IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| I-5 PROPERTIES, a general partnership, JANSEN, INC., a Washington corporation, AL JANSEN, individually, | ) | No. 61922-5-I |
| | ) | DIVISION ONE |
| Respondents, | ) | |
| v. | ) | |
| | ) | UNPUBLISHED OPINION |
| STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, | ) | FILED: August 31, 2009 |
| Appellant. | ) | |

AGID, J.—As a National Pollutant Discharge Elimination System (NPDES) General Permit holder, I-5 Properties would not have faced penalties for discharging polluted storm water runoff from its construction site if it had complied with the permit conditions. The General Permit generally requires the permit holder to develop a plan to prevent storm water discharges that exceed Washington's water quality standards. This plan must include practices designed to prevent storm water from eroding exposed soils on the site and from carrying those sediments off the site. With Washington's rainy season approaching, I-5 Properties left soils exposed and deviated from its engineer's storm water management plan. When a 100 year rainstorm hit, I-5

Properties' site began discharging turbid storm water runoff, attracting the Department of Ecology's (DOE) attention. I-5 Properties' continued turbid discharges and exposed soils sustained DOE's attention and elicited allegedly unhelpful compliance recommendations. I-5 Properties accumulated $82,000 in penalties for permit noncompliance by the time site conditions improved in spring. The Pollution Control Hearing Board (PCHB) affirmed the penalty, and the superior court reversed 35 findings of fact and dismissed the penalty, concluding that I-5 Properties had been wrongly held liable for problems caused by an act of God, the government, and farmers. DOE appeals, and we hold that substantial evidence in the record supports almost all of the PCHB's conclusions.

## FACTS

On January 23, 2003, I-5 Properties applied to discharge storm water associated with construction activity on 70 acres of its 72.1 acre site located near Ferndale, Washington. The permit application indicated that construction would start in February 2003 and be completed by August 2003. In its public notice of construction activity, I-5 Properties said it would disturb land to construct roadways, rechannel the existing creek, and build a 740,000 square foot building. I-5 Properties described the associated construction activity as "clearing, grading, landscaping, stockpiling, utilities, and stormwater facilities." The property had been used for agricultural purposes for decades before I-5 Properties applied to conduct construction activity on it, and a farmer renting land from I-5 Properties grew potatoes on several acres of the eastern section of the site until harvest in the early fall of 2003.

On February 20, 2003, DOE inspector Andrew Craig inspected the site in response to a citizen complaint. Although DOE had not yet granted I-5 Properties' permit application, Craig observed that approximately one-quarter to one-half of the site had been disturbed by construction activity. Craig discussed the permit requirements with the site manager and followed up with a warning letter, informing I-5 Properties that continued work on the site prior to General Permit coverage could subject them to civil penalties of up to $10,000 per day per violation. Craig's letter also advised I-5 Properties that it needed to develop and implement a storm water pollution prevention plan (SWPPP) and comply with that plan during all phases of construction.

DOE granted I-5 Properties coverage under the 2000 General Permit for storm water discharges associated with construction activity by duplicative letters dated March 12 and March 14, 2003. The coverage letters informed I-5 Properties that the development, implementation, and maintenance (revision) of a SWPPP was the most significant requirement of the General Permit. DOE received a one page SWPPP from I-5 Properties on March 17, 2003. The SWPPP generally provided that I-5 Properties would implement best management practices (BMPs) to control erosion, stabilize exposed and unworked soil, and limit pollutant discharges.

Carl Reichhardt, an engineer with Reichhardt & Ebe Engineering, Inc., designed the storm water drainage plans for the I-5 Properties site. Reichhardt designed the drainage system to manage storm water runoff so that postdevelopment runoff would be no greater than predevelopment runoff. Reichhardt's plans called for the storm water ponds to handle a two year storm event through infiltration and to handle larger

storms through infiltration and, as necessary, by releasing excess runoff through an overflow pipe system and an emergency spillway. Reichhardt planned for water leaving the ponds to flow into a tributary of California Creek,[1] which used to flow through a ditch that crossed I-5 Properties' construction site. At I-5 Properties' request,[2] Reichhardt's drainage plan relocated the tributary to the west side of the property, roughly parallel with the western boundary.

Reichhardt's drainage system divided the site into three basins (basins A, B, and C), with each drainage area flowing into a separate sediment detention pond (ponds A, B, and C). Each pond was designed to work independently by handling runoff from its corresponding drainage area. I-5 Properties had not installed ditch B, designed to connect drainage area B to pond B, by the fall of 2003.[3] Grant Jansen, I-5 Properties' project manager, testified that "ditch C and ditch A [were] much more critical than ditch B." He did not check with Reichhardt before coming to that conclusion. And instead of installing a drainage ditch (A-2) along the north side of the property as called for in Reichhardt's design,[4] I-5 Properties put ditches in the interior of the site and graded the site to cause water to drain towards the interior ditches.[5]

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[1] This tributary is also referred to as a ditch.

[2] I-5 Properties argues that the Washington Department of Fish and Wildlife insisted that a brand new ditch be constructed in a different location. Substantial evidence in the record supports the PCHB's finding that I-5 Properties needed to relocate the ditch in order to develop the site. For example, Reichhardt testified that the ditch was "not in a good location for the purpose that [I-5 Properties] wanted, so [I-5 Properties] wanted to move it over toward the western part of [the site]."

[3] I-5 Properties concedes that it deviated from Reichhardt's plan by not installing ditch B.

[4] I-5 Properties concedes that it deviated from Reichhardt's plan by not installing ditch A-2.

[5] Grant Jansen testified, "Well, the grading plan or the drainage plan called for, I think, six ditches just along one side of the road. We ended up putting ditches on both sides of the

A two year storm for Ferndale is 1.9 inches of rainfall in a 24 hour period. Weather records show that rainfall exceeded the two year storm minimum on October 16, 2003, when between 2.67 and 4.55 inches of rain fell in the Ferndale area. Roughly 7.5 to 10 inches of rain fell between October 15 and October 26, 2003, but the daily rainfall amounts only exceeded 1.9 inches for all dates relevant to this appeal on October 16, 2003.

On October 17 and October 20, 2003, pond A was discharging large volumes of highly turbid water.[6] On his October 20 inspection, Craig observed that "[i]t appeared that all the water from the site was being routed to pond A" and that ponds B and C were not receiving rainwater from the site and were only about 20 percent full. Thirty to forty percent of the site was covered in water, and there were more than three acres of exposed soil on the east side of the site. On October 21, pond A was again "discharging high volumes of muddy stormwater into the tributary stream of California Creek." Craig testified that water entering the ponds contained large quantities of suspended sediments.

Craig told I-5 Properties that the extra capacity in ponds B and C presented them with "an option to retain additional stormwater on site in these other two ponds as a temporary means of . . . preventing discharges of muddy water off site . . . , thereby

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road" and "What we did instead of grading this to be caught by a ditch and then come down here and come into your pond, we installed additional ditches around the entire site, ditches on both sides of the road. That allowed this site to be graded and drain this way . . . instead of needing [the north ditch]. There still is a -- we have prevented water from going into that ditch, it all grades the other way."

[6] Comparing the October 20 discharge to the October 17 discharge, Craig testified that "[a]s before, pond A was discharging again high volumes of muddy stormwater. Greater than 200 gallons per minute was my visual estimate."

reducing the severity and the volume of the discharge into the stream." Craig had seen this technique successfully used at other construction sites and commercial dairies. I-5 Properties would have preferred to continue discharging turbid water with the goal of draining the flooded portions of its property. But, I-5 Properties plugged the outlet of pond A and B and pumped water from pond A to B because it thought continuing to discharge was not an option. Craig testified that refusing to cap pond A would not have been a permit violation if I-5 Properties had implemented other BMPs designed to prevent continued turbid water discharges. Site photographs and Craig's testimony about the reduced turbidity and reduced volume of pond A's discharge on October 22 and 23, 2003, support the PCHB's finding that implementation of the cap and pump option reduced turbid discharges from the construction site.

Craig did not return to the site for an inspection until November 11, 2003, after a neighbor reported that the ponds were "spewing muddy water" on November 9, 2003.[7] On November 11, I-5 Properties and Craig met to discuss possible corrective actions. Craig recommended that I-5 Properties implement additional BMPs to control sediment flow into the ponds and not release water from the ponds until those discharges complied with water quality standards.[8] I-5 Properties expressed concern about using the cap and pump method.[9] At I-5 Properties' request, Craig put these

[7] The rainfall records indicate a sustained dry period from October 29, 2003, to November 10, 2003, when .33 to .87 inches of rain fell.

[8] Craig told them how to gauge compliance with water quality standards and offered to stop by the site before a discharge to test for compliance with those standards.

[9] Craig testified that I-5 Properties was concerned because it wanted to dig a septic system and needed to dewater that area of its site, meaning it did not have time to pump from pond A to pond B and needed to use the pumps to dewater the septic site.

recommendations in writing and emailed them to I-5 Properties on November 14, 2003.[10]

After more rain,[11] Craig returned for an inspection on November 19, 2003, and found that portions of the site were flooded. I-5 Properties was not pumping from the nearly full pond A into the less full pond B. Craig had not recommended capping the ponds without pumping water from pond A. Turbid water was discharging from the north field. Because that water was more turbid than what would have been coming out of pond A, Craig recommended opening pond A.

By November 21, 2003, site conditions were drier, and Craig recommended capping pond A and pumping into ponds B and C. I-5 Properties disagreed with this recommendation and requested instructions or criteria for determining when the pond should be capped or allowed to discharge water.[12] Craig replied by providing copies of

[10] In that email, Craig recommended that I-5 Properties

- Infiltrate all water on site using your existing detention ponds;
- Monitor [their] site according to permit conditions. Look for discharges and for areas that have a high risk for causing discharges;
- Implement erosion and sediment control BMP[s] to prevent all discharges from [their] site to the creek;
- Document what measures [I-5 Properties] take[s] (inspections, implementation of erosion and sediment control measures) to protect water quality on site;
- Keep all records of [their] activities with [their] Stormwater Pollution Prevention Plan;
- Do not attempt to discharge detention pond water to stream without first determining background conditions and the pond water conditions (turbidity levels).

[11] Rainfall records show that it rained between 1.55 and 1.83 inches on November 18, 2003, after a period of relatively dry weather. That amount is less than a two year storm for the area.

[12] Through counsel, I-5 Properties took the position "excessive terpidity [sic] can be avoided if I-5 Properties is allowed to keep the outfall open." I-5 Properties' theory was that capping the pond flooded the site, and that uncapping pulled turbid water from the site and into the ponds.

relevant regulatory and technical assistance documents. He also recommended additional BMPs and suggested that I-5 Properties consult an engineer.

On November 25, 2003, turbid water was discharging from the north field. Storm water runoff from an adjacent property to the east was flowing across the site into pond A, and the turbidity of that runoff tripled as it flowed across the site into pond A. I-5 Properties was not pumping from pond A to pond B, and it asked DOE's permission to allow discharges from pond A. Because the water discharged from the north field was less turbid than the water in pond A, Craig recommended continued infiltration of the water in pond A through capping and pumping. A December 1, 2003 inspection revealed continued turbid water discharges from the north field.

I-5 Properties asked Craig to conduct water quality sampling on January 9, 2004, because it wanted to discharge water from pond A. Craig's inspection showed that the water in pond A complied with water quality standards, and Craig told I-5 Properties that discharging pond A water was authorized under its NPDES permit. Site conditions started improving by February 2, 2004, although exposed and eroding soils remained unstabilized through DOE's last inspection on February 4, 2004.

On March 29, 2005, DOE fined I-5 Properties $82,000 for multiple violations of three General Permit conditions. I-5 Properties applied for relief from the penalty, which DOE denied. I-5 Properties appealed to the PCHB, which affirmed the penalty. It then appealed to Whatcom County Superior Court, which reversed the PCHB's findings of fact 3, 9, 11, 14-16, 22-24, 26-34, 36-43, 50-51, 54 and the factual findings in conclusions of law 11-12, 16, 18-19, 21-23, and conclusions of law 6, 9-13 and 23.

## DISCUSSION

The judicial review provisions of the state Administrative Procedure Act (APA)[13] govern our review of the PCHB's order.[14] In reviewing administrative action we sit in the same position as the superior court, applying the standards of the Administrative Procedure Act directly to the record before the agency.[15] This court will grant relief if the PCHB's order is not supported by substantial evidence based on the record before the PCHB.[16] Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter.[17] We view the evidence and its reasonable inferences in the light most favorable to the prevailing party—here, DOE—in the highest forum that exercised fact-finding authority—here, the PCHB.[18] We will also grant relief from the PCHB's order if it erroneously interpreted or applied the law.[19] Under the APA, I-5 Properties bears the burden of proving the invalidity of the PCHB's order on appeal.[20]

The Clean Water Act (CWA)[21] aims to "'restore and maintain the chemical,

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[13] Chapter 34.05 RCW.

[14] Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002).

[15] Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

[16] See RCW 34.05.570(3) ("The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that . . . (e) [t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court."). The superior court's findings of fact are not relevant. Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 100 n.11, 11 P.3d 726 (2000) ("Unless the superior court takes new evidence under RCW 34.05.562, its findings are not relevant in appellate review of an agency action.").

[17] R & G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413, review denied, 152 Wn.2d 1034 (2004).

[18] Johnson v. Dep't of Health, 133 Wn. App. 403, 411, 136 P.3d 760 (2006).

[19] RCW 34.05.510(3)(d).

[20] RCW 34.05.570(1)(a) ("The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.").

[21] 33 U.S.C. § 1251.

physical, and biological integrity of the Nation's waters.'"[22] To achieve this goal, the CWA prohibits discharging pollutants into the waters of the United States except where permitted.[23] The CWA authorizes discharges in compliance with a National Pollutant Discharge Elimination System (NPDES) permit.[24]

Congress authorized the Environmental Protection Agency to delegate the NPDES program to states.[25] DOE is Washington's water pollution control agency for all CWA purposes.[26] States may enforce water pollution control requirements that are more stringent than CWA requirements.[27] Washington's policy is to "maintain the highest possible standards to insure the purity of all waters of the state."[28] To that end, Washington's Water Pollution Control Act makes it

> unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of [DOE].[29]

Washington allows the discharge of pollutants from point sources when authorized by an individual or General Permit.[30]

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[22] Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 606 F. Supp. 2d 121, 124, (D.D.C. 2009) (quoting 33 U.S.C. § 1251(a)), appeal dismissed, 2009 WL 2251896 (D.C. Cir. 2009).

[23] Id. (citing 33 U.S.C. § 1311(a)).

[24] 33 U.S.C. § 1311(a); 33 U.S.C. § 1342.

[25] 33 U.S.C. § 1342(b).

[26] RCW 90.48.260.

[27] 33 U.S.C. § 1370.

[28] RCW 90.48.010.

[29] RCW 90.48.080. "Pollution" means "such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful." RCW 90.48.020.

[30] WAC 173-226-020 ("No pollutants shall be discharged to waters of the state from

In October 2000, DOE issued a National Pollution Discharge Elimination System and State Waste Discharge General Permit for storm water discharges associated with construction activities (General Permit).[31] The General Permit is intended to meet the requirements of Washington's Water Pollution Control Act and the CWA as they apply to storm water discharges from construction sites.[32] "For new operations, applications for coverage [under a General Permit] shall be submitted no later than one hundred eighty days prior to the commencement of the activity that may result in the discharge to waters of the state."[33] A permit holder granted coverage under a General Permit does not need to obtain an individual permit.[34]

General Permit condition S5 requires compliance with surface water quality standards, although a permit holder who discharges runoff in violation of those standards remains in compliance with condition S5 where an "adequate SWPPP has been prepared and fully implemented."[35] Condition S5 requires permit holders not in compliance with water quality standards to "take immediate action(s) to achieve compliance by implementing additional BMPs and/or improved maintenance of existing

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any point source, except as authorized by an individual permit . . . , or as authorized through coverage under a general permit.").

[31] "NPDES permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. General Permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region." Nat'l Res. Defense Council v. EPA, 279 F.3d 1180, 1183 (9th Cir. 2002) (citation omitted).

[32] See generally WAC 173-226-010.

[33] WAC 173-226-200(1)(b).

[34] WAC 173-226-020.

[35] As the PCHB stated, "The mechanism by which a permittee achieves compliance with [surface water quality] standards is through the development of a SWPPP, designed to prevent pollution in the first instance through the implementation of BMPs that minimize erosion and sediments from rainfall runoffs at construction sites, and that also identify, reduce, eliminate, or prevent the pollution of stormwater." (Emphasis omitted.)

BMPs."[36]

Condition S9 requires permit holders to develop a SWPPP; implement BMPs to minimize erosion and sediments from rainfall runoff at construction sites; and identify, eliminate, or prevent pollution of storm water. The SWPPP must include stabilization practices to stabilize exposed soils, and those practices must be implemented as soon as practicable on portions of the site where construction activity has temporarily or permanently ceased.[37] Permit holders must stabilize all exposed and unworked soils by suitable and timely applications of BMPs.[38] Permit holders are required to inspect all on-site erosion and sediment control measures at least once every seven days and within 24 hours after any storm event greater than .5 inches of rain per 24 hour period.[39] Whenever self-inspection reveals that BMPs are inadequate to control pollution, permit holders are required to implement necessary modifications in a timely manner.[40]

Condition G3 of the General Permit requires a permit holder to notify DOE if it does not comply with, or will be unable to comply with, the permit. The noncompliance

[36] Here, the permit is not clearly written about whether failure to fully implement an adequate SWPPP triggers the duty to take immediate actions, or whether it is noncompliance with surface water quality standards that triggers the duty to take immediate actions. While we interpret the meaning of statutes and regulations de novo, an agency's interpretation of its regulations is given great weight. Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 593, 90 P.3d 659 (2004). Here, neither I-5 Properties nor the PCHB substantially disagrees with DOE's interpretation that noncompliance with surface water quality standards triggers a duty to implement additional BMPs. Additionally, the record shows that I-5 Properties both violated water quality standards and failed to fully implement an adequate SWPPP.

[37] Condition S9.C.1.a.

[38] Condition S9.C.1.a.i.

[39] Condition S9.C.1.d.

[40] Condition S9.B.6.d.

notification must include:

A. A description of the nature and cause of noncompliance, including the quantity and quality of any unauthorized waste discharges;
B. The period of noncompliance, including exact dates and times and/or the anticipated time when the Permittee will return to compliance; and
C. The steps taken, or to be taken, to reduce, eliminate, and prevent recurrence of the noncompliance.

A. Condition S9 Violations

The PCHB found that DOE established violations of condition S9. I-5 Properties argues that the PCHB applied the wrong legal standard when it concluded that I-5 Properties failed to install, maintain, and modify BMPs "as needed," "fail[ed] to prioritize" the implementation of BMPs, demonstrated a "lack of reasonable diligence," and failed to employ "adequate" BMPs.

We disagree. Condition S9.C.1.d of the General Permit sets forth the "as needed" standard, which is the standard the PCHB used.[41] Condition S9.C.1.a requires permit holders to initiate stabilization as soon as practicable, and condition S9.C.1.a.i requires that exposed and unworked soils be stabilized by the "suitable and timely application of BMPs." In order to comply with these conditions, permit holders must prioritize BMP implementation. Thus, the PCHB did not err by concluding that condition S9 requires prioritizing BMPs. The PCHB was generous to I-5 Properties when it applied a "lack of reasonable diligence" standard. The permit requires compliance with its terms, not merely reasonable diligence. Accordingly, this error of law did not prejudice I-5 Properties. Finally, the PCHB's statement that BMPs were "not adequate" is a finding of fact, not a conclusion of law, which is based on testimony that the BMPs used by I-5 Properties were unable to control sediment runoff into the pond. Substantial evidence supports the finding.

Substantial evidence in the record supports the PCHB's conclusion that I-5 Properties violated condition S9 on October 17, 20, 21, 22, 23, November 19, 20, 25,

[41] "All BMPs shall be inspected, maintained, and repaired as needed."

January 9, 11, February 2, 4, 26, 27, and March 16. Condition S9 requires permit holders to prepare and implement a SWPPP and to inspect, maintain, and repair BMPs. Condition S9.C.1.b.iii requires permit holders to implement sediment control BMPs, such as sediment ponds, "as a first step in grading." I-5 Properties' SWPPP called for storm water to pass through BMPs to limit runoff and the discharge of pollutants, and the record shows that I-5 Properties elected to use a sediment catch pond to serve this function.

I-5 Properties argues that the PCHB erred in ruling that it did not prioritize full implementation of this BMP. It asserts that it could not have attached drainage pond B to basin B because it was waiting for regulatory approval, presumably Whatcom County's approval of the postconstruction storm water drainage system design.[42] It also contends heavy rain made the property too wet to construct ditch B by the time construction staging reached the point where ditch B could be built. Assuming I-5 Properties is referring to the Whatcom County permit, the record does not support its claim that delayed regulatory approval of its postconstruction erosion control plan prevented the timely implementation of the necessary components for the sediment control BMP. Instead, the record shows that any lack of regulatory approval did not inhibit I-5 Properties' construction activity. For example, Craig observed construction

[42] Despite RAP 10.3(a)(5)'s requirement that parties reference the record in support of each factual statement, I-5 Properties does not support its delayed regulatory approval argument. Nor does it explain who delayed regulatory approval, what regulatory approval was required, why it was delayed, or when they got approval. Our review of the record shows a February 11, 2003 letter from Whatcom County to I-5 Properties' engineer in which the county requests an amended drainage report before I-5 Properties constructs the infiltration ponds. The record also contains a February 18, 2003 drainage plan addendum and an erosion control plan drawing dated July 23, 2003, with a September 23, 2003 Whatcom County approval stamp.

as early as February 2003, and I-5 Properties states that "[m]ost all of the construction activity was completed by the end of September 2003." I-5 Properties does not explain why the lack of approval would have prevented it from constructing ditch B when it completed ditch C in the summer of 2003.

I-5 Properties argues that construction staging prevented it from installing ditch B before the heavy rains fell. Condition S9.C.1.b.iii requires permit holders to include implementation of BMPs when scheduling construction staging, as opposed to installing BMPs when the construction schedule allows it. Here, I-5 Properties had not installed ditch B by mid-October 2003 when "[m]ost all of the construction activity was completed." I-5 Properties added ditches that were not in Reichhardt's design, graded the site towards those ditches, and did not install the ditch Reichhardt designed for the northern portion of the property. Accordingly, the PCHB's conclusion that I-5 Properties failed to "install the recommended drainage system in the first instance" is supported by the record."

Condition S9.C.1.d requires all that "[a]ll BMPs shall be . . . maintained . . . as needed to assure continued performance of their intended function." The record shows that this drainage system was not maintained in a condition that would ensure it performed its intended function: removing sediment from the storm water running off the construction site. Reichhardt testified that the water running into the drainage ponds needed to be relatively free of sediment for the ponds to work properly, and the SWPPP, in accord with condition S9.C.1.a.i, provided that all exposed and unworked soils would be stabilized by suitable and timely application of BMPs. Stabilization

BMPs "include but are not limited to temporary seeding, permanent seeding, mulching, erosion control fabrics, sod stabilization, vegetative buffer strips, protection of trees, preservation of mature vegetation and any other and all appropriate measures." In addition, the SWPPP's erosion control plan called for immediate mulching of exposed areas as a BMP to prevent silt-laden water from entering any body of water. I-5 Properties sprayed seed on the site for erosion control purposes, but it did not spray the several acre eastern portion of the site where potatoes had been growing because the crops had not been harvested in time. Riechhardt's plan included temporary seeding to cover that area, but I-5 Properties left it exposed.

Craig's testimony supports a conclusion that exposed and unworked soils were not stabilized by suitable and timely application of BMPs. On October 17, 2003, Craig observed exposed and eroding soils that had not been stabilized by BMPs.[43] Exhibit 28-g, a picture taken on October 21, 2003, shows soils that remained exposed after Craig's October 17, 2003 inspection.[44] Craig testified that he identified areas of exposed or partially covered soil to I-5 Properties on his October 21, 2003 inspection.[45] Exhibit 28-R shows the same area in the same condition on October 22, 2003.[46] On October 23, 2003, Craig testified that a small amount of hay had been placed on an area where a whole berm had started to erode because of surface water flow across an

[43] PCHB Order FF 22. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on October 17, 2003.

[44] PCHB FF 23. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on October 20, 2003.

[45] PCHB FF 24. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on October 21, 2003.

[46] PCHB FF 26. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on October 22, 2003.

unstabilized soil surface. He also said that other berm soil remained unstabilized on that date.[47] However, finding of fact 28 does not support a conclusion that I-5 Properties violated condition S9 on November 9-10, 2003. Nor is there sufficient evidence to support that finding.

Exhibit 28-z shows exposed soil on November 11, 2003, in a newly created ditch without any stabilization BMP. Craig testified that he still saw exposed soils in the ditch on November 14, 2003. Exhibit 27-v shows that I-5 Properties installed matting in the same ditch, but not until the end of November 2003. I-5 Properties argues it could not have installed matting by November 21, 2003, because DOE's order to cap pond A caused the site to flood, preventing the installation of BMPs. But the evidence shows that the ditch was not underwater on November 11, 2003, so BMPs could have been implemented when the excavation occurred.[48]

Craig testified that some of the exposed soils along the Atwood Ditch had been covered, but the other 40 percent remained exposed on November 20, 2003.[49] At Craig's November 25, 2003 inspection, he observed water flowing from the adjacent property to the east and that soil in the eastern field had remained exposed from the beginning of October, 2003. The drainage system was not designed to accommodate water entering the site from adjacent properties. To address this SWPPP inadequacy,

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[47] PCHB FF 27. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on October 23, 2003.

[48] The above evidence substantially supports finding of fact 30, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on November 19, 2003. And exhibit 28-dd shows unstabilized areas of recent excavation on November 19, 2003.

[49] "And that area was still an area where muddy water could be created by exposed soils and that could discharge into the stream that this site discharged into." This evidence supports finding of fact 32, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on November 20, 2003.

Craig recommended that I-5 Properties update the SWPPP and hire an engineer.[50] Craig also noticed that I-5 Properties had applied straw to a limited section of an eroding pond wall. But riling and channeling had occurred, and other soils remained exposed, which were a source of the mud entering the pond.[51]

However, neither Craig's testimony nor the pictures support the finding that I-5 Properties violated condition S-9 on November 21, 2003. The testimony in support of the December 1, 2003 violation is conclusory and does not support a finding that I-5 Properties violated condition S9 on that day.

On January 9, 2004, Craig observed that an unlined trench had been dug through exposed soils in an apparent effort to drain a portion of the site.[52] On January 11, 2004, Craig observed an area of exposed soil that had not been stabilized by BMPs and that had remained exposed since October.[53] Site conditions had improved by February 2, 2004, but exposed trenches continued to allow muddy water to drain into the pond area, and an eroded area along a ditch that had been brought to I-5 Properties' attention in January remained eroded.[54] These problems remained on February 4, 2004.[55]

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[50] I-5 Properties did not consult with Reichhardt.

[51] PCHB FF 34. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on November 25, 2003.

[52] PCHB FF 38. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on January 9, 2004.

[53] PCHB FF 39. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on January 11, 2004.

[54] PCHB Order FF 50. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on February 2, 2004.

[55] PCHB Order FF 42. Substantial evidence in the record supports this finding, which supports the PCHB's conclusion that I-5 Properties violated condition S9 on February 4, 2004.

I-5 Properties argues that it acted immediately as required by the General Permit[56] and devoted 100 percent of its resources to storm water control.[57] I-5 Properties also contends that flooding, caused by DOE's recommendation that it cap ponds, killed the grass which was a stabilization BMP. The PCHB determined that allowing pond A to discharge continually would not have eliminated the flooding problems caused, in part, by I-5 Properties' failure to install the drainage system as engineered and its failure to update its SWPPP to deal with off-site water.[58] And to the extent that changing site conditions made I-5 Properties' stabilization BMPs less effective, condition S9 requires permit holders to modify its SWPPP to account for those changes.[59]

General Permit Condition S9.1.C.e states that "[r]eports summarizing the scope of inspections, the personnel conducting the inspections, the date(s) of the inspection, major observations relating to the implementation of the SWPPP, and actions taken as a result of these inspections shall be prepared and retained as part of the SWPPP." And S9.B.3 provides that permit holders shall retain the SWPPP and make it available to DOE upon request. On February 4, 2004, Craig called Grant Jansen and the site manager to request that I-5 Properties submit all SWPPP documents, including inspection logs, by February 9, 2004. I-5 Properties had not complied with Craig's

[56] I-5 Properties cites conclusion of law 18 to support the proposition that they acted immediately. Conclusion of law 18 gives I-5 Properties credit for the "sometimes helpful" remedial actions it took, but characterized those actions as intermittent and found that most remedial actions were "sporadic, ineffectual, and poorly managed."

[57] Permitees are not required to devote 100 percent of their resources to stormwater control, and the daily logs show that I-5 Properties expended far less than 100 percent of their resources on stormwater control.

[58] This argument is addressed more fully below.

[59] Condition S9.B.6.c.

request by February 24, 2004, when Craig sent a letter asking for all SWPPP records by February 26. Craig did not get the records by February 26, 2004. Accordingly, the PCHB did not err by upholding DOE's February 26, 2004 penalty against I-5 Properties for violating that condition of the General Permit.

On February 27, 2004, DOE received inspection logs for 2004 only, and those logs had only been filled out every seven days.[60] I-5 Properties did not provide any records from 2003 on February 27, 2004. General Permit Condition S9.B.5 requires permit holders to include noncompliance notifications in SWPPP records. Because I-5 Properties did not provide the 2003 SWPPP records on February 27, 2004, it also failed to provide the noncompliance notifications for 2003 that should have been in those records. Thus, the PCHB did not err by upholding DOE's February 27, 2004 penalty against I-5 Properties for violating this condition.

DOE made a final request for the 2003 SWPPP records on March 10, 2004, but I-5 Properties did not provide them. Therefore, substantial evidence supports the PCHB's conclusion that I-5 Properties was not in compliance with General Permit Condition S9.B.3, which states that the permit holder "shall retain the SWPPP on-site or within reasonable access to the site and make it available upon request to Ecology," on March 16, 2004.

I-5 Properties had not provided the requested SWPPP records for 2003 by the time Craig recommended enforcement action against I-5 Properties on June 25, 2004.

[60] Cf. General Permit Condition S9.C.1.d (requiring inspections "at least once every seven days and within 24 hours of any storm event of greater than 0.5 inches of rain per 24 hour period).

In response to a discovery request, I-5 Properties produced daily reports of site activity between October 13, 2003 and March 19, 2004. These reports were submitted after the March 16, 2004 violation occurred. I-5 Properties claims that these daily reports (exhibit 17) and the 2004 inspection logs (exhibit 17A) show that I-5 Properties substantially complied with condition S9's site inspection requirements. But the daily reports do not satisfy the inspection report content requirements of S9.1.C.e,[61] and do not comply with I-5 Properties' SWPPP, which called for an on-site list of all BMPs in use and when those BMPs were last checked. The inspection logs do not show that I-5 Properties conducted site inspections before 2004. And evidence that I-5 Properties experienced the same problems on multiple days shows that the inspections I-5 Properties claims to have conducted in 2004 did not help it identify BMPs that needed to be maintained or repaired to assure that they continued to perform their desired function.

I-5 Properties also claims, without citing to the record, that witness testimony supports their contention that inspections occurred as required by condition S9. But the permit requires permit holders to document the inspections and to provide those records to DOE, not establish compliance through after-the-fact testimony. Finally, even though Craig was present on site when I-5 Properties was required to inspect its site, the permit holder must still identify BMPs that need to be maintained or repaired. Accordingly, we hold that substantial evidence in the record supports all condition S9

[61] During closing arguments before the PCHB, I-5 Properties conceded that the inspection reports did not fulfill permit requirements. The daily reports also support the PCHB's finding that "[t]he daily logs indicate very little work being done on [BMPs]."

violations, except for those on November 10, 11, 21, and December 1, 2003.

B. Condition S5 Violations

The PCHB found that I-5 Properties violated water quality standards on October 17, 20, 21, 22, 23; November 9, 19, 20, 21, 25; December 1; January 11; February 2; and 4. I-5 Properties does not dispute that turbid water left the site on various occasions. Instead, it argues that those discharges should not count as condition S5 violations for 4 reasons.

1. Agricultural Use

I-5 Properties argues that the PCHB erred by determining that DOE met its burden of showing multiple violations of condition S5. First, it asserts that the decades of agricultural practices on the site caused the turbid water discharges and cites to the CWA for the proposition that agricultural storm water discharges are exempt from NPDES requirements.[62] I-5 Properties' contention that the PCHB displayed "ignorance" of the relevant legal standard is not well-taken. While the CWA excludes "agricultural stormwater discharges" from the definition of a "'point source,'"[63] Washington's "'point source'" definition does not.[64] Thus, if pollutants issue from a point source on land that

[62] See 33 U.S.C. § 1362(14).

[63] 33 U.S.C. § 1362(14). "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14).

[64] WAC 173-226-020 prohibits the discharge of pollutants into the waters of the state from any point source without a permit. "'Discharge of pollutant' and the term 'discharge of pollutants' each means the addition of any pollutant or combination of pollutants to waters of the state, respectively." WAC 173-226-030(6). "'Point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation,

had been used for agricultural purposes, those discharges are not exempt under state law.

2. Act of God/Upset Defense

I-5 Properties also contends that excessive rainstorms are an "act of God" which authorizes the discharge of pollutants in violation of Condition S5. "'[T]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit.'"[65] Similarly, Washington bars the discharge of pollutants except as authorized by permit.[66] Condition S5 of the NPDES permit at issue here requires permit holders to comply with water quality standards (chapter 173-201A WAC) by creating and following a plan designed to prevent the discharge of pollutants that can occur when water from storms runs off construction sites.

DOE recognizes that exceptional incidents beyond the reasonable control of the permit holder can cause temporary noncompliance with technology-based standards. The General Permit cross-references 40 C.F.R. § 122.41, which allows for a limited affirmative defense.[67]

> A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
>
> (i) An upset occurred and that the permittee can identify the cause(s) of the upset;
>
> (ii) The permitted facility was at the time being properly operated; and
>
> (iii) The permittee submitted notice of the upset . . . [within 24

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or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture." WAC 173-220-030(21); see also 33 U.S.C. § 1370 (States may enforce more stringent requirements under the NPDES program.).

[65] Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1010 (9th Cir. 2008) (quoting N. Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155, 1160 (9th Cir. 2003).

[66] WAC 173-226-020.

[67] Condition G11.

hours].

(iv) The permittee complied with any remedial measures required under paragraph (d) of this section.[68]

"Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee."[69]

I-5 Properties presented an "upset" defense before the PCHB, even if it called it an "act of God" defense, by arguing that an exceptional amount of rain caused its permit violations. Accordingly, I-5 Properties preserved for appellate review the question of whether the PCHB erred by not finding the defense applicable. We hold that I-5 Properties failed to establish the defense here. The upset defense only excuses temporary noncompliance. An exceptional amount of rain fell on October 16, 2003, but DOE documented water quality violations on October 17, 20, 21, 22, 23; November 9, 14, 19, 20, 21, 25; December 1; January 11; and February 2 and 4. The record does not support a conclusion that the noncompliance was temporary.

Even if the noncompliance on the days following the October 16 rainfall could have been attributed to that unusual event, the evidence before the PCHB would not have supported a finding that the facility was operating properly at the time of the upset. The storm water control plan and other erosion control BMPs had not been properly implemented. Finally, I-5 Properties did not did submit notice within 24 hours of the upset. Accordingly, we hold that the upset defense does not excuse I-5 Properties' permit noncompliance.

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[68] 40 C.F.R. § 122.41(n)(3).

[69] 40 C.F.R. § 122.41(n)(1) (emphasis omitted).

Permit condition S5(i) directs DOE to consider weather conditions as related to design storms when determining compliance. Here, DOE properly exercised its enforcement discretion by not penalizing I-5 Properties for the October 17 and October 20 S-5 violations because of heavy rainfall on October 16, 2003. Although rainfall amounts exceeded the pre build-out design capacity of the storm water drainage system only on October 16, 2003, DOE does not explain why it exercised enforcement discretion on October 20 but not on October 21. Accordingly, its decision to penalize I-5 Properties for its October 21, 2003 condition S5 violation was arbitrary.[70]

3. Violations Caused by DOE

I-5 Properties claims that it was denied due process when the PCHB affirmed penalties for violations that I-5 Properties asserts were caused by DOE's actions. Specifically, I-5 Properties claims that DOE ordered it to cap pond A and pump water into ponds B and C, causing the General Permit violations. We do not need to decide whether due process requires this court to recognize an "act of Ecology" defense because the record supports the PCHB's findings that DOE did not order I-5 Properties to cap and pump and that its recommendations did not cause permit violations.

I-5 Properties and DOE disputed the effect of Craig's statement that I-5 Properties could be liable for fines if it did not cap pond A and pump into pond B. I-5 Properties reasonably saw it as a requirement; Craig saw it as a prediction that I-5 Properties would not otherwise be able to comply with permit conditions. The PCHB heard the evidence and did not find that Craig ordered I-5 Properties to implement a

[70] See RCW 34.05.570(3) ("The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that . . . (i) [t]he order is arbitrary or capricious.").

cap and pump BMP. We leave to the PCHB resolution of this disputed factual issue and the concomitant credibility determinations. On this record, we cannot reverse the PCHB.

I-5 Properties and DOE also disputed the cause of the site flooding. I-5 Properties asserted that DOE's order to cap pond A and pump to pond B caused the site's flooding problems and turbid water discharges. DOE argued that I-5 Properties' capping and pumping was a BMP that it could implement to prevent condition S5 violations.

I-5 Properties offered testimony that the drainage system was not designed to be capped[71] and that plugging the pond flooded the site, leading to increased turbid discharges as uncapping pulled turbidity from the site and into the pond. But substantial evidence supports the PCHB's determination that the site would have experienced storm water problems even if pond A had continually discharged runoff. For example, I-5 Properties did not install the drainage system as designed, did not fully implement adequate BMPs,[72] and did not consult with an engineer to update its SWPPP to intercept and reroute off-site water. Substantial evidence also supports the PCHB's determination that DOE's ad hoc BMP recommendations reduced turbid discharges.[73] Accordingly, we do not need to resolve the question of whether due

[71] Reichhardt did not testify about whether capping and also pumping, as DOE had recommended, would lead to site flooding. The record shows that I-5 Properties capped without pumping on at least two occasions.

[72] See condition S9 violations.

[73] In addition, Craig had seen the techniques used successfully at other sites; pond B had underutilized infiltration capacity because of I-5 Properties' failure to connect pond B to basin B; and the ponds were designed with the capacity to fully infiltrate runoff from up to two-year storms.

process requires this court to recognize an "act of Ecology" defense because the record does not support I-5 Properties' contention that DOE's recommendations/requirements caused the permit violations.

4. Turbidity Water Quality Standard

Washington's surface water quality standards are designed to protect certain designated uses, which are defined as "those uses specified in this chapter for each water body or segment, regardless of whether or not the uses are currently attained."[74] Under WAC 173-201A-600(1), "[a]ll surface waters of the state not named in Table 602 are to be protected for the designated uses of: Salmonid spawning, rearing, and migration." DOE applied the turbidity water quality standard designed to protect salmon spawning, core rearing, noncore rearing, and migration to California Creek.[75] Before the PCHB, I-5 Properties argued that salmon were spawning in the relocated stream to support its position that the turbid discharges did not cause environmental harm.[76] Before this court, I-5 Properties argues that there was no proof of salmon spawning before or after November 20, 2003, and states that "[n]o one testified the salmon were spawning."[77] I-5 Properties now argues that the fish were lost, not spawning, meaning that DOE should not have applied the standard designed to protect salmon spawning. Because I-5 Properties' litigation strategy before the PCHB relied on

[74] WAC 173-201A-020.

[75] WAC 173-201A-602; WAC 173-201A-200(1)(e).

[76] "Salmon were spawning in the midst of the worse [sic] of the violations." See also email from Al Jansen to Craig: "Some salmon, approximately 20, did spawn in our spawning beds after the flooding storm of November 2003."

[77] But see Al Jansen's testimony on direct examination that he had seen some salmon spawning in its spawning bed that fall. And before the PCHB, I-5 Properties argued that Al Jansen testified about salmon spawning in the relocated tributary.

the existence of spawning salmon, it did not argue that DOE erred by applying the water quality standard intended to protect spawning salmon. Accordingly, it has waived that argument on appeal.[78]

I-5 Properties also argues that DOE tested water quality in the wrong place. I-5 Properties claims that it performed "in-water" work on the tributary to California Creek in November 2003 and that the PCHB erred by finding that DOE proved noncompliance with water quality standards when it measured turbidity at the point of discharge. When "necessary in-water construction activities [] result in the disturbance of in-place sediments,"[79] WAC 173-201A-200(1)(e)(i)(A)-(C) allows for "a temporary area of mixing during and immediately after" the construction activities by providing that the "point of compliance" shall be 100-300 feet "downstream [from] the activity causing the turbidity exceedance." WAC 173-201A-200(1)(e)(i) also provides that the temporary area of mixing can occur only after "the implementation of appropriate best management practices to avoid or minimize disturbance of in-place sediments and exceedances of the turbidity criteria." But I-5 Properties did not argue before the PCHB that DOE used the wrong point of compliance under the temporary mixing zone provision and accordingly waived review of that issue on appeal.[80]

C. Condition G3 Violations

Condition G3 requires permit holders who do not comply with permit conditions

[78] RCW 34.05.554(1) ("Issues not raised before the agency may not be raised on appeal.").

[79] WAC 173-201A-200(1)(e)(i).

[80] RCW 34.05.554(1). I-5 Properties argues that DOE concedes this issue on appeal, but that claim is not supported by the record or the briefing.

to

> at a minimum, provide [DOE] with the following information:
> A. A description of the nature and cause of noncompliance . . . ;
> B. The period of noncompliance . . . ; and
> C. The steps taken, or to be taken, to reduce, eliminate, and prevent recurrence of the noncompliance.

Although I-5 Properties conceded during closing argument before the PCHB that it did not comply with the formal requirements of condition G3,[81] it claims that it fulfilled all of the G3 reporting requirements because the parties met on site to communicate about I-5 Properties' compliance problems. This is not what the permit condition requires. In any event, I-5 Properties did not contest its violation of permit condition G3 as written before the PCHB, so it has waived review of that issue on appeal.

D. Penalty Calculation

RCW 90.48.114(3) authorizes penalties of up to $10,000 per violation per day and requires consideration of "the previous history of the violator and the severity of the violation's impact on public health and/or the environment in addition to other relevant factors" when setting the penalty amount. To that end, DOE uses a water quality penalty matrix to develop recommended penalties. The PCHB reviews DOE's penalty de novo,[82] under the standards of RCW 90.48.114. The PCHB may also consider the severity of the violation and "'other relevant factors.'"[83]

DOE found 20 condition S5 violations, 16 condition S9 violations, and 15 G3

[81] "Now down to G3. Mea culpa. They did not ever formally report under G3. Uncontested. . . . Yes, there were paperwork violations under G3 and S9."

[82] WAC 371.08.485(1).

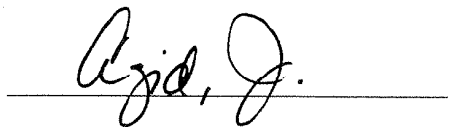
[83] Kaiser Aluminum Chem. Corp. v. Ecology, PCHB 99-121 & 135, at conclusion of law V (2000) (quoting RCW 90.48.144(3)).

violations.[84] In light of mitigating factors, such as heavy rain, it recommended a penalty for condition S5 violations on October 21; November 9, 20, 2003; January 11; February 2, and 4, 2004; for S9 violations on October 17, 20, 23; November 9, 20, 2003; January 11; February 2, 4, 26, 27; and March 16, 2004. Craig applied DOE's water quality penalty matrix to come up with a $3,000 penalty for each condition S5 and S9 violation and a $2,000 penalty per condition G3 violation for a total penalty of $82,000.

I-5 Properties claims that the PCHB erred by affirming penalties when DOE did not follow its guidance manual. Because the PCHB reviews penalty decision de novo for compliance with RCW 90.48.114, DOE's internal guidance manual is not binding on the PCHB.

I-5 Properties claims that the PCHB erred as a matter of law by considering the maximum penalty that could have been imposed. But figuring out the maximum penalty allowed by RCW 90.48.114 is relevant to determining whether DOE's penalty matched the severity of the violation's impact on the environment.[85]

We remand to the PCHB to reduce the penalties imposed on I-5 Properties in accordance with this opinion.



WE CONCUR:

[84] DOE identified 20 condition S9 violations in exhibit 19, but we hold that four of those are not supported by substantial evidence.

[85] DOE has filed a motion to strike the supplemental brief. We have not considered I-5 Properties' supplemental brief in deciding this case.

Dwyer, A.C.J.  Schindler, C.J.