BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

I-5 PROPERTIES, JANSEN, INC., & AL JANSEN, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NO. 05-063 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter arises from the appeal of an $82,000 penalty issued by the Department of Ecology (Ecology) on March 29, 2005 for violations of the 2000 National Pollutant Discharge Elimination System (NPDES) General Permit for Construction Activities (hereinafter the General Permit). Ecology issued the penalty to Appellants, who owned and operated a seventy-two (72) acre site in Whatcom County, for multiple violations of the General Permit during construction activities that occurred from October, 2003 through March, 2004.

The Board held a hearing in this matter on November 13 through 16, 2006 in Bellingham, Washington. Board Member Kathleen D. Mix presided for the Pollution Control Hearings Board (Board), joined by Board Chair William H. Lynch and Board Member Andrea McNamara Doyle. Assistant Attorney General Ronald L. Lavigne represented the Department of Ecology. Attorney Douglas K. Robertson represented the Appellants. Randi Hamilton and Kim Otis of Gene Barker and Associates, Olympia, Washington provided court-reporting services.

The legal issues identified in the Pre-hearing Order which governed the proceedings were as follows:

1. Whether the actions of the Appellants as alleged in the Notice of Penalty were individual and/or repeat violations of conditions listed in the NPDES General Permit for Construction Activities (Permit No. S03-005150);
2. Whether the actions of the Appellants as alleged in the Notice of Penalty were individual and/or repeat violations of the Washington State Water Pollution Control Act (RCW 90.48.010 et. seq.);
3. Whether the penalty imposed by Ecology's Notice of Penalty is authorized under applicable statute and administrative code;
4. Whether the penalty imposed by Ecology's Notice of Penalty is in an amount that is authorized under applicable statute and administrative code;
5. Whether Ecology is barred from imposing any Notice of Penalty given Ecology's activities in controlling and/or directing stormwater management activities on the property; and
6. Whether Ecology properly reviewed and responded to Appellants' Application for Relief from Penalty.

The Board received the sworn testimony of witnesses, admitted exhibits, and heard arguments on behalf of the parties. Having fully considered the record, the Board enters the following:

FINDINGS OF FACT

[1]

Ecology issued a NPDES and state waste discharge General Permit for stormwater discharges associated with construction activities in October, 2000. The General Permit had a five year term, with an expiration date of November 18, 2005. *Exhibit 1*. On January 29, 2003, Al Jansen filed an application for coverage under the General Permit (Notice of Intent) for a 72.1 acre site (the I-5 Industrial Center) near Ferndale, Washington. The owner/representative of the site was listed as I-5 Properties, Inc., and the contact for the site was listed as Al Jansen of Jansen, Inc. (hereinafter referred to collectively as I-5 Properties).[1] The Notice of Intent indicated that the construction site would discharge stormwater to an "unnamed receiving water" and to California Creek. The Notice stated that construction activity at the site would start in February, 2003 and be complete in August, 2003. *Exhibit 6.*

[2]

The General Permit required public notice of the proposed construction activities, and provided that permit coverage not be granted until thirty-one (31) days after the date of the last public notice. The public notice for the I-5 Properties site ran in the Bellingham Herald on February 4 and 11, 2003. *Exhibits 1 and 6.*

[3]

On February 20, 2003, Ecology inspector Andrew Craig conducted a site visit at I-5 Properties, in response to a complaint from a third party. Although I-5 Properties had not been

[1] Al Jansen signed the Notice of Intent as President of the owner/operator (I-5 Properties, Inc.) and testified at hearing that he is the President of Jansen, Inc. He has owned the project site for approximately 35 years.

granted coverage under the General Permit, the site was being cleared and graded. Approximately one-quarter to one-half of the designated site had been disturbed by construction activities. During the February 20 visit, Craig discussed permit requirements with the site manager, Mitch Pelzer, and asked to review plans to protect water quality. Craig informed Pelzer of the need to implement Best Management Practices (BMPs) and to have a Stormwater Pollution Prevention Plan (SWPPP) to manage stormwater runoff. Pelzer was cooperative and indicated a desire to comply with permit requirements. *Testimony of Craig.*

[4]

The I-5 Properties site itself was larger than most construction sites in the area, and the biggest that Craig had regulated since becoming a water quality inspector in 1998. *Testimony of Craig*. Prior to construction, the property was flat on the east and north sides, and sloped slightly toward the north overall. *Testimony of Reichhardt.* The property had previously been used for farming, and several acres along the eastern portion of the site continued to be used for crop farming until harvest in early fall of 2003. The farmer on the eastern portion of the site was a tenant of I-5 Properties. *Testimony of Al Jansen*.

[5]

As a result of the site visit, Craig sent I-5 Properties a warning letter on March 12, 2003. The letter warned I-5 Properties that continued work at the site prior to the granting of permit coverage violated the state's Water Pollution Control Act (RCW Ch. 90.48), and could subject the permittee to enforcement action and penalties. The letter also informed and warned I-5 Properties that it needed to develop and fully implement a SWPPP, and be in compliance with it

throughout all phases of construction. Craig's letter also noted that he had not received the documents that Pelzer had promised to forward as a result of the February 20 visit. *Exhibit 33, Testimony of Craig*.

[6]

Ecology granted I-5 Properties coverage under the General Permit by duplicative letters dated March 12 and 14, 2003. *Exhibits 10, 57.* The letters from Ecology enclosed a copy of the General Permit, informed I-5 Properties that it should read the permit carefully, and called attention to Special Condition S9 of the permit, which requires the development, implementation and maintenance (revision) of a SWPPP for the entire duration of the project. The letters note that the purpose of the SWPPP is to reduce, eliminate, and prevent the pollution of stormwater through the application of BMPs, and that failure to prepare and implement an adequate SWPPP could result in a violation of state and federal laws and regulations. *Exhibits 10, 57.*

[7]

Jansen Inc., the general contractor at the I-5 Properties site, submitted a one page SWPPP to Ecology on March 14, 2003, along with other requested documents and local permits. *Exhibits 12, 34.* The SWPPP did not cite to any stormwater management manual or indicate how it would be used, nor was there any discussion of how corrective actions would be undertaken. Ecology did not comment on the original SWPPP submitted by Jansen, nor point out deficiencies in the plan. Because the SWPPP was submitted at a time when there was minimal risk of stormwater discharges from the construction site, Craig did not follow up further with I-5 Properties at that time. *Testimony of Craig*.

[8]

In order to develop the property, I-5 Properties needed to relocate an existing ditch that crossed the property, as well as install a drainage system for the site. They retained Reichhardt & Ebe Engineering, Inc. for these purposes. Engineer Carl Reichhardt developed a plan to move the existing ditch, which was a tributary of California Creek, and took steps to obtain necessary regulatory approvals related to the stream relocation, particularly from the Washington Department of Fish and Wildlife (WDFW). The ditch was relocated to the west side of the property (running approximately parallel with the western boundary), with certain habitat enhancements to encourage and allow use by spawning salmon. *Exhibit 8; Testimony of Reichhardt*.

[9]

Reichhardt also created drainage plans for the site, which included drainage concepts, design criteria, numeric results analysis, and maintenance standards. *Testimony of Reichhardt, Exhibit 3.* Reichhardt amended the original October 10, 2002 drainage plan several times in response to comments from Whatcom County and Ecology. *Testimony of Reichhardt; Exhibits 3, 5, 9.* Reichhardt designed a system that divided the site into three main drainage areas, each flowing into a separate detention pond. The ponds were labeled Pond "A", "B" and "C," and each was expected to receive and drain the runoff from a corresponding drainage basin, also identified as Basin "A", "B" and "C," respectively. *Exhibits 8, 13, 58; Testimony of Reichhardt*. Reichhardt designed each pond to work independently, and he sized the capacity of each specific pond to handle the projected the drainage from each separate area. If water from one area were

directed to a pond other than the designed pond for that area, the system would not work as planned. Pond A was sized to hold run-off from 38.2 acres of the site, Pond B, 18.4 acres, and Pond C, 11.8 acres. The drainage system was designed to manage run-off so that post-development run-off would be no greater than pre-development conditions. *Testimony of Reichhardt; Exhibits 12, 13.*

[10]

The drainage design called for a trench or ditch system that would direct water from each basin into its designated ponds. Moving from north to south across the property, the design detail identified four ditches, a North Ditch (Ditch A-2), Ditch A, Ditch B, and Ditch C. The North Ditch (A-2) was designed to drain into Pond A, while the others were to drain their respective drainage basins. The North Ditch was intended to run along the north edge of the property, parallel to an existing ditch that was located on adjacent lands. On the south end of the property, along Atwood road, was another ditch which turned into the relocated steam or tributary and then ran along the west side of the property. Several culverts crossed and drained into this ditch and stream system on the south side of the property. *Exhibits 8, 58*; *Testimony of Reichhardt*. Ditch C was constructed during the summer of 2003, before the county had approved Reichardt's drainage design. *Testimony of Grant Jansen.*

[11]

Each pond was designed to be large enough to handle the two (2) year storm event for its respective drainage area by infiltration into the ground.[2] Larger storm events, including a ten (10) and one-hundred (100) year storm event, were to be handled by infiltration, and, as necessary, by releasing excess runoff via an overflow pipe system and an emergency spillway. The outflow structure consisted of a manhole set on the edge of the pond, in which water from the top of the pond could enter via a horizontal pipe, then travel upward through a vertical pipe, and out through another (higher) horizontal pipe where it would discharge to the tributary to California Creek. The emergency spillway system, which drained to the tributary on the west side of the property, was designed to allow overflow from the Ponds if they reached capacity. If constructed as designed, the overflow and spillway structures would provide drainage to avoid water backing up and flooding the site. The system design did not anticipate any of the pond outlets being closed off for any purpose, nor did it account for additional water entering the site from off-site locations. *Testimony of Reichhardt*.

[12]

Temporary seeding to reduce sediments going into the pond system was a very important aspect of proper site drainage. The ideal time to plant such seeding was September or October. *Testimony of Reichhardt*. To control erosion, check dams, preferably of rock, should have been placed in ditches leading to the ponds at the time of excavation or ditch construction. *Exhibit 13; Testimony of Reichhardt*.

[2] Later recalculations also showed the ponds would keep overflow run-off rates at pre-development rates even if there was *no* infiltration.

[13]

During the months of October and November, 2003, there were several significant rainfall events in the areas of Bellingham, Blaine and Birch Bay, Washington, as well as many days with no rain at all. Rainfall in excess of four inches in a twenty-four hour period equates to a one-hundred (100) year storm event. On October 15, 2003, 1.31 inches of rain fell in Blaine; on October 16, 4.55 inches; and October 17, 1.55 inches. Somewhat less, but still significant rain fell in Bellingham and Birch Bay on those same dates. On October 20, 2003 another heavy rainfall occurred, with 1.75 inches falling at Blaine, and slightly less in Bellingham and Birch Bay. The next most significant rainfall occurred on November 17 and 18, 2003, with .66 and 1.55 inches falling on those days in Blaine, respectively. Rainfall data for the Blaine and Birch Bay areas most closely represents the likely rainfall at I-5 Properties. *Testimony of Reichhardt, Craig; Exhibit 25.*

[14]

I-5 Properties did not install the drainage system as designed by Reichhardt and Ebe Engineering. Instead, I-5 Properties substituted its own judgment to put in several ditches adjacent to roads that they constructed in the middle of the property, roughly around the upper portions of drainage areas A and B and along the north and east sections of drainage area C. Drainage ditch A-2, along the north side of the property, and drainage ditch B in the center of the property, both of which were called for in the Reichhardt design, were not installed as part of the drainage system by the Fall of 2003. Ditch B was not constructed on the site in September, 2003 because conditions on the site had become too wet. During site preparation work in 2003, I-5

Properties also graded the site in a fashion that would cause water to drain inward towards the newly constructed ditches in the interior of the site. This created a change in grade from that observed by Reichhardt in his review of site conditions ("the ground is flat, with a slight slope to the North") and used to calculate his design of the drainage system. I-5 Properties did not consult with its engineer before or during its modifications to the drainage system. *Exhibits 5, 58, Testimony of Grant Jansen, Reichhardt.*

[15]

The drainage system as installed by I-5 Properties failed to provide effective drainage for stormwater from the property as envisioned by the drainage report. The lack of Ditch B caused water from a large portion of the site to drain toward Pond A in greater amounts than the Rechhardt calculations. Water did not drain to Ponds B and C as was calculated by the original drainage plans. The grading and failure to install a ditch on the north side of the property contributed to additional volumes of water flowing into Pond A through the alternative ditch system installed by I-5 Properties, which it was not designed to handle. Water was not being released through the emergency spillway, which indicates that the ponds were also incorrectly graded.

[16]

By mid-October 2003, large portions of the I-5 Properties site had become covered with water. On October 20, 2003, thirty to forty percent (30-40%) of the site was covered by water. Field areas on the north and east sides of the site had become covered with water, as had portions of the drainage basins. *Exhibit 28, 28dd, 28ff, 28nn, 28ccc*; *Testimony of Craig, Al Jansen,*

Grant Jansen; Off-site water was also coming onto the property from the east, contributing greatly to the flooded state of the site. Despite considerable and growing water back-up and flooding problems across the site in the fall and winter of 2003-2004, I-5 Properties did not consult with Carl Reichhardt to troubleshoot problems with the drainage system as installed, nor did I-5 Properties seek advice from Reichhardt on ways to remediate the stormwater runoff problems being experienced at the site. In late November, 2003, Grant Jansen met with an erosion control specialist on site, but there were no resulting recommendations, given the deteriorated site conditions. *Testimony of Grant Jansen.*

[17]

The General Permit regulates construction activity which results in the disturbance of five acres or more of land, including clearing, grading and excavation activities and those sites or common plans of development or sale that will result in the total disturbance of five acres or more. *Exhibit 1*. Critical terms of the permit include:

1. **Condition S5, Compliance with Standards**. This condition requires a permittee to achieve compliance with state surface water quality standards (Chapter 173-201A WAC), sediment management standards (Chapter 173-204 WAC), groundwater quality standards (Chapter 173-200 WAC), and human health based criteria in the National Toxics Rule (Federal Register, Vol. 57, No. 246, Dec. 22, 1992). Under permit condition S5 "compliance with standards" means that the permittee must have an adequate SWPPP prepared and fully implemented. If a construction site is not in compliance with the

water quality standards, the permittee is expected to take immediate action(s) to achieve compliance by implementing additional BMPs or improving maintenance of existing BMPs.

2. **Condition S9, Stormwater Pollution Prevention Plan (SWPPP)**. This condition requires the permittee to prepare and implement a SWPPP, with several objectives, including: a) implementing BMPs to minimize erosion and sediments from rainfall at construction sites, and to identify, eliminate, or prevent the pollution of stormwater, b) preventing violations of water quality and sediment management standards, and c) preventing adverse water quality impacts during the construction phase, including impacts to beneficial uses. Condition S9 sets out the general requirements for a SWPPP and specifies the contents of that document. The SWPPP is to consist of and make provision for "An Erosion and Sediment Control Plan" which describes the stabilization and structural practices to be implemented to minimize erosion and transport of sediments. This includes a description of both site-specific stabilization and structural BMPs, defined in some detail in the permit. The permit term also requires inspection of the BMPs "as needed to assure continued performance of their intended function" and recordkeeping to summarize the scope of inspections and actions taken as a result of the inspections, among other terms.

3. **General Condition G3, Noncompliance Notification**. This general term of the permit requires the permittee to provide Ecology with specified

information if the permittee does not comply with, or will be unable to comply with, conditions of the permit. Among the information required to be reported is a description of the nature and cause of noncompliance, the period of noncompliance, and the steps taken to reduce, eliminate, and prevent recurrence of the noncompliance. The permit gives timeframes for reporting noncompliance.

Exhibit 1; Testimony of Craig

[18]

The permit defines the term "best management practices" as "schedules of activities, prohibitions of practices, maintenance procedures, and other physical, structural and/or managerial practices to prevent or reduce the pollution of waters of the state. BMPs include treatment systems, operating procedures, and practices to control: plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." The permit further categorizes BMPs as "operational, source control, erosion and sediment control, and treatment" BMPs. *Exhibit 1*.

[19]

The permit requires the SWPPP to make provision for an Erosion and Sediment Control Plan which, in turn, shall describe stabilization and structural practices that will be implemented at a construction site as BMPs. *Testimony of Craig; Exhibit 1 (Permit Condition S9 C. 1.a. and b.*). Stabilization BMPs may include temporary or permanent seeding, mulching, geotextiles, vegetative buffer strips, and the like. Exposed and unworked soils are to be stabilized by suitable

and timely application of BMPs; erosion of outlets and adjacent stream banks are to be stabilized; slopes are to be designed to minimize erosion. Structural BMPs are those that divert flows from exposed soils, store flows, or otherwise limit runoff and discharge of pollutants from exposed areas of the site to the degree attainable. Such BMPs may include silt fences, earth dikes, drainage swales, check dams, and sediment basins, among others listed in the permit. Permittees within the Puget Sound Basin must select BMPs from the most recent edition of Ecology's Stormwater Management Manual (SWMM), or other equivalent and appropriate BMPs. *Testimony of Craig; Exhibit 1 (Permit Conditon S9 C.1a. and .b.)*

[20]

The permit also requires that all BMPs "shall be inspected, maintained, and repaired as needed to assure continued performance" of their erosion control functions. Erosion and sediment control measures must be inspected at least once every seven days, and within 24 hours after any storm event of greater than 0.5 inches of rain per 24 hour period. The permittee is required to keep records of such inspections. *Testimony of Craig*; *Exhibit 1* (*Permit Condition S9 B, C.1.d.).*

[21]

Ecology water quality inspectors visited I-5 Properties numerous times between October, 2003 and March 2005. Some of these inspections were within 24 hours of rainfall events of greater than .5 inches of rain within a 24 hour period. Ecology inspector Andrew Craig made site inspections on the following dates: October 17, October 20, October 21, October 22, October 23, November 14, November 19, November 20, November 21 (with Tamera Archer),

November 25 (with Tamera Archer) (2003), and January 9, January 11, February 2, February 4 (2004). Ms. Archer inspected on December 1 and reported her findings to Mr. Craig. On these site visits, the inspectors reviewed site conditions, took samples, and assessed compliance with the SWPPP and water quality standards. On many of these inspections, Ecology discussed with I-5 Properties a variety of matters related to permit compliance, including site erosion and sediment control BMPs, the quality of water discharging from the Pond systems, how to effectively implement the SWPPP, how inspections by I-5 Properties were being conducted and documented, and the need to comply with the General Permit. During a number of inspections, Mr. Craig took photos and water samples of various discharges. On one occasion, Craig made conclusions about site conditions based on information from a third party who observed muddy discharges from the site. Craig analyzed the water samples taken during his site inspections using a calibrated turbidimeter, either on-site or at Ecology's office. *Testimony of Craig; Exhibit 19.*

[22]

On October 17, 2003, approximately forty percent (40%) of the I-5 Properties site was under water following the heavy rains of that period. Pond A was close to capacity, within one foot of overtopping. It was also discharging high volumes of muddy stormwater, in excess of 200 gallons per minute (gpm), into the tributary of California Creek, creating a plume of muddy water flowing into a stream that was otherwise clear and free of sediment and muddy water. Water sample results taken during this inspection showed a background level of 12

nephelometric turbidity units (NTU) at a point five to ten feet upstream of the muddy discharge, and a Pond A discharge to the stream of 536 NTU. *Testimony of Craig, Exhibits 28 a-c; 19.*

On this same date, there were areas of exposed and eroding soils on the site, clearly visible in the outlet areas from Pond A. I-5 Properties had not implemented BMPs in the form of nets, blankets, straw, bark or mulch placement, or plastic sheeting to control sediment runoff in the area of Pond A and other site areas. *Exhibit 28 a-c.* I-5 Properties did not submit a written notice of noncompliance to Ecology to inform the agency of the site conditions that were causing a muddy discharge to the stream, and/or the corrective action steps they had taken or planned to take. *Testimony of Craig.*

[23]

On October 20, 2003, there was no visible change in conditions at the I-5 Properties site, and 30-40% of the property remained under water. The majority of stormwater on the site was routed to Pond A, as there was no ditch system effectively routing water to Ponds B and C. Pond A continued to discharge a clearly visible muddy plume to the tributary. Pond A was near capacity, as it had been on October 17, while Ponds B and C had substantial capacity for additional runoff, each appearing approximately 20 percent full. Water quality samples taken on this date and analyzed with a calibrated turbidimeter showed a background level of 21.2 NTU upstream of the discharge, and a Pond A discharge of 385 NTU.

There were exposed and eroding soils on the east and middle sections of the site. While some areas had grassy planting, the planting was inadequate to cover and stabilize soils. I-5

Properties did not submit any notice of noncompliance with permit conditions to Ecology. *Exhibit 28 d-g; Testimony of Craig.*

[24]

On October 21, 2003, approximately one-quarter of the site was still under water, and there was a muddy discharge from Pond A to the stream. While Pond A was within one foot of over-topping, Ponds B and C had capacity and were not discharging muddy water. Water quality samples taken on this date showed a background level of 13.6 NTU upstream of the Pond A discharge, and a discharge from Pond A at 293 NTU. There was no working outflow structure in place at Pond A to allow for a slow release of water after sediments had had a chance to settle in Pond A. *Testimony of Craig. Exhibit 28 h, j, l.*

Based on the overload situation in Pond A, Ecology inspector Craig recommended that I-5 Properties pump water from Pond A to the less full Pond B, and "cap" Pond A in order to prohibit muddy discharges into the tributary. Craig had seen such a technique work in other situations, including construction and dairy farm drainage problems. I-5 Properties decided to do so, and acquired pumps for that purpose. *Testimony of Craig, Grant Jansen; Exhibit 17.*

On this date, BMPs in place on the I-5 Properties site were not adequate to control sediment runoff into the Ponds, and the ponds themselves were not free of sediment. There were exposed soils on site which showed evidence of channels and rills. Hay bales were placed into a ditch, but in an ineffective manner that did not serve as an effective check dam. Grass plantings were present in some, but not all exposed areas, resulting in erosion and muddy runoff. I-5

Properties provided no notice of noncompliance to Ecology for this date. *Testimony of Craig; Exhibit 28 h, i. j, k, l, m.*

[25]

On October 21, 2003, Ecology also apprised I-5 Properties of permit violations at the site, the lack of implementation of effective BMPs, and the need for corrective actions. Craig went through the permit conditions with Pelzer, the site manager, and both Al and Grant Jansen. Craig highlighted permit conditions S5, S9, and G3, and left a copy of the highlighted permit with them in an effort to help them come into compliance. Craig also took water samples in the presence of Pelzer and the Jansens. Craig explained that a visible difference between upstream (background) conditions in the water and the point of pond discharges was indicative of a water quality violation that required immediate corrective action and notice to Ecology of the noncompliance. *Testimony of Craig; Exhibit 19.*

[26]

On October 22, 2003, there was a discharge from Pond A, but the volume and turbidity concentration was improved over previous times. Rainfall had subsided in the previous days. I-5 Properties was pumping highly turbid water from Pond A into Pond B in order to reduce the discharges from Pond A. Water quality samples taken on October 22 showed an upstream background level above the Pond A discharge site of 12.1 NTU, and a discharge of 171 NTU; above Pond B a 12.1 NTU background level, and a discharge of 162 NTU; 100 feet downstream of Pond B a 17.1 NTU (within 5 of background); 500 feet downstream of Pond B a 12.1 NTU (the same as background). *Testimony of Craig, Exhibit 28 o, p, q.*

On this date Craig observed that some corrective actions had been taken, but exposed soils remained throughout the site, and I-5 Properties had not fully implemented BMPs in many places throughout the site. I-5 Properties did not have records of regular inspections of the site and had not provided Ecology with any notice of noncompliance with permit conditions. Ecology informed site manager Pelzer that the temporary BMPs were reducing environmental harm on and around the property. *Testimony of Craig; Exhibit 28 r.*

[27]

On October 23, 2003, there was no discharge from Pond A. The water level in Pond A was approximately two feet lower, while Pond B was fuller, as a result of pumping between the ponds. There was a small volume of discharge from Pond B. Water quality samples taken upstream of Pond B showed a background level of 6.98 NTU, and a discharge level of 106 NTU. *Testimony of Craig, Exhibit 28 s, u, v.*

Implementation of erosion control BMPs at the site remained largely unchanged on this date. A small amount of hay mulch was thinly spread in an area along a berm on the side of Pond A where the berm had begun to erode away. However, the mulch was inadequate to protect from erosion. I-5 Properties had not submitted a notice of noncompliance to Ecology as of this date. *Testimony of Craig, Exhibit 28 t.*

[28]

Craig received information from Frank Eventoff, a neighbor of the site, that on November 9, 2003, there were discharges of muddy water to the tributary that runs along the side of the property. Mr. Eventoff had previously provided information to Craig that had proved

reliable and had subsequently been verified by Craig. *Testimony of Craig.* Mr. Eventoff testified before the Board that he observed very muddy water coming off the site to the creek during his regular walk by the site during this time period, and that he could see the eddy where the muddy water entered the creek. *Testimony of Eventoff*. Mr. Evantoff reported his concerns to Ecology; and Craig concluded, based on this information, that there were permit violations on November 9 and 10, 2003. I-5 Properties provided no notice of noncompliance with permit conditions for the period of November 9-10, 2003. *Testimony of Craig.*

[29]

On November 14, 2003, site conditions were somewhat improved and stable, although discharges from Pond A and B remained slightly above background levels, and exposed soils remained on the site. I-5 Properties continued to pump water from Pond A to Pond B. Water quality samples taken on this date showed a background level above the Pond A discharge of 2.01 NTU, a Pond A discharge of 23.6 NTU, and a Pond B discharge of 21.4 NTU. Samples collected the previous day by I-5 Properties showed comparable results. I-5 Properties did not file a noncompliance notification with Ecology for this date. *Testimony of Craig; Exhibits 28 w, x, y, z; 35*

[30]

On November 19, 2003, more than thirty percent (30%) of the site was again underwater after heavy rainfall on November 18 and 19. Water was entering the site on the east boundary from off-site sources and flooding into an area of exposed soils along the eastern side of the property. Sections in the middle of the site were also submerged. Most of this water continued

to be directed through available ditches to Pond A, with little or no water being routed to Ponds B and C. On this date both Pond A and B had been "capped" and were not discharging directly to the stream tributary. Pond A was close to breaching the emergency spillway system, and Pond B was within two feet of capacity. There was no pumping between ponds on this date, although the pumps were still on site. Six water quality samples taken on that date demonstrated the following results: a) Background levels in the stream upstream of Pond C —25.1 NTU, b) Pond A water--244 NTU, c) Discharge from North field to stream-->1000 NTU, d) Field water entering Pond A—344 NTU, e) Background levels in the stream where it entered the site next to Atwood Road (on south end of property) —9.05 NTU, and f) Discharge from the Atwood Road ditch (at the front entrance of the site)—856 NTU. *Testimony of Craig; Exhibits 19, 28 dd, ee, ff, gg, hh, ii, jj, kk, ll, mm, nn, oo, pp, qq.*

On this date, large areas of soil remained exposed on the site, if not under water. There was recent excavation on the site which had not been stabilized with appropriate BMPs. The exposed soils contributed to muddy discharges. Muddy field water moved toward and across exposed soils adjacent to Pond A. Areas along Atwood Road on the south end of the property remain exposed, with muddy water discharging to the stream that ran along the south and west side of the property and ultimately, into California Creek. While there was evidence that I-5 Properties had attempted or intended to install some BMPs (*e.g.* piles of mulch, hydroseeding, spread straw, hay bales), these efforts were untimely and wholly inadequate in the face of existing weather conditions and the severity of the drainage problems on the property. *Testimony of Craig; Exhibit 28 dd-qq.*

[31]

On November 19, 2003, Ecology sought to respond to the emergent conditions at the site, and to minimize sediment discharges. The agency did this by informing representatives of I-5 Properties of the need to manage site conditions in specific and general ways, including the following: I-5 Properties should try to stop the water leaving the north field, which was discharging directly to the stream, by construction of a dam to impound water on site; it should temporarily open up Pond A to create additional capacity for the field water, which was more turbid than Pond A; and it should continue pumping between Pond A and B. Craig outlined other steps to improve implementation of BMPs, reduce discharges and manage the site more effectively. I-5 Properties provided no notice of noncompliance to Ecology for this date. *Testimony of Craig; Exhibits 19, 28 dd-qq.*

[32]

On November 20, 2003, there continued to be a muddy discharge to the stream along Atwood Road. Water quality samples showed a background level of 3.77 NTU upstream of the discharge point, and a discharge level of 156 NTU. On this date adult coho salmon were present in the relocated stream along the western boundary of the property. Erosion control measures continued to be deficient. I-5 Properties had provided no notice of noncompliance to Ecology. *Testimony of Craig; Exhibits 28 rr, 41.*

[33]

On November 21, 2003, conditions at the site were drier and the level of field flooding had receeded. *Exhibit 28 vv.* As a result, Ecology recommended that I-5 Properties once again

cap discharges from Pond A, and pump water into Ponds B and C where there was more capacity than Pond A. Grant Jansen disagreed with Ecology's recommendation, and I-5 Properties requested instructions or criteria for when the Ponds should be open or closed to discharge. Ecology responded promptly to this request by providing written guidance and copies of relevant regulatory and technical assistance documents. *Exhibits 37, 38, 39.*

Water quality samples taken on this date showed a background level upstream of the Pond A discharge of 9.96 NTU, a low-volume Pond A discharge of 98.3 NTU, and 26 NTU 100 feet downstream of the discharge. Ecology counted approximately nineteen (19) adult salmon in the relocated stream on this date. *Testimony of Craig; Exhibits 19, 28 ss-xx*

The BMPs installed on the site to control erosion remained deficient on this date. Although progress had been made in spreading bark mulch on the exposed soils along Atwood Road, the ditch itself was exposed and muddy. Other soils in the middle of the site and along Pond A remained exposed. I-5 Properties did not submit a notice of noncompliance to Ecology for this date. *Testimony of Craig.*

[34]

On November 25, 2003, water was flowing off the north field of I-5 Properties and onto adjacent lands (particularly the Ebbe property on the east) as well as coming onto the I-5 site from adjacent properties. I-5 Properties asked Ecology for permission to allow discharges from Pond A to the stream to alleviate the situation. Water in Pond A was not being pumped to the other Ponds at this time. Ecology recommended that the SWPPP be updated, that I-5 Properties consult an engineer to explore routing water around the perimeter of the site, as water coming

onto the site from off-site was greatly exacerbating the on-site drainage problems. Water quality samples taken on this date showed that water entering the site had a turbidity reading of 45 NTU, while water in Pond A had a turbidity reading of 128 NTU. The tripling of turbidity was the result of water moving across the site and through the ditches on-site. Other water quality samples taken on this date showed a background level of 11.2 NTU in the stream next to Pond A, discharge from the north field at a level of 177 NTU, and discharge from the north field ditch into the stream at a level of 57 NTU. *Testimony of Craig; Exhibit 28 yy-fff, 44.*

I-5 Properties had installed a blanket bottom to the ditch along Atwood Road, a BMP that had been needed for some time to reduce sediment in the ditch. Some straw had been applied to the walls of Pond A, but there was erosion and channeling of the area, and it remained a source of mud into Pond A. Erosion and sediment control on the site continued to need improvement. No report of noncompliance was submitted to Ecology for this date. *Testimony of Craig, Exhibits 19, 28 yy-fff.*

[35]

On November 27, 2003, Ecology inspector Craig sent I-5 Properties a summary of violations of the NPDES permit that had been documented since October 17, 2003, including water quality sample results. The written summary informed I-5 Properties of the severity of each of the many violations and informed the business that a formal enforcement action, including penalties of up to $10,000 per day, per violation, was a likely response to the current and prior violations. *Testimony of Craig; Exhibit 44.*

[36]

On December 1, 2003, there were discharges from the north field to the relocated stream that were above permit discharge limitations. Field discharges to the stream were, however, lower in turbidity than the Pond A discharges to stream. The east side fields continued to have over three acres of exposed and eroding soils contributing to muddy water on the site. BMPs had not been effectively implemented across the site. I-5 Properties did not submit a notice of noncompliance to Ecology for this date. *Testimony of Craig*.

[37]

On November 26, 2003, I-5 Properties sent Ecology inspector Craig a letter indicating that the retention ponds were not designed to be capped, and that Ecology's directives to cap the outlets resulted in the flooding of the property and increased turbid water discharges. *Exhibit 43*. Ecology contacted Carl Reichhardt to discuss the drainage plans and seek suggestions for further BMPs at the site. Reichhardt informed Ecology that the ponds themselves were designed for 100% full conditions, and as infiltration ponds, but that they were not designed to handle water coming onto the site from off-site sources. He recommended preventing or routing water from off-site around the I-5 Properties site. Reichhardt did not visit the site nor inspect the manner in which his drainage plan had been implemented by I-5 Properties. *Testimony of Reichhardt*. Craig again warned I-5 Properties that formal enforcement action, including penalties, was a likely response to the ongoing violations at the site. *Exhibits 44, 45, 46, 47,48, 49, 50, 51; Testimony of Craig.*

[38]

On January 9, 2004, the stormwater on the site was frozen over with ice, and ice had built up on the ponds. The cold weather had allowed sediments to settle out within Pond A. Water quality samples indicated that the background level in the stream next to Pond A was at 32.8 NTU, the Pond A water was at 24 NTU, and the stormwater entering the site from the east was at 8.96 NTU. These levels indicated that allowing discharge to the stream from Pond A would be appropriate. Ecology provided notice to I-5 Properties that discharging under such conditions would be in compliance with the NPDES permit and was authorized, subject to certain water quality conditions. The agency warned that conditions were likely to change and that I-5 Properties needed to monitor conditions closely on a day-to-day basis. Ecology again warned that an enforcement order or penalties were possible for documented violations of the permit or RCW Ch. 90.48. *Testimony of Craig; Exhibits 28 ggg, hhh; 49.*

On this date, there continued to be exposed soils on the site and a need for soil stabilization BMPs. The three-acre area on the east of the site remained exposed, but frozen with muddy water. A trench had been excavated to drain water from the site into the Atwood Road ditch, but the trench exposed yet more soils to erosion. Exposed areas allowed more sediment to continue to discharge to Pond A. I-5 Properties had provided no notice of noncompliance to Ecology. *Testimony of Craig; Exhibit 28 iii, jjj, kkk*

[39]

On January 11, 2004, there was melting snow and ice at the site. Pond A was discharging to the stream through the same area of unstable, unprotected slopes that had been at issue since

the previous October. Water quality samples taken on this date showed a background level upstream of the Pond A discharge of 7.24 NTU, a Pond A discharge of 24 NTU, and water entering the site at Atwood Road at 8.96 NTU. There was erosion along the Atwood Road ditch itself, and a lack of BMPs on the site. I-5 Properties did not file a notice of noncompliance with Ecology for this date. Ecology again warned I-5 Properties of possible enforcement action. *Testimony of Craig; Exhibits 28 lll, mmm;50.*

[40]

On February 2, 2004, site conditions had improved over past months. Much of the water on the fields had dissipated, but muddy, exposed soils were apparent throughout the site. Pond A was discharging to the stream. Water quality samples taken on this date showed a background level of 6.36 NTU at the southern end of the site where water entered the property near Atwood Road, an Atwood Road ditch level of 20.8 NTU, and a Pond A discharge level of 44.4 NTU. *Testimony of Craig; Exhibit 28 nnn-ttt.*

An eroded area along a ditch that had been brought to the attention of I-5 Properties in early January remained eroded, with no additional BMPs in place. *See, Exhibit 28 lll and 28 rrr.* Exposed trenches, which had been built on an emergency basis to deal with immediate flooding and drainage problems, continued to allow muddy water to drain into the pond area. I-5 Properties provided no notice of noncompliance to Ecology for this date. *Testimony of Craig; Exhibit 28 nnn-ttt.*

[41]

On February 4, 2004, site conditions were much the same as on February 2. I-5 Properties has recently excavated an unprotected trench along the north side of the property which carried sediment off the field into a ditch. A second trench attempted to drain another area, again with a lack of implemented BMPs to protect soils from erosion. Other exposed and unstabilized soils remained on the site. Water quality samples taken on this date showed a background level at the Atwood Road culvert of 7.65 NTU, an Atwood Road ditch discharge to the stream of 17.4 NTU, and a Pond A discharge to stream of 34.8 NTU. I-5 Properties provided no notice of noncompliance to Ecology for this date. *Testimony of Craig; Exhibit 28 vvv, www.*

[42]

There was ongoing communication and disagreement between Ecology and I-5 Properties about the manner in which to manage discharges from the site through mid-January, 2004. Ecology and I-5 Properties disagreed on whether Pond A or the other ponds should have been capped at any time during this period. Ecology recommended, or in some situations, directed, that Pond A be capped in order to reduce or stop highly turbid discharges to the tributary along the western edge of the property. *Exhibits 37, 49.* Ecology reasoned that the other ponds were often below capacity, and that capping Pond A and pumping to the other ponds would allow infiltration time for sediments in the water and utilize the full drainage system more effectively. *Testimony of Craig.* I-5 Properties believed that such action contributed to the back-up of water on the site, and did not allow the drainage ponds to function as designed. I-5 Properties reasoned

that the capping caused flooding, which increased turbidity in the stormwater leaving the site. *Exhibits 38, 42, 43; Testimony of Grant Jansen, Al Jansen.*

[43]

The capping and pumping of Pond A throughout this period was the implementation of a BMP. Implementation of the capping and pumping option reduced turbid discharges from the construction site that would have otherwise violated water quality standards. The evidence does not support the claim that had Pond A been allowed to discharge continually, there would not have been the on-site water and flooding problems experienced during the fall and winter of 2003-2004. Multiple factors contributed to the back-up of water on the site, including the failure to properly install drainage system as engineered and designed, the failure to take action to intercept and re-route off-site water, and the failure to install and maintain BMPs effectively across the site. The capping of the ponds at various intervals was a site-specific BMP that was responsive to changing conditions on the site, and designed to minimize turbid discharges to the tributaries surrounding the site.

[44]

On February 4, 2004, Ecology made a verbal request to I-5 Properties to produce all SWPPP documents related to the site, including stormwater inspection reports, water quality testing, and logs of corrective actions taken, pursuant to Permit Condition S9. Mr. Pelzer responded, indicating he would provide the documents by February 9, 2004. I-5 Properties did not provide the requested documents by February 9. *Testimony of Craig*. On February 24, 2004, Craig sent a certified letter to I-5 Properties requesting submission of all SWPPP documents

related to the I-5 Industrial Center site no later than close of business on February 26, 2004. Craig noted the prior verbal requests for the documents, and the requirements of Condition S9 of the permit, which requires the permittee to maintain on-site the SWPPP, reports of incidents, inspection reports, and major observations related to implementation of the SWPPP, including actions taken as a result of the inspections. *Exhibit 53; Testimony of Craig.*

[45]

On February 27, 2004, I-5 Properties faxed Ecology some inspection records for January and February 2004. No inspection records were produced for 2003. *Exhibit 17A.* On March 10, 2004, Ecology Inspector Craig contacted I-5 Properties and requested all records for 2003, beginning from when inspections were initiated. Although I-5 Properties indicated they kept these records, they were never submitted to Ecology. I-5 Properties ultimately produced Daily Inspection Logs for the period of October, 2003 through March, 2004 during pre-hearing discovery. *Exhibit 17; Testimony of Craig*. I-5 Properties never submitted these inspection records to Ecology as requested in the certified letter of February 24, 2004, or as requested on March 10, 2004. *(Exhibit 53).* Records are, in fact, absent altogether for large segments of time covered by the permit, including February through October, 2003, during which time construction activities were underway at the site and subject to permit record-keeping requirements. The daily logs indicate very little work being done on BMPSs. I-5 Properties concedes there was a lack of quality in its record-keeping on this project. *(Closing Argument).*

[46]

I-5 Properties did not provide notice of noncompliance with permit conditions on any occasion during coverage under the General Permit, as required by permit condition G3. Counsel for I-5 Properties confesses this fact, with a "mea culpa," and assertion that the business was in frequent enough contact with Ecology that there was actual notice to the agency of site problems. *(Closing Argument).*

[47]

Spawning salmon were present in the relocated stream along the west side of the site in the fall of 2003. Turbid water has a negative effect on salmon habitat. Mud and sediment fill in gravel areas, smothering eggs and thereby limiting reproduction. Mud and sediment also negatively affect the aquatic life that fish feed on, disrupting the food chain. *Exhibit 28 ww; Testimony of Craig.*

[48]

On June 25, 2004, Mr. Craig recommended enforcement action, in the nature of a penalty, against I-5 Properties for unlawful discharges into the waters of the state, in violation of RCW Ch. 90.48 and violations of the waste discharge permit. *Exhibit 19.* Although Craig had provided technical assistance to I-5 Properties through the fall and winter of 2003-2004, he recommended a penalty in order to motivate compliance, prevent future violations, to send a message of deterrence to both I-5 Properties and other permit holders, and to create a level playing field for all businesses subject to this permit system. *Testimony of Craig; Exhibit 19.*

[49]

Craig calculated the recommended penalty by identifying the documented permit violations of various dates, beginning in February, 2003, when construction activities were first apparent on the site. Craig reviewed each documented violation, then determined whether and how much of a penalty should be assessed for the particular violation, considering the gravity of the violation, mitigating factors, and appropriate penalty ranges for the violation.

[50]

I-5 Properties consistently violated three terms of the permit, Conditions S5, S9 and G3 between October 17, 2003 and March 16, 2004. Craig prepared a matrix which summarized each of the permit violations he had documented for that time period. He calculated twenty (20) total violations of permit condition S5; twenty (20) total violations of permit condition S9; and fifteen (15) total violations of permit condition G3. Although there were repeated violations of the permit throughout the period of review, Craig "exercised enforcement discretion" with respect to many of the identified violations, and did not include some violations in the penalty calculation. He did so in recognition of environmental conditions which contributed to the violations (above average rainfall), some effort by I-5 Properties to implement BMPs which reduced or prevented pollution or the severity of the discharge, and because joint inspections by Ecology and I-5 Properties had resulted in mutually agreed upon corrective actions to protect water quality, thereby lessening the need for Ecology written noncompliance reports. The site was also not in compliance as of March 16, 2004. *Testimony of Craig; Exhibit 19, pp. 72-73.*

[51]

After consideration of the mitigating factors, Craig recommended enforcement of ten (10) separate violations of permit condition S5, twelve (12) violations of permit condition S9, and eight (8) violations of permit condition G3. Craig recommended a penalty for S5 violations which occurred on October 21, 2003; November 9, 20, 2003; January 11, 2004; and February 2, 4, 2004. He recommended a penalty for S9 violations which occurred on October 17, 20, 23, 2003; November 9, 20, 2003; January 11, 2004; February 2, 4, 26, 27, 2004; and March 16, 2004. He recommended a penalty for G3 violations which occurred on October 17, 20, 23, 2003; November 10, 21, 25, 2003; January 11, 2004; and February 2, 2004. *Testimony of Craig; Exhibit 19.*

[52]

In order to calculate the penalty for each set of permit violations, Craig utilized Ecology's "gravity criteria," which assess public health risk, environmental damage, the nature of the violation (willful or knowing, responsiveness, improper operation or maintenance), the failure to obtain necessary permits, and the economic benefit of noncompliance. Craig concluded that the S5 and S9 violations (requiring compliance with water quality standards and the implementation of the SWPPP) were serious and resulted in environmental damage by the discharge of turbid waters to the ditches and tributaries around the site. He also concluded that all the violations were probably willful or knowing, as he had made many efforts to review permit conditions with I-5 Properties, left copies of the permit with site managers, and received assurances that there would be compliance. Craig concluded that I-5 Properties was also unresponsive to correcting

violations that were repeatedly called to their attention, including the failure to install BMPs throughout the site, and failing to notify Ecology of noncompliant episodes. There was improper operation and maintenance of BMPs as well, allowing turbid discharges to state waters. With respect to the S5 and S9 violations, Craig concluded that it was probable that I-5 Properties had gained economic benefit from not complying with permit conditions. Craig concluded the G3 violations for failing to notify Ecology of permit noncompliance were important, as self-reporting is a key aspect to implementation of appropriate corrective measures, allowing Ecology to use its resources to respond to problems, and alerting the permittee to actions that need to be taken to come into compliance with the permit. *Testimony of Craig.*

[53]

After assessing the gravity criteria, Craig utilized Ecology's "gravity component penalty" table, which sets out varying penalty amounts based on the rating obtained after application of the gravity criteria. The S5 permit violations received a rating of 9-11 on the gravity component table (on a scale of 1-20), with a related penalty of $3000 per violation. The S9 permit violations received a rating of 9-11 on the gravity component table as well, with a related penalty of $3000 per violation. The G3 permit violations received a rating of 5-8, with a related penalty of $2000 per violation. *Testimony of Craig; Exhibit 19, pp.72-78.*

[54]

The maximum penalty that could have been imposed, had Ecology assessed a penalty for all the violations identified by Craig within the amounts computed through the gravity tables, was $150,000. This would have been based on twenty (20) S5 permit violations at $3000 each

($60,000), twenty (20) S9 permit violations at $3000 each ($60,000), and fifteen (15) G3 permit violations at $2000 each ($30,000). *Testimony of Craig; Exhibit 19, pp. 72-78.* Had Ecology imposed the statutory maximum penalty of $10,000 per day per violation, the amount of penalty could have been much higher still. The failure to provide 2003 SWPPP documents in response to Ecology's request was an ongoing violation of the permit that could have resulted in daily penalties so long as the documents were not produced to Ecology. Craig recommended a penalty of $82,000, based on the nature of the violations, prior behavior of the violator, and the efforts of I-5 Properties to correct the problems between the dates of the violations and the time of the recommended enforcement action. He did not recommend an escalation of the penalty for the repeated nature of the violations because I-5 Properties had taken some actions to attempt to control discharges at the site. *Testimony of Craig; Exhibit 19.*

[55]

On March 29, 2005, Ecology imposed a penalty of $82,000 on I-5 Properties, c/o Jansen, Inc. and Mr. Al Jansen, for repeated violations of three different conditions listed in the NPDES General Permit and for violations of the state Water Pollution Control Act, RCW Ch. 90.48. [3]*Exhibits 20, 55.* I-5 Properties timely filed an application for relief from the penalty with Ecology. *Exhibit 21.* Ecology denied the application, finding there were no extraordinary

[3] Ecology's Notice of Penalty Incurred and Due (Exhibit 20) failed to list November 11, 2003 as a date on which permit violations occurred at the site. The Board sustained an objection to testimony about violations observed on that date due to the lack of notice contained in the Notice of Penalty. Of the total violations considered by Ecology in the calculation of the penalty, only two related to the November 11 date (violations of permit conditions S5 and S9). Although the Board makes no findings related to the violations on this date, the lack of evidence related to the November 11 violations does not change the Board's ultimate conclusion that the penalty is reasonable. The Board concludes that Ecology proved multiple violations on multiple days contained in the Notice of Penalty, sufficient to support the reasonableness of the penalty.

circumstances justifying the cancellation or mitigation of the penalty. *Exhibit 23*. I-5 Properties, then timely appealed the penalty to this Board. *Exhibits 22, 24*.

Any Conclusion of Law deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

[1]

The Board has jurisdiction over the subject matter and parties pursuant to RCW 43.21B.300. The Board reviews the issues raised in an appeal *de novo*. WAC 371-08-485.

[2]

Chapter 90.48 RCW, the state Water Pollution Control Act, gives Ecology responsibility and jurisdiction "to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state." RCW 90.48.030. The Act authorizes Ecology to issue a civil penalty of up to $10,000 a day for each violation of the provisions of the Chapter. RCW 90.48.144. Each and every violation is considered a separate and distinct offense, and in the case of a continuing violation, every day's continuance is deemed a separate and distinct violation. RCW 90.48.144(3).

[3]

RCW 90.48.260 authorizes Ecology to implement and enforce all programs necessary to comply with the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 *et seq*. Such powers include the authority to administer the NPDES permit program (Ch.173-220 WAC)

and to establish water quality standards for both surface water and groundwater (Ch. 173-201A; Ch.173-200 WAC).

[4]

The ditches that cross the I-5 Properties site discharge to an unnamed tributary along the west side of the property. This tributary discharges to California Creek, which in turn discharges to Puget Sound. As tributaries, the ditches are "waters of the United States," and are subject to the Clean Water Act and its permit requirements. *Headwaters v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001); *Bouma Farms v. Ecology*, PCHB No.00-023 (2000) CL VII; *Huntington Dairy v. Ecology*, PCHB No. 01-111 (2002) CL IV; WAC 173-220-030 (21).

[5]

In an appeal of a penalty, the agency issuing the penalty has the burden of proving that a party is liable for a civil penalty. The agency must prove that the violation occurred and that the penalty was reasonable by a preponderance of evidence. *PL-2 Corp. v. Ecology*, PCHB No. 00-134 (2001); *Kaiser Aluminum Corp. v. Ecology*, PCHB No. 99-121, 99-135 (2000); *M/V Ping. v. Ecology*, PCHB No. 94-118(1995); WAC 371-08-485(2).

[6]

Ecology has met its burden to prove that I-5 Properties was in violation of various terms of the permit, the state's Water Pollution Control Act (RCW Ch. 90.48) and the water quality standards (Ch.173-201A WAC) on multiple occasions from October, 2003 through March 2004.

[7]

Permittees under the General Permit are responsible for achieving compliance with state surface water quality standard and sediment management standards. Compliance with the turbidity standards of the state water quality regulations is a key aspect of the Construction Stormwater General Permit. *Exhibit 1, (Permit Condition S5).* The mechanism by which a permittee achieves compliance with these standards is through development of a SWPPP, designed to *prevent* pollution in the first instance through the implementation of BMPs that minimize erosion and sediments from rainfall runoff at construction sites, and that also identify, reduce, eliminate, or prevent the pollution of stormwater. If a permittee cannot achieve compliance, the permit requires immediate steps to achieve compliance by implementing additional BMPs or improving and maintaining existing BMPs. *Exhibit 1 (Permit Condition S9).*

[8]

The Permit is also based on a system of self-inspection and self-reporting of violations. BMPs are to be inspected, maintained and repaired as needed, and at least once every seven days and within 24 hours after any storm event of greater than 0.5 inches or rain per 24 hours period. *Exhibit 1, (Permit Condition S9 C.1.d.).* The self-reporting aspects of the permit allow Ecology to focus limited resources on those businesses that are in noncompliance with the permit requirements, and motivates the permittee to develop responses that will bring them into compliance with water quality standards. As conditions at a construction site change, the SWPPP is to be modified and revised to define and document response actions to erosion and sediment problems presented by site conditions.

[9]

"Turbidity" means the clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter. WAC 173-201A-020. All indigenous fish and nonfish aquatic species, as well as certain listed key species, are to be protected in fresh surface waters of the state. WAC 173-201A-200. Among other aquatic life criteria, regulations set out the maximum turbidity criteria for aquatic life use categories, in table form. Of relevance to this case is the requirement that turbidity is not to exceed 5 NTU over background turbidity levels when the background is 50 NTU or less, nor exceed a 10% increase in turbidity when the background turbidity is more than 50 NTU. WAC 173-201A-200, Table 200 (1)(e).

[10]

Condition S5 of the permit, and state law, required I-5 Properties to achieve compliance with state surface water quality standards, including turbidity standards. WAC 173-201A. Muddy discharges from various points on the I-5 Properties site were in violation of the water quality standards on the following dates: October 17, 20, 21, 22, 23; November 9, 19, 20, 21, 25; December 1, (2003); and January 11, February 2, 4, (2004). On these 14 dates, samples taken with a calibrated turbidimeter confirmed background turbidity levels of 50 NTU or less and discharges in excess of 5 NTU over the background levels, the applicable water quality standard. WAC 173-201A-200. On some of these dates, multiple samples from different discharge points around the site revealed that there were multiple violations of permit condition S5.

[11]

Condition S9 of the permit required I-5 Properties to prepare and implement a SWPPP that would implement BMPs to minimize stormwater related erosion and sediments runoff at the construction site. Under this permit term, I-5 Properties was responsible for preventing adverse water quality impacts, including adverse impacts on beneficial uses, which include use by fish and aquatic life of waters on the site or waters which are fed by the site.

The one page SWPPP initially submitted by I-5 Properties was inadequate in several ways and did not comply with the conditions of the CSGP, Section S9. It lacked information about how BMPs would be selected or implemented at the site, defined no corrective actions to be taken if the initial BMPs proved inadequate during changing site conditions, contained no inspection and maintenance items, and outlined no protocol for when and how noncompliance notifications would be made if necessary. More importantly, the SWPPP was not used effectively to implement appropriate erosion and sediment control as construction proceeded at the site, and as required by permit condition S9. I-5 Properties failed to inspect the site as required, failed to install, maintain, and modify BMPs as needed to control erosion and turbid stormwater runoff at the site. There was a widespread lack of stabilization BMPs in place (temporary grass seeding, mulching, geotextiles, mats, straw) and a similar lack of structural BMPs in place (effective check dams, overflow control devices) throughout the construction period. *See, Exhibit 28.* The inability or failure to install and maintain BMPs was greatly exacerbated by I-5 Properties' failure to install the recommended drainage system in the first

instance, resulting in too much water on the site to implement necessary erosion control measures.

I-5 Properties failed to comply with permit condition S9 repeatedly during the construction period, and was in violation of permit condition S9 on the following 16 dates: October 17, 20, 21, 22, 23; November 9, 10, 19, 20, 21, 25; December 1, (2003); and January 9, 11, February 2, 4, (2004).

[12]

Condition S9 of the permit also required I-5 Properties to keep reports related to the ongoing inspection processes required by the permit. The business was to retain not only a copy of the SWPPP, but also inspection reports and all other reports required by the permit for at least three years after final stabilization of the construction site. Such documents were to be made available, upon request, to Ecology (Permit Condition S9 B.3 and S9 C. 1.e.). Counsel for I-5 Properties concedes that there was a "lack of quality" in its recordkeeping, as required by condition S9 of the permit, but challenges the amount of penalty imposed for the violations. (Closing Argument). I-5 Properties did not comply with this term of the permit starting on February 26, 2004, when it failed to respond to both verbal and written requests by Ecology to produce all SWPPP documents by that date. This violation continued until such time as the business produced the requested records during litigation in this matter. I-5 Properties was in violation of this permit condition on February 26, 27, and March 16, 2004.

[13]

Permit condition G3 required I-5 Properties to provide Ecology with specific information if, for any reason, the business did not comply with, or would be unable to comply with, permit terms. The noncompliance notification needed to include, among other things, "the steps taken, or to be taken, to reduce, eliminate, and prevent the recurrence of the noncompliance." G3.C. Counsel for I-5 Properties again concedes that they failed to report noncompliance under this term of the permit. *(Closing Argument).* However, they argue that such notification was unnecessary because Ecology had actual notice of the noncompliance through frequent site visits, or ongoing communication with site managers. This argument misses the point of this permit requirement. This condition motivates and requires a noncompliant business to take immediate action to stop, contain and clean up discharges, to take "all reasonable steps to minimize any adverse impacts to waters of the state" and to keep Ecology informed of those steps. The type of information received pursuant to this condition also allows Ecology to determine where to allocate its resources as it manages permits and problems in the field. The fact that Ecology observed noncompliant conditions during site visits does not excuse I-5 Properties from ongoing management of its construction site, including the identification and implementation of steps to be taken to reduce, eliminate, and prevent recurrence of noncompliance. Nor does it excuse I-5 Properties from informing Ecology of its corrective action efforts and plans..

I-5 Properties admittedly repeatedly failed to provide such notice to Ecology, in violation of permit terms. In failing to do so, it also failed to adequately assess and prioritize the

steps it should take to reduce or prevent recurrence of the discharge problems that plagued the site during the fall and winter of 2003-2004. I-5 Properties violated permit condition G3 on the following 13 dates: October 17, 20, 21, 22; November 10, 19, 20, 21, 25; December 1, (2003); and January 11, February 2, 4, (2004).

[14]

The Board considers three factors when it evaluates the reasonableness of a penalty: (1) the nature of the violations, (2) the prior history of the violator, and (3) the remedial actions taken by the penalized party. *Douma v. Ecology*, PCHB No. 00-019 (2005); *Crestview Development, Inc. v. PSCAA*, PCHB No. 04-059 (2004); *Kaiser Aluminum*, at CL V. As part of such an analysis, the Board has also considered whether the appellant gave any reason for refusing to cooperate with agency efforts to bring a project into compliance with the law, and the fact that Ecology imposed a lesser penalty than allowed by law. *Engman & Timberlake Associates Inc. v. Ecology*, PCHB No. 98-63 (1999). The Board also considers whether imposition of the penalty for lack of compliance with regulatory requirements will ensure a "level playing field" for those businesses that incur necessary costs to comply with all requirements of permits, regulations, or other aspects of the law.

[15]

The Board concludes that the $82,000 penalty against I-5 Properties is reasonable, based on these factors.

[16]

Nature of the violations: The fundamental goal of the Construction Stormwater General Permit is to reduce or eliminate stormwater pollution from construction activity by requiring the implementation of technology-based BMPs , and to eliminate violations of surface water quality standards caused by stormwater. *See, Exhibit 1,(Introduction).* The violations here were serious, and in many respects preventable. The Board concludes that I-5 Properties made many bad decisions in the management of this construction site, first by not implementing the recommended drainage concept for the site, and then failing to prioritize implementation of BMPs across this large site. The business did not inform itself of permit terms, even after being advised of requirements by Ecology, and did not commit itself to implement necessary or effective BMPs to manage stormwater discharges from the site. The Board concludes that I-5 Properties demonstrated a lack of reasonable diligence in complying with permit terms.

Violation of permit conditions S5 and S9 were the most serious of the violations. I-5 Properties discharged highly turbid stormwater from the site on multiple occasions throughout the Fall and Winter of 2003-2004, to the detriment of water quality. The turbid discharges flowed into waters in which spawning salmon were present. Repeated efforts by Ecology to inform and educate I-5 Properties of their responsibilties under the permit condition S9 and the need to implement BMPs to control stormwater discharges, went unheeded by I-5 Properties during the relevant time period. Use of the SWPPP and implementation of BMPs is at the heart of this permit and control of stormwater from construction sites. The lack of attention to this

requirement on a large site when construction activities occur through the Fall rainy season was a most serious violation.

Although the record-keeping violations themselves are less serious than those that directly affected water quality, the Board finds the Permittee's on-going lack of response and failure to produce documents in response to an official request from Ecology is a most serious violation of the permit. The failure to keep any records of actions on the site over an extended period of time demonstrates a troubling disregard of responsibilities under the permit. For these reasons, these record keeping violations are serious and merit a penalty.

Although these violations are serious, Ecology appropriately mitigated the penalty amount in light of the above-average rainfall at the site, and the efforts made by I-5 Properties to install some BMPs. Some of their efforts resulted in less turbid discharges from the site. Given the nature of the violations, and the fact that Ecology applied mitigating factors in assessing their seriousness, the Board concludes the penalty is reasonable on this prong of the analysis.

[17]

Prior history of the violator: No evidence was presented that I-5 Properties had a history of noncompliance with regulatory standards or permit conditions. Ecology did not rely on any prior enforcement actions or violations in calculating the penalty amount, and in fact considered prior history as a mitigating factor which lowered the penalty amount. The Board concludes that in light of the prior history of I-5 Properties, the penalty amount was appropriately mitigated and is reasonable.

[18]

Remedial actions taken by the penalized party: I-5 Properties took some actions throughout the Fall and Winter of 2003-2004 to respond to concerns raised by Ecology and to remediate stormwater runoff at the site. Mulch or straw was spread at some eroding areas; netting was placed in some ditch bottoms; check dams (of hay or sand bags) were at times placed in drainage ditches; ponds were capped and pumped as recommended by Ecology. These remedial actions were intermittent, but sometimes helpful to stormwater management at the site. However, the Board concludes that the remedial actions taken by I-5 Properties were more often sporadic, ineffectual, and poorly managed. The business never fully developed, implemented, nor updated a SWPPP for the site, the cornerstone of effective stormwater management. I-5 Properties was at times resistant to Ecology's recommendations to undertake actions that would manage the release of turbid water from the site, particularly the manner in which to manage the overflow in Pond A and the under-utilization of Ponds B and C. Yet the permittee did not seek professional assistance from the designer of its drainage system throughout this period, indicative of the lack of adequate response to the deteriorating and recurring drainage problems at the site. Given the record of response by I-5 Properties, the penalty reasonably takes into account the remedial actions taken, and not taken, at the site.

[19]

Reasons given for not cooperating: Ecology's recommendation regarding "capping" Pond A and pumping water from Pond A to Pond B may, to a limited extent, have been reasonably perceived by I-5 Properties as a "requirement" with which they disagreed. They

believed that the drainage system would work without such action. I-5 Properties' failure to further investigate their "belief" with their own drainage engineer, however, undermines this as a legitimate reason for not cooperating with the recommendation. Additionally, I-5 Properties' failure to implement other more comprehensive BMPs at the site reveals a lack of concern and understanding of permit requirements and the objectives they are designed to achieve. The Board concludes that the penalty is reasonable on this prong, given all the facts before it.

[20]

Amount of penalty imposed: The penalty imposed is substantially less than that allowed by law ($10,000/day) and less than the maximum ranges allowed in Ecology's gravity component table. The penalty was calculated based on substantially fewer violations than the Board concludes occurred at the site, and less than Ecology documented in the various site inspections. Ecology also simplified and reduced the penalty calculation by imposing a lower "gravity" level to the violations it did elect to include, resulting in a penalty calculation lower in the range of available penalties. The agency did so in recognition of the above-average rainfall events during the Fall of 2003, and the sporadic, but sometimes successful efforts of I-5 Properties to remediate site conditions, and the previous enforcement history of I-5 Properties. While Ecology could have imposed a penalty of $150,000 for all the recorded violations, it assessed a penalty 45% lower than would have been authorized by the agency's internal penalty calculation process. Accordingly, the Board concludes that I-5 Properties was penalized for far fewer violations than have been proven, and, given the nature and number of the violations of the

permit, the penalty is substantially less than what could have been imposed for these violations. The penalty is therefore reasonable on this aspect of the analysis.

[21]

Level playing field: I-5 Properties failed to invest the time and resources to adequately prepare the site for construction activities that would occur during the wet season through installation of a proper drainage system. It also did not incur costs to install and maintain BMPs needed to control stormwater runoff. The business thereby avoided costs that another business would likely incur as it attempted to comply with the permit. Given the number of violations and the size of this construction site, imposition of a penalty in this instance is merited to ensure a level playing field for other construction businesses that make the effort to comply with the permit and protect water quality in the state.

[22]

The enforcement action by Ecology is not barred on the basis that Ecology "took control" of the site or created a "special relationship" under the "public duty doctrine" that caused the deteriorated drainage conditions on the site, as argued by I-5 Properties. (Issue 5) The public duty doctrine is a concept of negligence law and related to the liability that may be imposed for a public official's negligent conduct in a tort action. *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988), *Laymon v. Dep't of Natural Resources*, 99 Wn.App. 518, 994 P.2d 232 (2000). It has no applicability to this Board's review of Ecology's administrative enforcement action against I-5 Properties for violations of the water quality statutes and permit, nor to the question of whether the agency imposed a reasonable penalty. Ecology provided technical

assistance in an effort to bring I-5 Properties into compliance with the permit. The business cannot be shielded from later enforcement action as a result of such agency consultation and efforts to assist in regulatory compliance.

[23]

I-5 Properties also contends that it was not responsible for any runoff from a portion of the site because potatoes were harvested from this area in September. I-5 Properties maintains that this soil was disturbed pursuant to agricultural use and not construction activity. The Board does not agree with I-5 Properties' analysis. I-5 Properties commenced construction activities on the general site even before the crop was harvested. Ditch C, for example, was constructed during the summer of 2003. *Testimony of Grant Jansen*. Furthermore, after the crop was harvested, I-5 Properties exercised control over the entire site as part of a construction project. As such, it had a responsibility to make sure the soils were stabilized prior to wet weather. I-5 Properties does not cite any authority to the contrary. In addition, no penalties are being imposed for the agricultural-related discharges coming from the north. Regardless of whether it is appropriate to consider the discharges related to the eastern portion of the property, Ecology could have imposed much higher fines than it did for I-5 Properties' failure to follow applicable permit requirements and the Boards finds that the amount of the penalty is reasonable.

[24]

Finally, the Board concludes that Ecology did properly review and respond to Appellant's Application for Relief from Penalty, and that there is no evidence to demonstrate any error or irregularity in that process. (Issue 6).

ORDER

The penalty issued against I-5 Properties, c/o Jansen, Inc. and Mr. Al Jansen, by the Department of Ecology in Notice of Penalty No.DE 05WQBE-2014, in the amount of $82,000, is AFFIRMED.

DONE this 12th day of February 2007.

POLLUTION CONTROL HEARINGS BOARD

KATHLEEN D. MIX, Presiding Member

WILLIAM H. LYNCH, Chair

ANDREA McNAMARA DOYLE, Member