

# 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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March 18, 2009



Colorado Department  
of Public Health  
and Environment

Manual Esquibel, City Manager  
City of Brighton  
22 South 4<sup>th</sup> Street  
Brighton, CO 80601

**RE: Compliance Order on Consent, Number: MC-090316-1**

Dear Mr. Esquibel:

Enclosed for the City of Brighton records you will find your copy 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 Ginny Torrez at (303) 692-3612 or by electronic mail at [ginny.torrez@state.co.us](mailto:ginny.torrez@state.co.us).

Sincerely,

Kristi-Ray Beaudin, Legal Assistant  
Water Quality Protection Section  
WATER QUALITY CONTROL DIVISION

cc: Tri-County Health Department  
MS-3 File

cc: Aaron Urdiales, EPA Region VIII  
Paul Kim, Engineering Section, CDPHE  
Dick Parachini, Watershed Program, CDPHE  
Gary Beers, Permits Unit, CDPHE  
Carolyn Schachterle, OPA

*Enclosure(s)*



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

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**COMPLIANCE ORDER ON CONSENT**

**NUMBER: MC-090316-1**

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**IN THE MATTER OF:     CITY OF BRIGHTON**  
**CDPS PERMIT NO. CO-0021547**  
**ADAMS COUNTY, COLORADO**

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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 the City of Brighton ("Brighton"). The Division and Brighton 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:
  - a. To stipulate terms and conditions under which the Division will conditionally authorize the construction, without prior site location or design approval, of a force main to be constructed by Brighton to serve a manufacturing facility being built in unincorporated Weld County, Colorado by Vestas-American Wind Technology, Inc, (the "Vestas Factories").
  - b. To establish stipulated penalties that will be applicable in the event Brighton fails to comply with the terms and conditions of this Consent Order.

**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 Brighton, and Brighton's compliance with the Act and its implementing regulations.
3. At all times relevant to the facts cited herein, Brighton was a municipality as defined by § 31-1-101(6) C.R.S.

4. Brighton is a "person" as defined by 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. Brighton owns and operates a "domestic wastewater treatment works" as defined by §25-8-103(5), C.R.S. The domestic wastewater treatment works is located in the Northwest ¼, Southwest ¼, Section 6, Township 1 South, Range 66 West, Adams County, Colorado (the "Facility"). The definition of a "domestic wastewater treatment works" includes pumping stations (lift stations).
6. The Colorado Water Quality Control Act, §25-8-702, C.R.S. states: "*No person shall commence the construction of any domestic wastewater treatment works or the enlargement of the capacity of an existing domestic wastewater treatment works, unless the site location and the design for the construction have been approved by the division.*"
7. The Division's "Guidance Document for the Site Location and Design Approval Regulations for Domestic Wastewater Treatment Works", Part 5.2, establishes that a force main is considered to be part of the lift station.
8. Brighton is currently designing and will be installing utility services (sanitary sewer and water) to serve the Vestas Factories.
9. The sanitary sewer service from the Vestas Factories will include the construction of a new lift station and new force main. The new lift station will be located near the intersection of Weld County Roads 6 and 27, with the associated force main being installed along Weld County Road 27 to an existing Brighton lift station located near the intersection of Weld County Roads 2 and 27.
10. Brighton has advised the Division that the site on which the Vestas Factories will be constructed is expected to be annexed into Brighton in 2009 and that it has committed to the owners of the Vestas Factories that the utility services, including the new force main but not the new lift station, will be installed by May 15, 2009. The new lift station needs to be installed by August 1, 2009. Brighton has advised the Division that the estimated construction time of the utility services, which includes the new force main, is approximately 90 days; therefore, the construction work may need to begin by March 16, 2009.
11. Brighton is currently designing the utility services and preparing the application for site location and associated engineering report (Nolte Associates, Inc.). Commonly, the time required to prepare the application for site location approval and associated engineering report; receive Division approval of the application for site location; prepare the plans, specifications and design report (design documents); and, receive Division approval of the design documents for a new lift station and force main is approximately six (6) months.
12. Brighton has advised the Division that it must commence construction of the new force main prior to receiving site location and design approvals from the Division in order to meet their commitment date of May 15, 2009; therefore, Brighton will be in violation of the Colorado Water Quality Control Act, §25-8-702, C.R.S.

## ORDER AND AGREEMENT

13. Based on the foregoing factual and legal determinations, pursuant to its authority under §25-8-602 and 605, C.R.S., the Division orders Brighton to comply with all provisions of this Consent Order, including all requirements set forth below.
14. Brighton agrees to the terms, conditions and requirements of this Consent Order.
15. Brighton further 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. Brighton also agrees not to challenge directly or collaterally, in any judicial or administrative proceeding brought by the Division or by Brighton 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.
  - d. The terms for payment of a stipulated penalty or the stipulated penalty amount outlined under the Stipulated Penalty section of this Consent Order.
16. Notwithstanding the above, Brighton does not admit to any of the factual or legal determinations made by the Division herein, and any action undertaken by Brighton pursuant to this Consent Order shall not constitute evidence of fault by Brighton.

### Compliance Requirements

17. Brighton shall immediately implement measures to achieve compliance with the terms of this Consent Order.
18. The Division acknowledges that Brighton is conditionally authorized to initiate construction of the force main associated with the Vestas Factories, upon Brighton accepting and complying with the following schedule designed to retroactively obtain site location and design approval for the force main construction project:
  - a. By May 1, 2009, Brighton will prepare and submit to the Division a complete application for site location approval (including local review agency signatures) and the associated engineering report for the new lift station and new force main. A check in full payment of fees for Division review of the site location application shall accompany the site location approval application.
  - b. Within fifteen (15) calendar days of receipt, Brighton will respond to and incorporate as appropriate any comments received from the Division's review of the application for site location approval and its associated engineering report.
  - c. Within thirty (30) calendar days of receiving written site location approval from the Division, Brighton will prepare and submit to the Division the design documents for the new lift station and new force main. Brighton will include a check in full payment of the design review fees charged by the Division.

- d. Brighton will promptly respond to and incorporate as appropriate any comments received from the Division's review of the design documents.
19. The Division agrees that it will expedite review of the site location approval application and design to the extent possible.
20. Brighton agrees that any Division identified deficiencies, with respect to the design or construction of the force main, subsequent to construction of the force main, will be corrected to the satisfaction of the Division and in accordance with a schedule set forth by the Division. The Division determined time schedule shall become a condition of this Consent Order.
21. Brighton agrees that physical construction of the new lift station associated with the force main will not begin until final site location and design approvals have been received from the Division. For the purpose of this Consent Order, "physical construction" shall be defined as the excavation and/or placement of structural components, materials or equipment including wet wells, pumps, electrical components, walls, floors, buildings, basins/walls, etc., associated with the lift station.
22. All documents submitted under this Consent Order shall use the same titles as stated in this Consent Order, and shall reference both the number of this Consent Order and the number of the paragraph pursuant to which the document is required.

#### **STIPULATED PENALTY**

23. The Division will not seek a civil penalty against Brighton for commencement of construction of the force main without site location and design approval, however, Brighton agrees that if it fails to comply with any requirement or agreed upon term of this Consent Order, it shall pay a civil penalty of \$10,000 per day until the requirement or term is satisfied. Brighton further agrees to pay the penalty within thirty (30) calendar days of the Division's written notice requiring payment. 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:

Ms. Ginny Torrez  
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 violations cited herein.
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 Brighton 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. 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.
27. 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, or any subsequent violation of any requirement of this Consent Order or the Act.
28. Notwithstanding paragraph 16 above, the violations described in this Consent Order will constitute part of Brighton’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 Brighton. Brighton agrees not to challenge the use of the cited violations for any such purpose.
29. This Consent Order does not relieve Brighton from complying with all applicable Federal, State, and/or local laws in fulfillment of its obligations hereunder and Brighton shall obtain all necessary approvals and/or permits to conduct the activities required by this Consent Order unless specifically relieved herein. 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**

30. Upon the effective date of this Consent Order, and during its term, this Consent Order shall stand in lieu of any other order or enforcement action by the Division with respect to the specific facts cited herein. 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.
31. This Consent Order does not grant any release of liability for any violations not specifically cited herein.
32. 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.
33. Upon the effective date of this Consent Order, Brighton 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.
34. Brighton 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 Brighton, or those acting for or on behalf of Brighton, including its officers, employees, agents, successors, representatives, contractors, consultants or attorneys in carrying out activities pursuant to this Consent Order. Brighton shall not hold out the State of Colorado or its employees, agents or representatives as a party to any

contract entered into by Brighton 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.

### **OFFSITE ACCESS**

35. To the extent any plan submitted by Brighton requires access to property not owned or controlled by Brighton, Brighton shall use its best efforts to obtain site access from the present owners of such property to conduct required activities, and to allow Division access to such property to oversee such activities. In the event that site access is not obtained when necessary, Brighton shall notify the Division in writing regarding its best efforts and its failure to obtain such access.

### **SITE ACCESS**

36. The Division shall be permitted to oversee any and all work being performed under this Consent Order. The Division shall be permitted access to Brighton's property at any time work is being conducted pursuant to this Consent Order, and during reasonable business hours during any period work is not being conducted, for the purposes of determining Brighton's compliance with the Act, the Regulations, and this Consent Order. The Division shall be permitted to inspect work sites, operating and field logs, contracts, purchasing/shipping records, and other relevant records and documents relating to this Consent Order or any requirement under this Consent Order and to interview Brighton personnel and contractors performing work required by this Consent Order. Nothing in this paragraph limits or impairs the Division's statutory authorities to enter and inspect the domestic wastewater treatment works and any appurtenances.
37. Brighton shall notify the Division in writing of any excavation, construction or other investigatory or remedial activities undertaken pursuant to any plan or requirement of this Consent Order a minimum of seventy-two (72) hours prior to beginning the excavation, construction, or required activity. Brighton shall provide the Division any blue print, diagram, construction or other permits for any construction activity undertaken pursuant to this Consent Order upon request.

### **FORCE MAJEURE**

38. Brighton 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, which are beyond the control of Brighton, and which cannot be overcome by due diligence.
39. Within seventy-two (72) hours of the time that Brighton knows or has reason to know of the occurrence of any event which Brighton has reason to believe may prevent Brighton from timely compliance with any requirement under this Consent Order, Brighton shall provide verbal notification to the Division. Within seven (7) calendar days of the time that Brighton knows or has reason to know of the occurrence

of such event, Brighton 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.

40. The burden of proving that any delay was caused by a force majeure shall at all times rest with Brighton. If the Division agrees that a force majeure has occurred, the Division will so notify Brighton. The Division will also approve or disapprove of Brighton'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 Brighton's proposed actions for mitigating the delay, it shall provide a written explanation of its determination to Brighton. Within fifteen (15) calendar days of receipt of the explanation, Brighton may file an objection.
41. 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, Brighton shall perform the requirements of this Consent Order that were delayed by the force majeure with all due diligence.

### **NOTICES**

42. 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: Ginny Torrez  
4300 Cherry Creek Drive South  
Denver, Colorado 80246-1530  
Telephone: 303.692.3612  
E-mail: [gabby.torrez@state.co.us](mailto:gabby.torrez@state.co.us)

For Brighton:

Manuel Esquibel, City Manager  
City of Brighton  
22 South 4<sup>th</sup> Street  
Brighton, CO 80601

### **OBLIGATIONS UNAFFECTED BY BANKRUPTCY**

43. The obligations set forth herein are based on the Division's police and regulatory authority. These obligations require specific performance by Brighton 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. Brighton 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 Brighton to achieve and maintain compliance with State law.

### **MODIFICATIONS**

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

### **COMPLETION OF REQUIRED ACTIONS**

45. Brighton shall submit a Notice of Completion to the Division upon satisfactory completion of all requirements of this Consent Order. The Division shall either accept or reject Brighton's Notice of Completion in writing within thirty (30) calendar days of receipt. If the Division rejects Brighton's Notice of Completion, it shall include in its notice a statement identifying the requirements that the Division considers incomplete or not satisfactorily performed and a schedule for completion. Brighton shall, within fifteen (15) calendar days of receipt of the Division's rejection, either:
- a. Submit a notice of acceptance of the determination; or
  - b. Submit a notice of dispute.

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

46. If Brighton files any notice of dispute pursuant to paragraph 45 the notice shall specify the particular matters in the Division's determination that Brighton seeks to dispute, and the basis for the dispute. Matters not identified in the notice of dispute shall be deemed accepted by Brighton. The Division and Brighton 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 Colorado State Administrative Procedures Act, §§ 24-4-101 through 108, C.R.S.

### **NOTICE OF EFFECTIVE DATE**

47. This Consent Order shall be fully effective, enforceable and constitute a final agency action on the date signed by the authorized representative of the last party.

### **BINDING EFFECT AND AUTHORIZATION TO SIGN**

48. This Consent Order is binding upon Brighton and its elected officials, employees, agents, representatives, successors in interest, and assigns. The undersigned warrant that they are authorized to legally bind their respective principals to this Consent Order. Brighton 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 THE CITY OF BRIGHTON:**

*Clint Bluchman*  
for Manuel Esquibel, City Manager Date: 3-16-09

**FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, WATER QUALITY CONTROL DIVISION:**

*Lori M. Gerzina* FOR Date: 3-16-09

Lori M. Gerzina, Section Manager  
Compliance Assurance Section  
WATER QUALITY CONTROL DIVISION