

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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

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

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TRANSCRIPT OF PROCEEDINGS  
ORAL ARGUMENT

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Heard at Room 111 of the Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
August 9, 2019  
9:25 a.m.

BEFORE CHAIR CHRIS DEVENY, JOHN DEARMENT,  
DEXTER BUSBY, MELISSA HORNBEIN,  
DR. DAVID LEHNHERR; and  
CHRIS TWEETEN AND HILLARY HANSON (by telephone)

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

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

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

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15 ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT:

16 MS. KIRSTEN BOWERS, ESQ.  
17 Special Assistant Attorney General  
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20 Department of Environmental Quality  
21 P.O. Box 200901  
22 Helena, MT 59620  
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1           WHEREUPON, the following proceedings were  
2 had:

3                           \* \* \* \* \*

4           CHAIR DEVENY: I believe we're ready to  
5 move on to the case, and I know we're going to  
6 need some time to set up.

7           MS. CLERGET: I think that they can  
8 probably -- Can you guys just come up and set up  
9 at your tables, and I can do a little talking  
10 while they do that.

11                   So the case before you guys -- I  
12 apologize for the memo being late. I frankly just  
13 completely forgot it until a few days before the  
14 Board meeting. So you have the memo from me which  
15 is the standard memo that you see every time with  
16 your menu of options for what to do with a  
17 contested case.

18                   Again, just to go over that, remember  
19 that you have -- facts and law are treated  
20 differently, so you have the facts. You can only  
21 modify if you find that the Hearing Examiner's  
22 findings are not based on substantial evidence,  
23 and then the entire Board has to review the entire  
24 record in order to modify facts.

25                   In order to modify law, you can do

4  
1 whatever you want with the law, you can modify it  
2 without having to review the whole record. So  
3 that's all laid out in the memo.

4 I met with the parties this morning  
5 briefly, and the FOFCOL that you have in front of  
6 you, based on the exceptions and response from the  
7 parties has some mistakes in it, which are mine.  
8 And in order to rectify those, I met with the  
9 parties this morning, and I provided them with the  
10 same thing that I've handed out to you.

11 And I apologize to Chris and Hillary  
12 because I don't have that, but maybe if Aleisha  
13 emails it to Lindsay, Lindsay can email -- or I  
14 don't know if Aleisha can email it to you  
15 directly. Either way we'll get it to you in  
16 email.

17 But essentially what it is is Pages 4,  
18 7, and 12 to 13 of the original FOFCOL, there are  
19 some red-line changes. On the first page of each  
20 of those pages you see the red-line version; and  
21 then on the back of the pages, there is the  
22 non-red-line versions, the final version.

23 And this is an attempt to correct on  
24 Page 4 the typo in the ARM; on Page 7, the fact  
25 that the motion to vacate was jointly filed, not

1 filed by Copper Ridge; and then on Page 12, <sup>5</sup> the  
2 corrections regarding Lot 7-B, which required  
3 changes to Findings of Fact 14 and 15. And then  
4 because of that change also a change to 17 for the  
5 first -- to make it the first, second, third  
6 filings of Reflections, and the second, third, and  
7 fourth filings of Copper Ridge.

8 So those are what I would deem mistakes,  
9 and therefore -- and I think the parties have  
10 agreed that the way to proceed with this, so that  
11 the Board doesn't have to review the entire record  
12 to modify these mistakes, that I'm going to  
13 withdraw my proposed, my original proposed FOFCOL  
14 and resubmit it with these changes, so that -- And  
15 again, this is with the stipulation of the parties  
16 -- so that the FOFCOL before you for decision is  
17 the FOFCOL that includes these changes. Does that  
18 make sense to everybody?

19 (Nods heads)

20 MS. CLERGET: I'm not seeing any  
21 questions. Can the parties just put on the record  
22 that we've agreed that we've talked about this and  
23 you agree.

24 MS. MARQUIS: Yes, Copper Ridge and  
25 Reflections agreed to the changes that you've just

1 presented.

2 MR. HAYES: I wasn't involved personally  
3 in the communications. Kirsten just ran to her  
4 office to pick up --

5 MS. CLERGET: Okay. Well, Kirsten --  
6 Here she is. Kirsten, can you just agree that  
7 DEQ, on the record that DEQ is okay with these  
8 changes.

9 MS. BOWERS: Yes. I reviewed them, and  
10 DEQ is okay with the changes.

11 MS. CLERGET: So I want to be clear that  
12 the FOFCOL that you guys are reviewing for  
13 acceptance or modification today is the FOFCOL  
14 with these changes in it, so you can essentially  
15 replace Pages 4, 7, 12 and 13 with the final pages  
16 that are provided to you on the back side of this  
17 packet. And I think that's all I have by way of  
18 intro.

19 CHAIR DEVENY: Just give Board members a  
20 minute here to digest this new information. Me  
21 maybe.

22 MS. CLERGET: And Chris and Hillary, it  
23 should be in your email, Aleisha tells me.

24 BOARD MEMBER BUSBY: Did you send out a  
25 new email?

1 MS. CLERGET: No. I'm just sending it  
2 to -- or Lindsay and Aleisha are just sending it  
3 to Chris and Hillary right now so that they'll  
4 have it.

5 BOARD MEMBER BUSBY: I don't have a  
6 printed copy. That's why -- of your --

7 MS. CLERGET: Of the actual FOFCOL?

8 BOARD MEMBER BUSBY: Yes.

9 MS. CLERGET: That's the full one.

10 (Provides document)

11 BOARD MEMBER BUSBY: Okay. Thank you.

12 CHAIR DEVENY: Chris and Hillary, are  
13 you prepared to move on? Are you comfortable with  
14 what you were sent, if you received it, or what  
15 you heard over the phone?

16 BOARD MEMBER TWEETEN: I'm fine, Madam  
17 Chair. This is Chris.

18 CHAIR DEVENY: Hillary, how about you?

19 BOARD MEMBER HANSON: Yes. I'm good,  
20 too. Thank you.

21 CHAIR DEVENY: How about those of us  
22 present in the room?

23 (Nods heads)

24 MS. BOWERS: Madam Chair, members of the  
25 Board, would it be possible to take a quick break?

1 DEQ would like to project some information during  
2 its presentation, and we also have some hand-outs,  
3 but the Board members on the phone would not see  
4 our hand-outs unless we project them.

5 CHAIR DEVENY: Sure. Why don't we take  
6 -- would this be a good time to take a break?  
7 Let's take a fifteen minute break, no longer, at  
8 this time.

9 (Recess taken)

10 CHAIR DEVENY: Let's go ahead and  
11 reconvene. Lindsay, would you take the roll call.

12 MS. FORD: Chris Deveny.

13 CHAIR DEVENY: Here.

14 MS. FORD: Dexter Busby.

15 BOARD MEMBER BUSBY: Here.

16 MS. FORD: Hillary Hanson.

17 (No response)

18 MS. FORD: Hillary Hanson.

19 (No response)

20 MS. FORD: John Dearment.

21 BOARD MEMBER DEARMENT: Here.

22 MS. FORD: Chris Tweeten.

23 (No response)

24 MS. FORD: Chris Tweeten.

25 (No response)

1 MS. FORD: Melissa Hornbein.

2 BOARD MEMBER HORNBEIN: Here.

3 MS. FORD: David Lehnherr.

4 BOARD MEMBER LEHNHERR: Here.

5 MS. FORD: All Board members in the room  
6 are present. The two Board members on the phone  
7 are still on break, it appears.

8 CHAIR DEVENY: Could you check with them  
9 somehow. And while we're waiting, we asked  
10 members of the public to identify themselves, and  
11 I think maybe some other additional people have  
12 come in. So if there is anybody here that hasn't  
13 identified themselves, if they could.

14 MR. WEISS: I'm Ryan Weiss with the  
15 Department of Environmental Quality.

16 CHAIR DEVENY: Thank you. Is there any  
17 member of the public on the phone that would like  
18 to identify themselves?

19 (No response)

20 CHAIR DEVENY: Chris or Hillary, are you  
21 on yet?

22 (No response)

23 CHAIR DEVENY: We could go ahead and  
24 proceed. John Dearment is recused from this case,  
25 so we do have a quorum with Melissa, David,

1 Dexter, and myself, but I'd like to just give a  
2 minute or two to see if we couldn't get our other  
3 two Board members on.

4 MS. FORD: Chris Tweeten, are you on the  
5 line?

6 (No response)

7 MS. FORD: Chris or Hillary, are you on  
8 the line? Are you able to hear us?

9 BOARD MEMBER TWEETEN: This is Chris.

10 BOARD MEMBER HANSON: Yes, Hillary is  
11 here, too.

12 CHAIR DEVENY: Okay. Great. We had a  
13 hard time getting you, but you're both on now, and  
14 we've reconvened to continue with the case of  
15 Copper Ridge and Reflections at Copper Ridge  
16 versus DEQ. So we have a quorum with six Board  
17 members available to work on this case.

18 So just as a little background, because  
19 we have two Board members who were not here at  
20 our, I think it was the November meeting when we  
21 heard this case, and we remanded this case back to  
22 our Hearing Officer to clarify the issue of  
23 owner/operator, and that's where we need to start  
24 today, because everything is really kind of  
25 dependent on our decision regarding

1 owner/operator.

2 So today we're going to allow the  
3 parties to make oral argument relating to the  
4 remand issue, and we will hear that, and then  
5 proceed with the case. And Sarah outlined in the  
6 procedural memo what our options are, so I think  
7 you're all clear on that.

8 And with that, I'd like to ask the  
9 parties to give oral argument, and I'd appreciate  
10 it if you could limit it to no more than fifteen  
11 minutes. We will have time for questions  
12 afterward from Board members. So I'm trying to  
13 decide who the best -- Between the two parties, do  
14 you have a preference as to who starts? DEQ,  
15 would you like to --

16 MS. BOWERS: Yes, since we have the  
17 burden.

18 MS. CLERGET: How long, Chris?

19 CHAIR DEVENY: Fifteen minutes. So if  
20 you could give the parties like a five minute  
21 notice, and then a one minute, that would be  
22 great. So Ms. Bowers, please proceed for DEQ.

23 MS. BOWERS: Thank you, Madam Chair,  
24 members of the Board. Just to add to the  
25 introduction, the purpose of the June 13th, 2019

1 hearing on the Copper Ridge and Reflections at  
2 Copper Ridge contested cases was to allow the  
3 parties to present additional evidence for final  
4 administrative determination whether Copper Ridge  
5 and Reflections at Copper Ridge were  
6 owners/operators with respect to their  
7 subdivisions, and responsible for obtaining MPDES  
8 permit coverage for storm water discharges  
9 associated with construction activities at those  
10 subdivisions.

11 At the February 8th, 2019 hearing before  
12 this Board, Copper Ridge and Reflections asserted  
13 that lots within the subdivisions that were still  
14 owned by Copper Ridge and Reflections were not  
15 disturbed by construction activity.

16 For example, in the transcript of those  
17 proceedings, in your materials it is at Bates Page  
18 No. 410, Board Member Tweeten asked, "Did the  
19 developer have any controls of runoff water in  
20 place on those lots that had not yet been sold?  
21 Because I don't think there's any question that  
22 they were owner/operator with respect to those  
23 lots, is there?"

24 And the answer by Counsel for Copper  
25 Ridge was, "With respect to the lots that had not

1 been sold, those lots were not disturbed. Those  
2 were stabilized. And so the point source again  
3 here is construction activity. There was no  
4 construction activity on those lots that remained  
5 in their ownership that would trigger the need for  
6 permit coverage."

7 Then later on Bates Page Nos. 441 to  
8 442, Board Member Tweeten asked, "Well, the  
9 Department says that all the lots were disturbed  
10 because ground preparation, and grading, and so  
11 forth had taken place even on those lots that  
12 hadn't been sold; is that right or wrong?"

13 The answer from Counsel for Copper Ridge  
14 was, "There was no evidence in the record that any  
15 of the lots that the developers owned and had not  
16 sold for individual home building had any  
17 disturbance on them whatsoever. In fact, any  
18 disturbance that my client would have caused would  
19 have been in conjunction with road building and  
20 utility installation.

21 "Again, that occurred in 2012, was  
22 completed. Everything they disturbed was  
23 stabilized. They sent in the notice to terminate.  
24 The Department agreed, and allowed the permit to  
25 terminate, essentially saying, 'Okay. You're good

1 to go. You don't need permit coverage anymore.  
2 You've done what you need to do for construction  
3 activity.'"

4 And then Board Member Tweeten asked, "So  
5 the record shows that except for road building  
6 activity which had already been deemed stabilized  
7 by the Department, there was no ground disturbance  
8 of any kind on any of the lots that the developer  
9 still owned? Does the record show that?"

10 And the answer was, "The record is  
11 fairly devoid of exactly which lots the  
12 disturbance is on, or the Department is alleging  
13 that there was a violation."

14 Board Member Tweeten then asked, "I  
15 understand that, but did you put in testimony from  
16 the developer that with respect to those lots that  
17 we hadn't sold, they were still in effectively  
18 their natural state with no ground having been  
19 disturbed to level the lots, or remove boulders,  
20 or whatever, remove vegetation, whatever other  
21 activities might be undertaken in preparation for  
22 selling?"

23 And the answer was, "There is evidence  
24 in the record that my client as a developer  
25 planned a subdivision, essentially drew the lines

1 on the lots. There is evidence on the record of  
2 construction activity they did do, and that was  
3 road building and utility installation, which was  
4 appropriately permitted and appropriately  
5 terminated. There is no evidence that any of the  
6 individual lots that they may have retained  
7 ownership of were disturbed. Again, this goes to  
8 the burden of proof which we believe is on the  
9 Department in this case."

10 After putting the condition of their  
11 lots within the subdivisions in question, and  
12 whether those lots had been subject to ground  
13 disturbance associated with unpermitted  
14 construction activity, Copper Ridge and  
15 Reflections moved to exclude broad categories of  
16 relevant and material evidence probative to  
17 determine which individual lots remained under  
18 ownership and control of Copper Ridge and  
19 Reflections, and what construction activities  
20 occurred on those lots at the time of the alleged  
21 violations.

22 Citing principles of equity and estoppel  
23 without any supporting legal analysis, the Hearing  
24 Examiner prevented DEQ from presenting photographs  
25 that were not publicly available, previously

1 produced in discovery, or attached to the  
2 September 23rd, 2013 violation letter, and the  
3 September 9th, 2013 compliance inspection report,  
4 or any maps that were created from such  
5 photographs. Thus the Hearing Examiner excluded  
6 four out of six photos in DEQ's proposed Exhibit  
7 36. Can you put Exhibit 36 up.

8 MS. MARQUIS: I'm going to object to  
9 this exhibit. The four photos were deemed  
10 inadmissible in a ruling on a motion in limine.  
11 The Department's exceptions document did not  
12 challenge the ruling on the motion in limine.  
13 It's inappropriate for the Department to now bring  
14 these photos in front of the Board.

15 You assigned this hearing to a Hearing  
16 Examiner. The Hearing Examiner made a ruling.  
17 And the Board, it's not clear. The Board should  
18 not see the photos now without making the decision  
19 to reopen the entire record and go through  
20 everything again. The photos have already been  
21 deemed inadmissible by the Hearing Examiner. That  
22 ruling wasn't challenged in their exceptions, and  
23 so the photos should not be put in front of this  
24 Board.

25 MS. BOWERS: The question of

1 admissibility is a question of law, and the  
2 Department did challenge the admissibility on --  
3 it is in your Bates number Page 71 in our  
4 exceptions.

5 CHAIR DEVENY: So I'm going to stop you  
6 right here. I guess Melissa and Chris, as  
7 attorneys, I guess I'd like your opinion about  
8 this without putting you on the spot. Putting you  
9 on the spot.

10 BOARD MEMBER HORNBEIN: Chris?

11 BOARD MEMBER TWEETEN: (No response)

12 CHAIR DEVENY: Chris Tweeten, are you  
13 on?

14 BOARD MEMBER TWEETEN: I am. I was  
15 planning to defer to Melissa on this.

16 BOARD MEMBER HORNBEIN: I mean if this  
17 is a question of a disputed evidentiary ruling,  
18 I'm hesitant to say that we can view the  
19 photographs without seeing what was filed with  
20 regard to the motion in limine regarding this  
21 evidence specifically.

22 Sarah, do you have anything to add?

23 MS. CLERGET: I do believe that DEQ  
24 argued in their exceptions that the motion in  
25 limine, they believe the motion in limine ruling

1 is wrong. And they did -- Although they didn't  
2 make an offer of proof at the hearing regarding  
3 Exhibit 36, they did file Exhibit 36 as part of  
4 their proposed exhibits.

5 So Exhibit 36 is in the record of the --  
6 and I think -- although I could be wrong, so  
7 everybody can tell me if I'm wrong -- but my  
8 assessment is that since the photographs are in  
9 the record, and the question is whether or not the  
10 Hearing Examiner correctly or incorrectly excluded  
11 that evidence, you could consider the record  
12 evidence to make that determination. I don't  
13 think it is extra-record evidence.

14 I also think that if the Board  
15 determines that it was properly excluded, they can  
16 disregard the evidence that they see. I think you  
17 are all capable of doing that. So it is up to  
18 you, and if I've got it wrong -- everybody, Chris,  
19 Melissa, Copper Ridge -- can disagree, but that is  
20 my assessment.

21 BOARD MEMBER TWEETEN: Madam Chair, this  
22 is Chris. I think that's right.

23 CHAIR DEVENY: Based on that, I'm going  
24 to allow --

25 BOARD MEMBER TWEETEN: Excuse me. Let

1 me conclude. I think given the way that DEQ's  
2 argument is laying out, we probably ought to rule  
3 on the exception dealing with the motion in limine  
4 first.

5 So perhaps Ms. Bowers can direct us to  
6 that portion of her argument, and we could hear  
7 from Copper Ridge in response to that particular  
8 issue, and the Board could make a decision on that  
9 exception.

10 If the photographs, we find that the  
11 photographs were properly disallowed into  
12 evidence, then we wouldn't want to see them in any  
13 event. So I guess it seems to me logically that  
14 the easiest way out is that we should deal with  
15 the motion in limine first.

16 CHAIR DEVENY: Okay. Sarah, could you  
17 refer us to where the motion in limine is in our  
18 packet.

19 MS. CLERGET: The motion in limine is  
20 not included in your packet. The FOFCOL relies on  
21 the motion in limine for the discussion of what is  
22 relevant. So if you want, we can pull up the  
23 motion in limine which is in the record, or I can  
24 direct you in the FOFCOL to where I believe it  
25 operates.

1           But I think the -- correct me if I'm  
2 wrong, please -- but I think the argument from DEQ  
3 is that the FOFCOL's estimation of what was  
4 relevant during the remand hearing, which is  
5 incorporated in a number of different places in  
6 the FOFCOL, is what they're taking issue to.

7           So the motion in limine is not attached  
8 as an exhibit. It is incorporated within the  
9 FOFCOL. Does that make sense?

10           CHAIR DEVENY: Could you steer us to the  
11 place in the FOFCOL --

12           MS. CLERGET: Sure. DEQ might be better  
13 able to do that, since it's their argument. I  
14 don't want to be arguing for the parties. But  
15 there is -- I will just point you to -- There is a  
16 discussion of relevance on remand. Well, first,  
17 there is a discussion in the procedural history;  
18 then there is a discussion on the relevance in  
19 remand in the discussion section, which starts on  
20 page --

21           MS. BOWERS: In your proposed FOFCOL, it  
22 is on Page 40.

23           MS. CLERGET: Thank you. Actually it  
24 starts on Page 39, the relevance on remand  
25 section.

1           And then in the conclusions of law, I  
2 think it is inherent in 12, 13, 14, and -- well,  
3 probably 12 through 19. It's inherent in those.

4           MS. BOWERS: In DEQ's exceptions to the  
5 proposed order, in your packet it's Bates number  
6 Page 71. DEQ takes exception to the Hearing  
7 Examiner's exclusion of the photos because they're  
8 relevant additional evidence which we believe the  
9 Board asked for, and it greatly constrained the  
10 DEQ's ability to present evidence requested by the  
11 Board, and there was really no reasoning or legal  
12 support for the equity and estoppel reasoning  
13 given by the Hearing Examiner.

14           And furthermore, if the motion in limine  
15 ruling was correct, during cross-examination,  
16 Counsel for Copper Ridge opened the door by asking  
17 questions of our witness about his investigation  
18 in the northern part of the Reflections at Copper  
19 Ridge Subdivision.

20           CHAIR DEVENY: Chris, could you steer us  
21 through your suggestion that we look at the motion  
22 in limine? I mean not being an attorney, I'm a  
23 little bit stymied with how we should proceed with  
24 your suggestion.

25           BOARD MEMBER TWEETEN: Well, Madam

1 Chair, it seems to me that to the extent that you  
2 can view -- want to argue from the evidence that  
3 was excluded at the hearing. The evidence was  
4 properly excluded if --

5 CHAIR DEVENY: I'm sorry. Chris, you're  
6 kind of breaking up. Can you get closer to your  
7 phone? Our Court Reporter is having a hard time  
8 picking you up.

9 BOARD MEMBER TWEETEN: Well, I'm getting  
10 some feedback. Basically my own statements are  
11 coming back to me a second after I make them.  
12 So --

13 CHAIR DEVENY: Lindsay says there is  
14 nothing she can do.

15 BOARD MEMBER HORNBEIN: He might be able  
16 to disconnect and call in again.

17 BOARD MEMBER TWEETEN: Well, in that  
18 case I'll just deal with it. Let me start over.

19 I gathered from the direction that Ms.  
20 Bowers was headed this morning that DEQ would like  
21 to argue from the evidence that was excluded  
22 pursuant to the ruling on the motion in limine.  
23 And if the motion in limine was correctly denied  
24 -- excuse me -- correctly ruled on, let's say, and  
25 the evidence was properly excluded from the

1 hearing below, then DEQ does not get to make those  
2 arguments, because the evidence is not in the  
3 record.

4 And I'm a little uncomfortable, I guess,  
5 hearing argument on the merits relying on evidence  
6 that was excluded below without having first made  
7 a ruling as to whether that evidence should have  
8 been admitted or not.

9 And I know we're presumably able to  
10 disregard that which is not admissible. We are  
11 not like a trial jury. We're more like a trial  
12 Judge. And therefore, reference to evidence that  
13 would ultimately be inadmissible is not highly  
14 prejudicial in this matter. It seems to me that  
15 -- go ahead. I'm sorry.

16 CHAIR DEVENY: Ms. Bowers.

17 MS. BOWERS: Board Member Tweeten and  
18 members of the Board, we're not really asking you  
19 to weigh the excluded evidence. We're asking you  
20 to reconsider the Hearing Examiner's ruling on the  
21 admissibility of that evidence, which is a  
22 question of law.

23 And first off, if the exclusion was  
24 based on estoppel, there was no demonstration of  
25 all the elements that would support estoppel.

1 There is no showing the Department made any  
2 representation of material fact, that the truth of  
3 the facts was known to the Department and not  
4 known to Copper Ridge and Reflections, that our  
5 conduct was intentional or with any expectation  
6 that it would be relied on, and no evidence that  
7 Copper Ridge and Reflections actually relied to  
8 their detriment on exclusion of the photos.

9 In the June 13th transcript of the  
10 hearing, the Hearing Examiner states, "The photos  
11 are excluded because they weren't turned over by  
12 DEQ in discovery."

13 And here the failure by the Department  
14 to turn over the photos was also not intentional,  
15 and was harmless. In the initial proceedings DEQ  
16 was focused on its inspection report, and that  
17 report focused on the downgradient portion of the  
18 Copper Ridge Subdivision because that showed  
19 impacts to State waters.

20 All photos associated with that  
21 inspection report were timely disclosed. The four  
22 photos that are in question here were not attached  
23 to the original inspection report, and when the  
24 Board asked for additional evidence that Copper  
25 Ridge and Reflections were owner/operators, DEQ

1 realized the importance of the additional photos  
2 taken at the northern end of the subdivision and  
3 disclosed them.

4 So I don't know if you want to actually  
5 see the four excluded photos, or just consider  
6 their admissibility based on a question of law.

7 CHAIR DEVENY: I don't want to see them  
8 until we clarify that this is something that we  
9 should be looking at, and that the Board needs to  
10 do that.

11 BOARD MEMBER TWEETEN: Madam Chair, I  
12 think from my perspective, Ms. Bowers has just  
13 summarized their argument on the motion in limine,  
14 if I'm understanding things correctly.

15 And if that's the case, then if we could  
16 hear from Copper Ridge with respect to their  
17 response to those arguments as to why the motion  
18 was properly ruled on by the Hearing Examiner,  
19 then I agree that it's a question of law, and the  
20 Board would be in a position to then rule on that  
21 aspect of DEQ's exceptions, and from that point  
22 forward we would know the status of those proposed  
23 exhibits one way or the other.

24 MR. HAYES: This is --

25 CHAIR DEVENY: Mr. Hayes, do you have

1 something to add?

2 MR. HAYES: Yes. This Ed Hayes  
3 representing DEQ. At the beginning of the  
4 conversation on this matter, I think the Hearing  
5 Examiner made correct observations that the  
6 photographs were part of the record, and that the  
7 Board had the ability to actually view the  
8 photographs.

9 And I think that's a valuable thing not  
10 to make a decision regarding the Hearing  
11 Examiner's ruling on equity and estoppel without  
12 seeing the actual evidence and the content of the  
13 evidence that she indicated was inadmissible.

14 So I think it's imperative for the Board  
15 to have a complete understanding of the evidence  
16 that was before the Hearing Examiner and the  
17 Hearing Examiner's ruling that the Board actually  
18 see the four photographs that DEQ produced in  
19 response to the Board's request for additional  
20 information and evidence, to fully evaluate the  
21 Hearing Examiner's ruling.

22 CHAIR DEVENY: Okay. Thank you. Ms.  
23 Marquis, would you limit your remarks to the  
24 motion in limine issue.

25 MS. MARQUIS: Yes, certainly. Madam

1 Chair, members of the Board, my name is Vicki  
2 Marquis. I'm with the law firm Holland and Hart.  
3 I'm here today representing Copper Ridge  
4 Development Corporation and Reflections at Copper  
5 Ridge.

6 With respect to the motion in limine,  
7 the Hearing Examiner made the correct decision.  
8 This is a case that, as you'll remember, began in  
9 September 2013. There was a remarkable huge storm  
10 event. It's very uncharacteristic at that time of  
11 year; made the front page or the headlines of the  
12 Billings Gazette. Some of the quotes that  
13 citizens from other parts of the city had to  
14 say --

15 CHAIR DEVENY: Could you just -- I know  
16 this background is --

17 MS. MARQUIS: Okay. There were 2.1  
18 inches of rain that fell in 45 minutes. The  
19 entire city experienced the effects of that.  
20 People in other areas had mud covering their back  
21 yards.

22 Now, DEQ admitted during the hearing  
23 last year that they didn't identify or write down  
24 specific lots during the inspection. And they  
25 also admitted during this most recent hearing that

1 the focus of their investigation was not land  
2 ownership or vacant lot disturbance. That's in  
3 the transcript at Page 91.

4 They didn't note any issues, they did  
5 not note issues on vacant lots. That's in the  
6 transcript at Page 40. They were focused on  
7 sediment in streets and the discharge. After  
8 their inspection, they issued a violation letter  
9 to Copper Ridge. And this is important because it  
10 included an inspection report with a set of  
11 photographs.

12 Now, you'll remember the statute,  
13 Montana Code Annotated 75-5-617, requires notice  
14 of a violation. What does that notice have to  
15 look like? If you look at the statute 75-5-611,  
16 it tells you that the notice and order must state  
17 the facts alleged to constitute the violation.

18 These four photographs that the  
19 Department now seeks to put in front of you were  
20 not provided either in the violation letter, and  
21 they weren't referenced in the administrative  
22 compliance and penalty orders that were issued in  
23 March 2015.

24 So there's been no notice that those  
25 four photos would serve as the basis for new

1 violations to be alleged against my client. There  
2 was no notice of those back in 2013, there was no  
3 notice of those in 2015, and so they're not  
4 violations that the Department can seek a penalty  
5 for anyway.

6 Another important point: In discovery  
7 we asked the Department for all of the evidence  
8 that supports the alleged violations. They had an  
9 opportunity to provide those photos to us at that  
10 time in 2015, and they did not.

11 We took three depositions of Department  
12 employees, and we asked repeatedly about the  
13 evidence that they relied upon to support the  
14 violations, and the evidence that they relied upon  
15 to support the allegation that Copper Ridge and  
16 Reflections were owners or operators, and they  
17 only answered that it was the sign at the  
18 subdivision entrance.

19 These photos were never talked about,  
20 and they were never discussed. So for that reason  
21 alone, the Hearing Examiner's ruling is correct on  
22 the photos.

23 And here's another important point. The  
24 photos don't even show construction in Copper  
25 Ridge or Reflections.

1           And you can tell, as outlined in our  
2 response to the Department's exceptions, based on  
3 the photo locations, they said they were taken  
4 looking south or east. Those photos are at the  
5 edge of the Reflections subdivision. They can't  
6 possibly show anything in the Copper Ridge  
7 Subdivision, and they're faced looking at the  
8 Falcon Ridge Subdivision, which is next door to  
9 Reflections.

10           Also an important point is, as we heard  
11 at the hearing, that area of the Reflections  
12 subdivision was covered by a general storm water  
13 construction permit. The notice of termination  
14 was submitted on February 19th, 2014. So that  
15 area had permit coverage for the road construction  
16 and the utility installation that Reflections was  
17 doing. That's at Findings of Fact 26.

18           MS. BOWERS: I don't think this argument  
19 is confined to your motion in limine.

20           MS. MARQUIS: This all supports why the  
21 photos don't matter, even if they were to be  
22 considered, but they were properly excluded  
23 because that area was never noticed to Copper  
24 Ridge or Reflections, and the Department has had  
25 six years to litigate this. They've never

1 produced the photos. We never saw them until May,  
2 just a few weeks prior to the hearing. So it is  
3 not fair for them to now bring the photos in front  
4 of the hearing and now in front of the Board.

5 And in terms of the Department's  
6 argument about equitable estoppel, the Department  
7 is trying to rely on those photos for the exact  
8 purpose that they said it is okay to enter them.  
9 They want to rely on them to say that there is  
10 construction activity in the subdivisions.  
11 They're relying on those, and it is not fair to  
12 us.

13 We have relied upon the representations  
14 that the Department made to us throughout  
15 discovery, in the depositions, and the notice that  
16 they provided to our client. Is it detrimental to  
17 us to now be confronted with additional evidence?  
18 Of course it is.

19 We saw the photos when they were first  
20 produced to us in May. We said, "These aren't in  
21 the subdivision. They shouldn't come in anyway."  
22 And there are a ton of legal arguments for why  
23 they shouldn't come in, beginning with they  
24 weren't properly included in the notice of the  
25 violations.

1 CHAIR DEVENY: I'm going to ask that you  
2 stop there. Thank you.

3 MS. MARQUIS: Thank you.

4 CHAIR DEVENY: And Board members, do you  
5 have suggestions on how we should proceed with the  
6 issue of the photographs?

7 MS. BOWERS: Can I reply just briefly to  
8 arguments by Copper Ridge Counsel?

9 CHAIR DEVENY: Ms. Bowers.

10 MS. BOWERS: First of all, on the  
11 notice, notice is provided in the violation letter  
12 and the inspection report attached to that  
13 violation letter. Notice, the violation letter,  
14 and the Department's administrative order may be  
15 likened to a complaint. You can amend a complaint  
16 if there is additional evidence.

17 In this case the Board asked for  
18 additional evidence, which the Department  
19 provided. I don't think there is any question  
20 that the four photos at issue are relevant and  
21 probative, and there has been no determination on  
22 the record that the photographs are -- that the  
23 value in the photographs is outweighed by unfair  
24 prejudice to Copper Ridge and Reflections.

25 And in fact, the photos do not unfairly

1 prejudice Copper Ridge and Reflections because  
2 they should be aware of what land they own, and  
3 what the condition of that land was, and what  
4 construction activity was occurring.

5 CHAIR DEVENY: Back to the Board.

6 MS. MARQUIS: I'm sorry.

7 CHAIR DEVENY: I'm going to wait. I  
8 want to have a discussion among us. Thank you.  
9 Board members, any thoughts on this?

10 BOARD MEMBER HORNBEIN: Sarah, is it  
11 correct that you viewed these photographs in your  
12 determination on the motion in limine?

13 MS. CLERGET: Yes.

14 BOARD MEMBER HORNBEIN: I think that if  
15 we are revisiting the Hearing Examiner's decision  
16 on the motion in limine, we should have before us  
17 the same evidence that she had before her in  
18 making that decision.

19 CHAIR DEVENY: And that means we should  
20 look at the photographs?

21 BOARD MEMBER HORNBEIN: If that's what  
22 we're doing. If we are reviewing her decision on  
23 the motion in limine, then yes.

24 CHAIR DEVENY: Would there be other  
25 things we would have to review as well? Sarah,

1 can you advise us on that?

2 MS. CLERGET: I'm thinking. I will  
3 leave it up to the parties to argue and to your  
4 discretion. I think the parties have argued that  
5 the motion in limine is a conclusion of law, and I  
6 think whether or not --

7 Well, it's up to you guys whether you  
8 want to review the record that was before me at  
9 the motion in limine stage. The record that was  
10 before me when I made the motion in limine  
11 included more than the photographs that DEQ wants  
12 you to look at now. It's up to you whether you  
13 want to review all of that, or whether you are  
14 comfortable making a determination on -- a legal  
15 determination without reviewing all of that.

16 CHAIR DEVENY: Chris, your thoughts?

17 BOARD MEMBER TWEETEN: Well, Madam  
18 Chair, I'm having a little trouble hearing Melissa  
19 when she speaks, but --

20 CHAIR DEVENY: Did you want Melissa to  
21 repeat that?

22 BOARD MEMBER TWEETEN: I guess I'm  
23 inclined at this stage to think, first of all --

24 CHAIR DEVENY: We can't hear you again.

25 BOARD MEMBER TWEETEN: First of all, it

1 appears to me that Sarah, even had the photographs  
2 been admitted, Sarah would not have found them  
3 particularly probative with respect to the issues  
4 that she ultimately decided. Perhaps we ought to  
5 -- Well, I'll just lay that out for the good of  
6 the order.

7 I tend to agree with what I understood  
8 Melissa to say, which is that in order to  
9 ultimately decide whether the photos should come  
10 in, the Board ought to look at the photos.

11 Summarizing that.

12 BOARD MEMBER HORNBEIN: Yes, that's  
13 correct. I mean I guess my point was that if we  
14 are revisiting the Hearing Examiner's decision on  
15 the motion in limine with regard to this piece of  
16 proffered evidence, we should have before us what  
17 she had before her; but she made the further point  
18 that there is additional material besides the  
19 photographs, presumably briefing by both parties  
20 on this issue.

21 So I don't know that we can take that  
22 evidence piecemeal. I suppose the underlying  
23 question is: Is that what we're doing? Are we  
24 revisiting that ruling, or are we simply going to  
25 make a decision on whether to view this piece of

1 evidence in the context of this hearing, because  
2 it is correct that its exclusion was a conclusion  
3 of law which we have the ability to alter.

4 BOARD MEMBER TWEETEN: Madam Chair, this  
5 is Chris again. I guess I understood from the  
6 packet of materials that we got some weeks ago  
7 that the briefing that was submitted below was  
8 included in that packet, was it not?

9 MS. CLERGET: Chris, I think Melissa is  
10 referring to the briefing on the motion in limine,  
11 which was not included in that packet. That's  
12 part of the record.

13 BOARD MEMBER TWEETEN: Okay.

14 CHAIR DEVENY: So Board members, any  
15 suggestions for how to proceed?

16 (No response)

17 CHAIR DEVENY: Ms. Marquis.

18 MS. MARQUIS: Madam Chair, members of  
19 the Board. Thanks for hearing me one more time on  
20 this.

21 It's important to remember that the  
22 Hearing Examiner's decision on this was as a  
23 matter of law. It was not based on any facts or  
24 anything that the pictures show. It was as a  
25 matter of law.

1           They say a picture is worth 1,000 words,  
2           so there is prejudice to see the pictures without  
3           the contrasting evidence that our side would have  
4           offered had they been admitted. To confine this  
5           to what the decision held, it was a matter of law,  
6           so I think that decision could be reviewed without  
7           looking at the photographs.

8           CHAIR DEVENY: Ms. Bowers, do you have a  
9           brief statement?

10          MS. BOWERS: Well, DEQ disagrees, and we  
11          urge you to look at the photographs and make a  
12          determination on admissibility.

13          BOARD MEMBER HORNBEIN: Madam Chair,  
14          could I ask a question of Board Counsel?

15          CHAIR DEVENY: Yes.

16          BOARD MEMBER HORNBEIN: My understanding  
17          is that the record was essentially reopened after  
18          the remand from the Board to allow for additional  
19          evidence solely on the owner/operator issue,  
20          correct?

21          MS. CLERGET: That's correct.

22          BOARD MEMBER HORNBEIN: So when DEQ  
23          submitted this proposed additional evidence, did  
24          Reflections have an opportunity to respond to that  
25          submission?

1 MS. CLERGET: Yes.

2 BOARD MEMBER HORNBEIN: And could they  
3 have submitted additional evidence to contradict  
4 DEQ's evidence?

5 MS. CLERGET: Well, back up to the  
6 timeline. So the photographs were produced in the  
7 simultaneous exchange of exhibits before the  
8 hearing, and then the motion in limine came. So  
9 Copper Ridge didn't have a chance before exhibits  
10 were submitted for the hearing to see these  
11 photographs.

12 When they were submitted as a potential  
13 exhibit, Copper Ridge moved in limine based on the  
14 legal arguments that they have laid out for you  
15 that they weren't produced in discovery; they were  
16 not attached to the notice; they were not attached  
17 to the violation letter. So those legal arguments  
18 were laid out in the motion in limine.

19 That motion in limine was briefed by the  
20 parties, so both parties had an opportunity to  
21 argue that law, and based on that law, I made a  
22 ruling in limine about the evidence that was  
23 proposed for the hearing exhibits.

24 So I guess I want to be clear because  
25 what I just heard from DEQ was different. There

1 was a ruling on admissibility at the hearing.  
2 That's an evidentiary ruling that I -- So they  
3 offered exhibits, and I excluded them. That's an  
4 evidentiary ruling at the hearing based on the  
5 Rules of Evidence.

6 There is also legal argument in the  
7 motion in limine, and I ruled on the motion in  
8 limine based on the legal argument. All of that  
9 is in the context of all of the evidence that's  
10 presented both in the proposed exhibits and  
11 ultimately at the hearing. Does that make sense?

12 So you just need to be careful what it  
13 is that you're reviewing at any -- Are you  
14 reviewing the evidentiary ruling? Are you  
15 reviewing the motion in limine? Are you reviewing  
16 the actual evidence? So I think that what you're  
17 considering may differ based on what question it  
18 is you're considering.

19 BOARD MEMBER LEHNHERR: I have a  
20 question, if I might.

21 CHAIR DEVENY: Just a second, Chris.  
22 David has a question here.

23 BOARD MEMBER LEHNHERR: For Sarah.  
24 Sarah, did you see the photographs?

25 MS. CLERGET: Yes.

1 BOARD MEMBER LEHNHERR: Thank you.

2 CHAIR DEVENY: Go ahead, Chris.

3 BOARD MEMBER TWEETEN: Madam Chair, a  
4 question for Sarah. I'm a little confused, and  
5 maybe I shouldn't be, but anyway, you didn't issue  
6 a separate written order on the motion in limine?  
7 It is just in the proposed findings, correct?

8 MS. CLERGET: No, I did issue a separate  
9 order on the motion in limine. Part of it is  
10 actually excerpted. There's a Footnote 3 on Page  
11 40 of the FOFCOL, and I excerpted part of it  
12 there, but I did not include the full text of the  
13 order.

14 But yes, I did issue a written order on  
15 the motion in limine, and then DEQ attempted to  
16 enter the evidence at the hearing as well, and I  
17 made an evidentiary ruling at the hearing in  
18 addition.

19 BOARD MEMBER TWEETEN: And that written  
20 order on the motion in limine is not in the  
21 packet; is that correct?

22 MS. CLERGET: That's correct.

23 BOARD MEMBER TWEETEN: I'm a little at a  
24 loss to understand how we can rule on the  
25 propriety of this order on motion in limine when

1 they haven't -- I mean I realize the order is in  
2 the record, but the material that's been provided  
3 to the Board members, that includes the order. So  
4 all we have -- I gather from what Sarah said -- is  
5 a summary of what the order said that's in the  
6 proposed findings, and a footnote, I guess. Is  
7 that right?

8 MS. CLERGET: At the risk of totally  
9 derailing this -- and the parties can disagree if  
10 they do -- but I think DEQ is arguing that if this  
11 evidence was improperly excluded, then the entire  
12 FOFCOL is suspect, and therefore -- am I wrong  
13 about that?

14 MS. BOWERS: No.

15 MS. CLERGET: So the point is that  
16 you're actually -- Although we've taken a rabbit  
17 hole down this motion in limine, what you're  
18 actually talking about is the whole FOFCOL,  
19 because the whole FOFCOL is based on my  
20 determination of what was relevant at remand.

21 So I think you might hear all of the  
22 argument and all of the FOFCOL together, and you  
23 might get some more clarity on this, because if  
24 you find that these photographs were improperly  
25 excluded, in other words, if you find that my

1 decision in the FOFCOL based on what was relevant  
2 at remand is improper, then you're going to have  
3 to review the whole record anyway. Does that make  
4 sense?

5 So I think you're going down a rabbit  
6 hole, but in fact you need -- If I'm understanding  
7 DEQ's argument correctly, the entire FOFCOL is  
8 what they're concerned about, and this is one  
9 thing that makes the FOFCOL suspect because of my  
10 determinations on what is appropriate or not  
11 appropriate on remand.

12 So it's part and parcel of what the  
13 entire FOFCOL is, I guess. The response to Chris  
14 is why the motion in limine is not in there is  
15 because it's inherent. The entire FOFCOL depends  
16 on the entire understanding of what was important  
17 on remand.

18 BOARD MEMBER TWEETEN: Well, this is  
19 Chris. I'm inclined to think we should just hear  
20 what the parties have for us today, but if it's  
21 true that Sarah's entire proposed order and  
22 findings and conclusions granting or denying of  
23 the motion in limine, at some point we have to see  
24 her order on that, it seems to me.

25 And I know the parties are here, locked

1 and loaded as far as today is concerned, and I  
2 guess it seems to me that the better course is  
3 that the argument that has been -- ready to  
4 present today, and once they've presented their  
5 arguments, we can take stock and decide how we  
6 want to proceed.

7 I'm concerned I guess that the motion in  
8 limine is somewhat central to this case, and yet  
9 we've got a packet of 500 and some pages of stuff.

10 MS. CLERGET: So if I might interject  
11 here again, Chris.

12 BOARD MEMBER TWEETEN: Just let me  
13 finish. We've got a packet of -- and the material  
14 dealing with the motion in limine is not here. So  
15 I don't know if I'm alone in being concerned about  
16 that, but --

17 MS. CLERGET: So the other option is the  
18 order on the motion in limine is eight pages long,  
19 so we can give it to you guys, and you could  
20 review it at lunch potentially is an option; or we  
21 could take a break. The point is it's not very  
22 long. So you can have it, and review it, and then  
23 the parties can make arguments on it if they want  
24 to. It's part of the record, so that's an option.

25 BOARD MEMBER TWEETEN: Madam Chair, this

1 is Chris again. I think we should go ahead and  
2 let the parties argue, and I think we should  
3 accept Sarah's offer to get copies of the order on  
4 the motion in limine.

5 CHAIR DEVENY: So Chris, with your  
6 suggestion that we continue without settling this  
7 issue of the photographs, do we leave -- we don't  
8 allow DEQ to present those photographs at this  
9 time? Is that what you're suggesting?

10 BOARD MEMBER TWEETEN: No, I think I've  
11 got confidence in the Board's ability to hear this  
12 case with or without the photographs. As I said,  
13 we're not a trial jury. I'm not worried about our  
14 prejudices being employed by accepting these  
15 photographs. I think we can look at them, and if  
16 it turns out we're not supposed to consider them,  
17 we can decide the case without considering them.  
18 I'm confident in the Board's ability to do that.  
19 I don't necessarily accept the argument that it's  
20 prejudicial to Copper Ridge.

21 CHAIR DEVENY: I feel we're making some  
22 progress.

23 BOARD MEMBER HORNBEIN: I agree with  
24 that. I believe that we should allow the parties  
25 to present their arguments, DEQ should be able to

1 include the photographic evidence in its argument.

2 And I am still a little uneasy with the  
3 idea of making a decision with regard to the  
4 motion in limine seeing only the order and not the  
5 briefing that supported it, but I believe we can  
6 proceed with the arguments, and make that decision  
7 later. And if the decision is that the evidence  
8 was properly excluded, then just like the Hearing  
9 Examiner, we can disregard that evidence in making  
10 our decision.

11 CHAIR DEVENY: Okay. Board members  
12 comfortable with that? David?

13 BOARD MEMBER LEHNHERR: Yes.

14 CHAIR DEVENY: Here's what I'd like to  
15 do then. We will ask you to get the materials for  
16 the motion in limine to have those available.

17 MS. CLERGET: And just as an offer, we  
18 can do -- the briefing on that is eight pages for  
19 the original brief, 31 pages for the response, and  
20 eight pages for the reply, so we can make all of  
21 those available at lunch. And again, it is not a  
22 lot. So I think you can have all of it available  
23 with my order over the lunch break.

24 CHAIR DEVENY: Have that available if we  
25 need it, and then we will continue with oral

1 argument. Take five minutes off your fifteen, we  
2 will allow the photographs to be projected at this  
3 point. And the Board needs to keep in mind that  
4 at some point there is a possibility that we could  
5 be asked to disregard those.

6 So with that, if you would adjust the  
7 times. Ms. Bowers has ten minutes left.

8 MS. BOWERS: Thank you, Madam Chair,  
9 members of the Board. So I'd like to show you  
10 what is labeled DEQ Exhibit 36. And the first  
11 photo is a photo that was attached to our DEQ  
12 inspector's report, and it's Photograph 13  
13 attached to the inspection report.

14 The next photograph is just a different  
15 view of that same photograph. That photograph was  
16 not attached to the inspector's report, and that's  
17 one of the four excluded photographs.

18 And then the next photograph on Page 4,  
19 this is a photograph that our DEQ inspector took  
20 at the northern edge of the Reflections at Copper  
21 Ridge Subdivision, and he's facing kind of  
22 southeast.

23 And then the next photograph, the DEQ  
24 inspector is facing more south. It is taken at  
25 the northern end of the Reflections at Copper

1 Ridge Subdivision.

2 And then the next photograph on Page 6  
3 is taken facing more southerly, also at the  
4 northern end of Reflections at Copper Ridge  
5 Subdivision.

6 Then the last photograph was attached to  
7 the DEQ inspector's report, and it is labeled  
8 Photograph 14 attached to that report. So it's  
9 just the four photographs between the first and  
10 the last that were excluded.

11 Then next I'd like to refer you to DEQ's  
12 Exhibit 23. This exhibit was admitted. It's an  
13 aerial photograph. The photograph is available to  
14 the public. And at the hearing, Susan Bawden  
15 testified to her extensive work experience in  
16 reading aerial satellite images, and education in  
17 mapping and geographic information systems.

18 And the Hearing Examiner erroneously  
19 discounts the evidence provided by this  
20 photograph. On the right northern -- on the  
21 northeast edge of the subdivisions, it shows the  
22 condition of Reflections at Copper Ridge.

23 Ms. Bawden testified that she could tell  
24 the difference between disturbed and undisturbed  
25 land based on the photograph, and that's in the

1 transcript of the hearing at Page 112.

2 And then the next photograph I'd like to  
3 show you is DEQ Exhibit 26, and this exhibit was  
4 admitted by the Hearing Examiner. It's a Google  
5 Earth image that was acquired on October 25th,  
6 2013, so shortly after the violations at issue.

7 And I just want to note that the  
8 previous photograph was taken in June of 2013, so  
9 it was taken before the violations. This one was  
10 taken after.

11 And as to this photograph, Ms. Bawden  
12 testified that she could differentiate lots that  
13 were disturbed and lots that had sod on them. She  
14 specifically looked at Reflections at Copper Ridge  
15 Subdivision, and she pointed to two parcels which  
16 are shown in the northern edge of that subdivision  
17 that were sodded, and then contrasted that the  
18 area around them had not been sodded. She further  
19 characterized this area as having been cleared and  
20 not stabilized.

21 Additionally Exhibit 26 shows the  
22 difference between lots that are disturbed and  
23 some undeveloped agricultural land to the south  
24 and east of the subdivisions.

25 And then next I'd like to show you DEQ's

1 Exhibit 33. This exhibit was admitted. And this  
2 is an overlay showing the lots that were owned by  
3 Copper Ridge between September 23, 2013, which was  
4 when they received notice of their violations, and  
5 December 23, 2013, which was when they obtained  
6 their ability to discharge under the general  
7 permit for construction activity.

8 At the hearing, Mr. Leep admitted that  
9 this exhibit accurately depicts lots Copper Ridge  
10 owned.

11 Then next I'd like to show Exhibit 34.  
12 This exhibit accurately, Mr. Leep testified  
13 accurately depicts lots owned by Reflections  
14 between September 23rd and December 23rd of 2013.

15 The Hearing Examiner erroneously  
16 discounts this evidence, including photographs  
17 taken by DEQ's inspector and his field notes,  
18 which are made contemporaneous to his inspection  
19 of the subdivisions on September 9th, 2013, which  
20 documented stockpiles on at least one lot, Lot 15,  
21 which was owned by Reflections.

22 And regarding Lot 15 and Reflections,  
23 which is depicted on Photograph 1 and Photograph  
24 13 which is attached to DEQ's Exhibit 2, Dan  
25 Freedland testified that area had disturbed ground

1 and no vegetative cover. In addition, he  
2 testified that Lot 15 contained a stockpile of  
3 material near the curb line, and that vehicles had  
4 tracked sediment from the lot to the adjacent  
5 roadway.

6 Further Mr. Freedland testified Lot 15  
7 is on the corner, and the lot in Photograph 13 is  
8 on the corner. That's Photograph 13 attached to  
9 Exhibit 2.

10 Inspector Freedland further testified  
11 that he went to the northern part of the  
12 subdivision where he observed the lots that had  
13 been graded and cleared of all vegetation. And  
14 Mr. Freedland further testified that the northern  
15 end of the subdivision is upgradient from Cove  
16 Ditch, a water of the State, which was impacted by  
17 sediment transported by storm water from the  
18 subdivision.

19 Copper Ridge and Reflections were owners  
20 or operators within the meaning of 75-5-103  
21 because they owned unsold lots within the  
22 subdivisions at the time of the alleged  
23 violations, and these unsold lots were disturbed  
24 by construction activity as that term is defined  
25 by Administrative Rules.

1           The picture that's shown now is Lot 15  
2 and Photo 13 attached to Exhibit 2.

3           The Hearing Examiner erred as a matter  
4 of law by focusing on a narrow definition of  
5 construction activity, limiting it to home  
6 building and active construction, which is  
7 inconsistent with the definition in the Board's  
8 rules.

9           Construction activities include  
10 clearing, grading, excavation, stockpiling earth  
11 materials, and other placement or removal of earth  
12 material performed during construction projects.

13           Construction activity for purposes of  
14 the Montana Water Quality Act storm water permit  
15 requirements include ground disturbing activities  
16 that create a conduit for pollutants to enter  
17 State waters, and not limited to active earth  
18 moving or construction.

19           Copper Ridge and Reflections admitted at  
20 the original hearing in February of 2018 that at  
21 the time the subdivisions were built, they owned  
22 the whole thing, and that they planned and  
23 permitted construction of roads, retainage ponds,  
24 utilities, and parks.

25           Further Copper Ridge and Reflections

1 admitted they planned the residential lots, and  
2 that they sell land that's vacant and undisturbed,  
3 and also admitted they graded and contoured some  
4 of the residential lots. And that's in the  
5 February hearing transcript on Page 110.

6 In December of 2013 Copper Ridge and  
7 Reflections submitted DEQ Notices of Intent to be  
8 covered by the general permit. The NOI associated  
9 with construction activity at Copper Ridge is  
10 entered in this matter as Exhibit 3, and the NOI  
11 for Reflections at Copper Ridge is Exhibit 5.

12 In the order on summary judgment Page  
13 19, the Hearing Examiner said that Reflections at  
14 Copper Ridge cannot rely on the defense that  
15 they're not an owner/operator as of December 17th,  
16 2013 because they agreed to follow the terms and  
17 conditions of the permit. And it's undisputed  
18 they entered the NOI's and Storm Water Pollution  
19 Prevention Plans, and undertook obligations  
20 contained in the general permit.

21 Therefore, even if you accept that  
22 they're not an owner/operator, the violation for  
23 violating terms of the general permit could still  
24 proceed because they agreed to abide by the terms  
25 of the general permit. Thank you.

1 CHAIR DEVENY: Thank you, Ms. Bowers.  
2 Ms. Marquis.

3 MS. MARQUIS: Thank you. I'd like to  
4 start where Kirsten ended off. She mentioned  
5 those storm water permits that my client was  
6 required to apply for and receive as a result of  
7 the violation letter.

8 Those permits were submitted under  
9 protest. There is testimony at both hearings to  
10 that effect. And those permits cannot be used as  
11 a basis for the violations that the Department  
12 alleged here. Why? Because those permits were  
13 submitted as a required corrective action. The  
14 Department required them to submit them. They  
15 were submitted under protest, and they were  
16 submitted after the alleged violations.

17 There is nothing in there that admits  
18 that Reflections or Copper Ridge are an  
19 owner/operator associated with these alleged  
20 violations.

21 In fact they've appealed this  
22 enforcement decision, and they've defended  
23 themselves against it from the very beginning. So  
24 it is obvious that they disagreed that they were  
25 an owner/operator with respect to the home

1 building construction activities that the  
2 Department alleged in the violation letter and  
3 their administrative order.

4 Now, let's go back to, if we could,  
5 please -- I'm not sure who's running the screen.  
6 Can we start -- Let's start with the aerial photo.  
7 I believe it was Exhibit 23, the one from USDA.

8 MS. CLERGET: Okay. Is it for you guys?  
9 We have them, too, but since you have them up, can  
10 you run them for Copper Ridge? Is that okay?

11 MS. BAWDEN: Okay.

12 MS. CLERGET: Thank you.

13 MS. MARQUIS: Now, what the Department  
14 did not tell you about this photograph is that  
15 this photograph is an aerial photograph taken by  
16 USDA. They typically do aerial photographs so  
17 they can track large parcels of land in  
18 agricultural use, not to track subdivision  
19 development, certainly not to track vegetation on  
20 individual lots.

21 The other thing that the Department  
22 failed to tell you about this photograph is that  
23 this photograph was taken in June of 2013, months  
24 prior to DEQ's inspection at the subdivision. You  
25 guys know summer in Montana is short. It's prime

1 construction and growing season. So things  
2 changed dramatically in the subdivision between  
3 June and September. And there is testimony to  
4 that effect in the record from Mr. Leep.

5 The other thing the Department has  
6 failed to tell you is that the construction work  
7 that Copper Ridge and Reflections did -- and I  
8 believe Ms. Bowers spoke about this, that at the  
9 hearing they admitted that they had cleared and  
10 graded, and done some work on the lots.

11 Well, of course they did, because they  
12 put in the roads and the utilities. And part of  
13 that project involves constructing right up next  
14 to and sometimes overlapping onto the  
15 rights-of-way of the lots. There is testimony in  
16 the record to that effect.

17 All of that work was appropriately  
18 permitted, and the permits are outlined in the  
19 proposed FOFCOL beginning at Finding of Fact No.  
20 17.

21 So the construction work that  
22 Reflections at Copper Ridge did was road building  
23 and utility construction. It was appropriately  
24 permitted, and it was all completed before  
25 September of 2013.

1           That's important, and we have not only  
2 testimony to that effect, but we also have  
3 documentary evidence. We submitted documents  
4 between the contractors and subcontractors and the  
5 developers showing that they had reached  
6 completion of all of their construction activities  
7 prior to September of 2013. They took all of  
8 their construction equipment and they left the  
9 subdivisions. Their work was done.

10           Mr. Leep testified that his companies  
11 don't own any construction equipment. They  
12 wouldn't know what to do with it. They don't have  
13 it. They're not in the construction business.  
14 They develop and they hire contractors to do the  
15 construction, so there was no way for them to do  
16 any construction activity after their contractors  
17 left.

18           So the work that was done was permitted,  
19 it was all completed before September 2013. After  
20 it was completed, there was no way for Copper  
21 Ridge or Reflections to do any construction  
22 activity, and they had no reason to do any  
23 construction activity. Their portion of the  
24 project was done.

25           Now, if we could talk about Lot 15 for a

1 minute, please. I'm sorry, Ms. Bawden, do you  
2 mind pulling up the Photograph 13 that was  
3 admitted?

4 Now, DEQ testified at the first hearing,  
5 and they testified again, that they weren't out  
6 there to specifically note specific lots. They  
7 did not note specific lot locations. That's in  
8 the transcript from both the hearing in February  
9 2018 and the hearing that we just had in June of  
10 this year.

11 Now DEQ comes and says that this  
12 portrays Lot 15, but we don't know how they know  
13 that because we have testimony from DEQ witness  
14 Dan Freedland who said he didn't know where the  
15 property lines were, and the property lines were  
16 not marked when he was out there.

17 He also testified that this was on the  
18 corner, but if you recall from the aerial  
19 photograph that we just looked at, there are no  
20 corners in the Reflections subdivision.  
21 Everything is on a curve. So where the property  
22 line is on the curve, we don't know. There is no  
23 straight edge that you can delineate a property  
24 line from.

25 What we do have in the record that is

1 credible evidence is testimony from Mr. Landy Leep  
2 that this photograph is not Lot 15. It is not the  
3 property that Reflections owned. Ms. Bowers has  
4 said earlier that they expect Copper Ridge and  
5 Reflections to know what property they own and the  
6 condition of that property. Mr. Leep knows that.  
7 The companies that he worked for, they owned the  
8 property, and they were selling the vacant lots  
9 for residential home building. This was not his  
10 property.

11 We also have testimony that their  
12 construction was done in 2013 or 2012, and the  
13 storm water permit for their construction work was  
14 terminated, and that termination was confirmed by  
15 the Department on December 19th, 2012.

16 There is no credible evidence in the  
17 record that anything portrayed in this photograph  
18 is on any property owned by Copper Ridge or  
19 Reflections.

20 Further, there is no credible evidence  
21 in the record anywhere that Copper Ridge or  
22 Reflections did any construction activity in the  
23 subdivisions between September and December of  
24 2013. You can see that in the Findings of Fact.

25 Mr. Leep's testimony is pretty clear. I

1 asked him several times, "What did you see? Did  
2 you see an excavator?" No, he didn't. "Did you  
3 see any construction equipment?" No, he didn't.  
4 "Did you see active construction activities,  
5 someone digging, someone trenching?" No, he  
6 didn't. He thought he might have seen someone  
7 trenching.

8 I'm sorry. Mr. Freedland. I said, "Did  
9 you know where that was? Where was that activity  
10 occurring?" He said no. What he did testify to  
11 was that he remembered there was a lot of activity  
12 to the east in a different subdivision.

13 And if we could please go, if you don't  
14 mind, Ms. Bawden, to the four photographs that  
15 were not admissible. You can go the next one,  
16 please.

17 This is the start of the photographs  
18 that are actually showing construction in the  
19 Falcon Ridge Subdivision. I just want to note for  
20 you. This is the exhibit, the one that I'm  
21 holding up, that the Department used to show their  
22 photo locations at the first hearing that we had  
23 in February 2018. This area is up here. It is  
24 not even on this aerial photograph. And there is  
25 testimony at the June hearing to that effect.

1 MS. CLERGET: We're going to put up 16,  
2 which is what you're just holding up.

3 MS. MARQUIS: Great. Thank you.

4 MS. CLERGET: We're going to put it up  
5 so the Board can see it.

6 MS. MARQUIS: Perfect. Thank you.

7 MS. CLERGET: Keep going if you want,  
8 but we'll get it up there.

9 MS. MARQUIS: So this photo shows big  
10 equipment, a lot of activity. This is totally  
11 counter to Mr. Leep's testimony and the  
12 documentary evidence in the record that proves  
13 that Copper Ridge and Reflections were done with  
14 their construction activity, and that the  
15 Department had agreed to terminate their  
16 construction permit prior to these photographs.

17 The only explanation for these  
18 photographs, and had they been admitted at the  
19 hearing, and had we provided testimony to explain  
20 these photographs, my client and likely others  
21 would have testified that these photographs show  
22 road building in the Falcon Ridge Subdivision, not  
23 in the Reflections Subdivision.

24 Again, I would direct you to Findings of  
25 Fact No. 17. That outlays a good timeline of when

1 the work was done in the subdivision, when it was  
2 permitted, and when those permits were terminated,  
3 and when that termination was confirmed by the  
4 Department. In all cases the construction  
5 activity was completed prior to September of 2013.

6 In the very north end of the subdivision  
7 -- which was new evidence to us because the  
8 Department had never looked up there before, never  
9 provided us notice up there -- in that north end  
10 of the subdivision, that storm water permit was  
11 still active, but the construction was done, and  
12 the Department agreed to terminate that permit.

13 One final point. If you go through  
14 Exhibit 2, which I believe is also in the packet  
15 that the Department provided to you, it's clear in  
16 the verbiage from their violation letter which is  
17 Exhibit 2, and their administrative compliance and  
18 penalty orders, that they were concerned about  
19 home building activities. Their photographs are  
20 of home building activities.

21 Copper Ridge and Reflections at Copper  
22 Ridge do not build homes. We have testimony in  
23 the record from the City of Billings -- they  
24 checked their records, because all of these homes  
25 required a permit from the City of Billings -- and

1 the City of Billings testified that neither Copper  
2 Ridge nor Reflections had any home building  
3 permits in that time period.

4 So I believe Exhibit 16 is up here on  
5 the opposite side of your screen. And could I  
6 approach the exhibit? Do you mind?

7 CHAIR DEVENY: Go ahead.

8 MS. MARQUIS: For a frame of reference  
9 -- and you can compare this to the other aerial  
10 photographs -- but what you'll find is that this  
11 road here is the Reflections Subdivision, and this  
12 over here is Copper Ridge. This stuff over here  
13 is the Falcon Ridge Subdivision.

14 And so this photograph you'll see,  
15 January of 2018, they had roads in there. And in  
16 that photograph you can see those roads being  
17 built. This area is Reflections, this area is  
18 not. The area in those photographs is up here.  
19 It is not even shown on this photograph.

20 This is the photograph that the  
21 Department relied upon in the hearing that was  
22 held in February of 2018, doesn't even show the  
23 area where they would now like to find violations.  
24 And that's why we get a little worked up about  
25 this, because we had no notice of those

1 photographs, and we feel that they cite to  
2 different violations that weren't noticed  
3 appropriately, and they're not even in the right  
4 subdivision.

5 So again, just to emphasize, the work  
6 that Copper Ridge and Reflections did was  
7 permitted, it was completed well before September  
8 of 2013, and you should uphold the Hearing  
9 Examiner's proposed findings and conclusions.

10 Thank you.

11 CHAIR DEVENY: Thank you, Ms. Marquis.  
12 I think let's have a break, ten minutes, and we'll  
13 have rebuttal when we return.

14 (Recess taken)

15 CHAIR DEVENY: I think we'll go ahead  
16 and get started. Let the record show that we have  
17 all the Board members back as well as the parties.  
18 And what I'd like to do then is to have five  
19 minutes for rebuttal, and wrap up, and then the  
20 Board will take it from there, and we'll probably  
21 have a lot of questions.

22 MS. BOWERS: Okay.

23 CHAIR DEVENY: Ms. Bowers.

24 MS. BOWERS: Thank you, Chair Deveny,  
25 members of the Board.

1           First of all I want to address Ms.  
2 Marquis's first point that the NOI's were taken  
3 out under protest. And they were not protested  
4 until after the administrative order issued, and  
5 that would have been March of 2015. The NOI's  
6 were actually taken out in December of 2013, and  
7 there is nothing on the four corners of the NOI  
8 that says it was taken out under protest.

9           I next want to talk a little bit about  
10 Exhibit 23. That is the aerial photograph that's  
11 acquired by the United States Department of  
12 Agriculture. And Ms. Marquis said, "Well, that's  
13 a busy construction season, that's why it looks  
14 that way, and also we had a big storm." Well,  
15 this photo is dated June of 2013, and the big  
16 storm was in September of 2013.

17           And next I'd like to show you Exhibit  
18 26, the Google Earth image. That image was  
19 acquired by Google Earth October 2013. That shows  
20 that much of the property in the northern end of  
21 Reflections is still cleared.

22           Also I'd like to refer you to Photo 13  
23 attached to Exhibit 2. That's the photo that  
24 depicts Reflections Lot 15. And Ms. Marquis  
25 pointed out that that was not designated in the

1 inspection report as Lot 15 or any particular lot  
2 within the Reflections at Copper Ridge or by an  
3 address.

4 But Inspector Freedland identified that  
5 lot by GPS location on his phone, and he was quite  
6 clear where he was standing when he took that  
7 picture.

8 Also I'd like to go to the excluded  
9 photos that are in DEQ's Exhibit 36, and starting  
10 with Photo 3. That photo is taken -- Photo 3 in  
11 Exhibit 36. Not Page 3. The next one. Sorry.  
12 The next one there is Photo 3. That photo was  
13 taken looking southeast toward the Falcon Ridge  
14 Subdivision, on the north side of Western Bluffs  
15 Boulevard, and to the east of Carrier Lane.

16 The photo shows construction equipment  
17 working in or near Carrier Lane. They may be in  
18 Falcon Ridge. But the foreground shows vacant  
19 lots in Reflections at Copper Ridge Subdivision,  
20 and these lots have been cleared and graded.

21 There is also an excavation ditch  
22 running through the lots, and there's sediment  
23 tracked out onto impervious surfaces of Western  
24 Bluffs, with sediment accumulated at the curb  
25 line.

1           The next photo, Photo 4, is taken facing  
2 a more southerly direction. The excavator and  
3 other equipment are working in an area that is  
4 likely part of Falcon Ridge Subdivision, but the  
5 cleared graded lots are in Reflections  
6 Subdivision.

7           And along with the excavation through  
8 the lots, the immediate foreground of the photo  
9 shows a cleared driveway of a Reflections lot.  
10 And it also shows sediment accumulated and tracked  
11 out onto Western Bluffs.

12           And then Photo 5 is taken facing south,  
13 and that's toward lots that are owned by  
14 Reflections. The background had a skid steer  
15 working, there are stockpiles of rock and soil.  
16 The equipment at the excavation through the  
17 Reflections lots can be seen on lots owned by  
18 Reflections, and there is tracked and accumulated  
19 sediment seen in the streets.

20           In that photo we're looking at Lots 32,  
21 33 in the foreground, Lots 20, 21 in the  
22 background, and the house under construction is  
23 Lot 19 of Reflections. And Reflections didn't own  
24 Lot 19.

25           One other point I'd like to make is

1 about the road building permits, the NOI's that  
2 covered road building. Those permits did not  
3 cover all activities in the subdivisions. And  
4 also the one at issue here was terminated in  
5 December of 2012. So the road building permits do  
6 not cover the full scope of activities occurring  
7 in the subdivisions, only a small fraction  
8 associated with roads and utilities. Thank you.

9 CHAIR DEVENY: Thank you, Ms. Bowers.  
10 Ms. Marquis, would you like to wrap up.

11 MS. MARQUIS: Yes, please. Ms. Bowers  
12 just told you that the permit at issue here was  
13 terminated in December of 2012, while this picture  
14 is on the screen behind you. That misrepresents  
15 the evidence and the testimony in the record, and  
16 it's not true.

17 The photograph behind you is in that  
18 north part of the Reflections Subdivision. It is  
19 part of the third filing. And in the proposed  
20 Findings of Fact and Conclusion of Law, you'll see  
21 at Finding of Fact No. 26 that in fact the notice  
22 of termination for the permit that covered this  
23 area was not submitted until February 19th of  
24 2014.

25 So the case with these photographs is

1 that the construction was completed in July of  
2 2013. There is a period of time where they have  
3 to stabilize the area, and then they submit their  
4 notice of termination to the Department. That  
5 happened in 2014. So this area in this photograph  
6 was permitted at the time that this picture was  
7 taken.

8 I'd like to talk a little bit about  
9 Photo 13, and the Department is now alleging that  
10 that shows Lot 15. In discovery again -- this was  
11 all going on throughout this case -- we asked for  
12 all of their evidence that supported their alleged  
13 violations.

14 One piece of evidence we received was a  
15 photograph taken of this same area, but from a  
16 different angle. And DEQ witness Dan Freedland  
17 confirmed that that photograph was of this same  
18 area taken at a different angle; and DEQ witness  
19 Dan Freedland confirmed that the address provided  
20 on that photograph from DEQ was 3028 Western  
21 Bluffs, 3030 Western Bluffs, and 3032 Western  
22 Bluffs.

23 Lot 15 which was owned by Reflections at  
24 the time, the street address was 3036 Western  
25 Bluffs, it's a different street address, and those

1 street addresses are supported by the warranty  
2 deeds in the record that will, or they do show  
3 that Reflections did not own 3028, 3030, or 3032  
4 Western Bluffs, which are the addresses that were  
5 on the photograph received from DEQ.

6 Lot 15, which they did own, is a  
7 different street address entirely, and it's not  
8 shown in this picture.

9 DEQ has also agreed that the lots that  
10 Reflections at Copper Ridge owned were vacant  
11 lots. There was no home building construction  
12 going on on the lots. They were vacant lots.  
13 What DEQ saw when they went out there was home  
14 building construction, and the results of a severe  
15 storm event, unprecedented and unexpected. And  
16 several people in areas throughout the Billings  
17 area struggled with the result of that storm.

18 I'd like to talk a little bit about the  
19 aerial photograph. If we could please pull up --  
20 I'm sorry. Ms. Bawden, if you could please pull  
21 up the one from October. It's the Google Earth  
22 aerial photograph.

23 And again, now even though the  
24 Department's violation letter and their  
25 administrative orders were centered on sort of the

1 lower southern part of the subdivisions, now the  
2 Department is looking at that northern part. The  
3 northern part towards the top of the screen,  
4 again, that's the area that was covered by a  
5 construction permit for the road building and the  
6 utility installation that was in effect until  
7 February of 2014.

8 And what does it show? Does it show  
9 that the areas are cleared or graded, or does it  
10 show that there is ground where maybe some seed  
11 has been put down, and the vegetation hasn't grown  
12 up yet? We don't know.

13 What we do know is there is testimony in  
14 the record that the green patches you're looking  
15 at up there are irrigated with an irrigation  
16 system, and they were sodded, so they were going  
17 to grow vegetation. The other areas weren't  
18 sodded, and they didn't have irrigation systems in  
19 there. So what that shows is what you would  
20 expect -- a permitted area where they're waiting  
21 for the vegetation to take hold.

22 And the Department has implied that the  
23 permit does not extend to or cover the whole area,  
24 but that's contrary to the evidence in DEQ's own  
25 files. And you can see this again in the Findings

1 of Fact, and the exhibits, Exhibit BBB, does show  
2 that the area disturbed and the area covered by  
3 that general permit and the BMP's that were put in  
4 place do extend to cover all of the individual  
5 lots, not just the roads. That wouldn't make  
6 sense. So the permits applied to the whole area.

7 That's all I have. Again, the findings  
8 and conclusions are correct, they should be  
9 upheld. Happy to answer any questions you might  
10 have. Thank you for your time.

11 CHAIR DEVENY: Thank you. How I thought  
12 we'd proceed, unless the Board members have other  
13 suggestions, would be to go through the Findings  
14 of Fact, and then as we have questions with those,  
15 ask questions of the parties, unless anybody has a  
16 burning question right now that they had of the  
17 parties. Hillary, Chris, does that sound okay to  
18 you?

19 BOARD MEMBER TWEETEN: Madam Chair, just  
20 one questions, I guess, for --

21 CHAIR DEVENY: Go ahead, Hillary.

22 BOARD MEMBER HANSON: I just was going  
23 to say that's fine with me.

24 CHAIR DEVENY: Thanks, Hillary. Go  
25 ahead, Chris.

1                   BOARD MEMBER TWEETEN: Ms. Bowers, you  
2 would agree with me that in order to find those  
3 various Findings of Fact that you've identified  
4 and challenged in your exceptions, the members of  
5 the Board would have to review the entire record,  
6 and then make a finding that each particular  
7 Finding of Fact -- (inaudible) -- evidence on the  
8 whole record. Do you agree with that?

9                   MS. BOWERS: Board member Tweeten,  
10 members of the Board, yes, I agree with that, and  
11 I think that's consistent with the memo that your  
12 Board attorney sent you.

13                   BOARD MEMBER TWEETEN: Right. I guess  
14 I'm a little concerned because I'm afraid I don't  
15 see briefing, a detailed analysis, finding by  
16 finding, of the state of the record, and why it is  
17 that each finding is not supported by substantial  
18 evidence. You've argued that you think there is  
19 more persuasive evidence on one side of a finding  
20 than on the side that -- (inaudible) -- down on.

21                   But it would have been helpful, I guess,  
22 if we understood why -- You know, the Supreme  
23 Court, as you know, has provided some fairly  
24 detailed guidance in what it means for a Finding  
25 of Fact to be supported by competent substantial

1 evidence. And I think your argument is talking  
2 about competent substantial evidence, and why  
3 there was not an absence of competent substantial  
4 evidence.

5 By that absence, are you suggesting that  
6 all of the members of the Board who are going to  
7 vote on this are going to have to take time to  
8 review not just the transcripts that have been  
9 provided to us, but all of the exhibits that have  
10 been admitted, and so on and so forth, and look at  
11 all of that evidence before we can find in your  
12 favor on these Findings of Fact?

13 MS. BOWERS: Well, Board Member Tweeten,  
14 members of the Board, DEQ did, in its exceptions  
15 to the Findings of Fact, we did describe why we  
16 thought certain findings were supported by  
17 substantial evidence.

18 I do understand that to change a Finding  
19 of Fact you would have to look at the entire  
20 record, so we pointed out what we think our  
21 problems are with the findings.

22 BOARD MEMBER TWEETEN: Okay. But  
23 clearly the Board is not going to be able to make  
24 a ruling on this in your favor today because as it  
25 stands now, at least I for one have not read the

1 entire record, and I suspect none of my colleagues  
2 on the Board have, so we would be able to carry  
3 this over to a future meeting while my colleagues  
4 and I go through the record document by document,  
5 and page by page, and make sure that we agree with  
6 you that there is an absence of substantial  
7 evidence for a particular finding.

8 MS. BOWERS: I understand that.

9 BOARD MEMBER TWEETEN: Okay. Thank you,  
10 Madam Chair.

11 CHAIR DEVENY: Okay. With that, if we  
12 could all refer to the Findings of Fact again on  
13 Page 9 of the FOFCOL, and --

14 BOARD MEMBER TWEETEN: This is Chris.  
15 Are we referring now to the document that was  
16 attached to the email that Aleisha sent around  
17 this morning at 9:28 a.m.?

18 MS. CLERGET: Yes, Chris.

19 CHAIR DEVENY: We are with the  
20 procedural history.

21 MS. CLERGET: Well, it is not just the  
22 procedural history. Those pages of the document  
23 that Aleisha sent supplement the pages in the  
24 FOFCOL. So it is both. You're looking at that  
25 document that she emailed, and the original

1 FOFCOL; and those pages in the document she  
2 emailed replaced the pages in the FOFCOL. Does  
3 that make sense, Chris?

4 BOARD MEMBER TWEETEN: It does. It is  
5 not going to be easy to keep track --

6 CHAIR DEVENY: It's the red-lined  
7 version, and I have a hard copy in front of me. I  
8 think I can point out any changes. I don't  
9 believe we need to go through the procedural  
10 history because I believe the parties kind of  
11 agreed those areas were all right. Would you just  
12 nod your head if that's the case, the procedural  
13 history.

14 (Response)

15 CHAIR DEVENY: So one of those changes,  
16 Chris, was in the -- or a couple of those changes  
17 was on the procedural history. So --

18 BOARD MEMBER TWEETEN: I do see that the  
19 document that Aleisha sent around this morning has  
20 some changes and red lines, so I think we're  
21 looking at the same document.

22 CHAIR DEVENY: The first one that we  
23 will be dealing with that's red-lined would not be  
24 until Page 12. So let's go ahead and proceed with  
25 the Findings of Fact. Let's look at one through

1 four on Page 9. Does anybody have any issues with  
2 those facts?

3 (No response)

4 CHAIR DEVENY: Seeing none, let's  
5 continue on with five, six, seven, eight, nine,  
6 and ten.

7 BOARD MEMBER LEHNHERR: Madam Chair, I'm  
8 wondering. This is -- I'm not a regulatory  
9 person, and I'm not an attorney, so this would be  
10 a basic question. I'm just wondering if there is  
11 someone out there that can in a nutshell explain  
12 the permit system.

13 We've talked about a permit for the road  
14 building, and where a permit was acquired and then  
15 terminated at the end of the road building, and  
16 then other permits issued during this process.

17 I'm just wondering. Does a permit  
18 grant, allow certain activity and certain, say,  
19 discharges, or certain events to occur in  
20 association with construction, or road building;  
21 and then once the project is completed, the permit  
22 is terminated; and whoever, say, put in a road is  
23 absolved of any consequences of whatever they did  
24 in the future. If someone could in a nutshell  
25 explain that process.

1           CHAIR DEVENY:    Could someone from DEQ  
2 explain the general permit that Billings has, and  
3 then the general permit that the storm water  
4 discharges have, and what those are for, and how  
5 those are terminated.

6           MS. BOWERS:    Yes, Madam Chair, members  
7 of the Board.    There are two general permits that  
8 are pertinent in this case.    The first is what's  
9 known as the MS4 permit, and that's issued to the  
10 cities.    The City of Billings has an MS4 permit.  
11 And that's for their whole storm drain system, and  
12 they're subject to certain terms and conditions  
13 under that general permit.

14           The other general permit is the general  
15 permit for discharges, storm water discharges that  
16 are associated with construction activity.    That  
17 permit is available for construction activities  
18 that disturbs an acre or more.    And the permittee  
19 applies for a permit, and they submit what's  
20 called a Notice of Intent to be covered under the  
21 general permit.    And that may be for -- In this  
22 case first they permitted roads and utilities, and  
23 then later they conducted work over the  
24 subdivision.

25           BOARD MEMBER LEHNHERR:    I understand

1 that, but I'm wondering what the permit allows or  
2 doesn't allow. And if a someone has a permit,  
3 does it say what you're expected to construct  
4 within certain guidelines? And if you have  
5 certain discharges during that period, we  
6 understand that. But once the permit is  
7 terminated, we've certified that, for example,  
8 your project meets certain standards, and whatever  
9 happens after the permit is terminated is not your  
10 responsibility, for example.

11 MS. BOWERS: Yes. So when an NOI is  
12 submitted, the applicant describes what their  
13 activity is going to be. And since the permit is  
14 general, if their activity fits under that permit,  
15 they have to comply, they have to give us what's  
16 called a Storm Water Pollution Prevention Plan,  
17 and they have to meet certain requirements. They  
18 have to install best management practices to  
19 control runoff from their activity.

20 And then once their activity is  
21 complete, and they stabilize by revegetating or by  
22 black topping roads, then they apply for or they  
23 submit a Notice of Termination, and it's accepted  
24 by the Department. It requires that if they  
25 stabilize through vegetation, they have to meet 70

1 percent of the preconstruction condition, or they  
2 can stabilize, like I said, by other means through  
3 paving roads.

4 MS. MARQUIS: Could I just point out  
5 there is a copy of the general storm water permit  
6 at Exhibit 1.

7 And we, of course, disagree with some of  
8 the Department's interpretations about the general  
9 permit, and we've outlined those on Pages 6 and 7  
10 of our response. But the general permit is one of  
11 the exhibits.

12 BOARD MEMBER LEHNHERR: And once a  
13 permit is terminated, then the parties that had  
14 the permit are no longer held liable or  
15 responsible for whatever may happen at the site?

16 MS. BOWERS: Right. The permit is  
17 terminated, and the permittee is no longer liable  
18 under the permit.

19 BOARD MEMBER LEHNHERR: Thank you.

20 CHAIR DEVENY: I would like to move,  
21 make a motion that the Board approves the Findings  
22 for Facts for the background which is numbers one  
23 through ten.

24 BOARD MEMBER BUSBY: I second that  
25 motion.

1 BOARD MEMBER HANSON: I'll second.

2 CHAIR DEVENY: There is a second. And  
3 is there discussion by Board members? Any  
4 concerns about that?

5 (No response)

6 CHAIR DEVENY: We'll put the motion up  
7 on the Board so all members know what we're voting  
8 on. One through ten.

9 So the motion is on the board if people  
10 need to look at it. And all those in favor,  
11 signify by saying aye.

12 (Response)

13 CHAIR DEVENY: Any opposed?

14 BOARD MEMBER HANSON: Aye.

15 CHAIR DEVENY: I think that was an aye  
16 from Hillary, or were you opposed?

17 BOARD MEMBER HANSON: I was in favor.

18 CHAIR DEVENY: Thank you. There is just  
19 a little time delay, and I'm not giving you enough  
20 time before I asked for the second round. Thank  
21 you.

22 Moving on, let's talk about ownership  
23 and construction activities September through  
24 December 2013 in the FOFCOL. No. 11. We have  
25 warranty deeds, visual inspection with aerial

1 photograph. I have ownership records overlaid  
2 after the remand.

3 Let's look at 11, 12, and 13 as a group,  
4 because I think we might have some discussion on  
5 14. So at this point I would move that we accept  
6 Findings of Fact 11, 12, and 13.

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

9 CHAIR DEVENY: It's been moved and  
10 seconded. Is there any discussion on those three  
11 Findings of Fact?

12 (No response)

13 CHAIR DEVENY: Hearing none, I'm  
14 assuming -- Are you guys are ready to vote, or do  
15 you want to wait until it's printed? It's up  
16 there. Okay. All those in favor of the motion,  
17 signify by saying aye.

18 (Response)

19 CHAIR DEVENY: All those opposed.

20 (No response)

21 CHAIR DEVENY: Hearing none, the motion  
22 passes.

23 Let's look at No. 14. This is the one  
24 that we had some red-line changes that were given  
25 to us this morning. So look at that red-lined

1 page. It actually printed out blue on mine.  
2 Blue-lined.

3 So the lots which we have ownership  
4 information, according to these findings of facts,  
5 are described under "A" through "E."

6 MS. CLERGET: "A" through "F."

7 CHAIR DEVENY: "A" through "F" in the  
8 red-line. Any concerns with that?

9 (No response)

10 CHAIR DEVENY: Does anybody want to make  
11 a motion regarding No. 14?

12 (No response)

13 CHAIR DEVENY: I'll move then that we  
14 accept Finding of Fact No. 14.

15 BOARD MEMBER LEHNHERR: Second.

16 CHAIR DEVENY: It's been moved and  
17 seconded. Is there any discussion about Finding  
18 of Fact 14? Do people need more time?

19 MS. BOWERS: Madam Chair, that's with  
20 the correction, with Sarah's correction?

21 CHAIR DEVENY: That's right. Hearing  
22 none, all those in favor of accepting Finding of  
23 Fact No. 14, please signify by saying aye.

24 (Response)

25 CHAIR DEVENY: All those opposed.

1 (No response)

2 CHAIR DEVENY: Hearing none, that motion  
3 passes.

4 BOARD MEMBER TWEETEN: Madam Chair, this  
5 is Chris. Can I just to clarify for the record?

6 CHAIR DEVENY: Yes.

7 BOARD MEMBER TWEETEN: Based on what was  
8 made this morning, the parties did not object to  
9 the red-lined corrections that are found in this  
10 document we're looking at; do I understand that  
11 correctly?

12 MS. CLERGET: Yes. Chris, this is  
13 Sarah. Yes, the parties stipulated to these  
14 changes.

15 BOARD MEMBER TWEETEN: Can I ask that  
16 the parties further stipulate that we may accept  
17 these red-line changes without review of the  
18 entire record?

19 MS. CLERGET: Yes, Chris. They've  
20 already stipulated to that. So we agreed this  
21 morning that these changes -- I withdrew the  
22 original FOFCOL and resubmitted the FOFCOL with  
23 these changes, and the parties agreed that they  
24 did not object to that, and that therefore the  
25 Board would not have to review the entire record

1 in order to make these changes, because I had  
2 already submitted them as corrected FOFCOL before  
3 the Board.

4 BOARD MEMBER TWEETEN: Is that in  
5 writing?

6 MS. CLERGET: It was on the record this  
7 morning with the Court Reporter.

8 BOARD MEMBER TWEETEN: I heard what went  
9 on on the record. I didn't hear a particularized  
10 acknowledgment by the parties that these could be  
11 adopted without a complete review of the entire  
12 record.

13 MS. CLERGET: Can the parties -- I  
14 believe that was part of our discussion this  
15 morning. Can you confirm that that's your  
16 understanding.

17 MS. MARQUIS: Yes, that's our  
18 understanding, and we agreed to that.

19 CHAIR DEVENY: Thank you, Ms. Marquis.

20 MS. BOWERS: Yes, I agree.

21 CHAIR DEVENY: Thank you, Ms. Bowers.

22 BOARD MEMBER TWEETEN: Thank you. I  
23 just wanted the record to be clear, Madam Chair.  
24 Thank you.

25 CHAIR DEVENY: Okay. Let's go down to

1 No. 15. I guess the parties had agreed to this  
2 previously, so that one should be fine. Let's  
3 vote on No. 15. I would move that we accept  
4 Finding of Fact No. 15.

5 BOARD MEMBER HORNBEIN: I'll second.

6 CHAIR DEVENY: It's been moved and  
7 seconded. Any discussion?

8 (No response)

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

11 (Response)

12 CHAIR DEVENY: All those opposed.

13 (No response)

14 CHAIR DEVENY: Motion carries. So now  
15 we're moving on to No. 16 which deals with the  
16 evidence of construction activity between  
17 September and December of 2013. We do not have  
18 any red-lined information here. The Finding of  
19 Fact states that the evidence consisted of the  
20 testimony of Dan Freedland and aerial photographs  
21 from October 25th, 2013 and one from June 15th,  
22 2013. Are the Board members okay with that one?

23 MS. BOWERS: Madam Chair, members of the  
24 Board, DEQ did take exception to 16(b), and that's  
25 the language that says the Google Earth image was

1 possibly taken on October 25th, 2013.

2 CHAIR DEVENY: Okay. That point is  
3 taken. "Possibly taken" in my mind means it could  
4 have been, and I think for the matter of the  
5 record we've been talking about it, so I'm not  
6 sure I would have any issue needing to change that  
7 Finding of Fact because of that.

8 Anybody else have any comments?

9 (No response)

10 CHAIR DEVENY: So I'll move that we  
11 accept Finding of Fact No. 16.

12 BOARD MEMBER BUSBY: I'll second that.

13 CHAIR DEVENY: It's been moved and  
14 seconded. Any further discussion?

15 (No response)

16 CHAIR DEVENY: All those in favor of  
17 approving Finding of Fact No. 16 signify by saying  
18 aye.

19 (Response)

20 CHAIR DEVENY: Any opposed.

21 (No response)

22 CHAIR DEVENY: Hearing none, motion  
23 passes. We're approaching noon. Can we continue  
24 with this? Let's keep working then.

25 Let's look at No. 17. We should be able

1 to approve that because that was red-lined, and  
2 both parties agreed that that was okay. So I'm  
3 going to move that we approve Finding of Fact No.  
4 17.

5 BOARD MEMBER LEHNHERR: Second.

6 CHAIR DEVENY: It's been moved and  
7 seconded. Any discussion?

8 (No response)

9 CHAIR DEVENY: Hearing none, all those  
10 in favor, signify by saying aye.

11 (Response)

12 CHAIR DEVENY: Any opposed.

13 (No response)

14 CHAIR DEVENY: So I believe we have  
15 gotten through all the red-lined areas.

16 MS. CLERGET: Yes.

17 CHAIR DEVENY: And now we're moving on  
18 to No. 18, which deals with the additional  
19 testimony regarding ownership and construction  
20 activity. Do Board members have any thoughts on  
21 No. 18 or questions of any of the parties? Do we  
22 need to take a minute to kind of review this?

23 Could I ask DEQ. Did you have  
24 exceptions to No. 18 in your written materials?  
25 And if you did, could you refer us to that.

1 MS. BOWERS: Yes, DEQ did take exception  
2 to Finding of Fact No. 18, and it's in your  
3 materials. It's Page 60. Essentially we take  
4 exception because the Finding of Fact --

5 CHAIR DEVENY: We can read it, but thank  
6 you for referring us to that. The objection that  
7 DEQ had here had to do with the definition of  
8 construction. And then Ms. Marquis, could you  
9 refer us to your written material.

10 MS. MARQUIS: Madam Chair, members of  
11 the Board. Certainly. On Page 5 of our response  
12 document under the heading FOF-18 is our response  
13 to DEQ's exception to Finding of Fact 18.

14 CHAIR DEVENY: Thank you. Do Board  
15 members have any discussion about the issue of the  
16 definition of construction that was used in the  
17 Hearing Officer's record?

18 (No response)

19 CHAIR DEVENY: Ms. Bowers and Ms.  
20 Marquis, could I ask you each to just maybe in  
21 thirty seconds briefly describe why this would be  
22 a factual issue for us to reject.

23 MS. BOWERS: Yes, Madam Chair, members  
24 of the Board. DEQ's exception takes exception to  
25 the findings because it relies on active

1 construction activity, which is not consistent  
2 with the definition of storm water discharge  
3 associated with construction activity at  
4 Administrative Rules of Montana 17.30.1102.

5 And that is a very broad definition that  
6 includes clearing, grading, excavation that  
7 results in disturbance. And disturbance is really  
8 what we're looking at when we go out and look at a  
9 site, disturbance of soil, placement of stockpiles  
10 which are sources of pollutants.

11 The construction activity, there was  
12 evidence of construction activity. DEQ's position  
13 is that there was evidence of construction  
14 activity on the lots. And we object to the  
15 finding, or we take exception to the finding  
16 because it relies on actual construction, earth  
17 moving, having construction equipment out at the  
18 site. And our definition of construction activity  
19 is not so limited.

20 CHAIR DEVENY: Ms. Marquis.

21 MS. MARQUIS: Madam Chair, members of  
22 the Board. Finding of Fact 18 is a summary of  
23 testimony given by Mr. Landy Leep. In his  
24 testimony he used the word, the terms  
25 construction, construction activity, and

1 construction work. There is nothing in the  
2 transcript that would indicate that he meant  
3 anything other than the same term "construction  
4 activity" that's used in the rules.

5 Further, the rules speak in present  
6 tense terms -- grading, excavating -- and they  
7 specify at the time of the construction project.  
8 So the rule indicates present tense, which is in  
9 line with the Board's ruling on this matter just a  
10 few months ago where they were specific about  
11 wanting evidence at the time of the alleged  
12 violations.

13 The main point again here is that this  
14 Finding of Fact summarizes Mr. Leep's testimony,  
15 and he used the words construction, construction  
16 activity, and construction work. There is no  
17 indication that he meant anything other than what  
18 is indicated in the rule.

19 CHAIR DEVENY: Do Board members need any  
20 clarification on the concerns that the parties had  
21 about the terminology of construction? Chris,  
22 Hillary, are you still with us?

23 BOARD MEMBER TWEETEN: Yes, I'm still  
24 here.

25 BOARD MEMBER HANSON: Yes.

1 CHAIR DEVENY: Okay. Would anybody like  
2 to entertain a motion on No. 18 so I can not have  
3 to talk so much?

4 BOARD MEMBER HORNBEIN: I would propose  
5 that we adopt Finding of Fact 18.

6 BOARD MEMBER BUSBY: Second.

7 CHAIR DEVENY: It's been moved and  
8 seconded to adopt Finding of Fact No. 18. All  
9 those in favor -- any further discussion?

10 (No response)

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

13 (Response)

14 CHAIR DEVENY: Any opposed?

15 BOARD MEMBER LEHNHERR: Yes. Aye.

16 CHAIR DEVENY: Motion carries with five  
17 affirmed, one opposed.

18 Let's go on to No. 19, No. 19 and 20.  
19 DEQ, did you have objections to that? And could  
20 you point to that.

21 MS. BOWERS: Yes, Madam Chair, members  
22 of the Board. We did take exception to Finding of  
23 Fact 19.

24 CHAIR DEVENY: And the page number?

25 MS. BOWERS: It's on our exceptions,

1 it's your page No. 60.

2 CHAIR DEVENY: Thank you.

3 MS. BOWERS: And essentially our  
4 exception is that the finding is only relevant to  
5 construction activities associated with road  
6 building and utility installation, if that's what  
7 is meant by Copper Ridge and Reflections'  
8 correspondence with its contractors. If those are  
9 -- Then I think we're probably okay with that  
10 finding.

11 CHAIR DEVENY: All right. What about 20  
12 and 21, while we're at it? You kind of grouped  
13 those together in your testimony.

14 MS. BOWERS: Yes. And our exception to  
15 20 is that the cited MPDES permits which are in  
16 Exhibits A, B, and C, those are all for  
17 subdivision street construction, and water and  
18 sanitary sewer. And the permitted areas of the  
19 disturbance are small compared to the whole site.

20 For example, Exhibit A permitted 5.3  
21 acres, not the whole 17.7 acre site; and "B"  
22 permitted 5.3 acres also, but not the whole 21.8  
23 acre site; and "C," which was the one for  
24 Reflections at Copper Ridge Subdivision third  
25 filing, that permitted a 3.5 acre of disturbance,

1 not the whole 8.27 acre site.

2 CHAIR DEVENY: And Ms. Marquis, could  
3 you refer to your response on that.

4 MS. MARQUIS: Madam Chair, members of  
5 the Board. Our response begins on Page 6 of our  
6 document under the heading "FOF's 19 through 21."

7 This is where we disagree with the  
8 Department on how the general permit is  
9 interpreted. The smaller acreage numbers that  
10 they provided are the disturbance area that's  
11 included in the Notice of Intent and the permit;  
12 but there is a larger number that is required to  
13 be provided that is the acreage of the site.

14 And so the permit does cover the site,  
15 and there is testimony in the record that the maps  
16 provided have a boundary area that includes all of  
17 the lots. The BMP's that were shown on those maps  
18 include all of the lots, and the Department hadn't  
19 cited any problems with that permitted work.

20 MS. BOWERS: And we disagree with that.  
21 The SWPPP may show BMP's that extend into the  
22 lots, but the area of disturbance is the smaller  
23 area.

24 CHAIR DEVENY: Do Board members have  
25 further questions or discussion of this?

1 BOARD MEMBER BUSBY: I have one easy  
2 question.

3 BOARD MEMBER TWEETEN: I'd move we  
4 adopt --

5 CHAIR DEVENY: Just a second, Chris. I  
6 think Dexter got ahead of you in the queue here.  
7 Just a second.

8 BOARD MEMBER BUSBY: Just a real quick  
9 question for Sarah. Your word "substantial" in  
10 No. 19, what do you mean by substantial? They're  
11 either done or they're not done.

12 MS. CLERGET: There was testimony in the  
13 record about what "substantial completion" means  
14 there. That's a term of art in contracting. And  
15 so substantial completion had to be done, had to  
16 be reached before they were released under the  
17 contract, so that's what I meant by that.

18 BOARD MEMBER BUSBY: Okay. Thank you.

19 CHAIR DEVENY: Okay, Chris. Go ahead.

20 BOARD MEMBER TWEETEN: Madam Chair, I  
21 move we adopt 19, 20, and 21.

22 BOARD MEMBER BUSBY: I would second  
23 that.

24 CHAIR DEVENY: It's been moved and  
25 seconded. Do we have discussion by Board members?

1 BOARD MEMBER TWEETEN: Madam Chair, by  
2 way of discussion. It appears to me that DEQ's  
3 objection is not for whether these Findings of  
4 Fact are accurate or not, but is directed more  
5 toward what they do and don't prove, which I think  
6 it seems pretty clear that these are accurate as  
7 far as they go, so I move their adoption on that  
8 basis.

9 CHAIR DEVENY: Do other Board members  
10 have any comments, questions?

11 (No response)

12 CHAIR DEVENY: Hearing none, there is a  
13 motion before the Board, and it's up on the board,  
14 to approve Findings of Fact 19 through 21. All  
15 those in favor of the motion signify by saying  
16 aye.

17 (Response)

18 CHAIR DEVENY: Any opposed?

19 BOARD MEMBER LEHNHERR: Aye.

20 CHAIR DEVENY: One in opposition and  
21 five affirmative.

22 Moving on. No. 22, 23, have to do with  
23 -- was included in CMG Construction. That's no  
24 big deal, I don't think. The permit was initiated  
25 by construction, confirmed by DEQ.

1 MS. BOWERS: Madam Chair, did we skip  
2 22?

3 CHAIR DEVENY: We haven't done that one  
4 yet.

5 MS. BOWERS: Okay. Thanks.

6 CHAIR DEVENY: DEQ, you had an exception  
7 to 22, if you'd like to briefly talk about that.

8 MS. BOWERS: Yes, Madam Chair, members  
9 of the Board. DEQ's exception to Finding of Fact  
10 22 is that it consolidates all the construction  
11 activity associated with roads and utilities that  
12 was permitted under MTR104993 with the  
13 construction activity conducted on residential  
14 lots and later permitted under MTR105376.

15 CHAIR DEVENY: And the problem with  
16 that?

17 MS. BOWERS: Well, the area in the north  
18 end of the Reflections subdivision was not all  
19 permitted under MTR104993, only the road  
20 construction and utility installation.

21 CHAIR DEVENY: Ms. Marquis, do you want  
22 to speak to that?

23 MS. MARQUIS: Sure. Thank you, Madam  
24 Chair, members of the Board. Our response to the  
25 Department's exception begins on Page 7 of our

1 document.

2           And again, we point out that the  
3 Department is referring to some construction  
4 activity later conducted by the subdivisions, but  
5 they don't cite to any evidence of what that later  
6 construction activity is or when it happened. So  
7 in terms of -- we've been through this. What our  
8 subdivisions did out there was the road building  
9 and the utility construction that was covered by a  
10 permit with boundaries that extended to include  
11 all of the individual lots.

12           The Department is again relying on those  
13 later permits that they required as a corrective  
14 action from the subdivision. Those permits were  
15 submitted under protest. They were after the  
16 alleged violations. And this is the same argument  
17 that they brought before you in regards to the  
18 summary judgment order that has already been  
19 remanded, and that's why we're here today.

20           CHAIR DEVENY: Further Board questions  
21 or discussions on this?

22           BOARD MEMBER HORNBEIN: Yes. I have a  
23 question for DEQ. You reference MTR105376 for  
24 construction of single family homes and necessary  
25 landscaping. Is that one of the permits that

1 Reflections was required to get under protest,  
2 or --

3 MS. BOWERS: That's the permit that they  
4 submitted an NOI for in December 2013.

5 CHAIR DEVENY: Further questions or  
6 clarifications?

7 BOARD MEMBER BUSBY: But was that one of  
8 the permits they were required to get by DEQ's  
9 order?

10 MS. BOWERS: Yes, they were required to  
11 permit their activity by DEQ's order. That's  
12 right.

13 BOARD MEMBER TWEETEN: Madam Chair, this  
14 is Chris.

15 CHAIR DEVENY: Go ahead, Chris.

16 BOARD MEMBER TWEETEN: Findings 22  
17 through 28 as a group, there are only exceptions  
18 to 22, 24, and 28 -- (inaudible) -- look into 23,  
19 25, 26, and 27, because neither party has taken  
20 exception to those findings. As far as 22, 24,  
21 and 28 are concerned, again, the findings are  
22 accurate as far as they go to --

23 CHAIR DEVENY: I'm sorry. You faded out  
24 on us, Chris. Could you go back to where you said  
25 "The findings are accurate."

1 BOARD MEMBER TWEETEN: I think they're  
2 accurate as far as they go. It simply says that  
3 this area was previously included in permit  
4 MTR104993. DEQ's answer to that is, well, that  
5 was a permit for road construction. Okay. That  
6 doesn't mean that the finding is inaccurate,  
7 because the property was in fact included within  
8 the scope of that permit.

9 24 is to the same effect. The permit  
10 boundary extended to include the entirety of the  
11 individual lots around Reflections Circle, and a  
12 portion of Western Bluffs Boulevard. Again, their  
13 objection is, well, that's a road building permit.  
14 Okay. The finding is correct, though, that the  
15 boundary did include those properties. 28 is  
16 basically the same. So Madam Chair, I would move  
17 that we adopt 28 --

18 MS. BOWERS: Madam Chair, may I be  
19 heard?

20 CHAIR DEVENY: Chris, we didn't hear  
21 what your motion was.

22 BOARD MEMBER TWEETEN: I'm sorry. The  
23 motion was to adopt 22 --

24 CHAIR DEVENY: We still couldn't hear  
25 you. The motion was to adopt 22 and 28, or 22

1 through 28?

2 BOARD MEMBER TWEETEN: 22 through 28 --  
3 24, 25, 26, 27, and 28.

4 CHAIR DEVENY: There is a motion before  
5 the Board. Is there a second?

6 BOARD MEMBER BUSBY: I'll second that.

7 CHAIR DEVENY: It's been moved and  
8 seconded. We'll have some discussion. Ms.  
9 Bowers, you had a comment.

10 MS. BOWERS: Yes. The Findings of Fact  
11 22, 24, and 28 incorrectly include the  
12 construction activity on residential lots in the  
13 road building permit MTR104993.

14 And Exhibit C, part of Exhibit C is the  
15 Storm Water Pollution Prevention Plan which  
16 includes a map, and that shows the area that was  
17 included under that permit MTR104993, and it's  
18 just the roads and an area that slightly extends  
19 beyond the roads, but not the residential lots.  
20 And that's DEQ's exception to those findings.

21 MS. MARQUIS: And if I may, that's  
22 contrary to the Department's testimony at the  
23 hearing where we looked at the maps. Exhibit BBB  
24 is the same map. It's the larger version of it.  
25 And the Department agreed that the boundary was

1 drawn on the exterior of all of the individual  
2 lots.

3 CHAIR DEVENY: So based on the -- Could  
4 I ask a question of our attorney?

5 MS. CLERGET: Yes.

6 CHAIR DEVENY: Did you consider -- When  
7 you wrote these, you would have considered both  
8 those testimonies in writing this?

9 MS. CLERGET: Yes.

10 CHAIR DEVENY: So it was your finding  
11 that is what we're seeing here in the Findings of  
12 Fact after you considered the two --

13 MS. CLERGET: Yes. And the testimony,  
14 yes.

15 CHAIR DEVENY: And the testimony. Okay.  
16 Thank you. Is there any further discussion by the  
17 Board?

18 (No response)

19 CHAIR DEVENY: Hearing none, there is a  
20 motion to approve Findings of Fact No. 22 through  
21 28. It's been moved and seconded, we've had  
22 discussion. Members of the Board, all in favor,  
23 please signify by saying aye.

24 (Response)

25 CHAIR DEVENY: All those opposed, please

1 signify by saying aye.

2 (Response)

3 CHAIR DEVENY: I couldn't hear Chris or  
4 Hillary's votes. Let's do a roll call vote.  
5 Lindsay, would you do that.

6 MS. FORD: Chris Deveny.

7 CHAIR DEVENY: Yes. Aye on the motion.

8 MS. FORD: Dexter Busby.

9 BOARD MEMBER BUSBY: Aye.

10 MS. FORD: Hillary Hanson.

11 BOARD MEMBER HANSON: Aye.

12 MS. FORD: Chris Tweeten.

13 BOARD MEMBER TWEETEN: (No response)

14 CHAIR DEVENY: Chris, we need a vote  
15 from you.

16 BOARD MEMBER TWEETEN: (No response)

17 CHAIR DEVENY: We seem to have lost  
18 Chris. Why don't you continue taking the roll  
19 call.

20 MS. FORD: Melissa Hornbein.

21 BOARD MEMBER HANSON: I can hear him. I  
22 don't know why you guys can't.

23 BOARD MEMBER HORNBEIN: Yes.

24 MS. FORD: David Lehnherr.

25 BOARD MEMBER LEHNHERR: Nay.

1 BOARD MEMBER TWEETEN: Aye. Can you  
2 hear me now?

3 MS. FORD: That's four to two.

4 CHAIR DEVENY: The motion passed four to  
5 two.

6 We're now on Finding of Fact No. 29.  
7 DEQ, do you want to speak to your objection to  
8 this Finding of Fact.

9 MS. BOWERS: Yes, Madam Chair, members  
10 of the Board. And this Finding of Fact we take  
11 basically the same exception that the  
12 consolidation of construction activity under the  
13 road permit MTR102807 with that activity that was  
14 later permitted under MTR105377 is incorrect; and  
15 the permitted area of disturbance is only 5.3  
16 acres, not the whole 17.7 acre site, and should  
17 not extend to the residential lots.

18 CHAIR DEVENY: Ms. Marquis.

19 MS. MARQUIS: Madam Chair, members of  
20 the Board, our response is essentially the same,  
21 that there is no -- The Department has said that  
22 it mischaracterizes or lumps together the  
23 different types of construction activities that  
24 were done by Copper Ridge and Reflections, and  
25 that's not true, because the only construction

1 they did was the road building and the utility  
2 installation that was appropriately permitted, and  
3 the permit boundaries are clear in the exhibits,  
4 and DEQ has agreed that those permit boundaries  
5 did extend the full extent of the individual lots.

6 CHAIR DEVENY: Do Board members have any  
7 questions of the parties? Any further discussion  
8 on 29? I think we could take 29, 30 --

9 MS. CLERGET: There is no objection  
10 until you get to 34, so you could do 29 through  
11 34.

12 CHAIR DEVENY: So we could do 29 through  
13 34 -- 33. Excuse me. Is there interest by  
14 members of the Board to approve Findings of Fact?

15 BOARD MEMBER BUSBY: I move we approve  
16 the Findings of Fact 29 through 33.

17 CHAIR DEVENY: I'll second it.  
18 Discussion? Concerns?

19 BOARD MEMBER HORNBEIN: Madam Chair, I  
20 have a question for the parties. It seems that  
21 there is some factual disagreement about the  
22 extent of these permits that are referenced in the  
23 Finding of Fact, specifically with regard to this  
24 Exhibit BBB, which Reflections asserts DEQ agreed  
25 to previously. And I would love to get some

1 background on that.

2 MS. CLERGET: We have it, too, if you  
3 would like to see it.

4 BOARD MEMBER HORNBEIN: I would like to  
5 see it, yes.

6 CHAIR DEVENY: We're putting the  
7 document exhibit up on the Board. Could somebody  
8 explain it. Ms. Marquis, would you explain that,  
9 and then we'll have DEQ respond. Feel free to  
10 come up and point out --

11 MS. MARQUIS: Sure. Thank you, Madam  
12 Chair, members of the Board.

13 This is the north part of the third  
14 filing of Reflections. So this maybe doesn't  
15 portray very clearly, but the testimony at the  
16 hearing we pointed out this thick black line that  
17 you see going around upward to the edges of the  
18 individual -- these are individual lots here.  
19 Obviously these are the roads, and the individual  
20 lots.

21 And this thick black line you'll see  
22 here, it is called a boundary area. I think  
23 that's the only place where it's identified as a  
24 boundary area. But it extends to the entire outer  
25 reaches of individual lots. And the testimony --

1 I was going to pull that up quickly in the  
2 transcript for you.

3 So this exhibit was I believe admitted,  
4 and this is my cross-examination of DEQ witness  
5 Mr. Dan Freedland. And I had asked him, "Drawing  
6 your attention to the boundary area which is noted  
7 in the top left of Exhibit BBB, the map in the top  
8 left, there is a note that says boundary area, and  
9 it refers to a dashed line." He answered yes.

10 I asked, "So does that boundary line  
11 extend so that it includes the entirety of all of  
12 the individual lots?" His answer was, "And around  
13 Reflections Circle, and yeah, some of them, yeah."

14 And then I asked him -- and this is on  
15 Page 59 of the transcript. I apologize if I  
16 didn't mention that before. I asked him, "Drawing  
17 your attention to the green line," and I asked him  
18 if his was a colored copy, too, and he said yes,  
19 it did.

20 And I said, "Is a swale or a berm gravel  
21 knocked down a BMP?," and he said -- I said, "It's  
22 a BMP, correct?" And he answered, "A swale berm,  
23 that would be a BMP, yes."

24 And I asked, "And it extends the entire  
25 width of that area; is that correct?" And his

1 answer was, "On the south side, yes."

2 So the Department agreed that the  
3 boundary areas and the BMP in place extend the  
4 entire width of the subdivision, including all of  
5 the individual lots.

6 BOARD MEMBER HORNBEIN: Could you  
7 provide the Bates number for that testimony.

8 MS. CLERGET: You don't have that  
9 transcript.

10 BOARD MEMBER HORNBEIN: We don't have  
11 that transcript.

12 MS. CLERGET: No, that's a hearing  
13 transcript. The transcripts you have are from  
14 Board meetings.

15 BOARD MEMBER HORNBEIN: Okay. Got it.

16 CHAIR DEVENY: Thank you, Ms. Marquis.  
17 Does DEQ --

18 MS. BOWERS: Yes, Madam Chair, members  
19 of the Board. The referred Exhibit BBB is a map  
20 that was in the Storm Water Pollution Prevention  
21 Plan, or attached to that plan for MTR104993,  
22 which is the permit for road building and utility  
23 installation in Reflections third filing.

24 The finding is based on a map which  
25 shows location of the best management practices

1 installed pursuant to the permit. It's not the  
2 area of disturbance.

3 And if you read Dan's testimony, Dan  
4 Freedland's testimony further, when he's asked a  
5 question, "And it goes along the entire back edge  
6 of the individual lots; is that correct?," he  
7 says, "Yes, but they're identifying the area of  
8 disturbance differently." And that's because this  
9 map is showing best management practices. It is  
10 not showing the whole area of disturbance  
11 permitted under that permit.

12 BOARD MEMBER HORNBEIN: Madam Chair, can  
13 I ask a follow up question?

14 CHAIR DEVENY: Please.

15 BOARD MEMBER HORNBEIN: Is there  
16 anything in the record that indicates the area of  
17 disturbance permitted under this permit?

18 MS. BOWERS: Yes. There are maps  
19 attached to the Storm Water Pollution Plan that  
20 show the area of disturbance, and I would have to  
21 dig through the record to find that, but that  
22 could be done. It would be Exhibit C, I believe.

23 CHAIR DEVENY: Maybe this would be a  
24 good time to take a lunch break. We don't have a  
25 motion to consider right now. And if you'd like

1 to go back into the record and find that.

2 MS. BOWERS: Yes, I can do that.

3 CHAIR DEVENY: Sarah.

4 MS. CLERGET: You have a pending motion.

5 CHAIR DEVENY: Oh, we do. I'm sorry.

6 So we do have a motion. Can we postpone the  
7 decision on that? Would the Board prefer to  
8 proceed?

9 BOARD MEMBER HORNBEIN: I think it would  
10 be nice to just finish up this chunk.

11 CHAIR DEVENY: Okay.

12 BOARD MEMBER HORNBEIN: Madam Chair, can  
13 I ask a question?

14 CHAIR DEVENY: Sure.

15 BOARD MEMBER HORNBEIN: Is that Exhibit  
16 C referenced by DEQ available for us to view?

17 MS. CLERGET: Yes.

18 CHAIR DEVENY: Can you bring it up now.

19 MS. CLERGET: It is big, so if we could  
20 have some idea of what page you want in it,  
21 because I don't know where the map is in it.

22 CHAIR DEVENY: Hillary, Chris, we're  
23 working on getting a document up for us to look  
24 at.

25 MS. BOWERS: There is the SWPPP.

1 MS. CLERGET: Do you know what page of  
2 Exhibit C, though? It's Page 27, and that was the  
3 one that was cut off, so that's why Exhibit BBB  
4 exists because 27 in "C" is cut. So you can show  
5 them. 27 in "C" is cut off. Somebody folded it  
6 when they copied it. So we entered Exhibit BBB,  
7 so that replaced Exhibit C page 27.

8 MS. BOWERS: I'm not sure BBB is the  
9 same, though.

10 MS. CLERGET: We can go back through the  
11 record, but that was the representation at the  
12 hearing. This is what Exhibit C -- this is the  
13 map in Exhibit C in the record.

14 CHAIR DEVENY: So the record does not  
15 have the accurate one either?

16 MS. CLERGET: So this is DEQ's Exhibit  
17 C, because this is the Exhibit C that DEQ  
18 submitted --

19 MS. BOWERS: No, Exhibit C is not DEQ's  
20 exhibit.

21 MS. CLERGET: I'm sorry. Copper Ridge's  
22 exhibit that is in the record. So that is what it  
23 is in the record. And then the representation was  
24 that Exhibit BBB replaced that page because it was  
25 folded over, is my understanding. And we can go

1 back through the transcript and confirm that, but  
2 the record is what it is with regard to the  
3 exhibits.

4 MS. BOWERS: Madam Chair, members of the  
5 Board. I think there is a map showing  
6 disturbance, not just the BMP's, and I can try to  
7 find that on the break if you want to look at it.

8 BOARD MEMBER HORNBEIN: Sure.

9 CHAIR DEVENY: Let's give DEQ a chance  
10 to find that document, assuming it was part of the  
11 record, and we'll take a lunch break and reconvene  
12 at 1:20.

13 MS. CLERGET: Sorry. Before we  
14 reconvene -- the motions and the order on the  
15 motions in limine have been emailed to the entire  
16 board, so Hillary and Chris, you should have those  
17 in your email, and we've got hard copies for  
18 everybody here. So we'll pass those out now, or  
19 we'll put them together and pass that out while  
20 you're having lunch.

21 (Lunch recess taken)

22 CHAIR DEVENY: I'm going to reconvene.  
23 Both Hillary and Chris have checked in, and all of  
24 us are here in the room, so let the record reflect  
25 that all six Board members are present.

1           So we left off with a motion on the  
2 table, and DEQ had wanted to show an exhibit.

3           MS. BOWERS: Well, I was partly  
4 mistaken. Exhibit C, the map that's represented I  
5 believe it is on Page 27, and that was later  
6 admitted as Exhibit BBB, that did replace the map  
7 in Exhibit C which is a map showing BMP's.

8           In Exhibit C on Page 10, there is a  
9 description of the area of disturbance, and that's  
10 3.5 acres out of the total eight; and there is a  
11 description of the activity permitted, which is  
12 road building and utility installation.

13           CHAIR DEVENY: Melissa, does that answer  
14 your question?

15           BOARD MEMBER HORNBEIN: (Nods head)

16           CHAIR DEVENY: So could you put up the  
17 motion, Aleisha, please.

18           MS. SOLEM: (Complies)

19           CHAIR DEVENY: The motion before the  
20 Board is to approve Findings of Fact 29 through  
21 33. Does the Board have any further discussion or  
22 questions of the parties, any Board members?

23           (No response)

24           CHAIR DEVENY: I'm hearing none. Let's  
25 vote. Go ahead.

1 BOARD MEMBER HORNBEIN: I'm sorry, Madam  
2 Chair. I just have I guess an observation. The  
3 disputed Findings of Fact are ones that I cannot  
4 agree to adopt. We decided to include up to 33  
5 because a number of those were not disputed. So I  
6 just want it to be clear that when I vote nay, it  
7 is with regard to the disputed Findings of Fact  
8 and not the others.

9 CHAIR DEVENY: So noted. So there is a  
10 motion on the table for approval of Facts 29  
11 through 33. All those in favor, signify by saying  
12 aye.

13 (Response)

14 CHAIR DEVENY: All those opposed.

15 BOARD MEMBER LEHNHERR: Aye.

16 BOARD MEMBER HORNBEIN: Aye.

17 CHAIR DEVENY: Chris, I don't believe we  
18 got a vote from you.

19 BOARD MEMBER TWEETEN: Aye. Madam  
20 Chair, if I might explain. For some reason I'm  
21 trying to follow along on speaker phone, because I  
22 actually have three electronic devices going at  
23 one time, and for some reason my speaker phone is  
24 not picking up my voice, so I have to turn off the  
25 speaker, hold it up to my ear, and say aye.

1 That's the reason why --

2 CHAIR DEVENY: Okay. I'll give you time  
3 to do that. Thank you. So what was the vote on  
4 that motion?

5 BOARD MEMBER TWEETEN: It was yes.

6 CHAIR DEVENY: So we have a four to two  
7 affirmative vote on those facts, so we will  
8 continue on with No. 34, 35, 36 and -- I've lost  
9 my place with DEQ's objections, so --

10 MS. CLERGET: It's Page 8 on DEQ's  
11 exceptions, and they group 34, 35, 37, 38, and 39  
12 objections together.

13 CHAIR DEVENY: I'll let you talk about  
14 those. Could you let me find them for a second,  
15 please.

16 MS. BOWERS: The exceptions are on your  
17 Page 63, DEQ's exceptions.

18 CHAIR DEVENY: Thank you. Go ahead, Ms.  
19 Bowers.

20 MS. BOWERS: And DEQ takes exception to  
21 Finding of Fact 34, 35, 37, 38 and 39, and that's  
22 because they rely on a definition of construction  
23 activity that is not consistent with the rule,  
24 17.30.1102(28) or with case law.

25 And that's because construction activity

1 for purposes of the Montana Water Quality Act and  
2 the Clean Water Act includes ground disturbing  
3 activities that create a conduit for pollutants,  
4 and it is not limited to just active construction  
5 or earth moving activity.

6 CHAIR DEVENY: Ms. Marquis.

7 MS. MARQUIS: Madam Chair, members of  
8 the Board. Again, our argument is that -- this is  
9 based on testimony from Mr. Leep who testified  
10 adequately about the construction activities, and  
11 that there is no reason for them to continue doing  
12 construction activities after the roads and  
13 utility work is done and installed. DEQ presented  
14 no evidence to the contrary. There is no evidence  
15 to contradict that at all.

16 And DEQ, the case law that DEQ relies on  
17 doesn't apply here because in that case, the  
18 construction began without a permit, and then they  
19 stopped the construction, and then they had to go  
20 in and get a permit, and the issue was how many  
21 days of violation would they charge, was there an  
22 ongoing violation that entire time.

23 That's not the case here at all because  
24 all of the construction activities that Copper  
25 Ridge and Reflections performed were permitted,

1 and then the Department accepted the Notices of  
2 Termination and terminated those permits. So that  
3 case law doesn't apply in this instance.

4 CHAIR DEVENY: Further discussion by the  
5 Board? Thoughts on this?

6 BOARD MEMBER TWEETEN: Madam Chair, can  
7 I ask Ms. Marquis a question?

8 CHAIR DEVENY: Yes.

9 BOARD MEMBER TWEETEN: I don't have the  
10 transcript of the hearing in front of me, but my  
11 question is: In the course of questioning Mr.  
12 Leep, these matters that are covered by these  
13 findings, with respect to what his understanding  
14 of the term construction activities was --

15 MS. MARQUIS: I'm sorry, Board Member  
16 Tweeten. So is your question essentially whether  
17 Mr. Leep elaborated on what the construction  
18 activity would be?

19 BOARD MEMBER TWEETEN: What he meant by  
20 -- I mean the argument here, as I understand it,  
21 is over the definition of the word "construction  
22 activities." Construction activities. And the  
23 Department, as I understand it, is arguing that --  
24 (inaudible) -- testifying in reference to  
25 construction activities, he was not referring to

1 that term as it's elaborated upon in the  
2 Administrative Rule 17.30.1102 sub (28).

3 So I guess my question is: During the  
4 questioning of Mr. Leep, was this regulation  
5 brought to his attention? And was that  
6 construction activities in the sense that it's  
7 used in the regulation?

8 MS. MARQUIS: I have to go back and  
9 check. I'm not sure that in this transcript at  
10 this hearing we went into in detail his  
11 understanding of that regulation. It's certainly  
12 been a key component throughout this case, and Mr.  
13 Leep has been involved in this case and reviewed  
14 all the briefing, and I'm certain he's seen the  
15 regulation and the rules before. We've discussed  
16 it several times.

17 But whether or not it appears in this  
18 transcript, it's going to take me a few minutes to  
19 find that.

20 BOARD MEMBER TWEETEN: I guess my  
21 concern is that if his sense of the term was  
22 construction activities referred to the erection  
23 of houses, and not to the various earth moving,  
24 grading, excavation, stockpiling actions that are  
25 referenced in the rule in his testimony. So

1 that's the reason why I'm posing the question.  
2 If you could shed any light on that, I'd  
3 appreciate it very much. Madam Chair, if I might  
4 ask Ms. Bowers a question?

5 CHAIR DEVENY: Just a moment, Chris.  
6 Ms. Marquis has a response.

7 MS. MARQUIS: Madam Chair, Board Member  
8 Tweeten. The line of questioning was all in the  
9 context of the completion of the construction work  
10 that the subdivisions had done for the road  
11 building and the utility installation, so it  
12 wouldn't have been limited inappropriately to home  
13 building construction. It would have been much  
14 broader than that. It certainly, in the series of  
15 questions, referred to the home building and the  
16 utility installation.

17 For example on Page 169 of the  
18 transcript on Line 22, I asked Mr. Leep, "What is  
19 the date of substantial completion for the  
20 construction work that you had contractors do in  
21 the first filing of Reflections?" His answer was,  
22 "The last date on this one is July 9th, 2008."

23 I next asked him, "Are you aware of any  
24 construction activity by Reflections or its  
25 contractors after that July 9th, 2008 date?" His

1 answer, he had asked, "In the first filing of  
2 Reflections?," and I said yes.

3 His answer was, "There would be nothing  
4 else to do once the contractors are done. We  
5 don't own tractors. We don't own tools. They  
6 take their equipment away. We have no way of  
7 doing additional work, and there is no work to do.  
8 We're done. The streets are in, the curbs are  
9 done, the water lines, sewer lines. The park is  
10 in in this case. There is nothing else for us to  
11 construct."

12 Is that what you were looking for, Board  
13 Member Tweeten?

14 BOARD MEMBER TWEETEN: That's helpful.  
15 Thank you. If I might ask Ms. Bowers a question.

16 CHAIR DEVENY: Yes, go ahead.

17 BOARD MEMBER TWEETEN: In your  
18 exceptions, you argue that the regulation is  
19 construction activity --

20 CHAIR DEVENY: You faded out on us  
21 again, Chris. Can you speak up or --

22 BOARD MEMBER TWEETEN: I'll try as best  
23 I can. Ms. Bowers, let me try again. Can you  
24 hear me now?

25 MS. BOWERS: Yes, I hear you.

1           BOARD MEMBER TWEETEN: The part in the  
2 regulation --

3           CHAIR DEVENY: You've dimmed out, you've  
4 gotten really dim on us again, Chris. Is it  
5 possible for you to get closer to your speaker on  
6 your phone?

7           BOARD MEMBER TWEETEN: What about now?  
8 Is that better?

9           MS. BOWERS: Yes, Board Member Tweeten.  
10 I hear you now.

11           BOARD MEMBER TWEETEN: Okay. The term  
12 in the regulation is "storm water discharge  
13 associated with construction activities." And as  
14 I understand the rule, a cause and effect  
15 relationship between a discharge in storm water  
16 and construction activities including clearing,  
17 grading, etc.

18           Now, as I understand what you've said in  
19 your exception, you've asserted that the discharge  
20 of storm water, for example from this September  
21 2013 event, would constitute a storm water  
22 discharge from construction activity if that storm  
23 water made it into the waters of the State through  
24 some conduit that was created because of the  
25 construction activities undertaken by Copper Ridge

1 at any time, correct?

2 MS. BOWERS: Board Member Tweeten,  
3 members of the Board. That's correct. The  
4 activity that's regulated is ground disturbance,  
5 and it is the ground disturbance that creates the  
6 conduit. So if the lots are left bare, that's the  
7 type of activity that's regulated.

8 BOARD MEMBER TWEETEN: What was the  
9 conduit that allowed this storm water to discharge  
10 -- in the September 2013 incident that allowed  
11 this storm water to discharge into the waters of  
12 State of Montana? What conduit did Copper Ridge  
13 create at whatever time that allowed this storm  
14 water to discharge to waters of the State?

15 MS. BOWERS: Board Member Tweeten,  
16 members of the Board. The conduit is bare or  
17 disturbed ground with no best management practices  
18 in place to control runoff.

19 Without some sort of BMP's in place to  
20 mitigate runoff, the water will just go downhill  
21 to Cove Ditch from the development. And so that's  
22 the regulated activity is the creating ground  
23 disturbance and leaving it, or leaving stockpiles  
24 of pollutants such as gravel or fill.

25 BOARD MEMBER TWEETEN: Okay. But the

1 conduit then would be the failure to adopt Best  
2 Management Practices?

3 MS. BOWERS: Yes. Leaving the ground  
4 bare without any BMP's to mitigate storm water  
5 discharge.

6 BOARD MEMBER TWEETEN: Okay. Refresh my  
7 recollection. What ground disturbing activities  
8 did Copper Ridge undertake other than the  
9 installation of the streets, curbs, and that sort  
10 of thing?

11 MS. BOWERS: Well, Board Member Tweeten,  
12 members of the Board, the evidence of ground  
13 disturbance is in Mr. Freedland's inspection  
14 report, Exhibit 2, and the photos attached to that  
15 report including the photo of Lot 15 which is  
16 Photograph 13 -- and I know we have some disputes  
17 over that -- as well as the photographs of the  
18 northern part of Reflections at Copper Ridge that  
19 you saw today. And also Dan's testimony, Mr.  
20 Freedland's testimony.

21 BOARD MEMBER TWEETEN: Okay.

22 CHAIR DEVENY: Chris, are you speaking?  
23 Because if you are, we can't hear you.

24 BOARD MEMBER TWEETEN: Well, I don't  
25 know what else I can do, Madam Chair. I've got

1 the phone right up against my ear. I'm speaking  
2 right into the bottom of it, so --

3 CHAIR DEVENY: We're hearing you now.

4 BOARD MEMBER TWEETEN: I'm trying as  
5 best I can to make this work. I suppose I could  
6 take the case off my phone and see if that helps.  
7 But did you get the gist of my question? My  
8 question was: What conduit did they create?

9 CHAIR DEVENY: We got that, and you  
10 heard Ms. Bowers' response.

11 BOARD MEMBER TWEETEN: And the problem  
12 I'm having is that I don't have the photographs  
13 that were up on the screen, I don't think, unless  
14 they're somehow -- (inaudible) -- You know, I have  
15 to have an electronic device to pull them up on  
16 anyway. -- (inaudible) -- pictures show what  
17 constitutes ground disturbing activity by Copper  
18 Ridge.

19 CHAIR DEVENY: We're still getting  
20 garbled sound from you on this end. I'm not  
21 criticizing. I'm just letting you know how it is.

22 BOARD MEMBER HANSON: I can hear him  
23 better. He said he can't see the pictures, and so  
24 he was curious on the pictures what on the  
25 pictures showed that -- or constitutes disturbance

1 by Copper Ridge.

2 MS. BOWERS: Board Member Tweeten,  
3 members of the Board. I guess you weren't able to  
4 see the pictures that we had up earlier.

5 MS. CLERGET: You guys, that was sent in  
6 an email. Lindsay sent it in an email to you this  
7 morning, so you should have those pictures. I  
8 apologize for all of the emails. I know that it's  
9 probably confusing. But it should be in your  
10 emails, so that you can look at them.

11 BOARD MEMBER TWEETEN: The problem I'm  
12 having is that I've got the proposed findings on  
13 one screen, I've got the exceptions on one screen,  
14 and I've got the cell phone in my hand, and I  
15 don't know where else to put to look to -- what  
16 else to use to bring up these pictures. I don't  
17 have another screen, is I guess what I'm saying.  
18 So let me work on that.

19 But just indulge me for a minute and  
20 explain to me what those photos show.

21 CHAIR DEVENY: While Chris is getting  
22 his technology rearranged, do other Board members  
23 have questions of the parties or want to discuss  
24 something relevant to this?

25 BOARD MEMBER BUSBY: I've got a couple

1 for Ms. Bowers.

2 CHAIR DEVENY: Go ahead, Dexter.

3 BOARD MEMBER BUSBY: Ms. Bowers, their  
4 construction permit or storm water permit was --  
5 should I say -- not in effect on September 13th,  
6 is that correct, the Copper Ridge and Reflections?

7 MS. BOWERS: I think one permit was in  
8 effect. I think the permit on Reflections third  
9 filing MTR104993 I believe was in effect.

10 BOARD MEMBER BUSBY: Is that part of the  
11 area that we're concerned about, or is the area  
12 that had been terminated the area we're concerned  
13 about?

14 MS. BOWERS: Well, Board Member Busby,  
15 members of the Board, we're concerned about both  
16 of the subdivisions. But the pictures that you've  
17 seen are mostly related to Reflections. The four  
18 you saw -- that were excluded -- this morning,  
19 those are in the third filing of Reflections at  
20 Copper Ridge, which was subject to MTR104993 for  
21 road building and utility construction.

22 BOARD MEMBER BUSBY: That one still was  
23 in effect?

24 MS. BOWERS: That's correct.

25 BOARD MEMBER BUSBY: On the ones that

1 were not in effect, had you issued a completion  
2 order on that, or a completion determination, and  
3 their 70 percent or whatever coverage?

4 MS. BOWERS: I know for 102807, that one  
5 was issued an NOT. I think the other one was to  
6 -- Vicki probably knows. I believe, yes, those  
7 were both issued NOT's.

8 BOARD MEMBER BUSBY: There is no  
9 requirement in the NOT to maintain that 70  
10 percent, or -- I think it's 70 percent, is it not?

11 MS. BOWERS: At the time the Notice of  
12 Termination issues, they're supposed to have  
13 achieved the 70 percent. There is nothing  
14 prohibiting DEQ from going out and making them  
15 take corrective action if it's not achieved, but  
16 generally we don't.

17 BOARD MEMBER BUSBY: Is there anything  
18 in the law that requires them to not only achieve  
19 it, but maintain it?

20 MS. BOWERS: Well, no, I don't believe  
21 there's any continuing maintenance. I think once  
22 it's achieved, the idea is that that would be  
23 sufficient to prevent erosion, that that would be  
24 sufficient vegetative cover.

25 BOARD MEMBER BUSBY: So if this was

1 terminated in 2008, I believe, and they had not  
2 watered it, and they had not done any maintenance  
3 work on it, it's possible that you only had a 20  
4 percent coverage, isn't that correct, or less?  
5 More or less?

6 MS. BOWERS: Board Member Busby, members  
7 of the Board, I guess anything is possible. But  
8 generally once 70 percent vegetation is achieved,  
9 it will grow. It's not going to just all die.  
10 And we generally require vegetation that, you  
11 know, that is right for the area. So if it's an  
12 arid area, it would be a vegetation that would  
13 withstand that. It doesn't have to be watered.

14 So I guess the expectation would be that  
15 it would not require maintenance, and the  
16 vegetative cover would stay in place.

17 BOARD MEMBER BUSBY: So I'm having a  
18 little problem with your term conduit. If this  
19 was terminated, and we have no idea whether it was  
20 maintained or not, but if we had it in 2008 or  
21 whatever the date it was terminated, and we're now  
22 in 2013, I'm having a little problem with this  
23 being a conduit.

24 MS. BOWERS: Board Member Busby, members  
25 of the Board. DEQ wasn't concerned about areas

1 that had been permitted for road building that  
2 were later issued Notices of Termination. DEQ was  
3 concerned about construction activity outside the  
4 road building permitted area on the residential  
5 lots, and the type of activity we were concerned  
6 about was ground disturbance.

7 BOARD MEMBER BUSBY: I understand that,  
8 but let's get back to the fundamental here. If it  
9 was terminated in 2008 -- and I don't know that it  
10 was terminated in 2008, the exact date -- and this  
11 is now 2013, you weren't concerned about it  
12 between 2008 and 2013; is that correct?

13 MS. BOWERS: Board Member Busby, members  
14 of the Board. DEQ first became aware of this site  
15 after the big September storm in 2013. So I guess  
16 you're right. We weren't concerned about it  
17 before then. It was after the storm that we went  
18 and did the inspection.

19 BOARD MEMBER BUSBY: But there's no  
20 permits and no activity. Okay. Thank you.

21 MS. MARQUIS: Could I respond for just a  
22 minute?

23 CHAIR DEVENY: Go ahead, Ms. Marquis.

24 MS. MARQUIS: Thank you, Madam Chair,  
25 Board Member Busby, members of the Board. To the

1 last segment here, the City of Billings contacted  
2 DEQ in March of 2013. They had some concerns with  
3 the home building construction activities and the  
4 erosion in the subdivisions.

5 So DEQ was aware of it at that point.  
6 There is in the record an email exchange between  
7 Dan Freedland and the City of Billings about that,  
8 where he indicated he would wait for storm event  
9 to document a violation.

10 The other part, Board Member Busby, you  
11 had asked about the termination of that permit for  
12 that one area that was shown, the gravel pile, and  
13 that termination was received and confirmed by the  
14 Department in 2012, and that's at the proposed  
15 Finding No. 88.

16 And the finally, the Department agreed,  
17 and this is found at Finding No. 68, that there is  
18 no requirement to maintain the vegetation after  
19 the permit has been terminated. There was  
20 testimony from DEQ on that point.

21 MS. BOWERS: Can I respond in part to  
22 the City of Billings notice to DEQ?

23 CHAIR DEVENY: Okay.

24 MS. BOWERS: Thank you, Madam Chair,  
25 members of the Board. That's correct. The City

1 had notified DEQ about their concerns about the  
2 subdivisions, and DEQ wasn't waiting for a storm  
3 to document violations, but waiting for a storm to  
4 see if the subdivisions discharged, because that's  
5 part of the permit requirement is preventing  
6 discharges to waters of the State. So Dan did  
7 wait to inspect the subdivision after there was a  
8 storm, so he could see if there were discharges.

9 CHAIR DEVENY: Chris, are you back with  
10 us?

11 MS. MARQUIS: I'm sorry. Those are two  
12 separate violations. Construction without a  
13 permit is one violation, that was Violation 1.  
14 Discharge without a permit is a separate  
15 violation. So they are independent. There is no  
16 need to wait for a storm to cite someone for doing  
17 construction without a permit. That was Violation  
18 No. 1. I just wanted to clarify that.

19 CHAIR DEVENY: Thank you, Ms. Marquis.  
20 Chris, are you back with us?

21 BOARD MEMBER TWEETEN: Well, I don't  
22 know. Can you hear me?

23 CHAIR DEVENY: Yes.

24 BOARD MEMBER TWEETEN: Okay. What  
25 you're referring to about construction activity on

1 the north end of the project, I don't seem to  
2 have. So I'm sorry, but I looked at -- The only  
3 photographs I think I have are the ones that were  
4 attached to the original Notice of Violation.  
5 Perhaps somebody could explain to me, maybe Ms.  
6 Bowers, what activity was occurring as shown in  
7 those photographs that you contend --

8 CHAIR DEVENY: Lindsay, are you checking  
9 on the emails to see if he had -- Chris, Lindsay  
10 is going to resend the email.

11 BOARD MEMBER TWEETEN: Which email was  
12 that attached to? I've gotten about four today or  
13 more. Some have attachments, and some don't. And  
14 I think I've looked at them all, and I don't see  
15 those, I don't see anything like that, but maybe I  
16 don't know what I'm looking for. That's entirely  
17 possible.

18 CHAIR DEVENY: Lindsay, what's the  
19 status there?

20 MS. FORD: I'm working on it. I'm just  
21 sending it to him again.

22 CHAIR DEVENY: Lindsay is sending it to  
23 you again, Chris, so we'll see how long it takes  
24 to get to Missoula.

25 BOARD MEMBER TWEETEN: I probably could

1 drive here faster. But I guess in what context?  
2 Are they just free standing PDF's or jpgs or  
3 something, or are they attached to some document?

4 MS. FORD: They're PDF's. I just  
5 emailed it to you again.

6 BOARD MEMBER TWEETEN: Well, all right.  
7 They're somewhere at this point. But please go on  
8 to somebody else at this point. Once I get the  
9 photographs --

10 CHAIR DEVENY: Melissa, did you have  
11 follow up to yours?

12 BOARD MEMBER HORNBEIN: Yes. I had  
13 follow up on Board Member Busby's question.

14 I'm a little bit confused about which  
15 permits were in effect or had been terminated.  
16 And what I thought I heard you say was that  
17 MTR0104993 was still in effect at the time of the  
18 storm event, and what I think you're alleging is  
19 that the discharges occurred outside of the area  
20 where that permit allowed for disturbance; is that  
21 right?

22 MS. BOWERS: Yes, Board Member Hornbein,  
23 that's right. That's correct.

24 BOARD MEMBER HORNBEIN: So with regard  
25 to the alleged disturbance in the area covered by

1 MTR104993, you are not alleging a disturbance in  
2 an area where there had previously been a permit  
3 that was terminated at that time? Does that make  
4 sense?

5 MS. BOWERS: Yes. In the area that was  
6 permitted by MTR104993, we're not alleging any  
7 permit violations related to that permit, or any  
8 -- those disturbances were covered by permit.

9 We're alleging violations related to  
10 disturbances outside of that permit on residential  
11 lots.

12 BOARD MEMBER HORNBEIN: For which there  
13 was no permit?

14 MS. BOWERS: That's right.

15 BOARD MEMBER HORNBEIN: Got it. Thanks.

16 CHAIR DEVENY: While Chris is still  
17 getting --

18 BOARD MEMBER TWEETEN: Okay, Madam  
19 Chair. I got the email.

20 CHAIR DEVENY: Can you see the  
21 photographs?

22 BOARD MEMBER TWEETEN: Well, I see some  
23 photographs. I don't know which ones are the ones  
24 that I'm supposed to be looking at to see this  
25 activity on the north end of the project that Ms.

1 Bowers was talking about. So perhaps someone  
2 could enlighten me further.

3 MS. BOWERS: Board Member Tweeten,  
4 members of the Board. The photographs are in  
5 what's marked DEQ Exhibit 36. It consists of  
6 seven pages, and six of those are photographs.

7 BOARD MEMBER TWEETEN: Oh, I see. Okay.

8 MS. BOWERS: The ones that are at the  
9 north end of Reflections at Copper Ridge are  
10 Photographs 3, 4, and 5.

11 BOARD MEMBER TWEETEN: All right. I'm  
12 assuming that that's Page 3 of 7, 4 of 7, and 5 of  
13 7?

14 MS. BOWERS: Actually Page 4 of 7 is the  
15 third photograph.

16 BOARD MEMBER TWEETEN: Okay. All right.  
17 I'm with you now. What is it that this is  
18 supposed to show me with respect to a conduit?

19 MS. BOWERS: Board Member Tweeten, the  
20 photograph shows -- it's looking southeast, and  
21 it's looking towards the Falcon Ridge Subdivision.  
22 And the photographer was Dan Freedland, DEQ's  
23 inspector. He's standing on the north side of  
24 Western Bluffs Boulevard.

25 In the foreground are vacant lots that

1 were owned by Reflections, and the lots are  
2 cleared and graded with no vegetative cover.

3 BOARD MEMBER TWEETEN: So it would be  
4 the grading of those lots in the absence of  
5 vegetative cover that would be the conduit?

6 MS. BOWERS: That's correct.

7 BOARD MEMBER TWEETEN: What about the  
8 next one?

9 MS. BOWERS: The next photograph on Page  
10 5. Mr. Freedland was facing a little bit more  
11 south. And again, the excavator is likely in  
12 Falcon Ridge, but the cleared graded lots in the  
13 foreground are owned by Reflections. And then the  
14 next photograph --

15 BOARD MEMBER TWEETEN: Then the next one  
16 is to the same effect?

17 MS. BOWERS: Yes, it's just facing a  
18 little bit further south, and that is looking at  
19 lots that are owned by Reflections.

20 BOARD MEMBER TWEETEN: Okay. That's  
21 very helpful. Thank you.

22 MS. MARQUIS: Can I respond briefly?

23 CHAIR DEVENY: Go ahead, Ms. Marquis.

24 MS. MARQUIS: This is why we argued to  
25 have the photos excluded, is because they can be

1 explained by attorneys to mean one thing, but when  
2 you talk to the people who know the facts, it  
3 becomes clear that they don't show construction  
4 activity completed or being performed by Copper  
5 Ridge or Reflections at Copper Ridge.

6 These are in the third filing of the  
7 Reflections subdivision. That's the permit that  
8 Board Member Hornbein just spoke about that was in  
9 effect until 2014. The testimony at the hearing  
10 was that Copper Ridge and Reflections were done  
11 with their construction in this area by July of  
12 2013.

13 And in fact you can see that because the  
14 roads are paved and the curbs are in. Those  
15 permits covered the roads, and the utility  
16 installation, and the rights-of-way which  
17 necessarily go into a portion of the lots. The  
18 boundary of those permits covered the entire lots.

19 There is no clear marker in here where  
20 you can tell where Reflections ends and Falcon  
21 Ridge begins. Had these been admissible, we would  
22 have provided testimony and photo evidence showing  
23 where that boundary is exactly on these photos.

24 Generally I think what you are seeing  
25 here is the front part, the foreground, are the

1 lots, but there is no construction activity on  
2 there. They're still permitted. The construction  
3 activity is done.

4 They haven't reached final stabilization  
5 yet -- that's true -- because the construction was  
6 done, but there was a permit in effect.

7 BOARD MEMBER HORNBEIN: Madam Chair,  
8 follow up. So if I understand this correctly, the  
9 point of disagreement between the parties is the  
10 extent to which that active permit covered?

11 You're asserting it covered the entire lot up to  
12 the rear lot line, and DEQ is asserting that that  
13 entire area was not covered; do I understand that  
14 dispute correctly?

15 MS. MARQUIS: Partially. Board Member  
16 Hornbein, Madam Chair. Our dispute is -- and a  
17 couple things.

18 There has been no evidence that there  
19 was any disturbance beyond the disturbance area  
20 described in the permits. There has been no  
21 evidence of any other construction activity other  
22 than road building and utility installation. The  
23 maps that go with the permit refer to a boundary  
24 area and a site that extends to the entire lot as  
25 you described.

1           And the permit itself speaks in terms of  
2 the site, not the disturbance area. The general  
3 permit, which is at Exhibit 1, refers to a  
4 disturbance area only to determine if you need a  
5 permit. Beyond that it refers to the site which  
6 the permit clearly defines as an area larger than  
7 the disturbance area.

8           So we disagree that the permit is as  
9 limited as the Department has portrayed, and we  
10 also disagree that there was any construction area  
11 beyond that disturbance area. There has been no  
12 evidence of that in the record.

13           BOARD MEMBER TWEETEN: Ms. Marquis --  
14 Madam Chair, may I --

15           CHAIR DEVENY: Yes, please.

16           BOARD MEMBER TWEETEN: Ms. Marquis, who  
17 was responsible for the removal of the vegetation  
18 that's depicted in these photographs? Your client  
19 was road building essentially. How is it that the  
20 vegetation on these lots has been removed?

21           MS. MARQUIS: Madam Chair, Board Member  
22 Tweeten. In the photographs, for example Page 6  
23 of 7, you can see -- To me they look like fence  
24 posts, but I don't believe they are.

25           Those are part of the water lines and

1 part of the utility installation. So the  
2 disturbance area for that construction permit  
3 would have extended into those individual lots  
4 necessarily to install the utilities. And those  
5 permits did cover that work, and they covered work  
6 in the rights-of-way which extends into the  
7 individual lots.

8 Again, this photograph allegedly was  
9 taken in September. It's at the end of the  
10 season. It's dry. And then it is followed by a  
11 one hundred plus year storm event.

12 BOARD MEMBER TWEETEN: Ms. Marquis, do  
13 these Photographs 4, 5, and 6 out of 7, they claim  
14 it's outside of the disturbance area that's  
15 covered by the existing permit?

16 MS. MARQUIS: I'm sorry. I'm not sure I  
17 understand your question, Board Member Tweeten.

18 BOARD MEMBER TWEETEN: Well, if I  
19 understand -- Can you hear me all right now?

20 MS. MARQUIS: Yes, I can.

21 BOARD MEMBER TWEETEN: I understand what  
22 was said, that what's shown in these photographs  
23 as areas that have been cleared of vegetation and  
24 so forth, and areas in which the revegetation has  
25 not yet grown in, those are all disturbance area

1 for the existing permit; is that right?

2 MS. MARQUIS: We don't have evidence --  
3 Board Member Tweeten, Madam Chair. There is no  
4 evidence in the record to define exactly where  
5 that disturbance area boundary is for those  
6 permits.

7 And again, we argued that those permits  
8 cover the entire site as that term is defined in  
9 the permit and shown as the boundary areas with  
10 the maps that goes with that permit.

11 And we dispute that those areas are  
12 completely cleared. It's September, it's dry, it  
13 was a one hundred plus year storm event that  
14 removed vegetation in all areas around Billings  
15 and within the city. So what removed the  
16 vegetation is unknown. It's likely it was the  
17 storm that occurred two days prior.

18 BOARD MEMBER TWEETEN: Madam Chair, if  
19 Ms. Bowers would like to respond to that, I'd love  
20 to hear it.

21 CHAIR DEVENY: Ms. Bowers.

22 MS. BOWERS: Board Member Tweeten,  
23 members of the Board. Just looking at the photo  
24 on Page 6 of 7 of DEQ's proposed Exhibit 36, I  
25 think it is pretty apparent that the construction

1 activity is beyond the area that is just for roads  
2 and utilities, if as Ms. Marquis points out the  
3 poles sticking up are utilities. I mean you can  
4 see beyond the lots in the foreground to the next  
5 lot, and there is a big stockpile on the next lot.

6 BOARD MEMBER TWEETEN: But do we know if  
7 that's in this subdivision or in the Falcon Ridge  
8 Subdivision?

9 MS. BOWERS: The photo on Page 6, that  
10 is showing Reflections at Copper Ridge. It's  
11 facing further south. That's not the Falcon Ridge  
12 Subdivision.

13 CHAIR DEVENY: Ms. Marquis, I see you  
14 shaking your head.

15 MS. MARQUIS: Thank you, Madam Chair,  
16 Board Member Tweeten. We dispute that. And  
17 again, these are things that we didn't have an  
18 opportunity to present testimony and contrary  
19 evidence to because they were properly excluded on  
20 a motion in limine. And so our expectation going  
21 into the hearing was that they would not be  
22 admitted into evidence.

23 Again, we didn't have any notice of  
24 these pictures when the violations were first  
25 noticed back in 2013 and in 2015. They weren't

1 disclosed during discovery. They weren't brought  
2 up in the first hearing in 2018. Now the  
3 Department brings them, and alleges that that  
4 construction in the background is Copper Ridge and  
5 Reflections. We dispute that, and adamantly say  
6 that it's not. It is Falcon Ridge.

7 CHAIR DEVENY: Chris, do you have  
8 anything to follow up with that?

9 BOARD MEMBER TWEETEN: Not at this time.  
10 Thank you.

11 BOARD MEMBER LEHNHERR: Can I say  
12 something, Madam Chair?

13 CHAIR DEVENY: Yes.

14 BOARD MEMBER LEHNHERR: I just am  
15 clarifying here about the permit 102807 which  
16 covered roads and utilities. That was terminated  
17 in October of 2009 apparently? And it sounds like  
18 you are saying that the pictures -- which you  
19 don't think are relevant -- that show bare areas  
20 adjacent to the roads, were taken four years  
21 later, and you're saying that perhaps there was  
22 vegetation there until the storm?

23 MS. MARQUIS: Board Member Lehnerr,  
24 Madam Chair. The permit that you referenced  
25 MTR102807 was issued to the JTL Group. That was

1 not for the third filing of Reflections.

2 So this gets a little confusing because  
3 the subdivision doesn't go in all at once. It  
4 goes in in phases or filings. And in this case  
5 they generally started at the southern end. And  
6 the first phase or the first filing of Reflections  
7 was at that southern end, and it was completely  
8 put in.

9 And I believe that's the area where that  
10 permit applied. Let me double check. I'm wrong.  
11 It applied to the second filing of the Copper  
12 Ridge Subdivision, and Copper Ridge is to the west  
13 of Reflections. So it is a different area. Let  
14 me make sure I've got that right. It is even  
15 confusing for us who have been living in it.

16 MS. CLERGET: Do you want the map  
17 Exhibit 47?

18 MS. MARQUIS: That would be helpful.  
19 Thank you. I think it is Copper Ridge. It was  
20 just on the first page.

21 So just to orient you to these maps.  
22 The aerial photos you looked at before, Copper  
23 Ridge would have been on to the left, and  
24 Reflections would be over here. So that north  
25 area that we've been talking about, and that is

1 shown in those pictures, that we've been arguing  
2 about a lot, is over here -- (indicating) -- in  
3 Reflections, which is a separate subdivision.

4 And Copper Ridge -- these lines here  
5 show you where the phases are, so this is Phase 1  
6 in Copper Ridge. And Phase 2 you can see is this  
7 area here. And then we have Phase 4 and Phase 3.  
8 And these phases weren't in existence at the time,  
9 or they were very early in their existence.

10 So the JTL permit that you talked about  
11 is Findings of Fact No. 29 and 30, and those refer  
12 to the second filing of the Copper Ridge  
13 Subdivision, which is this area right here. So  
14 that's the area where that construction was  
15 completed earlier. Does that answer your  
16 question?

17 BOARD MEMBER LEHNHERR: Yes, thank you.  
18 I was looking at Finding of Fact 34 and 35. Thank  
19 you.

20 CHAIR DEVENY: Do we have a map that  
21 shows both of the subdivisions together?

22 MS. CLERGET: They're one page after the  
23 other, so we have to scroll.

24 CHAIR DEVENY: Is there one that would  
25 be of Reflections then?

1 MS. CLERGET: Yes. That's Reflections.

2 CHAIR DEVENY: Is Reflections the one  
3 that has Lot 15 where the allegation was of the  
4 issue? Was that in Reflections or was that Copper  
5 Ridge? That's in Reflections?

6 MS. MARQUIS: That's in Reflections. I  
7 can point to it.

8 BOARD MEMBER BUSBY: (Indicating)

9 CHAIR DEVENY: There is another 15 on  
10 the outside, but this was the one on the inside?

11 MS. MARQUIS: That's what the Department  
12 has alleged, and of course we dispute it. But  
13 that is the lot that's in question is the one on  
14 the inside.

15 CHAIR DEVENY: So while we're talking  
16 about 15, I had a question of the parties,  
17 particularly DEQ.

18 You said that the inspector was able to  
19 use his phone to get a lat-long description, and  
20 that was -- so you were able to pinpoint that to a  
21 specific lot, but then --

22 MS. BOWERS: That's correct. Madam  
23 Chair, members of the Board. Dan Freedland, the  
24 DEQ inspector, he typically does record the  
25 metadata from his phone when he takes photos, and

1 it gives him a lat-long.

2 CHAIR DEVENY: So then you were able to  
3 go back and identify the lots, but the ownership  
4 apparently on Lot 15, according I believe to  
5 Copper Ridge, was it was not theirs; is that  
6 correct?

7 MS. BOWERS: Based on warranty deeds  
8 that DEQ obtained and are in the record, Lot 15  
9 was still owned by Reflections at the time of the  
10 violations.

11 MS. MARQUIS: Madam Chair, that's  
12 correct. Lot 15 was still owned by Reflections in  
13 September of 2013.

14 We dispute the location of the  
15 photograph. There is testimony in the record. He  
16 wrote down the lat-long in his notebook when he  
17 took the pictures, and the notebook page is  
18 exhibit I believe it's 15. And the lat-long that  
19 they have ascribed to the photo location is not  
20 written down anywhere on that notebook page, so  
21 we're not sure where it came from.

22 And then additionally there is the  
23 testimony where he's saying that it's an  
24 estimation that it was Lot 15, and he doesn't know  
25 where the property markers are. So we dispute the

1 photo location based on not just the testimony,  
2 but on the lat-long that was provided, but it's  
3 not in his notebook.

4 MS. BOWERS: Madam Chair, members of the  
5 Board. Also if I could call your attention to DEQ  
6 Exhibit 36 on Page 1. We provided the lat-long  
7 for each of the photos, and that was based on the  
8 data from Dan Freedland's phone, and taken  
9 contemporaneous with his photos.

10 CHAIR DEVENY: From his phone, but not  
11 in the inspection report?

12 MS. BOWERS: I don't believe it is in  
13 the inspection report. It's in his inspection  
14 notes.

15 CHAIR DEVENY: Were those notes part of  
16 the record?

17 MS. BOWERS: Yes.

18 CHAIR DEVENY: Ms. Marquis.

19 MS. MARQUIS: I'm sorry. His inspection  
20 notes are at Exhibit 15, and the lat-long that the  
21 Department has assigned to that photograph does  
22 not match a lat-long that's on that exhibit.

23 MS. CLERGET: Sorry, they were talking  
24 about 15, so I decided to put it up, so it's up.

25 CHAIR DEVENY: So I don't care which one

1 of you would come up, but if you could point out  
2 where the lat-long was in the notes that match the  
3 picture in the paper, in the exhibit.

4 MS. BOWERS: Is it just the one page?

5 MS. CLERGET: Yes.

6 MS. BOWERS: Madam Chair, members of the  
7 Board. I'm not sure that the lat-longs in Dan's  
8 notes is associated with these pictures in Exhibit  
9 36 because I think -- I would have to compare --  
10 but I think it goes with the pictures that were  
11 attached to Exhibit 2 which was his inspection  
12 report. And he didn't include a lot of these  
13 pictures. These are the pictures that he didn't  
14 include.

15 MR. HAYES: If I may, Chairwoman Chris  
16 Deveny. I would direct the Board's attention to  
17 Dan's actual testimony at the hearing.

18 I know that opposing Counsel has tried  
19 to throw some shadow of doubt in terms of Dan  
20 estimating that he was at Lot 15 when he took the  
21 photograph, but there were specific questions  
22 posed to Dan.

23 I'm referring to Page 237 of the  
24 transcript and it was a question by myself to Dan.  
25 I asked, "So when you identified where photograph

1 13 was taken, did you identify that by a street  
2 address, or did you identify that? Were you able  
3 to ascertain that that related to a specific lot  
4 number?" And Dan answered, "We used the map with  
5 the lot numbers, as I recall, that had the Lot 15  
6 on the aerial map. I didn't use the address. I  
7 don't know the address of this property."

8 Then I asked, "And how do you know that  
9 this is an accurate photograph of what we  
10 subsequently identified as Lot 15?" And Dan  
11 answered, "From where I was standing, and from the  
12 other photographs I took when I was on the site  
13 that day, and I verified the metadata on the photo  
14 from the iPhone that I used to take the photos."

15 I asked one last question, "How certain  
16 are you that this is a photograph of what we  
17 subsequently identified as Lot 15?" And Dan  
18 answered, "I'm certain Lot 15 is in this  
19 photograph."

20 CHAIR DEVENY: That's not the picture  
21 that was called Lot 15 that we have in this  
22 exhibit; is that correct?

23 MS. BOWERS: There is a picture in your  
24 exhibit that is also attached to Dan's inspection  
25 report, and that's the photo on Page 2 of --

1 CHAIR DEVENY: Is that the one he's  
2 talking about? Is that the photograph that he's  
3 referring to?

4 MR. HAYES: That is the photograph I was  
5 asking questions about.

6 MS. MARQUIS: Madam Chair, if I could  
7 just respond briefly. I don't want to belabor the  
8 point. But it's as simple as the handout that the  
9 Department provided to you today. Photo 2 is that  
10 photo. And they provide the lat-long there. And  
11 if you compare it to the lat-longs that are noted  
12 on the notebook page that was up on the screen,  
13 you don't find that lat-long anywhere on that  
14 notebook page.

15 Again, Mr. Hayes has cited to a small  
16 portion of the testimony. There is more in the  
17 findings and conclusions. In fact that testimony  
18 was followed just later on that Page 238. I  
19 asked, "Can you tell me where the property line  
20 is?," and Mr. Freedland's answer was no, he  
21 couldn't.

22 And I said, "Is it fair to say that this  
23 photo does not show the homes that were being  
24 built on either side of Lot 15?" He said, "Oh,  
25 correct. You can't see any building number on

1 that side."

2 I asked, "Do you recall there were homes  
3 being built on either side of Lot 15?" His  
4 answer, "Yes. I believe there was a lot. I think  
5 there was. I think this was a vacant lot. I know  
6 there was -- there was one next to me from where I  
7 was standing."

8 It's clear from the testimony, and it's  
9 cited in the findings, that they were going after  
10 the fact to try to pin this on Lot 15, but it is  
11 not certain. He says at one point that it was on  
12 the corner, and you can see that it was on a  
13 curve. So where is the property line on the  
14 curve? Mr. Freedland admitted he didn't know.

15 CHAIR DEVENY: Chris, did you have  
16 anything more to add or questions? Would you put  
17 the motion back up there, please.

18 MS. SOLEM: There is no pending motion.

19 CHAIR DEVENY: So we don't have a  
20 motion. Board members, what's your pleasure on  
21 Finding of Fact No. 40?

22 MS. CLERGET: No, 34 to 39.

23 CHAIR DEVENY: 34 to 39.

24 BOARD MEMBER TWEETEN: Madam Chair.

25 CHAIR DEVENY: Yes, Chris.

1                   BOARD MEMBER TWEETEN: I'm on. I was  
2 just thinking about what I wanted to say. I'm  
3 sorry.

4                   I'm inclined to overrule the exception  
5 -- (inaudible) -- because I think the failure to  
6 lay some foundation with respect to what Mr. Leep  
7 meant by construction activity -- (inaudible) --  
8 the probative value of his testimony into some  
9 doubt.

10                   But I do think that the findings  
11 themselves, as far as they go again, are accurate.  
12 First part has to talk about construction  
13 activity, and talks about construction. So I  
14 think the exception doesn't really apply to 34.  
15 Even if --

16                   First of all, I think "construction  
17 activity" speaks in the present tense in the  
18 regulation. I think -- (inaudible) -- the prior  
19 term that's defined which talks about the  
20 discharge of storm water as a consequence of  
21 construction activity.

22                   It's clear I think that DEQ's point is  
23 well taken. Construction activity undertaken  
24 before the -- in September 2013 could very well  
25 have provided a conduit for that storm water in

1 September 2013 to discharge into the waters of the  
2 State. So I think DEQ's point is well taken as  
3 far as it goes.

4 But with respect to these -- The  
5 question is whether the testimony is relevant, and  
6 I think it is perhaps marginally relevant, but  
7 relevant nonetheless. And I guess I would tend to  
8 think we ought to leave them in and accept them,  
9 just because I do think that they are -- I think  
10 tend to prove that -- (inaudible) -- into the  
11 waters of the State of Montana as a consequence of  
12 any construction activity that occurred after the  
13 contractors vacated the site.

14 So I would think that we ought to adopt  
15 34 through 39, and that I would so move.

16 CHAIR DEVENY: There has been a motion  
17 to adopt Findings of Fact 34 through 39.

18 BOARD MEMBER BUSBY: I'll second. Then  
19 I have a comment.

20 CHAIR DEVENY: Dexter, go ahead.

21 BOARD MEMBER BUSBY: When I read these  
22 about the last six times, I agree with Chris. I  
23 don't think there is anything in error in these,  
24 so they are statements of fact, and DEQ's point is  
25 well taken. If's historical construction, it

1 still falls under the construction thing. But  
2 this doesn't dispute that portion of it itself.

3 CHAIR DEVENY: Any other comments from  
4 Board members?

5 (No response)

6 CHAIR DEVENY: Hearing none, we'll vote  
7 on the motion. All those in favor of approving  
8 Findings of Fact 34 through 39, please signify by  
9 saying aye.

10 (Response)

11 CHAIR DEVENY: All those opposed to the  
12 motion, signify by saying nay.

13 BOARD MEMBER LEHNHERR: Nay.

14 CHAIR DEVENY: Chris, we didn't get a  
15 vote from you.

16 BOARD MEMBER TWEETEN: I was an aye.

17 CHAIR DEVENY: I didn't hear you. Thank  
18 you. We're moving on then.

19 No. 40, 41, 42. Let's finish up those  
20 three together. We'll finish that section. I  
21 don't believe we had any --

22 MS. CLERGET: DEQ has an objection to  
23 40.

24 CHAIR DEVENY: Ms. Bowers, briefly do  
25 you want to say something about 40?

1 MS. BOWERS: Yes, Madam Chair, members  
2 of the Board. DEQ's objection to 40 is that it  
3 states -- Basically the substance of Mr. Leep's  
4 testimony that they wouldn't leave stockpiles, or  
5 he was confident that there were no stockpiles of  
6 materials left on any of the lots Copper Ridge and  
7 Reflections owned after the contracted  
8 construction activity was complete, because it  
9 would not have been in their best interests to do  
10 that.

11 But it doesn't say why that testimony is  
12 more credible than the testimony of Dan Freedland  
13 who testified that he observed the stockpiles on  
14 at least one lot, Lot 15, which is the one that's  
15 depicted in Photograph 13 attached to Exhibit 2.

16 CHAIR DEVENY: I'm going to interrupt  
17 you. It's also a fact that -- your point doesn't  
18 say, doesn't delete his fact that this is what he  
19 testified to. The fact that is just that he  
20 testified he was confident. It doesn't say that  
21 his testimony was any better than anybody else's.

22 MS. BOWERS: Okay. And then -- Well,  
23 okay. Then I guess my concern is that Mr.  
24 Freedland's testimony is not given the weight it's  
25 due considering that he has photographed, he has

1 documented his observations with contemporaneous  
2 notes and photographs. So I guess that's the  
3 substance of DEQ's exception.

4 CHAIR DEVENY: I don't think that  
5 affects the fact here. Any other questions --

6 BOARD MEMBER BUSBY: He'd testified  
7 that.

8 CHAIR DEVENY: -- comments about that?  
9 (No response)

10 CHAIR DEVENY: So I would move that we  
11 accept the Findings of Fact No. 40, 41, and 42.  
12 Is there a second?

13 BOARD MEMBER HANSON: I second. This is  
14 Hillary.

15 CHAIR DEVENY: It's been moved and  
16 seconded. Any further discussion?

17 BOARD MEMBER BUSBY: I have a question.  
18 Is there any other photographs other than this one  
19 labeled Page 2 of 7 of Lot 15 or assumed to be Lot  
20 15?

21 MS. BOWERS: Yes, Board Member Busby,  
22 members of the Board. This photo on Page 2 of 7  
23 of Exhibit 36 is also Photo 13 that's attached to  
24 Exhibit 2, which is the violation letter dated  
25 September 23rd, 2013 in the inspection report.

1 MS. MARQUIS: Madam Chair, if I might  
2 add. There is another photograph of that same  
3 lot, and you can see this in Mr. Freedland's  
4 testimony we talked about that photograph.

5 And it's cited at Finding of Fact No.  
6 73, goes into the transcript, my cross-examination  
7 of Mr. Freedland where he agreed with me that the  
8 photograph I had presented him was of the same  
9 lot, it was the same area but taken from a  
10 different angle.

11 And that photograph had been produced to  
12 us by the Department, and on that photograph, the  
13 street address provided for that photograph were  
14 3028, 3030, and 3032 Western Bluffs. Those are  
15 the three street addresses that correlate to lots  
16 that were not owned by Copper Ridge and  
17 Reflections.

18 And that can be found at Finding 73  
19 through 78.

20 MS. CLERGET: Chris, I'm seeing there is  
21 only one photograph that's in the record. So if  
22 you're looking for either of those photographs,  
23 the one that happened during the cross-examination  
24 was not in the record. It was not moved for  
25 admission. And the photograph that was referenced

1 by DEQ is the same photograph appearing in two  
2 different places. So there is only one photograph  
3 in the record.

4 BOARD MEMBER BUSBY: That's the --

5 MS. CLERGET: That's the one that you're  
6 looking at.

7 CHAIR DEVENY: Any other questions or  
8 discussions on the motion?

9 (No response)

10 CHAIR DEVENY: Hearing none, all in  
11 favor, signify by saying aye.

12 (Response)

13 CHAIR DEVENY: Any opposed?

14 (No response)

15 CHAIR DEVENY: I believe that was  
16 unanimous all in favor.

17 Let's go on to Mr. Freedland's testimony  
18 and photographs. DEQ, you had some objections at  
19 all to any of these?

20 MS. BOWERS: Yes, Madam Chair, members  
21 of the Board. DEQ had exceptions to Finding of  
22 Fact 44, and to Findings of Fact 46 and 47.

23 CHAIR DEVENY: Could you refer us to the  
24 pages in your document, the exceptions.

25 MS. BOWERS: Yes, it is your Page 66.

1 CHAIR DEVENY: Thank you. Could you  
2 briefly summarize your exceptions.

3 MS. BOWERS: Yes, Madam Chair, members  
4 of the Board. Well, Finding of Fact 44 misstates  
5 the evidence in the record because Exhibit 33  
6 depicts the lots that were owned by Copper Ridge  
7 at the time of the violations. And there was  
8 testimony about that in the transcript at Page  
9 217, the June 13th transcript.

10 This included lots 8, 9, and 10 in the  
11 second filing of Copper Ridge. That's at the  
12 northern portion of that subdivision. And Exhibit  
13 34 depicts the lots owned by Reflections at the  
14 time of the violations. That's discussed in the  
15 transcript on Page 22. And that also included  
16 lots in the northern part of that subdivision.

17 So the finding, the exception that DEQ  
18 takes is that Mr. Freedland could not confirm that  
19 all of the lots he saw were owned by Copper Ridge  
20 and Reflections, or when, how, why, or by whom  
21 they may have been cleared.

22 CHAIR DEVENY: You're saying that he did  
23 confirm that?

24 MS. BOWERS: There is evidence in the  
25 record of which lots were owned by Reflections and

1 by Copper Ridge, and that's shown on the Exhibits  
2 33 and 34, which are in the packet that we gave to  
3 you today, and that's also part of the record.

4 CHAIR DEVENY: Could you pinpoint us to  
5 those places.

6 MS. CLERGET: 33 and 34 are up.

7 MS. BOWERS: Yes. And Copper Ridge and  
8 Reflections, they did not dispute that this  
9 accurately reflects lots that they owned.

10 BOARD MEMBER BUSBY: Just a quick  
11 question.

12 CHAIR DEVENY: Go ahead.

13 BOARD MEMBER BUSBY: But at this point  
14 he could not confirm that, or deny it at this  
15 point, or he didn't know for sure, is the way I  
16 read this 44.

17 MS. BOWERS: Well, at the time of his  
18 inspection he didn't identify lots. That was  
19 after he went back to the office with his phone  
20 data. That's correct.

21 BOARD MEMBER BUSBY: So if I take 44 in  
22 context, the only thing it says here, he could not  
23 confirm at the time of this that -- he didn't say  
24 they were or they weren't, it was just he could  
25 not confirm it.

1 MS. BOWERS: Yes, maybe with that  
2 addition that Mr. Freedland could not confirm at  
3 the time of the inspection.

4 CHAIR DEVENY: Then go to your next  
5 objection in that group that we're looking at.  
6 46 and 47.

7 MS. BOWERS: And our exception there is  
8 based on the definition of construction activity,  
9 that Mr. Freedland describes disturbed ground, and  
10 the findings appear to be limited to active  
11 construction activity. That's the basis of our  
12 exceptions.

13 CHAIR DEVENY: Okay. So I think we've  
14 kind of talked about the use of the construction  
15 term previously, and I think we've moved ahead  
16 with the facts anyway, just in addition to the  
17 exceptions.

18 And with that, I think we can go all the  
19 way to through Finding of Fact 62 without any  
20 issues coming up. So I would so move that we  
21 approve Findings of Fact 43 through 62.

22 MS. BOWERS: DEQ does have some  
23 exceptions to 54, for example --

24 CHAIR DEVENY: I'm sorry.

25 MS. BOWERS: That's on Page 66.

1 CHAIR DEVENY: I'll modify my motion --  
2 excuse me then -- to go through Finding of Fact  
3 53.

4 MS. BOWERS: Okay.

5 BOARD MEMBER BUSBY: I'll second your  
6 motion.

7 CHAIR DEVENY: It's been moved and  
8 seconded. Is there discussion?

9 BOARD MEMBER HORNBEIN: I have concerns  
10 about Photograph 44 where it says -- the  
11 discussion that we just had where he could not  
12 confirm that the lots he saw were owned by Copper  
13 Ridge. The way I read that is he couldn't confirm  
14 it at the time of his testimony. There is nothing  
15 about it to me that says he couldn't confirm it in  
16 the field, and DEQ asserting that he then did  
17 provide evidence confirming it subsequent to his  
18 field work.

19 So I have concerns with that one, and I  
20 just want to be clear that my concerns apply to  
21 Paragraph 44 and not the entire subset of  
22 paragraphs that this motion applies to.

23 CHAIR DEVENY: You don't think it would  
24 be enough to stop the whole procedure, and go  
25 back, and have the Board review the entire record?

1           BOARD MEMBER HORNBEIN: Well, I mean  
2 I've had concerns throughout this process, and I  
3 voted to reflect those concerns.

4           CHAIR DEVENY: Any other comments or  
5 discussion on the motion?

6           (No response)

7           CHAIR DEVENY: Chris and Hillary, are  
8 you still with us?

9           BOARD MEMBER HANSON: Yes.

10          CHAIR DEVENY: I haven't heard from  
11 Chris, but I'm going to go ahead and call for a  
12 vote. All those in favor of the motion to approve  
13 Findings of Fact 43 through 53, signify by saying  
14 aye.

15          (Response)

16          CHAIR DEVENY: Those opposed?

17          BOARD MEMBER LEHNHERR: Nay.

18          BOARD MEMBER HORNBEIN: Nay.

19          BOARD MEMBER HANSON: Nay.

20          CHAIR DEVENY: So we have a tie. The  
21 motion fails. Chris voted yes. So we have a tie  
22 vote. That motion fails. So if we don't want to  
23 approve these facts, then we will start over.  
24 Does anybody have a discussion on how the Board  
25 wants to proceed?

1           BOARD MEMBER HORNBEIN: I have an  
2 observation. I appreciate the work that the  
3 parties have put into this, and that the Board's  
4 attorney has put into these Finding of Fact. I do  
5 have concerns. The preponderance of the evidence  
6 is 51 percent. DEQ has raised, especially with  
7 regard to these photographs, some concerns -- not  
8 that active construction was happening on these  
9 sites, but that there was bare ground that maybe  
10 have caused these violations to occur.

11           I do share the Board attorney's concerns  
12 that she expressed in her order on the motions in  
13 limine as to why this evidence wasn't presented  
14 earlier on, but it does leave us where we are. So  
15 I don't really have any recommendations for where  
16 to go from here, but those are the reasons why I  
17 voted the way I did.

18           CHAIR DEVENY: Hillary, do you have  
19 anything you want to say?

20           BOARD MEMBER HANSON: I'm kind of with  
21 what was said last. I guess I'm just concerned,  
22 I'm mostly concerned less about the whole process,  
23 and more about the specific one, if they're taking  
24 the statement appropriately, and then reflecting  
25 in the Findings of Fact appropriately.

1           And so I feel like there are enough  
2 unknowns that this one statement specifically is  
3 still kind of sticking with me on like is that  
4 correct, and being interpreted correctly.

5           CHAIR DEVENY: David, comments,  
6 questions?

7           BOARD MEMBER LEHNHERR: I think I agree  
8 with what Melissa stated well. I certainly  
9 haven't been consistently a nay vote, but I'm  
10 troubled by several items in the exceptions.

11           CHAIR DEVENY: Well, it appears that  
12 there is enough of the Board members that don't  
13 feel that comfortable approving the facts in this  
14 case. And with that, I believe our only choice is  
15 to stop the case and agree to all go back and  
16 review the record on our own, and then at another  
17 future meeting make a decision, come up with our  
18 own Findings of Fact and Conclusions.

19           Sarah, would you kind of go through that  
20 procedure since we haven't done that before.

21           MS. CLERGET: Sure. So this kind of in  
22 the memo, but you have to remember, keep in mind  
23 the standards that are in the memo for rejecting  
24 or modifying a Finding of Fact.

25           So what you do now is go back through

1 the record, and we'll provide you with the whole  
2 record, and every Board member -- the Supreme  
3 Court has been very clear that every Board member  
4 has to review the entire record. So it can't be  
5 that some review the record, and then we rely on  
6 those who have reviewed the record when we come  
7 back. Everybody has to review it.

8 And then once you've reviewed it, you  
9 can come back and discuss on the record whether  
10 you're going to modify or reject those Findings of  
11 Fact. And your options at the next meeting after  
12 you have reviewed the record are essentially the  
13 same options that you've had all along, but you  
14 have at this meeting. You can accept.

15 The addition to that is that you can  
16 modify the facts once you've reviewed the entire  
17 record. So you guys can decide -- Again, you can  
18 do it as you have been going through finding by  
19 finding, or if you want to modify this finding  
20 this way; or you can give me or anyone else  
21 instructions on how you want Findings of Fact  
22 written whole cloth. So we're going to reject one  
23 or all of the Findings of Fact and rewrite them  
24 ourselves.

25 And again, you can instruct me on how

1 you want that done, or Lindsay, or anybody for  
2 that matter, on how you want that done; or one of  
3 you can write them, just so long as the ultimate  
4 final product has to look like you're used to  
5 seeing a Finding of Fact, Conclusions of Law  
6 looking. And how you get to that final product is  
7 sort of up to you guys. But that's ultimately  
8 where you have to get.

9 CHAIR DEVENY: And we would individually  
10 look at all of the record.

11 MS. CLERGET: Yes, every Board member  
12 has --

13 CHAIR DEVENY: We couldn't sit two in a  
14 room? That would not be appropriate; is that  
15 correct?

16 MS. CLERGET: You can't discuss it. Any  
17 discussion needs to happen on the record. So I  
18 would recommend, human nature being what it is,  
19 that you don't review it together because it's  
20 very difficult to review and not talk.

21 CHAIR DEVENY: Then in terms of coming  
22 up with the Findings of Fact, it would probably  
23 have to be done at the meeting where we're all  
24 together then.

25 MS. CLERGET: Probably. What I have

1 seen done before is that sometimes Board members  
2 will come with, you know, this is their version of  
3 what they think the Findings of Fact should be,  
4 and then we all compare at the meeting. That's  
5 happened before.

6 The other thing that sometimes happens  
7 is you discuss how you want the Findings of Fact  
8 modified at the meeting, instruct me to do that,  
9 and then we circulate a draft, and then you come  
10 back again and comment on that draft. That's  
11 another way to do it; or we just sit down and  
12 write them essentially line by line. Any of those  
13 options are available. It's up to you guys how  
14 you want to do it.

15 CHAIR DEVENY: So is there further  
16 discussion? I guess that's the road we're talking  
17 about taking at this point since we --

18 BOARD MEMBER TWEETEN: Well, Madam  
19 Chair, I think this is complicated enough, so let  
20 me make it a little more complicated. We also  
21 have a motion in limine to deal with.

22 MS. CLERGET: Yes, and I think that will  
23 be -- When I say the entire record, the record is  
24 not just the record of the hearing. The record is  
25 the record. So you're going to get all of it.

1 You're going to get all the --

2 BOARD MEMBER TWEETEN: I get that.

3 That's not my point. My point is this: If the  
4 Board were to decide that Sarah abused her  
5 discretion -- and that sounds harsh, but that's  
6 the name of the legal principle that's involved --  
7 is that Sarah abused her discretion in granting  
8 the motion in limine, Copper Ridge's argument  
9 today that they have additional evidence addressed  
10 at those photographs, and the subject of those  
11 photographs, that they did not present because the  
12 motion in limine had been granted; that were the  
13 Board to decide that the motion in limine was,  
14 that the granting of the motion in limine was an  
15 abuse of discretion, we would be best advised to  
16 remand this case again for another, for more  
17 proceedings in front of Sarah, in which the  
18 parties can go back over that ground with those  
19 documents in the record, and with Copper Ridge  
20 having the opportunity to then to marshal its  
21 evidence with respect to the subject matter of  
22 those documents, those photographs in order to  
23 complete the record before the case came back up  
24 here. And who knows? And as part of that  
25 exercise, Sarah could conceivably change her mind.

1 MS. CLERGET: It's happened before.

2 BOARD MEMBER TWEETEN: Completely  
3 differently than what we see in the front of us.

4 So I would suggest it would not be the  
5 best use of our time as Board members to go  
6 through the exercise of reviewing the record right  
7 now until we've confirmed or rejected the decision  
8 that the Hearing Examiner made with respect to the  
9 motion in limine.

10 For the benefit of the non-lawyers in  
11 the room, a motion in limine is a -- TV shows with  
12 trials, and movies with trials. And people offer  
13 exhibits, and if they're objected to, and the  
14 Judge makes a ruling.

15 Well, a motion in limine is an objection  
16 to evidence that's offered before the hearing  
17 starts rather than during the course of the  
18 hearing. And the law allows parties to move the  
19 Decider in advance of the hearing to rule on  
20 certain evidentiary issues like this one.

21 And that's what happened here. The  
22 photographs as exhibits, rather than waiting for  
23 the hearing and waiting for them to be offered as  
24 exhibits before tendering their objection, Copper  
25 Ridge decided they would file a motion in advance

1 of the hearing asking Sarah as the Hearing  
2 Examiner to rule on the admissibility of the  
3 photographs, and Sarah ruled that they would not  
4 be admitted.

5 And DEQ argued today I think that their  
6 proof at the hearing would have been different,  
7 perhaps longer, perhaps more would have been  
8 offered in addition to what was there had they  
9 known that these photographs were going to be in  
10 evidence.

11 So it seems to me that we ought to  
12 decide before we take on the burden of reviewing  
13 the record that may end up being incomplete, we  
14 ought to decide whether we approve of the Hearing  
15 Examiner's decision to exclude these photographs  
16 as evidence.

17 And if we approve of that decision, then  
18 we go on to the step of, "Well, okay. I guess  
19 we've got to all read the record." But if we  
20 don't approve of that decision, and we overrule  
21 Sarah's decision with respect to the motion, then  
22 I think that the most appropriate course for the  
23 Board to take would be to remand this matter once  
24 again for further proceedings in the record, and  
25 the parties marshalling all of the evidence they

1 have with respect to those photographs.

2 CHAIR DEVENY: So for clarification, if  
3 we go down the road, and it ends up remanded back  
4 to Sarah, does Sarah hold another hearing then?  
5 Sarah, is that what would happen?

6 MS. CLERGET: If --

7 BOARD MEMBER TWEETEN: Well --

8 MS. CLERGET: Go ahead, Chris.

9 BOARD MEMBER TWEETEN: -- (inaudible) --  
10 out of fairness we can let DEQ's documents in, and  
11 not give Copper Ridge an opportunity to marshal  
12 its evidence in response to what those photographs  
13 show, and it makes -- it's not much, and it's not  
14 contested, and it can go into the record by  
15 stipulation, and then Sarah could make another  
16 pass at her proposed order with those matters  
17 under consideration as well.

18 So how that gets done -- (inaudible) --  
19 Examiner, but I do think that in fairness, if we  
20 were to hold that those photographs should have  
21 been admitted, then it does have to get remanded.  
22 That's my opinion anyway.

23 CHAIR DEVENY: Any other Board member  
24 discussion or thoughts?

25 BOARD MEMBER HORNBEIN: I agree with

1 Chris.

2 BOARD MEMBER BUSBY: As a non-lawyer, I  
3 don't know.

4 BOARD MEMBER LEHNHERR: Sounds  
5 reasonable.

6 CHAIR DEVENY: Should we take up the  
7 order on limine then?

8 BOARD MEMBER BUSBY: Did you say the  
9 whole order on limine, or just pictures?

10 BOARD MEMBER TWEETEN: I would suggest  
11 that --

12 CHAIR DEVENY: Well, the motion in  
13 limine dealt with what we could or couldn't do  
14 with the pictures. So we have to rule on the  
15 motion in limine.

16 BOARD MEMBER BUSBY: There is more than  
17 that.

18 CHAIR DEVENY: There is more than that  
19 in the motion in limine.

20 BOARD MEMBER TWEETEN: Am I correct in  
21 understanding that the only part of that order in  
22 limine that DEQ has excepted to was the part  
23 dealing with the four photographs? That's right,  
24 isn't it?

25 CHAIR DEVENY: Ms. Bowers.

1 MS. BOWERS: That's correct. The  
2 motions in limine addressed more evidence than  
3 just the photos, but the only exception that DEQ  
4 raised was the photos, the excluded photos.

5 BOARD MEMBER TWEETEN: So I would  
6 suggest that that's the only part of the order in  
7 limine that we need to deal with at this point.  
8 The rest of it I think is --

9 CHAIR DEVENY: So it sounds like we  
10 should talk about the motion in limine and make a  
11 decision on that. Does everybody have that  
12 document? Hillary, do you have that?

13 BOARD MEMBER HANSON: I think I do. I  
14 just need to find it.

15 CHAIR DEVENY: Okay. We'll give you a  
16 couple minutes.

17 BOARD MEMBER HANSON: It was the one  
18 that was sent this morning, correct, or a little  
19 before lunch?

20 CHAIR DEVENY: Just at lunch. Right.  
21 We need to take a break for our Court Reporter.  
22 Let's take ten minutes.

23 (Recess taken)

24 CHAIR DEVENY: Chris and Hillary, are  
25 you still with us?

1 BOARD MEMBER HANSON: This is Hillary.  
2 I'm here.

3 CHAIR DEVENY: Chris Tweeten, are you  
4 still on?

5 (No response)

6 CHAIR DEVENY: I'll try another minute  
7 to get Chris on. Maybe we'll get go ahead and get  
8 started anyway. We have five members.

9 So before we proceed any further, Sarah,  
10 could you just give us kind of a procedural thing  
11 and a MAPA interpretation of what Chris has  
12 proposed that we do.

13 MS. CLERGET: Yes. Just during the  
14 break, I was just looking up to be sure, to  
15 confirm what the burden is with respect to  
16 evidentiary hearings, and I did find a case that  
17 very clearly discusses a board reviewing a Hearing  
18 Examiner case.

19 For the lawyers in the room, this is PVB  
20 v. PTRCB, (phonetic) it's a Montana District  
21 Court, Lexis 427 from 1999. It is a First  
22 Judicial District Court case where the First  
23 Judicial District is reviewing the agency's  
24 decision who reviewed the Hearing Examiner's  
25 decision, and they modified an evidentiary ruling

1 of the Hearing Examiner based on the determination  
2 that it was an abuse of the Hearing Examiner's  
3 discretion.

4 So the standard is abuse of discretion,  
5 and there is specific case law that you can modify  
6 the evidentiary rulings as long as you find that  
7 there was an abuse of discretion; and then  
8 specifically, you need to make a record about  
9 specifically why the discretion was abused, and  
10 how you're modifying the evidentiary ruling, how  
11 and why you're modifying the evidentiary ruling.

12 So I just confirmed that with respect to  
13 the motion in limine. So the standard is abuse of  
14 discretion. You have to determine whether the  
15 ruling on the motion in limine was an abuse of  
16 discretion.

17 If so, then you can either remand it  
18 back for additional findings -- Essentially it is  
19 open to you what you want to do. You could remand  
20 it back for additional hearing; you could allow  
21 written substitution, or written testimony I  
22 guess, or written documentary evidence if you  
23 wanted to. You can have your own hearing about  
24 that particular issue, or you can review the whole  
25 record.

1           The other thing I thought about on the  
2 break that I should mention is that -- and I  
3 apologize for not having mentioned this before  
4 when you were discussing the motion in limine.

5           In addition to the briefing, there was  
6 also an oral argument on the motion in limine, and  
7 then there was a subsequent hearing, the  
8 scheduling conference which I noted in the FOFCOL  
9 where I discussed and further articulated the  
10 order on motions in limine.

11           So if you're talking about the universe  
12 of things that occurred within the motion in  
13 limine, there were also those two hearings, of  
14 which there are both transcripts.

15           So those are your options and what is  
16 available in addition to, of course, the entire  
17 evidentiary record.

18           CHAIR DEVENY: Do Board members have a  
19 suggestion how to proceed?

20           (No response)

21           CHAIR DEVENY: Have we heard from Chris  
22 yet?

23           BOARD MEMBER TWEETEN: Madam Chair, this  
24 is Chris.

25           CHAIR DEVENY: You are on. Okay. Good.

1                   BOARD MEMBER TWEETEN: I kind of told  
2 you what I think we should do. I guess my  
3 suggestion would be we proceed to consider whether  
4 we think Sarah abused her discretion in excluding  
5 those four photographs. And Melissa has spoken to  
6 this issue briefly, I think, and I'll just add my  
7 thoughts to that.

8                   I understand to the extent that the  
9 ruling is based on failure to disclose, and if  
10 there is surprise, and so on, I'm not insensitive  
11 to the idea that this is pretty late in the game.

12                   But on the other hand, we did remand  
13 this to the Hearing Examiner for the purpose of  
14 taking additional evidence. And I think the  
15 Hearing Examiner recognized that by reopening the  
16 discovery, calling for a second disclosure of  
17 exhibits, and so on, and so forth.

18                   I think implicit in all of that is the  
19 understanding that somebody may come up with an  
20 exhibit that hasn't previously been considered for  
21 introduction. If the record were limited to the  
22 evidence that was already in, none of those  
23 procedural steps would have been necessary. So I  
24 think it's pretty clear to me that when the matter  
25 was remanded, it was understood by everybody that

1 additional evidence might be required.

2 In that respect, I think the arguments  
3 about unfair surprise and so forth are probably  
4 not as persuasive as they otherwise might be. The  
5 matter was disclosed some weeks ahead of the  
6 hearing. I think Copper Ridge had plenty of time  
7 to prepare a response. In fact they told us today  
8 that they know of additional evidence and  
9 additional witnesses that they would have offered  
10 had this material been admitted.

11 So clearly I mean whatever might have  
12 been the case back last summer, at this point  
13 admitting the exhibits isn't going to cause them  
14 any undue prejudice. So that argument I think is  
15 to me not persuasive.

16 And I'm not sure what else there is to  
17 the reasoning behind the order granting the motion  
18 in limine. I tend to think that these photographs  
19 should have been admitted, and the parties can  
20 make of them what they want. And they may not be  
21 found by the Hearing Examiner to be particularly  
22 probative, but they're certainly relevant, and I  
23 think they ought to have been admitted.

24 And reluctant as I am to say so, because  
25 I have great respect for Sarah, and I know how

1 much work she's put in on this case, I do think  
2 that the ruling was an abuse of discretion, and I  
3 think we ought to overturn it. That's my thought.

4 MS. CLERGET: Chris, if I may. I want  
5 to reiterate. There is no ego here, so once  
6 again, we need to get it right. So I say this not  
7 for any reason other than to tell the lawyers or  
8 the non-lawyers in here.

9 Abuse of discretion is particular thing  
10 in the legal world when we say "abuse of  
11 discretion standard." And for those of you who  
12 aren't lawyers, there's a definition of it, and I  
13 was going to provide that if it would be helpful.  
14 But again, I don't want to appear that -- Again,  
15 there is no ego in here, so if you believe they  
16 should have been admitted, that's appropriate to  
17 do. I say this not to argue but to provide you  
18 with you a definition. Would that be helpful?

19 CHAIR DEVENY: Yes. Go ahead.

20 MS. CLERGET: So this is from the case  
21 State v. McLaughlin 2009 Montana 211, which is a  
22 Supreme Court case. "An abuse of discretion  
23 occurs when a District Court --" or in this case  
24 Hearing Examiner -- "acts arbitrarily, or without  
25 conscious judgment, or exceeds the bounds of

1 reason." So that's the standard. And I'm sure  
2 the parties have all of that.

3 CHAIR DEVENY: So would an appropriate  
4 procedure here then be to let the parties give  
5 their opinion on this, or just for the Board to  
6 make a decision?

7 MS. CLERGET: I could be wrong, but I'm  
8 guessing the parties are probably itching to say  
9 something, and I don't think it would be  
10 inappropriate if you wanted to let them do that.

11 CHAIR DEVENY: Chris, did you want to  
12 hear from the parties before we proceed with any  
13 motions on this, do you think?

14 BOARD MEMBER TWEETEN: First of all,  
15 thanks to Sarah for bringing out the definition.  
16 And yes. Well, we've heard from the parties to an  
17 extent already, but I don't think it would hurt to  
18 give them five minutes apiece at this stage of the  
19 day to --

20 CHAIR DEVENY: I agree. We'll do that  
21 then. And DEQ, would you like to start. And just  
22 a couple minutes, please, unless it is really  
23 relevant.

24 MS. BOWERS: Thank you, Chair Deveny,  
25 members of the Board. I will be very brief

1 because I think I've made my arguments on this  
2 already as far as DEQ's arguments against  
3 excluding the four photos. We believe the photos  
4 are relevant, and that they are probative to the  
5 decision before the Board on the owner/operator  
6 issue.

7 And we're also concerned that the  
8 Hearing Examiner didn't make any -- there is  
9 nothing in the record weighing the undue  
10 prejudice, and it seemed like the main reason for  
11 excluding the photos was because they weren't  
12 disclosed during discovery, and a proper remedy  
13 for that is what the Board is doing now, giving  
14 the parties a chance to address the photos, maybe  
15 by allowing some additional discovery.

16 So DEQ supports overturning the ruling  
17 on the motion in limine, and allowing the parties  
18 a chance to address this evidence in the record.

19 I do have one point of clarification I  
20 would like to make, and that is in the order on  
21 motions in limine on Page 7, the determination is  
22 made to exclude the photographs, and that's on the  
23 order Part 1(c); and then there is also a  
24 determination made to not allow DEQ to use or  
25 enter any documents including maps that are

1 derived from or based on the photographs.

2 And I would also ask that you overturn  
3 1(d), and allow preparation of maps derived from  
4 photographs because I think those would be helpful  
5 to understanding of the photos and showing  
6 location of the photos. Nothing further.

7 CHAIR DEVENY: Thank you, Ms. Bowers.  
8 Ms. Marquis.

9 MS. MARQUIS: Madam Chair, members of  
10 the Board, thanks for your time today.

11 I don't disagree that the remand was to  
12 have more evidence presented. What I do disagree  
13 with is it was not to allow the Department to  
14 bring up entirely different violations than the  
15 ones that they originally alleged. And this is  
16 very important.

17 If you look to the enforcement statutes  
18 75-5-617 and 75-5-611, the Department has to  
19 provide notice to people when they're going to  
20 allege a violation, and they have to state with  
21 specificity the facts underlying the alleged  
22 violations. I'm sorry. Can we get Exhibit 16 up  
23 again? Is that possible?

24 The reason this is important is because  
25 things are moving very rapidly, and when you're

1 charged with a violation, you want to gather  
2 evidence and talk to witnesses. And while we can  
3 put on some evidence to rebut those photos, we  
4 can't go out and figure out who owned the big  
5 equipment that was shown in those photographs  
6 because that equipment is gone. There are houses  
7 there now.

8 We can't go back and recreate those  
9 photographs with anything that depicts clearly the  
10 property lines because there are houses there, and  
11 you don't have the field of vision that those  
12 photographs have because they were taken six years  
13 ago, and we were never provided a copy of them, or  
14 given an opportunity to know that that different  
15 area, those different violations were part of this  
16 action.

17 Again, I just want to reiterate. On  
18 this aerial photo -- and this was the big hearing  
19 we had over a year ago about this case, and the  
20 Department's evidence supported by photographs.  
21 Here are photographs; here are photographed  
22 locations; here, here, and here.

23 The photographs that you're talking  
24 about today are up here in an area not even shown  
25 on this map. So they're a different area,

1 different disturbance, different alleged  
2 violations of which we were never provided notice.  
3 That is the main reason why they should be  
4 excluded.

5 Can we go back and argue about them?  
6 You bet we can. Could we have done a better job  
7 if they'd been included in the violation letter or  
8 the administrative order? Yes, we could have. So  
9 we are prejudiced by going back and revisiting and  
10 allowing new areas of the subdivisions to come in  
11 and be part of this action when they were never  
12 appropriately noticed.

13 The original violation letters and the  
14 original orders were all about home building. You  
15 can go back and read the orders yourselves,  
16 Exhibits 2, 9, and 10. It's all about home  
17 building. As you saw from the USDA photo, there  
18 were no home building activities up in that area  
19 where those photos were supposedly taken.

20 The scope of this enforcement action was  
21 limited by the Department through the six years of  
22 this litigation. Based on that, it was  
23 appropriate to exclude those four photographs.  
24 Thank you.

25 CHAIR DEVENY: Thank you, Ms. Marquis.

1 Do Board members have any questions of the parties  
2 at this point?

3 BOARD MEMBER HORNBEIN: I have a  
4 question for DEQ. I would like them to address  
5 this issue that these proposed four photographs  
6 addressed only new violations.

7 When I read the violation notice, the  
8 first bullet point, I don't read that to be  
9 limited exclusively to the building of homes, but  
10 I do find it troubling that the map that was just  
11 up on the board doesn't even include the area that  
12 these photographs were taken in, so I would like  
13 you to address that, please.

14 MS. BOWERS: Yes, Board Member Hornbein,  
15 and members of the Board.

16 First of all, you're right. The first  
17 notice that was given to Reflections and Copper  
18 Ridge was the violation letter that's Exhibit 2  
19 dated September 23rd, 2013. And in that notice,  
20 the inspector refers to construction activity  
21 occurring throughout the subdivision. It is not  
22 limited to certain lots or certain areas of the  
23 subdivision.

24 And then with regard to Exhibit 16, the  
25 map that was up on the Board, that map was

1 prepared as a demonstrative exhibit to show  
2 locations of the inspector's photographs. And  
3 admittedly he did concentrate his inspection on  
4 the southern end of the subdivisions, and that was  
5 because that's where waters of the State were, and  
6 he was trying to document discharges to waters of  
7 the State.

8 But we aren't alleging new violations.  
9 The original violation letter and the order allege  
10 violations related to storm water discharges from  
11 construction activity throughout the subdivisions.

12 CHAIR DEVENY: Any other questions of  
13 the parties by Board members?

14 BOARD MEMBER BUSBY: I have one for  
15 Sarah, I believe. I think Sarah is the one.

16 The original remand from my memory was  
17 for determination of owner/operator at the  
18 locations of the violations; is that not correct?

19 MS. CLERGET: I believe that's correct,  
20 and that's why you guys have the transcripts of  
21 the original hearing, so you could go back and  
22 look at that yourself.

23 BOARD MEMBER BUSBY: That was my memory  
24 anyway. I'm not sure what another remand is going  
25 to do for us on the original determination of

1 owner/operator, whether the violations occurred,  
2 because they're not specific. DEQ has not been  
3 specific and says, "This is this lot, this lot,"  
4 that locations for the violations they're saying  
5 generally.

6 So we have a piece of property here  
7 that's owned somewhat by the developer, and  
8 largely by property owners, and we have violations  
9 that may or may not be from home building, but  
10 it's alluded to, or may or may not be from  
11 leftovers from their original development.

12 So I'm not sure we've really gone  
13 anywhere into determining owner/operator yet for  
14 the violations, and it's the violations that's  
15 being appealed. So I have a question whether  
16 we're going to get there with a new remand. Do  
17 you want to take a shot at what I just said?

18 MS. CLERGET: No, I'm going to leave  
19 that to the parties.

20 MS. BOWERS: Could I -- Board Member  
21 Busby, members of the Board. I think the remand  
22 could provide more information on -- We have  
23 provided information on ownership of lots within  
24 the subdivisions at the time of the violations.  
25 And the remand, including the photos, would

1 provide more information on the condition of those  
2 lots, as far as whether they were cleared and left  
3 that way at the time of the violations.

4 And that was -- my understanding -- what  
5 the Board wanted was more information on ownership  
6 and the status of the lots.

7 CHAIR DEVENY: Ms. Marquis.

8 MS. MARQUIS: Thank you, Madam Chair,  
9 members of the Board. Board Member Busby, I think  
10 you hit the nail on the head.

11 These are 100 acre subdivisions with  
12 multiple property owners, and so when the notice  
13 of violation was sent out citing home building  
14 construction with an attached inspection report  
15 with a set of photographs, those are the  
16 violations.

17 And the remand was to determine, based  
18 on those alleged violations, whether Copper Ridge  
19 or Reflections was the owner/operator with respect  
20 to those violations. Now we've ballooned out into  
21 a larger universe of property and alleged  
22 violations that we're looking for.

23 And we can't go back in time and collect  
24 evidence and talk to witnesses. The alleged  
25 violations are what they were alleged as supported

1 by the violation letters with the attached  
2 inspection report, and that set of photographs,  
3 and those are the ones that we've been talking  
4 about through six years of litigation, including  
5 the last hearing; and that the Board did on this  
6 in December, and again in February.

7 And on the remand what we were  
8 confronted with was an entirely new different set  
9 of violations, and that's why our first reaction  
10 was to file a motion in limine because it's  
11 improper, and they were properly excluded.

12 CHAIR DEVENY: Thank you. Any other  
13 comments or questions from Board members?

14 BOARD MEMBER TWEETEN: Madam Chair, this  
15 is Chris. I have one for Ms. Bowers.

16 CHAIR DEVENY: Go ahead.

17 BOARD MEMBER TWEETEN: -- argues with  
18 considerable force I think that these four  
19 photographs depict -- (inaudible) -- to the  
20 violations that are described in the notice of  
21 violation which I think is Exhibit 2; is that  
22 right?

23 MS. BOWERS: That's correct.

24 BOARD MEMBER TWEETEN: Each one of these  
25 four photographs before me -- and again, I don't

1 happen to have these in front of me, I don't think  
2 -- can explain the violations that are described  
3 in Exhibit 2.

4 MS. BOWERS: I'm digging for Exhibit 2.

5 BOARD MEMBER TWEETEN: I think the  
6 elements of the various violations seem to be on  
7 Page 2.

8 MS. BOWERS: Board Member Tweeten,  
9 members of the Board. On Page 2 of DEQ Exhibit 2,  
10 the inspector describes his facility site review,  
11 and he talks about what he observed and  
12 documented, and one of his first bullets, I guess  
13 it's actually the second bullet on that page, he  
14 says, "Active construction is occurring throughout  
15 the facility site. Construction activities  
16 include clearing, excavation, stockpiling,  
17 grading, and construction of single family homes."

18 So the photographs at the northern end  
19 of the subdivision show clearing, excavation,  
20 there are stockpiles, and there is grading.

21 He also talks about, in the last bullet  
22 on that page, he talks about sediment observed in  
23 streets, and he talks about sediments on Western  
24 Bluffs Way. He talks about ground disturbance and  
25 potential pollutant sources; that's on Page 3.

1 And he's talking more about the entire site. His  
2 photographs are attached as some examples of what  
3 he's observing.

4 So in answer to your question, I think  
5 the excluded photographs show examples of lots  
6 that have been disturbed by construction activity  
7 within the subdivisions.

8 MS. MARQUIS: May I respond?

9 CHAIR DEVENY: Yes. Go ahead, Ms.

10 Marquis.

11 MS. MARQUIS: Thank you, Madam Chair.  
12 This is a little bit different than -- What the  
13 Department has told you today is a little bit  
14 different than the testimony that we had at the  
15 hearing in June.

16 For example, Mr. Dan Freedland testified  
17 that the fact -- this is on Page 18 of the  
18 transcript, quote, "The factual portions of this  
19 letter of the violations are on the second page,  
20 and I identified during the compliance evaluation  
21 the conditions that were identified and  
22 documented. There is six bullet points, including  
23 the first one," end quote.

24 And he's talking about those bullet  
25 points that Ms. Bowers directed you to on Page 2

1 of the violation letter.

2 Now, Ms. Bowers told you that the  
3 disputed photos would support that first bullet  
4 comment of, "Active construction is occurring  
5 throughout the facility site. Construction  
6 activities include clearing, excavation,  
7 stockpiling, grading, and construction of single  
8 family homes."

9 On Page 19 of the transcript, Mr.  
10 Freedland was asked specifically about that first  
11 bullet point, and on Page 20, he was asked which  
12 photographs pertain to that allegation, and his  
13 answer, quote, "I didn't have photographs  
14 specifically for the first bullet point."

15 DEQ has also directed you to the bullet  
16 point at the bottom of that page. There are  
17 sub-bullet points under there that refer to  
18 specific photographs that were attached to the  
19 inspection report. We don't disagree that we were  
20 on notice with those specific photographs to  
21 support that allegation, but not any others.  
22 Thank you.

23 CHAIR DEVENY: Ms. Bowers, do you have a  
24 response to that?

25 MS. BOWERS: Well, in regard to Dan's

1 testimony, he was asked about photographs attached  
2 to his inspection report, which would not have  
3 included the excluded photos.

4 MR. HAYES: Madam Chair, if I might add.  
5 DEQ isn't required when we issue a Notice of  
6 Violation to actually attach evidence to the  
7 Notice of Violation. What we're required to do is  
8 provide a narrative that describes the provision  
9 or statute or rule that's being violated, and then  
10 notice of the factual content of the violation.

11 When we issued the Notice of Violation  
12 for this action, we went beyond that, and we  
13 actually attached some photographs to support  
14 those violations, but we're not limited to those  
15 photographs. Otherwise we'll never attach  
16 evidence or photographs to a violation letter if  
17 we're confined to just that evidence.

18 And I think the Board member hit it on  
19 the head, in that those six bullet points, if you  
20 read them, they're actually separate violations,  
21 and the first one is, "Active construction is  
22 occurring throughout the facility site.  
23 Construction activities include clearing,  
24 excavation, stockpiling, grading, and construction  
25 of single family homes."

1           Copper Ridge has tried to narrow our  
2 notice and say that it was just based on  
3 construction of family homes, but that's clearly  
4 not the case when you look at the first violation  
5 cited in this violation letter, when it talks  
6 about construction activity, defines it partially  
7 as including construction of single homes, but is  
8 much broader and goes to clearing, excavating,  
9 stockpiling, grading, and construction of single  
10 family homes.

11           For that succinct violation, we did not  
12 attach any photographs because we weren't required  
13 to do so.

14           CHAIR DEVENY: I'll give Ms. Marquis  
15 another minute if you'd like to respond, and then  
16 I'm going to have the Board go on and take some  
17 action here so we can move forward.

18           MS. MARQUIS: The statutes 75-5-611 and  
19 75-5-617 require the Department to put the alleged  
20 violator on notice, including on notice of the  
21 facts that support the alleged violation. These  
22 are the facts that the Department presented.

23           The testimony that we heard in June was  
24 that Mr. Freedland didn't have photographs to  
25 support that first alleged violation. Now the

1 Department is coming back and saying, "Oh, wait a  
2 minute. These photographs do support the first  
3 alleged violation."

4 They're in a completely different  
5 location and different area of the subdivision.  
6 We were never put on notice of those. Our  
7 argument has been and will remain that there's no  
8 way to collect penalties for those violations  
9 because they were not properly noticed.

10 CHAIR DEVENY: Thank you. Do Board  
11 members have any further discussion, or questions,  
12 comments, suggestions for what to do today?

13 BOARD MEMBER TWEETEN: Madam Chair, this  
14 is Chris. May I follow up with Ms. Bowers?

15 CHAIR DEVENY: Yes.

16 BOARD MEMBER TWEETEN: Ms. Bowers, Mr.  
17 Freedland -- (inaudible) -- violation have in mind  
18 the conditions that were shown in these four  
19 photographs? These four photographs as evidence  
20 at that time?

21 MS. BOWERS: Board Member Tweeten. He  
22 took the four excluded photographs at the time of  
23 his inspection. He didn't include them with the  
24 violation letter -- I'm kind of trying to get into  
25 his mind and reasoning -- but when I talked to

1 him, he told me he was more concerned about  
2 showing discharges to State waters, and he wasn't  
3 as concerned about the northern end of the  
4 subdivision. But he did make the observations on  
5 the northern end of the subdivision. He did take  
6 the photos on the day of his inspection.

7 BOARD MEMBER TWEETEN: And if we remand  
8 this matter for further proceedings, and direct  
9 the Hearing Examiner to admit these exhibits, do  
10 you have testimony that will tie the conditions  
11 that are shown in these exhibits to the discharge  
12 of storm water to State waters?

13 MS. BOWERS: I believe we can make that  
14 connection.

15 BOARD MEMBER TWEETEN: Would you make a  
16 brief offer of proof and tell me what that  
17 testimony is.

18 MS. BOWERS: Well, I guess at this point  
19 in time, Board Member Tweeten, members of the  
20 Board, I would rely on the Hearing Examiner's  
21 previous determinations that a storm event, ten  
22 year storm event in 24 hours -- I think that's a  
23 quarter of an inch in 24 hours. I might be wrong  
24 -- but a storm event of that magnitude would cause  
25 a discharge. And if there were a storm event on

1 bare lots that are upgradient from State waters,  
2 that discharge could make its way to State waters  
3 and impact State waters.

4 BOARD MEMBER TWEETEN: And these four  
5 photographs depict lots that were owned by Copper  
6 Ridge at the time of the inspection?

7 MS. BOWERS: Owned by Reflections.

8 BOARD MEMBER TWEETEN: I'm using Copper  
9 Ridge as --

10 MS. BOWERS: Right.

11 BOARD MEMBER TWEETEN: Okay.

12 CHAIR DEVENY: Any other comments from  
13 Board members?

14 (No response)

15 CHAIR DEVENY: How do we want to  
16 proceed? Do we want to take any action on the  
17 motion in limine?

18 MS. MARQUIS: Madam Chair, could I  
19 respond to the last exchange between Board Member  
20 Tweeten and DEQ briefly?

21 CHAIR DEVENY: Okay.

22 MS. MARQUIS: Let's not forget that  
23 those lots are in the third filing of Reflections,  
24 which had a storm water general permit in effect  
25 at the time. So whatever discharges occurred

1 wouldn't be an unpermitted discharge.

2 CHAIR DEVENY: Okay. Comments from  
3 Board members?

4 (No response)

5 CHAIR DEVENY: Is there a movement to  
6 take action on the motion in limine?

7 (No response)

8 CHAIR DEVENY: Or do we want to just go  
9 back and review the whole record?

10 BOARD MEMBER BUSBY: One of our lawyers  
11 should make the motion.

12 BOARD MEMBER TWEETEN: Madam Chair, this  
13 is Chris.

14 CHAIR DEVENY: Go ahead, Chris.

15 BOARD MEMBER TWEETEN: I think we've  
16 moved far enough to make a decision one way or  
17 another on the motion in limine, and it is a hard  
18 decision. I understand. I think it's a close  
19 question.

20 Candidly I don't feel as strongly about  
21 it now as I did an hour ago, but I'd be curious to  
22 hear what some of the other Board members might  
23 think about the importance of these photographs,  
24 and whether their admission or rejection actually  
25 makes a difference in this case, and just what

1 they think -- I hate to be the only one out there  
2 on record on this at this point, and I'm  
3 absolutely susceptible to having my mind changed  
4 here, but I'd like to hear some discussion from  
5 some of my colleagues about what they think about  
6 this issue.

7 CHAIR DEVENY: Dexter.

8 BOARD MEMBER BUSBY: Chris, I want your  
9 thoughts on this. But if those photographs are  
10 simply of an area that's covered under an  
11 existing, or was covered under an existing permit,  
12 I'm not sure they're relevant.

13 BOARD MEMBER HORNBEIN: I just want to  
14 respond to you, Chris, and build on what Dexter  
15 said.

16 My understanding is that the issue of  
17 whether those alleged discharges occurred under an  
18 existing permit is disputed between the parties,  
19 and so I don't feel that these four photographs  
20 are dispositive either way, but I also don't feel  
21 comfortable with the level of evidence that we  
22 have before us on that issue.

23 So I guess what I would like to see is  
24 to have those photos admitted, and see what the  
25 parties can come up with in addition on the issue

1 of "A," land ownership, and "B," whether the  
2 existing discharge permit that was still in effect  
3 at that time actually covered the areas from which  
4 that sediment was coming.

5 CHAIR DEVENY: Sarah, did you have a  
6 comment?

7 MS. CLERGET: I just want clarification,  
8 because how you would like that to fit into the  
9 violations as they're alleged, so where you think  
10 that evidence should go. Is it under the four  
11 violations? Does that make sense?

12 BOARD MEMBER HORNBEIN: Uh-huh.

13 MS. CLERGET: Because if you're  
14 remanding it, I want to be sure that I understand  
15 why you're remanding it, I get the remand correct  
16 for what you want additional evidence for. And so  
17 which of those violations potentially that  
18 evidence could go under would be helpful.

19 BOARD MEMBER HORNBEIN: Well, I think --  
20 and I may be not be correct here -- but I believe  
21 that it would be Violation 2 and potentially  
22 Violation 3, if we're talking about an area that  
23 is arguably, as DEQ argued, outside of the  
24 disturbance zone for a discharge.

25 And I do understand that there is legal

1 disagreement as to whether the disturbance zone is  
2 the relevant area to be looking at, or if the  
3 permit in fact covers all of the lot area. I  
4 think that's a question of fact that I have not  
5 been convinced on either way. That's what's  
6 making me fundamentally uneasy with coming to a  
7 decision on this.

8 CHAIR DEVENY: Dexter.

9 BOARD MEMBER BUSBY: I would also like  
10 to see whether DEQ can identify the exact  
11 properties that the runoff came off of, because  
12 this is split ownership, and it is not an easy  
13 split. Because if it did not come off of their  
14 property, then the violation does not belong to  
15 them. It's that simple. If it came off of their  
16 property, that's another conversation and another  
17 thing.

18 I don't know if Sarah can determine  
19 that, but I think DEQ, to write a violation  
20 letter, needs to be able to identify who belongs  
21 to the land.

22 MS. CLERGET: I guess I have another  
23 question. Again, I'm trying to understand if this  
24 is coming back, so I make sure that you guys get  
25 what it is that you want on potential remand.

1           So Violation 2 is for discharges without  
2 a permit. The discharge -- and please, parties,  
3 if I'm getting this wrong, please correct me. But  
4 I believe that the permit that Copper Ridge and  
5 Reflections got was to essentially solve that  
6 unpermitted discharge, so there was never -- or at  
7 least in my understanding that there was no  
8 permitted discharge of the permit that you're  
9 discussing.

10           So if my understanding is flawed, and  
11 there is -- we need evidence about the permit that  
12 you're talking about, which is not the permit that  
13 cured the unpermitted discharge. Does that make  
14 sense? So in December they're charged with  
15 unpermitted discharge in Violation 2, so they're  
16 required to get a permit. The permit that they  
17 get is the permit in December of 2013, December  
18 23rd, 2013, which cures the unpermitted discharge.  
19 So there is no --

20           And DEQ needs to correct me if I'm wrong  
21 on this. But I don't think the allegation has  
22 ever been that the unpermitted discharge was  
23 unpermitted based on the permit existing and the  
24 disturbance area in that existing permit in two  
25 thousand -- the one that was noticed, the

1 termination in 2014.

2 So they may need to correct me if I'm  
3 wrong, but that's why I'm asking about Violation  
4 2, because if you want to remand and you want more  
5 information about the permit that terminated in  
6 2014 in the northern section of the subdivision, I  
7 need to be sure and get that evidence in.

8 BOARD MEMBER HORNBEIN: And maybe it is  
9 entirely possible I have this wrong as well. I  
10 mean I referred to the permit number just because  
11 I believe this is the one I'm talking about, and  
12 the parties can verify that.

13 My understanding is that MTR104993 which  
14 was actually issued to CMG Construction, but  
15 that's the permit that addressed road building,  
16 and utilities, and related issues, and that is the  
17 one that was actually in effect at the time of the  
18 storm event.

19 What is not clear to me is whether the  
20 discharges that DEQ is alleging came from an area  
21 covered by that permit, as Reflections alleges, or  
22 whether they in fact came from outside of the  
23 permitted area, which would mean that they are a  
24 violation under 75-5-605(2)(c).

25 MS. CLERGET: So the permit that they

1 got to cover the unpermitted discharge was 105376;  
2 have I got that right?

3 MS. MARQUIS: That's right.

4 MS. CLERGET: So that's not the permit  
5 that you're talking about, just to be clear for  
6 the record.

7 BOARD MEMBER HORNBEIN: Correct.

8 MS. CLERGET: So the evidence that you  
9 want on remand is whether there were unpermitted  
10 discharges with respect to --

11 BOARD MEMBER HORNBEIN: -- 104993.

12 MS. CLERGET: Is that right?

13 BOARD MEMBER HORNBEIN: Yes. And just  
14 to clarify, the real issue is whether the  
15 discharges that are alleged by DEQ fell within  
16 that permit, in which case they're off the hook;  
17 or whether they didn't. And there is argument, I  
18 heard extensive argument today about the area of  
19 disturbance covered by that permit, as well as  
20 like the entire -- I can't remember the  
21 terminology, but basically the project area  
22 covered by the permit.

23 And I would love to know which of those  
24 two is relevant for determining if a violation  
25 occurred, and once we know that, to see if there

1 is evidence on where the violation came from. In  
2 other words, was it within that permit area, or  
3 they were allowed to discharge, or was it not?  
4 Because to me, that seems like the hub of the  
5 issue. Maybe I'm missing something, but that  
6 seems like the crux of it.

7 MS. MARQUIS: If I could just briefly.

8 CHAIR DEVENY: Ms. Marquis.

9 MS. MARQUIS: Madam Chair, members of  
10 the Board. I appreciate the concern and the level  
11 of interest in that permit. I have to again raise  
12 this objection on behalf of my client. We're  
13 greatly prejudiced by having to go back and gather  
14 evidence and testimony about a permit that was  
15 terminated five years ago. Are any of the people  
16 who managed that permit still available to come as  
17 witnesses? What kind of documents still exist?  
18 We have no idea.

19 Again, we weren't put on notice that any  
20 of the permits were subject to questioning in this  
21 enforcement action until May of this year. And so  
22 we can do what we can, but we're prejudiced in  
23 this regard, and that is exactly why we filed the  
24 motion in limine to keep those photographs out, to  
25 keep that area of the subdivision out, because it

1 wasn't appropriately noticed. It was covered by a  
2 permit. They've never alleged that there were any  
3 problems with the permit.

4 And so that's the prejudice to us and  
5 the detriment that we will have if this goes back  
6 on remand in that regard.

7 CHAIR DEVENY: David.

8 BOARD MEMBER LEHNHERR: I'm probably  
9 more confused than anyone in the room, but I think  
10 it would be helpful to have -- I think there is  
11 confusion about what permits covered what areas  
12 when, and where the photographs were allegedly  
13 taken.

14 And we have yet to see a large view of  
15 the subdivision, the Copper Ridge and Reflections  
16 Subdivision, with the permit areas outlined with a  
17 chronology, with the alleged locations of the  
18 photographs clearly delineated. And for someone  
19 like me, that would be extremely helpful.

20 CHAIR DEVENY: Other questions, comments  
21 from Board members?

22 (No response)

23 CHAIR DEVENY: Do we want to proceed  
24 with the remand? And do we first need to address  
25 the motion in limine? Not being an attorney, I'm

1 not quite sure how to proceed, and would greatly  
2 appreciate suggestions from Chris and Melissa.

3 BOARD MEMBER TWEETEN: Madam Chair, this  
4 is Chris. I hate to keep doing this, but I think  
5 we are having trouble keeping track. Could I ask  
6 another question of Ms. Bowers, please?

7 CHAIR DEVENY: Yes.

8 BOARD MEMBER TWEETEN: In the Hearing  
9 Examiner proposed -- (inaudible) -- in this  
10 matter, she found that with respect to Violations  
11 2 and 3 -- (inaudible) -- was not an  
12 owner/operator.

13 CHAIR DEVENY: I think we lost a little  
14 bit of what you said there, Chris. In respect to  
15 Violations 2 and 3 what?

16 BOARD MEMBER TWEETEN: I'm having  
17 trouble getting my question organized. Just a  
18 question this way. What -- (inaudible) -- do the  
19 photographs have on the question of whether  
20 Reflections was an owner/operator?

21 MS. BOWERS: So Board Member Tweeten,  
22 are you asking if the -- what effect on Violations  
23 2 and 3 if Copper Ridge and Reflections are not  
24 owner/operators?

25 BOARD MEMBER TWEETEN: No, I'm just --

1 (inaudible) -- owner/operator -- (inaudible) --

2 CHAIR DEVENY: We're not hearing you,  
3 Chris.

4 BOARD MEMBER TWEETEN: -- the  
5 owner/operator issue.

6 CHAIR DEVENY: We can't hear you. It is  
7 kind of just garbled.

8 BOARD MEMBER TWEETEN: Let me try again.  
9 Is this better?

10 CHAIR DEVENY: Yes, I believe so.

11 BOARD MEMBER TWEETEN: I guess the  
12 question, basic question for me is: Why are these  
13 photographs relevant to the owner/operator  
14 question that was before the Hearing Examiner on  
15 remand?

16 MS. BOWERS: Board Member Tweeten,  
17 members of the Board. The photos are relevant in  
18 that they show the condition of lots that were  
19 owned by Reflections during the time of the  
20 violations.

21 BOARD MEMBER TWEETEN: Okay. Madam  
22 Chair, just for discussion purposes, I'm going to,  
23 just to get the matter on the floor, move it off  
24 of dead zero here, I'm going to move that the  
25 Board -- (inaudible) -- Hearing Examiner abused

1 her discretion -- (inaudible) -- the motion in  
2 limine with respect to the four photographs that  
3 are identified in -- (inaudible) -- exceptions.

4 CHAIR DEVENY: There is a motion before  
5 the Board. Is there a second? Were you not  
6 through, Chris, with your motion?

7 BOARD MEMBER TWEETEN: -- motion and  
8 remand the matter.

9 CHAIR DEVENY: I'm sorry, Chris, but we  
10 lost you.

11 BOARD MEMBER TWEETEN: Okay. I'm back.  
12 Can you hear me now?

13 CHAIR DEVENY: Could you state your  
14 motion for us one more time.

15 BOARD MEMBER TWEETEN: I move that the  
16 Board find that the Hearing Examiner abused her  
17 discretion with respect to the four photographs as  
18 exceptions in DEQ's bill of exceptions, and that  
19 the Board remand this matter to the Hearing  
20 Examiner for further proceedings to take  
21 additional evidence with respect to the subject  
22 matter depicted by these four exhibits, determine  
23 the extent to which any of that is relevant to  
24 contested issues in this matter, and to issue a  
25 report back to the Board via the findings and

1 conclusions, and the proposed order that's  
2 currently before the Board need to be changed, and  
3 if so, in what respect.

4 CHAIR DEVENY: We're getting your motion  
5 written down and put up on the board so everybody  
6 can read it.

7 BOARD MEMBER TWEETEN: Great.

8 MS. CLERGET: So Chris, I'm just going  
9 to read this to you. This is what we got as your  
10 motion. Tell me if this is right.

11 Member Tweeten moved to find that the  
12 Hearing Examiner abused her discretion in regard  
13 to the motion in limine's four photographs, and  
14 that the matter be remanded back to the Hearing  
15 Examiner to take additional evidence and issue new  
16 proposed Findings of Fact and Conclusions of Law.

17 That's a slight restatement of your  
18 motion, I guess. How do you want us to edit that  
19 so it's --

20 BOARD MEMBER TWEETEN: Well, not exactly  
21 a match here, because I'm not convinced that  
22 additional evidence is even necessary. I think  
23 the parties ought to be offered the opportunity to  
24 submit whatever additional evidence they want to  
25 submit, and Sarah can then review it, and

1 determine -- I guess to put it most basically --  
2 whether it makes any difference.

3 I don't think Sarah needs to make  
4 additional findings and conclusions in the event  
5 that DEQ gets its way, and gets to put these  
6 photographs into evidence, and say whatever it is  
7 they want to say about them; and then Copper Ridge  
8 and Reflections gets to put in their evidence, and  
9 it all turns out to be a tempest in a teapot, and  
10 it doesn't really have anything to do with the  
11 question of who's an owner/operator with respect  
12 to these discharges, or any other contested issue  
13 that might be in the case at that point.

14 I don't want to tie Sarah's hands and  
15 make her go through an unnecessary exercise of  
16 issuing different findings if, in her judgment,  
17 they don't make any difference. I just want to  
18 get the evidence in the record, get all of the  
19 evidence from both sides as to that subject  
20 matter, and cover the questions that Melissa  
21 talked about in her comment, and explain to us why  
22 these photographs make it more likely that Copper  
23 Ridge and Reflections was responsible for this  
24 storm water discharge.

25 And I don't think there is any question

1 that a storm water discharge occurred. But was  
2 Copper Ridge the responsible party -- and I use  
3 that term broadly. Was Copper Ridge the  
4 responsible party, or were the properties that  
5 Copper Ridge still owns at the time of the  
6 discharge not contributing factors in the fact  
7 that the discharge happened.

8 And for sake of fairness and  
9 completeness, let these documents in, hear what  
10 the parties have to say about them, and then I  
11 would leave it to Sarah's discretion to decide  
12 what, if any, additional changes need to be made  
13 to her proposed order as it stands today. That's  
14 my motion. Massage the language that's on the  
15 Board accordingly.

16 BOARD MEMBER HORNBEIN: Chris, did you  
17 suggest that she review the additional evidence  
18 and then report back or provide a memo of some  
19 sort to the Board with regard to whether it's  
20 relevant and probative, or did I mishear that?

21 BOARD MEMBER TWEETEN: I think I said  
22 that. I'm not sure it's what I meant however.

23 If she makes the determination that this  
24 evidence isn't probative with respect to any  
25 contested issues, I think she could send a memo to

1 the Board to that effect along with the  
2 resubmission of her existing order.

3 If on the other hand -- (inaudible) --  
4 then she ought to provide us with modified  
5 proposed findings, conclusions, and a proposed  
6 order, taking into account whatever probative  
7 value these photographs have. Does that make  
8 sense?

9 CHAIR DEVENY: Is anybody getting -- you  
10 guys look a little confused over there. We're  
11 trying to come up with a motion.

12 BOARD MEMBER BUSBY: I have a question.

13 CHAIR DEVENY: Dexter has a question for  
14 you, Chris.

15 BOARD MEMBER BUSBY: Chris, are you  
16 looking for her to just look at the photographs,  
17 or are you thinking if there is other evidence out  
18 there from either side, that that should be  
19 brought in also?

20 BOARD MEMBER TWEETEN: Dexter, I think  
21 that she ought to look at the photographs,  
22 whatever additional evidence, the photographs, and  
23 the general subject matter of the photographs that  
24 DEQ would have offered had the photographs been  
25 admitted in the first place; and then whatever

1 rebuttal evidence Copper Ridge and Reflections  
2 has. So we basically complete the record with  
3 respect to the matter that's depicted in the  
4 photographs.

5 Because I understand both sides to have  
6 told us that they have other evidence out there  
7 with respect to this property on the north end of  
8 the subdivision, and they didn't present it  
9 because the motion in limine was granted and the  
10 photographs were excluded, and that if the  
11 photographs were admitted, there would have been  
12 other evidence surrounding the photographs that  
13 would have come in as well, and I think all of  
14 that should be in the record.

15 CHAIR DEVENY: Go ahead, Sarah, and see  
16 if Chris --

17 MS. CLERGET: I guess I'm trying to get  
18 clarity here. Chris, I know you're thinking as  
19 you're going. So do you want me to collect the  
20 evidence and then present you with the evidence,  
21 so that you can weigh the evidence, or do you want  
22 me to collect the evidence, and then weigh both  
23 the relevance -- which would determine the  
24 admissibility -- and then the ultimate question of  
25 whether or not Copper Ridge and Reflections are

1 the owner/operator and/or committed the violations  
2 alleged?

3 BOARD MEMBER TWEETEN: Well, I want you  
4 to be the Hearing Examiner. That's what that  
5 means is -- what that means to me is that --

6 MS. CLERGET: So I think what I've got  
7 here --

8 BOARD MEMBER TWEETEN: Let me finish.  
9 Maybe this will help. I mean you receive the case  
10 back from us on remand; you pretend that the way  
11 -- and the photographs have been admitted. We're  
12 going to have a half day hearing on such and such  
13 a date. I want to hear everything you've got on  
14 the general subject on these photographs that you  
15 would have introduced at the hearing in June had  
16 the photographs been in evidence.

17 -- (inaudible) -- in front of you, it  
18 seems to me you do one of two things. One, you  
19 can say, "None of this makes any difference with  
20 respect to what I found in my earlier proposed --  
21 my earlier findings and conclusions and proposed  
22 order," in which case you send us a memo to that  
23 effect; or you send a supplemental proposed  
24 findings, conclusions, and a supplemental proposed  
25 order, explaining what difference this new

1 evidence makes with respect to what you decided  
2 before. Does that --

3 MS. CLERGET: I'm trying to write that  
4 in so we can rewrite your motion here, so  
5 everybody is clear what they're voting on.

6 So one is: If the additional evidence  
7 changes the findings of fact or conclusions of law  
8 in the FOFCOL, and then if so, submit a modified  
9 FOFCOL, and if not, then a memo to that effect; is  
10 that right?

11 So the entire, what I've got written  
12 here is: Member Tweeten moved to find that the  
13 Hearing Examiner abused her discretion with regard  
14 to the four photographs excluded by the motion in  
15 limine.

16 And that the matter be remanded back to  
17 the Hearing Examiner to take additional evidence  
18 regarding the photographs from DEQ and REF, and  
19 determine that -- sorry -- from DEQ and  
20 Reflections and Copper Ridge, and determine, one,  
21 if the additional evidence changes the Findings of  
22 Fact and Conclusions of Law in the FOFCOL; two, if  
23 so, submit modified Findings of Fact and  
24 Conclusions of Law; and three, if not, then submit  
25 a memo to that effect. Does that --

1 BOARD MEMBER TWEETEN: Yes, I think  
2 you've got it.

3 MS. CLERGET: Okay. So does somebody  
4 want to put that in a motion?

5 BOARD MEMBER BUSBY: Chris did.

6 MS. CLERGET: So are we are clear that's  
7 your motion that everybody is voting on is what I  
8 just read?

9 BOARD MEMBER TWEETEN: I'm clear. I  
10 can't speak for anybody else.

11 MS. CLERGET: Then if everybody is  
12 clear, we need a second.

13 BOARD MEMBER LEHNHERR: Second.

14 CHAIR DEVENY: It's been moved and  
15 seconded. Is everybody clear on what we're voting  
16 on? Hillary, how about you?

17 BOARD MEMBER HANSON: I've got it.

18 CHAIR DEVENY: I'm sorry. Did you get  
19 it?

20 BOARD MEMBER HANSON: Still alive and I  
21 got it.

22 CHAIR DEVENY: Okay. Good.

23 MR. HAYES: Madam Chair.

24 CHAIR DEVENY: Let's have some  
25 discussion on the motion before us from Board

1 members.

2 BOARD MEMBER BUSBY: Just one quick  
3 thought. Whether I think it is irrelevant or not,  
4 this will solve that problem from all of us, I  
5 think, and let's just move forward on it.

6 CHAIR DEVENY: David.

7 BOARD MEMBER LEHNHERR: Maybe this isn't  
8 the best time to make this request, but I would  
9 ask that we get a single map of the subdivision or  
10 subdivisions -- depending on how you define CR and  
11 REF -- and have the appurtenant areas outlined and  
12 whatnot, so we can reference the maps or the map  
13 when we get together again. Thank you.

14 CHAIR DEVENY: Would that have to do  
15 with the No. D in the motion in limine?

16 MS. CLERGET: Maybe. That would be up  
17 to the parties, I think, as to whether that's how  
18 they would want to do that. It's up to them how  
19 they present their evidence. So it could be  
20 through "D," or it could be through existing  
21 evidence. I don't know.

22 CHAIR DEVENY: But if we don't change on  
23 that in the motion in limine, this still stands?

24 MS. CLERGET: So the way the motion is  
25 worded right now, it just relates to the four

1 photographs. So if it needs be changed, then we  
2 need to change it.

3 CHAIR DEVENY: Because right now it  
4 says, "DEQ will not be permitted to use or enter  
5 documents including maps based on, derived from,  
6 and created with information from the  
7 photographs."

8 MS. CLERGET: We could say "additional  
9 evidence regarding the photographs --" Sorry. I'm  
10 modifying this motion, so somebody is going to  
11 have to --

12 CHAIR DEVENY: I will move to modify  
13 Chris's motion to include the addition of maps.

14 MS. CLERGET: So I've got that  
15 modification right, it now reads -- this is going  
16 to be your motion, so "Chair Deveny moved to find  
17 that the Hearing Examiner abused her discretion  
18 with regard to the four photographs included by  
19 the motion in limine, and that the matter be  
20 remanded back to the Hearing Examiner to take  
21 additional evidence regarding the photographs, to  
22 include maps created from the photographs."

23 That doesn't make any sense. So  
24 "Additional evidence regarding photographs from  
25 DEQ --" that makes more sense -- "and Copper Ridge

1 and Reflections to include maps created from the  
2 photographs." Does that work, Chris?

3 CHAIR DEVENY: Yes. Is there a second  
4 to my addition to the motion?

5 BOARD MEMBER LEHNHERR: I would second  
6 it.

7 MR. HAYES: Madam Chair, may I request a  
8 clarification?

9 CHAIR DEVENY: Go ahead.

10 MR. HAYES: There has also been some  
11 interest expressed in regard to evidence regarding  
12 what areas were covered by the specific permit  
13 MT104993. And I don't know if this needs to be  
14 read broad enough to include that, or another  
15 motion needs to be made that the evidentiary  
16 hearing also include evidence on that matter,  
17 which is what I think Board members have voiced.

18 BOARD MEMBER HORNBEIN: I think David  
19 also had mentioned something about seeing the  
20 permit areas depicted.

21 BOARD MEMBER LEHNHERR: Correct.

22 CHAIR DEVENY: David had also asked  
23 that, Mr. Hayes. Thank you. Sarah, did you hear  
24 that?

25 MS. CLERGET: Yes. Do you mean the

1 areas permitted by 910?

2 BOARD MEMBER LEHNHERR: I'm thinking all  
3 of the permits that were issued, because it is a  
4 little bit confusing what areas were covered by  
5 the permits.

6 MS. CLERGET: Okay. So this, for  
7 purposes of the record, this says that the motion  
8 is "abused her discretion with regard to the four  
9 photographs excluded by the motion in limine, and  
10 that the matter be remanded back to the Hearing  
11 Examiner to take additional evidence regarding the  
12 photographs from DEQ and Copper Ridge and  
13 Reflections to include maps created from the  
14 photographs, and maps of the areas covered by the  
15 permits, and determine, one, if the additional  
16 evidence changes the Findings of Fact and  
17 Conclusions of Law in the FOFCOL; two, if so,  
18 submit a modified FOFCOL; and three, if not, then  
19 submit a memo to that effect.

20 That's not my best English, but does  
21 that appropriately reflect the motion as it  
22 stands? Everybody is nodding. You have to  
23 actually say something for the record.

24 CHAIR DEVENY: I think it does. I'm not  
25 hearing anybody say that it doesn't.

1           MR. LEHNHERR: From my standpoint. What  
2 about Chris?

3           CHAIR DEVENY: Chris, you're okay with  
4 that?

5           BOARD MEMBER TWEETEN: I think so.

6           MS. CLERGET: So I think it was your  
7 motion. We need a second. Or your amendment.  
8 Sorry.

9           CHAIR DEVENY: Let's vote on the  
10 amendment to the original motion, which was to add  
11 the information about the photographs being --  
12 creating the maps, and the photograph evidence.  
13 So all in favor of the amendment to the motion,  
14 signify by saying aye.

15                   (Response)

16           CHAIR DEVENY: Any opposed?

17                   (No response)

18           CHAIR DEVENY: Hearing none, the motion  
19 passes. Is there any further discussion on the  
20 motion before the Board?

21           MS. CLERGET: So the amendment passed,  
22 but you need to vote on the original motion.

23           CHAIR DEVENY: That's what we're getting  
24 ready to do. I called for more discussion, just  
25 in case somebody has second thoughts. Hearing

1 none, we need to vote on the motion before us.

2 MS. CLERGET: Chris Tweeten moved the  
3 original motion, Chris Deveny moved the amendment.  
4 Second were David.

5 CHAIR DEVENY: All those in favor of the  
6 motion before the Board, signify by saying aye.

7 (Response)

8 CHAIR DEVENY: All those opposed, nay.

9 (No response)

10 CHAIR DEVENY: The motion carries. So  
11 is there any further work that we need to do on  
12 this today?

13 MS. CLERGET: Just to be clear for the  
14 record, I guess, essentially the matter that the  
15 -- Well, no.

16 CHAIR DEVENY: So then I think, Sarah,  
17 you had an update for --

18 MS. CLERGET: This is the Board Counsel  
19 update, under the main agenda.

20 CHAIR DEVENY: Thank you today to the  
21 parties for your efforts.

22 MS. CLERGET: Wait. Actually I have one  
23 scheduling thing before the parties go somewhere.  
24 So do you want the remanded portion of this -- do  
25 you want to schedule a special meeting to do that,

1 or do you want to do this and Montinore at the  
2 October meeting?

3 Oh, sorry. And Vicki can't do that  
4 because she's Counsel for both Montinore and  
5 Copper Ridge, and it will kill her. So can we  
6 have a special meeting?

7 CHAIR DEVENY: Why don't you find out  
8 when some dates would be for a special meeting  
9 that would fit everybody's summer schedule, and  
10 we'll try to do that.

11 MS. CLERGET: When would you like to aim  
12 for that? Do you want it before the October  
13 meeting? Do you want it in September? Do you  
14 want it in November? Because we may have other  
15 things coming in.

16 CHAIR DEVENY: What are people's  
17 schedules?

18 MS. CLERGET: And then the reason I want  
19 to do this with the parties because they're going  
20 to need to hear the schedule, and they may need to  
21 be heard on the schedule, so I want to make sure  
22 everybody's on the same page.

23 BOARD MEMBER HORNBEIN: Do you want to  
24 consult Counsel for the parties first, because  
25 their time commitment is going to be greater than

1       ours in terms of an additional hearing and  
2       preparing documents.

3               MS. CLERGET: I think it would be most  
4       helpful for me if we could do some of that here,  
5       so you guys can tell me whether you want it before  
6       or after.

7               CHAIR DEVENY: Later in September.

8               MS. CLERGET: The parties, is that  
9       possible?

10              BOARD MEMBER HANSON: I'd like to do it  
11       before, so we don't forget everything we've talked  
12       about today and get it confused with a new case.

13              CHAIR DEVENY: Hillary, we missed the  
14       first part of what you said.

15              BOARD MEMBER HANSON: I said I vote for  
16       before so that we don't forget everything we heard  
17       today, and before we get it confused with a new  
18       case.

19              CHAIR DEVENY: So before the October  
20       meeting? Are people okay with that?

21              MS. MARQUIS: Madam Chair, to be honest,  
22       my schedule is full until the next meeting. I'm  
23       not entirely sure the scope of effort that this is  
24       going to require, but I know the remaining issues  
25       on my plate between now and October.

1 MS. CLERGET: December.

2 MS. MARQUIS: Exactly.

3 CHAIRMAN DEVENY: I think it might work  
4 best, Sarah, for you to work with the attorneys,  
5 try find two or three dates, and then --

6 MS. CLERGET: Are you guys going to be  
7 okay if it doesn't happen until November?

8 CHAIR DEVENY: It would be nice to have  
9 it done sooner, but if we can't fit it in, it's  
10 just the way it is.

11 MS. CLERGET: Thank you guys.

12 CHAIR DEVENY: Thank you very much,  
13 parties.

14 (The proceedings were concluded

15 at 4:35 p.m. )

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

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

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
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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 \_\_\_\_\_, 2019.

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

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