

RECEIVED

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**JUDGE'S
COPY**

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

BY _____

Counsel for the Federal Defendants

JUDGE'S COPY

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

WILLIAM MICHAEL JONES,)	
)	Case No. CV97-1674-ST
Plaintiff,)	
)	FEDERAL DEFENDANTS' NOTICE
v.)	OF LODGING CROSS-CLAIM
)	AND CONSENT DECREES
MIKE THORNE, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

The Federal Defendants with this notice hereby lodge with the Court pleadings that would resolve all claims in this action. Specifically, Attachment 1 contains a proposed consent decree that would settle all claims brought by plaintiff against all defendants. Attachment 2 contains a cross-claim by the United States against defendant Port of Portland alleging the discharge of pollutants into waters of the United States in Portland, Oregon in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). Attachment 3 contains a proposed consent decree that would settle all claims asserted in the cross-claim. The proposed consent decrees should not be

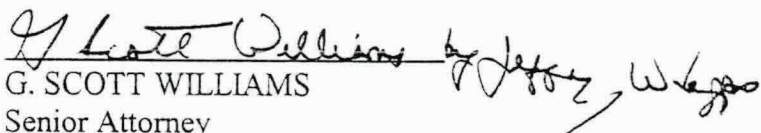
Federal Defendants'
Notice of Lodging

signed or entered by the Court at this time and the cross-claim should not be filed at this time.

Pursuant to 28 C.F.R. § 50.7, after the proposed consent decrees and cross-claim are lodged with the Court, the United States Department of Justice will submit a notice of the proposed settlement (including the cross-claim and both proposed consent decrees) for publication in the Federal Register, and will then accept public comment on the proposed settlement for 30 days. After the close of the public comment period, the United States will review the comments and will move the Court to file the cross-claim and enter the proposed consent decrees if that action is appropriate in light of the comments received. The United States reserves the right to withhold or withdraw its consent to the entry of the proposed consent decrees if the comments received disclose facts which indicate that the proposed judgments are inappropriate, improper, or inadequate.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division


G. SCOTT WILLIAMS
Senior Attorney
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Federal Defendants'
Notice of Lodging

CERTIFICATE OF SERVICE

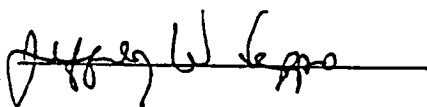
I, Jeffrey Leppo, certify that on this 28th day of November, 2000, a true and correct copy of the foregoing Federal Defendants' Notice of Lodging Cross-claim and Consent Decrees was served by first-class mail, postage prepaid, on the following:

William Michael Jones
2716 NE Mason Street
Portland, OR 97211

G. Scott Williams
Environmental Defense Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026

Dave Hlebechuk
Office of Counsel, Portland District
U.S. Army Corps of Engineers
P.O. Box 2946
Portland, OR 97208-2946

Deborah Hilsman
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, ORC-158
Seattle WA 98101

A handwritten signature in black ink, appearing to read "Jeffrey Leppo", is written over a horizontal line.

ATTACHMENT 1

1 pursuant to permits and extensions of permits issued by the U.S. Army Corps of Engineers
2 ("COE") that were invalid or otherwise unlawful; (ii) that defendants COE and the U.S.
3 Environmental Protection Agency ("EPA") failed to perform nondiscretionary duties under the
4 Clean Water Act in failing to prevent the Port of Portland from conducting unlawful filling in
5 Rivergate; (iii) that defendant U.S. Department of Transportation ("DOT"), through
6 defendant Federal Highway Administration ("FHWA") and defendant U.S. Coast Guard
7 ("USCG"), failed to perform nondiscretionary duties under the Clean Water Act with respect
8 to unlawful filling in Rivergate; (iv) that defendants DOT, FHWA, USCG and COE
9 unlawfully issued permits and unlawfully undertook other actions related to the filling of
10 waters of the United States within Rivergate and in the construction of the Columbia Slough
11 Rail Bridge; and (v) that defendants DOT, FHWA, USCG and COE violated the provisions of
12 NEPA and related legal requirements in connection with one or more fill permits and projects
13 within Rivergate. All defendants have appeared and answered the complaint by denying, in all
14 material respects, Jones' allegations.
15

16
17 WHEREAS, United States Magistrate Judge Janice M. Stewart entered Findings and
18 Recommendations dated July 15, 1999 resolving the Port's Motion for Summary Judgment
19 (docket #41) and Jones' Cross-Motion for Summary Judgment (docket #92). In the Findings
20 and Recommendations, the Magistrate determined on the merits, inter alia, that: the Port
21 should be granted summary judgment dismissing Jones' First Cause of Action with respect to
22 (i) fill placed by the Port in Rivergate within the boundaries and during the time frames of the
23 COE Permit DA 071-OYA-2-005294 (effective November 30, 1984) and the August 17, 1989
24 and July 19, 1990 extensions of that permit and (ii) fill placed by the Port north of Smith Lake
25 and adjacent to Marine Drive. The Findings and Recommendations also determined that COE
26 Permit 071-OYA-1-008624 (effective June 3, 1991) did not authorize the filling of any

illegal fill =
between 1991 &
1996.

1 wetlands pursuant to section 404 of the Clean Water Act and, accordingly, that all wetland
2 filling by the Port in Rivergate during the period of this permit was unauthorized (unless
3 permitted under a separate COE Permit) subject only to the Port's affirmative defenses of
4 equitable estoppel, laches and mootness. The Port timely objected to portions of the Findings
5 and Recommendations; however, consideration of the Port's objections has been stayed.

6 WHEREAS, simultaneous with the filing of this Consent Decree, the United States of
7 America, on behalf of the COE, has filed an enforcement cross-claim against the Port. The
8 United States' cross-claim alleges that the filling of certain wetlands within Rivergate by the
9 Port violated section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), because dredged or
10 fill material was discharged into waters of the United States within Rivergate without
11 authorization under section 404 of the CWA, 33 U.S.C. § 1344. The cross-claim seeks to
12 require the Port to provide appropriate mitigation and/or restoration for the unauthorized filling
13 of wetlands and to require the Port to pay a civil penalty as provided in 33 U.S.C. § 1319(d).
14 Jones and the Port have consented to the filing of the enforcement cross-claim by the United
15 States and to the related consent decree (the "Enforcement Consent Decree").

16 WHEREAS, plaintiff Jones, defendant Port of Portland, and defendants COE, EPA,
17 DOT, FHWA and USCG (the "United States") agree that settlement of this case is in the
18 public interest and that entry of this Consent Decree and the Enforcement Consent Decree are
19 the most appropriate means of resolving Jones' claims against all defendants and the United
20 States' cross-claim under the CWA against the Port.

21 WHEREAS, Jones, the Port of Portland and the United States (collectively, the
22 "Parties") also recognize and agree that matters addressed by this litigation are complicated
23 and substantially affected by: (i) the broad physical area encompassed by Rivergate, which has
24 been filled over many decades; (ii) the many permits, agreements and decisions issued or
25 entered into over a period of decades with respect to filling within Rivergate; (iii) the
26 ownership or management of Rivergate lands, or permitting authority, of numerous non-parties
including METRO, the City of Portland, the Smith and Bybee Lakes Management Committee,

1 the Oregon Division of State Lands, the Oregon Department of Fish and Wildlife, the Oregon
2 Department of Transportation and other private persons and entities; (iv) the divergent views
3 of the parties and numerous interested non-parties with respect to planned industrial
4 development, natural resource values, appropriate mitigation measures, and appropriate or
5 required public comment and process; and (v) the practical difficulties of successful
6 restoration, revegetation or buffering of filled areas.

7 NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as
8 follows:

9 **I. GENERAL PROVISIONS**

10 1. Parties' Intent

11 In furtherance of purposes of the CWA, the parties have agreed to: (i) finally and
12 specifically resolve all mitigation and restoration obligations of the Port of Portland under
13 specified permits for filling of waters of the United States within the Rivergate area of
14 Portland, Oregon as of the Effective Date, subject to specified exceptions; and (ii) finally and
15 specifically resolve Jones' challenges to any action taken or not taken by the United States with
16 respect to any filling performed by the Port in Rivergate and the construction of the Columbia
17 Slough Rail Bridge. These purposes are achieved through the provisions of this Consent
18 Decree and the Enforcement Consent Decree.

19 2. No Admission of Liability

20 Neither the Port of Portland nor the United States admit to any liability to Plaintiff or
21 otherwise arising out of the transactions, occurrences, actions or inaction alleged in Jones'
22 Complaint; nor do they admit any violation of any federal or state laws or regulations.

23 3. Commitments by the Port of Portland

24 The Port of Portland shall: (i) perform the mitigation and restoration measures
25 specified in section III of this Consent Decree and the related referenced appendices; (ii)
26 consent to entry of the Enforcement Consent Decree, including payment of a civil penalty to

1 the United States pursuant to 33 U.S.C. § 1319(d); and (iii) pay Jones the sum of Fifty
2 Thousand Dollars (\$50,000.00) in cash in settlement for his litigation costs.

3 4. Commitments by the United States

4 The United States shall: (i) find that the terms of this Consent Decree and the
5 Enforcement Consent Decree are the final and complete restoration and mitigation obligations
6 of the Port of Portland under the Clean Water Act for all fill material placed in Rivergate in
7 accordance with the terms of the specified permits, subject to specified exceptions, as provided
8 in paragraph 21 of this Consent Decree; (ii) lodge and seek entry of the Enforcement Consent
9 Decree, pursuant to which the fill identified in the cross-claim of the United States and the
10 activities required by the Enforcement Consent Decree shall be authorized by Nationwide
11 Permit 32; and (iii) terminate the *Cooperative Agreement* as provided in paragraph 22 of this
12 Consent Decree.

13 5. Commitments by Plaintiff

14 Upon the entry of this Consent Decree, Plaintiff, William Michael Jones, shall: (i)
15 release and forever discharge all claims against the Port of Portland and the United States as
16 provided in paragraph 25 of this Consent Decree; and (ii) dismiss his claims in this litigation
17 with prejudice.

18 **II. DEFINITIONS**

19 6. Whenever terms listed below are used in this Consent Decree or in the
20 appendices, the following definitions shall apply:

21 a. "Columbia Slough Rail Bridge" shall mean the rail line bridge within
22 Rivergate located at approximately mile point 0.8 of the Columbia Slough, as depicted and
23 labeled on the map of Rivergate that is **Appendix A**.

24 b. "Consent Decree" shall mean this Consent Decree and all appendices
25 incorporated by reference. In the event of a conflict between this Consent Decree and any
26 appendix, this Consent Decree shall control.

1 c. "Cooperative Agreement" shall mean the *Cooperative Agreement*
2 *Between the Port of Portland, Oregon Division of State Lands, Oregon Department of Fish and*
3 *Wildlife, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, U.S. Army*
4 *Corps of Engineers To Establish A Rivergate Development Program And An Acceptable*
5 *Mitigation Program For Wetland Impacts* executed in 1988 and 1989.

6 d. "Effective Date" shall mean the later date on which the Court executes
7 either this Consent Decree or the Enforcement Consent Decree.

8 e. "Enforcement Consent Decree" shall mean the separate consent decree
9 entered in this litigation in settlement of the enforcement cross-claim of the United States.

10 f. "Lombard Street Bridge" shall mean the public vehicular bridge that
11 crosses the Columbia Slough at the approximate intersection of Lombard Street and Marine
12 Drive in Rivergate, as depicted and labeled on the map of Rivergate that is Appendix A.

13 g. "Rivergate" is, in general, the area within the City of Portland located at
14 the confluence of the Willamette and Columbia Rivers as depicted on the map that is
15 Appendix A.

16 h. "United States" shall mean the United States of America, including the
17 Department of Transportation, the U.S. Coast Guard, the Federal Highway Administration, the
18 U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers, as well as
19 any successor agencies, departments or instrumentalities of the United States, except where
20 otherwise indicated.

21 i. "Waters of the United States" shall have the same meaning as defined in
22 33 C.F.R. § 328.3(a).

23 III. PORT OF PORTLAND'S SECTION 404 MITIGATION

24 7. Construction of Path Under the Lombard Street Bridge

25 The Port of Portland shall construct a path on the existing riprap rock embankment
26 beneath and adjacent to the Lombard Street Bridge. The path shall consist of an eight-foot
wide asphalt paved surface and a two-foot wide unpaved shoulder on the down-slope (west)

1 side of the path for a distance of approximately 140 feet. A clearance of ten feet minimum will
2 be maintained between the surface of the path and the soffits of the bridge girders. A
3 description and plan for the path is provided in **Appendix B**. The Port of Portland shall in
4 good faith expeditiously seek all necessary approvals and to the extent reasonably practicable
5 construct the path within twelve months of the Effective Date.

6 8. Columbia Slough Restoration and Revegetation

7 The Port of Portland shall remove fill from areas along the north and south banks of the
8 Columbia Slough, between the Columbia Slough Rail Bridge and the Lombard Street Bridge,
9 landward of the Port's surveyed property boundary, and revegetate, as follows:

10 a. North Bank. The project area shall be located on the north side of the
11 Columbia Slough, for a distance of approximately 1,400 lineal feet between the Lombard
12 Street Bridge and the Columbia Slough Rail Bridge (excepting the bridge approaches), and
13 landward (east) of the Port's property boundary, as established by survey dated May 13, 1975,
14 for a distance of 150 linear feet. Extending west from the 150-foot buffer line to the edge of
15 the existing vegetation, the Port of Portland shall remove existing sand fill and other fill
16 material down to native soils, except fill may be left at the location of the 40 Mile Loop Trail
17 (the "Trail") for the sole purpose of providing a base for the trail. The Port will make best
18 efforts to minimize the width of the base for the Trail. The fill slope located eastward of the
19 150-foot buffer line shall be no steeper than 3:1. Within the area requiring fill removal under
20 this paragraph, the Port shall construct the Trail. See paragraph 12 for details of the Trail.
21 The Trail shall be located adjacent to the toe of the fill slope wherever feasible, but the
22 location may vary within the area to accommodate topographical or vegetative features. The
23 Port shall construct within the native soil within the buffer area a swale or swales of a total
24 combined lineal length of 800 feet. Each swale shall be at least ten (10) feet wide at the
25 bottom and one to two feet below the surface of the native soil. The swale or swales shall be
26 constructed parallel to the Columbia Slough. The Port of Portland shall submit to the COE,
within 120 days of the Effective Date, a vegetation and final grading plan for the North Bank

1 (including the fill slope east of the 150-foot buffer line). The COE shall confer with the Port
2 regarding questions, concerns or changes, and shall approve, disapprove or modify the plan
3 and transmit that decision to the Port within thirty (30) days of receipt of the plan. The
4 vegetation and final grading plan, as approved or modified by the COE, shall become an
5 enforceable part of this Consent Decree. The Port shall have the right to seek judicial review
6 of the terms of the vegetation and final grading plan, as approved or modified by the COE,
7 pursuant to the dispute resolution provisions of paragraphs 27 through 29 of the Enforcement
8 Consent Decree only. A depiction of the North Bank project is provided in **Appendix C**.

9 b. South Bank. The project area shall be located on the south side of the
10 Columbia Slough for a distance of approximately 1,550 linear feet between the Lombard Street
11 Bridge and the Columbia Slough Rail Bridge (excepting the bridge approaches), landward
12 (west) of the Port's property boundary, as established by survey dated May 13, 1975, for a
13 distance of 50 linear feet. Extending west from the surveyed property boundary for a distance
14 of approximately 50 feet, the Port of Portland shall remove existing sand fill and other fill
15 material down to native soils. The fill slope located westward of the 50-foot buffer line shall
16 be no steeper than 3:1. The Port of Portland shall submit to the COE, within 120 days of the
17 Effective Date, a vegetation and final grading plan for the South Bank, including the fill slope
18 west of the 50-foot buffer line. The COE shall confer with the Port regarding questions,
19 concerns or changes, and shall approve, disapprove or modify the plan and transmit that
20 decision to the Port within thirty (30) days of receipt of the plan. The vegetation and final
21 grading plan, as approved or modified by the COE, shall become an enforceable part of this
22 Consent Decree. The Port shall have the right to seek judicial review of the terms of the
23 vegetation and final grading plan, as approved or modified by the COE, pursuant to the dispute
24 resolution provisions of paragraphs 27 through 29 of the Enforcement Consent Decree only. A
25 depiction of the south bank project is provided in **Appendix D**.

1 c. Project schedule. Removal of existing fill within the North Bank and
2 South Bank project areas as described in subparagraphs a. and b. above, will be completed
3 within eighteen (18) months of the Effective Date.

4 9. Leadbetter Peninsula Restoration and Revegetation

5 The project area shall be a 200-foot corridor bordering the current eastern,
6 southern and western boundaries of the Leadbetter Peninsula as identified in Appendix E.
7 Within this area of approximately 15 acres, the Port of Portland shall remove existing sand fill
8 and other fill material down to native soils for a minimum of 125 feet of the 200-foot corridor
9 on the slough and lake side of the corridor and provide a contoured slope, with an average of
10 no greater than a 4:1 grade, to meet the existing elevation of the top of the remaining fill at the
11 upland edge of the remaining 75 feet of the 200-foot corridor. The Port shall construct within
12 the native soils within the 200-foot corridor a swale or swales of a total combined lineal length
13 of approximately 1,500 feet. Each swale shall be at least ten (10) feet wide at the bottom and
14 two to four feet below the surface of the native soil. The swales shall be constructed parallel
15 to the toe of the fill slope. The Port shall submit to the COE, within 120 days of the Effective
16 Date, a vegetation and final grading plan for the Leadbetter Peninsula. The COE shall confer
17 with the Port regarding questions, concerns or changes, and shall approve, disapprove or
18 modify the plan and transmit that decision to the Port within thirty (30) days of receipt of the
19 plan. The vegetation and final grading plan, as approved or modified by the COE, shall
20 become an enforceable part of this Consent Decree. The Port shall have the right to seek
21 judicial review of the terms of the vegetation and final grading plan, as approved or modified
22 by the COE, pursuant to the dispute resolution provisions of paragraphs 27 through 29 of the
23 Enforcement Consent Decree only. Within and adjacent to the 200-foot corridor, the location
24 of the 40 Mile Loop Trail may vary. See paragraph 12 for details of the Trail. See Appendix
25 E. In addition, construction of a stormwater outfall, if otherwise lawfully permitted, shall be
26 permissible within the 200-foot corridor. Removal of the existing fill within the project area
will be completed within eighteen (18) months of the Effective Date.

1 10. Ramsey Lake Mitigation Area Restoration and Revegetation

2 a. Visual Vegetation Buffer. The project area shall be located within a
3 corridor bordering the top of the slope west and north of the Ramsey Lake Mitigation Area.
4 Within a corridor varying from 10 feet to 100 feet in depth, as depicted in **Appendix F**, a
5 visual buffer of shrubs and trees shall be planted. The height of the visual buffer shall be
6 limited as necessary to accommodate existing utility poles and transmission lines. The Port
7 shall submit to the COE, within 120 days of the Effective Date, a vegetation and final grading
8 plan for the visual vegetation buffer. The COE shall confer with the Port regarding questions,
9 concerns or changes, and shall approve, disapprove or modify the plan and transmit that
10 decision to the Port within thirty (30) days of receipt of the plan. The vegetation and final
11 grading plan, as approved or modified by the COE, shall become an enforceable part of this
12 Consent Decree. The Port shall have the right to seek judicial review of the terms of the
13 vegetation and final grading plan, as approved or modified by the COE, pursuant to the dispute
14 resolution provisions of paragraphs 27 through 29 of the Enforcement Consent Decree only.
15 This mitigation project does not include or authorize filling of the existing swale within the
16 project area.

17 b. Wetland and Riparian Enhancements North of Ramsey Lake

18 The project area shall include the Port's property bounded by the Columbia Slough on
19 the east and north and Ramsey Lake on the west and south. The Port shall remove existing
20 sand fill, other fill material and native soil down to an elevation of 14 NGVD within the
21 project area except for a 100-foot wide strip as measured from toe to toe which extends the full
22 length (southeast to northwest) of the project area as shown in **Appendix G**. The Port shall
23 construct within the project area two meandering swales of a total combined lineal length of
24 2,000 feet. Each swale shall be at least 50 feet wide at the bottom and the bottom of the swale
25 shall be approximately elevation 10 NGVD. The ends of the swales will be protected with
26 appropriate erosion control methods which may include the placement of fill material. At two
locations within the project area, one upstream and one downstream, swales shall connect with

1 the slough. The Port shall submit to the COE, within 120 days of the Effective Date, a
2 vegetation and final grading plan for the wetland and riparian enhancements. The COE shall
3 confer with the Port regarding questions, concerns or changes, and shall approve, disapprove
4 or modify the plan and transmit that decision to the Port within thirty (30) days of receipt of
5 the plan. The vegetation and final grading plan, as approved or modified by the COE, shall
6 become an enforceable part of this Consent Decree. The Port shall have the right to seek
7 judicial review of the terms of the vegetation and final grading plan, as approved or modified
8 by the COE, pursuant to the dispute resolution provisions of paragraphs 27 through 29 of the
9 Enforcement Consent Decree only. Removal of the existing fill within the project area will be
10 completed within eighteen (18) months of the Effective Date.

11 11. Culvert Removal

12 The Port shall remove the culvert which is adjacent to and east of the railroad bridge on
13 the south side of the Columbia Slough and related fill to the bottom of the elevation of the
14 existing culvert as shown on **Appendix H**. The Port shall implement appropriate erosion
15 control measures, which may include the placement of fill material. Culvert removal and
16 erosion control measures shall be completed within three (3) years of the Effective Date.

17 12. 40 Mile Loop Trail

18 The Port shall construct a portion of the 40 Mile Loop Trail along the north and east
19 sides of the Columbia Slough extending from the Columbia Slough Rail Bridge south to the
20 Port's property line, unless the City of Portland withdraws the Trail requirement with respect
21 to the Port. The Trail will be located within the buffers established along the Columbia
22 Slough. The Port shall attempt to negotiate with the City of Portland an agreement that the
23 width the Trail shall not exceed sixteen (16) feet toe to toe at the base, and if possible, shall be
24 narrower. The height of the Trail shall not exceed three (3) feet above native soil. The COE
25 may assist the Port in these negotiations with the City. The Trail may include the placement of
26 base fill material within the buffers. The design of the 40 Mile Loop Trail throughout the

mitigation areas identified in this Consent Decree shall be included within the appropriate vegetation and final grading plans.

13. Vegetation and Final Grading Plans

All vegetation and final grading plans required by this Consent Decree shall, in addition to vegetation and final grading, describe in detail (i) the design and location of all swales and benches, and (ii) slope vegetation at the particular mitigation sites.

14. Mitigation Monitoring and Reporting

Mitigation monitoring and reporting shall be provided for in, and enforced through, the Enforcement Consent Decree.

*Length of responsibility?
5 yr? Longer?*

15. Mitigation Success and Remediation

Mitigation success and remediation requirements shall be provided in, and enforced through, the Enforcement Consent Decree.

Performance measures?

16. Maintenance

Once the compensatory mitigation has been approved as complete, the Port may maintain the mitigation site, if consistent with this Consent Decree, by such activities as control of nutrients and removal of exotic (non-native) vegetative species. The Port may not engage in activities inconsistent with the Consent Decree, such as removal of vegetation or alteration of hydrology, without written approval from the COE.

*s/b required to
maintain in
perpetuity*

17. Inspection

The COE and EPA shall be provided the opportunity to inspect the mitigation areas upon reasonable notice to the Port.

18. Additional Mitigation Funding

In addition, the Port shall contribute the sum of Two Hundred Eighty-Five Thousand Dollars (\$285,000.00) cash for the express and sole purpose of performance of additional mitigation projects within the Smith & Bybee Lakes Management Area.

1 a. Within thirty (30) days of the Effective Date, the Port shall place the
2 specified funds in an interest-bearing account with U.S. Bank. Interest shall accrue for the
3 benefit of the fund, not for the benefit of the Port.

4 b. The Port shall withdraw and make payment of such funds for projects
5 within ten (10) days after the Port has been notified that such withdrawal and payment has been
6 approved by the COE. The COE may approve payments for projects in its discretion,
7 provided that such projects shall provide environmental mitigation within the Smith & Bybee
8 Lakes Management Area and provided that the COE consults with Mr. Jones regarding
9 potential projects prior to approving such projects for funding. Prior to approving the
10 withdrawal and payment of any funds, the COE shall provide the Parties with a minimum of
11 forty-five (45) days actual written notice describing the project to be funded and the amount of
12 the funding. Mr. Jones shall have the right to object to the withdrawal of such funds on the
13 grounds only: (i) that insufficient information has been provided by the COE from which to
14 evaluate the project and the amount of funding; or (ii) that the proposed project is inconsistent
15 with the purposes of this consent decree or the CWA. Mr. Jones shall make his objection by
16 filing a motion with the Court within the forty-five (45) day period. Mr. Jones shall state all
17 reasons for his objections and shall seek a hearing and determination by the Court. In the
18 event Mr. Jones timely files an objection with the Court pursuant to this provision, the COE
19 shall not approve the withdrawal and payment of the proposed funds until the Court has heard
20 and resolved Mr. Jones' objection or the Parties otherwise mutually agree in writing.

21 c. As described above, the Port's obligations under this paragraph shall be
22 strictly limited to making the initial payment into the fund and making payments from the fund
23 as approved by the COE.

24 19. Nationwide Permit Authorization

25 The Parties acknowledge that in accordance with the terms of the Enforcement Consent
26 Decree, Nationwide Permit 32, found at 61 Fed. Reg. 65,913 (Dec. 13, 1996), authorizes any
fill that was placed in the areas identified in **Appendix I** between June 3, 1991 and February

1 15, 1996 to remain in place subject to the conditions provided in the Nationwide Permit and
2 the Enforcement Consent Decree. The parties further acknowledge that in accordance with the
3 terms of the Enforcement Consent Decree, Nationwide Permit 32 authorizes the discharge of
4 dredged or fill material insofar as such discharge is necessary to complete the work required to
5 be performed pursuant to this Consent Decree.

6 IV. COMMITMENTS OF THE UNITED STATES

7 20. Enforcement Consent Decree

8 The Parties acknowledge that the Enforcement Consent Decree provides the terms of a
9 complete and final settlement of all civil claims for injunctive relief and civil penalties alleged
10 in the cross-claim of the United States against the Port under CWA section 301 concerning the
11 identified filling.

12 21. Completion of Port of Portland's Permitting and Mitigation Obligations

13 a. the Port of Portland has dredged and filled areas within Rivergate
14 pursuant to the following Department of Army (DA) permits:

- 15 ♦ DA Permit 1507-27-155 (effective May 30, 1971)
- 16 ♦ DA Permit 071-OYA-1-001349 (effective June 3, 1974)
- 17 ♦ DA Permit 071-OYA-1-001353 (effective June 3, 1974)
- 18 ♦ DA Permit 071-OYA-1-001354 (effective June 3, 1974)
- 19 ♦ DA Permit 071-OYA-1-001370 (effective June 3, 1974)
- 20 ♦ DA Permit 071-OYA-2-003158 (effective May 29, 1979, and extended effective
21 June 1, 1984)
- 22 ♦ DA Permit 071-OYA-2-005294 (effective November 30, 1984, and twice extended,
23 on August 17, 1989 and July 19, 1990)
- 24 ♦ DA Permit 071-OYA-1-008624 (effective June 3, 1991)
- 25 ♦ DA Permit 95-00534 (effective September 22, 1995)
- 26 ♦ Nationwide Permit 15 Authorization re: application No. 95-983 (effective
December 5, 1995)
- ♦ DA Permit 95-986 (effective March 26, 1996)

1 ♦ DA Permit 96-00711 (effective October 9, 1996)

2 b. Except as to those permits and conditions enumerated in subparagraph
3 (d) below, the Parties agree and the Court finds that the mitigation and restoration activities (i)
4 to be performed by the Port of Portland pursuant to paragraphs 7 through 18 of this Consent
5 Decree, and (ii) previously performed by the Port of Portland pursuant to the *Cooperative*
6 *Agreement*, constitute adequate mitigation and restoration under the Clean Water Act for all fill
7 material placed in Rivergate in accordance with the terms of the permits enumerated in
8 subparagraph (a) and all unauthorized filling as alleged in the enforcement cross-claim of the
9 United States. Accordingly, except as specified in subparagraph (d), the Parties agree and the
10 Court finds that the obligations of the Port of Portland under this Consent Decree are the
11 complete and final restoration and mitigation obligations of the Port of Portland under the
12 Clean Water Act (i) for fill material it has placed in the area of Rivergate in accordance with
13 the enumerated permits and (ii) for unauthorized filling as alleged in the enforcement cross-
14 claim of the United States.

15 c. To the maximum extent permitted by federal law, the findings in this
16 paragraph 21 are intended to and shall be accorded res judicata and collateral estoppel effect,
17 and to the maximum extent permitted by federal law shall also be found binding upon other
18 private parties who may hereafter file a citizen suit against the Port of Portland for alleged
19 violations of the Clean Water Act which have been alleged in this action.

20 d. Notwithstanding the other provisions of this paragraph, the Port of
21 Portland's obligations under the following enumerated permits remain fully effective:
22 DA permit 95-534, General Condition 6, subparagraphs d.2, f.1-.3 and h; DA Permit 95-986,
23 General Condition 6, subparagraphs k.1-.4 and m; DA Permit 96-711, General Condition 5;
24 and any and all future permits obtained by the Port of Portland after the execution of this
25 Consent Decree.

26 22. The United States, on behalf of the COE, EPA and the U.S. Fish & Wildlife
Service, releases the Port of Portland from any and all remaining or existing obligations,

1 responsibilities or liability to the United States under the *Cooperative Agreement* upon entry of
2 this Consent Decree.

3 **V. COMMITMENTS BY JONES**

4 23. **Adequate Legal Representation**

5 Plaintiff acknowledges that defendants advised him to involve qualified legal counsel in
6 the prosecution of this litigation and the negotiation and drafting of the settlement and Consent
7 Decree, that he has consulted legal counsel as he deemed appropriate, and that he has freely
8 elected to proceed, *pro se*.

9 24. **Dismissal of Claims With Prejudice**

10 Jones hereby agrees to and by this Consent Decree requests the dismissal of his claims
11 asserted in the above-captioned litigation with prejudice.

12 25. **Reservation of West Hayden Island Claims and Release**

13 The parties agree that Mr. Jones' dismissal and release of the defendants does not
14 foreclose Mr. Jones' claims of whatever nature with respect to West Hayden Island. In ✓
15 addition, except as otherwise provided in this Consent Decree and the Enforcement Consent
16 Decree, Mr. Jones' may bring future claims that could not have been brought in this litigation
17 based upon actions in Rivergate occurring after the Effective Date. However, in consideration
18 for this reservation of rights with respect to West Hayden Island, which Mr. Jones raised at
19 least in part in the present litigation, to the maximum extent permitted by law Mr. Jones
20 hereby releases and forever discharges the Port of Portland and the United States, and their
21 successors, assigns, agents and employees, from any and all claims, demands, damages,
22 losses, liabilities, injuries, actions, fees, costs, expenses, taxes, penalties, or fines, whether
23 equitable or legal, and whether based upon the statutes, regulations, common-law, executive
24 orders, ordinances or guidance of the United States, the State of Oregon, or the City of
25 Portland, and whether known or unknown, that were or could have been brought in this
26 litigation, including specifically and without limitation any and all claims with respect to the

1 entire Rivergate area of Portland. This release does not affect enforcement of the express
2 terms of this Consent Decree.

3 26. Cooperation

4 Jones agrees to cooperate in good faith with the United States and the Port of Portland
5 to obtain Court approval of this Consent Decree and to facilitate the completion of the
6 obligations of Parties under this Consent Decree.

7 **VI. FORCE MAJEURE & DISPUTE RESOLUTION**

8 27. "Force Majeure" for purposes of this Consent Decree is defined as any event
9 arising from causes, including but not limited to unusually severe weather, beyond the control
10 of a party or parties to this Consent Decree, including their contractors, that delays or prevents
11 the performance of an obligation under this Consent Decree despite a party's or parties'
12 diligent efforts to fulfill the obligation. A Force Majeure event does not include, inter alia,
13 increased costs of performance, changed economic circumstances, changed labor relations,
14 normal precipitation or climate events, changed circumstances arising out of the sale, lease or
15 other transfer or conveyance of title or ownership or possession of a mitigation site, or the
16 failure to obtain necessary federal, state or local permits, if the Port has failed to exercise due
17 diligence in applying for and pursuing such permits. Default by a contractor providing
18 plantings to the Port for this project may be considered a Force Majeure event provided that
19 the Port diligently monitors performance under the contract and provided the contract contains
20 a reasonable liquidated damages provision.

21 28. If the performance of any obligation under this Consent Decree is delayed,
22 whether or not caused by a Force Majeure event, the party or parties whose performance is
23 delayed shall notify the other parties to this Consent Decree in writing within fifteen (15) days
24 of the discovery that a delay will occur. The notice shall provide in reasonable detail an
25 explanation and description of the reasons for the delay, the anticipated duration of the delay
26 and a schedule for completion of the delayed performance. In the event that this information
cannot yet be determined, in whole or in part, by the date of the written notice, then the notice

1 shall provide a date certain not to exceed an additional thirty (30) days by which time the
2 remaining information will be provided.

3 29. In the event that a party does not agree that a delay or anticipated delay has been
4 or will be caused by a Force Majeure event, or does not agree with the revised schedule for
5 completion of the delayed performance, such party shall notify all other parties in writing of its
6 decision within thirty (30) days of the receipt of the written notice and information identified in
7 paragraph 28 of this Consent Decree and the parties shall negotiate in good faith in an effort to
8 resolve the dispute. No sooner than thirty (30) days after providing a timely written objection
9 of a delay and alternative schedule, but no later than an additional forty-five (45) days
10 thereafter, a party having previously provided a timely written objection may apply to the
11 Court for appropriate relief. In resolving the dispute, the Court shall give due weight and
12 consideration to the intent of the Parties as stated in this Consent Decree, and the objectives of
13 this Consent Decree and the CWA.

14 30. Notwithstanding paragraphs 27 through 29 of this Consent Decree, any dispute
15 between the Port of Portland and the United States over terms of this Consent Decree which
16 are identical to or incorporated into the Enforcement Consent Decree or concern Force
17 Majeure, shall be governed by the Force Majeure and/or Dispute Resolution provisions of the
18 Enforcement Consent Decree.

19 **VII. NOTICES AND SUBMISSIONS**

20 31. Notices and Submissions to COE

21 Whenever under the terms of section III of this Consent Decree, written notice is
22 required to be given or a report or other document is required to be sent to the COE, it shall be
23 directed to the following individual at the identified address, unless notice of a change is given
24 to the parties in writing: Chief, Regulatory Branch, Portland District, U.S. Army Corps of
25 Engineers, P.O. Box 2946, Portland, OR 97208-2946. All notices and submissions shall be
26 considered effective upon receipt, unless otherwise provided.

1 32. Notices and Submissions to the Parties

2 Whenever, under the terms of this Consent Decree, written notice is required to be
3 given or a report or other document is required to be sent by one party to the other parties, it
4 shall be directed to the parties through the individuals specified below at the identified
5 addresses, unless a party gives notice of a change to the other parties, in writing. All notices
6 and submissions shall be considered effective upon receipt, unless otherwise provided.

7
8 As to the United States:

9 G. Scott Williams
10 Environmental Defense Section
11 Environment & Natural Resources Division
12 U.S. Department of Justice
13 P.O. Box 23986
14 Washington, D.C. 20026
15 (202) 514-1950
16 (202) 514-8865 (facsimile)

17
18 As to the Port of Portland:

19 Jeffrey W. Ring
20 Assistant General Counsel
21 Port of Portland
22 121 NW Everett Street
23 P.O. Box 3529
24 Portland, OR 97208
25 (503) 944-7033
26 (503) 944-7038 (facsimile)

27 As to Plaintiff, William Michael Jones:

28 William Michael Jones
29 2716 N.E. Mason
30 Portland, OR 97211

31 This provision is not intended to require the submission to the Parties of materials specified in
32 section III of the Consent Decree for submission to the COE, unless otherwise indicated.

*Include Metro
on distribution?*

1 **VIII. RETENTION OF JURISDICTION**

2 33. This Court retains jurisdiction over both the subject matter of this Consent
3 Decree and the Parties until this Consent Decree is terminated pursuant to paragraph 35 below,
4 for the purpose of enabling any of the Parties to apply to the Court at any time for such further
5 order, direction and relief as may be necessary or appropriate: (i) for the construction or
6 modification of this Consent Decree; (ii) to effectuate or enforce compliance with its terms;
7 and (iii) to resolve disputes between or among the Parties.

8 **IX. MODIFICATION AND TERMINATION OF CONSENT DECREE**

9 34. Upon entry by the Court, this Consent Decree shall have the force and effect of
10 a final judgment. Any modification of this Consent Decree shall be in writing, and shall not
11 take effect unless signed by the Parties and approved by the Court; except that the schedules
12 specified in this Consent Decree and its appendices may be modified by unanimous agreement
13 of the Parties. All such agreed modifications shall be made in writing.

14 35. It is the intent of the Parties that this Consent Decree shall be terminated, upon
15 motion of the Port of Portland, after completion by the Port of the provisions of this Consent
16 Decree. The requirements of this Consent Decree do not include completion of the mitigation
17 monitoring and reporting, and the mitigation success and remediation requirements specified in
18 the Enforcement Consent Decree as provided in paragraphs 14 and 15 of this Consent Decree.

19 36. Nothing in this Consent Decree shall be deemed to alter the Court's power to
20 enforce, supervise, terminate or approve modifications to this Consent Decree.

21 37. The provisions, agreements and findings in paragraphs 19, 21, 22, 24, 25 and
22 40 of this Consent Decree are intended by the parties and shall by ORDER of this Court,
23 survive termination of this Consent Decree.

24 **X. COSTS OF SUIT**

25 38. Attorneys' Fee and Litigation Costs

26 The Parties shall each bear their own attorneys' fees incurred in connection with this
litigation. Within thirty (30) days of the entry of this Consent Decree, the Port of Portland

1 shall pay Jones the sum of Fifty Thousand Dollars (\$50,000.00) in complete and final
2 satisfaction for any and all of his litigation costs and expenses of whatever kind incurred in this
3 litigation.

4 **XI. APPENDICES**

5 39. The following appendices are attached to and incorporated into this Consent
6 Decree:

7 "Appendix A" is an aerial map of the Rivergate area.

8 "Appendix B" is a depiction of and plan for the path required by paragraph 7.

9 "Appendix C" is a depiction of the North Bank mitigation project required by
10 paragraph 8(a).

11 "Appendix D" is a depiction of the South Bank mitigation project required by
12 paragraph 8(b).

13 "Appendix E" is an depiction of the Leadbetter Peninsula mitigation project required
14 by paragraph 9.

15 "Appendix F" is a depiction of the Ramsey Lake Mitigation Area visual vegetataon
16 buffer mitigation project required by paragraph 10(a).

17 "Appendix G" is a depiction of the Ramsey Lake Mitigation Area wetland and riparian
18 mitigation project required by paragraph 10(b).

19 "Appendix H" is a depiction of the culvert removal mitigation project required by
20 paragraph 11.

21 "Appendix I" depicts the locations of the unauthorized filling in Rivergate that is
22 addressed in the Enforcement Consent Decree.

23 In the event of any conflict between the appendices and any written provision stated in
24 paragraphs 1 through 44 of this Consent Decree, the written provisions shall be controlling.

25 **XII. PUBLIC INTEREST AND DILIGENT PROSECUTION**

26 40. The Parties recognize, and the Court by entering this Consent Decree finds, that
this Consent Decree has been negotiated by the Parties in good faith, is the product of diligent
prosecution by the United States, that implementation of this Consent Decree will avoid
prolonged and complicated litigation between and among the Parties, and will expedite

1 performance of certain wetland-mitigation and natural resource enhancement measures, that
2 this Consent Decree is fair, reasonable, consistent with the requirements and purposes of the
3 Clean Water Act (including specifically sections 301 and 404) and all other applicable federal
4 law, and that this Consent Decree adequately protects and is in the public interest.

5 **XIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

6 41. This Consent Decree shall be lodged with the Court for a period of not less than
7 thirty (30) days for public notice and comment. The United States reserves the right to
8 withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts
9 or considerations which indicate that the Consent Decree is inappropriate, improper or
10 inadequate.

11 42. Jones and the Port of Portland hereby agree not to oppose entry of this Consent
12 Decree by this Court or to challenge any provision of this Consent Decree.

13 43. If for any reason the Court should decline to approve this Consent Decree in the
14 form presented, this Consent Decree is voidable at the sole discretion of any party.

15 **XIV. SIGNATORY AUTHORITY**

16 44. Each undersigned representative of the Parties, including the Assistant Attorney
17 General for Environment and Natural Resources of the Department of Justice, certifies that he
18 or she is fully authorized to enter into the terms and conditions of this Consent Decree and to
19 execute and legally bind such Party to this document.

1
2 SO ORDERED THIS ____ DAY OF _____, 2000.
3
4

5 Helen J. Frye
6 United States District Judge

7 FOR THE UNITED STATES OF AMERICA

8 LOIS J. SCHIFFER
9 Assistant Attorney General
Environment & Natural Resources Division

10 Dated: 11/22/00

11 G. Scott Williams
12 G. Scott Williams
13 Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026

14
15 Dated: 11/27/01

16 FOR THE PORT OF PORTLAND

17 Mike Thorne
Mike Thorne
Executive Director, Port of Portland

18 Dated: 11/21/00

19 Jeffrey W. Leppo
Jeffrey W. Leppo, WSBA. #11099
20 Beth S. Ginsberg, WSBA #18523
Richard Gleason, OSB #81239
21 STOEL RIVES LLP
600 University St., Suite 3600
Seattle, Washington 98101-3197

22 FOR PLAINTIFF

23 Dated: 11-27-00

24 William Michael Jones
25 William Michael Jones, pro se
26 2716 N.E. Mason, Portland OR 97211

G. Scott Williams
Environmental Defense Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026
(202) 514-1950
(202) 514-8865(fax)

Counsel for Federal Defendants/Cross-claim Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

WILLIAM MICHAEL JONES,)	
)	
Plaintiff,)	
)	
v.)	Case No. CV97-1674-ST
)	
MIKE THORNE, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	
)	
UNITED STATES OF AMERICA,)	
)	
Cross-claim Plaintiff.)	
)	
v.)	
)	
PORT OF PORTLAND,)	
)	
Cross-claim Defendant.)	
_____)	

UNITED STATES' CROSS-CLAIM AGAINST PORT OF PORTLAND

The United States of America, through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Secretary of the Army, acting through the Chief Engineer ("United States"), alleges as follows:

NATURE OF THE ACTION

1. This is a civil cross-claim commenced under sections 309(b) and (d), and 404(s) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1319(b) and (d), 1344(s), against the Port of Portland ("Port"), for the discharge of pollutants into waters of the United States in Portland, Oregon in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

2. In this cross-claim, and through the consent decree filed concurrently in settlement of this cross-claim, the United States seeks and the Port consents to (1) mitigation and/or restoration of the damages caused by the Port's unlawful activities, such mitigation and/or restoration to be performed by the Port at its own expense, as provided in the consent decree; and (2) payment of a civil penalty by the Port to the United States as provided in 33 U.S.C. §§ 1319(d) and 1344(s)(4).

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to CWA sections 309(b) and 404(s)(3), 33 U.S.C. §§ 1319(b), 1344(s)(3) and 28 U.S.C. §§ 1331, 1345, and 1355.

4. Venue is proper in the District of Oregon pursuant to CWA sections 309(b) and 404(s)(3), 33 U.S.C. §§ 1319(b), 1344(s)(3), and 28 U.S.C. § 1391(b) and (c), because the Port conducts business in this District, the subject property is located in this District, and the cause of action alleged herein arose in this District.

5. Notice of the commencement of this action has been provided to the State of Oregon pursuant to CWA sections 309(b) and 404(s)(3), 33 U.S.C. §§ 1319(b), 1344(s)(3).

THE PARTIES

6. The Cross-claim Plaintiff in this action is the United States of America. Authority to bring this action is vested in the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519, and 33 U.S.C. § 1366.

7. The Cross-claim Defendant in this action is the Port of Portland. The Port is a municipal corporation organized under the laws of Oregon with a business address of 121 N.W. Everett Street, Portland, OR 97209.

8. At all times relevant to the Complaint, the Port either owned, leased or otherwise controlled the real property that is the subject of this Cross-claim and/or otherwise controlled the activities that occurred on such property.

STATUTORY BACKGROUND

9. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

10. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the COE to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

11. CWA section 502(12), 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."

12. CWA section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" to include, inter alia, dredged spoil, rock, sand and cellar dirt.

13. CWA section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

14. 33 C.F.R. § 328.3(a)(1), (2), (3), (5) and (7), and 40 C.F.R. § 232.2, define "waters of the United States" to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii) all other waters, such as intrastate lakes, rivers, streams, sloughs or wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce; (iv) tributaries to such waters; and (v) wetlands adjacent to such waters or their tributaries.

15. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

16. CWA section 502(14), 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

17. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include "an individual [or] corporation."

18. CWA sections 309(b) and 404(s)(3), 33 U.S.C. §§ 1319(b), 1344(s)(3) authorize the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a), or any condition or limitation of a permit issued by the COE.

19. CWA sections 309(d) and 404(s)(4), 33 U.S.C. §§ 1319(d), 1344(s)(4), authorize the commencement of an action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a), or any condition or limitation of a permit issued by the COE.

COUNT I

20. The United States repeats and realleges the allegations set forth in Paragraphs 1 through 19.

21. Between June 3, 1991, through February 15, 1996, the Port and/or persons acting on its behalf, discharged dredged or fill material into waters of the United States without a permit under CWA section 404 in the Rivergate area in Portland, Oregon (identified in Exhibit 1 and hereinafter referred to as the "Rivergate Site").

22. The Rivergate Site is a "water of the United States" within the meaning of the CWA and the regulations promulgated thereunder.

23. The Port's activities at the Rivergate Site resulted in the filling of approximately 25 acres of waters of the United States.

24. The dredged or fill material that the Port and/or persons acting on its behalf caused to be discharged included, among other things, dirt, spoil, rock and sand, all of which constitute "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

25. The Port and/or persons acting on its behalf used mechanized land-clearing and earth-moving equipment to accomplish the discharges. This equipment constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

26. The Port did not obtain a permit from the COE for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344.

27. The Port either owned, leased or otherwise controlled the land on which each unauthorized discharge of dredged or fill material into waters of the United States occurred.

28. The Port conducted, contracted for, supervised and/or otherwise controlled the unauthorized activities at issue in Paragraph 21.

29. The Port is a person within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

30. The Port has violated CWA section 301(a), 33 U.S.C. § 1311(a), by its unauthorized discharges of dredged or fill material into waters of the United States, including wetlands, at the Rivergate Site.

31. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

32. The Port has allowed, and continues to allow, dredged or fill material to remain in the Rivergate Site in violation of CWA section 301, 33 U.S.C. § 1311.

33. Through the concurrently filed consent decree between the United States and the Port, the parties seek to resolve this cross-claim by requiring the Port to restore and/or mitigate the damage from its unlawful activities, and to pay a civil penalty to the United States.

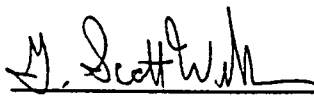
PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that this Court order the following relief:

After public notice and comment pursuant to 28 U.S.C. § 50.7, and upon motion by the United States, that this Court enter the executed consent decree that the parties have lodged concurrently with this cross-claim.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division



G. SCOTT WILLIAMS
Senior Attorney
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986
(202) 514-1950

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

WILLIAM MICHAEL JONES,)	
)	
Plaintiff,)	
)	
v.)	Case No. CV97-1674-ST
)	
MIKE THORNE, <u>et al.</u> ,)	
)	
Defendants.)	
<hr/>		
)	
UNITED STATES OF AMERICA,)	
)	
Cross-claim Plaintiff,)	
)	
v.)	
)	
PORT OF PORTLAND,)	
)	
Cross-claim Defendant.)	
<hr/>		

**CONSENT DECREE SETTling UNITED STATES'
CROSS-CLAIM AGAINST PORT OF PORTLAND**

WHEREAS, the Cross-claim Plaintiff, the United States of America ("United States"), on behalf of the United States Department of the Army, Corps of Engineers ("COE"), filed the Cross-claim herein against the Cross-claim Defendant, Port of Portland ("Port"), concurrently with this Consent Decree, alleging that the Port violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a);

WHEREAS, the Cross-claim alleges that the Port violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States in the Rivergate area of Portland, Oregon (the "Site,"

which is described more fully in Exhibit 1 to this Consent Decree, which is incorporated herein by reference);

WHEREAS, in the Cross-claim and this Consent Decree, the United States seeks and the Port consents to (1) mitigation and/or restoration of the damages caused by the Port's unlawful activities, such mitigation and/or restoration to be performed by the Port at its own expense, as provided in the Consent Decree; and (2) payment of a civil penalty by the Port to the United States as provided in 33 U.S.C. §§ 1319(d) and 1344(s)(4);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Cross-claim regarding the Site;

WHEREAS, the United States and the Port agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against the Port in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against the Port in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 309(b) and 404(s) of the CWA, 33 U.S.C. §§ 1319(b), 1344(s).

2. Venue is proper in the District of Oregon pursuant to CWA Sections 309(b) and 404(s), 33 U.S.C. §§ 1319(b), 1344(s) and 28 U.S.C. §§ 1391(b) and (c), because the Port conducts business in this District, the Site is located in this District, and the causes of action alleged in the Cross-claim arose in this District.

3. The Cross-claim states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon the Port, its officers, directors, agents, employees and servants, and its successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with the Port whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against the Port, the Port shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting in concert or participation with the Port, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the property subject to restoration and/or mitigation as described in Exhibit 2 to this Consent Decree, which is incorporated herein by reference, shall not alter or relieve the Port of its obligation to comply with all of the terms of this Consent Decree. At least five (5) days prior to the transfer of ownership or other interest in such property, the Port shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify the COE and the United States Department of Justice at the addresses specified in Section X below that such notice has been given. As a

condition to any such transfer, the Port shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Cross-claim against the Port under CWA Section 301 concerning the Site.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All plans, construction, remedial maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing the Port to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. The parties acknowledge that Nationwide Permit 32, found at 61 Fed. Reg. 65,913 (Dec. 13, 1996), authorizes any fill that was placed in the areas identified in Exhibit 1 between June 3, 1991, and February 15, 1996, to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 (61 Fed. Reg. 65,913) authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

9. Except for the provisions of paragraph 8 of this Consent Decree, this Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit

issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the COE to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the ability of the Environmental Protection Agency to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c). This paragraph shall not alter or affect in any way the provisions of paragraph 22 of the Consent Decree, Order of Dismissal with Prejudice and Release filed in Jones v. Thorne, Case No. CV-97-1674-ST (D. Oregon).

10. Except for the provisions of paragraph 8 of this Consent Decree, this Consent Decree in no way affects or relieves the Port of its responsibility to comply with any applicable federal, state, or local law, regulation or permit.

11. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

12. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

13. Except for the provisions of paragraph 8 of this Consent Decree, nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. SPECIFIC PROVISIONS

CIVIL PENALTIES

14. The Port shall pay a civil penalty to the United States in the amount of Fifty Thousand Dollars (\$50,000) within 30 days of entry of this Consent Decree.

15. The Port shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with

current electronic funds transfer procedures, referencing DOJ case number 90-5-1-4-585.

Payment shall be made in accordance with instructions provided to the Port by the Department of Justice. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

16. Upon payment of the civil penalty required by this Consent Decree, the Port shall provide written notice, at the addresses specified in Section X of this Consent Decree, that such payment was made in accordance with Paragraph 15.

17. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section IX) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

RESTORATION, MITIGATION AND PRESERVATION

18. The Port shall perform restoration and mitigation projects under the terms and conditions stated in Exhibit 2 appended hereto and incorporated herein by reference.

19. Upon completion of the terms and conditions of Exhibit 2, the Port shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner whatsoever any location identified in Exhibit 2, except as provided in Exhibit 2 or otherwise approved in writing by the COE. The COE may refuse to process or issue a permit pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344, for activities at any location identified in Exhibit 2 on the ground that such activities would be inconsistent with the purposes of this Consent Decree.

20. Within six (6) months of entry of this Consent Decree, the Port shall record a certified copy of this Consent Decree with the Recorder of Deeds Office in Multnomah County, Oregon. If required to properly record this Consent Decree, a legal description of the property identified in Exhibit 2 shall also be included. Any deed, title, or other instrument by which the Port conveys an interest in any property identified in Exhibit 2 shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree. Failure to comply with the requirements of this paragraph shall constitute a breach of this Consent Decree.

V. NOTICES AND OTHER SUBMISSIONS

21. Within 30 days after the deadline for completing any task set forth in Exhibit 2 of this Consent Decree, the Port shall provide the United States with written notice, at the addresses specified in Section X of this Consent Decree, of whether or not that task has been completed.

22. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

23. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Port shall, by signature of a senior management official, certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate

and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

24. Until the termination of this Consent Decree, the Port shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the tasks in Exhibit 2, regardless of any corporate retention policy to the contrary. Until the termination of this Consent Decree, the Port shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in Exhibit 2.

25. At the conclusion of the document retention period, the Port shall notify the United States at least 90 days prior to the destruction of any such records or documents. and, upon request by the United States, the Port shall deliver any such records or documents to the COE. The Port may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Port asserts such a privilege, it shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by the Port. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

26. A. Until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the Port's premises to:

- 1) Monitor the activities required by this Consent Decree;
- 2) Verify any data or information submitted to the United States;
- 3) Obtain samples;
- 4) Inspect and evaluate the Port's restoration and/or mitigation activities; and
- 5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

B. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from the Port as authorized by law.

VII. DISPUTE RESOLUTION

27. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and the Port to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other party that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and the Port cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Port files a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a

proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Port shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the provisions of this Consent Decree and the CWA, and that the Port's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

28. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Port shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Port shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the provisions of this Consent Decree, and that the Port's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

29. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of the Port under this Consent Decree, except as provided in Paragraph 37 below regarding payment of stipulated penalties.

VIII. FORCE MAJEURE

30. The Port shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes, including but not limited to unusually severe weather, beyond the control of Port, including its employees, agents, consultants and contractors, which could not be overcome

by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits, if the Port has failed to exercise due diligence in applying for and pursuing such permits. Default by a contractor providing plantings to the Port for this project may be considered a Force Majeure event provided that the Port diligently monitors performance under the contract and provided the contract contains a reasonable liquidated damages provision.

31. If the Port believes that a Force Majeure event has affected its ability to perform any action required under this Consent Decree, the Port shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section X. Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay; and
- D. any measures taken or planned by the Port to prevent or minimize the delay and a schedule for the implementation of such measures.

The Port may also provide to the United States any additional information that it deems appropriate to support its conclusion that a Force Majeure event has affected its ability to perform an action required under this Consent Decree. Failure to provide timely and complete

notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

32. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. The Port shall coordinate with the COE to determine when to begin or resume the operations that had been affected by any Force Majeure event.

33. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VII of this Consent Decree.

34. The Port shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of the Port and any entity controlled by the Port, including its contractors and consultants; (2) that the Port or any entity controlled by the Port could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

IX. STIPULATED PENALTIES

35. A. After entry of this Consent Decree, if the Port fails to timely fulfill any requirement of the Consent Decree (including Exhibit 2) identified in Paragraph 35.B. below, the Port shall pay a stipulated penalty to the United States for each violation of each requirement as follows:

- | | | |
|-----|---|------------------|
| (i) | For Day 1 up to and including
Day 30 of non-compliance | \$200.00 per day |
|-----|---|------------------|

- | | | |
|-------|--|--------------------|
| (ii) | For Day 31 up to and including
Day 60 of non-compliance | \$2,000.00 per day |
| (iii) | For Day 61 and beyond
of non-compliance | \$3,000.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

B. Stipulated penalties shall accrue for failure to fulfill the following requirements under this Consent Decree (including Exhibit 2):

- (i) Payment of the civil penalty pursuant to paragraph 14 of this Consent Decree;
- (ii) Submission of the vegetation and final grading plan pursuant to paragraphs 2-4 of Exhibit 2;
- (iii) Removal of fill pursuant to paragraphs 2-4 of Exhibit 2;
- (iv) Completion of plantings as provided in the vegetation and final grading plan as approved or modified by the COE pursuant to paragraphs 2-4 of Exhibit 2;
- (v) Completion of subsequent plantings as provided in any remediation plans as approved or modified by the COE pursuant to paragraph 9 of Exhibit 2;
- (vi) Submission of annual mitigation monitoring reports pursuant to paragraph 8 of Exhibit 2;
- (vii) Payment of the mitigation funding pursuant to paragraphs 11 and 12 of Exhibit 2.

36. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant

to the Dispute Resolution provisions in Section VII and/or the Force Majeure provisions in Section VIII shall be resolved upon motion to this Court as provided in Paragraphs 27 and 28.

37. The filing of a motion requesting that the Court resolve a dispute shall stay the Port's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that the Port does not prevail on the disputed issue, stipulated penalties shall be paid by the Port as provided in this Section.

38. To the extent the Port demonstrates to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 30 above) or otherwise prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

39. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

40. The Port shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing DOJ case number 90-5-1-4-585. Payment shall be made in accordance with instructions provided to the Port by the Department of Justice. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will

be credited on the next business day. Further, upon payment of any stipulated penalties, the Port shall provide written notice, at the addresses specified in Section X of this Decree.

X. ADDRESSES

41. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO THE COE:

Chief, Regulatory Branch
Portland District
U.S. Army Corps of Engineers
P.O. Box 2946
Portland, OR 97208-2946

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

G. Scott Williams, Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

C. TO THE PORT:

Jeffrey W. Ring, Esq.
Assistant General counsel
Port of Portland
121 NW Everett Street
P.O. Box 3529
Portland, OR 97209

XI. COSTS OF SUIT

42. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should the Port subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, the Port shall be liable for any costs or attorneys' fees

incurred by the United States in any action against the Port for noncompliance with or enforcement of this Consent Decree.

XII. PUBLIC COMMENT

43. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Port agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Port in writing that it no longer supports entry of the Consent Decree.

XIII. CONTINUING JURISDICTION OF THE COURT

44. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIV. MODIFICATION

45. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Port and approved by the Court.

XV. TERMINATION

46. The Port shall demonstrate to the satisfaction of the United States that the Port has complied with all the terms of this Consent Decree. One hundred eighty (180) days after such a showing by the Port, the United States agrees not to oppose a motion to terminate the Consent Decree. The provisions of paragraphs 19 and 20 of this Consent Decree shall survive the termination of this Consent Decree.

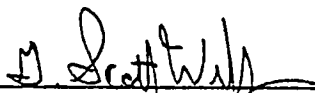
IT IS SO ORDERED.

Dated and entered this _____ day of _____, 200_.

United States District Judge

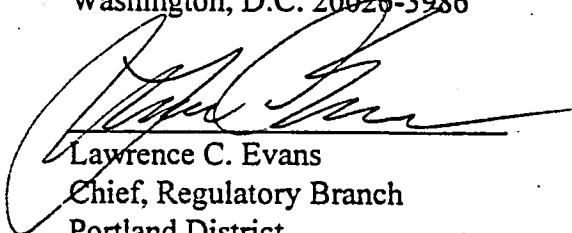
ON BEHALF OF THE UNITED STATES:

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division



G. Scott Williams, Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

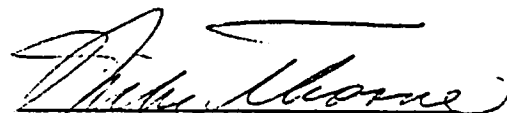
Dated: 11/21/00



Lawrence C. Evans
Chief, Regulatory Branch
Portland District
U.S. Army Corps of Engineers
P.O. Box 2946
Portland, OR 97208-2946

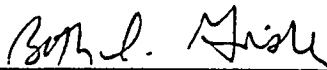
Dated: 11-22-00

FOR THE PORT OF PORTLAND:



Mike Thorne
Executive Director, Port of Portland

Dated: 11-27-00



Jeffrey W. Leppo, WSBA #11099
Beth S. Ginsberg, WSBA #18523
Richard Gleason, OSB #81239
STOEL RIVES LLP
600 University St., Suite 3600
Seattle, Washington 98101-3197

Dated: 11-27-00

EXHIBIT 2 TO
ATTACHMENT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILLIAM MICHAEL JONES,)	
)	
Plaintiff,)	
)	
v.)	Case No. CV97-1674-ST
)	
MIKE THORNE, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	
)	
UNITED STATES OF AMERICA,)	
)	
Cross-claim Plaintiff,)	
)	
v.)	
)	
PORT OF PORTLAND,)	
)	
Cross-claim Defendant.)	
_____)	

EXHIBIT 2
TO
CONSENT DECREE SETTLING UNITED STATES'
CROSS-CLAIM AGAINST PORT OF PORTLAND

The Port of Portland ("Port") shall perform the following mitigation and restoration in the Rivergate area of Portland, Oregon. A map of the Rivergate area is included as Appendix A.

1. Construction of Path Under the Lombard Street Bridge

The Port shall construct a path on the existing riprap rock embankment beneath and adjacent to the Lombard Street Bridge. The path shall consist of an eight-foot wide asphalt paved surface and a two-foot wide unpaved shoulder on the down-slope (west) side of the path for a distance of approximately 140 feet. A clearance of ten feet

minimum will be maintained between the surface of the path and the soffits of the bridge girders. A description and plan for the path is provided in Appendix B. The Port of Portland shall in good faith expeditiously seek all necessary approvals and to the extent reasonably practicable construct the path within twelve months of the Effective Date. The "Effective Date" for purposes of this Consent Decree shall mean the date on which the Court executes this Consent Decree.

2. Columbia Slough Restoration and Revegetation

The Port of Portland shall remove fill from areas along the north and south banks of the Columbia Slough, between the Columbia Slough Rail Bridge and the Lombard Street Bridge, landward of the Port's surveyed property boundary, and revegetate, as follows:

a. North Bank. The project area shall be located on the north side of the Columbia Slough, for a distance of approximately 1,400 lineal feet between the Lombard Street Bridge and the Columbia Slough Rail Bridge (excepting the bridge approaches), and landward (east) of the Port's property boundary, as established by survey dated May 13, 1975, for a distance of 150 linear feet. Extending west from the 150-foot buffer line to the edge of the existing vegetation, the Port of Portland shall remove existing sand fill and other fill material down to native soils, except fill may be left at the location of the 40 Mile Loop Trail (the "Trail") for the sole purpose of providing a base for the trail. The Port will make best efforts to minimize the width of the base for the Trail. The fill slope located eastward of the 150-foot buffer line shall be no steeper than 3:1. Within the area requiring fill removal under this paragraph, the Port

shall construct the Trail. See paragraph 6 for details of the Trail. The Trail shall be located adjacent to the toe of the fill slope wherever feasible, but the location may vary within the area to accommodate topographical or vegetative features. The Port shall construct within the native soil within the buffer area a swale or swales of a total combined lineal length of 800 feet. Each swale shall be at least ten (10) feet wide at the bottom and one to two feet below the surface of the native soil. The swale or swales shall be constructed parallel to the Columbia Slough. The Port of Portland shall submit to the United States Department of the Army, Corps of Engineers ("COE"), within 120 days of the Effective Date, a vegetation and final grading plan for the North Bank (including the fill slope east of the 150-foot buffer line). The COE shall confer with the Port regarding questions, concerns or changes, and shall approve, disapprove or modify the plan and transmit that decision to the Port within thirty (30) days of receipt of the plan. The vegetation and final grading plan, as approved or modified by the COE, shall become an enforceable part of this Consent Decree. The Port shall have the right to seek judicial review of the terms of the vegetation and final grading plan, as approved or modified by the COE, pursuant to the dispute resolution provisions of paragraphs 27 through 29 of this Consent Decree. A depiction of the North Bank project is provided in Appendix C.

b. South Bank. The project area shall be located on the south side of the Columbia Slough for a distance of approximately 1,550 linear feet between the Lombard Street Bridge and the Columbia Slough Rail Bridge (excepting the bridge approaches), landward (west) of the Port's property boundary, as established by survey dated May 13, 1975, for a distance of 50 linear feet. Extending west from the surveyed

property boundary for a distance of approximately 50 feet, the Port of Portland shall remove existing sand fill and other fill material down to native soils. The fill slope located westward of the 50-foot buffer line shall be no steeper than 3:1. The Port of Portland shall submit to the COE, within 120 days of the Effective Date, a vegetation and final grading plan for the South Bank, including the fill slope west of the 50-foot buffer line. The COE shall confer with the Port regarding questions, concerns or changes, and shall approve, disapprove or modify the plan and transmit that decision to the Port within thirty (30) days of receipt of the plan. The vegetation and final grading plan, as approved or modified by the COE, shall become an enforceable part of this Consent Decree. The Port shall have the right to seek judicial review of the terms of the vegetation and final grading plan, as approved or modified by the COE, pursuant to the dispute resolution provisions of paragraphs 27 through 29 of this Consent Decree. A depiction of the south bank project is provided in Appendix D.

c. Project schedule. Removal of existing fill within the North Bank and South Bank project areas as described in subparagraphs a. and b. above, will be completed within eighteen (18) months of the Effective Date.

3. Leadbetter Peninsula Restoration and Revegetation

The project area shall be a 200-foot corridor bordering the current eastern, southern and western boundaries of the Leadbetter Peninsula as identified in Appendix E. Within this area of approximately 15 acres, the Port of Portland shall remove existing sand fill and other fill material down to native soils for a minimum of 125 feet of the 200-foot corridor on the slough and lake side of the corridor and provide a contoured slope,

with an average of no greater than a 4:1 grade, to meet the existing elevation of the top of the remaining fill at the upland edge of the remaining 75 feet of the 200-foot corridor. The Port shall construct within the native soils within the 200-foot corridor a swale or swales of a total combined lineal length of approximately 1,500 feet. Each swale shall be at least ten (10) feet wide at the bottom and two to four feet below the surface of the native soil. The swales shall be constructed parallel to the toe of the fill slope. The Port shall submit to the COE, within 120 days of the Effective Date, a vegetation and final grading plan for the Leadbetter Peninsula. The COE shall confer with the Port regarding questions, concerns or changes, and shall approve, disapprove or modify the plan and transmit that decision to the Port within thirty (30) days of receipt of the plan. The vegetation and final grading plan, as approved or modified by the COE, shall become an enforceable part of this Consent Decree. The Port shall have the right to seek judicial review of the terms of the vegetation and final grading plan, as approved or modified by the COE, pursuant to the dispute resolution provisions of paragraphs 27 through 29 of this Consent Decree. Within and adjacent to the 200-foot corridor, the location of the 40 Mile Loop Trail may vary. See paragraph 6 of this Exhibit for details of the Trail. See Appendix E. In addition, construction of a stormwater outfall if otherwise lawfully permitted, shall be permissible within the 200-foot corridor. Removal of the existing fill within the project area will be completed within eighteen (18) months of the Effective Date.

4. Ramsey Lake Mitigation Area Restoration and Revegetation

- a. Visual Vegetation Buffer. The project area shall be located within

a corridor bordering the top of the slope west and north of the Ramsey Lake Mitigation Area. Within a corridor varying from 10 feet to 100 feet in depth, as depicted in Appendix F, a visual buffer of shrubs and trees shall be planted. The height of the visual buffer shall be limited as necessary to accommodate existing utility poles and transmission lines. The Port shall submit to the COE, within 120 days of the Effective Date, a vegetation and final grading plan for the visual vegetation buffer. The COE shall confer with the Port regarding questions, concerns or changes, and shall approve, disapprove or modify the plan and transmit that decision to the Port within thirty (30) days of receipt of the plan. The vegetation and final grading plan, as approved or modified by the COE, shall become an enforceable part of this Consent Decree. The Port shall have the right to seek judicial review of the terms of the vegetation and final grading plan, as approved or modified by the COE, pursuant to the dispute resolution provisions of paragraphs 27 through 29 of this Consent Decree. This mitigation project does not include or authorize filling of the existing swale within the project area.

b. Wetland and Riparian Enhancements North of Ramsey Lake

The project area shall include the Port's property bounded by the Columbia Slough on the east and north and Ramsey Lake on the west and south. The Port shall remove existing sand fill, other fill material, and native soil down to an elevation of 14 NGVD within the project area except for a 100-foot wide strip as measured from toe to toe which extends the full length (southeast to northwest) of the project area as shown in Appendix G. The Port shall construct within the project area two meandering swales of a total combined lineal length of 2,000 feet. Each swale shall be at least 50 feet wide at the

bottom and the bottom of the swale shall be approximately elevation 10 NGVD. The ends of the swales will be protected with appropriate erosion control methods which may include the placement of fill material. At two locations within the project area, one upstream and one downstream, swales shall connect with the slough. The Port shall submit to the COE, within 120 days of the Effective Date, a vegetation and final grading plan for the wetland and riparian enhancements. The COE shall confer with the Port regarding questions, concerns or changes, and shall approve, disapprove or modify the plan and transmit that decision to the Port within thirty (30) days of receipt of the plan. The vegetation and final grading plan, as approved or modified by the COE, shall become an enforceable part of this Consent Decree. The Port shall have the right to seek judicial review of the terms of the vegetation and final grading plan, as approved or modified by the COE, pursuant to the dispute resolution provisions of paragraphs 27 through 29 of this Consent Decree. Removal of the existing fill within the project area will be completed within eighteen (18) months of the Effective Date.

5. Culvert Removal

The Port shall remove the culvert which is adjacent to and east of the railroad bridge on the south side of the Columbia Slough and related fill to the bottom of the elevation of the existing culvert as shown on Appendix H. The Port shall implement appropriate erosion control measures, which may include the placement of fill material. Culvert removal and erosion control measures shall be completed within three (3) years of the Effective Date.

6. 40 Mile Loop Trail

The Port shall construct a portion of the 40 Mile Loop Trail along the north and east sides of the Columbia Slough extending from the Columbia Slough Rail Bridge south to the Port's property line, unless the City of Portland withdraws the Trail requirement with respect to the Port. The Trail will be located within the buffers established along the Columbia Slough. The Port shall attempt to negotiate with the City of Portland an agreement that the width of the Trail shall not exceed sixteen (16) feet toe to toe at the base, and if possible, shall be narrower. The height of the trail shall not exceed three feet above native soil. The COE may assist the Port in these negotiations with the City. The Trail may include the placement of base fill material within the buffers. The design of the 40 Mile Loop Trail throughout the mitigation areas identified in this Consent Decree shall be included within the appropriate vegetation and final grading plans.

7. Vegetation and Final Grading Plans

All vegetation and final grading plans required by this Consent Decree shall, in addition to vegetation and fine grading, describe in detail (i) the design and location of all swales and benches, and (ii) slope vegetation at the particular mitigation sites.

8. Mitigation Monitoring and Reporting

- a. The Port shall provide the COE with a yearly report providing information on the status of the project
- b. For year zero, the year in which the mitigation site is constructed and planted, the Port shall provide the COE with an as-built mitigation site report. That report shall include as-built plan and cross-section drawings, and full photographic

coverage of the mitigation site from fixed locations,

c. For the first through fifth years after planting of the site (years 1-5) the Port shall provide the COE with annual mitigation monitoring reports. These reports shall include: i) full photographic coverage of the site, ii) vegetation transect data, iii) hydrology information (including depth and duration of open water and emergent areas), iv) wildlife use, v) success of efforts to establish effective buffers to protect the wetlands and adjacent upland and vi) such other information as may be necessary to substantiate success of the mitigation effort. Sample points (photographic coverage, vegetation transects, hydrology samples, etc.) shall remain constant throughout the monitoring period and shall be clearly indicated on the maps submitted with the report.

d. All reports shall be due by November 1 of each year.

9. Mitigation Success and Remediation

a. After the COE receives the final mitigation monitoring report, it shall compare the results with the success criteria below, determine whether the Port has met its mitigation obligations and notify the Port of its determination.

b. The mitigation effort shall be considered successful when 80 percent of the plants planted by the Port, in each of the project areas described in paragraphs 2(a), 2(b), 3, 4(a) and 4(b) have been alive for at least five years.

c. If at any point during the monitoring period, it appears that more than 20 percent of the plants planted by the Port, in any of the project areas described in paragraph 2(a), 2(b), 3, 4(a) and 4(b) have died, the Port shall submit a remediation plan to the COE. The monitoring period set forth in paragraph 8(c) of this Exhibit shall be

extended to the degree determined necessary by the COE. The COE shall confer with the Port regarding questions, concerns or changes and shall approve, disapprove or modify the remediation plan and transmit that decision to the Port within thirty (30) days of receipt of the plan. The remediation plan, as approved or modified by the COE, shall become an enforceable part of this Consent Decree. The Port shall have the right to seek judicial review of the terms of the remediation plan, as approved or modified by the COE, pursuant to the dispute resolution provisions of paragraphs 28 through 30 of this Consent Decree.

10. Maintenance

Once the compensatory mitigation has been approved as complete, the Port may maintain the mitigation site, if consistent with this Consent Decree, by such activities as control of nutria and removal of exotic (non-native) vegetative species. The Port may not engage in activities inconsistent with the Consent Decree, such as removal of vegetation or alteration of hydrology, without written approval from the COE.

11. Additional Mitigation Funding

In addition, the Port shall contribute the sum of Two Hundred Eighty-Five Thousand Dollars (\$285,000) cash for the express and sole purpose of performance of additional mitigation projects within the Smith & Bybee Lakes Management Area.

a. Within thirty (30) days of the Effective Date, the Port shall place the specified funds in an interest-bearing account with U.S. Bank. Interest shall accrue for the benefit of the fund, not for the benefit of the Port.

b. The Port shall withdraw and make payment of such funds for projects

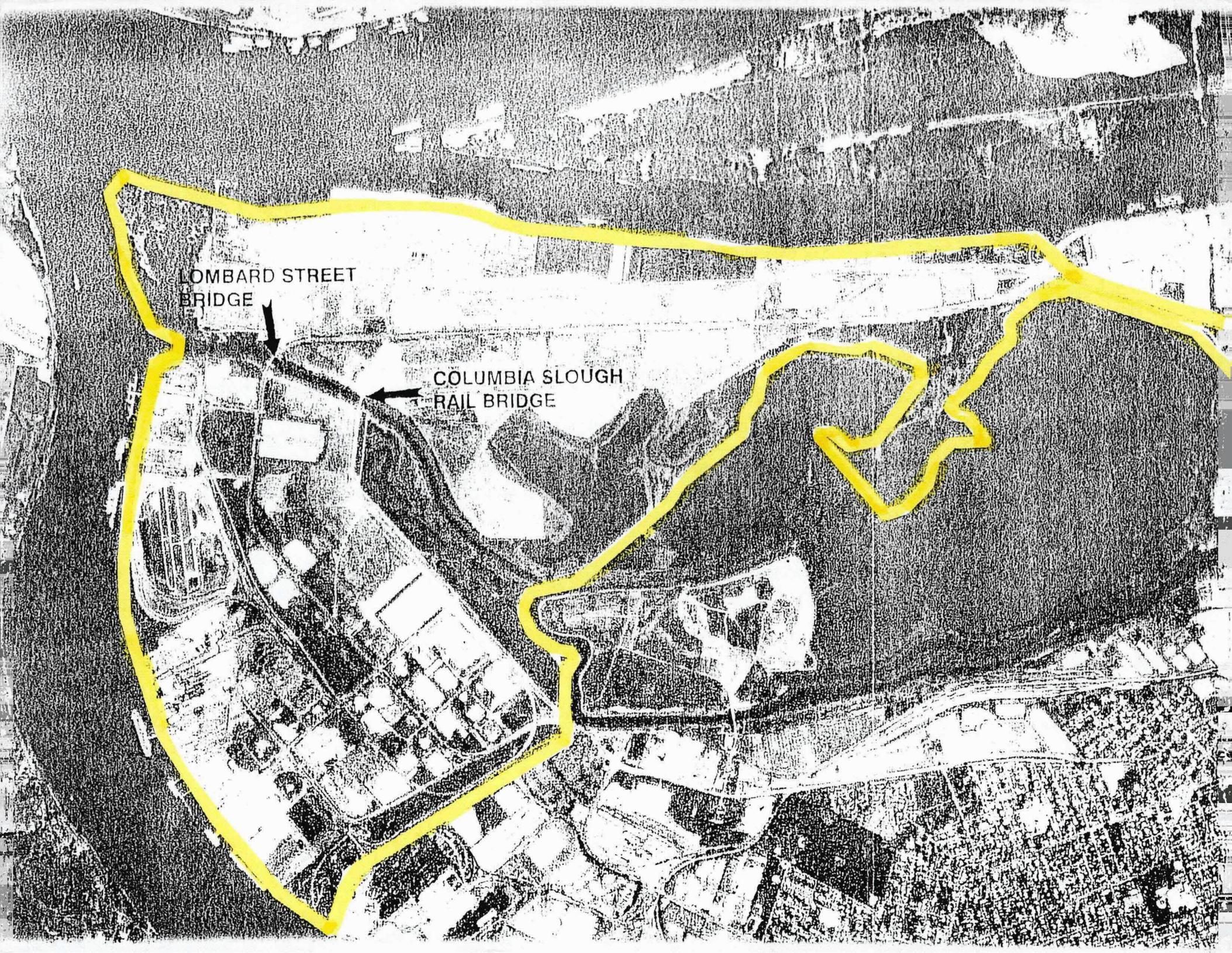
within ten (10) days after the Port has been notified that such withdrawal and payment has been approved by the COE. The COE may approve payments for projects in its discretion, provided that such projects shall provide environmental mitigation within the Smith & Bybee Lakes Management Area and provided that the COE consults with Mr. Jones regarding potential projects prior to approving such projects for funding. Prior to approving the withdrawal and payment of any funds, the COE shall provide the parties with a minimum of forty-five (45) days actual written notice describing the project to be funded and the amount of the funding. Mr. Jones shall have the right to object to the withdrawal of such funds on the grounds only: (i) that insufficient information has been provided by the COE from which to evaluate the project and the amount of funding; or (ii) that the proposed project is inconsistent with the purposes of this consent decree or the CWA. Mr. Jones shall make his objection by filing a motion with the Court within the forty-five (45) day period. Mr. Jones shall state all reasons for his objections and shall seek a hearing and determination by the Court. In the event Mr. Jones timely files an objection with the Court pursuant to this provision, the COE shall not approve the withdrawal and payment of the proposed funds until the Court has heard and resolved Mr. Jones' objection or the parties otherwise mutually agree in writing.

c. As described above, the Port's obligations under this paragraph shall be strictly limited to making the initial payment into the fund and making payments from the fund as approved by the COE.

12. Mitigation Funding to the City of Portland

The Port shall contribute the sum of Sixty Four Thousand Dollars (\$64,000.00) to

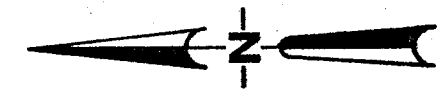
the City of Portland for the purpose of the City or its agents performing vegetation and revegetation of the lower Columbia Slough banks and buffer areas, in areas outside of the mitigation areas addressed in this Consent Decree. The Port's obligation under this provision are strictly limited to payment of the specified funds as conditioned by this provision. Payment shall be made within one hundred eighty (180) days of the Effective Date. This Consent Decree shall not create any obligation enforceable against the City of Portland.



LOMBARD STREET
BRIDGE

COLUMBIA SLOUGH
RAIL BRIDGE

APPX A



SCALE: 1" = 30'

APPROXIMATE 5' ELEVATION CONTOUR

APPROXIMATE ORDINARY LOW WATER
1.4' ELEVATION CONTOUR



NOTES:
1. VERTICAL DATUM IS NGVD

APPENDIX B


SR. MGR., CORP PROPERTY DEVELOPMENT

1998D018
DESIGN NUMBER

52158 - 200
PROJECT NUMBER

PATH UNDER LOMBARD STREET BRIDGE

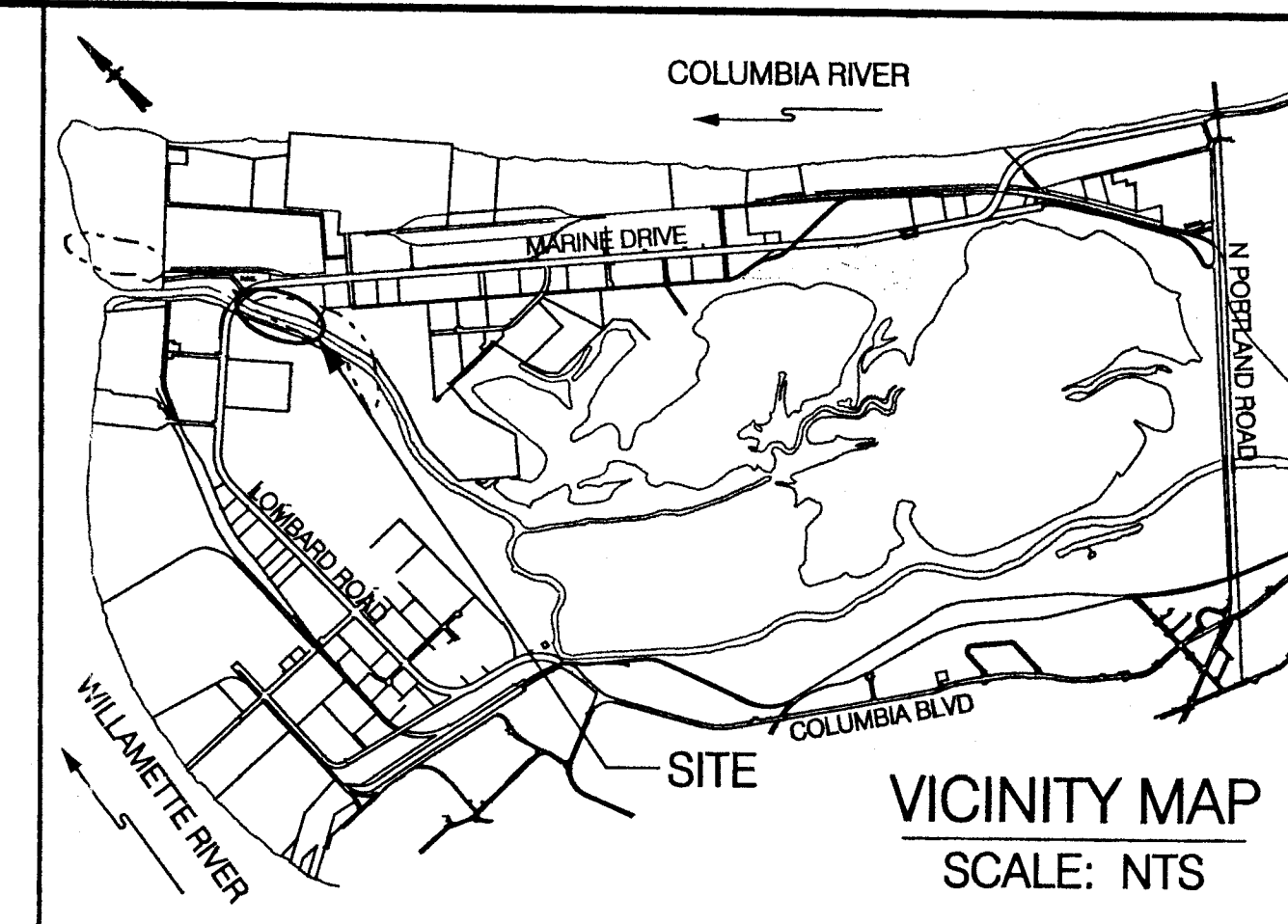
SUBMITTED BY *[Signature]*
PROPERTY DEPT. CHIEF OR MANAGER

TYPE
PD

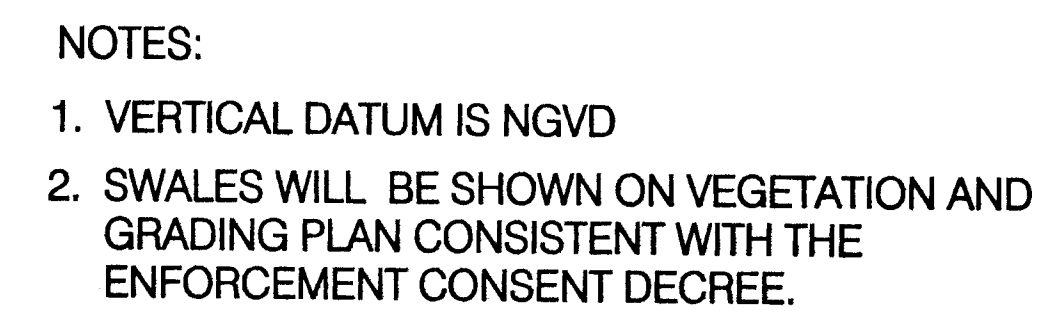
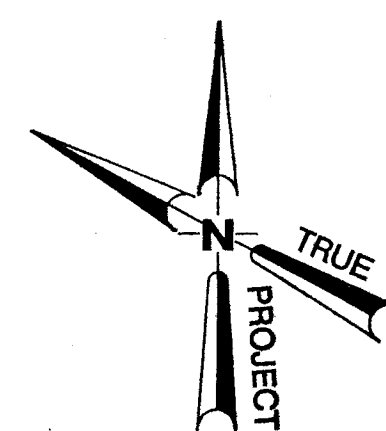
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RG 2000-5

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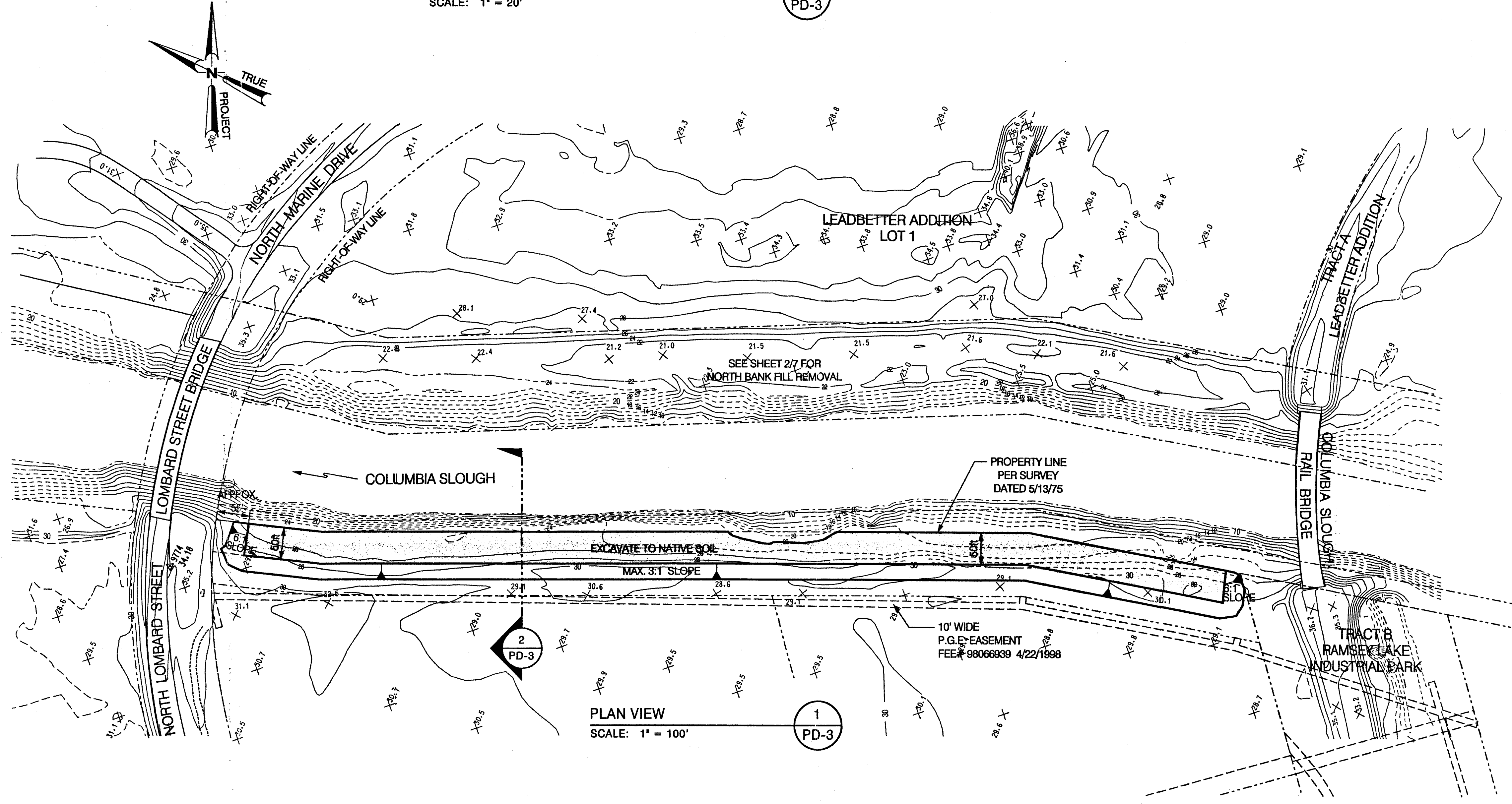
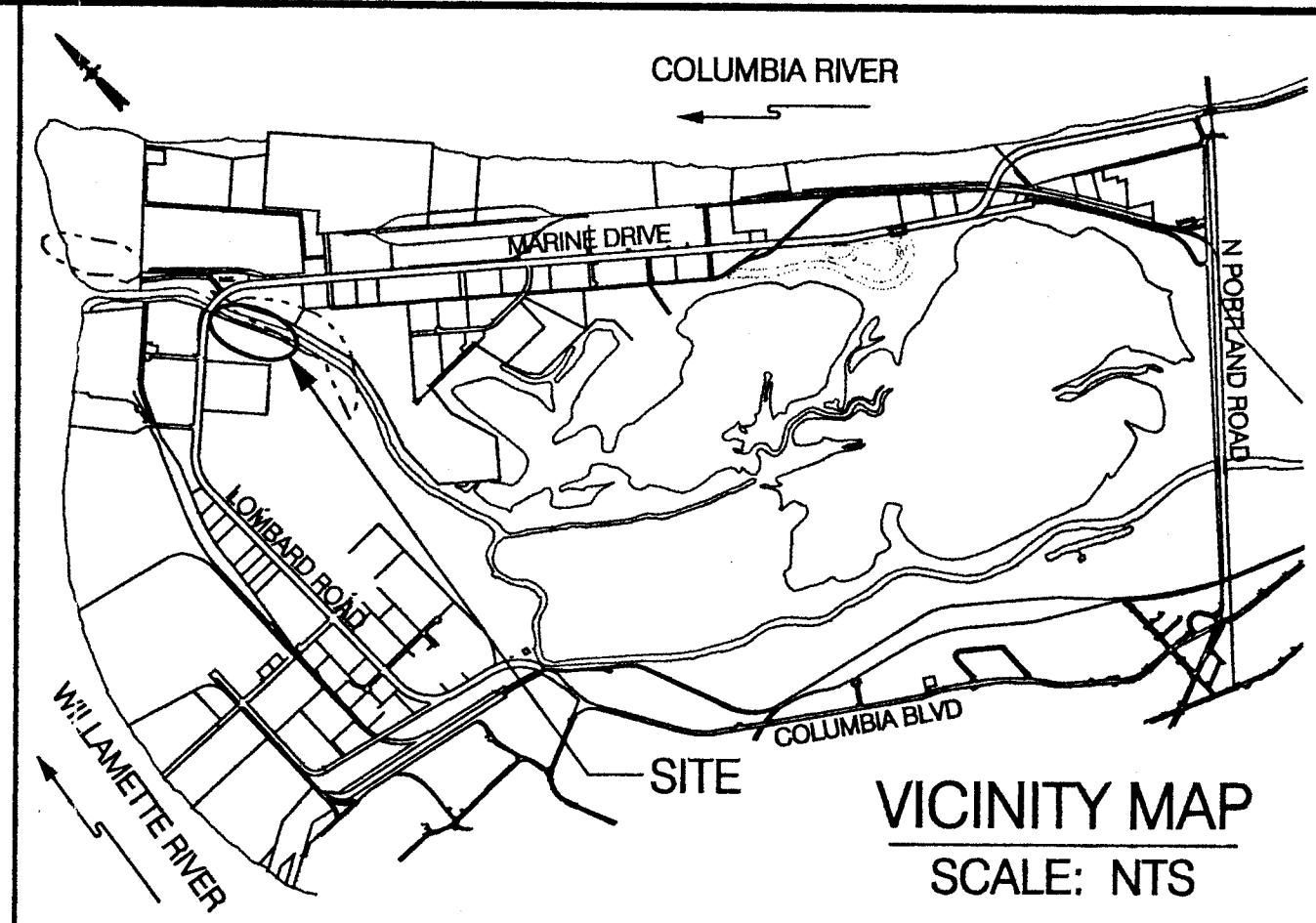
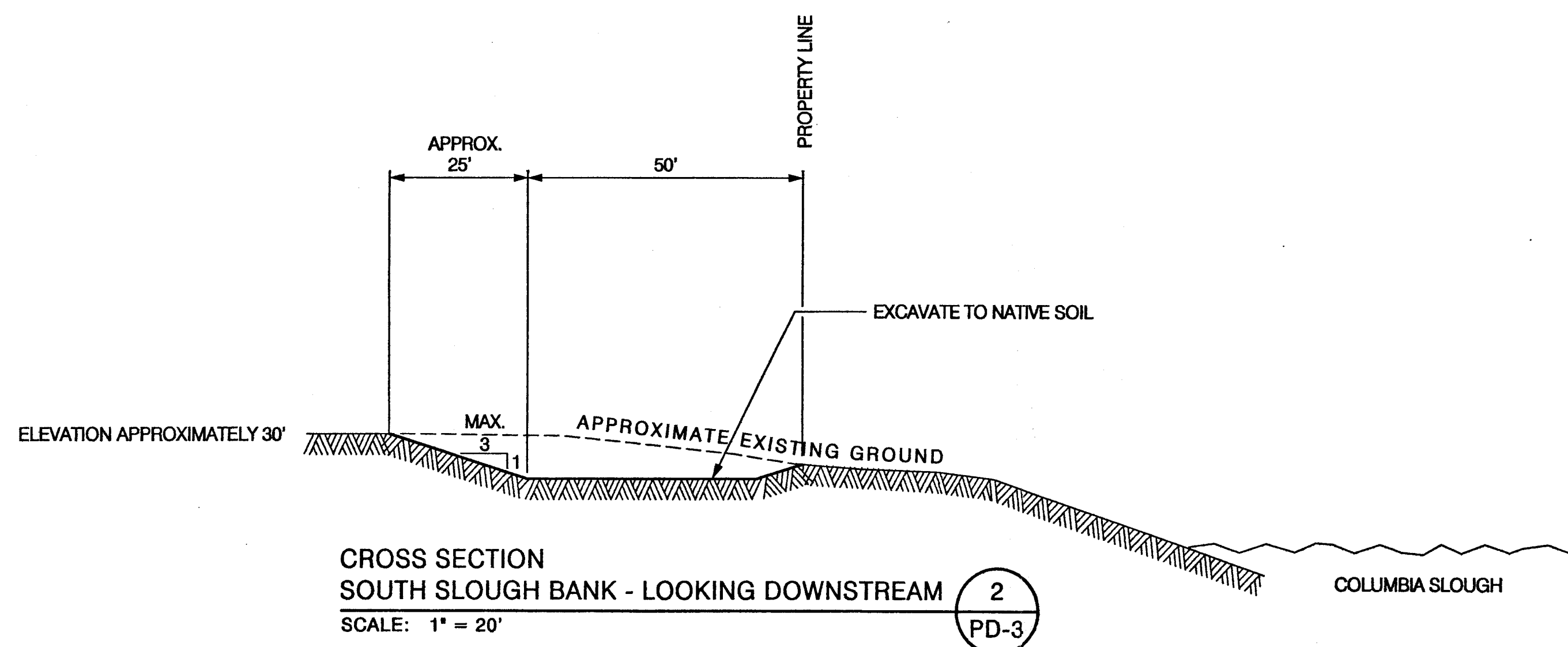
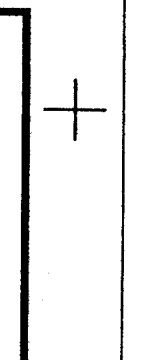


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PD2



APPENDIX C

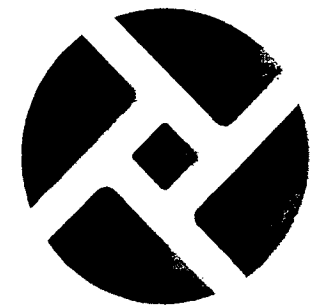
																																				<div>PORT OF PORTLAND PORTLAND, OREGON</div> <div> SR. MGR., CORP PROPERTY DEVELOPMENT</div> <div><div>1996D018 <small>DESIGN NUMBER</small></div><div>52158 - 200 <small>PROJECT NUMBER</small></div></div> <td colspan="12"><div>DESIGNED BY _____ DRAWN BY P. REYNOLDS CHECKED BY G. MEYER DATE MAR 2000 SCALE AS SHOWN</div></td> <td colspan="12"><div>RIVERGATE INDUSTRIAL DISTRICT</div><div>CONSENT DECREE</div><div>NORTH BANK COLUMBIA SLOUGH</div></td>												<div>DESIGNED BY _____ DRAWN BY P. REYNOLDS CHECKED BY G. MEYER DATE MAR 2000 SCALE AS SHOWN</div>												<div>RIVERGATE INDUSTRIAL DISTRICT</div> <div>CONSENT DECREE</div> <div>NORTH BANK COLUMBIA SLOUGH</div>											
SUBMITTED BY  <small>PK PROPERTY DEVELOPMENT MANAGER</small>												TYPE PD		DRAWING NO. RG 2000-5										2/8		(PD2)																																													



NOTES:
1. VERTICAL DATUM IS NGVD

APPENDIX D

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XXXX-BK XXXX-SC
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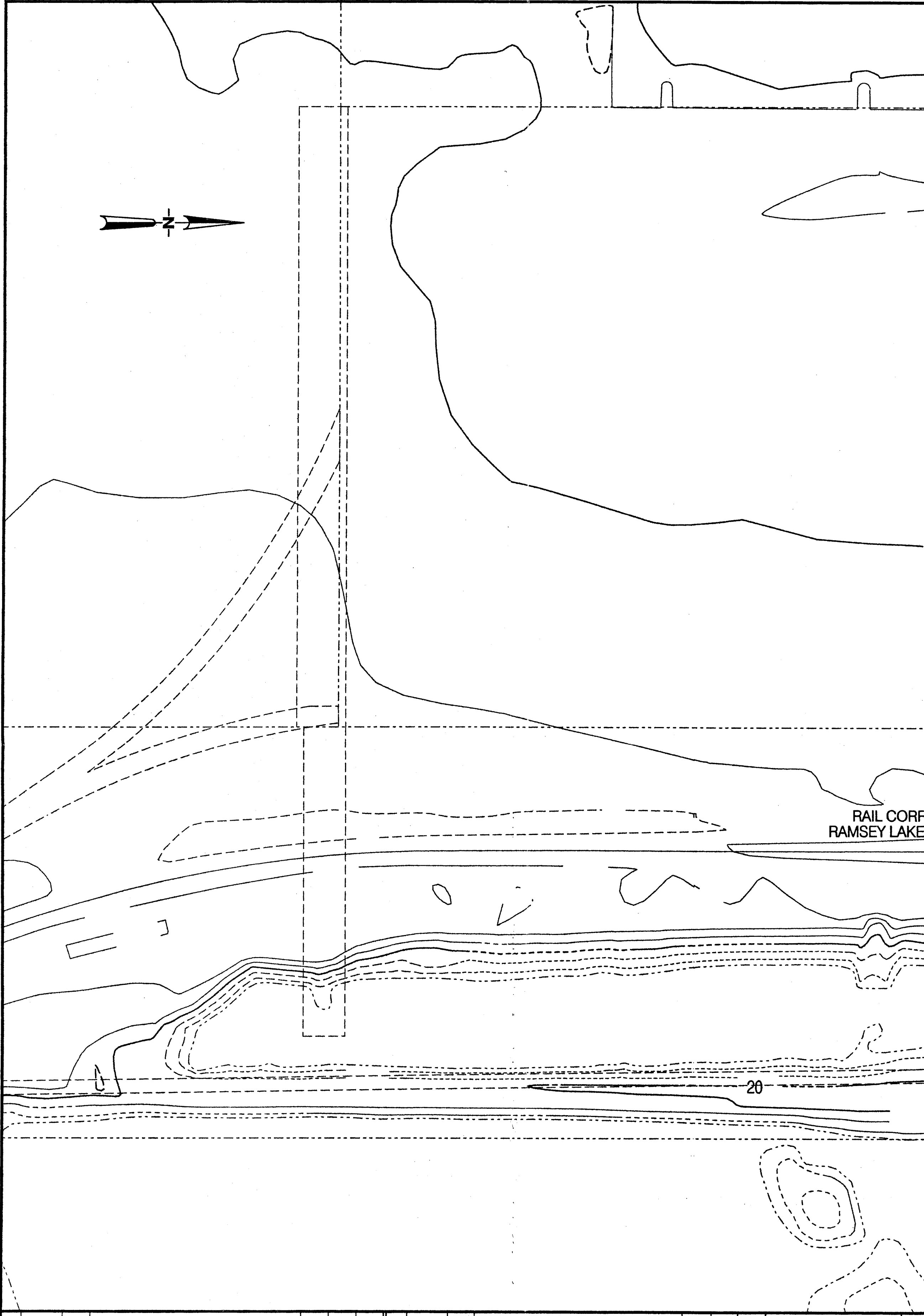
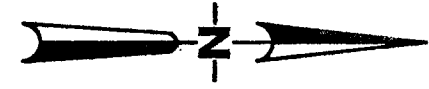
52158 - 200
PROJECT NUMBER

4/8 (PD4)

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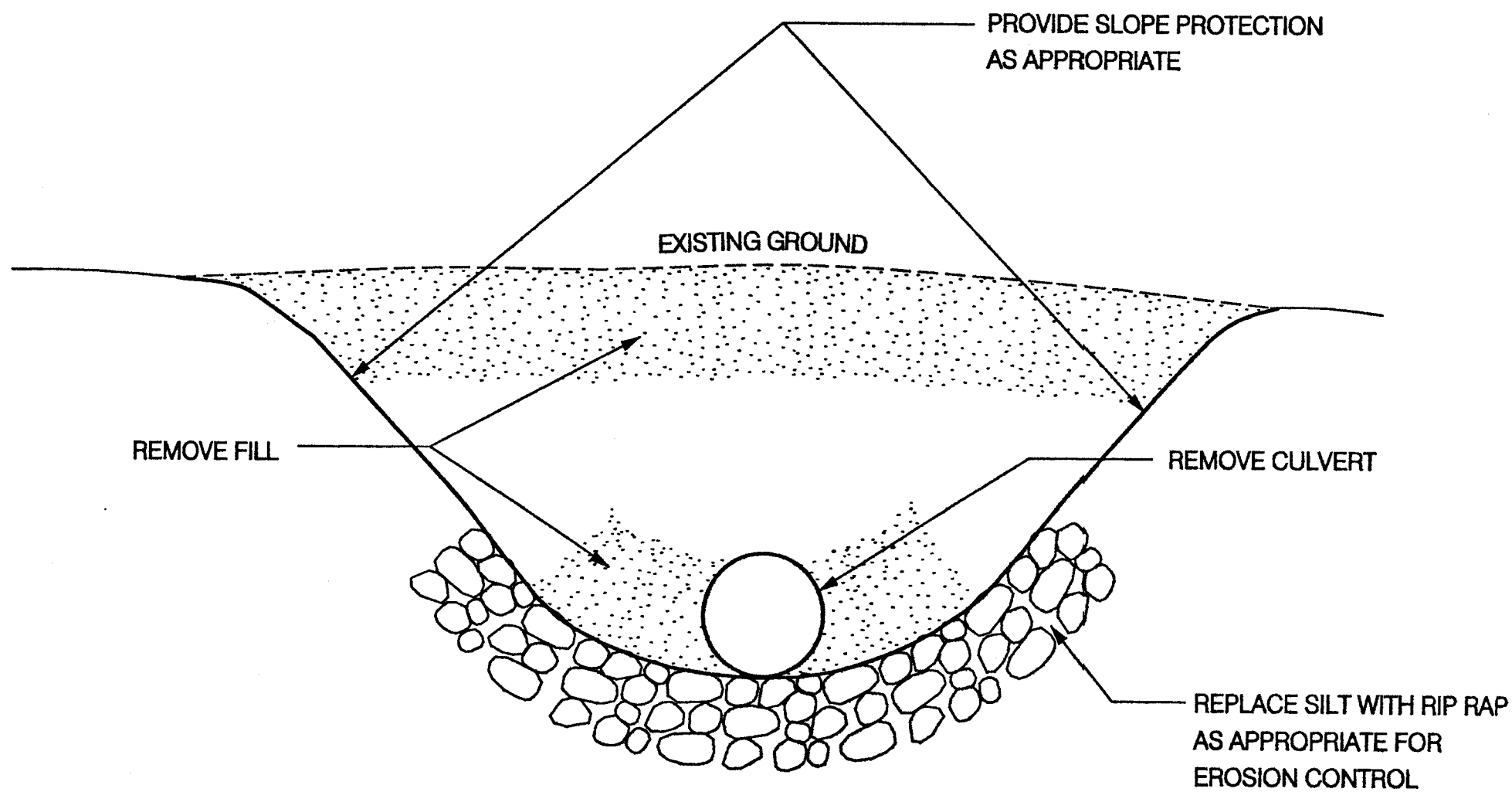
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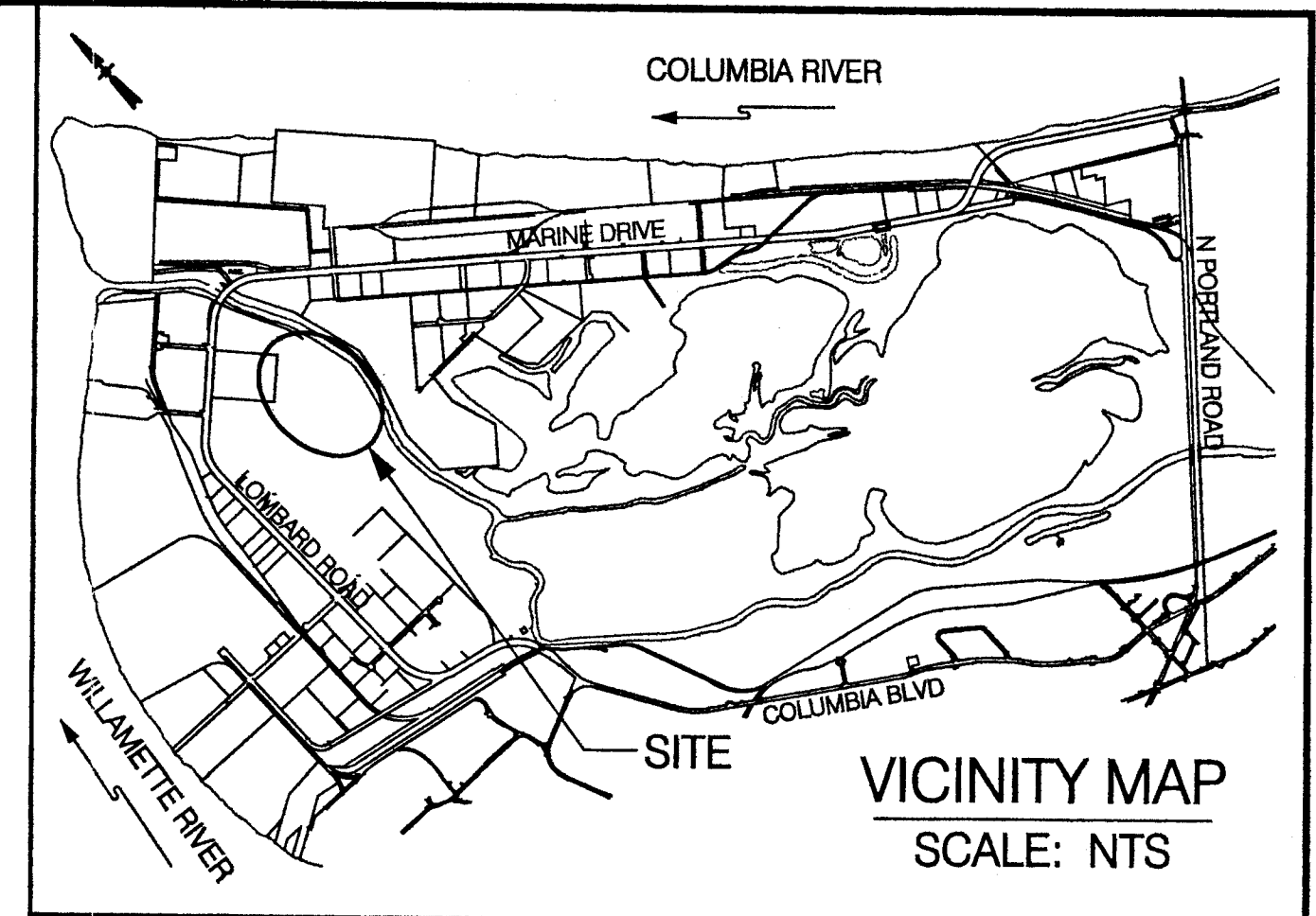
PLAN VIEW
SCALE: 1" = 50'

1
PD7



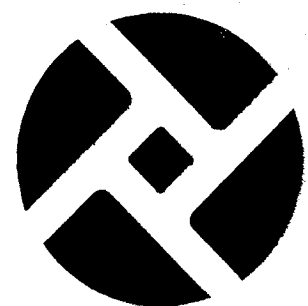
GRADING SECTION
SCALE: NOT TO SCALE

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PD7



VICINITY MAP
SCALE: NTS

NO.	DATE	BY	REVISIONS	CHK'D	APP'D	NO.	DATE	BY	REVISIONS	CHK'D	APP'D



PORT OF PORTLAND
PORTLAND, OREGON

SR. MGR., CORP PROPERTY DEVELOPMENT
SR. MGR., CORP PROPERTY DEVELOPMENT

1998D018
DESIGN NUMBER

52158 - 200
PROJECT NUMBER

DESIGNED BY _____
DRAWN BY P. REYNOLDS
CHECKED BY G. MEYER
DATE MAR 2000
SCALE AS SHOWN

RIVERGATE INDUSTRIAL DISTRICT

CONSENT DECREE
CULVERT REMOVAL

SUBMITTED BY *[Signature]*
PROPERTY DEVELOPMENT MANAGER

TYPE PD
DRAWING NO. RG 2000-5
7/8 (PD7)

