

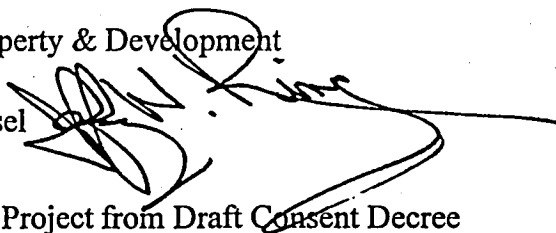


PORT OF PORTLAND
Legal Department

MEMORANDUM

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To: Bill Bach
Manager, Corporate Property & Development

From: J.W. Ring
Assistant General Counsel 

Date: June 1, 2000

Re: Details of Enhancement Project from Draft Consent Decree

The following are excerpts taken from the text of and appendices to the draft Consent Decree between M. Jones, the United States and the Port which is under review by the US Department of Justice. The Consent Decree, one of two that will be required to settle the case of Jones vs. Thorne, et. al. currently pending in the United States District Court for the District of Oregon will also need to proceed through notice and comment in the Federal Register and review and approval by the Court, before being signed and entered by the Court. Only after the Court has signed and entered the Decree will the document be actually final and effective.

I understand that the County has need of this information in its draft form and both the United States and Mr. Jones have agreed that we may discuss this matter with the County, prior to entry by the Court of the Decree.

- In furtherance of purposes of the CWA, the parties have agreed to: (i) finally and specifically resolve all mitigation and restoration obligations of the Port of Portland under specified permits for filling of waters of the United States within the Rivergate area of Portland, Oregon as of the Effective Date, subject to specified exceptions; and (ii) finally and specifically resolve Jones' challenges to any action taken or not taken by the United States with respect to any filling performed by the Port in Rivergate and the construction of the Columbia Slough Rail Bridge. These purposes are achieved through the provisions of this Consent Decree and the Enforcement Consent Decree.
- The Port of Portland shall: (i) perform the mitigation and restoration measures specified in section III of this Consent Decree and the related referenced appendices; (ii) consent to entry of the Enforcement Consent Decree, including payment of a civil penalty to the United States pursuant to 33 U.S.C. § 1319(d); and (iii) pay Jones the sum of Fifty Thousand Dollars (\$50,000.00) in cash in settlement for his litigation costs.

- The United States shall: (i) find that the terms of this Consent Decree and the Enforcement Consent Decree are the final and complete restoration and mitigation obligations of the Port of Portland under the Clean Water Act for all fill material placed in Rivergate in accordance with the terms of the specified permits, subject to specified exceptions, as provided in paragraph 21 of this Consent Decree; (ii) lodge and seek entry of the Enforcement Consent Decree, pursuant to which the fill identified in the cross-claim of the United States and the activities required by the Enforcement Consent Decree shall be authorized by Nationwide Permit 32; and (iii) terminate the *Cooperative Agreement* as provided in paragraph 22 of this Consent Decree.
- Upon the entry of this Consent Decree, Plaintiff, William Michael Jones, shall: (i) release and forever discharge all claims against the Port of Portland and the United States as provided in paragraph 25 of this Consent Decree; and (ii) dismiss his claims in this litigation with prejudice.
- Whenever terms listed below are used in this Consent Decree or in the appendices, the following definitions shall apply:
 - a. “Columbia Slough Rail Bridge” shall mean the rail line bridge within Rivergate located at approximately mile point 0.8 of the Columbia Slough, as depicted and labeled on the map of Rivergate that is **Appendix A**.
 - b. “Consent Decree” shall mean this Consent Decree and all appendices incorporated by reference. In the event of a conflict between this Consent Decree and any appendix, this Consent Decree shall control.
 - c. “*Cooperative Agreement*” shall mean the *Cooperative Agreement Between the 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* executed in 1988 and 1989.

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

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

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

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

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

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

- The Port of Portland 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 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 12 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 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 28 through 30 of the

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Enforcement Consent Decree only. 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 28 through 30 of the Enforcement Consent Decree only. 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.

- 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

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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 28 through 30 of the Enforcement Consent Decree only. Within and adjacent to the 200-foot corridor, the location of the 40 Mile Loop Trail may vary. See paragraph 12 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.

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- 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 28 through 30 of the Enforcement Consent Decree only. 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 28 through 30 of the Enforcement Consent Decree only.

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Removal of the existing fill within the project area will be completed within eighteen (18) months of the Effective Date.

- 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.
- ★ • 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.
- 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.
- Mitigation monitoring and reporting shall be provided for in, and enforced through, the Enforcement Consent Decree.
- Mitigation success and remediation requirements shall be provided in, and enforced through, the Enforcement Consent Decree.

- 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.
- The COE and EPA shall be provided the opportunity to inspect the mitigation areas upon reasonable notice to the Port.
- In addition, the Port shall contribute the sum of Two Hundred Eighty-Five Thousand Dollars (\$285,000.00) cash to Smith & Bybee Lakes Management Committee for the express and sole purpose of performance of additional environmental mitigation projects within the Smith & Bybee Lakes Management Area in conformance with applicable law. The Port's obligations under this provision are strictly limited to payment of the specified funds. Payment shall be made within thirty (30) days of the Effective Date. In the event that the Smith & Bybee Lakes Management Committee does not comply with applicable law, including Ordinance 163610 of the City of Portland, then Mr. Jones and the United States may seek appropriate relief from the Court. However, neither Mr. Jones nor the United States shall seek any additional relief from the Port under these circumstances.
- The Parties acknowledge that in accordance with the terms of the Enforcement Consent 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 15, 1996 to remain in place subject to the conditions provided in the Nationwide Permit and the Enforcement Consent Decree. The parties further acknowledge that in accordance with the terms of the Enforcement Consent Decree, Nationwide Permit 32 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.

Comments on consent decree

- Much of this work will occur within boundaries of SBLWA. As manager, Metro should be closely involved in planning and implementation of habitat restoration projects to ensure they are consistent with NRMP, rest of wildlife area and plans for future. At the very least, species must be native to the wildlife area and adapted for the conditions under which they will be growing. Further, there are a number of wildlife needs, ranging from Western painted turtle nesting sites to heron rookeries, and restoration should yield a mosaic of plant communities to provide for that range of needs. The wildlife area manager should review and approve all restoration plans before they are implemented.
- Sites where fill will be removed – especially Ramsey area – are used for nesting by Western painted turtles. This species is listed “sensitive – critical” by the State of Oregon, and SBLWA has one of the largest known populations in Oregon. Port and COE must work with Metro to ensure appropriate timing and manner of work to minimize disruption to animals and destruction of nests.
- Swales are called for throughout the decree. Important to plan them carefully; the elevation changes can facilitate habitat complexity and diversity. However, swales also could wind up serving as bullfrog ponds, not a desirable use. Should consider connecting them to each other and the lakes and slough.
- Swales in Ramsey fill removal area – discussion includes potential placement of fill material for erosion control; this is an ideal situation for bioengineering. Also states swales should connect with the slough on the upstream and downstream ends; this provides opportunity for restoration of seasonal flooding regime native to the site, thus the possibility of self-sustaining habitat restoration. Need to include fish passage, since this could provide off-channel refugia for juvenile Chinook. Remember this will have profound effects on Western painted turtles in the area, and includes considerable work in one of the most active nesting sites in the SBLWA.
- Support location of any trail well back from water’s edge. Metro Title 3 requires 50 feet; any more is a plus. At this time, Metro does not support trail construction on the north or east side of the Columbia Slough, especially upstream along the north bank of the North Slough. This habitat is sensitive to further fragmentation and its use as a trail site is subject to results of planning process starting later this year.
- Requirement that trail be positioned no more than 3 ft. above native soil will result in trail being submerged regularly. Caution that trail could be a trail to nowhere. Mini-master plan process will be under way soon and could result in alignment that makes this trail’s location obsolete. At the least, Metro will probably request that the Port place a gate across the trail at or near the future corrections facility location to block access to sensitive areas within SBLWA where the trail will dead-end.
- .Payment to Smith and Bybee Lakes Management Committee: the committee is not an entity that can receive funds; they will need to go to the Smith and Bybee Lakes Trust Fund at Metro. Decree calls for the funds to be spent on environmental mitigation projects, however, Metro and the committee have no mitigation responsibilities. Suggest the committee be allowed to expend the funds on any projects it deems suitable under its implementation of the NRMP. Metro can easily account specifically for expenditures out of this \$285,000 for tracking purposes.