



MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

FROM: Joyce Wittenberg, Board Secretary
Board of Environmental Review
P.O. Box 200901
Helena, MT 59620-0901

DATE: December 9, 2008

SUBJECT: Board of Environmental Review case, Case No. BER 2008-24 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE MONTANA WATER
QUALITY ACT BY JIM GILMAN
EXCAVATING, INC. AT AUGUSTA-SOUTH,
LEWIS AND CLARK COUNTY, MONTANA
[FID #1632, DOCKET NO. WQ-08-06]

Case No. BER 2008-24 WQ

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #1632, Docket No. WQ-08-06).

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

James Madden
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

John Arrigo, Administrator
Enforcement Division
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

BER 2008-24 WQ

FILED this 8th day of
December AD 2008
at 3:06 o'Clock P.M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: M. Gilman

KAKUK LAW OFFICES, P.C.
P.O. BOX 624
WHITE SULPHUR SPRINGS, MT 59645

MICHAEL S. KAKUK, ATTY.
LICENSED IN MONTANA,
WISCONSIN (INACTIVE),
AND U.S. PATENT BAR

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DECEMBER 5, 2008

BOARD SECRETARY
BOARD OF ENVIRONMENTAL REVIEW
P.O. BOX 20091
HELENA, MT 59620-0901

SENT VIA: USPS

RE: NOTICE OF VIOLATION (DOCKET NO. WQ-08-06)

Board Secretary:

Please be advised that Gilman Excavating, Inc. requests a hearing before the Board regarding the above-referenced matter.

Please feel free to contact me with any questions.

Sincerely,

Michael S. Kakuk
Attorney

CC: Client
Client File
Rich Jost, DEQ

1 BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
2 OF THE STATE OF MONTANA

3 IN THE MATTER OF:
4 VIOLATIONS OF THE MONTANA WATER
5 QUALITY ACT BY JIM GILMAN
6 EXCAVATING, INC. AT AUGUSTA-SOUTH,
7 LEWIS AND CLARK COUNTY, MONTANA.
(FID #1632)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE
AND PENALTY ORDER

Docket No. WQ-08-06

8 **I. NOTICE OF VIOLATION**

9 Pursuant to the authority of Section 75-5-611, Montana Code Annotated (MCA), the
10 Department of Environmental Quality (Department) hereby gives notice to Jim Gilman
11 Excavating, Inc. (Gilman Excavating) of the following Findings of Fact and Conclusions of Law
12 with respect to violations of the Montana Water Quality Act (WQA) (Title 75, chapter 5, part 6,
13 MCA) and the Administrative Rules of Montana (ARM) (Title 17, chapter 30, sub-chapters 1
through 20) adopted thereunder.

14 **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

15 The Department hereby makes the following Findings of Facts and Conclusions of Law:

16 1. The Department is an agency of the executive branch of government of the State
17 of Montana, created and existing under the authority of Section 2-15-3501, MCA. The
18 Department administers the WQA.

19 2. Gilman Excavating is a private corporation registered with the State of Montana,
20 and is, therefore, a "person" as defined in Section 75-5-103(23), MCA.

21 3. Section 75-5-103(19), MCA, defines "other wastes" as garbage, municipal refuse,
22 decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night soil, oil, grease, tar, heat,
23 chemicals, dead animals, sediment, wrecked or discarded equipment, radioactive materials, solid
24 waste, and all other substances that may pollute state waters.

1 4. Section 75-5-103(29)(a), MCA, defines “state waters” as a body of water,
2 irrigation system, or drainage system, either surface or underground.

3 5. ARM 17.30.1105(1)(a) provides that any person who discharges or proposes to
4 discharge storm water from a point source must obtain coverage under a Montana Pollutant
5 Discharge Elimination System (MPDES) general permit or an MPDES permit for discharges
6 associated with construction activities. A person who discharges or proposes to discharge storm
7 water associated with construction activity shall submit to the Department a notice of intent
8 (NOI) pursuant to Section 75-5-401(1)(c), MCA, and ARM 7.30.1115.

9 6. Section 75-5-605(1)(b), MCA, states that it is unlawful for any person to violate
10 any provision set forth in a permit or stipulation, including but not limited to limitations and
11 conditions contained in the permit. ARM 17.30.1342(1) requires, in part, that a permittee shall
12 comply with all conditions of a permit.

13 7. Gilman Excavating was contracted by the Montana Department of Transportation
14 (MDT) to reconstruct 6.8 miles of Highway 287 from reference post (RP) 31.7 to RP 38.6, south
15 of Augusta, Lewis and Clark County, Montana (Site). The project involved replacing the
16 existing roadway and bridges, and included grading, gravel surfacing, plant mix surfacing,
17 guardrail replacement, drainage installation, seeding and fencing. The total area of the Site
18 comprises 170 acres of land and the area of the Site to be disturbed by construction activities was
19 estimated at 153 acres.

20 8. On March 19, 2008, Gilman Excavating submitted an NOI to be covered under
21 the MPDES general permit. The NOI listed Elk Creek, Dry Creek and an unnamed perennial
22 drainage to Elk Creek as receiving surface waters. Elk Creek, Dry Creek and the unnamed
23 perennial drainage to Elk Creek are considered state waters pursuant to Section 75-5-103(29)(a),
24 MCA.

1 9. On March 26, 2008, the Department issued Authorization Number MTR102925
2 to Gilman Excavating to discharge storm water under the General Permit for Storm Water
3 Discharge Associated with Construction Activity (Permit).

4 10. On April 4, 2008, the Department issued Gilman Excavating a Short-Term Water
5 Quality Standard for Turbidity Permit, Permit No. MTB011008 (318 Authorization).

6 11. In May of 2008, a representative of Montana Fish, Wildlife and Parks (FWP)
7 conducted an inspection at the Site and documented that the existing Best Management Practices
8 (BMPs) were failing and inadequate, and the soils surrounding state water were eroding and
9 washing into drainages and wetlands.

10 12. On May 22 and 23, 2008, a representative of MDT conducted a site inspection
11 and documented that a number of BMPs had been removed without being replaced, and that a
12 few of the removed BMPs had been replaced incorrectly. MDT also documented that BMPs had
13 not been installed in at least one of the necessary areas and that BMPs in surrounding drainages
14 were inadequate.

15 13. On June 5, 2008, Chris Romankiewicz (Romankiewicz) of the Department's
16 Water Protection Bureau conducted both Permit and 318 Authorization compliance inspections
17 (Inspections) at the Site and documented that the existing BMPs were inadequate and improperly
18 maintained. Romankiewicz also documented a failure to install BMPs at necessary locations
19 throughout the Site. The failure to properly install and/or maintain adequate BMPs throughout
20 the Site resulted in a discharge of significant sediment to Elk Creek, Dry Creek and an unnamed
21 perennial discharge to Elk Creek.

22 14. On June 9, 2008, Romankiewicz contacted George Friez (Friez) of Gilman
23 Excavating to discuss the Inspections. Frieze stated that the Site recorded $5\frac{3}{4}$ inches of rain for
24 the week of May 20, 2008, and due to the amount of recent precipitation, the Site was difficult to

1 manage. Frieze also stated that the BMPs would be reinstalled when the waters subsided.
2 Subsequent to his conversation with Frieze, Romankiewicz noted that the National Oceanic and
3 Atmospheric Administration (NOAA) reported an accumulation of 2.89 inches of precipitation in
4 Augusta, Montana, during the period of May 21 through 27, 2008.

5 15. On June 9, 2008, Gilman Excavating sent the Department a letter (June 9 Letter)
6 stating that due to the amount of precipitation the Site and surrounding area received, Gilman
7 Excavation feels there were no available BMPs that could have withstood the flooding that
8 occurred. The June 9 Letter also stated that Gilman Excavating would repair existing BMPs and
9 install additional BMPs at the Site as the water subsided.

10 16. On July 2, 2008, the Department sent Gilman Excavating a Violation Letter
11 alleging that it was in violation of Part III, Section A and Part IV, Sections G, H, I and J of the
12 Permit and Sections 4 and 5 of the 318 Authorization, and thus was in violation of Section 75-5-
13 605(1)(b), MCA. The Violation Letter stated that during the period of May 23 through 27, 2008,
14 existing BMPs at the Site failed, resulting in the discharge of significant sediment to Elk Creek,
15 Dry Creek and an unnamed perennial drainage to Elk Creek. The Violation Letter informed
16 Gilman Excavating that the following actions were necessary to return to compliance: evaluate
17 the effectiveness of existing BMPs; incorporate improvements to prevent the discharge of
18 significant sediment to state waters; cleanup the significant sediment that was discharged into
19 state surface waters; and document the cleanup action in accordance with the Permit and 318
20 Authorization.

21 17. On July 24, 2008, Gilman Excavating sent the Department a letter of response
22 (Response Letter) to the Violation Letter. The Response Letter stated that some BMP failure
23 occurred due to extreme flooding, but that the BMPs significantly reduced the amount of
24 sediment that was discharged into state surface waters. The Response Letter also stated that the

1 Site was monitored during the storm event, but it was determined that any attempts to modify or
2 install additional BMPs would have created additional erosion and would have been a safety
3 hazard. The Response Letter further stated that the flooding made it difficult to determine the
4 quantity of sediment in state surface waters that originated from the Site.

5 18. On August 15, 2008, the Department sent Gilman Excavating a letter and
6 corresponding photographs (August 15 Letter) describing locations where sediment needed to be
7 removed from state surface waters.

8 **Violation #1 – Failure to install and maintain adequate BMPs.**

9 19. Pursuant to Parts II.E. and III.A.1. of the Permit, the permittee must implement
10 and maintain all BMPs and storm water management controls to minimize potential pollutants in
11 storm water discharges, as identified in the Storm Water Pollution Prevention Plan (SWPPP)
12 associated with the Permit. Section 4 of the 318 Authorization states “All disturbed areas on the
13 streambank and adjacent areas created by the construction activity shall be protected with
14 temporary erosion control during construction activities.”

15 20. In May of 2008, FWP documented that existing BMPs at the Site were failing and
16 that eroding soils were washing into drainages and wetlands. On May 22 and 23, 2008, MDT
17 documented that BMPs were inadequate to minimize or eliminate discharges of sediment into
18 state waters and that a number of BMPs at the Site had been removed without being replaced.
19 On June 5, 2008, the Department documented that BMPs were not properly installed and/or
20 maintained at the Site, resulting in the discharge of significant sediment to Elk Creek, Dry Creek
21 and an unnamed perennial discharge to Elk Creek.

22 21. By failing to install and maintain adequate BMPs, Gilman Excavating violated
23 Parts II.E. and III.A.1. of the Permit and Section 4 of the 318 Authorization, and therefore
24 violated Section 75-5-605(1)(b), MCA, and ARM 17.30.1342(1).

1 **Violation #2 – Unapproved discharge of significant sediment to state waters.**

2 22. Part II.B. of the Permit states “Any discharge to state surface waters must be
3 composed entirely of storm water. Discharges must consist of water generated only through
4 rainfall precipitation and snowmelt.” Part IV.H. of the permit states that BMPs must minimize
5 or prevent “significant sediment” from leaving the construction site. “Significant sediment” is
6 defined in Part VI.15. as sediment, solids, or other wastes discharged from construction site, or a
7 facility or activity regulated under the General Permit which exceeds 1.0 cubic foot in volume in
8 any area of 100 square feet that may enter state surface water or a drainage that leads directly to
9 state surface water. Part IV.J. states that if “significant sediment” results from the failure of
10 erosion or sediment control measures, the material should be cleaned up and placed back on site,
11 disposed of in an acceptable manner which minimizes any impact to state surface waters.
12 Section 5 of the 318 Authorization states that any excess material generated from this project
13 must be disposed of above the ordinary high water mark, not classified as a wetland, and in a
14 position not to cause pollution to state waters.

15 23. On June 5, 2008, the Department documented that BMPs were not properly
16 installed and/or maintained at the Site, resulting in the discharge of significant sediment to Elk
17 Creek, Dry Creek and an unnamed perennial discharge to Elk Creek.

18 24. By failing to prevent the discharge of significant sediment to Elk Creek, Dry
19 Creek and an unnamed perennial discharge to Elk Creek, Gilman Excavating violated Parts II.B.
20 and IV.H. of the Permit and Section 5 of the 318 Authorization, and therefore violated Section
21 75-5-605(1)(b), MCA, and ARM 17.30.1342(1).

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23 //
24 //

1 ***Administrative penalty***

2 25. Pursuant to Section 75-5-611, MCA, the Department may assess an administrative
3 penalty not to exceed \$10,000 for each day of each violation; however, the maximum penalty
4 may not exceed \$100,000 for any related series of violations.

5 26. The Department has calculated an administrative penalty in the amount of
6 \$41,434 for the violations alleged in Paragraphs 21 and 24 above. *See* Section 75-1-1001, MCA,
7 and ARM 17.4.301 through 17.4.308. The enclosed Penalty Calculation Worksheet is
8 incorporated by reference herein.

9 **III. ADMINISTRATIVE ORDER**

10 This Notice of Violation and Administrative Compliance and Penalty Order (Order) is
11 issued to Gilman Excavating pursuant to the authority vested in the State of Montana, acting by
12 and through the Department under the WQA and administrative rules adopted thereunder. Based
13 on the foregoing Findings of Fact and Conclusions of Law and the authority cited above, the
14 Department hereby ORDERS Gilman Excavating to take the following actions to comply with
15 the WQA within the timeframes specified in this Order:

16 27. Within 60 days from receipt of this Order, Gilman Excavating shall install,
17 replace and/or repair all BMPs necessary to prevent the discharge of significant sediment and
18 other pollutants to state waters, as required by the Permit.

19 28. Within 60 days from receipt of this Order, Gilman Excavating shall properly
20 remove and dispose of the significant sediment that was discharged to state waters at the
21 locations described in the August 15 Letter. Sediment removal and disposal shall be performed
22 in accordance with the Permit to minimize any impact to state surface waters.

23 29. Within 90 days from receipt of this Order, Gilman Excavating shall submit a
24 written report describing the actions taken to install, replace and/or repair BMPs at the Site and

1 to remove and dispose of the significant sediment that was discharged to state waters. The report
2 shall include photographic documentation of the sediment cleanup.

3 30. Gilman Excavating is hereby assessed an administrative penalty in the amount of
4 \$41,434 for the violations described in this Order.

5 31. Within 60 days from receipt of this Order, Gilman Excavating shall pay to the
6 Department the \$41,434 administrative penalty to resolve the violations cited herein. The
7 penalty must be paid by check or money order, made payable to the "Montana Department of
8 Environmental Quality," and sent to the address in Paragraph 32.

9 32. Inspection reports and penalty payments shall be sent to:

10 John L. Arrigo, Administrator
11 Enforcement Division
12 Department of Environmental Quality
13 1520 East Sixth Avenue
14 P.O. Box 200901
15 Helena, MT 59620-0901

16 33. Failure to take the required corrective actions and pay the assessed penalty by the
17 specified deadlines, as ordered herein, constitutes a violation of Title 75, chapter 5, part 6, MCA,
18 and may result in the Department seeking a court order assessing civil penalties of up to \$25,000
19 per day of violation pursuant to Section 75-5-631, MCA.

20 34. None of the requirements in this Order are intended to relieve Gilman Excavating
21 from complying with all applicable state, federal, and local statutes, rules, ordinances, orders, and
22 permit conditions.

23 35. The Department may take any additional enforcement action against Gilman
24 Excavating, including the right to seek injunctive relief, civil penalties, and other available relief
for any violation of, or failure or refusal to comply with, this Order.

1 36. This Order becomes effective upon signature of the Director of the Department or
2 his designee.

3 **IV. NOTICE OF APPEAL RIGHTS**

4 37. Gilman Excavating may appeal this Order under Section 75-5-611(4), MCA, by
5 filing a written request for a hearing before the Montana Board of Environmental Review no
6 later than 30 days after service of this Order. Any request for a hearing must be in writing and
7 sent to:

8 Board Secretary
9 Board of Environmental Review
10 P.O. Box 200901
11 Helena, MT 59620-0901

12 38. Hearings are conducted as provided in the Montana Administrative Procedure
13 Act, Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to
14 court proceedings, with witnesses being sworn and subject to cross-examination. Proceedings
15 prior to the hearing may include formal discovery procedures, including interrogatories, requests
16 for production of documents, and depositions. Because Gilman Excavating is not an
17 individual, Gilman Excavating must be represented by an attorney in any contested case hearing.
18 See *Weaver v. Law Firm of Graybill, Ostrem, Warner & Crotty*, 246 Mont. 175, 803 P.2d 1089
(1990) and Section 37-61-201, MCA.

19 39. If a hearing is not requested within 30 days after service of this Order, the
20 opportunity for a contested case appeal is waived.

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**Department of Environmental Quality - Enforcement Division
Penalty Calculation Worksheet**

Responsible Party Name:	Jim Gilman Excavating, Inc. (Gilman Excavating)
FID:	1632
Statute:	Water Quality Act
Date:	10/15/2008
Name of Employee Calculating Penalty:	Rich Jost
Maximum Penalty Authority:	\$10,000.00

Violation #1
Description of Violation: Gilman Excavating violated Parts II.E. and III.A.1. of the General Permit and Section 4 of the 318 Authorization by failing to install and maintain adequate BMPs, which resulted in the discharge of significant sediment to state waters. Violating a condition of a permit is a violation of Section 75-5-605(1)(b), Montana Code Annotated (MCA), and Administrative Rules of Montana (ARM) 17.30.1342(1). Pursuant to ARM 17.30.2001(1), a discharge of waste that enters state waters in a quantity not authorized by a permit constitutes a Class I violation.

I. BASE PENALTY

Nature

Explanation: The failure to install and maintain adequate BMPs has the potential to harm the environment by not preventing the erosion and sedimentation of state waters. Therefore, the nature of the violation is one that poses the potential to harm human health or the environment.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation: Pursuant to ARM 17.4.303(5)(b)(ii), the failure to install and maintain adequate BMPs is a violation of moderate gravity because it poses a potential to harm the quality of state waters and it demonstrates a failure to operate in accordance with the General Permit and 318 Authorization.	
Extent Explanation: Pursuant to ARM 17.4.303(4), the extent of the violation is moderate because although Gilman Excavating installed BMPs at the Augusta - South construction site (Site), the BMPs were inadequate and improperly maintained, resulting in a discharge of sediment to state waters in excess of permit limits.	

Harm to Human Health or the Environment

Gravity

Extent	Major	Moderate	Minor	
Major	0.85	0.70	0.55	
Moderate	0.70	0.55	0.40	
Minor	0.55	0.40	0.25	
Gravity and Extent Factor:				0.55

Impact to Administration

Gravity

Major	Moderate	Minor	
.50	.40	.30	
Gravity Factor:			0.00

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$5,500.00**

II. ADJUSTED BASE PENALTY

A. Circumstances (up to 30% added to Base Penalty)

Explanation:		
As a permitted entity, Gilman Excavating should have known of the requirements of the General Permit and 318 Authorization, and should have foreseen that failing to comply with the permits would result in a violation. Further, the Montana Department of Transportation (MDT) performed a Site inspection during a storm event and informed Gilman Excavating of several areas that needed BMPs to achieve compliance with the General Permit, but the required BMPs were not installed. Gilman Excavating was in control of the circumstances that resulted in the violation, but did not take reasonable precautions to prevent the violation. The Department is increasing the base penalty by 20% to reflect a moderate degree of culpability in circumstances that resulted in the violation.		
	Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)		\$1,100.00

B. Good Faith and Cooperation (up to 10% subtracted from Base Penalty)

Explanation:		
The purpose of the Storm Water Pollution Prevention Plan (SWPPP) is to minimize sediment discharge to state waters and therefore must reflect current conditions of a construction site. Gilman Excavating was informed by MDT and the Department that BMPs at the Site were inadequate for the conditions. Gilman Excavating reported that failing BMPs wouldn't be replaced and additional BMPs wouldn't be installed until the waters at the Site began to subside. Because Gilman Excavating did not prevent or minimize sediment discharge to state waters by updating its BMPs during the storm event, the Department is not reducing the base penalty for good faith and cooperation.		
	Good Faith & Coop. Percent:	0.00
Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent)		\$0.00

C. Amounts Voluntarily Expended (AVE) (up to 10% subtracted from Base Penalty)

Explanation:		
The Department is not aware of any amounts spent above and beyond what was required by law or rule to mitigate the violation or the impacts of the violation. Therefore, the Department is not decreasing the base penalty for amounts voluntarily expended.		
	AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)		\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$5,500.00
Circumstances	\$1,100.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$6,600.00

III. DAYS OF VIOLATION

Explanation:	
The July 2, 2008 Violation Letter issued by the Department alleges that the BMPs failed during the period of May 23 through 27, 2008. A May 22, 2008 inspection report by MDT and Gilman Excavating's SWPPP Inspection Reports support the Department's allegation. The Department is therefore assessing a penalty for five days of violation.	
	Number of Days: 5

ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$33,000.00

Other Matters as Justice May Require Explanation:	
Not applicable.	
	OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$0.00

IV. ECONOMIC BENEFIT

Explanation:

The Department believes Gilman Excavating realized an economic benefit by delaying the cost of installing and maintaining adequate BMPs. The Department assumes that it would have required two people a minimum of 24 hours to install or repair BMPs at the Site. Assuming labor costs \$15/hour: 24 hours x \$15/hour x 2 people = \$720. The Department also assumes that at least \$1,000 worth of materials would have been necessary to prevent significant sediment discharges at the Site.

The Department uses EPA's BEN Model to calculate the amount of economic benefit that a violator gains as a result of savings from avoided costs associated with a violation. The BEN Model takes into account the effect of inflation and taxes on the amounts saved to calculate the time value of money. In this case, the Department calculated that the failure to install and maintain BMPs resulted in a savings of \$1,720.00 in delayed costs for Gilman Excavating. For the purpose of calculating Gilman Excavating's economic benefit associated with the delayed costs, the Department assumes that adequate BMPs will be in place by December 29, 2008. Using the BEN computer model, the Department has determined that Gilman Excavating gained an economic benefit of \$34.00 as a result of delayed costs associated with installing and maintaining adequate BMPs.

ECONOMIC BENEFIT REALIZED:

\$34.00

Responsible Party Name:	Jim Gilman Excavating, Inc. (Gilman Excavating)
FID:	1632
Statute:	Water Quality Act
Date:	10/15/2008
Maximum Penalty Authority:	\$10,000.00

Violation #2	
Description of Violation:	
Gilman Excavating violated Parts II.B. and IV.H. of the General Permit and Section 5 of the 318 Authorization by discharging significant sediment to state waters. Violating a condition of a permit is a violation of Section 75-5-605(1)(b), MCA, and ARM 17.30.1342(1). Pursuant to ARM 17.30.2001(1), a discharge of waste that enters state waters in a quantity not authorized by a permit constitutes a Class I violation.	

I. BASE PENALTY

Nature

Explanation:	
The discharge of significant sediment to state waters has the potential to adversely impact the quality of state waters and therefore the nature of the violation is one that poses the potential to harm human health or the environment.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:	
Pursuant to ARM 17.4.303(5)(b)(ii), the discharge of significant sediment to state waters is a violation of moderate gravity because it poses the potential to harm the quality of state waters and it demonstrates a failure to operate in accordance with the General Permit and 318 Authorization.	
Extent Explanation:	
Pursuant to ARM 17.4.303(4), the extent of the violation is major because the primary purpose of the General Permit and SWPPP is to prevent erosion and minimize the discharge of sediment to state waters. The discharge of significant sediment to state waters is a major deviation from the General Permit requirement of minimizing the pollution of state waters.	

**Harm to Human Health or the Environment
Gravity**

Extent	Major	Moderate	Minor	
Major	0.85	0.70	0.55	
Moderate	0.70	0.55	0.40	
Minor	0.55	0.40	0.25	
	Gravity and Extent Factor:			0.70

**Impact to Administration
Gravity**

Gravity	Major	Moderate	Minor	
	.50	.40	.30	
	Gravity Factor:			

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$7,000.00**

II. ADJUSTED BASE PENALTY

A. Circumstances (up to 30% added to Base Penalty)

Explanation:	
As a permitted entity, Gilman Excavating should have known of the requirements of the General Permit and 318 Authorization, and should have foreseen that failing to comply with the permits would result in a violation. Gilman Excavating was in control of the circumstances that resulted in the violation, but did not take reasonable precautions to prevent the violation. The Department is increasing the base penalty by 20% to reflect a moderate degree of culpability in circumstances that resulted in the violation.	
Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$1,400.00

B. Good Faith and Cooperation (up to 10% subtracted from Base Penalty)

Explanation:	
The Department sent a letter to Gilman Excavating a letter on August 15, 2008, describing locations where sediment needed to be removed from state surface waters. As of the date of this Penalty Calculation, the Department is unaware of any actions that Gilman Excavating has performed to remove sediment from the described locations. Therefore, the Department is not reducing the base penalty for good faith and cooperation.	
Good Faith & Coop. Percent:	0.00
Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent)	\$0.00

C. Amounts Voluntarily Expended (AVE) (up to 10% subtracted from Base Penalty)

Explanation:	
The Department is not aware of any money spent above and beyond what was required by law or rule to mitigate the violation or the impacts of the violation. Therefore, the Department is not decreasing the base penalty for amounts voluntarily expended.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$7,000.00
Circumstances	\$1,400.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$8,400.00

III. DAYS OF VIOLATION

Explanation:	
The National Oceanic and Atmospheric Administration (NOAA) reported an accumulation of 2.89 inches of precipitation in Augusta, Montana, during the period of May 21 through 27, 2008. The Department assumes that significant sediment was discharged to state waters on multiple days during the above-stated time period, but for the purposes of this penalty calculation, the Department will assess a penalty for only one day of violation to correspond with the Department's June 5, 2008 compliance inspection in which the violation was documented.	
Number of Days:	1

ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$8,400.00

Other Matters as Justice May Require Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	

IV. ECONOMIC BENEFIT

Explanation:	
The economic benefit that Gilman Excavating gained by discharging significant sediment to state waters was accounted for in Violation 1.	
ECONOMIC BENEFIT REALIZED:	\$0.00

