

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Thomas Lloyd Herberg; Bruce Allen
Herberg; and D & G Drainage, Inc.,

Plaintiffs,

Civil Action No.

vs.

United States Environmental Protection
Agency; and Gina McCarthy, in her official
capacity as Administrator of the
Environmental Protection Agency,

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Thomas Herberg, Bruce Herberg, and D & G Drainage, Inc. (“Plaintiffs”) as and for their Complaint against the United States Environmental Protection Agency and Gina McCarthy, Administrator of the United States Environmental Protection Agency (in her official capacity) (“Defendants”), state and allege as follows:

INTRODUCTION

1. Plaintiffs bring this action for injunctive and declaratory relief under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*

2. Defendants United States Environmental Protection Agency and Gina McCarthy issued an Administrative Compliance Order under the CWA dated September 26, 2013, to Plaintiffs by registered mail, alleging that property owned by Plaintiffs Thomas Herberg and Bruce Herberg is subject to the CWA, and that Plaintiffs illegally placed discharged pollutants on their property. *See* Exhibit A. The Order required Plaintiffs to undertake corrective actions in

order to resolve the alleged violations within 30 days. The Order also demanded Plaintiffs respond within 10 days of the Order's issuance whether Plaintiffs intended to comply with the Order, or request within 10 days of the Order's issuance an informal conference with EPA to discuss any of the Findings or the Order's terms, or submit written information for EPA's consideration.

3. By letter dated October 11, 2013, Plaintiffs notified the EPA of their intent not to comply with the Administrative Compliance Order, but requested an informal conference with EPA to discuss the Order and present information to EPA. In their response, Plaintiffs specifically stated that their response in no way waived the requirements of Section 309(a) of the CWA, 33 U.S.C. § 1319(a)(5)(A), that the Order be personally served on the Parties.

4. Informal conferences were held with EPA, Plaintiffs, and Plaintiffs' counsel, by telephone on January 7, 2014, and January 13, 2014. Plaintiffs submitted written information regarding the Administrative Compliance Order to EPA on February 5, 2014.

5. Defendants issued an amended Administrative Compliance Order under the CWA dated April 9, 2014, to Plaintiffs, continuing to allege that property owned by Plaintiffs Thomas Herberg and Bruce Herberg is subject to the CWA, and that Plaintiffs illegally placed discharged pollutants on their property. *See* Exhibit B. The amended Order required Plaintiffs to undertake corrective actions in order to resolve the alleged violations within 30 days. The amended Order also demanded Plaintiffs respond within 10 days of its issuance whether Plaintiffs intended to comply with the amended Order.

6. The corrective actions demanded by the amended Administrative Compliance Order require Plaintiffs to submit a Restoration Plan for the sites within 30 days of the effective date of the amended Order to restore all streams and wetlands identified by the EPA. The

amended Order requires the Restoration Plan to include immediate commencement of substantial and costly restoration work, including stream restoration, complete removal of all drainage tiles, tile connections, intakes, outlets, and any other structure installed to facilitate the drainage of the sites, preparation and seeding of all wetland areas with a variety of wetland seeding mixes, undertaking control of invasive species by mowing and spot herbicide treating for two full growing seasons after seeding, implementing measures and best management practices to control erosion of the soil disturbed in the restoration, and three-year monitoring program during which the property must be left untouched.

7. Plaintiff Thomas Herberg reached a Voluntary Restoration Plan agreement with the State of Minnesota and Big Stone County, Minnesota to satisfy compliance with the alleged violations of State public waters and wetland laws. The agreed-upon Voluntary Restoration Plan between Plaintiff Thomas Herberg and the State of Minnesota and Big Stone County was reduced to restoration orders by the Minnesota Department of Natural Resources. *See* Exhibits C and D. Implementation of the restoration orders requires approval from the U.S. Army Corps of Engineers under the CWA, but both the U.S. Army Corps of Engineers and EPA have taken the position that regulatory approvals may not be given while the present matter is in dispute and enforcement of the amended Administrative Compliance Order is pending. The State of Minnesota has, thus far, been holding enforcement of the restoration orders in abeyance until this matter with the EPA is resolved. *See* Exhibit E.

8. Failure to comply with EPA's amended Administrative Compliance Order potentially subjects Plaintiffs to significant civil penalties and compliance with the amended Administrative Compliance Order does not preclude further enforcement action pursuant to the CWA for any violations cited in the Order.

9. The amended Administrative Compliance Order demanded that Plaintiffs notify EPA within 10 days of the issuance date of the Order whether Plaintiffs intended to comply with this Order. Plaintiffs responded by letter dated April 17, 2014, notifying EPA of their objections to the Order and their intent not to comply. In their response, Plaintiffs again specifically stated that their response in no way waived the requirements of Section 309(a) of the CWA, 33 U.S.C. § 1319(a)(5)(A), that the amended Order be personally served on the Parties.

10. This Complaint alleges that Defendants' actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or unsupported by substantial evidence under the CWA and the APA, 5 U.S.C. § 706.

11. Plaintiffs seek by this action a declaration that the property of Plaintiffs Thomas Herberg and Bruce Herberg is not subject to the CWA, that the installation of drainage tile complained of is not a regulable discharge of dredged material, and an injunction enjoining Defendants from enforcing the Administrative Compliance Order.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA).

13. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) because the property that is the subject of the action is situated here.

PARTIES

14. Plaintiffs Thomas Herberg and Bruce Herberg own the property that is the subject of this action. D & G Drainage, Inc. is a corporation organized under the laws of the State of Minnesota and contracted with Plaintiff property owners Thomas Herberg and Bruce Herberg to install drainage tile using a Waynes Tile Pro tile plow, a John Deere 9520 tractor, and a John Deere 310 SG backhoe on the subject property, which Plaintiffs Thomas Herberg and Bruce Herberg farm.

15. Defendant United States Environmental Protection Agency (EPA) is an agency of the United States established pursuant to Reorganization Plan No. 3 of 1970, 84 Stat. 2086. It is the federal agency with primary responsibility for the enforcement of the CWA.

16. Defendant Gina McCarthy is the Administrator of EPA, and oversees EPA's enforcement of the CWA. She is sued in her official capacity only.

LEGAL BACKGROUND

17. In 1972, Congress enacted the CWA to regulate the navigable waters of the United States.

18. Section 404 of the CWA, 33 U.S.C. § 1344(a) authorizes the Secretary of the United States Army Corps of Engineers to issue permits for the discharge of dredge or fill material into navigable waters of the United States.

19. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the unpermitted discharge of dredge and fill material into the navigable waters of the United States.

20. Section 309 of the CWA, 33 U.S.C. § 1319(a), authorizes EPA to issue compliance orders for violations of the CWA, including unpermitted discharges of dredge and fill material into navigable waters of the United States.

21. Sections 502(7), 33 U.S.C. § 1362(7), defines “navigable waters” to mean the “waters of the United States, including the territorial seas.”

22. The EPA has promulgated regulations to define “waters of the United States.” *See* 40 C.F.R. § 230.3(s).

23. Under the EPA’s regulations, navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are considered “waters of the United States.” *See* 40 C.F.R. §230.3(s)(1)–(7).

24. In 2001, the United States Supreme Court, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), held that isolated, intrastate non-navigable bodies of water are not “waters of the United States.”

25. In response to the SWANCC opinion, the EPA (in junction with the U.S. Army Corps of Engineers) issued an Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “waters of the United States,” seeking comment on whether and how 40 C.F.R. § 230.3 should be amended to account for the Supreme Court’s decision. *See* 68 Fed. Reg. 1991 (Jan. 15, 2003).

26. The EPA did not follow through with rulemaking at that time.

27. In 2006, the Supreme Court held in a split decision that the CWA does not provide the EPA with jurisdiction over certain wetlands that are connected to nonnavigable tributaries of traditional navigable waters. *See Rapanos v. United States*, 547 U.S. 715 (2006).

28. Subsequently, the Eighth Circuit held that the U.S. Army Corps of Engineers (and the EPA) has jurisdiction over wetlands that satisfy either the jurisdictional test expressed by the plurality opinion of Justice Scalia, joined by the Chief Justice, Justice Thomas, or Justice Alito or

the jurisdictional test of the concurring opinion authored by Justice Kennedy as set out in *Rapanos. United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

29. The jurisdictional test from the plurality opinion in *Rapanos* states, “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between the two, are ‘adjacent’ to such waters and covered by the [CWA].” *Rapanos*, 547 U.S. at 717 (Scalia, J., plurality).

30. The jurisdictional test from the concurring opinion in *Rapanos* states that a significant nexus exists between wetlands and a navigable water “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment). “When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’” *Id.*

31. The EPA’s method for identifying wetlands is governed by the 1987 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*. The Manual interprets the EPA’s regulations defining “waters of the United States,” 40 C.F.R. § 230.3(s).

32. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the unpermitted discharge of any pollutant. Section 502(6), 33 U.S.C. § 1362(6), defines the term “pollutant” to mean “dredged spoil . . . discharged into water.”

33. The term “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source” 33 U.S.C. § 1362(12). A point source is “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The “addition of any pollutant” includes the redeposit of

materials excavated or dredged from a wetland or water body. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923–24 (5th Cir. 1983)

34. The United States excludes “incidental fallback” from its definition of “discharge of dredged or fill materials” for which Section 404 permits are required. *See* 33 C.F.R. § 323.2(d)(2)(iii). Courts have narrowly interpreted in the incidental fallback exception to include “the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back.” *Nat'l Mining Ass'n v. U.S. Army Corps. of Engr's*, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

FACTUAL ALLEGATIONS

35. Plaintiffs Thomas Herberg and Bruce Herberg own and operate agricultural land located in the North Half of Section 29, the Southeast Quarter of Section 30, the Northeast Quarter of Section 31, and the Northwest Quarter of Section 32, all in Township 123 North, Range 46 West, Big Stone County, Minnesota.

36. Meadowbrook Creek, an altered natural watercourse (ditch), drains to the south along the western portion of Plaintiffs' property.

37. There is no surface water connection between the property and Meadowbrook Creek.

38. The property does not, either by itself or in combination with similarly situated properties in the area, substantially affect the physical, chemical, and biological integrity of Meadowbrook Creek or any other water body.

39. On or around August or September of 2011, Plaintiff D & G Drainage, Inc., under contract with Plaintiffs Bruce Herberg and Thomas Herberg, installed drainage tile on the property of Plaintiffs Bruce Herberg and Thomas Herberg.

40. For various sites in the North Half of Section 29, the Northwest Quarter of Section 32, and the Northeast Quarter of Section 31, the purpose of the installed drainage tile was to improve existing drainage manipulations on cropped ground. For other sites in the North Half of Section 29, the Northwest Quarter of Section 32, and the Northeast Quarter of Section 31, the purpose of the drainage tile installation was to improve existing cropped ground by installing tile where no previous drainage improvements existed.

41. Many of the alleged wetland sites contained preexisting drainage facilities before Plaintiffs undertook the actions that lead to the CWA violations alleged to have occurred in this enforcement action. Many of the alleged wetland sites have a significant history of being cropped and producing an agricultural commodity.

42. The installation of drainage tile using a Waynes Tile Pro tile plow and a John Deere 9520 tractor does not require soil to be excavated. The installation process does not involve the digging of trenches, sidecasting of dredged material, or the addition of fill or dredged material. No soil is excavated or dredged during the tile installation process.

43. To the extent any soil is disturbed during the tile installation process, the soil moves around the tile plow as the tile plow is moved through the soil in its normal, routine use. Any soil that is disturbed in the process does not leave the earth and settles back into virtually the same location immediately after the tile plow passes by and without further mechanical assistance or disturbance by the tile plow itself.

44. On or around August or September 2011, Plaintiff D & G Drainage, Inc., under contract with Plaintiffs Bruce Herberg and Thomas Herberg, excavated accumulated sediment to maintain drainage from Meadowbrook Creek using a John Deere 310 SG backhoe. The excavated material was transported to an upland disposal site. Excavated sediment was either

directly dumped into a box scraper and transported for disposal in an upland disposal site, or temporarily placed on top of old spoil for several minutes until the box scraper returned to remove the excavated material.

45. The purpose of Plaintiffs' excavation activities within Meadowbrook Creek was to maintain the creek as a drainage ditch.

46. Any alleged discharges into Meadowbrook Creek during the excavation process were incidental fallback to the removal of accumulated sediment and therefore not subject to the CWA.

47. Any temporary placement of excavated materials near Meadowbrook Creek until the box scraper was available to haul the excavated sediment away was placed on old spoil banks and not into wetlands that are "waters of the United States."

INJUNCTIVE RELIEF ALLEGATIONS

48. Plaintiffs hereby reallege and incorporate by reference all allegations contained in Paragraphs 1 through 47 as though fully set forth herein.

49. If an injunction does not issue enjoining Defendants from enforcing the compliance order against Plaintiffs, Plaintiffs will be irreparably harmed. Plaintiffs are presently and continuously injured by the Administrative Compliance Order's issuance because its issuance and coincident threat of enforcement will force Plaintiffs either to restore their property by enhancing and creating wetlands at great expense, or to subject themselves to severe civil and criminal penalties.

50. Plaintiffs have no plain, speedy, and adequate remedy at law.

51. If not enjoined by this Court, Defendants will continue to threaten to, and actually, enforce the Administrative Compliance Order in derogation of Plaintiffs' rights.

52. Defendants' amended Administrative Compliance Order is a final agency action subject to judicial review. *See* 5 U.S.C. § 702; *see also Sackett v. Env't'l Protection Agency*, 132 S. Ct. 1367 (2012).

53. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

54. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 53 as though fully set forth herein.

55. An actual and substantial controversy exists between Plaintiffs and Defendants over Defendants' failure to comply with the CWA and the APA in determining that Plaintiffs' property is subject to the CWA, that Plaintiffs activities created the discharge of a pollutant under the CWA, and that Plaintiffs can be held liable for violation of the Administrative Compliance Order, or the alleged underlying violation, without proof of a violation.

56. Defendants' Administrative Compliance Order is a final agency action subject to judicial review. *See* 5 U.S.C. § 702.

57. This case is presently justiciable because Defendants' failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Plaintiffs. Plaintiffs are presently and continuously injured by the Administrative Compliance Order's issuance because its issuance and coincident threat of enforcement will force Plaintiffs to enhance and create wetlands on Plaintiffs' property at great expense and devaluation to their property, or to subject themselves to severe civil and criminal penalties.

58. Declaratory relief is, therefore, appropriate to resolve this controversy.

FIRST CLAIM FOR RELIEF (Statutory Violation)

59. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 58 as though fully set forth herein.

60. Plaintiffs' property is not subject to the CWA under the controlling *Rapanos* decision because Plaintiffs' property (1) does not substantially affect, either by itself or in combination within similar properties in the area, the physical, chemical, and biological integrity of any traditional navigable water, and (2) is not connected to any other body of water such that one cannot discern where that body of water ends and the property begins.

61. Defendants' determination that Plaintiffs' property is subject to the CWA is, therefore, arbitrary and capricious, and contrary to law. *See* 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF (Statutory Violation)

62. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 61 as though fully set forth herein.

63. Plaintiffs' actions are not subject to the CWA because Plaintiffs' installation of drainage tile using a Waynes Tile Pro tile plow and a John Deere 9520 tractor does not result in the discharge of a pollutant.

64. Defendants' determination that Plaintiffs' actions are subject to the CWA is, therefore, arbitrary and capricious, and contrary to law. *See* 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF (Mischaracterization of Activity)

65. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 64 as though fully set forth herein.

66. Defendants have mischaracterized Plaintiffs actions in installation of the drainage tile by describing the alleged discharge as excavation of trenches, sidecasting the excavated

material along the side of the trench, laying of drainage tile, and then replacing the sidecast material on top of the installed drainage tile.

67. Defendants' characterization of Plaintiffs' activities are not based on relevant evidence and rests upon speculation and conjecture. *See* 5 U.S.C. § 706(2).

FOURTH CLAIM FOR RELIEF (Statutory Violation)

68. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 67 as though fully set forth herein.

69. Plaintiffs' actions are not subject to the CWA because Plaintiffs' purpose in excavating accumulated sediment from Meadowbrook Creek was to maintain the altered creek as a drainage ditch.

70. Plaintiffs' actions are not subject to the CWA because Plaintiffs' excavation of accumulated sediment from Meadowbrook Creek did not result in the discharge of a pollutant.

71. Any excavated sediment alleged to have been discharged into Meadowbrook Creek was incidental fallback from the John Deere 310 SG backhoe and not subject to the CWA.

72. All excavated sediment was disposed in an upland disposal site not subject to the CWA. Any excavated sediment not immediately hauled to the disposal site was deposited on old soil bank and not into wetlands adjacent to Meadowbrook Creek.

73. Defendants' determination that Plaintiffs' actions are subject to the CWA is, therefore, arbitrary and capricious, and contrary to law and rests upon speculation and conjecture. *See* 5 U.S.C. § 706(2).

FIFTH CLAIM FOR RELIEF (Insufficient Service)

74. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 73 as though fully set forth herein.

75. Plaintiffs received the amended Administrative Compliance Order dated April 9, 2014, by registered mail.

76. Section 309(a) of the CWA, 33 U.S.C. § 1319(a)(5)(A), requires compliance orders be issued by personal service.

77. Defendants' lack jurisdiction to enforce the compliance order without serving it personally upon Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. For a declaratory judgment that the property of Plaintiffs Thomas Herberg and Bruce Herberg are not subject to the CWA;
2. For a declaratory judgment that Plaintiffs' activities in installing drainage tile did not result in the discharge of a pollutant;
3. For a declaratory judgment that Plaintiffs' activities in removing accumulated sediment from the site did not result in the discharge of a pollutant;
4. For a declaratory judgment that, pursuant to the Administrative Procedure Act, the Defendants' actions are arbitrary and capricious, and not in accordance with law;
5. For a declaratory judgment that Defendants lack jurisdiction to enforce the compliance order due to insufficient service under the Clean Water Act;
6. An injunction enjoining Defendants from taking any enforcement action, or imposing any penalty, against Plaintiffs;
7. For an award of attorneys' fees, expenses, and costs; and,
8. For such other relief as the Court deems just and proper.

Dated: May 7, 2014.

RINKE NOONAN

/s/ John C. Kolb

John C. Kolb

Bar Number 268938

Attorney for Plaintiffs

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

SEP 26 2013

REPLY TO THE ATTENTION OF:
WW-16J

CERTIFIED MAIL 7001 0320 0005 8923 1665
RETURN RECEIPT REQUESTED

Mr. Thomas Herberg
Mr. Bruce Herberg
86736 County Road 54
Beardsley, Minnesota 56211

Mr. Todd Dybdahl
D & G Drainage, Inc.
67385 320th Street
Clinton, Minnesota 56225

Re: Wetlands Fill Violation Docket Number V-404-AO-13-10

Dear Gentlemen:

The enclosed Administrative Compliance Order (Order) is issued by the U.S. Environmental Protection Agency pursuant to Section 309(a) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a). The Order cites violations of Section 301 of the CWA, 33 U.S.C. § 1311, on two separate sites, and outlines corrective actions that must be undertaken to resolve the violations.

Compliance with this Order is required within 30 days of the effective date of this Order. Failure to comply with this Order may subject you to further enforcement action. You must notify us within 10 days of this Order being issued whether you intend to comply, during which time you may request an informal conference with EPA to discuss any of the Findings or the Order's terms, or submit written information you would like EPA to consider.

Please direct questions concerning this matter to Mr. Yone Yu at (312) 886-2260. Legal questions can be directed to Mr. Robert Guenther, Associate Regional Counsel, at (312) 886-0566.

Sincerely,

Tinka G. Hyde
Director, Water Division

EXHIBIT A

OCT 04 2013

OCT 04 2013

30018
Jerrisa Fox

cc: Tamara E. Cameron, Chief
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Lucas Youngsma
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Rinke Noonan
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P.O. Box 1497
St. Cloud, Minnesota 56302

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

Bruce Herberg,
Beardsley, Minnesota,

Thomas Herberg,
Beardsley, Minnesota,

and

D & G Drainage, Inc.,
Clinton, Minnesota,

RESPONDENTS.

DOCKET NO. V-404-AO-13-10

ADMINISTRATIVE COMPLIANCE
ORDER

PROCEEDINGS UNDER SECTION
309(a) OF THE CLEAN WATER ACT,
33 U.S.C. § 1319(a)

ADMINISTRATIVE COMPLIANCE ORDER

The United States Environmental Protection Agency (EPA) issues this Administrative Compliance Order to Bruce Herberg, Thomas Herberg, and D&G Drainage, Inc., (Respondents) under authority of section 309(a) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 5, who has duly redelegated this authority to the Director, Water Division, EPA, Region 5.

REGULATORY BASIS

1. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), states that whenever on the basis of any information available the Administrator finds that any person is in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), the Administrator may issue an order requiring that person to comply with that section.
2. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states that except as in compliance with, among other things, section 404 of the CWA, 33 U.S.C. § 1344, the discharge of any

pollutant by any person is unlawful.

3. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), states that the Secretary of the Army may issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

4. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of pollutants" as any addition of any pollutant to navigable waters from any point source.

5. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines a "pollutant" as, among other things, dredged spoil, solid waste, biological materials, rock, sand, cellar dirt, and agricultural waste discharged into water.

6. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term "navigable waters" as the waters of the United States.

7. Federal regulations, at 40 C.F.R. § 230.3(s), define the term "waters of the United States" as all other waters such as streams, wetlands and wetlands adjacent to waters such as lakes, rivers and streams.

8. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines a "point source" as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, or discrete fissure from which pollutants are or may be discharged.

9. Federal regulations, at 40 C.F.R. § 230.3(t), define "wetlands" as those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

GENERAL FINDINGS

10. The first Respondent is Bruce Herberg, a natural person living in Big Stone County,

Minnesota.

11. The second Respondent is Thomas Herberg, a natural person living in Big Stone County, Minnesota.

12. The third Respondent is D&G Drainage, Inc. (D&G), a corporation organized under the laws of the State of Minnesota.

13. Respondents are "persons" within the meaning of the definition set forth in section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. The first property subject to this Order is located in the NE¼ of Section 31 and NW¼ of Section 32, Township 123 North, Range 46 West in Big Stone County, Minnesota (Site 1). An unnamed tributary to Big Stone Lake, also known locally as Meadowbrook Creek, flows through part of the site. The current owners of record for Site 1 are Respondents Bruce Herberg and Thomas Herberg. See Exhibit 1, Figure 1 for a map of Site 1.

15. The second set of parcels subject to this Order are located in the SE¼ of Section 30 and N½ of Section 29, Township 123 North, Range 46 West in Big Stone County, Minnesota (Site 2). The current owners of record for Site 2 are Respondents Bruce Herberg and Thomas Herberg. See Exhibit 1, Figure 1 for a map of Site 2.

16. The wetlands identified at Site 1 and Site 2 are adjacent to Meadowbrook Creek, which flows to Big Stone Lake, a traditional navigable water and interstate lake. Traditional navigable waters are those waters which are subject to section 9 or 10 of the Rivers and Harbors Act, or determined to be navigable-in-fact under federal law, or are currently being used for commercial navigation, including commercial waterborne recreation (e .g., boat rentals, guided fishing trips, water ski tournaments, etc.), or have historically been used for commercial navigation, including commercial water-borne recreation; or are susceptible to being used in the future for commercial

navigation, including commercial water-borne recreation. Big Stone Lake is an interstate lake situated on the border between Minnesota and South Dakota.

17. Meadowbrook Creek and its adjacent wetlands, which were affected by the activities referenced in paragraphs 18, 19 and 26 below, are "waters of the United States" as those terms are defined at 40 C.F.R. § 230.3(s) and "navigable waters," as defined at section 502(7) of the CWA, 33 U.S.C. § 1362(7).

FINDINGS – Site 1

18. Between August 20 and September 10, 2011, using a Caterpillar 320 excavator, Respondent D&G, acting under a contract with Respondent property owners Bruce Herberg and Thomas Herberg, excavated sediment from 1,800 linear feet of Meadowbrook Creek in Site 1 and sidecast dredged material into adjacent wetlands. This excavation exceeded the historic bed elevation of the creek.

19. Also at Site 1, between August 20 and September 10, 2011, Respondent D&G, acting under contract with Respondent property owners Bruce Herberg and Thomas Herberg, discharged dredged material into wetlands adjacent to Meadowbrook Creek. This discharge occurred through the excavation of trenches of about 12 inches in width and between 3 and 6 feet in depth, sidecasting the excavated material along the side of the trench, laying of drainage tile, and then replacing the sidecast material on top of the installed drainage tile. These activities discharged roughly 1,200 cubic yards of material into the adjoining wetlands. The drainage tile was installed using a Waynes Tile Pro tile plow, a John Deere 9520 tractor, a John Deere 310 SG backhoe, and various hand tools. See Exhibit 1, Figure 2 for a map of the stream and the associated wetlands affected by Respondents' activities.

20. The machinery referenced in paragraphs 18 and 19 constitute "point sources" within the

meaning of the definition set forth in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. The dredged material referenced in paragraphs 18 and 19 constitutes "pollutants" within the meaning of the definitions set forth in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. The placement of dredged material in the wetlands referenced in paragraphs 18 and 19 constitutes a "discharge of pollutants" within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

23. At no time from the first date of the activities described in paragraphs 18 and 19 above until the date of this Order did any Respondent possess a permit issued under section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of pollutants described in paragraphs 18 and 19.

24. Each discharge of pollutants into navigable waters without a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

25. Each day the discharged material remains in the wetland without the required permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

FINDINGS – Site 2

26. At Site 2, between August 20 and September 10, 2011, Respondent D&G, acting under contract with Respondent property owners Bruce Herberg and Thomas Herberg, discharged dredged material into wetlands adjacent to Meadowbrook Creek. This discharge occurred through the excavation of trenches of about 12 inches in width and between 3 and 6 feet in depth, sidecasting the excavated material along the side of the trench, laying of drainage tile, and then replacing the sidecast material on top of the installed drainage tile. These activities discharged roughly 800 cubic yards of material into the adjoining wetlands. The drainage tile was installed

using a Waynes Tile Pro tile plow, a John Deere 9520 tractor, and a John Deere 310 SG backhoe. See Exhibit 1, Figure 3 for a map of the wetland areas on Site 2 affected by Respondents' activities.

27. The machinery described in paragraph 26 constitutes "point sources" within the meaning of the definition set forth in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

28. The fill material described in paragraph 26 constitutes "pollutants" within the meaning of the definitions set forth in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

29. The placement of the material in the wetlands referenced in paragraph 26 constitutes a "discharge of pollutants" within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

30. At no time from the first date of the activities described in paragraph 26 above until the date of this Order did Respondents possess a permit issued under section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of pollutants referenced in paragraph 26.

31. Each discharge of pollutants into navigable waters without a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

32. Each day the discharged material remains in the wetland without the required permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COMPLIANCE REQUIREMENTS

33. Respondents must refrain from further discharges of dredged or fill material into the wetlands or streams on Sites 1 and 2, except in compliance with a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, or the CWA generally, 33 U.S.C. §§ 1251 - 1387.

34. Respondents must notify EPA in writing within 10 days of the issuance date of this Order that they intend to comply with this Order.

35. Within 30 days of the effective date of this Order, Respondents must submit to EPA for approval a plan (Restoration Plan) to restore all of the streams and wetlands identified in paragraphs 18 – 32 of this Order. Respondents may submit a single Restoration Plan and are encouraged to do so. However, reliance by one Respondent on the actions of another to provide a Restoration Plan according to this paragraph, or to provide a revised plan pursuant to paragraph 37, below, will not relieve any Respondent of responsibility for failure to submit a plan satisfactory to EPA. EPA will approve the plan or provide comments as provided in paragraph 37.

36. The goals for restoration include establishing the pattern, profile, and dimensions of Meadowbrook Creek that were approved by the Minnesota Department of Natural Resources Limited Permit 2011-0184 and returning the tiled wetland areas to their original state as undrained palustrine, emergent wetlands. The Restoration Plan must incorporate the following requirements and be consistent with the general guidelines attached as Exhibit 2:

a. The portion of the Restoration Plan for Meadowbrook Creek at Site 1 must comply with the specific physical restoration requirements set forth in the Minnesota Department of Natural Resources' Public Waters Restoration and Replacement Order (State Order) issued to Respondent Thomas Herberg on September 18, 2013.

b. The portion of the Restoration Plan for restoration of wetlands at Sites 1 and 2 must include the complete removal of all drainage tiles, tile connections, intakes, outlets, and any other structure installed to facilitate the drainage of the sites. No installed drain tile may remain in place, even that which is disabled.

c. Upon removal of drainage tile from Sites 1 and 2, the wetland areas will be graded to contours that existed prior to disturbance, prepared with light tillage, and seeded with the Minnesota Board of Water and Soil Resources seed mix appropriate for the wetland community type that existed prior to disturbance. The Restoration Plan must also provide measures and best management practices to control erosion of the soil disturbed in the restoration. These measures and practices must also be implemented within 15 days of completing restoration activities.

d. The Restoration Plan must include a schedule of restoration activities and a date by which they will be completed. The Restoration Plan must also require monitoring to assess whether restoration efforts meet approved performance standards, and for regular reports to be submitted to EPA at the addresses specified in paragraph 40 below describing Respondents' compliance with the approved Restoration Plan. EPA recommends that Respondents retain the services of an experienced wetland consultant to work with EPA on this plan.

37. If EPA finds the submitted Restoration Plan acceptable, EPA will notify Respondents of its approval, and Respondents must commence site wetland restoration activities according to the approved plan or portion thereof. If EPA determines that the proposed Restoration Plan or its included implementation schedule is unacceptable in whole or in part, EPA will notify Respondent and provide corrective comments as appropriate within 30 days of submission. Respondent must revise the Restoration Plan, incorporating EPA's comments, within 15 calendar days of the date of the notification from EPA and receipt of EPA's comments.

38. The requirements of the approved or modified Restoration Plan will be incorporated into the requirements of this Order.

39. Within 30 days of completing restoration activities, Respondents must submit to EPA written certification that they have restored streams and wetlands at Sites 1 and 2 in accordance with the approved Restoration Plan. Such certification must include a report of all work performed at the sites. This report will include at minimum the following:

e. An as-built drawing of Site 1 showing the post-restoration pattern, profile, and dimensions of Meadowbrook Creek and the location of installed riffle structures. Respondents must also include copies of all correspondence with the State regarding their compliance with the State Order, or in lieu thereof if the documents are lengthy, a summary of the documents including the date of the correspondence, names of the sender and all recipients, and a brief description of the contents of the correspondence.

f. As-built drawings of the areas on Sites 1 and 2 showing the location of removed drainage tile, of wetland plant seeding, and of all erosion control measures and BMPs used.

g. A timeline of the restoration activities, description of the restoration activities, and identification of any problems encountered during implementation.

h. Before and after photographs of stream channels and wetland areas where restoration activities occurred.

40. Submittals provided under this Order must be certified as true, accurate and correct and submitted by Respondents under authorized signature to:

Yone Yu
Watersheds & Wetlands Branch
U.S. Environmental Protection Agency (WW-16J)
77 West Jackson Boulevard
Chicago, Illinois 60604

GENERAL PROVISIONS

41. EPA preserves any rights to use the information requested herein in an administrative, civil, or criminal action.

42. Neither the issuance of this Order by EPA nor compliance with its terms affects Respondents' ongoing obligation to comply with the CWA or any other federal, state, or local law or regulation.

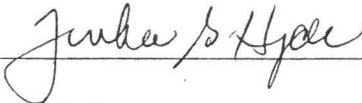
43. EPA reserves all rights and remedies, legal and equitable, available to address any violation cited in this Order or any other violation of the CWA, and to enforce this Order. Neither the issuance of this Order by EPA, nor compliance with its terms precludes further enforcement action pursuant to section 309 of the CWA, 33 U.S.C. § 1319, for the violations cited in this Order, for any other violation of the CWA or to enforce this Order.

44. This Order will become effective 10 days from the date it is issued, unless within that 10-day period Respondents request an informal conference to discuss the Order or to present information to EPA concerning the Order. If an informal conference is requested, it will be held at EPA's Region 5 offices at 77 West Jackson Boulevard, Chicago, Illinois, unless otherwise agreed to by the parties. Alternatively, it can be conducted by telephone at Respondents' request. Respondents may be represented by an attorney or other representative at the informal conference, but the conference will not take the form of a hearing. Additionally, even if no conference is requested, Respondents may submit to EPA, at the addresses shown in paragraph 40 of this Order, written information regarding this Order, provided they do so within 10 days of the date this Order is issued. To request an informal conference, Respondents should contact Mr. Yone Yu of my staff at (312) 886-2260, or Respondents' attorneys may contact Mr. Robert S. Guenther of the EPA Region 5 Office of Regional Counsel at (312) 886-0566.

45. If an informal conference is held or information is submitted to EPA, the Order will become effective 21 days from the date of the informal conference or EPA's receipt of written information regarding the Order, whichever is later. However, if the Order is withdrawn or modified based on information that the Respondents submit, EPA will notify the Respondents in writing within those 21 days. Then, the effective date of any withdrawn or modified Order will be the date of issuance of that final determination.

46. Respondents may seek federal judicial review of this Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

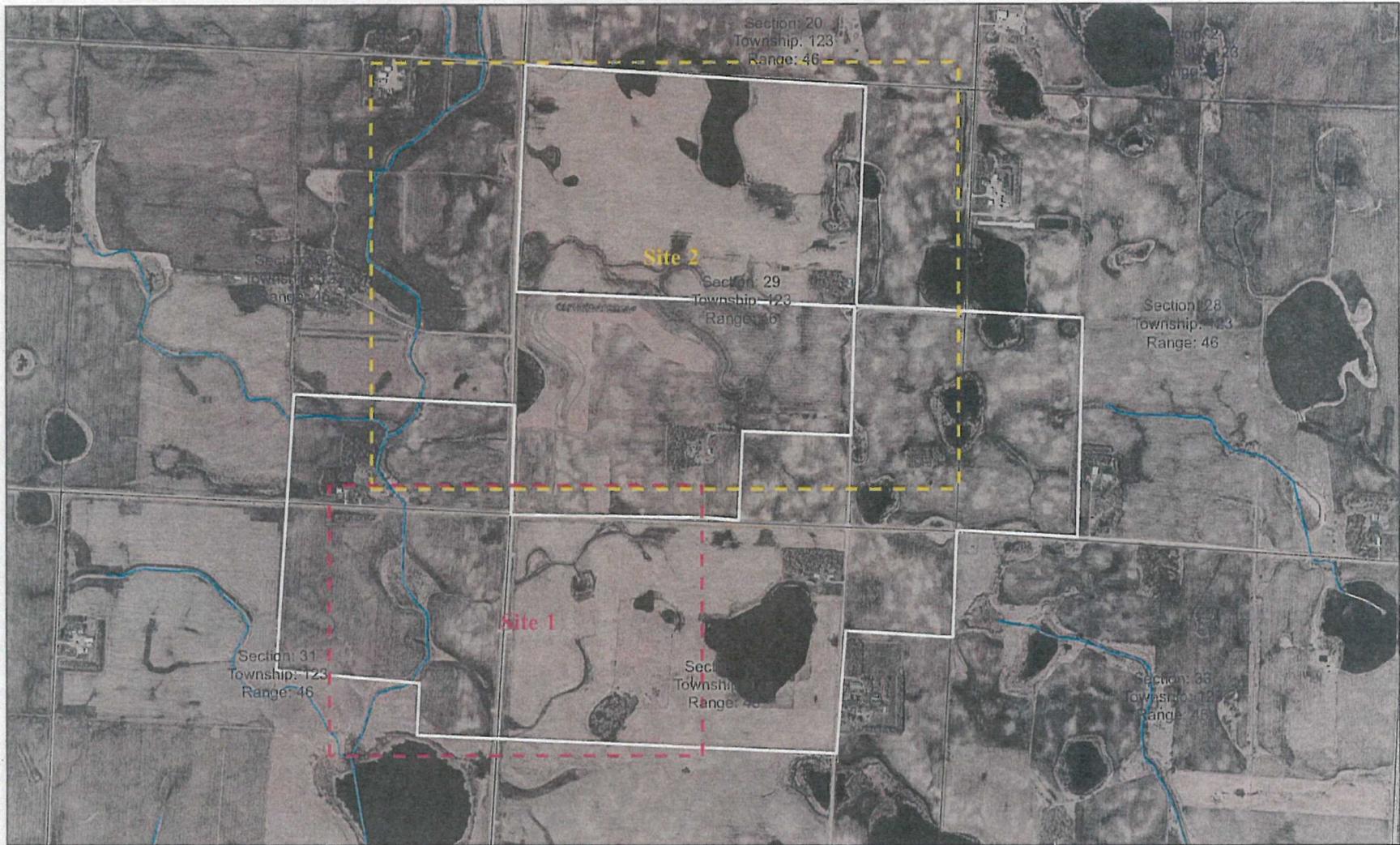
Dated: 9-26-13



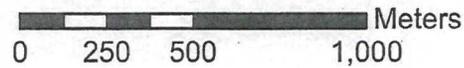
Tinka G. Hyde
Director, Water Division
U.S. Environmental Protection Agency, Region 5

EXHIBIT 1

Figure 1: Site Overview



Sections 29, 31 & 32 T123N, R46W
Big Stone County, Minnesota
Projection: NAD 83 UTM Zone 15N
Imagery: 2011 FSA Orthophoto



	Property Boundary
	PLSS
	Rivers and streams (NHD)

Figure 3: Site 2 Impacts



2011 Aerial Photograph

EXHIBIT 2

Exhibit 2

EPA Region 5 – General Guidelines for Removal and Restoration Plans

These guidelines provide general specifications for preparing removal and/or restoration plans to remediate the unauthorized filling of waters of the United States, including wetlands. As environmental conditions vary at every site, precise specifications will depend upon conditions pertaining to the site in question. The size of the area to be restored, its biological and physical characteristics, and the level of disturbance the site has experienced will define the scope and complexity of the restoration plan. For most cases, the following instructions represent the minimum requirements to prepare an acceptable removal and/or restoration plan.

I. Existing Physical Conditions

- A. Provide a surveyed site plan showing property boundaries, streets, buildings, waterbodies (show ordinary high water mark), wetlands, Federal Emergency Management Agency 100-year floodplain (if applicable), areas of unauthorized fill, elevation contours, and other ground surface features at a scale no less than 1 inch = 40 feet. The plan must include a cross-section view of the site that shows soil depths, fill depths, and the average depth to groundwater across the site.
- B. Describe the physical conditions of the site, including its size; the size and type of the unauthorized fill; existing aquatic resources (e.g. streams, lakes, wetlands - including the types of vegetation); the soil types present; the hydrologic regime of the site; and other relevant information such as presence of threatened and endangered species (and their designated critical habitat), surrounding land use, and any proposed alterations to aquatic resources to accommodate for these ongoing activities (irrigation practices, ditching, maintenance of drainageways, etc.) within or near the restoration site.

II. Proposed Physical Conditions

- A. Using the site plan described in I.A. as a base, show the areas where you will do the removal and restoration work. Show proposed finished grades, expected ordinary high water mark elevations, the location of proposed planting or seeding, and the location of all sediment and erosion control structures such as hay bales or silt screens. The plan must include a cross-section view of the site that shows proposed soil depths, and average depth to groundwater across the site.
- B. Describe the removal and restoration work, including the methods and equipment you will use; how the equipment will gain access to the site; where you will dispose of any removed material; a schedule of how the work will progress across the site; how the soil will be prepared for planting; a list of herbaceous and woody species you will seed or plant; the sources of the plant material (note: as a rule, EPA will not permit transplanting of plant stock); the planting methods; physical layout of where and how plant material will be installed and at what densities; how you will minimize adverse impacts to aquatic resources while work is underway; and, the expected hydrologic regime of the site when restored.

- C. Delineate the area(s) on the site to be restored by installation of flagging, sedimentation and erosion control structures, or other appropriate methods; this delineation shall represent the limit of construction activities such that no work shall occur beyond these boundaries unless authorized by EPA.

III. Actual Restored Physical Conditions

- A. Using the site plan described in I.A. as a base, show the actual physical conditions at the site when you have completed grading activities (i.e., an "as-built" plan), including actual finished grades and all pertinent ground surface features. This plan must include a cross-section view of the site that shows actual soil depths and average depth to groundwater across the site.

IV. Tree Planting Plan

- A. If tree planting is required, replanting of tree stock will require the use of bare root or Root Production Method (RPM) trees across all restoration sites. Initial planting densities will vary based on the size of trees planted and site-specific conditions, but as a general guideline plant at least 436 bare-root trees/acre or 109 RPM trees/acre.
- B. Select tree species that are native to the area, suitable for site conditions, and with diversity across several species. All planted trees must be clearly marked or labeled such that they can be identified in the field and differentiated from volunteer species.
- C. Implement appropriate predation deterrents to protect the tree plantings. These may include, but are not limited to, fences, tree shelters, tree tubes, bud caps, and spray repellants.

V. Performance Standards

- A. Restored sites must meet wetland criteria (soils, hydrology, and vegetation) as established in the 1987 Corps of Engineers Wetland Delineation Manual and the applicable Regional Supplement:
 - a. Predominance of hydrophytic vegetation.
 - b. Presence of hydric soils.
 - c. Presence of wetland hydrology.
- B. Vegetation Standards
 - a. More than 50% of plant species are facultative (FAC) or wetter (FACW or OBL).
 - a. Less than 20% cumulative areal cover of invasive and/or non-native species including, but not limited to, reed canary grass, cattails, Canada thistle, bull thistle, smooth brome grass, giant ragweed, giant foxtail, common ragweed, quack grass, black locust, *Phragmites*, sweet clovers, and non-native honeysuckles and buckthorns. Control of invasive and/or non-native plant species will occur for at least 3 full growing seasons, and include mowing, burning, disking, mulching, biocontrol and/or herbicide treatments as necessary.

C. Tree plantings will be required to meet or exceed these yearly performance standards:

Year	Survival of RPM trees	Survival of bare-root trees
1	98 trees/acre	370 trees/acre
2	98 trees/acre	370 trees/acre
3	87 trees/acre	305 trees/acre
4	87 trees/acre	305 trees/acre
5	76 trees/acre	240 trees/acre
6-10	76 trees/acre	240 trees/acre

The final performance standard is reflected in the years 5-10.

VI. Monitoring

- A. Provide a monitoring plan that proposes a simple statistical method to assess the success or failure of restoration. For example, you could use transects with sampling stations for measuring the percent cover in each vegetative stratum. Your plan must include a general provision to take corrective action, at the direction of EPA, should monitoring show that you are not meeting the performance standards.
- B. You must monitor midway through and near the end of the first and second growing seasons, then annually near the end of each successive growing season for the rest of the monitoring period. You must monitor for three to five years, depending on the scope and complexity of the restoration. Tree planting may require monitoring for up to 10 years.
- C. After each monitoring event, submit a report describing the environmental conditions at the site and assessing the success or failure of restoration. The report must include photographs, identify any problems discovered, and recommend corrective actions.
- D. If performance standards are not met after the end of the monitoring period, then you must take corrective action to achieve these performance standards and continue monitoring to track performance annually until the performance standards are met.

VII. Inspections

The plan must allow EPA or their designated agent to inspect the site after you have installed sedimentation and erosion control structures; completed grading activities; completed initial planting or seeding; and after monitoring indicated that you have met the performance standards.

VIII. Schedule

The plan must include a comprehensive schedule for all removal, restoration, inspection, monitoring, and reporting activities.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

APR 10 2014

REPLY TO THE ATTENTION OF:
WW-16J

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Thomas Herberg
Mr. Bruce Herberg
86736 County Road 54
Beardsley, Minnesota 56211

Mr. Todd Dybdahl
D & G Drainage, Inc.
67385 320th Street
Clinton, Minnesota 56225

Re: Wetlands Fill Violation Docket Number V-404-AO-13-10

Dear Gentlemen:

The enclosed Administrative Compliance Order (Order) is issued by the U.S. Environmental Protection Agency pursuant to Section 309(a) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a). The Order cites violations of Section 301 of the CWA, 33 U.S.C. § 1311, on two separate sites, and outlines corrective actions that must be undertaken to resolve the violations. This Order is a revision to the Administrative Compliance Order that was issued to you on September 26, 2013 and supersedes that Order.

Compliance with this Order is required within 30 days of the effective date of this Order. This Order is effective immediately upon issuance. Failure to comply with this Order may subject you to further enforcement action. You must notify us within 10 days of this Order being issued whether you intend to comply.

Please direct questions concerning this matter to Mr. Yone Yu at (312) 886-2260. Legal questions can be directed to Mr. Robert Guenther, Associate Regional Counsel, at (312) 886-0566.

Sincerely,

Tinka G. Hyde
Director, Water Division

EXHIBIT B

APR 14 2014

JCH/H
Herberg/Farn

Enclosures

cc: Tamara E. Cameron, Chief
Regulatory Branch
U.S. Army Corps of Engineers, St. Paul District
180 Fifth Street East, Suite 700
St. Paul, Minnesota 55101-1678

Lucas Youngsma
Area Hydrologist
Minnesota Department of Natural Resources
1400 E Lyon St
Marshall, Minnesota 56258

Darren Wilke
Environmental Officer
Big Stone County
20 SE 2nd St., Suite 105
Ortonville, Minnesota 56278

John C. Kolb
Rinke Noonan
Suite 300, US Bank Plaza
P.O. Box 1497
St. Cloud, Minnesota 56302

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

Bruce Herberg,
Beardsley, Minnesota,

Thomas Herberg,
Beardsley, Minnesota,

and

D & G Drainage, Inc.,
Clinton, Minnesota,

RESPONDENTS.

DOCKET NO. V-404-AO-13-10

ADMINISTRATIVE COMPLIANCE
ORDER

PROCEEDINGS UNDER SECTION
309(a) OF THE CLEAN WATER ACT,
33 U.S.C. § 1319(a)

ADMINISTRATIVE COMPLIANCE ORDER

The United States Environmental Protection Agency (EPA) issues this Administrative Compliance Order to Bruce Herberg, Thomas Herberg, and D&G Drainage, Inc., (Respondents) under authority of section 309(a) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 5, who has duly redelegated this authority to the Director, Water Division, EPA, Region 5.

REGULATORY BASIS

1. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), states that whenever on the basis of any information available the Administrator finds that any person is in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), the Administrator may issue an order requiring that person to comply with that section.
2. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states that except as in compliance with, among other things, section 404 of the CWA, 33 U.S.C. § 1344, the discharge of any

pollutant by any person is unlawful.

3. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), states that the Secretary of the Army may issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

4. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of pollutants" as any addition of any pollutant to navigable waters from any point source.

5. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines a "pollutant" as, among other things, dredged spoil, solid waste, biological materials, rock, sand, cellar dirt, and agricultural waste discharged into water.

6. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term "navigable waters" as the waters of the United States.

7. Federal regulations, at 40 C.F.R. § 230.3(s), define the term "waters of the United States" as all other waters such as streams, wetlands and wetlands adjacent to waters such as lakes, rivers and streams.

8. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines a "point source" as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, or discrete fissure from which pollutants are or may be discharged.

9. Federal regulations, at 40 C.F.R. § 230.3(t), define "wetlands" as those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

GENERAL FINDINGS

10. The first Respondent is Bruce Herberg, a natural person living in Big Stone County,

Minnesota.

11. The second Respondent is Thomas Herberg, a natural person living in Big Stone County, Minnesota.

12. The third Respondent is D&G Drainage, Inc. (D&G), a corporation organized under the laws of the State of Minnesota.

13. Respondents are "persons" within the meaning of the definition set forth in section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. The first property subject to this Order is located in the NE $\frac{1}{4}$ of Section 31 and NW $\frac{1}{4}$ of Section 32, Township 123 North, Range 46 West in Big Stone County, Minnesota (Site 1). An unnamed tributary to Big Stone Lake, also known locally as Meadowbrook Creek, flows through part of the site. The current owners of record for Site 1 are Respondents Bruce Herberg and Thomas Herberg. See Exhibit 1, Figure 1 for a map of Site 1.

15. The second set of parcels subject to this Order are located in the SE $\frac{1}{4}$ of Section 30 and N $\frac{1}{2}$ of Section 29, Township 123 North, Range 46 West in Big Stone County, Minnesota (Site 2). The current owners of record for Site 2 are Respondents Bruce Herberg and Thomas Herberg. See Exhibit 1, Figure 1 for a map of Site 2.

16. The wetlands identified at Site 1 and Site 2 are adjacent to Meadowbrook Creek, which flows to Big Stone Lake, a traditional navigable water and interstate lake. Traditional navigable waters are those waters which are subject to section 9 or 10 of the Rivers and Harbors Act, or determined to be navigable-in-fact under federal law, or are currently being used for commercial navigation, including commercial waterborne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or have historically been used for commercial navigation, including commercial water-borne recreation; or are susceptible to being used in the future for commercial

navigation, including commercial water-borne recreation. Big Stone Lake is an interstate lake situated on the border between Minnesota and South Dakota.

17. Meadowbrook Creek and its adjacent wetlands, which were affected by the activities referenced in paragraphs 18, 19 and 26 below, are "waters of the United States" as those terms are defined at 40 C.F.R. § 230.3(s) and "navigable waters," as defined at section 502(7) of the CWA, 33 U.S.C. § 1362(7).

FINDINGS – Site 1

18. Between August 20 and September 10, 2011, using a Caterpillar 320 excavator, Respondent D&G, acting under a contract with Respondent property owners Bruce Herberg and Thomas Herberg, excavated sediment from 1,800 linear feet of Meadowbrook Creek in Site 1 and sidecast dredged material into adjacent wetlands. This excavation exceeded the historic bed elevation of the creek.

19. Also at Site 1, between August 20 and September 10, 2011, Respondent D&G, acting under contract with Respondent property owners Bruce Herberg and Thomas Herberg, discharged dredged material into wetlands adjacent to Meadowbrook Creek. This discharge occurred through the excavation of trenches of about 12 inches in width and between 3 and 6 feet in depth, sidecasting the excavated material along the side of the trench, laying of drainage tile, and then replacing the sidecast material on top of the installed drainage tile. These activities discharged roughly 1,200 cubic yards of material into the adjoining wetlands. The drainage tile was installed using a Waynes Tile Pro tile plow, a John Deere 9520 tractor, a John Deere 310 SG backhoe, and various hand tools. See Exhibit 1, Figure 2 for a map of the stream and the associated wetlands affected by Respondents' activities.

20. The machinery referenced in paragraphs 18 and 19 constitute "point sources" within the

meaning of the definition set forth in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. The dredged material referenced in paragraphs 18 and 19 constitutes "pollutants" within the meaning of the definitions set forth in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. The placement of dredged material in the wetlands referenced in paragraphs 18 and 19 constitutes a "discharge of pollutants" within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

23. At no time from the first date of the activities described in paragraphs 18 and 19 above until the date of this Order did any Respondent possess a permit issued under section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of pollutants described in paragraphs 18 and 19.

24. Each discharge of pollutants into navigable waters without a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

25. Each day the discharged material remains in the wetland without the required permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

FINDINGS – Site 2

26. At Site 2, between August 20 and September 10, 2011, Respondent D&G, acting under contract with Respondent property owners Bruce Herberg and Thomas Herberg, discharged dredged material into wetlands adjacent to Meadowbrook Creek. This discharge occurred through the excavation of trenches of about 12 inches in width and between 3 and 6 feet in depth, sidecasting the excavated material along the side of the trench, laying of drainage tile, and then replacing the sidecast material on top of the installed drainage tile. These activities discharged roughly 800 cubic yards of material into the adjoining wetlands. The drainage tile was installed

using a Waynes Tile Pro tile plow, a John Deere 9520 tractor, and a John Deere 310 SG backhoe. See Exhibit 1, Figure 3 for a map of the wetland areas on Site 2 affected by Respondents' activities.

27. The machinery described in paragraph 26 constitutes "point sources" within the meaning of the definition set forth in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

28. The fill material described in paragraph 26 constitutes "pollutants" within the meaning of the definitions set forth in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

29. The placement of the material in the wetlands referenced in paragraph 26 constitutes a "discharge of pollutants" within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

30. At no time from the first date of the activities described in paragraph 26 above until the date of this Order did Respondents possess a permit issued under section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of pollutants referenced in paragraph 26.

31. Each discharge of pollutants into navigable waters without a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

32. Each day the discharged material remains in the wetland without the required permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COMPLIANCE REQUIREMENTS

33. Respondents must refrain from further discharges of dredged or fill material into the wetlands or streams on Sites 1 and 2, except in compliance with a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, or the CWA generally, 33 U.S.C. §§ 1251 - 1387.

34. Respondents must notify EPA in writing within 10 days of the issuance date of this Order that they intend to comply with this Order.

35. Within 30 days of the effective date of this Order, Respondents must submit to EPA for approval a plan (Restoration Plan) to restore all of the streams and wetlands identified in paragraphs 18 – 32 of this Order. Respondents may submit a single Restoration Plan and are encouraged to do so. However, reliance by one Respondent on the actions of another to provide a Restoration Plan according to this paragraph, or to provide a revised plan pursuant to paragraph 37, below, will not relieve any Respondent of responsibility for failure to submit a plan satisfactory to EPA. EPA will approve the plan or provide comments as provided in paragraph 37.

36. The goals for restoration include establishing the pattern, profile, and dimensions of Meadowbrook Creek that were approved by the Minnesota Department of Natural Resources Limited Permit 2011-0184 and returning the tiled wetland areas to their original condition as undrained wetlands. The Restoration Plan must incorporate the following requirements and be consistent with the general guidelines attached as Exhibit 2:

a. The portion of the Restoration Plan for Meadowbrook Creek at Site 1 must comply with the specific physical restoration requirements set forth in the Minnesota Department of Natural Resources' Public Waters Restoration and Replacement Order (State Order) issued to Respondent Thomas Herberg on September 18, 2013. See Exhibit 3.

b. The portion of the Restoration Plan for restoration of wetlands at Sites 1 and 2 must include the complete removal of all drainage tiles, tile connections, intakes, outlets, and any other structure installed to facilitate the drainage of the sites. No installed drain

tile may remain in place, even that which is disabled.

c. Upon removal of drainage tile from Sites 1 and 2, the wetland areas will be prepared and seeded according to the following specifications. Basins 2 and 16 should be seeded with a wet prairie wetland seed mix such as Minnesota State Seed Mix 34-261 or 34-171. Basins 3, 6, 9, 10, 11, 12, and 15 should be seeded with an emergent wetland mix such as Minnesota State Seed Mix 34-181 or the Shooting Star Nursery Emergent Mix. Basins 5, 7, 8, 11a, 13, 14, and 19 should be seeded with a wet meadow mix such as Minnesota State Seed Mix 34-271 or 34-171. Application of the seed mixes must be followed with control of invasive species by mowing, spot herbicide treatments, or other appropriate methods for two full growing seasons after seeding.

d. The Restoration Plan must also provide measures and best management practices to control erosion of the soil disturbed in the restoration. These measures and practices must be implemented within 15 days of completing restoration activities.

e. The Restoration Plan must include a schedule of restoration activities, monitoring events, and management practices. Restored wetland areas at Sites 1 and 2 must remain undisturbed (i.e. no agricultural use) for two full growing seasons after the wetland seed mixes are planted. A monitoring report must be submitted after each full growing season that provides descriptions of restored hydrologic conditions and vegetation present at wetland areas on the Sites. The Restoration Plan must also include monitoring of the restoration efforts at Meadowbrook Creek to assess whether they are meeting approved performance standards. This will be required for two consecutive years following restoration and will be summarized in an annual monitoring report to EPA. All reports submitted to EPA describing Respondents' compliance with the approved Restoration

Plan shall be to the address specified in paragraph 40 below. EPA recommends that Respondents retain the services of an experienced wetland consultant to work with EPA on this plan.

37. If EPA finds the submitted Restoration Plan acceptable, EPA will notify Respondents of its approval, and Respondents must commence site wetland restoration activities according to the approved plan or portion thereof. If EPA determines that the proposed Restoration Plan or its included implementation schedule is unacceptable in whole or in part, EPA will notify Respondent and provide corrective comments as appropriate within 30 days of submission. Respondent must revise the Restoration Plan, incorporating EPA's comments, within 15 calendar days of the date of the notification from EPA and receipt of EPA's comments.

38. The requirements of the approved or modified Restoration Plan will be incorporated into the requirements of this Order.

39. Within 30 days of completing restoration activities, Respondents must submit to EPA written certification that they have restored streams and wetlands at Sites 1 and 2 in accordance with the approved Restoration Plan. Such certification must include a report of all work performed at the sites. This report will include at minimum the following:

f. An as-built drawing of Site 1 showing the post-restoration pattern, profile, and dimensions of Meadowbrook Creek and the location of installed riffle structures.

Respondents must also include copies of all correspondence with the State regarding their compliance with the State Order, or in lieu thereof if the documents are lengthy, a summary of the documents including the date of the correspondence, names of the sender and all recipients, and a brief description of the contents of the correspondence.

g. As-built drawings of the areas on Sites 1 and 2 showing the location of removed

drainage tile, of wetland plant seeding, and of all erosion control measures and BMPs used.

h. A timeline of the restoration activities, description of the restoration activities, and identification of any problems encountered during implementation.

i. Before and after photographs of stream channels and wetland areas where restoration activities occurred.

40. Submittals provided under this Order must be certified as true, accurate and correct and submitted by Respondents under authorized signature to:

Yone Yu
Watersheds & Wetlands Branch
U.S. Environmental Protection Agency (WW-16J)
77 West Jackson Boulevard
Chicago, Illinois 60604

GENERAL PROVISIONS

41. EPA preserves any rights to use the information requested herein in an administrative, civil, or criminal action.

42. Neither the issuance of this Order by EPA nor compliance with its terms affects Respondents' ongoing obligation to comply with the CWA or any other federal, state, or local law or regulation.

43. EPA reserves all rights and remedies, legal and equitable, available to address any violation cited in this Order or any other violation of the CWA, and to enforce this Order. Neither the issuance of this Order by EPA, nor compliance with its terms precludes further enforcement action pursuant to section 309 of the CWA, 33 U.S.C. § 1319, for the violations cited in this Order, for any other violation of the CWA or to enforce this Order.

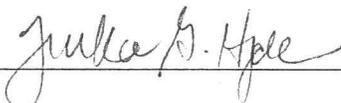
44. EPA issued the proposed Order to Respondents on September 26, 2013. Respondents

requested an informal conference with EPA to discuss the Order. EPA met with Respondents for informal conferences by telephone on January 7, 2014 and January 13, 2014. In addition, Respondents submitted written information regarding this Order for EPA to review on February 5, 2014. EPA considered the written information provided by the Respondents and the verbal communications from the informal conferences in issuing this Order. This Order makes some modifications and clarifications to the proposed Order in reply to the Respondents' comments.

45. This Order will become effective immediately upon issuance.

46. Respondents may seek federal judicial review of this Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Dated: April 9, 2014



Tinka G. Hyde
Director, Water Division
U.S. Environmental Protection Agency, Region 5

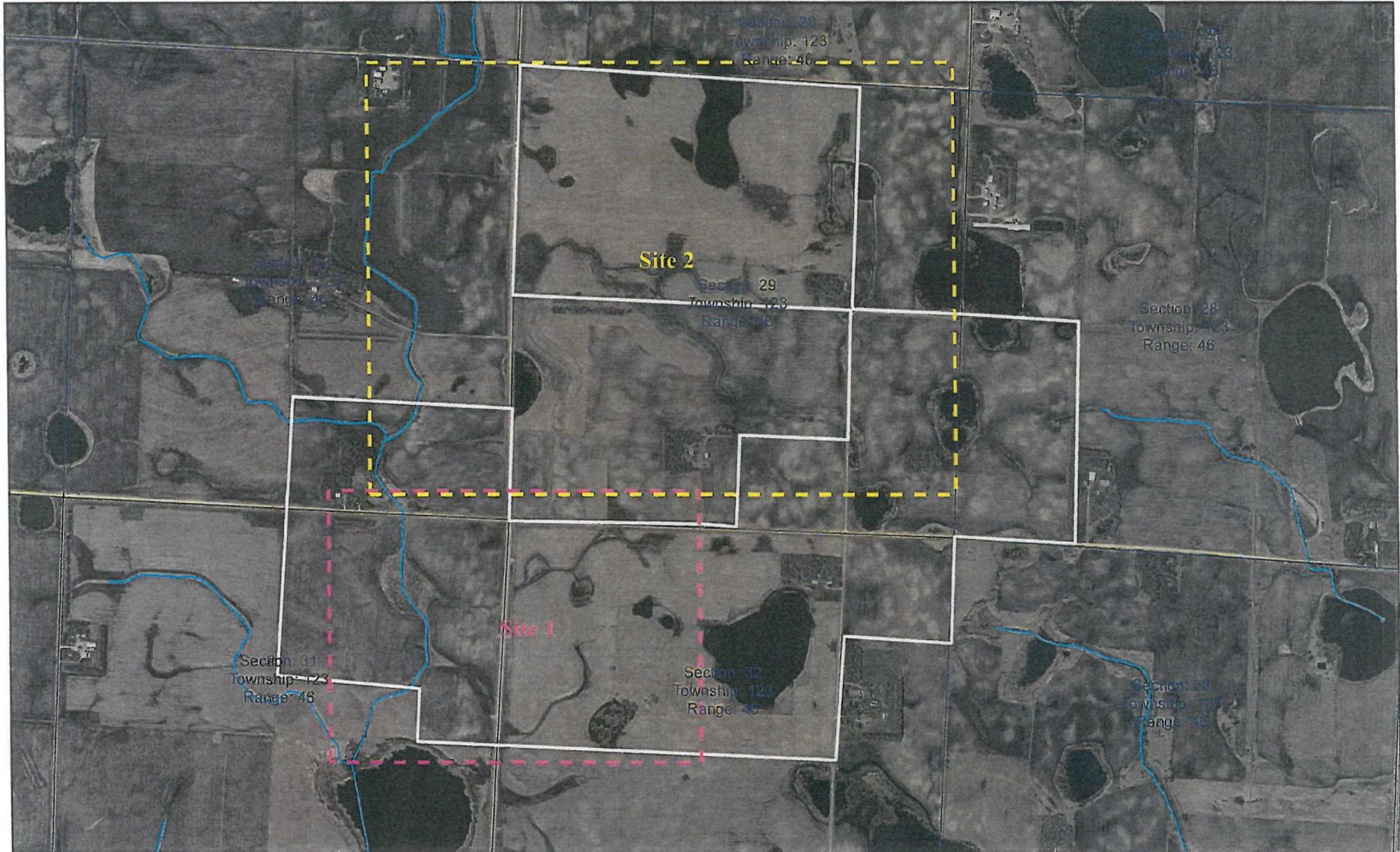
Exhibit 1

Figure 1: Site Overview

Figure 2: Site 1 Impacts

Figure 3: Site 2 Impacts

Figure 1: Site Overview



Sections 29, 31 & 32 T123N, R46W

Big Stone County, Minnesota

Projection: NAD 83 UTM Zone 15N

Imagery: 2011 FSA Orthophoto

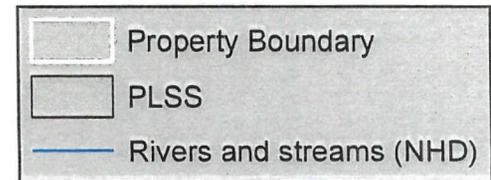
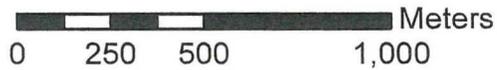
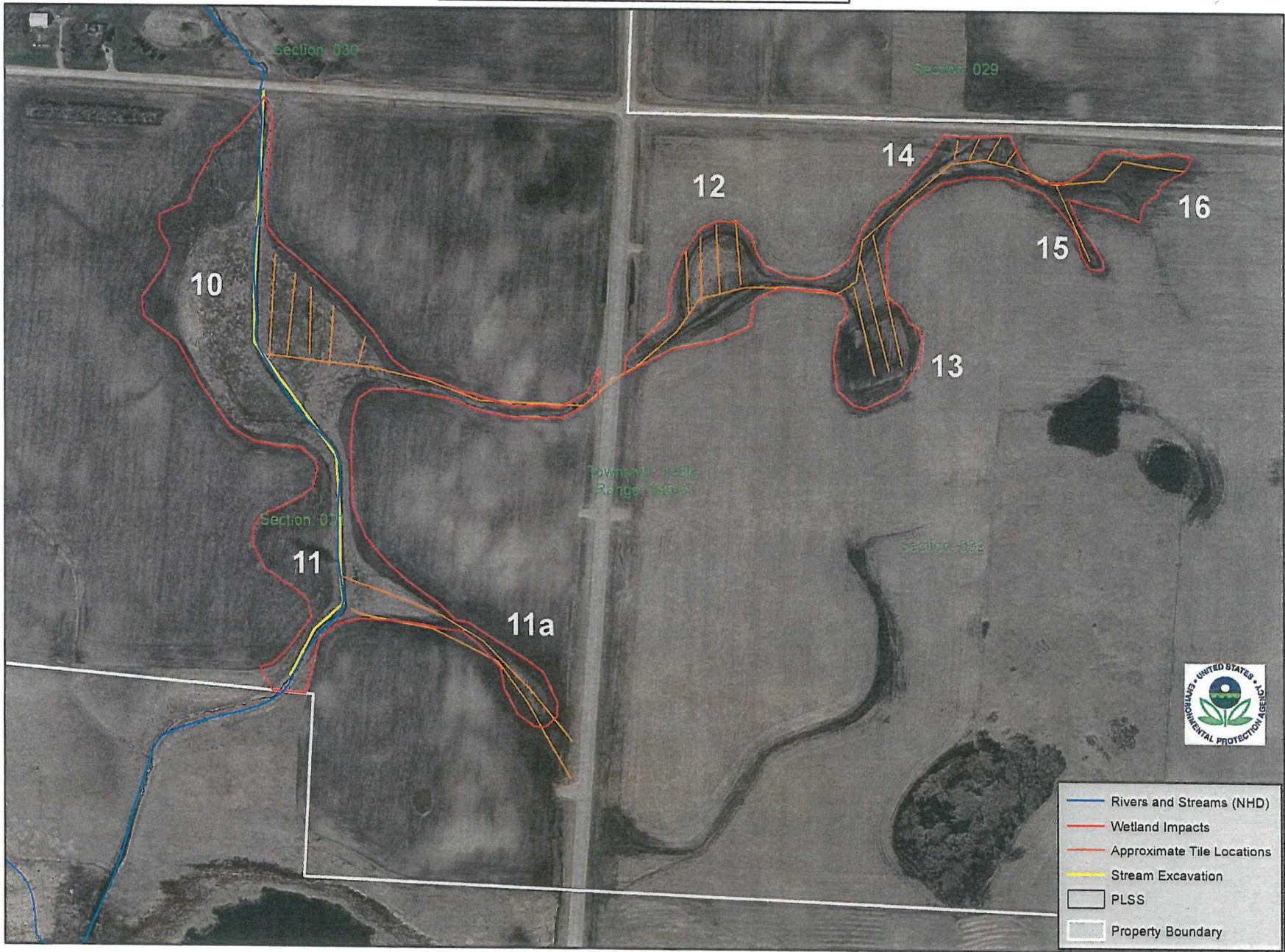


Figure 2: Site 1 Impacts



2011 Aerial Photograph

0 120 240 480 Meters

Figure 3: Site 2 Impacts

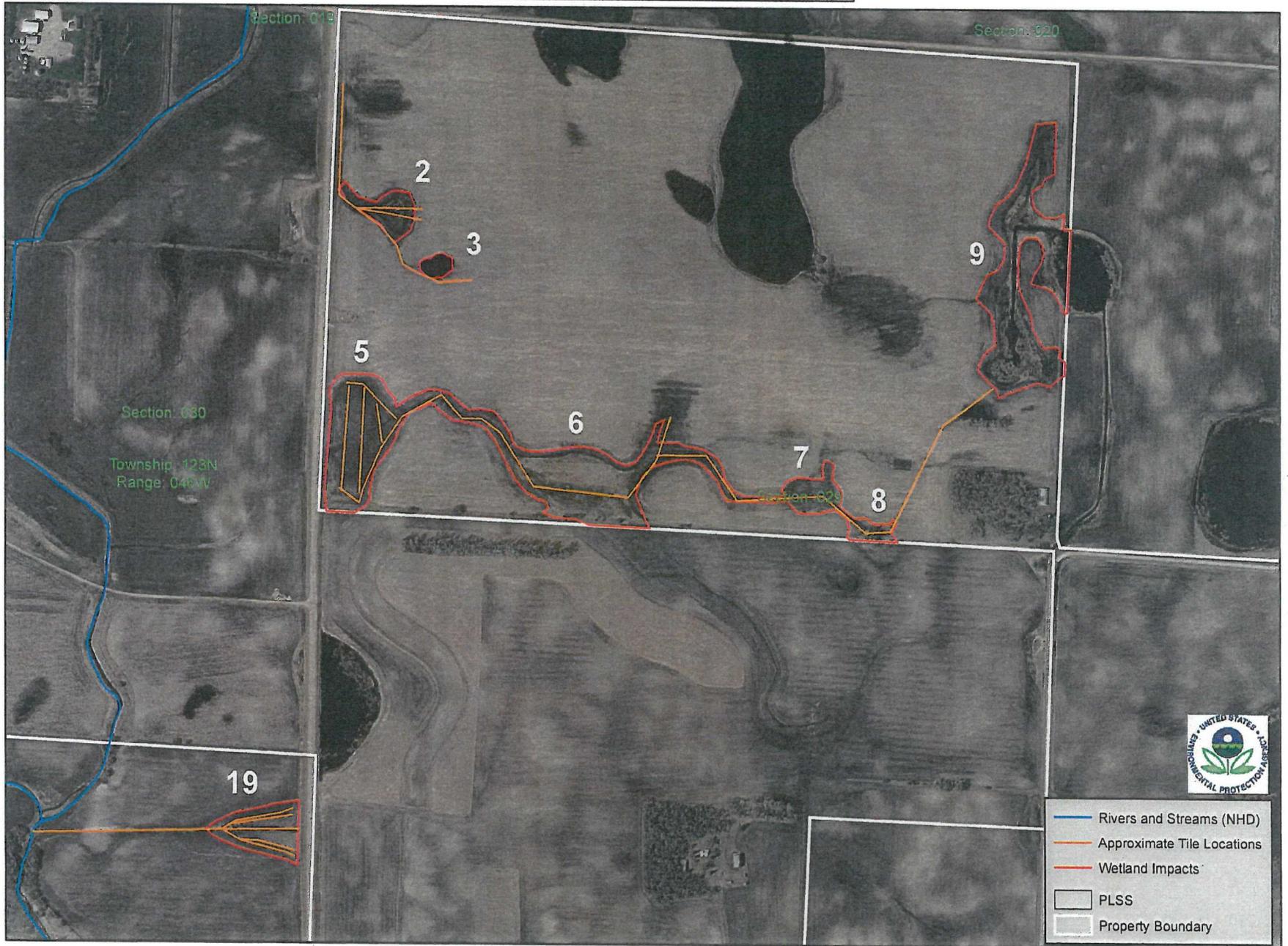


Exhibit 2

EPA Region 5 – General Guidelines for Removal and Restoration Plans

Exhibit 2

EPA Region 5 – General Guidelines for Removal and Restoration Plans

These guidelines provide general specifications for preparing removal and/or restoration plans to remediate the unauthorized filling of waters of the United States, including wetlands. As environmental conditions vary at every site, precise specifications will depend upon conditions pertaining to the site in question. The size of the area to be restored, its biological and physical characteristics, and the level of disturbance the site has experienced will define the scope and complexity of the restoration plan. For most cases, the following instructions represent the minimum requirements to prepare an acceptable removal and/or restoration plan.

I. Existing Physical Conditions

- A. Provide a surveyed site plan showing property boundaries, streets, buildings, waterbodies (show ordinary high water mark), wetlands, Federal Emergency Management Agency 100-year floodplain (if applicable), areas of unauthorized fill, elevation contours, and other ground surface features at a scale no less than 1 inch = 40 feet. The plan must include a cross-section view of the site that shows soil depths, fill depths, and the average depth to groundwater across the site.
- B. Describe the physical conditions of the site, including its size; the size and type of the unauthorized fill; existing aquatic resources (e.g. streams, lakes, wetlands - including the types of vegetation); the soil types present; the hydrologic regime of the site; and other relevant information such as presence of threatened and endangered species (and their designated critical habitat), surrounding land use, and any proposed alterations to aquatic resources to accommodate for these ongoing activities (irrigation practices, ditching, maintenance of drainageways, etc.) within or near the restoration site.

II. Proposed Physical Conditions

- A. Using the site plan described in I.A. as a base, show the areas where you will do the removal and restoration work. Show proposed finished grades, expected ordinary high water mark elevations, the location of proposed planting or seeding, and the location of all sediment and erosion control structures such as hay bales or silt screens. The plan must include a cross-section view of the site that shows proposed soil depths, and average depth to groundwater across the site.
- B. Describe the removal and restoration work, including the methods and equipment you will use; how the equipment will gain access to the site; where you will dispose of any removed material; a schedule of how the work will progress across the site; how the soil will be prepared for planting; a list of herbaceous and woody species you will seed or plant; the sources of the plant material (note: as a rule, EPA will not permit transplanting of plant stock); the planting methods; physical layout of where and how plant material will be installed and at what densities; how you will minimize adverse impacts to aquatic resources while work is underway; and, the expected hydrologic regime of the site when restored.

- C. Delineate the area(s) on the site to be restored by installation of flagging, sedimentation and erosion control structures, or other appropriate methods; this delineation shall represent the limit of construction activities such that no work shall occur beyond these boundaries unless authorized by EPA.

III. Actual Restored Physical Conditions

- A. Using the site plan described in I.A. as a base, show the actual physical conditions at the site when you have completed grading activities (i.e., an "as-built" plan), including actual finished grades and all pertinent ground surface features. This plan must include a cross-section view of the site that shows actual soil depths and average depth to groundwater across the site.

IV. Performance Standards

- A. Restored sites must meet wetland criteria (soils, hydrology, and vegetation) as established in the 1987 Corps of Engineers Wetland Delineation Manual and the applicable Regional Supplement:
 - a. Predominance of hydrophytic vegetation.
 - b. Presence of hydric soils.
 - c. Presence of wetland hydrology.
- B. Vegetation Standards
 - a. More than 50% of plant species are facultative (FAC) or wetter (FACW or OBL).
 - a. Less than 20% cumulative areal cover of invasive and/or non-native species including, but not limited to, reed canary grass, cattails, Canada thistle, bull thistle, smooth brome grass, giant ragweed, giant foxtail, common ragweed, quack grass, black locust, *Phragmites*, sweet clovers, and non-native honeysuckles and buckthorns. Control of invasive and/or non-native plant species will occur for at least 2 full growing seasons, and include mowing, burning, disking, mulching, biocontrol and/or herbicide treatments as necessary.

V. Monitoring

- A. Provide a monitoring plan that proposes a simple statistical method to assess the success or failure of restoration. For example, you could use transects with sampling stations for measuring the percent cover in each vegetative stratum. Your plan must include a general provision to take corrective action, at the direction of EPA, should monitoring show that you are not meeting the performance standards.
- B. You must monitor midway through and near the end of the first and second growing seasons, then annually near the end of each successive growing season for the rest of the monitoring period.
- C. After each monitoring event, submit a report describing the environmental conditions at the site and assessing the success or failure of restoration. The report must include photographs, identify any problems discovered, and recommend corrective actions.

- D. If performance standards are not met after the end of the monitoring period, then you must take corrective action to achieve these performance standards and continue monitoring to track performance annually until the performance standards are met.

VI. Inspections

The plan must allow EPA or their designated agent to inspect the site after you have installed sedimentation and erosion control structures; completed grading activities; completed initial planting or seeding; and after monitoring indicated that you have met the performance standards.

VII. Schedule

The plan must include a comprehensive schedule for all removal, restoration, inspection, monitoring, and reporting activities.

Exhibit 3

MnDNR – Public Waters Restoration and Replacement Order



PUBLIC WATERS RESTORATION AND REPLACEMENT ORDER

Cease and Desist
Order Number:

Pursuant to Minnesota Statutes, Section 103G.2372, and Minnesota Rules, part 6115.0255, the Commissioner of Natural Resources hereby orders Tom Herberg to restore approximately 1800 linear feet of Unnamed Tributary to Big Stone Lake, also known as Meadowbrook Creek, in the NE $\frac{1}{4}$ Section 31, Township 123N, Range 46W, Big Stone County.

Findings of Fact:

1. On December 1, 2010, DNR Regional Hydrologist Skip Wright issued Limited Permit 2011-0184 which authorized excavation of accumulated sediments in accordance with the attached profile and aerial map.
2. On September 16, 2011, DNR Enforcement Officer Craig Miska, along with WCA LGU Technician Darren Wilke inspected the site and determined work exceeded what was authorized in Limited Permit 2011-0184.
3. On September 29, 2011, DNR Area Hydrologist Lucas Youngsma inspected and surveyed the site, verifying that the completed work exceeded what was authorized. He was accompanied by BWSR Wetland Specialist, Kime Radel, Water Resource Enforcement Officer Larry Hanson, USACE Project Manager Eric Hanson, and WCA LGU Technician Darren Wilke.
4. On November 17, 2011, Attorney John Kolb sent a letter requesting an interagency meeting be scheduled.
5. On January 19, 2012, the above mentioned interagency meeting was held, during which a voluntary restoration plan was presented; Houston Engineering plans dated 1-18-12.
6. On February 23, 2012, revised Houston Engineering plans were submitted to DNR.
7. On March 6, 2012, DNR Area Hydrologist Lucas Youngsma submitted recommendations to Houston Engineering.
8. On February 11, 2013 DNR Area Hydrologist Lucas Youngsma sent a follow up letter regarding the recommendations.
9. On May 3, 2013, revised Houston Engineering plans (dated 4-19-13) were submitted to DNR.

Order:

You shall accomplish restoration by doing the following:

1. Complete restoration according to voluntarily proposed plans and specifications provided by Houston Engineering dated 4-19-13.
2. Additional work to return the site into compliance with the conditions of Limited Permit 2011-0184 (attached) shall also be conducted at the same time. This shall include:
 - a. Installation of erosion control measures such as those listed in "Temporary Erosion & Sediment Control Practices" as published in The Minnesota Stormwater Manual; available from the MPCA website at <http://www.pca.state.mn.us/index.php/water/water-types-and-programs/stormwater/stormwater-management/minnesotas-stormwater-manual.html>.
 - b. Establishment of a one rod (16.5') permanent vegetated buffer.
3. The voluntary proposed restoration work described above shall be completed by

3. The voluntary proposed restoration work described above shall be completed by December 31, 2013.
4. Please contact DNR Compliance Hydrologist Sara Jacobson at 320-234-2550 ext. 232 or Area Hydrologist Lucas Youngsma at (507) 537-7258 least 5 days prior to restoration work commencing, and within 5 days of the work being completed.
5. The culmination of successful restoration is the issuance of a Certificate of Satisfactory Restoration.

This Order is final and binding on you, unless within 30 days of the date on which it was served on you, you appeal the terms and conditions of this restoration order to the commissioner by filing a written request for review. Please mail any such request to: DNR Ecological and Water Resources, Violations Coordinator, 500 Lafayette Rd., St. Paul, MN 55155-4032

Violation of this order is a misdemeanor.

Craig Miska

DNR Conservation Officer

540

Badge Number

09-18-13

Date

Issuance Record:

In person

or, by certified mail on

09-18-13

Date

Attachments **Houston Engineering Plans Dated 4-19-13
Limited Permit 2011-0184**

Ec: Ethan Jenzen, Area Hydrologist
Sara Jacobson, Compliance Hydrologist
Blayne Johnson, County SWCD
Craig Miska, Conservation Officer
Curt Vacek, Area Wildlife Manager
Dianne Radermacher, Upper MN WSD
DNR Central Office Permits Unit
Mark Aanenson, Houston Engineering

Skip Wright, DNR EWR District Supervisor
Darren Wilke, County Planning and Zoning
Norm Haukos, Area Fisheries Manager
Larry Hanson, Water Resources Enforcement Officer
Eric Hanson, COE, Regulatory Branch
Kevin Mixon, Ecological & Water Resources
John Kolb, Rinke Noonan Law Firm
Tom Hovey, Violation Coordinator

CDO # _____

RPN # _____



Minnesota Wetland Conservation Act Restoration Order



The Commissioner of Natural Resources hereby orders **Thomas Lloyd Herberg** and his/hers/its heirs, successors, and assigns to complete restoration of the wetlands located at: NW1/4 & W1/2 NE1/4 of S29, T123N, R46W; NW1/4 NW1/4, S32, T123N, R46W; and NE1/4 of S31, T123N, R46W; Big Stone County, State of Minnesota.

Name: Thomas Lloyd Herberg
Address: 86736 260 th Street, PO Box 293, Beardsley, MN 56211

1. **Findings of Fact:** 11-23-10; WCA Notice of Decision for work in S31, T123N, R46W to Tom Herberg for cleanout of DNR Protected Watercourse known as Meadowbrook Creek, along with limited tiling activity of two eastern draws,
2. 9-9-11; Complaints received regarding tile activity in sections 29, 30, 31 and 32 of T123N, R46W. Drive-by of project conducted by LGU to document what areas had been tiled to compare to aerial photos and see if any wetland areas met agricultural exemption criteria,
3. 9-15-11; LGU drove by site and noticed tiling had just been completed in "southern draw" in S31, T123N, R46W that had been specifically prohibited in Notice of Decision on 11-23-10. LGU called Tom Herberg and left message to call regarding tiling activity and potential WCA violations,
4. 9-16-11; Tom Herberg called LGU and on-site meeting was conducted between Herberg, LGU and CO Craig Miska. Tom Herberg was made aware of several options. Tiling activity around the DNR Protected Watercourse was photographed and documented,
5. 9-25-11; LGU requested tiling as-builts,
6. 9-26-11; LGU spoke with Attorney John Kolb who stated Mark Aanenson with Houston Engineering had been hired to complete on-site reviews and prepare a voluntary restoration plan and exemption application,
7. 9-29-11; Water Resource Enforcement Officer Larry Hanson, USACE Project Manager Eric Hanson, LGU Darren Wilke, BWSR Wetland Specialist Kane Radel and DNR Area Hydrologist Lucas Youngsma inspected and surveyed the site.
8. 04-20-12; Letter received from John Kolb with attachments showing voluntary wetland restorations, tile as-builts and a Protected Watercourse restoration plan. In all, fifteen wetlands were drained and six of these did not meet WCA exemptions. Meadowbrook Creek was also dug deeper than allowed by DNR permit resulting in removing hydrology from wetlands 31-1 and 31-2. Approximately 16.9 non-exempt acres of type 3 wetlands were tiled in violation of the WCA. D&G Tiling was the contractor and a Contractor Liability Form was not completed for this project.

This order is issued pursuant to Minn. Stat. § 103G.2372 and MN Rule part 8420.0900.
**VIOLATION OF THIS ORDER IS A MISDEMEANOR
AND A DEED RESTRICTION COULD BE PLACED ON THE PROPERTY.**

You must either:

- A. Provide for restoration of the wetland in the manner required by this order. Complete restoration must be accomplished on or before October 18, 2013; or
- B. Submit a complete wetland replacement plan, exemption, or no-loss application to the Big Stone County Environmental Services Office within 30 days of receipt of this order.

Restoration shall be accomplished by doing the following: Wetland 29-6: Remove all tile in the wetland and within 150' of wetland; Wetland 29-4: Remove all perforated tile in wetland and within 130' of the wetland boundary. Non-perforated may be installed outside of the wetland. Wetland 29-3: Remove all tile in wetland and within 150'; Wetland 32-4: Remove all perforated tile in wetland and within 120'. Non-perforated tile may be installed outside of the wetland boundary. Wetland 31-1: Remove all tile in wetland and within 70' and provide stable rock outlet for tile coming from the east at wetland boundary; Wetland 31-2: Remove all tile within wetland and within 70' and provide stable rock outlet outside of wetland boundary for tile coming from the east. All trenches created from tile removal shall be backfilled with similar on-site soils and compacted to a density equal to or greater than that of surrounding undisturbed soil. Channel restoration of Meadowbrook Creek in section 31, as required by DNR Restoration Order, shall also be completed.

Attachments are a part of this document (check one) *Yes* *No*

Map 1: Wetland Numbering Map

Map 2: Section 29 Tiling and Restoration Map*

Map 3: Section 31 and 32 Tiling and Restoration Map*

*Maps show approximate locations and numbers of tile lines based on D&G Tiling As-built

The enforcement authority shall rescind this order if the landowner obtains approval for an after-the-fact replacement plan, exemption determination, or no-loss determination from the LGU. The contact person is **Darren Wilke** at (320)839-6376. If an after-the-fact approval is not received, the landowner/responsible party must restore the wetland as specified in this order. Upon completion of the restoration required by this order, the landowner must contact Blayne Johnson at the Big Stone Soil and Water Conservation District at (320)839-6149 and request that a Certificate of Satisfactory Completion be issued. The Soil and Water Conservation District can only certify the restoration when the wetlands are restored and fully functional.

If you choose to appeal the terms or conditions of this order, a written request must be submitted to the Minnesota Board of Water and Soil Resources (BWSR) Executive Director within 30 days of receiving this order, along with a minimum filing fee of \$500. If a written request and filing fee is not submitted to BWSR within 30 days, this restoration order shall become final.

Craig Miska 09-18-13
 Enforcement Officer Date
Craig Miska 540
 Printed name Badge #

Issuance Record: in person; or by certified mail on 09,18,13
 [Date]

Distribute Copies To:

- DNR Conservation Officer
- DNR Water Resources Enforcement Officer
- BWSR Wetland Specialist
- Local Government Unit (LGU)
- Soil and Water Conservation District (SWCD)
- Landowner

Appeal and fee can be mailed to:

Minnesota BWSR
 Executive Director
 520 Lafayette Road North
 St. Paul, MN 55155

Instructions for filling out Restoration Order (RO):

(Fill in your specific County information and save this form as your template.)

1. Cease and Desist Order (CDO) number, if applicable. If no CDO was issued, enter N/A.
2. Enter full name.
3. Location: Give legal description, GPS coordinates, and/or address of the impacted wetland violation. Make sure you double-check the location description for accuracy. Do not count on the CDO to be correct.
4. Enter County and County #. Example: *Mille Lacs (48)*
5. Full name, date of birth (DOB), and mailing address of the person receiving the restoration order.
6. Findings of Fact: Be specific and detailed. List type of wetland, size and type of impact area, what the violation was.

Example: A site visit was conducted at the location described above on 9/11/05 by the Mille Lacs County Technical Evaluation Panel (TEP). A determination was made that approximately 32,000 square feet (footprint) of fill was placed in a Type 2 wetland. The fill is approximately 1 foot deep throughout most of the impacted area. The fill consisted of Class 5 gravel and cement. The fill appears to be part of a road. The entire wetland basin is 3.5 acres. The fill was placed without an approved replacement plan and no exemption would apply to this type of impact.

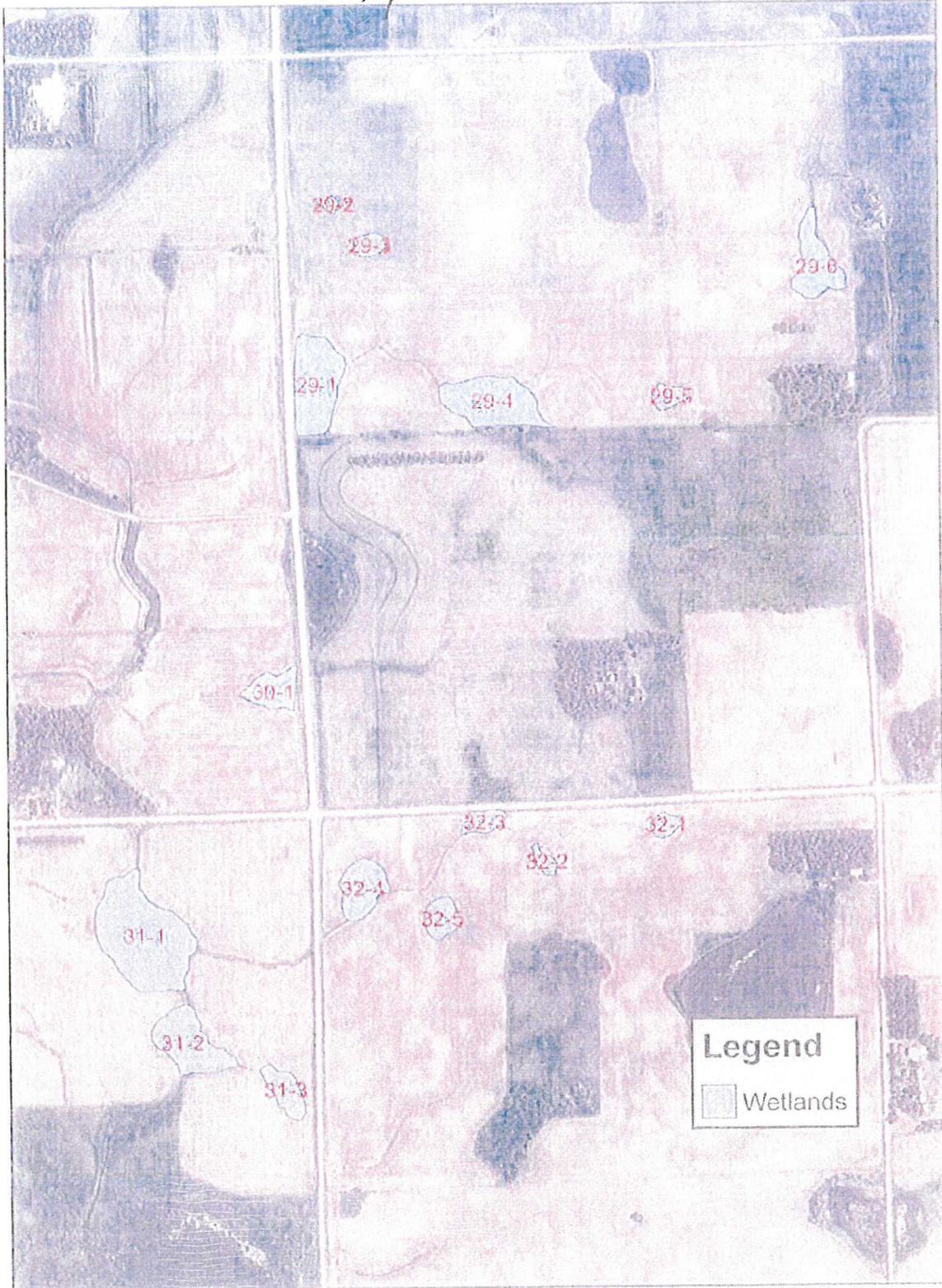
7. Date: Provide a date to restore; make no less than 31 days, but it depends on what the violation is. Larger violations may require more than 31 days; or the time of year (spring too wet) might require a longer time frame. Remember, the enforcement officer can grant an extension if needed; but try to keep these moving.
8. Enter the official office information that would receive an After-the-Fact Replacement Plan.
9. Date for the individual to submit a replacement plan application. This should be about 21 days, however the time of year and other factors could come into play to provide a longer time.
10. Restoration completion: Again, be very specific and detailed and always include "restore to pre-altered condition".

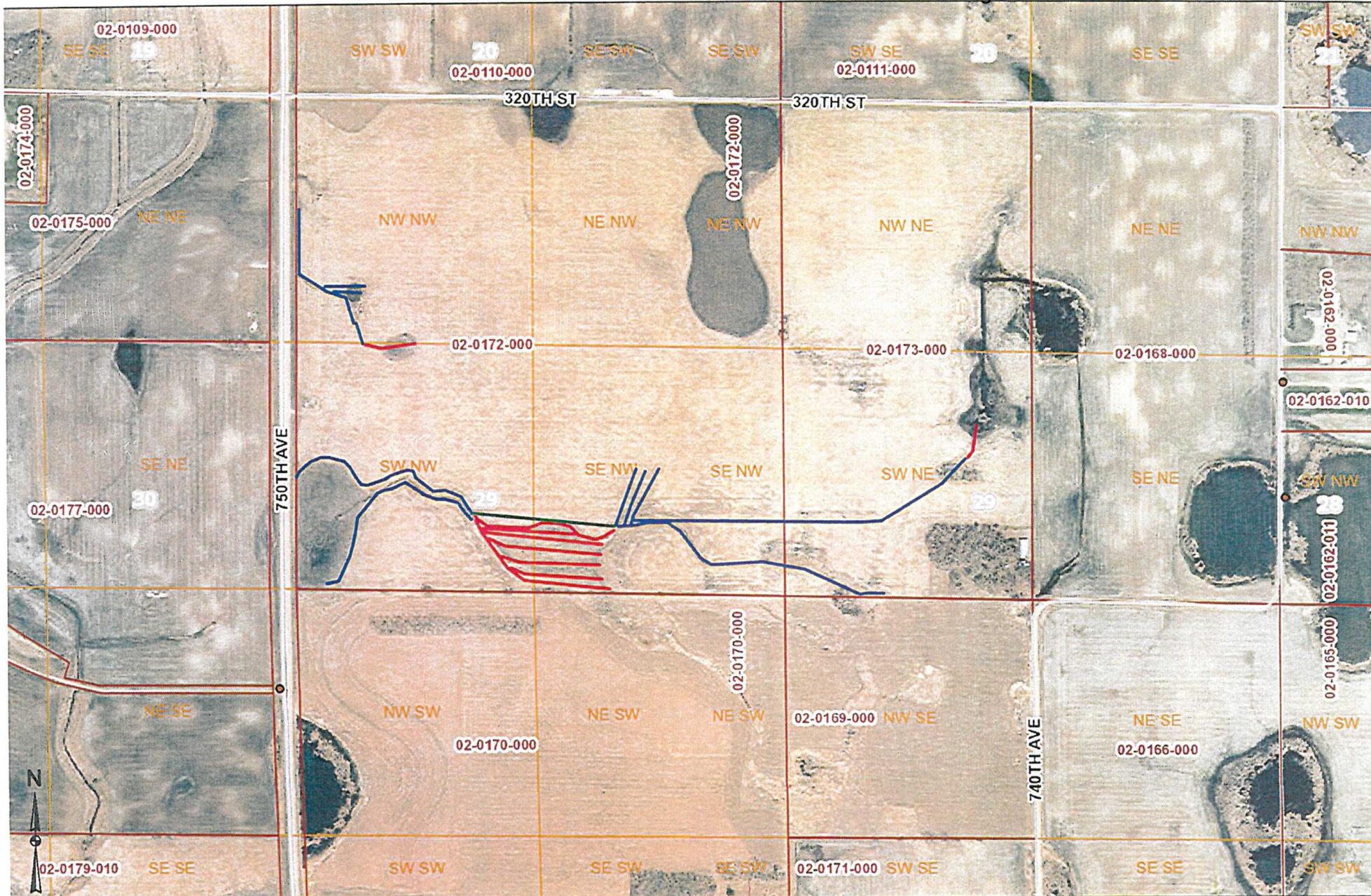
Example: You must restore the wetland to its pre-altered condition. This shall be accomplished by removing all of the fill material located in the wetland boundary as shown in the aerial photo down to original soil level. The fill must be removed to an upland site. No additional excavation is allowed. Once the fill material has been removed to an upland site, you must seed the exposed area with XXXX. You must use best management practices while accomplishing the restoration order. You must contact the SWCD Office upon completion of the restoration.

11. Attachments: List all of the attachments. If yes, you need to list what they are and be specific.
12. Enter Local Government Unit (LGU) office name.
13. Name of LGU contact.
14. LGU area code and telephone number.
15. Name of SWCD contact.
16. County of SWCD office
17. SWCD area code and telephone number.

When you are done with the order, it must be given to a Water Resources Enforcement Officer (WREO), Conservation Officer (CO), or other licensed peace officer for serving.

Map 1





These data are provided on an "AS-IS" basis, without warranty of any type, expressed or implied, including but not limited to any warranty as to their performance, merchantability, or fitness for any particular purpose.

Map 2

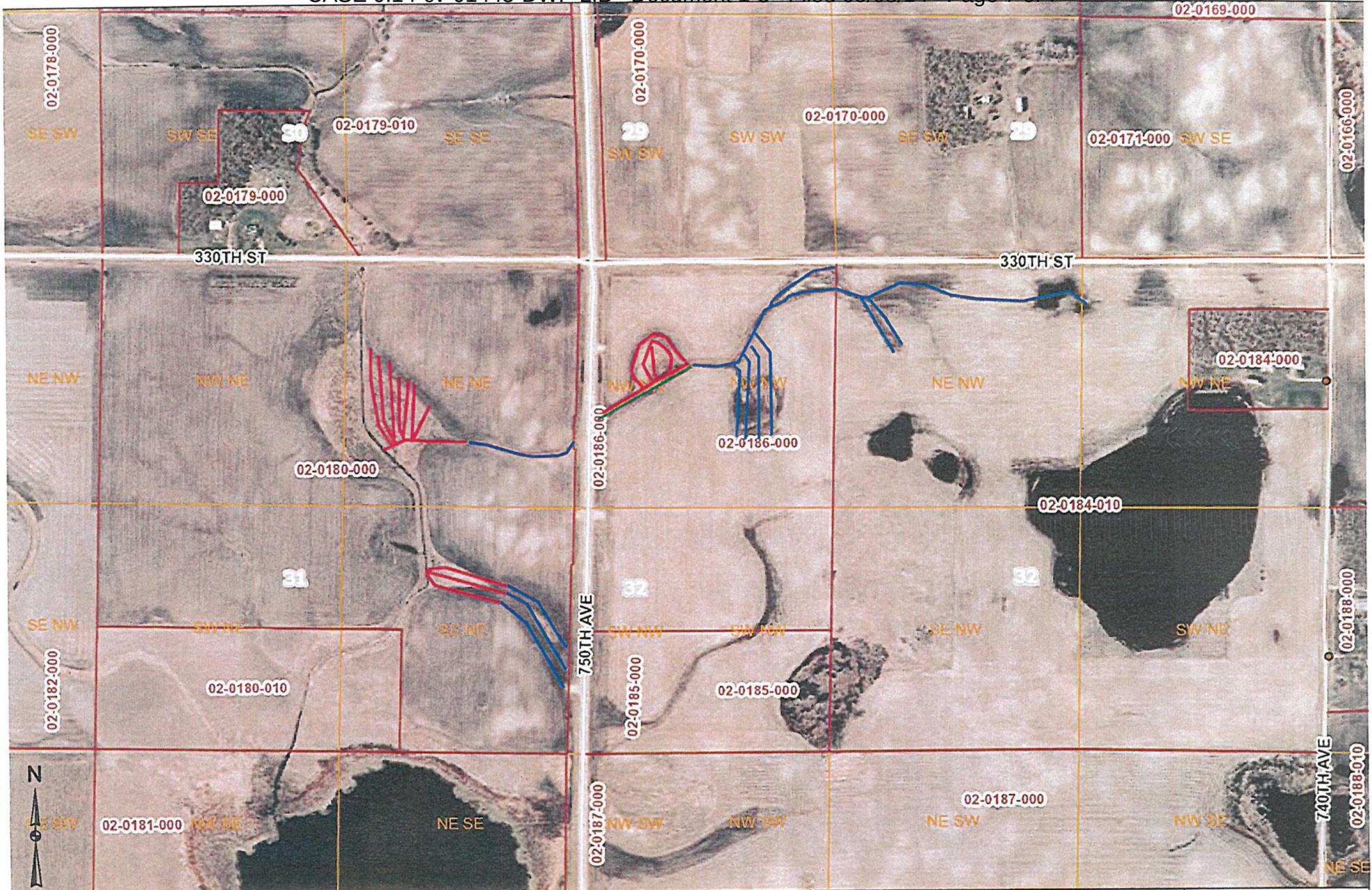
Red = Remove Tile
 Green = Replace Tile with Non-perforated
 Blue = Existing Tile to Remain

Date: 9/16/2013



**Big Stone County
Minnesota**

This map is not a substitute for accurate field surveys or for locating actual property lines and any adjacent features.



These data are provided on an "AS-IS" basis, without warranty of any type, expressed or implied, including but not limited to any warranty as to their performance, merchantability, or fitness for any particular purpose.

Red = Remove Tile
 Green = Replace Tile with Non-Perforated
 Blue = Existing Tile to Remain

Date: 9/16/2013

Map 3

This map is not a substitute for accurate field surveys or for locating actual property lines and any adjacent features.



Big Stone County
 Minnesota



PUBLIC WATERS RESTORATION AND REPLACEMENT ORDER

Cease and Desist
Order Number:

Pursuant to Minnesota Statutes, Section 103G.2372, and Minnesota Rules, part 6115.0255, the Commissioner of Natural Resources hereby orders Tom Herberg to restore approximately 1800 linear feet of Unnamed Tributary to Big Stone Lake, also known as Meadowbrook Creek, in the NE $\frac{1}{4}$ Section 31, Township 123N, Range 46W, Big Stone County.

Findings of Fact:

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2. On September 16, 2011, DNR Enforcement Officer Craig Miska, along with WCA LGU Technician Darren Wilke inspected the site and determined work exceeded what was authorized in Limited Permit 2011-0184.
3. On September 29, 2011, DNR Area Hydrologist Lucas Youngsma inspected and surveyed the site, verifying that the completed work exceeded what was authorized. He was accompanied by BWSR Wetland Specialist, Kane Rodel, Water Resource Enforcement Officer Larry Hanson, USACE Project Manager Eric Hanson, and WCA LGU Technician Darren Wilke.
4. On November 17, 2011, Attorney John Kolb sent a letter requesting an interagency meeting be scheduled.
5. On January 19, 2012, the above mentioned interagency meeting was held, during which a voluntary restoration plan was presented; Houston Engineering plans dated 1-18-12.
6. On February 23, 2012, revised Houston Engineering plans were submitted to DNR.
7. On March 6, 2012, DNR Area Hydrologist Lucas Youngsma submitted recommendations to Houston Engineering.
8. On February 11, 2013 DNR Area Hydrologist Lucas Youngsma sent a follow up letter regarding the recommendations.
9. On May 3, 2013, revised Houston Engineering plans (dated 4-19-13) were submitted to DNR.

Order:

You shall accomplish restoration by doing the following:

1. Complete restoration according to voluntarily proposed plans and specifications provided by Houston Engineering dated 4-19-13.
2. Additional work to return the site into compliance with the conditions of Limited Permit 2011-0184 (attached) shall also be conducted at the same time. This shall include:
 - a. Installation of erosion control measures such as those listed in "Temporary Erosion & Sediment Control Practices" as published in The Minnesota Stormwater Manual; available from the MPCA website at <http://www.pca.state.mn.us/index.php/water/water-types-and-programs/temwater/stormwater-manual>; available from the MPCA website at <http://www.pca.state.mn.us/index.php/water/water-types-and-programs/temwater/stormwater-manual>.
 - b. Establishment of a one foot (16.5") permanent vegetated buffer.
3. The voluntary proposed restoration work described above shall be completed by

EXHIBIT D

3. The voluntary proposed restoration work described above shall be completed by December 31, 2013.
4. Please contact DNR Compliance Hydrologist Sara Jacobson at 320-234-2550 ext. 232 or Area Hydrologist Lucas Youngsma at (507) 537-7258 least 5 days prior to restoration work commencing, and within 5 days of the work being completed.
5. The culmination of successful restoration is the issuance of a Certificate of Satisfactory Restoration.

This Order is final and binding on you, unless within 30 days of the date on which it was served on you, you appeal the terms and conditions of this restoration order to the commissioner by filing a written request for review. Please mail any such request to: DNR Ecological and Water Resources, Violations Coordinator, 500 Lafayette Rd., St. Paul, MN 55155-4032

Violation of this order is a misdemeanor.

Craig Miska

DNR Conservation Officer

540

Badge Number

09-18-13

Date

Issuance Record:

In person

or, by certified mail on

09-18-13

Date

Attachments Houston Engineering Plans Dated 4-19-13
 Limited Permit 2011-0184

Ec: Ethan Jenzen, Area Hydrologist
 Sara Jacobson, Compliance Hydrologist
 Blayne Johnson, County SWCD
 Craig Miska, Conservation Officer
 Curt Vacek, Area Wildlife Manager
 Dianne Radermacher, Upper MN WSD
 DNR Central Office Permits Unit
 Mark Aanenson, Houston Engineering

Skip Wright, DNR EWR District Supervisor
 Darren Wilke, County Planning and Zoning
 Norm Haukos, Area Fisheries Manager
 Larry Hanson, Water Resources Enforcement Officer
 Eric Hanson, COE, Regulatory Branch
 Kevin Mixon, Ecological & Water Resources
 John Kolb, Rinke Noonan Law Firm
 Tom Hovey, Violation Coordinator



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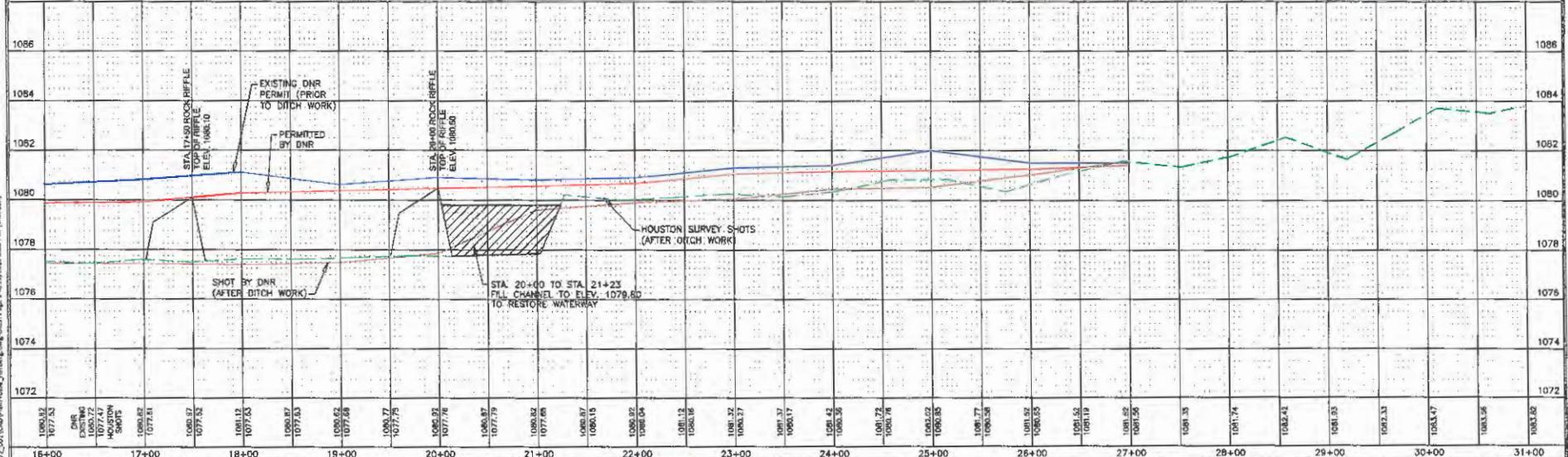
No.	Revision	Date	By



Fargo	Drawn by SMH	Date 04-19-13
P: 701.237.5065 F: 701.237.5101	Checked by ESJ	Scale AS SHOWN

HERBERG FARMS DRAINAGE
SECTION 31, ALMOND TOWNSHIP, T123N, R46W
BIG STONE COUNTY, MINNESOTA

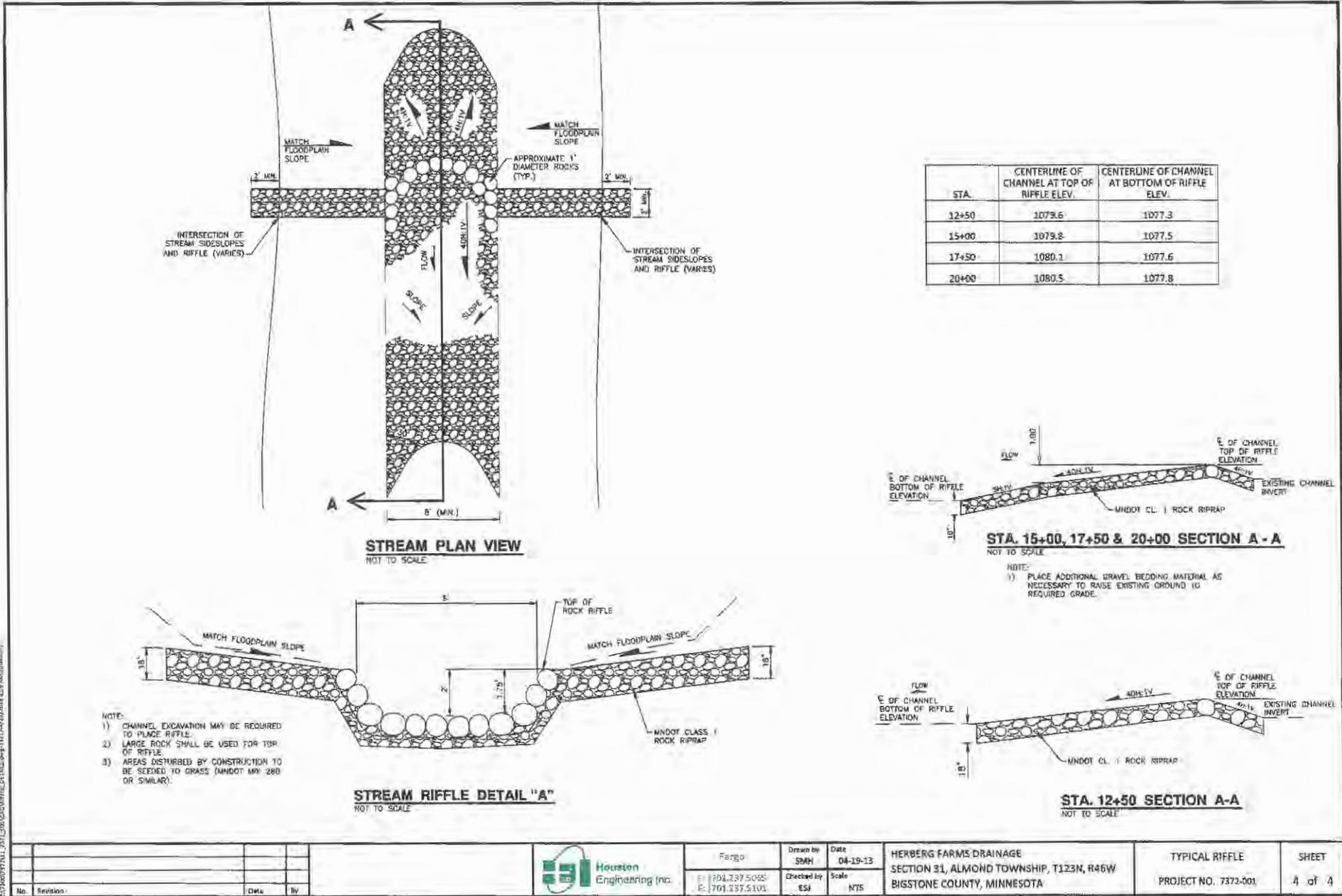
SECTION 31	SHEET
PROJECT NO. 7372-001	1 of 4



1080.52 1077.52	DNR EXISTING	17+00	1080.57 1077.52	18+00	1080.62 1077.68	19+00	1080.77 1077.75	20+00	1080.82 1077.68	21+00	1080.87 1077.75	22+00	1080.92 1077.82	23+00	1080.97 1077.89	24+00	1081.02 1077.96	25+00	1081.07 1078.03	26+00	1081.12 1078.10	27+00	1081.17 1078.17	28+00	1081.22 1078.24	29+00	1081.27 1078.31	30+00	1081.32 1078.38	31+00
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No.	Revision	Date	By		Fargo P: 701.237.5065 F: 701.237.5101	Drawn by CEQ,SMH	Date 04-19-13	HERBERG FARMS DRAINAGE SECTION 31, ALMOND TOWNSHIP, T123N, R46W BIG STONE COUNTY, MINNESOTA	PLAN AND PROFILE PROJECT NO. 7372-001	SHEET 3 of 4
						Checked by ESJ	Scale AS SHOWN			

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No.	Revision	Date	By



Fargo	Drawn by SMH	Date 04-19-13
E: 701.237.5055 F: 701.237.5101	Checked by ESI	Scale NTS

HERBERG FARMS DRAINAGE
SECTION 31, ALMOND TOWNSHIP, T123N, R46W
BIGSTONE COUNTY, MINNESOTA

TYPICAL RIFFLE
PROJECT NO. 7372-001

SHEET
4 of 4



LIMITED PUBLIC WATERS WORK PERMIT

**Permit Number
2011-0184**

Pursuant to Minnesota Statutes, Chapter 103G, and on the basis of statements and information contained in the permit application, letters, maps, and plans submitted by the applicant and other supporting data, all of which are made a part hereof by reference, **PERMISSION IS HEREBY GRANTED** to the applicant to perform the work as authorized below:

Public Water Unnamed to Big Stone Lake #06013a	County Big Stone (#06)
Name of Permittee Tom Herberg	Telephone Number (Include Area Code) (320) 808-6497
Address (No. & Street, RFD, Box No., City, State, Zip Code) Box 293, Beardsley, MN 56211	
Authorized Work: Excavate accumulated sediment in accordance with the profile on Attachment B from a 1400 linear feet portion of Unnamed Tributary to Big Stone Lake, also known as Meadowbrook Creek, from stations 13+00 to 27+00 as shown on Attachments A & B. Channel bottom dimension shall not exceed 6 feet in width, with 2:1 (Horizontal:Vertical) sideslopes; in accordance with the attachments A & B and the Conditions which follow.	
Purpose of Permit: #183 Channel/Ditch Cleanout/Restoration	Expiration Date of Permit December 31, 2014
Property Described As: NE¼ Section 31, T123N, R46W UTM Zone 15, Easting 227827, Northing 5035527	

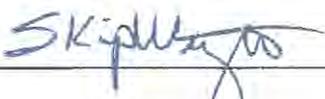
This permit is granted **subject to** the following **CONDITIONS**:

1. The **permittee** is not released from any rules, regulations, requirements, or standards of any applicable federal, state, or local agencies; including, but not limited to, the U.S. Army Corps of Engineers, Board of Water and Soil Resources, MN Pollution Control Agency, watershed districts, water management organizations, county, city and township zoning. This permit does not release the **permittee** of any permit requirement of the St. Paul district, U.S. Army Corps of Engineers, Army Corps of Engineers Centre, 190 Fifth Street East, St. Paul, MN 55101-1638.
2. This permit is not assignable by the **permittee** except with the written consent of the Commissioner of Natural Resources.
3. The **permittee** shall notify the Area Hydrologist at least five days in advance of the commencement of the work authorized hereunder and notify him/her of its completion within five days. The Notice of Permit issued by the Commissioner shall be kept securely posted in a conspicuous place at the site of operations.
4. The **permittee** shall make no changes, without written permission previously obtained from the Commissioner of Natural Resources, in the dimensions, capacity or location of any items of work authorized hereunder.
5. The **permittee** shall grant access to the site at all reasonable times during and after construction to authorized representatives of the Commissioner of Natural Resources for inspection of the work authorized hereunder.
6. This permit may be terminated by the Commissioner of Natural Resources at any time deemed necessary for the conservation of water resources of the state, or in the interest of public health and welfare, or for violation of any of the conditions or applicable laws, unless otherwise provided in the permit.

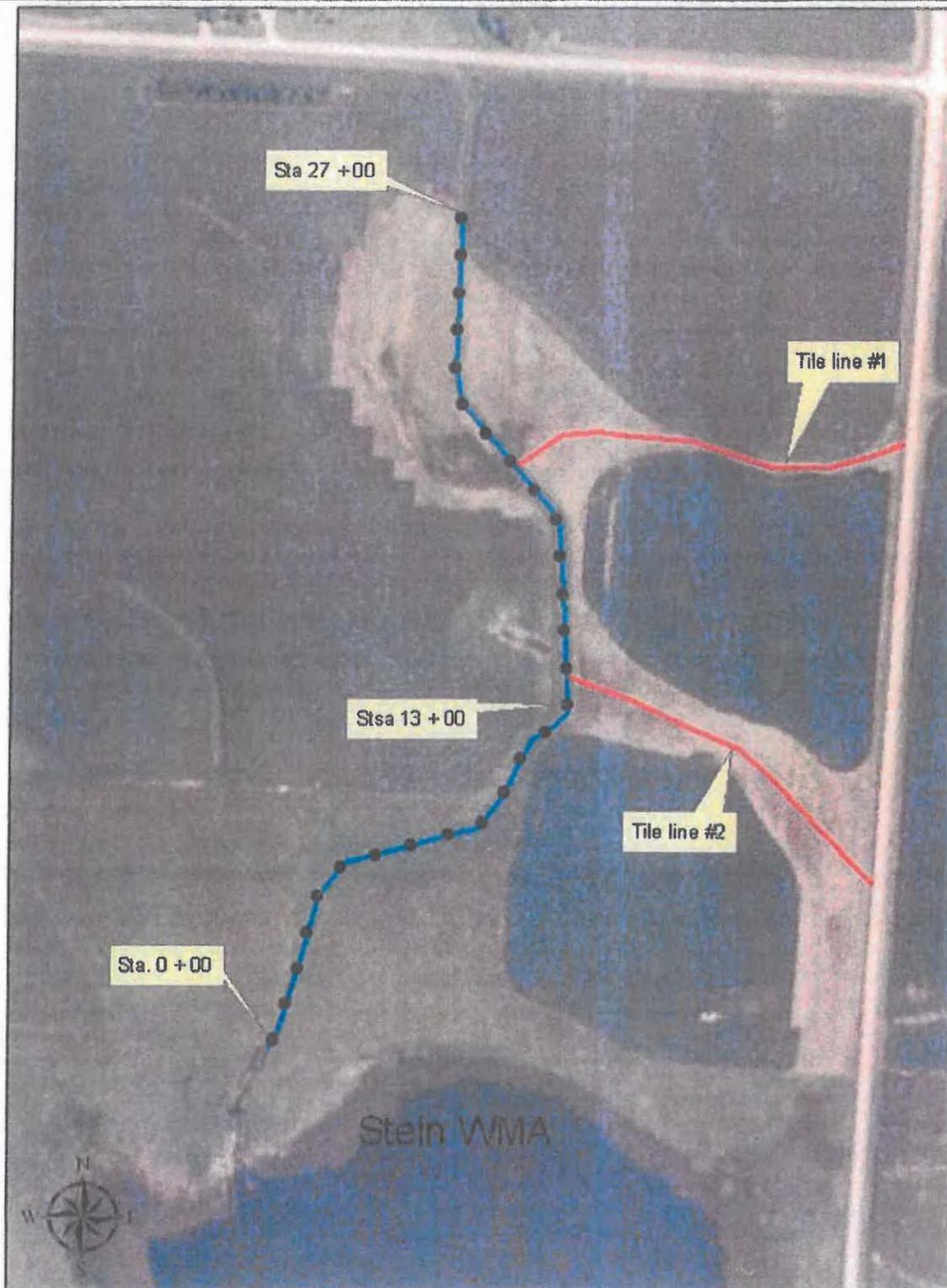
7. Construction work authorized under this permit shall be completed on or before the date specified above. The permittee may request an extension of the time to complete the project, stating the reason thereof, upon written request to the Commissioner of Natural Resources.
8. In all cases where the permittee by performing the work authorized by this permit shall involve the taking, using, or damaging of any property rights or interests of any other person or persons, or of any publicly owned lands or improvements thereon or interests therein, the permittee, before proceeding, shall obtain the written consent of all persons, agencies, or authorities concerned, and shall acquire all property, rights, and interests needed for the work.
9. This permit is permissive only. No liability shall be imposed by the State of Minnesota or any of its officers, agents or employees, officially or personally, on account of the granting hereof or on account of any damage to any person or property resulting from any act or omission of the permittee or any of its agents, employees, or contractors. This permit shall not be construed as estopping or limiting any legal claims or right of action of any person other than the state against the permittee, its agents, employees, or contractors, for any damage or injury resulting from any such act or omission, or as estopping or limiting any legal claim or right of action of the state against the permittee, its agents, employees, or contractors for violation of or failure to comply with the permit or applicable conditions.
10. Any extension of the surface of public waters from work authorized by this permit shall become public waters and left open and unobstructed for use by the public.
11. Where the work authorized by this permit involves the draining or filling of wetlands not subject to DNR regulations, the permittee shall not initiate any work under this permit until the permittee has obtained official approval from the responsible local government unit as required by the Minnesota Wetland Conservation Act.
12. The permittee shall ensure the contractor has received and thoroughly understands all provisions of this permit. Contractors must obtain a signed statement from the property owner stating that permits required for work have been obtained or that a permit is not required, and mail a copy of the statement to the regional DNR Enforcement office where the proposed work is located. The Landowner Statement and Contractor Responsibility Form can be found at: <http://www.bwsr.state.mn.us/wetlands/wca/index.html#general>.
13. Adequate methods shall be employed where necessary to prevent and/or correct erosion of channel banks resulting from entry of surface waters from adjacent lands and/or tributaries. Such methods may include drop structures, inlet pipes, riprap, and establishment and maintenance of vegetation.
14. All excavated spoil material shall be spread on upland (non-wetland) areas adjacent to the watercourse to a depth not to exceed 1 foot.
15. Permittee shall level spoil and seed to grasses and /or legumes all side slopes, plus a strip of land 16.5 feet wide along both sides of the channel. This work shall be completed as soon as spoil material moisture conditions allow and no later than the termination date of the permit. The grassed strips shall not be mowed until after July 31 of each year.
16. The Division of Waters reserves the right to review this permit as additional hydrologic data become available and to issue any further order as may become necessary to protect public interest.
17. No construction affecting the bed of the water body may be conducted between ice out and June 1 in order to minimize impacts on spring fish spawning. If work during this time is essential, it shall be done only upon the written approval of Area Fisheries Manager Norm Haukos.

ec: Lucas Youngsma, Area Hydrologist
 Darren Wilke, County Zoning Administrator
 Darrin Welle, SWCD
 Eric Hanson, USCOE
 Craig Miska, DNR Conservation Officer

Norm Haukos, DNR Fisheries
 Curt Vacek, DNR Wildlife
 DNR Central Office Permits Unit
 Upper MN Watershed District
 Kevin Mixon, Ecological & Water Resources

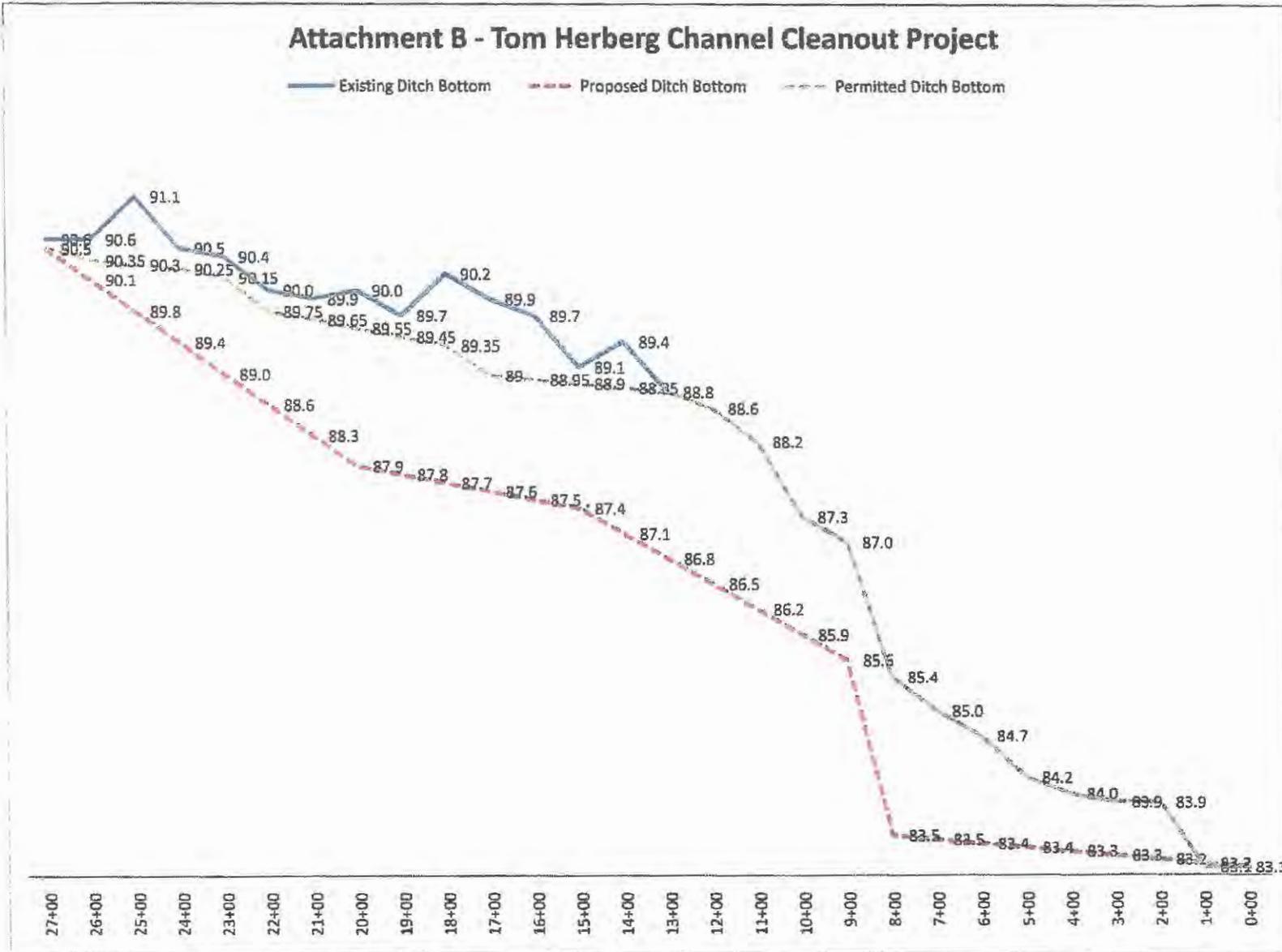
Authorized Signature	Title	Date
Skip Wright 	Regional Hydrologist	12-1-2010

Attachment A - Tom Herberg Channel Cleanout/Tile Project



T-123-N, R-46-W, Section 31 NE 1/4
2005 Aerial Photo

0 200 400 800 1,200 Feet





Minnesota Department of Natural Resources

Division of Law Enforcement
BX 47, 500 Lafayette Road, Saint Paul, MN 55155-4047

11/26/2013

RESTORATION ORDER EXTENSION

Landowner: Tom Herberg, Box 293 Beardsley, MN 56211

Waters Restoration Order Original Completion Date: 12/31/2013

WCA Restoration Order Original Completion Date: 10/18/2013

Restoration Order Extension Date for both Waters and WCA Restoration Orders: 06/30/2014

Dear Mr. Herberg:

The restoration order deadline that was issued to you was 12/31/13 for Waters and 10/18/13 for WCA. A request has been made by Mr. Herberg to extend both restoration orders deadlines since the Corps needs to issue permits for restoration order work to be completed. DNR Waters along with Big Stone County is recommending an extension to June 30th, 2014 which will allow enough time for the permit to be issued by the Corps and the Restoration work to be completed.

Please note that once the permits are issued by the Corps the work on the restoration orders shall be completed in a timely manner. Mr. Herberg must also contact either Sara Jacobson or Lucas Youngsma for waters at least five days prior to commencing any work so that this allows time to contact Fisheries to identify fish spawning exclusion dates if necessary and also contact shall be made within five days of the work being completed as stated in the restoration order.

If you have questions or concerns in regards to the restoration order, please contact Sara Jacobson at 320-234-2550 ext.232 or 320-796-2161 ext.230 or Lucas Youngsma at 507-537-7258. The WCA Contact is Darren Wilke in Big stone Co. at 507-839-6376, contact should also be made with Mr. Wilke prior to restoration work being completed.

Sincerely,

A handwritten signature in cursive script that reads "Lt. Larry Hanson".

2 Lt. Larry Hanson, DNR Enforcement Division
(507)537-0651

Cc: file

Sara Jacobson
Lucas Youngsma
Skip Wright
Darren Wilke

DNR Information: 651-296-6157 • 1-888-646-6367 • TTY: 651-296-5484 • 1-800-657-3929

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Page 1 of 2

EXHIBIT E