

CENPP-CO-G

17 July 1996

MEMORANDUM FOR RECORD

SUBJECT: Meeting with Michael Jones Regarding Concerns about Rivergate

1. Mike Jones dropped in, unannounced, to Tom Savidge's office today. Tom is Acting Chief, CENPP-CO, and Mike wanted to discuss his concerns regarding the Rivergate Industrial Park development by the Port of Portland. I took Mike to my office and asked him to write out his concerns. I said that I would address them.

2. The following is a listing of his concerns as I understood them. His written notes are attached.

- a. There have been illegal fills in the Rivergate area since 30 November 1989.
- b. The buffer zones, established by the Cooperative Agreement to Establish a Rivergate Development Program and an Acceptable Mitigation Program for Wetland Impacts, have been illegally filled (the District Engineer, U.S. Army Corps of Engineers, Portland District, signed the agreement on 27 January 1989).
- c. No Section 404 permits have been obtained as stipulated in the Cooperative Agreement.
- d. There has been no mitigation for any of the fills in Rivergate after 1989 as stipulated in the Cooperative Agreement.
- e. The terms of the Cooperative Agreement have not been fulfilled.
- f. The floodplain values of the buffers which were left as mitigation, as stipulated in the Cooperative Agreement, have not been respected (i.e., illegal fill has been placed there, and new fill is proposed in association with a rail bridge crossing Columbia Slough).
- g. There have been no public meetings concerning any of the things happening in the Rivergate Industrial Park.
- h. The new rail line proposed north of Smith and Bybee Lakes is in the buffer zone, and this impact has not been considered.
- i. There has never been an Environmental Impact Statement (EIS) for the Rivergate development.

j. There has been no direct consultation with resource agencies regarding the proposed rail line in the Rivergate area.

k. Some permits for activities in the Rivergate area have been changed substantially without notice (speaking specifically of the fill for the proposed rail bridge).

l. There has been no consideration of illegal fill during the delineation of wetlands at the rail bridge site. More specifically, illegal fill was placed in wetlands at the sites for the approaches to the proposed rail bridge, and soil samples were taken in the illegally placed sandy fill. The report then described the soil as sandy, non-hydric. The natural ground would have exhibited hydric soils since a wetland was present.

m. There has been no real assessment of need for any permit issued in the Rivergate area.

n. New permits have been issued in the Rivergate area without first examining previous permits in the same area.

o. Permits have been granted for the same property in the same year.

p. Areas of standing water, that were subject to regulation under Section 10 of the River and Harbor Act of 1899, have been filled. This filling is in violation of State law which specified no fill is to be placed below a certain elevation in the Smith and Bybee Lake area.

q. Although the proposed rail bridge is regulated by the Coast Guard under Section 9 of the River and Harbor Act of 1899, the work should also be regulated by the Corps under Section 10. No Section 10 permit has been required.

3. I told Mike that it would take some time to answer many of the questions, and that we would have to do some investigation to answer many of them. I said that we would answer him as soon as we could complete our analysis of his concerns, and that we would probably have to answer in several letters as we progress through his concerns.

W. B. PAYNTER
Chief, Regulatory Branch



DEPARTMENT OF THE ARMY
PORTLAND DISTRICT, CORPS OF ENGINEERS
P.O. BOX 2946
PORTLAND, OREGON 97208-2946

REPLY TO
ATTENTION OF:

August 28, 1996

Operations, Construction,
and Readiness Division

William Michael Jones
17751 Amity Vineyards Road
Portland, Oregon 97101

Dear Mr. Jones:

This letter is in response to discussions you have had with me at this office and over the telephone, and with Judy Linton of my staff, regarding activities of the Port of Portland in the Rivergate Industrial Area. During our meeting at our office, I asked you to write down your concerns so we could evaluate them and provide you with a full answer. You provided a list of 17 concerns for us to consider. I have subsequently discussed some of these concerns with you over the telephone. This letter is a partial response to those concerns.

During our telephone conversation on August 9, 1996, you indicated that your most immediate concerns were centered on the imminent construction of a railroad bridge across Columbia Slough, which is a navigable water of the U.S. Essentially you are concerned that the bridge will be built very soon, and that its construction will cut off a wildlife corridor that is important in the Rivergate area. Associated with this primary concern, you have also stated that wetlands adjacent to the bridge site have been illegally filled, and that the approaches to the bridge will be built on this unauthorized fill material. You recognize that the U.S. Coast Guard has the responsibility under Section 9 of the River and Harbor Act of 1899 to regulate bridges and causeways over navigable waters of the U.S., but you remain concerned with the Coast Guard's permitting process and decision. You contend that the approach fill to the bridge is regulated by the Corps under Section 404, while acknowledging that the wetland delineation at the approach fill sites did not find wetlands there (you contend that unauthorized fill was placed in the wetlands, so the soil samples showed the soil to be sandy and non-hydric). You also contend that the Corps should regulate certain features of the bridge construction under Section 10 of the River and Harbor Act of 1899 because they are being placed below the ordinary high water line of a navigable water of the U.S. (e.g., abutment fills). Finally, you contend that the Corps has special regulatory responsibilities under Executive Order 11988 regarding activities in floodplains. I will discuss these concerns first.

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First I would like to deal with the primary authority to regulate the construction of bridges over navigable waters of the U.S. The authority to regulate bridges and causeways under Section 9 of the River and Harbor Act of 1899 was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966. It is under Section 9 that bridges and the work and features associated with their construction in navigable waters of the U.S. is regulated. The same work and features in the navigable waters of the U.S. are not also regulated by another Federal agency under a different section of the same Federal law. Accordingly, all work and associated features of the rail bridge within and over Columbia Slough are regulated only by the Coast Guard under the River and Harbor Act of 1899. The Coast Guard is the lead Federal agency responsible for consultation with the appropriate Federal and State agencies in the process of deciding whether to issue a permit under Section 9. The Corps only regulates the discharge of dredged or fill material associated with the bridge construction under Section 404 of the Clean Water Act. In addition, the discharge of fill material for the bridge is permitted under the Corps nationwide permit 15, provided such discharge has been permitted by the Coast Guard as part of the Section 9 bridge permit. On December 5, 1995, we informed the Port of Portland that the proposed work associated with construction of the bridge is authorized under nationwide permit 15, subject to the condition of a Section 9 permit being issued for it.

We are still investigating whether unauthorized fill material was placed in the area of the bridge approaches. To date, we have not uncovered any substantial evidence which points to the placement of illegal fill. However, we will continue our investigation until we have examined all the information and make a determination. We will keep you informed of our progress and findings.

We reviewed and accepted the wetland delineation documentation associated with the bridge and approach fills. We agreed with the finding that, based on the information available, there were no wetlands in the area of the approach fills at the time the wetland delineation field work was performed. The soils were sandy and non-hydric. There did not appear to be sufficient hydrology to support wetlands. Therefore, we concurred that the approach fills would not occur in a wetlands. We realize that the outcome of our investigation of previous filling at the bridge site could cause this determination to be different if we find that wetlands had been previously filled without authorization. As stated above, we will inform you of our findings on that issue.

The Corps has no regulatory authority over activities occurring in floodplains, other than those features, subject to regulation under either Section 10 or Section 404, which occur in a water of the U.S. In accordance with the requirements of Executive Order 11988, the Corps considers the floodplain impacts of activities it regulates as part

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of its public interest review. To the extent practicable, the Corps seeks to avoid long and short term impacts associated with the occupancy and modification of floodplains, and seeks alternatives to floodplain development where possible. Regarding the rail bridge over Columbia Slough, the Coast Guard is the lead Federal regulating agency and has the primary responsibility to ensure that floodplain values are considered in its permit decision. Typically, the local government has the direct responsibility for developing and implementing floodplain ordinances in order to continue to participate in the floodplain insurance program. Therefore, in the case of this rail bridge, the Corps will defer to the Coast Guard's determination of whether the project conforms to the requirements of Executive Order 11988. As a practicable matter, a bridge will frequently occur in a floodplain, so alternatives will not exist outside the floodplain.

I would like to address one general concern you expressed to me regarding the application of the National Environmental Policy Act (NEPA) to the development of the Rivergate area. Authorization to the Port of Portland for dredging material in the Columbia River to obtain fill material for the Rivergate Industrial Park development dates back to August 3, 1967. At that time, the Corps only had the authority to regulate the dredging of material from the navigable river under Section 10 of the River and Harbor Act of 1899. The authority to regulate the discharge of fill material under Section 404 of the Clean Water Act was not in place until July 25, 1975. In addition, the NEPA, which is the basis for performing Environmental Impact Statements and Environmental Assessments on Federal Actions, was not enacted until 1969. So there was no requirement to regulate the discharge of fill material into wetlands and no requirement to complete an EIS or EA when the filling of Rivergate was initiated. On May 25, 1971, the permit to dredge in the Columbia River for fill material for Rivergate was reauthorized. There still was no authority to regulate the discharge of fill into wetlands, and an EIS was not required for the reissuance of the permit. On June 3, 1974, the permit was again reissued along with authorizations to dredge in 3 additional areas. District Counsel reviewed the reauthorization of the original dredging and the dredging of the new areas in view of NEPA and concluded that an EIS would not be required. Instrumental to this decision was the fact, supported by court decision, that the Corps did not have sufficient Federal control and responsibility over the activity (i.e., filling the Rivergate area) to constitute a Federal action. The authorization of the dredging itself was deemed to not be a Federal action that would significantly affect the quality of the human environment. On May 29, 1979, the dredging of the areas permitted in 1974 was reauthorized, and the placement of the fill in the Rivergate area was permitted. By this time, Section 404 of the Clean Water Act applied to action. District Counsel again reviewed the proposed authorizations and concluded that an EIS should not be required. The bases for this recommendation were that the commitment of the resources had been largely completed, the decision not to do an EIS in 1974, the North Portland Peninsula Plan and its process

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completed in 1972, the 1974 - 1976 Corps Draft EISs accompanying the Flood Control Report for the area, and the Environmental Assessment for the 1979 renewal of the permits. On November 30, 1984, and on June 3, 1991, the dredging and filling was again reauthorized. Copies of the permit records referenced above can be obtained by requesting them.

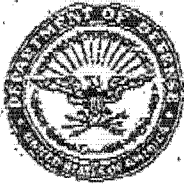
I hope my discussion on the issues in this letter are clear to you. As I indicated, we will need additional time to complete investigations or other work to answer the other concerns you have raised. I expect to provide another update by September 30, 1996.

Sincerely,

W. B. Paynter
Chief, Regulatory Branch

Copies Furnished:

U.S. Coast Guard (Mikesell)
✓ EPA (Shaich)
Port of Portland (Sigfried)



DEPARTMENT OF THE ARMY
PORTLAND DISTRICT, CORPS OF ENGINEERS
P.O. BOX 2940
PORTLAND, OREGON 97208-2946
October 4, 1996

REPLY TO
ATTENTION OF:

Operations, Construction,
and Readiness Division

William Michael Jones
17751 Amity Vineyards Road
Amity, Oregon 97101

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

of pages 12

To	Emily Roth	From	Joel Shreich
Dept./Agency	Larks + Greaspaes	Phone #	326-2716
Fax #	797-1849	Fax #	
NDN 7540-01-317-7368		5089-101	
GENERAL SERVICES ADMINISTRATION			

Dear Mr. Jones:

As I discussed with you when I called you on September 30, 1996, this letter responds to the remaining concerns that you have expressed to us through several meetings and telephone conversations. This letter is also a continuation of the discussion of several of the issues I addressed in my August 28, 1996, letter to you.

Based on the meeting we had on July 17, 1996, during which you wrote out your list of concerns regarding the Rivergate Development in North Portland, I have placed the issues into four principle categories: concerns regarding apparent illegal fills in the Rivergate area; concerns regarding apparent non-completion of items in the 1988/1989 Cooperative Agreement among the Port of Portland and five public agencies regarding mitigation for filling wetlands in Rivergate; concerns regarding the permitting process for Port of Portland permits in the Rivergate area; and concerns regarding the planning and building of a rail line in Rivergate. I will address each of these areas, responding to your specific concerns.

You cited two major reasons for your charge that illegal fills have occurred in Rivergate. The first is that the 1984 permit authorizing fill in Rivergate under Section 404 of the Clean Water Act expired after November 30, 1989, and that the permit issued on June 3, 1991, did not indicate that the work was authorized under that authority. The second reason is that the 1988/1989 Cooperative Agreement, which established a Rivergate development program and an acceptable mitigation program for wetland impacts, states that the Port recognizes the necessity of applying for and complying with state and Federal permits. The Port also agreed that the measures described in the Agreement would be incorporated into permit applications for fill in the Rivergate wetlands, and that they may become enforceable conditions of any permit issued for the fill. From these two sources you have contended that the Port did not apply for, and the U.S. Army Corps of Engineers has not issued, permits to fill wetlands in the Rivergate area since the expiration of the 1984 permit, which occurred after November 30, 1989.

In fact, the Port did apply to the Corps for a renewal of their 1984 permit on June 26, 1989. The application clearly described the Port's intention of continuing to dredge fill material from the permitted Columbia River borrow sites, and to use this material to continue to fill the Rivergate area. The Cooperative Agreement with the Corps and other Federal and state agencies was referenced in the permit application. The application was acknowledged by the Permit Project Manager, but it was not processed immediately due to the backlog of work

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on hand at that time. That Project Manager accepted employment outside the Corps, and eventually a new person filled the position. The public notice was published on September 21, 1990. Unfortunately, the new Project Manager did not understand that wetlands still existed in the Rivergate fill area, and did not indicate that the application was subject to Section 404 of the Clean Water Act as well as Section 10 of the Rivers and Harbors Act of 1899. The permit was issued on June 3, 1991, only under the authority of Section 10 of the Rivers and Harbors Act of 1899.

Clearly the intent of the Port was to renew its permit for obtaining fill material and placing fill in wetlands within the Rivergate area as they had been authorized to do in the two previous permits issued in 1979 and 1984 under both Section 10 and Section 404 authorities. Clearly the Corps was aware of the Port's intent when we signed the Cooperative Agreement on January 27, 1989. Unfortunately we omitted Section 404 on the permit as an authorizing authority for the fill due to an oversight. The Port, relying on the Corps to correctly identify the appropriate authorities for advertising the work and writing the permit, proceeded to conduct the work as they had in the past. Only recently has it come to our attention that the Section 404 authority was omitted from the permit we issued in 1991. We are considering the appropriate method of correcting this oversight and will keep you informed of the course of action we take.

You mentioned two other concerns relating to potential illegal fills. One concern was that illegal fill had occurred in a navigable water of the U.S. because it was below a certain elevation in Rivergate, although not in Columbia Slough itself. The Corps has made a specific determination of navigability at Columbia Slough. The slough is navigable for a distance of 8.4 miles from its mouth to the channel closure. The navigability pertains to the slough channel itself, and not to any other area adjacent or near it in Rivergate. I responded to a more specific concern in my August 28, 1996, letter to you regarding the non-applicability of Section 10 of the Rivers and Harbors Act to construction and abutment fills associated with the new rail bridge which was permitted by the U.S. Coast Guard under Section 9 of that Act. The other concern you expressed was that fill had been placed illegally under a State of Oregon law that prohibits such placement below a specified elevation within Smith and Bybee Lakes. This is a matter which you must take up with the State.

Regarding the Port's compliance with the terms of the Cooperative Agreement, you have contended that buffer zones intended to be protected have been filled, that there has been no mitigation for fills in the Rivergate area after 1989, that none of the terms of the agreement have been fulfilled, and that the floodplain values of the buffers have not been respected. We have met with Port representatives and have discussed in detail the terms of the Cooperative Agreement, and the progress in complying with those terms. To date, the Port has met most of the commitments they made, and we have no reason to believe they will not meet the remaining commitments in due course. For example, the fill boundaries of the Rivergate fill

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area was reduced from 330 acres with 235 acres of wetlands that could have been filled under permits that existed in 1989, to a fill area of 270 remaining acres with 203 acres of wetlands. The fill slopes have been constructed as agreed, and they are being planted as the property is developed (e.g., the South Rivergate fill slopes will be planted as part of the rail project now under construction). Vegetative screens are planted according to the Smith and Bybee Lakes Management Plan. The Ramsey Lake wetland mitigation area was constructed as specified, and work is still being done on revegetating the old fill site. The upland area between Ramsey Lake and Columbia Slough was planted as designed, but it has only been partially successful. Some plants have died, and the situation is being reviewed with the participating agencies in the Cooperative Agreement. An additional piece of land near Ramsey Lake, that was originally scheduled to be filled under the terms of the Cooperative Agreement, was not filled and will continue to function as wildlife habitat.

The buffers you referenced as an issue important to you have been preserved. This includes a 100-foot buffer along the slough in South Rivergate, and a 150-foot buffer adjacent to the slough in North Rivergate. In 1983, prior to the Cooperative Agreement, the Port spilled excess fill material in the north buffer zone. That material is being removed and the Port intends to revegetate the site. In addition, the remnant ponds adjacent to Bybee Lake on the north have been preserved and enhanced as described, and they now function as waterfowl habitat areas.

The analysis of the flow patterns in Columbia Slough has been completed. This information was used in a subsequent decision-making process by Metro regarding the construction of water control structures for Smith and Bybee Lakes. Metro decided that the structures described in the Cooperative Agreement were not appropriate and should be replaced by other measures. Upgrading of the existing water level control structure for the lakes was recommended and subsequently accomplished in 1992. This change was approved by the Smith & Bybee Lakes Management Committee, although it has not been reflected with a formal change to the Cooperative Agreement yet. A substitute is also being sought for the channel that was proposed between Bybee Lake and Columbia Slough, the most likely candidate being a water flow augmentation project. When a substitute is recommended by the Technical Advisory Committee and approved by the Smith & Bybee Lakes Management Committee, a modification to the Cooperative Agreement will be negotiated.

The Cooperative Agreement also called for the design and construction of a public storm drainage system to be built to City of Portland standards. This plan, while also in need of being updated, is being implemented essentially as described in the Agreement. The Port has transferred the responsibility for building the South Rivergate storm drainage system to the City, and has sold them the property to use for building the treatment facility. The Port is designing a facility for North Rivergate which will also meet the City's standards and will be transferred to the City for operation.

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In the third category of issues, you stated several concerns regarding the process used in issuing the Port permits for the Rivergate development. Specifically you mentioned that there had been no public meetings, no Environmental Impact Statement (EIS), no real assessment of need for any permit in Rivergate, no examination of previous permits when issuing new permits, and granting of permits on the same property in the same year. I reviewed the EIS issue in my August 28, 1996, letter to you. In summary, the Corps carefully examined whether an EIS should be required for the action of issuing permits in 1974 and 1979. We determined that an EIS would not be required for the reasons described in my previous letter to you. That position has been upheld in subsequent issuance of permits in 1984 and 1991.

A public hearing is held only when it is needed for making a decision on a permit application, and a valid interest would be served by the hearing. While no public hearings have been held in conjunction with the Corps decisions to issue permits to the Port in the Rivergate area, public input was received in response to the public notices, and was considered in the permit evaluations. The history of the development of Rivergate is a long one involving many studies and the issuance of permits at the local, state and Federal levels. There have been many meetings with citizens over the years, and significant opportunity for public input into the various processes. In addition, the need for the Rivergate has been well documented and known to the public for many years. Two documents which describe the need are the North Portland Peninsula Study prepared by the Columbia Slough Environmental Task Force in December 1972, and the Rivergate-North Portland Flood Control Study prepared by the Corps in 1975 (this study also documents two public hearings). Considering the many sources of identifying the need for an industrial park in the Rivergate area, additional analyses of need are unnecessary in evaluating permit applications within Rivergate.

Your other concerns in this category had to do with modifications to permits, considering previous permits when issuing new ones, and issuing permits on the same property. Modifications of permits are performed in accordance with the policy guidance in the regulations. The Corps has the authority to modify permits without public review when there is no substantial change in the attendant circumstances. When new permits are issued, the circumstances are reviewed for changes, the environmental impacts are described, and cumulative impacts are considered, including permitted activities in the same vicinity.

The final category of issues were centered specifically on the development of a rail line in Rivergate. My August 28, 1996, letter to you addressed your concerns regarding the rail bridge across Columbia Slough. Although not subject to our regulatory authorities, we understand that the rail line north of Smith and Bybee Lakes is consistent with the Smith & Bybee Lakes Management Plan. Our review of the Cooperative Agreement revealed that the rail line is also consistent with its terms and conditions. Any portion we have permitted has been coordinated as required by our regulations. We do not find anything out of order with this element of the development.

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I hope this answers your concerns regarding the Rivergate development. If you have further questions, I will be pleased to try to answer them, or direct you to the appropriate source for the answers.

Sincerely,

W. B. Paynter
Chief, Regulatory Branch

Copy Furnished:

Port of Portland (Montagne)

Oct. 15, 1996

William Michael Jones
17751 Amity Vineyards Road
Amity, Oregon 971010

Return Receipt Requested

Mike Thorn, Director
Port of Portland
700 NE Multnomah
Portland, Oregon 97232

Cory Streisinger, General Counsel
Port of Portland
700 NE Multnomah
Portland, Oregon 97232

RE: This is the notice required by 33 U.S.C. 1365 that 60 day notice is given prior to action against violation of the Clean Water Act.

Dear Sirs,

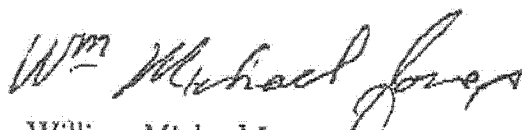
I, William Michael Jones, both a citizen within the meaning of 1365 (g) and a person within the meaning of Section 1362 (5) believe the Port of Portland has violated the Federal Water Pollution Control Act 33 U.S.C. §§ 1251-1376, the Clean Water Act. The Port of Portland has disposed of dredge spoils and fill into the waters of the United States in the area generally called Rivergate, an unlawful act under Subsection (A) of Section 1311 of the Clean Water Act.

These waters of the United States filled illegally from November, 1989 and continuing to the present day correspond partially to the 235 acres of wetland delineated by the Port of Portland, the U.S. Corps of Engineers and the U.S. Environmental Protection Agency in a document finalized in 1989.

Other wetlands adjacent to these wetlands have been filled without permit after 1977, see U.S.C. § 1344.

In addition, I welcome discussion about whatever facts you believe relevant which are not itemized in this letter. If you wish to avail yourself of this opportunity, or if you have any questions regarding this letter, please contact me.

Sincerely,


William Michael Jones