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Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Case No. CV 09-197 KI

Plaintiff,

NOTICE OF LODGING

v.

THE PORT OF ASTORIA, OREGON,

Defendant.

The United States hereby notifies the Court that a Consent Decree resolving the claims of the United States and The Port of Astoria in this case is being lodged. Pursuant to 28 C.F.R. § 50.7, this Consent Decree must be lodged with the Court for at least thirty (30) days before entry, in order to provide an opportunity for public comment.

Notice of the lodging of this Consent Decree will be published in the Federal Register in the near future, indicating that the Department of Justice will receive comments for a period of thirty days. Any public comments received will be considered and filed with the Court. If, after

consideration of any comments, the United States concludes that this Decree should be entered, it will move the Court for final approval and entry of the Consent Decree.

WHEREFORE, the United States requests that the Court receive the attached Consent Decree for lodging only.

Dated this 20th day of March, 2009.

Respectfully submitted,

KARIN J. IMMERGUT
United States Attorney
District of Oregon

/s/ Neil J. Evans
NEIL J. EVANS
Assistant United States Attorney
District of Oregon

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

UNITED STATES OF AMERICA,
Plaintiff,

Case No.

v.

CONSENT DECREE

THE PORT OF ASTORIA, OREGON,
t.

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Army Corps of Engineers ("Corps"), filed the Complaint herein against Defendant Port of Astoria, Oregon ("Defendant"), alleging that Defendant violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendant violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States from Defendant's maintenance

dredging upland disposal site to the point of discharge near Pier 3 in the Columbia River and entrance to Youngs Bay, approximately 13 river miles from the mouth of the Columbia River, in Section 12, Township 8 North, Range 10 West, Astoria, Clatsop County, Oregon (the "Site"), without authorization by the United States Department of the Army ("the Corps");

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendant, at its own expense and at the direction of the Corps to restore and/or mitigate the damages caused by their unlawful activities; and (3) to require Defendant to pay civil penalties as provided in 33 U.S.C. § 1319(d);

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

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

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

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

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the District of Oregon pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because Defendant conducts business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

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

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendant, its officers, directors, agents, employees and servants, and their successors and assigns, any person, firm, association or corporation who is, or will be, acting in concert or participation with Defendant, and any person, firm, association, or corporation that may purchase, acquire, or otherwise control the property that is addressed in the Complaint or this Consent Decree, whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against

Defendant, Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns, any person, firm or corporation acting in concert or participation with Defendant, or any person, firm or corporation that may purchase, acquire, or otherwise control the property that is addressed in the Complaint or this Consent Decree, to take any actions necessary to comply with the provisions hereof.

5. Nothing in this Consent Decree shall be interpreted to impose personal liability upon Defendant's officers, directors, agents employees and servants, or their successors and assigns, any person, firm, association or corporation who is, or will be, acting in concert or participation with Defendant, or any person, firm, association, or corporation other than Defendant that may purchase, acquire, or otherwise control the property that is subject to this Consent Decree.

III. SCOPE OF CONSENT DECREE

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

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

8. Except as in accordance with this Consent Decree, Defendant is enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

9. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the Corps' ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

10. This Consent Decree in no way affects or relieves Defendant of its responsibility to comply with any applicable federal, state, or local law, regulation or permit.

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

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

13. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. SPECIFIC PROVISIONS - CIVIL PENALTIES

14. Defendant shall pay a total civil penalty to the United States in the amount of ONE HUNDRED TWENTY FIVE THOUSAND Dollars (\$125,000.00). Within 30 days

of the date of entry of this Consent Decree Defendant shall pay FIFTY THOUSAND Dollars (\$50,000.00) in accordance with the provisions of paragraph 15 of this Consent Decree. The remaining balance shall be paid in two installments of TWENTY FIVE THOUSAND Dollars (\$25,000.00) within 6 months and the final FIFTY THOUSAND Dollars (\$50,000.00) within 12 months.

15. Defendant shall make the above-referenced payments by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing USAO file number 2005V00736, the Corps and the DOJ case number 90-5-1-1-18293. Payments shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of Oregon. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

16. Upon making payments of the civil penalty required by this Consent Decree, Defendant shall provide written notice, at the addresses specified in Section IX of this Consent Decree, that such payment was made in accordance with paragraph 15.

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

V. ENVIRONMENTAL COMPLIANCE OFFICER

18. On or before thirty days after the date of entry of this Consent Decree, Defendant shall have hired an environmental compliance officer. Defendant shall retain that officer to the extent permitted by law. The environmental compliance officer shall coordinate the Port's CWA permitting applications and be responsible for ensuring that the Port complies with the CWA. The environmental compliance officer shall either have a minimum of five years of work experience in environmental regulation, compliance or science, or be approved by the Corps.

VI. NOTICES AND OTHER SUBMISSIONS

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

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VII. RETENTION OF RECORDS AND RIGHT OF ENTRY

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

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

B. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections,

to require monitoring and to obtain information from Defendant as authorized by law.

VIII. DISPUTE RESOLUTION

21. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendant affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendant cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, Defendant file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, Defendant shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that Defendant's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

22. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30)

day period for informal negotiations. Defendant shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, Defendant shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that Defendant's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

23. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendant under this Consent Decree, except as provided in paragraph 31 below regarding payment of stipulated penalties.

IX. FORCE MAJEURE

24. Defendant shall perform the actions required under this Consent Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendant, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, *inter alia*, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

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

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

Defendant may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

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

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

under the procedures in Section VI of this Consent Decree.

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

X. STIPULATED PENALTIES

29. After entry of this Consent Decree, if Defendant fails to timely fulfill any requirement of the Consent Decree, Defendant shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- A. For Day 1 up to and including Day 30 of non-compliance \$1,000.00 per day
- B. For Day 31 up to and including 60 of non-compliance \$2,000.00 per day
- C. For Day 61 and beyond of non-compliance \$3,000.00 per day

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

30. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VI and/or the Force Majeure provisions in Section VII shall be resolved upon motion to this Court as provided in paragraphs 21 and 22.

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

32. To the extent Defendant demonstrates to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in paragraph 24 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

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

34. Defendant shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing the Corps and the DOJ case number 90-5-1-1-1829. Payment shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of Oregon. Any payments received by the

Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendant shall provide written notice, at the addresses specified in Section XI of this Consent Decree.

XI. ADDRESSES

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

A. TO THE UNITED STATES ATTORNEY'S OFFICE AND THE DEPARTMENT OF JUSTICE:

Neil Evans
Assistant United States Attorney
Office of the United States Attorney
District of Oregon
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204

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

B. TO THE U.S. ARMY CORPS OF ENGINEERS:

Ed Berger
Assistant District Counsel
Office of Counsel
P.O. Box 2946
Portland, Oregon 97208-2946

USAED, Portland
Enforcement Team Leader (OD-G)
P.O. Box 2946
Portland, Oregon 97208-2946

C. TO DEFENDANT:

Larry Pfund

Commission Chairman
Port of Astoria
422 Gateway Avenue, Suite 100
Astoria, OR 97103

Andrew Jordan
Jordan Schrader PC
P.O. Box 230669
Portland, OR 97281

XII. COSTS OF SUIT

36. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendant subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendant shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendant for noncompliance with or enforcement of this Consent Decree.

XIII. PUBLIC COMMENT

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

XIV. CONTINUING JURISDICTION OF THE COURT

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

XV. MODIFICATION

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

XVI. TERMINATION

40. This Consent Decree may be terminated by either of the following:

A. Defendant and the United States may at any time make a joint motion to the Court for termination of this Consent Decree or any portion of it; or

B. Defendant may make a unilateral motion to the Court to terminate this Consent Decree after each of the following has occurred:

1. Defendant has obtained and maintained compliance with all provisions of this Consent Decree and the CWA for twelve (12) consecutive months;

2. Defendant has paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

3. Defendant has certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and

4. Within forty-five (45) days of receiving such certification from Defendant, the Corps has not contested in writing that such compliance has been achieved. If the Corps disputes Defendant's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

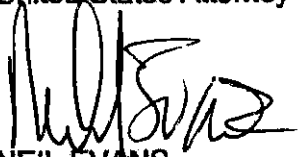
IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2009.

United States District Judge

ON BEHALF OF THE UNITED STATES:

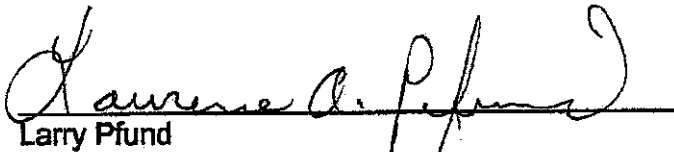
KARIN IMMERGUT
United States Attorney for the District of Oregon



NEIL EVANS
Office of the United States Attorney
District of Oregon
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204

Dated:

FOR DEFENDANT PORT OF ASTORIA



Larry Pfund
Commission Chairman, Port of Astoria
422 Gateway Avenue, Suite 100
Astoria, Oregon 97103

Dated: 2-19-09