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

BEFORE THE ADMINISTRATOR

| | | |
|--|---|-----------------------------|
| IN THE MATTER OF: |) | |
| |) | Docket No. CWA-07-2014-0065 |
| |) | |
| CRISS INVESTMENTS, INC., |) | |
| |) | COMPLAINT AND |
| |) | CONSENT AGREEMENT/ |
| |) | FINAL ORDER |
| Respondent, |) | |
| |) | |
| Proceedings under Section 1319(g) of the |) | |
| Clean Water Act, 33 U.S.C. § 1319(g) |) | |
| |) | |

The United States Environmental Protection Agency, Region 7 (“EPA”) and Criss Investments, Inc. (“Respondent”), have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order (“CA/FO”). Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) 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. Part 22, and pursuant to Subpart I of the Consolidated Rules.

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This CA/FO alleges that Respondent discharged pollutants into a water of the United States in violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

Parties

3. Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region 7, and re-delegation, is the Director of Region 7’s Water, Wetlands and Pesticides Division.

4. Respondent is Criss Investments, Inc., a corporation incorporated under the laws of the state of Kansas and authorized to conduct business in Kansas. Respondent's mailing address is 1855 Ridge Road, El Dorado, Kansas 67042.

Statutory and Regulatory Framework

5. 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.

6. 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.

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

8. 40 C.F.R. § 232.2 defines the term "fill material" to include material placed in waters of the United States where the material has the effect of changing the bottom elevation of any portion of a water of the United States. The definition provides examples including, *inter alia*, rock, sand, soil, clay, and materials used to create any structure or infrastructure in the waters of the United States.

9. 40 C.F.R. § 232.2 defines the term "discharge of fill material" to mean the addition of fill material into waters of the United States. The definition specifically includes, *inter alia*, the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; dams and dikes; and property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments.

10. 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 wetlands adjacent to waters of the United States.

11. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes the issuance of a penalty against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Allegations

12. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property located in Section 31, Township 25 South, Range 6 East, in Butler County, Kansas (hereinafter "the Site").

14. Respondent Criss Investments, Inc. contracted with Beran Concrete, Inc., Albert Hogoboom Oilfield Trucking, Inc., Eddie Dean d/b/a Custom Homes by Dean & Sons, and Cornejo & Sons, L.L.C. to perform activities associated with the construction of a low-head dam and stream crossing.

15. Sometime between January 2012 and March 2012, Respondent and/or persons acting on its behalf and using earth moving equipment authorized and/or directed the discharge of fill materials into Bird Creek in order to construct a low-head dam and stream crossing. The low-head dam and stream crossing together are approximately 20 feet wide, 6.5 feet high, and span between 75 and 99 feet across Bird Creek. The stream crossing is immediately adjacent to and downstream of the dam. The dam and stream crossing are constructed of riprap, formed concrete, and concrete blocks of two sizes placed in the streambed. Concrete pavement covers the top of the concrete blocks that constitute the stream crossing.

16. On February 7, 2012, the Corps visited the Site and documented that construction of the low-head dam and stream crossing was substantially completed. On March 7, 2012, the Corps issued a Notice of Violation to Mr. Criss of Criss Investments, Inc., which described the violations and directed him to do no further unauthorized work.

17. On November 19, 2012, EPA received a response from Mr. Criss to a request for information issued by EPA to Mr. Criss on November 6, 2012, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). Mr. Criss's response stated that work on the low-head dam and stream crossing commenced approximately January 26, 2012, and concluded approximately March 9, 2012. The response also provided invoices spanning the period between December 15, 2011, and May 9, 2012, for the work the contractors did on the low-head dam and stream crossing.

18. The fill materials discharged by Respondent into Bird Creek referenced in Paragraph 15 are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. The discharge of the fill material into Bird Creek referenced in Paragraph 15 constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

20. The earth moving equipment referenced in Paragraph 15 constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. Bird Creek is a "water 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.

22. Respondent's discharges of pollutants require a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

23. Respondent did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the work described in Paragraph 15, nor did Respondent perform the work described in Paragraph 15 under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

ALLEGATIONS OF VIOLATION

24. The facts stated in Paragraphs 12 through 23 above are herein incorporated.

25. Respondent's discharges of pollutants from a point source into a water of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. Therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

CONSENT AGREEMENT

26. Respondent admits the jurisdictional allegations set forth in this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or in any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

27. Respondent neither admits nor denies the factual allegations set forth in this CA/FO.

28. Respondent waives his right to contest the allegations set forth in this CA/FO and his right to appeal the Final Order portion of this CA/FO.

29. Respondent and Complainant each agree to bear their respective costs and attorney's fees incurred as a result of this action.

30. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

31. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

32. Respondent certifies by the signing of this CA/FO that, to the best of his knowledge, Respondent is scheduled to be in compliance with EPA's Administrative Order for Compliance on Consent, Docket No. CWA-07-2014-0066 and with the requirements of Sections 301 and 404 of the CWA.

33. The effect of settlement is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 32 above, of this CA/FO.

34. In settlement of this matter, Respondent agrees to complete the following Supplemental Environmental Project ("SEP"), which the parties agree is intended to secure significant environmental and/or public health benefits. Respondent shall execute a restrictive covenant (attached hereto as Attachment A and incorporated herein by reference) to conserve 62.6 acres of land bisected by Bird Creek, as described more specifically in the relevant portions of the Work and Mitigation Plan (attached hereto as Attachment B and incorporated herein by reference). The value of the SEP is estimated to be at least \$200,000.

35. The SEP shall be performed in accordance with the specifications set forth in the relevant portions of the Work and Mitigation Plan. Proper execution and filing of the restrictive covenant shall be completed no later than 90 days from the effective date of the Final Order. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

36. Within thirty days of execution and filing of the restrictive covenant, Respondent shall submit a SEP Completion Report to EPA at the address specified in Paragraph 37. The SEP Completion Report shall contain the following:

- (a) a detailed description of the SEP as implemented;
- (b) itemized costs, if any, documented by copies of purchase orders, receipts, or canceled checks; and
- (c) certification that the SEP has been fully implemented pursuant to the provisions of this CA/FO.

37. Respondent shall submit all notices and reports required by this CA/FO by first class mail to the following:

Lantz Tipton or his successor
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

38. In itemizing its costs, if any, in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this paragraph, "acceptable documentation" includes invoices, purchase orders or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

39. Respondent agrees to the payment of stipulated penalties as follows:

- (a) In the event Respondent fails to comply with any of the terms or provisions of this Consent Agreement relating to the performance of the SEP as set forth in Paragraphs 34 and 35 of this CA/FO, Respondent shall be liable for stipulated penalties according to the provisions set forth below:
- i. Except as provided in subparagraph (a)ii. and (a)iii. of this paragraph, if the restrictive covenant is not executed and filed satisfactorily and timely pursuant to the agreement set forth in Paragraphs 34 and 35 of this CA/FO, Respondent shall be liable for and shall pay a stipulated penalty to the United States in the amount of Twenty Thousand Two Hundred Fifty Dollars (\$20, 250), minus any documented expenditures determined by EPA to be acceptable for the SEP, for a total equal to 120% of the amount by which the settlement penalty was mitigated on account of the SEP.
 - ii. If Respondent fails to timely and completely submit the SEP Completion Report required by Paragraph 36, Respondent shall be liable for and shall pay a stipulated penalty in the amount of Two Hundred and Fifty Dollars (\$250).
 - iii. If the SEP is not completed in accordance with Paragraphs 34 and 35 of this CA/FO, but EPA determines that the Respondent made good faith and timely efforts to complete the project, Respondent shall not be liable for any stipulated penalty.
- (b) Respondent shall pay stipulated penalties not more than fifteen days after receipt of written demand by EPA for such penalties. The method of payment shall be in accordance with the provisions of Paragraph 1 of the Final Order portion of this CA/FO. Interest and late charges shall be paid as stated in Paragraph 46 herein.

40. Respondent certifies that it is not required to perform or develop the SEP by any federal, state, or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

41. Respondent certifies that it is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. Respondent further certifies that, to the best of its knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term "open federal financial assistance transaction" refers to a grant,

cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

42. For federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

43. Any public statement, oral or written, in print, film or other media, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency for violations of the Clean Water Act and underlying regulations."

44. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty in the amount of \$5,625.

45. Payment of the entire penalty and completion of the SEP shall resolve all civil and administrative claims of the United States alleged in the Allegations of Violation.

46. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below or any portion of a stipulated penalty as stated in Paragraph 39 above may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full.

Reservation of Rights

47. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

48. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including, without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is ORDERED that:

1. Respondent shall pay a mitigated civil penalty of Five Thousand Six Hundred and Twenty Five dollars (\$5,625), due thirty calendar days from the effective date of the CA/FO. Respondent shall pay the penalty by cashier's or certified check made payable to "Treasurer, United States of America," and shall deliver the check with a transmittal that identifies the case name and docket number CWA-07-2014-0065 to:

United State Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077
St. Louis, Missouri 63197-9000.

Copies of the transmittal letter and the check shall be simultaneously sent to:

Regional Hearing Clerk
United States Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to:

Erin Weekley
Assistant Regional Counsel
United States Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

2. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

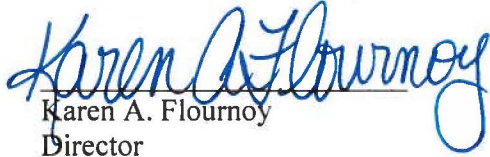
3. This Final Order shall apply to and be binding upon Respondent, his agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to

matters included herein, comply with the terms of this CA/FO.

Effective Date

4. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY



Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Date 6/23/2014





Erin Weekley
Assistant Regional Counsel

Date 6/23/2014

RESPONDENT:
CRISS INVESTMENTS, INC.

Date 5-2-2014



Name


Signature

Title V-PRES.

IT IS SO ORDERED. This Final Order shall become effective immediately.

Date

7-7-14

Karina Borromeo

Karina Borromeo
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 7

ATTACHMENT A

DECLARATION OF RESTRICTIVE COVENANTS

The Declarant, Ramon Criss, is the fee simple owner of the certain real property located in Butler County, Kansas, as described on Exhibit A, which is attached hereto and incorporated herein by reference (the "Property"). Declarant is subject to the requirements of an Order for Compliance on Consent, issued pursuant to Section 309(a)(3) of the Clean Water Act, EPA Docket No. CWA-07-2014-0066 (the "Order," attached as Exhibit B). In resolution of the allegations in the Order, Declarant has entered into a Consent Agreement and Final Order, EPA Docket No. CWA-07-2014-0065 (the "CA/FO," attached as Exhibit C) which includes preservation and protection of the Property in its natural condition as a Supplemental Environmental Project. In consideration of the issuance of the CA/FO, and for other good and valuable consideration, the Declarant hereby declares that the Property shall henceforth be subject to the following restrictive covenants (the "Restrictions"). As used herein, the term "Declarant" includes and shall be binding upon Ramon Criss and his successors, heirs, and assigns.

1. **Purpose:** The purpose of these Restrictions is to retain and maintain land and water areas on the Property in their natural, vegetative, hydrologic, scenic, open, agricultural, or wooded condition, and to retain such areas as suitable habitat for fish, plants, or wildlife. Those areas that are to be restored, enhanced, or created pursuant to the Order shall be retained and maintained in the restored, enhanced, or created condition required by the Order.

2. **Rights of EPA:** The following rights are granted to the EPA:

a. The right to take legal action to prevent any activity on or use of the Property that is inconsistent with these Restrictions, and to require the restoration of areas or features of the Property that may be damaged by any inconsistent activity or use;

b. The right to request entry upon and inspect the Property in a reasonable manner and at reasonable times to determine if the Declarant is complying with the covenants and prohibitions contained in these Restrictions; and

c. The right to proceed at law or in equity to enforce the provisions of these Restrictions, and to prevent the occurrence of any of the prohibited activities hereinafter set forth.

3. **Prohibited Uses:** Except for restoration, creation, enhancement, maintenance, and monitoring activities, or surface water management improvements, which are permitted by the United States Army Corps of Engineers or required by the Order, the following activities are prohibited on the Property:

a. Construction of any structure or object (i.e., buildings, roads, above or below ground utilities, signs, billboards, etc.) without written approval from the EPA prior to construction;

b. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste, or unsightly or offensive materials;

ATTACHMENT A

c. Removal or destruction of trees, shrubs, or other vegetation, except as may be allowed by the Order or the Work Plan required by the Order, and except for the removal of nuisance, noxious, exotic, or non-native vegetation in accordance with the Work Plan approved by the EPA;

d. Planting of nuisance, noxious, exotic, or non-native plants as listed by the State of Kansas;

e. Exploration for, or extraction of, oil or gas in such a manner as to affect the surface, or excavation, dredging, or removal of coal, loam, peat, gravel, soil, rock, or other material substance, except as may be allowed by the Order;

f. Use of motorized and non-motorized vehicles, the keeping or riding of horses, grazing, livestock confinement, or other surface use that may affect the natural condition of the Property, except for vehicle use for purposes of maintenance and upkeep, or as otherwise may be permitted or required by the Order;

g. Tilling, plowing, planting of crops, digging, mining, or other activities that are or may be detrimental to drainage, flood control, water conservation, water quality, erosion control, soil conservation, or fish and wildlife habitat preservation, including but not limited to ditching, diking, and fencing, except as permitted or required by the Order;

h. The extraction of water from the Property or adjacent properties owned by Grantor, or the impoundment of water on the Property or on adjacent properties owned by Grantor, so as to affect the hydrology of the Property; and

i. Acts or uses detrimental to the aforementioned retention and maintenance of land or water areas.

4. **Reserved Rights:**

a. Declarant reserves all rights as owner of the Property, including the right to engage in uses of the Property that are not prohibited herein.

b. Nothing herein shall be deemed to limit or otherwise impede EPA's rights of access and entry under federal and state law or other agreement. Nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of the Order or the CA/FO, or from taking any other legal or equitable action pursuant to the Clean Water Act or any other applicable law.

5. **Taxes:** Declarant shall pay any and all applicable real property taxes and assessments levied by competent taxing authority on the Property.

6. **Maintenance:** Declarant shall, at Declarant's sole expense, operate, maintain and keep up the Property consistent with the purpose of these Restrictions. Declarant shall remove from the Property any nuisance, noxious, exotic, or non-native plants as listed by the State of

ATTACHMENT A

Kansas and shall maintain the hydrology of the Property as it currently exists or as otherwise required by the Order.

7. **Hazardous Waste:** Declarant covenants that if any hazardous substances or toxic waste exist or have been generated, treated, stored, used, disposed of, or deposited in or on the Property, or there are or have been any underground storage tanks on the Property, Declarant shall retain liability for any and all necessary costs of remediation arising by reason of ownership of the Property.

8. **Public Access:** No right of access by the general public to any portion of the Property is conveyed by these Restrictions.

9. **Liability:** Declarant shall continue to retain all liability for any injury or damage to the person or property of third parties that may occur on the Property arising from solely by reason of ownership of the Property. Neither Declarant, nor any person claiming by or through Declarant, shall hold the EPA liable for any damage or injury that may occur on the Property.

10. **Recording Requirements:** Declarant shall record these Restrictions in the official records of Butler County, Kansas, and shall re-record these Restrictions at any time the EPA may require to preserve its rights. Declarant shall pay all recording costs and taxes necessary at any time to record these Restrictions in the public records.

11. **Notice upon Conveyance:** Declarant shall insert the terms and restrictions of these Restrictions in any deed or other legal instrument by which Declarant divests himself/herself/itself of any interest in the Property or any portion of the Property, and shall provide a copy of these Restrictions to the new owner(s). The notice shall be substantially in the following form:

THE INTEREST CONVEYED HEREBY IS SUBJECT TO A RESTRICTIVE COVENANT, DATED _____, 2014, RECORDED IN THE OFFICE OF THE RECORDER OF DEEDS OF BUTLER COUNTY, KANSAS, ON _____, 2014, AS DOCUMENT _____, BOOK _____, PAGE _____.

Declarant shall notify EPA within thirty (30) days following each conveyance of an interest in any portion of the Property. The notice shall include the name, address, and telephone number of the Transferee, and a copy of the deed or other documentation evidencing the conveyance.

12. **Enforcement:** The terms and conditions of these Restrictions may be enforced in an action at law or equity by the EPA against the Declarant or any other party violating or attempting to violate these Restrictions. Enforcement of these Restrictions shall be at the discretion of the EPA, and any forbearance on behalf of the EPA to exercise any right hereunder in the event of any breach by Declarant shall not be deemed or construed to be a waiver of rights. Any costs incurred in judicially enforcing the terms, provisions, and restrictions of these Restrictions, including without limitation, the costs of suit, and reasonable attorney's fees, shall be borne by and recoverable against the non-prevailing party in such proceedings, except that such costs shall not be recoverable against the EPA. In addition, if the EPA shall prevail in a judicial enforcement

ATTACHMENT A

action, EPA shall also be entitled to seek injunctive relief requiring the restoration of the land to the natural vegetative and hydrologic condition existing at the time of execution of these Restrictions.

13. Effect of Restrictions: These Restrictions shall take effect immediately upon declaration and shall run with the land in perpetuity. These Restrictions shall be deemed to survive unity of title. Declarant shall take no action to rescind, revoke, or otherwise nullify these Restrictions, except as described in Paragraph 17.

14. Successors: The covenants, terms, conditions, and restrictions of these Restrictions shall be binding upon, and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors, assigns, and other transferees in interest (collectively referred to as "Transferees") during their period of ownership, and shall continue as a servitude running in perpetuity with the Property. The term "Transferee(s)" as used in these Restrictions, shall mean any future owner of any interest in the Property or any portion thereof, including, but not limited to, owners of an interest in fee simple, mortgagees (subject to applicable lender liability protections prescribed by law), easement holders, and/or lessees.

15. Notices: All notices, consents, approvals, or other communications hereunder shall be in writing and shall be deemed properly given if sent by United States certified mail, return receipt requested, addressed to the Declarant or successor-in-interest. Any and all notices to the Declarant may be addressed to:

Ramon Criss
Criss Investments Inc.
1855 Ridge Rd
El Dorado, KS 67042-4033

with a copy to:

Kathryn Larkins
Shook, Hardy & Bacon LLP
2555 Grand Blvd.
Kansas City, MO 64108

16. Severability: If any provision of these Restrictions or the application thereof to any person or circumstances is found to be invalid, the remainder of the Restrictions shall not be affected thereby, as long as the purpose of these Restrictions is preserved.

17. Alteration or Revocation: These Restrictions may be amended, altered, released, canceled, or revoked only by written agreement between the EPA and the Declarant or Transferee of record at the time of such amendment, alteration, release, cancellation, or revocation. Each party's agreement shall be by letter attached as an exhibit to the document amending, altering, canceling, or revoking the Restrictions, and said letter shall be informal and shall not require notarization. It is understood and agreed that the EPA may require substitute or additional

ATTACHMENT A

mitigation, a separate conservation easement or alternate deed restrictions, or other requirements commensurate with these Restrictions as a condition of agreement. Any amendment, alteration, release, cancellation, or revocation together with each party's written agreement thereto shall then be filed in the public records of Butler County, Kansas, within 30 days thereafter.

18. Controlling Law: The interpretation and performance of these Restrictions shall be governed by the laws of the State of Kansas.

19. Effective Date: The effective date of these Restrictions shall be the date upon which the fully executed Restrictions have been recorded with the office of the recorder of Butler County.

IN WITNESS WHEREOF, the Declarant has executed this Declaration of Covenants and Restrictions this ____ day of _____, 2014.

Signed in the presence of:

DECLARANT:

Print Witness Name: _____

By: _____

Print: _____

Title: _____

Print Witness Name: _____

STATE OF KANSAS
COUNTY OF BUTLER

The foregoing Declaration of Restrictive Covenants was acknowledged before me this _____ day of _____, 2014, by _____ as _____ of _____ who is personally known to me or has produced _____ as identification.

My Commission Expires:

NOTARY PUBLIC

ATTACHMENT B

Work and Mitigation Plan

Amended

Ramon Criss Property

El Dorado, Kansas

Butler County

April 3, 2014

Prepared by:



ATTACHMENT B

Work and Mitigation Plan Ramon Criss Property

1.0 Introduction

Heritage Ecological, LLC (Heritage Ecological) was retained by Mr. Ramon Criss of Criss Investments, Inc. regarding the existing concrete weir overflow dam and crossing structure that bisects Bird Creek on Mr. Criss's property (Project). The Project site is located approximately 600 feet upstream of the confluence with the Walnut River (Goedecke 2012), in the Southwest ¼, of the Northeast ¼, of the Southwest ¼ of Section 31, Township 25 South, Range 06 East, Butler County, El Dorado, Kansas (**Figure 1**). The surrounding area primarily consists of agricultural areas and residential developments.

The following report details proposed work to modify the existing structure, and mitigate consistent with U.S. Army Corps of Engineers (USACE) guidelines (USACE 2010). The existing structure currently occupies 20 linear feet (lf) (.048 acres [ac.]). Upon modification, the Project size will be reduced to approximately 9 lf (.022 ac.) of potential jurisdictional tributaries (see **Figure 2** and **Attachment 1**).

The focus of this work and mitigation plan is the significant modification of the existing structure. Additionally, it is proposed to create an on-site preservation area consisting of approximately 7,728 lf (1.46 mi.) of perennial stream that lies on Mr. Criss's property; 54.4 acres of mixed bottomland and upland timber and canopy openings; and, 8.2 acres of currently tilled crop land that will be allowed to revert naturally.

On-site mitigation activities will benefit water quality, wildlife habitat, and soil stability within the mitigation area. Mitigation plan benefits include:

- Water quality benefits
- Wildlife habitat opportunities
- Surplus on-site mitigation of watershed resources

The following report includes a discussion of mitigation goals and objectives, as well as the design and protection of the mitigation/conservation site.

The scope of the proposed work falls within the thresholds of the farm road exemption (Section 404(f)(1)(E) and 33 CFR 323.4(a)(6)) will be sought for the Project prior to the commencement of work.

*Work and Mitigation Plan
Ramon Criss Property*

2.0 Mitigation Goals and Objectives

The following section includes a description of site resources, a summary of Project scope, and the mitigation goals and objectives.

2.1 Site Resources

Located in the Southwest $\frac{1}{4}$, of the Northeast $\frac{1}{4}$, of the Southwest $\frac{1}{4}$ of Section 31, Township 25 South, Range 06 East, Butler County, El Dorado, Kansas (**Figure 1**), the mitigation area/conservation area is described as an approximately 62.6-acre area, bisected by approximately 7,728 lf (1.46 mi) of perennial stream.

A variety of resource maps were referenced prior to site reconnaissance. Baseline information included a review of U.S.G.S. 7.5' topographic survey maps, National Wetland Inventory Maps (NWI), the Butler County Soil Survey, and aerial photography. The mitigation/conservation area is predominantly mixed bottomland and upland timber and canopy openings and small parcel of currently tilled cropland that will be allowed to revert naturally.

2.2 Project Scope

The project will ultimately involve .022 ac. of perennial tributary (P-1) (**Table 1, Figure 2**). Perennial tributaries P-2 and P-3 have been and will be entirely avoided. **Table 1** is a summary of potential non-wetland jurisdictional waters on the Project site. No wetlands were observed on the Project site or on the mitigation area.

Table 1: Summary of Potential Jurisdictional Waters

| Tributary Type | Length Linear feet (lf) | Acres (ac.) |
|---------------------------|----------------------------|----------------|
| Perennial Tributary (P-1) | 9 | .022 |

2.3 Major Goals and Objectives

The goal of the proposed activities is to preserve the benefits of mixed bottomland and upland timber and canopy openings, and existing on-site potential jurisdictional resources. The mitigation plan considers the following design parameters:

Goal 1: Avoidance of over-engineered structures – The existing structure will be modified to a “vented ford with pipe” design. This is presented in greater detail in **Section 3.0** and **Attachment 1**.

Goal 2: On-site compensatory mitigation – Mitigation will be performed on-site to benefit ecological functions and values of the Bird Creek watershed. On-site mitigation provides the following benefits:

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- Water Quality Enhancement
- Soil Stability
- Wildlife Habitat Enhancement and Preservation

3.0 Site Design for Mitigation/Conservation Area

The following section details the proposed work to modify the existing structure, and create the proposed mitigation/conservation area. The proposed mitigation is consistent with the Compensatory Mitigation Plan Requirements for Permittee-Responsible Mitigation Projects (USACE 2010). Baseline information was gathered during a site reconnaissance in June 2013. A watershed approach was used for site selection – the Project borders the proposed mitigation area (same HUC-8 watershed). Mitigation debits and credits have been calculated, and site protection consists of a restrictive covenant. Operations and maintenance and the performance standards for the mitigation/conservation area are presented in **Section 4.0**. The following section details the process of establishing the on-site mitigation area.

3.1 Selection Factors

The following factors were considered during mitigation area selection:

- Establish a self-sustaining ecological unit.
- Ensure minimal use of engineered structures.
- Minimize manipulation.
- Preserve bottomland and upland components.
- Provide conveyance for post modification hydrology.

3.2 On-Site Mitigation Measures

The on-site mitigation/conservation area was selected for a variety of factors including the following:

- The site is in an area that will not be developed and can be protected as a long-term ecological unit within the Bird Creek watershed.
- The site provides surplus mitigation, calculated in the form of credits relating to the proposed modified structure on tributary P-1 (see **Table 2** and **Appendix A**).
- Preserving uplands would create a permanent stream buffer to Bird Creek.
- The creation of a permanent conservation area of this size within the city limits of El Dorado would provide a significant environmental benefit. The proximity of the permanent green space to El Dorado Lake and the KDWPT managed wildlife area would also prove beneficial by reducing local dissected terrestrial habitats (see **Figure 3**).

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Table 2: Stream Mitigation Summary

| | | |
|--|------------------|--------------------|
| I. Required Mitigation | Debits | |
| A. Total Debits = (calculated from worksheets data) | 34.0443 | |
| II. Non-Banking Credit Summary | Credits | Linear Feet |
| B. Riparian Buffer Enhancement | | |
| C. Stream Restoration | | |
| D. Total Proposed Non-Bank Mitigation = B + C | 0 | 0 |
| III. Banking Credit Summary | Credits | Linear Feet |
| E. Riparian Buffer Enhancement | | |
| F. Stream Restoration | | |
| G. Total Proposed Bank Mitigation = E + F | 0 | 0 |
| IV. In-Lieu Credit Summary | Credits | Linear Feet |
| H. Riparian Buffer Enhancement | | |
| I. Stream Restoration | | |
| J. Total Proposed In-Lieu Mitigation = H + I | 0 | 0 |
| V. Grand Totals | Credits | Linear Feet |
| K. Total Riparian Enhancement Mitigation = (Calculated from worksheets data) | 5,860.395 | 7,728 |
| L. Total Stream Restoration Mitigation = (Calculated from worksheets data) | 1,7761.4 | 7,728 |
| M. Total Proposed Mitigation = K + L | 23,621.8 | 15,456 |
| | Yes or No | |
| Proposed Mitigation Credits (M) = Total Debits (A) | Yes | |
| Proposed Stream Restoration Credits (L) greater than or equal to 25% of the Debits (A) | Yes | |

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The following is a discussion of the work plan for structure modification and the mitigation/conservation area.

3.3.1 Work Plan

The existing structure will be modified to a “vented ford with pipe” design. This will be first accomplished by removing the 3.0' x 3.0' x 3.0' concrete blocks and associated streambed riprap immediately upstream of the existing structure. The riprap armoring the bank side-slopes immediately upstream of the existing structure would also be removed. Utilizing a concrete saw, the existing weir overflow dam structure would be cut as flush as possible, and removed. Lastly, it is proposed to install dual 18” pipes (Plan C) at existing creek-bed grade which will minimize creek channel down cutting (see **Attachment 1**). The pipes will be placed between the physical middle and the thalweg of the Creek. The installation of these pipes will also ensure adequate hydraulic conductivity of 13.8 miles of upstream headwaters, allow for the passage of most sediment, provide aquatic wildlife passage, and ameliorate additional bank saturation and possible erosion, by not impounding water in Bird Creek.

Once upstream armoring has been removed, the bed and banks will be restored to pre-construction contours (see **Figure 4**).

Discharge conditions and have been modeled and calculated for the proposed modification (see **Table 3** and **Attachment 1**).

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Table 3: Flow Calculations

| FLOW CALCULATION SUMMARY | | | | | | | | |
|--|--------------------|-----------------|-----------------------|--------------------|----------------------|--------------------------|--------------------|--------------------|
| PLAN | Channel Flow (cfs) | Pipe Flow (cfs) | Channel HGL Up Stream | Pipe HGL Up Stream | Pipe HGL Down Stream | Pipe Flow Depth "d" (ft) | Avg velocity (fps) | Remarks |
| A | 1 | 1 | 1271.81 | 1271.67 | 1269.5 | 0.42 | 2.23 | Low Flow |
| B | 1 | 1 | 1270.44 | 1270.37 | 1269.5 | 0.37 | 1.86 | Low Flow |
| C | 1 | 1 | 1270.31 | 1270.26 | 1269.5 | 0.26 | 1.41 | Low Flow |
| D | 1 | 1 | 1270.44 | 1270.37 | 1269.5 | 0.37 | 1.86 | Low Flow |
| E | 1 | 1 | 1270.31 | 1270.26 | 1269.5 | 0.26 | 1.41 | Low Flow |
| | | | | | | | | |
| A | 4.1 | 4.1 | 1272.38 | 1272.11 | 1269.5 | 0.85 | 5.5 | Flow 7-24-13 |
| B | 4.1 | 4.1 | 1270.93 | 1270.78 | 1269.5 | 0.78 | 3.86 | Flow 7-24-13 |
| C | 4.1 | 4.1 | 1270.64 | 1270.54 | 1269.5 | 0.54 | 2.61 | Flow 7-24-13 |
| D | 4.1 | 4.1 | 1270.93 | 1270.78 | 1269.5 | 0.78 | 3.86 | Flow 7-24-14 |
| E | 4.1 | 4.1 | 1270.64 | 1270.54 | 1269.5 | 0.54 | 2.61 | Flow 7-24-15 |
| | | | | | | | | |
| A | 2.7 | 2.7 | 1272.25 | 1271.95 | 1269.5 | 0.7 | 4 | Low Water Crossing |
| B | 14.1 | 14.1 | 1272.24 | 1271.75 | 1269.88 | 1.5 | 8.13 | Low Water Crossing |
| C | 28.2 | 28.2 | 1272.24 | 1271.75 | 1269.88 | 1.5 | 8.13 | Low Water Crossing |
| D | 17.6 | 17.6 | 1272.23 | 1271.43 | 1269.5 | 1.43 | 10.1 | Low Water Crossing |
| E | 35.3 | 35.3 | 1272.23 | 1271.42 | 1269.5 | 1.42 | 10.15 | Low Water Crossing |
| | | | | | | | | |
| A | 1040 | 5.01 | 1277.7 | 1277.7 | 1273.9 | 0.92 | 6.37 | Bankfull -1 year |
| B | 1040 | 14.69 | 1277.71 | 1277.71 | 1273.9 | 1.4 | 8.31 | Bankfull -1 year |
| C | 1040 | 29.19 | 1277.65 | 1277.65 | 1273.9 | 1.4 | 8.26 | Bankfull -1 year |
| D | 1040 | 17.5 | 1277.89 | 1277.89 | 1273.9 | 1.5 | 9.91 | Bankfull -1 year |
| E | 1040 | 34.79 | 1277.6 | 1277.6 | 1273.9 | 1.5 | 9.84 | Bankfull -1 year |
| | | | | | | | | |
| A | 1300 | 5.03 | 1278.4 | 1278.4 | 1274.49 | 0.92 | 6.41 | Bankfull -2 year |
| B | 1300 | 14.91 | 1278.37 | 1278.37 | 1274.49 | 1.4 | 8.44 | Bankfull -2 year |
| C | 1300 | 29.71 | 1278.33 | 1278.33 | 1274.49 | 1.4 | 8.41 | Bankfull -2 year |
| D | 1300 | 17.86 | 1278.36 | 1278.36 | 1274.49 | 1.5 | 10.1 | Bankfull -2 year |
| E | 1300 | 35.51 | 1278.59 | 1278.59 | 1274.49 | 1.5 | 10.05 | Bankfull -2 year |
| | | | | | | | | |
| Plan A: 12" X 40' CMP | | | | | | | | |
| Plan B: 1-18" X 30' CMP | | | | | | | | |
| Plan C: 2-18" X 30' CMP | | | | | | | | |
| Plan D: 1-18" X 18' CMP with Headwalls | | | | | | | | |
| Plan E: 2-18" X 18' CMP with Headwalls | | | | | | | | |

Source: Goedecke 2013

As calculated, modeled and designed, using proposed Plan C is the preferred plan as it satisfies the US Environmental Protection Agency's (USEPAs) request for dual 18" pipes, places the pipes at the least slope (5%) – best suited for aquatic wildlife passage, and does not require the installation of a headwall structure for low water crossing protection. The average flow velocity of Plan C is also the least of the two dual pipe alternatives.

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3.3.2 Planting Plan

Riparian vegetation adjacent-to and with-in the proposed mitigation/conservation area include green ash (*Fraxinus pennsylvanica*), red mulberry (*Morus rubra*), Canada wildrye (*Elymus canadensis*), riverbank grape (*Vitis riparia*), slippery elm (*Ulmus rubra*), black walnut (*Juglans nigra*), hackberry (*Celtis occidentalis*), and brome (*Bromus inermis*).

Adjacent creek banks affected by construction activities of modifying the existing structure will be revegetated. Once the banks are restored to pre-construction contours, they will be seeded with a Natural Resources Conservation Service-confirmed blend composed of a cover crop of cereal oats (*Avena sativa*), at a rate of 20 pounds per acre, and Eastern gamagrass (*Tripsacum dactyloides*), switchgrass (*Panicum virgatum*), big bluestem (*Andropogon gerardii*), and Indiangrass (*Sorghastrum nutans*), at a critical planting area rate of 40 Pure Live Seed (PLS) pounds per acre. Trees and shrubs will be allowed to naturally colonize.

4.0 Management, Monitoring, Maintenance, and Site Protection

The USACE periodically releases water into the Walnut River from El Dorado Lake. These discharges back up into and impact Bird Creek, a tributary of the Walnut River, causing water surface elevations to rise for prolonged periods. The resulting higher water elevations for prolonged periods have and continue to soften the banks and caused multiple riparian trees to become unstable and fall into Bird Creek and cause bank erosion. In effort to maintain the mitigation area and to prevent clogging of the “vent” pipe in the structure, periodic removal of these trees on an as-needed basis is anticipated. Accumulated woody debris will be removed from the inlet of the pipes every 6 months. Additionally, it is anticipated that further actions, including streambank stabilization, may be necessary in the future to protect adjacent agricultural property from erosion caused by these backed-up waters from the Walnut River. If such work is planned, the necessary notification, coordination, and permits will be obtained, and the USEPA notified, prior to commencement.

The following section details the post construction management of the mitigation area including success criteria, monitoring plan, maintenance measures, and site protection.

4.1 Success Criteria

The site will be considered successful if the mitigation/conservation area is legally established, as detailed in Section 4.4, and the restored adjacent creek banks affected by construction activities of modifying the existing structure are sufficiently vegetated. Vegetative success will be monitored by the following:

- The adjacent creek banks will be considered successful if;
 - After one full growing season there is 60% plant canopy cover, seedlings of the Canada wildrye found or seedlings of naturalized vegetation.
 - After two full growing seasons there is 80% plant canopy cover of Canada wildrye or naturalized vegetation.
 - After three full growing seasons there is 90% plant canopy cover of Canada wildrye or naturalized vegetation.

Monitoring of the site will include routine inspections in the mid- and late-growing seasons as described below.

Late Season Compliance Monitoring (September 1-October 15): A site walk through will be conducted to inspect the conditions of the vegetation. Monitoring episodes will include identifying remediation measures such as soil stabilization that can be completed or scheduled appropriately during remainder of growing season. The late season monitoring would also include an assessment of species establishment and relative coverage as described below.

Sampling Regime: Permanent transects (see **Figure 4**) will be established in the revegetated area. Transects will be placed on each bank that would provide repeatable data results during the five year monitoring period. Duplicating monitoring collection methods and analysis during the compliance

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monitoring period will provide an unbiased assessment of vegetation success. Transects will be established by driving solid pins with 1 ½” washers into the ground at each end of transect. A 4’ section of conduit will be driven into the ground 12” from each transect end then painted orange for ease of locating during future monitoring periods. Only sampling points within the revegetated area will be used to determine success.

Vegetative data will be collected to determine percent plant cover and the frequency at which plant species occur. The canopy coverage method (Daubenmire 1959) will be used to collect data in the field. A quadrat 0.025-m² (20cm x 50cm) will be used along transects to collect frequency and percent cover data. Canopy coverage will be visually estimated as a vertical projection from the undisturbed canopy to the ground within the quadrat. Only rooted plants within the quadrat will be considered for frequency. A coverage class will be given to plants rooted inside and outside the quadrat when the vegetation contributed to quadrat cover. Coverages for any quadrat could exceed 100 percent coverage. Bare soil will not be assigned coverage for study purposes. Quadrat data will be collected at a 5’ interval along all transects.

Results will be presented in the form of technical memorandums and will be submitted to the USACE and the USEPA annually for a period of five years. The technical memorandums will include a narrative description of the condition of the modified structure and representative photographs of the structure and 100’ upstream and downstream of the structure to document geomorphic condition.

4.2 Maintenance Measures

For the two establishment years, general maintenance measures such as nuisance species control, and minor grading and reseeded of eroded areas will be employed. Maintenance measures will include but are not limited to:

- Hand-weed unwanted plants prior to the growth of any seed.
- If herbicide use is considered necessary in the revegetated area, the use of an herbicide will be limited to Glyphosate, N-(phosphonomethyl) glycine in a form such as Rodeo® or equivalent that is approved for use near aquatic areas.

4.3 Site Protection

The proposed mitigation/conservation area consists of 62.6 acres of prime development ground with adjacent utilities located within the El Dorado city limits and adjacent to El Dorado Lake. Regionally, agricultural lands have sold for approximately \$2,000.00 per acre. There are residential subdivisions in the vicinity of the proposed mitigation/conservation area and this area is suitable for development as well. If the proposed mitigation/conservation area were developed into residential lots, the price per acre would be substantially higher than \$2000.00. In addition to the per-acre value of the property, the current dollar-value of on-site agricultural production and timber is significant. Converting these acres into a permanent conservation area, in lieu of farming, clearing, or developing them, would provide significant environmental benefit and would provide protection to the watershed. It is proposed that this area would be protected

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in perpetuity by a restrictive covenant. Attachment 2 contains a draft example of the restrictive covenant prepared to protect mitigation in perpetuity.

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5.0 References

Daubenmire, R. 1959. A canopy-coverage method of vegetational analysis. Northwest Sci. 33:43-64.

Goedecke Engineering Company. 2013. Study of Bird Creek Low Water Crossing with "Vented Ford Options." November

United States Army Corps of Engineers (USACE). 2010. Compensatory Mitigation Plan Requirements for Permittee-Responsible Mitigation Projects. Kansas City District, Corps of Engineers. January.

IN THE MATTER OF Criss Investments, Inc., Respondent
Docket No. CWA-07-2014-0065

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was sent this day in the following manner to the addressees:

Copy by email to Attorney for Complainant:

weekley.erin@epa.gov

Copy by First Class Mail to:

O.J. Connell, Jr.
Registered Agent
Criss Investments, Inc
218 W Central Avenue
El Dorado, Kansas 67042

Ramon Criss, President
Criss Investments, Inc
1855 Ridge Road
El Dorado, Kansas 67042-4033

Kathryn Larkins
Shook, Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, Missouri 64108

Mark Frazier
Chief, Regulatory Branch
Kansas City District,
Corps of Engineers
635 Federal Building, Room 402
Kansas City, Missouri 64106-2824

Michael B Tate
Director, Bureau of Water
Kansas Department of Health and Environment
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367

Dated:

7/9/14



Kathy Robinson
Hearing Clerk, Region 7