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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	**CASE NO. BER 2015-01 WQ**
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE, DEVELOPMENT CORPORTATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105377) [FID 2289, DOCKET NO. WQ-15-08]	**CASE NO. BER 2015-02 WQ**

HEARING EXAMINER'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW TO THE BER ON THE ISSUE OF OWNER/OPERATOR

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PROCEDURAL HISTORY

On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC (CR/REF) filed a Notice of Appeal and Request for Hearing with the Montana Board of Environmental Review (BER) based on the Administrative Compliance and Penalty Orders (AOs) issued by Department of Environmental Quality (DEQ). The AOs alleged four violations:

(1) Violation of Administrative Rules of Montana (ARM) 17.30.1105 by conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions;

(2) Violation of § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit;

(3) Violation of § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM l 7.30.629(2)(f) by placing waste where it will cause pollution; and

(4) Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000.

(JSF ¶ 16; AO.)

A hearings examiner was appointed to the contested case and a Scheduling Order was issued on May 26, 2015. After a short stay and subsequent issuance of a second Scheduling Order, CR/REF filed a Motion for Summary Judgment on January 25, 2017. DEQ filed a cross-motion for summary judgment on February 17, 2017. After both motions were fully briefed, the prior hearing examiner

Andres Haladay, issued an Order granting in part and denying in part both parties' Motions for Summary Judgment on August 1, 2017.

The undersigned assumed jurisdiction of the case as the hearing examiner on September 8, 2017. On February 22, 2018 she denied CR/REF's motion to reconsider Mr. Haladay's summary judgment rulings and ruled on the parties' motions in limine. The undersigned then conducted a three-day hearing on February 26-28, 2018. Based on that hearing, the undersigned issued her Proposed Findings of Fact and Conclusions of Law (FOFCOL) to the Board on July 16, 2018. CR/REF filed an exceptions brief to the Proposed FOFCOL and DEQ filed a response. This matter was fully briefed and before the BER at its meeting on December 7, 2018, as was a Motion to Strike from CR/REF relating to the exceptions briefing. At the December 7, 2018 meeting, the BER denied CR/REF's Motion to Strike and began oral argument and discussions on the issue of whether CR/REF were an owner/operator within the meaning of Mont. Code Ann. § 75-5-103(26). The BER lost its quorum before it could make further decisions at the December 7, 2018 meeting, however. The BER therefore requested additional briefing from the parties regarding the owner/operator issue and set a special meeting for February 8, 2019 to continue oral argument and discussions on the case. The parties each submitted additional briefs on the owner/operator issue on January 17, 2019.

At the February 8, 2019 special meeting, the BER clarified and interpreted the definition of "owner or operator" to mean someone "who owns, leases, operates, controls, or supervises a point source" (Mont. Code Ann. § 75-5-103(26)) "at the time of the discharge, as opposed to at some time in the past… ." (2/8/19 Tr. at 107:8-21, 114:5-115:14, 117:10-15, 119:13-21.) Further, the Board found that the record was insufficient "to justify a finding either way" on whether CR/REF was an owner/operator at the time of the violations, and so the Board decided to:

> …vacate the proposed findings of fact, conclusions of law, and order that Hearing Examiner Clerget entered, and also part and parcel of that would be vacating Hearing Examiner Haladay's summary judgment order. And the grounds that I would propose the Board rely on in vacating those documents would be that we disagree with the Hearing Examiners' -- plural -- conclusion of law, that based on those factual considerations that Hearing Examiner Haladay mentioned, Copper Ridge and Reflections ought to be deemed to be the owner/operator of this project for purposes of the storm water discharges that are at issue in these notices of violation…. And that we then remand the matter to Hearing Examiner Clerget for further proceedings, consistent with what we think the proper interpretation of that statute is, to-wit, which is that the statutory definition of owner/operator speaks to the person who owns, operates, or supervises the project at the time that the offending storm water discharges take place.

(2/8/19 Tr. at 112:5-113:22, 117:10-15, 119:13-21.) The Board left it to the discretion of the undersigned "to decide the scope of the proceedings on remand…as to whether the record needs to be reopened or not…." (2/8/19 Tr. at 115:15-117:15, 119:13-21.) Finally, the Board passed a motion:

> that on remand, the Board direct the Hearing Examiner to place on the Department the burden of persuasion with respect to those matters that are essential for them to prove in order to establish the violations that they claim under the appropriate legal standard that we previously adopted.

(2/8/19 Tr. at 131:2-12, 143:12-18.) The Board summarized the practical effect all of these holdings as follows:

> I think on remand, Sarah will determine whether the developer was an owner or operator. If Sarah decides not, then all of the rest of that stuff doesn't matter, because under the statute they didn't need to get a permit. If Sarah decides that they were an owner or operator, we haven't disturbed all of her findings and conclusions with respect to those other issues. Whether Violations 2, 3, and 4 actually occurred or not will come back in front of us with the owner or operator issue for our consideration later.

(2/8/19 Tr. at 137:10-21; see also 107:8-21.)

On remand, the undersigned reviewed the available record, consulted with the parties, issued Orders holding that the record would be re-opened with respect to the owner/operator issue and set a schedule for various procedural deadlines. Pursuant to the schedule, the parties exchanged supplemental discovery on April 12, 2019 and their proposed hearing exhibits on May 20, 2019. On May 2, 2019, CR/REF filed a *Motion in Limine* and then a second *Motion in Limine* on May 8, 2019. The Motions in Limine were fully briefed and the undersigned allowed oral argument on them at the final pretrial conference on May 23, 2019. CR/REF filed a Motion to Vacate the hearing and for additional discovery (if their Motions in Limine were denied). The undersigned issued an Order granting in part CR/REF's

Motions in Limine on May 24, 2019. On the same day, the undersigned held a status conference with the parties and reset the hearing date.

The undersigned held a one-day hearing on June 13, 2019, to allow the parties an opportunity to supplement the record with respect to the owner/operator issue. DEQ was represented by Kirsten Bowers and Ed Hayes, presented the testimony of Dan Freeland and Susan Bawden, and entered eleven exhibits. CR/REF moved for a directive verdict at the end of DEQ's case in chief. CR/REF was represented by Victoria Marquis, presented the testimony of Brian K. Anderson and Landy Leep, and entered twenty-five exhibits.

The following proposed FOFCOL sets forth the recommended decision of the undersigned regarding the single question put before her on remand: Whether or not DEQ met its burden of showing by a preponderance of the evidence that CR/REF were 'owner/operators,' within the meaning of Mont. Code Ann. § 75-5-103(26), such that they 'owned, leased, operated, controlled, or supervised a point source' of 'storm water discharges associated with construction activity' (per ARM 17.30.1102), requiring or violating permit coverage pursuant to ARM 17.30.1115, 17.30.1105, and Mont. Code Ann. § 75-5-605, *at the time of the alleged violations* in the AOs. Scheduling Order, p. 4 (February 19, 2019) (emphasis added).[1]

[1] To the extent possible, the undersigned has written this proposed FOFCOL such that, if adopted, it could stand independently as the Final Board Order. Therefore,

FINDINGS OF FACT

A. Background

1. *CR/REF are two subdivisions located in the City of Billings, Yellowstone County, Montana. Joint Stipulated Facts (JSF) ¶ 1.

2. A map of the CR/REF subdivisions, including the filings (aka phases) of the different subdivisions appears at Ex. 47.

3. Copper Ridge indicated the pre-construction condition of the subdivision to be short pasture/grassland; at 90 % density in its Storm Water Pollution Prevention Plan (SWPPP) submitted with the Notice of Intent (NOI) to obtain General Permit coverage. (6/13/19 Tr. 32:24-33:5; Ex. 4, DEQ 000062.)

4. Reflections indicated the preconstruction condition of the subdivision to be short pasture/grassland at 90% density in its SWPPP. (Ex. 6, DEQ 000094; 6/13/19 Tr. 216:22-217:2.)

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some facts found in the undersigned's original FOFCOL are repeated herein, but are marked with an asterisk (*) for easy identification. To the extent that the Board chooses to adopt this as its Final Board Order, therefore, no additional incorporation by reference should be necessary. If, however, the Board rejects this proposed FOFCOL, then the Board may need to return to the findings and conclusions in the Order on Summary Judgment, the original FOFCOL, the parties' original exceptions and supplemental owner/operator briefing, and the transcript of the Board's prior proceedings.

5. A bullet-pointed timeline, excerpted from and based on the findings of fact contained herein, is attached as Exhibit A.

6. *The City of Billings is the owner and operator of a municipal separate storm sewer system (MS4). The City is authorized to discharge storm water to state waters under the MPDES General Permit for Storm Water Discharge Associated with Small Municipal Separate Storm Sewer Systems (General Permit No. MTR040000). The City MS4 conveys storm water to state surface water through publicly owned storm water conveyance and drainage systems. The City MS4 ultimately discharges storm water to the Yellowstone River, a state water. JSF ¶ 2.

7. *DEQ issues the MPDES General Permit for Storm Water Discharges Associated with Construction Activity (General Permit No. MTR100000). Unless administratively extended, General Permit No. MTR 100000 is issued for five-year periods. Relevant to this matter, General Permit No. MTR100000 was effective January 1, 2013, through December 31, 2017. JSF ¶ 3.

8. Storm water from CR/REF subdivisions discharges to state surface waters, including Cove Ditch and the Yellowstone River, through overland flow and through the City of Billings MS4. (2/26/18 Tr. 66:20; 148:11; Ex. 2, DEQ000038.)

9. The north end of the subdivision is upgradient from Cove Ditch and the southern portions of the subdivision, which were impacted by sediment. (6/13/19 Tr. 27:4, 28:11-13.)

10. *On March 26, 2013, the City of Billings contacted DEQ to request assistance in addressing noncompliance with storm water requirements at CR/REF. DEQ informed the City that construction activities at CR/REF were not covered by General Permit No. MTR100000. JSF ¶ 4.

B. Ownership and Construction Activity September to December 2013[2]

i. Ownership and Construction Activity Generally

11. DEQ and CR/REF provided warrantee deeds showing the dates that specific lots transferred out of CR/REF's ownership. (Exs. 39, 42, JJ-NN, OOO-RRR.)

12. DEQ also made a visual representation using an aerial photograph of some of the lots CR/REF owned between September and December 2013. (Exs. 33, 34.)

13. DEQ did not retrieve ownership records and overlay them on aerial photos of the subdivisions until after the February 2019 remand from the Board. (6/13/19 Tr. 113:10-15; 146:3-6.)

2 As explained further below and in the original FOFCOL, and as found as a Conclusion of Law herein, the relevant time period for the alleged violations were September to December 2013, and October 21, 2014.

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

a. Seven lots (including Lot 15) along Western Bluffs Blvd. located in the second filing of Reflections (Exs. 34, 47 at 3);

b. Twenty-one lots along Western Bluffs Blvd. and Reflections Circle, located in the third filing of Reflections (Exs. 34, 47 at 3);

c. Three lots located on Amelia Circle in the second filing of Copper Ridge. (Exs. 33, 47 at 1);

d. Four located along Lucky Penny Circle and Lucky Penny Lane, in the third filing of Copper Ridge (Exs. 33, 47 at 1);

e. Eleven lots located along Lucky Penny lane, in the fourth filing of Copper Ridge (Exs. 33, 47 at 1);

15. DEQ did not provide ownership information (or visual representations of ownership) regarding the southern portions of the CR/REF subdivisions, such as property located along Golden Acres Drive, or any properties located in the first filing of Reflections, or the first or second filing of Copper Ridge. (Exs. 16, 23, 33, 34, 39, 42, 47.)

16. DEQ's evidence of construction activity between September and December of 2013 consisted of:

a. the testimony of Dan Freedland, who inspected the CR/REF subdivisions on September 9, 2013 (6/13/19 Tr. 34:15-22) and took photographs (Ex. 16) and field notes (Ex. 15);

b. Two publicly-available aerial photographs: one from Google Earth, possibly taken on October 25, 2013 (Ex. 26), and one from the United States Department of Agriculture taken June 15, 2013 (Ex. 23). (6/13/19 Tr. 103:6-104:5; 124:21-125:20).

17. Landy Leep, Vice President and Manager at CR/REF confirmed that the land ownership information provided by DEQ (listed above) for the second and third filings of Reflections and the third and fourth filings of Copper Ridge were accurate for September to December 2013. (6/13/19 Tr. 217:18-23, 222:12-17).

18. Mr. Leep gave the following additional testimony regarding CR/REF's ownership and construction activity from September to December 2013:

a. CR/REF owned one lot on Western Bluffs Blvd, did not own any lots located along Golden Acres Drive, and did not conduct any construction activity within the first filing of Reflections after July 9, 2008. (6/13/19 Tr. 166:612, 167:8-23, 169:11-170:16, 170:16-12, 207:9-12; Ex. III).

b. CR/REF did not conduct any construction activity at all in the second filing of the Reflections, including Lot 15 and lots located on Western Bluffs Boulevard and Reflections Circle, as the last construction activity was completed on June 14, 2013. (6/13/19 Tr. 166:6-12, 173:12-19, 176:7-8; 179:18-22; Exs. 34, 47, WW, XX, JJJ, NNN). The final plats for the second filing of the Reflections subdivision were executed in 2012, conveying the roads, rights-of-way and parkland to the City of Billings. (Ex. 40, p. 6.)

c. CR/REF did not conduct any construction activity at all in the third filing of Reflections including lots located on Western

Bluffs Boulevard, as the last construction activity was completed on July 30, 2013. (6/13/19 Tr. 189:19-193:11; Exs. 34, 47 at 3, C, AAA, BBB, KKK, MMM, 40). The final plat for the third filing of the Reflections subdivision was signed by Mr. Leep on April 19, 2013, conveying the roads, right-of-ways, easements and parkland to the City of Billings. (6/13/19 Tr. 194:15-22; Ex. 40, p. 8.)

d. CR/REF did not own any lots in the first filing of Copper Ridge (6/13/19 Tr. 2014:15-205:9);

e. CR/REF did not conduct any construction activity at all in the second filing of Copper Ridge including lots owned on Amelia Circle, as the last construction activity completed October 16, 2009. (6/13/19 Tr. 195:8-196:24, Exs. 33, 47 at 1, 50, A, SS, TT, UU). By final plat dated January 23, 2008, Copper Ridge conveyed the streets, parkland and easements in the second filing of the Copper Ridge subdivision to the City of Billings. (6/13/19 Tr. 196:25-197:10; Ex. 44.)

f. CR/REF did not conduct any construction activity at all in the third filing of Copper Ridge, including lots owned on Lucky Penny Lane and Lucky Penny Circle. (6/13/19 Tr. 173:12-19, 181:10-22; Exs. WW, XX, JJJ, NNN, 33, 47 at 1). The final plats for the third and fourth filings of the Copper Ridge subdivision were executed in 2012, conveying the roads, right-of-ways and parkland to the City of Billings. (6/13/19 Tr. 186:15-187:10; Ex. 44.)

g. Did not conduct any construction activity at all in the fourth filing of Copper Ridge, including lots owned on Lucky Penny Lane. (6/13/19 Tr. 173:12-19, 181:10-22; Exs. 33, 47 at 1, WW, XX, JJJ, NNN). The final plats for the third and fourth filings of the Copper Ridge subdivision were executed in 2012, conveying the roads, right-of-ways and parkland to the City of Billings. (6/13/19 Tr. 186:15-187:10; Ex. 44.)

19. CR/REF provided correspondence with its contractors confirming the dates of substantial completion on their contracts, which ranged from July of 2008 to July 30, 2013 (i.e. all prior to September of 2013). (6/13/19 Tr. 166:6-176:8, 189:19-196:24; Exs. UU, AAA).

20. The contracted work corresponded to a number of MPDES permits issued by DEQ for the work described in the contracts. (Exs. 50, 51, A, B, C, WW, BBB).

21. CR/REF also provided corresponding NOTs from DEQ on the MPDES permits for the contracted work. (Exs. VV, ZZ, SS,)

22. The third filing of the Reflections subdivision, including the area in the "far north" of the Reflections subdivision, that Dan Freeland allegedly visited during his September 9, 2013 inspection, was previously included in permit MTR104993, held by CMG Construction. (6/13/19 Tr. 42:21, 67:20-68:5; Exs. C, BBB.)

23. Permit MTR104993 was initiated by CMG Construction with a NOI dated April 18, 2013 and confirmed by DEQ on April 22, 2013. (Ex. C.)

24. The permit boundary area for Permit MTR104993 extended to include the entirety of the individual lots around Reflections Circle and a portion of Western Bluffs Boulevard. (6/13/19 Tr. 69:9-12; Ex. BBB.)

25. The BMPs for MTR104993 extended the entire width of the

subdivision on the downgradient side. (6/13/19 Tr. 69:20-70:3; Ex. BBB.)

26. A Notice of Termination (NOT), certifying that the permitted area, including the third filing of the Reflections subdivision had reached final stabilization, was submitted by CMG Construction on February 19, 2014. (6/13/19 Tr. 70:4-71:3; Ex. ZZ.)

27. By letter dated March 24, 2014, DEQ confirmed that the MTR104993 permit area had "achieved 'Final Stabilization' as defined in the General Permit" and confirmed termination of permit MTR104993. (6/13/19 Tr. 71:4-23; Ex. AAA.)

28. Properties noted in DEQ's December 9, 2014 Violation Letter (Ex. 8) in the third Filing of the Reflection subdivision, including lots along Reflections Circle, remained covered by the CMG permit MTR104993 during September 23, 2013 through December 23, 2013. (Exs. C, BBB.)

29. The Amelia Circle area in the second filing of the Copper Ridge subdivision noted during the September 9, 2013 inspection was previously included in permit MTR102807, held by JTL Group Inc. (6/13/19 Tr. 62:14-25; Ex. 50, p. 13.)

30. Permit MTR102807 was initiated by JTL Group Inc. by a NOI signed on October 26, 2007. (Ex. A.)

31. A NOT, certifying that the permitted area, including the Amelia Circle

area noted during the September 9, 2013 inspection, had reached final stabilization, was submitted by JTL Group and Knife River. DEQ received the NOT on October 16, 2009. (6/13/19 Tr. 63:3-64:9; Ex. SS.)

32. A letter from Knife River, received by DEQ on October 16, 2009, stated that the MTR102807 permit area, including the Amelia Circle area noted during the September 9, 2013 inspection, had "achieved the required 70% stabilization." (6/13/19 Tr. 64:10-65:18; Ex. TT.)

33. By letter dated October 19, 2009, DEQ confirmed that the MTR102807 permit area had "achieved 'Final Stabilization' as defined in the General Permit" and confirmed termination of permit MTR102807. (6/13/19 Tr. 65:19-67:9; Ex. UU.)

34. There was no reason for Copper Ridge or its contractors to do any construction in the second filing of the Copper Ridge subdivision after permit MTR102807 was terminated on October 16, 2009. (6/13/19 Tr. 196:5-12; Ex. SS.)

35. Copper Ridge did not contract for any construction activity after permit MTR102807 was terminated on October 16, 2009. (6/13/19 Tr. 196:13-15; Ex. SS.)

36. Neither side provided evidence of ownership or construction activity for filings after Reflections' third filing or Copper Ridge's fourth filing.

37. Mr. Leep testified that CR/REF can only conduct construction activity

through its contractors, so once contracted work is complete, he is confident that there was no construction activity:

> "There would be nothing else to do. Once the contractors are done - we don't own tractors, we don't own tools - they take their equipment away. We have no way of doing additional work and there's no work to do, we're done. The streets are in; curbs are done, waterlines, sewer lines; the park is in, in this case. There is nothing else for us to construct."

(6/13/19 Tr. 170:6-16, *see also* 179:4-15, 180:16:1-21.)

38. Neither Copper Ridge nor Reflections were issued any homebuilding permits by the City of Billings in 2013 or 2014. (6/13/19 Tr. 97:10 -21.)

39. Neither Copper Ridge nor Reflections built homes in either subdivision. (2/27/18 Tr. 59:22-60:7, 61:4-7, 66:17-20.)

40. Mr. Leep further testified that he was confident there were no stockpiles of materials left on any of the lots CR/REF owned after the contracted construction activity was complete because it would not be in CR/REF's best interest to do so:

> Q. Mr. Leep, as the developer, would you allow a stockpile of material to remain on your property after this final inspection?
> A. No. At the time the subdivision -- there's a walk-through. There really is -- we don't allow home building before the final walk-through. There is no other construction activity other than what we've directed and that we supervise. And at that point at the walk-through, all the lots are graded appropriately, seeded for final stabilization, water and sewer is shown, the property's been shown, and all of the aprons; very clean, looking good.
> Q. Why wouldn't you allow a stockpile to remain after the final inspection?

> A. Well, my main job is to sell the lots, so the looks of the subdivision -- I've got my "for sale" signs out there. It's got to look crisp and clean, and a leftover stockpile would not be allowed.
> …
> During our walk-throughs, we have to keep everything looking clean and professional, no leftover materials. That includes sewer pipes, water pipes, fire hydrants. Everything is cleaned up.

(6/13/19 Tr. 182:6-23, 191:8-17.)

41. DEQ has not alleged any permit violations on any of the previously terminated permits for the CR/REF contractors in the subdivisions. (Ex. 9 p. 10-16 (March 27, 2015); Ex. 10 p. 10-16 (March 27, 2015)- AOs by date and page.)

42. Mr. Freeland didn't see any issues with "the previously permitted areas." (6/13/19 Tr. 54:14-18; *see also* 34:9-14.)

ii. Freedland's Testimony and Photographs

43. Mr. Freedland testified generally that: "[t]here was active construction occurring throughout the facility site, construction activities including clearing, excavation, stockpiling, grading, and construction of single-family homes occurring…." (6/13/19 Tr. 18:7-10; Ex. 2). Mr. Freedland did not document (through photographs or notes) any specifics to support this general claim (in his subsequent letter on Sept. 23, 2013) that "clearing, excavation, stockpiling, [or] grading" was occurring throughout the cite. (6/13/19 Tr. 20:16-23; Ex. 2).

44. At the north end of the subdivision, Mr. Freeland observed bare ground, where grading appeared to have occurred and the lots were cleared of all

vegetation. (6/13/19 Tr. 29:15-19.) Mr. Freeland could not confirm, however, that the lots he saw were owned by CR/REF, or when, how, why, or by whom they may have been cleared. (6/13/19 Tr. 29:4-19.)

45. DEQ Inspector, Dan Freeland, observed the City of Billings cleaning up sediment on Amelia Circle, and observed sediment and trash in storm drain inlets originating from Copper Ridge subdivision. (6/13/19 Tr. 31:2-8.)

46. Mr. Freeland did not observe active construction on the vacant lots in the subdivision and did not see equipment actively clearing the vacant lots. (6/13/19 Tr. 38:16-22.) Mr. Freeland could not recall seeing construction equipment on the vacant lots. (6/13/19 Tr. 38:23-39:1) ("There was some excavating, but I don't remember – I think they were on – I don't remember, I don't remember").

47. Mr. Freedland could not provide details about any specific construction activity or where it may have been occurring. (See, e.g. 6/13/19 Tr. 19:3-6; 19:15-24.) For example, Mr. Freedland testified:

> "Q. Thank you. Mr. Hayes asked you about the scope of the allegation, and you answered, I believe, consistent with your previous testimony that there were a whole range of homes under construction. And you've already said today that the streets in that area were already paved when you were there, correct?
> A. Yes.
> Q. You also testified that there were lots with nothing on them; is that correct?
> A. Correct.

Q. What construction activity did you see on those lots?
A. That would be the clearing, the lack of vegetation.
Q. So did you see a piece of equipment actively clearing the lots?
A. No, they're -- not that I recall. But they had been -- they were devoid of vegetation, so something happened, I guess.
Q. Do you know what that "something" was?
A. Uh-uh [negative].
Q. Did you see equipment on those lots?
A. There was some excavating, but I don't remember -- I think they were on -- I don't remember, I don't remember.
Q. When you say "excavating," do you mean
actively excavating? A piece of equipment was moving earth?
A. Yeah. It seemed like there was -- I know there was a lot of activity to the east, which was a different subdivision, but I -- there was other activity off to this subdivision, like digging a trench -- (gesturing.)
Q. Do you know where that was?
A. Not exactly. If these lots -- it could have been, but it's so long ago.
Q. Can you point to any photograph that was attached to Exhibit 2 that documented any of that excavating or trench digging that you're referring to?
A. No. I focused this on the discharge and the waste in the street. That's where I was focused.

(6/13/19 Tr. 38:2-39:17.)

48. Mr. Freedland testified about the route that he took through the subdivisions and where he took his photographs during his September 9, 2013 inspection, which formed the basis of the alleged violations. (6/13/19 Tr. 27:19-29:11, Ex. 16, Ex. 2.)

49. Mr. Freeland started at Golden Acres Drive, walking down to Cove Ditch, then returned to his vehicle and drove west onto Western Boulevard, to the north end of the subdivision, then west on Amelia Circle, then south through East

Copper Ridge Loop, and then out the subdivision entrance. (6/13/19 Tr. 27:19-28:25.)

50. The general locations of the photographs that Mr. Freedland took are indicated on the map in Ex. 16 at 1.

51. All of these photographs, and the path that Mr. Freedland described, are in the Southern portion, in the first and second filings, of both subdivisions. (6/13/19 Tr. 27:19-29:11, Exs. 16, 47.)

52. Almost all of Mr. Freedland's photographs were on or around Golden Acres Drive, which is the most southerly road in the Reflections subdivision, first filing. (Ex. 16.)

53. DEQ Inspector, Dan Freeland, testified that he took photographs in the location of lots 11, 12, and 13, Block 1, Reflections at Copper Ridge, third filing, during the September 9, 2013 inspection. (6/13/19 Tr. 88:19-20; Exs. 2, 16, and 47.)

54. Photograph 14 is the most northerly photograph (taken alone and far away from all the other photographs) and it depicts lots on Amelia circle which DEQ does not allege CR/REF owned. (Ex. 16.)

55. Mr. Freedland did not take any photographs or field notes regarding any of the lots for which DEQ provided ownership information in Ex. 33, which included a total of eighteen lots located along Lucky Penny lane and Amelia

Circle, in the third and fourth filings of the Copper Ridge subdivision (Exs. 16, 15, 33, 42, 47 at 1.)

56. The only specific evidence of construction activity for lots owned by CR/REF along Lucky Penny lane and Amelia Circle, in the third and fourth filings of the Copper Ridge subdivision, were the two aerial photographs, one from Google Earth (Ex. 26) and one from the U.S. Department of Agriculture (Ex. 23).

iii. Aerial Photographs and Vegetative Cover

57. Exhibit 23 is an aerial photograph of the CR/REF subdivisions taken by the USDA Farm Services Agency on June 15, 2013. (6/13/19 Tr. 80:4-112:10-15; Ex. 23.)

58. Exhibit 33 is a map layer prepared by DEQ Enforcement Specialist, Susan Bawden, using ArcMap over the USDA base aerial photograph in Exhibit 23. Exhibit 33 shows lots owned by Copper Ridge as of the date of the initial violation letter on September 23, 2013. (6/13/19 Tr. 112:16-114:21; Ex. 33.)

59. Exhibit 34 is a map layer prepared by Ms. Bawden, using ArcMap over the USDA base aerial photograph in Exhibit 23. Exhibit 34 shows lots owned by Reflections as of the date of the initial violation letter on September 23, 2013. (6/13/19 Tr. 122:7-19; Ex. 34.)

60. Exhibit 26 is a Google Earth aerial image of CR/REF subdivisions allegedly (according to Ex. 26) acquired by Google Earth on October 25, 2013. (6/13/19 Tr. 124:22-25; Ex. 26.)

61. Ms. Bawden testified that she had looked at the Google Maps aerial photograph (Ex. 26) before assessing penalties in this case in 2013 (2/27/18 Tr. 27:17-28:3), but DEQ did not obtain the USDA photograph (Ex. 23) until after the Board remanded the case, so it did not form part of DEQ's original assessment of violations (6/13/19 Tr. 146:3-148:25).

62. Prior to the February 2019 remand from the Board, DEQ had relied upon other aerial photos to try to prove the allegations in this enforcement action. Those other aerial photos, previously used by DEQ, do not depict the same area and they look different than Exhibit 23. (6/13/19 Tr. 146:3-151:21.)

63. At most, both aerial photographs show, through some lighter coloring, that there are was limited vegetative cover on some lots owned by CR/REF in June and October of 2013. (Exs. 23, 26; 6/13/19 Tr. 131:7- 132:10).

64. The aerial photographs, on their own, do not show by a preponderance of the evidence that there was construction activity occurring on any lots owned by CR/REF.

65. CR/REF successfully challenged the accuracy of both of the aerial photographs, through cross examination (6/13/19 Tr. 140:13-148:25) and with the

testimony of Mr. Leep, who testified that the photographs: were not accurate to his memory and experience in the subdivisions from September to December 2013 (6/13/19 Tr. 164:17-166:3, 234:23-235:17), were internally inconsistent (6/13/19 Tr. 235:1-17), and were lacking in detail (6/13/19 Tr. 218:6-13).

66. Mr. Leep further testified that any ground appearing in the aerial photographs that was cleared, graded, or otherwise disturbed by his contractors—through other permitted activity (e.g. road and utility instillation)—was seeded and achieved the necessary 70% vegetative cover such that DEQ terminated the permits (and never alleged any violation of those permits). (6/13/19 Tr. 218:14-25) (cite exhibits for permits, NOTs, SWPPS).

67. CR/REF provided evidence, through testimony and cross examination, that the green areas of the aerial photographs are private lawns or Billings city park land, which are watered regularly, as opposed to vacant lots, which do not receive regular watering. (6/13/19 Tr. 165:20-166:3.)

68. Mr. Freedland confirmed that there is no requirement, once DEQ terminates a permit, for a permittee to maintain or revegetate areas where seeding and vegetation have died (for example, due to lack of regular watering over a period of months or years, since a permit was terminated). (6/13/19 Tr. 53:9-54:18.)

iv. Lot 15

69. The only photograph that Mr. Freedland took during his September 9, 2013 inspection that arguably shows a portion of a lot owned by CR/REF was photograph 13 (Ex. 16 at 15).

70. Mr. Freedland testified that when he took photograph 13, he was "standing to the north of Lot 15 toward the bottom, and I would have been looking toward a southerly… looking south across the street at 15." (6/13/19 Tr. 25:18-21, *see also* 25:22-26:20, 241:4-9.)

71. CR/REF provided contrary testimony from Mr. Leep, however, that Lot 15 was not shown in photograph 13, and the location of the photograph was mislabeled on Ex. 16 (the map showing where Mr. Freedland's photographs were taken). (6/13/19 Tr. 160:18-161:12, 166:4-9; Ex. 16 at 1, 15.)

72. Mr. Freedland was not able to ascribe a street address to the location of photograph 13, but gave a GPS location, which he subsequently verified using the metadata on the photograph from his iphone. (Ex. 15, 16 at 15; 6/13/19 Tr. 40:1-5, 42:7-13, 55:3-58:7, 238:1-9, 242:2-244:21.)

73. In 2015, during discovery, DEQ designated the addresses pictured in photograph 13 as 3028, 3030, and 3032 Western Bluffs Blvd. (6/13/19 Tr. 55:18-58:6; Ex. 16 at 15.)

74. DEQ did not present any evidence that CR/REF owned property at 3028, 3030, or 3032 Western Bluffs during the relevant time period between

September 23, 2013 and December 23, 2013.

75. The property at 3028 Western Bluffs was conveyed from Reflections to a third party on March 29, 2013. (Ex. PPP.)

76. The property at 3030 Western Bluffs was conveyed from Reflections to a third party on July 9, 2013. (Ex. JJ.)

77. The property at 3032 Western Bluffs was conveyed from Reflections to a third party on May 21, 2013. (Ex. QQQ.)

78. The street address of Lot 15 is 3036 Western Bluffs Blvd. (6/13/19 Tr. 161:10-12.).

79. Lot 15, Block 3, of Reflections at Copper Ridge subdivision, second filing was owned by Reflections at the time of the September 9, 2013 inspection, and the September 23, 2013 and the November 8, 2013 Violation Letters. Lot 15, Block 3, of Reflections at Copper Ridge subdivision, second filing was owned by Reflections until conveyed by warranty deed on June 12, 2014. (Ex. 39 at 11.)

80. Mr. Freedland testified that he believed the photograph showed that there was "disturbed ground with no vegetative cover, there's stockpiling of material on the lot near the curb line, and then of course the track-out…" (6/13/19 Tr. 21:3-15, 26:13-16; see also 2/26/18 Tr. 76:14-19, 178:20-21; Ex. 16 at 15.)

81. Mr. Freedland also stated that he did not know where the property

lines were; they were not marked; and the photograph does not show the homes that were being built on either side of Lot 15. (6/13/19 Tr. 238:17-239:10; Ex. 16 at 15.)

82. Mr. Freeland did not see an excavator or a bulldozer or any heavy equipment in that area and there was no equipment operating there. (6/13/19 Tr. 59:5-9; 18-20.)

83. It is unclear from the photograph and from Mr. Freedland's testimony whether there was any stockpiled material on Lot 15 or if there were, who placed it and when. (6/13/19 Tr. 94:2-8; Ex. 16 at 15.)

84. The portion of the lot shown in photograph 13, which may be Lot 15, is lacking in vegetative cover. (Ex. 16 at 15.)

85. Mr. Leep affirmatively testified that there was no construction activity occurring on Lot 15 from September to December 2013. (6/13/19 Tr. 166:10-12.)

86. CR/REF also provided evidence that the only construction activity conducted on Lot 15 was pursuant to Permit No. MTR 104590, and under contract with H.L. Ostermiller, for work was completed in 2012. (6/13/19 Tr. 49:2-19, 51:9-52:1, 55:10-14; Exs. YY, WW.)

87. Permit MTR104590 issued to H.L Ostermiller through a NOI dated June 15, 2012 provided permit coverage that included each individual lot, in its

entirety, for the third and fourth filings of the Copper Ridge subdivision and for the second phase of the Reflections subdivision. The permit area includes all of lot 15, block 3 in the second phase of the Reflections subdivision – the area that DEQ alleges is shown in photograph 13. (6/13/19 Tr. 51:9-52:1; 55:10-14; Ex. YY.)

88. DEQ confirmed the termination of Permit MTR104590 on December 19, 2012, stating "[t]he reason for terminating this permit authorization is because the construction project site has achieved 'Final Stabilization' as defined in the General Permit, and all applicable fees have been paid." (6/13/19 Tr. 49:2-19; Ex. WW.)

C. Inspection September 9, 2013

89.*On September 7, 2013, there was a significant storm event in and around Billings, MT. (Ex. 14.)

90. *The following day, the Billings Gazette published a story about the effects of the storm that included some discussion of the conditions in the CR/REF subdivisions during and after the storm. (Ex. 14; 2/26/18 Tr. 50:25-53:03.)

91. *Based on the Gazette's report, DEQ compliance inspector Dan Freeland visited CR/REF to conduct an inspection. (2/26/18 Tr. 50:25-53:03.)

92. *Two days after the storm event, on September 9, 2013, Mr. Freeland conducted an inspection of the CR/REF subdivisions. JSF ¶ 6.

93. *During the September 9, 2013 inspection, Mr. Freeland observed and documented sediment tacking on the streets and concrete waste washed on to the ground. (2/26/18 Tr. 54:21-56:4, 73:10-19, 74:1-6, 74:14-20, 74:24-75:8, 173:16-20; Ex. 15; CR/REF Proposed Findings of Fact (CR) ¶ 16; DEQ ¶ 16.)

D. Correspondence September to December 2013

94. CR and REF were first notified of Montana Water Quality Act violations at the subdivisions by a Violation Letter, dated September 23, 2013, addressed to Copper Ridge Development Corporation. (6/13/19 Tr. 17:11-12; Ex. 2.)

95. *On September 23, 2013, DEQ sent CopperRidge, through Gary Oakland, a letter. JSF ¶ 7; Ex. 2.

96. *The letter stated, "The Montana Department of Environmental Quality (DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action." (2/26/18 Tr. 65:24–66:8; Ex. 2 at DEQ 000038 – DEQ 000040; DEQ ¶ 18; CR Resp ¶ 1.)

97. DEQ asserted that the "purpose of a violation letter is to identify any violations that were observed, to state any corrective actions that could be taken to

remedy the violations, and identify where in the code or the rules that there was a violation that occurred." (6/13/19 Tr. 17:19-23.)

98. DEQ asserted that the factual basis of the alleged violations in this case are contained in the "six bullet points" on page 2 of the September 23, 2013 Violation Letter and that each bullet point sets forth "an independent factual basis for a violation." (6/13/19 Tr. 17:24-18:23; Ex. 2.)

99. The first bullet point on page 2 of the September 23, 2013 Violation Letter alleges that "[a]ctive construction is occurring throughout the facility site. Construction activities include clearing, excavation, stockpiling, grading, and construction of single-family homes." (Ex. 2, p. 2.)

100. DEQ "didn't have photographs specifically for the first bullet point" and none of the photographs attached to the September 23, 2013 Violation Letter were identified as supporting the allegation in the first bullet. (6/13/19 Tr. 20:16-21:2; 31:20-21) ("I didn't identify photos with the first issue – or first violation fact.").

101. DEQ presented no testimony addressing violations associated with the second, third, fifth and sixth bullets on page 2 of the September 23, 2013 Violation Letter.

102. DEQ testified that Photo 13 provided evidence of the fourth bullet point allegation of "sediment track-out onto impervious surfaces within areas of

active construction" and as evidence of the sixth bullet point allegation of "sediment was built up near storm drains throughout the subdivision." (6/13/19 Tr. 21:3-15; *see also* 2/26/18 Tr. 1:76:14-19.)

103. *In a September 27, 2013 letter, CR/REF provided clarification to DEQ regarding ownership information and sought to distinguish the violations based on the separate subdivisions, CopperRidge and Reflections. (Ex. 12; 2/26/18 Tr. 79:21-80:15, 83:8-83:16; CR ¶ 2; DEQ ¶¶ 20, 22.)

104. *In an October 8, 2013 letter responding to CR/REF's September 27, 2013 correspondence, Mr. Freeland explained that, based on his September 9, 2013 inspection, DEQ determined that the Copper Ridge Subdivisions were part of a greater common plan of development and one violation letter was adequate to address the violations at both subdivisions. (2/26/18 Tr. 80:19-81:24; Ex. O; DEQ ¶ 21; CR Resp. ¶ 1.)

105. *CR/REF responded with letter on October 29, 2013 regarding ownership and again sought to distinguish the violations based on the separate subdivisions. (Ex. 15; CR ¶ 2; DEQ ¶¶ 20, 22.)

106. *On November 8, 2013, DEQ issued another letter, which stated that violations at the CR were distinguishable from violations at REF. JSF ¶ 9.

107. *Within a timeframe acceptable to DEQ, Copper Ridge and Reflections at Copper Ridge each took the corrective action identified in the September 23, 2013 and November 8, 2013 letters from DEQ. JSF ¶ 10.

E. Permits (under protest) December 23, 2013

108. *On December 23, 2013, DEQ received NOI and SWPPPs from CR/REF (collectively, NOI package). (Exs. 3-6; JSF ¶ 8; 2/27/18 Tr. 59:9-21, 60:11-18.)

109. *On January 8, 2014, DEQ sent confirmation letters to Reflections issuing Permit No. MTR105376 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at Reflections, and to CopperRidge issuing Permit No. MTR105377 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at CopperRidge. JSF ¶ 11.

110. *Permit No. MTR105376 and Permit No. MTR105377 were effective from the date DEQ received the NOI Package on December 23, 2013. (Ex. 3; Ex. 4; 2/26/18 Tr. 95:23-96:10.)

111. Permit No. MTR105376 was issued to "Reflections at Copper Ridge, LLC" (Ex. 5 at 1), for a total construction-related disturbance area of "14.9 acres" for construction activity involving "construction of new single-family homes and

the necessary landscaping to complete the first, second, and third filing of the Reflection [sic] at Copper Ridge subdivision." (Ex. 5 at 3.)

112. Permit No MTR105377 was issued to "Copper Ridge Subdivision" (Ex. 3 at 1) for a total disturbance area of "11.94 acres" (Ex. 3 at 3), for construction activity involving "new single-family homes and the necessary landscaping to complete the third and fourth filing of Copper Ridge subdivision. A material stockpiling area (containing the proposed concrete washout area) in the area of the sixth filing as well as five lots in the first filing that have not yet achieved final stabilization." (Ex. 3 at 3.)

113. CR/REF did not own any lots in the first filing of the Copper Ridge subdivision on December 23, 2014, and there is no evidence of what lots they owned in the sixth filing of Copper Ridge. (6/13/19 Tr. 204:15-205:9.)

114. CR/REF does not and has not engaged in any single-family homebuilding in the Copper Ridge or Reflections subdivisions. (6/13/19 Tr. 96:8-97:22.)

115. CR/REF obtained Permit No. MTR105376 and Permit No. MTR105377 under protest, based on their understanding that they had to, for activity they did not conduct, and (in the case of the first filing of Copper Ridge at least) for land they did not own. (6/13/19 Tr. 204:15-205:9.)

F. Inspection October 21, 2014

116. *On March 7, 2014, Inspector Freeland sent an email to inspection and enforcement employees of DEQ stating, "I did not get to a lot of the new construction at [CR]. But I did document and photograph a few lots under construction and in one case there was a berm around the site and sand bags. There was also a house under construction which had straw bales on the perimeter. Appears to be an effort to control runoff from the individual lots I observed." (Ex. V.)

117. *On October 21, 2014, DEQ conducted a scheduled inspection of CR/REF. (JSF ¶ 12; 2/26/18 Tr. 100:11-100:20, 105:24-106:3; Ex. 7 at DEQ 000113; Ex. 8 at DEQ 000125.)

118. *On December 9, 2014, DEQ sent CR/REF letters that notified CR/REF of the alleged MPDES Permit violations observed and documented by DEQ Inspectors during the October 21, 2014 inspection and requested corrective action to address the violations. (JSF ¶¶ 13, 14; Ex. 7; Ex. 8.)

119. *In December 2014, CR/REF requested an extension from DEQ in order to respond to DEQ's December 9, 2014 letter of violation and inspection report; DEQ granted the extension by letter dated December 23, 2014. (Ex. X.)

120. *On January 8, 2015, the CR/REF subdivisions submitted a letter with corrective action and updates to their SWPPP to DEQ. (Ex. Y.)

121. *Within a timeframe acceptable to DEQ, CR/REF each took the corrective action identified in the December 9, 2014 letters from DEQ and submitted an updated SWPPP to DEQ. JSF ¶15.

122. *DEQ acknowledged the responses by CR/REF to the violations at the subdivisions noted during the October 21, 2014 inspection and identified in the December 9, 2014 letters. (2/26/18 Tr. 112:7-120:8; Ex. 18; Ex.19; DEQ ¶ 30; CR Resp. ¶ 1.)

123. *CR/REF did not propose "corrective action plans" to address violations of the Montana Water Quality Act. (2/28/18 Tr. 119:11; DEQ ¶ 31, CR Resp. ¶ 1.)

124. *On February 6, 2015, DEQ sent CR an acknowledgment letter indicating receipt of CR's response letter of January 8, 2015. DEQ indicated that there was further compliance assistance needed and outlined three specific areas for improvement. (Ex. 18; 2/26/18 Tr. 65:24 – 66; Ex. 2 at DEQ 000038 – DEQ 000040.)

125. *On February 9, 2015, DEQ sent REF an acknowledgment letter indicating receipt of REF's response letter dated January 8, 2015. DEQ indicated that there was further compliance assistance needed, mainly paperwork errors to be corrected. (Ex. 19.)

126. *DEQ seeks penalties for the violations noted in the December 9, 2014 letter. (Ex. 9; Ex. 10; CR ¶ 11; DEQ ¶ 32.)

127. *DEQ seeks penalties for the violations noted in the December 9, 2014 letter. (Ex. 9; Ex. 10; CR ¶ 11; DEQ ¶ 32.)

G. Owner/Operator October 21, 2014

128. DEQ entered no evidence regarding lots owned by CR/REF in October of 2014.

129. The undersigned asked Mr. Leep about lot addresses specifically noted in the December 9, 2014 inspection reports (Ex. 7 at 4-6; Ex. 8 at 5-6), but Mr. Leep was unsure of whether CR/REF owned the lots mentioned in October of 2014. (6/13/19 Tr. 207:23-212:22.)

130. Mr. Leep testified, that if there were construction activity going on during October of 214, in the filings covered by Permit No. MTR105376 and Permit No. MTR105377, it was "highly unlikely" that he owned the lots on which the construction activity occurred, because the only active construction in October of 2014 in those areas was for homebuilding (which CR/REF does not do). (6/13/19 Tr. 209:1-18.)

H. AOs and Alleged Violations

131. *DEQ issued AOs on March 27, 2015, identifying four alleged violations of the Montana Water Quality Act at CR/REF:

(1) Violation of Administrative Rules of Montana (ARM) 17.30.1105 by conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions;

(2) Violation of § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit;

(3) Violation of § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM l 7.30.629(2)(f) by placing waste where it will cause pollution; and

(4) Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000.

(JSF ¶ 16; AO.)

132. Reflections was issued an AO on March 27, 2015, initiating formal enforcement action. See Exhibit 9, DEQ 000137. The AO notified Reflections that the DEQ Inspector "documented homes under construction and areas disturbed by associated construction activity such as cleared and graded areas, excavations, soil stockpiles, concrete washout area, and sediment tracking in streets." (Exhibit 9, DEQ 000144-145.)

133. CopperRidge was issued an AO on March 27, 2015, initiating formal enforcement action. See Exhibit 10, DEQ 000167. The letter notified CopperRidge that the DEQ Inspector "documented homes under construction and areas disturbed by associated construction activity such as cleared and graded

areas, excavations, soil stockpiles, concrete washout area, and sediment tracking in streets." (Exhibit 9, DEQ 000174-175.)

134. *At the hearing, DEQ agreed that the number of days of violation for Violation 2 could be adjusted down to 19 days based on the precipitation events noted in the most current National Oceanic and Atmospheric Administration (NOAA) weather service data. (Ex. 20; 2/28/18 Tr. 8:8-21, 17:6-10, 33:21-35:2; CR ¶ 32; DEQ ¶ 55.)

135. *The NOAA data shows eight days between September 23, 2013 and December 23, 2013 when there were precipitation events greater than 0.25 inches. (Ex. 20.)

136. *Each of the AOs assesses a penalty and has a penalty calculation worksheet attached. (2/26/18 Tr. 215:19-216:5; Ex. 9 at DEQ 000154 – 000155, DEQ 000157; Ex. 10 at DEQ 000184 – 000185, DEQ 000187; DEQ ¶ 34; CR Resp. ¶ 1.)

DISCUSSION

A. Relevance on Remand

When the BER remanded this case on the owner/operator issue, it was clear that if CR/REF were found to be owner/operators, then the findings and conclusions in the Order on Summary Judgment and the FOFCOL would be undisturbed (i.e. before the BER for consideration). (2/8/19 Tr. at 137:10-21.)

Therefore, the findings and conclusions in both the Summary Judgment Order and original FOFCOL limit the relevant evidence on remand. If CR/REF are found to be owner/operators, then the Board must return to the posture at the February 8, 2019 BER meeting, when it considered the findings and conclusions in the Summary Judgment Order and original FOFCOL. (If the Board were to reject those findings, then it would have remand the entire case for rehearing anyway.)[3]

The Summary Judgment Order and original FOFCOL made specific findings about the violation and penalty dates, which translated as follows for the remand hearing (as explained during the June 4, 2019 status conference):

1) Violation One: if CR/REF were found to be an owner/operator, then the conclusion in the Summary Judgment Order finding that DEQ provided insufficient notice of this violation would stand. If CR/REF were found not to be an owner/operator conducting construction activities, then they were not required to submit an NOI and could not have violated Admin. Rule 17.30.1105;

[3]Before the hearing on remand, DEQ attempted to enter a large amount of evidence that essentially supported an entirely new theory of the case. In the June 4, 2019 Order on Motions *in Limine* and the status conference on the same day, the undersigned specifically limited the evidence to be presented at the remand hearing. Order, June 4, 2019, at 4-8; 6/4/19 Tr. (forthcoming). The undersigned found that:

> this entire proceeding is bounded by the following things: Mont. Code Ann. § 75-5-617; the notice that DEQ gave to CR/REF of the alleged violations, as contained in DEQ's various correspondence with CR/REF from September 9, 2013 to March 27, 2015; DEQ's discovery responses, including its Rule 30(b)(6) deposition testimony, and its prior testimony in this litigation; the findings of fact and conclusions of law contained in the Summary Judgment Order and the Proposed FOFCOL that were not disturbed by the Board – i.e. everything other than the Summary Judgment findings concerning CR/REF's status as an owner/operator. Additionally, the principles of equity and estoppel prevent DEQ from now—six years later…—presenting an entirely new theory with entirely new evidence.... If it is true that CR/REF owned land in the subdivisions on which they engaged in construction activity, and DEQ gave CR/REF sufficient notice of those violations in its prior correspondence, then such evidence is properly before the undersigned (and the Board).

Order, June 4, 2019, at 5-6. The undersigned clarified the practical meaning of this holding during the status conference on June 4, 2019, with respect to each of the alleged violations alleged in the AOs and the findings contained in the Summary Judgment Order and Original Proposed FOFCOL.

2) Violation Two: if CR/REF were found to be an owner/operator, then the conclusion in the Summary Judgment Order would stand, finding a violation of Mont. Code Ann. § 75-5-605(2)(c) by discharging storm water associated with construction activity without a discharge permit. The conclusion in the original FOFCOL regarding the appropriate penalty for this violation would also stand, such that there would be eight days of violation found, for eight days of precipitation events between September 23, 2013 (when CR/REF received notice from DEQ that they needed a permit) and December 23, 2013 (when CR/REF received permit coverage satisfactory to DEQ). If CR/REF were found not to be an owner/operator conducting construction activities, then they were not required to obtain permit coverage and therefore could not have violated Mont. Code Ann. § 75-5-605(2)(c);

3) Violation Three: if CR/REF were found to be an owner/operator, then the conclusion in the Summary Judgment Order would stand, finding that CR/REF placed waste, and the conclusions of the original FOFCOL would stand, finding that CR/REF "constructively" caused pollution by discharging storm water without a permit for eight days between September 23, 2013 and December 23, 2013, in violation of Mont. Code Ann. § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM l 7.30.629(2)(f). If CR/REF were found not to be an owner/operator, then they were not required to obtain permit coverage, and therefore could not have "constructively" caused pollution by discharging without a permit. Therefore, they could not have violated Mont. Code Ann. § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM l 7.30.629(2)(f).

4) Violation Four: if CR/REF were found to be an owner/operator, then the conclusion in the Summary Judgment Order would stand, finding a violation of Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000. The conclusion in the original FOFCOL regarding the appropriate penalty for this violation would also stand, such that there would be one day of violation found, for the observations that DEQ inspectors made regarding a lack of BMPs in place on October 21, 2014.

(6/4/19 Tr. 11:25-12:6, 14:21-15:3, 16:20-17:13; *see also* JSF ¶ 16; AO.

Thus, the only time period relevant to the alleged violations—if CR/REF were found to be owner/operators—is September 23, 2013 (when CR/REF received notice from DEQ that they needed a permit) to December 23, 2013 (when CR/REF received permit coverage satisfactory to DEQ), and October 21, 2014 (when DEQ observed a lack of BMPs in place during its inspection), because those are "the time of the discharge[s]."4 (2/8/19 Tr. at 114:5-115:14, 117:10-15, 119:13-21.)"

B. Owner/Operator September to December 2013 and October 2014

On remand, DEQ's main theory of construction activity in the subdivisions appeared to be that CR/REF had cleared and graded the lots they owned, perhaps beyond what was allowed in prior permits. DEQ's best evidence of this was contained in photograph 13 from Dan Freedland, Mr. Freedland's testimony, and the aerial photographs from Google Earth and the USDA. [5]

Photograph 13 was insufficient evidence of construction activity occurring on lot 15 because, even if the photograph showed Lot 15 (which is questionable),

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5 It is questionable whether these photographs should have been admitted at all, as CR/REF did not get them prior to May of 2019, and it is unclear how exactly they factored into DEQs determination of alleged violations on 9/9/13 or 10/21/14. It seems likely that DEQ was justifying their violations after the fact with evidence not provided to CR/REF at the time of the violations (or during discovery, or SJ, or the original hearing). However, the photos are (were) publicly available documents at the time the violations were alleged, so they were admitted over CR/REFs objection. Ultimately, as shown below, they were unconvincing, so even if they were admitted in error, it does not change the ultimate outcome.

at most it shows that there was bare ground near the road with little or no vegetative cover and some gravel of unknown origin (and uncertain exact location, with respect to Lot 15 specifically). DEQ terminated the prior road building permit, which covered Lot 15, and under which the ground around the road, shown in photo 13, would have been disturbed. This termination confirms the Reflection's subcontractor's signed statement that the property had been seeded and achieved 70% vegetative cover in June of 2013. It is reasonable that by September of 2013, without regular watering and after a major storm event, that vegetative cover could have died or been washed away.

Similarly, regarding the other lots that CR/REF owned throughout the subdivision, Mr. Freedland's testimony and the aerial photographs did not provide a preponderance of the evidence that CR/REF cleared or graded the lots they owned, or did so in the absence of, or in violation of, a permit. At most (giving DEQ the benefit of every doubt), the photographs showed some evidence (but not a preponderance) of ground areas lacking vegetation in June and October of 2013. Lacking vegetation, however, does not constitute proof by a preponderance of the evidence of construction activity. It certainly does not constitute proof by a preponderance of the evidence—especially when coupled with CR/REF's contrary evidence—that CR/REF was conducting construction activity on the lots they owned between September 23, 2013 and December 23, 2013 and on October 21,

2014.

There is no law (or at least, DEQ has pointed to none) that says an owner/operator of a lot must maintain 70% vegetative cover on lots in perpetuity, after permitted construction activity is completed. So, even if vegetative cover did (without anyone to water or maintain it) disappear after some past construction activity ceased (and after DEQ terminated permits) that would not constitute proof of any of the violations alleged in the AO. In other words, even if there were a discharge of storm water over bare and vacant lots lacking vegetative cover between September and December 2013, that would not constitute a "discharge of storm water related to construction activity" as contemplated by the statutes and administrative rules, because there is no "construction activity" at the time of the discharge—there is only a discharge because the vegetation died where past construction activity occurred. Failing to maintain vegetation is neither a violation alleged in this case, nor a discharge regulated by the MPDES permitting scheme. If it were, every farmer with a tilled and unplanted field would be guilty of discharging storm water without a permit.

CONCLUSIONS OF LAW

1. BER has jurisdiction to hear this matter pursuant to its authority under Mont. Code Ann. § 75-5-611(4)-(9), and the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6 (MAPA).

2. DEQ is authorized under Mont. Code Ann. § 75-5-211 to administer the provisions of the Montana Water Quality Act, Title 75, Chapter 5, Mont. Code Ann. ("WQA"). The permit program administered by DEQ is implemented through rules adopted by the BER. Mont. Code Ann. §§ 75-5-401 and 75-5-402.

3. DEQ treated CR and REF as separate violators under Mont. Code Ann. § 75-5-611 and initiated two separate enforcement actions in the above-captioned matters after considering evidence that each company is a separate legal entity, and each conducted separate development activities. Additionally, CopperRidge and Reflections obtained separate permit authorizations and submitted separate SWPPPs covering development activities at their respective subdivisions. Based on the evidence presented at the hearing and summary judgment, CopperRidge and Reflections are separate legal entities and therefore subject to separate penalties.

4. "Owner or operator" is defined as "a person who owns, leases, operates, controls, or supervises a point source." § 75-5-103(26), MCA.

5. Owners and operators of construction sites that disturb equal to or

greater than one acre of land must obtain National Pollutant Discharge Elimination System (NPDES) permit coverage. *See* 40 CFR §122.26(b)(15). The EPA has delegated its authority to administer the NPDES permit program within the State of Montana to DEQ. Under that delegation, DEQ issues MPDES permits for "point source" discharges of pollutants to state waters including permits authorizing storm water discharges associated with construction activity. *See* Section 75-5-401, MCA, and Administrative Rules of Montana (Admin Rule) Title 17, chapter 30, subchapters 11, 12, and 13. Under Admin Rule 17.30.1105(1)(a), a person who discharges or proposes to discharge storm water from a point source associated with construction activity is required to obtain coverage under an MPDES general permit or an MPDES individual permit.

6. The permit program administered by DEQ is implemented through rules adopted by the BER. §§ 75-5-401 and 75-5-402, MCA.

7. The rules establish the system for issuing permits for point sources discharging pollutants into state waters and allow DEQ to administer the permit program to be compatible with the requirements of the Federal Clean Water Act. ARM 17.30.1301. The Clean Water Act prohibits the discharge of any pollutants into regulated surface waters -- permitted pollutant discharges are an exception to this mandate. 33 U.S.C. § 1311 (a).

8. DEQ requires MPDES permit coverage under a general or individual

permit for discharges of storm water associated with construction activity. ARM 17.30.1105(1)(a). Upon submittal of an NOI, coverage under General Permit MTR100000 is available. Admin Rule 17.30.1115(4).

9. General Permit MTR100000 requires the permittee to identify sources of pollutants and implement and maintain best management practices (BMPs) to reduce the potential discharge of pollutants from the construction activities in the event of a storm. Exhibit 1, DEQ000005.

10. "Storm water discharge associated with construction activity" is defined as follows:

> a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of the rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more.

Admin Rule 17.30.1102(28).

7. "Final stabilization" is defined as follows:

> the time at which all soil-disturbing activities at a site have been completed and a vegetative cover has been established with a density of at least 70% of the pre-disturbance levels, or equivalent permanent, physical erosion reduction methods have been employed. Final stabilization using vegetation must be accomplished using seeding mixtures or forbs, grasses, and shrubs that are adapted to the conditions of the site. Establishment of a vegetative cover capable of providing erosion control equivalent to pre-existing conditions at the site will be considered final stabilization.

ARM 17.30.1102(5).

8. "Point source" is defined as "a discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged." Mont. Code Ann. § 75-5-103(29).

9. A person who discharges or propose to discharge storm water associated with construction activity shall submit a Notice of Intent (NOI) to be covered by the General Permit. ARM 17.30.1115(4). The NOI must be signed by the owner of the project or by the operator, or by both the owner and the operator if both have responsibility to ensure that daily project activities comply with the SWPPP and other general permit conditions.

10. An NOI must be completed on an NOI form developed by the department, in accordance with the requirements stated in the general permit, and must include the legal name and address of the operators, the facility name and address, the type of facility or discharges, and the receiving surface waters. Admin Rule 17.30.1115(2).

11. An NOI must be accompanied by a SWPPP, which must be completed in accordance with the requirements identified in the general permit, must be signed by all signatories to the NOI; and must require the identification and

assessment of potential pollutant sources that could be exposed to storm water runoff, and must contain provisions to implement BMPs, in accordance with the general permit. Admin Rule 17.30.1115(3).

11. In this matter, DEQ had the burden of proving, by a preponderance of the evidence, that CR/REF were owners or operators within the meaning of Mont. Code Ann. §75-5-103(26), such that they were required by Admin. Rule 17.30.1105(1)(a), 17.30.115(a), and 17.30.1102(28) to obtain MPDES permit coverage for construction activity occurring at the time of the violations alleged by DEQ.

12. The relevant dates of the alleged violations (on which DEQ must prove CR/REF were owners or operators of construction activity) include September 23, 2013 to December 23, 2013, and October 21, 2014.

13. DEQ failed to provide evidence sufficient to show that CR/REF were owners or operators within the meaning of Mont. Code Ann. §75-5-103(26), such that they were required by Admin. Rule 17.30.1105(1)(a), 17.30.115(a), and 17.30.1102(28) to obtain MPDES permit coverage for any construction activity occurring from September 23, 2013 to December 23, 2013, or on October 21, 2014.

14. CR and REF are not the owners or operators within the meaning of Mont. Code Ann. § 75-5-103(26), because they did not own lots within the

subdivisions at the time of the alleged violations in the AOs that were disturbed by "construction activity" or contained point sources of "storm water discharges associated with construction activity" (per Admin. Rule 17.30.1102(28)), requiring or violating permit coverage pursuant to Admin. Rule 17.30.1115, 1730.1105, and Mont. Code Ann. § 75-5-605.

15. Because CR/REF were not owners or operators of construction activity requiring MDES permit coverage at the time of the alleged violations, CR/REF were not required to obtain permit coverage.

Violation One

16. DEQ did not provide adequate notice regarding its first alleged violation against CR/REF—a violation of Admin. Rule 17.30.1105—and therefore no violation of that Admin. Rule can be shown and DEQ cannot seek administrative penalties based on such a violation.

Violation Two

17. DEQ has failed to provide facts necessary to establish that CR/REF discharged storm water to state waters without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c).

Violation Three

18. DEQ has failed to provide facts necessary to establish that CR/REF placed wastes where they will cause pollution of any state waters in violation of Mont. Code Ann. § 75-5-605(1)(a).

Violation Four

19. DEQ has failed to provide facts necessary to establish that CR/REF violated provisions contained within its general permit in violation of Mont. Code Ann. § 75-5-605(1)(b).

PROPOSED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, DEQ has failed to meet their burden of proof to establish the violations alleged in their notice letters of September 23, 2013, and the AOs dated March 27, 2015.

Therefore, IT IS ORDERED that Board has "determine[d] that a violation has not occurred" and therefore "declare[s] the department's notice void," pursuant to Mont. Code. Ann. § 75-5-611(6)(e). Judgment is entered in favor of CR/REF and this action is DISMISSED with prejudice.

DATED this 8th day of July, 2019.

/s/Sarah Clerget
Sarah Clerget
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue

P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

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DATED: 7/8/19

/s/ Aleisha Solem
Paralegal

9/9/13 DEQ conducts Inspection of the Copper Ridge Subdivisions. FOF 8

9/23/13 DEQ sends notice of violation letters to the Copper Ridge Subdivisions. FOF 10

9/27/13 Copper Ridge Subdivisions send letter to DEQ asking for subdivisions to be separated based on ownership information. FOF 12

10/8/13 DEQ responds to the Copper Ridge Subdivisions that collectively they are part of a greater common plan of development and therefore one letter addressing the violations at both subdivisions was adequate. FOF 14

10/29/13 Copper Ridge responds to DEQ contending they are separate entities and wish to have violations separated. FOF 12

11/8/13 DEQ issues two separate violation letters, one to Copper Ridge the other to Reflections at Copper Ridge. FOF 15

12/23/13 DEQ receives Copper Ridge Subdivisions' NOI package. FOF 17

1/8/14 DEQ sends confirmation letters to Copper Ridge and Reflections at Copper Ridge issuing permits. FOF 18

3/7/14 DEQ inspector Dan Freeland sends inspection and enforcement employees email regarding BMPs in place on some lots within Copper Ridge. FOF 19

10/21/14 Dan Freeland inspects the Copper Ridge Subdivisions. FOF 20

12/9/14 DEQ sends the Copper Ridge Subdivisions notice of violation letters. FOF 21

12/17/14 The Copper Ridge Subdivisions seek an extension of time in which to respond to DEQ's violation letter. FOF 23

12/23/14 DEQ grants the extension. FOF 23

1/8/15 The Copper Ridge Subdivisions provide written responses to DEQ regarding corrective action and update their SWPPP. FOF 24

2/6/15 DEQ sends Copper Ridge an acknowledgment letter indicating they received 1/8/15 response. DEQ indicates further compliance is needed and outlines 3 areas of concern. FOF 28

2/9/15 DEQ sends Reflections at Copper Ridge an acknowledgment letter indicating they received 1/8/15 response. DEQ indicates further compliance is needed and outlines 2 areas of concern. FOF 29

3/27/15 DEQ issues an Administrative Compliance and Penalty order to both Copper Ridge and Reflections at Copper Ridge. FOF. 31

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	BER 2015-01-WQ
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105377) (FID 2289, DOCKET NO. WQ-15-08]	BER 2015-02-WQ

DEQ'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Montana Department of Environmental Quality ("DEQ"), by and through undersigned counsel, files its exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order ("Proposed Order"), filed July 8, 2019, in the above-captioned matter.

I. Exceptions to Procedural History

The Administrative Rules of Montana cited in DEQ's Administrative Penalty and Compliance Order (Administrative Order) supporting Violation 3, placing waste where it will cause pollution, is miscited on page 4 of the proposed Findings of Fact and Conclusions of Law (FOFCOL). See Exhibits 9 and 10, DEQ cites ARM 17.30.624(2)(f) standards for B-2 classified waters. The Procedural History should be corrected to cite the applicable administrative rule.

On page 7 of the proposed FOFCOL, Hearing Examiner Clerget mischaracterizes the Motion to Vacate the hearing and for additional discovery, which was a joint motion filed by CR/REF and DEQ. See Doc. Seq. No. 99. Additionally, that joint motion to vacate was not contingent on Hearing Examiner Clerget's denial of CR and REF's Motions in Limine, but was made jointly by the parties because as of the date of the motion, the Hearing Examiner had not made a ruling on CR/REF motions in limine. Additionally, CR/REF was reviewing DEQ storm water construction general permit files and requested additional time to

complete the review and disclose any additional evidence prior to the hearing. Doc. Seq. No. 99, pages 2 – 3. The Procedural History should be corrected to correctly characterize the Parties' Joint Motion to Vacate the Hearing.

II. Exceptions to Findings of Fact

The Montana Supreme Court has defined "substantial evidence" as "evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Barrett v. Asarco, Inc.*, 245 Mont. 196, 200, 799 P.2d 1078, 1080 (1990) (citations omitted). For the reasons cited below, the record demonstrates that the following findings of fact contained within the Proposed Order are not based upon substantial evidence and should be modified as explained below.

Findings of Fact No. 14 and No. 15

These findings of fact incorrectly state the "[l]ots about which DEQ provided ownership information, from September to December 2013, were all located in the northern part of the CR/REF subdivision . . . and "DEQ did not provide ownership information (or visual representations of ownership) regarding the southern portions of the CR/REF subdivisions, such as property located along

Golden Acres Drive, or any properties located in the first filing of Reflections, or the first or second filing of Copper Ridge. In fact, DEQ provided copies of warranty deeds showing that REF owned lot 7B in the first filing of the Reflections subdivision until November 12, 2013. See Exhibit 39, page 1; Exhibit 34, and Exhibit 47, page 3. DEQ also provided copies of warranty deeds showing CR owned lots 8, 9, and 10 in the second filing of the Copper Ridge subdivision until February 2014. See Exhibit 42, pages 1 – 6, Exhibit 33, and Exhibit 47, page 1. Additionally, Finding of Fact No. 14(c) concludes DEQ provided ownership information, from September to December 2013, for three lots in Amelia Circle in the second filing of Copper Ridge contradicting the Hearing Examiner's finding that DEQ provided no ownership information for lots in the second filing of Copper Ridge.

Findings of Fact No. 16(b) and 60

These findings erroneously indicate that the Google Earth image that is DEQ Exhibit 26 was "possibly" acquired October 25, 2013. The image indicated on the bottom right that is was acquired October 25, 2013. Exhibit 26, page 1; 6/13/2019 Transcript page 124, Line 25. No contrary evidence of the acquisition date of Exhibit 26 was provided.

Finding of Fact No. 17

This finding misstates the testimony of Landy Leep at the 6/13/2019 hearing. Mr. Leep unequivocally agreed that Exhibit 33 accurately depicts lots owned by CR between 9/23/2013 and 12/23/2013. Transcript 6/13/2019 page 217, Lines 18 – 23. This included Lots 8, 9, and 10 in the second filing of Copper Ridge and was not limited to the third and fourth filings of Copper Ridge. Mr. Leep also testified that Exhibit 34 accurately depicts lots owned by REF between 9/23/2013 and 12/23/2013. Transcript 6/13/2019 page 222, Lines 12 – 17. This included Lot 7B in the first filing of Reflections at Copper Ridge and was not limited to the second and third filings of Reflections at Copper Ridge.

Finding of Fact No. 18

This finding of fact, states the substance of Landy Leep's testimony, which relies on a definition of "construction activity" that is inconsistent with administrative rules adopted by this Board to implement the Montana Water Quality Act. See ARM 17.30.1102.

Findings of Fact No. 19, 20, and 21

These findings of fact are relevant to construction activities that are associated with road construction and utility installation and are not relevant to construction activities on individual lots within the subdivisions. See Exhibit A, Permit No. MTR 102807 for City subdivision street construction and water and

sanitary sewer within Copper Ridge subdivision, the permitted area of disturbance is 5.3 acres and does not extend to the total 17.7-acre site; Exhibit B, Permit No. MTR 104590 for City subdivision street, water and sanitary sewer construction and related excavation work within Copper Ridge and Reflections at Copper Ridge subdivisions, the permitted area of disturbance is 5.3 acres and does not extend to the total 21.8- acre site; and Exhibit C, Permit No. MTR 104993 for highway, street, and utility construction within Reflections at Copper Ridge subdivision, third filing, the permitted area of disturbance is 3.5 acres and does not extend to the total 8.27- acre site.

Findings of Fact No. 22, 24, and 28

These findings of fact incorrectly consolidate the construction activity associated with roads and utilities that was permitted under MTR 104993 with the construction activity later conducted by REF on residential lots within the Reflections at Copper Ridge subdivision under MTR 105376. See Exhibit C, Permit No. MTR 104993, the permitted area of disturbance is 3.5 acres within the third filing of the Reflections at Copper Ridge subdivision and does not extend to the total 8.27- acre site or the first and second filings of the Reflections at Copper Ridge subdivision; See Exhibit 5, Permit No. MTR 105376, for construction of single-family homes and necessary landscaping within Reflections at Copper

Ridge subdivision, first, second, and third filings, the permitted area of disturbance is 14.9 acres. Hearing Examiner Clerget appears to base these erroneous findings on Exhibit BBB, which is a map showing the location of BMPs installed pursuant to MTR 104993 to mitigate impacts from construction of roads and utilities in the third filing of Reflections at Copper Ridge subdivision. See Transcript 6/13/2019 page 69, Line 3 – page 70, line 3. Also, Dan Freeland testified that he did visit the northern portion of the subdivisions. See Exhibit 15 (Field inspection notes) and Exhibit 2 (violation letter with report of September 9, 2013 compliance inspection), Transcript 6/13/2019 page 28, Lines 6 – 16, page 42, Lines 20 – 25, and page 88, Lines 13 - 17.

Finding of Fact No. 25

The BMPs for MTR 104993 did not "extend the entire width of the subdivision on the downgradient side." Again, this erroneous finding appears to be based on Exhibit BBB, a map showing the location of BMPs installed pursuant to MTR 104993 to mitigate impacts from construction of roads and utilities in the third filing of Reflections at Copper Ridge subdivision. The BMPs described in the Storm Water Pollution Prevention Plan (SWPPP) are associated with road and utility construction in the third filing of Reflections at Copper Ridge and not the "entire subdivision." See Transcript 6/13/2019 page 69, Line 3 – page 70, line 3;

See Exhibit C, pages 15 - 27, describing BMPs to mitigate storm water discharges associated with road and utility construction in the third filing of Reflections at Copper Ridge.

Finding of Fact No. 29

This finding of fact incorrectly consolidates the construction activity permitted under MTR 102807, associated with roads and utilities within the Copper Ridge subdivision with the construction activity later permitted by CR and REF on lots within the subdivisions under MTR 105377. See Exhibit A, Permit No. MTR 102807, the permitted area of disturbance is 5.3 acres and does not extend to the total 17.7-acre site; See Exhibit 3, Permit No. MTR 105377, the permitted area of disturbance is 11.9 acres and covers construction activity associated with construction of single-family homes and necessary landscaping to complete the third and fourth filing of Copper Ridge, a material stockpile area in the 6th filing, and lots within the first filing that had not achieved final stabilization. Exhibit 3, page 4.

Finding of Fact No. 34, 35, 37, 38, and 39

These findings of fact, restate the substance of testimony at the hearing, which relied on a definition of "construction activity" that is inconsistent with

administrative rules adopted by this Board to implement the Montana Water Quality Act.

> "Storm water discharge associated with construction activity" means a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more. (a) Regardless of the acreage of disturbance resulting from a construction activity, this definition includes any other discharges from construction activity designated by the department pursuant to ARM 17.30.1105(1)(f). (b) For construction activities that result in disturbance of less than five acres of total land area, the acreage of disturbance does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. For construction activities that result in disturbance of five acres or more of total land area, this definition includes those requirements and clarifications stated in (29)(a), (b), (d) and (e). See ARM 17.30.1102(28).

Construction activity for purposes of Montana Water Quality Act storm water permit requirements include ground disturbing activities that create a conduit for pollutants to enter state waters and are not limited to active earth moving or construction. *See* Molokai Chamber of Commerce v. Kuikui (Molokai), Inc.; 891 F.Supp 1389, 1400 - 1401 (once a conduit for pollutants is created, no further act is necessary to violate the [Clean water] act . . . If permit coverage is required for that conduit and is not obtained, the

conduit is a continual violation of the act. Notably, neither the Act nor the regulations promulgated under it contain an intent requirement for such violations. (citing United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979)).

Finding of Fact 40

This finding of fact restates the substance of Landy Leep's testimony without providing any reason why this testimony is more credible than testimony from DEQ's inspector, Dan Freeland, including Inspector Freeland's photographs and field notes made contemporaneous to his inspection of the subdivisions on September 9, 2013, which documented stockpiles on at least one lot (Lot 15) owned by CR and REF.

Specifically referring to Lot 15, which is depicted on Photograph 13, attached to Exhibit 2, Dan Freeland testified that the area had disturbed ground with no vegetative cover. In addition, he testified that Lot 15 contained a stockpile of material near the curb line and that vehicles had tracked sediment from the lot to the adjacent roadway. See Transcript 6/13/2019 pages 26, 38, 244. He further testified that he went to the northern part of the subdivision where he observed lots that had been graded and cleared of all vegetation. These lots were in addition to lots where houses were under construction. See Transcript 6/13/2019 page 29.

Finding of Fact No. 44

This finding of fact misstates the evidence. It is undisputed that Exhibit 33 accurately depicts lots owned by CR between 9/23/2013 and 12/23/2013. Transcript 6/13/2019 page 217, Lines 18 – 23. This included Lots 8, 9, and 10 in the second filing of Copper Ridge and the northern portion of that subdivision. It is also undisputed that Exhibit 34 accurately depicts lots owned by REF between 9/23/2013 and 12/23/2013. Transcript 6/13/2019 page 222, Lines 12 – 17. This included lots in the northern portion of that subdivision.

Findings of Fact 46 and 47

This finding of fact relies on an erroneous definition of "construction activity," which need not be "active." See ARM 17.30.1102. Dan Freeland did provide detailed descriptions of construction activity that is consistent with the Board's rules implementing the Montana Water Quality Act.

Finding of Fact 54

This finding of fact ignores the fact that CR owned lots 8, 9, and 10, which are located on Amelia Circle.

Finding of Fact 56

This finding of fact ignores the fact that Inspector Freeland testified as to construction activity he observed on Amelia Circle. Transcript 6/13/2019 page 27, Line 19 – page 29, Line 11; Page 58, Line 25 – page 59, Line 1.

Findings of Fact 63 through 65

In these findings, the Hearing Examiner erroneously discounts the evidence provided by the aerial photos by failing to contrast the disturbed lots within the subdivisions with undisturbed areas adjacent to the subdivisions to the west and east, and by failing to compare the cleared areas in the northern portion of the Reflections subdivision with the more developed southern portion of that subdivision. Likewise, the northern part of Copper Ridge must be compared with the southern, more developed part of that subdivision. See Exhibit 23, page 2. Further, DEQ presented the testimony of Susan Bawden. Bawden testified to her extensive work experience in reading aerial satellite images, and extensive education in Geographic Information Systems (GIS). Transcript 6/13/2019 pages 99 – 101. In relation to Exhibit 23, an aerial map of the subdivisions obtained by the USDA Farm Service Agency, Ms. Bawden testified that she could tell the difference between disturbed and undisturbed land by looking at the aerial map. Transcript 6/13/2019 page 112, Lines 10 – 15. Likewise, regarding Exhibit 26, a Google Earth image, acquired October 25, 2013, Bawden testified she differentiate

lots that were disturbed and lots that had been sodded. She specifically looked at the Reflections at Copper Ridge subdivision and pointed to two parcels in the northern part that had been sodded. In contrast, she testified that the area around them had not been sodded. She further characterized this area as having been cleared and then let go so that weeds had infested the area. Exhibit 26; Transcript 6/13/2019, page 131– page 132. Additionally, Exhibit 26 shows the difference between disturbed lots and undeveloped agricultural land to the south and east of the subdivisions. It should be noted that at the time CR and REF acquired the property that would become the subdivisions, the area consisted of short pasture grassland with a vegetative density cover of 90%. Transcript 6/13/2019, page 216 - 217. Without any explanation, the Hearing Examiner places more weight on the self-serving testimony of Landy Leep that the aerial photos lack detail and were inaccurate. When pressed on cross examination, Mr. Leep could provide no basis for his statement that Exhibit 23 was not an accurate depiction of the subdivisions. Transcript 6/13/2019 page 213, Line 25 – page 214, Line 20.

Finding of Fact 66

The finding is erroneous because ground disturbed by road and utility contractors should have been confined to the area permitted for road and utility construction. See Exhibits A, B, and C. Any area disturbed outside of the areas

permitted was disturbed by CR, REF, or their contractors without a permit and in violation of the Montana Water Quality Act and rules adopted under that Act.

Finding of Fact 73

This finding is erroneous because DEQ did not ascribe a street address to lot 15, depicted in Dan Freeland's Photograph 13, attached to Exhibit 2. The cited testimony does not support this finding. In fact, Dan Freeland states he used GPS to locate where he took each photo. Transcript 6/13/2019 page 40, Lines 1 – 5; Page 55, Line 25.

Finding of Fact 83

This finding is erroneous because it is unsupported by substantial evidence in the record. Dan Freeland was clear about the existence and location of the stockpile on Lot 15. Transcript 6/13/2019 page 40, Lines 1 – 5; Page 55, Line 25. Under the Montana Water Quality Act, it doesn't matter when the waste was placed, or by whom. The photo shows disturbed ground, which is a conduit for storm water, and the stockpile is a source of pollutants. Molokai Chamber of Commerce; 891 F.Supp at 1400 - 1401

Findings of Fact 86 and 87

These finding are erroneous because MTR 104590 only covered construction activity related to roads and did not cover construction activity on

individual lots. Exhibit B, Permit No. MTR 104590 was issued for City subdivision street, water and sanitary sewer construction and related excavation work within Copper Ridge and Reflections at Copper Ridge subdivisions, the permitted area of disturbance is 5.3 acres and does not extend to the total 21.8- acre site.

Finding of Fact 115.

This Finding is incorrect because CR and REF did not indicate they submitted the NOIs under protest until after the Administrative Orders issued in March 2015. MTR 105376 and 105377 were issued to REF and CR in December 2013. Nowhere, within the four corners of the permit, does CR or REF indicate they obtained permit coverage "under protest." See Exhibits 3 and 5.

Finding of Fact 128

This finding is incorrect because it is not necessary for DEQ to enter evidence that CR and REF are owners or operators for the purpose of establishing Violation 4 at each subdivision because in submitting NOIs to obtain permit coverage, CR and REF held themselves out as owners/operators.

Finding of Fact 130

This finding is incorrect because The Hearing Examiner fails to apply the correct definition of "construction activity." Disturbed ground and stockpiles are construction activity.

III. Exceptions to Discussion

1. In the Hearing Examiner's written scheduling order, she stated "[b]ased on the remand order from the BER, in the BER's reversal on the burden of proof, the undersigned will permit the parties to supplement the current evidentiary record with respect to the owner operator issue only." Pursuant to this direction, DEQ produced four photographs during supplemental discovery that it had not previously produced. Each of the four photographs depicted construction activity on lots owned by CR and REF at the time of the violations. The Hearing Examiner erred by excluding relevant evidence and by constraining DEQ's ability to present the evidence requested by the Board. The Hearing Examiner stated that equity and estoppel prevented DEQ from introducing the photographs into evidence. The Hearing Examiner, however, failed to provide any reasoning or legal support for her ruling. DEQ argued that CR and REF should be charged with constructive knowledge of the condition of its lots at the time of the violations.

Transcript of Pretrial Conference, May 23, 2019, page 58, lines 18 – 24. See Doc. Seq. 101, Order Resetting Hearing at page 4.

Furthermore, even if the motion in limine ruling was correct, CR and REF opened the door for introduction of the photographs in its cross examination of Dan Freeland. While DEQ avoided the subject in its direct examination of Dan Freeland.

2. The Hearing Examiner only considered "active" construction, but this is inconsistent with the definition of construction activity in the rule. See ARM 17.30.1102(28) and Findings of Fact 82 and 83.
3. The Hearing Examiner's findings that CR and REF conducted construction activity on lots they owned under the roadbuilding permits is not supported by any testimony or evidence in the record.
4. The Hearing Examiner's findings that the lots may have had vegetative cover upon stabilization that either died or was washed away is not supported by any evidence in the record.
5. The Hearing Examiner's analogy likening lots disturbed by past construction activity to a farm field is not apt and fails to acknowledge the exemption from permitting requirements for non-point source discharges from agricultural or forest activities. ARM 17.30.1310(d).

IV. Exceptions to Conclusions of Law

A. The Proposed Order Incorrectly Finds DEQ Failed to Prove That CR and REF were owners or operators within the meaning of 75-5-103(26), MCA.

DEQ presented evidence that CR and REF owned lots within the subdivisions at the time of the violations and that the lots were disturbed by construction activity.

CR and REF held themselves out as owners or operators of construction activities at the subdivisions when they obtained NOIs for coverage under the General Permit.

CONCLUSION

The Board should set aside the legal conclusions in the current proposed FOFCOL that DEQ failed to prove by a preponderance of evidence that CR and REF were owners or operators of construction activity and reinstate the remaining portions of the Orders on Summary Judgment and the previous proposed FOFCOL that were not reversed and remanded by the Board on February 8, 2019, including the establishment of Violations 2, 3, and 4 and assessment of an appropriate penalty.

DATED this 22nd day of July, 2019,

/s/ Kirsten H. Bowers
KIRSTEN H. BOWERS
Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of July, 2019, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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/s/ Kirsten H Bowers

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Attorneys for Reflections at Copper Ridge LLC and Copper Ridge Development Corp.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	)	Case No. BER 2015-01-WQ
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105377) (FID 2289, DOCKET NO. WQ-15-08]	)	Case No. BER 2015-02-WQ

AFFIDAVIT OF VICTORIA A. MARQUIS
PURSUANT TO MONT. CODE ANN. § 2-4-611(4)

STATE OF MONTANA)
: ss.
County of Yellowstone)

I, Victoria A. Marquis, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 years.

2. I represent Copper Ridge Development Corporation ("Copper Ridge") and Reflections at Copper Ridge, LLC ("Reflections") in this appeal of the Department of Environmental Quality's ("DEQ's") enforcement action against them. The matter is currently pending before the Board of Environmental Review ("BER").

3. On July 8, 2019, Hearing Examiner Clerget issued Proposed Findings of Fact and Conclusions of Law to the BER on the Issue of Owner/Operator. Pursuant to the Hearing Examiner's Order Setting Post Hearing Schedule, the BER will hear oral argument on the matter during its August 9, 2019 meeting.

4. Hearing Examiner Clerget's Order Setting Post Hearing Schedule instructed the parties that, in accordance with Mont. Code Ann. § 2-4-611(4):

> If any party believes that any current member of the BER should be disqualified from participating in the decision on this case because of 'personal bias, lack of independence, disqualification by law, or other disqualification,' that party will file 'in good faith… a timely and sufficient affidavit' explaining the reasons why disqualification is appropriate. Mont. Code Ann. § 2-4-611(4). Such an affidavit must be filed 'not less than 10 days before' the BER Meeting, i.e. **by July 30, 2019**. *Id.* **Failure to file such an affidavit will be deemed a waiver of the parties' right to argue that a BER member is unqualified to render a decision on the Proposed Order.**

Order Setting Post Hearing Schedule (June 17, 2019), p. 4 (emphasis in the original).

5. BER Member John DeArment has voluntarily recused himself from previous BER discussions and decisions on this matter. Mr. DeArment worked as the Division Administrator for DEQ's Permitting and Compliance Division during the relevant time period for this enforcement action. Because the enforcement action at issue here was initiated and

pursued by the Permitting and Compliance Division during Mr. DeArment's tenure as that Division's Administrator, Mr. DeArment's continued recusal and disqualification from deciding this matter would be appropriate.

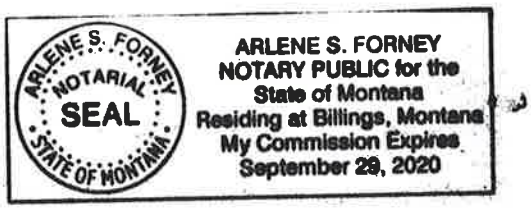
FURTHER AFFIANT SAYETH NOT.

Executed this 17th day of July, 2019.

Victoria A. Marquis

STATE OF MONTANA)
: ss.
County of Yellowstone)

SUBSCRIBED AND SWORN to before me on July 17, 2019, by Victoria A. Marquis.



Notary Signature
[Affix seal/stamp as close to signature as possible]

CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following person by e-mail and United States mail, postage prepaid as noted below.

Lindsay Ford Secretary, Board of Environmental Review Department of Environmental Quality 1520 E. 6th Avenue PO Box 200901 Helena, MT 59620-0901 Lindsay.Ford@mt.gov	[ ] U. S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
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DATED this 18th day of July, 2019.

/s/ Victoria A. Marquis

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Below are the underlying documents pertaining to the hearing examiner Clerget's Original Proposed Findings of Fact Conclusions of Law, the parties exceptions to that Order, the parties' supplemental briefing on the owner operator issue and hearing examiner Haladay's Order on Summary Judgment.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	**CASE NO. BER 2015-01 WQ**
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE, DEVELOPMENT CORPORTATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105377) [FID 2289, DOCKET NO. WQ-15-08]	**CASE NO. BER 2015-02 WQ**

HEARING EXAMINER'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW TO THE BER

On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC (CR/REF) filed a Notice of Appeal and Request for Hearing based on the Administrative Compliance and Penalty Orders (AOs) issued by Department of Environmental Quality (DEQ). A three-day hearing was held February 26-28, 2018. This matter is fully briefed and ready for disposition.

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INTRODUCTION

This case has been frustrating for many reasons. First, the factual record provided by both parties—even after summary judgment briefing and a three-day hearing—often left the undersigned struggling to answer questions vital to the case. Second, neither party came to this proceeding with clean enough hands to justify either awarding or avoiding a penalty. DEQ's performance—including its inspections, record-keeping, notices, communication, enforcement decisions, follow up, and the evidence, testimony, and explanations provided at the hearing—were difficult to understand and in some instances inadequate. CR/REF, however, were not much better, often seeming to at least passively use DEQ's inaction as an excuse to shirk their responsibility and care for the environment, without proactively ensuring they had the requisite coverage (or clearance) from DEQ for their operations. For these reasons, the undersigned has struggled to find any satisfactory resolution to this case that might deter such conduct in the future by both sides.

FINDINGS OF FACT

1. Copper Ridge, and Reflections at Copper Ridge, are two subdivisions located in the City of Billings, Yellowstone County, Montana (collectively, Copper Ridge Subdivisions or CR/REF). Joint Stipulated Facts (JSF) ¶ 1.

2. The City of Billings is the owner and operator of a municipal separate storm sewer system (MS4). The City is authorized to discharge storm water to state waters under the Montana Pollutant Discharge Elimination System ("MPDES") General Permit for Storm Water Discharge Associated with Small Municipal Separate Storm Sewer Systems (General Permit No. MTR040000). The City MS4 conveys storm water to state surface water through publicly owned storm water conveyance and drainage systems. The City MS4 ultimately discharges storm water to the Yellowstone River, a state water. JSF ¶ 2.

3. The Department of Environmental Quality (DEQ or Department) issues the MPDES General Permit for Storm Water Discharges Associated with Construction Activity (General Permit No. MTR100000). Unless administratively extended, General Permit No. MTR 100000 is issued for five-year periods. Relevant to this matter, General Permit No. MTR100000 was effective January 1, 2013, through December 31, 2017. JSF ¶ 3.

4. On March 26, 2013, the City contacted DEQ to request assistance in addressing noncompliance with storm water requirements at Copper Ridge. DEQ informed the City that construction activities at Copper Ridge were not covered by General Permit No. MTR100000. JSF ¶ 4.

5. The construction activities permitted under previous MPDES permit authorizations at CR/REF included construction of water, sanitary sewer, and

storm drainage utilities, and street and sidewalk improvements and the Storm Water Pollution Prevention Plans (SWPPP) associated with these permits did not included controls for construction activity on residential lots. Ex. A at 3; Ex. B at 3; Ex. C at 4; Hearing Transcript (Tr.) Vol. II (February 27, 2018), 62:4, 102:8 – 21; DEQ Proposed Findings of Fact (DEQ) ¶ 12; CR/REF Response to DEQ's Finding of Fact (CR Resp.) ¶ 1.

6. DEQ terminated the previous permit for construction activity in the Copper Ridge Subdivisions (MTR104590) in December 2012 without first notifying Copper Ridge. JSF ¶ 5.

7. Ground disturbance at the Copper Ridge Subdivisions each involve greater than one acre including all areas that are part of a "larger common plan of development or sale," as that phrase is used in General Permit No. MTR100000 and in ARM 17.30.1102(28). JSF ¶ 8.

8. On September 7, 2013, there was a significant storm event in and around Billings, MT. Ex. 14.

9. The following day, the Billings Gazette published a story about the effects of the storm that included some discussion of the conditions in the Copper Ridge Subdivisions during and after the storm. Ex. 14; Tr. Vol. I (February 26, 2018) 50:25-53:03.

10. Based on the Gazette's report, DEQ compliance inspector Dan Freeland decided to visit CR/REF and conduct an inspection. Tr. Vol. I 50:25-53:03.

11. Two days after the storm event Freeland conducted an inspection of the Copper Ridge Subdivisions. JSF ¶ 6.

12. During the September 9, 2013 inspection, DEQ observed and documented sediment tacking on the streets and concrete waste washed on to the ground. Tr. Vol. I, 54:21-56:4, 73:10-19, 74:1-6, 74:14-20, 74:24-75:8, 173:16-20; Ex. 15; CR/REF Proposed Findings of Fact (CR) ¶ 16; DEQ ¶ 16.

13. DEQ also observed and documented (with photographs provided a the hearing) stockpiled waste soil and areas of ground disturbance uncontrolled by Best Management Practices (BMPs) to mitigate contact with storm water; evidence that sediment and construction debris had been washed with storm water from the subdivisions toward Cove Ditch; evidence that concrete waste had been washed on to the ground with no containment; sediment in the storm drains, in the streets and on the sidewalks as a result of uncontrolled storm water discharges. Ex. 2 at DEQ 000039 – 000040, DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Tr. Vol. I, 71:2 – 77:18; DEQ ¶ 19; CR Resp. ¶ 1.

14. On September 23, 2013, DEQ sent CR, through Gary Oakland, a letter. JSF ¶ 7; Ex. 2.

15. The letter stated, "The Montana Department of Environmental Quality (DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action." Tr. Vol. I, 65:24–66:8; Ex. 2 at DEQ 000038 – DEQ 000040; DEQ ¶ 18; CR Resp ¶ 1.

16. In a September 27, 2013 letter, CR/REF provided clarification to DEQ regarding ownership information and sought to distinguish the violations based on the separate subdivisions, CR and REF. Ex. 12; Tr. Vol. I, 79:21-80:15, 83:8-83:16; CR ¶ 2; DEQ ¶¶ 20, 22.

17. In an October 8, 2013 letter responding to CR/REF's September 27, 2013 correspondence, Mr. Freeland explained that, based on his September 9, 2013 inspection, DEQ determined that the Copper Ridge Subdivisions were part of a greater common plan of development and one violation letter was adequate to address the violations at both subdivisions. Tr. Vol. I, 80:19-81:24; Ex. O; DEQ ¶ 21; CR Resp. ¶ 1.

18. CR/REF responded with letter on October 29, 2013 regarding ownership and again sought to distinguish the violations based on the separate subdivisions. Ex. 15; CR ¶ 2; DEQ ¶¶ 20, 22.

19. On November 8, 2013, DEQ issued another letter, which stated that violations at the CR were distinguishable from violations at REF. JSF ¶ 9

20. Within a timeframe acceptable to DEQ, Copper Ridge and Reflections at Copper Ridge each took the corrective action identified in the September 23, 2013 and November 8, 2013 letters from DEQ. JSF ¶ 10

21. On December 23, 2013, DEQ received Notice of Intent and SWPPPs from CR/REF (collectively, NOI package). DEQ Exs. 3-6; JSF ¶ 8; Tr. Vol. II, 59:9-21, 60:11-18.

22. On January 8, 2014, DEQ sent confirmation letters to REF issuing Permit No. MTR105376 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at REF, and to CR issuing Permit No. MTR105377 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at CR. JSF ¶ 11.

23. Permit No. MTR105376 and Permit No. MTR105377 were effective from the date DEQ received the NOI Package on December 23, 2013. Ex. 3; Ex. 4; Tr. Vol. I 95:23-96:10.

24. On March 7, 2014, Inspector Freeland sent an email to inspection and enforcement employees of DEQ stating, "I did not get to a lot of the new construction at [CR]. But I did document and photograph a few lots under construction and in one case there was a berm around the site and sand bags. There was also a house under construction which had straw bales on the perimeter. Appears to be an effort to control runoff from the individual lots I observed." Ex. V.

25. On October 21, 2014, DEQ conducted a scheduled inspection of CR/REF. JSF ¶ 12; Tr. Vol. I, 100:11-100:20; Ex. 7 at DEQ 000113; Tr. Vol. I, 105:24-106:3; Ex. 8 at DEQ 000125.

26. On December 9, 2014, DEQ sent CR/REF letters that notified CR/REF of the alleged MPDES Permit violations observed and documented by DEQ Inspectors during the October 21, 2014 inspection and requested corrective action to address the violations. JSF ¶¶ 13, 14; Ex. 7; Ex. 8.

27. In December 2014, Copper Ridge and Reflections at Copper Ridge requested an extension from DEQ in order to respond to DEQ's December 9, 2014 letter of violation and inspection report; DEQ granted the extension by letter dated December 23, 2014. Ex. X.

28. On January 8, 2015, the Copper Ridge Subdivisions submitted a letter with corrective action and updates to their SWPPP to DEQ. Ex. Y.

29. Within a timeframe acceptable to DEQ, CR/REF each took the corrective action identified in the December 9, 2014 letters from DEQ and submitted an updated SWPPP to DEQ. JSF ¶15.

30. DEQ acknowledged the responses by CR/REF to the violations at the subdivisions noted during the October 21, 2014 inspection and identified in the December 9, 2014 letters. Tr. Vol. I, 112:7-120:8; Ex. 18; Ex.19; DEQ ¶ 30; CR Resp. ¶ 1.

31. CR/REF did not propose "corrective action plans" to address violations of the Montana Water Quality Act. Tr. Vol. III (February 28, 2018), 119:11; DEQ ¶ 31, CR Resp. ¶ 1.

32. On February 6, 2015, DEQ sent CR an acknowledgment letter indicating receipt of CR's response letter of January 8, 2015. DEQ indicated that there was further compliance assistance needed and outlined three specific areas for improvement. Ex. 18; Tr. Vol. I, 65:24 – 66; Ex. 2 at DEQ 000038 – DEQ 000040.

33. On February 9, 2015, DEQ sent REF an acknowledgment letter indicating receipt of REF's response letter dated January 8, 2015. DEQ indicated that there was further compliance assistance needed, mainly paperwork errors to be corrected. Ex. 19.

34. DEQ seeks penalties for the violations noted in the December 9, 2014 letter. Ex. 9; Ex. 10; CR ¶ 11; DEQ ¶ 32.

35. DEQ issued AOs on March 27, 2015, identifying the following alleged violations of the Montana Water Quality Act at CR/REF:

(1) Violation of Administrative Rules of Montana (ARM) 17.30.1105 by conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions;

(2) Violation of § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit;

(3) Violation of § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM 1 7.30.629(2)(f) by placing waste where it will cause pollution; and

(4) Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000.

JSF ¶ 16; AO.

36. Each of the AOs assesses a penalty and has a penalty calculation worksheet attached. Tr. Vol. I, 215:19 – 216:5; Ex. 9 at DEQ 000154 – 000155, DEQ 000157; Ex. 10 at DEQ 000184 – 000185, DEQ 000187; DEQ ¶ 34; CR Resp. ¶ 1.

37. At the hearing, DEQ agreed that the number of days of violation for Violation 2 could be adjusted down to 19 days based on the precipitation events noted in the most current National Oceanic and Atmospheric Administration

(NOAA) weather service data. Ex. 20; Tr. Vol. III, 8:8-21, 17:6-10, 33:21-35:2; CR ¶ 32; DEQ ¶ 55.

38. The NOAA data shows eight days between September 23, 2013 and December 23, 2013 when there were precipitation events greater than 0.25 inches. Ex. 20.

DISCUSSION

A. Summary Judgment Findings (including Owner/Operator)

The prior hearing examiner made a number of findings based on the briefing and evidence presented at summary judgment. For brevity's sake, those findings and conclusions, with the underlying reasoning, are not reproduced in their entirety here; instead, the *Order on Summary Judgment* (Aug. 1, 2017) is attached to this decision and incorporated herein by reference. The main legal conclusions were as follows:

i. CR/REF were "owners or operators" for the purpose of obtaining permit coverage for the discharge of storm water at their respective developments. (Section II.)

ii. (Violation 1) DEQ did not provide adequate notice regarding a violation of ARM 17.30.1105 – and therefore no violation of that ARM can be shown and DEQ cannot seek administrative penalties based on such a violation. (Section I(D).)

iii. (Violation 2) DEQ has established that CR/REF Discharged storm water to state waters without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c). (Section III.)

iv. (Violation 4) DEQ has established that CR/REF violated provisions contained within its general permit in violation of Mont. Code Ann. § 75-5-605(1)(b). (Section V.)

Or. S.J. Despite a motion to reconsider, the undersigned did not disturb the previous hearing examiner's rulings. *Order on Motions in Limine*, at 6-8 (Feb. 22, 2018).

Based on those prior orders, the remaining issues to be decided by the undersigned at the hearing were:

i. The burden and standard of proof.

ii. (Violation 2) The appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules.

iii. (Violation 3) An issue of fact regarding whether CR/REF placed any wastes where they will cause pollution of any state waters in violation of Mont. Code Ann. § 75-5-605(1)(a). If such a violation occurred, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules. (*See Or. S.J.*, Section IV.)

iv. (Violation 4) The appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules.

Or. S.J., at 11-14.

The findings and conclusions contained herein necessarily depend upon the findings and conclusions of the prior hearing examiner set out in that order.

B. Burden and Standard of Proof

At the hearing, there was some disagreement among the parties and the undersigned about the burden and standard of proof applicable to this proceeding and the parties were accordingly requested to brief the issue as part of their post-hearing filings. The parties have agreed that the applicable standard of proof is the preponderance standard. DEQ ¶ 68; CR ¶ 7 The parties disagree, however, about who has the burden of proof, each pointing to the other. For the reasons set forth below, the undersigned concludes that CR/REF have the burden of proof.

CR and REF have brought (through the Notice of Appeal (NOA)) this "appeal" of DEQ's AO, "pursuant to Mont. Code Ann. § 75-5-611(4)." NOA at 1. CR and REF are therefore, by their own admission, analogous to an appellant and DEQ the appellee. Using as a guide the burden analysis set forth in *MEIC v. DEQ*, 2005 MT 96,[1] in this case CR/REF are in the same position as MEIC was in. Here, "[t]he claim [CR/REF] assert[s] before the Board [is] that the Department's decision … violated Montana law." *Id.* at ¶16. Therefore, CR/REF, like MEIC,

[1] BER's statutory authority varies widely between different subject matter areas. The *MEIC* decision concerned an air quality permitting case brought pursuant to Mont. Code Ann. § 75-2-211, and the holding of that case is not directly precedential to, for example, a Water Quality Act enforcement action brought pursuant to Mont. Code Ann. § 75-5-611(4). In other words, the *MEIC* decision does not mean that DEQ will never bear the burden of proof in a case before the BER. The position of the parties and BER must be determined from the specific statutory authority at issue in each case.

are "the party asserting the claim at issue[,]" and have "challenged the Department's decision … by requesting a contested case hearing before the Board." *Id.* at ¶15. DEQ is the same position here as it was in *MEIC* of responding to the challenge; so too, is BER in the same position of deciding the merits of the challenge. *Id.* at ¶¶ 6-8, 10-16.

In the present case, Mont. Code Ann. § 75-5-611(4) states that if DEQ "does not require an alleged violator to appear before [BER] for a public hearing, the alleged violator may request the board to conduct the hearing … within a reasonable time" after a timely request. The statute requires that, after the hearing, BER "shall make findings and conclusions that explain its decision" (*id.*, at (6)(a)), and "explain how it determined the amount of the administrative penalty," if any (*id.*, at (6)(d)). The statute also requires that "[i]f the board determines that a violation has not occurred, it shall declare the department's notice void." *Id.*, at (6)(e).

DEQ's AO stated that "this Order becomes effective upon signature of the Department." AO at ¶108. Therefore, the AO in this case is effective from its issuance unless CR/REF provides BER with a reason to "declare [it] void." Although the statute is silent on the burden and standard of proof, its plain meaning indicates that the BER is reviewing an action taken by DEQ (similar to an appellee) and challenged by CR/REF (similar to an appellant). Most importantly

to the *MEIC* analysis, absent CR/REF's appeal or challenge, and were CR/REF to present no evidence at the hearing, BER would have no reason to "declare the department's notice void" and DEQ's AO would remain final.

BER's authority and the position of the parties in this instance is therefore sufficiently similar to reach the same conclusion as in the *MEIC* case: "[i]f no challenge had been made" to DEQ's AO (*i.e.*, by CR/REF's NOA) or if "no evidence were presented at the contested case hearing establishing that [DEQ's action] violated the law, the Board would have no basis on which to determine the Department's decision was legally invalid." *MEIC*, at ¶16. CR/REF is "the party asserting a claim for relief" before BER and, pursuant to Mont. Code Ann. §§ 26-1-401 and -402, "bears the burden of producing evidence in support of that claim." *Id.* at ¶14. Based on the reasoning set out in *MEIC*, therefore, "as the party asserting the claim at issue, [CR/REF] ha[s] the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." *Id.* at ¶16.

CR/REF argue that this case is distinguishable from *MEIC* because of language contained in subsection (3) of Mont. Code Ann. § 75-5-611, which states:

> In a notice and order given under subsection (1), the department may require the alleged violator to appear before the board for a public hearing and to answer the charges. The hearing must be held no sooner than 15 days after service of the notice and order, except that the board may set an earlier date for hearing if it is requested to do so by the

> alleged violator. The board may set a later date for hearing at the request of the alleged violator if the alleged violator shows good cause for delay.

CR/REF argue that "'[T]he hearing' provided in subsection 4 refers to the same hearing in subsection 3 – the hearing where the alleged violator will answer the charges" and "[a]n alleged violator appearing before this Board to 'answer the charges' cannot bear the burden of proof because he will not know what to answer until the Department presents the charges." CR ¶¶ 1-2.

This argument is legally and factually unpersuasive for a number of reasons. First, by its own admission (in the NOA), CR/REF have requested this hearing pursuant to subsection (4) and not subsection (3) of the statute. Second, by its plain language subsection (3) contemplates a separate hearing from that described in subsection (4), and a hearing that is different in kind—namely an extremely expedited one. CR/REF did not request such a hearing in their NOA, and instead specifically requested a hearing "within a reasonable time after completion of discovery and resolution of any pre-hearing motion" (NOA at 1), this is not the hearing (or type of expedited hearing) contemplated by subsection (3).[2] Finally,

[2] It also appears that subsection (3) is referring a notice letter "given under subsection (1)" rather than to an AO (issued under subsection (2)) and there is no dispute that in this case the department issued an AO pursuant to subsection (2). As there was no argument on this point, however, and subsection (3) also refers to a "notice and order," perhaps contemplating subsection (1) and (2), the undersigned has not based the conclusion on this point.

even if "the hearing" referred to in subsection (4) were the same as a hearing conducted pursuant to subsection (3), nothing in the statute's requirement that CR/REF "answer the charges" changes the position of the parties or the analysis of the burden based on the *MEIC* case, as set forth above.

Contrary to CR/REF's assertion, the AO contains "the charges" presented by the department and to which CR/REF must respond. The parties agree that the AO in this case was issued and was in effect on the date it was signed. Therefore, CR/REF received notice of "the charges" with the AO and, absent any "answer" on CR/REF's part at the hearing, those "charges" would remain in effect. The statutory requirement (were it applicable) that CR/REF "answer the charges" therefore does not shift the burden to DEQ for the purpose of this hearing and CR/REF's argument to the contrary is unconvincing.

For all these reasons, CR/REF bear the burden of establishing by a preponderance of the evidence that "a violation has not occurred" and that BER must "declare the department's notice void" (Mont. Code Ann. § 75-5-611(6)(e)) or "the facts essential to a determination that the Department's decision violated the law" (*MEIC* at ¶16).

C. Notice

CR/REF have argued that DEQ cannot assess administrative penalties on any of the alleged violations because DEQ did not provide CR/REF adequate

notice before issuing the AOs, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-617 and ARM 17.30.2003 (repealed 2016). These laws (each and together) require DEQ to issue notice letters that meet certain requirements prior to issuing AOs, unless the violations alleged by the AO meet certain thresholds of seriousness.[3] Mont. Code Ann. §§ 75-5-611(2), -617(2); ARM 17.30.2003(7). If the AO's contain sufficiently serious allegations, however, then DEQ may proceed directly to an AO without sending a notice letter. Mont. Code Ann. §§ 75-5-611(1)(e), -617(2); ARM 17.30.2003(7).

The prior hearing examiner found that "[i]t is undisputed DEQ did not provide a written notice letter to Reflections or Copper Ridge prior to issuing the Administrative Order and Notice of Violation." *Or. S.J.*, at 8:10-12. For this reason, Violation 1 was dismissed, but Violations 2, 3, and 4 were allowed to remain because the three remaining allegations are serious enough to allow DEQ to proceed directly to an AO, pursuant to Mont. Code Ann. § 75-5-611(2)(a)(ii). *Id.*

In prehearing briefing and at the hearing, CR/REF made a slightly nuanced argument along these same lines, based on ARM 17.30.2003(5) (repealed 2016). ARM 17.30.2003(5) (repealed 2016) states that

[3] *E.g.*, violations of Mont. Code Ann. § 75-5-605, violations that present "imminent threat to human health, safety, or welfare or to the environment" or violations of "Class I" or "major extent and gravity".

> the department may not assess a penalty for a violation cited in the notice letter if the violator submits to the department in writing within the time specified in the notice letter: (a) a response signed by the violator certifying that its activity was, or is now, in compliance with all requirements cited in the notice letter; or [a corrective action plan].

CR/REF argued that because they (by DEQ's own admission, JSF ¶¶ 10, 15) adequately responded to all of DEQ's letters, within the timeframe allowed by DEQ, that subsection (5) prevented the assessment of any of the penalties contained in the AO. The record was not clear whether this argument was squarely before the previous hearing examiner and so the undersigned allowed limited argument and evidence on it at the hearing. *See Or. MIL*, at [cite].

It is true that CR/REF responded to all of DEQ's letters within DEQ's specified timeframe, and that by DEQ's own admission the responses were adequate. JSF, ¶¶ 10, 15. Specifically, CR/REF ultimately responded to DEQ's December 9, 2014 (and September 23, 2013, and November 8, 2013), letters on January 8, 2015 (Ex. Y) and then DEQ responded to CR/REF on February 6 and 8, 2015 (Ex. 18 and 19) and issued the AO on March 27, 2015. Tr. Vol I, 214:16-19; 215:6-11. However, it has already been determined that none of these correspondences from DEQ constituted "notice letters" because none of them contained all the requisite parts pursuant to Mont. Code Ann. § 75-5-611(1)(a)-(e). *Or. S.J.*, at 8:10-12. Because none of DEQ's correspondence constituted a notice letter, it follows as a matter of law that none of CR/REF's responses can constitute

the "response [to] … the notice letter" contemplated by ARM 17.30.2003(5). CR/REF's arguments regarding ARM 17.30.2003(5) are therefore unavailing. The only applicable section of ARM 17.30.2003 is subsection (7), which allows DEQ to proceed directly to an AO on violations, like the three remaining here, which meet the threshold level of seriousness.[4]

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[4] This conclusion does not ease all of the discomfort regarding DEQ's correspondence and ARM 17.30.2003. DEQ's argument is that any correspondence beyond an AO on cases that meet the seriousness thresholds are, essentially, a bonus or courtesy unrequired by law. While perhaps technically true, the undersigned is sympathetic to CR/REF's position that DEQ's correspondence created substantial, justifiable confusion.

Although these correspondence failed to meet the technical requirements of a "notice letter" (which seems inadvertent on DEQ's part, given that it originally charged Violation 1); any recipient could have construed the letters as intended to be "notice letters" within the meaning of subsection (2). There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence, as contemplated by subsection (5). CR/REF's frustration is understandable—it responded to and complied with all of DEQ's demands in the correspondence, only to receive an AO three months later. Had DEQ been more precise in its correspondence (as it should have been), subsection (5) would have acted to prevent any penalty absent some additional evidence from DEQ. It does not seem fair that DEQ should, in effect, be rewarded for its own failures to write (what it intended to be) a "notice letter."

That said, CR/REF have also benefited (by a dismissal of Violation 1) from the conclusion that none of the correspondence constituted a "notice letter." CR/REF go beyond arguing in the alternative when trying to assert both that *none* of DEQ's correspondence constituted a "notice letter" (and thus the dismissal of Violation 1 was justified) and that CR/REF adequately responded to *all* the "notice letters" (attempting to justify, now, dismissal of the remaining violations). Either DEQ's correspondence constituted "notice letters" within the meaning of Mont. Code Ann. § 75-5-611(1)(a)-(e), or it did not.

As it has already been decided that the correspondence did not so-constitute (and the benefit of that conclusion already conferred), the undersigned must be satisfied. And as the ARM has now been repealed, a contrary conclusion would have little or no deterrent effect on DEQ's future correspondence pursuant to that ARM.

D. Method for Calculating Penalties

Each of the Administrative Orders assesses a penalty and has a penalty calculation worksheet attached tracking the Administrative Rules on penalties. ARMs 17.4.301-308; *see also* Tr. Vol. I, 215:19 – 216:5; Ex. 9, DEQ 000154 - 000155; DEQ 000157; Ex. 10, DEQ 000184 – 000185, DEQ 000187. The method used to calculate any penalty for a violation is identical, pursuant to the steps set out in ARM 17.4.303.

Several of those steps, however, are in applicable to this situation. First, a base penalty may be decreased by up to 10% based on the "amounts voluntarily expended" (AVE). ARM 17.4.304(4). But here there was no evidence of amounts CR/REF expended beyond what was required to come into compliance and therefore this factor is not relevant here. *See also* Tr. Vol. I, 219:7 – 219:12.

Second, the total penalty may be adjusted if the violator has been issued an Order for violations of the Water Quality Act within the past three years or if the violator enjoyed an economic benefit through noncompliance. ARM 17.4.306; ARM 17.4.307. However, DEQ has not alleged any prior history for CR/REF and did not assess any economic benefit for violations 2-4, so neither of these penalty factors should be considered. Ex. 9, 157-166; Ex. 10, 187-196.

E. Violation Two

The previous hearing examiner concluded CR/REF were owner/operators requiring permit coverage. In other words, all discharges of storm water that occurred before CR/REF had permit coverage (prior to December 23, 2013) were necessarily in violation of Mont. Code Ann. § 75-5-605(2)(c).

Discharges of storm water are determined to occur whenever there is a storm event that results in of 0.25 inches or greater precipitation ("precipitation events"). Tr. Vol. II, 32:15-25, 33:1-12. Therefore, every day on which there was a precipitation event *and* on which CR/REF did not have a permit, CR/REF discharged storm water without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c). Tr. Vol III 104:10-16; 108:7-16 DEQ is only allowed, however, to "look back" for two years from the date of the AO (March 27, 2015) when counting the number of days that storm water was discharged. Tr. Vol. I, 225:14-25.

DEQ originally counted the number of days when there was a precipitation event between March 27, 2013 and December 23, 2013, to reach a total number of 21 days of storm water discharges without a permit. Tr. Vol. I, 225:14-226:3. However, DEQ apparently counted days based on precipitation data posted on the NOAA website, which was not as accurate as the certified NOAA data that they produced on the third day of the hearing. Tr. Vol. III, 33:10-36:20. When faced

with this data DEQ adjusted downward the number of days to a total of 19 days, instead of 21. Tr. Vol. III, 33:21-35:2.

However, CR/REF continues to dispute knowing they were (or could be determined to be by this proceeding) owner/operators required to have permit coverage. From the debate on this issue during summary judgment, it is clear that CR/REF at least had a non-frivolous, good faith legal basis to believe that they were not owner/operators requiring permit coverage. Based on the circumstances here, it is not fair n this instance to charge CR/REF with violations for discharges without a permit before DEQ told them affirmatively that they needed to have permit coverage. DEQ told CR/REF on September 23, 2013, that they needed permit coverage;[5] but, it then took until December 23, 2013, for CR/REF to comply. CR/REF can therefore only reasonably be penalized for the discharges of storm water (precipitation events) that occurred between September 23, 2013 and December 23, 2013. According to the certified NOAA data, there were eight precipitation events between those dates. Ex. 20. This calculation eliminates 11 days with precipitation events which occurred before DEQ's September 23, 2013 letter.

[5] As discussed *supra*, while this correspondence may not have been a "notice letter" within the meaning of the applicable laws and rules, it certainly informed CR/REF that DEQ believed permit coverage was required.

The nature of Violation 3 must be classified "as one that harms or has the potential to harm human health or the environment…." ARM 17.4.303(1), (5); ARM 17.4.302(6); Mont. Code Ann. § 75-5-605(2)(c). Violation 2 must be found to have a "major gravity" because it harmed or has the "potential for harm to human health or the environment…" and because "construction or operation without a required permit or approval" is a given example of a major gravity pursuant to ARM 17.4.303(5)(a).

There was no evidence presented at the hearing on the "volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit," which are the other factors to consider when determining the extent of a violation for the purpose of calculating a penalty. ARM 75.4.303(4). Therefore, the only remaining consideration for the extent of the violation is the "duration of the violation." *Id.* DEQ alleged that 19 days constituted a "major deviation from the applicable requirements" necessitating a major extent finding. This argument is strained. However, eight days of discharge between the time DEQ told CR/REF that they needed permit coverage and the time they obtained it is closer to a "minor deviation from the applicable requirements." *Id.* Adjusting the days of violation therefore also causes a downward adjustment of the extent finding to a "minor extent", which changes the base penalty from $8,500 per day, per entity, to $5,500 per day, per entity.

DEQ also premises their 30% upward adjustment for "circumstances" on the fact that, "As a large and experienced developer, [CR/REF] was aware that storm water discharges without a permit are prohibited by law" and therefore they should have known to get permit coverage. Ex. 9; Ex. 10; Tr. Vol. I, 222:18-223:6; Vol. III, 96:22-97:3. As noted above, there is at least a (continuing) debate between the parties about whether or not CR/REF was an owner/operator requiring permit coverage and those arguments are not frivolous. CR/REF got permit coverage (under protest) once DEQ told them it was needed. Ex. 3; Ex. 4. These circumstances do not warrant a 30% increase in the base penalty for CR/REF. They also, however, do not warrant a 10% decrease in the base penalty for good faith and cooperation, because if CR/REF had been proactive as contemplated by ARM 75.4.304(3), they could have sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage and done more to get the permit faster after learning DEQ felt it was needed.

For all these reasons, a base penalty, with no adjustments, of $5,500 per day is an appropriate penalty. The per day penalty multiplied by eight days of violation (for eight precipitation events between September 23, 2013 and December 23, 2013), comes to a total penalty of $44,000 per entity, or a total of $88,000 for both CR and REF for Violation 2.

F. Violation Three

The prior hearing examiner concluded "[t]here is sufficient evidence that Reflections and Copper Ridge placed or caused to be placed wastes" within the meaning of Mont. Code Ann. §§ 75-5-605(1)(a) and 75-5-103(24) (defining "other wastes"). *Or. S.J.*, at 17:4-5. This was based on the evidence presented by DEQ's inspector, Dan Freeland, regarding his observations at an unscheduled inspection of CR/REF on September 9, 2013. *Id.* at 17:5-10. However, at summary judgment DEQ failed to show that the waste CR/REF placed would cause "pollution" as defined by Mont. Code Ann. § 75-5-103(30), thus, leaving the issue for resolution at the hearing.

At the hearing, DEQ convincingly argued that because of the definition of pollution, any *unpermitted* discharge to state waters of storm water that includes "other wastes" (as defined by Mont. Code Ann. § 75-5-103(24)) constitutes pollution. Tr. Vol I 29:16-30:22, Vol. III, 110:1-113:09. Specifically, "'Pollution' means: (i) contamination or other alteration of the physical, chemical, or biological properties of state waters *that exceeds that permitted* by Montana water quality standards." Mont. Code Ann. § 75-5-103(30). When an entity has no permit to discharge storm water, all storm water discharges to a state water that contain waste are necessarily "exceeding that permitted." DEQ contends that permits themselves, and the BMPs they require, are what regulate the amount of waste that

is discharged in storm water. Tr. Vol. I, 29:16-30:22; Vol. III, 110:1-113:9. The assumption is that, if the BMPs are in place and working as they should, then the amount of waste (if any) that ends up in state waters through storm water discharges is permitted (*i.e.*, is of an amount that DEQ has determined is not going to harm human health or the environment or alter any applicable water quality standards). For this reason, numeric standards for the amount of waste are essentially irrelevant—either an entity is controlling waste through its permit and BMPs, or it is not. However, not all unpermitted storm water discharges are necessarily a violation of Mont. Code Ann. § 75-5-605(1)(a), because there must be the additional fact proven of an entity "plac[ing] or caus[ing] to be placed any wastes where they will" combine with storm water to cause unpermitted discharges and therefore "pollution."[6] Mont. Code Ann.
§ 75-5-103(30).

As stated above and in the *Order on Summary Judgment*, it has been established that CR/REF placed waste where it could cause pollution and that there were eight days of precipitation that could have caused storm water discharges between the time CR/REF had notice of the need for permit coverage and when it

[6] If this were not the case, having an unpermitted storm water discharge would simultaneously violate two sections of Mont. Code Ann. § 75-5-605 and would result in superfluous or redundant charge stacking, and would offer a work-around any statutory caps on maximum damages. *See* Mont. Code Ann. § 75-5-611(9)(d).

was obtained. Or. SJ at 17:4-5; Ex. 20. DEQ also offered additional evidence at the hearing (namely the observations and documentation of Inspector Freedland from September 9, 2013) that discharges of storm water from CR/REF containing waste flowed from CR/REF into Cove Ditch, a tributary to the Yellowstone River, and a state water. Ex. 16; Tr. Vol. I, 143:16-21; Vol. III, 97:16-20. CR/REF did not meet their burden to show that "no violation occurred," *i.e.*, that no waste was placed by CR/REF and no (or fewer) discharges of storm water occurred than alleged by DEQ. DEQ's assumption therefore stands. After CR/REF was found to be placing waste (on September 9, 2013) and before they had permit coverage[7] (on December 23, 2013), all of the storm water discharges were unpermitted and therefore placed waste into state waters in an amount "*that exceeds that permitted*[,]" Per Mont. Code Ann. § 75-5-103(30). Or. SJ at 17:4-5; Ex. 20; Ex. 16; Tr. Vol. I 29:16-30:22

As previously determined, there were eight days where precipitation occurred that might cause storm water discharges between September 23, 2013,

[7] As discussed further below, it is unclear from the record (with the exception of one day on which DEQ actually inspected) whether BMPs were in place after CR/REF had permit coverage. As this essentially constructive definition of "pollution" depends only on *unpermitted* discharges (rather than discharges made in violation of a permit) any time period after CR/REF were permitted would require additional, affirmative evidence of the amounts of waste that exceeded those contemplated by the permits.

and December 23, 2013. Therefore, CR/REF is found to have placed waste where it would cause pollution via unpermitted storm water discharges for eight days.

Similar to the previous violation, the nature of Violation 3 is classified "as one that harms or has the potential to harm human health or the environment…." ARM 17.4.303(1), (5); ARM 17.4.302(6); Mont. Code Ann. § 75-5-605(2)(c). Violation 3 must also be found to have a "major gravity" because the "release of a regulated substance that causes harm or poses a serious potential to harm human health or the environment" and "exceedance of a maximum containment level or water quality standard" are given examples of a major gravity pursuant to ARM 17.4.303(5)(a).

As in the prior violation, the only evidence presented at the hearing regarding the extent of Violation 3 concerned the "duration of the violation." ARM 75.4.303(4). DEQ alleged that 730 days of violation (representing every day in the maximum two-year statute of limitation) constituted a "major deviation from the applicable requirements" necessitating a major extent finding. However, an adjustment to eight days of violation constitutes a "minor deviation from the applicable requirements." *Id.* This adjustment of the days of violation also adjusts downward the extent finding to a "minor extent". Per the matrix, this makes the base penalty 0.55, or $5,500 per entity, per violation. As with the prior violation, no adjustments to the base or total penalty are appropriate for these circumstances,

good faith, AVE, or economic benefit. ARMs 75.4.304, 306, 307. The total penalty is therefore $44,000 per entity, or a total of $88,000 for both CR and REF for Violation 3.

G. Violation Four

The prior hearing examiner concluded based on observations by DEQ during the October 21, 2014 inspection (and the documentation memorializing it) that CR/REF violated the terms and conditions of their general permit in four ways: (1) the SWPPP administrator failed to conduct site inspection every seven days (Permit Section 2.3); (2) the SWPPP had not been or updated appropriately (Permit Sections 3.1.1 and 3.1.3); (3) the SWPPP administrator had failed to maintain records at the site (Permit Section 2.5); and (4) BMPs were not implemented to control and mitigate discharges of sediment and other pollutants (Permit Sections 2.1.1 and 2.1.4). *Or. S.J.*, 19-20. These findings were consistent with evidence presented at the hearing. JSF ¶ 12; Tr. Vol. I, 100:11-100:20; Ex. 7 at DEQ 000113; Tr. Vol. I. 105:24-106:3; Ex. 8 at DEQ 000125.

CR/REF correctly characterized all but the fourth violation of the permit as paperwork violations. Tr. Vol. III 43:6-53:12. While these violations are certainly important (particularly, for example, regular inspections),[8] they probably do not

[8] Hopefully it is not lost on CR/REF that (as discussed further below) had they done and documented regular inspections as required by the permit, and had those inspections

meet the threshold of seriousness contemplated by ARM 17.30.2003(7) (repealed 2016). As discussed above and in the *Order on Summary Judgment*, Violation 4 has only survived to this stage is because it (at least at the time) met the threshold level of seriousness to overcome DEQ's failure to provide a "notice letter." *See supra*, Secton C. It is therefore appropriate to focus on the fourth violation involving BMPs for the purpose of assessing a penalty, as this was the only violation that had the potential to harm human health and the environment. *See* Mont. Code Ann. § 75-5-605(1)(b); ARM 17.30.2003(7) (repealed 2016).

DEQ presented adequate evidence at the hearing to establish that when DEQ performed its scheduled inspection on October 21, 2014, CR/REF did not have BMPs in place and thus was not in compliance with the permit. Tr. Vol. I, 100:11-102:21 The specific BMPs were those intended to control storm water discharges: "Filtrexx Sediment Control, earthen berms, stabilized construction entrance, and preserving existing vegetation." Ex. 7 at DEQ000119; Tr. Vol. I, 125:5-13.

Based on that October inspection DEQ charged CR/REF with a violation for every day between the time CR/REF received permit coverage (December 23, 2013) and the date of the inspection (October 21, 2014), which resulted in 303

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showed that BMPs were appropriately in place, supplying those inspection records at the hearing (or at summary judgment) would have easily met their burden to show that "a violation has not occurred." Mont. Code Ann. § 75-5-611(6)(e).

days of violation. Ex. 9; Ex. 10; Tr. Vol. I, 229:12-23. Even when pointedly asked by the undersigned, however, DEQ could point to *no evidence* in the record that BMPs were *not* in place for the ten months between December 2013 and October 2014. Tr. Vol III 112:6-23. DEQ argued instead that because BMPs were not in place in October, it was appropriate to *assume* that they were never put in place. This assumption, however, was contradicted by DEQ's own inspector, Dan Freeland, who stated in an email to other DEQ employees on March 7, 2014, that while driving through CR/REF there were at least some of BMPs (straw bales and a berm) in place and that there "[a]ppear[ed] to be an effort to control runoff from the individual lots I observed." Ex. V.

For its part, CR/REF also provided no evidence that all of the BMPs required by the permit (including the four discussed by DEQ) *were* in place for those ten months. CR/REF had Marshall Phil, their SWPPP administrator on the stand at the hearing, and there was some testimony that there were more SWPP inspections than were documented. Tr. Vol. III, 50:15-51:14. However, CR/REF never provided for that period any inspection reports, photographs, testimony, or any other evidence that affirmatively demonstrated that the BMPs DEQ alleged were not in place were in fact in use. Marshall Phil, the SWPPP administrator for CR/REF, during his testimony could only state that a "good majority" of BMPs were onsite and installed correctly, without providing any further detail. Tr. Vol.

III 53:13-15. CR/REF alluded to (and DEQ even admitted that) perhaps a storm event could have wiped out BMPs just prior to the October inspection (Tr. Vol. III, 111:25-112:5); and provided vague evidence that sometimes children removed stakes from the Filtrexx controls to have sword fights. Tr. Vol III., 52:18-53:6 This evidence is insufficient to meet CR/REF's burden to show that "a violation has not occurred" (Mont. Code Ann. § 75-5-611(6)(e)) or that DEQ's penalty assessment of 303 days "violated the law" (*MEIC* at ¶16).

CR/REF did provide evidence, however (consistent with their position that they are not owner/operators) that they did not own (at least some of) the lots on which DEQ noted a lack of BMPs. Ex. Y. In their January 8, 2015 letter[9] CR/REF stated that its SWPPP administrator, Marshall Phil for Blue Line Engineering, "makes certain statements" in the attached corrective actions to the effect of,

> concerning BMPs to be repaired or installed on subdivision lots not owned by [CR/REF]. We will communicate your observations to these other property owners. Again, we do not own these lots and have no right to enter these properties.

Ex. Y at 1. The attached corrective actions from Mr. Phil then confusingly state both that BMPs are being put in place currently—*e.g.*, "[t]he site is currently in and the process of implementing the Filtrexx Sediment Control BMP…" (Ex. Y at 5)—

[9] CR/REF's January 8, 2015 letter responded to DEQ's December 9, 2014 letter notifying them of violations, which were based (in part) on DEQ's October 2014 inspection. JSF ¶¶ 12-15.

and that "[i]nstallation of additional BMPs and modification of existing BMPs … have yet to be performed. Weather has not permitted any installation or modification to BMPs. All BMP installation and modification will commence in the spring" (*id.*, at 2).

From the above quoted letter and the testimony at the hearing, it is entirely unclear to the undersigned whether or not BMPs were in place as of January 2015, were going to be put in place in the spring of 2015, or ever could be put in place based on CR/REF's ownership access.

DEQ, however, apparently believed that CR/REF's January 2015 communication was satisfactory regarding BMPs (and everything else) because it stipulated prior to hearing that "[w]ithin a timeframe acceptable to the Department, the Copper Ridge Subdivisions each took the corrective action identified in the December 9, 2014 Notices of Violation...." JSF ¶15. In seeming conflict with this stipulation, however, DEQ responded to CR/REF's letter in February 2015[10] by stating

> [i]n your response, you state the installation and modification of [BMPs] has not been completed and will not be completed until spring 2015. This delay is unacceptable, [BMPs] must be installed and maintained immediately to control the discharge of pollutants per Parts 2.1, 2.3.5, and 3.7 of the Permit.[11]

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[10] To CR on February 6 and to REF on February 9, 2015. Ex 18; Ex. 19.

[11] This response is only contained in DEQ's response to CR, not the response to REF. *Compare* Ex. 18 *with* Ex. 19.

Ex. 18 at 1-2. There was no further communication between the parties until DEQ issued the March 27, 2015 AO. In other words, CR/REF never responded (in almost two months) to DEQ's statement that BMPs must be put in place immediately; CR/REF gave no further argument about the weather or ownership preventing them from doing so. DEQ also apparently was not concerned enough (based on CR/REF's January communication or any of their other conduct) to do another site inspection after October of 2014 to check whether any BMPs were actually in place.

Yet, curiously, DEQ only charged CR/REF with penalty days of violations for the 303 days between December 2013 and October 2014, and not for any time after October 21, 2014. Ex. 9 at 9 (DEQ 000165); Ex. 10 at 9 (DEQ000195). It therefore appears DEQ believed (or was comfortable assuming) that after the October 2014 inspection, CR/REF had BMPs in place, despite CR/REF's communication in January of 2015 indicating BMPs were *not* in place and may never be in place in some areas. Ex. Y. The undersigned is thus unclear whether DEQ either understood or was really concerned about the status of the BMPs at CR/REF after the October 21, 2014 inspection.

For all these reasons, the undersigned has struggled to determine the number of penalty days to be assessed for CR/REF's failure to implement the provisions of

the permit.[12] Ultimately, the only thing that is clear from the evidence (or lack thereof) presented at the hearing is that on at least October 21, 2014, when DEQ put "eyes on" CR/REF, four BMPs required by the permit (which CR/REF had agreed to abide by) were not in place. The only penalty day that should clearly be assessed for a violation of the permit is therefore October 21, 2014.

Similar to the previous violations, there was no evidence presented at the hearing on the "volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit," which are the other factors to consider when determining the extent of a violation for the purpose of calculating a penalty. ARM 75.4.303(4). Therefore, the only remaining consideration for the extent of the violation is the duration. *Id.* DEQ alleged that ten months (between December 2013 and October 2014) constituted a "major deviation from the applicable requirements" necessitating a major extent finding. However, an adjustment to only one day of violating the permit constitutes a "minor deviation from the applicable requirements." *Id.* This adjustment of the days of violation, therefore also adjusts downward the extent finding to a "minor extent". A "failure to construct or operate in accordance with a permit or

[12] Whatever the penalty calculation, a final resolution of the owner/operator question by the Board seems the thing most likely to confer a meaningful penalty (or lack thereof) and future deterrent for both DEQ and CR/REF for these myriad failures.

approval" is by definition a "moderate gravity" finding. ARM 17.4.303(5)(b).[13] Per the matrix, this makes the base penalty 0.40, or $4,000 per entity, per violation. As with the prior violations, no adjustments to the base or total penalty are appropriate for circumstances, good faith, AVE, or economic benefit. ARMs 75.4.304, 306, 307. This makes the final penalty $4,000 per entity or $8,000 total for both CR/REF.

CONCLUSIONS OF LAW

1. BER has jurisdiction to hear this matter pursuant to its authority under Mont. Code Ann. § 75-5-611(4)-(9), and the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6 (MAPA).

2. DEQ is authorized under Mont. Code Ann. § 75-5-211 to administer the provisions of the Montana Water Quality Act, Title 75, Chapter 5, Mont. Code Ann. ("WQA"). The permit program administered by DEQ is implemented through rules adopted by the BER. Mont. Code Ann. §§ 75-5-401 and 75-5-402.

3. DEQ's AO, issued March 27, 2015, meets the requirements of Mont. Code Ann. § 75-5-611(1)-(2).

4. Pursuant to the reasoning stated in the *Order on Summary Judgment* at Section II (Aug. 1, 2017), CR/REF were "owners or operators" for the purpose

[13] DEQ's citation on their penalty calculation forms (Exs. 9 and 10) incorrectly cites ARM 17.4.304(5)(b)(ii) instead of ARM 17.4.303(5)(b)(ii).

of obtaining permit coverage for the discharge of storm water at their respective developments.

5. DEQ provided legally sufficient notice of violations under the Montana Water Quality Act, Mont. Code Ann. §§ 75-5-611(2)(a)(ii), and 75-5-617, and under ARM 17.30.2003 (repealed 2016).

6. At the hearing, CR and REF had the burden of proving, by a preponderance of the evidence, that "a violation has not occurred" and the BER must "declare the department's notice void" (Mont. Code Ann. § 75-5-611(6)(e)) or that "the facts essential to a determination that the Department's decision violated the law" (*MEIC* at ¶16).

Findings Relating to All Penalties

7. The total penalty may be adjusted if the violator has been issued an Order for violations of the Water Quality Act within the past three years, however DEQ has not alleged any prior history for CR/REF so this factor is not relevant. ARM 17.4.306; *see also* Tr. Vol. I, 218:4 – 218:11; Ex. 9, DEQ 000166; Ex. 10, DEQ 000196.

8. The total penalty may be increased if the violator enjoyed an economic benefit through noncompliance, however DEQ has not assessed any economic benefit for violations 2-4, and therefore this factor is not relevant. ARM 17.4.307; *see also* Tr. Vol. I, 218:12 – 218:20; Ex. 9; Ex. 10.

9. DEQ treated CR and REF as separate violators under Mont. Code Ann. § 75-5-611 and initiated two separate enforcement actions in the above-captioned matters after considering evidence that each company is a separate legal entity, and each conducted separate development activities. Additionally, CR and REF obtained separate permit authorizations and submitted separate SWPPPs covering development activities at their respective subdivisions. Based on the evidence presented at the hearing and summary judgment, CR and REF are separate legal entities and therefore subject to separate penalties. [cites]

10. Based on Mont. Code Ann. § 75-5-611(9)(a) the penalty for each violator is limited to "not more than $10,000 for each day of each violation" and "the maximum penalty may not exceed $100,000 for any related series of violations." As separate cases and entities (though considered together at the hearing and herein) therefore, CR/REF together may not be subject to more than $20,000 per day or $200,000 total in penalties. *Id.*

Violation One

11. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section I(D), DEQ did not provide adequate notice regarding its first alleged violation against CR/REF—a violation of ARM 17.30.1105—and therefore no violation of that ARM can be shown and DEQ cannot seek administrative penalties based on such a violation.

Violation Two

12. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section III, DEQ has established that CR/REF discharged storm water to state waters without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c).

13. Based on the evidence presented at the hearing, and as set forth above, the requisite penalty calculation (set forth below), and pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and ARMs 17.4.301-308, the appropriate assessment of penalties for Violation 2 is $44,000 per entity, or $88,000 total for CR/REF.

14. The nature of this violation is classified as harming or having "the potential to harm human health or the environment…." ARMs 17.4.302(6), 17.4.303(1).

15. The gravity of the violation is major because it harmed or has the "potential for harm to human health or the environment…" and because "construction or operation without a required permit or approval" is a specific example of a major gravity pursuant to ARM 17.4.303(5)(a).

16. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely "the duration of the violation." ARM 17.4.303(4). As the duration of the violation is eight days, "it constitutes a minor deviation from the applicable requirements." *Id.*, at (4)(c).

17. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.55 or $5,500, per violation.

18. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

19. The number of days of the violation is eight because that is the number of days between when CR/REF had notice that DEQ required permit coverage (September 23, 2013) and before they got permit coverage (December 23, 2013), and on which there was a precipitation event of 0.25 inches or greater as shown by the NOAA data. This number of days is also reasonable because the multiplication of days for the continuing violation "results in a penalty that is higher than … necessary to provide an adequate deterrent" and the Board "may reduce the number of days of violation." ARM 17.4.305(2). It is also reasonably adjusted "as justice may require." ARM 17.4.308.

Violation Three

20. Based on the evidence presented at the hearing, and as set forth above, CR/REF placed wastes where they will cause pollution of any state waters in violation of Mont. Code Ann. § 75-5-605(1)(a).

21. Based on the evidence presented at the hearing, and as set forth above, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611,

75-5-1001, and ARMs 17.4.301-308, is $44,000 per entity, or $88,000 total for CR/REF.

22. The nature of this violation is classified as harming or having "the potential to harm human health or the environment…." ARMs 17.4.302(6), 17.4.303(1).

23. The gravity of this violation is major because the "release of a regulated substance that causes harm or poses a serious potential to harm human health or the environment" and "exceedance of a maximum containment level or water quality standard" are specified examples of a major gravity pursuant to ARM 17.4.303(5)(a).

24. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely "the duration of the violation." ARM 17.4.303(4). As the duration of the violation is eight days, "it constitutes a minor deviation from the applicable requirements." *Id.* at (4)(c).

25. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.55 or $5,500, per violation.

26. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

27. The number of days of the violation is eight because that is the number of days between when CR/REF had notice that DEQ required permit

coverage (September 23, 2013) and before they got permit coverage (December 23, 2013), and on which there was a precipitation event of 0.25 inches or greater as shown by the NOAA data. This number of days is also reasonable because the multiplication of days for the continuing violation "results in a penalty that is higher than … necessary to provide an adequate deterrent" and the Board "may reduce the number of days of violation." ARM 17.4.305(2). It is also reasonably adjusted "as justice may require." ARM 17.4.308.

Violation Four

28. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section V, DEQ has established that CR/REF violated provisions contained within its general permit in violation of Mont. Code Ann. § 75-5-605(1)(b).

29. Based on the evidence presented at the hearing, and as set forth above, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and ARMs 17.4.301-308, is $4,000 per entity, or $8,000 total for CR and REF.

30. The nature of this violation is classified as harming or having "the potential to harm human health or the environment…." ARMs 17.4.302(6), 17.4.303(1).

31. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely "the duration of the violation…." ARM 17.4.303(4). As the duration of the violation is one day, "it constitutes a minor deviation from the applicable requirements." ARM 17.4.303(4)(c).

32. The gravity of the violation is moderate because it includes a "failure to construct or operate in accordance with a permit or approval." ARM 17.4.303(5)(b).

33. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.4 or $4,000, per entity, per violation.

34. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

35. The number of days of the violation is one because that is the number of days on which there is any evidence that four BMPs were not in place in violation of the requirements of the permit. This number of days is also reasonable because the multiplication of days for the continuing violation "results in a penalty that is higher than … necessary to provide an adequate deterrent" and the Board "may reduce the number of days of violation." ARM 17.4.305(2). It is also reasonably adjusted "as justice may require." ARM 17.4.308.

Total Penalties

36. The combined total of penalties for Violations 2, 3, and 4 is $92,000 per entity, or $184,000 total for CR and REF.

DATED this 16th day of July, 2018.

/s/Sarah Clerget
Sarah Clerget
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Post-Hearing Submissions to be mailed to:

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DATED: 7/16/18

/s/ Aleisha Solem
Paralegal

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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

CASE NO. BER 2015-02 WQ

ORDER ON SUMMARY JUDGMENT

The Parties have filed cross motions for summary judgment and have had the opportunity for oral argument. Both Motions for Summary Judgment are granted in part and denied in part. A hearing is still necessitated in this matter, and a Scheduling Order is issued in conjunction with this Order, setting forth the process going forward.

FACTS

1. On September 9, 2013, DEQ conducted a compliance evaluation inspection at the Reflections at Copper Ridge (Reflections) and Copper Ridge Subdivisions.

2. DEQ documented areas with construction activity that it believed were not authorized under General Permit MTR 100000. DEQ observed clearing, grading, excavation, soil stockpiles, concrete washout areas, and sediment tracking on streets. DEQ documented that the subdivisions did not have Best Management Practices (BMPs) in place to control or mitigate the discharge of pollutants associated with storm water runoff from construction at the subdivisions.

3. On September 23, 2013, DEQ sent a Violation Letter to Gary Oakland of the Copper Ridge Development Corporation.

4. The letter stated "The Montana Department of Environmental Quality

(DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action."

5. The letter documented conditions observed at Copper Ridge and Reflections, on September 9, 2013.

6. DEQ conducted a CEI of construction disturbance observed within the respective subdivisions and the impact on storm water discharge into Cove Ditch.

7. DEQ concluded:

> Based on the facility site inspection and the documentation reviewed, the DEQ has determined that Copper Ridge Development Corporation is in violation of the following provisions of the Montana Water Quality Act:
>
> - Unauthorized discharge of wastes to state waters without a valid permit is a violation of 75-5-605(2)(c) of the Montana Code Annotated (MCA).
> - Causing pollution of state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters is a violation of 75-5-605(1)(1) [sic] MCA.

8. DEQ explained it was "initiating a formal enforcement action," and requested Copper Ridge Development Corporation complete corrective actions by October 18, 2013. DEQ further explained:

> this letter of violation is intended to inform Copper Ridge Development of the formal enforcement action and require corrective actions to demonstrate compliance with the Montana Water Quality Act. If Copper Ridge Development Corporation believes the facts stated in this letter are inaccurate or the necessary corrective actions are not achievable by the required dates please contact me upon receipt of this letter. DEQ will take into consideration any documentation that indicates the violations did not occur, or that they occurred differently than described above.

9. On December 17, 2013, DEQ received a Notice of Intent (NOI) and Storm Water Pollution Prevention Plan (SWPPP) from both Copper Ridge and Reflections.

10. Section C of the NOI and SWPPP forms provides for the

"Owner/Operator" to provide information.

11. On both the NOI and SWPPP, Reflections identified itself as the "Owner/Operator."

12. On the NOI, Reflections described the construction activity as "construction of new single-family homes and the necessary landscaping to complete the third and fourth filing of the Copper Ridge subdivision. A material stockpiling area (containing the proposed concrete washout area) in the area of the Fifth filing as well as five lots in the first filing that have not yet achieved final stabilization have also been included in this SWPPP area."

13. On both the NOI and SWPPP, Copper Ridge identified itself as the "Owner/Operator."

14. On the NOI, Copper Ridge described its construction activity as "construction of new single-family homes and the necessary landscaping to complete the first, second and third filing of the Reflection at Copper Ridge subdivision."

15. On the SWPPP, Copper Ridge described the project as "construction of single-family homes and establishment of vegetation.

16. On October 21, 2014, DEQ conducted a phase I storm water CEI inspection for Copper Ridge and Reflections at Copper Ridge.

17. On December 9, 2014, DEQ sent Violation Letters to Copper Ridge and Reflections at Copper Ridge, by certified mail.

18. The Violation Letters noted a violation for "[f]ailure to conduct inspections at required intervals in violation of § 75-5-605(1)(b), MCA, Administrative Rules of Montana (ARM) 17.30.1342(a), and Part 2.3 of the General Permit for Storm Water Discharges Associated with Construction Activity."

19. The Violation Letters also noted a violation for "[f]ailure to retain and

make available records listed in 2.5 of Permit No. MTR100000, including the complete signed NOI and the latest signed SWPPP in violation of Section 75-5-605(1)(b), MCA, ARM 17.30.1342(a), and Part 2.5 of Permit No. MTR100000."

20. The Violation Letters also noted a violation for "[f]ailure to maintain a SWPPP that describes the intended sequence of construction activity; that provides an implementation schedule; and that clearly describes the relationship between each phase of construction and the best management practices (BMPs) to be employed in violation of Section 75-5-605(1)(b), MCA, ARM 17.30.1342(a), and Part 3 of Permit No. MTR100000."

21. Finally the Violation Letters noted a violation for "[f]ailure to properly design, install and maintain effective BMPs in violation of § 75-5-605(1)(b), MCA, ARM 17.30.1342(1), and Parts 2.1, 3.1 and 3.7 of Permit No. MTR 100000."

22. The Violation Letters concluded:

> The purpose of this letter is to provide you with notice that you are in violation of the Montana Water Quality Act, rules adopted under that act, and permit requirements, all of which require your compliance. If you fail to respond to this letter by addressing the above-listed violations in a timely manner, you may be subject to administrative or civil enforcement actions to compel compliance and seek penalties.

23. On March 27, 2015, DEQ served Reflections at Copper Ridge and Copper Ridge with respective Administrative Compliance and Penalty Orders.

24. The respective Penalty Orders identified four violations by Copper Ridge and Reflections at Copper Ridge.

25. First, DEQ stated the subdivisions "violated ARM 17.30.1105 from 2006 until December 23, 2013, by conducting construction activities that discharged storm water to state waters prior to submitting an NOI."

26. Second, DEQ stated the subdivisions "violated 75-5-605(2)(c), MCA,

from at least 2006 to December 23, 2013 by illicitly discharging water associated with construction activities to state water without a permit."

27. Third, DEQ stated the subdivisions "violated Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settleable solids, and other debris above levels that are naturally occurring in the state surface waters."

28. Fourth, DEQ stated the subdivisions violated "75-5-605(1)(b), MCA," for violating conditions of the General Permit.

29. Additional facts are interposed, as necessary, throughout resolution of the individual arguments.

ANALYSIS

The parties have filed cross-motions for summary judgment. Copper Ridge and Reflections moved for summary judgment on the following bases:

1. All alleged violations should be dismissed because neither Copper Ridge nor Reflections constitute an owner or operator.
2. All alleged violations should be dismissed because Copper Ridge and Reflections did not discharge to state waters without a permit.
3. The third alleged violation should be dismissed because Copper Ridge and Reflections did not place waste where it would cause pollution.
4. All alleged violations should be dismissed because DEQ did not comply with mandatory notice provisions.
5. DEQ cannot assess administrative penalties because it did not comply with mandatory notice provisions.

DEQ has moved for partial summary judgment to establish liability for all four alleged violations. DEQ has not moved for summary judgment regarding appropriate corrective action and penalty amounts.

I. DEQ MET ITS NOTICE REQUIREMENTS WITH REGARD TO THE

SECOND, THIRD AND FOURTH ALLEGED VIOLATIONS AGAINST COPPER RIDGE AND REFLECTIONS.

Copper Ridge and Reflections have argued DEQ did not comply with Mont. Code Ann. §§ 75-5-617, 75-5-611 and ARM 17.30.2003 (now repealed). The analysis will begin with these three statutes because, if Copper Ridge's Motion is granted no further substantive analysis will be required for the respective alleged violation.

A. The September 23, 2013 and December 9, 2014 Letters Satisfied the Requirements of Mont. Code Ann. § 75-5-617(2).

Reflections and Copper Ridge argue DEQ did not issue a letter notifying them of alleged violations as required by Mont. Code Ann. § 75-5-617(2). Montana Code Ann. § 75-5-617(1) provides that whenever DEQ finds a person in violation of Title 75, Chapter Five, "a rule adopted under this chapter, or a condition or limitation in a permit, authorization, or order issued under this chapter, the department shall initiate an enforcement response." An enforcement response includes administrative or judicial penalties under Mont. Code Ann. § 75-5-611. Mont. Code Ann. § 75-5-617(1)(d). Mont. Code Ann. § 75-5-617(2) places a notice limitation on enforcement responses: "Unless an alleged violation represents an imminent threat to human health, safety, or welfare or to the environment, the department shall first issue a letter notifying the person of the violation and requiring compliance. If the person fails to respond to the conditions in the department's letter, then the department shall take further action as provided in subsection (1)." Based on the plain language of this statute, DEQ may not bring an administrative proceeding for penalties unless the notice requirements are met.

On September 23, 2013, DEQ notified Copper Ridge and Reflections at Copper Ridge of three of the four alleged violations that form the basis for administrative penalties in this matter: (1) conducting construction activities that discharged storm water into state waters prior to submitting an NOI, discharging

water associated with construction activities to state water without a permit, and (3) placing waste where it will cause pollution. The September 23, 2013 letter notified Copper Ridge and Reflections at Copper Ridge that part of the corrective action was to "implement and maintain the SWPPP in accordance with the general permit for Storm Water Discharges Associated with Construction Activity." Furthermore, Copper Ridge and Reflections at Copper Ridge were to "[c]omply with the provision of the general permit for Storm Water Discharges Associated with Construction Activity." In addition, Reflections and Copper Ridge were instructed to implement BMPs to control pollutants associated with construction activity,

On December 9, 2014, DEQ notified Copper Ridge and Reflections at Copper Ridge of observed non-compliance with the General Permit for Storm Water Discharges Associated with Construction Activity. DEQ also notified Copper Ridge and Reflections at Copper Ridge that they had failed to design, install and maintain effective BMPs. Despite DEQ's finding of non-compliance with the corrective actions requested in the September 23, 2013 Letter, DEQ gave Copper Ridge and Reflections further time to correct these alleged violations.

Based on the foregoing, DEQ complied with Mont. Code Ann. § 75-5-617(2). On two occasions, DEQ provided Reflections and Copper Ridge with notices of violation and conditions of compliance. DEQ's violation letters notified Copper Ridge and Reflections the Department considered them out of compliance with their storm water discharge permit obligations, notified them of the salient statutes, permit provisions and administrative rules, and informed them of the necessary corrective action. DEQ complied with Mont. Code Ann. § 75-5-617(2) and was permitted to undertake an enforcement response as provided in Mont. Code Ann. § 75-5-617(1).

B. Compliance with Mont. Code Ann. § 75-5-611.

Reflections and Copper Ridge next argue DEQ did not comply with the procedural provisions of Mont. Code Ann. § 75-5-611 and cannot pursue administrative penalties. Mont. Code Ann. § 75-5-611(1) provides:

> When the department has reason to believe that a violation of this chapter, a rule adopted under this chapter, or a condition of a permit or authorization required by a rule adopted under this chapter has occurred, it may have a written notice letter served personally or by certified mail on the alleged violator or the violator's agent.

The written notice letter must state specific information. Mont. Code Ann. § 75-5-611(1)(a-e). DEQ may not assess an administrative penalty until the specific provisions of Mont. Code Ann. § 75-5-611(1)(a-e) have been satisfied. Mont. Code Ann. § 75-5-611(1)(e). It is undisputed DEQ did not provide a written notice letter to Reflections or Copper Ridge prior to issuing the Administrative Order and Notice of Violation.

However, Mont. Code Ann. § 75-5-611(2) provides an exception to the above notice rule. Mont. Code Ann. § 75-5-611(2)(a)(ii) provides, "[t]he department may issue an administrative notice and order in lieu of the notice letter provided under subsection (1) if the department's action... seeks an administrative penalty only for an activity that it believes and alleges has violated or is violating 75-5-605." Therefore, if the alleged violations in DEQ's Administrative Compliance and Penalty Order only seek penalties for activities DEQ believes and alleges violate Mont. Code Ann. § 75-5-605, DEQ will have complied with the procedural provisions of Mont. Code Ann § 75-5-611. The Department has alleged four violations against Copper Ridge and Reflections respectively. Three of the alleged violations satisfy Mont. Code Ann. § 75-5-611(2)(a)(ii) on their face: the second, third and fourth.

C. The Second, Third and Fourth Violations Alleged Violations of

Mont. Code Ann. § 75-5-605.

DEQ's second alleged violation states Copper Ridge and Reflections "violated 75-5-605(2)(c), MCA, from at least 2006 to December 23, 2013 by illicitly discharging water associated with construction activities to state water without a permit." This is a facial allegation of a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

DEQ's fourth alleged violation states that Copper Ridge and Reflections, "violated 75-5-605(1)(b), MCA, by violating provisions of the general permit. Like the second violation, discussed above, this is a facial allegation of a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

DEQ's third alleged violation states Copper Ridge and Reflections "violated Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settleable solids, and other debris above levels that are naturally occurring in the state surface waters." Regardless the references to administrative rules, this alleges a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

D. The First Alleged Violation Did Not Allege a Violation of Mont. Code Ann. § 75-5-605.

DEQ's first alleged violation states Copper Ridge and Reflections "violated ARM 17.30.1105 from 2006 until December 23, 2013, by conducting construction activities that discharged storm water to state waters prior to submitting an NOI."

DEQ asserts "ARM 17.30.1105 provides storm water permit requirements and violation of ARM 17.30.1105 is a violation of § 75-5-605." DEQ asserts, "[v]iolation of ARM 17.30.1105, discharge without a permit, is the act prohibited by § 75-5-605(2), MCA."

A violation of ARM 17.30.1105 is not a violation of § 75-5-605. When ARM 17.30.1105 was promulgated, the only statutes cited as authority were Mont. Code Ann. §§ 75-5-201 and 75-5-401. More importantly, the only implementing statute cited was 75-5-401. Had DEQ or the BER intended violations of ARM 17.30.1105 to constitute violations of Mont. Code Ann. § 75-5-605, it could have been explicitly stated. In the absence of a reference to Mont. Code Ann. § 75-5-605, it does not appear a violation of ARM 17.30.1105 constitutes a violation of § 75-5-605.

Furthermore, Mont. Code Ann. § 75-5-611(1) provides "when the department has reason to believe that a violation of this chapter, *a rule adopted* under this chapter or…" (emphasis added). There is no question that ARM 17.30.1105 was adopted pursuant to Mont. Code Ann. §§ 75-5-201 and 75-5-401. ARM 17.30.1105 was not adopted pursuant to Mont. Code Ann. § 75-5-605. This makes alleged violations of ARM 17.30.1105 subject to the general notice requirement under 75-5-611(1), *prior* to seeking an administrative penalty.

Moreover, DEQ's argument is basically that a violation of Mont. Code Ann. § 75-5-605(2)(c) is identical to a violation of ARM 17.30.1105(1)(a). A cursory reading of the two provisions demonstrates they are not identical. Moreover, if DEQ's argument was accepted, it would essentially permit duplicative violations, allowing DEQ to bring a violation of Mont. Code Ann. § 75-5-605 twice: once for a violation of Mont. Code Ann. § 75-5-605(2)(c) and once for violation of ARM 17.30.1105(1)(a). This would be superfluous or redundant charge stacking, does not make sense, and would attempt to work-around any statutory caps on maximum

damages. *See* Mont. Code Ann. § 75-5-611(9)(d).

Based on the foregoing, DEQ was required to comply with Mont. Code Ann. § 75-5-611(1)(a-e) to provide Copper Ridge and Reflections notice of the alleged violations of ARM 17.30.1105. The exception under Mont. Code Ann. § 75-5-611(2)(a)(ii) did not apply because a violation of 17.30.1105 is not a violation of Mont. Code Ann. § 75-5-605. As a result "an administrative penalty may not be assessed until the provision of [Mont. Code Ann. § 75-5-611(1)] have been complied with." DEQ may not seek an administrative penalty for violation of ARM 17.30.1105.

E. DEQ's Second, Third and Fourth Alleged Violations, all Allege Violations of Major Extent and Gravity, Class I Violations, or Both.

Copper Ridge and Reflections moved for Summary Judgment based on DEQ's failure to comply with notice requirements contained in ARM 17.30.2003. DEQ served the Notices of Violation and Administrative penalty in March of 2015. At that time ARM 17.30.2003 was in effect. ARM 17.30.2003 was repealed on March 19, 2016. The procedures set forth in ARM 17.30.2003 applied to initiation of an administrative proceeding against Copper Ridge and Reflections.

ARM 17.30.2003 imposed greater requirements on DEQ than Mont. Code Ann. § 75-5-611. Instead of merely parroting the exception contained in Mont. Code Ann. § 75-5-611(2)(a)(ii), this administrative rule imposed additional requirements before DEQ could seek an administrative penalty for violations of Mont. Code Ann. § 75-5-605. Subsection 7 provided:

> In lieu of the notice letter under (2), the department may issue an administrative notice together with an administrative order if the department's action:
>
> (a) does not involve assessment of an administrative penalty; or
>
> (b) seeks an administrative penalty only for an activity that the

> department believes and alleges was or is a violation of 75-5-605, MCA, and the violation was or is:
> (i) a class I violation as described in ARM 17.30.2001(1); or
> (ii) a violation of major extent and gravity as described in ARM 17.4.303.

ARM 17.30.2003(7). Even for alleged violations of Mont. Code Ann. § 75-5-605, DEQ was required to provide prior notice unless DEQ alleged (1) a class I violation, or (2) a violation of major extent and gravity.

DEQ's second alleged violation alleged a violation of major extent and gravity, and a Class I violation. DEQ's third alleged violation alleged a violation of major extent and gravity. The fourth alleged a Class I violation. The first alleged violation will not be addressed because it did not allege a violation of Mont. Code Ann. § 75-5-605.

F. Violation 2 Alleged a Violation of Major Extent and Gravity and a Class I Violation.

DEQ alleged a violation of Mont. Code Ann. § 75-5-605(2)(c) for "discharging storm water into the state waters without a permit." DEQ explained the basis for its Extent and Gravity analysis. It determined the Extent and Gravity factor was .85, which constitutes a violation of major gravity and extent.

Furthermore, at the time this proceeding was filed, it was a Class I violation to discharge waste into state waters without a permit. ARM 17.30.2001(1)(b) (now repealed). DEQ's second alleged violation alleged both a Class I violation and a violation of major extent and gravity. As a result, ARM 17.30.2003(7) did not impose any additional notice requirements before issuing the Administrative Compliance and Penalty Orders.

G. Violation 3 Alleged a Violation of Major Extent and Gravity

DEQ's Notice of Violation and Administrative Penalty alleged a violation of Mont. Code Ann. § 75-5-605(1)(a) for placing waste where it will cause pollution. DEQ explained the basis for its Gravity and Extent analysis. It determined the

Extent and Gravity factor was .85, which constitutes a violation of major Extent and Gravity. Therefore, DEQ's second alleged violation alleged a violation of major Extent and Gravity. As a result, ARM 17.30.2003(7) did not impose any additional notice requirements before issuing the Administrative Compliance and Penalty Orders.

H. Violation 4 Alleged a Class I Violation.

The Administrative Compliance and Penalty Orders asserted a violation of Mont. Code Ann. § 75-5-605(1)(b) for a host of sections in the general permit. At the time DEQ issued the Administrative Compliance and Penalty Orders it was a Class I violation to "violate a permit compliance plan or schedule." ARM 17.30.2001(1)(d) (Repealed March 19, 2016). All of the alleged violations of the permit are violations of a permit compliance plan or schedule. This is an alleged violation of a Class I violation. As a result, ARM 17.30.2003(7) did not impose any additional notice requirements before issuing the Administrative Compliance and Penalty Orders.

II. COPPER RIDGE AND REFLECTIONS ARE OWNERS OR OPERATORS.

"Any person who discharges or proposes to discharge storm water from a point source must obtain coverage under an MPDES general permit or another MPDES permit for discharges…associated with construction activity." ARM 17.30.1105(1)(a). "A person who discharges or proposes to discharge storm water associated with construction activity shall submit to the department a notice of intent (NOI) as provided in this rule." ARM 17.30.1115(1). The NOI must be signed by either the owner or operator, or both. ARM 17.30.1115(1)(a). The phrase, "storm water discharge associated with construction activity" is defined as:

> a discharge of storm water from construction activities including

> clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more.

ARM 17.30.1102(28). "Owner or operator," is defined as "a person who owns, leases, operates, controls or supervises a point source." Mont. Code Ann. § 75-5-103(26). The parties disagree regarding whether Copper Ridge or Reflections is an owner or operator.

Reflections and Copper Ridge propose too narrow a definition of Owner and operator, generally limiting their arguments to ownership, lease and operations. Mont. Code Ann. § 75-5-103(26) also defines a owner or operator as someone who "controls or supervises a point source." Furthermore, Copper Ridge and Reflections focus too heavily on construction of homes, rather than the more expansive statutory definition of "storm water discharge associated with construction activity."

Reflections and Copper Ridge were the original owners and developers of all land in their respective subdivisions. Construction activities, including clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects, resulted in disturbance equal to or greater than one acre of total land area at the respective subdivisions. These construction activities were initiated in 2006, in the respective subdivisions. These construction activities were undertaken with the eventual goal of the sale of individual lots for residential home construction.

Copper Ridge and Reflections admit that they entered into at least one contract that required "all excess material from pipe and bedding displacement shall be left on site." Therefore, not only did Copper Ridge and Reflections have supervision and control over the actions of third parties, they acted on their ability to

instruct others how to engage in stockpiling of materials, an act expressly contained in the definition of "construction activities." This put Copper Ridge and Reflections in a position of either control or supervision with regard to the terms of sale of any individual lot for construction of residential homes. Any argument to the contrary ignores the common sense and practical reality of development of a residential subdivision. The mere fact that neither Copper Ridge nor Reflections exercised supervision or control over the contractual terms of the sale of land, does not change the fact that they had the power to supervise or control land with regard to storm water discharges. In addition, on September 9, 2013, DEQ observed "clearing, grading, excavation, soil stockpiles, concrete washout areas, and tracking on streets."

Moreover, Reflections and Copper Ridge conceded their owner or operator status when they filed their December 23, 2013, SWPPs and NOIs, respectively. Both Reflections and Copper Ridge expressly acknowledged they were the owner or operator for construction activities. The affidavit produced by Landy Leep does not create a material dispute of fact. Leep attempts to characterize the intent behind his signature on the SWPPPs and the NOIs. However, the documents themselves are undisputed for the purposes of summary judgment and the admissions made by Copper Ridge and Reflections that they were the owners or operators. Based on the foregoing, Reflections and Copper Ridge were owners or operators with regard to construction activities at their respective subdivisions.

III. DEQ HAS ESTABLISHED COPPER RIDGE AND REFLECTIONS DISCHARGED STORM WATER TO STATE WATERS WITHOUT A PERMIT.

It is "unlawful to carry on any of the following activities without a current permit from the department…discharge sewage, industrial wastes or other wastes into any state waters." Mont. Code Ann. § 75-5-605(2)(c). DEQ has alleged Copper Ridge and Reflections violated this statute by "discharging storm water

associated with construction activities to state water without a permit" from at least 2006 to December 23, 2013. The parties dispute whether storm water detention ponds are treated as State waters and whether overspills from the detention ponds, to state waters, constitutes a discharge into state waters.

This is all beside the point. DEQ has provided an affidavit of Dan Freeland who conducted the September 9, 2013 CEIs at Reflections and Copper Ridge. Freeland stated that he "documented and observed discharges of storm water from Reflections at Copper Ridge and from Copper Ridge subdivisions through *direct overland flow* and through swales, storm drains and drainage ditches into Cove Ditch, which is state water." (emphasis added). Freeland's personal observations have not been disputed on summary judgment.

Regardless the Parties' disputes over state waters and the effect of the overfilling of the detention ponds, there is no dispute that Freeland documented and observed discharges of storm water that traveled over land, into Cove Ditch, a state water. As a result, DEQ has established Reflections and Copper Ridge discharged storm water into state waters, without a permit, a violation of Mont. Code Ann. § 75-5-605(2)(c). DEQ is entitled to summary judgment on its second alleged violation.

IV. THERE IS A DISPUTE OF MATERIAL FACT REGARDING THE ALLEGED VIOLATION OF MONT. CODE ANN. § 75-5-605(1)(a).

"It is unlawful to…cause pollution, as defined in 75-5-103, of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters…" Mont. Code Ann. § 75-5-605(1)(a). DEQ alleged both Reflections and Copper Ridge violated this statute, from at least May 2012, to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settable solids and other debris above levels that are naturally

occurring in state surface waters. Copper Ridge and Reflections argue that there is no evidence that Copper Ridge or Reflections placed waste within the subdivisions and DEQ lacks an expert to testify that the waste could cause pollution.

There is sufficient evidence that Reflections and Copper Ridge placed or caused to be placed wastes. On September 9, 2013, Dan Freeland observed stockpiling of materials, concrete washout, sediment waste tracked onto impervious surfaces, sediment and debris on the bank of Cove Ditch, accumulated sediment on the sidewalk and grass area of the city park areas, and sediments on the streets and storm drains throughout Reflections and Copper Ridge. All of this meets the definition of "other wastes" contained in Mont. Code Ann. § 75-5-103(24).

In addition, DEQ does not necessarily require expert testimony to establish the placement of wastes could cause pollution. In pertinent part, "pollution" is defined as:

> (i) contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or
> (ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

Mont. Code Ann. § 75-5-103(30).

Expert testimony is often required when the subject matter is outside of the common experience of the trier of fact and the expert testimony will assist the trier of fact in determining the issue or understanding the evidence. *Dubiel v. Mont. DOT*, 2012 MT 35, 364 Mont. 175, 272 P.3d 66. However, in a MAPA contested case proceeding, "[n]otice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge." Mont. Code Ann. § 2-4-612(6). In addition, the

"agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." Mont. Code Ann. § 2-4-612(7).

Based on the definition of "pollution" and Mont. Code Ann. § 2-4-612(6) and (7), there is no per se requirement that DEQ identify an expert. DEQ's exhibits and the testimony of its personnel, with their specialized knowledge, appears to be sufficient to provide evidence of alleged pollution, as defined by statute. DEQ is not required to present expert testimony in order to establish Reflections or Copper Ridge placed, or caused to be placed, waste in a manner that could cause pollution of state waters.

That said, DEQ has not met its burden to establish it is entitled to judgment as a matter of law. The first prong of "pollution" requires DEQ to establish some form of alteration of state waters "that exceeds that permitted by Montana water quality standards." Mont. Code Ann. § 75-5-103(30)(i). DEQ has not provided any evidence of permitted water quality standards at this time. As a result, DEQ has not established pollution under the first prong of the definition.

The second prong of "pollution" requires DEQ to establish that a substance has entered state water that will either create a nuisance or "render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife." Mont. Code Ann. § 75-5-103(30)(ii). While DEQ has established the placement of waste, DEQ has not identified the facts to establish or explain how this waste will create a nuisance or otherwise cause the harm required in the definition of "pollution." As a result, DEQ is not entitled to summary judgment on this alleged violation.

V. DEQ IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON ITS CLAIM THAT COPPER RIDGE AND REFLECTIONS VIOLATED THE CONDITIONS OF THE GENERAL PERMIT.

DEQ's fourth alleged violation is that Reflections and Copper Ridge violated Mont. Code Ann. § 75-5-605(1)(b), for violating provisions contained within the General Permit. As a threshold matter, Reflections and Copper Ridge cannot rely on their defense that they are not an owner or operator. Reflections and Copper Ridge provided their respective SWPPPs and NOIs in December of 2013. Resolution of this alleged violation is separate and distinct from the alleged violations in the absence of a permit. Although Reflections and Copper Ridge constituted owners or operators, that legal determination is not necessary for the resolution of this fourth alleged violation.

As of December 17, 2013, Reflections and Copper Ridge agreed to follow the terms and conditions of the General Permit. It is undisputed they entered the NOIs and SWPPPs and undertook the obligations contained in the general permit. Therefore, even if one accepted Reflections and Copper Ridge's argument as true – that they are not owners or operators – this alleged violation could still proceed because they agreed to abide by the provisions of the general permit. Their alleged violations of any specific provisions are divorced from their status as an owner or operator.

DEQ provided undisputed testimony that on October 21, 2014, Dan Freeland and Chris Romankiewicz conducted a CEI as Reflections and Copper Ridge. Freeland and Romankiewicz observed:

(1) the SWPPP administrator failed to conduct site inspection every seven days in accordance with the inspection schedule in the SWPPP, a violation of Section 2.3 of the general permit.

(2) The SWPPP had not been developed in accordance with good engineering practices and had not been updated to reflect current onsite conditions, a violation of Sections 3.1.1 and 3.1.3 of the general permit.

(3) The SWPPP administrator had failed to maintain records at the site where they could be made available to the DEQ Inspectors upon request, a violation of Section 2.5 of the general permit.

(4) Best management practices were not implemented to control and mitigate discharges of sediment and other pollutants from construction related activities, violations of Sections 2.1.1 and 2.1.4 of the general permit.

Freeland and Romankiewicz's observations were memorialized in (1) a December 9, 2014 letter to Reflections and Copper Ridge, (2) an MPDES Compliance Inspection report for each subdivision, and (3) a Storm Water Construction Inspection Report for each subdivision.

Copper Ridge and Reflections have not disputed Freeland and Romankiewicz's observations and factual allegations. DEQ has met its burden to establish violations of provisions of the General Permit, a violation of Mont. Code Ann. § 75-5-605(1)(b). DEQ is entitled to partial summary judgment on the fourth alleged violation in the Administrative Compliance and Penalty Order.

CONCLUSION

Both parties' cross Motions for Summary Judgment are granted in part and denied in part:

(1) Copper Ridge and Reflections' Motions are GRANTED with regard to its argument that DEQ cannot seek administrative penalties for a violation of ARM 17.30.1105.

(2) Copper Ridge and Reflections' Motions for summary judgment are DENIED in all other aspects.

(3) DEQ's Motion for Partial Summary Judgment is GRANTED with regard to the violations of Mont. Code Ann. § 75-5-605(2)(c), discharge of waste into state waters and 75-5-605(1)(b), violation of provisions set forth in a permit.

(4) DEQ's Motion for Partial Summary Judgment is DENIED with regard to alleged violation of ARM 17.30.1105.

(5) DEQ's Motion for Partial Summary Judgment is DENIED with regard to alleged violation of 75-5-605(1)(a).

DATED this 1st day of August, 2017.

/s/ Andres Haladay
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Hearing Examiner
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Summary Judgment to be mailed to:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	)	Case No. BER 2015-01-WQ
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105377) [FID 2289, DOCKET NO. WQ-15-08]	)	Case No. BER 2015-02-WQ

EXCEPTIONS TO HEARING EXAMINER'S ORDER ON SUMMARY JUDGMENT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Copper Ridge Development Corporation (Copper Ridge) and Reflections at Copper Ridge, LLC (Reflections) respectfully submit these Exceptions for the Board of Environmental Review (Board) to consider when determining the most appropriate final Order in this enforcement case.

I. INTRODUCTION

The Proposed Findings of Fact and Conclusions of Law (Proposed FOFCOL) submitted to this Board on July 16, 2018 relies on an incorrect burden of proof. For this reason alone, the Board may find that "the proceedings on which the findings were based did not comply with essential requirements of law." § 2-4-621(3), MCA. This case should therefore be remanded back to the Hearing Examiner for consideration using the correct burden of proof.

However, even if the Board accepts the Findings of Fact in the Proposed FOFCOL and the Order on Summary Judgment, it should modify the proposed conclusions and void the Department of Environmental Quality's (DEQ's) Administrative Compliance and Penalty Order because DEQ has not and cannot meet its burden of proving that Copper Ridge and Reflections committed the alleged violations. § 75-5-611(6)(e), MCA.

Even if this Board finds that Copper Ridge and Reflections committed the alleged violations, the proposed findings of fact do not support the assessed penalty

amounts. Therefore, justice demands that the penalty amounts be adjusted to zero, which this Board may do without a full record review. § 2-4-621(3), MCA.

Finally, a review of the complete record will reveal facts that contradict and add more accurate context to the proposed findings, proving that the proposed findings are not based upon "competent substantial evidence" and should therefore be modified. § 2-4-621(3), MCA.

For perspective, the total penalty proposed in this case ($184,000) is greater than the *annual* amount of penalties deposited in the General Fund and Special Revenue Accounts for Water Quality Act cases for all but one of the last six fiscal years - 2011 ($23, 255), 2012 ($333,350), 2013 ($72,495), 2014 ($58,578), 2015 ($119,891) and 2016 ($123,505).[1] In this case, Copper Ridge and Reflections did nothing wrong. In fact, the proposed findings of fact demonstrate their repeated compliance with all of DEQ's requests. Yet, DEQ persists in this enforcement action, forcing these two corporations to continue, at great expense, this legal battle.

II. BACKGROUND

Copper Ridge and Reflections are developers who appropriately planned and developed two subdivisions on the west end of Billings – all in accordance with the

[1] Department of Environmental Quality, Annual Amounts of Penalties Deposited in General Fund and Special Revenue Accounts FY 2011 through FY 2016, available at http://deq.mt.gov/portals/112/deqadmin/enf/documents/Reports/FY16/Penalties_collected-2011-2016.pdf (accessed September 13, 2018).

Montana Subdivision and Platting Act and all other legal requirements, including the Montana Water Quality Act. It is undisputed that Copper Ridge and Reflections had appropriate stormwater permit coverage for their construction activities as the developers of the subdivisions. It is also undisputed that DEQ terminated that permit coverage – effectively telling Copper Ridge and Reflections that they no longer needed permit coverage.

More than a year later, in September 2013, the Billings area experienced an unprecedented significant storm that pummeled the area with 2.10 inches of rain in just 45 minutes. Not surprisingly, the storm triggered flash flooding that literally turned streets into rivers. Along with the rain came wind gusts of up to 73 mph – strong enough to break trees and power poles and leave thousands of Billings residents without power.

That was just the storm that DEQ had been waiting for because, despite the City of Billings' request to address stormwater concerns on the west end of Billings *six months earlier*, DEQ waited for a storm that would create conditions for a stronger case – one that would be sure to create violations and compel compliance. But Copper Ridge and Reflections, with a proven track record of compliance, did not need such compulsion. Nor did they need or deserve the resulting $200,000 penalty first assessed against them. As any prudent corporation would do, Copper Ridge and Reflections challenged the DEQ enforcement action,

questioning how DEQ found them liable for such violations. DEQ has never responded with facts that specifically tie any of the violations to any property owned or operated by Copper Ridge and Reflections. Nor has DEQ explained its purported authority to hold Copper Ridge and Reflections responsible for violations that, in all likelihood, originated on residential lots owned by others.

DEQ has failed at every step of this enforcement action. First, they failed to take proactive enforcement action in response to concerns raised by the City of Billings six month prior to the alleged violations - action that could have prevented the alleged discharges. Then DEQ failed to realize the magnitude and disastrous force of the storm, which overwhelmed nearly every stormwater system in the area. Instead, DEQ used the disastrous storm to initiate an unwarranted enforcement action against a compliant developer. DEQ failed to document exactly where the violations originated and failed to document the exact property and property owners responsible for the discharges and placement of wastes. Instead, DEQ looked only to the biggest target in the neighborhood – the developer who simply drew the boundaries, developed the infrastructure (all in accordance with all legal requirements), and sold the individual lots for residential homes to be built. DEQ also failed to document any pollution or harm that may have resulted from the disastrous storm's impact to Cove Ditch, an irrigation canal on the Billings west end. Further, DEQ failed to provide the statutorily and regulatory

notices for this enforcement action and assessed inappropriate and unsupportable penalties that simply ignore the facts of this case.

This Board should not reward DEQ's failures with an inappropriate Administrative Compliance and Penalty Order in this case. The regulated public, as well as Copper Ridge and Reflections, deserve better. The law demands better.

Of all the enforcement actions pending or needing to be pursued throughout this state, this one is an abomination. This enforcement action inappropriately penalizes the wrong party – the compliant subdivision developer – for a natural disaster. DEQ's action cannot withstand this Board's scrutiny. There is no proof that Copper Ridge and Reflections committed the alleged violations. Even if this Board determines or has any question whether Copper Ridge and Reflections did commit the alleged violations, penalties cannot be assessed for those violations because DEQ failed to follow the proper notice requirements and failed to assess the penalty amounts in compliance with its regulatory requirements. As illustrated by key facts provided herein, which contradict and provide more accurate context for the proposed findings, a review of the full record will reveal that the proposed findings are "not based upon competent substantial evidence" because no "reasonable mind" can accept them as adequate to support either the alleged violations or the substantial penalty assessment. The proposed finding should therefore be rejected or modified. § 2-4-621(3), MCA.

III. STANDARD OF REVIEW

When faced with an Administrative Compliance and Penalty Order, the alleged violator may request a hearing before the Board. "After a hearing, the board shall make findings and conclusions that explain its decision. ... If the board determines that a violation has not occurred, it shall declare the department's notice void." § 75-5-611(6)(a) and (e). In a contested case hearing such as this, where the full Board has chosen not to hear the case and has assigned it to a Hearing Examiner, the Hearing Examiner proposes findings and conclusions to the Board, then the Board decides whether to adopt, modify or reject the findings and/or conclusions:

> The agency [Board] may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

§ 2-4-621(3), MCA. While rejecting or modifying the findings of fact calls "for an explanation as required by § 2-4-621(3), MCA;" rejecting and modifying the proposed conclusions of law does not. *Key West, Inc. v. Winkler*, 2004 MT 186, ¶ 21, 322 Mont. 184, 95 P.3d 666. The substantial evidence required to reject or

modify the proposed findings "is evidence that a reasonable mind might accept as adequate to support a conclusion." *State Pers. Div., Dep't of Admin. v. Child Support Investigators*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305 (citation omitted).

IV. ARGUMENT

This action should be remanded for consideration under the correct burden of proof. Alternatively, the Board should modify the proposed conclusions and void DEQ's Administrative Compliance and Penalty Order in its entirety because none of DEQ's alleged violations or assessed penalties are supported by the proposed facts. Finally, if this Board has further doubt, it can consider the entire record before it, easily determine that key facts are missing and reject or modify the proposed findings of fact because no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties.

A. DEQ Must Bear the Burden of Proof in an Enforcement Case.

Copper Ridge and Reflections disagree with the holding that Copper Ridge and Reflections have the burden of proving their compliance with the Montana Water Quality Act. Proposed FOFCOL, pp. 14-18. As the innocent party being charged as guilty of violating the Water Quality Act, Copper Ridge and Reflections should have the right, under the United States Constitution's due process clause, to be considered innocent until proven guilty. *See In Re Winship*, 397 U.S. 358, 363,

90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970) ("the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law."). Although this is not a criminal case, this contested case is similar because it is an enforcement action under the Water Quality Act, specifically §§ 75-5-611 and 75-5-617, MCA, which allow DEQ to initiate an enforcement response when it "has reason to believe that a violation" of the law has occurred. Indeed, DEQ's enforcement action alleges that Copper Ridge and Reflections acted in violation of the Water Quality Act and DEQ therefore requests relief, or punishment, in the form of an Administrative Compliance and Penalty Order. Under the due process clause, it is only fair that Copper Ridge and Reflections be presumed innocent of the alleged violation until DEQ proves their guilt. The due process requirements of the United State Constitution demand that the government bear the burden of proof in enforcement actions such as this case.

Additionally, DEQ is in exactly the same position as the plaintiff in *MEIC v. DEQ*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, upon which the Proposed FOFCOL relies – "MEIC filed a petition and affidavit with the Board alleging that the Department approved the permit *in violation of Montana statutes and administrative regulations*, and requesting the following relief..." MEIC, ¶ 15. In that case, the Board first required evidence from MEIC "necessary to establish the

facts essential to a determination that the Department's decision *violated the law*." *MEIC*, ¶ 16 (emphasis added).

Here, DEQ is, just like the plaintiff in *MEIC* - the one claiming that there has been a violation of the law. Copper Ridge and Reflections are not, as the Proposed FOFCOL stated, the ones asserting that DEQ's decision "violated Montana law." Proposed FOFCOL, p. 14. Rather, Copper Ridge and Reflections are defending themselves against the allegations and answering "the charges" levied against them by DEQ. § 75-5-611(3) (the alleged violator may be required to appear "before the board for a public hearing to answer charges.").

Federal statutes, rules and administrative case law specific to the federal Clean Water Act all agree that in an enforcement action such as this, it is the government who bears the burden of proving a violation of law has occurred and that the relief sought is appropriate. The federal Administrative Procedure Act requires that the "proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Here, DEQ claims authority to issue a "notice and order" under § 75-5-611, MCA; however, that order is not final, as evidenced by the alleged violator's ability to request a hearing and have the Board "determine[] that a violation has occurred," "issue an appropriate order" or "determine that a violation has not occurred," and "declare the department's notice void." §§ 75-5-611(6)(b) and (e),

MCA.[2] DEQ's administrative notice and order is a request for the Board to issue an order against the alleged violator. Unless the alleged violator fails to request a hearing, the notice and order does not become final without further agency action. Once the alleged violator requests a hearing, the order is taken off the automatic track to become final and is instead placed before the Board to issue the final order. Here, DEQ is the "proponent" of an order and as such, has the "burden of proof." 5 U.S.C. § 556(d).

The administrative procedures for federal enforcement of these same types of violations under the Clean Water Act requires:

> (a) The **complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate**. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.
> (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

40 C.F.R. § 22.24 (emphasis added). Cases heard by the EPA's Environmental Appeals Board (EAB), which is analogous to this Board, have resoundingly held

[2]Indeed, the statute, when read in total, contemplates that any violations alleged by the Department are not final until either 1) a hearing is not required by the Department and the alleged violator fails to request one or 2) the alleged violator requests a hearing and the Board issues findings and conclusions. Until one of those points is reached, the violations are merely alleged and the order is not final. §§ 75-5-611(3) – 75-5-611(6), MCA.

that when the government alleges a violation, the government must prove every element of that violation. *In re Henry Stevenson and Parkwood Land Co.*, 16 E.A.D. 151, 158 (EAB 2013) ("the Region [EPA] bears the burden of demonstrating that the alleged violation occurred" and "the Region [EPA] must show, by a preponderance of the evidence, that the factual prerequisites exist for finding a violation of the applicable regulatory requirements." (*citing In re Bricks, Inc.*, 11 E.A.D. 224, 233 (EAB 2003) (rejecting an administrative law judge's findings of fact because the Region had failed to demonstrate that the facts were supported by a preponderance of the evidence); *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 (EAB 2004) (explaining preponderance of the evidence standard); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (same)).

Here, DEQ is the "complainant" who must prove that the violations occurred as set forth in their notice and order, and Copper Ridge and Reflections are the "respondents" who then have the burden of presenting defenses to the allegations.

The Proposed FOFCOL mistakenly views Copper Ridge and Reflections as "the party asserting a claim for relief" and concludes that §§ 26-1-401 and -402, MCA require Copper Ridge and Reflections to bear the burden of proof. That is wrong because clearly DEQ is the party asserting a claim for relief via its Administrative Compliance and Penalty Order.

Having DEQ bear the burden of proof in an enforcement proceeding complies with § 26-1-401, MCA because, prior to the order being final (either by lapse of the alleged violator's opportunity to request a hearing or by action of the Board), DEQ is only alleging violations that it has "reason to believe" occurred. § 75-5-611(1), MCA. Therefore, "if no evidence were given on either side," DEQ's allegations go unsupported, the Board has no evidence upon which to "determine[] that a violation has occurred" and therefore cannot "issue an appropriate order." §§ 26-1-401; 75-5-611(6)(b), MCA. Since DEQ's claim that a violation has occurred would be defeated in the absence of any evidence from either side, the plain reading of § 26-1-401 illustrates that DEQ bears the burden of producing evidence as to each particular fact that proves the alleged violation.

Having DEQ bear the burden of producing evidence also comports with the traditional notions of justice and fairness by placing the burden on the party bringing the claim and requesting relief. Here, it is DEQ who brings the claim that Copper Ridge and Reflections have violated the law and it is DEQ who requests relief in the form of a penalty payment. Copper Ridge and Reflections are not raising a claim, they are defending against DEQ's claims. Requiring the alleged violator to prove his innocence, or compliance, before any proof of the alleged violations is formally presented at a hearing before the Board, essentially requires the alleged violator to prove a negative – that no violation occurred. This is unfair

and would impose an undue burden on the regulated public because DEQ would "solely possess the relevant information pertaining to the activities." *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 32, 326 Mont. 174, 108 P.3d 469. Until the case has gone through discovery and has been presented as the case in chief before the Board, the alleged violator cannot know for certain the extent or scope of evidence that DEQ will bring to bear against him. To require Copper Ridge and Reflections to prove that no violation occurred, without first having DEQ present its proof of the alleged violations, prejudices Copper Ridge and Reflections and requires the impossible – to prove a negative and to defend against allegations not yet articulated or proven.

The United States Constitution, Montana case law and statutes, as well as federal statutes, regulations and case law all emphasize that it is the government who bears the burden of proving a violation of law. Therefore, it is necessary that DEQ bear the burden of proof in this enforcement action. The notions of justice and fairness to the regulated public also require that when DEQ alleges a violation of the law, it must bear the burden of proving "each fact the existence or nonexistence of which is essential to the claim for relief." § 26-1-402, MCA. Here, it is DEQ who alleges a violation of law, just as the plaintiff did in *MEIC v. DEQ*; therefore, it is DEQ who must prove, by a preponderance of the evidence, every element of each violation and every element of the requested penalty.

Because the Proposed FOFCOL relied on the wrong burden of proof, this Board should reject the proposed findings and conclusions, in their entirety, because "the proceeding on which the findings were based did not comply with essential requirements of law." § 2-4-621(3), MCA. The entire case should be remanded back to the Hearing Examiner for review and consideration using the correct burden of proof.

B. The Facts Do Not Support the Violations Alleged.

Alternatively, this Board may examine the proposed findings of fact and reach different conclusions of law, without remanding this case back to the Hearing Examiner and without examining the complete record. § 2-4-621(3), MCA. Both the law and logic require that the Board modify the conclusions, even if it chooses not to reject or modify the proposed findings.

Neither the proposed findings nor the facts presented in the Order on Summary Judgment support a conclusion that Copper Ridge and Reflections discharged wastes to state waters without a permit, that Copper Ridge and Reflections placed or caused to be placed wastes where they will cause pollution, or that Copper Ridge and Reflections committed either of those violations over multiple days. Therefore, this Board may accept the proposed findings but modify the proposed conclusions to exonerate Copper Ridge and Reflections of DEQ's unproven allegations.

1. DEQ has Failed to, and Indeed Cannot, Prove that Copper Ridge and Reflections Own or Operate the Source of the Discharge, are Persons who Discharged Stormwater, or that Copper Ridge and Reflections Placed or Caused to be Placed Any Wastes.

Th Hearing Examiner relies on the previous Order on Summary Judgment for the conclusion that "CR/REF were 'owners or operators' for the purpose of obtaining permit coverage for the discharge of storm water at their respective developments." Proposed FOFCOL, pp. 38-39, ¶ 4. The Order on Summary Judgment concluded that Copper Ridge and Reflections were owners or operators who "discharge[d] or propose[d] to discharge storm water associated with construction activity" Order on SJ, p. 13 (*citing* ARM 17.30.1115(1). Pages 14 through 15 of the Order describe the operative facts relied upon:

1) Copper Ridge and Reflections were the original owners and developers of the subdivisions. *Id.*, p. 14.

2) Copper Ridge and Reflections' construction activities within the subdivision that would be subject to permitting requirements began with the initial development in 2006 and "were undertaken with the eventual goal of the sale of individual lots for residential home construction." *Id.*

3) Copper Ridge and Reflections entered into one contract that instructed that excavated materials should remain on site. *Id.*

4) Copper Ridge and Reflections "conceded their owner or operator status when they filed their December 23, 2013 SWPPs and NOIs." *Id.*, p. 15.

Even if all of those facts are taken as true, they do not support liability for what can be charged as a $10,000 per day violation of the Water Quality Act.

A subdivision "means a division of land or land so divided that creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed." § 76-4-102(17), MCA. Such is the case here – both the statutes and the Order affirm that Copper Ridge and Reflections, as the developers, intended to sell the individual lots for subsequent construction of residential homes *by someone other than Copper Ridge and Reflections*.

DEQ administers the Montana Subdivision and Platting Act, which contains specific requirements for stormwater systems:

> The rules and standards must provide the basis for approving subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal. The rules and standards must be related to:
>
> (a) size of lots;
> (b) contour of land;
> (c) porosity of soil;
> (d) ground water level;
> (e) distance from lakes, streams, and wells;
> (f) type and construction of private water and sewage facilities; and
> (g) other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.

§ 76-4-104(2), MCA. The "rules must further provide for: ... standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways." § 76-4-104(6)(e), MCA.

DEQ has authority to enforce the subdivision provisions, including those dealing with stormwater, but DEQ has not pursued any enforcement action against Copper Ridge and Reflections, as the developers, for any violation of the Montana Subdivision and Platting Act, including the requirements for stormwater. Indeed, no one has even alleged that Copper Ridge and Reflections failed to meet the Montana Subdivision and Platting Act's statutory or regulatory requirements for stormwater. In fact, DEQ admits that Copper Ridge and Reflections had valid stormwater permit coverage for their development of the subdivisions. Proposed FOFCOL, pp. 4-5, ¶ 5. DEQ went so far as to terminate that coverage without noting *any* violations. *Id.*, p. 5, ¶ 6; p. 22 (noting that "DEQ has not alleged any prior history" of Water Quality Act violations for Copper Ridge and Reflections). Thus, all of the evidence (or lack thereof) indicates that Copper Ridge and Reflections, as the subdivision developers, did *everything* that they were supposed to do in terms of stormwater.

Of course, those permits for the development of the subdivisions did not include "controls for construction activity on residential lots" because those lots were "sold, rented, leased or otherwise conveyed" *out of* Copper Ridge and

Reflections' ownership and control – just as the subdivision statutes envision and in-line with the noted "eventual goal of the sale of individual lots for residential home construction." *Id.*, p. 5, ¶ 5; Order on SJ, p. 14; § 76-4-102(17), MCA. The record is clear that Copper Ridge and Reflections were not involved in, nor intended to be involved in, construction activities on the individual lots.

This enforcement action kicked off with an inspection in September of 2013 – seven years after the development of the subdivisions and one year after DEQ was apparently so satisfied with Copper Ridge and Reflections' compliance with stormwater permit requirements during the developers' construction activities that they terminated the permit coverage – essentially telling Copper Ridge and Reflections that stormwater coverage for the subdivision developer was no longer necessary. Again, no violations of either the Water Quality Act or the Montana Subdivision and Platting Act were alleged against Copper Ridge and Reflections, the subdivision developers.

Neither the Proposed FOFCOL nor the Order on Summary Judgment articulated where, within the subdivisions, the discharges originated. The origin of the discharge is critical to the violation cited here because, for stormwater discharges associated with construction activity, it is the disturbance caused by the construction that is the regulated point source. ARM 17.30.1102(28).

DEQ has not described, with specificity, the location of the "disturbance" where the discharges originated. However, it is more likely than not, given the following facts, that the disturbances were on individual lots:

- Development began in 2006, but the discharges were not observed until 2013. Order on SJ, p. 14; p. 1, Facts ¶¶ 1 and 2.
- "[T]he eventual goal" of the subdivisions was "the sale of individual lots for residential home construction." Order on SJ, p. 14.
- DEQ terminated Copper Ridge's and Reflections' permit coverage of the developers' construction activities, outside of the individual lots, which did not include "controls for construction activity on residential lots." Proposed FOFCOL, pp. 4-5, Findings of Fact ¶¶ 5-6.
- After the violations were alleged, DEQ required Copper Ridge and Reflections to file corrective SWPPPs and NOIs for "construction of new single-family homes." Order on SJ, p. 3, Facts ¶ 14.

It is unlikely that DEQ would terminate Copper Ridge's and Reflections' permit coverage if it believed that the disturbances were still occurring due to the developer's permitted construction activities outside of the individual lots. It is also unlikely that a developer would delay completing development of its substantial investment and delay its "eventual goal" of selling individual lots for seven years (the time between initiation of the development and the DEQ

inspection). Further, it is expected that DEQ would require permit coverage for the specific construction activity that caused the violation – the "construction of new single-family homes" – for which Copper Ridge and Reflections applied in response to the requirements in DEQ's violation letters. Therefore, it is more likely than not that the sources of the discharges at issue in this enforcement action were *disturbances on individual lots*. DEQ's observed "tracking on streets" does nothing to change this conclusion because it is not clear what "tracking" is or how it qualifies as a "construction activity" specifically tied to a Copper Ridge or Reflections construction project. ARM 17.30.1104(28) ("For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects.").

If the discharges originated from construction projects on the individual lots, as is more likely than not in the case here, then Copper Ridge and Reflections cannot be held liable for those discharges because they are neither the owner nor the operator of the individual lots, nor were they responsible for any construction projects on the individual lots. The Order on Summary Judgment also relied on one contract that is obviously related to the developer's construction activities in accordance with their responsibilities as developers under the Montana Subdivision and Platting Act. Order on SJ, p. 14. Any degree of "supervision and control" that

may be portrayed in that contract is limited to the developer's construction activities outside of the individual lots pursuant to the approved Subdivision Certificate only, and does not apply to homebuilding construction activities on individual lots.

Further, the Hearing Examiner stated that the same contract "put Copper Ridge and Reflections in a position of either control or supervision with regard to the terms of the sale of any individual lot for construction of residential homes," and that Copper Ridge and Reflections "had the power to supervise or control land with regard to storm water discharges" and should have "exercised supervision or control over the contractual terms of the sale of land." Order on SJ, p. 15. No authority is cited for this position and in fact, none can be found.

The Subdivision laws govern the developer's responsibilities with regard to subsequent purchasers and only require that:

> The developer or owner of an approved subdivision shall provide each purchaser of property within the subdivision with a copy of the plat or certificate of survey and the certificate of subdivision approval specifying the approved locations of water supply, storm water drainage, and sewage disposal facilities. Each subsequent seller of property within the subdivision shall include within the instruments of transfer a reference to the conditions of the certificate of subdivision approval. A written verification of notice that is signed by both the seller and the purchaser and is recorded with the county clerk and recorder constitutes conclusive evidence of compliance with this section for that transaction.

§ 76-4-113, MCA. The idea that the developer must somehow "supervise and control" the use of land after it is purchased by someone else defies logic and is inconsistent with the very terms of property ownership. In fact, after the developer sells the lots and provides the information required by § 76-4-113, MCA, the lot owner becomes subject to the requirements of the Subdivision Certificate, including any covenants, conditions or restrictions imposed through the Subdivision Certificate. *See generally*, *Eastgate Village Water and Sewer Assoc. v. Davis*, 2008 MT 141, 343 Mont. 108, 183 P.3d 873. The previous owner of the lot, the developer in this case, no longer has authority over that land.

Nor would it be appropriate for the previous owner (even if the previous owner is the developer) to retain authority over that land for purposes of Water Quality Act or Montana Subdivision and Platting Act requirements. The Legislature specifically vested authority to administer the Water Quality Act in DEQ, not any previous landowner. § 75-5-211, MCA ("Except as otherwise provided, the department [of environmental quality] is responsible for administration of this chapter."). Nothing in the Water Quality Act vests authority in a previous landowner or developer to enforce any Water Quality Act requirements, including stormwater discharge requirements. Further, nothing in the Montana Subdivision and Platting Act gives the developer enforcement authority. § 76-4-108, MCA ("If the reviewing authority has reason to believe that

a violation of this part or a rule adopted or an order issued under this part has occurred, the reviewing authority may have written notice and an order served personally or by certified mail on the alleged violator or the alleged violator's agent."). Copper Ridge and Reflections retained no authority over stormwater discharges from the individual lots.

After complying with the Montana Subdivision and Platting Act, being granted a Subdivision Certificate and relaying the required information to the subsequent landowner, Copper Ridge and Reflections, as the developers, had done everything required of them under the law. Copper Ridge and Reflections, as the developers, have no authority to go beyond those requirements to control stormwater discharges associated with construction activities taking place on land they no longer own. Indeed, to do so would likely constitute trespass and subject Copper Ridge and Reflections to civil liability. *Davis v. Westphal*, 2017 MT. 276, ¶ 15, 389 Mont. 251, 405 P.3d 73 ("Because the legal harm is the interference with another's right to *exclusive possession of property*, an unauthorized tangible presence on the property of another constitutes a trespass regardless of whether the intrusion caused any other harm.") (emphasis added). Although not included as a proposed finding, the Proposed FOFCOL acknowledges testimony presented on this very issue:

> From the above quoted letter and the testimony at the hearing, it is entirely unclear to the undersigned whether or not BMPs [Best

> Management Practices for stormwater control] were in place as of January 2015, were going to be put in place in the spring of 2015, or ever could be put in place based on CR/REF's ownership access.

Proposed FOFCOL, p. 35. Trespass and liability concerns prevent Copper Ridge and Reflections from enforcing any stormwater requirements on land they no longer own.

The Order on Summary Judgment also relies on the fact that Copper Ridge and Reflections signed SWPPPs and NOIs, as *required* by DEQ, *after* the violations were alleged, as proof that Copper Ridge and Reflections were owners or operators. Order on SJ, pp. 2 – 3, ¶¶ 8 – 15. However, Copper Ridge and Reflections submitted (and still maintain) those SWPPPs and NOIs *under protest*. Proposed FOFCOL, p. 26. Surely DEQ cannot mean that documents it requires for compliance, and which are submitted under protest, somehow prove liability for the very violation that is the subject of the enforcement action. Not only is the timing wrong (using a later completed document to prove liability for an earlier violation), but the end result is absurd. If this Board approves this as an acceptable enforcement strategy, then DEQ can merely cite violations as it pleases, *without proof of liability*, in hopes of garnering some documented signature later that would prove liability. The law demands more. *In re Henry Stevenson*, 16 E.A.D. at 158.

None of the facts relied upon in the Order on Summary Judgment support a conclusion that Copper Ridge and Reflections are owners or operators of any individual lots. The preponderance of the evidence cannot, therefore, support any conclusion that Copper Ridge and Reflections discharged stormwater without a permit. At most, DEQ has proven that discharges originated somewhere in the subdivision or in an adjacent upgradient subdivision. Given that the violation at issue here demands that the discharge be tied to some construction activity's "disturbance," and given that there are multiple property owners within and adjacent to each subdivision, DEQ cannot just summarily assign the violation to Copper Ridge and Reflections without affirmatively demonstrating that Copper Ridge and Reflections own the disturbed land where the discharge originated. ARM 17.30.1102(28); § 26-1-402, MCA.

Therefore, given the facts as provided in the Order on Summary Judgment and in the Proposed FOFCOL, the preponderance of the evidence only leads to a conclusion that discharges occurred from construction projects somewhere in the subdivision or in an adjacent upgradient subdivision. There is no evidence, and indeed it is unlikely, that the discharges originated from any of Copper Ridge and Reflections' property. Therefore, Copper Ridge and Reflections cannot be held liable for the discharges.

Similarly, DEQ has failed to prove that Copper Ridge and Reflections "*place[d] or cause[d] to be placed* any wastes where they will cause pollution of any state waters" § 75-5-605(1)(a) (emphasis added). Although the Order on Summary Judgment found that all of the materials observed by DEQ on September 9, 2013 meet "the definition of 'other wastes' contained in Mont. Code Ann. § 75-5-103(24)," what's missing is any proof that Copper Ridge and Reflections "placed or caused" those wastes to be placed. Order, p. 17. The fact that wastes are present in a subdivision is no different than the fact that wastes are present in a municipality, in a parking lot, alongside a county road, on a river bank, or in any other public space. DEQ must do more than identify the developer who established the boundaries of the subdivision in which it finds wastes. The facts presented to this Board are devoid of any proof that Copper Ridge and Reflections handled any wastes, moved any wastes, created any wastes, placed any wastes, or caused any wastes to be placed. To the extent that DEQ seeks to hold Copper Ridge and Reflections responsible for wastes placed by others in conjunction with construction projects on individual lots (which, as explained above is the most likely interpretation of the facts provided), Copper Ridge and Reflections cannot be held responsible for the actions of private landowners over whom they have no control, also as explained above.

If any doubt remains about Copper Ridge's and Reflections' innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.

2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.

3. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed* discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

4. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or

testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

5. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

6. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

7. DEQ acknowledges that sediment has other sources and there is "no way [...] to know where the sediment would have come from." Hearing Transcript, Vol. 1, 158:1 – 14.

8. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed

FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged Violation 2. § 2-4-621(3), MCA.

2. DEQ Failed to Prove that any Wastes Will Cause Pollution.

Violation 3 was alleged against Copper Ridge and Reflections as a violation of § 75-5-601(1), MCA, which makes it unlawful to:

> (a) cause pollution, as defined in 75-5-103, of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters.

§ 75-5-601(1)(a), MCA.

DEQ must prove every element of the violation, including "pollution" which is defined as:

> (i) contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or
>
> (ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

§ 75-5-103(30), MCA.

As noted in the Order on Summary Judgment, DEQ failed to meet its burden:

> … to establish "some form of alteration of state waters 'that exceeds that permitted by Montana water quality standards.'" DEQ has not

> provided any evidence of permitted water quality standards at this time. As a result, DEQ has not established pollution under the first prong of the definition.

Order on SJ, p. 18 (*citing* § 75-5-103(30)(i)). DEQ also failed to meet the second prong of the definition of pollution:

> While DEQ has established the placement of waste, DEQ has not identified the facts to establish or explain how this waste will create a nuisance or otherwise cause the harm required in the definition of 'pollution.'

Order on SJ, p. 18.

Nothing has changed. The Proposed FOFCOL includes no proposed findings or conclusions regarding any "alteration of state waters" let alone any alteration that "exceeds that permitted by Montana water quality standards." § 75-5-103(30)(i), MCA. Nor are there any proposed findings or conclusions regarding a nuisance or harm that meets the definition of pollution.

The Proposed FOFCOL tries to rationalize around the requirement by stating "[w]hen an entity has no permit to discharge storm water, all storm water discharges to a state water that contain waste are necessarily 'exceeding that permitted.' " Proposed FOFCOL, p. 27. But this language omits the operative phrase "... exceeding that permitted by Montana water quality standards" and fails to recognize that a stormwater general permit is not a water quality standard that

has been promulgated by the Board.[3] The Proposed FOFCOL's logic seems to be that because there was no permit, there must have been a discharge that exceeded that permitted by Montana water quality standards. But that is the analysis for whether there was a discharge without a permit, which is the completely separate Violation 2 cited by DEQ. *See* § 75-5-605(2)(c), MCA ("it is unlawful to carry on any of the following activities without a current permit from the department … discharge …other wastes into any state waters.").

Here, the operative analysis is not whether there was a discharge without a permit, but whether the discharge caused an alteration "that exceeds that permitted by Montana Water Quality Standards." § 75-5-103(30), MCA. "Pollution" is an element that must be proven by a preponderance of the evidence in order for DEQ to meet its burden of proving Violation 3. § 26-1-402, MCA.

The Proposed FOFCOL imputes the analysis for a violation of discharge without a permit into the analysis for a violation of placement of wastes. The two are not the same and, contrary to the Proposed FOFCOL's assertion that "numeric standards for the amount of waste are essentially irrelevant," Montana's water quality standards do matter and must guide any analysis of whether or not

[3] The Board is tasked by the Legislature to "formulate and adopt standards of water quality" and has promulgated "[s]pecific surface water quality standards, along with general provisions … [that] protect the beneficial water uses." (§ 75-5-301(2), MCA.) ARM 17.30.620. None of the proposed findings or conclusions identify which water quality standard is alleged to have been exceeded such that the placement of wastes actually caused or would have caused pollution.

"pollution" was or would be caused by the placement of waste. §§ 75-5-605(1)(a); 75-5-103(30), MCA. The statute requires, as noted in the Order on Summary Judgment, that DEQ prove that the placement of wastes would cause "pollution." Without such proof, DEQ fails to meet its burden of proving the violation. Because there is no finding of fact that any placement of waste caused any "alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards," DEQ has not met the burden of proving that the first prong of pollution was met.

Regarding the second prong of pollution, which "requires DEQ to establish that a substance has entered state water that will either create a nuisance or 'render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife,' " again, there are no findings or conclusions in the Proposed FOFCOL establishing that a nuisance was or could have been created or that the waters were or could have been rendered harmful, detrimental or injurious to any use. Order on SJ, p. 18.

In fact, the Proposed FOFCOL notes that there was no evidence on the "volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit." Proposed FOFCOL, p. 25. That evidentiary void means that DEQ has failed to meet its burden of proving "pollution;" therefore, Copper Ridge and Reflections cannot be found to have

"place[d] or cause[d] to be placed wastes where they would cause pollution." § 75-5-605(1)(a). Violation 3 cannot stand.

The analysis provided to the Board simply equates a violation for discharging without a permit to a violation of placement of wastes where they will cause pollution. Practically speaking, if that rationale stands, then every unpermitted discharge could be charged as both an unpermitted discharge under § 75-5-605(2)(c) and as a placement of wastes where they will cause pollution under § 75-5-605(1)(a). Not only does that prejudice the regulated public by alleviating DEQ of the burden of proving an element of the violation (pollution), it also leads to an unjust result because it exposes the regulated public to duplicative, costly violations.

If any doubt remains about Copper Ridge's and Reflections' innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

2. DEQ acknowledges that sediment has other sources and there is "no way [...] to know where the sediment would have come from." Hearing Transcript, Vol. 1, 158:1 – 14.

3. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

4. DEQ did not observe or take water quality measurements of Cove Ditch and has no evidence of alterations of the water's turbidity, taste or color. Nor does DEQ have any evidence of floating debris. Hearing Transcript, Vol. 1, 175:3 – 176:4; 200:21 – 24.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged Violation 3. § 2-4-621(3), MCA.

3. DEQ has Failed to Prove Any Subsequent Days of Violation.

The sole basis for concluding that there were eight days of violation for both Violation 2 and Violation 3 is "NOAA data [that] shows eight days between September 23, 2013 and December 23, 2013 when there were precipitation events greater than 0.25 inches." Proposed FOFCOL, p. 12, ¶ 38; p. 24; p. 42, ¶ 19; pp. 43-44, ¶ 27. Nothing in the statute allows DEQ to allege violations based on precipitation events. For Violation 2, the statute is clear – it is "unlawful to …discharge … wastes into any state waters." § 75-5-605(2)(c), MCA. The statute affirmatively requires that a discharge occur in order for there to be a violation. Charging days of violations based on precipitation events rather than actual discharges is unlawful.

For the same reasons, the daily penalties for Violation 3 are wrong. The statute at issue in Violation 3 requires that the placement of wastes "will cause pollution of any state waters." § 75-5-605(1)(a), MCA. Nothing in the precipitation records demonstrates that pollution will be caused. In fact, the precipitation records do not consider the terrain, the proximity to state waters, the exact location of the precipitation, or the duration and intensity of the precipitation. All of those factors, and more, need to be considered before any logical conclusion can be reached as to when a placement of wastes "*will* cause pollution of state waters."

If DEQ is allowed to penalize the regulated public based on weather data, how can the regulated public be expected to comply with the law? The regulated public (and likely no one) can accurately forecast the weather. Weather cannot be an element of a violation. In fact, the elements of the violations are clearly spelled out in statute and do not include weather. They include affirmative "discharges" and placement of wastes that "will cause pollution" – neither of which can be proven by looking at a precipitation record. DEQ cannot ignore the statutory elements of the violations, cannot insert different elements into the statutes, and cannot "conform [the statute] to what may be a prevailing practice actually at odds with what the [statutes] clearly and unambiguously require." *Busch v. Atkinson*, 278 Mont. 478, 483, 925 P.2d 874, 877 (1996); § 1-2-101, MCA.

There is no evidence of a discharge or a placement of wastes that will cause pollution on any of the eight days cited for either Violation 2 or Violation 3. As a matter of law, the daily penalties for these violations cannot stand. Because DEQ has relied on an unlawful method of alleging violations, the Proposed Conclusions of Law No. 19 and No. 27 must be modified to reflect, at most, one day of violation.

Further, because the time period in which those eight days occur (September 23, 2013 and December 23, 2013) is the "timeframe acceptable to DEQ" in which Copper Ridge and Reflections were allowed to complete the

required compliance tasks, DEQ cannot now seek penalties for noncompliance during that timeframe. Proposed FOFCOL, p. 8, ¶¶ 20, 21; § 75-5-617(2), MCA ("*If the person fails* to respond to the conditions in the department's letter, then the department shall take further action."). Here, all parties agree that Copper Ridge and Reflections responded appropriately "to the conditions in the departments letters;" therefore, no further enforcement action, including assessment of penalties, may be taken and certainly no penalties may be assessed during the timeframe DEQ provided Copper Ridge and Reflections to complete the compliance tasks.

If any doubt remains about Copper Ridge's and Reflection's innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed*

discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

2. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

3. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

4. When calculating the penalties, DEQ calculated the number days based only on weather data collected in 24-hour increments. Any 24-hour period when a quarter-inch or more of rain was measured by the weather station was considered a day of violation regardless of whether or not a discharge actually occurred. Hearing Transcript, Vol. 1, 224:13 – 25, 256:23 – 257:25.

5. When calculating the penalties, DEQ calculated the number days without considering that no placement of waste or discharges were observed on any day before or after September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

6. DEQ acknowledges that sediment has other sources and there is "no way [...] to know where the sediment would have come from." Hearing Transcript, Vol. 1, 158:1 – 14.

7. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged daily violations. § 2-4-621(3), MCA.

4. DEQ Failed to Prove that Violations 2 and 3 Occurred at <u>Each</u> Subdivision.

DEQ maintains that Copper Ridge and Reflections are two separate subdivisions. Proposed FOFCOL, p. 3, ¶ 1. It is physically and legally impossible for the subdivisions to overlap each other. They occupy separate and distinct portions of land and are owned by separate and distinct corporations. Therefore, each violation must be separately established for each subdivision. But DEQ conducted one site inspection and documented alleged violations of stormwater discharging from one combined "construction activity." Without distinguishing

between the two subdivisions, DEQ issued one violation letter, based on the fact that the subdivisions were "part of a larger common plan of development" (i.e.: one construction activity) such that "one violation letter was adequate to address the violations." Proposed FOFCOL, p. 7, ¶ 17; p. 5, ¶ 7 (*citing* ARM 17.30.1102(28)).

The phrase "part of a larger common plan of development" is not defined in the rules; rather, it is used to define the term "construction activity" as used in the basis for the alleged violations - "storm water discharge associated with construction activity." DEQ's initial citation alleged that the "construction activity" in this case is the "larger common plan of development," or both subdivisions together. ARM 17.30.1102(28) ("Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more."). It is the "storm water discharge associated with [the larger common plan of development – i.e.: both subdivisions combined as one construction activity]" that DEQ alleged constituted the violation. Because DEQ cited the violations as occurring due to one combined construction activity, at most only one penalty may be assessed.

Nothing in the proposed findings distinguishes the violations as between the two separate subdivisions. *See* Proposed FOFCOL, p. 6, ¶¶ 12, 13; p. 9, ¶ 26.

After the initial Violation Letter, DEQ provided only a statement, with no supporting facts or analysis, that the violations were distinguishable. Proposed FOFCOL, p. 8, ¶ 19. Indeed, the facts alleged to constitute the violations were never separated or identified by subdivision. *See* Proposed FOFCOL, p. 6, ¶¶ 12, 13; p. 9, ¶ 26. For the penalty calculations, each of the three violations is analyzed without regard for, and even without reference to, the separate subdivisions. But then the assessment is just summarily multiplied by two and charged against both subdivisions. Proposed FOFCOL, pp. 22-38; p. 41, ¶ 13; pp. 42-43, ¶ 21; p. 44; ¶ 29.

DEQ cannot have it both ways. They cannot investigate, document, and send a notice letter for just one set of violations when it is convenient for them and then, without explanation and without separating the facts and tying each fact to a specific allegation against a specific subdivision, just double everything, including the penalties. Because DEQ initiated this action with one set of facts alleging violations against one "common plan of development" and because DEQ has never distinguished the facts as they apply to each subdivision, DEQ may not simply double every penalty for every violation. If any penalty is assessed, it should only be a single penalty amount of each violation. The Proposed Conclusions of Law Nos. 13, 21, 29, and 36 must be revised to reflect, at most, a singular penalty.

If any doubt remains about Copper Ridge's and Reflection's innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. On November 8, 2013, DEQ issued a "617 Letter of Violation – Clarification" to Copper Ridge Development Corporation. Although the letter indicated that DEQ intended to pursue separate formal enforcement actions against each subdivision, neither that letter nor the September 23, 2013 letter was addressed to REF, the owner of the Reflections at Copper Ridge subdivision. The November 8, 2013 letter provided the same information, cited the same violations, and required the same compliance and corrective actions as did the September 23, 2013 letter, but moved the compliance deadline to December 15, 2013. Ex. 17; The Parties' Joint Stipulated Facts, ¶ 9.

2. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed*

discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

3. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

4. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged violations. § 2-4-621(3), MCA.

C. Even if the Violations Stand, the Penalty Assessments are Wrong.

The notice requirements and statutorily-required penalty factors dictate that, based on the findings and conclusions in the Proposed FOFCOL, no penalties can be assessed for any of the violations.

1. Section 75-5-617(2) and ARM 17.30.2003(5) Preclude Assessment of Penalties in this Case.

As described in the Proposed FOFCOL, there is "discomfort regarding DEQ's correspondence and ARM 17.30.2003" which "created substantial, justifiable confusion." Proposed FOFCOL, p. 21, fn 4.

> [A]ny recipient could have construed the letters as intended to be "notice letters" within the meaning of subsection (2) [of ARM 17.30.2003]. There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence, as contemplated by subsection (5) [of ARM 17.30.2003]. CR/REF's frustration is understandable – it responded to and complied with all of DEQ's demands in the correspondence, only to receive an AO three months later. … It does not seem fair that DEQ should, in effect, be rewarded for its own failures to write (what it intended to be) a "notice letter."

Id.

It is clear that, had the Proposed FOFCOL concluded that ARM 17.30.2003(5) applied, it would preclude DEQ from seeking penalties for the remaining violations. Both § 75-5-617 and ARM 17.30.2003(5) **do** apply to this case and preclude DEQ from seeking penalties for the remaining violations.

There are two types of notices – notice under § 75-5-611 and notice under § 75-5-617. As explained in the Order on Summary Judgment, § 75-5-617 "provides that whenever DEQ finds a person in violation … the department shall initiate an enforcement response" and that "enforcement response includes administrative or judicial penalties under Mont. Code Ann. § 75-5-611," which has

separate, additional notice provisions. Order on SJ, p. 6 (*citing* § 75-5-617(1)(d), MCA). In effect, § 75-5-617 authorizes an enforcement response and § 75-5-611 explains that enforcement response. Compliance with § 75-5-611 does not absolve DEQ of the requirements of § 75-5-617. In fact, DEQ must comply with § 75-5-617 before proceeding to § 75-5-611.

Also as correctly noted in the Order on Summary Judgment, § 75-5-617 requires that DEQ may only proceed to one of the allowable enforcement responses if it satisfies specific notice requirements **and** "[i]f the person fails to respond to the conditions in the department's letter." Order on SJ, p. 6 (*citing* § 75-5-617(2), MCA); *see also* ARM 17.30.2003(5).

"There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence." Copper Ridge and Reflections did "respond to the conditions in the department's letter;" therefore, "DEQ may not bring an administrative proceeding for penalties." Proposed FOFCOL, p. 8, ¶ 20; p. 10, ¶ 29; Order on SJ, p. 6 (*citing* § 75-5-617(2), MCA).

The Proposed FOFCOL alleges that Copper Ridge and Reflections cannot "assert <u>both</u> that *none* of DEQ's correspondence constituted a 'notice letter' … <u>and</u> that CR/REF adequately responded to *all* the 'notice letters.' " Proposed FOFCOL, p. 21, fn. 4 (emphasis in original). But keep in mind that there are two statutes governing different types of notice - §§ 75-5-611 and 75-5-617. Copper

Ridge and Reflections proposed that "[b]oth the September 23, 2013 and the November 8, 2013 letters were issued pursuant to § 75-5-617 and the rules promulgated pursuant to that statute." Copper Ridge and Reflections' Proposed FOFCOL, p. 4, FOF ¶ 4; p. 13, COL ¶ 1. Copper Ridge and Reflections do not argue that none of the notice provisions were met, only that, as agreed in the Order on Summary Judgment, the notice provisions of § 75-5-611 were not met.

DEQ's notices constituted notice letters under § 75-5-617 and ARM 17.30.2003(1), and Copper Ridge and Reflections adequately responded to those notice letters. Proposed FOCOL, p. 8, ¶ 20; p. 10, ¶29. Therefore, § 75-5-617(2) and ARM 17-30-2003(5) prohibit DEQ from seeking administrative penalties for those violations. Section 75-5-611 was never invoked in this case and DEQ had no authority to issue any Administrative Compliance and Penalty Order.

Because the previous Hearing Examiner concluded that the provisions of § 75-5-617(2) apply and because all parties agree that "Copper Ridge and Reflections at Copper Ridge each took the corrective action identified in the [notice letters]," no administrative penalties may be sought in this case. § 75-5-617(2), MCA; ARM 17.30.2003(5). Proposed Conclusions of Law Nos. 13, 21, 29, and 36 are void and the remaining Proposed Conclusion of Law regarding penalties, including Nos. 7 through 10, 14 through 19, 22 through 27, and 30 through 35, are unnecessary.

2. Additionally, ARM 17.30.2003(7) Precludes Assessment of Penalties for Violations 3 and 4.

DEQ is only allowed to pursue an administrative penalty for violations that are either "(i) a class I violation as described in ARM 17.30.2001(1); or (ii) a violation of major extent and gravity as described in ARM 17.4.303." Order on SJ, pp. 11-12 (*citing* ARM 17.30.2003(7)).

The previous Order on Summary Judgment did not rule that Violation 3 was a Class I violation. Order on SJ, pp. 12-13. Indeed, it cannot be a Class I violation because ARM 17.30.2001(2)(c) which clearly classes "placement of wastes in a location that will cause pollution of state waters" as a *Class II* violation. Further, because the current Proposed FOFCOL concludes that a proper analysis of Violation 3 reveals that it is only of "minor extent," Violation 3 does not meet the 17.30.2003(7) criteria for assessing a penalty without proper notice under § 75-5-611. Proposed FOFCOL, p. 30. The Order on Summary Judgment held, and the Proposed FOFCOL has not disturbed the holding, that there was no adequate notice under § 75-5-611. Because there was insufficient notice under § 75-5-611 and because Violation 3 no longer meets the criteria of ARM 17.30.2003(7), a penalty may not be assessed. This is another reason why the Proposed Conclusion of Law No. 21 is void and Proposed Conclusion of Law Nos. 22 through 27 are unnecessary.

Violation 4 was characterized in the Order on Summary Judgment as a "viola[tion] [of] a permit compliance plan or schedule" which meets the criteria for a Class I violation. Order on SJ, p. 13; Admin. R. Mont. 17.30.2001(1)(d). However, as testimony from DEQ revealed, Violation 4 never alleged a violation of a permit compliance plan or schedule. Proposed FOFCOL, p. 10, ¶ 31. Therefore, the sole basis for asserting that Violation 4 was a Class I violation was erroneous.

Because violation 4 is no longer a Class I violation and because the Proposed FOFCOL finds that it is not of major extent and gravity, it no longer meets the criteria in ARM 17.30.2003(7) for assessment of a penalty without the proper notice under § 75-5-611. The Order on Summary Judgment held, and the Proposed FOFCOL has not disturbed the holding, that there was no adequate notice under § 75-5-611. Because there was insufficient notice under § 75-5-611 and because Violation 4 no longer meets the criteria of ARM 17.30.2003(7) a penalty may not be assessed.

3. Other Matters as Justice May Require Dictate that the Penalties for Violations 2 and 3 be Reduced to Zero.

When determining an appropriate penalty amount, DEQ "*shall* take into account … other matters that justice may require." § 75-1-1001(1)(g) (emphasis added). However, the Proposed FOFCOL only mentions this required penalty factor in terms of calculating the number of days of violation, which is a separate

penalty consideration pursuant to ARM 17.4.305. Proposed FOFCOL, pp. 42, 44, ¶¶ 19, 27. Because the Proposed FOFCOL fails to consider "other matters that justice may require," as it must under the statute, "the proceeding on which the findings were based did not comply with the essential requirements of law." § 2-4-621(3).

The Proposed FOFCOL fails to make any findings with respect to "other matters that justice may require." The Proposed FOFCOL doesn't even offer a finding that there are *no* "other matters that justice may require." Even if it had, that finding would not be supported by "competent substantial evidence" in light of the following evidence to the contrary:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.

2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.

3. Although DEQ was aware of potential issues at the Subdivisions and other subdivisions in that area as early as March 2013, an inspection was not performed until September 2013, after a sudden and disastrous storm, in order to "catch" Copper Ridge and Reflections. Enforcement of unpermitted construction activity, without a potential discharge to state waters, is not a priority and DEQ

prefers enforcement during a storm event when a discharge is likely and will provide a "stronger case." Hearing Transcript, Vol. 1, 50:25 – 51:6; 191:4 – 193:17; 200:25 – 201:15; 142:24 – 143:6; 49:16 – 50:6; Ex. 14.

4. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

5. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not know and did not consider the lack of control that Copper Ridge and Reflections had over the homebuilding construction activities within the Subdivisions or the lack of control that Copper Ridge and Reflections had over the private property owners in the Subdivisions. Hearing Transcript, Vol. 1, 251:17 – 252:12; Vol. 2, 73:12 – 20, 80:3 – 81:18; Vol. 2, 90:1 – 15, 110:1 – 12.

6. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider that the occurrence and magnitude of the September 2013 storm was not foreseeable. Exs. 9, 10. "The burst of rain happened so quickly". Within 45 minutes "an unofficial total of 2.10 inches fell just west of [Billings]" causing flash flooding. "Saturday's total was five times the total month-to-date rainfall average." Ex. 14, pp. 2-3.

7. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider the stormwater design of the Subdivisions, or that Copper Ridge and Reflections had hired professional outside consultants to ensure compliance and had required contractors to obtain discharge permits and employ BMPs. Hearing Transcript, Vol. 1, 253:5 -22; Vol. 2, 8 – 16, 103:23 – 104:23; Exs. 9, 10, G.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are "not based upon substantial competent evidence" and that no "reasonable mind" could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections. § 2-3-261(3), MCA.

Even using the proposed findings as presented, the penalties cannot stand. Even though the City of Billings specifically requested that DEQ address storm water compliance issues at Copper Ridge and even though DEQ told the City of Billings that Copper Ridge did not have permit coverage for the storm water discharges, DEQ delayed for nearly six months, and purposely waited until after a "significant storm event" had resulted in alleged discharges to complete an inspection. Proposed FOFCOL, p. 4, ¶ 4; pp. 5-6, ¶¶ 8-11. DEQ also knew that Copper Ridge had previously obtained storm water permit coverage. *Id.*, pp. 4-5, ¶

5. In fact, DEQ had terminated that coverage without noting any violations. *Id.*, p. 5, ¶ 6; p. 22. So DEQ had no reason to think that Copper Ridge and Reflections were unwilling or unable to obtain permit coverage if they had been asked to do so prior to the September 2013 storm. It is not fair to penalize Copper Ridge and Reflections for discharges that could have been avoided if DEQ had responded appropriately and timely to the City's concerns.

It also is not fair for DEQ to wait for six months, until a "significant storm event" that was sure to cause problems occurred before conducting the inspection and requesting that Copper Ridge and Reflections obtain permit coverage. DEQ could have easily contacted Copper Ridge and Reflections immediately after the City first asked them to do so in March 2013 but chose not to. There is no reason to believe that, had DEQ notified Copper Ridge and Reflections of the need for a permit in March of 2013, as first requested by the City of Billings, that Copper Ridge and Reflections would not have had appropriate permit coverage in place six months later when the "significant storm event" occurred. Copper Ridge and Reflections' previous successful permit coverage and their timely permit submission in response to DEQ's requests suggests that it is more likely than not that Copper Ridge and Reflections would have promptly responded to DEQ's request for a permit application, had such a request been timely made.

Instead, DEQ waited until a discharge was certain, and then inspected the subdivision. For all its posturing about the importance of protecting state waters, DEQ itself failed to protect state waters by failing to timely respond to the City's call for an inspection and by specifically waiting until *after* a "significant storm event" to inform the regulated public of the need for a permit. As the Proposed FOFCOL acknowledges:

> CR/REF at least had a non-frivolous, good faith legal basis to believe that they were not owner/operators requiring permit coverage. Based on the circumstances here, it is not fair [i]n this instance to charge CR/REF with violations for discharges without a permit before DEQ told them affirmatively that they needed to have permit coverage.

Proposed FOFCOL, p. 24.

Those circumstances are significant enough to be documented in the Proposed FOFCOL, yet they were not considered in terms of the penalty calculation. Proposed FOFCOL, p. 4, ¶ 4; pp. 5-6, ¶¶ 6-11; p. 22. The Proposed FOFCOL notes, at its very opening:

> DEQ's performance – including its inspections, record-keeping, notices communication, enforcement decisions, follow up, and the evidence, testimony, and explanations provided at hearing – were difficult to understand and in some instances inadequate.

Proposed FOFCOL, p. 3. Those documented issues are "other matters as justice may require" and demand that the penalty for Violations 2 and 3 be reduced down to zero. The regulated public should not pay the price for DEQ's delay and

inaction in the face of a potential discharge to state waters. The Proposed Conclusions of Law ¶¶ 13 and 21 must be modified to reflect zero penalty.

4. All of the Penalties Should be Reduced for Good Faith and Cooperation.

The Proposed FOFCOL asserts that Copper Ridge and Reflections "could have sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage [i.e.: before the September 9, 2013 inspection that noted a violation] and done more to get the permit faster after learning DEQ felt it was needed." Apparently, those are reasons why no decrease of the base penalty is warranted for good faith and cooperation pursuant to Admin. R. Mont. 17.4.304(3). But the Proposed FOFCOL refers to none of the good faith and cooperation criteria that must be included in DEQ's consideration of this penalty factor:

> (a) the violator's promptness in reporting and correcting the violation, and in mitigating the impacts of the violation;
> (b) the extent of the violator's voluntary and full disclosure of the facts related to the violation; and
> (c) the extent of the violator's assistance in the department's investigation and analysis of the violation.

ARM 17.4.304(3).

All of those criteria are forward looking, *after* the violation has occurred. Therefore, it is improper to discount the good faith and cooperation of Copper Ridge and Reflections based on what they did or did not do *before* the violation was issued. Indeed, the assertion that Copper Ridge and Reflections "could have

sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage" contradicts an earlier statement that "it is clear that CR/REF at least had a non-frivolous, good faith legal basis to believe that that they were not owner/operators requiring permit coverage" at least until "DEQ told CR/REF on September 23, 2013 that they needed permit coverage." Proposed FOCOL, p. 24. Because the rule requires consideration of actions that occur *after* the violation has been alleged, not before, and because the Proposed FOFCOL acknowledges that prior to DEQ alleging a violation against Copper Ridge and Reflections, that Copper Ridge and Reflections had good reason to believe that they did not require permit coverage, the assertion that no discount should be given for good faith and cooperation should be voided.

Further, there is no evidence anywhere in the record that Copper Ridge and Reflections "could have sought guidance from DEQ sooner" or that they could have done anything "more to get the permit faster," as asserted in the Proposed FOFCOL. These phrases, which are relied upon for the mistaken premise that Copper Ridge and Reflections did not act in good faith and did not cooperate, are not actual proposed findings; therefore, the Board cannot be certain that they are based on "competent substantial evidence" and cannot rely upon them for any conclusion.

DEQ "*shall* take into account …the [alleged] violator's good faith and cooperation." § 75-1-1001, MCA. From the Findings of Fact that are proposed, it is clear that:

- Copper Ridge and Reflections had appropriate permit coverage for all of *their* work, as the developers of the subdivision, including "construction of water, sanitary sewer, and storm drainage utilities, and street and sidewalk improvements." Proposed FOFCOL, pp. 4 – 5, ¶ 5.
- DEQ terminated that coverage without notifying Copper Ridge and Reflections. Proposed FOFCOL, p. 5, ¶ 6.
- "Within a timeframe acceptable to DEQ, Copper Ridge and Reflections at Copper Ridge each took the corrective actions" required in each of the violation letters received from DEQ. Proposed FOFCOL, pp. 8, 10, ¶¶ 20, 29.

In fact, the permitting process included *legitimate* (as acknowledged in the Proposed FOFCOL, p. 24) confusion and necessary clarification regarding ownership and permitting needs. Also, the permitting process took place in the winter, when discharges were unlikely and installation of BMPs was hampered by weather. Even so, Copper Ridge and Reflections were able to come into compliance by December 23, 2013 – just three months after DEQ's violation letter

was sent to them. Nothing in the evidence indicates that this timeframe was unreasonable or that Copper Ridge and Reflections could have done anything "more to get the permit faster." The blatant failure to consider any good faith and cooperation proves that the base penalty was not properly adjusted.

Indeed, the record shows a consistent on-going dialogue between the parties, with Copper Ridge and Reflections taking the appropriate corrective actions "[w]ithin a timeframe acceptable to DEQ." Proposed FOCOL, p. 8, ¶ 20; p. 10, ¶ 29. Further, the record shows that Copper Ridge and Reflections had made "an effort to control runoff" including installation of "a berm around the site and sand bags" as well as "straw bales on the perimeter." Proposed FOCOL, p. 9, ¶ 24. Because the conclusion that no adjustment was warranted for "good faith and cooperation" was not based on any facts and is contradicted even within the Proposed FOFCOL, the proposed conclusions regarding the penalties should be modified to include a 10-percent reduction, in consideration of Copper Ridge and Reflections' good faith and cooperation.

5. All of the Penalties Should be Reduced in Consideration of Amounts Voluntarily Expended.

The Proposed FOFCOL asserts that "there was no evidence of amounts CR/REF expended beyond what was required to come into compliance." Proposed FOFCOL, p. 22. This was not, but likely should have been, a proposed finding because without such a finding, this Board cannot appropriately determine, as they

must, whether there was an "amount voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation." § 75-1-1001, MCA (requiring that DEQ "shall take into account the following factors…").

Considering the Proposed FOFCOL's statement above ("no evidence of amounts CR/REF expended beyond what was required to come into compliance") as a proposed finding, this Board can easily determine that it is not supported by "competent substantial evidence." § 2-4-621(3), MCA. The only citation provided in the Proposed FOFCOL is to DEQ's recitation of the penalty factors, not to any relevant facts of this case. The record is clear:

> When calculating the penalties, DEQ did not consider amounts voluntarily expended by Copper Ridge and Reflections to hire professional outside consultants for permit compliance and administration. Landy Leep testified that Copper Ridge and Reflections hired a professional consultant and have paid at least $18,000 for "storm water management erosion control."

Hearing Transcript, Vol. 1, 258:11 –16; Vol. 2, 8 – 16; Vol. 2, 72:8 – 16; 113:18 – 114:4; Exs. 9, 10, G.

What the agency failed to acknowledge is that Copper Ridge and Reflections did not have to hire a professional consultant, they could have done the work internally. They could have had someone less qualified, and less expensive, do the work. Instead, they hired a professional consultant to ensure that the work was done correctly and completely. Hiring an independent third-party professional

gives the agency some assurances and confidence that the regulated entity will come into compliance. Therefore, it is wholly appropriate for DEQ to acknowledge this extra effort and expense. There is no requirement that exact amounts be expended in order to qualify for consideration of the 10-percent decrease in the base penalty allowed by Admin. R. Mont. 17.4.304(4).

Here, the agency didn't even consider the evidence in front of them – that Copper Ridge and Reflections hired a professional consultant to prepare the permit package and ensure compliance. The Proposed FOFCOL fails to acknowledge that the NOIs and SWPPPs were submitted by Mr. Marshall Phil, P.E., Senior Engineer with Blue Line Engineering. Proposed FOFCOL, p. 21. Nothing in the rules or statutes requires Copper Ridge and Reflections to hire a professional consultant. The fact that Copper Ridge and Reflections hired Blue Line Engineering, qualifies as "amounts voluntarily expended" to be considered under the rule.

Because the Proposed FOFCOL's conclusion regarding a required penalty factor is not based on any fact that is supported by competent substantial evidence, the conclusion regarding the penalty must be modified. § 2-4-621(3), MCA.

D. The Findings Presented to the Board are not Based on "Competent Substantial Evidence."

The proposed findings are missing several key facts that illustrate the egregiousness of DEQ's behavior in this case and are essential to reaching the proper decision. Although this problem is alluded to in the Introduction to the

Proposed FOFCOL, the following facts are not, but should be, included in any Order issued by this Board:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.

2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.

3. On November 8, 2013, DEQ issued a "617 Letter of Violation – Clarification" to Copper Ridge Development Corporation. Although the letter indicated that DEQ intended to pursue separate formal enforcement actions against each subdivision, neither that letter nor the September 23, 2013 letter was addressed to REF, the owner of the Reflections at Copper Ridge subdivision. The November 8, 2013 letter provided the same information, cited the same violations, and required the same compliance and corrective actions as did the September 23, 2013 letter, but moved the compliance deadline to December 15, 2013. Ex. 17; The Parties' Joint Stipulated Facts, ¶ 9.

4. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed* discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

5. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

6. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

7. Although DEQ was aware of potential issues at the Subdivisions and other subdivisions in that area as early as March 2013, an inspection was not performed until September 2013, after a sudden and disastrous storm, in order to "catch" Copper Ridge and Reflections. Enforcement of unpermitted construction activity, without a potential discharge to state waters, is not a priority and DEQ prefers enforcement during a storm event when a discharge is likely and will provide a "stronger case." Hearing Transcript, Vol. 1, 50:25 – 51:6; 191:4 – 193:17; 200:25 – 201:15; 142:24 – 143:6; 49:16 – 50:6; Ex. 14.

8. When calculating the penalties, DEQ did not consider that the alleged discharge occurred only during a significant storm event that also overwhelmed developed areas outside the Subdivisions with sediment, or that the alleged discharges were to an irrigation ditch that naturally carries high levels of sediment.

Exs. 9, 10, 14; Hearing Transcript, Vol. 1, 143:19 – 23, 146:14 – 147:2, 242:12 – 243:6; Vol. 2, 92:5 – 11.

9. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

10. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not know and did not consider the lack of control that Copper Ridge and Reflections had over the homebuilding construction activities within the Subdivisions or the lack of control that Copper Ridge and Reflections had over the private property owners in the Subdivisions. Hearing Transcript, Vol. 1, 251:17 – 252:12; Vol. 2, 73:12 – 20, 80:3 – 81:18; Vol. 2, 90:1 – 15, 110:1 – 12.

11. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider that the occurrence and magnitude of the September 2013 storm was not foreseeable. Exs. 9, 10. "The burst of rain happened so quickly". Within 45 minutes "an unofficial total of 2.10 inches fell just west of [Billings]" causing flash flooding. "Saturday's total was five times the total month-to-date rainfall average." Ex. 14, pp. 2-3.

12. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider the stormwater design of

the Subdivisions, or that Copper Ridge and Reflections had hired professional outside consultants to ensure compliance and had required contractors to obtain discharge permits and employ BMPs. Hearing Transcript, Vol. 1, 253:5 -22; Vol. 2, 8 – 16, 103:23 – 104:23; Exs. 9, 10, G.

13. When calculating the penalties, DEQ did not consider amounts voluntarily expended by Copper Ridge and Reflections to hire professional outside consultants for permit compliance and administration. Landy Leep testified that Copper Ridge and Reflections hired a professional consultant and have paid at least $18,000 for "storm water management erosion control." Hearing Transcript, Vol. 1, 258:11 –16; Vol. 2, 8 – 16; Vol. 2, 72:8 – 16; 113:18 – 114:4; Exs. 9, 10, G.

14. When calculating the penalties, DEQ calculated the number days based only on weather data collected in 24-hour increments. Any 24-hour period when a quarter-inch or more of rain was measured by the weather station was considered a day of violation regardless of whether or not a discharge actually occurred. Hearing Transcript, Vol. 1, 224:13 – 25, 256:23 – 257:25.

15. When calculating the penalties, DEQ calculated the number days without considering that no placement of waste or discharges were observed on any day before or after September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

16. DEQ acknowledges that sediment has other sources and there is "no way [...] to know where the sediment would have come from." Hearing Transcript, Vol. 1, 158:1 – 14.

17. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

18. DEQ did not observe or take water quality measurements of Cove Ditch and has no evidence of alterations of the water's turbidity, taste or color. Nor does DEQ have any evidence of floating debris. Hearing Transcript, Vol. 1, 175:3 – 176:4; 200:21 – 24.

19. After submitting the required NOIs and SWPPPs and completing the required corrective action, Copper Ridge and Reflections asked for verification that they were no longer in violation. DEQ responded that it did not know. DEQ asserted only that violations would be assessed at a future compliance evaluation inspection. Hearing Transcript, Vol. 1, 186:8 – 187:12; Ex. U.

20. DEQ then found and cited violations for deficiencies in the NOIs and SWPPPs, including documentation failures that could have been spotted and addressed if DEQ had provided the assistance Copper Ridge and Reflections requested earlier. The deficiencies included failure to document inspections, failure to have signed SWPPPs available, and failure to maintain SWPPPs that

describe the construction activity, implementation schedule, and relationship between phases of construction and BMPs. Hearing Transcript, Vol. 1, 100:11 – 104:11; Ex. 7.

21. DEQ acknowledged that SWPPPs for each of the Subdivisions were "signed and certified by Landy Leep" and were received at the Department on December 23, 2013. Nonetheless, DEQ cited Copper Ridge and Reflections for "[f]ailure to retain and make available [...]" the latest signed SWPPPs and have assessed penalties for that alleged violation. Hearing Transcript, Vol. 1, 94:1 – 9, 95:9 – 15, 97:21 – 98:2; Vol. 2, 43:6 – 25; Exs. 3, 4, 5, 9, 10.

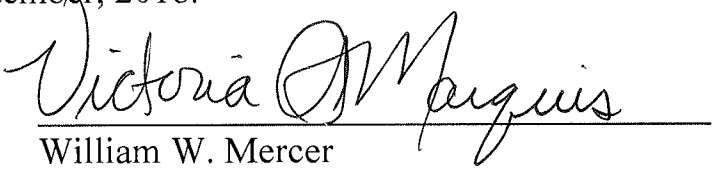
22. None of the permit violations alleged in Violation 4 posed a threat to human health or to the environment and the majority of issues noted are "paperwork issue[s]." Yet, DEQ characterized the nature of the violations as having the potential to harm human health and the environment. Hearing Transcript, Vol. 1, 264:20 – 22, 266:3 – 17; Exs. 9, 10.

A review of the record will reveal that the above findings contradict and provide important context for this contested case. Without the above facts, the Proposed FOFCOL cannot be said to be "based on competent substantial evidence." Therefore, the Proposed FOFCOL should be modified to include the above findings.

V. CONCLUSION

DEQ has failed to carry its burden of proof in this enforcement action. The proposed findings do not support the alleged violations or the assessed penalties. There simply is no proof that Copper Ridge and Reflections discharged anything, that they placed wastes or that even if they did place wastes, that those wastes caused or would cause pollution. DEQ must prove every element of every violation in accordance with the Water Quality Act. They have failed to prove that Copper Ridge and Reflections did anything wrong, have failed to prove that discharges occurred, that any pollution occurred or was even possible, and that any of the multiple days of violation alleged actually occurred. Further, DEQ failed to comply with statutory notice provisions and failed to consider statutorily required penalty factors. Therefore, this Board should modify the Proposed FOFCOL and void DEQ's Administrative Compliance and Penalty Order in its entirety.

DATED this 17th day of September, 2018.



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ATTORNEYS FOR REFLECTIONS AT COPPER RIDGE, LLC AND COPPER RIDGE DEVELOPMENT CORP.

CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following persons by e-mail and United States mail, postage prepaid on the date herein.

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DATED this 17th day of September, 2018.

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA; AND BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376 AND MTR105377) (FID 2288 AND 2289) [DOCKET NO. WQ-15-07 AND WQ-15-08].	Case Nos. BER 2015-01 WQ BER 2015-02 WQ

DEQ'S RESPONSE TO EXCEPTIONS TO HEARING EXAMINER'S ORDER ON SUMMARY JUDGMENT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY COPPER RIDGE DEVELOPMENT CORPORATION AND REFLECTIONS AT COPPER RIDGE, LLC

The Montana Department of Environmental Quality ("DEQ"), by and through undersigned counsel, hereby responds to Reflections at Copper Ridge, LLC ("REF") and Copper Ridge Development Corporation ("CR") Exceptions to Hearing Examiner's Order on Summary Judgment and Proposed Findings of Fact and Conclusions of Law in case numbers BER 2015-01 WQ and BER 2015-02 WQ ("CR and REF Exceptions").

I. Introduction

Pursuant to § 75-5-611(4), Montana Code Annotated (MCA), REF and CR appealed the Administrative Compliance and Penalty Orders (Administrative Orders) issued by DEQ on March 27, 2015, for violations of the Montana Water Quality Act (WQA), § 75-5-101, MCA *et seq* at Reflections at Copper Ridge subdivision (BER 2015-01 WQ) and at Copper Ridge subdivision (BER 2015-02 WQ). The Administrative Orders alleged four violations under the Montana Water Quality Act and administrative rules adopted thereunder and assessed administrative penalties pursuant to the § 75-1-1001, MCA, Administrative Rules of Montana (ARM) Title 17, Chapter 4, subchapter 3; and §§ 75-5-601 through 75-5-641, MCA.

Pursuant to the parties' cross motions for summary judgment, the Hearing Examiner issued Orders on Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ on August 1, 2017 (Orders on Summary Judgment), concluding:

a. CR and REF motions for summary judgment are granted regarding their argument that DEQ cannot seek penalties for conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions (Violation 1) and DEQ's motions for summary judgment are denied regarding Violation 1. The Hearing Examiner found that DEQ did not meet the notice requirements § 75-5-611(1)(a) – (e) to provide CR and REF notice of violation of Violation 1 and, as a result, DEQ may not seek an administrative penalty for alleged violation of ARM 17.30.1105;

b. The hearing examiner determined that CR and REF violated § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit (Violation 2). DEQ's motions for summary judgment are granted regarding Violation 2;

c. The hearing examiner determined that CR and REF violated § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR100000 (Violation 4). DEQ's motions for summary judgment are granted regarding Violation 4; and

d. The Hearing Examiner found there are material facts in dispute as to whether CR and REF placed waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA (Violation 3). DEQ's motions for summary judgment are denied regarding Violation 3.

The Orders on Summary Judgment are attached to the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law (FOFCOL) submitted to the Board of Environmental Review (BER) on July 16, 2018. The Orders on Summary Judgment also determined that CR and REF are owners or operators based, in part, on findings that CR and REF were the original owners and developers of all land in the subdivisions and initiated construction activities

that included clearing, grading, excavation, stockpiling earthen materials, and placement of and removal of earthen materials resulting in land disturbances at each subdivision of equal to or greater than one acre. *See* Order on Summary Judgment entered in BER 2015-01 WQ on page 14; and Order on Summary Judgment entered in BER 2015-02 WQ on page 14.

February 26 through February 28, 2018, a consolidated case hearing to determine the remaining issues, after the Orders on Summary Judgment, in BER 2015-01 WQ and BER 2015-02 WQ was held before the BER's Hearing Examiner. The two remaining issues after the Orders on Summary Judgment are: 1) the liability of CR and REF for Violation 3 (placing waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA; and 2) the appropriate corrective actions and administrative penalties for Violation 2, 3, and 4 set forth in the Administrative Orders. CR and REF, through counsel, have filed exceptions to the Hearing Examiner's Proposed FOFCOL for BER's consideration in determining its final Order in Cause Nos. BER 2015-01 WQ and BER 2015-02 WQ. CR and REF's Exceptions fall into the following categories:

1. The Hearing Examiner incorrectly placed the burden of proof on CR and REF to present evidence demonstrating by a preponderance of

evidence that DEQ's Administrative Orders issued against CR and REF violated the law.

2. The Hearing Examiner should have determined that DEQ has not proven, by a preponderance of evidence, the occurrence of Violations 2, 3, and 4 alleged in DEQ's Administrative Orders issued against CR and REF.

3. The Hearing Examiner should have adjusted the administrative penalties assessed in the Administrative Orders to assess zero dollars against CR and REF.

DEQ submits the following responses to CR and REF's Exceptions and requests that BER reject the Exceptions and arguments raised by CR and REF and adopt the Hearing Examiner's proposed FOFCOL.

II. The Hearing Examiner Applied the Correct Burden and Standard of Proof (Proposed FOFCOL pages 14 - 18. CR and REF Exceptions to Proposed FOFCOL pages: 1, 7 – 14).

The Hearing Examiner appropriately relied on the Montana Supreme Court's holding in *MEIC v. DEQ*, applied statutory rules of evidence to this contested case hearing, and determined "the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side; in addition a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." *MEIC v. DEQ*, 2005 MT

96, ¶¶ 13 – 14; 326 Mont. 502, 506-507; 112 P.3d 964, 966-967. CR and REF misinterpret the Montana Supreme Court's holding in *MEIC v. DEQ*, which involved MEIC's request for a contested case hearing in its challenge of an air quality permit issued by DEQ to a developer proposing to build a coal-fired power plant in a Class I Area. Class I Areas are designated for special protections under the federal Clean Air Act. 42 USC § 7491. In the MEIC case, as in CR and REF's appeal of DEQ's Administrative Orders, if no challenge had been made, DEQ's administrative decision would stand. MEIC, as the party seeking relief through overturning DEQ's permitting decision, had the burden of presenting evidence that DEQ's issuance of the air quality permit violated the law. In the case now before the Board, CR and REF have the burden to present evidence that DEQ's issuance of AOs against CR and REF are legally insufficient and should be void. *MEIC v. DEQ*, 2005 MT at ¶ 16; 326 Mont. at 507; 112 P.3d at 967 (interpreting §§ 26-1-401 and 402, MCA). *MEIC v. DEQ* stands for the proposition that the party requesting relief from an agency decision bears the burden of producing evidence in support of its claims. *Id.*

CR and REF argue the Montana Supreme Court's holding in *MEIC v. DEQ* requires the claimant in an administrative case, alleging a violation of law, to bear the burden of proof. CR and REF argue MEIC bore the burden

of proof in its challenge of DEQ's air quality permit because it was alleging DEQ violated the law in issuing permit. In the case presently before the BER, CR and REF argue, because DEQ is alleging that CR and REF violated the WQA by failing to conduct construction-related activities in accordance with storm water requirements, DEQ bears the burden of proof. CR and REF's argument is contrary to standard civil process in which the party asserting a claim bears the burden of proof. Here, CR and REF claim to be adversely affected by DEQ's administrative enforcement decision and request relief from the Administrative Orders. CR and REF bear the burden of proof to demonstrate by a preponderance of evidence that they are entitled to the requested relief, the alleged violations did not occur, and the Administrative Orders should be declared void. § 75-5-611(5)(e), MCA.

Absent the request for contested case appeal by CR and REF, the Administrative Orders issued to CR and REF are DEQ's final agency decision. CR and REF's state "DEQ's administrative notice and order is a request for the Board to issue an order against the alleged violator. Unless the alleged violator fails to request a hearing, the notice and order does not become final without further agency action." CR and REF Exceptions, page 10. CR and REF's exception is counter to the clear language in § 75-5-611(5)(e), MCA, which states "if the board determines that a violation has not

occurred, it shall declare the department's notice void." Without such declaration by the Board, DEQ's Administrative Orders stand. CR and REF are appealing DEQ's Administrative Orders before the BER and have the burden to show the alleged violations did not occur and the Board should act to modify or void the Administrative Orders.

CR and REF further state "without placing the burden of proof on DEQ, the alleged violator cannot know the extent or scope of evidence that DEQ will bring to bear against him." CR and REF Exceptions, page 12. However, the Hearing Examiner correctly determined that the Administrative Orders "contain "the charges" presented by the department and to which CR/REF must respond." Hearing Examiner's Proposed FOFCOL, page 18. The Hearing Examiner also correctly held the contested case hearing was held pursuant to CR and REF's request for hearing under § 75-5-611(4), MCA and not under § 75-5-611(3), MCA to "answer the charges" in a notice given under § 75-5-611(1), MCA. Hearing Examiner's Proposed FOFCOL, pages 16 - 17.

DEQ set forth its case against CR and REF in the Administrative Orders issued under § 75-5-611(2), MCA. DEQ's evidence in support of the Administrative Orders is detailed in the September 23, 2013 Notice of Violation, which notified CR and REF that DEQ was initiating formal enforcement action for violations of the Montana Water Quality Act observed

by DEQ Inspector Dan Freeland during his September 9, 2013 compliance inspection. The September 23, 2013 Notice of Violation included evidence of unpermitted discharges from the subdivisions to state surface water and no best management practices (BMPs) in place to control storm water discharges from the subdivisions. Hearing Transcript Vol. I, 65:24 – 66:8, Exhibit 2, DEQ 000038 – DEQ 000040. On November 8, 2013, in response to written requests from CR and REF, DEQ issued a second notice of violation that distinguished violations at the Copper Ridge Subdivision from violations at the Reflections at Copper Ridge subdivision. *Joint Stipulated Facts*, Fact No. 9; Hearing Transcript, Vol. I, 85:2 – 92:18; Exhibit 17, Exhibit 2, DEQ00046 (Photo 6), DEQ00050 (Photos 16, 17, and 18). DEQ provided CR and REF with sufficient notice of the substantial, credible evidence upon which the Administrative Orders are based; evidence which CR and REF failed to meet its burden to refute in the contested case hearing.

While admitting this is a civil and not a criminal case, CR and REF argue, since this case involves enforcement for violations of the Montana Water Quality Act, application of due process restrictions that apply in criminal cases are reasonable in this case. CR and REF Exceptions, pages 7 - 8. CR and REF argue, under the due process clause, they are entitled to "be presumed innocent of the alleged violation until DEQ proves their guilt." CR

and REF Exceptions, page 8. However, there are no life, liberty, or property interests at stake that give rise to the same level of due process protection expected by an alleged violator in a criminal case.

Here, CR and REF requested a hearing under § 75-5-611(4), MCA and that statutory provision allows an alleged violator to submit a written request for hearing within thirty days after service of a notice and order under § 75-5-611(2), MCA. The hearing contemplated by § 75-5-611(4), MCA is a contested case appeal to BER and is held under MAPA contested case provisions found at Title 2, chapter 4, part 6, MCA. See § 75-5-611(4), MCA. CR and REF further argue BER should consider provisions under the federal Administrative Procedure Act (APA), which assign the burden of proof to the "proponent of a rule or order." 5 U.S.C. § 556(d). The hearing required by law in this case was a contested case appeal under § 75-5-611(4), MCA. See for example *Johansen v. State*, 1998 MT 51, ¶ 22; 288, Mont. 39; 955 P.2d 653, 658 (the agency's enabling/authorizing statute dictates the type of hearing required). CR and REF had a full and fair opportunity to present their case in a trial-type hearing before the Hearing Examiner held pursuant to § 75-5-611(4), MCA. Under § 75-5-611(6)(b), MCA, upon a determination that the alleged violations occurred, the BER shall issue an appropriate order for

the prevention, abatement, or control of pollution, the assessment of administrative penalties, or both.

The Hearing Examiner conducted a contested case hearing under § 75-5-611(4), MCA, properly received evidence, entered findings based on the preponderance of the evidence presented, and then entered conclusions of law based on those findings. The Hearing Examiner correctly found that the Administrative Orders issued to CR and REF set forth the allegations to which CR and REF must respond. Hearing Examiner's Proposed FOFCOL, page 18. The Hearing Examiner correctly held that the party seeking to overturn the administrative decision of the agency bears the burden of proof. *See Myers v. Mont. Dept. of Transportation*, 2010 Mont. Dist. LEXIS 366, ¶10 (citing § 26-1-401, MCA). The initial burden of producing evidence is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against that party in the absence of further evidence. *Id.* CR and REF are the parties that would be defeated if no evidence were given on either side because DEQ's decision contained in the Administrative Orders would stand. CR and REF seek to overturn those decisions. In the contested case hearing held before the Board's Hearing Examiner, DEQ and CR and REF each called witnesses and presented evidence in the form of testimony and exhibits. The

Hearing Examiner correctly found CR and REF bear the burden of presenting evidence necessary to establish that the violations alleged in the Administrative Orders did not occur; or that the violations occurred, but the Administrative Orders violated the law; or the administrative penalties and corrective actions assessed against CR and REF are inappropriate. Hearing Examiner's Proposed FOFCOL, page 18; § 75-5-611(6)(e), MCA; *MEIC*, 2005 MT at ¶ 16; 326 Mont. at 507; 112 P.3d at 967. Regardless of who had the burden of proof in this case, the preponderance of evidence demonstrates that CR and REF violated the WQA at the subdivisions. *Myers*, 2010 Mont. Dist. LEXIS at ¶13 (when the evidence is overwhelming and conclusive, it does not matter who has the burden of proof).

III. DEQ ESTABLISHED THE OCCURRENCE OF VIOLATIONS 2, 3, AND 4 ALLEGED IN THE ADMINISTRATIVE COMPLIANCE AND PENALTY ORDERS ISSUED AGAINST CR AND REF BY A PREPONDERANCE OF EVIDENCE.

A. The Orders on Summary Judgment are the Law of This Case and Establish That REF is the Owner and Operator of Reflections at Copper Ridge Subdivision and CR is the Owner and Operator of Copper Ridge Subdivision.

An owner or operator under the WQA is "a person who owns, leases, operates, controls, or supervises a point source." § 75-5-103(26), MCA. The Hearing Examiner correctly determined, based on the undisputed material facts in the record and as a matter of law, CR and REF were the "owners or operators"

of point source discharges from the subdivisions. *See* Hearing Examiners Proposed FOFCOL, page 38; Orders on Summary Judgment Cause No. BER 2015-01 WQ, pages 13 – 15; Cause No. BER 2015-02 WQ, pages 13 – 15. The Hearing Examiner's determinations in the Orders on Motions for Summary Judgment were based on evidence that CR was the original owner, operator, developer, and subdivider of the Copper Ridge subdivision and REF was the original owner, operator, developer, and subdivider of the Reflections at Copper Ridge subdivision. Orders on Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ, page 14. This conclusion is further supported by evidence in the record of the contested case hearing that REF owned and controlled development on 100 percent of the property in the Reflections at Copper Ridge subdivision and CR owned and controlled development on 100 percent of the property in the Copper Ridge subdivision. Hearing Transcript, Vol. II, 66:21 – 67:17; 102:22 – 104:23.

CR and REF try to counter the evidence in the record with a discussion of their history of compliance with the Montana Subdivision and Platting Act. This discussion is outside the administrative record for Cause Nos. BER 2015-01 WQ and BER 2015-02 WQ and has no bearing on whether CR and REF are owners or operators of point source discharges of storm water from their

subdivisions for purposes of § 75-5-103 (26), MCA. CR and REF Exceptions, pages 16 - 29.

B. DEQ Established by a Preponderance of Evidence that CR and REF Discharged Storm Water from Reflections at Copper Ridge and Copper Ridge Subdivisions to State Surface Waters Through Overland Flow and Through the City of Billings Municipal Separate Storm Sewer System (MS4) Without an MPDES Permit in Violation of the Montana Water Quality Act § 75-5-605(2)(c), MCA (Violation 2).

Relying on the affidavit of DEQ's Inspector, Dan Freeland, who conducted compliance evaluation inspections (CEIs) at the subdivisions on September 9, 2013, documenting unpermitted discharges of storm water from Reflections at Copper Ridge and from Copper Ridge, the Hearing Examiner determined that CR and REF were responsible for unpermitted discharges of storm water from the subdivisions to state waters. *See* Orders on Summary Judgment Cause No. BER 2015-01 WQ, pages 15 - 16; Cause No. BER 2015-02 WQ, pages 15 - 16. The Hearing Examiner correctly determined that Dan Freeland's observations were undisputed by CR and REF on motions for summary judgment. *Id.*

CR and REF argue that the precise location of these observed discharges from the subdivisions were not described and the disturbances were likely from individual lots, which upon sale to individual homebuilders, CR and REF no longer own or operate. CR and REF Exceptions, pages 18 – 29. CR and REF

appear to base their argument that the discharges were from individual lots on the following facts: 1.) previous discharge permit authorizations were issued to construction contractors hired by CR and REF under General Permit No. MTR100000 for road and utility work; 2.) these previous permit authorizations covered storm water discharges associated with the development and construction of street improvements and construction and installation of utilities including water, sanitary sewer, and storm sewer in the subdivisions; and 3.) the previous permit authorizations would have reached final stabilization resulting in permit termination by 2013, and could not have been the source of discharges. *See* Hearing Transcript Vol. I, 133:23 – 139:25, Exhibit A (MPDES Permit No. MTR 102807 issued to JTL Group, Inc.), Exhibit B (MPDES Permit No. MTR 104590 issued to H.L. Ostermiller Construction), and Exhibit C (MPDES Permit No. MTR 104993 issued to CMG Construction, Inc.), CR and REF Exceptions, page 19. The road and utility permit authorizations, issued to construction contractors, for road and utility development being conducted within the boundaries of the subdivisions, were terminated by DEQ upon submission of notices of termination by the named owners or operators on those permits and certification that the permitted projects had reached final stabilization. Hearing Transcript Vol. I, 202:7 – 17. *Joint Stipulated Fact* 5. The

construction activities permitted under the road and utility construction MPDES permit authorizations at Copper Ridge and Reflections at Copper Ridge subdivisions included construction of water, sanitary sewer, and storm drainage utilities, and street and sidewalk improvements. The Storm Water Pollution Prevention Plans (SWPPPs) associated with these permit authorizations did not include best management practices (BMPs) or controls for construction activity on residential lots. Therefore, once the storm water discharge permit authorizations for road improvements and utility installation terminated, there was no permit coverage for homebuilding on the residential lots and no plan in place by the subdivision developers, CR and REF, to obtain such coverage. *See* Exhibit A, page 3; Exhibit B, page 3; and Exhibit C, page 4. *See* Hearing Transcript Vol. II, 62:4, 102:8 - 21. CR and REF do not take exception to the Hearing Examiner's proposed FOFCOL ¶¶ 12 and 13, which lists DEQ Inspector Freeland's observations during his September 9, 2013 CEI including sediment discharges onto streets, sidewalks, and other common areas; uncontained waste stockpiles; and evidence that sediment and construction debris had been "washed with storm water from the subdivisions to state surface waters." CR and REF seem to assert that these discharges are from the residential lots and are not their responsibility. Hearing Examiner's Proposed FOFCOL ¶¶ 12 and 13, page 6; CR and REF Exceptions, page 19.

CR and REF cannot defend their failure to obtain storm water discharge permit coverage for construction activities at the subdivisions by claiming, after they planned and developed the subdivision, upon the sale of individual residential lots within the subdivision, they are not an owner or operator associated with construction activities on those lots. *See* CR and REF Exceptions, pages 20 – 21. Storm water discharge associated with construction activity must be covered by a Montana Pollutant Discharge Elimination System (MPDES) Permit. ARM 17.30.1105. "Storm water discharge associated with construction activity" is defined as "a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more. ARM 17.30.1102(28). The plan in a common plan of development is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot.

Friends of Maha'Ulepu, Inc. v. Hawaii Dairy Farms, LLC, 224 F.Supp.3d 1094 (U.S. Dist. Court Dist. Hawaii 2016). In his testimony, DEQ Inspector Dan Freeland explained that he determined Copper Ridge subdivision and Reflections at Copper Ridge subdivision were a common plan of development or sale based on the signs identifying the subdivisions, the company website advertising the developments, and the company's advertising brochures. Hearing Transcript Vol. I, 67:16 – 25.

A "larger common plan of development or sale" is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. Thus, if a distinct activity has been identified by the time the discharge permit application would be submitted, that distinct activity is included as part of a larger common plan. *Friends of Maha'Ulepu*, 224 F.Supp.3d at 1108. CR and REF admitted in hearing testimony that the common plan of development included improvements necessary to get the subdivision approved by the City of Billings, then subdivide and start selling residential lots. Hearing Transcript Vol. II, 66:21 - 67:17. CR and REF further admitted the use of the property prior to CR and REF's initiation of development and construction activity was agricultural. Hearing Transcript Vol. II, 110:18 - 23. The common plan of development for the Copper Ridge and Reflections at Copper

Ridge subdivisions included grading, contouring, road building, utility installation, development of storm water retainage ponds, and other common areas, as well as the design and planning of residential lots for eventual sale to homebuilders. Hearing Transcript Vol. II, 105:15 – 111:6. CR and REF did not properly permit storm water discharges associated with construction activity at the subdivisions until December 23, 2013, when they each submitted a Notice of Intent requesting authorization to discharge storm water associated with construction activity under General Permit No. MTR100000. REF was issued Permit No. MTR105376 and CR was issued Permit No, MTR105377 authorizing each entity to discharge storm water associated with construction activity at their respective subdivisions. *Joint Stipulated Facts*, Fact No. 11; Hearing Transcript, Vol. I, 92:20 – 100:10; Exhibit 4, DEQ 00057; and Exhibit 5, DEQ 000083. CR and REF were obligated under the WQA to permit all construction activities that were part of the larger common plan of development or sale at Copper Ridge and Reflections at Copper Ridge subdivisions. § 75-5-401, MCA; ARM 17.30.1105.

Construction activity is the regulated point source that must be permitted when it meets the definition at ARM 17.30.1102(28). Ground disturbance at each of the above-named subdivisions involves more than one acre including all areas that are part of a "larger common plan of development

or sale," as that phrase is used in General Permit No. MTR100000 and in ARM 17.30.1102(28). *Stipulated Facts*, Fact No. 8. It is not necessary, as CR and REF assert, for DEQ to show who placed, or who caused waste to be placed in the subdivisions. CR and REF Exceptions at 28. The Hearing Examiner correctly held that CR and REF violated the WQA by discharging storm water associated with construction activity without a permit (Violation 2). *See* Orders on Motions for Summary Judgment in Cause No. BER 2015-01 WQ, pages 15 – 16, and in Cause No. BER 2015-02, pages 15 – 16.

Any precipitation event of .25 inches or greater in a 24-hour period will cause an unpermitted discharge of pollutants including sediment, construction debris, and other waste materials from Copper Ridge and Reflections at Copper Ridge subdivision. Storm water runoff will enter Cove Ditch and public storm drainage systems. Additionally, surface runoff flows overland toward Cove Ditch and through storm drainage systems until it ultimately flows offsite to the Yellowstone River. Hearing Transcript Vol 1, 66:20; 148:11; Exhibit 2, DEQ 000038. Water quality may be impacted by sediment and construction debris during these precipitation events. Hearing Transcript Vol 1, 54:21 – 56:4; Exhibit 15. The Hearing Examiner's determination that CR and REF should only be charged with precipitation events between September 23, 2013, the date CR and REF were put on notice that they needed

MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage is reasonable for purposes of calculating an administrative penalty. See Hearing Examiner's Proposed FOFCOL at page 24.

DEQ has established by a preponderance of evidence that CR and REF violated the Montana Water Quality Act by discharging pollutants to state waters from a point source without MPDES permit authorization. The BER should accept the Hearing Examiner's proposed FOFCOL supporting CR and REF's liability for Violation 2.

C. DEQ Established by a Preponderance of Evidence that CR and REF Placed Waste Where it Will Cause Pollution of State Waters in Violation of the Montana Water Quality Act at § 75-5-605(1)(a), MCA (Violation 3).

The Hearing Examiner correctly determined, based on the September 9, 2013 inspection conducted by DEQ Inspector Dan Freeland, that CR and REF placed or caused to be placed waste through unpermitted and uncontrolled discharges of storm water to state water. Dan Freeland documented, in writing and in photographs, substantial, credible evidence of stockpiled materials without protection to control contact with storm water, unmanaged concrete washout sites, sediment tracked onto impervious surfaces, sediment and debris on the banks of Cove Ditch, sediment on sidewalks and grassy common areas, and sediment in streets and built up in

and near the storm drains. Exhibit 2, DEQ 000038 – DEQ 000040, DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Hearing Transcript Vol I, 71:2 – 77:18. The Hearing Examiner found uncontroverted evidence that CR and REF placed waste or caused waste to be placed where it may cause pollution. Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 16 - 18, and in Cause No. BER 2015-02, pages 16 – 18.

After the contested case hearing, the Hearing Examiner correctly found that CR and REF placed waste where it will cause pollution of state waters, in violation of § 75-5-605(1)(a), MCA, by contributing sediment and other pollutants from unpermitted construction activities in the subdivisions, causing uncontrolled sediment, oil, solids, and other debris to be placed where it will impact state surface waters, including Cove Ditch. Hearing Examiner's Proposed FOFCOL, pages 27 – 31 supported by Exhibit 2, DEQ 000039 – 000040; DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Hearing Transcript Vol I, 71:2 – 77:18. In his testimony, Dan Freeland explained that he observed grass laid down

indicating the direction of storm water flow from the subdivisions toward Cove Ditch. Hearing Transcript Volume I, 72:15-22.

CR and REF disputes the Hearing Examiner's Proposed FOFCOL that unpermitted discharges are necessarily "exceeding that permitted by Montana water quality standards" and, therefore, causing "pollution" as that term is defined at § 75-5-103(30), MCA. CR and REF Exception, pages 29-34. CR and REF fail to acknowledge that not all water quality standards are numeric. DEQ Inspector Dan Freeland's documented evidence that sediment and other pollutants, contributed by CR and REF's unpermitted construction activities at the subdivisions, caused floating debris and other waste materials to be placed in and near Cover Ditch where it would impact state surface waters in violation of ARM 17.30.637(1). Because CR and REF conducted construction activity without a permit that required installation of BMPs and pollution prevention measures that meet engineering standards and specifications for control and mitigation of discharges of sediment and other pollutants from the construction activities at the subdivisions, waste, including sediment and construction debris, was placed where it will cause pollution of state waters in violation of ARM 17.30.637(5). Violation of the general prohibitions at ARM 17.30.637 are violations of Montana water quality standards.

DEQ has established by a preponderance of evidence that CR and REF violated the Montana Water Quality Act by placing waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA. The BER should accept the Hearing Examiner's proposed FOFCOL supporting CR and REF's liability for Violation 3.

The Hearing Examiner's determination that CR and REF should only be charged with eight days of violation based on precipitation events between September 23, 2013, the date they were put on notice that they needed MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage is reasonable for purposes of calculating an administrative penalty for Violation 3. *See* Hearing Examiner's Proposed FOFCOL at pages 29 - 30.

D. DEQ Established by a Preponderance of Evidence that CR and REF Violated the Terms and Conditions of General Permit MTR100000 (Violation 4).

The Hearing Examiner properly determined that CR and REF violated terms and conditions of General Permit MTR100000 at the subdivisions, based on undisputed evidence documented in an inspection reported summarizing the findings of DEQ Inspectors Dan Freeland and Chris Romankiewicz after conducting inspections of the subdivisions on October 21, 2014. Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 19 -

20, and in Cause No. BER 2015-02, pages 19 – 20. CR and REF have not filed an exception to the Hearing Examiners' conclusions regarding Violation 4 and the BER should accept the Hearing Examiners' Orders on Summary Judgment and proposed FOFCOL supporting CR and REF's liability for Violation 4.

The Hearing Examiner's determination that CR and REF should only be charged with one day of violation based on the date DEQ observed the violations of the General Permit conditions is reasonable for purposes of calculating an administrative penalty for Violation 4. *See* Hearing Examiner's Proposed FOFCOL at pages 31 - 38.

IV. The Hearing Examiner's Proposed Administrative Penalties are Appropriate to Address CR and REF's Violations of the Montana Water Quality Act at Reflections at Copper Ridge and Copper Ridge Subdivisions.

The administrative penalties are assessed pursuant to the statutory penalty factors in § 75-1-1001, MCA; in ARM Title 17, chapter 4, subchapter 3; and subject to DEQ's authority under § 75-5-601 through § 75-5-641 MCA. The administrative penalties are assessed for the related series of violations, stemming from failure to obtain MPDES permit coverage, at each subdivision. Under §§ 75-5-611(9)(a), MCA the penalty is capped at $100,000 for each related series of violations.

A. DEQ is not Prevented from Assessing Administrative Penalties Under §§ 75-5-611, 75-5-617, MCA, or ARM Title 17, chapter 30, subchapter 20 (repealed March 19, 2016).

CR and REF overstate their confusion with regard to DEQ's violation letters sent to CR and REF on September 23, 2013. CR and REF Exceptions, page 44. The violation letters satisfied § 75-5-617(2), MCA. *See* Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 6 - 7, and in Cause No. BER 2015-02, pages 6 – 7. Under § 75-5-617(2), MCA DEQ is not foreclosed from pursuing administrative penalties when the recipient of a letter issued under § 75-5-617(2), MCA responds as alleged by CR and REF. CR and REF Exceptions, page 46. Enforcement response actions under § 75-5-617, MCA include issuance of a letter; issuance of an order; judicial action; or an action seeking administrative or judicial penalties. In this case, DEQ initiated an enforcement response under § 75-5-611, MCA after providing CR and REF with notice under § 75-5-617, MCA.

Section 75-5-611(1), MCA requires written notice to an alleged violator before seeking administrative penalties. There is an exception for such notice when DEQ seeks administrative penalties only for activities it believes and alleges are violations of § 75-5-605, MCA. § 75-5-611(2)(a)(ii), MCA (emphasis added). Violations 2, 3, and 4 meet this notice exception. *See*

Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ page 8, and in Cause No. BER 2015-02, page 8.

ARM 17.30.2003 (repealed 2016) imposed additional notice requirements on DEQ. Under ARM 17.30.2003 prior notice of a violation was required unless DEQ was not seeking an administrative penalty, or was seeking an administrative penalty only for activities it believed and alleged were violations of § 75-5-605, MCA, and the violations were a class I violation as described in ARM 17.30.2001(1) or a violation of major extent and gravity under ARM 17.4.303. DEQ met the notice requirements in ARM 17.30.2003 for Violation 2 (violation of § 75-5-605, MCA; major extent and gravity; class I), for Violation 3 (violation of § 75-5-605, MCA; major extent and gravity), and for Violation 4 (violation of § 75-5-605, MCA; class I). *Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 11-13, and in Cause No. BER 2015-02, pages 11-13.*

DEQ is not precluded from assessing administrative penalties for Violation 3 as asserted by CR and REF because DEQ believed and alleged Violation 3 was a violation of § 75-5-605, MCA and a violation of major extent and gravity under ARM 17.4.303, which satisfies ARM 17.30.2003(7). CR and REF Exceptions, page 47. The Hearing Examiner's Proposed Conclusion of Law is correct and not void based on CR and REF's misreading of ARM 17.30.2003.

DEQ is not precluded from assessing administrative penalties for Violation 4 as asserted by CR and REF because DEQ believed and alleged Violation 4 was a violation of § 75-5-605, MCA and the Hearing Examiner's determination that Violation 4 is a Class I violation is undisturbed. CR and

REF's Exceptions at 48; Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ page 13, and in Cause No. BER 2015-02, page 13. The Hearing Examiner determined that Violation 4 was a violation of a permit compliance plan or schedule. Some of the violations observed by DEQ's Inspectors during the October 2014 inspection of the subdivisions involved failure by CR and REF to conduct inspections in accordance with the schedules imposed under the permit. A Class I violation satisfies ARM 17.30.2003(7).

B. DEQ appropriately determined the days of violation for Violation 2 by considering NOAA precipitation data, for Violation 3 by considering evidence of ground disturbance and uncontrolled placement of waste, and for Violation 4 by considering lack of adequate permit implementation from the date CR and REF submitted NOIs.

It was reasonable for DEQ and the Hearing Examiner to consider the National Oceanic and Atmospheric Administration (NOAA) weather service data to determine the days of violation for Violation 2, discharging without a permit. Hearing Examiner's Proposed FOFCOL, page 23 – 26, CR and REF Exceptions at 23. Use of NOAA precipitation data is supported by the inspection schedule set forth in the General Permit requiring the SWPPP administrator to conduct routine inspections every fourteen days along with post-storm inspections within 24 hours of the end of a rainfall event of 0.25 inches or greater. DEQ Exhibit 1, DEQ000013. DEQ reasonably considered

a storm event resulting in .25 inches or more precipitation within 24 hours likely to result in discharges from the subdivisions and CR and REF presented no substantial evidence to counter this determination.

DEQ appropriately considered evidence of ground disturbance at the subdivisions, limited by the two-year statute of limitations for penalty actions, for days of violation for Violation 3. Hearing Transcript, Vol. I, 228:7 – 15. CR and REF presented no substantial evidence to counter these determinations. The Hearing Examiner has determined that CR and REF should only be charged with eight days of violation for Violation 3 based on precipitation events between September 23, 2013, the date they were put on notice that they needed MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage. DEQ believes eight days of violation is reasonable for purposes of calculating an administrative penalty for Violation 3. *See* Hearing Examiner's Proposed FOFCOL at pages 29 - 30.

C. DEQ Provided Adequate Notice Under the WQA for Violations at Copper Ridge Subdivision and for Violations at Reflections at Copper Ridge Subdivision.

CR and REF allege DEQ failed to notify CR separately of each violation at Copper Ridge Subdivision and REF separately of each violation at Reflections at Copper Ridge Subdivision. CR and REF Exceptions 39 – 43. This assertion is not supported by evidence in the record and is contrary

to the parties' joint stipulated fact 7, which provides that the September 23, 2013 violation letter was sent to both CR and to REF and joint stipulated fact 9, which provides DEQ sent a separate violation letter dated November 8, 2013 that separated violations associated with the Copper Ridge subdivision. DEQ provided the November 8, 2013 letter to CR in response to a written request from Landy Leep in a letter to Dan Freeland, dated September 27, 2013, in which Mr. Leep explained that Copper Ridge subdivision and Reflections at Copper Ridge subdivision were separate real estate developments, owned and operated by separate legal entities. Mr. Leep requested two separate violation letters to "clarify which alleged violations pertain to Copper Ridge Development Corporation and which apply to Reflections at Copper Ridge, LLC." Hearing Transcript, Vol. I, 79:21 - 80:15; 83:18 – 86:3, Exhibit 12, DEQ 000202; Exhibit 17. Prior to sending the November 8, 2013 violation letter, DEQ Compliance Inspector Dan Freeland explained to Mr. Leep that DEQ considered Copper Ridge and Reflections at Copper Ridge subdivisions as part of one greater common plan of development and the September 23, 2013 violation letter was adequate to address the violations at both subdivisions. Hearing Transcript, Vol. I, 80:19 – 81:24; Exhibit O. Mr. Leep insisted the two subdivisions are separate and distinct, and that CR and REF should respond to DEQ's enforcement action

separately. Hearing Transcript, Vol. I. 83:8 – 83:16; Ex 13. In response to Mr. Leep's request, the November 8, 2013 letter distinguished violations at the Copper Ridge Subdivision from violations at the Reflections at Copper Ridge subdivision. *Stipulated Facts*, Fact No. 9. The September 23, 2013 letter served as notice to REF of the violations at Reflections at Copper Ridge subdivision. DEQ Exhibit 2, DEQ 000038. The November 8, 2013 letter provided notice to CR of the violations at Copper Ridge Subdivision. CR and REF insisted on two separate enforcement actions, which resulted in two separate related series of violations, each with a maximum administrative penalty of $100,000. § 75-5-611(9), MCA.

D. DEQ was not foreclosed from taking further enforcement action after CR and REF addressed the violations in the September 23, 2013, and November 8, 2013 violation letters by obtaining coverage under the General Permit for discharges from the Copper Ridge and Reflections at Copper Ridge subdivisions.

The parties stipulated that "Within a timeframe acceptable to the Department, CR and REF each took the corrective action identified in the September 23, 2013 and November 8, 2013 Notices of Violation." *Stipulated Facts*, Fact No. 10. DEQ agrees that, within an acceptable timeframe, CR and REF obtained coverage under the General Permit for construction activity at Copper Ridge and Reflections at Copper Ridge subdivisions. This fulfilled one of the corrective actions identified in the September 23, 2013, and

November 8, 2013 Notices of Violation. Hearing Transcript Vol. 1; 95:23 – 96:10, 100:3 – 100:10. CR and REF Exceptions, page 44; referencing Hearing Examiner Proposed FOFCOL, page 21, and footnote 4 (In footnote 4 the Hearing Examiner expressed some discomfort over the clarity of DEQ's correspondence with CR and REF and the application of ARM 17.30.2003 (repealed 2016). Footnote 4 is not, however a proposed finding of fact).

E. DEQ was not foreclosed from taking further enforcement action after CR and REF addressed the violations in the December 9, 2014 violation letters by submitting an updated Storm Water Pollution Prevention Plan under the General Permit for discharges from the Copper Ridge and Reflections at Copper Ridge subdivisions.

On October 21, 2014, DEQ conducted a scheduled compliance inspection of the Copper Ridge and the Reflections at Copper Ridge subdivisions. *Stipulated Facts*, Fact No. 12; Hearing Transcript Vol. 1; 100:11 – 101:23; Exhibit 7, DEQ000113; Hearing Transcript Vol. 1; 105:24 – 106:3; Exhibit 8, DEQ000125. During the October 21, 2014 inspection, DEQ observed and documented several MPDES Permit violations at the subdivisions. On December 9, 2014, the Department sent CR and REF notices of violation and required corrective action to address the violations. *Stipulated Facts*, Nos. 13 and 14; Hearing Transcript, Vol 1, 103:25 - 105:21; Exhibit 7, DEQ000113; Hearing Transcript, Vol 1, 106:7 - 107:11; and Exhibit 8, DEQ000125. The parties stipulated that "Within a timeframe

acceptable to the Department, CR and REF each took the corrective action identified in the December 9, 2014 Notices of Violation and submitted an updated SWPPP to DEQ." *Stipulated Facts*, Fact No. 15; Hearing Transcript, Vol 1, 108:19 - 110:3; Exhibit Y. Submission of the updated SWPPP by CR and REF did not correct all violations noted during the October 21, 2014 inspection, but DEQ determined the response was adequate. Hearing Transcript, Vol 1, 112:7 – 120:8; Exhibit 18 and Exhibit 19. At no time did CR and REF propose corrective action plans to address violations of the Montana Water Quality Act at Copper Ridge and Reflections at Copper Ridge subdivisions. Hearing Transcript, Vol. III, 119:11. Because there had been significant violations of the Montana Water Quality Act at Copper Ridge and Reflections at Copper Ridge subdivisions, CR and REF were referred to DEQ's Enforcement Division for further action. Hearing Transcript, Vol. I, 108:17, 120 :11, 121:13.

F. DEQ planned its compliance inspection to coincide with a storm event in order to observe discharges from the subdivisions.

CR and REF assert DEQ was aware of potential problems at the subdivisions as early as March 2013, but waited for a "disastrous and sudden" storm in September 2013 to "catch" CR and REF. CR and REF Exceptions, page 49. Dan Freeland explained in his testimony that after the City notified

him of noncompliance with MS4 storm permit requirements at the subdivisions, he checked an EPA database and discovered the subdivisions had no MPDES permit coverage for construction activities. Dan then determined to inspect the subdivisions during a storm event to better identify and document unpermitted discharges. This was designed to make a stronger case and convince the non-compliant owner/operator they needed permit coverage. Hearing Transcript Volume I, 48:21 – 50:19.

G. DEQ properly determined Violation 2 and Violation 3 are major extent and gravity based on the degree of deviation from requirements and the seriousness of the violations.

Discharging without a permit, Violation 2, and placing a waste where it will cause pollution, Violation 3, have the potential to harm human health or the environment. Hearing Testimony, Volume I, 217:7 – 10. In determining extent of a violation, DEQ may consider the duration of the violation. ARM 17.4.303(4). A violation has major gravity if it causes harm or poses serious potential to harm human health or the environment. ARM 17.4.303(4). DEQ properly determined Violation 2 and 3 are of major extent and gravity based on the duration and the seriousness of the violations. DEQ Exhibit 9, DEQ000160 – 163; DEQ Exhibit 10, DEQ000190 – 193. In addition, the Orders on Summary Judgment determined Violation 2 and 3 are major extent and gravity. Orders on Summary Judgment 11 – 13.

H. DEQ properly determined Violation 4 was of major extent and moderate gravity and the Hearing Examiner in Orders on Summary Judgment determined Violation 4 was a Class I Violation.

Violation 4, violating terms and conditions of General Permit No. MTR100000 is of moderate gravity. ARM 17.4.303(5)(b)(ii). DEQ considered the duration of the violation in its determination that the violation was of major extent. ARM 17.4.303(4); Hearing Testimony, Volume I, 222:7 – 14. The Orders on Summary Judgment determined Violation 4 is a Class I violation. Orders on Summary Judgment 13.

I. CR and REF provide no evidence of voluntary expenditures that are above and beyond what is necessary to comply with their WQA obligations.

CR and REF suggest they should be credited with voluntary expenditures made to "hire a professional outside consultant to complete permitting compliance and administration." REF and CR Exceptions, page 58. However, these expenditures merely met CR and REF's obligations to comply with the WQA and DEQ's penalty rules allow a decrease of up to 10 percent for amounts voluntarily expended beyond what is required by law or by order. ARM 17.4.304(4); Hearing Testimony, Volume I, 219:7 – 12.

J. CR and REF provide no evidence that the penalties should be further reduced for good faith and cooperation.

CR and REF argue they should be credited with good faith and cooperation and suggest they are entitled to a ten percent reduction. REF and

CR Exceptions, page 54, 57. CR and REF provide no evidence of "promptness in reporting and correcting the violation, and in mitigating the impacts of the violation; the extent of . . . voluntary and full disclosure of the facts related to the violation; and the extent of . . . assistance in the department's investigation and analysis of the violation." ARM 17.4.304(a) – (c).

V. Conclusion

The Hearing Examiner's findings of fact are supported by substantial evidence in the record and should be adopted by BER as its final order. § 2-4-621(3), MCA; Blaine County v. Stricker, 2017 MT 80, ¶25; 387 Mont 202, 211; 493 P.3d 159, 165. The proceedings on which the proposed finding of fact are based complied with essential requirements of law. The Hearing Examiner's conclusions of law, which include the recommended administrative penalty of $92,000 for the related series of WQA violations at each subdivision totaling $184,000 for violations at both Copper Ridge and Reflections at Copper Ridge subdivisions, should be adopted by the BER as it final order. § 2-4-621(3), MCA; and § 75-5-611(9), MCA.

WHEREFORE, DEQ requests that the Board reject CR and REF's Exceptions and adopt the Hearing Examiners' Orders on Motions for Summary Judgment and Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted this 31st day of October, 2018.

KIRSTEN BOWERS
Department of Environmental Quality
Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2018, I caused to be served a true and correct copy of the foregoing document and any attachments for BER 2015-01 WQ and BER 2015-02 WQ to all parties or their counsel of record as set forth below:

	[ ]	U.S. Mail, postage prepaid
Victoria A. Marquis	[X]	Electronic Mail
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Attorneys for Reflections at Copper Ridge LLC

And by email to:
Sarah Clerget, Hearing Examiner
DOJ – ALS – 9th Avenue
sclerget@mt.gov
asolem@mt.gov

By _____
Sandy Scherer
Legal Secretary

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC, AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY	) CASE NO. BER 2015-01 WQ
and:	
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY	) CASE NO. BER 2015-02 WQ

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT - VOLUME I

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
December 7, 2018
11:00 a.m.

BEFORE CHAIR CHRIS DEVENY, JOHN DEARMENT;
BOARD MEMBERS CHRIS TWEETEN, DEXTER BUSBY,
and TIM WARNER (by telephone)

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

A P P E A R A N C E S

APPEARING ON BEHALF OF THE BOARD OF ENVIRONMENTAL REVIEW:

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WHEREUPON, the following proceedings were had:

* * * * *

CHAIR DEVENY: Let's get back, and get started on this case. And Lindsay, would you take roll call again, and make sure we've got everybody with us.

MS. FORD: Chris Deveny.

CHAIR DEVENY: Present.

MS. FORD: Dexter Busby.

(No response)

MS. FORD: Dexter Busby.

(No response)

MS. FORD: Tim Warner.

(No response)

MS. FORD: Chris Tweeten.

MR. TWEETEN: (No response)

CHAIR DEVENY: We seem to have lost our phone connection.

MS. CLERGET: Is somebody on the phone? Can we hear you?

(No response)

MS. FORD: Tim Warner?

BOARD MEMBER WARNER: Yes, Madam Chair.

MS. FORD: Dexter Busby.

BOARD MEMBER BUSBY: I'm here.

MS. FORD: Chris Tweeten.

BOARD MEMBER TWEETEN: Present.

MS. FORD: John Dearment.

BOARD MEMBER DEARMENT: Here.

MS. FORD: We're all here.

CHAIR DEVENY: Great. Thanks, everybody. We're going to hear this case and move on, and at some point we will take a half hour break for lunch. We'll try to find a logical point at which to stop. So we have a quorum, and John Dearment has recused himself from this case. So it will be Dexter, Tim, Chris, and myself are the Board members who will be hearing this case today.

I'd like Sarah just to do an introduction to this cases for the purpose of today, which is to hear oral arguments and make a decision regarding the Copper Ridge case.

MS. CLERGET: So this is the time set. The Case Number is BER 2015-01 WQ, and the companion case -- they're combined for the purposes of this oral argument -- is BER 2015-02 WQ. These are enforcement actions -- or excuse me -- are penalty findings against Copper Ridge and

Reflections at Copper Ridge, two different companies, and that's why there are two different case numbers, one for each company.

And it is the appeal of the Administrative Order that is before you today. As you saw in your packets, you have two pieces of this proposed decision. One is the order on summary judgment, which was issued by Andres Haladay, and one is my proposed findings of fact and conclusions of law which obviously I issued based on the hearing that I held in the case.

And there are complementing decisions in both of those sources that work together to put a final set of decisions, both factual and legal, in front of you. So there's a lot of moving pieces, and some of your decisions will necessarily involve changes in other decisions, so we're just going to have to kind of work through this piece by piece, I think, as we go through.

Are there any other procedural questions? The memo that I've included in the materials outlines your options moving forward, which are the same as they always are in these cases.

You have an exceptions brief from Copper

Ridge, a response from DEQ, and then there is also a motion to strike portions of DEQ's response to the exceptions brief which was filed by Copper Ridge.

And I apologize. I'm going to refer to Copper Ridge, and when I say that, it's Copper Ridge and Reflections together. Just for the purposes of shorter speech, I will say Copper Ridge, and I think often people will in the course of this case assuming that they are both.

So there is a motion to strike filed by Copper Ridge to strike portions of DEQ's response to their exceptions briefs; and then DEQ filed a response to that motion to strike, which was a supplemental part of your packet.

And as I have rendered my findings, proposed findings and conclusions, the authority for that motion rests with you, so you have to deal to the motion to strike either as part of your decision. You can deal with it before or you can deal with it together with the rest of decisions that you have to make. And then as I said, the memo that I provided gives you your options with respect to the case itself. Any other procedural questions?

CHAIR DEVENY: Sarah, thank you. So the options that we have that Sarah has outlined in our packet is to accept the order on summary judgment and the proposed order in their entirety, and adopt them as the Board's final order; or to accept the finding of facts in the order on summary judgment and the proposed order, but modify the conclusions of law or interpretation of the Administrative Rules in either of those; or to reject the order on summary judgment and/or the proposed order, and then review the entire record that's before the Examiner.

And just to remind people, if we do not concur with findings of fact, then we're down in that section where we would need to review the entire case. I just want to be clear on that.

This is kind of a convoluted case, as Sarah alluded to, so I would like to start out with addressing the motion to strike that has been presented by Copper Ridge. And again for purposes of brevity, I'm going to refer to both entities as Copper Ridge.

And so I'd like to have a separate oral argument on just the memo to strike, and then I'd like the Board to make a decision on that memo to

strike, because that is going to impact every other decision that we make here today.

So with that, if the parties are ready, I would like to first ask the Copper Ridge folks to make their oral argument on that, then DEQ. And if at all possible, I'd really like to try to limit each party's time on this to five minutes if that's reasonable, and we'll see how we go with that. And I'll ask Lindsay to be our time keeper.

MS. MARQUIS: Thank you, Madam Chair, members of the Board, Hearing Examiner Clerget. Thank you for your time here today. My name is Vicki Marquis. I'm with the law firm of Holland and Hart out of Billings. I represent the Copper Ridge Development Corporation, and Reflections at Copper Ridge, LLC.

I'm joined here today with Mr. Landy Lees, who is the Vice President of the Copper Ridge Development Corporation, and the manager of Reflections at Copper Ridge, LLC.

Regarding the motion to strike, Violations 2, 3, and 4 were allowed to remain in this case only because the previous Hearing Examiner felt that they were serious enough to allow DEQ to proceed directly to an Administrative

Order pursuant to Montana Code Annotated 75-5-611 Subparagraph (2) Sub(a) sub-romanette (ii).

But the previous order on Page 7 said that DEQ complied with the provisions of Montana Code Annotated 75-5-611(2), and found that Copper Ridge and Reflections at Copper Ridge were non-compliant after September of 2013 violation.

That's wrong. I want to point that out. As a matter of fact, Copper Ridge and Reflections at Copper Ridge fixed everything that they were supposed to fix, and so the September violations cannot serve as the basis for penalties.

And again, after the December 2014 violation letter, Copper Ridge and Reflections at Copper Ridge fixed everything that the Department asked them to fix. Therefore, no penalty can be allowed.

But even if you assume that the Department satisfied the provisions of 75-5-617, and that the Department now gets to move into their options for enforcement response which are provided under 75-5-611, the rules simply don't allow it in this case.

First of all, the Administrative Rules of Montana that were in effect at the time, ARM

17.30.2003 Subparagraph (5) says that if an alleged violator responds and it returns to compliance, no penalty can be sought. It is undisputed that Copper Ridge and Reflections at Copper Ridge did this. That's reflected in the Hearing Examiner's proposed findings of fact.

Furthermore, as the Hearing Examiner noted, there was, quote, "Substantial justifiable confusion," and Copper Ridge and Reflections at Copper Ridge, their frustration was understandable. Quote, "It responded to and complied with all of DEQ's demands in the correspondence, only to receive an administrative penalty three months later."

She noted, and indeed is right, that it is not fair for DEQ to, quote, "in effect be rewarded for its own failures," that being its failure to write the appropriate letters, the notice letters that are required under the statute.

Now, this current proposed order brings up another issue, which is the basis of our motion to strike. The Administrative Rules in effect at that time, ARM 17.30.2003 Subparagraph (2), provides additional notice requirements that must

be met before the Department may seek a penalty under the statute. The Department must send a notice letter in accordance with Montana Code Annotated 75-5-611(1). We know that the Department did not do that. The previous Hearing Examiner held that.

So the only way that the Department can get around that notice requirement is if the violation meets certain requirements or criteria that are specified in Administrative Rules of Montana 17.30.2003 subparagraph (7), and those requirements are that the violations must be of major extent and gravity, or they must be a Class 1 violation.

We know from the Hearing Examiner's order that has been proposed and is in front of you today that Violations 3 and 4 do not meet that requirement because neither one of them is a Class 1 violation, and neither one of them is of major extent and gravity. They have to be both major extent and major gravity. Here the proposed order finds that Violations 3 and 4 are not major extent, so no penalty can be sought for those violations.

Now, the Department's response brief,

they would have you believe that there are two opportunities to classify a violation. They would have you believe that the Department can classify the extent and gravity --

CHAIR DEVENY: Can you wrap up this in two minutes?

MS. MARQUIS: Yes, ma'am, I can. They would have you believe that the extent and gravity can be classified as something during the notice provisions, and then they can change their mind and classify it as something else during the penalty provisions.

You won't find a basis for that anywhere in the rule or the law. There is only one rule that describes how to classify a violation in terms of its nature, extent, and gravity, and that rule must be followed. It can't change whether you're in the notice provision or the penalty portion of the case.

If you were to allow that to happen, the Department could simply charge every violation as being the worst violation possible, so that they could get around those notice provisions, and then later they can change their mind and downgrade the violation for the penalty portion.

That's not fair to the regulated public, and that's not in accordance with the laws and the rules. There is only one rule that describes how to classify a violation. That rule was analyzed and the facts were considered and applied to that rule. The Hearing Examiner found that Violations 3 and 4 don't meet the standard for the notice requirement, and they can't be charged with a penalty in this case. Thank you.

CHAIR DEVENY: Thank you, Ms. Marquis. I'm going to ask DEQ to have five minutes with just a little bit longer to give their oral argument on this aspect of the case, and then we'll have questions of both parties from the Board members.

MS. BOWERS: Madam Chair, members of the Board, I'm Kirsten Bowers, DEQ attorney representing DEQ in this matter.

And in response to Copper Ridge's motion to strike, I believe they're conflating two different provisions in enforcement law.

What we're actually talking about here is notice that was provided to Copper Ridge and Reflections at Copper Ridge, and both on orders on summary judgment, and the Hearing Examiner's

proposed findings of fact and conclusions of law, it was determined that DEQ did not provide a notice under 75-5-611 sub (1).

That provision has five very specific requirements, one of which is a calculation of a penalty up front that's provided to the violator, and then they are also given a time frame in which they are to make corrective actions.

There is another provision under 611, that's 611 Sub (2), in which the Department may issue an administrative notice and order in lieu of the notice under 611 sub (1), and that's if the Department action seeks an administrative penalty only for activities it believes and alleges are violations of 75-5-605, and I think that language "believes and alleges" is important.

In DEQ's violation letter dated September 23, in fact it is entitled a 617 violation letter, Copper Ridge and Reflections was told that DEQ would be taking formal enforcement action. And so under 611 Sub (2), we went directly to an order.

The violation letters were a courtesy notice and not even required. They were provided a violation letter on September 23rd, which in

fact attached Dan Freeland's inspection report, and give them notice of all the allegations against them. And then there was a second violation letter in October after DEQ did an inspection and found violations of the permit.

I think Hearing Examiner Clerget was very clear in her proposed findings of fact and conclusions of law that some of her findings were related only to the penalty calculation, and not to the notice that was provided. In fact, she has a finding, I believe it is proposed finding -- or proposed Conclusion of Law 5 that says DEQ did provide adequate notice under 617 and 611 Sub (2).

Then with regard to the rules that Copper Ridge mentioned, as they were at 17.30, and in the subchapter 2000, those rules did in fact add some additional requirements on DEQ, which DEQ did comply with. The violations, the four violations DEQ did allege at the time it gave its notice, and provided a penalty calculation in its administrative order.

DEQ provided a penalty calculation and Violation 1 was of major extent and gravity; Violation 2 was also of major extent and gravity; Violation 3 was of major extent and gravity;

Violation 4 was of moderate gravity and major extent.

But the Hearing Examiner in his orders on summary judgment found that violation to be a Class 1 violation, which is defined in 17.30 of the rules at subchapter I think it is 2001.

He found that violation to be a violation of a permit's compliance schedule or plan. And I believe he found that because there are many schedules in the general permit such as inspection requirements, and recordkeeping requirements, that Copper Ridge and Reflections did not comply with.

So DEQ is requesting that you deny Copper Ridge and Reflections' motion to strike to the extent it applies to anything other than the penalties. We are not contesting, we have not filed any arguments contrary to the Hearing Examiner's proposed findings of fact and conclusions of law, and we're not contesting her reduction in the number of days that would reduce the extent of Violations 2, 3, and 4.

Unless you have questions, I have nothing further.

CHAIR DEVENY: Thank you, Ms. Bowers.

Board members, do you have questions of either of the parties, Ms. Marquis or Ms. Bowers?

BOARD MEMBER TWEETEN: Madam Chair, this is Chris. I have one for Ms. Marquis, please.

CHAIR DEVENY: Go ahead, Chris.

BOARD MEMBER TWEETEN: Counsel, what is it about this material that is redundant, scandalous, impertinent, or otherwise meets the standard for granting a motion to strike as opposed to simply disposing of it on its merit as part of the final order in this case?

MS. MARQUIS: Madam Chair, Board Member Tweeten. Certainly the Board could do either. I think procedurally it is important that the motion to strike be decided and that the Department be prevented from arguing that the violations have any nature, extent, and gravity other than that which has been proposed in the Hearing Examiner's proposed order.

The procedure here is important. The Hearing Examiner issued a proposed order, and all parties had an opportunity to file exceptions to that proposed order. Copper Ridge and Reflections at Copper Ridge were the only parties who filed exceptions to that order. Therefore, we put the

Department on notice of what our arguments were against the proposed order.

The Department did not file any exceptions, and did not put us on notice that they would be raising this argument that the violations can be characterized as anything other than what is in the proposed order.

It would be unfair for them to come before this Board now, and to argue as if those violations can be classified as they desire them to be classified, and not as in the proposed order, given that they didn't file exceptions to the proposed order. They didn't provide an exception briefing that would allow this Board to make a full and fair decision on the merits of that particular issue in this case.

BOARD MEMBER TWEETEN: Further question, Madam Chair.

CHAIR DEVENY: Go ahead.

BOARD MEMBER TWEETEN: Is there something in the briefing with respect to Hearing Examiner Clerget's proposed final disposition that leads you to believe that the Department plans to make arguments that are contrary to those portions of Ms. Clerget's proposed decision to which the

Department has not taken exception? Is that a clear question?

MS. MARQUIS: Yes. Madam Chair, Board Member Tweeten. I've identified in our motion to strike the exact portions of the Department's response brief that we request be stricken from the record.

And in its response brief, for example, at Page 34, at the bottom of the page, the Department argues that the Violations 2 and 3 are major extent and gravity, and that is in direct contradiction to what the proposed order in front of the Board today proposes.

Likewise on Page 35 at the top, the Department argues that Violation 4 was of major extent. Well, in the proposed order that's in front of you for a decision today, the Hearing Examiner has proposed that Violation 4 is actually of minor extent. That's on Page 37 of the proposed order.

BOARD MEMBER TWEETEN: Thank you, Ms. Marquis. Madam Chair, can I pose a question to Ms. Bowers, please?

CHAIR DEVENY: Yes, please do.

BOARD MEMBER TWEETEN: Thank you. Ms.

Bowers, does the Department assert that in this case it is entitled to make arguments that are contrary to Hearing Examiner Clerget's proposed final order in this case, final disposition in this case, including the findings, and conclusions, and all those things, to make an argument that's contrary to something that is in those findings, and conclusions and final order proposed by Mr. Clerget that the Department has not taken exception to?

MS. BOWERS: Madam Chair, members of the Board, member Tweeten, no. DEQ does not propose to make any arguments that are contrary to the Hearing Examiner's proposed findings of fact and conclusions of law, or the orders on summary judgment in this case.

And I want to point out that one of her conclusions of law is that DEQ provided legally sufficient notice of violations under the Montana Water Quality Act, including 611 Sub (2), 75-5-617, and ARM 17.30.2003.

And the pages in DEQ's response to Copper Ridge's exceptions that Copper Ridge is pointing to, DEQ is only pointing out that the order determined the violations were Class 1 or of

major extent and gravity for purposes of adequate notice that was provided, not for purposes of penalty calculation.

BOARD MEMBER TWEETEN: Okay. Thank you.

CHAIR DEVENY: Any other questions from Board members of either of the parties on the motion to strike?

(No response)

CHAIR DEVENY: Hearing none, I'm inclined to not allow the motion to strike, because when I looked back through the documents, I really couldn't find anything that wasn't already in either the summary judgment or the Hearing Officer's order, and I think I would prefer to let these documents speak for themselves.

And I don't think we need to belabor this particular issue further to have an adverse impact on our decision. And so I would like to allow these documents to be given the weight that they are in the packet that we have, and in the conclusions of law, and the findings of fact, and the exceptions, and DEQ's response to the exceptions, and therefore I would move to deny the motion to strike made by Copper Ridge.

BOARD MEMBER TWEETEN: Madam Chair, this is Chris. I agree with you wholeheartedly. I didn't catch -- Did you move to deny the motion to strike?

CHAIR DEVENY: I did. I have moved to deny the motion to strike.

BOARD MEMBER TWEETEN: I'll second your motion.

CHAIR DEVENY: There has been a motion and a second. Do we have Board discussion on the motion?

(No response)

CHAIR DEVENY: Hearing none, I'd like to take a vote on the motion. All those in favor of the motion to deny the motion to strike made by Copper Ridge, please signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: I believe everybody was in favor of the motion, so the motion passes, and the motion to strike has been denied.

So next I believe we want to go to the oral argument on the summary judgment, and the proposed findings of fact.

MS. CLERGET: Would you like to take that together, or would you like to take it separately by issue?

CHAIR DEVENY: I would like to -- I believe there is another issue that we need to talk about before we really move to everything.

And I think a fundamental issue in this case before we proceed is for the Board to decide the owner/operator issue that was brought out and was raised by the Hearing Examiner. And I'd like to give Copper Ridge and DEQ another chance to just specifically focus on that for oral argument.

Again, I'm doing that because these decisions are sort of layered. One depends on another. And I think if we don't settle the owner/operator issue up front, it really impacts how we move on to the rest of the case today. So let's try to see if we can take care of this issue before we break for lunch. Do Board members understand that, or think that that's an okay way to proceed?

(No response)

CHAIR DEVENY: Hearing no argument, I'm going to go ahead with that. So I'd like to give each of the parties five minutes again for oral

argument on this particular issue, and Copper Ridge, would you like to start.

MS. MARQUIS: Madam Chair, members of the Board. I think this is a very important pivotal issue. Would it be possible to have ten minutes?

CHAIR DEVENY: Okay.

MS. MARQUIS: Thank you. An owner/operator is defined as, quote, "A person who owns, leases, operates, controls, or supervises a point source." That comes from the statute Montana Code Annotated 75-5-103 Subparagraph (26).

And when we think about the point source, it is important to note that for stormwater discharges associated with construction activity, it is the disturbance that is caused by the construction that is the regulated point source.

And I think if you look in the briefing, you'll see that Copper Ridge and Reflections at Copper Ridge and the Department are actually very similar on this topic. We both cite to the same rule, and say that construction activity is the regulated point source that must be permitted.

It is important to keep in mind here,

because at the time that these violations were charged, Copper Ridge and Reflections at Copper Ridge were not conducting the construction activity that resulted in the discharge, and we know that for a variety of reasons.

We know that the Copper Ridge and Reflections at Copper Ridge were in compliance with everything they had to do under the Subdivision Act. We know that they had a construction stormwater permit for their development activities, which included road building and installation of utilities.

We know that they did everything that they needed to do to comply with those permits because there weren't any violations charged under those permits, and those permits were in fact terminated by the Department.

At that time, if the Department had felt that Copper Ridge and Reflections at Copper Ridge needed any more permit coverage, they could have told them that, but they didn't. They said nothing. And they waited. And six months later, the City of Billings voices some concerns about stormwater discharges within the subdivisions.

It is important when we think about the

subdivisions to think about that the line drawn around a neighborhood is a subdivision. It doesn't mean that Copper Ridge Development Corporation and Reflections at Copper Ridge own everything within that boundary area.

Indeed there comes a point in time when they begin to sell off individual lots for development by third parties, people who are not connected to either Copper Ridge Development Corporation or Reflections at Copper Ridge.

It is at that point in time that Copper Ridge and Reflections at Copper Ridge no longer had control. They no longer met the definition of an owner/operator. They don't own the land, they don't lease the land, they don't operate the land, they don't have any control over the land, and they don't supervise anything that's going on on that land.

It is also important to note that the Hearing Examiner provided evidence in her order on Pages 34 and 35. She cited to Exhibit Y, and she said, "Copper Ridge and Reflections at Copper Ridge did provide evidence that they did not own or at least some of the lots on which DEQ noted a lack of BMP's," end quote, and, quote, "It is

entirely unclear to the Hearing Examiner whether or not BMP's ever could be put in place based on Copper Ridge and Reflections at Copper Ridge's ownership access." So recognizing that Copper Ridge and Reflections at Copper Ridge have no control over those individual lots.

Even if you look at the order on summary judgment, the Hearing Examiner based his decision on some facts and assumptions. Even if you take all of those facts and assumptions as true, none of those add up to support a conclusion that Copper Ridge and Reflections at Copper Ridge owned or operated any point source within the subdivisions.

Now, DEQ has argued, and in their response brief, they point to a couple points in the transcript that they point to as proof that Copper Ridge and Reflections at Copper Ridge owned 100 percent of the property.

But it is important to go back to the transcript and read those questions, because those questions were asking Mr. Lees about the property at the time it was developed or before it was developed. And he says, "Yes, as we developed our property, at the time we're developing, we own it

100 percent." That's what he said.

And he's right. At the time that they developed it, at the time they put in the roads and the utilities, they owned 100 percent of that property, and they had the proper construction permits. And then later on in that part of the transcript he says they subdivided, "and then we start selling lots." Once they sell those lots, they no longer have control over those lots.

This is a very important point because if this Board wants to affirm this order, essentially what you're saying is that a private corporation that is no longer connected to a piece of property must somehow control what happens on that property. The private corporation can't do that unless you also delegate some regulatory authority to that private corporation.

And I don't think the Department or the Board are willing to do that, and in fact, there is no basis for that in the law or the rule.

Copper Ridge and Reflections at Copper Ridge clearly did not own or operate the individual lots where the home building was occurring. There's testimony that says that's not their deal. They develop it and they sell it off

and let somebody else build the houses.

We've also cited to a trespass case and a subdivision case that raised concerns for us. If this Board affirms the order and says that the subdeveloper after they've sold the property has to go back and do things on that land, they can't without causing a trespass and creating a claim of action that the landowner would have against the subdivision. That can't be possible. It can't be right.

BOARD MEMBER TWEETEN: Madam Chair, this is Chris. May I interpose a question at this point?

CHAIR DEVENY: Go ahead, Chris.

BOARD MEMBER TWEETEN: Because I don't want to -- (inaudible) --

Ms. Marquis, your argument suggests that once the property passes out of the hands of the developer and the lot is sold to the new owner who proposes to build, then any adverse effects such as stormwater runoff from that particular parcel are beyond the ability of DEQ to regulate; is that what you're saying?

MS. MARQUIS: I'm saying that it's not something that the developer can regulate because

the developer no longer has control over that piece of property, and the development --

BOARD MEMBER TWEETEN: I understand that. I'll get to that in a second. But just respond to my question. Does DEQ have the authority to take any action with respect to the purchaser?

MS. MARQUIS: If DEQ finds that the purchaser has discharged without a permit, I believe that's the same violation, and I don't know why they couldn't cite the individual lot owner for that violation, instead of citing my client who no longer owns that property.

BOARD MEMBER TWEETEN: Okay. So my second question then is: Would it not be possible for the developer in conveying the lot to the new owner to include in that conveyance some sort of covenant on the part of the new owner to allow the developer to supervise to assure that there aren't any violations of the permits that have been issued with respect to the subdivision regarding, say, stormwater runoff?

MS. MARQUIS: Madam Chair, Board Member Tweeten. The Subdivision Act is fairly clear on the responsibilities between the developer and the

individual lot purchasers, and the Subdivision Act requires that they inform the individual lot owner where the stormwater system is located. If there are covenants, conditions, or requirements, they also inform them of those.

But at the point that the property is purchased by a third party, those requirements become requirements on that third party. It is no longer the developer's requirement to comply with those. And that's what the case of Eastgate Village Water and Sewer Association versus Davis stands for. It says once you purchase property that has conditions and terms and requirements on it, it is the property owner's responsibility to comply with those. You can't hold the developer responsible for those.

BOARD MEMBER TWEETEN: So as far as you're concerned then, there would be no reason why DEQ could not, in the event you prevail in this matter, DEQ could not turn around and cite the property owners for violations.

MS. MARQUIS: I don't know why the violations that were cited in this case couldn't have also been cited against an individual property owner. That's true. The violations were

for discharging without a permit -- that can be charged against an individual -- and for placement of waste where they may cause pollution. Those are the two main violations connected to this storm event, and those could be charged against an individual landowner.

And let's not forget also the important piece here is that the stormwater system in the subdivisions is connected to the City of Billings stormwater system, and so it is not like there isn't another public entity involved that couldn't regulate the individual lot owners. In fact, it was the City of Billings that originally voiced concerns to the Department.

So to the extent that the Department would want to delegate or have another public entity involved in regulating, the City of Billings is already there, and it is already connected to their system.

BOARD MEMBER TWEETEN: I see. Thank you.

CHAIR DEVENY: Ms. Marquis, could you wrap up your oral argument on this within the next couple minutes.

MS. MARQUIS: Yes, certainly, Madam

Chair, Board members.

Board Member Tweeten went to my next point exactly. That was a great segue. And I just want to close with this, and reiterate that if the Board affirms this order, what you're saying is that a private corporation that does not own lease, operate, or control the source of the discharge must somehow control that discharge.

But what regulatory authority does that private corporation have, and what regulatory authority will you delegate to that private corporation to enforce that requirement? That's a scenario that the Montana Water Quality Act does not support and cannot support. The subdivisions are not the owners or operators after they've sold the lots. Thank you.

CHAIR DEVENY: Thank you, Ms. Marquis. I'd like to ask Ms. Bowers to present DEQ's oral argument, and again, we'll give you ten minutes, and probably time for a little questioning.

MS. BOWERS: Madam Chair, members of the Board. I think as Ms. Marquis pointed out, there are areas where we agree. We agree on what the definition of owner/operator is, and that that's a person who owns, leases, operates, or controls a

point source.

In the case of construction, a point source is created when the developer opens up the land and creates a conduit for stormwater to run towards waters of the State, and that discharge must be controlled by a permit.

I think something that is missed in Copper Ridge's arguments are that they did maintain some control here. They were responsible for the original development.

They, as they admit, they owned 100 percent of the property before they initiated the development. It was all agricultural land. So they went in, and they planned roads, they planned the lots for residential home building, they installed infrastructure including storm sewer infrastructure, and they did get permits for the initial road building and installation of utilities.

Those permits were issued to contractors who signed as owners or operators because they were in control of their discharges, and they filed with the DEQ notices of termination. DEQ terminated those permits. And then Copper Ridge began to sell lots. But what they didn't do is

they didn't plan for stormwater permitting as the property developed and lots were sold.

DEQ does not go out and tell people how to permit their development. There are many options for doing it. Copper Ridge and Reflections could have transferred the permit that their road builders held. They could have extended that permit to cover the residential lots, and then transferred it to home builders, either individually, or a home builder who could be in charge or oversee the construction, and make sure that the stormwater pollution prevention plan was complied with.

But the problem is Copper Ridge and Reflections did nothing to ensure that the site was permitted, that all phases of the development was permitted, or that there was at least a plan to permit the site.

So I think the argument that they are just no longer connected to lots when a home builder comes in and starts building. Maybe just on pure ownership, title, ownership of the property, they have an argument there, but they had to have a plan for permitting the construction activity.

Also I think the trespass argument is a little over blown, because many BMP's can occur in the right-of-way to protect the storm sewer system. There are many BMP's that occur at curb side or around the storm drain to control discharges to that system.

Also Copper Ridge and Reflections provided no evidence in this hearing or in briefing that they ever asked a lot owner to access the lot to install BMP's. There is absolutely no evidence that they asked and were denied, and it was just impossible for them to do.

To respond to Board Member Tweeten's questions, yes, DEQ could regulate individual home builders. The problem here is there was no permit. There was nothing. There has to be some sort of plan by the original owner/operator, the person in control of designing a subdivision, specifications, modification of specifications. I mean all of those things evidence control.

And I think that's in part what the Hearing Examiner in his order on summary judgment pointed to, was that Copper Ridge and Reflections did have some control over the original development, and that they were proposing too

narrow a definition of owner to just the person who owns the property.

And additionally, the Hearing Examiner on orders for summary judgment also was persuaded by the fact that when Copper Ridge and Reflections did get their notices under the general permit for stormwater -- I'm sorry -- under the general permit when they submitted their NOI's and did permit the sites, they signed as owner/operators of the development. I think the Hearing Examiner was somewhat persuaded by that evidence that they did eventually permit the sites as the owner/operator.

Unless there are questions, I don't have anything else.

CHAIR DEVENY: Are there questions by Board members of Ms. Bowers?

(No response)

CHAIR DEVENY: Any further questions by Board members of either of the parties?

BOARD MEMBER TWEETEN: Madam Chair, this is Chris. I guess I need to connect the dots here a little bit better, and I'm not familiar enough with the record to do this, so I'll ask Counsel to enlighten me.

Is there any way to segregate the stormwater runoff between those properties that continue to be owned by the developer on one hand, and those properties that have been sold to private owners on the other?

MS. BOWERS: Madam Chair, members of the Board, and Board Member Tweeten, that's a really good question.

The construction activity that's being regulated under general permit for stormwater construction, it's really the disturbance to land that's being regulated, and it is possible to stabilize certain portions of a development and then terminate the permit that covers that portion of the development, and then permit the development in phases, which I think is what most developers do, so that --

And I think I understand your question correctly, so that you're not just -- you don't have the site that's opened up, and then people coming in doing various activities, and maybe causing more disturbance that is no longer subject to a permit.

MS. MARQUIS: Can I respond if you're done?

BOARD MEMBER TWEETEN: Let me just follow up briefly before you do, Ms. Marquis, if you would indulge me.

So I'm assuming that at some point, the infrastructure for the subdivision is connected into the City of Billings' stormwater system, whatever their storm sewer system is that carries off stormwater; am I correct in that assumption?

MS. BOWERS: That's correct, and in this case, the subdivisions were connected to the MS4, the municipal separate storm sewer system. So yes, that's true.

BOARD MEMBER TWEETEN: That was operated under a separate permit that was taken out by the City of Billings, correct?

MS. BOWERS: That's correct.

BOARD MEMBER TWEETEN: And in this case, the Department I gather alleges that there was some stormwater discharge from this property, or these properties I guess, that discharged into Montana waters without going through that City of Billings storm sewage system; is that correct?

MS. BOWERS: That's correct. Actually there were discharges that both flowed over land and went directly to waters of the State, and

there were discharges that went to the MS4.

BOARD MEMBER TWEETEN: And I would assume that any discharges that went into the City of Billings system would not be a violation of any permit; is that correct?

MS. BOWERS: No, that's not correct. The owner/operator of a construction site has to have a permit. They can't just discharge uncontrolled stormwater discharges directly to the MS4. So they have to have BMP's in place that control those discharges. That's the treatment. That's --

BOARD MEMBER TWEETEN: Presumably the owners, the individual owners of lots that had been purchased are entitled to rely on the City of Billings stormwater discharge system, correct?

MS. BOWERS: You mean after they're fully developed or --

BOARD MEMBER TWEETEN: No, I mean after they're purchased, after a private owner takes ownership of a lot. Any discharges from that property, are they still covered by the construction permit, or are they subject to the City of Billings permit for their stormwater system?

MS. BOWERS: Those discharges should be covered by a construction permit until they're stabilized, and the Department issues a notice of termination.

BOARD MEMBER TWEETEN: So by stabilize, you would mean that the lot had been sodded so that the top soil would no longer run off with the rain water, for example; would that be right?

MS. BOWERS: Yes. For example, they have to grow some grass or something on -- they can't have bare ground anymore.

BOARD MEMBER TWEETEN: They have to pave those areas that they're going to pave and so forth.

MS. BOWERS: Correct.

BOARD MEMBER TWEETEN: The Department's argument is that until those activities are undertaken, the construction permit still controls, even though the land has been passed into private ownership?

MS. BOWERS: That's right. There should still be a construction permit in place to control discharges from lots that are just exposed bare ground, or lots that have construction debris, or fill that's been stockpiled that shouldn't be just

exposed to stormwater without some protection.

BOARD MEMBER TWEETEN: What exactly did the permit in this case, if anything, with regard to this question?

MS. BOWERS: At the time of the violations, there was no permit in place.

BOARD MEMBER TWEETEN: So how did that -- Did the permit expire of its own force, or did DEQ issue some sort of a document indicating that the permit had been terminated?

MS. BOWERS: The prior permits that were issued were for road building activity and utility installation, and those permits were terminated, and they were terminated because DEQ received a notice of termination.

BOARD MEMBER TWEETEN: So did the developers submit that notice of termination?

MS. BOWERS: Yes, the permittees which were road builders under contract with Copper Ridge and Reflections.

BOARD MEMBER TWEETEN: So once that happened, there was no permit in place --

MS. BOWERS: That's right.

BOARD MEMBER TWEETEN: -- with respect to stormwater.

MS. BOWERS: That's correct.

BOARD MEMBER TWEETEN: Has DEQ alleged that that's a violation in this case?

MS. BOWERS: Yes. That's Violation 2, discharging stormwater without a permit.

BOARD MEMBER TWEETEN: Ms. Marquis, can you respond to this subject for me, please. I'm just trying to figure out how this works.

MS. MARQUIS: Sure.

BOARD MEMBER TWEETEN: The Department seems to take the position that your clients were responsible for maintaining a stormwater discharge permit on this property, I guess theoretically until all of the individually purchased lots were stabilized in some way, either through the raising of a grass lawn, or pavement, or some combination of those two. Can you address that allegation for me, please.

MS. MARQUIS: Certainly. Madam Chair, Board Member Tweeten. The Department has said that the construction activity is a regulated point source, and that it must be permitted; and that may be true, but because it must be covered, it does not mean that DEQ can just look to essentially the biggest target in the

neighborhood, or the sign at the entrance to the neighborhood and say, "Tag. You're it. You need to get the coverage."

No, point source in this case is the disturbance that's caused by the construction activity.

And you had asked about segregating lots to ones that were developed and were not developed. There is really no need to do that, because in this case the proof is that my client's disturbances were completely stabilized, and that's the only condition, that that condition had to have been met for their permit to be terminated.

So they had stabilized their construction activity. Any other lots in the subdivision that they may have owned were not under construction. There is evidence in the record that says they don't do the home building. They leave that to someone else.

So whatever lots they owned had either never been disturbed, or if they had been disturbed due to any construction activity that my client may have done, they had been completely stabilized to the satisfaction of the Department,

and that permit had been terminated.

That's important because what it says to my client is that, "Okay. You're good. Keep going. You're good." It is obvious to everybody that a subdivision is there to build individual houses. Everybody knows that that's the next step. And the Department never said, "Okay. So where is your individual home building permit?"

The Department didn't do that, and they terminated those development permits in December of 2012, and they waited almost a full year until there was a big storm, and they saw the impacts of that storm, and that's the first time they came to my client and said, "Well, look. You need a permit for home building activities."

And you can imagine my client gets a violation letter in the mail that says, "You're in violation, and you need to do X, Y, and Z to come into compliance. You're in big trouble" essentially. And so my client does X, Y, and Z, fills out the paperwork, submits the NOI, and gets the permit.

And now the Department and this Hearing Examiner want to use that compliance action that my client took, because the Department said they

had to, now they want to use that as the hook to say that they're the owner and operator. Well, that can't be right, because that's a later action that my client took to come into compliance at the direction of the Department. There is simply no way that those later signed NOI's indicate that my client is the owner or operator.

It is also important to know that while we're talking about discharges, there really is no evidence in the record of an observed discharge, and it can't be the case because by all admissions, everybody says the storm occurred on September 7th, and the Department did not do their inspection until two days later. The water was gone. There was no discharge that was directly observed. So that's an important point to keep in mind.

And again, the arguments about whether the stormwater needed to continue to be controlled goes to the construction activity, and it goes to the owner/operator issue, because if my client is not doing the construction activity, they have no control over it. They don't own it or operate it or control it.

They've done everything that they're

supposed to do under the subdivision laws. They've sold the property. They can't go on the property without trespassing. And the Department has said here today, well, they could have asked to go on the property and install some BMP's.

But okay, so let's play that hypothetical out, and say they go and they ask if they can go on the property and install some BMP's; but as soon as they leave, whoever owns this property tears out the BMP's and does whatever they want with them. Well, now what recourse does my client have?

And this goes to the regulatory authority. They have no authority to require the individual homeowners to do anything about stormwater. The minute they sold the property, whatever stormwater requirements there are became the burden of the individual lot owner, not my client.

And you had asked about the violation that was charged, Board Member Tweeten, and there was a violation that was charged for conducting construction activities prior to submitting an NOI.

That was the first violation the

Department charged, and that violation was essentially dismissed by the previous Hearing Examiner. Because of those notice violations that we talked about earlier, that violation didn't meet the threshold for a violation that the Department can seek a penalty for without completing the notice provisions.

CHAIR DEVENY: Ms. Marquis, I'd like us to stick to the owner/operator topic here while we're at it.

MS. MARQUIS: Certainly. I think there was some confusion about whether the Department had charged a violation for an unpermitted discharge, if they charged a violation for construction activity without a permit. I just wanted to make clear that they charged both of them, and one of those was already dismissed.

CHAIR DEVENY: I have some questions of DEQ, Chris, unless you had further questions of Ms. Marquis.

BOARD MEMBER TWEETEN: No, Madam Chair. Thank you.

CHAIR DEVENY: Ms. Bowers, Ms. Marquis alleged that there were no discharges coming from the property that was owned by Copper Ridge, that

it was all from the property that was owned by the other property owners, not in the context of owner/operators, but of landowner owner/operators. Is that accurate in your --

MS. BOWERS: Madam Chair, members of the Board. That really gets to the type of activity that's regulated under the general permit for stormwater associated with construction activity. And it regulates all activities, not just home building. It is clearing, grading, excavation, any activity that results in a disturbance that's equal to or greater than one acre of total land area.

But for purposes of the rules, it also applies to activities, construction activities that may be less than one acre if they're part of what's known as a larger common plan of development or sale.

And that's what we had here. Copper Ridge and Reflections were the initial developer of a larger common plan of development or sale.

And this in part addresses Ms. Marquis's allegation that DEQ just went after the biggest target. DEQ went after the entity that they believed was the owner or operator of the larger

common plan of development or sale, and that was based on signs that the inspector saw at the subdivision that said "Copper Ridge," and showed all of the lots laid out, and also some advertising by the company.

And the reason for that definition of larger common plan of development or sale is so that you can't just divide up a big development into little lots, and avoid permitting obligations, because the little lots are obviously less than an acre, and the whole subdivision could avoid permitting if that were the activity regulated.

CHAIR DEVENY: And another question, and this is: In the hypothetical development of the subdivision, you have subdivision rules that apply, and you have the permits that are required under the Subdivision Act, and then when they're terminated, the stormwater permit comes into effect under the water quality regulations; am I getting that sort of straight? I guess they're related.

MS. BOWERS: There are a whole host of permits that a developer has to take out, and the stormwater permit is just one.

CHAIR DEVENY: So I guess what my question is is: As a subdivision is being developed, and they reach a point where they have done the Phase 1 development, and they're ready to sell the lots and move in, is it typical that a subdivision developer would then move into getting those next set of permits?

MS. BOWERS: Oh, you mean -- I'm just trying to understand your question, Madam Chair. Are you concerned with the fact that the developer got a permit that just covered roads and utilities, and then went into the home building phase, and -- Are you asking if typically they would have gotten a permit for that phase, a separate permit?

CHAIR DEVENY: Well, I guess I need clarification on why the original permit was terminated, and at that point why another one wasn't sought.

MS. BOWERS: Well, for DEQ's part, the original permits were terminated because the permittee provided a notice of termination, and in that notice of termination, they state that the site is now stable. And so DEQ, in their administration of the permit, they terminate

permits where there is stabilization, and no longer a need for a discharge permit.

And the problem here was that then that left the rest of the development without a permit because that road building permit was very specific to just the road building activity. There are a lot of ways that the site could have been permitted. The road building permit could have been extended to include the other activities, but it didn't happen.

CHAIR DEVENY: Is that typically what would happen? Would the permit be extended, or would people apply for a new permit in that case?

MS. BOWERS: There are a lot of ways to permit a site. I have some DEQ people here I could ask, but I think that it's fairly common that the road building permit is extended to include the other activities. Dan Freeland is here, who was the inspector, if you want to ask him a specific --

CHAIR DEVENY: Not at this point. I don't want to introduce any new kinds of evidence.

Other questions right now of Ms. Bowers while she's here?

BOARD MEMBER TWEETEN: Madam Chair, this

is Chris. I have one.

Ms. Bowers, there has to come some point in time where the developer's responsibility to get and maintain permitting ends; isn't that correct?

MS. BOWERS: When the site is fully stable, there is no need for a stormwater permit for construction activity.

BOARD MEMBER TWEETEN: So it would be the Department's position then that until every single lot in this development was stabilized, the developer has some obligation to maintain a stormwater discharge permit, correct?

MS. BOWERS: If not maintain the permit themselves, transfer the permit to another owner/operator who can maintain control of the site.

BOARD MEMBER TWEETEN: Well, who would that be? Who could that potentially be? It seems to me the only potential other party that could be subject to such a permitting requirement could be the purchaser; is that right?

MS. BOWERS: The permit could be transferred to home builders, who would be purchasers.

BOARD MEMBER TWEETEN: Where do the statutes or regulations address this particular question of the hand-off of the responsibility for stormwater permitting?

MS. BOWERS: There are provisions for permit transfer in Administrative Rules of Montana Title 17 Chapter 30 Subchapter (13); and Subchapter (11) pertains more to general permits and stormwater discharge permits.

BOARD MEMBER TWEETEN: I guess my question, though, is: Is there somewhere in all of these regulations in which it is clearly stated that somebody has to have responsibility for stormwater permitting from one end of the process to the other, or is it solely a matter of determining who the owner/operator is?

MS. BOWERS: Well, let me just step back a minute. There is a requirement to cover a discharge of a pollutant, and so as long as there is an addition of pollutants from a point source to State waters, there has to be a permit to cover that discharge.

BOARD MEMBER TWEETEN: Right, and then there is an over-arching permit held by the City of Billings that deals with the subject of

stormwater runoff, and it's my understanding that the City's permit must have necessarily been extended to this subdivision at the time that the subdivision hooked on to the City system, correct?

MS. BOWERS: Well, the MS4 permit is little bit different. I mean the City does have an infrastructure through which stormwater flows, and then it flows eventually to State water, and the City is also subject to some best management practices and some inspection requirements in order to comply with their permit and control stormwater discharges to their system.

The stormwater discharges that are associated with construction activity are subject to separate controls and separate permitting; and the City, within their MS4 they also have some enforcement authority, and can require permit coverage.

BOARD MEMBER TWEETEN: But is it not correct that the construction activity with respect to which the developer had been permitted -- that would be road building and so forth -- that construction activity was already over, wasn't it?

MS. BOWERS: Yes, it was.

BOARD MEMBER TWEETEN: Their permit had been terminated for that purpose, so one can only assume that that construction activity was over.

Now, I would assume there is no gap with respect to stormwater coverage, so any discharges that happened from water running down the street and into the storm sewers and into the City of Billings system is not the subject of any of these complaints against this developer, correct?

MS. BOWERS: Well, stormwater that was contributed by construction activity within the subdivisions that flowed onto streets, sidewalks, and into the storm drain without controls is part of this enforcement action.

MS. CLERGET: Madam Chair, may I interrupt here for a second. And Chris, I'm going to point you to a place in the summary judgment order that I think offers you the analysis you were looking for of the applicable ARM and statutes, and that's Page 13 to 14 in the summary judgment order. That's in your packet at page 235 to 236. And that walks you through the statutory analysis, I think what you're struggling to find.

BOARD MEMBER TWEETEN: Right. Okay. So I don't want to ask any more questions for now and

let other people have a chance.

BOARD MEMBER BUSBY: This is Dexter. I've got one quick easy question.

CHAIR DEVENY: Go ahead, Dexter.

BOARD MEMBER BUSBY: On these lots that have been sold and there is construction activity, is that not covered under the building permit for those lots, the runoff?

MS. BOWERS: The stormwater discharges, no, they're not covered under building permits.

BOARD MEMBER BUSBY: Interesting, because the ones I have had had a clause in there that you had to control runoff.

MS. BOWERS: This is Kirsten Bowers, Member Busby. And I think some local governments are adding that language to building permits.

BOARD MEMBER BUSBY: Because I'm not sure that isn't where the responsibility lies for the individual lots that have been sold.

MS. BOWERS: This is Kirsten Bowers again. One concern there is those lots are smaller than an acre, and so the construction activity that's regulated under stormwater permitting is activity that disturbs more than one acre, or a smaller area if it is part of a larger

common plan of development or sale.

BOARD MEMBER BUSBY: I don't disagree with what you just said, but the construction on an individual lot which is under one acre, which would not fall under State control, falls under the City of Billings control in this case.

MS. BOWERS: Okay. That's kind of beyond my knowledge.

MS. MARQUIS: Can I respond to that for one minute?

CHAIR DEVENY: No, I want to continue with Ms. Bowers here for a second. Hold your point. I guess my question hasn't yet been answered as to: Does DEQ have evidence that the wastes, stormwater wastes, coming off into the streets or into the sidewalks that were observed did not come solely, or did or did not come solely off of properties that were owned by individuals, or that were still undeveloped lots owned by Copper Ridge developers?

MS. BOWERS: Madam Chair, members of the Board. The answer to your question is the actual point of discharge is not pinpointed, and I'm going to argue that it doesn't have to be, because it is the whole common plan, it is the whole

development that's subject to permitting.

Even if stormwater ran upgradient from a totally different development onto the Copper Ridge and Reflections at Copper Ridge development, they have to have a permit because they have to control that stormwater. It can't just flow without any control over their stockpiles, over their concrete washout area into the storm sewer system, or directly into waters of the State. They have to have the controls in place, and they did not have those.

CHAIR DEVENY: Further questions of Ms. Bowers?

(No response)

CHAIR DEVENY: Further questions of Ms. Marquis?

(No response)

CHAIR DEVENY: Ms. Marquis, I'll give you an opportunity to answer Dexter's question, but I'd like you to simply focus on that.

MS. MARQUIS: Thank you, Madam Chair, Board Member Busby. You've mentioned the City, and I think that is an important consideration here, but it is also important to note that there isn't any evidence before us of what the City does

and does not regulate. So to say that the City can't regulate something is not a question that should properly be before the Board right now.

And the other issue is that the entire discussion of construction activities on less than an acre, that's the necessary level at which the Department can require someone to get a permit. It is really important here, and this is what I was trying to explain earlier.

To focus on the violations that are at issue, the violations that are at issue are a discharge without a permit, so we have to meet the elements of that statute, 75-5-605. We have to prove that there was a discharge, and that there was no permit for it, not that somebody needed a permit and didn't have a permit. We have to prove that a discharge happened, and that there was no permit.

Ms. Bowers argued that the subdivision didn't have any controls in place, and again, this goes to the same thing. The violation is not that there weren't any controls in place. The violation cited was that there was a discharge, and that there was a placement of waste.

Those are the violations that have to be

proven, and you can't prove those without showing who was responsible for that discharge, and who was responsible for the placement of waste, and our position is that the evidence is not sufficient in the record to prove that our client discharged or placed any pollution.

And we have additional argument. I know there are other issues before the Board that we would like to argue, particularly the burden of proof.

CHAIR DEVENY: We'll get to that later. We need to decide on the owner/operator before we proceed.

I'd like to point Board members to the order on summary judgment where Hearing Officer Haladay wrote that, "Copper Ridge and Reflections admit that they entered into at least one contract that required all excess material from pipe and bedding displacement be left on site."

Therefore, he concludes that, "Not only did Copper Ridge and Reflections have supervision and control over the actions of third parties, they acted on their ability to instruct others how to engage in stockpiling of materials, which is an act expressly contained in definition of

construction activities."

"And this puts Copper Ridge and Reflections in a position of either control or supervision with regard to the term of sale of any of the individual lots for construction of residential homes, and any argument to the contrary ignores the common sense and practical reality of the development of a residential subdivision."

"The mere fact that neither Copper Ridge nor Reflections exercised supervision or control over the contractual terms of the sale of land does not change the fact that they had the power to supervise or control land with regard to the stormwater discharges."

So I think my read of that is that Hearings Officer Haladay felt that Copper Ridge was aware that they could, and actually did in some cases have authority and control over the construction activities.

I'm wondering if this might be a good place for us to stop and have lunch, and I think we'll do that. We'll go ahead and break for a half hour, and why don't we come back at 1:00. Are the Board members still on line?

BOARD MEMBER TWEETEN: Yes, Madam Chair, this is Chris. I'm in a bit of bind here. I'm about to go get on a bus, and travel up to Mission Valley. And I hope I can get back on in a half hour, but I'm not able to make a guarantee that I can. It all depends on my ability to get an internet signal. So I will get back on if I can.

CHAIR DEVENY: Chris, without you, we don't have a quorum.

BOARD MEMBER TWEETEN: I understand that, but I don't have any -- I'm pulled in two different directions here, and I have to do both.

CHAIR DEVENY: There is one more option that the Board has, if we could ask the parties. John Dearment is here, but has asked to be recused. If the parties would agree to have him hear, participate in hearing the oral argument and making the decision, we would have a quorum if Chris is not able to come on. Do the parties have a --

BOARD MEMBER TWEETEN: Madam Chair, I don't know what your thoughts are about this matter, but I have a hard time thinking that we will have thoroughly sorted this matter out enough to make a final decision this afternoon. There

are lots of issues that we just spent virtually an hour on that we need to sort out, and then there are other relatively thorny issues to sort out as well.

If you wanted to continue the hearing and hear argument on all of these matters, and then carry over the decision until our next meeting, you certainly could do that, and then the absence of a quorum wouldn't really matter because you wouldn't be taking final action.

So if I'm not able to get on, you always have the option of carrying this matter over to the next meeting.

CHAIR DEVENY: I guess that is an option, according to Sarah. But I would like the parties to respond to my request about having Mr. Dearment on this case so we are able to move along today.

MS. MARQUIS: Madam Chair, members of the Board, it is our understanding that Mr. Dearment was the Division Administrator at the time that this enforcement action was initiated, so we are not willing to waive our objection.

CHAIR DEVENY: Okay. So why don't we take a break and see if you can get back on,

Chris, and we'll make a decision at 1:00. Does that sound all right, Chris?

(No response)

CHAIR DEVENY: Let's take a break for lunch.

(Lunch recess taken)

(Board Member Tweeten not present)

CHAIR DEVENY: Let's reconvene. Lindsay, can you take roll call and see who all with us.

MS. FORD: Chris Deveny.

CHAIR DEVENY: Here.

MS. FORD: John Dearment.

BOARD MEMBER DEARMENT: Here.

MS. FORD: Dexter Busby.

BOARD MEMBER BUSBY: I'm here.

MS. FORD: Tim Warner.

BOARD MEMBER WARNER: Tim Warner is here.

MS. FORD: Chris Tweeten.

(No response)

MS. FORD: Chris Tweeten.

(No response)

MS. FORD: At this time, we do not have a quorum. It does look like there is someone else

on the line. There's three people on right now. Is there someone else on the line?

(No response)

MS. FORD: Anyone else there?

(No response)

CHAIR DEVENY: So would the parties be amenable to us continuing this without a quorum?

MS. MARQUIS: Madam Chair, members of the Board, of course this causes a lot of frustration for my client and I. These trips to Helena are fairly expensive, and we had anticipated to resolve this in one trip, and it seems that now regardless of what we do, we will be making two trips.

So our preference -- and we've talked to the State and to Ms. Clerget about this -- would be to continue this, and perhaps provide additional briefing on the owner/operator issue, and then resume in February with a new Board who has access to the transcript from this hearing, and we could argue again at the next Board meeting; or perhaps a special Board meeting.

Does that characterize what we've talked about fairly?

MS. BOWERS: Yes. Madam Chair, members

of the Board, DEQ is in agreement that we would prefer to proceed with a quorum, and either at the February meeting or a special meeting.

CHAIR DEVENY: So you don't want to us to proceed today with anything?

MS. BOWERS: Not with less than a quorum, no.

CHAIR DEVENY: Well, I guess we will decide whether to hold a special meeting then or postpone this to February. I don't know that we can set a January date right now. Let's try to pursue a January date if we can find one that will meet all of the schedules of all of the Board members, as well as you folks. If not, we will then move on to the February meeting. And Sarah, I'll ask you to work with Lindsay to coordinate that.

MS. CLERGET: Yes. And what is your preference with the additional briefing that the parties requested? Do you want additional briefing on the owner/operator issue, or would you like the special meeting or the next meeting to be based only on the record as it exists in front of the Board now plus the transcript?

CHAIR DEVENY: So your additional

briefing on the owner/operator, you wanted to continue that without the quorum; did I understand that correctly?

MS. BOWERS: Madam Chair, members of the Board, that was one of the stipulations that Ms. Marquis and I discussed in the hall with Sarah is that DEQ and Copper Ridge would propose doing some additional supplemental briefing on just the issue of owner/operator. We could file the brief simultaneously, and then respond simultaneously so it's not a long briefing schedule. If you think would be helpful.

CHAIR DEVENY: I think it would be very helpful. I would appreciate that. It seems to be an issue I'm not really clear on, and I really want the Board to be clear when we make a decision. So yes, please do that.

MS. CLERGET: Can you allow me to set a deadline for the briefing based on the dates that we reach for the next meeting?

CHAIR DEVENY: Yes, please do. Do we need to have a motion?

MS. FORD: Madam Chair, I did just get an email from Chris Tweeten that he is on the bus, and it's a bit noisy, but he's hoping he can make

it work. Do you want me to see if he's on the line again before we --

CHAIR DEVENY: I don't think so. I think there is too much risk that he'll get out of service, and then we'll be kind of stuck where we are now. So I think it is best to quit today while people can still get back home during the light hours. And I apologize to everybody that the Board members weren't able to make it today. We thought they were all able to come.

So I would so move then that we ask the parties to submit continued briefs just on the owner/operator issue, and that we postpone and continue this case review, I guess I'll call it, in January, if we can find an amenable date for all parties and the Board members to be hopefully present in person, and to have Sarah work with the parties to set a date for submittal of the additional briefs; is that right?

MS. CLERGET: Yes.

CHAIR DEVENY: So moved. Could I get a second?

BOARD MEMBER WARNER: Second.

CHAIR DEVENY: Thank you, Tim. It's been moved and seconded. All those in favor, say

aye.

(Response)

CHAIR DEVENY: Opposed, please say nay.

BOARD MEMBER BUSBY: I'm not opposed. I can't hear you guys. I'm getting so much background.

CHAIR DEVENY: Basically, Dexter, we're postponing the continuation of this case to either a special day in January or to the next Board meeting in February because we don't have quorum.

BOARD MEMBER BUSBY: I'm not opposed to that.

CHAIR DEVENY: And we're also having Sarah work with the parties to allow some additional materials to be submitted to the Board on this whole owner/operator issue.

BOARD MEMBER BUSBY: Okay.

CHAIR DEVENY: Sarah is going to set a date for the parties to do that. That was the motion. So it's been moved and seconded. All those in favor, please signify by saying aye.

(Response)

CHAIR DEVENY: Motion passes. Thank you everybody.

(The proceedings were recessed at 1:08 p.m.)

C E R T I F I C A T E

STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter, Notary Public in and for the County of Lewis & Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at the time and place herein named; that the proceedings were reported by me in shorthand and transcribed using computer-aided transcription, and that the foregoing - 70 - pages contain a true record of the Volume I of the proceedings to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this _____ day of _____, 2018.

_____

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

T

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	**CASE NO. BER 2015-01 WQ**
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE, DEVELOPMENT CORPORTATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105377) [FID 2289, DOCKET NO. WQ-15-08]	**CASE NO. BER 2015-02 WQ**

ORDER SETTING BRIEFING SCHEDULE ON SPECIAL ISSUE AND NOTICE OF SPECIAL BER MEETING

On December 7, 2018, the Board of Environmental Review (BER) held a meeting regarding the Proposed Findings of Fact Conclusions of Law issued by the undersigned in this case. The BER requested additional briefing from the parties

on the owner/operator issue and a subsequent oral argument. Therefore,

IT IS HEREBY ORDERED:

1. The parties may submit simultaneous briefing on the owner/operator issue on or before January 17, 2019 at noon.

2. The BER will convene a Special Meeting on January 24, 2019, at 9:00 a.m. to hear this matter.

DATED this 4th day of January, 2019.

/s/Sarah Clerget
Sarah Clerget
Hearing Examiner
Agency Legal Services Bureau
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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	)	Case No. BER 2015-01-WQ
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105377) (FID 2289, DOCKET NO. WQ-15-08]	)	Case No. BER 2015-02-WQ

REFLECTIONS AT COPPER RIDGE, LLC'S AND COPPER RIDGE DEVELOPMENT CORP.'S SPECIAL BRIEFING ON THE TERM "OWNER OR OPERATOR"

I. INTRODUCTION

Nearly four years ago, on March 27, 2015, the Department of Environmental Quality (the "Department") issued Administrative Compliance and Penalty Orders to both Copper Ridge Development Corp. ("Copper Ridge") and Reflections at Copper Ridge, LLC ("Reflections") for violations allegedly discovered during inspections conducted in September 2013 and October 2014. Hearing Exs. 10 and 11. The Department initially sought millions of dollars in penalties from each corporation - an unprecedented amount. Hearing Trans., Vol. 1, 269:14 - 24; Vol. 3, 81:10 - 16; CR/Ref Exceptions Br., p. 1, fn 1 (referring to the Department's total annual penalty deposits for each of the last six fiscal years). Copper Ridge and Reflections timely appealed the Department's enforcement decision. The case proceeded through discovery and summary judgment, resulting in an Order on Summary Judgment issued August 1, 2017 ("SJ Order").

A hearing was then held February 26 through February 28, 2018. Post hearing briefing was completed and the Hearing Examiner issued Proposed Findings of Fact & Conclusions of Law on July 16, 2018 ("Proposed FOFCOL"). On September 17, 2018, Copper Ridge and Reflections filed Exceptions to both the

Order on Summary Judgment and the Proposed Findings of Fact and Conclusions of Law ("CR/Ref Exceptions Br"). The Department did not file exceptions, but did file a Response to the Exceptions on October 31, 2018 ("Dept. Response Br.").

The matter was set before the Board of Environmental Review ("Board") for oral argument on December 7, 2018. Oral argument began at 11:00 AM with five Board members present; however, Board Member DeArment recused himself; therefore, only the minimum quorum of four Board Members participated in the abbreviated oral argument. Oral Arg. Trans., 4:8 - 15. After approximately one hour of argument, the Board recessed for a brief lunch break, after which only three participating Board Members were available. Therefore, even though the oral argument had been set well in advance and even though Copper Ridge and Reflections had prepared for and traveled to the Board for oral argument, the Board suddenly, and without explanation, no longer had a quorum present to decide this case.

The Board asked if Copper Ridge and Reflections would allow Board Member DeArment to participate in the case, so that it could "move along today." Oral Arg. Trans. 64:15 - 18. Noting that Board Member DeArment was the Department's Water Quality Division Administrator at the time this enforcement action was initiated, Copper Ridge and Reflections declined to waive their objection to Board Member DeArment's participation. Oral Arg. Trans., 64:19 -

23. The Board then asked whether the parties would be amenable to continuing without a quorum, with final agency action to be taken at the next Board meeting. Oral Arg. Trans., 64:5 - 10; 66:6 - 7. Noting their frustration with the inability to complete the oral argument during the time specifically set for it and the unanticipated need to make another appearance before the Board at a subsequent meeting, Copper Ridge and Reflections declined to proceed without a quorum. Oral Arg. Trans., 66:8 - 14. The Department agreed not to proceed further without a quorum. Oral Arg. Trans., 67:4 - 7. The parties agreed to provide additional briefing on the singular issue of whether Copper Ridge and Reflections were "owners or operators" as that term is defined in the Montana Water Quality Act and its implementing rules, and to return for oral argument at a subsequent Board meeting. Oral Arg. Trans., 66:15 - 67:3.

Copper Ridge and Reflections submit this brief, in satisfaction of their obligation to provide additional argument on the singular issue of whether they meet the definition of "owners or operators." It is undisputed that Copper Ridge and Reflections were owners of construction activity that was properly permitted and completed prior to December 2012. Joint Stipulated Facts, ¶ 5. By that point in time - December 2012 - Copper Ridge and Reflections had ceased their construction activity in the subdivisions. The violations at issue here were alleged to have occurred in September 2013 - well after Copper Ridge and Reflections had

ceased construction activities. Therefore, Copper Ridge and Reflections cannot be held liable as owners or operators in this case.

Copper Ridge and Reflections argue, as they did in their Exceptions Brief, that the burden of proof must be correctly established before any findings in either the Order on Summary Judgment or the Proposed Findings of Fact and Conclusions can be affirmed or denied. CR/Ref Exceptions Br., pp. 7-14.

II. STANDARD OF REVIEW

The "owner or operator" issue was decided on summary judgment. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). The moving party has the initial burden of establishing the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law. *Russell v. Masonic Home of Montana, Inc.*, 2006 MT 286, ¶ 9, 334 Mont. 351, 147 P.3d 216. The burden then shifts to the non-moving party to present substantial evidence essential to one or more elements of its case in order to raise a genuine issue of material fact. *Id.*

This Board should reject the SJ Order's determination of the "owner or operator" issue because it was based on disputed facts and because the Department is not entitled to judgment as a matter of law.

III. ARGUMENT

There is no evidence that Copper Ridge or Reflections discharged any waste or placed any waste where it would cause pollution.[1] CR/Ref SJ Br., pp. 11-12; CR/Ref Exceptions Br., pp. 27 - 28 ("DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions" *citing* Hearing Trans., Vol. 1, 159:6 - 11; 162:25-163:7; 164:3 - 10; 261:16-19.). Instead, both the previous Hearing Examiner and the Department take the attenuated position that Copper Ridge's and Reflections' identity as the original developers of the subdivisions makes them responsible for all discharges from, and placement of wastes within, the geographic footprint of the subdivisions - regardless of property ownership. SJ Order, p. 16 (concluding that discharges occurred at the subdivisions and "[a]s a result, DEQ has established Reflections and Copper Ridge discharged storm water into state waters, without a permit, a violation of Mont. Code Ann. § 75-5-605(2)(c)."); Order, p. 17 (concluding that evidence of wastes in the subdivisions is "sufficient evidence that Reflections and Copper Ridge placed or caused to be placed wastes.") *See also* Dept. SJ Br., p. 3 (referring only to "construction activity in the area of Reflections at Copper Ridge and Copper Ridge subdivisions."); Dept. SJ Ex. 3, p. 2 (Department inspector

[1] The Department inaccurately described the alleged placed wastes as "their stockpiles" and "their concrete washout areas," implying that "their" referred to Copper Ridge and Reflections. Oral Arg. Trans., 59:6 - 11. To the contrary, there is no evidence that Copper Ridge or Reflections owned, leased, operated, controlled or supervised those stockpiles or concrete washout areas. CR/Ref SJ Br., pp. 11-12; CR/Ref Exceptions Br., pp. 27-29.

"documented areas within the subdivisions that were disturbed."). But this attenuated approach ignores the very language of the laws and rules and stretches the definition of "owner or operator" too far.

A. IT IS UNDISPUTED THAT COPPER RIDGE AND REFLECTIONS DID NOT OWN, LEASE OR OPERATE INDIVIDUAL LOTS AND THAT THEY DID NOT ENGAGE IN HOMEBUILDING CONSTRUCTION ACTIVITIES.

The Department, Copper Ridge and Reflections agree that an " '[o]wner or operator' means a person who owns, leases, operates, controls, or supervises a point source" and that the "[c]onstruction activity is the regulated point source." Mont. Code Ann. § 75-5-103(26) (2015); Admin. R. Mont. 17.30.1102(28); Dept. Response Br., p. 19; CR/Ref Exceptions Br., p. 18. Assuming *arguendo* that the evidence gathered by the Department on September 9, 2013 equates to a discharge of wastes to state waters and placement of waste where it would cause pollution of state waters, then in order to hold Copper Ridge and Reflections liable, it must also be proven that on that date, September 9, 2013, Copper Ridge and Reflections owned, leased, operated, controlled or supervised the construction activity that resulted in the alleged discharge and alleged placement of wastes. Admin. R. Mont. 17.30.1102(28); § 75-5-605, MCA.

As an initial matter, the Department admits that the construction activity was homebuilding, but does not establish the exact location of the homebuilding construction activity. Hearing Ex. 2 (Violation Letter describes active

construction, specifically "construction of single family homes" occurring "throughout the facility site;" lack of Best Management Practices ("BMPs") "in areas of new construction of single family homes;" sediment tracking "within areas of active construction;" and a concrete washout located "at single family home construction."). The only assertion is that the homebuilding construction activities were within the geographic footprint of the subdivisions. SJ Order, p. 1.

While it is undisputed that Copper Ridge and Reflections originally developed the subdivisions, their construction activities in the subdivisions were properly permitted and ended before their permit was terminated in December 2012 - all prior to the alleged violations. Joint Stip. Fact ¶ 5; CR/Ref SJ Br., p. 10; CR/Ref SJ Ex. C, ¶¶ 5 - 8; CR/Ref Exceptions Br., pp. 18-19. It is undisputed that Copper Ridge and Reflections did not engage in homebuilding activities; rather, they sold the lots to individuals who then constructed homes on the individual lots. CR/Ref SJ Br., p. 10; CR/Ref SJ Ex. C, ¶¶ 5 - 8; CR/Ref Exceptions Br., p. 27 ("Copper Ridge and Reflections do not construct homes in the Subdivisions." *citing* Hearing Trans., Vol. 2, 59:22 - 60:7, 61:4 - 7, 66:17 - 20). Therefore, it is undisputed that, at the time of the alleged 2013 violations, Copper Ridge and Reflections did not own, lease or operate the homebuilding construction activities alleged to have caused the violations nor did they own the properties on which the construction was conducted. *See also* Proposed FOFCOL p. 34. ("CR/Ref did

provide evidence, however (consistent with their position that they are not owner/operators), that they did not own (at least some of) the lots.")

B. COPPER RIDGE AND REFLECTIONS DID NOT CONTROL OR SUPERVISE THE HOMEBUILDING CONSTRUCTION ACTIVITIES ALLEGED TO HAVE CAUSED THE VIOLATIONS.

Since it is undisputed that Copper Ridge and Reflections did not own, lease, or operate the homebuilding construction activities alleged to have caused the violations, the question becomes: did Copper Ridge and Reflections control or supervise the homebuilding construction activities alleged to have caused the violations? Relying on evidence not connected to the alleged violations and evidence submitted under protest as a result of this enforcement action (with its threat of millions of dollars in penalties), the Hearing Examiner incorrectly concluded that Copper Ridge and Reflections "had the power to supervise or control land[2] with regard to storm water discharges." SJ Order, p. 15.

The Hearing Examiner relies on the fact that Copper Ridge and Reflections were the original owners and developers of the subdivisions. SJ Order, p. 14. Because it is undisputed that the discharges and placement of waste originated from homebuilding construction activities and that Copper Ridge and Reflections

[2] Neither the Department nor the Hearing Examiner pointed to evidence establishing the location of the land or the parcels of property where the discharges or wastes originated. The evidence only suggests that discharges originated, and wastes were placed within, the geographic footprint of the subdivisions. SJ Order, p. 1. All photo evidence gathered by the Department is on property that Copper Ridge and Reflections did not own. The Department did not examine any deed or title or make any effort to determine who owned the specific lots where the construction activities were taking place. CR/Ref SJ Br., pp. 6 - 11 (*citing* the Department's deposition testimony.).

did not themselves engage in homebuilding construction activities, this fact will only support a theory of control or supervision if there is something in the relationship between the developers and the homebuilders that would require the developers to exert control or supervision over the homebuilders.[3]

The fact that the developer, Copper Ridge and Reflections in this case, initiated development of the geographic subdivisions with "the eventual goal of the sale of individual lots for residential home construction" does not, and cannot confer any control or supervisory power upon the developers. SJ Order, p. 14. Indeed, a subdivision, by definition, indicates a goal to sell, rent, lease, or otherwise convey title to or possession of individual lots to new individual owners. § 76-4-102(17), MCA. Copper Ridge's and Reflections' compliance with the Montana Subdivision and Platting Act does not support finding that such compliance equates to supervision or control over the lots after their conveyance to new individual owners. Nor can it support liability for violations of the Montana Water Quality Act.

Here, the fact that Copper Ridge and Reflections were the developers (and preceding owners) only establishes a seller-purchaser relationship between Copper Ridge and Reflections, as the developers, and the lot owners. But is there

[3] Absent a relationship or connection, the developers would need some grant of regulatory authority over the homebuilders in order to control or supervise the homebuilders' stormwater management. As explained below, only the Department has been granted that authority. § 75-5-211, MCA.

something about that seller-purchaser relationship, and that contract between the subdivision developers and the lot owner, that would support the developers' control or supervision over the homebuilding construction activities? The Board has asked "[w]ould it not be possible for the developer in conveying the lot to the new owner to include in that conveyance some sort of covenant on the part of the new owner to allow the developer to supervise to assure that there aren't any violations of the permits that have been issued with respect to the subdivision regarding, say stormwater runoff?" Oral Arg. Trans., 30:15 - 22. Aside from the impossibility of administering such an open-ended and vague requirement, for this theory to support a violation, there must be something more than a "possibility." There must be some prohibition that was not followed or some requirement that was violated to support this enforcement action. § 75-5-605, MCA, (listing prohibited activities); § 75-5-611, MCA, (authorizing administrative actions and penalties "[w]hen the department has reason to believe that a violation" has occurred.); § 75-5-617, MCA, (authorizing certain enforcement response when "the department finds that a person is in violation.").

Here, the only relevant requirements are those imposed by the Department through the Montana Water Quality Act and the Montana Subdivision and Platting Act. The Water Quality Act imposes no duties upon a developer when conveying property to individual lot owners, but the Subdivision and Platting Act does. It

requires that "[t]he developer or owner of an approved subdivision shall provide each purchaser of property within the subdivision with a copy of the plat or certificate of survey and the certificate of subdivision approval specifying the approved locations of water supply, storm water drainage, and sewage disposal facilities." § 76-4-113, MCA. After the developer sells the lot, the new lot owner becomes subject to the requirements of the Subdivision Certificate, including any covenants, conditions or restrictions imposed through the Subdivision Certificate. *See Eastgate Village Water and Sewer Assoc. v. David*, 2008 MT 14, 343 Mont. 108, 183 P3d 873. At that point, the developer is no longer responsible for the lot's compliance with the subdivision requirements and no longer has control or supervision over the lot via the Subdivision and Platting Act. Therefore, as soon as Copper Ridge and Reflections conveyed the individual lots to new owners, Copper Ridge and Reflections were no longer responsible for the sold lots. Copper Ridge and Reflections have no requirement to control or supervise the homebuilding construction activities (or any activities) on individual lots after those lots are conveyed to individual owners.

The Department, the Hearing Examiner, and the Board may all be tempted to extend the developers' liability beyond the point in time when an individual lot is sold. In fact, the Department's deposition testimony establishes that extension of liability to the developers was a "recommendation" that "makes it, yes, easier"

to administer the permitting process. CR/Ref SJ Br., Ex. B, 25:3 - 26:6. The Department agreed that it is not a statutory requirement. *Id.*

For any extension of developer liability, ask yourself what mechanism supports continued liability? What document, relationship, law or rule requires control beyond the point of purchase? Simply put, there is none. Nothing in the subdivision requirements, nothing in the conveyance, nothing in the Water Quality Act, and nothing in the relationship between the developer and the lot owners requires, or even supports, continued control and supervision beyond the point of purchase.

Next, the Hearing Examiner cites to "at least one contract that required 'all excess material from pipe and bedding displacement shall be left on site' " as proof that "Copper Ridge and Reflections have supervision and control over the actions of third parties" and that they "acted on their ability to instruct others how to engage in stockpiling of materials, an act expressly contained in the definition of 'construction activities.' " SJ Order, pp. 14-15. Although the Hearing Examiner does not cite the specific contract, the language comes from the Department's Summary Judgment Exhibits 1 and 2, specifically Copper Ridge's and Reflections' responses to Request for Admission No. 11. Copper Ridge's response, in its entirety is:

> Copper Ridge objects because the request seeks information **related to a contract that was for a project that did not include**

homebuilding, and the request is therefore not relevant to the Department's claims or reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding that objection, Copper Ridge states that it does not know whether there was any excess material, and it denies that it directed contractors to distribute excess material. Copper Ridge admits that it hired Sanderson Stewart to prepare contracts, including Contract 365 [sic][4], for the installation of roads and utilities and to oversee and direct **non-homebuilding construction activity** within the Subdivision. Copper Ridge admits that Addendum No. 2 to Contract 365 [sic] states the following:

Copper Ridge 3rd and 4th Filing: Distribute excess material first over Lots 35-39. Once lots are sufficiently filled, the Engineer will direct as to where any remaining excess material will be distributed on the site.

Reflections at Copper Ridge 2nd Filing: Distribute excess material first over Lots 21-23 of Block 3 and then over the area just north of Butte Ridge Drive. Once lots and areas are sufficiently filled, the Engineer will direct as to where any remaining excess material will be distributed on the sites.

For bidding purposes, use the following areas in determining seeding quantities:

1. Copper Ridge 3rd and 4th Filing: 6 acres
2. Reflections at Copper Ridge 2nd Filing: 5 acres

Dept. Br. in Response to Mtn. for SJ, Ex. 2 (emphasis added).

Reflections' response, in its entirety is:

Reflections objects because the request seeks information related to a **contract that was for a project that did not include homebuilding,** and the request is therefore not relevant to the Department's claims or reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding that objection, Reflections states that it does not know whether there was any excess material, and it denies that it

[4] Although the response refers to "Contract 365" the request for admission asked about Contract 635. The reference to Contract 365 is assumed to be a typo.

> directed contractors to distribute excess material. Reflections admits that it hired Sanderson Stewart to prepare contracts, including Contract 635, for the installation of roads and utilities and to oversee and direct **non-homebuilding construction activity** within the Subdivision. Reflections admits that Addendum No. 1 to Contract 635 states "All excess material from pipe and bedding displacement shall be left on site."

Dept. Br. in Response to Mtn. for SJ, Ex. 1 (emphasis added).

Notably, Copper Ridge and Reflections objected for the very same reason that this Board should overrule the Hearing Examiner's conclusions - nothing that either developer did had anything to do with the homebuilding that allegedly caused the violations. The Hearing Examiner's reliance on the discovery responses, over objection, with no resolution of that objection, is procedurally improper and illustrates that the issue was disputed, meaning it cannot serve as the basis for summary judgment. This is yet another reason why this Board should overrule the SJ Order's conclusion on the "owner or operator" issue.

The cited contracts were not for homebuilding. CR/Ref Combined SJ Resp. and Reply Br., p. 9 *citing* SJ Ex. C (Affidavit of L. Leep "CR purchased land, subdivided it, arranged for roads and utilities to be installed, and then sold lots."); Ex. G (Construction Activity permitted by Copper Ridge described as "[i]nstallation of new water, sanitary sewer, and storm drainage utilities and new street surfacing and sidewalk improvements."); and Ex. H (Construction Activity permitted by Copper Ridge described as "[c]onstruction of new streets and utilities

for residential housing."); *see also* Hearing Exs. H, I and M (cover page of Contract 635 titled "To Provide Water, Sanitary Sewer, Storm Drain, and Street Improvements..."). Therefore, the contract relied upon in the SJ Order was for the developers' lawfully permitted road-building and utility installation construction - not for homebuilding, which is the source of the alleged violations. Further, it is undisputed that the contracted work was properly permitted and completed. Those Construction Stormwater permits were terminated with no notice to Copper Ridge and Reflections (and with no indication of any Water Quality Act violation) in December 2012 - a full *nine months prior to* the alleged violations at issue in this case. Joint Stipulated Facts, ¶ 5. Similarly, the Department's reliance on testimony from Mr. Landy Leep that Copper Ridge and Reflections owned all of the property is wrong because that testimony is referencing the 2006-2012 timeframe *prior* to conveyance of the individual lots to individual owners for homebuilding. Hearing Trans., Vol. II, ("As we developed our property - At the time we're developing, it's all - - we own it 100 percent;" we "[s]ubdivide it, then we start selling lots;" "I was not involved in the home-building;" "I had a SWPPP that covered my activity as the owner and operator while building roads and utilities and parks.").

The SJ Order's reliance upon the discovery responses cannot support a conclusion that Copper Ridge or Reflections controlled or supervised any

homebuilding in either subdivision because: (i) the discovery responses illustrate a disputed fact; (ii) the contracts did not cover homebuilding; (iii) the contracted work was finished well before the September 2013 alleged violations; and (iv) the contracts only exhibit control over road-building and utility installation, which were completed in compliance with all Water Quality Act laws and released from permitting needs in December 2012.

Next, the Hearing Examiner relies on the fact that Copper Ridge and Reflections ultimately, in response to requirements placed upon them by the Department, signed permit paperwork as the owner or operator. SJ Order, p. 15. As explained in Copper Ridge and Reflections' Exceptions Brief, it is undisputed that the permits were filed under protest, well after the violations were alleged, and only in response to the Department's enforcement action (with its threat of millions of dollars in penalties). CR/Ref Exceptions Br., p. 24; Proposed FOFCOL, p. 26. As such, the documents do not establish liability for the alleged violations.

C. THE DEPARTMENT HAS OTHER, MORE APPROPRIATE MEANS TO ENSURE COMPLIANCE WITH THE WATER QUALITY ACT.

The Department concedes that the discharges are not beyond the Department's ability to regulate and that it can regulate individual homeowners. Oral Arg. Trans., 36:14-15. Analysis of the operative statute, § 75-5-605, MCA, reveals that there is no requirement that the developer, and not the individual lot owner, be held liable for discharges from the lots. In fact, the terms "owner or

operator," "storm water discharge associated with construction activity" and "larger common plan of development" are not found anywhere in § 75-5-605, MCA. Therefore, anyone who discharges to state waters or places wastes where they will cause pollution may be found liable under § 75-5-605, MCA, regardless of their relationship to the property and regardless of what activities they are conducting. The Department should more appropriately focus its enforcement actions on the persons actually causing the discharges and actually placing wastes where they will cause pollution. Nothing in the statute prevents them from doing so; in fact, the statute prevents them from establishing liability for anyone other than the discharger or the person who places the wastes.

The Department argues that "[t]he problem here is that there was no permit. There was nothing." Oral Arg. Trans., 36:15-17. But that speaks to a failure to obtain a permit in violation of Admin. R. Mont. 17.30.1102 - the violation that has already been dismissed in this action. SJ Order, pp. 9-11. What the Department seems to want is a mechanism by which a developer must continue to maintain a permit for stormwater discharges associated with construction activity for an open-ended period of time and for activities and land it does not own, control, or supervise. But what if an individual buys a lot but does not initiate homebuilding for one, five, ten or more years? Would the developer be required to maintain stormwater permit coverage for that entire time? Or to re-initiate coverage at the

whim of the lot owner? What if the lot owner initially builds a house, then several years later builds out-buildings? Again, must the developer monitor property it no longer owns, *ad infinitum*, and re-initiate permit coverage, or ensure that someone does, all at the whim of the lot owner? The laws and rules (and common sense) say no. There is nothing that requires the sort of open-ended, impossible permit coverage that the Department seeks. CR/Ref SJ Br., p. 11 ("Only persons who propose to discharge storm water associated with construction activity must obtain a discharge permit, and neither CR nor REF proposed to discharge storm water from land that they did not own or that was associated with construction activity with which they were not involved." *See* ARM 17.30.1115; CR/Ref SJ Br., Ex. C at ¶ 4.).

The Department implies that the developer must also keep permits in place and be liable for discharges from upgradient discharges "from a totally different development." Oral Arg. Trans., 59:2 - 11. But that it not what the rule requires. Only "[a] person who discharges or proposes to discharge storm water associated with construction activity shall submit to the department a notice of intent ("NOI") as provided in this rule." ARM 17.30.1115. Upgradient discharges that merely flow through the subdivision are not anything that Copper Ridge or Reflections discharges or proposes to discharge. The Department's argument fails as a matter of law.

The Department also implies that there is a "larger common plan of development" that must be permitted and, therefore, because Copper Ridge and Reflections had a plan to develop the subdivisions, they are must obtain a permit. This argument fails for a number of reasons. First, the term "larger common plan of development" does not equate to a "point source" that must be permitted. The construction activity is the point source. Second, the Department's reliance on *Friends of Maha'Ulepu, Inc. v. Hawai'i Dairy Farms* is misplaced because in that case it was undisputed that only one party owned all of the property and was conducting all of the construction activities. *Friends of Maha'Ulepu, Inc. v. Hawai'i Dairy Farms*, did not involve multiple property owners and multiple parties conducting construction activities, as is the case here. *Friends of Maha'Ulepu Inc. v. Hawai'i Dairy Farms*, 224 F.Supp.3d 1094.

Third, even if Copper Ridge or Reflections conducted any activity that required a permit, it would only establish a violation Admin. R. Mont. 17.30.1105 for failure to have a permit - the very violation that has already been dismissed in this case. To prove the violations at issue here, which are all violations of § 75-5-605, MCA, the Department would also have to prove that it was specifically Copper Ridge's and Reflections' construction activities that caused a discharge to state waters and caused the placement of wastes where they will cause pollution. But the Department has no evidence that anything Copper Ridge or Reflections did

caused a discharge or placed wastes where they would cause pollution. CR/Ref SJ Br., pp. 11-12; CF/Ref Exceptions Br., pp. 27-29.

The Department and this Board have intimated that Copper Ridge and Reflections, as the developers, could have extended their road-building and utility installation permit to cover homebuilding and then transferred it to the homebuilders. Oral Arg. Trans., 52:11-18. This analysis fails for several reasons. First, the standard is not whether the developers "could have" done something, the standard for enforcement is whether the laws or rules required the alleged violator to do something that they failed to do or prohibited them from doing something that they did. Whether or not they could have done any number of things is irrelevant. For a violation to stand, it must be proven that the alleged violator failed to do something that it was required to do or committed some prohibited act. §§§ 75-5-605; MCA, 75-5-611; MCA, 75-5-617, MCA. As much as the Department, the Hearing Examiner, or this Board may desire to hold a developer liable for discharges originating from property and activities that the developer no longer owns or controls, but within the geographic footprint of the subdivision, there simply is nothing in the laws or rules that requires such open-ended oversight and liability.

To the extent that the Department, the Hearing Examiner or this Board desire to create, de facto, a regulatory scheme that inserts the developer as a party

liable for all discharges and all wastes throughout the entire geographic subdivision for the entire length of time that homebuilding occurs, there is no mechanism in law or rule to do so. Doing so would add another layer, similar to the MS4 municipal stormwater system, but with liability (and enforcement authority) vested in a private corporation. The Water Quality Act does not contemplate or support such an addition. CR/Ref Exceptions Br., p. 22 (citing § 75-5-211, MCA, giving responsibility for administration of the Water Quality Act to the Department; therefore, private corporations such as Copper Ridge and Reflects cannot enforce stormwater control requirements on any other entity or landowners.).

Additionally, there is no mechanism for the permit transfer scheme advocated by the Department. As explained above, there is no relationship between the developer and the homebuilder that would serve as the basis for that transfer. The permits are expensive and include the payment of fees, engineering support, drafting and approval of an appropriate Storm Water Pollution Prevention Plan ("SWPPP"), and technical field work to ensure compliance. A transfer implies that some compensation is provided by the entity receiving the benefit of the already funded, engineered, and compliant permit. Yet, there may be no seller-purchaser relationship between the developer and the homebuilder that could precipitate or require such a transfer.

The Department argues that the permit transfer provisions provided in the administrative rules address the transfer of liability from the developer to the homebuilder. Oral Arg. Trans., 54: 1-9. This is incorrect. Admin. R. Mont. 17.30.1117 limits transfers to a "new or revised owner or operator of a facility or activity." Here, there is no facility being permitted. Instead, the "activity" permitted was roadbuilding and utility installation - not homebuilding. The permitted "activity" - the road building and utility installation - was finished and therefore no permitted "activity" remained that could have been transferred.

Further, the mechanics of a permit transfer to the homebuilders are unworkable. The developer held one permit, but each subdivision could have many individual lots - presumably with many different homebuilders constructing homes at different times. To whom and when would the transfer take place? And what happens when a lot owner changes homebuilders or the lot ownership and homebuilders change? Must the developer remain mired in the contractual relationships to which he is not a party, in order to ensure that further permit transfers occur? Compliance with such a hypothetical regulatory requirement is unworkable at best and likely impossible.

Finally, any scheme that holds the developers liable for construction activities and stormwater controls on property that the developer does not own or control is precluded by trespass issues. Proposed FOFCOL, p. 35 (noting that "it is

entirely unclear" if BMPs "ever could be put in place based on CR/REF's ownership access"); Davis v. Westphal, 2017 MT 276, ¶ 15, 389 Mont. 351, 405 P.3d 73 ("Because the legal harm is the interference with another's right to exclusive possession of property, an unauthorized tangible presence on the property of another constitutes trespass regardless of whether the intrusion caused any other harm."). The Department counters that Copper Ridge and Reflections "provided no evidence in this hearing or in briefing that they ever asked a lot owner to access the lot to install BMPs." Oral Arg. Trans., 36: 8-10. That is precisely the point - in order to avoid being liable for trespass, Copper Ridge and Reflections must seek permission from the lot owners to install and maintain BMPs - proving that Copper Ridge and Reflections do not own, lease, operate, control or supervise the lots or the construction activities on the lots. Therefore, Copper Ridge and Reflections are not the "owner or operators" of the point sources at issue in this case.

IV. CONCLUSION

Because the Order on Summary Judgment relied upon facts that do not support finding Copper Ridge and Reflections liable as "owners or operators," it must be overruled. Further, enforcement of violations of § 75-5-605, MCA should be aimed at the person who discharges the waste to state waters or places waste where it will cause pollution. Enforcement of such violations against a developer

for discharges and placement of waste that originate outside of or somewhere in the geographic footprint of the subdivision, without analysis of who caused the discharge or placed the waste, ignores the elements of the statute and stretches the enforcement beyond the bounds of the Montana Water Quality Act and its implementing rules. The SJ Order's conclusions regarding the "owner or operator" issue should be rejected by this Board.

DATED this 17th day of January, 2019.

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CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following persons by e-mail and United States mail, postage prepaid on the date herein.

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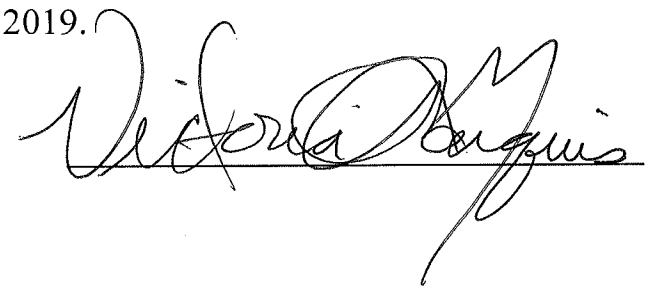
DATED this 17th day of January, 2019.



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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA; AND	Case Nos. BER 2015-01 WQ
BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376 AND MTR105377) (FID 2288 AND 2289) [DOCKET NO. WQ-15-07 AND WQ-15-08].	BER 2015-02 WQ

DEQ'S SUPPLEMENTAL BRIEF FOR JANUARY 24, 2019 HEARING REGARDING WHETHER COPPER RIDGE DEVELOPMENT CORPORATION AND REFLECTIONS AT COPPER RIDGE, LLC ARE OWNERS OR OPERATORS OF POINT SOURCES AT THE COPPER RIDGE AND REFLECTIONS AT COPPER RIDGE SUBDIVISIONS

On August 1, 2017, the Hearing Examiner issued Orders on the parties' cross motions for summary judgment in Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ (Orders on Summary Judgment). In the Orders on Summary Judgment, the Hearing Examiner determined that Copper Ridge Development Corporation (CR) and Reflections at Copper Ridge, LLC. (REF) are owners or operators of point sources. This determination was based, in part, on findings that CR and REF were the original owners and developers of all land in the Copper Ridge subdivision and the Reflections at Copper Ridge subdivision (collectively referred to as the Subdivisions) and had initiated construction activities, including clearing, grading, excavating, stockpiling earthen materials, and placing and removing earthen materials resulting in land disturbances at each subdivision of equal to or greater than one acre. *See* Order on Summary Judgment entered in BER 2015-01 WQ on page 14; and Order on Summary Judgment entered in BER 2015-02 WQ on page 14.

On February 26 through February 28, 2018, the Hearing Examiner held a consolidated case hearing to determine the remaining issues. CR and REF filed exceptions to the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law (FOFCOL) and DEQ responded to those exceptions. At its meeting held on December 7, 2018, the Board of Environmental Review (BER) considered whether it would accept, accept with modifications, or

reject the proposed FOFCOL and the Orders on Summary Judgment. The BER requested further analysis of the definition of owner/operator under the Montana Water Quality Act (WQA).

For the reasons stated herein, CR and REF are owners or operators of construction activities at the Subdivisions. As owners and operators of construction activities at the subdivisions, CR and REF are responsible for ensuring that all phases of construction have MPDES permit coverage until final stabilization is achieved.

1. Regulatory and Factual Background.

To protect the nation's surface waters from polluted storm water runoff, the United States Environmental Protection Agency (the EPA) requires National Pollutant Discharge Elimination System (NPDES) permit coverage to implement practices to control polluted storm water runoff from construction sites and to reduce resulting adverse impacts to water quality and aquatic habitat. Owners and operators of construction sites that disturb equal to or greater than one acre of land must obtain NPDES permit coverage. *See* 40 CFR § 122.26(b)(15). The EPA has delegated its authority to administer the NPDES permit program within the State of Montana to DEQ.

Under that delegation, DEQ issues MPDES permits for "point source" discharges of pollutants to state waters including permits authorizing storm

water discharges associated with construction activity. *See* Section 75-5-401, MCA and Title 17, chapter 30, subchapters 11, 12, and 13, Administrative Rules of Montana. Under ARM 17.30.1105(1)(a), a person who discharges or proposes to discharge storm water from a point source associated with construction activity is required to obtain coverage under an MPDES general permit or an MPDES individual permit.

"Storm water discharge associated with construction activity" is defined as follows:

> "Storm water discharge associated with construction activity" means a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of the rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more. ARM 17.30.1102(28).

A "larger common plan of development or sale" is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under a plan. If a distinct activity has been identified by the time the discharge permit application is submitted, that distinct activity is included as part of a larger common plan. *Friends of Maha'Ulepu*, 224 F.Supp.3d at 1108.

In November of 1992, DEQ issued an MPDES General Permit for Storm Water Discharges Associated with Construction Activity (the General Permit) having a fixed term of five years. DEQ has reissued the General Permit in 1997, 2002, 2006, 2012 and 2018. The General Permit requires owners and operators to identify sources of pollutants and to implement and maintain best management practices (BMPs) to reduce the potential discharge of identified pollutants from the construction site in the event of a storm. *See* DEQ Hearing Exhibit 1, pages DEQ000021 - 24. Owners and operators authorized to discharge under the General Permit must achieve technology-based effluent limits through development and implementation of a Storm Water Pollution Prevention Plan (SWPPP) that describes storm water pollution controls, or best management practices (BMPs). DEQ Hearing Exhibit 1, page DEQ000011. BMPs may include such pollution controls as silt fences, detention basins, street sweeping to remove mud and dirt tracking in streets, and other erosion and sediment controls. DEQ Hearing Exhibit 1, pages DEQ000011 -16.

Owners and operators who discharge or propose to discharge storm water associated with construction may file a Notice of Intent (NOI) to be covered by the General Permit. *See* DEQ Hearing Exhibit 1; ARM 17.30.1115(4). In December of 2013, CR and REF submitted to DEQ a Notice of Intent to be

covered by the 2012 General Permit. Orders on Summary Judgment, Finding of Fact No. 9.

CR and REF admitted at the hearing that the common plan of development for the Subdivisions included improvements necessary to get subdivision approval by the City of Billings and, then, the subdivision and selling of residential lots. Hearing Transcript Vol. II, 66:21 - 67:17. The common plan of development included grading, contouring, road building, utility installation, development of storm water retainage ponds, and other common areas, as well as the design and planning of residential lots. Hearing Transcript Vol. II, 105:15 – 111:6. Finally, DEQ Inspector Dan Freeland testified that he determined that the Subdivisions were common plans of development or sale based on the signs identifying the subdivisions, the company website advertising the developments, and the company's advertising brochures. Hearing Transcript Vol. I, 67:16 – 25.

2. <u>Supplemental Analysis of the Definition of Owner/Operator under the Montana WQA.</u>

An owner or operator under the WQA is "a person who owns, leases, operates, controls, or supervises a point source." § 75-5-103(26), MCA. The Hearing Examiner initially determined that CR and REF proposed too narrow a definition of "owner and operator," limiting their arguments to ownership, lease and operations. Additionally, the Hearing Examiner determined that CR and

REF focused too heavily on construction of homes, rather than the more expansive statutory definition of "storm water discharge associated with construction activity." Finally, the Hearing Examiner focused on the ability of CR and REF to exercise supervision and control through its contractual relationships with construction contractors developing water, sanitary sewer, storm drain, and street improvements for the subdivisions as follows:

> Reflections and Copper Ridge were the original owners and developers of all land in their respective subdivisions. Construction activities, including clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects, resulted in disturbance equal to or greater than one acre of total land area at the respective subdivisions. These construction activities were initiated in 2006, in the respective subdivisions. These construction activities were undertaken with the eventual goal of the sale of individual lots for residential home construction.
>
> Copper Ridge and Reflections admit that they entered into at least one contract that required "all excess material from pipe and bedding displacement shall be left on site." Therefore, not only did Copper Ridge and Reflections have supervision and control over the actions of third parties, they acted on their ability to instruct others how to engage in stockpiling of materials, an act expressly contained in the definition of "construction activities." This put Copper Ridge and Reflections in a position of either control or supervision with regard to the terms of sale of any individual lot for construction of residential homes. Any argument to the contrary ignores the common sense and practical reality of development of a residential subdivision. The mere fact that neither Copper Ridge nor Reflections exercised supervision or control over the contractual terms of the sale of land, does not change the fact that they had the power to supervise or control land with regard to storm water discharges . . . .
>
> Moreover, Reflections and Copper Ridge conceded their owner or operator status when they filed their December 23, 2013, SWPPs and

> NOIs, respectively. Both Reflections and Copper Ridge expressly acknowledged they were the owner or operator for construction activities . . . . *See* Orders on Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ, pp. 14-15.

The Hearing Examiner properly focused on the contractual relationship between CR and REF and their construction contractors in determining whether they were "owners or operators." In fact, the contractual relationship between a developer and a general contractor is carried forward in the direction given in the General Permit Fact Sheet in determining the entity that is considered an owner or operator. The General Permit Fact Sheet provides as follows:

> In order to provide additional clarification, for the purposes of obtaining authorization under this permit, the following entities are considered an owner or operator":
>
> - In order to provide additional clarification, for the purposes of obtaining authorization under this permit, the following entities are considered an owner or operator":
> - Owner or Developer-an owner or developer who is operating as the site manager or otherwise has supervision and control over the site, either directly or **through a contract with an entity such as those listed below**;
>
> - General Contractor or Subcontractor-a contractor **with contractual responsibility and operational control** (including SWPPP implementation) to address the impacts construction activities may have on storm water quality; or
>
> - Other Designated Agents/Contractors-other agents with contractual responsibility and operation control to address the impacts construction activities may have on storm water quality. 2012 General Permit Fact Sheet, page 4 (Emphasis added.). The 2012 General Permit Fact Sheet is attached hereto as Exhibit 1 and by this reference is incorporated herein.

Under this direction, exactly who is considered an owner/operator is largely controlled by how the developer chooses to structure the contracts with the general contractors hired to design and/or build the project. A general contractor is not an owner or operator under the General Permit unless it has contractually assumed the responsibility to comply with the terms of the General Permit in the construction on the individual lots. Thus, developers are required to ensure the requirements of the General Permit are satisfied either by themselves or through entering into a contract with the builder to take over compliance with the General Permit.

The directions given in the General Permit to determine who is an owner/operator is consistent with the following direction given by the EPA in determining who is required to obtain coverage under an NPDES permit:

> In many instances, there may be more than one party at a site performing tasks related to operational control and more than one operator may need to submit an NOI. Depending on the site and the relationship between the parties (e.g., owner, developer, general contractor), there can either be a single party acting as site operator and consequently responsible for obtaining permit coverage, or there can be two or more operators all needing permit coverage. Exactly who is considered an operator is largely controlled by how the *owner* of the project chooses to structure the contracts with the *contractors* hired to design and/or build the project. The following are three general operator scenarios (variations on any of these three are possible, especially as the number of owners and contractors increases);
>
> - *Owner as sole permittee.* The property owner designs the structures for the site, develops and implements the SWPPP, and serves as

general contractor (or has an on-site representative with full authority to direct day-to-day operations). The owner may be the only party that needs permit coverage under these circumstances. Everyone else on the site may be considered subcontractors and might not need permit coverage.

- *Contractor as sole permittee*. The property owner hires one company (i.e., a contractor to design the project and oversee all aspects of the construction project, including preparation and implementation of the SWPPP and compliance with the permit (e.g., a *turnkey* project). Here, the contractor would likely be the only party needing a permit. It is under this scenario that an individual having a personal residence built for his own use (e.g., not those to be sold for profit or used as rental property) would not be considered an operator. However, individual property owners would meet the definition of operator and may require permit coverage if they perform general contracting duties for construction of their personal residences.

- *Owner and contractor as co-permittees*. The owner retains control over any changes to site plans, SWPPPs, or stormwater conveyance or control designs; but the contractor is responsible for overseeing actual earth disturbing activities and daily implementation of SWPPP and other permit conditions. In this case, which is the most common scenario, both parties may need to apply for permit coverage. (*Developing your Stormwater Pollution Prevention Plan – A Guide for Construction Sites*, EPA, May 2007, pp. 6-7 (EPA-833-R-06-004) Page 1 and page 6 is attached hereto as Exhibit 2 and by this reference is incorporated herein.)

Under this EPA direction, the only scenario under which the owner of a project is not required to maintain coverage under the permit is the second one. That scenario requires the owner of the project to hire a contractor to design the project and to oversee all aspects of the construction project, including preparation and implementation of the SWPPP and compliance with the permit. This is analogous to the direction found in the General Permit, providing that a

builder in not an "owner or operator" unless it contractually assumes the developer's responsibility to comply with the General Permit for all aspects of the project.

The guidance provided by other states in implementing their EPA delegated authority to control polluted storm water runoff from construction sites follows suit, either requiring the owner of the project to contractually convey its obligations under the General Permit to the individual builder or at least require the owner of the project to advise the individual builder of the obligations under the General Permit and to ensure that the individual builder submits its own NOI to be covered under the General Permit. ("The NOI is required from the individual builder when coverage under the construction general permit is transferred from the developer of the common plan to the individual builder. If a transfer is not performed, then the stormwater permit requirements pertaining to the builders activities are the responsibility of the developer." *Larger Common Plan Permitting Guidance Document*, North Dakota Department of Health, December 2007, pp. 1-2; *See also* "If an operator obtains a permit for a development, and then the operator (permittee) sells off lots or parcels within that development, permit coverage must be continued on those lots until a Notice of Termination (NOT) . . . is submitted. . . . In cases where permit responsibilities for individual lot(s) will be terminated after sale

of the lot, the permittee shall inform the individual lot owner of the obligations under this permit and ensure that the Individual Lot NOI application is submitted to Ohio EPA." *General Permit Authorization for Storm Water Discharges Associated with Construction Activity under the National Pollutant Discharge Elimination System*, Ohio Environmental Protection Agency, April 23, 2018, p. 6.) The *Larger Common Plan Permitting Guidance Document*, North Dakota Department of Health, December 2007 is attached hereto as Exhibit 3 and by this reference is incorporated herein. Page 1 and page 6 of the *General Permit Authorization for Storm Water Discharges Associated with Construction Activity under the National Pollutant Discharge Elimination System*, Ohio Environmental Protection Agency, April 23, 2018 is attached hereto as Exhibit 4 and by this reference is incorporated herein.

The Hearing Examiner properly determined that CR and REF were owners or operators, having the authority to supervise and control storm water discharge associated with construction activity even after individual lots were sold. As a factual matter relied on by the Hearing Examiner, CR and REF acted within this authority by instructing others on how to stockpile materials, an activity expressly falling within the definition of construction activities. Moreover, CR and REF had the ability to contractually convey their obligations under the General Permit to other parties, but did not do so. Therefore, the

obligations to comply with the General Permit as owners or operators remained with CR and REF. To hold otherwise would allow construction activities on individual lots that are less than one acre of total land area but are part of a larger common plan of development or sale without coverage by a General or individual permit, in violation of ARM 17.30.1105(1)(a).

In arguing against the BER's adoption of the proposed order, CR and REF assert that once individual lots are sold to third parties, CR and REF are no longer owners or operators. CR and REF do not cite any authority under the statutes, rules, guidance or case law dealing with MPDES or NPDES permits to support their position. Rather, they rely, in part, on the factual assertion that they don't "own the land," "lease the land," or "operate the land." It is this narrow definition of "owner operator" that was rejected by the Hearing Examiner. CR and REF further assert that they don't "supervise anything that's going on on that land." Transcript of the December 7 Hearing, page 26, Lines 11 – 18. CR and REF's position overlooks the fact that they have, in fact, exerted such control by entering into at least one contract with a third party directing the third party's disposal of excess material derived during construction activities. Finally, CR and REF ignore their capacity to control stormwater discharge form construction activities even after the individual lots

are sold by contractually obligating third parties to comply with the obligations set forth in the General Permit.

3. The Subdivision Act Does Not Regulate Storm Water Discharges Associated with Construction Activity

CR and REF attempt to counter the evidence in the record by pointing to their history of compliance with the Montana Subdivision and Platting Act. This discussion is outside the administrative record for Cause Nos. BER 2015-01 WQ and BER 2015-02 WQ and has no bearing on whether CR and REF are owners or operators of point source discharges of storm water from their subdivisions for purposes of the WQA. *See* CR and REF Exceptions, pages 16 – 29, Transcript of the December 7, 2018 Hearing, page 25: lines 6 thorough 12.

The Montana Subdivision Act controls water supply, sewage disposal, and solid waste disposal in individual developments to protect water quality for public water supply, domestic and other beneficial uses. *See* § 76-4-101, MCA *et seq*. Storm water drainage is regulated under the Subdivision Act to ensure the development will be constructed in accordance with minimum design standards. *See* DEQ Circular 8, page 6. Compliance with the Montana Subdivision and Platting Act ensures that the **completed development** will have adequate drainage, but does not obviate the need to obtain General Permit coverage and comply with the WQA **during construction** of the subdivision. Compliance with the General Permit is still necessary to ensure

construction activities associated with development of the subdivision meet the requirement of the WQA.

At the December 7, 2018 Hearing, CR and REF cited *Eastgate Village Water and Sewer Association v. Davis, 2008 MT 141; 343 Mont. 108; 183 P.3d 873*, for the proposition that once property is purchased by a third party, the developer's obligations to comply with the Subdivision Act became requirements of the third party and are no longer that of the developer. Transcript of the December 7, 2018 Hearing, page 31: lines 6 thorough 12. CR and REF's reliance on *Eastgate Village* is misplaced.

The issue in *Eastgate Village* dealt with a subdivision (Eastgate Village) just east of East Helena. The Eastgate Village Water and Sewer Association (Association) is responsible for supplying adequate potable water to the homes located in the subdivision. During a drought in the summer of 2003 and with some subdivision residents exploring the possibility of drilling private wells, the Association banned private wells in Eastgate Village for all purposes. One subdivision resident proceeded to drill a private well despite the ban. The Association filed a declaratory action seeking a judgment that the rule prohibiting construction of private wells was valid and enforceable. *Id.*, ¶¶ *8-15.* The Montana Supreme Court determined that the rule banning private wells was within the rulemaking authority of the Association in "all matters necessary

or incidental" to the use and utilization of water and handling of sewage "generally relating to the maintenance, repairs, preservation and operation of the sewer and water systems." *Id.*, ¶ 29. The Court further determined that the rule banning private wells was reasonable, being adopted by the Association to prevent contamination of Eastgate Village's public water supply. Contamination could occur simply by connecting the untreated private well with the hose bib on the house. *Id.*, ¶¶ *31-38.*

Thus, *Eastgate Village* simply addressed the Association's ability to enact a ban on the drilling of private wells within a subdivision. There is no discussion in *Eastgate Village* that supports CR and REF's assertion that when lots are sold in a subdivision for development by third parties, requirements under the Subdivision Act are transferred from the developer of the subdivision to the third-party acquiring the individual lot.

4. Discharges from the Subdivisions that Flow to the Municipal Separate Storm Sewer System are Subject to Regulation under the Montana Water Quality Act Including the General Permit

The City of Billings ("the City") is the owner and operator of a municipal separate storm sewer system (MS4). The City is authorized to discharge storm water to state waters under the Montana Pollutant Discharge Elimination System ("MPDES") General Permit for Storm Water Discharge Associated with Small Municipal Separate Storm Sewer Systems (General

Permit No. MTR040000). The City MS4 conveys storm water to state surface water through publicly owned storm water conveyance and drainage systems and the City MS4 ultimately discharges storm water to the Yellowstone River, state water.

Storm water from the subdivisions discharges through catch basin inlets, swales, pipes, detention ponds, and overland flow to Cove Ditch and its tributary drainages, which are state water; and to the Billings MS4 which consists of storm drains and other conveyances that discharge to state water. Discharges from the subdivisions to the Billings MS4 are discharges to state waters. The MS4 General Permit, and the City of Billings authorization to discharge under that Permit, require certain minimum control measures including implementation and enforcement of a program to reduce pollutants in storm water runoff from construction activities that result in land disturbance of greater than or equal to one acre. *See* General Permit MTR040000, page 21, Billings Authorization MTR040001. Storm water from construction activities within the MS4 must be controlled to meet the MS4's General Permit requirements.

Conclusion

REF and CR meet the federal and state definition of owners and operators of the construction activities at the subdivisions because they

exercised authority and control over planning and development of the subdivisions. As owners and operators, REF and CR are responsible for compliance with the WQA and the administrative rules adopted thereunder at ARM Title 17, Chapter 30 related to storm water discharges associated with construction activities at the subdivisions including the requirement to obtain coverage under the General Permit and insure that all phases of construction and development within the subdivisions are covered under the General Permit until final stabilization is reached and the permit authorizations are terminated.

WHEREFORE, DEQ requests that the Board adopt the Hearing Examiner's Orders on Motions for Summary Judgment and Proposed Findings of Fact and Conclusions of Law regarding the findings and conclusions that CR and REF are owners and operators of construction activity at Copper Ridge and Reflection at Copper Ridge subdivisions.

Respectfully submitted this 17th day of January, 2019.

KIRSTEN BOWERS
Department of Environmental Quality
Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2019, I caused to be served a true and correct copy of the foregoing document and any attachments for BER 2015-01 WQ and BER 2015-02 WQ to all parties or their counsel of record as set forth below:

[ ] U.S. Mail, postage prepaid
[X] Electronic Mail
[ ] Facsimile Transmission
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By Sandy Scherer
Sandy Scherer
Legal Secretary

Montana Department of Environmental Quality
Permitting and Compliance Division
Montana Pollutant Discharge Elimination System (MPDES)

Fact Sheet

General Permit for Storm Water Discharges Associated with Construction Activity

MPDES Permit Number: MTR100000

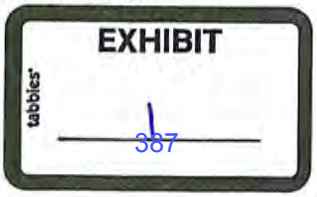
I. Status of Permit

This Fact Sheet supports the renewal of the existing MPDES "General Permit for Storm Water Discharges Associated with Construction Activity" (General Permit) which is required by the Administrative Rules of Montana (ARM) 17.30.1341(6) to have a fixed term not to exceed five years. MTR100000 was originally issued on November 17, 1992 and expired on August 31, 1997. The General Permit was then reissued on May 19, 1997 with an expiration date of August 31, 2002, and reissued again with an effective date of June 8, 2002 and an expiration date of December 31, 2006. MTR100000 was then reissued with the latest General Permit which was effective on April 16, 2007 and had an expiration date of December 31, 2011. The Department is proposing to reissue a fifth generation of this General Permit, and as required by ARM 17.30.1371, this document is the "Fact Sheet" for this reissued General Permit.

The Department will also complete a Programmatic Review / Environmental Assessment for the General Permit to fulfill its responsibilities under the Montana Environmental Policy Act (MEPA). The Department will provide an opportunity for public comment on the draft General Permit and draft Programmatic Environmental Assessment in accordance with ARM 17.30.1373.

This General Permit is issued by the Department under the authority of 75-5-402, Montana Code Annotated (MCA) and Sections 402 and 303 of the Federal Clean Water Act. ARM 17.30.1105 requires any person who discharges or proposes to discharge "storm water discharge associated with construction activity", as defined in ARM 17.30.1102(28), to get MPDES permit coverage.

Regulated construction activity storm water discharges are relatively shorter and finite MPDES permit authorizations, typically lasting from one to three years, as they pertain to the actual construction of something. At any given time, there are many hundreds of construction activities which require storm water discharges to be covered under this General Permit. Consequently, in addition to new authorizations under the General Permit during the next five-year General Permit



term, there are also hundreds of existing permittees required to renew their permit coverage under this General Permit as their construction projects are not yet completed (achieved "final stabilization" of disturbed areas as defined in ARM 17.30.1102(5)).

II. Description of Discharge and Discharging Facilities

This General Permit is applicable to storm water discharges associated with construction activity within the State of Montana, excluding Indian Reservations. "Storm water" is defined in ARM 17.30.1102(27). "Storm water discharge associated with construction activity" is defined in ARM 17.30.1102(28). For regulated activities under this definition, the term includes construction-related disturbance equal to or greater than one acre due to clearing, grading, excavating, stockpiling earth materials, and other placement or removal of earth material performed during construction projects through to final stabilization.

Without adequate control, based on Department experience and information related to construction sites, typical storm water discharges may contain pollutants which pose a threat to receiving state surface waters. Construction activities typically disturb the site's stabilizing vegetative cover and expose the remaining soil more to erosive elements such as rainfall and snowmelt runoff. Consequently, storm water runoff from construction activities may carry higher than normal loadings of sediment, but also other pollutants such as those from wastes, fueling, and/or washing at the construction site. The primary pollutant generated at construction sites is sediment including, total suspended solids, turbidity, and siltation. Pollutant concentrations may vary considerably with respect to construction sites, storm events, and location. Typically, sediment runoff rates from construction sites are 10 to 20 times greater than those from agricultural lands, and 1,000 to 2,000 times greater than those of forestlands (EPA 833-F-00-013, January, 2000). During a short period of time, construction activity can contribute more sediment to streams than is naturally deposited over several decades.

Sediment and other materials are defined as "other wastes" in 75-5-103(19), MCA. "Pollutant", is defined in ARM 17.30.1102(19) as dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural wastes discharged into water. The terms "sewage", "industrial waste", and "other wastes" as defined in 75-5-103, MCA, are interpreted as having the same meaning as pollutant. The Montana Water Quality Act (MWQA) prohibits the discharge of these wastes to state waters without a current permit from the Department, as stated in 75-5-605(2), MCA.

III. Coverage

Pursuant to 75-5-402, MCA and requirements found in ARM Title 17, Chapter 30, Subchapters 11, 12, and 13, the Department regulates storm water discharges associated with construction activities. Specifically, ARM 17.30.1105(1)(a) requires MPDES permit coverage for "storm water discharge associated with construction activity" as defined in ARM 17.30.1102(28). Additionally, point source discharges could require MPDES permit coverage under ARM 17.30.1105(1)(e) or (f) if the Department determines that storm water controls are needed based on Waste Load Allocations that are part of Total Maximum Daily Loads (TMDLs) that address the pollutants of concern, or if the Department determines the discharge causes or contributes to an exceedance of applicable water quality standards.

Part 1.1 of the General Permit contains eligibility requirements. Based on the aforementioned statutes and rules, this includes a description of the two determining criteria (acreage of construction-related ground disturbance and discharge to state surface waters) which would trigger the need for coverage under the General Permit. In order to help the regulated community evaluate these two criteria and better avoid potential compliance problems which may result from not obtaining authorization under the General Permit when necessary, the Department has included additional explanation regarding these potential factors in Part 1.1. This will also help improve efficiency for both the regulated community and Department in obtaining necessary authorizations by further minimizing questions and uncertainties, while serving to capture a higher percentage of "storm water discharges associated with construction activity" requiring authorization and thereby potentially avoiding additional third-party complaints and/or non-filer compliance and enforcement issues. Along these same lines, further clarifying information is also provided regarding support activities for a construction project. Additionally, by placing such critical information up-front in the first few pages (Parts 1.1. and 1.2.) of the General Permit itself, it is more likely to be recognized and effectively acted upon by the regulated community.

"Larger common plan of development or sale" is defined in Part 5 of this permit. For purposes of interpreting this definition, a "plan" is considered to be any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, engineering plan sheet, permit application, zoning request, computer design, report/plan, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating that construction activities may occur within a specific geographic area. A common plan includes all support activities and areas of disturbance that were created exclusively for, and are a direct result of, the construction activity.

For clarification with respect to residential subdivisions and development, individual residential lots that are part of a larger common plan of development or sale are not required to maintain active permit coverage once all of the conditions below are met:

- The individual lot has been sold to a homeowner for private residential use;
- The lot is less than one acre of disturbed area;
- Construction activities on the individual lot that were conducted by the permittee for the larger development are completed;
- A certificate of occupancy (or equivalent) has been awarded to the homeowner; and
- The SWPPP for the permittee for the larger development has been updated to indicate the individual lot has reached final stabilization.

Part 1.1 of the General Permit also contains requirements which clarify allowable storm water discharges and allowable non-storm water discharges. Although the storm water regulated under this General Permit is typically rainfall or snowmelt runoff generated due to a particular "wet weather" precipitation event, there are some types of non-storm water discharges which are conventionally allowed to be discharged with the storm water, provided such a discharge is not subject to MPDES discharge permitting separately. The allowable non-storm water discharges stated in this General Permit are similar to those allowed under other MPDES storm water general permits to ensure compatibility and coordination in areas where regulated storm water discharges may co-exist, such as for regulated small municipal separate storm sewer systems in Montana's seven largest urban areas.

Part 1.2 of the General Permit contains requirements for how an "owner or operator", as defined in 75-5-103, MCA, obtains authorization under the General Permit based on the aforementioned statutes and rules. For the purposes of this permit, the "owner or operator" of the "storm water discharge associated with construction activity" which obtains authorization under this permit is identified as the "permittee". Consequently, the term "permittee" is used throughout the permit.

In order to provide additional clarification, for the purposes of obtaining authorization under this permit, the following entities are considered an owner or operator:

- Owner or Developer – an owner or developer who is operating as the site manager or otherwise has supervision and control over the site, either directly or through a contract with an entity such as those listed below;
- General Contractor or Subcontractor – a contractor with contractual responsibility and operational control (including SWPPP implementation) to address the impacts construction activities may have on storm water quality; or
- Other Designated Agents / Contractors – other agents with contractual responsibility and operational control to address the impacts construction activities may have on storm water quality.

Part 1.2. also contains typical requirements pertaining to the continuation of the General Permit if it is not reissued or replaced prior to it's expiration date based on ARM 17.30.1313, and it contains requirements pertaining to modification of an NOI based on new fee rule requirements contained in ARM 17.30.201.

Parts 1.3 and 1.4 of the General Permit contain requirements pertaining to the ongoing use and protocol for terminating permit coverage using the standard Department "Notice of Termination" (NOT) Form, and requirements for transferring General Permit coverage using the Department's ongoing standard "Permit Transfer Notification" (PTN) Form.

Through the authority of ARM 17.30.1105(5), certain construction activity discharges may qualify for a waiver instead of needing storm water discharge permitting under an MPDES permit. To help the regulated community understand and recognize this potential option, this "Storm Water Rainfall Erosivity Waiver" option is mentioned in Part 1.5. of the General Permit.

To elaborate, ARM 17.30.1105(5)(a) provides this waiver option for an owner or operator of a construction project which has a "storm water discharge associated with construction activity" (as defined in ARM 17.30.1102(28)), and a total construction-related disturbance of less than five acres of total land area, and which results in the construction activity having a Rainfall Erosivity Factor ("R" in the Revised Universal Soil Loss Equation - RUSLE) of less than five, as determined using a Department-approved method.

This form is used for construction activities (projects) which will initiate construction-related ground disturbance and achieve final stabilization within the same calendar year between the dates of March 1st and November 30th. Construction projects which initiate in, but do not achieve final stabilization in, this same period within a single calendar year are not eligible for this waiver.

A separate Rainfall Erosivity Waiver Form must be provided for each construction activity qualifying for the waiver. All portions of the construction activity's work which are part of the "larger common plan of development or sale" must be included in the determination stated on the Rainfall Erosivity Waiver Form. In other words, the waiver is available on a development-wide basis only, not for individual filings, phases, or other portions of the "larger common plan of development or sale".

Coverage under the permit is required if the construction project's R Factor ever becomes greater than five due to changes, or anticipated changes, in the project's construction period, such as due to unexpected delays. Also, if the overall construction project or "larger common plan of development or sale" becomes, or is anticipated to become, five or more acres of construction-related

disturbance, the project no longer qualifies for the Rainfall Erosivity Waiver.

Based on the Department's experience in permitting storm water discharges associated with construction activity in Montana, it needs to be emphasized that the vast majority of construction activities performed in Montana will likely not qualify for using this waiver form. This is primarily because, in addition to the earthwork and building phases, most construction projects depend on natural rainfall to establish vegetation and can take months or longer to achieve final stabilization.

For further information about the "Storm Water Rainfall Erosivity Waiver Form" and it's limitations, the General Permit refers to the Department's storm water construction webpage through the Department's website at: http://www.deq.mt.gov.

IV. Receiving Waters and Applicable Standards

Storm water discharges associated with construction activity regulated by this General Permit cover discharge of storm waters to state surface waters. Surface waters are defined in ARM 17.30.1102(32). Intermittent and ephemeral watercourses and drainages are state surface waters in accordance with 75-5-103(29), MCA.

The Montana Water Quality Act requires that permits issued pursuant to Title 17, Chapter 30, Subchapter 11 and 13 comply with the Montana surface water quality standards found in Subchapter 6.

New or increased sources (ARM 17.30.702(16)), must comply with Montana's Nondegradation Policy (75-5-303, MCA), and rules (ARM 17.30.701 et. seq.). Nondegradation requirements are discussed in Part VII of this Fact Sheet.

V. Effluent Limitations and Related Permit Conditions

Section 402 of the Montana Water Quality Act (75-5-402, MCA) authorizes the Department to regulate the discharges of sewage, industrial and other wastes into state surface waters. Pursuant to ARM 17.30.1201, the Department is required to establish effluent limitations, treatment standards, and other requirements for point sources discharging wastes to state waters. The Montana Board of Environmental Review has not adopted minimum treatment requirements for storm water discharges associated with construction activity. The discharge of sewage or industrial wastes is not allowed under the General Permit.

The General Permit is exclusive to "other wastes" as defined under 75-5-103(19) MCA, resulting from regulated activities, and receive, at a minimum, treatment to

restore and maintain the quality of surface waters (ARM 17.30.635(1), 75-5-305, MCA).

A. Technology-Based Effluent Limits (TBELs)

Sediment, turbidity, total suspended solids, and other parameters can potentially be increased through such construction activity storm water discharges. As stated in the Montana Water Quality Act it is not necessary that wastes be treated to conditions purer than the receiving waters as long as minimum treatment requirements have been set (75-5-306, MCA). As the effluent characteristics of storm water runoff can be highly variable and unpredictable, ARM 17.30.1345(1) and 17.30.1344 provide for the use of Best Management Practices (BMPs) where effluent limitations are infeasible. Based upon best professional judgement, the use of BMPs is the most appropriate type of control for this point source category. BMPs should be the most cost-effective means of removing the pollutants, or eliminating and/or minimizing contact between pollutants and storm water discharges associated with construction activity.

Based on the above, the Department has concluded that the most prudent, reasonable land, soil and water conservation practices, to protect surface waters of the state will be achieved through BMP-oriented narrative effluent limitations, and the development and implementation of a "Storm Water Pollution Prevention Plan" (SWPPP) as defined in ARM 17.30.1102(31). SWPPP submittal is a required component of the NOI Package pursuant to 75-5-401(1)(c) and the consequent ARM 17.30.1115(3). This SWPPP identifies site characteristics, potential pollutants, and various BMPs to minimize or prevent pollutants from entering storm water runoff and/or receiving state surface waters. The General Permit will require the permittee to develop and maintain BMPs and storm water management controls in accordance with a SWPPP (Parts 2 and 3 of the General Permit).

In the December 1, 2009 "Federal Register", the federal U.S. Environmental Protection Agency (EPA) promulgated new regulations entitled "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category" (informally called the "C & D ELGs"). In the July 1, 2010 40 CFR publication, these are found under Subchapter N entitled "Effluent Limitations and Guidelines." These include 40 CFR Parts 450.21, 450.22, 450.23, and 450.24. These are generally incorporated by reference for use in MPDES permitting through the authority in ARM 17.30.1207. Consequently, most of these requirements, as presented and explained in the aforementioned Federal Register, were included in this General Permit.

More specifically, in this General Permit, narrative TBELs reflecting the "best practicable technology currently available" (BPT) found in 40 CFR Part

450.21 were literally brought in through Part 2.2. of the General Permit. These requirements are primarily oriented around BMPs.

40 CFR Part 450.22(c), (d), (e), (f), (g), and (h) were also brought into this General Permit in Part 2.2. as they refer back to Part 450.21. 40 CFR Part 450.22 requirements are "effluent limitations reflecting the best available technology economically achievable" (BAT). 40 CFR Part 450.22(a) and (b) were not brought into this General Permit at this time, as explained below.

40 CFR Part 450.23 was similarly brought into this General Permit in Part 2.2. as it also refers back to Part 450.21. Part 450.23 requirements are "effluent limitations reflecting the best conventional pollutant control technology" (BCT).

40 CFR Part 450.24 requirements are "new source performance standards reflecting the best available demonstrated control technology" (NSPS). This refers back to Part 450.22, which as explained below, resulted in only 40 CFR Parts 450.22 (c), (d), (e), (f), (g), and (h) being included in the General Permit.

Turbidity monitoring requirements brought in through 40 CFR Part 450.22(a) and (b), and the respective portion of Part 450.24, will be brought into General Permit MTR100000 at a later date. 40 CFR Part 450.22(a) and (b) pertain to turbidity monitoring, a numerical turbidity effluent limit, and an exemption for turbidity monitoring. This delay is because the numeric turbidity limit of 280 NTU stated in Part 450.22(a)(1) is undergoing litigation, reevaluation, and potential revision at this time at the federal EPA level. Without fixed and established federal requirements for this turbidity monitoring from the federal EPA, the Department considered it prudent to wait until these requirements are firmly determined before such requirements are included in General Permit MTR100000. There is a significant amount of effort in establishing a turbidity monitoring program with an enforceable limit for the Department and regulated community, and the Department needs to have more certainty with respect to these requirements to ensure a productive, efficient, and worthwhile effort for all involved.

In keeping with some more contemporary and recently issued similar permits from the EPA and other states, and in order to help ensure better compliance/enforceability with respect to these more strict TBELs and BMP requirements brought about through the incorporation of the federal C & D ELGs, the Department has included various improvements with respect to self-inspections, corrective actions, and the SWPPP in this General Permit.

B. Water Quality Based Effluent Limits

Based on ARM Title 12, Chapter 30, Subchapter 6, and with the exception of storm water discharges associated with construction activity into an ephemeral stream (defined in ARM 17.30.602(12)), for construction activity storm water discharges there are a few more pertinent water quality standards identified in Subchapter 6 which apply to state surface waters classified as A-Closed, A-1, B-1, B-2, B-3, C-1, C-2, I, and C-3 (ARM 17.30.621 through 629). In summary, these include:

1. No increases are allowed above naturally occurring concentrations of sediment or suspended sediment (except as permitted in 75-5-318, MCA), settleable solids, oils, or floating solids, which will or are likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife."

2. Standards pertinent to turbidity (defined in ARM 17.30.602(38)) for the above classifications range from no increase above naturally occurring turbidity to maximum increases of ten nephelometric turbidity units above naturally occurring turbidity, except as permitted in 75-5-318, MCA.

3. General Prohibitions found in ARM 17.30.637 including state surface waters being free from certain specified undesirable or harmful conditions, measures ensuring waste discharges and activities conducted will not potentially violate water quality standards, various BMP performance standards, and ephemeral stream treatment requirements.

Water quality standards found in ARM 17.30.621 through 629 do not apply to ephemeral streams.

It is the Department's position that Montana's surface water quality standards, including those stated above, can be maintained through compliance with the General Permit's TBELs, the development and implementation of a SWPPP, and other conditions in the General Permit. SWPPP requirements document various information about site characteristics including hydrology, potential sources of pollutants such as disturbed ground or wastes/products, and BMPs to minimize consequent pollutants in storm water runoff. The SWPPP allows for an iterative approach to BMP implementation whereby BMP effectiveness is tracked and evaluated through self-inspections, and corrective actions and improvements are made as necessary. The BMPs help minimize or

eliminate the generation or migration of pollutants to receiving state surface waters.

Part 2.3 of this General Permit does not authorize storm water discharges that the Department determines will cause, or have a reasonable potential to cause or contribute to an exceedance of applicable water quality standards. If the regulated storm water discharge causes or contributes to an exceedance of applicable water quality standards, the Department will notify the permittee that additional storm water controls are necessary or terminate coverage under the General Permit and require an MPDES individual permit.

Furthermore, requirements are incorporated into the General Permit in Part 3.11. to address listed impaired waterbodies and their pollutants of concern, with or without approved Total Maximum Daily Loads (TMDLs), under Section 303(d) of the Clean Water Act. More specifically, depending on whether the storm water discharges into a listed impaired receiving surface water(s), the permittee's SWPPP may need to include a section describing how the SWPPP will control discharges of pollutants of concern (for which the listed waterbody is impaired) and ensure storm water discharges will not cause or contribute to instream exceedances of water quality standards. This SWPPP must specifically identify BMPs that will collectively control the potential discharges of pollutants of concern. Information on impaired waterbodies may be obtained from the Department website: http://cwaic.mt.gov/.

If a TMDL has been approved for any waterbody into which the permittee discharges storm water, and the TMDL considered and addressed MPDES-regulated storm water discharges, then the Department must incorporate the Waste Load Allocation (WLA), as applicable, into the permit as required by 75-5-703, MCA.

Typically, the WLA is assumed to be accomplished by ensuring compliance with this General Permit for pertinent construction projects with authorized storm water discharges. In other words, with respect to addressing storm water discharges to a 303(d) listed or impaired water body, the Department believes General Permit requirements, including TBELs, SWPPP, self-inspections, and corrective action requirements, will typically be sufficient in addressing erosion and sediment control and other pollutant concerns.

C. Inspection, Corrective Action, Recordkeeping, and Reporting Requirements

Part 2.3. of the General Permit provides inspection requirements which the permittee's SWPPP Administrator must conduct during the effective period of the particular permit authorization. Self-inspections are a critical tool in evaluating and keeping track of BMP effectiveness, and consequently, in minimizing or preventing pollutant discharge from a site through storm water runoff. Proper BMP implementation through the SWPPP and these self-inspections are also critical in helping to ensure compliance with the TBELs stated in Part 2.1. of the General Permit.

As these inspections typically require site-specific knowledge and experience related to the requirements in this General Permit and associated BMPs, the Department is requiring self-inspections to be conducted by a "SWPPP Administrator" which meets the requirements in Part 3.2. of the General Permit. The SWPPP Administrator requirements in Part 3.2. include training requirements which will be phased in during the first year of the effective General Permit cycle in order to provide the regulated community more time to obtain this training.

In Part 2.3. inspection requirements, this General Permit includes an option for permittees to select either weekly routine inspections, or biweekly routine inspections in conjunction with post-storm event inspections after a certain-sized rainfall event or certain snowmelt events. It also includes a reduction in inspection frequency for inactive construction activity sites.

Regarding the size of a storm event which triggers the need for a post-storm event inspection, based on field evidence, it was clear that on many construction projects a relatively smaller storm event can cause significant problems with respect to BMPs and erosion/sediment control. In part, this is due to Montana's semi-arid climate, less vegetation, more topography, harder growing conditions for vegetation, more erosive soils, and unpredictability with respect to storm event size and duration over broader areas. Given the above factors, the requirement for post-storm event inspections was reduced from a 0.5-inch to 0.25-inch rainfall event, and a requirement was also added to strengthen these inspections with respect to snowmelt events.

Additionally, based on Department experience and inspections, it was evident there was a need to generally improve and expand self-inspection requirements. More requirements were necessary with respect to ensuring quality and completeness, including the inspection scope, documenting inspections, and ensuring corrective action was taken and documented where necessary. In particular, it was important to strengthen requirements with respect to BMP maintenance, replacement, and/or failures, as over the years the Department has observed that the

maintenance of BMPs has often been a problem area in ensuring compliance with the General Permit. Consequently, Part 2.3. of the General Permit contains some new requirements to better accomplish this. Inspection and BMP maintenance procedures must be documented in the SWPPP as required by Part 3.10. of the permit.

Other requirements in Parts 2.5 and 2.6. include ongoing and improved measures for keeping specified permit-related documentation at the site, and to notify the Department of a change in the SWPPP Administrator designated by the permittee. To elaborate, the Department has continued to experience problems and compliance issues with permittees not retaining the required documentation and/or having it readily available at the site. Consequently, the SWPPP Administrator must now be solely responsible for this recordkeeping requirement, and ensuring such documentation is readily available at the site. Depending on the particular construction project, the availability of the SWPPP Administrator, and/or whether office trailers or similar options exist at the actual site for retaining this required site documentation, other measures may need to be considered including the use of secure lock-boxes for the retention of such documentation at the site.

D. Special Conditions - Storm Water Pollution Prevention Plan Requirements

A Storm Water Pollution Prevention Plan (SWPPP), as defined in ARM 17.30.1102(31), must be developed for each facility or activity covered by this General Permit. A SWPPP is required directly through 75-5-401(1)(c) MCA and ARM 17.30.1115(3). As described above, the primary purpose of the SWPPP is to identify pertinent site characteristics, sources of pollution to storm water, and to implement BMPs to prevent pollutant migration to surface waters. Another important function of the SWPPP is to help ensure compliance with the effluent limitations in Part 2 of the General Permit. The BMPs selected in the SWPPP need to eliminate or minimize contamination of storm water runoff at their source and/or remove pollutants before discharge into state surface waters. Facilities must implement the provisions of the SWPPP required under this part as a condition of this permit (75-5-303 (3)(d), MCA). SWPPPs are intended to be "living documents", to be updated and accommodate "as-built" field changes, and to reflect current conditions and activities at the site. Periodic evaluation and ongoing improvements to the BMPs at the site can only help improve the quality of storm water runoff.

SWPPP BMPs must be developed using good standard engineering practices. They must include requirements stated in the General Permit. The SWPPP must be signed in accordance with ARM 17.30.1323 and the requirements stated in the General Permit.

The SWPPP requirements contained within MTR100000 have not changed significantly during the previous four five-year cycles of this General Permit. However, due to a number of factors, the Department has incorporated new improvements into the SWPPP during this General Permit reissuance cycle. These factors include:

- the promulgation of the new 2010 requirements (narrative TBELs) contained within the federal C & D ELGs;
- to ensure better compliance with respect to General Permit requirements
- to ensure more effective implementation of BMPs; and
- to generally contemporize and bring SWPPP requirements more in-line with similar permits from EPA and other permits within the region.

Consequently, based on historical EPA/State permits, guidance, and experience, the SWPPP has evolved over the past 20 years to contain the following elements within this General Permit:

1. SWPPP General Requirements;
2. SWPPP Administrator Requirements (including training);
3. Construction Activity and BMP Schedule and Phasing;
4. Site Description;
5. Site Map;
6. Identification and Summary of Potential Pollutant Sources;
7. Description of Best Management Practices (BMPs)
   - Structural BMPs for Erosion and Sediment Control
   - Non-Structural BMPs for Erosion and Sediment Control
   - Materials Handling
   - Dedicated Concrete or Asphalt Batch Plants
   - Waste Management and Disposal, Including Concrete Washout
   - Stabilization Measures
   - Minimize Ground Disturbance
   - Ground Water Dewatering
   - Operational Controls
   - Spill Prevention and Response Procedures
   - Off-Site Vehicle Trucking of Sediment
   - Local Sediment and Erosion Control Requirements;
8. Final Stabilization;

9. Post-Construction Storm Water Management;
10. Inspection and BMP Maintenance Procedures;
11. Water Quality Controls for Discharges to Impaired Waterbodies; and
12. SWPPP Revisions and Updates.

E. Standard Conditions and Definitions

Based on ARM 17.30.1342, standard conditions pertaining to all MPDES permits are included in Part 4 of this General Permit. Part 5 of the General Permit contains general definitions and abbreviations associated with the MPDES permit program and this General Permit

VI. Mixing Zones

A mixing zone is an area where the effluent mixes with the receiving water and certain water quality standards may be exceeded (ARM 17.30.502(6)). Because the General Permit regulates the discharge of pollutants through the development and implementation of technology-based controls (TBELs, BMPs, and SWPPP), a mixing zone is not applicable. As stated in Section V.B., facilities which cause a contribution to a violation of water quality standards must apply for an MPDES Individual Permit.

VII. Nondegradation

The activities covered by this General Permit have been determined to be non-significant based on 75-5-303 (3)(d) MCA, and 75-5-317(2)(b) MCA, whereas the SWPPP requirement stipulates that the SWPPP and associated BMPs will be implemented prior to the commencement of regulated activities covered under this General Permit. The SWPPP requirement also includes provision for the ongoing inspections and evaluation of BMPs to eliminate or minimize pollutants contained in storm water runoff. If the applicant provides information that indicates the proposed discharge will not meet conditions of ARM 17.30.715(1), the Department will require the operator to amend the SWPPP in order to comply with Montana's Nondegradation Policy and rules.

VIII. Total Maximum Daily Loads (TMDL)

On September 21, 2000, a U.S. District Judge issued an order stating that until all necessary total maximum daily loads (TMDLs) under Section 303(d) of the Clean Water Act are established for a particular water quality limited segment (WQLS), the State is not to issue any new permits or increase permitted discharges under the MPDES program. The order was issued in the lawsuit *Friends of the Wild Swan v. U.S. EPA, et al.*, CV 97-35-M-DWM, District of

Montana, Missoula Division. The Department finds that the renewal and re-issuance of this General Permit does not conflict with the order, because: (1) it is not a new permit, and (2) the permit prohibits storm water discharges that cause or contribute to a violation of water quality standards.

IX. Procedure for Coverage under the General Permit

Through the authority of 75-5-401(1)(c), and the rule requirements in ARM 17.30.1115, the Department uses a "Notice of Intent" (NOI) system to regulate this type of storm water discharge. Through the submittal of an NOI, the owner or operator acknowledges eligibility for coverage under this permit and agrees to comply with the conditions of this permit for their particular "storm water discharge associated with construction activity". ARM 17.30.1115 contains the procedures to be utilized with respect to this NOI-based system.

In order to obtain coverage under the General Permit, an "owner or operator" (as defined in 75-5-103(25)), must submit a complete "NOI Package" to the Department. The NOI Package collectively contains the information required through ARM 17.30.1115. A NOI Package includes the standard NOI form provided by the Department, a SWPPP, and the permit application fee based on ARM 17.30.201. Forms and information pertaining to this are available through the Department's website at http://deq.mt.gov.

The NOI form must be completed by the owner or operator of the construction project. The owner or operator means a person who owns, leases, operates, controls, or supervises a point source. A person includes the state, a political subdivision of the state, institution, firm, corporation, partnership, individual, other entity (75-5-103(23), MCA). Persons completing an NOI form, other than an individual, must comply with the signatory requirements in ARM 17.30.1323 and Part 4.15. of the General Permit. The owner or operator assumes responsibility for all storm water discharges at the site.

The Department performs a completeness check of each NOI Package when it is received. This includes a check for completion of items on the NOI form, a check to ensure the SWPPP was provided and is signed as required in the General Permit, and a check to ensure the appropriate fee amount has been submitted.

Based on ARM 17.30.1115(4), authorization to discharge under the General Permit is effective upon receipt by the Department of the complete NOI Package. In order to ensure storm water discharges from the construction site are properly regulated prior to their occurrence, and due to the unpredictability associated with storm water (rainfall and snowmelt) discharges, the Department requires this NOI Package to be submitted prior to the initiation of construction activities at the site.

The NOI Package is not complete and the source is not covered under the General Permit until the Department receives the complete NOI Package (including fees).

Coverage under the General Permit remains in effect until the permittee submits a Notice of Termination (NOT) stating that the site has achieved final stabilization. The NOT form must be signed by the owner or operator or other authorized person in accordance with Part 4.15. of the General Permit. The permittee is responsible for payment of annual fees for each calendar year in which the source is covered under the General Permit.

For all permittees renewing continued coverage under MTR100000, they are not required to submit a new or an amended SWPPP, however, a valid SWPPP must be maintained at the site. They are just required to submit a complete renewal NOI form and a renewal application fee, if applicable, based on ARM 17.30.201.

X. References/ Information Sources

(1) Administrative Rules of Montana Title 17, Chapter 30 *et seq.*
(2) Montana Code Annotated Title 75, Chapters 5, Subchapters 1 through 6
(3) Code of Federal Regulations 40 CFR Parts 122 through 133, and Part 450
(4) Federal Register, Tuesday December 1, 2009 (federal C & D ELGs)
(5) Montana DEQ MPDES Permit No. MTR100000, effective date April 16, 2007
(6) Colorado Department of Public Health and Environment, Colorado Discharge Permit System Permit No. COR-030000, effective date July 1, 2007
(7) Wyoming Department of Environmental Quality, Wyoming Pollutant Discharge Elimination System Permit No. WYR10-0000, effective date May 9, 2011
(8) EPA Spring 2011 Draft NPDES General Permit for Discharges from Construction Activities
(9) EPA 2012 Final NPDES General Permit for Discharges from Construction Activities

Prepared by: Brian Heckenberger, DEQ Water Protection Bureau - July 2012.

Developing Your Stormwater Pollution Prevention Plan

A Guide for Construction Sites

EPA-833-R-06-004
May 2007

B. Who Is Required to Get NPDES Permit Coverage?

Construction site *operators* are responsible for obtaining NPDES permit coverage for their stormwater discharges. Each state has its own definition of the term *operator*. Operators may include owners (e.g., developers), general contractors, independent subcontractors, government officials, companies, or corporations. This section reflects EPA's understanding of most NPDES permit requirements for stormwater discharges throughout the country. You should, of course, consult your construction general permit for the requirements that apply to you. In some cases, states have defined the operator as a single entity, usually the land owner or easement holder. In other states, several entities may meet the definition of operator. For instance, the owner may control the project's plans and specifications, and the general contractor may control the site's day-to-day operations. In such cases, both may be defined as operators. If a site has multiple operators, they may cooperate on the development and implementation of a single SWPPP. Operators generally obtain coverage under an NPDES permit, often by filing a form called a Notice of Intent (NOI).

Figure 4. Use signage to help educate construction staff.

EPA's Construction General Permit (which applies only where EPA is the permitting authority—see Chapter 2 Section A) defines operator as any party that:

- Has control over the construction plans and specifications

  and/or

- Has day-to-day operational control of the site, including activities necessary to implement the SWPPP

Regardless of whether or not the operator is a corporation or governmental entity, someone must direct the SWPPP's preparation and implementation and apply for NPDES permit coverage for the stormwater discharges. In most cases, this will be a high-level official, such as a corporate officer, manager or elected official, or a principal executive officer. For specific instructions, refer to the appropriate NPDES stormwater permit.

Multiple Operators

In many instances, there may be more than one party at a site performing tasks related to *operational control* and more than one operator may need to submit an NOI. Depending on the site and the relationship between the parties (e.g., owner, developer, general contractor), there can either be a single party acting as site operator and consequently responsible for obtaining permit coverage, or there can be two or more operators all needing permit coverage. Exactly who is considered an operator is largely controlled by how the *owner* of the project chooses to structure the contracts with the *contractors* hired to design and/or build the project. The following are three general operator scenarios (variations on any of these three are possible, especially as the number of owners and contractors increases):

- *Owner as sole permittee.* The property owner designs the structures for the site, develops and implements the SWPPP, and serves as general contractor (or has an on-site representative with full authority to direct day-to-day operations). The owner may be the only party that needs permit coverage under these circumstances. Everyone else on the site may be considered subcontractors and might not need permit coverage.

- *Contractor as sole permittee.* The property owner hires one company (i.e., a contractor) to design the project and oversee all aspects of the construction project, including preparation and implementation of the SWPPP and compliance with the permit (e.g., a *turnkey* project). Here, the contractor would likely be the only party needing a permit. It is under this scenario that an individual having a personal residence built for his own use (e.g., not those to be sold for profit or used as rental property) would not be considered an operator. However, individual property owners would meet the definition of *operator* and may require permit coverage if they perform general contracting duties for construction of their personal residences.
- *Owner and contractor as co-permittees.* The owner retains control over any changes to site plans, SWPPPs, or stormwater conveyance or control designs; but the contractor is responsible for overseeing actual earth disturbing activities and daily implementation of SWPPP and other permit conditions. In this case, which is the most common scenario, both parties may need to apply for permit coverage.

However, you are probably not an operator and subsequently would not need permit coverage if one of the following is true:

- You are a subcontractor hired by, and under the supervision of, the owner or a general contractor (i.e., if the contractor directs your activities on-site, you probably are not an operator)
- The operator of the site has indicated in the SWPPP that someone other than you (or your subcontractor) is reponsible for your activities as they relate to stormwater quality (i.e., another operator has assumed responsibility for the impacts of your construction activities). This is typically the case for many, if not most, utility service line installations.

In addition, *owner* typically refers to the party that owns the structure being built. Ownership of the land where construction is occurring does not necessarily imply the property owner is an operator (e.g., a landowner whose property is being disturbed by construction of a gas pipeline). Likewise, if the erection of a structure has been contracted for, but possession of the title or lease to the land or structure does not to occur until after construction, the would-be owner may not be considered an operator (e.g., having a house built by a residential homebuilder).

Transferring Ownership

In many residential developments, an overall developer applies for the stormwater permit coverage, conducts grading activities, and installs the basic infrastructure (e.g., utilities, roads). Individual lots are then sold to builders who then construct the houses. Unless the developer is still responsible for stormwater on these individual lots (which is typically not the case), it is likely that the builder will need to apply for NPDES permit coverage for stormwater discharges during home construction.

Subcontractors

It is typically a good idea to include specific contract language requiring subcontractors to implement appropriate stormwater controls. Subcontractors should be trained on appropriate BMPs and requirements in the SWPPP and should not disturb or remove BMPs. Some contractors will include specific penalties in subcontractor agreements to ensure subcontractors do not damage or remove BMPs.

Take a Closer Look...

Erosion Control vs. Sediment Control

When developing a SWPPP, it is important to understand the difference between erosion control and sediment control. Erosion control measures (e.g., mulch, blankets, mats, vegetative cover) protect the soil surface and prevent soil particles from being dislodged and carried away by wind or water. Sediment control measures remove soil particles after they have been dislodged (typically through settling or filtration). It is usually easier and less expensive to prevent erosion than it is to control sedimentation.

What does this mean to me?

You should try to use erosion control BMPs as the primary means of preventing stormwater contamination, and sediment control techniques to capture any soil that does get eroded. Because no one technique is 100 percent effective, a good SWPPP will use both kinds of BMPs in combination for the best results.

NORTH DAKOTA
DEPARTMENT of HEALTH

LARGER COMMON PLAN PERMITTING GUIDANCE DOCUMENT
(12/07)

The North Dakota Department of Health (NDDoH) has developed new guidance for permitting construction activity within a larger common plan of development or sale. The construction stormwater general permit, NDR10-0000, defines a larger common plan as:

> "a contiguous area where multiple separate and distinct land disturbing activities may be taking place at different times, on different schedules, but under one proposed plan. One plan is broadly defined to include design, permit application, advertisement or physical demarcation indicating that land-disturbing activities may occur."

Examples of larger common plans include residential subdivisions, commercial developments, or industrial parks.

Beginning January 1, 2008:

- A Notice of Intent (Application) or NOI to obtain coverage under the general permit is required from each individual builder within separate and distinct common plans. By submitting a NOI, each builder is responsible for complying with the terms and conditions of the general permit including the development of a site-specific Stormwater Pollution Prevention (SWPP) plan and inspection records. The NOI must be submitted to the North Dakota Department of Health before construction activity begins.

  An individual builder is considered the owner/operator of the site as defined in the general permit.

- The NOI is required from the individual builder when coverage under the construction general permit is transferred from the developer of the common plan to the individual builder. If a transfer is not performed, then the stormwater permit requirements pertaining to the builder's activities are the responsibility of the developer. If an option to buy exists on the property, the developer may not transfer coverage.

  The following provides further explanation of the transfer process:

  1. The developer sells off property to a builder*.

  2. The developer amends the SWPP plan to exclude those areas which have been sold to a builder.

  3. The builder then applies for coverage under the general permit for the purchased property, or if coverage already exists, amends the existing SWPP plan and site map for that common plan to include the property.

EXHIBIT
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* If the builder does not obtain a permit and the developer does not have documentation requiring the builder to apply for permit coverage or comply with environmental regulations as part of the property sale, the developer is responsible for stormwater discharges from the sold lots.

- A NOI is required from an individual builder once coverage is transferred and before construction activity begins. **Once coverage has been granted to the builder, activity which disturbs additional acreage within the common plan will not require the submittal of another NOI. Instead, all activity conducted by the builder within the common plan is covered under the initial NOI.**

- The builder shall keep and maintain a list of their active construction sites within the common plan as part of the SWPP plan. The SWPP plan shall also indicate the locations of any site-specific BMP.

- The submittal of one Notice of Intent for construction activity within a larger common plan eliminates the individual builder's requirement to submit an annual location report to the Department at the end of the reporting period. However, an annual report is still required for small construction activities that are not part of a larger common plan.

The permitting requirement applies to all common plans of development or sale within the State of North Dakota. This includes but is not limited to industrial, commercial and residential construction activity.

In order to terminate coverage, a builder must submit a Notice of Termination (NOT) to the NDDoH. Termination of coverage within a larger common plan of development may be achieved by:

- Achieving final stabilization on all properties for which the builder is responsible.

- Transferring permit coverage to another builder who has purchased the property; similar to the initial transfer between the developer and the builder.

- For residential construction only, temporary erosion protection and down gradient perimeter control for individual lots has been completed and the residence has been transferred to the homeowner. Additionally, the builder has distributed a "homeowner fact sheet" to the homeowner informing them of the need for, and benefits of, final stabilization.

There may be instances where the covered property within a larger common plan has achieved final stabilization, but no additional construction activity is anticipated. In those instances a builder may choose to maintain or terminate coverage at their own discretion. If coverage has been terminated and a parcel of property is sold to a new builder, the new builder must obtain coverage before construction activity begins.

Issuance Date: April 23, 2018
Effective Date: April 23, 2018
Expiration Date: April 22, 2023

Entered in the Director's Journal

OHIO ENVIRONMENTAL PROTECTION AGENCY

GENERAL PERMIT AUTHORIZATION FOR STORM WATER DISCHARGES ASSOCIATED WITH CONSTRUCTION ACTIVITY UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Water Pollution Control Act, as amended (33 U.S.C. Section 1251 et. seq. hereafter referred to as "the Act") and the Ohio Water Pollution Control Act [Ohio Revised Code ("ORC") Chapter 6111], dischargers of storm water from sites where construction activity is being conducted, as defined in Part I.B of this permit, are authorized by the Ohio Environmental Protection Agency, hereafter referred to as "Ohio EPA," to discharge from the outfalls at the sites and to the receiving surface waters of the state identified in their Notice of Intent ("NOI") application form on file with Ohio EPA in accordance with the conditions specified in Parts I through VII of this permit.

It has been determined that a lowering of water quality of various waters of the state associated with granting coverage under this permit is necessary to accommodate important social and economic development in the state of Ohio. In accordance with OAC 3745-1-05, this decision was reached only after examining a series of technical alternatives, reviewing social and economic issues related to the degradation, and considering all public and intergovernmental comments received concerning the proposal.

This permit is conditioned upon payment of applicable fees, submittal of a complete NOI application form, development (and submittal, if applicable) of a complete Storm Water Pollution Prevention Plan (SWP3) and written approval of coverage from the director of Ohio EPA in accordance with Ohio Administrative Code ("OAC") Rule 3745-38-02.

Craig W. Butler
Director

Total Pages: 60

I hereby certify this is a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency.

By Date: 4-23-18

The director will send written notification that an alternative NPDES permit is required. This notice shall include a brief statement of the reasons for this decision, an application form and a statement setting a deadline for the operator to file the application. If an operator fails to submit an application in a timely manner as required by the director under this paragraph, then coverage, if in effect, under this permit is automatically terminated at the end of the day specified for application submittal.

2. Operators may request an individual NPDES permit. Any owner or operator eligible for this permit may request to be excluded from the coverage of this permit by applying for an individual permit. The owner or operator shall submit an individual application with reasons supporting the request to the director in accordance with the requirements of 40 CFR 122.26. If the reasons adequately support the request, the director shall grant it by issuing an individual NPDES permit.

3. When an individual NPDES permit is issued to an owner or operator otherwise subject to this permit or the owner or operator is approved for coverage under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit or the date of approval for coverage under the alternative general permit, whichever the case may be.

D. Permit requirements when portions of a site are sold

If an operator obtains a permit for a development, and then the operator (permittee) sells off lots or parcels within that development, permit coverage must be continued on those lots until a Notice of Termination (NOT) in accordance with Part IV.B is submitted. For developments which require the use of centralized sediment and erosion controls (i.e., controls that address storm water runoff from one or more lots) for which the current permittee intends to terminate responsibilities under this permit for a lot after sale of the lot to a new owner and such termination will either prevent or impair the implementation of the controls and therefore jeopardize compliance with the terms and conditions of this permit, the permittee will be required to maintain responsibility for the implementation of those controls. For developments where this is not the case, it is the permittee's responsibility to temporarily stabilize all lots sold to individual lot owners unless an exception is approved in accordance with Part III.G.4. In cases where permit responsibilities for individual lot(s) will be terminated after sale of the lot, the permittee shall inform the individual lot owner of the obligations under this permit and ensure that the Individual Lot NOI application is submitted to Ohio EPA.

E. Authorization

1. Obtaining authorization to discharge. Operators that discharge storm water associated with construction activity must submit an NOI application form and Storm Water Pollution Prevention Plan (SWP3) if located within the Big Darby Creek watershed or portions of the Olentangy watershed in accordance with the requirements of Part I.F of this permit to obtain authorization to discharge under this general permit. As required under OAC Rule 3745-38-06(E), the director, in response to the NOI submission, will notify the applicant in writing that he/she has or has not been granted general permit coverage to discharge storm water associated with construction activity under the terms and conditions of this permit or that the applicant must apply for an individual NPDES permit or coverage under an alternate general NPDES permit as described in Part I.C.1.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC, AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY	) CASE NO.) BER 2015-01 WQ
and: IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY	) CASE NO.) BER 2015-02 WQ

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT - VOLUME II

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
February 8, 2019
9:40 a.m.

BEFORE CHAIR CHRIS DEVENY, JOHN DEARMENT, CHRIS TWEETEN, DEXTER BUSBY, and HILLARY HANSON

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

A P P E A R A N C E S

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WHEREUPON, the following proceedings were had:

* * * * *

CHAIR DEVENY: Let's proceed with the Copper Ridge case. Let the minutes reflect that we still have a quorum. And for this case, John Dearment is recused, so it will be four of us Board members that will be making a decision here today.

Before we proceed with oral arguments, which is what we're here to hear today, I want to separate these issues because there are a couple things that need to be really settled first.

The last time when we were at the hearing, we did settle one of those issues, and that was a motion to strike, and we denied Copper Ridge's request to strike, so we don't need to address that.

The next issue, though, that's really key to this case and fundamental is the owner/operator issue, so I'd like us to just take that issue up at this point. And we've had oral argument on that. We've also had additional written arguments submitted by both the parties on the owner/operator.

I'd like to give the parties one more opportunity for oral argument on that, but I really want you to limit it to no more than five minutes. So if we could start with that. Do either of you have a preference who goes first? Ms. Bowers?

MS. BOWERS: I think as the Appellant, you should go first.

MS. MARQUIS: Madam Chair, members of the Board, I'm Vicki Marquis, and I'm here today representing Copper Ridge and Reflections at Copper Ridge. My client Landy Leap is here today.

You have received extensive briefing on the issue of owner/operator, and I think through that briefing, it has become clear that the Department and Copper Ridge agree on the definitions that are at issue here, and that an owner/operator must own, lease, operate, control, or supervise a point source.

And in this case, we all agree that the point source at issue is the construction activity, that is the actual disturbance of the ground.

It is undisputed here that Copper Ridge and Reflections at Copper Ridge did not own,

lease, or operate any of the individual lots where the home building was taking place. There is testimony on the record that Copper Ridge and Reflections at Copper Ridge do not engage in home building activities, and that they did not own the individual lots where the construction was occurring at that time.

So the question really comes down to whether they controlled or supervised any of that construction activity. Now, the previous Hearing Examiner cited to a contract on this issue. It was a contract between the developer and one of their contractors who was engaged in installing streets and putting in the utilities.

This is in our supplemental brief at Pages 13 to 17, and there we explain that we had objected not only to the request for information from the Department, but we objected because that contract did not concern any home building activities. It is undisputed that the home building activities were the source of the violation. That contract had nothing to do with home building activities.

The second important point about that contract, is that that contract work was done,

wrapped up, complete, and those permits were terminated in 2012, a full nine months prior to the violations that the Department alleges that they found in this case.

Now, the Department cites to some EPA guidance in their brief, and I'd like to refer to that quickly, specifically Exhibit 2, Page 3 of the exhibit, and it's EPA guidance, and in there EPA says that in cases like this where there is construction activity in a subdivision, the owner typically refers to the party who owns the structure being built. In this case there were individual homes being built. The developer did not own those structures being built.

Additionally, the next paragraph on transferring ownership, the EPA says specifically that unless the developer is still responsible for storm water on these individual lots, which is typically not the case, it is likely that the builder will need to apply for MPDES permit coverage for storm water discharges during home construction.

So the EPA says it's the typical case that the developer does not remain liable for those discharges of individual home building.

That's the case we have here.

Now, the Department goes into a discussion about the larger common plan of development. This is really sort of a red herring here. This tells you when coverage is needed, but it does not tell you who needs the coverage.

The Department relies on the Hawaii Dairy Farm case, but that case is really very different than the case in front of you today. In that case, there was one dairy, and they wanted to start out with 699 cows and expand to 2,000 cows, and had all kinds of plans for things they wanted to do on their property. It was one dairy, owned by one owner, one property where they were doing a bunch of different activities.

That's not the case here. In this case, we have a subdivision. We have a variety of individual property owners. And again, the property where the construction activity that occurred that the Department alleges caused the violation were the individual lots where homes were being built.

It's undisputed that Copper Ridge and Reflections at Copper Ridge did not engage in those home building activities, so this case is

nothing like the Hawaii Dairy Farm case cited by the Department.

Here in fact in this case, the permit coverage that Copper Ridge and Reflections at Copper Ridge had was only for street building and utility installation. That's an important distinction because in the Hawaii case, the permit coverage that they had was for the entire project. It covered everything that they were going to do at the dairy.

That's not the case here. The permit coverage that my client had and maintained was for street building and utility installation, and that was it. There was not a permit for the entire subdivision.

That's another important distinction because the Department also provides information from North Dakota and Ohio, and I want to make clear that the attachments to their brief are not laws, they're not rules, they're not even in Montana, they have no precedential value in this matter. We don't know what the laws and rules are in those states. It is not clear.

What's clear is that in Montana, the requirement for a permit is the construction

activity. That's the point source.

Just one more point I'd like to make. The Department refers to the City of Billings, and I think their discussion there highlights the City of Billings' involvement here, and how the City of Billings has enforcement capabilities and responsibilities, unlike my client.

If you were to extend the owner/operator to include my client, to hold him liable for events and activities that occur on property he does not own and cannot control, you must also provide him some regulatory authority, so that he can enforce those requirements, because without it, he's left with nothing more than just a plain ask of individual homeowners, with no teeth, no enforcement capabilities whatsoever.

Further, the Water Quality Act in Montana does not contemplate that any entity other than a public entity, the Department, or the City of Billings, would have that enforcement capability.

That concludes my argument on owner/operator. I'm happy to answer whatever questions you might have.

CHAIR DEVENY: Let's hear from the

Department, and then we'll open it up to questions from the Board. Ms. Bowers.

MS. BOWERS: Madam Chair, members of the Board, I'm Kirsten Bowers representing DEQ in this matter, and sitting at the table with me is Mindy McCarthy. She's the DEQ Compliance, Training, and Technical Assistance Section Supervisor.

To address the owner/operator issue, Copper Ridge and Reflections at Copper Ridge are owners/operators of the construction activity at the subdivisions. They admit that they were the original developer; they drew the subdivision boundaries; they developed infrastructure for the subdivision; they hired contractors; they had control over designs and specs; they planned the subdivision.

And in their supplemental brief, Copper Ridge and Reflections admit that they were owners of construction activity that was permitted and completed prior to December 2012, but they want you to limit that activity to road building and utilities installation.

And that's not the regulated activity. The activity is construction activity, and it includes all earth moving activity. It is not

broken out into phases, such as road building and home construction.

For purposes of the Water Quality Act and these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and placement or removal of earth material, performed during construction projects.

Copper Ridge and Reflections argue that the Board should segregate their road building and utility installation related construction activities that occurred up to December of 2012 from the activities, including home building, that occurred after December 2012, but that is just not how the Water Quality Act and the rules work.

Construction activity includes the disturbance of less than one acre if it is part of a larger common plan of development. That's where larger common plan of development or sale comes in. It is not a red herring that DEQ is throwing out.

When Copper Ridge and Reflections proposed the subdivision for approval by the City of Billings, they contemplated building, designing and building residential lots and all of the infrastructure that supports the development.

The larger common plan of development or sale is a contiguous area where multiple separate and distinct construction activities are taking place at different times and on different schedules, but all under one plan.

Copper Ridge and Reflections admitted in hearing testimony that the common plan of development for the subdivision included the improvements necessary to get the subdivision approved by the City of Billings, and to subdivide and sell residential lots.

So the common plan therefore included grading, contouring, road building, utility installation, development of the storm water retainage ponds and common areas, and the design and planning of residential lots for eventual sale to home builders.

As the owner/operator of the plan of development, Copper Ridge and Reflections had to arrange for continued permit coverage of their construction activity, which included all of the earth disturbing activity as the lots were sold.

The Hearing Examiner properly determined in his orders on summary judgment that Copper Ridge and Reflections were the owner/operators of

the construction activity because they exerted control over construction in the subdivisions, and he used evidence that they directed the placement of soil on residential lots in the subdivisions, and that's in the order on summary judgment at Page 14.

Copper Ridge and Reflections fault the Hearing Examiner's reliance on contract language because they argue these contracts were not for home building, but this argument ignores the fact that construction activity, all construction activity, requires permit coverage.

And the contract language relied on by the Hearing Examiner unambiguously evidences the fact that Copper Ridge and Reflections contractors placed fill on residential lots. That's an activity that is a construction activity. And they graded the lots. As the owner/operator, Copper Ridge and Reflections controlled this activity.

Also under the Water Quality Act and related guidance, as the developer and owner/operator, Copper Ridge and Reflections had many options to ensure continued permit coverage of their construction activity. They could have

hired a contractor to hold the permit, and as the development progressed, they could have assigned or transferred permit coverage to other developers.

Copper Ridge and Reflections admit here they're the original developer of the subdivisions, that they were the original owner/operator of the construction activity, but they maintain they are not responsible for discharges associated with construction activity once residential lots are sold.

They also admit they had a permit that terminated on December 2012, but that under that permit, their responsibility was limited to discharges related to road construction and utility installation, and they argue they should be absolved of any responsibility for construction activities that are related to home building occurring on residential lots, even though they owned, developed, and prepared the lots for sale.

By adopting this argument, it would undermine national and state concepts of common plan of development, which does not allow a large developer to avoid permit obligations by developing only a portion or a phase of a

development when it's part of a larger common plan.

And I think the Hawaii case is instructive in this area because the rule in that case is that if the activity is identified at the time the discharge permit application is submitted, then the activities are all part of the plan. And I think Copper Ridge and Reflections has admitted that the common plan of development included all improvements necessary to get the subdivision approved by the City of Billings, then subdivided into lots.

Additionally, the Hearing Examiner relied on Mr. Leap's signature on the Notices of Intent to obtain coverage under the permit, under the general permit for their construction activity, and in signing those NOI's as that owner/operator, they did not at the time state that they were signing under protest as they now argue.

And at the time the NOI's were signed, they weren't under threat of penalty as they argued in their supplemental brief, because the penalty order wasn't issued until almost a year after the NOI's were signed.

I think if Copper Ridge and Reflections did not want to maintain the permit for home building activities, they could have transferred or assigned it, but it was their obligation to ensure permit coverage for the construction activities. DEQ does have a permit transfer mechanism. Probably a new NOI would have been required and a fee, an additional fee, and maybe an updated storm water pollution prevention plan.

CHAIR DEVENY: Could you wrap up, please.

MS. BOWERS: Yes. I just want to mention one thing about the City of Billings. The City of Billings has a permit for their MS4, and that municipal separate storm sewer system does serve the subdivision, but the City of Billings as the permittee, they have to prohibit discharges of unpermitted and uncontrolled storm water to the MS4. So it doesn't cover -- It is not an over-arching permit that would cover the storm water discharge activity of the owner/operator of the subdivisions. And I just wanted to clarify that. I don't have anything further.

CHAIR DEVENY: Okay. Thank you. Let's have some questions from Board members, and then

we will allow another opportunity for you to speak. Do members of the Board have questions of Ms. Marquis or Ms. Bowers?

BOARD MEMBER BUSBY: I have just an easy question for the State. You've got a subdivision that's not completely built out and completely completed, as you would define it, with all of the lots sold, and all of the lots built on, and all the landscaping in place.

Do you require permits across the state for other subdivisions that are not completely built out?

MS. BOWERS: Yes. The permit is required as long as there's exposed ground. Until there is stabilization of the subdivision, they have to have permit coverage.

BOARD MEMBER BUSBY: Forever?

MS. BOWERS: Until stabilization. And that is 70 percent of cover.

BOARD MEMBER HANSON: So then is it like -- I guess I'm with you -- from a standpoint of then is it common that when a developer starts to sell the lots, that they would transfer the permits to those folks, or do they often keep them and participate?

MS. BOWERS: I believe a lot of developers do hold the permit, but I think some of them transfer to different developers for different phases if they can segregate a phase.

BOARD MEMBER HANSON: So as long as there is not stabilization, a permit should be there regardless of who has it?

MS. BOWERS: Right. Correct.

CHAIR DEVENY: So continued question. So the initial permit that Copper Ridge had was terminated by DEQ after they requested it because they said stabilization had occurred; is that right?

MS. BOWERS: Yes, Madam Chair, that is correct.

CHAIR DEVENY: And at that point, then there was nothing to transfer, or would they have needed to apply for another permit?

MS. BOWERS: Yes. Madam Chair, Members of the Board. Once the road building permit was terminated in 2012, they had nothing to transfer. They would have had to submit a new NOI and get a new permit.

There are some developers that will expand the road building phase permit to include

home building. They'll expand the scope of the permit. So I guess you would call that a permit amendment.

CHAIR DEVENY: So once DEQ terminated that permit, was there an expectation there that the party would immediately be applying for another permit?

MS. BOWERS: Yes. Madam Chair, Members of the Board. There is an expectation that they would apply for a permit that would cover the other construction activity at the site.

CHAIR DEVENY: Would there have been any notification given to them that they should do that?

MS. BOWERS: Well, the way this came to DEQ's attention was the City of Billings became concerned about, well, about enforcement for their MS4. And back in 2013 there was a lot of storm activity, and so they were worried about erosion at the site.

CHAIR DEVENY: But somebody at DEQ knew that they had terminated the permit.

MS. BOWERS: Yes. We knew that the permit was terminated. I can't say for sure that we knew what activity was ongoing at the site

until we heard from the City.

BOARD MEMBER TWEETEN: Madam Chair.

CHAIR DEVENY: Chris.

BOARD MEMBER TWEETEN: What does the record show regarding where the offending runoff came from? Does it show or delineate between those lots that had already been transferred out of the developer's ownership and into the ownership of private owners, as opposed to lots that the developer still owned? Is there any sort of showing in the record as to what exactly was the source of this runoff that was of concern to DEQ?

MS. BOWERS: Well, Madam Chair, Board Member Tweeten, the record shows that the discharges came from the subdivision. And the best place to look in the record is DEQ's inspection report which is attached to Exhibit 2, and it shows grass laid flat, and you can tell the direction that the water flowed from the subdivisions to the ditch.

And Cove Ditch is a water of the State. It is pretty hard to determine exactly which lot was involved, but there were lots that had stockpiles, unprotected stockpiles, and also

concrete washes that were unprotected, and all of that material flowed downhill to Cove Ditch.

BOARD MEMBER BUSBY: I want to go back to my original question. You said that until the lots were stabilized, a permit is required. So the permit that they had was terminated -- I think is the right term -- because stabilization had taken place.

MS. BOWERS: The road building activity, correct.

BOARD MEMBER BUSBY: Well, on the developed, the non-built-on developed lots; is that fair?

MS. BOWERS: I believe the notice of termination that was submitted by the contractor was for the road building phase.

BOARD MEMBER BUSBY: But did that include all the utilities and all the --

MS. BOWERS: Yes.

BOARD MEMBER BUSBY: The developer had permitted to install, the permit allowed him to install on whatever. So we have a developer that technically had completed his portion of the construction on both of these developments, and he had now turned this over to the sales department

to sell lots essentially; and as the lots sold, he was divorced of ownership of these individual lots; is that correct?

MS. BOWERS: Well --

BOARD MEMBER BUSBY: Ownership.

MS. BOWERS: You know, I can't really say what the intent of the developer was. That might be more directed to Copper Ridge and Reflections.

CHAIR DEVENY: Ms. Marquis.

MS. MARQUIS: The intent -- Board Member Busby, members of the Board. The intent of the developer is summarized in the hearing transcript Volume II, Page 105, lines 22 to 24. My client Landy Leap testified that his common plan of development as a subdivider is to "develop roads and streets and retainage ponds on property I own and control."

And it's also reflected in the notices of intent and the permits that they had in place for that very work. All of those are for road building and utility installation. None of those are for home building. Does that answer your question?

BOARD MEMBER TWEETEN: As long as you're

up there, let me ask one. Does the record reflect that the developer -- and when I say developer, I mean both Copper Ridge and Reflections because they seem to have been conflated in this case. Did the developer have any controls of runoff water in place on those lots that had not yet been sold? Because I don't think there is any question that they were owner/operator with respect to those lots, is there?

MS. MARQUIS: Board Member Tweeten, members of the Board. With respect to the lots that had not been sold, those lots were not disturbed. Those were stabilized. And so the point source again here is construction activity. There was no construction activity on those lots that remained in their ownership that would trigger the need for permit coverage.

BOARD MEMBER TWEETEN: Is that disputed by DEQ?

MS. MARQUIS: I don't recall that in the record.

BOARD MEMBER TWEETEN: Maybe Counsel for DEQ can respond to that question. Does DEQ dispute that with respect to those lots that had not yet been sold, those lots were stabilized for

purposes of controlling runoff?

MS. BOWERS: Board Member Tweeten. At the time of the violations, Copper Ridge and Reflections did still own some lots that they hadn't sold. The common plan of development as a whole was not stabilized because --

BOARD MEMBER TWEETEN: That's not my question, though. I'm not asking about the entire subdivision. I'm just asking with respect to those lots, that if we accept the developer's argument that once the lots go out of their ownership, they lose control, they nevertheless are responsible for the lots that they still own.

MS. BOWERS: Right.

BOARD MEMBER TWEETEN: My question is: Does DEQ dispute what Ms. Marquis just said, to the effect that with respect to those unsold lots, the ground was not disturbed, therefore it was stabilized, and there was no runoff activity that could be related to construction? Does DEQ dispute that?

MS. BOWERS: DEQ disagrees with that. The ground had been disturbed. The lots were graded, and they didn't have vegetative cover.

BOARD MEMBER TWEETEN: Are there

findings and conclusions in the record regarding that question?

MS. BOWERS: Well, what is in the record is the inspector's report, which shows some lots that just have stockpiles on them. But I don't think you could really determine from that report which lots are owned by Copper Ridge and which are owned by home builders.

BOARD MEMBER TWEETEN: So the answer is no, there is no delineation in the record between those lots that were still owned by the developer, and the extent to which those lots were stabilized or not.

The developer takes the position that the runoff issue with respect to sediments and so forth arises specifically and exclusively from the disturbing of that land for the purpose of constructing buildings; is that correct? Do you agree with that or disagree?

MS. BOWERS: I disagree with that. And Board Member Tweeten, members of the Board, I think what Copper Ridge and Reflections is asking you to accept is a very narrow definition of construction activity, to just narrow it to the home building on the lots, and construction

activity is much broader than that.

Construction activity is disturbance of soil. And so it includes grading, stockpiling. When the blade touches the ground, they've started construction activity.

BOARD MEMBER TWEETEN: So what does the record show with respect to those kinds of soil disturbance activities that the developer conducted on the lands that it still owned?

MS. BOWERS: Well --

BOARD MEMBER TWEETEN: At the time of the violation.

MS. BOWERS: I think --

BOARD MEMBER TWEETEN: What does the record show?

MS. BOWERS: What the record shows is that the subdivisions as a whole were disturbed. And I think we're getting a little bit down in the weeds on ownership, with all due respect, because we have to look at the larger common plan of development, and the larger common plan was two very large subdivisions.

And at the time of the violation it is true that they were starting to sell lots. And DEQ, in their inspection report, just shows that

there is erosion coming from the subdivisions, but doesn't break down each lot owner by owner, and show who is the source of the erosion.

BOARD MEMBER TWEETEN: So as far as DEQ is concerned then, does the violation arise from the fact that the developer fails to include in the contracts for sale of individual lots provisions relating to storm water runoff that would transfer the responsibility for controlling that runoff to the purchaser, or in the alternative, allow the developer to maintain responsibility for that runoff?

MS. BOWERS: Yes, Board Member Tweeten, members of the Board. That would have been one way to accomplish permit coverage for the site, would have been to transfer the responsibility as they sold lots, or to keep the responsibility for themselves.

BOARD MEMBER TWEETEN: So you're saying that as a matter of law, anyone who puts together a subdivision and submits it for approval and gets approved by the local government has to address the issue of storm water runoff for the subdivision as a whole, until all lots in the subdivision are stabilized with ground cover, or

however else the lots would be stabilized?

MS. BOWERS: Yes. They have to plan for that, and they have to have some permit coverage, that there are a lot of options for how they could accomplish that.

BOARD MEMBER TWEETEN: What statute or regulation addresses that obligation on the part of the developer?

MS. BOWERS: That's the Water Quality Act requirement for point source discharges to have permit coverage; and the construction activity is the point source discharge.

BOARD MEMBER TWEETEN: Okay.

CHAIR DEVENY: Further questions, Board members?

BOARD MEMBER TWEETEN: Ms. Marquis, would you like to address that question for us, and give the developer's position with respect to that. I'm sorry. That was your prerogative.

CHAIR DEVENY: Go ahead.

MS. MARQUIS: Thank you. Madam Chair, Board Member Tweeten. Yes, what we've heard today is a lot of could have, and should have, and beliefs, but where is the requirement?

And you can look through the statutes

and the rules, and you won't find the requirement that says the subdivision developer must remain liable for the entire subdivision over the entire life of all construction within that geographic footprint.

There is no requirement on the books like that in Montana. And there might be in North Dakota or Ohio, but there is not in Montana. There is no requirement, and in fact this triggers a lot of concerns about trespass, and these were noted by the Hearing Examiner in her proposed order on Pages 34 and 35.

She said, "It's entirely unclear whether or not BMP's could ever be placed based on Copper Ridge and Reflections ownership access," basically do not have ownership or control of those individual lots that they've sold where the construction activity is occurring, and so they cannot accomplish the goals of the permit.

BOARD MEMBER TWEETEN: But DEQ just told us that you were -- that the developer was under an obligation to do precisely that for the perpetuity of the development until every single lot in the development is stabilized. They contend that -- I think I just heard Counsel say

-- that the water use act and its implementing regulations place that obligation on the developer. Are they wrong about that?

MS. MARQUIS: Yes. Board Member Tweeten, Madam Chair, members of the Board. They are wrong about that. There is no requirement in the statute or the rule. I didn't hear one cited by the Department to that effect.

Now, to be clear, we're not disputing that home building is a construction activity. It is a construction activity. Is it subject to a permit? It could be. But does that liability for that permit lie with the developer? No, it does not. It lies with the person who is conducting that construction activity. That is the individual lot owner.

BOARD MEMBER TWEETEN: But Counsel for DEQ just told us that there is nothing in the record that will permit us to determine whether this particular offensive runoff came from lots that were under the developer's control, under the control of individual owners, that the record simply doesn't give us a basis for making that determination.

So if we accept your argument that we

have to sort of segregate out responsibility depending on who owns the property, what do we do with this case at that point? Do we remand it to the Department with directions, or to the Hearing Examiner, I guess, with directions to conduct further proceedings in order to take evidence on that question?

MS. MARQUIS: Board Member Tweeten, Madam Chair, members of the Board. That's precisely one of our additional arguments, is that there is no evidence in this case of exactly where the sediment and where the storm water originated, or where or who placed the waste, and you can find that in our argument in supplemental brief on Page 5 and in Footnotes 1 and 2.

And we cite to testimony from the hearing where the Department admitted they had not observed and they had no evidence of anyone placing or causing to be placed waste anywhere in the subdivision, so there is no evidence of it in the record.

It is not to say that evidence could not have been gathered and put in the record, it's just the record in this case is devoid of any of that evidence. It is not there.

Had there been evidence of these specific lots where the sediment had originated or the waste had been placed, certainly the Department could have done the research to determine who owned that lot, who was actually doing that construction activity, and there is no reason that an enforcement action could not have been taken against that individual who owned and operated that construction activity.

What happened here is, as the Department has told you, they noticed sediment and placement of waste within the geographic footprint of the subdivision, and the Department admitted that they had never made an attempt to tie the lots and the ownership of the lots to what they allege were the violations on the ground.

BOARD MEMBER TWEETEN: Would that even be possible?

MS. MARQUIS: Certainly. If the Department can see where the grass had been laid down, or where sediment had occurred, they could follow that back, and it should be pretty obvious in that situation which lots were disturbed.

BOARD MEMBER TWEETEN: Well, the Department says that all the lots were disturbed,

because ground preparation and grading and so forth had taken place even on those lots that hadn't been sold; is that right or wrong?

MS. MARQUIS: We dispute that, Board Member Tweeten, Madam Chair, members of the Board. There is no evidence in the record that any of the lots that the developers owned and had not sold for individual home building had any disturbance on them whatsoever.

In fact, any disturbance that my client would have caused would have been in conjunction with the road building and the utility installation. Again, that occurred in 2012, was completed; everything that they had disturbed was stabilized; they sent in the notice to terminate; the Department agreed; allowed that permit to terminate, essentially saying, "Okay. You're good to go. You don't need permit coverage anymore. You've done what you needed to do for your construction activity."

BOARD MEMBER TWEETEN: So the record shows that except for those road building activities which had already been deemed stabilized by the Department, there was no ground disturbance of any kind on any of the lots that

the developer still owned? Does the record show that?

MS. MARQUIS: The record is fairly devoid of exactly which lots the disturbance was on, where the Department is alleging that there was a violation.

BOARD MEMBER TWEETEN: I understand that, but did you put in testimony from the developer that, "With respect to those lots that we hadn't sold, they were still in effectively their natural state, with no ground having been disturbed to level the lots, or remove boulders, or whatever, remove vegetation, whatever other activities might be under taken in preparation for selling"?

MS. MARQUIS: Board Member Tweeten, Madam Chair, members of the Board. There is evidence in the record that my client as the developer planned a subdivision, essentially drew the lines on the lots. There is evidence on the record of the construction activity that they did do, and that was the road building and the utility installation, which was appropriately permitted and appropriately terminated.

There is no evidence that any of the

individual lots that they may have retained ownership of were disturbed. Again, this goes to the burden of proof, which we believe is on the Department in this case.

BOARD MEMBER TWEETEN: Okay. Thank you.

BOARD MEMBER BUSBY: One quick question.

CHAIR DEVENY: Sure.

BOARD MEMBER BUSBY: In this morning's presentation, you said that it was the disturbance caused by the construction of homes, did you not, that was the source of the runoff, or however you want to describe the runoff, or the issue of this? Did you not say that in your original presentation this morning?

MS. MARQUIS: Board Member Busby, Madam Chair, members of the Board. Yes, it was the Department's position -- you can see this in the violations that they sent -- that the disturbances that resulted in the violations were caused by home building activities.

BOARD MEMBER BUSBY: Okay. Thank you.

BOARD MEMBER HANSON: Can you speak to the other point that was brought up -- and I'm not going to have the right words that were brought forward -- but in terms of the developer signing

as the owner/operator.

MS. MARQUIS: Certainly. Board Member Hanson, Madam Chair, members of the Board. The argument that my client signed a notice of intent and that that somehow makes him liable as an owner/operator is based on notices of intent that the Department required him to submit when they sent the violation letters.

So the violation letters go out. Keep in mind that, and there is testimony in the record at the hearing, that the original violation letters threatened to impose penalties in the millions of dollars; and in order to return to compliance, so that they wouldn't have to incur these penalties, the Department requested that they submit NOI's, Notices of Intent or permits.

So being a law abiding citizen, the Department asked him to do something, that's what they did. They submitted the NOI's and sent them.

They did send them under protest. Now you heard the Department earlier today say that there was no notice that they were under protest, but this is found in the Hearing Examiner's proposed findings of fact and conclusions of law at Page 26, where she says they were submitted

under protest.

And importantly, they were submitted as a result of the violation letters at the request of the Department after the violations were alleged. That later act cannot be used to hold my client liable for the violations that the Department alleged much earlier than that.

BOARD MEMBER HANSON: So when you use the terminology "under protest" -- just for my clarification -- what exactly does that mean? And was the protest specific to the fact that they, the developer, did not think that they were the owner/operator, or should be the one responsible for this?

MS. MARQUIS: Board Member Hanson, Madam Chair, members of the Board. We'll have to go back and look at the actual transmittal of those NOI's. But it was clear, and this was all done in the context of the violation letters, and in the context of the developer doing what the Department required it to do to return to compliance.

I think as any law abiding citizen, when someone threatens you with millions of dollars of penalties, and tells you, "You must do this or we're going to fine you," you do what you're told

at that point, and that's exactly what my client did; made it very clear that they had the appropriate permit coverage for their construction activity, and they did not feel it was reasonable to have to submit these NOI's.

And in fact that's why they appealed this enforcement decision, and why we're here today. Did that answer your question?

BOARD MEMBER HANSON: (Nods head)

CHAIR DEVENY: Thank you.

BOARD MEMBER TWEETEN: Madam Chair. Ms. Marquis, just follow up on that. In making those, filling out those forms and so forth, there is no dispute that the person who filled them out was acting on behalf of the developers, and was authorized by the developers to provide that information in those forms.

Ordinarily for non-corporeal entities, like corporations, or limited partnerships, or whatever, statements made on behalf of the entity by someone acting with authority can be attributed as admissions -- attributed to the entity as an admission. There is no dispute that those predicate facts are there, that the person who filled out the form was authorized to do that?

MS. MARQUIS: Board Member Tweeten, Madam Chair, members of the Board. We don't have any evidence of that in the record. That wasn't an issue that came up during our proceedings.

BOARD MEMBER TWEETEN: Who signed the forms?

MS. MARQUIS: I'm sorry. I would have to look. I think they are hearing exhibits --

MS. CLERGET: The NOI's? Is that what you're looking at?

MS. MARQUIS: I believe so.

MS. CLERGET: We can pull them up for you here, but Landy Leap signed them.

BOARD MEMBER TWEETEN: So Mr. Leap was authorized to do that on behalf of the developer, correct?

MS. MARQUIS: Board Member Tweeten, Madam Chair, members of the Board. Yes.

BOARD MEMBER TWEETEN: Okay. Thank you.

CHAIR DEVENY: I have a question for Ms. Bowers. In your written testimony that you submitted recently, you indicate that, "The Notice of Intent is required from the individual builder when coverage under the construction general permit is transferred from the developer of the

common plan to the individual builder."

"If a transfer is not performed, then the storm water permit requirements pertaining to the builder's activities are the responsibility of the developer."

And can you cite where in the law or regulations that is included.

MS. BOWERS: I'm sorry. What page of the supplemental brief?

CHAIR DEVENY: And those were guidance, but you state that fairly emphatically that's the way it is. I'm assuming that should be in the law or the rules.

MS. BOWERS: Madam Chair, what page are you referring to?

CHAIR DEVENY: Page 11 of 19.

MS. BOWERS: In that portion of the brief, I am referring to guidance provided by other states. DEQ doesn't have similar guidance, but in guidance from other states, the developer can contractually assign his responsibility for permit coverage to builders.

CHAIR DEVENY: But we don't allow that in Montana?

MS. BOWERS: We do allow that. We just

don't have similar guidance.

BOARD MEMBER TWEETEN: You allow it as a matter of policy, but not as a matter of Administrative Rule.

MS. BOWERS: Yes.

BOARD MEMBER TWEETEN: Well, under MAPA, since it constitutes an affirmative obligation on the part of the developer, aren't you required to do it by rule?

MS. BOWERS: Well, by rule, and under the Water Quality Act, the discharge has to be permitted. The way the developer does it is sort of up to them, but it just -- there has to be coverage for the activity.

BOARD MEMBER TWEETEN: It has to be permitted to the owner/operator. It doesn't say it has to be permitted to the developer.

MS. BOWERS: To the owner, operator, that's correct, which is somebody who owns, operates, controls, supervises.

BOARD MEMBER TWEETEN: And in this case the developer argues with some logic, it seems to me, that once the property transfers out of their ownership and into the hands of a private owner, who then hires a contractor, who disturbs the

ground, and by virtue of that activity becomes the owner/operator, I think, or at least an owner/operator.

Once that happens, once it passes out of their ownership, they're no longer responsible as the owner/operator.

Now, I guess the question is: Is there anything in Montana law that says they can't do that? And what I'm hearing you say is that there is no statute or Administrative Rule that says they can't do that, but that DEQ as a matter of policy says they can't do that.

And my question, I guess, my problem with that is that under MAPA, if the agency wants to adopt an affirmative obligation on the part of a regulated entity to engage in certain activity on pain of a penalty if they don't, they're required to do that by Administrative Rule. That's the definition of Administrative Rule.

So how is it that you can get away with placing that obligation on the developer if there is nothing in the law that gives them notice that they have that obligation?

MS. BOWERS: Well, Board Member Tweeten, the Water Quality Act does not allow discharges

from point sources without permit coverage. And then we have Administrative Rules that cover storm water discharges; and they cover permit requirements for storm water discharges for construction activity, and that includes a larger common plan of development.

And the reason that the larger common plan of development or sale is in the rule -- and this comes from EPA as well -- is so that a developer can't separate out smaller portions of a development, and not avoid permit coverage by doing that.

BOARD MEMBER TWEETEN: Can you remind me which regulation it is that talks about the common plan of development.

MS. BOWERS: It's 17.30.1105.

BOARD MEMBER TWEETEN: 17.30.1105.

MS. CLERGET: We can pull it up here for you guys if you want to see it.

CHAIR DEVENY: I wonder if it's a good time to take a break. We'll take a ten minute break, and we'll come back in ten minutes, twenty to eleven.

(Recess taken)

CHAIR DEVENY: I'm going to reconvene

the Board, and we'll continue with this hearing. We continue to have a quorum, so we'll go on. Chris, did you want to pursue the rule at this point?

BOARD MEMBER TWEETEN: I guess I do.

CHAIR DEVENY: Ms. Bowers.

BOARD MEMBER TWEETEN: Ms. Bowers, would you help me with this rule, please.

MS. BOWERS: Yes.

BOARD MEMBER TWEETEN: I'm looking at 17.30.1105, which I believe is the one that you said I should look at.

MS. BOWERS: Yes. 17.30.1105 sub (1) states that, "Any person who discharges or proposes to discharge storm water from a point source must obtain coverage under an MPDES general permit or another MPDES permit for discharges associated with construction activity."

BOARD MEMBER TWEETEN: Where is the language that you have been using with respect to the overall plan of development?

MS. BOWERS: Right. The definition of storm water discharge associated with construction activity is in 17.30.1102 sub (28). That definition states that, "Storm water discharges

associated with a construction activity means a discharge of storm water from construction activities, including clearing, grading, and excavation, that result in the disturbance of equal to or greater than one acre of total land area.

"For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects.

"Construction activity includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale, if the larger common plan will ultimately disturb one acre or more."

BOARD MEMBER TWEETEN: That doesn't really answer my question, though, does it? It doesn't address the question of whether the permit responsibility rests on the person who created the larger common plan of development, or does it rest on the person who engaged in the clearing, grading, and excavation of the property? This regulation doesn't address that question.

MS. BOWERS: Well, it rests on the

person who proposes to discharge, and proposing to discharge from a point source is the construction activity that will be the point source.

So the person who is going to initiate construction activity has an obligation to get the permit if they're going to disturb more than one acre, or they have a larger common plan of development or sale in mind.

BOARD MEMBER TWEETEN: It doesn't say that. I don't think it says that. It doesn't address the question of -- It says that construction activity includes the disturbance of less than one acre of land, and is part of a common, a larger common plan of development or sale that will ultimately disturb more than one acre, that it is storm water discharge associated with construction activity, but it doesn't address who needs to get the permit. This regulation doesn't.

Is there another one that we need to look at?

MS. BOWERS: Well, under the statute, 75-5-401 --

MS. CLERGET: We'll get it.

BOARD MEMBER TWEETEN: 75-5-401.

MS. BOWERS: I think these rules are all adopted to implement 75-5-401.

BOARD MEMBER TWEETEN: Okay. Are we looking at the one that's effective on occurrence of a contingency or the temporary --

MS. BOWERS: Again, the contingency hasn't occurred.

BOARD MEMBER TWEETEN: So we're looking at the temporary one. All right. I'm with you so far. 75-5-401. Which subdivision of this statute should we be looking at?

MS. BOWERS: No, for requirement to have a permit first.

BOARD MEMBER TWEETEN: It says we have to adopt rules.

MS. BOWERS: I guess that's just the --

BOARD MEMBER TWEETEN: This just addresses rulemaking.

MS. BOWERS: So I guess that's just the rulemaking authority. But if you look at 17.30.1115.

BOARD MEMBER TWEETEN: Which subdivision should I be looking at?

MS. BOWERS: In 17.30.1115, these are the rules that pertain to the requirement to

submit a notice of intent to be covered under the general permit.

And under that rule, a person who discharges or proposes to discharge storm water associated with construction activity shall submit to the Department a notice of intent as provided in the rule, and that rule says that the NOI must be signed by the owner of the project, or by the operator, or by both owner or the operator.

BOARD MEMBER TWEETEN: Where's that language?

MS. BOWERS: That's in 17.30.1115 sub (1) Sub(a).

CHAIR DEVENY: Hillary.

BOARD MEMBER HANSON: I have a question for you. When you spoke about the signing of the NOI, I believe you said that it was not under protest until later; is that correct? The DEQ did not consider it under protest at the time it was turned in?

MS. BOWERS: That's correct. Board Member Hanson. The NOI was signed by Mr. Leap as the person having authority to sign for the owner/operator, and he did not indicate that he was signing under protest.

BOARD MEMBER HANSON: Okay.

MS. MARQUIS: I'm going to object. It was in the proposed findings of fact and conclusions of law. The Hearing Examiner made a statement that those NOI's were submitted under protest. The Department had an opportunity to file exceptions and to argue against those statements, and they did not.

BOARD MEMBER HANSON: So can you actually show me where that is? Because I couldn't find the actual verbiage "under protest" in the Hearing Examiner area. And I'm probably just missing it, but -- I see where it talked about that, "Leap attempt to characterize the intent behind his signature." However I don't see the words "under protest."

MS. MARQUIS: In the Hearing Examiner's proposed findings of fact and conclusions of law to the BER, Page 26, in the first paragraph, just about halfway down. It is Line 8.

MS. CLERGET: So I just want to be clear that that's not a proposed finding of fact. That's in the discussion.

BOARD MEMBER TWEETEN: Counsel, having looked at these regulations, it seems to me they

all focus back on the question of what is the definition of an owner/operator, owner or operator, which is a statute, and the regulation incorporates the statutory definition by reference, right?

MS. BOWERS: Yes.

BOARD MEMBER TWEETEN: "An owner or operator means a person who owns, leases, operates, controls, or supervises a point source." There doesn't appear to be any evidence in the record this is what the developer says, and I don't think you've pointed us to anything different.

There doesn't appear to be any evidence in the record that the surface of the lots that they still owned at the time were in any way the subject of construction activity, other than the road building activities for which they were permitted, and for which they were released from permit by the Department.

It doesn't appear that there is anything in the record that would contradict that statement, first of all. So I think we're left then with their assertion that the point source in this case has to be limited to those lots that

have been disturbed by construction activity related to individual homes.

That's what it looks like to me anyway, and there doesn't appear to be any evidence in the record that the developer owns that property, leases that property, operates those properties, controls those properties, or supervises those properties.

So where in the law do I find an anchor for the assertion that they can nevertheless be treated as an owner or operator of the point source?

MS. BOWERS: Well, Board Member Tweeten, I don't disagree that we're stuck with the statutory definition of owner or operator.

I assert that the Hearing Examiner correctly found as a matter of law in his orders on summary judgment that Copper Ridge and Reflections were owners or operators of the subdivisions, and he focused his determination on evidence that they supervised construction activity, and controlled construction activity, because they were the original subdivider, they planned the development, and they had control over design and specs.

And he focused on contracts between the owner and their contractors, and he focused on language in those contracts where Copper Ridge and Reflections directed their contractors to place fill on lots, and that goes beyond just road building activity. That's activity on the lots in the subdivision.

I think you're onto something when you say there could have been multiple owners or operators, and there could be, but it was up to the original owner/operator/developer to plan for the permit coverage, and to transfer permit coverage to other owner/operators undertaking construction activity in the subdivisions, but they did not. So we have a point source here that discharged without a permit.

BOARD MEMBER TWEETEN: So their obligation to get a permit applies not only if they in fact operate, control, or supervise the point source, but also if they at any point in time had the power to impose controls or supervision over the point source; is that what the Department argues? Because that's not what the statute says. The statute is written in the present tense. It says "supervises or controls."

MS. BOWERS: Right. But the subdivision developer, they are the original owner/operator; and if they don't have the permit coverage or a plan for permit coverage, then --

BOARD MEMBER TWEETEN: Why wouldn't that obligation pass to the person who is the present -- in the present tense -- the operator, or supervisor, or controller of that particular lot where the discharge comes from, lot, or lots?

MS. BOWERS: Well --

BOARD MEMBER TWEETEN: Why aren't they the owner/operator?

MS. BOWERS: Board Member Tweeten, members of the Board. I think we have to look to the larger definition of construction activity, that it is not just the home building activity, it is all the construction activity in the development. It includes even the common areas that Copper Ridge and Reflections still owned. It includes unsold lots.

BOARD MEMBER TWEETEN: But there is no evidence in the record -- I thought we agreed -- indicating that with respect to those common areas or unsold lots there was any disturbance of the surface of the ground that could have contributed

to the discharge. I thought that it was agreed that the record didn't show that. Am I wrong about that?

MS. BOWERS: Well, that's not where the Hearing Examiner focused in his determination as a matter of law that Copper Ridge and Reflections are owner/operators.

BOARD MEMBER TWEETEN: Right, and we're talking about a legal determination, not a finding of fact.

MS. BOWERS: Right.

BOARD MEMBER TWEETEN: So if we don't agree with his interpretation, we're free to change it, correct?

MS. BOWERS: Correct.

BOARD MEMBER TWEETEN: I'm sorry. I interrupted you. Please complete your thought.

MS. BOWERS: No. DEQ's argument is that the Hearing Examiner's determination is correct that Copper Ridge and Reflections did have -- and I mean we're going back to 2013 -- but they did have authority to supervise and control the point source, which is the construction activity at the subdivision, and construction activity in the very broad definition.

CHAIR DEVENY: Other questions?

(No response)

CHAIR DEVENY: Ms. Bowers, I'm going to refer to your supplemental oral argument which is on Page 9, where you talk about under the general permit. In your brief on the oral argument.

MS. CLERGET: I think you mean the owner/operator brief.

CHAIR DEVENY: I'm sorry. Owner/operator in your latest brief on Page 9.

MS. BOWERS: Okay.

CHAIR DEVENY: You talk about the general permit, where you say, "The developers are required to ensure the requirements of the general permit are satisfied, either by themselves or through entering into a contract with the builder to take over compliance with the general permit."

So in this case, there was no permit; is that correct?

MS. BOWERS: That's correct. At the time of the violation, there was no permit.

CHAIR DEVENY: So there is really no way of knowing -- I guess does the record show that there were any kind of contracts that would have moved any of this responsibility to anyone else?

MS. BOWERS: Madam Chair, members of the Board, I don't believe there are any contracts in the record that show how the developer was going to structure permit coverage, except for with regard to their road building contracts, they required their contractor to comply with the Water Quality Act.

CHAIR DEVENY: And could I ask Copper Ridge a question. Why didn't Copper Ridge get a permit after the storm water -- or after the road construction and that portion of the subdivision was completed?

MS. MARQUIS: Madam Chair, members of the Board. After the developer had completed their construction activity, and had appropriately been released from permit coverage, they weren't conducting additional construction activity in the subdivision, so there was no need for them to obtain a permit.

Now, they did -- you had asked the Department about contracts between the developer and the home builders, and there is no requirement for those to contain any provision that requires the home builder to go out and get storm water permit coverage.

However, when this came up at the hearing -- and this is from the hearing transcript Volume II on Page 62 -- there is a line of questioning my client, "Did Copper Ridge and Reflections require persons that purchased lots to take out a permit?" He answers clearly, "No. It's my understanding the State of Montana and regulations of the State would require that, but not through the private contract would we require that."

And then he's asked, "Did you give them any notice that storm water should be controlled?," and the answer was, "Yes, we do. In our contract we reference the SIA, which is the Subdivision Improvements Agreement, between our development company and the City of Billings, and they acknowledge that they read it, received it. Inside that document, it specifically says BMP's are required as they begin their construction activity."

So that's the notice, albeit that's not required for the developer to provide that to the individual lot builder. But even so, the developer provided that notice.

What we have here is the typical case

that's presented in the EPA guidance that was attached to the Department's brief, again, where that says, "When the individual lots are then sold to builders, unless the developer is still responsible, it is likely that the builder will need the permit." And that's the case here today.

BOARD MEMBER HANSON: So what is the relationship in these subdivisions between the developer? Like once the lot is sold, over and done, you find your own contractor to build the house?

MS. MARQUIS: Board Member Hanson, Madam Chair, members of the Board. Yes, it's like any real estate transaction. Once the property is conveyed to another party, the previous landowner has no control over what happens on that property.

BOARD MEMBER HANSON: So the developer is not engaged in helping them find a contractor, builder, not engaged in the building of that?

MS. MARQUIS: Board Member Hanson, Madam Chair, members of the Board. There may be some informal discussions, but there is no formal relationship after the property is conveyed, like any other real estate transaction.

BOARD MEMBER TWEETEN: Before you sit

down.

CHAIR DEVENY: Chris.

BOARD MEMBER TWEETEN: Looking at the order on summary judgment, and I'm on Page 14 at Line 24, Hearing Examiner Haladay points to a fact that, "Developers entered into at least one contract that required all excess material from pipe and bedding displacement shall be left on site." Are you with me? What does that mean? What does that refer to? What contract does that refer to?

MS. MARQUIS: Board Member Tweeten, Madam Chair, members of the Board. It is not expressly from this order, but referring back to the briefing that this order followed, it appears that that language comes from the Department's summary judgment Exhibits 1 and 2.

And I've explained this beginning on Page 13 in our supplemental brief, and in that supplemental brief, you'll see I provide the full text of the responses that Copper Ridge provided, and in there it is clear that those contracts were not for home building. They were for street building and installation of utilities.

BOARD MEMBER TWEETEN: For those

activities that were already released from permit by the Department, correct?

MS. MARQUIS: Board Member Tweeten, Madam Chair, members of the Board. Yes, that's exactly correct. Those contracts were in place and part of the permit that was in place for the development that was terminated in 2012. The violations at issue before you today were not cited until September 2013.

BOARD MEMBER TWEETEN: Thank you.

CHAIR DEVENY: Ms. Bowers, would you have any kind of response to that statement?

MS. BOWERS: Well, Madam Chair, members of the Board. I guess in response to that, as far as construction activity that should have been permitted, it doesn't matter if it was associated with road building or home building. It's still construction activity within the larger common plan of development, and there should have been permit coverage for that activity.

BOARD MEMBER TWEETEN: Correct, but the law doesn't tell us who is responsible for obtaining that permit coverage. We've been through that.

MS. BOWERS: Well, under the rules,

Board Member Tweeten, members of the Board, it is the person who is going to discharge or proposes to discharge, and the owner or operator of a point source.

And I think the Hearing Examiner in his order on summary judgment -- I'm sorry to keep pounding this -- but I think he was right to look at supervision and control at the time of the violations, and there was evidence that they did supervise and control their contractors, and that those contractors did place fill on lots within the larger common plan of development.

And I also want to refer to the Department's violation letter that was Exhibit 2 in the hearing, and in that violation letter, Dan Freeland, the Department's inspector, did notify the subdivisions, Copper Ridge, that they were part of a larger common plan of development or sale as described in the Administrative Rules, and that there was -- based on his observations,the subdivisions were a contiguous area where there were multiple separate and distinct activities planned and occurring, and that those activities needed to be permitted.

And I also want to point out that the

violation letter itself told Copper Ridge and Reflections that they were going to be referred for enforcement action, but did not threaten millions of dollars in penalties. I just want to put that on the record.

BOARD MEMBER TWEETEN: Can I ask you. I think you've said before that the Department could have filed a Notice of Violation against the owners of the individual lots that have been disturbed for construction purposes, for purposes of constructing a building, as opposed to simply building roads and so forth. The Department could have gone against those owners or theoretically the contractors who were conducting those operations. You could have done that.

MS. BOWERS: Yes. I'm looking at my Department people, but yes, we could have issued multiple violation letters.

BOARD MEMBER TWEETEN: I mean other than the fact that it would require the Department to -- let me back up. I assume that in order to do that, the Department would have had to conduct further investigation into determining how exactly this storm runoff made its way into waters of the state.

In other words, maybe there is -- if it comes through a gully, maybe there is land below the gully that couldn't have contributed water into that gully, while there was also constructed land above the gully that would obviously be the source of the runoff. The gully would catch it on its way down the hill, and water is not going to flow uphill.

So for purposes of that particular mechanism, if you want to call it that, the uphill properties would be the ones that would theoretically be responsible.

Now, you could conduct that kind of further investigation, and try to track down where the point source is. That could be done, couldn't it?

MS. BOWERS: Board Member Tweeten, members of the Board. The compliance inspector, it's true he didn't try to pinpoint which lot was the source, but he looked at the subdivisions as a whole, and the construction activities occurring, and he could tell that the erosion and the flow of water came from that development. And the pictures show that. I mean just the grass is laid down. You can tell the direction of the flow.

And also I want to point out that if BMP's had been installed and properly maintained, even if water flowed above the subdivisions, that should have been controlled, too. They should have BMP's to control water flowing from upgradient onto the subdivision, because the storm water rules related to construction activity require exposed soils, or exposed concrete wash, or stockpiles to be protected. They shouldn't come into contact with storm water, and flow to waters of the state.

BOARD MEMBER TWEETEN: And that requirement exists whether that ground has been disturbed by construction activity or not?

MS. BOWERS: No. It applies to construction activity.

BOARD MEMBER TWEETEN: Okay.

MS. BOWERS: But stockpiling is construction activity.

CHAIR DEVENY: I have a question. On the stockpiled materials and the fill materials that I believe were indicated that were put on the lots, was that done after or before the permit was terminated?

MS. BOWERS: The December 2012 permit,

Madam Chair, for road building?

CHAIR DEVENY: Yes.

MS. BOWERS: I think it was done at the time of the road building activity, so it was probably done before the termination.

CHAIR DEVENY: So if the termination letter was issued, and there had been stockpiling, that would have meant that the stockpiles would have had to have been stabilized before the permit would have been terminated; is that correct?

MS. BOWERS: I believe the permit was just for road building and utility installation, and I think the notice of termination only applied to that activity. And I honestly don't know if the Department knew that there were stockpiles on the lots at the time of the termination.

BOARD MEMBER HANSON: What is the procedure for terminating then? I mean do they go visit the site, and agree with what the developer has said?

MS. BOWERS: The developer files a notice of termination, and the Department reviews it, but no, they don't look at the site. So we basically trust that the site has been stabilized.

CHAIR DEVENY: Dexter.

BOARD MEMBER BUSBY: I'm getting there. I'm trying to formulate the question.

MS. BOWERS: Mindy just indicated to me that -- sorry. Members of the Board -- that the permittee signs under penalty of law that the site is stabilized.

BOARD MEMBER BUSBY: But is there evidence in the record -- I'm going to use his language now -- in the record where the material theoretically from pre-2012, whatever that pile that we're speaking of here came from, whether it's from installing sewer, or water lines, or road building, or wherever, is there evidence that that pile was not stabilized in the record, or is there evidence that that pile caused or contributed this -- or was there even a pile? Is there any evidence that it wasn't leveled and stabilized?

MS. BOWERS: Board Member Busby, members of the Board. There is no evidence that the stockpiles were not stabilized. There is only evidence, based on the contract language, that Copper Ridge and Reflections directed their contractors to put -- to leave the fill on site.

BOARD MEMBER BUSBY: So we don't know if

this is part of the problem, or has nothing to do with the problem; is that what you're telling me?

MS. BOWERS: No. What I'm telling you is that the -- Board Member Busby -- is that language is what the Hearing Examiner in the order on summary judgment relied on to show supervision and control. That's --

BOARD MEMBER BUSBY: I'm not getting to my answer. The permit was terminated in 2012. This was done under the previous permit.

MS. BOWERS: Correct -- or I believe so.

BOARD MEMBER BUSBY: And if it was terminated, there had to have been some evidence to the Department that this was stabilized, leveled, or somehow taken care of? To terminate the permit, they have to have some evidence of that.

If they're going to refer back to it now, what evidence are they using to refer back to it other than -- This was contractual, and contracts, a lot of times, have things where you move dirt around. I think this is what the argument is. They relocated some dirt, which I'm sure they relocated a lot of it, when you dig up and put in a road.

But they're just going specifically to this one contract. So in order to terminate that contract, didn't you have to have evidence that that was completed and stabilized?

MS. BOWERS: Board Member Busby, members of the Board. The evidence the Department had was an application for termination by the contractor, which the Department accepted.

CHAIR DEVENY: A follow up on that. So the contractor made the application, not the owner/operator?

MS. BOWERS: Copper Ridge and Reflections' contractor, yes, was the permittee in that case for the road building. That's correct, Madam Chair.

CHAIR DEVENY: Other thoughts here?

BOARD MEMBER TWEETEN: I'm just trying to -- I don't know if this is a question or not. I'm trying to piece together how these arguments all fit together. This is very confusing.

Hearing Examiner Haladay said that Copper Ridge was the owner/operator because they included in contracts for the road building and utility placement requirements that stockpiles be made, and dirt essentially be left in place on the

property.

But DEQ terminated the developer's obligation under that permit in 2012, and I think it is safe to presume from that, even though DEQ is relying on a certification that was made by the developer, that DEQ was satisfied that that construction activity was sufficiently stabilized that it no longer required a permit.

And now, there are inspections after that time that show that storm water is carrying sediments off of the subdivided property and into waters of the state, but there is no evidence in the record that I can see, so first --

So I think that makes the provisions in those contracts between the developer and its contractors irrelevant at this point to the discharge that is subject of this complaint. You released them from their obligation under that permit, and to come back and then say, "Well, you had to have a permit for that construction activity" seems to me to be not right.

So you're left with their argument, which seems to me is right, that for purposes of the discharges that occurred post-termination of their permit, the responsibility for controlling

those discharges lies -- or is based on something else.

And it is either based on your argument that they didn't control those discharges, although they had the right to require the purchasers to control them; or based on their argument that at that point in time, whatever responsibility there was to control runoff from those properties that were under home building construction, was the responsibility of the builder.

It seems to me that those are two choices we have here; isn't that right?

MS. BOWERS: Well, Board Member Tweeten, members of the Board, it is my belief that the Hearing Examiner could have focused also on ownership, but he didn't. He focused more on supervision and control.

BOARD MEMBER TWEETEN: It was narrower than that. It was the right to supervise and control that he was focused on, not actual supervision and control.

MS. BOWERS: And he also looked at the fact that Mr. Leap signed the NOI's.

BOARD MEMBER TWEETEN: Right. I was

going to get to that.

MS. BOWERS: I mean that's another element. But in order to sell lots, you have to own lots, so Copper Ridge and Reflections are also owners.

BOARD MEMBER HANSON: I mean that's --

BOARD MEMBER TWEETEN: But they're not. At the time that -- If we assume what I said before was right, and that the sediment discharge that's the problem here came from the disturbance of the ground for the purpose of building houses, they didn't own the lots. They didn't build any houses. The houses were built by subsequent owners in conjunction with either as contractors themselves, or by hiring a contractor. They disturbed the earth for the purpose of building a house.

MS. BOWERS: Well, Board Member Tweeten, members of the Board, Copper Ridge and Reflections did own lots. They owned the whole subdivisions and they sold lots.

BOARD MEMBER TWEETEN: Sure. But again, let's go back to the prior conversation that we had. There isn't any evidence in the record that the lands that they still owned had been the

subject of any activity for the construction of homes. There is no evidence of that in the record, correct?

MS. BOWERS: There is evidence of construction activity. I think focusing on home building is too narrow of a focus. There is construction activity that occurred at the site.

BOARD MEMBER TWEETEN: Based on what's in the record, what other construction activity took place on those lots that Copper Ridge still owned?

MS. BOWERS: There is a concrete wash; there are stockpiles of soil. I guess we don't know who left them there, but they're there.

BOARD MEMBER TWEETEN: That's all activity that was done prior to the time that you released their permit. I think we established that just a minute ago.

MS. BOWERS: It is all construction activities related to the larger common plan of development.

BOARD MEMBER TWEETEN: I understand that. But having read that pretty carefully, I don't see anything in there that allocates the responsibility for that common plan of development

between the developer and the subsequent purchaser. Maybe I missed something, but I didn't see that in the law, that that delineation was made.

MS. BOWERS: The reason that definition is included in construction activity, or I think it's storm water discharges associated with construction activity, is so that a large developer can't do what Copper Ridge and Reflections did, which is to just sell little lots, and avoid their obligation to have permit coverage for the construction activity.

BOARD MEMBER TWEETEN: Well, I can see a narrower purpose for that statute in simply creating responsibility for a discharge permit for lots of less than one acre that are sold pursuant to a common plan of development, without going further and then delineating who is subject to that responsibility.

I think to figure out that question, you go back to the definition of owner/operator, and I don't see in the definition of owner and operator a provision that says that you can be an owner and operator, or operator, based simply on having at one time had the right to control or supervise,

because the statute, as I said, is written in the present tense. It says owns, controls, or supervises.

MS. BOWERS: But I'm going to argue --

BOARD MEMBER TWEETEN: In the present tense they weren't doing that. Maybe they should have. Maybe there should be a statute that says they have to. But I don't see where that statute exists right now.

MS. BOWERS: Well, Board Member Tweeten, members of the Board. I'm going to argue that Copper Ridge and Reflections, as the original owner, that they had ownership and control of the whole development, and that they --

BOARD MEMBER TWEETEN: At one time, yes.

MS. BOWERS: -- and that they should have planned for permit coverage, for all the construction activity on the -- and they could have done it. They had a lot of different ways that they could have taken care of their obligation to have permit coverage.

BOARD MEMBER TWEETEN: This then refers back to the discussion we had a little while ago about the fact that if that is going to be DEQ's policy, that needs to be clearly expressed in an

Administrative Rule. It is an Administrative Rule by definition, and it has to be adopted after notice and comment, and through all of the procedures for adopting rules that are found in MAPA.

And the Department has not done that. Your Administrative Rules don't say that. That may be your interpretation, and it may be your policy, but the law is pretty clear in the administrative law area that when you have a policy determination made by an agency that places an affirmative obligation on a regulated entity, that has to be in an administrative regulation. That can't be done simply by policy.

MS. BOWERS: Well, the Administrative Rules do require a discharger or a person who proposes to discharge to have a permit for storm water discharges associated with construction activity under 17.30.1115. That requirement is in the rule.

And it has been the Department's interpretation, and this interpretation is consistent with federal law, that the developer has to cover the whole larger common plan of development, and they can do it however they want

to. They can hire a contractor; they can segregate out activity; they can do it however they want to do it, but it is their obligation to have permit coverage for the construction activity.

BOARD MEMBER TWEETEN: But I guess the problem, just to summarize the problem I have with that argument, it is that as far as the written law goes, which is made up of both statutes and administrative regulations, as far as the written law goes, the obligation to engage in those permitting activities to get the permit from DEQ to control these discharges falls on a person who is an owner or operator.

That's all that exists in the law, and I don't see in that definition language that would clearly place that obligation on the developer. That's the problem that I'm having. I understand that that's your policy, and that's the agency interpretation; but at some point, it seems to me that you have to look to MAPA, and make the determination as to whether you have to implement that policy through rulemaking, which you haven't done.

So that's the problem that I'm having

here. I don't know how whether it's fair to the developer. I mean in an abundance of caution, I understand that developers across the state probably do take that problem in hand, and go downstream to their purchasers and contractors, and make sure that all of this is controlled; but I don't see anything in the law that requires them to do that.

MS. BOWERS: Well, Board Member Tweeten, members of the Board, I take to heart your comments that the rules could be more clear, but DEQ has been consistent across the Board with developers. DEQ has done a lot of outreach to developers to educate them about their storm water permitting obligations.

And it's also not fair to not hold this developer responsible, because he was the original owner/operator -- not he -- Copper Ridge and Reflections were the original owners and operators of the development, and they certainly had enough control, enough authority, to figure out how they wanted to permit the site, and to transfer the permit to contractors if they didn't want to be stuck holding a permit until stabilization of the development.

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

CHAIR DEVENY: I just want to comment, too, that in the proposed findings of fact and conclusions of law, it's referred to the photographs where they apparently show that there were stockpiled waste soil and areas of ground disturbance, and as well as the evidence of sediment and construction debris.

So that kind of implies to me that there maybe were some problems with some of the stockpiled sediments, or the things on the lots that maybe weren't developed, so that it draws a question in my mind as to whether we can really say that it just came off the residence, or that it just could have come off any part of the subdivision.

BOARD MEMBER BUSBY: To just follow up. But there is no real evidence that it came from anyplace else but the house construction as per their presentation.

MS. MARQUIS: Can I respond to that briefly?

CHAIR DEVENY: Yes. Please do.

MS. MARQUIS: Madam Chair, members of

the Board. There has been a lot of talk about the stockpiles, and the concrete washout, and I stressed this in our Footnote 1 in our supplemental brief, where they allege those, but nothing ties those back to any property or any activity that Copper Ridge or Reflections at Copper Ridge did.

In fact, if you look at Page 7 and 8 of our supplemental brief, we refer you to the violation letter, which is the hearing Exhibit 2, and in there it talks about construction specifically, quote, "construction of single family homes occurring throughout the facility."

They talk about areas of new construction of single family homes. They note sediment tracking, quote, "within areas of active construction," end quote, and a concrete washout located, quote, "at a single family home construction," end quote.

So those stockpiles and the concrete washout were all noted in the violation in the context of the individual home building construction activities in 2013. There is no evidence that ties any of that back to the road building activities that occurred and were

stabilized nine months prior to that in 2012.

CHAIR DEVENY: Thank you for clarifying that.

BOARD MEMBER BUSBY: Chris, I'd like to ask Sarah a question.

CHAIR DEVENY: Sure.

BOARD MEMBER BUSBY: So we can start moving this thing forward. I'm having trouble with the owner/operator, with the developer being the owner/operator of the lots being built on. So how would we word a motion to separate these two?

MS. CLERGET: So Copper Ridge and Reflections submitted a motion for summary judgment in this case that essentially asked the Hearing Examiner to grant them summary judgment that they were not an owner/operator.

So if you agree with Copper Ridge and Reflections that they are not an owner/operator, what you need to do is reverse the Hearing Examiner's finding that they are an owner/operator, and his denial of their summary judgment motion; and in turn grant their summary judgment motion that they are an owner/operator.

So I have that --

BOARD MEMBER BUSBY: They are not --

MS. CLERGET: Sorry. That they are not an owner/operator. I missed a word there. I have it written down.

CHAIR DEVENY: And following up on that, if we did that, that would basically end this case; is that correct?

MS. CLERGET: Yes. The grant of summary judgment ends the case.

BOARD MEMBER BUSBY: I'll just simplify it. I'll make a motion we grant the summary judgment and reverse the Hearing Officer's decision; is that correct?

MS. CLERGET: Yes. There were cross motions for summary judgment, so you just need to be clear that you're granting Copper Ridge and Reflections' motion for summary judgment, and reversing his denial of that motion.

BOARD MEMBER BUSBY: Yes. Okay. That would just open it up for discussion on a much narrower subject.

CHAIR DEVENY: There is a motion. Is there a second? Was that a motion?

BOARD MEMBER BUSBY: Yes, that's a motion.

CHAIR DEVENY: Is there a second?

BOARD MEMBER HANSON: So we need a second to discuss this; is that correct? I'll second it then.

CHAIR DEVENY: Chris.

BOARD MEMBER TWEETEN: Madam Chair. The proposed findings of fact and conclusions of law delineate four separate violations. They all depend on the finding of owner/operator?

MS. CLERGET: Yes.

BOARD MEMBER TWEETEN: So if we agree with Copper Ridge that the Hearing Examiner Haladay was wrong -- you incorporated his reasoning by reference?

MS. CLERGET: Yes.

BOARD MEMBER TWEETEN: So if we agree with the developer that Hearing Examiner Haladay was incorrect in his conclusion of law that Copper Ridge was the owner/operator, then all four of the violations would fall as a result of that?

MS. CLERGET: That's my opinion. If the parties disagree with me, they should probably say that.

BOARD MEMBER TWEETEN: Would you please address that question.

MS. BOWERS: Madam Chair, members of the

Board. The four violations basically all arise from discharging storm water associated with construction activity without a discharge permit.

So I guess I agree then that if Copper Ridge and Reflections are not owner/operators, then they would not have been obligated to get a discharge permit, and they would not have been responsible for placing the waste and for violating terms of a permit.

BOARD MEMBER TWEETEN: I assume Copper Ridge agrees with that. It seems quite beneficial to your position, so --

MS. MARQUIS: Board Member Tweeten, Madam Chair. Yes, we do.

CHAIR DEVENY: Hillary.

BOARD MEMBER HANSON: I'm struggling, Sarah, a little bit with the -- they're "the" owner/operator versus "an" owner/operator?

MS. CLERGET: That's probably an appropriate correction. The motion should be "an" owner/operator. And I think the determination that they are or are not "an" owner/operator would end the case.

BOARD MEMBER HANSON: Because from my point of view, I see it as they are an

owner/operator in the subdivision. Are they "the"? I go with no. I think that there are clearly some other owners that have started construction, etc.

So to me they're "an" owner/operator, but does this need to be looked at broader, and then you would get into the violations to see if they specifically were responsible for the violations for the components which they were an owner/operator of. Does that make sense?

MS. CLERGET: Yes.

BOARD MEMBER BUSBY: That makes perfect sense.

BOARD MEMBER TWEETEN: Madam Chair, if I might. Well, let's assume for purposes of argument at this point that we find that the record is not sufficient for us to make a determination that Copper Ridge was "the" owner/operator responsible for these particular -- either "the" or "an" owner/operator responsible for these discharges.

It seems to me we have two choices here at that point. One is we can reverse the summary judgment finding by Hearing Examiner Haladay to that effect, and also reject the conclusion of law

that incorporated that conclusion of law by reference that Sarah made, and finding the violation not proven, because it was not proven that they were the owner/operator.

We could direct DEQ to dismiss the notice of violation. That would be one thing we could do. The other thing we could do -- another thing we could do would be to vacate the orders to the extent that they rely on the finding of owner/operator, and remand the matter to Hearing Examiner Clerget for further proceedings directed to the factual predicates that underlie the question of owner/operator, based on the absence of evidence in the record that conclusively establishes either way.

I understand and appreciate Copper Ridge's argument that the burden of proof is on the Department to show that Copper Ridge was the owner/operator. And if we determine that they failed to sustain that burden of proof, there would certainly be grounds to dismiss, and order the Department to dismiss the notice of violation based on the failure to prove with respect to that element of the violation.

So I think there are certainly equitable

arguments to be made that dismissal is the right thing to do at this point, especially this far down the road time-wise from when these events took place.

I'm assuming that Copper Ridge has continued to sell lots in the subdivision, and that construction activity has gone on, and so on and so forth. Storm events being relatively rare, perhaps this has not been an ongoing problem.

And there is certainly an equitable argument to be made that under those circumstances it is not really equitable to allow the Department to impose financial penalties on Copper Ridge without first proving, providing the factual predicate for a finding, that they were the owner/operator at that time under the law as we determine it is properly interpreted.

So I guess I would be leaning in that direction, if we find as a board that the evidence in the record doesn't support the conclusion that they were an owner/operator with respect to these discharges. But we also have the opportunity to remand as well, if we want to, and have further proceedings.

BOARD MEMBER HANSON: Can I ask a

question, Sarah? Does the determination of being "an" owner/operator mean we're saying they're an owner/operator responsible for these discharges?

MS. CLERGET: Yes. Well, they are -- as Chris said, it is a first step. Then they have to determine whether or not the violations themselves occurred, but that they are responsible for getting a permit, that they're responsible for permit coverage.

BOARD MEMBER HANSON: So basically when we're talking about the determination of them being an owner/operator, we're talking about are they the responsible party for permitting these violations?

MS. CLERGET: Well, no. Are they the responsible party for getting a permit? Then the question is: Were there violations?

BOARD MEMBER HANSON: Because I think where I'm struggling in my head is in my mind, they are an owner/operator of lots within the subdivision. I think everyone maybe would agree with that.

And so what I'm struggling with is so in my mind, yes, they're responsible for a permit for those lots in which they own, but it sounds like

there is other lots, and in my mind then those folks would be responsible for the permitting of those lots.

And so where I'm struggling is then I think it gets into where, on which -- or which properties caused these violations, and I don't think that's clear.

MS. CLERGET: I also want to clarify. We might need to get the parties' opinion on this. I will let them jump up and object if they think I'm over-stepping my bounds here.

But I think you're conflating owner/operator to a certain extent. Owner of the lots does not mean owner/operator requirement to get a permit, because the requirement to get a permit belongs or attaches when there is a disturbance that's going to cause discharge. Does that make sense?

BOARD MEMBER HANSON: Yes.

BOARD MEMBER BUSBY: Construction activity.

MS. CLERGET: So you're required to get a permit if you're going to do something for which a permit would be necessary. Does that make sense?

BOARD MEMBER HANSON: Yes.

MS. CLERGET: So watch the use of owner there.

BOARD MEMBER TWEETEN: Well, the term is disjunctive. It says owner "or" operator. And owner or operator, if person owns a point source, they are an owner or operator. If they operate the point source, they're also an owner/operator.

MS. CLERGET: But point source is the issue there, so there has to be a point source. And I think whether or not there is a point source -- just because you own the land doesn't mean that there is a point source discharge. That's all I was trying to clarify.

BOARD MEMBER TWEETEN: If the land is an identifiable contributor to a discharge to state waters, then there is a point source. If it is on land that you own, you can be considered an owner or operator.

MS. CLERGET: Yes.

BOARD MEMBER BUSBY: But doesn't the requirement to get a permit involve construction activities under the law?

MS. CLERGET: One of the things, yes.

BOARD MEMBER TWEETEN: I think Mr. Hayes

might want to enlighten us.

MR. HAYES: Chairwoman Deveny, members of the Board, for the record, Ed Hayes, Acting Chief Legal Counsel.

I just wanted to chime in a little bit in terms of burden of proof, and to remind the Board that this is in the context of a motion for summary judgment, which is only proper when there is no disputed material fact, and that the person receiving an award of summary judgment is entitled to that by conclusion of law.

To defeat summary judgment, DEQ does not have the burden of proving that the sedimentation came from lots owned by the developer. There just has to be a material, a dispute of that material fact for summary judgment, and that to be appropriate, and to remand back to DEQ.

BOARD MEMBER TWEETEN: To follow up with that, extend that a little farther. If we find that there is a genuine issue of material fact with respect to the legal conclusion of who the owner or operator is, the Department would have the burden of proving those facts that are predicate to the conclusion that Copper Ridge was the owner/operator.

MR. HAYES: Upon remand?

BOARD MEMBER TWEETEN: Yes.

MR. HAYES: Yes, I would agree.

MS. CLERGET: I'm not sure about that. I think that if it were -- if you're saying summary judgment is defeated, and there is a material issue of fact, summary judgment is defeated, and it's gone to a hearing, the question of who has the burden at that hearing is a question currently before the Board about which there is disagreement.

BOARD MEMBER TWEETEN: And your conclusion was what?

MS. CLERGET: My conclusion in the findings of fact and conclusions of law was that Copper Ridge had the ultimate burden at the hearing. And therefore if it goes to a hearing, Copper Ridge would be responsible for proving that they are not the owner/operators within the meaning of the statute, and based on these facts. However --

BOARD MEMBER TWEETEN: Maybe that should be the next issue.

MS. CLERGET: They disagree with me.

BOARD MEMBER TWEETEN: Thank you.

That's helpful.

Having considered Mr. Hayes' comments, I guess I'm changing my mind here about whether dismissal as opposed to remand is the appropriate remedy, if we find that summary judgment on the owner/operator question was improperly granted, because I think Mr. Hayes is right, that if summary judgment was improvidently granted on that question, the appropriate remedy is to send it back to the Hearing Examiner with directions to take evidence on that question, subject to the appropriate legal standard that we would determine in our remand order. Does that make sense to everybody?

BOARD MEMBER HANSON: No.

BOARD MEMBER BUSBY: Makes sense. I'd like to --

BOARD MEMBER TWEETEN: This is inside baseball for lawyers. Summary judgment is a way that litigation can be short circuited in advance of an evidentiary hearing, and basically the principle is that if the material facts are undisputed, then there is nothing left for you to go to hearing on with respect to the evidence, and the only questions to be determined are questions

of law.

Under those circumstances, the tribunal gets to enter what's called summary judgment, and what that means there is no genuine issue of material fact, and one or the other of the parties is entitled to judgment on that issue as a matter of law. That's what the rule says.

And Mr. Hayes is right, that with respect to that standard, the party opposing summary judgment is entitled to all of the inferences of fact that need to be made. In other words, if you view the facts that are set forth in the summary judgment papers in the light most favorable to the party opposing summary judgment -- because that's how you determine whether there is a genuine issue of material fact or not. You look at the evidentiary materials that the parties submit.

And because the law favors evidentiary hearings whenever there is a disputed fact, if there is any interpretation of those materials that would give rise to a disputed issue of fact, then summary judgment should be denied, and the matter ought to go to hearing.

Now in this case, as I understand the

papers -- and I could be wrong about this, but I don't think I am -- Hearing Examiner Haladay found that there were no genuine issues of material fact with respect to the question of owner/operator based on those circumstances that were stated in his summary judgment order.

And there were two. One was the form that was signed by Copper Ridge basically admitting that they were the owner/operator; and the other was the contracts that Copper Ridge had with its contractors dealing with road building, and culvert building, and so on and so forth, leaving no materials in place, and stockpiling and all those other things.

And those were the only two factual considerations, I think, if I read the order right, that Hearing Examiner Haladay relied on in support of his conclusion of law that Copper Ridge was the owner/operator, owner or operator.

So if we find that he applied the improper standard legally, because for example he read "supervises, controls, or operates" to mean had the power in the past to supervise control or operate -- which I think is the Department's position -- if we think that that reading of the

statute is wrong, that statute operates in the present tense, and at the time the point source discharge occurs, we look to who had ownership, operation, or supervision.

If that's what we find, and I'm inclined to think that that's right, if that's what we find, then he applied the improper standard legally, and we ought to send the case back for the Hearing Examiner, in this case Sarah, to review the record; I would argue give the parties an opportunity to further clarify the evidentiary record; and then either determine that summary judgment is appropriate, or enter proposed findings and conclusions on the question that do not simply incorporate by reference what Mr. Haladay said.

Am I getting closer to making sense here?

CHAIR DEVENY: Say the last part again. The part before you said, "Does that make sense?"

BOARD MEMBER TWEETEN: Let me see if I can reconstruct it. If we tell Sarah that Andres applied the wrong standard legally, she can go back and apply the right standard to the evidence that's already in the record, and decide whether

under those circumstances summary judgment should be entered, or whether under those circumstances it is more appropriate to deem that the evidence is in conflict; and then make findings of fact and conclusions of law with respect to which view of the evidence is the most probable and what legal conclusion that evidence leads to.

So this is starting to get clearer in my mind as to where this is.

BOARD MEMBER BUSBY: So Chris, a quick question basically for you is: We've got the two things really that Sarah brought out. If we conclude one of them is there, if we're dealing in the present tense, not the past, far in the past tense, the present tense meaning September '13, whatever that date of the rainfall is. If we say he used the wrong standard at that point, doesn't it make the other part null and void?

BOARD MEMBER TWEETEN: It makes his conclusion of law null and void. It doesn't affect what the evidence is. The evidence is what it is.

BOARD MEMBER BUSBY: The evidence is what it is.

BOARD MEMBER TWEETEN: And what legal

conclusions should flow from the two pieces of evidence that he cited in his order, one, the stockpiling and disturbance dealing with the matters prior to the release of the first permit, plus the admission.

What effect that has on Copper Ridge's responsibility would have to be assessed by Sarah, using the appropriate standard. Do either of those facts together or singly, what's the preponderance of the evidence with respect to who the owner/operator was at the time of the point source discharge.

If that's what we decide the law is, and that the law looks at present tense, we look at the time of the discharge, and we determine who the owner or operator was at that point, regardless of whether somebody else could have been an owner or operator previously.

If we say it operates as of the time of discharge, then Sarah would have to look at the record, including those two items that Andres cited in his order, plus any other evidence that's in the record as well; and Sarah would have the option of concluding that evidence is in conflict or not sufficient to make a finding, so we're

going to reopen the record, take more testimony, and let the parties put in whatever proof they want to, and then we'll decide who the owner/operator was.

That would be left to Sarah's discretion on remand to decide whether to limit it to the record as it exists, or to give the parties an opportunity, now that the standard of law has been clarified, to conform their proof to what this standard is.

That's up to Sarah on remand. She can decide what in her discretion the more appropriate route is.

CHAIR DEVENY: Sarah, is that what you understand would be --

MS. CLERGET: I understand that, yes.

CHAIR DEVENY: -- that Chris laid that out?

MS. MARQUIS: Can I --

BOARD MEMBER TWEETEN: I guess I'd like to hear from the parties as to what the appropriate remedy is. If we agree with Copper Ridge that they have not been proven on the existing record to be an owner/operator under their interpretation of the statute, should we

decide to adopt it.

I'd like to hear from both sides as to should we order it dismissed, or should we remand it for further proceedings.

MS. MARQUIS: Member Tweeten, Madam Chair, members of the Board. Copper Ridge and Reflections at Copper Ridge also moved for summary judgment in this matter, and their motion was to dismiss the administrative actions because they were not the owner or the operator.

It seems to be within this Board's authority to be able to modify conclusions of law, and that would be what you would be doing, modifying the conclusion of law in the summary judgment order to say that they are not in fact owners or operators, and grant Copper Ridge and Reflections' motion for summary judgment.

BOARD MEMBER TWEETEN: But we wouldn't say they are not the owner or operator. We would say on the existing record they have not been proven to be the owner or operator. It wouldn't be a ruling on the merits, is what I'm saying.

It would be dismissed without prejudice, because on this record, the evidence is lacking with respect to that point. Theoretically, I

suppose, the Department could go back and refile, and put in additional evidence if they wanted to, and then you'd have to deal with claim preclusion, and issue preclusion, and all those res judicata kind of concepts that are really, really complicated and not easy to understand.

MS. CLERGET: Vicki, if I might clarify. I think what they're saying, and what Ed said, was that it would be a finding that there is a genuine issue of material fact on the summary judgment. It is denied based on genuine issue of material fact.

BOARD MEMBER TWEETEN: That's correct.

MS. MARQUIS: Couldn't it be, though, a denial of summary judgment based on the conclusion of law, that the law was wrong? Even if you take his findings, that he found that contract, and he found that they were the original owners, even so, those don't support the conclusion that they are the owner/operator.

BOARD MEMBER TWEETEN: Sure. But if he crafted his order referring to evidence that supported his interpretation of the law, and his interpretation turned out to be wrong, and there is other evidence in the record that might bear on

the question and whether there is an issue of fact and so forth, under the appropriate standard, why should we give you that windfall, and dismiss the matter? Why shouldn't we go back and have the Hearing Examiner review the entire record under the appropriate standard, and make a determination as to whether there's a genuine issue of material fact or whether there needs to be more evidence?

MS. MARQUIS: Member Tweeten, Madam Chair, members of the Board. I'm not sure what more evidence is out there, and to continue with more evidentiary hearings --

BOARD MEMBER TWEETEN: I certainly don't know either, but I would -- I mean the parties are much more aware of what other facts could be marshalled than we are at this stage. We have the record.

MS. MARQUIS: What we've heard today is that the Department has no evidence that Copper Ridge and Reflections owned those lots where the home building activities occurred that were the basis for the violation.

BOARD MEMBER TWEETEN: They didn't introduce any evidence in the record. Maybe they don't have any, in which case you have nothing to

worry about.

But if there is additional evidence out there that bears on that question that the Department wants to lay in front of the Hearing Examiner, properly instructed by us as to what the legal standard is, I think Sarah ought to be given the discretion to allow them to present that, if the determination is made that that's appropriate.

I wouldn't want to prejudge that question. I think the parties are much more aware of all of that than we are, and you can make arrangements with Sarah to either reopen the evidence or not, depending on what she in her discretion decides is the most appropriate.

BOARD MEMBER BUSBY: A quick question. If we decided today that for the lots that were being built on, that Copper Ridge and Reflections were not the owner/operator on the lots being built, that wouldn't preclude the Department from going back and filing against the owners of those lots.

BOARD MEMBER TWEETEN: No, it would not. In my opinion, it wouldn't.

BOARD MEMBER BUSBY: I don't think it would either. In my opinion, it wouldn't either.

BOARD MEMBER TWEETEN: I think the Department has told us that they think they have the authority to do that certainly, so I think they could go back and do that, and there may be time constraints, maybe there's a statute of limitations, or a statute of repose, or some kind of a laches argument that could be made with respect to the fact that after all this time has gone by, is it equitable to go back and charge these owners with a violation that they didn't even know they were committing. But that's all equitable stuff that can be presented to Sarah on remand.

CHAIR DEVENY: Ms. Bowers, could you speak to the remand.

MS. BOWERS: Yes, Madam Chair, members of the Board. Just to speak to Board Member Busby's comment about lot owners.

Under the Water Quality Act, we generally take enforcement action against current violations or ongoing violations, and so I'm pretty sure the development is stabilized by now, and there wouldn't be an ongoing violation.

BOARD MEMBER BUSBY: That's really the basis of my question, so can you go back into

history and grab the history --

MS. BOWERS: We wouldn't go back for a past violation.

And with regard to Hearing Examiner Haladay's orders on summary judgment, of course we urge you to adopt those, and find that Copper Ridge and Reflections are owner/operators. But if you decide that there are material facts, then we would propose that we have a hearing on the question of owner/operator.

And I also want to say that there was other evidence in the record. Hearing Examiner Haladay just really focused on the contracts, and used those to show supervision and control by Copper Ridge and Reflections.

He also on Page 14 talks about the Copper Ridge and Reflections being the original owners and developers of all the land in the subdivision. And then he talks about their signing the NOI, and that being the concession that they are the owner or operator.

So if you find that that order was not -- that there is still a question of material fact and that order should be reversed, DEQ would urge you to have the opportunity to present more

evidence, or to present the evidence that Hearing Examiner Haladay didn't focus on in his order.

MS. CLERGET: You might also want to hear from the parties, Chris. You raised a reason of equity about sending it back versus dismissal, based on the procedural posture, and you might want to hear from the parties on that as well.

BOARD MEMBER TWEETEN: If I were in your shoes as the Hearing Examiner, I would on remand, if we remand, I would notify the parties that it has been remanded on this issue with respect to owner/operator; and if there are any other matters that are conclusive with respect to Copper Ridge's liability in this case that the parties want to present you at that time, they should be free to present those on remand as well.

I don't think we're going to make a finding with respect to those equitable considerations as a board now based on the record that's here, because there was no evidence and no argument with respect to that. So that ought to be first in front of you, and depending on what you do with it, it'll come back to us or not.

Is that clear to the parties? I think you understand what I'm saying. If you want to

make arguments with respect to laches or any sort time barrier with respect to proceeding at this point, those ought to be presented on remand, because we're not going to consider them at this point.

And those are arguments that obviously would be open to the original buyers should the Department want to go back and proceed. But I understand what Ms. Bowers said, that that's not likely to happen, if ultimately the finding is made that Copper Ridge is not responsible. By Copper Ridge, I mean both Copper Ridge and --

BOARD MEMBER BUSBY: Where are we at on the motion?

CHAIR DEVENY: The motion was to reject summary judgment.

MS. CLERGET: Was to grant Copper Ridge's motion for summary judgment.

CHAIR DEVENY: And we have discussed an alternative that I think I know I'm leaning toward. It sounds like you are.

BOARD MEMBER TWEETEN: Right. I guess the first question, Madam Chair, the first question would be whether at this point a majority of the voting Board agrees with the position that

I've articulated, which is that Hearing Examiner Haladay applied the incorrect legal standard in interpreting the term owner or operator, to apply based on the fact that the developer at some point in time had the opportunity to address the conditions that led to this discharge and failed to do so.

If we want to reverse that, and say that we think that the statute properly interpreted means that owner or operator is the person who at the time of the discharge was either the owner or in control or supervising the construction activities on the property.

If that's what we think the appropriate interpretation is, then based on that conclusion of law on our part, we would reverse the summary judgment, and reverse Sarah's determination which incorporates it by reference, and send the matter back to Sarah for further proceedings, applying the appropriate standard, the scope of which she can determine on remand.

MS. CLERGET: You're still going to have to solve the burden of proof issue, though.

CHAIR DEVENY: Let's take a break, and we'll reconvene here at twenty of one.

(Lunch recess taken)

CHAIR DEVENY: We'll reconvene. Let the record show that we continue to have our quorum. And we left off with a motion on the table to discuss, and also a conversation that Chris was initiating about --

BOARD MEMBER TWEETEN: Madam Chair, if I might. Before we vote on the motion, there is a matter that I'd like to hear from the parties on.

Since we are considering adopting a statutory interpretation that's different from the one that the Department applied in this case, I think it is incumbent on us to ask whether if we do take a different approach to the interpretation of the statute, we're going to be creating any unintended consequences for the Department with respect to other storm water enforcement matters or other MPDES matters generally.

So can I hear from the Department on that question, and then I'd like to give the developer, Madam Chair, an opportunity to respond as well.

MS. BOWERS: Board Member Tweeten, members of the Board. Listening earlier, I left for the break with the impression that you were

going to reverse, or you were leaning towards reversing Hearing Examiner Haladay's order on summary judgment, because there are questions of material fact as to owner or operator. And DEQ believes we can provide more facts and support our determination that Copper Ridge and Reflections were the owner or operator. So if you do that, you wouldn't really disturb our interpretations of the Administrative Rules or the statute.

If you do adopt a different interpretation that's inconsistent with what the Department has been doing, which is to look to the owner or operator of the larger common plan as responsible for the permit at least initially, then that would be a change for the Department, and we would have to be really clear about what the rule would be going forward.

BOARD MEMBER TWEETEN: Well, it seems to me that, as we discussed before lunch, one of the concerns that I have personally about this situation is the absence in the Administrative Rules that you've adopted of any clarifying language that puts that complete development theory into words that the developing community can look at and determine that their

responsibilities are. So you would be able to perhaps engage in rulemaking that might clarify that matter.

MS. BOWERS: I think the responsibilities are in the rules. It says under 17.30.1115, it says that the discharger or the person proposing the discharge has to get the permit. And then in I think it is 1115(2) that the NOI to go under the general permit has to be signed by the owner or operator, and so that could be put together a little bit better. I mean I take that seriously, your comments on the rule.

BOARD MEMBER TWEETEN: Okay. But you don't foresee a catastrophe in your enforcement program --

MS. BOWERS: At this time I don't foresee a catastrophe.

BOARD MEMBER TWEETEN: I just wanted to make sure. Vicki, do you have any anything to add? Madam Chair, if I might.

CHAIR DEVENY: Yes.

BOARD MEMBER TWEETEN: Do you have an opinion on that question?

MS. MARQUIS: Board Member Tweeten, Madam Chair, members of the Board, the worst case

scenario, what happens is that rulemaking is initiated, and it does make the laws and the rules more clear for the regulated public, and that's a good thing, and it enables the policies and the goals of the Montana Water Quality Act.

BOARD MEMBER TWEETEN: Thank you. That answers my question.

BOARD MEMBER BUSBY: Can we recap something where we're at, because I'm not sure where I started with that.

CHAIR DEVENY: We have a motion on the floor that we've kind of left open. We still at some point need to vote on that. But before we do, I'd like Chris to kind of reiterate what it is that you're going to suggest that we do in place of this motion.

BOARD MEMBER TWEETEN: And I don't know if this should form the basis of a substitute motion. Frankly I don't remember exactly what Dexter's motion was.

BOARD MEMBER BUSBY: It basically simply put was to -- not remand, but to --

MS. CLERGET: Grant Copper Ridge's motion for summary judgment.

BOARD MEMBER BUSBY: -- grant their

motion for judgment.

BOARD MEMBER TWEETEN: Madam Chair, I would oppose that motion.

CHAIR DEVENY: I would, too.

BOARD MEMBER TWEETEN: Because I don't think the record is sufficient to justify a finding either way on that question. So I think a remand is the most appropriate thing to do, taking Mr. Hayes' guidance to heart, that since we are talking about a summary judgment here, unless we find that the record is crystal clear one way or the other, the appropriate thing is to remand for a factual hearing and further consideration, in light of the legal standard that we think is appropriate.

So I think I would oppose that motion. What I would suggest as an alternative is that the Board vacate the proposed findings of fact, conclusions of law, and order that Hearing Examiner Clerget entered, and also part and parcel of that would be vacating Hearing Examiner Haladay's summary judgment order.

And the grounds that I would propose the Board rely on in vacating those documents would be that we disagree with the Hearing Examiners' --

plural -- conclusion of law, that based on those factual considerations that Hearing Examiner Haladay mentioned, Copper Ridge and Reflections ought to be deemed to be the owner/operator of this project for purposes of the storm water discharges that are at issue in these notices of violation.

CHAIR DEVENY: And that we remand?

BOARD MEMBER TWEETEN: And that we then remand the matter to Hearing Examiner Clerget for further proceedings, consistent with what we think the proper interpretation of that statute is, to-wit, which is that the statutory definition of owner/operator speaks to the person who owns, operates, or supervises the project at the time that the offending storm water discharges take place.

And that simply having had the opportunity to take steps that might have controlled those discharges at some time in the past does not make one an owner or operator for purposes of the statute.

BOARD MEMBER BUSBY: Can I ask you a question? Does that get to my concern of the actual bright line of who the property owner is

and as part of the owner/operator thing?

BOARD MEMBER TWEETEN: I think it does.

BOARD MEMBER HANSON: I think it does, too.

BOARD MEMBER TWEETEN: I think simply by virtue of the fact that Copper Ridge owned the property at one time, and could have, in its contracts with the contractors or its contracts for the sale of the property, impose conditions on storm water runoff, that by itself is not enough to make them an owner or operator under the statute; that the statute says that an owner or operator is a person who owns, operates, supervises -- whatever the verbs are in the statute. I don't remember -- in the present tense, which I interpret, I think the Board should interpret to mean at the time of the discharge, as opposed to at some time in the past.

I think that's the clearest reading of the statute, it is the most consistent with the plain language of the statute, and I also think that if the Department had wished to adopt an interpretation of the statute that embellished on that plain meaning by having some sort of responsibility relate back to persons who were

owners or operators in the past, they were obligated to do that by adopting an Administrative Rule to that effect, which has not been done.

So then the statutory language stands by itself, and the clear guidance of the Montana Supreme Court is that unless the statute is internally ambiguous, the statute ought to be read according to its plain meaning, which in this case is the present tense.

The statute is not ambiguous. It doesn't -- it is in the present tense, clearly speaks to the present tense, and I don't see anything in the statute that's ambiguous with respect to the point.

CHAIR DEVENY: So in remanding back to Sarah then, she opens up the record and can take more testimony; is that --

BOARD MEMBER TWEETEN: She has the discretion to do that if she chooses. The MEIC case that's cited in Sarah's proposed findings and conclusions with respect to burden of proof question talks to that point, and indicates that the discretion is with the Hearing Examiner in the first instance to decide the scope of the proceedings on remand, unless we give specific

direction to the contrary.

And I would prefer to allow Sarah, with her superior knowledge of the record, to make the determinations as to whether the record needs to be reopened or not, obviously having heard from the parties what their views are on that question.

CHAIR DEVENY: If you don't open up the record, though, are you going to get additional information? If the record isn't opened, is there an opportunity for DEQ to submit their additional information that they indicated they had?

MS. CLERGET: No. They would need to point to it. If it's in the record already, they can point to it. If it is not already in the record, then they would have to give additional -- going to have to reopen the record to then allow additional evidence.

BOARD MEMBER TWEETEN: And the developer would have the opportunity to offer its evidence --

MS. CLERGET: Right. Do the same. Correct.

BOARD MEMBER TWEETEN: -- in rebuttal if it chooses to do that.

BOARD MEMBER BUSBY: She has that

discretion?

BOARD MEMBER TWEETEN: My thought is that the Board should take the position that she has that discretion, yes.

BOARD MEMBER BUSBY: My big concern was I want to make sure there's a bright line of the sale of the property, unless it's contractually carried -- something contractually carried through on the sale of the property.

BOARD MEMBER TWEETEN: So Dexter, can I offer that as a substitute motion?

BOARD MEMBER BUSBY: I accept that as a substitute motion.

CHAIR DEVENY: Is there a second?

BOARD MEMBER HANSON: Second.

MR. HAYES: Madam Chair, members of the Board, Ed Hayes for the record, Acting Chief Legal Counsel.

I'm not sure that it is correct that Sarah would have the discretion to have another supplemental evidentiary hearing. My experience is when summary judgment is not granted because there is a material, a dispute of material fact, that then there is an evidentiary hearing on that disputed fact; and it is only after the judicial

body hears the additional evidence submitted after summary judgment has been denied that the case is then situated for an actual ruling on that factual matter.

BOARD MEMBER TWEETEN: Madam Chair. I agree with that up to a point, Ed. I think if, as we've said, not only does there appear to be perhaps a factual issue, but also the application of an incorrect legal standard by the Hearing Examiner.

I think in those cases, I believe the law allows the finder of fact at the trial level, or the hearing level in this case, to admit additional evidence because the parties likely conformed their proof during the hearing to the legal standard that the Hearing Examiner was applying.

And if that legal standard constrained the proof that the parties offered down below, they ought to be allowed to offer additional evidence under the appropriate standard. That's what I would say. So that's why I think the potential for additional evidence on remand ought to be there.

MR. HAYES: Thank you for that

clarification.

CHAIR DEVENY: Are you comfortable with that, Sarah?

MS. CLERGET: Yes.

CHAIR DEVENY: So --

BOARD MEMBER TWEETEN: Any further discussion?

CHAIR DEVENY: From the Board members?

BOARD MEMBER TWEETEN: I don't have any more. I think I've said it all.

BOARD MEMBER BUSBY: I don't think I've got --

CHAIR DEVENY: Call for the question and we'll take a vote. All those in favor of the motion, please signify by saying aye.

(Response)

BOARD MEMBER BUSBY: That's for the substitute motion?

CHAIR DEVENY: Yes. Any opposed?

(No response)

CHAIR DEVENY: None. Motion carries.

MS. CLERGET: Now you need to deal with the burden of proof issue.

CHAIR DEVENY: So we'll go back to oral arguments specific to the burden of proof, and

start with Copper Ridge.

MS. MARQUIS: Madam Chair, members of the Board. With respect to the burden of proof, this is perhaps one of the most egregious errors in the proposed order. It completely up-ends our concept of justice in America.

If you think about it, this is going to sound extreme, but this is really how tyranny begins. It's the government sitting up above somewhere, and just looking down at an individual -- whether that be a corporation or a person -- and saying, "I think you're in violation. I saw some stakes in mud. Come prove to me why you're not in violation."

That's the situation we're faced with here. In this case, that was the additional fact here was that the Department said, "I think you're in violation, and I think the penalty calculation is going to be in the millions of dollars," and that is on the record in the hearing transcript Volume I, Page 269, Lines 14 through 24.

So then if you accept that, and then the burden of proof is on the accused, how can the accused go back in time and collect any evidence? They simply cannot. This requires them to prove a

negative, and it's impossible, and it is not in accord with the due process clause of our United States Constitution.

Now, I realize the In re: Winship case that I cited in my brief refers to a criminal matter, where they say the presumption of innocence is a bedrock, axiomatic, and elementary principle. But this is much the same type of case, because in a criminal context you have the government saying, "We think you've violated the law."

And that's exactly what the Department is saying here. They've said to my client, "We think you violated the law." It is not fair for my client to have the burden of proof.

The Department has said that there was a full and fair opportunity for a hearing, but the problem is coming into the hearing, my client was presumed guilty, and had to prove that somehow he wasn't guilty, even though he didn't know at the time that whatever was happening on that day would result in him being assumed guilty. That's not a full and fair opportunity for a hearing.

Now, the federal analog is very much the same. In fact, if these exact same violations had

been cited under Federal law in the Clean Water Act, there is no doubt that the government would bear the burden of proof in those enforcement actions. And this argument is presented on Pages 9 and 10 of our exceptions brief. There is a robust body of case law in the EPA administrative arena that supports this.

The MEIC case, that's MEIC versus DEQ 2005 MT 96, is distinguishable here for a couple of reasons. In that case there was a final agency action that was on appeal; and in this case there is not a final agency action. And we know this if we refer to the statutes at issue here, and that's 75-5-611.

In those statutes, it is obvious that the Department only alleges a violation. They allege facts that they believe constitute the violation. In fact, at 75-5-611 subparagraph (6)(b), it says very clearly that it is this Board's job to determine if a violation occurred. They don't just judge the merits of the challenge, but it is this Board's job to determine if a violation occurred.

So we don't have a final action in front of the Board today, so that's one distinction from

the MEIC case.

The other one is that in that case, MEIC was alleging that there was a violation of the law, and that's the exact same position that the Department is in here today. The Department is alleging that my client violated the law.

So in the MEIC case, the plaintiff who made that allegation had the burden of proof. In this case here, the Department is alleging that there is a violation. They should have the burden of proof here as well.

The Department has relied on the Meyers case (phonetic). This is on Page 11 of their response brief. But I want to point out that if you read the entire Meyers case, especially at asterisk six, it becomes clear that what Meyers was appealing from was an agency decision. There had been an informal review and an agency decision that was final, and it was that agency decision that Meyers was claiming violated the law. So in that case the burden of proof was appropriate to be on Meyers.

Again, we're not in that scenario here. Here it is the Department who is alleging there is a violation of law.

This also complies with the statute in MAPA 26-1-401. It says, "The party asserting the claim bears the burden." Again, here it is the Department that is asserting that my client has violated the law, so it is the Department who must bear the burden.

Further, this Board could look to its own precedent to decide this matter. I went through some of the cases that have gone through the Board of Environmental Review, and the most recent case I found for enforcement that had gone all the way through the Board was an opencut mining case. It was Case No. 2011-02-0C, NOV of OC Mining Act by Deer Lodge Asphalt, Inc. at the Olson Pit in Powell County.

That was an enforcement case much like this where the Department alleged that there had been a violation of the law, and in that case, the briefing was clear that the government took the burden of proof offer, and they offered proof on every element of each violation.

Furthermore, the government initiated argument at the hearing, and took the burden of proof at the hearing. So that's precedent even within this agency.

So placing the burden of proof upon my client is not only contrary to the due process requirements of the Constitution, it is contrary to Federal law, it is contrary to State law, it is contrary to this Board's precedent, and the burden of proof should more appropriately be placed on the Department who is alleging the violation.

CHAIR DEVENY: Thank you. Ms. Bowers.

MS. BOWERS: Madam Chair, members of the Board. The Hearing Examiner in this case correctly relied on the MEIC versus DEQ case, and assigned the burden of proof to Copper Ridge and Reflections as the parties challenging the administrative compliance and penalty order.

That order is the administrative decision, and contains DEQ's charges, and Copper Ridge and Reflections had the right to appeal the decision. They're in the position of appellant. So it is up to them to show that the violations did not occur, or that the order was otherwise legally insufficient.

And without an appeal that order would have become final. And the Hearing Examiner's determination is not inconsistent with other older cases.

There is a case from 1980, Thornton versus Commissioner of Labor and Industry, that goes even further and states that there is a rebuttable presumption in favor of the decision of the agency, and the burden of proof is on the party attacking that decision to show that it is erroneous.

Also with regard to the penalty calculation, the calculated penalty is very different than the actual imposed penalty. The penalty calculation potentially could have been into the millions, but millions of dollars were never imposed in this case. We have a statutory cap for violations at $1,000 per violation.

CHAIR DEVENY: Okay. Questions from the Board members? Comments? Chris.

BOARD MEMBER TWEETEN: This is a complicated question. On the one hand there is a presumption in statute that official duty has been regularly performed, and that would suggest that there is a rebuttable presumption that the allegations of the Department are appropriate, and the burden of rebutting that presumption would lie on the regulated entity.

I do think there is a difference between

the facts in MEIC and the facts here. MEIC involved a challenge to the issuance of a permit.

The permit was a done deal. And it wasn't a situation where the Department proposed to issue a permit, and the regulated entity was entitled under MAPA to a contested case hearing. The Department issued the permit, and then an adversely affected party decided to seek a contested case to try to reverse that Department action that had already taken place.

Here you're dealing with a notice of violation. Penalties have not been collected. Before the notice of violation ripened into an actual violation, the developer was entitled to a hearing, to ask for a hearing, which they did.

So it is a little bit different situation. It is not an accomplished agency action, but simply a notice of intention to take an action that's being challenged here. So in that respect I think the cases are different.

There are other factors I guess that come into play in allocating burdens of proof. One is the burden ought to most appropriately lie on the party who has the best access to evidence on the dispute in question.

In this case that cuts a little bit both ways, because the Department had their own investigation. On the other hand, the developer was thoroughly familiar with the site, and what had been done and what was being done on the property as well. So that one is kind of -- doesn't cut either way.

I guess I'm persuaded that the more important statute here is not 26-1-401 which deals with the burden of proof as to facts, but rather 26-1-402 which deals with who has the burden of persuasion with respect to claims and defenses.

And what that statute says is that except as otherwise provided by law -- which I don't think applies here -- a party has the burden of persuasion as to each fact, the existence or non-existence of which is essential to the claim for relief or defense the party is asserting.

Now, what that says to me is that the burden of persuasion with respect to the facts underlying the violation lies with the Department. They're the ones who are making the claim for relief and seeking the imposition of penalties. And the ultimate burden of persuading the Hearing Examiner initially, and then this Board ultimately

with respect to the soundness of that claim under this statute, would lie with the Department.

If there are any affirmative defenses that the developer wanted to raise, the burden of proving the facts with respect to those affirmative defenses would lie with the developer. But in this case, the burden of persuasion I believe lies with the Department; and the burden of going forward with evidence and rebutting the Department's showing lies with the developer.

And then the question of where the ultimate balance of the evidence tips lies with the Hearing Examiner in the first instance, and then with this Board. That's the way I read the statute anyway.

So I would be inclined -- Again, I'm not picking on you, Sarah -- but I would be inclined to disagree with Sarah's conclusion. I don't think we're bound by MEIC because I think the cases are distinguishable, and therefore there is no precedent directly on point, I don't believe.

And I think the appropriate procedure on remand would be to require the Department to produce the evidence that supports its claim that the developer was in violation, and then the

developer would have the opportunity to provide evidence of rebuttal or response, and to assert any affirmative defenses on which they would bear the burden of persuasion, and then the Hearing Examiner would determine where the preponderance of the evidence lies with respect to those factual questions.

So where we are then is under the existing motion, I think we vacated Sarah's determination or decision in its entirety, as well as the decision by Hearing Examiner Haladay. So I think that motion, having been passed -- unless somebody wants to move that we amend that determination by reinstating Sarah's burden of proof analysis -- then I think what we've done so far is sufficient to implement, in my view at least, this burden of proof issue.

BOARD MEMBER BUSBY: I want to hear from Sarah.

MS. CLERGET: I think it might be helpful to have a specific motion and second on what the burden of proof is going forward. I agree with you that vacating my motion gets rid of my analysis, but what you think it is going forward, having that in a seconded motion, I think

would be helpful.

BOARD MEMBER TWEETEN: In that case, Madam Chair, I would move that on remand, the Board direct the Hearing Examiner to place on the Department the burden of persuasion with respect to those matters that are essential for them to prove in order to establish the violations that they claim under the appropriate legal standard that we previously adopted.

CHAIR DEVENY: There is a motion. Is there a second?

BOARD MEMBER BUSBY: I'll second that.

CHAIR DEVENY: Discussion. I had a question, just to kind of bring it a little bit out of the legal realm, I guess. But the appeal was against the notice, is that correct, the notice that was given to the party is the notice?

BOARD MEMBER TWEETEN: Madam Chair, can I respond to that?

CHAIR DEVENY: Yes.

BOARD MEMBER TWEETEN: I think that sort of underlines the difference between this case and MEIC. I don't think that the developer in this case was in the position of appellant, because in MEIC, the permit had already issued, and the

appropriateness of the permit was being appealed by MEIC.

In this case, the notice of violation has been issued, but before the violation becomes final, the developer has the opportunity under MAPA to demand an evidentiary hearing.

So it is a little bit different than that. I guess in my mind at least, it doesn't seem to me that the two cases are the same, or that the developer is here in the position of an appellant like they were in MEIC. I think it is a different case.

CHAIR DEVENY: And DEQ makes the point that if there hadn't been an appeal, the notice would have just continued, and there would have been action taken --

BOARD MEMBER TWEETEN: If there hadn't been a request for a hearing, that's true. But under MAPA, you have the request for hearing, and then specifically MAPA says that the statutory, and the statutes and rules governing evidence apply. And in this case, the burden of persuasion statute that I talked about is one of those statutes that applies.

So I'm not 100 percent certain. I think

that MEIC was rightly decided, but I don't think we have to get to that point, because I think the cases are not the same case, and therefore MEIC is not necessarily controlling on its own facts.

CHAIR DEVENY: Any other questions or comments?

BOARD MEMBER TWEETEN: Did that answer your question?

CHAIR DEVENY: Kind of, yes. It is still kind of confusing.

BOARD MEMBER TWEETEN: This is a very confusing area of the law. There is no question about that.

BOARD MEMBER BUSBY: So can I just make a comment for my own understanding, and you can tell me if I'm right or wrong.

Based on your motion, if I understood it correctly, and where you were headed, I think, is that we have the Department alleging a violation, and at the point where we're at here, they have to show cause or proof, as the case may be, that that violation occurred.

And a part of that is that when we made the decision on ownership, which hasn't been 100 percent determined yet, but they have to prove

based on the determination of ownership who was the point source of the violation; is that --

BOARD MEMBER TWEETEN: I think that's right. Yes. Well, let me put a finer point on it. I think on remand it would be up to the Department to adduce, to point to the evidence in the record, and then with the permission of the Hearing Examiner, introduce whatever additional evidence they think they need to introduce to show that at the time the discharges occurred that are the subject of this case, Copper Ridge and Reflections were owner/operators under the definition that's in the statute as we've interpreted it.

So they'd have to prove all those facts, or put in enough evidence to establish a case that those facts exist; and then the developer would have an opportunity to put in its own evidence on those questions.

And then since this is not a criminal case, and we're not looking for proof beyond a reasonable doubt, we're just looking at the 50 percent plus one iota of proof standard, it would be up to Sarah in the first instance to make factual findings on those questions, and enter a

decision as to whether the developer was an owner or operator under the statutory definition.

CHAIR DEVENY: Hillary, you had a comment or question?

BOARD MEMBER HANSON: So I guess I'm reading the proposed findings of facts and conclusions, and I think the thing I'm struggling with on Page 16 -- so everyone knows where I am -- one of the pieces is that -- the question is are we determining that, to me, whether Copper Ridge violated the law, or the Department's decision violated the law?

And so I'm kind of just -- I guess I'm trying to think of it a little differently from a fact of when you look at Copper Ridge's argument, I feel like what part of what they're putting forward is that DEQ didn't do things properly, too, hence what they did was not legal.

BOARD MEMBER BUSBY: Under the law.

BOARD MEMBER HANSON: Right. So if we look at it from a standpoint of that's what they're appealing, then to me, the burden of proof -- I don't know where I'm landing, but I guess I'm landing with the burden of proof would be Copper Ridge, if you're looking it from that viewpoint.

BOARD MEMBER TWEETEN: We are not -- Madam Chair. We haven't disturbed those aspects of Sarah's reasoning and Mr. Haladay's reasoning that deal with the notice question, for example, whether the notice was appropriate. Sarah's perfectly free to reinstate her reasoning on those other issues that we haven't talked about, without violating our order on remand.

I don't look at it as a question of whether the Department violated the law. I just look at it as a question of whether they can prove the facts that they need to prove in order to establish that the violation that they claim actually occurred.

So I don't view them as being in violation of the law necessarily. I just view them as being put to their proof with respect to what they're alleging Copper Ridge and Reflections did wrong. Does that make sense?

BOARD MEMBER HANSON: Kind of. It makes sense to me on kind of the initial phase of it. I agree with you, to be frank. But I do think there is a piece the Department needs to show these violations occurred, they're the owner/operator.

I think where I'm struggling is then

where do these other basically appeals come into play, because the appeals that Copper Ridge is making, to me, do say the Department did something wrong, and they need to show --

I think I'm getting a little confused in my head, to be totally frank with you, about I think kind of looking at this as a whole, both of them.

BOARD MEMBER TWEETEN: Here's what I think about that. I think on remand, Sarah will determine whether the developer was an owner or operator. If Sarah decides not, then all of the rest of that stuff doesn't matter, because under the statute they didn't need to get a permit.

If Sarah decides that they were an owner or operator, we haven't disturbed all of her findings and conclusions with respect to those other issues. Whether Violations 2, 3, and 4 actually occurred or not will come back in front of us with the owner or operator issue for our consideration later.

I don't see much to be gained by our spending lots of time on those questions when it may be that they're moot because they're in.

BOARD MEMBER HANSON: No, that's fair.

CHAIR DEVENY: That's why I have been separating these issues out.

BOARD MEMBER TWEETEN: Right. So I don't anticipate that those issues are going to be litigated on remand.

BOARD MEMBER HANSON: I guess I was just concerned by making this decision we are impacting things, even though we were separating them out, and talking to them, that we're making a decision that impacts all of them.

BOARD MEMBER TWEETEN: I think what we're doing is sending the matter back a step; not back to square one, but back a step. We're at the position where --

Well, two steps. We're going back to the position where the matter is in front of the Hearing Examiner, and she gets to make a determination based on a record -- either this record or a bigger record, depending on what she decides is necessary -- and will issue proposed findings of fact, conclusions of law, and a proposed order; or findings of fact, proposed conclusions of law, and order more technically.

And then the parties will be able to file their exceptions, and they can incorporate by

reference the rulings or exceptions that they -- that they may, or file new exceptions if they want to, which will then come to us, and all of that stuff will be laid out on the table in front of us, and we'll have to decide what we have to decide at that point.

BOARD MEMBER HANSON: Okay.

BOARD MEMBER TWEETEN: Vicki, you look like you have something that's really important to say. Madam Chair, if I might.

MS. MARQUIS: Board Member Tweeten, Madam Chair, members of the Board. Thanks for another opportunity to speak on this.

Board Member Hanson, you raised a good point about our allegations about where the Department was wrong, and those are our defenses that we have raised.

And again, to draw an analogy to the criminal context, which I know isn't an exact analog, but it's very close, it would be if a defendant alleged that the government did an improper search, or an improper seizure. The government is bound to follow certain procedures when they do an enforcement action.

That's the case here with the

Department. They're bound by the statutes and rules to follow a certain procedure. The fact that we point out where they're erroneous does not shift the burden of proof. It merely is a defense that we can raise.

BOARD MEMBER TWEETEN: I'm not sure I agree with that 100 percent, because in the search and seizure context, they're limited to the four corners of the warrant, so there really aren't factual disputes, it's whether the warrant is or is not right.

Perhaps a better example might be an allegation of coerced confession, where the burden is on the party challenging the confession to prove the circumstances of coercion, and then the burden of going forward with evidence is on them, and then the ultimate burden of persuasion with respect to the fact that the confession was voluntary lies with the government. Okay?

It is presumed that the confession is voluntary, and the burden is on the party challenging it to show it wasn't. But the ultimate burden of persuading the Court that it was a voluntary confession lies with the government, so that's where the burden of proof

lies.

But you would definitely have the obligation to go forward with evidence to establish that there is an issue there. So I think the burden is on the government to show that the facts alleged in the notice of violation are sufficient to prove a violation, and then you can go forward with evidence to the contrary as you see fit.

CHAIR DEVENY: Ms. Bowers, did you have anything to add?

MS. BOWERS: Thank you, Madam Chair, members of the Board. Just I think to clarify. So DEQ will have the burden of proof on the owner/operator issue, which is the issue you're sending back. And if Copper Ridge and Reflections should have some sort of affirmative defense, they have the burden on that, correct?

BOARD MEMBER TWEETEN: Yes. Right. But the ultimate burden of persuasion with respect to the existence of a violation is yours.

MS. BOWERS: Yes, to prove each element of the violation, that's DEQ's burden.

BOARD MEMBER TWEETEN: Right. So you have to convince Sarah that you've established

each element of the violation by a preponderance of the evidence.

MS. BOWERS: Okay.

BOARD MEMBER BUSBY: And violated --

BOARD MEMBER TWEETEN: Well, the homeowners aren't here, so --

CHAIR DEVENY: No side conversations. So there is a motion out there. I can't begin to describe what it is, but --

BOARD MEMBER HANSON: Did we move anything?

MS. CLERGET: Yes, I've got it. I know what it is.

BOARD MEMBER TWEETEN: The motion boiled down is that the burden is on the Department to prove each element of the violation. You have to put in that evidence first. Then the developer gets to go put in its evidence on those questions, and then the ultimate determination of where the preponderance of the evidence lies, and whether the violation exists under the governing standards of law falls on Sarah.

They get to take exception to that, if they choose to, and then it comes to us. That's the motion.

CHAIR DEVENY: And it is remanded to Sarah.

BOARD MEMBER TWEETEN: And it is remanded to Sarah for that purpose.

CHAIR DEVENY: Does everybody understand what we're doing then?

BOARD MEMBER BUSBY: I think so.

BOARD MEMBER TWEETEN: Did my motion get a second?

CHAIR DEVENY: Hillary seconded it.

MS. SOLHEIM: Dexter seconded it.

CHAIR DEVENY: So all in favor, signify by saying aye.

(Response)

CHAIR DEVENY: All opposed?

(No response)

CHAIR DEVENY: Motion carries. Simply put the load back on Sarah.

MS. CLERGET: Thanks.

CHAIR DEVENY: And that's going to wrap up.

(The proceedings were concluded at 1:51 p.m.)

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C E R T I F I C A T E

STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter, Notary Public in and for the County of Lewis & Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at the time and place herein named; that the proceedings were reported by me in shorthand and transcribed using computer-aided transcription, and that the foregoing - 143 - pages contain a true record of the proceedings to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal
this _____ day of _____, 2019.

_____

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