

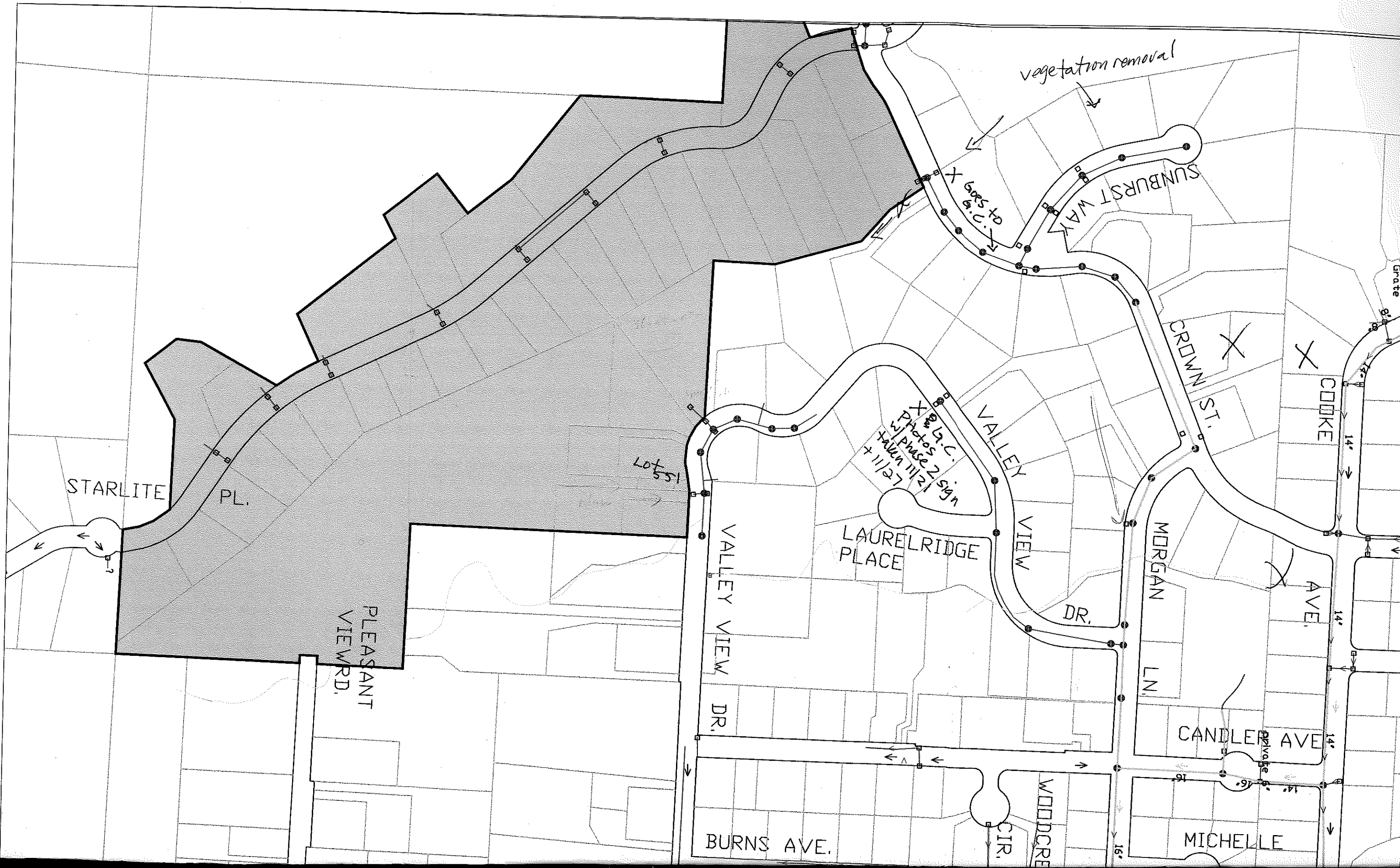
Part 1 of 2
OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 02/03/2005



State of Oregon
Department of
Environmental
Quality

This file is digitized in *color* using Optical Character Recognition (OCR) in a standard PDF format.

Standard PDF Creates PDF files to be printed to desktop printers or digital copiers, published on a CD, or sent to client as publishing proof. This set of options uses compression and downsampling to keep the file size down. However, it also embeds subsets of all (allowed) fonts used in the file, converts all colors to sRGB, and prints to a medium resolution. Window font subsets are not embedded by default. PDF files created with this settings file can be opened in Acrobat and Reader versions 6.0 and later.



vegetation removal

X goes to 4.7.5 sign

X Photos taken 11/17 12:11 p.m. L.C. Phase 2 sign

Lot 551

STARLITE PL.

PLEASANT VIEW RD.

VALLEY VIEW DR.

LAURELRIDGE PLACE

VALLEY VIEW

DR.

MORGAN LN.

CROWN ST.

COOKE

AVE.

CANDLER AVE.

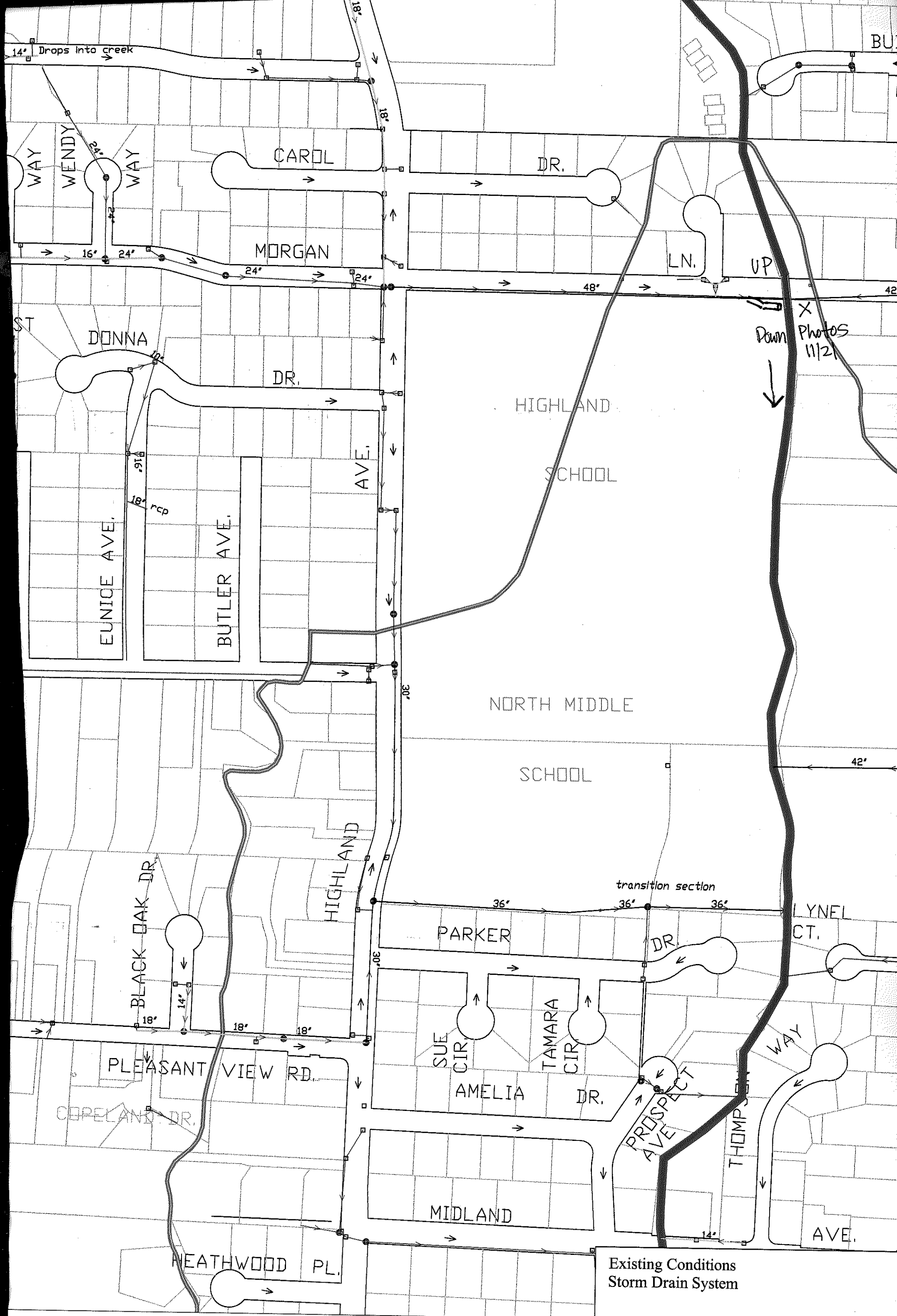
MICHELLE

BURNS AVE.

WOODCREE CIR.

Grate





14' Drops into creek

BUD

WAY
WENDY
WAY

CAROL

DR.

MORGAN

LN.

UP

X
Down
Photos
11/21

DONNA

DR.

HIGHLAND
SCHOOL

EUNICE AVE.

BUTLER AVE.

AVE.

NORTH MIDDLE

SCHOOL

BLACK OAK DR

HIGHLAND

transition section

PARKER

DR.

LYNEL
CT.

PLEASANT VIEW RD.

SUE
CIR.

TAMARA
CIR.

AMELIA

DR.

PROSPECT
AVE

THOMPSON
WAY

CEPELAND DR.

MIDLAND

HEATHWOOD PL.

AVE.

Existing Conditions
Storm Drain System

POWELL GULCH

Outfall

S

A

S

S

Cap

Cap

P1

P2

P3

SLAUR
SPLAS

VALLEY VIEW DR.

DR.

BURNS AVE.

148
MS

SLAUR
SPLAS

PLEASANT
VIEW RD.

1200

1201

1301

1302

1300

1400

1401

1402

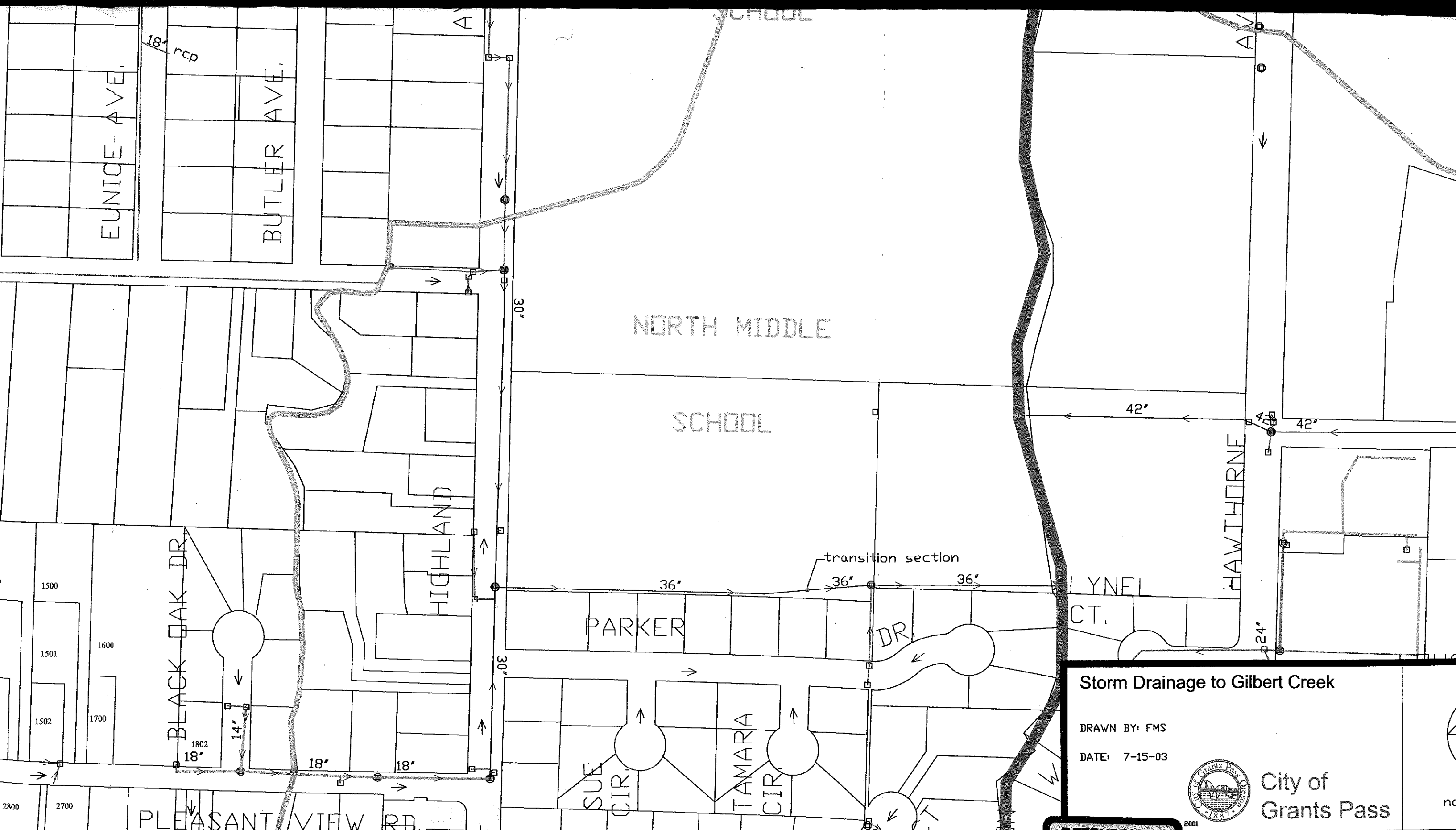
3000

3001

2900

2800






Storm Drainage to Gilbert Creek

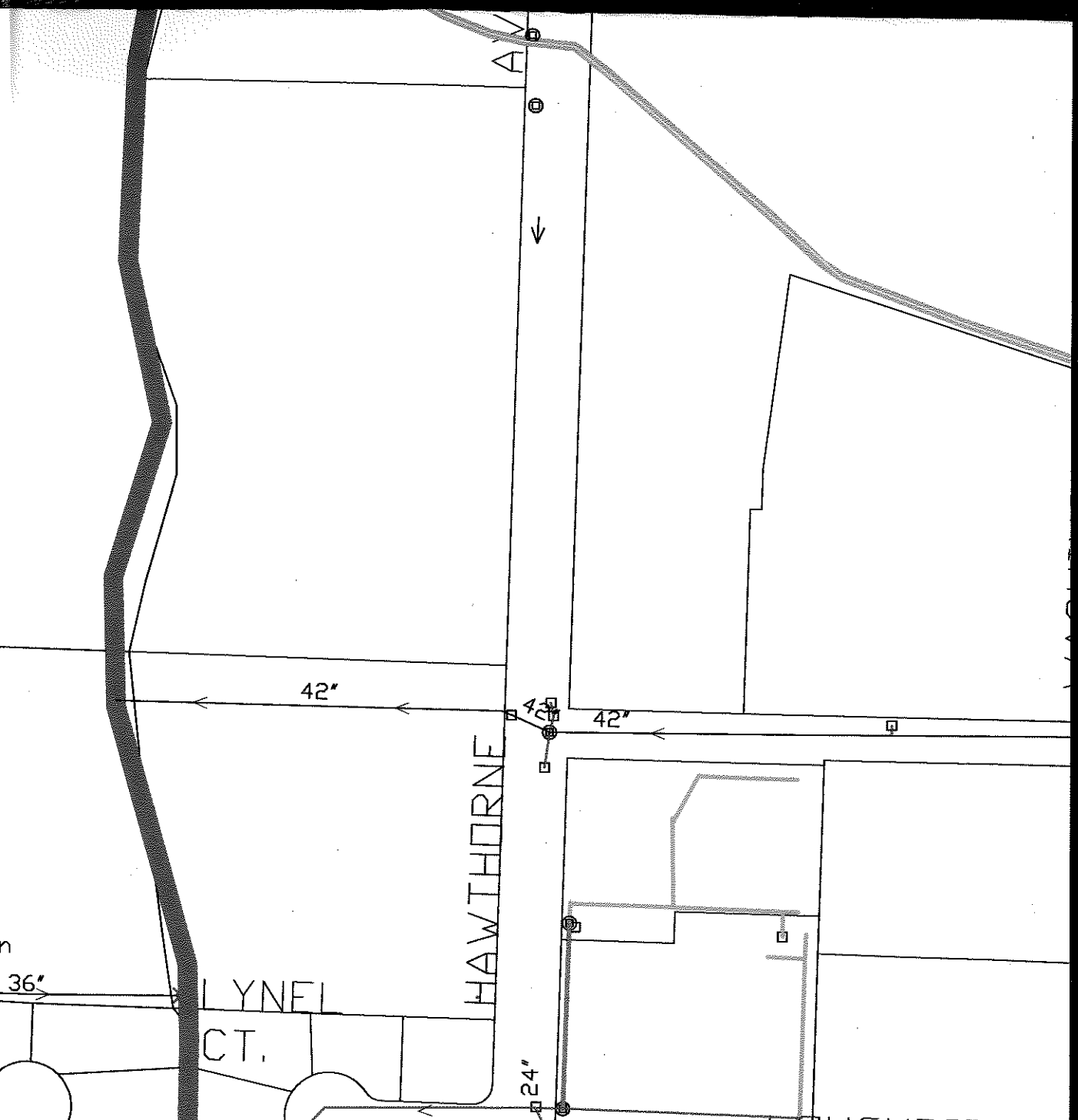
DRAWN BY: FMS

DATE: 7-15-03



City of Grants Pass

DEFENDANT'S
EXHIBIT
105
A



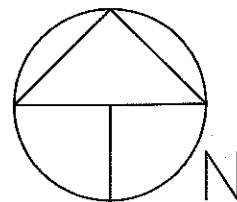
Storm Drainage to Gilbert Creek

DRAWN BY: FMS

DATE: 7-15-03

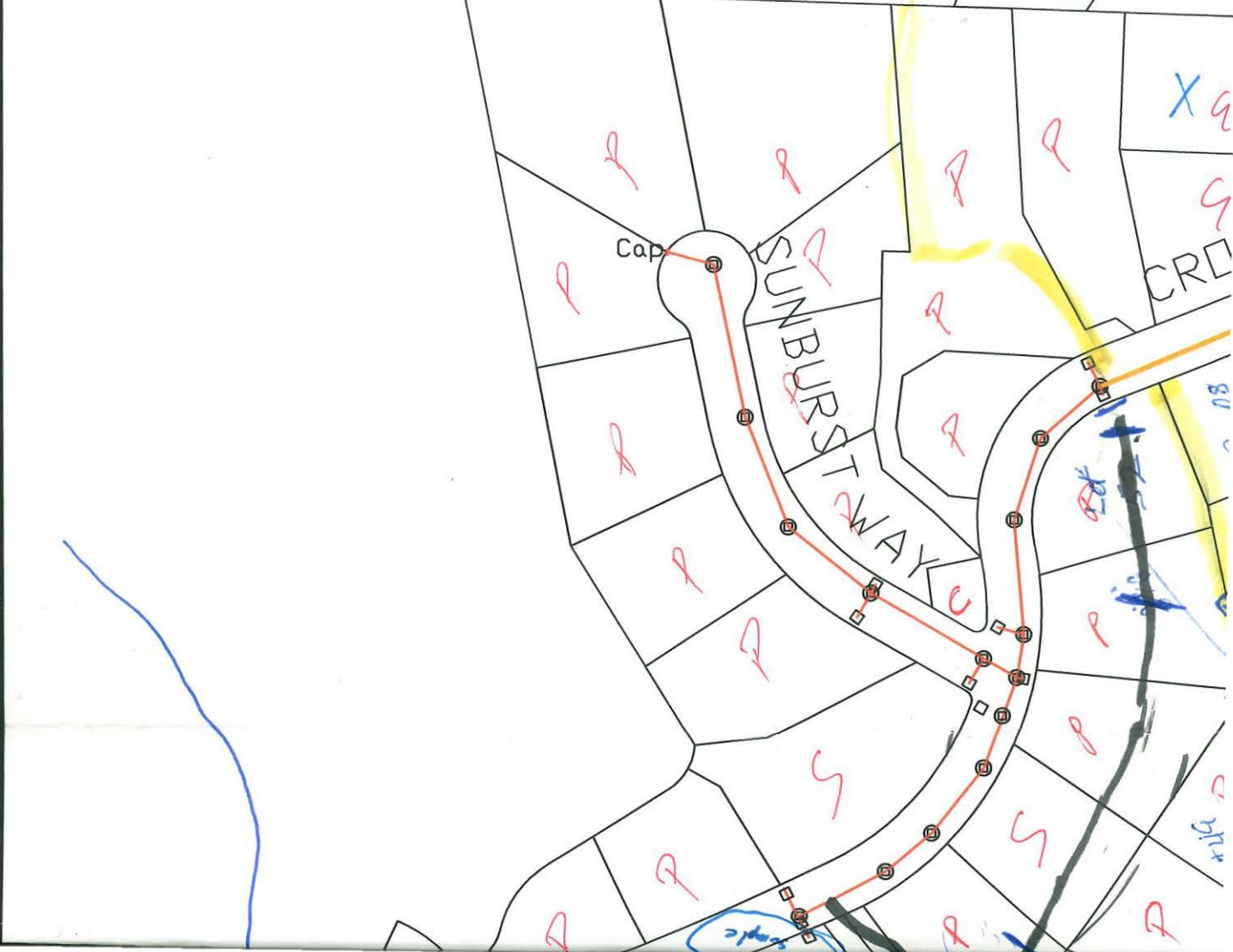


**City of
Grants Pass**

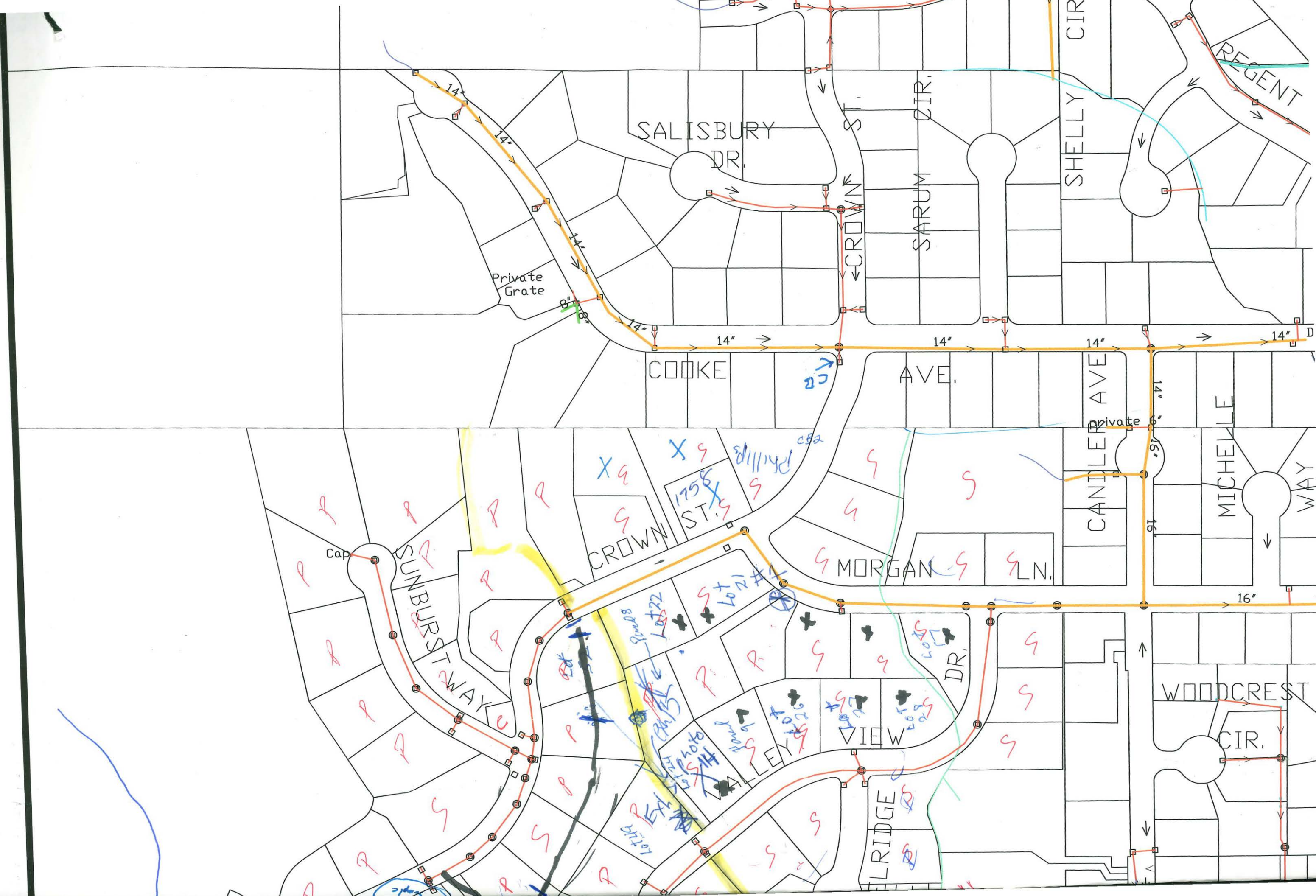


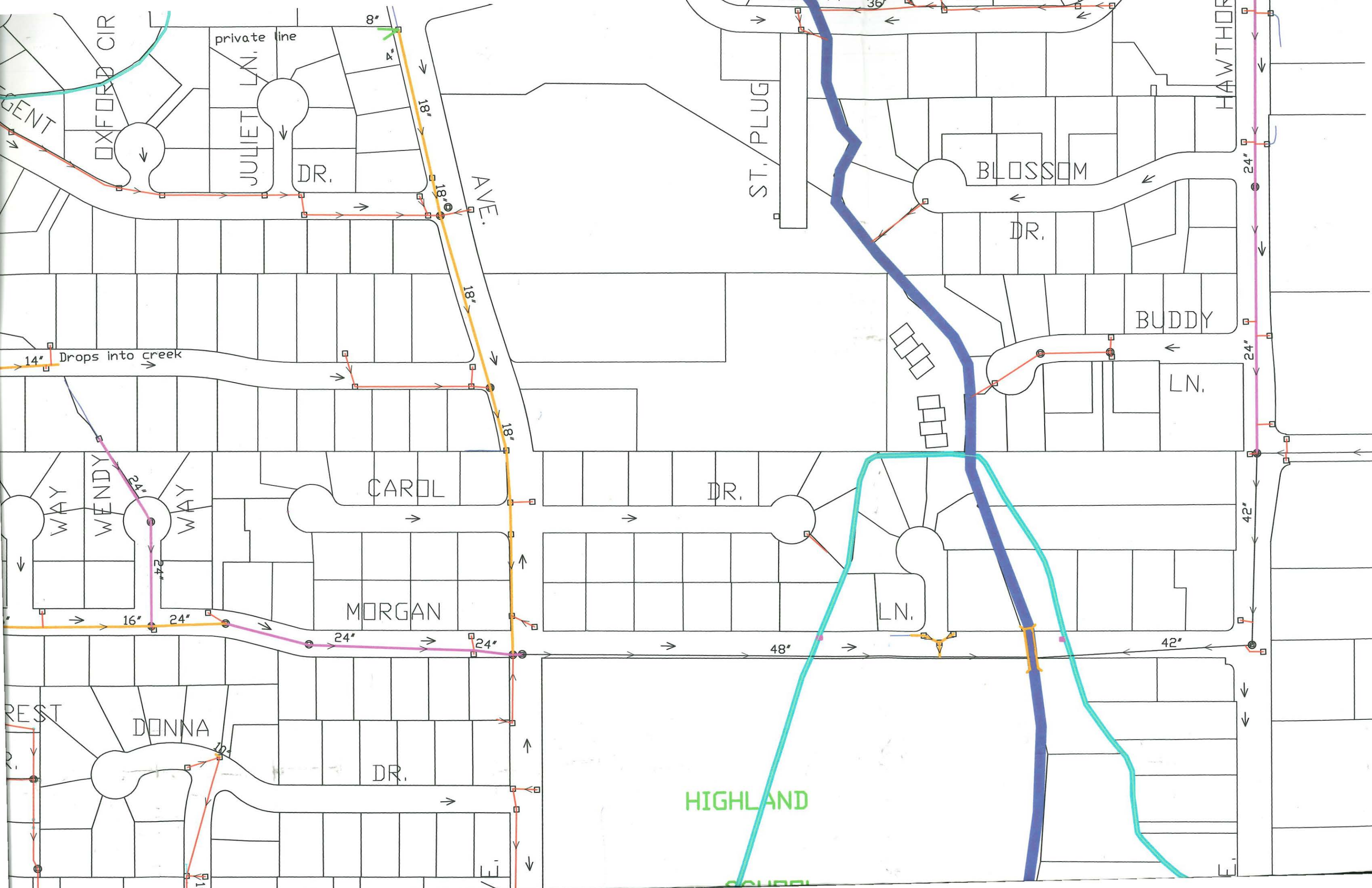
not to scale

**DEFENDANT'S
EXHIBIT**
105
A









private line

OXFORD CIR

JULIET LN.

DR.

AVE.

ST. PLUG

BLOSSOM

DR.

BUDDY

LN.

CAROL

DR.

MORGAN

LN.

WENDY WAY

WAY

DONNA

DR.

HIGHLAND

HAWTHOR

GENT

REST

R.

1

14" Drops into creek

24"

48"

42"

42"

24"

24"

18"

18"

18"

18"

8"

36"

16"

24"

24"

24"

24"

24"

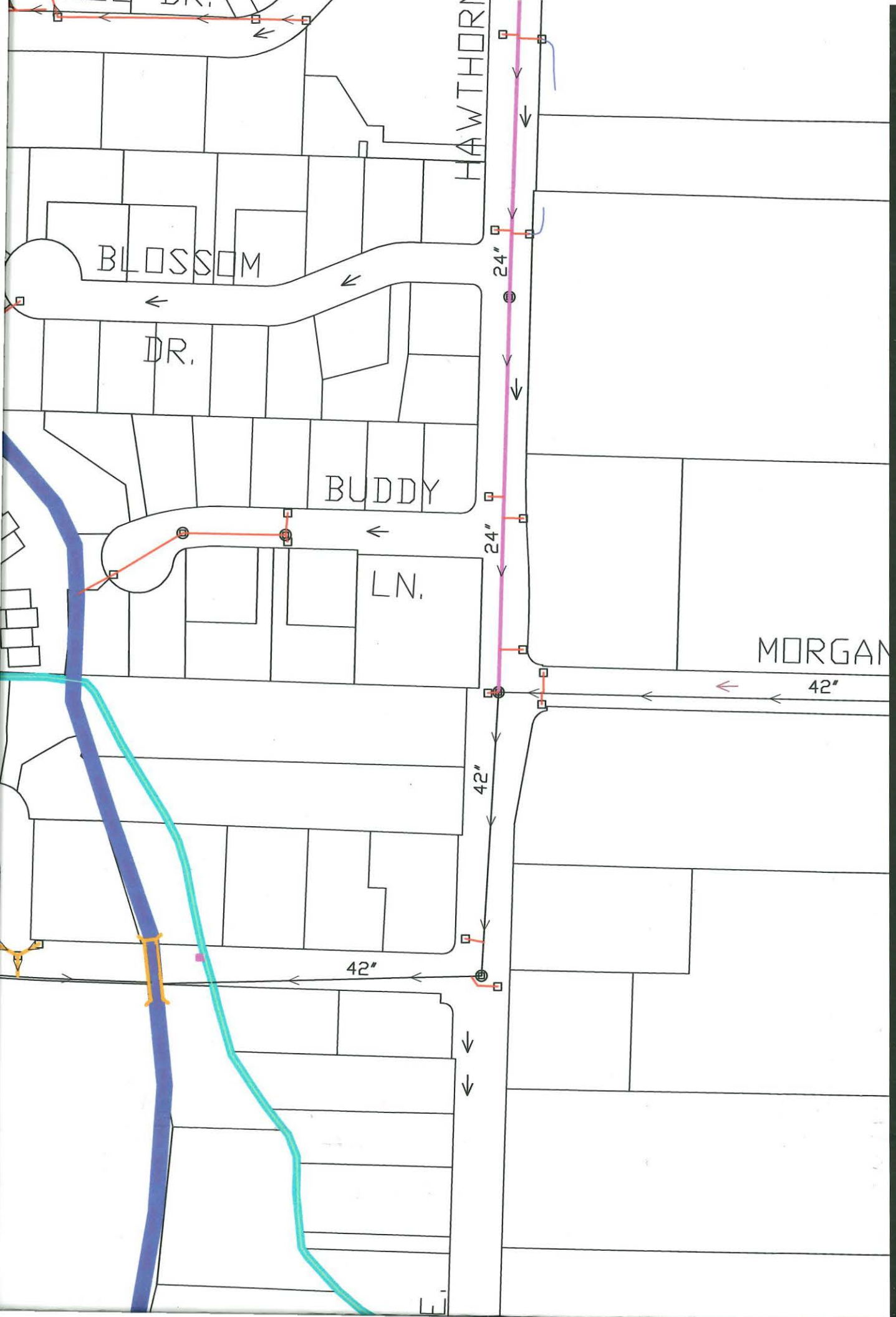
42"

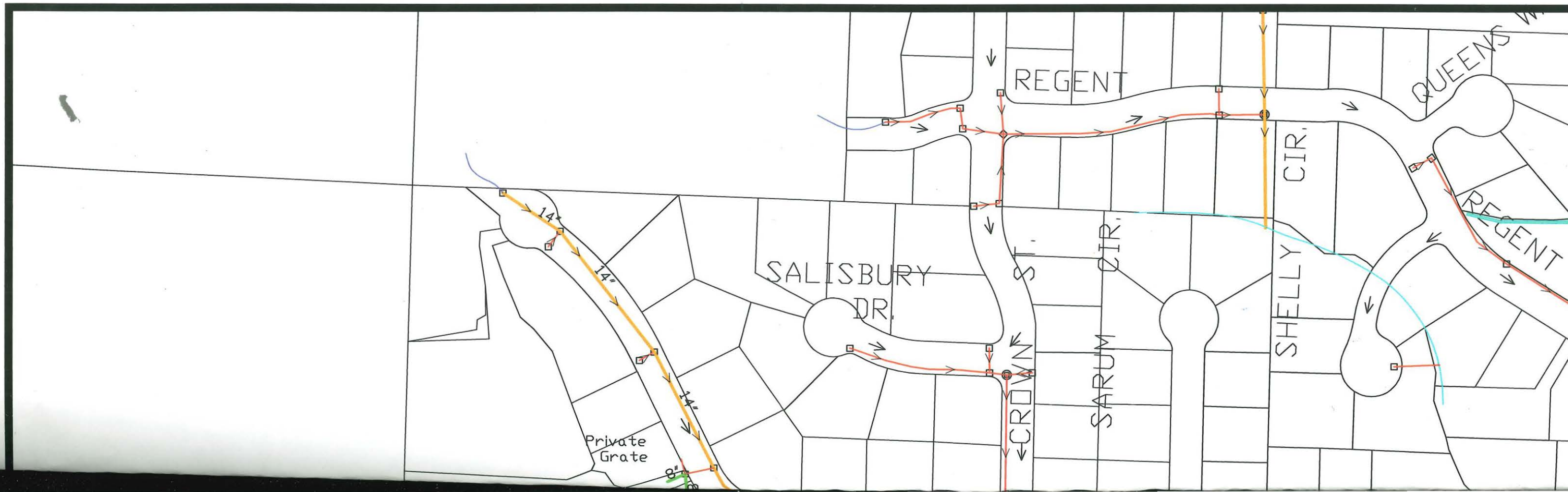
10"

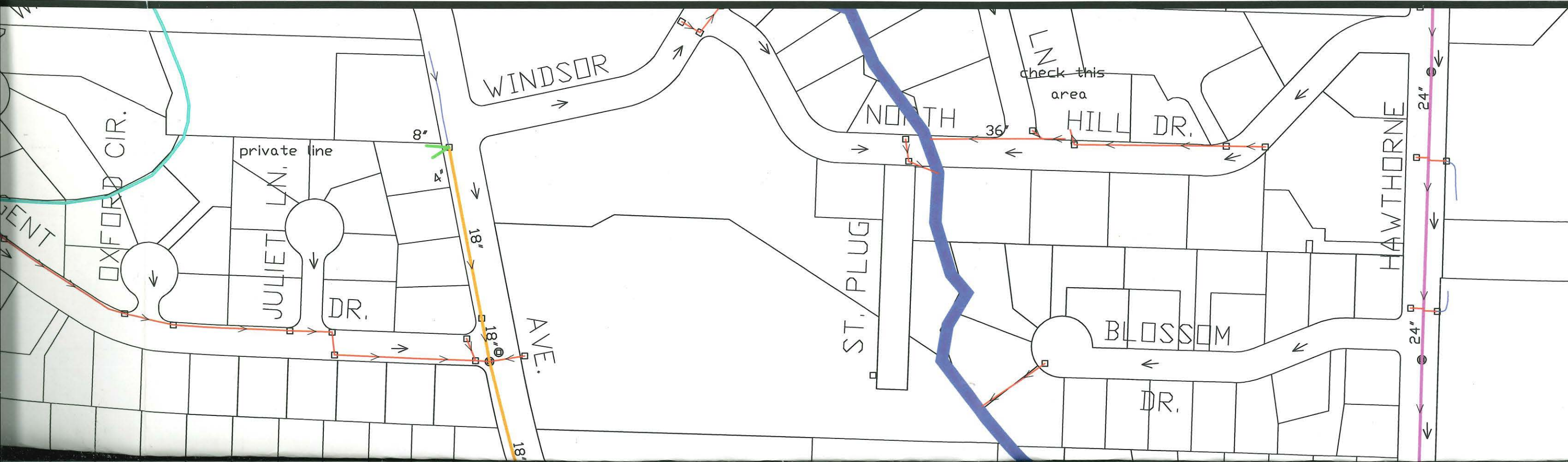
10"

18"

18"

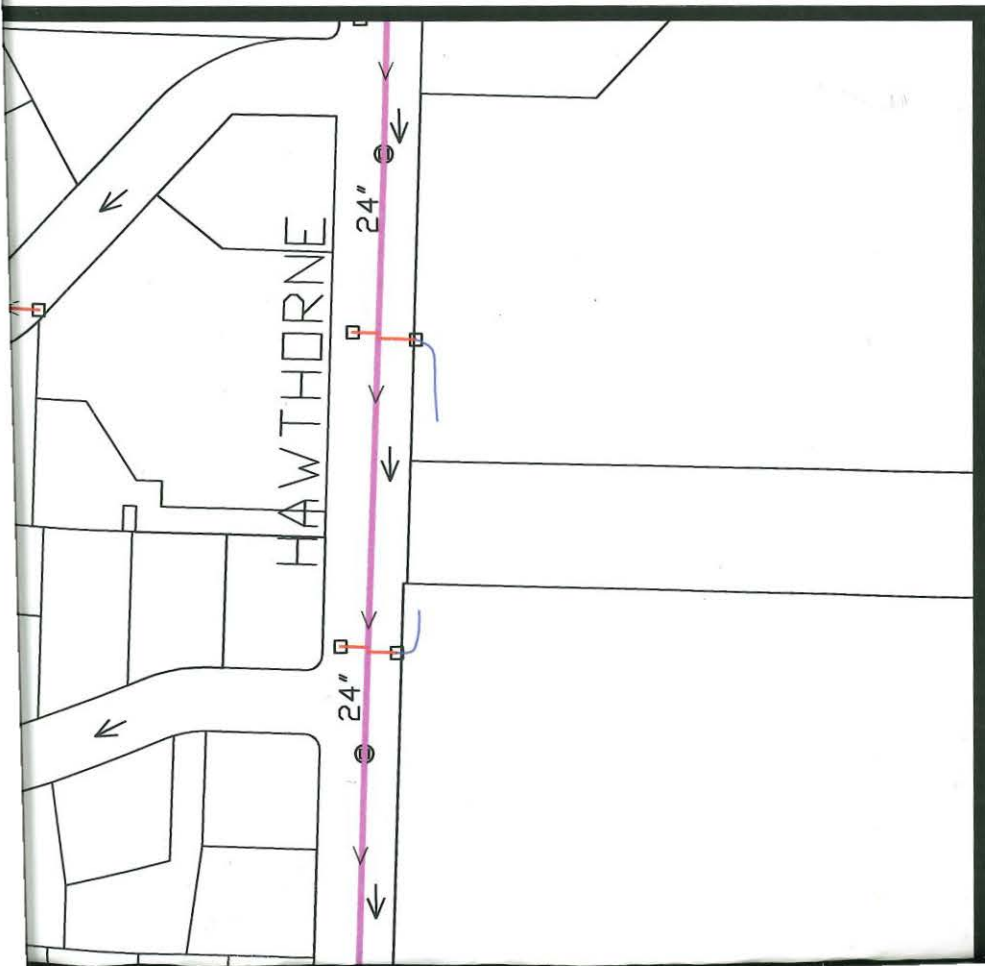






Att

Attachment EE A105



**Environmental Quality Commission Meeting
February 3-4, 2005
DEQ Headquarters, Room 3A**

Thursday, February 3, regular meeting begins at 1:00 p.m.

- 1:00 – 2:45 A. Contested Case No. WQ/SW-WR-02-015 regarding William H. Ferguson, Anne Price and Jenine Camilleri, and a representative of William Ferguson
Note: this item was set over from the December 9-10, 2004 meeting
- 2:45 – 3:00 Break
- 3:00 – 3:45 B. Informational Item: Update on the Status of the Umatilla Chemical Agent Disposal Facility, Dennis Murphey
- 3:45 – 4:15 C. Director's Dialogue, Stephanie Hallock

Friday, February 4, regular meeting begins at 9:30 a.m.

- 8:30 – 9:30 Executive Session in Room 3B to discuss litigation involving the DEQ and EQC
- 9:30 – 9:35 D. Adoption of Minutes
- 9:35 – 11:35 E. Informational Item: Oregon's Greenhouse Gas Reduction Strategy, Andy Ginsburg, and representatives of the Governor's Global Warming Advisory Group, the Oregon Department of Energy, and others
- 11:35 – noon Public Forum
- Noon – 1:00 Working lunch
- 1:00 – 1:30 F. Incorporation of National Emission Standards for Hazardous Air Pollutants, revisions of New Source Performance Standards, and adoption of Title V Permitting Regulation Amendments, Andy Ginsburg and Jerry Ebersole
Note: The Chair will have the option to move this item to Thursday afternoon if desired; Andy and Jerry will be prepared for either day, and we don't know of any stakeholders planning to attend to witness this item.
- 1:30 – 1:35 G. Commissioners' Reports

**Environmental Quality Commission Meeting
February 3-4, 2005¹**

Department of Environmental Quality (DEQ) Headquarters
811 SW Sixth Ave., Room 3A, Portland, Oregon

Thursday, February 3 – regular meeting begins at 1:00 p.m.

- A. Contested Case No. WQ/SW-WR-02-015 regarding William H. Ferguson**
The Commission will consider a contested case in which William H. Ferguson appealed a proposed order and \$5,400 civil penalty for causing pollution to waters of the state. The Commission will hear statements on behalf of Mr. Ferguson and the DEQ at this meeting.
- B. Informational Item: Update on the Status of the Umatilla Chemical Agent Disposal Facility**
Dennis Murphey, DEQ Chemical Demilitarization Program Administrator, will give an update on the status of recent activities at the Umatilla Chemical Agent Disposal Facility (UMCDF). In August 2004, the Commission gave approval to start chemical weapon destruction at the facility, and DEQ's Chemical Demilitarization Program continues close oversight of work at the facility.
- C. Director's Dialogue**
Stephanie Hallock, DEQ Director, will discuss current events and issues involving the Department and the state with Commissioners.

Friday, February 4 – regular meeting begins at 9:30 a.m.

At 8:30 a.m., prior to the regular meeting, the Commission will hold an executive session to consult with counsel concerning legal rights and duties regarding current and potential litigation against the DEQ². Only representatives of the media may attend, and media representatives may not report on any deliberations during the session.

- D. Adoption of Minutes**
The Commission will review, amend if necessary, and approve draft minutes of the December 9-10, 2004, Environmental Quality Commission meeting.
- E. Informational Item: Oregon's Greenhouse Gas Reduction Strategy**
Members of Governor Kulongoski's Advisory Group on Global Warming, with representatives of the Oregon Department of Energy and DEQ, will brief the Commission on the *Oregon Strategy for Greenhouse Gas Reductions*. The advisory group adopted the strategy in December 2004, and the recommendations will soon be presented to the Governor for his consideration. Several recommended strategies could affect DEQ if the

¹ This agenda and the staff reports for this meeting can be viewed and printed from DEQ's web site at <http://www.deq.state.or.us/about/eqc/eqc.htm>.

² This executive session will be held pursuant to ORS 192.660(1)(h).

Governor chooses to move forward with implementation. Commission discussion will focus on potential roles for DEQ in implementing actions related to motor vehicles, waste reduction and landfills.

F. *Rule Adoption: Incorporation of National Emission Standards for Hazardous Air Pollutants, revisions of New Source Performance Standards, and adoption of Title V Permitting Regulation Amendments

Andy Ginsburg, DEQ Air Quality Division Administrator, will propose changes to the National Emission Standards for Hazardous Air Pollutants (NESHAPs), New Source Performance Standards (NSPSs), and Air Quality Title V program that DEQ implements. NESHAPs control emissions of hazardous air pollutants from specific types of emission sources (i.e. pulp and paper mills and chromium electroplaters) and implement the requirements of Section 112 of the Clean Air Act. NSPSs control emissions from types of emission sources (i.e. bulk gasoline terminals and landfills) that EPA determines "cause, or contribute significantly to, air pollution" as directed by section 111 of the Clean Air Act. Title V of the Clean Air Act requires each state to develop a comprehensive operating permit program for major industrial sources of air pollution. The proposed changes would update state rules to reflect recent changes in the federal programs and ensure consistency between state and federal standards.

G. Commissioners' Reports

Adjourn

Future Environmental Quality Commission meeting dates for 2005 include:
April 21-22 June 23-24 August 18-19 October 20-21 December 8-9

Agenda Notes

***Rule Adoptions:** Hearings have been held on Rule Adoption items and public comment periods have closed. In accordance with ORS 183.335(14), no comments may be presented by any party to either the Commission or Department on these items at any time during this meeting.

Staff Reports: Staff reports for each item on this agenda can be viewed and printed from DEQ's web site at <http://www.deq.state.or.us/about/eqc/eqc.htm>. To request a particular staff report be sent to you in the mail, contact Day Marshall in the Director's Office of the Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon 97204; telephone 503-229-5990, toll-free 1-800-452-4011 extension 5990, or 503-229-6993 (TTY). Please specify the agenda item letter when requesting reports. If special physical, language or other accommodations are needed for this meeting, please advise Ms. Marshall as soon as possible, but at least 48 hours in advance of the meeting.

Public Forum: The Commission will break the meeting at approximately 11:30 a.m. on Friday, February 4 to provide members of the public an opportunity to speak to the Commission on environmental issues not part of the agenda for this meeting. Individuals wishing to speak to the Commission must sign a request form at the meeting and limit presentations to five minutes. The Commission may discontinue public forum after a reasonable time if a large number of speakers wish to appear. In accordance with ORS 183.335(13), no comments may be presented on Rule Adoption items for which public comment periods have closed.

Note: Because of the uncertain length of time needed for each agenda item, the Commission may hear any item at any time during the meeting. If a specific time is indicated for an agenda item, an effort will be made to consider that item as close to that time as possible. However, scheduled times may be modified if participants agree. Those wishing to hear discussion of an item should arrive at the beginning of the meeting to avoid missing the item.

Environmental Quality Commission Members

The Environmental Quality Commission is a five-member, all volunteer, citizen panel appointed by the governor for four-year terms to serve as DEQ's policy and rule-making board. Members are eligible for reappointment but may not serve more than two consecutive terms.

Mark Reeve, Chair

Mark Reeve is an attorney with Reeve Kearns in Portland. He received his A.B. at Harvard University and his J.D. at the University of Washington. Commissioner Reeve was appointed to the EQC in 1997 and reappointed for a second term in 2001. He became Chair of the EQC in 2003. Commissioner Reeve also serves as a member of the Oregon Watershed Enhancement Board.

Lynn Hampton, Vice Chair

Lynn Hampton serves as Tribal Prosecutor for the Confederated Tribes of the Umatilla Indian Reservation and previously was Deputy District Attorney for Umatilla County. She received her B.A. at University of Oregon and her J.D. at University of Oregon School of Law. Commissioner Hampton was appointed to the EQC in July 2003 and lives in Pendleton.

Deirdre Malarkey, Commissioner

Deirdre Malarkey graduated from Reed College and received her M.A. and Ph.D. from the University of Oregon. She has served previously on two state natural resource boards and on the Water Resources Commission and retired as a land use planner. Commissioner Malarkey was appointed to the EQC in 1999 and reappointed in 2003. Commissioner Malarkey lives in Eugene.

Ken Williamson, Commissioner

Ken Williamson is head of the Department of Civil, Construction and Environmental Engineering at Oregon State University and serves as Co-Director of the Center for Water and Environmental Sustainability. He received his B.S. and M.S. at Oregon State University and his Ph.D. at Stanford University. Commissioner Williamson was appointed to the EQC in February 2004 and he lives in Corvallis.

The fifth Commission seat is currently vacant.

Stephanie Hallock, Director

Department of Environmental Quality

811 SW Sixth Avenue, Portland, OR 97204-1390

Telephone: (503) 229-5696 Toll Free in Oregon: (800) 452-4011

TTY: (503) 229-6993 Fax: (503) 229-6124

E-mail: deq.info@deq.state.or.us

Mikell O'Mealy, Assistant to the Commission

Telephone: (503) 229-5301

Summary Report
Performance Evaluation of the Director
Department of Environmental Quality
January 2005

Background

During the fall 2004, the Environmental Quality Commission conducted a review of Stephanie Hallock, Director of the Oregon Department of Environmental Quality, using the guidelines developed for the review conducted in 2002. In October, the Commission solicited input and sent surveys to government officials, stakeholders, DEQ managers and the DEQ Executive Management Team. All surveys allowed the response to be confidential.

The Process

The actual process used by the Commission is shown in Appendix A. Examples of the forms used in measuring and evaluating performance are attached in Appendix B. There were some slight changes in the forms for the various groups sampled. Each performance measure could be ranked on a Likert scale from 1 (unsatisfactory) to 5 (outstanding).

The overall response of the survey was 30% (35/115). The response from governmental officials was 53% (23/43); from the DEQ Executive Management Team, 12% (7/60).

The Evaluation

The commission found the responses in performance for 2003-2004. The average from stakeholders was 4.40; from the DEQ Executive Management Team, 4.14. All three groups met or exceeded "expectations" to "outstanding".

The written comments are summarized below.

Governmental officials and stakeholders praised Hallock for her outstanding job steering an agency that is making difficult decisions, and tends to generate controversy. They commended her for attempting to prioritize the agency's work, responding to all points of view, and maintaining a transparency of operations. They empathized with her efforts to re-organize her management team and live with the tension of allowing staff freedom, yet

Day - Please give copies of this to Stephanie, Paul, Gale Miller, and send one to each EOC member.

Also, please send a copy to Mike Cameron with the attached memo.

Please put the original in the EOC's 2/3-4/05 binder & give me a copy also. Thanks! Mikell

She does an especially good job at attempting to prioritize the agency's work, responding to all points of view, and maintaining a transparency of operations. They empathized with her efforts to re-organize her management team and live with the tension of allowing staff freedom, yet

Summary Report
Performance Evaluation of the Director
Department of Environmental Quality
January 2005

Background

During the fall 2004, the Environmental Quality Commission conducted a review of Stephanie Hallock, Director of the Oregon Department of Environmental Quality, using the guidelines developed for the review conducted in 2002. In October, the Commission solicited input and sent surveys to government officials, stakeholders, DEQ managers and the DEQ Executive Management Team. All surveys allowed the response to be confidential.

The Process

The actual process used by the Commission is shown in Appendix A. Examples of the forms used in measuring and evaluating performance are attached in Appendix B. There were some slight changes in the forms for the various groups sampled. Each performance measure could be ranked on a Likert scale from 1 (unsatisfactory) to 5 (outstanding).

The overall response of the survey was 30% (35/115). The response from governmental officials was 53% (23/43); from the DEQ Executive Management Team, 42% (5/12); and from the DEQ management, 12% (7/60).

The Evaluation

The commission found the responses in general to be highly positive of the Director's performance for 2003-2004. The average response from the government officials and stakeholders was 4.40; from the DEQ Executive Management Team, 4.72; and from the DEQ managers, 4.14. All three groups rated her performance between "exceeds expectations" to "outstanding".

The written comments are summarized for each group as:

Governmental officials and stakeholders. This group found the Director doing an outstanding job steering an agency that is underfunded, that makes highly political decisions, and tends to generate controversy. She does an especially good job at attempting to prioritize the agency's work, responding to all points of view, and maintaining a transparency of operations. They empathized with her efforts to re-organize her management team and live with the tension of allowing staff freedom, yet

dealing with the inevitable mistakes. There was some sense that she needed to provide a clearer vision for the agency and to help the agency be more proactive.

DEQ Executive Management Team: This group uniformly found the Director to be a great leader for the agency who can communicate the DEQ's work and effort in the political arena. They see the Director doing a good job in looking out for the agency's best interests in the political fray.

DEQ Managers: This group found the Director to be an effective manager who has improved standards of performance and the direction of the agency. In general, they are glad that Stephanie is their boss and see her as a significant improvement over past directors. The most identifiable criticism is that they feel that the Director reacts too much to political constraints in setting the directions of the agency, not focusing more on promoting what they see as more active environmental protection and values.

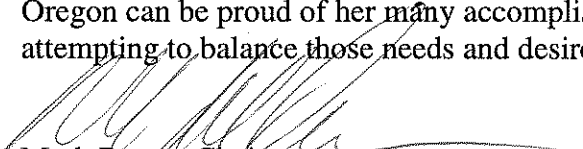
The Commission met in executive session on December 10, 2004 to discuss the responses and the Commissioner's personal observations. The Commission found consensus on the following points:

- The Director tends to promote good relationships between the DEQ and outside groups including the public, industry, other state agencies, the EPA, legislators, and the Governor's staff. She consistently solves relationship problems, does not create them.
- The Director's effort to restructure DEQ and to reassign and replace management personnel appears to be positive. She has an ability to identify personnel that are blocking the effectiveness of the organization and the courage to replace such persons. She has high expectations of performance and ensures that they are met.
- The Director is highly committed to making the DEQ an effective agency through moving forward on a variety of issues. She has successfully led the effort to reduce the water quality permit backlog, change the enforcement protocol, develop a new Strategic Plan, involve DEQ in the state's climate change plan, align the agency with the Governor's Willamette Initiative, and begin the incineration process of chemical agents at the Umatilla Chemical Weapons Depot.
- The Director maintains a clear, honest, and open communication with all parties. Her communication style is obviously a positive asset for the agency.

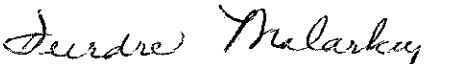
The Commission was disappointed in the number of responses from DEQ managers. The reason for the poor response is unknown. We are considering the introduction of an alternative approach in 2006 that will get feedback from focus groups in hopes of expanding the participation rate.

Conclusions

The Commission gives Director Hallock high evaluations for her work in 2003-2004. We find her to be especially effective in her position given the difficult task of the DEQ for fulfilling its mission to protect Oregon's environment, while maintaining working relationships with regulated parties. The DEQ stands squarely in the middle of diverse needs and desires of environmental activists, Oregon's many businesses and industries, the Oregon Legislature, and the federal environmental laws. We believe that the State of Oregon can be proud of her many accomplishments and excellent leadership in attempting to balance those needs and desires.




Mark Reeve, Chair



Deirdre Malarkey, Commissioner



Lynn Hampton, Commissioner



Kenneth Williamson, Commissioner

Appendix A. The Purpose and Process Statement

I. Purpose

The Environmental Quality Commission (Commission) is responsible under ORS 468.045 for directing the performance of the Director of the Department of Environmental Quality (DEQ). The Commission exercises part of its responsibility by performing a performance evaluation of the Director. Such evaluation is intended to increase and improve communications both within the Department and the broad spectrum of outside agencies, governments, and private parties with whom the Director interacts. The evaluation further allows the Commission to review goals, establish criteria, provide commendations, and broadly recognize the work of the Director.

II. Process

1. The Commission shall evaluate the performance of the DEQ Director on at least a biennial basis. Normally, the process will require an eight-week period.
2. The Commission may solicit and review information concerning the performance of the Director from any source.
3. Immediately before an evaluation, the Commission shall:
 - a. Appoint a subcommittee of the Commission to prepare for and schedule the evaluation.
 - b. Review and adopt criteria for the evaluation.
4. In keeping with the Commission-adopted criteria, the Director shall provide the Commission with a written self-evaluation.
5. The Commission shall review the Director's self-evaluation in Executive Session, absent the Director.
6. The Commission shall follow the review of the Director's self-evaluation with an Executive Session with the Director.
7. The Commission shall accept and compile all input from appropriate sources and provide due consideration within the overall performance review process.
8. The Commissioners shall then complete their own individual evaluations of the Director using adopted criteria.
9. The Commissioners' evaluations shall be submitted to the Commission Chair for compilation. Evaluations and compilations shall be kept confidential to the extent allowed under Oregon law.
10. Based upon all input and the individual evaluations and their compilations, an executive session will be held with the Director to review results.
11. The evaluation will become a basis for all aspects of employment.
12. The Commission will prepare a public release of the performance evaluation in summary form. Before such release, the Commission Chair will review such document with the Director.

Appendix B. Performance Measures and Evaluation Form

III. Performance Measures and Evaluation Form

Commissioner Name _____

Performance Period: _____

Mid-Rating Period: _____

Performance Measures

Performance Ratings

(Circle one number)

<p>1. POLICY AND DIRECTIVES Director will give clear direction to staff to ensure implementation of Commission policy in a timely manner. Include evidence from DEQ activities, processes and actions underway or completed during the past review period. Director ensures, through subordinates, that staff field decisions are based on existing statutes, goals, executive orders, Commission rules and Department policies.</p> <p>COMMENTS</p>	<table> <tr> <td>Outstanding</td> <td>5</td> </tr> <tr> <td>Exceeds expectations</td> <td>4</td> </tr> <tr> <td>Fully meets expectations</td> <td>3</td> </tr> <tr> <td>Needs improvement</td> <td>2</td> </tr> <tr> <td>Unsatisfactory</td> <td>1</td> </tr> <tr> <td>Not Rated</td> <td>N</td> </tr> </table> <hr/> <p>Weight¹ _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												
<p>2. SERVICES AND RELATIONS Director ensures effective services to and relations with the Commission. Upon confirmation, all new Commissioners receive up-to-date Department goals and applicable enabling, operational and regulatory statutes and rules; a handbook including Commission and staff names, mailing, fax and email addresses, telephone numbers; and business cards. Per diem/mileage forms will be provided at each meeting to be submitted together for payment. Any required tax information will be provided on a timely basis. Commission/staff disagreements will be openly discussed with resolution/outcome reflected in meeting minutes. Meeting materials will be provided to all Commission members for review in a timely manner. Any written communication to the Commission from work groups and/or advisory committees will be included in agenda packets. Clerical and other necessary support services will be available.</p> <p>COMMENTS</p>	<table> <tr> <td>Outstanding</td> <td>5</td> </tr> <tr> <td>Exceeds expectations</td> <td>4</td> </tr> <tr> <td>Fully meets expectations</td> <td>3</td> </tr> <tr> <td>Needs improvement</td> <td>2</td> </tr> <tr> <td>Unsatisfactory</td> <td>1</td> </tr> <tr> <td>Not Rated</td> <td>N</td> </tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												

¹ Assign a weight between 0 and 100 percent to each of the ten Performance Measures so that the combined total of all ten weights is 100 percent.

<p>3. COMMUNICATION Clearly and effectively communicates issues, ideas, resources and/or information in a timely manner. Emphasis will be placed on collaborative processes and high-quality, informative materials including applicable analyses, documents, surveys and reports to facilitate a range of policy implications for discussion. The Commission will be kept informed so as not to be surprised by significant issues.</p> <p>COMMENTS</p>	<table border="0"> <tr><td>Outstanding</td><td>5</td></tr> <tr><td>Exceeds expectations</td><td>4</td></tr> <tr><td>Fully meets expectations</td><td>3</td></tr> <tr><td>Needs improvement</td><td>2</td></tr> <tr><td>Unsatisfactory</td><td>1</td></tr> <tr><td>Not Rated</td><td>N</td></tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												
<p>4. INTER/INTRA GOVERNMENTAL RELATIONSHIPS Effectively represents the agency and the State within the state, federal and local government organizational structures.</p> <p>COMMENTS</p>	<table border="0"> <tr><td>Outstanding</td><td>5</td></tr> <tr><td>Exceeds expectations</td><td>4</td></tr> <tr><td>Fully meets expectations</td><td>3</td></tr> <tr><td>Needs improvement</td><td>2</td></tr> <tr><td>Unsatisfactory</td><td>1</td></tr> <tr><td>Not Rated</td><td>N</td></tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												
<p>5. IMPLEMENTATION OF STRATEGIC PLAN Progress toward accomplishing priorities, objectives and strategies as approved by Commission.</p> <p>COMMENTS</p>	<table border="0"> <tr><td>Outstanding</td><td>5</td></tr> <tr><td>Exceeds expectations</td><td>4</td></tr> <tr><td>Fully meets expectations</td><td>3</td></tr> <tr><td>Needs improvement</td><td>2</td></tr> <tr><td>Unsatisfactory</td><td>1</td></tr> <tr><td>Not Rated</td><td>N</td></tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												
<p>6. PROBLEM SOLVING Identifies challenges, opportunities and problems clearly and aids DEQ in the analysis of possible actions or responses as necessary.</p> <p>COMMENTS</p>	<table border="0"> <tr><td>Outstanding</td><td>5</td></tr> <tr><td>Exceeds expectations</td><td>4</td></tr> <tr><td>Fully meets expectations</td><td>3</td></tr> <tr><td>Needs improvement</td><td>2</td></tr> <tr><td>Unsatisfactory</td><td>1</td></tr> <tr><td>Not Rated</td><td>N</td></tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												

<p>7. RECRUITMENT/RETENTION/DIVERSITY Appoint(s), re-appoints, assigns and reassigns as necessary all subordinate offices and employees of the department, clearly prescribes their duties and fixes their compensation, subject to State Personnel Relations Law ORS 179.090. Department personnel are to be highly qualified and responsive to DEQ's entire customer base, including EQC.</p> <p>COMMENTS</p>	<table border="0"> <tr><td>Outstanding</td><td>5</td></tr> <tr><td>Exceeds expectations</td><td>4</td></tr> <tr><td>Fully meets expectations</td><td>3</td></tr> <tr><td>Needs improvement</td><td>2</td></tr> <tr><td>Unsatisfactory</td><td>1</td></tr> <tr><td>Not Rated</td><td>N</td></tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												
<p>8. DECISION-MAKING Director's decisions and actions reflect a high level of understanding of Oregon state government and the political environment in which the agency must function.</p> <p>COMMENTS</p>	<table border="0"> <tr><td>Outstanding</td><td>5</td></tr> <tr><td>Exceeds expectations</td><td>4</td></tr> <tr><td>Fully meets expectations</td><td>3</td></tr> <tr><td>Needs improvement</td><td>2</td></tr> <tr><td>Unsatisfactory</td><td>1</td></tr> <tr><td>Not Rated</td><td>N</td></tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												
<p>9. COMMISSION EFFECTIVENESS In order to assist the Commission in being as effective as possible, the Director will provide information monthly that is relevant to DEQ issues. Such information may include explanation of the State's interest when amending and adopting goals, rules, policies and/or guidelines. The Director also will communicate opportunities within State government for training and educational experiences to enhance high-quality board service.</p> <p>COMMENTS</p>	<table border="0"> <tr><td>Outstanding</td><td>5</td></tr> <tr><td>Exceeds expectations</td><td>4</td></tr> <tr><td>Fully meets expectations</td><td>3</td></tr> <tr><td>Needs improvement</td><td>2</td></tr> <tr><td>Unsatisfactory</td><td>1</td></tr> <tr><td>Not Rated</td><td>N</td></tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												
<p>10. RESULTS Responses and actions are productive; results are appropriate and positive, timely, consistent, and of high quality.</p> <p>COMMENTS</p>	<table border="0"> <tr><td>Outstanding</td><td>5</td></tr> <tr><td>Exceeds expectations</td><td>4</td></tr> <tr><td>Fully meets expectations</td><td>3</td></tr> <tr><td>Needs improvement</td><td>2</td></tr> <tr><td>Unsatisfactory</td><td>1</td></tr> <tr><td>Not Rated</td><td>N</td></tr> </table> <hr/> <p>Weight _____%</p>	Outstanding	5	Exceeds expectations	4	Fully meets expectations	3	Needs improvement	2	Unsatisfactory	1	Not Rated	N
Outstanding	5												
Exceeds expectations	4												
Fully meets expectations	3												
Needs improvement	2												
Unsatisfactory	1												
Not Rated	N												

11. OVERALL PERFORMANCE

Multiply the number circled in each section by the weight given² and add the totals from each of the 10 measures to find the overall rating.

COMMENTS

Overall Rating _____

Outstanding	5
Exceeds expectations	4
Fully meets expectations	3
Needs improvement	2
Unsatisfactory	1

Date of Approval: _____

Melinda S. Eden, Chair
Environmental Quality Commission

² Example: If "Fully meets expectations" was given a 20% rating for one performance measure, multiply 3 by 0.20 to get a 0.60 rating for that measure. Add ratings from each of the 10 measure to get the overall rating.

Definitions

Performance Ratings:

<i>Outstanding</i>	Performance at this level far surpasses expected performance and is among the top 10% of state agency managers
<i>Exceeds Expectation</i>	Performance at this level meets expectations and in some cases exceeds expectations
<i>Fully Meets Expectations</i>	Performance at this level meets expectations
<i>Improvement Needed</i>	Performance at this level is partially met but requires some improvement
<i>Unsatisfactory</i>	Performance at this level is unacceptable and requires a development plan

Skills Listing:

Leadership

- Establishes a high-performance climate by using techniques of coaching, leadership and mentoring.
- Increases a group's energy and creative potential.
- Maintains group cohesiveness and cooperation.
- Demonstrates working knowledge of staffing, compensation, performance management and employee relations processes.
- Demonstrates high ethical standards and fiscal accountability in managing public resources.

Strategic Thinking

- Recognizes the environmental context in which the organization operates.
- Understands current and future problems and challenges faced by the organization.
- Demonstrates ability to apply strategic objectives to departmental operations.

Communications

- Speaks clearly and expresses self well in groups and in conversations with individuals.
- Demonstrates strong listening and writing skills, including grammar, organization and structure.
- Shares appropriate information on a timely basis.

Teamwork

- Works cooperatively.
- Contributes to the team by supporting and encouraging team members.
- Supports consensus decision-making by the team.

Customer or Constituent Service/Focus

- Identifies customers.
- Anticipates and understands customer needs.
- Acts to meet customer needs.
- Continues to search for ways to increase customer satisfaction.

Personal Responsibility/Accountability

- Inspires self and others to set and maintain high standards of excellence.
- Works with high energy, focus and persistence.

Definitions

(Groupings by performance/goal results and supporting skills/behavioral traits.)

1. Outstanding

Performance/Goal Results

- Significantly exceeds goals.
- Always produces more than required.
- Project plans and actions serve as a model for effective staff and resource activities.
- Provides exceptional presentations that inform and educate.
- Resolves controversial and complex decisions.
- Implements creative solutions to long-standing or especially troublesome problems.

Supporting Skills

- Serves as a model for working productively.
- Always performs special assignments and projects or unanticipated activities and completes them ahead of deadlines.
- Works with an unusually high degree of energy, focus and persistence.
- Produces work at the highest level of accuracy.
- Works independently with broad direction and little, or no, follow-up.
- Develops highest quality products or services.
- Gives life to the agency.
- Motivates employees to exceed departmental goals while focusing on organization wide issues.
- Frequently helps others within DEQ, even when it is "not in the job description."
- Can always be relied upon to serve as the source of accurate information.
- Serves as a leader in team discussions, yet does not monopolize team discussions.
- Contributes constructive ideas and suggestions that have major impact.
- Significantly improves work area by leading collaboration and cooperation.
- Always assists coworkers in completing assignments, with the only goal of improving organization effectiveness.
- Displays exceptional skill at organizing and responding to complex project issues.
- Serves as a model for outstanding customer service.
- Is highly respected by peers and colleagues

2. Exceeds Expectations

Performance/Goal Results

- ❑ Often exceeds goals.
- ❑ Frequently produces more than required
- ❑ Handles controversial or complex decisions.

Supporting Skills

- ❑ Self-motivated and sets high productivity levels.
- ❑ Anticipates developments or delays and makes adjustments.
- ❑ Goes the extra mile to ensure that goals and objectives are met.
- ❑ Serves as a facilitator in ensuring clear and effective communication among involved parties.
- ❑ Meets targets, timetables and deadlines, and is often prepared ahead of schedule.
- ❑ Frequently handles difficult pressure situations and distractions.
- ❑ Motivates employees to exceed departmental goals and objectives.
- ❑ Can always be counted on to add something new or innovative to each project.
- ❑ Exhibits excellent oral and written communication to all levels of staff.
- ❑ Frequently performs special assignments and projects or unanticipated activities and appears to be positively challenged by them.
- ❑ Puts success of team above own interests.
- ❑ Takes great initiative to ensure that customer needs are exceeded.
- ❑ Serves as the ideal standard for collaboration and cooperation.
- ❑ Consistently analyzes all problems and crafts workable, creative solutions.
- ❑ Views problems as an opportunity to use new technology or implement better methods.

3. Fully Meets Expectations

Performance/Goal Results

- Meets all goals.
- Completes all regularly assigned duties.
- Performs all assignments regardless of distractions or pressure situations.
- Completes work with acceptable level of accuracy and professionalism.
- Is prompt and prepared for meetings and other scheduled events.
- Responds quickly and appropriately to unanticipated delays or developments.

Supporting Skills

- Recognizes and analyzes complex problems and takes action or recommends effective, creative solutions.
- Adjusts priorities as needed.
- Provides follow-up directives and continually communicates a shared vision.
- Recognizes, responds, and supports employees with changing conditions.
- Assists other management in communicating difficult issues.
- Develops project plans that are creative and innovative and makes good use of staff and organization resources.
- Actively participates in group discussions.
- Contributes constructive activities and suggestions that are implemented.
- Frequently helps others achieve their goals through support and/or assistance.
- Recognizes and analyzes problems and takes appropriate action.
- Researches and efficiently prepares products and activities at acceptable standards.
- Handles routine pressure situations and distractions of the job while maintaining normal workload.
- Demonstrates reliable and predictable attendance and/or punctuality.
- Rarely is gone due to unscheduled absences.
- Meets targets, timetables and deadlines.
- Works quickly and strives to increase productivity.
- Is prompt and prepared for meetings and other scheduled events.
- Responds to routine developments appropriately.
- Motivates employees to meet departmental goals and objectives.
- Provides direction to employees by clearly communicating a shared vision.
- Is flexible when dealing with changing conditions.
- Helps the team accomplish its goals.
- Assesses individuals' strengths and weaknesses and suggests methods for improvement.
- Proactively changes and communicates progress to all.
- Successfully manages project team activities.
- Follows policies, procedures and regulations.
- Ensures customer satisfaction through consistent or special effort in response to customer need.
- Provides requested assistance and information to others in a prompt and courteous manner.
- Works to enable understanding and obtains clarification when needed.

(continued)

- ❑ Responds appropriately to questions.
- ❑ Demonstrates good presentation skills.
- ❑ Participates in team discussions.
- ❑ Performs special assignments and projects or unanticipated activities.
- ❑ Contributes ideas and suggestions.
- ❑ Volunteers to serve for special projects
- ❑ Takes initiative to understand new or more complex equipment, software or changes in operational procedures.
- ❑ Exhibits positive attitudes, especially during times of change and disruption.
- ❑ Recognizes and provides support and/or assistance to coworkers.
- ❑ Works actively to resolve conflicts.
- ❑ Demonstrates strong problem solving skills to ensure smooth operations.
- ❑ Consistently analyzes problems and applies logical solutions.
- ❑ Makes effective decisions on a timely basis.

4. Improvement Needed

Performance/Goal Results

- ❑ Assignments occasionally are not completed on time.

Supporting Skills

- ❑ Does not understand some basic functions or activities of the unit.
- ❑ Inconsistently organizes activities and information.
- ❑ Occasionally fails to make proficient use of technology.
- ❑ Inconsistently uses correct practices or procedures
- ❑ Is inconsistent in meeting targets, timetables or deadlines.
- ❑ Is inconsistent in promptness or preparation for meetings or other scheduled events.
- ❑ Some routine assignments and duties require supervisory guidance.
- ❑ Is inconsistent in completing assigned work.
- ❑ Recognizes problems, but requires some assistance to develop workable solutions.
- ❑ Occasionally unable to meet an acceptable standard of quality
- ❑ Is inconsistent in organization or maintaining operations.
- ❑ Occasionally communicates in an inappropriate manner.
- ❑ Occasionally and reluctantly performs special assignments and projects or unanticipated activities.
- ❑ Is inconsistent in making decisions on a timely basis.
- ❑ Is inconsistent in analysis of problems or application of logical solutions.
- ❑ Marginally courteous; may provide requested assistance and information to others in a less than prompt or courteous manner.

5. Unsatisfactory

Performance/Goal Results

- Assignments often not completed on time.

Supporting Skills

- Rarely performs special assignments and projects or unanticipated activities.
- Is often not at work due to unscheduled absences.
- Attendance and/or punctuality habits cause hardship for colleagues.
- Frequent errors.
- Low tolerance to pressure situations or distractions.
- Rarely motivates employees.
- Rarely available to staff.
- Rarely manages changing conditions.
- Project activities often need to be redone.
- Budget and staff time are not used in an effective manner.
- Rarely communicates.
- Rarely participates in team discussion.
- Rarely contributes ideas and suggestions.
- Reluctantly cooperates with others to achieve agency goals.
- Reluctantly accepts direction from supervisor.
- Minimally supports team leader.
- Rarely develops and maintains cooperative relationships with team or with others outside the work unit.
- Often the source of negative conflict.
- Unit and individual productivity is significantly disrupted by unreliable attendance and/or punctuality.
- Often does not meet requirements.
- Frequently does not meet targets, timetables or deadlines.
- Frequently lacks promptness or preparation for meeting or other scheduled events.
- Routine developments require supervision.
- Rarely recognizes problems or unable to recommend effective solutions.
- Frequent errors that have negative impact.
- Must be reminded about customer service standards.
- Rarely able to work under pressure situations or handle distractions.
- Rarely effective in organizing or maintain operations.
- Occasionally does not provide assistance and information to others in a prompt or courteous manner.



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue

Portland, OR 97204-1390

503-229-5696

TTY 503-229-6993

August 10, 2005

Richard A. Stark
Attorney At Law
201 West Main Street, Suite 1B
Medford, OR 97501

On August 10, 2005, the Environmental Quality Commission issued the attached Final EQC Order in Case No. WQ/SW-WR-02-015. The Final Order found that your client, William H. Ferguson, is liable for a civil penalty of \$5,400, to be paid to the State of Oregon. While your client has 60 days to seek judicial review of the decision, the penalty is due and payable 10 days after the date of the Final Order, pursuant to Oregon Revised Statute (ORS) 183.090.

Please immediately send a check or money order in the amount of \$5,400 made payable to "State Treasurer, State of Oregon," to the Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.

If we do not receive payment in full by August 22, 2005, we will file the Final Order with the appropriate counties, thereby placing a lien on any property your client owns within Oregon. We will also refer the Final Order to the Department of Revenue and/or a private collection agency for collection, pursuant to ORS 293.231. Statutory interest on judgments is nine percent per annum.

If you have any questions, please call Deborah Nesbit at DEQ's Office of Compliance and Enforcement in Portland, (503) 229-5340.

Sincerely,

Cat Skaar
Assistant to the Commission

GPHL.DEMAND, 08/21/2002

cc: Business Office, DEQ
Larry Knudsen, DOJ
Andy Ullrich, Medford Office, DEQ
William H. Ferguson, 5200 Pioneer Road, Medford, OR 97501
Ann Redding, Office of Administrative Hearings, Transportation
Hearings Division, 1905 Lana Ave NE, Salem, OR 97314

**BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON**

In the Matter of	)	Final Order
)	
William H. Ferguson,	)	DEQ Case No. WQ/SW-WR-02-015
)	
Petitioner/Respondent	)	(OAH Case No. 107491)

This matter came before the Oregon Environmental Quality Commission (Commission) on the petition of the Respondent, William H. Ferguson, for review of a proposed contested case order issued by Administrative Law Judge (ALJ) Teresa Hogan on December 10, 2003. The matter was initially scheduled for hearing at the Commission's regular meeting on December 9, 2004. At the request of Mr. Ferguson, however, the case was set over to the Commission's regular meeting held on February 3, 2005. Mr. Ferguson was represented by Counsel, Richard A. Stark. The Department of Environmental Quality (Department) was represented by Jenine Camilleri, Environmental Law Specialist, and Anne Price, Administrator of the Department's Office of Compliance and Enforcement. The Commission reviewed the record of the proceedings below and considered the exceptions, briefs and motion filed on behalf of Mr. Ferguson and the briefs and response to the motion filed by the Department.

The Commission first considered the motion to reopen the record to submit new evidence submitted by Mr. Ferguson on January 24, 2005, and the Department's objection to that motion as untimely and unsupported by good cause as required by OAR 340-011-0575(6). The Commission also considered its authority to reopen the matter on its own motion, but noted that a remand to ALJ Hogan would be required to receive any new evidence. Thereafter, Counsel for Mr. Ferguson withdrew the motion.

The Commission then heard argument on the merits of the case. It heard argument on the issues of (1) whether the Commission should find for the Petitioner/Respondent, or the matter should be dismissed altogether, because a portion of the tape from the administrative hearing was not properly preserved; (2) the Petitioner/Respondent's exceptions to the findings of fact and conclusions of law; and (3) the Petitioner/Respondent's claim that ORS 468B.025(1)(a) and 468B.005(5) were unconstitutional because of the alleged vagueness and overbreadth of the definition of "pollution" in ORS 468B.005(5).

With respect to the record, the portion of missing record is relatively small and the remaining portions of the tape provide ample foundation for the relevant evidence and for each of the ALJ's findings. The Commission concludes that the missing tape is not needed to support the ALJ's proposed findings or conclusions. The Commission also concludes that the taping error does not prejudice Mr. Ferguson, especially in light of the

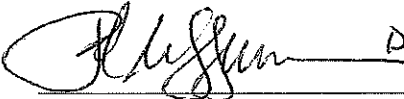
Department's stipulation to Mr. Ferguson's summary of the testimony in the Petitioner/Respondent's Exceptions and Brief.

The Commission considered each of Petitioner/Respondent's 16 Exceptions to the ALJ's proposed findings of fact. Most are findings of historical fact. ORS 183.650(3). Such findings may be modified only if they are not supported by a preponderance of the evidence in the record. ORS 183.650(3). The Commission concludes that the proposed findings are supported by substantial evidence and by a preponderance of the evidence in the record. The Commission also considered the Exceptions to each of the ALJ's seven Conclusions of Law. The Commission finds that each of the Conclusions of Law is supported by the findings and otherwise appropriate.

In his Amended Exceptions and Brief, the Petitioner/Respondent argued for the first time that the definition of "pollution" in ORS 468B.005(5) and the Department's application of that term in ORS 468B.025(1)(a) is unconstitutional. This argument was not raised before the ALJ or in the Petitioner/Respondent's answer to the Department's Notice of Violation, Department Order and Assessment of Civil Penalty. The Commission finds that Petitioner/Respondent waived the constitutional arguments by failing to raise them in his answer. OAR 340-011-0530(2). Moreover, the Commission sees nothing on the face of ORS 468B.005(5) or in its application in this matter that supports an argument that the statute is unconstitutional.

The ALJ's proposed order is hereby adopted as the Commission's final order and incorporated by reference as Attachment A. ORS 183.470(2); OAR 137-03-0655(6).

Dated this 10 day of August, 2005.

 Deputy Director
for

Stephanie Hallock, Director
Department of Environmental Quality
On behalf of the
Environmental Quality Commission

RIGHT TO JUDICIAL REVIEW:

You have the right to appeal this Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the day this Order was served on you. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was *mailed*, not the day you received it. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.

Attachment A

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
ENVIRONMENTAL QUALITY COMMISSION**

IN THE MATTER OF	)	PROPOSED ORDER
)	
WILLIAM H. FERGUSON, RESPONDENT	)	OAH Case No. 107491
	)	Department Case No. WQ/SW-WR-02-015

HISTORY OF THE CASE

On October 15, 2002, the Department of Environmental Quality (DEQ) issued a Notice of Violation, Department Order and Assessment of Civil Penalty (Notice) citing William H. Ferguson (Ferguson) with two violations. The first alleged violation charged that Ferguson violated ORS 468B.025(1)(a) by failing to install and maintain sufficient erosion controls on property in the Laurelridge subdivision and causing the discharge of significant amounts of turbid water into Gilbert Creek, waters of the state. The second alleged violation charged that Ferguson violated ORS 468B.025(2) by failing to properly install and maintain erosion controls on Phase 3 of the Laurelridge subdivision in violation of Schedule F, Section B, Condition 1 of the National Pollution Discharge Elimination System General Storm Water Discharge Permit No. 1200-C (Permit) issued to Ferguson. DEQ assessed a civil penalty of \$5,400 based on the first alleged violation. On October 28, 2002, Ferguson filed an Answer to Notice of Violation with DEQ. At hearing, DEQ withdrew the Department Order portion of its Notice of Assessment of Civil Penalty, which required submission of a new plan, because a plan had been submitted.

DEQ referred the request to the Hearing Officer Panel (now known as the Office of Administrative Hearings) on March 28, 2003. A hearing was held on July 16 and 17, 2003, July 31, 2003 and on August 14, 2003. Administrative Law Judge (ALJ) Teresa Hogan, from the Office of Administrative Hearings, presided. Ferguson appeared with counsel, Richard Stark. William Ferguson, Daniel Ferguson, Gary Wicks, Paul Hagerman, Rich Stuart, Richard Phillips and Robert VanHeuit testified on behalf of Ferguson. DEQ was represented by Jeanine Camilleri, an authorized agency representative. Edward Ullrich, Martin Seybold, Kathleen Staley and William Meyers testified for DEQ. The record closed at the conclusion of the hearing on August 14, 2003.

ISSUES

(Violation I/ Assessment of Civil Penalty)

1. Whether Ferguson can be subject to a civil penalty in this matter when the property from which the turbid water was allegedly discharged was owned by a partnership, rather than by Ferguson individually.
2. Whether the discharge of turbid water into Gilbert Creek was caused by Ferguson's acts or omissions or by other factors.
3. Whether the R factor (level of intentionality) was correctly determined.
4. Whether the P factor (prior history) was correctly calculated in assessing the penalty.
5. Whether the violation, if it occurred, should be classified as a minimal violation or a moderate violation.
6. Whether DEQ has shown all the elements to support the civil penalty.

(Violation II)

7. Whether DEQ has shown all of the elements of the violation.

EVIDENTIARY RULINGS

DEQ Exhibits 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 14, 15, 16 and 17 were admitted without objection. DEQ Exhibits 5, 9, 18, 19, 20 and 21 were admitted over objection as to relevance. Exhibit 15 was admitted over objection based on relevance and failure to disclose in discovery. Exhibit 13 was not offered. Ferguson's Exhibits 102, 103, 104, 105, 106, 107, 109, 111, 112, 113A, 114, 114A and 115 were admitted without objection. Ferguson's Exhibits 108 and 110 were admitted over objection based on relevance. Exhibit 101 was not offered.

OTHER RULINGS

DEQ moved to amend the Notice at the second sentence of Paragraph 1 under the heading "Violations" to state, "Specifically, Respondent failed to properly install and maintain sufficient erosion controls on Phase 1 and Phase 2 of the site causing significant amounts of turbid water to leave the site and discharge to Gilbert Creek, waters of the state." The amendment adds "Phase 1" to the allegation. DEQ also moved to amend Paragraphs 4, 5 and 6 under the heading "Findings" to substitute the date November 27, 2001 for the date November 28, 2001. Both amendments were allowed.

FINDINGS OF FACT

1. Ferguson was a partner in Laurelridge Development, a general partnership, engaged in the development of the Laurelridge Subdivision (the subdivision) in Grants Pass, Oregon.

2. In November 2001, Ferguson had a two-thirds interest in the partnership. The remaining one-third interest was held by Gwen Ferguson. (Test. of Ferguson.) Gwen Ferguson was not required to contribute her time and efforts to the partnership. Ferguson was not entitled to compensation for his partnership efforts. (Ex. 109)

3. Ferguson directed and controlled erosion control and storm water discharge on the subdivision. He was the storm water discharge permittee. (Ex. 3 and 102.) He was in charge of employees and contractors carrying out such work. (Test. Ferguson, Daniel Ferguson and Stuart.) He received geologic reports on the project. (Ex. 4 and 14.) There was no evidence that anyone else exercised control over the project.

4. The subdivision was developed in three phases. In November 2001, Laurelridge Development owned all the property in Phase 3 of the subdivision and retained some, but not all, the lots in Phases 1 and 2 of the subdivision. (Test. of Ferguson; Ex. 105.)

5. There was decomposed granite soil throughout the subdivision. The subdivision contained steep slopes. Because of these conditions, there was a high risk of erosion in the area being developed. (Ex. 4 and 12.)

6. The assignment of the storm water discharge permit (Permit No. 1200C/File No. 109617) for Phase 2 of the subdivision was terminated on December 29, 2000 at Ferguson's request based on completion of permanent erosion controls. The letter terminating the permit (Ex. 102) advised that Ferguson was responsible for continuing to monitor the site and correct any erosion problems that occurred. It also advised that Ferguson could be liable for civil penalties if he did not do so. Ferguson was provided with a report dated December 15, 2000 prepared by the Galli Group (Ex. 12) outlining problems with erosion control on Phase 2 of the subdivision. (Test. Staley.)

7. The lot located at 928 Valley View was owned by Laurelridge Development in November 2001. (Test. of Seybold; Test of Ferguson; Ex. 13.)¹

8. Sometime during the late summer or early fall of 2001, Ferguson conducted additional grading operations on various lots in Phase 2 of the subdivision. The grading operation disturbed the ground and left it exposed. Runoff from the graded areas ultimately emptied into Gilbert Creek. The graded areas were hydroseeded. Ferguson believed it was likely that the hydroseeding might fail because of the time of year it was done. (Test. of Ferguson.) The soil on these lots was not otherwise stabilized, for example, through the use of mats. In fact, the hydroseeding did not result in a good grass growth to stabilize the soil. (Test. of Ferguson.)

9. Soil was also disturbed by all terrain vehicle activity on the subdivision. This activity was not conducted with permission, but had been a longstanding problem. (Test. of Daniel Ferguson.)

¹ On Exhibit 105, there is a lot marked as "sold" adjacent to a flag lot which was retained by the partnership. The flag lot is 928 Valley View on which the hay bale and weephole, depicted in Exhibit 8, photograph 14 and Exhibit 10 photograph 1, were located. The lot marked as sold on Exhibit 105 is the lot immediately to the right in Exhibit 8, photograph 14 on which a house is visible.

10. There were about and one-half acres of open, unprotected soil in Phase Two of the subdivision, which were in Ferguson's control. (Test. of Staley.)

11. On February 20, 2001, a storm water discharge permit, Permit 1200-C (the permit), was issued to Ferguson for construction activity on Phase 3 of the subdivision.

12. Most of the land on Phase 3 of the subdivision drained into Blue Gulch, which contained a seasonal stream. (Test. of Ferguson; Ex. 103.)

13. Schedule F, Section B, Condition 1 of the permit requires the permittee to properly operate and maintain all facilities. Schedule A, Section 4, Paragraph(c) of the permit requires that, for filter fences, sediment shall be removed before it reaches one third of the above ground fence height. (Ex. 3.)

14. Daniel Ferguson performed erosion control maintenance on the subdivision. In general, he was the only person performing such maintenance. He was generally available for this work only in the afternoons. (Test. of Staley and Daniel Ferguson.)

15. On November 21, 2001, there were heavy rains. Edward Ullrich, a DEQ compliance engineer, Martin Seybold, Director of Field Operations for the City of Grants Pass and Kathleen Staley, an engineering technician with the City of Grants Pass visited the subdivision on that date. In general, the erosion control practices they observed at the site were of poor quality in comparison to other practices in the area. (Test. of Seybold.)

16. On November 21, 2001, at 928 Valley View, a straw bale was displaced and a substantial flow of sediment laden water flowed from a weephole onto the street. (Ex. 8, photograph 14.) The water flowing over that lot and into the storm drain system included runoff from several upslope lots. These lots were also controlled by Ferguson. (Test. of Seybold and Daniel Ferguson.) The water entered the storm drain system and discharged into Gilbert Creek. (Test. of Seybold; Ex. 103.) The erosion control devices in place at that location were overwhelmed. The problem was subsequently corrected by excavating a larger sediment pond. (Test. of Daniel Ferguson.)

17. On November 21, 2001, other sediment laden runoff entered the storm drain system from several lots on Crown Street that were in Ferguson's control. (Test. of Staley.) This runoff also discharged into Gilbert Creek.

18. On November 21, 2001 a sediment fence on Phase 3 of the subdivision that controlled runoff into Blue Gulch accumulated sediment in excess of one third of its height from the ground. (Ex. 8, photograph 3; Test of Ullrich.)

19. On November 21, 2001, substantial sediment laden runoff drained from Phase 3 into or towards Blue Gulch. (Ex. 8, photographs 4, 5, 11, 12 and 13.)

20. On November 21, 2001, Phillips and Hagerman owned two lots in Phase 2 of the subdivision totaling about one-half acre. Some of the bark that had been placed on these lots washed off and a substantial amount of soil was displaced, causing a storm drain to clog. The problem was not immediately corrected and runoff continued for several days when it rained.

The sediment laden runoff from these lots also entered Gilbert Creek. (Test. of Phillips, Hagerman and Staley.)

21. On November 27, 2003, it rained again. On that date, sediment laden runoff from 928 Valley View and the upslope lots that drained through it flowed into the storm drain system and emptied into Gilbert Creek. (Test. of Staley and Seybold.)

22. On both November 21 and November 27, 2001, the water that discharged into Gilbert Creek from the drainpipe serving the subdivision was heavily sediment laden. (Test. of Ullrich, Seybold and Staley; Ex. 8, photograph 16 and Ex. 10, photograph 6.) On both dates, the water upstream of the discharge point was relatively clear and the water downstream was opaque and brown colored. (Test. of Ullrich, Seybold and Staley; Ex. 8, photographs 17 and 18 and Ex. 10, photographs 8 and 9.)² On both dates, runoff from property under Ferguson's control contributed substantially to the sediment in the water discharged from the storm drain pipe into Gilbert Creek and caused an increase in turbidity in the water of Gilbert Creek. (Test. of Ullrich, Seybold and Staley; Ex. 8, photographs 17 and 18 and Ex. 10, photographs 8 and 9.)

23. Gilbert Creek is a continuously running stream in the state of Oregon and is "waters of the state." (Test. of Meyers)

24. Gilbert Creek is a habitat for steelhead and coho salmon. (Test. of Meyers.)

25. The increase in turbidity in Gilbert Creek caused by the discharge from the storm drain system serving the subdivision tended to have a detrimental impact on the fish habitat provided by Gilbert Creek. (Test. of Meyers.)

26. No measurements of turbidity measured in NTU's were taken on November 21 or November 27, 2001 either of water in Gilbert Creek or of the subdivision runoff. (Test. of Ullrich.)

27. Ferguson failed to use reasonable measures to prevent sediment from running off into Gilbert Creek in that he failed to:

- 1) use available means to stabilize soil that had been disturbed;
- 2) prevent sediment from running off exposed soil by using adequate sedimentation ponding or other devices and properly maintaining existing devices such as the hay bale at 928 Valley View; and
- 3) employ sufficient staff to maintain erosion control during heavy rainfall.

28. Ferguson has a prior history of two Class II violations and three Class I violations in connection with asbestos violations in Case Number AQAB-WR-96-315 and one Class II violation in connection with open burning in Case Number AQ/OB-WR-99-234. (Ex. 1 and 2.)

² Ferguson argued that Exhibit 8, photograph 17 and Exhibit 10, photograph 8 are the same photograph. They appear very much the same and there is a possibility that one of the photographs was mislabeled as to the date. The finding that the difference in water quality existed on both of the dates in question is based not only on the photographs, but also on the testimony of Ullrich, Seybold and Staley as to what they actually saw on those dates.

CONCLUSIONS OF LAW

1. Ferguson is personally liable for the violation of ORS 496B.025(1)(a).
2. Ferguson's acts or omissions caused the discharge of turbid water into Gilbert Creek and increased the turbidity of Gilbert Creek in violation of ORS 486B.025(1)(a).
3. The R factor under OAR 340-012-0045 is correctly calculated as 2 based on negligence as defined in OAR 340-012-0030(11).
4. The P factor under OAR 340-012-0045 is correctly calculated at 6.
5. The violation is properly classified as moderate under 340-012-0045(1)(a)(B) because the evidence establishes that the discharge of turbid water into Gilbert Creek could have had an adverse effect on the environment.
6. The proposed civil penalty in the amount of \$5,400 for violation of ORS 486B.025(1)(a) is valid.
7. Ferguson violated ORS 468B.025(2) by failing to meet the requirements of Schedule F, Section B, Condition 1 of the permit.

OPINION

1. Ferguson is personally liable for the violation of ORS 486B.025(1)(a).

Ferguson argued that he was not the proper party to this proceeding because, at the time of the alleged violations, a partnership was the owner of the property from which the turbid water was discharged. ORS 486B.025(1)(a) prohibits any person from causing pollution to waters of the state. OAR 340-012-0055(1)(b) provides that it is a Class One violation to cause pollution of waters of the state. The inquiry is whether Ferguson caused pollution to waters of the state. The entire record demonstrated that Ferguson controlled the storm water discharge and erosion control practices on the property in question. He personally was the storm water discharge permittee. He directed employees and contractors with respect to the work to be performed. He received the geological and engineering reports with respect to the subdivision. He was the person who made the decisions that resulted in inadequate containment of sediment laden water on the dates in question.

2. Ferguson's acts and omissions caused pollution of Gilbert Creek.

ORS 468B.005(3) provides that:

"Pollution" or "water pollution" means such alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself or in connection with any other substance, create a public nuisance or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to

domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof.

This is a broad definition. It requires a demonstration that the act caused an alteration in a physical characteristic, which includes turbidity, that "tends" to render the water detrimental to fish habitat. It is not necessary that a particular numerical value be assigned to the alteration. There was sufficient evidence to show that the runoff from property in Ferguson's control caused pollution. Gilbert Creek is a fish habitat. Small increases in turbidity can adversely affect fish habitat.

The runoff from the property controlled by Ferguson, in particular from 928 Valley View, was markedly discolored and significant in volume. The water dumped into Gilbert Creek was very discolored and caused an obvious change in the physical characteristics of the stream. Although runoff from 928 Valley View was not the only source of turbid water running into Gilbert Creek, it is reasonable to conclude that it was a significant source because Ferguson controlled a significantly larger portion of the land with disturbed or bare soil than did the other potential polluters, Phillips and Hagerman. The Department met its burden of showing that Ferguson is subject to a civil penalty for pollution of waters of the state.

3. Ferguson did not take reasonable measures to prevent excessive sediment laden runoff during heavy rainfall and, therefore, the R factor is properly calculated as 2 for "negligence" rather than 0 for "accident."

OAR 340-012-0030(11) defines negligence as the failure to take reasonable care to avoid a foreseeable risk of committing an act or omission constituting a violation. Ferguson undertook efforts to prevent erosion on his property. He completed permanent erosion controls on Phase 2 of the subdivision and received a letter terminating his storm water permit for that phase. However, decomposed granite soil is particularly subject to erosion. The subdivision contained steep slopes, which increased the risk of soil displacement. Winter rainfall was a predictable, foreseeable event. Soils had been disturbed by grading and ATV traffic. Water was routed off upper lots through the lot at 928 Valley View. It was foreseeable that extensive efforts at erosion control might be necessary to filter sediment from the runoff.

Ferguson did not use all available and reasonable means to prevent excessive runoff. Although he hydroseeded, he did not use mats even though he foresaw that hydroseeding might not be successful. Ferguson did not employ enough staff to effectively maintain erosion controls during heavy rainfall. Although Daniel Ferguson was employed to do that, his availability was limited to the afternoons. The project was large and maintenance demands were substantial. Ferguson did not make an adequate effort to assure that these demands would be met. In general, the erosion control practices were among the poorer practices in the area.

4. The P factor was correctly calculated at 6.

Ferguson has three prior Class I violations. In addition, he has three prior Class II violations. Two Class II violations are a Class I equivalent. OAR 340-012-0030(1). Ferguson had four Class I or Class I equivalents which are assessed a value of 5 under OAR 340-012-0045(1)(c)(A)(vi). The additional Class II violation has a value of 1 under 340-012-0045(1)(c)(A)(ii). The total is 6. The calculation of the P factor at 6 is proper.

5. The Department met its burden of showing that Ferguson's violation should be classified as a "moderate" as opposed to a "minimal" violation.

OAR 340-012-0045(1)(a)(B) provides:

The magnitude of a violation is determined by first consulting the selected magnitude categories in OAR 340-012-0090. In the absence of a selected magnitude, the magnitude shall be moderate unless:***

(ii) If the Department finds that the violation had no potential for or actual adverse impact on the environment, nor posed any threat to public health, or other environmental receptors * * *.

OAR 340-012-0090 sets out specific standards measured in NTU's for whether an increase in turbidity is of minimal, moderate or major magnitude if the allegation is a violation of numeric water quality standards. In this case, the allegation is pollution in violation of ORS 468B.025(1)(a) and, therefore, the general standard of OAR 340-012-0045(1)(a)(B) applies rather than the specific standard under OAR 340-012-0090.

A finding of minimal magnitude would not be proper. The evidence established that the violation had a potential for adverse impact on the environment. Small increases in turbidity, not easily seen, can adversely affect fish habitat. Ferguson argued that the burden of proof could not be met without a measurement of turbidity in NTU's. If the allegation had been a violation of a numeric water quality standard, Ferguson's argument would have considerable weight. DEQ's allegation was simply that the discharge tended to adversely affect fish habitat. The evidence demonstrated this fact. Aside from Meyer's testimony, the upstream and downstream photographs of Gilbert Creek (Ex. 8, photographs 17 and 18) show a dramatic deterioration of water quality. Common sense suggests that such an increase in sediment and decrease in visibility would adversely affect aquatic life. The moderate magnitude determination was correct.

6. The proper civil penalty is \$5,400.

The formula the civil penalty is $BP + [(0.1 \times BP) \times (P + H + O + R + C)] = EB$. OAR 340-012-0045. The BP (base penalty) factor was correctly calculated as \$3000 under the matrix in OAR 340-012-0042(1)(b)(B) because this was a moderate magnitude, Class I violation. The P (prior history) factor was correctly set at 6. The R factor (intentionality) was correctly set at 2. The remaining factors were not contested. The application of the formula yields a civil penalty of \$5,400.

7. Ferguson violated Schedule F, Section B, Condition 1 of the permit by failing to maintain erosion control devices.

Ferguson allowed sediment to overwhelm sediment control fences on Phase 3 of the subdivision. The grades used in that phase were in excess of those recommended. There was significant sediment laden runoff from Phase three of the subdivision. The permit required Ferguson to maintain erosion control devices to certain standards and this was not done. In particular, sediment accumulated behind a sediment fence in excess of

one third of its above ground height. A finding that Ferguson violated conditions of the storm water discharge permit is warranted.

PROPOSED ORDER

I propose that the Department issue the following order:

Respondent is subject to a civil penalty in the amount of \$5,400.

Randolph Fraser, for

Teresa Hogan

Administrative Law Judge

Office of Administrative Hearings

ISSUANCE AND MAILING DATE:

December 10, 2003

REVIEW

If you are not satisfied with this decision, you have a right to petition the Environmental Quality Commission for review. To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date of service of this Order, as provided in Oregon Administrative Rule (OAR) 340-011-0132(1) and (2). Service is defined in OAR 340-011-0097, as the date the Order is mailed to you, not the date you receive it. The Petition for Review must be filed with:

Environmental Quality Commission
c/o DEQ-Assistant to the Director
811 SW 6th Avenue
Portland OR 97204

Within 30 days of filing the Petition, you must also file exceptions and a brief as provided in OAR 340-011-0132(3).

CERTIFICATE OF SERVICE

I certify that on December 10, 2003, I served the attached Proposed Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

WILLIAM H. FERGUSON
5200 PIONEER RD
MEDFORD OR 97501

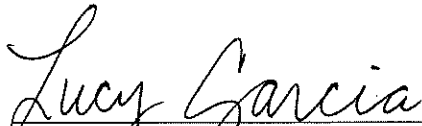
**BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 6385**

RICHARD STARK
ATTORNEY AT LAW
201 WEST MAIN ST STE 1B
MEDFORD OR 97501

**BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 6378**

JENINE CAMILLERI
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL



Lucy Garcia, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

State of Oregon
Department of Environmental Quality

Memorandum

Date: November 18, 2004
To: Environmental Quality Commission
From: Stephanie Hallock, Director *S. Hallock*
Subject: Agenda Item A: Contested Case No. WQ/SW-WR-02-015 regarding William H. Ferguson, December 9, 2004 EQC Meeting

Appeal to EQC On January 6, 2004, William H. Ferguson (Petitioner) appealed the Proposed Order (Attachment AA), which assessed him a \$5,400 civil penalty for causing pollution to waters of the state.

Background This case involves violations stemming from the multi-phase development of Laurelridge Subdivision (subdivision) in Grants Pass, Oregon. At the time of the violation, the subdivision was being developed in three phases. Petitioner was the storm water permittee for all three phases of development, and as such, directed and controlled the erosion control practices throughout the subdivision.

On October 15, 2002, the Department issued Petitioner a Notice of Violation, Department Order, and Assessment of Civil Penalty (Notice). (Attachment DD) The Notice alleged that Petitioner violated Oregon Revised Statute (ORS) 468B.025(1)(a) by causing pollution to waters of the state, which resulted from storm water discharge from Phase 2 of the subdivision. The Notice also alleged that Petitioner violated ORS 468B.025(2) by violating Schedule F of his National Pollution Discharge Elimination System Storm Water Discharge General Permit No. 1200-C (Permit), which resulted from Petitioner's failure to comply with erosion control requirements under the Permit.

On October 28, 2002, Petitioner appealed the Notice. (Attachment CC) On July 16, 2003, a contested case hearing was held. The hearing continued on July 17, July 31, and August 14, 2003. On December 10, 2003, the Administrative Law Judge (ALJ) issued a Proposed Order (Attachment AA) holding that Petitioner was liable for the violations above and upholding the Department's \$5,400 civil penalty. On January 6, 2004, Petitioner filed a petition for the Environmental Quality Commission (the Commission) to review the Proposed Order. (Attachment Z)

Findings of Fact (FOF) made by the ALJ in her Proposed Order are summarized as follows:

Petitioner was a partner in Laurelridge Development, a general partnership, engaged in the development of the subdivision. (FOF 1) The subdivision was

developed in three phases. (FOF 4) In September 1997, Petitioner applied for coverage under the Permit to develop Phases 1 and 2 of the subdivision. In December 2000, as requested by Petitioner, the Department terminated the Petitioner's coverage under the Permit for Phase 1 and 2, because he had completed the permanent erosion controls in these areas. The Department advised Petitioner in writing that he was responsible for continuing to monitor the site and correct any erosion problems that occurred in these areas, and if he failed to do so, he may receive a civil penalty. On February 20, 2001, Petitioner applied for coverage under the Permit to develop Phase 3 of the subdivision. (FOF 11)

The subdivision contained steep slopes and there was decomposed granite soil throughout the subdivision. Because of these conditions, there was a high risk of erosion in the areas being developed. (FOF 5) Most of the land in Phases 1 and 2 of the subdivision drained to Gilbert Creek (Creek), while most of the land on Phase 3 of the subdivision drained into Blue Gulch (Gulch), which contained a seasonal stream. (FOF 12)

As the storm water permittee, Petitioner directed and controlled erosion control and storm water discharge on the subdivision. Petitioner was also in charge of employees and contractors carrying out such work. (FOF 3) In general, Petitioner's son, Daniel Ferguson, was the only person who performed erosion control maintenance on the subdivision. (FOF 14) Schedule F, Section B, Condition 1 of the Permit requires the permittee to properly operate and maintain all facilities. Schedule A, Section 4, paragraph (c) of the Permit requires that sediment shall be removed from filter fences before it reaches one third of the above ground fence height. (FOF 13)

During the summer of 2001 or early fall of 2001, Petitioner conducted additional grading on various lots in Phase 2 of the subdivision. The grading disturbed the ground and left it exposed. Runoff from the graded areas ultimately emptied into the Creek. Petitioner hydro-seeded the graded areas, but this did not result in a good grass growth. The soils on these lots were not otherwise stabilized with erosion controls such as matting. (FOF 8) All terrain vehicles that used the property without Petitioner's permission also disturbed soils. (FOF 9) Petitioner controlled about two and half acres of open and unprotected soil in Phase 2 of the subdivision. (FOF 10)

In November 2001, Laurelridge Development owned all the property in Phase 3 of the subdivision and retained some lots in Phases 1 and 2 of the subdivision, including 928 Valley View Drive. (FOF 4 and 7) Petitioner had a two-thirds interest in Laurelridge Development at this time. (FOF 2)

On November 21, 2001, there were heavy rains. Andy Ullrich, a DEQ compliance inspector, Martin Seybold, Director of Field Operations for the City of Grants Pass, and Kathleen Staley, an engineering technician with the City of Grants Pass, visited the subdivision and observed that the erosion controls on Petitioner's properties were of poor quality in comparison with other practices in the area. (FOF 15) At 928 Valley View Drive, the erosion controls in this area were overwhelmed. A straw bale was displaced and a substantial flow of sediment laden water flowed from a weep hole onto the street. The water flowing from this lot included runoff from several upslope lots that were under Petitioner's control. The runoff entered the storm drain system on the street and discharged to the Creek. (See FOF 16) Sediment laden runoff from several lots on Crown Street that were under Petitioner's control entered the storm drain system and discharged to the Creek. (FOF 17) On Phase 3 of the subdivision, the sediment fence that controlled runoff to the Gulch had accumulated sediment in excess of one-third of its height from the ground, and substantial sediment laden runoff drained into or towards the Gulch. (FOF 19)

On November 21, 2001, other properties in the subdivision that were not owned by the Petitioner also discharged sediment laden waters to the Creek. Richard Phillips and Paul Hagerman owned two lots in Phase 2 of the subdivision that totaled one and a half acres. Some bark and a substantial amount of soil washed off their properties which caused the storm water drain to clog. This problem was not immediately corrected so runoff continued for several days when it rained. The runoff from these two lots entered the Creek. (FOF 20)

On November 27, 2003, it rained again. Sediment laden runoff from 928 Valley View Drive and the upslope lots, which drain through it, flowed into the storm drain system and entered the Creek. (FOF 21)

On November 21 and 27, 2003, heavily sediment laden water discharged from the subdivision's storm water drainage pipe into the Creek. The water in the creek upstream of the pipe was relatively clear and the water downstream of the pipe was opaque and brown colored. The runoff from Petitioner's property contributed substantially to the sediment in the water that discharged from the pipe to the Creek, and caused an increase in turbidity in the Creek. (FOF 22)

The Creek is a continuously running stream in the state, and constitutes waters of the state. (FOF 23) The Creek provides habitat for steelhead and coho salmon. (FOF 24) The increase in the turbidity in the Creek caused by the discharge from the subdivision tended to have a detrimental impact on fish habitat provided by the Creek. (FOF 25) No measurements of turbidity were taken on November 21 and 27, 2001 of the water in the Creek or the subdivision runoff. (FOF 26)

Petitioner failed to use reasonable measures to prevent sediment from running off into the Creek in that he failed to: (1) use available means to stabilize disturbed soils; (2) prevent sediment from running off exposed soils by using adequate sedimentation ponds or other devices, and properly maintaining existing devices such as the straw bale at 928 Valley View Drive; and (3) employ sufficient staff to maintain erosion controls during heavy rainfall. (FOF 28)

In her Conclusions of Law (COL), the ALJ found that:

1. Petitioner is personally liable for violation of ORS 496.B025(1)(a). (COL 1)
2. Petitioner's acts or omissions caused the discharge of turbid water into the Creek and increased the turbidity of the Creek in violation of ORS 468B.025(1)(a). (COL 2)
3. The Department's civil penalty assessment is appropriate. (COL 3-6)
4. Petitioner violated ORS 468B.025(2) by failing to meet the requirements of Schedule F, Section B, Condition 1 of the Permit. (COL 7)

**Procedural
Issues:**

A. Hearing Tapes

On March 1, 2004, Petitioner submitted his Exceptions and Brief to the Commission. (Attachment R) On April 16, 2004, the Department submitted to the Commission its Answering Brief. (Attachment M) In its Answering Brief, the Department responded to the Exceptions of Findings of Fact and Conclusions of Law that were raised in Petitioner's Exceptions and Brief. The Department also requested that Petitioner submit a transcript of the testimony described in his Exceptions and Brief, because he was directly arguing evidence that was not included in the ALJ's Findings of Fact.

On April 19, 2004, the Department mailed Petitioner a copy of the hearing tapes. (Attachment L) On May 20, 2004, Petitioner notified the Department that some of the hearing could not be transcribed because testimony between Tape 1, Side 2 and Tape 2, Side 1, and on Tape 4, Side 1 was missing. (Attachment J) This testimony was also missing from the original hearing tapes. The Department was not able to determine the cause of the lost testimony, but it is likely that the testimony was not recorded properly during the hearing.

On May 28, 2004, the Department sent a letter to Petitioner stating that it was willing to either stipulate to any missing testimony described in Petitioner's

Exceptions and Brief, or agree to reopen the record for rehearing on the missing parts. (Attachment I) On June 15, 2004, the Department sent a letter to Petitioner explaining that the testimony of Petitioner's witnesses, Mr. Phillips and Mr. Van Heuit (an engineer), which was recorded on Tape 4, side 1, was the only testimony that he referenced in his Exceptions and Brief that was missing from the record. The Department stated that it was willing to stipulate to Petitioner's description of their testimony in his Exceptions and Brief. (Attachment H)

On June 16, 2004, Ms. Mikell O'Mealy sent a letter to Petitioner requesting that he submit a Supplemental Brief that included the transcript of the testimony described by Petitioner in his Exceptions and Brief that already existed in the hearing record. (Attachment G)

On July 30, 2004, Petitioner submitted to the Commission an Amended Exceptions and Brief (Attachment C), and a transcript of the hearing record, except for the missing testimony between Tape 1, Side 2 and Tape 2, Side 1, and on Tape 4, Side 1. In Petitioner's Amended Brief, he argues that Exhibit 8 was admitted into the record during testimony that was not recorded. He also acknowledges that the Department stipulated to his description of Mr. Phillips and Mr. Van Heuit's testimony in his Exceptions and Brief. In addition, Petitioner requests that the Commission dismiss the action, because the record was not preserved.

On September 1, 2004, the Department submitted to the Commission its Reply Brief. (Attachment A) In the Reply Brief, the Department responds that the missing testimony of Mr. Phillips and Mr. Van Heit did not disadvantage the Petitioner nor was it a material defect in the case, because the Department stipulated to their testimony as described by Petitioner. The Department further argues that although the initial foundation testimony regarding Exhibit 8, which is photographs from Andy Ullrich's November 21, 2001 inspection, and its admission into the hearing record was not recorded, additional testimony about the photographs and what Mr. Ullrich observed during his inspection was recorded during the hearing. The Department argues that Mr. Ullrich' testimony that is in the record is sufficient for foundation.

The Department requests that the Commission uphold the Proposed Order, because there is sufficient evidence on the record to prove the violations in the Notice. The Department requests that if the Commission cannot uphold the Proposed Order because of the missing testimony, that it remand the case to the Administrative Law Judge to hear testimony on the missing parts of the hearing.

B. Petitioner Made Additional Legal Argument in Amended Brief.

The Department argues that in the Amended Brief, Petitioner presented additional legal argument regarding the constitutionality of the definition of "pollution," and that this argument is outside the scope of the original pleadings in the Exceptions and Brief. The Department requests that the Commission disallow this additional legal argument, because it was not raised at the contested case hearing as required by EQC rules. OAR 340-011-0132(3)(a). Moreover, it was not raised in Petitioner's initial Exceptions and Brief.

Issues On Appeal:

In his Exceptions and Brief and amended Exceptions and Brief (Attachments R and C), Petitioner requests that the Commission adopt alternate findings of fact and alternate conclusions of law, and reverse the ALJ's conclusion that Petitioner is liable for the violations issued in the Notice.

In its Answering and Reply Briefs (Attachment M and A), the Department requests that the Commission uphold the Proposed Order.

A. Petitioner requests that the Commission replace Findings of Facts.

Petitioner requests that the Commission reverse many of the ALJ's Findings of Fact and adopt alternative findings of facts. (Attachment R, Exceptions No. 1-8, and 14) Petitioner also requests that the Commission add findings of facts to the ALJ's Findings of Facts. (Exceptions 11 and 16)

The Department replies that the Commission should uphold the ALJ's Findings of Fact, because the Petitioner is not providing any new information to the Commission that was not presented at the hearing. (Attachment M, page 3, lines 9-21) Findings of fact are best determined by the ALJ, because the findings are often based on the demeanor or credibility of a witness, which is difficult to evaluate when reviewing the record. The Commission may only reverse or modify a Finding of Fact if it determines that the finding is not supported by a preponderance of the evidence in the hearing record. (OAR 137-003-0665(4))

Should the Commission wish to consider the specific arguments of Petitioner and responses of the Department, they are summarized as follows:

1. Petitioner's discharge was insignificant.

A. Petitioner's Argument

Petitioner claims that the most significant discharge to the Creek was from Mr.

Phillips and Mr. Hagerman's properties. (Attachment R, Exception 12) Petitioner states that the amount of silt and granite that washed into the storm system from these two properties was extensive and was not filtered by any devices, which caused the storm drain system in that area to fill with dirt and to overflow on November 21, 2001. (Attachment R, Exception 7)

Petitioner argues that the discharge from 928 Valley View Drive was small, thrice filtered and settled water, and no more than five gallons per minute for a short duration. (Exceptions 7 and 12) Petitioner claims that this filtered and settled water was insignificant in comparison to the discharge from Mr. Phillips and Mr. Hagerman's properties and that there was no credible evidence that the filter dust from 928 Valley View Drive contributed significantly to the change in color in the Creek. (Exception 15) Petitioner argues that there is no evidence that the runoff from his property contributed substantially to the sediment in the water that discharged from the storm drain pipe to the Creek, and that the release caused an increase in turbidity in the Creek. (Exception 12)

Petitioner argues that although the Department presented testimony of runoff entering the storm drain system from other properties under his control in Phase I and II of the subdivision, there was no evidence of this runoff and the only pictures of Phase I and II were of 928 Valley View Drive. (Exception 8)

B. Department's Argument

The Commission does not need to address the size of the discharge to make a determination in this case because it is not an element of the violation. (Attachment M, Page 5, lines 1-4) However, the Department addresses this argument for purposes of completeness. (Attachment M, page 5, lines 4-5)

The Department replies that Petitioner's claim that the discharge from 928 Valley View Drive was thrice filtered and settled water and de minimis is not persuasive, because the ALJ found that the erosion control devices on 928 Valley View Drive were overwhelmed and the discharge from this property was substantial. (FOF 16) The Department argues that it presented witness testimony and photographs that clearly showed opaque and brown colored water running off 928 Valley View Drive to the storm drain system and discharging to the Creek. (Attachment M, page 5, lines 12-14)

The Department argues that the ALJ found that the runoff from Mr. Ferguson's property, particularly 928 Valley View Drive, was markedly discolored and significant in volume. (Attachment AA, Opinion 2) The Department argues that the ALJ found that, although 928 Valley View Drive was not the only source of

turbid water running into the Creek, it was reasonable to conclude that it was a significant source because Petitioner controlled a significantly larger portion of the land with disturbed or bare soil than Mr. Phillips and Mr. Hagerman. (Opinion 2) Therefore, the runoff from 928 Valley View Drive was not filtered or settled water, but a substantial flow of sediment laden waters that discharged to the Creek. (Attachment M, page 5, lines 21-22)

2. Petitioner's discharge did not pollute state waters.

A. Petitioner's Argument

Petitioner claims that there was no measurement of turbidity in nephelometric units (NTUs) taken on November 21 and November 27, 2001 and that without a measurement of NTU's, no conclusions could be made to the extent of the turbidity in the Creek on those days. (Attachment R, Exceptions 13 and 14) Petitioner claims that the Department only used photographs, and no actual data to show that the turbidity in the Creek from the storm water system serving the subdivision could "tend to have a detrimental impact on fish habitat." (ORS 468B.005(3)) (Exception 13)

Petitioner states that the Department's witness, Bill Meyers, could not state for sure that there was any likelihood of an impact on the fish habitat based on the evidence presented at the hearing. (Exception 13) Petitioner claims that Mr. Meyers did not testify that the short duration of the five gallon per minute water containing dust from 928 Valley View Drive had any effect on fish habitat. (Exception 13)

B. Department's Argument

The Department replies that the ALJ found that numerical data of the turbidity in the Creek is not required to prove this violation, rather it is required to prove a violation of a numeric water quality standard. (Attachment AA, Opinion 5) The Department argues that it put substantial evidence on the record through witness testimony, inspection reports and photographs from November 21 and 27, 2001 that showed that Petitioner allowed storm water heavily laden with sediment to discharge from his property to the Creek and increase the turbidity in the Creek. (Attachment M, pages 3, lines 24-27) The Department argues that the ALJ found that the increase in turbidity to the Creek caused by the discharge from the subdivision tended to have a "detrimental impact on fish habitat provided by the Creek." (Attachment AA, FOF 25 and Opinion 5)

The Department argues that its witness, Mr. Meyers, who is the DEQ Rogue

Basin Coordinator and has many years of experience in stream ecology, testified that the discharge “tended to have a detrimental effect on the Creek.” (Attachment M, page 4, lines 14-17) The Department states that he made that determination by looking at the color of the turbid water discharge and clarity of the Creek, captured in the Department’s photographs, and estimated the effects the discharge may have had on the Creek. (Attachment M, page 4, lines 17-19) The Department argues that the Creek was running fairly clear upstream from the point where Petitioner’s discharge entered the Creek and the water downstream was opaque and brown colored. (Attachment AA, FOF 22) The Department argues that the ALJ found that the storm water discharging to the Creek was very discolored and caused an obvious change in the physical characteristics of the Creek by increasing its turbidity, and that small increases in turbidity can adversely affect fish. (Opinion 2) The ALJ found that the photographs of the Creek show a dramatic deterioration in water quality, which indicates that an increase in sediment and decrease in visibility would adversely affect aquatic life. (Opinion 5)

3. Petitioner did not violate Schedule F of the Permit.

A. Petitioner’s Argument

Petitioner argues that it was reasonable to deviate from his Permit, which requires sediment to be removed from filter fences before it reaches one-third of the above ground height. (Attachment R, Exception 5) Petitioner claims that in the steep areas in Phase 3 of the subdivision, Daniel Ferguson used wire mesh steel posts with anchored silt fences that had to be sunk into the ground to stay in place. (Exception 5) Petitioner claims that these fences were not the standard wood stake fences, but rather wire mesh fabric fences with steel fence posts successfully anchoring the fences into place. (Exception 5)

Petitioner states that Schedule A of the Permit provides that an Erosion and Sediment Control Plan (Plan) shall be developed and implemented to prevent the discharge of significant amounts of sediment to surface waters, and that all other performance limitations in the Permit refer to the discharge to surface water or turbid flows of water leaving the subdivision that are not filtered or settled to remove turbidity. (Exception 5) Petitioner argues that the water that reached the Gulch from Phase 3 of the subdivision did not contain silt, because there were a series of redundant silt fences in the ravines that prevented any silt-filled water from reaching the Gulch. (Exception 12)

Petitioner argues that although Daniel Ferguson in most cases was the only person performing erosion control maintenance on the subdivision, he would hire

additional help when needed and be available on call for instances where he needed to address erosion control issues. (Exception 6) Petitioner argues that all terrain vehicles disturbed soils in Phase 3 of the subdivision without his permission, and the runoff from this disturbance did not leave the subdivision. (Exception 3)

B. Department's Argument

The Department responds that to prove this violation, it need only show by a preponderance of the evidence that Petitioner failed to maintain the erosion controls on Phase 3 of the subdivision according to his Plan and the requirements of the Permit, and as a result a discharge of sediment to the Gulch likely occurred. (Attachment M, page 6, lines 14-17) The Department states that it need not prove that turbid water actually discharged to the Gulch. (Attachment M, page 6, lines 17-18)

The Department argues that the Petitioner did not provide any evidence, besides oral testimony, showing the existence of these redundant silt fences, nor did he provide any proof that the silt fences worked properly to prevent turbid runoff from reaching the Gulch. (Attachment M, page 7, lines 4-7) Department claims that a large amount of sediment had accumulated behind silt fences on Phase 3 causing unfiltered turbid water to flow around the edge of the fence. The Department argues that it presented photographs that showed erosion and steep grades with insufficient erosion controls on Phase 3, and a significant amount of turbid water running off Phase 3 towards the Gulch. (Attachment M, page 7, lines 18-20)

The Department claims that Petitioner failed to comply with the maintenance requirement in the Permit and remove the trapped sediment before it reached one-third of the above ground fence height. (Attachment M, page 7, lines 15-17) Therefore, the ALJ found that Petitioner violated Schedule F of the Permit because he did not maintain erosion controls in Phase 3 of the subdivision. (Opinion 7)

B. Petitioner's Exceptions to Conclusions of Law

1. Petitioner's Argument

Petitioner argues that the Findings of Facts do not support the ALJ's Conclusion of Law that he caused pollution to waters of the state in violation of ORS 468B.025(1)(a). (Attachment R, page 9, lines 9-11) Petitioner argues that ORS

468B.005(3) defines pollution as an alteration to waters of the state that must “by itself” cause the problem complained of. (Attachment R, page 9, lines 25-26)

Petitioner states that on November 21, 2001, there were two significant discharge events in the subdivision from Mr. Phillips and Mr. Hagerman’s lots. Petitioner claims that the decomposed granite and soil from their lots was not filtered and entered a storm system that served the subdivision causing the system to completely fill for at least two weeks. (Attachment R, page 10, lines 1-7) Petitioner compares these two discharges with the discharge from his property, located at 928 Valley View Drive, which had gone through a settling pond and a series of silt fences. Petitioner claims that the subdivision constituted ten to fifteen percent of the storm water from the Grants Pass area that drains from the drainage pipe involved in this case to the Creek.

Petitioner argues that the Department did not show by a preponderance of the evidence that the discharge from his property “by itself” could cause the changes to the color of the Creek. (Attachment R, page 10, lines 17-25)

2. Department’s Argument

The Department replies that it need not prove that the discharge from Petitioner’s property “by itself” polluted the creek. (Attachment M, page 2, lines 15-16) The Department claims that Petitioner’s argument contradicts the express language of the statute by overlooking the following words in the definition of pollution: “by itself or in connection with any other source.” The Department states that the legislature intended “pollution” to be expansive and broadly applied, and that by including the words “in connection with any other source,” the legislature intended that each party discharging wastes to state waters be held responsible for the pollution of those waters. (Attachment M, page 3, lines 1-5)

The Department states that pollution may stem from multiple sources, and it is poor public policy to relieve from responsibility people who discharge waste into already polluted waters further impairing water quality and aquatic habitat. The Department argues that Petitioner’s legal argument is an incorrect statement of the law and against public policy. (Attachment M, page 3, lines 7-8)

The Department argues that it put substantial evidence on the record through witness testimony, inspection reports and photographs from November 21 and 27, 2001 that showed that Petitioner allowed storm water heavily laden with sediment to discharge from his property to the Creek and increase the turbidity

in the Creek. (Attachment M, pages 3, lines 24-27) The Department argues that the ALJ found that the increase in turbidity to the Creek caused by the discharge from the subdivision tended to have a “detrimental impact on fish habitat provided by the Creek.” (Attachment AA, FOF 25 and Opinion 5)

**EQC
Authority**

The Commission has the authority to hear this appeal under OAR 340-011-0132.

The Department’s contested case hearings must be conducted by an ALJ.¹ The Proposed Order was issued under current statutes and rules governing the ALJ Panel.² Under ORS 183.600 to 183.690, the Commission’s authority to change or reverse an ALJ’s proposed order is limited.

The most important limitations are as follows:

- (1) The Commission may not modify the form of the ALJ’s Proposed Order in any substantial manner without identifying and explaining the modifications.³
- (2) The Commission may not modify a recommended finding of historical fact unless it finds that the recommended finding is not supported by a preponderance of the evidence.⁴ Accordingly, the Commission may not modify any historical fact unless it has reviewed the entire record or at least all portions of the record that are relevant to the finding.
- (3) The Commission may not consider any new or additional evidence, but may only remand the matter to the ALJ to take the evidence.⁵

The rules implementing these statutes also have more specific provisions addressing how Commissioners must declare and address any *ex parte* communications and potential or actual conflicts of interest.⁶

In addition, the Commission has established by rule a number of other procedural provisions, including, that the Commission will not remand a matter to the ALJ to consider new or additional facts, unless the proponent of the new evidence has properly filed a written motion and statement showing good case for the failure to present the evidence to the ALJ, or the Commission decides on

¹ ORS 183.635.

² ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.

³ ORS 183.650(2).

⁴ ORS 183.650(3). A historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist either before or at the time of the hearing.

⁵ OAR 137-003-0655(5).

⁶ OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.

it own motion that the evidence is necessary.⁷

Alternatives The Commission has three different sets of decisions to make in this case. The alternatives are discussed generally below. Commission counsel will be available during the hearing to assist with a discussion of any specific alternatives that the Commission may wish to explore.

A. Transcript

- (1) If the Commission determines that the missing portion of the transcript (even with the stipulation) prevents it from fully considering the petition, it may (a) remand the matter to the hearing officer for further proceedings to correct the record or (b) strike all related findings and conclusions and issue a decision for the Petitioner.
- (2) If the Commission determines that no significant prejudice is created by virtue of the Department's stipulation to the Petitioner's characterization of the missing testimony, the Commission may proceed to evaluate the Petitioner's exceptions.

B. New Constitutional Argument

- (1) As the Department requested, the Commission may not hear any new arguments that were not raised in Petitioner's Initial Brief.⁸ (Attachment R)
- (2) If the Commission determines that Petitioner properly raised the argument in his Brief, the Commission may hear the argument, but it may not consider any new evidence to support the argument.
- (3) The Commission may remand the matter to the Hearing Officer to consider the new legal issue.

C. Exceptions/Proposed Findings

- (1) Where the Petitioner has challenged an ALJ finding of historical fact, the Commission may set aside the finding of historical fact only if it finds that the finding is not supported by a preponderance of the evidence in the record.
- (2) If the Commission sets aside a finding of historical fact, any alternative finding of fact adopted by the Commission must be based on substantial

⁷ OAR 340-011-0575(6).

⁸ OAR 340-011-0575(5)(a).

evidence in the existing record, and, if there is conflicting evidence, supported by a preponderance of the evidence.

- (3) The Commission may alter a proposed conclusion of law (or finding of fact that is not a historical fact) if it explains in its decision the reasons for making the modification.

Attachments

- A. Department's Reply Brief, dated September 1, 2004.
- B. Letter from Andrea Bonard to Jenine Camilleri, dated August 5, 2004.
- C. Petitioner's Amended Exceptions and Brief and Transcript of the Hearing Record, dated July 30, 2004.
- D. Letter from Andrea Bonard to Petitioner, dated July 22, 2004.
- E. Letter from Petitioner to Andrea Bonard, dated July 21, 2004.
- F. Letter from Petitioner to Andrea Bonard, dated July 20, 2004.
- G. Letter from Mikell O'Mealy to Petitioner, dated June 16, 2004.
- H. Letter from Jenine Camilleri to Petitioner, dated July 15, 2004.
- I. Letter from Jenine Camilleri to Petitioner, dated May 28, 2004.
- J. Letter from Petitioner to Mikell O'Mealy, dated May 20, 2004.
- K. Letter from Petitioner to Mikell O'Mealy, dated April 27, 2004.
- L. Letter from Jenine Camilleri to Petitioner, dated April 19, 2004.
- M. Department's Answering Brief, dated April 16, 2004.
- N. Letter from Mikell O'Mealy to Jenine Camilleri, dated April 13, 2004.
- O. Letter from Jenine Camilleri to Mikell O'Mealy, dated April 12, 2004.
- P. Letter from Mikell O'Mealy to Jenine Camilleri, dated March 30, 2004.
- Q. Letter from Jenine Camilleri to Mikell O'Mealy, dated March 29, 2004.
- R. Petitioner's Brief and Exceptions, dated March 1, 2004.
- S. Letter from Mikell O'Mealy to Petitioner, dated February 27, 2004.
- T. Letter from Petitioner to Mikell O'Mealy, dated February 27, 2004.
- U. Letter from Mikell O'Mealy to Petitioner, dated February 24, 2004.
- V. Letter from Petitioner to Mikell O'Mealy, dated February 24, 2004.
- W. Letter from Mikell O'Mealy to Petitioner, dated February 5, 2004.
- X. Letter from Petitioner to Mikell O'Mealy, dated February 4, 2004.
- Y. Letter from Mikell O'Mealy to Petitioner, dated January 9, 2004.
- Z. Petitioner's Petition for Commission Review, dated January 6, 2004.
- AA. Proposed Order for Assessment of Civil Penalty, dated December 10, 2003.
- BB. Notice of Hearing and Contested Case Rights, dated May 9, 2003.
- CC. Petitioner's Answer and Request For Hearing, dated October 28, 2002.
- DD. Notice of Violation, Department Order, and Assessment of Civil Penalty, dated October 15, 2002.
- EE. Exhibits from Hearing on July 16, 17, and 31, and August 14, 2003.
 - A1. Petitioner's Notice of Assessment of Civil Penalty No. AQ/AB-WR-96-315, dated December 5, 1996.
 - A2. Petitioner's Notice of Assessment of Civil Penalty No. AQ/OB-WR-99-

- 234, dated July 10, 2000.
- A3. Petitioner's National Pollution Discharge Elimination System Storm Water Discharge General Permit No. 1200-C (Permit), dated February 20, 2001.
 - A4. Report by Ferrero Geologic on Phase 3 of the subdivision, dated September 9, 2000.
 - A5. Department Letter from Andy Ullrich to Petitioner regarding issuance of Permit for Phase 3 of the subdivision, dated November 1, 2000.
 - A6. Department Letter from Andy Ullrich to Petitioner regarding citizen complaint of turbid water discharge from the subdivision, dated January 20, 2000.
 - A7. November 21, 2001 Inspection Report of subdivision written by Andy Ullrich, dated December 18, 2001.
 - A8. Photographs taken by Andy Ullrich on November 21, 2001.
 - A9. Citizen Complaint Letter to Andy Ullrich regarding turbid water discharge from the subdivision, dated November 30, 2001.
 - A10. Photographs taken by Martin Seybold on November 27, 2001.
 - A11. Notice of Violation to Petitioner from City of Grants Pass, dated November 21, 2001.
 - A12. Erosion Control Revisions/Corrections to Phase 2 of the subdivision by the Galli Group to City of Grants Pass, dated December 15, 2000.
 - A13. Incident Report to Richard Phillips from City of Grants Pass, dated February 7, 2002.
 - A14. Report by Ferrero Geologic to Petitioner regarding Erosion Controls on Phase 3 of the subdivision, dated December 26, 2001.
 - A15. Photograph taken by City of Grants Pass, dated December 13, 2001
 - A16. Complaint from Martin Seybold of City of Grass to Andy Ullrich regarding Erosion from subdivision, dated December 6, 2001.
 - A17. Josephine County Assessor Record of Petitioner's Property Ownership of 928 Valley View Drive in Grants Pass, dated July 23, 2003.
 - A.18. Sample Bottle showing 3.43 NTUs in Gilbert Creek, dated July 25, 2003. (Not provided as an attachment.)
 - A.19. Sample Bottle showing 47.7 NTUs in Gilbert Creek, dated July 25, 2003. (Not provided as an attachment.)
 - A.20. Sample Bottle showing 380 NTUs in Gilbert Creek, dated July 25, 2003. (Not provided as an attachment.)
 - A.21. Department Sample Bottle showing 970 NTUs in Gilbert Creek, dated July 25, 2003. (Not provided as an attachment.)
 - A101. Department Notes regarding Andy Ullrich's November 21, 2001 Inspection of subdivision.
 - A102. Department Letter to Petitioner regarding Cancellation of Permit for Phase 2 of the subdivision, dated December 29, 2000.

- A103. Map of East Side Drainage Basins of subdivisions by Wicks Engineering & Surveying, dated July 17, 1986. (Oversized materials; not provided as an attachment. Will be available at the EQC hearing, and EQC members can arrange to view in advance if desired.)
- A104. Runoff Estimates of the subdivision by Gary Wicks, dated August 8, 1997.
- A105. Map of Storm Water Drainage to Gilbert Creek by City of Grants Pass, dated July 16, 2003.
- A106. Pictures of Runoff from Mr. Phillips and Mr. Haggerman's properties.
- A107. Pictures of Erosion on Property located in Grants Pass.
- A108. Website document on Turbidity, dated June 6, 2003.
- A109. Partnership Agreement for Laurelridge Development, dated November 16, 1994.
- A110. Department Guidance on Best Management Practices For Storm Water Discharges Associated with Construction Activities, dated January 2003.
- A.111. Letter to Petitioner from Jenine Camilleri regarding informal meeting, dated December 18, 2002.
- A.112. Diagram of weephole, staples and curb at 928 Valley View Drive.
- A.113. Pictures of sediment runoff from developed lots in Grants Pass.
- A.113(ALJ duplicated this exhibit number). Final Plat for Phase 2 of subdivision by Wicks Engineering & Surveying, dated December 28, 2000. (Oversized materials; not provided as an attachment. Will be available at the EQC hearing, and EQC members can arrange to view in advance if desired.)
- A.114. National Rain Data for Grants Pass in November and December 2001 and February 2002.
- A.114(ALJ duplicated this exhibit number). Pictures of sediment runoff down street.
- A.115. Pictures of all-terrain vehicle disturbance in the subdivision.

Report Prepared by: Mikell O'Mealy
Assistant to the Commission
Phone: (503) 229-5301



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue

Portland, OR 97204-1390

503-229-5696

TTY 503-229-6993

September 1, 2004

Stark & Hammack, P.C., Attorneys at Law,
c/o Richard Stark
201 W. Main Street, Suite 1B
Medford, Oregon 97501

Environmental Quality Commission
c/o Mikell O'Mealy, DEQ-Assistant to the Director
811 SW 6th Avenue
Portland, OR 97204

Re: Reply Brief
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491
DEQ Case No. WQ/SW-WR-02-015

Office of the Director
Oregon DEQ

SEP 01 2004

RECEIVED

Dear Mr. Stark:

Enclosed please find the Department of Environmental Quality's Reply Brief regarding the appeal of the Proposed Order issued in the above case. The Department would like to schedule your client's appeal in front of the Environmental Quality Commission (EQC). The next EQC meeting that has availability for your appeal is being held in Portland, Oregon on December 9 and 10, 2004. Please let me know if either of these dates will work for you. Please contact me at (503) 229-6775 regarding the scheduling of your appeal.

Sincerely,

Jenine Camilleri

Jenine Camilleri
Environmental Law Specialist
Office of Compliance and Enforcement

Enclosure:

cc: Mikell O'Mealy, DEQ-Assistant to the Director, Environmental Quality
Commission, HQ, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

1
2
3 IN THE MATTER OF:
4 WILLIAM H. FERGUSON,

5 RESPONDENT.

) DEPARTMENT'S REPLY BRIEF

) NO. WQ/SW-WR-02-015
) JACKSON COUNTY

6
7 The Department of Environmental Quality (the Department), submits this Reply Brief to the
8 Environmental Quality Commission (Commission) for its consideration in the appeal of the
9 Administrative Law Judge's (ALJ's) Proposed Order in Notice of Violation, Department Order and
10 Assessment of Civil Penalty No. WQ/SW-WR-02-015 (Notice), filed by William H. Ferguson,
11 Petitioner.

12 I. CHRONOLOGY OF BRIEFS

13 On March 1, 2004, Respondent submitted to the Commission his Exceptions and Brief. On
14 April 16, 2004, the Department submitted to the Commission its Answering Brief. In the
15 Department's Answering Brief, the Department responded to the Exceptions of Findings of Fact,
16 Exceptions of Law, and Legal Argument that Respondent raised in his Exceptions and Brief. The
17 Department also requested that Respondent submit a transcript of the testimony described in his
18 Exceptions and Brief.

19 On May 20, 2004, Respondent notified the Department that some of the hearing could not
20 be transcribed because testimony between Tape 1, Side 2 and Tape 2, Side 1, and on Tape 4, Side 1
21 was missing. The cause of the loss of testimony is undetermined.

22 On May 28, 2004, the Department sent a letter to Respondent stating that the Department
23 was willing to either stipulate to any missing testimony described in Respondent's Exceptions and
24 Brief, or agree to reopen the record for rehearing on the missing parts. On June 15, 2004, the
25 Department sent a letter to Respondent stating that the only testimony that Respondent referenced in
26 his Exceptions and Brief that was missing from the record was the testimony of Mr. Phillips and

27 ///

1 Mr. VanHeuit, which was recorded on Tape 4, side 1. The Department also stated that it would
2 stipulate to Respondent's description of their testimony in his Exceptions and Brief.

3 On June 16, 2004, Ms. Mikell O'Mealy, Assistant to the Commission, sent a letter to
4 Respondent requesting that he submit a Supplemental Brief that included the transcript of the
5 testimony described by Respondent in his Exceptions and Brief that existed in the hearing record.

6 On July 30, 2004, Respondent submitted to the Commission an Amended Exceptions and
7 Brief (Amended Brief) and a transcript of the hearing record, except for the missing testimony
8 between Tape 1, Side 2 and Tape 2, Side 1, and on Tape 4, Side 1. The Department and
9 Respondent agree on the substance of Mr. Phillips and Mr. VanHeuit's missing testimony from
10 Tape 4, Side 1. See Amended Brief, Page 2, lines 1-2.

11 The Department is now presenting in this Reply Brief its argument on new issues that were
12 raised in Respondent's Amended Brief. The Department responded in its April 16, 2004 Answering
13 Brief to all other arguments reraised by Respondent in his July 30, 2004 Amended Brief.

14 II. ARGUMENT

15 **Commission should not dismiss the case.**

16 Respondent suggests that the Commission dismiss the case because certain taped testimony
17 is not in the record. See Amended Brief, Page 1, lines 24-26, through Page 2, lines 1-3. Two pieces
18 of taped testimony are missing, but this neither disadvantages Respondent nor is a material defect in
19 this matter.

20 First, the testimony on Tape 4, Side 1 is missing from the record, which included testimony
21 from Respondent's witnesses, Mr. Phillips and Mr. VanHeuit. Mr. Phillips and Mr. VanHeuit's
22 testimony is the only testimony referenced in Respondent's Exceptions and Brief that is missing
23 from the record. The Department stipulated to Respondent's description of their testimony in his
24 Exceptions and Brief. Therefore, Respondent is not at a disadvantage because the Department is
25 agreeing to his description of Mr. Phillips and Mr. VanHeuit's testimony in his Exceptions and
26 Brief.

27 ///

1 Second, the testimony between Tape 1, Side 2 and Tape 2, Side 1 is missing. This is likely
2 the testimony Department's first witness, Andy Ullrich. The beginning of Mr. Ullrich's testimony
3 is recorded on Tape 1, Side 1, however his remaining testimony on Tape 1, Side 2 was likely
4 recorded over. As a result, Mr. Ullrich's initial foundation testimony regarding the photographs he
5 took during his November 21, 2001 inspection, which was marked as the Department's Exhibit No.
6 8, and the ALJ's granting of the Department's motion to admit the exhibit into the record is missing.
7 However, additional foundation testimony by Mr. Ullrich about these photographs and what he
8 observed during his inspection was recorded during hearing. See Transcript, Tape 4, side 2, pages
9 20-21; Tape 5, Side 1, pages 5-16, and Tape 8, side 1, pages 6-8. Therefore, the Department
10 contends that although some of Mr. Ullrich's testimony is missing, there is sufficient evidence on
11 the record to show that the Department met its burden of proof and for the Commission to uphold
12 the ALJ's decision in this case.

13 The Department requests that the Commission not dismiss this case. If the Commission
14 finds that it cannot uphold the ALJ's decision in this case because of the absence of the two pieces
15 of taped testimony, then the Commission should remand the case to the ALJ to hear testimony on
16 the missing parts of the hearing.

17 **Commission should not hear additional legal argument.**

18 In the Amended Brief, Petitioner presented additional legal argument regarding the
19 constitutionality of the definition of "pollution" found in ORS 468B.005(5). See Amended Brief,
20 Page 12, lines 6-8. This argument is outside the scope of the original pleadings in the Exceptions
21 and Brief. See Exceptions and Brief, Pages 9-11. Because this legal argument was not raised at the
22 contested case hearing or in the initial Exceptions and Brief, Respondent moves that the
23 Commission disallow this additional legal argument.

24 ///

25 ///

26 ///

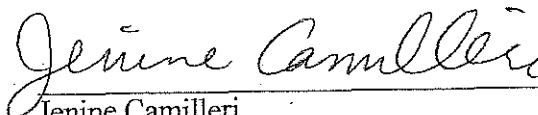
27 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

III. CONCLUSION

Based on Respondent's failure to raise any sufficient legal or policy reason to alter the ALJ's Proposed Order, the Department requests that the Commission adopt the Proposed Order as its Final Order.

9/11/04
Date


Jenine Camilleri
Environmental Law Specialist

CERTIFICATE OF SERVICE

I hereby certify that I served the Brief on the 1st day of September, 2004 by

PERSONAL SERVICE upon

The Oregon Environmental Quality Commission
c/o Mikell O'Mealy, Assistant to the Commission
811 SW Sixth Avenue
Portland, OR 97204

and upon

William H. Ferguson
5200 Pioneer Road
Medford, Oregon 97501

Richard Stark
Attorney at Law
201 West Main Street, Suite 1B
Medford, Oregon 97501

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at
the U.S. Post Office in Portland, Oregon, on September 1, 2004





Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390

503-229-5696

TTY 503-229-6993

August 5, 2004

Via Personal Delivery

Jenine Camilleri
Oregon Department of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204

RE: WQ/SW-WR-02-015

Dear Ms. Camilleri:

The Environmental Quality Commission received the respondent's supplemental brief in the above referenced case on August 2, 2004. The Department now has 30 days, or until September 1, 2004 to submit a reply brief. To file the brief, please mail these documents to Mikell O'Mealy, on behalf of the Environmental Quality Commission, at 811 SW 6th Avenue, Portland, Oregon 97204, with copies to Richard A. Stark.

If you have any questions, please contact me at 503-229-5990.

Sincerely,

Andrea Bonard
Acting Assistant to the Commission

cc: Richard A. Stark, Stark and Hammack, P.C., 201 West Main Street, Suite 1B, Medford,
Oregon 97501

STARK AND HAMMACK, P.C.

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

July 30, 2004

VIA FEDERAL EXPRESS

Ms. Andrea Bonnard
Acting Assistant to the Commission
Environmental Quality
811 SW 6th Avenue
Portland, OR 97204

RE: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Issued December 10, 2003, by Teresa Hogan, Administrative Law Judge
Our File No.: RP 3045

Dear Ms. Bonnard:

Enclosed please find the *Respondent William H. Ferguson's Amended Exceptions and Brief*. Also enclosed is a copy of the transcript which I had prepared of the proceedings that were held in this case. Please note that the closing arguments were not transcribed.

I have sent a copy of this letter and a true copy of the *Amended Exceptions and Brief* and of the transcript to Jenine Camilleri.

Thank you for your attention to this matter.

Very truly yours,

STARK AND HAMMACK, P.C.



Richard A. Stark
Counsel for Respondent
William H. Ferguson

RAS:df
Encl.
cc: Jenine Camilleri
client

RECEIVED

AUG 02 2004

Oregon DEQ
Office of the Director

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:

WILLIAM H. FERGUSON

Respondent.

No. WQ/WS-WR-02-015

RESPONDENT
WILLIAM
H. FERGUSON'S
AMENDED
EXCEPTIONS AND BRIEF

COMES NOW the Respondent, William H. Ferguson, hereinafter referred to as "Ferguson", and presents the following amended exceptions and brief in support of his appeal to the Environmental Quality Commission of the proposed Order assessing civil penalty issued December 10, 2003, by Teresa Hogan, Administrative Law Judge.

After filing the initial brief it was requested that a transcript be prepared. When the transcript was prepared it was discovered that substantial portions of the transcript involving important witnesses was not available. A transcript has been sent to the Department of Environmental Quality, hereinafter referred to as "DEQ", with this amended brief and references in this brief will be to the transcript referring to the tape number, side number, and page number.

The omissions were testimony that occurred between Tape 1, Side 1 and Tape 1, Side 2 (45 minutes); and Tape 4, Side 1 is blank (45 minutes). Exhibit 8, a key exhibit, was admitted into the record during the testimony that was not recorded. The testimony offered

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
100 MAIN ST., SUITE 1B
SEASIDE, OREGON 97138
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

1 by Ferguson from Phillips and Vandehoff was not recorded and therefore has been
2 stipulated to by the DEQ. The Respondent contends that because of the failure to preserve
3 the record this action should be dismissed.

4 The Respondent presents the following Summary of Argument, Exceptions to the
5 Findings of Fact, Exceptions to Conclusions of Law, and Legal Argument.

6 **SUMMARY OF ARGUMENT**

7 The evidence at the hearing showed that there was a very small discharge of water
8 into the storm sewer from 928 Valley View which was property owned by the partnership
9 of which the Respondent, William Ferguson, owned two-thirds. This discharge was
10 approximately five gallons per minute for a short duration and the water that actually went
11 into the street came from a settling pond and was filtered by silt fences before it went into
12 the street. This very small discharge from the property owned by the partnership is
13 compared to the discharge on the very dates in question, November 21 and 27, 2001, from
14 the Phillips and Hagerman lots. These lots were not controlled by the partnership and the
15 discharge from those lots comprised a very large discharge of decomposed granite and soil
16 directly into the storm system. This discharge filled up a storm drain which remained filled
17 up for at least two weeks including November 21 and 27, 2001. The law requires that the
18 discharge **by itself** must cause the pollution. It could not be said by a preponderance of the
19 evidence presented at the hearing that the discharge from the property owned by the
20 partnership **by itself** caused a change in color in Gilbert Creek or caused pollution under the
21 law.

22 There was evidence that the actual discharge from Ferguson's lot at 928 Valley View
23 was injurious to fish or aquatic life.

24 As to the alleged violations relating to Phase III, the evidence at the hearing showed
25 that no water-bearing silt left the subdivision premises nor did such water ever come close
26 to waters of the state.

1 8. During the late summer or early fall of 2001, at the request of the City
2 of Grants Pass, Ferguson conducted additional grading operations in
3 Phase II of the subdivision to flatten fill slopes on some lots not owned
4 by the development partnership. The disturbed ground and the graded
5 areas were hydroseeded. Ferguson believed that the necessary
6 hydroseeding would be done too late in the year to have its best effect.
7 However, Ferguson caused a settling pond and a series of silt fences
8 and hay bales to be constructed to make sure that the runoff from the
9 newly disturbed ground was filtered and that unfiltered runoff did not
10 reach the storm system. As expected the hydroseeding did not result
11 in good grass growth to fully stabilize the soil. (Test. of Ferguson;
12 Tape 6, Side 2, pages 11-15; Tape 7, Side 2, pages 2-5.)

13 **3.**

14 Exception is taken to Findings of Fact number 9. That Finding should be replaced
15 with the following Finding of Fact:

16 9. Soil was disturbed by all terrain vehicle activity on the subdivision in
17 Phase III. This activity was not conducted with permission, but, had
18 been a longstanding problem. (Test. of Daniel Ferguson; Tape 5, Side
19 2, pages 22-23; Tape 6, Side 1, page 1.) The runoff from the soil that
20 was disturbed by all terrain vehicle activity did not leave the boundary
21 of the Laurelridge Subdivision. (Unrebutted Test. of Daniel
22 Ferguson; Tape 4, Side 2, page 16; Tape 5, Side 1, pages 17-18.)(Test
23 of Ferguson; Tape 6, Side 2, pages 5-10.)

24 **4.**

25 Exception is taken to Findings of Fact number 12. That Finding should be replaced
26 with the following Finding of Fact:

1 12. Almost all of the land in Phase III of the subdivision drained into Blue
2 Gulch to the west which contained a seasonal stream. (Test. of
3 Ferguson; Tape 6, Side 2, pages 5-10; Ex. 103.) However, none of the
4 water containing silt from Phase III reached Blue Gulch in that there
5 were a series of redundant wire mesh-backed steel fence post anchored
6 silt fences in the ravines that prevented any silt-filled water from
7 reaching Blue Gulch. (Ex. 103; Unrebutted Test. of Daniel Ferguson
8 and Ferguson; see 4 above.)

9 5.

10 Exception is taken to Findings of Fact number 13. That Finding should be replaced
11 with the following Finding of Fact:

12 13. Schedule F, Section B, Condition 1 of the permit requires the permittee
13 to properly operate and maintain all facilities. Schedule A, Section 4,
14 Paragraph(c) of the permit requires that, for filter fences, sediment
15 shall be removed before it reaches one third of the above ground fence
16 height. (Ex. 3.) The wire mesh steel post anchored silt fences
17 installed on the property in steep areas had to be sunk into the ground
18 to stay in place so that it was reasonable to deviate from Schedule A,
19 Section 4 in this particular case. The silt fences used by Daniel
20 Ferguson were not the standard wood stake fences, but rather wire
21 mesh fabric fences with steel fence posts successfully anchoring the
22 fences in place. (Test. of Daniel Ferguson; Tape 5, Side 1, pages 4-5.)
23 Schedule A provides that "an erosion and sediment control plan
24 (ESCP) shall be developed and implemented to prevent the discharge
25 of significant amounts of sediment to surface waters." (*Emphasis*
26 *supplied.*) All other performance limitations refer to discharge to

1 surface waters or turbid flows of water leaving the subdivision that are
2 not filtered or settled to remove turbidity. The un rebutted evidence
3 was that in Phase III all of the water that left the site was filtered and
4 was protected by redundant silt fences in the ravines and draws.
5 (Unrebutted Test. of Daniel Ferguson and Ferguson see paragraph 4
6 above.)

7 6.

8 Exception is taken to Findings of Fact number 14. That Finding should be replaced
9 with the following Finding of Fact:

10 14. Daniel Ferguson performed erosion control maintenance on the
11 subdivision for Ferguson. In most cases, he was the only person
12 performing such maintenance but hired additional help when needed.
13 He was always available for work in the afternoons and evenings.
14 Ferguson was available on call for instances where he was needed to
15 address erosion control issues. (Test. of Daniel Ferguson; Tape 5, Side
16 2, pages 6-10.)

17 7.

18 Exception is taken to Findings of Fact number 16 and in that the discharge from 928
19 Valley View was insignificant and the following Finding of Fact should be made:

20 16. On November 21, 2001, there was an event that occurred on property
21 owned by Phillips and Hagerman in Phase II of the Laurelridge Subdivision.
22 Some large hillside areas washed down on both Phillips' and Hagerman's
23 lots. The amount of silt and granite that were washed into the system was
24 extensive and was not filtered by any devices. The storm drain settling
25 devices on November 21, 2001, in the Phillips and Hagerman area were full
26 of dirt and overflowing. (Ex. 6; Test. of Phillips (stipulated to); Test. of

1 Hagerman-Tape 1, Side 2, pages 10-21; and Test. of Ferguson-Tape 7, Side
2 1, pages 2-6.) Phillips and Hagerman testified that the storm drain in the area
3 was filled up and that the storm drain was not cleaned out for a week or two
4 after November 21, 2001, and probably was not cleaned out until January or
5 February of 2002. The discharge from the Phillips and Hagerman event was
6 unfiltered and untreated granite and soil, whereas the small discharge from
7 928 Valley View was thrice filtered and settled water. (Test. of Daniel
8 Ferguson-Tape 4, Side 2, pages 9-17; and Test. of Ferguson-Tape 7, Side 1,
9 pages 4-5.)

10 **8.**

11 Exception is taken to Findings of Fact number 17. DEQ specifications on silt fencing
12 allow some dust in the water. That Finding should be replaced with the following Finding
13 of Fact:

14 17. Staley testified that on November 21, 2001, there may have been
15 sediment laden runoff entering the storm drain system in Phase II other
16 than at 928 Valley View. But, that testimony is called into question
17 because there was no evidence of any alleged runoff. Two people in
18 the group that was inspecting the subdivision that day had digital
19 cameras and took pictures of other sites. The only pictures of Phase
20 I and II were of 928 Valley View. (Test. of Staley; Tape 3, Side 1,
21 pages 17-19.)

22 **9.**

23 Exception is taken to Findings of Fact number 18. The fact that the silt fences must
24 be built into the ground to last was explained by Daniel Ferguson and none of the discharge
25 from the redundant sediment fences on Phase III left the subdivision nor came anywhere
26 near Blue Gulch. (Unrebutted Test. of Daniel Ferguson and Ferguson-see paragraph 4

1 above.)

2 **10.**

3 Exception is taken to Findings of Fact number 19. On November 21, 2001, as shown
4 in Ex. 8, photographs 4, 5, 11, 12, and 13 there were insignificant failures of various
5 portions of a few sediment control devices in Phase III of the wire mesh fences and steel
6 posts but none of those releases left the subdivision nor did they approach Blue Gulch
7 because of the redundant silt fences below and to the west in the gullies for the runoff from
8 Phase III. (Unrebutted Test. of Daniel Ferguson and Ferguson-see paragraph 4 above.)

9 **11.**

10 Exception is taken to Findings of Fact number 20. At the end of this Finding should
11 be added:

12 The extent of the runoff was shown in Ex. 6 and the runoff from the
13 Phillips property was completely unfiltered and much more substantial
14 than any minimal runoff from 928 Valley View. (Test. of Phillips and
15 Hagerman-see paragraph 7 above.)

16 **12.**

17 Exception is taken to Findings of Fact number 22. There is no evidence that runoff
18 from property under the partnership's control contributed substantially to the sediment in
19 the water discharge from the storm drain pipe into Gilbert Creek and that the release caused
20 an increase in turbidity. By far the most significant discharge was from the Phillips and
21 Hagerman properties and the unrebutted testimony was that the discharge from 928 Valley
22 View was no more than five gallons per minute for a short duration. (See paragraph 7
23 above.)

24 **13.**

25 Exception is taken to Findings of Fact number 25. Meyers testified using only
26 pictures and no actual data that the turbidity in Gilbert Creek caused by the discharge from

1 the storm drain system serving the subdivision could tend to have a detrimental impact on
2 fish habitat. He acknowledged that the time over which the fish habitat was exposed was
3 critical and could not state for sure that there was any likelihood of impact on the fish
4 habitat from the evidence presented. Meyers did not testify that the short duration of the
5 five gallon per minute water containing dust from 928 Valley View had any effect on fish
6 habitat. (Test. of Meyers; Tape 3, Side 2, page 20.)

7 **14.**

8 Exception is taken to Findings of Fact number 26. That Finding should be replaced
9 with the following Finding of Fact:

10 26. No measurements of turbidity measured in NTU's were taken on
11 November 21 or November 27, 2001, either of water in Gilbert Creek
12 of the subdivision runoff. (Stipulated Test. of Vandehoff.) Vandehoff
13 PE testified that without a measurement of the NTU's which could be
14 done very simply, no conclusions could be made as to the extent of the
15 turbidity on November 21 or November 27, 2001.

16 **15.**

17 Exception is taken to Findings of Fact number 27. Ferguson was confronted with a
18 failure of a portion of his sediment control system in Phase II and Phase I of his subdivision
19 on November 21 and November 27, 2001. The resulting filtered and settled discharge was
20 insignificant in comparison to the discharge from the Phillips and Hagerman incident and
21 there was no credible testimony that the filter dust from 928 Valley View contributed
22 significantly to the change in color of Gilbert Creek. The evidence failed to show that the
23 discharge of water from lots owned by the Laurelridge Partnership, by itself, caused any
24 pollution to Gilbert Creek. (See paragraph 6 above.)

25 **16.**

26 The following Findings of Fact number 29, should be added to read as follows:

1 29. Engineer Gary Wicks testified that all of the drainage from the
2 Laurelridge Subdivision constituted only ten percent to fifteen percent
3 of the whole drainage of the area that drained into the city storm sewer
4 in question which flowed into Gilbert Creek. (Test. of Wicks; Tape 1,
5 Side 2, pages 2-6.)

6 **EXCEPTIONS TO CONCLUSIONS OF LAW**

7 PETITIONER accepts to the Conclusions of Law numbers 1 through 7. The Facts
8 did not support Conclusions of Law numbers 1, 2, and 7, and, consequently, the other
9 Conclusions are irrelevant in this particular case.

10 **LEGAL ARGUMENT**

11 The operative section controlling the legal test to be applied to this case is found in
12 the definition of pollution under ORS 468b.005(5) reads, in part:

13 "Pollution" or "water pollution" means such alteration of the physical,
14 chemical or biological properties of any waters of the state, including change
15 in temperature, taste, color, turbidity, silt or odor of the waters, or such
16 discharge of any liquid, gaseous, solid, radioactive or other substance into any
17 waters of the state, which will or tends to, either **by itself** or in connection
18 with any other substance, create a public nuisance or which will or tends to
19 render such waters harmful, detrimental or injurious to public health, safety
20 or welfare, or to domestic, commercial, industrial, agricultural, recreational
21 or other legitimate beneficial uses or to livestock, wildlife, fish or other
22 aquatic life or the habitat thereof. (*Emphasis supplied.*)

23 The statute defining pollution states that the alteration to the waters of the state must
24 "by itself" cause the problem complained of.

25 In this particular case there is no contention that the silt from Mr. Ferguson's
26 property was combined with any other substance, so, the Respondent contends that there

1 must be some testimony tying in the actual small discharge from Ferguson's lot as having
2 a tendency to be injurious to fish or aquatic life. In the case at hand, on the November 21,
3 2001, the evidence showed that there were two significant events in the Laurelridge
4 Subdivision not under the control of the partnership. The Phillips and Hagerman lots, as
5 shown by Ex. 6, had banks completely fall onto the street and consequently into the storm
6 system with no silt filters, no settling ponds; but, an actual discharge of soil and dirt into the
7 storm system. The testimony was unrebutted that a portion of the storm system, a storm
8 drain, was completely filled with decomposed granite and soil and remained that way for
9 a period in excess of two weeks and probably for a month or two. On the other hand, the
10 discharge from 928 Valley View had gone through a settling pond and a series of silt fences,
11 including a silt fence directly behind the weephole before a very small amount of water was
12 discharged into the street. There was no showing at all that the discharge from the
13 Laurelridge Partnership property "by itself", as required under the statute, caused any
14 problem with Gilbert Creek.

15 In addition, Engineer Gary Wicks testified that the area involved in the Laurelridge
16 Subdivision constituted approximately ten percent to fifteen percent of the entire area of that
17 part of Grants Pass which drained into Gilbert Creek and the drain pipe involved in this
18 case.

19 The evidence is simply not sufficient when you consider that the Department of
20 Environmental Quality has the burden of proof by showing by a preponderance of the
21 evidence that a violation has occurred. No such finding can be made under the facts
22 presented in this case. To change a finding of a historical fact of the hearing officer the
23 Commission must determine that the finding of historical fact made by the hearing officer
24 is not supported by a preponderance of the evidence of the record. (See 1999 Oregon Laws
25 Chapter 849 Section 12.2 and 12.3.) In this particular case, the preponderance of the
26 evidence certainly does not support that the Ferguson minor discharge "by itself" could

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
100 MAIN ST., SUITE 1B
SEASIDE, OREGON 97138
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

1 cause the changes to the color of Gilbert Creek. To the contrary, there was unrebutted
2 testimony that the substantial discharge into the storm drain by the Phillips and Hagerman
3 incident would be the cause of any problems and that the ten percent or fifteen percent of
4 drainage to the pipe in question, from Laurelridge Subdivision, is inconsequential to the
5 overall flow into that pipe.

6 If the Respondent, William H. Ferguson, is held liable for "pollution" under ORS
7 468b.005(5) then that statute is unconstitutionally broad and violates the due process and
8 equal protection clauses of the Oregon and United States Constitutions.

9 **CONCLUSION**

10 The decision of the hearing officer should be reversed.

11
12 DATED this 30th day of July, 2004.

13
14 Respectfully submitted,

15 STARK AND HAMMACK, P.C.

16
17 By: 

18 Richard A. Stark, OSB #69164
19 Of Attorneys for William H. Ferguson
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of July, 2004, I served the foregoing:

**RESPONDENT WILLIAM H. FERGUSON'S
AMENDED EXCEPTIONS AND BRIEF**

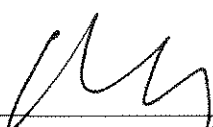
on the following:

Ms. Jenine Camilleri
Oregon Department of Environmental Quality
Office of Compliance and Enforcement
811 SW Sixth Avenue
Portland, OR 97204

by mailing a true copy thereof contained in a sealed envelope with postage fully prepaid thereon, addressed to the above individual at the address indicated, and deposited in the United States Mail at Medford, Oregon.

DATED this 30th day of July, 2004.

STARK AND HAMMACK, P.C.

By: 
Richard A. Stark, OSB #69164
Of Attorneys for Respondent

START: TAPE 1, SIDE 1

HOGAN This is Theresa Hogan, Administrative Law Judge. We're on the record in the case of William H. Ferguson, Case Number 107491. We are at the Department of Environmental Quality in Medford, Oregon, on July 16, 2003. The time is 9:02. Present in the hearing room are the Petitioner, Mr. Ferguson, Dan Ferguson and their attorney, Mr. Stark.

STARK: Are we the Petitioner? We're not the Petitioner are we? We'd be the respondent. I think.

HOGAN I always. I guess I'm used to doing the DMV hearings, where people are.

CAMILLERI Mr. Ferguson requested the hearing.

STARK What are your exhibits marked?

CAMILLERI My exhibits are marked 1, 2.

STARK What does it say on the top there? I can't read that.

CAMILLERI That's actually, these are my exhibits and I just have an exhibit like that.

HOGAN So we tend to refer to them as being called agency and requester in these hearings. We call them Petitioners in the DMV hearings, which is what I normally do. So the Requester then is Mr. Ferguson and he is present along with Dan Ferguson and the attorney for the Requester, Mr. Stark. Present for the agency is agency representative, Jenine Camilleri, and we also have present for the Department.

CAMILLERI This is Andy Ullrich, Bill Meyers, Martin Seybold, and then, that's Mr. Ferguson's son. These are our witnesses here.

HOGAN Right, is there going to be a request for exclusion of witnesses? On either party, Mr. Stark?

WILLIAM FERGUSON I'm sorry; I don't hear as good as I should.

STARK Do you think we should exclude witnesses?

WILLIAM FERGUSON I don't think it's necessary.

STARK Okay.

CAMILLERI We actually have another witness who is coming.

HOGAN I was just wanting to check and see if you have any objection to witnesses for either side being present in the hearing.

CAMILLERI No, I do not.

HOGAN Okay, then I will not exclude witnesses. The pretrial. Well, just as a preliminary matter. I was, this was previously assigned to Administrative Law Judge Dreyer and it was reassigned to me. Is there any objection to me as the judge, Mr. Stark?

STARK No.

CAMILLERI No.

HOGAN Okay and you were given notice of that, but, it was a little bit shorter than we normally give because the reassignment was within the fourteen days. In the pretrial order it appeared that the parties were to exchange exhibits at the time of hearing, is that correct?

STARK Yes, we kind of unilaterally hoped that you would go along with...Jenine will put on her case and so we don't have doubling up of exhibits I won't mark mine until after I see what comes in from the state.

HOGAN Do you need to inspect each others exhibits at this time or...?

CAMILLERI I don't think so. Typically it's...the hearings that I've done we don't exchange them, we just go forward with our case and so, I don't have a problem with not looking at exhibits.

HOGAN Are there any unresolved discovery matters or preliminary matters, Mr. Stark.

STARK No, I don't think so.

CAMILLERI No.

HOGAN Okay. Just checking.

STARK I did subpoena Mr. Seybold and I don't know if he was able

to respond to my subpoena. I got a letter, I mean a call from the City Attorney that I was late and I don't know how much he was able to get together for my subpoena so maybe we could handle that.

SEYBOLD Judge, Martin Seybold, City of Grants Pass. I received the subpoena at a little bit after 3 o'clock yesterday afternoon and I produced what I could in that period of time. The City Attorney did contact Mr. Stark and tell him that I didn't think we'd be able to provide all the things he wanted. Here are photographs, all the photographs that I could find. They're all electronic. And here are copies of incidence reports that I had with my files from the police department and here is a map of the drainage of the area and this illustrates some of the sites and here is a warning that was issued to Mr. Ferguson. And then I did have some other photographs and things, but, I wasn't able to copy those and you're welcome to copy them.

CAMILLERI These are your photographs?

SEYBOLD Those are my photographs I provided you in the past.

CAMILLERI Yes.

STARK Do you have some other photographs?

CAMILLERI These, I was going to give back to you.

SEYBOLD Okay, well if you want copies of these you're welcome to copy any of these.

STARK Do any of those involve any other alleged violations other than Mr. Ferguson's?

SEYBOLD These do not, no.

STARK Okay, how many are on here, just for.

SEYBOLD They aren't alleged, they were cited.

STARK Just so I know what's involved here, how many photos approximately?

SEYBOLD Probably about forty photographs.

STARK Okay. Well it might help me if I could go down my office

just for a second and tell my, if it's alright with Mr. Seybold, just have them go to Copy Quick or Pronto or somebody and have them, have colored photos made.

HOGAN Okay, we'll take about five minutes. And your office is right down the stairs, right? Okay.

STARK Yes.

HOGAN We'll take five minutes and let you do that.

STARK And then I can, if I can use the Plaintiff's exhibits. Yours are yellow. Shall I just use Defendant's exhibits?

HOGAN That will be fine and I think you're...

STARK We're 101.

HOGAN I have to look at the pretrial order. I know that you have separate--1 to 100 and 101 to 200. Okay, so we will go off the record for a moment.

HOGAN Okay, we're back on the record and were there any other preliminary matters?

CAMILLERI I have a preliminary matter. In the original action we included a department order that required Mr. Ferguson to submit a new plan to the Department for Phase III and at this point we are requesting that that order be satisfied and you don't have to make a ruling on it.

STARK Okay, now, so, is that in this action. Okay? So, you're just withdrawing one thing we have to worry about?

CAMILLERI Right. We're saying that Mr. Ferguson submitted some additional documents to us last week that lead us to believe that the Department order will be satisfied.

HOGAN Do you want to withdraw that now or you or are you saying you're planning on withdrawing that upon the receipt of further documents?

CAMILLERI If I...we don't necessarily think we need to talk about that today. So, would that mean I'd need to withdraw it from the record today?

HOGAN Well, we'll go ahead and take all the evidence that you want

to present and then maybe at the conclusion you can let me know what the status is as there are two, essentially two alleged violations, right?

CAMILLERI There's two alleged violations and then there is a department order.

HOGAN And then the order to produce the plans for Phase III.

CAMILLERI Yeah, which we're in the process of getting that, so I think that we're willing to at this point withdraw it.

HOGAN So are you withdrawing it right now or do you want to wait? That's what I'm trying to find out.

CAMILLERI Well, I don't think it's under the hearing it's going to make a difference.

HOGAN Okay, so you are withdrawing now the order to produce the plan?

CAMILLERI Correct.

WILLIAM FERGUSON What was the, give me the date again, because I dug out the other one. I've been digging through here. Was it in March?

UNKNOWN PERSON March 22, 2002.

WILLIAM FERGUSON 2000 and?

UNKNOWN PERSON 2002.

HOGAN Any preliminary matters, Mr. Stark?

STARK Not that I'm aware of.

CAMILLERI I have another preliminary matter or I believe that I would take it up as a preliminary matter. In our exhibit in the P and H factors I was going to enter into the record the exhibits for that and explain the Department's determination because they're just factual. I wouldn't have anybody giving testimony on them.

HOGAN These are exhibits that you want to offer to support the formula for the penalty, is that it?

CAMILLERI Yes.

HOGAN Actually what I'm going to do is just go ahead and let you present your, if we're ready to go with the opening statements. Then if you want to present exhibits without a foundational witness you can just go ahead and present those exhibits and we'll take them, you know, that'll be part of the evidentiary record, okay. Okay, opening statements from DEQ.

CAMILLERI The Department will prove today that in 1997 Mr. Ferguson began construction of the Laurelridge Subdivision in Grants Pass, Oregon. There are three phases to this development project. Mr. Ferguson obtained from DEQ a national pollution discharge eliminations system, which is otherwise an NPDS, general storm water discharge 1200C permit from DEQ and that permit allows Mr. Ferguson to conduct grading on the property, but he is required to implement an erosion control plan under the permit to prevent significant amounts of sediment from leaving the construction site and also to prevent the discharge of any soils from his property to waters of the state. However, in November of 2001 the Department received citizen complaints regarding sediment flowing off of Mr. Ferguson's site and into Gilbert Creek which is waters of the state. Representatives from the Department and also the City of Grants Pass conducted inspections on November 21st and November 27th of 2001 at Mr. Ferguson's site and they observed at that time that the erosion controls on the site were not properly installed or maintained. And as a result muddy water was leaving the site and entering the storm water drains which flow down to Gilbert Creek and as a result Mr. Ferguson caused pollution to waters of the state in violation of ORS 468B.0251a. These discharges changed the physical properties of the water by changing the color of the water, they're very turbid, extremely turbid waters entering Gilbert Creek, and that the turbidity in the water may be harmful or detrimental to the fish or other aquatic species living in the creek. This discharge occurred over more than one day and it also occurred because Mr. Ferguson failed to properly install and maintain erosion controls on his site. As a result, Mr. Ferguson also violated schedule F of his permit which requires him to ensure that

he properly maintains and installs erosion controls on the property and Mr. Ferguson has had a lot of conversations with DEQ and the City of Grants Pass over the course of the last five years and the Department believes that Mr. Ferguson acted negligently in failing to install the erosion controls properly and to maintain them on Phases II and III of his construction site. We've gone out to the property and talked with him. The City of Grants Pass has sent him warning letters, as well as DEQ. There have been numerous conversations, verbal and written, and we just believe that Mr. Ferguson failed to take reasonable care to avoid these discharges from occurring and as a result seeks that Judge Hogan today affirm the \$5,400.00 civil penalty the Department has issued against Mr. Ferguson.

HOGAN And Mr. Stark, did you wish to make an opening statement?

STARK Yes. In the Phase II is the portion of Mr. Ferguson's subdivision, the Laurelridge Subdivision, that it's alleged to that the pollution to the waters of the state has occurred and in the winter of 2002 essentially, pardon me, the winter of 2000-2001 all of the erosion control measures were in place and operated reasonably during that winter. The City of Grants Pass did an inspection in the early part or summer of 2001 and I guess Mr. Galli a engineer requested some changes to the Phase II. The Phase II permit itself had actually been terminated and what you do when you terminate a permit is, Mr. Ferguson had completed his plan, lots were being sold, private owners were taking over control of lots, and the permit was terminated. After that date, Mr. Galli recommended some grading to be done. This was less than five acres of grading and fill. Mr. Ferguson performed that grading and fill in the summer of 2001 and hydroseeded the areas that were, they had grass on them when, before he started and he hydroseeded those and did the necessary steps for erosion control that were recommended by Mr. Galli and in November of 2001 we had some heavy rain. Some of the one or two areas of many in Phase II there was some light brown colored water that came out on the street or went into the system. We will show

that is completely diminimus. That the percentage of water that was generated by those two areas would be a very small part of the system that eventually discharged into Gilbert Creek. We will also show that the--there were other areas in the subdivision not under the control of Mr. Fergsuon that had no erosion control at all and we'll have pictures of those sites. There were two contractors that will testify that essentially most of the problem that occurred in Gilbert Creek, if any, was their fault. That they didn't know what they were doing, they had no controls in place in the construction sites that they were operating at that time, and that they are the ones, that if there was anyone who contributed to the turbidity of Gilbert Creek, it was they, And to Mr. Ferguson's, from his activities, it would be a very, very, very small amount, if any, that actually got to Gilbert Creek. And that is, I believe, the evidence will show today, that that is the fact and you should find for the Respondent in this case.

HOGAN Okay, and you proceed with your evidence.

CAMILLERI Okay. In the exhibit the Department alleged in the P and H factors which is the first one the P is the prior significant actions that looked at any prior actions the Department had against Mr. Ferguson and I would like to enter into the record Exhibits 1 and 2 which are prior significant actions that the Department had against Mr. Ferguson. The first one was AQ/AB-WR-96-315 and this case was resolved by an order by the Environmental Quality Commission and in this order the Environmental Quality Commission found that Mr. Ferguson violated five violations and that is found on pages 6 through 10.

STARK Well, I would object to this form of testimony. The exhibit speaks for itself, the hearings officer is well able read it. If you want to have some guidance from us, fine; but, it seems to me that the exhibit is the exhibit.

HOGAN I think the objection is well taken. The exhibit does, I have already flipped through the reports and so these exhibits are being offered as official records is that correct? I think that they probably do speak for themselves.

CAMILLERI Okay. Okay.

STARK I have no objection to Exhibit 1.

CAMILLERI So based on the findings in these two actions...

STARK I would like to reserve a possible objection to both of them in that the owner of this property is a partnership and that this is, these actions were Mr. Ferguson and I would like to be able to raise that issue in my testimony that I present today.

HOGAN Okay, I think that is a legal argument so it would, I'm going to overrule that as far as the admissibility of the exhibits themselves, they appear to be for the same person and I understand that an argument's coming as we develop more evidence about the subdivision that's currently at issue. Whether there's a person these actions were taken against is the same person and I'll get to that when I get to that, I guess. Any other objection of 1 or 2?

STARK What's the number on 2 there?

WILLIAM FERGUSON Jenine, I gave Andy three reports that bracketed the data in question, but, I didn't find one on the date of the 22nd but I found one just before and just after so I don't know.

ULLRICH Would you like me to make copies of this?

HOGAN I just going to have to warn you we're on the record so you're being tape recorded if you have, you need to have a conversation off the record maybe you could let me know and we could recess. Exhibits 1 and 2 are admitted. You can proceed.

CAMILLERI Okay. Based on the these exhibits that I have just put on the record the Department in the P and H factors found in Exhibit number 1 alleged that there is a value of 6 for the prior significant action and pursuant to OAR 340-012-00451CA the Department determined that there was five class one or equivalentents which we calculate to a value of six and you will find in those exhibits the five class one or equivalentents. To clarify, just to put on the record, there were three class one violations there was two class one violations which, if you look at the definition of prior significant action two class two violations will be a class

one equivalent. And then there was the last class two violation. So that's how the Department calculated the value of six. And the Department seeks today that you uphold that value. Also under the H factors the Department determined that Mr. Ferguson should have a value of a negative two which means that he was able to come into compliance with those violations after the Department assessed them.

HOGAN That's the adjustment to the?

CAMILLERI That's the H factor it looks at whether after the Department has issued a final order if the Respondent was cooperative and took steps to come into compliance with those violations.

STARK I would.

HOGAN We are kind of coming into argument.

STARK I'd object that Jenine's contentions vary from the Exhibit 1 that's attached to the complaint. Exhibit 1 alleges three class one violations and two class two violations and one class two violation, so there is, she alleges three class one violations and three class two violations.

CAMILLERI Which is what I had said, I just said it in a different way.

HOGAN I think we are getting into a more of an argument and you know the evidence shows what it shows. And we're at that point in the hearing when we are doing arguments I'll really appreciate this information from each of you as to how you're analyzing; but, a lot of times the proof will vary from the, from the allegation. If it never did, there'd hardly be a point in having a hearing. Okay and go ahead with the rest of your evidence then.

CAMILLERI Okay, well then my first witness will be Andy Ullrich from DEQ.

HOGAN Mr. Ullrich, if you could raise your right hand. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

ULLRICH It is.

HOGAN And can you state for the record your full name, spelling your

last.

ULLRICH Edward Andrew Ullrich. U-L-L-R-I-C-H.

HOGAN You may proceed.

CAMILLERI What is your position with DEQ?

ULLRICH My position with DEQ is a Compliance Engineer in the Water Quality Division.

CAMILLERI How long have you been in the position?

ULLRICH I have been in that position since August 1994.

CAMILLERI And please describe your job duties.

ULLRICH My job duties are to administer permits that are assigned to sites with compliance inspections and follow-up if necessary.

CAMILLERI Are you familiar with the Laurelridge Subdivision located in Grants Pass, Oregon?

ULLRICH Yes, I am.

CAMILLERI Are you the DEQ inspector for this site?

ULLRICH Yes, I am.

CAMILLERI What type of activities have occurred in the past on this site?

ULLRICH Laurelridge Subdivision is a new residential subdivision on previously undeveloped land.

CAMILLERI When did the construction begin?

ULLRICH The permit for was applied for Phase I on September 4, 1997. Construction has proceeded since that time.

CAMILLERI How many phases are there to this project?

ULLRICH To date there are three phases that I know of.

CAMILLERI And do you know when the last phase began?

ULLRICH We received a complete application for Phase III on , I'm checking here, on October 24, 2000.

CAMILLERI Are there any other phases of the project right now under the permit?

ULLRICH Only Phase III has an active permit at this time.

CAMILLERI Okay. Who is the permittee for this site?

ULLRICH William H. Ferguson.

CAMILLERI And what type of permit does Mr. Ferguson have?

ULLRICH He has a national pollutant discharge elimination system
general storm water permit 1200C.

CAMILLERI Okay. Do you recognize this document?

ULLRICH Yes, I do.

CAMILLERI What is it?

ULLRICH This is the 1200C permit that has been signed for Phase III.

CAMILLERI Are you a custodian of this document in the ordinary course
of business?

ULLRICH Yes, I am.

CAMILLERI Was this document kept in the course of regularly conducted
business activities?

ULLRICH Yes, it was.

CAMILLERI And is this document a true and accurate copy?

ULLRICH Yes, it is.

CAMILLERI Judge Hogan, we'd like to offer this permit into the record as
Exhibit number 3.

HOGAN Any objection?

STARK Okay, attached to the exhibit is a letter that apparently is not
part of the exhibit itself. I don't want to make a big deal about it; but, the it's the
Exhibit says its 16 of 16 pages and there is another letter attached. In addition,
just so, Jenine, we can get straightened around here, I assume the relevancy of this
document is, is violation number two. Is that right?

CAMILLERI That's correct.

STARK The Phase III? I have no objection other than maybe an
explanation of the letter.

ULLRICH The letter is the standard cover letter that is attached to a permit when it is issued.

STARK Okay, I have no objection to the Exhibit 3.

HOGAN Exhibit 3 is admitted.

CAMILLERI When was this permit assigned?

ULLRICH The permit was assigned originally on January 16, 2001. That was the previous version of the exhibit. When this version of the permit was assigned...was released then it was...the site was given this new permit on May 1, 2001.

CAMILLERI And what part of the construction project does this permit apply to?

ULLRICH It applies to Phase III.

CAMILLERI And when does the permit expire?

ULLRICH The permit expires December 31, 2005.

CAMILLERI Is this...is the contents in this permit similar to the permit that was applied to Phase II and Phase I of the construction site?

ULLRICH Yes, it is.

CAMILLERI Okay.

ULLRICH A general permit is a permit that is assigned to the same permit is assigned to multiple sites and locations, that's why it's called a general permit it's not customized to an individual project.

CAMILLERI Okay and what is the purpose of this permit?

ULLRICH The overall purpose of the permit is to control erosion on the site so that there is not excessive sediment runoff during the course of construction.

CAMILLERI And what are Mr. Ferguson's responsibilities under the permit?

ULLRICH Well, broadly, his responsibilities are to prevent sediment from leaving his site. Specifically, the overall requirements of the permit is that he

needs to develop and implement an erosion control plan. It specifies that the erosion control plan should detail what elements, what techniques is proposes to use to control erosion and then that the control measures must be properly maintained.

CAMILLERI Did Mr. Ferguson submit an erosion control plan to DEQ for Phase III?

ULLRICH He submitted an erosion control plan with his initial application and then there have been several other auxiliary documents since that time.

CAMILLERI Okay. Do you recognize this document?

ULLRICH Yes, I do. This is the initial erosion control plan that was submitted with his Phase III application of the project.

CAMILLERI Are you the custodian of this document?

ULLRICH Yes, I am.

CAMILLERI Was this document kept in the ordinary course of business?

ULLRICH Yes, it was.

CAMILLERI Fine, and is this document a true and accurate copy?

ULLRICH It appears to be so, yes.

CAMILLERI Judge Hogan, we'd like to offer this document into the record as Exhibit number 4.

HOGAN Objections?

STARK No objection.

CAMILLERI What is the purpose of this plan?

HOGAN I've got to say on the record that it is admitted after he says no objection, okay? Exhibit 4 is admitted.

CAMILLERI Can you explain to Judge Hogan what's the purpose of this plan?

ULLRICH The purpose of the plan is to delineate what erosion control measures are proposed for the project, how they will be installed, how they will be

maintained as so to control erosion and sediment runoff at the project.

CAMILLERI And who developed this plan?

ULLRICH It appears to have been developed by Ferraro Geologic.

CAMILLERI Do you know who Ferraro Geologic is?

ULLRICH It's a consulting firm in Ashland.

CAMILLERI And at the time were they working for Mr. Ferguson?

ULLRICH Apparently so.

CAMILLERI And at the time that you received this document did you review it?

ULLRICH I did.

CAMILLERI And did you approve the plan?

ULLRICH I approved the plan with conditions.

CAMILLERI And what were some of those conditions?

ULLRICH In the plan it states that grading should only take place during the dry summer months and so in my approval letter I said that the plan was approved only for the dry summer months, that if grading and soil disturbance continued into the winter months that a new plan would have to be developed and submitted.

CAMILLERI Okay, and do you recognize this document?

ULLRICH This was my approval letter for the erosion control plan as supplied with the initial application for Phase III.

HOGAN And that's Exhibit 5?

CAMILLERI Correct. And did you make this document? Did you make this document at or near the time that you reviewed the plan?

ULLRICH Yes.

CAMILLERI Is this document a true and accurate copy?

ULLRICH Yes, it is.

CAMILLERI And did you notify Mr. Ferguson of your concerns about the erosion control plan?

ULLRICH That is in paragraph two of the letter where it states that the plan is approved only for the dry months.

CAMILLERI And did Mr. Ferguson follow those conditions?

ULLRICH Grading and soil disturbance continued into the wet winter months.

CAMILLERI And did you ever receive any calls or complaints about the site?

ULLRICH We received an initial complaint on January 10, 2000, this would have been for Phase I or II.

STARK I object to that evidence as it doesn't relate to any of the allegations in the, in the notice of assessment.

HOGAN You're objecting to Exhibit 5 on relevance?

STARK No, to his testimony concerning the complaint in 2000.

CAMILLERI All right, can I respond?

HOGAN Yes. Why is it relevant?

CAMILLERI I believe that it is relevant because it relates to the R factor in this case in which we allege that Mr. Ferguson was negligent so it creates a basis of knowledge that the Department has sent him these documents explaining that there are con...erosion control concerns and this was in relation at that time Phase II was under the permit and the violations that we alleged in November of 2001 were in relation to Phase II.

HOGAN I'm going to overrule the objection. I think that history is relevant on the issue of negligence.

CAMILLERI Okay. We are entering into the Exhibit number 6 here.

HOGAN Did you want to...we haven't ruled on 5. Are you offering 5?

CAMILLERI Yes, I am.

HOGAN Objections?

STARK You overruled my objection, I made my argument.

HOGAN 5 is admitted.

CAMILLERI Okay, I might be going too fast here. Sorry about that.

STARK I have a further objection to...well you haven't offered 6 yet have you?

HOGAN No.

CAMILLERI No.

CAMILLERI Okay. Do you recognize this document?

ULLRICH Yes, I do.

CAMILLERI Did you make this document?

ULLRICH I did.

CAMILLERI Okay. Did you make it at or near the time that you received the complaint?

ULLRICH Yes.

CAMILLERI And is it a true and accurate copy?

ULLRICH It is.

CAMILLERI Judge Hogan, I'd like to enter this document into the record as Exhibit number 6.

STARK Well, just for clarification, may I ask a question of the witness?

HOGAN Certainly.

STARK This is dated January 20, 2000, the...is that a misprint?

ULLRICH This is in response to the complaint that we received on January 10, 2000.

STARK But, the, so far, you've been testifying about Phase III, but, Phase III was not in existence at that time. Is that correct?

ULLRICH No, I didn't. This complaint was in regards to Phase II.

STARK Okay, I have no objection to this exhibit.

CAMILLERI Okay.

HOGAN 6 is admitted.

CAMILLERI Okay. What were the details of the complaint that you

received?

ULLRICH The complaint alleged that muddy turbid water was running off the site and that erosion controls were not being properly maintained.

CAMILLERI And what part of the site was that?

ULLRICH Phase II.

CAMILLERI And did you notify Mr. Ferguson of this complaint?

ULLRICH The complaint, Mr. Ferguson was advised of the complaint in this letter and was advised that he needed to ensure that these discharges were not occurring.

CAMILLERI Okay. Did you investigate the site? Excuse me; were there any further erosion control problems on the site after January of 2000?

ULLRICH We received a request from the City of Grants Pass to do a joint inspection in November of 2001, alleging that there were severe erosion problems at the site.

CAMILLERI Did you investigate the site after receiving this call from the City?

ULLRICH I conducted a joint inspection with the City of Grants Pass on November 21, 2001

STARK Pardon me, I missed that. What did you say?

ULLRICH I conducted a joint inspection of the site with the City of Grants Pass on November 21, 2001.

STARK Just for purposes of the record, Your Honor, I would ask that the witness be when he says the site he indicates whether it's Phase II, Phase III, or a combination of the two.

HOGAN Could you clarify on that, what the inspection was of?

ULLRICH The inspection covered all phases, predominately II and III.

HOGAN Okay.

CAMILLERI Do you recognize this document?

ULLRICH This is my write up from the joint inspection of November

21st.

CAMILLERI Did you make this document?

ULLRICH I did.

CAMILLERI Did you make the document at or near the time that you conducted your site visit?

ULLRICH The document was finalized on December 18, 2001.

CAMILLERI And is this a true and accurate copy of the document?

ULLRICH Yes, it is.

CAMILLERI Judge Hogan, I'd like to enter this document into the record as Exhibit number 8.

HOGAN It's marked as 7?

CAMILLERI Sorry, 7.

HOGAN Objections to 7?

STARK Is it okay if I remove my coat, Your Honor?

HOGAN Yes, it is certainly permissible.

STARK It's a little warm in here.

HOGAN It is a little warm. In fact, if anybody needs to make adjustments to their attire, it's fine.

STARK Trying to sweat me out.

HOGAN That's actually an objection to the conditions...it's sustained. But, is there an objection to Exhibit 7?

WILLIAM FERGUSON This is just an internal document, nothing they sent to me.

STARK No objection.

HOGAN Okay, Exhibit 7 is admitted.

CAMILLERI Okay, you talked about you did an inspection of mostly Phase II and Phase III of the construction site and did you observe erosion control problems on those two Phases on November 21, 2001?

ULLRICH I did.

CAMILLERI And can you explain to Judge Hogan what erosion controls were on Phase II and Phase III?

ULLRICH The predominant erosion controls on Phase II and Phase III at that point were a series of straw bale sediment fences. There was some limited sediment fencing also used. There was limited seeding that had been done in a few areas, some which had failed. And there were also some sediment barriers in the curb gutters.

CAMILLERI And were those erosion controls adequate for the conditions that day?

ULLRICH They were not.

CAMILLERI And what were the conditions that day?

ULLRICH It was actively raining.

CAMILLERI And what did you observe at the site due to the precipitation?

ULLRICH In many locations the runoff was bypassing the sediment barriers and flowing directly offsite.

CAMILLERI And when you say offsite, can you clarify that?

ULLRICH Phase II drains down into Gilbert Creek, part of Phase III drains to Gilbert Creek, the other part of Phase III drains into what is designated as Blue Gulch.

CAMILLERI And by what means do these waters drain to these surface waters?

ULLRICH The drainage to Gilbert Creek enters the City of Grants Pass's storm drain system and then discharges into Gilbert Creek.

CAMILLERI Did you observe discharge to Gilbert Creek that day?

ULLRICH I did.

CAMILLERI Can you explain how you...well let me introduce the photographs. Okay.

HOGAN Okay, you've handed me Exhibit 8 which has eighteen photographs?

CAMILLERI Yes. Do you have a copy of the photographs taken on the day of inspection in front of you?

ULLRICH Yes, I do.

CAMILLERI Do you recognize these photographs?

ULLRICH They were taken that day.

CAMILLERI Did you take these photographs?

ULLRICH I did.

CAMILLERI Can you describe to the hearing officer what you saw in these photographs?

ULLRICH In photograph 1 and 2 there, this is at Phase III, there is a large amount of bare exposed ground, there are many erosion gullies present. In photograph 4 its turbid water that is flowing past the barrier, it's not being adequately treated to settle out the suspended material. Photograph 5 also shows a straw bale that was placed in the street to attempt to filter the water. You can see how the turbid water is basically bypassing the bale. Photograph 6 and 7 show the drain pipe on one of the flat lots has no barrier in front of it so that the water is flowing off untreated. The same with photograph 8 and 9 it's another catch basin with drain pipes with the same situation. Photograph 10 showing a bank that is failing, it had been seeded; but, there is a significant erosion gully forming. Photograph 11 shows some of the turbid water that's flowing down into Blue Gulch. Photograph 12 is another example of water that's flowing past a sediment barrier without being properly treated, as is photograph 13. Photographs 14 and 15 are two views of the same area on Phase II, turbid water is coming down, you can see that the bale has shifted out of position and is not providing any treatment at all and there is muddy plume of water that's going across the street. Photograph 16 shows the storm drain exit from that services the Laurelridge area immediately before it enters Gilbert Creek, you can see the muddy water coming out of the storm drain pipe and finally, photographs 17 and 18 are Gilbert Creek upstream and downstream of where the storm drain discharges into the creek.

CAMILLERI And are these photographs an accurate description of what you saw that day?

ULLRICH They are.

CAMILLERI Judge Hogan, I'd like to enter these photographs into the record as Exhibit number 8.

HOGAN Objections?

STARK May I ask a question in aid of an objection?

HOGAN Certainly.

STARK Mr. Ullrich, would you please identify which of these photographs are Phase II.

ULLRICH Specifically, Phase II photographs are 14 and 15.

STARK May we go off the record for a minute?

HOGAN Certainly, in fact, I need to turn over the tape, so I'll do that while we are off the record.

END: TAPE 1, SIDE 1

STARK: TAPE 1, SIDE 2

HOGAN Go on the record. You may resume your examination.

STARK I'll mark that Defendant's Exhibit 102 and I would offer that into evidence.

HOGAN Objection?

CAMILLERI No objection.

HOGAN Exhibit 102 is admitted.

STARK I have no further questions for this witness.

HOGAN Your next witness.

STARK Your Honor, I would ask, I have two witnesses that will probably take maybe a half hour They are working over in Grants Pass. They're here, they could testify out of order. I would ask that they be allowed to testify out of order.

HOGAN Is there any objection to taking witnesses out of order.

CAMILLERI Given the time that Mr. Stark has stated, I think that would be okay.

HOGAN This is just to facilitate everybody's getting back to work. So your, Mr. Stark, your witness that you wanted to call?

STARK I call Mr. Wicks. Would you state your name and occupation please.

HOGAN I need to swear him in. If you could raise your right hand. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

WICKS Yes, I do.

HOGAN And can you state for the record your full name, spelling your last.

WICKS Sure, it's Gary Wicks, W-I-C-K-S.

HOGAN You may proceed

STARK Occupation?

WICKS Civil engineer, land surveyor.

STARK How long have you been a civil engineer?

WICKS Its been 16-17 years since I've been licensed.

STARK Are you familiar with the Laurelridge Subdivision and you are employed by Mr. Ferguson to do engineering work on that?

WICKS Yes.

STARK Okay, did you also prepare a storm water plan for the Laurelridge Subdivision?

WICKS Yes, for Phase I and II.

STARK And I showed you a picture earlier that's in evidence and I'd just like you to assume that photograph 16 is a picture of the discharge height from the storm system where it goes into Gilbert Creek. Are you familiar with that pipe?

WICKS No, I haven't been down there for a long time.

STARK Okay, then I'd like you to assume for the purposes of my question, that that is the discharge pipe from the storm system that, where it goes into Gilbert Creek. Now, I'd ask you do you know as a percentage, you designed the storm system for Phase I and II, is that correct?

WICKS Yes.

STARK As a percentage of the overall storm area that serves, that dumps into that pipe how much is Phase I and Phase II?

WICKS Well, the calculations that we did, the capacity at the outlet for that culvert, we're about 87 cfs. And not entering from Phase I and II collectively because we did the design for both you know, as a unit it was about 16-17 percent. I think it came out about 18 percent total and splitting them up I would just guess at 10 percent in Phase II and the other 8 percent in Phase I. I haven't done any rigorous calculations to separate the two.

STARK But, based on what you know about the...that's your best opinion, is that correct?

WICKS Yes, yes.

STARK Okay, and would you , you brought a map, would you show the hearings officer please the map you brought.

HOGAN Are we going to marking this as an exhibit for identification?

STARK Yes.

WICKS You're talking about this map?

STARK Yes. I'll mark the map Exhibit 103 and what is that map of?

WICKS That is when we very first started the subdivision. I was figuring out the drainage basins and what was contributing flow to which particular portion of the storm drain so we could figure out the capacities, we could figure out the pipe sizes going down this division what was contributing to the existing line in Morgan.

STARK And this just shows Phase I and Phase II, is that correct?

WICKS Well, it shows all the phases there. It shows we only did the runoff calcs for Phase I and II because those were limited to the ridge there. Everything from the west of there drains into Blue Gulch. But, this is all the drainage that contributed flow to the storm drain in Morgan Lane, runoff into Gilbert Creek, I should say.

STARK And does this, what are the different colors on this map show?

WICKS Well, they're, I just separated the different basins to--these are sub-basins of the whole basin and these show those that contribute, like Area A was an area that flowed north off the site over onto the storm drain area on Crown, Area C flowed through and it picked up the area water from B those collectively came together and went down Morgan, so these were sized by the little sub-basins within, so we could use those to figure out the storm drainage. You start at the top, you work your way down and use that to calculate the pipe size. And then Area D, there, flowed into the Demaray Canal and that flows on down and it doesn't contribute runoff to the Morgan Lane.

STARK So, what areas on this map would actually flow into the pipe that you looked at as Photo 16 of Exhibit 8?

WICKS A, B, and C.

STARK Okay, and this A, B, and C would be approximately 18 percent of the whole area that's served by this?

WICKS No, not by area . I was using by capacity.

STARK By capacity? By...

WICKS Looking at runoff and discharge, yeah.

STARK So 18 percent of the overall discharge into that pipe?

WICKS Right.

STARK And you've got some calculations also, what do these calculations show?

WICKS Well, they're the ones that go along with the map there that showed the basin runoff calculations and the pipe sizes and calculations and how we arrived at what we got for the pipe sizes. That has the discharge volumes on here, right there in the schematics code.

STARK Okay, I'd offer Exhibits 103 and 104.

HOGAN Objections?

CAMILLERII don't have an objection, but, I would like to look at a copy of them.

HOGAN Certainly.

CAMILLERI Okay. Is it my turn to ask questions?

HOGAN No. Okay, but we're just working on the exhibits now and you have a right to examine an exhibit before you decide whether you want to object to it or not. You're looking at Exhibit 4.

CAMILLERI I accept it into the record.

HOGAN Okay, Exhibits 103 and 104 are admitted.

STARK Now, in the calculation of the size of the pipe that goes into Gilbert Creek what assumption do you make for sizing that pipe? Is there a certain size of storm or how do you do that?

WICKS Well, we directed, the City directs that you use what they call a 25-year storm event. The storm event, like the 100-year storm, 50-year storm, 25-year storm, the longer the period between the events, the more likely it is to be a larger storm. They fixed 25 years as the event to designed to and they have a, the City of Grants Pass, has a Master Storm Water Plan and on that there are what you call rainfall intensity curves that you use for the storm event so if you know, with the basins here the calculations show, you come up first with the time of concentration for that particular area, the time of concentration you match that with the rainfall intensity for that particular time period so that you are getting the full contribution of the storm over that particular basin. So, with that in it, you've got the full contribution of the whole storm over the whole basin and use that to determine the capacity of the pipe. And there's other assumptions in there too, as far as runoff coefficients.

STARK And you did calculation of the capacity of the pipe based on those assumptions. What was the figure of gallons per minute in the pipe--9,000 or something like that?

WICKS Well, I did it in cfs, its like 17 cfs and it's about 450 gallons per minute per cfs whatever that works out.

STARK 17.

HOGAN Is cfs cubic feet per second?

WICKS Yes.

STARK So the capacity of the pipe would be 17 cfs by 450?

WICKS Right, that would be...

STARK Per gallons per minute.

WICKS Right.

STARK And I ask you to look at Exhibits 16 and 17 again.

HOGAN These are photos 16 and 17 from Exhibit 8, is that correct?

STARK Yes, I'm sorry. 14 and 15, 14 and 15.

WICKS That shows water coming out of the weephole into the

sidewalk. It looks like Phase II Valley View toward the top.

STARK That's right. Based on your experience can you estimate just looking at that photograph how many gallons per minutes are coming out of that weephole?

WICKS a real rough estimate, yeah. The pipe weephole's not running full and it doesn't have a lot of pressure on it. I'd say it was somewhere in the 5 to 10 gallon a minute, somewhere, maybe less than 5, somewhere in that area it looks like.

STARK All right. I have no further questions.

CAMILLERI Did you explain that the percentage of storm water runoff was from Phase I and II was a total of 18 percent for this storm drain on Morgan Lane, is that correct?

WICKS Well, it's for the--let me check my numbers--capacity calcs I got for Morgan all the way to the discharge at Gilbert Creek were about 87 cfs and we've got about 16, it comes around to Cook Estates off of Crown too, so I'd assume about 17, 18, somewhere in there. So I just divided it, the 16 or 17 by 87 to get it.

CAMILLERI What other properties in the area flow into this too, are you familiar with the area enough to answer that question? Where did you get your calculation of 87 cfs?

WICKS I calculated, I have a total water shed for the area contributing to Morgan and that's based on this, I just plundered this off of this is the 7-1/2 minute USDS quad map and these are the contours there to determine the water shed. I split those up into sub-basins also and this is roughly, area 4 here, is roughly Laurelridge and then these are the areas contributing offsite to it down, this is kind of a tough map to follow, but, this is Morgan down here and this is Cooke Estates here and this is actually Laurelridge here, so I used that to compute the whole drainage for that basin.

HOGAN And this is in Exhibit 104, right, there is a map attached as

part of that?

WICKS Yeah. 104.

HOGAN It's the last page.

CAMILLERI And so just to clarify, all of these discharge areas in this watershed are discharging down to Morgan Lane, is that what this is showing?

WICKS Right. They contribute at different reaches along the watershed. You know, these are right at the mouth of the storm drain, these are the upper reaches.

CAMILLERI But, they all come out of that outfall that's in that photograph.

WICKS Right.

CAMILLERI Okay, and could, when was this determination made?

WICKS 1997.

CAMILLERI Could anything have changed in the area since that time to change these calculations?

WICKS Well, not on the total watershed area, I don't. Anything would change significantly because this is a 1 to 2,000 scale so any changes wouldn't even show up on this and as far as runoff coefficients, I assumed it was full buildout when I did the calculations.

CAMILLERI Excuse me. You said full buildout?

WICKS Well, I assumed it was being developed to what the zoning capacity would allow so I figured the runoff coefficients based on those numbers.

CAMILLERI Okay. I have no further questions.

HOGAN I guess I wanted to follow up on this question of the, you've been talking about the storm drain that is depicted in Photograph 16 in Exhibit 8 and you've been referring to that as the Morgan Lane storm drain?

WICKS Yes.

HOGAN Is that part of the City of Grants Pass system?

WICKS Yeah.

HOGAN So you, when you were designing the storm drains through

Laurelridge did you tie into that system then?

WICKS Yeah, we're in the upper end of it. That area has been extended probably halfway to Laurelridge up Morgan or maybe Barton. We had to, the calculations we did, we had to, the pipe was undersized for the first run and we had to put a parallel pipe down along side it to get it up to capacity. I don't remember how far that was, 3000 or 4000 feet, and then we hooked onto the end of the system that extended up Laurelridge.

HOGAN And just referring to this Exhibit 104, the last page, the map. I couldn't quite, let's see, I think you were saying, maybe, this, there's circles with numbers in them.

WICKS Yeah, those are the sub-basins within the total watershed.

HOGAN And there's a number 8 here is that what you're referring to as would be in the Morgan Lane? Maybe you could just identify where Laurelridge is on that versus where the Morgan Lane is.

WICKS Laurelridge would probably be 6 and 7.

HOGAN 6 and 7.

WICKS Yeah, this was, this quad shape is before there were streets up there so I kind of sketched on what was there at the time. This is Cooke Estates on up to the north of Laurelridge and this is...

HOGAN That's another subdivision.

WICKS Right.

HOGAN Was that fully built at the time that you were doing this design?

WICKS It was pretty closely, but it wasn't, it must've been about 80...80 percent built out I would think. I can't remember if there were very many vacant lots on it at the time.

HOGAN Okay, and then the Morgan Lane can you indicate by reference to a number where that Morgan Lane location is?

WICKS It's at the south end of 8, the street along there is Morgan

Lane and this is Highland School and North Middle School.

HOGAN So, it's sort of to the lower right hand part of the green circled area?

WICKS Ues, this is Laurelridge.

HOGAN Okay. I don't have any further questions. Do you have any follow up, Mr. Stark? Is there any reason we cannot excuse Mr. Wicks? And you had another witness you wanted to call out of order?

STARK Yes, just a clarification, Mr. Wicks. Now you said, from my notes anyway, 6 and 7 were approximately Laurelridge?

WICKS Yeah, I think so.

STARK But, 8 is Morgan Lane...it's not Laurelridge, right or? It think you said..

WICKS Laurelridge is everything, you see all these little dots are houses and this is about the end of Morgan Lane where we added on to the storm drainage up to right in here.

STARK Laurelridge would be approximately 6 and 7.

WICKS Right. Not totally, the watershed of 6 and 7 that would equate to the watershed you see.

STARK I have no further questions. I'd like to call Mr. Hagerman. Mr. Seybold are you going to use this, this map that you've provided to me?

SEYBOLD Probably not.

STARK Okay, is it okay if I do it for an exhibit?

SEYBOLD Okay.

STARK Exhibit 105, I think.

HOGAN 105, yeah.

STARK Has he been sworn in?

HOGAN He has not, sorry. If you could raise your right hand. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

HAGERMAN I do.

HOGAN And can you state for the record your full name, spelling your last.

HAGERMAN Paul Wendel Hagerman, H-A-G-E-R-M-A-N.

STARK Mr Hagerman, what is your business?

HAGERMAN I'm a builder.

STARK And did you have an erosion problem in November of 2001?

HAGERMAN Yes, I did.

STARK And did you receive a citation on November 27th for erosion related problems?

HAGERMAN Yes.

STARK And who was that from, what entity issued you that citation?

HAGERMAN The Engineering Department of Grants Pass. Kathy Staley basically gave me the citation, I think. Or Martin...Martin. Yeah, Martin it was.

STARK And, I have a copy of citation that indicates 1958 NW Crown Street. Can you indicate to the hearings officer please where your, as I understand you had three lots is that correct?

HAGERMAN Uh-huh.

STARK Where were your three lots?

HAGERMAN I had lots number 4, 5, and 6, right here.

STARK Could you just draw a or put an "x" on each lot please on Exhibit 105. And is that in Phase II of Laurelridge?

HAGERMAN Yes.

STARK And could you describe to the hearings officer what happened on November 27th.

HAGERMAN Well, prior to November 27th I was issued a warning back in September that they are going to STARK giving citations for erosion control...for erosion into the storm drain. So at that time I went ahead and got all my drainage for 1958 Crown Street in place and I spent \$10,000 on landscaping and installed

probably four drains on site and two french drains behind masonry walls. I thought I was doing pretty good with my erosion control methods because the whole site was completely finished and then we had a pretty heavy rain in November, the November 27th I believe it was, and part of my landscaping washed out and the builder next to me, the building this lot on the corner, his driveway kind of washed out at that time.

STARK Is that Mr. Phillips?

HAGERMAN Yes.

STARK I'm just going to write "Phillips" on that, okay.

HAGERMAN Uh-huh.

STARK All right. What do you mean washed out?

HAGERMAN Well, it was virgin landscaping it had only been in place for six weeks, we had a heavy rain. Of course, you know, we didn't really have the water channeled, we didn't know how it was going to come off the hill. This was really the first heavy rain of the season. It came off, eroded my landscaping out which washed right across the sidewalk into the catch basin.

STARK And did all your landscaping...all your good work just went in the catch basin?

HAGERMAN No, no, just a small amount...it was just a few spots that we had runoff.

STARK And were any pictures taken by the City of Grants Pass do you remember?

HAGERMAN Yes, I do believe there were pictures taken.

STARK Okay, and this was on November 27th?

HAGERMAN Yes.

STARK Okay, were you there?

HAGERMAN I was issued the citation the next day. But, we were in the process of cleaning up the.

STARK did you also have a problem on November...earlier in that

week or was this the first problem?

HAGERMAN No, there were times when we were, we had erosion and then we'd go up there and clean it up and we were just maintaining our fresh landscaping.

STARK Did you learn something from this?

HAGERMAN Yes, definately.

STARK And what do you do differently now?

HAGERMAN Since then, this is the first time the City had been enforcing the mud control and the erosion control. Since then we've been to extensive classes, we've, there's several different techniques that we use that...we're much more educated now than we were before.

STARK All right. Did you have, did you have to do some remedial action immediately as ordered by the City in the way of pumping out catch basins or something?

HAGERMAN Well, instead of paying a fine for my erosion problem, we made a deal with the City to clean out a catch basin and remove the silt from the catch basin, which we did.

STARK Okay. Where was the catch basin in relationship to your lots?

HAGERMAN Well, the catch basin was right down here on the corner down. This one right here.

STARK This one right here on the corner of...

HAGERMAN Actually, the City did the work for us.

STARK And you just paid for it?

HAGERMAN And we paid for it, yes.

STARK Was it your silt and stuff that, that filled up the catch basin?

HAGERMAN Well, it was, I contributed to it, yes.

STARK Okay, I have no further questions.

CAMILLERI Where was the catch basin located at?

HAGERMAN I believe its this one right here.

CAMILLERI Okay.

HOGAN And just maybe we could mark a little indicator on the exhibit.

STARK I'll put "CB" and an arrow, right.

HAGERMAN Now, Kathy Staley could positively identify it, but, I think it was the one on the corner.

HOGAN Yeah, you have to just answer the questions that asked, you can't have a consultation.

CAMILLERI And when was that remedial action, when did that occur?

HAGERMAN When did they clean it out?

CAMILLERI Yeah.

HAGERMAN I'm not really sure when they cleaned it out, I just wrote a check for the services.

CAMILLERI Was that like a week or two after?

HAGERMAN I would imagine it was a week or two after, yes.

CAMILLERI Okay. So, can you explain the function of a catch basin?

HAGERMAN A catch basin gathers all of the surface water from the street and its a collection and it dumps into the storm.

CAMILLERI Okay, and the function of cleaning it out, what does that do?

HAGERMAN Well, there's a...the catch basin has a silt trap at the bottom of it, with the drain probably, I'm not sure how high above the silt trap, but, the silt trap catches the silt and then the storm water flows out the drain.

CAMILLERI Okay, and so, I have a question about the material that was coming off your property You said that you landscaped it, what kind of, what did you landscape it with?

HAGERMAN Well, we had grass and we had bark areas and the bark areas is what really eroded off my property.

CAMILLERI What is, what are bark areas?

HAGERMAN Bark would be shrubs, you have plants and shrubs and you

have bark around the plants and shrubs.

CAMILLERI Is this material different from the materials, the soils that are on this property?

HAGERMAN Yes, the soils on the property would be a granite type material and then this would be a finish material that we put over the top of the subgrade.

CAMILLERI Did you ever observe water coming off of your property from the landscape material?

HAGERMAN Yes.

CAMILLERI What was the color of it?

HAGERMAN Well, once the water starting eroding the landscaping area then it got down into the granite so it would be more of a, it was a milky, more of a milky color.

CAMILLERI Okay. Is it similar to, referring to Exhibit 8 photograph number 14 here, is it similar to this color?

HAGERMAN Yes.

CAMILLERI Okay. I have no further questions.

HOGAN Well, I had a few questions for you. The, you said that you cleaned the, or you had the City ...reimbursed the City for cleaning the catch basin.

HAGERMAN Uh-huh.

HOGAN And you described how there was a silt trap in the catch basin?

HAGERMAN Uh-huh.

HOGAN Was that, did that separate the silt material like the gravel and so fo..., or this milky kind of sediment that's in, that you pointed out in photograph 14 that causes that milky color, does the silt basin separate that?

HAGERMAN Well, the, I think that what happens is all that material goes into the catch basin and at the bottom there's a trap down there that collects the solid material that's running in the water, then the water flows out the drain, which is...you have to make them deep enough so you get to the storm drain...so they can

be five or six feet deep, these catch basins, and this one had plugged up completely with granite. The catch basin had.

HOGAN Uh-huh. So there'd, it had separated out the granite soil, right, and then it clogged the basin?

HAGERMAN Right.

HOGAN And that would make the water come up on the street, right?

HAGERMAN It wouldn't make it drain, it would come up on the street.

HOGAN And, well, I doubt that you could answer this question. Just. I did want to ask you, these two photographs of number 14 and 15, does that lot belong to you?

HAGERMAN I'm not sure where these lots are. Oh, yes, this is...

HOGAN And you're talking about 14 there.

HAGERMAN This lot I bought later, we had a real bad erosion problem down this picture right here is this lot right here coming out on...

HOGAN Can you mark that on the map as picture Exhibit 14 or photo 14, or something.

HAGERMAN This house right here would be that lot and then this driveway right here is where this erosion is coming down. There is about, all these lots up here, above here, this one, this one, this one, this one all drain down on this area right here.

HOGAN Okay, so you pointed out the four lots that are above the one you just identified as being the lot in photograph 14?

HAGERMAN Uh-huh, yes.

HOGAN Okay.

HAGERMAN Now, since the pictures were taken, I've, I worked a deal with Bill to develop this lot, this lot, and this lot.

HOGAN Those are the next three lots over from the four lots. Okay.

HAGERMAN Right, these four lots here and I've done extensive drains. We put a drain down here with a catch basin at the, a little on-site catch basin, that,

with a silt trap in it, and it goes into the storm drain. So, we've put drains, on-site drainage, catch basins, on-site with french drains on-site. We've put a french drain all the way along this property line here that catches one, two, three, four, five lots above. We've put another french drain with a retaining wall that catches a lot of stuff from this and it drains into a drain here; and then plus we've put another drain, french drain, this is tens of thousands of dollars worth of french drains and on-site catch basins.

HOGAN And you did that to control the erosion that is displayed there on photo 14?

HAGERMAN Yes, we've put a french drain, this retaining wall is probably 150 feet long down this whole side here and its draining all the lots from up above here. The clean water into the storm drain.

HOGAN And the, when did you purchase the lot that's depicted on, in photo 14?

HAGERMAN Oh, this must have been probably about a year and a half ago.

HOGAN So in 2002?

HAGERMAN Yes, it was probably in January or February 2002.

HOGAN Okay, so at, in November 2001 the lot belonged to Mr. Ferguson?

HAGERMAN I'm not sure of that, I don't have those records with me; but, I know that I've acquired those lots approximately a year and a half ago.

HOGAN And did you acquire them from Mr. Ferguson?

HAGERMAN Yes.

HOGAN Okay.

HAGERMAN And then all last summer I was working on the drainage on those lots. I put in thirty to forty thousand dollars worth of retaining walls and french, french drains behind the retaining walls.

HOGAN And that, and when you are talking about that with respect to all of the lots that you've indicated that you've bought, right, not just the lot that's

on...

HAGERMAN Yes, well, I've bought this lot, this lot, this lot and this lot, all four of these right down this critical area here.

HOGAN That are above the photo 14?

HAGERMAN Yes.

HOGAN Okay.

HAGERMAN I've...and I also developed this lot here.

HOGAN And that's the one that you've marked as the photo 14 lot?

HAGERMAN Yes.

HOGAN And, so, you were doing all that work that \$30,000 worth of work, or whatever, to control the erosion that was coming down onto the photo, the photo 14 lot?

HAGERMAN Yes, and then we worked for six months on that erosion control...in cooperation with the City of Grants Pass. I had to show them a drainage plan on all four of those lots and then we sort of worked around the retaining walls and french drains and tying all the drainage into existing catch basins on site.

CAMILLERI Can I ask Mr. Hagerman a question?

HOGAN Certainly, I'm trying to think if I have any more questions for Mr. Hagerman. I don't think I do, I think that's what I wanted to know. You may ask.

CAMILLERI That last that you "x"d off here, off of Crown that you had some citations with the City on November 27th, approximately how many...first of all let me ask you what citations did you receive? Did you receive citations for all three properties?

HAGERMAN No, just this one right here...1958 Crown Street.

CAMILLERI Okay. I'm going to mark that "1958", and how much land was disturbed in that landscape activity that you did?

HAGERMAN Well, you know, this is a steep slope all the way down to Rich

Phillips property here, so what happened is Rich had done some excavating on his property, so, of course, our water was flowing down on his property and it was flowing down the driveway out on the street. So, basically the City said, well, we don't know where the dirty water is coming from, we're going to cite both of you for it. Basically, is what happened on that.

CAMILLERI Okay. So, where was the landscaping done on this property? Can you give me an approximate, an approximation on how much landscaping was done?

HAGERMAN 100%, front and back yard, side yard.

CAMILLERI Okay. How big is that piece of property?

HAGERMAN Oh, that property is probably 10,000 square feet.

CAMILLERI Could you do like acre-wise?

HAGERMAN Oh, that would be a fifth of an acre.

CAMILLERI Okay. Are you familiar with Phillips property?

HAGERMAN Yes, of course.

CAMILLERI Okay. Do you know how big his property was?

HAGERMAN It's about a fifth of an acre, too. They're all 8,000 to 10,000 square feet.

CAMILLERI Okay and, let me make sure I understood that you were not there the day you received the citation.

HAGERMAN No.

CAMILLERI Okay, okay.

HAGERMAN I was on the property the day we received the citation, we were doing cleanup. It needed..

CAMILLERI Okay.

HAGERMAN We were trying to stop the erosion. We were trying to, you know, do the cleanup as much as we could.

CAMILLERI Okay. Do you know how many hours or minutes there was a problem there?

HAGERMAN Oh, it was a...we had a real heavy rain that day which we really didn't expect and it was a torrential downpour is what it was.

CAMILLERI Okay.

HAGERMAN And that's what caused the problem.

CAMILLERI Okay, okay. Did you know...were you there when the rain started?

HAGERMAN Yes, I drove by.

CAMILLERI And did you observe erosion coming off the site?

HAGERMAN Yes.

CAMILLERI Okay and then how much time passed until controls were established?

HAGERMAN Oh, we were...we were on the job within three or four hours...

CAMILLERI Okay.

HAGERMAN I had cleanup guys there.

CAMILLERI Looking at Fergus...the photograph in Exhibit 8 here off of Phase II or Phase III of Mr. Ferguson's site, does...does the storm water coming off of your property..did it look to be about the same type of volume? Is that...can you even...if you can't answer that question just...

HAGERMAN I would say it was about the same...same volume.

CAMILLERI Okay.

HOGAN And that's photograph...?

HAGERMAN Photograph 14...no, I'm not sure which one this is.

HOGAN Who identified the photograph he...?

CAMILLERI Oh, excuse me, photograph 14...13 and 14.

HAGERMAN This one here.

STARK Well, 13 is in Phase III.

CAMILLERI I was just using it as an example of what the storm water looked...might look like.

STARK So, your storm water looked about what is on 13?

HAGERMAN Yes.

STARK As opposed to 14?

HAGERMAN It's about the same I think. The same color, about the same amount of ...

STARK Volume wise?

HAGERMAN I would think about the same, yes.

STARK As 13?

HAGERMAN 13 and 14.

STARK Well, okay, well, anyway. But, the City took some pictures, didn't they?

HAGERMAN Yes. I have a catch basin at the very corner of my property which would have been the corner catch basin right here in this corner right here. And what had happened is my landscaping had completely fallen into my catch basin, so, my water from my erosion problem was running over the side lot. So to correct that, we put in a rock, a rock, little dry creek bed and then the water filtered down into the catch basin.

CAMILLERI Where did it run from the side lot? Did it run to a storm water drain?

HAGERMAN It ran into a curb and gutter.

CAMILLERI Do you know where that curb and gutter outfalls to?

HAGERMAN Yes, it is...to this catch basin down here on Morgan and Cooke.

CAMILLERI Do you know where that outfalls to?

HAGERMAN It goes to...I'm sure it goes down the storm drain to Allen Creek.

CAMILLERI To Allen Creek? Do you know where that's located?

WILLIAM FERGUSON It's Gilbert Creek.

HAGERMAN Gilbert Creek, I'm sorry.

CAMILLERI Okay.

HOGAN Yeah, actually, you can't comment on the witness's answer, okay? You know, every witness has to do their best and Mr. Stark can ask follow up questions. Do you know whether's it's Allen Creek or Gilbert Creek that receives the runoff?

HAGERMAN It's Gilbert Creek.

HOGAN And, do you feel confident about that?

HAGERMAN Yes.

HOGAN What's this Allen Creek you're talking about?

HAGERMAN Allen Creek's...that's another creek out by another piece of property I'm working on. I just got the two confused.

HOGAN Okay.

CAMILLERI Okay, I have no further questions.

HOGAN All right. Did you have any follow ups...is there any reason Mr. Hagerman cannot be excused?

CAMILLERI I am...I do have some concerns because the City of Grants Pass representatives will probably be discussing this site and if there are photographs I don't know if you're gonna want to ask them any additional questions or.

STARK Yeah, we have no objections to him being excused.

HOGAN Okay, do you have any objection with Mr. Hagerman being excused?

CAMILLERI Okay, no.

HOGAN Then you are excused.

CAMILLERI Thank you.

HOGAN Is that all the witnesses you wanted to take out of order?

STARK Yes.

CAMILLERI Okay, my next witness is Martin Seybold.

HOGAN And I thought it might be good to get as much...especially

given the parking situation, to get as much as we could done before taking a lunch break. Does anyone have a problem with, uh, taking this entire witness before we take a lunch break? That would probably put us a little bit into the...middle of the lunch hour.

CAMILLERI That's okay. We actually, I think, our witness is going to be a little shorter than expected, so...

HOGAN Okay.

A BRIEF CONVERSATION OCCURRED UNRELATED TO THE HEARING REGARDING TELEPHONE CALL FOR ONE OF THE PEOPLE ATTENDING THE HEARING AT NOON.

HOGAN Okay, Mr. Seybold? If you could raise your right hand. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

SEYBOLD I do.

HOGAN And can you state for the record your full name, spelling your last.

SEYBOLD Martin E. Seybold, S-E-Y-B-O-L-D.

HOGAN And you may proceed.

CAMILLERI Mr. Seybold, where are you employed?

SEYBOLD I am employed by the City of Grants Pass.

CAMILLERI And what is your position there?

SEYBOLD I am the Director of Field Operations and as such I am responsible for a number of different areas...parks and recreation, streets and drainage, fleet, property, and buildings.

CAMILLERI How long have you worked for the City?

SEYBOLD I've worked for the City for 16 years.

CAMILLERI Okay, and how long have you been in that position?

SEYBOLD I was in a position that was basically the same as manager and I promoted to director, it's basically the same activities, the same responsibilities for the entire time.

CAMILLERI Okay, and what is your educational background?

SEYBOLD I have a bachelor's and master's degree in forest and natural resource management. I am certified or was certified my certification has expired, in conservation education and biology. I worked, that's the work of my doctorate in field enforcement natural resource management spent two years at the University of Washington working on that I did not complete my degree...a graduate minor in business administration.

CAMILLERI Have you received any training in erosion control?

SEYBOLD I have, before I came to the City of Grants Pass I was the natural resource planning director for King County which is in the Seattle metropolitan area and I had some training as part of that job and then also I have received some additional training directly in storm water management erosion control and other activities through workshops and professional trainings.

CAMILLERI Have you conducted inspections of construction sites in the Grants Pass area?

SEYBOLD I have.

CAMILLERI And approximately how many inspections have you done in, over the course of the last couple years?

SEYBOLD About 30.

CAMILLERI Okay. Are you familiar with the Laurelridge Subdivision and construction site?

SEYBOLD I am.

CAMILLERI How did you become involved with this site?

SEYBOLD There was an extensive construction activity that was going on in the hills above Grants Pass with steep hillsides, we received concerns from the community in terms of erosions. We had contacts with citizens who called us

concerned as development continued to go up the hillside. We've had some other concerns with hillside construction in the community and I went out to take a look at this particular site because it was a very large subdivision and to take a look at the types of erosion controls and practices that were in place. To see whether or not they were protecting the streams of the community. I also was involved in a storm water management plan, a new plan that the City of Grants Pass is preparing at this point in time, and as part of that plan we are very concerned about the water ways of the community and how we go about protecting them.

CAMILLERI Can you explain to Judge Hogan how...describe this property...how it's shaped and where the water runs off to.

SEYBOLD When you're talking about this property, you're talking about phase or...?

CAMILLERI The whole...Phase I, II and III...the whole Laurelridge Subdivision site at...to date.

SEYBOLD Okay. Phase I and II and then there's a third Phase III that's under development at this point in time and this property slopes up to a ..

TESTIMONY ENDS IN MID-SENTENCE

END: TAPE 1, SIDE 2

START: TAPE 2, SIDE 1

THIS IS A REPEAT RECORDING OF TAPE 1, SIDE 2

END: TAPE 2, SIDE 1

START: TAPE 2, SIDE 2

HOGAN Missed a little bit of your answer in the record. You were explaining the map and what the colored lines on the map indicate.

SEYBOLD Yes, it's showing the storm drainage system of this area, the underground system for the City of Grants Pass and it denotes the size of lines and some arrows show which directions the flow go. This is...this entire area sloping from the west toward the east and the primary entry point for waters from this whole subdivision area that was undeveloped at the point in time that I was upgrading the inspections. In other words, there were not homes built, it was raw land. The land, the water is flowing down Morgan and entering at a storm water discharge point into Gilbert Creek.

CAMILLERI Can you point on the map where that outfall is?...to Gilbert Creek.

SEYBOLD Yes, I can. As you continue down Morgan there is a line that comes in at a bridge that crosses where there's a...Morgan Lane crosses Gilbert Creek at this point. I'm showing at the far east edge of the map. And there is a discharge point right here where the water is collected from up above and then discharged into Gilbert Creek.

CAMILLERI Okay, can you show us, using the map and Exhibit 105, where Phase II, where the storm water drains flow to?

SEYBOLD Could you repeat the question first.

CAMILLERI Looking at the map which is Exhibit 105 can you point or explain, specifically for Phase II, where the drainage points are and where they flow to.

SEYBOLD Phase II is primarily located in this area of the map through here and then Phase I connects in, this map doesn't denote the difference between Phase I and Phase II, there are individual catch basins that are shown along in the street areas, when I went up and investigated the site I found some extensive

problems here, here, here and along up through this area here in Phase II. All of these and up into this area on Sunburst, but, I believe that's in Phase III. and all these areas then connect together through the storm drainage system, flow down Morgan Lane, and end up in Gilbert Creek.

CAMILLERI Have you conducted any inspections of over all these construction sites?

SEYBOLD Yes, I've been up to the site on a number of occasions. I was up there in November and December and January of 19...or excuse me 2000...let me refer to some notes .

CAMILLERI Sure.

SEYBOLD In 2001. I was in there in November and December and then into January of the next year looking at the site and looking at the erosion control practices that were in place and looking at problems with erosion control practices and waters that were flowing off the site that were carrying sediments down into our storm system and down into Gilbert Creek. As the previous witness testified, there was, Mr. Hagerman, there was extensive areas of open land up above Valley View on the lots in this area and we know that there was erosion coming off from those sites that were directed down to one location, here, and I would estimate that at perhaps three acres of land up through this area.

HOGAN You know, I'm gonna...I'm sorry to interrupt, but, I'm thinking, you know, there's so much visual input here that isn't being described in the...for the tape and it looks to me like you're pointing at the area that would be above that area that's been marked as photo 14?

SEYBOLD That's correct.

HOGAN Okay

SEYBOLD I'm pointing to an area.

HOGAN And that's about three acres in total?

SEYBOLD Approximately three acres up in this area...the area that's above Valley View Drive and it's just below or to the south and east of Crown

Street. There are a number of lots in this area that were all contributing flows and that were coming out onto Valley View at the point that was marked as Exhibit photo H, I believe

HOGAN 14, Exhibit 8, Photograph 14.

SEYBOLD Exhibit 8, photograph 14. down into this area and there were some other problems that I found throughout the...through the area as well. I took an extensive number of photographs on different days as I went up to the site to illustrate the problems that I saw coming from Phase II of this development.

CAMILLERI Okay .

HOGAN And you're handing...Exhibit 10...the collection of photographs.

CAMILLERI Yes. Do you have a copy of the photographs taken on the day of your inspection in front of you?

SEYBOLD I have a copy of a number of photographs that were taken at 928 Valley View which I took and also of, at Gilbert Creek discharge point to Gilbert Creek both above and below the...above and below the discharge point. Yes, I did take these photographs.

CAMILLERI And, do you recognize these photographs?

SEYBOLD Yes, the photograph number 1, Phase II, at 928 Valley View was a point that I visited on a number of occasions and each time I found substantial muddy water being discharged off the site and inappropriate and inadequate erosion...

STARK Just a second, Your Honor. I believe the witness is being nonresponsive. The question was, when he took this photograph.

CAMILLERI I asked him if he recognized these photographs.

HOGAN Yeah, I think that was the question is did he recognize the photographs and actually, Mr. Seybold, if I can ask you to confine your answers to the question, I'm sure that the, you know, are going to go through a sequence of questions. But, really if you asked if you recognize the photographs you either do

or you don't.

SEYBOLD I do.

CAMILLERI Okay.

HOGAN So, I'm sustaining the objection.

STARK Thank you.

CAMILLERI Can you describe to the hearings officer what you saw in these photographs?

SEYBOLD Yes, at this site in photograph 1 and photograph 2, photograph 2 is looking up onto the site which would be the, basically, the entry road or kind of a flag going into the lot at 928 Valley View and what it exhibits are rills or erosion gullies with muddy water flowing down to the sidewalk. Photo 3 is somewhat blurred and it shows water running down the curb and gutter area and down through a weep hole out, spewing out into the street.

(INTERRUPTION BY PHONE)

HOGAN I'm sorry, you can continue your answer, we knew that interruption was coming, but.

SEYBOLD Photo 3 is a bit blurry, is showing at the same point as photo 1. Showing water being discharged out from a weep hole through the curb. It shows water flowing down the curb line and actually spewing out all the way across the street and the street is slightly crowned so there is a fair amount of head on that ..being to spew the water out that floor...out that far. Photograph 4 is at the same location again and where water is coming out from a discharge point from the lot out onto the public street. Photograph 5, I believe, is the same as photograph 4. And photograph 6 then is taken the same day and this is a discharge point where water is being collected from the larger area here it's the point where waters from Phase II would be discharged along with other waters into Gilbert Creek and that's that actual discharge pipe, you can see a wing wall. And then in

photo 7 it's the same wing wall, you can see the, the water is discharging out into the stream and photo 8 was taken at the same time within two minutes of the other photograph and all I did was walk across the other side of Morgan, which would be about 20 feet and I took a photograph of the water color and clarity on that side and one can see, the bottom of the creek here, one can see leaves on the bottom, there's some concrete blocks, and sorry to see them in the creek, but they're clearly visible through the waters of the...the water is clear, the water is much more clear. Then photo 9 is back on the side where the discharge is occurring and there is the color of the water in the creek, water that's being discharged from up in the subdivision there.

HOGAN I'm sorry, I did want to just interject with a clarifying question. It appears to me that these photos, photo numbers 1 through 5 and Exhibit 10, which you've marked as 928 Valley View are the same property as depicted in photograph 14 and 15 of Exhibit 8, is that correct?

SEYBOLD Yes, photograph ...

HOGAN Don't separate the exhibit.

SEYBOLD 13, 14 and 15 are the same site as, as shown on...I'm not sure what exhibit this is.

HOGAN That's Exhibit 10.

SEYBOLD ...as Exhibit 10, and the discharge that's shown in photograph 16, 17 and 18, those are the same as the photographs shown in, the same location as photographs 6, 7, 8, and 9 of Exhibit 10.

HOGAN Okay, you may continue.

CAMILLERI And what was the date that you took these photographs?

SEYBOLD These were taken on the 27th of November, 2001.

CAMILLERI How did you take the photographs?

SEYBOLD I used a digital camera.

CAMILLERI And, do they look similar to what you observed on the day of taking...do the contents of these photographs, do they look similar to what you

observed that day?

SEYBOLD Yes, they do.

CAMILLERI I would like to enter these photographs into the record as Exhibit 10.

HOGAN Objections?

STARK No. No objection to the photographs.

HOGAN Exhibit 10 is admitted.

CAMILLERI Okay. Can you explain to Judge Hogan the erosion controls on the property on 11/27? On these sites in which you took the photograph? Which would be 928 Valley View

SEYBOLD Looking at the photographs again for Exhibit 10, what I observed at this site were inadequate erosion control measures. There was a hay bale that had been placed, apparently to direct flows and keep them from flooding back across the property, there were no sedimentation fences, there were no cover materials placed on the site, there, there are broken up straw materials or erosion control mattings. I found erosion rills and gullies cut into the slope when I look at photograph 2 there is a cut slope in the back and it's pretty difficult to see, there's a sign back in the corner of this location and there was water flowing over the edge and several rills coming off from the site above. The waters had been concentrated into areas and was flowing down and carrying mud and sediment particles off the site and into the street and into our storm drainage system.

CAMILLERI Did you...did you observe the site on 11/21/2001?

SEYBOLD I did. On 11/21/2001 I went up to the site and was frankly pretty surprised at the lack of erosion control practices that were throughout the whole subdivision. The number of areas that were where I saw erosion that had occurred, I saw cut slopes...

STARK You know, I'd object to this narrative form of answer. First of all, we agreed at the start of this hearing that we'd separate things between Phase II and Phase III. The witness is being allowed to give an obviously biased

narrative and I object to it.

HOGAN You know, I, I'm sorry I can't recall the exact phrasing of the question.

CAMILLERI I asked him if he had conducted, had gone to the property on November 21, 2001

HOGAN That's pretty much what I recollected. What I, what I'm going to ask you to do is, Mr. Seybold, I'm going to ask you to confine your answer to the question that has been asked and then to follow-up with specific questions. What did you observe? And also in questioning to try to be specific as to what was observed in what areas themselves.

SEYBOLD She did ask me what I observed, but, yes I did go visit the site on that date.

CAMILLERI Okay, and what did you observe on that date specifically, on..we had already talked about Phase II on 11/27, what did you specifically observe on that day in regards to Phase II and Phase III in regards to erosion controls?

HOGAN And can you separate out as to what you saw in Phase II and Phase III.

SEYBOLD Sure, I'll do my best to do that. On Phase II, beginning at the lower corner of Valley View Drive what I saw were dir...I saw a driveway and a catch basin that was not on private property that was not on the City of Grants Pass property that had broken bags of, of granite that were surrounding the catch basin. Apparently, to direct water from the site into the catch basin and keep it from flowing out directly into the street.

CAMILLERI Was this on Phase II?

SEYBOLD This was, I'm not positive about that . It was down in this, this corner and that's kind of the dividing line between Phase II and Phase III, so. I do have photographs of that site.

HOGAN Do you have an address for that?

SEYBOLD I do, if I may refer to my records.

HOGAN Yes.

SEYBOLD At 906 Valley View.

HOGAN And, this is on November 21st?

SEYBOLD Yes, it is.

HOGAN You saw the broken, broken sacks around the catch basin?

SEYBOLD That is correct and I saw broken sacks of granite that were used to apparently direct water into a catch basin. The water that was flowing into that catch basin was silt-enriched, it had the same type of color as photos shown in Exhibit 10 and then that water was flowing from that catch basin into the city system. As I worked my way up I found another area that would be about three blocks to the north where a large uh encatchment area like a basin had been constructed and I found granite that had overflowed into that area and it did not appear to have been maintained and then I found, we went to this site that's located at 928 Valley View at that site found water that was being discharged directly out into the street that was full of sediment went around the corner on Morgan and I'd have to refer to my records again to get the, to get the address if you'd like me to do so?

HOGAN I would.

CAMILLERI You know for relevancy I think we could just, I just wanted to give a broad overview of what he observed, so, if you can't find the photograph for this one piece of property, I think we could just go on.

HOGAN Okay, well, I just...if it was possible to identify it by address that would be nice but, maybe you can just indicate on the map where this next piece of property was that you looked at.

SEYBOLD The next location I looked at was right, I don't have the address right now, it's on Morgan, it's right here.

HOGAN On Morgan, and maybe you can identify that as Morgan 1 or something.

SEYBOLD At that location I found sediment fences that had been erected that were about 3/4 of the way filled with sediments and the sediments had worked their way around the fence, around the corner and were going into a catch basin that was so...you could see an erosion, an eroded rill at that point where water cut down and carried soil and materials away into the catch basin. Going around onto Crown and we're moving up toward the Phase III and there were expansive areas up onto Crown that had no erosion control, large relatively flat areas on the top of Crown, had did not have any straw, did not have any...any planted materials, any grasses, I found, didn't find any materials up here and I took photographs of those as well and saw rills that had developed from the site where water was being discharged off the site.

HOGAN And this area is Crown, the name of the street?

SEYBOLD Crown is the name of the street, yes. It's up here in the vicinity, actually..what's the name of this street across here? This is Starlight. I'm sorry, rather than Crown, Starlight, which would be into Phase III. Across Starlight and I do have photographs of those also.

HOGAN And the Crown...the area on Crown where you said there was no erosion control in place was tha...

SEYBOLD I'm sorry, I'd like to strike that and say that was...that was on Starlight not Crown.

HOGAN It was on Starlight then that you observed this?

SEYBOLD Yes, on Crown, I went up onto Starburst Lane. I have photographs of that also where there was mud and materials cascading down off the side of, across the sidewalk into the street onto Starburst and there was cutting in, that was occurring upon the site during the rainy season and removal of vegetation and all those were contributing to materials that were coming into the public right-of-way.

HOGAN And was that Starburst area, do you know if that's in Phase III or Phase II?

SEYBOLD I'm not sure of that.

HOGAN Is that, is that the name, Starburst?

SEYBOLD Starburst, I'm sorry it's Sunburst, not Starburst. Sunburst.

CAMILLERI What you've, what you've explained to us that you observed on 11/21/2001, did you observe similar events on 11/27/2001?

SEYBOLD I did.

CAMILLERI And did you notify Mr. Ferguson of the problems that you observed on the site on 11/21/2001, after that inspection?

SEYBOLD I did.

CAMILLERI And, do you recognize this document?

SEYBOLD I do.

CAMILLERI And, what is it?

SEYBOLD This was a notice of violation that was sent to Mr. Ferguson. I called him on two different phone numbers and also mailed this to him noting that there were multiple violations for sediments that were being discharged into the drainage system on Laurelridge Subdivision

CAMILLERI Okay, let me just cut you off real quick. Is this a true and accurate copy of the document?

SEYBOLD Yes, it is.

CAMILLERI Okay, and did you make the document at or near the time that you conducted the inspection?

SEYBOLD I did.

CAMILLERI Okay, and, Judge Hogan, I'd like to enter this document into the record as Exhibit number 11.

HOGAN Objections?

STARK No objection.

HOGAN Exhibit 11 is admitted.

CAMILLERI Okay, and you can go on explaining the details of the document, as the purpose of writing the document to Mr. Ferguson.

SEYBOLD This was a notice that there were multiple violations on the site. Normally, we give people 24 hours to correct violations. In this case, because they were so extensive and we were coming up on a holiday, we gave him an additional period of time to make corrections to the violations.

CAMILLERI Okay, and we heard testimony today from Mr. Hagerman, who owned properties off of Crown Street, and are, were you there on the day of the inspection on 11/27/2001?

SEYBOLD I was.

CAMILLERI And what did you observe that day?

SEYBOLD On that day we noted violations with two properties that were not owned by Mr. Ferguson. One was owned by Mr., Hagerman and the other was owned by Mr. Philips. And those are two lots about a third of an acre each and we had issued warnings to these individuals and I'd, I'd have to pull the violations to get the exact dates. We issued a warning to them and then we issued a violation when there were continued problems with nothing corrected

CAMILLERI And we have Mr. Hagerman's testimony today that there was milky water similar to the color of the water that was coming off of Phase II as seen in Exhibit 8, photograph 14...13 and 14, and is that similar to what you observed that day?

SEYBOLD May I see, I did not see what he is referring to when he was describing the discharge from his site opposed to others.

CAMILLERI I was referring to photographs 13 and 14.

SEYBOLD In my estimation, the discharge from Mr. Hagerman's site was not as severe as the, what I saw in, in 13 and 14 but, there was a violation from this site. But, it was not as severe as from this site here.

CAMILLERI What do you mean, not severe?

SEYBOLD There's not as much volume or as much material coming off of the site.

CAMILLERI Okay. No further questions.

HOGAN Mr. Stark?

STARK Okay. Did you take your pictures on the 27th at the same time Mr. Ullrich did?

SEYBOLD Ullrich?

STARK Ullrich.

SEYBOLD Yes, I did.

CAMILLERI Excuse me, what date are you referring to?

SEYBOLD 27th.

CAMILLERI Okay. Mr. Ullrich was not on the property on that date.

HOGAN I think the record, I'll go back and check, I think the record on Exhibit 10 is the 28th...no it says. Okay, just a minute. Yeah, I have 11/21 was the date these pictures were taken.

SEYBOLD Let me clarify. Mr. Ullrich came out to the site on one of the days that I was there and he took basically the same photographs we did.

STARK Well, I have in my records and I could be wrong...I believe the pictures that are Exhibit 8 he testified were taken on the 21st.

CAMILLERI Correct.

STARK Is that correct?

HOGAN I believe that's correct, that's what my notes reflect.

STARK And the pictures that are in evidence on the 10, Exhibit 10, were taken on the 27th, is that correct?

SEYBOLD Yes, that is correct. I have photographs that I took on more than one occasion. The disk that I provided to you has the dates of all the photographs that were taken by myself.

STARK The disc that you provided to me?

SEYBOLD Yes.

STARK Were that, was that, those photographs provided to the DEQ?

SEYBOLD Yes.

STARK All the photographs?

SEYBOLD Yes.

STARK How come you didn't produce those to me.

CAMILLERI That is a disk, it's a...should I answer that question? It's like a discovery question.

HOGAN Well, yeah, it is a discovery question and so let me inquire. Mr. Seybold, you're saying that you did provide a disc of photographs to the Department of Environmental Quality?

SEYBOLD I brought a disc today for them as well as for you and I also had some photographs that I had provided to DEQ before.

CAMILLERI And to clarify.

HOGAN Okay, so the disc that you brought in was provided to Department of Environmental Quality and to Mr. Stark at the same time, is that ?

SEYBOLD Today, I just brought that today based on his request, so I, the same material that I provided to him I brought again for DEQ.

HOGAN And you previously provided that material for DEQ?

SEYBOLD I believe all those materials are here, yes.

CAMILLERI And let me...

HOGAN Are you saying that all the photographs on the disc are also in hard copy right there?

SEYBOLD I think they are, I'd have to take a look at the ones I provided to him and here, but, I think they're the same ones.

HOGAN And you provided those documents to DEQ?

SEYBOLD The photographs?

HOGAN Uh-huh. Okay.

SEYBOLD Yes.

HOGAN Okay, and was there any reason that those weren't, did Mr. Stark request those photographs?

CAMILLERI Your Honor, just to clarify it, we this issue came up in the prehearing conference, the judge made the determination on that issue and to

clarify Mr. Seybold had original photographs and he had digital photographs. So, I received, I came down to this area last year and I received a packet which were those original photographs, which Mr. Stark was well aware of, and I also received over computer some digital photographs from the day on which Mr. Seybold was out there that related to this violations. Which are those photographs there. So, when Mr. Stark asked us to provide him copies, I provided him with copies from the days on which we assessed violations and we did not have the resources to provide him copies of all of those photographs. That's pretty much and...judge, judge.

HOGAN Okay, what was the pretrial order on this.

CAMILLERI The judge ruled in the Department's favor.

HOGAN I did, I did see a note in there and it says motion to produce files some documents withheld, photographs withheld. Richard Stark looked at local file.

HOGAN Well, so, what's the problem with these photographs?

STARK Well, the problem is that from his testimony he got photographs that he took on the days in question that have not been provided to me and were provided to the DEQ.

HOGAN Uh-huh.

STARK And that's absolutely contrary to the representations that Jenine has made to me, uh.

HOGAN So you're saying it has to do with dates the photographs were taken?

STARK Right.

SEYBOLD Judge Hogan, may I make one other comments. I have provided all these photographs on a disc and hard copies to the attorney that was representing Mr. Ferguson before Mr. Stark became involved. All of them.

WILLIAM FERGUSON I had no other attorney on this.

SEYBOLD Mister..wasn't Mr. Dole representing you? He asked for

materials.

WILLIAM FERGUSON Not on this matter, that's on your city citations not on this matter.

HOGAN I see so there was an attorney, Mr. Dole, that was representing Mr. Ferguson in a dispute with the City and you provided all the photographs to Mr. Dole? Okay.

CAMILLERI Also, if I can make one statement, I provided you with everything I had. I received some documents from Mr. Seybold. This action is at least over a year old and there were...those photographs there could have been a couple other ones, at some point about six months ago I deleted those from my computer and I have the hard copy which you see in front of you. So, it's not like I haven't, you know, I'm only relying on those documents that you have in front of you, those photographs.

HOGAN I have one more question. Do we have all the photographs that were taken on the dates in question, on the violation dates, today? Are they in that pile right there?

CAMILLERI Uh-huh.

SEYBOLD Yes.

HOGAN Okay, and what do you want to do...and so, my question is what do you want to do about not having received these photographs prior to today?

STARK Well, Mr. Seybold's testified that he gave a hard copy to the DEQ.

CAMILLERI Which, I disagree with too, because I didn't get them.

STARK And I requested copies of all photographs they had on the days in question, November 21st and November 27th, and all I got was Exhibit 8 and I did get an additional digital disc.

HOGAN Okay, and you got...right.

STARK And, that's is, so.

HOGAN So there's four photographs there.

CAMILLERI Uh-huh.

STARK So, there's apparently other photographs that were given to the DEQ in hard copy and digitally that I didn't get.

HOGAN Okay, I'm...I'm not going to have people argue about this anymore. Here's the problem...here's my thought about it...these photographs haven't been offered, so I don't need to exclude them, what I do want you to do is to have a full opportunity to view them. If there's rebuttal material, or additional then you'll, you know additional issues that are raised by those photographs that would rebut the photographs that have been submitted, etc., we'll let you go with that; but, I don't think the...it doesn't look to me like there was an intentional effort to prevent you from looking at these photographs and it seems like there was some effort to provide the photographs that may not have been timely to give you the disk this morning, but there...so what I'm going to do is we'll just go ahead and I'm not going to suppress the photographs that have been already admitted into the record and...and I'll give you an opportunity to examine the...the complete set of photographs that's available here today. You've already been provided with the disc and, you know, obviously if those photographs add information, you can bring that out and if they were to be offered as evidence then I'd consider the discovery issue; but, you know, they're not actually, sort of, they're not actually in play right now except as they may assist you in rebuttal and I'll, and you just need to let me know what opportunities you need to examine them and, and pursue the question.

CAMILLERI Can I just make one comment in regards to what was said just to clarify in the record? Mr. Stark, you said that you received the photographs in Exhibit 8. I also sent you the photographs that I am introducing into the record right now, Exhibit 10. I sent those photographs to you, you've received them.

STARK Right.

CAMILLERI Okay, I just wanted to clarify, because it didn't sound like

that's what you were saying. okay.

HOGAN Did you have further questions for Mr. Seybold?

STARK Yes, now when Mr. and I may butcher his name, Ullrich...

ULLRICH Ullrich.

STARK Ullrich testified, he testified that the only two pictures in this Exhibit 8 that were Phase II were 14 and 15, and that 13 was not Phase II. Now your testimony was, I think, different. I'd like you to look at those photographs and tell me whether you can tell me all three of them are Phase II or just the 14 and 15?

SEYBOLD Photograph 14 and 15 are Phase II, the discharge is from Phase II.

HOGAN Yeah, but what about 13? Do you know specifically where that was taken?

SEYBOLD That appears to be in Phase III.

STARK Okay. Now on the 21st when were you there?

SEYBOLD I contacted Mr. Ferguson at 1:00 o'clock, so we were there for the morning of that day The morning of November 21st.

STARK Starting when...from when to when. Mr. Ullrich testified approximately two hours.

SEYBOLD We were there approximately two hours, perhaps a little bit longer than that.

STARK Okay, and how long were you there on the 27th?

SEYBOLD I don't recall, it probably would have been approximately the same amount of time.

STARK Did you have any conversations, between the 21st and the 27th...with Mr. Ferguson or any of Mr. Ferguson's agents?

SEYBOLD Yes, I contacted Mr. Ferguson by phone twice on November 21st told him I was sending this notification of a notice of violation and he did return a call to me and I told him pretty much what it says in the notice of

violation, that they were multiple violations with sediments being discharged into the drainage system and failure of sedimentation erosion control devices.

STARK Okay, did he respond back to you again...did you only have one conversation?

SEYBOLD That's the only conversation I can recall having with Mr. Ferguson.

STARK Did he respond with himself and six men?

SEYBOLD I don't know that.

STARK Now you testified in your Exhibit 10, here's a copy of Exhibit 10, maybe I should use Exhibit 10. Is this Exhibit 8? We have two marked Exhibit 8?

HOGAN No, I think you marked a couple...this is my Exhibit 8 here. It...that might have been stamped, I don't know whose copy that is, but, this is mine.

STARK Okay, Exhibit 10, does that indicate...you indicate there's no silt fences, but there is a silt fence there, isn't there?

SEYBOLD There is, yes.

STARK Okay, and there's a silt fence there...that shows the silt fence doesn't it?

SEYBOLD That's correct and that's not on the property where the water is coming off from. That... that lot was not cited.

STARK Okay.

HOGAN These are photographs in Exhibit 10?

STARK Yeah, I'll refer to them. Photo number 2 was in just the edge of the silt fence.

SEYBOLD On the adjoining property, right.

STARK And photo number 4 showed the, the rest of the silt fence.

SEYBOLD On the adjoining property.

STARK And photo 5 shows the same thing.

SEYBOLD On the adjoining property.

STARK Are you trying to say it's on the adjoining property?

SEYBOLD On the adjoining property, yes.

STARK Okay now, on this map, just so that I'm oriented and hopefully the judge is also, is this blue line Gilbert Creek?

HOGAN There's a dark blue and a light blue line.

SEYBOLD Yes, the blue line would be Gilbert Creek.

HOGAN That's the dark blue line, right?

SEYBOLD The dark blue line is Gilbert Creek, that's correct.

STARK And the green line is an irrigation canal?

SEYBOLD That is correct.

HOGAN Oh, that's green, okay. It looked like light blue to me.

STARK Now it looks to me that not only does the, what's referred to as the Morgan Street pipe, discharge into Gilbert Creek at this bridge location, but, also there's a...another system under the storm sewer that also discharges in that location. Is that correct?

SEYBOLD That is correct.

STARK Did you take any pictures of the pipe that discharges from this system?

SEYBOLD I did not.

STARK Do you know how large that pipe is?

SEYBOLD It's 42 inches.

STARK And what is the one from...

SEYBOLD 48 inches. The one from, coming from the upper area that discharges on the west side of the stream, that's the one that I took the photographs of, where you can see it discharging directly into the creek and then there's one on the other side that's 42 inch line.

STARK Okay, and you cited...did you cite Philips and Hagerman?

SEYBOLD No.

STARK Did you issue a ticket to them?

SEYBOLD No.

STARK Who did?

SEYBOLD The City Community Service Officer.

STARK Is that Kathy?

SEYBOLD No.

STARK Okay, and when was that done to the best of your knowledge?

SEYBOLD I'd have to refer to the documents that were brought in to you, it has a date on them.

STARK Well, Hagerman says on the 27th.

SEYBOLD Mr. Hagerman was cited on 11/27.

STARK I didn't see any for Mr. Philips.

SEYBOLD I think if you look further at the documents I gave you, there's another one there.

STARK It looks like...did you take...when you were out there with Mr. Ullrich did you take a picture of the Hagermans'/Philips' problem?

SEYBOLD Yes, I did. Well, I'm quite certain I did. I took some pictures either on the 21st or 27th, again I provided those photographs to you on the disk I gave you this morning.

STARK Okay. Were there problems with the Hagerman/Philips site on both times you were up there?

SEYBOLD I believe so, that's why they were cited the second time. They received a warning and then a citation. For...two, an individual lot for Mr. Philips and an individual lot for Mr. Hagerman.

STARK Your Honor, I'd like to have a time to look at the photos and I may have some additional questions.

HOGAN Okay. I'm going to ask you to just remain available until we're able to resolve the, you know, complete the examination. Did you have further questions at this point?

STARK Not at this point.

HOGAN I'll be having a few questions for you, Mr. Seybold, too. But, at this time, I'll...it's probably it would be a good idea to take a lunch break, it's 12:31 now and so if we could resume at 1:30?

LUNCH BREAK

HOGAN We're back on the record. And, Mr. Seybold, if you could come to the table we'll go ahead and complete your examination. I did have a few questions for you. You described the property and erosion conditions. Property that you looked at on November 21st and 27th, I guess it was November 27th, and you described it as the lots on 906 and 928 Valley View, Morgan Street, Starlight, and Sunburst. Were those properties that you described owned by Mr. Ferguson at the time you inspected them?

SEYBOLD To the best of my knowledge, yes, they were.

HOGAN What is your knowledge based on?

SEYBOLD The fact that is was part of Phase I or Phase II, they were undeveloped lots at that point in time and still under development. The development was owned by Mr Ferguson.

HOGAN And how do you know it was owned by him, was that part of the...

SEYBOLD From the tax records and the applications that were provided to the City of Grants Pass.

HOGAN Okay, the applications for construction?

SEYBOLD For the, for the building permit.

HOGAN And, you...in your opinion was the erosion control that you observed calculated to prevent turbid water runoff?

SEYBOLD No.

HOGAN And why not?

SEYBOLD I, in my opinion, it was inadequate. There were large areas of surface...several things. One, there were large areas or surfaces that were not covered with any kind of erosion control.

CAMILLERI On which site?

SEYBOLD That was on multiple sites. There were many areas that were within Phase II and then other areas in Phase III. And the specifics were that there was no straw that had been spread across the site to reduce the impact of rainfall and to temper that impact so that soil particles weren't broken loose. That was one thing that I noted. Second, it appeared to me on several occasions that I looked there were attempts to control erosion by putting a sediment fence up; however, the sediment fence is a last...is kind of a last resort to use, the last thing I think it's used in a series and they were placed in a location to collect water from as much as several acres...multiple lots...and they were just overwhelmed. They were not able to...to control the sedimentation and they were either overflowing or being bypassed or waters were continuing to go into our storm drainage system So, those were two things that I specifically noted. I also noticed some steeper slopes that were unprotected and erosion was continuing to occur and that was evidenced by rills or gullies that were formed on the sites.

HOGAN And do you know if you observed these conditions we've been trying to identify days three...days two. Did you observe these conditions, the lack of cover, overrun sediment fences, and rills that are gullies on Phase III property?

SEYBOLD I do have a map here that shows Phase II and Phase III. May I get that?

HOGAN Certainly, if you want to refer to that.

SEYBOLD I'm referring to Laurelridge Subdivision showing Phase III and Phase II of the project and this has lot numbers, but, it does not have addresses. And places that I noticed specific problems were...

STARK Okay, now, again I would like this testimony to be limited to

dates, times, and whether it's Phase II or Phase III.

HOGAN That's what I'm asking him, I think he needs to refer to the map and the I'm specifically about questions...conditions that existed on November 21st. So, go ahead.

SEYBOLD Okay, I'm referring right now to areas that are in Phase II and they're shown as lots and parcel numbers. How do you want me to refer to areas here?

HOGAN Well, if you could summarize the conditions that you saw in each Phase. In other words, Phase II and Phase III...identify three things that you considered inadequate, now, what did you observe in each of those phases?

SEYBOLD Okay. In Phase II...

STARK I'm sorry. This is November 21st?

HOGAN Yeah, all of my questions are about November 21st.

SEYBOLD In the area of Phase II I saw areas that were either bare ground without erosion control materials in place and I also saw areas where there were either lack of sediment fences as an example of the site that's been shown in photograph 14 on Exhibit 8 where flows have been concentrated from a number of lots and then flowing out and all I saw there was one straw bale. There were no other erosion control practices in the area of the outlet coming onto the street. Therefore, what I observed was a sidewalk area where soils had been washed away and they apparently had been transported off the site and onto the street and into our storm drainage system. In Phase II, excuse me, in Phase III, on the upper portion of the site, on Starlight, I saw large areas across lots that did not have either broken up straw on them or other products to hold soils in place. I observed straw bales that were set, particularly on the west side of the, of the road where it appeared the intent was to funnel water to those spots and that's what was occurring, water was being funneled to them and that was going off onto the street carrying sediments and other materials.

HOGAN Okay, and where did you observe the slopes with rills and

gullies? Was that in Phase II, Phase III, or both Phases?

SEYBOLD I saw some rills and gullies in the vicinity of photograph 14, of Exhibit 8 on a hillside and then I saw a number of rills in Phase III, rills and gullies.

HOGAN Is Phase III a higher elevation than Phase II?

SEYBOLD For the most part, yes, it is.

HOGAN Okay.

SEYBOLD Most of it is and it goes along, there's kind of a ridge line and the road goes along the ridge line and it breaks going in two directions, the drainage.

HOGAN Okay, I'm running out of tape here so I need to change the tape.

END: TAPE 2, SIDE 2

START: TAPE 3, SIDE 1

HOGAN We're back on the record. You indicated that you've done about 30 construction site inspections?

SEYBOLD That is correct.

HOGAN And, as far as the you. How does the practice that you observed at this subdivision with respect to covering bare ground compare with what you've observed at other construction sites.

SEYBOLD I've seen problems on other steep slopes in areas that are flatter obviously it's not as much of a concern because as the water flows off the site it doesn't have gravity accelerating it's flow. So, I would say this was, we had one other site in town where we had some substantial problems this would be on a par with that. Other ones I saw, I saw erosion control practices that were a variety of practices. Some were better, some were worse. In several we contacted property owners and gave them warnings and they did make changes to their erosion control practices.

HOGAN Have you observed the use of covers on ground? Is that done?

SEYBOLD Yes. Yes.

HOGAN Okay, and...and what about...on the second issue of the use of sediment fences, how does this compare with other construction sites you've inspected.

SEYBOLD In other ones that I saw, again, some being on steep slopes similar to this site and some being on flatter sites. On flatter sites I saw them used along stream areas in particular. I do not always see them installed correctly. In other words, they need to be buried partially into the ground. So, I would say that hi...these practices were among the poorer practices I saw but I did see some poor practices on other sites for the City as well.

HOGAN Have you seen...are sediment fences used routinely in erosion

control in construction sites?

SEYBOLD They are now.

HOGAN As opposed to?

SEYBOLD At this point in time? On November 21st?

HOGAN Well, I guess, you know, at that 2001 timeframe, you know, if there's been a change within these two years. You know, has there been a change in the practice as far as using sediment fences?

SEYBOLD As far as a recognized practice for erosion control, it is not a new practice, that is a common practice that is adopted was used when I was in Seattle almost 20 years ago. So, it's not a new practice in terms of the industry. As far as a use in Grants Pass, I do not see people applying them correctly in all locations So they were not all good.

HOGAN And then the drainage. Some of the areas...can you indicate maybe with reference to 105, the map underneath, areas that drain...do some areas shown on that map drain into Gilbert Creek, some into Blue Gulch and some into the irrigation ditch?

SEYBOLD Yes, the area that's noted there under photo 14 would flow down Valley View to Morgan Lane and continue into Gilbert Creek. The other area that I saw with very extensive problems was on Morgan Lane in this area, draining a whole area up above and that also would flow directly down Morgan Lane into Gilbert Creek. The areas that I saw up on top where there were some problems...

HOGAN And that's Starlight?

SEYBOLD That's Starlight, which would be Phase III. Many of the problems that I saw there that were flowing onto the roadway and then into Blue Gulch.

HOGAN Okay, and is there any area that runs into the irrigation ditch?

SEYBOLD There are, an area down below on Valley View and, I think, Mr. Ferguson was noting that this is actually in Phase III also, and that would flow

into an irrigation ditch

HOGAN Okay, and those on Valley View are those 928 and the 906 you were talking about?

SEYBOLD Not 928. 928 flows directly into Gilbert Creek. That's one that photo 14

HOGAN Okay, so 906.

SEYBOLD 906 would flow into the irrigation ditch.

HOGAN Were there any other sites besides 906 that you looked at that were flowing into the irrigation ditch rather than the Blue Gulch, or...

SEYBOLD Not that I'm aware of. Just this area right here.

HOGAN Okay. I don't have any more questions for Mr. Seybold.

STARK Well, I've got a couple. Okay. On the 21st you go out there with Andy? Correct?

SEYBOLD That is correct.

STARK And you took pictures and those pictures are not exhibits yet. Is that correct?

SEYBOLD I don't know if there are any that are exhibits from the 21st. I'd have to look at the exhibits again.

HOGAN I found Exhibit 10. If I can find it and show it to you.

STARK Well, when I got Exhibit 10 it has right up here 11/27/01.

HOGAN That's the 27th, that's right.

STARK I'm just asking. Now here...Did you take pictures on the 21st?

SEYBOLD Yes.

STARK Okay. I would like you to...are Andy's pictures on the 21st the only ones that involved Phase II, except for the pictures of the Gilbert Creek thing, were 14 and 15. And that shows, as we've talked about the bale and there's water coming on to the street and back here some areas that need some work.

SEYBOLD Yes, he did. I believe that is correct, but, let me check for

sure.

STARK Yeah, Exhibit 8, photographs 14 and 15.

SEYBOLD That is correct.

STARK Okay. Now, I don't think there are any other pictures that have been provided to me by you or by the DEQ that involve Phase II on November 21st.

SEYBOLD Did you print the photographs that I gave to you?

STARK Yes.

SEYBOLD Okay. What dates were shown on those?

STARK There weren't any dates shown.

SEYBOLD I think it does show on the files. Do you have a portable computer, we could look at them. Well, if I may, just to... I only had two hours from when you asked for photographs. I put together what I could with a very short timeframe.

HOGAN Okay, but, let's just try to identify them on the disk you brought in this morning. Were there any photographs on that disk from the 21st?

SEYBOLD Well, that's what I'm not sure of. I'd have to take a look at the disk. I only had a short period of time.

STARK Your previous testimony was that you had photographs in hard copy of the 21st showing some violations and I couldn't find them.

SEYBOLD I do have copies of the ...or I do have photographs from the 21st that I did take. Whether or not they're in this group that I just got back from DEQ, I do not know. I do have photographs from the 21st of November and I put together as quickly as I could the materials that you requested and as I said I have provided materials to Mr. Ferguson's attorney before and with the short notice I wasn't able to put any other material together.

STARK Well, I didn't request those photographs. I requested anything to do with violations. But, be that as it may, the record right now, the only, I believe, the only Phase II photograph is 14 and 15 for the 21st?

SEYBOLD That is correct. In terms of the ones that are there, that are provided.

STARK And then your photographs of the 27th which is Exhibit 10, is of the same, exact area as on the 21st?

SEYBOLD That is correct. These are from 928 Valley View and then showing the discharge into Gilbert Creek.

STARK All right. So, all right. Then my question is, when did you take a picture of Mr. Philips' and Mr. Hagerman's problem?

SEYBOLD I provided some photographs to you of that. Do you have all those photographs I gave you?

HOGAN Can you just answer the question, he asked when you took the photograph?

SEYBOLD Okay. I am not sure what the date was, the 21st or 27th. If I could take a look at the violation date I know I took some on that day.

STARK Well, no that's the one. I'll get you that. It's the 27th from the ticket. So you think it's that day?

SEYBOLD I think...I'm sure I would have taken photographs that day.

STARK Okay, now I've made what I think from your...do you have a record of my last exhibit.

HOGAN 105 was your last exhibit. So you're on 106 now.

STARK Thank you. 106 is a group of photographs. Now, I think I took from the disk that you gave me today, pictures of what I assume were taken on the 27th from your testimony and involved the, the area involved in Hagerman and Philips. Is that correct?

SEYBOLD That is correct.

STARK May I offer Exhibit 106?

HOGAN Objections?

CAMILLERI No.

HOGAN 106 is admitted.

STARK Okay. Now the last...I'll just let you look at mine...the last pictures are of a seriously silted up catch basin. Now can you tell the judge where that catch basin was?

SEYBOLD Yes, I can. That catch basin is located at the corner of Cooke and Crown, right there

STARK Okay Now, does any silt that would have accumulated in that catch basin and not been caught have ended up at the pipe that comes down Morgan and dumps into Gilbert Creek?

SEYBOLD Yes, I believe that would.

STARK Is this the catch basin, a picture of the catch basin, that you've...the City eventually pumped out and charged Mr. Hagerman for?

SEYBOLD It is. Yes, it is. Right.

STARK All right. From all of this actions with Mr. Ferguson did you require him to pump out any catch basins?

SEYBOLD No.

STARK Does...is it fair to say that the debris that came from Mr. Hagerman and Mr. Philips would have gone into the City's storm system?

SEYBOLD Yes.

STARK And being fair about this would you say that on the 21st there was material from Mr. Hagerman and Mr. Philips problem going into the storm system?

SEYBOLD Yes.

STARK Okay. Now are there other lots in the subdivision that have exposed areas and rivulets that indicate erosion potential?

SEYBOLD Are there other lots owned by someone else? Or by Mr. Ferguson?

STARK Yes, by someone else.

SEYBOLD I wouldn't be the best person to answer that question. I do not know that.

STARK Okay. You didn't look around on the 21st or the 27th specifically for any other possible problem?

SEYBOLD The answer to that question is...I'm not sure how to answer your question as a yes or no. We looked around for other problems throughout the entire area here; then we went back to our office and identified the lots that were owned by Mr. Ferguson.

STARK Okay. Does the City have...you are responsible...is it true to say in layman's terms you're the erosion guru right now for the City of Grants Pass?

SEYBOLD No.

STARK Okay, if there's erosion problems are you the one that looks at them for the City?

SEYBOLD Actually, it would be a number of different staff people that would include the people in the Engineering Division primarily.

STARK Do you know if the City has any monitoring or oversight for the Merlin Landfill?

SEYBOLD Yes, I know that we do.

STARK Okay, have you ever worked on the erosion of...

CAMILLERI I'm going to object to the relevancy of this...to this proceeding.

STARK The gentleman testified as to his experience. I am going to, very briefly, ask him about the experience that the City of Grants Pass has had at the Merlin Landfill to illustrate...which would bear on his experience.

HOGAN I am going to allow the...a limited questioning. I do think, you know, he said, I've asked him to compare this to other situations, so I feel it's within the scope to inquire into some other situation. He has indicated that there have been other problem situations within other situations within which erosion was better handled. So, you know, I'm going to go ahead and allow it.

STARK Are you familiar with the erosion problems with the Merlin

Landfill?

SEYBOLD I am not.

STARK Have you ever seen that?

SEYBOLD No.

STARK Well, let me hand you some pictures and I just want to ask you in your own experience whether or not these pictures...I'd like you to assume for the purposes of my question these were all taken in the Merlin Landfill in areas controlled by the City of Grants Pass...and I'd just like to ask you if what you see there is the type of erosion procedures that are good or bad?

SEYBOLD The photographs you're showing me you say are from the Merlin Landfill. I see rills and some gullies that are cut into the area that is...or have cut down into the area that seeding has been applied to. And the third picture or the one on the second page is one showing considerable flow of granite and other material, I don't know what this is, this is leading to a detention facility or where this is leading so it's hard to say if this going to control structure or not. The next picture I'm not sure what it is. The one that's on the third page. The one that's on the bottom of the page looks like the same as the page before. I'm not sure what this one is; but that is illustrative. The next page looks like a sediment fence, I'm having a hard time telling for the scale, it looks like a sediment fence where sediment has come up against it and probably overflowed it, I don't know that for a fact. The one below it looks like a sediment fence that is in place and I can see material that's up onto the fence, it looks like its about a third of the way up. So I don't know which side, what's on the other side of the fence in that location. The next one looks like a drainage way that does have sediment that has overflowed the fence area. Again, I don't know what is below this. And the last one, I'm not sure on the last one. It looks like there's some erosion problems on this one.

STARK It looks like those would bear looking into?

SEYBOLD Yes.

STARK Now, did I mark...no, I haven't marked that exhibit.

HOGAN No, I was wondering if we were going to do that.

STARK Exhibit 107 are the exhibits that Mr. Seybold just testified about and I would offer Exhibit 107.

HOGAN Objections?

CAMILLERI I had an objection to it that was overruled.

HOGAN Well, because there's already testimony in the record I'm going to go ahead and admit this because it's pretty hard to understand. I have to say it's pretty limited relevance, this person wasn't involved in the inspection.

STARK Okay.

HOGAN Also, as long as we're on the pause for exhibits, I don't have it noted here that Exhibit 105, the map was offered or admitted.

STARK I would offer Exhibit 105.

HOGAN Any objections?

CAMILLERI No.

HOGAN I might be just a mistake in my notekeeping, but, I did not have that down.

STARK I have no further questions.

HOGAN Any further questions?

CAMILLERI No, but I would like to take my next witness, Kathy Staley.

HOGAN You know, before I forget, there was this issue about the photographs...examination of additional photographs that Mr. Seybold took. Are you still in the process of doing that Mr. Stark?

STARK No I'm through looking at them.

HOGAN Can Mr. Seybold be excused then?

STARK Sure.

HOGAN Okay, and Miss Staley is next. If you'd raise your right hand. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

STALEY I do.

HOGAN And can you state for the record your full name, spelling your last.

STALEY Kathleen Staley, S-T-A-L-E-Y.

CAMILLERI What is your position with the city?

STALEY I'm an engineering technician.

CAMILLERI And how long have you worked for the City?

STALEY Twenty-five years.

CAMILLERI How long have you been in that position?

STALEY Four.

CAMILLERI Okay, and can you please describe your job duties?

STALEY My job duties are that I review subdivisions, the public improvements. I work with the civil drawings of--Mr. Wicks would hand them in to me and I would do the review of the water, the sewer, the storm drain, and review the drainages plans and how the storm drain is going to work. And then also after the subdivision's done then I also do the...I review each house as it goes in.

CAMILLERI And, do you have any special training for that job?

STALEY The special training, I've done to a lot of erosion control schools, but...

CAMILLERI So, you've taken courses or...?

STALEY Courses.

CAMILLERI And, what is your educational background?

STALEY I don't have a degree in anything like that, no.

CAMILLERI Okay, and how long have you or how many years have you been taking these erosion control courses?

STALEY About four.

CAMILLERI Okay, and are your familiar with the Laurelridge Subdivision?

STALEY Yes, I live there, it seems like.

CAMILLERI And, and how did you get involved with this site?

STALEY I started in reviewing, I helped with some of the water testing on Phase I and I was given then the job to review the plans on Phase II after the planning. But, before that I was a planner 20 years ago when it was first submitted.

CAMILLERI Okay, and when you are saying the plans, what type of plans?

STALEY The civil plans.

CAMILLERI Okay, and have you conducted inspections on this site before?

STALEY Yes.

CAMILLERI For how many years?

STALEY This was first submitted as Phase I, I...and that was in, I think we started like in '99.

CAMILLERI And do you respond to complaints?

STALEY Yes, I do some response to complaints, yes. I'm not always the first person, but, yes, I often go out.

CAMILLERI Okay and during November 21st through November 27th of 2001 had you been out to the Laurelridge Subdivision?

STALEY Yes, I was with Andy that day and then, I believe, I was with Martin that day.

CAMILLERI Okay, so what phases of the site did you inspect?

STALEY We started at the bottom of Valley View and worked our way around. So, it would have been primarily Phase II, at that point Phase I was pretty well built out, and so it was Phase II. And then we would have swung around and checked out Phase III.

CAMILLERI Okay.

HOGAN I'm sorry, ma'am, I didn't get the dates.

STALEY She asked for 11/21 and 11/27.

HOGAN Both dates?

STALEY Yes, I was with them both days.

CAMILLERI And we heard testimony today from Mr. Hagerman about erosion problems on his site. Were you there the day of that inspection?

STALEY Yes.

CAMILLERI Okay, and did Mr. Hagerman's site get inspected more than once that week?

STALEY Probably daily.

CAMILLERI Okay.

STALEY I was at the site almost daily almost always.

CAMILLERI Okay, and we also had heard that there was this drainage pipe down here off of Morgan Lane which we have seen many photographs of and are you familiar with this drainage system for that outfall?

STALEY Uh-huh.

CAMILLERI And, this area here, does that drain into Morgan Lane?

HOGAN Would you explain where you're pointing to.

CAMILLERI I'm pointing this 42 inch pipe coming from the...east. Does this flow into the outfall...or does it flow into Gilbert Creek near Morgan Lane?

STALEY Yes.

CAMILLERI Okay. Do you know what type of lots or properties use this drainage area on the side of the creek?

STALEY Well, these are all homes that have been built in the late '70's, early '80's up through here and there's some fourplexes that were built in the early '90's up there. And these are industrial uses that are mostly they have parking lots and I think there's a big field

CAMILLERI Was there any land disturbances going on that area?

STALEY No.

CAMILLERI Okay. Did you observe that drainage pipe that flowed into Morgan Lane from the east side? Did you do that?

STALEY I didn't look at it specifically, but, since I was standing on

this side of it and looking down, I would assume that, you know, I would have seen the water coming out of it, but, I didn't.

CAMILLERI Okay.

STALEY It didn't, it didn't ring a bell at least.

CAMILLERI Okay. So did it appear to you in standing on that bridge that the source of the turbid water was mostly coming from the discharge pipe on the west side of the bridge?

STARK I'd object to the question, the witness has answered she didn't look at the other side.

STALEY I didn't note the other side, I've...where I was standing...

HOGAN I'm going to overrule the objection. She...she said she had the area in view and it appeared that the discharge was coming from the westerly pipe.

CAMILLERI Okay, and we heard testimony today from Gary Wicks, I believe that's how you pronounce his name, in regards to this drainage pipe and that there was 18 percent of the water in this area flows from Laurelridge Subdivision. And, now, just hypothetically, the other what is that...72 percent...82 percent of the water. Are you familiar with where those other sources would have come from?

STALEY Yeah, they'd come from, you were showing, you know, these other subdivisions here that, these are all built out down here and here and some over here and these are built out.

CAMILLERI Okay, so where there any other land disturbances in the area, on those areas that you just pointed out, besides Mr. Hagerman, Mr. Philips, and Mr. Ferguson on Phase II, to the best of your knowledge?

STALEY I'm trying to think if there was any houses that were being built at that time through here and I don't think there were any houses at that moment being built other than those two.

CAMILLERI Okay, and the, on the day that you were observing the

Hagerman and Philips sites, did you observe the turbid water on the street as noted in these photographs?

STALEY Uh-huh.

HOGAN And which day was that you said November, you were there several days and?

STALEY I'm...that's really hard because I'm there every day. I believe during that period I was there just about every day of the week; but, I know, you know, the days that they had cited Rich and Randy that I was there and also the day that we had called, when Andy was with us, and we had called and talked to Bill about his which was the 21st.

HOGAN Were, were the conditions that you observed on the Philips and Hagerman lots pretty continuous during this time period?

STALEY Yeah, well, it was kind of, you know, some days were, they were doing construction and finishing up the, you know, the landscaping with the bark and that had slowed it down pretty, pretty substantially until and they had put some new piping in, a french drain, and that had helped, and, it had slowed down and there was just some trickling out until, you know, Bill was obviously a problem that occurred after that, on the day it rained real hard something, I'm not sure what, had happened up above it. And I, I think, Randy and I'd gone up and, I think he said his catch basin in his backyard had, had filled with the bark chips, I think it was.

CAMILLERI Okay, so when we have erosion problems like this, would you typically see it around this time if it was raining or was it something that was just happening naturally, or?

STALEY Well, you see it mostly when it's raining; but, because water continues to flow even after it stops raining because the soil kind of holds it and then it just kind of seeps out, it tends to just trickle out even after rain events occur

CAMILLERI Okay, and so on November 21st and November 27th you explained that you were on the Phase II and Phase III sites of Mr. Ferguson's

property and over at Philips' and Hagerman's lots. And, so, based on what you saw on those days, given the size of Mr. Ferguson's property versus the size of Philips' and Hagerman's lots, do you believe or would...could you estimate the difference in volume of the storm water coming off of those properties?

STALEY Oh, well, you can see, you know, this is Hagerman's and Ferguson's... Hagerman's and Philips' and Ferguson had, you know, all of this. These lots right here are Phase I lots, so everything up here, you know, these are all Phase II lots. Gosh, I don't know it, I don't know how many acres are in Phase II right off the top of my head, Philips and Hagerman I think were .24, they're like a quarter of an acre apiece, so they would have made up a half an acre.

CAMILLERI Could you estimate, roughly estimate, at that time how many acres were disturbed on those properties we've seen on Phase II, for Mr. Ferguson?

STARK Now, there is no qualification of this witness to testify about this opinion in any iota, and I'd object to it.

HOGAN I don't think it's calling for an opinion. Overruled. It's calling for an estimate which is somewhat different.

STALEY I believe that there was more than half of that area, because of all of this on Phase II was opened up. They had been bringing in fill and had filled this gully, so that was fresh filled. They...there was some trees and stuff that had been cut down up here and so this had been opened up pretty good. These pieces had never been, the straw hadn't been put on and they hadn't been seeded. The sites along the road had; but the actual pads themselves had not been.

CAMILLERI And just on Phase II?

STALEY Just all on Phase II, not even thinking about Phase I. And then this part here is trees and these along in here were all fill lots and so this was all bare.

CAMILLERI So, if we couldn't do it by acreage, could you do it, maybe by a ratio?

STALEY I would say at least half of the ground was open in Phase II at that point in time. There was only a few houses that had been built in Phase II.

CAMILLERI So, if you compare that amount with Philips and Hagerman could you make a ratio for that?

HOGAN When, when you say that amount are you talking about the total Ferguson property or the total exposed part.

CAMILLERI Exposure...the exposed land on Phase II of Mr. Ferguson's property vers...in comparison to the exposed property on Philips and Hagerman?

STALEY Philips and Hagerman's houses were built on it, they're both in excess of, I think they're both over 4,000 square foot houses, but, you know, and they're on lots that are quarter acre which comes to about 12,000 roughly, 10-12 thousand square foot lots, so, you know, half of their lots. And then you have a combination of both lots having, you know, 20,000 square feet because they're, I think they're multiple story houses, so the footprint, you know.

CAMILLERI Okay, and, and in comparison to that with the open land that we saw on Ferguson.

STALEY Well, at least half of his property is open and so, if each one of these are a quarter of an acre, you could count them up. I know these two are a lot bigger And I think Phase II starts right here. So there's ten of them right there that would have been open times a quarter of an acre, so.

CAMILLERI And on those ones that you were just pointing to, did you find that the erosion controls were adequate in that area?

STALEY No. They didn't meet what the best management practices that the state has about how you do erosion control.

CAMILLERI Okay.

STALEY Those we usually refer to as BMP.

CAMILLERI Okay. I have no further questions.

HOGAN Mr. Stark?

STARK Well, Mrs. Staley, Ms. Staley, the only picture we have of

any of Mr. Ferguson's Phase II milky water going in the system is photograph 14 and photograph 15.

STALEY I know, I've been here since nine. I know 14 and 15. I didn't have a camera, so, I did not take any pictures.

HOGAN Are they only pictures that you are aware of in the records regarding that?

STALEY Of this, I haven't gone through these. I haven't looked at them

HOGAN Actually, was that a question or was it a statement that was going to be a prelude?

STARK A statement, but, I'll make it into question.

HOGAN Okay, go with the question.

STARK The question is, I'll hand you Exhibit 10 and Exhibit 8 and take as long as you want to look at them and let me know all of the photographs that are involved with Phase II?

STALEY Phase II. 928 is Phase II. It's hard because Phase II is like, I think, there. So, you know, how far do you...where do you want me.

STARK What's next up to it?

STALEY Well, Phase I sits next to Phase II.

STARK I see, so some of that might be Phase I in photograph 2 there?

STALEY Yeah, some of them are, you know, and I'm not sure if it's this side of that road or that side of the road. But, Phase I is through there.

HOGAN You're looking at photo 2 in 10.

STALEY Yeah, photo 1 and photo 2 those are Phase II. Photo 3, they don't have an address on this one and it's pretty...

STARK It's 928.

CAMILLERI Can I ask the relevance of these questions, because we've already gone through these with the witnesses?

HOGAN So you're objecting to relevancy. These are being offered.

CAMILLERI It's repetitious.

STARK Because she gave a ratio I'm going to ask her to compare the...

HOGAN I'm going to overrule the objection and allow the inquiry, you know, she made observations and we...go ahead and see.

CAMILLERI Okay.

STALEY These are Phase II.

STARK II. Okay.

HOGAN And could you identify the numbers there, the photo numbers on 10?

STALEY This is on Exhibit 10. 1, 2, 3, 4, 5. So, basically all the pictures in Phase...on this, other than the Gilbert Creek ones, are Phase II.

STARK Okay, you are cosigning with the previous witnesses so far.

STALEY 8. These are all on the upper part which are Phase III.

HOGAN And that's the first four photographs?

STALEY Yeah, 1,2,3,4--Phase III. That one's Phase III. That one's Phase III. That one's Phase III.

HOGAN So, we're up to 12.

STALEY 12 is of Phase III. This is...this one is Phase III coming around the corner to Phase II.

HOGAN 13?

STALEY 13. 14 is the top part is this same spot here, 928. This picture.

HOGAN So that's Phase II, right?

STALEY That's Phase II. And that's the same.

HOGAN 15?

STALEY 15 is the same, and then you're back to Gilbert Creek.

STARK Okay. So, the only pictures we have of any silty water from Phase II are Exhibit 10 and Exhibit 2.

STALEY In those two exhibits, yeah. Uh-huh.

STARK And, the...the silt and problem with Philips and Hagerman is in Exhibit 106, and Mr. Seybold said that, quite honestly I thought, that probably it would have been a similar problem on the 21st and on the 27th. Would you agree with that?

STALEY Probably, just about every day that I went up there was pretty similar.

STARK Wouldn't you think there's a heck of a lot more silt being put into the system from Hagerman and Philips based on those photographs and to fill that storm drain than from the Phase II photograph?

STALEY Not, not when you look at the ratio, it couldn't have. Otherwise, the houses wouldn't be sitting on dirt.

STARK Well, I'm asking you to look at the photographs of the water and the soil coming across the.

STALEY Yeah, I did and I looked at that.

STARK Okay, and your testimony is that, that this is putting more silt in the system than this on Exhibit 105?

STALEY Well, this one isn't because it's closed. You know, it, just the size of them tells me that you couldn't...

STARK Well, well aren't there erosion control measures in there that are doing some good?

STALEY Oh, I'm sure there are.

CAMILLERI Can you clarify which, what you're talking about? Where?

HOGAN In there, in there...

STARK Phase II.

HOGAN Yeah, I think he switched to Phase II.

STARK Well, I mean there are erosion control measures in place on Phase II, are there not?

STALEY There were some and, you know, measures in place; but,

there were also measures in place on that one there too.

HOGAN In the Philips and Hagerman?

STALEY Those, they, you know, put in, you know, as they told you, thousands of dollars of erosion control.

STARK Okay. As to the 21st and the 27th, we've got a picture of the only silty water on Phase II on Ferguson's property and the problem on Hagerman and Philip.

HOGAN I have a difficulty, I think the questions assumes facts not in evidence. The evidence is that those are the only pictures in the record. Not that that is the only silty water. So, if you could conform your evidence to the record, or your question to the record.

STARK Well, okay, I have...Well, were you employed by Mr. Ferguson indirectly to monitor the erosion control up there?

STALEY No.

STARK Have you billed him for erosion control?

STALEY No.

STARK But, the City billed him for erosion control.

STALEY No, the City has billed him for my time as an engineering technician when I do review and when I do inspection.

STARK Okay. Have you also on occasion taken your shovel and corrected a problem that you've seen?

STALEY Yes, I have; but, I haven't billed him either.

STARK Okay. Okay.

STALEY I'm kind of compulsive that way.

STARK In the past, when there was a problem would you contact Mr. Ferguson and he'd immediately take care of it?

STALEY Well, I would call Bill and he would call Dan and Dan would come. But, Dan was only able to come, you know, in the afternoons. So, you know, it depends on when I called him. But, he always came; but, just Dan.

HOGAN Mr. Dan Ferguson is apparently involved in the business, or?

STALEY He was doing erosion control for Mr. Ferguson.

HOGAN Okay.

STARK I have no further questions.

HOGAN Well, I did want to follow up on this conundrum about photos versus what was on the ground. The, on November 21st and November 27th, when you were on the site did you see other silty water in Phase II besides the water depicted in photographs 14 and 15 in Exhibit 8?

STALEY Yes, there was quite a problem on this number "1", here, which, you know, was kind of this top end of, this had all been filled and so it was all.

HOGAN Okay, I need you to kind of describe things a little better.

STALEY It's...it's...I think it's 1131 Morgan. It's a catch basin that is on Morgan between Valley View and Crown.

HOGAN Okay, and is that marked on Exhibit 105?

STALEY Yes, it's got a number "1" next to it with a little star.

HOGAN Okay, and you observed silty water discharging into?

STALEY Going into that catch basin.

HOGAN And where was that silty water coming from?

STALEY It's coming down off of right through here.

HOGAN And you're indicating a series of about eight lots?

STALEY Yeah, there's these top lots that came down between, right here there's a gully that runs down and exits here.

HOGAN Okay, and those lots are the lots north of the area marked as photo 14?

STALEY Yes.

HOGAN And those, there was, you observed silty runoff on the dates in question, November 21st and 27th, running into the catch basin at "1".

STALEY Yes, into the catch basin that's at the "1".

HOGAN And were those lots owned by Mr. Ferguson on those dates?

STALEY I believe so. Through our connection with the Assessor's Office, that's what they showed anyhow.

HOGAN Okay, and did you observe any other silty water from Phase II on those days?

STALEY Phase II. I believe there was some that was coming off of this portion at the top of Crown just before it went into Starlight there was a problem of the water flowing down across.

HOGAN And does that drain into Blue Gulch?

STALEY No, this is...this still drains into Gilbert Creek. Crown is right here, so it breaks right there.

HOGAN And when you say right here, you're pointing to sort of the west edge of the.

STALEY It's at the corner of Starlight and Crown.

HOGAN I don't think I have any further questions. I need to turn the tape over.

END: TAPE 3, SIDE 1

START: TAPE 3, SIDE 2

HOGAN Okay. We're back on the record. Was there any follow up?

CAMILLERI I have one more exhibit that I'd like to enter into the record.
Is that okay? Okay.

HOGAN Now this is a report that was prepared for Ms. Staley?

CAMILLERI Yes.

HOGAN Exhibit 12?

CAMILLERI Exhibit 12 and is that correct, the number? Yes, Exhibit 12,
yes.

HOGAN And were you going to question the witness on this?

CAMILLERI Yes. Do you recognize this document?

STALEY Yes.

CAMILLERI What is it?

STALEY It's a report that I had asked an engineer to provide to me
when I had some concerns on Laurelridge.

CAMILLERI Who is this engineer?

STALEY Bill Galli of Galli Group. He is a, I think, a geological
engineer, I think. He does erosion systems.

CAMILLERI Okay. And what was the reason that you requested him to
conduct an investigation?

STALEY I had some concerns about the stability of the hillsides and
whether or not they were going to actually stay there. There were some major
cracks on the construction so I was kind, kind of concerned, especially right next
to the roadways and so, I asked him to look at it and to see if, if it was safe and
what sort of erosion issues did he see. One of the other problems is that because I
am not an engineer, there is a question as to whether or not I should be saying
there is erosion issues. I thought it would be best to have a PE look at it.

HOGAN Is that PE a professional engineer?

STALEY Yes.

CAMILLERI And what part, what Phase of the construction site is the report is on here?

STALEY This was, this was all on Phase II.

CAMILLERI Was, are you the custodian of this document?

STALEY It was in my files, yes.

CAMILLERI Was it kept, kept in the ordinary course of business?

STALEY Uh-huh.

CAMILLERI And this a true and accurate copy?

STALEY Yes.

CAMILLERI Judge Hogan, I'd like to offer this document into the record as Exhibit number 12.

HOGAN Objections?

STARK Okay.

HOGAN Exhibit 12 is admitted.

CAMILLERI Okay. Can you explain for the record the details of this document? As briefly as possible, it's 90 pages, just the shape, the gist of it.

STALEY Well, basically, he went up Crown and checked and Valley View both, I'm sorry, and enumerated some of the erosion control areas that were lacking or needed to be maintained or needed attention.

CAMILLERI After?

STALEY And he did it lot by lot.

CAMILLERI Okay. Did he find that there were a lot of problems with it?

STALEY Yes, he did.

CAMILLERI And after this document was complete did Mr. Ferguson receive a copy of it?

STALEY Yes, I sent one to Dan.

CAMILLERI Okay, and what was the date of that document?

STALEY It was dated December 15, 2000.

CAMILLERI And did you inspect the property after this document was written?

STALEY Yes.

CAMILLERI Had Mr. Ferguson installed or maintained additional erosion controls to meet the needs of that document?

STALEY He did some things; but, I'm not sure that there was enough done.

CAMILLERI And why do you make that statement?

STALEY We still were having erosion controls with the granite coming off the top of the areas that didn't have any protection.

CAMILLERI I have no further questions.

HOGAN Mr. Stark, did you have some follow-up on my examination and on this exhibit here?

STARK Well, before the permit would have been cancelled Mr. Galli would have signed off on this wouldn't he?

STALEY I don't know because I'm not part of the approval. I'm not sure.

STARK Do you know if Mr. Galli signed off on the subdivision?

STALEY I don't believe he did. But, I'm not sure.

STARK I have no further questions.

HOGAN I did have one further thing, I'm kind of concerned about this exhibit. I wasn't sure if we had all the street names on this exhibit.

STALEY Yeah, Starlight wasn't on here in, in. But, all the other names are on here

HOGAN Okay. Just needed to check on 105 to make sure we'd be able to decipher the testimony regarding that. Okay. I don't have more questions for this witness. Okay.

STARK Okay.

CAMILLERI Okay.

HOGAN Can Miss Staley be excused, and she?

STARK Can I take a five minute witness out of order?

CAMILLERI Okay.

HOGAN There's no objection. Certainly. Can we excuse Ms. Staley, are we completed with her?

STARK Sure.

STALEY So I can.

HOGAN You can leave now. You're excused to really go.

STARK Mr. Stewart, would you just come up here please.

STEWART Yes, thank you. I appreciate you allowing that.

HOGAN If you could raise your right hand, Mr. Stewart. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

STEWART Yes.

HOGAN And can you state for the record your full name, spelling your last.

STEWART Rich Stewart, S-T-E-W-A-R-T.

STARK Mr. Stewart, what is your employment?

STEWART I'm the founder and CEO of Suma Pacific Corporation a soil erosion application company.

HOGAN Suma Pacific?

STEWART One "m", yes.

STARK Suma Erosion, what was?

STEWART Suma Pacific Corporation and we are erosion control applicators.

STARK All right, and how long have you been?

STEWART Twenty-five years.

STARK And do you have any formal training for erosion control?

STEWART I'm kind of like Kathy Staley, I've been to a lot of IECA

meetings and a lot of workshops, but, I do not have a degree. I hire those folks.

STARK Okay. But you know a lot about erosion control?

STEWART Yeah, I guess that's probably a fair statement.

STARK Now, what's your connection with Mr. Ferguson?

STEWART Mr. Ferguson employed us to do some mitigation work on Phase II and most of the erosion control on Phase III.

STARK And, as far as Phase II, do you recall when you...what you did and when you did that for Phase II?

STEWART Yeah, I...I don't have the record and data; but, I do recall what we did. We, we applied a prescription called hydroseeding which is a slurry of wood fibers and fertilizers and, and specific grass seeds. We applied that and then we also applied straw mulch over some of the areas, and then we also came back over with a with a material known in the industry as a tactifier, its a almost glue usually waterbased natural product that, that actually holds the straw or tacks, as it's referred to, to keep the straw in place. That's for raindrop impact, so when rain hits it it doesn't strip the soil. The soil is left untreated.

STARK Well now, you know, it kind of these violations of Phase II as far as causing pollution are alleged to have happened on November 21st and November 27th of 2001. Can you give the judge any idea of when your work was done in connection with Phase II as to those dates?

STEWART As I recall, I think we were up at that notorious landfill on the 21st. There was a big rain event. I, I can't tell you precisely which date we were there; but, Mr. Ferguson was, was pretty diligent at getting us up there.

STARK Then it would have been that summer?

STEWART I believe so, yes.

STARK And did, were, were some of the houses sold at that time when you did this last work?

STEWART I, I believe so, I don't know if they were actually in escrow or what. But, there were some houses built up there.

STARK Well, was this work done in 2001?

STEWART I believe so, yes.

STARK Okay. And how do you put the hydroseed on?

STEWART You have a, a distributor truck that's about the size of a ten, ten-wheel water truck that you see on construction sites, and it has agitation paddles on either side and it has pumps and it, it comes out through a, a truing, a spring device on the top then through hoses, and its sprayed on kind of like paint. It looks a lot like paint.

STARK Can you spray it from the roads or do you have to go out on the?

STEWART Most of the time its from the roads. Occasionally, its done through hoses and from most sites, occasionally its dropped from airplanes.

STARK On this particular site, were all the vari...areas covered?

STEWART I can't recall whether all the areas were covered or not. I, I don't recall. I don't actually, I, I'm on the site, I don't actually do the work.

STARK Have you...are your familiar with site. Did you go up there and inspect it?

STEWART Yes, I, I actually live in Phase I.

STARK Okay.

STEWART I actually do live in Phase I.

STARK Okay. Have you gone...are you familiar...at any time have you inspected Phase II and III and, and the job that was done on erosion?

STEWART Yes.

STARK And, when was the last time you did that?

STEWART Oh, its been probably several weeks ago. I drove through there, no charge to Bill, but, I drive through occasionally just to make sure that its holding up.

STARK Does it look pretty good now?

STEWART It looks pretty good, yeah.

STARK Okay. How about prior to that, when's the last time prior to that you actually observed the erosion control on the site?

STEWART I went up there last winter through a couple of rain events that were happening and just to see how things were holding up.

STARK And, what did you find?

STEWART It looks pretty good.

STARK Just a second please. Did you inspect the site in the previous winter?

STEWART Yes.

STARK And this the winter that we're alleged to have created some problems

STEWART You know, I'm not sure if I was in that particular part of the subdivision at that time. I've heard of these problems, but, have I witnessed them firsthand? I don't believe so.

STARK Okay. In your opinion for the work that your company did for erosion control, was it a reasonable thing to have done to that site at the time, in 2001?

STEWART Yeah, I think reasonable is correct.

STARK Do you know if you spread some straw and things?

STEWART We do so many jobs, in so many different places. I think we did, but, I'm not, I'm not a hundred percent sure. We did exactly what Mr. Ferguson asked us to do up there.

STARK Did you have an engineering, any other drawings or reports to follow besides what Mr. Ferguson told you?

STEWART No, we, we followed the instructions that our customers supply us with.

STARK I have no further questions.

CAMILLERI I have no questions.

HOGAN Okay, then you are excused.

STEWART Thank you for getting me out of here.

CAMILLERI Okay.

HOGAN And are you concluded? No you have one more.

CAMILLERI Yes, I have one more witness. My witness is Bill Meyers.

HOGAN If you'd raise your right hand. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

MEYERS Yes, I do.

HOGAN And can you state for the record your full name, spelling your last.

MEYERS William J. Meyers, M-E-Y-E-R-S, and you can call me Bill.

HOGAN You may proceed.

CAMILLERI Okay, and, Bill, where do you work?

MEYERS I work for DEQ here in Medford.

CAMILLERI Okay, and what is your position with DEQ?

MEYERS My position is a Natural Resource Specialist in the Water Quality Division program

CAMILLERI Okay, and how long have you worked for DEQ?

MEYERS Its been a little bit over two years.

CAMILLERI Okay, and have you been in that position the whole time?

MEYERS Yes, I have.

CAMILLERI What's your educational background?

MEYERS My formal education is a masters degree in environmental chemistry from the University of California, Davis. My professional background I've worked for the US Geological Survey for four years doing water quality work. Worked for the Nature Conservancy for two years here in water quality work. Within the Rogue Valley I worked for regional government, Rogue Valley Councils of Government, for four years doing water quality work before taking this position.

CAMILLERI Have you done any water quality testing...what...could you

just expand on what that water quality work, some of that.

MEYERS Its...it involves, it runs the full gamut of field work, what we're doing, we're doing, we're taking water quality samples. Doing analysis, looking at stream conditions. Interpreting those results, creating reports, working with local interest groups with forestry interests, agricultural interests, with cities, counties explaining and trying to improve water quality conditions throughout the Rogue Basin.

CAMILLERI Have you gone out and looked at erosion conditions on a stream or waterbed in this area?

MEYERS As part of my work currently with DEQ one of the things we look at is the potential for stream bank erosion. So, not necessarily from construction site work, but, just are banks stable or not.

CAMILLERI Okay.

MEYERS And how that may impact sedimentation and turbidity at some time in the future Are banks stable or are they not.

CAMILLERI Okay. Can you explain to Judge Hogan what you meant by turbidity?

MEYERS Turbidity is a measure of the clarity of water and basically turbidity, the less clear the water is, the higher the turbidity numbers are.

CAMILLERI And, when you say clear what, what is involved that causes the water to become not clear anymore?

MEYERS The causes or how we measure it?

CAMILLERI Yeah, the causes.

MEYERS It comes from suspended particles in the water column. So, by clarity, when you take up a glass of water and how its measured with an instrument is a beam of water goes or a beam of light goes through a calibrated cell and how much of that light makes it through determines the turbidity its... the light scattering ability is what's suspended in water, and turbidity can take many forms. It can be something like a bag of tea, you know, where the water is now it

will absorb light however you can let that bag of tea in effect tea set for a week and its never going to settle out. That is, that's dissolved. Clays tend to stay in suspension also. Things like sand will be suspended as that water moves, as soon as the water slows down the turbidity will drop a little bit as particles settle out.

CAMILLERI Okay, and in this today we've heard a lot about granite soils that were coming off of the Laurelridge construction site. So, how would those kinds of soils, you know, affect the turbidity of the receiving stream?

MEYERS You know, in the most general sense it would, granitic soil is basically a fine to coarse sand. When the water is moving quickly, when the water is in motion, these things will be in motion with it and then carried along and the water is suspending these particles. When it slows down in a catch basin or in a pond, something like that, these particles, many of them, will tend to settle out. There are other things, you know, lighter particles that will have just keep moving down the stream.

CAMILLERI Okay. And how do we measure something like that? How do we measure turbidity typically?

MEYERS Its measured with an instrument, at least the way we do it, its measured with an instrument called a turbidometer. And that is that, you know, its a calibrated, its, its a known cell just basically in a glass bottle, very clear glass, and its put into a very small instrument which basically shoots a beam of light through the water and then there's a detector on the other side that, that, you know, there's no amount of light that comes through, there's no amount that is absorbed and it reflects the difference. Turbidity units are, they're expressed in NTU, and that's nescometric turbidity units.

CAMILLERI Okay. So, what, on a scale of turbidity units, when do we start to get into impact to water quality?

MEYERS Basically the, the guidance that we have received comes from the National Marine Fishery Service and its based on the needs of cold water fisheries and with that guidance and its, what that guidance says is anything over

50 NTU's is considered moderately impaired for cold water fisheries. Cold water fisheries would be trout, salmon, and steelhead.

CAMILLERI And, so, what would...I don't, if you could try to explain, what would 50 NTU's in a receiving stream look like?

MEYERS 50 NTU's, its surprising, its not that much. Basically, it is, you know, it's slightly cloudy water and the impairment comes from it, it impacts some cold water fisheries because they are more susceptible to predation because they can't see as well, they can't feed as well, and, then, depending on what, what the material is in suspension, it also causes damage to their breathing. To their gills. But basically, what's 50 looks like is its semi-cloudy water. You can still see through it.

CAMILLERI Okay, and are you, today we've talked about Gilbert Creek. So, does Gilbert Creek have, to your knowledge, does Gilbert Creek have fish habitat, and fish and aquatic species in it?

MEYERS It does. As part of preparation for this hearing I contacted ODFW.

HOGAN And who is that?

MEYERS Department of Fish and Wildlife. I contacted the Department of Fish and Wildlife, their fisheries biologist. Gilbert Creek is habitat for Coho salmon which is a listed species under the Endangered Species Act that's threatened in Southern Oregon. Steelhead, I believe its summer steelhead, summer steelhead as well as resident trout, those would be the rainbow trout most likely.

CAMILLERI And, so, are those fish, do they, are they in that water body throughout the year do you know?

MEYERS It, it depends on the species and where they are in life history and are they coming up to spawn, are they laying eggs, have they hatched out of the eggs, and they're hanging around the nest. They are, during the month, during the month of November. Here's a table I got from ODFW. During the month of

November, just in a general sense, as best as we understand within the Rogue Basin, maybe, if this, this table is by month by month but it really depends on the river conditions, there's quite a bit of movement one direction or another. Summer steelhead, winter steelhead. Adults may be present in November. Spawning Chinook if they're present, winter steelhead may be spawning that time of year. Egg incubation so there may be eggs that are in the gravels for winter, winter steelhead, spring chinook, fall chinook, and coho also. Coho may have eggs in the gravel. And juvenile rearing. So, if the eggs got in early and the eggs hatched there may be juveniles living in the area. For both summer and winter steelhead and Coho salmon.

CAMILLERI Okay, and how, how about habitat? Is habitat, are we going to have fish habitat around that time of year?

MEYERS Well, the habitat is going to impact, you know, the reason why the fish are here. If the fish are up the stream and they're there to spawn, there are certain gravel requirements relatively available, they can't be all clogged with fine gravel. It has to be the right gravel size for the, for the species.

CAMILLERI So, is there a potential if you have turbid water discharging into Gilbert Creek in November of 2001, is there a potential that there could be harmful impacts to fish or aquatic species or their habitat?

MEYERS The potential is certainly there. The fish are there, and, and another thing I didn't mention is the microinvertebrates which are the bugs, which are the insects that the fish eat can also be affected by sediments coming down and turbidity.

CAMILLERI Okay. , and I'm going to refer to Exhibit 10 and Exhibit 8 and photographs on Exhibit 10, photographs 6, 7, and 8 and 9; and also you might want to take this just take this one at a time. But, also on photograph, Exhibit 8, look at photograph 16, sorry, 17 and 18. And I'll just kind of lay these down, and...

MEYERS So, let me know what I need to look at here.

CAMILLERI Okay, so just looking here on Exhibit 8, which was taken on November 21st. Can you explain the conditions of the upstream, upstream of the discharge?

MEYERS In, based strictly on what I'm seeing the upstream discharge looks very clear. I can see leaves at the bottom, I can see some, at the bottom of that, the creek there. You know, I can see leaves and twigs. It looks generally fairly clear. Photograph 18, the water is very turbid, I can't see any of the bottom of the creek. Can't tell how deep it is.

CAMILLERI So, based on that observation, could there be potential for there to be impacts to fish and the microinvertebrates and habitat?

MEYERS Based on what I'm seeing here, I, I would say most definitely, yes.

CAMILLERI And then also with these photographs here on Exhibit 10, numbers 7, 8...I'm sorry 8 and 9, can you make that determination as well?

MEYERS Now, photograph 8 again is looking fairly clear. I can see some rocks, I can see a cinder block on the bottom of the creek, I can see leaves and twigs, etc. Photograph 9 is looking, uh, very turbid. I cannot see the bottom, maybe a little bit on the edges; but, its, its looking very turbid.

CAMILLERI Based on those two photographs, could you make a rough estimation as to the NTU's on, photographs on, in Exhibit 8 and 10? Numbers 17 and 18 and 8 and 9. Specifically, photograph 18 and photograph 9. Could you make a rough estimation as to the NTU's based on your experience and?

STARK May I ask a question may it be possible, Judge Hogan?

HOGAN Yes, you may.

STARK Isn't...aren't there fairly easy ways to take a sample and, and actually measure the NTU's?

MEYERS There are, the instrumentation is fairly simple to use.

STARK And, would you, there's three types that I'm aware of anyway. There's a disk cylinder...let me see my notes here. You know what I'm

talking about there? What's that cylinder called?

MEYERS Yeah, its, its made by Hawk and its called a compiler. You're, you've got your sample, its kind of like a binocular, kind of set up. Its got a sample on one side and you've got a wheel, is that the one? And you turn the wheel.

STARK I'm just thinking, I just for purposes of this objection. You can't be at all, you're speculating aren't you? I mean you have to, aren't there?

HOGAN Let him answer that question.

MEYERS I haven't answered the question yet. I haven't speculated yet, you know, it would be best professional judgment and it would be within an order of magnitude. You know, it is based on experience, but, given any...there is a lot of uncertainty there.

STARK Doesn't DEQ require when you're talking about turbidity, they require you to test it if you're going to pass anything or you're going to get a permit it has to be tested, doesn't it?

MEYERS They would require the permittee to test it. So the entity, the corporation or the individual, who holds the permit is generally the one who's required to test it, to demonstrate that they are meeting turbidity requirements.

STARK Was there any testing done of this water...to your knowledge?

MEYERS At this time or in general?

STARK This time.

MEYERS At this time, not to my knowledge.

STARK So, it would be speculative for you to, to give this opinion you were asked to?

MEYERS It would a best guess estimate. You know, I can. It's hard to say what the, the level of accuracy is there. It would be an estimate.

STARK Aren't NTU's a, actually a unit of weight.

MEYERS Not that I'm aware.

STARK Isn't, isn't the water standards for, for drinking water

standards not more than 10 percent rise, isn't that based on weight?

MEYERS Do I? Should I answer that?

HOGAN I guess, yeah.

MEYERS For drinking water standard I think the standard is less than 1 NTU and that is a measure of clarity. Again, its using a similar technology maybe a different instrumentation.

STARK Just a second here.

CAMILLERI I'm little confused as to the line of questioning. Are we still...

HOGAN I, this is questioning in aid of objection and I'm hoping that an objection will be coming soon.

STARK Well, the objection was that it was speculative and I'm asking questions to show that objection.

CAMILLERI Is that an objection that can be made at, at, I believe there's only three objections that can be made.

HOGAN Yeah, actually, it can. Those are examples of objections the immaterial, irrelevant or cumulative are examples but other types of objections that can be made in a, in administrative hearings or with foundation. And really, I think that this is one of the, in essence this is, this objection is to materiality. Because what he's saying is that it doesn't tend to prove the fact in issue because, um, the estimate of the witness would be too unreliable to, to use in a finding of fact. I wouldn't. Not to put words in Mr. Stark's mouth.

STARK I'll object on the basis of materiality and the speculative nature of this.

HOGAN Okay. I'm going to allow the witness to answer the question although we need to if possible. Well, let me ask you one more question. Is it possible for you to state a range of values from observing photographs, in other words to say that, that looking at this photograph in my, you know, in my best professional opinion that it, the NTU's would be not less than and not greater than?

MEYERS Yes. I would feel comfortable with that.

HOGAN Then I'm going to allow an answer, I'm going to allow an answer if that, if you can.

MEYERS And, I can also answer a little more qualitatively just by saying that, you know, the difference between picture 17 and 18, based on my professional experience, I'd stake my career on it that that is at greater than a ten percent difference between photograph 17 and 18.

HOGAN What do you mean greater than ten percent?

MEYERS Well, I don't know if the discussion has gotten to permit requirements and our administrative roles, to the Oregon Revised Statutes. But, our turbidity standard is no more than a ten percent increase as the result of an activity. And that ten percent is measured upstream and then it is measured a hundred feet downstream of an activity. And that's the way our Administrative Rules are written.

HOGAN I don't, I want you to be able to complete your questioning. I'm sorry, I didn't mean to get. Interrupting.

CAMILLERI Okay. Okay. I have a...so back to earlier we were talking about that around 50 NTU's you'll have impact to the fish.

MEYERS Uh-huh.

CAMILLERI So, based...looking at, in Exhibit 8 and Exhibit 10 photographs 18 and 9 could you make a rough range estimation as to what the NTU's would be in this photograph?

MEYERS Just based on what I'm seeing here in these two photos, I would estimate it in the range of 500 to 1,000 NTU's.

HOGAN And, that's on photo. Which photo is that?

MEYERS That's based on photograph 18.

CAMILLERI And photograph 9.

MEYERS And photograph 9. Exhibit 8 and Exhibit 10.

CAMILLERI Photograph 9.

HOGAN And you said how many NTU's?

MEYERS Between 500 and 1,000.

HOGAN I'm sorry, I didn't get that again written down.

CAMILLERI Looking at the turbid water on Phase II of the construction site. This is photograph 14 in Exhibit 8 and photograph 1 in Exhibit 10. Could you make, you know, again about a best guess estimation as to the turbidity seen coming off of this?

STARK Which two photographs?

CAMILLERI These two photographs here.

MEYERS I would put it in that same range if not higher. When you see, when you actually have particles in suspension and you can see some sediment just lighting up its difficult to measure generally you have to dilute the sample several, several times before you can measure it. But I would say in this, you know, 500 to 1,500 range.

CAMILLERI Okay, and the discharge that we saw back on the previous pages into Gilbert Creek photograph 18, Exhibit 8, and photograph 9, Exhibit 10. Would you say that there is a change in the physical, biological, or chemical properties of the creek?

MEYERS Yes, primarily the physical properties, based on appearance.

CAMILLERI Okay. I do not have any further questions.

HOGAN Mr. Stark?

STARK Well, I'd like to hand you Exhibit 106 and look at all those pictures if you would. Based on your same type of estimate that you made for the previous photographs, what would you estimate the NTU's are in that runoff?

MEYERS You know, its really hard to say. I need to see some moving water, you know, this one is just basically a stain, and a bunch of sand and gravel coming down the curb. These two have a little water, so let's see. Photograph 1 doesn't have any moving water that I can see. Photograph 4 is just showing some sediment sitting on the curb, so there's really not any moving water. 6, photographs 6 and 7 are a detention basin. Photograph 2 and 3 have a little bit of

moving water. You know, I put these in that same order of magnitude, somewhere between 500 and 1,500 NTU's.

STARK And, if it rained those sediments would end up in the storm system. Wouldn't that be true, I mean, unless those were cleaned out those would end up in the storm system.

MEYERS Assuming that there's a storm drain downstream or there's a natural waterway it would eventually, and the magnitude of the storm. And you've got some, you know, you know, picture number 2 you've got some pretty large gravels here if there's a large enough storm that will create some runoff that'll move that downstream. Potentially, that could go in as well.

STARK Okay. I have no further questions.

HOGAN In reference to the questions asked did you have any follow up?

CAMILLERI No, thank you.

STARK I'd like you to assume as fact that during this period of time in November of 2001 and November 21st and 28th, I'd like you to assume as a fact that the Rogue River was more turbid than, than photograph 18. Is that square with your understanding, or not?

MEYERS Are you asking me to assume or to, to assume that?

STARK Well, let me ask you this way. I'd like you to say that there'll be some testimony that the Rogue River is more turbid than photograph 18 at this particular time. Does that square with your understanding of the relationship between Gilbert Creek and the Rogue River or not?

MEYERS I would state in my experience, I don't know if I can recall ever measuring or seeing the Rogue River this color.

STARK Okay.

MEYERS Based on my experience.

HOGAN Actually, I did have some questions. The question I wanted to go into was this issue about the the increase in turbidity by ten percent. How do

you decide if that's happened or not? What does that mean increase?

MEYERS Its, that a requirement of...that's a permit requirement. Where if there's in stream construction going on...let's say a bridge or someone's working on a stream bank they are required to measure with a turbidimeter, which is that small handheld instrument, the turbidity of the water above the construction site and the turbidity of the water below that construction site. And if there is an increase of greater than ten percent due to the activities of whatever is going on or in the stream then that is considered a violation.

HOGAN So, for example, if the turbidity was 100 and then it went to 112 that would be a 12 percent increase, right?

MEYERS That would be a 12 percent increase.

HOGAN And does this apply just to construction actually in the waters or adjacent to the waters?

MEYERS It...it also applies, I believe its written into the 1200c, storm water permit as well. So it's, it applies to anything that is, any kind of, anything that has the potential to disturb sediments, to create turbidity. So, whether its, anything that has a discharge into a waterway. Whether that's the result of working on a bridge or on a bank or building a house or working on a road right-of-way.

HOGAN Okay, and then I kind of lost the exhibits here. I think they're on the desk. Here's Exhibit 8 here. Exhibit 8, photograph 17. Can you give a range of turbidity for that water?

MEYERS Which one?

HOGAN 17.

MEYERS Okay. 17, you know, I would say its in the 5 to 15 range.

HOGAN And Exhibit 10, photo 8. Again, if you can do so, if you can't do so that's fine. Can you give an estimate of the turbidity of that water?

MEYERS Well, again its just an estimate, but, I would in that 5 to 15, 5 to 15 range.

HOGAN I don't have further questions.

CAMILLERI Okay. I don't either.

HOGAN Any follow up on my questions, Mr. Stark?

STARK Just this one. Isn't the effect on fish also determinative of time?

HOGAN You mean the time of the discharge?

STARK The time...the duration of the exposure to the, to the turbidity.

MEYERS Yes, it, it is certainly dependent on the length of exposure. It's also dependent on the life stage and its also dependent on is it a fly that's just hatched versus a full-grown adult, that they're just spawned. They will be affected differently by turbidity and its also dependent on the material that's in suspension, that causing the turbidity. There's a lot of variables and that's where that 50 is, you know, that is a rule of thumb, that's come from the National Marine Fishery Service. It's a recommendation.

STARK Okay.

HOGAN Since we have a little pause, I'm going to go ahead and go off the record and change the tape. My warning light is flashing.

END: TAPE 3, SIDE 2

START: TAPE 4, SIDE 1

THIS SIDE OF THE TAPE IS BLANK.

END: TAPE 4, SIDE 1

START: TAPE 4, SIDE 2

HOGAN Okay, we're back on the record. I turned over the tape. You can continue.

CAMILLERI Okay, so, on November 27, 2001, was this driveway paved?

SEYBOLD I'm not positive about that.

CAMILLERI Okay.

SEYBOLD It was paved on the 28th and I...it didn't appear that is was just paved that day.

CAMILLERI Okay.

SEYBOLD I, I couldn't, couldn't verify that it wasn't, was not paved, I believe it was.

CAMILLERI Do you have any recollection of this driveway being unpaved?

SEYBOLD No, Kathy Staley was the person that would have done inspections at that point in time.

CAMILLERI Okay. Okay, no further questions.

HOGAN I just wanted to...on photo 1 in Exhibit 106, that paved area to the right is the driveway?

SEYBOLD That's the driveway accessing the home, yes.

HOGAN And, the...and this photo accurately depicts the runoff that you observed?

SEYBOLD Yes, ma'am.

HOGAN Okay. And, and is this white area out here the curb and gutter that goes into the street?

SEYBOLD That is the sidewalk.

HOGAN That's the sidewalk and then, oh, I see, this photo 2 shows it better. Was there, this silt material did it continue on into the, I guess photo 3 shows is that the from the Hagerman/Philips area on the street.

SEYBOLD Yes, ma'am.

HOGAN Okay, you have to turn it upside down, I guess.

SEYBOLD My fault.

HOGAN Okay, and how about photo 4, does that show the extent of the dirt on the street?

SEYBOLD Yes, ma'am and that would taken on a different day, the ones that I testified before were three photographs, this one is taken on a different day and I didn't check that, that one.

HOGAN You didn't check that one. How do you know it's on a different day?

SEYBOLD I think it's raining in the other one.

HOGAN Well, that's what it looks like to me too. So you don't know the date of 4. How about 5, 6, and 7, do you have the dates on?

SEYBOLD I've have to go back out and look at them?

HOGAN Okay.

SEYBOLD If they were the same day or not. I don't think those were.

HOGAN Okay.

SEYBOLD May I see them again?

HOGAN Sure. Did you, having looked at the photographs did you have anything to add?

SEYBOLD No.

HOGAN Okay. Further?

STARK I, you know, if its helpful we could at a later time just access the computer and put a date on those.

HOGAN I think there's going be a motion about how to hold the record open. There was some talk about that. You know it would desirable to have the dates for the pictures, it really would. Your next witness.

WILLIAM FERGUSON Dan should be here shortly, we had somebody had an air conditioner went out and I sent him over to see if he could, I didn't think it'd

be this quick. But, you can take me if you want, Dick, first.

STARK Sure.

WILLIAM FERGUSON Then I could just, you could break me until when Dan comes and then get rid of him.

HOGAN Okay, Mr. Ferguson, if you could raise your right hand. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

WILLIAM FERGUSON I do.

HOGAN And can you state for the record your full name, spelling your last.

WILLIAM FERGUSON William Henry Ferguson, F-E-R-G-U-S-O-N.

HOGAN You may proceed.

STARK Would you please give a brief history of your employment experience and what you do at the present time.

WILLIAM FERGUSON I'm a graduate of the University of Oregon with a degree in economics and later the University of Oregon Law School with an LLP, and thereafter passed the Oregon State Bar that year and commenced employment as the first deputy district attorney of Josephine County, and I worked there for two and a half years was employed in private practice with the firm of Coker and Myrick for about two years. Went out on my own after that associated with an attorney there named Charles Seagraves and in 1970 I had an opportunity to associate in a partnership with Robert Grant of this city. Later Bill Carter joined the partnership and that continued until I retired, in round numbers, twelve years ago.

STARK And, would you tell the judge please about your ownership of this subdivision and how that came about. I've got, I've marked as Exhibit 109 a partnership agreement for the Laurelridge Development you can refer to that if you want to, but, just tell the judge who owns the subdivision and how you acquired your own.

WILLIAM FERGUSON Okay, um, actually we bought the basic subdivision property in 1965 as a location for the City to locate a third lower reservoir. The City Engineer at that time was looking for a site, we were developing a subdivision where I wanted to build a house which was called the Starlight Subdivision which is just to the south and down the ridge from the subject property. I didn't have any money at that time, I was fresh out of law school, so I got my dad and uncle to pony up the money and I agreed to, you know, handle the property until we could get it sold. A number of things happened...the economy was good and bad, I was busy and didn't get around really to devoting other than one, we had some approvals at one point but that's when high interest came by and I just said hey we don't want to do anything. So, about the time we, I retired, actually just before I retired, my father died so my stepmother owned a third interest and then before we got ready to develop it my uncle died so my aunt owned a third interest and thereafter my stepmother sold out to a fellow named Noel Moore, a developer from Medford, a builder. And Noel ran into some financial problems on the east side of Medford, I guess with a road and some other things. Long and the short of it is, he asked me to buy him out, which I did. Prior to that time, we'd...it had always been in a partnership originally and Ferguson Ventures was the name of the partnership, and then after Dad and Uncle George died it was just a partnership with the two widows and myself, and then when Noel bought my stepmother out we entered into a new partnership called Laurelridge Development and thereafter the property was, in effect, owned by Laurelridge Development by that partnership. Exhibit 109 is the partnership agreement between myself and Noel Moore and my aunt, Gwen Ferguson, who is since deceased.

STARK Okay, and the part...the property that we are talking about today is owned by this partnership, is that correct?

WILLIAM FERGUSON That's correct. Yes.

STARK I don't know. I'll offer Exhibit 109 if you want it.

HOGAN Is there an objection to 109?

CAMILLERI No.

HOGAN Then that's admitted.

STARK Now, please tell the judge. This erosion control thing. I got a document that DEQ puts out called Best Management Practice for Storm Water Discharges for Construction Activities. I thought it would be relevant to this...these proceedings and I would ask that the court take judicial notice of this as a document produced by the DEQ and I'd offer that into evidence.

HOGAN We don't have that marked, it's 110. And this is the Best Management Practices, is kind of like a learned treatise, you know.

STARK Yeah.

HOGAN Any objection to 110? I object to reading it.

STARK Well, I'm going to point out a part for you I want you to read.

HOGAN That's all right.

STARK Okay.

HOGAN Is there an objection to 110?

CAMILLERI I don't know how I would object to this, but, just that this document has not been approved by the agency. It is on our website, but, it hasn't gone through the steps of approval. So, it is a tool used to assist people, but, it isn't the bible.

HOGAN Okay, okay is it published on the, on the internet by the agency?

CAMILLERI It is, but, it didn't go through the proper approval channels.

HOGAN It's not, it's not an approved document, but, it is one that is available to the public.

CAMILLERI It is for assistance, yes.

HOGAN Okay, well, I'm, you know, I think it probably does qualify as an authority that people would refer to, it's intended to be referred to by the members of the public for information and I understand that it doesn't have the

authority that a manual adopted by the agency would have.

CAMILLERI Okay.

HOGAN But, that kind of goes more to the weight of it then. So, I'm going to overrule the objections and admit the exhibit.

STARK And Exhibit 111 is a letter from Jenine to Bill Ferguson that I would like to, dated December 18, 2002, that I'd like to enter into the record.

HOGAN Okay and this is from the agency representative Miss Camilleri.

CAMILLERI I don't know what that is, I can't see. Okay. I have no objection to that.

HOGAN 111 is admitted.

STARK Okay, then Dan Ferguson has come in, I'd like to just suspend Mr. Ferguson's testimony if I could and take Dan?

HOGAN Okay, I take it Mr. Ferguson is going to be a fairly lengthy witness. That's a little bit irregular, but, we'll go ahead and do it. I know you need to use Dan. You know we are running up, we've got about half an hour, do you think you'll be able to complete Dan Ferguson's testimony.

STARK For sure, yeah.

HOGAN Okay. If you could raise your right hand. Do you swear under penalty of perjury that the testimony you will give in this proceeding will be the truth?

DANIEL FERGUSON Yes.

HOGAN And can you state for the record your full name, spelling your last.

DANIEL FERGUSON Daniel Scott Ferguson, F-E-R-G-U-S-O-N.

HOGAN You may proceed.

STARK And, Dan, would you please the judge a brief, educational background that you had. What is your educational background?

DANIEL FERGUSON I've got a doctorate in jurisprudence, just a wide

variety of things prior to that and after that and just practical experience with erosion control.

STARK Okay. What practical experience have you had as far as erosion control? You worked for your dad as I understand it on this subdivision. Have you worked on other subdivisions?

DANIEL FERGUSON A subdivision in Jacksonville. I worked for a couple years, doing erosion control there also.

STARK Is that for your father?

DANIEL FERGUSON Yes.

STARK Okay, and you've worked with contractors that specialize in erosion control and engineers that do.

DANIEL FERGUSON Yes, I have.

STARK Okay, how many total years have you been doing this?

DANIEL FERGUSON I think it's six years.

STARK Okay. Now, I'll take you back to November of , of 2001. Do you recall a first contact from the DEQ or from the...I guess from the DEQ concerning a problem with the subdivision?

DANIEL FERGUSON I recall first contact with both of them.

STARK Okay, and what, what occurred?

DANIEL FERGUSON The first contact I had was from City of Grants Pass, from Martin Seybold.

STARK And, what did, was this, how, how was this contact made.

DANIEL FERGUSON My father had called me and told me that there was a representative from the City other than Kathy Staley, who I'd had contact with, constant contact every, every other day or so I'd see her on the subdivision. But, it was the first contact from a representative other than Kathy Staley, that expressed concerns this, there was some serious erosion co...problems occurring at that time.

STARK Okay, and did you talk to Mr. Seybold ?

DANIEL FERGUSON Yes, I did.

STARK On the phone?

DANIEL FERGUSON No, in person.

STARK Okay, did you meet on the site?

DANIEL FERGUSON Yes.

STARK Okay, and do you know about when this was?

DANIEL FERGUSON I don't.

STARK But, do you think it was during this November incident that everybody's been testifying to today?

DANIEL FERGUSON Yes, it was.

STARK Okay, and would you please tell the judge what... First of all where did you meet at, on the site?

DANIEL FERGUSON We met it was on the corner of Morgan Lane and Valley View. Is where I caught up to him and introduced myself or attempted to.

STARK Okay, what do you mean you attempted to?

DANIEL FERGUSON He was not exactly receptive to my attempts to introduce myself.

STARK Okay, what do you mean by that?

DANIEL FERGUSON I said My name is Dan Ferguson. As he was walking, I was walking behind him, trying to speak to him and he said, so, I understand that there's some erosion concerns and can I...could you let me know, you know, what it is, you know, and what I can do? And he said, he was not there to address my concerns, he was there to write tickets. That was essentially, not an exact quote, but, that's the gist of the conversation and then he turned his back and kept walking.

STARK Okay, and that day did, did...was it your responsibility to monitor this and do whatever was necessary to, to comply with, with the erosion control methods in the subdivision?

DANIEL FERGUSON Yes, it was.

STARK Okay. Now, what did you do at that time, after you met Mr.

Seybold?

DANIEL FERGUSON I called my father back and said that this person wouldn't communicate with me, you know, whatever he could tell me, whatever my father could tell me, that, that understood the problems were I would, you know, address those problems.

STARK Okay. Did you look around the subdivision, looking for problems at that time?

DANIEL FERGUSON Sure, I did every day. I was there every day.

STARK Okay. Now as far as Phase II goes, could I have Exhibits 8 and 10 please?

HOGAN They're underneath there.

STARK As to Phase II, I'm sure you've heard some testimony today concerning 928 Valley View. Did you, at this time when you first contacted Mr. Seybold, did you observe anything at 928 Valley View, as to what needed to be done?

DANIEL FERGUSON This is pretty representative of the condition and what was going on at the time. I, its, its not apparent from these photographs, but, what I had done...you'll see its a bit of a puddle here.

HOGAN And, just...this is Exhibit 10, photo 1 that you are talking about, that is representative?

DANIEL FERGUSON Exhibit 10, photo 1, yes.

HOGAN Yeah, okay, I can see what you're talking about, but, its not in the record.

DANIEL FERGUSON There's a large puddle in front of this hay bale and then you'll see that there is, whatever you want to call it, its a ditch that I dug that goes from this hay bale all the way back to the end of that lot. This puddle, it's a rather deep puddle, what I had done was, this was dug out very, oh, maybe like two feet deep and a lot bigger around then what it appears here. I dug that out and then, where this weephole is that it goes underneath the sidewalk I had put silt

fence as a screen, as a filter, and I put a bunch of big rocks around it and so the sediment pond I created was substantially below the fencing here, the black silt fencing I cut out of some fence, put it with the big rocks there so that it would be filtered. At the time I went up there, you know, it was not, it was getting around that fencing. That's why there's some of the dirty water here. You know, it was overwhelmed at the time, and, you know, a whole bunch of dirt had come down and started filling this in it was just, you know, it was not adequate at that time to contain that amount of sediment that came down that day. It was a very, very hard rain and so I, you know, dug it out much, much, much larger starting that day and the day that I contacted him and continuing thereafter to where eventually I had it going up probably 18 feet by 2 feet deep by about 3 feet across and I didn't have that problem after that. But, that, that took some period of time.

STARK How long did it take?

DANIEL FERGUSON Every time that I would go back if it would look like it was going to be overwhelmed I would dig it deeper than I had the time before. On a daily basis if was, you know, to where I would try to assure myself it was not going to be a problem. I also put in silt fences above there, that just don't show up, but shortly after I put in a series of silt fences down that driveway and then dug out behind them deeper and deeper and deeper as the time passed to make sure that it wouldn't be overwhelmed.

STARK I'll hand you now Exhibit 8 was taken on the 21st. Exhibit 10 was taken on the 27th. I'll hand you Exhibit 8 and I'd like you to look at photograph 14 and I'd like you to assume that this, this is what it looked like when they took the picture on the 21st of November. Now, so, you dug a, a bigger settling pond between the curb and, and the...where the water comes down. Is that right?

DANIEL FERGUSON That's correct.

STARK And what, what do you, talking about a silt fence. What's a silt fence?

DANIEL FERGUSON Its a filtering material that comes in rolls. It's like three and a half feet high it. I don't know. Its standard in industry, its silt fence that. So what comes...the water that comes through it is clean water or relatively clean.

STARK And you put that between the curb and the hole so that, and put rocks in there, so it would stay there?

DANIEL FERGUSON That's correct.

STARK Okay. After the...you saw Mr. Seybold and you saw the problem, did you change that filter or do you have to change the filter...how does it...does it get all...how come there was dirty water coming through the, the weephole?

DANIEL FERGUSON Well, it was, it wasn't 100 percent, you know, I'd taken the staples we use six inch long staples, landscaping staples and I tried to, a combination of staples, rocks, and cement to block off any entry of water that was unfiltered to this weephole, you know. There's a lot of cement under the curb, it's irregular surfaces. When I had that volume of water there was no way that everything I put in there could block all the water, unfiltered water from coming through there. That's why later on I dug it so deep that it would have to fill up even to get up to that hole, you know, and everything could settle out before it could even get to the hole was the only remedy that would solve the problem. But at the time I didn't know that, you know, it wasn't all blocked off and prior to this time, this Kathy Staley had said that, had okayed this, you know, we hadn't had this volume of rain, but, she, when it was. I had a sediment pond, most of the sediment was being dropped prior to the water leaving the property, that that was not a problem. You know, this was an extremely hard rain that I just had not anticipated this volume of water coming there at that time.

STARK But, you took care of it?

DANIEL FERGUSON Yes, I sure did.

STARK There was no, after you finished your improvements, there

was no further water coming out, uh, onto the street through the weephole? Dirty water, unfiltered water.

DANIEL FERGUSON There...well, not through the weephole because with this type of dirt the first thing that happens...this is a very, very fine clay...when it rains real hard, you get this really fine clay, these suspended particles, and they plug up the silt fences, just absolutely, and no water will pass. They're the perfect size for what the silt fence, it just, it plugs them up just 100 percent. So you have to go through and you vibrate the silt fence enough that these sediments will drop down a little bit once they coagulate, you know, if you vibrate them they'll drop down, then I can get some water through. Otherwise, you...when its raining that hard quite a lake would build up, a very dangerous lake. You have to vibrate them down. After those sediments drop down, settle down, they stay down, and then the silt fence works fine; but, you've got to get rid of that initial sediment. You know, that was an ongoing process. Any time that it would get new dirt, we'd get new fines, super fines, you know, they would clog up as soon as they would settle out, you know, I would vibrate them down to the ground. Then the catch basin I had would be adequate; but, you know, it was an ongoing process all day, every day to make sure those things dropped off the fence. It would get to the point where, when I was digging it out here, I would dig out a foot or two of clay-type that when you put your shovel in, it would be two or three times the size of your shovel when you lifted your shovel up. The fines were that, I know its a silica clay, but, its quite a clay that comes off the, you know, percentage wise its just not real high percentage of the dirt, but, its very significant material for clogging up silt fence.

STARK Did you...did you inspect other areas of the subdivision that day after you saw Mr. Seybold beside the 928 Valley View place?

DANIEL FERGUSON I inspected the entire subdivision on a daily basis.

STARK Okay. Was there any other, in Phase II, was there any other water, unfiltered water, going into the system, to your knowledge? In Phase II.

DANIEL FERGUSON Unfiltered water coming off of the property?

STARK Right.

DANIEL FERGUSON In Phase II. There was, at the other end of this ditch, there are no...I don't know. I could point to it and I don't know the address, but, there's a little hillside over...this is on the exact opposite side of the property where Morgan Lane and Crown intersect. What we did was, we had two primary lateral ditches across the property to carry the water so that it would not...its elevation would decrease gradually and I, we wouldn't pick up dirt, causing erosion. Well, the ditch that's up on top here, its, oh, it must be 45 feet, no probably 75 feet above this one here, it did go all the way to the opposite side of the property at a very gradual descent. At that point, I had a big sediment pond dug and a silt fence there, when without enough water coming down to that other side of the property that is was getting when it would get overwhelmed it would get full, all the sediments would go down to the bottom and then at the back end of the silt fence, the pond, some water would come out and go on the street that was unfiltered. I was informed that even though that was okay the year before, because all the sediments were going into the fence and this was just the water backing up and around the end of the silt fence, that that was no longer acceptable that no water would be allowed to leave. It was through another person, he wouldn't speak to me, but, he had relayed it...I can't remember if it was through my father...that no water would be allowed to leave the property that wasn't, he essentially he wanted clean water, you had to have the filter at the time, backing up around the silt fence was not sufficient. You know he saw dirty water so I went ahead and I put a pipe in a ditch so that all the water from above would all come down to here where I could filter it. And that was.

HOGAN So you rerouted the water to the settlement pond that's shown in the, in the photograph?

DANIEL FERGUSON Right, right. Yeah, and so some water, it was right around in that period of time, did come off, it was, just up the hill from where Rich

Phillips, his house was on the opposite side of the street. But some dirty water did come out of there.

STARK But, you don't know the date of that?

DANIEL FERGUSON No, I'm sure it was a few days. It wasn't real dirty water, but, yeah, there was some water that came out of there.

STARK Okay, did you personally observe anything in November with the Phillips and Hagerman properties as far as an event that happened?

DANIEL FERGUSON Sure.

STARK What happened there?

DANIEL FERGUSON That was about the time that they were getting after me about this one and that's when I saw theirs I was going you know that the little bit of dirty water I was getting on the street was, it was not related to what they had on the street and they covered the entire street with dirt, and, you know, I was thinking god, they're getting after me hard on and there was some dirty water coming out of here, you know, much more than I ever intended, but, it was, it paled in comparison. You can't even relate them, I mean, one was a landslide and one was some, dirty water, you know. And there was, you just can't compare them...they're apples and oranges.

STARK Now, in this...in these photographs, Dan, you, you had a ditch in...this is Exhibit 3, photograph 14, you had a ditch that carried water all along here and then you, you did a bigger settling pond towards the street here, towards the hay bale.

DANIEL FERGUSON Yes.

STARK But, were there other measures back up here, uh, for erosion control or how did you cover the water that came from the, from the lots above and things like that. What, what measures were taken to control the water?

DANIEL FERGUSON Well, at the other end of...

HOGAN Just,...that's Exhibit 8, 14.

STARK Yeah, right.

DANIEL FERGUSON At the, like I was saying, at the very far end of that ditch over on Crown Street that's where I had a big sediment pond and it was just the overflow water off of that sediment pond that came along a very gradual ditch that I had dug out deeper and deeper and deeper so that all along the property, there were sediment ponds, just constant, you know. I would dig out a big area where water could settle out dirt, you know, I'd go another 10 or 15 feet, wherever the slope was best, I would dig out another big area. I don't know how many, you know, maybe there was 10 or 15 sediment ponds all along there. And there was also, we had one going right down the lot at the end of that driveway. I dug out a great big sediment pond there.

STARK Well, can you show on the map where you're talking about. Apparently, the hay bale in picture on Exhibit 3, 8 is right at the juncture of this flag lot that's coming through here. Is that correct?

DANIEL FERGUSON Uh-huh, yes.

STARK Okay, and, at...before you saw Mr. Seybold you have this existing on, on, uh, what's this, Valley View.

DANIEL FERGUSON Yes.

STARK But, what other measures were there on, uh, what's this street here? This must be Crown.

DANIEL FERGUSON Yes.

STARK Crown, Crown and...

DANIEL FERGUSON Sunburst.

STARK Sunburst. Is this Phase III, Sunburst?

DANIEL FERGUSON No.

STARK Okay. What other measures did you have for taking the water--existed prior to seeing Mr. Seybold up on the site?

DANIEL FERGUSON Its right over here, right over here is where...

STARK And the witness is looking at Exhibit 105.

DANIEL FERGUSON Yes, the address is on here. It's below Sunburst, if you

drew a straight line from this, oh, what is it?

STARK 928.

DANIEL FERGUSON 928, there's a driveway that is pictured on the exhibit here, if you went right down that driveway. See the line of these two back lots. On the up hill side the, uh, west side of this line, that's where the ditch came. All the way from Crown Street. Um, and there was a big sediment pond, there was two of them actually, dug right here, two in succession. Um, there was another, uh, not all the water, um, well, some water would come down, um, in this lot right here, this was an undeveloped lot. There was a big sediment pond right here in the middle of this lot. Another big sediment pond on this lot just below it. And then there was, on site here, a big, big catch basin and I had silt fences, I think three silt fences in front of this catch basin and sediment pond...a series, three sediment ponds also in front of that catch basin. I had, the top catch bas...or the top sediment pond up here in the center of it, up high, was a pipe it would carry water down to the next lot. So, there was a huge sediment basin there to let all, you know, not 100 percent drinkable water was going down that pipe, but, the...it settled for a long time because that was a huge sediment area.

STARK So it wasn't like all of the water from these lots above Valley View were going through what we're, we're seeing on photograph 14?

DANIEL FERGUSON Well, no. Not all of it, a whole bunch of it was settling out on this, this lot here and then the next lot. You know, the other pipes I had. And any of the water that was not in that top ditch, any water that was coming out of the sky was all directed towards those sediment ponds.

STARK Okay, and from what you know does Phase III drain to Gilbert Creek or not?

DANIEL FERGUSON None of Phase III drains to Gilbert Creek, no.

STARK Okay, and...

(interruption from outside source---re going past 5 o'clock)

HOGAN I was going to let the testimony goe until 5:00. We're almost at 5:00 now. How much more do you think you have for Mr. Ferguson?

STARK Two or three questions.

CAMILLERI I'm going to want to have some rebuttal.

HOGAN Yeah, I got to tell you, I'm following along as well. I'm a little worried about the record with Mr. Ferguson, because he's pointed to a lot of things, so, I wanted to do some repeats. And then I'm not extremely familiar with, you know, construction. So, I'm probably going to have some questions that everybody else understands the answers to. So, I really would like to have Mr. Ferguson resume tomorrow. I'm a little unsure about my schedule tomorrow. Unfortunately, I haven't been to the office. I did have an 8:30 tomorrow, but, I believe that's been reset and so would it, would it work for everybody to resume tomorrow at 9:00?

CAMILLERI You know, is that bad for you?

WILLIAM FERGUSON I've got an 11 o'clock thing, but, I think that maybe I can move it.

CAMILLERI Can we start at 8:00 because Andy, I don't know if we'll need him here, but, he could be here from like 8 to 9.

HOGAN Yeah, we could start at 8:00. I guess my, my concern is I'm not a 100 percent sure about what my morning schedule is tomorrow. But, let's...I just...like I'm 90 percent sure that that is not happening tomorrow.

STARK We could always start at my library which is right downstairs if...instead of bothering the DEQ people. We could do it in my library.

WILLIAM FERGUSON And my, my meeting is with the representative at County on a, on a lease thing and I can probably kick that over, I mean, if...I could move it over to the afternoon because...

HOGAN Let's try starting at 8, okay? At the library. What I would like to do...

CAMILLERI Can I...I know we have to wrap things up. But, I'm a little unsure about what I need to do now as far as my flight.

HOGAN Right.

CAMILLERI And I was just going to, well, maybe we could. I'll just deal with it after. But, it's 5 o'clock so I'm thinking that my, that the woman that I would connect with up in Portland is probably going to be leaving the office. But, you know, I guess we'll just say we're gonna have it and I'll just have to deal with whatever.

HOGAN Okay, Mr. Stark, I guess what I will do if there is a problem tomorrow is just to notify your office.

STARK Yeah, they don't open until nine. So, let me give you my home phone and you can call me at home.

HOGAN Well, you're gonna be at your office tomorrow at eight, right?

STARK Yes, absolutely.

HOGAN All right. Okay. All right. I'll take the other number just in case.

STARK 779-1876.

HOGAN And, do you want to be notified also?

CAMILLERI The thing is I don't have a, I don't know where I'm gonna be staying tonight.

HOGAN Oh, okay.

CAMILLERI So, I'll have to call the hotel and see if they have a room. They were sold out last night; but, there's got to be a hotel somewhere in Medford that I can get to.

STARK Do you have a car?

CAMILLERI No.

STARK Well, I'd be glad to drive you to the Red Lion.

CAMILLERI Yeah, I like the Red Lion. I'm going to call the Comfort Inn right now.

STARK Yeah, they're good.

CAMILLERI That's where I stayed last night.

HOGAN Okay, I'm sorry I didn't realize it was that..

CAMILLERI Oh, that's okay.

HOGAN That major of a problem. Okay. You have...perhaps Mr., you should take Mr. Stark's home number also and then you call and probably leave a message. But, I, I believe everything will be in the clear and we'll be resuming at 8 o'clock at Mr. Stark's office. So.

CAMILLERI Eight a.m.?

HOGAN Eight a.m. I'm far from enthusiastic about it, but...

CAMILLERI We could do nine, too.

HOGAN Actually, I think everybody's contingencies that gives us three hours to get through testimony and I think that's what we need to do.

CAMILLERI Okay, what's his home phone.

HOGAN 779-1876. I'm gonna go off the record now and we'll recess 'till 8 o'clock tomorrow morning and we're gonna be at Mr. Stark's office at that time.

OFF THE RECORD --- END OF TESTIMONY ON JULY 16
-- RESUME JULY 17

HOGAN Okay, well, we're back on the record and..

WILLIAM FERGUSON You're gonna be on the grand jury?

ULLRICH No, I'm being called before them to testify.

HOGAN Okay.

ULLRICH Do you want to ignore that.

WILLIAM FERGUSON I didn't think I was that guilty, but...

HOGAN We're actually on the record, we actually have the tape recorder going, so. Okay, we're resuming the hearing in, case number 107491.

It's 8:09 we're in Mr. Stark's conference room and Miss Camilleri is present, Mr. Ullrich is present, Mr. Stark and Mr. Ferguson. Mr. Dan Ferguson who we...who was testifying when we left off has not arrived yet and Miss Camilleri, indicates to me that she wished to present some rebuttal through Mr. Ullrich and that Mr. Ullrich is not available today after 9:15. So, you will, Mr. Stark indicated he was willing to go ahead with Mr. Ullrich's testimony.

STARK That's correct.

HOGAN Still under oath, Mr. Ullrich.

CAMILLERI Okay. Yesterday we heard testimony from Dan Ferguson. Are you familiar with Dan Ferguson?

ULLRICH I've met Mr. Ferguson, Mr. Dan Ferguson, several times.

CAMILLERI Okay, and are you familiar with what he does out on the site?

ULLRICH On the, let me refer to my notes quickly here. I met with Mr. Dan Ferguson on a follow-up site visit on December 27, 2001, and he and I walked through part of Phase III discussing the erosion control measures that he was working on.

CAMILLERI And, prior to that, around the dates of the violations November 1st when you were out on the site, November 1, 2001, was Dan out on the site that day?

ULLRICH Are you referring to November 21st?

CAMILLERI I'm sorry. November 21, 2001.

ULLRICH I, on, during November 21st, Mr. Ferguson, Mr. Dan Ferguson, was not on the site.

CAMILLERI Okay, and when you conducted that inspection that day were any other individuals associated with Mr. Ferguson...Mr. William Ferguson associated...were there any other individuals associated with Mr. William Ferguson out on the site?

ULLRICH Not that I saw.

CAMILLERI And, what were the conditions again that day?

ULLRICH On the 21st it was raining.

CAMILLERI Okay, typically would, when you've conducted inspections on other sites, is it typical to have an individual on the site on a day where you have high precipitation?

ULLRICH It is quite common, yes.

CAMILLERI And, just to talk a little further about the erosion controls that were on the property on Phase II and Phase III.

STARK Could I ask a question in aid of a possible objection?

HOGAN Uh-huh.

STARK Could I see your notes there please? Okay. I object to this whole testimony because these notes were not in part of the file that was exhibited to us from the DEQ.

HOGAN Okay, I'm gonna have to...I see my warning light's on for the tape, so, I should take care of that.

END: TAPE 4, SIDE 2

START: TAPE 5, SIDE 1

HOGAN Okay, we're back on the record. So, were these within the scope of a discovery request and when was the request made and...

STARK Let me just ask him a question. Did you prepare that recently?

ULLRICH I prepared that, I'd have to check the date stamp on the file; but, it was probably last Thursday or Friday.

STARK Okay.

ULLRICH And, what it was, was going through the file and noting the...

STARK I withdraw my objection.

HOGAN Okay, you may proceed.

CAMILLERI Okay. Back to the question at hand. We had talked about erosion controls on Phase II and III yesterday. Did you deem them to be adequate at the time of your inspection?

HOGAN On November 21st?

CAMILLERI November 21st, yes.

ULLRICH On November 21st I deemed them to be not adequate given the amount of turbid water that was bypassing the control measures.

CAMILLERI And to the best of your knowledge, we've heard that Dan has been the authority on the erosion controls on the site and has worked to maintain the erosion controls on sites specifically, Phase II and III. In your opinion, would hiring one person to do the erosion controls for a site as large as Mr. Ferguson's be adequate?

ULLRICH I would say no, that was more help was needed.

CAMILLERI And in your experience in working with Mr. Ferguson and Dan in these two Phases after your inspection on November 21st, did you find that they were timely in attending to the needs of the property and maintaining those controls after November 21st?

ULLRICH I believe that Dan was dispatched in a timely basis to try to address the issues; but, again, I think that the manpower issue was, was an issue. That there was not, that he by himself or with one other helper that I saw on the 27th was not an adequate manpower to keep up with the work.

CAMILLERI And, in your experience in inspecting other construction sites, is it typical to only have one other person on the property or two people to ensure that the site is stable?

ULLRICH The number of bodies required for a site depends both on the size of the site and the steepness of the slopes. Obviously, the larger the site the more people you may need, the steeper the slope the more controls you need. Factoring in these two issues, I believe that one to two people was not adequate for maintaining the erosion control at Laurelridge over the winter months.

STARK Okay, I'd object to this testimony because its not related to Phase II and Phase III. Phase II was a completed site, private homes throughout the site. Phase III was still in development and a permit was required and in operation at the time that Mr. Ullrich is testifying and I just don't think under the parameters that the judge has given that that testimony should be allowed unless its divided between the two Phases.

HOGAN I'm gonna overrule the objection. The, its a continuous piece of land, and the problems obviously, he's talking about the manpower for the total land at issue. So, I, I don't, I think it is relevant and I am overruling the objection.

CAMILLERI Let me just submit this exhibit. I believe it is Exhibit 14.

HOGAN It is.

CAMILLERI And, do you recognize this document?

ULLRICH This document...let me double check...but, I believe it was part of a package that was submitted by Mr. Ferguson to the DEQ. Let me double check on that just to be sure. This document is part of a package that Mr. Ferguson submitted to the DEQ, cover letter for the submission of December 31, 2001.

CAMILLERI And, who made this document?

ULLRICH The letterhead is from Ferraro Geologic in Ashland.

CAMILLERI Who is Ferraro Geologic?

ULLRICH Ferraro Geologic is an erosion and geology consulting firm.

CAMILLERI Okay, and are you the custodian of this document in the ordinary course of business?

ULLRICH It is kept in the file.

STARK I have no objection.

CAMILLERI Okay, okay. We'd like to enter the document into the record as Exhibit number 14.

HOGAN Exhibit 14 is admitted.

CAMILLERI Can you explain to the judge the purpose of this document and the details within.

ULLRICH This document was a site review done by Mr. Ferraro I believe at the request of Mr. Ferguson, but, that is somewhat speculative on my part but since it was addressed to Mr. Ferguson, was supplied by Mr. Ferguson, I'm assuming it was done for Mr. Ferguson. It was a site insp...or summary of some inspections he had made out on the site.

CAMILLERI And when was this document made?

ULLRICH The date on the document is December 6, 2001.

CAMILLERI And is that at or near the time of the inspections that you guys...that you and Martin had completed?

ULLRICH The inspections, the site visits I had made were on November 21, 2001, and then a follow up visit on December 27th. So my visits bracketed this report.

CAMILLERI And, can you explain a little bit more about the detail of what...what the...what is within the document, what Ferraro was, discussing in the document?

ULLRICH Mr. Ferraro was discussing the grading and also the erosion

control issues on the site.

CAMILLERI Can you explain in the document what the gist of Ferraro's discussion was on erosion controls?

ULLRICH In the document Mr. Ferraro expresses concerns over the amount of manpower available to maintain erosion control at the site.

STARK Your Honor, I, same objection I made before. The document speaks for itself and for the record, I'd just point out it's a Phase III only document.

HOGAN I'm going to allow a limited testimony about the significance of the document. It's...I haven't had a chance to read it and I'm not sure given the time limitations that I'll be able to read it so that I'll be able to read it so that I could ask questions, explanatory questions, and I might benefit from some explanation given the limited technical background that I have. So, I'm going to allow it.

CAMILLERI And, what Phase does this is document apply to?

ULLRICH Phase III.

CAMILLERI Okay, and are there any other erosion control issues that are discussed in the, in the permit...I'm sorry, in the document besides the manpower, and if you could explain a little bit more about what, what their concerns were there.

ULLRICH He has con...he describes some of the erosion control failures, some of the recommendations he had for upgrades. He indicates that in his opinion the erosion control efforts would be, in his words, likely a winterlong struggle. That is that, phrased another way, that the...it was going to be a l...

STARK I'm gonna object to the witness paraphrasing what's in the report. He's testifying about the report, but, he certainly can't say that the report is...what he's really saying is the report is this when he's not the author of the report. So, I'd object to that testimony of Mr. Erlich.

ULLRICH Sir, if you don't mind my last name is Ullrich. You

consistently mispronounce it and, just for the record, I'd like you to pronounce it correctly, if you don't mind, sir.

STARK I'm sorry.

HOGAN Well, I...I think that's the same objection that was made before and...and, you know, if I had time to read this whole thing and frame questions before 9:15 when Mr. Ullrich won't be available any more, I'd sustain your objection. But, I don't have time to do that, so he's going to be allowed to give some explanatory testimony.

CAMILLERI Okay.

ULLRICH Mr. Ferraro anticipates that there will be continuing failures on the site and that they will need to be addressed on an ongoing basis in some time and fashion.

CAMILLERI Okay, I have no further questions.

HOGAN Is that all the rebuttal evidence you wanted to present at this time? I mean from Mr. Ullrich.

CAMILLERI I think so, I'm just trying to think. Yes.

ULLRICH I will be available upstairs until 9:15 if you need to call me back for something.

HOGAN Mr. Stark?

CAMILLERI I had a couple more questions.

HOGAN Okay.

CAMILLERI When you spoke earlier about the slope and the size of a construction site that being dependent on how much manpower you need. Could you explain a little bit more on this site about the slope?

ULLRICH Phase III has a number of steeper slopes that is it...slopes approaching two, or one unit of rise for two units of run, slopes like this are more prone to erosion than flatter areas. Not too surprising there, and, so, steeper slopes do require both more erosion control measures to begin with and require more maintenance, they'll more difficult to install on steeper slopes just because of the

physical work of having to walk and down them, so the amount of manpower needed is typically larger for steeper slope sites.

CAMILLERI And, Dan had spoke earlier about the erosion controls that had been installed on the property and we have photographs from Exhibit 8 that show Phase III, and can you explain a little bit about how...what the importance of installation and maintenance of those erosion controls.

ULLRICH Well, for a successful erosion control project there are three, um, components that need to be satisfied. Sort a three-legged stool, if you will. The first component is selecting the proper measures the...for the site. The second component is proper installation of the measures, and then, the third component is the proper maintenance of the measures. You can have...select the best measures in the world, you can properly install them; but, if you don't maintain them and they accumulate all the sediment they can and then start to fail it will not be a successful project.

CAMILLERI And in this case, looking at photographs 1 through 8 on Phase III were these adequately installed and/or maintained?

HOGAN And this is on Phase?

ULLRICH Phase III. I would say that they were neither properly installed nor maintained, the improper installation comes from the amount of turbid water that is flowing past them. For example, the straw bale should be keyed more into the ground so that the water cannot flow underneath it. And, in terms of maintenance. I don't have a picture of it, but, I did observe some areas that had excessive sediments, accumulated by...Oh, well, in photograph 3 there is a large amount of sediment accumulated behind the silt fence. The permit specifies the sediment should be removed when it reaches one-third of the fence height and it is above that amount...in the photograph.

CAMILLERI Okay, and in regards to Phase II, now. We had some testimony yesterday from Dan and looking at Exhibit 8, photograph 14, we have this site here on...or this piece of property on Phase II and, in your opinion, is this,

the amount of erosion control seen in this photograph which looks to be one stray...straw bale near the sidewalk here, is that adequate...is, is that the sufficient amount of erosion controls?

ULLRICH I would say, no and I'm basing that on the fact that the water is not flowing through the straw bale it is flowing around the straw bale. So it is not...the bale is not providing any filtering or settling of the water.

CAMILLERI And, Dan had spoke yesterday about that he had dug a hole in this area and he had dug other holes in the area. Did you observe that...those kind of activities when you were...doing your inspection?

ULLRICH I remember seeing a certain amount of channels being dug to attempt to direct the water in certain directions. I do not recall holes as such.

CAMILLERI Okay, channels. Is that a standard procedure that's used in erosion control?

ULLRICH Only to the extent of directing the water towards a control such as silt fencing or straw bales. For example, in photograph 14, a channel conceivably could have been made above the straw bale and it looks like there may be the start of one to direct the water to that, uh, to the straw bale or other control measure. But, then of course the other component would be that you have to have an effective control that the water is being directed to.

CAMILLERI But, in this case, would you consider this to be effective?

ULLRICH No, I would not.

HOGAN And you're indicating this straw bale on ...?

CAMILLERI On Phase II.

HOGAN Right.

CAMILLERI On Exhibit 8, photograph 14. Okay, I have no further questions.

STARK Mr. Ullrich, I got it right that time?

ULLRICH Yes, thank you.

STARK I apologize, I didn't do that on purpose. I have problems with

names sometimes. But, Exhibit 8, were all of the Exhibit 8's photographs taken by you?

ULLRICH Yes, they were.

STARK And when were they taken?

ULLRICH They were taken during the November 21st inspection with the City of Grants Pass.

STARK What type of a camera did you use?

ULLRICH It is an Olympus, twin lenses, all weather camera.

STARK Not a digital?

ULLRICH No, it is film. We're, we're not quite that technologically advanced in the agency.

STARK Okay, and none of the...if you'd show the witness Exhibit 10. And look at photo number 8, if you would please. You did not take that photo did you?

ULLRICH No, I did not.

STARK Okay. Now, let's talk about Phase III. Phase III, there's a 1200C permit in effect for Phase III. Is that correct?

ULLRICH That is correct.

STARK And isn't it true that for Phase III the erosion control plan, the permit, is a work in progress and you keep working on that until finally you withdraw the permit?

ULLRICH It would be considered a work in progress if there are problems at the site. Some pl...many sites submit an initial plan its either on a flat area or during the dry months they install the controls they propose, they have no problems, and they go through to completion and there are no updates made. Other sites that do have issues that develop do need to come back and make revisions, yes.

STARK And that's exactly what Exhibit 13 was doing was telling the developer to improve his erosion control. Is that correct?

ULLRICH Again, you'll...you'll need to refresh my memory, which is Exhibit 13?

STARK That's the Ferraro.

HOGAN Actually, Exhibit 13 hasn't been admitted. The Ferraro is Exhibit 14.

STARK I'm sorry, I misspoke. Exhibit 14 is Ferraro, 12/6/03 report.

ULLRICH Okay, in the Ferraro's report it does recommend some upgrades to the erosion control measures on Phase III, yes.

STARK Okay, was Phase III completed and the permit terminated? As far as erosion control is concerned?

ULLRICH You said Phase III?

STARK Yes.

ULLRICH Phase III's permit has not been terminated, no.

STARK Okay.

ULLRICH It is still active.

STARK On December 27th when you were there, did you issue any further warnings or citations?

ULLRICH Not at that point, no.

STARK Did you take any pictures?

ULLRICH Not that day, no.

STARK Well, let's go to Exhibit 3, photograph 14.

HOGAN Exhibit 3 or Exhibit 8?

STARK Exhibit 8, sorry. Photograph 14. Now, when you were there on December 27th, did the...did you inspect this site at 928 Valley View Drive?

ULLRICH No, on the December 27th visit was only on Phase III.

STARK So, you didn't go by and look at this site?

ULLRICH Not to my recollection, no.

STARK And you didn't look at any other sites in Phase II?

ULLRICH I only recall looking at Phase III with Mr. Dan Ferguson.

STARK Did you get a call on November 21, 2001, from Mr. Seybold?
Or, how did you dec...go out on the site on the 21st?

ULLRICH Mr. Seybold had called me several days previous, I do not have a notation as to what date he specifically called me. He expressed some concerns about the erosion control at the site and requested to set up a mutually convenient time for me to come out and inspect the site with him. The first available date that we both had was November 21st.

STARK What time of day did you go there?

ULLRICH That was in the morning.

STARK And was it raining when you were there?

ULLRICH It was.

STARK Did it rain the whole time you were there?

ULLRICH To varying degrees at times it was just a mist, other times it was raining quite hard. It was a typical southern Oregon winter that...wait five minutes and the amount of precipitation changes.

STARK Was it overcast?

ULLRICH Overcast the whole time, yes.

STARK Does photograph 16 on Exhibit 8 look like there's sun in the picture?

ULLRICH Not to me.

STARK Now, in a...let's just take Phase III, where you have a permit and you see water going around like this, are there...on this site are there silt fences and other measures...settling ponds...that will...that will further filter something going in the street on Phase III?

HOGAN And are we looking at a particular photograph?

STARK Yeah, it's number 13 on Exhibit 8.

ULLRICH I'm sorry, could you please repeat the question?

STARK Okay. Phase III was a permit. The permit was active.

ULLRICH It was a permitted site. That is correct.

STARK Okay. On photograph 13, Exhibit 8, it shows some muddy water going around a bale in the street.

ULLRICH Okay.

STARK Okay. My question is: from your knowledge of the site for Phase III, were there additional filtering devices downstream from this...fences or settling ponds...that would have picked up that water on Exhibit 13?

ULLRICH There may have been another straw bale in the street farther down, but, there would have been no silt fencing out in the street, because silt fencing has to be keyed into the ground and so it can't be installed on a hard surface such as a paved street.

STARK Okay.

ULLRICH Also, for there to...there couldn't have been a settling pond downstream of this bale because again it was out in the street. You can't...the only way to have a settling pond would have been to jackhammer out the asphalt and create a pond in the street.

STARK I have no further questions.

HOGAN Okay, I have...had a few questions for you just to follow up what Mr. Stark was asking about. Just taking a look at the runoff here in photograph 15, where you can see it's flowing down the street. And that's ...

ULLRICH This is from Phase II.

HOGAN And that's 15 in Exhibit 8, Phase II. I think its 928 Valley View. Am I right?

CAMILLERI Uh-huh.

HOGAN Okay, and is there, based on your inspection of the entire development is there anything that's going to happen to this water other than hitting a storm drain and entering the storm drain system?

ULLRICH I don't remember seeing any other control measures in the street, downstream of that point in Phase II.

HOGAN And, then I wanted to just have you take a look at this map.

You've been out to the site how many times?

ULLRICH Four or five times.

HOGAN Are...do you know which parts of it are Phase II and which parts are Phase III?

ULLRICH Approximately, but, you know, in terms of if you were to point at a specific lot and say is this Phase II or Phase III...that I couldn't necessarily tell you.

HOGAN Okay, well, looking at...looking at 105 here, Mr. Ferguson, I believe you might have been present for the testimony, he was testifying about erosion control on these upper lots above the lot photographed in Exhibit...the photograph 14 and 15 in Exhibit 8. Which I think is 928. Did you look at any of the ditches and excavations in these lots? They're to the north of this 928 Valley View and to the south of Crown.

ULLRICH I believe that they were looked at briefly during the joint inspection with the City; but, my recollection of them is...is fairly hazy and I'm not sure I can provide any useful information on what I saw.

HOGAN Okay, and I guess I had one other question. I'm trying to accurately recall Mr. Dan Ferguson's testimony from yesterday which may not be...but, with respect to this photo number 1, again this is the 928 Valley View, which is Phase II, right? I think. I believe he was saying tht he had installed silt fencing below the curb level. Are you aware of that? Either at this location, or another one that he had silt fencing below the curb level between the curb, or the sidewalk and the weep hole.

ULLRICH I do not recall seeing any silt fencing at that particular location.

HOGAN Would you have been able to see it?

ULLRICH One would have thought so because it would have needed to have lapped up onto the top of the sidewalk to be able to be above the surface of the water.

HOGAN Okay, so you normally would expect to be able to visually see silt fencing that was in place? You need to answer.

ULLRICH Yes, I would. I would normally to see...be able to see silt fencing if it had been installed.

HOGAN And, the...do you...did you see any silt fencing at any location that that intercepted...basically protecting runoff through a weephole?

ULLRICH I believe there were several in such installations up on Phase III.

HOGAN Okay, so you did note that in Phase III?

ULLRICH There was some limited silt fencing in conjunction with the straw bales on Phase III.

HOGAN Now, for the fencing to work when it...I'm having trouble with my vocabulary, it's not good enough to cover construction...but, basically, if you have a...if you have a sidewalk and a we...weephole on the street side of the sidewalk that's meant to discharge filtered water, is the silt fencing going to be effective if there isn't a flush application to the concrete on the...on the lot side of the sidewalk?

ULLRICH The closer that the silt fencing is to the sidewalk the more effective it will be if you...you have your sidewalk here and you put your silt fencing here and you've got the weephole here, you know, the fence will filter what's coming through here; but, then you have this bare ground...strip of bare ground..that could recontribute sediment to the water. But, if you put the fence right up against the weephole along the edge of the sidewalk, then all this soil is runoff is...or all the runoff from the soil area is going through the fence.

HOGAN Okay, so, what I'd understand from that is that there is sort of a continuum of effectiveness of the silt fence that's protecting a weephole.

ULLRICH That would be a fair statement.

HOGAN And, so they'd, the less attached they are the less effective they are, the more congruent they are the more effective they are.

ULLRICH That would be a fair statement.

HOGAN Okay, I'm trying to think if I have any other questions. I don't think I had any other questions for you. Any follow up?

CAMILLERI I had a question. Can I look at the inspection report from November 21st?

HOGAN Oh, the 21st. Yeah, is that 13?

CAMILLERI This is Exhibit 7.

HOGAN Exhibit 7.

CAMILLERI And, just to refresh your recollection, we were talking about the storm water drains on Phase II and III. And, to the best of your knowledge or remembrance of this site on your inspection on November 21st...were most of the storm water drains that you observed...did they have straw bales next to them?

ULLRICH I couldn't give you a, you know, numeric--75%, 85%--figure like that. There were a number of bales in the street that were attempting to protect the storm drain inlets. Straw bales in terms of protecting storm drain inlets are not...are not really effective at all, and that was one of my concerns at the site.

CAMILLERI And, what were they located in the proper positions...the straw bales that you saw?

ULLRICH Well, Dan...straw bales in terms of, of protection in the street are really not effective and, so, to say...are they properly placed? Well, they're not in mine an appropriate control technology.

CAMILLERI Did you see sediment going around them? Were they stopping the sediment?

ULLRICH The sediment was going around the straw bales that were placed in the street which is why I feel that they are not effective control measures, in the street. Straw bales certainly have their uses, but, not as a catch basin, in-street control measure.

CAMILLERI Okay, and...I'm considering entering these photographs into the record. They were provided to Mr. Ferguson on the disk yesterday. They're

not from the day of the inspection; but, they are of the area in which you were pointing to on the map, the higher area where the channels were developed by Dan?

HOGAN Well, it's up to you whether to offer them or not. It's up to Mr. Ferguson whether, or, or Mr. Stark whether to object or not.

CAMILLERI Okay. Do you recognize this area?

HOGAN Can we mark them for identification before we get any further?

CAMILLERI Yeah.

HOGAN And we're at 14, so these will be 15 through whatever number.

CAMILLERI Oh, just put it right on the photograph.

HOGAN I mark photographs on the back.

CAMILLERI Okay. Thanks. Okay, we'll just use that one. Do you recognize where this photograph was taken?

ULLRICH Not specifically.

CAMILLERI Okay, then I'm not going to enter this into the record.

HOGAN We'll mark it for identification, okay.

CAMILLERI Okay.

HOGAN That's 15 for ID and it's not offered, but, I still need to identify everything that is happening.

CAMILLERI Okay. Mr. Stark, could I look at the document you have in your hand? Are you looking at it right now?

STARK Yes, I am.

CAMILLERI Okay. Okay, I'm looking here at Exhibit 110 and are you familiar with this document?

ULLRICH This is a document that was produced by DEQ. I've seen it before, yes.

CAMILLERI Okay, is it something that you use in this office?

ULLRICH We use one that's very similar to this one. Northwest Region took the standard DEQ document, slightly tweaked it for some specific requirements of...in the City of Portland area; but, it is funda...the overall scope of the document is the same as the one that is used in general statewide.

CAMILLERI Okay. Okay. I have no further questions.

HOGAN Okay, any follow up, Mr. Stark?

STARK No.

HOGAN Okay, and we can resume with your witnesses, Mr. Stark. We resume with Mr. Dan Ferguson?

STARK That's right.

HOGAN Mr. Dan Ferguson, you're still under oath.

HOGAN Okay, did you want to take a recess then?

STARK Yes.

HOGAN Okay then.

HOGAN Back on the record. Mr. Ferguson , you're still under oath. You may precede, Mr. Stark.

STARK Okay. I'll give you a piece of paper here, Dan, and that famous photograph in Exhibit 8, number 14, I'll show you here. There is testimony from you that you had a silt fence between the weephole and the ...

HOGAN This is actually 8, 14 here.

WILLIAM FERGUSON It's the same.

HOGAN Okay, I'm sorry. I didn't know what you had there, and I'm going just a minute I know I have Exhibit 8 right out here. I'm sorry.

STARK Or, maybe it'd be better for you.

HOGAN No, I just wanted to make sure we were all looking at the same photograph.

STARK Would you just draw, real quickly draw, a curb in there and the weephole. Show the judge how you put the silt fence in there. Just draw. This is 928. Okay, and I'll make this Exhibit...

HOGAN You're at 112.

STARK Okay. What does that illustrate?

DANIEL FERGUSON The...this top line here...this is the curb. The bottom height on the curb is four inches so this is the bottom of the curb. The center circle there is the weephole, and the lines around it are staples.

STARK And you would cut a piece of silt fence and staple it right to the hole.

DANIEL FERGUSON Right around the hole, because there's dirt all the way around the weephole itself. Except for right here...the very top, there's cement and you can't get it to the very, very top...but, essentially all the way around it. Staples and rocks down under the water level.

HOGAN And this would be on the lot side of the sidewalk, right?

DANIEL FERGUSON That's correct.

STARK Okay, and then you put rocks in behind that?

DANIEL FERGUSON Rocks around it to hold where the staples wouldn't go through the cement, you know. There's obstructions in cement. You know, you try to hammer them in as best you can; but they bend...things like that. You know, I put rocks around there.

STARK And, why didn't this work in this particular instance to filter out the water?

DANIEL FERGUSON It could have been for...we had constant nonstop vandalism...there was a guy across the street that was very upset about me putting anything here because he used this driveway to turnaround. You know, I went out there one time when his kid was stuck there, you know, had driven over the hay bale and was stuck on the other side of the curb and I don't know if it was their friends or just general public; but, there was...they were constantly riding fourwheelers and motorcycles right through here and up this long driveway. You...there was just so much constant vandalism...that's why I imagine at the time, you know, why the dirty water is coming out there rather than over the top.

Because what ordinarily would happen is the silt fence would get plugged up fairly quick there, you know, and then it would be coming over the top...it wouldn't be coming through the weephole. You know, once it started getting filled in with dirt like this I, you know, you had to keep cleaning this out; and we had so much vandalism up above too with fourwheel drive vehicles and motorcycles where this dirt, where this water comes from that's where all this dirt would come from...keep filling this in. And the reason I didn't see it at the time when they come up there was I because I was up on Phase III doing vandalism control. It was an everyday, nonstop activity, you know, that...you know, we constantly had contact with the police, you know, reporting it and we caught a few people. Yeah every single day...or every night when I would leave there would be vandalism. You know, that's where the thing would get filled in like this.

STARK How would...how would the vandalism fill it in? You mean, they'd put dirt behind it and more dirt would come in...or what?

DANIEL FERGUSON They would four wheel drive...I'd have these long...this would have been dug out a bunch more...it's just...that's where that channel is where all the water and dirt comes from, from all the way back up above and then a little later or near this time where the ditch cut clear across the mountain...where Mr. Seybold said that we couldn't have any water, well, he wanted drinkable water leaving the premises. You know, I had it piped it back around. So, we had four wheel drive vehicles going up the side of this...these banks here and as soon as they started doing that all of that dirt, you know, would start coming down here also.

HOGAN And, just to make it a little clearer for the record, I, you know, I'm following along with what you're saying; but, you're pointing to a photograph, okay....and that's photograph 14 in Exhibit 8 and my understanding of what you're saying is that you had a problem with four wheel drive vehicles using the property at night for recreation?

DANIEL FERGUSON Yes.

HOGAN And the bank you're talking about is the one that is about three-quarters of the way up the picture that they would cut through that edge and that would cause mud to come down this channel that's appearing in the picture along the side of the driveway?

DANIEL FERGUSON The bank that's where the silt fences.

HOGAN Oh, I see, over at the left.

DANIEL FERGUSON They would go up that bank and they would also go up the bank clear down next to Crown Street over there. It's hard to see in this picture; but...

HOGAN And so this channel here that's coming towards the weephole along the side of the driveway.

DANIEL FERGUSON Right.

HOGAN That, that would get water both from the activity at Crown Street and the...or I should say siltation from the activity at Crown Street and from the activity behind this silt fence?

DANIEL FERGUSON It would get narrower. I would dig it out and then we would have vandalism, things like that and it would get filled in. I tried to make it a constant practice to go down...

HOGAN What would get filled in?

DANIEL FERGUSON The channel.

HOGAN The channel.

DANIEL FERGUSON It would get smaller and smaller due to silt.

HOGAN Okay, so it's start filling up and...

DANIEL FERGUSON Right, and I'd come down and dig it out.

HOGAN And, and what was your purpose in digging out the channel? Was that just to focus water on this weephole?

DANIEL FERGUSON Yeah, so that there would be a place for sediment to settle out. Otherwise you were, you know, you were constantly knocking, vibrating that silt fence so that the fines would fall off so that water could get out.

HOGAN Uh-huh. So you wanted...you wanted to channel the water to the weephole?

DANIEL FERGUSON Yes, that's correct.

HOGAN And, the...and when the channel got filled in what...what would...I'm guessing, but, tell me if this is right...what would happen if that channel got filled in is just that there'd be a general runoff over the sidewalks and into the street from the bare slope. Is that what would happen?

DANIEL FERGUSON That's what would happen if that got filled in. That's why I kept digging it deeper and deeper and deeper and that's why, eventually, I put in going right up the channel, I put in a silt fence here...here...here...and here. A series of four of them.

HOGAN Was that after the November rains? After November 2001 that you put those silt fences in?

DANIEL FERGUSON Yes.

HOGAN So they don't appear in this photograph?

DANIEL FERGUSON That's correct, yeah.

HOGAN Right. Okay.

STARK Would you just...with your...without marking on the photograph...or maybe you could mark on my photograph here just to give the judge an idea of how big is the settling pond that you built eventually to handle...to make sure that you had more than enough area to keep water from coming into the street.

DANIEL FERGUSON It's probably twice the surface area; but, its three or four times as deep, you know, I was trying to settle sediment so I tried to go deep rather than out. I needed a place for the sediment to fall out, not, you know... The less area, the less ground, you disturb the less probable that its going to get more sediment. It's hard to see; but, there was grass here growing all along this driveway and I was trying the entire time to minimize any disruption to the surface, so I just went deep, deep, deep, rather than out.

STARK And, is that a common practice for taking care of the erosion and the runoff on your site?

DANIEL FERGUSON The only way to get your water the cleanest possible is...is a place to have sediment settle out. That's why, you know, this was acceptable without the silt fence just as long as I had a good place for the sediment to settle out until Mr. Seybold came and said, you know, no water can leave with any sediment. And at that point, you know, it was the rainy season, I couldn't get in here with a dozer and build a lake...that was what essentially he wanted. You know, well, you gotta have a lake, you can't have water leave the premises. This was the best alternative under the circumstances. The only alternative. There's nothing else you can do, and I had to have some water leave the premises.

HOGAN Okay, I'm going to stop you now. Are you finished with your answer, Mr. Ferguson?

DANIEL FERGUSON Yeah.

HOGAN Okay, I need to turn the tape over.

END: TAPE 5, SIDE 1

START: TAPE 5, SIDE 2

HOGAN We're back on the record.

STARK Okay. Did...did your efforts in...with the silt fences and digging this settling area in back of the curb. Did it work?

DANIEL FERGUSON It worked for...I also put...

CAMILLERI I'm gonna object just to the relevancy. We're in that the Department is focusing on the dates of 11/21 and 11/28, and this seems to span past that time.

STARK I'm just showing the relationship between what Exhibit 14 shows and what had to done to make...to correct the problem.

HOGAN Well, I'm gonna...I'm gonna overrule the objection. I actually find that the...I'm not sure anybody's going to be happy... but this issue of what could be done to control sediment I do believe is relevant. It may not be favorable to Respondent; but, it is useful to me to know that, additional steps were taken and, you know, I assume Respondent wants to show cooperation for the mitigation of the penalty, you know, but that is the purpose of it. But, it also shows me that erosion is controllable ultimately, so I think it's relevant.

CAMILLERI Can I say one more thing. We will then have to present information to...to oppose what they're saying then. I'm just saying it's just going to open up more testimony for us. And if that's okay; because they're putting on their opinion and we'll probably want to counteract that.

HOGAN Yeah, you'll have a chance for rebuttal at the conclusion regardless.

CAMILLERI Okay.

HOGAN But, I think...I understand that it's not relevant as far as we did these things at the time of the alleged violations; but, it is relevant in terms of what could have been done.

CAMILLERI Okay.

STARK Okay. Well, let me ask you this. I'll offer Exhibit 112.

HOGAN And, any objection to 112?

CAMILLERI No.

HOGAN 112 is admitted.

STARK Now, is 112 a ...a common practice throughout the subdivision as far as filtering the water?

DANIEL FERGUSON To put it just over...just the weepole?

STARK Yes.

DANIEL FERGUSON No, no. There was...I used hay bales with staples into silt fence in the hay bales around a lot of the weepoles. It was...here a lot of it was just due to vandalism. You know, if there was something sticking up the guy across the street, I...You know, it was just nonstop, you know, you'd be in one development and you were past his house and he was going what he could do to prevent it. You know, he would get over there...he would call on the phone and I'd get a call a few minutes later saying that we have dirt coming out of here and he'd sit there and point at his phone as he's standing in his picture glass window waving it back and forth to me on a sunny day, you know. And there'd be no water. I said, there's no dirty water...there's no water...it's just, you know. I don't know what agenda he was on; but, there I did anything I could to make things as vandalism-proof as I could.

STARK Was this more for...there are weepoles all along the subdivision aren't there?

DANIEL FERGUSON Yes.

STARK Is this more methods to prevent dirty water flowing in the street than most weepoles?

DANIEL FERGUSON Oh, certainly, yes. Ordinarily a weepole doesn't have any protection.

STARK Okay, okay. Now...

DANIEL FERGUSON Could I expand? I did some other additional measures

besides digging this channel out further. I put straw bales...this goes parallel with the channel. I also put it perpendicular later and then, well, I put a series of them...like three of them up. Six or seven of them out this way along the channel. And then going clear up above the hay bales here I put silt fence and stapled it all in...all along here so that in the event the silt fence over the weephole did get plugged up, which I knew it would, that it would come up and be caught in the silt fence that was stapled into the hay bales.

STARK Now, what about...I'll show you, ask you to look at photograph 13 of Exhibit 8 where the water is flowing around a hay bale put in the street. Now, is putting a hay bale in the street, was that something that you or one of your experts came up with?

DANIEL FERGUSON No, that was I didn't think it did very much good; but, Kathy Staley said, you know, to put them in the street. It was an extra protection...to go ahead and put them in anyhow. And, it did do some good, I mean, you know, you could go down there if you caught it and you could take a few shovelfulls out.

STARK Did, now this is in Phase III. The water that gets in the street on Phase III, are there further protections downstream to further filter that water?

DANIEL FERGUSON Yes, I put in all...everything on Phase III went into the different canyons. I went down each canyon and put in silt fences up to five per canyon. Redundant silt fences all the way down the canyon so that any dirty water that went down there would be caught in these silt fences.

STARK Did you...

DANIEL FERGUSON I constantly monitored those.

STARK Did you also have settling ponds?

DANIEL FERGUSON These silt fences, I put them into the canyons to make large settling ponds. That was the purpose of silt fences so that they could...you found large settling ponds not get overwhelmed and gradually let the waters seep through...clean water.

STARK Now, I'll call your attention to Exhibit 8, uh, photograph 3 and there's been testimony from the DEQ witnesses that, uh, in this pipe collects water and takes it down to a silt fence and a pond. Is that correct?

DANIEL FERGUSON Yes.

STARK And their testimony was that this silt fence had been...the water came...the debris came up too high on the silt fence. Now, what has been your experience in this subdivision concerning the silt fences and what you have to do to make sure that they work?

DANIEL FERGUSON Well, this particular photograph, this is where a large volume of water was coming down. When you're working and it's a fairly steep slope, when you have a large volume of water, steep slope, and decomposed granite I usually started by, you know, they say six inch you gotta underlay your silt fence in the dirt...well, six inch just won't work. Not with that type of volume of water...you just can't do it. It would be a joke, you know, it may say that in the written...but, that's a joke. You had to put hay bales. First, you dig your ditch it's going to be a lot more than six inches of silt fence. It's got to be a lot further under the ground than that. And, then you put hay bales on the above side and below side of the silt fence and then I put dirt. And I started with dirt more than a third of the way up the silt fence, because if you don't that volume of water...that steep a slope...the pressure hitting it...it would wash out immediately. I've tried it with less on other areas and it...it just doesn't work. You know, I've put in a lot of silt fences and unless you on, an area like this and down in the canyons many places, too, you've got to start with more than a third of the way up your silt fence or it's not going to do any good at all. You know, I'm not there to just a throw my time away. It wouldn't have done any good whatsoever, regardless of how it's written. In decomposed granite, steep slope, high volume of water...you don't put, you know, six inches of dirt on it and expect it to hold. It won't. It's going to go right underneath and it'll take all the dirt around it with it. All you did was create a whole lot worse problem than if you'd done nothing at all.

STARK So, you had to, in layman's terms then, you had to make a foundation up the silt fence so it would hold on the bottom.

DANIEL FERGUSON Yes.

STARK And then the clean water would go...would still work on the silt fence but it wouldn't, uh, it wouldn't erode it underneath?

DANIEL FERGUSON Right. The same with when they say that you put staples on the erosion controls...staples are six inch square staples...you say, put them in its every few inches. Well, in a place like this, I don't even necessarily put them in touching each other you've got to overlap them....you know, well overlapped. In something like this, I think I've purchased for the subdivision like 120,000 staples. You've got to put in...in this short section of silt fence here, I've probably put in 450 staples. You just, there's no way in the world that you can possibly prevent it from undereroding...going under that silt fence...and...if you do anything different.

STARK Okay, and so the, the reason this is up over one third of the silt fence is because you have to have that base on it.

DANIEL FERGUSON Yes. There is some silt there; but, I started with it more than a third, you know, or it wouldn't have done any good at all.

STARK Okay, and that's just to anchor the silt fence in.

DANIEL FERGUSON That's right. So that water doesn't go underneath and just take everything with it.

STARK And this is an example of...on Phase III, uh, the water that comes in the system goes down and gets filtered before it goes further on. Is that right?

DANIEL FERGUSON That's one of the first filters, right. Yeah, I've got...the minimum I think was three more filters on the least filtered canyon is three more very large silt fences, very....yeah, that's just to stop the water, slow it down. Prevent it from creating an erosion canyon right there. That's just miniscule compared to the silt fences I've got down below there that actually do the filtering.

I've got huge ponds down below. One after another after another.

STARK And this is on Phase III?

DANIEL FERGUSON That's correct.

STARK Okay, and is this all that was part of what was recommended by your engineers and things?

DANIEL FERGUSON That's right, by Ferraro Geologic.

STARK Okay, and was all of this systems of ponds and silt fences on Phase III...was that on your...on the property for the subdivision? I mean, was it property you owned?

DANIEL FERGUSON Most of it; but, not all of it...no.

STARK Okay, and did it, from your observation, did it do a good job?

DANIEL FERGUSON I'd never had the last even...not the last one...but, I've never gone to the last two silt fences. If it failed at all. I've had them fill up, going down two silt fences and go around. You know, not...never over the top...go around. But, I've always had two sediment ponds below that that were not compromised. And I periodically I would go and dig these out. So...

STARK So, there never was a problem on Phase III with your system that you developed?

DANIEL FERGUSON That's right.

STARK Did you check them all the time?

DANIEL FERGUSON Constantly, sure. Checked and dug them out. You see, there was definite sediment reaching them and most of that was due to vandalism, the four wheel drive vehicles every single night.

STARK Okay. I have no further questions for this witness.

CAMILLERI I'm thinking. Dan, what...we talked earlier about ...

HOGAN I know we have more than one Mr. Ferguson...but, maybe Mr. Dan Ferguson or Mr. Ferguson.

CAMILLERI Okay. Mr. Dan Ferguson, can you explain a little bit more about the training you have received in erosion controls.

DANIEL FERGUSON It's mostly Ferraro had explained a lot of things to me. But, I've been using silt fence since it first came on the market. I was doing other erosion control in Jacksonville and out at Pacific North when silt fence came on the market they suggested that I try it. I'd never seen it anywhere in the valley...they hadn't sold anywhere else. And that when I started experimenting with it and using it. And, um, that was like six years ago.

CAMILLERI Okay, and did you ever get any certifications for erosion control?

DANIEL FERGUSON No. Formal certification? No.

CAMILLERI Okay, and how many other people did you have working with you on this site?

DANIEL FERGUSON I had one other person that was...we averaged 14 to 16 hours a day, 7 days a week. That was primarily due to vandalism. And we did a lot of preparation prior to the rainy season. But, due to the vandalism we did have to work a lot of long hours. When the problems occurred here with lot 928 on the 21st and 27th, at that time my younger brother and three of his school mates had gotten out for Christmas break and so there was six of us working at that time and then my older brother and his construction crew. Both crews under my direction, there was another four other people with him, worked another few days. But, my younger brother and his three worked two and a half weeks with me and got caught back up. Yes.

CAMILLERI And, what kind of things did they do up there?

DANIEL FERGUSON Shovelled out behind silt fences where sediment had been accumulating. We had, as I mentioned it was 140,000 staples. On some of the canyons in order to prevent, you know, we had hydroseed and the grass was growing up; but, the dirt was getting saturated. The only way that I felt that it could be stabilized was to get this cloth, erosion control matting, roll it down the canyons, staple it in every couple of inches. So, there was a couple of canyons up on Phase III and a couple open places on Phase II that I went ahead and put the

cloth and stapled it all in. So they did a lot of stapling.

CAMILLERI And this was all after...this was in December?

DANIEL FERGUSON Started doing it in November... and I did some the year before in different places on Phase II also, that tended to be problems.

CAMILLERI Most of...how many years would you say you've worked on Phase II and III?

DANIEL FERGUSON Well, I grew up there and lived there all my life.

CAMILLERI But, during the construction helping your father.

DANIEL FERGUSON I did some, I logged the property before it started and had to do some water bars and things like that before...

CAMILLERI Okay, just focusing on the erosion control work you're doing.

DANIEL FERGUSON Well, I did erosion control then too with the water barn; but, yes, its formally after he had DEQ permits it was before he got permits, you know, we had to look out for, steward the property. But, from the very beginning I've been working on it.

CAMILLERI Okay, in...I guess in relation to when the site was permitted by DEQ in 1997. Were you working on the site then?

DANIEL FERGUSON Sure.

CAMILLERI Okay, and have you been working on the site since then?

DANIEL FERGUSON Continuously.

CAMILLERI Okay, and throughout that time has it mostly been you working on erosion controls?

DANIEL FERGUSON I have worked on the erosion controls more than any other person.

CAMILLERI Okay and if you could make an estimation on over that time period, how often have you had other people out there helping you?

DANIEL FERGUSON Well, there's been other people besides me that my father has hired that didn't do the same type of things that I was doing. You know, from...a lot of people. You know, operating heavy equipment, things like

that during the summer, um.

CAMILLERI But, you do the majority of the erosion control work...like the installing of the silt fences, the maintenance of the hay bales, silt fences, the settling ponds you were talking about that kind of thing...focusing on sediment and erosion control.

DANIEL FERGUSON Well, during the winter time when you don't want heavy equipment moving around. I mean, that's a small part of it. The most important thing is to get prepared before the rain comes. You do what you do with the heavy equipment then. But after the rain has started...your question is what percent of my time versus...

CAMILLERI Yeah, basically were you mostly out there by yourself during those times or...doing the erosion control work?

DANIEL FERGUSON Probably half the time I was by myself.

CAMILLERI Okay, and did you feel that you were doing a good job with just having that one person out there? Would it have been helpful to have more people out there helping you?

DANIEL FERGUSON When we had vandalism if I could have found other people that knew what they were doing it certainly would have been helpful because I didn't like working seven days a week, 14 hours a day. It was very unpleasant. But you do what you have to do because I couldn't find anybody that knew what they were doing. You know, I tri...I hired a few people but they had not a clue what they were doing. So, it was just more time hiring them and overseeing them then what it was worth.

CAMILLERI Okay, are there erosion control specialists in the Grants Pass area? Did you look into that?

DANIEL FERGUSON Sure. Sure. I talked to, yeah, people about it all the time.

CAMILLERI And, but, they...you don't...why weren't they hired on?

DANIEL FERGUSON Either they were unavailable or when I did talk to them

they didn't know what they were doing. It was just more time for me to supervise.

CAMILLERI Okay. Do you know approximately how many lots on Phase II and III you were working on?

DANIEL FERGUSON I don't have any idea. I didn't...lot lines were not...

CAMILLERI How about like acreage? Could you do it by that means?

DANIEL FERGUSON The hydro...no, not really...no.

CAMILLERI Okay. You talked about the settling ponds that you had used. Did you have any...did you get any advice on how to use those settling ponds or any training?

DANIEL FERGUSON Sure, from Ferraro and a lot of experimentation myself. And I got some from Mr. Seybold. Some really bad advice. You know, I didn't know if he was intentionally trying to sabotage the project or what, but, he did have some advice that I started to try for the filter I went Jesus, Christ, you know, I...he, he either was trying to intentionally trying to cause a problem or he didn't know what he was talking about.

CAMILLERI Okay, and the...in the area of 928 Valley View...if I can look at the map which is Exhibit 105. When you talked yesterday about these lots up in here, how you were taking the channels and focusing them down to the sediment fences in this area.

DANIEL FERGUSON Uh-huh.

CAMILLERI What...what did the properties look like up here? What there bare soil? Was there vegetation?

DANIEL FERGUSON There was vegetation.

CAMILLERI This is back in November 21st.

DANIEL FERGUSON Right, there was vegetation but it was sparse.

CAMILLERI What's the purpose of the vegetation?

DANIEL FERGUSON To prevent erosion.

CAMILLERI Okay, was that working?

DANIEL FERGUSON Was it working perfectly? It wouldn't be working

perfectly. Decomposed granite is pretty tricky soil, it doesn't matter what type of vegetation you have. If you've got a steep enough slope and a high enough volume of water, it'll go right through it.

CAMILLERI And what were the slopes like in this area?

DANIEL FERGUSON Quite a range from steep to shallow. You know, there was...

CAMILLERI When you say steep, what do you mean?

DANIEL FERGUSON Close to straight up and down. Straight up and down is usually not a problem. You know, you can get your water to a place where you can pipe it right down, a straight up and down slope.

CAMILLERI So, these properties in here, they were flowing down. Was there anything that from here that was flowing into this area?

DANIEL FERGUSON Anything from?

CAMILLERI From the top of Crown?

DANIEL FERGUSON All of, everything over here flowed down this way the only stuff that flowed here was some from here and then...

HOGAN Some from kind of ...the upper end of Starburst?...Sunburst?

DANIEL FERGUSON I'm sorry, it's ...it's some from right here...this side of Crown Street.

HOGAN The south side of Crown Street.

CAMILLERI You know, maybe we'll just draw an arrow.

HOGAN Yeah.

CAMILLERI Okay, so what type of erosion prevention tools were used in this area to prevent erosion?

DANIEL FERGUSON Well, it had been hydroseeded. And what I did, the slope of this ground here was gradually heading over to here.

HOGAN Over to the num...where there's a number "1" marked?

DANIEL FERGUSON Yes. On the slope right here this headed to here..yes, all of this sloped right to here, and this is the ditch that came clear back acrossed.

Right there. All of this went into a catch basin right here...on site catch basin. Well, there was two of them. There was one here that I piped the water down to here and then had another sediment basin and piped the water down to an onsite catch basin there with a series of hay bales and silt fences. There was three of them in a row just above that catch basin.

HOGAN You know, I'm kind of concerned about the record on this. So can I just follow up with a few questions. I'm going to ask you to mark...I don't know maybe just with an "X". You're kind of pointing to a point where that slope is divided, that the water on the west side of this point went into the 928 Valley View system and the water on the east side went into the number...what I call the number "1" system.

DANIEL FERGUSON Uh-huh.

HOGAN Is that your testimony is or am I mischaracterizing that?

DANIEL FERGUSON Where, where this arrow is drawn most all of this water on the east side of this arrow went down to here.

HOGAN To number "1"?

DANIEL FERGUSON Yes.

HOGAN And most of the water on the...at the arrow and to the west, went into the 928?

DANIEL FERGUSON Right.

HOGAN Okay, I think that makes it a little bit clearer what you're saying just in terms of, if somebody was trying to understand what had been said at the hearing.

DANIEL FERGUSON That was after Mr. Seybold was there and said that, you know, we couldn't have water. I did have water going onto the street here. I had a...

HOGAN On Crown Street?

DANIEL FERGUSON Yes. I had a...

HOGAN And when was that?

DANIEL FERGUSON It must have been somewhere in December. The one time he did communicate with me...well. He had actually talked to me and said that this was not permissible because there was water going on the street and that's when I went ahead and I piped it down so that it would go clear over to here.

HOGAN And those changes were made before or after November 21 through 27?

DANIEL FERGUSON I think it was in December, but, I'm not sure.

HOGAN It was after the violation dates then?

DANIEL FERGUSON I'm not sure.

HOGAN So, what was the situation at the time of the violation dates...December 21 and 27?

DANIEL FERGUSON Whether or not I had piped it down at that time?

HOGAN Yeah, where was the water going?

DANIEL FERGUSON Well, it was. ..half of it was going...the water from up here was entering the street here through a weephole.

HOGAN Crown Street.

DANIEL FERGUSON Crown Street, right. Yeah, there was a series of silt fences there and a piece of silt fence over the weephole and the water would enter the street there.

HOGAN And then what happened after it entered the st...Crown Street? Where did it go?

DANIEL FERGUSON It would just go down the street then.

HOGAN It would go to the west, right?

DANIEL FERGUSON That's correct...no, to the east.

HOGAN East.

DANIEL FERGUSON To the east, to the east.

HOGAN I'm sorry. I'm looking at this map upside down, it's a challenge. It would go to the east and it would basically be kind of heading towards number "1", right?

DANIEL FERGUSON That's correct.

HOGAN Okay.

CAMILLERI Can I use the photograph?

HOGAN You can continue follow up. I, because I apologize for going on so long, but, I...

CAMILLERI That one photograph that I was going to enter.

HOGAN Yeah, I have it. 15?

CAMILLERI Here it is. Do you recognize this photograph? Do you recognize where that's at on the property?

DANIEL FERGUSON Yes, I do.

CAMILLERI Where is that?

DANIEL FERGUSON It is...well, it's right here gen...I mean it covers a big area; but, it's right there essentially. You know, I mean its...

HOGAN And, could we label that may be...is that Exhibit 15?

CAMILLERI Yeah.

HOGAN And could you put "EX" next to it so I know its not photo 15.

CAMILLERI And, is this...does the description in this photograph depict what you saw around December 13, 2001...for the site?

DANIEL FERGUSON I don't remember exactly a day. But, I would, you know, the photograph's marked the 13th?

STARK Before we testify from the photograph, could I see it please?

CAMILLERI I'm going to enter all three of these. Can I...

HOGAN Well, let's mark them and then we have to take ...

CAMILLERI So they are marked individually?

HOGAN Take ...Yeah, we might as well mark them individually.. So that will be 16, 17...there's two more or four more?

CAMILLERI Here's...here's the problem with giving you them, though. Because we're going to need them, so, if I give them to you I'm not getting them back, right?

HOGAN That's right.

CAMILLERI So, I'm just going to use them.

STARK You know, I object to this as not being presented in discovery to me, these photos.

HOGAN These, are these from the disk that was produced yesterday?

CAMILLERI They are on the disk, yes.

STARK And further, the date on this photo is December 13, 2001.

CAMILLERI I'm just using the photograph to recollect to...

STARK And I don't believe its permissible under the discovery. Jenine made a representation to me that the photos I had from her were the photos that she was going to rely on in this case and I asked her for all photos that she was going to rely on.

CAMILLERI True, however, we've also gone into additional dates past the date of violation. So, I'm just trying to respond also to the testimony that was given about additional erosion controls that were done in this area, and I...

HOGAN Well, let me inquire. I mean this photograph is after the date...it's exemplary...I don't think its a specific, you know, it's not that a photograph that Miss Camilleri said she, uh, didn't realize she was going to be relying on the photograph. So, what's the harm of it... is there a surprise in this or...

STARK Absolutely, I haven't seen these photographs until yesterday.

HOGAN And, what would you need to address for the information in the photographs? I guess that we're all...

STARK The point is that this photograph is after the date.

HOGAN That's right and you made some inquiries regarding after the date. Okay, I think it's now relevant. I mean we've expanded our, our scope. It's also...things after the date may still be relevant. As an example, I don't know how far, you know what's going to happen next, but, I'm going to guess that possibly in the two weeks in between the violation date and the photographs that there may

not have been major changes to that piece of ground. So, we'd have to get that from a witness, you know. But, I'm going to overrule that objection, I don't think there's any demonstration of prejudice. It does seem that there wasn't originally an intent to rely upon the photograph; but, and the photographs were made available to you on disks. Apparently, that was kind of a late request as far some of this stuff was concerned. Is that correct?

STARK No, not as to these.

HOGAN What was the disk that...

CAMILLERI Mr. Fergu...I'm sorry. Mr. Stark did ask in discovery if he could get a copy of these photographs and I did explain to him that we were just...I gave him the photographs that we were going to rely on based on the dates of the violations. So, and also because we had photographs stemming from November to March and there was about 75 of them and the cost to reproduce all those photographs was too much for the agency.

STARK Were those photographs in your possession? The hard copy?

CAMILLERI Yeah, you knew that they were in my possession.

STARK You testified, you told me you did not have them in hard copy.

CAMILLERI That is not true. I told you.

HOGAN You know, there's a misunderstanding about this; but, my point of view on discovery issues is where...no harm, no foul. And unless you can tell me or show me that there is a problem with this photograph in terms of your response to it or developing evidence, I'm not going to rule it out. And if there is a problem then tell me what it is...tell me the additional time you need to investigate...to find new evidence, etc., to respond to this photograph and you'll get it. You know, but, if there's a way to...there's almost always a way to fix the issue.

STARK I agree with you, okay.

HOGAN And it's better to take evidence that allows us to have a full

record.

STARK As long as we are going to keep the record open, at the end I would agree with you.

HOGAN And I'll, you know, I understand from DEQ there's going to be a motion to keep the record open and so you're already at an advantage, Mr. Stark, there. And so, and so, that's my ruling that I'm going to allow the photograph but if there is a demonstration that there is additional time that's needed for or the record needs to be held open for responding to submit additional evidence in response to that photograph, I don't have a problem with that. But, it's hard for me to believe it's a total surprise, given that it's a photograph of the area, the Respondents are familiar with the area, etc. You know, it's not as if it's a wholly new fact that's coming in in that photograph. So the objection on discovery is overruled. I think that this was, this kind of came up in rebuttal to an expansion and ..

CAMILLERI I just wanted to ask you just a couple of questions and we can move on for time purposes. Okay, so you've identified this, as I've entered this photograph into the record as Exhibit 15?

HOGAN Yeah, it's Exhibit 15. Objections to 15 other than discovery, which I have ruled on?

STARK No.

CAMILLERI Okay.

HOGAN Then Exhibit 15 is admitted.

STARK There was an objection as to relevancy, too. I just want to make sure that's...

HOGAN Okay. I'm going to overrule the objection on, I think there's an issue on relevancy; but, I'm going to overrule the objection on relevancy and trust that this will be tied in on the additional testimony. You may want to renew your objection at the end; but, at this point I'm going to admit the exhibit, and I would reconsider that ruling if there isn't sufficient testimony to tie it in.

CAMILLERI Okay.

STARK I'd just like to state also, I can't go past noon today.

CAMILLERI Right.

HOGAN Yeah, I understood Mr. Ferguson had an 11 o'clock appointment today.

WILLIAM FERGUSON Well, I do; but I'll make a phone call and move it. We need to get this done.

CAMILLERI I just have a couple more questions.

HOGAN Okay.

CAMILLERI So, just to tie back in with the testimony you gave earlier that you had channeled the water in this area to come down to the silt fencing that you talked about and the hay bale here on 928 Valley View. So, this photograph what does it show again?

DANIEL FERGUSON This photograph is below this arrow it's actually it goes right about this lot line here.

CAMILLERI Okay, so it's more like around here.

DANIEL FERGUSON Yes, to the east.

CAMILLERI Is this correct, this area here or here?

DANIEL FERGUSON It's on the east side, it's over here, it's where the photograph's looking at.

HOGAN Is the vantage point kind of on the lot line to the west looking east?

DANIEL FERGUSON That's correct.

CAMILLERI Okay. So, would this area here flow down into this area?

DANIEL FERGUSON No.

CAMILLERI Okay, were does this flow to?

DANIEL FERGUSON This flows...that drainage area there flows right to the intersection of this next lot, right...it flows right to there.

CAMILLERI Okay.

HOGAN And then what happens to the water?

DANIEL FERGUSON All the water is, I mean you can see it, there's two lots here and both of them with decomposed granite I know it's essential when you make your lots, you must have the end of your lot be higher than the front end of your lot, the downhill side, must be higher than the back end of the lot. If you have any water going over the front end of a lot...any...it will immediately erode out and you've got a massive problem. That's why you can see the water's accumulating here because the front of this lot, the downhill side, is significantly higher than it is in the back. It's all accumulating right in the middle. Right in the middle there's a pipe and that water is piped down to the next lot where there is another pipe there that's the same. The lot is constructed the same way and all the water from that lot goes into that pipe. From there both the pipes go down to a silt fence, a series of silt fences in front of one of the square boxes.

HOGAN Catch basin.

DANIEL FERGUSON Catch basin, right.

HOGAN I'm learning a lot stuff for only one day.

CAMILLERI Can you show us where that catch basin is?

DANIEL FERGUSON It's right here.

HOGAN So, ultimately that would drain into catch basin number "1"?

DANIEL FERGUSON That's right.

HOGAN Okay, and that's kind of consistent with what your...and is this the situation before and after November 21 through 27?

DANIEL FERGUSON Yes.

HOGAN So, both before and after?

DANIEL FERGUSON The year before too.

HOGAN And the year before and then now.

DANIEL FERGUSON Well, no, now there's houses there. It's totally...

HOGAN And, that's kind of consistent with what you were showing us with this arrow that's kind of the dividing line between the drainage, yeah, on

the west side of the arrow is into 928 Valley View and that the east side of the arrow goes into number "1"? Or went into number "1" before the...

STARK You know, maybe we should identify that arrow? Is there only one arrow on the map there?

HOGAN Well, yeah, there's only one long arrow. But, if you want to initial that, Mr. Ferguson, so that we know that's the arrow. Maybe just put your initials by the arrow.

DANIEL FERGUSON Sure.

HOGAN So we know that's your arrow.

CAMILLERI I don't have any further questions on this area, I just was using the photographs to try to show. Just a couple more questions. So, over the course of 2000, 2001 on Phase II and Phase III, were there other, besides November 21 and 28, other problems with turbid, muddy water flowing to storm drains or flowing off the site?

DANIEL FERGUSON Well.

STARK Are you talking about Phase II? I've asked you to...

CAMILLERI Phase II.

STARK Okay.

DANIEL FERGUSON Is turbid water defined as Mr. Seybold said, you know, if it's not drinking water, if its not clear he called it turbid...sure, every house there wasn't...every bit of water of that went into a storm drain everywhere had something in it.

CAMILLERI Okay, why do you think that was?

DANIEL FERGUSON When rain hits a leaf a little bit of material comes down and you take a look in there you're going to find something.

CAMILLERI Did you think that, you know, based on your opinion, were there sufficient erosion controls on the property to prevent that from occurring?

DANIEL FERGUSON Minus vandalism, sure.

CAMILLERI And where did the vandalism occur again?

DANIEL FERGUSON It was rampant; but the worst up on Phase III. Well, every place where I would move they would be right behind me. You know, where it created the problem obviously was just above lot 928, and then where I piped the water...this right here... was a huge constant problem with the four wheel drive vehicles driving out there...

HOGAN And, you're indicating the lots just to the west of the arrow?

DANIEL FERGUSON That's correct.

CAMILLERI Okay, and did you...

DANIEL FERGUSON Oh, and right here was a real...even bigger problem. A steep little hill, let's see, right here and that was just out of sight of the houses all except for the guy across from 928 anyhow. But, that was every time I turned around there would be somebody four wheel drive going up and down that slope and that's where a tremendous amount of the problem all came from.

CAMILLERI Were some of these problems with the erosion controls caused in your opinion mostly because of the slope of the property? Up farther, like on Phase III and up in the higher reaches of Phase II?

DANIEL FERGUSON What do you mean?

CAMILLERI The steep slopes that you referred to.

DANIEL FERGUSON Well, if we didn't have decomposed granite it would have been different. If we didn't have steep slope it would have been different. If we didn't have vandalism it would have been different.

CAMILLERI Okay, and what about the reports from Ferraro Geologic or the Galli Group? Did you talk to them in regards to erosion controls and they've...we've submitted two documents on the record where they talked about problems with erosion controls on the property and I'm wondering if you read those documents when they were created?

DANIEL FERGUSON I don't know about Galli, and not when the documents were created maybe soon thereafter or I went around, I hiked the property on many occasions with Mr. Ferraro. Him making suggestions. We'd discuss

different ways to prevent erosion. So, prior to him writing the reports I had input and he input to me discussions regarding erosion control measures.

CAMILLERI And then were those...did you complete those requests or those recommendations?

DANIEL FERGUSON Yes, I did. Yeah, I completed everything that he had requested.

CAMILLERI Okay, I have no further questions.

HOGAN Okay, I did have some questions. When did you first note that there was four wheel drive activity on the property?

DANIEL FERGUSON You mean in this year?

HOGAN No ever, in your life.

DANIEL FERGUSON Oh, well, God, I guess when I was about ten years old it started to become a problem. You know, my father's had a constant problem with motorcycles, different, you know. The motorcyclers there think they have, they own the mountain. They've threatened us, you know, there was a gas can with a note left in the back of the pickup saying don't mess with our mountain. Quite a bunch.

HOGAN Okay. And then let's focus on the time period the summer of 2001...July, August, September, of, October of 2001. Did you note four wheel drive or motorcycle activity on the property?

DANIEL FERGUSON During the summer?

HOGAN Uh-huh.

DANIEL FERGUSON Sure, yeah, yeah, it's always...

HOGAN And was that...could...where did this activity occur on Phase II?

DANIEL FERGUSON Phase I, II, III and all the property surrounding them.

HOGAN And, you've described this as vandalism. I can see that the activity caused a problem for you; but, I'm not sure the nature of the problem it caused. Can you kind of spell that out for me...why it was a problem.

DANIEL FERGUSON If any place where you get water moving in decomposed granite...

NOTE: ENDED IN MID-SENTENCE

END: TAPE 5, SIDE 2

START: TAPE 6, SIDE 1

HOGAN Mr. Ferguson, I apologize here...the tail end of your answer might have been cut off. You were explaining that the motorcycle activity causes channels to be cut in the, in the granite type soil.

DANIEL FERGUSON Yes.

HOGAN And that gives, I take it, an avenue for water.

DANIEL FERGUSON To concentrate and if you concentrate it at all with a little disturbance of the surface you...it's going to start washing out here.

HOGAN As soon as it rains, right?

DANIEL FERGUSON Well, even before it rains, it will a little bit. Decomposed granite is not stable until you get deep roots in it. It's tough soil to work with. It's the only soil I've worked with extensively, so, I can't really say other soils. But, its...I've had a lot of practice on it and you better do everything just right, you know, or it will move.

HOGAN I'm assuming that's what makes it so attractive to four wheel drivers. But, anyway, so, now just looking at this photograph 15, that, of course is after the rain period, is that correct?

DANIEL FERGUSON Certainly.

HOGAN Was this...was this area...this land area in a similar condition during November?

DANIEL FERGUSON Yeah, it would have been similar assuming that that's a December picture. I'm sure, yeah...it rained, yeah, in November it would have been similar.

HOGAN I guess by similar I mean the...that portion of ground appears to be bare soil.

DANIEL FERGUSON It's pretty bare, right. It's hard to see, but, you know, the vegetation comes down, you know. This was new vegetation, this was from the year before...this thick stuff. This was newly seeded.

HOGAN The markedly green... and then you seeded that.

DANIEL FERGUSON Right, but, it only came down to right about here and then the slope, the eastward slopes of the banks...you know what I mean?

HOGAN Uh-huh.

DANIEL FERGUSON That was all seeded and, you know, the seeding comes, oh, maybe six or eight feet on the flat side of the lot over. It's, you know, the center two-thirds of it is vegetation free...or primarily. There was not much vegetation.

HOGAN And, its kind of hard for me to detect the slope here; but, it appears to me that the ground slopes downward towards where the houses are. Is that correct?

DANIEL FERGUSON Well, in a sense. It...the houses are to the west, I mean, it actually slopes directly east, you know, not toward the houses but next to the houses is where the slope goes.

HOGAN Okay, so it's running...the slope goes parallel to the houses and to the...

DANIEL FERGUSON To the houses as they are.

HOGAN To the left edge of the picture?

DANIEL FERGUSON That's right.

HOGAN It's just...it's hard to tell because its not dimensional, um, the picture's not dimensional. So, I can't really tell where the...direction of slope.

DANIEL FERGUSON It actually slopes slightly away from the houses a little bit more to the...

HOGAN So is this sloping then from the right hand side of the picture to the left hand side?

DANIEL FERGUSON Very slightly.

HOGAN Okay. All right, and then the...this...I'm really just asking a lot of this just to help me visualize what you've been telling because this is a picture that maybe shows it. These striations are these like ditches or depressions

that you dug out here or is that just the natural action of the water or how come there are these little dips here?

DANIEL FERGUSON Those are just from it...a bulldozer, those are, you know. When a bulldozer blade moves through dirt, you know, the dirt comes out the two sides of the blade. And those are just imperfections in, you know, there wasn't...there wasn't a grader after a bulldozer so you have little bumps. And that's why there's lines through those little bumps to make the water all come over to here. That's why I'm saying the grade actually goes away from the houses...over to here. You know, I made sure that there was little lines in all of them so that water could flow over to here where the pipe is.

HOGAN And, okay, what about this area right here...that looks like it's kind of dug out...that's where I thought the pipe was; but, I guess not.

DANIEL FERGUSON No, it's right there...you can see it...that little dark spot.

HOGAN That little dark spot right there.

DANIEL FERGUSON Yes, that's an upright grate. This is dug out, you know that's a settling pond, and this grate is sticking up in the air so that when you get enough water just the very top water flows in that grate and down the pipe. The rest of it settles.

HOGAN And then what this kind of disturbed area here on the lower right part from the center over to the right hand part it looks...and there's kind a little depression in the middle of the picture of accumulated water...what's that?

DANIEL FERGUSON There's a, it turned out to be a little spring here...right here.

HOGAN The lower part.

DANIEL FERGUSON Yeah, and the water, you know, just did that, you know. It just settled out there because that's where it was flat. That's where all the dirt settled out. It's just a river delta is what it is, you know.

HOGAN What, if anything, of actions did you undertake to control

four wheel drive activities?

DANIEL FERGUSON I spent, well, a lot of nights up there. Constantly calling the police when I, you know, could catch them. Putting up lots and lots of wire backed silt fence because that seemed to be the most difficult for the people to dismantle, and tear up. You know, you drive your steel fence posts...they're these green posts, I forget what they call them. But, you drive those way deep in the ground, and I put them to where, you know, there is only this much of them sticking up because then I found that they couldn't wench onto them and things. It would take them a long time and they didn't want to drive over them and hurt their tires. And I'd attach silt fence...wire backed silt fence, to that. You know, wire it and wire it and wire it and sometimes that would be effective for quite a while.

HOGAN Okay and then you described a series of ponds and silt fences that you put in, I think in relation to Exhibit 8, photograph 3. This is draining into what? Blue Gulch?

DANIEL FERGUSON Eventually, it would go into Blue Gulch. Right.

HOGAN And when were these series of silt fences installed?

DANIEL FERGUSON I started with the ones at the top and then worked my way down. First thing I would do was, all of the drains, you know there's maybe four or five of them, would go down this side of the hill of the subdivision. I started with putting these at the bases of all of them and that was, you know, before any rain came. And then I would start with silt fences down below, you know, so that I would be working the whole subdivision building more and more down. I didn't just, you know, go to one canyon, build all the way down and leave the rest unprotected, you know.

HOGAN Okay, let me try to focus this a little bit then. Were all of the fences in place on November 21, 2001?

DANIEL FERGUSON I don't think so. You know, I don't know exactly. I continually put in more, I put in more than even what Ferraro's report requested. There were some places that I felt...

HOGAN You did additional fencing after the Ferraro report?

DANIEL FERGUSON Sure.

HOGAN Okay and then, this particular fence that's shown on photograph 3, were there...at the time that the photograph was taken November 21, 2001, were there additional fences downstream of this?

DANIEL FERGUSON Sure, sure there was. I think before rains came I had at least two or three silt fences, redundant in each canyon or each discharge pipe.

HOGAN Okay, I don't have any further questions for Mr. Ferguson.

CAMILLERI I just have one more question. Was there any mulch used on Phase I or...Phase II or Phase III on the property?

WILLIAM FERGUSON I'm sorry I couldn't hear you.

CAMILLERI Mulch?

WILLIAM FERGUSON Mulch.

CAMILLERI Mulch or straw?

DANIEL FERGUSON Sure, there was on all phases.

CAMILLERI How about in 928 Valley View, I know we heard a lot about using vegetation. But, since the vegetation didn't seem to be completely working was there ever any discussion about putting mulch down?

DANIEL FERGUSON There was mulch down. We did put mulch down.

CAMILLERI Okay, I just couldn't see any in that area there. There didn't look to be. Is there any mulch in that area?

HOGAN You're talking about?

CAMILLERI Exhibit 15.

HOGAN Exhibit 15.

WILLIAM FERGUSON On the settling ponds.

DANIEL FERGUSON Oh, this is over...this is clear at the ...I thought you meant by 928 is...right here is 928...clear over here, clear away.

CAMILLERI Up here and, I guess, yeah.

HOGAN We need to go section by section.

CAMILLERI Okay, on Exhibit 15?

DANIEL FERGUSON Sure, I spread a lot of hay in here. I don't know how many bales.

CAMILLERI How about around November 21st and that time November 28th...was there any hay in this area?

DANIEL FERGUSON I don't know. It was an ongoing process when I was putting hay there. I know it's difficult to see in the pictures because as soon as it gets dirty it blends in. And besides the mulch or hay that I was putting out. You know, I'd put in...they call it from the Grange Co-op, slope holders. Seed...I seeded this whole area and the slopes and these downhill slopes to make sure they didn't move, I went ahead and put the erosion control cloth...stapled it all in over those slopes. This didn't create any problem at all until...and vandalism one time and until I took Mr. Seybold's advice and took...put a filter there and that's when I quit, as soon as that water started to go over, it would all wash out. He said it had to be filtered. He said he's going to write me a ticket if I didn't put a filter over this drain. And I put a filter there. I said I don't think, you know, it's going to create a problem. I did for a short time and it immediately started filling up and that's when I pulled the filter off. And that's when we didn't have any more discussion.

CAMILLERI Okay. You were talking before. Now let's kind of focus back over here on photograph 14, Exhibit 8. You were talking about mulch and straw. Did you use any in this area?

DANIEL FERGUSON In this area here?

CAMILLERI Yeah.

DANIEL FERGUSON Sure, yeah, you can see it there pretty clearly.

CAMILLERI What's the purpose of mulch or straw? What's...what's the...why is it important to use?

DANIEL FERGUSON It keeps the temperature of the dirt more consistent to increase your germination and growth rate of your grass when the rain drops hit it

disperses the rain drops so that you don't have, you know, big rain drops hitting in an area it would immediately, your newly starting germinated grass would be washing out. It stabilizes it, it disperses the water as well as keeping a constant temperature for the grass to...at night, you know, it keeps it warm and it germinates and keeps growing.

CAMILLERI Did you...did you hydroseed the Phase II and III at the same time?

DANIEL FERGUSON I didn't. You know we only hired one company on it. I mean they would go, we can't do both at the same time and there was only a limited number of...I mean as far as I know, I wasn't watching to see when they at the same time...they could have had more than one truck there at a time. I don't know.

CAMILLERI Do you know around what time of year the hydroseed was put down?

DANIEL FERGUSON Many times a year. Primarily in the early fall.

CAMILLERI Was that a good time to put hydroseed down for growth by the late fall? November months.

DANIEL FERGUSON Is there...is there a better time?

CAMILLERI Yes.

DANIEL FERGUSON Sure, you know, we put it down I think from August. I, there was so much hydroseeding going on it was a constant process. Right, yeah, we put some down late also as well as early.

CAMILLERI What's the purpose of the hydroseed?

DANIEL FERGUSON The same thing as grass seed with mulch. As you heard the guy testify that applies it, its got the glue...it keeps the grass seed sticking and keeps the mulch on the grass seed so that it germinates and has the best growth rate. It's also got a fertilizer in it.

CAMILLERI Do you know if its...if the grass should germinate before the winter season? To have proper erosion control.

DANIEL FERGUSON Well, in the places that I felt were at the most risk, when we hydroseeded I ran sprinklers. All of these property owners, all let me run hundreds and hundreds and hundreds of feet of hoses and sprinklers. I ran it all over there and made it consistently, constantly wet in order to not let the grass start and die. Yeah, every exposed slope that I felt was at risk that we hydroseeded, I got water on, starting clear...I did some in May and ran sprinklers all summer long so that the grass would be up to a reasonable, you know the roots would be in reasonable to prevent erosion.

CAMILLERI Did...did that grass do what it was intended to do to prevent the...the runoff?

DANIEL FERGUSON Sure, yeah, what it was intended to do, yes.

CAMILLERI Okay, I have no further questions.

HOGAN Any follow up, Mr. Stark?

STARK No.

HOGAN So, I think we've completed with you, Mr. Ferguson. Can Mr. Dan Ferguson be excused?

STARK Sure, if he wants to be. You bet.

HOGAN You're welcome to remain also. Your next witness, Mr. Stark.

STARK Call Mr. Seybold.

HOGAN You're still under...you were sworn in yesterday, you're still under oath.

SEYBOLD Okay, sure.

STARK Help me, please. What's my next number?

HOGAN Your next number is 113.

STARK I'm marking three pages of photographs Exhibit 113, and believe it or not that copy is for you.

HOGAN Thanks.

STARK I'd like you to assume for the questions I'm going to ask you,

Mr. Seybold, that those are pictures in the...in the November of 2001 of other areas in the drainage area that would end up in the Morgan Street pipe and be deposited in the Gilbert Creek. So, I'd like you to assume that as a fact. I will tie that up later; but, just for purposes of the questions that I am going to ask of you, I'll ask you to assume that. Okay?

SEYBOLD Okay.

STARK All right. Let's just on this exhibit just mark...we'll make this 1, 2, 3, 4, 5, 6, 7, 8, 9. Now, let's take photo 1. That's a clear day obviously; but, I'd like you to assume that you've got rain similar to what you saw on November 21st.

SEYBOLD Okay.

STARK And, would you expect erosion...do you see evidence of erosion in photo 1?

SEYBOLD I see some minor rills here adjoining this stone wall, yes.

STARK Would you expect that that particular photo 1 would generate silt into the storm water system?

SEYBOLD On this particular photograph I would not because there is a gravel path adjoining that site. So, I can see some evidence of some of the rill where material has gone into a gravel path which would act as a filter. So, on that specific picture unless water is going down this way...which I don't see any rills in that direction...I would say no.

STARK Okay, and photo 2 on page 1. Same question with that. Just assume that you're going to have some rain like you saw November 21st.

SEYBOLD I would say this one's a problem. I can see evidence of some silt material that has been washed off the site onto the sidewalk. So, yes, I would say that was a problem.

STARK Okay and that silt would have ended up in...eventually in Gilbert Creek.

SEYBOLD Well, it appears that it would. Assuming that what you noted

about where the drainage area is. I don't know that; but, it does appear that it would end up in the storm drain system.

STARK Okay.

SEYBOLD Since I don't know where the location of that is.

STARK Right, and photograph 3?

SEYBOLD Photograph 3 appears to be...is that the same as photograph 2?

STARK It could be.

SEYBOLD It looks like the same place, so I'd same the same.

STARK And, photograph 4.

SEYBOLD Is the same as photograph 1.

STARK Right, okay. Photograph 5.

SEYBOLD This appears to be the same from what I can see it appears to be the same site as photograph 1 and 2. So, I would make the same conclusion. There appears to be some material on the sidewalk. There is some material on the sidewalk that would appear to end up in the storm drainage system and from there it could be conveyed to the stream, whatever stream would be in this area.

STARK Okay, and photograph 6?

SEYBOLD That appears to be the same as photograph 5. I would...I know that there are rills on this site. I don't see...well, I guess I do see some material on the sidewalk down here. So, I would say the same. Make the same comments as, the same site as 5.

STARK And photograph 7 which I'd like you to further assume that is City property.

SEYBOLD I see a small cut bank here. I don't see any evidence of any rills here. I do see some vegetative material and I see a gravel way here. I don't see any material...I see a very minimal amount here. I don't see any along the curb line or onto the sidewalk. So, that one does not appear to be a big issue.

STARK And 8 appears?

SEYBOLD Appears to be the same as the other photographs that you showed me.

STARK 9?

SEYBOLD 9, I can't see enough of that, well, I think that's the same as that side right there. Do you know if that is?

STARK I believe it is. So, your answer would be the same as photo 7?

SEYBOLD Same as 7, where I don't see any rills. I don't see...I see very minor area right here but I don't see any major evidence on that particular one.

STARK Okay. Now, when you were on the site on November 21st was it raining?

SEYBOLD I'd have to look at the photographs to refresh my memory on that.

STARK Okay. Well, the ones that are in evidence are Exhibit 8.

HOGAN Yeah.

SEYBOLD Yes, it was raining that day.

STARK Did you take any pictures on November 21st?

SEYBOLD I did.

STARK On November 27th, when you went back was it raining or not?

SEYBOLD Again, I'd have to take a look at the photographs to refresh my memory on that. Yes, it was raining the 27th.

STARK Do you recall whether it was raining...how hard it was raining?

SEYBOLD Yes, when I was there it was raining real hard; but, I think it had been at some in time before this. But, at that point it was not. When the photographs were taken.

STARK Okay. Now, I ask...I'd just like you to compare Exhibit 8, photograph 17, with Exhibit 10, photograph 8.

SEYBOLD Okay.

STARK Would you say those are the same photographs?

SEYBOLD Yes, with the different color resolution just based on the printing. Yes, I would. Or very close to it. There's a spot here on this, I'm not sure what that is. If that's trying to...it's the same location. Whether or not its the exact same photograph, I'm not sure of that.

STARK It certainly looks like the same photograph, doesn't it.

SEYBOLD Well, you look...I can see a concrete block right there. I see a concrete block there and they are in two different locations in the photograph, so I don't believe they are the exact same photograph; but, I believe they were taken at the same time.

STARK Okay. No further questions.

CAMILLERI To clarify. Can we have those exhibits back out please.

STARK Well, these are mine.

CAMILLERI Oh, okay.

HOGAN 8. here's 8 and 10.

CAMILLERI Okay. What date were these photographs taken on?

HOGAN And you're asking about 10?

SEYBOLD Exhibit 10. These were taken on 11/27 of 01.

CAMILLERI Okay. I'd like to introduce another exhibit...Exhibit 16. Do you recognize this document?

SEYBOLD Yes, I do.

CAMILLERI And what is...did you make the document?

SEYBOLD Yes, I did.

CAMILLERI Can you explain what it is?

SEYBOLD This is a letter that I wrote to Mr. Ullrich, from the Department of Environmental Quality, after we visited the site and because of my frustration with the lack of appropriate storm water management controls on Laurelridge Subdivision.

CAMILLERI Okay, is this document a true and accurate copy?

SEYBOLD Yes, it is.

CAMILLERI Did you make it at or near the time of...that you wanted to write that complaint?

SEYBOLD I'm sorry.

CAMILLERI Did you make it at or near the time that you did the inspection in?

SEYBOLD Yes, I did this...I wrote this letter on December 6th of 2001.

CAMILLERI Okay, Judge Hogan, I'd like to introduce it into the record as Exhibit 16.

STARK I have no objection.

CAMILLERI Okay.

HOGAN Admitted.

CAMILLERI Okay, and what was the purpose of the document?

SEYBOLD The purpose was to initiate a complaint because of what I viewed and our had viewed as substantial violations to the NPBS (sp?) permit.

CAMILLERI And over what period of time did you view those problems?

SEYBOLD I had viewed the problem on a number of occasions and I had reviewed a report from Mr. Galli that was prepared for the City of Grants Pass noting substantial problems with erosion control measures on Phase II, that was written the previous winter. So, I went out to take a look and see how things were operating at this point in time. And what I observed were...substantial problems were the primary issue that I saw was there were inappropriate controls in place to prevent erosion and the attempts were made to then control sedimentation running off the site; but, there were large areas that were bare throughout the subdivision on multiple lots and what we saw were discharges going into the storm water system of the City of Grants Pass.

CAMILLERI And did you...what you've documented in...in this...documented is that there were you enumerated a certain number of lots that

you talked about erosion controls; and did you observe those concerns with your own eyes?

SEYBOLD I did. I...there are several examples that I gave in this letter of problems that I observed on the site; but, this is...were just examples. This was by no means the entire number of problems that we saw.

CAMILLERI And when did you observe those problems that you wrote in the...in the letter?

SEYBOLD I visited the site on numerous occasions in the late fall and into the winter of 2000...fall of 2000 and then into the winter of 2001. So, in November, primarily, I noted a number of problems on this site.

STARK Is this 2000 you said? You said 2000.

SEYBOLD I'm sorry. November of 2001 not 2000.

CAMILLERI Okay, I have no further questions.

STARK Mr. Seybold, using Exhibit 16 can you put addresses on those tax lots?

SEYBOLD Where is Exhibit 16?

STARK Right in front of you.

SEYBOLD Can I put addresses on any of these?

STARK On tax lot 146 for instance.

SEYBOLD I'd have to look at the records.

STARK I have the map.

SEYBOLD Well, its the map.

SEYBOLD Well, that doesn't have...

WILLIAM FERGUSON Tax lots on it.

HOGAN Can...as long as we're doing this...I wanted to find out whether the tax lots mentioned were in Phase I or Phase II. So, maybe you can indicate that too.

SEYBOLD That wasn't something that was of any concern to us. We just noted problems on the site, Judge, so, as far...

CAMILLERI You probably would know one.

SEYBOLD I do know for one of them. I'm not sure which is tax lot 146...I think its right on the border between Phase II and Phase III. You'd probably have to get testimony from someone else on that. For tax lot 123, that was site 928 NW Valley View. I believe that is 928 NW Valley View.

STARK Now, you looked at a packet of your photographs when you referred to that. What date is on those photographs?

SEYBOLD 11/28/01.

STARK Okay.

SEYBOLD And for...for tax lot 146...identify that as 906 Valley View and that's the one I'm not sure. That could be in either in Phase II or Phase III. I believe its right on the edge between the two. And then for tax lot 148, I'm sorry I don't have an address on that one.

STARK Okay.

SEYBOLD Well, I know for a fact that one was...well, I could point to the location on the map where that's located; but I don't what the address is.

STARK The one for 906 Valley View you looked at your packet. What...what's the date on the packet that you looked at for...for 146?

SEYBOLD 906?

STARK 906 Valley View.

SEYBOLD 11/28/01.

STARK Okay. And, I'm sorry, I missed what you said about tax lot 148. You can point to it?

SEYBOLD I can point to the location on the map; but, I am...I don't have the address.

STARK Why don't you look at Exhibit 5 and...

HOGAN 105?

STARK 105, yes.

SEYBOLD Right there.

STARK Okay, would you put "148" on that lot and then just put your initials. And, do you know enough from your visit to the site. Can you do the same thing for Valley View address number 906? Would you just write "906" and your initials by it we'll know that that's from your testimony.

SEYBOLD So, you're asking me about the one that was tax lot 123?

STARK Sure, let's do that one first.

HOGAN 146...Well, 123 is 928 which is already marked on there as the 14. That's photo 14, yeah.

STARK Okay, and then 146.

SEYBOLD 146 well its approximately in this...in this area. That's the one that I'm unsure on from the map, I'd have to go out to the site. If I looked at the addresses, its right in this area; but, I can't tell specifically which one of these it is. I believe its...I think its this one here. Almost positive its this one. It's within..

STARK It's this flag lot.

SEYBOLD Well, there's a flag coming up here and the water was coming down this roadway into a catch basin here and then discharging into ours and I'm not sure if that's representing the catch basin or not. It's right in this area here.

STARK Is that in Phase III?

SEYBOLD Well, that's what I said I don't know. It's right on the edge, between II and III.

STARK All right. I believe Mr. Ferguson can tell that.

SEYBOLD Do you want me to write any notes on map at this location?

STARK No, that's okay. I got it. I have no further questions.

CAMILLERI I have one last question. Since November 21st and 27th of 2001 have there been, excuse me, further inspections of that property dating up to the present time?

SEYBOLD Yes, in fact, we have made a number of inspections and issued approximately 40 citations on various sites throughout the Laurelridge

subdivision.

CAMILLERI Are those 40 citations mostly to Mr. Ferguson?

SEYBOLD Yes.

CAMILLERI Okay, are they all to Mr. Ferguson?

SEYBOLD Of the 40 that I'm noting right now there's 40 different complaints and about 20 different tickets covering different sites throughout Phase II and Phase III.

CAMILLERI Okay, and in the last year, 2000...the winter of 2003, were there any problems out at the Phase III of the site?

SEYBOLD I can't really speak to that. I have not been the person out there doing the investigations at this point in time.

CAMILLERI Okay, okay, no further questions.

STARK No questions.

HOGAN Your next witness, Mr. Stark.

STARK Mr. Ferguson.

HOGAN I think I already swore you in. I did.

WILLIAM FERGUSON We can do it again.

HOGAN No that's all right, you're still under oath. So, you may proceed.

STARK Mr. Ferguson, I think we got through the fact that the partnership owns this land with your aunt and you?

WILLIAM FERGUSON At this times that correct, or actually its the estate now; but, at the time in question it was my aunt and myself under Laurelridge Development.

STARK Now, would you just, in narrative, well, I've complained about that so maybe I better ask more specific questions. When you started to build this subdivision was that in 1997?

WILLIAM FERGUSON The actual construction?

STARK Yeah. Well, the permit I'm going by the...where is the

permit? Let me get that.

WILLIAM FERGUSON Oh, I...if we look at the date of the partnership agreement, it was about a year afterwards, I think.

STARK Well, the partnership agreement, Exhibit 109, appears to be dated November 16, 1994.

WILLIAM FERGUSON '94, okay, so it would have about two years after, I think would have been in '96.

STARK Okay, and did you know that when you started to develop this subdivision that there was going to have to be a permit and some erosion control?

WILLIAM FERGUSON Yeah, I think the surveyor filled out a form to get the permit and I don't recall whether I signed it or whether he did. But, I knew there would have to be erosion control. Yes.

STARK Okay, and would you...who did you contact to do the erosion control for Phase I?

WILLIAM FERGUSON For Phase I, Erosion Control, Inc., they did both Phase I and Phase II.

STARK And would you tell the Judge please what measures were take...undertaken starting with Phase I.

WILLIAM FERGUSON On Phase I, everything was after construction everything was hydroseeded and we used where necessary straw bales to sop any areas where the hydroseeding had not taken yet. I don't recall, there could have been a settlement basin or two; but, that together with the...on every lot that had a granite bank. Unless you hydroseed the bank, not necessarily the flat, but the bank where the wash occurs on every lot the contractors, at that time it was Copeland on Phase II. SOU Underground on Phase III...I'm sorry, Phase II; and Copeland on Phase III. But, in every case they compacted the soil to specifications that were put in place by Mr. Galli who was a geotechnical engineer from Grants Pass. They hired him, meaning Copeland, to do some testing and also Southern Oregon Underground did, he tested the compaction and he helped in terms of what we

should hydroseed, when we should hydroseed it. And working with Gary Wicks again it's hard to separate the Phases. In Phase I we had some catch basins which were protected by hay bales and some fabric as well as settling areas in the bottom of the catch basins. And, in Phase I, I think there were two or three of those. Two that...two for sure, and I think a total of three catch basins other than the catch basins that are installed as part of the...of the drainage system. The the City had even though their plans showed there was a 24-inch drain coming into our property...as it turned out the engineer remembered one time looking at it and thinking it was only 16, so he went back and re-examined it and as a result of that the City didn't have funds and we had to put in a parallel 16-inch drain for about 400 feet. So, that was, you know, part of our erosion control system, too, as well as the...the storm water runoffs and the retention ponds in effect that were made because of the brimming of individual lots. I don't recall on Phase I that we used any silt fences. We could have because they were just coming in to...into the market place about that time. But, I know we did substantially on Phase II.

STARK So, this, you know, to me ponding sounds like a pretty crude method; but, that's...is that the essential way you...what's the theory about ponding? Why do you have these ponds or settling areas?

WILLIAM FERGUSON Well, actually I think the City of Grants Pass, at least I went to one meeting that Mr. Seybold hosted where he wanted no water leaving construction sites, and he wanted everything ponded so that it would sink into the dirt or evaporate. And create on each lot or each development wetland areas where this liquid stuff would naturally dissipate. There is a movement apparently in that direction; but, ponding was something that we did to stop the flow of water. And once you get it into a pond then you can place a pipe in the pond and remove the water after it builds up to a certain height and giving it an opportunity to settle out. You could remove the water without running it over the face, and if you don't have a pipe outlet, if the water gets too high, it'll, you know, cut the face of the granite base and cause substantial erosion. So, we used ponding for those

purposes.

STARK Is that in Phase II?

WILLIAM FERGUSON We used ponding in Phase II and Phase I.

STARK Okay. Now, do you...this Exhibit 105 we've been using extensively.

WILLIAM FERGUSON It's really easier for me to use one of the official subdivision maps.

STARK Well, this is my question. By looking at the official subdivision plat which you have in your hand, and I'll make this an exhibit so if we want to have we can have it...but, by, well, let me do that right now. So that's 115?

HOGAN I have you at 114, maybe I'm missing something. I have you at 113...but, we had a 113.

STARK What's the last one you show?

HOGAN The last one I show is 112, which was the diagram from Mr. Dan Ferguson. So 113 is where we'd be.

STARK Well, can you on Exhibit 105, Mr. Ferguson, can you draw a line where Phase I and Phase II and Phase III are? Or is that?

WILLIAM FERGUSON I could, but, it would be much easier to...here's the Phase line already drawn on this map.

STARK Okay.

WILLIAM FERGUSON Between...this would be Phase I to the right and Phase II to the left of this dividing line right here. So you're going to mark Phase I and Phase II?

STARK Right. But, how can...

WILLIAM FERGUSON Phase III is actually up here, its not on this map.

STARK Okay, but, how can we...we've been using this for a lot of testimony.

WILLIAM FERGUSON Yeah, that shows some of the storm drain...that's a

storm drain map.

STARK Okay, but let's see.

HOGAN You can actually figure it out from looking at the two maps.

WILLIAM FERGUSON You can, its just so much easier because this line is here to delineate between the two.

STARK Well, for instance, can you...we see Sunburst is clearly in Phase II.

WILLIAM FERGUSON That's correct.

STARK Okay, and we come down to Crown and before we get to Morgan we're in Phase I.

WILLIAM FERGUSON That's correct.

STARK So, the mark here where number "1" is is in Phase I, is that correct?

WILLIAM FERGUSON Mark where number "1" is would be right in this location right here.

HOGAN That would be Phase I.

WILLIAM FERGUSON Okay, that's marked number "1"...I'll put a number "1" on here...okay?

STARK Okay.

WILLIAM FERGUSON That is Phase I, that's correct.

STARK All right, and...

HOGAN Except I lost you.

STARK And then going up Valley View, let's just count lots here. I'm referring to...

WILLIAM FERGUSON Starting at the corner of...right here.

STARK Yeah, let's...can I write on this and put "Lot 117"?

WILLIAM FERGUSON Its just 17.

STARK Lot 17?

WILLIAM FERGUSON That's correct.

STARK Okay, Lot 17. What's the next one?

HOGAN Are we going to admit 113?

STARK Yeah, but I just want to put it so we can know where these lots are.

WILLIAM FERGUSON Lot 28 is the next one up, then Lot 27, then Lot 26. Okay, then Parcel 9, and then Lot 24.

STARK And then what is this?

WILLIAM FERGUSON That's Parcel 8.

STARK Is that in...

WILLIAM FERGUSON The next one's Parcel 7.

STARK Just a second here.

WILLIAM FERGUSON Okay, sorry.

STARK I'm just going to put "Parcel 8".

WILLIAM FERGUSON Okay.

STARK And then what's this one.

WILLIAM FERGUSON 8.

STARK And Parcel 8 is in Phase I?

WILLIAM FERGUSON That's correct.

STARK And Lot 49 is the one next to it here...in Phase II?

WILLIAM FERGUSON Yeah, that's Gary Head's (sp?) lot there.

STARK So that the 928 Valley View is in Phase I not Phase II?

WILLIAM FERGUSON That's correct.

STARK Is that correct?

WILLIAM FERGUSON Yes, it's pretty close to the line; but, its in Phase II, yes.

HOGAN Is it in Phase I or Phase II?

WILLIAM FERGUSON I'm sorry, Phase I, misspoke myself.

HOGAN I've got it going both ways.

WILLIAM FERGUSON Phase I.

STARK Okay, and so the weephole and the problems that we show in Exhibit 8, photographs 14 and 15, and Exhibit 10, photogra...

NOTE: TAPE ENDED IN MID-SENTENCE

END: TAPE 6, SIDE 1

START: TAPE 6, SIDE 2

HOGAN Okay, we did have a little off the record discussion about how to conclude. I'm going to have to call it a day. At least...I have a 1 o'clock hearing...so at least this portion will have to wind up by about 11:45 and at that time we'll figure ...because Miss Camilleri needs to return to...are you based out of Portland?

CAMILLERI Uh-huh. Correct.

HOGAN And, so, it seems feasible we'll finish any additional testimony telephonically and...and then we'll take up the...there's apparently different thoughts about closing arguments, but.

CAMILLERI I could actually since we're not going to do them today. I'm okay with doing them verbally, I just would need, you know, a little bit of time to collect my thoughts because we've talked about so many things. So, I'm not opposed to doing a verbal closing because we're going to have it a later time.

HOGAN Well, if both people are agreeable to that, that also can be done telephonically.

CAMILLERI Yeah.

STARK Agreed.

HOGAN Is there any objections to doing these things telephonically?

STARK Absolutely not.

CAMILLERI No.

HOGAN Okay, so that seems to me that it will work just fine. I have a great setup in my office and it will work. Okay, so resume.

STARK Okay, going on, I'd just like to identify the lots that are clearly in Phase I by the subdivision plat and Parcel 8 is in Phase I, Mr. Ferguson?

WILLIAM FERGUSON That's correct.

STARK Okay, and if you go up to this pie-shaped lot.

WILLIAM FERGUSON 52.

STARK That's Lot 52. And the one next to it, is that in Phase I?

WILLIAM FERGUSON Lot 51? No those are Phase II lots. The line is right here.

STARK 52 is Phase II?

WILLIAM FERGUSON That's correct.

HOGAN And we're going to mark 113 as an exhibit, right? Or, we're going to receive it as an exhibit.

STARK Right.

HOGAN Let's do that right now. Any objection to 113?

WILLIAM FERGUSON He's already marked this 113.

HOGAN I know, but, I just...its not in the record yet.

CAMILLERI I just wondered...who created the document?

WILLIAM FERGUSON I'm sorry.

CAMILLERI I just wanted to know who created the document? Because I don't know if that's been established.

WILLIAM FERGUSON Who created it?

CAMILLERI Who created it?

WILLIAM FERGUSON It was created by...

STARK Wicks Engineering

WILLIAM FERGUSON Wicks Engineering and Associates and it's dated December 28, 2000.

CAMILLERI Okay.

WILLIAM FERGUSON Here, you can look at it if you want.

STARK I would propose we get a yellow marker. Just put it right down there.

HOGAN Well, I'm afraid I won't be able to read...I think what we're doing is okay. If I have 113 I'm going to be able to cross-reference that.

STARK Okay.

CAMILLERI Can I get a copy of this and I don't have...you haven't

provided me with copies of your exhibits. So, when we leave today I would like a copy of these two exhibits.

STARK Okay.

HOGAN Other than that...is there any objection to Exhibit 113?

CAMILLERI No.

HOGAN Okay, Exhibit 113 is admitted. Is it okay if you remain after I leave to take care of the copies...we'll all have to come back and get them, I guess, the originals.

STARK I may have to make...my copier won't make this big of a copy.

CAMILLERI Yeah, we can even break it...even just that little area there. ..I just need to be able to see where that delineation is.

STARK And going on, Mr. Ferguson. The Lot 22 is in Phase I... and I'm putting a "Lot 22" marker on that, right?

WILLIAM FERGUSON Yeah, correct.

STARK Okay, and then the one on the corner of Crown Street and Morgan is Lot 21.

WILLIAM FERGUSON Yes.

STARK And...well, you...Jenine you can put any in later you want. Anyway that orients things as to Phase I and Phase II.

WILLIAM FERGUSON Sure and you can draw a line in there if you want.

CAMILLERI It would be helpful to have a line.

HOGAN If everyone wants a line, they get the line. Okay.

CAMILLERI I don't know why I can't seem to connect those two.

HOGAN Okay, I think that's...

WILLIAM FERGUSON Well, that's...this map is of such a huge area...you know, it's all the drainage. And this is just these two Phases.

CAMILLERI Okay.

HOGAN I do still have the tape recorder going just to let people know.

Mr. Stark went out to get a marker, I think. Okay, yeah, if you could use that yellow highlighter because then I can still read the other marks underneath it. So, that's what I'm concerned about is not obscuring the other...the other marks. And so you're going to mark that with the yellow highlighter the division...the line between Phase I and Phase II, right?

STARK You screwed up there.

WILLIAM FERGUSON I did. Where?

STARK 52. You did it right.

HOGAN The witness is always right.

WILLIAM FERGUSON That's...this map is wrong, there's another lot in here that doesn't show, so its a little bit...but, we can do it this way.

HOGAN So you're saying that 105 has the lot above Crown marked a little differently than 113, and so your yellow line there on 105 is your best understanding of the division between Phase I and Phase II. Is that right?

WILLIAM FERGUSON That's correct. They've left off Lot 53 in this...in this map.

HOGAN Okay.

STARK So the yellow line..to the right of the yellow line is Phase I? And to the left of the yellow line is Phase II?

WILLIAM FERGUSON Why don't I do that on both of them so that we've got yellow on each one and make it easier on everybody.

STARK I'd offer Exhibit 113 if you have no objections.

HOGAN It's already in.

STARK In Exhibit 3, Mr. Ferguson, the date on that, it's the permit, the date on that is 2/20/2001. Is that for Phase III? Or do you know by looking at it?

WILLIAM FERGUSON I'll read the cover letter. Yes, I'm pretty sure this is Phase III.

STARK Okay. I have certified copies of rainfall records for Josephine

County, KAJO Grants Pass, which is one of their recording sites in Grants Pass, and I need this for another purpose, the original, I can exhibit it to you; but, I have copies for everybody and I'd like to make a copy of the original for the record.

HOGAN So, that will be 114, right?

STARK Yeah. And, Jenine, you can look at these.

CAMILLERI This is fine, the copy's fine. Thanks.

STARK Mr. Ferguson, is, do you know...I haven't asked you this, so I don't know what you're going to answer...do you know where KAJO Grants Pass is?

WILLIAM FERGUSON It's a radio station in Grants Pass.

STARK Is that in downtown, or?

WILLIAM FERGUSON I have no idea...none.

STARK It's in Josephine County.

WILLIAM FERGUSON That's correct.

STARK Now, let's take Phase III, Mr. Ferguson. And, I'll call you back to November of 2001. In your opinion, are you familiar with the erosion controls on the Phase III?

WILLIAM FERGUSON On Phase III?

STARK Yeah.

WILLIAM FERGUSON Yes.

STARK And that drains not towards Gilbert Creek but towards another canyon...Blue Gulch. Is that right?

WILLIAM FERGUSON The majority...vast majority of Phase III drains towards Blue Gulch. There is a little bit on the east side of the ridge that drains to Gilbert Creek. The road in Phase II is built on the west edge of the ridge.

STARK Let me ask you this in general. As to Phase III, and you've seen the pictures that have been entered of evidence.

WILLIAM FERGUSON Right.

STARK To your knowledge does any of that...does any unfiltered

water go off your property in Phase III?

WILLIAM FERGUSON It...no.

STARK Now, how can you say that none of it goes out...how do you know that?

WILLIAM FERGUSON Well, for several reasons. There's a road that goes down through Dr. Mathis' property that I've been able to get on and he's the property owner adjoining us to the west. I've been down on his property and I haven't been down there in the last six or eight months; but, prior to that time I could walk and I walked some of the area down there and the...in addition to five layers of hydroseeding and mulch and the compaction and the other work that was done on the west side slopes the system was designed to pickup any erosion that might occur any place on the top of the hill or on these slopes by redundant silt fences which extend down through my property and in a couple of cases onto Dr. Mathis' property with with his permission. And generally speaking, there's nothing, well, I mean, absolutely speaking there's nothing that's gotten beyond the toe of those silt fences as they exist today.

STARK Okay, and going back to November of 2001, were your inspections frequent enough to give that same opinion as to that date?

WILLIAM FERGUSON Well, in November of 2001 I don't think all of the redundancy was in place; but, at that time, they were installing on areas that Dr. Ferraro indicated there were slight areas of silver failure or sliver failure I guess he calls it because Copeland overstepped during the construction some of those slopes. So, to make sure that there was nothing leaving the site in addition to the layers of hydroseeding and mulching and straw, we placed in areas that appeared to be critical we placed straw matting with staples on those surfaces. And the straw matting is such that the grasses can go through and establish, you know, a good firm base. And we had no sliver failures in those areas and, you know, after those were installed, and they were installed during the fall of 2001. Also Copeland, at the direction of Dr. Ferraro, went back and pulled back the tops of

the slopes and they also brimmed all of the slope areas on the west side so that no water would go...run directly over the slopes. The only water going down the slopes would be that that was on the it. And then in two areas where there were lots that were out on little, sort of, peninsulas or ridges that went from Starlight to the west we had settling basins with...with drain pipes draining out down into the gulches that were protected by silt fences and that...we used that system to pipe any excess water that might accumulate in the settling basins on those. I can think of two particularly that where lots were built out on fill.

STARK Okay. Were they...in November of 2001...November 21, 2001, were the silt fences that...that protected the canyons to the west of Phase III...were those installed?

WILLIAM FERGUSON There was at least one or two in every canyon. We have since supplemented those because Ferraro's Geologic wanted us to, I guess you would say, have a number of fail-safe devices so that if there was, for instance, a slip on one of these fills that there would be enough redundancy in silt fences to catch that. We didn't have any...any real slips in the fills other than the sliver failures that he addressed in his report.

STARK Okay, I'll just refer to Schedule A of Exhibit 3 and 1a says, I'll ask you this question: were there any earthslides or mudflows that leave the construction site and are likely to discharge to surface waters? In Phase III?

WILLIAM FERGUSON No.

STARK B: Evidence of concentrated flows of water causing erosion which such flows are not filtered or settled to remove sediment prior to leaving the construction site and are likely to discharge to surface waters? Were there any of those conditions?

WILLIAM FERGUSON No, actually the road itself and the curbs and gutters and storm sewers are all part of the erosion control and the City didn't approve the subdivision until such time as the City Engineer and Dr. Ferraro and the regular engineer and the other people from the City of Grants Pass were satisfied there

would be no difficulty and the subdivision was, I think, finalized for the streets and everything was turned over to the City in, I think, September or maybe August, but probably September of 2002.

STARK C: Turbid flows of water that are not filtered or settled to remove turbidity prior to leaving the construction site and are likely to discharge to surface waters?

WILLIAM FERGUSON Yeah, there wasn't any discharge in surface waters, and, again, the construction...I mean it was a construction site until...until September or October of 2002.

STARK D: Deposits of sediment at the construction site in areas that drain to unprotected storm water inlets or catch basins that discharge to surface waters?

WILLIAM FERGUSON No. Not to my knowledge.

STARK Inlets and catch basins with failing sediment controls due to lack of maintenance or inadequate design will be considered unprotected.

WILLIAM FERGUSON No. There were none of those.

STARK Okay. If there were such, I mean, we've seen a photograph 13 of Exhibit 3 shows some...Exhibit 8, I'm sorry. Shows...shows silty water going down the street in Phase III; but, how can you answer the question that there are no turbid flows of water...no...deposits of sediment at the construction sites in areas that drain to unprotected storm water inlets and catch basins that discharge to surface waters. Inlets and catch basins with failing sediment controls due to lack of maintenance or inadequate design will be considered unprotected. What you're saying is...well, answer the question.

WILLIAM FERGUSON Okay. Well, there is a hay bale here that catches sediment and then periodically these are...as they fill up...they are shoveled out. If you look down here, you can see another hay bale that catches settlement. You can just barely see it here. So anything that got around here there was a secondary hay bale. Beyond that hay bale there is a catch basin which has a

settling area below it. It then goes across over this way to an outlet that has silt fences beyond the outlet that has redundant silt fences beyond the outlet, so. There...its...there's redundancy throughout the system. Starting with the brimming that occurred to stop anything from going over raw faces and then the storm system is designed so that even if anything were to get on the street it would not get into Blue Gulch. I'm not sure Blue Gulch...it doesn't...it's not a stream. It just has...just an area that in the winter sometimes has some water in it.

STARK E: Deposits of sediment from a construction site on public or private streets outside the permitted construction activity that are likely to discharge to surface waters?

WILLIAM FERGUSON No, not to my knowledge.

STARK Okay, and F: Deposits of sediment from the construction site on any adjacent property outside of the permitted construction activity that are likely to discharge to surface waters?

WILLIAM FERGUSON Again, you're talking Phase III?

STARK Right.

WILLIAM FERGUSON That's correct. There weren't any. And I, you know, I might if...if there were, I'm sure Mr. Seybold would have brought it to my attention.

STARK Okay, and then there's an asterisk it says: Flow to storm water inlets or catch basins located on the site will be considered leaving the site if there are no sediment control structures designed for expected construction flows of downstream. Flows downstream of the inlets or catch basins that are under the Permittee's control.

WILLIAM FERGUSON That has to do with our redundant silt fences.

STARK And, that's what you had?

WILLIAM FERGUSON That's correct.

STARK In November of 2001 was there any construction activity on Phase III?

WILLIAM FERGUSON No. There are two reasons for that if you want them.

STARK Yeah.

WILLIAM FERGUSON Easy answer is...no.

STARK What are the reasons for that?

WILLIAM FERGUSON One, the City ordinance precludes it without their permission after October 15. And, two, we wouldn't do it if we thought there was a likelihood of any...any rain and thirdly, I guess, I wanted Copeland to finish up and get out of there so we could get the subdivision approved and try and recover some of our investment.

STARK Okay. Now in Phase III. What, just in the summer of 2001 or spring of 2001 and fall of 2001, what was done in Phase III in regards to seeding or hay spreading or anything like that? What was done to Phase III at that time?

WILLIAM FERGUSON On Phase III the fill areas were first hydroseeded and then we came back with a...after the original hydroseeding which has some tactifier and some mulch in it, fertilizer...we came back later and did another layer where they take hay and its in a mulch and they spray the hay all over everything that was hydroseeded and then after that they came back and put in a layer of tactifier, which is its a got fertilizer and glue in it and maybe some seed, but it helps hold the stability of the slopes.

STARK And who did you hire to do that in Phase III in 2001?

WILLIAM FERGUSON Phase III was done by Suma Pacific and they...we entered into a contract with them to monitor the subdivision.

STARK And, just for putting us in perspective. How much was that contract for? Approximately?

WILLIAM FERGUSON How much did we pay them?

STARK Yes.

WILLIAM FERGUSON For the hydroseeding? You know, it's a little bit complicated because I had them do some hydroseeding down below too and

mulching. And, but, all told I would make an estimate of \$10,000 to \$20,000 but, I'm not...in that ballpark.

STARK And that's in the summer of 2001?

WILLIAM FERGUSON Summer of ...

STARK Yeah, summer of 2001.

WILLIAM FERGUSON In the fall of 2001 and then later also, yes. In the spring of the next year we went back and hit everything.

STARK All right. Now, the...back to photograph 14 on Exhibit 8.

WILLIAM FERGUSON That's correct.

STARK The prior winter was there any problem at all with Phase II? As far as turbidity into the streets or anything like that?

WILLIAM FERGUSON Well, the problem with this, you know, I mean I can't just give a yes or no answer. There was a bit of turbidity entering the streets, but, that system had been approved by Kathy Staley who was the City person in charge of our erosion control and her standard was as long as there was, you know, no material...I mean, you could have a little color in the water as long as there wasn't granite getting in the system and plugging it up...as long as that was the case it was permissible. So, yes, there was a little bit of opaque water entering the system on Phase I and Phase II.

STARK Okay, and in the summer of...you received your letter of termination for Phase II, I think its in December of 2000...December of 2000. Let me get that, as long as we're...

HOGAN Its 102.

STARK 102? Thank you. 102 is the termination letter from Gary Messer dated December 29, 2000.

WILLIAM FERGUSON Yes.

STARK Okay. Now, after you received your termination letter did the City of Grants Pass require you to do some work on Phase II?

WILLIAM FERGUSON That's correct.

STARK And using the map which is Exhibit number 105. I forgot we had colors. Would you explain to the judge where...or what happened in the summer of 2001, as to Phase II.

WILLIAM FERGUSON Okay. Phase II had not been an approved subdivision and the City of Grants Pass was in the process of adopting some new ordinances on what they call steep hillsides, and those new ordinances required a geotechnical engineer to design the foundation on every house on the lot and a geotechnical engineer to design an erosion control plan. And, because they were in the process of adopting this ordinance the City of Grants Pass hired Mr. Galli to do a survey of Phase II prior to approval of the subdivision and Mr. Galli came onto the subdivision, inspected all of the erosion control that was in place...and here I'm talking Phase II is what he was looking at...inspected all the erosion control that was in place and had some suggestions, and we had to implement those suggestions and then he came back and inspected again and then the City approved the subdivision. Included in his suggestions were that on the lots here where there was some fill. When Copeland had put...

STARK Instead of here, why don't we refer to the lots that are. Which direction is this? This is east.

WILLIAM FERGUSON You had a big black pen a minute ago, it might be better for me.

HOGAN Its underneath...its right underneath the...

WILLIAM FERGUSON Its there. There was a berm that was created by the construction. Actually this was done by Southern Oregon Underground. When they were building the road part of the erosion control called for them to build the road on all cut. Whereas a number of engineering, you know, a lot of cut and fills to be balanced; but, this was all cut so they had excess dirt and the closest place to dispose of that dirt was on this hillside...actually creating some lots. So there was, you know, it was a cost saving to them and some benefit to me. There was a...there were compaction reports that were done as they placed the dirt here; but,

when they got done there was a roadway that actually came down like this. I'm writing this in black pen across one, two, three, four, five lots and then they came out here. And on the...all this was compacted to the west of the roadway and also to the...I'm sorry...yeah, to the east of the roadway all this was too, except along the roadway they had created a brim that stuck up about three feet and to stop any water from coming over this way.

STARK There was a brim along Crown Street? Close to the sidewalk?

WILLIAM FERGUSON No, it was back in at the...towards the back of the lots.

STARK So, that's what your black...

HOGAN It was, the black line is actually a road that was put in back.

WILLIAM FERGUSON That's correct.

HOGAN That was brimmed.

WILLIAM FERGUSON Yes, on the outside of the road was brimmed. It was a construction road originally, yes.

HOGAN Oh, it was just a construction road. Was that meant to remain or was it removed or?

WILLIAM FERGUSON I mean, like it wasn't graveled or anything, it was a just a place for them to, you know, they had to get their equipment in and out. This was a convenient place for them to do that. But, the brim was there I suppose for two reasons. One, it gave them an edge of the road so their guys wouldn't be driving over it; and secondly it would stop any water that might come down from going over to these other...there were houses down in here...or washing the bank.

STARK Okay. Now, prior to the summer of 2001, the brim was still there and was there vegetation in this area?

WILLIAM FERGUSON Yes, we'd hydroseeded all of that area.

STARK In previous years?

WILLIAM FERGUSON Yes, that's correct.

STARK And, how high was the grass in there would you say?

WILLIAM FERGUSON Oh, the grass was, at that point...I think we'd hydroseeded it in the previous fall and then again in the spring...and so the grass was, you know, the larger part of the grass was probably a foot high.

STARK And that would have been all in this area around the black line?

WILLIAM FERGUSON That's correct.

STARK Okay, and then what happened?

WILLIAM FERGUSON Well, I guess to be completely accurate, uh, there was a lot of cut on Valley View where it starts the squiggly portion of it, and there was another brim, like right about there.

STARK You put another black line on that?

WILLIAM FERGUSON That's correct. On Phase II. And Mr. Galli had concluded that where the brim was created the slopes were steeper than his recommendation and so he had...he requested us to flatten those brims out because where the brim was pushed up it was a little too steep on the down sides. So, Copeland, who had the Phase III contract, came in prior to our approval of Phase II and with an excavator and a grader they pulled back some material off the edge here and then graded it smooth. They still left the little brim; but, they flattened the slope on the brim and they did that in two locations.

STARK Was this area of excavation less than five acres total?

WILLIAM FERGUSON Oh, yeah, it was, I mean the price of moving their equipment is expensive and they only charged me \$1,500. It took the guy about a half a day to...and they moved some of the dirt out, too, in a dump truck.

STARK My question was, was it less than five acres?

WILLIAM FERGUSON Oh, yes, yes. It was less than one acre.

STARK Okay, and you didn't feel under the laws at that time you didn't have to get another permit. Is that correct?

WILLIAM FERGUSON That's correct, yes.

STARK It was five acre minimum at that time; but, December 1,

2001, I think, 2002? Well, anyway, at that time the law was that if it was less than five acres you didn't have to get another permit?

WILLIAM FERGUSON That's correct. Its probably ten feet wide, you know, what they did and it would extend...these are roughly hundred foot lots...and it wasn't on the first one here...so, its one, two, three...essentially three and a half lots and another about two blocks down below. So, we're talking maybe five hundred feet times ten feet which five thousand feet which is an eighth of an acre.

STARK Okay, and you did that work in accordance with Mr. Galli's directions.

WILLIAM FERGUSON And the City of Grants Pass dir...inspections, yes.

STARK And when was Phase II approved by the City of Grants Pass to sell lots and build houses?

WILLIAM FERGUSON It was approved after we did that work and I'm going to think that it was done in...it was approved in maybe July or August of 2001.

STARK Okay, and, your honor, I'm just going to have...would you place a dot with the black pen on each lot that had a house on it on November 21, 2001. To the best of your recollection. I mean not on the whole subdivision.

WILLIAM FERGUSON On Phase I or Phase II?

STARK Well, on the area here that we've been talking about, if you can. Between Valley View and Crown.

WILLIAM FERGUSON I don't think there were any houses on Phase II because we'd just recently got the approval although a number of lots had been sold, but, there were no houses on Phase II.

STARK How about houses sold?

WILLIAM FERGUSON Pardon.

STARK How about lots sold? November 21, 2001.

WILLIAM FERGUSON You know, we've sold so many lots at so many different times. I mean, I can make a stab at it but it might be really inaccurate, you know.

STARK All right, we'll tighten that up. How about houses existing on Phase I as of November 21, 2001? Is that?

WILLIAM FERGUSON Yeah, I can, I think I can do that because they'll all be on Phase I.

STARK Just in this area here.

WILLIAM FERGUSON Here, I'll just put little black "x"s on the houses that were. Do you want me to go across the street in Laurelridge Place, too.

STARK Was there a house on this lot?

WILLIAM FERGUSON There was not.

STARK On II there was not.

WILLIAM FERGUSON No, because Phase II wasn't approved until, you know, late in the summer as I recall.

STARK All right.

WILLIAM FERGUSON There were houses down here and houses over here; but...

STARK I'm in a period which would make sense to break if you want to.

HOGAN Well, its pretty good timing. Plus or minus five minutes. That gives us a minute to discuss how we're going to conclude. I know I have a few questions for Mr. Ferguson. I imagine Ms. Camilleri has a few questions.

STARK Well, I have some more questions for him.

HOGAN You have not even completed with direct yet.

STARK No.

HOGAN I think, and I also have some questions on rebuttal from Mr. Seybold and Mr. Ullrich. Can they be made available for telephonic testimony?

CAMILLERI Yes, its just...we'll just have to coordinate our schedules.

HOGAN Okay. What I'm going to suggest we do is have a telephone conference Friday afternoon with Ms. Camilleri and ...

CAMILLERI You mean tomorrow?

HOGAN Yes.

CAMILLERI I won't be at work tomorrow.

HOGAN You're not going to be at work tomorrow?

CAMILLERI No.

HOGAN Unfortunately, I don't...okay, then I don't have my schedule. So, what I'm going to do. I don't have my schedule for next week so I don't know when my blank spaces are after Friday. So what I'm going to do is contact each of you hopefully in a conference call; but, if not, to arrange a conference call as soon as I am able to determine when I would be available. So, I'll be contacting you, then you'll be getting your messages Monday morning.

CAMILLERI Yes.

HOGAN And, Mr. Stark, are you available then on Monday morning?

STARK No, I'm not. Monday I have to go to Grants Pass at 9 o'clock.

HOGAN Okay, tomorrow are you going to be in the office?

STARK Yes, I'll be in the office tomorrow morning.

HOGAN What I'll do is I'll contact each of you then and give you my available dates for a telephone conference. At the telephone conference then I'd like you to be ready to tell me when you're ready to have your witnesses available and have some open dates so we can finish with the three...with Mr. Ferguson, and a rebuttal from Mr. Ullrich and Mr. Seybold...and the arguments. Okay?

STARK Okay.

HOGAN I'll just give you some times when I can make that and you can select out of that.

CAMILLERI Okay.

HOGAN Anything else we need to deal with before we go off the record? No?

CAMILLERI I have one question. When Mr. Ferguson first started off with his testimony we talked about property ownership and all that. Was there an

exhibit introduced at that time?

STARK No. Just the partnership agreement.

HOGAN The partnership agreement had previously been received.

CAMILLERI Okay, that one I'd like to have a copy of, too.

HOGAN Okay. Can I allow you two to confer regarding copies off the record.

CAMILLERI Okay.

STARK Sure.

CAMILLERI I have a question also about the exhibit or the testimony we hear from...was it Gary Wilkes?

HOGAN Wicks.

CAMILLERI Wicks. He referred to some documents and I don't think he entered them all into the record.

HOGAN There aren't...actually I meant to...he probably didn't. But, I do have some documents that I've already noted are not...101 has not been offered, and that the notes of Mr. Ullrich's notes...and number 13 the incident report has not been offered. And so if those items...if people want to offer those, we can do that at the subsequent hearing. We're just about out of tape. If you could ask Mr. Stark for copies of the documents Mr. Wicks referred to if those are the ones.

CAMILLERI Okay.

HOGAN All right. We're going to go off the record. I'll contact each of your offices with some potential times for the conference call and then we'll schedule the rest of the hearing.

END: TAPE 6, SIDE 2

START: TAPE 7, SIDE 1

HOGAN This is Teresa Hogan, Administrative Law Judge. Here is Mr. Seybold. Mr. Seybold if you could close the door behind you, I'd appreciate that because I think everybody's here and...Are you expecting anyone Mr. Stark, I don't want to bother you. There's another hearing go.

CAMILLERI I'm going to call back Bill Meyers; but, I was going to wait until you guys were done and then actually call him at the DEQ office and tell him to come over.

HOGAN Okay, that's...he's a rebuttal witness?

CAMILLERI Yeah, I was just trying to maybe get an estimate as to when that would be and then I could give him a call, and it takes about five minutes to get here.

HOGAN Okay, that sounds good. And, I just...I didn't quite do my preliminary announcement when Mr. Seybold arrived. We're back on the record in William Ferguson, Case Number 107491, and its August 31, 2003, the time is 10 o'clock. In addition to Mr. Seybold being present in the hearing room, we have Miss Camilleri and Mr. Ullrich for DEQ and Mr. Stark and Mr. Ferguson. When we recessed the hearing, whichever day it was when we recessed the hearing, Mr. Ferguson was testifying, and we'll just resume with his testimony. Mr. Ferguson, you are still under oath. You may proceed, Mr. Stark.

STARK Mr. Ferguson, just to recap a little bit. You've gotten these 1200C permits for each of your Phases, is that correct?

WILLIAM FERGUSON I'm sorry, I missed the first part of it.

STARK The 1200C permit.

WILLIAM FERGUSON I'm not familiar with the number. You mean the discharge permits?

STARK Right.

WILLIAM FERGUSON Okay.

STARK Okay.

WILLIAM FERGUSON That's why I didn't understand it.

STARK Up until November of 2003 would you please tell the hearing officer what type of monitoring did you have for your various phases of the subdivision? You testified about your son and his helpers and him; but, what else did you have by the way of monitoring?

WILLIAM FERGUSON Well, during the wintertime I was there, not daily, but, probably on an average of every other day if there was...looked like there was rain or any kind of rain and part of the reason for that was just to make sure there were no problems. Also, it does traditionally rain more in Grants Pass than it does in Medford, so, actually about 50 percent more, I think our is 19 and theirs is about 29. So, I couldn't always rely on the fact that it wasn't raining in Medford, so I'd have to go over and check ...which I would on a regular basis. And this went on, you know, from the...essentially from the first Phase through the third Phase which is the old hill gully.

STARK Now, obviously, you have some disabilities now.

WILLIAM FERGUSON Oh, and additionally, I was going to tell you another part of monitoring. The City of Grants Pass employed Kathy Staley and she did monitoring. Again, any time it rained she was there and we paid her...I've forgotten what her hourly rate was, maybe \$35 an hour...but, we paid her about \$12,000 to look at the site and monitor it. And, I think she did a little plan check, too. But, that was...she's not an engineer so most of her's was monitoring it then, and if she thought...usually if she thought there was an area that we're getting a build up behind this hay bale or this silt fence or whatever...she'd usually call if she saw it and we weren't there and we'd get somebody right over. And, this happened as I say from '96 all the way up until Mr. Seybold took over and then Kathy got back on and I understand he's not doing that any longer and she's back on it. And so, we had the, you know, the same relationship with her.

STARK And, just for the hearings officer understanding, you were

able to do work up until about a year ago, a year and a half ago. Is that correct?

WILLIAM FERGUSON Myself?

STARK Yes.

WILLIAM FERGUSON Yeah, about a year and a half, two years ago.

STARK Okay. Now up until November of 2001, had there ever been an official complaint or anything about the erosion control procedures that you had done on the site.

WILLIAM FERGUSON You mean a citation or anything?

STARK Yeah.

WILLIAM FERGUSON No. When you say complaint, I mean Kathy would call and say "Hey, this needs attention"...we had a few of those things. But, nothing...nobody complained about any discharge or runoff.

STARK And from your experience of being out there the runoff in the winter...is it a different color then if you had some type of hose or runoff in the summer. In other words, is the general runoff from that area colored in the winter?

WILLIAM FERGUSON Yes, yes, it is.

STARK And that's not just from your site, is that true?

WILLIAM FERGUSON It's from everything on that whole side of the valley is decomposed granite soils and it, in heavy rains, it has a tendency to float the fines and if it rains hard enough, I mean, it can even cause rivulets and so forth. But, yeah, there's a certain amount of sediment that get's in the water depending on the rain and the location and so forth.

STARK Now, referring to Exhibit 8, there's a...let's see if I can find Exhibit 8. It should be kind of worn.

HOGAN Oh, that's the photos. I'm not sure where the earlier photos are. I'm going to go off the record while we look for that, I'm not sure where it is.

HOGAN Back on the record and we have Exhibit 8 out. Okay.

STARK Exhibit 8, photos 14 and 15, show the site we have talked

about a lot, Mr. Ferguson. Downstream from those ...that area in Phase, actually it'd be in Phase I, as I understand it. What erosion control structures are downstream that would further filter the water in Exhibit 8, photographs 15 and 14?

WILLIAM FERGUSON I don't know if filtering would be the right word; but, there were two on the inside of the street and I think there were two or three on the outside of the street; but, the inside of the street is where the water was going from pictures and exhibit..14 and 15. Those two pictures, those went into scuppers. There was one scupper which is simply a hole in the curb in which there is a storm drain underneath it and the storm drain has an inlet and an outlet and a settling area below and there were two of those scuppers between ...that this water could get into. I mean, there's more further on down; but, I'm assuming that all the water went into either the first or second scupper.

STARK And that would...the difference in elevation between the inlet and outlet so that the water would filter out its solids. Is that the...

WILLIAM FERGUSON Well, I guess the inlet...in some cases, depending on the terrain...the inlet outlet might be across from each other; but, there would be an area below it. I think Mr. Philips testified , over on his they had to pump out the sediment that collected there because his got fully plugged, I think, where they...not only the catch basin but filled up the lines, too.

STARK Okay. And in the...November 21st in that area did you actually observe what occurred at the Philips and Hagerman site?

WILLIAM FERGUSON Yes, I did.

STARK And would you describe for the hearings officer what you observed at that time.

WILLIAM FERGUSON Well, they had a couple of problems. The one I guess the Philips driveway wasn't fully completed and Hagerman property discharged into the area adjoining and it caused a big area to slid out in the street...a big area of mud and dirt; and I think they had a backhoe or some other. I've forgotten

whether it was they used a backhoe or a front scoop to pick the stuff up and put it back in and I think that...I think it actually happened on a couple of different occasions. About, and I'm not sure of the dates, but I suspect it was the same two dates that we had heavy rains, the 21st and 27th.

STARK Okay, and did you ...and their scupper downstream from their property was actually filled up to the top with sediment?

WILLIAM FERGUSON Yes, it was actually...you could see the granite, as you drove by it you could see the granite just piled up in the top of it, yes.

STARK And would the sediment from that, when it was raining, would the sediment from that event end up in Gilbert Creek?

WILLIAM FERGUSON Yes, it would go. If it couldn't get in that scupper it would go to the next one and go down in. Yes.

STARK Okay. How much...just so that hearings officer will get kind the scope of this. How much do you estimate you spent on erosion control in the three phases to date of your subdivision?

WILLIAM FERGUSON Well, erosion control consists of a lot of measures. To start with, you know, we're working on hillside. The engineers and the geotechnical engineers that were involved in at least the later phases and wanted everything built on cut and whereas often times when you build a road the engineer tries to equalize the cut and fill so you don't have to move so much material. Because this was hillside they wanted to do it in effect in all native ground so we have a lot more cut than you would ordinarily have and then with that cut you don't have the areas on the roadbed where you can lay the fill because again they wanted it all on cut. So we then had to move the granite, decomposed granite, and when you move it the engineers require that it be compacted to, I think it was 98 percent compaction, which means that you then move it to an area and then you have water trucks and an outfit they called a sheepsfoot, I think is what they used, and maybe some compacting rollers. Anyway, they compact it and then they come and test it. So, you know, that was the first phase. Of course,

then we put in additional catch basins and drains that were not in the city streets. We used erosion control cloth extensively, particularly on Phase III, we hydroseeded everything at least four times and then we had people on site. All told, I would say that we spent more than \$100,000 on erosion control matters of various types. I mean it, certainly not all hydroseeding. I mean a small portion of it was hydroseeding, a lot of it was labor and extra drains and compaction and moving dirt and the kinds of things that the engineers wanted us to do.

STARK Now, was Phase III, at the time of these alleged violations, was it an approved subdivision?

WILLIAM FERGUSON No.

STARK It was in construction?

WILLIAM FERGUSON It was under construction, yes. It had not been approved, I think, until well I think about a year ago this September, I think was when it was approved. Not less then...it's been approved less than a year, I think.

STARK From now?

WILLIAM FERGUSON Yes, less than a year ago from now. Yes.

STARK And, based on your knowledge of this property, would any of the runoff that are in these pictures from Phase III, Exhibit 10 and Exhibit 8, would any of the runoff from those areas reach the surface waters of the state?

WILLIAM FERGUSON No.

STARK Okay, now how can you be so sure about that?

WILLIAM FERGUSON Well, to begin with the...there is a little bit of Phase III...another words the ridge is just to the east, it'd be the right hand side of the roadway...the ridge is right here, and its all cut. There was no fill on the ridge. The fill was located, that they had, was located here on the west side of the ridge. So, everything on the east side did go down towards Valley View; but, there was no...we had a brim along the top and there was no water from the subdivision that went to the right.

HOGAN And you're kind of indicating Starlight...is that Starlight?

WILLIAM FERGUSON I'm sorry. Starlight, yes, ma'am I'm sorry. Yes, Starlight. And this was all was just what would normally fall there. There was in other words no accumulation of water that went over the bank so it was just...and this is all wooded...and so, I, you know, to my knowledge, other than some water that would normally go there, nothing went this way. On the stuff that was on the west side...

STARK Just for the purpose of the record. Nothing to the right of Starlight other than the normal rainfall would enter...would enter into Gilbert Creek?

WILLIAM FERGUSON That's correct, and there was nothing disturbed to the east side other than some on this one lot right here on the corner of...but even that, we had controls that went down in this direction. But, and that actually is a Phase II lot although when they resubdivided it it became a Phase III lot so its a little complicated. But, essentially, there was nothing that went this way. On this side we had the road, we had erosion control things in place, we had erosion mats on the fills, we had hydroseeding, we had drains, we had drains, the number of drains here that are shown along Starlight, these drains all exited down to properties and to the west and there were redundant silt fences all the way down along here and there was no, to my knowledge, there was no material or sediment that got into Blue Gulch and Blue Gulch is down over further to the west. It's not a stream, it's just an area that if it rains real hard there'll be some water in it; but, its not a stream per say. They call it gulch for that reason. Now, when you get way down below, there's probably some irrigation water that comes in in the summer because there's an irrigation that goes around so there might be some water way down below; but, that would be, you know, at least a half mile down below the subdivision. And, I don't even know if you would call that a stream, its just irrigation runoff.

STARK Okay. Now did you do some experiments between the first hearing and this hearing concerning gallons of water per minute?

WILLIAM FERGUSON Yes.

STARK Okay, would you explain to the hearings officer what you did.

WILLIAM FERGUSON Well, Mr. Wicks testified there was someplace, I think, in the neighborhood of five or a few more gallons of water that he saw coming out of the weephole, we call them, the drain in effect that are designed to drain from behind the sidewalks and we just tried to test whether that was an accurate observation. So we used a bale testing on a hose and took pictures of what five gallons a minute looked like coming out. Not of the same weephole because its since been covered over and paved. The house is there but one just on the adjoining street doesn't have quite the same fall but it...its pretty similar and shows the volume as being pretty similar to what was coming out of the weephole in question.

STARK Okay. I'd offer Exhibit ...what number?

HOGAN For you we're at 114.

STARK Okay. I lost my tags here. I left them at my office.

HOGAN I don't have tags handy we can just mark directly on.

STARK I'd offer Exhibit 114.

CAMILLERI I don't object.

HOGAN Okay, 114 is admitted.

STARK I have no further questions at this time.

CAMILLERI Mr. Ferguson in regards to Exhibit 114, can you explain a little bit more. Where did this soil come from?

WILLIAM FERGUSON That soil?

CAMILLERI Yeah.

WILLIAM FERGUSON Well, what we did was we put the hose up the weephole and originally my thought was to dig out here and run water; but, it was plugged up. So, we just put the hose up the weephole and that's what came out.

CAMILLERI Okay, and what were trying to show with this again?

WILLIAM FERGUSON To show the gallonage that came out of the weephole.

CAMILLERI Okay, and this in coorelation with ...

WILLIAM FERGUSON I'm sorry.

CAMILLERI It's in connection with 928 Valley View and the photographs we showed. I'm just...I don't understand what you guys are trying to present here.

WILLIAM FERGUSON Well, the question was the volume of water that came out of that weephole and...

CAMILLERI On 928 Valley View at the time of the violation?

WILLIAM FERGUSON Yes, that's correct, and we were trying to replicate something similar to that to see what the volume was.

CAMILLERI Okay. Okay. And, I'd like to go over a little bit more about the scudders that you...

WILLIAM FERGUSON Scuppers?

CAMILLERI Scuppers. Exactly, if you could explain more about what...where they are and what they do and were they installed by you or was it something that the City installed?

WILLIAM FERGUSON The City doesn't do anything. We do everything.

CAMILLERI Okay, is every catch basin

WILLIAM FERGUSON Pardon.

CAMILLERI Is every catch basin on the site, does each catch basin have a scudder?

HOGAN Scupper.

CAMILLERI Scupper.

WILLIAM FERGUSON Well, a scupper is a catch basin.

CAMILLERI Okay. Okay.

WILLIAM FERGUSON And what its designed is to...I mean they call them scuppers but it's a just an opening and the water flows in and so it doesn't build up huge volume they do it a little bit at a time down the street, you know.

CAMILLERI Which looks like? Something like this? Which is Exhibit 8,

photograph 5. Is that what you are referring to as a scupper?

WILLIAM FERGUSON Yeah. Or a catch basin is probably similar to that.

CAMILLERI Okay, so, you were saying that there's an inlet and outlet inside of there?

WILLIAM FERGUSON Yes.

CAMILLERI Okay, so can you explain more what the design of that would look like inside the catch basin?

WILLIAM FERGUSON There's usually a pipe going in and a pipe going out and there's...depending on the fall and depending on the design...then there's usually some area below the pipe where there is an opportunity for things to settle out. It depends on the design, depends on the individual scupper or catch basin. Some of them are deeper than others.

CAMILLERI Okay, and on Valley View then in th...on Valley View in the area where these photographs were taken...928 Valley View...were the scuppers inspected during the time of this violation by you?

WILLIAM FERGUSON No, the City usually inspected those and if they needed to be pumped because they were full of settlement they'd call us or call somebody to do it.

CAMILLERI Okay, and did that occur during that time?

WILLIAM FERGUSON No. No. They didn't indicate they were filled with sediment.

CAMILLERI Okay. And, earlier you had talked about all the monitoring that was done of the erosion controls on the site. And that you had gone around and looked at things. And, so, what about maintenance? How often would you say the erosion controls on the site were maintained, improved, cleaned out...that kind of thing?

WILLIAM FERGUSON I think it depended on whether it was raining or not. When it was raining we tried to have somebody there to monitor the thing. It wasn't always in the morning because Dan had maintenance on buildings to do in

the mornings and he'd usually get there in the afternoons. I would be there either in morning or afternoon just to make sure that everything was going according to what the plan was.

CAMILLERI So, would you ask Dan what actions he took to either clean out sediment fences, put additional sediment fences down. Did you guys have those kind of discussions?

WILLIAM FERGUSON Yes, if I thought there was an additional fence needed some place or some place needed to be cleaned out. But, he knows pretty much what to do. I didn't have to direct him, just other than say check it out and make sure everything is going as good as can be.

CAMILLERI Okay. And, you talked about what there...Mr. Stark had asked you about if there had been any citations or complaints before this violation, if I understand correctly.

WILLIAM FERGUSON Yes.

CAMILLERI Do you recollect receiving a letter from Andy Ullrich on January 20, 2000, which was talking about problems with erosion controls on the site?

WILLIAM FERGUSON I don't think on Phase I or II. I think there was some things he wanted, I think, done on Phase III.

CAMILLERI Well, just one second, please.

WILLIAM FERGUSON He'd written me more than one letter. So, maybe you ought to show me the letter and I'll know better.

CAMILLERI Okay, does this look familiar to you?

HOGAN And, that's Exhibit?

CAMILLERI 6.

WILLIAM FERGUSON Exhibit 6. You know, I don't remember this specific letter.

CAMILLERI Okay.

WILLIAM FERGUSON I know Andy wrote to us a couple of times and...Yeah,

I really don't.

CAMILLERI Okay. Thanks. Also, just a couple more questions. You talked about in the area of Grants Pass, in the Grants Pass area near the Laurelridge subdivision the general runoff in that area when you have heavy rains, that there is going to be some decomposed granite in ...getting into the creek. And, so, is that...

WILLIAM FERGUSON I don't know decomposed granite as much as it is the sort of the dust. The granite itself settles out.

CAMILLERI Okay, so the fines though?

WILLIAM FERGUSON Yeah, the very fines, yeah. The silt or dust or whatever. Yeah.

CAMILLERI Okay, and so is that based...is your knowledge of that based on...the areas that create the fines, is that from exposed soil? Like construction?

WILLIAM FERGUSON Well, that, yeah. I think it's a little bit of everything. For instance, in touring the site trying to remember which ones there was an area. In the Cooke Subdivision that was under new house construction right in this area there was some cut banks up in here. I think some other cut banks up Salisbury Drive. In this area, even on the subdivision on lots we sold, for instance we didn't own this lot even though we tried to control everything on it. This lot was sold, most of these, well, all of these were sold. This lot for instance had no erosion control on it at all, was just a bare lot. This big piece here there was a new house under construction here. This there was no erosion control on this. There was really none on this piece of property. This gentleman here didn't have his lawn in yet. Everybody else had relatively new landscaping because this was the newest subdivision. This was a newer subdivision, the Cooke Subdivision was. You had all of these, there was a certain amount of...even from new landscaping...when it rains like crazy you get a certain amount of color in the water. Same thing was true down even at Highland School. They had big granite play areas that were uncovered. Granite's a pretty thing for kids to play on, its less harmful than

cement if you fall. And so they had some big areas and it all drained into here. And they had a baseball field in this area and they had some new landscaping they put along the inside of the curb. And I mean I didn't make an effort to go throughout here. I know there was new construction on Valley View although it...at some point it flows this way. And I'm not sure, maybe the line is right here, I don't know. But, anyway there was construction throughout the whole area of drainage and landscaping and other things that all are going to leach a little bit of colored water in really, really heavy rain. Which is what we had.

CAMILLERI Okay, I just wanted to clarify what you meant there. And, we were talking about Phase III and Mr. Stark asked you a couple questions about the west side of Starlight and you had talked about erosion controls...hydroseeding, redundant silt fences...and I just wanted to present the photographs here in Exhibit 8, photograph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11...sorry. All of them except for ...

HOGAN 14 and 15?

CAMILLERI Yeah, sorry about that. Actually, all the photographs up to photograph 12. And if that looks familiar to you as Phase III? Just the first three pages.

WILLIAM FERGUSON The last page is not.

CAMILLERI Just 1 through 12.

WILLIAM FERGUSON Yeah, those look like they're part of Phase III.

CAMILLERI Okay, so looking at these photographs, example photograph 1 do you see hydroseed down there? Or you know vegetation?

WILLIAM FERGUSON On photograph 1?

CAMILLERI Yeah.

WILLIAM FERGUSON That area was not hydroseeded and the reason is this was essentially all cut and Curt Belcher, the City Fire Marshal, told us he did not want that grassed because wind is on the ridge if a fire were to start it would sweep over the ridge and get into some houses. So, he asked us to keep the vegetation down on the east side of Starlight. As a matter of fact, this last summer

where we had some grass --I mean we did eventually hydroseed a small area along the...on the edge and, of course, the area that doesn't show here-- well, maybe--I don't think you've got a picture of the. No you don't have any pictures of the areas that we hydroseeded, but, he had us come in and try and cut those out because he was concerned particularly Fourth of July a lot of people go up there and they historically had fireworks and this year they actually had two patrolmen on the site and signs up and they were--they've always been very concerned about that. So, instead of hydroseeding we controlled the erosion in another manner by channeling what little bit--I mean there's water there but there's very little bit of dirt moved because it was 90 percent cut. And, so, we elected to channel the water and get it into the scuppers. Take them across, underneath the road, and then down to the redundant silt fences below.

CAMILLERI Okay, and in photograph 3 here we have that, I believe what you're speaking of, the redundant silt fencing.

WILLIAM FERGUSON That's the first one I think.

CAMILLERI Okay.

WILLIAM FERGUSON Yes, there should be three or four more below that.

CAMILLERI Below that?

WILLIAM FERGUSON Yes.

CAMILLERI And who installed that?

WILLIAM FERGUSON Dan and his helpers--I don't know he had two or three different helpers.

CAMILLERI Okay, can you estimate the distance from this point here in photograph 3 from Blue Gulch?

WILLIAM FERGUSON That's really difficult, because Blue Gulch start's like right here and then the it.

CAMILLERI Can we draw a pen. A mark on here for Blue Gulch?

HOGAN Sure.

CAMILLERI You want to indicate.

WILLIAM FERGUSON There might be a better map somewhere that shows it, I don't know.

CAMILLERI I don't think we have anything at this time.

HOGAN Those are the three maps out there and I don't think there's a clear

WILLIAM FERGUSON That doesn't show it. Anyway...

CAMILLERI Could you indicate here on Exhibit 105?

HOGAN You could just write Blue Gulch in the approximate area.

WILLIAM FERGUSON I should just probably draw a sort of a line where Blue Gulch goes.

HOGAN And if you can write Blue Gulch on it somewhere I'd really appreciate that. I'm having a hard time reading the map.

WILLIAM FERGUSON Actually I think it--it actually comes back this way further here.

CAMILLERI Could you also indicate on there where the redundant silt fences are. Like the first one here in photograph 3.

WILLIAM FERGUSON Well, looking at photograph 3, see, I can't tell whether its this one, this one, this one, this one, this one, or this one.

CAMILLERI Okay.

WILLIAM FERGUSON See, they all look about the same and I didn't take the picture so I don't know, but

CAMILLERI How steep is the slope here off of--if you could estimate--off of the west side of Starlight?

WILLIAM FERGUSON Well, it varies.

CAMILLERI Okay.

WILLIAM FERGUSON There's some fill, I don't know if we can see any from these pictures. But, there's probably only one that shows. Any way, these are areas of fill. And, so, for instance, there would be a lot here or lot here--I think one of these pictures was taken for either this lot or there's actually more of the

subdivision down here, it goes further than the map has, and there's a couple of fill areas there, there's fill areas up above, and those are pretty flat except the face of the fill will be about one and a half to...one to one and a half to one to two in terms of slope.

CAMILLERI Right.

WILLIAM FERGUSON And then some of the headwalls between the areas of fill are probably steeper than that--they're more like in some places it probably gets close to one to one and then as you get out here it flattens out and there's some of these areas that are just almost flat where it goes sort of across the field to get, you know, to eventually to Blue Gulch.

CAMILLERI Okay.

WILLIAM FERGUSON So the further you go down this way, down Starlight, the further Blue Gulch is away from our property.

CAMILLERI Okay. Okay. All right. I don't think I have any additional questions. Yeah, I think that's it.

HOGAN Okay. I had a few questions. I wanted to go back to the partnership that's a general partnership, is that correct, Mr. Ferguson?

WILLIAM FERGUSON I'm sorry.

HOGAN Your partnership that owns the property, is a general partnership?

WILLIAM FERGUSON No, it's not in existence anymore because my aunt died and on the death of a partner it terminates the partnership.

HOGAN Was the partnership in existence on the dates in November?

WILLIAM FERGUSON That's correct, it was.

HOGAN The dates at issue in this?

WILLIAM FERGUSON That's correct. Yes.

HOGAN And you, my understanding was you had two-thirds of the interest in that partnership, is that correct?

WILLIAM FERGUSON Eventually.

HOGAN Let's just stick with November.

WILLIAM FERGUSON At the time in question, yes, I had a two-thirds interest, that's correct.

HOGAN Okay, I just wanted to make sure I was following along there. And, I'm wondering if you can do this with reference to one of the maps--maybe the one Exhibit --you have quite a bit of marking on that Exhibit 105. Does anyone have a red pen?

CAMILLERI Yeah, I do.

HOGAN Is that a red pen? Okay, I'm wondering if you can, maybe, go through and mark on these lots indicating which--or maybe do these black marks here are those to indicate your lots or. What I'm trying to do is figure out which lots in the development were owned by you, or by the partnership, and which lots were owned by other people.

WILLIAM FERGUSON In November?

HOGAN In November, right, at the time in question not currently.

WILLIAM FERGUSON It's probably, I mean these black marks...I don't remember why those black "x's" are there.

HOGAN Me either.

CAMILLERI I think it was when Dan was talking about...

WILLIAM FERGUSON But, they look like my "x's" though. I suspect that those were lots that were sold. I mean, they appear to be and I can make some more.

HOGAN Well, first of all let's start with a foundation question. I jumped ahead here, Mr. Ferguson, in my desire to try to get something that would help me with this piece of information. Do you know which lots were in--owned by the partnership and which were not owned by the partnership in November, the date of issue?

WILLIAM FERGUSON I think I do. I don't think we had any sales pending right then.

HOGAN Okay, so what I'm going to ask you to do is not referring to the black marks but just, I think, well could you just mark the lots to show which ones were owned by you in the dev...by the partnership, I mean, and which were owned by others. So, maybe I'm thinking a symbol to show that it was owned by you as...maybe a "P" for partnership and then maybe an "S" for sold on the ones that were...did not belong to you. And if you could use the red pen it would differentiate it from the other marks, I think.

STARK So, "P" for the ones that are owned by the partnership and...

HOGAN "S" for the ones that are sold.

WILLIAM FERGUSON "S"?

HOGAN Yes.

STARK "S" if they're sold.

WILLIAM FERGUSON Okay, well, let's go through the sold ones first, I guess.

HOGAN And, I'm going to go off the record while you're marking the exhibit.

HOGAN We're back on the record and Mr. Ferguson was inquiring about the scope of the question.

WILLIAM FERGUSON Phase I and II lots, because we, none of them on Phase III would be sold because .

HOGAN I'm not going to make you do useless things. So, we'll have it in the record none on Phase III are sold and then so it would be the Phase I and II lots that I would want to know that.

WILLIAM FERGUSON "P" for partnership?

HOGAN "P" for partnership and "S" for sold.

WILLIAM FERGUSON Two "P's" which have the yellow line between them, because this map is not accurate...this was reset by the partition here. So, there were actually two parcels. And, there's one piece of City here that I don't .

HOGAN I guess that would be "C".

WILLIAM FERGUSON "C", okay. That's, the City had, we put in a pump

station for them and they received that pump station and the real estate as part of the transaction. There are four lots that I'm not sure of, that we sold to Mr. Philips about this time and; but, I think they all turned the other way anyway. So, they drained into Valley View. Yeah, but these four lots which I'll put --how about "PU" for unsure.

HOGAN Whatever abbreviation works for you. Question mark will work. You have "PU" because partnership unsure?

WILLIAM FERGUSON Mr. Hagerman bought these three but I'm pretty sure it was after that date.

HOGAN After that date, yeah. I know that this has been testified to before in the prior part of the hearing; but, I'm just not sure I remember correctly everything that was already said. But, it...Phase III, most of Phase III drains into Blue Gulch, right? Is that correct, Mr. Ferguson?

WILLIAM FERGUSON Yes, the vast majority does, yes.

HOGAN And, then Phase II and Phase I do those drain into Gilbert Creek ultimately?

WILLIAM FERGUSON Not all of them.

HOGAN Okay, what is the other drainage?

WILLIAM FERGUSON The other drainage is going down Valley View and it actually part of the drainage system even for these--some of these lots-- like here. These all drain into the irrigation ditch.

HOGAN And, so the Valley View drainage is into an irrigation ditch?

WILLIAM FERGUSON Yes, there was no storm sewer in Valley View...

ENDED IN MID-SENTENCE

END: TAPE 7, SIDE 1

START: TAPE 7, SIDE 2

HOGAN Compare the lot by lot where the drainage occurs?

WILLIAM FERGUSON Yes, I guess.

HOGAN And, how do you know that?

WILLIAM FERGUSON Well, we've owned the property since 1965 and I've been all over in that over the years so I know where the breaks are in the hills and I've also reviewed all the engineering plans and was there during much of the construction.

HOGAN And, is part of what you did in the course of planning the subdivision determining which--what the storm drain system would be? How the lots would feed into the storm?

WILLIAM FERGUSON Yeah, that's correct. The engineer had to prepare for the City a calculation as to what water would go into what areas and they had to make sure that the system was adequate to meet like a 25-year storm. And, so, yeah, that those were all discussed and I know there was discussion with the Irrigation District just how much water we could dump in their system and so forth. And, so, yeah, they were pretty familiar with most of the drainage there.

HOGAN Is there still an objection to the question?

CAMILLERI No.

HOGAN I'd just say everybody testifies from their own knowledge. If there's other contradictory evidence of Mr. Ferguson's that will be considered.

CAMILLERI Okay, I just wanted to clarify that.

HOGAN Okay, so with reference to this Exhibit 105 that you've marked these numbers on, can you indicate the lots that you've marked that do not drain into...

WILLIAM FERGUSON Gilbert Creek?

HOGAN Gilbert Creek.

WILLIAM FERGUSON Now, I need to quantify that a little bit, because the

irrigation ditch if it overflows eventually it's going to get into Gilbert Creek, it has to. You see, someplace way down below though.

HOGAN So the irrigation ditch is the primary drainage and Gilbert Creek is secondary to that?

WILLIAM FERGUSON Well, the irrigation ditch way down below will dump into Gilbert Creek. In other words, further down below...way down. Because if it gets full it has to go someplace.

HOGAN Okay.

WILLIAM FERGUSON What didn't go into this drainage were---I'll just put an "X" or what shall I put.

CAMILLERI What about a "No D"? Or "No GC"?

WILLIAM FERGUSON Pardon?

CAMILLERI No Gilbert Creek.

HOGAN I'm trying to think. I don't want things to get too unreadable. Yeah, about how many lots that you've marked did not drain into Gilbert Creek, but, drained into the irrigation ditch?

WILLIAM FERGUSON Probably seven to ten. And the reason I say that is, for instance, the slope here is down towards the irrigation ditch, natural slope, when the houses are built and I don't think any of these had houses at that time.

HOGAN I'm talking about conditions at the time of the alleged violations. What happened subsequent to the drainage isn't an issue.

WILLIAM FERGUSON Okay, then it would be like ten lots.

HOGAN Okay, and can you just mark those with an "I" for irrigation.

WILLIAM FERGUSON Yeah, ten I think is right.

HOGAN Thank you, sorry to make you work so hard. And was there any grading activity on Phase II after the permit for that Phase was terminated?

WILLIAM FERGUSON Yes.

HOGAN Okay, and can you explain what that was?

WILLIAM FERGUSON Okay. Well, the area of discharge we are talking about

is actually Phase I, but, the---there was some grading on Phase II after the permit was terminated and that was terminated when we were working on Phase III. The DEQ person called and I said yeah, we're done working there, we're working on the other one. So, she did a termination and issued us one on Phase III. But, there was some---two areas of work that the City of Grants Pass required for the approval of Phase II and that was after the termination and those are areas to begin with on these lots that I've put the "I" for irrigation ditch. There's three lots to the west---I'm sorry to the east of Valley View and on those we had a brim so the water would drain back towards the street instead of over a fill face. And the City hired, now this is, they were in the transition of requiring a geotech by the subdivider but they were in the process of adopting that ordinance. And they hadn't adopted it yet, so, we didn't employ, as I recall, a geotech in the beginning of Phase II. But, at the end the City employed somebody just to check on everything and make sure that, you know, everything was right--erosion control and everything--before they approved the subdivision. And he wanted us to grade off the top of these brims. We'd created brims so the water would go.

HOGAN Is the brim...you're talking roughly where that black mark is?

WILLIAM FERGUSON That's where this big black mark is, yes.

HOGAN Right. Correct. Okay.

WILLIAM FERGUSON Okay, that's...and this went into the irrigation ditch. The other place that he required it was, the same thing, and it was approximately--I'm going to draw a blue line here and clear to the end of ...well, almost to the end of this...about there.

HOGAN That's kind of along the black line that runs. What's the name of that street? Is that Crown?

WILLIAM FERGUSON This is Crown Street, yes.

HOGAN Okay.

WILLIAM FERGUSON Just to the east of Crown Street. And that was, these lots are roughly 110 feet wide, so, one, two, three, four. You know, probably 400

to 500 feet. Maybe not, probably not the total distance of that. Because this end, as I recall, wasn't a problem. It was probably right about here to here. So, probably about 300 feet. And the same thing, there was some fill that went in from the road that was down here and we--when Southern Oregon Underground did it they put up a little brim so the water wouldn't go over the face. If it goes over the face of granite it washes. So, again, they wanted that flattened out because they wanted it to meet a one to one and three-quarters slope is what he wanted and where that brim was it was a little bit steeper than that. So, they came in and for about, maybe, eight feet--six to eight feet wide, this distance, they pulled back the dirt.

HOGAN Okay, and when did this grading occur?

WILLIAM FERGUSON Pardon?

HOGAN When did the grading occur?

WILLIAM FERGUSON The grading occurred--it wasn't too far--I'm going to say it was maybe two or three months before the November dates we are talking about.

HOGAN Okay. So, it would have been like maybe August, September?

WILLIAM FERGUSON Yeah, probably August maybe. Because I know we had, prior to doing that, we had a really good crop of grass growing there and I remember talking to Kathy Staley about the, you know, that the cure might be worse than the disease because we didn't...we went back in and hydroseeded that, but, the hydroseeding didn't have time to germinate and grow up. Whereas, we'd done it the year before and we had a big bunch of grass. So, that's the area where much of the color got in the water because that hydroseeding didn't...you know, we did it again; but, it didn't have time to germinate.

HOGAN Okay, and did you get--have the permit reissued --the waste water permit that you'd previously gotten--reissued for this grading? Or did you do the grading without?

WILLIAM FERGUSON I think the requirement at that time was five acres. It might have been reduced to an acre. But, in any event, we were way less than that.

HOGAN You didn't get a permit because you felt the grading area was below the requirement?

WILLIAM FERGUSON No, we didn't get a permit for that. I did not understand it was required. I still don't think it is.

HOGAN Something that was mentioned in the...The scuppers you were talking about--do you know how many scuppers are installed on Valley View? Was it Valley View?

WILLIAM FERGUSON I'm going to correct some of my testimony. I had forgot about this, but, also Copeland when they were working on this lot up here they put some dirt on this lot.

HOGAN And you're indicating that lot on Crown and ...it's got a "P" on it there and its right where the black line kind of curves and ends.

WILLIAM FERGUSON Yeah, they probably put dirt on a maybe 50 by 50 foot square, something like that. But, this was dirt they took from here and they didn't really have another place--I mean they could have put it over here--but it was getting steep and there was enough piles over here so they actually brought some dirt and put it down there and I had forgotten about that. But, that happened also in like, well it happened about the same time as the grading because Southern Oregon Underground had built all this but Copeland actually did the little grading on the top. So all that was done about the same time. In probably August or it could even have been July; but, in any event, it was the late part of the summer.

HOGAN It was the summer, the late summer, preceding the violations?

WILLIAM FERGUSON That's correct.

HOGAN Okay. Or the alleged violations, I'm sorry. Didn't mean to misspeak myself. Yeah, how many scuppers to you have...you said there were scuppers that you felt were interceding between the flowoff and the Gilbert Creek

downstream from the area in Exhibit 8, photograph 14, is that right?

WILLIAM FERGUSON Yeah, we're talking about the area of the picture? Photograph? Yes.

HOGAN Photograph 14 in Exhibit 8.

WILLIAM FERGUSON Yeah, there were two scuppers. There were some on the other side of the street too; but, I'm assuming that none of the water or very little got over.

HOGAN You thought there were two intercepting scuppers?

WILLIAM FERGUSON Yes.

HOGAN Okay.

WILLIAM FERGUSON And there are some others down here; but, I'm assuming these two would take care of everything. Probably, the first one didn't.

HOGAN Now, the...what is the...how many cubic feet does the catch basin or the scupper hold?

WILLIAM FERGUSON Well, they're about...well, there's a manhole covering it; but, I mean its smaller than that and the whole scupper or catch basin as you'd call it probably is and this is a little bit of a guess just looking at the size; but, I'd say its probably six to eight square feet, something in that ballpark.

HOGAN Cubic feet or square feet.

WILLIAM FERGUSON Cubic feet, yes, I'm sorry.

HOGAN Okay, and the, you know as I've been thinking about the operation of these scuppers, they...I assume that they're more effective at screening out or removing heavier material.

WILLIAM FERGUSON That's correct, yes.

HOGAN And that lighter materials can pass over?

WILLIAM FERGUSON Floaters are going to float, yes.

HOGAN And, I also assume that the effectiveness or the rate of removal would depend somewhat on the speed of the water passing through...the flow rate.

WILLIAM FERGUSON Yeah, I would think so. If there's an awful lot of water going through its going to create a little bit of churning and, yeah, it would probably pick up something that would ordinarily settle.

HOGAN Okay. I had a few more questions. You know I'm thinking this is probably on the record elsewhere but since you're so familiar with the property. Am I correct in my understanding that that property from say Cooke Avenue down to Valley View is a...it slopes upward to the north?

WILLIAM FERGUSON Actually, yeah. Cooke Avenue is sort of a low spot that comes through here and this property flows down to...or slopes down to Cooke and then it comes up this way and its sort of flatter here; but, basically comes back this way.

HOGAN What's the slope...where...how does the slope run from this set of lots that is near the Crown Street with respect to set of lots that Valley View.

WILLIAM FERGUSON I'm sorry. Where do these thing flow?

HOGAN Well, yeah, I'm just trying to figure out the slope of the property. I thought I had it figured out but now I'm questioning it.

WILLIAM FERGUSON These's flow down and down this way...there's a ridge right about here where these house are there's a ridge.

HOGAN There's kind of a ridge at the back of this row of lots that's on Crown Street...on the north side of Crown Street?

WILLIAM FERGUSON Yes, it sort of sweeps around a little bit, you know, there is a ridge there.

HOGAN And then its, in general, also on the west side of where you've indicated these brims and up above that that tends to be a high point.

WILLIAM FERGUSON And this all slopes down this way and the road is into the side of the hillside here. And then there's little finger ridges that, you know, come out of raised places. For instance, there's a little finger ridge that comes down through here and

HOGAN Okay, I'm trying to get...I get the big...And then we have a

topo map, a topographical map here that's 103. Right? So, the high points would be where the lines are on this 103 or closer together, right, and then it?

WILLIAM FERGUSON Not necessarily. You have to look at the elevation numbers.

HOGAN The elevation numbers, okay.

WILLIAM FERGUSON The steeper...the closer together, the steeper they are; but, the height is based on the elevation numbers. And this, I'm assuming, was that's before the subdivision was put in there.

HOGAN That was Mr. Wicks, it's an old map, it's 1997.

WILLIAM FERGUSON Yeah.

HOGAN All right. Well, I don't have any more questions for Mr. Ferguson. Mr. Stark, do you have any redirect?

STARK No.

CAMILLERI I have a couple of questions. On this map, Mr. Ferguson, I saw that there's a property here that you missed.

HOGAN It's not marked sold or ...

WILLIAM FERGUSON It's not marked either way, is it? That was owned by the---get my red pen here...these two were both owned by the partnership here.

CAMILLERI And which property there is 928 Valley View?

WILLIAM FERGUSON You, know, I think it's this lot. But, I'm not sure.

HOGAN And that's the lot that has "14" marked on it.

WILLIAM FERGUSON Yeah, I'm not sure.

CAMILLERI Okay.

WILLIAM FERGUSON I'm familiar with the lot numbers, not the property addresses. Particularly, if there's no house on it.

CAMILLERI I wanted to enter...I wanted to present this exhibit to you and see if this can help you. And, if you could take a look at that exhibit and read into the record what it's indicating.

WILLIAM FERGUSON Well, I'm not sure. It shows owner Paul Hagerman;

but this is in 7/23/03. It's got an assessed value and so forth and then.

CAMILLERI How about that sale information?

WILLIAM FERGUSON I'm sorry.

CAMILLERI The sale information. Down farther on that it says 928 Valley View, code area sale information.

WILLIAM FERGUSON 928 Valley View...what now?

CAMILLERI The...it says 928 Valley View and then it comes down and it says sale information, 5/30/2002 for \$105...

STARK Sale information.

WILLIAM FERGUSON Sale information.

CAMILLERI Is that the date on which this property was sold to Paul Hagerman?

WILLIAM FERGUSON You know, he bought three lots, not one. And he sure didn't pay \$105,000 for one lot. I mean, that might have been...I don't know where they got that information. Maybe that was for two lots or something? That's not accurate. Anyway, he bought three lots in the center and those were, let's see...one, two, three...right up the line here. And he owned some there; but, I don't...

STARK So, it may be that 928 is the flag lot?

WILLIAM FERGUSON Well, it could be the flag lot, yeah. Because these two would front on Morgan Lane. These two. And, so, it could be this lot here, the flag lot that comes out. But, I think that was a partition plat. When does it show he bought that? Does it show?

STARK 5/30/2002 if you take the sale information.

CAMILLERI I'm not going to enter this into the record. Is it necessary?

HOGAN I'm...it's not being offered. But, it probably is necessary to mark it just because the witness was asked questions about it.

CAMILLERI Okay, so that would be Exhibit?

HOGAN That would be 17, and I know its not being offered as a

CAMILLERI Okay. I have no further questions.

HOGAN Your next witness.

STARK We don't have any more witnesses.

CAMILLERI Okay, do you mind if we take a five minute break and I can call.

HOGAN We'll take a recess.

HOGAN We're back on the record. You indicated that you contacted your witness but you wanted to proceed with Mr. Seybold is that correct?

CAMILLERI Correct.

HOGAN And Mr. Ferguson, excuse me, Mr. Stark indicated he had a couple of additional questions for Mr. Ferguson.

STARK Are we Exhibit 115, now?

HOGAN You're at Exhibit 115.

STARK Now, there's been some testimony about a neighbor that complained about some erosion problems up there. I believe a letter is in the record, Mr. Ferguson. I'll hand you Exhibit 115. What's the significance of that picture?

WILLIAM FERGUSON Well, it shows some vandalism that occurred up on Phase III when we...Dan actually caught, and I got there a little bit later. A...guys in a four-wheel drive pickup driving over the banks and creating erosion problems and shortly before this picture was taken Dan stopped two guys in a pickup...young guys about 18, 19 years old...and they told him that they could go any place they wanted up there because, even though it was in the city that there was no "no trespassing" signs and he said his dad was a lawyer and he lived right down below the subdivision and his dad said he could drive any place he wanted there, and I told him "Hey does this mean I can go to your front yard and do wheelies?" I mean, I said, I don't think so. This is city property. It's clearly private property, its not wilderness. You can't do that. And at that point in time we were thinking of turning him over to the police and we ended up not doing it.

But, shortly thereafter the letter was generated by Mr. Hewitts complaining about the subdivision.

STARK And that was his son?

WILLIAM FERGUSON His son, yes. Well, I mean, he said he lived right down the hill and his dad was a lawyer and he's the only one that it could be, okay.

STARK I'd offer Exhibit 115.

HOGAN Well, could I ask a couple of questions about that? When was this photograph taken?

WILLIAM FERGUSON Where?

HOGAN When, at what time?

WILLIAM FERGUSON It was taken--it would have been in the winter of '01.

HOGAN And, when did this incident occur in relation to the letter from Mr. He...let me check and see what the exhibit says. That's the letter. I believe it's 6. I'm just looking. Yeah, when did this incident occur in relation to the letter that was?

WILLIAM FERGUSON My recollection was it was not too long before the letter.

HOGAN I think that maybe is Exhibit 9, I'm not sure. And, were you offering....was this photograph taken at the same time, or?

WILLIAM FERGUSON Yeah, it was about the same time. Yeah. My recollection was looking at the photograph, and that's why we took it, it was related to the winter. The damage that was done there. We had a lot of other vandalism too. This wasn't the only incident.

HOGAN And that letter, I think that you're referring to is Exhibit 9, right? From Mr. Hewitts?

STARK Right.

WILLIAM FERGUSON Yeah.

HOGAN And is this Exhibit 115...is that typical of the type of damage

that was done by four-wheel drive vehicles?

WILLIAM FERGUSON That was, that was more than the...I mean that was so direct because they kicked it right out into the street. Other places it was back in on the lots and we had a lot of dumping of, for instance one year we had like 19 Christmas trees and we had TV sets and car blocks and all kinds of leaves and trees. In fact, we had trees stolen from the place. We had people up cutting without permission. I mean, a lot of things. That's a sort of an extreme example of...where they kicked it back on the road.

HOGAN Okay, are you offering 115?

STARK Yes.

HOGAN Is there any objection/

CAMILLERI No.

HOGAN 115 is admitted.

CAMILLERI I have one...are you finished?

STARK No. Now, let's see, if we can find Exhibit 10.

HOGAN It should be in the vicinity of Exhibit 9, but maybe not. The photo packet, is that 8? 10 is a photo packet. There you go.

STARK And, just put a "H" on the lot you think Mr. Hewitts lived on.

WILLIAM FERGUSON I'm pretty sure, there was a little piece that lopped over the irrigation ditch and he was in an argument with the gentleman that owned this lot and he ended up coming up here and building a sort of a spike fence and I think he was concerned about these lots we didn't own and they just drained into the irrigation ditch. But any way

STARK Just put an "H".

WILLIAM FERGUSON That's where I'm pretty sure Hewitts lives, right there.

STARK Now, Mr. Ferguson, I'd like you to look at Exhibit 10, photo 8, and Exhibit 8, photo 16. And the testimony is that those photos were taken on different days. From your examination of those photos, is it your opinion that that's impossible?

WILLIAM FERGUSON Yeah, I think they're the same picture. The leaves that are floating down the river, the sticks that are in the river. Everything is just identical. I don't think, I mean I think they're the same pictures.

STARK And they're taken at the same time?

WILLIAM FERGUSON It's impossible for them to be, I think, different.

STARK Now, we've talked about Mr. Ullrich's letter of January of 2000 concerning erosion problems. During the break was your reflection, recollection reflect improved on what happened that particular time?

WILLIAM FERGUSON Well, in the winter of 2000 the City had a policy that you couldn't work on hillsides after October 15th. Southern Oregon Underground, who did the construction of Phase II, was supposed to be completed and they'd already cut the roads in going up Crown Street along the side of the hill and the other roads. Unfortunately, they had some internal problems and they were actually bought out by LTM which was the parent company. Knife River Corporation, I guess. But, anyway, the long and the short of it is they didn't get that completed. So, even though we had our erosion control in on the side banks below the road, there was water coming down the road itself and they had to build a big dam at the end of Crown Street at that time which was...would have been right here.

STARK Between Phase I and Phase II?

WILLIAM FERGUSON Yeah, between Phase I and Phase II. They built a big dam on the end of the road there and, you know, if I got that letter from Andy I would have sent it to them because they were responsible for what was going on there at the time. And I know I wrote them letters, so if I was concerned and Kathy and I were both up there several times concerned about the dam they built at the end of the road as not being very adequate we thought.

STARK No further questions.

HOGAN Did you have anything further for Mr. Ferguson?

CAMILLERI I have one last question. Back to this property right here.

Mr. Ferguson, can you just, I want to make sure that I'm looking at this right, on this map here, Exhibit 105. This property goes down to Valley View?

WILLIAM FERGUSON That's correct.

CAMILLERI Okay. And that property was owned by the partnership at the time of the violations?

WILLIAM FERGUSON Yes, I don't think we'd sold it yet to Mr. Hagerman. It was part of Phase I.

CAMILLERI Okay. No further questions. I'd like to call Martin Seybold.

HOGAN Okay.

CAMILLERI Come over here and sit down.

HOGAN Okay, Mr. Seybold, you're still under oath.

SEYBOLD Yes, Ma'am.

CAMILLERI Okay, first, Mr. Seybold, we heard some testimony about these catch basins and also scuppers and I just...do you have an understanding of how they function?

SEYBOLD Yes, I do.

CAMILLERI And could you explain a little bit about...Mr. Ferguson talked about how these ...the storm water would enter the catch basin and go down and into the catch basin and can you explain what happens at that point?

SEYBOLD The catch basins are what we refer to as curb inlets and the reason they're set up that way is the old style had a grate right in the curb line and those were dangerous for bicyclists. So the new design has what's called a curb inlet and the water is funneled into this inlet.

CAMILLERI And then what happens?

SEYBOLD When it comes into the inlet if you were to take a manhole cover off you'd see a large cylinder inside and as Mr. Ferguson testified are different depths. And the intent of them is they generally have a bottom on them and then from the bottom of the cylinder up some distance would be a pipe that's an outlet that would continue...

CAMILLERI Okay and what does that do?

SEYBOLD Baffles where when the water comes in any materials that are in it would hopefully settle out in the catch basin depending on the grade, the water running into it...how quickly it's running and how much, the velocity of the water. It will hit that area and if its a very gentle rain water would settle out some at the bottom the water would rise up and then flow out through the outlet to the pipe that would continue to the rest of our storm drainage system.

CAMILLERI Okay, so with this site here we have decomposed granite and, so, what would happen--best estimation--as to how that work based on the rain amounts that were occurring in November 2001 around the times of the violations?

SEYBOLD In the particular area that most of the discussion's been about along on Valley View this is a fairly, fairly steep grade. It tapers and comes down into the lower portion of Valley View. There's a catch basin. Water would be running off the sites, hitting the catch basin, and then coming into the rest of the drainage system. Continue down Morgan down to Gilbert Creek. So water that's flowing off quickly often would not have an opportunity to settle out in catch basins because of the velocity and the churning waters as Mr. Ferguson described and would carry sediments and continue on down through the storm drainage system, entering Gilbert Creek.

CAMILLERI Okay. And, I'd offer again into the record Exhibit 17. This, I'm going to actually enter.

HOGAN It's already marked as 17.

CAMILLERI This one I was going to do because it has the raised seal.

HOGAN Okay. Is that identical to what you showed the witness?

CAMILLERI Yes.

HOGAN Except for the raised seal?

CAMILLERI Yeah, I just thought that would be better for us to have in the record.

HOGAN Well, the reason I marked the one was just because that's what you showed the witness. Is it okay for her to substitute the copy with the raised seal?

STARK Sure, whatever you want to do.

HOGAN Are you satisfied that that's the same thing Mr. Ferguson was looking at?

STARK Absolutely.

HOGAN Because I actually haven't inspected them yet. 17. 2 pages.

STARK That's fine.

CAMILLERI Okay, and referring back to Exhibit 17. Do you recognize this document?

SEYBOLD Yes, I do.

CAMILLERI Okay, and what is it?

SEYBOLD This is an official record of property ownership which I obtained from Josephine County Assessor's Office.

CAMILLERI And when did you obtain it?

SEYBOLD I think it was about one week ago.

CAMILLERI Okay, and are you the custodian of this document in the ordinary course of business?

SEYBOLD No, I am not.

CAMILLERI Okay, and can you tell me was it, were you, was it kept under your control until this time?

SEYBOLD Yes, it was.

STARK I have no objection to the exhibit.

CAMILLERI Okay, so then I'd like it entered in...it's already been entered in, I guess I was just.

HOGAN Well, it hasn't been admitted, though. So, you're offering it and in the absence of objection it is admitted.

CAMILLERI Okay.

HOGAN 17 is admitted.

CAMILLERI Can you explain...did you talk to a member of the County about this document?

SEYBOLD Yes, I did.

CAMILLERI And what is did that conversation entail?

SEYBOLD I asked them if they could provide a record showing the ownership of a piece of property at 928 Valley View Drive and this is the document they provided to me showing that the property was owned by Mr. Ferguson and then sold to Mr. Hagerman on 6...5/30/02.

CAMILLERI Okay. I have no further questions.

HOGAN Okay, did you have any questions for Mr. Seybold.

STARK Just one. Exhibit 10, just, I know I've asked you this Mr. Seybold, but, what date were these pictures taken on?

SEYBOLD I took a lot of photographs up on this site, the date that is shown here is 11/27/01. I know I did take photographs on that date and I took photographs. Any particular ones in here or the whole set?

STARK Well, I think you testified earlier that they were all take on the 27th.

SEYBOLD I believe these were all taken on the 27th. I do have a...on the computer in my office I would have all these photographs and they would be dated. I believe this is the correct date.

STARK Okay. I have no further questions.

HOGAN Well, okay, I have a few questions. Just starting with the photographs. Did you mark the dates down on Exhibit 10, they're marked with these dates 11/27/01?

SEYBOLD I'm not sure if I marked that or not.

HOGAN You don't know if that's your handwriting or not?

SEYBOLD I'm not sure if this is. I'm sure that one's not. I'm not sure if I made them personally. I'm really not certain at this point.

HOGAN Okay, so I guess, did you also take photographs of the site on November 21st?

SEYBOLD Yes, I did.

HOGAN And, can you explain to me the dating process or the labeling process or how you know today which photographs were taken on which day?

SEYBOLD The photographs, when they're taken, there's a...I have a computer record that shows the date these photographs were taken. The early ones, we did not stamp them onto the photograph. Later on we began stamping them all onto the photographs so the computer record itself did show the exact date that the photograph was taken. For each photograph.

HOGAN Okay, but, as far as your statements today, that's based on what?

SEYBOLD Well, I know I took photographs on the 21st and the 27th and I took them on other days as well and I'd have to go back and check my record to be certain that these were the ones that were taken on the 27th. To the best of my recollection, they are the ones that were taken on the 27th of 2001.

HOGAN Okay. From your testimony today, is it possible that there could be a mistake as to the date of a particular photograph in that packet, in Exhibit 10?

SEYBOLD I think that's always possible. To the best of my knowledge these are correct. I do have some additional exhibits in the trunk of my car that I have here that are dated, and I would like to check that against just to be certain. But, I'm relatively certain these are correct.

HOGAN And you could verify it by checking your computer?

SEYBOLD That's correct.

HOGAN Okay, and the other things. Let me just ask you, you were there on the site both on the 21st and the 27th?

SEYBOLD Yes, ma'am.

HOGAN On that date did you view the point...the discharge point into

Gilbert Creek on both of those dates or just one date?

SEYBOLD Yes, I did.

HOGAN And, on both dates did you...did the discharge appear similar?

SEYBOLD Yes.

HOGAN And, was the downstream water similar to the photograph in--
-photograph 18, in Exhibit 8--on both dates?

SEYBOLD Yes, ma'am.

HOGAN And, there's a...apparently there's another outlet...drainage
outlet...there in that area across the stream from the storm drain that runs from the
subdivision. Is that correct?

SEYBOLD I heard that testimony. I did not observe that the day that I
was there. It was not related to this one.

HOGAN Did you observe a second discharge point where you could
see muddy water going into the stream?

SEYBOLD No, I did not.

HOGAN And was the water upstream on both dates substantially more
upstream of the discharge point, substantially clearer than the water downstream?

SEYBOLD Yes, ma'am, it was.

HOGAN Okay.

SEYBOLD The secondary discharge that was discussed, I did hear that
testimony, and that was not visible from...I was standing at the bridge and I looked
on both sides of the bridge and I did not observe an additional discharge coming
in. Perhaps in the map...if I may refer to the map just for a moment.

HOGAN It's 105, there you are.

SEYBOLD It does indicate another discharge here and that was not
running visible. Water pouring in from the forty--like its shown is a 48 inch pipe
coming down on Morgan Lane that is clearly visible and exposed...readily visible
to the naked eye. And that was what I could see and I took photographs right at the
discharge and the photographs...If I may refer back to the photographs in Exhibit

10. I can find one photograph showing the...

HOGAN I'm going to need to change the tape. So while you locating the photograph, I'll do that.

END: TAPE 7, SIDE 2

START: TAPE 8, SIDE 1

SEYBOLD ...I'm saying that photograph 6 of Exhibit 10 shows the actual pipe that is discharging coming down Morgan Lane from the subdivision above. There's a wing wall shown on the edge and kind of a concrete apron where the water is discharging around the corner. I took a second photograph which is photograph number 7. This is showing a continuation of the wing wall that's shown here and it's showing the water being discharged directly into the creek itself. So this water is running from this pipe and then it is entering into Gilbert Creek. And in photograph number 9 is just showing the continuation of that same line where it's discharging into Gilbert Creek. Photo number 8 is the photograph that I took when I walked across the bridge on to the other side and looked down into the stream and shows the water being quite clear where you can see elements in the bottom of the channel.

HOGAN And, let's see, you were here for Mr. Ferguson's testimony about the direction of drainage or the lots that drain into Gilbert Creek. Do you have any substantial disagreement with what he had to say about that?

SEYBOLD I could not see where Mr. Ferguson specifically was pointing. I can note that, and I'm not sure what...can you describe what the yellow line is?

HOGAN The yellow line divides Phase I and Phase II.

SEYBOLD I know that from the lot which is...this is the lot that I just testified as to the ownership of. I know from that point over this is flowing down Valley View Drive to Morgan Lane down Morgan Lane and intersects into Gilbert Creek.

HOGAN So, from that lot that was photographed in Exh...photograph 14, that area to the east discharges into Gilbert Creek?

SEYBOLD Yes, photograph 14 is a picture of the address testified about.

HOGAN I think its Exhibit 8, photograph 14. Yup, that's the famous photo...I think that's the same address you were talking about as well.

SEYBOLD Yes, ma'am. It is. And from there the water, one could see the water flowing down the street into this catch basin. And, it was...it was actually shooting out far enough to go across the street and I think one of the photographs...I'm sure it's one of the exhibits...shows some 4X4 wood pieces that were laid in the street to contain the flow so that would go all the way...it was shooting out so far it was going all the way across onto Crown Street. It was going uphill and over to the other side there was enough force to go to the other side. There were some 4X4's laying in the street near the discharge point to try to corral the water and keep it down this one side of the street.

HOGAN And then the last one I need to ask about. I don't know if you...no, you might not be the right one to ask about this. Did you...did you look at any of the silt fences and so forth on the property?

SEYBOLD Yes, ma'am.

HOGAN If you aren't familiar with this...actually these photographs were taken by Mr. Ullrich. But, on this photograph 3 on Exhibit 8, did you view that fence?

SEYBOLD Yes, ma'am.

HOGAN Do you know if there's any...I mean if you don't know which fence it is or whatever, just tell me. Are there any fences further downstream from that?

SEYBOLD I wouldn't be able to testify to that.

HOGAN You didn't inspect further downstream?

SEYBOLD No, as Mr. Ferguson noted, there were a number of these discharge points along the top edge of...where are they, Mr. Ferguson,...up here on Starlight there were several discharges going down the street. Going down discharging...it's a pretty steep hill going down. What I saw were...I did see sediment fences and then it appeared that additional sediment fences had been installed. There did not appear to be any, in fact, we were concerned for our safety to try to hike down this slope. The normal event that occurs is that these are

to be maintained by removing the sediments. And it wasn't possible to do that in this area. So, we did see sediment fences here; but, on that particular one I couldn't tell you if there were additional ones below that or not.

HOGAN Okay. That's all the questions I had for Mr. Seybold.

CAMILLERI I have one more question. Are you familiar with Blue Gulch?

SEYBOLD Yes, generally I am.

CAMILLERI Okay, do you know if that's an intermittent stream?

SEYBOLD Yes, ma'am this would be an intermittent stream in the upper portion, then it connects in as part of the drainage that goes back into Gilbert Creek. So, it would be part of this same watershed area.

CAMILLERI What does the term intermittent stream mean?

SEYBOLD An intermittent stream would be one that flows during certain times of the year depending on the amount of rainfall and the seepage or runoff and flow from the surrounding area.

CAMILLERI About...based on...how long have you lived in Grants Pass?

SEYBOLD Sixteen years.

CAMILLERI Okay, so, when do the fall rains usually start in this area?

SEYBOLD We look at October 15th as Mr. Ferguson was testifying before as kind of a drop dead date for doing work on hillsides because by that point in time we can expect rain to occur.

CAMILLERI So, an intermittent stream like Blue Gulch in the Grants Pass watershed area...can you approximate around what time of year that would start to run?

SEYBOLD No, I don't feel that I'd be qualified to venture a guess as to when I would see flow occurring in Blue Gulch.

CAMILLERI Okay, I have no further questions.

STARK Just so we can hopefully put this to rest, which particular lot from which you've been able to ascertain from the public records or your own personal knowledge is 928 Valley View?

SEYBOLD It's the one that has the narrow neck here. That's a flag lot coming up to this lot up above.

STARK Okay, that makes sense. I have no further questions.

CAMILLERI Okay, so I would like to call Andy Ullrich.

HOGAN Mr. Ullrich, you're still under oath also.

CAMILLERI Andy, have you been to the subdivision...Laurelridge Subdivision...in the last week?

ULLRICH I was there on last Friday, I believe the 25th.

CAMILLERI Okay, and what was the purpose of the visit?

ULLRICH I collected a soil sample.

CAMILLERI Did you collect any other samples?

ULLRICH I also collected some water samples from Gilbert Creek.

CAMILLERI Okay, and do you have experience collecting soil and water samples?

ULLRICH It is a regular part of my job function.

CAMILLERI Okay, and did you follow standard procedures when you collected these samples?

ULLRICH I did.

CAMILLERI And where did you collect your soil samples?

ULLRICH The soil sample was collected on Crown on...a little bit, just above Sunburst...from a sediment trap that was immediately adjacent to the street.

CAMILLERI And what type of soil did you collect?

ULLRICH It was a mixture commonly referred to as decomposed granite.

CAMILLERI Okay, and can you explain the consistency of the soil?

ULLRICH Well, decomposed granite is actual...it is not a one type of soil. It is actually typically a mix of both fine and then heavier material like a fine sand.

CAMILLERI Okay, and is this type of soil found throughout the

subdivision?

ULLRICH It appears to be common throughout the subdivision.

CAMILLERI Okay, and in your opinion is the soil you collected from off of Crown and Sunburst there...is that a representative sample of the soil in the subdivision?

ULLRICH In my opinion, it is since it was collected from the sediment trap. The sediment trap was collecting water from a fairly wide area so it was more representative than merely taking a soil sample from one particular spot.

CAMILLERI Okay, in your opinion, is it more likely than not that this is the same type of soil that would have run off Mr. Ferguson's property in November 2001?

ULLRICH It was collected from a sediment trap and the...I believe it was representative of what would have been running off the site.

CAMILLERI Okay, and where did you collect your samples in Gilbert Creek?

ULLRICH They were collected at Morgan...where Gilbert Creek crosses Morgan.

CAMILLERI Okay, and what did you do with these samples after you collected them?

ULLRICH They were taken back to the Medford office.

CAMILLERI And were the only person that had access to these samples?

ULLRICH I was the only person that had access to them until I gave them to Bill Myers.

CAMILLERI And when did you give them to Bill?

ULLRICH I gave them to him early Friday afternoon.

CAMILLERI Okay, I have no further questions.

HOGAN Mr. Ferguson?

STARK You know, I don't quibble. We've admitted its decomposed granite; but the consistency of the soil would be a lot different from run off

material than the regular soil in the subdivision, wouldn't it?

ULLRICH Not necessarily, due to the erosion gullies that were present in parts of the site.

STARK Well, would you show on the map...maybe with a blue "X"...where you took your soil site from?

ULLRICH It would have been...I wrote "soil sample" and then circled it. That's an approximate location.

WILLIAM FERGUSON That's Crown Street.

ULLRICH Yeah.

WILLIAM FERGUSON You testified Sunburst.

ULLRICH No I said Crown Street in the vicinity of Sunburst.

STARK Well, anyway. So, your job regularly involves taking soil samples and water samples?

ULLRICH Regularly water samples. Less regularly soil samples. But, it is a function, yes.

STARK On the times that you were up to this particular site in November of 2001, did you take any soil samples?

ULLRICH Not at that time.

STARK Okay, did you take any water samples?

ULLRICH Not at that time.

STARK All right, is it relatively easy to take samples?

ULLRICH Water is relatively easy, yes.

STARK I have no further questions.

CAMILLERI Okay.

HOGAN Actually, I have some questions for Mr. Ullrich, I've been saving them up. You know, you had a gap in the hearing and that was a mistake. I did have a question about Exhibit 8, photograph 3, which is a photograph that you took? Were there any silt fences down slope from the one photographed?

ULLRICH None that I observed; but, I did not hike down there so I

cannot definitively state that there were not. I did not observe any.

HOGAN Okay. I don't think I had any...I didn't have any other questions, that was it.

STARK We just...one more question. When you took your soil sample at this location indicated that was from soil that had settled out. Isn't that right? You took it from the trap.

ULLRICH Uh-huh.

HOGAN Keep your answer yes or no, because the tape recorder doesn't pick up.

STARK Is that correct?

ULLRICH That is correct.

STARK So the actual soil on the site would be vastly different from that, wouldn't it? I mean, you have...in the trap you have soil that's been washed with water and settled down and that's what you took out. That is not representative of the soil over the whole subdivision I assume?

ULLRICH Well, the purpose of the sediment fence is to capture the soil from the subdivision that has moved and so if the sediment fence is working properly it would capture all of the soil that had moved to that location from upstream.

STARK But, any water that left the subdivision wouldn't have...would be far different from the soil sample that you would take from the sediment trap?

ULLRICH You just asked if the water would be different from the soil and yes the water would be different than soil because water is not soil.

STARK I mean, any solids in the water that left the subdivision would be vastly differently from the soil sample that you took?

ULLRICH That would...the answer is that it would depend if the...all the water was going through the sediment traps then that would be true. If water was bypassing the sediment traps then it could be the same.

STARK Okay, but, again you didn't take any water samples when you were there in November of 2001?

ULLRICH I did not.

STARK Okay. I have no further questions.

CAMILLERI Okay, I'd like to call Bill Meyers.

HOGAN I think we're almost to the end of our witnesses. So, let's try to wind up the testimony before the lunch break. Mr. Meyers, you're still under oath.

CAMILLERI Okay, so we just heard testimony from Andy that he passed on some soil samples to you. Can you verify that you received them?

MEYERS That's correct.

CAMILLERI Okay, and when did you receive them?

MEYERS Friday, the 25th. Last week.

CAMILLERI Okay, and what did you do with the samples?

MEYERS On Friday I put them on my shelf in my office.

CAMILLERI Okay, and did you have access...were you the only person who had access to those soil samples?

MEYERS As far as I know.

CAMILLERI Okay, and what was the purpose of you receiving these samples?

MEYERS The purpose of the samples was to be able to provide some type of visual example of what different turbidity numbers looked like and I requested that Andy visit the site and take some native material from the const...from the building site and also collect water from Gilbert Creek.

CAMILLERI Okay, and so can we bring those samples up onto the table? Do you have them with you? Okay, so what did you with the soil and the water samples once you received them from Andy?

MEYERS When I received the samples and I processed them on Monday, I took some of the soil, mixed it into a large glass until I got a very

turbid water and then I added just a very little bit of the sample to this bottle...a little bit more to this one...a little bit more to this, and then I diluted the samples out. And the reason I diluted the samples out is because I was looking for...I wanted to get a certain range of turbidity just to provide an example of what that looks like.

CAMILLERI Okay, and then can you explain here what these glass jars are?

MEYERS The first sample here, this is Gilbert...this is Gilbert Creek water and its important that the bottles are stirred because when you measure turbidity it measures particles in suspension. So you have moving water where things are suspended in the water column. So this first sample is Gilbert Creek water from last Friday and the turbidity at that time measured 3.4 and that NTU, nephelometric turbidity units.

HOGAN And that sample is water with no added sediment?

MEYERS Correct, that is just water that came out of the creek. Andy collected it as per standard protocol and delivered it to me and all I did was poured it in that bottle. The next sample is Gilbert Creek water again where its just a little bit of this sediment added to produce a turbidity of around 50 turbidity units and I think this one measures 47.7. And when I give turbidity readings our protocol is that's the average of three...the average of three readings on a sample. So, it's 47.7

HOGAN And what instrument did you use or what measuring method did you use?

MEYERS I used a standard...our standard sampling equipment and that's a HACH 2100 Turbidimeter, and it's an instrument about this big. The third sample that I will present is Gilbert Creek water plus a little bit more of the native material...the soil. And the turbidity on this sample measures about 380. And again when I give these measurements, I'm saying about. It's the average of three samples and as you can see as you let the sample sit that some of the particulate

matter settles out and the water...the turbidity changes. And then the last one here is Gilbert Creek water plus soil and its around 970 is the NTU reading.

CAMILLERI Okay, I have no further questions.

STARK Were any water samples taken in November of 2001?

MEYERS Not that I'm aware of.

STARK Was the actual turbidity you don't know...let's see, let me ask this question...if there were decomposed granite being up...way up on the site...let's say a mile or two away from where it goes into Gilbert Creek, and there were settling catch basins and the water appears turbid, it would not actually have soil in it, would it? It would be a suspension, much like that...like number 3 here, wouldn't it?

MEYERS I didn't exactly follow the question.

STARK Okay, if you took a sample of the water that was cascading into Gilbert Creek would it settle out solids or would it remain in the condition that it was at the time?

MEYERS The rate at which the particles settle out...whatever they happen to be...is a function of the velocity of the water...how quickly its moving. And the size of the particles, their mass. So, it's very, well, it's difficult to say. Depends how fast the water's moving and what those particles look like. A large piece of gravel or cobble will settle out much quicker than some fine sand.

STARK Well, I guess my question is, if you have some turbid water will it eventually all settle out if you just left it sitting here would it go out?

MEYERS It depends on the material that's in suspension. What we saw initially, you can kind of see the rate at which things will settle out. A certain amount will stay...the clays, the very fine material will stay in suspension indefinitely. The sands and there're some organic things maybe some bark and things like that that are in here, there's some grass...those will settle out eventually...over time.

STARK Okay, I have no further questions.

HOGAN Well, I have one unhappy thought, which is I think we need to mark these samples as exhibits. In order to have a record of what was viewed or considered in the hearing. I'm not enthusiastic about being the custodian of water bottles; but,

CAMILLERI At least you're at your office so you don't have to carry them anywhere.

HOGAN I'll have to pack them up and send them to; but, I'll do that. But, I can't see that we can preserve the record otherwise.

STARK And I, of course, I'll object to them as irrelevant. They don't bear in time to the conditions that existed in November of 2001. The condition of Gilbert Creek would be vastly different at that time. Here we're talking about August of two years later versus the time when there's two inches of rain falling on one day in November and 22/100 of an inch on the 21st and 36/100 of an inch on the 27th.

HOGAN I actually, that goes not just to the exhibits, but to the testimony as well. So, I'm going to take it as an objection to the whole. And the relevance, Miss Camilleri?

CAMILLERI The relevance in using these is to show that the difference in the turbidity and its not to say specifically that this is what the turbidity looked like in November of 2001. It's to say we had put testimony on the record last time about when do fish get impacted by turbidity and Mr. Myers had talked about over 50 and he uses the standard. And, so this is an example of what 50 NTU's roughly looks like versus 400 and then...yeah, roughly around 400, and then about 970 to show that at different levels of the impacts to the water quality because we just wanted to present examples of that. Visual examples. We're not trying to say that this is.

HOGAN Okay, I'm ready to rule on it. I'm going to go ahead, as unenthusiastic as I am about having these as evidence, I'm going to admit them. I think that it is kind of a demo...its a demonstrative piece of evidence that helps

interpret the other evidence that is related in time and place and it also goes to this issue of helping evaluate that evidence in terms of whether it could have impacted part of the pollution definition is the impact on species in an environment. I don't have the exact language in my mind; but...So, I do think its relevant on those issues to help interpret the evidence that's already in the record and also to help demonstrate to help prove that the level of what we observed and what was testified to could impact fish I think that's really it so I'm going to go ahead and admit them. We need to mark them though.

CAMILLERI The problem is that I ran out of exhibit slips.

HOGAN You know, I'm going to go off the record I believe I have some stickers in my office and so it probably would be nice. Otherwise, we'll write on the labels.

HOGAN We're back on the record. I'm just going to label those 18, 19, 20, and 21. And those are in order of turbidity.

CAMILLERI Are we on the record?

HOGAN Yeah, we are. All right. So, 18, 19, 20, and 21 are admitted. Anything further?

STARK Mr. Meyers, there will be some lay testimony that the Rogue River is actually where Gilbert Creek goes into the Rogue River, appears to be more turbid than the waters of Gilbert Creek in the winter of 2001. Would that be in accordance with your understanding?

MEYERS So, this is in November, that the waters of the Rogue may be more turbid than Gilbert Creek?

STARK Yes.

MEYERS That could be believable.

STARK Now, you know they always tell attorneys not to ask a question you don't know the answer to; but, I'm going to go ahead and do it because I think you're an honest guy. And my question is: The Rogue River in November of the year, what type of NTU's would you expect after a good heavy

rain? For the Rogue River itself to show?

MEYERS You know, I'd feel more comfortable, I think, doing a data search on that because we do have data on that and that's available on the web.

STARK Do you have a range?

MEYERS You know, I would be. You know, I would be saying a guess for something that we have actual data on we could definitely get the range.

STARK Do you have such data for Gilbert Creek?

MEYERS No, we do not. Not that I'm aware of.

STARK Have you ever done any testing on the Rogue River itself?

MEYERS Yes, I have.

STARK In what type of months?

MEYERS You know, I assume you're referring to turbidity testing?

STARK Right.

MEYERS You know, I have not taken turbidity samples myself on the Rogue River.

STARK Have you been familiar with turbidity samples that you haven't taken yourself on the Rogue River?

MEYERS They typically, they're gathered and they go up to Portland and they come right up in our data base. And again the data base that's public record that is available on the internet.

STARK And is it...do you know how they do that or where they do it as far as the turbidity?

MEYERS The...we have something called ambient water quality sites and they are visited every eight weeks and there is one at Dodge Bridge, there is one on Highway 234 in Gold Hill, and there is one at Robertson Bridge. So that would give you measurements Robertson's below and Highway 234 would be above Grants Pass and Gilbert Creek.

STARK Where is that Robertson Bridge?

MEYERS Robertson...Robertson Bridge. It's on the lower river.

STARK Does the City of Grants Pass also have a site on the Rogue that collects samples, or do you know?

MEYERS You know, I don't know. That would be part of, you know. I don't know.

STARK Is it common in the winter to have more turbid water than in the summer?

MEYERS Certainly, yes.

STARK And is there a range you can tell the hearings officer. You know, looking at the photos we've seen you can see a difference; but, do you know what the NTU's for Gilbert Creek...you expect from your experience what the NTU's in the winter would be?

MEYERS You know it would be really difficult. Again, I would be guessing because the turbidities that manifest itself is a function of the condition of the drainage area. You know, if you have a wooded area that has never been disturbed versus an area that has been either logged or mined or developed your turbidity is going to be very different.

STARK So, if there had been water samples taken in November of 2001 you could have done the similar testing on the...that you did last week?

MEYERS If there had been water samples collected the turbidity at the discharge point, upstream, downstream could have been determined.

STARK Just as you did today?

MEYERS Yes, it could.

STARK I have no further questions.

HOGAN I don't have any further questions.

CAMILLERI I have one question. On Exhibit 8, photograph 16, well just photographs 17 and 18. I think you've already looked at this before. But, do you know if, looking at this, in an area on Gilbert Creek where there wouldn't be a lot of development or mining or those other land use kinds of activity would this be an example of what the river may look like in the winter?

HOGAN And that's the before 17.

MEYERS Yes, the picture is 17. You know, I don't know if that. What I see is some fairly clear water. I don't know if that's an example of what that creek would like all winter long or if that is just to this because its just a snapshot in time.

CAMILLERI Yeah, okay. Thanks. No further questions.

STARK Most of the streams do fluctuate, is that right?

MEYERS Certainly in both flow and basic water quality parameters throughout the year.

STARK I have no further questions.

HOGAN Okay, is that the end of the rebuttal presentation for the DEQ?

CAMILLERI One thing here with Martin and then its done.

HOGAN Okay, you're recalling Mr. Seybold.

CAMILLERI Recalling him. Thank you. This is in regard to testimony that Martin's already put on as far as the time of the photograph being taken.

HOGAN Okay.

CAMILLERI We just thought...if you could explain here what this is showing and have been the holder of this piece of...of these photographs?

SEYBOLD Yes, these are the same photographs that were shown in Exhibit 10 and I went down to my car and picked this up and its dated 11/27/01 and I'm confident I took the photographs on 11/27.

CAMILLERI When did you make this?

SEYBOLD Back about eight months ago we were preparing to go to trial.

CAMILLERI What did you...how did you make it...what's the basis of the dates?

SEYBOLD These photographs are taken from the disc from the photographs that I took on the site and we dated the board to reflect that.

CAMILLERI Would you have referred to something in order to make that date or?

SEYBOLD At the time that I made this it was fresh in my mind when we were having recently taken the photographs and so that point in time was just fresher on my mind.

CAMILLERI Okay.

SEYBOLD And they are dated on those photographs...electronically.

CAMILLERI Okay.

HOGAN Well, okay. I don't...basically you looked at these...this poster-type exhibit to refresh your recollection, is that right?

SEYBOLD That is correct.

HOGAN Any questions?

STARK No questions.

CAMILLERI Okay. No further testimony.

HOGAN Okay, and so its 12:30 and were you going to...I don't know how long we go on with testimony. Usually I cut it off at this point; but, you said...you indicated Mr. Stark that you had some additional...something about you were expecting to present lay testimony about the turbidity of the Rogue River.

STARK Just a couple questions of Mr. Ferguson. It won't take very long, Your Honor.

HOGAN Would that conclude our testimonial portion?

STARK Right.

HOGAN Okay. I'm going to just go ahead and do that. I'd like to have all the testimony finished and then just hear the arguments after lunch, okay. So you may recall Mr. Ferguson.

STARK Mr. Ferguson, you went down to the Rogue River and observed during this period. When did you go down there and looked at the Rogue River versus Gilbert Creek?

WILLIAM FERGUSON I went down there on three or four different occasions.

STARK Okay.

WILLIAM FERGUSON But in November, late November of 2001.

STARK And what did you observe?

WILLIAM FERGUSON Well, it was raining, hard and the river was at the confluence of Gilbert Creek the river was a...appeared to be a darker color than Gilbert Creek. I didn't take any measurements, but, there appeared to be more turbidity in the river than there was in Gilbert Creek.

STARK Okay, I have no further questions.

HOGAN I don't have any questions for Mr. Ferguson. Do you have any questions?

CAMILLERI I just have one question. Does Gilbert Creek flow into the Rogue River?

WILLIAM FERGUSON Yes.

CAMILLERI Okay. No further questions.

HOGAN Okay, then that'll conclude the testimonial portion and I'll take the arguments after lunch.

CAMILLERI I have a couple of motions that I wanted to make.

HOGAN Okay.

CAMILLERI One, I know that you want to give oral arguments. I still want to...I know I agreed at the end of the hearing last time to do oral argument; but, I'd like to actually change my mind if I can and allow you to put on oral argument; but, to be able to write a brief which is standard procedure for us. And rather than closing argument, we've heard a ton of testimony in this case and I think it would be clearer if I could be able to put it in writing.

HOGAN So, you'd prefer oral arguments in writing?

CAMILLERI I don't mind if Mr. Stark does oral, I just would prefer...

STARK Well, obviously I'm going to have to do a brief if she does a brief. If you want to?

WILLIAM FERGUSON The problem is one of cost and this is a huge cost to me.

CAMILLERI Why do you...I'm not requiring you to do it.

HOGAN Okay, let me think. Actually, what matters to me is what's most useful to me and I regret to say it while there's some utility in both methods, I guess, so I'm thinking about that. I don't. What I'm going to do is, let's go ahead and take our lunch recess and when we come back I'll address it. I agree that, I mean, that I could oral arguments and briefs or something like that. But, ultimately, it's going to go. The advantage of oral arguments is I can ask questions at the time sometimes when I accept briefs I don't always have the issues addressed that I want to have addressed.

STARK My preference would be to conclude things today, give us a week to get out thoughts together on this, and have oral arguments and that's it and we could do it then.

CAMILLERI You mean have an oral argument over the telephone?

STARK Right.

CAMILLERI I don't...we could close off for today then you would be as far as cost. Dan, you wouldn't have to come back. We do our oral arguments over the telephone if you'd like to do that. It's just .

STARK I would like to do that.

HOGAN Okay, that's what we're going to do.

CAMILLERI Can I make one last motion though? Okay, I'd like to make a motion that all of the facts that we heard throughout the hearing, that the notice conform to the facts that we heard at the hearing. We have in our violation; for violation number one we talk about Phase II. We've heard facts that some of the properties were on Phase I and I would be like to be able to stipulate that 928 Valley View was on Phase I and that that doesn't affect any other facts in the notice that we could have any facts discussed at the hearing conform to the notice.

HOGAN Okay, we still need to finish with the argument thing then we're going to move on to that. Can we excuse the witnesses, they look like they want to go to lunch? Is there any reason they can't leave? I think this may be all legal matters. If we are going to...what I understand people are willing to do is to

have oral arguments telephonically at a later time, which has it's own issues. But, is that more acceptable to you, Mr. Stark.

STARK And then at the end if you want us to brief it you can make us brief it. But, I'm hopeful that if we do a good job of preparing for oral argument.

HOGAN And you feel that you'll be more able to present the Department's case, is that correct, if you follow that procedure where we delay the oral arguments a little bit?

CAMILLERI My thing was more to just have everything in writing so it was clear. I mean, I could probably go forward today and do oral arguments; but, I could also wait a week and do oral arguments too. I've already prepared an oral argument in case that motion wasn't agreed upon.

HOGAN Right.

CAMILLERI But, I just...it sometimes there's just so much we've talked about it's easier sometimes if its in writing, that's all.

HOGAN Well, you could prepare...I don't care if you read a brief for your oral argument.

CAMILLERI That's fine.

HOGAN Okay, so we need to pick a time that this is going to happen. Unfortunately, I don't have my calen...let me think about this. I'm going to go off the record for a minute, I may have my calendar at this point for next week and that would enable us to get a time. Okay? And then we'll do the next one.

HOGAN We're back on the record. Next week is out, what's the next date you have.

STARK I have depositions three days and then I'll be out of town. So the next week...I have a hearing on the 12th, that's Tuesday the 12th. But, other than Tuesday the 12th. That next week I don't have anything scheduled at all.

CAMILLERI How about...what's the 14th...a Thursday?

STARK It's a Thursday.

CAMILLERI How about...my schedule's fairly open. I could do something on the 14th or the 13th or the 15th.

HOGAN Okay, well, I'm just going to pick. The 14th looks good for people. Nine a.m. on the 14th.

CAMILLERI All right.

HOGAN And, I'll call from my phone. By then I will have learned how to work it, Mr. Stark.

STARK Okay.

HOGAN Now, we'll take the next motion. Is the...you want to amend the pleadings to conform to the proof and is there anything other than the statement of Phase I to Phase II that you want to amend?

CAMILLERI I want to just say Phase I and II.

HOGAN Phase I and II?

CAMILLERI Yeah.

HOGAN Is there an objection to that motion?

STARK Yes, we've been careful to limit that throughout the hearing and object to the...right from the start to the testimony that wasn't in the proper Phase so I think it's too late for them to amend at this time.

HOGAN Okay, I'm going to allow the motion to amend and just to make it clear what we're doing here...we're amending paragraph 1 under III Violations to indicate Phase I and Phase II of the site...is that correct?

CAMILLERI Yes.

HOGAN And, I don't think the Phases and with respect to that violation the reason I'm allowing it is I don't think that the Phase is a material aspect of the pleadings. The material aspect is that the Respondent caused a discharge of turbid water into Gilbert Creek from his property. And that it really doesn't matter where that property...which Phase of the subdivision. There's evidence that the subdivision was resubdivided or replatted from time to time and I think its just a very nonmaterial...the difference between Phase III and Phase II

is very material because you have a second violation alleged saying that there was a violation of a permit which applied to Phase III and, so, I think that's quite material. On Violation 2 it has to be something that the permit applied to; but, on Violation 1 the first paragraph under violations I don't think its material and so I am allowing the amendment. Anything else?

CAMILLERI No.

STARK No.

HOGAN Okay, so that will actually conclude us for today and then at 9:00 a.m. on the 14th of August (she said November) I'll be contacting you for oral argument.

END: TAPE 8, SIDE 1



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696
TTY 503-229-6993

July 22, 2004

Via Certified Mail

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501
Also sent via fax: 541-773-2084

RE: WQ/SW-WR-02-015

Dear Mr. Stark:

On July 20, the Environmental Quality Commission received your request for an extension of time to July 23, to file your supplemental brief in the above referenced case, and the Commission granted your request. On July 21, the Commission received a second request for extension of time to file your supplemental brief in the above referenced case.

The Commission has granted your request for an extension in filing time until August 2, 2004. To file your supplemental brief, please mail the document to Andrea Bonard, on behalf of the Environmental Quality Commission, at 811 SW 6th Avenue, Portland, Oregon, 97204, with copies to Jenine Camilleri.

If you have any questions, please contact me at 503-229-5990 or 800-425-4011 ext. 5990 within the state of Oregon.

Sincerely,

Andrea Bonard
Acting Assistant to the Commission

Cc: Jenine Camilleri, DEQ Environmental Law Specialist

STARK AND HAMMACK, P.C.

ATTORNEYS AT LAW

201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

FAX TRANSMITTAL

Date: July 21, 2004

To: Andrea Bonnard Destination FAX Number#: (503) 229-6762

To: Jenine Camilleri Destination FAX Number#: (503) 229-6762

Number of Pages (including cover): 2

From: Richard A. Stark

Your Reference: WQ/SW-WR-02-015



OUR REFERENCE: RP 3045

- An original is being mailed.
- An original is being delivered.
- An original is available on request.
- Facsimile transmittal only.

Confidentially Notice:

This facsimile transmission (and/or documents accompanying it) may contain confidential information belonging to the sender, which is protected by the attorney/client privilege. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the document(s).

STARK AND HAMMACK, P.C.

ATTORNEYS AT LAW

201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

July 21, 2004

VIA FACSIMILE (503) 229-6762 and REGULAR U.S. MAILMs. Andrea Bonnard
Department of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204RE: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Issued December 10, 2003, by Teresa Hogan, Administrative Law Judge
Our File No.: RP 3045

Dear Ms. Bonnard:

As I told you in my voice mail, in going through the transcript is turning out to be a lot more time consuming than I anticipated when I spoke to you yesterday.

I called Jenine Camilleri and she stated that she would have no objection to an extension of time within which to file the amended brief to Friday, August 2, 2004.

Please accept this letter as a request for a further extension of time to that date.

Thank you for your attention to this matter.

Respectfully yours,

STARK AND HAMMACK, P.C.

Richard A. Stark
Counsel for Respondent
William H. Ferguson

RAS:df

cc: Jenine Camilleri (via fax only 503-229-6762)
client

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

FAX TRANSMITTAL

Date: July 20, 2004

To: Andrea Bonnard Destination FAX Number#: (503) 229-6762

To: Jenine Camilleri Destination FAX Number#: (503) 229-6762

Number of Pages (including cover): 2

From: Richard A. Stark

Your Reference: WQ/SW-WR-02-015

OUR REFERENCE: RP 3045

- An original is being mailed.
- An original is being delivered.
- An original is available on request.
- Facsimile transmittal only.

Confidentially Notice:

This facsimile transmission (and/or documents accompanying it) may contain confidential information belonging to the sender, which is protected by the attorney/client privilege. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the document(s).

STARK AND HAMMACK, P.C.

ATTORNEYS AT LAW

201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 773-3133
FAX (541) 773-2084
ras@starkhammack.com

July 20, 2004

VIA FACSIMILE (503) 229-6762 ONLY

Ms. Andrea Bonnard
Department of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204

RE: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Issued December 10, 2003, by Teresa Hogan, Administrative Law Judge
Our File No.: RP 3045

Dear Ms. Bonnard:

This will confirm our telephone conversation where I requested an extension to file my supplemental brief containing transcript references to Friday, July 23, 2004.

Thank you for granting the requested extension.

Respectfully yours,

STARK AND HAMMACK, P.C.



Richard A. Stark
Counsel for Respondent
William H. Ferguson

RAS:df

cc: Jenine Camilleri (via fax only 503-229-6762)
client



Oregon

Theodore R. Kulongoski, Governor

Attachment G

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696
TTY 503-229-6993

June 16, 2004

Via Certified Mail

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

RE: WQ/SW-WR-02-015

Dear Mr. Stark:

The Environmental Quality Commission received Ms. Camilleri's June 15 letter, which confirms that a portion of the hearing record in the above-referenced case is missing, and states the Department's willingness to stipulate that you have correctly described the missing witness testimony in your March 1 brief. Assuming you agree with this stipulation, the appeal may proceed. Please submit to the Commission your supplemental brief, including a transcript of any testimony referenced in your March 1 brief that does exist in the hearing record. Please submit the brief within the next 30 days, or by Friday, July 16, 2004, by mailing the document to me, on behalf of the Commission, at 811 SW 6th Avenue, Portland, Oregon, 97204. Please also send a copy to Ms. Camilleri.

If you have any questions, please contact me at 503-229-5301 or 800-452-4011 ext. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Janine Camilleri, DEQ Environmental Law Specialist



Oregon

Theodore R. Kulongoski, Governor

June 15, 2004

Department of Environmental Quality

811 SW Sixth Avenue

Portland, OR 97204-1390

503-229-5696

TTY 503-229-6993

Stark & Hammack, P.C., Attorneys at Law,
c/o Richard Stark
201 W. Main Street, Suite 1B
Medford, Oregon 97501

Re: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491
DEQ Case No. WQ/SW-WR-02-015

Dear Mr. Stark:

After our last conversation on June 11, 2004, I listened to the hearing record, which includes Tapes 1 through 8. We are missing testimony from Tape 1, Side 1 and Tape 4, Side 1. Nearly all of the record is intact and we believe there is sufficient evidence on the record for the Environmental Quality Commission to make a decision in this matter.

The only testimony you referenced in your brief that is missing from the hearing record is that given by Mr. Phillips and Mr. VanHeuit, which was recorded on Tape 4, Side 1. The Department is willing to stipulate that you have correctly described the testimony of these two witnesses on pages 7 and 8 of your brief dated March 1, 2004.

The Department is willing to proceed with the appeal on the existing record and with the stipulation we have offered above.

If you have any questions, please contact me at (503) 229-6775. Ms. O' Mealy will be in touch with you about the next procedural steps in your appeal.

Sincerely,

Jenine Camilleri
Environmental Law Specialist
Office of Compliance and Enforcement

Enclosure:

cc: Mikell O'Mealy, DEQ-Assistant to the Director, Environmental Quality
Commission, HQ, DEQ



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696
TTY 503-229-6993

May 28, 2004

Stark & Hammack, P.C., Attorneys at Law,
c/o Richard Stark
201 W. Main Street, Suite 1B
Medford, Oregon 97501

Environmental Quality Commission
c/o Mikell O'Mealy, DEQ-Assistant to the Director
811 SW 6th Avenue
Portland, OR 97204

Re: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491
DEQ Case No. WQ/SW-WR-02-015

Dear Mr. Stark:

As we discussed this week, I have reviewed the original hearing tapes in the above case and the testimony matches the testimony on your tapes, which were copied by the Department. As a result, we are missing testimony from either Tape 1, Side 1 or Tape 2, Side 2, since both sides of these tapes have the same exact testimony. Also, we are missing testimony from Tape 4, Side 1. Given that the original tapes are incomplete, the Department believes that the testimony at the hearing may not have been recorded properly.

To resolve this matter, we have two options at this time. First, upon your completion of the transcription of the hearing record, we can stipulate to the oral testimony that you may reference in your brief that you can not transcribe from the hearing tapes. Second, we could redo the hearing on those parts that are missing from the record.

You explained to me that you would discuss these options with your client. Please contact me by Friday June 4, 2004 with your decision. Thank you for your cooperation.

Sincerely,

Jenine Camilleri
Environmental Law Specialist
Office of Compliance and Enforcement

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

May 20, 2004

VIA FACSIMILE (503) 229-6762 and REGULAR U.S. MAIL

Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

VIA FACSIMILE (503) 229-6762 and REGULAR U.S. MAIL

Ms. Jenine Camilleri
Office of Compliance and Enforcement
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390

RE: The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Our File No.: RP 3045

Dear Mikell and Jenine:

As you know, the transcriber is transcribing the tapes of the hearings in Medford. She is almost through with the closing arguments and the final tape that was supplied to me.

However, from her review of the tapes it appears that we are missing tapes. Enclosed with this letter are transcription notes on the areas in question provided by the transcriber. Hopefully, the excerpts given will help to determine if we are in fact missing one side or more of taped testimony.

JENINE: Could you please review the records and the tapes to see if there are missing tapes as set forth above.

RECEIVED

MAY 24 2004

Oregon DEQ
Office of the Director

Department of Environmental Quality

May 20, 2004

Page - 2

Please let me hear from you.

Very truly yours,

STARK AND HAMMACK, P.C.

A handwritten signature in black ink, appearing to read "Richard A. Stark", with a long horizontal flourish extending to the right.

Richard A. Stark
Counsel for Respondent
William H. Ferguson

RAS:df

Encl.

cc: client

SENDER: COMPLETE THIS SECTION		SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		<ul style="list-style-type: none"> Agent <input type="checkbox"/> Addressee <input type="checkbox"/> 	
1. Article Addressed to:		A. Signature x <i>Diana F</i>		B. Received by (Printed Name) A. YOUNG	
Richard A. Stark Stark and Hammack, P.C. 210 West Main Street, Suite 1B Medford, OR 97501		B. Received by (Printed Name) Diana F		C. Date of Delivery 3-2-04	
2. Article Number (Transfer from service label) 7002 2410 0002 2228		D. Is delivery address different from item 1? If YES, enter delivery address below:		D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No	
PS Form 3811, August 2001 Domestic Return Receipt		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Registered <input type="checkbox"/> Insured Mail		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
2. Article Number (Transfer from service label) 7002 2410 0002 2228		4. Restricted Delivery?		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, August 2001 Domestic Return Receipt		2. Article Number (Transfer from service label) 7002 2410 0002 2228		PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540	

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

1780 U.S. POSTAGE PB5518177
 2793#00.370 MAY 20 2004
 4324 MAILED FROM ZIP CODE 97501

Ms. Mikell O'Mealy
 Assistant to the Commission
 Environmental Quality Commission
 811 SW 6th Avenue
 Portland, OR 97204

97204X1334 6023

Intelligent Mail Barcode

TRANSCRIPTION NOTES

There are two apparent gaps in tapes provided for transcription apparent in both context and content and are described as followed:

1. There appears to be a break in sequence of tapes. Apparently, there is at least one side of one tape that is missing here.

At the end of Tape 1, Side 1, it ends according and Tape 1, Side 2, begins with the following testimony:

TAPE 1, SIDE 2

HOGAN Go on the record. You may resume your examination.

STARK I'll mark that Defendant's Exhibit 102 and I would offer that into evidence.

HOGAN Objection?

CAMILLERI No objection.

HOGAN Exhibit 102 is admitted.

2. Tapes received as TAPE 1, SIDE 2, and TAPE 2, SIDE 1, are duplicate recordings.

3. There appears to be a break in sequence of tapes. Apparently, there is at least one side of one tape that is missing here.

The Tape received as TAPE 4, SIDE 1, is blank.

The tape marked "TAPE 3, SIDE 2" ends with the following lines of testimony:

MEYERS Yes, it, it is certainly dependent on the length of exposure.

It's also dependent on the life stage and it's also dependent on is it a fly that's just hatched versus a full-grown adult, that they're just spawned. They will be affected differently by turbidity. And it's also dependent on the material that's in suspension, that causing the turbidity. There's a lot of variables and that's where that 50 is, you know that is a rule of thumb, that's come from the National Marine Fishery Service. It's a recommendation.

STARK Okay.

HOGAN Since we have a little pause, I'm going to go ahead and go off the record and change the tape. My warning light is flashing.

END TAPE 3, SIDE 2

The tape marked "TAPE 4, SIDE 2" begins with the following lines of testimony:

TAPE 4, SIDE 2

HOGAN Okay, we're back on the record. I turned over the tape. You can continue.

CAMILLERI Okay, so, on November 27, 2001, was this driveway paved?

UNKNOWN VOICE NOT CONSISTENT WITH PRIOR WITNESS MEYERS I'm not positive about that.

CAMILLERI Okay.

UNKNOWN VOICE NOT CONSISTENT WITH PRIOR WITNESS MEYERS It was paved on the 28th and I...it didn't appear that it was just paved that day.

CAMILLERI Okay.

STARK AND HAMMACK, P.C.

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

April 27, 2004

VIA FACSIMILE (503) 229-6762 and REGULAR U.S. MAIL

Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

RE: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Issued December 10, 2003, by Teresa Hogan, Administrative Law Judge
Our File No.: RP 3045

Dear Ms. O'Mealy:

Jenine Camilleri told me about the problem with my brief in that without a transcript it would be hard for the Environmental Quality Commission to review. I spoke to Larry Knutsen about this matter and he stated that my only option was to prepare a transcript.

I received the tapes recently from Jenine Camilleri and I am having them transcribed at the present time. I expect this transcription to take two or three weeks and please accept this letter as a request for postponement of a hearing on this matter before the Environmental Quality Commission until I can obtain the transcript and submit a supplemental brief with references to the transcript. I will give a copy of the transcript to the State as well.

Thank you for your attention to this matter.

Respectfully yours,

STARK AND HAMMACK, P.C.

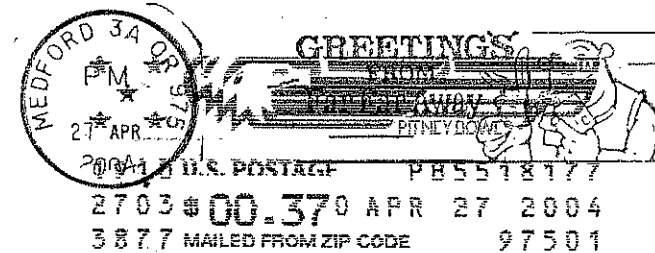


Richard A. Stark
Counsel for Respondent
William H. Ferguson

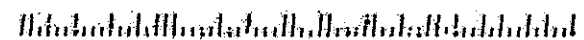
RAS:df

cc: Jenine Camilleri (via fax only 503-229-6762)
client

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501



Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204





Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390

503-229-5696

TTY 503-229-6993

April 19, 2004

Richard Stark, Attorney at Law
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, Oregon 97501

Re: The Matter of William H. Ferguson, Respondent
Proposed Order
OAH Case No. 107491
DEQ Case No. WQ/SW-WR-02-015

Dear Mr. Stark:

I have enclosed a copy of the audio tapes from the contested case hearing in the above matter as you requested. If you have any further questions, please feel free to contact me at (503) 229-6775.

Sincerely,

Jenine Camilleri
Environmental Law Specialist
Office of Compliance and Enforcement

cc: Mikell O'Mealy, Director's Office, DEQ, HQ



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696
TTY 503-229-6993

April 16, 2004

CERTIFIED MAIL 7002 2410 0002 2229 5653

Environmental Quality Commission
c/o Mikell O'Mealy, DEQ-Assistant to the Director
811 SW 6th Avenue
Portland, OR 97204

RECEIVED

APR 16 2004

Oregon DEQ
Office of the Director

Re: The Matter of William H. Ferguson, Respondent
Proposed Order
OAH Case No. 107491
DEQ Case No. WQ/SW-WR-02-015

Dear Commission:

Enclosed please find the Department's Brief for the above case.

The Department is also in the process of copying the hearing record for Mr. Ferguson's attorney, Richard Stark, and will provide Mr. Stark with a copy of the tapes by April 23, 2004.

Sincerely,

Jenine Camilleri
Environmental Law Specialist
Office of Compliance and Enforcement

cc: Richard Stark, Stark & Hammack, P.C., Attorneys at Law, 201 W. Main Street,
Suite 1B, Medford, Oregon 97501.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:)
WILLIAM H. FERGUSON,)
)
PETITIONER)
)
)
)
)
)
)

RESPONDENT'S BRIEF
NO. WQ/SW-WR-02-015
JACKSON COUNTY

Respondent, Department of Environmental Quality (the Department), submits this Brief to the Environmental Quality Commission (Commission) for its consideration in the appeal of the Administrative Law Judge's (ALJ's) Proposed Order in Notice of Violation, Department Order and Assessment of Civil Penalty No. WQ/SW-WR-02-015 (Notice), filed by William H. Ferguson, Petitioner.

I. CASE HISTORY

On October 15, 2002, the Department assessed Mr. Ferguson a \$5,400 penalty for causing pollution to waters of the state, and also cited a second violation without penalty for failing to comply with the conditions of his National Pollution Discharge Elimination System General Storm Water Discharge No. 1200-C Permit (Permit). Mr. Ferguson appealed and a contested case hearing was held on July 16, 17, and 31, and August 14, 2003. On December 12, 2003, the ALJ issued a Proposed Order upholding the violations and civil penalty in the Department's Notice. On March 1, 2004, Mr. Ferguson filed a petition for Environmental Quality Commission (EQC) review of the Proposed Order.

II. COMMISSION ACTION REQUESTED

The Department requests that the Commission deny Mr. Ferguson's petition and issue a Final Order upholding the ALJ's Proposed Order.

III. ARGUMENT

The following basic facts in this case are not in dispute.

At all relevant times, Mr. Ferguson was a partner in Laurelridge Development, a general partnership, engaged in the development of the Laurelridge Subdivision (the subdivision) in Grants

1 Pass, Oregon. In November 2001, Ferguson had a two-thirds interest in the partnership, which
2 owned all the property in Phase 3 of the subdivision and retained some, but not all, of the lots in
3 Phases 1 and 2 of the subdivision. Mr. Ferguson held the Permit for the construction activities on
4 Phase 3 of the subdivision. Mr. Ferguson directed and controlled erosion control and storm water
5 discharge from disturbed properties he owned throughout the subdivision. On November 21, and
6 27, 2001, storm water flowed off disturbed properties on Phase 2 and Phase 3 of the subdivision that
7 were under Mr. Ferguson's control. The storm water from Phase 3 of the subdivision flowed in the
8 direction of Blue Gulch (gulch), waters of the state. The storm water from Phase 2 of the
9 subdivision entered the storm drain system and discharged to Gilbert Creek (creek), waters of the
10 state. The water upstream of the discharge point was relatively clear and the water downstream was
11 opaque and brown colored. The creek is habitat for steelhead and coho salmon.

12 **Mr. Ferguson's discharge need not "by itself" pollute the creek.**

13 Mr. Ferguson contends that he did not violate ORS 468B. 025(1)(a) because the discharge
14 from his property could not "by itself" cause pollution to the creek. See Petitioner's Exceptions
15 and Brief, page 10, lines 24-25. The Department, however, need not prove that discharge from
16 Mr. Ferguson's property "by itself" polluted the creek. ORS 468B.005(3) defines pollution as
17 the "alteration of physical ... properties of any waters of the state, including changes in ...
18 turbidity, ... **which will or tends to, either by itself or in connection with any other**
19 **substance, ...will or tends to render such waters harmful or detrimental ... to fish or other**
20 **aquatic life or the habitat thereof."**¹ Mr. Ferguson's abbreviated quote of the statute eliminates
21 all the words showing the legislature intended "pollution" to be expansive. It overlooks the
22 following words in the definition: "by itself or **in connection with any other source.**" Mr.
23 Ferguson's argument contradicts the express language of the statute. The state legislature

24 ¹ ORS 468B. 005(3) provides that pollution or water pollution means such alteration of physical, chemical, or
25 biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt, odor of
26 the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state,
27 which will or tends to, either by itself or in connection with any other substance, create a public nuisance or which
will or tends to render such waters harmful, detrimental, or injurious to public health, safety, or welfare, or to
domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses or to livestock,
wildlife, fish or other aquatic life or habitat thereof.

1 intended for the definition to be broadly applied. The quality of state waters, especially flowing
2 waters, are affected by many natural and human influences. Therefore, pollution rarely stems
3 from a single source. Furthermore, it is poor public policy to relieve from responsibility people
4 who discharge waste into already polluted waters further impairing water quality and aquatic
5 habitat. By including the words "in connection with any other source," the legislature intended
6 that each party discharging wastes to state waters be held responsible for the pollution of those
7 waters. Mr. Ferguson's argument that the discharge from his property must have "by itself"
8 caused the pollution in the creek is an incorrect statement of the law and against public policy.

9 **Mr. Ferguson requests reversals to Findings of Facts.**

10 In addition to his legal argument, Mr. Ferguson has asked the Commission to reverse the
11 ALJ's findings of fact and to substitute new findings of fact on the following issues: (1) Mr.
12 Ferguson polluted the creek; (2) The discharge from Mr. Ferguson's property was significant,
13 and (3) Mr. Ferguson violated Schedule F of the Permit. The Department has addressed Mr.
14 Ferguson's arguments regarding these issues below. However, Mr. Ferguson is not providing
15 any new information to the Commission that he did not present at the hearing. While the
16 Commission may reverse or modify an ALJ's finding of fact, it can do so only if it determines that
17 the finding is not supported by a preponderance of the evidence in the hearing record. OAR 137-
18 003-0665(4). Findings of fact are often best determined by the ALJ, especially when there is
19 conflicting evidence in the record. These findings are often based on the demeanor or credibility of
20 a witness, which is difficult to evaluate when reviewing the record. The ALJ found Mr. Ferguson
21 unpersuasive so the Commission should uphold the ALJ's findings of fact on these issues.

22 **Mr. Ferguson's discharge polluted the creek.**

23 The Department established that the discharge from Mr. Ferguson's property polluted the
24 creek. See Opinion (2), Proposed Order at 7. The Department put substantial evidence on the
25 record through witness testimony, inspection reports and photographs from November 21 and 27,
26 2001, that showed that the erosion controls on Mr. Ferguson's property were insufficient and
27 allowed storm water heavily laden with sediment to discharge from his property to the creek. See

1 Department Exhibits 7, 8 and 10. The sediment discharge to the creek changed the physical
2 characteristics of the creek by increasing the turbidity in the creek. See Findings of Fact (25),
3 Proposed Order at 5; and Opinion (2), Proposed Order at 7. The discharge from Mr. Ferguson's
4 property by itself or in connection with other sources such as Mr. Phillips' and Mr. Hagerman's
5 properties tended to have a detrimental impact on fish habitat in the creek. See Findings of Fact
6 (25), Proposed Order at 5; and Opinion (2), Proposed Order at 7.

7 Mr. Ferguson claims that the Department did not prove that the discharge from his property
8 could tend to have a detrimental impact on fish habitat in the creek because the Department
9 presented no numerical data of turbidity in the creek. See Petitioner's Exceptions and Brief, page 8,
10 lines 1-5. Mr. Ferguson is incorrect that such evidence was necessary. Numerical data is not
11 required to prove a violation of ORS 468B.025(1)(a), only to prove a violation of a numeric water
12 quality standard. See Opinion (5), Proposed Order at 8.

13 Mr. Ferguson also alleges that the testimony of Mr. Meyers, who testified on behalf of the
14 Department, was not credible. Mr. Meyers is the DEQ Rouge Basin Coordinator and has many
15 years experience in stream ecology. Mr. Meyers testified that the sediment laden waters that
16 discharged to the creek "tended to have a detrimental effect on the creek." Mr. Meyers made that
17 determination by looking at the color of the turbid water discharge and clarity of the creek, captured
18 in the Department's photographs in Exhibits 8 and 10, and estimated the effects the discharge may
19 have had on the creek. The ALJ found that the photographs of the creek show a dramatic
20 deterioration in water quality and that common sense suggests that such an increase in sediment and
21 decrease in visibility would adversely affect aquatic life in the creek. Opinion (5), Proposed Order
22 at 8.

23 **Discharge from Mr. Ferguson's property was significant.**

24 Throughout Petitioner's Exceptions and Brief, Mr. Ferguson makes a reoccurring argument
25 that the primary source of turbid water to the creek was from Mr. Phillips and Mr. Hagerman's
26 properties, and that the discharge from his property was insignificant. See Petitioner's Exceptions
27 and Brief, page 6, lines 1-13; page 7, lines 21-25; and page 8, lines 21-26. While the size of the

1 discharge is not an element that the Department needed to prove, the facts demonstrate that the
2 discharge from Mr. Ferguson's property was more than de minimis. Therefore, the Department
3 does not believe that the Commission needs to address this issue of the size of the discharge to make
4 a determination in this case. However, the Department will address Mr. Ferguson's arguments for
5 the purposes of completeness.

6 Mr. Ferguson claims that the discharge from 928 Valley View was thrice filtered and settled
7 water. See Petitioner's Exceptions and Brief, page 6, lines 1-13. Mr. Ferguson's argument is not
8 persuasive. The ALJ found that the erosion control devices on 928 Valley View were overwhelmed
9 and the discharge from this property was substantial. See Findings of Fact (16), Proposed Order at
10 4. Even if Mr. Ferguson had multiple erosion control devices in place, a finding not made by the
11 ALJ, thrice filtering the storm water on 928 Valley View was insufficient to prevent turbid water
12 runoff to the creek. The Department presented witness testimony and photographs that clearly
13 showed opaque and brown colored water running off 928 Valley View to the storm drain system
14 and discharging to the creek. See Department Exhibit 8, photographs 14-18; and Exhibit 10,
15 photographs 2-8. The ALJ found that the runoff from Mr. Ferguson's property, particularly 928
16 Valley View, was markedly discolored and significant in volume. See Opinion (2), Proposed Order
17 at 7. The ALJ also found that, although 928 Valley View was not the only source of turbid water
18 running into the creek, it was reasonable to conclude that it was a significant source because Mr.
19 Ferguson controlled a significantly larger portion of the land with disturbed or bare soil than did the
20 other potential polluters, Mr. Phillips and Mr. Hagerman. Opinion (2), Proposed Order at 7.
21 Therefore, the runoff from 928 Valley View was not filtered or settled water, but a substantial flow
22 of sediment laden waters that discharged to the creek.

23 Mr. Ferguson also claims that there is no evidence that the soil runoff from his property
24 contributed substantially to the sediment in the discharge to the creek and that the release caused an
25 increase in turbidity in the creek. See Petitioner's Exceptions and Brief, page 7, lines 21-24. Mr.
26 Ferguson claims that the discharge from his property was insignificant compared to the discharge
27 from Mr. Phillips and Mr. Hagerman's properties. See Petitioner's Exceptions and Brief page 7,

1 lines 24-26. Mr. Ferguson disturbed over four times the amount of land in the subdivision than Mr.
2 Phillips and Mr. Hagerman disturbed on their private lots. See Findings of Fact (8), Proposed Order
3 at 4; and Findings of Fact (10), Proposed Order at 5. Furthermore, on November 21 and 27, 2001,
4 the creek was running fairly clear upstream from the point where Mr. Ferguson's discharge entered
5 the creek and the water downstream was opaque and brown colored. See Findings of Fact (22),
6 Proposed Order at 5. The ALJ found that the storm water discharging to creek was very discolored
7 and caused an obvious change in the physical characteristics of the creek by increasing its turbidity.
8 See Findings of Fact (22), Proposed Order at 5; and Opinion (2), Proposed Order at 8.

9 **Mr. Ferguson violated Schedule F of the Permit.**

10 The ALJ upheld the Department's determination that Mr. Ferguson violated Schedule F of
11 the Permit because he did not maintain erosion controls on Phase 3 of the subdivision.² (Violation 2
12 of the Notice). See Opinion (7), Proposed Order at 8. Mr. Ferguson claims that the Department did
13 not meet its burden of proof because it did not show that turbid water from Phase 3 of the
14 subdivision discharged to the gulch, waters of the state. To prove this violation, however, the
15 Department need only show that Mr. Ferguson failed to maintain the erosion controls on Phase 3 of
16 the subdivision according to his Erosion and Sediment Control Plan (Plan) and the requirements of
17 the Permit, and as a result a discharge of sediment to the gulch was likely to occur.³ The
18 Department need not prove that that turbid water actually discharged to the gulch.

19
20 ² Schedule F, Section B, Condition 1 of the Permit states that the permittee shall at all times properly operate and
21 maintain facilities and systems of treatment and control which are installed or used by the permittee to achieve
22 compliance with the conditions of the Permit.

23 ³ Schedule A of the Permit requires permittees to develop and implement an erosion and sediment control plan to
24 prevent significant amounts of sediment to surface waters. The following conditions describe significant amounts of
25 sediment and shall be prevented from occurring: (c) turbid flows of water that are not filtered or settled to remove
26 turbidity prior to leaving the construction site and are likely to discharge to surface waters. Flow to storm water inlets or
27 catch basins located on the site will be considered "leaving the site" if there are no sediment control structures designed
for expected construction flows downstream of the inlets or catch basins that are under the permittee's control.

1 Mr. Ferguson claims that all the storm water that discharged from Phase 3 of the subdivision
2 was filtered and protected by redundant silt fencing which prevented turbid water from reaching the
3 gulch. See Petitioner's Exceptions and Brief, page 4, lines 9-16; page 5, lines 1-12; and page 7,
4 lines 1-12. Other than his testimony, Mr. Ferguson did not provide any proof, such as
5 photographs, as to the existence of these redundant silt fences. Furthermore, Mr. Ferguson did
6 not provide any proof of how he determined that the silt fences worked sufficiently to prevent
7 turbid water from reaching the gulch.

8 The Department presented substantial evidence on the record that Mr. Ferguson did not
9 properly install and maintain the erosion controls on Phase 3 of the subdivision and that failure
10 likely resulted in turbid water discharging to the gulch. See Findings of Fact (13), (17), (18) and
11 (19), Proposed Order at 4. The Department presented Mr. Ullrich's November 21, 2001
12 inspection report that stated that the erosion controls were ineffective and not being maintained
13 on Phase 3 of the subdivision. See Department Exhibit 7. A large amount of sediment had
14 accumulated behind silt fencing on Phase 3 causing unfiltered turbid water to flow around the
15 edge of the fence. See Department Exhibit 7, and Exhibit 8, photograph 3. Mr. Ferguson failed
16 to comply with the maintenance requirements in Schedule A of the Permit and remove the
17 trapped sediment before it reached one-third of the above ground fence height.⁴ See Department
18 Exhibit 3. The Department also presented photographs that showed erosion and steep grades
19 with insufficient erosion controls on Phase 3, and a significant amount of turbid water running
20 off Phase 3 towards the gulch. See Department Exhibit 8, photographs 1-12. After reviewing
21 the evidence presented by both parties, the ALJ properly determined that Mr. Ferguson failed to
22 comply with Schedule F of his Permit and ensure he properly maintain the erosion controls on
23 Phase 3 of the subdivision. See Findings of Fact (13), (17), (18) and (19), Proposed Order at 4;
24 and Opinion (7), Proposed Order at 8.

25 ///

26 _____
27 ⁴ Schedule A, Condition (4)(c) requires permittees to remove trapped sediments in a filter fence before they reach one third of the ground fence height.

1 **Mr. Ferguson references oral testimony not included in Findings of Fact.**

2 In numerous places throughout Petitioner's Exceptions and Brief, Mr. Ferguson references
3 oral testimony of witnesses at the contested case hearing that was not included in the ALJ's findings
4 of fact. The Department objects to Mr. Ferguson's use of this testimony because he did not provide
5 the Commission with a written transcript from the hearing record of the referenced testimony. If the
6 Commission entertains this testimony, the Department requests that the Commission require Mr.
7 Ferguson to provide written transcript of the testimony referenced in his brief, and allow the
8 Department additional time to respond.

9 IV. CONCLUSION

10 Based on Ferguson's failure to raise any sufficient legal or policy reason to alter the ALJ's
11 Proposed Order, the Department requests that the Commission adopt the Proposed Order as its Final
12 Order.

13
14
15
16 4/16/04
17 Date

Jenine Camilleri
18 Jenine Camilleri
19 Environmental Law Specialist
20
21
22
23
24
25
26
27

1 CERTIFICATE OF SERVICE

2 I hereby certify that I served the Brief within on the ____ day of April, 2004 by

3 PERSONAL SERVICE upon

4 The Oregon Environmental Quality Commission
5 c/o Mikell O'Mealy, Assistant to the Commission
6 811 SW Sixth Avenue
7 Portland, OR 97204

8 and upon

9 William H. Ferguson
10 5200 Pioneer Road
11 Medford, Oregon 97501

12 Richard Stark
13 Attorney at Law
14 201 West Main Street, Suite 1B
15 Medford, Oregon 97501

16 by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at
17 the U.S. Post Office in Portland, Oregon, on April 16, 2004

18
19
20
21
22
23
24
25
26
27

Amy Smothers 4/16/04



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696
TTY 503-229-6993

April 13, 2004

Via Certified Mail

Jenine Camilleri
Oregon Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204

RE: WQ/SW-WR-02-015

Dear Ms. Camilleri:

The Environmental Quality Commission received your request for an extension of time to file exceptions and briefs in the above-referenced case. The Commission has granted your request for an extension in filing time until April 16, 2004. To file exceptions and briefs, please mail these documents to Mikell O'Mealy, on behalf of the Environmental Quality Commission, at 811 SW 6th Avenue, Portland, Oregon, 97204, with copies to Richard A. Stark.

If you have any questions, please contact me at 503-229-5301 or 800-452-4011 ext. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Richard A. Stark, Stark and Hammack, P.C., 201 West Main Street, Suite 1B, Medford,
OR 97501



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696
TTY 503-229-6993

April 12, 2004

Environmental Quality Commission
c/o Mikell O'Mealy, DEQ-Assistant to the Director
811 SW 6th Avenue
Portland, OR 97204

Re: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491
DEQ Case No. WQ/SW-WR-02-015

RECEIVED

APR 12 2004

Oregon DEQ
Office of the Director

Dear Commission:

The Department is requesting an extension to Friday, April 16, 2004 to submit its Answering Brief.

I have spoken with Richard Stark, Respondent's attorney, and he agreed to this request.

Sincerely,

Jenine Camilleri
Environmental Law Specialist
Office of Compliance and Enforcement

cc: Richard Stark, Stark & Hammack, P.C., Attorneys at Law, 201 W. Main Street,
Suite 1B, Medford, Oregon 97501.



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696
TTY 503-229-6993

March 30, 2004

Via Certified Mail

Jenine Camilleri
Oregon Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204

RE: WQ/SW-WR-02-015

Dear Ms. Camilleri:

Yesterday, the Environmental Quality Commission received your request for an extension of time to file exceptions and briefs in the above-referenced case. The Commission has granted your request for an extension in filing time until April 12, 2004. To file exceptions and briefs, please mail these documents to Mikell O'Mealy, on behalf of the Environmental Quality Commission, at 811 SW 6th Avenue, Portland, Oregon, 97204, with copies to Richard A. Stark.

If you have any questions, please contact me at 503-229-5301 or 800-452-4011 ext. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Richard A. Stark, Stark and Hammack, P.C., 201 West Main Street, Suite 1B, Medford,
OR 97501



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696
TTY 503-229-6993

March 29, 2004

Environmental Quality Commission
c/o Mikell O'Mealy, DEQ-Assistant to the Director
811 SW 6th Avenue
Portland, OR 97204

RECEIVED

MAR 29 2004

Oregon DEQ
Office of the Director

Re: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491
DEQ Case No. WQ/SW-WR-02-015

Dear Commission:

Due to the need to further examine issues raised in Respondent's Exceptions and Brief in the above matter, the Department is requesting an extension to Monday, April 12, 2004 to submit its Answering Brief.

I have spoken with Richard Stark, Respondent's attorney, and he agreed to this request.

Sincerely,

Jenine Camilleri
Environmental Law Specialist
Office of Compliance and Enforcement

cc: Richard Stark, Stark & Hammack, P.C., Attorneys at Law, 201 W. Main Street,
Suite 1B, Medford, Oregon 97501.

STARK AND HAMMACK, P.C.

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

March 1, 2004

VIA FACSIMILE (503) 229-6762 and FEDERAL EXPRESS (OVERNIGHT)

Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

RE: The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Proposed Order Issued December 10, 2003, by Teresa Hogan,
Administrative Law Judge
Our File No.: RP 3045

Dear Ms. O'Mealy:

Enclosed please find the following document for the above-captioned case:

PETITIONER WILLIAM H. FERGUSON'S, EXCEPTIONS AND BRIEF

Also enclosed is an additional copy of the filing for conforming and returning in the enclosed postage-paid, self-addressed envelope.

Very truly yours,

STARK and HAMMACK, P.C.



Richard A. Stark

RAS:df

Encl.

cc: Ms. Shelley K. McIntyre
Ms. Jenine Camilleri
client

RECEIVED

MAR 02 2004

Oregon DEQ
Office of the Director

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:

WILLIAM H. FERGUSON

Respondent.

No. WQ/WS-WR-02-015

RESPONDENT
WILLIAM
H. FERGUSON'S
EXCEPTIONS AND
BRIEF

///
///
///

COMES NOW the Respondent, William H. Ferguson, hereinafter referred to as "Ferguson", and presents the following exceptions and brief in support of his appeal to the Environmental Quality Commission of the proposed Order assessing civil penalty issued December 10, 2003, by Teresa Hogan, Administrative Law Judge.

THE Respondent presents the following Summary of Argument, Exceptions to the Findings of Fact, Exceptions to Conclusions of Law, and Legal Argument.

SUMMARY OF ARGUMENT

The evidence at the hearing showed that there was a very small discharge of water into the storm sewer from 928 Valley View which was property owned by the partnership of which the Respondent, William Ferguson, owned two-thirds. This discharge was approximately five gallons per minute for a short duration and the water that actually went into the street came from a settling pond and was filtered by silt fences before it went into the street. This very small discharge from the property owned by the partnership is

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
100 MAIN ST., SUITE 1B
SEASIDE, OREGON 97138
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

1 compared to the discharge on the very date in question, November 21, 2001, from the
2 Phillips and Hagerman lots not controlled by the partnership and which was a very large
3 discharge of decomposed granite and soil directly into the storm system. This discharge
4 filled up a storm drain which remained filled up for at least two weeks including November
5 27, 2001. The law requires that the discharge **by itself** must cause the pollution. It could
6 not be said by a preponderance of the evidence presented at the hearing that the discharge
7 from the property owned by the partnership **by itself** caused a change in color in Gilbert
8 Creek or caused pollution under the law.

9 As to the alleged violations relating to Phase 3, the evidence at the hearing showed
10 that no water-bearing silt left the subdivision premises nor did such water ever come close
11 to Blue Gulch.

12 EXCEPTIONS TO FINDINGS OF FACT

13 An exception is taken to the operative Findings of Fact in that the Findings of Fact
14 relied on for assessing the penalty are not supported by a preponderance of the evidence that
15 was set forth at the hearing.

16 1.

17 Exception is taken to Findings of Fact number 3. That Finding should be replaced
18 with the following Finding of Fact:

19 3. Ferguson on behalf of the Laurelridge Development Partnership
20 directed and controlled erosion control and storm water discharge on
21 the subdivision. He was the storm water discharge permittee. (Ex. 3
22 and 102.) For a period of six years prior to the alleged violation Kathy
23 Staley, an employee of the City of Grants Pass, monitored the erosion
24 control system and essentially it operated without any problems.
25 (Test. of Staley.) Ferguson on behalf of the development partnership
26 was in charge of employees and contractors carrying out such work.

1 (Test. of Ferguson and Daniel Ferguson.) He received expert geologic
2 reports on the project for stability and erosion control and had spent
3 about \$50,000 on improvements to control the erosion. (Test. of
4 Ferguson; Ex. 4 and 14.) There was evidence that in the summer of
5 2001 the City of Grants Pass required excavation of a small area above
6 928 Valley View Drive which had caused no problems in the past.
7 The small area excavated was not owned by the Laurelridge
8 Partnership. (Test. of Ferguson.)

9 **2.**

10 Exception is taken to Findings of Fact number 8. That Finding should be replaced
11 with the following Finding of Fact:

12 8. During the late summer or early fall of 2001, at the request of the City
13 of Grants Pass, Ferguson conducted additional grading operations in
14 Phase 2 of the subdivision to flatten fill slopes on some lots not owned
15 by the development partnership. The disturbed ground and the graded
16 areas were hydroseeded. Ferguson believed that the necessary
17 hydroseeding would be done too late in the year to have its best effect.
18 However, Ferguson caused a settling pond and a series of silt fences
19 and hay bales to be constructed to make sure that the runoff from the
20 newly disturbed ground was filtered and that unfiltered runoff did not
21 reach the storm system. As expected the hydroseeding did not result
22 in good grass growth to fully stabilize the soil. (Test. of Ferguson.)

23 **3.**

24 Exception is taken to Findings of Fact number 9. That Finding should be replaced
25 with the following Finding of Fact:

26 9. Soil was disturbed by all terrain vehicle activity on the subdivision in

1 Phase 3. This activity was not conducted with permission, but, had
2 been a longstanding problem. (Test. of Daniel Ferguson.) The runoff
3 from the soil that was disturbed by all terrain vehicle activity did not
4 leave the boundary of the Laurelridge Subdivision. (Unrebutted Test.
5 of Daniel Ferguson and Ferguson.)

6 4.

7 Exception is taken to Findings of Fact number 12. That Finding should be replaced
8 with the following Finding of Fact:

9 12. Almost all of the land in Phase 3 of the subdivision drained into Blue
10 Gulch to the west which contained a seasonal stream. (Test. of
11 Ferguson; Ex. 103.) However, none of the water containing silt from
12 Phase 3 reached Blue Gulch in that there were a series of redundant
13 wire mesh-backed steel fence post anchored silt fences in the ravines
14 that prevented any silt-filled water from reaching Blue Gulch.
15 (Unrebutted Test. of Daniel Ferguson and Ferguson; Ex. 103.)

16 5.

17 Exception is taken to Findings of Fact number 13. That Finding should be replaced
18 with the following Finding of Fact:

19 13. Schedule F, Section B, Condition 1 of the permit requires the permittee
20 to properly operate and maintain all facilities. Schedule A, Section 4,
21 Paragraph(c) of the permit requires that, for filter fences, sediment
22 shall be removed before it reaches one third of the above ground fence
23 height. (Ex. 3.) The wire mesh steel post anchored silt fences
24 installed on the property in steep areas had to be sunk into the ground
25 to stay in place so that it was reasonable to deviate from Schedule A,
26 Section 4 in this particular case. The silt fences used by Daniel

1 Ferguson were not the standard wood stake fences, but rather wire
2 mesh fabric fences with steel fence posts successfully anchoring the
3 fences in place. (Test. of Daniel Ferguson and Ferguson.) Schedule
4 A provides that “an erosion and sediment control plan (ESCP) shall be
5 developed and implemented to prevent the discharge of significant
6 amounts of sediment to surface waters.” (*Emphasis supplied.*) All
7 other performance limitations refer to discharge to surface waters or
8 turbid flows of water leaving the subdivision that are not filtered or
9 settled to remove turbidity. The un rebutted evidence was that in Phase
10 3 all of the water that left the site was filtered and was protected by
11 redundant silt fences in the ravines and draws. (Test. of Daniel
12 Ferguson and Ferguson.)

13 6.

14 Exception is taken to Findings of Fact number 14. That Finding should be replaced
15 with the following Finding of Fact:

16 14. Daniel Ferguson performed erosion control maintenance on the
17 subdivision for Ferguson. In most cases, he was the only person
18 performing such maintenance but hired additional help when needed.
19 He was always available for work in the afternoons and evenings.
20 (Test. of Staley and Daniel Ferguson.) Ferguson was available on call
21 for instances where he was needed to address erosion control issues.
22 (Test. of Ferguson and Staley.)

23 7.

24 Exception is taken to Findings of Fact number 16 and in that the discharge from 928
25 Valley View was insignificant and the following Finding of Fact should be made:

26 16. On November 21, 2001, there was an event that occurred on property

1 owned by Phillips and Hagerman in Phase 2 of the Laurelridge
2 Subdivision. Some large hillside areas washed down on both Phillips'
3 and Hagerman's lots. The amount of silt and granite that were washed
4 into the system was extensive and was not filtered by any devices.
5 The storm drain settling devices on November 21, 2001, in the Phillips
6 and Hagerman area were full of dirt and overflowing. (Ex. 6.) Phillips
7 and Hagerman testified that the storm drain in the area was filled up
8 and that the storm drain was not cleaned out for a week or two after
9 November 21, 2001, and probably was not cleaned out until January
10 or February of 2002. The discharge from the Phillips and Hagerman
11 event was unfiltered and untreated granite and soil, whereas the small
12 discharge from 928 Valley View was thrice filtered and settled water.
13 (Test. of Daniel Ferguson and Ferguson.)

14 **8.**

15 Exception is taken to Findings of Fact number 17. DEQ specifications on silt fencing
16 allow some dust in the water. That Finding should be replaced with the following Finding
17 of Fact:

18 17. Staley testified that on November 21, 2001, there may have been
19 sediment laden runoff entering the storm drain system; but, that
20 testimony is called into question because there was no evidence of any
21 such alleged runoff. Two people in the group that was inspecting the
22 subdivision that day had digital cameras and took pictures of other
23 sites. The only pictures of Phase I and II were of 928 Valley View.
24 (Test. of Staley, Seybold, Ullrich, Ferguson and Daniel Ferguson; Ex.
25 8 and 10.)

26 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

9.

Exception is taken to Findings of Fact number 18. The fact that the silt fences must be built into the ground to last was explained by Daniel Ferguson and none of the discharge from the redundant sediment fences on Phase 3 left the subdivision nor came anywhere near Blue Gulch. (Unrebutted Test. of Daniel Ferguson and Ferguson.)

10.

Exception is taken to Findings of Fact number 19. On November 21, 2001, as shown in Ex. 8, photographs 4, 5, 11, 12, and 13 there were insignificant failures of various portions of a few sediment control devices in Phase 3 of the wire mesh fences and steel posts but none of those releases left the subdivision nor did they approach Blue Gulch because of the redundant silt fences below and to the west in the gullies for the runoff from Phase 3. (Unrebutted Test. of Daniel Ferguson and Ferguson.)

11.

Exception is taken to Findings of Fact number 20. At the end of this Finding should be added:

The extent of the runoff was shown in Ex. 6 and the runoff from the Phillips property was completely unfiltered and much more substantial than any minimal runoff from 928 Valley View. (Test. of Phillips, Hagerman, and Ferguson.)

12.

Exception is taken to Findings of Fact number 22. There is no evidence that runoff from property under the partnership's control contributed substantially to the sediment in the water discharge from the storm drain pipe into Gilbert Creek and that the release caused an increase in turbidity. By far the most significant discharge was from the Phillips and Hagerman properties and the unrebutted testimony was that the discharge from 928 Valley View was no more than five gallons per minute for a short duration. (Test. of Ferguson.)

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
100 MAIN ST., SUITE 1B
SEASIDE, OREGON 97138
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

13.

Exception is taken to Findings of Fact number 25. Meyers testified using only pictures and no actual data that the turbidity in Gilbert Creek caused by the discharge from the storm drain system serving the subdivision could tend to have a detrimental impact on fish habitat. He acknowledged that the time over which the fish habitat was exposed was critical and could not state for sure that there was any likelihood of impact on the fish habitat from the evidence presented. Meyers did not testify that the short duration of the five gallon per minute water containing dust from 928 Valley View had any effect on fish habitat. (Test. of Meyers.)

14.

Exception is taken to Findings of Fact number 26. That Finding should be replaced with the following Finding of Fact:

26. No measurements of turbidity measured in NTU's were taken on November 21 or November 27, 2001 either of water in Gilbert Creek of the subdivision runoff. (Test. of Ullrich.) Vandehoff PE testified that without a measurement of the NTU's which could be done very simply, no conclusions could be made as to the extent of the turbidity on November 21 or November 27, 2001.

15.

Exception is taken to Findings of Fact number 27. Ferguson was confronted with a failure of a portion of his sediment control system in Phase 2 and Phase 1 of his subdivision on November 21 and November 27, 2001. The resulting filtered and settled discharge was insignificant in comparison to the discharge from the Phillips and Hagerman incident and there was no credible testimony that the filter dust from 928 Valley View contributed significantly to the change in color of Gilbert Creek. The evidence failed to show that the discharge of water from lots owned by the Laurelridge Partnership, by itself, caused any

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
100 MAIN ST., SUITE 1B
SEASIDE, OREGON 97138
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

1 pollution to Gilbert Creek.

2 **16.**

3 The following Findings of Fact number 29, should be added to read as follows:

4 29. Engineer Gary Wicks testified that all of the drainage from the
5 Laurelridge Subdivision constituted only ten percent to fifteen percent
6 of the whole drainage of the area that drained into the city storm sewer
7 in question which flowed into Gilbert Creek. (Test. of Gary Wicks.)

8 **EXCEPTIONS TO CONCLUSIONS OF LAW**

9 PETITIONER accepts to the Conclusions of Law numbers 1 through 7. The Facts
10 did not support Conclusions of Law numbers 1, 2, and 7, and, consequently, the other
11 Conclusions are irrelevant in this particular case.

12 **LEGAL ARGUMENT**

13 The operative section controlling the legal test to be applied to this case is found in
14 the definition of pollution under ORS 468b.005(3) reads, in part:

15 "Pollution" or "water pollution" means such alteration of the physical,
16 chemical or biological properties of any waters of the state, including change
17 in temperature, taste, color, turbidity, silt or odor of the waters, or such
18 discharge of any liquid, gaseous, solid, radioactive or other substance into any
19 waters of the state, which will or tends to, either **by itself** or in connection
20 with any other substance, create a public nuisance or which will or tends to
21 render such waters harmful, detrimental or injurious to public health, safety
22 or welfare, or to domestic, commercial, industrial, agricultural, recreational
23 or other legitimate beneficial uses or to livestock, wildlife, fish or other
24 aquatic life or the habitat thereof. (*Emphasis supplied.*)

25 The statute defining pollution states that the alteration to the waters of the state must
26 "by itself" cause the problem complained of. In the case at hand, on the November 21,

1 2001, the evidence showed that there were two significant events in the Laurelridge
2 Subdivision not under the control of the partnership. The Phillips and Hagerman lots, as
3 shown by Ex. 6, had banks completely fall onto the street and consequently into the storm
4 system with no silt filters, no settling ponds; but, an actual discharge of soil and dirt into the
5 storm system. The testimony was unrebutted that a portion of the storm system, a storm
6 drain, was completely filled with decomposed granite and soil and remained that way for
7 a period in excess of two weeks and probably for a month or two. On the other hand, the
8 discharge from 928 Valley View had gone through a settling pond and a series of silt fences,
9 including a silt fence directly behind the weep hole before a very small amount of water was
10 discharged into the street. There was no showing at all that the discharge from the
11 Laurelridge Partnership property "by itself", as required under the statute, caused any
12 problem with Gilbert Creek.

13 In addition, Engineer Gary Wicks testified that the area involved in the Laurelridge
14 Subdivision constituted approximately ten percent to fifteen percent of the entire area of that
15 part of Grants Pass which drained into Gilbert Creek and the drain pipe involved in this
16 case.

17 The evidence is simply not sufficient when you consider that the Department of
18 Environmental Quality has the burden of proof by showing by a preponderance of the
19 evidence that a violation has occurred. No such finding can be made under the facts
20 presented in this case. To change a finding of a historical fact of the hearing officer the
21 Commission must determine that the finding of historical fact made by the hearing officer
22 is not supported by a preponderance of the evidence of the record. (See 1999 Oregon Laws
23 Chapter 849 Section 12.2 and 12.3.) In this particular case, the preponderance of the
24 evidence certainly does not support that the Ferguson minor discharge "by itself" could
25 cause the changes to the color of Gilbert Creek. To the contrary, there was unrebutted
26 testimony that the substantial discharge into the storm drain by the Phillips and Hagerman

1 incident would be the cause of any problems and that the ten percent or fifteen percent of
2 drainage to the pipe in question, from Laurelridge Subdivision, is inconsequential to the
3 overall flow into that pipe.

4 **CONCLUSION**

5 The decision of the hearing officer should be reversed.

6
7 DATED this 1st day of March, 2004.

8 Respectfully submitted,

9 STARK AND HAMMACK, P.C.

10
11
12 By: 

13 Richard A. Stark, OSB #69164
14 Of Attorneys for William H. Ferguson
15
16
17
18
19
20
21
22
23
24
25
26

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
100 MAIN ST., SUITE 1B
SEASIDE, OREGON 97138
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2004, I served the foregoing:

**RESPONDENT WILLIAM H. FERGUSON'S
EXCEPTIONS AND BRIEF**

on the following:


Ms. Shelley K. McIntyre
Assistant Attorney General
Department of Justice
General Counsel Division
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201
fax: (503) 229-5120

Ms. Jenine Camilleri
Oregon Department of Environmental Quality
Office of Compliance and Enforcement
811 SW Sixth Avenue
Portland, OR 97204
fax: (503) 229-6762

by mailing a copy thereof contained in sealed envelopes with postage fully prepaid thereon, addressed to the above individuals at the addresses indicated, and deposited in the United States Mail at Medford, Oregon.

DATED this 1st day of March, 2004.

STARK AND HAMMACK, P.C.

By: 
Richard A. Stark, OSB #69164
Of Attorneys for Respondent



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue

Medford, OR 97504-1390

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

7002 2410 0002 2228 1113

Postage	\$	
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		

Postmark
Here

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

PS Form 3800, June 2002

See Reverse for Instructions

February 27, 2004

Via Certified Mail

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

RE: WQ/SW-WR-02-015

Dear Mr. Stark:

Today, the Environmental Quality Commission received your request for a *third extension* to file exceptions and briefs in the above-referenced case, because of a miscommunication between you and your client. The Commission has granted your request for an extension in filing time until March 2, 2004.

If you have any questions, please contact me at 503-229-5301 or 800-452-4011 ext. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Jenine Camilleri, Oregon Department of Environmental Quality

STARK AND HAMMACK, P.C.

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

February 27, 2004

VIA FACSIMILE (503) 229-6762 and REGULAR U.S. MAIL

Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

RE: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Issued December 10, 2003, by Teresa Hogan, Administrative Law Judge
Our File No.: RP 3045

Dear Ms. O'Mealy:

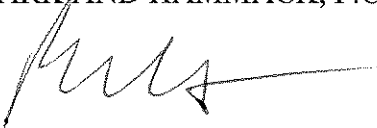
I apologize for bothering you again for an additional extension. My client is in the Palm Springs area and through a miscommunication he did not receive the draft brief last night which I faxed down to the place where he is staying. He will not get the brief until this evening or Saturday and I will not get his comments or questions and be able to make any changes until Monday, March 1, 2004.

Please accept this letter as my request for an additional extension until Tuesday, March 2, 2004, to file the brief. I plan to fax a copy to you on Monday, March 1, 2004, and to send the brief to you by Federal Express on Monday also.

I left a message on Jenine Camilleri voice mail informing her of the extension and requesting her approval.

Respectfully yours,

STARK AND HAMMACK, P.C.



Richard A. Stark
Counsel for Respondent
William H. Ferguson

RAS:df

cc: Jenine Camilleri (via fax only 503-229-6762)
client



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696

February 24, 2004

Via Certified Mail

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

RE: WQ/SW-WR-02-015

Dear Mr. Stark:

On February 24, 2004, the Environmental Quality Commission received your request for a second extension to file exceptions and briefs in the above-referenced case, due to your recent illness. The Commission has granted your request for an extension in filing time until February 27, 2004. To file exceptions and briefs, please mail these documents to Mikell O'Mealy, on behalf of the Environmental Quality Commission, at 811 SW 6th Avenue, Portland, Oregon, 97204, with copies to Jenine Camilleri, Oregon Department of Environmental Quality, 811 SW 6th Ave., Portland, Oregon 97204.

If you have any questions, please contact me at 503-229-5301 or 800-452-4011 ext. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Jenine Camilleri, Oregon Department of Environmental Quality

U.S. Postal Service™		CERTIFIED MAIL™ RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)			
For delivery information visit our website at www.usps.com			
OFFICIAL USE			
Postage	\$		Postmark Here
Certified Fee			
Return Receipt Fee (Endorsement Required)			
Restricted Delivery Fee (Endorsement Required)			
Total Post			
Sent To		Richard A. Stark	
Street, Apt. or PO Box #		Stark and Hammack, P.C.	
City, State, ZIP		210 West Main Street, Suite 1B	
		Medford, OR 97501	
PS Form 3800, June 2002		See Reverse for Instructions	

STARK AND HAMMACK, P.C.

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

February 24, 2004

VIA FACSIMILE (503) 229-6762 and REGULAR U.S. MAIL

Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

RE: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Issued December 10, 2003, by Teresa Hogan, Administrative Law Judge
Our File No.: RP 3045

Dear Ms. O'Mealy:

Please accept this letter as my request for a further extension until March 1, 2004, within which to file the exceptions and brief in connection with the above-captioned matter.

I was out of the office for two days last week with a virus and it put me behind schedule. I will be able to fax and mail the brief on Friday, February 27, 2004.

I have left a message with Jenine Camilleri who represents DEQ at the hearing and I have not heard back from her as to her position at the time this letter was faxed and mailed to you.

Thank you for your attention to this matter.

Respectfully yours,

STARK AND HAMMACK, P.C.

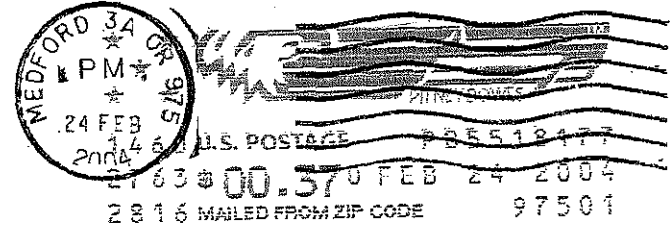


Richard A. Stark
Counsel for Respondent
William H. Ferguson

RAS:df

cc: Jenine Camilleri
client

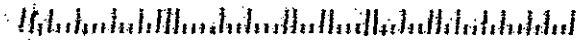
STARK AND HAMMACK, P.C.
Attorneys at Law
201 West Main Street, Suite 1B
Medford, Oregon 97501



Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204



97204+1334



Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

97204+1334





Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390
503-229-5696

February 5, 2004

Via Certified Mail

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

RE: WQ/SW-WR-02-015

Dear Mr. Stark:

On February 4, 2004, the Environmental Quality Commission received your request for a 20-day extension to file exceptions and briefs in the above-referenced case. The Commission has granted your request for an extension in filing time until February 25, 2004. To file exceptions and briefs, please mail these documents to Mikell O'Mealy, on behalf of the Environmental Quality Commission, at 811 SW 6th Avenue, Portland, Oregon, 97204, with copies to Jenine Camilleri, Oregon Department of Environmental Quality, 811 SW 6th Ave., Portland, Oregon 97204.

If you have any questions, please contact me at 503-229-5301 or 800-452-4011 ext. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Jenine Camilleri, Oregon Department of Environmental Quality

U.S. Postal Service™	
CERTIFIED MAIL™ RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com®	
OFFICIAL USE	
Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Postage Fee (Endorsement Required)	
Total Postage	
Sent To	Richard A Stark
Street, Apt or PO Box	Stark and Hammack, P.C.
City, State	201 West Main Street, Suite 1B
	Medford, OR 97501
PS Form 3800, June 2002	
See Reverse for Instructions	

7002 2410 0002 2228 1063

STARK AND HAMMACK, P.C.

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

February 4, 2004

VIA FACSIMILE ONLY (503) 229-6762 and REGULAR U.S. MAIL

Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

RE: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Issued December 10, 2003, by Teresa Hogan, Administrative Law Judge
Our File No.: RP 3045

Dear Ms. O'Mealy:

Please accept this letter as my request for an extension of twenty (20) days within which to file the exceptions and brief in connection with the above-captioned matter.

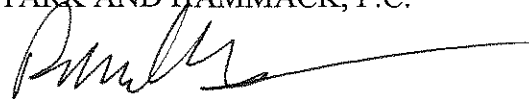
The extent of the documentation and other matters in connection with the file do not enable me to complete the exceptions and brief by tomorrow and as I said I would request an additional twenty (20) days to Tuesday, February 24, 2004.

I have left a message with Jenine Camilleri who represented DEQ at the hearing and I have not heard back from her as to her position.

Thank you for your attention to this matter.

Respectfully yours,

STARK AND HAMMACK, P.C.



Richard A. Stark
Counsel for Respondent
William H. Ferguson

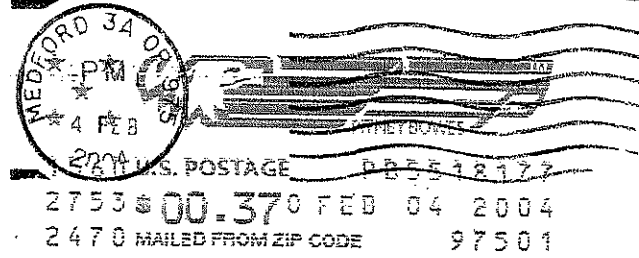
RAS:df
cc: Jenine Camilleri
client

RECEIVED

FEB 09 2004

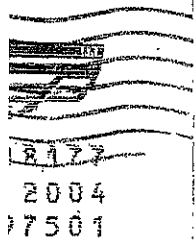
Oregon DEQ
Office of the Director

STARK AND HAMMACK, P.C
Attorneys at Law
201 West Main Street, Suite 1B
Medford, Oregon 97501



Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

97204+1334



Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

97204+1334





Oregon

Theodore R. Kulongoski, Governor

January 9, 2004

Via Certified Mail

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

RE: WQ/SW-WR-02-015

Dear Mr. Stark:

On January 6, 2004, the Environmental Quality Commission received your timely request for Commission review of the Proposed Order for the above referenced case.

The Proposed Order outlined appeal procedures, including filing of exceptions and briefs. The hearing decision and Oregon Administrative Rules (OAR 340-011-0132) state that you must file exceptions and brief within thirty days from the filing of your request for Commission review, or February 5, 2004. Your exceptions should specify the findings and conclusions that you object to in the Proposed Order and include alternative proposed findings. Once your exceptions have been received, a representative of the Department of Environmental Quality may file an answer brief within thirty days. I have enclosed a copy of the applicable administrative rules for your information.

To file exceptions and briefs, please mail these documents to Mikell O'Mealy, on behalf of the Environmental Quality Commission, at 811 SW 6th Avenue, Portland, Oregon, 97204, with copies to Jenine Camilleri, Oregon Department of Environmental Quality, 811 SW 6th Ave., Portland, Oregon 97204.

After both parties file exceptions and briefs, this item will be set for Commission consideration at a regularly scheduled Commission meeting, and I will notify you of the date and location. If you have any questions about this process, or need additional time to file exceptions and briefs, please call me at 503-229-5301 or 800-452-4011 ext. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Jenine Camilleri, Oregon Department of Environmental Quality

Department of Environmental Quality

811 SW Sixth Avenue

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark
Here

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

PS Form 3800, June 2002

See Reverse for Instructions

7002 2410 0002 2228 1038

- (f) Dismissal: The Commission may dismiss any Petition if the Petitioner fails to timely file and serve any exceptions or brief required by this rule.
- (g) Oral Argument: Following the expiration of the time allowed the participants to present exceptions and briefs, the Chairman will schedule the appeal for oral argument before the Commission.
- (4) Additional Evidence: A request to present additional evidence will be submitted by motion and be accompanied by a statement specifying the reason for the failure to present the evidence to the hearing officer. If the Commission grants the motion or decides on its own motion that additional evidence is necessary, the matter will be remanded to a hearing officer for further proceedings.
- (5) Scope of Review: The Commission may substitute its judgment for that of the hearing officer in making any particular finding of fact, conclusion of law, or order except as limited by OAR 137-003-0665.

Stat. Auth.: ORS 183.335 & ORS 468.020

Stats. Implemented: ORS 183.430 & ORS 183.435

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 115, f. & ef. 7-6-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00

STARK AND HAMMACK, P.C.

ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

January 6, 2004

VIA FEDERAL EXPRESS and FACSIMILE (503) 229-6762

Environmental Quality Commission
c/o DEQ-Assistant to the Director
811 SW 6th Avenue
Portland, OR 97204

RE: Proposed Order
The Matter of William H. Ferguson, Respondent
OAH Case No. 107491 Department Case No. WQ/SW-WR-02-015
Issued December 10, 2003, by Teresa Hogan, Administrative Law Judge
Our File No.: RP 3045

Dear Commission:

Please accept this letter as a *Petition for Commission Review* in connection with the above-referred to Administrative Law Judge Order.

It is the intent of the Respondent, William H. Ferguson, to have the Commission review the Administrative Law Judge's Order.

Very truly yours,

STARK AND HAMMACK, P.C.



Richard A. Stark
Counsel for Respondent
William H. Ferguson

RAS:df
cc: client

RECEIVED

JAN 09 2004

Oregon DEQ
Office of the Director

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of:
WILLIAM H. FERGUSON,
Respondent.

OAH Case No. 107491
No. WQ/SW-WR-02-015

AFFIDAVIT OF MAILING

STATE OF OREGON)
County of Jackson)ss.

I, Richard A. Stark, being first duly sworn, depose and say that: I am counsel for the Respondent of the above-captioned case; I have mailed a true copy of the letter submitted to the Environmental Quality Commission dated January 6, 2005, as a *Petition for Commission Review*.

The information was mailed to each of the following named persons on the 6th day of January, 2004:

Ms. Jenine Camilleri
Oregon Department of Environmental Quality
Office of Compliance and Enforcement
811 SW Sixth Avenue
Portland, OR 97204

Each such information was contained in a separate sealed envelope with postage thereon fully prepaid, addressed to each of the persons at the address as it appears herein sent by first class and certified mail.

Richard A. Stark
Of Attorneys for Respondent

1 STATE OF OREGON)
2 County of Jackson)ss.
3

4 This instrument was acknowledged before me this 6th day of January, 2004, by
5 Richard A. Stark.



Diana L. Fellows
Notary Public for Oregon
My Commission Expires: 10-08-07

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
ENVIRONMENTAL QUALITY COMMISSION

RECEIVED
DEC 12 2003
OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF

) PROPOSED ORDER
)

WILLIAM H. FERGUSON,
RESPONDENT

) OAH Case No. 107491
) Department Case No. WQ/SW-WR-02-015

HISTORY OF THE CASE

On October 15, 2002, the Department of Environmental Quality (DEQ) issued a Notice of Violation, Department Order and Assessment of Civil Penalty (Notice) citing William H. Ferguson (Ferguson) with two violations. The first alleged violation charged that Ferguson violated ORS 468B.025(1)(a) by failing to install and maintain sufficient erosion controls on property in the Laurelridge subdivision and causing the discharge of significant amounts of turbid water into Gilbert Creek, waters of the state. The second alleged violation charged that Ferguson violated ORS 468B.025(2) by failing to properly install and maintain erosion controls on Phase 3 of the Laurelridge subdivision in violation of Schedule F, Section B, Condition 1 of the National Pollution Discharge Elimination System General Storm Water Discharge Permit No. 1200-C (Permit) issued to Ferguson. DEQ assessed a civil penalty of \$5,400 based on the first alleged violation. On October 28, 2002, Ferguson filed an Answer to Notice of Violation with DEQ. At hearing, DEQ withdrew the Department Order portion of its Notice of Assessment of Civil Penalty, which required submission of a new plan, because a plan had been submitted.

DEQ referred the request to the Hearing Officer Panel (now known as the Office of Administrative Hearings) on March 28, 2003. A hearing was held on July 16 and 17, 2003, July 31, 2003 and on August 14, 2003. Administrative Law Judge (ALJ) Teresa Hogan, from the Office of Administrative Hearings, presided. Ferguson appeared with counsel, Richard Stark. William Ferguson, Daniel Ferguson, Gary Wicks, Paul Hagerman, Rich Stuart, Richard Phillips and Robert VanHeuit testified on behalf of Ferguson. DEQ was represented by Jeanine Camilleri, an authorized agency representative. Edward Ullrich, Martin Seybold, Kathleen Staley and William Meyers testified for DEQ. The record closed at the conclusion of the hearing on August 14, 2003.

**This hearing decision has been copied to:
field person & his/her mngr; Staff Folder; EQC;
DA; Business Office; Hearing Decision Notebook;
West Publishing; & LexusNexus. Let me know if
anyone else needs a copy. Deb**

ISSUES

(Violation I/ Assessment of Civil Penalty)

1. Whether Ferguson can be subject to a civil penalty in this matter when the property from which the turbid water was allegedly discharged was owned by a partnership, rather than by Ferguson individually.
2. Whether the discharge of turbid water into Gilbert Creek was caused by Ferguson's acts or omissions or by other factors.
3. Whether the R factor (level of intentionality) was correctly determined.
4. Whether the P factor (prior history) was correctly calculated in assessing the penalty.
5. Whether the violation, if it occurred, should be classified as a minimal violation or a moderate violation.
6. Whether DEQ has shown all the elements to support the civil penalty.

(Violation II)

7. Whether DEQ has shown all of the elements of the violation.

EVIDENTIARY RULINGS

DEQ Exhibits 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 14, 15, 16 and 17 were admitted without objection. DEQ Exhibits 5, 9, 18, 19, 20 and 21 were admitted over objection as to relevance. Exhibit 15 was admitted over objection based on relevance and failure to disclose in discovery. Exhibit 13 was not offered. Ferguson's Exhibits 102, 103, 104, 105, 106, 107, 109, 111, 112, 113A, 114, 114A and 115 were admitted without objection. Ferguson's Exhibits 108 and 110 were admitted over objection based on relevance. Exhibit 101 was not offered.

OTHER RULINGS

DEQ moved to amend the Notice at the second sentence of Paragraph 1 under the heading "Violations" to state, "Specifically, Respondent failed to properly install and maintain sufficient erosion controls on Phase 1 and Phase 2 of the site causing significant amounts of turbid water to leave the site and discharge to Gilbert Creek, waters of the state." The amendment adds "Phase 1" to the allegation. DEQ also moved to amend Paragraphs 4, 5 and 6 under the heading "Findings" to substitute the date November 27, 2001 for the date November 28, 2001. Both amendments were allowed.

FINDINGS OF FACT

1. Ferguson was a partner in Laurelridge Development, a general partnership, engaged in the development of the Laurelridge Subdivision (the subdivision) in Grants Pass, Oregon.

2. In November 2001, Ferguson had a two-thirds interest in the partnership. The remaining one-third interest was held by Gwen Ferguson. (Test. of Ferguson.) Gwen Ferguson was not required to contribute her time and efforts to the partnership. Ferguson was not entitled to compensation for his partnership efforts. (Ex. 109)

3. Ferguson directed and controlled erosion control and storm water discharge on the subdivision. He was the storm water discharge permittee. (Ex. 3 and 102.) He was in charge of employees and contractors carrying out such work. (Test. Ferguson, Daniel Ferguson and Stuart.) He received geologic reports on the project. (Ex. 4 and 14.) There was no evidence that anyone else exercised control over the project.

4. The subdivision was developed in three phases. In November 2001, Laurelridge Development owned all the property in Phase 3 of the subdivision and retained some, but not all, the lots in Phases 1 and 2 of the subdivision. (Test. of Ferguson; Ex. 105.)

5. There was decomposed granite soil throughout the subdivision. The subdivision contained steep slopes. Because of these conditions, there was a high risk of erosion in the area being developed. (Ex. 4 and 12.)

6. The assignment of the storm water discharge permit (Permit No. 1200C/File No. 109617) for Phase 2 of the subdivision was terminated on December 29, 2000 at Ferguson's request based on completion of permanent erosion controls. The letter terminating the permit (Ex. 102) advised that Ferguson was responsible for continuing to monitor the site and correct any erosion problems that occurred. It also advised that Ferguson could be liable for civil penalties if he did not do so. Ferguson was provided with a report dated December 15, 2000 prepared by the Galli Group (Ex. 12) outlining problems with erosion control on Phase 2 of the subdivision. (Test. Staley.)

7. The lot located at 928 Valley View was owned by Laurelridge Development in November 2001. (Test. of Seybold; Test of Ferguson; Ex. 13.)¹

8. Sometime during the late summer or early fall of 2001, Ferguson conducted additional grading operations on various lots in Phase 2 of the subdivision. The grading operation disturbed the ground and left it exposed. Runoff from the graded areas ultimately emptied into Gilbert Creek. The graded areas were hydroseeded. Ferguson believed it was likely that the hydroseeding might fail because of the time of year it was done. (Test. of Ferguson.) The soil on these lots was not otherwise stabilized, for example, through the use of mats. In fact, the hydroseeding did not result in a good grass growth to stabilize the soil. (Test. of Ferguson.)

9. Soil was also disturbed by all terrain vehicle activity on the subdivision. This activity was not conducted with permission, but had been a longstanding problem. (Test. of Daniel Ferguson.)

¹ On Exhibit 105, there is a lot marked as "sold" adjacent to a flag lot which was retained by the partnership. The flag lot is 928 Valley View on which the hay bale and weephole, depicted in Exhibit 8, photograph 14 and Exhibit 10 photograph 1, were located. The lot marked as sold on Exhibit 105 is the lot immediately to the right in Exhibit 8, photograph 14 on which a house is visible.

10. There were about 2 and one-half acres of open, unprotected soil in Phase Two of the subdivision, which were in Ferguson's control. (Test. of Staley.)

11. On February 20, 2001, a storm water discharge permit, Permit 1200-C (the permit), was issued to Ferguson for construction activity on Phase 3 of the subdivision.

12. Most of the land on Phase 3 of the subdivision drained into Blue Gulch, which contained a seasonal stream. (Test. of Ferguson; Ex. 103.)

13. Schedule F, Section B, Condition 1 of the permit requires the permittee to properly operate and maintain all facilities. Schedule A, Section 4, Paragraph(c) of the permit requires that, for filter fences, sediment shall be removed before it reaches one third of the above ground fence height. (Ex. 3.)

14. Daniel Ferguson performed erosion control maintenance on the subdivision. In general, he was the only person performing such maintenance. He was generally available for this work only in the afternoons. (Test. of Staley and Daniel Ferguson.)

15. On November 21, 2001, there were heavy rains. Edward Ullrich, a DEQ compliance engineer, Martin Seybold, Director of Field Operations for the City of Grants Pass and Kathleen Staley, an engineering technician with the City of Grants Pass visited the subdivision on that date. In general, the erosion control practices they observed at the site were of poor quality in comparison to other practices in the area. (Test. of Seybold.)

16. On November 21, 2001, at 928 Valley View, a straw bale was displaced and a substantial flow of sediment laden water flowed from a weephole onto the street. (Ex. 8, photograph 14.) The water flowing over that lot and into the storm drain system included runoff from several upslope lots. These lots were also controlled by Ferguson. (Test. of Seybold and Daniel Ferguson.) The water entered the storm drain system and discharged into Gilbert Creek. (Test. of Seybold; Ex. 103.) The erosion control devices in place at that location were overwhelmed. The problem was subsequently corrected by excavating a larger sediment pond. (Test. of Daniel Ferguson.)

17. On November 21, 2001, other sediment laden runoff entered the storm drain system from several lots on Crown Street that were in Ferguson's control. (Test. of Staley.) This runoff also discharged into Gilbert Creek.

18. On November 21, 2001 a sediment fence on Phase 3 of the subdivision that controlled runoff into Blue Gulch accumulated sediment in excess of one third of its height from the ground. (Ex. 8, photograph 3; Test of Ullrich.)

19. On November 21, 2001, substantial sediment laden runoff drained from Phase 3 into or towards Blue Gulch. (Ex. 8, photographs 4, 5, 11, 12 and 13..)

20. On November 21, 2001, Phillips and Hagerman owned two lots in Phase 2 of the subdivision totaling about one-half acre. Some of the bark that had been placed on these lots washed off and a substantial amount of soil was displaced, causing a storm drain to clog. The problem was not immediately corrected and runoff continued for several days when it rained.

The sediment laden runoff from these lots also entered Gilbert Creek. (Test. of Phillips, Hagerman and Staley.)

21. On November 27, 2003, it rained again. On that date, sediment laden runoff from 928 Valley View and the upslope lots that drained through it flowed into the storm drain system and emptied into Gilbert Creek. (Test. of Staley and Seybold.)

22. On both November 21 and November 27, 2001, the water that discharged into Gilbert Creek from the drainpipe serving the subdivision was heavily sediment laden. (Test. of Ullrich, Seybold and Staley; Ex. 8, photograph 16 and Ex. 10, photograph 6.) On both dates, the water upstream of the discharge point was relatively clear and the water downstream was opaque and brown colored. (Test. of Ullrich, Seybold and Staley; Ex. 8, photographs 17 and 18 and Ex. 10, photographs 8 and 9.)² On both dates, runoff from property under Ferguson's control contributed substantially to the sediment in the water discharged from the storm drain pipe into Gilbert Creek and caused an increase in turbidity in the water of Gilbert Creek. (Test. of Ullrich, Seybold and Staley; Ex. 8, photographs 17 and 18 and Ex. 10, photographs 8 and 9.)

23. Gilbert Creek is a continuously running stream in the state of Oregon and is "waters of the state." (Test. of Meyers)

24. Gilbert Creek is a habitat for steelhead and coho salmon. (Test. of Meyers.)

25. The increase in turbidity in Gilbert Creek caused by the discharge from the storm drain system serving the subdivision tended to have a detrimental impact on the fish habitat provided by Gilbert Creek. (Test. of Meyers.)

26. No measurements of turbidity measured in NTU's were taken on November 21 or November 27, 2001 either of water in Gilbert Creek or of the subdivision runoff. (Test. of Ullrich.)

27. Ferguson failed to use reasonable measures to prevent sediment from running off into Gilbert Creek in that he failed to:

- 1) use available means to stabilize soil that had been disturbed;
- 2) prevent sediment from running off exposed soil by using adequate sedimentation ponding or other devices and properly maintaining existing devices such as the hay bale at 928 Valley View; and
- 3) employ sufficient staff to maintain erosion control during heavy rainfall.

28. Ferguson has a prior history of two Class II violations and three Class I violations in connection with asbestos violations in Case Number AQAB-WR-96-315 and one Class II violation in connection with open burning in Case Number AQ/OB-WR-99-234. (Ex. 1 and 2.)

² Ferguson argued that Exhibit 8, photograph 17 and Exhibit 10, photograph 8 are the same photograph. They appear very much the same and there is a possibility that one of the photographs was mislabeled as to the date. The finding that the difference in water quality existed on both of the dates in question is based not only on the photographs, but also on the testimony of Ullrich, Seybold and Staley as to what they actually saw on those dates.

CONCLUSIONS OF LAW

1. Ferguson is personally liable for the violation of ORS 496B.025(1)(a).
2. Ferguson's acts or omissions caused the discharge of turbid water into Gilbert Creek and increased the turbidity of Gilbert Creek in violation of ORS 486B.025(1)(a).
3. The R factor under OAR 340-012-0045 is correctly calculated as 2 based on negligence as defined in OAR 340-012-0030(11).
4. The P factor under OAR 340-012-0045 is correctly calculated at 6.
5. The violation is properly classified as moderate under 340-012-0045(1)(a)(B) because the evidence establishes that the discharge of turbid water into Gilbert Creek could have had an adverse effect on the environment.
6. The proposed civil penalty in the amount of \$5,400 for violation of ORS 486B.025(1)(a) is valid.
7. Ferguson violated ORS 468B.025(2) by failing to meet the requirements of Schedule F, Section B, Condition 1 of the permit.

OPINION

1. Ferguson is personally liable for the violation of ORS 486B.025(1)(a).

Ferguson argued that he was not the proper party to this proceeding because, at the time of the alleged violations, a partnership was the owner of the property from which the turbid water was discharged. ORS 486B.025(1)(a) prohibits any person from causing pollution to waters of the state. OAR 340-012-0055(1)(b) provides that it is a Class One violation to cause pollution of waters of the state. The inquiry is whether Ferguson caused pollution to waters of the state. The entire record demonstrated that Ferguson controlled the storm water discharge and erosion control practices on the property in question. He personally was the storm water discharge permittee. He directed employees and contractors with respect to the work to be performed. He received the geological and engineering reports with respect to the subdivision. He was the person who made the decisions that resulted in inadequate containment of sediment laden water on the dates in question.

2. Ferguson's acts and omissions caused pollution of Gilbert Creek.

ORS 468B.005(3) provides that:

"Pollution" or "water pollution" means such alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself or in connection with any other substance, create a public nuisance or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to

domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof.

This is a broad definition. It requires a demonstration that the act caused an alteration in a physical characteristic, which includes turbidity, that "tends" to render the water detrimental to fish habitat. It is not necessary that a particular numerical value be assigned to the alteration. There was sufficient evidence to show that the runoff from property in Ferguson's control caused pollution. Gilbert Creek is a fish habitat. Small increases in turbidity can adversely affect fish habitat.

The runoff from the property controlled by Ferguson, in particular from 928 Valley View, was markedly discolored and significant in volume. The water dumped into Gilbert Creek was very discolored and caused an obvious change in the physical characteristics of the stream. Although runoff from 928 Valley View was not the only source of turbid water running into Gilbert Creek, it is reasonable to conclude that it was a significant source because Ferguson controlled a significantly larger portion of the land with disturbed or bare soil than did the other potential polluters, Phillips and Hagerman. The Department met its burden of showing that Ferguson is subject to a civil penalty for pollution of waters of the state.

3. Ferguson did not take reasonable measures to prevent excessive sediment laden runoff during heavy rainfall and, therefore, the R factor is properly calculated as 2 for "negligence" rather than 0 for "accident."

OAR 340-012-0030(11) defines negligence as the failure to take reasonable care to avoid a foreseeable risk of committing an act or omission constituting a violation. Ferguson undertook efforts to prevent erosion on his property. He completed permanent erosion controls on Phase 2 of the subdivision and received a letter terminating his storm water permit for that phase. However, decomposed granite soil is particularly subject to erosion. The subdivision contained steep slopes, which increased the risk of soil displacement. Winter rainfall was a predictable, foreseeable event. Soils had been disturbed by grading and ATV traffic. Water was routed off upper lots through the lot at 928 Valley View. It was foreseeable that extensive efforts at erosion control might be necessary to filter sediment from the runoff.

Ferguson did not use all available and reasonable means to prevent excessive runoff. Although he hydroseeded, he did not use mats even though he foresaw that hydroseeding might not be successful. Ferguson did not employ enough staff to effectively maintain erosion controls during heavy rainfall. Although Daniel Ferguson was employed to do that, his availability was limited to the afternoons. The project was large and maintenance demands were substantial. Ferguson did not make an adequate effort to assure that these demands would be met. In general, the erosion control practices were among the poorer practices in the area.

4. The P factor was correctly calculated at 6.

Ferguson has three prior Class I violations. In addition, he has three prior Class II violations. Two Class II violations are a Class I equivalent. OAR 340-012-0030(1). Ferguson had four Class I or Class I equivalents which are assessed a value of 5 under OAR 340-012-0045(1)(c)(A)(vi). The additional Class II violation has a value of 1 under 340-012-0045(1)(c)(A)(ii). The total is 6. The calculation of the P factor at 6 is proper.

5. The Department met its burden of showing that Ferguson's violation should be classified as a "moderate" as opposed to a "minimal" violation.

OAR 340-012-0045(1)(a)(B) provides:

The magnitude of a violation is determined by first consulting the selected magnitude categories in OAR 340-012-0090. In the absence of a selected magnitude, the magnitude shall be moderate unless:***

(ii) If the Department finds that the violation had no potential for or actual adverse impact on the environment, nor posed any threat to public health, or other environmental receptors * * *

OAR 340-012-0090 sets out specific standards measured in NTU's for whether an increase in turbidity is of minimal, moderate or major magnitude if the allegation is a violation of numeric water quality standards. In this case, the allegation is pollution in violation of ORS 468B.025(1)(a) and, therefore, the general standard of OAR 340-012-0045(1)(a)(B) applies rather than the specific standard under OAR 340-012-0090.

A finding of minimal magnitude would not be proper. The evidence established that the violation had a potential for adverse impact on the environment. Small increases in turbidity, not easily seen, can adversely affect fish habitat. Ferguson argued that the burden of proof could not be met without a measurement of turbidity in NTU's. If the allegation had been a violation of a numeric water quality standard, Ferguson's argument would have considerable weight. DEQ's allegation was simply that the discharge tended to adversely affect fish habitat. The evidence demonstrated this fact. Aside from Meyer's testimony, the upstream and downstream photographs of Gilbert Creek (Ex. 8, photographs 17 and 18) show a dramatic deterioration of water quality. Common sense suggests that such an increase in sediment and decrease in visibility would adversely affect aquatic life. The moderate magnitude determination was correct.

6. The proper civil penalty is \$5,400.

The formula the civil penalty is $BP + [(0.1 \times BP) \times (P + H + O + R + C)] = EB$. OAR 340-012-0045. The BP (base penalty) factor was correctly calculated as \$3000 under the matrix in OAR 340-012-0042(1)(b)(B) because this was a moderate magnitude, Class I violation. The P (prior history) factor was correctly set at 6. The R factor (intentionality) was correctly set at 2. The remaining factors were not contested. The application of the formula yields a civil penalty of \$5,400.

7. Ferguson violated Schedule F, Section B, Condition 1 of the permit by failing to maintain erosion control devices.

Ferguson allowed sediment to overwhelm sediment control fences on Phase 3 of the subdivision. The grades used in that phase were in excess of those recommended. There was significant sediment laden runoff from Phase three of the subdivision. The permit required Ferguson to maintain erosion control devices to certain standards and this was not done. In particular, sediment accumulated behind a sediment fence in excess of

one third of its above ground height. A finding that Ferguson violated conditions of the storm water discharge permit is warranted.

PROPOSED ORDER

I propose that the Department issue the following order:

Respondent is subject to a civil penalty in the amount of \$5,400.

Randolph Fraser, for

Teresa Hogan

Administrative Law Judge

Office of Administrative Hearings

ISSUANCE AND MAILING DATE:

December 10, 2003

REVIEW

If you are not satisfied with this decision, you have a right to petition the Environmental Quality Commission for review. To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date of service of this Order, as provided in Oregon Administrative Rule (OAR) 340-011-0132(1) and (2). Service is defined in OAR 340-011-0097, as the date the Order is mailed to you, not the date you receive it. The Petition for Review must be filed with:

Environmental Quality Commission
c/o DEQ-Assistant to the Director
811 SW 6th Avenue
Portland OR 97204

Within 30 days of filing the Petition, you must also file exceptions and a brief as provided in OAR 340-011-0132(3).

CERTIFICATE OF SERVICE

I certify that on December 10, 2003, I served the attached Proposed Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

WILLIAM H. FERGUSON
5200 PIONEER RD
MEDFORD OR 97501

**BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 6385**

RICHARD STARK
ATTORNEY AT LAW
201 WEST MAIN ST STE 1B
MEDFORD OR 97501

**BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 6378**

JENINE CAMILLERI
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL



Lucy Garcia, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division



Oregon

Theodore R. Kulongoski, Governor

Attachment BB

HEARING OFFICER PANEL

1905 Lana Avenue NE

Salem OR 97314

Telephone: (503) 945-5547

FAX: (503) 945-5304

TTY: (503) 945-5001

NOTICE OF HEARING

Date Mailed: May 9, 2003

WILLIAM H FERGUSON
5200 PIONEER RD
MEDFORD OR 97501

JENINE CAMILLERI
DEPT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS AND CERTIFIED MAIL. CERTIFIED MAIL RECEIPT #7002 2410 0001 7406 1948

RE: *In the Matter of William Ferguson*
For the Oregon Department of Environmental Quality
Hearing Officer Panel Case No. 107491
Agency Case No. WQ/SW-WR-02-015

A hearing has been set in the above-entitled matter before the Hearing Officer Panel.

Hearing Date: June 5, 2003 Hearing Time: 9:00 a.m.

**Location: DEQ Western Region Medford Office
201 W Main Street Suite 2-D
Medford OR 97501**

The Hearing Officer Panel is an impartial tribunal, and is independent of the agency for whom the hearing is held. Your case has been assigned to Administrative Law Judge James A. Dreyer, an employee of the Hearing Officer Panel.

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired or need a language interpreter at the hearing, immediately notify the Hearing Officer Panel at (503) 945-5547 or TDD at (503) 945-5001. The Hearing Officer Panel can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

Please notify the Hearing Officer Panel at (503) 945-5547 immediately if you change your address or telephone number at any time prior to a final decision in this matter.

RECEIVED
MAY 12 2003

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Under ORS 183.413(2), you must be informed of the following:

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.
2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.
3. Hearings officer. The person presiding at the hearing is known as the hearings officer. The hearings officer is an employee of the Central Hearing Officer Panel under contract with the Environmental Quality Commission. The hearings officer is not an employee, officer or representative of the agency.
4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the hearing officer that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.
5. Address change or change of representative. It is your responsibility to notify DEQ and the hearings officer of any change in your address or a withdrawal or change of your representative.
6. Interpreters. If you have a disability or do not speak English, the hearings officer will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the hearings officer a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.
7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the hearings officer will have the opportunity to ask questions of all witnesses. DEQ or the hearings officer will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.
8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in

support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ and the hearings officer. DEQ or the hearings officer may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the hearings officer take "official notice" of any fact and you will be given an opportunity to contest any such facts.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

12. Continuances. There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. Please make sure you have all your evidence ready for the hearing. However, if you can show that the record should remain open for additional evidence, the hearings officer may grant you additional time to submit such evidence.

13. Record. A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This will be done by tape recorder. This tape and any exhibits received in the record will be the whole record of the hearing and the only evidence considered by the hearings officer. A copy of the tape is available

upon payment of a minimal amount, as established by DEQ. A transcript of the record will not normally be prepared, unless there is an appeal to the Court of Appeals.

14. Proposed and Final Order. The hearing officer has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF
WILLIAM H. FERGUSON

) ANSWER, AND NOTICE
) OF CONTEST OF NOTICE
) OF VIOLATION
) DEPARTMENT ORDER
) AND ASSESSMENT OF
) CIVIL PENALTY No.
) WQ/SW-WR-02-015
) JOSEPHINE COUNTY

Respondent

By way of response, request for hearing and answer, the respondent responds to allegations of the Department of Environmental Quality's notice as follows:

I.

Denies each and every allegation set forth therein except as specifically admitted or set forth herein below.

II.

Admits that the DEQ issued permits to respondent for construction of phase I, II and III of the Laurelridge Subdivision in Grants Pass, Oregon.

III.

Admits that the notice issued in paragraph II, 7 was for phase III.

RECEIVED
2002


IV.

Alleges that respondent provided DEQ with a supplemental erosion control plan prepared by Thomas Fererro, Geo Technical Geologist, of Ashland, Oregon shortly after January 1, 2002 as part of it's requested report package.

V.

That DEQ previously cited respondent for the violations now again set forth which violations were dismissed by the DEQ the evening before the scheduled hearing date as after respondent had fully prepared and incurred substantial attorney fees, expenses and inconvenience.

Respondent requested a hearing before an independent qualified hearing officer, that DEQ requests be denied and the notice of violations against respondent be again dismissed and that respondent recover his reasonable costs and attorney's fees herein and hereinafter incurred.


William H. Ferguson
Respondent

10-28-02
Date



Oregon

John A. Kitzhaber, M.D., Governor

HEARING OFFICER PANEL

1905 Lana Avenue NE
Salem OR 97314
Telephone: (503) 945-7960
FAX: (503) 945-5304
TTY: (503) 945-5001

NOTICE OF HEARING

Date Mailed: June 27, 2002

TO: WILLIAM FERGUSON
5200 PIONEER RD
MEDFORD OR 97501

JENINE CAMILLERI
OFFICE OF COMPLIANCE AND
ENFORCEMENT
811 SW SIXTH AVENUE
PORTLAND OR 97204

RE: *In the Matter of William Ferguson*
For the Department of Environmental Quality
Hearing Officer Panel Case No. 101195
Agency Case No. WQ/SW-WR-02-015

July 17 AM 4:00 pm APR
Said no hearing
Call from 773-9415

A hearing has been set in the above-entitled matter before the Hearing Officer Panel.

Hearing Date: July 18, 2002 **Hearing Time:** 10:00 AM
Location: Medford DEQ Office
3030 Biddle Road
Medford OR 97504

The Hearing Officer Panel is an impartial tribunal, and is independent of the agency for whom the hearing is held. Your case has been assigned to Administrative Law Judge Laurence S. Smith, an employee of the Hearing Officer Panel.

The Department of Environmental Quality will be represented by an assistant attorney general.

A written request for a reset of the hearing must be submitted at least 7 days prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired or need a language interpreter at the hearing, immediately notify the Hearing Officer Panel at (503) 945-5547 or TDD at (503) 945-5001. The Hearing Officer Panel can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

Please notify the Hearing Officer Panel at (503) 945-5547 immediately if you change your address or telephone number at any time prior to a final decision in this matter.

CERTIFIED MAIL RECEIPT #7099 3400 0015 7214 4093

EXHIBIT A (1)



Oregon

John A. Kitzhaber, M.D., Governor

HEARING OFFICER PANEL
1905 Lana Avenue NE
Salem OR 97314
Telephone: (503) 945-7960
FAX: (503) 945-5304
TTY: (503) 945-5001

AMENDED NOTICE OF HEARING

Date Mailed: July 11, 2002

TO: WILLIAM FERGUSON
5200 PIONEER RD
MEDFORD OR 97501

JENINE CAMILLERI
OFFICE OF COMPLIANCE AND
ENFORCEMENT
811 SW SIXTH AVENUE
PORTLAND OR 97204

RE: In the Matter of William Ferguson
For the Department of Environmental Quality
Hearing Officer Panel Case No. 101195
Agency Case No. WQ/SW-WR-02-015

503 945-5545

A hearing has been set in the above-entitled matter before the Hearing Officer Panel.

Hearing Date: July 18, 2002 **Hearing Time:** 10:00 AM

Location: Medford DEQ Office
201 W Main Street, Suite 2D
Medford OR 97504

945-5547

*AND REORDER
SCHEDULE HEARING*

The Hearing Officer Panel is an impartial tribunal, and is independent of the agency for whom the hearing is held. Your case has been reassigned to Administrative Law Judge Teresa Hogan, an employee of the Hearing Officer Panel.

The Department of Environmental Quality will be represented by an assistant attorney general.

A written request for a reset of the hearing must be submitted at least 7 days prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired or need a language interpreter at the hearing, immediately notify the Hearing Officer Panel at (503) 945-5547 or TDD at (503) 945-5001. The Hearing Officer Panel can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

Please notify the Hearing Officer Panel at (503) 945-5547 immediately if you change your address or telephone number at any time prior to a final decision in this matter.

CERTIFIED MAIL RECEIPT #7099 3400 0015 7214 3836

SX A *(2)*



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TTY (503) 229-6993

July 17, 2002

Hearing Officer Panel
C/o Judge Theresa Hogan
1905 Lana Avenue NE
Salem, OR 97314

Re: William H. Ferguson
Contested Case Hearing
WQ/SW-WR-02-015

Post-It® Fax Note	7671	Date	7/17/02	# of pages	
To	William Ferguson	From	Jenine Camilleri		
Co./Dept.		Co.	DEQ		
Phone #		Phone #	503-229-6775		
Fax	541-772-4757	Fax #			

Dear Judge Hogan:

The Department of Environmental Quality (Department) is withdrawing the Notice of Civil Penalty Assessment in the above case and will be issuing a new normal enforcement action in the future. This case is scheduled for a contested case hearing on July 18, 2001 in Medford, Oregon. The Department is canceling that hearing.

If you have any questions, please call me at (503) 229-6775.

Sincerely,

Jenine Camilleri
Environmental Law Specialist
Office of Compliance and Enforcement

Cc: William H. Ferguson, 5200 Pioneer Road, Medford, Oregon 97501

FX A

(3)



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6993

May 23, 2002

CERTIFIED MAIL 7001 1140 0002 3546 4358

William H. Ferguson
5200 Pioneer Road
Medford, Oregon 97501

Re: Notice of Assessment of Civil Penalty
No. WQ/SW-WR-02-015
Josephine County

On October 13, 2000, you registered with the Department of Environmental Quality (DEQ or Department) for a National Pollution Discharge Elimination System General Storm Water Discharge Permit No. 1200-C (Permit) for Phase 3 of the Laurelridge Subdivision construction site located in Grants Pass, Oregon. You also submitted to the Department an Erosion and Sediment Control Plan (Plan). The Permit requires you to develop and implement that Plan to prevent significant amounts of sediment from leaving the construction site and discharging to surface waters.

On November 21, 2001, representatives from the Department and the City of Grants Pass conducted an inspection of the site after receiving citizen complaints about erosion and turbid water discharges to Gilbert Creek. During the inspection, the DEQ representative observed that you allowed unfiltered turbid water to leave the site and discharge to Gilbert Creek. The discharge occurred because you failed to properly install and maintain the erosion controls on the site according to your Plan. Large amounts of sediment accumulated behind the site fences. The straw bales were not properly staked into the ground. Large disturbed areas were not seeded or mulched and extensive erosion gullies had developed in those areas. The storm drains were not properly protected with straw bales and unfiltered turbid water was entering the storm drains. Your failure to properly install and maintain these erosion controls caused unfiltered turbid water to leave the site and discharge to Gilbert Creek.

Turbidity in the water column and deposition of sediments can damage water quality and may harm aquatic life by covering up food sources, abrading fish gills, and smothering fish eggs and invertebrate organisms living in Gilbert Creek.

You are liable for a civil penalty assessment because you failed to comply with the Permit and prevent turbid discharges to surface waters of the state. The enclosed Notice assesses a civil penalty of \$1,800. The amount of the penalty is determined by the procedures set forth in Oregon Administrative Rule (OAR) 340-012-0045. The Department's findings and civil penalty determination are attached to the Notice as Exhibit 1. Copies of referenced rules are enclosed.

S R A (64)

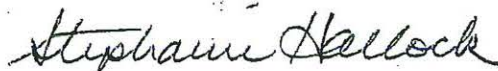
Appeal procedures are outlined in Section V of the Notice. If you fail within twenty (20) days either to pay or to appeal the penalty, a Default Order will be entered against you, and the Department will consider the penalty due and owing.

If you wish to discuss this matter, or believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, a request for an informal discussion may be attached to your appeal. A request to discuss this matter with the Department will not waive your right to a contested case hearing.

The Department looks forward to your cooperation in complying with Oregon's environmental laws in the future. However, if any additional violations occur, you may be assessed additional civil penalties.

If you have any questions about this action, please contact Jenine Camilleri with the Department's Office of Compliance and Enforcement in Portland at 229-6775, toll-free at 1-800-452-4011, extension 6775.

Sincerely,



Stephanie Hallock
Director

(e:\winword\letter\ferguson.ltr.doc)

Enclosures

cc: Andy Ullrich, Water Quality, Western Region, Medford Office, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Josephine County District Attorney
City of Grants Pass

ER A (5)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

18TH
10 AM

IN THE MATTER OF
WILLIAM H. FERGUSON

RESPONDENT'S ANSWER
AND REQUEST FOR HEARING
No. WQ/SW-WR-02-015
JOSEPHINE COUNTY

Respondent.

CAN: 19R1
Dan Ferguson
GARY WICKS

Respondent admits, denies and alleges as follows:

I. ADMITS

Paragraphs I and II.

II. DENIES

Each and every allegation of paragraphs III and IV.

III. ALLEGES

701 W MAIN
SUITE 2D

All waters leaving the site were filtered and no significant amount of unfiltered turbid water discharged into Gibert Creek. All areas subject to erosion were properly seeded and/or maintained to prevent any unfiltered water from entering Gilbert Creek.

Pursuant to paragraph V notice and request for hearing is nearby alleged.

Respondent requested the assessment pf civil penalty be dismissed and that respondent recover his reasonable costs and attorney's fees in defense hereof.

5-29-02
Date

[Signature]
William H. Ferguson, Respondent

RECEIVED
JUN 02 2002

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
2 OF THE STATE OF OREGON

3 IN THE MATTER OF:
4 WILLIAM H. FERGUSON,

) NOTICE OF ASSESSMENT OF
) CIVIL PENALTY
) No. WQ/SW-WR-02-015
) JOSEPHINE COUNTY

5
6 Respondent.
7)

8 I. AUTHORITY

9 This Notice of Assessment of Civil Penalty (Notice) is issued to the Respondent, William
10 H. Ferguson, by the Department of Environmental Quality (Department) pursuant to Oregon
11 Revised Statutes (ORS) 468.100; ORS Chapter 183; and Oregon Administrative Rules (OAR)
12 Chapter 340, Divisions 11 and 12.

13 II. PERMIT

14 On October 13, 2000, Respondent registered for a National Pollution Discharge
15 Elimination System General Storm Water Discharge Permit No. 1200-C (Permit) and submitted
16 to the Department an Erosion and Sediment Control Plan (Plan), as required by Schedule A,
17 condition 2 of the Permit, for Phase 3 of the Laurel Ridge construction site located on Morgan
18 Lane, Valley View and Starlite Place in Grants Pass, Oregon (Property).

19 III. VIOLATION

20 On or around March 3, 2001, Respondent violated ORS 468B.025(2) by violating
21 Schedule A, conditions 1(b) and (c) of the Permit. Specifically, Respondent failed to implement his
22 Plan to prevent the discharge of significant amounts of sediment to surface waters. Respondent
23 failed to properly install and maintain erosion controls causing significant amounts of turbid water
24 that was not filtered or settled to leave the Property and discharge to Gilbert Creek, waters of the
25 state. Respondent disturbed large areas on the Property without providing seeding or mulching
26 causing erosion rills and channels to develop on the Property. This is a Class II violation pursuant
27 to OAR 340-012-0055(2)(f).

1 IV. ASSESSMENT OF CIVIL PENALTIES

2 The Director imposes a civil penalty of \$1,800 for the violation cited in Section III. The
3 findings and determination of Respondent's civil penalty pursuant to OAR 340-012-0045 are
4 attached and incorporated as Exhibit No 1.

5 V. OPPORTUNITY FOR CONTESTED CASE HEARING

6 This Notice shall become final unless Respondent requests, in writing, a hearing before
7 the Environmental Quality Commission. **The request must be received by the Department**
8 **within twenty (20) days from the date Respondent receives this Notice, and must be**
9 **accompanied by a written "Answer" to the allegations contained in this Notice.**

10 In the written Answer, Respondent shall admit or deny each allegation of fact contained
11 in this notice, and shall affirmatively allege any and all affirmative claims or defenses to
12 violations and assessment of any civil penalty that Respondent may have and the reasoning in
13 support thereof. Except for good cause shown:

- 14 1. Factual matters not controverted shall be presumed admitted;
- 15 2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim
16 or defense;
- 17 3. New matters alleged in the Answer shall be presumed to be denied unless
18 admitted in subsequent pleading or stipulation by the Department or Commission.

19 Send the request for hearing and Answer to: **Deborah Nesbit, Department of**
20 **Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Following receipt
21 of a request for hearing and an Answer, Respondent will be notified of the date, time and place
22 of the hearing.

23 Failure to file a timely request for hearing and Answer may result in the entry of a
24 Default Order for the relief sought in this Notice.

25 Failure to appear at a scheduled hearing or meet a required deadline may result in a
26 dismissal of the request for hearing and also an entry of a Default Order.

27 ///

1 The Department's case file at the time the Notice was issued may serve as the record for
2 purposes of entering the Default Order.

3 VI. OPPORTUNITY FOR INFORMAL DISCUSSION

4 In addition to filing a request for a contested case hearing, Respondent may also request
5 an informal discussion with the Department by attaching a written request to the hearing request
6 and Answer.

7 VII. PAYMENT OF CIVIL PENALTY

8 The civil penalty is due and payable ten (10) days after the Order imposing the civil
9 penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before
10 that time. Respondent's check or money order in the amount of \$1,800 should be made payable
11 to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of**
12 **Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

13
14
15 5-23-02
Date

Stephanie Hallock
Stephanie Hallock, Director

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Failure to comply with the conditions of a waste discharge permit in violation of Oregon Revised Statute ORS 468B.025(2).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0055(2)(g).

MAGNITUDE: The violation is moderate because there is no selected magnitude for this violation, and pursuant to OAR 340-012-0045(1)(a)(B), there is insufficient information to make a finding to increase or decrease the magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:
$$BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$$

"BP" is the base penalty, which is \$1,000 for a Class II, moderate magnitude violation in the matrix listed in OAR 340-12-042(1)(b)(B).

"P" is Respondent's prior significant action(s) and receives a value of 6 because Respondent has the following prior significant actions: three Class I violations and two Class II violations in No. AQ/AB-WR-96-315 issued on December 6, 1996, and one Class II violation in No. AQ/OB-WR-99-234 issued on July 16, 2000.

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of -2 as Respondent took all feasible steps to correct the majority of all prior significant actions.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 as the violation existed for more than one day.

"R" is the cause of the violation and receives a value of 2 as Respondent's actions were negligent. Respondent's NPDES Storm Water Permit expressly requires that Respondent implement an Erosion and Sediment Control Plan (Plan) to prevent the discharge of significant amounts of sediments to surface waters. Respondent submitted a Plan listing the steps Respondent would take to control the sediment runoff. Respondent did not comply with his Plan to properly install and maintain erosion controls on the property and allowed unfiltered turbid water to discharge to surface waters. Respondent knew or should have known to implement the Plan and properly install and maintain erosion controls on the property, and failed to take reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as there is insufficient information to make a finding.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance pursuant to OAR 340-012-0045(1)(c)(F)(i) and receives a value of \$0, as there is insufficient information to make a finding.

PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} &= \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{R} + \text{C})] + \text{EB} \\ &= \$1,000 + [(0.1 \times \$1,000) \times (6 - 2 + 2 + 2 + 0)] + \$0 \\ &= \$1,000 + [(\$100 \times 8)] + \$0 \\ &= \$1,000 + \$800 + \$0 \\ &= \$1,800 \end{aligned}$$



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Western Region
201 W Main, Suite 2-D
Medford, OR 97501
(541) 776-6010
FAX (541) 776-6262

December 14, 2001

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501

Re: **NOTICE OF NONCOMPLIANCE**
WRM-01-138
WQ-Josephine County
Project: Laurelridge Subdivision
File 109617
Site Location: Morgan Lane/Valley View/Starlite
Place, Grants Pass
***Failure to Properly Install and Maintain Erosion
Control Measures***
***Discharge of turbid water from site into waters of
the state***

Dear Mr. Ferguson:

Background

The Department of Environmental Quality conducted an inspection of the Laurelridge Subdivision project on November 21st, 2001. This inspection was prompted by citizen and city complaints regarding excessive erosion occurring at the site.

Observations

During the site visit, the following violations were noted:

- **Discharge of turbid water from the site was observed.** It was actively raining at the time of the site visit, and multiple occurrences of turbid storm water flowing off the site and/or entering the City's storm drain system were noted. In addition, the storm drain discharging into Gilbert Creek from your project had extremely turbid water, and the creek was significantly more turbid downstream of the discharge than upstream.
- **Proper maintenance had not been done on many of the erosion control measures.** Some of the erosion control measures had excessive silt accumulated behind them, and were no longer providing effective control.

(over)

SK A (12)

William H. Ferguson – Laurelridge Subdivision

December 14, 2001

Page 2 of 3

Developing erosion gulleys were not filled. Straw bales that had shifted out of position were not restaked. Some areas of seeding had poor germination, and these areas had not been re-seeded.

- **Some erosion control measures were improperly installed.** Some of the straw bales were not properly staked and keyed into the ground. This allowed the bales to shift out of the way of the runoff, so that the bales were no longer filtering the water. In other locations, the filter fabric had not been properly wrapped around the straw bales, leading to gaps that allowed turbid water to escape.
- **Improper selection of erosion controls.** In a number of locations, straw bales had been placed in the street gutters to act as sediment traps. Turbid water was observed flowing around and under the bales, and was not being filtered or otherwise treated.

There was also a large area of disturbed ground along the extension of Starlite Place that had not been seeded, mulched or otherwise stabilised. Significant erosion gulleys were developing in this area, and the existing controls were not enough to prevent sediment-containing storm water from flowing into the street and then into the storm drain system.

Violations

As a result of the above documented violations, we are referring your file to the Department's Enforcement Section with a recommendation to initiate a formal enforcement action. Discharging wastewater into waters of the state without obtaining a permit is a Class I violation, and may result in a civil penalty for each day of violation.

Actions Required

To correct the above violations, you are required to do the following:

1. **Properly maintain all erosion control measures.** This includes such items as removing accumulated sediment from behind straw bale barriers. It also includes repairing broken or failed barriers, and reseeded areas that have not properly germinated.
2. **Update and implement a new erosion control plan.** Because of the number of problems noted at the site, you must develop and submit a new erosion control plan to the Department. It is recommended that you engage the services of an erosion control professional to help you

develop and implement the plan. The plan must include a time-line of when the various control measures will be implemented.

Your updated plan must be submitted by 11:59 AM, December 31st, 2001.
5200 Pioneer Road, Medford, OR 97501

PARK PLACE BUILDING

SK A (13)

William H. Ferguson – Laurelridge Subdivision

December 14, 2001

Page 3 of 3

3. **Designate an inspector for all erosion control measures.** Under the conditions of the NPDES 1200-C permit, all erosion control measures must be inspected weekly, and written records be kept on-site for Department review.

Your inspection records from January 2001 to date must be submitted by December 31st, 2001.

4. **Certify that any workers installing erosion control measures have been trained in the proper installation techniques.** This includes such items as properly staking straw bales into the ground, and the proper installation of any other needed controls.

This certification must be submitted along with your updated erosion control plan by December 31st, 2001.

If you have any questions about this notice or the permit requirements please contact me at (541) 776-6010, extension 246.

Sincerely,

E. Andrew Ullrich

E. Andrew Ullrich
Storm Water Specialist
Water Quality Division

EAU

cc: Enforcement Section, HQ
Martin Seybold
City of Grants Pass
101 NW "A" Street
Grants Pass, OR 97526

File

winword\1200-C\non01-n-12c-Laurelridge.doc

*FINING
LAUREL RIDGE (LAUREL RIDGE)*

503-229-6775

5200 Pioneer Road, Medford, OR 97501
503-772-9545
PARK PLACE BUILDING

2 x 1 (14)



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TTY (503) 229-6993

October 15, 2002

CERTIFIED MAIL 7001 1140 0002 3546 4846

William H. Ferguson
5200 Pioneer Road
Medford, Oregon 97501

Re: Notice of Violation, Department Order, and Assessment of Civil Penalty
No. WQ/SW-WR-02-015
Josephine County

Beginning in September 1997 you began performing construction activities at the Laurelridge construction site located on Morgan Lane, Valley View, and Starlight Place Drive in Grants Pass, Oregon (site). You applied with the Department of Environmental Quality (Department or DEQ) for coverage under the National Pollution Discharge Elimination System General Storm Water Discharge Permit No. 1200-C (Permit) for Phase 1, Phase 2, and Phase 3 of the site.

As required by the Permit, you also submitted to the Department an Erosion and Sediment Control Plan (Plan) for the site. The Permit requires you to develop and implement a Plan to prevent significant amounts of sediment from leaving the site and discharging to surface waters. Because of the steep slopes and highly erosive soils, the Department informed you in writing that it was concerned about potential erosion problems and that you needed to ensure that the erosion controls were properly installed and maintained throughout construction.

In December 2000, you completed construction on Phase 1 and Phase 2 of the site. As you requested, the Department cancelled your permit assignment for these two phases. The Permit continued to cover construction activities on Phase 3 of the site.

In November 2001, the Department received citizen complaints of turbid water leaving the site and discharging to Gilbert Creek, waters of the state. On November 21 and 28, 2001, representatives from the Department and the City of Grants Pass (City) conducted inspections of the site. During the inspections, they observed that you failed to properly install and maintain the erosion controls on Phase 2 and Phase 3 of the site.

On Phase 2 the inspectors found that you performed additional grading without reapplying for coverage under the Permit. In addition, you failed to install sufficient erosion controls in this area to prevent turbid water from leaving the site. Significant amounts of turbid water were entering the storm drains and discharging to Gilbert Creek. Downstream from this discharge point Gilbert Creek was very opaque.

Turbidity in the water column and deposition of sediments can damage water quality and may harm aquatic life by covering up food sources, abrading fish gills, and smothering fish eggs and invertebrate organisms living in Gilbert Creek.

On Phase 3 the inspectors found you failed to properly install and maintain sufficient erosion controls according to your Plan. Large disturbed areas were not adequately seeded or mulched and extensive erosion gullies had developed in those areas. Straw bales were not staked into the ground so turbid water was running under the bales and entering the storm drains. The turbid water then flowed down a corrugated pipe and discharged to the west side of the site. Large amounts of sediment had accumulated behind the silt fences installed at the end of the pipe. These fences were not adequately maintained and failed to capture the sediment and turbid water.

Your Plan for Phase 3 only covered construction performed during the dry months of late spring, summer, and early fall. Because this Plan did not consider work you intended to conduct during the winter months, including November, the Department requested in a Notice of Noncompliance that you submit a new Plan for Phase 3 to the Department by December 31, 2001. You did not develop and submit the new Plan by that deadline. The enclosed Notice includes a Department Order directing you within twenty (20) days of receiving the Order, to submit a new Plan for Phase 3 to the Department.

You are liable for a civil penalty assessment because your failure to properly install and maintain the erosion controls on the construction site caused pollution to waters of the state. The enclosed Notice assesses a civil penalty of \$5,400. The amount of the penalty is determined by the procedures set forth in Oregon Administrative Rule (OAR) 340-012-0045. The Department's findings and civil penalty determination are attached to the Notice as Exhibit 1.

Appeal procedures are outlined in Section VI of the Notice. If you fail within twenty (20) days either to pay or to appeal the penalty, a Default Order will be entered against you, and the Department will consider the penalty due and owing.

If you wish to discuss this matter, or believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, a request for an informal discussion may be attached to your appeal. A request to discuss this matter with the Department will not waive your right to a contested case hearing.

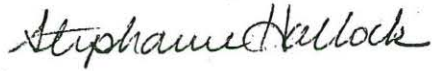
The Department looks forward to your cooperation in complying with Oregon's environmental laws in the future. However, if any additional violations occur, you may be assessed additional civil penalties.

Copies of referenced rules are enclosed. Also enclosed is a copy of the Department's internal management directive regarding civil penalty mitigation for Supplemental Environmental Projects (SEPs). If you are interested in having a portion of the civil penalty fund an SEP, please review the enclosed SEP directive. Exceptional pollution prevention could result in partial penalty mitigation.

Bill Ferguson
WQ/SW-WR-02-015
Page 3

If you have any questions about this action, please contact Jenine Camilleri with the Department's Office of Compliance and Enforcement in Portland at 229-6775, toll-free at 1-800-452-4011, extension 6775.

Sincerely,



Stephanie Hallock
Director

(e:\winword\letter\ferguson.ltr.doc)

Enclosures

cc: Andy Ullrich, Water Quality, Western Region, Medford Office, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Josephine County District Attorney
Martin Seybold, City of Grants Pass, 101 Northwest "A" Street, Grants Pass,
Oregon, 97526

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
2 OF THE STATE OF OREGON

3
4 IN THE MATTER OF:
5 WILLIAM H. FERGUSON,

6 Respondent.

) NOTICE OF VIOLATION,
) DEPARTMENT ORDER, AND
) ASSESSMENT OF
) CIVIL PENALTY
) No. WQ/SW-WR-02-015
) JOSEPHINE COUNTY

7 1. AUTHORITY

8 This Notice of Violation, Department Order, and Assessment of Civil Penalty (Notice) is
9 issued to the Respondent, William H. Ferguson, by the Department of Environmental Quality
10 (Department) pursuant to Oregon Revised Statutes (ORS) 468.126 through 468.140; ORS
11 Chapter 183; and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

12 II. FINDINGS

13 1. On September 8, 1997, the Department issued a National Pollution Discharge
14 Elimination System General Storm Water Discharge Permit No. 1200-C (Permit) to Respondent
15 for the Laurelridge Subdivision construction site located in Grants Pass, Oregon (site). The
16 Department approved Respondent's Erosion and Sediment Control Plan (Plan) for Phase 1 and
17 Phase 2 of the site located on Morgan Lane and Valley View Roads. Schedule A of the Permit
18 requires Respondent to develop and implement a Plan to prevent the discharge of significant
19 amounts of sediment to surface waters.

20 2. On November 1, 2000, the Respondent applied for coverage under the Permit for
21 Phase 3 of site located on Starlite Place Drive and submitted a Plan for this area to the
22 Department. The Department approved the Plan only for construction during the dry months of
23 late spring, summer, and early fall. The Department informed Respondent in writing that if he
24 performed grading during the wet winter months, a new Plan would need to be submitted for
25 Department approval.

26 3. On December 28, 2000, Respondent submitted to the Department a request to
27 cancel the permit assignment for Phase 1 and Phase 2 of the site. On December 29, 2000, the

1 Department approved the cancellation of the permit assignment for Phase 1 and Phase 2. The
2 Department informed Respondent in writing that these areas had potential erosion concerns and
3 it was Respondent's responsibility to continue to monitor these areas and correct any erosion
4 problems promptly. The letter also stated that if erosion problems were not corrected in a timely
5 fashion, Respondent may be required to reapply for coverage under the Permit and liable for civil
6 penalties.

7 4. On November 21 and 28, 2001, representatives from DEQ and the City of Grants
8 Pass (City) inspected the site. Respondent had conducted additional grading on Phase 2 of the
9 site that was causing erosion problems. Respondent did not reapply for coverage under the
10 Permit before reinitiating construction on Phase 2 of the site.

11 5. On November 21 and 28, 2001, the DEQ and City representatives observed
12 graded areas on Phase 2 without sufficient erosion controls to capture turbid water runoff.
13 Turbid water was running off the site and entering unprotected storm drains. Significant
14 amounts of turbid water were leaving the site through the storm drains and discharging to Gilbert
15 Creek, waters of the State. Downstream from the discharge point Gilbert Creek was very
16 opaque.

17 6. On November 21 and 28, 2001, the DEQ and City representatives observed that
18 disturbed areas on Phase 3 were not adequately seeded or mulched and erosion gullies were
19 developing in these areas. Straw bales were not staked into the ground. Turbid water was
20 running under the bales and entering the storm drains. The turbid water flowed through a
21 corrugated pipe and discharged to the west side of the site. Large amounts of sediment had
22 accumulated behind the silt fences at the end of the pipe. The silt fences were not adequately
23 maintained and sediment was running past the fences.

24 7. On December 14, 2001, the Department issued Respondent a Notice of
25 Noncompliance (NON) for failing to prevent significant amounts of sediment and turbidity from
26 leaving the site and entering surface waters of the state. The Department requested in the NON
27 that Respondent develop a new Plan for Phase 3 and submit it to the Department by

1 December 31, 2001. As of October 1, 2002, Respondent has not submitted a new Plan for Phase
2 3 to the Department.

3 III. VIOLATIONS

4 1. On or around November 21 and 27, 2001, Respondent violated ORS
5 468B.025(1)(a) by causing pollution to waters of the state. Specifically, Respondent failed to
6 properly install and maintain sufficient erosion controls on Phase 2 of the site causing significant
7 amounts of turbid water to leave the site and discharge to Gilbert Creek, waters of the state.
8 Downstream from the discharge point, Gilbert Creek was very opaque. This is a Class I violation
9 pursuant to OAR 340-012-0055(1)(b).

10 2. On or around November 21, 2001, Respondent violated ORS 468B.025(2) by
11 violating Schedule F, Section B, Condition 1 of the Permit. Specifically, Respondent failed to
12 properly operate and maintain all systems of treatment and control which were installed by the
13 permittee to achieve compliance with the conditions of the Permit. Respondent failed to properly
14 install and maintain sufficient erosion controls on Phase 3 according to his Plan. This is a Class II
15 violation pursuant to OAR 340-012-0055(2)(f).

16 IV. ASSESSMENT OF CIVIL PENALTIES

17 The Director imposes a civil penalty of \$5,400 for the violation cited in Section III,
18 paragraph 1 above. The findings and determination of Respondent's civil penalty pursuant to
19 OAR 340-012-0045 are attached and incorporated as Exhibit No 1.

20 V. DEPARTMENT ORDER

21 Based upon the foregoing FINDINGS AND VIOLATION, Respondent is hereby
22 ORDERED TO:

23 Within fourteen (14) days of receipt of this Notice and Order, submit to the Department a
24 new Plan for Phase 3 of the site. Please direct the new Plan to Andy Ullrich in the Department's
25 Western Region, Medford office located at: 201 W. Main Street, Suite 2-D, Medford, Oregon
26 97501.

27 ///

1 VI. OPPORTUNITY FOR CONTESTED CASE HEARING

2 This Notice and Order shall become final unless Respondent requests, in writing, a
3 hearing before the Environmental Quality Commission. **The request must be received by the**
4 **Department within twenty (20) days from the date Respondent receives this Notice and**
5 **Order, and must be accompanied by a written "Answer" to the allegations contained in**
6 **this Notice.**

7 In the written Answer, Respondent shall admit or deny each allegation of fact contained
8 in this notice, and shall affirmatively allege any and all affirmative claims or defenses to
9 violations and assessment of any civil penalty that Respondent may have and the reasoning in
10 support thereof. Except for good cause shown:

- 11 1. Factual matters not controverted shall be presumed admitted;
- 12 2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim
13 or defense;
- 14 3. New matters alleged in the Answer shall be presumed to be denied unless
15 admitted in subsequent pleading or stipulation by the Department or Commission.

16 Send the request for hearing and Answer to: **Deborah Nesbit, Department of**
17 **Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Following receipt
18 of a request for hearing and an Answer, Respondent will be notified of the date, time and place
19 of the hearing.

20 Failure to file a timely request for hearing and Answer may result in the entry of a
21 Default Order for the relief sought in this Notice.

22 Failure to appear at a scheduled hearing or meet a required deadline may result in a
23 dismissal of the request for hearing and also an entry of a Default Order.

24 The Department's case file at the time the Notice was issued may serve as the record for
25 purposes of entering the Default Order.

26 ///

27 ///

1 VII. OPPORTUNITY FOR INFORMAL DISCUSSION

2 In addition to filing a request for a contested case hearing, Respondent may also request
3 an informal discussion with the Department by attaching a written request to the hearing request
4 and Answer.

5 VIII. PAYMENT OF CIVIL PENALTY

6 The civil penalty is due and payable ten (10) days after the Order imposing the civil
7 penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before
8 that time. Respondent's check or money order in the amount of \$5,400 should be made payable
9 to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of**
10 **Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

11
12 10-15-02
Date

Stephanie Hallock
Stephanie Hallock, Director

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Causing pollution to waters of the state in violation of Oregon Revised Statute ORS 468B.025(1)(a).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(b).

MAGNITUDE: The violation is moderate because there is no selected magnitude for this violation, and pursuant to OAR 340-012-0045(1)(a)(B), there is insufficient information to make a finding to increase or decrease the magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:
$$BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$$

"BP" is the base penalty, which is \$3,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-12-042(1)(b)(B).

"P" is Respondent's prior significant action(s) and receives a value of 6 because Respondent has the following prior significant actions: three Class I violations and two Class II violations in No. AQ/AB-WR-96-315 issued on December 6, 1996, and one Class II violation in No. AQ/OB-WR-99-234 issued on July 16, 2000.

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of -2 as Respondent took all feasible steps to correct the majority of all prior significant actions.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 as the violation existed for more than one day.

"R" is the cause of the violation and receives a value of 2 as Respondent's actions were negligent. Respondent's National Pollutant Discharge Elimination System Storm Water Discharge Permit expressly requires that Respondent prevent unfiltered turbid flows from leaving the construction site and discharging to surface waters. From October 1997 to November 2001, the Department sent Respondent letters notifying him of the potential for erosion problems on the construction site and the need to properly install and maintain erosion controls on the construction site. Respondent performed construction activities on Phase 2 and Phase 3 of the construction site and failed to properly install and maintain erosion controls causing unfiltered turbid water to discharge to waters of the state. Respondent knew or should have known to properly install and maintain erosion controls on the construction site to prevent the discharge of turbid flows to surface waters, and failed to take reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as there is insufficient information to make a finding.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance pursuant to OAR 340-012-0045(1)(c)(F)(i) and receives a value of \$0, as there is insufficient information to make a finding.

PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} &= \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{R} + \text{C})] + \text{EB} \\ &= \$3,000 + [(0.1 \times \$3,000) \times (6 - 2 + 2 + 2 + 0)] + \$0 \\ &= \$3,000 + [(\$300 \times 8)] + \$0 \\ &= \$3,000 + \$2,400 + \$0 \\ &= \$5,400 \end{aligned}$$



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:
WILLIAM H. FERGUSON,

Respondent.

)
)
)
)

NOTICE OF ASSESSMENT
OF CIVIL PENALTY
No. AQAB-WR-96-315
JACKSON COUNTY

I. AUTHORITY

This Notice of Assessment of Civil Penalty (Notice) is issued to Respondent, William H. Ferguson, by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.126 through 468.140, ORS Chapter 183, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. VIOLATIONS

1. On or about October 1 and 2, 1996, Respondent violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste material. Specifically, Respondent failed to follow the work practices set forth in OAR 340-32-5640 when removing asbestos-containing duct wrap from buildings he owned at the corner of West Sixth Street and North Ivy Street (421 W. Sixth and 37 N. Ivy, hereinafter "the buildings"), Medford. The removal resulted in potential public exposure to asbestos or release of asbestos fibers into the air. This is a Class I violation pursuant to OAR 340-12-050(1)(o).

2. On or about October 1 and 2, 1996, Respondent violated OAR 340-32-5600(4) by openly accumulating asbestos-containing waste material. Specifically, Respondent failed to properly contain asbestos-containing waste material generated from the removal of asbestos duct wrap from the buildings. This is a Class I violation pursuant to OAR 340-12-050(1)(p).

3. On or about October 1 and 2, 1996, Respondent violated OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material. Specifically, Respondent failed to dispose of asbestos-containing waste material generated by removal of asbestos duct wrap removed from the building in accordance with the provisions of OAR 340-32-5650, creating the potential for public exposure to asbestos or the release of asbestos fibers to the air. This is a Class I violation pursuant to OAR 340-12-050(1)(s).



Ref No.: G50087

STATE OF OREGON

Dec Mail

Case No: 97-GAL-00027

Mailed by: BGS

Case Type: DEQ

HEARING DECISION

WILLIAM H. FERGUSON
5200 PIONEER RD

MEDFORD OR 97501 9314

DEPART. OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

JEFF BACHMAN, DEQ ENFORCEMENT

2020 SW 4TH STE 400
PORTLAND OR 97201

STATEWIDE ENFORCEMENT SECTION
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
DEC 15 1997

The following **HEARING DECISION** was served to the parties at their respective addresses.

Held by: Employment Department Hearings Section
875 Union Street NE
Salem, OR 97311

**BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON**

IN THE MATTER OF THE NOTICE OF)	HEARING OFFICER'S
VIOLATION AND ASSESSMENT OF)	FINDING OF FACT AND
CIVIL PENALTY FOR FAILURE TO)	CONCLUSION OF LAW
FOLLOW REQUIRED WORK PRACTICES)	No. AQFB-WR-96-351
FOR ASBESTOS ABATEMENT)	Jackson County, Oregon
 WILLIAM H. FERGUSON)	
Respondent.)	

Background

William H. Ferguson has appealed from a December 5, 1996 Notice of Violation and Assessment of Civil Penalty issued pursuant to Oregon Revised Statutes (ORS) Chapter 468, ORS Chapter 183, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. The Department of Environmental Quality (Department, DEQ) alleged that respondent violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste material; that respondent violated OAR 340-32-5600(4) by opening accumulating asbestos-containing waste material; that respondent violated OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material; that respondent violated OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project; that respondent violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement; and that respondent violated OAR 340-33-030(4) by supervising an asbestos abatement project without being certified.

A civil penalty of \$5,400 was assessed pursuant to OAR 340-12-045.

William H. Ferguson requested a hearing on December 20, 1996.

A hearing was conducted in Medford, Oregon on September 10, 1997. The respondent William H. Ferguson appeared with witnesses Joel Ferguson, A. K. Morris, April Sevack, Gary Breeden, and William Corelle. Jeff Bachman represented the Department with witness Keith Tong.

RESPONDENT'S CONTENTIONS

Respondent William H. Ferguson contends that he had taken reasonable steps to assure the property was free from contaminants when he purchased the property, that he was not aware there were asbestos-containing materials in the building when he started the renovation, and that when he became aware that there might be a problem he took reasonable measures to protect the public and others from exposure, and that once he determined the materials were asbestos-containing he complied with all statutes and rules regarding the removal of such materials.

FINDINGS OF FACT

1. On October 2, 1996, Keith Tong (Tong), Department Asbestos Control Analyst, was driving by a building renovation project being conducted at 421 W. Sixth Street-37 North Ivy Street, Medford, Oregon, when he observed what appeared to be asbestos-containing material on the site.

2. Tong stopped at the site, inspected the materials he had observed, and contacted Joel Ferguson who was in charge of the renovation project, and advised him that the duct wrap appeared to be asbestos-containing material, and that proper steps should be taken to accomplish the asbestos removal, and not to disturb the materials.
3. Tong was on his way to a meeting and advised Joel Ferguson that he would return after the meeting and conduct a more detailed inspection, and left the premises.
4. After Tong left, Joel Ferguson called his father, William H. Ferguson, respondent herein, and reported his contact with Tong.
5. Respondent contacted the disposal company that was authorized to dispose of asbestos-containing materials and was advised that the materials needed to be double bagged and the bags secured for disposal.
6. Respondent went to the renovation project and obtained a sample of the material and took it in for testing.
7. Respondent advised Joel Ferguson to bag the material so that there would be no further disbursement of the materials if it was asbestos-containing and not to remove further ducting.
8. Joel Ferguson placed the ducting in double black plastic bagging and placed it in a utility trailer on the premises and also sent other workers home until it could be determined whether the duct wrap did contain asbestos.
9. When Tong returned after the meeting he found that the ducting and wrap containing what appeared to be asbestos-containing material had been removed from where he first observed it and placed in black plastic garbage bags and placed in a utility trailer on the premises.
10. Tong did observe pieces of the material on the ground where the ducting had been located.
11. After the second meeting with Tong, respondent and Joel Ferguson did encapsulate the building and taped off the premises from public passage.
12. The materials did test positive for asbestos and respondent contracted for the services of an abatement engineer and then with an abatement contractor for the actual removal of the material.
13. Respondent paid approximately \$5,160 for the services of the engineer and actual removal of the material.
14. Joel Ferguson is not a certified asbestos removal worker.
15. Respondent is not certified as an asbestos abatement project supervisor.
16. When respondent purchased the property, the environmental investigation and study of the building did not reveal any active or current contamination problems although did indicate that there could be asbestos on the premises.
17. Respondent had removed a false ceiling and was removing a length of old heating duct so that new heating ducts could be installed, when the asbestos-containing material was discovered by Tong.
18. The ducting situation had been reviewed by the heating and air-conditioning contractor and the contractor who worked with respondent on a number of renovation or construction projects and

neither observed any conditions or materials that caused them concern that asbestos was a factor in the renovation project.

19. The type of wrap used on the length of duct work that had been removed was manufactured in asbestos-containing and non asbestos containing products, and the wrap had no distinguishing marks or colors to accurately determine whether it contained asbestos or not.
20. Respondent had been involved in the renovation of another building where a similar type of wrap was suspected of containing asbestos, but after testing, it was determined that it in fact did not.
21. Respondent did not believe that the duct wrap was asbestos containing, but wanted to take some precautions in case it was and had directed Joel Ferguson to bag the wrapped ducting and to put it in the trailer.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.
2. William H. Ferguson violated OAR 340-32-5620(1), OAR 340-32-5600(4), OAR 340-32-5650, OAR 340-33-030(2) and OAR 340-33-030(4).
3. William H. Ferguson is subject to a civil penalty of \$1,000.

OPINION

1. The Commission has jurisdiction.

The Environmental Quality Commission is directed by ORS Chapters 468 and 468A to adopt rules and policies to establish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training and to establish work practice standards regarding the abatement of asbestos hazards and the handling and disposal of waste materials containing asbestos. The Commission did that, and these proceedings are under those rules. The Commission has jurisdiction to proceed with the notice of violation herein and the assessment of civil penalty.

2. William H. Ferguson violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste.

OAR 340-32-5620(1) provides that any person conducting an asbestos abatement project shall comply with notification and asbestos abatement work practices and procedures of OAR 340-32-5630 and OAR 340-32-5640 (1) through (11).

OAR 340-032-5590(3) defines an "Asbestos abatement project" as any demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling or disposal of any asbestos-containing material with the potential of releasing asbestos fibers from asbestos-containing material into the air.

OAR 340-32-5640(1) provides that if asbestos containing materials were not discovered prior to demolition, upon discovery of the materials, the owner should stop demolition work immediately, notify the department of the occurrence, keep the exposed material adequately wet until a licensed abatement contractor begins removal, and have a licensed asbestos abatement contractor remove and dispose of the materials.

Respondent is an experienced property owner and manager who has been involved in the acquisition, renovation and maintenance of commercial properties. He has been involved in situations involving potential asbestos-containing materials, and took reasonable steps to assure that the building in question was free from any hazardous materials or contaminants that would cause costs for removal or containment. He was not aware of the nature of the duct work above the false ceiling, and when the false ceiling was removed, took additional steps to assure that he was not dealing with any materials that would require special handling or removal processes. He was conducting the demolition portion of the renovation project accordingly.

Respondent became aware of there might be concerns when Mr. Tong informed respondent's son that the insulation wrap on some of the duct work that had been removed might contain asbestos. Upon becoming aware of Mr. Tong's concerns, he immediately took a sample to a testing laboratory to be tested and did advise his son to place the removed ducting in plastic bags and put them in a trailer that was on the site. He also advised his son to stop all removal operations.

Prior to Mr. Tong's notification, respondent was not involved in an "Asbestos abatement project", notwithstanding the definition of the rule and the strict liability interpretation of its provisions. Prior to Mr. Tong's notification of potential asbestos-containing material respondent had taken all reasonable and necessary steps to proceed with his demolition and remodeling project. Liability, in this case, did not attach prior to notification.

It is clear from the testimony and evidence that respondent was aware of the problems associated with properties with contaminates or other materials that would require special handling or removal procedures, and that he probably would not have acquired this particular property had he been aware of any potential problems. Further, he had dealt specifically with potential asbestos-containing materials and took further steps to assure that the insulation wrap on the ducting was not asbestos-containing material. Respondent was not attempting to avoid compliance with the law and rules regarding the removal of asbestos-containing material.

Mr. Tong gave notice of potential asbestos-containing material. At that point liability attached. While there was still question at that point as to whether the wrap was asbestos-containing material or not, until it was determined that it was not, respondent was required to conform to the provisions of the rule regarding asbestos abatement projects. At that point, respondent was required to immediately stop the demolition, notify the Department, and keep the suspected asbestos-containing materials in a wetted condition until such time as a licensed asbestos abatement contractor could begin removal.

Respondent immediately stopped the demolition. The Department, although not formally notified of the project as provided by the rule, was aware of the project through Mr. Tong's involvement. Respondent, after stopping the demolition, however, continued to handle the suspected asbestos-containing material in violation of the rule.

While respondent's actions may have been a good faith effort to protect the public, the statutes and rules involving the removal and disposal of asbestos-containing materials impose a strict liability on the property owner, and non-compliance, even based on good faith effort does not excuse violation of the rules.

Respondent's testing of the sample was reasonable. Mr. Tong's observations were hurried and in passing, and there was no definitive means by which to visually determine whether that particular type of insulation wrap contained asbestos or not. Further, respondent had been recently involved in a situation where a similar appearing wrap of suspected asbestos-containing material turned out not to contain asbestos. Notwithstanding the reasonableness of the testing and the delay in notification or contact with an asbestos removal engineer or contractor, the strict liability of the rule required that nothing transpire with the material other than wetting down the material and keeping it in that condition until removal.

The respondent did not do that and is in violation of the rule.

The respondent, in proceeding with the bagging and removal of the duct work with the wrap from where it was stacked to the trailer also violated the following provisions of the rules.

William H. Ferguson violated OAR 340-32-5600(4) by openly accumulating asbestos-containing waste material.

OAR 340-32-5600(4) provides that open accumulation of friable asbestos-containing waste material is prohibited.

Again, the stacking of the material, prior to Mr. Tong's notification does not result in liability in this specific case. However, once the notice was given respondent was responsible to conform to the rule. The insulating wrap materials were not bagged and sealed in accordance with the rule and therefore created an open accumulation of those materials.

William H. Ferguson violated OAR 340-32-5650 by failing to properly package and store asbestos-containing waste material.

OAR 340-32-5650 provides for standards for the packaging, storage, transport and disposal of asbestos-containing waste material and requires that all asbestos-containing waste material shall be adequately wetted to ensure that they remain wet until disposed of and packaged in leak-tight containers such as two plastic bags each with a minimum thickness of 6 mil and labeled as provided in the rule.

Respondent did call the disposal company and then triple bagged the materials as was suggested, however the materials were not wetted and respondent did not use the 6 mil bags required by the rule. Respondent did not properly package and store the asbestos-containing materials.

William H. Ferguson did not violate OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project.

OAR 340-32-5620(1) requires that any person who conducts an asbestos abatement project shall comply with OAR 340-032-5630 which requires that any person conducting such project shall provide notification within a specific time prior to the abatement project being started.

In this case, respondent was not aware that there was any asbestos-containing materials in the building or that would be affected by the demolition or renovation, and then, other than the bagging and moving of the materials was not actively involved in the actual abatement project that was conducted through the abatement engineer and abatement contractor. At the time of the bagging and removal to the trailer it had not been determined that the materials were in fact asbestos-containing. It is not appropriate to assess violation under this provision of the rule.

William H. Ferguson violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement.

OAR 340-33-030(2) provides that an owner of a facility shall not allow any person who is not certified to removal asbestos-containing waste material to perform asbestos abatement projects.

Joel Ferguson was not a certified asbestos abatement worker.

William H. Ferguson violated OAR 340-33-030(4) by supervising an abatement project without being certified.

OAR 340-33-030(4) provides that each person acting as a supervisor for any asbestos abatement project must be certified.

Respondent was not a certified asbestos abatement project supervisor.

3. William H. Ferguson is subject to a civil penalty of \$1000.

Violation 1. Failing to employ required work practices for handling and removal of asbestos containing waste.

Penalty = BP + [(1 x BP) (P + H + O + R + C)] + BE.

"BP" is the base penalty which is \$1000 for a Class I, minor magnitude violation. "P" is respondent's prior violations. "H" is the past history of the respondent in taking all feasible steps or procedures necessary to correct any prior violations. "O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation. "R" is the cause of the violation. "C" is the respondent's cooperativeness. "EB" is the approximated dollar sum of the economic benefit that respondent gained through noncompliance.

The Department classified the magnitude of the violation as moderate because of the asbestos content of the materials involved. While the Department does have the option of raising the magnitude of the violation one level under OAR 340-12-090(1)(d)(D), it is not appropriate in this case to do so. As discussed in the earlier paragraphs, respondent's involvement in this matter was not intentional and does not warrant increasing the magnitude of the violation in this matter.

The Department assigned a values of 0 to "P" and "H", because respondent had no prior violations or past history regarding violations.

The Department assigned "O" a value of 2 because the violation occurred for more than one day. As far as this decision, it is found that the occurrence that results in the violation and penalty occurred during a period in one day where materials were moved and stored. "O" is assigned a value of 0 for this penalty calculation.

The Department assigned a value of 6 for "R" on the basis that violation was intentional. As set forth earlier, for the purposes of this decision, liability did not attach until respondent was notified that the material might contain asbestos. At that time, respondent to steps to ascertain whether the material in fact contained asbestos and also took steps which he felt were appropriate to protect the public if it were asbestos-containing. He was at most negligent for the purposes of this element and "R" is assigned a value of 2.

The Department assigned "C" a value of 0 because respondent continued abatement proceedings after being advised that the materials might contain asbestos. The rule provides for a value of -2 if a respondent was cooperative and took reasonable efforts to correct the violation or minimize the effects of the violation. Respondent was skeptical. He had taken steps to assure that the building did not contain contaminates. He had been involved with suspected asbestos-containing materials before which had been tested and found not to contain asbestos. Notwithstanding those facts, he did stop demolition immediately, took what he felt were reasonable steps to minimize the effects of the violation, and then hired an engineer and contractor to perform the removal and disposal tasks. "C" is assigned a value of -2. Respondent was cooperative after it was determined that the materials were asbestos-containing.

"EB" is assigned a value of \$0 because respondent did not gain any economic benefit by his actions after determining that the materials were asbestos-containing.

The rule is specific as to the values to be assigned under the varying circumstance and there is no provision for assigning values other than those set forth in the rule.

The civil penalty as calculated under the rule for violation 1 is \$1,000.

Penalties are not calculated or assessed for the additional violations because each is based on the same fact situation and circumstances that resulted in the penalty assessment for the penalty above, and it is not appropriate to assess further penalty in this matter.

The requirements for establishing a penalty have been met. The values assigned and the calculations are set forth above. William H. Ferguson is liable for a civil penalty of \$1,000.

Dated this 11th day of December 1997.

Environmental Quality Commission



Melvin M. Menegat
Hearings Officer.

1 **BEFORE THE ENVIRONMENTAL QUALITY COMMISSION**
2 **OF THE STATE OF OREGON**

I HEREBY CERTIFY THAT THE FORGOING
IS A COMPLETE AND EXACT COPY OF THE
ORIGINAL THEREOF.

3 IN THE MATTER OF THE NOTICE OF
4 VIOLATION AND ASSESSMENT OF
5 CIVIL PENALTY FOR FAILURE TO
6 FOLLOW REQUIRED WORK
7 PRACTICES FOR ASBESTOS
8 ABATEMENT

9 WILLIAM H. FERGUSON,
10
11 Respondent.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW, OPINION AND ORDER

Case No. AQFB-WR-96-351

12 **Background**

13 Mr. William H. Ferguson has appealed from a December 5, 1996 Notice of
14 Violation and Assessment of Civil Penalty issued pursuant to Oregon Revised Statutes
15 (ORS) Chapter 468, ORS Chapter 183, and Oregon Administrative Rules (OAR) Chapter
16 340, Divisions 11 and 12. The Department of Environmental Quality (Department) alleged
17 that Respondent violated: OAR 340-32-5620(1) by failing to employ required work
18 practices for handling and removal of asbestos-containing waste material; violated OAR
19 340-32-5600(4) by open accumulation of asbestos-containing waste material; violated OAR
20 340-32-5650 by failing to properly dispose of asbestos-containing waste material; violated
21 OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project;
22 violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos
23 abatement; and violated OAR 340-33-030(4) by supervising an asbestos abatement project
24 without being certified.

25 A civil penalty of \$5,400 was assessed pursuant to OAR 340-12-045.

26 Mr. William H. Ferguson requested a hearing on December 20, 1996. A hearing
was conducted in Medford, Oregon on September 10, 1997. The Respondent appeared with
witnesses Joel Ferguson, A. K. Morris, April Sevack, Gary Breeden, and William Corelle.
Mr. Jeff Bachman represented the Department with witness Keith Tong.

1 On December 11, 1997, the Hearings Officer issued Findings of Fact, Conclusions
2 of Law and an Order. The Hearings Officer found that the Commission has jurisdiction
3 and that Respondent had violated each of the cited rules except for OAR 340-032-5620(1)
4 (failure to notify the Department of an asbestos abatement project). The Hearings Officer
5 further found that the Respondent was liable for a civil penalty of \$1,000 rather than
6 \$5,400. This was based upon his determination that the base penalty and the occurrence,
7 responsibility and cooperative factors should be decreased.

8 The Department filed a timely notice of appeal. It subsequently filed five exceptions
9 to the Hearings Officer's conclusion and opinion. These were filed late. The Respondent
10 submitted a brief that also was filed late.

11 The Commission set August 10, 1998 as the date to hear oral arguments. At that
12 time, the Commission entered a preliminary ruling denying the Respondent's motion to
13 dismiss based upon the late filing of the Department's exceptions and brief. With this
14 decision, that preliminary ruling is made final. After the Commission made its preliminary
15 ruling, the Chair of the Commission granted both the Department and the Respondent
16 extensions and the Commission accepted the exceptions and briefs.

17 The Respondent was not present at the August 10, meeting. The Respondent sent a
18 representative in his place. This representative, however, was not a licensed attorney and
19 therefore could not represent the Respondent in the proceedings. The representative
20 withdrew his request to represent the Respondent and the Commission set the matter over
21 until September 17, 1998. The Commission resumed its hearing on September 17. At that
22 time, the Commission heard oral arguments. Mr. Jeffrey Bachman represented the
23 Department and the Respondent represented himself.

24 **Respondent's Contentions**

25 Respondent Mr. William H. Ferguson contends that he had taken reasonable steps to
26 assure the property was free from contaminants when he purchased the property, that he

1 was not aware there were asbestos-containing materials in the building when he started the
2 renovation, and that when he became aware that there might be a problem he took
3 reasonable measures to protect the public and others from exposure, and that once he
4 determined the materials were asbestos-containing he complied with all statutes and rules
5 regarding the removal of such materials.

6

7

FINDINGS OF FACT

8 1. On October 2, 1996, Mr. Keith Tong (Mr. Tong), Department Asbestos
9 Control Analyst, was driving by a building renovation project being conducted at 421 W.
10 Sixth Street-37 North Ivy Street, Medford, Oregon, when he observed what appeared to be
11 asbestos-containing material on the site.

12 2. Mr. Tong stopped at the site, inspected the materials he had observed, and
13 contacted Joel Ferguson who was in charge of the renovation project, and advised him that
14 the duct wrap appeared to be asbestos-containing material, and that proper steps should be
15 taken to accomplish the asbestos removal, and not to disturb the materials.

16 3. Mr. Tong was on his way to a meeting and advised Joel Ferguson that he
17 would return after the meeting and conduct a more detailed inspection, and left the
18 premises.

19 4. After Mr. Tong left, Mr. Joel Ferguson called his father, Respondent herein,
20 and reported his contact with Mr. Tong.

21 5. Respondent contacted the disposal company that was authorized to dispose of
22 asbestos-containing materials and was advised that the materials needed to be double
23 bagged and the bags secured for disposal.

24 6. Respondent went to the renovation project and obtained a sample of the
25 material and took it in for testing.

26 ///

1 7. Respondent advised Mr. Joel Ferguson to bag the material so that there
2 would be no further disbursement of the materials if it was asbestos-containing and not to
3 remove further ducting.

4 8. Mr. Joel Ferguson placed the ducting in double black plastic bagging and
5 placed it in a utility trailer on the premises and also sent other workers home until it could
6 be determined whether the duct wrap did contain asbestos.

7 9. When Mr. Tong returned after the meeting he found that the ducting and
8 wrap containing what appeared to be asbestos-containing material had been removed from
9 where he first observed it and placed in black plastic garbage bags and placed in a utility
10 trailer on the premises.

11 10. Mr. Tong did observe pieces of the material on the ground where the ducting
12 had been located.

13 11. After the second meeting with Mr. Tong, Respondent and Mr. Joel Ferguson
14 did encapsulate the building and taped off the premises from public passage.

15 12. The materials did test positive for asbestos and Respondent contracted for the
16 services of an abatement engineer and then with an abatement contractor for the actual
17 removal of the material.

18 13. Respondent paid approximately \$5,160 for the services of the engineer and
19 actual removal of the material.

20 14. Mr. Joel Ferguson is not a certified asbestos removal worker.

21 15. Respondent is not certified as an asbestos abatement project supervisor.

22 16. When Respondent purchased the property, the environmental investigation
23 and study of the building did not reveal any active or current contamination problems.
24 although did indicate that there could be asbestos on the premises.

25 ///

26 ///

1 17. Respondent had removed a false ceiling and was removing a length of old
2 heating duct so that new heating ducts could be installed, when the asbestos-containing
3 material was discovered by Mr. Tong.

4 18. The ducting situation had been reviewed by the heating and air-conditioning
5 contractor and the contractor who worked with Respondent on a number of renovation or
6 construction projects and neither observed any conditions or materials that caused them
7 concern that asbestos was a factor in the renovation project.

8 19. The type of wrap used on the length of duct work that had been removed was
9 manufactured in asbestos-containing and non asbestos containing products, and the wrap
10 ///
11 had no distinguishing marks or colors to accurately determine whether it contained asbestos
12 or not.

13 20. Respondent had been involved in the renovation of another building where a
14 similar type of wrap was suspected of containing asbestos, but after testing, it was
15 determined that it in fact did not.

16 21. Respondent did not believe that the duct wrap was asbestos containing, but
17 wanted to take some precautions in case it was and had directed Joel Ferguson to bag the
18 wrapped ducting and to put it in the trailer.

19

20

CONCLUSIONS OF LAW

21

1. The Commission has jurisdiction.

22

2. Mr. William H. Ferguson violated OAR 340-32-5620(1), OAR 340-32-

23

5600(4), OAR 340-32-5650, OAR 340-33-030(2) and OAR 340-33-030(4).

24

3. Mr. William H. Ferguson is subject to a civil penalty of \$1,400.

25 ///

26 ///

1 Respondent is an experienced property owner and manager who has been involved
2 in the acquisition, renovation and maintenance of commercial properties. He has been
3 involved in situations involving potential asbestos-containing materials, and took reasonable
4 steps to assure that the building in question was free from any hazardous materials or
5 contaminants that would cause costs for removal or containment. He was not aware of the
6 nature of the duct work above the false ceiling, and when the false ceiling was removed,
7 took additional steps to assure that he was not dealing with any materials that would require
8 special handling or removal processes. He was conducting the demolition portion of the
9 renovation project accordingly.

10 Respondent became aware of concerns when Mr. Tong informed Respondent's son
11 that the insulation wrap on some of the duct work that had been removed might contain
12 asbestos. Upon becoming aware of Mr. Tong's concerns, he immediately took a sample to
13 a testing laboratory to be tested and did advise his son to place the removed ducting in
14 plastic bags and put them in a trailer that was on the site. He also advised his son to stop
15 all removal operations.

16 The Hearings Officer concluded that prior to Mr. Tong's notification, Respondent
17 was not involved in an "Asbestos abatement project," notwithstanding the definition of the
18 rule and the strict liability interpretation of its provisions. He reasoned that prior to
19 Mr. Tong's notification of potential asbestos-containing material, Respondent had taken all
20 reasonable and necessary steps to proceed with his demolition and remodeling project, and
21 this liability did not attach prior to notification.

22 The Department took exception to this determination. It argued that the ruling is
23 contrary to the strict liability standard applicable to this violation.

24 A majority of the Commission concludes that the Hearings Officer erred in the
25 determinations and that in keeping with the strict liability standard established by ORS

26 ///

1 468.140(1)(f) and the Commission's prior decisions, liability attached when the Respondent
2 began asbestos abatement.

3 Respondent immediately stopped the demolition. The Department, although not
4 formally notified of the project as provided by the rule, was aware of the project through
5 Mr. Tong's involvement. Respondent, after stopping the demolition, however, continued to
6 handle the suspected asbestos-containing material in violation of the rule.

7 While Respondent's actions may have been a good faith effort to protect the public,
8 the statutes and rules involving the removal and disposal of asbestos-containing materials
9 impose a strict liability on the property owner, and non-compliance, even based on good
10 faith effort does not excuse violation of the rules.

11 Respondent's testing of the sample was reasonable. Mr. Tong's observations were
12 hurried and in passing, and there was no definitive means by which to visually determine
13 whether that particular type of insulation wrap contained asbestos or not. Further,
14 Respondent had been recently involved in a situation where a similar-appearing wrap of
15 suspected asbestos-containing material turned out not to contain asbestos. Notwithstanding
16 the reasonableness of the testing and the delay in notification or contact with an asbestos
17 removal engineer or contractor, the strict liability of the rule required that nothing transpire
18 with the material other than wetting down the material and keeping it in that condition until
19 removal.

20 The Respondent did not do that and thus violated the rule.

21 The Respondent, in proceeding with the bagging and removal of the duct work with
22 the wrap from where it was stacked to the trailer also violated the following provisions of
23 the rules.

24 Respondent violated OAR 340-32-5600(4) by openly accumulating asbestos-
25 containing waste material.

26 ///

1 OAR 340-32-5600(4) provides that open accumulation of friable asbestos-containing
2 waste material is prohibited. Once the notice was given Respondent was responsible to
3 conform to the rule. The insulating wrap materials were not bagged and sealed in
4 accordance with the rule and therefore created an open accumulation of those materials.

5 Respondent violated OAR 340-32-5650 by failing to properly package and store
6 asbestos-containing waste material.

7 OAR 340-32-5650 provides for standards for the packaging, storage, transport and
8 disposal of asbestos-containing waste material and requires that all asbestos-containing
9 waste material shall be adequately wetted to ensure that they remain wet until disposed of
10 and packaged in leak-tight containers such as two plastic bags each with a minimum
11 thickness of 6 mil and labeled as provided in the rule.

12 Respondent did call the disposal company and then triple bagged the materials as
13 was suggested, however the materials were not wetted and Respondent did not use the
14 6 mil bags required by the rule. Respondent did not properly package and store the
15 asbestos-containing materials.

16 Respondent did not violate OAR 340-32-5620(1) by failing to notify the Department
17 of an asbestos abatement project.

18 OAR 340-32-5620(1) requires that any person who conducts an asbestos abatement
19 project shall comply with OAR 340-032-5630 which requires that any person conducting
20 such project shall provide notification within a specific time prior to the abatement project
21 being started.

22 In this case, Respondent was not aware that there was any asbestos-containing
23 materials in the building or that would be affected by the demolition or renovation, and
24 then, other than the bagging and moving of the materials was not actively involved in the
25 actual abatement project that was conducted through the abatement engineer and abatement
26 contractor. At the time of the bagging and removal to the trailer it had not been determined

1 that the materials were in fact asbestos-containing. It is not appropriate to assess violation
2 under this provision of the rule.

3 Respondent violated OAR 340-33-030(2) by allowing uncertified persons to perform
4 asbestos abatement.

5 OAR 340-33-030(2) provides that an owner of a facility shall not allow any person
6 who is not certified to remove asbestos-containing waste material to perform asbestos
7 abatement projects.

8 Mr. Joel Ferguson was not a certified asbestos abatement worker.

9 Respondent violated OAR 340-33-030(4) by supervising an abatement project
10 without being certified.

11 OAR 340-33-030(4) provides that each person acting as a supervisor for any
12 asbestos abatement project must be certified.

13 Respondent was not a certified asbestos abatement project supervisor.

14 3. Respondent is subject to a civil penalty of \$1,400.

15 Violation 1. Failing to employ required work practices for handling and removal of
16 asbestos containing waste.

17 $Penalty = BP + [(0.1 \times BP) (P + H + O + R + C)] + BE.$

18 "BP" is the base penalty which is \$1000 for a Class I, minor magnitude violation.

19 "P" is Respondent's prior violations. "H" is the past history of the Respondent in taking all
20 feasible steps or procedures necessary to correct any prior violations. "O" is whether or not
21 the violation was a single occurrence or was repeated or continuous during the period of the
22 violation. "R" is the cause of the violation. "C" is the Respondent's cooperativeness.

23 "BE" is the approximated dollar sum of the economic benefit that Respondent gained
24 through noncompliance.

25 The Department applied a base penalty of \$3,000 finding that this was a class I,
26 moderate magnitude violation as provided in OAR 340-012-0042(1). This was predicated

1 on the provision in OAR 340-012-0090(1)(d)(D) which allows the magnitude to be increase
2 one level if the asbestos containing material was compromised of more the 5% asbestos.

3 The Hearings Officer reduced the base penalty to \$1,000 because he believed it was
4 inappropriate to increase the base penalty. His decision was based on conclusion that the
5 violation was not intentional.

6 A majority of the Commission finds that the Respondent's actions were intentional
7 as that term is used in OAR 340-012-0045. Nevertheless, when the Respondent's conduct is
8 viewed as whole, a majority of the Commission agrees that it will not exercise its discretion
9 to increase the magnitude of the violation. Accordingly, the base penalty is \$1,000.

10 The Department assigned a value of 0 to "P" and "H," because Respondent had no
11 prior violations or past history regarding violations.

12 The Department assigned "O" a value of 2 because the violation occurred for more
13 than one day. The Hearings Officer found that the occurrence that results in the violation
14 and penalty occurred during a period in one day where materials were moved and stored.
15 "O" is assigned a value of 0 for this penalty calculation. The Department filed an
16 exception to this ruling.

17 The Commission was unable to reach an agreement on this issue. Therefore, the
18 decision of the Hearings Officer will stand on this factor. The Commission agrees,
19 however, that the Hearings Officer's reasoning on this point should not be viewed as
20 precedent in future cases.

21 The Department assigned a value of 6 for "R" because it determined that the
22 violation was intentional. The Hearings Officer reduced the factor to 2 because he
23 concluded that the Respondent's actions were at most negligent. The Department excepted.
24 It noted that intent is defined in OAR 340-012-0030(9) and that the definition requires only
25 "a conscious objective to cause the result of the conduct." Accordingly, only general intent
26 to remove the asbestos-containing material is required, not specific intent to violate the

1 asbestos regulations. A majority of the Commission agrees with the Department and
2 accordingly the R factor is 6.

3 The Department assigned "C" a value of 0 because Respondent continued abatement
4 proceedings after being advised that the materials might contain asbestos. The rule
5 provides for a value of -2 if a Respondent was cooperative and took reasonable efforts to
6 correct the violation or minimize the effects of the violation. The Hearings Officer noted
7 that the Respondent was skeptical and he had taken steps to assure that the building did not
8 contain contaminates. He had been involved with suspected asbestos-containing materials
9 before which had been tested and found not to contain asbestos. Notwithstanding those
10 facts, he did stop demolition immediately, took what he felt were reasonable steps to
11 minimize the effects of the violation, and then hired an engineer and contractor to perform
12 the removal and disposal tasks. Based on these findings, the Hearings Officer assigned a
13 value of -2 to the "C" factor.

14 The Commission was unable to reach an agreement on this issue. Therefore, the
15 decision of the Hearings Officer will stand on this factor. The Commission agrees,
16 however, that the Hearings Officer's reasoning on this point should not be viewed as
17 precedent in future cases.

18 "EB" is assigned a value of \$0 because Respondent did not gain any economic
19 benefit by his actions after determining that the materials were asbestos-containing.

20 The civil penalty as calculated under the rule for violation 1 is \$1,400.

21 The requirements for establishing a penalty have been met. The values assigned and
22 the calculations are set forth above. Respondent is liable for a civil penalty of \$1,400.

23 ///

24 ///

25 ///

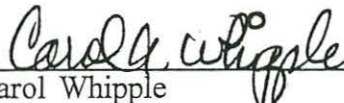
26 ///

1 **ORDER**

2 The Commission, through its Hearings Officer, finds that the Commission has
3 subject matter and personal jurisdiction in this proceeding: that William H. Ferguson
4 violated OAR 340-32-5620(1) by failing to employ required work practices for handling
5 and removal of asbestos-containing waste material; OAR 340-32-5600(4) by open
6 accumulation of asbestos-containing waste material; OAR 340-32-5650 by failing to
7 properly dispose of asbestos-containing waste material; OAR 340-33-030(2) by allowing
8 uncertified persons to perform asbestos abatement; and OAR 340-33-030(4) by supervising
9 an asbestos abatement project without being certified; and that Respondent is liable for a
10 \$1,400 civil penalty.

11 DATED this 30 day of Oct, 1998.

12
13 Environmental Quality Commission

14
15 
16 Carol Whipple
17 Chair

18 Notice of Right to Judicial Review: You have the right to appeal this Order
19 to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you
20 must file a petition for judicial review with the Court of Appeals within 60
21 days from the day this Order was served on you. If this Order was personally
22 delivered to you, the date of service is the day you received the Order. If this
23 Order was mailed to you, the date of service is the day it was *mailed*, not the
24 day you received it. If you do not file a petition for judicial review within the
25 60 day time period, you will lose your right to appeal.

26 LK:kt/LJK0862.PLE

Certificate of Mailing

I certify that I mailed the attached FINDINGS OF FACT AND CONCLUSIONS OF LAW, OPINION AND ORDER to each of the following persons on

11/3, 1998:

William H. Ferguson
5200 Pioneer Road
Medford OR 97501
(Via Certified Mail #P335742336)

Mark Reeve
Environmental Quality Commission
610 S.W. Alder, Suite 803
Portland OR 97205

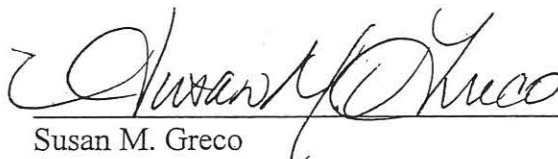
Jeff Bachman
Department of Environmental Quality
2020 S.W. 4th Avenue, Suite 400
Portland OR 97201

Tony Van Vliet
Environmental Quality Commission
1530 N.W. 13th
Corvallis OR 97330

Carol Whipple, Chair
Environmental Quality Commission
21755 Highway 138 West
Elkton OR 97436

Melinda S. Eden
Environmental Quality Commission
P.O. Box 79
Milton-Freewater OR 97862

Linda McMahan
Environmental Quality Commission
Berry Botanic Garden
11505 S.W. Summerville Avenue
Portland OR 97219


Susan M. Greco
Department of Environmental Quality

1 **BEFORE THE ENVIRONMENTAL QUALITY COMMISSION**
2 **OF THE STATE OF OREGON**

I HEREBY CERTIFY THAT THE FORGOING
IS A COMPLETE AND EXACT COPY OF THE
ORIGINAL THEREOF.

3 IN THE MATTER OF THE NOTICE OF
4 VIOLATION AND ASSESSMENT OF
5 CIVIL PENALTY FOR FAILURE TO
6 FOLLOW REQUIRED WORK
7 PRACTICES FOR ASBESTOS
8 ABATEMENT

FINDINGS OF FACT AND CONCLUSIONS
OF LAW, OPINION AND ORDER

Case No. AQFB-WR-96-351

9 WILLIAM H. FERGUSON,
10 Respondent.

11 **Background**

12 Mr. William H. Ferguson has appealed from a December 5, 1996 Notice of
13 Violation and Assessment of Civil Penalty issued pursuant to Oregon Revised Statutes
14 (ORS) Chapter 468, ORS Chapter 183, and Oregon Administrative Rules (OAR) Chapter
15 340, Divisions 11 and 12. The Department of Environmental Quality (Department) alleged
16 that Respondent violated: OAR 340-32-5620(1) by failing to employ required work
17 practices for handling and removal of asbestos-containing waste material; violated OAR
18 340-32-5600(4) by open accumulation of asbestos-containing waste material; violated OAR
19 340-32-5650 by failing to properly dispose of asbestos-containing waste material; violated
20 OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project;
21 violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos
22 abatement; and violated OAR 340-33-030(4) by supervising an asbestos abatement project
23 without being certified.

24 A civil penalty of \$5,400 was assessed pursuant to OAR 340-12-045.

25 Mr. William H. Ferguson requested a hearing on December 20, 1996. A hearing
26 was conducted in Medford, Oregon on September 10, 1997. The Respondent appeared with
witnesses Joel Ferguson, A. K. Morris, April Sevak, Gary Breeden, and William Corelle.
Mr. Jeff Bachman represented the Department with witness Keith Tong.

PAGE 1 - FINDINGS OF FACT AND CONCLUSIONS OF LAW, OPINION AND ORDER

1 On December 11, 1997, the Hearings Officer issued Findings of Fact, Conclusions
2 of Law and an Order. The Hearings Officer found that the Commission has jurisdiction
3 and that Respondent had violated each of the cited rules except for OAR 340-032-5620(1)
4 (failure to notify the Department of an asbestos abatement project). The Hearings Officer
5 further found that the Respondent was liable for a civil penalty of \$1,000 rather than
6 \$5,400. This was based upon his determination that the base penalty and the occurrence,
7 responsibility and cooperative factors should be decreased.

8 The Department filed a timely notice of appeal. It subsequently filed five exceptions
9 to the Hearings Officer's conclusion and opinion. These were filed late. The Respondent
10 submitted a brief that also was filed late.

11 The Commission set August 10, 1998 as the date to hear oral arguments. At that
12 time, the Commission entered a preliminary ruling denying the Respondent's motion to
13 dismiss based upon the late filing of the Department's exceptions and brief. With this
14 decision, that preliminary ruling is made final. After the Commission made its preliminary
15 ruling, the Chair of the Commission granted both the Department and the Respondent
16 extensions and the Commission accepted the exceptions and briefs.

17 The Respondent was not present at the August 10, meeting. The Respondent sent a
18 representative in his place. This representative, however, was not a licensed attorney and
19 therefore could not represent the Respondent in the proceedings. The representative
20 withdrew his request to represent the Respondent and the Commission set the matter over
21 until September 17, 1998. The Commission resumed its hearing on September 17. At that
22 time, the Commission heard oral arguments. Mr. Jeffrey Bachman represented the
23 Department and the Respondent represented himself.

24 **Respondent's Contentions**

25 Respondent Mr. William H. Ferguson contends that he had taken reasonable steps to
26 assure the property was free from contaminants when he purchased the property, that he

1 was not aware there were asbestos-containing materials in the building when he started the
2 renovation, and that when he became aware that there might be a problem he took
3 reasonable measures to protect the public and others from exposure, and that once he
4 determined the materials were asbestos-containing he complied with all statutes and rules
5 regarding the removal of such materials.

6

7

FINDINGS OF FACT

8 1. On October 2, 1996, Mr. Keith Tong (Mr. Tong), Department Asbestos
9 Control Analyst, was driving by a building renovation project being conducted at 421 W.
10 Sixth Street-37 North Ivy Street, Medford, Oregon, when he observed what appeared to be
11 asbestos-containing material on the site.

12 2. Mr. Tong stopped at the site, inspected the materials he had observed, and
13 contacted Joel Ferguson who was in charge of the renovation project, and advised him that
14 the duct wrap appeared to be asbestos-containing material, and that proper steps should be
15 taken to accomplish the asbestos removal, and not to disturb the materials.

16 3. Mr. Tong was on his way to a meeting and advised Joel Ferguson that he
17 would return after the meeting and conduct a more detailed inspection, and left the
18 premises.

19 4. After Mr. Tong left, Mr. Joel Ferguson called his father, Respondent herein,
20 and reported his contact with Mr. Tong.

21 5. Respondent contacted the disposal company that was authorized to dispose of
22 asbestos-containing materials and was advised that the materials needed to be double
23 bagged and the bags secured for disposal.

24 6. Respondent went to the renovation project and obtained a sample of the
25 material and took it in for testing.

26 ///

1 7. Respondent advised Mr. Joel Ferguson to bag the material so that there
2 would be no further disbursement of the materials if it was asbestos-containing and not to
3 remove further ducting.

4 8. Mr. Joel Ferguson placed the ducting in double black plastic bagging and
5 placed it in a utility trailer on the premises and also sent other workers home until it could
6 be determined whether the duct wrap did contain asbestos.

7 9. When Mr. Tong returned after the meeting he found that the ducting and
8 wrap containing what appeared to be asbestos-containing material had been removed from
9 where he first observed it and placed in black plastic garbage bags and placed in a utility
10 trailer on the premises.

11 10. Mr. Tong did observe pieces of the material on the ground where the ducting
12 had been located.

13 11. After the second meeting with Mr. Tong, Respondent and Mr. Joel Ferguson
14 did encapsulate the building and taped off the premises from public passage.

15 12. The materials did test positive for asbestos and Respondent contracted for the
16 services of an abatement engineer and then with an abatement contractor for the actual
17 removal of the material.

18 13. Respondent paid approximately \$5,160 for the services of the engineer and
19 actual removal of the material.

20 14. Mr. Joel Ferguson is not a certified asbestos removal worker.

21 15. Respondent is not certified as an asbestos abatement project supervisor.

22 16. When Respondent purchased the property, the environmental investigation
23 and study of the building did not reveal any active or current contamination problems
24 although did indicate that there could be asbestos on the premises.

25 ///

26 ///

1 17. Respondent had removed a false ceiling and was removing a length of old
2 heating duct so that new heating ducts could be installed, when the asbestos-containing
3 material was discovered by Mr. Tong.

4 18. The ducting situation had been reviewed by the heating and air-conditioning
5 contractor and the contractor who worked with Respondent on a number of renovation or
6 construction projects and neither observed any conditions or materials that caused them
7 concern that asbestos was a factor in the renovation project.

8 19. The type of wrap used on the length of duct work that had been removed was
9 manufactured in asbestos-containing and non asbestos containing products, and the wrap
10 ///
11 had no distinguishing marks or colors to accurately determine whether it contained asbestos
12 or not.

13 20. Respondent had been involved in the renovation of another building where a
14 similar type of wrap was suspected of containing asbestos, but after testing, it was
15 determined that it in fact did not.

16 21. Respondent did not believe that the duct wrap was asbestos containing, but
17 wanted to take some precautions in case it was and had directed Joel Ferguson to bag the
18 wrapped ducting and to put it in the trailer.

19

20

CONCLUSIONS OF LAW

21 1. The Commission has jurisdiction.

22 2. Mr. William H. Ferguson violated OAR 340-32-5620(1), OAR 340-32-
23 5600(4), OAR 340-32-5650, OAR 340-33-030(2) and OAR 340-33-030(4).

24 3. Mr. William H. Ferguson is subject to a civil penalty of \$1,400.

25 ///

26 ///

1 Respondent is an experienced property owner and manager who has been involved
2 in the acquisition, renovation and maintenance of commercial properties. He has been
3 involved in situations involving potential asbestos-containing materials, and took reasonable
4 steps to assure that the building in question was free from any hazardous materials or
5 contaminants that would cause costs for removal or containment. He was not aware of the
6 nature of the duct work above the false ceiling, and when the false ceiling was removed,
7 took additional steps to assure that he was not dealing with any materials that would require
8 special handling or removal processes. He was conducting the demolition portion of the
9 renovation project accordingly.

10 Respondent became aware of concerns when Mr. Tong informed Respondent's son
11 that the insulation wrap on some of the duct work that had been removed might contain
12 asbestos. Upon becoming aware of Mr. Tong's concerns, he immediately took a sample to
13 a testing laboratory to be tested and did advise his son to place the removed ducting in
14 plastic bags and put them in a trailer that was on the site. He also advised his son to stop
15 all removal operations.

16 The Hearings Officer concluded that prior to Mr. Tong's notification, Respondent
17 was not involved in an "Asbestos abatement project," notwithstanding the definition of the
18 rule and the strict liability interpretation of its provisions. He reasoned that prior to
19 Mr. Tong's notification of potential asbestos-containing material, Respondent had taken all
20 reasonable and necessary steps to proceed with his demolition and remodeling project, and
21 this liability did not attach prior to notification.

22 The Department took exception to this determination. It argued that the ruling is
23 contrary to the strict liability standard applicable to this violation.

24 A majority of the Commission concludes that the Hearings Officer erred in the
25 determinations and that in keeping with the strict liability standard established by ORS

26 ///

1 468.140(1)(f) and the Commission's prior decisions, liability attached when the Respondent
2 began asbestos abatement.

3 Respondent immediately stopped the demolition. The Department, although not
4 formally notified of the project as provided by the rule, was aware of the project through
5 Mr. Tong's involvement. Respondent, after stopping the demolition, however, continued to
6 handle the suspected asbestos-containing material in violation of the rule.

7 While Respondent's actions may have been a good faith effort to protect the public,
8 the statutes and rules involving the removal and disposal of asbestos-containing materials
9 impose a strict liability on the property owner, and non-compliance, even based on good
10 faith effort does not excuse violation of the rules.

11 Respondent's testing of the sample was reasonable. Mr. Tong's observations were
12 hurried and in passing, and there was no definitive means by which to visually determine
13 whether that particular type of insulation wrap contained asbestos or not. Further,
14 Respondent had been recently involved in a situation where a similar-appearing wrap of
15 suspected asbestos-containing material turned out not to contain asbestos. Notwithstanding
16 the reasonableness of the testing and the delay in notification or contact with an asbestos
17 removal engineer or contractor, the strict liability of the rule required that nothing transpire
18 with the material other than wetting down the material and keeping it in that condition until
19 removal.

20 The Respondent did not do that and thus violated the rule.

21 The Respondent, in proceeding with the bagging and removal of the duct work with
22 the wrap from where it was stacked to the trailer also violated the following provisions of
23 the rules.

24 Respondent violated OAR 340-32-5600(4) by openly accumulating asbestos-
25 containing waste material.

26 ///

1 OAR 340-32-5600(4) provides that open accumulation of friable asbestos-containing
2 waste material is prohibited. Once the notice was given Respondent was responsible to
3 conform to the rule. The insulating wrap materials were not bagged and sealed in
4 accordance with the rule and therefore created an open accumulation of those materials.

5 Respondent violated OAR 340-32-5650 by failing to properly package and store
6 asbestos-containing waste material.

7 OAR 340-32-5650 provides for standards for the packaging, storage, transport and
8 disposal of asbestos-containing waste material and requires that all asbestos-containing
9 waste material shall be adequately wetted to ensure that they remain wet until disposed of
10 and packaged in leak-tight containers such as two plastic bags each with a minimum
11 thickness of 6 mil and labeled as provided in the rule.

12 Respondent did call the disposal company and then triple bagged the materials as
13 was suggested, however the materials were not wetted and Respondent did not use the
14 6 mil bags required by the rule. Respondent did not properly package and store the
15 asbestos-containing materials.

16 Respondent did not violate OAR 340-32-5620(1) by failing to notify the Department
17 of an asbestos abatement project.

18 OAR 340-32-5620(1) requires that any person who conducts an asbestos abatement
19 project shall comply with OAR 340-032-5630 which requires that any person conducting
20 such project shall provide notification within a specific time prior to the abatement project
21 being started.

22 In this case, Respondent was not aware that there was any asbestos-containing
23 materials in the building or that would be affected by the demolition or renovation, and
24 then, other than the bagging and moving of the materials was not actively involved in the
25 actual abatement project that was conducted through the abatement engineer and abatement
26 contractor. At the time of the bagging and removal to the trailer it had not been determined

1 that the materials were in fact asbestos-containing. It is not appropriate to assess violation
2 under this provision of the rule.

3 Respondent violated OAR 340-33-030(2) by allowing uncertified persons to perform
4 asbestos abatement.

5 OAR 340-33-030(2) provides that an owner of a facility shall not allow any person
6 who is not certified to remove asbestos-containing waste material to perform asbestos
7 abatement projects.

8 Mr. Joel Ferguson was not a certified asbestos abatement worker.

9 Respondent violated OAR 340-33-030(4) by supervising an abatement project
10 without being certified.

11 OAR 340-33-030(4) provides that each person acting as a supervisor for any
12 asbestos abatement project must be certified.

13 Respondent was not a certified asbestos abatement project supervisor.

14 3. Respondent is subject to a civil penalty of \$1,400.

15 Violation 1. Failing to employ required work practices for handling and removal of
16 asbestos containing waste.

17 $\text{Penalty} = \text{BP} + [(.1 \times \text{BP}) (\text{P} + \text{H} + \text{O} + \text{R} + \text{C})] + \text{BE}.$

18 "BP" is the base penalty which is \$1000 for a Class I, minor magnitude violation.

19 "P" is Respondent's prior violations. "H" is the past history of the Respondent in taking all
20 feasible steps or procedures necessary to correct any prior violations. "O" is whether or not
21 the violation was a single occurrence or was repeated or continuous during the period of the
22 violation. "R" is the cause of the violation. "C" is the Respondent's cooperativeness.

23 "EB" is the approximated dollar sum of the economic benefit that Respondent gained
24 through noncompliance.

25 The Department applied a base penalty of \$3,000 finding that this was a class I,
26 moderate magnitude violation as provided in OAR 340-012-0042(1). This was predicated

1 on the provision in OAR 340-012-0090(1)(d)(D) which allows the magnitude to be increase
2 one level if the asbestos containing material was compromised of more the 5% asbestos.

3 The Hearings Officer reduced the base penalty to \$1,000 because he believed it was
4 inappropriate to increase the base penalty. His decision was based on conclusion that the
5 violation was not intentional.

6 A majority of the Commission finds that the Respondent's actions were intentional
7 as that term is used in OAR 340-012-0045. Nevertheless, when the Respondent's conduct is
8 viewed as whole, a majority of the Commission agrees that it will not exercise its discretion
9 to increase the magnitude of the violation. Accordingly, the base penalty is \$1,000.

10 The Department assigned a value of 0 to "P" and "H," because Respondent had no
11 prior violations or past history regarding violations.

12 The Department assigned "O" a value of 2 because the violation occurred for more
13 than one day. The Hearings Officer found that the occurrence that results in the violation
14 and penalty occurred during a period in one day where materials were moved and stored.
15 "O" is assigned a value of 0 for this penalty calculation. The Department filed an
16 exception to this ruling.

17 The Commission was unable to reach an agreement on this issue. Therefore, the
18 decision of the Hearings Officer will stand on this factor. The Commission agrees,
19 however, that the Hearings Officer's reasoning on this point should not be viewed as
20 precedent in future cases.

21 The Department assigned a value of 6 for "R" because it determined that the
22 violation was intentional. The Hearings Officer reduced the factor to 2 because he
23 concluded that the Respondent's actions were at most negligent. The Department excepted.
24 It noted that intent is defined in OAR 340-012-0030(9) and that the definition requires only
25 "a conscious objective to cause the result of the conduct." Accordingly, only general intent
26 to remove the asbestos-containing material is required, not specific intent to violate the

1 asbestos regulations. A majority of the Commission agrees with the Department and
2 accordingly the R factor is 6.

3 The Department assigned "C" a value of 0 because Respondent continued abatement
4 proceedings after being advised that the materials might contain asbestos. The rule
5 provides for a value of -2 if a Respondent was cooperative and took reasonable efforts to
6 correct the violation or minimize the effects of the violation. The Hearings Officer noted
7 that the Respondent was skeptical and he had taken steps to assure that the building did not
8 contain contaminates. He had been involved with suspected asbestos-containing materials
9 before which had been tested and found not to contain asbestos. Notwithstanding those
10 facts, he did stop demolition immediately, took what he felt were reasonable steps to
11 minimize the effects of the violation, and then hired an engineer and contractor to perform
12 the removal and disposal tasks. Based on these findings, the Hearings Officer assigned a
13 value of -2 to the "C" factor.

14 The Commission was unable to reach an agreement on this issue. Therefore, the
15 decision of the Hearings Officer will stand on this factor. The Commission agrees,
16 however, that the Hearings Officer's reasoning on this point should not be viewed as
17 precedent in future cases.

18 "EB" is assigned a value of \$0 because Respondent did not gain any economic
19 benefit by his actions after determining that the materials were asbestos-containing.

20 The civil penalty as calculated under the rule for violation 1 is \$1,400.

21 The requirements for establishing a penalty have been met. The values assigned and
22 the calculations are set forth above. Respondent is liable for a civil penalty of \$1,400.

23 ///

24 ///

25 ///

26 ///

1 **ORDER**

2 The Commission, through its Hearings Officer, finds that the Commission has
3 subject matter and personal jurisdiction in this proceeding: that William H. Ferguson
4 violated OAR 340-32-5620(1) by failing to employ required work practices for handling
5 and removal of asbestos-containing waste material; OAR 340-32-5600(4) by open
6 accumulation of asbestos-containing waste material; OAR 340-32-5650 by failing to
7 properly dispose of asbestos-containing waste material; OAR 340-33-030(2) by allowing
8 uncertified persons to perform asbestos abatement; ^{(s) conduct of asbestos proj. by person no} and OAR 340-33-030(4) by supervising
9 an asbestos abatement project without being certified; and that Respondent is liable for a
10 \$1,400 civil penalty.

11 DATED this 30 day of Oct, 1998.

12
13 Environmental Quality Commission

14
15 
16 Carol Whipple
17 Chair

18 Notice of Right to Judicial Review: You have the right to appeal this Order
19 to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you
20 must file a petition for judicial review with the Court of Appeals within 60
21 days from the day this Order was served on you. If this Order was personally
22 delivered to you, the date of service is the day you received the Order. If this
23 Order was mailed to you, the date of service is the day it was *mailed*, not the
24 day you received it. If you do not file a petition for judicial review within the
25 60 day time period, you will lose your right to appeal.

26 LK:kt/LJK0862.PLE

Certificate of Mailing

I certify that I mailed the attached FINDINGS OF FACT AND CONCLUSIONS OF LAW, OPINION AND ORDER to each of the following persons on 11/3, 1998:

William H. Ferguson
5200 Pioneer Road
Medford OR 97501
(Via Certified Mail #P335742336)

Mark Reeve
Environmental Quality Commission
610 S.W. Alder, Suite 803
Portland OR 97205


Jeff Bachman
Department of Environmental Quality
2020 S.W. 4th Avenue, Suite 400
Portland OR 97201

Tony Van Vliet
Environmental Quality Commission
1530 N.W. 13th
Corvallis OR 97330

Carol Whipple, Chair
Environmental Quality Commission
21755 Highway 138 West
Elkton OR 97436

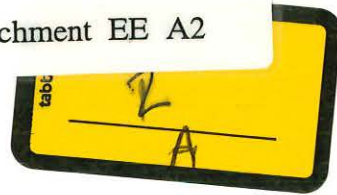
Melinda S. Eden
Environmental Quality Commission
P.O. Box 79
Milton-Freewater OR 97862

Linda McMahan
Environmental Quality Commission
Berry Botanic Garden
11505 S.W. Summerville Avenue
Portland OR 97219


Susan M. Greco
Department of Environmental Quality

DEPARTMENT OF ENVIRONMENTAL QUALITY
TRANSMITTAL ADVICE
CIVIL PENALTY RECEIPTS

CK #	TRAN AMNT	FOR THE ACCOUNT OF	CIVIL PENALTY #
CHECK NAME		REASON FOR PAYMENT	INV # RCPT #
10707	1,400.00	WILLIAM FERGUSON	AQAB-WR-96-315
PARK PLACE BUILDING		FULL PAYMENT	
	<u>1,400.00</u>	TOTAL	



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:	)	NOTICE OF ASSESSMENT
WILLIAM HENRY FERGUSON,	)	OF CIVIL PENALTY
	)	No. AQ/OB-WR-99-234
Respondent.	)	JACKSON COUNTY

I. AUTHORITY

This Notice of Assessment of Civil Penalty (Notice) is issued to Respondent, William Henry Ferguson, by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.126 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. VIOLATION

On or about October 31, 1999, Respondent caused or allowed to be initiated or maintained the open burning of construction and demolition waste within the Rogue Basin open burning control area on real property controlled by Respondent and located at 5200 Pioneer Road, Medford, Oregon, in violation of OAR 340-264-0170(5). This is a Class II violation pursuant to OAR 340-012-0050(2)(g).

III. ASSESSMENT OF A CIVIL PENALTY

The Director imposes a civil penalty of \$900 for the violation cited in Section II. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-012-0045, are attached and incorporated as Exhibit No. 1.

IV. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right to have a formal contested case hearing before the Environmental Quality Commission (Commission) or its hearings officer regarding the matters set out above, at which time Respondent may be represented by an attorney and subpoena and cross-examine witnesses. The request for hearing must be made in writing, must be received by the Department's Rules Coordinator within twenty

1 (20) days from the date of service of this Notice, and must be accompanied by a
2 written "Answer" to the charges contained in this Notice.

3 In the written Answer, Respondent shall admit or deny each allegation of fact
4 contained in this Notice, and shall affirmatively allege any and all affirmative claims or
5 defenses to the assessment of this civil penalty that Respondent may have and the
6 reasoning in support thereof. Except for good cause shown:

7 1. Factual matters not controverted shall be presumed admitted;

8 2. Failure to raise a claim or defense shall be presumed to be a waiver of
9 such claim or defense;

10 3. New matters alleged in the Answer shall be presumed to be denied
11 unless admitted in subsequent pleading or stipulation by the Department or
12 Commission.

13 Send the request for hearing and Answer to: DEQ Rules Coordinator, Office of
14 the Director, 811 S.W. Sixth Avenue, Portland, Oregon 97204. Following receipt of
15 a request for hearing and an Answer, Respondent will be notified of the date, time
16 and place of the hearing.

17 Failure to file a timely request for hearing and Answer may result in the entry
18 of a Default Order for the relief sought in this Notice.

19 Failure to appear at a scheduled hearing or meet a required deadline may result
20 in a dismissal of the request for hearing and also an entry of a Default Order.

21 The Department's case file at the time this Notice was issued may serve as
22 the record for purposes of entering the Default Order.

23 V. OPPORTUNITY FOR INFORMAL DISCUSSION

24 In addition to filing a request for a contested case hearing, Respondent may
25 also request an informal discussion with the Department by attaching a written
26 request to the hearing request and Answer.

27 \\\

VI. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after an Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of \$900 should be made payable to "State Treasurer, State of Oregon" and sent to the Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.

7/10/00
Date

Lydia Taylor
Langdon Marsh, Director

**DEPARTMENT OF ENVIRONMENTAL QUALITY
TRANSMITTAL ADVICE
CIVIL PENALTY RECEIPTS**

CK #	TRAN AMNT	FOR THE ACCOUNT OF	CIVIL PENALTY #
CHECK NAME		REASON FOR PAYMENT	INV # RCPT #
10707	1,400.00	WILLIAM FERGUSON	AQAB-WR-96-315
PARK PLACE BUILDING		FULL PAYMENT	
	<u>1,400.00</u>	TOTAL	

CRH

DEPARTMENT OF ENVIRONMENTAL QUALITY
TRANSMITTAL ADVICE
CIVIL PENALTY RECEIPTS

CK #	TRAN AMNT	FOR THE ACCOUNT OF	CIVIL PENALTY #
CHECK NAME		REASON FOR PAYMENT	INV # RCPT #
02-813967648	100.00	CHARLES CASTEEL	AQ/OB-NWR-99-110
MO		SCHEDULED PAYMT / BALANCE DUE: \$522.59	
16768	7,200.00	CURLY'S DAIRY	AQ/AB-WR-00-071
WILCOX FAMILY FARMS		FULL PAYMENT	
0982	3,600.00	GALVANIZERS COMPANY	WMC/HW-NWR-99-183
		FULL PAYMENT	
10407	435.00	JOHN'S WATERPROOFING CO	AQ/A-WR-00-011
		1ST SCHEDULED PYMT/BAL DUE: \$4,565.00	
8088	560.00	QUALITY METAL FINISHING INC	WMC/HW-WR-99-200
		SCHEDULED PAYMT / BALANCE DUE: \$557.83	
1932	200.00	STEVE BALDWIN	WQOI-ER-96-262
		SCHEDULED PAYMT / BALANCE DUE: \$2,399.21	
143	50.00	WILLIAM B. WEISGRAM	AQ/OB-WR-00-121
		1ST SCHEDULED PYMT/BAL DUE: \$1,767.00	
13015	900.00	WILLIAM HENRY FERGUSON	AQ/OB-WR-99-234
PARK PLACE BUILDING		FULL PAYMENT	
	<u>13,045.00</u>	TOTAL	

Permit Number: 1200-C

Expiration Date: 12/31/2005

Page 1 of 16

**GENERAL PERMIT
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
STORM WATER DISCHARGE PERMIT**

Oregon Department of Environmental Quality

811 SW Sixth Avenue, Portland 97204, (503) 229-5279

Issued pursuant to ORS 468B.050 and The Federal Clean Water Act

**ASSIGNED TO:**

File Number: 109617

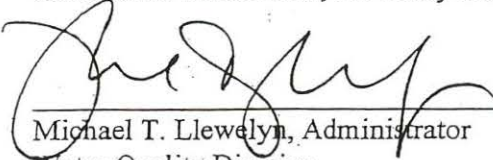
Assigned 1/16/01

Josephine County
ORR10-3812Ferguson, William H.
5200 Pioneer Rd.
Medford, OR 97501Hydro Code
15--ROGU 102 ISite Location: Laurelridge Subdivision, Morgan Lane/Valley View
Drive, Grants Pass**SOURCES COVERED BY THIS PERMIT:**

Construction activities including clearing, grading, excavation, and stockpiling activities that will result in the disturbance of five or more acres. Also included are activities that disturb a total of five or more acres if part of a larger common plan of development.

Effective December 1, 2002 the previously described construction activities will include land disturbance of one acre or more, and will also include activities that disturb a total of one or more acres if part of a larger common plan of development. Two waivers from this permit can apply at projects of one to five acres where the operator certifies that a site has a rainfall erosivity factor less than five or when an approved total maximum daily load or equivalent analysis determines that allocations for construction activities for the pollutants of concern are not needed to protect water quality. [40 CRF 122.26 (b)(15)(i)(A)(B)]

This permit does not authorize in-water or riparian work. These activities are regulated by the Oregon Division of State Lands, US Army Corp of Engineers, and/or the DEQ Section 401 certification program.



Michael T. Llewellyn, Administrator
Water Quality Division

2/20/2001
Date

PERMITTED ACTIVITIES

Until this permit expires or is modified or revoked, the permittee is authorized to construct, install, modify, or operate erosion and sediment control measures, and storm water treatment and control facilities, and to discharge storm water to public waters in conformance with all the requirements, limitations, and conditions set forth in the attached schedules as follows:

	<u>Page</u>
Schedule A - Limitations and Controls for Storm Water Discharges	2
Schedule B - Minimum Monitoring Requirements	8
Schedule C - Compliance Schedule	10
Schedule D - Special Conditions	11
Schedule F - General Conditions	12

Unless specifically authorized by this permit, by another NPDES or WPCF permit, or by Oregon Administrative Rule, any other direct or indirect discharge to waters of the state is prohibited, including discharges to an underground injection control system.

SCHEDULE A
LIMITATIONS AND CONTROLS FOR STORM WATER DISCHARGES

1. **Performance Limitations** An Erosion and Sediment Control Plan (ESCP) shall be developed and implemented to prevent the discharge of significant amounts of sediment to surface waters. The following conditions describe significant amounts of sediment and shall be prevented from occurring.
 - a. Earth slides or mud flows that leave the construction site and are likely to discharge to surface waters.
 - b. Evidence of concentrated flows* of water causing erosion when such flows are not filtered or settled to remove sediment prior to leaving the construction site and are likely to discharge to surface waters. Evidence includes the presence of rills, rivulets or channels.
 - c. Turbid flows* of water that are not filtered or settled to remove turbidity prior to leaving the construction site and are likely to discharge to surface waters.
 - d. Deposits of sediment at the construction site in areas that drain to unprotected storm water inlets or catch basins that discharge to surface waters. Inlets and catch basins with failing sediment controls due to lack of maintenance or inadequate design will be considered unprotected.
 - e. Deposits of sediment from the construction site on public or private streets outside of the permitted construction activity that are likely to discharge to surface waters.
 - f. Deposits of sediment from the construction site on any adjacent property outside of the permitted construction activity that are likely to discharge to surface waters.

* Flow to storm water inlets or catch basins located on the site will be considered "leaving the site" if there are no sediment control structures designed for expected construction flows downstream of the inlets or catch basins that are under the permittee's control.

2. **Erosion and Sediment Control Plan Preparation and Submittal** The permittee shall ensure that a comprehensive ESCP is prepared and implemented for the construction activity regulated by this permit.
 - a. For construction activities disturbing 20 or more acres, the ESCP shall be prepared and stamped by an Oregon Registered Professional Engineer, Oregon Registered Landscape Architect, or Certified Professional in Erosion and Sediment Control (Soil and Water Conservation Society)
 - b. If engineered facilities such as sedimentation basins or diversion structures for erosion and sediment control are required, the ESCP shall be prepared and stamped by an Oregon Registered Professional Engineer.
 - c. The ESCP shall be submitted to the Department of Environmental Quality (Department) and/or its authorized agent (Agent) for approval. An ESCP approved prior to February 15, 2001 is not required to be resubmitted to the Department or its Agent.
 - d. Prior to beginning clearing, grading, excavation, or construction, the ESCP shall be approved by the Department or its Agent. If the Department has not commented on the ESCP within 30 days of receipt, the ESCP shall be approved by default. If the ESCP is required to be submitted to the

Department's Agent, the permittee shall follow the schedule set forth by the Agent. The Department or its Agent's approval of the ESCP does not constitute compliance with this permit. The permittee shall be responsible for complying with all permit conditions.

- e. A copy of the ESCP shall be retained on-site and made available to the Department, its Agent, or the local municipality upon request. During inactive periods of greater than seven (7) consecutive calendar days, the ESCP shall be retained by the permittee.
 - f. The Department or its Agent may request modifications to the ESCP at any time if the ESCP is ineffective at preventing the discharge of significant amounts of sediment and turbidity to surface waters.
 - g. The ESCP shall include any procedures necessary to meet local erosion and sediment control requirements or storm water management requirements.
 - h. If possible, during the period of October through May, construction activities should avoid or minimize excavation and bare ground activities. If the operator chooses to continue land disturbance activities within this period, additional wet weather requirements (refer to A.3.d) are required in the ESCP. Specifically, if construction activity occurs during the winter season where slopes are greater than five (5) percent and the soils have medium to high erosion potential additional erosion controls will be required.
 - i. The following non-storm water discharges are allowed as long as they are identified in the ESCP and all necessary controls are implemented to minimize sediment transport. These include: firefighting activity, hydrant flushing and potable waterline flushing (refer to DEQ guidance), air conditioning condensate, dewatering activities of uncontaminated groundwater or spring water, and uncontaminated foundation or footer drain water.
3. **Erosion and Sediment Control Plan Requirements** The ESCP shall, at a minimum, include the following elements.
- a. Site Description A description of the following:
 - i. Nature of the construction activity, including a proposed timetable for major activities.
 - ii. Estimates of the total area of the permitted site and the area of the site that is expected to undergo clearing, grading and/or excavation.
 - iii. Nature of the fill material to be used, the insitu soils, and the erosion potential of such soils.
 - iv. Names of the receiving water(s) for storm water runoff.
 - b. Site Map Indicating the following: (Note: In order to provide all the required information, a general location map in addition to the site map is required.)
 - i. Areas of total development
 - ii. Drainage patterns
 - iii. Areas of total soil disturbance (including, but not limited to, showing cut and fill areas and pre and post development elevation contours)
 - iv. Areas used for the storage of soils or wastes
 - v. Areas where vegetative practices are to be implemented. Include type of vegetation seed mix.
 - vi. Location of all erosion and sediment control measures or structures
 - vii. Location of impervious structures after construction is completed. Include buildings, roads, parking lots, outdoor storage areas, etc., if any.
 - viii. Springs, wetlands and other surface waters located on-site

- ix. Boundaries of the 100-year flood plain if determined
 - x. Location of storm drainage outfalls to receiving water(s) if applicable
 - xi. Location of drinking water wells and underground injection controls
 - xii. Details of sediment and erosion controls
 - xiii. Details of detention ponds, storm drain piping, inflow and outflow details
- c. Required Controls and Practices The following controls and practices are required:
- i. Each site shall have graveled, paved, or constructed entrances, exits and parking areas, prior to beginning any other work, to reduce the tracking of sediment onto public or private roads.
 - ii. All unpaved roads located on-site shall be graveled. Other effective erosion and sediment control measures either on the road or down gradient may be used in place of graveling.
 - iii. When trucking saturated soils from the site, either water-tight trucks shall be used or loads shall be drained on-site until dripping has been reduced to minimize spillage on roads.
 - iv. A description of procedures that describe controls to prevent the discharge of all wash water from concrete trucks.
 - v. A description of procedures for correct installation or use of all erosion and sediment control measures.
 - vi. A description of procedures for prompt maintenance or repair of erosion and sediment control measures utilized on-site (refer to A.4).
- d. Additional Controls and Practices Additional controls and practices shall be developed that are appropriate for the site. At a minimum the following shall be considered:
- i. A description of clearing and grading practices, including a schedule of implementation, that will minimize the area of exposed soil throughout the life of the project. Whenever practicable, clearing and grading shall be done in a phased manner to prevent exposed inactive areas from becoming a source of erosion.
 - ii. A description of vegetative erosion control practices, including a schedule of implementation, designed to preserve existing vegetation where practicable and re-vegetate open areas when practicable after grading or construction.

In developing vegetative erosion control practices, at a minimum the following shall be considered: temporary seeding, permanent seeding, mulching, sod stabilization, vegetative buffer strips, and protection of trees with protective construction fences.
 - iii. A description of additional erosion control practices, including a schedule of implementation, designed to protect exposed areas and prevent soil from being eroded by storm water.

In developing additional erosion control practices, at a minimum the following shall be considered: mulching with straw or other vegetation, use of erosion control blankets, and application of soil tackifiers.
 - iv. A description of sediment control practices, including a schedule of implementation, that will be used to divert flows from exposed soil, store flows to allow for sedimentation, filter flows, or otherwise reduce soil laden runoff. All temporary sediment control practices shall not be removed until permanent vegetation or other cover of exposed areas is established.

In developing sediment control practices, at a minimum the following shall be considered: use of silt fences, earth dikes, brush barriers, drainage swales, check dams, subsurface drains, pipe slope drains, rock outlet protection, sediment traps, and temporary or permanent sedimentation basins.

- v. A description of erosion and sediment control practices that will be used to prevent stockpiles from becoming a source of erosion. Stockpiles located away from the construction activity but still under the control of the permittee shall also be protected to prevent significant amounts of sediment from discharging to surface waters. At the end of each workday the soil stockpiles must be stabilized or covered.

In developing these practices, at a minimum the following shall be considered: diversion of uncontaminated flows around stockpiles, use of cover over stockpiles, and installation of silt fences around stockpiles.

- vi. A description of the best management practices that will be used to prevent or minimize storm water from being exposed to pollutants from spills, cleaning and maintenance activities, and waste handling activities. These pollutants include fuel, hydraulic fluid, and other oils from vehicles and machinery, as well as debris, leftover paints, solvents, and glues from construction operations. The reuse and recycling of construction wastes should be promoted.

In developing these practices, at a minimum the following shall be considered: written spill prevention and response procedures; employee training on spill prevention and proper disposal procedures; regular maintenance schedule for vehicles and machinery; and covered storage areas for waste and supplies.

4. Maintenance Requirements The following maintenance activities shall be implemented.

- a. Significant amounts of sediment that leave the site shall be cleaned up within 24 hours and placed back on the site or properly disposed. Any in-stream clean up of sediment shall be performed according to Oregon Division of State Lands' required timeframe.
- b. Under no conditions shall sediment intentionally be washed into storm sewers or drainageways unless it is captured by a BMP before entering receiving waters.
- c. For a filter fence, the trapped sediment shall be removed before it reaches one third of the above ground fence height.
- d. For catch basin protection, cleaning must occur when design capacity has been reduced by fifty percent.
- e. For a sediment basin, removal of trapped sediments shall occur when design capacity has been reduced by fifty percent.
- f. All erosion and sediment controls not in the direct path of work shall be installed before any land disturbance.
- g. If fertilizers are used to establish vegetation, the application rates shall follow manufacturer's guidelines and the application shall be done in such a way to minimize nutrient-laden runoff to receiving waters.

- h. If construction activities cease for thirty (30) days or more, the entire site must be stabilized, using vegetation or a heavy mulch layer, temporary seeding, or another method that does not require germination to control erosion.
- i. Any use of toxic or other hazardous materials shall include proper storage, application, and disposal.
- j. The permittee shall manage abandoned hazardous wastes, used oils, contaminated soils or other toxic substances discovered during construction activities in a manner approved by the Department.
- k. If a storm water treatment system for construction activities is employed, an operation and maintenance plan shall be submitted to the Department for approval.

5. Additional Requirements

- a. **Water Quality Standards:**
The ultimate goal for permittees is to comply with water quality standards in OAR 340-41. In instances where a storm water discharge adversely impacts water quality, the Department may require the facility to implement additional management practices, apply for an individual permit, or take other appropriate action.
- b. **Turbidity (Nephelometric Turbidity Units, NTU) Water Quality Standard:**
No more than a ten percent cumulative increase in natural stream turbidities shall be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:
 - (A) **Emergency activities:** Approval coordinated by DEQ with the Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare;
 - (B) **Dredging, Construction or other Legitimate Activities:** Permit or certification authorized under terms of Section 401 or 404 (Permits and Licenses, Federal Water Pollution Control Act) or OAR 141-085-0100 et seq. (Removal and Fill Permits, Division of State Lands), with limitations and conditions governing the activity set forth in the permit or certificate.

[see OAR 340-041-(basin)(2)(c)]
- c. **Water Quality Limited Streams:**
The Department may establish additional controls on construction activities that discharge storm water runoff to water quality limited streams if Total Maximum Daily Loads are established and construction activities are determined to be a significant contributor to these loads. The Department may also require application for individual permit or develop a watershed-based general permit for the activity.

6. **Required Actions Prior to Termination of the Permit** The following actions shall be completed before permit coverage is terminated.
- a. There is no potential for discharge of a significant amount of construction related sediment to surface waters.
 - b. All elements of the ESCP have been completed.
 - c. Construction materials, waste, and temporary erosion and sediment controls have been removed and disposed of properly. This includes any sediment that was being retained by the temporary erosion and sediment controls.
 - d. All disturbed areas of the site must be stabilized.
 - e. Submittal of DEQ Notice of Termination Form.

SCHEDULE B
MINIMUM MONITORING REQUIREMENTS

All Sites

1. A person with knowledge and experience in construction storm water controls and management practices shall conduct the inspections. The ESCP shall identify the person(s) and/or title of the personnel that will conduct the inspections and provide a contact phone number for such person(s).

Active Sites

2. Frequency of inspections shall be daily during storm water runoff or snowmelt runoff and at least once every seven (7) calendar days and within 24 hours after any storm event of greater than 0.5 inches of rain per 24-hour period.

Inactive Sites

3. During inactive periods of greater than seven (7) consecutive calendar days, inspections shall only be required once every two (2) weeks.
4. Prior to discontinuing activities at the site, any exposed area shall be stabilized to prevent erosion. Stabilization may occur by applying appropriate cover (mulch, erosion control blanket, soil tackifier, etc.) or establishing adequate vegetative cover.
5. When a site is inaccessible due to adverse weather conditions, inspections shall not be required. Adverse weather condition shall be recorded on the inspection sheet.
6. Prior to leaving an inactive site or in anticipation of site inaccessibility, existing erosion and sediment control measures shall be inspected to ensure that they are in working order. Any necessary maintenance or repair shall be made prior to leaving the site.

Written Records

7. All visual inspections must document the following information:
 - a. Inspection date, inspector's name, weather conditions, and rainfall amount for past 24 hours (inches). (Rainfall information can be obtained from the nearest weather recording station.)
 - b. List observations of all BMPs: erosion and sediment controls, chemical and waste controls, locations where vehicles enter and exit the site, status of areas that employ temporary or final stabilization control, soil stockpile area, and nonstormwater controls.
 - c. At representative discharge location(s) from the construction site conduct observation and document the quality of the discharge for any turbidity, color, sheen, or floating materials. If possible, in the receiving stream, observe and record color and turbidity or clarity upstream and downstream within 30 feet of the discharge from the site. For example, a sheen or floating material could be noted as present/absent, if observation is yes, it could indicate concern about a possible spill and/or leakage from vehicles or materials storage. For turbidity and color an observation would describe any apparent color and the clarity of the discharge, and any apparent difference in comparison with the receiving stream.

- d. If significant amounts of sediment are leaving the property, briefly explain the corrective measures taken to reduce the discharge and/or clean it up and describe efforts to prevent future releases. The ESCP shall be amended accordingly.
 - e. If a site is inaccessible due to inclement weather the inspection shall include observations at a relevant discharge point or downstream location, if practical.
8. All inspection records for an active site shall be kept on-site or be maintained with the permittee, and shall made available to the Department, its Agent, or local municipality upon request.
 9. A written record of inspections for an inactive site shall be maintained with the permittee and made available to the Department, its Agent, or local municipality upon request.
 10. Retention of all inspection records shall be for a period of one year from project completion.

SCHEDULE C
COMPLIANCE SCHEDULE

1. Registration of Underground Injection Systems (40 CFR 144 and OAR 340-044). The permittee shall submit to DEQ a registration form if construction activities include disposal of storm water or other wastewater discharges to an injection system. These types of disposal systems are classified under the Underground Injection Control Program as a Class V well, require registration, and must meet Division 44 standards.
 - a. A new permittee shall register any applicable underground treatment systems **prior to** the construction of a new facility.
 - b. For facilities covered by the previous 1200-C permit, the registration form is due within **thirty (30) days** after receipt of this new 1200-C permit.

SCHEDULE D
SPECIAL CONDITIONS

1. Issuance of this permit does not relieve the permittee from all other permitting and licensing requirements. Prior to beginning construction activities, all other necessary approvals shall be obtained.
2. The permit will remain in effect after the expiration date or until another permit is issued if the permittee has paid all fees and has filed a renewal application.
3. Any permittee that does not want to be covered or limited by this general permit may make application for an individual NPDES permit in accordance with the procedures in OAR 340-45-030.
4. Permit Specific Definitions:

Best Management Practices (BMPs) Schedules of activities, prohibitions of practices, maintenance procedures, and other physical, structural and/or managerial practices to prevent or reduce the pollution of waters of the state. BMPs include treatment systems, erosion and sediment control, source control, and operating procedures and practices to control: site runoff, spillage or leaks, and waste disposal.

Dewatering The removal and disposal of surface water or groundwater for purposes of preparing a site for construction.

Erosion The movement of soil particles resulting from the tracking, flow or pressure from storm water or wind.

Grade Construction activity that causes the disturbance of the earth. This shall include but not be limited to any excavating, filling, stockpiling of earth materials, grubbing, root mat or topsoil disturbance, or any combination of them.

Hazardous Materials As defined in 40 CFR 302 Designation, Reportable Quantities, and Notification. Available on the web at <http://www.epa.gov>.

Phasing Clearing a parcel of land in distinct phases, with the stabilization of each phase before clearing of the next phase; including soil stockpiling.

Stabilization The completion of all soil disturbance activities at the site and the establishment of a permanent vegetative cover, or equivalent permanent stabilization measures (such as riprap, gabions, geotextiles, or bioengineering methods) that will prevent erosion.

Start of Construction The first land-disturbing activity associated with a development, including land preparation such as clearing, grading, excavation, and filling; installation of streets and walkways; erection of temporary forms; and installation of accessory buildings such as garages.

Storm Water Storm water runoff, snow melt runoff, and surface runoff associated with a storm event.

Turbidity An expression of the optical property of a sample which causes light to be scattered and absorbed rather than transmitted in a straight line through the sample. It is caused by the presence of suspended matter in a liquid.

SCHEDULE F
NPDES GENERAL CONDITIONS

SECTION A. STANDARD CONDITIONS

1. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of Oregon Revised Statutes (ORS) 468B.025 and is grounds for enforcement action; for permit termination, suspension, or modification; or for denial of a permit renewal application.

2. Penalties for Water Pollution and Permit Condition Violations

Oregon Law (ORS 468.140) allows the Director to impose civil penalties up to \$10,000 per day for violation of a term, condition, or requirement of a permit.

Under ORS 468.943, unlawful water pollution, if committed by a person with criminal negligence, is punishable by a fine of up to \$25,000 or by imprisonment for not more than one year, or by both. Each day on which a violation occurs or continues is a separately punishable offense.

Under ORS 468.946, a person who knowingly discharges, places or causes to be placed any waste into the waters of the state or in a location where the waste is likely to escape into the waters of the state, is subject to a Class B felony punishable by a fine not to exceed \$200,000 and up to 10 years in prison.

3. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment. In addition, upon request of the Department, the permittee shall correct any adverse impact on the environment or human health resulting from noncompliance with this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

4. Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and have the permit renewed. The application shall be submitted at least 180 days before the expiration date of this permit.

The Director may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date.

5. Permit Actions

This permit may be modified, suspended, revoked and reissued, or terminated for cause including, but not limited to, the following:

- a. Violation of any term, condition, or requirement of this permit, a rule, or a statute;
- b. Obtaining this permit by misrepresentation or failure to disclose fully all material facts; or
- c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

The filing of a request by the permittee for a permit modification or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

6. Toxic Pollutants

The permittee shall comply with any applicable effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

7. Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privilege.

8. Permit References

Except for effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants and standards for sewage sludge use or disposal established under Section 405(d) of the Clean Water Act, all rules and statutes referred to in this permit are those in effect on the date this permit is issued.

SECTION B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

1. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls, and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary

facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

2. Duty to Halt or Reduce Activity

For industrial or commercial facilities, upon reduction, loss, or failure of the treatment facility, the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power of the treatment facility fails or is reduced or lost. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

3. Bypass of Treatment Facilities

a. Definitions

- (1) "Bypass" means intentional diversion of waste streams from any portion of the treatment facility. The term "bypass" does not include nonuse of singular or multiple units or processes of a treatment works when the nonuse is insignificant to the quality and/or quantity of the effluent produced by the treatment works. The term "bypass" does not apply if the diversion does not cause effluent limitations to be exceeded, provided the diversion is to allow essential maintenance to assure efficient operation.
- (2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities or treatment processes which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Prohibition of bypass.

- (1) Bypass is prohibited unless:
 - (a) Bypass was necessary to prevent loss of life, personal injury, or severe property damage;
 - (b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance; and
 - (c) The permittee submitted notices and requests as required under General Condition B.3.c.
- (2) The Director may approve an anticipated bypass, after considering its adverse effects and any alternatives to bypassing, when the Director determines that it will meet the three conditions listed above in General Condition B.3.b.(1).

c. Notice and request for bypass.

- (1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior written notice, if possible at least ten days before the date of the bypass.
- (2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in General Condition D.5.

4. Upset

a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operation error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

b. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of General Condition B.4.c are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

- (1) An upset occurred and that the permittee can identify the causes(s) of the upset;
- (2) The permitted facility was at the time being properly operated;
- (3) The permittee submitted notice of the upset as required in General Condition D.5, hereof (24-hour notice); and
- (4) The permittee complied with any remedial measures required under General Condition A.3 hereof.

d. Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

5. Treatment of Single Operational Event

For purposes of this permit, A Single Operational Event which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation. A single operational event is an exceptional

incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. A single operational event does not include Clean Water Act violations involving discharge without a NPDES permit or noncompliance to the extent caused by improperly designed or inadequate treatment facilities. Each day of a single operational event is a violation.

6. Overflows from Wastewater Conveyance Systems and Associated Pump Stations

- a. Definitions
- (1) "Overflow" means the diversion and discharge of waste streams from any portion of the wastewater conveyance system including pump stations, through a designed overflow device or structure, other than discharges to the wastewater treatment facility.
 - (2) "Severe property damage" means substantial physical damage to property, damage to the conveyance system or pump station which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of an overflow.
 - (3) "Uncontrolled overflow" means the diversion of waste streams other than through a designed overflow device or structure, for example to overflowing manholes or overflowing into residences, commercial establishments, or industries that may be connected to a conveyance system.
- b. Prohibition of overflows. Overflows are prohibited unless:
- (1) Overflows were unavoidable to prevent an uncontrolled overflow, loss of life, personal injury, or severe property damage;
 - (2) There were no feasible alternatives to the overflows, such as the use of auxiliary pumping or conveyance systems, or maximization of conveyance system storage; and
 - (3) The overflows are the result of an upset as defined in General Condition B.4. and meeting all requirements of this condition.
- c. Uncontrolled overflows are prohibited where wastewater is likely to escape or be carried into the waters of the State by any means.
- d. Reporting required. Unless otherwise specified in writing by the Department, all overflows and uncontrolled overflows must be reported orally to the Department within 24 hours from the time the permittee becomes aware of the overflow. Reporting procedures are described in more detail in General Condition D.5.

7. Public Notification of Effluent Violation or Overflow

If effluent limitations specified in this permit are exceeded or an overflow occurs, upon request by the Department, the permittee shall take such steps as are necessary to alert the public about the extent and nature of the discharge. Such steps may include, but are not limited to, posting of the river at access points and other places, news releases, and paid announcements on radio and television.

8. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in such a manner as to prevent any pollutant from such materials from entering public waters, causing nuisance conditions, or creating a public health hazard.

SECTION C. MONITORING AND RECORDS

1. Inspection and Entry

The permittee shall allow the Director, or an authorized representative upon the presentation of credentials to:

- a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
- b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
- c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit, and
- d. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by state law, any substances or parameters at any location.

SECTION D. REPORTING REQUIREMENTS

1. Planned Changes

The permittee shall comply with Oregon Administrative Rules (OAR) 340, Division 52, "Review of Plans and Specifications". Except where exempted under OAR 340-52, no construction, installation, or modification involving disposal systems, treatment works, sewerage systems, or common sewers shall be commenced until the plans and specifications are submitted to and approved by the Department. The permittee shall give notice to the Department as soon as possible of any planned physical alternations or additions to the permitted facility.

2. Anticipated Noncompliance

The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

3. Transfers

This permit may be transferred to a new permittee provided the transferee acquires a property interest in the permitted activity and agrees in writing to fully comply with all the terms and conditions of the permit and the rules of the Commission. No permit shall be transferred to a third party without prior written approval from the Director. The permittee shall notify the Department when a transfer of property interest takes place.

4. Compliance Schedule

Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date. Any reports of noncompliance shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirements.

5. Twenty-Four Hour Reporting

The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally (by telephone) within 24 hours, unless otherwise specified in this permit, from the time the permittee becomes aware of the circumstances. During normal business hours, the Department's Regional office shall be called. Outside of normal business hours, the Department shall be contacted at 1-800-452-0311 (Oregon Emergency Response System).

A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. If the permittee is establishing an affirmative defense of upset or bypass to any offense under ORS 468.922 to 468.946, and in which case if the original reporting notice was oral, delivered written notice must be made to the Department or other agency with regulatory jurisdiction within 4 (four) calendar days.

The written submission shall contain:

- a. A description of the noncompliance and its cause;
- b. The period of noncompliance, including exact dates and times;
- c. The estimated time noncompliance is expected to continue if it has not been corrected;
- d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance; and
- e. Public notification steps taken, pursuant to General Condition B.7.

The following shall be included as information which must be reported within 24 hours under this paragraph:

- a. Any unanticipated bypass which exceeds any effluent limitation in this permit.
- b. Any upset which exceeds any effluent limitation in this permit.
- c. Violation of maximum daily discharge limitation for any of the pollutants listed by the Director in this permit.

The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

6. Other Noncompliance

The permittee shall report all instances of noncompliance not reported under General Condition D.4 or D.5, at the time monitoring reports are submitted. The reports shall contain:

- a. A description of the noncompliance and its cause;
- b. The period of noncompliance, including exact dates and times;
- c. The estimated time noncompliance is expected to continue if it has not been corrected; and
- d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

7. Duty to Provide Information

The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit.

Other Information: When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to the Department, it shall promptly submit such facts or information.

8. Signatory Requirements

All applications, reports or information submitted to the Department shall be signed and certified in accordance with 40 CFR 122.22.

9. Falsification of Reports

Under ORS 468.953, any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, is subject to a Class C felony punishable by a fine not to exceed \$100,000 per violation and up to 5 years in prison.

10. Changes to Indirect Dischargers - [Applicable to Publicly Owned Treatment Works (POTW) only]
The permittee must provide adequate notice to the Department of the following:
- Any new introduction of pollutants into the POTW from an indirect discharger which would be subject to section 301 or 306 of the Clean Water Act if it were directly discharging those pollutants and;
 - Any substantial change in the volume or character of pollutants being introduced into the POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.
 - For the purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.
11. Changes to Discharges of Toxic Pollutant - [Applicable to existing manufacturing, commercial, mining, and silvicultural dischargers only]
The permittee must notify the Department as soon as they know or have reason to believe of the following:
- That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
 - One hundred micrograms per liter (100 g/l);
 - Two hundred micrograms per liter (200 g/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 g/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;
 - Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
 - The level established by the Department in accordance with 40 CFR 122.44(f).
 - That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
 - Five hundred micrograms per liter (500 g/l);
 - One milligram per liter (1 mg/l) for antimony;
 - Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
 - The level established by the Department in accordance with 40 CFR 122.44(f).

SECTION E. DEFINITIONS

- BOD means five-day biochemical oxygen demand.
- TSS means total suspended solids.
- mg/l means milligrams per liter.
- kg means kilograms.
- m³/d means cubic meters per day.
- MGD means million gallons per day.
- Composite sample means a sample formed by collecting and mixing discrete samples taken periodically and based on time or flow.
- FC means fecal coliform bacteria.
- Technology based permit effluent limitations means technology-based treatment requirements as defined in 40 CFR 125.3, and concentration and mass load effluent limitations that are based on minimum design criteria specified in OAR 340-41.
- CBOD means five day carbonaceous biochemical oxygen demand.
- Grab sample means an individual discrete sample collected over a period of time not to exceed 15 minutes.
- Quarter means January through March, April through June, July through September, or October through December.
- Month means calendar month.
- Week means a calendar week of Sunday through Saturday.
- Total residual chlorine means combined chlorine forms plus free residual chlorine.
- The term "bacteria" includes but is not limited to fecal coliform bacteria, total coliform bacteria, and E. coli bacteria.
- POTW means a publicly owned treatment works.



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Western Region - Salem Office

750 Front St. NE, Ste. 120

Salem, OR 97301-1039

(503) 378-8240

(503) 378-3684 TTY

May 1, 2001

William H. Ferguson
5200 Pioneer Rd.
Medford, OR 97501

Re: NPDES General Storm Water Discharge Permit No. 1200-C
File Number: 109617
EPA Number: ORR10-3812
Site Location: Laurelridge Subdivision, Morgan Lane/Valley View Drive, Grants Pass
Josephine County

Dear Mr. Ferguson:

We have received your application for assignment to the National Pollutant Discharge Elimination System (NPDES) General Storm Water 1200-C Permit, the required application fees, and the Erosion Control Plan for your planned construction activities. We have completed our review of the application and your assignment to the enclosed permit is now effective. Please review the permit in its entirety and take special note of new rules effective December 1, 2002, which will require a permit for activities of land disturbance of **one acre or more**.

The permit prohibits significant amounts of sediments from leaving the construction site and requires that erosion control measures be inspected regularly by the permittee. The Erosion Control Plan is in the process of being reviewed. You will receive an approval notification upon completion of the process. This permit does not authorize excavation or fill in state waterways, including wetlands, and does not replace the requirement for receiving authorization to do this type of work under Section 404 of the Clean Water Act.

When you have completed your construction project and wish the permit assignment to be cancelled, please send written notification to me at Department of Environmental Quality (DEQ), Salem Office, 750 Front Street, Suite 120, Salem, OR 97301-1039. The Department considers the project to be completed when disturbed soils are established with vegetation, and the potential for erosion is minimized to the maximum extent practicable. Please be aware that you will be billed an annual compliance fee in June for each year this permit remains in effect.

We are currently processing the refund of your overpayment in the amount of \$85. You should receive a check from our business office within three to four weeks.

Should you have any technical questions please contact Andy Ullrich in our Medford Office at (541) 776-6010, extension 246. For administrative or fee questions contact me at (503) 378-8240 extension 224.

Sincerely,


Jennifer Claussen
Water Quality Permit Coordinator
Western Region

Enclosure

cc: Andy Ullrich, Western Region- Medford Office





Ferrero Geologic

276 Grant Street, Ashland, Oregon 97520
541-488-2452 (ph) 541-488-6473 (FAX)
Email: ferrerogeo@mindspring.com



To: Bill Ferguson
F & L Ltd.
5200 Pioneer Road
Medford, Oregon 97501

Date: 09/29/00

Subject: Geologic investigation, Laurelridge Subdivision Phase 3, Grants Pass, Oregon

Introduction

I completed field examination of Laurelridge Phase 3 on 09/26/00. Proposed Phase 3 developments include a ridge top road, several building sites on the shoulders of the ridge and a few building sites down-slope at the foot of the ridge. The attached Phase 3 topographic maps, adapted from drawings created by Gary Wicks Engineering, show the location of the proposed developments in relation to site topography.

Field work included surface mapping and examination of subsurface conditions. Subsurface exposures included shallow cuts along the existing cat road pioneered along the proposed Phase 3 Starlight Place corridor and deeper road cuts in Phase 2. Additional data was collected in 1999, from backhoe pits and an auger hole on a lot adjacent to Phase 3.

Findings

Vicinity Geology/Topography

The site is located on a ridge in the foothill terrain of the geologic feature known as the Grants Pass Granitic Pluton. Typically, the granitic rocks of the Grants Pass Pluton weather deeply, to very erosive, silty coarse sand soils.



Ferrero Geologic

276 Grant Street, Ashland, Oregon 97520

541-488-2452 (ph) 541-488-6473 (FAX)

Email: ferrerogeo@mindspring.com



Soil and Bedrock

The granitic bedrock under the site weathers to about 3 to 4 feet of soft to medium dense, granitic colluvial (shallow slope) soil, over 4 to 5 feet of medium dense to very dense residual soil (completely decompose granite), over firm to hard, partially decomposed granite. Soils tend to be somewhat shallower on the ridge top and steep drainage channels and headwalls than on the ridge shoulders and slopes between drainages. Colluvial and residual soils are composed of silty sand to sandy silt (USCS SM to ML).

Groundwater

The site is mostly high and dry. I saw no signs of groundwater saturation of soils with the potential to cause slope stability problems. It is likely that there is some concentration of groundwater at the colluvium/residuum contact during winter and spring, that will be addressed by foundation and retaining wall drainage design and road cut drainage.

Surface Water

The high dry site has no major stream channels. Very steep headwalls above well-incised drainage channels do reach up into some of the lots.

Erosion

The existing logging road system has been eroded in places. The ridge-top logging road will be regraded as part of Starlight Place and building site developments. The spur road that drops down from the ridge on lot 105 and onto the bench at the west margin of lot 104, crosses the head of a well-incised channel and is severely rutted.

Seismic Hazards

Based on data collected along the Oregon, Washington and northern California coasts, seismologists have estimated that the risk of a severe earthquake (Richter 7.0+) somewhere on the Oregon coast (Cascadia Subduction Zone) is



Ferrero Geologic

*276 Grant Street, Ashland, Oregon 97520
541-488-2452 (ph) 541-488-6473 (FAX)
Email: ferrerogeo@mindspring.com*



about 10 to 20% in the next 50 years. Lagoonal tsunami sand deposits and other features indicate that major seismic events occur on the Oregon Coast about every 300 to 500 years, the last one occurring about 300 years ago.

In 1873, an earthquake estimated to have had a Richter magnitude of 6.3 occurred along the southern Oregon coast that was felt in the Rogue Valley area, though no significant damage was reported. There was one earthquake in the Medford/Ashland area with a magnitude 4.0 to 5.0, four with magnitudes of 3.0 to 4.0, two at 2.0 to 3.0 and six from 1.0 to 2.0 reported between 1841 and 1986.

In addition, significant earthquakes occur in the Klamath Falls area, related to Cascade Mountain/Basin and Range contact zone range front faulting. Magnitudes historically are generally in the Richter 3.0 to 5.0 range, but in 1993 one occurred with a magnitude of 6.0, which did very minor damage in the Rogue Valley area. Researchers estimate that a 7.0 magnitude earthquake is possible on the Klamath Falls area.

A recent study by the Oregon Department of Geology and Mineral Industries assessed the expected risk and damage from severe earthquakes from 1996 to 2050. They defined severe earthquakes as ones that cause ground shaking of 0.3 g (0.3 times the acceleration of gravity). DOGAMI estimated an expected recurrence interval for severe earthquakes to be 1,250 years for Jackson County. This reflects the expected recurrence interval for subduction zone earthquakes on the southern Oregon Coast strong enough to cause 0.3 g shaking this far inland.

According to Oregon Department of Geology publication GMS-100, Earthquake Hazard Maps for Oregon, 1996, the estimated maximum earthquake ground shaking in the Rogue Valley vicinity expected for an earthquake with frequency occurrence of 500 years (10% chance in 50 years) is 0.20 g, 1,000 years (5% chance in 50 years) is 0.26g and 2,500 years (2% chance in 50 years) is 0.35g. GMS-100 defines damage at various g levels as follows. At 0.20g, poorly built structures are considerably damaged and ordinary structures are slightly to moderately damaged. At 0.35g, poorly built structures



Ferrero Geologic

276 Grant Street, Ashland, Oregon 97520

541-488-2452 (ph) 541-488-6473 (FAX)

Email: ferrerogeo@mindspring.com



are greatly damaged, ordinary structures are considerably damaged, and specially designed structures are slightly to moderately damaged.

Conclusions and Recommendation

Grading – General Specifications

Unretained cut slopes should not exceed 1 to 1. Cuts higher than 8 feet should be terraced, with maximum vertical height between terraces of 8 feet and minimum terrace width of 3 feet.

Road and building pad fill slopes should not exceed 2 to 1. Fills should not be placed on slopes steeper than 40 percent. All slopes that are to receive fills must be cleared of top-soil and vegetation.

All grading must conform to the UBC.

Fills and cuts must be set back from property lines as per the UBC.

Seismic Design Parameters

The vicinity earthquake history and predictive models based on recent research data indicate a low hazard level within the expected lifetime of a structure. However, a severe earthquake could occur tomorrow, or in 1,000 years. The region is currently in earthquake zone 3 (seismic zone factor, Z [design acceleration] = 0.3 g). Structural elements should meet current seismic zone specifications.

For this site, the UBC seismic zone factor, Z is 0.30 and the UBC soil profile type (for seismic design) is S_D .

Starlight Place

The road alignment should be moved slightly to the northeast in the locations indicated on the attached topo map, in order to keep all grading out of the very



Ferrero Geologic

276 Grant Street, Ashland, Oregon 97520

541-488-2452 (ph) 541-488-6473 (FAX)

Email: ferrerogeo@mindspring.com



steep drainage headwalls along the southwest slope of the ridge. No fills should be placed at the top of the steep headwalls. Headwall grading increases the risk of down-slope safety hazards and property damage due to slope and fill failure leading to debris torrents.

The existing vegetation laden pioneer road fill should be pulled back. Most of it should be hauled off site. The vegetation can be separated from some of it and placed where applicable, in compliance with the above grading specifications.

Foundations

I completed a foundation investigation for the residence at 1055 Starlight in March of 1999. It is the last lot on the northeast side of the ridge, in the cul de sac just off the southeast end of Phase 3 (see attached maps). Conditions on that lot are very likely to be representative of conditions on many of the lots in Phase 3. Safe construction on 1055 Starlight included a stepped foundation design and footings trenched into the 58 percent slope.

The attached cross-section shows the footing recommendations for 1055 Starlight, which included two options. The minimum option involved trenching into granitic residuum to where the horizontal distance from the outer edge of footings to the slope was three times footing width (two foot footing – six foot setback). In this case, the depth was about 4 feet. The optimum option, involved trenching to bedrock, which was about 8 feet deep. The former was applied. Though each lot will require site specific geologic evaluation, this example illustrates foundation design principles applicable to many of the Phase 3 lots.

I have separated the lots into groups based on building site topographic and access conditions, designated A through D, representing increasing slope, design challenges and geologic hazard. Borderline sites are designated B to C or C to D.

A = Down slope, gently sloping (<35%) lots accessed from below.



Ferrero Geologic

276 Grant Street, Ashland, Oregon 97520

541-488-2452 (ph) 541-488-6473 (FAX)

Email: ferrerogeo@mindspring.com



B = Ridge top or ridge shoulder lots where there is adequate buildable area on gentle slopes, and easily accessible from Starlight Place.

C = Ridge top or ridge shoulder lots where the buildable area on gentle slopes is small and so building sites and or access driveways will most likely include steep (35 to 60%) slopes. [e.g. 1055 Starlight]

D = Ridge top sites where there is little or no gently sloping buildable area, located at the top of very steep (>60%) drainage headwalls.

C to D and D lots may not be suitable for building due to geologic hazards. Their suitability for development will be determined by site specific foundation investigations.

Surface Drainage

Surface and roof drainage must be diverted away from foundation excavations. Surface flow can be managed by sloping perimeter backfill away from foundations. Roof drain outflow lines should be smooth walled PVC pipe, not the flexible pipe in common use (which typically collapses, and is nearly impossible to clean out). All concentrated surface and roof drainage flow should be directed via buried pipes or rock-armored ditches (rock armoring of ditches prevents erosion and sedimentation of streams) to natural stream channels and/or storm drains.

Subsurface Drainage

All basement, retaining wall and footing excavations should be interconnected and grade to one or more low points so that adequate drainage can be installed, and so that there is no pooling of groundwater in foundations or behind retaining walls.

Drain design should include four inch diameter, perforated, smooth walled, schedule 40 or better PVC pipe set 4 to 6 inches above sub-grade, in a bed of drain rock. The entire drain rock mass should be wrapped in 4 to 5 ounce, non-woven filter cloth (e.g. Mirafi 140N). The bottom of drain structures



Ferrero Geologic

276 Grant Street, Ashland, Oregon 97520
541-488-2452 (ph) 541-488-6473 (FAX)
Email: ferrero@mindspring.com



should be set on sub-grade soil, not on top of footings. Drains should extend up to about one foot below surface. Subsurface drain lines should not merge with roof and other surface drain lines. Drain design should also include clean-outs at angle points.

Erosion Control

Any existing erosion problem related to the old logging road system, such as the one cited above on lots 104 and 105, should be corrected. Runoff should be directed away from such sites. Rutting should be graded out and unstable fill material removed. Water bars and possibly complete channel crossing fill and culvert removal may be warranted at lots 104 and 105. This can be addressed in greater detail as part of site specific geologic investigations for those lots.

Grading should be started and completed during the dry months of late spring, summer and early fall.

During construction, in case of summer cloudbursts, the perimeter of the disturbed area should be lined with hay bails staked down with rebar and covered with filter cloth to serve as a sediment barrier. Alternatively, the perimeter can be ditched to outlet points through arcs of staked hay bails. In draws or other points of concentrated run-off, bale barriers should be at least two bales high. All erosion control systems must be maintained regularly. During storms, ditches and barriers must be inspected at least twice daily and maintained as necessary to assure that they do not fail due to filling with mud beyond capacity, or other causes.

The down slope hay bails trap should be maintained (cleaned out and repaired as necessary) until the pad, fill and impacted draw areas have stabilized and revegetated, and storm flow is exiting the site without sediments.

After completion of construction, all disturbed surfaces and fills should be revegetated and/or armored with dry stacked rock. Vegetation will not grow well on the portions of cuts exposing granitic residuum and decomposed bedrock. Where cuts expose residuum and decomposed rock in the lower



Ferrero Geologic

276 Grant Street, Ashland, Oregon 97520

541-488-2452 (ph) 541-488-6473 (FAX)

Email: ferrerogeo@mindspring.com



portion, and soil in the upper portion, the combination of low rock armor and revegetation above is most effective. On terraced cuts, terraces should be insloped to rock armored ditches.

Erosion control features should be in place and functional by October 1.

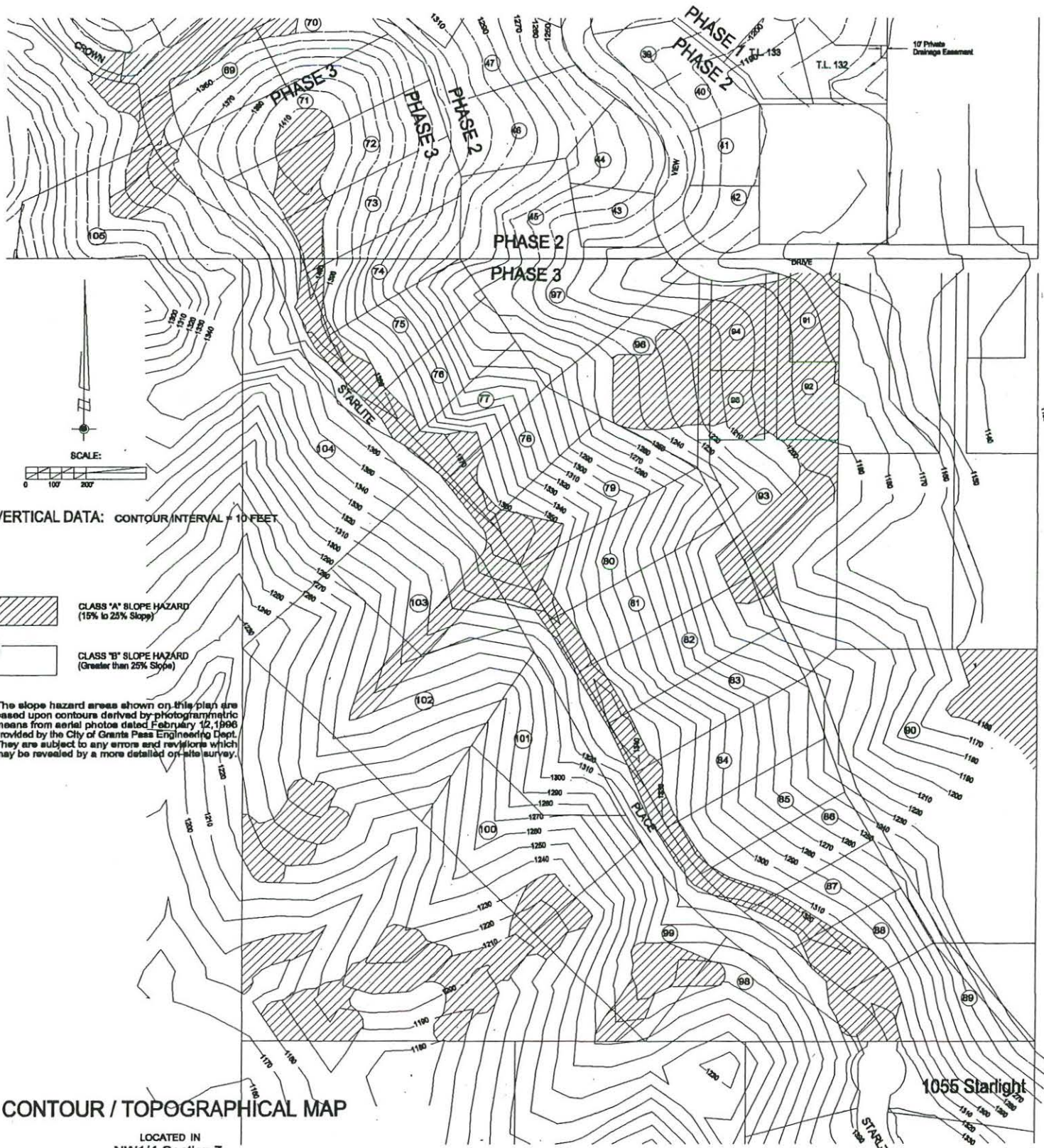
Inspections

In order to assure compliance with the above recommendations, Ferrero Geologic should be called to the site to inspect at the following times.



- 1) Before grading, after temporary erosion control systems are in place.
- 2) After rough road grading is completed, before installation of base rock.
- 3) After road construction is completed and permanent erosion control measures are in place, to confirm compliance with drainage and erosion control recommendations.
- 4) Before each building site is developed, to complete site specific geologic foundation investigations.

Respectfully,





VERTICAL DATA: CONTOUR INTERVAL = 10 FEET

-  CLASS "A" SLOPE HAZARD (15% to 25% Slope)
-  CLASS "B" SLOPE HAZARD (Greater than 25% Slope)

The slope hazard areas shown on this plan are based upon contours derived by photogrammetric means from aerial photos dated February 12, 1996 provided by the City of Grants Pass Engineering Dept. They are subject to any errors and revisions which may be revealed by a more detailed on-site survey.

CONTOUR / TOPOGRAPHICAL MAP

LOCATED IN
 NW1/4 Section 7,
 T.36 S., R.5 W., W.M.
 Josephine County, Oregon

TENTATIVE PLAN

LAURELRIDGE SUBDIVISION Phase 3

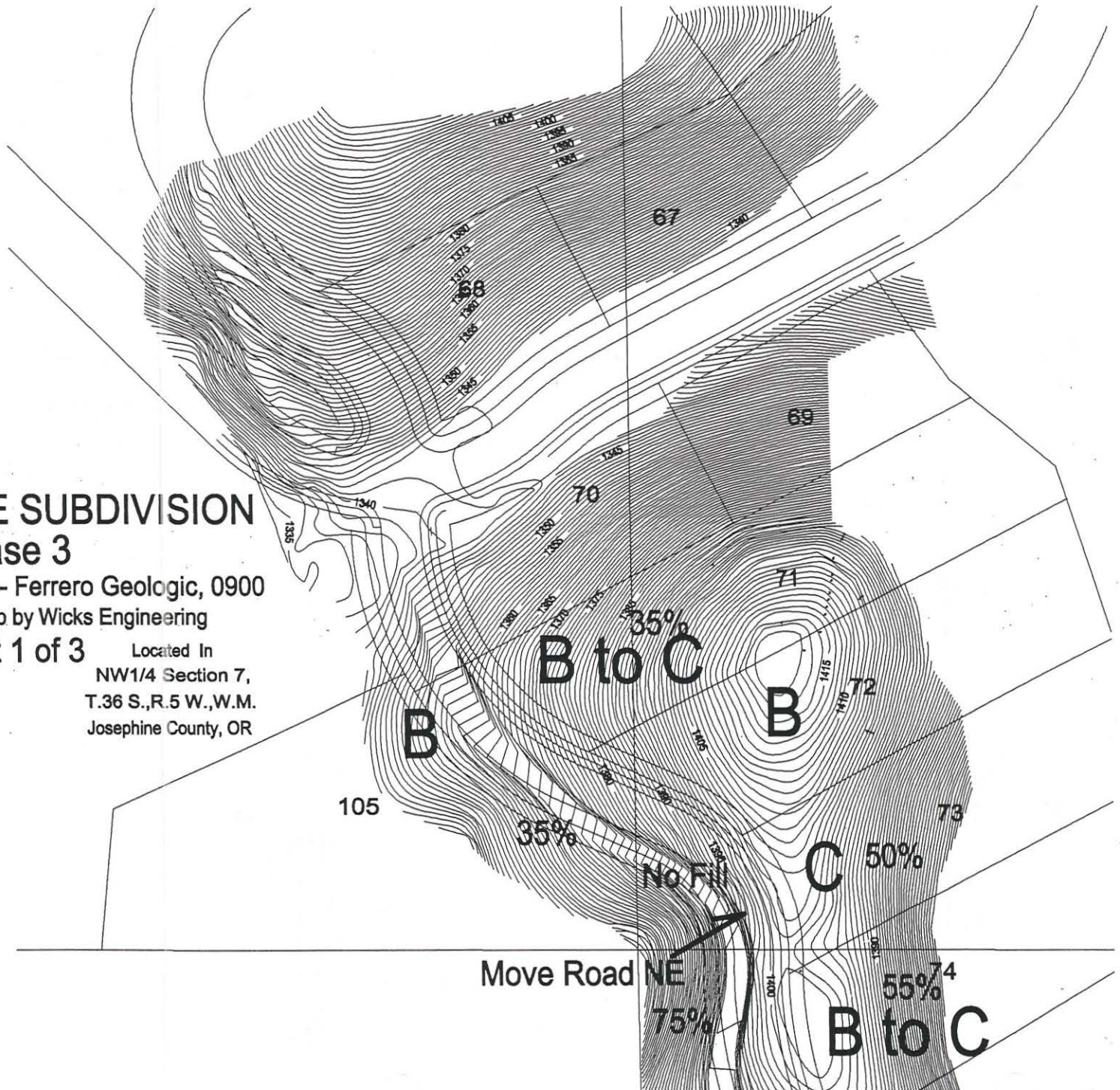
LAURELRIDGE SUBDIVISION Phase 3

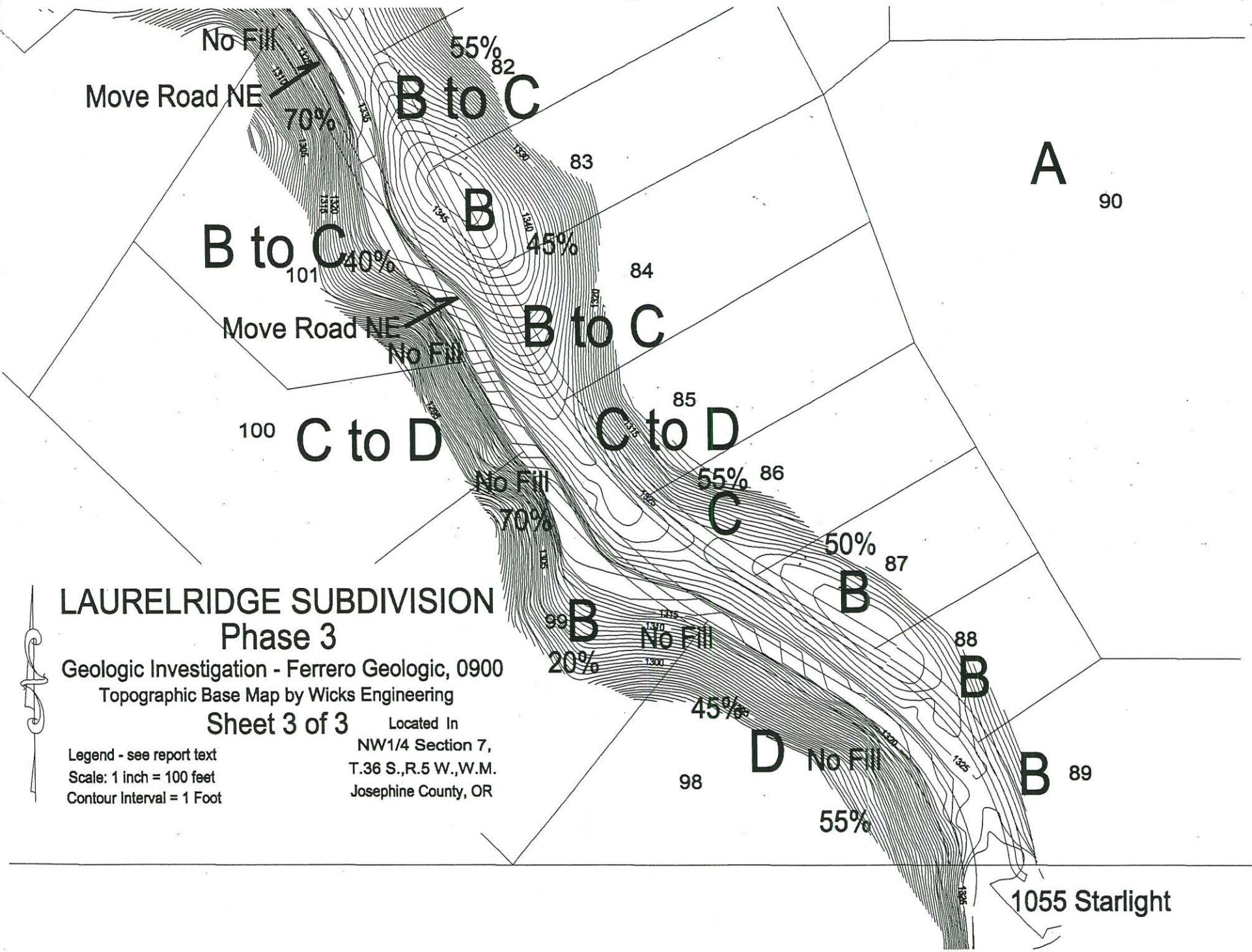
Geologic Investigation - Ferrero Geologic, 0900
Topographic Base Map by Wicks Engineering

Sheet 1 of 3

Legend - see report text
Scale: 1 inch = 100 feet
Contour Interval = 1 Foot

Located In
NW1/4 Section 7,
T.36 S., R.5 W., W.M.
Josephine County, OR





**LAURELRIDGE SUBDIVISION
Phase 3**

Geologic Investigation - Ferrero Geologic, 0900
Topographic Base Map by Wicks Engineering

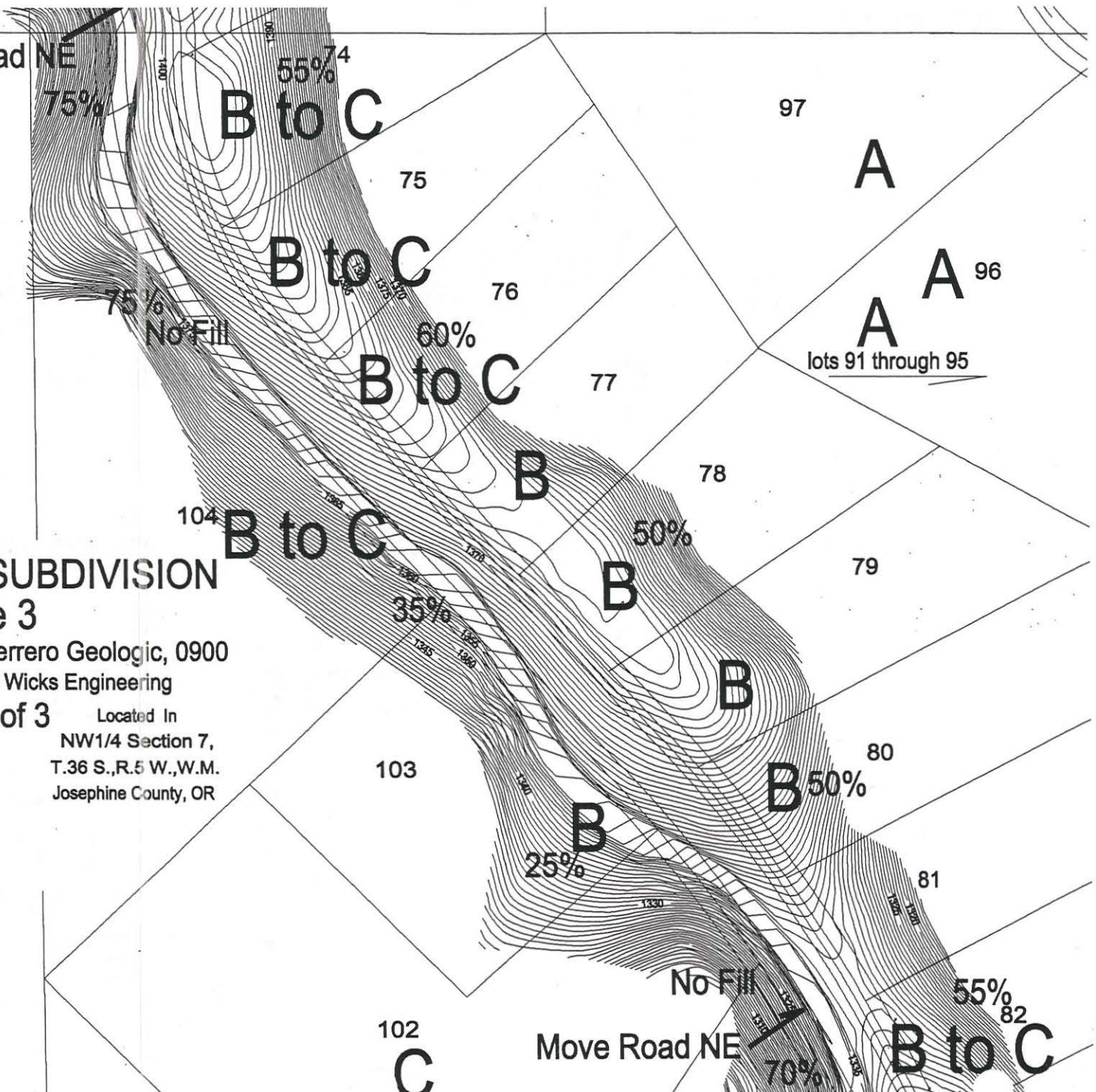
Sheet 3 of 3

Legend - see report text
Scale: 1 inch = 100 feet
Contour Interval = 1 Foot

Located In
NW1/4 Section 7,
T.36 S., R.5 W., W.M.
Josephine County, OR

1055 Starlight

Move Road NE



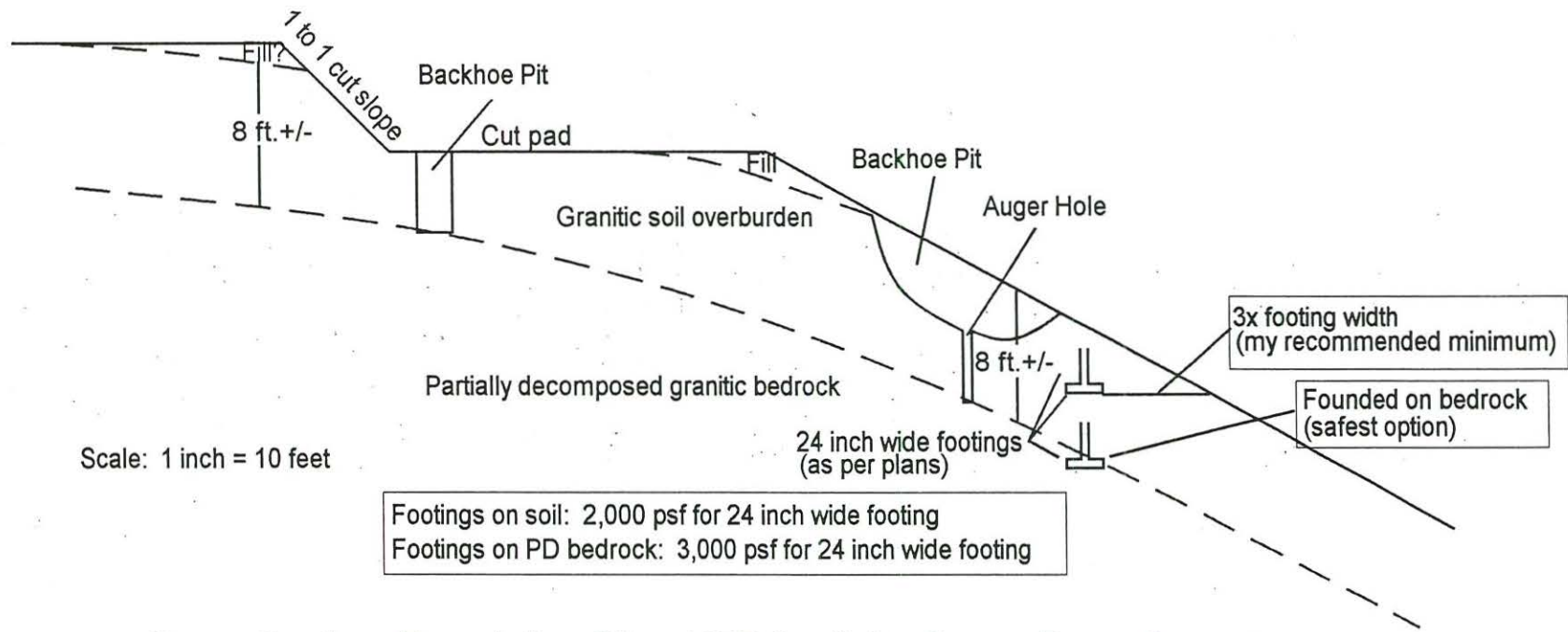
**LAURELRIDGE SUBDIVISION
Phase 3**

Geologic Investigation - Ferrero Geologic, 0900
Topographic Base Map by Wicks Engineering

Sheet 2 of 3

Located In
NW1/4 Section 7,
T.36 S., R.5 W., W.M.
Josephine County, OR

Legend - see report text
Scale: 1 inch = 100 feet
Contour Interval = 1 Foot



Cross-Section, Foundation Site, 1055 Starlight, Grants Pass, Oregon

Ferrero Geologic, 3/17/99

EROSION AND SEDIMENT CONTROL PLAN WORKSHEET

Project Name: LAURELRIDGE SUBDIVISION- PHASE 3

Prepared By: Gary D. Wicks

Company Name: Wicks Engineering & Surveying

Telephone: (541)479-3436 fax: (541)479-1014

Please answer the following questions as indicated. If needed, additional space is provided for you at the end of this form. You may also attach any information you feel is pertinent to the project.

1. Does your Erosion and Sediment Control Plan require structural controls like settling basins and/or diversion structures, or is the plan for an activity that covers 20 acres or more of disturbed land?
- ___ YES X NO

If yes, the plan must be prepared by a registered engineer. Please provide the following information and use the space provided to imprint your seal.

Name: _____

Address: _____

Telephone: _____

See report prepared by Ferrero Geologic which accompanies this application

Imprint Seal Above

2. Describe the nature of the construction activity: _____
- This development is for a proposed residential subdivision. The proposed construction activities include the construction of approximately 2110 feet of urban standard streets with appurtenant sanitary sewers, water lines, storm drains, and underground public utilities. In addition to the street construction, there will be excavation along the ridge line on the east side of the proposed Starlite Place for the creation of residential building pads.
- _____
- _____
- _____
- _____
- _____

- 3. Describe in detail the phases of construction and the erosion control measures to be implemented during each phase. Also complete the table on the next page to assist with the narrative description.

The proposed construction activity is for Phase 3 of Laurelridge Subdivision. The cut and fill slopes created by the construction of streets and building pads will be protected by hydroseeding and/or a hay mulch. There are no existing storm drains along the ridge line for the Phase 3 storm drains to connect to. For this reason, cross culverts and catch basins will be constructed at each natural channel. This will create several small drainages rather than concentrating all the storm runoff onto one site. Since all the disturbed areas are along the ridge line, the runoff quantities will be minimal. Natural vegetation below the construction will be left undisturbed to provide buffer strips for erosion control.

4. Fill in the year(s) and the month(s) at the top of the chart during which the project will occur, and check the appropriate boxes to indicate when the items in the left column will be performed and/or installed. You may photocopy the chart if your project will last longer than 12 months.

YEAR:	'00	'00	'00	'01	'01	'01	'01	'01	'01	'01	'01	'01
MONTH:	O	N	D	J	F	M	A	M	J	J	A	S
CLEARING	*	*	*									
EXCAVATION	*	*	*	*								
GRADING	*	*							*	*		
CONSTRUCTION	*	*	*	*	*	*	*	*	*	*		
EROSION CONTROLS:												
Vegetative Buffer Strips	*	*	*	*	*	*	*	*	*	*	*	*
Mulching		*	*	*								
Netting/Mats/Blankets												
Temporary Seeding												
Permanent Seeding		*	*					*	*			
Sod Stabilization												
Other:												
SEDIMENT CONTROLS:												
Silt Fencing			*	*	*	*						
Straw Bales			*	*								
Sediment Traps												
Sediment Basins												
Storm Inlet Protection			*	*	*	*	*					
Drainage Swales												
Check Dams												
Contour Furrows												
Terracing												
Pipe Slope Drains				*	*	*	*	*	*	*	*	*
Rock Outlet Protection				*	*	*	*	*	*	*	*	*
Other:												

5. Describe the origin and nature of fill material to be used: _____

All fill material will be granitic soil generated on-site from road cuts, building pads, and from underground utility trench excavation.

6. Describe the soils present on the site and erosion potential of the soils.

(a) Soil type(s): _____

From "Soil Survey of Josephine County" dated December, 1983

Holland Sandy Loam : slopes = 2% to 30%

Siskiyou Gravelly Sandy Loam: slopes = 30% to 70%

(b) Erosion Potential: _____

The erosion potential for both soils is listed as moderate to heavy, depending upon the steepness of the ground slopes.

7. Submit two copies of site maps and constructions plans. The following checklist is provided for your convenience:

IS THE FOLLOWING INFORMATION PROVIDED AND DETAILED ON THE MAPS SUBMITTED TO THE DEQ?	YES	No	NOT APP.
a. The complete development, including any phases.	*		
b. The areas of soil disturbance on the site, including areas that will be cleared, graded or excavated.	*		
c. The areas of cut and fill.		*	
d. The drainage patterns and slopes of the land both before and after major grading activities.	*		
e. The location of existing and proposed storm drains and outfalls.		*	
f. The receiving waterbody for drainage from the site.		*	
g. The areas used for storage of soils or wastes.		*	
h. The location of all erosion and sediment control facilities and/or structures.		*	
i. The areas on the site where vegetative practices will be used.		*	
j. The location of existing and future impervious structures and areas.	*		
k. The location and name of all springs, wetlands, and surface waterbodies near the project.			*
l. The boundaries of the 100 year flood plain if known.			*
m. The location of graveled access entrance and exit drives and graveled parking areas to be used by construction vehicles.	*		
n. The locations of graveled roads travelled by more than 25 vehicles per day.			*
o. Installation details of vegetative and other erosion control practices (vegetative buffer strips, seeding, mulching, erosion blankets, etc.).		*	
p. Installation details of sediment control practices (silt fences, straw bale dikes, storm drain inlet protection, etc.).		*	

8. Describe the truck drippage precautions you will take to prevent discharge of water from trucks hauling wet soils or stone excavated from the site:

It is anticipated that truck drippage will not be a problem with this development. All excavated material will be used on-site for road fill.

It is also anticipated that the main part of the road excavation will occur during the dry season when soil moisture content will be low enough to mitigate potential problems.

[Empty lined area for response to question 8]

9. Describe the procedures you will use to assure prompt maintenance and repair of graded surfaces and erosion and sediment control measures:

The graded surfaces and ESC measures will be inspected weekly and/or within 24 hours of any storm which contribute more that 0.5 meters of rain in a 24 hour period. Any problem detected will be repaired or reinforced the same day.

[Empty lined area for response to question 9]



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

EXHIBIT

tabbies

5 A

Western Region
201 W Main, Suite 2-D
Medford, OR 97501
(541) 776-6010
FAX (541) 776-6262

November 1, 2000

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501

Re: Laurelridge Subdivision Phase 3
Starlight Place, Grants Pass
General NPDES Permit 1200-C
File 111178
102617

Dear Mr. Ferguson:

I have reviewed your application for the Laurelridge Subdivision Phase 3 project in Grants Pass. Your application was signed-off and returned to our permit office for permit issuance. You should be receiving your permit within the week. **Please do not start construction until you receive your permit.**

Your erosion control plans were also reviewed. The plans recommend that grading should be done during the dry months of late spring, summer and early fall (page 7). Therefore, your erosion control plans as submitted are approved *only* for this time period. If you wish to continue grading during the wet winter months, a new erosion control plan will need to be developed and submitted for Department approval.

I would like to take this opportunity to emphasise the following items:

- Due to steep slopes and moderate to highly erosive soils, winter construction is *not* recommended, due to the difficulty in controlling erosion. You should make every effort to complete grading and stabilise the site before the heavy winter rains arrive.
- If you find the erosion control measures to be inadequate once they are implemented, you are required to make the necessary improvements to prevent sediment and turbid water from leaving the site.
- Please note that trackout onto surrounding streets is not allowed.
- Turbid water discharges to either drainage ditches, irrigation canals or a storm drain system is also not allowed.

(over)



William H. Ferguson
Laurelridge Subdivision Phase 3
November 1, 2000
Page 2 of 2

- You are responsible for the implementation of any addition erosion control measures that are required by local or Federal authorities.

Please notify the DEQ when your construction project is complete, and the permit is no longer needed. If notification is not received you will be billed \$275.00 for each year the permit remains in effect.

If you have any questions about this approval please contact me at (541) 776-6010 extension 246.

Sincerely,



E. Andrew Ullrich
Storm Water Permit Specialist
Water Quality Division

EAU

cc: File

\\winword\1200-C\letters\00-e-12c-Laurelridge.doc



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environment



201 W Main, Ste 100
Medford, OR 97501
(541) 776-6010
FAX (541) 776-6262

January 20, 2000

William Ferguson
5200 Pioneer Road
Medford, OR 97501

Re: Laurelridge subdivision
General NPDES Permit 1200-C
File 109617

Dear Mr. Ferguson:

The Department received a complaint of turbid water leaving this construction site and entering the local creek.

Discharge of turbid water from your construction site is a violation of *Schedule A* of your National Pollutant Discharge Elimination System (NPDES) Storm Water Discharge Permit No. 1200-C. You need to repair or upgrade your erosion control measures as needed to cease this discharge.

Continued discharge of turbid water will lead to a formal Notice Of Noncompliance. Ongoing violations may also be referred to the Department's Enforcement Section with a recommendation to initiate a formal enforcement action. Failure to comply with a condition of the NPDES permit may result in a Notice of Permit Violation (NPV) or civil penalties for each day of violation.

Please submit to the Department within seven (7) days what measures you took to control the discharge of turbid water from this project. If you cannot control the discharge within seven (7) days, you will need to submit a timeline to the Department as to when the site will be in compliance.

(over)



William Ferguson
Laurelridge Subdivision
January 20, 2000
Page 2 of 2

Thank you for your attention to this matter. If you have any questions about this letter or your permit please contact me at (541) 776-6010 extension 246.

Sincerely,



E. Andrew Ullrich
Storm Water Permit Specialist
Water Quality Division

EAU

cc: File
\\winword\1200-C\letters\00-1-12c-Laurelridge.doc



Permittee: Ferguson, William H.	Source Address: Morgan Ln/Valley View/Starlite Pl, Grants Pass	Date Inspected: 11/21/2001
Facility Name: Laurelridge subdivision	Source Phone #: (541) 772-9545	Official Contacted/Title: (none)
File # (Site ID #): 109617	Mailing Address: 5200 Pioneer Road, Medford 97501	
EPA ID # (NPDES only): ORR10-3812		
Permit #: NPDES GEN12C	Type of Inspection: <input checked="" type="checkbox"/> Compliance <input type="checkbox"/> UIC	Samples Taken: <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> SPLIT
Permit Exp. Date: 12/31/2005	<input type="checkbox"/> Technical Assistance <input type="checkbox"/> Land Application/Reuse	System Classification: Treatment <u>n/a</u> Collection <u>n/a</u>

COMPLIANCE STATUS	In Comp	Not In Comp	On Schedule	SUMMARY OF INSPECTION FINDINGS, COMMENTS & RECOMMENDATIONS
-------------------	---------	-------------	-------------	--

Schedule A Waste Discharge Limitations	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Schedule B Monitoring and Reporting	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Schedule C Compliance Conditions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Schedule D Special Conditions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
General Conditions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SFO or MAO Requirements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Background
A joint inspection with the City of Grants Pass was made on November 21st, 2001. The inspection was made at the request of the City, which had on-going concerns about erosion controls at the site.

Observations
It was actively raining at the time of the site visit.

A large amount of area along Starlite Dr. has not been seeded, mulched, or otherwise protected (Photographs 1 & 2). Extensive erosion gullies were noted. Sediment is being carried into the storm drain system, and transported off site.

Specific concerns

- Erosion control measures are not being maintained (Photograph 3). In this photograph, a large amount of sediment has accumulated behind the silt fencing. Turbid water is now flowing around the edges of the fence, and is not being filtered.
- Sediment controls are not effective (Photograph 4, 5, 12, 13 – 15). In many locations, straw bales have been put along the curb of the street in an attempt to capture sediment. These bales are not effective, as the turbid water flows under and/or around the bales.
- Turbid water is leaving the site (Photographs 6-9, 11). Some drains have no erosion protection at all. Others (as noted above) have ineffective controls.
- Sediment is entering Waters of the State (Photographs 16-18). Photograph 16 shows the storm drain discharge from part of the project into Gilbert Creek. Photographs 17 and 18 show Gilbert Creek upstream and downstream of the discharge point. A significant increase in turbidity was noted.

Follow-up
NON WRM-01-138 was issued 12/14/2001 for violations of the NPDES General 1200-C permit. Under department rules, this must also be referred to the Enforcement Section with a recommendation for Civil Penalty.
The Permittee must submit a new erosion control plan, provide inspection records, and certify installation workers by 12/31/2001.

CONTINUED ON ATTACHED PAGE

VIOLATIONS NOTED:

- Multiple discharges of turbid water.
- Improper maintenance of erosion control measures.
- Improper installation of erosion control measures.
- Improper selection of controls.

PREPARATION TIME: 0.5 HRS
 INSPECTION TIME: 4.0 HRS (include travel to & from)
 FOLLOW-UP TIME: 4.0 HRS (inspection write-up, enforcement if necessary)
 CC: Permittee WQ UIC Coordinator Other: ___

Andy Ullrich
 Inspector's Name (Please Print)

Andy Ullrich
 Inspector's Signature

WR-Medford
 Region & Office

12/18/01
 Date

Photograph One Erosion along Starlite Drive



Photograph Two Erosion along Starlite Drive



EXHIBIT
\$
A

tabbles®

Photograph Three Discharge of storm drain system – west of Starlite Dr.



Photograph Four Turbid water flowing past barrier



Attachment EE A8

Photograph Five Turbid water flowing past barrier



Photograph Six Channel leading to drain pipe



Photograph Seven Discharge of drain pipe



Photograph Eight Catch basin



Photograph Nine Discharge of catch basin



Photograph Ten Erosion on filled bank



Photograph Eleven Discharge from storm drain system



Photograph Twelve Turbid water flowing past barrier



Photograph Thirteen Turbid water flowing past barrier



Photograph Fourteen Turbid water leaving project



Photograph Fifteen Same as #14 – different view



Photograph Sixteen Discharge of storm drain system by Gilbert Creek

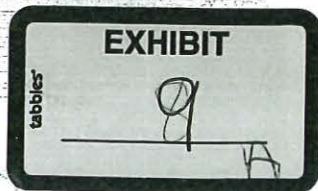


Photograph Seventeen Gilbert Creek – upstream of discharge



Photograph Eighteen Gilbert Creek- downstream of discharge





HEUERTZ & MONEN, P.C.
ATTORNEYS AND COUNSELORS AT LAW

214 E. MAIN
P.O. BOX 1408

ROGUE RIVER, OREGON 97537

November 30, 2001

MEDFORD-GOLD HILL AREA
(541) 855-7121

ROGUE RIVER-GRANTS PASS AREA
(541) 582-4115

FACSIMILE
(541) 582-0116

LOREN L. HEUERTZ
CRAIG W. MONEN

Department of Environmental Quality
State of Oregon
Attn: Andrew Ullrich
201 W. Main, Suite D
Medford, Oregon 97501

**RE: LETTER OF COMPLAINT RE: NPDES PERMIT - FERGUSON -
LAURELRIDGE SUBDIVISION, GRANTS PASS, OREGON**

Dear Mr. Ullrich:

Please consider this a formal letter of complaint with regard to the water quality violations that have regularly and continually occurred in the Laurel Hill Subdivision in Grants Pass, Oregon, being developed by William and Gwen Ferguson. I reside immediately below this subdivision at 1846 Candler Ave and for the last three years have continually observed serious violations.

Frankly, I am appalled with the amount of material, mud and debris that have been allowed to flood off the development directly into the street, storm drains and ultimately our streams and rivers. I previously made a phone complaint to your office about these problems in the fall of 1999. I understood you examined the area at that time and a letter of warning had been issued.

With the onset of the rains this year these problems are again occurring. It is time to bring this non-compliance to a stop. Would you please review and take appropriate action. Surely such continued violations are in violation of this permit and warrant the imposition of serious sanctions.

Sincerely,

Loren L. Heuertz

LLH:slk
d:\forms\heuertz.environmental.ltr.wpd

RECEIVED
DEC 4 2001
Dept. Environmental Quality
MEDFORD