

# STATE OF COLORADO

Bill Ritter, Jr., Governor  
James B. Martin, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

4300 Cherry Creek Dr. S.      Laboratory Services Division  
Denver, Colorado 80246-1530      8100 Lowry Blvd.  
Phone (303) 692-2000      Denver, Colorado 80230-6928  
TDD Line (303) 691-7700      (303) 692-3090  
Located in Glendale, Colorado

<http://www.cdphe.state.co.us>



Colorado Department  
of Public Health  
and Environment

September 17, 2009

Thomas Martino, Registered Agent  
Appel Farms Group, LLC  
7900 Fox Creek Trail  
Franktown, CO 80116

Certified Mail Number: 7005 1820 0000 3208 0909

**RE: Order for Civil Penalty, Number: SP-090917-2**

Dear Mr. Martino:

Appel Farms Group, LLC is hereby served with the enclosed Order for Civil Penalty ("Penalty Order"). This Penalty Order is issued by the Colorado Department of Public Health and Environment's Water Quality Control Division (the "Division") pursuant to the authority given to the Division by §25-8-608(2) of the *Colorado Revised Statutes*. Payment of the imposed civil penalty should be made in accordance with the methods referenced in the Penalty Order.

If you have any questions regarding the Penalty Order or the payment method, please do not hesitate to contact me at (303) 692-3598 or by electronic mail at [michael.harris@state.co.us](mailto:michael.harris@state.co.us).

Sincerely,

Michael Harris  
Enforcement Unit  
WATER QUALITY CONTROL DIVISION

cc: Aaron Urdiales, EPA Region VIII  
Tom Roan, Colorado Attorney General's Office  
Gary Beers, Permits Section, CDPHE  
Nathan Moore, Permits Section, CDPHE  
Dick Parachini, Watershed Program, CDPHE  
Carolyn Schachterle, OPA, CDPHE  
Doug Camrud, Engineering Section, CDPHE

Enclosure(s)



**COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**  
**DIVISION OF ADMINISTRATION**  
**WATER QUALITY CONTROL DIVISION**

---

**ORDER FOR CIVIL PENALTY**

**NUMBER: SP-090917-2**

---

**IN THE MATTER OF: APPEL FARMS GROUP, LLC**  
**CDPS PERMIT NO. COR-030000**  
**CERTIFICATION NO. COR-039688**  
**WELD COUNTY, COLORADO**

---

Pursuant to the authority vested in the Colorado Department of Public Health & Environment's (the "Department") Division of Administration by §§25-1-109 and 25-8-302, C.R.S., which authority is implemented through the Department's Water Quality Control Division (the "Division"), the Division hereby makes the following findings and issues the following Order for Civil Penalty in accordance with §25-8-608, C.R.S. and 5 CCR 1002-21, §21.12. The Department's Executive Director has delegated the authority to determine civil penalties in this matter to the Director of the Water Quality Control Division.

**GENERAL FINDINGS**

1. Pursuant to §25-8-608(1), C.R.S., any person who violates the Colorado Water Quality Control Act (the "Act"), or any permit issued under the Act, shall be subject to a civil penalty of not more than ten thousand dollars per day for each day during which such violation occurs.
2. On August 18, 2006, the Division issued Appel Farms Group, LLC ("Appel Farms") a Notice of Violation/Cease and Desist Order (the "NOV/CDO") which included findings that Appel Farms violated the Act and the Colorado Discharge Permit System General Permit, Number COR-030000, for Stormwater Discharges Associated with Construction Activity. A copy of the NOV/CDO is attached hereto as Exhibit A and is incorporated herein by reference.
3. On September 22, 2006, the Division received a request for a hearing from Appel Farms. Appel Farms further requested that the Division delay scheduling the hearing to allow for the opportunity to discuss a possible resolution of the matter.
4. On March 6, 2009, following several months of unsuccessful settlement negotiations, Appel Farms withdrew its request for a hearing.

5. Appel Farms' withdrawal of its request for hearing constitutes a waiver of its right to a hearing, including a waiver of its right to contest the findings and conclusions set forth in the NOV/CDO. Since Appel Farms has so waived its right to contest those findings and conclusions, the Director hereby accepts those findings and conclusions as true and enters the following order.

### **ORDER FOR CIVIL PENALTY**

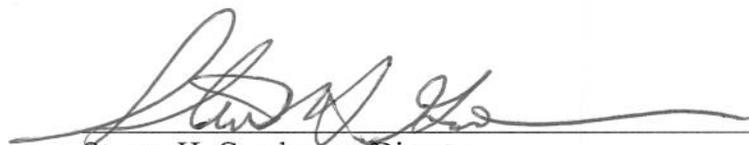
6. Based upon the facts described in the NOV/CDO, the Division has determined that a civil penalty is appropriate and warranted in this matter. Therefore, the Division hereby imposes a civil penalty in the amount of One Hundred Ninety Thousand Three Hundred Ninety Six Dollars (\$190,396.00) against Appel Farms for the violations cited in the NOV/CDO. The civil penalty was determined in accordance with the procedures outlined in the Division's Stormwater Civil Penalty Policy (January 25, 2007). A copy of the civil penalty calculation is attached hereto as Exhibit B and is incorporated herein by reference. The civil penalty shall be paid within thirty (30) calendar days of the date of this Order for Civil Penalty. Method of payment shall be by certified or cashier's check drawn to the order of the "Colorado Department of Public Health and Environment," and delivered to:

Michael Harris  
Colorado Department of Public Health and Environment  
Water Quality Control Division  
Mail Code: WQCD-CADM-B2  
4300 Cherry Creek Drive South  
Denver, Colorado 80246-1530

### **REQUEST FOR APPEAL**

7. You may appeal this Order for Civil Penalty pursuant to 5 CCR 1002, §21.12.

Issued at Denver, Colorado, this 17<sup>th</sup> day of September, 2009.



Steven H. Gunderson, Director  
Water Quality Control Division  
DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

# EXHIBIT A



**COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT  
DIVISION OF ADMINISTRATION  
WATER QUALITY CONTROL DIVISION**

---

**NOTICE OF VIOLATION / CEASE AND DESIST ORDER**

**NUMBER: SO-060818-2**

---

**IN THE MATTER OF: APPEL FARMS GROUP, LLC &  
DUST AND DIRT EXCAVATING LLC  
CDPS PERMIT NO. COR-030000  
CERTIFICATION NO. COR-039688  
JEFFERSON COUNTY, COLORADO**

---

Pursuant to the authority vested in the Colorado Department of Public Health and Environment's (the "Department") Division of Administration by §§25-1-109 and 25-8-302, C.R.S., which authority has been delegated to the Department's Water Quality Control Division (the "Division"), and pursuant to §§25-8-602 and 25-8-605, C.R.S., the Division hereby makes the following Findings of Fact and issues the following Notice of Violation / Cease and Desist Order:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. At all times relevant to the violations cited herein, Appel Farms Group, LLC ("Appel Farms") was a Colorado limited liability company in good standing and registered to conduct business in the State of Colorado.
2. At all times relevant to the violations cited herein, Dust & Dirt Excavating LLC ("Dust & Dirt") was a Colorado limited liability company in good standing and registered to conduct business in the State of Colorado.
3. Appel Farms and Dust & Dirt are "persons" as defined by §25-8-103(13), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2(73).

### **Operating Without a Stormwater Permit**

4. Pursuant to §25-8-501(1), C.R.S., and its implementing permit regulation, 5 CCR 1002-61, §61.3(1)(a), no person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the Division for such discharge.

## EXHIBIT A

5. Pursuant to 5 CCR 1002-61, §61.3(2)(e)(iii)(J), construction activity, including clearing, grading and excavation, that results in the disturbance of five or more acres of total land area is considered to be "industrial activity."
6. Pursuant to 5 CCR 1002-61, §61.3(2), stormwater discharges associated with industrial activity are point sources requiring Colorado Discharge Permit System ("CDPS") permit coverage.
7. On May 2, 2002, Dust & Dirt initiated ground disturbing construction activities, on behalf of Appel Farms, to build a residential housing development on eighty (80) acres of land located at or near 13756 State Highway 52 in the City of Fort Lupton, Weld County, Colorado (the "Project").
8. On April 14, 2005, a representative from the Weld County Department of Public Health & Environment (the "Inspector") conducted an onsite inspection of the Facility on behalf of the Division, pursuant to the Division's authority under §25-8-306, C.R.S., to determine the Project's compliance with the Water Quality Control Act. During the inspection, the Inspector interviewed a Dust & Dirt representative, conducted a review of the Project's stormwater management records, and conducted a physical inspection of the Project.
9. During the April 14, 2005 inspection, the Inspector determined that the Project was not covered under a CDPS permit authorizing discharges of stormwater from the Project.
10. On April 15, 2005, the Weld County Department of Public Health & Environment sent a letter and Stormwater Inspection Report to Dust & Dirt, informing Dust & Dirt that a CDPS permit for stormwater discharges must be obtained for the Project.
11. On February 15, 2006, the Division sent letters to Appel Farms and Dust & Dirt requesting information regarding the nature of the construction activities at the Project.
12. In response to the Division's February 15, 2006 letter, on March 10, 2006, Appel Farms applied for Project coverage under the Colorado Discharge Permit System ("CDPS") General Permit, Number COR-030000, for Stormwater Discharges Associated with Construction Activity (the "Permit").
13. On March 14, 2006, the Division issued Appel Farms Certification Number COR-039688 authorizing Appel Farms to discharge stormwater from the construction activities associated with the Project to Shortline Ditch, a tributary of the South Platte River, under the terms and conditions of the Permit. Certification Number COR-039688 became effective March 14, 2006 and remains in effect until June 30, 2007 or until Appel Farms inactivates Permit coverage.
14. Shortline Ditch and the South Platte River are "state waters" as defined by §25-8-103(19), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2(101).
15. The Division records establish that neither Appel Farms nor Dust & Dirt had any permits authorizing discharges of stormwater from the Project prior to March 14, 2006.

## EXHIBIT A

16. Appel Farms' and Dust & Dirt's failure to obtain CDPS permit coverage for the Project, prior to March 14, 2006, constitutes violation(s) of §25-8-501(1) C.R.S., 5 CCR 1002-61, §61.3(1)(a), and 5 CCR 1002-61, §61.3(2).

### **Failure to Implement and/or Maintain Best Management Practices to Protect Stormwater Runoff**

17. On June 2, 2006, the Inspector conducted an onsite inspection of the Project on behalf of the Division, pursuant to the Division's authority under §25-8-306, C.R.S., to determine Appel Farms' compliance with the Water Quality Control Act and the Permit. During the inspection, the Inspector interviewed Project representatives, conducted a review of the Project's stormwater management records, and conducted a physical inspection of the Project.
18. Pursuant to 5 CCR 1002-61, §61.8, a permittee must comply with all the terms and conditions of a permit and violators of the terms and conditions specified in a permit may be subject to civil and criminal liability pursuant to §§25-8-601 through 612, C.R.S.
19. Pursuant to Part I. B. 3. a. (1) of the Permit, Appel Farms is required to minimize erosion and sediment transport from the Project. The Permit specifies that structural site management practices may include, but are not limited to: straw bales, silt fences, earth dikes, drainage swales, sediment traps, subsurface drains, inlet protection, outlet protection, gabions, and temporary or permanent sediment basins.
20. Pursuant to Part I. B. 3. a. (2) of the Permit, Appel Farms is required to implement interim and permanent stabilization practices, including site-specific scheduling of the implementation of the practices. The Permit specifies that site plans should ensure that existing vegetation is preserved where possible and that disturbed areas are stabilized. The Permit specifies that non-structural practices may include, but are not limited to: temporary seeding, permanent seeding, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees, and preservation of mature vegetation.
21. During the June 2, 2006 inspection, the Inspector observed several soil stockpiles at the Project with no Best Management Practices ("BMPs") in place to prevent the soil from discharging toward the storm sewer during storm events.
22. During the June 2, 2006 inspection, the Inspector observed a concrete washout area at the Project with no BMPs in place to prevent concrete wash water from leaving the washout area and discharging to the storm sewer during storm events.
23. Appel Farms' failure to implement and maintain BMPs at the Project to protect stormwater quality during construction activities constitutes violation(s) of Part I. B. 3. a. of the Permit.

# EXHIBIT A

## NOTICE OF VIOLATION

Based on the foregoing Findings of Fact and Conclusions of Law, you are hereby notified that the Division has determined Appel Farms and Dust & Dirt have violated the following sections of the Water Quality Control Act and the Colorado Discharge Permit System Regulations:

**§25-8-501(1) C.R.S.**, which states in part, "No person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division for such discharge, and no person shall discharge into a ditch or man-made conveyance for the purpose of evading the requirement to obtain a permit under this article."

**5 CCR 1002-61, §61.3(1)(a)**, which states in part, "No person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the Division for such discharge..."

**5 CCR 1002-61, §61.3(2)**, which states in part, "...discharges of stormwater as set forth in 61.3(2) and 61.4(3) are point sources requiring a permit" and, "The following discharges composed entirely of stormwater are required to obtain a permit. (ii) A stormwater discharge associated with industrial activity."

Based on the foregoing Findings of Fact you are hereby notified that the Division has determined Appel Farms has violated the following sections of the Permit:

**Part I. B. 3. a. of the Permit**, which outlines in part that BMPs for Stormwater Pollution Prevention shall address erosion and sediment controls, including, "structural site management practices which will minimize erosion and sediment transport," and "interim and permanent stabilization practices, including site specific scheduling of the implementation of the practices. Site plans should ensure that existing vegetation is preserved where possible and that disturbed areas are stabilized."

## CEASE AND DESIST ORDER

Based upon the foregoing factual and legal determinations and pursuant to §25-8-605, C.R.S., Appel Farms and Dust & Dirt are hereby ordered to:

24. Cease and desist from all violations of the Colorado Water Quality Control Act, §§25-8-101 to 703, C.R.S., and the permit regulations promulgated thereunder:

Further, the Division hereby orders Appel Farms and Dust & Dirt to comply with the following specific terms and conditions of this Order.

25. Appel Farms shall comply with the terms and conditions of the Permit and the associated certification, COR-039688, that was issued to Appel Farms on March 14, 2006. In addition, Appel Farms shall ensure that all contractors and/or homebuilders working on the Project are in compliance with the terms and conditions of the Permit.

## EXHIBIT A

26. Appel Farms shall immediately implement measures to ensure that adequate Best Management Practices (“BMPs”) are in place to control stormwater and sediment discharges originating from the Project. Appel Farms shall ensure that all BMPs meet the design requirements specified in the Project’s most up-to-date SWMP. Within thirty (30) calendar days of receipt of this Order, Appel Farms shall submit a certification to the Division stating that the Project’s complete and up-to-date SWMP, including all BMPs necessary to protect stormwater quality during construction activities, is fully implemented at the Project.
27. Within thirty (30) calendar days of receipt of this Order, Appel Farms shall submit to the Division a detailed written statement outlining the standard procedures Appel Farms will undertake to ensure that adequate stormwater management systems are fully implemented at its future Colorado construction sites.
28. Within thirty (30) calendar days of receipt of this Order, Dust & Dirt shall submit to the Division a detailed written statement outlining the standard procedures Dust & Dirt will undertake to ensure that adequate stormwater management systems are fully implemented at its future Colorado construction sites.

### **NOTICES AND SUBMITTALS**

For all documents, plans, records, reports and replies required to be submitted by this Notice of Violation/Cease and Desist Order, Appel Farms and Dust & Dirt shall submit an original and one copy to the Division at the following address:

Colorado Department of Public Health and Environment  
Water Quality Control Division / WQCD-B2  
Compliance Assurance / Enforcement Program  
Attention: Michael Harris  
4300 Cherry Creek Drive South  
Denver, Colorado 80246-1530

For any person submitting documents, plans, records and reports pursuant to this Notice of Violation / Cease and Desist Order, that person shall make the following certification with each submittal:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

## EXHIBIT A

### **OBLIGATION TO ANSWER AND REQUEST FOR HEARING**

Pursuant to §25-8-603, C.R.S. and 5 CCR 1002, §21.11(A) each party in this action is required to submit to the Division an answer affirming or denying each paragraph of the Findings of Fact and responding to the Notice of Violation.

Section 25-8-603, C.R.S. and 5 CCR 1002, §21.11 also provide that the recipient of a Notice of Violation may request the Division to conduct a public hearing to determine the validity of the Notice, including the Findings of Fact. Such request shall be filed in writing with the Division and include the information specified in 5 CCR 1002, §21.4(B)(2). Absent a request for hearing, the validity of the factual allegations and the Notice of Violation shall be deemed established in any subsequent Department proceeding.

Both the answer and the request for hearing, if any, shall be filed no later than thirty (30) calendar days after issuance of this action. The filing of an answer does not constitute a request for hearing.

### **FALSIFICATION AND TAMPERING**

Be advised, in accord with §25-8-610, C.R.S., that any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Colorado Water Quality Control Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than ten thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

### **POTENTIAL CIVIL AND CRIMINAL PENALTIES**

You are also advised that any person who violates any provision of the Colorado Water Quality Control Act (the "Act"), §§25-8-101 to 703, C.R.S., or of any permit issued under the Act, or any control regulation promulgated pursuant to the Act, or any final cease and desist order or clean-up order issued by the Division shall be subject to a civil penalty of not more than ten thousand dollars per day for each day during which such violation occurs. Further, any person who recklessly, knowingly, intentionally, or with criminal negligence discharges any pollutant into any state waters commits criminal pollution if such discharge is made without a permit, if a permit is required by the Act for such discharge, or if such discharge is made in violation of any permit issued under the Act or in violation of any Cease and Desist Order or Clean-up Order issued by the Division. By virtue of issuing this Notice of Violation / Cease and Desist Order, the State has not waived its right to bring an action for penalties under §§25-8-608 and 609, C.R.S., and may bring such action in the future.

## EXHIBIT A

### RELEASE OR DISCHARGE NOTIFICATION

Pursuant to §25-8-601, C.R.S., you are further advised that any person engaged in any operation or activity which results in a spill or discharge of oil or other substance which may cause pollution of the waters of the state, shall notify the Division of the discharge. If said person fails to so notify, said person is guilty of a misdemeanor, and may be fined or imprisoned or both.

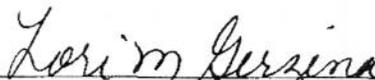
### EFFECT OF ORDER

Nothing herein contained, particularly those portions requiring certain acts to be performed within a certain time, shall be construed as a permit or license, either to violate any provisions of the public health laws and regulations promulgated thereunder, or to make any discharge into state waters. Nothing herein contained shall be construed to preclude other individuals, cities, towns, counties, or duly constituted political subdivisions of the state from the exercise of their respective rights to suppress nuisances or to preclude any other lawful actions by the State.

For further clarification of your rights and obligations under this Notice of Violation / Cease and Desist Order you are advised to consult the Colorado Water Quality Control Act, §§25-8-101 to 703, C.R.S., and regulations promulgated thereunder, 5 CCR 1002.

Issued at Denver, Colorado, this 18th day of July, 2006.

### FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT



\_\_\_\_\_  
Lori M. Gerzina, Section Manager  
Compliance Assurance and Data Management Section  
WATER QUALITY CONTROL DIVISION

Exhibit B

**STORMWATER PENALTY COMPUTATION WORKSHEET**

<b>System Name:</b> Appel Farms Group, LLC	<b>Permit Number:</b> COR-039688
<b>Beneficial Use Classification:</b> Middle South Platte River Segment 3 – <i>Aq Life Warm 2</i> , Recreation 1a, Agriculture	<b>Date of NOV/CDO:</b> August 18, 2006 <b>Number:</b> SO-060818-2
<b>Type of Facility:</b> Construction	<b>Disturbed Acres:</b> 80 acres <b>Number of Employees:</b> N/A

**Part I – Base Penalty Calculation**

**A. Potential Damage Component**

	<b>Violation Type</b>	<b>Adjustment</b>	<b>Amount in Dollars</b>
Line 1	<b>Conducting Covered Activity Without A Stormwater Permit</b>	Moderate = +25% of \$1000	\$1250.00
	<i>Adjustment Justification:</i> Weld County conducted an inspection and identified that the project was not covered under a stormwater permit. Additionally, the inspector identified a lack of BMPs installed on site and a failure to develop and implement a functional stormwater management system. Although the site’s storm sewer system drained to a large flood control pond before discharging from the site, the pond was designed to manage and release flood waters and had not been modified to function as a sediment control BMP for construction activities. Additionally, the pond discharged to an adjacent drainage ditch that leads directly to the South Platte River, located approximately one mile away. However, the Division conservatively assigns a moderate potential harm to health/environment.		
Line 2	<b>Failure to Prepare Stormwater Management Plan (SWMP)</b>		\$0.00
	<i>Adjustment Justification:</i>		
Line 3	<b>Deficient Stormwater Management Plan (SWMP)</b>		\$0.00
	<i>Adjustment Justification:</i>		
Line 4	<b>Failure to Install, Maintain or Properly Select Best Management Practices</b>	Minor = +0% of \$2000	\$2000.00
	<i>Adjustment Justification:</i> Weld County conducted a follow-up inspection of the project (after Appel Farms obtained permit coverage) and noted deficiencies in the implementation of BMPs at the Project, including a failure to install BMPs for soil stockpiles and a concrete washout on the site. Additionally, the site’s flood control pond discharged to an adjacent drainage ditch that leads directly to the South Platte River, located approximately one mile away. However, at the time of the inspection, most of the site had been built out and disturbed areas were relatively limited. Therefore, the Division conservatively assigns a minor potential harm to health/environment.		
Line 5	<b>Failure to Perform Inspections of Stormwater Management System</b>		\$0.00

## Exhibit B

	Violation Type	Adjustment	Amount in Dollars
	<i>Adjustment Justification:</i>		
Line 6	<b>Failure to Submit Required/ Requested Reports (Annual Reports, Permit Compliance Schedule Items, Etc.)</b>		\$0.00
	<i>Adjustment Justification:</i>		
Line 7	<b>Failure to Maintain Required Records</b>		\$0.00
	<i>Adjustment Justification:</i>		
Line 8	<b>Pollution, Contamination or Degradation of State Waters</b>		\$0.00
	<i>Adjustment Justification:</i>		
Line 9	<b>Other Administrative Violations</b>		\$0.00
	<i>Adjustment Justification:</i>		
<b>Line 10</b>	<b>Potential Damage Total (Sum of Lines 1 through 9)</b>	<i>(Not to exceed \$6000/day)</i>	<b>\$3,250.00</b>

### B. Fault Component

		Amount in Dollars
Line 11	<b>Fault: Category 2</b>	<i>(Not to exceed \$3000/day)</i>
	<i>Justification:</i> Appel Farms has substantial financial and managerial resources and relied on professional engineering and construction companies during the development of its project and, as such, should have been able to decipher the stormwater permitting regulations (which have been in effect since 1992) and should have been aware of the circumstances that led to the violations. Therefore, the Division has assigned a category-2 fault. The Division has chosen the midpoint of the category two range, as the Division has no additional information to support adjustments from this value.	
		<b>\$1,400.00</b>

### C. History Component

		Amount in Dollars
Line 12	<b>History: None</b>	<i>(Not to exceed \$1000/day)</i>
	<i>Justification:</i> Appel Farms has no prior violation history with the Division.	
		<b>\$0.00</b>

## Exhibit B

### Part II – Determination of Days of Violation

			<b>Days of Violation</b>
<b>Line 13</b>	<b>Total Days of Violation</b>		<b>366</b>
	<p><i>Justification:</i></p> <p><b>Conducting Covered Activity Without A Stormwater Permit:</b> Construction activities at the project commenced on May 2, 2002. On April 14, 2005, Weld County conducted an inspection of the project and determined that the project was not covered under the stormwater permit. On March 10, 2006, Appel Farms applied for project coverage under the permit. Thus, 1,407 days of violation occurred. However, the Division has chosen to conservatively limit the days of violation to one year from the date that Weld County identified the violation. Therefore, the Division is conservatively utilizing 365 days of violation for this penalty calculation.</p> <p><b>Failure to Install, Maintain or Properly Select Best Management Practices:</b> On June 2, 2006, Weld County performed an inspection of the project and identified that Appel Farms failed to implement BMPs on portions of the project. Therefore, the Division is conservatively utilizing 1 day of violation for this penalty calculation.</p>		

### Part III – Determination of Multi-Day Penalty Amount

			<b>Amount in Dollars</b>																																
<b>Line 14</b>	<b>Multi-Day Penalty Amount</b>		<b>\$196,850.00</b>																																
	<p><i>Calculations:</i></p> <p><i>(Note: Days 1-365 account for the No Permit violations. Day 366 accounts for the single day of BMP violation. The percentage multiplier for each duration interval below is derived from the Multi-Day Violation Matrix outlined on Page 6 of the Stormwater Civil Penalty Policy, and applies only to the No Permit violations in this case. )</i></p> <p>(Potential Damage + Fault + History) × days of violation</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%;">Day 1</td> <td style="width: 45%;">(\$1250.00 + \$1400.00 + \$0.00) × 1 day</td> <td style="width: 15%; text-align: right;">=</td> <td style="width: 25%; text-align: right;">\$ 2,650.00</td> </tr> <tr> <td>+ Days 2-10</td> <td>\$2650.00 × 9 days × 50%</td> <td style="text-align: right;">=</td> <td style="text-align: right;">\$ 11,925.00</td> </tr> <tr> <td>+ Days 11-50</td> <td>\$2650.00 × 40 days × 40%</td> <td style="text-align: right;">=</td> <td style="text-align: right;">\$ 42,400.00</td> </tr> <tr> <td>+ Days 51-100</td> <td>\$2650.00 × 50 days × 30%</td> <td style="text-align: right;">=</td> <td style="text-align: right;">\$ 39,750.00</td> </tr> <tr> <td>+ Days 101-200</td> <td>\$2650.00 × 100 days × 20%</td> <td style="text-align: right;">=</td> <td style="text-align: right;">\$ 53,000.00</td> </tr> <tr> <td>+ Days 201-365</td> <td>\$2650.00 × 165 days × 10%</td> <td style="text-align: right;">=</td> <td style="text-align: right;">\$ 43,725.00</td> </tr> <tr> <td>+ Day 366</td> <td>(\$2000.00 + \$1400.00 + \$0.00) × 1 day</td> <td style="text-align: right;">=</td> <td style="text-align: right;">\$ 3,400.00</td> </tr> <tr> <td></td> <td style="border-top: 1px solid black;">Multi-Day Base Gravity Penalty</td> <td style="text-align: right;">=</td> <td style="text-align: right; border-top: 1px solid black;">\$196,850.00</td> </tr> </table>			Day 1	(\$1250.00 + \$1400.00 + \$0.00) × 1 day	=	\$ 2,650.00	+ Days 2-10	\$2650.00 × 9 days × 50%	=	\$ 11,925.00	+ Days 11-50	\$2650.00 × 40 days × 40%	=	\$ 42,400.00	+ Days 51-100	\$2650.00 × 50 days × 30%	=	\$ 39,750.00	+ Days 101-200	\$2650.00 × 100 days × 20%	=	\$ 53,000.00	+ Days 201-365	\$2650.00 × 165 days × 10%	=	\$ 43,725.00	+ Day 366	(\$2000.00 + \$1400.00 + \$0.00) × 1 day	=	\$ 3,400.00		Multi-Day Base Gravity Penalty	=	\$196,850.00
Day 1	(\$1250.00 + \$1400.00 + \$0.00) × 1 day	=	\$ 2,650.00																																
+ Days 2-10	\$2650.00 × 9 days × 50%	=	\$ 11,925.00																																
+ Days 11-50	\$2650.00 × 40 days × 40%	=	\$ 42,400.00																																
+ Days 51-100	\$2650.00 × 50 days × 30%	=	\$ 39,750.00																																
+ Days 101-200	\$2650.00 × 100 days × 20%	=	\$ 53,000.00																																
+ Days 201-365	\$2650.00 × 165 days × 10%	=	\$ 43,725.00																																
+ Day 366	(\$2000.00 + \$1400.00 + \$0.00) × 1 day	=	\$ 3,400.00																																
	Multi-Day Base Gravity Penalty	=	\$196,850.00																																

Exhibit B

**Part IV – Base Penalty Total**

		Amount in Dollars
<b>Line 15</b>	<b>Base Penalty = Potential Damage + Fault + History (Sum of Line 10 + Line 11 + Line 12, OR Line 14)</b>	<b>\$196,850.00</b>

**Part V – Application of Aggravating or Mitigating Factors**

	Aggravating / Mitigating Factors	% Base Penalty Increase or Decrease	Amount in Dollars
Line 16	Factor A: Voluntary and Complete Disclosure of Violations <i>Justification:</i> The Division identified the violations through a regulatory inspection. Appel Farms did not disclose the violations. Therefore, no penalty mitigation was applied.	0%	\$0.00
Line 17	Factor B: Full and Prompt Cooperation <i>Justification:</i> Appel Farms undertook considerable efforts to address the deficiencies outlined in the NOV/CDO. Appel Farms met all of the Division’s NOV/CDO deadlines within an acceptable time period and rectified its permitting issues. Therefore, the Division has reduced the base penalty by 25% for Appel Farms’ full and prompt cooperation.	– 25%	– \$49,213.00
Line 18	Factor C: Environmental Compliance Program <i>Justification:</i> The Division did not receive any information suggesting that Appel Farms implemented a regularized and comprehensive environmental compliance/audit program. Therefore, no penalty mitigation was applied.	0%	\$0.00
Line 19	Factor D: Intentional, Reckless or Negligent Violations <i>Justification:</i> As a professional entity that was developed to complete a large construction project, Appel Farms should have been aware of the stormwater regulations, which went into effect in 1992 for construction operations larger than 5 acres. At the very least, the Division believes Appel Farms’ violations involved negligence. However, the Division has conservatively chosen not to apply a penalty aggravation in this case.	0%	\$0.00
Line 20	Factor E: Other Aggravating or Mitigating Circumstances <i>Justification:</i> Appel Farms failed to obtain permit coverage for its construction project and failed to implement a functional stormwater management system during the time period it was operating without a permit. The <i>Stormwater Civil Penalty Policy</i> (Table 1, footnote 3) allows the Division to aggravate penalties for sites that fail the obtain permit coverage <u>and</u> fail to implement functional stormwater management systems. However, the Division has conservatively chosen not to apply a penalty aggravation in this case.	0%	\$0.00
Line 21	Sum of Line 16 through Line 20	– 25%	– \$49,213.00
<b>Line 22</b>	<b>Adjusted Base Penalty (Sum of Line 15 + Line 21)</b>		<b>\$147,637.00</b>

Exhibit B

**Part VI– Economic Benefit Consideration**

		Amount in Dollars
<b>Line 23</b>	<b>Economic Benefit</b>	<b>\$42,759.00</b>
<p><i>Justification:</i></p> <p>Appel Farms delayed the cost of obtaining a stormwater permit for the project from May 2, 2002 until March 10, 2006. The yearly fee for a construction stormwater permit was \$449 until June 30, 2004, \$339 from July 1, 2004 to June 30, 2005, and \$270 from July 1, 2005 on. Therefore, Appel Farms realized an economic benefit of <b>\$1,509.00</b> from the avoided cost of not obtaining a stormwater permit for 3.85 years.</p> <p>Appel Farms delayed the cost of developing a complete SWMP and avoided the cost of revising and updating its SWMP over a period of 1,407 days. The Division conservatively estimates the cost of periodically revising and updating a SWMP for a project of this size, including consulting and reprinting fees, to be \$1250. Due to the often changing conditions at construction sites, frequent evaluation of a project’s SWMP is necessary. As a result, the Division estimates that a SWMP for construction will need significant revisions and updates at least every 6 months. Therefore, the Division has determined Appel Farms realized an economic benefit of <b>\$8,750.00</b> from the avoided costs of not revising and updating the Project’s SWMP for over 3 and a half years.</p> <p>Appel Farms avoided the cost of inspecting its stormwater management system at least every 14 days and after every precipitation event that caused surface erosion. Appel Farms should have performed at least 100 routine 14-day inspections of the project. The Division estimates that it would take 4 man-hours to thoroughly inspect a project of this size. (4 man-hours X \$25/hour X 100 inspections = \$10,000). Additionally, the Division estimates the cost of management review and implementation of corrective actions to be \$150 for each inspection event. (\$150 X 100 inspections = \$15,000). Therefore, the Division has conservatively determined that Appel Farms realized an economic benefit of <b>\$25,000.00</b> from the avoided cost of not inspecting the project’s stormwater management system.</p> <p>Appel Farms avoided the cost of implementing and/or maintaining BMPs at the project. The Division conservatively estimates the cost of implementing a typical BMP to be \$1000 and the cost of maintaining a BMP throughout its use to be \$500. As documented in the NOV/CDO and inspection reports, Appel Farms failed to implement at least 7 BMPs and failed to maintain at least 1 other. Therefore, the Division has conservatively determined that Appel Farms realized an economic benefit of <b>\$7,500.00</b> from the avoided costs of not implementing and/or maintaining BMPs at the Project.</p> <p><i>(Note: Time value of money for time periods in question was predicted to be insignificant and thus BEN runs were not performed)</i></p>		

**Part VII – Violation Penalty Total**

		Amount in Dollars
<b>Line 24</b>	<b>Civil Penalty: (Sum Line 22 + Line 23)</b>	<b>\$190,396.00</b>

Exhibit B

**Part VIII – Ability to Pay Adjustment**

			<b>Amount in Dollars</b>
Line 25	Ability to Pay Reduction:		\$0.00
	<p><i>Justification:</i> The Division reviewed Appel Farms’ financial records, including tax returns for the 2004, 2005 and 2006 tax years. The Division determined, with the assistance of the Environmental Protection Agency’s “ABEL” computer model, that Appel Farms possessed “good liquidity” and sizeable assets that could be utilized to resolve its penalty obligations. Additionally, the financial information revealed that Appel Farms’ partners had been taking withdrawals and distributions (\$160,000 in 2005 and \$80,000 in 2006, for instance), further indicating Appel Farms’ ability to pay a penalty. Therefore, no ability to pay reduction was applied to this penalty calculation.</p>		

**Part IX – Final Adjusted Penalty**

			<b>Amount in Dollars</b>
Line 26	Total Civil Penalty: (Sum Line 24 + Line 25)		\$190,396.00