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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:) Case No. BER 2015-01-WQ
VIOLATIONS OF THE WATER)
QUALITY ACT BY REFLECTIONS)
AT COPPER RIDGE, LLC AT)
REFLECTIONS AT COPPER)
RIDGE SUBDIVISION, BILLINGS,)
YELLOWSTONE COUNTY,)
MONTANA (MTR105376) [FID)
2288, DOCKET NO. WQ-15-07])

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

**REFLECTIONS AT COPPER RIDGE, LLC'S AND COPPER RIDGE
DEVELOPMENT CORP.'S RESPONSES TO DEQ'S EXCEPTIONS TO
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER**

Copper Ridge Development Corp. (“Copper Ridge”) and Reflections at Copper Ridge, LLC (“Reflections”) submit these Responses to the Department of Environmental Quality’s (“DEQ’s”) Exceptions.

I. Procedural History

Although harmless error, the typo on page 4 could be corrected to cite to ARM17.30.624(2)(f).

Although the error is harmless, the text on page 7 could be corrected to note that it was a joint motion. DEQ is incorrect about it not being contingent on the Motions in Limine ruling. *See* Joint Motion, p.2.

II. Findings of Fact

DEQ has not argued that the proceedings failed to comply with the law, only that the findings “are not based upon substantial evidence.” DEQ Exceptions, p.3.

The Board’s “standard on review is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings.” *Blaine Cty. v. Stricker*, 2017 MT 80, ¶ 26, 387 Mont. 202, 394 P.3d 159 (internal citations removed). “The evidence is viewed in the light most favorable to the prevailing party when determining whether findings are supported by substantial credible evidence.” *Id.* The Board need not recreate the Hearing Examiner’s analysis, which considered the

preponderance of the evidence (a more likely than not standard). Instead, the Board need only confirm that “substantial evidence” supports the Hearing Examiner’s findings. Although the term “substantial evidence” seems weighty, it is not. Substantial evidence is “less than a preponderance” and “more than a mere scintilla of evidence.” *Id.*

FOFs14-15

DEQ did not rely upon or refer to Lot 7B and has never asserted that any construction activity occurred on that lot. *See* Ex.2 (Violation Letters and Inspection), Ex.9,10 (Administrative Orders), DEQ’s motion for summary judgment, DEQ’s Proposed FOFCOL. Therefore, the absence of Lot 7B in FOF14 is harmless error. Nonetheless, Reflections would stipulate to a revised FOF14 (new text underlined):

The lots about which DEQ provided ownership information, from September to December 2013, were generally located in the northern part of the CR/REF subdivisions as follows:...

Although the inconsistency between FOFs 14 and 15 is harmless error, Copper Ridge and Reflections would stipulate to a revised FOF15 (new text underlined, text to be omitted marked with ~~strikethrough~~):

... regarding the southern portions of the CR/REF subdivisions, including such as property located along Golden Acres Drive, or any properties located in ~~the first filing of Reflections, or the first or second filing of Copper Ridge.~~

FOFs16(b), 60

Exhibit 23 included a certification of the date acquired. Ex.23, p.1. In contrast, Exhibit 26 is “a screenshot” of Ms. Bawden’s computer and the image is created from “a variety of resources that they use to tile together their maps,” with no certification. Trans.124:22-125:20. It is reasonable to conclude that it was “possibly taken” or was “allegedly ... acquired by Google Earth” on October 25, 2013.

FOF17

Exhibits 33 and 34 were created to depict lot ownership. Trans.122:7-16; 154:13-16 (“This map was simply to show lots associated with the deeds I had, had gotten in – so that it was clear that this is where the lot boundaries were and this was the number of the lot.”); 155:11-14 (“Again, the purpose of the map was to show, in clarity, the lots that were associated with the deeds [...], be able to show the boundaries and the lot number clearly.”). When responding to objections, DEQ stated, “This map goes to land ownership at the time.” and “This piece shows ownership.” Trans.117:19-21; 118:18.

Because Mr. Leep was present for DEQ’s testimony and responses to objections, his responses to questions about Exhibits 33 and 34 reflect a reasonable

understanding that the questions were about the accuracy of the ownership portrayed in the exhibits.

Mr. Leep testified that the aerial photos were not accurate depictions of the subdivisions because they were “blotchy,” did not reflect the vegetation present in the subdivisions, and did not even reflect the “black-topped” roads in the subdivisions. Trans.213: 25-214:24; FOF65. Mr. Leep’s testimony, cited by DEQ, that the exhibits were accurate is therefore restricted to ownership.

Recognizing the issues noted above regarding FOF14-15, Copper Ridge and Reflections would stipulate to a revised FOF17 (inserted text underlined):

Landy Leep, Vice President and Manager at CR/REF confirmed that the land ownership information provided by DEQ (listed above) for the first, second and third filings of Reflections and the second, third and fourth filings of Copper Ridge were accurate for September to December 2013.

FOF18

The Hearing Examiner accurately interpreted the regulations, statutes and Board Order, concluding that the elements to be proven on remand are: 1) owned, leased, operated, controlled, or supervised; 2) a point source of storm water discharges associated with construction activity; 3) at the time of the alleged violations. Proposed FOFCOL, p.8 (*citing* Scheduling Order, p.4); COL11. Both the regulatory definition of “construction activities” and the Board Order limit the

analysis to the time of the alleged violations. ARM17.30.1102(28); Feb. 2019 Board Trans. 113:14-17; 69:14-17; 97:13-18; 113:18-22.

Mr. Leep's testimony cited in FOF18 refers to "construction," "construction activity," and "construction work" between September and December 2013.

Nothing indicates that Mr. Leep understood his terminology, which is broad, to be inconsistent with the definition of "construction activities" found in ARM17.30.1102(28).

FOFs19-21

When considered in conjunction with Mr. Leep's testimony and the exhibits cited in FOF18, the permits make clear that Reflections' and Copper Ridge's construction in the subdivisions was permitted and when it was complete (prior to September 2013), they had no reason, nor any means to conduct additional construction in the subdivisions. FOFs19, 34, 35, 37, 40, 85, 86, 130. Therefore, the permits are relevant.

DEQ's argument is contrary to their own documents and testimony, which agreed that the boundaries and the BMPs extended to include the entirety of the individual lots. FOFs24, 25, 87. DEQ has not presented evidence that the 'disturbance area' does not extend to the individual lots. DEQ has not and cannot present legal authority establishing that the permits are confined to the 'disturbance

area.’ In fact, a permittee must provide the disturbance area and “the total area of the site.” ARM17.30.1115. The “site” is “the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.” Ex.1, p.36. The General Permit refers to “disturbance area” to determine permit applicability. *Id.*, p.6. In contrast, the General Permit refers to “site” to determine compliance. *Id.*, p.9 (requiring that a “site” must achieve final stabilization prior to permit termination); 14 (requiring inspections of “site conditions” and the “site perimeter”); 15 (requiring corrective actions if an unauthorized release or discharge “occurs at the site.”); 17-26 (the SWPPP applies to the “site” and must include a “site description,” “site map,” and description of “all structural BMPs implemented at the site.”). Additionally, “support activities,” which may be “on or off the conventional construction project site” may be covered by the General Permit. *Id.*, pp.6-7. Therefore, the permit is not restricted to the disturbance area as DEQ argues.

FOFs22, 24, 28

DEQ alleges some “construction activity later conducted by REF” without pointing to any evidence other than the homebuilding permits that were submitted under protest because DEQ required them as a corrective action, under threat of penalty. The findings do not incorrectly consolidate the road building and utility

installation with any other later construction because, as noted above regarding FOFs18-21, there was no later construction by Reflections or Copper Ridge and the previous permits covered the individual lots.

Just as it did in the now-overruled and remanded summary judgment action, DEQ is again relying upon permit documents filed under protest, *after the alleged violations*, and only because DEQ required the permits, under threat of penalty. Those permits cannot prove that either Copper Ridge or Reflections was the owner or operator of a point source of discharges *at the time of the alleged violations*.

FOF25

See FOFs 19-21 above.

FOF29

See FOFs22, 24, and 28 above.

FOF34, 35, 37, 38, and 39

See FOF18. DEQ's reliance on *Molokai* is wrong because here, permit coverage was obtained and later terminated by DEQ. Therefore, there is no continual violation at issue.

DEQ is wrong to assert that FOFs38 and 39, which prove that neither Reflections nor Copper Ridge built homes, rely on a definition of "construction

activity” inconsistent with the same rules cited in their enforcement action, which is based on homebuilding.

FOF40

DEQ fails to undermine FOF40 and only cites to evidence that may support different findings, which is not enough to modify or reject the finding. *Blaine Cty.*, ¶26.

Even so, several findings explain why Mr. Leep’s testimony is more credible than Mr. Freeland’s (FOFs44-47, 71-78, 81-83, 85-88), including the following, to which DEQ has not objected:

- “Mr. Freeland did not document (through photographs or notes) any specifics to support this general claim” that clearing, excavation, stockpiling, or grading was occurring throughout the site. FOF43.
- “Mr. Freeland was not able to ascribe a street address to the location of photograph 13.” FOF72.
- Mr. Freeland “did not know where the property lines were; they were not marked; and the photograph does not show the homes that were being built on either side of Lot 15.” FOF81.

- “Mr. Freeland did not see an excavator or a bulldozer or any heavy equipment in that area and there was no equipment operating there.”

FOF82.

DEQ presented no credible evidence contradicting Mr. Leep’s testimony.

Therefore, it is reasonable to rely on Mr. Leep’s testimony.

FOF44

DEQ seeks to have Mr. Freeland’s observations automatically imputed to land owned by Copper Ridge, but the evidence does not support that.

Mr. Freeland’s testimony never affirmatively connected any construction activity to any lot owned by Reflections or Copper Ridge. FOF46-47. Mr. Freeland previously testified that he “didn’t identify or write down specific lots” during his inspection. Feb. 2018 Trans. Vol. 1, 178:20 – 21; *see also* Feb. 2019 Board Trans.63:18-21 (confirming no effort to “pinpoint which lot was the source”).

None of Mr. Freeland’s testimony can be connected to a specific lot, let alone a specific lot owned by Reflections or Copper Ridge.

FOFs46 and 47

See FOF18. DEQ does not cite any evidence supporting the alleged “detailed descriptions of construction activity.” Mr. Freeland only testified that he observed bare ground, sediment in the streets, and a stockpile of material (gravel)

placed at some unknown time. FOF44, 80; Trans. 94:2-8. None of those observations are of present-tense construction activity as required by ARM17.30.1102(28).

The testimony cited in FOFs46 and 47 is clear, there is no evidence of active construction. In contrast, Reflections presented evidence and testimony, including testimony from the City of Billings and Mr. Leep, and documents from DEQ, the City of Billings, and independent contractors, that it was not conducting any construction during the Inspection or during the timeframe September through December 2013. FOFs18b, 40, 85-88.

FOF54

DEQ provided no evidence that Copper Ridge owned any of the lots depicted in Photograph 14, none of which are vacant lots. Assuming that the location of Photograph 14 is correct,¹ and noting that it was taken facing south, Photograph 14 could not possibly depict lots 8, 9, or 10, because those lots are north of the alleged photo location. Exs.16, 2, 47.

¹ The location of photo 14, as provided on Exhibit 16, was disputed by Mr. Leep. Trans.162:1-163:11

FOF56

The citations provided by DEQ are only to general observations of areas with no vegetation and to cleanup of the paved streets, not to any “specific evidence” that would contradict this finding.

FOF63-65

DEQ’s aerial photos were not produced until May 1, 2019 – nearly six years after this enforcement action was initiated. The photos were presented just to show ownership. *See* FOF17 above. “It is questionable whether these photographs should have been admitted at all.” Proposed FOFCOL, p.42, fn 5; Order on MIL.

Even so, the Hearing Examiner did consider the vegetation levels depicted in the aerial photos, comparing the subdivisions to the surrounding area and found that, “At most, both aerial photographs show, through some lighter coloring, that there was limited vegetative cover on some lots owned by CR/REF in June and October of 2013.” FOF63.

DEQ’s own admissions confirm Mr. Leep’s testimony that Exhibits 23, 33, and 34 do not accurately depict the status of the subdivisions in September – December 2013. Trans.152:2-15 (Ms. Bawden confirming that park areas in Exhibit 26, allegedly from October 2013, are not shown in Exhibit 23, from June 2013).

DEQ would have this Board rely on aerial photos taken by satellites hundreds of miles away to conclude that areas were “sodded” or “undisturbed” and that other areas were “disturbed” or “cleared and then let go so that weeds had infested the area.” DEQ’s Exceptions, pp.12, 13 (*citing* Ms. Bawden’s testimony at Trans.112: 10-15; 131-132). It is not reasonable to conclude, from an aerial photo, whether an area was been “sodded” or whether it simply has some vegetation growing on it. Nor is it reasonable to conclude, from an aerial photo, whether an area has been “cleared” and has weeds or whether it simply has less vegetation or dead vegetation.

Ms. Bawden’s interpretation of Exhibit 34, which was produced by magnifying Exhibit 23, was contrary to Mr. Freeland’s on-the-ground observations. *Compare* Trans.142:8-144:1 (Ms. Bawden testifying that based on the aerial photos, the pavement ends within the subdivision, between lots 12 and 33) *with* Trans.38:5-8 (Mr. Freeland testifying that all of the streets were paved during his September 9, 2013 Inspection). Further, Ms. Bawden agreed that she could not see the curb lines delineating black-top pavement from areas that are “white, which would be indicative of a disturbed area.” Trans.143:1-17. If the photo cannot be used reliably to differentiate paved from unpaved areas, it cannot

be used reliably to differentiate vegetated from non-vegetated areas on individual lots.

DEQ has not and cannot point to any testimony that the aerial photos show any active clearing, grading, excavating or stockpiling. The Hearing Examiner correctly found that the aerial photos do not show any construction activity on lots owned by Copper Ridge or Reflections.

FOF66

DEQ's implication that areas outside the permitted areas were disturbed is wrong. DEQ has not asserted a violation of the previous permits based on an unpermitted disturbance, Mr. Freeland testified that he "didn't see any issues with" the previously permitted work, and DEQ terminated the permits. Trans.54:14-18; *See also* FOF19-21.

FOF73

Mr. Freeland testified that Photo 13 and the photo produced by DEQ in 2015 depict the same pile of gravel and "were taken at different angles." Trans.56:8-19. Mr. Freeland confirms that the street addresses on the photo produced by DEQ in 2015 are "3028, 3030 and 3032 Western Bluffs." Trans.58:2-7. Mr. Freeland's use of GPS to locate where Photo 13 was taken is not contrary to this finding.

FOF83

DEQ has not objected to findings based on testimony that Mr. Freeland could not tell where the property lines were, and he agreed that property lines “weren’t marked in any way.” FOF81. DEQ has not objected to findings based on Mr. Freeland’s testimony that “I think I just saw the stockpiling and bare ground. I don’t think I saw equipment.” FOF82. Mr. Freeland’s testimony *is not clear*:

- “I’m assuming that that would be Lot 15. But again, with no markings, I don’t know if this part toward the southern – or this corner of the photo would also be Lot 15 – (indicating.) I don’t know that;”
- The location of lot 15 “would be my estimation.”

Trans.244:9-21. Mr. Freeland also testified that he “wouldn’t know” when the stockpile was placed. Trans.94:2-8.

DEQ cites no legal authority for its assertion that “it doesn’t matter when the waste was placed or by whom.” For liability and statute of limitation purposes, DEQ must determine when an alleged violation occurred and by whom. It is the placement of waste or the causing a waste to be placed that triggers a violation. §75-5-605(a), MCA. Therefore, the date of placement and the identity of the entity who placed the waste or caused the waste to be placed are necessary elements that must be proven.

FOF86-87

See FOFs19-21 above.

FOF115

Mr. Leep previously testified “We signed these basically under protest. There’s one signature line, its preprinted. We had the feeling it was not up for discussion.” Feb.2018 Trans., Vol. 2, 86:15-18. Indeed, submission of the permits was a corrective action required by DEQ, under threat of penalty. Ex.2, p.3. Mr. Leep confirmed that Copper Ridge and Reflections only obtained the permits because they “were told by Dan Freeland to do so” and that they did so “under protest.” Trans.205:4-9.

FOF128

See FOFs22, 24, 28 above.

FOF130

See FOF18 above.

III. Discussion

1. No error was made in excluding the photographs because their admission would violate the Order on the Motions in Limine (to which DEQ has

not objected).² DEQ confirmed that it did not rely on the photographs to support the alleged violations. Trans.90:25-91:13. DEQ is wrong to assert that the inadmissible photographs “depicted construction activity on lots owned by CR and REF at the time of the violations.” The photographs were not taken anywhere near the Copper Ridge subdivision. Trans.88:15-20 (Mr. Freeland testifying the location of the photos was near “Lots 11, 12, and 13 at Reflections.”). That is on the east end, in the Third Filing of Reflections, where Mr. Freeland noted, “there was a lot of activity to the east, which was a *different* subdivision.” Ex.47, Trans.39:5-9; *see also* Trans.112:13-14 (DEQ confirming “the Falcon Ridge Subdivision [is] to the east” of Reflections); Trans.131:5-6 (DEQ confirming active construction in Falcon Ridge).

The inadmissible photographs are of different alleged activity and are of different locations than the violations alleged in this action. The photographs did not serve as the basis for DEQ’s enforcement action and were not part of the required notice to Copper Ridge and Reflections. §75-5-611(1)(b), MCA. DEQ admits that they were not produced until after the Board’s remand. DEQ’s characterization of the inadmissible photographs is unsupported and unlikely.

FOF18c cites to multiple sources of evidence that Copper Ridge and Reflections

² DEQ wrongly asserts that Reflections and Copper Ridge “opened the door for introduction” of the photographs. Over Reflections and Copper Ridge’s objections, to the extent that that any door was opened, the Hearing Examiner did allow testimony on the photographs. Trans.86:1-88:7.

did no construction in the Third Filing of Reflections during the relevant timeframe. The evidence supporting FOF18c remains uncontroverted. The inadmissible photographs were rightfully denied admission and DEQ's assertions are wrong.

2. See FOF18 above.

3. See FOFs19-20 above.

4. The Hearing Examiner does not make a specific finding that the vegetative cover died or washed away, but only reasoned that even if it did, that still "would not constitute proof of any of the violations alleged in the AO ... because there is no construction activity *at the time of the discharge*" – a requirement of the governing statutes and regulations. Proposed FOFCOL, p.44 (emphasis added).

5. The Hearing Examiner's analogy is neither a finding nor a conclusion. It merely makes the point that, without more evidence, a stormwater discharge over bare land is not a violation of the Montana Water Quality Act. The additional evidence needed here was evidence of a construction activity at the time of the offending discharge. DEQ failed to present any evidence that Copper Ridge or Reflections engaged in any construction activity during the relevant timeframe.

CONCLUSION

The findings are supported by substantial evidence. The Board should approve the proposed findings and conclusions with no changes.

DATED this 2nd day of August, 2019.

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CERTIFICATE OF MAILING

This is to certify that the foregoing was served on the following persons as noted below on the date herein.

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DATED this 2nd day of August, 2019.

/s/ Victoria A. Marquis