

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

Received by
EPA Region 7
Hearing Clerk

IN THE MATTER OF:)	
)	
)	Docket No. CWA-07-2021-0043
BAYER CROPSCIENCE LP)	
)	
and)	
)	
HELMKAMP CONSTRUCTION CO.)	
)	
Respondents)	
)	
)	ADMINISTRATIVE
)	ORDER FOR COMPLIANCE
)	ON CONSENT
Proceedings under Section 309(a)(3) of the)	
Clean Water Act, 33 U.S.C. § 1319(a)(3))	
_____)	

Preliminary Statement

1. The following Administrative Order for Compliance on Consent (“Order”) is issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). The authority to take action under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), is vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”). The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7.

2. The Respondents in this case are Bayer CropScience LP and Helmkamp Construction Co. (“Respondents”).

3. EPA, together with Respondents, enter into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

4. It is the parties’ intent through this agreement to address discharges of pollutants by Respondents into the waters of the United States without a permit issued pursuant to Section 404 of the CWA.

5. By entering into this Order, Respondents (1) consent to and agree not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) consent to personal service by electronic mail, (3) agree to undertake all actions required by the terms and conditions of this Order, and (4) consent to be bound by the requirements set forth herein. Respondents neither admit nor deny the specific factual allegations or Findings of Violation in this Order on Consent, except that, as stated above in (1), Respondents consent and agree not to contest EPA's authority or jurisdiction to issue or enforce this Order. Respondents also waive any and all claims for relief and otherwise available rights or remedies to judicial or administrative review of this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

7. The CWA prohibits the discharge of "pollutants" from a "point source" into a "navigable water" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

8. Section 404 of the CWA, 33 U.S.C. § 1344, requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (hereinafter "Corps"), for any discharge of "dredged or fill material" into the "navigable waters" of the United States.

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters," in part, as the "waters of the United States," which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328, and which include tributaries and wetlands adjacent to waters of the United States.

10. Section 40 C.F.R. § 232.2 defines "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."

11. 40 C.F.R. § 232.2 defines "discharge of fill material" as "the addition of fill material into waters of the United States."

12. 40 C.F.R. § 232.2 defines "fill material" as any material that has the effect of "replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States."

13. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

Allegations of Facts

14. Respondents are “persons” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
15. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property containing portions of Sunswept Creek and Dielmann Creek within the Bayer Campus in Creve Coeur, Missouri located in Section 1, Township 45 North, Range 5 East, St. Louis County (hereinafter “the Site”). Respondents were collectively involved in bank stabilization and other in-stream construction activities within the creeks.
17. On December 16, 2020, Corps personnel conducted an investigation at the Site and observed construction activity in both creeks, and the Corps prepared written findings in which the Corps described the work, including “concrete weirs, concrete wing walls, and rip rap placement” in Sunswept Creek and “rectangular concrete elevation breaks and keypad weirs,” as well as “bank stabilization work ... adjacent to a new concrete culvert structure” in Dielmann Creek.
18. The in-stream construction impacted approximately 250 linear feet of Sunswept Creek and approximately 225 linear feet of Dielmann Creek.
19. After the Corps’ site visit, Corps personnel identified Sunswept Creek and Dielmann Creek as perennial streams that flow into Deer Creek approximately 1.5 miles from the creeks’ confluence. The Deer Creek watershed flows into the River des Peres, which flows into the Mississippi River.
20. Sunswept Creek and Dielmann Creek are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.
21. The fill material placed by Respondents into Sunswept Creek and Dielmann Creek are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
22. The earth moving equipment used to grade the Site and place the fill material into Sunswept Creek and Dielmann Creek constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
23. The discharge of the fill material into the Sunswept Creek and Dielmann Creek constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

Findings of Violation

24. The facts stated in above are herein incorporated.

25. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill placement described herein, nor did Respondents perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

26. Respondents' discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Order for Compliance on Consent

Based on the Factual Background and Findings of Violation set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), EPA hereby ORDERS, and Respondents hereby AGREE to take, the actions described below:

27. Respondents shall comply with the CWA by immediately ceasing the discharge of pollutants into Sunswept Creek and Dielmann Creek and taking steps to ensure that such discharges do not occur in the future.

28. Retention of Qualified Consultant: Respondents have retained a qualified consultant, conducted a study of the Site, and submitted to EPA a report which assesses the Site modification and proposes restoration and mitigation to remediate impacts of Respondents' work.

29. Restoration and Mitigation Work: Within six (6) months of the Effective Date of this Agreement, Respondents shall: 1) conduct the riparian enhancement work described in the attached planting plan prepared by Terra Technologies ("Riparian Enhancement Work Plan") attached as Exhibit 1; and 2) complete purchase of mitigation credits described in Exhibit 2.

30. Once the purchase of mitigation credits has been completed, Respondents agree to submit proof of purchase to the EPA within thirty (30) days of the purchase.

31. Once the work identified in the Riparian Enhancement Work Plan has been completed, Respondents agree to submit a completion report, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete. The completion report must be submitted within sixty (60) days after work has been completed.

32. Respondents agree to submit annual monitoring reports to EPA, beginning on the date of the first anniversary of the completion of the Riparian Enhancement Work Plan, for a period of three years. These reports shall include photos of the site, a description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies to maintain proper stream functions. Annual monitoring reports must be submitted by December 1st of each year.

33. The submission of documents by Respondents, as identified above, shall include the following written statement, followed by signature of duly authorized representatives of Respondents:

I certify under penalty of law that 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.

34. All documents to be submitted to EPA under this Order shall be submitted by electronic mail to:

Dr. Delia Garcia, or her delegate
garcia.delia@epa.gov
ECAD/WB
U.S. Environmental Protection Agency, Region 7

General Provisions

35. Respondents' failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that Respondents have violated the Act and failed to comply with the terms of the Order.

36. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state, and/or federal permits.

37. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 et seq., all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Access and Requests for Information

38. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property owned or operated by Respondents and/or to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

39. If any provision or authority of this Order, or the application of this Order to Respondents, is held by federal judicial authority to be invalid, the application to Respondents of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Parties Bound

40. This Order shall apply to and be binding upon the Respondents, their agents, successors, and assigns. Respondents shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this Order.

Effective Date

41. The terms of this Order shall be effective and enforceable on the Effective Date, which is the date this Order is signed by EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

Termination

42. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

Signatories

43. The undersigned for each party have the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.

For the Complainant, U.S. Environmental Protection Agency, Region 7:

WENDY LUBBE
Acting Director
Enforcement and Compliance Assurance Division

SHANE MCCOIN
Assistant Regional Counsel
Office of Regional Counsel

For Respondent Bayer CropScience LP


SIGNATURE

2/22/2022
DATE

SCOTT J. SMITH - US HEAD FACILITIES PLATFORM SITES
NAME/TITLE

For Respondent Helmkamp Construction Co.



SIGNATURE

3-11-22

DATE

Rob Johns President

NAME/TITLE

CERTIFICATE OF SERVICE

I certify that on the date noted below I delivered this Findings of Violation and Administrative Order for Compliance on Consent to the Regional Hearing Clerk, U.S. Environmental Protection Agency, by electronic mail to: R7_Hearing_Clerk_Filings@epa.gov.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance on Consent by electronic mail to the following:

For Respondent, Bayer CropScience LP:

Scott Smith, US Head of Facilities Platform Sites, Bayer U.S. LLC
scott-j.smith@bayer.com

Jessica E. Merrigan, Spencer Fane LLP
jmerrigan@spencerfane.com

For Respondent, Helmkamp Construction Co:

Kyle Ogden, Project Director, Helmkamp Construction Co.
kogden@helmkamp.com

Ryan O. Corrigan, McCarthy, Leonard & Kaemmerer, L.C.
rcorrigan@mlklaw.com

For Complainant, U.S. Environmental Protection Agency Region 7:

Dr. Delia Garcia, Enforcement and Compliance Assurance Division
garcia.delia@epa.gov

Shane McCoin, Office of Regional Counsel
mccoin.shane@epa.gov

Signature

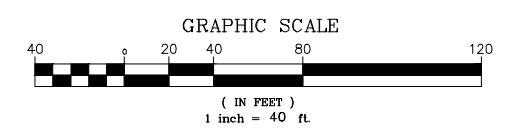
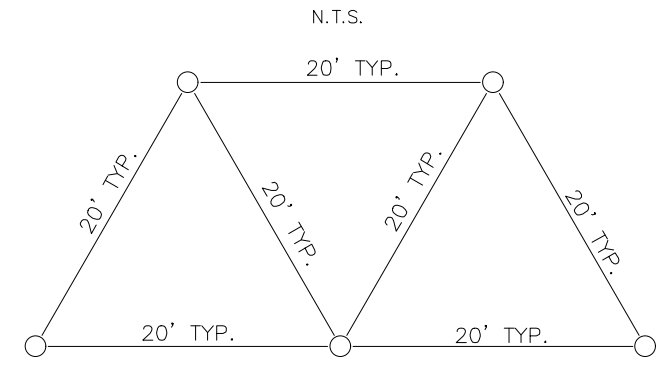
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Exhibit 1: Riparian Enhancement Work Plan



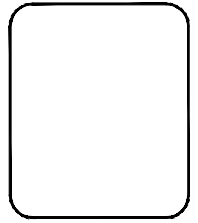
Native Restoration Zones
1.08 Acres

TYPICAL TREE SPACING DETAIL

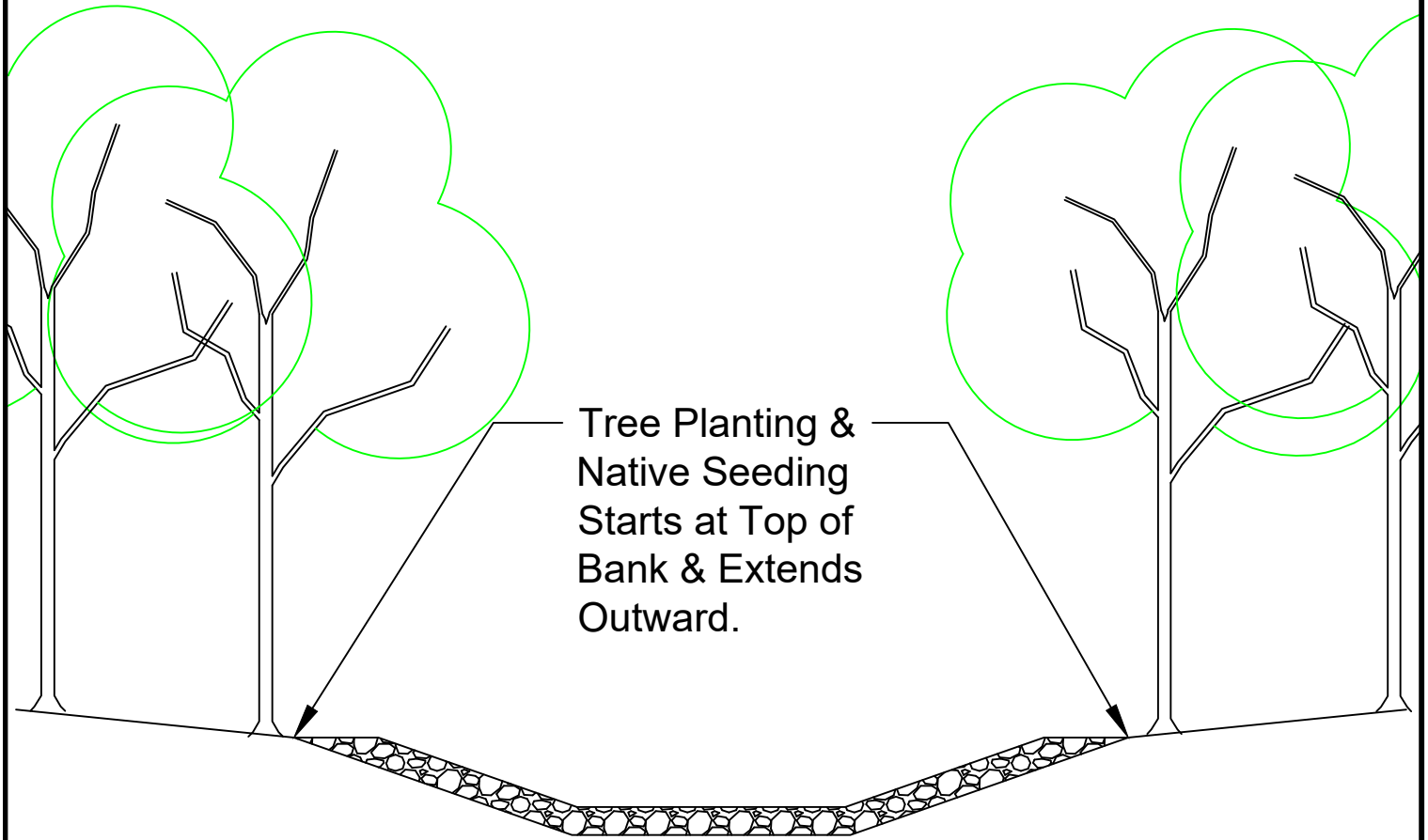


6240 W. 135th St., Ste. 100
Overland Park, Kansas
66223
Tel 913.385.9560 Fax 913.385.5295

**Terra
Technologies**



SHEET TITLE		Native Restoratoin Zones	
PROJECT		Bayer Campus	
CLIENT		Spencer Fane	
REVISIONS			
DATE	DESCRIPTION		
DATE	09/29/21		
CHECKED BY	JMK	DRAWN BY	DTD
SHEET NO.			
JOB NO.	XXX		



Tree Planting &
Native Seeding
Starts at Top of
Bank & Extends
Outward.

See Tree and Shrub table and Seed Mix table for recommended species. See Native Restoration Zones Figure for extents of plantings.

Revisions		
No.	Description	Date



**Terra
Technologies**
6240 West 135th Street, Suite 100, Overland Park, KS 66223

Bayer Corporate Headquarters
Campus
St. Louis, MO

Seeding and Planting
Typical Section

DRAWING	DATE
FIG 1	AUG 2021

Riparian Buffer and Stream Restoration Seed List		
Common Name	Scientific Name	lbs/acre
BIG BLUESTEM	<i>Andropogon gerardii</i>	5
COMMON MILKWEED	<i>Asclepias syriaca</i>	0.25
BUTTERFLY MILKWEED	<i>Asclepias tuberosa</i>	0.125
WHITE WILD INDIGO	<i>Baptisia alba</i>	0.125
SIDEOATS GRAMA	<i>Bouteloua curtipendula</i>	5
BUFFALO GRASS	<i>Bouteloua dactyloides</i>	2
SHOWY PARTRIDGE PEA	<i>Chamaecrista fasciculata</i>	1
LANCELEAF COREOPSIS	<i>Coreopsis lanceolata</i>	0.5
PURPLE PRAIRIE CLOVER	<i>Dalea purpurea</i>	1
PRAIRIE BUNDLE FLOWER	<i>Desmanthus illinoensis</i>	0.5
CANADA WILD RYE	<i>Elymus canadensis</i>	4
VIRGINIA WILD RYE	<i>Elymus virginicus</i>	4
Maxm SUNFLOWER	<i>Helianthus maximiliani</i>	0.5
SMOOTH OXEYE SUN	<i>Heliopsis helianthoides</i>	0.25
SWITCHGRASS	<i>Panicum virgatum</i>	2
FOXGLOVE BEARDTONGUE	<i>Penstemon digitalis</i>	0.25
UPRIGHT PR CONEFLOWER	<i>Ratibida columnifera</i>	2
BLACK-EYED SUSAN	<i>Rudbeckia hirta</i>	1
COMPASS PLANT	<i>Silphium laciniatum</i>	0.25
INDIAN GRASS	<i>Sorghastrum nutans</i>	2
REGREEN STERILE WHEAT	<i>Triticum spp.</i>	20
POUNDS		51.75

Riparian Buffer Restoration Tree and Shrub Plantings			
Scientific Name	Common Name	Tree or Shrub	Size
<i>Acer saccharinum</i>	Silver Maple	Tree	* 3# APM/RPM
<i>Asimina triloba</i>	Common Paw Paw	Tree	* 3# APM/RPM
<i>Celtis laevigata</i>	Sugar-Berry	Tree	* 3# APM/RPM
<i>Celtis occidentalis</i>	Common Hackberry	Tree	* 3# APM/RPM
<i>Diospyros virginiana</i>	Common Persimmon	Tree	* 3# APM/RPM
<i>Fraxinus pennsylvanica</i>	Green Ash	Tree	* 3# APM/RPM
<i>Platanus occidentalis</i>	American Sycamore	Tree	* 3# APM/RPM
<i>Quercus alba</i>	Northern White Oak	Tree	* 3# APM/RPM
<i>Quercus bicolor</i>	Swamp White Oak	Tree	* 3# APM/RPM
<i>Quercus macrocarpa</i>	Burr Oak	Tree	* 3# APM/RPM
<i>Quercus muehlenbergii</i>	Chinkapin Oak	Tree	* 3# APM/RPM
<i>Quercus palustris</i>	Pin Oak	Tree	* 3# APM/RPM
<i>Quercus rubra</i>	Northern Red Oak	Tree	* 3# APM/RPM
<i>Salix amygdaloides</i>	Peach-Leaf Willow	Tree	* 3# APM/RPM
<i>Salix nigra</i>	Black Willow	Tree	* 3# APM/RPM
<i>Ulmus americana</i>	American Elm	Tree	* 3# APM/RPM
<i>Cephalanthus occidentalis</i>	Common Buttonbush	Shrub	* 3# APM/RPM
<i>Cercis canadensis</i>	Redbud	Shrub	* 3# APM/RPM
<i>Cornus amomum</i>	Silky Dogwood	Shrub	* 3# APM/RPM
<i>Cornus drummondii</i>	Rough-Leaf Dogwood	Shrub	* 3# APM/RPM
<i>Cornus florida</i>	Flowering Dogwood	Shrub	* 3# APM/RPM
<i>Crataegus mollis</i>	Downy Hawthorn	Shrub	* 3# APM/RPM
<i>Sambucus nigra</i>	Black Elder	Shrub	* 3# APM/RPM
<i>Symphoricarpos orbiculatus</i>	Coral-Berry	Shrub	* 3# APM/RPM
<i>Viburnum dentatum</i>	Southern Arrow-Wood	Shrub	* 3# APM/RPM
<i>Viburnum lentago</i>	Nanny Berry	Shrub	* 3# APM/RPM

· Select no less than 8 species of trees and 6 species of shrubs to comprise the plantings.
· Contractor shall make quantity and species selections based on site conditions, as approved by the owner's representative.

* Larger pot sizes can be used at the discretion of the property owner

Bayer Creve Coeur Riparian Corridor Maintenance Plan

Bayer has established a riparian corridor as depicted in Figure 1. This Riparian Corridor Maintenance Plan (“Plan”) sets out the management activities to monitor and maintain the corridor.

Routine Maintenance: Recurring and as needed maintenance and landscaping work to ensure continued viability of plantings within the corridor.

Trees, Shrubs and Planting Beds

- a. Healthy tree, shrub, and plant coverage and growth is achieved through the appropriate use of pruning, trimming, soil composition and nutrient testing, chemical or nutrient additives or retardants, watering, mulching, and tailored to the season.
- b. Water evaporation and run-off is minimized and water retention is encouraged through the strategic use and placement of mulch, native and adapted plants, and ground cover.
- c. Weed and nuisance plant growth is minimized or eliminated through the use of mulch, ground cover, weed killer, or other appropriate means.
- d. Safe vehicular and pedestrian passage is maximized and security vulnerabilities and safety hazards are minimized through the strategic use, placement, trimming, and pruning of plants, shrubs, and trees.
- e. Approaches are implemented such that tree, shrub, and planting bed maintenance time and costs are reduced.
- f. Trees, shrubs and plants are free from harmful insects or disease.
- g. Trees are pruned up to fifteen (15) feet in height to eliminate damaged, dead, or low hanging branches or to minimize or eliminate hazards or potential hazards, including those that could result from weather events, to vehicles, pedestrians, neighboring properties, and utility lines.

Turf

- a. Healthy lawn and full grass coverage is achieved through the appropriate use of mowing, trimming, soil composition and nutrient testing, chemical or nutrient additives or retardants, seeding, watering, aeration, and tailored to the season.
- b. Campus lawns are free from weeds, trash, debris, fallen leaves, and tree/shrub droppings.
- c. Weed and nuisance plant growth is minimized or eliminated through the use of mulch, ground cover, weed killer, or other means.
- d. Approaches are implemented to reduce turf maintenance time and costs.
- e. Turf is free from harmful insects or disease.
- f. Use of mowing or trimming equipment does not leave ruts, cuts, smudges, or gouges to turf, trees, or structures.

Wildlife and Wildlife Habitats

- a. Frequently used and high visibility areas are maintained free from dead wildlife.

- b. Injured wildlife in frequently used or high visibility areas shall be reported to the owner representative.
- c. Natural wildlife habitats and environments (woodlands, wetlands, prairie, and wildflower) are preserved, protected, and maintained so that they offer shelter, protection, food, water, movement corridors, and nesting sites for wildlife and contribute to the ecological diversity of the land.
- d. Natural habitat evolution is stimulated through the intentional execution of conservation management techniques, such as, brush hog and chemical application and vehicle interruptions are minimized.
- e. Service Provider shall act as facilitator for controlled burns in coordination with the Bayer Environmental Office and the controlled burn vendor.
- f. Invasive plants, specifically, honeysuckle, are removed or eradicated.

Outdoor Areas

- a. Active walkways, parking areas, easements, and other outdoor areas are kept clean, clear, safe, and secure from obstructions, hazardous conditions, overgrowth, or standing water to permit safe pedestrian passage.
- b. Nature trails are maintained such that paths are clearly identified and free from obstructions, hazardous conditions, or overgrowth to permit safe pedestrian passage.

Storm Water Drainage

- a. Water run-off properly flows, channels, and drains to appropriate water collection areas.
- b. Storm water drainage areas are maintained to facilitate the flow of water and minimize standing water or other hazards such that successful utility inspection and/or certification is achieved.

Irrigation Systems

- a. Irrigation systems' zones, water lines, and parts are functioning in good working order to ensure complete coverage.
- b. Proper watering and moisture levels are achieved and maintained throughout all zones to maintain healthy plants and foliage appropriate for the season and temperature.
- c. Evaporation and run-off resulting from operation of the irrigation systems is minimized.
- d. Water lines are properly shut down and cleared so as not to freeze and break.
- e. Repairs and adjustments to the irrigation systems are made in a timely fashion to ensure operational functionality and minimize stress on plants.

Annual Inspection and Report for EPA AOC: For 3 years following establishment of the riparian corridor, the riparian corridor shall be inspected annually to confirm appropriate function of the corridor. The inspection shall include photographic documentation of the corridor and written descriptions of the on-site conditions. The report will document status of planted species and any restoration work needed to taken to ensure 80% survival.

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Exhibit 2: Mitigation Credits

Respondents shall, within six months of the Effective Date of the Agreement, purchase a total of Two Thousand, Nine Hundred and Ninety-Two (2992) Stream Credits from the Land Learning Foundation to be reserved from the Land Learning Foundation's In-Lieu Fee Mitigation Program (Corps Project No. 2008-1124) which service territory includes the Apple-Joachim Ecological Drainage Unit.