

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION**

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	
WRIGHT BROTHERS CONSTRUCTION	:	
COMPANY; and GEORGIA DEPARTMENT	:	
OF TRANSPORTATION,	:	
	:	
Defendants.	:	
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**CONSENT DECREE**

WHEREAS, the Plaintiff, the United States of America (“United States”), at the request of the Administrator of the United States Environmental Protection Agency and the Secretary of the United States Department of the Army, acting through the United States Army Corps of Engineers, has filed a Complaint in this action concurrently with the lodging of this Consent Decree, alleging that Defendants, Wright Brothers Construction Company, Inc. (“Wright Bros.”) and Georgia Department of Transportation (“GDOT”), violated Clean Water Act (“CWA”) section 301(a), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendants violated CWA section 301(a) by discharging dredged or fill material into waters of the United States in Rabun County, Georgia, without authorization by the United States Army Corps of Engineers;

WHEREAS, the Complaint requests that the Court award injunctive relief and civil penalties;

WHEREAS, Defendants do not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint;

WHEREAS, Wright Bros. submitted evidence to the United States regarding current constraints on its cash flow; and

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the United States and Defendants, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, before the taking of any testimony upon the pleadings, without the adjudication or admission of any issue of fact or law except as provided in Section I of this Consent Decree, and upon consent of the Parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT

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 CWA sections 309(b) and 404(s), 33 U.S.C. §§ 1319(b) and 1344(s).

2. Venue lies in the Northern District of Georgia pursuant to CWA sections 309(b) and 404(s), 33 U.S.C. §§ 1319(b) and 1344(s), and 28 U.S.C. §§ 1391(b) and (c).

3. For purposes of this Consent Decree, and any action to enforce this Consent Decree, Defendants consent to the Court's jurisdiction over this Consent Decree, over any such action to enforce this Consent Decree, and over Defendants, and Defendants consent to venue in

this judicial district.

4. For purposes of this Consent Decree, and any action to enforce this Consent Decree, the Parties agree, and the Court finds, that the Complaint states claims upon which relief can be granted pursuant to CWA sections 301(a), 309(d), and 404(s) of the CWA, 33 U.S.C. §§ 1311(a), 1319(d), and 1344(s).

## II. APPLICABILITY

5. This Consent Decree applies to and is binding upon the United States, and upon Defendants and any successors, assigns, or other entities or persons otherwise bound by law whether or not such entity or person has notice of this Consent Decree.

6. Defendants shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, including any contractor or consultant retained to perform Work. Defendants shall condition any such contract upon performance of the Work in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Defendants shall not raise as a defense the failure by any of their officers, directors, employees, agents, contractors, or consultants to take any actions necessary to comply with this Consent Decree.

8. Defendants represent that, on or before their execution of this Consent Decree, they have obtained all interests or rights necessary to perform Work in Jones Branch and Acorn Creek; to monitor and maintain relevant portions of Jones Branch and Acorn Creek; to submit reports regarding the condition of Jones Branch and Acorn Creek; and to provide the United

States with a right of entry as set forth in Paragraph 33 of this Consent Decree. No subsequent transfer by Defendants of those interests or rights shall alter or relieve Defendants of their obligations in this Consent Decree to perform Work in Jones Branch and Acorn Creek; to monitor and maintain relevant portions of Jones Branch and Acorn Creek; to submit reports regarding the condition of Jones Branch and Acorn Creek; and to provide the United States with a right of entry as set forth in Paragraph 33 of this Consent Decree. At least thirty (30) Days prior to any transfer of those interests or rights, the transferring Defendant shall provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to the United States at the addresses specified in Section XI of this Consent Decree. As a condition of any such transfer, the transferring Defendant shall reserve all rights necessary to comply with this Consent Decree. In the event of such transfer, the transferring Defendant shall provide a true copy of this Consent Decree to the transferee(s) and shall simultaneously notify the United States at the addresses specified in Section XI of this Consent Decree that such notice has been given. Any transfer by Defendants of any of Defendants' interests or rights in the Persimmon Road Site, the Bradshaw/Sheehan Site, or any other site relevant to Work in Jones Branch and Acorn Creek without complying with this Paragraph constitutes a violation of this Consent Decree.

### III. DEFINITIONS

9. Terms used in this Consent Decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to them in the statute or such regulations, unless otherwise provided in this Consent Decree.

10. Whenever the terms set forth below are used in this Consent Decree, the definitions in the following subparagraphs shall apply.

a. “Acorn Creek” shall mean the body of water that is at and/or proximate to the Bradshaw/Sheehan Site and flows into the Tallulah River at Lake Burton; the approximate location of impacted portions of Acorn Creek is outlined in red on Appendix A to this Consent Decree.

b. “Bradshaw/Sheehan Site” shall mean real property generally located on the south side of U.S. Route 76 midway between the intersection of U.S. Route 76 and Persimmon Road (on the east) and the intersection of U.S. Route 76 and Acorn Creek Road (on the west) in Rabun County, Georgia, and outlined in yellow on Appendix A to this Consent Decree.

c. “CWA” shall mean the Clean Water Act, 33 U.S.C. §§ 1251-1387.

d. “Complaint” shall mean the Complaint filed by the United States in this action.

e. “Consent Decree” shall mean this Consent Decree; all Appendices attached hereto and listed in Section XX of this Consent Decree; all Deliverables approved by EPA in accordance with Section XIV of this Consent Decree; and all modifications made effective in accordance with Section XV of this Consent Decree.

f. “Corps” shall mean the United States Army Corps of Engineers and any of its successor departments or agencies.

g. “Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next

working day.

h. “Defendants” shall mean Wright Brothers Construction Company, Inc., and the Georgia Department of Transportation.

i. “Deliverable” shall mean any Work plan, monitoring and maintenance plan, monitoring and maintenance report, mitigation credit purchase proposal, or other document that is submitted to EPA for its review and approval pursuant to Section XIV of this Consent Decree.

j. “EPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies.

k. “Effective Date” shall mean the date on which this Consent Decree is entered by the Court.

l. “GDOT” shall mean the Georgia Department of Transportation and any of its successor departments or agencies.

m. “Jones Branch” shall mean the body of water that is at and/or proximate to the Persimmon Road Site and flows into the Tallulah River at Lake Burton; the approximate location of impacted portions of Jones Branch is outlined in red and labeled “Jones Branch Impact” on Appendix B to this Consent Decree.

n. “Loudermilk Site” shall mean real property generally located north of the intersection of U.S. Route 441 and Wolf Creek Road in Rabun County, Georgia, and outlined in yellow on Appendix C to this Consent Decree.

o. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral;

- p. “Parties” shall mean the United States and Defendants.
- q. “Persimmon Road Site” shall mean real property generally located north of the intersection of U.S. Route 76 and Persimmon Road in Rabun County, Georgia, and outlined in yellow on Appendix B to this Consent Decree.
- r. “Section” shall mean, except when citing a provision of the CWA or regulations, a portion of this Consent Decree identified by a Roman numeral.
- s. “Slaughter Pen Branch” shall mean the body of water that exists or existed at and/or proximate to the Turpen Site and flowed into the Tallulah River at Tallulah Falls Lake; the approximate location of impacted portions of Slaughter Pen Branch is outlined in red on Appendix D to this Consent Decree.
- t. “Stream 1” shall mean the body of water that exists or existed at and/or proximate to the Persimmon Road Site and flowed into Jones Branch; Stream 1’s approximate location is outlined in red and labeled “ST1” on Appendix B to this Consent Decree.
- u. “Stream 2” shall mean the body of water that exists or existed at and/or proximate to the Persimmon Road Site and flowed into Jones Branch; Stream 2’s approximate location is outlined in red and labeled “ST2” on Appendix B to this Consent Decree.
- v. “Stream 3” shall mean the body of water that exists or existed at and/or proximate to the Persimmon Road Site and flowed into Jones Branch; Stream 3’s approximate location is outlined in red and labeled “ST3” on Appendix B to this Consent Decree.
- w. “Stream 4o” shall mean the body of water that exists or existed at and/or proximate to the Loudermilk Road Site and flows into the Tallulah River, including Tallulah

Falls Lake, by way of Pole Bridge Creek and Tiger Creek; the approximate location of impacted portions of Stream 40 is outlined in red on Appendix C to this Consent Decree.

x. “Turpen Site” shall mean real property generally located east of the intersection of U.S. Route 441 and Rock Mountain Road in Rabun County, Georgia, and outlined in yellow on Appendix D to this Consent Decree.

y. “United States” shall mean the United States of America, acting on behalf of EPA and the Corps.

z. “Work” shall mean the on-the-ground activities that Defendants are required to perform, or otherwise agree to undertake, pursuant to Paragraphs 24 and 25 of this Consent Decree.

aa. “Wright Bros.” shall mean the Wright Brothers Construction Company, Inc., and any of its successors or assigns.

#### IV. GENERAL PROVISIONS

11. This Consent Decree resolves the civil claims of the United States for the violations of the CWA alleged in the Complaint, as well as any civil claims of the United States against non-Parties that arise from the same factual transaction as the claims alleged in the Complaint, through the date of the lodging of this Consent Decree. In addition, Defendants’ compliance with this Consent Decree resolves the United States’ civil claims for ongoing violations of the CWA alleged in the Complaint (as well as any civil claims against non-Parties that arise from the same factual transaction).



12. 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.

13. Defendants' obligations under this Consent Decree are joint and several.

14. The Parties acknowledge that, upon entry of this Consent Decree, Nationwide Permit 32, found at 72 Fed. Reg. 11,092, 11,127-28 (Mar. 12, 2007), and Savannah District 2007 Nationwide Regional Conditions, found at <http://www.sas.usace.army.mil/regulatory/documents/2007-NWP-Conditions.pdf> ("Regional Conditions"), will authorize, subject to the conditions provided in the Nationwide Permit, Regional Conditions, and this Consent Decree: (a) any dredged or fill material that, as of February 2006, was placed into Stream 1, Stream 2, Stream 3, and Jones Branch at and/or proximate to the Persimmon Road Site, as illustrated in Appendix B to this Consent Decree; (b) any dredged or fill material that, as of April 2006, was placed into Acorn Creek at and/or proximate to the Bradshaw/Sheehan Site, as illustrated in Appendix A to this Consent Decree; (c) any dredged or fill material that, as of March 2006, was placed into Slaughter Pen Branch at and/or proximate to the Turpen Site, as illustrated in Appendix D to this Consent Decree; and (d) any dredged or fill material that, as of April 2007, was placed into Stream 40 at and/or proximate to the Loudermilk Site, as illustrated in Appendix C to this Consent Decree. The Parties further acknowledge that Nationwide Permit 32 authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete Work in Jones Branch and Acorn Creek, with such authorization being subject to the conditions provided in Nationwide Permit 32, Regional Conditions, and this Consent Decree. In providing pre-construction notice ("PCN") as required by Regional Conditions, Defendant shall

provide PCN to the Corps and EPA at the addresses specified in Section XI of this Consent Decree.

15. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to any federal, state, or local laws or regulations. Except as provided in Paragraph 14, 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 EPA's ability to exercise its authority pursuant to CWA section 404(c), 33 U.S.C. § 1344(c).

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

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

18. The United States reserves any and all legal and equitable remedies available to enforce this Consent Decree and applicable law. The United States further reserves all legal and equitable remedies available to address any imminent and substantial endangerment to public health or welfare or the environment, whether related to the alleged violations addressed in this Consent Decree or otherwise. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the CWA or its implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in Paragraph 11 of this Consent Decree. In any subsequent proceeding initiated by the

United States, Defendants shall not assert, and may not maintain, any defense or claim based on the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim splitting, or other defenses based on any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims resolved by this Consent Decree as specified in Paragraph 11 of this Consent Decree.

19. Except as provided in Section I of this Consent Decree, nothing in this Consent Decree shall constitute an admission of fact or law by any party.

## V. SPECIFIC PROVISIONS

### CIVIL PENALTY

20. Payment of a Civil Penalty:

a. Defendants shall pay a civil penalty to the United States in the amount of one million five hundred thousand dollars (\$1,500,000). Defendants shall pay one million one hundred thousand dollars (\$1,100,000) of that amount within thirty (30) Days of the Effective Date of this Consent Decree. Defendants shall pay the remaining four hundred thousand dollars (\$400,000) of that amount within three hundred sixty five (365) Days of the Effective Date of this Consent Decree.

b. To the extent that the civil penalty is not paid in full within thirty (30) Days of the Effective Date of this Consent Decree, Defendants shall be liable for interest on the unpaid portion of the civil penalty, as provided for in 28 U.S.C. § 1961, accruing as of the thirty-first (31<sup>st</sup>) Day following the Effective Date of this Consent Decree. The interest shall be computed daily from the thirty-first (31<sup>st</sup>) Day following the Effective Date of this Consent Decree until the

date full payment is made. The interest shall also be compounded annually.

21. Payment to the United States shall be made in accordance with the written instructions to be provided to Defendants by the United States Department of Justice. Upon payment, Defendants shall provide written notice to the United States at the addresses specified in Section XI of this Consent Decree.

22. Defendants shall not deduct any penalties paid under this Consent Decree pursuant to this Section or Section X in calculating any federal income tax owed.

#### INJUNCTIVE RELIEF

23. Prohibitory Injunction: Except as in accordance with this Consent Decree, Defendants are enjoined from discharging any pollutant into the Tallulah River, any segment of the Tallulah River, or any body of water that contributes its flow to the Tallulah River or any segment of the Tallulah River, unless such discharge complies with the provisions of the CWA and its implementing regulations. The prohibitory injunction set forth in this Paragraph shall expire six (6) years after the Effective Date of this Consent Decree.

24. Work in Jones Branch: Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall remove the entire pipe from, and restore the bed and bank of, Jones Branch at the Persimmon Road Site in accordance with Appendix E to this Consent Decree. Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall implement the Work plan by the deadline set forth in Appendix E. Upon completion of Work in Jones Branch, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall provide written notice to the United States at the addresses specified in

Section XI of this Consent Decree.

25. Work in Acorn Creek: Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall remove approximately thirty (30) linear feet of pipe from, and restore the bed and bank of, Acorn Creek at the Bradshaw/Sheehan Site in accordance with Appendix E to this Consent Decree. Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall implement the Work plan by the deadline set forth in Appendix E. Upon completion of Work in Acorn Creek, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall provide written notice to the United States at the addresses specified in Section XI of this Consent Decree.

26. Monitoring and Maintenance: Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall monitor and maintain relevant portions of Jones Branch and Acorn Creek in accordance with Appendix E to this Consent Decree. Following completion of Work at each location, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall monitor and maintain for a period of five years at that location unless the success criteria set forth in Appendix E are met for three consecutive years (and EPA determines that such criteria have been met), in which case the monitoring and maintenance obligations terminate at that location. Upon completion of monitoring and maintenance, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall provide written notice to the United States at the addresses specified in Section XI of this Consent Decree.

27. Purchase of Mitigation Credits:

a. Within thirty (30) Days of the Effective Date of this Consent Decree, Defendants shall submit to EPA for review and approval pursuant to Section XIV of this Consent Decree the name of an approved mitigation bank or banks in the primary service area from which Defendants propose to purchase seven thousand (7,000) mitigation credits in accordance with the next sentence in this Paragraph (Paragraph 27a). Within ten (10) days of EPA's approval of Defendants' proposal, or within an extended period of time agreed to by EPA in writing, Defendants shall purchase 7,000 mitigation credits from the primary service area.

b. Not later than May 17, 2012, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall submit to EPA for review and approval pursuant to Section XIV of this Consent Decree the name of an approved mitigation bank or banks in the primary service area from which it proposes to purchase an additional five thousand (5,000) mitigation credits in accordance with the next sentence in this Paragraph (Paragraph 27b). Within ten (10) days of EPA's approval of the proposal, or within an extended period of time agreed to by EPA in writing, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall purchase an additional 5,000 mitigation credits from the primary service area.

c. Not later than November 17, 2012, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall submit to EPA for review and approval pursuant to Section XIV of this Consent Decree the name of an approved mitigation bank or banks in the primary service area from which it proposes to purchase an additional four thousand nine

hundred twenty (4,920) mitigation credits in accordance with the next sentence in this Paragraph (Paragraph 27c). Within ten (10) days of EPA's approval of the proposal, or within an extended period of time agreed to by EPA in writing, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall purchase an additional 4,920 mitigation credits from the primary service area.

d. After each purchase of mitigation credits – i.e., after the initial purchase(s) of 7,000 mitigation credits; the second purchase(s) of 5,000 mitigation credits; and the remaining purchase(s) of 4,920 mitigation credits (for a grand cumulative total of 16,920 mitigation credits) – Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall promptly provide a copy of the purchase receipt to the United States at the addresses specified in Section XI of this Consent Decree.

## VI. REPORTS

28. Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall submit a total of seven monitoring and maintenance reports to EPA for its review under Section XIV of this Consent Decree. Each report shall address monitoring and maintenance efforts; problems encountered or anticipated, together with implemented or proposed solutions; and such other information as required by Appendix E to this Consent Decree. Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall submit their first report to EPA six months after completing Work in Jones Branch and Acorn Creek (whichever is earlier). Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall submit additional monitoring and maintenance reports to EPA

as follows: six months after the first report; one year after the first report; one year and six months after the first report; two years and six months after the first report; three years and six months after the first report; and four years and six months after the first report.

29. Each monitoring and maintenance report submitted pursuant to this Section of the Consent Decree shall be signed by an individual who constitutes a “responsible corporate officer” or “duly authorized representative” within the meaning of 40 C.F.R. § 122.22(a)(1)-(3), (b), and it shall include the following certification:

“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 upon personal knowledge or my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete.”

30. The reporting requirements of this Consent Decree do not relieve Defendants of any reporting obligations required by the CWA or its implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

31. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

## VII. RETENTION OF RECORDS AND RIGHT OF ENTRY

32. Until three (3) years after the termination of this Consent Decree pursuant to Section XVI, Defendants shall retain, and shall instruct their contractors, consultants, and other agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in their or their



contractors' or other agents' possession or control, or that come into their contractors' or other agents' possession or control, and that relate in any manner to Defendants' performance of their obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Defendants shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

33. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into the Persimmon Road Site, the Bradshaw/Sheehan Site, or any other site relevant to Work in Jones Branch and Acorn Creek upon presentation of credentials, to assess Defendants' compliance with this Consent Decree and to inspect and review any records required to be kept under this Consent Decree and/or the CWA. Specifically, the United States may:

- a. monitor Work required by this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by Defendants, including their representatives, contractors, or consultants; and
- d. obtain evidence, including documents, photographs, GPS, flow measurement, and other similar data.

e. Upon request, the United States shall, within a reasonable time, produce and permit Defendants to inspect, copy, test, or sample any non-privileged documents, photographs, measurements, or other data collected as a result of such visit.

34. This Consent Decree in no way limits or affects any other rights of entry and inspection, or any rights to obtain information, held by the United States, including EPA, pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendants to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

#### VIII. DISPUTE RESOLUTION

35. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section (“Dispute Resolution”) shall be the exclusive mechanism for Defendants to resolve all of their disputes arising under or with respect to this Consent Decree. Defendants’ failure to seek resolution of a dispute under this Section shall preclude Defendants from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendants arising under or with respect to this Consent Decree.

36. Any dispute Defendants have that is subject to Dispute Resolution shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendants send the United States a written Notice of Dispute, pursuant to Section XI. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed twenty one (21) Days from the date the dispute arises, unless that period is modified in writing by the United States. If the Parties cannot resolve a dispute by informal

negotiations, then the position advanced by the United States shall be considered binding unless, within thirty (30) Days after the conclusion of the informal negotiation period, Defendants file with the Court a motion for judicial resolution of the dispute.

37. In any dispute submitted to the Court for resolution pursuant to this Section, Defendants shall have the burden of proving by a preponderance of evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that Defendants' position will achieve compliance with the terms of this Consent Decree and the CWA.

38. The invocation of Dispute Resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent Decree. Stipulated penalties and interest, if applicable to the disputed matter, shall continue to accrue from the first Day of violation, but payment shall be stayed pending resolution of the dispute as provided in Section X. If Defendants do not prevail on the disputed issue, stipulated penalties, and interest, if applicable, shall be assessed and paid as provided in Section X.

#### IX. FORCE MAJEURE

39. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendants, of any person or entity controlled by Defendants, or of Defendants' contractors or consultants, that delays or prevents the performance of any obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation. The requirement that Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to

address 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 extent possible. “Force majeure” does not include financial inability to perform any obligation under this Consent Decree.

40. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendants shall provide notice to the United States, as specified in Section XI, within 72 hours of when Defendants first knew or should have known that the event might cause a delay. Within three (3) Days after the initial notice, Defendants shall provide in writing to the United States, in accordance with Section XI, an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendants’ rationale for attributing such delay to a force majeure event if they intend to assert such a defense; and a statement as to whether, in the opinion of Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The United States may, in its unreviewable discretion, extend the time within which notice must be given. No such extension shall be effective unless it is in writing. Defendants shall include with any written notice required by this Section all available documentation supporting the claim that the delay was attributable to a force majeure event, and such notice shall be signed and certified as set forth in Paragraph 29 of this Consent Decree. Failure to comply with the requirements of this Section shall preclude Defendants from asserting any defense of force majeure for that event, and for any additional delay caused by such failure.

Defendants shall be deemed to know of any circumstance of which Defendants, any person or entity controlled by Defendants, including Defendants' contractors and consultants, knew or should have known.

41. If the United States agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event may be extended by the United States for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation.

42. If the United States does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, or does not agree to the extension of time sought by Defendants, then the United States' position shall be binding, unless Defendants invoke Dispute Resolution under Section VIII of this Consent Decree.

43. If Defendants invoke Dispute Resolution under Section VIII of this Consent Decree, Defendants shall have the burden of demonstrating that the delay or anticipated delay has been or will be caused by a force majeure event; the number of Days of delay or anticipated delay that was or will be caused by such force majeure event; that the duration of the delay or the extension sought was or will be warranted under the circumstances; that Defendants could not have foreseen and prevented such delay; that Defendants, including their contractors and consultants, exercised best efforts to prevent, avoid, minimize and mitigate the delay and its effects; and that Defendants complied with the requirements of this Section.

## X. STIPULATED PENALTIES

44. Defendants shall be liable for stipulated penalties to the United States for violations of this Consent Decree in accordance with this Section, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Consent Decree, including the terms of any Deliverable or modification approved under this Consent Decree, within the specified time schedules established by or approved under this Consent Decree.

45. Stipulated penalties shall accrue for violations of this Consent Decree as follows:

a. Failure to pay civil penalty or purchase mitigation credits: If Defendants fail to pay the civil penalty when due, Defendants shall pay a stipulated penalty of three thousand dollars (\$3,000) per Day for each Day that the payment is late. If Defendants fail to purchase 7,000 mitigation credits when due pursuant to Paragraph 27a of this Consent Decree, Defendants shall pay a stipulated penalty of three thousand dollars (\$3,000) per Day for each Day that the payment is late. If Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) fails to purchase mitigation credits when due pursuant to Paragraphs 27b and 27c of this Consent Decree, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall pay a stipulated penalty of three thousand dollars (\$3,000) per Day for each Day that the payment is late.

b. Failure to perform Work: If Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) fails to complete any of the Work required by Paragraphs 24 and 25 of this Consent Decree, Wright Bros. (and/or GDOT, in accordance with Section XXI

of this Consent Decree) shall pay stipulated penalties as follows:

- i. For Day 1 up to and including Day 14 of violation: one thousand five hundred dollars (\$1,500) per Day;
- ii. For Day 15 up to and including Day 30 of violation: three thousand dollars (\$3,000) per Day; and
- iii. For Day 31 and beyond of violation: four thousand five hundred dollars (\$4,500) per Day.

c. Failure to monitor and maintain: If Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) fails to monitor and maintain as required by Paragraph 26 of this Consent Decree, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall pay stipulated penalties as follows:

- i. For Day 1 up to and including Day 14 of violation: seven hundred fifty dollars (\$750) per Day;
- ii. For Day 15 up to and including Day 30 of violation: one thousand five hundred dollars (\$1,500) per Day; and
- iii. For Day 31 and beyond of violation: two thousand five hundred dollars (\$2,500) per Day.

d. Failure to submit Deliverables: If Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) fails to timely submit any Deliverable, Wright Bros. (and/or GDOT, in accordance with Section XXI of this Consent Decree) shall pay stipulated penalties as follows:

- i. For Day 1 up to and including Day 14 of violation: five hundred dollars (\$500) per Day;
- ii. For Day 15 up to and including Day 30 of violation: one thousand dollars (\$1,000) per Day; and
- iii. For Day 31 and beyond of violation: two thousand dollars (\$2,000) per Day.

46. Stipulated penalties under this Section shall begin to accrue on the Day a violation occurs and shall continue to accrue until the violation ceases, except: 1) to the extent that a force majeure event occurs under Section IX; 2) to the extent that Work has been delayed due to a failure to obtain any necessary permits or approvals notwithstanding timely submission and completion of all necessary applications by Defendants; or 3) during the period of time EPA reviews a proposal submitted by GDOT pursuant to Paragraph 74 of this Consent Decree. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

47. Except as provided in Paragraphs 48 and 49 below, Defendants shall pay any stipulated penalty within thirty (30) Days of receiving the United States' written demand. Defendants shall make any such payment in accordance with written instructions to be provided by the United States. Upon any such payment, Defendants shall provide written notice, at the addresses specified in Section XI of this Consent Decree.

48. Prior to issuing a written demand under Paragraph 47 of this Consent Decree, the United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties that have accrued under this Consent Decree.



49. Any disputes concerning the amount of stipulated penalties or the underlying violation that gives rise to the assessment of stipulated penalties are subject to the Dispute Resolution provisions of Section VIII. Stipulated penalties and any applicable interest shall continue to accrue as provided in Paragraph 46, but need not be paid until the following:

a. If the dispute is resolved by agreement between the Parties, Defendants shall pay the amount due under such agreement, together with any applicable interest, to the United States within thirty (30) Days of the effective date of the agreement.

b. If the dispute is taken to the Court, Defendants shall pay all accrued penalties determined by the Court to be owing, together with any applicable interest, within thirty (30) Days of receiving the Court's decision, except as provided in subparagraph c, below.

c. If any party appeals the Court's decision to the Court of Appeals (or beyond), Defendants shall pay all accrued penalties determined to be owing, together with any applicable interest, within fifteen (15) Days of receiving the final appellate decision.

50. If Defendants fail to pay stipulated penalties in accordance with this Consent Decree, Defendants shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. 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. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendants' failure to pay any stipulated penalties.

51. The stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Defendants' violation of this Consent Decree or applicable law.

#### XI. ADDRESSES

52. 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:

i. TO THE DEPARTMENT OF JUSTICE:

Andrew J. Doyle, Attorney  
Martha C. Mann, Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-4427; (202) 514-2664 (p)  
(202) 514-8865 (f)  
andrew.doyle@usdoj.gov  
martha.mann@usdoj.gov

ii. TO EPA:

Margaret Kroening  
Associate Regional Counsel  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street SW  
Mail Code 9T25  
Atlanta, GA 30303-8960  
(404) 562-9579 (p)  
(404) 562-8078 (f)  
kroening.margaret@epa.gov

Joel Strange  
Life Scientist  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street SW  
15th Floor  
Atlanta, GA 30303-8960  
(404) 562-9455 (p)  
(404) 562-9772 (f)  
strange.joel@epa.gov

iii. TO THE CORPS:

Melanie L. Casner  
Assistant District Counsel  
U.S. Army Corps of Engineers  
Savannah District  
100 West Oglethorpe Avenue  
Savannah, Georgia 31401-3640  
(912) 652-5952 (p)  
(912) 652-5126 (f)  
Melanie.Casner@usace.army.mil

b. TO WRIGHT BROS.:

i. Stephen Wright  
P.O. Box 437  
Charleston, TN 37310-0437  
(423) 336-2261 (p)  
(423) 336-2079 (f)

c. TO GDOT:

i. General Counsel  
Georgia Department of Transportation  
600 West Peachtree Street NW  
Atlanta, GA 30308

ii. Commissioner  
Georgia Department of Transportation  
600 West Peachtree Street NW  
Atlanta, GA 30308

53. Any party may, by written notice to the other party, change its designated notice recipient or notice address provided above.

54. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

## XII. COSTS OF SUIT

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

## XIII. PUBLIC COMMENT

56. 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 or considerations which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified Defendants in writing that it no longer supports entry of the Consent Decree. Defendants consent to entry of this Consent Decree in its present form without further notice.

#### XIV. APPROVAL OF DELIVERABLES

57. After Defendants submit any Deliverable, EPA shall in writing: (a) approve the Deliverable; (b) approve the Deliverable upon specified conditions; (c) approve part of the Deliverable and disapprove the remainder; or (d) disapprove the Deliverable.

58. If the Deliverable is approved pursuant to Paragraph 57(a) above, Defendants shall take all actions required by the Deliverable, in accordance with the schedules and requirements of the Deliverable, as approved. If the Deliverable is conditionally approved or approved only in part, pursuant to Paragraph 57(b) or (c), Defendants shall, upon written direction from EPA, take all actions required by the approved Deliverable that EPA determines are technically severable from any disapproved portions, subject to Defendants' right to dispute only the specified conditions or the disapproved portions, under Section VIII of this Consent Decree (Dispute Resolution).

59. If the Deliverable is disapproved in whole or in part pursuant to Paragraph 57(c) or (d), Defendants shall, within twenty (20) Days, or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the Deliverable, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs in this Section of the Consent Decree. If the resubmitted Deliverable is approved in whole or in part, Defendants shall proceed in accordance with Paragraph 58 above. If the resubmitted Deliverable is disapproved in whole or in part, EPA may again require Defendants to correct any deficiencies in accordance with the preceding Paragraphs in this Section of the Consent Decree, or EPA may itself correct any deficiencies, subject to Defendants' right to invoke Dispute Resolution under Section VIII of this

Consent Decree and the right of EPA to seek stipulated penalties under Section X of this Consent Decree. Any EPA-corrected Deliverable shall be incorporated into and become enforceable under this Consent Decree and shall be implemented by Defendants according to the terms of such Deliverable, subject to Defendants' right to invoke Dispute Resolution under Section VIII of this Consent Decree.

#### XV. MODIFICATION

60. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Consent Decree, it shall be effective only upon approval by the Court.

#### XVI. TERMINATION

61. After Defendants have completed the requirements of Section V of this Consent Decree and have paid any accrued stipulated penalties not waived or reduced by the United States pursuant to Paragraph 48 of this Consent Decree, Defendants may submit to the United States, at the addresses specified in Section XI of this Consent Decree, a Request for Termination, stating that Defendants have satisfied those requirements, together with supporting documentation.

62. Following receipt by the United States of Defendants' Request for Termination, the Parties may confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Consent Decree may be terminated, the United States shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree.

63. If the United States does not agree that the Consent Decree may be terminated, Defendants may invoke Dispute Resolution under Section VIII of this Consent Decree. However, Defendants shall not seek Dispute Resolution of any dispute regarding termination, under Section VIII of this Consent Decree, until ninety (90) Days after service of its Request for Termination.

64. Termination of this Consent Decree does not extinguish the prohibitory injunction set forth in Paragraph 23 of this Consent Decree.

65. Termination of this Consent Decree does not discharge Defendants of their obligations set forth in Section VII of this Consent Decree.

#### XVII. SIGNATORIES/SERVICE

66. Each undersigned representative of Wright Bros., GDOT, and the United States Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

67. This Consent Decree may be signed in counterparts, such counterpart signature pages shall be given full force and effect, and its validity shall not be challenged on that basis. Defendants agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

### XVIII. INTEGRATION

68. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree and supersedes any prior agreements and understandings, whether verbal or written, concerning the settlement embodied herein. Other than Appendices, Deliverables approved by EPA in accordance with Section XIV of this Consent Decree, and modifications made effective in accordance with Section XV of this Consent Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

### XIX. FINAL JUDGMENT AND RETENTION OF JURISDICTION

69. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendants.

70. This Court retains jurisdiction over this action until termination of this Consent Decree, for the purpose of resolving disputes arising under this Consent Decree, or entering orders modifying this Consent Decree, or effectuating or enforcing compliance with the terms of this Consent Decree.

### XX. APPENDICES

71. The following Appendices are attached to and part of this Consent Decree:

Appendix A: Bradshaw/Sheehan Site

Appendix B: Persimmon Road Site

Appendix C: Loudermilk Site



Appendix D: Turpen Site

Appendix E: Work and Monitoring and Maintenance Plan for Jones Branch and  
Acorn Creek

XXI. ADDITIONAL PROVISIONS REGARDING GDOT

72. As between Wright Bros. and GDOT, Wright Bros. shall be responsible in the first instance for completing the Work required by Paragraphs 24 and 25 of this Consent Decree; for monitoring and maintaining as required by Paragraph 26 of this Consent Decree; and for submitting reports as required by Section VI of this Consent Decree. In the event that the United States determines that Wright Bros. has failed to meet any of the foregoing requirements and the United States notifies the Parties about its determination, GDOT shall correct any and all deficiencies in accordance with a plan submitted by GDOT and approved by EPA in accordance with Section XIV of this Consent Decree. GDOT shall submit the plan referenced in the foregoing sentence to EPA within fifteen (15) days of the United States' notice or within an extended period of time agreed to by EPA in writing.

73. As between Wright Bros. and GDOT, Wright Bros. shall be responsible in the first instance for paying any stipulated penalties under Section X of this Consent Decree due to violations of the Work obligations of Paragraphs 24 and 25 of this Consent Decree; the monitoring and maintenance obligations of Paragraph 26 of this Consent Decree; and the reporting obligations of Section VI of this Consent Decree. In the event that the United States determines that Wright Bros. has failed to pay any amount of stipulated penalties when due, GDOT shall be liable for and shall pay those stipulated penalties in accordance with the United

States' written demand.

74. As between Wright Bros. and GDOT, Wright Bros. shall be responsible in the first instance for meeting the requirements of Paragraphs 27b and 27c of this Consent Decree concerning the purchase of 9,920 mitigation credits. In the event that the United States determines that Wright Bros. has failed to meet any of the requirements set forth in Paragraphs 27b and 27c and notifies the Parties about its determination, GDOT shall, within fifteen (15) days of the United States' notice, submit to EPA for review and approval pursuant to Section XIV of this Consent Decree the name of an approved mitigation bank or banks in the primary service area from which GDOT proposes to purchase the mitigation credits that Wright Bros. failed to purchase. Within ten (10) days of EPA's approval of the proposal, or within an extended period of time agreed to by EPA in writing, GDOT shall purchase mitigation credits in accordance with the EPA-approved proposal.

75. As between Wright Bros. and GDOT, Wright Bros. shall be responsible in the first instance for paying any stipulated penalties under Section X of this Consent Decree due to violations of the mitigation credit requirements of Paragraphs 27b and 27c of this Consent Decree. In the event that the United States determines that Wright Bros. has failed to pay any amount of stipulated penalties when due, GDOT shall be liable for and shall pay those stipulated penalties in accordance with the United States' written demand.

IT IS SO ORDERED

Dated, entered, and made effective this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_.

---

United States District Judge

FOR PLAINTIFF UNITED STATES OF AMERICA:

SALLY QUILLIAN YATES

United States Attorney

SHARON STOKES

Georgia Bar. No. 227475

Assistant United States Attorney

75 Spring Street SW, Suite 600

Atlanta, GA 30303-3309

Tel: (404) 581-6301

sharon.stokes@usdoj.gov

IGNACIA S. MORENO

Assistant Attorney General

Environment and Natural Resources Division

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

---

ANDREW J. DOYLE, Attorney  
MARTHA C. MANN, Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-4427 (p) (Doyle)  
(202) 514-2664 (p) (Mann)  
(202) 514-8865 (f)  
andrew.doyle@usdoj.gov  
martha.mann@usdoj.gov

FOR EPA:

---

MARY J. WILKES  
Regional Counsel and Director  
Office of Environmental Accountability  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, SW  
Atlanta, GA 30303

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

OF COUNSEL:

MARGARET KROENING  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street SW  
Mail Code 9T25  
Atlanta, GA 30303-8960  
(404) 562-9579 (p)  
(404) 562-8078 (f)  
kroening.margaret@epa.gov

FOR EPA (cont'd):

---

CYNTHIA GILES  
Assistant Administrator  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

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

---

ADAM M. KUSHNER  
Director, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

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

---

MARK POLLINS  
Director, Water Enforcement Division  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

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

---

MELISSA KATZ  
Attorney Advisor  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

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

FOR DEFENDANT WRIGHT BROTHERS CONSTRUCTION COMPANY, INC.:

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

\_\_\_\_\_  
STEPHEN D. WRIGHT  
Vice President  
Wright Brothers Construction Company, Inc.  
P.O. Box 437  
Charleston, TN 37310-0437  
(423) 336-2261 (p)  
(423) 336-2079 (f)

COUNSEL FOR DEFENDANT WRIGHT BROTHERS CONSTRUCTION  
COMPANY, INC.:

---

W. HENRY PARKMAN  
Sutherland Ashbill & Brennan, LLP  
999 Peachtree Street, NE  
Suite 2300  
Atlanta, GA 30309-3996  
Tel.: (404) 853-8151  
Fax: (404) 853-8806  
henry.parkman@sutherland.com

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

---

WILLIAM L. PENNY  
Stites & Harbison, PLLC  
401 Commerce Street  
Suite 800  
Nashville, TN 37219-2376  
Tel.: (615) 782-2308  
Fax: (615) 742-0707  
william.penny@stites.com

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



FOR DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION:

\_\_\_\_\_  
KEITH GOLDEN, P.E., COMMISSIONER

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

ATTEST:

\_\_\_\_\_  
Angela Whitworth, Treasurer

\_\_\_\_\_  
Notary Public

Address:  
Office of the Commissioner  
One Georgia Center  
600 West Peachtree St NW  
Atlanta, GA 30308

COUNSEL FOR DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION :

\_\_\_\_\_  
EDWARD A. KAZMAREK  
Kazmarek Geiger & Laseter LLP  
3490 Piedmont Road NE, Suite 350  
Atlanta, GA 30305  
Tel.: (404) 812-0840  
Fax: (404) 812-0845  
skazmarek@kglattorneys.com

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

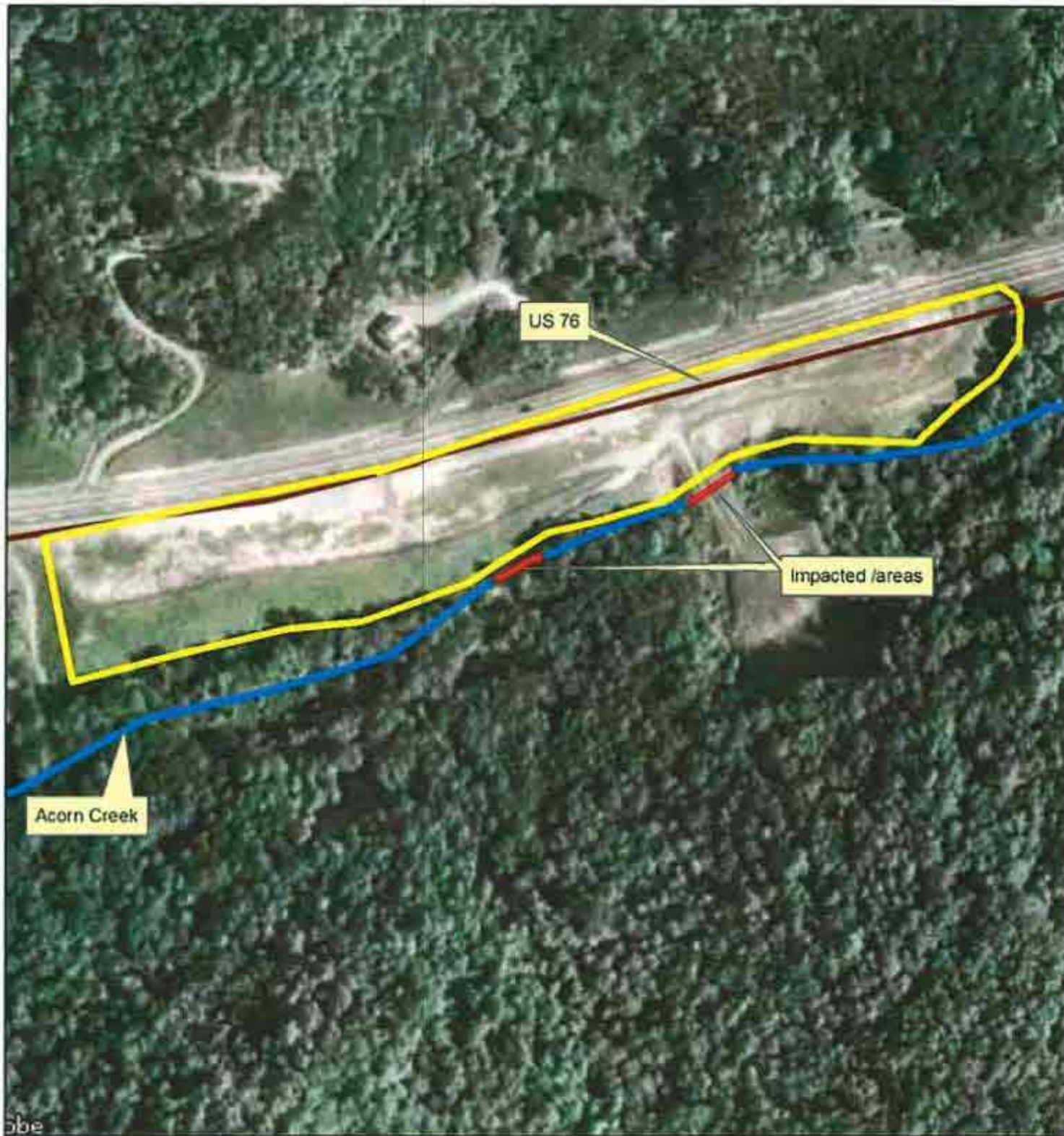
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION

UNITED STATES OF AMERICA,	:
	:
Plaintiff,	:
	:
v.	: Civil Action No.
	:
WRIGHT BROTHERS CONSTRUCTION	:
COMPANY; and GEORGIA DEPARTMENT	:
OF TRANSPORTATION,	:
	:
Defendants.	:
_____	:

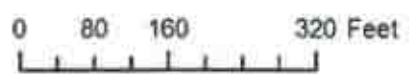
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Appendix A to Consent Decree:



Bradshaw/Sheehan Site



# Bradshaw/Sheehan Site



## Legend

-  Violation Sites
-  Impacted streams
-  Streams

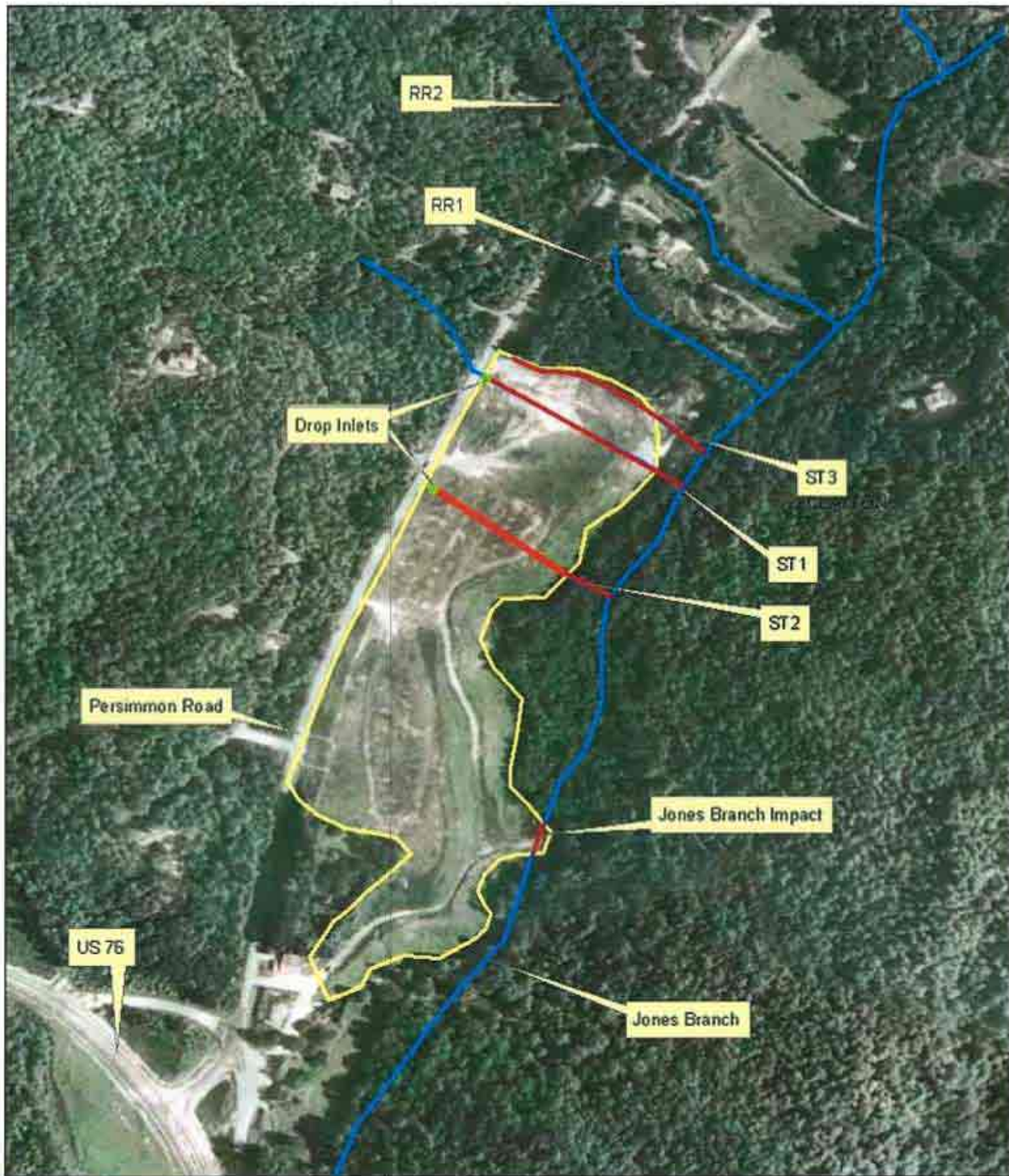


**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION**

UNITED STATES OF AMERICA,	:
	:
Plaintiff,	:
	:
v.	: Civil Action No.
	:
WRIGHT BROTHERS CONSTRUCTION	:
COMPANY; and GEORGIA DEPARTMENT	:
OF TRANSPORTATION,	:
	:
Defendants.	:
_____	:

Appendix B to Consent Decree:

Persimmon Road Site



## Persimmon Road Site

### Legend

- Impacted streams
- Streams
- Violation Sites



0 162.5 325 650 Feet

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

WRIGHT BROTHERS CONSTRUCTION  
COMPANY; and GEORGIA DEPARTMENT  
OF TRANSPORTATION,

Defendants.

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Civil Action No.

Appendix C to Consent Decree:

Loudermilk Site

Exhibit B



# Loudermilk Site



## Legend

-  impacted stream
-  Streams
-  Violation Sites





IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WRIGHT BROTHERS CONSTRUCTION  
COMPANY; and GEORGIA DEPARTMENT  
OF TRANSPORTATION,

Defendants.

---

Civil Action No.

Appendix D to Consent Decree:

Turpen Site

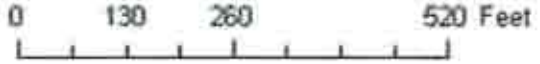


Impacted Area

Springhead

Slaughter Pen Branch

### Turpen Site



### Legend

-  impacted stream
-  Violation Site
-  Stream





**Work and Monitoring  
and Maintenance Plan  
for Jones Branch and  
Acorn Creek**

**Rabun County, GA**

Prepared for

**Stites & Harbison, PLLC**

On behalf of  
Wright Brothers Construction

**August 17, 2011**

## **Introduction**

Wright Brothers Construction contracted with the Georgia Department of Transportation to perform road improvements on U.S. Route 76 near Persimmon Road in Rabun County, Georgia. While implementing these road improvements, various accommodations were made for adjacent land owners, including the installation of culverts within watercourses adjacent to road improvements.

## **Objectives**

Two of these locations, the Jones Branch and Acorn Creek fill locations (collectively designated herein as the “Wright Brothers fill sites”) were visited and investigated in order to develop a plan for the removal of all, or a portion of, the culvert and restore the channel to a stable condition consistent with the contributing and receiving reaches of the streams (Figure 1).

## **Baseline information**

### **Jones Branch**

The Persimmon Road site is adjacent to Persimmon Road and features approximately 120 feet of culvert on Jones Branch with 15 to 20 feet of fill material covering the culvert. Side slopes were seeded and planted, with lined drainage systems on each corner. Planted tree survival was very high, and all slopes appeared to be stable. Sediment and erosion controls including wire-backed silt fencing were still in place and appeared to be structurally sound.

Jones Branch is a steep, headwater system with a sand-cobble substrate. The culvert was set with a steep drop held in place with boulder-sized rock, and a marginal slope throughout the 72” corrugated metal pipe. Given that the diameter of the pipe is sufficiently large enough to convey high flows, the amount of fill below the ordinary high water mark appear to be less than ten cubic yards. Some cobble material has washed into the culvert.

Upstream of the culvert, Jones Branch has a long run of approximately 40 feet with a sand substrate. The bankfull width is approximately 8.2 feet with a maximum depth of 2.67 feet, and a wide, available floodplain.

Downstream of the culvert, Jones Branch has a riffle approximately 12 feet long with a cobble substrate with some interstitial sand deposition, and some iron staining on stagnant water adjacent to the right descending bank. The riffle is approximately 14.4 feet wide and 2.46 feet deep. The downstream channel has a somewhat more confined floodplain than the upstream reach, with some indication of channel incision further downstream from the area around the culvert. Indicators of generally good water quality include multiple genera of EPT, riparian canopy present or regenerating with good survival, and stable channel bed and banks.

### **Acorn Creek**

The Sheehan site features approximately 75 feet of culvert on Acorn Creek with 2 to 4 feet of fill material covering the culvert. Planted tree survival was very high, with many volunteer pine trees and all slopes appeared to be stable. An abandoned channel on the left descending floodplain exhibits wetland characteristics, with a connection to the existing channel just above the culvert.

Upstream of the culvert, Acorn Creek has high sinuosity with sand-gravel-cobble substrate. The channel is somewhat incised with some undercut banks held by dense root masses from woody vegetation including magnolia and mountain laurel. The bankfull width is approximately 12.2 feet with a maximum depth of 3.6 feet.

Downstream of the culvert, Acorn Creek exits the 48" pipe into a wide, deep pool with fish, crayfish, frogs, snakes and water striders. Given that the diameter of the pipe is sufficiently large enough to convey high flows, the amount of fill below the ordinary high water mark appear to be less than ten cubic yards. A small tributary that appears to originate from adjacent fill material from the roadway improvements connects with the main channel on the right bank approximately 3 feet downstream of the culvert. Some iron staining is evident on the rocks in the small tributary. A riffle with cobble substrate originates approximately 8 linear feet below the culvert outlet. The riffle is approximately 20.2 feet wide and 3.6 feet deep. The downstream channel is incised with a broad floodplain, and some channel bar development within the incised channel. Undercut banks held by dense root masses from woody vegetation including magnolia and mountain laurel. Indicators of generally good water quality include fish, crayfish, snakes, multiple genera of EPT, riparian canopy present or regenerating with good survival, and stable channel bed and banks.

### **Work Plan for Jones Branch and Acorn Creek**

Portions of the existing crossings will be removed and the banks at the crossing will be restored, backfilled, stabilized and planted to ensure long-term channel stability. The banks will be defined using staked coir roll material and the adjacent banks will be backfilled and contoured to the adjacent banks, seeded and stabilized with erosion control matting and planted with live willow stakes on approximate 3-foot centers (Figure 2). Willow stakes must be *Salix nigra* (Black Willow). Existing sediment bed load materials will be redistributed to achieve a stable stream gradient. Appropriate erosion and sediment control management practices will be implemented to ensure stabilization of areas disturbed during removal of the crossing and restoration of the stream channel and banks. All work will take place in the dry.

Riparian vegetation will be established within the affected buffer on either side of the channel. The channel side slopes will be seeded with rapidly germinating species, and covered with matting for immediate bank stabilization, and a number of 1 inch caliper tree species will be planted within the buffer. These species will be selected based on their availability, nativity to the region, growth rates, and ability to stabilize the banks. Emergent aquatic vegetation such as sedges (*Carex* spp.) and rushes (*Juncus* spp.) will be planted at the water's edge along the stream channel. The establishment of native riparian and emergent aquatic vegetation will be a positive influence on both the water quality and ecological attributes of the restoration.

#### **Jones Branch**

The fill material on top of the culvert will be removed, and the entire length of culvert will be removed. Fill material must be placed in uplands with appropriate sediment and erosion control measures in place to ensure no addition of sediment to waters. A new channel will be constructed in place of the culvert (Figure 3). The new channel will incorporate planform, pattern and profile of the existing channel and will exhibit flow characteristics associated with the existing channel. Bank and bed stability will be augmented by structural integration of rock or rock-log structures (Figure 3). In-stream habitat will be provided in the form of the introduction of clean cobbles and gravel material. Banks will be stabilized via erosion control matting, seeding and planting shrubs and trees.

#### **Acorn Creek**

The fill material on the top and sides of the culvert will be removed from 35 linear feet of the upstream end of the culvert and the uppermost 30 linear feet of the culvert will be detached from the remaining section and removed. Fill material must be placed in uplands with appropriate sediment and erosion control measures in place to ensure no addition of sediment to waters. In-stream habitat will be

provided in the form of the introduction of clean cobbles and gravel material. Banks will be stabilized via erosion control matting, seeding and planting shrubs and trees.

All proposed work at both sites will be completed within 360 days of the date of the Consent Decree, and photographs of completed work will be submitted to EPA for review within 20 days of completion of the proposed work.

### **Monitoring and Maintenance Plan for Jones Branch and Acorn Creek**

Should any portion or aspect of the project not meet the specified success criteria based on reporting and/or additional visual observations in a monitoring year, the nature and cause(s) of the resulting condition shall be thoroughly investigated and documented. If it is determined that corrective action to a perceived problem area is not warranted at the time, the rationale for such a decision shall be stated. Continued monitoring of the condition or area, including the use of more detailed methodologies and at a more intensive rate, may be most appropriate. These actions shall also be documented. In instances where corrective action is deemed necessary, a plan shall be prepared which includes proposed actions, a schedule and revised monitoring plan.

#### **Success Criteria**

Success criteria for the applicable aspects of a project shall consist of the following:

- *Establishment of riparian buffers* –Trees will be planted on approximate ten foot centers within the 50-foot riparian corridor.
- *Survival of trees planted in the buffers riparian area* - A minimum of 80% survival, comprised of both planted and desirable seedlings from natural regeneration (must be on approved native species planting list) shall remain growing at the end of the monitoring period. At each inspection, dead plants shall be replaced sufficient to ensure that at least 80% of the original number of plants installed are alive.
- *Stream Bank Stabilization* - The monitored success criteria values for the restored areas shall not deviate from the actual as-built values by more than 20% in any monitoring year.
- *Stability* – The Channel Stability Rating must be “Good” during every monitored year.
- *Invasive Species* – The riparian vegetative community shall consist of less than 10% areal coverage of invasive exotic species, as identified by the Georgia Invasive Species Task Force (<http://www.gainvasives.org/>). If invasive exotic species are identified, eradication will take place in a manner consistent with processes identified in the Georgia Invasive Plant Management Handbook. If eradication is necessary, monitoring reports will document the invasive exotic species present, methods for eradication, and actions taken to inhibit future invasive exotics species establishment.

#### **Monitoring Requirements**

The success of the work efforts will be determined by following an established monitoring plan. This plan will document the success of the constructed stream channel by monitoring stream habitat, morphology characteristics, and the establishment of the riparian vegetation both within and adjacent to the channel.

The semi-annual qualitative and quantitative assessment of the work will include the following:

1. Semi-annual narrative description of the status of the overall work.

2. Semi-annual photo documentation of work actions.
3. Semi-annual riparian tree survey within the riparian buffer.
4. Semi-annual channel morphology surveys for stabilized banks at the Persimmon Road Site.
5. Semi-annual stability assessments for stabilized banks within the Persimmon Road Site and the Sheehan Site.
6. Year 3 (Year 5, if necessary) - Water quality and habitat assessment using EPA Rapid Bioassessment Protocol at the Persimmon Road Site and the Sheehan Site.

If the monitoring activities indicate that all monitoring requirements are met for the first three consecutive years, and EPA determines that all success criteria have been met, the work will be considered successful and no further monitoring shall be required. If deficiencies are identified within the first three years of monitoring, those deficiencies shall be addressed and monitoring will continue through five years after completion of work in Jones Branch and Acorn Creek.

A total of seven monitoring and maintenance reports will be submitted reports to EPA for its review. Each report will address monitoring and maintenance efforts; problems encountered or anticipated, together with implemented or proposed solutions; and a summary of the semi-annual qualitative and quantitative assessments.

The first report will be submitted to EPA six months after completing Work in Jones Branch and Acorn Creek. Subsequent reports will be submitted based upon the following schedule: six months after the first report; one year after the first report; one year and six months after the first report; two years and six months after the first report; three years and six months after the first report; and four years and six months after the first report.

Each monitoring and maintenance report submitted pursuant to this Section of the Consent Decree shall be signed by an individual who constitutes a “responsible corporate officer” or “duly authorized representative” within the meaning of 40 C.F.R. ' 122.22(a)(1)-(3), (b), and it shall include the following certification:

“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 upon personal knowledge or my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete.”

#### Long-term Management Plan

If any conditions requiring significant maintenance activities are discovered after the successful monitoring period, a qualitative evaluation of overall site conditions including photo documentation will be performed and submitted to EPA within 20 days of each inspection. Minor upkeep will occur in a manner consistent with the conditions set forth in the Land-Use Restriction.

#### Adaptive Management and Maintenance Plan

Should any portion or aspect of the project not meet the specified success criteria based on reporting and/or additional visual observations in a monitoring year, the nature and cause(s) of the resulting condition shall be thoroughly investigated and documented. If it is determined that corrective action to a perceived problem area is not warranted at the time, the rationale for such a decision shall be stated,



and proposed for EPA's review. Continued monitoring of the condition or area, including the use of more detailed methodologies and at a more intensive rate, may be most appropriate. These actions shall also be documented and submitted to EPA. In instances where corrective action is deemed necessary, a plan shall be prepared and submitted to EPA which includes proposed actions, a schedule and revised monitoring plan.

**Figure 1: Wright Brothers Construction Culvert Locations, Rabun County, GA**





Source: Bing Aerial Hybrid Road Maps



0 470 940 1,880 Feet

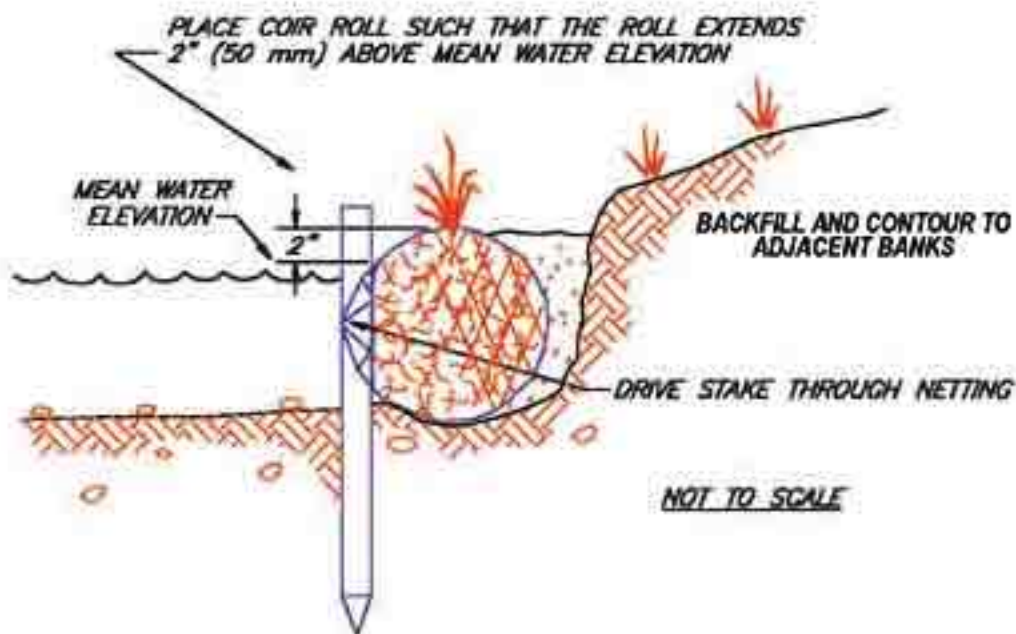
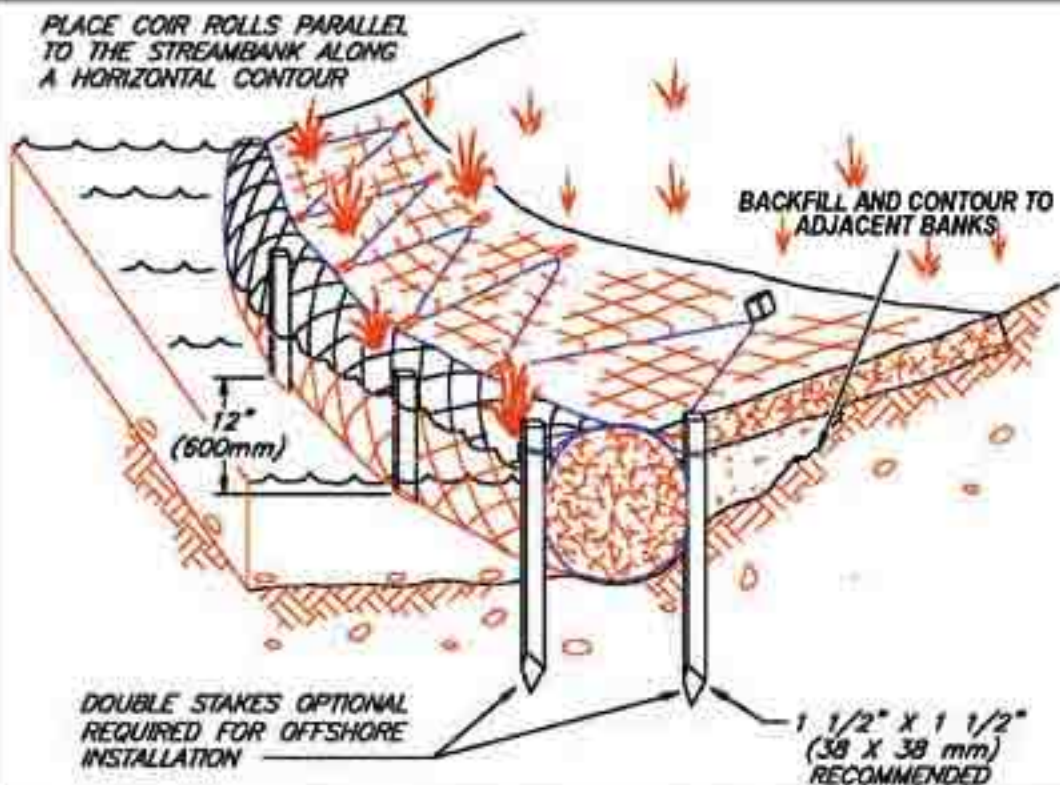
**Legend**

-  Culverts
-  Streams

Prepared by:

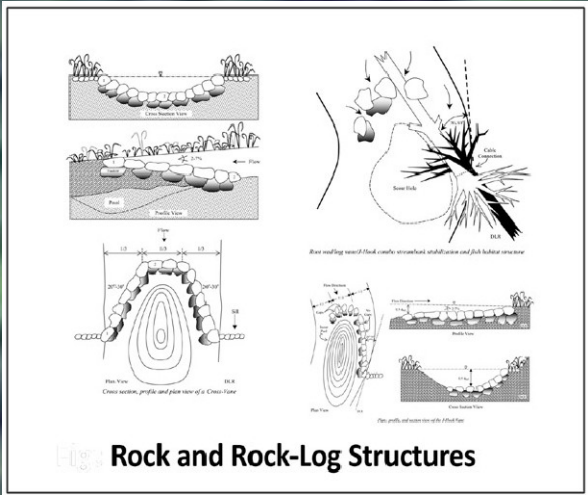
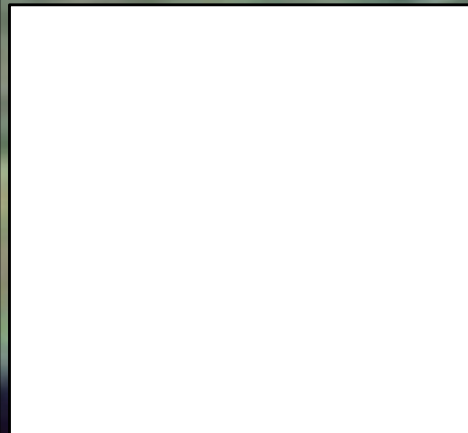
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**Prepared for:**  
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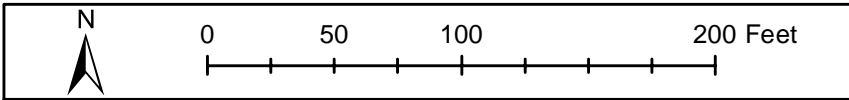


**Figure 2: Restoration Detail**

**Figure 3: Jones Branch Site Channel Alignment, Rabun County, GA**



Source: Bing Aerial Hybrid Road Maps



**Legend**

	Culverts
	Existing Channel
	Restored Channel

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