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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
 REGION 5

REGIONAL HEARING CLERK  
 U.S. ENVIRONMENTAL  
 PROTECTION AGENCY,

In the Matter of:	)	
	)	Consent Agreement and Final Order
<b>City of Willmar, Minnesota</b>	)	In a Proceeding to Assess a Civil Penalty
	)	Under Section 309(g) of the
Respondent	)	Clean Water Act
	)	
	)	Docket No.: CWA-05-2009-0005
_____	)	

**CONSENT AGREEMENT AND FINAL ORDER**

Complainant, the Director of the Water Division, U.S. Environmental Protection Agency, Region 5, and Respondent, City of Willmar, 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* found at 40 C.F.R. §§ 22.13(b) and 22.18(b). Respondent consents to the entry of this Consent Agreement and Final Order ("CAFO").

**PRELIMINARY STATEMENT**

1. EPA institutes this civil administrative proceeding for the assessment of a civil penalty pursuant to the authority granted 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. Respondent is a "person" as that term is defined at Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

## STATUTORY AND REGULATORY BACKGROUND

3. 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.

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

5. Section 402(p) of the CWA, 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.

6. As authorized by Section 402(p) of the CWA, 33 U.S.C. § 1342(p), 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.

7. "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).

8. 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.

9. “Pollutants” includes “dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq. )), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *See* 40 C.F.R. § 122.2.

10. 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.”

11. 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.”

12. 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.”

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

14. Dischargers of storm water associated with industrial 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).

15. Under the general permitting program, the State issues a general permit covering large categories of dischargers who generally do not need individual permits. *See* 40 C.F.R. § 122.28.

16. 40 C.F.R. § 122.28 allows discharges from storm water point sources to be regulated by general permits.

17. Minnesota Statutes 115.04 (a) allows the MPCA “to administer and enforce all laws relating to the pollution of any of the waters of the state.”

18. EPA approved MPCA’s general permits program on December 15, 1987.

19. Under the authority of Section 402(b) of the CWA, 33 U.S.C. Section 1342(b), on August 1, 2003, MPCA issued the General Permit Authorization to Discharge Storm Water Associated with Construction Activity, Permit No. MN R100001 (“General Permit”). The General Permit became effective on August 1, 2003.

20. The General Permit established certain limitations and other provisions governing the discharge of storm water from construction sites in Minnesota. Among other requirements, the General Permit requires the submission of a storm water pollution prevention plan (“SWPPP”) that identifies, among other things, Best Management Practices (“BMPs”).

#### **ALLEGATIONS**

21. On October 17, 2003, the Willmar Municipal Airport Grading project (“Willmar Airport Project”), located in the City of Willmar, Minnesota, received coverage from MPCA under the General Permit.

22. Respondent was listed as the owner of the Willmar Airport Project on the application for the General Permit and in the “Notice of Storm Water Permit Coverage” for the project.

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

24. 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)(x).

25. The storm water runoff from the Willmar Airport Project 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).

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

27. The application for the General Permit identified Hawk Creek as a surface water that receives storm water from the Willmar Airport Project.

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

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

30. EPA personnel conducted an inspection of the Willmar Airport Project on November 9, 2004.

**Count 1: Failure to List the Location of All Required BMPs in the SWPPP**

31. Paragraphs 1 through 30 of this CAFO are incorporated herein.

32. Section III.A.3. of the General Permit requires that the SWPPP must identify the location and type of all temporary and permanent erosion prevention and sediment control BMPs.

33. On November 9, 2004, Respondent had not identified in its SWPPP the location and type of all temporary and permanent erosion prevention and sediment control BMPs at the Willmar Airport Project.

34. Respondent's failure to identify the location and type of all necessary BMPs in the SWPPP violated Section III.A.3. of the General Permit.

**Count 2: Failure to Install Energy Dissipation at Pipe Outlets**

35. Paragraphs 1 through 30 of this CAFO are incorporated herein.

36. Section IV.B.4. of the General Permit requires that “[p]ipe outlets must be provided with temporary or permanent energy dissipation within 24 hours of connection to a surface water.”

37. 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 Willmar Airport Project.

38. November 9, 2004, was more than 24 hours after the connection of the pipe outlet to Hawk Creek.

39. Respondent's failure to install energy dissipation at the pipe outlet connecting to Hawk Creek within 24 hours of connecting that pipe to Hawk Creek violated Section IV.B.4. of the General Permit.

**Count 3: Failure to Install Sediment Control Practices on All Down Gradient Perimeters**

40. Paragraphs 1 through 30 of this CAFO are incorporated herein.

41. Section IV.C.2. of the General Permit requires that “[s]ediment control practices must be established on all down gradient perimeters before any up gradient land disturbing activities begin.”

42. On November 9, 2004, Respondent had failed to establish sediment control practices down gradient to the roadways on the western side of the Willmar Airport Project.

43. Prior to November 9, 2004, Respondent had begun up gradient land disturbing activities at and around the roadways on the western side of the Willmar Airport Project.

44. Respondent’s failure to install sediment control practices on down gradient perimeters prior to beginning up gradient land disturbing activities at and around the roadways on the western side of the Willmar Airport Project violated Section IV.C.2. of the General Permit.

**Count 4: Failure to Appropriately Install BMPS Specified in the SWPPP**

45. Paragraphs 1 through 30 of this CAFO are incorporated herein.

46. Section IV.A. of the General Permit requires that BMPs identified in the SWPPP must be installed in an appropriate and functional manner. Section IV.E .4.a. of the General Permit 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.”

47. On November 9, 2004, the following BMPs specified in the SWPPP were not installed or were installed inappropriately: (1) sediment was above 1/3 the height of the silt fence on the south portion of the Willmar Airport Project; (2) additional silt fence was falling along the southern end of the Willmar Airport Project; (3) bio-rolls were not appropriately tacked to the

ground; and (4) erosion control blankets were not installed at pipe outlets.

48. Respondent's failure to appropriately install BMPs specified in the SWPPP violated Sections IV.A. and IV.E.4.a of the General Permit.

#### **Count 5: Failure to Stabilize Exposed Soils**

49. Paragraphs 1 through 30 of this CAFO are incorporated herein.

50. Section IV.B.2. of the General Permit requires that all 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.

51. On November 9, 2004, at least 75% of the southwest portion of the Willmar Airport Project did not have temporary or permanent stabilization.

52. The portion of the Willmar Airport Project identified in Paragraph 51 was an exposed soil area that had a continuous positive slope and was located within 200 lineal feet of surface water.

53. Respondent's failure to stabilize the southwest portion of the Willmar Airport Project violated Section IV.B.2. of the General Permit.

#### **TERMS OF SETTLEMENT**

54. Based upon the penalty factors set forth in Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA and Respondent agree to settle this matter for \$11,000.

55. For the purposes of this proceeding, and pursuant to 40 C.F.R. § 22.18(b) and (c), Respondent: (1) admits that EPA has jurisdiction over the subject matter set forth in this CAFO; and (2) neither admits nor denies the facts stipulated in this CAFO.



56. Upon execution of this CAFO, Respondent waives all rights to request a judicial or administrative hearing on any issue of law or fact set forth in this CAFO, 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 CAFO found at Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B).

57. Respondent must pay the \$11,000.00 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.

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

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

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

60. 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 persons at the address indicated:

Regional Hearing Clerk  
Planning and Management Division (R-13J)  
EPA, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

Charles Mikalian  
Associate Regional Counsel  
Office of Regional Counsel (C-14J)

EPA, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

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

61. Respondent's failure to pay the assessed civil penalty in accordance with the provisions of this CAFO 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 CWA, 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 on 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.

62. Notwithstanding any other provision of this CAFO, 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.

63. Respondent agrees to comply with the requirements of the CWA during its construction activities.

#### **OTHER MATTERS**

64. This CAFO settles EPA's claims for civil penalties for the violations alleged above.

65. Nothing in this CAFO relieves Respondent of the duty to comply with the CWA or other federal, state or local laws or statutes.

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

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

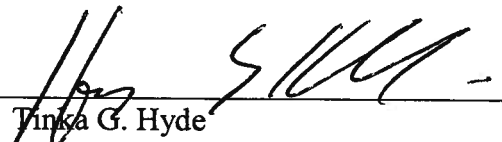
68. Pursuant to 40 C.F.R. § 22.38, by letter dated December 19, 2008, the State was notified of this proceeding.

69. The effective date of this CAFO is the date that the CAFO is filed in the office of the Regional Hearing Clerk, after having been signed by the Regional Administrator or his designated representative and subjected to the requirements of Section 309(g)(4)(C) of the CWA, 33 U.S.C. 1319(g)(4)(C).

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

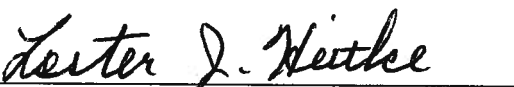
**United States Environmental Protection Agency, Region 5,  
Complainant**

Date 4/16/09

By:   
Tinka G. Hyde  
Director, Water Division  
EPA, Region 5

**City of Willmar, Minnesota  
Respondent**

Date 3-31-2009

By:   
Lester Heitke  
Mayor, City of Willmar

**CONSENT AGREEMENT AND FINAL ORDER**

**In the Matter of: City of Willmar**

**Docket No. CWA-05-2009-0005**

**FINAL ORDER**

This CAFO is hereby approved. The Respondent is hereby ORDERED to comply with all of the terms of the CAFO effective immediately upon filing of this CAFO with the Regional Hearing Clerk. This CAFO disposes of this matter pursuant to 40 C.F.R. § 22.18(c).

By: \_\_\_\_\_

Bharat Mathur  
Acting Regional Administrator  
United States Environmental Protection Agency  
Region 5

Dated: \_\_\_\_\_