

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

October 6, 2009

Terry T. Kyger, CFO
Village Homes of Colorado, Inc.
6000 Greenwood Plaza Blvd., Ste. 200
Greenwood Village, CO 80111

RE: Final Compliance Order on Consent

Dear Mr. Kyger,

Enclosed for Village Homes of Colorado, Inc.'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 as noted in paragraph 29. 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 document 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
Gary Beers, Permits Unit, CDPHE
Nathan Moore, Permits Unit, CDPHE
Carolyn Schachterle, OPA

Enclosure(s)



COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
WATER QUALITY CONTROL DIVISION

COMPLIANCE ORDER ON CONSENT

NUMBER: SC-090924-1

IN THE MATTER OF: **VILLAGE HOMES OF COLORADO, INC.**
CDPS PERMIT NO. COR-030000
CERTIFICATION NO. COR-035753
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 §25-8-605, 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 Village Homes of Colorado, Inc. ("Village Homes"). The Division and Village Homes 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-060919-2) that the Division issued to Village Homes on September 19, 2006, and as amended on February 12, 2009.

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 Village Homes and Village Homes' compliance with the Act, its implementing permit regulations, and the stormwater permit for construction.
3. At all times relevant to the alleged violations identified herein, Village Homes was a Colorado corporation in good standing and registered to conduct business in the State of Colorado.
4. Village Homes 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).

Operating Without a Stormwater Permit

5. Pursuant to §25-8-501(1), C.R.S. and its implementing permit regulation, 5CCR 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), stormwater discharges associated with industrial activity are point sources requiring Colorado Discharge Permit System (“CDPS”) permit coverage.
7. 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.”
8. Pursuant to 5 CCR 1002-61, §61.4(3)(a)(i), facilities proposing a discharge of stormwater associated with industrial activity shall submit a permit application 180 days before that facility commences industrial activity which may result in a discharge of stormwater associated with that industrial activity. Facilities involved in construction activities shall submit a permit application at least 90 days before the date on which construction is to commence.
9. In or about January 2001, Village Homes initiated construction activities to build residential homes and townhouses on 61.9 acres of land within the Eagle Ranch Development, in or near the Town of Eagle, Eagle County, Colorado (the “Project”).
10. Village Homes’ construction activity constituted industrial activity that is subject to stormwater permitting requirements.
11. On September 29, 2003, Village Homes applied for Project coverage under the Colorado Discharge Permit System General Permit, Number COR-030000, for Stormwater Discharges Associated with Construction Activity (the “Permit”).
12. On October 2, 2003, the Division provided Village Homes Certification Number COR-035753 authorizing Village Homes to discharge stormwater from the construction activities associated with the Project to Brush Creek, a tributary of the Eagle River, under the terms and conditions of the Permit. Certification Number COR-035753 became effective October 1, 2003 and remained in effect until Village Homes certified the Project had been finally stabilized and inactivated Permit coverage on August 28, 2007.
13. Brush Creek and the Eagle 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).
14. The Division records establish that Village Homes did not have any permits authorizing discharges of stormwater from the Project for the period of January 2001 through September 2003.
15. Village Homes’ failure to obtain CDPS permit coverage for the Project, for the period of January 2001 through September 2003, constitutes a violation of §25-8-501(1) C.R.S., 5CCR 1002-61, §§61.3(1)(a), 61.3(2) and 61.4(3)(a)(i).

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

16. 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.
17. Pursuant to Part I. B. 3. a. (1) of the Permit, Village Homes 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.
18. Pursuant to Part I. B. 3. a. (2) of the Permit, Village Homes 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.
19. Pursuant to Part I. B. of the Permit, Village Homes was required to implement the provisions of the Project's Stormwater Management Plan ("SWMP") as a condition of the Permit.
20. Pursuant to Part II. A. 10. of the Permit, Village Homes was required to properly maintain all systems of treatment and control which are installed or used to achieve compliance with the conditions of the Permit.
21. On April 14, 2006, a representative from Kleinfelder, Inc. (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 Village Homes' 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 records, and performed a physical inspection of the Project.
22. The Division has determined that Village Homes failed to implement and/or maintain adequate Best Management Practices ("BMPs") at the Project as described in paragraphs 22(a-g) below:
 - a. During the April 14, 2006 inspection, the Inspector observed a disturbed area between Hockett Street and Ewing Street at the Project. Vehicles had tracked sediment from the disturbed area onto the paved road adjacent to the construction disturbance. No BMPs were observed in place to prevent sediment from discharging from the disturbed area to the impervious road and traveling toward the storm sewer. Additionally, the Project's SWMP states, "Vehicle tracking pads shall be installed where vehicles transition between the pavement and the soil." However, no vehicle tracking pad was observed in place.

- b. During the April 14, 2006 inspection, the Inspector observed a storm drain inlet located at or near the intersection of Greenhorn Avenue and Short Street at the Project. The Project's SWMP states, "All storm drains shall be equipped with inlet protection." However, no inlet protection device was observed in place.
 - c. During the April 14, 2006 inspection, the Inspector observed straw wattles in place along Longview Street. The straw wattles were not being properly installed/maintained as gaps were observed under and between the wattles. Thus, the straw wattles were not acting as functional BMPs to control sediment.
 - d. During the April 14, 2006 inspection, the Inspector observed silt fence in place west of Greenhorn Avenue at the Project. The silt fence had not been properly installed as gaps were observed under the fence. Thus, the silt fence was not acting as a functional BMP to control sediment.
 - e. During the April 14, 2006 inspection, the Inspector observed silt fence in place west of the intersection of Greenhorn Avenue and Longview Street at the Project. The silt fence was not being properly maintained as the fence had broken stakes and was falling over. Thus, the silt fence was not acting as a functional BMP to control sediment.
 - f. During the April 14, 2006 inspection, the Inspector observed silt fence in place near the intersection of Ewing Street and Founders Avenue at the Project. The silt fence had not been properly installed/maintained as gaps were observed under the fence. Thus, the silt fence was not acting as a functional BMP to control sediment.
 - g. During the April 14, 2006 inspection, the Inspector observed a storm drain inlet on the corner of Hockett Street and Sylvan Lake Road at the Project. The inlet was being protected by a rock sock, however no other BMPs were observed in place to prevent erosion of the disturbed soil surrounding the inlet, nor to prevent sediment from traveling toward the storm sewer inlet. Consequently, the inlet protection in place would be easily overwhelmed during storm events.
23. Village Homes' failure to implement and maintain functional BMPs to protect stormwater quality during construction activities at the Project constitutes violations of Part I. B., Part I. B. 3. a., and Part II. A. 10. of the Permit.

ORDER AND AGREEMENT

24. 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-060919-2), the Division orders Village Homes to comply with all provisions of this Consent Order, including all requirements set forth below.

25. Village Homes agrees to the terms and conditions of this Consent Order. Village Homes 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. Village Homes also agrees not to challenge directly or collaterally, in any judicial or administrative proceeding brought by the Division or by Village Homes 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.
26. Notwithstanding the above, Village Homes does not admit to any of the factual or legal determinations made by the Division herein, and any action undertaken by Village Homes pursuant to this Consent Order shall not constitute evidence of fault by Village Homes with respect to the conditions of the Project.

CIVIL PENALTY

27. 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, Village Homes agrees to the assessment of Ninety Thousand Dollars (\$90,000.00) in civil penalties. The Division intends to petition the Executive Director, or his designee, to impose the Ninety Thousand Dollar (\$90,000.00) civil penalty for the above violation(s). Subject to approval by the United States Bankruptcy Court for the District of Colorado, this penalty shall constitute a general unsecured claim against the Village Homes estate in Bankruptcy Case No. 08-27714-ABC. Any distributions to satisfy this claim shall be 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

28. 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 19, 2006 Notice of Violation / Cease and Desist Order (Number: SO-060919-2).
29. 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 Village Homes 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.

30. 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 Village Homes, 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.
31. 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.
32. 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.
33. Notwithstanding paragraph 26 above, the violations described in this Consent Order will constitute part of Village Homes' 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 Village Homes. Village Homes agrees not to challenge the use of the cited violations for any such purpose.
34. This Consent Order does not relieve Village Homes 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

35. 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 19, 2006 Notice of Violation / Cease and Desist Order (Number: SO-060919-2). 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.
36. This Consent Order does not grant any release of liability for any violations not specifically cited herein.
37. 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.
38. Upon the effective date of this Consent Order, Village Homes 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.

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

40. 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 Village Homes:

Terry T. Kyger, CFO
Village Homes of Colorado, Inc.
6000 Greenwood Plaza Blvd., Ste. 200
Greenwood Village, CO 80111
Telephone: 303.795-1976
E-mail: tkyger@villagehomes.com

MODIFICATIONS

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

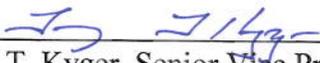
NOTICE OF EFFECTIVE DATE

42. 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.

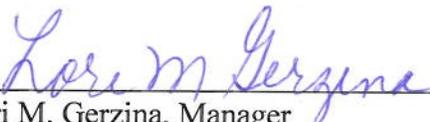
BINDING EFFECT AND AUTHORIZATION TO SIGN

43. This Consent Order is binding upon Village Homes 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 VILLAGE HOMES OF COLORADO, INC.:

 Date: 9/2/09
Terry T. Kyger, Senior Vice President and Chief Financial Officer
Village Homes of Colorado, Inc.

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

 Date: 9/24/09
Lori M. Gerzina, Manager
Compliance Assurance Section
WATER QUALITY CONTROL DIVISION