STATE OF COLORADO

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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

June 9, 2008

Ralph L. Scanga, Jr., President
New Salida Ditch Company
9250 County Road 156
Salida, CO 81201

RE: Compliance Order on Consent, Number: SC-080609-2

Dear Mr. Scanga:

Enclosed for the New Salida Ditch Company's records you will find your copy, with original signatures, of the recently executed Compliance Order on Consent.

Please remember that this agreement is subject to a thirty-day public comment period *(paragraph 30)*. Upon initiation, if the Division receives any comments during this period we will contact your office to discuss. Also, please be advised that the first page of the Order was changed in order to place the assigned Order Number on the final document.

If you have any questions, please don't hesitate to contact Mike Harris at (303) 692-3598 or by electronic mail at michael.harris@state.co.us.

Sincerely,

Scott Klarich, Unit Manager
Enforcement & Clean Water Compliance Assurance Unit
Compliance Assurance and Data Management Section
WATER QUALITY CONTROL DIVISION

cc: Chaffee County Environmental Health Department

ec: Aaron Urdiales, EPA Region VIII
Tim Vrudny, Engineering Section, CDPHE
Kathy Dolan, Permits Section, CDPHE
Dick Parachini, Outreach and Assistance Unit, CDPHE
Garry Beers, Permits Section, CDPHE

Enclosure(s)

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

WATER QUALITY CONTROL DIVISION

COMPLIANCE ORDER ON CONSENT **NUMBER: SC-080609-2**

IN THE MATTER OF: **NEW SALIDA DITCH COMPANY**
CDPS PERMIT NO. COR-030000
CERTIFICATION NO. COR-039781
CHAFFEE COUNTY, COLORADO

The Colorado Department of Public Health and Environment ("Department"), through the Water Quality Control Division ("Division"), issues this Compliance Order on Consent ("Consent Order"), pursuant to the Division's authority under §25-8-605, C.R.S. of the Colorado Water Quality Control Act ("the Act") §§ 25-8-101 to 703, C.R.S., and its implementing regulations, with the express consent of New Salida Ditch Company. The Division and New Salida Ditch Company may be referred to collectively as "the Parties."

STATEMENT OF PURPOSE

1. The mutual objectives of the Parties in entering into this Consent Order are to resolve, without litigation, the Division's findings of violations of Colorado's water quality laws and regulations and the Division's decision to impose civil penalties associated with the alleged violations identified in the Notice of Violation / Cease and Desist Order / Clean-Up Order (Number: SO-060306-1) that the Division issued to New Salida Ditch Company on March 6, 2006.

DIVISION'S FINDINGS OF FACT AND DETERMINATION OF VIOLATIONS

2. Based upon the Division's investigation into and review of the compliance issues identified herein, and in accordance with §25-8-602 and 605 C.R.S., the Division has made the following determinations regarding New Salida Ditch Company and New Salida Ditch Company's compliance with the Act.

3. At all times relevant to the violations cited herein, New Salida Ditch Company was a Colorado company recognized with the Colorado Secretary of State.

4. New Salida Ditch Company is a "person" as defined by §25-8-103(13), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2(73).

5. New Salida Ditch Company owns and manages the New Salida Ditch, an irrigation ditch utilized to divert water from the Arkansas River to neighboring agricultural lands, which is located along the Arkansas River approximately one mile northeast of the intersection of U.S. Highway 285 and State Highway 291, in Chaffee County, Colorado (the "Ditch").

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

7. Pursuant to 5 CCR 1002-61, §61.3(2)(f), stormwater discharges associated with small construction activity are point sources requiring Colorado Discharge Permit System ("CDPS") permit coverage.

8. Pursuant to 5 CCR 1002-61, §61.3(2)(f)(ii)(A), construction activity, including clearing, grading and excavation, that results in land disturbance of equal to or greater than one acre and less than five acres is considered "small industrial activity."

9. In or about April 2005, New Salida Ditch Company initiated land-disturbing construction activities adjacent to the Ditch, which included the disturbance of more than one acre of total land and the placement of disturbed soil and rock ("fill material") directly in and along approximately one thousand five hundred eighty four (1,584) linear feet of the Arkansas River, for the purpose of creating additional land between the Ditch and the Arkansas River's east bank (the "Project").

10. The Arkansas River is "state waters" as defined by §25-8-103(19), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2(101).

11. Soil and rock are "pollutants" as defined by §25-8-103(15) and its implementing permit regulation, 5 CCR 1002-61, §61.2(76).

12. Division records establish that New Salida Ditch Company did not have any permits authorizing the discharges of soil and rock and/or stormwater discharges from the Project.

13. New Salida Ditch Company's failure to obtain CDPS permit coverage for the Project prior to commencing the work constitutes violation(s) of §25-8-501(1) C.R.S., 5CCR 1002-61, §61.3(1)(a), and 5 CCR 1002-61, §61.3(2).

NEW SALIDA DITCH COMPANY'S RECITALS

14. New Salida Ditch Company maintains that its purpose in conducting work at the Project was to maintain the line, grade, capacity and purpose of the Ditch and was not for the purpose of creating additional land between the ditch and the bank of the Arkansas River.

15. New Salida Ditch Company maintains that is work was exempted or excepted from permitting under 5 CCR 1002-61.3(2)(f)(ii)(A).

ORDER AND AGREEMENT

16. Based on the Division's foregoing factual and legal determinations, pursuant to its authority under §25-8-602 and 605 C.R.S., and in satisfaction of the alleged violations and the civil penalties associated with the alleged violations cited herein and in the Notice of Violation / Cease and Desist Order / Clean-up Order (Number: SO-060306-1), the Division orders New Salida Ditch Company to comply with all provisions of this Consent Order, including all requirements set forth below.

17. The Parties agree to the terms and conditions of this Consent Order and that this Consent Order constitutes a notice of alleged violation and an order issued pursuant to § § 25-8-605, C.R.S. and is an enforceable requirement of the Act. The Parties also agree not to challenge directly or collaterally, in any judicial or administrative proceeding brought by the Division or by New Salida Ditch Company against the Division:

    a. The issuance of this Consent Order;
    b. The factual and legal determinations made by the Division herein; and
    c. The Parties' authority to bring, or the court's jurisdiction to hear, any action to enforce the terms of this Consent Order under the Act.

18. Notwithstanding the above, New Salida Ditch Company does not admit to any of the factual or legal determinations made by the Division herein, and any action undertaken by New Salida Ditch Company hereunder shall not constitute evidence of fault by New Salida Ditch Company.

CIVIL PENALTY AND SUPPLEMENTAL ENVIRONMENTAL PROJECTS

19. In addition to all other funds necessary to comply with the requirements of this Consent Order, New Salida Ditch Company shall pay Fifty Three Thousand Four Hundred Fifty Dollars ($53,450.00) in the form of civil penalties and expenditures on a Supplemental Environmental Project ("SEP") in order to achieve settlement of this matter.

20. Based upon the application of the Division's Stormwater Civil Penalty Policy (January 25, 2007), and consistent with Departmental policies for violations of the Act, New Salida Ditch Company shall pay Three Thousand Four Hundred Fifty Dollars ($3,450.00) in civil penalties. The Division intends to petition the Executive Director, or his designee, to impose the Three Thousand Four Hundred Fifty Dollar ($3,450.00) civil penalty for the above violation(s) and New Salida Ditch Company agrees to make the payment within thirty (30) calendar days of the issuance of a Penalty Order by the Executive Director or his designee. Method of payment shall be by certified or cashier's check drawn to the order of the "Colorado Department of Public Health and Environment," and delivered to:

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

21. New Salida Ditch Company shall also perform the SEP identified below, which the Parties agree is intended to secure significant environmental or public health protection and improvements. New Salida Ditch Company's total expenditure for the SEP shall be not less than Fifty Thousand Dollars ($50,000.00).

22. New Salida Ditch Company shall design and implement a ditch improvement project with the goal of limiting seepage from the Ditch and breaches of the Ditch channel/banks within the area of the Project. The design of the ditch improvement project shall be certified by a professional engineer registered in the State of Colorado and shall include enclosing approximately four hundred (400) feet of the Ditch channel in a pipeline to enhance the stability of the Ditch and the Arkansas River bank. The ditch improvement project shall be located within the section of the Project identified by engineering study and past experience to be most susceptible to seepage and breaches of the Ditch channel/banks. The ditch improvement project shall result in a durable conveyance to minimize deterioration over time and be able to withstand periodic cleaning, maintenance and repair. Construction of the ditch improvement project shall at all times be conducted with the implementation and maintenance of properly selected and installed Best Management Practices ("BMPs") to limit or prevent erosion and sediment transport from the construction activities. At least thirty (30) calendar days prior to initiation of construction activities, New Salida Ditch Company shall submit a report to the Division on the final design of the pipeline.

23. New Salida Ditch Company shall not deduct the expenses associated with the design and implementation of the above-described SEP for any tax purpose or otherwise obtain any favorable tax treatment of such payment or project.

24. New Salida Ditch Company hereby certifies that, as of the date of this Consent Order, it is not under any existing legal obligation to perform or develop the SEP. New Salida Ditch Company further certifies that it has not received, and will not receive, credit in any other enforcement action for the SEP. In the event that New Salida Ditch Company has, or will receive credit under any other legal obligation for the SEP, New Salida Ditch Company shall pay Twenty Nine Thousand Four Dollars ($29,004.00) to the Division as a civil penalty within thirty (30) calendar days of receipt of a demand for payment by the Division. Method of payment shall be as specified in paragraph 20 above.

25. The SEP must be completed to the satisfaction of the Division by June 30, 2009. In the event that New Salida Ditch Company fails to comply with any of the terms or provisions of this Consent Order relating to the performance of the SEP, New Salida Ditch Company shall be liable for penalties as follows:

    a. Payment of a penalty in the amount of Twenty Nine Thousand Four Dollars ($29,004.00). The Division, in its sole discretion, may elect to reduce this penalty for environmental benefits created by the partial performance of the SEP.
    b. New Salida Ditch Company shall pay this penalty within thirty (30) calendar days of receipt of written demand by the Division. Method of payment shall be as specified in paragraph 20 above.

26. New Salida Ditch Company shall submit a SEP Completion Report to the Division within forty five (45) calendar days of completion of the SEP. The SEP Completion Report shall contain the following information:

    a. A detailed description of the SEP as implemented;
    b. A description of any operating problems encountered and the solutions thereto;
    c. Itemized costs, documented by copies of purchase orders and receipts or canceled checks;

d. Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Order; and
e. A description of the environmental and public health benefits resulting from implementation of the SEP (with quantification of the benefits and pollutant reductions, if feasible).

27. Failure to submit the SEP Completion Report with the required information, or any periodic report, shall be deemed a violation of this Consent Order.

28. New Salida Ditch Company shall include the following language in any public statement, oral or written, making reference to the SEP: "This project was undertaken in connection with the settlement of an enforcement action taken by the Colorado Department of Public Health and Environment alleging violations of the Colorado Water Quality Control Act."

SCOPE AND EFFECT OF CONSENT ORDER

29. The Parties agree and acknowledge that this Consent Order constitutes a full and final settlement of the actual or alleged violations of Colorado's water quality laws and regulations alleged herein and in the March 6, 2006 Notice of Violation / Cease and Desist Order / Clean-up Order (Number: SO-060306-1) and a full and final settlement of the Division's decision to impose civil penalties associated with such actual or alleged violations.

30. This Consent Order is subject to the Division's "Public Notification of Administrative Enforcement Actions Policy," which includes a thirty-day public comment period. The Division and New Salida Ditch Company each reserve the right to withdraw consent to this Consent Order if comments received during the thirty-day period result in any proposed modification to the Consent Order.

31. This Consent Order constitutes a final agency order or action upon the date when the Executive Director or his designee imposes the civil penalty following the public comment period. Any violation of the provisions of this Consent Order by New Salida Ditch Company, including any false certifications, shall be a violation of a final order or action of the Division for the purpose of §25-8-608, C.R.S., and may result in the assessment of civil penalties of up to ten thousand dollars per day for each day during which such violation occurs.

32. Notwithstanding paragraph 18 above, the alleged violations described in this Consent Order will constitute part of New Salida Ditch Company's compliance history for purposes where such history is relevant under Colorado law. This may include considering the alleged violations described above in assessing a penalty for any subsequent violations against New Salida Ditch Company. New Salida Ditch Company agrees not to challenge the existence of the alleged violations as part of its compliance history.

33. This Consent Order does not relieve New Salida Ditch Company from complying with all applicable Federal, State, and/or local laws in fulfillment of its obligations hereunder and shall obtain all necessary approvals and/or permits to conduct the activities required by this Consent Order. The Division makes no representation with respect to approvals and/or permits required by Federal, State, or local laws other than those specifically referred to herein.

LIMITATIONS, RELEASES AND RESERVATION OF RIGHTS AND LIABILITY

34. Upon the effective date of this Consent Order, and during its term, this Consent Order shall stand in lieu of and shall extinguish any other enforcement action by the Division with respect to the specific instances of actual or alleged violations cited herein and in the March 6, 2006 Notice of Violation / Cease and Desist Order / Clean-up Order (Number: SO-060306-1) and with respect to civil penalties for such instances. The Division reserves the right to bring any action to enforce this Consent Order, including actions for penalties or the collection thereof, and/or injunctive relief.

35. This Consent Order does not grant any release of liability for any violations not specifically cited herein.

36. Nothing in this Consent Order shall preclude the Division from imposing additional requirements in the event that new information is discovered that indicates such requirements are necessary to protect human health or the environment.

37. Upon the effective date of this Consent Order, and except with respect to the obligations created herein, each party mutually releases and covenants not to sue each other and each others' employees, agents or representatives with respect to the specific instances of actual or alleged violations cited herein and in the March 6, 2006 Notice of Violation / Cease and Desist Order / Clean-up Order (Number: SO-060306-1) and with respect to civil penalties for such instances.

38. New Salida Ditch Company shall not seek to hold the State of Colorado or its employees, agents or representatives liable for any injuries or damages to persons or property resulting from acts or omissions of New Salida Ditch Company, or those acting for or on behalf of New Salida Ditch Company, including its officers, members, directors, employees, agents, successors, representatives, contractors, consultants or attorneys in carrying out the ditch improvement project pursuant to this Consent Order. New Salida Ditch Company shall not hold out the State of Colorado or its employees, agents or representatives as a party to any contract entered into by New Salida Ditch Company in carrying out activities pursuant to this Consent Order. Nothing in this Consent Order shall constitute an express or implied waiver of immunity otherwise applicable to the State of Colorado, its employees, agents or representatives.

FORCE MAJEURE

39. New Salida Ditch Company shall perform the requirements of this Consent Order within the schedules and time limits set forth herein and in any approved plan unless the performance is prevented or delayed by events that constitute a force majeure. A force majeure is defined as any event arising from causes which are not reasonably foreseeable or which are beyond the control of New Salida Ditch Company, and which cannot be overcome by due diligence.

40 Within seventy-two (72) hours of the time that New Salida Ditch Company knows or has reason to know of the occurrence of any event which New Salida Ditch Company has reason to believe may prevent New Salida Ditch Company from timely compliance with any requirement under this Consent Order, New Salida Ditch Company shall provide verbal notification to the Division. Within seven (7) calendar days of the time that New Salida Ditch Company knows or has reason to know of the occurrence of such event, New Salida Ditch Company shall submit to the Division a written description of the event causing the delay, the reasons for and the expected duration of the delay, and actions which will be taken to mitigate the duration of the delay.

41. The burden of proving that any delay was caused by a force majeure shall at all times rest with New Salida Ditch Company. If the Division agrees that a force majeure has occurred, the Division will so notify New Salida Ditch Company. The Division will also approve or disapprove of New Salida Ditch Company's proposed actions for mitigating the delay. If the Division does not agree that a force majeure has occurred, or if the Division disapproves of New Salida Ditch Company's proposed actions for mitigating the delay, it shall provide a written explanation of its determination to New Salida Ditch Company. Pursuant to the Dispute Resolution section, within fifteen (15) calendar days of receipt of the explanation, New Salida Ditch Company may file an objection.

42. Delay in the achievement of one requirement shall not necessarily justify or excuse delay in the achievement of subsequent requirements. In the event any performance under this Consent Order is found to have been delayed by a force majeure, New Salida Ditch Company shall perform the requirements of this Consent Order that were delayed by the force majeure with all due diligence.

DISPUTE RESOLUTION

43. If the Division determines that that a violation of this Consent Order has occurred, that a force majeure has not occurred; that the actions taken by New Salida Ditch Company to mitigate the delay caused by a force majeure are inadequate; that new requirements are necessary pursuant to paragraph 36, or that New Salida Ditch Company's SEP Completion Report submitted pursuant to paragraph 26 is deficient, the Division shall provide a written explanation of its determination to New Salida Ditch Company. Within fifteen (15) calendar days of receipt of the Division's determination, New Salida Ditch Company shall:

    a. Submit a notice of acceptance of the determination; or
    b. Submit a notice of dispute of the determination.

    If New Salida Ditch Company fails to submit either of the above notices within the specified time, it will be deemed to have accepted the Division's determination.

44. If the Division disapproves or approves with modifications any original or revised plan submitted by New Salida Ditch Company pursuant to this Consent Order, the Division shall provide a written explanation of the disapproval or approval with modifications. Within fifteen (15) days of receipt of the Division's approval with modifications or disapproval of the plan, New Salida Ditch Company shall:

    a. In the case of an approval with modifications only, submit a notice of acceptance of the plan as modified and begin to implement the modified plan;
    b. In the case of a disapproval only, submit a revised plan for Division review and approval. New Salida Ditch Company may not select this option if the Division has included in its disapproval an alternate plan that shall be implemented by New Salida Ditch Company; or
    c. Submit a notice of dispute of the disapproval or approval with modifications.

    If New Salida Ditch Company fails to do any of the above within the specified time, New Salida Ditch Company shall be deemed to have failed to comply with the Consent Order, and the Division may bring an enforcement action, including an assessment of penalties.

45. If New Salida Ditch Company submits a revised plan, the plan shall respond adequately to each of the issues raised in the Division's written explanation of the disapproval or approval with modifications. The Division may determine that failure to respond adequately to each of the issues raised in the Division's written explanation constitutes a violation of this Consent Order. The Division shall notify New Salida Ditch Company in writing of its approval, approval with modifications, or disapproval of the revised plan. If the Division disapproves the revised plan, it may include in its disapproval a plan for implementation by New Salida Ditch Company. Such disapproval and plan shall be deemed effective and subject to appeal in accordance with the Act and the Colorado State Administrative Procedures Act, §§ 24-4-101 through 108, C.R.S. (the "APA"), unless New Salida Ditch Company submits a notice of dispute, pursuant to paragraph 43 above, of the Division's disapproval and plan for implementation. All requirements and schedules of the Division's plan shall not become effective pending resolution of the dispute.

46. If New Salida Ditch Company files any notice of dispute pursuant to paragraph 43, 44, or 45 the notice shall specify the particular matters in the Division's determination that New Salida Ditch Company seeks to dispute, and the basis for the dispute. Matters not identified in the notice of dispute shall be deemed accepted by New Salida Ditch Company. The Division and New Salida Ditch Company shall have thirty (30) calendar days from the receipt by the Division of the notification of dispute to reach an agreement. If agreement cannot be reached on all issues within this thirty (30) calendar day period, the Division shall confirm or modify its decision within an additional fourteen (14) calendar days, and the confirmed or modified decision shall be deemed effective and subject to appeal in accordance with the Act and the APA.

NOTICES

47. Unless otherwise specified, any report, notice or other communication required under the Consent Order shall be sent to:

For the Division:

Colorado Department of Public Health and Environment
Water Quality Control Division / WQCD-CADM-B2
Attention: Michael Harris
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530
Telephone: 303.692.3598
E-mail: michael.harris@state.co.us

For New Salida Ditch Company:

Ralph L. Scanga, Jr., President
New Salida Ditch Company
9250 County Road 156
Salida, CO 81201
Fax: (719) 539-6344

MODIFICATIONS

48. This Consent Order may be modified only upon mutual written agreement of the Parties.

NOTICE OF EFFECTIVE DATE

49. This Consent Order shall be fully effective, enforceable and constitute a final agency action upon the date when the Executive Director or his designee imposes the civil penalty. If the penalty as described in this Consent Order is not imposed, or an alternate penalty is imposed, this Consent Order becomes null and void.

BINDING EFFECT AND AUTHORIZATION TO SIGN

50. This Consent Order is binding upon the Division and the New Salida Ditch Company and its members, officers, directors, employees, successors in interest, and assigns. The undersigned warrant that they are authorized to legally bind their respective principals to this Consent Order. New Salida Ditch Company agrees to provide a copy of this Consent Order to any contractors and other agents performing work pursuant to this Consent Order and require such agents to comply with the requirements of this Consent Order. In the event that a party does not sign this Consent Order within thirty (30) calendar days of the other party's signature, this Consent Order becomes null and void. This Consent Order may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Consent Order.

FOR NEW SALIDA DITCH COMPANY:

Ralph L. Scanga, Jr. Date: 5-28-2008
Ralph L. Scanga, Jr., President

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

Lori M. Gerzina Date: 6/9/08
Lori M. Gerzina, Section Manager
Compliance Assurance and Data Management Section
WATER QUALITY CONTROL DIVISION