UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 14-1443 DWF/LIB

Thomas Lloyd Herberg, et al.,

Plaintiffs,

v.

United States Environmental Protection Agency, et al.,

Defendants.

CONSENT DECREE

WHEREAS, Plaintiffs Thomas Lloyd Herberg ("Thomas Herberg") and Bruce Allen Herberg (collectively "the Herbergs") own land in Sections 29, 30, 31, and 32, Township 123 North, Range 46 West, Big Stone County, Minnesota (the "Site");

WHEREAS, the Herbergs contracted with Plaintiff D & G Drainage, Inc. ("D&G") to perform earthmoving and drainage work at the Site;

WHEREAS, on September 18, 2013, the Commissioner of the Minnesota Department of Natural Resources issued to Thomas Herberg two orders under Minn. Stat. §103G.2372, a Minnesota Wetland Conservation Act Restoration Order and a Public Water Restoration and Replacement Order ("State Restoration Orders," attached to this Consent Decree as Appendix A), directing Thomas Herberg to restore certain wetlands on the Site and to restore approximately 1800 linear feet of an unnamed waterway at the Site, also known as Meadowbrook Creek, a tributary to Big Stone Lake;

WHEREAS, the State Restoration Orders include maps and plans which identify in more detail the wetlands to be restored (which in general are designated Wetlands 29-6, 29-4, 29-3, 32-4, 31-1, and 31-2), and the portion of Meadowbrook Creek to be restored, (collectively, "Restoration Areas");

WHEREAS, on April 9, 2014, the United States Environmental Protection Agency ("EPA") issued to the Herbergs and to D&G a Findings of Violation and Administrative Order for Compliance under the Clean Water Act ("EPA Compliance Order," attached to this Consent Decree as Appendix B), which amended a similar order issued on September 26, 2013;

WHERAS, the EPA Compliance Order asserts that the Herbergs and D&G conducted or were responsible for activities that resulted in the discharge of dredged and/or fill material to certain wetlands at the Site subject to federal regulation under the Clean Water Act, and to a portion of Meadowbrook Creek at the Site subject to federal regulation under the Clean Water Act;

WHEREAS, on May 8, 2014, the Herbergs and D&G initiated this case challenging the EPA Compliance Order (the "Complaint");

WHEREAS, the Complaint alleges that the EPA Compliance Order is arbitrary and capricious because the Site and the Herbergs' and D&G's activities at the Site are not subject to the Clean Water Act, and because EPA did not properly serve the EPA Compliance Order;

WHEREAS, the United States of America, on behalf of EPA, has potential counterclaims against the Herbergs and D&G alleging that the Herbergs and D&G: (1) violated Sections 301(a) and 309 of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319, by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at the Site without authorization by the United States Department of the

Army, and (2) violated Section 309 of the Clean Water Act by failing to comply with the terms of the EPA Compliance Order;

WHEREAS, the parties, after due and good faith consideration of all claims and defenses, have agreed to enter into this Consent Decree to mitigate the mutual risks of proceeding in litigation, and to settle the claims between and among the parties;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the Herbergs' and D&G's claims against EPA and the United States' potential claims against the Herbergs and D&G arising from the facts alleged in the EPA Compliance Order;

WHEREAS, the United States, EPA, the Herbergs, and D&G agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the claims and potential counterclaims in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the claims and potential counterclaims in this case, and that this Consent Decree adequately protects the public interest in accordance with the Clean Water Act and all other applicable federal law.

WHEREAS, nothing in this Consent Decree shall be deemed an admission by Herbergs or D&G of any violation of the Clean Water Act or other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 5 U.S.C. § 702, 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b).

2. Venue is proper in the District of Minnesota pursuant to Clean Water Act Sections 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b), (c), and (e), because the Herbergs and D&G conduct business in this district.

3. The complaint states a claim upon which relief can be granted pursuant to Section 706 of the APA, 5 U.S.C. § 706.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon the Herbergs and D&G, its officers, directors, agents, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with the Herbergs or D&G whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against the Herbergs or D&G, neither the Herbergs nor D&G shall raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting in concert or participation with the Herbergs or D&G, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the Restoration Areas (as defined above and as described in the State Restoration Orders) shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in the Restoration Areas, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors

in interest and shall simultaneously notify EPA and the United States Department of Justice at the addresses specified in Section X below that such notice has been given. As a condition to any such transfer, the party making the transfer shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all claims alleged in the Complaint and the EPA Compliance Order concerning the Site through the date of lodging this Consent Decree.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in Clean Water Act Section 101, 33 U.S.C. § 1251. All obligations in this Consent Decree or resulting from the activities this Consent Decree requires shall have the objective of causing the Herbergs and D&G to achieve and maintain full compliance with, and to further the purposes of, the Clean Water Act.

8. Except as in accordance with this Consent Decree, the Herbergs and D&G and their agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the Clean Water Act and its implementing regulations.

9. The parties acknowledge that Regional General Permit RGP-003-MN (2012), Item H, authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work this Consent Decree requires shall be subject to the conditions of the Regional General Permit and this Consent Decree.

10. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the Clean Water Act, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit EPA's ability to exercise its authority pursuant to Section 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c).

11. This Consent Decree in no way affects or relieves the Herbergs or D&G of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

12. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

13. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

14. This Consent Decree is the result of compromise and settlement, and shall not be construed as an admission on any party's behalf of any legal or factual matter relating to the claims at issue in this litigation.

IV. SPECIFIC PROVISIONS

A. CIVIL PENALTIES

15. The Herbergs and D&G are jointly and severally responsible to pay a civil penalty to the United States in the amount of $10,000.00 within 30 days of entry of this Consent Decree.

16. The Herbergs and/or D&G shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the United States Department of Justice account in accordance with current electronic funds transfer procedures, referencing EPA Region

5 and the DOJ case number 90-5-1-1-20160. Payment shall be made in accordance with instructions the Financial Litigation Unit of the United States Attorney's Office for the District of Minnesota provides to the Herbergs or D&G. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Upon payment of the civil penalty this Consent Decree requires, the Herbergs and D&G shall provide written notice, at the addresses specified in Section X of this Consent Decree, that such payment was made in accordance with Paragraphs 15 and 16.

18. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section IX) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

B. RESTORATION

19. Thomas Herberg shall comply with the State Restoration Orders (attached to this Consent Decree as Appendix A), which are incorporated herein by reference as an enforceable part of this Consent Decree.

20. Thomas Herberg shall complete the tasks required in the State Restoration Orders within the timelines provided in the State Restoration Orders, as may be modified by the Commissioner of the Minnesota Department of Natural Resources, but in no event shall such modified timelines extend beyond October 31, 2016. Thomas Herberg shall not unreasonably delay completion of the tasks required in the State Restoration Orders.

C. CONSERVATION EASEMENT

21. The Herbergs shall, within three months after entry of this Consent Decree, record the conservation easement in the form attached as Appendix C.

V. NOTICES AND OTHER SUBMISSIONS

22. Within 30 days after the deadlines for completing all of the tasks set forth in Paragraphs 19-21, Thomas Herberg shall provide the United States with written notice, at the addresses specified in Section X of this Consent Decree, of whether or not the tasks have been completed.

23. The notices required by Paragraph 22 shall specify the date when the tasks were completed, and explain the reasons for any delay in completion beyond the scheduled time the State Restoration Orders establish for such completion or Paragraph 21 establishes for recording the conservation easement.

24. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, Thomas Herberg shall, by his signature, certify such notices, documents and reports as follows:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

25. Until termination of this Consent Decree, Thomas Herberg shall preserve and retain all records and documents now in his possession or control or which come into his possession or control that relate in any manner to the performance of the tasks in the Restoration Orders. Until termination of this Consent Decree, Thomas Herberg shall also instruct his

contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in the Restoration Orders.

26. At the conclusion of the document retention period, Thomas Herberg shall notify the United States at least 90 days before the destruction of any such records or documents, and, upon the United States' request, shall deliver any such records or documents to EPA. Thomas Herberg may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege federal law recognizes. If Thomas Herberg asserts such a privilege, he shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege he asserts. No documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

27. A. Until termination of this Consent Decree, and subject to the provisions of this paragraph, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the portions of the Site on which work pursuant to the State Restoration Orders is to be performed, to:

1) Monitor the activities this Consent Decree requires;

2) Verify any data or information submitted to the United States;

3) Inspect and evaluate compliance with the State Restoration Orders and the conservation easement.

The United States will, except in the event of exigent circumstances, use its best efforts to provide notification to Thomas Herberg at least 48 hours in advance of entry.

B. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring, and to obtain information from the Herbergs or D&G as authorized by law.

VII. DISPUTE RESOLUTION

28. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States, the Herbergs, and D&G to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond 30 days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless those parties agree to a longer period of time in writing. If a dispute cannot be resolved through informal negotiations, then the position the United States advances shall be considered binding unless, within 30 days after the end of the negotiations period, the Herbergs or D&G files a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have 30 days to respond to the motion and propose an alternate resolution. The United States' position shall be binding unless the moving party proves by clear and convincing evidence that the moving party's proposal better meets the requirements of this Consent Decree and the requirements and objectives of the Clean Water Act.

29. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute before the expiration of the 30-day period for informal negotiations. The Herbergs and D&G shall have 14 days to respond to the motion and propose

an alternate resolution. The United States' position shall be binding unless the responding party proves by clear and convincing evidence that the responding party's proposal better meets the requirements of this Consent Decree and the requirements and objectives of the Clean Water Act.

30. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of the Herbergs or D&G under this Consent Decree, except as provided in Paragraph 36 below regarding payment of stipulated penalties.

VIII. FORCE MAJEURE

31. Thomas Herberg shall perform the actions required in Paragraph 19 of this Consent Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Thomas Herberg, including his employees, agents, consultants and contractors, which delays or prevents the performance of an action despite Thomas Herberg's best efforts to fulfill the obligation. The requirement that Thomas Herberg exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Thomas Herberg's financial inability to perform any obligation under this Consent Decree.

32. If Thomas Herberg believes that a Force Majeure event has affected his ability to perform any action required under this Consent Decree, he shall notify the United States in writing within seven calendar days after the event at the addresses listed in Section X. Such notice shall include a discussion of the following:

A. What action has been affected;

B. The specific cause(s) of the delay;

C. The length or estimated duration of the delay; and

D. Any measures taken or planned to prevent or minimize the delay and a schedule for the implementation of such measures.

Thomas Herberg may also provide to the United States any additional information that he deems appropriate to support his conclusion that a Force Majeure event has affected his ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

33. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay the Force Majeure event caused. Thomas Herberg shall coordinate with EPA to determine when to begin or resume the operations delayed as a result of the Force Majeure event.

34. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VII of this Consent Decree.

35. Thomas Herberg shall bear the burden of proving: (1) that any alleged noncompliance at issue was caused by circumstances beyond the control of Thomas Herberg and any entity under his control, including his contractors and consultants; (2) that neither Thomas Herberg nor any entity he controlled could have foreseen and prevented such alleged noncompliance; and (3) the number of days of delay that any circumstances alleged to represent a Force Majeure event caused.

IX. STIPULATED PENALTIES

36. After entry of this Consent Decree, if Thomas Herberg fails to pay the civil penalty when due, fails to timely complete the work required by the State Restoration Orders, or fails to timely record the conservation easement, Thomas Herberg shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

A.	For Day 1 up to and including Day 30 of non-compliance	$1000.00 per day
B.	For Day 31 up to and including Day 60 of non-compliance	$2,000.00 per day
C.	For Day 61 and beyond of non-compliance	$3,000.00 per day

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

37. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that the parties cannot resolve pursuant to the Dispute Resolution provisions in Section VII and/or the Force Majeure provisions in Section VIII shall be resolved upon motion to this Court as provided in Paragraphs 28 and 29.

38. The filing of a motion requesting that the Court resolve a dispute shall stay Thomas Herberg's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Thomas Herberg does not prevail on the disputed issue, he shall pay stipulated penalties as provided in this Section.

39. To the extent Thomas Herberg demonstrates to the Court that a delay or other non-compliance resulted from a Force Majeure event (as defined in Paragraph 31 above) or

otherwise prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

40. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

41. Thomas Herberg shall make any payment of a stipulated penalty by FedWire EFT or wire transfer to the United States Department of Justice account in accordance with current electronic funds transfer procedures, referencing EPA Region 5 and the DOJ case number 90-5-1-1-20160. Payment shall be made in accordance with instructions provided to Thomas Herberg by the Financial Litigation Unit of the United States Attorney's Office for the District of Minnesota. Any payments the Department of Justice receives after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Thomas Herberg shall provide written notice at the addresses specified in Section X of this Decree.

X. ADDRESSES

42. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

(1) Robert Guenther
Office of Regional Counsel, C-14J
United States Environmental Protection Agency, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

(2) Yone Yu
Watersheds & Wetlands Branch, WW-16J

United States Environmental Protection Agency, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Daniel R. Dertke, Attorney
Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

C. TO THE HERBERGS or D&G:

John C. Kolb
RINKE NOONAN
Suite 300, US Bank Plaza
P.O. Box 1497
St. Cloud, MN 56302

XI. COSTS OF SUIT

43. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should the Court subsequently determine that the Herbergs or D&G have violated the terms or conditions of this Consent Decree, the Herbergs and D&G shall be liable for any costs or attorneys' fees the United States incurs in any action against the Herbergs or D&G for noncompliance with or enforcement of this Consent Decree.

XII. PUBLIC COMMENT

44. The parties acknowledge that after the lodging and before the entry of this Consent Decree, the United States' final approval is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Herbergs and D&G agree not to withdraw from,

oppose entry of, or challenge any provision of this Consent Decree, unless the United States has notified the Herbergs and D&G in writing that it no longer supports entry of the Consent Decree.

XIII. CONTINUING JURISDICTION OF THE COURT

45. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIV. MODIFICATION

46. Upon the Court's entry of this Consent Decree, the Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by the United States, the Herbergs, and D&G and approved by the Court.

XV. TERMINATION

47. After Thomas Herberg has completed the requirements of Section IV of this Consent Decree and has paid any outstanding stipulated penalties this Consent Decree requires, he may submit to the United States, at the addresses specified in Section X of this Consent Decree, a Request for Termination, stating that he has satisfied those requirements, together with supporting documentation.

48. Following the United States' receipt of Thomas Herberg's Request for Termination, the parties may confer informally concerning the request and any disagreement that the parties may have as to whether Thomas Herberg has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Consent

Decree may be terminated, the United States shall submit a motion to terminate the Consent Decree.

49. If the United States does not agree that the Consent Decree may be terminated, Thomas Herberg may invoke Dispute Resolution under Section VII of this Consent Decree. Provided, however, that Thomas Herberg shall not seek Dispute Resolution of any dispute regarding termination, under Section VII of this Consent Decree, until 60 days after service of its Request for Termination.

50. Termination of this Consent Decree does not extinguish the prohibitory injunction set forth in Paragraph 8 of this Consent Decree.

XVI. SIGNATORIES/SERVICE

51. Each undersigned representative of the Herbergs, D&G, EPA, and the United States Department of Justice, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

52. This Consent Decree may be signed in counterparts, such counterpart signature pages shall be given full force and effect, and its validity shall not be challenged on that basis.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2015.

_____
United States District Judge

Dated: 1/29/15

Susan Shinkman, Director
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Dated: 1.29.15

Mark Pollins, Director
Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Dated: 01/26/15

Melissa Katz, Attorney
Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

ON BEHALF OF THE HERBERGS AND D&G:

John C. Kolb

Dated: January 30, 2015

John C. Kolb
RINKE NOONAN
Suite 300, US Bank Plaza
P.O. Box 1497
St. Cloud, MN 56302

Appendix A

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 NE¼ 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, Kane 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	540	09-18-13
DNR Conservation Officer	Badge Number	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 Enginerring
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 260th 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-builts

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: [X] **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.*

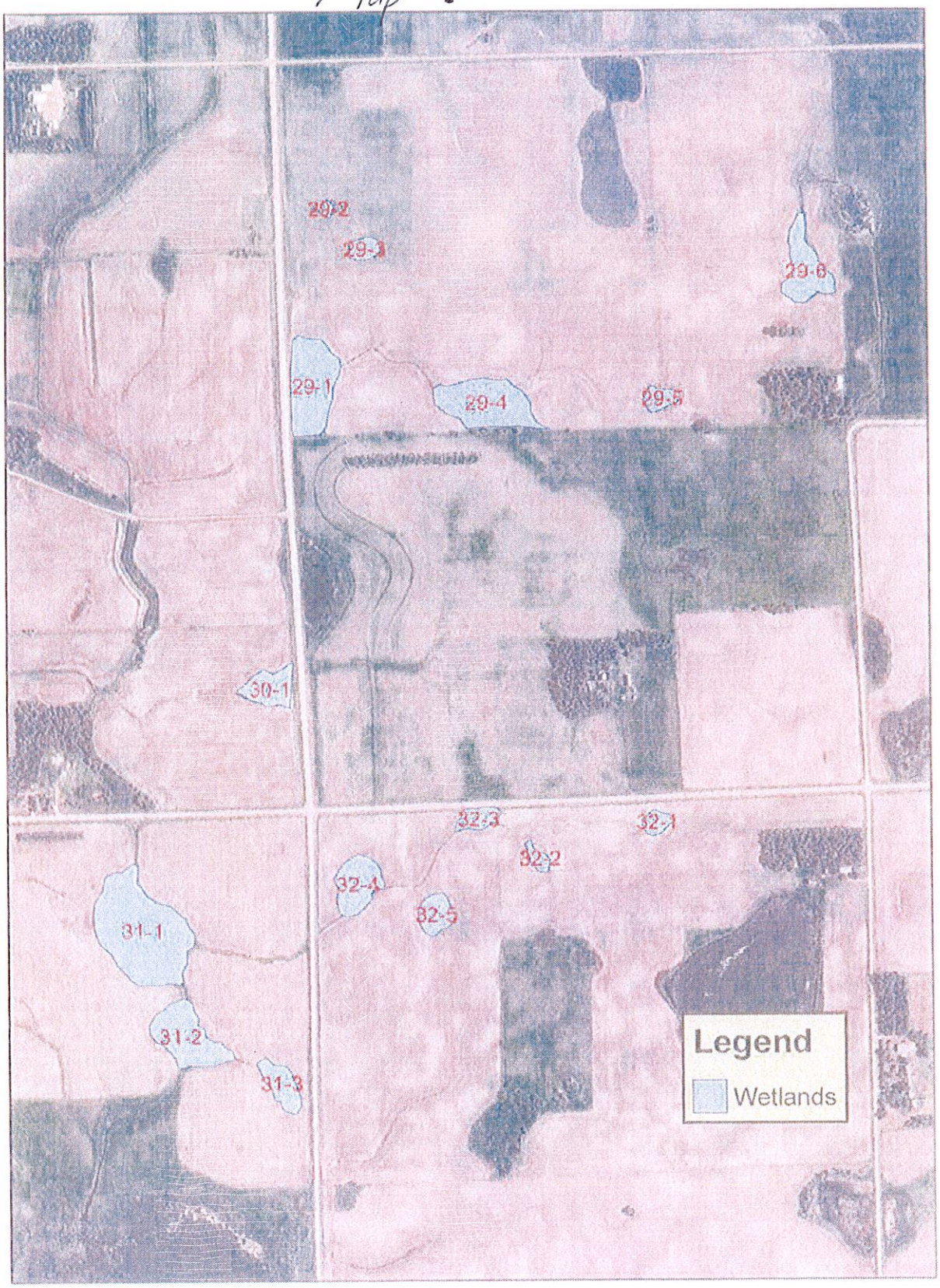
7. Date: Provide a date to restore; make no less than 31 days, but it depends on what the violation is. Larger violations may require more than 31 days; or the time of year (spring too wet) might require a longer time frame. Remember, the enforcement officer can grant an extension if needed; but try 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".

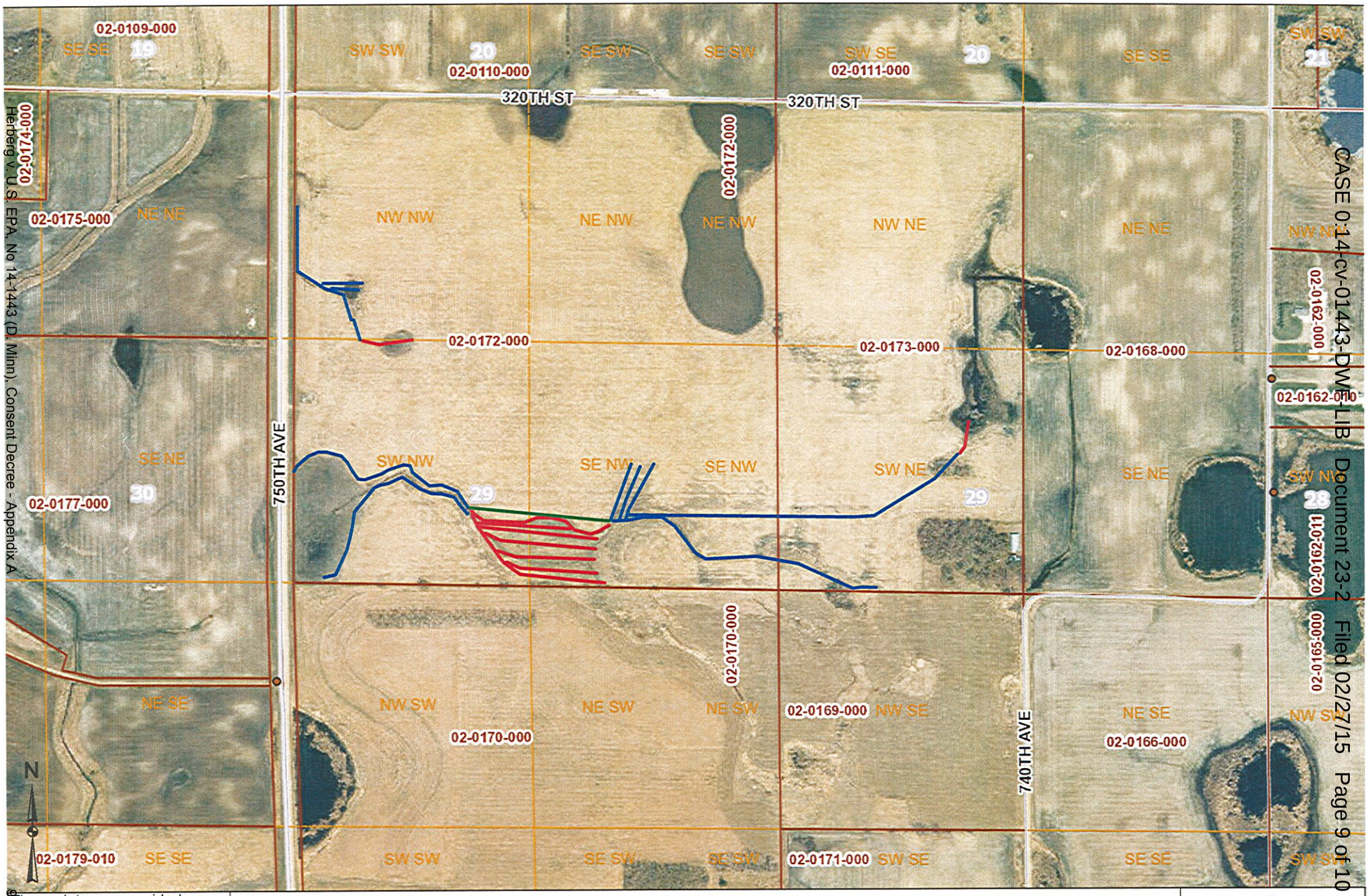
Example: *You must restore the wetland to its pre-altered condition. This shall be accomplished by removing all of the fill material located in the wetland boundary as shown in the aerial photo down to original soil level. The fill must be removed to an upland site. No additional excavation is allowed. 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


29-2
29-3
29-6
29-1
29-4
29-5
30-1
32-3
32-1
32-2
32-4
32-5
31-1
31-2
31-3
Legend
Wetlands



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.

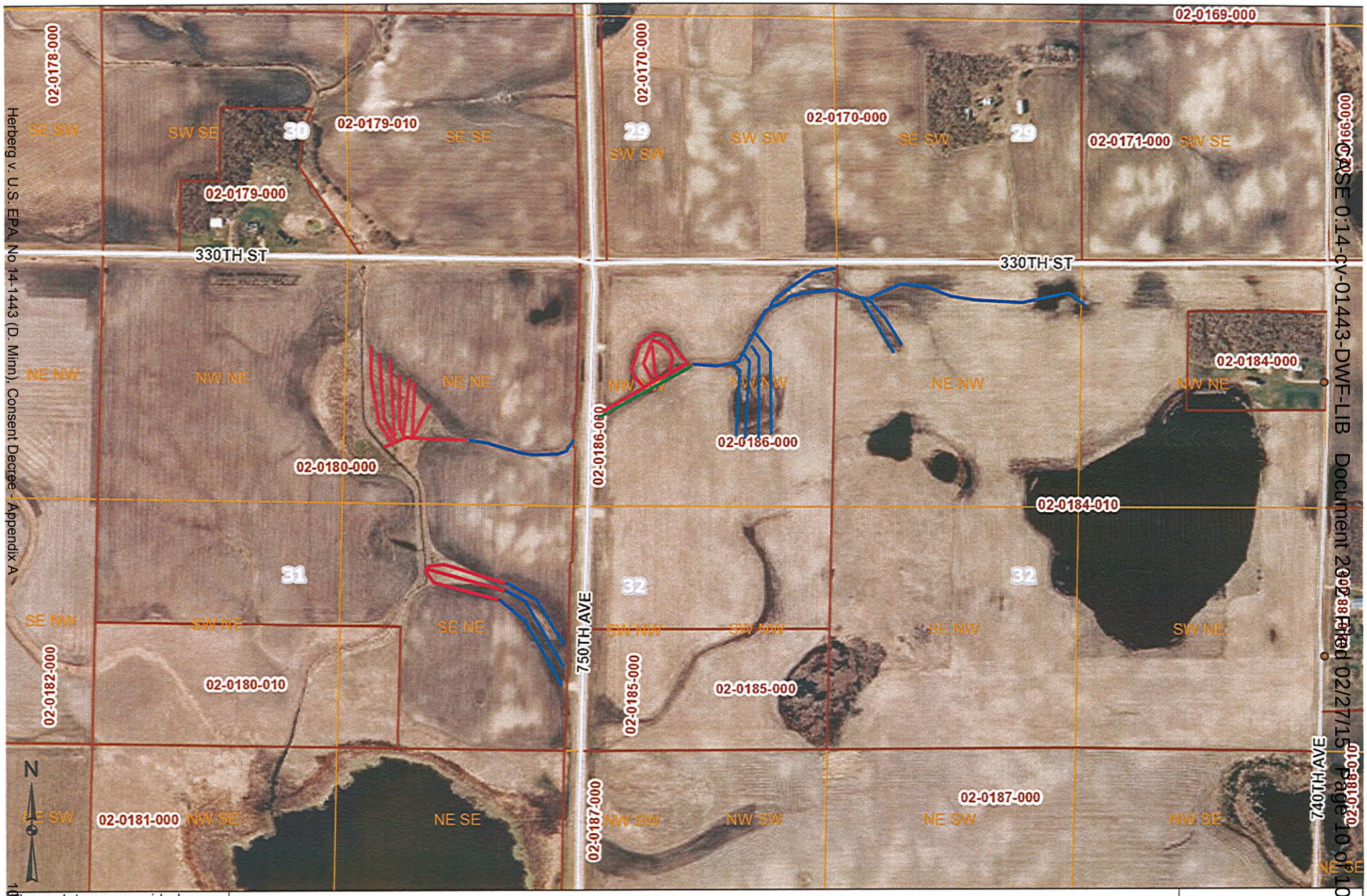
Map 2

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

Date: 9/16/2013

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

Big Stone County Minnesota



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

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

Map 3

Big Stone County Minnesota

Appendix B

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

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

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 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 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

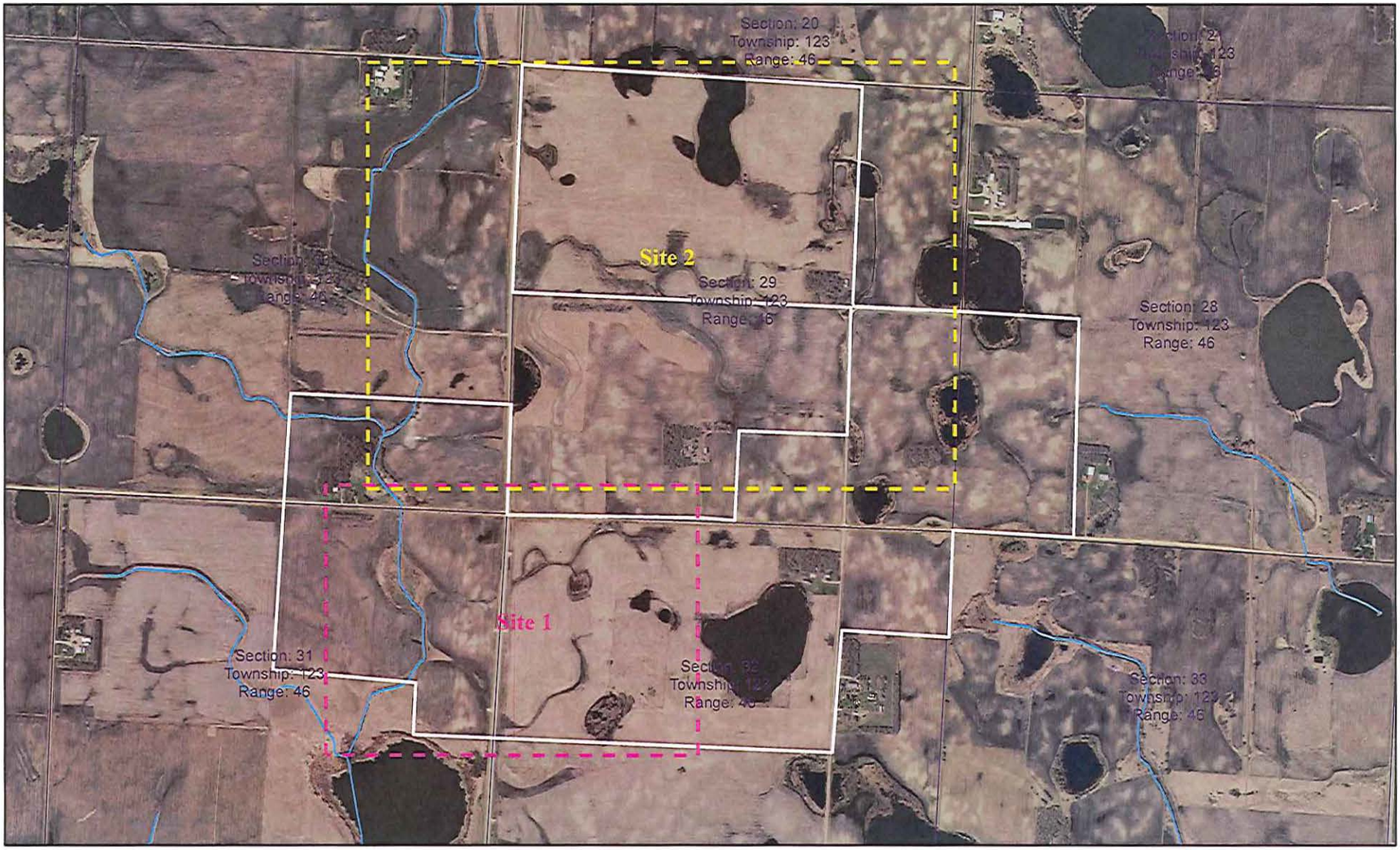
Exhibit 1

Figure 1: Site Overview

Figure 2: Site 1 Impacts

Figure 3: Site 2 Impacts

Figure 1: Site Overview



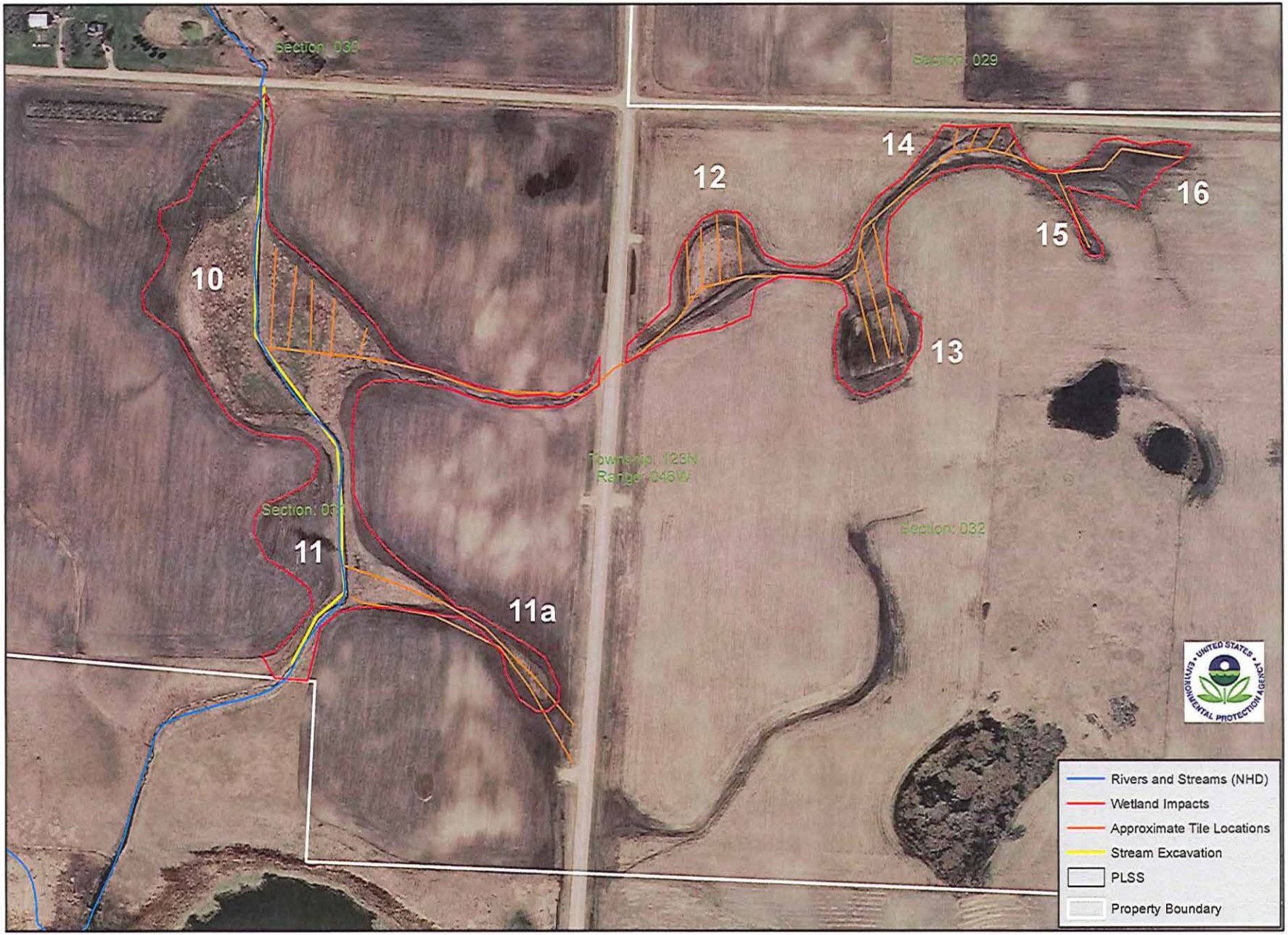
Sections 29, 31 & 32 T123N, R46W
Big Stone County, Minnesota
Projection: NAD 83 UTM Zone 15N
Imagery: 2011 FSA Orthophoto

Meters
0 250 500 1,000

N W E S

Property Boundary
PLSS
Rivers and streams (NHD)

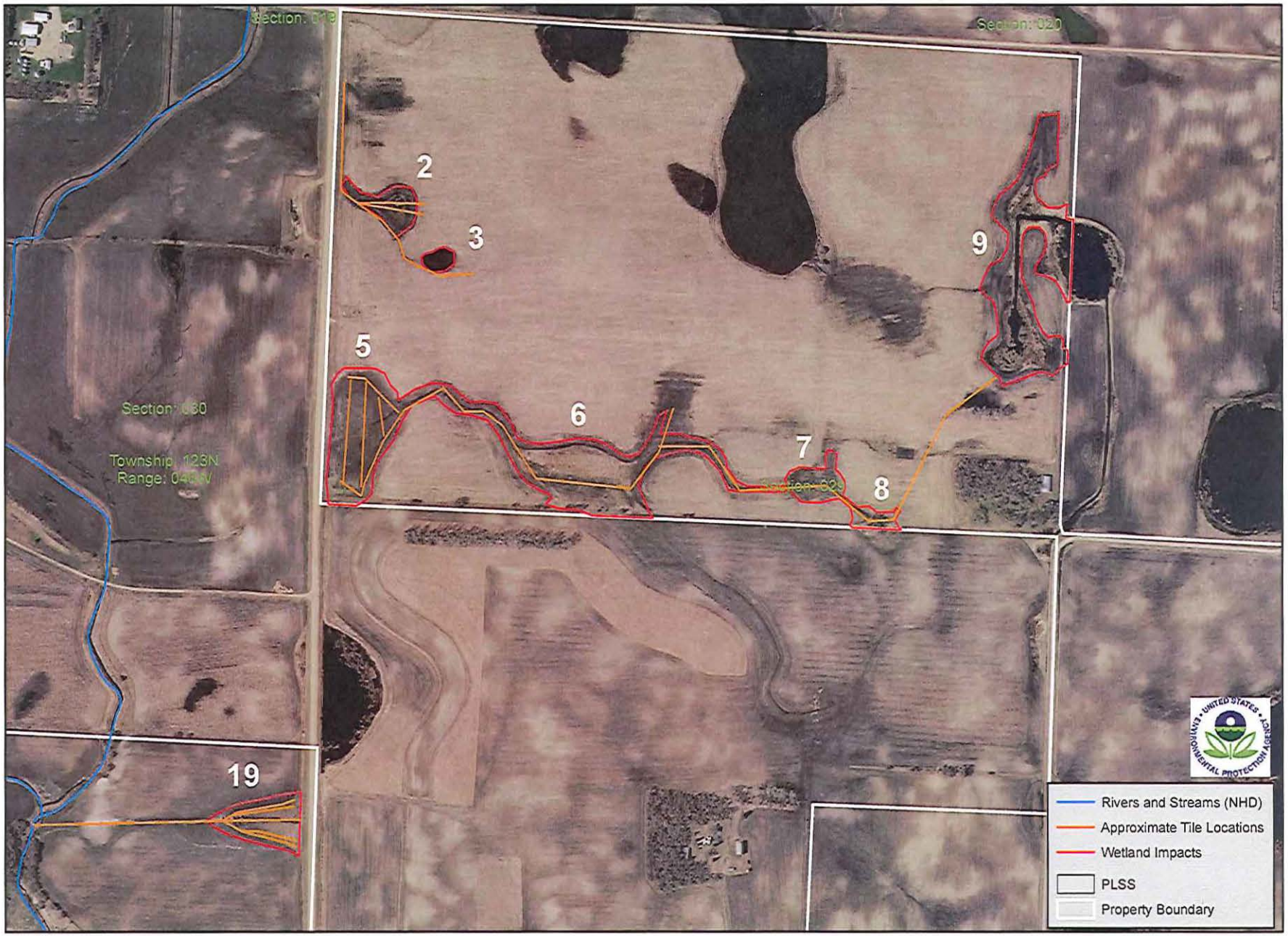
Figure 2: Site 1 Impacts



2011 Aerial Photograph

0 120 240 480 Meters

Figure 3: Site 2 Impacts



2011 Aerial Photograph

0 150 300 600 Meters

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 NE¼ 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, Kane 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	540	09-18-13
DNR Conservation Officer	Badge Number	Date

Issuance Record: [X] 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 Enginerring
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

Revised 6/21/2012

Appendix C

PERPETUAL CONSERVATION EASEMENT AND RESTRICTIONS FOR WETLAND AND UPLAND BUFFER AREA

Grantor: Thomas Lloyd Herberg and Kerri Herberg, husband and wife and Bruce Allen Herberg, a single person

Grantee/Holder: Big Stone County, Minnesota, in its role as Local Government Unit for implementation of the Wetland Conservation Act (Minn. Rules 8420).

Possessors of "Third-party Rights of Enforcement" pursuant to Minnesota Statutes Chapter 84C: State of Minnesota, by and through the Board of Water and Soil Resources pursuant to the Wetland Conservation Act and the United States of America, by and through the United States Army Corps of Engineers pursuant to the Clean Water Act

Location: The Northwest Quarter of Section 29, Township 123 North, Range 46 West, Big Stone County, Minnesota

Thomas Lloyd Herberg and Kerri Herberg, husband and wife and Bruce Allen Herberg, a single person ("Grantor"), are the fee owners of the Northwest Quarter of Section 29, Township 123 North, Range 46 West, Big Stone County, Minnesota, as more precisely and legally described in **Exhibit A** (the "Property"). Grantor is in the process of restoring wetlands within a portion of the Property pursuant to voluntarily issued restorations orders and pursuant to a stipulation with the United States.

The stipulation with the United States resolved various allegations of violations of the Clean Water Act. As part of the stipulation, Grantor agreed to grant a conservation easement and restrictions over a portion of the Property containing an existing wetland along with an upland buffer area around the wetland.

In exchange for the United States' dismissal of the allegations of violations of the Clean Water

Act and as a condition of the stipulation, the Grantor grants to Big Stone County, Minnesota ("Grantee/Holder"), the Conservation Easement and Covenant of Restrictions ("Conservation Easement and Restriction") contained herein.

This Conservation Easement and Restriction shall be effective upon the Grantee/Holder's execution of its acceptance pursuant to statutes section 84C.02(b).

This Conservation Easement and Restriction is granted over the following portion of the Property located in Big Stone County, Minnesota:

> See legal description in **Exhibit B** and depicted in **Exhibit C** attached hereto and made a part hereof. ("Easement Area")

The Grantor is responsible for complying with the terms of this Conservation Easement and Restriction. This Conservation Easement and Restriction and the duties and obligations contained herein shall run with the land.

In addition to the rights granted to the Grantee/Holder herein, Grantor also grants the right to enforce the terms of the Conservation Easement and Restriction to the State of Minnesota, by and through the Board of Water and Soil Resources pursuant to the Wetland Conservation Act and the United States of America, by and through the United States Army Corps of Engineers pursuant to the Clean Water Act, as possessors of third-party rights of enforcement ("Third Parties").

The purposes of this Conservation Easement and Restriction are to maintain and improve the ecological values of the wetland located in the Easement Area and to preserve the Easement Area in its restored/natural condition in perpetuity.

COVENANT OF RESTRICTIONS:

Grantor shall:

1. Establish and maintain visible signs at prominent locations along the boundary of the Easement Area indicating the presence of the wetland and providing notice of the restrictions on use of the Easement Area. Such signs must have a surface area of at least one quarter (¼) square feet, mounted on a fence post at least 4 feet above ground, and minimally contain the words "Boundary of Wetland Easement Area - Subject to Perpetual Conservation Easement Restrictions – Big Stone County Soil and Water Conservation District for Further Information." Signs must be made of non-degradable material.

2. Prevent, including by Grantee:

    a. Production of agricultural crops within the Easement Area, except that this provision does not restrict the harvest of the seeds of native vegetation if only the seed-head is

removed in the process of harvest and does not involve the use of vehicular, motorized equipment;

b. The cutting of hay, mowing of vegetation or removal timber within the Easement Area, except as indicated below;

c. Vegetative alterations within the Easement Area that do not enhance or would degrade the ecological functions and values of the wetland and upland buffer area. Vegetative alterations shall be limited to those required for elimination of noxious weeds or non-native, invasive plant species;

d. The grazing of livestock within the Easement Area;

e. The placement of materials, substances or other objects, or construction of any type of structure, temporary or permanent, within the Easement Area, except as indicated below;

f. Vehicular traffic within the Easement Area, except as indicated below;

g. Alteration of the topography of the Easement Area by any means, including plowing, dredging, filling, mining or drilling, except as indicated below;

h. Modification of the hydrology within the Easement Area in any way or by any means including pumping, draining, ditching, diking, impounding or diverting surface or ground water into or out of the Easement Area, except as indicated below;

i. Human or recreational use of the Easement Area which, in the judgment of the Grantor or Grantee/Holder, is detrimental to the wetland;

j. Use of the Easement Area inconsistent with the enhancement or preservation of the wetland.

3. Record this Conservation Easement and Restriction at Grantor's expense in the real property records of the county where the Property is located. Said recording shall take place within 30 days of the Grantee/Holder's acceptance of this Conservation Easement and Restriction. The Grantor shall provide the original copy of the recorded Conservation Easement and Restriction to the Grantee/Holder and the Third Parties.

Exceptions:

1. **Maintenance of Existing Tile Drainage System:** There currently exists within the upland buffer portion of the Easement Area a tile drainage system that outlets to the wetland. The tile drainage system drains other portions of the Property. Maintenance of the existing tile drainage system within the Easement Area is excepted from the Restrictions contained in

paragraph 2 b, e, f, g and h above.

2. **Alteration of Topography for the Purpose of Environmental Investigation or Monitoring:** Drilling or establishment of monitoring wells and soil borings required for investigation and groundwater quality monitoring within the Easement Area is excepted from the Restrictions contained in paragraph 2 g and h above.

3. **Lawful Actions of Road Authorities Within Road Right of Way:** The Easement Area is bounded to the west by a public road. Lawful actions of the road authority working within its road right of way are excepted from the Restrictions contained in paragraph 2 b, e, f, g and h above.

Terms of Conservation Easement and Restriction

The Conservation Easement and Restriction shall be deemed to be a perpetual conservation easement pursuant to statutes chapter 84C, and shall be unlimited in duration regardless of recording.

Grantor grants the Grantee/Holder, Third Parties and the agents and employees of the Grantee/Holder and Third Parties, reasonable access to the Easement Area for inspection, monitoring and enforcement purposes. The Grantee/Holder, Third Parties, and their agents and employees are hereby granted a perpetual right of entry to and from the Easement Area. The right of entry shall be reasonably exercised at locations designated by the Grantor or from public rights of way. This right of entry grants no access to the Property or the Easement Area to the general public.

This Conservation Easement and Restriction may be modified only with the approval of the Grantee/Holder in consultation with the Third Parties.

This Conservation Easement and Restriction may be enforced, at law or in equity, by the Grantee/Holder or any Third Party named herein. The right to enforce the terms of this Conservation Easement and Restriction is not waived or forfeited by any forbearance or failure to act on the part of the Grantee/Holder or Third Parties.

Grantor's Acknowledgments

Grantor is the fee owner of the Property. Grantor represents that no other persons or entities have an interest in the Property and that no further consents or subordinations are required for the execution of this Conservation Easement and Restriction. If it is determined at any time that there is any other party who may have an interest in the Property that is prior to this Conservation Easement and Restriction, then Grantor shall immediately obtain and record a consent and subordination agreement signed by such other party. Acceptance of this Conservation Easement and Restriction does not release Grantor from the obligation to obtain and record a consent and subordination agreement signed by any party who may have an

interest in the Property that is prior to this Conservation Easement and Restriction, even if such interest was of record at the time of acceptance.

SIGNATURE OF GRANTOR

Dated: _____, 2015 THOMAS LLOYD HERBERG

_____

STATE OF MINNESOTA)
) SS
COUNTY OF BIG STONE)

On this ___ day of _____, 2015, before me, a Notary Public within and for said County, personally appeared Thomas Lloyd Herberg, to me known to be the person described herein, and did sign said instrument as his free act and deed.

_____
Notary Public

Dated: _____, 2015 KERRI HERBERG

_____

STATE OF MINNESOTA)
) SS
COUNTY OF BIG STONE)

On this ___ day of _____, 2015, before me, a Notary Public within and for said County, personally appeared Kerri Herberg, to me known to be the person described herein, and did sign said instrument as her free act and deed.

_____
Notary Public

Dated: _____, 2015 BRUCE ALLEN HERBERG

_____

STATE OF MINNESOTA)
) SS
COUNTY OF BIG STONE)

On this ___ day of _____, 2015, before me, a Notary Public within and for said County, personally appeared Bruce Allen Herberg, to me known to be the person described herein, and did sign said instrument as his free act and deed.

_____
Notary Public

ACCEPTANCE

Big Stone County accepts the foregoing Conservation Easement and Restriction.

BIG STONE COUNTY MINNESOTA:

By: _____

Its: _____

STATE OF MINNESOTA)
) ss.
COUNTY OF BIG STONE)

This instrument was acknowledged before me this _____ day of _____, 2015 by _____ (name of person), _____ (title) of Big Stone County, Minnesota.

_____
Notary Public

Notarial Stamp or Seal

THIS INSTRUMENT DRAFTED BY:
RINKE NOONAN (25173-0001 (JCK))
1015 West St. Germain, Ste. 300
P.O. Box 1497
St. Cloud, MN 56302
(320) 251-6700

(Adapted from BWSR Form: wca-bank-06 (easement).doc (Revised 3/12/10) By the Board of Water and Soil Resources, 520 Lafayette Road, St. Paul, MN 55155)

EXHIBIT A

Legal Description of Property

As evidenced in Document Number 167346 recorded with the Big Stone County Recorder on June 4, 2010.

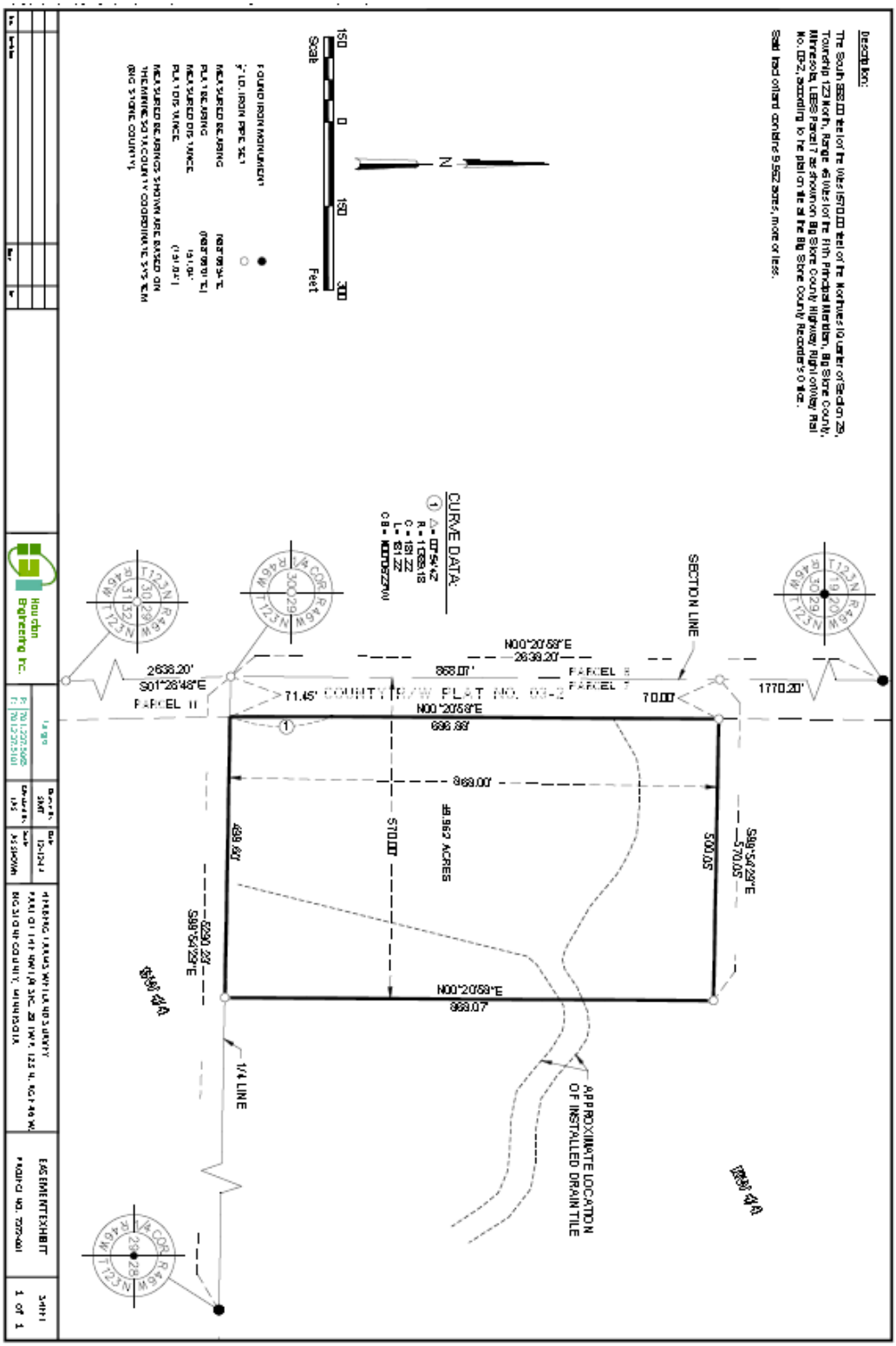
Northwest Quarter (NW¼) of Section Twenty-nine (29), Township One Hundred Twenty-three (123) North, Range Forty-six (46) West of the 5th P.M., EXCEPTING THEREFROM Parcel 7 located in the W½NW¼ of said Section 29, Township 123 North, Range 46 West, according to the "Big Stone County Highway Right of Way Plat 03-2" on file in the office of the County Recorder, Big Stone County, Minnesota, in Large Plat Case, page 188;

EXHIBIT B

Legal Description of Easement Area

The South 868.00 feet of the West 570.00 feet of the Northwest Quarter of Section 29, Township 123 North, Range 46 West of the Fifth Principal Meridian, Big Stone County, Minnesota, LESS Parcel 7 as shown on Big Stone County Highway Right of Way Plat No. 03-2, according to the plat on file at the Big Stone County Recorder's Office.

Said tract of land contains 9.962 acres, more or less.

EXHIBIT C

Map/Survey of Easement Area