

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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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 I

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
December 7, 2018
11:00 a.m.

BEFORE CHAIR CHRIS DEVENY, JOHN DEARMENT;
BOARD MEMBERS CHRIS TWEETEN, DEXTER BUSBY,
and TIM WARNER (by telephone)

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

A P P E A R A N C E S

1
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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR DEVENY: Let's get back, and get
5 started on this case. And Lindsay, would you take
6 roll call again, and make sure we've got everybody
7 with us.

8 MS. FORD: Chris Deveny.

9 CHAIR DEVENY: Present.

10 MS. FORD: Dexter Busby.

11 (No response)

12 MS. FORD: Dexter Busby.

13 (No response)

14 MS. FORD: Tim Warner.

15 (No response)

16 MS. FORD: Chris Tweeten.

17 MR. TWEETEN: (No response)

18 CHAIR DEVENY: We seem to have lost our
19 phone connection.

20 MS. CLERGET: Is somebody on the phone?
21 Can we hear you?

22 (No response)

23 MS. FORD: Tim Warner?

24 BOARD MEMBER WARNER: Yes, Madam Chair.

25 MS. FORD: Dexter Busby.

1 BOARD MEMBER BUSBY: I'm here.

2 MS. FORD: Chris Tweeten.

3 BOARD MEMBER TWEETEN: Present.

4 MS. FORD: John Dearment.

5 BOARD MEMBER DEARMENT: Here.

6 MS. FORD: We're all here.

7 CHAIR DEVENY: Great. Thanks,
8 everybody. We're going to hear this case and move
9 on, and at some point we will take a half hour
10 break for lunch. We'll try to find a logical
11 point at which to stop. So we have a quorum, and
12 John Dearment has recused himself from this case.
13 So it will be Dexter, Tim, Chris, and myself are
14 the Board members who will be hearing this case
15 today.

16 I'd like Sarah just to do an
17 introduction to this cases for the purpose of
18 today, which is to hear oral arguments and make a
19 decision regarding the Copper Ridge case.

20 MS. CLERGET: So this is the time set.
21 The Case Number is BER 2015-01 WQ, and the
22 companion case -- they're combined for the
23 purposes of this oral argument -- is BER 2015-02
24 WQ. These are enforcement actions -- or excuse me
25 -- are penalty findings against Copper Ridge and

1 Reflections at Copper Ridge, two different
2 companies, and that's why there are two different
3 case numbers, one for each company.

4 And it is the appeal of the
5 Administrative Order that is before you today. As
6 you saw in your packets, you have two pieces of
7 this proposed decision. One is the order on
8 summary judgment, which was issued by Andres
9 Haladay, and one is my proposed findings of fact
10 and conclusions of law which obviously I issued
11 based on the hearing that I held in the case.

12 And there are complementing decisions in
13 both of those sources that work together to put a
14 final set of decisions, both factual and legal, in
15 front of you. So there's a lot of moving pieces,
16 and some of your decisions will necessarily
17 involve changes in other decisions, so we're just
18 going to have to kind of work through this piece
19 by piece, I think, as we go through.

20 Are there any other procedural
21 questions? The memo that I've included in the
22 materials outlines your options moving forward,
23 which are the same as they always are in these
24 cases.

25 You have an exceptions brief from Copper

1 Ridge, a response from DEQ, and then there is also
2 a motion to strike portions of DEQ's response to
3 the exceptions brief which was filed by Copper
4 Ridge.

5 And I apologize. I'm going to refer to
6 Copper Ridge, and when I say that, it's Copper
7 Ridge and Reflections together. Just for the
8 purposes of shorter speech, I will say Copper
9 Ridge, and I think often people will in the course
10 of this case assuming that they are both.

11 So there is a motion to strike filed by
12 Copper Ridge to strike portions of DEQ's response
13 to their exceptions briefs; and then DEQ filed a
14 response to that motion to strike, which was a
15 supplemental part of your packet.

16 And as I have rendered my findings,
17 proposed findings and conclusions, the authority
18 for that motion rests with you, so you have to
19 deal to the motion to strike either as part of
20 your decision. You can deal with it before or you
21 can deal with it together with the rest of
22 decisions that you have to make. And then as I
23 said, the memo that I provided gives you your
24 options with respect to the case itself. Any
25 other procedural questions?

1 CHAIR DEVENY: Sarah, thank you. So the
2 options that we have that Sarah has outlined in
3 our packet is to accept the order on summary
4 judgment and the proposed order in their entirety,
5 and adopt them as the Board's final order; or to
6 accept the finding of facts in the order on
7 summary judgment and the proposed order, but
8 modify the conclusions of law or interpretation of
9 the Administrative Rules in either of those; or to
10 reject the order on summary judgment and/or the
11 proposed order, and then review the entire record
12 that's before the Examiner.

13 And just to remind people, if we do not
14 concur with findings of fact, then we're down in
15 that section where we would need to review the
16 entire case. I just want to be clear on that.

17 This is kind of a convoluted case, as
18 Sarah alluded to, so I would like to start out
19 with addressing the motion to strike that has been
20 presented by Copper Ridge. And again for purposes
21 of brevity, I'm going to refer to both entities as
22 Copper Ridge.

23 And so I'd like to have a separate oral
24 argument on just the memo to strike, and then I'd
25 like the Board to make a decision on that memo to

1 strike, because that is going to impact every
2 other decision that we make here today.

3 So with that, if the parties are ready,
4 I would like to first ask the Copper Ridge folks
5 to make their oral argument on that, then DEQ.
6 And if at all possible, I'd really like to try to
7 limit each party's time on this to five minutes if
8 that's reasonable, and we'll see how we go with
9 that. And I'll ask Lindsay to be our time keeper.

10 MS. MARQUIS: Thank you, Madam Chair,
11 members of the Board, Hearing Examiner Clerget.
12 Thank you for your time here today. My name is
13 Vicki Marquis. I'm with the law firm of Holland
14 and Hart out of Billings. I represent the Copper
15 Ridge Development Corporation, and Reflections at
16 Copper Ridge, LLC.

17 I'm joined here today with Mr. Landy
18 Lees, who is the Vice President of the Copper
19 Ridge Development Corporation, and the manager of
20 Reflections at Copper Ridge, LLC.

21 Regarding the motion to strike,
22 Violations 2, 3, and 4 were allowed to remain in
23 this case only because the previous Hearing
24 Examiner felt that they were serious enough to
25 allow DEQ to proceed directly to an Administrative

1 Order pursuant to Montana Code Annotated 75-5-611
2 Subparagraph (2) Sub(a) sub-romanette (ii).

3 But the previous order on Page 7 said
4 that DEQ complied with the provisions of Montana
5 Code Annotated 75-5-611(2), and found that Copper
6 Ridge and Reflections at Copper Ridge were
7 non-compliant after September of 2013 violation.

8 That's wrong. I want to point that out.
9 As a matter of fact, Copper Ridge and Reflections
10 at Copper Ridge fixed everything that they were
11 supposed to fix, and so the September violations
12 cannot serve as the basis for penalties.

13 And again, after the December 2014
14 violation letter, Copper Ridge and Reflections at
15 Copper Ridge fixed everything that the Department
16 asked them to fix. Therefore, no penalty can be
17 allowed.

18 But even if you assume that the
19 Department satisfied the provisions of 75-5-617,
20 and that the Department now gets to move into
21 their options for enforcement response which are
22 provided under 75-5-611, the rules simply don't
23 allow it in this case.

24 First of all, the Administrative Rules
25 of Montana that were in effect at the time, ARM

1 17.30.2003 Subparagraph (5) says that if an
2 alleged violator responds and it returns to
3 compliance, no penalty can be sought. It is
4 undisputed that Copper Ridge and Reflections at
5 Copper Ridge did this. That's reflected in the
6 Hearing Examiner's proposed findings of fact.

7 Furthermore, as the Hearing Examiner
8 noted, there was, quote, "Substantial justifiable
9 confusion," and Copper Ridge and Reflections at
10 Copper Ridge, their frustration was
11 understandable. Quote, "It responded to and
12 complied with all of DEQ's demands in the
13 correspondence, only to receive an administrative
14 penalty three months later."

15 She noted, and indeed is right, that it
16 is not fair for DEQ to, quote, "in effect be
17 rewarded for its own failures," that being its
18 failure to write the appropriate letters, the
19 notice letters that are required under the
20 statute.

21 Now, this current proposed order brings
22 up another issue, which is the basis of our motion
23 to strike. The Administrative Rules in effect at
24 that time, ARM 17.30.2003 Subparagraph (2),
25 provides additional notice requirements that must

1 be met before the Department may seek a penalty
2 under the statute. The Department must send a
3 notice letter in accordance with Montana Code
4 Annotated 75-5-611(1). We know that the
5 Department did not do that. The previous Hearing
6 Examiner held that.

7 So the only way that the Department can
8 get around that notice requirement is if the
9 violation meets certain requirements or criteria
10 that are specified in Administrative Rules of
11 Montana 17.30.2003 subparagraph (7), and those
12 requirements are that the violations must be of
13 major extent and gravity, or they must be a Class
14 1 violation.

15 We know from the Hearing Examiner's
16 order that has been proposed and is in front of
17 you today that Violations 3 and 4 do not meet that
18 requirement because neither one of them is a Class
19 1 violation, and neither one of them is of major
20 extent and gravity. They have to be both major
21 extent and major gravity. Here the proposed order
22 finds that Violations 3 and 4 are not major
23 extent, so no penalty can be sought for those
24 violations.

25 Now, the Department's response brief,

1 they would have you believe that there are two
2 opportunities to classify a violation. They would
3 have you believe that the Department can classify
4 the extent and gravity --

5 CHAIR DEVENY: Can you wrap up this in
6 two minutes?

7 MS. MARQUIS: Yes, ma'am, I can. They
8 would have you believe that the extent and gravity
9 can be classified as something during the notice
10 provisions, and then they can change their mind
11 and classify it as something else during the
12 penalty provisions.

13 You won't find a basis for that anywhere
14 in the rule or the law. There is only one rule
15 that describes how to classify a violation in
16 terms of its nature, extent, and gravity, and that
17 rule must be followed. It can't change whether
18 you're in the notice provision or the penalty
19 portion of the case.

20 If you were to allow that to happen, the
21 Department could simply charge every violation as
22 being the worst violation possible, so that they
23 could get around those notice provisions, and then
24 later they can change their mind and downgrade the
25 violation for the penalty portion.

1 That's not fair to the regulated public,
2 and that's not in accordance with the laws and the
3 rules. There is only one rule that describes how
4 to classify a violation. That rule was analyzed
5 and the facts were considered and applied to that
6 rule. The Hearing Examiner found that Violations
7 3 and 4 don't meet the standard for the notice
8 requirement, and they can't be charged with a
9 penalty in this case. Thank you.

10 CHAIR DEVENY: Thank you, Ms. Marquis.
11 I'm going to ask DEQ to have five minutes with
12 just a little bit longer to give their oral
13 argument on this aspect of the case, and then
14 we'll have questions of both parties from the
15 Board members.

16 MS. BOWERS: Madam Chair, members of the
17 Board, I'm Kirsten Bowers, DEQ attorney
18 representing DEQ in this matter.

19 And in response to Copper Ridge's motion
20 to strike, I believe they're conflating two
21 different provisions in enforcement law.

22 What we're actually talking about here
23 is notice that was provided to Copper Ridge and
24 Reflections at Copper Ridge, and both on orders on
25 summary judgment, and the Hearing Examiner's

1 proposed findings of fact and conclusions of law,
2 it was determined that DEQ did not provide a
3 notice under 75-5-611 sub (1).

4 That provision has five very specific
5 requirements, one of which is a calculation of a
6 penalty up front that's provided to the violator,
7 and then they are also given a time frame in which
8 they are to make corrective actions.

9 There is another provision under 611,
10 that's 611 Sub (2), in which the Department may
11 issue an administrative notice and order in lieu
12 of the notice under 611 sub (1), and that's if the
13 Department action seeks an administrative penalty
14 only for activities it believes and alleges are
15 violations of 75-5-605, and I think that language
16 "believes and alleges" is important.

17 In DEQ's violation letter dated
18 September 23, in fact it is entitled a 617
19 violation letter, Copper Ridge and Reflections was
20 told that DEQ would be taking formal enforcement
21 action. And so under 611 Sub (2), we went
22 directly to an order.

23 The violation letters were a courtesy
24 notice and not even required. They were provided
25 a violation letter on September 23rd, which in

1 fact attached Dan Freeland's inspection report,
2 and give them notice of all the allegations
3 against them. And then there was a second
4 violation letter in October after DEQ did an
5 inspection and found violations of the permit.

6 I think Hearing Examiner Clerget was
7 very clear in her proposed findings of fact and
8 conclusions of law that some of her findings were
9 related only to the penalty calculation, and not
10 to the notice that was provided. In fact, she has
11 a finding, I believe it is proposed finding -- or
12 proposed Conclusion of Law 5 that says DEQ did
13 provide adequate notice under 617 and 611 Sub (2).

14 Then with regard to the rules that
15 Copper Ridge mentioned, as they were at 17.30, and
16 in the subchapter 2000, those rules did in fact
17 add some additional requirements on DEQ, which DEQ
18 did comply with. The violations, the four
19 violations DEQ did allege at the time it gave its
20 notice, and provided a penalty calculation in its
21 administrative order.

22 DEQ provided a penalty calculation and
23 Violation 1 was of major extent and gravity;
24 Violation 2 was also of major extent and gravity;
25 Violation 3 was of major extent and gravity;

1 Violation 4 was of moderate gravity and major
2 extent.

3 But the Hearing Examiner in his orders
4 on summary judgment found that violation to be a
5 Class 1 violation, which is defined in 17.30 of
6 the rules at subchapter I think it is 2001.

7 He found that violation to be a
8 violation of a permit's compliance schedule or
9 plan. And I believe he found that because there
10 are many schedules in the general permit such as
11 inspection requirements, and recordkeeping
12 requirements, that Copper Ridge and Reflections
13 did not comply with.

14 So DEQ is requesting that you deny
15 Copper Ridge and Reflections' motion to strike to
16 the extent it applies to anything other than the
17 penalties. We are not contesting, we have not
18 filed any arguments contrary to the Hearing
19 Examiner's proposed findings of fact and
20 conclusions of law, and we're not contesting her
21 reduction in the number of days that would reduce
22 the extent of Violations 2, 3, and 4.

23 Unless you have questions, I have
24 nothing further.

25 CHAIR DEVENY: Thank you, Ms. Bowers.

1 Board members, do you have questions of either of
2 the parties, Ms. Marquis or Ms. Bowers?

3 BOARD MEMBER TWEETEN: Madam Chair, this
4 is Chris. I have one for Ms. Marquis, please.

5 CHAIR DEVENY: Go ahead, Chris.

6 BOARD MEMBER TWEETEN: Counsel, what is
7 it about this material that is redundant,
8 scandalous, impertinent, or otherwise meets the
9 standard for granting a motion to strike as
10 opposed to simply disposing of it on its merit as
11 part of the final order in this case?

12 MS. MARQUIS: Madam Chair, Board Member
13 Tweeten. Certainly the Board could do either. I
14 think procedurally it is important that the motion
15 to strike be decided and that the Department be
16 prevented from arguing that the violations have
17 any nature, extent, and gravity other than that
18 which has been proposed in the Hearing Examiner's
19 proposed order.

20 The procedure here is important. The
21 Hearing Examiner issued a proposed order, and all
22 parties had an opportunity to file exceptions to
23 that proposed order. Copper Ridge and Reflections
24 at Copper Ridge were the only parties who filed
25 exceptions to that order. Therefore, we put the

1 Department on notice of what our arguments were
2 against the proposed order.

3 The Department did not file any
4 exceptions, and did not put us on notice that they
5 would be raising this argument that the violations
6 can be characterized as anything other than what
7 is in the proposed order.

8 It would be unfair for them to come
9 before this Board now, and to argue as if those
10 violations can be classified as they desire them
11 to be classified, and not as in the proposed
12 order, given that they didn't file exceptions to
13 the proposed order. They didn't provide an
14 exception briefing that would allow this Board to
15 make a full and fair decision on the merits of
16 that particular issue in this case.

17 BOARD MEMBER TWEETEN: Further question,
18 Madam Chair.

19 CHAIR DEVENY: Go ahead.

20 BOARD MEMBER TWEETEN: Is there
21 something in the briefing with respect to Hearing
22 Examiner Clerget's proposed final disposition that
23 leads you to believe that the Department plans to
24 make arguments that are contrary to those portions
25 of Ms. Clerget's proposed decision to which the

1 Department has not taken exception? Is that a
2 clear question?

3 MS. MARQUIS: Yes. Madam Chair, Board
4 Member Tweeten. I've identified in our motion to
5 strike the exact portions of the Department's
6 response brief that we request be stricken from
7 the record.

8 And in its response brief, for example,
9 at Page 34, at the bottom of the page, the
10 Department argues that the Violations 2 and 3 are
11 major extent and gravity, and that is in direct
12 contradiction to what the proposed order in front
13 of the Board today proposes.

14 Likewise on Page 35 at the top, the
15 Department argues that Violation 4 was of major
16 extent. Well, in the proposed order that's in
17 front of you for a decision today, the Hearing
18 Examiner has proposed that Violation 4 is actually
19 of minor extent. That's on Page 37 of the
20 proposed order.

21 BOARD MEMBER TWEETEN: Thank you, Ms.
22 Marquis. Madam Chair, can I pose a question to
23 Ms. Bowers, please?

24 CHAIR DEVENY: Yes, please do.

25 BOARD MEMBER TWEETEN: Thank you. Ms.

1 Bowers, does the Department assert that in this
2 case it is entitled to make arguments that are
3 contrary to Hearing Examiner Clerget's proposed
4 final order in this case, final disposition in
5 this case, including the findings, and
6 conclusions, and all those things, to make an
7 argument that's contrary to something that is in
8 those findings, and conclusions and final order
9 proposed by Mr. Clerget that the Department has
10 not taken exception to?

11 MS. BOWERS: Madam Chair, members of the
12 Board, member Tweeten, no. DEQ does not propose
13 to make any arguments that are contrary to the
14 Hearing Examiner's proposed findings of fact and
15 conclusions of law, or the orders on summary
16 judgment in this case.

17 And I want to point out that one of her
18 conclusions of law is that DEQ provided legally
19 sufficient notice of violations under the Montana
20 Water Quality Act, including 611 Sub (2),
21 75-5-617, and ARM 17.30.2003.

22 And the pages in DEQ's response to
23 Copper Ridge's exceptions that Copper Ridge is
24 pointing to, DEQ is only pointing out that the
25 order determined the violations were Class 1 or of

1 major extent and gravity for purposes of adequate
2 notice that was provided, not for purposes of
3 penalty calculation.

4 BOARD MEMBER TWEETEN: Okay. Thank you.

5 CHAIR DEVENY: Any other questions from
6 Board members of either of the parties on the
7 motion to strike?

8 (No response)

9 CHAIR DEVENY: Hearing none, I'm
10 inclined to not allow the motion to strike,
11 because when I looked back through the documents,
12 I really couldn't find anything that wasn't
13 already in either the summary judgment or the
14 Hearing Officer's order, and I think I would
15 prefer to let these documents speak for
16 themselves.

17 And I don't think we need to belabor
18 this particular issue further to have an adverse
19 impact on our decision. And so I would like to
20 allow these documents to be given the weight that
21 they are in the packet that we have, and in the
22 conclusions of law, and the findings of fact, and
23 the exceptions, and DEQ's response to the
24 exceptions, and therefore I would move to deny the
25 motion to strike made by Copper Ridge.

1 BOARD MEMBER TWEETEN: Madam Chair, this
2 is Chris. I agree with you wholeheartedly. I
3 didn't catch -- Did you move to deny the motion to
4 strike?

5 CHAIR DEVENY: I did. I have moved to
6 deny the motion to strike.

7 BOARD MEMBER TWEETEN: I'll second your
8 motion.

9 CHAIR DEVENY: There has been a motion
10 and a second. Do we have Board discussion on the
11 motion?

12 (No response)

13 CHAIR DEVENY: Hearing none, I'd like to
14 take a vote on the motion. All those in favor of
15 the motion to deny the motion to strike made by
16 Copper Ridge, please signify by saying aye.

17 (Response)

18 CHAIR DEVENY: Any opposed?

19 (No response)

20 CHAIR DEVENY: I believe everybody was
21 in favor of the motion, so the motion passes, and
22 the motion to strike has been denied.

23 So next I believe we want to go to the
24 oral argument on the summary judgment, and the
25 proposed findings of fact.

1 MS. CLERGET: Would you like to take
2 that together, or would you like to take it
3 separately by issue?

4 CHAIR DEVENY: I would like to -- I
5 believe there is another issue that we need to
6 talk about before we really move to everything.

7 And I think a fundamental issue in this
8 case before we proceed is for the Board to decide
9 the owner/operator issue that was brought out and
10 was raised by the Hearing Examiner. And I'd like
11 to give Copper Ridge and DEQ another chance to
12 just specifically focus on that for oral argument.

13 Again, I'm doing that because these
14 decisions are sort of layered. One depends on
15 another. And I think if we don't settle the
16 owner/operator issue up front, it really impacts
17 how we move on to the rest of the case today. So
18 let's try to see if we can take care of this issue
19 before we break for lunch. Do Board members
20 understand that, or think that that's an okay way
21 to proceed?

22 (No response)

23 CHAIR DEVENY: Hearing no argument, I'm
24 going to go ahead with that. So I'd like to give
25 each of the parties five minutes again for oral

1 argument on this particular issue, and Copper
2 Ridge, would you like to start.

3 MS. MARQUIS: Madam Chair, members of
4 the Board. I think this is a very important
5 pivotal issue. Would it be possible to have ten
6 minutes?

7 CHAIR DEVENY: Okay.

8 MS. MARQUIS: Thank you. An
9 owner/operator is defined as, quote, "A person who
10 owns, leases, operates, controls, or supervises a
11 point source." That comes from the statute
12 Montana Code Annotated 75-5-103 Subparagraph (26).

13 And when we think about the point
14 source, it is important to note that for
15 stormwater discharges associated with construction
16 activity, it is the disturbance that is caused by
17 the construction that is the regulated point
18 source.

19 And I think if you look in the briefing,
20 you'll see that Copper Ridge and Reflections at
21 Copper Ridge and the Department are actually very
22 similar on this topic. We both cite to the same
23 rule, and say that construction activity is the
24 regulated point source that must be permitted.

25 It is important to keep in mind here,

1 because at the time that these violations were
2 charged, Copper Ridge and Reflections at Copper
3 Ridge were not conducting the construction
4 activity that resulted in the discharge, and we
5 know that for a variety of reasons.

6 We know that the Copper Ridge and
7 Reflections at Copper Ridge were in compliance
8 with everything they had to do under the
9 Subdivision Act. We know that they had a
10 construction stormwater permit for their
11 development activities, which included road
12 building and installation of utilities.

13 We know that they did everything that
14 they needed to do to comply with those permits
15 because there weren't any violations charged under
16 those permits, and those permits were in fact
17 terminated by the Department.

18 At that time, if the Department had felt
19 that Copper Ridge and Reflections at Copper Ridge
20 needed any more permit coverage, they could have
21 told them that, but they didn't. They said
22 nothing. And they waited. And six months later,
23 the City of Billings voices some concerns about
24 stormwater discharges within the subdivisions.

25 It is important when we think about the

1 subdivisions to think about that the line drawn
2 around a neighborhood is a subdivision. It
3 doesn't mean that Copper Ridge Development
4 Corporation and Reflections at Copper Ridge own
5 everything within that boundary area.

6 Indeed there comes a point in time when
7 they begin to sell off individual lots for
8 development by third parties, people who are not
9 connected to either Copper Ridge Development
10 Corporation or Reflections at Copper Ridge.

11 It is at that point in time that Copper
12 Ridge and Reflections at Copper Ridge no longer
13 had control. They no longer met the definition of
14 an owner/operator. They don't own the land, they
15 don't lease the land, they don't operate the land,
16 they don't have any control over the land, and
17 they don't supervise anything that's going on on
18 that land.

19 It is also important to note that the
20 Hearing Examiner provided evidence in her order on
21 Pages 34 and 35. She cited to Exhibit Y, and she
22 said, "Copper Ridge and Reflections at Copper
23 Ridge did provide evidence that they did not own
24 or at least some of the lots on which DEQ noted a
25 lack of BMP's," end quote, and, quote, "It is

1 entirely unclear to the Hearing Examiner whether
2 or not BMP's ever could be put in place based on
3 Copper Ridge and Reflections at Copper Ridge's
4 ownership access." So recognizing that Copper
5 Ridge and Reflections at Copper Ridge have no
6 control over those individual lots.

7 Even if you look at the order on summary
8 judgment, the Hearing Examiner based his decision
9 on some facts and assumptions. Even if you take
10 all of those facts and assumptions as true, none
11 of those add up to support a conclusion that
12 Copper Ridge and Reflections at Copper Ridge owned
13 or operated any point source within the
14 subdivisions.

15 Now, DEQ has argued, and in their
16 response brief, they point to a couple points in
17 the transcript that they point to as proof that
18 Copper Ridge and Reflections at Copper Ridge owned
19 100 percent of the property.

20 But it is important to go back to the
21 transcript and read those questions, because those
22 questions were asking Mr. Lees about the property
23 at the time it was developed or before it was
24 developed. And he says, "Yes, as we developed our
25 property, at the time we're developing, we own it

1 100 percent." That's what he said.

2 And he's right. At the time that they
3 developed it, at the time they put in the roads
4 and the utilities, they owned 100 percent of that
5 property, and they had the proper construction
6 permits. And then later on in that part of the
7 transcript he says they subdivided, "and then we
8 start selling lots." Once they sell those lots,
9 they no longer have control over those lots.

10 This is a very important point because
11 if this Board wants to affirm this order,
12 essentially what you're saying is that a private
13 corporation that is no longer connected to a piece
14 of property must somehow control what happens on
15 that property. The private corporation can't do
16 that unless you also delegate some regulatory
17 authority to that private corporation.

18 And I don't think the Department or the
19 Board are willing to do that, and in fact, there
20 is no basis for that in the law or the rule.

21 Copper Ridge and Reflections at Copper
22 Ridge clearly did not own or operate the
23 individual lots where the home building was
24 occurring. There's testimony that says that's not
25 their deal. They develop it and they sell it off

1 and let somebody else build the houses.

2 We've also cited to a trespass case and
3 a subdivision case that raised concerns for us.
4 If this Board affirms the order and says that the
5 subdeveloper after they've sold the property has
6 to go back and do things on that land, they can't
7 without causing a trespass and creating a claim of
8 action that the landowner would have against the
9 subdivision. That can't be possible. It can't be
10 right.

11 BOARD MEMBER TWEETEN: Madam Chair, this
12 is Chris. May I interpose a question at this
13 point?

14 CHAIR DEVENY: Go ahead, Chris.

15 BOARD MEMBER TWEETEN: Because I don't
16 want to -- (inaudible) --

17 Ms. Marquis, your argument suggests that
18 once the property passes out of the hands of the
19 developer and the lot is sold to the new owner who
20 proposes to build, then any adverse effects such
21 as stormwater runoff from that particular parcel
22 are beyond the ability of DEQ to regulate; is that
23 what you're saying?

24 MS. MARQUIS: I'm saying that it's not
25 something that the developer can regulate because

1 the developer no longer has control over that
2 piece of property, and the development --

3 BOARD MEMBER TWEETEN: I understand
4 that. I'll get to that in a second. But just
5 respond to my question. Does DEQ have the
6 authority to take any action with respect to the
7 purchaser?

8 MS. MARQUIS: If DEQ finds that the
9 purchaser has discharged without a permit, I
10 believe that's the same violation, and I don't
11 know why they couldn't cite the individual lot
12 owner for that violation, instead of citing my
13 client who no longer owns that property.

14 BOARD MEMBER TWEETEN: Okay. So my
15 second question then is: Would it not be possible
16 for the developer in conveying the lot to the new
17 owner to include in that conveyance some sort of
18 covenant on the part of the new owner to allow the
19 developer to supervise to assure that there aren't
20 any violations of the permits that have been
21 issued with respect to the subdivision regarding,
22 say, stormwater runoff?

23 MS. MARQUIS: Madam Chair, Board Member
24 Tweeten. The Subdivision Act is fairly clear on
25 the responsibilities between the developer and the

1 individual lot purchasers, and the Subdivision Act
2 requires that they inform the individual lot owner
3 where the stormwater system is located. If there
4 are covenants, conditions, or requirements, they
5 also inform them of those.

6 But at the point that the property is
7 purchased by a third party, those requirements
8 become requirements on that third party. It is no
9 longer the developer's requirement to comply with
10 those. And that's what the case of Eastgate
11 Village Water and Sewer Association versus Davis
12 stands for. It says once you purchase property
13 that has conditions and terms and requirements on
14 it, it is the property owner's responsibility to
15 comply with those. You can't hold the developer
16 responsible for those.

17 BOARD MEMBER TWEETEN: So as far as
18 you're concerned then, there would be no reason
19 why DEQ could not, in the event you prevail in
20 this matter, DEQ could not turn around and cite
21 the property owners for violations.

22 MS. MARQUIS: I don't know why the
23 violations that were cited in this case couldn't
24 have also been cited against an individual
25 property owner. That's true. The violations were

1 for discharging without a permit -- that can be
2 charged against an individual -- and for placement
3 of waste where they may cause pollution. Those
4 are the two main violations connected to this
5 storm event, and those could be charged against an
6 individual landowner.

7 And let's not forget also the important
8 piece here is that the stormwater system in the
9 subdivisions is connected to the City of Billings
10 stormwater system, and so it is not like there
11 isn't another public entity involved that couldn't
12 regulate the individual lot owners. In fact, it
13 was the City of Billings that originally voiced
14 concerns to the Department.

15 So to the extent that the Department
16 would want to delegate or have another public
17 entity involved in regulating, the City of
18 Billings is already there, and it is already
19 connected to their system.

20 BOARD MEMBER TWEETEN: I see. Thank
21 you.

22 CHAIR DEVENY: Ms. Marquis, could you
23 wrap up your oral argument on this within the next
24 couple minutes.

25 MS. MARQUIS: Yes, certainly, Madam

1 Chair, Board members.

2 Board Member Tweeten went to my next
3 point exactly. That was a great segue. And I
4 just want to close with this, and reiterate that
5 if the Board affirms this order, what you're
6 saying is that a private corporation that does not
7 own lease, operate, or control the source of the
8 discharge must somehow control that discharge.

9 But what regulatory authority does that
10 private corporation have, and what regulatory
11 authority will you delegate to that private
12 corporation to enforce that requirement? That's a
13 scenario that the Montana Water Quality Act does
14 not support and cannot support. The subdivisions
15 are not the owners or operators after they've sold
16 the lots. Thank you.

17 CHAIR DEVENY: Thank you, Ms. Marquis.
18 I'd like to ask Ms. Bowers to present DEQ's oral
19 argument, and again, we'll give you ten minutes,
20 and probably time for a little questioning.

21 MS. BOWERS: Madam Chair, members of the
22 Board. I think as Ms. Marquis pointed out, there
23 are areas where we agree. We agree on what the
24 definition of owner/operator is, and that that's a
25 person who owns, leases, operates, or controls a

1 point source.

2 In the case of construction, a point
3 source is created when the developer opens up the
4 land and creates a conduit for stormwater to run
5 towards waters of the State, and that discharge
6 must be controlled by a permit.

7 I think something that is missed in
8 Copper Ridge's arguments are that they did
9 maintain some control here. They were responsible
10 for the original development.

11 They, as they admit, they owned 100
12 percent of the property before they initiated the
13 development. It was all agricultural land. So
14 they went in, and they planned roads, they planned
15 the lots for residential home building, they
16 installed infrastructure including storm sewer
17 infrastructure, and they did get permits for the
18 initial road building and installation of
19 utilities.

20 Those permits were issued to contractors
21 who signed as owners or operators because they
22 were in control of their discharges, and they
23 filed with the DEQ notices of termination. DEQ
24 terminated those permits. And then Copper Ridge
25 began to sell lots. But what they didn't do is

1 they didn't plan for stormwater permitting as the
2 property developed and lots were sold.

3 DEQ does not go out and tell people how
4 to permit their development. There are many
5 options for doing it. Copper Ridge and
6 Reflections could have transferred the permit that
7 their road builders held. They could have
8 extended that permit to cover the residential
9 lots, and then transferred it to home builders,
10 either individually, or a home builder who could
11 be in charge or oversee the construction, and make
12 sure that the stormwater pollution prevention plan
13 was complied with.

14 But the problem is Copper Ridge and
15 Reflections did nothing to ensure that the site
16 was permitted, that all phases of the development
17 was permitted, or that there was at least a plan
18 to permit the site.

19 So I think the argument that they are
20 just no longer connected to lots when a home
21 builder comes in and starts building. Maybe just
22 on pure ownership, title, ownership of the
23 property, they have an argument there, but they
24 had to have a plan for permitting the construction
25 activity.

1 Also I think the trespass argument is a
2 little over blown, because many BMP's can occur in
3 the right-of-way to protect the storm sewer
4 system. There are many BMP's that occur at curb
5 side or around the storm drain to control
6 discharges to that system.

7 Also Copper Ridge and Reflections
8 provided no evidence in this hearing or in
9 briefing that they ever asked a lot owner to
10 access the lot to install BMP's. There is
11 absolutely no evidence that they asked and were
12 denied, and it was just impossible for them to do.

13 To respond to Board Member Tweeten's
14 questions, yes, DEQ could regulate individual home
15 builders. The problem here is there was no
16 permit. There was nothing. There has to be some
17 sort of plan by the original owner/operator, the
18 person in control of designing a subdivision,
19 specifications, modification of specifications. I
20 mean all of those things evidence control.

21 And I think that's in part what the
22 Hearing Examiner in his order on summary judgment
23 pointed to, was that Copper Ridge and Reflections
24 did have some control over the original
25 development, and that they were proposing too

1 narrow a definition of owner to just the person
2 who owns the property.

3 And additionally, the Hearing Examiner
4 on orders for summary judgment also was persuaded
5 by the fact that when Copper Ridge and Reflections
6 did get their notices under the general permit for
7 stormwater -- I'm sorry -- under the general
8 permit when they submitted their NOI's and did
9 permit the sites, they signed as owner/operators
10 of the development. I think the Hearing Examiner
11 was somewhat persuaded by that evidence that they
12 did eventually permit the sites as the
13 owner/operator.

14 Unless there are questions, I don't have
15 anything else.

16 CHAIR DEVENY: Are there questions by
17 Board members of Ms. Bowers?

18 (No response)

19 CHAIR DEVENY: Any further questions by
20 Board members of either of the parties?

21 BOARD MEMBER TWEETEN: Madam Chair, this
22 is Chris. I guess I need to connect the dots here
23 a little bit better, and I'm not familiar enough
24 with the record to do this, so I'll ask Counsel to
25 enlighten me.

1 Is there any way to segregate the
2 stormwater runoff between those properties that
3 continue to be owned by the developer on one hand,
4 and those properties that have been sold to
5 private owners on the other?

6 MS. BOWERS: Madam Chair, members of the
7 Board, and Board Member Tweeten, that's a really
8 good question.

9 The construction activity that's being
10 regulated under general permit for stormwater
11 construction, it's really the disturbance to land
12 that's being regulated, and it is possible to
13 stabilize certain portions of a development and
14 then terminate the permit that covers that portion
15 of the development, and then permit the
16 development in phases, which I think is what most
17 developers do, so that --

18 And I think I understand your question
19 correctly, so that you're not just -- you don't
20 have the site that's opened up, and then people
21 coming in doing various activities, and maybe
22 causing more disturbance that is no longer subject
23 to a permit.

24 MS. MARQUIS: Can I respond if you're
25 done?

1 BOARD MEMBER TWEETEN: Let me just
2 follow up briefly before you do, Ms. Marquis, if
3 you would indulge me.

4 So I'm assuming that at some point, the
5 infrastructure for the subdivision is connected
6 into the City of Billings' stormwater system,
7 whatever their storm sewer system is that carries
8 off stormwater; am I correct in that assumption?

9 MS. BOWERS: That's correct, and in this
10 case, the subdivisions were connected to the MS4,
11 the municipal separate storm sewer system. So
12 yes, that's true.

13 BOARD MEMBER TWEETEN: That was operated
14 under a separate permit that was taken out by the
15 City of Billings, correct?

16 MS. BOWERS: That's correct.

17 BOARD MEMBER TWEETEN: And in this case,
18 the Department I gather alleges that there was
19 some stormwater discharge from this property, or
20 these properties I guess, that discharged into
21 Montana waters without going through that City of
22 Billings storm sewage system; is that correct?

23 MS. BOWERS: That's correct. Actually
24 there were discharges that both flowed over land
25 and went directly to waters of the State, and

1 there were discharges that went to the MS4.

2 BOARD MEMBER TWEETEN: And I would
3 assume that any discharges that went into the City
4 of Billings system would not be a violation of any
5 permit; is that correct?

6 MS. BOWERS: No, that's not correct.
7 The owner/operator of a construction site has to
8 have a permit. They can't just discharge
9 uncontrolled stormwater discharges directly to the
10 MS4. So they have to have BMP's in place that
11 control those discharges. That's the treatment.
12 That's --

13 BOARD MEMBER TWEETEN: Presumably the
14 owners, the individual owners of lots that had
15 been purchased are entitled to rely on the City of
16 Billings stormwater discharge system, correct?

17 MS. BOWERS: You mean after they're
18 fully developed or --

19 BOARD MEMBER TWEETEN: No, I mean after
20 they're purchased, after a private owner takes
21 ownership of a lot. Any discharges from that
22 property, are they still covered by the
23 construction permit, or are they subject to the
24 City of Billings permit for their stormwater
25 system?

1 MS. BOWERS: Those discharges should be
2 covered by a construction permit until they're
3 stabilized, and the Department issues a notice of
4 termination.

5 BOARD MEMBER TWEETEN: So by stabilize,
6 you would mean that the lot had been sodded so
7 that the top soil would no longer run off with the
8 rain water, for example; would that be right?

9 MS. BOWERS: Yes. For example, they
10 have to grow some grass or something on -- they
11 can't have bare ground anymore.

12 BOARD MEMBER TWEETEN: They have to pave
13 those areas that they're going to pave and so
14 forth.

15 MS. BOWERS: Correct.

16 BOARD MEMBER TWEETEN: The Department's
17 argument is that until those activities are
18 undertaken, the construction permit still
19 controls, even though the land has been passed
20 into private ownership?

21 MS. BOWERS: That's right. There should
22 still be a construction permit in place to control
23 discharges from lots that are just exposed bare
24 ground, or lots that have construction debris, or
25 fill that's been stockpiled that shouldn't be just

1 exposed to stormwater without some protection.

2 BOARD MEMBER TWEETEN: What exactly did
3 the permit in this case, if anything, with regard
4 to this question?

5 MS. BOWERS: At the time of the
6 violations, there was no permit in place.

7 BOARD MEMBER TWEETEN: So how did that
8 -- Did the permit expire of its own force, or did
9 DEQ issue some sort of a document indicating that
10 the permit had been terminated?

11 MS. BOWERS: The prior permits that were
12 issued were for road building activity and utility
13 installation, and those permits were terminated,
14 and they were terminated because DEQ received a
15 notice of termination.

16 BOARD MEMBER TWEETEN: So did the
17 developers submit that notice of termination?

18 MS. BOWERS: Yes, the permittees which
19 were road builders under contract with Copper
20 Ridge and Reflections.

21 BOARD MEMBER TWEETEN: So once that
22 happened, there was no permit in place --

23 MS. BOWERS: That's right.

24 BOARD MEMBER TWEETEN: -- with respect
25 to stormwater.

1 MS. BOWERS: That's correct.

2 BOARD MEMBER TWEETEN: Has DEQ alleged
3 that that's a violation in this case?

4 MS. BOWERS: Yes. That's Violation 2,
5 discharging stormwater without a permit.

6 BOARD MEMBER TWEETEN: Ms. Marquis, can
7 you respond to this subject for me, please. I'm
8 just trying to figure out how this works.

9 MS. MARQUIS: Sure.

10 BOARD MEMBER TWEETEN: The Department
11 seems to take the position that your clients were
12 responsible for maintaining a stormwater discharge
13 permit on this property, I guess theoretically
14 until all of the individually purchased lots were
15 stabilized in some way, either through the raising
16 of a grass lawn, or pavement, or some combination
17 of those two. Can you address that allegation for
18 me, please.

19 MS. MARQUIS: Certainly. Madam Chair,
20 Board Member Tweeten. The Department has said
21 that the construction activity is a regulated
22 point source, and that it must be permitted; and
23 that may be true, but because it must be covered,
24 it does not mean that DEQ can just look to
25 essentially the biggest target in the

1 neighborhood, or the sign at the entrance to the
2 neighborhood and say, "Tag. You're it. You need
3 to get the coverage."

4 No, point source in this case is the
5 disturbance that's caused by the construction
6 activity.

7 And you had asked about segregating lots
8 to ones that were developed and were not
9 developed. There is really no need to do that,
10 because in this case the proof is that my client's
11 disturbances were completely stabilized, and
12 that's the only condition, that that condition had
13 to have been met for their permit to be
14 terminated.

15 So they had stabilized their
16 construction activity. Any other lots in the
17 subdivision that they may have owned were not
18 under construction. There is evidence in the
19 record that says they don't do the home building.
20 They leave that to someone else.

21 So whatever lots they owned had either
22 never been disturbed, or if they had been
23 disturbed due to any construction activity that my
24 client may have done, they had been completely
25 stabilized to the satisfaction of the Department,

1 and that permit had been terminated.

2 That's important because what it says to
3 my client is that, "Okay. You're good. Keep
4 going. You're good." It is obvious to everybody
5 that a subdivision is there to build individual
6 houses. Everybody knows that that's the next
7 step. And the Department never said, "Okay. So
8 where is your individual home building permit?"

9 The Department didn't do that, and they
10 terminated those development permits in December
11 of 2012, and they waited almost a full year until
12 there was a big storm, and they saw the impacts of
13 that storm, and that's the first time they came to
14 my client and said, "Well, look. You need a
15 permit for home building activities."

16 And you can imagine my client gets a
17 violation letter in the mail that says, "You're in
18 violation, and you need to do X, Y, and Z to come
19 into compliance. You're in big trouble"
20 essentially. And so my client does X, Y, and Z,
21 fills out the paperwork, submits the NOI, and gets
22 the permit.

23 And now the Department and this Hearing
24 Examiner want to use that compliance action that
25 my client took, because the Department said they

1 had to, now they want to use that as the hook to
2 say that they're the owner and operator. Well,
3 that can't be right, because that's a later action
4 that my client took to come into compliance at the
5 direction of the Department. There is simply no
6 way that those later signed NOI's indicate that my
7 client is the owner or operator.

8 It is also important to know that while
9 we're talking about discharges, there really is no
10 evidence in the record of an observed discharge,
11 and it can't be the case because by all
12 admissions, everybody says the storm occurred on
13 September 7th, and the Department did not do their
14 inspection until two days later. The water was
15 gone. There was no discharge that was directly
16 observed. So that's an important point to keep in
17 mind.

18 And again, the arguments about whether
19 the stormwater needed to continue to be controlled
20 goes to the construction activity, and it goes to
21 the owner/operator issue, because if my client is
22 not doing the construction activity, they have no
23 control over it. They don't own it or operate it
24 or control it.

25 They've done everything that they're

1 supposed to do under the subdivision laws.
2 They've sold the property. They can't go on the
3 property without trespassing. And the Department
4 has said here today, well, they could have asked
5 to go on the property and install some BMP's.

6 But okay, so let's play that
7 hypothetical out, and say they go and they ask if
8 they can go on the property and install some
9 BMP's; but as soon as they leave, whoever owns
10 this property tears out the BMP's and does
11 whatever they want with them. Well, now what
12 recourse does my client have?

13 And this goes to the regulatory
14 authority. They have no authority to require the
15 individual homeowners to do anything about
16 stormwater. The minute they sold the property,
17 whatever stormwater requirements there are became
18 the burden of the individual lot owner, not my
19 client.

20 And you had asked about the violation
21 that was charged, Board Member Tweeten, and there
22 was a violation that was charged for conducting
23 construction activities prior to submitting an
24 NOI.

25 That was the first violation the

1 Department charged, and that violation was
2 essentially dismissed by the previous Hearing
3 Examiner. Because of those notice violations that
4 we talked about earlier, that violation didn't
5 meet the threshold for a violation that the
6 Department can seek a penalty for without
7 completing the notice provisions.

8 CHAIR DEVENY: Ms. Marquis, I'd like us
9 to stick to the owner/operator topic here while
10 we're at it.

11 MS. MARQUIS: Certainly. I think there
12 was some confusion about whether the Department
13 had charged a violation for an unpermitted
14 discharge, if they charged a violation for
15 construction activity without a permit. I just
16 wanted to make clear that they charged both of
17 them, and one of those was already dismissed.

18 CHAIR DEVENY: I have some questions of
19 DEQ, Chris, unless you had further questions of
20 Ms. Marquis.

21 BOARD MEMBER TWEETEN: No, Madam Chair.
22 Thank you.

23 CHAIR DEVENY: Ms. Bowers, Ms. Marquis
24 alleged that there were no discharges coming from
25 the property that was owned by Copper Ridge, that

1 it was all from the property that was owned by the
2 other property owners, not in the context of
3 owner/operators, but of landowner owner/operators.
4 Is that accurate in your --

5 MS. BOWERS: Madam Chair, members of the
6 Board. That really gets to the type of activity
7 that's regulated under the general permit for
8 stormwater associated with construction activity.
9 And it regulates all activities, not just home
10 building. It is clearing, grading, excavation,
11 any activity that results in a disturbance that's
12 equal to or greater than one acre of total land
13 area.

14 But for purposes of the rules, it also
15 applies to activities, construction activities
16 that may be less than one acre if they're part of
17 what's known as a larger common plan of
18 development or sale.

19 And that's what we had here. Copper
20 Ridge and Reflections were the initial developer
21 of a larger common plan of development or sale.

22 And this in part addresses Ms. Marquis's
23 allegation that DEQ just went after the biggest
24 target. DEQ went after the entity that they
25 believed was the owner or operator of the larger

1 common plan of development or sale, and that was
2 based on signs that the inspector saw at the
3 subdivision that said "Copper Ridge," and showed
4 all of the lots laid out, and also some
5 advertising by the company.

6 And the reason for that definition of
7 larger common plan of development or sale is so
8 that you can't just divide up a big development
9 into little lots, and avoid permitting
10 obligations, because the little lots are obviously
11 less than an acre, and the whole subdivision could
12 avoid permitting if that were the activity
13 regulated.

14 CHAIR DEVENY: And another question, and
15 this is: In the hypothetical development of the
16 subdivision, you have subdivision rules that
17 apply, and you have the permits that are required
18 under the Subdivision Act, and then when they're
19 terminated, the stormwater permit comes into
20 effect under the water quality regulations; am I
21 getting that sort of straight? I guess they're
22 related.

23 MS. BOWERS: There are a whole host of
24 permits that a developer has to take out, and the
25 stormwater permit is just one.

1 CHAIR DEVENY: So I guess what my
2 question is is: As a subdivision is being
3 developed, and they reach a point where they have
4 done the Phase 1 development, and they're ready to
5 sell the lots and move in, is it typical that a
6 subdivision developer would then move into getting
7 those next set of permits?

8 MS. BOWERS: Oh, you mean -- I'm just
9 trying to understand your question, Madam Chair.
10 Are you concerned with the fact that the developer
11 got a permit that just covered roads and
12 utilities, and then went into the home building
13 phase, and -- Are you asking if typically they
14 would have gotten a permit for that phase, a
15 separate permit?

16 CHAIR DEVENY: Well, I guess I need
17 clarification on why the original permit was
18 terminated, and at that point why another one
19 wasn't sought.

20 MS. BOWERS: Well, for DEQ's part, the
21 original permits were terminated because the
22 permittee provided a notice of termination, and in
23 that notice of termination, they state that the
24 site is now stable. And so DEQ, in their
25 administration of the permit, they terminate

1 permits where there is stabilization, and no
2 longer a need for a discharge permit.

3 And the problem here was that then that
4 left the rest of the development without a permit
5 because that road building permit was very
6 specific to just the road building activity.
7 There are a lot of ways that the site could have
8 been permitted. The road building permit could
9 have been extended to include the other
10 activities, but it didn't happen.

11 CHAIR DEVENY: Is that typically what
12 would happen? Would the permit be extended, or
13 would people apply for a new permit in that case?

14 MS. BOWERS: There are a lot of ways to
15 permit a site. I have some DEQ people here I
16 could ask, but I think that it's fairly common
17 that the road building permit is extended to
18 include the other activities. Dan Freeland is
19 here, who was the inspector, if you want to ask
20 him a specific --

21 CHAIR DEVENY: Not at this point. I
22 don't want to introduce any new kinds of evidence.

23 Other questions right now of Ms. Bowers
24 while she's here?

25 BOARD MEMBER TWEETEN: Madam Chair, this

1 is Chris. I have one.

2 Ms. Bowers, there has to come some point
3 in time where the developer's responsibility to
4 get and maintain permitting ends; isn't that
5 correct?

6 MS. BOWERS: When the site is fully
7 stable, there is no need for a stormwater permit
8 for construction activity.

9 BOARD MEMBER TWEETEN: So it would be
10 the Department's position then that until every
11 single lot in this development was stabilized, the
12 developer has some obligation to maintain a
13 stormwater discharge permit, correct?

14 MS. BOWERS: If not maintain the permit
15 themselves, transfer the permit to another
16 owner/operator who can maintain control of the
17 site.

18 BOARD MEMBER TWEETEN: Well, who would
19 that be? Who could that potentially be? It seems
20 to me the only potential other party that could be
21 subject to such a permitting requirement could be
22 the purchaser; is that right?

23 MS. BOWERS: The permit could be
24 transferred to home builders, who would be
25 purchasers.

1 BOARD MEMBER TWEETEN: Where do the
2 statutes or regulations address this particular
3 question of the hand-off of the responsibility for
4 stormwater permitting?

5 MS. BOWERS: There are provisions for
6 permit transfer in Administrative Rules of Montana
7 Title 17 Chapter 30 Subchapter (13); and
8 Subchapter (11) pertains more to general permits
9 and stormwater discharge permits.

10 BOARD MEMBER TWEETEN: I guess my
11 question, though, is: Is there somewhere in all
12 of these regulations in which it is clearly stated
13 that somebody has to have responsibility for
14 stormwater permitting from one end of the process
15 to the other, or is it solely a matter of
16 determining who the owner/operator is?

17 MS. BOWERS: Well, let me just step back
18 a minute. There is a requirement to cover a
19 discharge of a pollutant, and so as long as there
20 is an addition of pollutants from a point source
21 to State waters, there has to be a permit to cover
22 that discharge.

23 BOARD MEMBER TWEETEN: Right, and then
24 there is an over-arching permit held by the City
25 of Billings that deals with the subject of

1 stormwater runoff, and it's my understanding that
2 the City's permit must have necessarily been
3 extended to this subdivision at the time that the
4 subdivision hooked on to the City system, correct?

5 MS. BOWERS: Well, the MS4 permit is
6 little bit different. I mean the City does have
7 an infrastructure through which stormwater flows,
8 and then it flows eventually to State water, and
9 the City is also subject to some best management
10 practices and some inspection requirements in
11 order to comply with their permit and control
12 stormwater discharges to their system.

13 The stormwater discharges that are
14 associated with construction activity are subject
15 to separate controls and separate permitting; and
16 the City, within their MS4 they also have some
17 enforcement authority, and can require permit
18 coverage.

19 BOARD MEMBER TWEETEN: But is it not
20 correct that the construction activity with
21 respect to which the developer had been permitted
22 -- that would be road building and so forth --
23 that construction activity was already over,
24 wasn't it?

25 MS. BOWERS: Yes, it was.

1 BOARD MEMBER TWEETEN: Their permit had
2 been terminated for that purpose, so one can only
3 assume that that construction activity was over.

4 Now, I would assume there is no gap with
5 respect to stormwater coverage, so any discharges
6 that happened from water running down the street
7 and into the storm sewers and into the City of
8 Billings system is not the subject of any of these
9 complaints against this developer, correct?

10 MS. BOWERS: Well, stormwater that was
11 contributed by construction activity within the
12 subdivisions that flowed onto streets, sidewalks,
13 and into the storm drain without controls is part
14 of this enforcement action.

15 MS. CLERGET: Madam Chair, may I
16 interrupt here for a second. And Chris, I'm going
17 to point you to a place in the summary judgment
18 order that I think offers you the analysis you
19 were looking for of the applicable ARM and
20 statutes, and that's Page 13 to 14 in the summary
21 judgment order. That's in your packet at page 235
22 to 236. And that walks you through the statutory
23 analysis, I think what you're struggling to find.

24 BOARD MEMBER TWEETEN: Right. Okay. So
25 I don't want to ask any more questions for now and

1 let other people have a chance.

2 BOARD MEMBER BUSBY: This is Dexter.

3 I've got one quick easy question.

4 CHAIR DEVENY: Go ahead, Dexter.

5 BOARD MEMBER BUSBY: On these lots that
6 have been sold and there is construction activity,
7 is that not covered under the building permit for
8 those lots, the runoff?

9 MS. BOWERS: The stormwater discharges,
10 no, they're not covered under building permits.

11 BOARD MEMBER BUSBY: Interesting,
12 because the ones I have had had a clause in there
13 that you had to control runoff.

14 MS. BOWERS: This is Kirsten Bowers,
15 Member Busby. And I think some local governments
16 are adding that language to building permits.

17 BOARD MEMBER BUSBY: Because I'm not
18 sure that isn't where the responsibility lies for
19 the individual lots that have been sold.

20 MS. BOWERS: This is Kirsten Bowers
21 again. One concern there is those lots are
22 smaller than an acre, and so the construction
23 activity that's regulated under stormwater
24 permitting is activity that disturbs more than one
25 acre, or a smaller area if it is part of a larger

1 common plan of development or sale.

2 BOARD MEMBER BUSBY: I don't disagree
3 with what you just said, but the construction on
4 an individual lot which is under one acre, which
5 would not fall under State control, falls under
6 the City of Billings control in this case.

7 MS. BOWERS: Okay. That's kind of
8 beyond my knowledge.

9 MS. MARQUIS: Can I respond to that for
10 one minute?

11 CHAIR DEVENY: No, I want to continue
12 with Ms. Bowers here for a second. Hold your
13 point. I guess my question hasn't yet been
14 answered as to: Does DEQ have evidence that the
15 wastes, stormwater wastes, coming off into the
16 streets or into the sidewalks that were observed
17 did not come solely, or did or did not come solely
18 off of properties that were owned by individuals,
19 or that were still undeveloped lots owned by
20 Copper Ridge developers?

21 MS. BOWERS: Madam Chair, members of the
22 Board. The answer to your question is the actual
23 point of discharge is not pinpointed, and I'm
24 going to argue that it doesn't have to be, because
25 it is the whole common plan, it is the whole

1 development that's subject to permitting.

2 Even if stormwater ran upgradient from a
3 totally different development onto the Copper
4 Ridge and Reflections at Copper Ridge development,
5 they have to have a permit because they have to
6 control that stormwater. It can't just flow
7 without any control over their stockpiles, over
8 their concrete washout area into the storm sewer
9 system, or directly into waters of the State.
10 They have to have the controls in place, and they
11 did not have those.

12 CHAIR DEVENY: Further questions of Ms.
13 Bowers?

14 (No response)

15 CHAIR DEVENY: Further questions of Ms.
16 Marquis?

17 (No response)

18 CHAIR DEVENY: Ms. Marquis, I'll give
19 you an opportunity to answer Dexter's question,
20 but I'd like you to simply focus on that.

21 MS. MARQUIS: Thank you, Madam Chair,
22 Board Member Busby. You've mentioned the City,
23 and I think that is an important consideration
24 here, but it is also important to note that there
25 isn't any evidence before us of what the City does

1 and does not regulate. So to say that the City
2 can't regulate something is not a question that
3 should properly be before the Board right now.

4 And the other issue is that the entire
5 discussion of construction activities on less than
6 an acre, that's the necessary level at which the
7 Department can require someone to get a permit.
8 It is really important here, and this is what I
9 was trying to explain earlier.

10 To focus on the violations that are at
11 issue, the violations that are at issue are a
12 discharge without a permit, so we have to meet the
13 elements of that statute, 75-5-605. We have to
14 prove that there was a discharge, and that there
15 was no permit for it, not that somebody needed a
16 permit and didn't have a permit. We have to prove
17 that a discharge happened, and that there was no
18 permit.

19 Ms. Bowers argued that the subdivision
20 didn't have any controls in place, and again, this
21 goes to the same thing. The violation is not that
22 there weren't any controls in place. The
23 violation cited was that there was a discharge,
24 and that there was a placement of waste.

25 Those are the violations that have to be

1 proven, and you can't prove those without showing
2 who was responsible for that discharge, and who
3 was responsible for the placement of waste, and
4 our position is that the evidence is not
5 sufficient in the record to prove that our client
6 discharged or placed any pollution.

7 And we have additional argument. I know
8 there are other issues before the Board that we
9 would like to argue, particularly the burden of
10 proof.

11 CHAIR DEVENY: We'll get to that later.
12 We need to decide on the owner/operator before we
13 proceed.

14 I'd like to point Board members to the
15 order on summary judgment where Hearing Officer
16 Haladay wrote that, "Copper Ridge and Reflections
17 admit that they entered into at least one contract
18 that required all excess material from pipe and
19 bedding displacement be left on site."

20 Therefore, he concludes that, "Not only
21 did Copper Ridge and Reflections have supervision
22 and control over the actions of third parties,
23 they acted on their ability to instruct others how
24 to engage in stockpiling of materials, which is an
25 act expressly contained in definition of

1 construction activities."

2 "And this puts Copper Ridge and
3 Reflections in a position of either control or
4 supervision with regard to the term of sale of any
5 of the individual lots for construction of
6 residential homes, and any argument to the
7 contrary ignores the common sense and practical
8 reality of the development of a residential
9 subdivision."

10 "The mere fact that neither Copper Ridge
11 nor Reflections exercised supervision or control
12 over the contractual terms of the sale of land
13 does not change the fact that they had the power
14 to supervise or control land with regard to the
15 stormwater discharges."

16 So I think my read of that is that
17 Hearings Officer Haladay felt that Copper Ridge
18 was aware that they could, and actually did in
19 some cases have authority and control over the
20 construction activities.

21 I'm wondering if this might be a good
22 place for us to stop and have lunch, and I think
23 we'll do that. We'll go ahead and break for a
24 half hour, and why don't we come back at 1:00.
25 Are the Board members still on line?

1 BOARD MEMBER TWEETEN: Yes, Madam Chair,
2 this is Chris. I'm in a bit of bind here. I'm
3 about to go get on a bus, and travel up to Mission
4 Valley. And I hope I can get back on in a half
5 hour, but I'm not able to make a guarantee that I
6 can. It all depends on my ability to get an
7 internet signal. So I will get back on if I can.

8 CHAIR DEVENY: Chris, without you, we
9 don't have a quorum.

10 BOARD MEMBER TWEETEN: I understand
11 that, but I don't have any -- I'm pulled in two
12 different directions here, and I have to do both.

13 CHAIR DEVENY: There is one more option
14 that the Board has, if we could ask the parties.
15 John Dearment is here, but has asked to be
16 recused. If the parties would agree to have him
17 hear, participate in hearing the oral argument and
18 making the decision, we would have a quorum if
19 Chris is not able to come on. Do the parties have
20 a --

21 BOARD MEMBER TWEETEN: Madam Chair, I
22 don't know what your thoughts are about this
23 matter, but I have a hard time thinking that we
24 will have thoroughly sorted this matter out enough
25 to make a final decision this afternoon. There

1 are lots of issues that we just spent virtually an
2 hour on that we need to sort out, and then there
3 are other relatively thorny issues to sort out as
4 well.

5 If you wanted to continue the hearing
6 and hear argument on all of these matters, and
7 then carry over the decision until our next
8 meeting, you certainly could do that, and then the
9 absence of a quorum wouldn't really matter because
10 you wouldn't be taking final action.

11 So if I'm not able to get on, you always
12 have the option of carrying this matter over to
13 the next meeting.

14 CHAIR DEVENY: I guess that is an
15 option, according to Sarah. But I would like the
16 parties to respond to my request about having Mr.
17 Dearment on this case so we are able to move along
18 today.

19 MS. MARQUIS: Madam Chair, members of
20 the Board, it is our understanding that Mr.
21 Dearment was the Division Administrator at the
22 time that this enforcement action was initiated,
23 so we are not willing to waive our objection.

24 CHAIR DEVENY: Okay. So why don't we
25 take a break and see if you can get back on,

1 Chris, and we'll make a decision at 1:00. Does
2 that sound all right, Chris?

3 (No response)

4 CHAIR DEVENY: Let's take a break for
5 lunch.

6 (Lunch recess taken)

7 (Board Member Tweeten not present)

8 CHAIR DEVENY: Let's reconvene.
9 Lindsay, can you take roll call and see who all
10 with us.

11 MS. FORD: Chris Deveny.

12 CHAIR DEVENY: Here.

13 MS. FORD: John Dearment.

14 BOARD MEMBER DEARMENT: Here.

15 MS. FORD: Dexter Busby.

16 BOARD MEMBER BUSBY: I'm here.

17 MS. FORD: Tim Warner.

18 BOARD MEMBER WARNER: Tim Warner is
19 here.

20 MS. FORD: Chris Tweeten.

21 (No response)

22 MS. FORD: Chris Tweeten.

23 (No response)

24 MS. FORD: At this time, we do not have
25 a quorum. It does look like there is someone else

1 on the line. There's three people on right now.
2 Is there someone else on the line?

3 (No response)

4 MS. FORD: Anyone else there?

5 (No response)

6 CHAIR DEVENY: So would the parties be
7 amenable to us continuing this without a quorum?

8 MS. MARQUIS: Madam Chair, members of
9 the Board, of course this causes a lot of
10 frustration for my client and I. These trips to
11 Helena are fairly expensive, and we had
12 anticipated to resolve this in one trip, and it
13 seems that now regardless of what we do, we will
14 be making two trips.

15 So our preference -- and we've talked to
16 the State and to Ms. Clerget about this -- would
17 be to continue this, and perhaps provide
18 additional briefing on the owner/operator issue,
19 and then resume in February with a new Board who
20 has access to the transcript from this hearing,
21 and we could argue again at the next Board
22 meeting; or perhaps a special Board meeting.

23 Does that characterize what we've talked
24 about fairly?

25 MS. BOWERS: Yes. Madam Chair, members

1 of the Board, DEQ is in agreement that we would
2 prefer to proceed with a quorum, and either at the
3 February meeting or a special meeting.

4 CHAIR DEVENY: So you don't want to us
5 to proceed today with anything?

6 MS. BOWERS: Not with less than a
7 quorum, no.

8 CHAIR DEVENY: Well, I guess we will
9 decide whether to hold a special meeting then or
10 postpone this to February. I don't know that we
11 can set a January date right now. Let's try to
12 pursue a January date if we can find one that will
13 meet all of the schedules of all of the Board
14 members, as well as you folks. If not, we will
15 then move on to the February meeting. And Sarah,
16 I'll ask you to work with Lindsay to coordinate
17 that.

18 MS. CLERGET: Yes. And what is your
19 preference with the additional briefing that the
20 parties requested? Do you want additional
21 briefing on the owner/operator issue, or would you
22 like the special meeting or the next meeting to be
23 based only on the record as it exists in front of
24 the Board now plus the transcript?

25 CHAIR DEVENY: So your additional

1 briefing on the owner/operator, you wanted to
2 continue that without the quorum; did I understand
3 that correctly?

4 MS. BOWERS: Madam Chair, members of the
5 Board, that was one of the stipulations that Ms.
6 Marquis and I discussed in the hall with Sarah is
7 that DEQ and Copper Ridge would propose doing some
8 additional supplemental briefing on just the issue
9 of owner/operator. We could file the brief
10 simultaneously, and then respond simultaneously so
11 it's not a long briefing schedule. If you think
12 would be helpful.

13 CHAIR DEVENY: I think it would be very
14 helpful. I would appreciate that. It seems to be
15 an issue I'm not really clear on, and I really
16 want the Board to be clear when we make a
17 decision. So yes, please do that.

18 MS. CLERGET: Can you allow me to set a
19 deadline for the briefing based on the dates that
20 we reach for the next meeting?

21 CHAIR DEVENY: Yes, please do. Do we
22 need to have a motion?

23 MS. FORD: Madam Chair, I did just get
24 an email from Chris Tweeten that he is on the bus,
25 and it's a bit noisy, but he's hoping he can make

1 it work. Do you want me to see if he's on the
2 line again before we --

3 CHAIR DEVENY: I don't think so. I
4 think there is too much risk that he'll get out of
5 service, and then we'll be kind of stuck where we
6 are now. So I think it is best to quit today
7 while people can still get back home during the
8 light hours. And I apologize to everybody that
9 the Board members weren't able to make it today.
10 We thought they were all able to come.

11 So I would so move then that we ask the
12 parties to submit continued briefs just on the
13 owner/operator issue, and that we postpone and
14 continue this case review, I guess I'll call it,
15 in January, if we can find an amenable date for
16 all parties and the Board members to be hopefully
17 present in person, and to have Sarah work with the
18 parties to set a date for submittal of the
19 additional briefs; is that right?

20 MS. CLERGET: Yes.

21 CHAIR DEVENY: So moved. Could I get a
22 second?

23 BOARD MEMBER WARNER: Second.

24 CHAIR DEVENY: Thank you, Tim. It's
25 been moved and seconded. All those in favor, say

1 aye.

2 (Response)

3 CHAIR DEVENY: Opposed, please say nay.

4 BOARD MEMBER BUSBY: I'm not opposed. I
5 can't hear you guys. I'm getting so much
6 background.

7 CHAIR DEVENY: Basically, Dexter, we're
8 postponing the continuation of this case to either
9 a special day in January or to the next Board
10 meeting in February because we don't have quorum.

11 BOARD MEMBER BUSBY: I'm not opposed to
12 that.

13 CHAIR DEVENY: And we're also having
14 Sarah work with the parties to allow some
15 additional materials to be submitted to the Board
16 on this whole owner/operator issue.

17 BOARD MEMBER BUSBY: Okay.

18 CHAIR DEVENY: Sarah is going to set a
19 date for the parties to do that. That was the
20 motion. So it's been moved and seconded. All
21 those in favor, please signify by saying aye.

22 (Response)

23 CHAIR DEVENY: Motion passes. Thank you
24 everybody.

25 (The proceedings were recessed at 1:08 p.m.)

C E R T I F I C A T E

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STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 70 - pages contain a true
record of the Volume I of the proceedings to the
best of my ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this _____ day of _____, 2018.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2020.

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