

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 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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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR DEVENY: Let's proceed with the
5 Copper Ridge case. Let the minutes reflect that
6 we still have a quorum. And for this case, John
7 Dearment is recused, so it will be four of us
8 Board members that will be making a decision here
9 today.

10 Before we proceed with oral arguments,
11 which is what we're here to hear today, I want to
12 separate these issues because there are a couple
13 things that need to be really settled first.

14 The last time when we were at the
15 hearing, we did settle one of those issues, and
16 that was a motion to strike, and we denied Copper
17 Ridge's request to strike, so we don't need to
18 address that.

19 The next issue, though, that's really
20 key to this case and fundamental is the
21 owner/operator issue, so I'd like us to just take
22 that issue up at this point. And we've had oral
23 argument on that. We've also had additional
24 written arguments submitted by both the parties on
25 the owner/operator.

1 I'd like to give the parties one more
2 opportunity for oral argument on that, but I
3 really want you to limit it to no more than five
4 minutes. So if we could start with that. Do
5 either of you have a preference who goes first?
6 Ms. Bowers?

7 MS. BOWERS: I think as the Appellant,
8 you should go first.

9 MS. MARQUIS: Madam Chair, members of
10 the Board, I'm Vicki Marquis, and I'm here today
11 representing Copper Ridge and Reflections at
12 Copper Ridge. My client Landy Leap is here today.

13 You have received extensive briefing on
14 the issue of owner/operator, and I think through
15 that briefing, it has become clear that the
16 Department and Copper Ridge agree on the
17 definitions that are at issue here, and that an
18 owner/operator must own, lease, operate, control,
19 or supervise a point source.

20 And in this case, we all agree that the
21 point source at issue is the construction
22 activity, that is the actual disturbance of the
23 ground.

24 It is undisputed here that Copper Ridge
25 and Reflections at Copper Ridge did not own,

1 lease, or operate any of the individual lots where
2 the home building was taking place. There is
3 testimony on the record that Copper Ridge and
4 Reflections at Copper Ridge do not engage in home
5 building activities, and that they did not own the
6 individual lots where the construction was
7 occurring at that time.

8 So the question really comes down to
9 whether they controlled or supervised any of that
10 construction activity. Now, the previous Hearing
11 Examiner cited to a contract on this issue. It
12 was a contract between the developer and one of
13 their contractors who was engaged in installing
14 streets and putting in the utilities.

15 This is in our supplemental brief at
16 Pages 13 to 17, and there we explain that we had
17 objected not only to the request for information
18 from the Department, but we objected because that
19 contract did not concern any home building
20 activities. It is undisputed that the home
21 building activities were the source of the
22 violation. That contract had nothing to do with
23 home building activities.

24 The second important point about that
25 contract, is that that contract work was done,

1 wrapped up, complete, and those permits were
2 terminated in 2012, a full nine months prior to
3 the violations that the Department alleges that
4 they found in this case.

5 Now, the Department cites to some EPA
6 guidance in their brief, and I'd like to refer to
7 that quickly, specifically Exhibit 2, Page 3 of
8 the exhibit, and it's EPA guidance, and in there
9 EPA says that in cases like this where there is
10 construction activity in a subdivision, the owner
11 typically refers to the party who owns the
12 structure being built. In this case there were
13 individual homes being built. The developer did
14 not own those structures being built.

15 Additionally, the next paragraph on
16 transferring ownership, the EPA says specifically
17 that unless the developer is still responsible for
18 storm water on these individual lots, which is
19 typically not the case, it is likely that the
20 builder will need to apply for MPDES permit
21 coverage for storm water discharges during home
22 construction.

23 So the EPA says it's the typical case
24 that the developer does not remain liable for
25 those discharges of individual home building.

1 That's the case we have here.

2 Now, the Department goes into a
3 discussion about the larger common plan of
4 development. This is really sort of a red herring
5 here. This tells you when coverage is needed, but
6 it does not tell you who needs the coverage.

7 The Department relies on the Hawaii
8 Dairy Farm case, but that case is really very
9 different than the case in front of you today. In
10 that case, there was one dairy, and they wanted to
11 start out with 699 cows and expand to 2,000 cows,
12 and had all kinds of plans for things they wanted
13 to do on their property. It was one dairy, owned
14 by one owner, one property where they were doing a
15 bunch of different activities.

16 That's not the case here. In this case,
17 we have a subdivision. We have a variety of
18 individual property owners. And again, the
19 property where the construction activity that
20 occurred that the Department alleges caused the
21 violation were the individual lots where homes
22 were being built.

23 It's undisputed that Copper Ridge and
24 Reflections at Copper Ridge did not engage in
25 those home building activities, so this case is

1 nothing like the Hawaii Dairy Farm case cited by
2 the Department.

3 Here in fact in this case, the permit
4 coverage that Copper Ridge and Reflections at
5 Copper Ridge had was only for street building and
6 utility installation. That's an important
7 distinction because in the Hawaii case, the permit
8 coverage that they had was for the entire project.
9 It covered everything that they were going to do
10 at the dairy.

11 That's not the case here. The permit
12 coverage that my client had and maintained was for
13 street building and utility installation, and that
14 was it. There was not a permit for the entire
15 subdivision.

16 That's another important distinction
17 because the Department also provides information
18 from North Dakota and Ohio, and I want to make
19 clear that the attachments to their brief are not
20 laws, they're not rules, they're not even in
21 Montana, they have no precedential value in this
22 matter. We don't know what the laws and rules are
23 in those states. It is not clear.

24 What's clear is that in Montana, the
25 requirement for a permit is the construction

1 activity. That's the point source.

2 Just one more point I'd like to make.

3 The Department refers to the City of Billings, and
4 I think their discussion there highlights the City
5 of Billings' involvement here, and how the City of
6 Billings has enforcement capabilities and
7 responsibilities, unlike my client.

8 If you were to extend the owner/operator
9 to include my client, to hold him liable for
10 events and activities that occur on property he
11 does not own and cannot control, you must also
12 provide him some regulatory authority, so that he
13 can enforce those requirements, because without
14 it, he's left with nothing more than just a plain
15 ask of individual homeowners, with no teeth, no
16 enforcement capabilities whatsoever.

17 Further, the Water Quality Act in
18 Montana does not contemplate that any entity other
19 than a public entity, the Department, or the City
20 of Billings, would have that enforcement
21 capability.

22 That concludes my argument on
23 owner/operator. I'm happy to answer whatever
24 questions you might have.

25 CHAIR DEVENY: Let's hear from the

1 Department, and then we'll open it up to questions
2 from the Board. Ms. Bowers.

3 MS. BOWERS: Madam Chair, members of the
4 Board, I'm Kirsten Bowers representing DEQ in this
5 matter, and sitting at the table with me is Mindy
6 McCarthy. She's the DEQ Compliance, Training, and
7 Technical Assistance Section Supervisor.

8 To address the owner/operator issue,
9 Copper Ridge and Reflections at Copper Ridge are
10 owners/operators of the construction activity at
11 the subdivisions. They admit that they were the
12 original developer; they drew the subdivision
13 boundaries; they developed infrastructure for the
14 subdivision; they hired contractors; they had
15 control over designs and specs; they planned the
16 subdivision.

17 And in their supplemental brief, Copper
18 Ridge and Reflections admit that they were owners
19 of construction activity that was permitted and
20 completed prior to December 2012, but they want
21 you to limit that activity to road building and
22 utilities installation.

23 And that's not the regulated activity.
24 The activity is construction activity, and it
25 includes all earth moving activity. It is not

1 broken out into phases, such as road building and
2 home construction.

3 For purposes of the Water Quality Act
4 and these rules, construction activities include
5 clearing, grading, excavation, stockpiling earth
6 materials, and placement or removal of earth
7 material, performed during construction projects.

8 Copper Ridge and Reflections argue that
9 the Board should segregate their road building and
10 utility installation related construction
11 activities that occurred up to December of 2012
12 from the activities, including home building, that
13 occurred after December 2012, but that is just not
14 how the Water Quality Act and the rules work.

15 Construction activity includes the
16 disturbance of less than one acre if it is part of
17 a larger common plan of development. That's where
18 larger common plan of development or sale comes
19 in. It is not a red herring that DEQ is throwing
20 out.

21 When Copper Ridge and Reflections
22 proposed the subdivision for approval by the City
23 of Billings, they contemplated building, designing
24 and building residential lots and all of the
25 infrastructure that supports the development.

1 The larger common plan of development or
2 sale is a contiguous area where multiple separate
3 and distinct construction activities are taking
4 place at different times and on different
5 schedules, but all under one plan.

6 Copper Ridge and Reflections admitted in
7 hearing testimony that the common plan of
8 development for the subdivision included the
9 improvements necessary to get the subdivision
10 approved by the City of Billings, and to subdivide
11 and sell residential lots.

12 So the common plan therefore included
13 grading, contouring, road building, utility
14 installation, development of the storm water
15 retainage ponds and common areas, and the design
16 and planning of residential lots for eventual sale
17 to home builders.

18 As the owner/operator of the plan of
19 development, Copper Ridge and Reflections had to
20 arrange for continued permit coverage of their
21 construction activity, which included all of the
22 earth disturbing activity as the lots were sold.

23 The Hearing Examiner properly determined
24 in his orders on summary judgment that Copper
25 Ridge and Reflections were the owner/operators of

1 the construction activity because they exerted
2 control over construction in the subdivisions, and
3 he used evidence that they directed the placement
4 of soil on residential lots in the subdivisions,
5 and that's in the order on summary judgment at
6 Page 14.

7 Copper Ridge and Reflections fault the
8 Hearing Examiner's reliance on contract language
9 because they argue these contracts were not for
10 home building, but this argument ignores the fact
11 that construction activity, all construction
12 activity, requires permit coverage.

13 And the contract language relied on by
14 the Hearing Examiner unambiguously evidences the
15 fact that Copper Ridge and Reflections contractors
16 placed fill on residential lots. That's an
17 activity that is a construction activity. And
18 they graded the lots. As the owner/operator,
19 Copper Ridge and Reflections controlled this
20 activity.

21 Also under the Water Quality Act and
22 related guidance, as the developer and
23 owner/operator, Copper Ridge and Reflections had
24 many options to ensure continued permit coverage
25 of their construction activity. They could have

1 hired a contractor to hold the permit, and as the
2 development progressed, they could have assigned
3 or transferred permit coverage to other
4 developers.

5 Copper Ridge and Reflections admit here
6 they're the original developer of the
7 subdivisions, that they were the original
8 owner/operator of the construction activity, but
9 they maintain they are not responsible for
10 discharges associated with construction activity
11 once residential lots are sold.

12 They also admit they had a permit that
13 terminated on December 2012, but that under that
14 permit, their responsibility was limited to
15 discharges related to road construction and
16 utility installation, and they argue they should
17 be absolved of any responsibility for construction
18 activities that are related to home building
19 occurring on residential lots, even though they
20 owned, developed, and prepared the lots for sale.

21 By adopting this argument, it would
22 undermine national and state concepts of common
23 plan of development, which does not allow a large
24 developer to avoid permit obligations by
25 developing only a portion or a phase of a

1 development when it's part of a larger common
2 plan.

3 And I think the Hawaii case is
4 instructive in this area because the rule in that
5 case is that if the activity is identified at the
6 time the discharge permit application is
7 submitted, then the activities are all part of the
8 plan. And I think Copper Ridge and Reflections
9 has admitted that the common plan of development
10 included all improvements necessary to get the
11 subdivision approved by the City of Billings, then
12 subdivided into lots.

13 Additionally, the Hearing Examiner
14 relied on Mr. Leap's signature on the Notices of
15 Intent to obtain coverage under the permit, under
16 the general permit for their construction
17 activity, and in signing those NOI's as that
18 owner/operator, they did not at the time state
19 that they were signing under protest as they now
20 argue.

21 And at the time the NOI's were signed,
22 they weren't under threat of penalty as they
23 argued in their supplemental brief, because the
24 penalty order wasn't issued until almost a year
25 after the NOI's were signed.

1 I think if Copper Ridge and Reflections
2 did not want to maintain the permit for home
3 building activities, they could have transferred
4 or assigned it, but it was their obligation to
5 ensure permit coverage for the construction
6 activities. DEQ does have a permit transfer
7 mechanism. Probably a new NOI would have been
8 required and a fee, an additional fee, and maybe
9 an updated storm water pollution prevention plan.

10 CHAIR DEVENY: Could you wrap up,
11 please.

12 MS. BOWERS: Yes. I just want to
13 mention one thing about the City of Billings. The
14 City of Billings has a permit for their MS4, and
15 that municipal separate storm sewer system does
16 serve the subdivision, but the City of Billings as
17 the permittee, they have to prohibit discharges of
18 unpermitted and uncontrolled storm water to the
19 MS4. So it doesn't cover -- It is not an
20 over-arching permit that would cover the storm
21 water discharge activity of the owner/operator of
22 the subdivisions. And I just wanted to clarify
23 that. I don't have anything further.

24 CHAIR DEVENY: Okay. Thank you. Let's
25 have some questions from Board members, and then

1 we will allow another opportunity for you to
2 speak. Do members of the Board have questions of
3 Ms. Marquis or Ms. Bowers?

4 BOARD MEMBER BUSBY: I have just an easy
5 question for the State. You've got a subdivision
6 that's not completely built out and completely
7 completed, as you would define it, with all of the
8 lots sold, and all of the lots built on, and all
9 the landscaping in place.

10 Do you require permits across the state
11 for other subdivisions that are not completely
12 built out?

13 MS. BOWERS: Yes. The permit is
14 required as long as there's exposed ground. Until
15 there is stabilization of the subdivision, they
16 have to have permit coverage.

17 BOARD MEMBER BUSBY: Forever?

18 MS. BOWERS: Until stabilization. And
19 that is 70 percent of cover.

20 BOARD MEMBER HANSON: So then is it like
21 -- I guess I'm with you -- from a standpoint of
22 then is it common that when a developer starts to
23 sell the lots, that they would transfer the
24 permits to those folks, or do they often keep them
25 and participate?

1 MS. BOWERS: I believe a lot of
2 developers do hold the permit, but I think some of
3 them transfer to different developers for
4 different phases if they can segregate a phase.

5 BOARD MEMBER HANSON: So as long as
6 there is not stabilization, a permit should be
7 there regardless of who has it?

8 MS. BOWERS: Right. Correct.

9 CHAIR DEVENY: So continued question.
10 So the initial permit that Copper Ridge had was
11 terminated by DEQ after they requested it because
12 they said stabilization had occurred; is that
13 right?

14 MS. BOWERS: Yes, Madam Chair, that is
15 correct.

16 CHAIR DEVENY: And at that point, then
17 there was nothing to transfer, or would they have
18 needed to apply for another permit?

19 MS. BOWERS: Yes. Madam Chair, Members
20 of the Board. Once the road building permit was
21 terminated in 2012, they had nothing to transfer.
22 They would have had to submit a new NOI and get a
23 new permit.

24 There are some developers that will
25 expand the road building phase permit to include

1 home building. They'll expand the scope of the
2 permit. So I guess you would call that a permit
3 amendment.

4 CHAIR DEVENY: So once DEQ terminated
5 that permit, was there an expectation there that
6 the party would immediately be applying for
7 another permit?

8 MS. BOWERS: Yes. Madam Chair, Members
9 of the Board. There is an expectation that they
10 would apply for a permit that would cover the
11 other construction activity at the site.

12 CHAIR DEVENY: Would there have been any
13 notification given to them that they should do
14 that?

15 MS. BOWERS: Well, the way this came to
16 DEQ's attention was the City of Billings became
17 concerned about, well, about enforcement for their
18 MS4. And back in 2013 there was a lot of storm
19 activity, and so they were worried about erosion
20 at the site.

21 CHAIR DEVENY: But somebody at DEQ knew
22 that they had terminated the permit.

23 MS. BOWERS: Yes. We knew that the
24 permit was terminated. I can't say for sure that
25 we knew what activity was ongoing at the site

1 until we heard from the City.

2 BOARD MEMBER TWEETEN: Madam Chair.

3 CHAIR DEVENY: Chris.

4 BOARD MEMBER TWEETEN: What does the
5 record show regarding where the offending runoff
6 came from? Does it show or delineate between
7 those lots that had already been transferred out
8 of the developer's ownership and into the
9 ownership of private owners, as opposed to lots
10 that the developer still owned? Is there any sort
11 of showing in the record as to what exactly was
12 the source of this runoff that was of concern to
13 DEQ?

14 MS. BOWERS: Well, Madam Chair, Board
15 Member Tweeten, the record shows that the
16 discharges came from the subdivision. And the
17 best place to look in the record is DEQ's
18 inspection report which is attached to Exhibit 2,
19 and it shows grass laid flat, and you can tell the
20 direction that the water flowed from the
21 subdivisions to the ditch.

22 And Cove Ditch is a water of the State.
23 It is pretty hard to determine exactly which lot
24 was involved, but there were lots that had
25 stockpiles, unprotected stockpiles, and also

1 concrete washes that were unprotected, and all of
2 that material flowed downhill to Cove Ditch.

3 BOARD MEMBER BUSBY: I want to go back
4 to my original question. You said that until the
5 lots were stabilized, a permit is required. So
6 the permit that they had was terminated -- I think
7 is the right term -- because stabilization had
8 taken place.

9 MS. BOWERS: The road building activity,
10 correct.

11 BOARD MEMBER BUSBY: Well, on the
12 developed, the non-built-on developed lots; is
13 that fair?

14 MS. BOWERS: I believe the notice of
15 termination that was submitted by the contractor
16 was for the road building phase.

17 BOARD MEMBER BUSBY: But did that
18 include all the utilities and all the --

19 MS. BOWERS: Yes.

20 BOARD MEMBER BUSBY: The developer had
21 permitted to install, the permit allowed him to
22 install on whatever. So we have a developer that
23 technically had completed his portion of the
24 construction on both of these developments, and he
25 had now turned this over to the sales department

1 to sell lots essentially; and as the lots sold, he
2 was divorced of ownership of these individual
3 lots; is that correct?

4 MS. BOWERS: Well --

5 BOARD MEMBER BUSBY: Ownership.

6 MS. BOWERS: You know, I can't really
7 say what the intent of the developer was. That
8 might be more directed to Copper Ridge and
9 Reflections.

10 CHAIR DEVENY: Ms. Marquis.

11 MS. MARQUIS: The intent -- Board Member
12 Busby, members of the Board. The intent of the
13 developer is summarized in the hearing transcript
14 Volume II, Page 105, lines 22 to 24. My client
15 Landy Leap testified that his common plan of
16 development as a subdivider is to "develop roads
17 and streets and retainage ponds on property I own
18 and control."

19 And it's also reflected in the notices
20 of intent and the permits that they had in place
21 for that very work. All of those are for road
22 building and utility installation. None of those
23 are for home building. Does that answer your
24 question?

25 BOARD MEMBER TWEETEN: As long as you're

1 up there, let me ask one. Does the record reflect
2 that the developer -- and when I say developer, I
3 mean both Copper Ridge and Reflections because
4 they seem to have been conflated in this case.
5 Did the developer have any controls of runoff
6 water in place on those lots that had not yet been
7 sold? Because I don't think there is any question
8 that they were owner/operator with respect to
9 those lots, is there?

10 MS. MARQUIS: Board Member Tweeten,
11 members of the Board. With respect to the lots
12 that had not been sold, those lots were not
13 disturbed. Those were stabilized. And so the
14 point source again here is construction activity.
15 There was no construction activity on those lots
16 that remained in their ownership that would
17 trigger the need for permit coverage.

18 BOARD MEMBER TWEETEN: Is that disputed
19 by DEQ?

20 MS. MARQUIS: I don't recall that in the
21 record.

22 BOARD MEMBER TWEETEN: Maybe Counsel for
23 DEQ can respond to that question. Does DEQ
24 dispute that with respect to those lots that had
25 not yet been sold, those lots were stabilized for

1 purposes of controlling runoff?

2 MS. BOWERS: Board Member Tweeten. At
3 the time of the violations, Copper Ridge and
4 Reflections did still own some lots that they
5 hadn't sold. The common plan of development as a
6 whole was not stabilized because --

7 BOARD MEMBER TWEETEN: That's not my
8 question, though. I'm not asking about the entire
9 subdivision. I'm just asking with respect to
10 those lots, that if we accept the developer's
11 argument that once the lots go out of their
12 ownership, they lose control, they nevertheless
13 are responsible for the lots that they still own.

14 MS. BOWERS: Right.

15 BOARD MEMBER TWEETEN: My question is:
16 Does DEQ dispute what Ms. Marquis just said, to
17 the effect that with respect to those unsold lots,
18 the ground was not disturbed, therefore it was
19 stabilized, and there was no runoff activity that
20 could be related to construction? Does DEQ
21 dispute that?

22 MS. BOWERS: DEQ disagrees with that.
23 The ground had been disturbed. The lots were
24 graded, and they didn't have vegetative cover.

25 BOARD MEMBER TWEETEN: Are there

1 findings and conclusions in the record regarding
2 that question?

3 MS. BOWERS: Well, what is in the record
4 is the inspector's report, which shows some lots
5 that just have stockpiles on them. But I don't
6 think you could really determine from that report
7 which lots are owned by Copper Ridge and which are
8 owned by home builders.

9 BOARD MEMBER TWEETEN: So the answer is
10 no, there is no delineation in the record between
11 those lots that were still owned by the developer,
12 and the extent to which those lots were stabilized
13 or not.

14 The developer takes the position that
15 the runoff issue with respect to sediments and so
16 forth arises specifically and exclusively from the
17 disturbing of that land for the purpose of
18 constructing buildings; is that correct? Do you
19 agree with that or disagree?

20 MS. BOWERS: I disagree with that. And
21 Board Member Tweeten, members of the Board, I
22 think what Copper Ridge and Reflections is asking
23 you to accept is a very narrow definition of
24 construction activity, to just narrow it to the
25 home building on the lots, and construction

1 activity is much broader than that.

2 Construction activity is disturbance of
3 soil. And so it includes grading, stockpiling.
4 When the blade touches the ground, they've started
5 construction activity.

6 BOARD MEMBER TWEETEN: So what does the
7 record show with respect to those kinds of soil
8 disturbance activities that the developer
9 conducted on the lands that it still owned?

10 MS. BOWERS: Well --

11 BOARD MEMBER TWEETEN: At the time of
12 the violation.

13 MS. BOWERS: I think --

14 BOARD MEMBER TWEETEN: What does the
15 record show?

16 MS. BOWERS: What the record shows is
17 that the subdivisions as a whole were disturbed.
18 And I think we're getting a little bit down in the
19 weeds on ownership, with all due respect, because
20 we have to look at the larger common plan of
21 development, and the larger common plan was two
22 very large subdivisions.

23 And at the time of the violation it is
24 true that they were starting to sell lots. And
25 DEQ, in their inspection report, just shows that

1 there is erosion coming from the subdivisions, but
2 doesn't break down each lot owner by owner, and
3 show who is the source of the erosion.

4 BOARD MEMBER TWEETEN: So as far as DEQ
5 is concerned then, does the violation arise from
6 the fact that the developer fails to include in
7 the contracts for sale of individual lots
8 provisions relating to storm water runoff that
9 would transfer the responsibility for controlling
10 that runoff to the purchaser, or in the
11 alternative, allow the developer to maintain
12 responsibility for that runoff?

13 MS. BOWERS: Yes, Board Member Tweeten,
14 members of the Board. That would have been one
15 way to accomplish permit coverage for the site,
16 would have been to transfer the responsibility as
17 they sold lots, or to keep the responsibility for
18 themselves.

19 BOARD MEMBER TWEETEN: So you're saying
20 that as a matter of law, anyone who puts together
21 a subdivision and submits it for approval and gets
22 approved by the local government has to address
23 the issue of storm water runoff for the
24 subdivision as a whole, until all lots in the
25 subdivision are stabilized with ground cover, or

1 however else the lots would be stabilized?

2 MS. BOWERS: Yes. They have to plan for
3 that, and they have to have some permit coverage,
4 that there are a lot of options for how they could
5 accomplish that.

6 BOARD MEMBER TWEETEN: What statute or
7 regulation addresses that obligation on the part
8 of the developer?

9 MS. BOWERS: That's the Water Quality
10 Act requirement for point source discharges to
11 have permit coverage; and the construction
12 activity is the point source discharge.

13 BOARD MEMBER TWEETEN: Okay.

14 CHAIR DEVENY: Further questions, Board
15 members?

16 BOARD MEMBER TWEETEN: Ms. Marquis,
17 would you like to address that question for us,
18 and give the developer's position with respect to
19 that. I'm sorry. That was your prerogative.

20 CHAIR DEVENY: Go ahead.

21 MS. MARQUIS: Thank you. Madam Chair,
22 Board Member Tweeten. Yes, what we've heard today
23 is a lot of could have, and should have, and
24 beliefs, but where is the requirement?

25 And you can look through the statutes

1 and the rules, and you won't find the requirement
2 that says the subdivision developer must remain
3 liable for the entire subdivision over the entire
4 life of all construction within that geographic
5 footprint.

6 There is no requirement on the books
7 like that in Montana. And there might be in North
8 Dakota or Ohio, but there is not in Montana.
9 There is no requirement, and in fact this triggers
10 a lot of concerns about trespass, and these were
11 noted by the Hearing Examiner in her proposed
12 order on Pages 34 and 35.

13 She said, "It's entirely unclear whether
14 or not BMP's could ever be placed based on Copper
15 Ridge and Reflections ownership access," basically
16 do not have ownership or control of those
17 individual lots that they've sold where the
18 construction activity is occurring, and so they
19 cannot accomplish the goals of the permit.

20 BOARD MEMBER TWEETEN: But DEQ just told
21 us that you were -- that the developer was under
22 an obligation to do precisely that for the
23 perpetuity of the development until every single
24 lot in the development is stabilized. They
25 contend that -- I think I just heard Counsel say

1 -- that the water use act and its implementing
2 regulations place that obligation on the
3 developer. Are they wrong about that?

4 MS. MARQUIS: Yes. Board Member
5 Tweeten, Madam Chair, members of the Board. They
6 are wrong about that. There is no requirement in
7 the statute or the rule. I didn't hear one cited
8 by the Department to that effect.

9 Now, to be clear, we're not disputing
10 that home building is a construction activity. It
11 is a construction activity. Is it subject to a
12 permit? It could be. But does that liability for
13 that permit lie with the developer? No, it does
14 not. It lies with the person who is conducting
15 that construction activity. That is the
16 individual lot owner.

17 BOARD MEMBER TWEETEN: But Counsel for
18 DEQ just told us that there is nothing in the
19 record that will permit us to determine whether
20 this particular offensive runoff came from lots
21 that were under the developer's control, under the
22 control of individual owners, that the record
23 simply doesn't give us a basis for making that
24 determination.

25 So if we accept your argument that we

1 have to sort of segregate out responsibility
2 depending on who owns the property, what do we do
3 with this case at that point? Do we remand it to
4 the Department with directions, or to the Hearing
5 Examiner, I guess, with directions to conduct
6 further proceedings in order to take evidence on
7 that question?

8 MS. MARQUIS: Board Member Tweeten,
9 Madam Chair, members of the Board. That's
10 precisely one of our additional arguments, is that
11 there is no evidence in this case of exactly where
12 the sediment and where the storm water originated,
13 or where or who placed the waste, and you can find
14 that in our argument in supplemental brief on Page
15 5 and in Footnotes 1 and 2.

16 And we cite to testimony from the
17 hearing where the Department admitted they had not
18 observed and they had no evidence of anyone
19 placing or causing to be placed waste anywhere in
20 the subdivision, so there is no evidence of it in
21 the record.

22 It is not to say that evidence could not
23 have been gathered and put in the record, it's
24 just the record in this case is devoid of any of
25 that evidence. It is not there.

1 Had there been evidence of these
2 specific lots where the sediment had originated or
3 the waste had been placed, certainly the
4 Department could have done the research to
5 determine who owned that lot, who was actually
6 doing that construction activity, and there is no
7 reason that an enforcement action could not have
8 been taken against that individual who owned and
9 operated that construction activity.

10 What happened here is, as the Department
11 has told you, they noticed sediment and placement
12 of waste within the geographic footprint of the
13 subdivision, and the Department admitted that they
14 had never made an attempt to tie the lots and the
15 ownership of the lots to what they allege were the
16 violations on the ground.

17 BOARD MEMBER TWEETEN: Would that even
18 be possible?

19 MS. MARQUIS: Certainly. If the
20 Department can see where the grass had been laid
21 down, or where sediment had occurred, they could
22 follow that back, and it should be pretty obvious
23 in that situation which lots were disturbed.

24 BOARD MEMBER TWEETEN: Well, the
25 Department says that all the lots were disturbed,

1 because ground preparation and grading and so
2 forth had taken place even on those lots that
3 hadn't been sold; is that right or wrong?

4 MS. MARQUIS: We dispute that, Board
5 Member Tweeten, Madam Chair, members of the Board.
6 There is no evidence in the record that any of the
7 lots that the developers owned and had not sold
8 for individual home building had any disturbance
9 on them whatsoever.

10 In fact, any disturbance that my client
11 would have caused would have been in conjunction
12 with the road building and the utility
13 installation. Again, that occurred in 2012, was
14 completed; everything that they had disturbed was
15 stabilized; they sent in the notice to terminate;
16 the Department agreed; allowed that permit to
17 terminate, essentially saying, "Okay. You're good
18 to go. You don't need permit coverage anymore.
19 You've done what you needed to do for your
20 construction activity."

21 BOARD MEMBER TWEETEN: So the record
22 shows that except for those road building
23 activities which had already been deemed
24 stabilized by the Department, there was no ground
25 disturbance of any kind on any of the lots that

1 the developer still owned? Does the record show
2 that?

3 MS. MARQUIS: The record is fairly
4 devoid of exactly which lots the disturbance was
5 on, where the Department is alleging that there
6 was a violation.

7 BOARD MEMBER TWEETEN: I understand
8 that, but did you put in testimony from the
9 developer that, "With respect to those lots that
10 we hadn't sold, they were still in effectively
11 their natural state, with no ground having been
12 disturbed to level the lots, or remove boulders,
13 or whatever, remove vegetation, whatever other
14 activities might be under taken in preparation for
15 selling"?

16 MS. MARQUIS: Board Member Tweeten,
17 Madam Chair, members of the Board. There is
18 evidence in the record that my client as the
19 developer planned a subdivision, essentially drew
20 the lines on the lots. There is evidence on the
21 record of the construction activity that they did
22 do, and that was the road building and the utility
23 installation, which was appropriately permitted
24 and appropriately terminated.

25 There is no evidence that any of the

1 individual lots that they may have retained
2 ownership of were disturbed. Again, this goes to
3 the burden of proof, which we believe is on the
4 Department in this case.

5 BOARD MEMBER TWEETEN: Okay. Thank you.

6 BOARD MEMBER BUSBY: One quick question.

7 CHAIR DEVENY: Sure.

8 BOARD MEMBER BUSBY: In this morning's
9 presentation, you said that it was the disturbance
10 caused by the construction of homes, did you not,
11 that was the source of the runoff, or however you
12 want to describe the runoff, or the issue of this?
13 Did you not say that in your original presentation
14 this morning?

15 MS. MARQUIS: Board Member Busby, Madam
16 Chair, members of the Board. Yes, it was the
17 Department's position -- you can see this in the
18 violations that they sent -- that the disturbances
19 that resulted in the violations were caused by
20 home building activities.

21 BOARD MEMBER BUSBY: Okay. Thank you.

22 BOARD MEMBER HANSON: Can you speak to
23 the other point that was brought up -- and I'm not
24 going to have the right words that were brought
25 forward -- but in terms of the developer signing

1 as the owner/operator.

2 MS. MARQUIS: Certainly. Board Member
3 Hanson, Madam Chair, members of the Board. The
4 argument that my client signed a notice of intent
5 and that that somehow makes him liable as an
6 owner/operator is based on notices of intent that
7 the Department required him to submit when they
8 sent the violation letters.

9 So the violation letters go out. Keep
10 in mind that, and there is testimony in the record
11 at the hearing, that the original violation
12 letters threatened to impose penalties in the
13 millions of dollars; and in order to return to
14 compliance, so that they wouldn't have to incur
15 these penalties, the Department requested that
16 they submit NOI's, Notices of Intent or permits.

17 So being a law abiding citizen, the
18 Department asked him to do something, that's what
19 they did. They submitted the NOI's and sent them.

20 They did send them under protest. Now
21 you heard the Department earlier today say that
22 there was no notice that they were under protest,
23 but this is found in the Hearing Examiner's
24 proposed findings of fact and conclusions of law
25 at Page 26, where she says they were submitted

1 under protest.

2 And importantly, they were submitted as
3 a result of the violation letters at the request
4 of the Department after the violations were
5 alleged. That later act cannot be used to hold my
6 client liable for the violations that the
7 Department alleged much earlier than that.

8 BOARD MEMBER HANSON: So when you use
9 the terminology "under protest" -- just for my
10 clarification -- what exactly does that mean? And
11 was the protest specific to the fact that they,
12 the developer, did not think that they were the
13 owner/operator, or should be the one responsible
14 for this?

15 MS. MARQUIS: Board Member Hanson, Madam
16 Chair, members of the Board. We'll have to go
17 back and look at the actual transmittal of those
18 NOI's. But it was clear, and this was all done in
19 the context of the violation letters, and in the
20 context of the developer doing what the Department
21 required it to do to return to compliance.

22 I think as any law abiding citizen, when
23 someone threatens you with millions of dollars of
24 penalties, and tells you, "You must do this or
25 we're going to fine you," you do what you're told

1 at that point, and that's exactly what my client
2 did; made it very clear that they had the
3 appropriate permit coverage for their construction
4 activity, and they did not feel it was reasonable
5 to have to submit these NOI's.

6 And in fact that's why they appealed
7 this enforcement decision, and why we're here
8 today. Did that answer your question?

9 BOARD MEMBER HANSON: (Nods head)

10 CHAIR DEVENY: Thank you.

11 BOARD MEMBER TWEETEN: Madam Chair. Ms.
12 Marquis, just follow up on that. In making those,
13 filling out those forms and so forth, there is no
14 dispute that the person who filled them out was
15 acting on behalf of the developers, and was
16 authorized by the developers to provide that
17 information in those forms.

18 Ordinarily for non-corporeal entities,
19 like corporations, or limited partnerships, or
20 whatever, statements made on behalf of the entity
21 by someone acting with authority can be attributed
22 as admissions -- attributed to the entity as an
23 admission. There is no dispute that those
24 predicate facts are there, that the person who
25 filled out the form was authorized to do that?

1 MS. MARQUIS: Board Member Tweeten,
2 Madam Chair, members of the Board. We don't have
3 any evidence of that in the record. That wasn't
4 an issue that came up during our proceedings.

5 BOARD MEMBER TWEETEN: Who signed the
6 forms?

7 MS. MARQUIS: I'm sorry. I would have
8 to look. I think they are hearing exhibits --

9 MS. CLERGET: The NOI's? Is that what
10 you're looking at?

11 MS. MARQUIS: I believe so.

12 MS. CLERGET: We can pull them up for
13 you here, but Landy Leap signed them.

14 BOARD MEMBER TWEETEN: So Mr. Leap was
15 authorized to do that on behalf of the developer,
16 correct?

17 MS. MARQUIS: Board Member Tweeten,
18 Madam Chair, members of the Board. Yes.

19 BOARD MEMBER TWEETEN: Okay. Thank you.

20 CHAIR DEVENY: I have a question for Ms.
21 Bowers. In your written testimony that you
22 submitted recently, you indicate that, "The Notice
23 of Intent is required from the individual builder
24 when coverage under the construction general
25 permit is transferred from the developer of the

1 common plan to the individual builder."

2 "If a transfer is not performed, then
3 the storm water permit requirements pertaining to
4 the builder's activities are the responsibility of
5 the developer."

6 And can you cite where in the law or
7 regulations that is included.

8 MS. BOWERS: I'm sorry. What page of
9 the supplemental brief?

10 CHAIR DEVENY: And those were guidance,
11 but you state that fairly emphatically that's the
12 way it is. I'm assuming that should be in the law
13 or the rules.

14 MS. BOWERS: Madam Chair, what page are
15 you referring to?

16 CHAIR DEVENY: Page 11 of 19.

17 MS. BOWERS: In that portion of the
18 brief, I am referring to guidance provided by
19 other states. DEQ doesn't have similar guidance,
20 but in guidance from other states, the developer
21 can contractually assign his responsibility for
22 permit coverage to builders.

23 CHAIR DEVENY: But we don't allow that
24 in Montana?

25 MS. BOWERS: We do allow that. We just

1 don't have similar guidance.

2 BOARD MEMBER TWEETEN: You allow it as a
3 matter of policy, but not as a matter of
4 Administrative Rule.

5 MS. BOWERS: Yes.

6 BOARD MEMBER TWEETEN: Well, under MAPA,
7 since it constitutes an affirmative obligation on
8 the part of the developer, aren't you required to
9 do it by rule?

10 MS. BOWERS: Well, by rule, and under
11 the Water Quality Act, the discharge has to be
12 permitted. The way the developer does it is sort
13 of up to them, but it just -- there has to be
14 coverage for the activity.

15 BOARD MEMBER TWEETEN: It has to be
16 permitted to the owner/operator. It doesn't say
17 it has to be permitted to the developer.

18 MS. BOWERS: To the owner, operator,
19 that's correct, which is somebody who owns,
20 operates, controls, supervises.

21 BOARD MEMBER TWEETEN: And in this case
22 the developer argues with some logic, it seems to
23 me, that once the property transfers out of their
24 ownership and into the hands of a private owner,
25 who then hires a contractor, who disturbs the

1 ground, and by virtue of that activity becomes the
2 owner/operator, I think, or at least an
3 owner/operator.

4 Once that happens, once it passes out of
5 their ownership, they're no longer responsible as
6 the owner/operator.

7 Now, I guess the question is: Is there
8 anything in Montana law that says they can't do
9 that? And what I'm hearing you say is that there
10 is no statute or Administrative Rule that says
11 they can't do that, but that DEQ as a matter of
12 policy says they can't do that.

13 And my question, I guess, my problem
14 with that is that under MAPA, if the agency wants
15 to adopt an affirmative obligation on the part of
16 a regulated entity to engage in certain activity
17 on pain of a penalty if they don't, they're
18 required to do that by Administrative Rule.
19 That's the definition of Administrative Rule.

20 So how is it that you can get away with
21 placing that obligation on the developer if there
22 is nothing in the law that gives them notice that
23 they have that obligation?

24 MS. BOWERS: Well, Board Member Tweeten,
25 the Water Quality Act does not allow discharges

1 from point sources without permit coverage. And
2 then we have Administrative Rules that cover storm
3 water discharges; and they cover permit
4 requirements for storm water discharges for
5 construction activity, and that includes a larger
6 common plan of development.

7 And the reason that the larger common
8 plan of development or sale is in the rule -- and
9 this comes from EPA as well -- is so that a
10 developer can't separate out smaller portions of a
11 development, and not avoid permit coverage by
12 doing that.

13 BOARD MEMBER TWEETEN: Can you remind me
14 which regulation it is that talks about the common
15 plan of development.

16 MS. BOWERS: It's 17.30.1105.

17 BOARD MEMBER TWEETEN: 17.30.1105.

18 MS. CLERGET: We can pull it up here for
19 you guys if you want to see it.

20 CHAIR DEVENY: I wonder if it's a good
21 time to take a break. We'll take a ten minute
22 break, and we'll come back in ten minutes, twenty
23 to eleven.

24 (Recess taken)

25 CHAIR DEVENY: I'm going to reconvene

1 the Board, and we'll continue with this hearing.
2 We continue to have a quorum, so we'll go on.
3 Chris, did you want to pursue the rule at this
4 point?

5 BOARD MEMBER TWEETEN: I guess I do.

6 CHAIR DEVENY: Ms. Bowers.

7 BOARD MEMBER TWEETEN: Ms. Bowers, would
8 you help me with this rule, please.

9 MS. BOWERS: Yes.

10 BOARD MEMBER TWEETEN: I'm looking at
11 17.30.1105, which I believe is the one that you
12 said I should look at.

13 MS. BOWERS: Yes. 17.30.1105 sub (1)
14 states that, "Any person who discharges or
15 proposes to discharge storm water from a point
16 source must obtain coverage under an MPDES general
17 permit or another MPDES permit for discharges
18 associated with construction activity."

19 BOARD MEMBER TWEETEN: Where is the
20 language that you have been using with respect to
21 the overall plan of development?

22 MS. BOWERS: Right. The definition of
23 storm water discharge associated with construction
24 activity is in 17.30.1102 sub (28). That
25 definition states that, "Storm water discharges

1 associated with a construction activity means a
2 discharge of storm water from construction
3 activities, including clearing, grading, and
4 excavation, that result in the disturbance of
5 equal to or greater than one acre of total land
6 area.

7 "For purposes of these rules,
8 construction activities include clearing, grading,
9 excavation, stockpiling earth materials, and other
10 placement or removal of earth material performed
11 during construction projects.

12 "Construction activity includes the
13 disturbance of less than one acre of total land
14 area that is part of a larger common plan of
15 development or sale, if the larger common plan
16 will ultimately disturb one acre or more."

17 BOARD MEMBER TWEETEN: That doesn't
18 really answer my question, though, does it? It
19 doesn't address the question of whether the permit
20 responsibility rests on the person who created the
21 larger common plan of development, or does it rest
22 on the person who engaged in the clearing,
23 grading, and excavation of the property? This
24 regulation doesn't address that question.

25 MS. BOWERS: Well, it rests on the

1 person who proposes to discharge, and proposing to
2 discharge from a point source is the construction
3 activity that will be the point source.

4 So the person who is going to initiate
5 construction activity has an obligation to get the
6 permit if they're going to disturb more than one
7 acre, or they have a larger common plan of
8 development or sale in mind.

9 BOARD MEMBER TWEETEN: It doesn't say
10 that. I don't think it says that. It doesn't
11 address the question of -- It says that
12 construction activity includes the disturbance of
13 less than one acre of land, and is part of a
14 common, a larger common plan of development or
15 sale that will ultimately disturb more than one
16 acre, that it is storm water discharge associated
17 with construction activity, but it doesn't address
18 who needs to get the permit. This regulation
19 doesn't.

20 Is there another one that we need to
21 look at?

22 MS. BOWERS: Well, under the statute,
23 75-5-401 --

24 MS. CLERGET: We'll get it.

25 BOARD MEMBER TWEETEN: 75-5-401.

1 MS. BOWERS: I think these rules are all
2 adopted to implement 75-5-401.

3 BOARD MEMBER TWEETEN: Okay. Are we
4 looking at the one that's effective on occurrence
5 of a contingency or the temporary --

6 MS. BOWERS: Again, the contingency
7 hasn't occurred.

8 BOARD MEMBER TWEETEN: So we're looking
9 at the temporary one. All right. I'm with you so
10 far. 75-5-401. Which subdivision of this statute
11 should we be looking at?

12 MS. BOWERS: No, for requirement to have
13 a permit first.

14 BOARD MEMBER TWEETEN: It says we have
15 to adopt rules.

16 MS. BOWERS: I guess that's just the --

17 BOARD MEMBER TWEETEN: This just
18 addresses rulemaking.

19 MS. BOWERS: So I guess that's just the
20 rulemaking authority. But if you look at
21 17.30.1115.

22 BOARD MEMBER TWEETEN: Which subdivision
23 should I be looking at?

24 MS. BOWERS: In 17.30.1115, these are
25 the rules that pertain to the requirement to

1 submit a notice of intent to be covered under the
2 general permit.

3 And under that rule, a person who
4 discharges or proposes to discharge storm water
5 associated with construction activity shall submit
6 to the Department a notice of intent as provided
7 in the rule, and that rule says that the NOI must
8 be signed by the owner of the project, or by the
9 operator, or by both owner or the operator.

10 BOARD MEMBER TWEETEN: Where's that
11 language?

12 MS. BOWERS: That's in 17.30.1115 sub
13 (1) Sub(a).

14 CHAIR DEVENY: Hillary.

15 BOARD MEMBER HANSON: I have a question
16 for you. When you spoke about the signing of the
17 NOI, I believe you said that it was not under
18 protest until later; is that correct? The DEQ did
19 not consider it under protest at the time it was
20 turned in?

21 MS. BOWERS: That's correct. Board
22 Member Hanson. The NOI was signed by Mr. Leap as
23 the person having authority to sign for the
24 owner/operator, and he did not indicate that he
25 was signing under protest.

1 BOARD MEMBER HANSON: Okay.

2 MS. MARQUIS: I'm going to object. It
3 was in the proposed findings of fact and
4 conclusions of law. The Hearing Examiner made a
5 statement that those NOI's were submitted under
6 protest. The Department had an opportunity to
7 file exceptions and to argue against those
8 statements, and they did not.

9 BOARD MEMBER HANSON: So can you
10 actually show me where that is? Because I
11 couldn't find the actual verbiage "under protest"
12 in the Hearing Examiner area. And I'm probably
13 just missing it, but -- I see where it talked
14 about that, "Leap attempt to characterize the
15 intent behind his signature." However I don't see
16 the words "under protest."

17 MS. MARQUIS: In the Hearing Examiner's
18 proposed findings of fact and conclusions of law
19 to the BER, Page 26, in the first paragraph, just
20 about halfway down. It is Line 8.

21 MS. CLERGET: So I just want to be clear
22 that that's not a proposed finding of fact.
23 That's in the discussion.

24 BOARD MEMBER TWEETEN: Counsel, having
25 looked at these regulations, it seems to me they

1 all focus back on the question of what is the
2 definition of an owner/operator, owner or
3 operator, which is a statute, and the regulation
4 incorporates the statutory definition by
5 reference, right?

6 MS. BOWERS: Yes.

7 BOARD MEMBER TWEETEN: "An owner or
8 operator means a person who owns, leases,
9 operates, controls, or supervises a point source."
10 There doesn't appear to be any evidence in the
11 record this is what the developer says, and I
12 don't think you've pointed us to anything
13 different.

14 There doesn't appear to be any evidence
15 in the record that the surface of the lots that
16 they still owned at the time were in any way the
17 subject of construction activity, other than the
18 road building activities for which they were
19 permitted, and for which they were released from
20 permit by the Department.

21 It doesn't appear that there is anything
22 in the record that would contradict that
23 statement, first of all. So I think we're left
24 then with their assertion that the point source in
25 this case has to be limited to those lots that

1 have been disturbed by construction activity
2 related to individual homes.

3 That's what it looks like to me anyway,
4 and there doesn't appear to be any evidence in the
5 record that the developer owns that property,
6 leases that property, operates those properties,
7 controls those properties, or supervises those
8 properties.

9 So where in the law do I find an anchor
10 for the assertion that they can nevertheless be
11 treated as an owner or operator of the point
12 source?

13 MS. BOWERS: Well, Board Member Tweeten,
14 I don't disagree that we're stuck with the
15 statutory definition of owner or operator.

16 I assert that the Hearing Examiner
17 correctly found as a matter of law in his orders
18 on summary judgment that Copper Ridge and
19 Reflections were owners or operators of the
20 subdivisions, and he focused his determination on
21 evidence that they supervised construction
22 activity, and controlled construction activity,
23 because they were the original subdivider, they
24 planned the development, and they had control over
25 design and specs.

1 And he focused on contracts between the
2 owner and their contractors, and he focused on
3 language in those contracts where Copper Ridge and
4 Reflections directed their contractors to place
5 fill on lots, and that goes beyond just road
6 building activity. That's activity on the lots in
7 the subdivision.

8 I think you're onto something when you
9 say there could have been multiple owners or
10 operators, and there could be, but it was up to
11 the original owner/operator/developer to plan for
12 the permit coverage, and to transfer permit
13 coverage to other owner/operators undertaking
14 construction activity in the subdivisions, but
15 they did not. So we have a point source here that
16 discharged without a permit.

17 BOARD MEMBER TWEETEN: So their
18 obligation to get a permit applies not only if
19 they in fact operate, control, or supervise the
20 point source, but also if they at any point in
21 time had the power to impose controls or
22 supervision over the point source; is that what
23 the Department argues? Because that's not what
24 the statute says. The statute is written in the
25 present tense. It says "supervises or controls."

1 MS. BOWERS: Right. But the subdivision
2 developer, they are the original owner/operator;
3 and if they don't have the permit coverage or a
4 plan for permit coverage, then --

5 BOARD MEMBER TWEETEN: Why wouldn't that
6 obligation pass to the person who is the present
7 -- in the present tense -- the operator, or
8 supervisor, or controller of that particular lot
9 where the discharge comes from, lot, or lots?

10 MS. BOWERS: Well --

11 BOARD MEMBER TWEETEN: Why aren't they
12 the owner/operator?

13 MS. BOWERS: Board Member Tweeten,
14 members of the Board. I think we have to look to
15 the larger definition of construction activity,
16 that it is not just the home building activity, it
17 is all the construction activity in the
18 development. It includes even the common areas
19 that Copper Ridge and Reflections still owned. It
20 includes unsold lots.

21 BOARD MEMBER TWEETEN: But there is no
22 evidence in the record -- I thought we agreed --
23 indicating that with respect to those common areas
24 or unsold lots there was any disturbance of the
25 surface of the ground that could have contributed

1 to the discharge. I thought that it was agreed
2 that the record didn't show that. Am I wrong
3 about that?

4 MS. BOWERS: Well, that's not where the
5 Hearing Examiner focused in his determination as a
6 matter of law that Copper Ridge and Reflections
7 are owner/operators.

8 BOARD MEMBER TWEETEN: Right, and we're
9 talking about a legal determination, not a finding
10 of fact.

11 MS. BOWERS: Right.

12 BOARD MEMBER TWEETEN: So if we don't
13 agree with his interpretation, we're free to
14 change it, correct?

15 MS. BOWERS: Correct.

16 BOARD MEMBER TWEETEN: I'm sorry. I
17 interrupted you. Please complete your thought.

18 MS. BOWERS: No. DEQ's argument is that
19 the Hearing Examiner's determination is correct
20 that Copper Ridge and Reflections did have -- and
21 I mean we're going back to 2013 -- but they did
22 have authority to supervise and control the point
23 source, which is the construction activity at the
24 subdivision, and construction activity in the very
25 broad definition.

1 CHAIR DEVENY: Other questions?

2 (No response)

3 CHAIR DEVENY: Ms. Bowers, I'm going to
4 refer to your supplemental oral argument which is
5 on Page 9, where you talk about under the general
6 permit. In your brief on the oral argument.

7 MS. CLERGET: I think you mean the
8 owner/operator brief.

9 CHAIR DEVENY: I'm sorry.
10 Owner/operator in your latest brief on Page 9.

11 MS. BOWERS: Okay.

12 CHAIR DEVENY: You talk about the
13 general permit, where you say, "The developers are
14 required to ensure the requirements of the general
15 permit are satisfied, either by themselves or
16 through entering into a contract with the builder
17 to take over compliance with the general permit."

18 So in this case, there was no permit; is
19 that correct?

20 MS. BOWERS: That's correct. At the
21 time of the violation, there was no permit.

22 CHAIR DEVENY: So there is really no way
23 of knowing -- I guess does the record show that
24 there were any kind of contracts that would have
25 moved any of this responsibility to anyone else?

1 MS. BOWERS: Madam Chair, members of the
2 Board, I don't believe there are any contracts in
3 the record that show how the developer was going
4 to structure permit coverage, except for with
5 regard to their road building contracts, they
6 required their contractor to comply with the Water
7 Quality Act.

8 CHAIR DEVENY: And could I ask Copper
9 Ridge a question. Why didn't Copper Ridge get a
10 permit after the storm water -- or after the road
11 construction and that portion of the subdivision
12 was completed?

13 MS. MARQUIS: Madam Chair, members of
14 the Board. After the developer had completed
15 their construction activity, and had appropriately
16 been released from permit coverage, they weren't
17 conducting additional construction activity in the
18 subdivision, so there was no need for them to
19 obtain a permit.

20 Now, they did -- you had asked the
21 Department about contracts between the developer
22 and the home builders, and there is no requirement
23 for those to contain any provision that requires
24 the home builder to go out and get storm water
25 permit coverage.

1 However, when this came up at the
2 hearing -- and this is from the hearing transcript
3 Volume II on Page 62 -- there is a line of
4 questioning my client, "Did Copper Ridge and
5 Reflections require persons that purchased lots to
6 take out a permit?" He answers clearly, "No.
7 It's my understanding the State of Montana and
8 regulations of the State would require that, but
9 not through the private contract would we require
10 that."

11 And then he's asked, "Did you give them
12 any notice that storm water should be
13 controlled?," and the answer was, "Yes, we do. In
14 our contract we reference the SIA, which is the
15 Subdivision Improvements Agreement, between our
16 development company and the City of Billings, and
17 they acknowledge that they read it, received it.
18 Inside that document, it specifically says BMP's
19 are required as they begin their construction
20 activity."

21 So that's the notice, albeit that's not
22 required for the developer to provide that to the
23 individual lot builder. But even so, the
24 developer provided that notice.

25 What we have here is the typical case

1 that's presented in the EPA guidance that was
2 attached to the Department's brief, again, where
3 that says, "When the individual lots are then sold
4 to builders, unless the developer is still
5 responsible, it is likely that the builder will
6 need the permit." And that's the case here today.

7 BOARD MEMBER HANSON: So what is the
8 relationship in these subdivisions between the
9 developer? Like once the lot is sold, over and
10 done, you find your own contractor to build the
11 house?

12 MS. MARQUIS: Board Member Hanson, Madam
13 Chair, members of the Board. Yes, it's like any
14 real estate transaction. Once the property is
15 conveyed to another party, the previous landowner
16 has no control over what happens on that property.

17 BOARD MEMBER HANSON: So the developer
18 is not engaged in helping them find a contractor,
19 builder, not engaged in the building of that?

20 MS. MARQUIS: Board Member Hanson, Madam
21 Chair, members of the Board. There may be some
22 informal discussions, but there is no formal
23 relationship after the property is conveyed, like
24 any other real estate transaction.

25 BOARD MEMBER TWEETEN: Before you sit

1 down.

2 CHAIR DEVENY: Chris.

3 BOARD MEMBER TWEETEN: Looking at the
4 order on summary judgment, and I'm on Page 14 at
5 Line 24, Hearing Examiner Haladay points to a fact
6 that, "Developers entered into at least one
7 contract that required all excess material from
8 pipe and bedding displacement shall be left on
9 site." Are you with me? What does that mean?
10 What does that refer to? What contract does that
11 refer to?

12 MS. MARQUIS: Board Member Tweeten,
13 Madam Chair, members of the Board. It is not
14 expressly from this order, but referring back to
15 the briefing that this order followed, it appears
16 that that language comes from the Department's
17 summary judgment Exhibits 1 and 2.

18 And I've explained this beginning on
19 Page 13 in our supplemental brief, and in that
20 supplemental brief, you'll see I provide the full
21 text of the responses that Copper Ridge provided,
22 and in there it is clear that those contracts were
23 not for home building. They were for street
24 building and installation of utilities.

25 BOARD MEMBER TWEETEN: For those

1 activities that were already released from permit
2 by the Department, correct?

3 MS. MARQUIS: Board Member Tweeten,
4 Madam Chair, members of the Board. Yes, that's
5 exactly correct. Those contracts were in place
6 and part of the permit that was in place for the
7 development that was terminated in 2012. The
8 violations at issue before you today were not
9 cited until September 2013.

10 BOARD MEMBER TWEETEN: Thank you.

11 CHAIR DEVENY: Ms. Bowers, would you
12 have any kind of response to that statement?

13 MS. BOWERS: Well, Madam Chair, members
14 of the Board. I guess in response to that, as far
15 as construction activity that should have been
16 permitted, it doesn't matter if it was associated
17 with road building or home building. It's still
18 construction activity within the larger common
19 plan of development, and there should have been
20 permit coverage for that activity.

21 BOARD MEMBER TWEETEN: Correct, but the
22 law doesn't tell us who is responsible for
23 obtaining that permit coverage. We've been
24 through that.

25 MS. BOWERS: Well, under the rules,

1 Board Member Tweeten, members of the Board, it is
2 the person who is going to discharge or proposes
3 to discharge, and the owner or operator of a point
4 source.

5 And I think the Hearing Examiner in his
6 order on summary judgment -- I'm sorry to keep
7 pounding this -- but I think he was right to look
8 at supervision and control at the time of the
9 violations, and there was evidence that they did
10 supervise and control their contractors, and that
11 those contractors did place fill on lots within
12 the larger common plan of development.

13 And I also want to refer to the
14 Department's violation letter that was Exhibit 2
15 in the hearing, and in that violation letter, Dan
16 Freeland, the Department's inspector, did notify
17 the subdivisions, Copper Ridge, that they were
18 part of a larger common plan of development or
19 sale as described in the Administrative Rules, and
20 that there was -- based on his observations, the
21 subdivisions were a contiguous area where there
22 were multiple separate and distinct activities
23 planned and occurring, and that those activities
24 needed to be permitted.

25 And I also want to point out that the

1 violation letter itself told Copper Ridge and
2 Reflections that they were going to be referred
3 for enforcement action, but did not threaten
4 millions of dollars in penalties. I just want to
5 put that on the record.

6 BOARD MEMBER TWEETEN: Can I ask you. I
7 think you've said before that the Department could
8 have filed a Notice of Violation against the
9 owners of the individual lots that have been
10 disturbed for construction purposes, for purposes
11 of constructing a building, as opposed to simply
12 building roads and so forth. The Department could
13 have gone against those owners or theoretically
14 the contractors who were conducting those
15 operations. You could have done that.

16 MS. BOWERS: Yes. I'm looking at my
17 Department people, but yes, we could have issued
18 multiple violation letters.

19 BOARD MEMBER TWEETEN: I mean other than
20 the fact that it would require the Department to
21 -- let me back up. I assume that in order to do
22 that, the Department would have had to conduct
23 further investigation into determining how exactly
24 this storm runoff made its way into waters of the
25 state.

1 In other words, maybe there is -- if it
2 comes through a gully, maybe there is land below
3 the gully that couldn't have contributed water
4 into that gully, while there was also constructed
5 land above the gully that would obviously be the
6 source of the runoff. The gully would catch it on
7 its way down the hill, and water is not going to
8 flow uphill.

9 So for purposes of that particular
10 mechanism, if you want to call it that, the uphill
11 properties would be the ones that would
12 theoretically be responsible.

13 Now, you could conduct that kind of
14 further investigation, and try to track down where
15 the point source is. That could be done, couldn't
16 it?

17 MS. BOWERS: Board Member Tweeten,
18 members of the Board. The compliance inspector,
19 it's true he didn't try to pinpoint which lot was
20 the source, but he looked at the subdivisions as a
21 whole, and the construction activities occurring,
22 and he could tell that the erosion and the flow of
23 water came from that development. And the
24 pictures show that. I mean just the grass is laid
25 down. You can tell the direction of the flow.

1 And also I want to point out that if
2 BMP's had been installed and properly maintained,
3 even if water flowed above the subdivisions, that
4 should have been controlled, too. They should
5 have BMP's to control water flowing from
6 upgradient onto the subdivision, because the storm
7 water rules related to construction activity
8 require exposed soils, or exposed concrete wash,
9 or stockpiles to be protected. They shouldn't
10 come into contact with storm water, and flow to
11 waters of the state.

12 BOARD MEMBER TWEETEN: And that
13 requirement exists whether that ground has been
14 disturbed by construction activity or not?

15 MS. BOWERS: No. It applies to
16 construction activity.

17 BOARD MEMBER TWEETEN: Okay.

18 MS. BOWERS: But stockpiling is
19 construction activity.

20 CHAIR DEVENY: I have a question. On
21 the stockpiled materials and the fill materials
22 that I believe were indicated that were put on the
23 lots, was that done after or before the permit was
24 terminated?

25 MS. BOWERS: The December 2012 permit,

1 Madam Chair, for road building?

2 CHAIR DEVENY: Yes.

3 MS. BOWERS: I think it was done at the
4 time of the road building activity, so it was
5 probably done before the termination.

6 CHAIR DEVENY: So if the termination
7 letter was issued, and there had been stockpiling,
8 that would have meant that the stockpiles would
9 have had to have been stabilized before the permit
10 would have been terminated; is that correct?

11 MS. BOWERS: I believe the permit was
12 just for road building and utility installation,
13 and I think the notice of termination only applied
14 to that activity. And I honestly don't know if
15 the Department knew that there were stockpiles on
16 the lots at the time of the termination.

17 BOARD MEMBER HANSON: What is the
18 procedure for terminating then? I mean do they go
19 visit the site, and agree with what the developer
20 has said?

21 MS. BOWERS: The developer files a
22 notice of termination, and the Department reviews
23 it, but no, they don't look at the site. So we
24 basically trust that the site has been stabilized.

25 CHAIR DEVENY: Dexter.

1 BOARD MEMBER BUSBY: I'm getting there.
2 I'm trying to formulate the question.

3 MS. BOWERS: Mindy just indicated to me
4 that -- sorry. Members of the Board -- that the
5 permittee signs under penalty of law that the site
6 is stabilized.

7 BOARD MEMBER BUSBY: But is there
8 evidence in the record -- I'm going to use his
9 language now -- in the record where the material
10 theoretically from pre-2012, whatever that pile
11 that we're speaking of here came from, whether
12 it's from installing sewer, or water lines, or
13 road building, or wherever, is there evidence that
14 that pile was not stabilized in the record, or is
15 there evidence that that pile caused or
16 contributed this -- or was there even a pile? Is
17 there any evidence that it wasn't leveled and
18 stabilized?

19 MS. BOWERS: Board Member Busby, members
20 of the Board. There is no evidence that the
21 stockpiles were not stabilized. There is only
22 evidence, based on the contract language, that
23 Copper Ridge and Reflections directed their
24 contractors to put -- to leave the fill on site.

25 BOARD MEMBER BUSBY: So we don't know if

1 this is part of the problem, or has nothing to do
2 with the problem; is that what you're telling me?

3 MS. BOWERS: No. What I'm telling you
4 is that the -- Board Member Busby -- is that
5 language is what the Hearing Examiner in the order
6 on summary judgment relied on to show supervision
7 and control. That's --

8 BOARD MEMBER BUSBY: I'm not getting to
9 my answer. The permit was terminated in 2012.
10 This was done under the previous permit.

11 MS. BOWERS: Correct -- or I believe so.

12 BOARD MEMBER BUSBY: And if it was
13 terminated, there had to have been some evidence
14 to the Department that this was stabilized,
15 leveled, or somehow taken care of? To terminate
16 the permit, they have to have some evidence of
17 that.

18 If they're going to refer back to it
19 now, what evidence are they using to refer back to
20 it other than -- This was contractual, and
21 contracts, a lot of times, have things where you
22 move dirt around. I think this is what the
23 argument is. They relocated some dirt, which I'm
24 sure they relocated a lot of it, when you dig up
25 and put in a road.

1 But they're just going specifically to
2 this one contract. So in order to terminate that
3 contract, didn't you have to have evidence that
4 that was completed and stabilized?

5 MS. BOWERS: Board Member Busby, members
6 of the Board. The evidence the Department had was
7 an application for termination by the contractor,
8 which the Department accepted.

9 CHAIR DEVENY: A follow up on that. So
10 the contractor made the application, not the
11 owner/operator?

12 MS. BOWERS: Copper Ridge and
13 Reflections' contractor, yes, was the permittee in
14 that case for the road building. That's correct,
15 Madam Chair.

16 CHAIR DEVENY: Other thoughts here?

17 BOARD MEMBER TWEETEN: I'm just trying
18 to -- I don't know if this is a question or not.
19 I'm trying to piece together how these arguments
20 all fit together. This is very confusing.

21 Hearing Examiner Haladay said that
22 Copper Ridge was the owner/operator because they
23 included in contracts for the road building and
24 utility placement requirements that stockpiles be
25 made, and dirt essentially be left in place on the

1 property.

2 But DEQ terminated the developer's
3 obligation under that permit in 2012, and I think
4 it is safe to presume from that, even though DEQ
5 is relying on a certification that was made by the
6 developer, that DEQ was satisfied that that
7 construction activity was sufficiently stabilized
8 that it no longer required a permit.

9 And now, there are inspections after
10 that time that show that storm water is carrying
11 sediments off of the subdivided property and into
12 waters of the state, but there is no evidence in
13 the record that I can see, so first --

14 So I think that makes the provisions in
15 those contracts between the developer and its
16 contractors irrelevant at this point to the
17 discharge that is subject of this complaint. You
18 released them from their obligation under that
19 permit, and to come back and then say, "Well, you
20 had to have a permit for that construction
21 activity" seems to me to be not right.

22 So you're left with their argument,
23 which seems to me is right, that for purposes of
24 the discharges that occurred post-termination of
25 their permit, the responsibility for controlling

1 those discharges lies -- or is based on something
2 else.

3 And it is either based on your argument
4 that they didn't control those discharges,
5 although they had the right to require the
6 purchasers to control them; or based on their
7 argument that at that point in time, whatever
8 responsibility there was to control runoff from
9 those properties that were under home building
10 construction, was the responsibility of the
11 builder.

12 It seems to me that those are two
13 choices we have here; isn't that right?

14 MS. BOWERS: Well, Board Member Tweeten,
15 members of the Board, it is my belief that the
16 Hearing Examiner could have focused also on
17 ownership, but he didn't. He focused more on
18 supervision and control.

19 BOARD MEMBER TWEETEN: It was narrower
20 than that. It was the right to supervise and
21 control that he was focused on, not actual
22 supervision and control.

23 MS. BOWERS: And he also looked at the
24 fact that Mr. Leap signed the NOI's.

25 BOARD MEMBER TWEETEN: Right. I was

1 going to get to that.

2 MS. BOWERS: I mean that's another
3 element. But in order to sell lots, you have to
4 own lots, so Copper Ridge and Reflections are also
5 owners.

6 BOARD MEMBER HANSON: I mean that's --

7 BOARD MEMBER TWEETEN: But they're not.
8 At the time that -- If we assume what I said
9 before was right, and that the sediment discharge
10 that's the problem here came from the disturbance
11 of the ground for the purpose of building houses,
12 they didn't own the lots. They didn't build any
13 houses. The houses were built by subsequent
14 owners in conjunction with either as contractors
15 themselves, or by hiring a contractor. They
16 disturbed the earth for the purpose of building a
17 house.

18 MS. BOWERS: Well, Board Member Tweeten,
19 members of the Board, Copper Ridge and Reflections
20 did own lots. They owned the whole subdivisions
21 and they sold lots.

22 BOARD MEMBER TWEETEN: Sure. But again,
23 let's go back to the prior conversation that we
24 had. There isn't any evidence in the record that
25 the lands that they still owned had been the

1 subject of any activity for the construction of
2 homes. There is no evidence of that in the
3 record, correct?

4 MS. BOWERS: There is evidence of
5 construction activity. I think focusing on home
6 building is too narrow of a focus. There is
7 construction activity that occurred at the site.

8 BOARD MEMBER TWEETEN: Based on what's
9 in the record, what other construction activity
10 took place on those lots that Copper Ridge still
11 owned?

12 MS. BOWERS: There is a concrete wash;
13 there are stockpiles of soil. I guess we don't
14 know who left them there, but they're there.

15 BOARD MEMBER TWEETEN: That's all
16 activity that was done prior to the time that you
17 released their permit. I think we established
18 that just a minute ago.

19 MS. BOWERS: It is all construction
20 activities related to the larger common plan of
21 development.

22 BOARD MEMBER TWEETEN: I understand
23 that. But having read that pretty carefully, I
24 don't see anything in there that allocates the
25 responsibility for that common plan of development

1 between the developer and the subsequent
2 purchaser. Maybe I missed something, but I didn't
3 see that in the law, that that delineation was
4 made.

5 MS. BOWERS: The reason that definition
6 is included in construction activity, or I think
7 it's storm water discharges associated with
8 construction activity, is so that a large
9 developer can't do what Copper Ridge and
10 Reflections did, which is to just sell little
11 lots, and avoid their obligation to have permit
12 coverage for the construction activity.

13 BOARD MEMBER TWEETEN: Well, I can see a
14 narrower purpose for that statute in simply
15 creating responsibility for a discharge permit for
16 lots of less than one acre that are sold pursuant
17 to a common plan of development, without going
18 further and then delineating who is subject to
19 that responsibility.

20 I think to figure out that question, you
21 go back to the definition of owner/operator, and I
22 don't see in the definition of owner and operator
23 a provision that says that you can be an owner and
24 operator, or operator, based simply on having at
25 one time had the right to control or supervise,

1 because the statute, as I said, is written in the
2 present tense. It says owns, controls, or
3 supervises.

4 MS. BOWERS: But I'm going to argue --

5 BOARD MEMBER TWEETEN: In the present
6 tense they weren't doing that. Maybe they should
7 have. Maybe there should be a statute that says
8 they have to. But I don't see where that statute
9 exists right now.

10 MS. BOWERS: Well, Board Member Tweeten,
11 members of the Board. I'm going to argue that
12 Copper Ridge and Reflections, as the original
13 owner, that they had ownership and control of the
14 whole development, and that they --

15 BOARD MEMBER TWEETEN: At one time, yes.

16 MS. BOWERS: -- and that they should
17 have planned for permit coverage, for all the
18 construction activity on the -- and they could
19 have done it. They had a lot of different ways
20 that they could have taken care of their
21 obligation to have permit coverage.

22 BOARD MEMBER TWEETEN: This then refers
23 back to the discussion we had a little while ago
24 about the fact that if that is going to be DEQ's
25 policy, that needs to be clearly expressed in an

1 Administrative Rule. It is an Administrative Rule
2 by definition, and it has to be adopted after
3 notice and comment, and through all of the
4 procedures for adopting rules that are found in
5 MAPA.

6 And the Department has not done that.
7 Your Administrative Rules don't say that. That
8 may be your interpretation, and it may be your
9 policy, but the law is pretty clear in the
10 administrative law area that when you have a
11 policy determination made by an agency that places
12 an affirmative obligation on a regulated entity,
13 that has to be in an administrative regulation.
14 That can't be done simply by policy.

15 MS. BOWERS: Well, the Administrative
16 Rules do require a discharger or a person who
17 proposes to discharge to have a permit for storm
18 water discharges associated with construction
19 activity under 17.30.1115. That requirement is in
20 the rule.

21 And it has been the Department's
22 interpretation, and this interpretation is
23 consistent with federal law, that the developer
24 has to cover the whole larger common plan of
25 development, and they can do it however they want

1 to. They can hire a contractor; they can
2 segregate out activity; they can do it however
3 they want to do it, but it is their obligation to
4 have permit coverage for the construction
5 activity.

6 BOARD MEMBER TWEETEN: But I guess the
7 problem, just to summarize the problem I have with
8 that argument, it is that as far as the written
9 law goes, which is made up of both statutes and
10 administrative regulations, as far as the written
11 law goes, the obligation to engage in those
12 permitting activities to get the permit from DEQ
13 to control these discharges falls on a person who
14 is an owner or operator.

15 That's all that exists in the law, and I
16 don't see in that definition language that would
17 clearly place that obligation on the developer.
18 That's the problem that I'm having. I understand
19 that that's your policy, and that's the agency
20 interpretation; but at some point, it seems to me
21 that you have to look to MAPA, and make the
22 determination as to whether you have to implement
23 that policy through rulemaking, which you haven't
24 done.

25 So that's the problem that I'm having

1 here. I don't know how whether it's fair to the
2 developer. I mean in an abundance of caution, I
3 understand that developers across the state
4 probably do take that problem in hand, and go
5 downstream to their purchasers and contractors,
6 and make sure that all of this is controlled; but
7 I don't see anything in the law that requires them
8 to do that.

9 MS. BOWERS: Well, Board Member Tweeten,
10 members of the Board, I take to heart your
11 comments that the rules could be more clear, but
12 DEQ has been consistent across the Board with
13 developers. DEQ has done a lot of outreach to
14 developers to educate them about their storm water
15 permitting obligations.

16 And it's also not fair to not hold this
17 developer responsible, because he was the original
18 owner/operator -- not he -- Copper Ridge and
19 Reflections were the original owners and operators
20 of the development, and they certainly had enough
21 control, enough authority, to figure out how they
22 wanted to permit the site, and to transfer the
23 permit to contractors if they didn't want to be
24 stuck holding a permit until stabilization of the
25 development.

1 BOARD MEMBER TWEETEN: Okay. Thank you.
2 That's very helpful. Thank you.

3 CHAIR DEVENY: I just want to comment,
4 too, that in the proposed findings of fact and
5 conclusions of law, it's referred to the
6 photographs where they apparently show that there
7 were stockpiled waste soil and areas of ground
8 disturbance, and as well as the evidence of
9 sediment and construction debris.

10 So that kind of implies to me that there
11 maybe were some problems with some of the
12 stockpiled sediments, or the things on the lots
13 that maybe weren't developed, so that it draws a
14 question in my mind as to whether we can really
15 say that it just came off the residence, or that
16 it just could have come off any part of the
17 subdivision.

18 BOARD MEMBER BUSBY: To just follow up.
19 But there is no real evidence that it came from
20 anyplace else but the house construction as per
21 their presentation.

22 MS. MARQUIS: Can I respond to that
23 briefly?

24 CHAIR DEVENY: Yes. Please do.

25 MS. MARQUIS: Madam Chair, members of

1 the Board. There has been a lot of talk about the
2 stockpiles, and the concrete washout, and I
3 stressed this in our Footnote 1 in our
4 supplemental brief, where they allege those, but
5 nothing ties those back to any property or any
6 activity that Copper Ridge or Reflections at
7 Copper Ridge did.

8 In fact, if you look at Page 7 and 8 of
9 our supplemental brief, we refer you to the
10 violation letter, which is the hearing Exhibit 2,
11 and in there it talks about construction
12 specifically, quote, "construction of single
13 family homes occurring throughout the facility."

14 They talk about areas of new
15 construction of single family homes. They note
16 sediment tracking, quote, "within areas of active
17 construction," end quote, and a concrete washout
18 located, quote, "at a single family home
19 construction," end quote.

20 So those stockpiles and the concrete
21 washout were all noted in the violation in the
22 context of the individual home building
23 construction activities in 2013. There is no
24 evidence that ties any of that back to the road
25 building activities that occurred and were

1 stabilized nine months prior to that in 2012.

2 CHAIR DEVENY: Thank you for clarifying
3 that.

4 BOARD MEMBER BUSBY: Chris, I'd like to
5 ask Sarah a question.

6 CHAIR DEVENY: Sure.

7 BOARD MEMBER BUSBY: So we can start
8 moving this thing forward. I'm having trouble
9 with the owner/operator, with the developer being
10 the owner/operator of the lots being built on. So
11 how would we word a motion to separate these two?

12 MS. CLERGET: So Copper Ridge and
13 Reflections submitted a motion for summary
14 judgment in this case that essentially asked the
15 Hearing Examiner to grant them summary judgment
16 that they were not an owner/operator.

17 So if you agree with Copper Ridge and
18 Reflections that they are not an owner/operator,
19 what you need to do is reverse the Hearing
20 Examiner's finding that they are an
21 owner/operator, and his denial of their summary
22 judgment motion; and in turn grant their summary
23 judgment motion that they are an owner/operator.

24 So I have that --

25 BOARD MEMBER BUSBY: They are not --

1 MS. CLERGET: Sorry. That they are not
2 an owner/operator. I missed a word there. I have
3 it written down.

4 CHAIR DEVENY: And following up on that,
5 if we did that, that would basically end this
6 case; is that correct?

7 MS. CLERGET: Yes. The grant of summary
8 judgment ends the case.

9 BOARD MEMBER BUSBY: I'll just simplify
10 it. I'll make a motion we grant the summary
11 judgment and reverse the Hearing Officer's
12 decision; is that correct?

13 MS. CLERGET: Yes. There were cross
14 motions for summary judgment, so you just need to
15 be clear that you're granting Copper Ridge and
16 Reflections' motion for summary judgment, and
17 reversing his denial of that motion.

18 BOARD MEMBER BUSBY: Yes. Okay. That
19 would just open it up for discussion on a much
20 narrower subject.

21 CHAIR DEVENY: There is a motion. Is
22 there a second? Was that a motion?

23 BOARD MEMBER BUSBY: Yes, that's a
24 motion.

25 CHAIR DEVENY: Is there a second?

1 BOARD MEMBER HANSON: So we need a
2 second to discuss this; is that correct? I'll
3 second it then.

4 CHAIR DEVENY: Chris.

5 BOARD MEMBER TWEETEN: Madam Chair. The
6 proposed findings of fact and conclusions of law
7 delineate four separate violations. They all
8 depend on the finding of owner/operator?

9 MS. CLERGET: Yes.

10 BOARD MEMBER TWEETEN: So if we agree
11 with Copper Ridge that the Hearing Examiner
12 Haladay was wrong -- you incorporated his
13 reasoning by reference?

14 MS. CLERGET: Yes.

15 BOARD MEMBER TWEETEN: So if we agree
16 with the developer that Hearing Examiner Haladay
17 was incorrect in his conclusion of law that Copper
18 Ridge was the owner/operator, then all four of the
19 violations would fall as a result of that?

20 MS. CLERGET: That's my opinion. If the
21 parties disagree with me, they should probably say
22 that.

23 BOARD MEMBER TWEETEN: Would you please
24 address that question.

25 MS. BOWERS: Madam Chair, members of the

1 Board. The four violations basically all arise
2 from discharging storm water associated with
3 construction activity without a discharge permit.

4 So I guess I agree then that if Copper
5 Ridge and Reflections are not owner/operators,
6 then they would not have been obligated to get a
7 discharge permit, and they would not have been
8 responsible for placing the waste and for
9 violating terms of a permit.

10 BOARD MEMBER TWEETEN: I assume Copper
11 Ridge agrees with that. It seems quite beneficial
12 to your position, so --

13 MS. MARQUIS: Board Member Tweeten,
14 Madam Chair. Yes, we do.

15 CHAIR DEVENY: Hillary.

16 BOARD MEMBER HANSON: I'm struggling,
17 Sarah, a little bit with the -- they're "the"
18 owner/operator versus "an" owner/operator?

19 MS. CLERGET: That's probably an
20 appropriate correction. The motion should be "an"
21 owner/operator. And I think the determination
22 that they are or are not "an" owner/operator would
23 end the case.

24 BOARD MEMBER HANSON: Because from my
25 point of view, I see it as they are an

1 owner/operator in the subdivision. Are they
2 "the"? I go with no. I think that there are
3 clearly some other owners that have started
4 construction, etc.

5 So to me they're "an" owner/operator,
6 but does this need to be looked at broader, and
7 then you would get into the violations to see if
8 they specifically were responsible for the
9 violations for the components which they were an
10 owner/operator of. Does that make sense?

11 MS. CLERGET: Yes.

12 BOARD MEMBER BUSBY: That makes perfect
13 sense.

14 BOARD MEMBER TWEETEN: Madam Chair, if I
15 might. Well, let's assume for purposes of
16 argument at this point that we find that the
17 record is not sufficient for us to make a
18 determination that Copper Ridge was "the"
19 owner/operator responsible for these particular --
20 either "the" or "an" owner/operator responsible
21 for these discharges.

22 It seems to me we have two choices here
23 at that point. One is we can reverse the summary
24 judgment finding by Hearing Examiner Haladay to
25 that effect, and also reject the conclusion of law

1 that incorporated that conclusion of law by
2 reference that Sarah made, and finding the
3 violation not proven, because it was not proven
4 that they were the owner/operator.

5 We could direct DEQ to dismiss the
6 notice of violation. That would be one thing we
7 could do. The other thing we could do -- another
8 thing we could do would be to vacate the orders to
9 the extent that they rely on the finding of
10 owner/operator, and remand the matter to Hearing
11 Examiner Clerget for further proceedings directed
12 to the factual predicates that underlie the
13 question of owner/operator, based on the absence
14 of evidence in the record that conclusively
15 establishes either way.

16 I understand and appreciate Copper
17 Ridge's argument that the burden of proof is on
18 the Department to show that Copper Ridge was the
19 owner/operator. And if we determine that they
20 failed to sustain that burden of proof, there
21 would certainly be grounds to dismiss, and order
22 the Department to dismiss the notice of violation
23 based on the failure to prove with respect to that
24 element of the violation.

25 So I think there are certainly equitable

1 arguments to be made that dismissal is the right
2 thing to do at this point, especially this far
3 down the road time-wise from when these events
4 took place.

5 I'm assuming that Copper Ridge has
6 continued to sell lots in the subdivision, and
7 that construction activity has gone on, and so on
8 and so forth. Storm events being relatively rare,
9 perhaps this has not been an ongoing problem.

10 And there is certainly an equitable
11 argument to be made that under those circumstances
12 it is not really equitable to allow the Department
13 to impose financial penalties on Copper Ridge
14 without first proving, providing the factual
15 predicate for a finding, that they were the
16 owner/operator at that time under the law as we
17 determine it is properly interpreted.

18 So I guess I would be leaning in that
19 direction, if we find as a board that the evidence
20 in the record doesn't support the conclusion that
21 they were an owner/operator with respect to these
22 discharges. But we also have the opportunity to
23 remand as well, if we want to, and have further
24 proceedings.

25 BOARD MEMBER HANSON: Can I ask a

1 question, Sarah? Does the determination of being
2 "an" owner/operator mean we're saying they're an
3 owner/operator responsible for these discharges?

4 MS. CLERGET: Yes. Well, they are -- as
5 Chris said, it is a first step. Then they have to
6 determine whether or not the violations themselves
7 occurred, but that they are responsible for
8 getting a permit, that they're responsible for
9 permit coverage.

10 BOARD MEMBER HANSON: So basically when
11 we're talking about the determination of them
12 being an owner/operator, we're talking about are
13 they the responsible party for permitting these
14 violations?

15 MS. CLERGET: Well, no. Are they the
16 responsible party for getting a permit? Then the
17 question is: Were there violations?

18 BOARD MEMBER HANSON: Because I think
19 where I'm struggling in my head is in my mind,
20 they are an owner/operator of lots within the
21 subdivision. I think everyone maybe would agree
22 with that.

23 And so what I'm struggling with is so in
24 my mind, yes, they're responsible for a permit for
25 those lots in which they own, but it sounds like

1 there is other lots, and in my mind then those
2 folks would be responsible for the permitting of
3 those lots.

4 And so where I'm struggling is then I
5 think it gets into where, on which -- or which
6 properties caused these violations, and I don't
7 think that's clear.

8 MS. CLERGET: I also want to clarify.
9 We might need to get the parties' opinion on this.
10 I will let them jump up and object if they think
11 I'm over-stepping my bounds here.

12 But I think you're conflating
13 owner/operator to a certain extent. Owner of the
14 lots does not mean owner/operator requirement to
15 get a permit, because the requirement to get a
16 permit belongs or attaches when there is a
17 disturbance that's going to cause discharge. Does
18 that make sense?

19 BOARD MEMBER HANSON: Yes.

20 BOARD MEMBER BUSBY: Construction
21 activity.

22 MS. CLERGET: So you're required to get
23 a permit if you're going to do something for which
24 a permit would be necessary. Does that make
25 sense?

1 BOARD MEMBER HANSON: Yes.

2 MS. CLERGET: So watch the use of owner
3 there.

4 BOARD MEMBER TWEETEN: Well, the term is
5 disjunctive. It says owner "or" operator. And
6 owner or operator, if person owns a point source,
7 they are an owner or operator. If they operate
8 the point source, they're also an owner/operator.

9 MS. CLERGET: But point source is the
10 issue there, so there has to be a point source.
11 And I think whether or not there is a point source
12 -- just because you own the land doesn't mean that
13 there is a point source discharge. That's all I
14 was trying to clarify.

15 BOARD MEMBER TWEETEN: If the land is an
16 identifiable contributor to a discharge to state
17 waters, then there is a point source. If it is on
18 land that you own, you can be considered an owner
19 or operator.

20 MS. CLERGET: Yes.

21 BOARD MEMBER BUSBY: But doesn't the
22 requirement to get a permit involve construction
23 activities under the law?

24 MS. CLERGET: One of the things, yes.

25 BOARD MEMBER TWEETEN: I think Mr. Hayes

1 might want to enlighten us.

2 MR. HAYES: Chairwoman Deveny, members
3 of the Board, for the record, Ed Hayes, Acting
4 Chief Legal Counsel.

5 I just wanted to chime in a little bit
6 in terms of burden of proof, and to remind the
7 Board that this is in the context of a motion for
8 summary judgment, which is only proper when there
9 is no disputed material fact, and that the person
10 receiving an award of summary judgment is entitled
11 to that by conclusion of law.

12 To defeat summary judgment, DEQ does not
13 have the burden of proving that the sedimentation
14 came from lots owned by the developer. There just
15 has to be a material, a dispute of that material
16 fact for summary judgment, and that to be
17 appropriate, and to remand back to DEQ.

18 BOARD MEMBER TWEETEN: To follow up with
19 that, extend that a little farther. If we find
20 that there is a genuine issue of material fact
21 with respect to the legal conclusion of who the
22 owner or operator is, the Department would have
23 the burden of proving those facts that are
24 predicate to the conclusion that Copper Ridge was
25 the owner/operator.

1 MR. HAYES: Upon remand?

2 BOARD MEMBER TWEETEN: Yes.

3 MR. HAYES: Yes, I would agree.

4 MS. CLERGET: I'm not sure about that.

5 I think that if it were -- if you're saying
6 summary judgment is defeated, and there is a
7 material issue of fact, summary judgment is
8 defeated, and it's gone to a hearing, the question
9 of who has the burden at that hearing is a
10 question currently before the Board about which
11 there is disagreement.

12 BOARD MEMBER TWEETEN: And your
13 conclusion was what?

14 MS. CLERGET: My conclusion in the
15 findings of fact and conclusions of law was that
16 Copper Ridge had the ultimate burden at the
17 hearing. And therefore if it goes to a hearing,
18 Copper Ridge would be responsible for proving that
19 they are not the owner/operators within the
20 meaning of the statute, and based on these facts.
21 However --

22 BOARD MEMBER TWEETEN: Maybe that should
23 be the next issue.

24 MS. CLERGET: They disagree with me.

25 BOARD MEMBER TWEETEN: Thank you.

1 That's helpful.

2 Having considered Mr. Hayes' comments, I
3 guess I'm changing my mind here about whether
4 dismissal as opposed to remand is the appropriate
5 remedy, if we find that summary judgment on the
6 owner/operator question was improperly granted,
7 because I think Mr. Hayes is right, that if
8 summary judgment was improvidently granted on that
9 question, the appropriate remedy is to send it
10 back to the Hearing Examiner with directions to
11 take evidence on that question, subject to the
12 appropriate legal standard that we would determine
13 in our remand order. Does that make sense to
14 everybody?

15 BOARD MEMBER HANSON: No.

16 BOARD MEMBER BUSBY: Makes sense. I'd
17 like to --

18 BOARD MEMBER TWEETEN: This is inside
19 baseball for lawyers. Summary judgment is a way
20 that litigation can be short circuited in advance
21 of an evidentiary hearing, and basically the
22 principle is that if the material facts are
23 undisputed, then there is nothing left for you to
24 go to hearing on with respect to the evidence, and
25 the only questions to be determined are questions

1 of law.

2 Under those circumstances, the tribunal
3 gets to enter what's called summary judgment, and
4 what that means there is no genuine issue of
5 material fact, and one or the other of the parties
6 is entitled to judgment on that issue as a matter
7 of law. That's what the rule says.

8 And Mr. Hayes is right, that with
9 respect to that standard, the party opposing
10 summary judgment is entitled to all of the
11 inferences of fact that need to be made. In other
12 words, if you view the facts that are set forth in
13 the summary judgment papers in the light most
14 favorable to the party opposing summary judgment
15 -- because that's how you determine whether there
16 is a genuine issue of material fact or not. You
17 look at the evidentiary materials that the parties
18 submit.

19 And because the law favors evidentiary
20 hearings whenever there is a disputed fact, if
21 there is any interpretation of those materials
22 that would give rise to a disputed issue of fact,
23 then summary judgment should be denied, and the
24 matter ought to go to hearing.

25 Now in this case, as I understand the

1 papers -- and I could be wrong about this, but I
2 don't think I am -- Hearing Examiner Haladay found
3 that there were no genuine issues of material fact
4 with respect to the question of owner/operator
5 based on those circumstances that were stated in
6 his summary judgment order.

7 And there were two. One was the form
8 that was signed by Copper Ridge basically
9 admitting that they were the owner/operator; and
10 the other was the contracts that Copper Ridge had
11 with its contractors dealing with road building,
12 and culvert building, and so on and so forth,
13 leaving no materials in place, and stockpiling and
14 all those other things.

15 And those were the only two factual
16 considerations, I think, if I read the order
17 right, that Hearing Examiner Haladay relied on in
18 support of his conclusion of law that Copper Ridge
19 was the owner/operator, owner or operator.

20 So if we find that he applied the
21 improper standard legally, because for example he
22 read "supervises, controls, or operates" to mean
23 had the power in the past to supervise control or
24 operate -- which I think is the Department's
25 position -- if we think that that reading of the

1 statute is wrong, that statute operates in the
2 present tense, and at the time the point source
3 discharge occurs, we look to who had ownership,
4 operation, or supervision.

5 If that's what we find, and I'm inclined
6 to think that that's right, if that's what we
7 find, then he applied the improper standard
8 legally, and we ought to send the case back for
9 the Hearing Examiner, in this case Sarah, to
10 review the record; I would argue give the parties
11 an opportunity to further clarify the evidentiary
12 record; and then either determine that summary
13 judgment is appropriate, or enter proposed
14 findings and conclusions on the question that do
15 not simply incorporate by reference what Mr.
16 Haladay said.

17 Am I getting closer to making sense
18 here?

19 CHAIR DEVENY: Say the last part again.
20 The part before you said, "Does that make sense?"

21 BOARD MEMBER TWEETEN: Let me see if I
22 can reconstruct it. If we tell Sarah that Andres
23 applied the wrong standard legally, she can go
24 back and apply the right standard to the evidence
25 that's already in the record, and decide whether

1 under those circumstances summary judgment should
2 be entered, or whether under those circumstances
3 it is more appropriate to deem that the evidence
4 is in conflict; and then make findings of fact and
5 conclusions of law with respect to which view of
6 the evidence is the most probable and what legal
7 conclusion that evidence leads to.

8 So this is starting to get clearer in my
9 mind as to where this is.

10 BOARD MEMBER BUSBY: So Chris, a quick
11 question basically for you is: We've got the two
12 things really that Sarah brought out. If we
13 conclude one of them is there, if we're dealing in
14 the present tense, not the past, far in the past
15 tense, the present tense meaning September '13,
16 whatever that date of the rainfall is. If we say
17 he used the wrong standard at that point, doesn't
18 it make the other part null and void?

19 BOARD MEMBER TWEETEN: It makes his
20 conclusion of law null and void. It doesn't
21 affect what the evidence is. The evidence is what
22 it is.

23 BOARD MEMBER BUSBY: The evidence is
24 what it is.

25 BOARD MEMBER TWEETEN: And what legal

1 conclusions should flow from the two pieces of
2 evidence that he cited in his order, one, the
3 stockpiling and disturbance dealing with the
4 matters prior to the release of the first permit,
5 plus the admission.

6 What effect that has on Copper Ridge's
7 responsibility would have to be assessed by Sarah,
8 using the appropriate standard. Do either of
9 those facts together or singly, what's the
10 preponderance of the evidence with respect to who
11 the owner/operator was at the time of the point
12 source discharge.

13 If that's what we decide the law is, and
14 that the law looks at present tense, we look at
15 the time of the discharge, and we determine who
16 the owner or operator was at that point,
17 regardless of whether somebody else could have
18 been an owner or operator previously.

19 If we say it operates as of the time of
20 discharge, then Sarah would have to look at the
21 record, including those two items that Andres
22 cited in his order, plus any other evidence that's
23 in the record as well; and Sarah would have the
24 option of concluding that evidence is in conflict
25 or not sufficient to make a finding, so we're

1 going to reopen the record, take more testimony,
2 and let the parties put in whatever proof they
3 want to, and then we'll decide who the
4 owner/operator was.

5 That would be left to Sarah's discretion
6 on remand to decide whether to limit it to the
7 record as it exists, or to give the parties an
8 opportunity, now that the standard of law has been
9 clarified, to conform their proof to what this
10 standard is.

11 That's up to Sarah on remand. She can
12 decide what in her discretion the more appropriate
13 route is.

14 CHAIR DEVENY: Sarah, is that what you
15 understand would be --

16 MS. CLERGET: I understand that, yes.

17 CHAIR DEVENY: -- that Chris laid that
18 out?

19 MS. MARQUIS: Can I --

20 BOARD MEMBER TWEETEN: I guess I'd like
21 to hear from the parties as to what the
22 appropriate remedy is. If we agree with Copper
23 Ridge that they have not been proven on the
24 existing record to be an owner/operator under
25 their interpretation of the statute, should we

1 decide to adopt it.

2 I'd like to hear from both sides as to
3 should we order it dismissed, or should we remand
4 it for further proceedings.

5 MS. MARQUIS: Member Tweeten, Madam
6 Chair, members of the Board. Copper Ridge and
7 Reflections at Copper Ridge also moved for summary
8 judgment in this matter, and their motion was to
9 dismiss the administrative actions because they
10 were not the owner or the operator.

11 It seems to be within this Board's
12 authority to be able to modify conclusions of law,
13 and that would be what you would be doing,
14 modifying the conclusion of law in the summary
15 judgment order to say that they are not in fact
16 owners or operators, and grant Copper Ridge and
17 Reflections' motion for summary judgment.

18 BOARD MEMBER TWEETEN: But we wouldn't
19 say they are not the owner or operator. We would
20 say on the existing record they have not been
21 proven to be the owner or operator. It wouldn't
22 be a ruling on the merits, is what I'm saying.

23 It would be dismissed without prejudice,
24 because on this record, the evidence is lacking
25 with respect to that point. Theoretically, I

1 suppose, the Department could go back and refile,
2 and put in additional evidence if they wanted to,
3 and then you'd have to deal with claim preclusion,
4 and issue preclusion, and all those res judicata
5 kind of concepts that are really, really
6 complicated and not easy to understand.

7 MS. CLERGET: Vicki, if I might clarify.
8 I think what they're saying, and what Ed said, was
9 that it would be a finding that there is a genuine
10 issue of material fact on the summary judgment.
11 It is denied based on genuine issue of material
12 fact.

13 BOARD MEMBER TWEETEN: That's correct.

14 MS. MARQUIS: Couldn't it be, though, a
15 denial of summary judgment based on the conclusion
16 of law, that the law was wrong? Even if you take
17 his findings, that he found that contract, and he
18 found that they were the original owners, even so,
19 those don't support the conclusion that they are
20 the owner/operator.

21 BOARD MEMBER TWEETEN: Sure. But if he
22 crafted his order referring to evidence that
23 supported his interpretation of the law, and his
24 interpretation turned out to be wrong, and there
25 is other evidence in the record that might bear on

1 the question and whether there is an issue of fact
2 and so forth, under the appropriate standard, why
3 should we give you that windfall, and dismiss the
4 matter? Why shouldn't we go back and have the
5 Hearing Examiner review the entire record under
6 the appropriate standard, and make a determination
7 as to whether there's a genuine issue of material
8 fact or whether there needs to be more evidence?

9 MS. MARQUIS: Member Tweeten, Madam
10 Chair, members of the Board. I'm not sure what
11 more evidence is out there, and to continue with
12 more evidentiary hearings --

13 BOARD MEMBER TWEETEN: I certainly don't
14 know either, but I would -- I mean the parties are
15 much more aware of what other facts could be
16 marshalled than we are at this stage. We have the
17 record.

18 MS. MARQUIS: What we've heard today is
19 that the Department has no evidence that Copper
20 Ridge and Reflections owned those lots where the
21 home building activities occurred that were the
22 basis for the violation.

23 BOARD MEMBER TWEETEN: They didn't
24 introduce any evidence in the record. Maybe they
25 don't have any, in which case you have nothing to

1 worry about.

2 But if there is additional evidence out
3 there that bears on that question that the
4 Department wants to lay in front of the Hearing
5 Examiner, properly instructed by us as to what the
6 legal standard is, I think Sarah ought to be given
7 the discretion to allow them to present that, if
8 the determination is made that that's appropriate.

9 I wouldn't want to prejudge that
10 question. I think the parties are much more aware
11 of all of that than we are, and you can make
12 arrangements with Sarah to either reopen the
13 evidence or not, depending on what she in her
14 discretion decides is the most appropriate.

15 BOARD MEMBER BUSBY: A quick question.
16 If we decided today that for the lots that were
17 being built on, that Copper Ridge and Reflections
18 were not the owner/operator on the lots being
19 built, that wouldn't preclude the Department from
20 going back and filing against the owners of those
21 lots.

22 BOARD MEMBER TWEETEN: No, it would not.
23 In my opinion, it wouldn't.

24 BOARD MEMBER BUSBY: I don't think it
25 would either. In my opinion, it wouldn't either.

1 BOARD MEMBER TWEETEN: I think the
2 Department has told us that they think they have
3 the authority to do that certainly, so I think
4 they could go back and do that, and there may be
5 time constraints, maybe there's a statute of
6 limitations, or a statute of repose, or some kind
7 of a laches argument that could be made with
8 respect to the fact that after all this time has
9 gone by, is it equitable to go back and charge
10 these owners with a violation that they didn't
11 even know they were committing. But that's all
12 equitable stuff that can be presented to Sarah on
13 remand.

14 CHAIR DEVENY: Ms. Bowers, could you
15 speak to the remand.

16 MS. BOWERS: Yes, Madam Chair, members
17 of the Board. Just to speak to Board Member
18 Busby's comment about lot owners.

19 Under the Water Quality Act, we
20 generally take enforcement action against current
21 violations or ongoing violations, and so I'm
22 pretty sure the development is stabilized by now,
23 and there wouldn't be an ongoing violation.

24 BOARD MEMBER BUSBY: That's really the
25 basis of my question, so can you go back into

1 history and grab the history --

2 MS. BOWERS: We wouldn't go back for a
3 past violation.

4 And with regard to Hearing Examiner
5 Haladay's orders on summary judgment, of course we
6 urge you to adopt those, and find that Copper
7 Ridge and Reflections are owner/operators. But if
8 you decide that there are material facts, then we
9 would propose that we have a hearing on the
10 question of owner/operator.

11 And I also want to say that there was
12 other evidence in the record. Hearing Examiner
13 Haladay just really focused on the contracts, and
14 used those to show supervision and control by
15 Copper Ridge and Reflections.

16 He also on Page 14 talks about the
17 Copper Ridge and Reflections being the original
18 owners and developers of all the land in the
19 subdivision. And then he talks about their
20 signing the NOI, and that being the concession
21 that they are the owner or operator.

22 So if you find that that order was not
23 -- that there is still a question of material fact
24 and that order should be reversed, DEQ would urge
25 you to have the opportunity to present more

1 evidence, or to present the evidence that Hearing
2 Examiner Haladay didn't focus on in his order.

3 MS. CLERGET: You might also want to
4 hear from the parties, Chris. You raised a reason
5 of equity about sending it back versus dismissal,
6 based on the procedural posture, and you might
7 want to hear from the parties on that as well.

8 BOARD MEMBER TWEETEN: If I were in your
9 shoes as the Hearing Examiner, I would on remand,
10 if we remand, I would notify the parties that it
11 has been remanded on this issue with respect to
12 owner/operator; and if there are any other matters
13 that are conclusive with respect to Copper Ridge's
14 liability in this case that the parties want to
15 present you at that time, they should be free to
16 present those on remand as well.

17 I don't think we're going to make a
18 finding with respect to those equitable
19 considerations as a board now based on the record
20 that's here, because there was no evidence and no
21 argument with respect to that. So that ought to
22 be first in front of you, and depending on what
23 you do with it, it'll come back to us or not.

24 Is that clear to the parties? I think
25 you understand what I'm saying. If you want to

1 make arguments with respect to laches or any sort
2 time barrier with respect to proceeding at this
3 point, those ought to be presented on remand,
4 because we're not going to consider them at this
5 point.

6 And those are arguments that obviously
7 would be open to the original buyers should the
8 Department want to go back and proceed. But I
9 understand what Ms. Bowers said, that that's not
10 likely to happen, if ultimately the finding is
11 made that Copper Ridge is not responsible. By
12 Copper Ridge, I mean both Copper Ridge and --

13 BOARD MEMBER BUSBY: Where are we at on
14 the motion?

15 CHAIR DEVENY: The motion was to reject
16 summary judgment.

17 MS. CLERGET: Was to grant Copper
18 Ridge's motion for summary judgment.

19 CHAIR DEVENY: And we have discussed an
20 alternative that I think I know I'm leaning
21 toward. It sounds like you are.

22 BOARD MEMBER TWEETEN: Right. I guess
23 the first question, Madam Chair, the first
24 question would be whether at this point a majority
25 of the voting Board agrees with the position that

1 I've articulated, which is that Hearing Examiner
2 Haladay applied the incorrect legal standard in
3 interpreting the term owner or operator, to apply
4 based on the fact that the developer at some point
5 in time had the opportunity to address the
6 conditions that led to this discharge and failed
7 to do so.

8 If we want to reverse that, and say that
9 we think that the statute properly interpreted
10 means that owner or operator is the person who at
11 the time of the discharge was either the owner or
12 in control or supervising the construction
13 activities on the property.

14 If that's what we think the appropriate
15 interpretation is, then based on that conclusion
16 of law on our part, we would reverse the summary
17 judgment, and reverse Sarah's determination which
18 incorporates it by reference, and send the matter
19 back to Sarah for further proceedings, applying
20 the appropriate standard, the scope of which she
21 can determine on remand.

22 MS. CLERGET: You're still going to have
23 to solve the burden of proof issue, though.

24 CHAIR DEVENY: Let's take a break, and
25 we'll reconvene here at twenty of one.

1 (Lunch recess taken)

2 CHAIR DEVENY: We'll reconvene. Let the
3 record show that we continue to have our quorum.
4 And we left off with a motion on the table to
5 discuss, and also a conversation that Chris was
6 initiating about --

7 BOARD MEMBER TWEETEN: Madam Chair, if I
8 might. Before we vote on the motion, there is a
9 matter that I'd like to hear from the parties on.

10 Since we are considering adopting a
11 statutory interpretation that's different from the
12 one that the Department applied in this case, I
13 think it is incumbent on us to ask whether if we
14 do take a different approach to the interpretation
15 of the statute, we're going to be creating any
16 unintended consequences for the Department with
17 respect to other storm water enforcement matters
18 or other MPDES matters generally.

19 So can I hear from the Department on
20 that question, and then I'd like to give the
21 developer, Madam Chair, an opportunity to respond
22 as well.

23 MS. BOWERS: Board Member Tweeten,
24 members of the Board. Listening earlier, I left
25 for the break with the impression that you were

1 going to reverse, or you were leaning towards
2 reversing Hearing Examiner Haladay's order on
3 summary judgment, because there are questions of
4 material fact as to owner or operator. And DEQ
5 believes we can provide more facts and support our
6 determination that Copper Ridge and Reflections
7 were the owner or operator. So if you do that,
8 you wouldn't really disturb our interpretations of
9 the Administrative Rules or the statute.

10 If you do adopt a different
11 interpretation that's inconsistent with what the
12 Department has been doing, which is to look to the
13 owner or operator of the larger common plan as
14 responsible for the permit at least initially,
15 then that would be a change for the Department,
16 and we would have to be really clear about what
17 the rule would be going forward.

18 BOARD MEMBER TWEETEN: Well, it seems to
19 me that, as we discussed before lunch, one of the
20 concerns that I have personally about this
21 situation is the absence in the Administrative
22 Rules that you've adopted of any clarifying
23 language that puts that complete development
24 theory into words that the developing community
25 can look at and determine that their

1 responsibilities are. So you would be able to
2 perhaps engage in rulemaking that might clarify
3 that matter.

4 MS. BOWERS: I think the
5 responsibilities are in the rules. It says under
6 17.30.1115, it says that the discharger or the
7 person proposing the discharge has to get the
8 permit. And then in I think it is 1115(2) that
9 the NOI to go under the general permit has to be
10 signed by the owner or operator, and so that could
11 be put together a little bit better. I mean I
12 take that seriously, your comments on the rule.

13 BOARD MEMBER TWEETEN: Okay. But you
14 don't foresee a catastrophe in your enforcement
15 program --

16 MS. BOWERS: At this time I don't
17 foresee a catastrophe.

18 BOARD MEMBER TWEETEN: I just wanted to
19 make sure. Vicki, do you have any anything to
20 add? Madam Chair, if I might.

21 CHAIR DEVENY: Yes.

22 BOARD MEMBER TWEETEN: Do you have an
23 opinion on that question?

24 MS. MARQUIS: Board Member Tweeten,
25 Madam Chair, members of the Board, the worst case

1 scenario, what happens is that rulemaking is
2 initiated, and it does make the laws and the rules
3 more clear for the regulated public, and that's a
4 good thing, and it enables the policies and the
5 goals of the Montana Water Quality Act.

6 BOARD MEMBER TWEETEN: Thank you. That
7 answers my question.

8 BOARD MEMBER BUSBY: Can we recap
9 something where we're at, because I'm not sure
10 where I started with that.

11 CHAIR DEVENY: We have a motion on the
12 floor that we've kind of left open. We still at
13 some point need to vote on that. But before we
14 do, I'd like Chris to kind of reiterate what it is
15 that you're going to suggest that we do in place
16 of this motion.

17 BOARD MEMBER TWEETEN: And I don't know
18 if this should form the basis of a substitute
19 motion. Frankly I don't remember exactly what
20 Dexter's motion was.

21 BOARD MEMBER BUSBY: It basically simply
22 put was to -- not remand, but to --

23 MS. CLERGET: Grant Copper Ridge's
24 motion for summary judgment.

25 BOARD MEMBER BUSBY: -- grant their

1 motion for judgment.

2 BOARD MEMBER TWEETEN: Madam Chair, I
3 would oppose that motion.

4 CHAIR DEVENY: I would, too.

5 BOARD MEMBER TWEETEN: Because I don't
6 think the record is sufficient to justify a
7 finding either way on that question. So I think a
8 remand is the most appropriate thing to do, taking
9 Mr. Hayes' guidance to heart, that since we are
10 talking about a summary judgment here, unless we
11 find that the record is crystal clear one way or
12 the other, the appropriate thing is to remand for
13 a factual hearing and further consideration, in
14 light of the legal standard that we think is
15 appropriate.

16 So I think I would oppose that motion.
17 What I would suggest as an alternative is that the
18 Board vacate the proposed findings of fact,
19 conclusions of law, and order that Hearing
20 Examiner Clerget entered, and also part and parcel
21 of that would be vacating Hearing Examiner
22 Haladay's summary judgment order.

23 And the grounds that I would propose the
24 Board rely on in vacating those documents would be
25 that we disagree with the Hearing Examiners' --

1 plural -- conclusion of law, that based on those
2 factual considerations that Hearing Examiner
3 Haladay mentioned, Copper Ridge and Reflections
4 ought to be deemed to be the owner/operator of
5 this project for purposes of the storm water
6 discharges that are at issue in these notices of
7 violation.

8 CHAIR DEVENY: And that we remand?

9 BOARD MEMBER TWEETEN: And that we then
10 remand the matter to Hearing Examiner Clerget for
11 further proceedings, consistent with what we think
12 the proper interpretation of that statute is,
13 to-wit, which is that the statutory definition of
14 owner/operator speaks to the person who owns,
15 operates, or supervises the project at the time
16 that the offending storm water discharges take
17 place.

18 And that simply having had the
19 opportunity to take steps that might have
20 controlled those discharges at some time in the
21 past does not make one an owner or operator for
22 purposes of the statute.

23 BOARD MEMBER BUSBY: Can I ask you a
24 question? Does that get to my concern of the
25 actual bright line of who the property owner is

1 and as part of the owner/operator thing?

2 BOARD MEMBER TWEETEN: I think it does.

3 BOARD MEMBER HANSON: I think it does,
4 too.

5 BOARD MEMBER TWEETEN: I think simply by
6 virtue of the fact that Copper Ridge owned the
7 property at one time, and could have, in its
8 contracts with the contractors or its contracts
9 for the sale of the property, impose conditions on
10 storm water runoff, that by itself is not enough
11 to make them an owner or operator under the
12 statute; that the statute says that an owner or
13 operator is a person who owns, operates,
14 supervises -- whatever the verbs are in the
15 statute. I don't remember -- in the present
16 tense, which I interpret, I think the Board should
17 interpret to mean at the time of the discharge, as
18 opposed to at some time in the past.

19 I think that's the clearest reading of
20 the statute, it is the most consistent with the
21 plain language of the statute, and I also think
22 that if the Department had wished to adopt an
23 interpretation of the statute that embellished on
24 that plain meaning by having some sort of
25 responsibility relate back to persons who were

1 owners or operators in the past, they were
2 obligated to do that by adopting an Administrative
3 Rule to that effect, which has not been done.

4 So then the statutory language stands by
5 itself, and the clear guidance of the Montana
6 Supreme Court is that unless the statute is
7 internally ambiguous, the statute ought to be read
8 according to its plain meaning, which in this case
9 is the present tense.

10 The statute is not ambiguous. It
11 doesn't -- it is in the present tense, clearly
12 speaks to the present tense, and I don't see
13 anything in the statute that's ambiguous with
14 respect to the point.

15 CHAIR DEVENY: So in remanding back to
16 Sarah then, she opens up the record and can take
17 more testimony; is that --

18 BOARD MEMBER TWEETEN: She has the
19 discretion to do that if she chooses. The MEIC
20 case that's cited in Sarah's proposed findings and
21 conclusions with respect to burden of proof
22 question talks to that point, and indicates that
23 the discretion is with the Hearing Examiner in the
24 first instance to decide the scope of the
25 proceedings on remand, unless we give specific

1 direction to the contrary.

2 And I would prefer to allow Sarah, with
3 her superior knowledge of the record, to make the
4 determinations as to whether the record needs to
5 be reopened or not, obviously having heard from
6 the parties what their views are on that question.

7 CHAIR DEVENY: If you don't open up the
8 record, though, are you going to get additional
9 information? If the record isn't opened, is there
10 an opportunity for DEQ to submit their additional
11 information that they indicated they had?

12 MS. CLERGET: No. They would need to
13 point to it. If it's in the record already, they
14 can point to it. If it is not already in the
15 record, then they would have to give additional --
16 going to have to reopen the record to then allow
17 additional evidence.

18 BOARD MEMBER TWEETEN: And the developer
19 would have the opportunity to offer its
20 evidence --

21 MS. CLERGET: Right. Do the same.
22 Correct.

23 BOARD MEMBER TWEETEN: -- in rebuttal if
24 it chooses to do that.

25 BOARD MEMBER BUSBY: She has that

1 discretion?

2 BOARD MEMBER TWEETEN: My thought is
3 that the Board should take the position that she
4 has that discretion, yes.

5 BOARD MEMBER BUSBY: My big concern was
6 I want to make sure there's a bright line of the
7 sale of the property, unless it's contractually
8 carried -- something contractually carried through
9 on the sale of the property.

10 BOARD MEMBER TWEETEN: So Dexter, can I
11 offer that as a substitute motion?

12 BOARD MEMBER BUSBY: I accept that as a
13 substitute motion.

14 CHAIR DEVENY: Is there a second?

15 BOARD MEMBER HANSON: Second.

16 MR. HAYES: Madam Chair, members of the
17 Board, Ed Hayes for the record, Acting Chief Legal
18 Counsel.

19 I'm not sure that it is correct that
20 Sarah would have the discretion to have another
21 supplemental evidentiary hearing. My experience
22 is when summary judgment is not granted because
23 there is a material, a dispute of material fact,
24 that then there is an evidentiary hearing on that
25 disputed fact; and it is only after the judicial

1 body hears the additional evidence submitted after
2 summary judgment has been denied that the case is
3 then situated for an actual ruling on that factual
4 matter.

5 BOARD MEMBER TWEETEN: Madam Chair. I
6 agree with that up to a point, Ed. I think if, as
7 we've said, not only does there appear to be
8 perhaps a factual issue, but also the application
9 of an incorrect legal standard by the Hearing
10 Examiner.

11 I think in those cases, I believe the
12 law allows the finder of fact at the trial level,
13 or the hearing level in this case, to admit
14 additional evidence because the parties likely
15 conformed their proof during the hearing to the
16 legal standard that the Hearing Examiner was
17 applying.

18 And if that legal standard constrained
19 the proof that the parties offered down below,
20 they ought to be allowed to offer additional
21 evidence under the appropriate standard. That's
22 what I would say. So that's why I think the
23 potential for additional evidence on remand ought
24 to be there.

25 MR. HAYES: Thank you for that

1 clarification.

2 CHAIR DEVENY: Are you comfortable with
3 that, Sarah?

4 MS. CLERGET: Yes.

5 CHAIR DEVENY: So --

6 BOARD MEMBER TWEETEN: Any further
7 discussion?

8 CHAIR DEVENY: From the Board members?

9 BOARD MEMBER TWEETEN: I don't have any
10 more. I think I've said it all.

11 BOARD MEMBER BUSBY: I don't think I've
12 got --

13 CHAIR DEVENY: Call for the question and
14 we'll take a vote. All those in favor of the
15 motion, please signify by saying aye.

16 (Response)

17 BOARD MEMBER BUSBY: That's for the
18 substitute motion?

19 CHAIR DEVENY: Yes. Any opposed?

20 (No response)

21 CHAIR DEVENY: None. Motion carries.

22 MS. CLERGET: Now you need to deal with
23 the burden of proof issue.

24 CHAIR DEVENY: So we'll go back to oral
25 arguments specific to the burden of proof, and

1 start with Copper Ridge.

2 MS. MARQUIS: Madam Chair, members of
3 the Board. With respect to the burden of proof,
4 this is perhaps one of the most egregious errors
5 in the proposed order. It completely up-ends our
6 concept of justice in America.

7 If you think about it, this is going to
8 sound extreme, but this is really how tyranny
9 begins. It's the government sitting up above
10 somewhere, and just looking down at an individual
11 -- whether that be a corporation or a person --
12 and saying, "I think you're in violation. I saw
13 some stakes in mud. Come prove to me why you're
14 not in violation."

15 That's the situation we're faced with
16 here. In this case, that was the additional fact
17 here was that the Department said, "I think you're
18 in violation, and I think the penalty calculation
19 is going to be in the millions of dollars," and
20 that is on the record in the hearing transcript
21 Volume I, Page 269, Lines 14 through 24.

22 So then if you accept that, and then the
23 burden of proof is on the accused, how can the
24 accused go back in time and collect any evidence?
25 They simply cannot. This requires them to prove a

1 negative, and it's impossible, and it is not in
2 accord with the due process clause of our United
3 States Constitution.

4 Now, I realize the In re: Winship case
5 that I cited in my brief refers to a criminal
6 matter, where they say the presumption of
7 innocence is a bedrock, axiomatic, and elementary
8 principle. But this is much the same type of
9 case, because in a criminal context you have the
10 government saying, "We think you've violated the
11 law."

12 And that's exactly what the Department
13 is saying here. They've said to my client, "We
14 think you violated the law." It is not fair for
15 my client to have the burden of proof.

16 The Department has said that there was a
17 full and fair opportunity for a hearing, but the
18 problem is coming into the hearing, my client was
19 presumed guilty, and had to prove that somehow he
20 wasn't guilty, even though he didn't know at the
21 time that whatever was happening on that day would
22 result in him being assumed guilty. That's not a
23 full and fair opportunity for a hearing.

24 Now, the federal analog is very much the
25 same. In fact, if these exact same violations had

1 been cited under Federal law in the Clean Water
2 Act, there is no doubt that the government would
3 bear the burden of proof in those enforcement
4 actions. And this argument is presented on Pages
5 9 and 10 of our exceptions brief. There is a
6 robust body of case law in the EPA administrative
7 arena that supports this.

8 The MEIC case, that's MEIC versus DEQ
9 2005 MT 96, is distinguishable here for a couple
10 of reasons. In that case there was a final agency
11 action that was on appeal; and in this case there
12 is not a final agency action. And we know this if
13 we refer to the statutes at issue here, and that's
14 75-5-611.

15 In those statutes, it is obvious that
16 the Department only alleges a violation. They
17 allege facts that they believe constitute the
18 violation. In fact, at 75-5-611 subparagraph
19 (6)(b), it says very clearly that it is this
20 Board's job to determine if a violation occurred.
21 They don't just judge the merits of the challenge,
22 but it is this Board's job to determine if a
23 violation occurred.

24 So we don't have a final action in front
25 of the Board today, so that's one distinction from

1 the MEIC case.

2 The other one is that in that case, MEIC
3 was alleging that there was a violation of the
4 law, and that's the exact same position that the
5 Department is in here today. The Department is
6 alleging that my client violated the law.

7 So in the MEIC case, the plaintiff who
8 made that allegation had the burden of proof. In
9 this case here, the Department is alleging that
10 there is a violation. They should have the burden
11 of proof here as well.

12 The Department has relied on the Meyers
13 case (phonetic). This is on Page 11 of their
14 response brief. But I want to point out that if
15 you read the entire Meyers case, especially at
16 asterisk six, it becomes clear that what Meyers
17 was appealing from was an agency decision. There
18 had been an informal review and an agency decision
19 that was final, and it was that agency decision
20 that Meyers was claiming violated the law. So in
21 that case the burden of proof was appropriate to
22 be on Meyers.

23 Again, we're not in that scenario here.
24 Here it is the Department who is alleging there is
25 a violation of law.

1 This also complies with the statute in
2 MAPA 26-1-401. It says, "The party asserting the
3 claim bears the burden." Again, here it is the
4 Department that is asserting that my client has
5 violated the law, so it is the Department who must
6 bear the burden.

7 Further, this Board could look to its
8 own precedent to decide this matter. I went
9 through some of the cases that have gone through
10 the Board of Environmental Review, and the most
11 recent case I found for enforcement that had gone
12 all the way through the Board was an open-cut
13 mining case. It was Case No. 2011-02-0C, NOV of
14 OC Mining Act by Deer Lodge Asphalt, Inc. at the
15 Olson Pit in Powell County.

16 That was an enforcement case much like
17 this where the Department alleged that there had
18 been a violation of the law, and in that case, the
19 briefing was clear that the government took the
20 burden of proof offer, and they offered proof on
21 every element of each violation.

22 Furthermore, the government initiated
23 argument at the hearing, and took the burden of
24 proof at the hearing. So that's precedent even
25 within this agency.

1 So placing the burden of proof upon my
2 client is not only contrary to the due process
3 requirements of the Constitution, it is contrary
4 to Federal law, it is contrary to State law, it is
5 contrary to this Board's precedent, and the burden
6 of proof should more appropriately be placed on
7 the Department who is alleging the violation.

8 CHAIR DEVENY: Thank you. Ms. Bowers.

9 MS. BOWERS: Madam Chair, members of the
10 Board. The Hearing Examiner in this case
11 correctly relied on the MEIC versus DEQ case, and
12 assigned the burden of proof to Copper Ridge and
13 Reflections as the parties challenging the
14 administrative compliance and penalty order.

15 That order is the administrative
16 decision, and contains DEQ's charges, and Copper
17 Ridge and Reflections had the right to appeal the
18 decision. They're in the position of appellant.
19 So it is up to them to show that the violations
20 did not occur, or that the order was otherwise
21 legally insufficient.

22 And without an appeal that order would
23 have become final. And the Hearing Examiner's
24 determination is not inconsistent with other older
25 cases.

1 There is a case from 1980, Thornton
2 versus Commissioner of Labor and Industry, that
3 goes even further and states that there is a
4 rebuttable presumption in favor of the decision of
5 the agency, and the burden of proof is on the
6 party attacking that decision to show that it is
7 erroneous.

8 Also with regard to the penalty
9 calculation, the calculated penalty is very
10 different than the actual imposed penalty. The
11 penalty calculation potentially could have been
12 into the millions, but millions of dollars were
13 never imposed in this case. We have a statutory
14 cap for violations at \$1,000 per violation.

15 CHAIR DEVENY: Okay. Questions from the
16 Board members? Comments? Chris.

17 BOARD MEMBER TWEETEN: This is a
18 complicated question. On the one hand there is a
19 presumption in statute that official duty has been
20 regularly performed, and that would suggest that
21 there is a rebuttable presumption that the
22 allegations of the Department are appropriate, and
23 the burden of rebutting that presumption would lie
24 on the regulated entity.

25 I do think there is a difference between

1 the facts in MEIC and the facts here. MEIC
2 involved a challenge to the issuance of a permit.

3 The permit was a done deal. And it
4 wasn't a situation where the Department proposed
5 to issue a permit, and the regulated entity was
6 entitled under MAPA to a contested case hearing.
7 The Department issued the permit, and then an
8 adversely affected party decided to seek a
9 contested case to try to reverse that Department
10 action that had already taken place.

11 Here you're dealing with a notice of
12 violation. Penalties have not been collected.
13 Before the notice of violation ripened into an
14 actual violation, the developer was entitled to a
15 hearing, to ask for a hearing, which they did.

16 So it is a little bit different
17 situation. It is not an accomplished agency
18 action, but simply a notice of intention to take
19 an action that's being challenged here. So in
20 that respect I think the cases are different.

21 There are other factors I guess that
22 come into play in allocating burdens of proof.
23 One is the burden ought to most appropriately lie
24 on the party who has the best access to evidence
25 on the dispute in question.

1 In this case that cuts a little bit both
2 ways, because the Department had their own
3 investigation. On the other hand, the developer
4 was thoroughly familiar with the site, and what
5 had been done and what was being done on the
6 property as well. So that one is kind of --
7 doesn't cut either way.

8 I guess I'm persuaded that the more
9 important statute here is not 26-1-401 which deals
10 with the burden of proof as to facts, but rather
11 26-1-402 which deals with who has the burden of
12 persuasion with respect to claims and defenses.

13 And what that statute says is that
14 except as otherwise provided by law -- which I
15 don't think applies here -- a party has the burden
16 of persuasion as to each fact, the existence or
17 non-existence of which is essential to the claim
18 for relief or defense the party is asserting.

19 Now, what that says to me is that the
20 burden of persuasion with respect to the facts
21 underlying the violation lies with the Department.
22 They're the ones who are making the claim for
23 relief and seeking the imposition of penalties.
24 And the ultimate burden of persuading the Hearing
25 Examiner initially, and then this Board ultimately

1 with respect to the soundness of that claim under
2 this statute, would lie with the Department.

3 If there are any affirmative defenses
4 that the developer wanted to raise, the burden of
5 proving the facts with respect to those
6 affirmative defenses would lie with the developer.
7 But in this case, the burden of persuasion I
8 believe lies with the Department; and the burden
9 of going forward with evidence and rebutting the
10 Department's showing lies with the developer.

11 And then the question of where the
12 ultimate balance of the evidence tips lies with
13 the Hearing Examiner in the first instance, and
14 then with this Board. That's the way I read the
15 statute anyway.

16 So I would be inclined -- Again, I'm not
17 picking on you, Sarah -- but I would be inclined
18 to disagree with Sarah's conclusion. I don't
19 think we're bound by MEIC because I think the
20 cases are distinguishable, and therefore there is
21 no precedent directly on point, I don't believe.

22 And I think the appropriate procedure on
23 remand would be to require the Department to
24 produce the evidence that supports its claim that
25 the developer was in violation, and then the

1 developer would have the opportunity to provide
2 evidence of rebuttal or response, and to assert
3 any affirmative defenses on which they would bear
4 the burden of persuasion, and then the Hearing
5 Examiner would determine where the preponderance
6 of the evidence lies with respect to those factual
7 questions.

8 So where we are then is under the
9 existing motion, I think we vacated Sarah's
10 determination or decision in its entirety, as well
11 as the decision by Hearing Examiner Haladay. So I
12 think that motion, having been passed -- unless
13 somebody wants to move that we amend that
14 determination by reinstating Sarah's burden of
15 proof analysis -- then I think what we've done so
16 far is sufficient to implement, in my view at
17 least, this burden of proof issue.

18 BOARD MEMBER BUSBY: I want to hear from
19 Sarah.

20 MS. CLERGET: I think it might be
21 helpful to have a specific motion and second on
22 what the burden of proof is going forward. I
23 agree with you that vacating my motion gets rid of
24 my analysis, but what you think it is going
25 forward, having that in a seconded motion, I think

1 would be helpful.

2 BOARD MEMBER TWEETEN: In that case,
3 Madam Chair, I would move that on remand, the
4 Board direct the Hearing Examiner to place on the
5 Department the burden of persuasion with respect
6 to those matters that are essential for them to
7 prove in order to establish the violations that
8 they claim under the appropriate legal standard
9 that we previously adopted.

10 CHAIR DEVENY: There is a motion. Is
11 there a second?

12 BOARD MEMBER BUSBY: I'll second that.

13 CHAIR DEVENY: Discussion. I had a
14 question, just to kind of bring it a little bit
15 out of the legal realm, I guess. But the appeal
16 was against the notice, is that correct, the
17 notice that was given to the party is the notice?

18 BOARD MEMBER TWEETEN: Madam Chair, can
19 I respond to that?

20 CHAIR DEVENY: Yes.

21 BOARD MEMBER TWEETEN: I think that sort
22 of underlines the difference between this case and
23 MEIC. I don't think that the developer in this
24 case was in the position of appellant, because in
25 MEIC, the permit had already issued, and the

1 appropriateness of the permit was being appealed
2 by MEIC.

3 In this case, the notice of violation
4 has been issued, but before the violation becomes
5 final, the developer has the opportunity under
6 MAPA to demand an evidentiary hearing.

7 So it is a little bit different than
8 that. I guess in my mind at least, it doesn't
9 seem to me that the two cases are the same, or
10 that the developer is here in the position of an
11 appellant like they were in MEIC. I think it is a
12 different case.

13 CHAIR DEVENY: And DEQ makes the point
14 that if there hadn't been an appeal, the notice
15 would have just continued, and there would have
16 been action taken --

17 BOARD MEMBER TWEETEN: If there hadn't
18 been a request for a hearing, that's true. But
19 under MAPA, you have the request for hearing, and
20 then specifically MAPA says that the statutory,
21 and the statutes and rules governing evidence
22 apply. And in this case, the burden of persuasion
23 statute that I talked about is one of those
24 statutes that applies.

25 So I'm not 100 percent certain. I think

1 that MEIC was rightly decided, but I don't think
2 we have to get to that point, because I think the
3 cases are not the same case, and therefore MEIC is
4 not necessarily controlling on its own facts.

5 CHAIR DEVENY: Any other questions or
6 comments?

7 BOARD MEMBER TWEETEN: Did that answer
8 your question?

9 CHAIR DEVENY: Kind of, yes. It is
10 still kind of confusing.

11 BOARD MEMBER TWEETEN: This is a very
12 confusing area of the law. There is no question
13 about that.

14 BOARD MEMBER BUSBY: So can I just make
15 a comment for my own understanding, and you can
16 tell me if I'm right or wrong.

17 Based on your motion, if I understood it
18 correctly, and where you were headed, I think, is
19 that we have the Department alleging a violation,
20 and at the point where we're at here, they have to
21 show cause or proof, as the case may be, that that
22 violation occurred.

23 And a part of that is that when we made
24 the decision on ownership, which hasn't been 100
25 percent determined yet, but they have to prove

1 based on the determination of ownership who was
2 the point source of the violation; is that --

3 BOARD MEMBER TWEETEN: I think that's
4 right. Yes. Well, let me put a finer point on
5 it. I think on remand it would be up to the
6 Department to adduce, to point to the evidence in
7 the record, and then with the permission of the
8 Hearing Examiner, introduce whatever additional
9 evidence they think they need to introduce to show
10 that at the time the discharges occurred that are
11 the subject of this case, Copper Ridge and
12 Reflections were owner/operators under the
13 definition that's in the statute as we've
14 interpreted it.

15 So they'd have to prove all those facts,
16 or put in enough evidence to establish a case that
17 those facts exist; and then the developer would
18 have an opportunity to put in its own evidence on
19 those questions.

20 And then since this is not a criminal
21 case, and we're not looking for proof beyond a
22 reasonable doubt, we're just looking at the 50
23 percent plus one iota of proof standard, it would
24 be up to Sarah in the first instance to make
25 factual findings on those questions, and enter a

1 decision as to whether the developer was an owner
2 or operator under the statutory definition.

3 CHAIR DEVENY: Hillary, you had a
4 comment or question?

5 BOARD MEMBER HANSON: So I guess I'm
6 reading the proposed findings of facts and
7 conclusions, and I think the thing I'm struggling
8 with on Page 16 -- so everyone knows where I am --
9 one of the pieces is that -- the question is are
10 we determining that, to me, whether Copper Ridge
11 violated the law, or the Department's decision
12 violated the law?

13 And so I'm kind of just -- I guess I'm
14 trying to think of it a little differently from a
15 fact of when you look at Copper Ridge's argument,
16 I feel like what part of what they're putting
17 forward is that DEQ didn't do things properly,
18 too, hence what they did was not legal.

19 BOARD MEMBER BUSBY: Under the law.

20 BOARD MEMBER HANSON: Right. So if we
21 look at it from a standpoint of that's what
22 they're appealing, then to me, the burden of proof
23 -- I don't know where I'm landing, but I guess I'm
24 landing with the burden of proof would be Copper
25 Ridge, if you're looking it from that viewpoint.

1 BOARD MEMBER TWEETEN: We are not --
2 Madam Chair. We haven't disturbed those aspects
3 of Sarah's reasoning and Mr. Haladay's reasoning
4 that deal with the notice question, for example,
5 whether the notice was appropriate. Sarah's
6 perfectly free to reinstate her reasoning on those
7 other issues that we haven't talked about, without
8 violating our order on remand.

9 I don't look at it as a question of
10 whether the Department violated the law. I just
11 look at it as a question of whether they can prove
12 the facts that they need to prove in order to
13 establish that the violation that they claim
14 actually occurred.

15 So I don't view them as being in
16 violation of the law necessarily. I just view
17 them as being put to their proof with respect to
18 what they're alleging Copper Ridge and Reflections
19 did wrong. Does that make sense?

20 BOARD MEMBER HANSON: Kind of. It makes
21 sense to me on kind of the initial phase of it. I
22 agree with you, to be frank. But I do think there
23 is a piece the Department needs to show these
24 violations occurred, they're the owner/operator.

25 I think where I'm struggling is then

1 where do these other basically appeals come into
2 play, because the appeals that Copper Ridge is
3 making, to me, do say the Department did something
4 wrong, and they need to show --

5 I think I'm getting a little confused in
6 my head, to be totally frank with you, about I
7 think kind of looking at this as a whole, both of
8 them.

9 BOARD MEMBER TWEETEN: Here's what I
10 think about that. I think on remand, Sarah will
11 determine whether the developer was an owner or
12 operator. If Sarah decides not, then all of the
13 rest of that stuff doesn't matter, because under
14 the statute they didn't need to get a permit.

15 If Sarah decides that they were an owner
16 or operator, we haven't disturbed all of her
17 findings and conclusions with respect to those
18 other issues. Whether Violations 2, 3, and 4
19 actually occurred or not will come back in front
20 of us with the owner or operator issue for our
21 consideration later.

22 I don't see much to be gained by our
23 spending lots of time on those questions when it
24 may be that they're moot because they're in.

25 BOARD MEMBER HANSON: No, that's fair.

1 CHAIR DEVENY: That's why I have been
2 separating these issues out.

3 BOARD MEMBER TWEETEN: Right. So I
4 don't anticipate that those issues are going to be
5 litigated on remand.

6 BOARD MEMBER HANSON: I guess I was just
7 concerned by making this decision we are impacting
8 things, even though we were separating them out,
9 and talking to them, that we're making a decision
10 that impacts all of them.

11 BOARD MEMBER TWEETEN: I think what
12 we're doing is sending the matter back a step; not
13 back to square one, but back a step. We're at the
14 position where --

15 Well, two steps. We're going back to
16 the position where the matter is in front of the
17 Hearing Examiner, and she gets to make a
18 determination based on a record -- either this
19 record or a bigger record, depending on what she
20 decides is necessary -- and will issue proposed
21 findings of fact, conclusions of law, and a
22 proposed order; or findings of fact, proposed
23 conclusions of law, and order more technically.

24 And then the parties will be able to
25 file their exceptions, and they can incorporate by

1 reference the rulings or exceptions that they --
2 that they may, or file new exceptions if they want
3 to, which will then come to us, and all of that
4 stuff will be laid out on the table in front of
5 us, and we'll have to decide what we have to
6 decide at that point.

7 BOARD MEMBER HANSON: Okay.

8 BOARD MEMBER TWEETEN: Vicki, you look
9 like you have something that's really important to
10 say. Madam Chair, if I might.

11 MS. MARQUIS: Board Member Tweeten,
12 Madam Chair, members of the Board. Thanks for
13 another opportunity to speak on this.

14 Board Member Hanson, you raised a good
15 point about our allegations about where the
16 Department was wrong, and those are our defenses
17 that we have raised.

18 And again, to draw an analogy to the
19 criminal context, which I know isn't an exact
20 analog, but it's very close, it would be if a
21 defendant alleged that the government did an
22 improper search, or an improper seizure. The
23 government is bound to follow certain procedures
24 when they do an enforcement action.

25 That's the case here with the

1 Department. They're bound by the statutes and
2 rules to follow a certain procedure. The fact
3 that we point out where they're erroneous does not
4 shift the burden of proof. It merely is a defense
5 that we can raise.

6 BOARD MEMBER TWEETEN: I'm not sure I
7 agree with that 100 percent, because in the search
8 and seizure context, they're limited to the four
9 corners of the warrant, so there really aren't
10 factual disputes, it's whether the warrant is or
11 is not right.

12 Perhaps a better example might be an
13 allegation of coerced confession, where the burden
14 is on the party challenging the confession to
15 prove the circumstances of coercion, and then the
16 burden of going forward with evidence is on them,
17 and then the ultimate burden of persuasion with
18 respect to the fact that the confession was
19 voluntary lies with the government. Okay?

20 It is presumed that the confession is
21 voluntary, and the burden is on the party
22 challenging it to show it wasn't. But the
23 ultimate burden of persuading the Court that it
24 was a voluntary confession lies with the
25 government, so that's where the burden of proof

1 lies.

2 But you would definitely have the
3 obligation to go forward with evidence to
4 establish that there is an issue there. So I
5 think the burden is on the government to show that
6 the facts alleged in the notice of violation are
7 sufficient to prove a violation, and then you can
8 go forward with evidence to the contrary as you
9 see fit.

10 CHAIR DEVENY: Ms. Bowers, did you have
11 anything to add?

12 MS. BOWERS: Thank you, Madam Chair,
13 members of the Board. Just I think to clarify.
14 So DEQ will have the burden of proof on the
15 owner/operator issue, which is the issue you're
16 sending back. And if Copper Ridge and Reflections
17 should have some sort of affirmative defense, they
18 have the burden on that, correct?

19 BOARD MEMBER TWEETEN: Yes. Right. But
20 the ultimate burden of persuasion with respect to
21 the existence of a violation is yours.

22 MS. BOWERS: Yes, to prove each element
23 of the violation, that's DEQ's burden.

24 BOARD MEMBER TWEETEN: Right. So you
25 have to convince Sarah that you've established

1 each element of the violation by a preponderance
2 of the evidence.

3 MS. BOWERS: Okay.

4 BOARD MEMBER BUSBY: And violated --

5 BOARD MEMBER TWEETEN: Well, the
6 homeowners aren't here, so --

7 CHAIR DEVENY: No side conversations.
8 So there is a motion out there. I can't begin to
9 describe what it is, but --

10 BOARD MEMBER HANSON: Did we move
11 anything?

12 MS. CLERGET: Yes, I've got it. I know
13 what it is.

14 BOARD MEMBER TWEETEN: The motion boiled
15 down is that the burden is on the Department to
16 prove each element of the violation. You have to
17 put in that evidence first. Then the developer
18 gets to go put in its evidence on those questions,
19 and then the ultimate determination of where the
20 preponderance of the evidence lies, and whether
21 the violation exists under the governing standards
22 of law falls on Sarah.

23 They get to take exception to that, if
24 they choose to, and then it comes to us. That's
25 the motion.

1 CHAIR DEVENY: And it is remanded to
2 Sarah.

3 BOARD MEMBER TWEETEN: And it is
4 remanded to Sarah for that purpose.

5 CHAIR DEVENY: Does everybody understand
6 what we're doing then?

7 BOARD MEMBER BUSBY: I think so.

8 BOARD MEMBER TWEETEN: Did my motion get
9 a second?

10 CHAIR DEVENY: Hillary seconded it.

11 MS. SOLHEIM: Dexter seconded it.

12 CHAIR DEVENY: So all in favor, signify
13 by saying aye.

14 (Response)

15 CHAIR DEVENY: All opposed?

16 (No response)

17 CHAIR DEVENY: Motion carries. Simply
18 put the load back on Sarah.

19 MS. CLERGET: Thanks.

20 CHAIR DEVENY: And that's going to wrap
21 up.

22 (The proceedings were concluded

23 at 1:51 p.m.)

24 * * * * *

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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 - 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.

<p style="text-align: center;"><u> </u> \$ <u> </u></p> <p>\$1,000 - 126:14</p> <p style="text-align: center;"><u> </u> 1 <u> </u></p> <p>1 [5] 31:15, 44:13, 48:13, 59:17, 79:3 10 - 122:5 100 [3] 132:25, 133:24, 140:7 105 - 22:14 11 [2] 40:16, 123:13 111 - 1:17 1115(2 - 110:8 13 [3] 5:16, 59:19, 96:15 14 [4] 13:6, 59:4, 104:16, 120:21 143 - 144:12 1500 - 2:9 1520 - 1:17 16 - 135:8 17 - 5:16 17.30.1102 - 44:24 17.30.1105 [4] 43:16, 43:17, 44:11, 44:13 17.30.1115 [5] 47:21, 47:24, 48:12, 75:19, 110:6 1712 - 2:5 19 - 40:16 1980 - 126:1 1:51 - 143:23</p> <p style="text-align: center;"><u> </u> 2 <u> </u></p> <p>2 [7] 6:7, 20:18, 31:15, 59:17, 61:14, 79:10, 137:18 2,000 - 7:11 2005 - 122:9 200901 - 2:13 2011-02-0C - 124:13 2012 [12]</p>	<p>6:2, 10:20, 11:11, 11:13, 14:13, 18:21, 33:13, 60:7, 64:25, 67:9, 69:3, 80:1</p> <p>2013 [4] 19:18, 54:21, 60:9, 79:23 2015-01 - 1:5 2015-02 - 1:9 2019 [2] 1:18, 144:17 2020 - 144:22 22 - 22:14 24 [3] 22:14, 59:5, 120:21 26 [2] 36:25, 49:19 26-1-401 [2] 124:2, 128:9 26-1-402 - 128:11 269 - 120:21 28 - 44:24</p> <p style="text-align: center;"><u> </u> 3 <u> </u></p> <p>3 [2] 6:7, 137:18 31st - 2:9 34 - 29:12 35 - 29:12</p> <p style="text-align: center;"><u> </u> 4 <u> </u></p> <p>4 - 137:18 401 - 2:9</p> <p style="text-align: center;"><u> </u> 5 <u> </u></p> <p>5 - 31:15 50 - 134:22 59101 - 2:9 59620 [2] 2:5, 2:14</p> <p style="text-align: center;"><u> </u> 6 <u> </u></p> <p>6)(b - 122:19 62 - 57:3 699 - 7:11</p> <p style="text-align: center;"><u> </u> 7 <u> </u></p> <p>7 - 79:8 70 - 17:19 75-5-401 [4] 46:23, 46:25, 47:2, 47:10 75-5-611 [2]</p>	<p>122:14, 122:18</p> <p style="text-align: center;"><u> </u> 8 <u> </u></p> <p>8 [3] 1:18, 49:20, 79:8</p> <p style="text-align: center;"><u> </u> 9 <u> </u></p> <p>9 [4] 55:5, 55:10, 122:5, 144:22 96 - 122:9 9:40 - 1:19</p> <p style="text-align: center;"><u> </u> A <u> </u></p> <p>a.m - 1:19 abiding [2] 36:17, 37:22 ability - 144:14 able [3] 99:12, 110:1, 138:24 absence [2] 85:13, 109:21 absolved - 14:17 abundance - 77:2 accept [5] 24:10, 25:23, 30:25, 117:12, 120:22 accepted - 68:8 access [2] 29:15, 127:24 accomplish [3] 27:15, 28:5, 29:19 accomplished - 127:17 accord - 121:2 according - 115:8 accused [2] 120:23, 120:24 acknowledge - 57:17 acre [8] 11:16, 45:5, 45:13, 45:16, 46:7, 46:13,</p>	<p>46:16, 73:16 across [3] 17:10, 77:3, 77:12 act [16] 1:5, 1:10, 9:17, 11:3, 11:14, 13:21, 28:10, 30:1, 37:5, 41:11, 42:25, 56:7, 103:19, 111:5, 122:2, 124:14 acting [4] 38:15, 38:21, 90:3, 117:17 action [11] 32:7, 62:3, 103:20, 122:11, 122:12, 122:24, 127:10, 127:18, 127:19, 132:16, 139:24 actions [2] 99:9, 122:4 active - 79:16 activities [34] 5:5, 5:20, 5:21, 5:23, 7:15, 7:25, 9:10, 11:4, 11:11, 11:12, 12:3, 14:18, 15:7, 16:3, 16:6, 26:8, 33:23, 34:14, 35:20, 40:4, 45:3, 45:8, 50:18, 60:1, 61:22, 61:23, 63:21, 72:20, 76:12, 79:23, 79:25, 89:23, 101:21, 107:13 activity [103] 4:22, 5:10, 6:10, 7:19, 9:1, 10:10, 10:19, 10:21, 10:23, 10:24, 10:24,</p>	<p>10:25, 11:15, 12:21, 12:22, 13:1, 13:11, 13:12, 13:17, 13:17, 13:20, 13:25, 14:8, 14:10, 15:5, 15:17, 16:21, 19:11, 19:19, 19:25, 21:9, 23:14, 23:15, 24:19, 25:24, 26:1, 26:2, 26:5, 28:12, 29:18, 30:10, 30:11, 30:15, 32:6, 32:9, 33:20, 34:21, 38:4, 41:14, 42:1, 42:16, 43:5, 44:18, 44:24, 45:1, 45:12, 46:3, 46:5, 46:12, 46:17, 48:5, 50:17, 51:1, 51:22, 51:22, 52:6, 52:6, 52:14, 53:15, 53:16, 53:17, 54:23, 54:24, 56:15, 56:17, 57:20, 60:15, 60:18, 60:20, 64:7, 64:14, 64:16, 64:19, 65:4, 65:14, 69:7, 69:21, 72:1, 72:5, 72:7, 72:9, 72:16, 73:6, 73:8, 73:12, 74:18, 75:19, 76:2, 76:5, 79:6, 83:3, 86:7, 88:21 actual [8] 4:22, 37:17,</p>	<p>49:11, 70:21, 113:25, 118:3, 126:10, 127:14 add [2] 110:20, 141:11 additional [16] 3:23, 16:8, 31:10, 56:17, 100:2, 102:2, 116:8, 116:10, 116:15, 116:17, 118:1, 118:14, 118:20, 118:23, 120:16, 134:8 Additionally [2] 6:15, 15:13 address [10] 3:18, 10:8, 27:22, 28:17, 45:19, 45:24, 46:11, 46:17, 82:24, 107:5 addresses [2] 28:7, 47:18 adduce - 134:6 administrative [20] 41:4, 42:10, 42:18, 42:19, 43:2, 61:19, 75:1, 75:1, 75:7, 75:10, 75:13, 75:15, 76:10, 99:9, 109:9, 109:21, 115:2, 122:6, 125:14, 125:15 admission [2] 38:23, 97:5 admissions - 38:22 admit [5] 10:11, 10:18, 14:5, 14:12,</p>
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