COLORADO
Department of Public Health & Environment

Dedicated to protecting and improving the health and environment of the people of Colorado

October 12, 2016

New Mark Merrill Mountain States, LLC
5850 Canoga Avenue, Suite 650
Woodland Hills, CA 91367

Certified Mail Number: 7012 1640 0000 0801 9359

RE: Compliance Order on Consent, Number: SC-161012-1

Dear Sir or Madam:

Enclosed for New Mark Merrill Mountain States, LLC's records, you will find New Mark Merrill Mountain States, LLC'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 (paragraph 38). Following 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 Compliance Order on Consent was changed to place the assigned Order Number on the final document.

If you have any questions, please don't hesitate to contact me at (303) 692-6498 or by electronic mail at andrea.beebout@state.co.us.

Sincerely,

Andrea Beebout, Enforcement Specialist
Clean Water Enforcement Unit
WATER QUALITY CONTROL DIVISION

Enclosure(s): Compliance Order on Consent SC-161012-1

cc: Enforcement File

ec: Michael Boeglin, EPA Region VIII
Joe Malinowski, Boulder Public Health
Aimee Konowal, Watershed Section, CDPHE
Corrina Quintana, Grants and Loans Unit, CDPHE
Doug Camrud, Engineering Section, CDPHE
Kelly Jacques, Field Services Section, CDPHE
Lillian Gonzalez, Permits Section, CDPHE
Tania Watson, Data Management, CDPHE
Nathan Moore, Clean Water Compliance Unit, CDPHE
Megan Shirley, Clean Water Compliance Unit, CDPHE

COLORADO

Department of Public Health & Environment

WATER QUALITY CONTROL DIVISION

COMPLIANCE ORDER ON CONSENT **NUMBER: SC-161012-1**

IN THE MATTER OF: NMMS TWIN PEAKS, LLC
CDPS PERMIT NO. COR030000
CERTIFICATION NO. COR03M455
BOULDER 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 803, C.R.S., and its implementing regulations, with the express consent of NMMS Twin Peaks, LLC ("NMMS"). The Division and NMMS 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-151007-1 ("NOV/CDO"), that the Division issued to NMMS on October 7, 2015.

DIVISION'S FINDINGS OF FACT AND DETERMINATION OF VIOLATIONS

2. At all times relevant to the alleged violations identified herein, NMMS was a California limited liability company in good standing and registered to conduct business in the State of Colorado.

3. NMMS 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).

4. On or about July 14, 2014, NMMS initiated construction activities of a commercial development on the Village at the Peaks Project within the City of Longmont, Boulder County, Colorado ("Project").

5. On July 1, 2014, the Division received an application from NMMS for coverage under the Colorado Discharge Permit System ("CDPS") General Permit Number COR030000, for Stormwater Discharges Associated with Construction Activity ("Permit") for a planned disturbance of 58.1 acres of land within the Project.

6. On July 8, 2014, the Division provided NMMS with Certification Number COR03M455 authorizing NMMS to discharge stormwater from construction activities associated with the Project to waters of the State of Colorado, including but not limited to, Saint Vrain Creek and the South Platte River under the terms and conditions of the Permit. Certification Number COR03M455 became effective July 8, 2014 and remained in effect until July 1, 2016 when it was inactivated at the request of NMMS.

7. On April 14, 2015, the Division received a modification application from NMMS to exclude Lots 2-1 and 3-1, totaling 12.5 acres from Permit coverage. The Division granted the modification request on April 20, 2015. On December 2, 2015 and January 5, 2016, the Division received modification applications from NMMS to exclude stabilized portions of the Project from Permit coverage. The Division granted the modification requests on December 15, 2015 and January 13, 2016, respectively.

8. Pursuant to 5 CCR 1002-61, §61.8, NMMS must comply with all the terms and conditions of the Permit, and violations of such terms and conditions as specified in the Permit may be subject to civil and criminal liability pursuant to §§25-8-601 through 25-8-612, C.R.S.

9. On November 11, 2014 and April 23, 2015, a representative from the Division ("Inspector") conducted on-site inspections of the Project pursuant to the Division's authority under §25-8-306, C.R.S., to determine NMMS's compliance with the Water Quality Control Act and the Permit. During the inspections, the Inspector interviewed Project representatives, reviewed the Project's stormwater management system records, and performed a physical inspection of the Project.

10. On May 27, 2015, a representative from the City of Longmont Public Works & Natural Resources department ("Representative") conducted an on-site inspection of the Project.

Deficient and/or Incomplete Stormwater Management Plan

11. Pursuant to Part I.B. of the Permit, NMMS is required to prepare and maintain a Stormwater Management Plan ("SWMP") in accordance with good engineering, hydrologic, and pollution control practices. The SWMP shall identify all potential sources of pollution that may reasonably be expected to affect the quality of stormwater discharges associated with construction activity from the Project. In addition, the SWMP shall describe the Best Management Practices ("BMPs") that will be used to reduce the pollutants in the stormwater discharges associated with construction activity at the Project.

12. Pursuant to Part I.C. of the Permit, the SWMP shall include, at minimum, the following items:

    a. Site Description - The SWMP shall clearly describe the construction activity, including:

        i. The nature of the construction activity at the site.
        ii. The proposed sequence for major activities.
        iii. Estimates of the total area of the mine site, and the area and location expected to be disturbed by clearing, excavation, grading, or other construction activities.
        iv. A summary of any existing data used in the development of the site construction plans or SWMP that describe the soil or existing potential for soil erosion.
        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 all potential pollution sources, including ground surface disturbing activities, vehicle fueling, storage of fertilizers or chemicals, etc.

vii. The location and description of any anticipated allowable sources of non-stormwater discharge at the site, such as uncontaminated springs, landscape irrigation return flow, construction dewatering, and concrete washout.

viii. The name of the receiving water(s) and the size, type and location of any outfall(s). If the stormwater discharge is to a municipal separate storm sewer system, the name of that system, the location of the storm sewer discharge, and the ultimate receiving water(s).

b. Site Map - The SWMP shall include a legible site map(s), showing the entire site, identifying:

i. Construction site boundaries.
ii. All areas of ground surface disturbance.
iii. Areas of cut and fill.
iv. Areas used for storage of building materials, equipment, soil, or waste.
v. Locations of dedicated asphalt or concrete batch plants.
vi. Locations of all structural BMPs.
vii. Locations of all non-structural BMPs as applicable.
viii. Locations of springs, streams, wetlands and other surface waters.

c. Stormwater Management Controls - The SWMP must include a description of all stormwater management controls that will be implemented as part of the construction activity to control pollutants in stormwater discharges, including:

i. SWMP Administrator - The SWMP shall identify a specific individual(s), position or title responsible for developing, implementing, maintaining, and revising the SWMP.
ii. Identification for Potential Pollutant Sources - The SWMP shall identify and describe those sources determined to have the potential to contribute pollutants to stormwater discharges.
iii. BMPs for Stormwater Pollution Prevention - The SWMP shall identify and describe appropriate BMPs that will be implemented at the project to reduce the potential of pollution sources to contribute pollutants to stormwater discharges. The SWMP shall clearly describe the installation and implementation specifications for each BMP identified in the SWMP.

(1) Structural Practices for Erosion and Sediment Control - The SWMP shall clearly describe and locate all structural practices implemented at the site to minimize erosion and sediment transport. Practices may include, but are not limited to: straw bales, wattles/sediment control logs, silt fences, earth dikes, drainage swales, sediment traps, subsurface drains, pipe slope drains, inlet protection, outlet protection, gabions, and temporary or permanent sediment basins.

(2) Non-Structural Practices for Erosion and Sediment Control - The SWMP shall clearly describe and locate, as applicable, all non-structural practices implemented at the site to minimize erosion and sediment transport. Description must include interim and permanent stabilization practices, and site-specific scheduling for implementation of the practices. Non-structural practices may include, but are not limited to: temporary vegetation, permanent vegetation, mulching, geotextiles, sod stabilization, slope

roughening, vegetative buffer strips, protection of trees, and preservation of mature vegetation.

(3) Phased BMP Implementation - The SWMP shall clearly describe the relationship between the phases of construction, and the implementation and maintenance of both structural and non-structural stormwater management controls. The SWMP must identify the stormwater management controls to be implemented during the project phases, which can include, but are not limited to, clearing and grubbing; road construction; utility and infrastructure installation; vertical construction; final grading; and final stabilization.

(4) Materials Handling and Spill Prevention - The SWMP shall clearly describe and locate all practices implemented at the site to minimize impacts from procedures or significant materials that could contribute pollutants to runoff. Such procedures or significant materials could include: exposed storage of building materials; paints and solvents; fertilizers or chemicals; waste material; and equipment maintenance or fueling procedures.

(5) Dedicated Concrete or Asphalt Batch Plants - The SWMP shall clearly describe and locate all practices implemented at the site to control stormwater pollution from dedicated concrete or asphalt batch plants.

(6) Vehicle Tracking Control - The SWMP shall clearly describe and locate all practices implemented at the site to control potential sediment discharges from all areas of vehicle tracking. Practices can include: minimizing site access; street sweeping or scraping; tracking pads; graveled parking areas; requiring that vehicles stay on paved areas on-site; wash racks; contractor education; and/or sediment control BMPs, etc.

(7) Waste Management and Disposal, Including Concrete Washout - The SWMP shall clearly describe and locate the practices implemented at the site to control stormwater pollution from all construction site wastes, including concrete washout activities.

(8) Groundwater and Stormwater Dewatering - The SWMP shall clearly describe and locate the practices implemented at the site to control stormwater pollution from the dewatering of groundwater or from excavations, wells, etc.

d. Final Stabilization and Long-Term Stormwater Management - The SWMP shall clearly describe the practices used to achieve final stabilization of all disturbed areas at the site, and any planned practices to control pollutants in stormwater discharges that will occur after construction operations have been completed at the site.

e. Inspection and Maintenance - The SWMP shall clearly describe the inspection and maintenance procedures implemented at the site to maintain all erosion and sediment control practices, and other protective practices identified in the SWMP, in good and effective operating condition.

13. During the November 11, 2014 inspection, the Inspector reviewed the Project's SWMP and identified the following deficiencies, as described in paragraphs 13(a-g) below:

a. The SWMP did not identify and describe the vegetation present prior to construction activities.

b. The SWMP did not identify and describe all potential pollutant sources. Specifically, building demolition materials, crushed asphalt piles, building materials for vertical building and

finishing were observed onsite by the inspector but were not included in the SWMP.

c. Two sections of the SWMP conflicted on whether construction dewatering would be required. During the inspection, it was confirmed that dewatering had taken place on the northeast corner of the Project, however construction dewatering activities were not identified consistently in the SWMP.

d. The site map included with the SWMP did not identify all areas of ground surface disturbance. Additionally, the SWMP site map did not identify the storage location of all building materials and equipment associated with construction activities or the location of asphalt crushing and material storage.

e. The site map included with the SWMP did not consistently identify the locations of all structural control measures. Specifically, the SWMP did not consistently identify the locations of grade cuts or surface roughening that were observed onsite during the inspection.

f. The SWMP did not identify and describe all stormwater controls implemented at the Project to reduce the potential of pollutants in stormwater discharges. Specifically, the SWMP did not describe grade cuts, asphalt crushing controls, asphalt drive lanes and designated haul routes used for tracking control. In addition, the maximum capacity for concrete washouts varied throughout the SWMP.

g. The SWMP did not describe the installation and implementation specifications for each control measure identified in the SWMP. Specifically, the SWMP did not describe specifications for sand bags used for inlet protection or grade cuts used along the perimeter of the Project.

14. During the April 23, 2015 inspection, the Inspector reviewed the Project's SWMP and identified the following deficiencies, as described in paragraphs 14(a-e) below:

a. The site map included with the SWMP did not identify all areas of ground surface disturbance. Specifically, the site map did not differentiate between areas of ground disturbance and areas which have been built upon with building foundations, roads and/or curb and gutter. Additionally, the SWMP site map did not identify the storage location of all building materials and equipment associated with construction activities.

b. The site map included with the SWMP did not consistently identify the locations of all BMPs implemented at the Project to reduce the potential of pollutants in stormwater discharges. Specifically, the site map did not identify the locations of all inlet protection control measures, silt fence, or grade cuts observed onsite during the inspection.

c. The SWMP did not identify and describe all stormwater controls implemented at the Project to reduce the potential of pollutants in stormwater discharges. Specifically, the SWMP did not describe silt fence and grade differentials implemented onsite as inlet protection.

d. The SWMP did not describe the installation and implementation specifications for each control measure identified in the SWMP and/or observed onsite by the Inspector. Specifically, the SWMP did not describe specifications for the dandy product rubber wattles used for inlet protection or the wheel wash.

e. The installation and implementation specification for the grade cut control measure included in the SWMP was not designed according to good engineering, hydrologic and pollution control practices. Specifically, the specification did not indicate the minimum grade cut depth behind the back of curb or the width of the cut between the curb and disturbance needed to provide sufficient capture area for settling of sediment and debris.

15. The Division has determined that NMMS failed to prepare and maintain a complete and accurate SWMP for the Project.

16. NMMS's failure to prepare and maintain a complete and accurate SWMP for the Project constitutes violations of Parts I.B. and I.C. of the Permit.

Failure to Perform and/or Document Inspections of Stormwater Management System

17. Pursuant to Part I.D.6.(a) of the Permit, for active sites where construction has not been completed, NMMS is required to make a thorough inspection of the Project's stormwater management system at least once every fourteen (14) calendar days and within twenty-four (24) hours after the end of any precipitation or snowmelt even that causes surface erosion.

18. Pursuant to Part I.D.6.(b)(2) of the Permit, NMMS is required to keep a record of inspections that describes the name(s) and title(s) of personnel making the inspection, any corrective actions taken, the dates the corrective actions were taken, and any measures taken to prevent future violations, including requisite changes to the SWMP. Additionally, after adequate corrective action has been taken, or where a report does not identify any incidents requiring corrective action, the report shall contain a signed statement indicating the site is in compliance with the Permit to the best of the signer's knowledge and belief.

19. During the November 11, 2014 inspection, the Inspector reviewed the available inspection records for the period from July 14, 2014 through November 8, 2014 and identified the following deficiencies, as described in Paragraphs 19(a-d) below:

a. Inspections were not conducted between the following time periods: August 8, 2014 and August 24, 2014; August 24, 2014 and September 11, 2014; September 22, 2014 and October 13, 2014. These periods exceed the minimum fourteen day interval between inspections.

b. The title of the inspector was not included on all reports.

c. The name of the inspector was missing on the November 3, 2014 inspection record.

d. The signature at the end of the inspection reports does not include a certification statement indicating the site is in compliance with the Permit to the best of the signer's knowledge and belief.

20. During the April 23, 2015 inspection, the Inspector reviewed the available inspection records for the period from November 8, 2014 through April 21, 2015 and identified the following deficiencies, as described in Paragraphs 20(a-b) below:

a. Inspections were not conducted between March 27, 2015 and April 16, 2015. This period exceeds the minimum fourteen day interval between inspections.

b. The title of the inspector was not included on all reports.

21. The Division has determined that NMMS failed to properly perform and document inspections of the stormwater management system at the Project.

22. NMMS's failure to properly perform and document its inspections constitutes violations of Parts I.D.6.(a) and I.D.6.(b)(2) of the Permit.

Failure to Install, Maintain, or Properly Select Best Management Practices

23. Pursuant to Part I.B.3. of the Permit, NMMS must implement the provisions of the Project's SWMP as written and updated, from commencement of construction activity until final stabilization is complete.

24. Pursuant to Part I.D.2. of the Permit, NMMS must select, install, implement, and maintain appropriate BMPs, following good engineering, hydrologic and pollution control practices. BMPs implemented at the site must be adequately designed to provide control for all potential pollutant sources associated with construction activity at the Project to prevent pollution of State waters.

25. Pursuant to Part I.D.7. of the Permit, all erosion and sediment control practices and other protective measures identified in the SWMP must be maintained in effective operating condition. BMPs that are not adequately maintained in accordance with good engineering, hydrologic, and pollution control practices, including removal of collected sediment outside the acceptable tolerances of BMPs, are considered to be no longer operating effectively and must be addressed.

26. During the November 11, 2014 inspection, the Inspector identified the following deficiencies related to BMP selection, design, installation, implementation and/or maintenance at the Project, as described in Paragraphs 26 (a-k) below:

    a. No control measures were implemented to manage pollutant contributions from an asphalt waste pile on the west side of the Project. As a result of this deficiency, there was a potential for asphalt wastes to comingle with stormwater and be discharged offsite. Additional inadequate control measures were implemented down gradient of this location (refer to paragraphs 25b and 25k) and stormwater flowed towards a storm sewer inlet adjacent to the asphalt operations, eventually draining to Dry Creek.

    b. A sand bag control measure implemented as inlet protection to manage pollutant contributions from the nearby asphalt crushing measures was not selected according to good engineering, hydrologic and pollution control practices. Specifically, the sand bags were not consistently overlapped to prevent gaps between sand bags, leading to a potential for polluted stormwater to bypass the control measure. In addition, sand bags can easily break and become an additional pollutant source. No additional control measures were implemented down gradient of the inlet and stormwater flowed through the inlet and associated storm sewer system, eventually draining to Dry Creek.

    c. A straw wattle control measure implemented to manage pollutant contributions from disturbed areas located in front of the emergency egress fence was not installed or maintained according to good engineering, hydrologic and pollution control practices.

Specifically, the straw wattle was installed on an impervious surface and could not be properly staked down or trenched as required by Project SWMP specifications. As a result of this deficiency, there was a high potential for polluted stormwater to bypass the control measure. No additional control measures were implemented down gradient of this location and stormwater flowed generally east towards City of Longmont MS4 inlets, eventually draining to Dry Creek.

d. No vehicle tracking control measures were implemented at the entrance to the concrete washout area and CSI staging area at the Project despite Project SWMP specifications requiring all egress points on the jobsite to have a stabilized construction entrance to prevent tracking of sediment from construction traffic. As a result of this deficiency, there was a potential for contaminated stormwater to discharge offsite. No additional control measures were implemented down gradient of the egress points and stormwater flowed generally southeast to the City of Longmont MS4, eventually discharging to Dry Creek.

e. A concrete washout area was implemented; however it was not installed according to good engineering, hydrologic, or pollution control practices. Specifically, the concrete washout area did not have a vehicle tracking pad at the access and concrete waste was observed outside of the washout area despite Project SWMP specifications requiring vehicle tracking control at the entrance of the pit and maintenance activities to remove washout waste and concrete outside of the washout area. No control measures to remove dissolved pollutants were implemented down gradient of the concrete washout and stormwater flowed generally southeast towards inlets, eventually draining to Dry Creek.

f. Silt fence implemented to manage pollutant contributions from disturbed areas on the northeast corner of the Project was not installed or maintained according to good engineering, hydrologic and pollution control practices. Specifically, the silt fence joints were not wrapped in fabric and rotated 180 degrees around one another and the silt fence fabric was not entrenched and backfilled as required by Project SWMP specifications. In addition, several areas of the silt fence were in need of maintenance due to tears in the fabric, pulling of fabric away from stakes, and/or more than six inches of sediment buildup. As a result of these deficiencies, the effectiveness of the silt fence was reduced and there was a potential for polluted stormwater to bypass the control measure. Additional inadequate control measures were implemented down gradient of the silt fence (refer to paragraph 25g) and stormwater flowed generally north to Dry Creek.

g. A straw wattle control measure implemented to manage pollutant contributions from disturbed areas on the northeast corner of the Project was not installed or maintained according to good engineering, hydrologic and pollution control practices. Specifically, the straw wattle was not trenched in or staked down as required by Project SWMP specifications. As a result of this deficiency, there was a potential for polluted stormwater to bypass the straw wattle and discharge offsite. No additional control measures were implemented down gradient of this location and stormwater flowed generally north to Dry Creek.

h. A straw wattle control measure implemented as inlet protection on the north end of the Project was not installed or maintained according to good engineering, hydrologic and pollution control practices. Specifically, the straw wattle was not trenched in or staked down as required by Project SWMP specifications. In addition, the straw wattle was in need of maintenance due to holes and tearing. As a result of these deficiencies, there was a potential for polluted stormwater to bypass the control measure and be discharged offsite.

No additional control measures were implemented down gradient of the inlet and stormwater flowed through the inlet and associated storm sewer system, eventually draining to Dry Creek.

i. Concrete waste was discharged directly to the ground without containment near the Regal Theater building foundation. Project SWMP specifications require that concrete waste be contained in a concrete washout area. As a result of this deficiency, there was a potential for concrete waste to comingle with stormwater and discharge offsite. No control measures to remove dissolved pollutants were implemented down gradient of the concrete waste and stormwater flowed generally east towards the Project perimeter.

j. A temporary masonry mixing station located near the Regal Theater building foundation did not have secondary containment. Secondary containment control measures for the masonry mixing station were not described in the Project SWMP. As a result, masonry waste was observed on the ground and had the potential to comingle with stormwater and discharge offsite. No control measures to remove dissolved pollutants were implemented down gradient of the masonry station and stormwater flowed generally northeast towards the Project perimeter.

k. A grade cut control measure implemented along the Project perimeter was not installed or maintained according to good engineering, hydrologic, or pollution control practices. Specifically, the grade cut was inconsistently installed and in many areas would not provide adequate ponding based on its height and width and the contributing drainage area. No additional control measures were implemented down gradient of the grade cut and stormwater flowed generally to low points within the site and/or offsite of the Project.

27. During the April 23, 2015 inspection, the Inspector identified the following deficiencies related to BMP selection, design, installation, implementation and/or maintenance at the Project, as described in Paragraphs 27 (a-l) below:

a. Silt fence implemented to manage pollutant contributions from disturbed areas on the southwest quadrant of the Project was not installed or maintained according to good engineering, hydrologic and pollution control practices. Specifically, the silt fence joints were not wrapped in fabric and rotated 180 degrees around one another, the fabric was not pulled tight and attached to stakes to prevent sagging, and the silt fence was not entrenched and backfilled as required by Project SWMP specifications. In addition, the silt fence was not consistently installed at the edge of the disturbed area to manage sediment contributions. As a result of these deficiencies, there was a potential for polluted stormwater to bypass the control measure. Additional inadequate control measures were implemented down gradient of the silt fence (refer to paragraphs 26h and 26j) and stormwater flowed generally south to the City of Longmont MS4 curb inlets, eventually draining to Dry Creek.

b. The concrete washout area located in the southeast quadrant of the Project was not installed according to good engineering, hydrologic, or pollution control practices. Specifically, the concrete washout area did not have a vehicle tracking pad at the access and concrete waste was observed outside of the washout area and berm despite Project SWMP specifications requiring vehicle tracking control at the entrance of the pit and maintenance activities to remove washout waste and concrete outside of the washout area. No control measures to remove dissolved pollutants were implemented down gradient of the concrete washout area and stormwater flowed within the Project boundaries to City of

Longmont MS4 drop inlets, eventually draining to Dry Creek.

c. Two masonry stations located in the northwest and southwest quadrants of the site were not implemented and maintained according to good engineering, hydrologic, and pollution control practices. Specifically, the containment boundary was built out of wooden 2x4's instead of earthen berms as required by Project SWMP specifications. In addition, maintenance was needed to replace sections of the boundary where spills could result and masonry waste/materials were observed spilled outside of the containment area. As a result of these deficiencies, there was a potential for masonry wastes to pollute stormwater and be discharged offsite of the Project. No control measures to remove dissolved pollutants were implemented down gradient of the masonry stations. Stormwater from the masonry stations flowed within the Project boundaries to City of Longmont MS4 drop inlets, eventually draining to Dry Creek.

d. Straw wattles implemented as inlet protection to manage pollutant contributions from disturbed areas throughout the Project were not installed or maintained according to good engineering, hydrologic, or pollution control practices. Specifically, the wattles were not consistently entrenched, backfilled, or staked as required by Project SWMP specifications. In addition, the wattles were in need of maintenance to repair holes, tears, and remove accumulated sediment. In addition to being incorrectly installed and/or poorly maintained, certain inlets were surrounded by concrete waste or were being used as storage areas for fuel and building materials. As a result of these deficiencies, there was a significant potential for polluted stormwater to be discharged offsite. No additional control measures were implemented down gradient of the inlets, and stormwater flowed within the associated storm sewer system, eventually draining to Dry Creek.

e. Surface roughening was observed in the northeast quadrant of the Project; however, it was not implemented according to good engineering, hydrologic, or pollution control practices. Specifically, a sheepsfoot roller was used to create the surface roughening and it did not provide the correct orientation of tracking on the slope, or the necessary depth for the furrows. Project SWMP specifications required furrows 2 to 6 inches deep and approximately 6 inches apart. As implemented, the surface roughening was not an effective control measure and instead had the potential to contribute additional sediment erosion. Additional inadequate control measures were implemented down gradient of this location (refer to paragraph 26f) and stormwater from this area of the Project flowed north, discharging to Dry Creek.

f. Silt fence implemented as a perimeter control measure on the north and northeast quadrant boundaries of the Project was not installed or maintained according to good engineering, hydrologic, or pollution control practices. Specifically, the fabric was not consistently entrenched, backfilled, and secured to the stakes as required by Project SWMP specifications. In many locations silt fence was observed to have significant sagging and/or sediment buildup, which significantly decreases the ability of the silt fence to act as an effective control measure. In addition, sediment was observed on the down gradient side of the silt fence without additional control measures less than 50 feet from Dry Creek. No additional control measures were implemented down gradient of any portion of the silt fence and stormwater flowed directly north and into to Dry Creek.

g. A wheel wash control measure was implemented to manage sediment contributions on the southeast quadrant of the Project; however, it was not designed according to good engineering, hydrologic or pollution control practices. Specifically, the sediment trap for

the wheel wash did not have adequate containment features such as excavated and/or compacted berms to allow for adequate ponding time. In addition, the aggregated tracking pad/outfall of the sediment trap was installed on top on an unprotected inlet (refer to paragraph 26d) and was in need of maintenance to remove significant staining from hydraulic fluids. As a result of this deficiency, there was a probability for polluted stormwater to be discharged offsite. Stormwater and wheel wash water from this location discharged into the associated City of Longmont MS4 inlet, eventually discharging to Dry Creek.

h. A grade cut control measure was implemented along the perimeter of the southwest, southeast, and northeast quadrants of the Project; however, it was not installed or maintained according to good engineering, hydrologic, or pollution control practices. Specifically, soils were accumulating against the back of the curb, reducing ability of the curb to pond water, therefore rendering the control measure ineffective. Project SWMP specifications require the removal of sediment and soils when built up to 2/3 the capacity of the control. In addition, even after removal of accumulated sediment, the grade cut was not of an adequate height or width to act as an effective perimeter control measure for the contributing disturbed areas. Additional inadequate control measures were implemented down gradient of these locations (refer to paragraphs 26d, 26j, and 26k) and stormwater from these locations flowed to various City of Longmont MS4 curb inlets, eventually discharging to Dry Creek.

i. A vehicle tracking pad was implemented at the southeast quadrant egress of the Project, however it was not being maintained according to good pollution control practices. Specifically, the aggregate was filled with sediment and was no longer operating effectively, as evidenced by significant sediment tracking offsite on public roadways. Project SWMP specifications require rock to be reapplied or re-graded as necessary to maintain capacity and for the removal of any tracked sediment on a daily basis. As a result of these deficiencies, there was a potential for polluted stormwater to discharge offsite. Additional inadequate control measures were implemented down gradient of this location (refer to paragraph 26j) and stormwater flowed to curb inlets outside of the Project, eventually draining through the associated storm sewer system, and discharging to Dry Creek.

j. Rubber wattles were implemented as curb inlet protection along the public roadway outside the southeast quadrant of the Project; however, the rubber wattles were not selected, installed or maintained according to good engineering, hydrologic or pollution control practices. Specifically, the rubber wattles were installed on combination inlets with a grate and curb throat. The rubber wattles are unable to wrap fully around this type of inlet and as a result, stormwater can easily bypass the control measure and enter the storm sewer system without treatment. In addition, many of the wattles were in need of maintenance to remove accumulated sediment and debris. Several inlets were surrounded by disturbed areas but had no backside protection to prevent polluted stormwater and sediment from overtopping the inlet and entering the storm sewer system without treatment. No additional control measures were implemented down gradient of the inlets and stormwater flowed through the City of Longmont MS4, eventually draining to Dry Creek.

k. Silt fence implemented as drop inlet protection throughout the northeast, northwest, and southeast quadrants was not installed or maintained according to good engineering, hydrologic, and pollution control practices. Specifically, the fabric was not consistently entrenched, backfilled, and secured as required by Project SWMP specifications. In several

instances, the fabric was sagging and/or collapsing and sediment had accumulated against the fabric. These deficiencies would likely result in a failure of the control measure and a subsequent discharge of polluted stormwater directly to the City of Longmont MS4. Stormwater entering the City of Longmont MS4 flows north, eventually discharging to Dry Creek.

l. Concrete waste was observed on the ground without containment through the Project despite Project SWMP specifications requiring all waste generate from concrete activities to be contained within a concrete washout and/or disposed of properly offsite. As a result of this deficiency, there was a potential for stormwater to comingle with concrete wastes and discharge offsite without treatment. No control measures to remove dissolved pollutants were implemented down gradient of the concrete waste and stormwater flowed towards inlets throughout the Project, eventually discharging to Dry Creek.

28. During a May 27, 2015 City of Longmont inspection, the Representative observed two pumps discharging stormwater associated with construction activity. At both locations, the end of the pump hose was placed directly into the inlet without the use of any control measures to remove pollutant contributions. Photographs taken by the Representative show sediment laden waters along with other potential sources of pollution such as fuel containers and pumps without secondary containment. Both inlets are a part of the City of Longmont MS4 and drain directly to Dry Creek without additional down gradient control measures.

29. The Division has determined that NMMS has failed to select, design, install, implement and/or maintain BMPs for all potential pollutant sources at the Project, following good engineering, hydrologic, and pollution control practices.

30. NMMS's failure to select, design, install, implement and/or maintain BMPs at the Project constitutes violations of Parts I.B.3., I.D.2., and I.D.7. of the Permit.

ORDER AND AGREEMENT

31. 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 NOV/CDO, the Division orders NMMS to comply with all provisions of this Consent Order, including all requirements set forth below.

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

33. Notwithstanding anything in this Consent Order to the contrary, NMMS does not admit to or concede any of the factual or legal determinations made by the Division in this Consent Order or the

NOV/CDO, and neither NMMS's execution of this Consent Order nor any action undertaken by NMMS pursuant to this Consent Order shall constitute an admission or evidence of fault or liability by NMMS with respect to the conditions of the Project. NMMS expressly reserves, and does not waive, all rights, claims and defenses, to any of the Division's factual or legal determinations or defend itself in any other third party proceeding relating to the information identified in this Consent Order.

Compliance Requirements

34. NMMS agrees to develop and implement a construction stormwater training program ("training program") if any future projects require CDPS stormwater coverage in the State of Colorado. The program shall include:

    a. A stormwater training course prepared and presented by a qualified third party. The stormwater training shall be attended by all of NMMS's project managers, superintendents, and construction foremen involved in the design and/or construction of projects. The stormwater training shall include, at a minimum, the following topics: 1) the importance of, and principles of, erosion and sediment control; 2) stormwater regulations and permit requirements; 3) the proper development and utilization of SWMPs; 4) the proper selection and implementation of erosion and sediment controls; and 5) the proper use of permanent water quality features and/or stormwater BMPs;
    b. A requirement and schedule for an annual refresher course for all of NMMS's project managers, superintendents, and construction foremen involved in the design and/or construction of projects; and
    c. A method for recording and/or tracking the training status of NMMS's project managers, superintendents, and construction foremen involved in the design and/or construction of projects.

    Within thirty (30) calendar days of training program implementation, NMMS shall provide documentation of the training program ("plan") to the Division.

35. The training program prescribed in paragraph 33 shall be in effect for a period of two (2) years after the effective date of this Order and apply to all Colorado construction projects for which NMMS is owner, operator, and/or permit holder.

CIVIL PENALTY

36. Based upon the factors set forth in §25-8-608(1), C.R.S., and consistent with Departmental policies for violations of the Act, NMMS shall pay One Hundred Thousand Dollars ($100,000.00) in civil penalties. The Division intends to petition the Executive Director, or his designee, to impose the One Hundred Thousand Dollar ($100,000.00) civil penalty for the above violation(s) and NMMS agrees to make the payment within thirty (30) calendar days of the issuance of an Order for Civil Penalty 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:

    Andrea Beebout
    Colorado Department of Public Health and Environment
    Water Quality Control Division
    Mail Code: WQCD-CWE-B2

4300 Cherry Creek Drive South
Denver, Colorado 80246-1530

SCOPE AND EFFECT OF CONSENT ORDER

37. The Parties agree and acknowledge that this Consent Order constitutes a full and final settlement of the civil penalties associated with the violations cited herein and in the NOV/CDO.

38. This Consent Order is subject to the Division's "Public Notification on Administrative Enforcement Actions Policy," which includes a thirty day public comment period. The Division and NMMS 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.

39. 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 NMMS, 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.

40. Notwithstanding paragraph 33 above, the violations described in this Consent Order will constitute part of NMMS's compliance history.

41. NMMS shall comply 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

42. 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 NOV/CDO, and any potential penalties against NMMS arising from or relating to stormwater discharges from the Project arising or occurring prior to and as of the effective date of this Consent Order and Settlement Agreement. 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.

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

44. NMMS reserves its rights and defenses regarding the Project other than proceedings to enforce this Consent Order.

45. Nothing in this Consent Order shall preclude the Division from imposing additional requirements necessary to protect human health or the environment and to effectuate the purposes of the Consent Order. Nor shall anything in this Consent Order preclude the Division from imposing

additional requirements in the event that additional information is discovered that indicates such requirements are necessary to protect human health or the environment.

46. NMMS 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 or for any injuries or damages to persons or property resulting from acts or omissions of NMMS, or those acting for or on behalf of NMMS, including its officers, employees, agents, successors, representatives, contractors, consultants or attorneys in carrying out activities pursuant to this Consent Order. NMMS shall not hold out the State of Colorado or its employees, agents or representatives as a party to any contract entered into by NMMS 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.

FORCE MAJEURE

47. NMMS 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 NMMS, and which cannot be overcome by due diligence.

48. Within seventy-two (72) hours of the time that NMMS knows or has reason to know of the occurrence of any event which NMMS has reason to believe may prevent NMMS from timely compliance with any requirement under this Consent Order, NMMS shall provide verbal notification to the Division. Within seven (7) calendar days of the time that NMMS knows or has reason to know of the occurrence of such event, NMMS 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.

49. The burden of proving that any delay was caused by a force majeure shall at all times rest with NMMS. If the Division agrees that a force majeure has occurred, the Division will so notify NMMS. The Division will also approve or disapprove of NMMS'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 NMMS's proposed actions for mitigating the delay, it shall provide a written explanation of its determination to NMMS. Pursuant to the Dispute Resolution section, within fifteen (15) calendar days of receipt of the explanation, NMMS may file an objection.

50. 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, NMMS shall perform the requirements of this Consent Order that were delayed by the force majeure with all due diligence.

DISPUTE RESOLUTION

51. If the Division determines that that a violation of this Consent Order has occurred; that a force majeure has not occurred; that the actions taken by NMMS to mitigate the delay caused by a force majeure are inadequate; the Division shall provide a written explanation of its determination to NMMS. Within fifteen (15) calendar days of receipt of the Division's determination, NMMS shall:

a. Submit a notice of acceptance of the determination; or
b. Submit a notice of dispute of the determination.

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

52. If the Division disapproves or approves with modifications to any original or revised plan submitted by NMMS pursuant to this Consent Order, the Division shall provide a written explanation of the disapproval or approval with modifications. Within fifteen (15) calendar days of receipt of the Division's approval with modifications or disapproval of the plan, NMMS shall:

a. In the case of an approval with modifications only, submit a notice of acceptance of the plan as modified and begin to implement the modified plan;
b. In the case of a disapproval only, submit a revised plan for Division review and approval. NMMS may not select this option if the Division has included in its disapproval an alternate plan that shall be implemented by NMMS; or
c. Submit a notice of dispute of the disapproval or approval with modifications.

If NMMS fails to do any of the above within the specified time, NMMS shall be deemed to have failed to comply with the Consent Order, and the Division may bring an enforcement action, including an assessment of penalties.

53. If NMMS submits a revised plan, the plan shall respond adequately to each of the issues raised in the Division's written explanation of the disapproval or approval with modifications. The Division may determine that failure to respond adequately to each of the issues raised in the Division's written explanation constitutes a violation of this Consent Order. The Division shall notify NMMS in writing of its approval, approval with modifications, or disapproval of the revised plan. If the Division disapproves the revised plan, it may include in its disapproval a plan for implementation by NMMS. Such disapproval and plan 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. (the "APA"), unless NMMS submits a notice of dispute, pursuant to paragraph 52 above, of the Division's disapproval and plan for implementation. All requirements and schedules of the Division's plan shall not become effective pending resolution of the dispute.

NOTICES

54. Unless otherwise specified, any report, notice or other communication required under the Consent Order shall be sent to:

For the Division:

Andrea Beebout
Colorado Department of Public Health and Environment
Water Quality Control Division
Mail Code: WQCD-CWE-B2
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530
Telephone: 303-692-6498
E-mail: andrea.beebout@state.co.us

For NMMS Twin Peaks, LLC:

New Mark Merrill Mountain States, LLC
5850 Canoga Avenue, Suite 650
Woodland Hills, CA 91367

OBLIGATIONS UNAFFECTED BY BANKRUPTCY

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

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MODIFICATIONS

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

NOTICE OF EFFECTIVE DATE

57. 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 following closure of the public comment period referenced in paragraph 38. If the penalty as described in this Order is not imposed, or an alternate penalty is imposed, this Consent Order becomes null and void.

BINDING EFFECT AND AUTHORIZATION TO SIGN

58. This Consent Order is binding upon NMMS 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 NMMS TWIN PEAKS, LLC:
BY: NewMark Merrill Mountain States, LLC,
a Colorado limited liability company,
its Manager

By: NewMark Merrill Companies, LLC,
a California limited liability company,
Property Manager

By: Sigal Investments, LLC,
a California limited liability company,
Its Manager

_____ Date: 9.19.2016
Sanford D. Sigal, Manager

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

_____ Date: 10/12/16
Nicole Rowan, P.E.
Clean Water Program Manager
WATER QUALITY CONTROL DIVISION

COLORADO
Department of Public Health & Environment