UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. IDAHO TRANSPORTATION DEPARTMENT, a department within the State of Idaho and SCARSELLA BROTHERS. INC. Defendants MICA BAY PROPERTY OWNERS ASSOCIATION, INC. Plaintiff - Intervenor	)	No. CV-04-428-N-EJL CONSENT DECREE WITH IDAHO TRANSPORTATION DEPARTMENT

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INTRODUCTION

A. Whereas, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed the Complaint in this matter alleging that Idaho Transportation Department ("ITD") has violated Section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a), relating to the Act's requirements governing the discharge of storm water. The alleged violations include claims ITD violated the Federal Storm Water Construction General Permit ("CGP") which was applicable during the pendency of the construction identified in the complaint and the compliance order issued by EPA on May 9, 2002.

B. Whereas, the Mica Bay Property Owners Association, Inc. ("Citizen Plaintiff") has filed a complaint in intervention alleging violations of the CGP (the "Complaint in Intervention").

C. Whereas ITD neither admits nor denies the allegations in the Complaint and nothing in this Decree shall constitute or be construed as an admission of liability, fact or law, or of any wrongdoing on the part of ITD.

D. Whereas, the United States and ITD have consented to the entry of this Decree without trial of any issues.

E. Whereas, the parties agree that this Decree is not intended to be used in subsequent litigation to establish either a point of law or fact; provided, however, that the foregoing shall in no way affect the binding nature of this Decree or the parties' respective obligations pursuant to this Decree, nor shall the parties be precluded from establishing the existence or content of this Decree in either subsequent litigation or subsequent proceedings in

this lawsuit where the terms or existence of the Decree may be at issue, including, without limitation, any action to enforce the terms of this Decree. This Decree does not create any rights, implied or otherwise, in any third parties.

F. Whereas, these parties recognize, and this Court finds by entering this Consent Decree, that the United States and ITD have negotiated this Consent Decree in good faith, that implementation of the Consent Decree will avoid prolonged and complicated litigation between these parties, and that it is fair, reasonable, and in the public interest;

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without adjudication or admission of any issue of fact or law and upon consent and agreement of the parties, it is hereby ORDERED, DECREED, and ADJUDGED as follows:

I. DEFINITIONS

1. Except as specifically provided in this Decree, definitions for the terms used in this Decree shall be incorporated from the Clean Water Act and the regulations promulgated pursuant to that Act. Whenever terms listed below are used in this Decree the following definitions apply:

a. Best Management Practices ("BMPs") shall mean schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to waters of the United States. BMPs also include treatment requirements, operating procedures, and practice to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

b. Clean Water Act shall mean 33 U.S.C. §§ 1251-1387 (2005).

c. Construction Activities shall mean the disturbance of soils associated with

clearing, grading, or excavating activities or other construction-related activities.

d. Permit shall mean the Construction General Permits issued by EPA and published on July 1, 2003 (68 Fed. Reg. 39087 - 39091) and any amendments thereto, or, any permit governing storm water discharges from construction activities issued by EPA in the State of Idaho.

e. Project shall mean any location in the State of Idaho that is subject to construction activities under a contract issued by ITD and which is subject to the NPDES storm water construction regulations set forth at 40 C.F.R. 122.26(b)(14)(x) or 40 C.F.R. 122.26(b)(15).

f. Resident Engineer shall mean a representative of the ITD administrator with authority and duties as described in the Standard Specifications for Highway Construction, current edition.

g. Responsible Contractor shall mean the general contractor charged with the supervision or completion of construction at a Project. If there is no general contractor for a Project, the Responsible Contractor shall be each contractor retained by ITD responsible for activities at the Project.

h. Environmental Inspector shall mean an ITD employee or a consultant working directly for ITD who is designated by ITD to conduct self-inspections as required by the CGP and by this Consent Decree and who has the necessary experience and qualifications to conduct inspection of storm water controls at ITD Projects.

i. SWPPP shall mean a Storm Water Pollution Prevention Plan as described in the CGP or other plan for controlling pollutants in storm water discharges from Projects.

II. COMPLIANCE PROGRAM

A. Storm Water Management Training Program

2. All Resident Engineers and Environmental Inspectors employed by ITD shall attend a training course presented by a third party or by ITD, within one hundred twenty (120) days of the effective date of this Decree for Resident Engineers, and within one hundred eighty (180) days of the effective date of this Decree for Environmental Inspectors. ITD shall submit to EPA a certification that the course meets or exceeds the requirements set out in Appendices A and B respectively for Resident Engineers or Environmental Inspectors. EPA reserves the right to reject the certification as non-compliant with the Appendix A and B requirements as applicable. Such rejection shall be subject to the Dispute Resolution Clause of this Decree.

3. During the term of this Decree, all Resident Engineers and Environmental Inspectors newly employed by ITD or attaining those positions after entry of this Decree shall comply with the training requirements described in Paragraph 2 within sixty (60) days of assuming that position. If a training program is not available in that initial 60 day period, Environmental Inspectors hired or assigned to that position after entry of the Decree may comply with the training requirements of Paragraph 2 through review of videotapes and materials from the initial training session or through computer-based training modules that ITD certifies meet or exceed the requirements set out in Appendix A and B as applicable. However, any such Environmental Inspector shall attend the full training course within one year of assuming this new position. Any Resident Engineer or Environmental Inspector who has taken a training course that ITD certifies meets or exceeds the requirements of Appendix A or Appendix B as applicable within one (1) year prior to the effective date of this Decree need not take the initial training for two years from the date of the last training. That person remains subject to the

retraining requirements of this paragraph. All Resident Engineers and Environmental Inspectors shall retrain in a storm water management course that meets or exceeds the requirements of Appendices A and B as applicable every two years.

4. ITD shall prepare and distribute to its Resident Engineers, Environmental Inspectors and other interested personnel a quarterly storm water bulletin that highlights new developments in the field of storm water management, recent storm water management problems encountered by ITD in the field, or other similar topics that will act to inform the reader of current issues in storm water management. The bulletin shall be at least two pages in length, and can be distributed either in paper or electronic format. A copy of each bulletin shall be provided to EPA.

5. ITD shall require as a term of its contracts for all Projects that, prior to initiating any Construction Activities at a Project the Responsible Contractor, shall designate a "Water Pollution Control Manager ("WPCM")" who shall visit the Project on a frequent basis and in no instance less than once per week during the construction period. The construction period ends upon the submittal of Notice of Termination of the CGP and does not include any applicable winter shutdown period. The contract shall also require that the WPCM shall attend, in the twelve months prior to the beginning of Construction Activities on any Project, storm water management training, presented by a third party, that meets the minimum requirements of Appendix C. The WPCM shall be responsible for ensuring compliance with the CWA, the CGP, and the SWPPP and shall be responsible for regular communications with ITD regarding storm water issues.

B. Inspection Program

6. Designation of Environmental Inspectors. Before commencement of Construction Activities at any Project, ITD shall designate an ITD employee as an Environmental Inspector. The Environmental Inspector shall be an ITD employee or a consultant working directly for ITD having primary responsibility for conducting and reporting on inspections required by the CGP and by this Consent Decree, for the daily supervision of construction activities, and for ensuring ITD's and the Responsible Contractor's compliance with the applicable permit for the Project.

7. Inspection Procedures: ITD shall establish within forty-five days of the entry of this Decree a set of inspection procedures for all Projects. ITD shall memorialize these inspection procedures in a written guidance or similar document, and distribute the document to its field offices state wide. The procedures shall be binding on all ITD personnel and all Responsible Contractors working for ITD at all Projects. At a minimum, the inspection procedures shall include the following:

(A) each Project shall be inspected in accordance with the CGP by a trained Environmental Inspector;

(B) each Project shall also be inspected within 24 hours after the conclusion of a rain event and every 24 hours during an extended rain event.

(C) within 24 hours of each storm water inspection, the Responsible Contractor shall be made aware of any deficiencies found during the inspection;

(D) the Responsible Contractor shall sign a form acknowledging it has been informed of the alleged deficiencies (in the event the Responsible Contractor refuses to sign ITD shall note that refusal on the form);

(E) the Responsible Contractor and ITD shall correct all deficiencies identified during the

inspection as soon as possible and no later than five days after the inspection or prior to the next rain event, whichever is sooner;

(F) each inspection report shall clearly indicate all areas of the site that were inspected, using both descriptions and station numbers (e.g. "entrance at Station ____ ; potential discharge points at Stations ____ , ____ , and ____ ; ROW and BMPs from Station ____ to ____ "); and,

(G) each inspection report shall clearly indicate the station number associated with each observation (e.g. "silt fences at Station ____ holding up well; Sediment pond at Station ____ needs to be cleaned out").

8. Inspection Forms: ITD shall submit an inspection form for EPA review and approval within 45 days of entry of this Decree. Upon EPA approval, the form shall be used at all Projects. The form shall include all elements required by the CGP, including the following:

a. The inspection date;

b. Names, titles, and qualifications of personnel making the inspection;

c. Weather information for the period since the last inspection (or since commencement of construction activity if the first inspection), including a best estimate of the beginning of each storm event, duration of each storm event, approximate amount of rainfall for each storm event (in inches), and whether any discharges occurred;

d. Weather information and a description of any discharges occurring at the time of the inspection;

e. Location(s) of discharges of sediment or other pollutants from the site;

f. Location(s) of BMPs that need to be maintained;

g. Location(s) of BMPs that failed to operate as designed or proved inadequate for a

particular location;

h. Location(s) where additional BMPs are needed that did not exist at the time of inspection;

i. Corrective action required including any necessary changes to the SWPPP and implementation dates;

j. Station numbers and descriptions indicating the following inspected areas: limits of active construction; all site entrances; potential discharge locations; all storage areas and contractor yards; all onsite and offsite topsoil storage, waste and borrow areas used solely for the Project being inspected;

k. An indication, by station number and description, of any areas not inspected, along with an explanation of why they were not inspected;

l. An indication of any incidents of non-compliance with the Permit; and

m. Where a report does not identify any incidents of non-compliance, a certification that the construction project or site is in compliance with the SWPPP and the Permit, signed in accordance with Appendix G, Section 11 of the Permit.

<u>The form must also include the following elements:</u>

n. Days since last inspection;

o. Areas of concern not addressed since the last inspection

p. A dated signature block indicating that the contractor has received a copy of the inspection report, in accordance with Paragraph 7(D).

Should ITD wish to alter this form it may seek approval from EPA to alter that form. EPA's approval of non-substantive changes shall not be unreasonably withheld. Any refusal by EPA to

agree to such changes shall be subject to the Dispute Resolution procedures of this Decree. The ITD inspector and the contractor shall both sign the follow-up page certifying that the corrective action has been satisfactorily completed.

9. Third-Party Inspections: For all Projects that disturb five acres or more of soil and that are located in an environmentally sensitive area, ITD shall retain a qualified third-party consultant who inspects for compliance with the CGP. Such inspections shall occur at least once every 30 days during the construction season and shall be unannounced. If significant deficiencies are found, a follow-up inspection will occur within 14 days. The Consultant shall provide to ITD and the Responsible Contractor within twenty-four (24) hours of each inspection written findings and recommendations that contain at least the information on the form described in Paragraph 8. The Consultant shall also provide any follow-up written report if changes to the SWPPP or BMPs are necessary within seven (7) days of each inspection. A copy of all such reports shall be maintained in the file with the SWPPP located at the site, and shall be available for review by EPA during any inspection of the Project. ITD shall implement all recommendations by the consultant, unless infeasible. If ITD rejects a recommendation as infeasible, it shall place in its files on the job site a written description by the Resident Engineer of why the recommendation(s) was not followed. For purposes of this section, "environmentally sensitive area" means any area which would be directly impacted by storm water discharges from the Project, and which is designated critical habitat for any listed threatened or endangered species, or which contains an immediate downstream water body that is listed as impaired for sediment by the Idaho Department of Environmental Quality under section 303(d) of the CWA.

10. If ITD believes that a third party inspection would result in no significant

environmental benefits at a Project (e.g., the Project area is located in an extremely dry, flat area with no nearby water bodies), ITD may seek a waiver of this requirement from EPA. The grant or denial of this waiver by EPA is in the sole discretion of EPA and is not subject to the dispute resolution provisions of this Decree.

11. Within 15 days following the date of entry of this Decree, ITD shall provide Plaintiff by electronic mail to the addresses specified in Paragraph 32 (Notification) a list of all Projects. By the 15th day of every March, June, September and December, ITD shall provide Plaintiff with notice by electronic mail at the addresses specified in Paragraph 32 (Notification) of any updates to this list of Projects. Each notice required by this Paragraph shall include the following information for each Project: (i) ITD's Permit number and name of the Project, if available; (ii) the name of the Responsible Contractor(s) and their permit number; (iii) the location of the Project including the physical address, milepost number if applicable and the latitude and longitude; (iv) a job site contact (include telephone number and/or e-mail); (v) the best estimate for the start date of Construction Activities; and (vi) the best estimate for the completion of Construction Activities.

C. Construction Requirements

12. ITD and its contractors shall adhere to Section 212 of the ITD Standard Specifications (2004), as amended, and other ITD BMP guidance materials at all times at all Projects. ITD shall allow no clearing or grubbing outside the physical clearance limits shown on the site plans of any Project, and no clearing or grubbing shall take place outside the schedule in the applicable SWPPP.

13. ITD shall not allow any exposed unstabilized soils on Projects in the following

counties during the winter shut-down period: Boundary, Bonner, Kootenai, Shoshone, Benewah, and Latah. For the purpose of this paragraph, exposed unstabilized soils are soils that are disturbed by construction activity and that are not effectively stabilized through application and maintenance of erosion controls. The winter-shut down period shall be at least October 15 through April 15 of each year, during which time there will be no earthwork on the project except that required as part of routine BMP maintenance or installation, or any work required to be done during this period because of regulatory agency requirements, or as needed to remedy unforeseen situations that could otherwise lead to exceedances of applicable water quality standards. All stabilization work shall be complete and in place no later than October 15 of each year. ITD may request, in writing, a waiver of these winter shut-down period requirements in these six counties where ITD deems it necessary, explaining to EPA the reasons why such a waiver is necessary, the requested extent of the waiver, and what BMPs and other erosion and sediment control measures will be used during any earthwork conducted during the winter shut-down period to minimize any stormwater pollutant discharges. EPA will timely review the request and approve or deny the request in EPA's sole discretion. EPA's review or approval of an appropriate request will not be unreasonably withheld.

14. In the counties identified in Paragraph 13, ITD and its contractor shall maintain all BMPs throughout the winter shut-down period. Where feasible, and where inspections will not cause significant damage to the site, ITD shall inspect the BMPs at least once per week during the winter shut down period. The Responsible Contractor and ITD shall correct all deficiencies identified during the inspection as soon as possible and no later than five days after the inspection or prior to the next storm event, whichever is sooner. The inspection findings, the

remedy, and the existence of any conditions that ITD believes precluded timely access or correction of noted deficiencies shall be documented and kept in ITD's records for that Project's storm water discharge authorization.

D. Reporting Requirements

15. ITD shall provide a written report of each known violation of the CGP and each known violation any of the terms of this Consent Decree by ITD or its contractor(s) to EPA within five days of the discovery of the violation.

16. ITD shall submit to EPA an annual report, to be submitted by January 30th, summarizing all actions taken to comply with the terms of this Consent Decree and certifying ITD's compliance with all requirements of this Consent Decree in the previous year. This summary certification shall address compliance with Paragraphs 2 through 14. As part of the report, ITD shall submit a statement identifying occurrences of non-compliance with the Consent Decree. This report shall be submitted either in hard copy or electronically on a compact disc.

III. CIVIL PENALTY

17. Civil Penalty. Within 30 days after entry of this Decree, ITD shall pay a civil penalty of $495,000.

18. Payments to be Made Solely by ITD. ITD shall pay the civil penalty called for in the prior Paragraph, out of its own funds and shall not seek payments, reimbursement, indemnification or insurance coverage for this civil penalty from any contractor, third party or agency of the United States including, but not limited to, the Federal Highway Administration ("FHWA"). ITD shall not seek any litigation-related costs or its attorney fees (both private and internal) incurred after July 15, 2004, in this action or in anticipation of this action from any

agency of the United States including, but not limited to, the FHWA. If any such costs or fees have previously been paid by reimbursement or otherwise from the FHWA to ITD, these costs or fees shall be refunded by ITD to FHWA. Nothing in this Consent Decree shall limit FHWA's right to assert that any costs incurred by ITD prior to July 15, 2004 were incurred in anticipation of this litigation and are not subject to reimbursement by FHWA.

19. United States' Costs of Suit. The United States agrees that it shall not seek to recover from ITD its costs and attorneys' fees incurred prior to entry of the Decree in this action or in anticipation of this action.

20. Method of Payment. The $495,000 penalty shall be made payable to the "Treasurer of the United States" by Electronic Funds Transfer ("EFT" or wire transfer) to the United States Department of Justice lock box bank, referencing DOJ # 90-5-1-1-08052 and the USAO File Number 2004CV00095. A confirmation of such transfer shall be forwarded to the United States at the addresses specified in Paragraph 32 (Notification).

IV. GENERAL PROVISIONS

21. Jurisdiction and Venue. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 33 U.S.C. § 1319 and 28 U.S.C. §§ 1331, 1345 and 1355. The complaint states a claim upon which relief may be granted under 33 U.S.C. § 1319. Venue is proper under 28 U.S.C. § 1391(b) and (c). For purposes of the Decree, ITD consents to and will not contest the jurisdiction of this Court over this matter. The Court shall retain jurisdiction to enforce the terms and conditions of this Decree, to resolve disputes arising hereunder and for such other action as may be necessary or appropriate for construction or execution of the Decree.

22. Parties Bound. In accordance with the provisions of Federal Rule of Civil

Procedure 65, the provisions of this Decree shall apply to and be binding upon the United States and ITD. Within 10 days of entry of this Decree, ITD shall provide a summary of the Decree provisions relevant to contractors as part of each bid package for each Project where the bid closing date has not passed as of the effective date of this Decree

23. ITD Responsibility. In any action to enforce this Decree, ITD shall not assert as a defense the failure of its officers, directors, agents, trustees, servants, employees, successors, assigns, and contractors to take actions necessary to comply with this Decree unless ITD establishes that the failure resulted from a Force Majeure event as defined in Section VIII (Force Majeure).

24. No Warranty by the United States . The United States does not, by its consent to entry of this Decree, warrant or aver in any manner that ITD's compliance with this Decree will result in compliance with the provisions of applicable federal or state laws, regulations, or permit conditions. Notwithstanding the Plaintiff's review and approval of any data, reports or plans formulated pursuant to this Decree, ITD shall remain solely responsible for compliance with this Decree, the Clean Water Act, any Permit, and any other applicable state, federal, or local law or regulation.

25. Final Judgment. Upon approval and entry of this Decree by the Court, this Decree shall constitute a final judgment between and among the United States and ITD.

26. Purpose of Decree. It is the express purpose of the parties in entering into this Consent Decree to further the storm water pollution prevention goals of the Clean Water Act. All obligations under this Decree shall be interpreted in a manner consistent with causing ITD to maintain compliance with the Act, its Construction General Permits and all applicable

regulations at all times.

27. Right of Entry. Until termination of this Decree, the United States and its representatives, contractors, consultants and attorneys shall each have the authority to enter, at reasonable times and upon presentation of credentials, any Project or any location at which records relating to this Decree are kept for the purposes of:

i. monitoring ITD's compliance with this Decree;

ii. verifying any data or information submitted by ITD pursuant to this Decree;

iii. obtaining samples from any Project and, upon request, splits or duplicates of any samples taken by ITD its contractors or consultants; and

iv. reviewing and copying any records required to be kept by ITD pursuant to this Decree.

28. No Limitation on Other Rights of Entry. Nothing in Paragraph 27 (Right of Entry) or any other provision of this Decree shall be construed to limit any statutory right of entry or access or other information gathering authority pursuant to any federal, state, or local law.

29. Preservation of Records. In addition to complying with any other applicable local, state, or federal records preservation requirements, until one calendar year after termination of this Decree, ITD shall preserve at least one legible copy of all documents in its possession, custody, or control that relate to the performance of ITD's obligations under this Decree. Within 30 days of retaining or employing any agent, consultant, or contractor for the purpose of carrying out the terms of this Decree, ITD shall enter into an agreement with any such agent, consultant, or contractor requiring such person to provide ITD a copy of all documents relating to the

performance of ITD obligations under this Decree.

30. Authority to Sign Decree. The undersigned representative of ITD certifies that he or she is authorized to enter into this Decree and to execute and legally bind ITD to the terms and conditions of this Decree and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

31. Designation of Agent for Service. ITD shall identify on the attached signature page the name and address of an agent who is authorized to accept service of process by mail on ITD behalf with respect to all matters arising under or relating to this Decree.

32. Notification.

a. When written notification or communication is required by the terms of this Decree, such notification or communication shall be addressed to the following individuals at the addresses specified below (or to such other addresses as may be designated by written notice to the parties):

As to the United States:

Chief, Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611
Reference Case No. 90-5-1-1-08052

United States Attorney
District of Idaho
P.O. Box 32
Boise, Idaho 83707
(208) 334-1211

Mark Ryan
U.S. EPA, Region 10
1435 N. Orchard St.
Boise, Idaho 83706
ryan.mark@epa.gov
(208) 378-5768

Andrew Stewart
Attorney-Advisor
U.S. EPA, OECA/ORE/WED
Ariel Rios Building South
1200 Pennsylvania Avenue, NW
Mailstop 2243A
Washington, D.C. 20460
202-564-1463
stewart.andrew@epa.gov

As to ITD:

Dennis Clark
Environmental Section Manager
Highway Division
Idaho Department of Transportation
3311 W. State Street
P.O. Box 7129
Boise, Idaho 83707-1129
(208) 334-8203

With a copy to:

Karl Vogt
Deputy Attorney General
Idaho Department of Transportation
3311 W. State Street
P.O. Box 7129
Boise, Idaho 83707-1129
(208) 334-8018

b. Notifications to or communications with ITD or the United States shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested.

33. Certification of Reports and Submissions. Except as otherwise expressly provided in this Decree, any report or other document submitted by ITD pursuant to this Decree which makes any representation concerning compliance or noncompliance with any requirement of this Decree shall be certified by a Responsible Officer of ITD. The certification shall be in the following form:

> I certify that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to evaluate the information submitted. I certify that the information contained in or accompanying this submittal is true, accurate, and complete. As to those identified portion(s) of this submittal for which I cannot personally verify the accuracy, I certify that this submittal and all attachments were prepared in accordance with procedures designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the

person or persons who manage the system, or those directly responsible for gathering the information, or the immediate supervisor of such person(s), 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.

Signature:_____
Name: _____
Title: _____
Date: _____

34. Entire Agreement. This Decree is the final, complete, and exclusive agreement between the Parties. The Parties acknowledge that there are no inducements, promises, representations, agreements, or understandings relating to the settlement other than those expressly contained in this Decree.

35. Modification. The deadlines set forth in Paragraphs 2, 3 and 11 of this Decree may be modified by this Court in accordance with Section VII (Dispute Resolution) or by written agreement of the parties and notification to the Court. Modifications by agreement of the parties shall be effective 10 days after the date the notice is filed with the Court unless otherwise ordered by the Court. With respect to all other provisions of this Decree, except as expressly provided in Section VII (Dispute Resolution), there shall be no modification of this Decree without written agreement of all the parties to this Decree and approval by the Court. Unanticipated or increased costs or expenses associated with the implementation of actions called for by this Decree and economic hardship or changed financial circumstances shall not serve as a basis for modifications of this Decree.

36. Public Notice. The parties acknowledge and agree that the final approval and entry of this Decree is subject to the requirements of 28 C.F.R. § 50.7, which provides that notice of proposed consent decrees be given to the public and that the public shall have at least 30 days

in which to make any comments. The United States may withhold or withdraw its consent to this Decree based on such comments.

37. Agreement to Entry of Decree. ITD hereby agrees not to oppose entry of this Decree by this Court or to challenge any provision of this Decree.

38. Termination of Decree.

a. No sooner than 4 years after entry of this Decree, ITD may request the United States' consent to termination of this Decree. In seeking such consent, ITD shall demonstrate that:

i. ITD has paid all monies, civil penalties, interest, and stipulated penalties due under this Decree;

ii. As of the date ITD provides any notice or request to terminate this Decree, EPA has not provided ITD with any Notice of Dispute invoking the Dispute Resolution provisions of this Decree, and there are no unresolved matters subject to dispute resolution pursuant to Section VII (Dispute Resolution); and

iii. No enforcement action under this Decree is pending.

b. The United States shall notify ITD in writing within 30 days of receiving any request to terminate by ITD whether the United States does or does not object to the request. If the United States does not object, then the parties shall jointly file a motion to terminate with the Court. If the United States objects to such request, the parties will work together for a period of at least 30 days in an effort to informally resolve any disputes. The Decree shall remain in effect pending resolution of the dispute by the parties, or, ultimately, the Court.

c. The Court may terminate this Decree 60 days after ITD has filed with the Court a

motion to terminate the Decree and served a copy of that motion upon the United States, so long as either (1) ITD's motion to terminate the Decree is accompanied by a true and correct copy of the United States' notice that it does not object to the termination or (2) ITD prevails in any motion it files to terminate the decree.

d. Any dispute involving ITD's right to terminate the Decree shall not be subject to the dispute resolution process of Section VII.

V. EFFECT OF DECREE

39. Covenants Not to Sue by United States . This Consent Decree resolves the civil claims of the United States against ITD for the violations alleged in the Complaint filed in this action through the date of lodging of the Consent Decree.

40. No Effect on Third Parties. Subject to the restrictions of Paragraph 18, this Consent Decree does not limit or affect the rights of ITD or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against ITD, except as otherwise provided by law.

41. United States' Reservations of Rights. The United States reserves all legal and equitable remedies available to enforce this Consent Decree, except as expressly stated in paragraph 39. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or its implementing regulations, or under other federal or State laws, regulations, or permit conditions, except as expressly specified in Paragraph 39.

42. Effect of Decree. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

43. Not a Permit Modification. This Decree is neither a permit nor a modification of existing permits under any federal, state, or local law, and in no way relieves ITD of its responsibilities to comply with all applicable federal, state, and local laws and regulations.

VI. STIPULATED PENALTIES

44. Stipulated Penalty Amounts. If EPA determines that ITD has failed to comply fully and timely with the requirements of this Decree, ITD shall pay stipulated penalties in the following amounts:

a. for failure to timely train Resident Engineers in accordance with Paragraph 2 - $750.00 per person for each missed deadline. This $750.00 per person violation shall continue to accrue for every 14 days that the person fails to timely receive the applicable training;

b. for failure to timely prepare and distribute a quarterly storm water bulletin in material compliance with Paragraph 4 - a one time stipulated penalty of $2,000 per quarterly bulletin;

c. for failure to ensure that the Responsible Contractor on any Project has a properly trained WPCM assigned to a Project in accordance with the requirements of Paragraph 5 - $750.00 per day of construction;

d. for failure to ensure that any inspection required under the Permit performed at a Project was performed by Environmental Inspector trained in accordance with the requirements of Paragraph 2 - $750.00 for each such inspection;

e. for failure to create written inspection procedures within 45 days of entry of the Decree in accordance with Paragraph 7 - $750.00 per day;

f. for failure to comply with the requirements of Paragraph 7 (B) and (C) - $750.00

per failure;

g. for failure of ITD to comply with the requirements of Paragraph 7(E) - $750.00 per day;

h. for failure to properly complete an inspection form on a storm water inspection per Paragraph 8 - $750.00 per failure;

I. for failure to comply with a requirement of Paragraph 9 (related to utilization of third-party inspectors) - $1,000.00 per inspection not timely performed;

j. for failure to provide written notices in accordance with Paragraph 11 - $750.00 per day;

k. for failure to follow the requirements set forth in Paragraphs 12, 13 and 14 - $1,500.00 per day for days 1 - 10; $2,500.00 per day for days 11 - 20; and, $3,500.00 per day for days 21 and continuing;

l. for failure to timely submit a report per Paragraph 15 (known CGP and Decree violations) - $750.00 per day; and,

m. for failure to timely submit a complete Annual Report per Paragraph 16 - $750.00 per day.

45. Payment of Stipulated Penalties.

a. All penalties owed to the United States under this Section shall be due and payable within 30 days of ITD's receipt from the United States of a demand for payment of the penalties, unless ITD invokes the procedures under Section VII (Dispute Resolution). ITD shall forward the amount due by Electronic Funds Transfer ("EFT") to the United States Department of Justice lockbox bank referencing DOJ case number 90-5-1-1-08052 and the United States

Attorney General's Office file number 2004CV00095 in accordance with instructions provided by the United States upon entry of this Decree. Any EFTs received at the United States Department of Justice lockbox bank after 11:00 a.m. (Eastern Time) will be credited on the next Business Day. After payment, ITD shall mail a cover letter specifying the amount and date of payment, civil docket number and reason for payment, to the United States in accordance with Paragraph 32 (Notification).

b. ITD may request, in writing, that the United States waive stipulated penalties which have accrued pursuant to Paragraph 44. The United States may, in its sole discretion, waive such claims. In considering that request, the United States shall consider, inter alia, ITD's status as public agency of the State of Idaho.

46. Accrual of Stipulated Penalties. Stipulated penalties shall begin to accrue on the day after performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Decree. Stipulated penalties shall accrue regardless of whether the United States has notified ITD of a violation.

47. No Effect on Obligation to Comply. The payment of penalties shall not alter in any way ITD's obligation to comply with the requirements of this Decree.

48. Effect of Dispute Resolution. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, ITD shall pay accrued penalties determined to be owing to the United

States within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, ITD shall pay all accrued penalties determined by the Court to be owed within 30 days of receipt of the Court's decision or order, except as provided in subparagraph (c) of this Paragraph;

c. If the Court's decision is appealed by any party, ITD shall pay all accrued penalties determined by the District Court to be owing into an interest-bearing escrow account within 30 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 30 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States or to ITD to the extent that they prevail.

49. Interest on Late Payment. If ITD fails to pay stipulated penalties when due, ITD shall pay interest accrued at the rate established by the Secretary of the Treasury under 31 U.S.C. § 3717 beginning upon the day the stipulated penalties were due.

50. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' exclusive remedy for violations of this Decree. The United States expressly reserves the right to seek any other relief it deems appropriate, including but not limited to, action for statutory penalties, contempt, or injunctive relief against ITD. However, the amount of any statutory penalty assessed for a violation of this Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Decree for the same violation.

VII. DISPUTE RESOLUTION

51. Exclusive Remedy. Unless otherwise expressly provided for in this Decree, the Dispute Resolution procedures of this Section shall be the exclusive mechanism to resolve

disputes arising under this Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of ITD that have not been disputed in accordance with this Section.

52. Informal Dispute Resolution. Any dispute subject to dispute resolution under this Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen on the day ITD hand delivers the United States a written Notice of Dispute or on the day following delivery by overnight courier, or three days following delivery by U.S. Mail. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 60 days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 45 days after the conclusion of the informal negotiation period, ITD invokes formal dispute resolution procedures set forth in Paragraph 53 (Formal Dispute Resolution).

53. Formal Dispute Resolution.

a. Within 45 days after the conclusion of the informal negotiation period, ITD may invoke formal dispute resolution procedures by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not be limited to, any factual data, analysis, or opinion supporting ITD's position and any supporting documentation relied upon by ITD.

b. The United States shall serve its Statement of Position within 45 days of receipt of ITD's Statement of Position. The United States' Statement of Position shall include, but may not be limited to, any factual data, analysis, or opinion supporting that position and all supporting

document relied upon by the United States. The United States' Statement of Position shall be binding on ITD unless ITD files a motion for judicial review of the dispute in accordance with Paragraph 53 (Petitions to the Court).

54. Petitions to the Court. In the event that the parties cannot resolve a dispute by negotiations as set forth above, the following procedures shall control:

a. ITD may seek judicial review of the dispute by filing with the Court and serving on the United States a motion requesting judicial resolution of the dispute. The motion shall be filed within 45 days of receipt of the United States' Statement of Position set forth in Paragraph 53(b) (Formal Dispute Resolution). The motion shall contain a written statement of ITD's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of this Decree.

b. The United States shall respond to ITD's motion within 45 days of receipt of the motion, unless the parties stipulate otherwise.

c. ITD may file a reply memorandum within 30 days of receipt of the United States' response.

d. In any dispute under this Paragraph, ITD shall bear the burden of demonstrating that its position complies with this Decree and the Clean Water Act and that ITD is entitled to relief under applicable law. The United States reserves the right to argue that its position is reviewable only on the administrative record and shall be upheld unless arbitrary and capricious or otherwise not in accordance with law. For purposes of this Decree, the administrative record shall comprise the Statements of Position exchanged by the Parties pursuant to Paragraph 53

(Formal Dispute Resolution), including any documents attached to or incorporated by reference in those Statements. ITD reserves the right to argue that its position is based on a reasonable interpretation of a statute, regulation, or permit, or a reasonable interpretation of this Decree and that the United States' litigation position is not entitled to any deference.

55. Effect on Other Obligations. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of ITD under this Decree not directly in dispute, unless the United States agrees in writing or the Court orders otherwise.

56. Computation of Time. The computation of any period of time set forth in this Section VII shall be governed by Rule 6 of the Federal Rules of Civil Procedure.

VIII. FORCE MAJEURE

57. Definition of Force Majeure. A "force majeure event" is any event beyond the control of Defendant, its contractors, or any entity controlled by Defendant that delays the performance of any obligation under this Decree despite Defendant's best efforts to fulfill the obligation. "Best efforts" includes anticipating any potential force majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Decree. Failure to apply for a required permit or approval or to provide in a timely manner all information required to obtain a permit or approval that is necessary to meet the requirements of this Decree, or failure of ITD to approve contracts shall not, in any event, be considered Force Majeure events.

58. Required Notification for Force Majeure. ITD shall notify the United States

orally and by electronic or facsimile transmission as soon as possible, but not later than 72 hours after the time ITD first knew of, or in the exercise of reasonable diligence under the circumstances should have known of, any event which might constitute a Force Majeure event. ITD shall make the oral notification required by this Paragraph by calling Mark Pollins at 202-564-4001 and sending him a message by electronic mail at pollins.mark@epa.gov. If Mr. Pollins is not available by telephone, ITD may satisfy the telephone notice requirement by leaving a message for Mr. Pollins stating that ITD had called to notify him pursuant to this Paragraph. The United States may designate an alternative representative to receive oral notification at its discretion by sending ITD a written designation in accordance with Paragraph 32 (Notification). The written notice ITD submits pursuant to this Paragraph shall indicate whether ITD claims that the delay should be excused due to a Force Majeure event. The notice shall describe in detail the basis for ITD's contention that it experienced a Force Majeure delay, the anticipated length of the delay, the precise cause or causes of the delay, the measures taken or to be taken to prevent or minimize the delay, and the timetable by which those measures will be implemented. ITD shall adopt all reasonable measures to avoid or minimize such delay. Failure to so notify the United States shall render this Section VIII (Force Majeure) void and of no effect as to the event in question, and shall be a waiver of ITD right to obtain an extension of time for its obligations based on such event.

59. Procedures for Extension. If the United States finds that a delay in performance is, or was, caused by a Force Majeure event, the United States shall extend the time for performance, in writing, for a period to compensate for the delay resulting from such event, and stipulated penalties shall not be due for such a period. In proceedings on any dispute regarding a

delay in performance, the dispute resolution provisions of Section VII (Dispute Resolution) shall apply, and ITD shall have the burden of proving that the delay is, or was, caused by a Force Majeure event and that the amount of additional time requested is necessary to compensate for that event.

60. Effect on Other Obligations. Compliance with a requirement of this Decree shall not by itself constitute compliance with any other requirement. An extension of one compliance date based on a particular event shall not automatically extend any other compliance date. ITD shall make an individual showing of proof regarding the cause of each delayed incremental step or other requirement for which an extension is sought.

SO ORDERED THIS _____ DAY OF , 2006

_____
HON. EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of the Decree in United States v. Idaho Transportation Department subject to the public notice requirements of 28 C.F.R. §50.7.

FOR THE UNITED STATES OF AMERICA:

Date: 4/27/06

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, DC 20530

Date: 5/1/06

DAVID L. DAIN
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Date: 5/1/06

DEBORAH A. FERGUSON
Assistant U.S. Attorney
District of Idaho
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(208) 334-1211

Date: 4/28/06

WALKER B. SMITH
Director, Office of Civil Enforcement
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Date: 4/19/06

ANDREW R. STEWART
Attorney-Advisor
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
(202) 564-1463

Date: 4/19/06

MARK RYAN
Assistant Regional Counsel
U.S. Environmental Protection Agency
1435 N. Orchard Street
Boise, Idaho 83716
Telephone: (208) 378-5768

WE HEREBY CONSENT to the entry of the Decree in United States v. Idaho Transportation Department subject to the public notice requirements of 28 C.F.R. §50.7.

FOR IDAHO TRANSPORTATION DEPARTMENT:

Date: 04/03/2006

David S. Ekern
Director

Appendix A - Resident Engineer Training

Minimum of 8 hours (classroom). This training module shall contain information on the following:

- History of Clean Water Act and past violations;
- Role of ITD, DEQ, EPA, and Contractor in storm water management for projects in Idaho;
- How construction sites can potentially negatively affect water quality;
- Basic principles of erosion, sediment control, and non-storm water/waste management control;
- ITD Storm Water related Standard Plans and Specifications and BMP Manual;
- Selection and implementation of erosion control, sediment control, and non-storm water management/waste; management control BMPs;
- How to review and approve a SWPPP based on ITD and EPA requirements and guidance manuals; and
- BMP inspection and maintenance program.

Each training session shall include a written examination intended to ensure the participants knowledge of the subjects covered.

Each participant who attends the entire session and receives a passing grade on the written examination shall be issued a certification. That certification shall include the participants name, the date and location of the training and the name of the instructor(s). ITD shall maintain copies of all such certifications.

Appendix B - Environmental Inspector Training (To include Resident Engineers if Resident Engineer is also primary Environmental Inspector)

Minimum of 8 hours (classroom). This training module shall contain information on the following:

- History of Clean Water Act and past violations;
- Role of ITD, DEQ, EPA, and Contractor in storm water management for projects in Idaho;
- How construction sites can potentially negatively affect water quality;
- Basic principles of erosion, sediment control, and non-storm water/waste management control;
- ITD Storm Water related Standard Plans and Specifications and BMP Manual;
- Selection and implementation of erosion control, sediment control, and non-storm water management/waste; management control BMPs;
- Basic SWPPP requirements based on ITD and EPA documents and guidance manuals; and
- How to inspect a construction site to ensure BMPs are properly installed and maintained.

Each training session shall include a written examination intended to ensure the participants knowledge of the subjects covered.

Each participant who attends the entire session and receives a passing grade on the written examination shall be issued a certification. That certification shall include the participants name, the date and location of the training and the name of the instructor(s). ITD shall maintain copies of all such certifications.

Appendix C - Contractor Training

– Minimum of 16 hours of training (classroom and field).This training module shall contain information on the following:

- History of Clean Water Act and past violations;
- Role of ITD, DEQ, EPA, and Contractor in storm water management for projects in Idaho;
- How construction sites can potentially negatively affect water quality;
- Basic principles of erosion, sediment control, and non-storm water/waste management control;
- ITD Storm Water related Standard Plans and Specifications and BMP Manual;
- Selection and implementation of erosion control, sediment control, and non-storm water management/waste; management control BMPs;
- How to prepare a SWPPP for construction projects in Idaho;
- Inspection, maintenance, and repair program for storm water BMPs; and
- Field demonstration of BMP implementation and installation (minimum of 4 hours for field portion of class).

Each training session shall include a written examination intended to ensure the participants knowledge of the subjects covered.

Each participant who attends the entire session and receives a passing grade on the written examination shall be issued a certification. That certification shall include the participants name, the date and location of the training and the name of the instructor(s). The Responsible Contractor shall maintain copies of all such certifications.