

STATE OF COLORADO

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

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

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Colorado Department
of Public Health
and Environment

July 17, 2008

Michael O'Neil
Davis Ranches Subdivision, LLC
11585 Orleans Road
Fountain, CO 80817

RE: Compliance Order on Consent, Number: SC-080716-2

Dear Mr. O'Neil:

Enclosed for your records you will find a 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 25). 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 me at (303) 692-3598 or by electronic mail at michael.harris@state.co.us.

Sincerely,

Michael Harris
Environmental Protection Specialist
Water Quality Enforcement
WATER QUALITY CONTROL DIVISION

cc: El Paso County Health and Environment Department

cc: Aaron Urdiales, EPA Region VIII
Kathy Dolan, Permits Section, CDPHE
Dick Parachini, Outreach and Assistance Unit, CDPHE

Enclosure(s)



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

COMPLIANCE ORDER ON CONSENT

NUMBER: SC-080716-2

**IN THE MATTER OF: DAVIS RANCHES SUBDIVISION, LLC
 CDPS PERMIT NO. COR-030000
 CERTIFICATION NO. COR-037806
 EL PASO 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 Davis Ranches Subdivision, LLC (“DRS”). The Division and DRS 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 civil penalties associated with the alleged violations identified herein and in the Notice of Violation / Cease and Desist Order / Clean-Up Order (Number: SO-070108-1) the Division issued to DRS on January 8, 2007.

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 DRS and DRS’s compliance with its stormwater permit certification and the Act.
3. At all times relevant to the alleged violations identified herein, DRS was a Colorado limited liability company in good standing and registered to conduct business in the State of Colorado.
4. DRS is a “person” as defined under the Water Quality Control Act, §25-8-103(13), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2(73).
5. DRS performed construction activities to build two residential subdivisions on property located south of Davis Road between Curtis Road and Kennedy Road, in El Paso County, Colorado (the “Project”).

6. On December 23, 2005, the Division received a Notice of Transfer and Acceptance of Terms of a Stormwater Discharge General Permit Certification form (“Notice of Transfer”) from DRS. The Notice of Transfer requested that Project coverage under the Colorado Discharge Permit System (“CDPS”) General Permit, Number COR-030000, for Stormwater Discharges Associated with Construction Activity (the “Permit”) be transferred from the original permittee, Angelholm Development, LLC, to DRS.
7. On January 6, 2006, the Division transferred Certification Number COR-037806 to DRS, authorizing DRS to discharge stormwater from the construction activities associated with the Project to Black Squirrel Creek under the terms and conditions of the Permit. Certification Number COR-037806 remained in effect until DRS terminated permit coverage for the Project on December 12, 2007.
8. Black Squirrel Creek is “state waters” as defined by §25-8-103(19), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2 (102).
9. Pursuant to 5 CCR 1002-61, §61.8, a permittee must comply with all the terms and conditions of a permit and violators of the terms and conditions specified in a permit may be subject to civil and criminal liability pursuant to §§25-8-601 through 612, C.R.S.
10. On August 14, 2006, a representative from the Division (the “Inspector”) conducted an on-site inspection of the Project, pursuant to the Division’s authority under §25-8-306, C.R.S., to determine DRS’s compliance with the Water Quality Control Act and the Permit. During the inspection, the Inspector interviewed Project representatives, conducted a review of the Project’s stormwater management system records, and performed a physical inspection of the Project.
11. Pursuant to Part I. B. of the Permit, DRS was required to prepare a Stormwater Management Plan (“SWMP”) that identified Best Management Practices (“BMPs”) that, when implemented, would meet the terms and conditions of the Permit. The SWMP was required to identify potential sources of pollution, which may have been reasonably expected to affect the quality of stormwater discharges associated with construction activity from the Project. In addition, the plan was required to describe and ensure the implementation of BMPs, which would be used to reduce the pollutants in stormwater discharges associated with construction activity.
12. The Division has determined that DRS failed to prepare and maintain a complete and accurate SWMP for the Project as described in paragraphs 12(a–e) below:
 - a. During the August 14, 2006 inspection, the Inspector reviewed the Project’s SWMP and noted that the site map did not identify all areas of soil disturbance that were observed at the Project.
 - b. During the August 14, 2006 inspection, the Inspector reviewed the Project’s SWMP and noted that the site map did not identify all areas used for storage of building materials, soils or wastes that were observed at the Project.
 - c. During the August 14, 2006 inspection, the Inspector reviewed the Project’s SWMP and noted that the SWMP did not include specifications and design criteria for the three stormwater detention basins that were observed at the Project.

- d. During the August 14, 2006 inspection, the Inspector reviewed the Project's SWMP and noted that the SWMP did not include a section on final stabilization and long-term stormwater management, as required in the Permit.
 - e. During the August 14, 2006 inspection, the Inspector reviewed the Project's SWMP and noted that the SWMP did not include a section on other controls, as required in the Permit.
13. DRS's failure to prepare and maintain a complete and accurate SWMP for the Project constitutes violation(s) of Part I. B. of the Permit.
14. Pursuant to Part I. B. 3. a. (1) of the Permit, DRS was required to minimize erosion and sediment transport from the Project. The Permit specifies that structural site management practices may include, but are not limited to: straw bales, silt fences, earth dikes, drainage swales, sediment traps, subsurface drains, inlet protection, outlet protection, gabions, and temporary or permanent sediment basins.
15. Pursuant to Part I. B. 3. a. (2) of the Permit, DRS was required to implement interim and permanent stabilization practices, including site-specific scheduling of the implementation of the practices. The Permit specifies that site plans should ensure existing vegetation is preserved where possible and that disturbed areas are stabilized. The Permit specifies that non-structural practices may include, but are not limited to: temporary seeding, permanent seeding, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees and preservation of mature vegetation.
16. Pursuant to Part I. B. of the Permit, DRS was required to implement the provisions of the Project's SWMP as a condition of the Permit.
17. On August 14, 2006, the Division received photographs of the Project from a neighboring property owner, which document BMP deficiencies at the Project as described in paragraphs 17(a-f) below:
- a. A photograph taken on June 14, 2006 shows disturbed soils surrounding the culverts near Kennedy Road at the Project with no BMPs in place to stabilize the disturbed area or to prevent sediment from discharging from this area of the Project. Consequently, the photograph shows significant erosion of the disturbed area and sediment discharge beyond the Project's property boundary and onto neighboring land.
 - b. Photographs taken on June 20, 2006 show a disturbed drainage channel at the Project that drains stormwater to the culverts located near Kennedy Road at the Project, via a drop inlet structure, with no BMPs in place to stabilize the disturbed areas or to prevent sediment from discharging into the drop inlet.
 - c. Photographs taken on June 26, 2006 show disturbed soils surrounding the culverts near Kennedy Road at the Project with no BMPs in place to stabilize the disturbed area or to prevent sediment from discharging from this area of the Project. Consequently, the photographs show significant erosion of the disturbed area, a heavy accumulation of mud in and around the culverts, and mud and sediment discharge beyond the Project's property boundary and onto neighboring land.

- d. Photographs taken on July 5, 2006 show disturbed soils surrounding the culverts near Kennedy Road at the Project with no functional BMPs in place to temporarily or permanently stabilize the disturbed area, as required in the Permit. Consequently, the photographs show significant erosion of the disturbed area. The photographs show silt fence in place adjacent to the Project's property boundary, however, silt fence is not designed to be utilized in areas of concentrated stormwater flow, such as the discharge point from the culverts. Therefore, the silt fence was not acting as a functional BMP to control sediment discharges.
 - e. Photographs taken on August 13, 2006 show stormwater flowing in a disturbed drainage channel at the Project. A hay bale check dam is shown in place within the drainage channel, however, the check dam was not installed to act as a functional BMP. Standard engineering practices outline that check dams should have a center weir section, which is at least 6 inches lower than the outer edges of the dam, to allow stormwater to flow over the weir without bypassing the check dam. The hay bale check dam in the August 13, 2006 photographs did not have a center weir section. Consequently, the photographs show stormwater bypassing the check dam by flowing around the outer edges of the dam.
 - f. Photographs taken on August 13, 2006 show disturbed soils surrounding the culverts near Kennedy Road at the Project with no functional BMPs in place to temporarily or permanently stabilize the disturbed area, as required in the Permit. Consequently, the photographs show significant erosion of the disturbed area. The photographs show silt fence and hay bales in place adjacent to the Project's property boundary, however, silt fence is not designed to be utilized in areas of concentrated stormwater flow. Additionally, the August 13, 2006 photographs show gaps under the silt fence and hay bales. Consequently, the photographs show sediment laden stormwater discharging beyond the Project's property boundary and onto the neighboring land.
18. The Division has determined that DRS failed to implement and/or maintain functional BMPs at the Project as described in paragraphs 18(a–c) below:
- a. During the August 14, 2006 inspection, the Inspector observed disturbed soils all along Kennedy Road at the Project with no BMPs in place to temporarily or permanently stabilize the disturbed areas, as required in the Permit. Consequently, the Inspector observed significant erosion of the disturbed areas. The Inspector observed a silt fence in place adjacent to the Project's property boundary, however, the silt fence was not trenched in the ground and holes and gaps were observed in the silt fence material. Consequently, the Inspector observed a heavy accumulation of sediment that had discharged from the Project and onto the neighboring land. Additionally, a section of the silt fence was installed directly in front of culverts that convey stormwater under the road. Silt fence is not designed to be utilized in areas of concentrated stormwater flow, such as the discharge point from the culverts. Therefore, the silt fence was not acting as a functional BMP to control sediment discharges.

- b. During the August 14, 2006 inspection, the Inspector observed disturbed drainage channels located throughout the Project with no functional BMPs in place to temporarily or permanently stabilize the channels. Hay bale check dams were observed in place within the disturbed drainage channels, however, the check dams were not installed according to specifications outlined in the SWMP. The SWMP outlined that the check dams would be installed with a center weir section, however, the Inspector observed that the check dams had no center weir and/or significant gaps were observed between individual bales, which would allow stormwater to flow around and/or between the hay bales. Consequently, the Inspector observed significant erosion and sediment transport throughout the Project from these disturbed drainage channels.
 - c. During the August 14, 2006 inspection, the Inspector observed a detention basin (E1) located near the southeast corner of Filing 2 at the Project. No BMPs were observed in place within the disturbed drainage channel that extends from the outlet of the detention basin to an off site discharge point located on neighboring land. The SWMP stated that this channel would be stabilized with erosion control fabric and riprap, however, no stabilization practices were being utilized at the time of the August 14, 2006 inspection.
19. DRS's failure to implement and maintain functional BMPs to protect stormwater quality during construction activities at the Project constitutes violations of Part I. B. and Part I. B. 3. a. of the Permit.

ORDER AND AGREEMENT

20. Based on the foregoing factual and legal determinations, pursuant to its authority under §§25-8-602 and 605 C.R.S., and in satisfaction of the civil penalties for the alleged violations cited herein and in the Notice of Violation / Cease and Desist Order / Clean-Up Order (Number: SO-070108-1), the Division orders DRS to comply with all provisions of this Consent Order, including all requirements set forth below.
21. DRS agrees to the terms and conditions of this Consent Order. DRS agrees that this Consent Order constitutes a notice of alleged violation and an order issued pursuant to §§25-8-602 and 605, C.R.S., and is an enforceable requirement of the Act. DRS also agrees not to challenge directly or collaterally, in any judicial or administrative proceeding brought by the Division or by DRS against the Division:
- a. The issuance of this Consent Order;
 - b. The factual and legal determinations made by the Division herein; and
 - c. The Division's authority to bring, or the court's jurisdiction to hear, any action to enforce the terms of this Consent Order under the Act.
22. Notwithstanding the above, DRS does not admit to any of the factual or legal determinations made by the Division herein and any action undertaken by DRS pursuant to this Consent Order shall not constitute evidence of fault or liability by DRS with respect to the conditions of the Project.

CIVIL PENALTY

23. 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, DRS shall pay Thirty Eight Thousand Dollars (\$38,000.00) in civil penalties. The Division intends to petition the Executive Director, or his designee, to impose the Thirty Eight Thousand Dollar (\$38,000.00) civil penalty for the above violation(s) and DRS 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

SCOPE AND EFFECT OF CONSENT ORDER

24. The Parties agree and acknowledge that this Consent Order constitutes a full and final settlement of the civil penalties associated with violations cited herein and in the Notice of Violation / Cease and Desist Order / Clean-Up Order (Number: SO-070108-1).
25. 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 DRS 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.
26. This Consent Order constitutes a final agency order or action upon the date when the Executive Director or his designee imposes the civil penalty. Any violation of the provisions of this Consent Order by DRS, 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.
27. Notwithstanding paragraph 22 above, the violations described in this Consent Order will constitute part of DRS's compliance history for purposes where such history is relevant. This includes considering the violations described above in assessing a penalty for any subsequent violations against DRS. DRS agrees not to challenge the use of the cited violations for any such purpose.

LIMITATIONS, RELEASES AND RESERVATION OF RIGHTS AND LIABILITY

28. Upon the effective date of this Consent Order, and during its term, this Consent Order shall stand in lieu of any other enforcement action by the Division with respect to civil penalties for the specific instances of violations cited herein and in the Notice of Violation / Cease and Desist Order / Clean-Up Order (Number: SO-070108-1). 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.
29. This Consent Order does not grant any release of liability for any violations not specifically cited herein.
30. 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.
31. Upon the effective date of this Consent Order, DRS releases and covenants not to sue the State of Colorado or its employees, agents or representatives as to all common law or statutory claims or counterclaims arising from, or relating to, the violations of the Act specifically addressed herein.
32. 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

NOTICES

33. 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 DRS:

Davis Ranches Subdivision, LLC
Michael O'Neil
11585 Orleans Road
Fountain, CO 80817

MODIFICATIONS

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

NOTICE OF EFFECTIVE DATE

35. 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

36. This Consent Order is binding upon DRS and its corporate subsidiaries or parents, their 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. 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 DAVIS RANCHES SUBDIVISION, LLC:

Michael O'Neil, Manager Date: July 7, 08
Michael O'Neil, Manager

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

Lori M. Gerzina Date: July 16, 2008
Lori M. Gerzina, Section Manager
Compliance Assurance and Data Management Section
WATER QUALITY CONTROL DIVISION