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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
MISSOURI DEPARTMENT OF)	Docket No. CWA 07 2005-0117
TRANSPORTATION)	
Respondent)	
)	
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	

CONSENT AGREEMENT/FINAL ORDER

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TRANSPORTATION)
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Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

I. CONSENT AGREEMENT/FINAL ORDER

The United States Environmental Protection Agency, Region VII (“EPA”) and the Missouri Department of Transportation (“Respondent” or “MoDOT”) have agreed to a settlement of this action before filing of a complaint, and 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) 64 Fed. Reg. 40181, 40183 (July 23, 1999), to be codified at 40 C.F.R. §§ 22.13(b), 22.18(b)(2).

This Consent Agreement/Final Order is a complete and final settlement of all civil and administrative claims and causes of action for the violations set forth in this Consent

Agreement/ Final Order relating to Respondent's: 1) failure to comply with the General Operating Permit for Highway Construction, also known as the National Pollution Discharge Elimination System (NPDES) permit, at the Highway 63 Construction Site; 2) discharge of pollutants into waters of the United States adjacent to the Grand River near Chillicothe, Missouri (Route 36 Highway Project) without the permit required by law; and 3) discharge of pollutants into waters of the United States at the Missouri River near Waverly, Missouri (Waverly Bridge Project) without the permit required by law.

II. ALLEGATIONS

A. 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 Consent Agreement/Final Order serves as notice that EPA has reason to believe that Respondent has violated Sections 301, 402 and 404, 33 U.S.C. §§1311, 1342 and 1344 of the CWA, and the regulations promulgated thereunder.

3. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

B. Section 402 of the CWA

Statutory and Regulatory Framework of Section 402 of the CWA

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, by any person except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. §§ 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants

may be discharged only in accordance with the terms of an NPDES permit issued pursuant to that Section.

5. 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.

6. Section 402(p) of the CWA, 33 U.S.C. § 1342(p) sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

7. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

8. 40 C.F.R. §§ 122.26 (a)(1)(ii) and 122.26 (c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

9. 40 C.F.R. § 122.26 (b)(14)(x) defines “storm water discharge associated with industrial activity” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

10. The Missouri Department of Natural Resources (“MDNR”) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant

to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

11. MDNR issued a NPDES General Permit for the discharge of storm water associated with construction sites, Permit Number MO-R100007 (the Permit), specifically:

Construction or land disturbance activity (e.g. clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

The Permit became effective on April 11, 2003 and remains in effect until April 18, 2007.

Section 402 of the CWA - Factual Background

12. On or about January 2004, Respondent initiated construction activities to expand Highway 63 in Macon and Adair Counties, Missouri (Highway 63 Construction Site) for 21.6 miles, covering approximately 90 acres. Construction activities include clearing, grading and excavation which have disturbed five (5) or more acres of total land area.

13. Storm water, surface drainage, and runoff water has left the Highway 63 Construction Site on the east side of Highway 63 moving into drainage paths of unnamed tributaries leading to the Middle Fork Salt River. The runoff and drainage from the site is “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

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

15. Respondent’s storm water runoff is a “discharge of a pollutant” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362.

16. The Highway 63 Construction Site is a “point source” which has caused the “discharge of pollutants” as defined by Section 502 of the CWA, 33 U.S.C. § 1362.

17. Respondent discharged pollutants into unnamed tributaries to Middle Fork Salt River. The Middle Fork Salt River is a “navigable water” as defined by Section 502 of the CWA, 33 USC. § 1362.

18. Respondent’s discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

19. Respondent applied for and was issued NPDES permit coverage under the General Permit described in Paragraph 11 above.

20. On June 18, 2004 and August 4, 2004, MDNR performed inspections of the Highway 63 Construction Site under the authority of Section 644.026.1 RSMo. of the Missouri Clean Water Law to determine Respondent’s compliance with its General Permit.

21. On June 28-29, 2004, EPA performed an inspection of the Highway 63 Construction Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a) to evaluate the treatment and disposal of storm water at the Highway 63 Construction Site in accordance with the CWA.

Findings of Violation of Section 402 of the CWA

22. The facts stated in Paragraphs 12 through 21 above are herein incorporated.

23. Part 13 (Requirements and Guidelines) of Respondent’s Permit requires Respondent to maintain at all times all pollution control measures and systems in good order to achieve compliance with the terms of the General Permit.

24. The inspections referenced in Paragraphs 20 and 21 above revealed that i) silt fences were undermined at three locations on June 18, 2004 and remained undermined on June 28-29, 2004; ii) no storm water control structures were present along the newly constructed roadway or around drainage inlets on June 18, 2004, and iii) no ditch checks were present on June 28-29, 2004 where sediment was present off-site in drainage ways leading east to unnamed tributaries which flow into the Middle Fork Salt River.

25. Part 12 (Requirements and Guidelines) of the Permit requires Respondent to inspect a land disturbance site at a minimum of once per week and, after heavy rainfall, within 72 hours. Part 12 further requires Respondent to correct any deficiencies within seven calendar days of inspection.

26. Respondent's inspections logs from January 2004 through June 2004 and the EPA inspection referenced in Paragraph 21 above indicate that Respondent did not inspect silt fences immediately after each rainfall and did not make corrections within seven days of noting the deficiency in silt fences.

27. Part 3 (Requirements and Guidelines) of the Permit prohibits Respondent from discharging in to waters of the state such that the substances cause unsightly color or turbidity.

28. On August 4, 2004, following a rainfall event of approximately 3.5 inches on August 3, 2004, the MDNR inspector observed storm water leaving the Highway 63 Construction Site causing turbidity in unnamed tributaries of the Middle Fork Salt River near Katydid Street and Highway 63, south of Highway 63 and the junction of NN, north of Kiln Street, and south of Kiln Street.

29. By failing to maintain at all times all pollution control measures and systems in good order, such as silt fences, storm water control structures and ditch checks, failing to correct deficiencies within seven calendar days of an inspection, and failing to protect waters in the above-referenced unnamed tributaries of the Middle Fork Salt River from being free of substances in sufficient amount to cause unsightly color or turbidity, Respondent failed to comply with Parts 13, 12 and 3 of its NPDES Permit. Non-compliance with the NPDES Permit is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p).

30. At all times relevant to this administrative action, the unnamed tributaries leading to the Middle Fork Salt River and the Middle Fork Salt River are each a “water of the United States” as defined by 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3.

31. Based on information and belief, in August 2004, Respondent or one acting on its behalf, discharged pollutants into waters of the United States in violation of its NPDES permit.

32. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region VII hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violation cited above, in the amount of \$17,000.

C. Section 404 of the CWA

Statutory and Regulatory Framework of Section 404 of the CWA

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

34. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the discharge of dredged or fill material into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, occur in accordance with a permit issued under that Section.

35. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the Secretary of the Army, acting through the Chief of Engineers, may issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

36. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

37. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, inter alia, dredged spoil, rock, sand and cellar dirt.

38. 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.”

39. Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines “point source” as any discernible, confined and discrete conveyance...from which pollutants are or may be discharged.”

40. 40 C.F.R. § 232.2 and 33 C.F.R. Part 328 define waters of the United States, in part, as, “ lakes, rivers and streams, ...wetlands.”

41. Section 502 of the CWA defines “person” to include a State or a political subdivision of a State.

42. Section 404 of the CWA requires a person to obtain a permit from the United States Army Corps of Engineers (Corps) prior to any discharge of dredged or fill material into the navigable waters of the United States.

Section 404 of the CWA - Factual Background

a. Count I

43. During the week of July 21, 2003, Respondent or one acting on its behalf, performed excavation activities with a bulldozer in an area that is part of the Consolidated Wetland Mitigation Area, located adjacent to the Grand River near Chillicothe, Livingston County, Missouri. During the excavation, dirt, spoil rock or sand were discharged into the wetlands.

44. The bulldozer used by Respondent acted as a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

45. The gravel and earthen material that was placed into the Consolidated Wetland Mitigation Area is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

46. The deposition of gravel and earthen material into a water of the United States constitutes the “discharge of pollutants” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

47. The wetlands adjacent to the Grand River and the Grand River are navigable waters within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

48. Respondent did not obtain a 404 permit prior to conducting the activities described in Paragraph 43 above.

b. Count II

49. In December 2003, in Waverly, Carroll County, Missouri, Respondent, or one acting on its behalf, used a dragline to excavate earthen material from the bank of the Missouri River near river mile 293.4 to construct an access pad within the river. While using the dragline, Respondent discharged dirt, spoil, rock or sand into the Missouri River.

50. The dragline used by Respondent acted as a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

51. The gravel and earthen material that was placed into the Missouri River is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

53. The deposition of gravel and earthen material into a water of the United States constitutes the “discharge of pollutants” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

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

55. Respondent did not obtain a 404 permit prior to conducting the activities described in Paragraph 49 above.

Findings of Violation Of Section 404 Of The CWA

a. Count I

56. The facts stated in paragraphs 43 through 48 above are herein incorporated.

57. The use of a bulldozer referenced in Paragraph 43 indicates that Respondent discharged pollutants into wetlands and the Grand River by using earth-moving equipment without obtaining a Section 404 permit.

58. Respondent's failure to obtain a Section 404 permit prior to conducting activities described in Paragraph 43 above is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

59. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region VII hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violation cited above, in the amount of \$46,000.

b. Count II

60. The facts stated in Paragraphs 49 through 55 above are herein incorporated.

61. Respondent's use of a dragline referenced in Paragraph 49 above indicates that Respondent discharged pollutants into the Missouri River without obtaining a Section 404 permit.

62. Respondent's failure to obtain a 404 permit prior to conducting activities described in Paragraph 49 above is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

63. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region VII hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violation cited above, in the amount of \$40,000.

III. CONSENT AGREEMENT

1. Respondent and EPA agree to the terms of this Consent Agreement/Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement/Final Order.

2. Respondent admits the jurisdictional allegations of this Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this Consent Agreement/Final Order.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement/Final Order.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth in this Consent Agreement/Final Order.

5. Nothing contained in the Final Order portion of this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligation to comply with applicable Federal, state and local environmental statutes and regulations and applicable permits.

6. Respondent agrees, in settlement of the claim alleged in this Consent Agreement/Final Order, to pay a cash penalty of \$25,750.00 and to mitigate the remainder of the cash penalty through successful performance of a Supplemental Environmental Project ("SEP"), identified in Attachment 1, attached to and incorporated into this Consent Agreement/Final Order.

7. This Consent Agreement/Final Order constitutes a settlement by EPA of all claims for civil penalties pursuant to Section 309 of the Clean Water Act for the violation alleged herein. Nothing in this Consent Agreement/Final Order is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent. Compliance with this Consent Agreement/Final Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations administered

by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.

A. SEP

8. The parties agree that performance of the SEP set forth in Attachment 1 is intended to secure significant environmental restoration and protection.

9. Respondent shall implement the SEP described in Attachment 1 and in accordance with Attachment 2 (Schedule), attached to and incorporated into this Consent Agreement/Final Order, and this Paragraph. All submittals to EPA shall be sent to:

Raju Kakarlapudi, Compliance Officer
Office of Water, Wetlands and Pesticides Division EPA - Region VII
901 North 5th Street
Kansas City, Kansas 66101

10. Respondent hereby certifies that, as of the date of this Consent Agreement/Final Order, Respondent 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 in compliance 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.

11. Any public statement, oral or written, 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 U.S. Environmental Protection Agency for alleged violations of the Clean Water Act."

12. Respondent shall notify EPA in writing within one week of completion of the SEP. Within thirty (30) days of the notification letter to EPA, Respondent shall submit to EPA a SEP Completion Report that shall include, but not be limited to, the following :

- a. A description of the activities that Respondent completed in its implementation of the SEP Work Plan.
- b. An itemized accounting of the costs incurred in performance of the SEP. The itemization shall be submitted with the following statement, signed by Respondent:

I certify that the information accompanying this submittal is true, accurate, and complete. I am aware that there are significant penalties for submitting false information to the United States, its agencies and departments, including the possibility of fine and imprisonment for knowing violations.

B. Stipulated Penalties

13. Respondent shall pay stipulated penalties in the following circumstances:
- a. For failure to submit any SEP Work Plan, as required by Attachment 1, or failure to submit any SEP Work Plan to EPA within the time frame set forth in Attachment 2 (Schedule), Respondent shall pay a stipulated penalty in the amount of \$250.00 for each day after the due date set forth in Attachment 2 until the report is submitted in a form that satisfies EPA.
 - b. For failure to submit the SEP Completion Report, as required by Paragraph 12 above, or failure to submit it to EPA within the time frame set forth in Attachment 2 (Schedule), Respondent shall pay a stipulated penalty in the amount of \$500.00 for each day after the due date set forth in the Schedule, until the report is submitted in a form that satisfies EPA.

c. Except as provided in subparagraph (e) below, if the SEP has not been completed satisfactorily as determined by EPA, Respondent shall pay a stipulated penalty to the United States in the amount that equals twice the estimated cost of the SEP as set forth in Attachment 1. If Respondent disagrees with EPA's determination that the SEP has not been satisfactorily completed, Respondent may request reconsideration of this determination by objecting in writing to Mr. Raju Kakarlapudi, EPA Compliance Officer, within ten (10) days of receipt of notification by EPA of the unsatisfactory determination. EPA and Respondent shall have an additional thirty (30) days from the receipt by EPA of the written objection to reach agreement. If agreement cannot be reached on any such issue within this thirty (30) day period, Respondent may request reconsideration by the Branch Chief of the Water, Wetland and Pesticides Division. The Branch Chief will provide a written statement of his/her decision to Respondent, which decision shall be final and binding upon Respondent. Nothing herein waives Respondent's right to judicial review as provided under Section 701 *et seq.* of the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*

d. If the SEP is not completed satisfactorily, but Respondent made good faith and timely efforts to complete the project and certifies, with supporting documentation, that at least 90% of the estimated SEP cost, as set forth in Attachment 1, was expended on the SEP, Respondent shall not pay any stipulated penalty.

e. If the SEP is satisfactorily completed, but Respondent spent less than 90% of the estimated SEP cost, as set forth in Attachment 1, Respondent shall pay

a stipulated penalty equal to the difference between the amount of the estimated SEP cost set forth in Attachment 1 and the amount expended in implementing the SEP.

f. If the SEP is satisfactorily completed, and Respondent spent at least 90% of the estimated SEP cost, as set forth in Attachment 1, Respondent shall not pay any stipulated penalty.

14. Payment of stipulated penalties shall be immediately due and payable upon notice by EPA. Respondent's failure to pay any portion of the civil penalty of \$25,750.00 or any stipulated penalty assessed herein in accordance with the provisions of this Order may result in commencement of a civil action in Federal District Court to recover the total penalty required by the terms of the Final Order, together with interest thereon at the applicable statutory rate. Payment of a stipulated penalty shall be made in accordance with the instructions set forth in Paragraph 2 of the Final Order.

IV. FINAL ORDER

Pursuant to Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319 (g)(2)(B), and according to the terms of this Consent Agreement/Final Order, IT IS HEREBY ORDERED THAT:

1. Within thirty (30) days of the effective date of this Consent Agreement/Final Order, Respondent shall pay a civil penalty of \$25,750.00.

2. Payment of the penalty shall be by cashier or certified check made payable to "United States Treasury" and remitted to:

U.S. EPA Region VII
P.O. Box 371099M
Pittsburgh, PA 15251

Respondent shall reference the name of the case, In the Matter of the Missouri Department of Transportation, Docket Number CWA -07-2005-0117, on the check. A copy of the check shall also be mailed to:

Audrey Asher, Esq.
EPA - Region VII
901 North 5th Street
Kansas City, Kansas 66101

3. 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.

4. Respondent shall perform the SEP described in Attachment 1, in accordance with the Schedule in Attachment 2. If Respondent fails to implement the SEP in compliance with Attachment 1, consistent with the Schedule in Attachment 2, Respondent shall pay stipulated penalties as set forth in Paragraph 15 of this Consent Agreement/Final Order.

6. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

7. This Consent Agreement/Final Order addresses all civil administrative claims for the CWA violation identified above. EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this Consent Agreement/Final Order.

8. Notwithstanding any other provision of this Consent Agreement/Final Order, EPA reserves the right to enforce the terms of the Final Order by initiating a judicial or

administrative action under Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

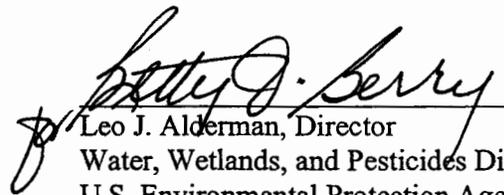
9. This Final Order will terminate upon satisfactory completion of all requirements as determined by EPA. Whether Respondent has complied with the terms of this Consent Agreement/Final Order through performing the SEP as required shall be the sole determination of EPA.

10. This Final Order shall apply to and be binding upon Respondent and its agents, successors, and assigns.

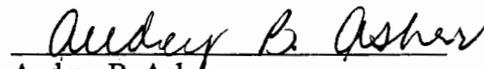
11. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

For the United States Environmental Protection Agency - Region VII

08/18/05
Date


Leo J. Alderman, Director
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency Region VII

8/16/05
Date


Audrey B. Asher
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency Region VII

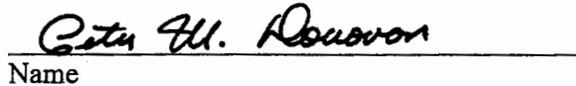
For the Respondent:

08-10-05
Date


Name

Title Director of Program Delivery

08/11/05
Date

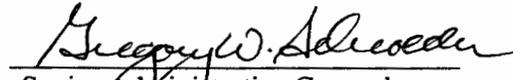

Name

Title Asst. Chief Counsel-Project Development

Attest:

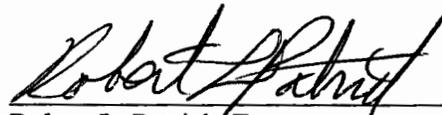
Approved As to Form:


Secretary to the Missouri Highways
and Transportation Commission


Senior Administrative Counsel

IT IS SO ORDERED.

Oct. 21, 2005
Date


Robert L. Patrick, Esq.
Regional Judicial Officer

ATTACHMENT 1
Pershing State Park-Erosion and Stream Sedimentation Control
Supplemental Environmental Project

Summary: The Missouri Department of Transportation proposes a project along Locust Creek at Pershing State Park, Linn County, Missouri. The project components include blocking flow into Higgins Ditch, notching levees to open a floodway that routes more Locust Creek flow through park wetlands, and restoring forested or other wetland vegetation to 3 former leveed agricultural fields. The project protects and enhances wetland restoration efforts on 150 acres of former agricultural fields along its path. Benefits include protecting 2000 acres of high quality native wetlands from dewatering and silt accretion, protecting private agricultural land and a highway bridge, and increasing quantity and quality forested and seasonally flooded wetlands in the park. The project will provide long-term benefits to wetland and neotropical migratory birds, habitat for the federally-listed Massasauga rattlesnake, several kinds of native wetland plant communities, and the aquatic fauna within the naturally meandering portion of Locust Creek.

Background and problem description: This project is adopted in response to lost wetlands in Livingston County, and to supplement the mitigation for the placement of fill into the Missouri River in Carroll County and damage from storm water runoff from a construction site along Highway 63 in Macon County. The EPA's requirement was that this project must be innovative and contribute to increases in wetland quality and quantity, create habitat for shallow water species, and reduce sediment load to Missouri's streams and rivers.

Pershing State Park lies along Locust Creek in Linn County at Highway 36. The park contains one of the largest remnant native wetland environments in Missouri, with nearly 3000 contiguous acres of forested wetlands, sloughs, marshes, shrub swamps and at 800 acres, one of Missouri's two remaining large wet prairies. The park preserves habitat for a tremendous variety of native plant and wildlife, was recently documented to contain one of north Missouri's most species-rich native fish communities, protects one of (candidate) wet prairie species, contains habitat and records for the federally endangered Indian bat, and includes two Missouri Natural Areas. It frequently serves as a scientific reference or model for native natural wetland ecosystems.

The quality of these natural wetland and aquatic systems has been progressively impaired by erosion sediments deposited by the upstream channelized portion of Locust Creek, and most recently by the flow-induced head-cutting from a channelized private ditch. Higgins Ditch has now connected to Locust Creek and is poised to divert the main Locust Creek flow around the park. Continued head-cutting threatens to isolate the parks wetlands by removing their hydrologic connection to Locust Creek water, while threatening private levees and even the Highway 36 bridge through the increased flooding into Higgins Ditch.

If this happens, there will be an increase in flooding damage to levees that line Higgins Ditch, damaging park neighbors' property and agricultural lands and the Fountain Grove Conservation Area downstream of the park. Erosion around the Highway 36 bridge,

which was not built to the same standards as at Locust Creek because flow in Higgins Ditch was not anticipated to be high at the time of its construction, will threaten its integrity. And of course the sedimentation along Locust Creek will harm the park wetlands and water quality in times of flood, while the loss of water at other times will seriously impact its wetlands.

The objective: a) prevent loss of Locust Creek to Higgins Ditch, b) reduce sediment entering the native wetlands and wetland restoration areas by dispersing Locust Creek overbank flow in the north part of the park and c) facilitate restoration of forested buffers to filter much of this sediment before it can impair the water quality and significant wetlands downstream.

The project: The proposed project has two components: a) block the erosion channels to Higgins Ditch; and b) notch existing park levees to create a floodway that carries water eastward, away from Higgins Ditch and facilitates wetland development and enhancement.

All erosion channels near Locust Creek will be filled with gradient controls that reduce flow west into Higgins Ditch. These will be simple rip-rap or log structures with anchors to the land that block most flow below normal flow elevations, and slow the rate of head-cutting. We will concurrently open gaps in existing park levees to promote easterly flow of floodwater through restored park wetlands and Muddy Creek, then back to Locust Creek downstream. The latter project will involve opening 200 foot long gaps in six series of levees east of Locust Creek within Pershing State Park. These will have a 1-in-12 slope on both sides, topped by a spillway or control structure to dictate the amount of water held in the field following a flood event. This part of the project will create a floodway for water, allowing it to flow east through restored forested wetlands, be filtered of sediment, and finally routed into Locust Creek rather than Higgins Ditch. It also functions to re-connect this part of the floodplain with Locust Creek, and the spillway or water control structure elevation allows for water retention and wetland development in these park units which were purchased by the Department of Natural Resources for these exact purposes. For the former agricultural fields that lie in much of this floodway, restoration via reforestation and water control capability will slow the water and filter sediment, before it reaches the park's quality stream reaches and wetlands south of Highway 36. The approximate 150 acres of former agricultural fields will be reverted through water management and natural succession to forested (or other) wetlands, with water retention capability for low-level seasonal flooding.

The estimated cost is \$80,000. This cost would include opening the floodway, wetland enhancement, and the construction of gradient controls that block flow to Higgins Ditch.

Wetlands benefits: The EPA's SEP policy requires there to be a nexus between violations and SEPs. This proposal has a nexus to the alleged violation at i) Chillicothe, by creating shallow water habitat; ii) Waverly Bridge, by creating shallow water habitat; and iii) Waverly Bridge and Highway 63 by reducing sediment load to streams and rivers. By keeping flow in Locust Creek, the project also provides significant sediment

and wetlands protection benefits. The three criteria are met by this project in the following ways:

Project Objectives:

- Preventing diversion of Locust Creek into Higgins Ditch. This is a wetland enhancement that prevents loss of function to over 2000 acres of high-quality natural wetland downstream in the park.
- Notching the park levees and creating a floodway on the east side of Locust Creek expands the floodplain north of Highway 36 and its capacity to hold and filter floodwater, and re-connects these areas to the river system.
- Designing spillway heights in the levee notches that allow for passive water control and wetland management of three former farm fields, which increases wetland values for associated plant and wildlife species. Currently these farm fields are entirely ringed by agriculture levee, which limits their function for these purposes.
- Facilitating re-forestation of the two former agriculture fields allows them to function as sediment traps and filters in the floodway, thus improving water quality for the biologically rich natural remnants of stream and associated wetlands downstream in the park.
- Re-forestation and water control capability converts the 150 acres of three former agriculture fields to natural wetlands that are consistent in function and value to the contiguous 2000 acre park, a marked enhancement over their current fallow condition.

Project Monitoring Criteria:

- Percent closure of existing erosion channels to Higgins Ditch.
- Presence/absence of over-bank flow through levee notches, into Muddy Creek and lower Locust Creek.
- Acres of shallow water retention maintained by levee notch spillways or water control structures.
- Acres of forest, wet prairie or emergent marsh created and maintained within the former agriculture fields.
- Acres of contiguous (unfragmented) natural habitat added for neotropical migratory breeding bird use north of Highway 36.
- Acres and type of natural wetlands protected below Highway 36, in the main body of the park.

Pershing State Park Project Map



Locust Creek
(channelized)

(channelized)

levees to be notched

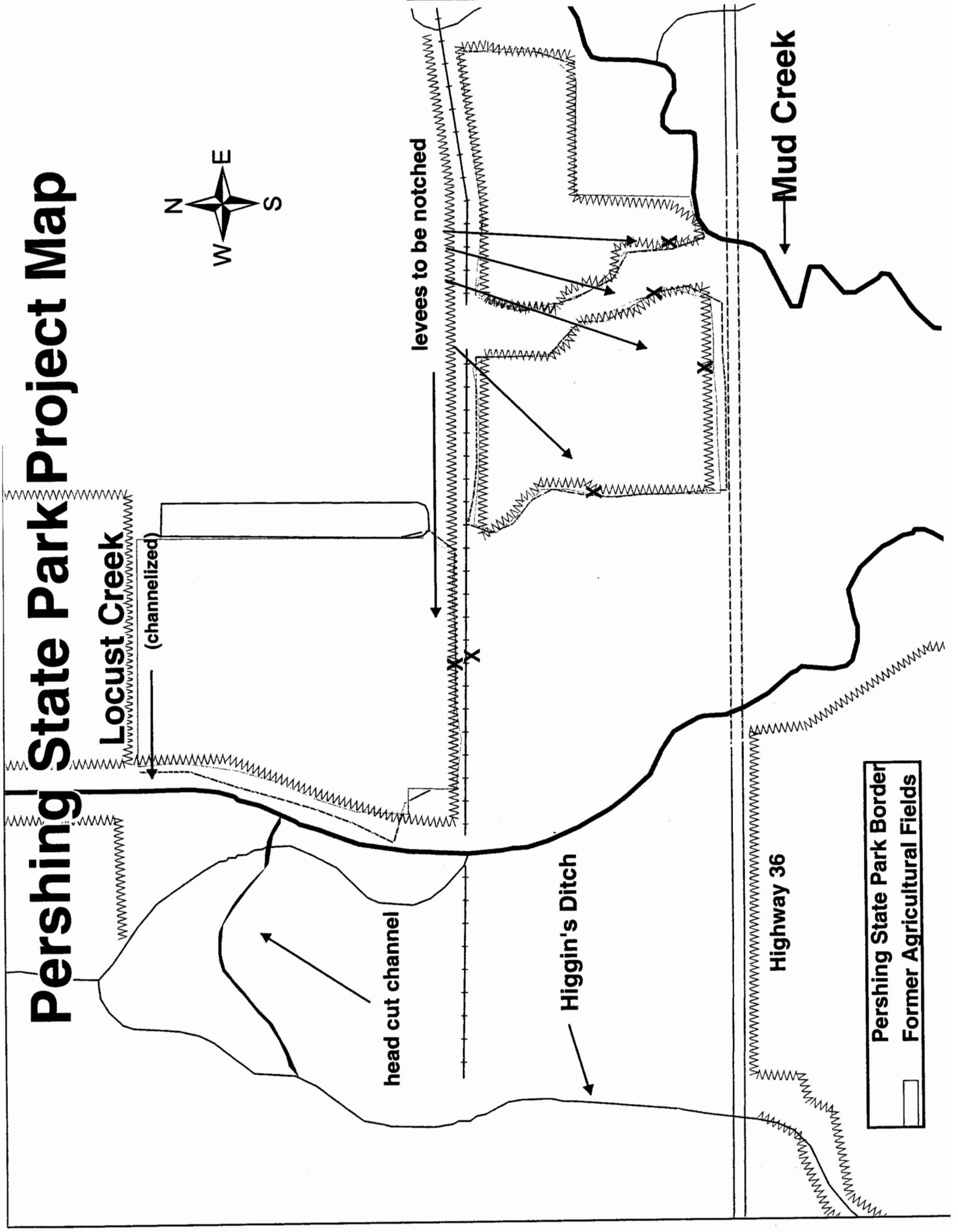
head cut channel

Higgin's Ditch

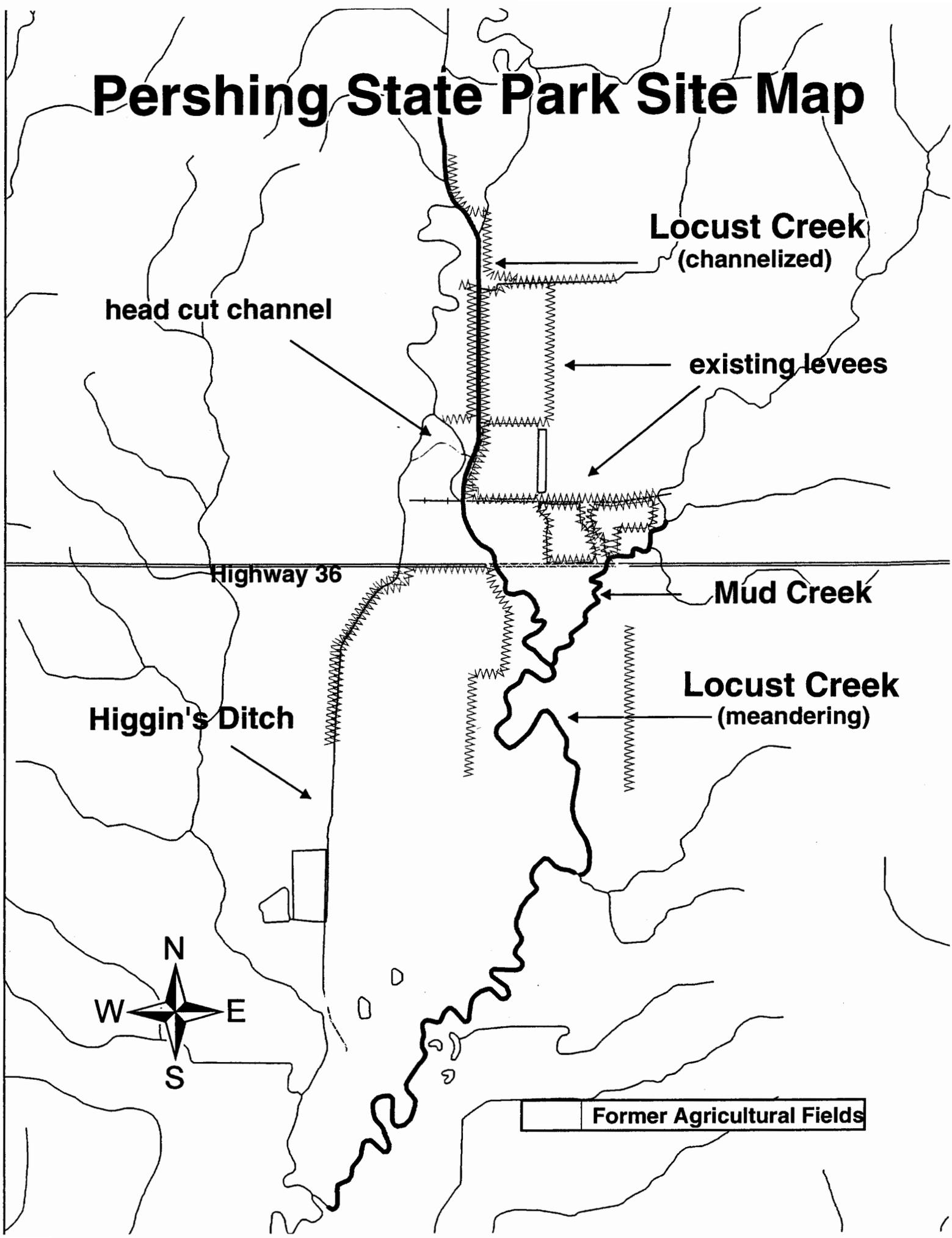
Highway 36

Mud Creek

	Pershing State Park Border
	Former Agricultural Fields



Pershing State Park Site Map



Locust Creek
(channelized)

head cut channel

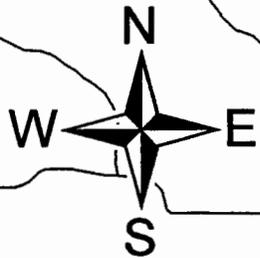
existing levees

Highway 36

Mud Creek

Higgin's Ditch

Locust Creek
(meandering)



Former Agricultural Fields

**ATTACHMENT 2
SEP SCHEDULE**

Draft Work Plan	w/in 90 days of Effective Date of Consent Agreement/Final Order
Final Work Plan	w/in 30 days of receipt of EPA's comments on Draft Design
SEP Completion Report (narrative and photos to demonstrate compliance with the EPA approved design)	Within 30 days of completion of the SEP by October 31, 2006
Annual Reports (to include Project Monitoring criteria as set forth in Attachment 1 and corrective actions, if any)	by October 31, 2007 continuing annually through October 31, 2011.

IN THE MATTER OF Missouri Department of Transportation, Respondent
Docket No. CWA-07-2005-0117

CERTIFICATE OF SERVICE

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

Copy hand delivered to
Attorney for Complainant:

Audrey B. Asher
Senior Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Gregory W. Schroeder
Missouri Highways and Transportation Commission
Senior Administrative Counsel
P.O. Box 270
105 W. Capitol Avenue
Jefferson City, Missouri 65102

Dated: 10/21/05


Kathy Robinson
Regional Hearing Clerk