



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

SEP 26 2008

REPLY TO THE ATTENTION OF:

WC-15J

CERTIFIED MAIL – 7001 0320 0005 8922 6449
RETURN RECEIPT REQUESTED

Mr. Donald Walser
Kraft, Walser, Hettig, Honsey & Kleiman
131 Main Street South
Hutchinson, MN 55350

Re: Docket No: CWA-05-2008-0005
Duininck Brothers, Inc.
Prinsburg, MN
BD No: 2750843W004

Dear Mr. Walser:

I have enclosed one copy of the fully executed Consent Agreement and Final Order (CAFO) in the resolution of the above case. We filed the signed original with the Regional Hearing Clerk on September 23, 2008.

Please have your client pay the civil penalty of \$90,000 which is due and payable (60) days after the effective date of this CAFO. **Please Note: The payment address on Page 26 Paragraph 155 of the CAFO is incorrect . A Certified or Cashier Check should be made payable to the "Treasurer, United States of America," at the following address:**

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

When submitting your check, **please be sure that the Case Docket No. and the Billing Docket No. (BD) is included at the bottom of your check.** As indicated in your (CAFO) a copy of the check or electronic transfer must be sent to:

Regional Hearing Clerk, (R-13J)
U.S. EPA
77 W. Jackson Blvd.
Chicago, IL 60604

Jenny Davison, (WC-15J)
Life Scientist
U.S. EPA
77 W. Jackson Blvd.
Chicago, IL 60604

John C. Matson
Associate Regional Counsel
U.S. EPA
77 West Jackson Blvd
Chicago, IL 60604

There is now an On Line Payment Option available through the Department of Treasury at <https://www.pay.gov>; which allows you to make payments using your credit card, checking or saving account. Using the Search Public Forms field (left side of page) enter "SFO 1.1" to access the EPA Miscellaneous Payments-Cincinnati Finance Center Form. Follow the instruction for payment.

If you have any questions, please contact Jenny Davison at (312) 886-0184.

Sincerely yours,



Sally K. Swanson, Chief
Water Compliance & Assurance Branch

Enclosure

cc: Ann Foss, MPCA

RECEIVED
REGIONAL HEARING CLERK
2008 JUL 23 PM 3:11

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the matter of:)	Consent Agreement and Final Order
)	Pursuant to 40 C.F.R. § 22.13(b)
Duininck Bros., Inc.,)	In a Proceeding to Assess a Civil Penalty
Prinsburg, Minnesota,)	Under Section 309(g) of the Clean Water Act
)	
Respondent)	Docket No. CWA-05-2008-0005

CONSENT AGREEMENT AND FINAL ORDER

Complainant, the Director of the Water Division, United States Environmental Protection Agency ("U.S. EPA"), Region 5, and Respondent, Duininck Bros., Inc., 408 Sixth Street, Prinsburg, Minnesota ("Respondent"), have agreed to the settlement of this action before the filing of a complaint. Therefore, this action is simultaneously commenced and concluded under Rules 22.13(b) and 22.18(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules) 40 C.F.R. §§ 22.13(b) and 22.18(b). Respondent consents to the entry of this Consent Agreement and Final Order.

PRELIMINARY STATEMENT

1. U.S. EPA institutes this civil administrative proceeding for the assessment of a civil penalty pursuant to the authority Congress granted U.S EPA in Section 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g).

2. Complainant is, by lawful delegation, the Director of the Water Division, United States Environmental Protection Agency, Region 5.

3. Respondent is Duininck Bros., Inc., a Minnesota corporation doing business in Minnesota.

4. U.S. EPA and Respondent enter into this Consent Agreement pursuant to 40 C.F.R. § 22.13(b), which provides that where the parties agree to the settlement of one or more causes of action before the filing of a Complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a Consent Agreement and Final Order (“CAFO”).

STATUTORY AND REGULATORY BACKGROUND

5. To restore and maintain the integrity of the nation’s water, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into navigable waters of the United States by any person, except in compliance with, *inter alia*, a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, establishes the NPDES program under which U.S. EPA and, upon receiving authorization from U.S. EPA, a state may permit discharges into navigable waters, subject to specific terms and conditions.

7. Section 402(p) of the Act, 33 U.S.C. § 1342(p), requires that any storm water discharge associated with industrial activity must comply with the requirements of an NPDES permit.

8. As authorized by Section 402(p) of the Act, 33 U.S.C. § 1342(p), U.S. EPA has issued regulations defining requirements for NPDES permits for storm water discharges. The regulations include those codified at 40 C.F.R. Part 122.26.

9. “Storm water discharge associated with industrial activity” includes discharges associated with “construction activity including clearing, grading, and excavation” activities

resulting in the disturbance of at least five acres or more of total land area. *See* 40 C.F.R. § 122.26(b)(14)(x).

10. 40 C.F.R. § 122.2 defines “discharge of a pollutant” to include any addition of any pollutant to waters of the United States from any point source.

11. “Pollutants” include dredged soil, rock, sand and biological materials. *See* 40 C.F.R. § 122.2.

12. Section 502(7) of the CWA, 33 U.S.C. § 1362(7) defines “navigable waters” as “the waters of the United States, including the territorial seas.”

13. 40 C.F.R. § 122.2 defines “waters of the United States” to include tributaries of waters that “may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”

14. 40 C.F.R. § 122.2 defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

15. On June 30, 1974 U.S. EPA authorized the State of Minnesota (“the State”), through the Minnesota Pollution Control Agency (“MPCA”), to issue and administer NPDES permits for discharges in that State.

16. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. *See* 40 C.F.R. § 122.26(c).

17. A person can comply with the permit requirements for storm water discharges associated with industrial activity by applying for an individual permit, a group permit, or coverage under a general permit. *See* 40 C.F.R. § 122.26(c)(1).

18. Under the general permitting program, the State issues a general permit covering large categories of dischargers who generally do not need individual permits, so long as the state-issued general permit at a minimum meets the federal requirements of 40 C.F.R. § 122.28.

19. 40 C.F.R. § 122.28 allows discharges from storm water point sources to be regulated by General Permits.

20. MPCA's General Permits Program was approved on December 15, 1987.

21. Under the authority of Section 402(a) of the Act, 33 U.S.C. § 1342(a), MPCA issued the General Permit Authorization to Discharge Storm Water Associated with Construction Activity under the NPDES Permit Program for Permit No. MNR 110000 ("the General Permit"), which became effective on September 4, 1998.

22. Under the authority of Section 402(a) of the Act, 33 U.S.C. Section 1342(a), on August 1, 2003 MPCA re-issued the General Permit Authorization to Discharge Storm Water Associated with Construction Activity under the NPDES Permit Program for Permit No. MN R100001 ("General Permit No. MN R100001"). General Permit No. MN R100001 became effective on August 1, 2003.

23. The General Permit established certain limitations and other provisions governing the discharge of storm water from construction sites in the State.

24. Respondent is a Corporation engaged in, *inter alia*, the business of road construction, and Respondent's business is classified as Standard Industrial Classification ("SIC") code number 1611-Highway and Street Construction, Except Elevated Highways.

25. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.

U.S. EPA'S ALLEGATIONS**Highway 27 Lake Osakis Site**

26. Starting on May 17, 2002, Respondent owned, or was engaged in construction activities at the Trunk Highway 27 Construction Project, Project Name S.P. 2106-32 ("Highway 27 Project"), located in the City of Osakis, Minnesota ("the City").

27. At all times relevant to its work on the Highway 27 Project Respondent was engaged in an "industrial activity" pursuant to 40 C.F.R. § 122.26(b)(14).

28. On or about May 15, 2002, an "Application for General Storm Water Permit for Construction Activity (#MNR110000)" ("the Application") was mailed to MPCA for the Highway 27 Project, Project Name S.P 2106-32, located in Osakis, Minnesota.

29. Effective May 17, 2002, MPCA granted coverage under NPDES General Permit MNR110000 to the Highway 27 Project ("the Notice of Coverage").

30. The identification number for the Notice of Coverage for the Highway 27 Project was C00009325.

31. The Notice of Coverage for the Highway 27 Project lists Respondent as the General Contractor.

32. The Highway 27 Project involved construction activity, including "clearing, grading, and excavation activities," resulting in the disturbance of 22.3 acres.

33. Respondent's construction activities at the Highway 27 Project resulted in the disturbance of over five acres.

34. The Highway 27 Project construction site was a "point source," as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

35. The runoff and drainage from the Highway 27 Project is “storm water” as defined in 40 C.F.R. § 122.26(b)(13).

36. Storm water contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

37. The storm water runoff from the Highway 27 Project construction site was the “discharge of a pollutant,” as defined in Sections 502(6) and 502(12) of the CWA, 33 U.S.C. §§ 1362(6) and (12).

38. Storm water, snow melt, surface drainage, and runoff water from the Site of the Highway 27 Project flowed into the City storm sewer system, wetlands, drainage ditches and Lake Osakis (“the water conveyances”).

39. The water conveyances drain to Faille Lake, which drains to Lake Osakis.

40. Lake Osakis is the head waters of the Sauk River.

41. The Sauk River is a “navigable water” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

42. Lake Osakis has a “significant nexus” to the Sauk River; a navigable water within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

43. Lake Osakis is a “water of the United States,” as defined by 40 C.F.R. § 122.2.

44. Respondent’s construction activities at the Highway 27 Project resulted in storm water associated with industrial activity being discharged into Lake Osakis, a water of the United States.

Willmar Airport Site

45. On October 17, 2003, the Willmar Municipal Airport Grading/Dr project (“Willmar Airport Project”), located in the City of Willmar, Minnesota, received coverage from MPCA under General Permit No. MN R100001.

46. Duinick was listed as the contractor on the October 7, 2003 Application for General Storm Water Permit for Construction Activity (MNR100001) for the 203 Willmar Airport Grading/DR Project (Identification number C00010974), and in the “Notice of Storm Water Permit Coverage” for the construction project.

47. The Willmar Airport Project involved construction activity, including “clearing, grading, and excavation activities,” resulting in the disturbance of 176 acres.

48. Thus, Respondent’s construction activities at the Willmar Airport Project resulted in the disturbance of over five acres.

49. At all times relevant to its work on the Willmar Airport Project Respondent was engaged in an “industrial activity” pursuant to 40 C.F.R. § 122.26(b)(14).

50. The storm water runoff from the Willmar Airport Project was the “discharge of a pollutant,” as defined in Sections 502(6) & 502(12) of the CWA, 33 U.S.C. §§1362(6) & (12).

51. The Willmar Airport Project was a “point source,” as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

52. The Application for General Storm Water Permit for Construction Activity (#MNR100001) submitted for the Willmar Airport Project identified Hawk Creek as a surface water “that will receive storm water from the site or discharge from permanent storm water management system.”

53. The Storm Water Pollution Prevention Plan (“SWPPP”) for the Willmar Airport Project shows that the water conveyances drain to Hawk Creek.

54. Hawk Creek is a tributary to the Minnesota River.

55. Hawk Creek has a “significant nexus” to the Minnesota River; a navigable water within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

56. Hawk Creek is a “navigable water” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

57. Hawk Creek is a “water of the United States,” as defined by 40 C.F.R. § 122.2.

58. Duinick’s construction activities at the Willmar Airport Project resulted in the discharge of storm water associated with industrial activity into Hawk Creek; a water of the United States.

**Count 1: Failure to Stabilize Drainage Ditches
October 30, 2002-Osakis, MN**

59. For the Highway 27 Project, Section I.D.1.c of the General Permit required that “[t]he bottom of any temporary or permanent drainage ditch constructed to drain water from a construction site must be stabilized within 100 lineal feet from a water of the state. Stabilization must be initiated within 24 hours of connecting the drainage ditch to a water of the state, existing gutter, storm sewer inlet, drainage ditch, or other storm water conveyance system which discharges to waters of the state and completed within five calendar days.”

60. On October 30, 2002, MPCA and Sauk River Watershed District (“SRWD”) personnel conducted a joint inspection of the Highway 27 Project located in the City of Osakis, Minnesota (the “October 30, 2002 inspection”).

61. During the October 30, 2002 Inspection, MPCA observed that Respondent had failed to install temporary and/or permanent stabilization along drainage ditches north and south of the Highway 27 Project roadway along the east end of the site.

62. Respondent's failure to stabilize drainage ditches along the Highway 27 Project area violated Section I.D.1.c of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

Count 2: Failure to Stabilize Drainage Ditches
March 18, 2003-Osakis, MN

63. For the Highway 27 Project, Section I.D.1.c of the General Permit required that “[t]he bottom of any temporary or permanent drainage ditch constructed to drain water from a construction site must be stabilized within 100 lineal feet from a water of the [S]tate. Stabilization must be initiated within 24 hours of connecting the drainage ditch to a water of the state, existing gutter, storm sewer inlet, drainage ditch, or other storm water conveyance system which discharges to waters of the state and completed within five calendar days.”

64. On March 18, 2003 SRWD personnel, and members of Minnesota Department of Transportation, conducted a joint inspection of the Highway 27 Project located in the City of Osakis, Minnesota (the “March 18, 2003 inspection”).

65. During the March 18, 2003 Inspection, SRWD Inspectors observed that Respondent had failed to add temporary and/or permanent stabilization along drainage ditches along the north and south of the Highway 27 Project roadway along the east end of the site, north of Highway 27 along the center of the site by the NAPA property, and along the Olsen property (mid/east end of the site), and north of Highway 27 along the west end of the site.

66. Respondent's failure to stabilize drainage ditches along the Highway 27 Project area violated Section I.D.1.c of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 3: Failure to Stabilize Drainage Ditches
March 24, 2003-Osakis, MN**

67. For the Highway 27 Project, Section I.D.1.c of the General Permit required that "[t]he bottom of any temporary or permanent drainage ditch constructed to drain water from a construction site must be stabilized within 100 lineal feet from a water of the [S]tate. Stabilization must be initiated within 24 hours of connecting the drainage ditch to a water of the state, existing gutter, storm sewer inlet, drainage ditch, or other storm water conveyance system which discharges to waters of the state and completed within five calendar days."

68. On March 24, 2003, MPCA and SRWD Inspectors conducted a joint inspection of the Highway 27 Project Located in the City of Osakis, Minnesota (the "March 24, 2003 inspection").

69. During the March 24, 2003 Inspection, MPCA and SRWD Inspectors observed that Respondent had failed to add temporary and/or permanent stabilization along drainage ditches along the south of the Highway 27 Project roadway along the west and east ends of the site, and along the Northwest quadrant of 27 and 127.

70. Respondent's failure to stabilize drainage ditches along the Highway 27 Project area violated Section I.D.1.c of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 4: Failure to Install Temporary or Permanent Stabilization
October 30, 2002-Osakis, MN**

71. For the Highway 27 Project, Section I.D.1.b of the General Permit required that “[u]nless precluded by snow cover, all exposed soil areas with a continuous positive slope within 100 lineal feet from a water of the state, or from a curb, gutter, storm sewer inlet, temporary or permanent drainage ditch or other storm water conveyance system, which is connected to a water of the state, shall have temporary protection or permanent cover for exposed soil areas.”

72. During the October 30, 2002 Inspection, MPCA observed that Respondent had failed to install either temporary protection or permanent cover for exposed soil areas along the north and south of the Highway 27 Project roadway along the east end of the site.

73. Respondent’s failure to stabilize exposed soil areas along the Highway 27 project area violated Section I.D.1.b of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 5: Failure to Install Temporary or Permanent Stabilization
March 18, 2003-Osakis, MN**

74. For the Highway 27 Project, Section I.D.1.b of the General Permit required that “[u]nless precluded by snow cover, all exposed soil areas with a continuous positive slope within 100 lineal feet from a water of the state, or from a curb, gutter, storm sewer inlet, temporary or permanent drainage ditch or other storm water conveyance system, which is connected to a water of the state, shall have temporary protection or permanent cover for exposed soil areas.”

75. During the March 18, 2003 Inspection, SRWD Inspectors observed that Respondent had failed to install either temporary protection or permanent cover for exposed soil areas north and south of the Highway 27 Project roadway along the east end of the site, as well as north of

Highway 27 along the center of the site by the NAPA property, and along the Olsen Property (mid/east end of the site), and north of Highway 27 along the west end of the site.

76. Respondent's failure to stabilize exposed soil areas along the Highway 27 project area violated Section I.D.1.b of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342..

**Count 6: Failure to Install Temporary or Permanent Stabilization
March 24, 2003-Osakis, MN**

77. For the Highway 27 Project, Section I.D.1.b of the General Permit required that “[u]nless precluded by snow cover, all exposed soil areas with a continuous positive slope within 100 lineal feet from a water of the state, or from a curb, gutter, storm sewer inlet, temporary or permanent drainage ditch or other storm water conveyance system, which is connected to a water of the state, shall have temporary protection or permanent cover for exposed soil areas.”

78. During the March 24, 2003 Inspection, MPCA and SRWD Inspectors observed that Respondent had failed to install either temporary protection or permanent cover for exposed soil areas north and south of the Highway 27 Project roadway along the west and east ends of the site and on the northwest quadrant of Highways 27 and 127.

79. Respondent's failure to stabilize exposed soil areas along the Highway 27 project area violated Section I.D.1.b of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 7: Discharge Not Entirely Composed of Storm Water
October 30, 2002-Osakis, MN**

80. For the Highway 27 Project, Appendix C, Part D of the General Permit required that “[a]ll discharges of storm water associated with a construction activity shall be composed entirely

of storm water.” Part I.E.c. states that “...the permittee shall remove all deltas and sediment deposited in drainage ways, catch basins, or waters of the state...”

81. During the October 30, 2002 Inspection, MPCA observed that sediment was in drainage ditches along the north and south of the Highway 27 Project roadway along the east end of the site.

82. Respondent's failure to keep discharges composed entirely of storm water along these areas of the Highway 27 Project violated Appendix C, Part D of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 8: Discharge Not Entirely Composed of Storm Water
March 18, 2003-Osakis, MN**

83. For the Highway 27 Project, Appendix C, Part D of the General Permit required that “[a]ll discharges of storm water associated with a construction activity shall be composed entirely of storm water.” Part I.E.c. states that “...the permittee shall remove all deltas and sediment deposited in drainage ways, catch basins, or waters of the state...”

84. During the March 18, 2003 Inspection, SRWD Inspectors observed that sediment was in drainage ditches along the north and south sides of the Highway 27 Project roadway along the east end of the site.

85. Respondent's failure to remove sediment deposited in the drainageway along these areas of the Highway 27 Project violated Appendix C, Part D of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

Count 9: Discharge Not Entirely Composed of Storm Water
March 24, 2003-Osakis, MN

86. For the Highway 27 Project, Appendix C, Part D of the General Permit required that “[a]ll discharges of storm water associated with a construction activity shall be composed entirely of storm water.” Part I.E.c. states that “...the permittee shall remove all deltas and sediment deposited in drainage ways, catch basins, or waters of the state...”

87. During the March 24, 2003 Inspection, MPCA and SRWD Inspectors observed that sediment was in drainage ditches south of the Highway 27 Project roadway along the east end of the site, and north and south of Highway 27 on the west end of the site. Additional sediment was observed along the southwest quadrant of Highways 127 and 27.

88. Respondent’s failure to keep discharges composed entirely of storm water along these areas of the Highway 27 Project violated Appendix C, Part D of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

Count 10: Failure to Establish BMPs
October 30, 2002-Osakis, MN

89. For the Highway 27 Project, Section I.D.2.a of the General Permit required that “[s]ediment control best management practices (BMPs) which prevent sediment from entering a water of the state, gutter, storm sewer inlet, ditch or other storm water conveyance system, shall be established on all down gradient perimeters before any up gradient land disturbing activities begin, and shall remain in place until final stabilization has been established.”

90. During the October 30, 2002 Inspection, MPCA observed that Respondent had failed to install and or maintain BMPs, which prevent sediment from entering the drainage ditches along the north and south of the Highway 27 Project roadway along the east end of the site.

91. Respondent's failure to establish BMPs along these areas of the Highway 27 Project violated Section I.D.2.a of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 11: Failure to Establish BMPs
March 18, 2003-Osakis, MN**

92. For the Highway 27 Project, Section I.D.2.a of the General Permit required that “[s]ediment control best management practices (BMPs) which prevent sediment from entering a water of the state, gutter, storm sewer inlet, ditch or other storm water conveyance system, shall be established on all down gradient perimeters before any up gradient land disturbing activities begin, and shall remain in place until final stabilization has been established.”

93. During the March 18, 2003 Inspection, SRWD Inspectors observed that Respondent had failed to install and or maintain BMPs, which prevent sediment from entering the drainage ditches along the north and south of the Highway 27 Project roadway along the east end of the site.

94. Respondent's failure to establish BMPs along these areas of the Highway 27 Project violated Section I.D.2.a of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 12: Failure to Establish BMPs
March 24, 2003-Osakis, MN**

95. For the Highway 27 Project, Section I.D.2.a of the General Permit required that “[s]ediment control best management practices (BMPs) which prevent sediment from entering a water of the state, gutter, storm sewer inlet, ditch or other storm water conveyance system, shall be established on all down gradient perimeters before any up gradient land disturbing activities begin, and shall remain in place until final stabilization has been established.”

96. During the March 24, 2003 Inspection, MPCA and SRWD Inspectors observed that Respondent had failed to had failed to install and or maintain BMPs, which prevent sediment from entering the drainage ditches along the west end of the Highway 27 Project.

97. Respondent's failure to establish BMPs along these areas of the Highway 27 Project violated Section I.D.2.a of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 13: Failure to Minimize Vehicle Trackout
October 30, 2002-Osakis, MN**

98. For the Highway 27 Project, Section I.D.2.b of the General Permit required that "the Permittee shall minimize vehicle tracking of sediment or soil off site at locations where vehicles exit the construction site onto paved surfaces."

99. During the October 30, 2002 Inspection, MPCA observed that extensive sediment had been tracked onto the roadway along the west end of the site.

100. Respondent's failure to minimize vehicle track out of sediment to offsite location along the Highway 27 Project violated Section I.D.2.b of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 14: Failure to Minimize Vehicle Trackout
March 24, 2003-Osakis, MN**

101. For the Highway 27 Project, Section I.D.2.b of the General Permit required that "the Permittee shall minimize vehicle tracking of sediment or soil off site at locations where vehicles exit the construction site onto paved surfaces."

102. During the March 24, 2003 Inspection, MPCA and SRWD Inspectors observed that extensive sediment had been tracked along 100 feet on north side of Highway 27 along the east end of the site.

103. Respondent's failure to minimize vehicle tracking of sediment to offsite locations along the Highway 27 Project violated Section I.D.2.b of the General, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 15: Failure to Provide Energy Dissipation at Pipe & Drainage Outlets
October 30, 2002-Osakis, MN**

104. For the Highway 27 Project, Section I.D.1.d of the General Permit required that "prior to connecting any pipe to a water of the state or drainage ditch, the pipe's outlet must be provided with temporary or permanent energy dissipation to prevent erosion."

105. During the October 30, 2002 Inspection, MPCA observed that Respondent had failed to install energy dissipation at approximately 6 outlets along the north and south of the Highway 27 Project roadway along the east end of the site.

106. Respondent's failure to install energy dissipation devices along these areas of the Highway 27 Project violated Section I.D.1.d of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 16: Failure to Provide Energy Dissipation at Pipe & Drainage Outlets
March 18, 2003-Osakis, MN**

107. For the Highway 27 Project, Section I.D.1.d of the General Permit required that "prior to connecting any pipe to a water of the state or drainage ditch, the pipe's outlet must be provided with temporary or permanent energy dissipation to prevent erosion."

108. During the March 18, 2003 Inspection, SRWD Inspectors observed that Respondent had failed to install energy dissipation at approximately 2 outlets along the south side the Highway 27 Project roadway along the east end of the site and at 2 culverts north of 27 at the west end of the site.

109. Respondent's failure to install energy dissipation devices along these areas of the Highway 27 Project violated Section I.D.1.d of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 17: Failure to Repair or Replace Non-Functional BMPs
October 30, 2002-Osakis, MN**

110. For the Highway 27 Project, Section I.E.1.a of the General required that “[a]ll non functional perimeter sediment control BMPs and...erosion control BMPs shall be repaired, replaced, or supplemented with functional BMPs as soon as field conditions allow access.”

111. During the October 30, 2002 Inspection, MPCA observed that Respondent had failed to replace or re-install a lacking and failing silt fence north and south of the Highway 27 Project roadway along the east end of the site.

112. Respondent's failure to repair and/or replace non-functional BMPs along these areas of the Highway 27 Project violated Section I.E.1.a of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 18: Failure to Repair or Replace Non-Functional BMPs
March 18, 2003-Osakis, MN**

113. For the Highway 27 Project, Section I.E.1.a of the General Permit required that “[a]ll non functional perimeter sediment control BMPs and...erosion control BMPs shall be repaired, replaced, or supplemented with functional BMPs as soon as field conditions allow access.”

114. During the March 18, 2003 Inspection, SRWD Inspectors observed that Respondent had failed to replace or re-install a lacking and failing BMP including: 10 feet of silt fence along the south of the Highway 27 Project roadway along the east end of the site, and 20 feet of silt fence along two areas at west end of the site.

115. Respondent's failure to repair and/or replace non-functional BMPs along these areas of the Highway 27 Project violated Section I.E.1.a of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 19: Failure to Repair or Replace Non-Functional BMPs
March 24, 2003-Osakis, MN**

116. For the Highway 27 Project, Section I.E.1.a of the General Permit required that "[a]ll non-functional perimeter sediment control BMPs and...erosion control BMPs shall be repaired, replaced, or supplemented with functional BMPs as soon as field conditions allow access."

117. During the March 24, 2003 Inspection, MPCA and SRWD Inspectors observed that Respondent had failed to replace or re-install a lacking and failing BMP including: reinstalling temporary cover along the north side of Highway 27 on the east end of the site, and re-installing a silt fence for approximately 12 feet north of Highway 27 on the west end of the site and along the north west quadrant of 27 and 127.

118. Respondent's failure to repair and/or replace non-functional BMPs along these areas of the Highway 27 Project violated Section I.E.1.a of the General Permit, as well as Section 301 of the CWA, 33 U.S.C. § 1311 and Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 20: Failure to List the Location of All Required BMPs in the SWPPP
October 22, 2004-November 2, 2005-Willmar Airport Project**

119. Section III.A.3. of General Permit No. MN R100001 requires that “[t]he SWPPP requirements must be incorporated into the project’s final plans and specifications and/or documentation, as appropriate and must include a Location and type of all temporary and permanent erosion prevention and sediment control BMPs along with the procedures to be used to establish additional temporary BMPs as necessary for the site conditions during construction. Standard plates and or specifications for the BMPs used on the project must be included in the final plans and specifications for the project.”

120. On November 9, 2004, Respondent had not included in its SWPP the location and type of all temporary and permanent erosion prevention and sediment control BMPs along with the procedures to be used to establish additional temporary BMPs as necessary for the site conditions during construction.

121. Respondent’s failure to include all necessary BMPs in the SWPPP violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

**Count 21: Failure to Install Energy Dissipation at Pipe Outlets
November 9, 2004-Willmar Airport Project**

122. Section IV.B.4 of General Permit No. MN R100001 requires that “[p]ipe outlets must be provided with temporary or permanent energy dissipation within 24 hours of connection to a surface water.”

123. On November 9, 2004, Respondent had not installed energy dissipation at the pipe outfall which discharges to Hawk Creek on the western perimeter of the site.

124. November 9, 2004 was more than 24 hours from the connection of the pipe outlet to a surface water.

125. Respondent's failure to install energy dissipation at the pipe outlet connecting to Hawk Creek violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

**Count 22: Failure to Install Sediment Control Practices on all Down Gradient Perimeters
January 21, 2004-Willmar, MN**

126. Section IV.C.2 of General Permit No. MN R100001 requires that "Sediment control practices must be established on all down gradient perimeters before any upgradient land disturbing activities begin. These practices shall remain in place until the final stabilization has been established..."

127. On January 21, 2004 MPCA personnel conducted a joint inspection of the Willmar Airport Project located in the City of Willmar, Minnesota (the "January 21, 2004 inspection").

128. On January 21, 2004, Respondent failed to protect stockpiles on the site by installing sediment control practices on down gradient perimeters.

129. On January 21, 2004, Respondent had begun upgradient land disturbing activities.

130. Respondent's failure to install sediment control practices on down gradient perimeters prior to initiating upgradient land disturbing activities violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

**Count 23: Failure to Install Sediment Control Practices on All Down Gradient Perimeters
November 9, 2004-Willmar, MN**

131. Section IV.C.2 of General Permit No. MN R100001 requires that “[s]ediment control practices must be established on all down gradient perimeters before any upgradient land disturbing activities begin. These practices shall remain in place until the final stabilization has been established...”

132. On November 9, 2004, Respondent failed to establish and maintain sediment control practices on the southwestern perimeters of the site, because the Site had fallen silt fences and sediment was piled along a silt fence.

133. On November 9, 2004, Respondent also failed to establish and maintain sediment control practices down gradient to the roadways in the western side of the site.

134. On November 9, 2004, Respondent had begun upgradient land disturbing activities.

135. Respondent's failure to install sediment control practices on down gradient perimeters violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

**Count 24: Discharges not Entirely Composed of Stormwater
November 9, 2004-Willmar, MN**

136. Section V.C of General Permit No. MN R100001 “prohibits discharges of any material other than storm water.”

137. On November 9, 2004, Hawk Creek was contaminated with sediment near the pipe outfalls along the western perimeter of the site.

138. Respondent's discharge of sediment into Hawk Creek violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

**Count 25: Failure to Appropriately Install BMPS Specified in the SWPPP
November 9, 2004-Willmar, MN**

139. Section IV.A of General Permit No. MN R100001 requires that “[t]he Best Management Practices identified in the SWPPP and in this permit must be installed in an appropriate and functional manner”

140. On November 9, 2004, the following BMPs specified in the SWPPP were not installed or were installed inappropriately: (1) a silt fence on the south western portion of the site was falling; (2) bio-rolls were not appropriately tacked to the ground; (3) erosion control blankets were not at onsite pipe outlets.

141. Respondent’s failure to appropriately install BMPs specified in the SWPPP violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

**Count 26: Failure to Stabilize Exposed Soils
January 21, 2004-Willmar, MN**

142. Section IV.B.2 of General Permit No. MN R100001 requires that “[a]ll exposed soil areas with a continuous positive slope within 200 lineal feet of a surface water must have temporary erosion protection or permanent cover for the exposed soil areas year round, according to the following table of slopes and time frames... These areas include constructed storm water management pond side slopes, and any exposed soil areas with a positive slope to a storm water conveyance system, such as a curb and gutter system, storm sewer inlet, temporary or permanent drainage ditch or other natural or man made systems that discharge to a surface water.”

143. On January 21, 2004, Respondent had not stabilized exposed soils along the ditch banks east of County Road 116.

144. Respondent's failure to stabilize the southwest portion of the site violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

**Count 27: Failure to Stabilize Exposed Soils
November 9, 2004-Willmar, MN**

145. Section IV.B.2 of General Permit No. MN R100001 requires that "[a]ll exposed soil areas with a continuous positive slope within 200 lineal feet of a surface water must have temporary erosion protection or permanent cover for the exposed soil areas year round, according to the following table of slopes and time frames...These areas include constructed storm water management pond side slopes, and any exposed soil areas with a positive slope to a storm water conveyance system, such as a curb and gutter system, storm sewer inlet, temporary or permanent drainage ditch or other natural or man made systems that discharge to a surface water. "

146. On November 9, 2004, at least 75% of the southwest portion of the site, including storm water conveyance systems, did not have temporary or permanent stabilization.

147. Respondent's failure to stabilize the southwest portion of the site violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

**Count 28: Failure to Repair or Replace Non-Functional BMPs
November 9, 2004-Willmar, MN**

148. Section IV.E .4.a of General Permit No. MN R100001 requires that "[a]ll silt fences must be repaired, replaced, or supplemented when they become non-functional or the sediment reaches 1/3 of the height of the fence."

149. On November 9, 2004, sediment was above 1/3 the height of the silt fence on the south portion of the site. Additional silt fence was falling along the southern end of the site.

150. Respondent's failure to repair or replace silt fence along the southern portion of the site violated Section 301 of the CWA, 33 U.S.C. §1311 and Section 402 of the CWA, 33 U.S.C. §1342.

CONSENT AGREEMENT

151. After further communications, and based upon such factors as good faith, cooperation, and litigation considerations, U.S. EPA and Respondent agree to settle these matters for \$90,000.00.

152. For the purposes of this proceeding, and pursuant to 40 C.F.R. § 22.18(b) and (c), Respondent: (1) admits that U.S. EPA has jurisdiction over the subject matter set forth in this consent agreement; (2) does not admit the facts alleged by U.S. EPA above; and (3) consents to the settlement terms of this CAFO, which begin at paragraph 151 above.

153. Upon execution of the final order attached hereto, Respondent waives all rights to request a judicial or administrative hearing on any issue of law or fact set forth in this consent agreement, including, but not limited to, its right to request a hearing under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and its right to appellate review of the attached Final order found at section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B).

154. Respondent must pay the \$90,000.00 civil penalty by mailing a certified or cashier's check made payable to "Treasurer, United States of America" within 60 days after the effective date of this CAFO, which is the date that the CAFO is filed with the Regional Hearing Clerk. U.S. EPA reserves the right to require Respondent to provide a docket number on the check.

155. Respondent must send the check to the following address:

U.S. EPA, Region 5
P.O. Box 371531
Pittsburgh, PA 15251-7531

156. This civil penalty is not deductible for federal tax purposes.

157. A transmittal letter, stating Respondent's name, complete address, and the case docket number must accompany the payment. Respondent shall simultaneously and separately send notice of such payment, including a copy of the check, to each of the following three parties at the address indicated:

Regional Hearing Clerk
Planning and Management Division (19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

John C. Matson
Associate Regional Counsel
Office of Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Jenny Davison
Water Division (WC-15J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

158. Respondent's failure to pay the assessed civil penalty in accordance with the provisions of this CAFO, above, will result in the referral of this matter to the United States Department of Justice for collection in accordance with Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. In addition to any unpaid balance and interest of this penalty,

Respondent shall also be required to pay attorney's fees and costs for collection proceedings and a quarterly nonpayment penalty. This nonpayment penalty shall be in an amount equal to 20% of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of each such quarter.

159. Interest shall accrue on any amount overdue under the terms of this CAFO at an annual rate calculated in accordance with 40 C.F.R. § 13.11.

160. This CAFO settles U.S. EPA's claims for the violations alleged above.

161. Nothing in this CAFO relieves Respondent of the duty to comply with the Clean Water Act, or other federal, state or local laws or statutes.

162. This Consent Agreement binds both parties, their officers, directors, employees, successors, and assigns to this action. The representative of each party signing this consent agreement certifies that he or she has authority to enter into the terms of this consent agreement and bind that party to it.

163. Each party agrees to bear its own costs accrued in the course of this action.


164. Pursuant to 40 C.F.R. § 22.38, on May 8, 2008, the State of Minnesota was notified of this proceeding.

165. The effective date of this CAFO is the date that the Final Order signed by the Regional Administrator or his designated representative is filed in the office of the Regional Hearing Clerk, and is subject to the requirements of Section 309(g)(4)(C) of the Act, 33 U.S.C. 1319(g)(4)(C).

166. This CAFO constitutes the entire agreement between the parties.

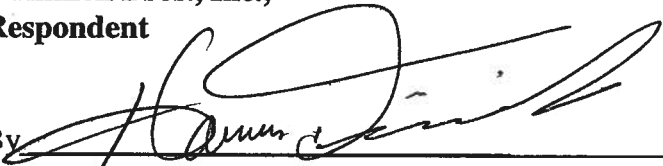
**United States Environmental Protection Agency, Region 5,
Complainant**

Date 7-18-08

By 
Tinka Hyde
Acting Director, Water Division
U.S. EPA, Region 5

**Duininck Bros., Inc.,
Respondent**

Date July 7, 08

By 
Harris Duinick
Vice-President
Duininck Bros., Inc.

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US EPA, REGION 5

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CONSENT AGREEMENT AND FINAL ORDER
In the Matter of: Duininck Bros., Inc.
Docket No. CWA-05-2008-0005

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is hereby ORDERED to comply with all of the terms of the Consent Agreement, effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This Order disposes of this matter pursuant to 40 C.F.R. § 22.18(c).

By: Walter W. Kordulak
Lynn Buhl
Regional Administrator
United States Environmental Protection Agency
Region 5

Dated: 9/22/08

Facility Name: Duininck Brothers, Inc.
Location: Prinsburg, MN
Docket No: CWA-05-2008-0005
BD No: 2750843W004

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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this Administrative Complaint was filed with the Regional Hearing Clerk on September 23, 2008. The above referenced document was sent Certified Mail to:

CERTIFIED MAIL 7001 0320 0005 8922 6449
RETURN RECEIPT REQUESTED

Mr. Donald Walser
Kraft, Walser, Hettig, Honsey & Kleiman
131 Main Street South
Hutchinson, MN 55350

CERTIFIED MAIL 7004 2510 0000 9556 1783
RETURN RECEIPT REQUESTED

Ms. Ann Foss, North District Manager
Minnesota Pollution Control Agency
520 Lafayette Road
St. Paul, MN 55155-4194

Denise Moore Denise Moore
Title: Program Assistant
Date: 9-26-08