

Information for File # 2011-03944-ERH

Applicant: Tom Herberg

Corps Contact: Benjamin Cox

Address: 180 Fifth Street East, Saint Paul, Minnesota 55101

Email: benjamin.r.cox@usace.army.mil

Phone: (651) 290-5377

County: Big Stone County, Minnesota

Section, Township, Range: NE 1/4 sec. 31, T. 123 N., R. 46 W.

Information Complete On: 1 December 2013

Posting Expires On: 31 December 2013

Authorization Type: This application is being reviewed in accordance with the practices for documenting Corps jurisdiction under Section 404 of the Clean Water Act identified in Regulatory Guidance Letter 07-01. We have made a preliminary determination that Meadowbrook Creek is a water of the United States.

Project Description and Purpose: The applicant proposes to discharge dredged and/or fill material into Meadowbrook Creek for the purpose of complying with a Minnesota Department of Natural Resources Public Water Restoration and Replacement Order. This work is also required by an Environmental Protection Agency Administrative Compliance Order. The project would involve the installation of four riffle structures to reestablish the pre-violation bottom elevations and grade of the tributary.

Name, Area, and Type of Waters Subject to Loss: Dredged and/or fill material would be discharged into approximately 300 linear feet at four separate locations of Elm Creek. The project would not result in the loss of waters. The purpose of the project is to restore this segment of Elm Creek to its pre-violation condition.

Alternatives Considered: None.

Compensatory Mitigation: The applicant has not proposed any compensatory mitigation as the project would not result in the loss of waters and is intended to remedy the impacts associated with the violation.

Drawings: See attached.



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 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



Received
MAY 07 2013
Marshall DNR

May 3, 2013

Direct Dial: 320-656-3503
Jkolb@RinkeNoonan.com

Lucas Youngsma
Area Hydrologist
Minnesota Department of Natural Resources
1400 East Lyon Street
Marshall, MN 56258

**Re: Tom Herberg Voluntary Restoration Unnamed Water Course, Big Stone County
Our File No. 23563,001**

Dear Mr. Youngsma:

This letter is in response to your correspondence dated February 11, 2013, to my client, Tom Herberg. Per your recommendation, we have instructed our consulting engineer to revise the restoration plans for the unnamed water course referenced above to include a fourth riffle. I do appreciate your efforts to continue to work with us as we move toward voluntary restoration of Mr. Herberg's public waters permit violation. As you know, however, we are under the shadow of an enforcement action by the Environmental Protection Agency related to alleged violations of the Clean Water Act for various work performed by Mr. Herberg, including alleged discharge of dredge or fill material to waters in the United States related alteration of the unnamed water course referenced above.

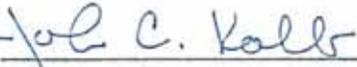
Until we know the outcome of the EPA's enforcement action, it is imprudent for us to proceed with any activity requiring review or regulatory approval under the Clean Water Act. While Mr. Herberg has been prepared for well over a year to implement the voluntary restoration plan, even as modified by the enclosed plans, it is difficult to advise him to move forward with the remaining uncertainty over EPA enforcement actions.

I am hoping that we can get all alleged violations resolved by a single restoration action so that Mr. Herberg does not have to face the uncertainty of multiple or sequential restoration activities. I would encourage you to continue to work with the EPA in resolving its concerns regarding restoration. Related to this, we believe we have resolved issues related to Big Stone County's enforcement of the Wetland Conservation Act for the same activities being investigated for enforcement by the EPA. Other elements of the voluntary restoration proposal submitted in 2012 appear to be appropriate to remedy the alleged violations of the Wetland Conservation Act.

Lucas Youngsma
May 3, 2013
Page 2

Please contact me if you would like to discuss this matter further.

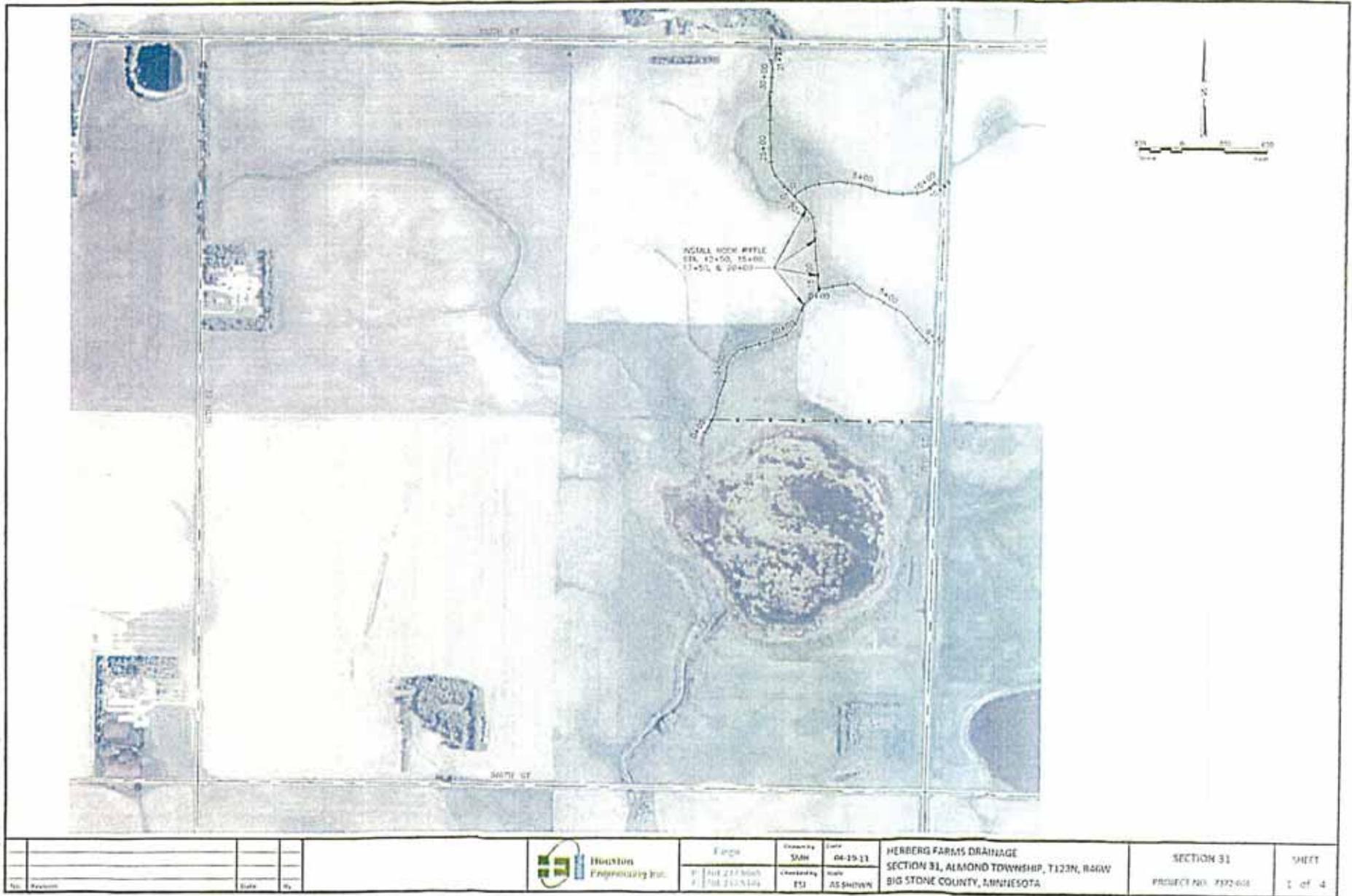
Sincerely,



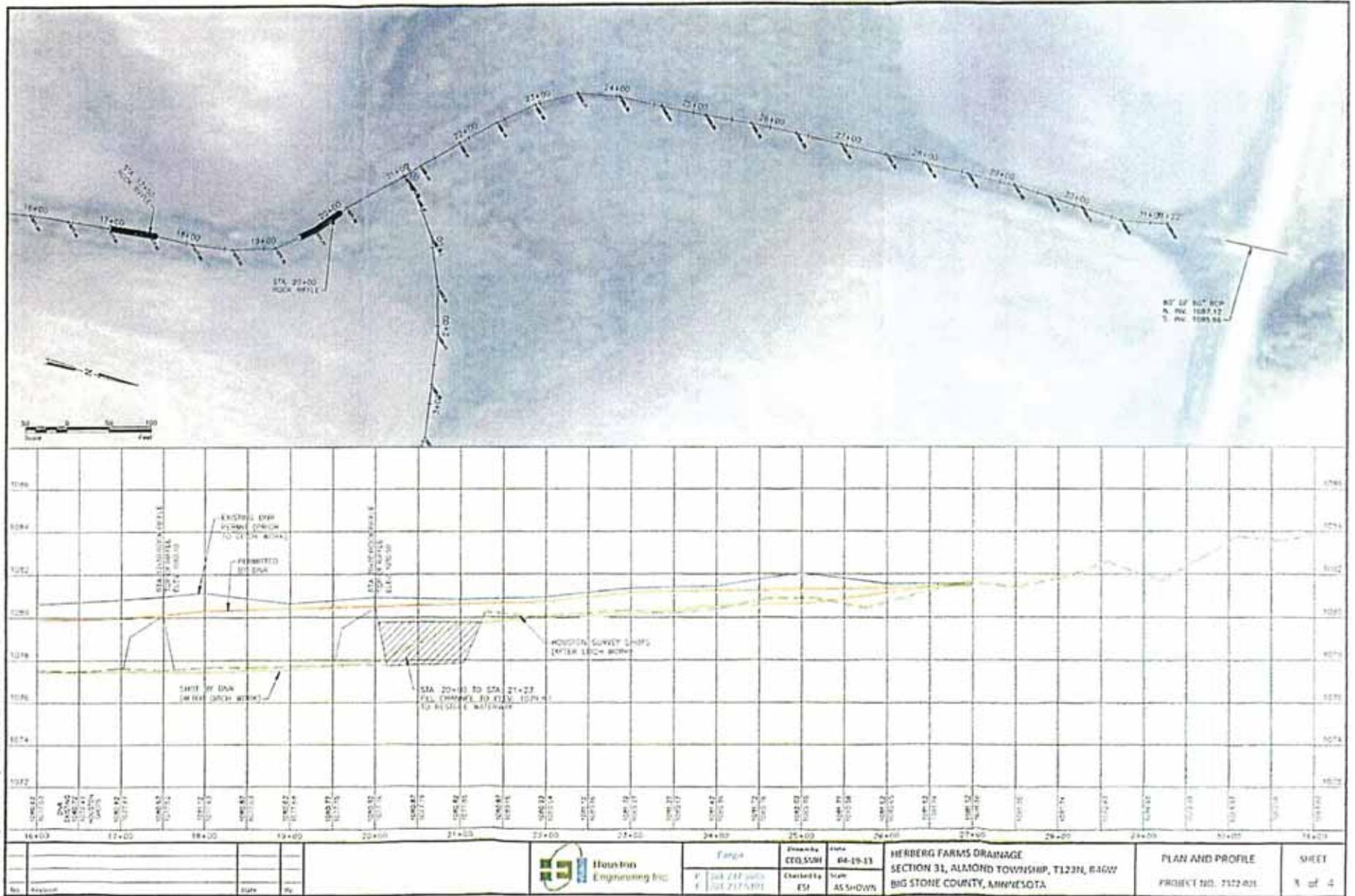
John C. Kolb
JKK/jlp

Enclosure – Revised Restoration Plans dated April 19, 2013

cc: Tom Herberg (w/o encl.)
Ethan Jenzen, Area Hydrologist
Sara Jacobson, Compliance Hydrologist
Curt Vacek, Area Wildlife Manager
Dianne Radermacher, Upper Minnesota Watershed District
Tom Hovey, Violations Coordinator – DNR
Mark Aanenson, Houston Engineering
Skip Wright, DNR EWR District Supervisor
Darrin Wilke, Big Stone County Planning and Zoning
Eric Hanson, Corps of Engineers
Yone Yu, United States Environmental Protection Agency



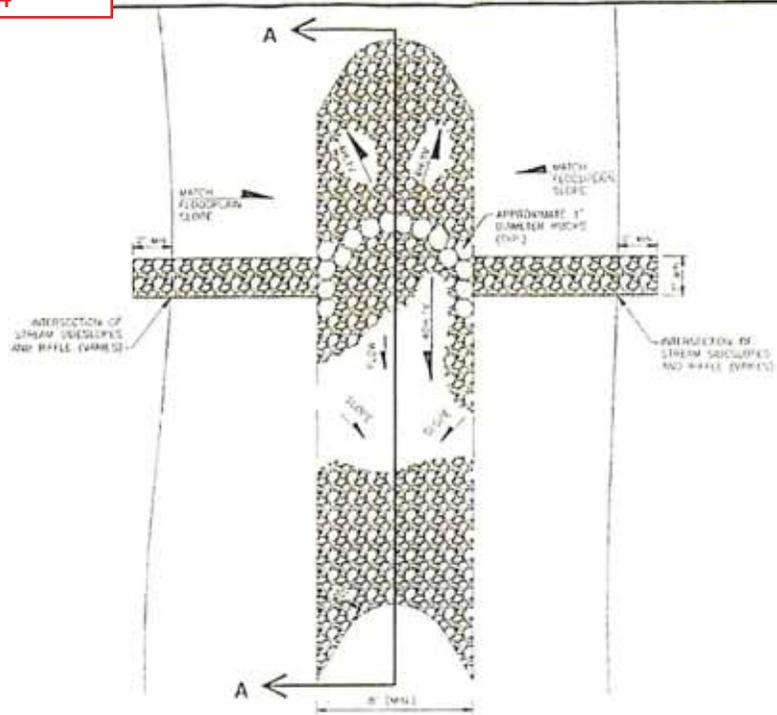
<table border="1"> <tr> <td>No.</td> <td>Revision</td> <td>Date</td> <td>By</td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </table>		No.	Revision	Date	By					<p>Houston Engineering Inc.</p>	Project 2011-03944-ERH	Drawing 151	Date 04-19-11	Name AS SHOWN	HERBERG FARMS DRAINAGE SECTION 31, ALMOND TOWNSHIP, T123N, R46W BIG STONE COUNTY, MINNESOTA	SECTION 31 PROJECT NO. 2011-03944-ERH	SHEET 1 of 4
No.	Revision	Date	By														



Drawn by CEQ/SSM	Date 04-19-13
Checked by ESJ	Scale AS SHOWN

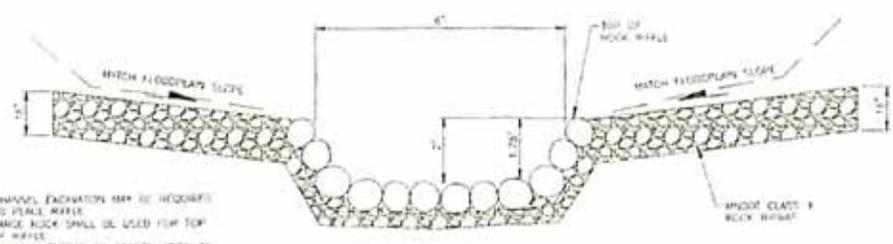
HERBERG FARMS DRAINAGE
SECTION 31, ALMOND TOWNSHIP, T123N, R46W
BIG STONE COUNTY, MINNESOTA

PLAN AND PROFILE	SHEET
PROJECT NO. 7122-031	8 of 8



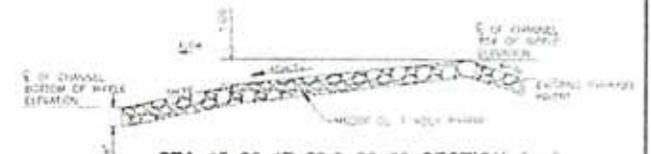
STREAM PLAN VIEW
NOT TO SCALE

STA	CENTERLINE OF CHANNEL AT TOP OF RIFFLE ELEV.	CENTERLINE OF CHANNEL AT BOTTOM OF RIFFLE ELEV.
12+50	1079.6	1077.3
15+00	1079.8	1077.5
17+50	1080.1	1077.6
20+00	1080.5	1077.8



STREAM RIFFLE DETAIL "A"
NOT TO SCALE

- NOTE:
- CHANNEL EXCAVATION MAY BE REQUIRED TO INSTALL RIFFLE
 - LARGE ROCK SHALL BE USED FOR TOP OF RIFFLE
 - AREAS DISTURBED BY CONSTRUCTION TO BE STEREO TO GRADE (MAYOR MAY 270 04 SPEC-MS)



STA. 15+00, 17+50 & 20+00 SECTION A - A
NOT TO SCALE

- NOTE:
- PLACE ADDITIONAL CHANNEL BEDDING MATERIAL AS NECESSARY TO MAINTAIN EXISTING 1% RIFFLE GRADE



STA. 12+50 SECTION A - A
NOT TO SCALE

Minnesota Department of Natural Resources

Southern Region • 261 Highway 15 South • New Ulm, MN • 56073

507-359-6000



November 29, 2010

Mr. Tom Herberg
Box 293
Beardsley, MN 56211

Dear Mr. Herberg:

Re: Limited Permit 2011-0184, Unnamed to Big Stone Lake #06013a, Big Stone County

The Department of Natural Resources has completed its review of your proposal to excavate accumulated sediment from 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.

A site visit conducted on November 3, 2010, found limited evidence of accumulation of sediment downstream of station 13+00, including approximately 900 feet of channel on David Steen WMA. Additionally, it has been determined that excavation downstream of station 13+00 may negatively impact wetlands under the protection of the Wetland Conservation Act.

For the reasons stated above, a portion of your project proposal was determined to be inconsistent with State Public Waters Rules. It is required that any proposed project represent the minimal impact solution to a need with respect to all other reasonable alternatives, and does not exceed more than a minimum encroachment, change or damage to the environment, particularly the ecology of the waters (Minnesota Rules 6115.0201, Subp. 5. C.). In order to comply with these Rules, Permit 2011-0184 is being limited to only allow excavation between station 13+00 and 27+00 (starting 1,300 feet upstream of the David Steen WMA wetland, identified on Attachment A). Please read all the conditions of your permit and ensure that the enclosed Notice of Permit (orange card) is conspicuously displayed during construction.

Note the permit condition regarding wetlands not subject to DNR permit jurisdiction. Contact the appropriate local government unit (County, City, or Soil and Water Conservation District) for a determination concerning compliance with the Wetland Conservation Act. This permit does not authorize you to proceed with your project until you comply with the Act.

Pursuant to Minnesota Statutes, Section 103G.311, Subdivisions 5 and 6, the applicant, the managers of the watershed district, the board of supervisors of the soil and water conservation district or the mayor of the municipality may demand a hearing on the Order provided the demand for hearing and the bond required by Subdivision 6 is filed with the Commissioner within 30 days. No bond or security is required of a public authority that demands a hearing. The statutes further provide that if no demand for hearing is made or if a hearing is demanded but no bond is filed as required by Subdivision 6, the Order shall become final at the expiration of 30 days after mailed notice thereof. Thereafter the validity of the findings of Fact and Order can no longer be challenged in the courts.

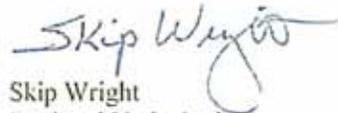
Page 2
Tom Herberg
November 29, 2010

Subdivisions 6 and 7 require that an applicant filing a demand for a public hearing execute and file a corporate surety bond or equivalent security (a check is allowable) to the State of Minnesota. The amount to be filed is \$500.00 as set by the Commissioner. The bond or security shall be conditioned for the payment of certain costs and expenses of the public hearing if the Order is affirmed without material modification; however, the applicant's liability is limited to \$750.00. The \$750.00 limit does not apply when a public hearing is demanded by a public authority, which is not the applicant. Bond forms will be supplied at your request.

If you have any questions, please contact Area Hydrologist Lucas Youngsma at (507) 537-7258.

Thank you for your cooperation in protecting our irreplaceable water resources.

Sincerely,



Skip Wright
Regional Hydrologist

Enclosures

Ec: Lucas Youngsma, Area Hydrologist
Darrin Welle, County SWCD
Curt Vacek, Area Wildlife Manager
Eric Hanson, COE, Regulatory Branch
Upper MN WSD

Darren Wilke, County Planning and Zoning
Norm Haukos, Area Fisheries Manager
Craig Miska, Conservation Officer
DNR Central Office Permits Unit
Kevin Mixon, Ecological & Water Resources



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	

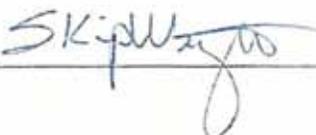
This permit is granted **subject** to the following **CONDITIONS**:

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.

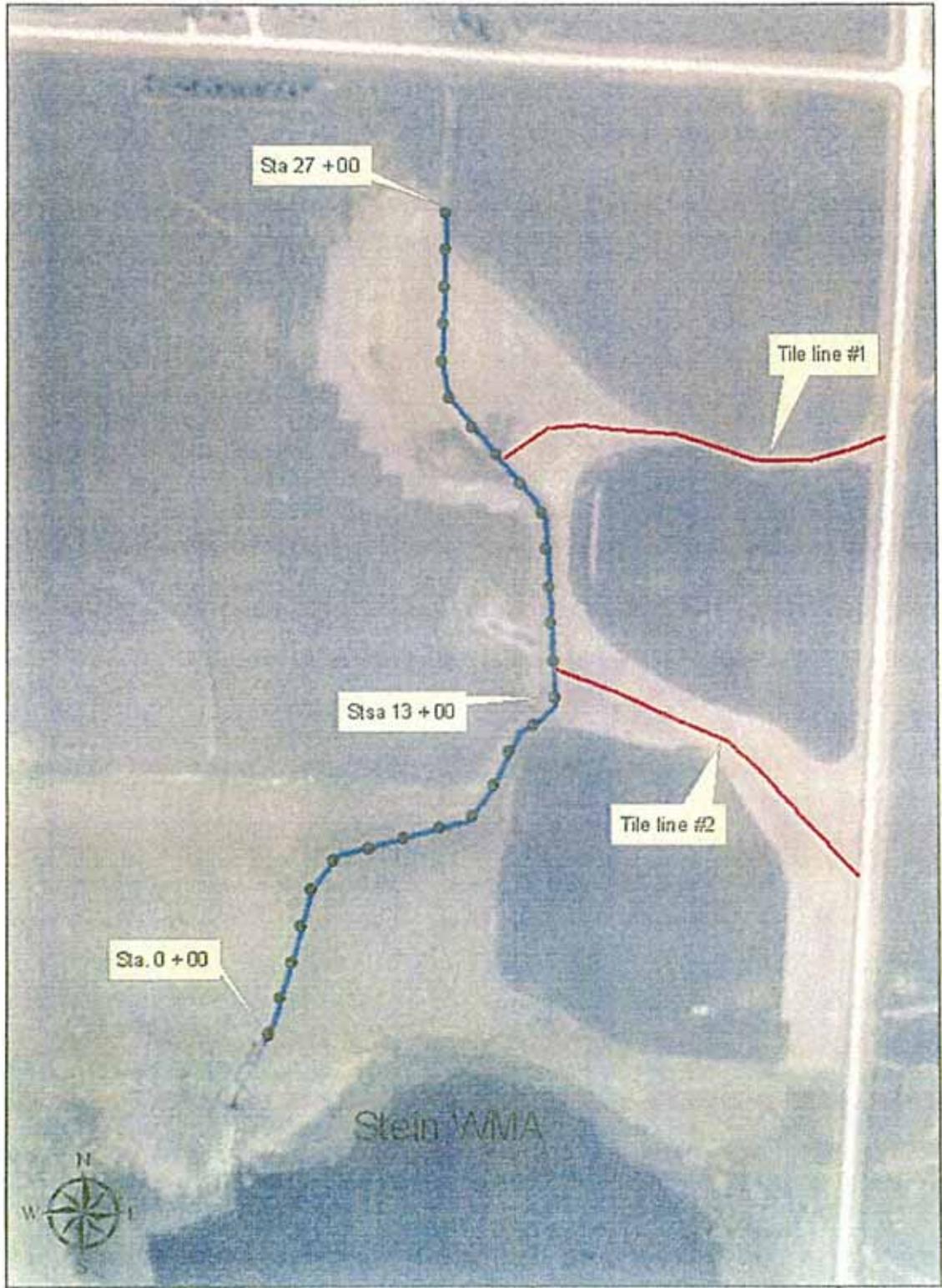
7. Construction work authorized under this permit shall be completed on or before the date specified above. The **permittee** may request an extension of the time to complete the project, stating the reason thereof, upon written request to the Commissioner of Natural Resources.
8. In all cases where 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.

cc: 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

0 200 400 600 1,200 Feet

