

# BOGLE & GATES P.L.L.C.

A Professional Limited Liability Company

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73062/00002

August 7, 1998

### VIA AIR COURIER

G. Scott Williams, Esq.  
Environmental Defense Section  
U.S. Department of Justice  
601 "D" Street N.W., Suite 8000  
Washington, D.C. 20026

Re: Jones v. Thorne, et al.

Dear Scott:

The purpose of this letter is to explain the Port's proposed "Remaining Mitigation Measures" detailed in paragraph 12 of the August 6, 1998 draft Consent Decree. As you know, the Remaining Mitigation Measures are intended to address any unresolved obligations of the Port of Portland specified in the *Cooperative Agreement* (the so-called "COMA"). These conditions must be resolved between the Federal Defendants and the Port of Portland and, as agreed during the settlement conferences, will not involve negotiations that include Mr. Jones.

The mitigation measures potentially at issue are specified in the ten numbered paragraphs in Section IV of the *Cooperative Agreement*. Items 7 through 10 concern water control structures that have either been constructed or superseded, or that are addressed in the Consent Decree through other provisions. Accordingly, this letter gives no further attention to these paragraphs. Items 1 through 6 are addressed in order below.

1. Fill Boundary. Item 1 specifies a change in the prior extent of the permitted fill boundary. The Port's final fill boundaries comply with Attachment A to the *Cooperative Agreement*, with one exception. Along the eastern boundary of the rail yard, the notched area south of the Ramsey Lake mitigation area has not been and will not be filled. BES constructed a water quality facility in this area in 1995. We presume that less fill poses no problems.

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2. Fill Slopes and Vegetation. Item 2 specifies that the new slopes are not to exceed 3:1 in steepness and should be revegetated.<sup>1</sup> On the south side of the Columbia Slough, the new fill slopes along the eastern boundary of the rail yard were regraded to 3:1 in 1997 and replanted in the spring of 1998. With respect to the north side, Port staff surveyed these fill slopes in July 1998. Although there are areas where the slope is slightly steeper than 3:1, the Port believes that regrading is not recommended in light of the established vegetation. The Port is prepared to detail the results of its slope study, which involved 16 separate measurements, by teleconference or in connection with a site visit. The July 1998 work also involved an analysis of vegetation on the same fill slopes by a botanist with Fishman Environmental Services. This work indicates that the fill slopes require revegetation work to varying degrees. The Port's proposed scope of work for this item is detailed in paragraph 12(a) of the Remaining Mitigation Measures.
3. Ramsey Lake. Item 3 specifies that the Port will create an area of at least 16-acres of water surface area, and also addresses related wetland fringe and island vegetation.

The Ramsey Lake mitigation area was originally constructed by the Port in 1988, with three ponds, each containing one or two islands. The total water surface area on the design drawings is 15.1 acres. Two recent topographic surveys are available for the Ramsey Lake mitigation area (1991 and 1997). The September 1991 topographic survey shows a water surface area of 12.7 acres during a period when Oregon experienced below normal stream flows because of abnormally dry periods during five of the six previous years. The July 1997 topographic survey shows a water surface area of 18.8 acres, during a period of above normal precipitation in Oregon that followed three consecutive relatively wet winters. Based upon the above, the Port has concluded that a surface water area of at least 16 acres exists in satisfaction of the intent of Item 3, recognizing that the actual amount of surface water present at any given time varies with annual and seasonal precipitation levels, Columbia River and Willamette River levels and groundwater levels, all of which are related. Additional excavation with all the construction-related resource impacts and permit requirements is not recommended.

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<sup>1</sup>Please note that the *Cooperative Agreement* includes two sources that bear upon revegetation issues. First, replanting is to occur as specified in Attachment B. Second, paragraph VI.8 of the *Cooperative Agreement* specifies as follows:

Vegetative improvements will be maintained by the PORT for three years after planting. Within that time, plant material will be replaced, if necessary, to assure the viability of buffers and screens. After three years, planted buffer areas will be left alone to mature naturally. Vegetative screens will be maintained by the PORT, or its tenants, to assure continued effectiveness.

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The Ramsey Lake mitigation area was originally planted as specified in Attachment B to the *Cooperative Agreement* in 1989 by Inskeep Learning Center. A second phase of replanting occurred in 1991. A vegetation survey was conducted for the Port in this area in July 1998 by a botanist with Fishman Environmental Services. The survey indicated that the wetland fringe is providing habitat envisioned by the *Cooperative Agreement*, although with a different diversity and density of plant species. Although the Port believes it complied with the three-year vegetation requirement for this area, it is proposing to implement additional weed and undesirable species control measures as specified in paragraph 12(b) of the Remaining Mitigation Measures.

4. Upland Planting Between Ramsey Lakes and Columbia Slough. Item 4 specifies that the Port is to plant remaining upland areas between Ramsey Lake and the Columbia Slough using the specifications in Attachment B to create at least 20 acres of riparian habitat. Upland planting was performed per Attachment B by Inskeep Learning Center in 1989-91. The area of Port property between the Ramsey Lake mitigation area and the Columbia Slough is approximately 28.3 acres. Portions of this area are wetland and/or have significant existing upland vegetation. The portion of this area that is currently unvegetated is approximately 7 acres. The Port proposes to revegetate these bare areas as provided in paragraph 12(c) of the Remaining Mitigation Measures.
5. Columbia Slough Buffers. Item 5 specifies buffer areas on the north and south sides of the Columbia Slough. This requirement is being addressed by the Columbia Slough fill and revegetation projects specified in paragraph 11 of the Consent Decree.
6. North Bybee Lake Area. Item 6 specifies enhancement of at least two acres of wetland adjacent to the new fill boundaries in this area. An inventory in this area was conducted in July 1998. The old dike has been breached resulting in three distinct areas forming adjacent to the new fill boundary. A permanent triangular shaped pond area (the "West Pond") of approximately 2.1 acres exists where the old fill boundary has been breached. A small triangular-shaped area (the "South Triangle") of approximately 0.9 acres remains between the southeast end of the new fill boundary and the old dike. A portion of this area is ponded during winter and spring due to breaching of the dike and low elevations. A permanent long ponded area (the "East Pond") of approximately 4.4 acres in total (2.6 acres of permanent pond) is present at the toe of the slope along the east side of the new fill boundary. At the time of the *Cooperative Agreement*, these three areas were all inside the original fill boundary and permanent dike (and therefore subject to filling). All contained no vegetation. Currently, with the breaching of the dike, the East and West ponds are connected to Bybee Lake and constitute a permanent addition of 4.7 acres of permanent ponds (with aquatic vegetation and wildlife readily observable), with an additional 2.7 acres

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of fringing emergent wetland and shrub/scrub vegetation. Additional deepening or enlarging of the ponded areas is not recommended because it would destroy existing aquatic and fringing vegetation that currently provides habitat for various wildlife species.

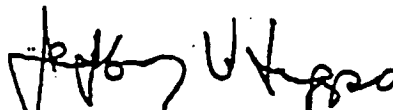
In sum, as discussed with the Court, the Port is proposing to include provisions in the Consent Decree related to items 2, 3 and 4 of the *Cooperative Agreement*. We recognize that your clients may have questions about the Port's proposal and may wish to view the affected areas. Although we consider the Port's proposed terms comprehensive, we are interested in hearing your views and resolving any related concerns as quickly as is possible.

Finally, as you know, the settlement principals that define the Port's involvement to this point are: (1) certainty; (2) finality; and (3) practicality. Accordingly, as the resource agencies evaluate the Port's proposed actions, we urge them to take a pragmatic approach that both fairly addresses the remaining commitments in a manner that is clear and specific about what needs to be done and that provides an end point for the obligations. Please do not hesitate to call if you have any questions regarding the information provided by the Port or the terms of the draft Consent Decree.

This letter will also serve to confirm that the Port has tentatively reserved the morning of Thursday, August 13<sup>th</sup> for a site tour and is available and ready to discuss any and all of the draft consent decree terms by phone or in person as soon as possible. Please confirm whether the site tour will be going forward and, if so, who will attend.

Very truly yours,

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Jeffrey W. Leppo

cc: Bruce M. Landon, Esq. (via fax)  
David D. Hlebechuk, Esq. (via fax)  
Jeffrey W. Ring, Esq. (via fax)

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DRAFT  
(revised)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

WILLIAM MICHAEL JONES,

Plaintiff,

v.

MIKE THORNE, DIRECTOR OF THE PORT OF  
PORTLAND, et al.,

Defendants.

Case No. CV 97-1674 ST

CONSENT DECREE, ORDER OF  
DISMISSAL WITH PREJUDICE  
AND RELEASE

I. BACKGROUND

The Parties expressly stipulate, and the Court by entering this Consent Decree FINDS, as follows:

A. The Rivergate area of Portland, Oregon is a portion of the peninsula formed by the confluence of the Willamette River and the Columbia River, consisting of approximately 2800 acres. The Columbia Slough bisects the Rivergate area. Portions of Smith Lake and Bybee Lake are also included within Rivergate. An aerial photograph of Rivergate is provided at Appendix A.

B. The Rivergate area has been planned and developed for heavy industrial and commercial development for many decades. Land use planning for the area is reflected in, for example, the *North Portland Peninsula Plan* and the *Smith & Bybee Lakes Management Plan*. The Port of Portland began filling in Rivergate to create land for industrial development in 1942. In the 1960s, the Port of Portland

1 continued filling wetland areas within Rivergate to create developable uplands by placing Columbia  
2 River sediments that were dredged as authorized by Department of Army ("DA") permits issued by the  
3 Army Corps of Engineers ("COE") pursuant to Section 10 of the Rivers and Harbors Act of 1898.  
4 Beginning in 1974, the Port also sought and obtained a series of DA permits from the COE under  
5 authority of both Section 10 and Section 404 of the Clean Water Act ("CWA"). These permits  
6 authorized the Port of Portland to dredge Columbia River sediments and to place this material on to  
7 Rivergate wetlands and waters as fill.

8 C. In 1989, a *Cooperative Agreement Between the Port of Portland, Oregon Division of*  
9 *State Lands, Oregon Department of Fish and Wildlife, U.S. Environmental Protection Agency, U.S. Fish*  
10 *and Wildlife Service, U.S. Army Corps of Engineers To Establish A Rivergate Development Program*  
11 *And An Acceptable Mitigation Program For Wetland Impacts* (the "Cooperative Agreement") was  
12 executed. The *Cooperative Agreement* recorded an understanding between the Port and the signatory  
13 agencies concerning: (i) Port's commitment to perform certain actions as compensation and mitigation  
14 for future filling of waters and wetlands within Rivergate; and (ii) the agencies' recognition that the  
15 identified actions were sufficient and adequate mitigation and compensation under applicable laws,  
16 including specifically under Section 404 of the Clean Water Act and under the National Environmental  
17 Policy Act ("NEPA") for all prior and ongoing filling of wetlands and waters in Rivergate.

18 D. After the execution of the *Cooperative Agreement*, changes in the physical condition of  
19 Smith Lake and Bybee Lake, new information, developments occurring adjacent to Rivergate areas and  
20 the views and opinions of third-parties, including federal and state agencies, affected performance of the  
21 actions identified in the *Cooperative Agreement*. In some instances, a substitute action was agreed upon  
22 by all parties to the *Cooperative Agreement* and performed. In other instances, a lack of consensus has  
23 existed among the signatory agencies regarding what, if any, substitute action should be performed by  
24 the Port. In still other instances, the selected action did not yield the desired result. Accordingly, prior  
25 to the execution and entry of this Consent Decree the Port of Portland had not completed all of the

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1 actions specified in the *Cooperative Agreement* and a lack of consensus continued to delay, in part,  
2 completion.

3 E. Plaintiff, William Michael Jones ("Jones"), appearing *pro se*, filed a complaint on  
4 November 25, 1997 pursuant to the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365, the  
5 Administrative Procedures Act ("APA") and NEPA. In his complaint, plaintiff contends, among other  
6 things: (i) that the Port has filled waters of the United States within Rivergate either without obtaining a  
7 permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344, or pursuant to permits and  
8 extensions of permits issued by the COE that were invalid or otherwise unlawful; (ii) that the COE and  
9 the U.S. Environmental Protection Agency ("EPA") failed to perform nondiscretionary duties under the  
10 Clean Water Act in permitting the Port of Portland to conduct unlawful filling in Rivergate; (iii) that the  
11 U.S. Department of Transportation ("DOT"), through the Federal Highway Administration ("FHWA")  
12 and the U.S. Coast Guard ("USCG"), failed to perform nondiscretionary duties under the Clean Water  
13 Act in permitting the Port of Portland to conduct unlawful filling in Rivergate; (iv) that final actions of  
14 the DOT, FHWA, USCG and COE in permitting filling of waters of the United States within Rivergate  
15 and in permitting construction of the Columbia Slough Rail Bridge were unlawful; and (v) that the DOT,  
16 FHWA, USCG and COE violated the provisions of NEPA in failing to require the preparation of an  
17 Environmental Impact Statement ("EIS") in connection with one or more fill permits and projects within  
18 Rivergate. All defendants have appeared and answered the complaint by denying, in all material  
19 respects, Jones' allegations.

20 F. Plaintiff Jones, defendant Mike Thorne, Director of the Port of Portland (the "Port of  
21 Portland"), and defendants Frederico Pena, former Secretary of the Department of Transportation,  
22 Rodney Slater, Secretary of the Department of Transportation and former Administrator of the Federal  
23 Highway Administration, Gloria Jeff, former Administrator of the Federal Highway Administration,  
24 R.E. Kremeck, Commandant of the United States Coast Guard, Carol Browner, Administrator of the  
25 Environmental Protection Agency, and Togo D. West, Jr., Secretary of the United States Army have  
26 agreed to settle the plaintiff's claims asserted in the above-captioned litigation.

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1 G. Jones, the Port of Portland and the United States (collectively, the "Parties") also  
2 recognize and agree that matters addressed by this litigation are complicated and substantially affected  
3 by: (i) the broad physical area encompassed by Rivergate, which has been filled over many decades; (ii)  
4 the many permits, agreements and decisions issued or entered into over a period of decades with respect  
5 to filling within Rivergate; (iii) the ownership or management of Rivergate lands, or permitting  
6 authority, of numerous non-parties including METRO, the City of Portland, the Smith and Bybee Lakes  
7 Management Committee, the U.S. Fish and Wildlife Service, the Oregon Division of State Lands, the  
8 Oregon Department of Fish and Wildlife, the Oregon Department of Transportation and other private  
9 persons and entities; (iv) the divergent views of the parties and numerous interested non-parties with  
10 respect to planned industrial development, natural resource values, appropriate mitigation measures, and  
11 appropriate or required public comment and process; and (v) the practical difficulties of successful  
12 restoration, revegetation or buffering of filled areas.

13 H. Accordingly, in furtherance of purposes of the Clean Water Act, the parties have also  
14 agreed to: (i) finally and specifically resolve all permit and mitigation obligations of the Port of Portland  
15 for filling of waters of the United States within the Rivergate area of Portland, Oregon as of the date of  
16 this Consent Decree, subject to specified exceptions; (ii) provide a public decision-making process for  
17 selecting certain natural resource enhancement in the public interest; and (iii) provide funding for  
18 performance of the selected mitigation action..

19 I. This Consent Decree is the product of negotiation, compromise and mutual intent, facilitated  
20 through multiple settlement conferences by the Honorable Donald C. Ashmanskas, U.S. Magistrate  
21 Judge. Plaintiff acknowledges that defendants advised him to involve qualified legal counsel in  
22 negotiation and drafting of the settlement and Consent Decree, that he has consulted legal counsel as he  
23 deemed appropriate, and that he has freely elected to proceed, *pro se*.

24 J. The Port of Portland and the United States do not admit any liability to Plaintiff or otherwise  
25 arising out of the transactions, occurrences, actions or inaction alleged in the Complaint; nor do they  
26 admit any violation of any federal or state laws or regulations.



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1 K. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent  
2 Decree has been negotiated by the Parties in good faith, that implementation of this Consent Decree will  
3 avoid prolonged and complicated litigation between and among the Parties, and will expedite  
4 performance of certain wetland-mitigation and natural resource enhancement measures, and that this  
5 Consent Decree is fair, reasonable, consistent with the requirements and purposes of the Clean Water  
6 Act, including specifically section 404, and in the public interest.

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

## 8 II. JURISDICTION

9 1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.  
10 §§ 1331 and 1345, and 33 U.S.C. § 1365. Solely for purposes of this Consent Decree, the Port of  
11 Portland and the United States waive all objections and defenses that they may have to jurisdiction of the  
12 Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or  
13 this Court's jurisdiction to enter, modify, enforce and/or terminate this Consent Decree.

## 14 III. PARTIES BOUND

15 2. This Consent Decree shall apply to and be binding upon the United States, the Port of  
16 Portland and William Michael Jones, as well as the parties' respective successors, assigns and agents.

## 17 IV. DEFINITIONS

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

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

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

25 Consent Decree shall control.

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

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

9 e. "METRO" shall mean METRO an Oregon municipal corporation.

10 f. "METRO's Mitigation Commitment" shall mean a written and binding agreement  
11 by METRO to design, in good faith seek permitting for, and construct the Smith & Bybee Lakes  
12 Mitigation Measure selected by the Selection Committee on a schedule acceptable to the Selection  
13 Committee.

14 g. "Mitigation Funds" shall mean all or any portion of the Four Hundred and Four  
15 Thousand Dollars (\$404,000) deposited by the Port of Portland into the registry of the Court pursuant to  
16 paragraph 13 of this Consent Decree.

17 h. "Remaining Mitigation Measures" shall mean the mitigation measures the Port is  
18 to perform as specified in paragraph 12 of this Consent Decree.

19 i. "Rivergate" is, in general, the area within the City of Portland located at the  
20 confluence of the Willamette and Columbia Rivers as depicted on the map that is Appendix A.

21 j. "Selection Committee" shall mean the committee composed of a designated  
22 representative from the Army Corps of Engineers, the U.S. Environmental Protection Agency, the U.S.  
23 Fish & Wildlife Service, the Oregon Division of State Lands and the Oregon Department of Fish &  
24 Wildlife, which by a simple majority selects the Smith & Bybee Lakes Mitigation Measure as provided  
25 in paragraph 14 of this Consent Decree.

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1 k. "Smith & Bybee Lakes Mitigation Measure" shall mean a water control structure,  
2 including, if appropriate, a tidal pump, selected by the Selection Committee in accordance with the  
3 procedures established in paragraph 14 of this Consent Decree.

4 l. "United States" shall mean the United States of America, including the  
5 Department of Transportation, the U.S. Coast Guard, the Federal Highway Administration, the U.S.  
6 Environmental Protection Agency, the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife  
7 Service, as well as any successor agencies, departments or instrumentalities of the United States.

8 m. "Waters of the United States" shall have the same meaning as defined in 33  
9 C.F.R. § 230.3(s)(7).

## 10 V. GENERAL PROVISIONS

### 11 5. Objectives of the Parties

12 The objectives of the Parties in entering into this Consent Decree are: (i) to protect the public  
13 interest and further the purposes of the Clean Water Act by the specification, performance and funding  
14 of certain mitigation and natural resource enhancement measures; (ii) to provide a public process for  
15 selection of the Smith & Bybee Lakes Mitigation Measure; (iii) to specify and finally resolve permitting  
16 and mitigation obligations under the Clean Water Act of the Port of Portland for existing fill placed into  
17 waters of the United States within Rivergate; (iv) to finally resolve the claims asserted by the plaintiff  
18 against the Port of Portland and the United States as provided in this Consent Decree; and (v) to provide  
19 public notice and an opportunity for public comment with respect to this Consent Decree and settlement.

### 20 6. Commitments by the Port of Portland

21 The Port of Portland shall: (i) construct a path under the Lombard Street Bridge in accordance  
22 with the specifications and schedules provided in paragraph 10 of this Consent Decree; (ii) remove fill  
23 and revegetate areas contiguous to the north and south banks of the Columbia Slough in accordance with  
24 the specifications and schedules provided in paragraph 11 of this Consent Decree; (iii) perform the  
25 Remaining Mitigation Measures in accordance the specifications and schedules adopted in paragraph 12

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1 of this Consent Decree; and (iv) deposit the sum of Four Hundred and Four Thousand Dollars  
2 (\$404,000) into the registry of this Court within thirty (30) days of the entry of this Consent Decree.

3 7. Commitments by the United States

4 The United States shall: (i) through the COE, facilitate and manage, in good faith, the public  
5 process provided for in paragraph 14 of this Consent Decree for selecting the Smith & Bybee Lakes  
6 Mitigation Measure; (ii) through the COE, facilitate in good faith the communications with METRO  
7 with respect its election to design and construct the selected Smith & Bybee Lakes Mitigation Measure;  
8 (iii) through the COE, provide an opportunity for public notice and comment on this Consent Decree;  
9 and (iv) through the COE, apply to the Court for the disposition of the Mitigation Funds in accordance  
10 with the provisions of paragraph 16 of this Consent Decree; (v) find that the terms of this Consent  
11 Decree are the final and complete obligations and civil liability of the Port of Portland with respect to  
12 existing filling of waters of the United States within the Rivergate area consistent with and under the  
13 federal Clean Water Act and, in particular, section 404, except for specified terms of specified existing  
14 section 404 permits as provided in paragraph 19 of this Consent Decree; and (vi) terminate the  
15 *Cooperative Agreement*.

16 8. Commitments by Plaintiff

17 Upon the entry of this Consent Decree, Plaintiff, William Michael Jones, shall: (i) release and  
18 forever discharge all claims against the Port of Portland and the United States as provided in paragraph  
19 21 of this Consent Decree; and (ii) dismiss his claims in this litigation with prejudice and without award  
20 of fees, costs or expenses to any party.

21 9. Compliance With Applicable Law

22 Nothing in this Consent Decree relieves any party or non-party from the obligation to obtain all  
23 required federal, state and local permits and approvals, and to comply with all applicable laws and  
24 procedures, necessary to perform the Smith & Bybee Lakes Mitigation Measure or other commitments  
25 provided for in this Consent Decree. However, the Port of Portland may seek relief under the provisions  
26 of Section X (Force Majeure) of this Consent Decree for any delay in the performance of its

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1 commitments resulting from a failure to obtain, or a delay in obtaining, any permit required for such  
2 performance. Notwithstanding the forgoing, this Consent Decree does release and forever discharge the  
3 Port of Portland and the United States from: (i) any obligation or requirement with respect to obtaining  
4 or issuing a permit to the Port of Portland pursuant to section 404 of the Clean Water Act for existing fill  
5 placed into waters of the United States within Rivergate, including applicable procedures and process  
6 pursuant to the APA and NEPA; and (ii) any obligation or requirement with respect to mitigation by the  
7 Port of Portland for existing fill placed into waters of the United States within Rivergate, except as  
8 expressly provided or reserved in this Consent Decree. This Consent Decree also releases the Port of  
9 Portland from its obligations under the *Cooperative Agreement*.

#### 10 VI. PORT OF PORTLAND'S SECTION 404 MITIGATION

##### 11 10. Construction of Path Under the Lombard Street Bridge

12 The Port of Portland shall construct a path on the existing riprap rock embankment beneath and  
13 adjacent to the Lombard Street Bridge. The path shall consist of an eight-foot wide asphaltic paved  
14 surface and a two-foot wide unpaved shoulder on the down-slope (west) side of the path for a distance of  
15 approximately 140 feet. A clearance of ten feet minimum will be maintained between the surface of the  
16 path and the soffits of the bridge girders. An illustrative description and plan for the path is provided in  
17 Appendix B. The Port of Portland shall in good faith expeditiously seek all necessary approvals and to  
18 the extent reasonably practicable construct the path within twelve months of the Effective Date of this  
19 Consent Decree.

##### 20 11. Columbia Slough Fill Removal and Revegetation

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

- 24 a. North bank. The project area shall be located on the north side of the Columbia  
25 Slough, for a distance of approximately 1,400 linear feet between the Lombard Street Bridge and the  
26 Columbia Slough Rail Bridge (excepting the bridge approaches), and landward (east) of the Port's

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1 property boundary, as established by survey dated May 13, 1975, for a distance of 150 linear feet.  
2 Extending east from the bottom toe of the east slope of the 40-mile loop trail to the 150-foot boundary  
3 line, the Port of Portland shall remove existing hydraulic sand fill down to the higher of native soils or  
4 16-feet NGVD. The fill slope located eastward of the 150-foot boundary line shall be no steeper than  
5 3:1. The location of the 40-mile loop trail may vary in the Port's sole discretion in order to  
6 accommodate topographical or vegetative features. In addition, as provided in subparagraph c below,  
7 the Port of Portland shall vegetate all disturbed areas within the project area. An illustrative depiction of  
8 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 Columbia  
10 Slough for a distance of approximately 1,550 linear feet between the Lombard Street Bridge and the  
11 Columbia Slough Rail Bridge (excepting the bridge approaches), landward (west) of the Port's property  
12 boundary, as established by survey dated May 13, 1975, for a distance of 100 linear feet. Extending  
13 west from the surveyed property boundary for a distance of approximately 50 feet, the Port of Portland  
14 shall remove existing hydraulic sand fill as follows: (i) from the property line west for 25 feet, material  
15 will be removed down to the higher of native soils or 22-feet NGVD; and (ii) from this point west for an  
16 additional 25 feet, material will be removed to create a natural contour to meet existing grade, with fill  
17 not to exceed a 3:1 slope. In addition, the Port of Portland shall vegetate all disturbed areas within the  
18 project area extending west to the 100-foot boundary, including the fill slope that shall begin at or  
19 beyond 25 feet from the surveyed boundary line, as provided in subparagraph c below. The western fill  
20 slope located within the project area shall be no steeper than 3:1. An illustrative depiction of the south  
21 bank project is provided in Appendix D.

22           c. Revegetation. Appendices C and D provide illustrative depictions of the North  
23 bank and South bank revegetation obligations of the Port of Portland, which are detailed below.

24           (i) Planting. Planting will occur after fill removal and within the normal  
25 planting seasons, which are April-June and September-October. Non-native vegetation will be removed  
26 prior to planting; however, existing native vegetation will be preserved. Plant material will be installed

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1 in the disturbed portions of the entire North bank and South bank project areas subject to the following  
 2 exceptions: areas below 16.6 NGVD that are adjacent to the Columbia Slough (west of the future 40-  
 3 mile loop trail alignment within the North bank project area); a twenty-foot wide corridor within the  
 4 North bank project area for alignment of the future 40-mile loop trail; the two mitigation areas within the  
 5 North bank project area that are subject to vegetation under LUR 95-00943EN; and the landscape  
 6 mitigation area within the North bank project area that is subject to vegetation under LUR 98-00426EN.  
 7 Planting will conform to the following standards and shall include: a minimum of two trees and six  
 8 shrubs for every 500 square feet of planting area; planting of trees and shrubs in clusters of at least three  
 9 plants per cluster; a minimum of three species of trees will be planted; and groundcovers will consist of  
 10 50 percent seed mix grass and 50 percent flowers. For purposes of classifying plants, references shall be  
 11 the Portland Plant List and in the Portland Environmental Handbook, "*Deciduous Forested Wetlands*  
 12 *and Floodplains.*" Plant materials may be collected and transplanted or will be obtained from a native  
 13 plant nursery.

14 (ii) Plant Palette. Native plant species that may be used for planting are listed  
 15 below. . Plant material availability may necessitate changes in the final planting installation.

# TREES

<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>	<u>SIZE</u>
FRAXINUS LATIFOLIA	OREGON ASH	1 GAL - 3 GAL
POPULUS BALSAMIFERA	BLACK COTTONWOOD	1 GAL - 3 GAL
TRICHOCARPA		
RHAMNUS PURSHIANA	CASCARA	1 GAL - 5 GAL
CRATAEGUS DOUGLASHII	BLACK HAWTHORNE	1 GAL - 5 GAL

# SHRUB LAYER

<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>	<u>SIZE</u>
CORNUS SERICEA	RED TWIG DOGWOOD	CUTTING
SPP. SERICEA		
HOLODISCUS DISCOLOR	OCEAN SPRAY	1 GAL
SALIX LASIANDRA	PACIFIC WILLOW	CUTTING
SALIX SCOULERIANA	SCOULER'S WILLOW	CUTTING
SAMBUCUS SPP.	ELDERBERRY	1 GAL
ROSA NUTKANA	NOOTKA ROSE	1 GAL
ROSA PISOCARPA	SWAMP ROSE	1 GAL



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**GROUND COVER**

	<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>	<u>LBS/ACRE</u>
1			
2	REGREEN (COVER CROP)	STERILE WHEATGRASS	10
	ELYMUS GLAUCA	BLUE WILD RYE	10
3	HERACLEUM LANATUM	COW PARSNIP	.5
	BROMUS CARINATUS	CALIFORNIA BROME GRASS	8
4	DESCHAMPSIA CAESPITOSA	TUFTED HAIRGRASS	2
	OENOTHERA BIENNIS	YELLOW PRIMROSE	2
5	ACHILLEA MILLEFOLIUM YARROW		1
	LUPINUS POLYPHYLLUS	LARGE-LEAVED LUPINE	2
6	LUPINUS RIVULARIS	STREAM LUPINE	2
	RUNUNCULUS OCCIDENTALIS	WESTERN BUTTERCUP	.5

(iii) Maintenance. Plant materials will be managed for a period of two years following substantial completion of the planting. Water for irrigation will be provided from an existing well. Invasive and non-native vegetation will be removed midway through the growing season of each year. Animal protection, consisting of wire screening, plastic mesh or plastic tubing, will be provided on all trees to a minimum of two feet high. After two years, planted areas will be left alone to mature naturally.

(iv) Monitoring and Replacement - Trees. Tree survival (based upon a 50 percent survival success standard) within the project areas will be monitored annually for two years following planting, on or about September 1<sup>st</sup> of each year. So long as no less than 50 percent of the total trees planted survive, no replacement of trees shall be required. If, as a result of either or both of the two annual monitoring events, the tree survival rate is determined to be less than 50 percent of the total trees planted, then trees will be replaced during the subsequent fall planting season to meet the 50 percent success standard. Replacement species may be revised based upon a review of species survival and success. Only species confirmed to survive will be replanted.

(v) Monitoring and Replacement - Shrubs. Shrub survival (based upon a 50 percent survival success standard) within the project areas will be monitored annually for two years following planting, on or about September 1<sup>st</sup> of each year. For purposes of monitoring shrub survival, two, twenty-foot wide, linear transects extending from the north and south buffer/property lines to the limits of revegetation at 16.6 NVGD, will be field located within each of the North bank and South bank

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1 project areas. The approximate locations of the transects are depicted in Appendices C and D. On or  
2 about September 1<sup>st</sup> of the second year, in conjunction with monitoring of the transects, a comprehensive  
3 review of shrubs planted within the project areas will be conducted to evaluate and compare the success  
4 of shrubs within the transects and the success of shrubs within the entire project areas. If the shrub  
5 survival rate is determined to be less than 50 percent in either the North bank or South bank project  
6 areas, then shrubs will be replaced during the fall planting season of the second year to meet the 50  
7 percent success standard in both the North bank and South bank project areas. Replacement species may  
8 be revised based upon a review of species survival and success. Only species confirmed to survive will  
9 be replanted.

10 d. Project schedule. Permitting and removal of existing fill within the North bank  
11 and South bank project areas as described in subparagraphs a and b above, will be completed by  
12 December 1, 1999. Initial planting will be completed by July 1, 2000. Notwithstanding the above  
13 planting schedule, revegetation within the North bank project area must be coordinated with mitigation  
14 planting required for the Pacific Gateway outfall project. Delay of planting that is necessary to  
15 coordinate the schedule with the Pacific Gateway outfall project may constitute a Force Majeure event as  
16 provided in Section X of this Consent Decree.

17 12. Remaining Mitigation Measures

18 The Port of Portland shall perform the following additional mitigation measures (collectively the  
19 "Remaining Mitigation Measures"):

20 a. Revegetation of Fill Slopes. Appendix E illustrates the general location of the fill  
21 slope boundaries on the North side of the Columbia Slough and adjacent to Bybee Lake. The Port of  
22 Portland shall revegetate the identified fill slopes as provided below.

23 (i) Planting. Planting and seeding will occur within the normal planting  
24 seasons, which are April-June and September-October, and will be completed by December 1, 2000.  
25 Non-native vegetation will be removed prior to planting; however, existing native vegetation will be  
26 preserved. Plant material will be installed at the top of all fill slopes above 16.6 NGVD, including

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1 seeding of groundcover on all bare slopes. A vegetative screen will be planted along the top of the fill  
 2 slopes as illustrated on Appendix E. Plant materials may be collected and transplanted or will be  
 3 obtained from a native plant nursery Organic soil amendment will be incorporated into plant pits for  
 4 trees and shrubs.

5 (ii) Plant Palette. Native plant species that may be used for planting are listed  
 6 below. Plant material availability may necessitate changes in the final planting installation.

### 7 TREES

8	<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>	<u>SIZE</u>
	ALNUS RUBRA	RED ALDER	1 GAL
9	FRAXINUS LATIFOLIA	OREGON ASH	1 GAL
	POPULUS BALSAMIFERA	BLACK COTTONWOOD	1 GAL
10	TRICHOCARPA		
	RHAMNUS PURSHIANA	CASCARA	1 GAL
11	CRATAEGUS DOUGLASII	BLACK HAWTHORNE	1 GAL

### 12 SHRUB LAYER

13	<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>	<u>SIZE</u>
	CORNUS SERICEA	RED TWIG DOGWOOD	CUTTING
14	SPP. SERICEA		
	HOLODISCUS DISCOLOR	OCEAN SPRAY	1 GAL
15	SALIX LASIANDRA	PACIFIC WILLOW	CUTTING
	SALIX SCOULERIANA	SCOULER'S WILLOW	CUTTING
16	SAMBUCUS SPP.	ELDERBERRY	1 GAL

### 17 GROUND COVER

18	<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>	<u>LBS/ACRE</u>
	ELYMUS GLAUCA	BLUE WILDRYE	10
19	HERACLEUM LANATUM	COW PARSNIP	.5
	BROMUS CARINATUS	CALIFORNIA BROME GRASS	8
20	DESCHAMPSIA CAESPITOSA	TUFTED HAIRGRASS	2
	OENOTHERA BIENNIS	YELLOW PRIMROSE	2
21	ACHILLEA MILLEFOLIUM	YARROW	1
	LUPINUS POLYPHYLLUS	LARGE-LEAVED LUPINE	2
22	LUPINUS RIVULARIS	STREAM LUPINE	2

23 (iii) Maintenance. Plant materials will be managed for a period of two years  
 24 following substantial completion of the planting. Water will be accomplished with a watering truck or  
 25 through other means. Invasive and non-native vegetation will be removed midway through the growing  
 26 season of each year. Weed control may include chemical (organic and inorganic foliar sprays, soil or

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1 water treatments and stem applications), biological (insects and diseases) and physical (mowing, tillage,  
2 hand pulling, burning, smothering and flooding) methods. Animal protection, consisting of wire  
3 screening, plastic mesh or plastic tubing, will be provided on all trees to a minimum of two feet high.  
4 After two years, planted areas will be left alone to mature naturally.

5 (iv) Monitoring and Replacement - Seeded Groundcover. Survival of seeded  
6 groundcover shall be monitored annually for two years following planting. For purposes of determining  
7 seeded groundcover survival, success shall be defined as no more than 10 percent of 200 lineal feet of  
8 slope, from the top of the slope to the based of the slope, with bare spots 2 inches in diameter or larger.  
9 If groundcover survival is less than the standard for success, bare areas will be reseeded during the  
10 following planting season.

11 (v) Monitoring and Replacement - Trees. Tree survival (based upon a 50  
12 percent survival success standard) within the project areas will be monitored annually for two years  
13 following planting, on or about September 1<sup>st</sup> of each year. So long as no less than 50 percent of the  
14 total trees planted survive, no replacement of trees shall be required. If, as a result of either or both of  
15 the two annual monitoring events, the tree survival rate is determined to be less than 50 percent of the  
16 total trees planted, then trees will be replaced during the subsequent fall planting season to meet the 50  
17 percent success standard. Replacement species may be revised based upon a review of species survival  
18 and success. Only species confirmed to survive will be replanted.

19 (vi) Monitoring and Replacement - Shrubs. Shrub survival (based upon a 50  
20 percent survival success standard) within the project areas will be monitored annually for two years  
21 following planting, on or about September 1<sup>st</sup> of each year. For purposes of monitoring shrub survival,  
22 three, twenty-foot long, linear transects will be field located along the top of the slope within the project  
23 area. The approximate locations of the transects are depicted in Appendix E. On or about September 1<sup>st</sup>  
24 of the second year, in conjunction with monitoring of the transects, a comprehensive review of shrubs  
25 planted within the project areas will be conducted to evaluate and compare the success of shrubs within  
26 the transects and the success of shrubs within the entire project area. If the shrub survival rate is

1 determined to be less than 50 percent in the project area, then shrubs will be replaced during the fall  
2 planting season of the second year to meet the 50 percent success standard in the project area.  
3 Replacement species may be revised based upon a review of species survival and success. Only species  
4 confirmed to survive will be replanted.

5           b.     Ramsey Lake Mitigation Area - Weed Control. Invasive and non-native  
6 vegetation will be removed midway through the growing season of each year for a period of two years.  
7 Weed control may include chemical (organic and inorganic foliar sprays, soil or water treatments and  
8 stem applications), biological (insects and diseases) and physical (mowing, tillage, hand pulling,  
9 burning, smothering and flooding) methods.

10           c.     Ramsey Lake Mitigation Area/Columbia Slough Riparian Habitat. Appendix F  
11 depicts the area between the Ramsey Lake Mitigation Area and the Columbia Slough. The Port of  
12 Portland shall revegetate the identified upland portions of this project area as provided below.

13           (i)     Planting. Planting will occur within the normal planting seasons, which  
14 are April-June and September-October, and will be completed by December 1, 2000. Non-native  
15 vegetation will be removed prior to planting; however, existing native vegetation will be preserved.  
16 Planting material will be installed in upland areas that are currently unvegetated as depicted in Appendix  
17 F. Planting will conform to the following standards: a minimum of two trees and six shrubs for every  
18 500 square feet of planting area; planting of trees and shrubs in clusters of at least three plants per  
19 cluster; a minimum of three species of trees will be planted; and groundcovers will consist of 50 percent  
20 seed mix grass and 50 percent flowers. Organic soil amendment will be incorporated into plant pits for  
21 trees and shrubs. For purposes of classifying plants, references shall be the Portland Plant List and in the  
22 Portland Environmental Handbook, "*Deciduous Forested Wetlands and Floodplains.*" Plant materials  
23 may be collected and transplanted or will be obtained from a native plant nursery. An access road will  
24 be located and maintained within the project area for purposes of vegetation planting, maintenance,  
25 monitoring and replacement. Native plant species that may be used for planting are listed in paragraph  
26 12(a)(ii) above. Plant material availability may necessitate changes in the final planting installation.

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1 (ii) Maintenance. Plant materials will be managed for a period of two years  
2 following substantial completion of the planting. Watering will be accomplished with a watering truck.  
3 Invasive and non-native vegetation will be removed midway through the growing season of each year.  
4 Invasive and non-native vegetation will be removed midway through the growing season each year.  
5 Weed control may include chemical (organic and inorganic foliar sprays, soil or water treatments and  
6 stem applications), biological (insects and diseases) and physical (mowing, tillage, hand pulling,  
7 burning, smothering and flooding) methods. Animal protection, consisting of wire screening, plastic  
8 mesh or plastic tubing, will be provided on all trees to a minimum of two feet high. After two years,  
9 planted areas will be left alone to mature naturally.

10 (iii) Monitoring and Replacement - Trees. Tree survival (based upon a 50  
11 percent survival success standard) within the project areas will be monitored annually for two years  
12 following planting, on or about September 1<sup>st</sup> of each year. So long as no less than 50 percent of the  
13 total trees planted survive, no replacement of trees shall be required. If, as a result of either or both of  
14 the two annual monitoring events, the tree survival rate is determined to be less than 50 percent of the  
15 total trees planted, then trees will be replaced during the subsequent fall planting season to meet the 50  
16 percent success standard. Replacement species may be revised based upon a review of species survival  
17 and success. Only species confirmed to survive will be replanted.

18 (iv) Monitoring and Replacement - Shrubs. Shrub survival (based upon a 50  
19 percent survival success standard) within the project areas will be monitored annually for two years  
20 following planting, on or about September 1<sup>st</sup> of each year. For purposes of monitoring shrub survival,  
21 two forty-foot diameter vegetation circles will be field located the project area. The approximate  
22 locations of the vegetation circles are depicted in Appendix F. On or about September 1<sup>st</sup> of the second  
23 year, in conjunction with monitoring of the circles, a comprehensive review of shrubs planted within the  
24 project areas will be conducted to evaluate and compare the success of shrubs within the circles and the  
25 success of shrubs within the entire project areas. If the shrub survival rate is determined to be less than  
26 50 percent in the project area, then shrubs will be replaced during the fall planting season of the second

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1 year to meet the 50 percent success standard in the project area. Replacement species may be revised  
2 based upon a review of species survival and success. Only species confirmed to survive will be  
3 replanted.

4 13. Mitigation Funds

5 Within thirty (30) days of the entry of this Consent Decree by the Court, the Port of Portland  
6 shall deposit into the Registry of the Court, or such other account as the parties shall designate and the  
7 Court shall approve, the sum of Four Hundred and Four Thousand Dollars (\$404,000). The Port of  
8 Portland shall be entitled to return of a portion of the Mitigation Funds under such circumstances  
9 provided in paragraph 16 of this Consent Decree.

10 VII. COMMITMENTS OF THE UNITED STATES

11 14. Selection Process for Smith & Bybee Lakes Mitigation Measure

12 The United States, through the COE, shall facilitate and manage a decision process for selection  
13 of the Smith & Bybee Lakes Mitigation Measure. At a minimum, the process shall consist of the  
14 following:

15 a. Selection committee. Within thirty (30) days of the Effective Date of this  
16 Consent Decree, the COE, EPA, U.S. Fish & Wildlife Service, Oregon Division of State Lands and  
17 Oregon Department of Fish & Wildlife shall each designate a representative to the Selection Committee.  
18 In the event that the Oregon Division of State Lands or the Oregon Department of Fish & Wildlife  
19 decline to participate or otherwise fail to timely designate a representative, the Selection Committee  
20 shall be constituted of the remaining designated representatives. Decisions by the Selection Committee,  
21 including selection of the Smith & Bybee Lakes Mitigation Measure, shall be made by a simple majority  
22 vote of the designated representatives. The designated representative of the COE shall preside over,  
23 facilitate and manage the meetings, decisions and other actions and communications of the Selection  
24 Committee.

25 b. Public hearing. The Selection Committee shall conduct at least one public  
26 hearing at which the designated representative of each of the Selection Committee members shall be

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1 present, and over which the COE representative shall preside, for the purpose of obtaining public  
2 commit regarding the appropriate Smith & Bybee Lakes Mitigation Measure, including without  
3 limitation, information regarding the location, function, design, permitting and cost of a water control  
4 structure (with or without a tidal pump) and alternatives.

5 c. Advance public notice. The Selection Committee shall provide thirty (30) days  
6 advance notice to Jones, METRO and to the public prior to any meeting including any public hearing.

7 d. Transcript. The Selection Committee shall tape record and arrange for the  
8 preparation of a verbatim transcript of the public hearing. The Selection Committee shall notify Jones  
9 and the other participants in the public hearing that the transcript is available for review or copying at a  
10 specified location.

11 e. Selection decision. After the transcription of the public hearing has been made  
12 available to Jones and the other participants in the public hearing, and after public notice, the Selection  
13 Committee acting in public session shall consider and by simple majority select the Smith & Bybee  
14 Lakes Mitigation Measure. The criteria for the decision shall be the public interest.

15 f. No judicial review. The decision of the Selection Committee with respect to  
16 selection of the Smith & Bybee Lakes Mitigation Measure shall not be subject to judicial or  
17 administrative review for any reason.

18 g. Submission to METRO. Within thirty (30) days of the selection of the Smith &  
19 Bybee Lakes Mitigation Measure by the Selection Committee, the Selection Committee shall offer to  
20 METRO in writing the Mitigation Funds provided that METRO commits in writing to design, in good  
21 faith seek permits for, and construct, the Smith & Bybee Lakes Mitigation Measure on a schedule  
22 acceptable to the Selection Committee.

23 h. Election by METRO. The Selection Committee's offer letter to METRO shall be  
24 expressly limited in time to ninety (90) days. If, within the ninety days, METRO provides the Selection  
25 Committee with a written and binding commitment to design, in good faith seek permits for and  
26 construct, the Smith & Bybee Lakes Mitigation Measure on a schedule acceptable to the Selection

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1 Committee ("METRO's Mitigation Commitment"), then the COE shall make application to the Court to  
2 authorize the release of the Mitigation Funds to METRO in such amounts and in such a manner as it  
3 determines in its discretion is appropriate for the sole purpose of the design, permitting and construction  
4 of the Smith & Bybee Lakes Mitigation Measure subject to the terms of paragraph 16 below. Except as  
5 is reasonably necessary for METRO to design and in good faith seek permits for construction of the  
6 Smith & Bybee Lakes Mitigation Measure, the COE shall not authorize the release of Mitigation Funds  
7 to METRO until and unless METRO obtains all permits necessary to proceed with construction.

8 i. Termination of Selection Committee. The Selection Committee shall terminate  
9 upon the occurrence of any one of the following events: (i) METRO's election not to accept the offer of  
10 the Selection Committee with respect to the Smith & Bybee Lakes Mitigation Measure; (ii) METRO  
11 failure to provide the Selection Committee with METRO's Mitigation Commitment within ninety days  
12 of the date of the Selection Committee's written offer; or (iii) the Selection Committee's failure to select  
13 the Smith & Bybee Lakes Mitigation Measure prior to the first annual anniversary of the Effective Date  
14 of this Consent Decree.

15 15. Alternative Mitigation Measures

16 In the event that the Selection Committee is terminated as provided in paragraph 14(j) above,  
17 then, within ninety (90) days thereafter the United States, through the COE, shall make application to the  
18 Court to distribute to one or more persons or entities the total sum of Three Hundred Fifty-Eight  
19 Thousand Dollars (\$358,000) for the purpose of performing Alternative Mitigation Measures within the  
20 State of Oregon. It is the Parties' intention that the Court should approve the release and distribution of  
21 funds for the Alternative Mitigation Measures proposed by the COE, provided that the Alternative  
22 Mitigation Measures further the purposes of section 404 of the Clean Water Act. By way of example  
23 and not limitation, the Alternative Mitigation Measures may include the purchase, preservation or  
24 restoration of wetlands or waters of the United States within the State of Oregon, but may not include  
25 the funding of environmental advocacy. The COE shall not request that the Court distribute any funds  
26 to METRO pursuant to the terms of this paragraph 15 of the Consent Decree.



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1        16. Management of Mitigation Funds

2        The United States, through the COE, shall manage distribution of the Mitigation Funds as  
3 follows:

4            a.        The United States shall cooperate in good faith with the Port of Portland to  
5 establish the Mitigation Funds within the registry of the Court so as to minimize the associated court  
6 fees and costs that are charged. All required court fees and charges shall be deducted from the  
7 Mitigation Funds.

8            b.        Upon receipt of METRO's Mitigation Commitment, the United States shall  
9 authorize the distribution of Mitigation Funds to METRO in such amounts and under such conditions as  
10 it determines appropriate for sole purpose of the design, permitting and construction of the Smith &  
11 Bybee Lakes Mitigation Measure. After receipt of METRO's Mitigation Commitment, the United  
12 States may authorize the distribution of Mitigation Funds to METRO as reimbursement for reasonable  
13 and necessary design, permitting or construction costs incurred prior to the Selection Committee's  
14 receipt of METRO's Mitigation Commitment.

15            c.        The United States shall require METRO as a condition of the distribution of  
16 Mitigation Funds to provide written periodic accountings of all Mitigation Funds it receives and to  
17 maintain records sufficient to reasonably substantiate its accountings. As a condition of the distribution  
18 of Mitigation Funds to METRO, the periodic accountings and related records shall be available to the  
19 Port of Portland for review or auditing upon the Port of Portland's request.

20            d.        Upon completion of the design, permitting and construction of the selected Smith  
21 & Bybee Lakes Mitigation Measure and the distribution of all Mitigation Funds reasonable and  
22 necessary for such purpose, the United States shall authorize the return of all remaining Mitigation  
23 Funds, if any, to the Port of Portland.

24            e.        Within thirty (30) days after the termination of the Selection Committee as  
25 provided in paragraph 14(j), the United States shall authorize the distribution of the sum of Forty-Six  
26

1 Thousand Dollars (\$46,000), less court fees and charges for the Mitigation Funds, to the Port of  
2 Portland.

3 17. Opportunity for Public Comment On Consent Decree

4 The United States, through the COE, shall publish public notice of this Consent Decree as  
5 provided in paragraph 31 of this Consent Decree.

6 18. Completion of Port of Portland's Permitting and Mitigation Obligations

7 a. Except as provided in subparagraph c below, the United States hereby finds and  
8 acknowledges: (i) the filling of waters of the United States by the Port of Portland through the date of  
9 this Consent Decree has been in the public interest; (ii) the actions taken by the Port of Portland and the  
10 commitments provided for in this Consent Decree meet the policy requirements, provide acceptable  
11 quality and kinds of mitigation and are in compliance with section 404 of the Clean Water Act,  
12 including section 404(b)(1), and state fill/removal laws; and (iii) the commitments of the Port of  
13 Portland in this Consent Decree are the final and complete permit and mitigation obligations of the Port  
14 of Portland under the Clean Water Act with respect to past and existing filling of waters of the United  
15 States within the Rivergate area and the construction of the Columbia Slough Rail Bridge.

16 b. The COE, EPA and U.S. Fish & Wildlife Service hereby confirm that the Port of  
17 Portland is released from any and all remaining or existing obligations, responsibilities or liability to the  
18 United States under the *Cooperative Agreement* upon entry of this Consent Decree. The United States  
19 further agrees to facilitate in good faith execution of a written termination agreement between all non-  
20 federal signatories to the *Cooperative Agreement*.

21 c. The provisions of subparagraph a above and of paragraph 22 below shall not  
22 apply to the following DA permit provisions: [list exceptions by permit and permit condition].

23 19. Anti-Deficiency Act.

24 This Consent Decree, insofar as it establishes commitments of the United States, is subject to the  
25 availability of funds, and shall not be interpreted to require the expenditure of funds not appropriated by  
26 Congress.

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**VIII. COMMITMENTS BY JONES****20. Dismissal of Claims With Prejudice**

Jones hereby agrees to and by this Consent Decree requests the dismissal of his claims asserted in the above-captioned litigation with prejudice and with each party to bear its own attorneys' fees, costs or expenses.

**21. Release**

Jones hereby releases and forever discharges the Port of Portland and the United States, and their successors, assigns, agents and employees, from any and all claims, demands, damages, losses, liabilities, injuries, actions, fees, costs, expenses, taxes, penalties, or fines, whether equitable or legal, and whether based upon the statutes, regulations, common-law, executive orders, ordinances, or guidance of the United States, the State of Oregon, or the City of Portland, and whether known or unknown, that were or could have been brought in this litigation. This release does not affect enforcement of the express terms of this Consent Decree.

**22. Cooperation**

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

**IX. MITIGATION AND PERMITTING FINALITY**

23. In accord with the findings and agreement of the United States as provided in paragraph 18 (Completion of Port of Portland's Permitting and Mitigation Obligations) and the provisions of paragraph 9 (Compliance with Applicable Law), and in the public interest consistent with the purposes and policies of the Clean Water Act, and except as expressly listed in paragraph 18(c) of this Consent Decree, the Court finds that the Port of Portland shall have no further or additional permitting or mitigation obligations or requirements, or any other civil liability, pursuant to the Clean Water Act, for any filling of waters of the United States within Rivergate that has occurred as of the Effective Date of

1 this Consent Decree or for construction of the Columbia Slough Rail Bridge, including related filling of  
2 waters of the United States and approach areas.

3 **X. FORCE MAJEURE**

4 24. "Force Majeure" for purposes of this Consent Decree is defined as any event arising from  
5 causes beyond the control of a party or parties to this Consent Decree, including their contractors, that  
6 delays or prevents the performance of an obligation under this Consent Decree despite a party's or  
7 parties' diligent efforts to fulfill the obligation. "Force Majeure" does not include financial inability to  
8 complete an obligation under this Consent Decree.

9 25. If the performance of any obligation under this Consent Decree is delayed, whether or not  
10 caused by a Force Majeure event, the party or parties whose performance is delayed shall notify the  
11 other parties to this Consent Decree in writing within fifteen (15) days of the discovery that a delay will  
12 occur. The notice shall provide in reasonable detail an explanation and description of the reasons for the  
13 delay, the anticipated duration of the delay and a schedule for completion of the delayed performance..  
14 In the event that this information cannot yet be determined, in whole or in part, by the date of the written  
15 notice, then the notice shall provide a date certain not to exceed an additional thirty (30) days by which  
16 time the remaining information will be provided.

17 26. In the event that a party does not agree that a delay or anticipated delay has been or will  
18 be caused by a Force Majeure event, or does not agree with the revised schedule for completion of the  
19 delayed performance, such party shall notify all other parties in writing of its decision within thirty (30)  
20 days of the receipt of the written notice and information identified in paragraph 22 of this Consent  
21 Decree and the parties shall negotiate in good faith in an effort to resolve the dispute. No sooner than  
22 thirty (30) days after providing a timely written objection of a delay and alternative schedule, but no  
23 later than an additional forty-five (45) days thereafter, a party having previously provided a timely  
24 written objection may apply to the Court for appropriate relief.

25

26

**XI. NOTICES AND SUBMISSIONS**

27. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties, in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided.

**As to the United States:**

[insert COE person and address]

**As to the Port of Portland**

[insert Port person and address]

**As to Plaintiff, William Michael Jones**

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

**XII. EFFECTIVE DATE**

28. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

**XIII. RETENTION OF JURISDICTION**

29. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties until this Consent Decree is terminated pursuant to paragraph 30 below, for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate: (i) for the construction, or modification of this Consent Decree; (ii) to effectuate or enforce compliance with its terms; or (iii) to resolve disputes between or among the Parties.

**BOGLE & GATES P.L.L.C.**  
A Professional Limited Liability Company  
200 S.W. Market Street  
Suite 600  
Portland, Oregon 97201-5793  
(503) 222-1515



#### XIV. MODIFICATION AND TERMINATION OF CONSENT DECREE

30. The schedules specified in this Consent Decree and its appendices may be modified by unanimous agreement of the Parties. All such modifications shall be made in writing.

31. This Consent Decree and this Court's jurisdiction as provided in paragraph 26 above, shall terminate without further notice or action on December 31, 2002, unless prior to its termination a party obtains an order from the Court extending the termination date of this Consent Decree for good cause.

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

#### XV. APPENDICES

33. The following appendices are attached to and incorporated into this Consent Decree:

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

"Appendix B" (Port Drawing #RG 98-12 1/1 (PD-1)) is an illustrative depiction of the path required by paragraph 10.

"Appendix C" (Port Drawings #RG 98-11 1/4 (PD-1) and #RG 98-11 2/4 (PD-2)) consists of two pages and is an illustrative depiction of both the fill removal and revegetation project to be performed on the north side of the Columbia Slough required by paragraph 11.

"Appendix D" (Port Drawing #RG 98-11 3/4 (PD-3) and #RG 98-11 4/4 (PD-4)) consists of two pages and is an illustrative depiction of the fill removal and revegetation project to be performed on the south side of the Columbia Slough required by paragraph 11.

"Appendix E" (Port Drawing #RG 98-\_\_\_\_\_) is an illustrative depiction of the fill slope revegetation project area required by paragraph 12(a).

"Appendix F" (Port Drawing #RG 98-\_\_\_\_\_) is an illustrative depiction of the upland revegetation project area required by paragraph 12(c).

Unless expressly stated otherwise, these appendices are provided for illustrative purposes. In the event of any conflict between the appendices and any written provision stated in paragraphs A through K and paragraphs 1 through 37 of this Consent Decree, the written provisions shall be controlling.

BOGLE & GATES P.L.L.C.  
A Professional Limited Liability Company  
200 S.W. Market Street  
Suite 600  
Portland, Oregon 97201-5793  
(503) 222-1515

8/7/98 Revised Draft

**XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

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

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

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

**XVII. SIGNATORY AUTHORITY**

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

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 1998.

Donald C. Ashmanskas  
United States Magistrate Judge

**BOGLE & GATES P.L.L.C.**  
A Professional Limited Liability Company  
200 S.W. Market Street  
Suite 600  
Portland, Oregon 97201-5793  
(503) 222-1515

1 THE UNDERSIGNED PARTIES hereby agree to this Consent Decree in the matter of *William Michael*  
2 *Jones v. Mike Thorne, et al.*, Case No. 97-1674 ST, and consent to the jurisdiction of United States  
3 Magistrate Judge C. Ashmanskas for the purpose of entering this Consent Decree and for the purposes of  
4 continuing jurisdiction as provided herein.

5 FOR THE UNITED STATES OF AMERICA

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

9 Dated: \_\_\_\_\_

Bruce M. Landon  
801 B Street, Suite 504  
Anchorage, Alaska 99501-3657

11 Dated: \_\_\_\_\_

G. Scott Williams  
Environmental Defense Section  
U.S. Department of Justice  
P.O. Box 32986  
Washington, D.C. 20026

15 FOR THE PORT OF PORTLAND

16 Dated: \_\_\_\_\_

Mike Thorne  
Executive Director, Port of Portland

19 Dated: \_\_\_\_\_

Gregory J. Miner, OSB #86247  
Jeffrey W. Leppo, WSBA #11099  
Beth S. Ginsberg, WSBA #18523  
BOGLE & GATES P.L.L.C.  
200 S.W. Market Street  
Suite 600  
Portland, Oregon 97201-5793  
Attorneys for Defendant Port of Portland

24 FOR PLAINTIFF

25 Dated: \_\_\_\_\_

William Michael Jones, *pro se*

BOGLE & GATES P.L.L.C.  
A Professional Limited Liability Comp  
200 S.W. Market Street  
Suite 600  
Portland, Oregon 97201-5793  
(503) 222-1515

Holly



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**FROM:** G. Scott Williams  
Environmental Defense Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

Fax No.: (202) 514-8865  
Voice No.: (202) 514-1950

**TO:** Jerry Hedrick

**FAX No.:** (503) 378-4844

**DATE:** August 12, 1998

**NUMBER OF PAGES SENT (INCLUDING COVER PAGE):** 33

**SPECIAL INSTRUCTIONS:** Jerry, As we discussed, please pass this material along to Holly Michaels. The site visit will start at the offices of the Port at 700 N.E. Multnomah. Please ask for Lydia Hudsick at the main reception area on the 13<sup>th</sup> floor (please also pass this information on to Holly Michaels). Finally, please call me to confirm your receipt of this. Thanks. Scott

12:37

**METRO**

September 2, 1998

Mike Thorne  
Port of Portland  
P.O. Box 3529  
Portland, OR 97208

Dear Mr. Thorne,

Metro recently received from the U.S. Fish and Wildlife Service a copy of a draft of the proposed consent decree for the case of William Michael Jones v. Mike Thorne, Director of the Port of Portland, et al. (draft prepared by Bogle and Gates dated August 7, 1998). I am quite troubled that the draft decree could obligate Metro to fulfill the Port of Portland's wetland mitigation obligations in the Rivergate Industrial Area. As stated in the decree, a mitigation measure to be completed at the Smith and Bybee Lakes Wildlife Area would be selected by a committee as a major component of the Port's mitigation obligation. Metro would then have the option to accept the project or not. It is my understanding that if Metro does not accept the project, the mitigation money cannot be given to Metro and can be used anywhere in Oregon. I am very concerned that 1) the decree does not hold the Port of Portland responsible for implementing the project, 2) Metro is not listed as a member of the project selection committee and 3) there is a stipulated amount of money in the agreement without a definite project.

In early June Metro was contacted by Bruce Landon, a lawyer for the U.S. Justice Department, about the cost of constructing a water control structure at the Smith and Bybee Lakes Wildlife Area. At that time Metro estimated it would cost \$400,000 to remove the earthen dike and build an open culvert structure across the N. Slough. The structure would return the lakes to tidal freshwater marsh, meeting the primary goal of the natural resource management plan for the area. The signatory agencies to the Rivergate Cooperate Agreement agreed that this was the best course of action for the lakes ecosystem. The draft decree does not guarantee that the project selected by Metro, the Smith and Bybee Lakes Management Co. and the signatories to the Rivergate Cooperative Agreement will be built. Instead an unspecified project with a specific amount of money put into a Mitigation Fund is proposed in the consent decree. If Metro doesn't accept the project, the mitigation fund for Rivergate wetland fills will be used outside the area.

The Port of Portland filled wetlands in the Rivergate Industrial area. Metro feels it is the Port's responsibility to mitigate for the impacts. It is the Port's obligation to design, secure permits and construct the Smith and Bybee Lakes mitigation project. As the managing agency of the wildlife area, Metro personnel and a member of the Smith and Bybee Lakes Management Committee need to be included as voting members of the selection committee to ensure the project meets the goals of the wildlife area. Upon completion, Metro is willing to accept the management of the structure.

If the parties to the suit feel it is more appropriate for Metro to oversee the water control project, the amount of money the Port of Portland deposits in the Mitigation Fund must be

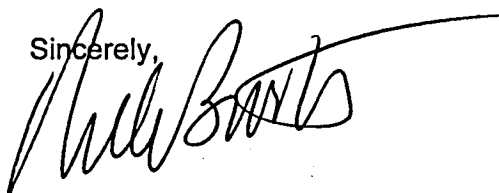
based on the actual costs of design, permits, construction, and Metro staff time needed to administer and complete the project. The uses of the Mitigation Funds in the draft decree do not allow for administrative and staff time, for contingencies or updating the natural resources management plan, if necessary. Metro has serious concerns about these provisions.

Another section of the decree states that if Metro turns down the selection committee's project, the Mitigation Funds can be used anywhere in Oregon for wetland protection and that the funds cannot be offered to Metro. The wetland fill is adjacent to the Smith and Bybee Lakes Wildlife Area and has created adverse impacts to wildlife and vegetation in the wildlife area. In this case, we feel strongly that the adverse impacts need to be mitigated within or adjacent to the Smith and Bybee Lakes Wildlife Area only.

The draft decree does not hold the Port of Portland to the same permit conditions and standards for wetland and riparian planting success, maintenance and monitoring as the Corps of Engineers and the Oregon Division of State Lands presently require on other similar permits. Metro feels that the Port should be required to meet the same standards as all permittees. Anything less would result in an inadequate buffer to the lakes from the surrounding industrial development and the likelihood that invasive pest plants will colonize these areas.

Before the decree is finalized, I am requesting that Metro be brought into the process and our concerns addressed. It is imperative that 1) Metro be represented on the selection committee for the mitigation project at the Smith and Bybee Lakes Wildlife Area, 2) that any project selected meet the goals of the wildlife area as stated in the adopted management plan, and 3) the selected project be fully and completely funded by the Port of Portland. If you have any comments or questions about Metro's concerns, please contact Dan Cooper, General Counsel, at 797-1528.

Sincerely,



Mike Burton  
Executive Officer

C: Bruce Landon, U.S. Department of Justice  
G. Scott Williams, U.S. Department of Justice  
Gregory J. Miner, Bogle & Gates  
William Michael Jones, private citizen  
Col. Robert J. Slusar, U. S. Army Corps of Engineers  
Chuck Clark, U.S. Environmental Protection Agency  
Anne Badgley, U.S. Fish and Wildlife Service  
Yvonne Vallett, U.S. Environmental Protection Agency  
Jennifer Thompson, U.S. Fish and Wildlife Service  
Judy Linton, U.S. Army Corps of Engineers  
Jerry Hedrick, Oregon Division of State Lands  
Holly Michael, Oregon Department of Fish and Wildlife



# Port of Portland

Box 3529, Portland, Oregon 97208, U.S.A.  
503/231-5000

RECEIVED

SEP 15 1998

EXECUTIVE OFFICER

September 11, 1998

Mike Burton  
Executive Officer  
Metropolitan Service District  
600 N.E. Grand Avenue  
Portland, OR 97232

Dear Mike:

Your letter of September 2 raises objections to some of the elements in the proposed Consent Decree in the pending federal lawsuit, Jones vs. Thorne, et. al. While I can understand the concerns that prompted your objections, I hope you will be persuaded to drop them.

The lawsuit brought against the Port and various federal agencies, including the permitting agency, the Army Corps of Engineers, raises various claims concerning the federally permitted wetlands filling and mitigation in the Rivergate District. One underlying cause for the filing of the litigation by Mr. Jones was the Port's alleged failure to timely complete mitigation obligations. That allegation arises in no small part from the Port's inability to obtain concurrence among the parties to various agreements and planning documents concerning the nature, extent and timing of the mitigation.

The settlement that the parties are working towards with the help of a federal settlement judge resolves Clean Water Act issues that have been a source of protracted and inconclusive planning and negotiation for years. The Consent Decree gives finality to the Port with respect to completing its wetlands fill mitigation obligations created by the issuance, many years ago, of Army Corps and Division of State Lands permits. That finality and a clear completion of the Port's mitigation obligations in Rivergate should be a primary goal for all concerned.

Five fundamental facts set the context for settlement discussions with Mr. Jones:

1. Mr. Jones will not settle if the Port is able to influence or control the project choice or implementation on the third Smith & Bybee Lakes mitigation project.
2. Mr. Jones will not settle if Metro is able to control the project choice on the third Smith & Bybee Lakes mitigation project.
3. Metro was not a party to the "Cooperative Agreement between Port of Portland, Oregon Division of State Lands, Oregon Department of Fish and Wildlife, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers to Establish a Rivergate Development Program and an



Acceptable Mitigation Program for Wetland Impacts" (COMA); nor is Metro a party to the lawsuit. If the litigation goes to trial, a federal Judge will decide what, if any, remaining mitigation obligations are owing from the Port, and the level of Metro involvement, if any, will be solely up to the Judge.

If the litigation proceeds to a stage where defining mitigation is before the Court, the Port will pursue a fixed, defined, final mitigation obligation definition that accommodates the Port's interests, including the Port's interests in eliminating any additional process and in minimizing the expense.

4. The parties to the COMA originally orally agreed that the Port's cost for the three mitigation projects would not exceed \$500,000. The parties to the COMA, in consultation with Metro, selected the first two projects and the Port completed them in 1991 and 1992, respectively, at a cost of approximately \$250,000. The parties to COMA and Metro spent six years trying to decide on the third mitigation project. Meanwhile, the Port spent \$138,609 in staff and consultant time in the effort to define a project that would achieve consensus.

Metro, although not a party to the mitigation agreement, was invited to participate in the deliberations and argued forcefully for another water control structure. The agencies and Metro seemed to be coming close to an agreement on that proposal in November 1997. Mr. Jones then filed his lawsuit, which effectively took this decision out of the hands of the COMA parties and gave it to the Federal Court.

5. Prior to the Jones' lawsuit, the Port tentatively agreed to fund construction of the new water control structure advocated by Metro if all the parties would agree that this undertaking would complete the Port's mitigation obligation for a third project. This approach was premised and conditioned on getting the COMA parties and Metro to agree upon and take responsibility for their decision on the third mitigation project.

The second Smith & Bybee Lakes mitigation project, also selected by the COMA parties and Metro, is now deemed by most parties to have been a mistake. All parties, of course, hope for a better outcome on the third mitigation project. The Port's engineering staff, however, has voiced strong doubts that this project will work as intended, and has tried without success to persuade the agencies to modify it or select another project.

It is unmistakably clear that the decision on the third mitigation project will be made by others. Therefore, although the Port must fund the project, it makes no sense for the Port to have design and implementation responsibility for it. Accordingly, both Mr. Jones and the federal agencies agreed in settlement discussions to limit the Port's role to funding a fixed amount for the COMA parties to spend on a third project. The Port has agreed to provide up to \$404,000

funding for the project selected by the COMA parties on the condition that the lawsuit is dismissed with prejudice, the COMA terminated, and the Port not be asked to guarantee the third project's success. The entities making the decision on the third project should bear responsibility for any corrections if the project they select falls short of their expectations.

With these factors in mind, the Port attempted in settlement discussions with Mr. Jones and the other parties to achieve the following:

1. While necessarily adding Mr. Jones to the decision-making process on the third mitigation project, make the process and the parties virtually identical to the process in place prior to the lawsuit, except that the public (and Mr. Jones) should have an opportunity to influence selection, consistent with the mandates of the Clean Water Act.
2. Provide Port funding to get the project done and provide for potential administrative expenses, even if the sum of the mitigation projects' costs exceeds the originally-envisioned maximum of \$500,000, as long as Port involvement in the decision, planning, and implementation of the project is eliminated (as Mr. Jones prefers) and the Port's mitigation obligations are concluded.

The proposed Consent Decree, although still under negotiation, is intended to meet the two above goals. It also effectively, if not strictly, achieves the three "imperatives" demanded in the last paragraph of your letter.

Metro has an "unofficial" but substantial role in deciding on the third project; the same or greater role they had before the lawsuit. The federal government's lawyers have discussed this issue with Metro's counsel and have advised Metro that it can veto the third project, giving it a strong voice in the ultimate decision. The COMA parties, minus the Port, will enter the process knowing that failure to reach consensus with Metro will mean the funds will be spent at the sole discretion of the Corps on other Oregon mitigation projects.

If Metro and the COMA parties, minus the Port, all concur, they can use the goals in the adopted management plan among the criteria for selecting the third mitigation project. This is no different from the circumstances that obtained prior to the lawsuit, except in one aspect: The appropriate entities, Metro and the COMA parties, minus the Port, will have clear authority and the obligation to make a timely decision and will bear the consequences of not doing so or of making a poor decision. Under the previous circumstances, the Port bore all the consequences but had no authority to make key decisions.

Also under the previous circumstances, the Port's mitigation obligations under the COMA were disputable for two reasons: lack of clarity and continual susceptibility to legal challenges, like Mr. Jones', that they did not meet Clean Water Act requirements. The

Mike Burton  
Page 4  
September 11, 1998

Consent Decree at least achieves certainty and, eventually, finality to disputes that have sapped the resources of several public agencies for years.

The water control structure constructed in 1992 as the second mitigation project cost \$169,381, including design engineering, materials, construction, and professional services for permitting, document preparation, advertising, project management, graphics, and construction support. In the settlement discussions, the parties agreed to ascribe this cost to the proposed third project, adjust it to 1998 dollars with a 4 percent per year inflation factor, add a 25 percent contingency, and add an additional \$146,400 for a margin of error. Thus, under the proposed Consent Decree, the Port would pay \$404,000; far more than any of the parties originally envisioned for the third mitigation project and far more than the cost estimate derived from the best available information.

Mike, I believe I understand the concerns expressed in your letter. But I believe that the proposed Consent Decree provides means for satisfying those concerns in a quite practical way and that your objections to it are entirely misplaced.

I do not mean to suggest that everyone will or should like every aspect of the outcome of the difficult settlement negotiations in this case. In fact, I personally think the Consent Decree obligates the Port to far more than is warranted and more than the Judge would deem appropriate if the matter went to trial. But recognizing that litigation seldom satisfies any of the interested parties no matter how it ends, I believe any reasonable objective observer, including the Judge, would say the provisions in the Consent Decree fall within the range of responsible public policy and practical feasibility.

Yours very truly,



Mike Thorne  
Executive Director

cc: Bruce Landon, U.S. Department of Justice  
G. Scott Williams, U.S. Department of Justice  
Gregory J. Miner, Bogle & Gates  
William Michael Jones, private citizen  
Col. Robert J. Slusar, U.S. Army Corps of Engineers  
Chuck Clark, U.S. Environmental Protection Agency  
Anne Badgley, U.S. Fish and Wildlife Service  
Yvonne Vallett, U.S. Environmental Protection Agency  
Jennifer Thompson, U.S. Fish and Wildlife Service  
Judy Linton, U.S. Army Corps of Engineers  
Jerry Hedrick, Oregon Division of State Lands  
Holly Michael, Oregon Department of Fish and Wildlife