STATE OF COLORADO

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

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

4300 Cherry Creek Dr. S.
Denver, Colorado 80246-1530
Phone (303) 692-2000
TDD Line (303) 691-7700
Located in Glendale, Colorado

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

Laboratory Services Division
8100 Lowry Blvd.
Denver, Colorado 80230-6928
(303) 692-3090

Colorado Department
of Public Health
and Environment

September 16, 2008

Tom D. Gorton
Tom D. Gorton Construction, Inc.
135 Burnett Drive, Suite 107
Denver, CO 81301

Certified Mail Number: 7007 0220 0001 0159 9087

RE: Order for Civil Penalty, Number: [SP-080916-4]

Dear Mr. Gorton:

Tom D. Gorton Construction, Inc. is hereby served with the enclosed Order for Civil Penalty ("Penalty Order"). This Penalty Order is issued by the Colorado Department of Public Health and Environment's Water Quality Control Division (the "Division") pursuant to the authority given to the Division by §25-8-608(2) of the *Colorado Revised Statutes*. Payment of the imposed civil penalty should be made in accordance with the methods referenced in the Penalty Order and *[Compliance Order on Consent Number: SC-0800716-1]*.

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.

Sincerely,

Kristi-Raye Beaudin

Kristi-Raye Beaudin, Legal Assistant
Compliance Assurance and Data Management Section
WATER QUALITY CONTROL DIVISION

cc: San Juan Basin Health Department
MS-3 File

ec: Aaron Urdiales, EPA Region VIII
Greg Brand, Engineering Section, CDPHE
Dick Parachini, Watershed Program, CDPHE
Carolyn Schachterle, OPA

Enclosures

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

DIVISION OF ADMINISTRATION

WATER QUALITY CONTROL DIVISION

ORDER FOR CIVIL PENALTY **NUMBER: SP-080916-4**

IN THE MATTER OF: **TOM D. GORTON CONSTRUCTION, INC.**
CDPS PERMIT NO. COR-030000
CERTIFICATION NO. COR-035773 & COR-036455
LA PLATA COUNTY, COLORADO

This matter having come to my attention as the Designee of the Executive Director of the Colorado Department of Public Health and Environment upon petition for imposition of a civil penalty by the Water Quality Control Division's Compliance Assurance and Data Management Section, I hereby impose a civil penalty in the amount of Fifty Four Thousand Dollars ($54,000.00) against Tom D. Gorton Construction, Inc. ("Gorton") for the violations cited in the Compliance Order on Consent between DRS and the Division, executed on July 16, 2008 (the "Consent Order"). A copy of the Consent Order is attached hereto as Exhibit A 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 as set forth in the Consent Order. 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

Dated this 16th day of September, 2008.

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

Exhibit A

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

WATER QUALITY CONTROL DIVISION

COMPLIANCE ORDER ON CONSENT **NUMBER: SC-080716-1**

IN THE MATTER OF: **TOM D. GORTON CONSTRUCTION, INC.**
CDPS PERMIT NO. COR-030000
CERTIFICATION NOS. COR-035773 & COR-036455
LA PLATA 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 Tom D. Gorton Construction, Inc. ("Gorton"). The Division and Gorton 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 alleged violations cited herein by the Division and the associated civil penalties.

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 Gorton and Gorton's compliance with its stormwater permit certifications and the Act.

3. At all times relevant to the alleged violations identified herein, Gorton was a Colorado corporation in good standing and registered to conduct business in the State of Colorado.

4. Gorton 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. Gorton is involved in construction activities to build a residential subdivision (Edgemont Highlands) on property located at or near the intersection of Silver Queen Road and County Road 240, in or near the City of Durango, La Plata County, Colorado (the "Project").

6. On October 3, 2003, the Division received an application from Gorton for Phase 1 Project coverage under the Colorado Discharge Permit System ("CDPS") General Permit, Number COR-030000, for Stormwater Discharges Associated with Construction Activity (the "Permit").

7. On October 9, 2003, the Division provided Gorton Certification Number COR-035773 authorizing Gorton to discharge stormwater from the construction activities associated with Phase 1 of the Project to the Florida River under the terms and conditions of the Permit. Certification Number COR-035773 became effective October 7, 2003 and remains in effect until June 30, 2012 or until Gorton inactivates permit coverage.

8. On April 7, 2004, the Division received an application from Gorton for Phase 2 Project coverage under the Permit.

9. On April 28, 2004, the Division provided Gorton Certification Number COR-036455 authorizing Gorton to discharge stormwater from the construction activities associated with Phase 2 of the Project to the Florida River under the terms and conditions of the Permit. Certification Number COR-036455 became effective April 26, 2004 and remains in effect until June 30, 2012 or until Gorton inactivates permit coverage.

10. The Florida 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 (102).

11. 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.

12. On October 6, 2005, a representative from the San Juan Basin Health Department (the "Inspector") conducted an on-site inspection of Phase 1 of the Project on behalf of the Division, pursuant to the Division's authority under §25-8-306, C.R.S., to determine Gorton's compliance with the Water Quality Control Act and the Permit (the "First Inspection"). During the First Inspection, the Inspector interviewed Gorton representatives, conducted a review of the Project's Phase 1 stormwater management system records, and performed a physical inspection of Phase 1 of the Project. Based upon the First Inspection, the Inspector prepared a Stormwater Inspection Report and Gorton submitted a response dated December 6, 2005.

13. On November 15, 2006, the Inspector conducted an on-site inspection of Phase 2 of the Project on behalf of the Division, pursuant to the Division's authority under §25-8-306, C.R.S., to determine Gorton's compliance with the Water Quality Control Act and the Permit (the "Second Inspection"). During the Second Inspection, the Inspector interviewed Gorton representatives, conducted a review of the Project's Phase 2 stormwater management system records, and performed a physical inspection of Phase 2 of the Project. Based upon the Second Inspection, the Inspector prepared a Stormwater Inspection Report and Gorton submitted a response.

14. Pursuant to Part I. B. of the Permit, Gorton is required to prepare a Stormwater Management Plan(s) ("SWMP") that identifies Best Management Practices ("BMPs") that, when implemented, will meet the terms and conditions of the Permit. The SWMP(s) is required to identify potential sources of pollution, which may be reasonably expected to affect the quality of stormwater discharges associated with construction activity from the Project. In addition, the plan(s) is required to describe and ensure the implementation of BMPs, which will be used to reduce the pollutants in stormwater discharges associated with construction activity.

15. Pursuant to Part I. C. 4. a. of the Permit, Gorton is required to maintain the SWMP(s) on site.

16. The Division has determined that Gorton failed to prepare and maintain complete and accurate SWMPs for the Project as described in paragraphs 16(a–c) below:

    a. During the October 6, 2005 First Inspection, the Inspector requested to review the Project's Phase 1 SWMP, however, the SWMP was not available.

    b. During the November 15, 2006 Second Inspection, the Inspector reviewed the Project's Phase 2 SWMP and identified that the site map did not identify all areas of soil disturbance that were observed during the inspection.

    c. During the November 15, 2006 Second Inspection, the Inspector reviewed the Project's Phase 2 SWMP and identified that the SWMP did not include procedures and specifications for the installation of the straw wattles that were observed in place throughout the Project.

17. Gorton's failure to prepare and maintain complete and accurate SWMPs for the Project constitutes violation(s) of Part I. B. and Part I. C. 4. a. of the Permit.

18. Pursuant to Part I. B. 3. a. (1) of the Permit, Gorton is required to minimize erosion and sediment transport from the Project. The Permit specifies that structural site management practices may include, but are not limited to: straw bales, silt fences, earth dikes, drainage swales, sediment traps, subsurface drains, inlet protection, outlet protection, gabions, and temporary or permanent sediment basins.

19. Pursuant to Part I. B. 3. a. (2) of the Permit, Gorton is required to implement interim and permanent stabilization practices, including site-specific scheduling of the implementation of the practices. The Permit specifies that site plans should ensure 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.

20. Pursuant to Part I. B. of the Permit, Gorton is required to implement the provisions of the SWMP(s) as a condition of the Permit.

21. The Division has determined that Gorton failed to implement and/or maintain functional BMPs at the Project as described in paragraphs 21 (a–i) below:

a. During the October 6, 2005 First Inspection, the Inspector observed an area located north of the primary sedimentation pond at the Project. The Project's Phase 1 SWMP stated that a berm would be constructed to channel stormwater through this area of the Project. However, no berm had been implemented. No other BMPs were observed in place to prevent erosion and sediment transport from this area of the Project.

b. During the October 6, 2005 First Inspection, the Inspector observed disturbed areas at the north and east ends of Phase 1 at the Project. Final stabilization of the areas had not been achieved, yet no BMPs were observed in place to temporarily stabilize the disturbed areas or to prevent sediment discharges from the disturbed areas during storm events. Consequently, erosion and sediment transport were observed in these areas of the Project.

c. During the October 6, 2005 First Inspection, the Inspector observed significant erosion of the road side ditches in the east and northeast ends of Phase 1 of the Project and of a slope in the north end of Phase 1 at the Project. No BMPs were observed in place to stabilize the disturbed areas or to prevent sediment from discharging from these areas during storm events.

d. During the October 6, 2005 First Inspection, the Inspector observed a silt fence in place at the north end of Phase 1 at the Project. The silt fence had not been installed or maintained to act as a functional BMP, however, as gaps were observed under the fence in several locations.

e. During the November 15, 2006 Second Inspection, the Inspector identified that Gorton failed to implement BMPs described in the Project's Phase 2 SWMP. The SWMP indicated that hay bales would be installed in select locations and geo-textile material would be installed beneath rip-rap locations throughout the site. However, the hay bales and geo-textile material had not been implemented.

f. During the November 15, 2006 Second Inspection, the Inspector observed disturbed slopes along the east entrance of Unit 2, Phase 2 at the Project. No BMPs were observed in place to stabilize the disturbed slopes or to prevent sediment from discharging from the area during storm events.

g. During the November 15, 2006 Second Inspection, the Inspector observed disturbed slopes along the roadways of Unit 2, Phase 2 at the Project. Surface roughening had been implemented on the slopes, however, the roughening had not been implemented to act as a functional BMP as the heavy equipment tracking had been conducted parallel to the disturbed slopes, thus increasing the potential for erosion.

h. During the November 15, 2006 Second Inspection, the Inspector observed disturbed ditches along the roadways of Unit 2, Phase 2 at the Project. No BMPs were observed in place to stabilize the disturbed ditch lines or to prevent sediment from discharging from the areas during storm events.

i. During the November 15, 2006 Second Inspection, the Inspector observed a silt fence in place in Unit 2, Phase 2 of the Project. The silt fence had not been installed and/or maintained to act as a functional BMP, however, as gaps were observed under the fence in several locations.

22. Gorton'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.

23. Pursuant to Part I. C. 5. a. of the Permit, for active sites where construction has not been completed, Gorton is required to make a thorough inspection of the Project's stormwater management system at least every 14 days and after any precipitation or snowmelt event that causes surface erosion.

24. During the October 6, 2005 First Inspection, the Inspector reviewed the Project's Phase 1 stormwater management system records and identified that Gorton had not conducted any inspections at the site since December 8, 2004.

25. Gorton's failure to conduct inspections of the Project's stormwater management system constitutes violations of Part I. C. 5. a. of the Permit.

GORTON'S RECITALS

26. Gorton maintains that the First Inspection and Second Inspection were conducted at Gorton's request to the Inspector in order to assist Gorton with its efforts to comply with the Permit.

27. Gorton further contends:

    a. The First Inspection was initiated by Gorton as compliance assistance after it had completed its Phase 1 Project work.
    b. The Second Inspection was initiated by Gorton as compliance assistance after it had completed most of its Phase 2 Project work.
    c. That through various protective measures implemented by Gorton there has not been any sediment discharge to the Florida River from the Project.

28. Although Gorton does not waive these contentions, as well as others it has asserted in these negotiations, it agrees to abide by the terms of this Consent Order as a full and complete settlement of any and all violations associated with the First and Second Inspections.

ORDER AND AGREEMENT

29. Based on the foregoing factual and legal determinations, pursuant to its authority under §§25-8-602 and 605 C.R.S., and in full and complete satisfaction of the alleged violations cited herein and any other violations associated with the First Inspection and/or Second Inspection, the Division orders Gorton to comply with all provisions of this Consent Order, including all requirements set forth below.

30. Gorton agrees to the terms and conditions of this Consent Order. Gorton 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. Gorton also agrees not to challenge directly or collaterally, in any judicial or administrative proceeding brought by the Division or by Gorton 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.

31. Notwithstanding the above, Gorton does not admit to any of the factual or legal determinations made by the Division herein and any action undertaken by Gorton pursuant to this Consent Order shall not constitute evidence of fault or liability by Gorton with respect to the conditions of the Project.

Compliance Requirements

32. Within thirty (30) calendar days of the effective date of this Consent Order, Gorton shall submit to the Division a written certification stating that complete, effective and up-to-date SWMPs have been fully developed and implemented at the Project.

33. Within thirty (30) calendar days of the effective date of this Consent Order, Gorton shall submit to the Division a written certification stating that all existing BMPs at the Project are being implemented and maintained to meet the design requirements specified in the Project's complete and up-to-date SWMPs. Additionally, Gorton shall submit photographs to the Division documenting the current conditions and the associated BMPs implemented at the Project.

34. Within thirty (30) calendar days of the effective date of this Consent Order, Gorton shall submit to the Division a written certification stating that inspections of the Project's stormwater management system are being conducted in accordance with the terms and conditions of the Permit.

CIVIL PENALTY

35. Based upon the application of the Division's penalty policies and procedures, and consistent with Departmental policies for violations of the Act, Gorton shall pay Fifty Four Thousand Dollars ($54,000.00) in civil penalties. The Division intends to petition the Executive Director, or his designee, to impose the Fifty Four Thousand Dollar ($54,000.00) civil penalty for the above violation(s) and Gorton 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

36. The Parties agree and acknowledge that this Consent Order constitutes a full and final settlement of all the violations cited herein and any other violations associated with the First Inspection and/or Second Inspection.

37. 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 Gorton 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.

38. 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 Gorton, 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.

39. The Parties' obligations under this Consent Order are limited to the matters expressly stated herein or in approved submissions required hereunder. All submissions made pursuant to this Consent Order are incorporated into this Consent Order and become enforceable under the terms of this Consent Order as of the date of approval by the Division.

40. The Division's approval of any submission, standard, or action under this Consent Order shall not constitute a defense to, or an excuse for, any prior violation of the Act that is not already addressed by this Consent Order, or any subsequent violation of any requirement of this Consent Order or the Act.

41. Notwithstanding paragraph 31 above, the violations described in this Consent Order will constitute part of Gorton'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 Gorton. Gorton agrees not to challenge the use of the cited violations for the purposes described in this paragraph.

LIMITATIONS, RELEASES AND RESERVATION OF RIGHTS AND LIABILITY

42. 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 the specific instances of violations cited herein and any other violations associated with the First Inspection and/or Second Inspection. The Division reserves the right to bring any action to enforce this Consent Order, including actions for penalties for violation of the Consent Order or the collection thereof, and/or injunctive relief.

43. This Consent Order does not grant any release of liability for any violations that are not included in this Consent Order.

44. 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 pursuant to the Division's authority under the Act. Nothing in this consent Order shall limit Gorton's ability to oppose the imposition of such additional requirements.

45. Upon the effective date of this Consent Order, Gorton 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, including any other violations associated with the First Inspection and/or Second Inspection.

46. Gorton 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 Gorton, or those acting for or on behalf of Gorton, including its officers, employees, agents, successors, representatives, contractors, consultants or attorneys in carrying out activities pursuant to this Consent Order. Gorton shall not hold out the State of Colorado or its employees, agents or representatives as a party to any contract entered into by Gorton 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

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 Gorton:

Tom D. Gorton Construction
c/o Michael Russell
Russell Engineering, Inc.
934 Main Ave., Unit C
Durango, CO 81301
Telephone: 970.385.4546
michael@russelleng.biz

OBLIGATIONS UNAFFECTED BY BANKRUPTCY

48. The obligations set forth herein are based on the Division's police and regulatory authority. These obligations require specific performance by Gorton of corrective actions carefully designed to prevent on-going or future harm to public health or the environment, or both. Enforcement of these obligations is not stayed by a petition in bankruptcy. Gorton agrees that the penalties set forth in this Consent Order are not in compensation of actual pecuniary loss. Further, the obligations imposed by this Consent Order are necessary for Gorton and the Project to achieve and maintain compliance with State law.

MODIFICATIONS

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

NOTICE OF EFFECTIVE DATE

50. 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 an Order for Civil Penalty, which shall be the "effective date" for purposes of this Consent Order. If the penalty as described in this Consent Order is not imposed, or an alternate penalty is imposed, or consent is withdrawn under the terms of paragraph 37 above, this Consent Order becomes null and void.

BINDING EFFECT AND AUTHORIZATION TO SIGN

51. This Consent Order is binding upon Gorton 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 TOM D. GORTON CONSTRUCTION, INC.:

_____ Date: 7/8/09

Tom D. Gorton, Owner

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