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

November 17, 2009

Mr. Fred S. Kummer, President
Kummer Development Corporation
d/b/a Adam's Rib
11330 Olive Boulevard
St. Louis, MO 63141

RE: Final Compliance Order on Consent, Number: SC-091116-1

Dear Mr. Kummer,

Enclosed for Kummer Development Corporation's records, you will find Kummer's 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, as further described in paragraph 26 of the document. 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 for the purpose of placing the assigned Order Number on the final document.

If you have any questions, please do not hesitate to contact me at (303) 692-3598 or by electronic mail at michael.harris@state.co.us.

Sincerely,

Michael Harris
Enforcement Unit
WATER QUALITY CONTROL DIVISION

Enclosure(s)

cc: Eagle County Environmental Health Department
General Counsel, Kummer Development Corporation (11330 Olive Boulevard, St. Louis MO 63141)

ec: Aaron Urdiales, EPA Region VIII
Dick Parachini, Watershed Program, CDPHE
Nathan Moore, Permits Unit, CDPHE
Carolyn Schachterle, OPA, CDPHE

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

DIVISION OF ADMINISTRATION

WATER QUALITY CONTROL DIVISION

COMPLIANCE ORDER ON CONSENT **NUMBER: SC-091116-1**

IN THE MATTER OF: **KUMMER DEVELOPMENT CORPORATION**
d/b/a ADAM'S RIB
CDPS PERMIT NO. COR-030000
CERTIFICATION NO. COR-038057
EAGLE 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 §25-8-602 and 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 Kummer Development Corporation ("Kummer"). The Division and Kummer 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 alleged violations cited herein and in the Notice of Violation / Cease and Desist Order (Number: SO-080917-1) that the Division issued to Kummer on September 17, 2008.

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 Kummer and Kummer's compliance with the Act and its stormwater permit certification.

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

4. Kummer 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. On April 16, 1984, Kummer registered the trade name "Adam's Rib" with the Colorado Secretary of State.

6. In May 2005, Kummer initiated construction activities of a commercial development on 350 acres of property located at or near Brush Creek Road and Eaton Lane, in or near the Town of Eagle, Eagle County, Colorado (the "Project").

7. On April 13, 2005, the Division received an application from Adam's Rib for Project coverage under the Colorado Discharge Permit System ("CDPS") General Permit, Number COR-030000, for Stormwater Discharges Associated with Construction Activity (the "Permit"). During the times relevant to the alleged violations identified herein, a version of the Permit was in place that was effective from July 1, 2002 through June 30, 2007 (the "2002 Permit"). The current version of the Permit, which was signed on May 31, 2007, became effective on July 1, 2007 and remains in effect until June 30, 2012 (the "2007 Permit").

8. On April 20, 2005, the Division provided Adam's Rib Certification Number COR-038057 authorizing Kummer to discharge stormwater from the construction activities associated with the Project to Brush Creek and the Colorado River under the terms and conditions of the Permit. Certification Number COR-038057 became effective April 19, 2005 and remains in effect until June 30, 2012 or until Kummer inactivates permit coverage.

9. Brush Creek and the Colorado River are "state waters" as defined by §25-8-103(19), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2 (102).

10. 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.

11. On May 19, 2007, William T. Carlson (the "Inspector") conducted an on-site inspection of the Project on behalf of the Division, pursuant to the Division's authority under §25-8-306, C.R.S., to determine Kummer's compliance with the Water Quality Control Act and the Permit. During the inspection, the Inspector interviewed Project representatives, reviewed the Project's stormwater management system records, and performed a physical inspection of the Project.

Failure to Implement and/or Maintain
Best Management Practices to Protect Stormwater Runoff

12. Pursuant to Part I. B. 3. a. (1) of the 2002 Permit, Kummer was required to minimize erosion and sediment transport from the Project. The 2002 Permit specified that structural site management practices may include, but were 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.

13. Pursuant to Part I. B. 3. a. (2) of the 2002 Permit, Kummer was required to implement interim and permanent stabilization practices, including site-specific scheduling of the implementation of the practices. The 2002 Permit specified that site plans should ensure existing vegetation was preserved where possible and that disturbed areas were stabilized. The 2002 Permit specified that non-structural practices may include, but were not limited to: temporary seeding, permanent seeding, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees and preservation of mature vegetation.

14. Pursuant to Part I. B. of the 2002 Permit, Kummer was required to implement the provisions of the Project's Stormwater Management Plan ("SWMP") as a condition of the 2002 Permit.

15. The Division has determined that Kummer failed to implement and/or maintain functional BMPs at the Project as described in paragraphs 15(a–e) below:

    a. During the May 19, 2007 inspection, the Inspector observed a disturbed area located directly adjacent to Brush Creek at the Project. A silt fence was in place, however, the silt fence had not been installed and/or maintained to act as a functional BMP, as the silt fence was not trenched and was falling over.

    b. During the May 19, 2007 inspection, the Inspector observed bulk fuel storage tanks at the Project. The Project's SWMP stated that a secondary containment berm would be constructed for the tanks. However, a functional secondary containment BMP was not in place.

    c. During the May 19, 2007 inspection, the Inspector observed a disturbed road side ditch located at the intersection of Red Bluffs Land and Frost Creek Drive at the Project. No BMPs were observed in place to stabilize the disturbed area or to prevent erosion and sediment discharge from this area of the Project. Consequently, erosion of the ditch line and surrounding disturbed areas was observed.

    d. During the May 19, 2007 inspection, the Inspector observed disturbed slopes leading down to a disturbed drainage ditch located along Frost Creek Drive at the Project. No BMPs were observed in place to stabilize the disturbed slopes or to prevent sediment from discharging to the drainage ditch. Hay bales were in place within the ditch, however, the hay bales had not been installed and/or maintained in accordance with good engineering practices, as the hay bale check dams did not have a center weir section and did not extend completely across the ditch channel. Consequently, erosion and sediment discharge was observed within the drainage ditch.

    e. During the May 19, 2007 inspection, the Inspector observed a disturbed drainage spillway leading from sediment basin #16 at the Project. No BMPs were observed in place to stabilize the disturbed spillway or to prevent erosion and sediment discharge towards Brush Creek.

16. Kummer'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 2002 Permit.

Failure to Conduct Inspections of Stormwater Management System

17. Pursuant to Part I. C. 5. a. of the 2002 Permit, for active sites where construction had not been completed, Kummer was 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 caused surface erosion.

18. Pursuant to Part I. C. 5. a. 3. of the 2002 Permit, Kummer was required to keep a record of inspections.

19. During the May 19, 2007 inspection, the Inspector reviewed the Project's stormwater management system inspection records and identified that Kummer failed to perform inspections at the Project from January 1, 2007 until May 18, 2007.

20. Kummer's failure to conduct inspections of the Project's stormwater management system constitutes violations of Part I. C. 5. a. of the 2002 Permit.

ORDER AND AGREEMENT

21. 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 associated with the alleged violations cited herein and in the Notice of Violation / Cease and Desist Order (Number: SO-080917-1), the Division orders Kummer to comply with all provisions of this Consent Order, including all requirements set forth below.

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

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

CIVIL PENALTY

24. 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, Kummer shall pay Sixty Five Thousand Dollars ($65,000.00) in civil penalties. The Division intends to petition the Executive Director, or his designee, to impose the Sixty Five Thousand Dollar ($65,000.00) civil penalty for the above violation(s) and Kummer 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

25. The Parties agree and acknowledge that this Consent Order constitutes a full and final settlement of the civil penalties associated with the violations alleged herein and in the September 17, 2008 Notice of Violation / Cease and Desist Order (Number: SO-080917-1).

26. 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 Kummer 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.

27. 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 Kummer, 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.

28. Notwithstanding paragraph 23 above, the alleged violations described in this Consent Order will constitute part of Kummer's compliance history for purposes where such history is relevant. This includes considering the alleged violations described above in assessing a penalty for any subsequent violations against Kummer. Kummer agrees not to challenge the use of the cited alleged violations for any such purpose.

LIMITATIONS, RELEASES AND RESERVATION OF RIGHTS AND LIABILITY

29. 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 September 17, 2008 Notice of Violation / Cease and Desist Order (Number: SO-080917-1). 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.

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

31. 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.

32. Upon the effective date of this Consent Order, Kummer 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.

33. 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

34. 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 Kummer:

Mr. Fred S. Kummer, President
Kummer Development Corporation
d/b/a Adam's Rib
11330 Olive Boulevard
St. Louis, MO 63141
Telephone: 314.567.9000
Fax: 314.567.7839

General Counsel
Kummer Development Corporation
d/b/a/ Adam's Rib
11330 Olive Boulevard
St. Louis, MO 63141
Telephone: 314.567.9000
Fax: 314.567.7839

MODIFICATIONS

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

NOTICE OF EFFECTIVE DATE

36. 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

37. This Consent Order is binding upon Kummer 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 KUMMER DEVELOPMENT CORPORATION:

_____ Date: October 28, 2009
Fred S. Kummer, President

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

Lori M. Gerzina Date: 11/14/09

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