you would pump
it to a waste water treatment plant, you would
treat that. You'd have to treat it before it went
out.

They didn't want to do that. I mean the
1999 permit was good for that, I mean for them. I
don't think it was very good for the river, but it
was good for them, and they liked that. And I can
see why. So that's what they -- they didn't want
to make those changes. And if we would have --

And I guess another comment to what he
said. If we would have mandated that they do that
like he suggested, but they refused to do it, they
would have been in immediate non-compliance again.
I mean we can't mandate certain activities. We
regulate the discharge of pollutants. So that's
kind of where we are.

BOARD MEMBER FELTON: Thank you.

CHAIR DEVENY: There is a motion before
the Board. Is there any further discussion or
clarification that needs to be made?

(No response)

BOARD MEMBER BUSBY: Would you read back
the motion?

CHAIR DEVENY: You're going to make me
read back the motion? Basically what I'm moving
is that we're looking at Conclusion of Law No. 4.
And I'm saying that we reject "A" and "C," and
that we agree with the conclusion of law 4(b).

We still have all of these other
conclusions to go through, and I don't know that
we -- I don't think we have to go through those
individually, but I thought this one, maybe it was
something we might want to separate out.

BOARD MEMBER FELTON: One last question.
If this motion passes, then we need to revisit the
proposed order, right? Because it takes away a
significant amount of what's in the content of the
order. Is that --

MS. CLERGET: Yes.

BOARD MEMBER FELTON: Okay. Just so I
understand what we're doing.

BOARD MEMBER BUSBY: Could I take one
jump before we consider this?

CHAIR DEVENY: Absolutely.

BOARD MEMBER BUSBY: I'd like to make a
motion. Because CFAC is no longer an operating
entity, there is no chance of being an operating
entity, that we remand the entire permit back to
be rewritten under that scenario.

MS. CLERGET: Do the parties want to
comment on that?

MR. TIETZ: We would need a moment to talk.

BOARD MEMBER BUSBY: We need a second before --

CHAIR DEVENY: So we have motion on the table. I don't think we can move to another topic.

BOARD MEMBER BUSBY: That's what I was wondering.

MS. CLERGET: You’ve got to deal with the first one.

BOARD MEMBER BUSBY: That’s why I asked.

CHAIR DEVENY: Let’s take a vote on my motion. All those in favor of the motion, signify by saying aye.

(Response)

CHAIR DEVENY: Aye.

BOARD MEMBER TWEETEN: Aye.

CHAIR DEVENY: All those opposed.

BOARD MEMBER HANSON: Aye.

BOARD MEMBER BUSBY: Aye.

BOARD MEMBER FELTON: Aye.

CHAIR DEVENY: I think there was two for and three against. So the motion fails. So let's
BOARD MEMBER BUSBY: I was going to make a substitute motion or a different motion, that let's remand, because of the conditions have completely changed that the permit was written under, and just remand the whole thing back to DEQ to rewrite a permit based on the new conditions, that CFAC is no longer an operating entity or no longer plans to be an operating entity.

BOARD MEMBER HANSON: I'll second it.

CHAIR DEVENY: Second for discussion.

MS. CLERGET: Do you want to hear --

CHAIR DEVENY: Dexter, do you want to continue with --

BOARD MEMBER BUSBY: I was going to ask Sarah to give us her thoughts on that.

MS. CLERGET: I think you should probably hear from the parties, as that wasn't a conclusion, that wasn't a conclusion of law that I proposed. So I think you need to hear from the parties about what they think about that.

BOARD MEMBER BUSBY: I'd like to hear from DEQ first, if possible, because that puts the burden on them, is the reason I'd like to hear.

MR. MOSER: Madam Chair, members of the
Board, it is hard to think about this on the fly, but I'm not sure that there are supporting facts in the record for that, like a wholesale remand. There are certainly a lot of conclusions that are in the order, and some of those are favorable to DEQ, some of them are favorable to CFAC.

We did not dispute the second conclusion, so it is going to be remanded to reconfigure Outfall 006. I believe the cyanide limits in question are coming out of that outfall. So that concern is really going to be something that we're going to be looking at.

I don't think that if you rule the way that DEQ is suggesting you rule, that that means they will immediately have to comply with what you're concerned with. So it is going to be remanded, I believe, based upon that second of the two major legal findings.

BOARD MEMBER BUSBY: I'm concerned about the immediate compliance issue, plus Outfall 006. I think they're both extremely important issues to both parties.

MR. TIETZ: CFAC would not object to taking the whole permit back to the Department to rewrite based on the current conditions.
I don't know whether the Board can hear -- Steve Wright can give you an update on what the current condition of the CFAC facility is right now, if that would help the Board understand what that would mean, if that is appropriate.

MR. MOSER: DEQ will object to that. We don't think that would be procedurally appropriate to hear that kind of testimony at this hearing that's scheduled for exceptions. If there is some other format that the Board thinks that would be more appropriate to remand back, or have an additional fact finding, that's another possibility; but in this format, I think that that would be inappropriate.

BOARD MEMBER BUSBY: I think that would be inappropriate. That's --

CHAIR DEVENY: It sounds like it would be introducing new information that wasn't in the hearing record. Sarah, I would defer to you.

MS. CLERGET: Yes, I think new evidence at this stage is not appropriate.

I will note that in the findings of fact that you've decided on, Finding of Fact 20 states that, "CFAC has now been designated a federal Superfund site." No. 21 discusses remedial
investigation and feasibility. No. 17 states that they've ceased aluminum production; and No. 18 states that they have announced a permanent closure. So those facts are in the record.

MR. TIETZ: I would just say that, at least for consideration, that the testimony of Mr. Wright would not be with respect to the decision of the findings of fact and conclusions of law. It would be in answer to Mr. Busby's direct motion. So it would be for a different purpose.

CHAIR DEVENY: Hillary.

BOARD MEMBER HANSON: So can I ask a question maybe of DEQ. If in the proposed order we remanded this anyway, does it not in and of itself kind of go towards this motion? Because wouldn't you take into consideration the fact that they're now closed?

MR. MOSER: Again, I think as the Hearing Examiner -- Madam Chair, Board member Hanson -- indicated, the Hearing Examiner indicated, there is evidence in the record that you already know that this is the case. So it is closed, it is permanently closed, it is a Superfund site, there is remedial activities going on, all those. And additional things on remand
would be taken into consideration. They'd have to be.

BOARD MEMBER HANSON: That's all I'm asking.

MR. MOSER: But the decision before you now is you're remanding for us to go through Outfall 006, DEQ's exceptions to the ruling centered upon legal conclusions it does not want to have hanging over its head on that remand. But if the parties sit down and talk about a compliance schedule, they can sit down and talk about a compliance schedule.

If they think about -- and they're going to sit down and talk about how to reconfigure this thing, because it is going to be different. But we don't know exactly how that's going to be. We have to sit down and go through that, so --

BOARD MEMBER BUSBY: Question for Sarah. How would we reword my motion to make it compatible with what Mr. Moser just said?

BOARD MEMBER HANSON: If I'm hearing correctly, he still wants a decision on the conclusions of law, so that there is -- DEQ has -- that's what I'm hearing.

BOARD MEMBER BUSBY: I am, too.
BOARD MEMBER HANSON: Which takes away -- ditches the whole thing.

BOARD MEMBER BUSBY: I'm not sure we want to ditch the whole thing, but remand the permit back for review, but I'm not sure how that should be worded.

CHAIR DEVENY: Well, I think we need to go through the conclusions of law before we start talking about a --

BOARD MEMBER BUSBY: We can do it under a motion if you want.

CHAIR DEVENY: I believe that we have to go through the conclusions of law and make a decision about them before we make a decision on the order. John.

BOARD MEMBER FELTON: Thank you.

BOARD MEMBER TWEETEN: Madam Chair, this is Chris. Can I --

CHAIR DEVENY: John Felton had a comment first. Just a second, Chris. You're up next.

BOARD MEMBER TWEETEN: Okay.

BOARD MEMBER FELTON: So I understand that we need to get through the conclusions of law first, but this really relates directly to what I think is a DEQ concern, which is reading that part
of that Conclusion 4, which I think DEQ's concern
is does that mandate that every single permit must
incorporate the idea of a compliance schedule.
They'd have to consider that.

But when we look at the order, it talks
about remanding to DEQ to re-examine or rewrite
the permit, such that it provides for compliance
either immediately or with a compliance schedule.
I don't think that finding or conclusions of law,
whatever that term is, necessarily is dictating
that DEQ must build a compliance schedule into
every permit, because within the order itself it
says that's an option.

So I think, I feel like -- that's part
of the reason I voted against the previous motion,
is I don't think it has that implication.

But my other question, and this is a
procedural question, sort of follow-up to that, is
if this proceeds to the decision to remand to the
Department for reconsideration and rewriting of
the permit, does that come back to this Board at
all, or would it have to be on another appeal and
come back to the Board? Just procedural.

MS. CLERGET: It would have to be back
on another appeal.
BOARD MEMBER FELTON: Thank you. That's all I have.

CHAIR DEVENY: Chris Tweeten, you had a comment or question.

BOARD MEMBER TWEETEN: Yes, Madam Chair, a couple of observations. One, even though CFAC did not announce its intention to permanently cease operations until the year after the 2014 permit, it was not in fact in operation when the 2014 permit was approved by DEQ, and the actual physical conditions at that time haven't changed, I don't think.

It seems to me, looking through the findings of fact and conclusions of law, that the cyanide releases that are troublesome in this case are the result of the historic, as I understand the facts, the result of the historic landfilling of these potliners over the years that have ceased before 2014, and aren't going to happen anymore now that they're out of business, but they weren't happening in 2014 either. This was a discharge from historic waste that had been landfilled some years prior.

And so I'm not sure that the permanent cessation of operations at CFAC makes much
difference with respect to the actual discharges that we're talking about here. That's my first observation.

My second observation is that if we're going to remand anyway, then Specification C in Sarah's conclusions of law regarding the unnoticed exhibit is moot, because to the extent that it is going to be included in the new order or the new permit that issues, if there will be one, will be available for public comment in fact, and it's out in the open now anyway.

But if there is going to be remand anyway then under Specification B, then "C" doesn't make any difference then. So just a couple of thoughts there.

I'd like to hear from some people that know more about this than I do, what their thoughts are about whether the cessation, the permanent cessation of business by CFAC really makes much of a difference in terms of the conditions on the ground that were the subject of the permit that was already issued.

CHAIR DEVENY: Could DEQ comment on that.

MR. MOSER: Madam Chair, Board member
Tweeten, could you please repeat that question?

BOARD MEMBER TWEETEN: Sure. Let me try again. I think it is common ground here that in 2014 when the permit was issued, CFAC wasn't making aluminum at that point. They'd stopped some years before. That's right, isn't it?

MR. MOSER: I believe that the information on the record suggests that they stopped or halted production in 2009, but I could be wrong about that.

BOARD MEMBER TWEETEN: Right, but it doesn't matter exactly when, but they hadn't been producing for awhile in --

MR. MOSER: I would say this, Board member Tweeten. So because these discharges go through the ground, sometimes they take longer to get out, to express themselves out into the river. So that's a little bit different scenario here as well. So that's something to consider.

BOARD MEMBER TWEETEN: But I guess my question is that the simple making permanent of the situation that was thought to be potentially temporary in 2014, I mean the possibility of reopening in 2014 was still out there, but a year later they had made the situation permanent.
It doesn't seem to me to be that big of a difference of change in circumstances with respect to the data that was actually used as the basis for issuing the permit. It wasn't based on -- the permit wasn't based on the active production of aluminum by CFAC, it was based on the discharges that were resulting from the historic landfill and the potliners that were associated with active production in the past, right?

MR. MOSER: Madam Chair, Board member Tweeten. Actually the 2014 permit was not based upon the landfills, the historic landfills. That was no longer included as a source because the Agency asked CFAC to properly characterize it. The Agency argued that that should not have been considered a point source as it was currently configured because there was no discrete conveyance to the surface water. Therefore it didn't fit the definition of a point source.

So the permit actually did specifically -- was specifically written for industrial operations, and the other related activities connected to the active production of aluminum. So it was written that way.
The fact is, though, that there are the seeps from the landfills flow underneath the plant, and mix, and presumably mix with the other discharge points in the groundwater before it all gets to the river. And so you're right that those contaminants are still likely moving towards the river, but the permit itself was based upon an active industrial operation.

BOARD MEMBER TWEETEN: Okay. Thank you.

CHAIR DEVENY: So we have a motion that's been seconded before us. Is there further discussion on the motion?

BOARD MEMBER BUSBY: I guess my only comment is is the wording satisfactory? Do we need to adjust the wording slightly?

MS. CLERGET: If you leave the wording the way it is, you're going to still have to address the other conclusions of law, I think.

BOARD MEMBER BUSBY: How would we avoid that?

MS. CLERGET: I guess can you -- you might have to read back the motion. I guess I'll need to rehear it.

BOARD MEMBER BUSBY: I just said based on the information and your recommendation that we
remand the permit back to DEQ --

MS. CLERGET: It is completely the
pleasure of the Board what your conclusions of law
are, so that would --- As the motion is made, it
would mean that the Board did not address what is
currently contained in Conclusion of Law 4(a) or
(c), and it would create essentially a new
conclusion of law and reason for remand based on
the findings of fact that I've cited regarding the
current state of CFAC.

So I would then rewrite the conclusions
of law based on your direction to reflect that.
So if that is what you intend to do, if that's
what you want to do, that is completely within
your purview.

And then you're essentially not reaching
all of the conclusions that I reached, and so
you're rejecting those that you're not reaching,
and then you're adding a conclusion of law based
on the findings of fact. Does that make sense?

BOARD MEMBER BUSBY: Not completely.

CHAIR DEVENY: John.

BOARD MEMBER FELTON: So the motion
really relates to sort of saying pretty much
everything is moot because the plant is closed.
But if we get to the order, and we actually remand this thing, isn't that a relevant factor? I mean whatever is going on will have to somehow play into where we -- how the new permit gets written.

So my inclination is to not go that route simply because then we have to go through and figure out which of these findings of law, or conclusions of law matter and which don't. So that would be my feeling.

I think it is going to as a practical matter, if we get to the point of remand, it's going to somehow play in.

CHAIR DEVENY: I think so, too.

BOARD MEMBER BUSBY: I'll withdraw it if she'll withdraw the second.

BOARD MEMBER HANSON: Yes.

CHAIR DEVENY: The motion and the second have been withdrawn, so we'll move on to the conclusions of law. Let's take a break and come back at 2:30.

(Recess taken)

CHAIR DEVENY: Chris, are you with us?

BOARD MEMBER TWEETEN: Yes, I am.

CHAIR DEVENY: We're back and ready to start again, and Sarah is going to give us a
description of what transpired over the break.

MS. CLERGET: So my understanding from the parties is that they are going to request a stay from the Board on their decision on the proposed order, and the reasons for that, and what the parties have agreed to Ms. Laughner is going to explain.

CHAIR DEVENY: Can you tell us exactly what the stay would entail?

MS. CLERGET: The stay would mean that you make no decision on the conclusions of law -- or the proposed order. You make no decision on the proposed order today, based on what Ms. Laughner is going to describe the agreement of the parties is. And then as she'll describe, the case will resolve itself.

MS. LAUGHNER: So the parties have, CFAC and DEQ have reached a settlement that would involve Columbia Falls Aluminum Company submitting a new application based on current site conditions or reassessing whether a permit is needed, and that would be until February, the end of February 2019 that we would do that.

And another important point would be that the plant and the conditions remain as status
quo, so CFAC would continue to be in compliance.

And so we'll have discussions and work out what kind of permit, the new permit needs to look like, or if we need a permit, and we would accomplish that by the end of February 2019.

MR. MOSER: Madam Chair, members of the Board, that's correct. We did reach a settlement with those parameters.

MS. CLERGET: It would be my recommendation to the Board, based on that, that the Board stay their decision until February of 2019. Essentially this is a motion to stay by the parties, based on the settlement, and so the Board can grant that motion to stay until February of 2019, at which point the parties will -- the case will resolve.

CHAIR DEVENY: Board members have any questions?

BOARD MEMBER BUSBY: Do we need a motion?

CHAIR DEVENY: We will need a motion.

BOARD MEMBER BUSBY: So moved.

CHAIR DEVENY: It's been moved.

BOARD MEMBER FELTON: Second.

CHAIR DEVENY: Any further discussion?
(No response)

CHAIR DEVENY: All those in favor,

signify by saying aye.

BOARD MEMBER TWEETEN: Madam Chair, hang

on just a second. This is Chris. Sarah, will we

be receiving a status report on this matter at the

December meeting?

MS. CLERGET: Parties, what do you

think?

MS. LAUGHNER: I'm agreeable to that.

MR. MOSER: DEQ is agreeable to that.

MS. CLERGET: Yes, Chris.

BOARD MEMBER TWEETEN: I think that

would be useful. Based on my experience, parties

can enter into discussions with every intention of

settling, and at the end of the day not be able to

do so because of some unforeseen circumstance. So

it would be nice for us to keep on top of this I

think a little bit, so a status report at our next

meeting would be good to have.

MS. LAUGHNER: Just so I can be clear,

we have settled. We're not going to go back and

write something up, but we can give you a status

report of how our discussions are going in

December.
BOARD MEMBER TWEETEN: So the contested case is going to be dismissed; is that my understanding?

MS. LAUGHNER: That's our goal.

CHAIR DEVENY: But at this point we just stay.

MS. CLERGET: Yes, the idea being that there will be a Rule 41 dismissal forthcoming from the parties once the February 2019 deadline comes.

BOARD MEMBER TWEETEN: Not to dice words with you, but I think you have an agreement in principle. I don't think you have a settlement yet. So we'll be looking forward to hearing, at least I'll be looking forward to hearing about your progress as the next meeting unfolds.

CHAIR DEVENY: There is a motion and a second before us. All in favor, please signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Motion carries. The stay is granted.

MS. LAUGHNER: Thank you very much.

MR. MOSER: Thank you.
MS. CLERGET: Thank you guys for working so well together.

(The proceedings were concluded at 3:00 p.m.)

* * * * *
CERTIFICATE

STATE OF MONTANA

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 - 130 - 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 _______________ day of __________, 2018.

________________________________
LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires March 9, 2020.
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