STATE OF COLORADO

Bill Ritter, Jr., Governor
Martha E. Rudolph, 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

January 7, 2010

Ed MacArthur, President
Native Excavating, Inc.
1878 13th Street
Steamboat Springs, CO 80487

Certified Mail Number: 7005 1820 0000 3208 1012

RE: Final Compliance Order on Consent, Number: SC-100106-2

Dear Mr. MacArthur,

Enclosed for Native Excavating, Inc.'s records, you will find Native Excavating'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 25 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: Routt County Department of Environmental Health

ec: Aaron Urdiales, EPA Region VIII
Nathan Moore, Permits Section, CDPHE
Dick Parachini, Watershed Program, 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-100106-2**

IN THE MATTER OF: **NATIVE EXCAVATING, INC.**
CDPS PERMIT NO. COR-030000
CERTIFICATION NO. COR-03A433
ROUTT 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 Native Excavating, Inc. ("Native"). The Division and Native 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-080729-4) that the Division issued to Native on July 29, 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 Native and Native's compliance with the Act and its stormwater permit certification.

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

4. Native 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 or about August 16, 2006, Native initiated construction activities to build a residential and commercial development on 25 acres of property located at or near Mt. Werner Road and Steamboat Boulevard, in the City of Steamboat Springs, Routt County, Colorado (the "Project").

6. On July 10, 2006, the Division received an application from Native for 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 July 11, 2006, the Division provided Native Certification Number COR-03A433 authorizing Native to discharge stormwater from the construction activities associated with the Project to the Yampa River under the terms and conditions of the Permit. Certification Number COR-03A433 became effective July 11, 2006 and remained in effect covering Native's construction activities at the Project until it was transferred on August 13, 2007.

8. The Yampa 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).

9. 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.

10. On March 30, 2007, a representative from PG Environmental, LLC (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 Native'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.

Deficient and/or Incomplete Stormwater Management Plan

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

12. Pursuant to Part I. B. of the Permit, the Project's SWMP shall include, at a minimum, the following items:

    a. Site Description - Each plan shall provide a description of the following:
        i. A description of the construction activity.
        ii. The proposed sequence for major activities.
        iii. Estimates of the total area of the site and the area of the site that is expected to undergo clearing, excavation or grading.
        iv. An estimate of the runoff coefficient of the site before and after construction activities are completed (2002 Permit) and any existing data describing the soil, soil erosion potential or the quality of any discharge from the site.

v. A description of the existing vegetation at the site and an estimate of the percent vegetative ground cover.
vi. The location and description of any other potential pollution sources, such as vehicle fueling, storage of fertilizers or chemicals, etc.
vii. The location and description of any anticipated non-stormwater components of the discharge, such as springs and landscape irrigation return flow (2002 Permit) or allowable sources of non-stormwater discharge at the site, e.g., uncontaminated springs, landscape irrigation return flow, construction dewatering, and concrete washout (2007 Permit).
viii. The name of the receiving water(s) and the size, type and location of any outfall or, if the discharge is to a municipal separate storm sewer, the name of that system, the location of the storm sewer discharge, and the ultimate receiving water(s).

b. Site Map - Each plan shall provide a generalized site map or maps which indicate:
i. Construction site boundaries.
ii. All areas of soil disturbance.
iii. Areas of cut and fill.
iv. Areas used for storage of building materials, soils or wastes.
v. Location of any dedicated asphalt or concrete batch plants.
vi. Location of major erosion control facilities or structures.
vii. Springs, streams, wetlands and other surface waters.
viii. Boundaries of 100-year flood plains, if determined.

c. BMPs for Stormwater Pollution Prevention - The plan shall include a narrative description of appropriate controls and measures that will be implemented before and during construction activities at the facility, including:

i. Erosion and Sediment Controls – A description of structural site management controls (Structural Practices) which will minimize erosion and sediment transport <u>and</u> a description of interim and permanent stabilization practices (Non-Structural Practices), including the site-specific scheduling of the implementation of the practices.
ii. Phased BMP Implementation – The SWMP shall clearly describe the relationship between the phases of construction and the implementation and maintenance of BMPs
iii. Materials Handling and Spill Prevention - The SWMP shall identify any procedures or significant materials handled at the site that could contribute pollutants to runoff.
iv. Dedicated Concrete or Asphalt Batch Plants – The SWMP shall clearly describe and locate BMPs to control stormwater pollution from dedicated concrete batch plants or dedicated asphalt batch plants.

d. Final Stabilization and Long-Term Stormwater Management - Description of the measures used to achieve final stabilization and measures to control pollutants in stormwater discharges that will occur after construction operations have been completed.

e. Other Controls - Description of other measures to control pollutants in stormwater discharges, including plans for waste disposal and limiting off-site soil tracking.

f. Inspection and Maintenance - Description of procedures to inspect and maintain in good and effective operating condition the vegetation, erosion and sediment control measures and other protective measures identified in the SWMP.

13. The Division has determined that Native failed to prepare and maintain a complete and accurate SWMP for the Project as described in paragraphs 13(a-g) below:

    a. During the March 30, 2007 inspection, the Inspector reviewed the Project's SWMP and identified that the site map did not include all areas of soil disturbance at the Project.

    b. During the March 30, 2007 inspection, the Inspector reviewed the Project's SWMP and identified that the SWMP did not describe all potential pollutant sources at the Project. Specifically, the SWMP did not describe the mobile fueling operations that were taking place on the site.

    c. During the March 30, 2007 inspection, the Inspector reviewed the Project's SWMP and identified that the site map did not include all areas of cut and fill at the Project.

    d. During the March 30, 2007 inspection, the Inspector reviewed the Project's SWMP and identified that the site map did not include all areas used for the storage of building materials, soils or wastes. Specifically, the site map did not include the location of the soil stockpiles or the construction pipe and materials located near the western perimeter of the site.

    e. During the March 30, 2007 inspection, the Inspector reviewed the Project's SWMP and identified that the SWMP did not describe the relationship between the phases of construction and the implementation of controls and measures.

    f. During the March 30, 2007 inspection, the Inspector reviewed the Project's SWMP and identified that the SWMP did not include a description of the measures used to achieve final stabilization and measures to control pollutants in stormwater discharges that would occur after construction operations had been completed.

    g. During the March 30, 2007 inspection, the Inspector reviewed the Project's SWMP and identified that the SWMP did not include a description of other measures to control pollutants in stormwater discharges. Specifically, the SWMP did not describe measures used to limit off-site soil tracking.

14. Native's failure(s) to prepare and maintain a complete and accurate SWMP for the Project constitutes violations of Part I. B. of the Permit.

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

15. Pursuant to Part I. B. 3. a. (1) of the Permit, Native 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.

16. Pursuant to Part I. B. 3. a. (2) of the Permit, Native 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.

17. The Division has determined that Native failed to implement and/or maintain functional BMPs at the Project as described in paragraphs 17(a–f) below:

    a. During the March 30, 2007 inspection, the Inspector observed a disturbed area and drainage channel located at the southwestern portion of the Project, near the proposed common area. Haybales and straw wattles were observed within the disturbed drainage channel, which was leading to an existing, active flowing drainage ditch. However, no BMPs were observed in place to prevent run on to the disturbed area, to stabilize the disturbed area, or to prevent sediment from discharging from the disturbed area to the channel and ditch. Consequently, the haybales and straw wattles alone were not acting as functional BMPs for the area, as sediment was observed discharging from the channel into the drainage ditch, which leads to the Yampa River.

    b. During the March 30, 2007 inspection, the Inspector observed a large disturbed area located adjacent to a wetland on the western perimeter of the Project, near the proposed common area. A straw wattle was in place along the perimeter of the disturbed area, however, the wattle was not being maintained to act as a functional BMP, as the wattle was mostly buried with sediment and was not entrenched. No other BMPs were observed in place to stabilize the large disturbed area or to prevent sediment from discharging to the wetland during storm events. Consequently, sediment discharge to the wetland area was observed.

    c. During the March 30, 2007 inspection, the Inspector observed disturbed areas located along the southern perimeter of the site. No BMPs were observed in place to stabilize the disturbed area located up gradient of the perimeter or to prevent sediment from discharging from the disturbed area during storm events. Consequently, erosion of the disturbed area and sediment discharge to the down gradient perimeter was observed. The drainage flowed through an area of concentrated flow located parallel to a rock retaining wall. No BMPs were observed in place to stabilize the drainage conveyance or to prevent sediment from discharging further downstream. Consequently, erosion of the flow path was observed.

    d. During the March 30, 2007 inspection, the Inspector observed a continuance of the drainage conveyance described in paragraph 17c above. The drainage flowed along the southern perimeter of the Project near lots 11, 12 and 15. Additional disturbed areas were observed at this location of the Project. Haybales and straw wattles were observed in place within the drainage conveyance. However, no BMPs were observed in place to prevent run on to the disturbed areas located adjacent to the conveyance, to stabilize the disturbed areas, or to prevent sediment from discharging from the disturbed areas to the drainage conveyance. Consequently, the haybales and straw wattles alone were not acting as functional BMPs for the area, as sediment was observed discharging beyond the southern boundary of the Project.

e. During the March 30, 2007 inspection, the Inspector observed disturbed slopes along the eastern perimeter of the Project. No BMPs were observed in place to prevent run on the disturbed slopes, to stabilize the disturbed slopes, or to prevent sediment from discharging from the slopes during storm events. Consequently, erosion of the slopes was observed.

f. During the March 30, 2007 inspection, the Inspector observed a snow and soil stockpile located near the southwestern corner of the Project. A straw wattle was in place at the toe of the stockpile, however, the wattle had not been implemented to act as a functional BMP, as the wattle was installed up against the edge of the stockpile, thus negating its ability to pond water, and soil was overtopping the wattle. No other BMPs were observed in place to stabilize the stockpile or to prevent sediment and soil from discharging from the area.

18. On May 7, 2007, the Inspector conducted a visual evaluation of the Project and identified ongoing deficiencies with the implementation and maintenance of functional BMPs at the Project, including a continued lack of run on controls and stabilization practices for the various disturbed areas at the site.

19. Native's failure to implement and maintain functional BMPs to protect stormwater quality during construction activities at the Project constitutes violations of Part I. B. 3. a. of the Permit.

ORDER AND AGREEMENT

20. 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-080729-4), the Division orders Native to comply with all provisions of this Consent Order, including all requirements set forth below.

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

22. Notwithstanding the above, Native does not admit to any of the factual or legal determinations made by the Division herein, and any action undertaken by Native pursuant to this Consent Order shall not constitute evidence of fault by Native with respect to the conditions of the Project. Notwithstanding the foregoing, Native disputes the findings of fact and determinations set forth in this Consent Order. The findings and determinations are those of the Department and the inspector and not those of Native.

CIVIL PENALTY

23. 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, Native shall pay Forty Five Thousand Dollars ($45,000.00) in civil penalties. The Division intends to petition the Executive Director, or his designee, to impose the Forty Five Thousand Dollar ($45,000.00) civil penalty for the above violation(s) and Native agrees to make the payment through three installment payments as described in the table below:

Payment	Amount	Due Date
1	$15,000.00	Within thirty (30) calendar days of issuance of a Penalty Order by the Executive Director or his designee
2	$15,000.00	February 1, 2011
3	$15,000.00	February 1, 2012

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

24. 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 July 29, 2008 Notice of Violation / Cease and Desist Order (Number: SO-080729-4).

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 Native 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. 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 Native, 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.

27. Notwithstanding paragraph 22 above, the violations described in this Consent Order will constitute part of Native'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 Native. Native agrees not to challenge the use of the cited violations for any such purpose.

LIMITATIONS, RELEASES AND RESERVATION OF RIGHTS AND LIABILITY

28. 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 July 29, 2008 Notice of Violation / Cease and Desist Order (Number: SO-080729-4). 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.

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

30. 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.

31. Upon the effective date of this Consent Order, Native 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.

32. 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

33. 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 Native:

Ed MacArthur, President
Native Excavating, Inc.
1878 13th Street
Steamboat Springs, CO 80487
Telephone: 970.879.6231
E-mail: native@springsips.com

MODIFICATIONS

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

NOTICE OF EFFECTIVE DATE

35. 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

36. This Consent Order is binding upon Native 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 NATIVE EXCAVATING, INC.:

_____ Date: 12/22/09
Ed MacArthur, President

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

Lori M Gerzina Date: 01-06-2010

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