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DEQ Hearings Coordinator
DOCKET NO. _____

BEFORE THE DEPARTMENT OF HEALTH AND WELFARE

STATE OF IDAHO

TIM and SHERRI GERLITZ,)	
)	Docket No. 0108-99-02
Petitioners,)	
)	
vs.)	ORDER AFFIRMING DECISION OF
)	THE HEARING OFFICER
IDAHO DEPARTMENT OF HEALTH AND)	
WELFARE,)	
)	
Respondent.)	

THIS APPEAL came on for oral argument before the Board of Health and Welfare on February 17, 2000. Appellants Gerlitz represented themselves. Respondent Department of Health and Welfare, Division of Environmental Quality, was represented by Stephen Goddard, Deputy Attorney General.

Tim and Sherri Gerlitz appeal the decision of the hearing officer dated October 15, 1999, which affirmed the reimposition of sanitary restrictions on their property in Harbor View Estates in Kootenai County, pursuant to Idaho Code § 50-1326.

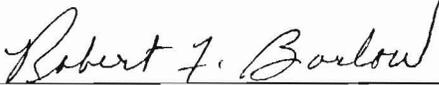
In oral argument, Mr. and Mrs. Gerlitz asserted that DEQ made a poor decision to reimpose sanitary restrictions and that they should be able to build their home since only one or two houses are built in the subdivision per year. They argued that since most of the required repairs have now been made, sanitary restrictions should not be reimposed on their lot and the Board should consider developments since the hearing.

The Board is limited to the issue on appeal and the record made in the hearing. The hearing officer's thorough decision and the extensive record in this matter are ample support for the reimposition of sanitary restrictions, which are incentive for the developer to complete the project and for the protection of the owners and the public. The Gerlitzes provided no legal justification or authority for the Board to make an exception for them and not other owners who may wish to build.

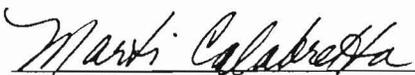
Whether or not system improvements have been substantially or minimally completed in fact, the developer did not provide certification that the systems meet regulatory standards within the stipulated time so that reimposition of the restrictions could be avoided. As the hearing officer noted, the requirement for engineer certification of the systems is not a mere formality but the only credible evidence that deficiencies have in fact been corrected. (Decision and Preliminary Order, Finding 30, pp. 13-14.) DEQ is required to rely on such certifications, not promises or estimates.

NOW, THEREFORE, the Board of Health and Welfare having fully considered the record and the arguments of the parties, hereby AFFIRMS the decision of the hearing officer dated October 15, 1999.

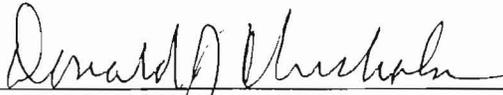
DATED this 28th day of February, 2000.



ROBERT F. BARLOW, Chairman



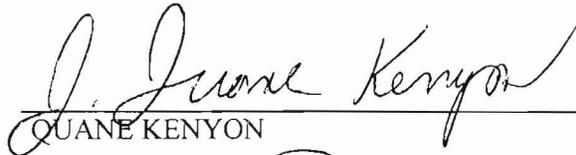
MARTI CALABRETTA



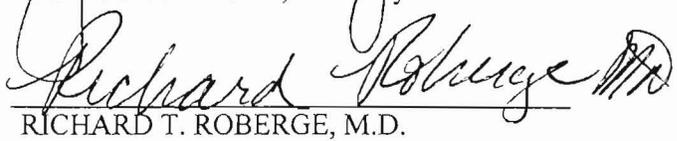
DONALD J. CHISHOLM



G. BERT HENRIKSEN, Vice-Chairman


QUANE KENYON


JANET F. PENFOLD, Secretary


RICHARD T. ROBERGE, M.D.

This is a final Order of the agency. Pursuant to § 67-5270, et. seq., Idaho Code, any party may appeal to district court by filing a petition in the county in which:

- 1) a hearing was held,
- 2) the final agency action was taken,
- 3) the party seeking review of the order resides, or
- 4) the real or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of the date of mailing of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of February, 2000, a true and correct copy of the foregoing ORDER AFFIRMING DECISION OF THE HEARING OFFICER was served on the following as indicated below:

Tim and Sherri Gerlitz
P.O. Box 3359
Hayden, ID 83835

Stephen V. Goddard
Attorney General's Office
1410 N. Hilton
Boise, ID 83706-1255



HEIDI L. FISHER
Hearing Officer
Mullan Professional Building
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DEQ Hearings Coordinator
DOCKET NO. 0108-99-02

BEFORE THE DEPARTMENT OF HEALTH AND WELFARE
STATE OF IDAHO

* * *

TIM and SHERRI GERLITZ,)	
)	
Petitioners,)	Appeal No.: 0108-99-02
)	
-vs-)	DECISION AND
)	PRELIMINARY ORDER
IDAHO DEPARTMENT OF HEALTH,)	
AND WELFARE,)	
)	
Respondent.)	
_____)	

THIS MATTER is before the undersigned Hearing Officer, duly appointed by the Board of Health and Welfare, on appeal by Tim and Sherri Gerlitz of action taken by the Department of Health and Welfare, Division of Environmental Quality, to effect reimposition of the sanitary restriction pursuant to Idaho Code § 50-1326 upon lots in Harbor View Estates Subdivision, Kootenai County, Idaho.

Hearing on the appeal was had on August 17 and 18, 1999. Petitioners appeared Pro se; the Division of Environmental Quality, Department of Health and Welfare was represented by Deputy Attorney General Stephen V. Goddard and appeared by and through Gary Gaffney, a professional water quality engineer for the Division. Post-hearing, the Hearing Officer received certain exhibits which were submitted for official notice, or pursuant to the Hearing

Officer's invitation made at the hearing to augment the record in specific respects. The Hearing Officer, having received testimony and evidence and having received written arguments, makes the following findings and conclusions:

FINDINGS AND CONCLUSIONS

1. There is no dispute that the plat for Harbor View Estates Subdivision was filed with the Kootenai County Recorder in 1985 and that the sanitary restriction pursuant to Idaho Code §§ 50-1301(10), 1326 was released by Panhandle Health District under delegated authority by separate document, also in 1985.

2. By letter dated December 4, 1998, Exhibit 65, the Division of Environmental Quality, Department of Health and Welfare (hereinafter "DEQ") gave written notice of intent to reimpose the sanitary restriction on specified lots in Harbor View Estates, North Cape Estates and Stevens Point Estates. By this letter, Petitioners were notified that their lot - Number 46, Block 2, Harbor View Estates Subdivision - was included among the lots upon which DEQ intended to reimpose the sanitary restriction.

3. On January 11, 1999, Petitioners filed their appeal and request for hearing pursuant to Idaho Code § 50-1326, as an aggrieved party under Idaho Code § 39-107, because their lot would be affected by the intended action of DEQ.

4. Other parties (Harbor View Estates, Inc. and Wescor Forest Products Co.) also filed appeals. These appeals were resolved by Stipulation, dated May 5, 1999, between DEQ, Harbor View Estates, Inc. and Wescor Forest Products Co. and these parties' appeals did not proceed to hearing. Petitioners did not join in the Stipulation. On August 13, 1999, pursuant to the terms and conditions of the Stipulation, a Certificate of Disapproval directing the reimposition of the sanitary restriction was issued by DEQ for all lots included in the original notice, excepting

Petitioners' lot.

5. There is an extensive history of problems with the Harbor View Estates sewer and water systems as shown by the testimony of the witnesses and exhibits. However, at issue before the Hearing Officer is not the existence of purely historical problems, but what deficiencies persisted to the date of hearing. These are addressed below, first with regard to the waste water or sewage system and then with respect to the water system.

6. The "Harbor View Technical Specifications for Construction of a Water and Sewer System" (Exhibit 2) contain design and construction criteria. Pages 16 and 18 of the Harbor View Estates plans show system details for sewage lift stations, sewer connections, trench backfill, manhole placement and more. The plans and the specifications (page 15323-1, 2) require that duplex pump lift stations include watertight wet well basins, access hatches, duplex submersible grinder pumps with lift out rings and quick disconnect slide couplings control and other items. Page 15323-2 requires a hydraulic sealed slide coupling arrangement so that the pump can be removed from the wet well for service or replacement and then returned to service without draining or entering the wet well. Pages 15323-3 and 4 require that all control panels include elapsed time meters and audio and visual high water alarms. The duplex panels are to be provided with alternators to alternate pumps each cycle and "seal offs" installed in rigid electric conduit between the wet well and the control. All piping and electrical connections are to be made in a neat and workmanlike manner and in accordance with the National Electrical Code. Piping connections and valving are to be installed so that either pump may be removed without disturbing the other pump. Sheet 16 of the Plans shows the specific construction details of the lift stations. The Specifications at 02297-1 and 02297-2 provide that in regard to manholes, the joint seal is to provide a permanent watertight

joint. Completed manholes are to be properly set to grade and watertight. Page 15311-1 requires that in gravity sewers, all pipe joint is to be aligned and the joints be entirely forced home. Pages 15311-2 and 3 of the Specifications require that all pipe sections are to be tested and then repaired and retested if leaks are found. For pressure sewers, all sections must be pressure tested using the specified hydrostatic pressure test referenced at 15312-1. The formula used to determine maximum leakage is presented at 15312-2. Once leaks have been found, they must be repaired. The Harbor View system was designed for 250 gallons per day per connection/single family dwelling.

7. The "Recommended Standards for Wastewater Facilities," 1990 Edition (also known as the "10 state standards") require that suitable devices for measuring wastewater flow be provided at all pumping stations (§ 42.8 at page 40-6). Watertight manhole covers are to be used when the manhole tops may be flooded (§ 34.6 at Page 30-7). All joints are to be designed to minimize infiltration (§ 33.91 at page 30-5). Section 33.7 at page 30-3 provides the leakage limitation on the couplings for the pipes must be in accordance with §§ 33.93 and 33.94. Section 33.93 at 30-6 refers to the required Hydrostatic Test which states "The leakage exfiltration or infiltration shall not exceed 200 gallons per inch of pipe diameter per mile per day ($0.019\text{m}^3/\text{mm}$ of pipe diameter/km/day) for any section of the system.

8. The Harbor View Technical Specifications at page 12000-1 provide that a hydrostatic water test be conducted on all water lines. A formula is provided for determining the maximum allowable leakage for a test section of waterline (at pages 12000-2). If the maximum leakage is exceeded, the leak must be repaired and the line retested. "The Idaho Rules for Public Drinking Water Systems" require that leaking water mains are to be repaired or replaced in conformance with the current American Water Works Association

standards. Section 7.3 of the AWWA standards at pages 15, 16 and 17 provides the test pressure and the maximum allowable leakage for a test section as well as a table showing the allowable leakage at different test pressures and pipe diameters. Section 7.3.5.4 of the AWWA standards requires that all visible leaks be repaired regardless of the amount of leakage. The Specifications at 02221-1 require bedding material for water/sewer line to be material less than ¾" in size.

9. Since as early as 1993, the Harbor View sewer system has persistently contributed excess amounts of sewage to the Kidd Island Bay Sewage Treatment Facility during wet times of the year. This sewage has greatly exceeded the 250 gallons per day for which the system was designed and engineered, as shown by the testimony and Exhibits, including 4, 7, 12, 19, 67, 68 and 69. Exhibit 72 graphs the average amount of sewage pumped into the Kidd Island Bay treatment facility per house for the Harbor View system and for the other systems using the facility. Using the design and regulation figure for a three bedroom house of 250 gallons per day or 7500 gallons per month, the Exhibit illustrates that during wet periods the Harbor View system exceeded the allowable amount by two to four times in years 1993-99. This extreme excess shows serious problems with inflow and infiltration into the sewage system and would not occur if the system had been built in accordance with the approved plans and specifications which provide that the system is to be pressure tested and all leaks repaired. The inflow and infiltration problem continued to exist at the time of hearing. Excess wastewater was pumped by the Harbor View system into the Kidd Island Bay sewage treatment facility as recently as the first week of August 1999, shortly after a rainfall, as shown by the lift station hour meter readings reported in Exhibit 89.

10. Between February 22 and February 24, 1999, there was a significant amount of rainfall in the local area and severe inflow

and infiltration of water into the Harbor View Estates sewer system took place. At this time, Michael Anderson, President of the Harbor View Estates Homeowners Association, personally observed and photographed inflow and infiltration occurring at several locations, including Sewer Pump/Lift Stations 1, 3 and 10. His photographs, Exhibit 69, show sewage flowing out of the system at Lift Station #1 (Greenfield) and onto the ground and into nearby seasonal streams; water and sewage flowing out of Lift Station #3 (Meadow Lane), water inflow to Lift Station #10 (Baypoint Way), water leaking into manhole seams (Harbor View Drive) and inflow to a manhole (Baypoint Way) via three uncapped stub-outs of lines without any home connections. Mr. Anderson prepared a list, part of Exhibit 83, identifying 12 sites where he observed excessive inflow and infiltration in February 1999. Since February 1999, work has been underway by Waldo Construction to correct these conditions. On or about August 11, 1999, Mr. Gaffney conferred with Jerry Hogatt, construction inspector for Ruen-Yeager, Harbor View Estates' consulting engineers regarding the progress of Waldo Construction and on August 13, he met with Mr. Hogatt and Mr. Waldo at Harbor View subdivision to check the status. At these times, Mr. Hogatt represented to Mr. Gaffney that only four or five of the listed problems, and then only one, remained to be fixed. The testimony of Mr. Anderson and Charles Nikula, the facilities manager of the Harbor View Estates water and sewer system, and Exhibit 89 conflict with these representations. As of hearing, no "as built" plans or engineer certification had been submitted to DEQ to show that the identified problems were rectified and in what manner.

11. Exhibit 80 is a report dated April 29, 1999, prepared by R. C. Worst & Co., pumping systems specialists, outlining the inspector's findings from inspection of the nine sewage lift stations at Harbor View Estates sewer system, conducted on April 23 and 26, 1999. The report includes findings that three lift stations

had inoperable pumps, two lift stations had inoperable panel lights, four lift stations lacked elapsed time hour meters, five lift stations lacked poured seal off (and consequently did not meet electrical code), four other stations did not meet electrical code for other reasons, two stations had inoperative alternators and all nine lift stations had access problems due to improperly installed rail systems and concrete covers. The report concludes that most of the lift stations needed major work not only to comply with plans and specifications, but even to meet the minimum industry standards. Mr. Nikula observed and photographed the condition of the access holes and rail systems at Lift Stations 5 and 7 in April 1999. His photographs, Exhibit 79, visually demonstrate the deficiencies regarding these Lift Stations reported by R. C. Worst & Co. R. C. Worst & Co. has been engaged in work to correct the deficiencies in the sewage pump/lift stations since April and has made very substantial progress in doing so. Nonetheless, Mr. Gaffney testified that he had received oral representations from Mr. Hogatt that although much of the required corrective work had been done, it was not complete as of August 13, 1999, and as of the hearing, no "as built" plans or engineer certification had been submitted to DEQ to show that the pump/lift station problems were fixed and in what manner.

12. In April 1999, Mr. Nikula observed sewer and water line being laid by two Waldo Construction workers, in trenches with no bedding material. Mr. Nikula's photographs, Exhibit 79, show the sewer and water pipe surrounded by large rocks. Mr. Nikula photographed the sewer and water line installation at this stage. Within less than two hours, the pipe had been backfilled along a 400 foot length. To Mr. Nikula's knowledge, the pipe was backfilled without the addition of proper bedding material. Mr. Gaffney has received oral representations from Mr. Hogatt that Waldo Construction was instructed to excavate the sites and redo them

with proper bedding material. However, as of the hearing, no "as built" plans or engineering certification had been submitted to DEQ to substantiate that this corrective work was completed according to instructions and inspected by Ruen-Yeager to confirm that it was done.

13. The Harbor View Estates water distribution system has a long history of unaccounted for water (being the difference between the water produced for use in the system and the water consumed), evidencing very serious water leakage from the system. Exhibits 19, 67 and 68 include compilations of data collected regarding the water produced, water consumed and water lost. Exhibit 71 illustrates the extent of the problem and graphically demonstrates the amount by which the water lost to the system grossly exceeds five to ten percent, being the acceptable standards to which Mr. Gaffney and Mr. Nikula testified. The extreme rate of water loss would not occur if the system was constructed in compliance with approved plans and specifications. At the request of Harbor View Homeowners Association, American Leak Detection conducted an inspection survey to locate leaks in May 1998. The inspection resulted in a report, Exhibit 42, citing the detection of four leaks at available test points. Again, Waldo Construction has been working to rectify this situation and on August 11, Mr. Hogatt orally represented to Mr. Gaffney that two of the four leaks isolated in the May leak survey were repaired or resolved. The data collected by the Homeowners Association regarding water production and consumption for monthly periods ending July 10 and August 10 showed substantial reduction in the amount of water loss to between five (5%) and ten (10%) percent. All witnesses acknowledged that this data is a very favorable indication that the excessive leakage situation is under control. However, as of the hearing, no "as built" plans or engineer certification had been submitted to DEQ to show what leakage points had been corrected in what manner.

14. The evidence shows that the drinking water system is incomplete or deficient in a number of other respects. In particular, the water system expansion project has been very prolonged in completion. As of hearing, flushing of the treatment facility sand bays was not finished according to Mr. Nikula. There are five filtration cells, which are essentially boxes of sand through which water pumped up from the lake is treated by being filtered. Two of the five cells, 1 and 1A are "siamese" so the common reference is to four cells or bays. According to Mr. Nikula, all of the cells are functioning, but filter bays 1/1A and 2 are still being flushed to achieve acceptable turbidity levels and cannot yet meet standards to supply water to the subdivision. No "as built" plans or engineer certification of the filter plant expansion project had been submitted to DEQ as of the hearing. The filtration plant project plans and specifications include a filter to waste line for the discharge of outflow from the sand filtration bays back to the lake. For quite some time, instead of the outflow being returned to the lake via pipe, the waste water was discharged to run uncontained down the hillside. Although Waldo Construction has done substantial work to install the discharge line, according to observations of the witnesses, by August 13, 1999, the work was incomplete. As of hearing no "as built" plans or engineer certification had been submitted to DEQ for the line.

15. The plans and specifications provide that the water tank/reservoir is to be outfitted with a recording remote flow meter to measure peak flows. On August 13, Mr. Hogatt indicated to Mr. Gaffney that the flow meter was operational, but the installation was not entirely complete.

16. Other significant problems in the water distribution system brought out by the testimony and evidence include excessive operation of the small booster pumping station, indicative of leakage in the water supply system to the lots/homes served by that

station, and excessive water loss from the 2-inch supply line to the lots/homes in the Baypointe Way-Rockshore Drive area. From the testimony of Mr. Gaffney and Mr. Nikula and Exhibit 83, it appears that these two problems have been ameliorated and the data collected at both sites is within a reasonable range.

17. The testimony and evidence shows that the Harbor View Estates plans provide for water and sewer service connections to all platted lots and that not all water and sewer service connections or water and sewer lines had been installed per the plans as recently as April 1999. Mr. Gaffney testified that Mr. Hogatt represented to him on August 11 that recent efforts by Waldo Construction have achieved completion of this work. However, as of hearing, no "as built" plans or engineer certification had been submitted to DEQ to substantiate this representation.

18. Exhibit 25 is a list and mapping of 57 items identified in 1997 by Ruen-Yeager Engineers as deficiencies in construction compliance with county code requirements. All but about six of these concern parts of the Harbor View Estates water and sewer system. As of the hearing, DEQ had received no oral representations, "as built" plans or engineer certification as to the extent of corrections made of the deficiencies catalogued by Exhibit 25.

19. The Board of Health and Welfare has legal authority and jurisdiction in this matter pursuant to The Environmental Protection and Health Act, Title 39, Chapter 1, Idaho Code. Proceedings in this matter are governed by the Administrative Procedure Act, Title 67, Chapter 52, Idaho Code and by the Idaho Department of Health and Welfare "Rules Governing Contested Case Proceedings and Declaratory Rulings," IDAPA 16.05.03.

20. Idaho Code § 39-118(1) requires that all plans and specifications for public water systems and sewer systems shall be submitted to and approved by the Department of Health and Welfare

prior to construction and that all construction shall be in compliance with the plans and specifications. No deviation from the plans and specifications is permitted without the prior approval of the Department. Within 30 days of the completion of construction, alteration, or modification of a public water or sewer system, complete and accurate plans and specifications depicting the actual construction, alteration or modification must be submitted to the Department of Health and Welfare. Pursuant to Idaho Code § 39-118(2), the Board may require that certain types of plans and specifications must be certified by a registered professional engineer.

21. The Idaho Legislature has given the Board of the Department of Health and Welfare authority to promulgate rules, regulations and standards necessary and feasible to protect the environment and health of the citizens of the State of Idaho. By this authority, the Board promulgated the "Water Quality Standards and Wastewater Treatment Requirements," IDAPA 16.01.02.

22. The Idaho Legislature has given the Board of the Idaho Department of Health and Welfare authority to promulgate rules governing quality and safety of drinking water, Title 37, Chapter 21 and Title 39, Chapter 1, Idaho Code. By this authority, the Board promulgated the "Idaho Rules for Public Drinking Water Systems," IDAPA 16.01.08.

23. The foregoing rules of the Idaho Department of Health and Welfare incorporate by reference all applicable regulations, documents and standards, including in particular the following:

Recommended Standards for Water Works: a committee report of the Great Lakes - Upper Mississippi River Board of Department of Public Health and Environmental Health Managers,

American Water Works Association (AWWA) Standards

Recommended Standards for Sewage Works by the Great Lakes

- Upper Mississippi River Board of State Sanitary Engineers.

24. The foregoing rules of the Idaho Department of Health and Welfare require that all plans and specifications for the construction, alteration or expansion of any sewage treatment system, waste water treatment or disposal facility and for construction or modification of a new or existing public water system, shall be certified by the imprint of an Idaho registered professional engineer's seal. IDAPA 16.01.02.402.01-04, IDAPA 16.01.08.551.04.

25. Also pursuant to regulatory authority granted by Idaho Legislature, IDAPA 16.01.03.007.08 provides standards for wastewater flows from various establishments. For single family dwellings, this standard is 250 gallons per day per unit.

26. Idaho Code § 50-1326 requires that the sanitary restriction shall be reimposed on any plat of a subdivision upon the issuance of a certificate of disapproval after notice and an opportunity to appeal, "if construction is not in compliance with approved plans and specifications or the facilities do not substantially comply with regulatory standards in effect at the time of facility construction."

27. As a general rule, matters in issue in an administrative proceeding must be established by a preponderance of the evidence. Furthermore, the general rule in administrative proceedings is that the burden of proof is on the proponent of a rule or order and on the party asserting the affirmative issue, as here where the Department asserts that a certificate of disapproval should issue and sanitary restrictions be imposed. Assignment of the burden of proof to the Department in this matter is not inconsistent with IDAPA 16.05.03.101.16 because, in this instance, the Department has initiated action against Petitioners by seeking to reimpose the

sanitary restriction by way of a certificate of disapproval. Contrary to being proponents of the certificate of disapproval, the Petitioners' appeal is in opposition thereto. Thus, it was the Department's burden at the contested case hearing to prove by a preponderance of the evidence that there is factual basis for issuance of a certificate of disapproval, i.e. that construction is not in compliance with approved plans and specifications or the facilities do not substantially comply with regulatory standards in effect at the time of facility construction.

28. The evidence shows a long history and pattern of Mr. Gaffney communicating requirements to Harbor View Estates with deadlines to meet the requirements (Gaffney letters-Exhibits 51, 63, 88 and 83). The record is almost devoid of any objections or exceptions by Harbor View Estates that the requirements are invalid, not justified, unnecessary to meet compliance with approved plans and specifications or regulatory standards (Dodson letters-Exhibits 48, 77 and 81). To the contrary, several consultants, including Harbor View Estate's own, have identified and reported numerous deficiencies requiring correction to comply with the plans, specifications and applicable standards (Esvelt Environmental Engineers/Exhibit 15, Inland Pacific Engineers/Exhibit 10, Welch Comer/Exhibit 15, Ruen-Yeager/Exhibits 16, 17, 22 and 25). The foregoing recitation of specific findings is not intended to be an exhaustive catalogue of every way in which the Harbor View Estates water and sewer systems were shown to be deficient with respect to plans, specifications and/or regulatory standards, but is sufficient to support the general finding that the construction and facilities were non-compliant.

29. Although the evidence presented by the Department clearly shows the existence of numerous serious deficiencies, the evidence also suggests that some and perhaps many of the deficiencies have recently been alleviated, if not resolved. However, whether or not

the problems which appear to have been resolved were corrected in a manner consistent with the plans and specifications or compliant with applicable standards cannot be determined in the absence of "as built" plans or engineer certification. The lack of "as built" and/or engineer certification is not the absence of a mere formality in this case, but constitutes the absence of credible evidence that the proven deficiencies have been corrected in a way that is compliant with plans, specifications and/or regulatory standards.

30. The Department has shown by a preponderance of the evidence that the construction of the sewer/wastewater and water systems of Harbor View Estates Subdivision are not in compliance with approved plans and specifications.

31. The Department has shown by a preponderance of the evidence that the construction of the sewer/wastewater and water systems of Harbor View Estates Subdivision do not substantially comply with regulatory standards in effect at the time of facility construction.

32. Petitioners have a Kootenai County Building Permit to build a single-family residence on their property in Harbor View Estates subdivision, Lot 46, Block 2 - Permit No. 30126, dated July 13, 1999. Reimposition of the sanitary restriction will or may operate to prevent or halt construction by the Petitioners on their property. The Idaho Legislature has given enforcement authority to the Department Director that encompasses means other than reimposition of sanitary restrictions. DEQ could have pursued other enforcement actions, such as monetary penalties against Harbor View Estates, that may have had a less direct or immediate impact upon Petitioners. As the Hearing Officer has previously ruled, the Hearing Officer is not at liberty to substitute her judgment for the Department's, as to which particular method of fulfilling its statutory enforcement obligations is preferable. The Department's

action under review in this appeal nor these contested proceedings operate in any way to deny or deprive Petitioners of equal protection of the law. Petitioners have received proper notice and opportunity for fair hearing and all applicable procedural due process and substantive due process protections. The Department's action under review in this appeal does not constitute arbitrary or capricious classifications or decisions.

PRELIMINARY ORDER

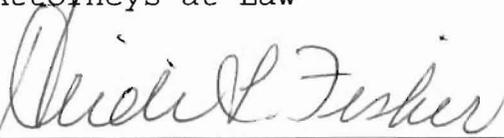
BASED upon all of the evidence before the Hearing Officer, it is the recommendation and Preliminary Order of the Hearing Officer that the decision of the Division of Environmental Quality to issue a certificate of disapproval, for the reimposition of sanitary restrictions, on the lot owned by Petitioners Gerlitz (Lot 46, Block 2, Harbor View Estates, Kootenai County, Idaho) be affirmed.

Pursuant to Idaho Code §§ 67-5243 and 5245, this Preliminary Order can and will become final and conclusive without further action or notice unless a Petition for Review is filed with the Board of Health and Welfare within fourteen (14) days after the service date of this Preliminary Order on the parties.

DATED this 15 day of October, 1999.

CHILD AND FISHER
Attorneys at Law

By:



Heidi L. Fisher
Hearing Officer

CERTIFICATE OF SERVICE

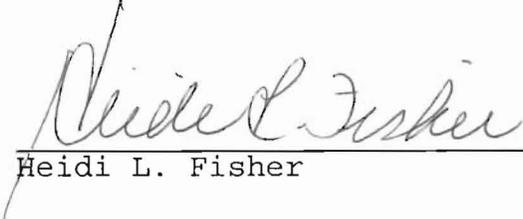
I hereby certify that I delivered a true and correct copy of the above and foregoing Decision and Preliminary Order to:

Paula Saul
DEQ Hearings Coordinator
Natural Resources Division
Environmental Quality Section
1410 N. Hilton, Second Floor
Boise, ID 83706-1255
Facsimile: (208) 373-0481

by :

regular United States mail, postage prepaid thereon this
15 day of October, 1999.

facsimile this ___ day of _____, 1999.



Heidi L. Fisher