BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

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

and:

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

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:

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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
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 TWEENETEEN: 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 undertaken 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 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
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.
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
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
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
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

    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.


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.


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.)

* * * * *
CERTIFICATE

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.
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### Additional

- **acceptable**
- **acceptance**
- **address**
- **administrative**
- **admit**

### Additional Terms

- **additional**
- **address**
- **administrative**
- **admit**