

AGREEMENT CONCERNING STREAM MITIGATION

by and between

FORT BEND COUNTY

and

Katy Prairie Mitigation Company, LLC

This Agreement Concerning Mitigation (the "Agreement") is entered into effective as of the dates set forth on the signature page hereto between **Fort Bend County** (hereinafter sometimes referred to as "Permittee"), a body corporate and politic under the laws of the State of Texas whose mailing address is 301 Jackson Street, Richmond, Texas 77469 and **Katy Prairie Mitigation Company, LLC** (hereinafter sometimes referred to as "KPMC"), mailing address: 1101 Haynes Street, Suite 211, Raleigh, North Carolina, 27604.

Recitals

WHEREAS, Permittee's project (the "Project") will result in certain impacts to streams and Permittee expects to incur compensatory mitigation obligations to be established by the US Army Corps of Engineers (the "USACE") in connection with the FM 1093 Westpark Extension Phase II Project (the "Project");

WHEREAS, Restoration Systems DBA as Prairie Creek Ventures, a Texas incorporated entity is the Sponsor of and authorized agent for Katy Prairie Stream Mitigation Bank (the "Mitigation Bank");

WHEREAS, the Project and the Mitigation Bank are both located in the USACE, Galveston District;

WHEREAS, Permittee, desires to reserve and purchase Stream Mitigation Credits ("Credits") from the Mitigation Bank for compensatory stream mitigation associated with the Project and KPMC desires to sell to Permittee such Credits, all pursuant to the terms and conditions set forth in this Agreement; and

WHEREAS, the Mitigation Bank is established and operated in accordance with all regulatory requirements found at 33 CFR Parts 325 and 332, and 40 CFR Part 230, (Processing Department of the Army Permits and Compensatory Mitigation for Losses of Aquatic Resources: Final Rule, April 10, 2008), as well as other requirements deemed essential by the USACE;

NOW THEREFORE, for and in consideration of the premises and the payments hereinafter set forth, KPMC and Permittee hereby agree as follows:

Agreement

1. **Recitals.** The foregoing Recitals are hereby incorporated into and made a part of this Agreement.
2. **Availability of Credits from the Mitigation Bank.** Subject to the terms and conditions of this Agreement, Permittee and KPMC agree that a total of 3,666 Credits are available from the Mitigation Bank for purchase by Permittee,
3. **Credit Pricing.** The fixed purchase price is \$275 per Credit. Purchase price payment shall be made to KPMC upon delivery of Credits by the Mitigation Bank as set forth below.
4. **Credit Deposit.** Upon execution and delivery of this Agreement, Permittee shall pay KPMC the cash sum of One Million Eight Thousand One Hundred Fifty and 00/100 (\$1,008,150.00) Dollars. Payment to be made within 60 days of approval from Commissioner's Court.
5. **Agreement to Purchase and Sell.** For the fixed purchase price per Credit set forth in Section 3, KPMC agrees to cause the Mitigation Bank to sell and transfer to Permittee, and Permittee hereby agrees to purchase from the Mitigation Bank 3,666 Credits that will satisfy Permittee's obligations for compensatory Stream mitigation determined by the USACE under the permit issued by the USACE in connection with the Project (the "Project Permit").
6. **Responsibilities of KPMC.**
 - a. Upon transfer and delivery by the Mitigation Bank of the Credits to Permittee, KPMC shall assume responsibility for compensatory mitigation requirements under the Project Permit and KPMC shall provide to the USACE a Letter of Confirmation with a copy of Permittee's Approved Permit that confirms that Prairie Creek Ventures, as sponsor of the Mitigation Bank, has accepted the responsibility for providing the compensatory mitigation required under the Project Permit.
 - b. KPMC shall perform all necessary work to restore, enhance and/or preserve functions and maintain habitats in accordance with the provisions of the approved Mitigation Banking Instrument.
7. **Acceptance of Responsibility.** Upon its receipt of all payments due from Permittee for Credits purchased under this Agreement, KPMC agrees to accept sole responsibility for all Stream mitigation requirements of Permittee under the Project Permit on the terms provided in this Agreement.
8. **Authorized Agent.** KPMC has entered into an agreement with the USACE that provides that KPMC, and its successors or assigns, shall be the authorized agent responsible for maintaining and protecting lands contained within the Mitigation

Bank. This responsibility includes, but is not limited to, lands subject to this Agreement, in perpetuity, unless said lands are transferred to a state or federal resource agency or non-profit conservation organization.

9. Termination.

- a. This Agreement may be terminated by the mutual written agreement of the parties.
- b. In the case of the filing of a petition in bankruptcy by either party, or the appointment of a receiver for Permittee, or the insolvency of Permittee prior to Permittee's and Permittee's Agent's full performance hereunder, this Agreement shall automatically and immediately terminate without the necessity of any action or notice by or from KPMC.

- 10. Notices.** Except as otherwise provided herein, all notices, requests, demands and other communications required or permitted to be given hereunder shall be in writing and shall be deemed to have been duly given if delivered personally, sent by reputable overnight delivery service, mailed first-class, postage prepaid, registered or certified mail, or sent by email, as follows:

KATY PRAIRIE

MITIGATION COMPANY: Katy Prairie Mitigation Company, LLC
Attention: John Preyer
1101 Haynes St., Suite 211
Raleigh, NC 27604
Email: jpreyer@restorationsystems.com

PERMITTEE: Fort Bend County
Attn: County Judge
401 Jackson Street, 1st Floor
Richmond, Texas 77469

With a copy to: Fort Bend County Engineering
Attn: County Engineer
301 Jackson Street, 4th Floor
Email: Richard.Stolleis@fortbendcountytexas.gov

- 11. Rights and Remedies.** In the event of default by either party hereto, the non-defaulting party shall have the right to seek such relief as may be provided by law or equity, or both, and the non-prevailing party shall be responsible for all costs incurred by the prevailing party.
- 12. No Agency.** Permittee and Permittee's Agent are not partners, agents or joint venturers with KPMC, and this Agreement is not intended to nor shall it be construed to create a partnership, joint venture or agency relationship between Permittee or Permittee's Agent and KPMC.

13. **Indemnification.** KPMC shall indemnify and hold Permittee harmless from and against such claims, damages, litigation and expenses that result from, arise out of or are caused by, and only to the extent of, KPMC negligence or intentional misconduct.

14. **Miscellaneous.**

a. Prevailing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without giving effect to conflicts of law principles of such State.

b. Amendment; Waiver. This Agreement may not be amended, modified or altered without the written consent of the parties hereto. Any waiver of any provision or requirement hereunder shall be valid only if set forth in an instrument in writing signed by the party to be bound thereby. Any waiver of any term or condition shall not be construed as a waiver of any subsequent breach or a subsequent waiver of the same term or condition, or a waiver of any other term or condition, of this Agreement. The failure of any party to assert any of its rights hereunder shall not constitute a waiver of any of such rights.

c. Entire Agreement. This Agreement sets forth the entire Agreement and understanding of the parties with respect to the transactions contemplated hereby and supersedes all prior agreements, arrangements and understandings related to the subject matter hereof. No representation, promise or inducement or statement of intention has been made by any party which is not embodied in this Agreement or in the exhibits or schedules hereto. No party hereto shall be bound by or liable for any alleged representation, promise or inducement or statement of intention not so set forth. The Schedules and Exhibits hereto are incorporated herein and form a part of the Agreement.

d. Assignment. This Agreement may not be assigned by any party hereto without the prior written consent of all other parties hereto, said consent shall not be unreasonably withheld, conditioned, or delayed. Notwithstanding the foregoing, Permittee may, without the prior consent of KPMC, assign its rights under this Agreement, in whole or in part, to any: (i) entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control of, Permittee, or a joint venture of Permittee; (ii) entity to whom Permittee has assigned all or substantially all of its assets; or (iii) bank, financing institution or other lender, or groups thereof, pursuant to the terms of any financing agreements; provided, however, that no such assignment shall relieve Permittee from any payment obligations under this Agreement. Any assignment, if agreed to by Permittee, is subject to the assignee or successor party's assumption of all rights and obligations of the assigning party under this Agreement.

- e. **Severability.** If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any law or public policy, all other terms and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party.
- f. **No Third-Party Beneficiaries.** This Agreement will not confer any rights or remedies upon any person other than the parties and their respective successors and permitted assigns.
- g. **Counterparts; Electronic Transmissions.** This Agreement may be executed in one or more counterparts, each of which will be deemed an original but all of which together will constitute one and the same instrument. The exchange of copies of this Agreement and of signature pages by facsimile or electronic (i.e., PDF) transmission will constitute effective execution and delivery of this Agreement and may be used instead of the original Agreement for all purposes.
- h. **Expenses.** Each of the parties will bear its own costs and expenses, including legal fees and expenses, incurred in connection with this Agreement and the transactions contemplated hereby, except as otherwise set forth in Paragraph 14 of this Agreement.
- i. **Attorneys' Fees.** Permittee does not agree to pay any and/or all attorney fees incurred by KPMC or in any way associated with this Agreement.
- j. **No Consequential or Punitive Damages.** Neither party shall be liable to the other for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages, whether by statute, in tort or contract or otherwise in respect of this Agreement or otherwise in connection with this transaction.

(Signature Page Follows)

Agreed to and accepted this 15th day of June, 2017.

Katy Prairie Mitigation Company, LLC

By: _____

John Preyer, President

Agreed to and accepted this _____ day of _____, 2017.

FORT BEND COUNTY

By: _____

Robert E. Hebert, County Judge

Date: _____

ATTEST:

By: _____

Laura Richard, County Clerk

APPROVED:

By: _____

Richard W. Stolleis, P.E., County Engineer

AUDITOR'S CERTIFICATE

I hereby certify that funds in the amount of \$_____ are available to pay the obligation of Fort Bend County within the foregoing Agreement.

Robert Ed Sturdivant, County Auditor

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