

# STATE OF COLORADO

Bill Ritter, Jr., Governor  
Martha E. Rudolph, Executive Director

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

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Colorado Department  
of Public Health  
and Environment

October 25, 2010

John Giancanelli  
258 Thistle Court  
Grand Junction, Colorado 81503

Certified Mail Number: 7007 0220 0001 0159 6352

**RE: Order for Civil Penalty, Number: SP-101025-1**

Dear Mr. Giancanelli:

You are 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 and Notice of Violation/Cease and Desist Order Number: SO-030128-1.

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

Sincerely,

Russell Zigler, Legal Assistant  
Compliance Assurance Section  
Enforcement Unit  
WATER QUALITY CONTROL DIVISION

*Enclosure(s)*

cc: Rio Blanco County Department of Public Health and Environment

cc: Aaron Urdiales, EPA Region VIII  
Mark Kadnuck, Engineering Section, CDPHE  
Nathan Moore, Permits Section, CDPHE  
Dick Parachini, Watershed Program, CDPHE  
Michael Beck, FSU, CDPHE  
Michael Harris, Case Person, CDPHE  
Tania Watson, CDPHE



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

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**ORDER FOR CIVIL PENALTY**

**NUMBER: SP-101025-1**

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**IN THE MATTER OF: JOHN GIANCANELLI**  
**RIO BLANCO COUNTY, COLORADO**

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This matter comes before the Executive Director of the Colorado Department of Public Health & Environment on petition by the Water Quality Control Division for a civil penalty against John Giancanelli. The Executive Director, through her designee, having considered this petition, 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.

**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 January 28, 2004, the Division issued John Giancanelli a Notice of Violation/Cease and Desist Order (the "NOV/CDO") which included findings that John Giancanelli violated the Act and its implementing permit regulations. A copy of the NOV/CDO is attached hereto as Exhibit A and is incorporated herein by reference.
3. On February 20, 2004, the Division received a request for a hearing from John Giancanelli.
4. On November 18 and 19, 2008, the Division held a hearing on the NOV/CDO before an Administrative Law Judge at the Office of Administrative Courts (Case Number: WQ 2007-0001). On January 12, 2009, the Administrative Law Judge, through the Office of Administrative Courts, issued an Initial Decision on the matter.
5. On April 15, 2009, the Division filed Exceptions to the Initial Decision of the Office of Administrative Courts.

6. On May 14, 2010, the Executive Director of the Department issued an Amended Final Agency Order modifying the Initial Decision of the Administrative Law Judge and affirming the Division's determination that John Giancanelli violated §25-8-501(1), C.R.S., and its implementing permit regulations. A copy of the Amended Final Agency Order, including the Initial Decision of the Administrative Law Judge, is attached hereto as Exhibit B and is incorporated herein by reference.
7. Notice of the Amended Final Agency Order was published in the Water Quality Information Bulletin on May 28, 2010.
8. Pursuant to 5 CCR 1002-21, §21.11(D), appeal of final determinations by the Division shall be made to the Colorado Water Quality Control Commission within thirty (30) calendar days of the mailing of the Division's Water Quality Information Bulletin.
9. Division records establish that John Giancanelli did not exercise his appeal right associated with the Amended Final Agency Order.

#### **ORDER FOR CIVIL PENALTY**

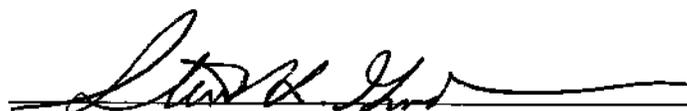
10. Based upon the facts described in the NOV/CDO and the Amended Final Agency Order, the Executive Director, through her designee, has determined that a civil penalty is appropriate and warranted in this matter. Therefore, the Executive Director, through her designee, hereby imposes a civil penalty in the amount of Fifty Six Thousand Two Hundred Twelve Dollars (\$56,212.00) against John Giancanelli for the violations cited in the NOV/CDO and affirmed in the Amended Final Agency Order. 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 C 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-CAS-B2  
4300 Cherry Creek Drive South  
Denver, Colorado 80246-1530

**REQUEST FOR APPEAL**

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

Issued at Denver, Colorado, this 25<sup>th</sup> day of October, 2010.

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



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

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

**NUMBER: SO-030128-1**

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**IN THE MATTER OF:   JOHN GIANCANELLI**  
**SANDERSON HILLS SUBDIVISION**  
**RIO BLANCO COUNTY, COLORADO**

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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 Director of 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**

1. John Giancanelli is owner and developer of the undeveloped portion of Sanderson Hills Subdivision ("Subdivision") which is located at the beginning of the unpaved portion of Sanderson Drive located within the limits of the Town of Meeker, Rio Blanco County, Colorado. John Giancanelli plans to extend Sanderson Drive to obtain access to and develop Mimi Circle (1153 thru 1162 Mimi Circle) and Michael Circle (1130 -1148 Michael Circle), which are within the undeveloped portion of the Subdivision.
2. John Giancanelli is a "person" as defined by §25-8-103(13), C.R.S. and its implementing control regulation, 5 CCR 1002-61, §61.2(61).
3. On July 14, 2003, representatives from the Town of Meeker ("Town Representatives") conducted an inspection of the Subdivision. The Town Representatives observed that soil and vegetation had been removed from Sanderson Drive and was piled to the back of lots 76-95 on Michael Circle. During the inspection, it was observed by the Town Representatives that the soil and vegetation were very loose, and creating dust problems. The Town Representatives noted that if the site received measurable precipitation there was a potential for severe erosion from the disturbed areas. The Town Representatives advised John Giancanelli that due to the area being disturbed and the potential for sediment to discharge into the storm sewer system, he was required to obtain a stormwater permit for construction activities from the Division.

## Exhibit A

4. John Giancanelli is engaged in industrial activity (construction activity) at the Subdivision, as defined in 5 CCR 1002-61, §61.3(2)(e), which has resulted in the disturbance of greater than one acre of land area within the Subdivision.
5. Stormwater runoff from the disturbed areas of the Subdivision will transport sediment into the Town of Meeker's storm sewer system, which subsequently discharges into the White River.
6. The White River is "state waters" as defined by §25-8-103(19), C.R.S. and its implementing control regulation, 5 CCR 1002-61, §61.2(85).
7. Sediment is a "pollutant" as defined by §25-8-103(15), C.R.S. and its implementing control regulation, 5 CCR 1002-61, §61.2(64).
8. Pursuant to §25-8-501(1), C.R.S., 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.
9. Pursuant to 5 CCR 1002-61, §61.3(2), stormwater discharges associated with industrial activity (construction activity) are "point sources" subject to Colorado Discharge Permit System permitting requirements.
10. On July 22, 2003, a representative from the Division ("Division Representative") contacted John Giancanelli by phone and explained the requirement for him to obtain a stormwater permit for his construction activity at the Subdivision.
11. On July 23, 2003, the Division Representative sent John Giancanelli a Compliance Advisory requesting him to submit a stormwater permit application for construction activity to the Division by August 15, 2003.
12. The Division records to date establish that John Giancanelli has not applied for, nor obtained a stormwater discharge permit authorizing the discharge of stormwater from the Subdivision into the White River.
13. John Giancanelli's failure to obtain a discharge permit for stormwater discharges associated with the Subdivision constitutes violations of 5 CCR 1002-61, §§61.3(2)(a) and 61.3(2)(e) and §25-8-501(1), C.R.S.

### **NOTICE OF VIOLATION**

Based on the foregoing Findings of Fact you are hereby notified that the Division has determined that John Giancanelli has violated the following sections of the Colorado Water Quality Control Act and implementing control regulations:

**Section 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."

## Exhibit A

**5 CCR 1002-61, §61.3(2)(a)**, which states in part "...discharges of stormwater as set forth in 61.3(2) and 61.4(3) are point sources requiring a permit."

**5 CCR 1002-61, §61.3(2)(e)**, which states in part "Stormwater discharges associated with industrial activity (construction activity) are required to obtain a permit."

### **CEASE AND DESIST**

Based upon the foregoing factual and legal determinations and pursuant to §25-8-605, C.R.S. John Giancanelli is hereby ordered to:

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

Further, the Division hereby orders John Giancanelli to comply with the following specific terms and conditions of this Order.

### **Compliance Requirements**

15. Within fifteen (15) calendar days of receipt of this Order, John Giancanelli shall submit to the Division a detailed written statement outlining the measures John Giancanelli has taken or plans to take to achieve immediate compliance with this cease and desist order.

16. Within thirty (30) calendar days of receipt of this Order, John Giancanelli shall prepare and submit a complete application for Stormwater Discharges Associated with Construction Activity (General Permit No. COR-030000) for the Subdivision. John Giancanelli must also include, along with the permit application, a written copy of its implemented Stormwater Management Plan ("SWMP"). *(Enclosed for reference is a permit application, a SWMP preparation guidance document and Colorado's Storm Water Program fact sheet.)*

17. Within thirty (30) calendar days of receipt of any Division comments on the submitted SWMP, John Giancanelli shall submit to the Division a written certification stating that John Giancanelli has revised his SWMP to address any received Division comments and that the SWMP has been fully implemented at the Subdivision.

### **NOTICES AND SUBMITTALS**

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

## Exhibit A

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

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

Pursuant to §25-8-603, C.R.S., you are required to submit to the Division an answer admitting or denying each paragraph of the Findings of Fact and responding to the Notice of Violation. Absent such an answer, the validity of the factual allegations and the Notice of Violation shall be deemed established in any subsequent proceeding.

Section 25-8-603, C.R.S. also provides 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.

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

### **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 Division has not waived its right to bring an action for penalties under §25-8-608, C.R.S., and may bring such action in the future.

### **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.

Exhibit A

**EFFECT OF ORDER**

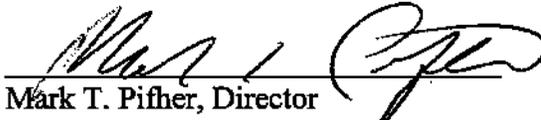
Nothing herein contained, particularly those portions requiring certain acts to be performed within a certain time, shall be construed as a permit or license, either to violate any provisions of the public health laws and regulations promulgated thereunder, or to make any discharge into state waters.

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, you are advised to consult the Water Quality Control Act, §§25-8-101 to 703, C.R.S., and regulations promulgated thereunder, 5 CCR 1002.

Issued at Denver, Colorado, this 28<sup>th</sup> day of January, 2004.

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

  
\_\_\_\_\_  
Mark T. Pipher, Director  
Water Quality Control Division

## Exhibit B

BEFORE THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, WATER QUALITY CONTROL DIVISION,  
Petitioner,

v.

JOHN GIANCANELLI,  
Respondent.

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### AMENDED FINAL AGENCY ORDER

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This matter comes before the Executive Director of the Colorado Department of Public Health and Environment on exceptions filed by the Petitioner to the January 12, 2009 Initial Decision of Administrative Law Judge Matthew Norwood ("ALJ"). The Initial Decision followed a hearing held November 18 – 19, 2008 and December 1, 2008. Petitioner appeared by through Assistant Attorney General Stephen Brown. Respondent appeared through counsel Mark Williams. Petitioner timely filed Exceptions to the Initial Decision on April 15, 2009.

After due consideration of the record and the pleadings filed by the parties, the Executive Director enters the following Amended Final Agency Order pursuant to C.R.S. § 24-4-105.

#### **ALJ's Findings of Fact**

In the January 12, 2009 Initial Decision, the ALJ made the following Findings of Fact:

1. In June, 1978, the Town of Meeker, Colorado approved a development plan for the Sanderson Hills Subdivision, the plat of which is shown on exhibit 26. Water and sewer lines were installed in the subdivision within a couple of years. Since then, grasses and sagebrush covered the undeveloped portions of the subdivision, preventing erosion.
2. Along with the plat, the Town approved detailed grading and construction plans. With the exception of minor changes, the plans have remained unchanged since that time.
3. By 2003, approximately 30% of the plan had been developed. At the present time, all but a few lots have been developed.
4. Prior to July 2003, Mimi and Michael Circle were two platted but undeveloped cul-de-sacs off Sanderson Drive in the subdivision. In 2003 and 2004, the Respondent was the owner and developer of this property.

## Exhibit B

5. On July 14, 2003, the Respondent and a contractor working for him met with Sharon Day, the town administrator of Meeker. Ms. Day agreed to allow the Respondent to “grub off” sagebrush and dig on the property to inspect the condition of the sewer lines. There had been a report from the sanitation district that the sewer line contained “sags” or depressions that prevented proper drainage. No additional work on the property was permitted by Ms. Day until an improvement agreement was in place.

6. On July 21, 2003, Russell Overton, the public works supervisor for the Town of Meeker, was made aware of telephone complaints from citizens, one with asthma, regarding the fact that construction activity involving heavy equipment was creating large clouds of dust.

7. The construction activity was taking place at the Mimi and Michael Circle areas of the Sanderson Hills Subdivision. The nearby homeowners were required to keep their windows closed even though this activity was taking place in the heat of the summer.

8. When Mr. Overton arrived at the site, he found “Rick,” a worker for the Respondent. Rick was himself using one piece of heavy equipment and was also in charge of a crew working on the site.

9. Rick told Mr. Overton that he was not permitted to stop work unless the Respondent told him to.

10. Rick’s crew had a motor grader and a landscaper on site. The crew used this equipment to remove dirt from the entire width of Mimi and Michael Circles. The “cut down,” *i.e.* the dirt removed, averaged twelve to eighteen inches below the surface of the surrounding landscape. This work was greatly in excess of what would have been required to check a sewer line.

11. Mr. Overton returned to the site on July 22, 2003. He talked to Rick who was still working with his crew. Rick told Mr. Overton that the Respondent had told him not to stop unless the Town of Meeker obtained a court order.

12. The following day, Mr. Overton returned to the site with Chris Strouse, an engineer from the Schmueser Gordon Meyer engineering firm employed by the Town of Meeker. By that time, the construction work had ceased. There were large piles of uncompacted dirt and vegetation or “spoils” piled up on the back of the lots on Michael Circle. At some point in time after the July 21 and 22 construction activities, Mr. Overton measured the area disturbed. The ALJ determined that based on Mr. Overton’s measurements, an area slightly greater than one acre had been disturbed. The amount disturbed did not exceed five acres.

13. On July 21, 2003, the Respondent met with Ms. Day. She confronted him with the fact that the work he had done went beyond what was allowed. The Respondent did not deny

## Exhibit B

this, but said that he was in business to make money and could not afford to bring the heavy equipment back a second time.

14. Ms. Day also consulted with Mr. Strouse, who told her that the Respondent's construction activities would require a stormwater discharge permit from the Division. Ms. Day sent an e-mail to Matthew Czahor of the Division on July 21, and he called her back the next day. He also told her that Respondent was required to obtain a permit.

15. Mr. Czahor called the Respondent on July 22 and told him of the need to obtain a permit. The Respondent was uncooperative, insulting, and abusive.

16. On July 23, 2003, Mr. Czahor sent the Respondent a certified letter telling him that he was required to obtain a permit. In the letter, Mr. Czahor gave the website address to download the permit application form. He also explained that the application requires the preparation of a stormwater management plan ("SWMP"). He said in the letter that the permit application should have been submitted prior to breaking ground. In light of the fact that it had not been, Mr. Czahor gave the Respondent until August 15, 2003, to submit a permit and stormwater management plan.

17. The Respondent did not comply, and the Division sent the Respondent a Notice of Violation/Cease and Desist Order ("NOV/CDO") dated January 28, 2004. The NOV/CDO contained findings of fact, a notice of violation, a cease and desist order, and other provisions. The cover letter with the NOV/CDO instructed the Respondent to provide an answer in 30 days and that, absent such an answer, the validity of the factual findings would be deemed established.

18. The Respondent, through then counsel, did provide an answer dated February 14, 2004 and received by the Division on February 20, 2004.

19. The Town of Meeker often experiences heavy spring runoffs. For multiple days in March, 2004, loose dirt and sediment disturbed by the Respondent's construction activities ran out of Mimi and Michael Circles onto Sanderson Drive and into storm drains along Sanderson Drive. The storm sewer system eventually runs into the White River approximately one mile away. There is insufficient evidence that the dirt and sediment from the Respondent's construction activities in fact made it to the White River.

20. The White River is "state waters" as defined by § 25-8-103(19) and Water Quality Control Commission regulation 5 CCR 1002-61.2(85). There was no evidence that any channel for the water upstream to the White River was "state waters."

21. There was no evidence that the storm sewer system was other than a "sewage system" as described in the definition of "state waters" at § 25-8-103(19). Paragraph 5 of the Findings of Fact of the NOV/CDO refers to the system downstream from the storm drains as the "Town of Meeker's storm sewer system."

## Exhibit B

22. Mr. Overton was concerned about the sediment flowing into the storm drains. Dave Henderson, an assistant to Mr. Overton, purchased straw bales, also referred to as hay bales, and secured them around the storm drains to protect the drainage system from the mud, dirt, and sediment.

23. On May 11, 2004, the Respondent submitted a Division application for a permit for stormwater discharges associated with construction activity. The application contained a SWMP created by Rhino Engineering, Inc. The application described the project as “construction of a 30-lot single family residential subdivision” and listed the total area of the project as 6.1 acres.

24. In a letter dated June 8, 2004, Michael Harris of the Division wrote to the Respondent and identified aspects of the SWMP the Division felt needed further development.

25. On January 10, 2007, counsel for the Division requested that the OAC assign an ALJ for a stormwater permit hearing.

26. The Respondent did not have a permit from the Division at the time of his activities in July 2003. There is no evidence that the Division ever issued him a permit.

27. The parties agree that the NOV/CDO is the charging document in this case and the ALJ so finds. There is no other charging document. The Division’s Prehearing Statement filed May 22, 2007 states that the Division’s claims are set out in the NOV/CDO.

28. The NOV/CDO relies on the “phase 1” stormwater regulations at § 61.3(2)(a) and (e). Much of the dispute at hearing concerned the phrase “larger plan of development or sale” at § 61.3(2)(e)(iii)(J).

29. Section 61.3(2)(e)(ii) and (iii)(J) provide:

(e) Stormwater Discharges for Which a Permit is Required – Phase 1: The following discharges composed entirely of stormwater are required to obtain a permit.

(ii) A stormwater discharge associated with industrial activity.

(iii) The following categories of facilities are considered to be engaging in “industrial activity” for purposes of this subsection:

## Exhibit B

(J) Construction activity, including clearing, grading, and excavation, that results in the disturbance of five or more acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale, if the larger common plan will ultimately disturb five acres or more;

30. The Respondent maintains that he was not required to obtain a permit pursuant to this rule because his activities in July 2003 were exploratory and limited to examining the sewer lines. The Respondent maintains that he had not yet formulated a “larger common plan of development or sale” whereby his disturbance of less than five acres would require him to obtain a permit.

31. The Division argues that the words “larger common plan of development or sale” in this case refers to the entire Sanderson Hills Subdivision as originally platted in 1978.

32. In other words, the two parties each argue for a different standard in the case of a disturbance of less than five acres. The Respondent argues for a subjective approach where his own personal decision-making is controlling. The Division relies on an objective standard where the Respondent’s activities are compared to a plan that may, as in this case, be even larger than the project when finally completed.

33. This issue did not need to be addressed. The ALJ determined as fact that on July 21, 2003, the Respondent had already made the decision to develop the Mimi and Michael Circle area. As shown by the Respondent’s May 2004 application for a permit that describes the area as 6.1 acres, this planned area of development exceeds the five-acre limit.

34. Respondent’s construction activities on July 21 and 22, 2003, exceeded what was required merely to examine the sewer system. Respondent had the entire width of Mimi and Michael Circles graded, using heavy equipment. It is apparent that he had in his own mind gone past the point of merely trying to determine if development was feasible.

35. Other evidence shows that Respondent had made the decision by July 2003 to develop the Mimi and Michael Circle area. Prior to April 7, 2003, he solicited a detailed bid that was made on that date from Frontier Paving, Inc., to pave and install curbs in the area. The bid was for \$141,267.40 plus other unknown costs. The Respondent signed the bid as “accepted” on June 18, 2003.

36. Prior to July 21, 2003, the Respondent also had received bids for a gas contract, a telephone contract, and an electric contract. The Respondent agreed to the telephone contract in May 2003 and signed the electric contract on July 11, 2003.

## Exhibit B

### ALJ's Conclusions of Law

In the January 12, 2009 Initial Decision, the ALJ made the following conclusions of law based on the Findings of Fact:

1. The Notice of Violation/ Cease and Desist Order issued to Respondent relies on § 25-8-501(1), C.R.S., and 5 CCR 1002-61.3(2)(a) and (e). Section 25-8-501(1) provides:

(1) 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...

2. The definition of "pollutant" at § 25-8-103(15) includes "dredged spoil, dirt, slurry, rock, sand, or any industrial ... waste." The dirt and sediment from the Respondent's activities that resulted in the NOV/ CDO were "pollutants."

3. The "division" is the Division of Administration at the Department of Public Health and Environment.

4. The NOV/CDO cites Respondent for violating only § 25-8-501(1), C.R.S., and 5 CCR 1002-61.3(2)(a) and (e). The NOV/CDO does not cite Respondent for violating § 61.3(2)(f), and the Petitioner may only prosecute violations included in the Notice.

5. The Division has the burden of proof to prove the allegations of the NOV/CDO by a preponderance of evidence.

6. There is insufficient evidence that dirt and sediment ever actually flowed into state waters. Therefore, Respondent did not violate § 25-8-501(1), C.R.S.

7. Commission regulations 5 CCR 1002-61.3(2)(a) and (e) do not require individuals to obtain a permit for the mere discharge of pollutants into storm drains.

8. Respondent was cited only with violating 5 CCR 1002-61.3(2)(a) and (e).

9. 5 CCR 1002-61.3(2)(a) and (e) provide in part:

(a) [D]ischarges of stormwater ... are point sources requiring a permit.

...

(e) Stormwater Discharges for Which a Permit is Required – Phase I: The following discharges composed entirely of stormwater are required to obtain a permit.

## Exhibit B

(ii) A stormwater discharge associated with industrial activity.

(iii) The following categories of facilities are considered to be engaging in “industrial activity” for purposes of this subsection:

...

(J) Construction activity, including clearing, grading, and excavation, that results in the disturbance of five or more acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale, if the larger common plan will ultimately disturb five acres or more; ....

10. Respondent’s activities constituted “construction activity” and “industrial activity” as defined in 5 CCR 1002-61.3(2)(e)(iii) and subsection (J).

11. “Discharge” is defined at section 5 CCR 1002-61.2(22) as “the discharge of pollutants as defined in § 25-8-103(3), C.R.S.....”

12. Section 25-8-103(3), C.R.S., defines “discharge of pollutants” as “the introduction or addition of a pollutant into state waters.” There was insufficient evidence that pollutants from Respondent’s activities entered state waters.

13. The case of *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10<sup>th</sup> Cir. 2005) supports the ALJ’s conclusion that actual discharge of pollutants into state waters must be proven in order to establish a violation of § 25-8-501(1), C.R.S., and 5 CCR 1002-61.3(2)(a) and (e).

14. Petitioner cites a Commission regulation, 5 CCR 1002-65, in support of its position that the discharge of pollutants into a storm drain is sufficient to require a permit.

15. Regulation 5 CCR 1002-65 supports the ALJ’s conclusion that Petitioner must prove that Petitioner discharged pollutants into state waters.

### ALJ’s Conclusions

1. The ALJ determined that there was insufficient evidence that the dirt and sediment from Respondent’s industrial activities polluted state waters. Respondent was not in violation of the requirements of § 25-8-501(1), C.R.S., and 5 CCR 1002-61.3(2)(a) and (e).

### ORDER

The ALJ’s Findings of Fact, Conclusions of Law, and recommended sanctions are affirmed, modified, or set aside as follows:

## Exhibit B

1. The ALJ's Findings of Fact set forth in the Initial Decision are adopted and affirmed.
2. Conclusions of Law #1 are affirmed and adopted.
3. Conclusions of Law #2 are affirmed and adopted.
4. Conclusions of Law #3 are affirmed and adopted.
5. Conclusions of Law #4 are affirmed and adopted.
6. Conclusions of Law #5 are affirmed and adopted.
7. The Department rejects and sets aside Conclusions of Law #6. In Conclusion of Law #6, the ALJ determined that Respondent did not violate § 25-8-501(1), C.R.S. because there was no proof that pollutants from Respondent's activities reached state waters. This Conclusion of Law is erroneous.

The stated purpose of the Water Quality Control Act is to conserve and protect state waters, and "to provide that no pollutant be released into any state waters without first receiving the treatment or other corrective action necessary to reasonably protect the legitimate and beneficial uses of such waters...." § 25-8-102(3), C.R.S. To promote this goal, § 25-8-501(1), C.R.S., provides that "no person shall discharge any pollutant into any state water from a point source without first having obtained a permit...."

To accomplish these statutory goals and requirements, the Water Quality Control Commission has enacted regulations requiring stormwater permits for certain activities that might impact the quality of state waters. Regulation 5 CCR 1002-61.3(2)(a) states that discharges of stormwater as set forth in 5 CCR 1002-61.3(2) and 61.4(3) are "point sources" requiring a permit. Regulation 61.3(2)(e) provides that a permit is required for stormwater discharge associated with "industrial activity." The term "industrial activity" includes:

Construction activity, including clearing, grading, and excavation, that results in the disturbance of five or more acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger plan of development or sale if the larger common plan will ultimately disturb five acres or more....

5 CCR 1002-61.3(2)(e)(iii)(J).

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Individuals or entities conducting “construction activity” as defined in 5 CCR 1002-61.3(2)(e)(iii)(J) “shall submit [stormwater permit] applications at least 90 days before the date on which construction is to commence.” 5 CCR 1002-61.4(3)(a)(i).

While finding that Respondent’s actions constituted construction activity within the meaning of the regulation, the ALJ nevertheless concluded that Respondent was not required to obtain a stormwater permit absent a showing of an actual discharge to state waters from that construction activity. In reaching this conclusion, the ALJ relied on the use of the term “stormwater discharge” in 5 CCR 1002-61.3(2)(e) and the statutory definition of discharge as a discharge into state waters. While this language does provide some textual support for the ultimate conclusion in the Initial Decision, based on a careful reading of the regulatory language, and in light of the stated purpose of the statute and the regulation, the ALJ’s interpretation does not reflect the regulatory intent of the stormwater permitting requirements and thus must be set aside.

Regulatory provisions must be interpreted to give effect to the intent of the administrative body that adopted the regulation. *Slack v. Farmers Insurance Exchange*, 5 P.3d 280, 284 (Colo. 2000). Whenever possible, intent is determined from the plain and ordinary meaning of the regulatory language. *Woellhaf v. People*, 105 P.3d 209, 215 (Colo. 2005). In instances where the meaning of a particular regulatory provision is ambiguous, the provision must be interpreted in the context of the regulatory language as a whole, and consistent with the purpose of the regulation. *See Ruff v. Industrial Claim Appeals Office*, 218 P.3d 1109, 1113 (Colo. App. 2009 (the provisions of an administrative rule should be read together so that the rule itself may be interpreted as a whole); *Benuishis v. Industrial Claim Appeals Office*, 195 P.3d 1142, 1145 (Colo. App. 2008) (courts’ primary task in interpreting administrative regulations is to give effect to the intent of the enacting body).

The applicable regulatory language does not explicitly state whether or not a construction activity stormwater permit is required in a case such as here, where there has been construction activity, but no clear record that the construction activity resulted in a discharge of pollutants into state waters. While the use of the term “discharge” in reference to stormwater permits suggests that a permit is not required absent a showing of an actual discharge to state waters, the operative regulatory language also plainly states that individuals who plan to engage in defined “construction activity” are required to obtain a stormwater discharge permit “at least 90 days before the date on which construction is to commence.” 5 CCR 1002-61.4(3)(a)(i). This language, which requires a permit based solely on the commencement of construction without reference to any actual discharge caused by that construction, is difficult to reconcile with the conclusion advanced in the Initial Decision that an actual discharge is a prerequisite to the permitting requirement. If the Commission had intended that a construction activity stormwater permit is only required where there has been an actual discharge of pollutants into state waters, the Commission would have included language referencing such a discharge in section 61.4(3)(a)(i). Indeed in requiring stormwater permits for other types of industrial activities the Commission explicitly states that such facilities must apply for a permit at least 180 days prior to

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commencing the “industrial activity which *may result in a discharge* of stormwater associated with that industrial activity.” 5 CCR 1002-61.4(3)(a)(i) (emphasis added). And for non-stormwater permits, a permit application is required “*at least 180 days prior to discharge.*” 5 CCR 1002-61.4(1)(c) (emphasis added). Read together, these provisions compel the conclusion that while an actual discharge is required in the case of a non-stormwater permit, and a potential discharge is required in the case of a stormwater permit for other industrial activities; in the case of stormwater permits for construction activity, the Commission intended that a permit is required regardless of whether there is a showing of an actual discharge to state waters.

This conclusion is further compelled when considering the issue in light of the statutory and regulatory purpose. The stated purpose of the Water Quality Control Act is to prevent the release of pollutants into state waters “without first receiving the treatment or other corrective action necessary ....” § 25-8-102(3), C.R.S. This legislative goal can only be achieved if individuals obtain permits before pollution occurs; indeed, the permit process is meaningless if permits are obtained only after construction activities have polluted state waters. While the regulatory interpretation adopted in the Initial Decision, does not necessarily allow a facility to wait until after pollution of state has occurred before obtaining a construction activity stormwater permit, it certainly encourages such a course of action, and thereby undermines the statutory and regulatory purpose for the stormwater permitting requirements at issue in this case.

In addition to undermining the essential purpose of the stormwater permitting requirements, the regulatory interpretation that the ALJ advocates presents significant practical difficulties. Under this interpretation, neither the Division nor the person conducting the construction activity can know with any reasonable level of certainty whether a construction activity stormwater permit is required until after the pollution of state waters occurs. Unlike more traditional point sources, where the facility can control the discharge of pollutants into state waters, stormwater discharges are by their very nature dependant on the weather, which of course the facility can neither control nor even predict. Accordingly, a stormwater permitting scheme that requires an actual discharge to state waters fails to provide the regulated community with any meaningful guidance about whether a permit is required until after a violation has occurred.

Deference is given to the reasonable interpretations of the administrative agencies charged with enforcing a statute. *Coffman v. Colorado Common Cause*, 102 P.3d 999, 1005 (Colo. 2004). The Commission’s implementation of 5 CCR 1002-61.3(2)(e)(iii)(J) and 5 CCR 1002-61.4(3)(a)(i) is a reasonable interpretation of the legislative mandate set forth in § 25-8-102(3), C.R.S.

An administrative agency’s interpretation of its own regulations is generally entitled to great weight and should not be disturbed on review unless plainly erroneous or inconsistent with such regulations. *Jimenez v. Industrial Claim Appeals Office*, 51 P.3d 1090, 1093 (Colo. App. 2002). The Division’s interpretation that the regulations required Respondent to obtain a stormwater permit prior to engaging in construction activities, regardless of whether a

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subsequent discharge to state waters occurs, is reasonable and consistent with the regulatory intent and language.

The ALJ's conclusion that Respondent did not violate § 25-8-501(1), C.R.S. and its implementing regulations because there was no proof that pollutants from Respondent's activities reached state waters is inconsistent with the intent of the Commission regulations and the stated purpose of the Water Quality Control Act. For these reasons, the ALJ's Conclusions of Law #6 are set aside.

8. For the reasons set forth above, Conclusions of Law #7 are set aside.

9. Conclusions of Law #8 are affirmed and adopted.

10. Conclusions of Law #9 are affirmed and adopted.

11. Conclusions of Law #10 are affirmed and adopted.

12. Conclusions of Law #11 are affirmed and adopted.

13. Conclusions of Law #12 are affirmed and adopted.

14. Conclusions of Law #13 are set aside. The case of *Sierra Club v. El Paso Mines, Inc.*, did not involve the regulations at issue in this case and thus does not support the ALJ's conclusions.

15. Conclusions of Law #14 are affirmed and adopted.

16. Conclusions of Law #15 are set aside. Neither Regulation 65 nor the Commission's interpretation of Regulation 65 is at issue in this case. Accordingly, the Commission's interpretation of Regulation 65 does not support the ALJ's conclusions.

17. The ALJ's conclusion ("Initial Decision") that Respondent did not violate § 25-8-501(1) is set aside for the reasons stated elsewhere in this Amended Final Agency Order.

### CONCLUSION

1. IT IS ORDERED that the Initial Decision of Administrative Law Judge Matthew E. Norwood, entered on January 12, 2009, is modified as outlined above.

2. IT IS FURTHER ORDERED that the Division's determination that Respondent violated § 25-8-501(1), C.R.S., and Commission regulations when he commenced construction activity in July 2003 without first having obtained a stormwater permit is hereby affirmed.

## Exhibit B

Dated this 14<sup>th</sup> day of May, 2010.

By the Colorado Department of Public Health &  
Environment:



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Martha E. Rudolph  
Executive Director

This decision becomes final upon mailing. Any person adversely affected by this Amended Final Agency Order may appeal this Amended Final Agency Order to the Colorado Water Quality Control Commission by filing such appeal in writing to the Administrator, Water Quality Control Commission, 4300 Cherry Creek, Drive South, Denver, CO., 80246-1530, postmarked within 30 days after the date of the mailing list distribution containing notification of this Amended Final Agency Order in the Water Quality Information Bulletin sent to those persons on the mailing list maintained by the Division pursuant to section 25-8-302(1)(e), C.R.S. Any such appeal will be limited to a review of the administrative record before the Colorado Department of Public Health and Environment Executive Director's Office for the Amended Final Agency Order and will be governed by Commission Rule 21.11.D, 5 CCR 1002-21. Any party adversely affected or aggrieved by any agency action may commence an action in district court within 30 days after such action becomes final.

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### CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Amended Final Agency Order upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 10<sup>th</sup> day of May 2010 addressed as follows:

Stephen Brown  
Assistant Attorney General  
1525 Sherman St., 7<sup>th</sup> Floor  
Denver, CO 80203

John Giancanelli  
258 Thistle Street  
Grand Junction, CO 81503

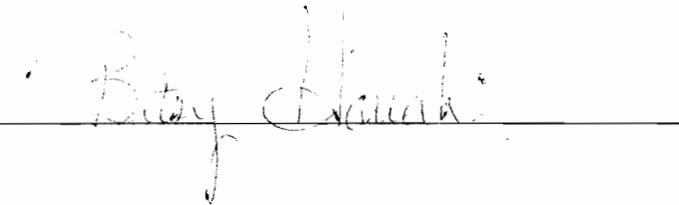
  
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Exhibit B

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 633 17 <sup>th</sup> Street, Suite 1300 Denver, Colorado 80202	
<b>COLORADO DEPARTMENT OF PUBLIC HEALTH AND THE ENVIRONMENT, WATER QUALITY CONTROL DIVISION,</b> Petitioner,  v.  <b>JOHN GIANCANELLI,</b> Respondent.	▲ COURT USE ONLY ▲  <b>CASE NUMBER:</b>  <b>WQ 2007-0001</b>
<b>INITIAL DECISION</b>	

This is an appeal from a Notice of Violation/Cease and Desist Order issued under the authority of Sections 25-8-602 and 25-8-605, C.R.S. of the Colorado Water Quality Control Act, Section 25-8-101, C.R.S. *et seq.* The NOV/CDO was issued by the Division of Administration ("Division") as described at Section 25-1-102(2), C.R.S. of the Department of Public Health and Environment. The Division has the authority to enforce regulations issued by the Water Quality Control Commission ("Commission"). Section 25-8-602.

Hearing in this matter was held in person at the Office of Administrative Courts ("OAC") November 18 and 19, 2008 before Administrative Law Judge ("ALJ") Matthew E. Norwood. Closing argument was held by telephone December 1, 2008 and post-hearing briefs were submitted December 5, 2008. The hearing and closing arguments were electronically recorded. Stephen M. Brown, Senior Assistant Attorney General, appeared on behalf of the Division. Mark N. Williams, Esq. appeared on behalf of the Respondent.

**Statement of the Case and Background**

This case is an enforcement action regarding the failure of the Respondent to obtain a permit prior to engaging in construction activities. Spring runoff caused dirt and sediment from these construction activities to run into storm sewers in the Town of Meeker, Colorado. These storm sewers eventually discharge into the White River. The Respondent maintains that no permit was required for his activities.

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On October 22, 2007 the ALJ denied the Division's motion for summary judgment on the grounds that genuine issues of material fact remained in dispute. Specifically, those issues were the meaning of "construction activities" at Section 61.3(2)(e)(iii)(J),<sup>1</sup> and whether the Respondent's actions had an impact on water flowing from the "Meeker Ditch to Sulphur Creek to White River."

### Findings of Fact

Based upon the evidence presented at the hearing, the ALJ finds as fact:

1. In June of 1978 the Town of Meeker, Colorado approved a development plan for the Sanderson Hills Subdivision, the plat of which is shown on exhibit 26. Water and sewer lines were installed in the subdivision within a couple of years. Since then, grasses and sagebrush covered the undeveloped portions of the subdivision, which prevented erosion.

2. Along with the plat, the Town approved detailed grading and construction plans. Except in some very minor respects, the plans have not changed since that time.

3. In 2003 approximately 30% of the plan had been developed. At the present time all but a few lots have been developed.

4. Prior to July 2003, Mimi and Michael Circle were two platted but undeveloped cul-de-sacs off of Sanderson Drive in the subdivision. In 2003 and 2004 the Respondent was the owner and developer of this property.

5. On July 14, 2003 the Respondent and a contractor working for him met with Sharon Day, the town administrator for Meeker. Ms. Day agreed to allow the Respondent to "grub off" sagebrush and dig on the property to inspect the condition of the sewer lines. There had been a report from the sanitation district that the sewer line contained "sags" or depressions that prevented proper drainage. No additional work on the property was permitted by Ms. Day until an improvement agreement was in place.

6. On July 21, 2003 Russell Overton, the public works supervisor for the Town of Meeker, was made aware of telephone complaints from citizens, one with asthma, regarding the fact that construction activity involving heavy equipment was creating large clouds of dust.

7. The construction activity was taking place at the Mimi and Michael Circle areas of the Sanderson Hills Subdivision. The nearby homeowners were required to keep their windows closed even though this was in the heat of the summer.

8. When Mr. Overton arrived at the site he found "Rick," a worker for the Respondent. Rick was himself using one piece of heavy equipment and was also in charge of a crew working on the site.

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<sup>1</sup> Unless otherwise indicated, all Commission rules mentioned in this Initial Decision appear at 5 CCR 1002-61 and will be cited by section number only.

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9. Rick told Mr. Overton that he was not permitted to stop work unless the Respondent told him to.

10. Rick's crew had a motor grader and a landscraper on site. The crew used this equipment to remove dirt from the entire width of Mimi and Michael Circles. The "cut down," i.e. the dirt removed, averaged twelve to eighteen inches below the surface of the surrounding landscape. This work was greatly in excess of what would have been required to check a sewer line.

11. Mr. Overton returned to the site on July 22, 2003. He talked to Rick who was still working with his crew. Rick told Mr. Overton that the Respondent had told him not to stop unless the Town of Meeker had obtained a court order.

12. The following day Mr. Overton returned to the site with Chris Strouse, an engineer from the Schmueser Gordon Meyer engineering firm employed by the Town of Meeker. By that time the construction work had ceased. There were large piles of uncompacted dirt and vegetation or "spoils" piled up on the back of the lots on Michael Circle. At some point in time after the July 21 and 22 construction activity, Mr. Overton measured the area disturbed. Based on Mr. Overton's measurements, the ALJ finds as fact that an area slightly greater than one acre had been disturbed. The amount disturbed did not exceed five acres.

13. On July 21, 2003 the Respondent met with Ms. Day. She confronted him with the fact that the work he had done went beyond what was allowed. The Respondent did not deny this, but said that he was in the business to make money and could not afford to bring the heavy equipment back a second time.

14. Ms. Day also consulted with Mr. Strouse who told her that the Respondent's construction activities would require a storm water discharge permit from the Division. Ms. Day sent an e-mail to Matthew Czahor of the Division on July 21 and he called her back the following day. He also told her that the Respondent was required to obtain a permit.

15. Mr. Czahor also called the Respondent on July 22 and told him of the need to obtain a permit. The Respondent was uncooperative, insulting and abusive.

16. On July 23, 2003 Mr. Czahor sent the Respondent a certified letter telling him that he was required to obtain a permit. In his letter Mr. Czahor gave the web site address to download the permit application form. He also explained that the application requires the preparation of a stormwater management plan ("SWMP"). He said in the letter that the permit application should have been submitted prior to breaking ground. In light of the fact that it had not been, Mr. Czahor gave the Respondent until August 15, 2003 to submit a permit and stormwater management plan.

17. The Respondent did not comply and the Division sent the Respondent a Notice of Violation/Cease and Desist Order ("NOV/CDO") dated January 28, 2004. The NOV/CDO contained findings of fact, a notice of violation, a cease and desist order and other provisions. The cover letter with the NOV/CDO instructed the Respondent to

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provide an answer in 30 days and that, absent such an answer, the validity of the factual findings would be deemed established.

18. The Respondent, through then counsel, did provide an answer dated February 14, 2004 and received by the Division February 20, 2004.

19. The Town of Meeker often experiences heavy spring runoffs. For multiple days in March of 2004 loose dirt and sediment disturbed by the Respondent's construction activities ran out of Mimi and Michael Circles onto Sanderson Drive and into storm drains along Sanderson Drive. The storm sewer system eventually runs into the White River approximately one mile away. There is insufficient evidence that the dirt and sediment from the Respondent's construction activities in fact made it to the White River.

20. The White River is "state waters" as defined by Section 25-8-103(19) and Commission Section 61.2(85). There was no evidence that any channel for the water upstream to the White River was "state waters."

21. There was no evidence that the storm sewer system was other than a "sewage system" as described in the definition of "state waters" at Section 25-8-103(19). Paragraph 5 of the Findings of Fact of the NOV/CDO refers to the system downstream from the storm drains as the "Town of Meeker's storm sewer system."

22. Mr. Overton was concerned about the sediment flowing into the storm drains. Dave Henderson, an assistant to Mr. Overton, purchased straw bales, also referred to as hay bales, and secured them around the storm drains to protect the drainage system from the mud, dirt and sediment.

23. On May 11, 2004 the Respondent submitted a Division application for a permit for stormwater discharges associated with construction activity. The application contained a SWMP created by Rhino Engineering, Inc. The application described the project as "construction of a 30-lot single family residential subdivision" and listed the total area of the project as 6.1 acres.

24. In a letter dated June 8, 2004 Michael Harris of the Division wrote to the Respondent and identified aspects of the SWMP the Division felt needed further development.

25. There is insufficient evidence of subsequent developments in the case. On January 10, 2007, counsel for the Division requested that the OAC assign an ALJ for a stormwater permit violation hearing.

26. The Respondent did not have a permit from the Division at the time of his activities in July 2003. There is no evidence that the Division ever issued him a permit.

27. The parties agree that the NOV/CDO is the charging document in this case and the ALJ so finds. There is no other charging document. The Division's Prehearing Statement filed May 22, 2007 states that the Division's claims are set out in the NOV/CDO.

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28. The NOV/CDO relies on the “phase 1” stormwater regulations at Section 61.3(2)(a) and (e). Much of the dispute at hearing concerned the phrase “larger common plan of development or sale” at Section 61.3(2)(e)(2)(iii)(J).

29. Section 61.3(2)(e)(ii) and (iii)(J) provide:

(e) Stormwater Discharges for Which a Permit is Required -  
Phase I: The following discharges composed entirely of  
stormwater are required to obtain a permit.

...

(ii) A stormwater discharge associated with industrial activity.

...

(iii) The following categories of facilities are considered to be  
engaging in “industrial activity” for purposes of this  
subsection:

...

(J) Construction activity, including clearing, grading and  
excavation, that results in the disturbance of five or more  
acres of total land area. Construction activity also includes  
the disturbance of less than five acres of total land area that  
is a part of a larger common plan of development or sale, if  
the larger common plan will ultimately disturb five acres or  
more;

30. The Respondent maintains that he was not required to obtain a permit pursuant to this rule because his activities in July 2003 were exploratory and limited to examining the sewer lines. The Respondent maintains that he had not yet formulated a “larger common plan of development or sale” whereby his disturbance of less than five acres would require him to obtain a permit.

31. The Division argues that the words “larger common plan of development or sale” in this case reference the entire Sanderson Hills Subdivision as originally platted in 1978.

32. In other words, the two parties each argue for a different standard in the case of a disturbance of less than five acres. The Respondent argues for a subjective approach where his own personal decision-making is controlling. The Division relies on an objective standard where the Respondent’s activities are compared to a plan that may, as in this case, be even larger than the project when finally completed.

33. The ALJ need not resolve this issue because he finds as fact that there was a “larger common plan of development or sale” even by the subjective test. The ALJ finds as fact that on July 21, 2003 the Respondent had already made the decision to develop the Mimi and Michael Circle area. As shown by the Respondent’s May 2004

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application for a permit that describes the area as 6.1 acres, this planned area of development exceeds the five-acre limit.

34. As found above, Respondent's construction activities on July 21 and 22, 2003 exceeded what was required merely to examine the sewer system. Respondent had the entire width of Mimi and Michael Circles graded using heavy equipment. It is apparent that he had in his own mind gone past the point of merely trying to determine if development was feasible.

35. Other evidence shows that the Respondent had made the decision by July 2003 to develop the Mimi and Michael Circle area. Prior to April 7, 2003 he solicited a detailed bid that was made on that date from Frontier Paving, Inc. to pave and install curbs in the area. The bid was for \$141,267.40 plus other unknown costs. The Respondent signed the bid as "accepted" June 18, 2003.

36. Prior to July 21, 2003 the Respondent also had received bids for a gas contract, a telephone contract and an electric contract. The Respondent agreed to the telephone contract in May 2003 and signed the electric contract July 11, 2003.

### Conclusions of Law

Based upon the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

1. The NOV/CDO relies on Section 25-8-501(1), C.R.S., and Sections 61.3(2)(a) and (e). Section 25-8-501(1) provides:

(1) 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 ....

2. The definition of "pollutant" at Section 25-8-103(15) includes "dredged spoil, dirt, slurry, ... rock, sand, or any industrial ... waste." The dirt and sediment from the Respondent's activity in July 2003 that went into the Town of Meeker's storm drains was a "pollutant."

3. The "division" is the Division of Administration of the Department of Public Health and Environment. Section 25-8-103(4), C.R.S.

4. At the outset of the hearing the ALJ sustained the Respondent's objection to the opening statement by the Division that it would also be relying on the "phase 2" authority at Section 61.3(2)(f). The NOV/CDO does not cite the "phase 2" authority, only the phase 1 regulations at Section 61.3(2)(e) are mentioned. Section 24-4-105(2) requires that a person entitled to a hearing receive notice of the legal authority and jurisdiction under which it is to be held. An administrative agency may only consider

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matters included in the notice upon which the hearing is based. *Spedding v. Motor Vehicle Dealer Board*, 931 P.2d 480 (Colo.App. 1996).<sup>2</sup>

5. The Division has the burden of proof in this matter to prove the allegations of the NOV/CDO. Section 25-8-401(3), C.R.S. The Division's burden is that of a preponderance of the evidence. Section 24-4-105(7), C.R.S.

6. Because there is insufficient evidence that the dirt and sediment that flowed down the storm drains ever made it the one-mile trip to the White River, there is insufficient evidence that the Respondent discharged "any pollutant into any state water." There is therefore insufficient evidence that Respondent violated the provisions of Section 25-8-501(1). The definition of "state waters" at Section 25-8-103(19) excludes water in "sewage systems." The storm water drains appear to be a type of "sewage system." In any case, there was no evidence in this case that anything other than the White River was "state waters."

7. In its December 5, 2008 Post-Hearing Brief, the Division appears to anticipate this problem. The Division argues that the mere discharge of pollutants into the storm drains is enough to require a permit. The Division argues that it should not have to wait for the pollution to make it to state waters. While this may be good public policy, this argument is not supported by the authority relied upon in the NOV/CDO.

8. The only rules cited in the NOV/CDO are Sections 61.3(2)(a) and (e).<sup>3</sup> The Commission, defined at Section 25-8-202, C.R.S., has the authority to issue rules and regulations governing hearings before the Division.<sup>4</sup> Section 25-8-401(2), C.R.S.

9. Sections 61.3(2)(a) and (e) provide in pertinent part:

---

<sup>2</sup> Even if the Division had been permitted to proceed relying on the "phase 2" authority at Section 61.3(2)(f) the outcome of this case likely would be the same. The "phase 2" regulations also rely on a "discharge" into state waters. See below for the significance of this word.

<sup>3</sup> The Colorado Secretary of State is required to publish an electronic version of agency regulations. Section 24-4-103(11)(b), C.R.S. Such electronic version can be found at <http://www.sos.state.co.us/CCR/Welcome.do>. The electronic version of the Commission's rules at 61.3(2)(a) and (e) contain a notation indicating that the regulations were effective November 30, 2006. At hearing the ALJ questioned the Division's counsel regarding whether the current version was in effect at the time of the events at issue and counsel indicated that it was. Since that time, the Division has submitted a Petitioner's Submittal of Amendments to Water Quality Control Commission Regulations 5 CCR 1002 61.3 and 61.4 Since 2003. That submission shows that the rules at issue in this case, despite the "eff. 11/30/06" notation in the Secretary of State's electronic version, are the same now as they were in 2003 and 2004.

<sup>4</sup> This case was styled by the parties as being before the "Water Quality Control Division." However, no such "division" is identified by the C.R.S. as part of the State Department of Public Health and Environment. Section 25-1-102(2), C.R.S. identifies the Division of Administration as the only division in the State Department. Section 24-1-119(5)(c) identifies a second division, the Prevention Services Division. In any case, it is the Division of Administration that has the authority to enforce water quality control. Section 25-8-601, C.R.S., *et seq.* The parties have not raised the issue of the naming of the petitioner in this matter and the ALJ regards it as not significant. The caption of the NOV/CDO demonstrates that the authority relied upon is that of the Department of Public Health and Environment and the Division of Administration.

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(a) [D]ischarges of stormwater ... are point sources requiring a permit.

...

(e) Stormwater Discharges for Which a Permit is Required - Phase I: The following discharges composed entirely of stormwater are required to obtain a permit.

...

(ii) A stormwater discharge associated with industrial activity.

...

(iii) The following categories of facilities are considered to be engaging in "industrial activity" for purposes of this subsection:

...

(J) Construction activity, including clearing, grading and excavation, that results in the disturbance of five or more acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale, if the larger common plan will ultimately disturb five acres or more;

10. As set forth in the Findings of Fact, Respondent's work on July 21 and 22, 2003 constituted "construction activity" and "industrial activity" as defined in Section 61.3 (2)(e)(iii) and subsection (J).

11. "Discharge" is defined at Section 61.2(22) as "the discharge of pollutants as defined in section 25-8-103(3) C.R.S. ...."

12. Section 25-8-103(3) defines "discharge of pollutants" as "the introduction or addition of a pollutant *into state waters*." Emphasis added. As stated, there was insufficient evidence that the pollutants from Respondent's activities actually made it into state waters.

13. The significance of this insufficiency is consistent with relevant federal authority regarding discharge of pollutants. In *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10<sup>th</sup> Cir. 2005) the court held that the granting of summary judgment was improper where there were disputed facts whether pollutants actually traveled down a mineshaft, out a tunnel, and into Cripple Creek.

14. In support of its position that the mere discharge into a storm drain is sufficient to require a permit, the Division sets out in its Post-Hearing Brief a "Statement of Basis and Purpose" ("Statement") made in connection with revisions to rules at 2

## Exhibit B

CCR 1002-65 in May 2008. That Statement, as shown on the Secretary of State's web site described in footnote 3, reads, with italics added:

The Commission affirms that the intent of Regulation 65 [2 CCR 1002-65] is to allow the Division to make a finding of violation where a discharge enters a storm sewer inlet or pipe based on the premise that such discharge will reach state waters, either directly or as a result of a subsequent storm or other unrelated flow event. *The Commission finds that this authority is necessary above and beyond that provided to the Division under the Colorado Discharge Permit System Regulations, which would otherwise require the Division to demonstrate that the discharge reached state waters.* The Commission does not intend that this action will alter the interpretation of the term "state waters." The Commission finds that it is appropriate to apply a more proactive regulatory approach due to the risk that such discharges could pose to the beneficial uses of state waters. In addition, the Commission finds that it is not appropriate to require the Division to expend what could be significant resources to monitor the outlet for potentially long periods before a subsequent storm or other flow event flushed the pollutants in the discharge into state waters. The Commission also states that this regulation does not authorize any storm water discharge that is otherwise required to obtain a permit pursuant to Regulation No. 61.

15. The italicized portion is significant. The "Colorado Discharge Permit System Regulations" or "Regulation No. 61" are the rules at 5 CCR 1002-61. These rules are titled "Colorado Discharge Permit System." *These* are the rules that the Respondent was charged with, not the rules at 5 CCR 1002-65 that make a prosecution easier. That the Commission believes 5 CCR 1002-65 is needed to avoid proving an actual discharge into state waters, in fact, supports the ALJ's conclusion that such a discharge must be proven in this case.

### INITIAL DECISION

It is the Initial Decision of the ALJ that there is insufficient evidence that the dirt and sediment from Respondent's industrial activities polluted state waters. No permit for his activities was therefore required by the authority relied upon in the NOV/CDO. The Respondent is not in violation of the requirements of Section 25-8-501(1), C.R.S. and Section 61.3(2)(a) and (e).

In accordance with Section 24-4-105(14)(a), C.R.S. this Initial Decision is sent

Exhibit B

only to the Division for service on the parties.

**DONE AND SIGNED**

January 12, 2009

  
MATTHEW E. NORWOOD  
Administrative Law Judge

Exhibits admitted:

For the Division: Exhibits 1-32. A second set of exhibits also marked 1-5 were admitted. These exhibits appear in the Division's exhibit notebook in front of exhibits 1-32.

For the Respondent: none.

Exhibit C

**STORMWATER PENALTY COMPUTATION WORKSHEET**

<b>System Name:</b> John Giancanelli "Sanderson Hills Subdivision"	<b>Permit Number:</b> No Permit
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<b>Beneficial Use Classification:</b> White River Segment 9a – Aq Life 2, Recreation N, <u>Water</u> <u>Supply</u> , Agriculture	<b>Date of NOV/CDO:</b> 1/28/04 <b>Number:</b> SO-030128-1
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<b>Type of Facility:</b> Construction	<b>Disturbed Acres (planned):</b> 6.1 Acres
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**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>	Minor/Moderate: +20% of \$200	\$240.00
	<i>Adjustment Justification:</i> The Town of Meeker visited the site and identified that Mr. Giancanelli’s project was not covered under a stormwater permit. Additionally, the Town identified a failure to develop and implement a functional stormwater management system at the site, and the potential for severe erosion and sediment transport to the storm sewer system - which discharges directly to the White River located approximately one mile away. During multiple days in March of 2004, dirt and sediment from the project was observed running into the storm sewer system during heavy spring runoff events, which are common for this area. As determined by EPA in their 2000 National Water Quality Inventory Report, sediment is one of the leading causes of water quality impairment in the United States. Therefore, the Division conservatively assigns a minor/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>		\$0.00
	<i>Adjustment Justification:</i>		
Line 5	<b>Failure to Perform Inspections of Stormwater Management System</b>		\$0.00
	<i>Adjustment Justification:</i>		

## Exhibit C

	Violation Type	Adjustment	Amount in Dollars
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>	<b><i>(Not to exceed \$6000.00)</i></b>	<b>\$240.00</b>

### B. Fault Component

		Amount in Dollars
<b>Line 11</b>	<b>Fault: Category 2 &amp; Category 3</b>	<b><i>(Not to exceed \$3000.00)</i></b>
		<b>\$300.00 \$500.00</b>
	<p><i>Justification:</i> Mr. Giancanelli is an experienced construction site operator who should have been aware of the stormwater permit regulations (which had been in place since 1992) and, as such, should have been aware of his obligation to obtain a stormwater permit prior to commencing construction activities on or before July 21, 2003. On July 22, 2003, the Division called Mr. Giancanelli and advised him of his obligation to obtain a permit. On July 23, 2003, the Division sent Mr. Giancanelli a compliance advisory informing Mr. Giancanelli of his obligation to obtain a permit. On January 28, 2004, the Division issued a NOV/CDO to Mr. Giancanelli outlining the violations and ordering Mr. Giancanelli to obtain a permit. Mr. Giancanelli did not obtain a permit until May 13, 2004, nearly four months after issuance of NOV/CDO. From at least July 22, 2003 on, the Division believes Mr. Giancanelli was fully aware of the circumstances which led to the violation(s) and failed to take the necessary steps to comply.</p> <p>Therefore, a Category 2 Fault value is assigned for the violations that occurred on July 21, 2003, and a category 3-Fault value is assigned for the violations that occurred between July 22, 2003 and May 13, 2004. In each case, the Division has chosen the midpoint of the category range, as the Division has no additional information to support adjustments from this value.</p>	

### C. History Component

		Amount in Dollars
<b>Line 12</b>	<b>History: N/A</b>	<b><i>(Not to exceed \$1000.00)</i></b>
	<i>Justification:</i> Mr. Giancanelli has no prior violation history.	

Exhibit C

**Part II – Determination of Days of Violation**

			Days of Violation
<b>Line 13</b>	<b>Total Days of Violation</b>		<b>297</b>
	<p><i>Justification:</i></p> <p><b>Conducting Covered Activity Without A Stormwater Permit:</b> On or before July 21, 2003, Mr. Giancanelli commenced construction activities at the project with a plan to disturb 6.1 acres of land. On May 13, 2004, the Division received a permit application for the project from Mr. Giancanelli. Therefore, Mr. Giancanelli conducted a covered activity without a stormwater permit for at least 297 days – the period from July 21, 2003 through May 12, 2004.</p>		

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

			Amount in Dollars																												
<b>Line 14</b>	<b>Multi-Day Penalty Amount</b>		<b>\$48,788.00</b>																												
	<p><i>Calculations:</i></p> <p><i>(Note: 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.)</i></p> <p>Base Penalty = (Potential Damage + Fault + History) × days of violation</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding-left: 20px;">Day 1</td> <td style="padding-left: 20px;">(\$240.00 + \$300.00 + \$0.00) × 1 day</td> <td style="padding-left: 20px;">=</td> <td style="padding-left: 20px;">\$ 540.00</td> </tr> <tr> <td style="padding-left: 20px;">+ Days 2-10</td> <td style="padding-left: 20px;">(\$240.00 + \$500.00 + \$0.00) × 9 days × 50%</td> <td style="padding-left: 20px;">=</td> <td style="padding-left: 20px;">\$ 3,330.00</td> </tr> <tr> <td style="padding-left: 20px;">+ Days 11-50</td> <td style="padding-left: 20px;">(\$240.00 + \$500.00 + \$0.00) × 40 days × 40%</td> <td style="padding-left: 20px;">=</td> <td style="padding-left: 20px;">\$11,840.00</td> </tr> <tr> <td style="padding-left: 20px;">+ Days 51-100</td> <td style="padding-left: 20px;">(\$240.00 + \$500.00 + \$0.00) × 50 days × 30%</td> <td style="padding-left: 20px;">=</td> <td style="padding-left: 20px;">\$11,100.00</td> </tr> <tr> <td style="padding-left: 20px;">+ Days 101-200</td> <td style="padding-left: 20px;">(\$240.00 + \$500.00 + \$0.00) × 100 days × 20%</td> <td style="padding-left: 20px;">=</td> <td style="padding-left: 20px;">\$14,800.00</td> </tr> <tr> <td style="padding-left: 20px;">+ Days 201-297</td> <td style="padding-left: 20px;">(\$240.00 + \$500.00 + \$0.00) × 97 days × 10%</td> <td style="padding-left: 20px;">=</td> <td style="padding-left: 20px;">\$ 7,178.00</td> </tr> <tr> <td></td> <td style="padding-left: 40px;">Multi-Day Base Gravity Penalty</td> <td style="padding-left: 20px;">=</td> <td style="padding-left: 20px;">\$48,788.00</td> </tr> </table>			Day 1	(\$240.00 + \$300.00 + \$0.00) × 1 day	=	\$ 540.00	+ Days 2-10	(\$240.00 + \$500.00 + \$0.00) × 9 days × 50%	=	\$ 3,330.00	+ Days 11-50	(\$240.00 + \$500.00 + \$0.00) × 40 days × 40%	=	\$11,840.00	+ Days 51-100	(\$240.00 + \$500.00 + \$0.00) × 50 days × 30%	=	\$11,100.00	+ Days 101-200	(\$240.00 + \$500.00 + \$0.00) × 100 days × 20%	=	\$14,800.00	+ Days 201-297	(\$240.00 + \$500.00 + \$0.00) × 97 days × 10%	=	\$ 7,178.00		Multi-Day Base Gravity Penalty	=	\$48,788.00
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	Multi-Day Base Gravity Penalty	=	\$48,788.00																												

**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 Line14 )</b>		<b>\$48,788.00</b>

Exhibit C

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

	<b>Aggravating / Mitigating Factors</b>	<b>% Base Penalty Increase or Decrease</b>	<b>Amount in Dollars</b>
Line 16	Factor A: Voluntary and Complete Disclosure of Violations	0%	\$0.00
	<i>Justification:</i> The Division was notified of the violations through a site visit and telephone call from the Town of Meeker. Mr. Giancanelli did not disclose the violations. Therefore, no penalty mitigation was applied.		
Line 17	Factor B: Full and Prompt Cooperation	0%	\$0.00
	<i>Justification:</i> Mr. Giancanelli did not apply for a stormwater permit, as required by the NOV/CDO, until 3.5 months after the date required by the order. Mr. Giancanelli only complied with one of the NOV/CDO imposed compliance requirements on time and failed to submit a certification that the NOV/CDO-required Stormwater Management Plan had been revised and implemented on site. As such, Mr. Giancanelli failed to fully and promptly cooperate with the Division to resolve all issues surrounding his non-compliance. Therefore, no penalty mitigation was applied.		
Line 18	Factor C: Environmental Compliance Program	0%	\$0.00
	<i>Justification:</i> The Division did not receive or identify any information suggesting that Mr. Giancanelli implemented a regularized and comprehensive environmental compliance/audit program. Therefore, no penalty mitigation was applied.		
Line 19	Factor D: Intentional, Reckless or Negligent Violations	0%	\$0.00
	<i>Justification:</i> As an experienced construction site operator, Mr. Giancanelli should have been aware of the stormwater regulations that went into effect in 1992. At the very least, the Division believes Mr. Giancanelli’s violations involved negligence. However, the Division has conservatively chosen not to apply a penalty aggravation in this case.		
Line 20	Factor E: Other Aggravating or Mitigating Circumstances	0%	\$0.00
	<i>Justification:</i> Mr. Giancanelli failed to obtain permit coverage for his construction project and failed to implement a functional stormwater management system during the time period he 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.		
Line 21	Sum of Lines 16 through Line 19		\$0.00
<b>Line 22</b>	<b>Adjusted Base Penalty (Sum of Line 15 + Line 21)</b>		<b>\$48,788.00</b>

Exhibit C

**Part VI– Economic Benefit Consideration**

		Amount in Dollars
<b>Line 23</b>	<b>Economic Benefit</b>	<b>\$7,424.00</b>
	<p><i>Justification:</i></p> <p>Mr. Giancanelli avoided the cost of obtaining a stormwater permit for the project from at least July 21, 2003 through May 12, 2004. The yearly fee for a construction stormwater permit at the time was \$449. Therefore, Mr. Giancanelli realized an economic benefit of <b>\$374.00</b> from the avoided cost of not obtaining a stormwater permit for 10 months.</p> <p>Mr. Giancanelli delayed the cost of developing a SWMP for the project. However, the time value of money for the time period in question was determined to be insignificant. Therefore, the Division has conservatively determined the economic benefit of this delayed cost to be <b>\$0.00</b></p> <p>Mr. Giancanelli avoided the cost of implementing and maintaining BMPs at the project. The Division conservatively estimates the cost of implementing a typical construction BMP to be \$1000 and the cost of maintaining a BMP throughout its use to be \$500. The Division believes Mr. Giancanelli should have implemented at least one stabilization practice and one structural control for each section of Mimi Circle and Michael Circle at the project. As such, Mr. Giancanelli avoided the costs of both implementing and maintaining at least 4 BMPs. <math>(\\$1000 + \\$500) \times 4 = \\$6,000.00</math>. Therefore, the Division has conservatively determined that Mr. Giancanelli realized an economic benefit of <b>\$6,000.00</b> from the avoided costs of not implementing and/or maintaining BMPs at the Project.</p> <p>Mr. Giancanelli avoided the cost of inspecting a stormwater management system at least every 14 days and after every precipitation event that caused surface erosion (as required by the permit). Mr. Giancanelli should have performed at least 21 routine 14-day inspections of the project during the time period that he operated without a permit. The Division estimates that it would take 1 man-hour to thoroughly inspect a project of this size. <math>1 \text{ man-hour} \times \\$25/\text{hour} \times 21 \text{ inspections} = \\$525</math>. Additionally, the Division estimates the cost of management review and implementation of corrective actions to be \$25 for each inspection event. <math>\\$25 \times 21 \text{ inspections} = \\$525</math>. Therefore, the Division has conservatively determined that Mr. Giancanelli realized an economic benefit of <b>\$1,050.00</b> from the avoided cost of not inspecting the stormwater management system for 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>\$56,212.00</b>

Exhibit C

**Part VIII – Ability to Pay Adjustment**

			<b>Amount in Dollars</b>
<b>Line 25</b>	<b>Ability to Pay Reduction:</b>		<i>\$0.00</i>
	<i>Justification:</i> Mr. Giancanelli has not provided any financial information or made any claims of an inability to pay a penalty. Therefore, an ability to pay assessment could not be conducted and was not included in this penalty calculation.		

**Part IX – Final Adjusted Penalty**

			<b>Amount in Dollars</b>
<b>Line 26</b>	<b>Total Civil Penalty: (Sum Line 23 + Line 24)</b>		<b>\$56,212.00</b>