

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. Laboratory Services Division
Denver, Colorado 80246-1530 8100 Lowry Blvd.
Phone (303) 692-2000 Denver, Colorado 80230-6928
TDD Line (303) 691-7700 (303) 692-3090
Located in Glendale, Colorado

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



Colorado Department
of Public Health
and Environment

July 6, 2009

Darwin Derr
Dust & Dirt Excavating, LLC
699 N. 1st Avenue
Greeley, CO 80631

RE: Compliance Order on Consent, Number: SC-090702-1

Dear Mr. Derr:

Enclosed for Dust & Dirt Excavating, LLC'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 24). 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
Enforcement Unit
WATER QUALITY CONTROL DIVISION

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

Enclosure(s)



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

COMPLIANCE ORDER ON CONSENT

NUMBER: SC-090702-1

**IN THE MATTER OF: DUST & DIRT EXCAVATING LLC
WELD 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 Dust & Dirt Excavating LLC ("Dust & Dirt"). The Division and Dust & Dirt 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 cited herein and in the Notice of Violation / Cease and Desist Order (Number: SO-060818-2) that the Division issued to Dust & Dirt on August 18, 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 Dust & Dirt and Dust & Dirt's compliance with the Act and its implementing permit regulations.
3. At all times relevant to the alleged violations identified herein, Dust & Dirt was a Colorado limited liability company in good standing and registered to conduct business in the State of Colorado.
4. Dust & Dirt 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. 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.

6. Pursuant to 5 CCR 1002-61, §61.3(2)(e)(iii)(J), construction activity, including clearing, grading and excavation, that results in the disturbance of five or more acres of total land area is considered to be “industrial activity.”
7. Pursuant to 5 CCR 1002-61, §61.3(2), stormwater discharges associated with industrial activity are point sources requiring Colorado Discharge Permit System (“CDPS”) permit coverage.
8. On May 2, 2002, Dust & Dirt initiated ground disturbing construction activities, on behalf of Appel Farms Group, LLC (“Appel Farms”), to build a residential housing development on eighty (80) acres of land located at or near 13756 State Highway 52 in the City of Fort Lupton, Weld County, Colorado (the “Project”).
9. On April 14, 2005, a representative from the Weld County Department of Public Health & Environment (the “Inspector”) conducted an onsite inspection of the Facility on behalf of the Division, pursuant to the Division’s authority under §25-8-306, C.R.S., to determine the Project’s compliance with the Water Quality Control Act. During the inspection, the Inspector interviewed a Dust & Dirt representative, conducted a review of the Project’s stormwater management records, and conducted a physical inspection of the Project.
10. During the April 14, 2005 inspection, the Inspector determined that the Project was not covered under a CDPS permit authorizing discharges of stormwater from the Project.
11. On April 15, 2005, the Weld County Department of Public Health & Environment sent a letter and Stormwater Inspection Report to Dust & Dirt, informing Dust & Dirt that a CDPS permit for stormwater discharges must be obtained for the Project.
12. On February 15, 2006, the Division sent letters to Dust & Dirt and Appel Farms requesting information regarding the nature of the construction activities at the Project.
13. In response to the Division’s February 15, 2006 letter, on March 10, 2006, Appel Farms applied for Project coverage under the Colorado Discharge Permit System (“CDPS”) General Permit, Number COR-030000, for Stormwater Discharges Associated with Construction Activity (the “Permit”).
14. On March 14, 2006, the Division issued Appel Farms Certification Number COR-039688 authorizing Appel Farms to discharge stormwater from the construction activities associated with the Project to Shortline Ditch, a tributary of the South Platte River, under the terms and conditions of the Permit. Certification Number COR-039688 became effective March 14, 2006 and remains in effect until June 30, 2012 or until Appel Farms inactivates Permit coverage.
15. Shortline Ditch and the South Platte 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(101).
16. The Division records establish that neither Appel Farms nor Dust & Dirt had any permits authorizing discharges of stormwater from the Project prior to March 14, 2006.
17. Dust & Dirt’s failure to obtain CDPS permit coverage for the Project constitutes violation(s) of §25-8-501(1) C.R.S., 5 CCR 1002-61, §61.3(1)(a), and 5 CCR 1002-61, §61.3(2).

ORDER AND AGREEMENT

18. 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-060818-2), the Division orders Dust & Dirt to comply with all provisions of this Consent Order, including all requirements set forth below.
19. Dust & Dirt agrees to the terms and conditions of this Consent Order. Dust & Dirt 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. Dust & Dirt also agrees not to challenge directly or collaterally, in any judicial or administrative proceeding brought by the Division or by Dust & Dirt 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.
20. Notwithstanding the above, Dust & Dirt does not admit to any of the factual or legal determinations made by the Division herein, and any action undertaken by Dust & Dirt pursuant to this Consent Order shall not constitute evidence of fault by Dust & Dirt with respect to the conditions of the Project.

CIVIL PENALTY

21. 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, Dust & Dirt shall pay One Hundred Seven Thousand Dollars (\$107,000.00) plus interest in civil penalties. The Division intends to petition the Executive Director, or his designee, to impose the One Hundred Seven Thousand Dollar (\$107,000.00) civil penalty for the above violation(s) and Dust & Dirt agrees to make the payments in accordance with the terms set forth in the First Amended Plan of Reorganization dated March 16, 2009, Case No. 0813883MER, in the United States Bankruptcy Court for the District of Colorado, and attached to this Consent Order as Attachment A. 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

22. Dust and Dirt shall provide an annual financial accounting report on each anniversary of the date this order is signed. Further, Dust and Dirt shall, upon reasonable advanced notice, make available to the Division its financial records for the purpose of audit. Any costs for such audit shall be paid by the Division.

SCOPE AND EFFECT OF CONSENT ORDER

23. 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 August 18, 2006 Notice of Violation / Cease and Desist Order (Number: SO-060818-2).
24. 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 Dust & Dirt 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.
25. 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 Dust & Dirt, 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.
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 20 above, the violations described in this Consent Order will constitute part of Dust & Dirt'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 Dust & Dirt. Dust & Dirt agrees not to challenge the use of the cited violations for any such purpose.
29. This Consent Order does not relieve Dust & Dirt 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

30. 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 August 18, 2006 Notice of Violation / Cease and Desist Order (Number: SO-060818-2). 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 a latent condition is discovered that indicates such requirements are necessary to protect human health or the environment.
33. Upon the effective date of this Consent Order, Dust & Dirt 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. Dust & Dirt 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 Dust & Dirt, or those acting for or on behalf of Dust & Dirt, including its officers, employees, agents, successors, representatives, contractors, consultants or attorneys in carrying out activities pursuant to this Consent Order. Dust & Dirt shall not hold out the State of Colorado or its employees, agents or representatives as a party to any contract entered into by Dust & Dirt 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

35. 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 Dust & Dirt:

Darwin Derr
Dust & Dirt Excavating, LLC
699 N. 1st Avenue
Greeley, CO 80631

MODIFICATIONS

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

NOTICE OF EFFECTIVE DATE

37. 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

38. This Consent Order is binding upon Dust & Dirt 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 DUST & DIRT EXCAVATING LLC:

Darwin Derr Manager

Darwin Derr, Owner

Date:

6/24/08

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

Lori M Gerzina

Date: *July 2, 2009*

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