

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, ex rel.
STEPHANIE HALLOCK, DIRECTOR
DEPARTMENT OF ENVIRONMENTAL
QUALITY

Plaintiff,

v.

ZRZ Realty Company, Zidell Marine
Corporation, and Tube Forgings of America,
Inc.

Defendants.

Case No. _____

GENERAL JUDGMENT
on
Stipulation and Consent

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18 1. Purpose

19 This General Judgment on Stipulation and Consent (Consent Judgment) is filed
 20 simultaneously with and for the purpose of resolving the underlying complaint by the State of
 21 Oregon. The parties desire to resolve this action without litigation and have agreed to entry of
 22 the Consent Judgment without admission or adjudication of any issue of fact or law.

23 The mutual objective of the parties is to protect public health, safety, and welfare and the
 24 environment by the design and implementation of remedial measures in accordance with ORS
 25 465.200 through 465.410, regulations promulgated thereto, and the administrative Record of
 26 Decision dated June 30, 2005.

1 2. Stipulations

2 A. Defendants ZRZ Realty Company, Zidell Marine Corporation, and Tube Forgings
3 of America, Inc. (collectively “Defendants”) stipulate:

4 (1) To entry of this Consent Judgment;

5 (2) To perform and comply with all applicable provisions of this Consent
6 Judgment;

7 (3) In any proceeding brought by the Oregon Department of Environmental
8 Quality (“DEQ”) to enforce this Consent Judgment, not to litigate this Court’s jurisdiction over
9 this matter or the validity of the Consent Judgment; and

10 (4) To waive any right Defendants might have under ORS 465.260(7) or
11 465.325(2) to seek reimbursement or financial assistance for the costs incurred under this
12 Consent Judgment.

13 B. DEQ and Defendants each stipulate:

14 (1) ZRZ Realty Company is an Oregon corporation. Zidell Marine
15 Corporation is a Washington corporation. Tube Forgings of America, Inc. is an Oregon
16 Corporation.

17 (2) ZRZ Realty Company is the owner of real property located in Section 10,
18 Township 1 South, Range 1 East of the Willamette Meridian, within Multnomah County
19 (referred to in this Consent Judgment as “Tax lots 1 and 42”). Tax Lots 1 (now 300 but referred
20 to herein as 1) and 42 (now 200 but referred to herein as 42) are approximately 13.98 and 15.69
21 acres in size, respectively. The property is located at 3121 SW Moody Avenue in Portland,
22 Multnomah County, Oregon. The property is bordered by the Willamette River on the east, by
23 SW Moody Avenue on the west, by property zoned for commercial use on the north (currently
24 vacant property owned by the Oregon Health Sciences University [OHSU]), and by property
25 owned by OHSU on the south currently under re-development. By terms of State Waterway
26 Lease ML-8551, ZRZ Realty Company is lessee of 7.552 acres of state-owned submerged lands

1 in the Willamette River adjacent to Tax Lots 1 and 42. Tax Lots 1 and 42 and the in-water area
2 shown in Attachment A, Figure 1 to this Consent Judgment comprise and are collectively
3 referred to herein as the “Site.” The state-owned submerged lands leased by ZRZ Realty
4 Company and the in-water area shown in Attachment A, Figure 1 overlap to some extent, but are
5 not coextensive. The general location of the Site is shown on Attachment A, Figure 2 to this
6 Consent Judgment.

7 (3) In 1926, Coast Steel and Machinery occupied the north part of the Site.
8 By 1930, Zidell Machinery and Supply Company and Zidell-Steinberg Company occupied a
9 warehouse and sold steel plates from a small area of the Site located east of and next to SW
10 Moody Avenue, on Tax Lot 1. From 1920 to 1942, numerous businesses, including Columbia
11 River Shipbuilding Company and Kern Boat Building Company occupied the rest of the Site.
12 From 1942 to 1947, Commercial Iron Works (“CIW”) built and repaired ships on the Site, where
13 a large dock was constructed to support such operations. CIW occupied almost all of the present
14 Site, building ships south of the Ross Island Bridge, and converting and repairing them on the
15 north side of the Ross Island Bridge.

16 (4) In 1947, the Zidell Ship Dismantling Company leased the Commercial
17 Iron Works dock, from the Portland War Assets Administration. The Zidell Ship Dismantling
18 Company dismantled surplus World War II ships on the river beside the docks until cranes could
19 move sections to the shore on Tax Lot 1 for final dismantling and storage. Various other Zidell
20 companies, a butt weld fitting manufacturing business (Tube Forgings of America, Inc), and a
21 plumbing supply company also occupied the Site during the 1950s and 1960s. (Tube Forgings
22 has not been a tenant on the Site since the early 1990’s).

23 (5) A Zidell company began building barges on Tax Lot 42 in 1968. Ship
24 dismantling, wire burning, and secondary aluminum smelting ceased by approximately the mid-
25 1970s. From about 1983 to 1986, Jones Construction Company leased part of Tax Lot 1 to
26 manufacture prefabricated modular housing.

1 (6) Most of the current site activity is on Tax Lot 42, where the Zidell
2 companies maintain offices. Zidell Marine Corporation, a tenant on the Site, builds and sells or
3 leases steel barges, and ZRZ Realty Company manages the Zidell companies' real estate
4 holdings. Current manufacturing activities are essentially limited to barge fabrication by Zidell
5 Marine Corporation, in the large building on the south part of Tax Lot 42. Tax Lot 1 is currently
6 vacant or used to store salvage materials.

7 (7) On April 14, 1995, ZRZ Realty Company entered into an agreement with
8 the DEQ Voluntary Cleanup Program (DEQ Number WMCVC-NWR-94-23) to complete a
9 remedial investigation ("RI") and feasibility study ("FS"). The purpose of the RI was to
10 investigate the nature and extent of hazardous substance contamination at the Site; the purpose of
11 the FS was to develop alternatives for remedial action. The RI was completed between 1997 and
12 2004. The FS was completed in 2004.

13 (8) The RI documented potential sources of soil contamination including
14 historical releases from features or areas of concern (AOCs) such as former wire-burning
15 incinerators, transformers, the open-pit wire-burning area, the oil/water separator near the river,
16 the steam-cleaning area and crane pit sump, the electrical/maintenance/carpentry shop, the oil-
17 storage area, and the steam-cleaning area; and nonpoint source releases generated during
18 historical ship dismantling, salvaging, and processing operations or from materials in the fill.

19 (9) Polychlorinated biphenyls (PCBs), metals (antimony, arsenic, cadmium,
20 chromium, copper, lead, mercury, nickel, and zinc), polycyclic aromatic hydrocarbons (PAHs),
21 benzene, and petroleum hydrocarbons (diesel, gasoline, oil, grease, and other petroleum
22 hydrocarbons) were detected in soil at concentrations above screening values.

23 (10) Asbestos containing material (ACM) was confirmed in landfilled
24 insulation materials in several locations along the riverbank in the area where ship salvaging
25 activities historically occurred. The landfilled material containing ACM is several feet thick in
26 these areas.

1 (11) Surface sediment analyses have shown antimony, arsenic, cadmium,
2 chromium, copper, lead, mercury, nickel, zinc, PCBs, PAHs, petroleum hydrocarbons (diesel,
3 lube oil, and motor oil), and butyltins detections in at least one location at levels exceeding
4 screening levels.

5 (12) Subsurface sediment analyses have shown metals (barium, chromium,
6 copper, lead, zinc), PCBs, PAHs, petroleum hydrocarbons (diesel and motor oil), and butyltins
7 were detected in multiple locations at levels exceeding screening levels.

8 (13) Sediment pore water analyses have shown copper, lead, ammonia, and
9 butyltins were detected in multiple locations at levels exceeding screening levels.

10 (14) The primary source of sediment contamination appears to be related to
11 past ship dismantling activities and fires along the dock. Organotin contamination is most likely
12 associated with paint chips produced by sand blasting. The source of metals is most likely sand-
13 blasting grit, paint chips (chromium, copper, and lead), and other parts of the ships. PCBs may
14 have been contained in cables, gaskets, paint, and elsewhere in older ships, as well as in
15 transformers dismantled at the site. The PAHs and petroleum hydrocarbons may have been
16 generated during ship and tank dismantling as well as during dock fires. The source of
17 Chemicals of Concern (COCs) may also be particulates suspended in stormwater discharged to
18 the Willamette River through stormwater outfalls, surface soils eroded from the upland portion
19 or bank of the site, historical groundwater discharges to the Willamette River, and suspended
20 sediment transported from upriver sources. (Historical industrial operations immediately
21 upstream and downstream of the Site included an herbicide and pesticide manufacturer,
22 shipbuilding companies, scrap metal salvage, ship dismantling and automobile shredding and
23 baling operations, a foundry, a trailer manufacturer, a lumber company, a power plant, sand and
24 gravel companies, and concrete and asphalt plants.)

25 (15) In July, 2003, ZRZ Realty Company submitted a Final RI to DEQ, and in
26 October, 2004 a Supplemental Remedial Investigation Report was submitted to DEQ. In

1 December, 2004, ZRZ Realty Company submitted the Final FS to DEQ. Pursuant to ORS
2 465.320, on July 12, 2005, DEQ published notice of a proposed remedial action and provided
3 opportunity for public comment. Comments received on the proposed remedial action were
4 considered by DEQ, as shown in the Administrative Record.

5 (16) DEQ's Northwest Region Administrator selected the remedial action set
6 forth in a Record of Decision dated June 30, 2005 ("ROD"), which is incorporated herein by
7 reference. COCs at the site are COCs due to concerns over direct exposures and their
8 inextricable link to groundwater, surface water, and sediments. In order to prevent potential
9 adverse impacts to human health and the environment from a) transport of COCs in greenway
10 and non-greenway soil to groundwater, surface water (Willamette River), and sediment via
11 infiltration, stormwater runoff, and windblown transport, and b) excess exposure of human or
12 ecological receptors to COCs in soil, the ROD requires the actions set forth in stipulation (17),
13 below.

14 (17) The ROD requires the following:¹

- 15 • Interim source control measures to prevent releases of hazardous substances to the
16 Willamette River from upland and bank soils through stormwater runoff;
- 17 • Excavation, screening, and off-site disposal of up to 8,000 cubic yards of
18 contaminated soil exceeding hot spot concentrations;
- 19 • Removal and off-site disposal of asbestos containing material encountered during
20 excavation and regrading;
- 21 • On-site consolidation of soil exceeding cleanup levels from greenway Area or
22 future public right-of-ways to non-greenway area of the Site prior to capping;
- 23 • Re-grading the greenway shoreline to facilitate placement of a soil cap (or
24 equivalent) above existing armor (approximate elevation 13 feet), and utilizing
25 the existing armoring of the riverbank from approximately 3 to 13 feet in
elevation. Additional armoring will be installed in the bank areas where
existing armoring is discontinuous or of questionable structural integrity;

26 ¹ Figure 7-1 of the ROD includes a site diagram depicting the greenway/Non-greenway areas described below.

- 1 • Engineering controls involving placement of a cap over residual soil
2 contamination exceeding risk-based concentrations;
- 3 • Institutional controls involving inspection and maintenance of the upland
4 cap and protocols for future sub-surface maintenance activities.
- 5 • Engineering controls to include placement of a clean sand/rock cap (or
6 equivalent) over up to 17 acres of contaminated sediment along the Site shoreline;
- 7 • Institutional controls involving inspection and maintenance of the sediment cap;
- 8 • Periodic reviews by DEQ;
- 9 • Selective sediment dredging/capping of the barge launchway to facilitate
10 continued Site operations; and
- 11 • At ZRZ Realty Company’s discretion, and subject to any consultation required by
12 law, selective sediment dredging/capping of the barge launchway to facilitate
13 possible future use of the area for public access for river-related activities.

14 (18) The contaminants described in paragraphs 8 through 13 are “hazardous
15 substances” within the meaning of ORS 465.200(16). The presence of “hazardous substances” at
16 the Site constitutes a “release” within the meaning of ORS 465.200(22), and makes the Site a
17 “facility” within the meaning of ORS 465.200(13).

18 (19) On [Date], DEQ published notice of this proposed Consent Judgment and
19 provided opportunity for public comment in accordance with ORS 465.325(4)(d). The comment
20 period ended [Date]. Written comments were received from _____. These
21 comments were considered by DEQ, as documented in the agency’s file.

22 Based on the above Stipulations, the parties agree to entry of the following Consent
23 Judgment:

24 JUDGMENT

25 3. Work to be Performed

26 A. Remedial Design and Remedial Action

- (1) Defendants shall perform the remedial design and remedial action for the

1 Site, consistent with the ROD, in accordance with the terms and schedules set forth in the Scope
2 of Work (“SOW”), attached to and incorporated by reference into this Consent Judgment as
3 Attachment B, any amendments to the SOW, and the terms and schedules set forth in an
4 approved work plan and any related deliverables. Such deliverables may include plans requiring
5 ongoing measures, including but not limited to long term maintenance and monitoring of the
6 remedy.

7 B. Modification of SOW or Related Work Plans

8 (1) If DEQ determines that modification of the work specified in the SOW
9 and/or in work plans developed pursuant to the SOW is necessary in order to implement or
10 maintain the effectiveness of the remedy set forth in the ROD, DEQ may require that such
11 modification be incorporated into the SOW and/or such work plans; provided any such
12 modification may be required pursuant to this paragraph only to the extent that the modification
13 is consistent with the scope of the remedy selected in the ROD.

14 (2) Subject to dispute resolution under Subsection 7.M. of this Consent
15 Judgment, Defendants shall modify the SOW and/or work plans as required by DEQ and
16 implement any work required by the modifications. Before invoking dispute resolution under
17 Subsection 7.M., Defendants and DEQ shall make a good-faith effort to resolve any dispute
18 regarding DEQ-requested modifications by informal discussions for no more than 30 days
19 following notice from DEQ of a requested modification.

20 C. Periodic Review

21 At least once every five years, DEQ will review the remedy to ensure that the Site
22 remains protective of public health, safety, and welfare and the environment. Periodic reviews
23 will include evaluation of monitoring data, progress reports, inspection and maintenance reports,
24 land and water uses, compliance with institutional controls, and any other relevant information.

25 D. Site Restrictions

26 (1) Within 30 days of lodging of this Consent Judgment, Defendant ZRZ

1 Realty Company shall record with the County Clerk, Multnomah County, the Easement and
2 Equitable Servitude attached to this Consent Judgment as Attachment C. Defendant ZRZ Realty
3 Company shall provide DEQ a file-stamped copy of the Easement and Equitable Servitude
4 within five working days of recording. Defendants further agree to amend the Easement and
5 Equitable Servitude to describe and depict areas filled with excavated soil upon completion of
6 excavation work required by the ROD.

7 (2) Defendants agree to record analogous deed restrictions for any portion of
8 the Site not otherwise covered by the Easement and Equitable Servitude, including without
9 limitation the in-water portion of the Site. Defendants also agree that, if at any time one of them
10 were to acquire a fee interest in some or all of the in-water portion of the Site, then the relevant
11 Defendant shall record an analogous deed restriction within 30 days of acquiring that fee interest.

12 (3) Defendants agree to comply with all terms and conditions of the Easement
13 and Equitable Servitude attached hereto as Attachment C, any amendments thereto, any other
14 site restrictions applicable to the in-water portion of the Site, and any ongoing obligations related
15 to maintenance and monitoring of the remedy.

16 (4) Property subject to the Easement and Equitable Servitude may be freely
17 alienated at any time after recording; provided, the deed or other instrument of conveyance from
18 Defendant ZRZ Realty Company shall refer to or incorporate the Easement and Equitable
19 Servitude.

20 (5) Any deed, title, or other instrument of conveyance regarding real property
21 owned by the Defendant ZRZ Realty Company within the Site must reserve such access (by
22 easement, right-of-way, or otherwise) as might be necessary to carry out Defendants' obligations
23 under this Consent Judgment.

24

25 4. General Provisions

26 A. Selection of Supervising Contractor

1 (1) All aspects of the work to be performed by Defendants in designing and
2 constructing the remedy pursuant to this Consent Judgment must be performed under the
3 direction and supervision of a qualified contractor or contractors having experience in hazardous
4 substance remediation and knowledge of applicable state and federal laws, regulations, and
5 guidance.

6 (2) Before initiation of remedial design work for the Site, Defendant ZRZ
7 Realty Company shall notify DEQ in writing of the name, title, and qualifications of any
8 proposed supervising contractor. DEQ may for good cause disapprove the proposed contractor.
9 In the event of such disapproval, DEQ will notify Defendant ZRZ Realty Company in writing of
10 the reasons for its disapproval, within 14 days of receipt of the initial notice from Defendant
11 ZRZ Realty Company. Within 14 days of receiving DEQ's notice of disapproval, Defendant
12 ZRZ Realty Company shall notify DEQ of the name, title, and qualifications of an alternative
13 supervising contractor, subject to DEQ's right to disapprove under the terms and schedule
14 specified above. DEQ approves Maul, Foster, Alongi, Inc. as a qualified contractor for purposes
15 of this Consent Judgment.

16 (3) If, during the course of work required under this Consent Judgment,
17 Defendants propose to change its supervising contractor, Defendant ZRZ Realty Company shall
18 notify DEQ in accordance with the provisions of the preceding paragraph. DEQ may disapprove
19 such contractor, under the terms and schedule specified in the preceding paragraph.

20 B. Financial Assurance

21 (1) Defendant ZRZ Realty Company shall demonstrate its ability to perform
22 the work required under this Consent Judgment by obtaining and submitting to DEQ for approval
23 one or a combination of the following: (1) a performance bond; (2) a letter(s) of credit equaling
24 the total estimated cost of the work; (3) evidence of an escrow account dedicated to payment of
25 or reimbursement for remedial action costs; (4) internal financial information (financial test or
26 corporate guarantee) sufficient to satisfy DEQ that its net worth is sufficient to make additional

1 financial assurances unnecessary. If internal financial information is relied upon, the standards
2 used to determine the adequacy of Defendant ZRZ Realty Company's resources must be
3 substantially equivalent to those set forth in 40 CFR Part 265, Subpart H. Financial assurance
4 must be submitted within 30 days of DEQ approval of the final remedial design work plan in the
5 amount of the estimated total capital cost of the remedial action.

6 (2) Within 30 days of receipt of the financial assurance or other information,
7 DEQ will determine its adequacy and communicate that determination to Defendant ZRZ Realty
8 Company. If DEQ determines that such assurance or information is inadequate, Defendant ZRZ
9 Realty Company shall submit one of the other forms of assurance to DEQ for approval. If
10 internal corporate information is relied upon, Defendant ZRZ Realty Company shall submit
11 updated financial information annually on the anniversary date of issuance of this Consent
12 Judgment.

13 (3) During implementation of the remedial action, DEQ may require
14 Defendant ZRZ Realty Company to revise the cost estimates used to demonstrate Defendant
15 ZRZ Realty Company's financial assurance, and Defendant ZRZ Realty Company at its own
16 election may revise the cost estimate for the required work from time to time. If the revised cost
17 estimate is significantly higher or lower than the original cost estimate, DEQ may require
18 Defendant ZRZ Realty Company to submit, or Defendant ZRZ Realty Company may elect to
19 submit, revised financial assurance under the terms and schedule set forth in the preceding
20 paragraphs adequate to assure financial capability at the level of the revised cost estimate.

21 (4) Except as approved by DEQ, work required under this Consent Judgment
22 may not be delayed pending submission and/or approval of financial assurance under this
23 subsection.

24 C. Access

25 (1) Defendants shall allow DEQ to enter all portions of the Site owned by or
26 under the control of Defendants at all reasonable times for the purpose of overseeing

1 Defendants' performance under this Consent Judgment, including but not limited to inspecting
2 records relating to work under this Consent Judgment, observing Defendants' progress in
3 implementing this Consent Judgment, conducting such tests and taking such samples as DEQ
4 deems necessary, verifying data submitted to DEQ by Defendants, conducting periodic review,
5 and using camera, sound recording, or other recording equipment. DEQ will make available to
6 Defendant ZRZ Realty Company a split or duplicate of any sample taken in connection with this
7 Consent Judgment and provide Defendant ZRZ Realty Company with copies of all analytical
8 data for such samples. DEQ will also make available to Defendant ZRZ Realty Company, upon
9 Defendant ZRZ Realty Company's request, any photographs or recorded or videotaped material
10 taken.

11 (2) Defendants shall permit DEQ to inspect and copy all records, files,
12 photographs, documents, and data that Defendants prepare in order to complete work required
13 under this Consent Judgment, except that Defendants shall not be required to permit DEQ
14 inspection or copying of items subject to attorney-client or attorney work product privilege.

15 (3) Defendants shall identify to DEQ (by addressor-addressee, date, general
16 subject matter, and distribution) any document, record, or item withheld by the Defendants from
17 DEQ on the basis of attorney-client or attorney work product privilege, except to the extent that
18 such identifying information is itself subject to a privilege. DEQ reserves its rights under law to
19 obtain documents DEQ asserts are improperly withheld by Defendants. Attorney-client and
20 work product privileges may not be asserted with respect to any records required under
21 Paragraph 4.G.(1) of this Consent Judgment.

22 D. Project Managers

23 (1) To the extent possible, all reports, notices, and other communications
24 required under or relating to this Consent Judgment shall be directed to:
25
26

1 DEQ
2 Project Manager:

3 Chris Kaufman
4 2020 SW 4th Avenue, Suite 400
5 Portland, Oregon 97201
6 Phone:503-229-5614
7 Fax: 503-229-6945
8 E-mail: chris.kaufman@deq.state.or.us

9 Defendants' Project Manager:

10 Kathryn Silva
11 ZRZ Realty Company
12 3121 SW Moody Avenue
13 Portland, OR 97239
14 Phone: 503.228.8691
15 Fax: 503.228.6750
16 E-mail: kathryns@zidell.com

17 (2) The Project Managers shall be available and have the authority to make
18 day-to-day decisions necessary to complete the SOW.

19 E. Notice and Samples

20 (1) Defendants shall make every reasonable effort to notify DEQ of any new
21 excavation, drilling, or sampling to be conducted by Defendants under this Consent Judgment, at
22 least five working days before such activity, but in no event less than 24 hours before such
23 activity. Upon DEQ's verbal request, Defendants shall make available to DEQ a split or
24 duplicate of any sample taken pursuant to this Consent Judgment. DEQ will provide Defendant
25 ZRZ Realty Company with copies of all analytical data from such samples as soon as
26 practicable.

 (2) In the event DEQ conducts any sampling or analysis in connection with
this Consent Judgment, DEQ will make every reasonable effort to notify Defendant ZRZ Realty
Company of any excavation, drilling, or sampling, at least five working days before such
activity, but in no event less than 24 hours before such activity. Upon Defendant ZRZ Realty
Company's verbal request, DEQ will make available to Defendant ZRZ Realty Company a split

1 or duplicate of any sample taken in connection with this Consent Judgment and provide
2 Defendant ZRZ Realty Company with copies of all analytical data for such samples. Defendant
3 ZRZ Realty Company shall provide DEQ with copies of all analytical data from such samples as
4 soon as practicable.

5 F. Quality Assurance

6 (1) Defendants shall conduct all sampling, sample transport, and sample
7 analysis in accordance with the Quality Assurance/Quality Control (“QA/QC”) provisions
8 approved by DEQ as part of the work plan. All plans prepared and work conducted under this
9 Consent Judgment shall be consistent with DEQ’s “Environmental Cleanup Program Quality
10 Assurance Policy No. 760.000.” Defendants shall make every reasonable effort to ensure that
11 the laboratory used by Defendants for analysis performs such analyses in accordance with such
12 provisions. In the event that DEQ submits QA/QC sample(s) to Defendants’ laboratory,
13 Defendants shall also make every reasonable effort to ensure that such laboratory analyzes all
14 samples submitted by DEQ for QA/QC monitoring in accordance with such provisions.

15 (2) In the event DEQ conducts sampling or analysis in connection with this
16 Consent Judgment, DEQ will conduct sampling, sample transport, and sample analysis in
17 accordance with the QA/QC provisions of the approved work plan. Upon written request, DEQ
18 will provide Defendant ZRZ Realty Company with copies of DEQ’s records regarding such
19 sampling, transport, and analysis.

20 G. Records

21 (1) In addition to those reports and documents specifically required under this
22 Consent Judgment, Defendants shall provide to DEQ, within 10 days of DEQ’s written request,
23 copies of QA/QC memoranda and audits, raw data, task memoranda, field notes (not made by or
24 at the direction of Defendants’ attorney), and laboratory analytical reports relating to the work to
25 be performed under this Consent Judgment.

26 (2) Defendants shall preserve all records and documents in possession or

1 control of Defendants or its employees, agents, or contractors that relate in any way to activities
2 under this Consent Judgment for at least five years after termination under Section 7 of this
3 Consent Judgment. Upon DEQ's request, Defendants shall provide, or make available for
4 copying by DEQ, copies of nonprivileged records to DEQ. After five years and up to 10 years
5 after termination, Defendants shall provide DEQ 60 days notice before destruction or other
6 disposal of such records or documents. Ten years after termination, Defendants shall have no
7 further obligation to preserve documents or records.

8 (3) Defendants may assert a claim of confidentiality under the Oregon Public
9 Records Law regarding any documents or records submitted to or copied by DEQ pursuant to
10 this Consent Judgment. DEQ will treat documents and records for which a claim of
11 confidentiality has been made in accordance with ORS 192.410 through 192.505. If Defendants
12 does not make a claim of confidentiality at the time the documents or records are first submitted
13 to or copied by DEQ, the documents or records may be made available to the public without
14 notice to Defendants .

15 H. Progress Reports

16 During each calendar quarter following entry of this Consent Judgment,
17 Defendants shall deliver to DEQ, on or before the fifteenth working day of each quarter, a
18 progress report containing:

19 (1) Actions taken by Defendants under this Consent Judgment during the
20 previous three months;

21 (2) Actions scheduled to be taken by Defendants in the next three months;

22 (3) A summary of sampling, test results, and any other data generated by
23 Defendant ZRZ Realty Company during the previous three months; and

24 (4) A description of any problems experienced by Defendants during the
25 previous three months.

26 DEQ may approve less frequent reporting by Defendants, if warranted. Progress

1 reports may be submitted in electronic form. If submitted in hard-copy written form, two copies
2 shall be provided to DEQ.

3 I. Other Applicable Laws

4
5 (1) Subject to ORS 465.315(3), all actions under this Agreement shall be performed in
6 accordance with applicable Federal, State, and local laws and regulations.

7 (2) Without limiting the foregoing, all action under this Agreement shall be performed
8 in accordance with any applicable federal, state and local laws and regulations related to
9 archeological objects and sites and protection thereof. If archeological objects or human remains
10 are discovered during any investigation, removal or remedial activities at the Property, ZRZ Realty
11 Company shall, at a minimum, (a) stop work immediately in the vicinity of the find, (b) provide
12 any notifications required by ORS 97.745 and ORS 358.920, (c) notify the DEQ Project Manager
13 within 24 hours of the discovery, and (d) use best efforts to ensure that ZRZ Realty Company and
14 its employees, contractors, counsel and consultants keep the discovery confidential, including but
15 not limited to, refraining from contacting the media or any third party or otherwise sharing
16 information regarding the discovery with any member of the public. Any project delays caused by
17 the discovery of archeological object or human remains shall be considered a Force Majeure under
18 Paragraph K of this Agreement.
19
20

21 J. Reimbursement of DEQ Oversight Costs

22 (1) DEQ shall submit to Defendant ZRZ Realty Company monthly invoices of
23 costs actually and reasonably incurred by DEQ or the State of Oregon, after approval of this
24 Consent Judgment by the Court, in connection with any activities related to the SOW, oversight
25 of Defendant's implementation of this Consent Judgment, and periodic review. Each invoice
26 will include a summary of costs billed to date.

1 (2) DEQ or State of Oregon oversight costs payable by Defendants include
2 direct and indirect costs. Direct costs include site-specific expenses, DEQ contractor costs, and
3 DEQ legal costs. DEQ's direct cost summary will include a direct labor summary showing the
4 persons charging time, the number of hours, and the nature of work performed. Indirect costs
5 include those general management and support costs of DEQ and of the Land Quality Division
6 ("LQD") allocable to DEQ oversight of this Consent Judgment and not charged as direct, site-
7 specific costs. Indirect charges are based on actual costs and applied as a percentage of direct
8 personal services costs. DEQ will maintain work logs, payroll records, receipts, and other
9 documents to document work performed and expenses incurred under this Consent Judgment
10 and, upon request, will provide copies of such records to Defendants during the term of this
11 Consent Judgment and for at least five years thereafter. After five years and up to 10 years after
12 termination, DEQ will provide Defendant ZRZ Realty Company 60 days notice before
13 destruction or other disposal of such records or documents. Upon Defendants' request, DEQ will
14 provide Defendant ZRZ Realty Company with copies of such records or documents. Ten years
15 after termination, DEQ will have no further obligation to preserve such records or documents.

16 (4) Within 30 days of receipt of DEQ's invoice, Defendants shall pay the
17 amount of costs billed by check payable to the "State of Oregon, Hazardous Substance Remedial
18 Action Fund", or invoke dispute resolution under Subsection 4.M. of this Consent Judgment.
19 After 30 days, any unpaid amounts that are not the subject of pending dispute resolution, or that
20 have been determined owing after dispute resolution, shall become a liquidated debt collectible
21 under ORS 293.250 or other applicable law.

22 (5) Defendants shall pay simple interest of 9% per annum on the unpaid
23 balance of any DEQ oversight costs, which interest shall begin to accrue at the end of the 30-day
24 payment period, unless dispute resolution has been invoked. Interest on any amount disputed
25 under Subsection 4.M. shall begin to accrue 30 days from final resolution of any such dispute.

26

1 K. Force Majeure

2 (1) If any event occurs that is beyond Defendants' reasonable control and that
3 causes or might cause a delay or deviation in performance of the requirements of this Consent
4 Judgment despite Defendants' due diligence ("force majeure"), Defendants shall promptly, upon
5 learning of the event, notify DEQ's Project Manager verbally of the cause of the delay or
6 deviation, its anticipated duration, the measures that have been or will be taken to prevent or
7 minimize the delay or deviation, and the timetable by which Defendants propose to carry out
8 such measures. Defendants shall confirm in writing this information within five working days of
9 the verbal notification. Failure to comply with these notice requirements precludes Defendants
10 from asserting force majeure for the event and for any additional delay caused by the event.

11 (2) If Defendant ZRZ Realty Company demonstrates to DEQ's satisfaction
12 that the delay or deviation has been or will be caused by force majeure, DEQ will extend times
13 for performance of related activities under this Consent Judgment as appropriate. Circumstances
14 or events constituting force majeure might include but not be limited to acts of God, unforeseen
15 strikes or work stoppages, delays in government action or approvals, fire, explosion, riot,
16 sabotage, or war. Normal inclement weather, increased cost of performance or changed business
17 or economic circumstances shall not be considered force majeure.

18 L. DEQ Approvals

19 (1) Where DEQ review and approval is required for any plan or activity under
20 this Consent Judgment, Defendants shall not proceed to implement the plan or activity until DEQ
21 approval is received. Any DEQ delay in granting or denying approval shall correspondingly
22 extend the time for completion by Defendants. Prior approval shall not be required in
23 emergencies, provided that Defendants shall notify DEQ immediately after the emergency and
24 shall evaluate the impact of the emergency, and Defendants response, on Defendants' work.

25 (2) After review of any plan, report, or other item required to be submitted for
26 DEQ approval under this Consent Judgment, DEQ will:

1 (a) Approve the submission in whole or in part; or
2 (b) Disapprove the submission in whole or in part, notify Defendant of
3 the submission's deficiencies, and request modifications to cure the deficiencies.

4 (3) In the event of two deficient submittals of the same deliverable that are
5 deficient for the same reasons due to Defendants' failure in good faith to cure the original
6 deficiency, DEQ may modify the submission to cure the deficiency.

7 (4) DEQ approvals, rejections, or identification of deficiencies will be given
8 in writing within the time specified in the SOW or as soon as practicable, and will state DEQ's
9 reasons with reasonable specificity.

10 (5) In the event of approval or modification of a submission by DEQ,
11 Defendants shall implement the actions(s) required by the plan, report, or other item, as so
12 approved or modified.

13 (6) In the event of DEQ disapproval or request for modification of a
14 submission, Defendants shall, within 30 days of receipt of the DEQ notice or such longer time as
15 may be specified in the notice, either correct the deficiencies and resubmit the revised report or
16 other item for approval, or institute dispute resolution under Subsection 4.M. of this Consent
17 Judgment.

18 M. Dispute Resolution

19 (1) In the event any or all of the Defendants disagrees with DEQ regarding
20 oversight costs, review and approval of any plan or activity, interpretation of data, or DEQ
21 modifications of a deliverable, Defendants shall promptly notify DEQ in writing of their
22 objection. DEQ and the Defendants then shall make a good-faith effort to resolve the
23 disagreement within 14 days of Defendants' written objection. At the end of the 14-day period,
24 DEQ will provide the Defendants with a written statement of its position from DEQ's Northwest
25 Region Cleanup Manager. If Defendants still disagree with DEQ's position, then Defendants,
26 within 14 days of receipt of DEQ's position from the Cleanup Manager, shall provide

1 Defendants' position and rationale in writing to DEQ's Northwest Region Administrator. The
2 Region Administrator may discuss the disputed matter with the Defendants and, in any event,
3 will provide Defendants with DEQ's final position in writing as soon as practicable after receipt
4 of Defendants' written position.

5 (2) If the Defendants refuse or fail to follow DEQ's final decision pursuant to
6 Paragraph 4.M.(1) above, and DEQ seeks to (a) enforce its final decision, (b) collect stipulated
7 penalties, (c) assess civil penalties, (d) collect DEQ oversight costs, or (e) collect costs related to
8 any removal or remedial action performed by DEQ, the parties, subject to Section 2 of this
9 Consent Judgment, shall be entitled to such rights, remedies, and defenses as are provided by
10 applicable law.

11 (3) During the pendency of any dispute resolution as provided in this
12 subsection, the time for completion of work or obligations affected by such dispute shall be
13 extended for a period of time not to exceed the actual time taken to resolve the dispute.
14 Elements of work or obligations not affected by the dispute shall be completed in accordance
15 with the applicable schedule approved pursuant to this Consent Judgment.

16 N. Stipulated Penalties

17 (1) Subject to Subsections 4.K., 4.L., and 4.M. of this Consent Judgment,
18 upon any violation by Defendants of any provision of this Consent Judgment, and upon
19 Defendants' receipt from DEQ of written notice of violation, Defendants shall pay in total the
20 stipulated penalties set forth in the following schedule:

21 (a) Up to \$5,000 for the first week of violation or delay and up to
22 \$2,500 per day of violation or delay thereafter, for failure to allow DEQ access to the Site or
23 provide records under Subsections 4.C. or 4.G.

24 (b) Up to \$2,500 for the first week of violation or delay and up to
25 \$1,000 per day of violation or delay thereafter, for:

26 (i) failure to submit a final work plan, addressing in good faith

1 DEQ's comments on the draft work plan, in accordance with the SOW schedule and terms;

2 (ii) failure to complete the work in accordance with the
3 approved work plan schedule and terms;

4 (iii) failure to submit a final report, addressing in good faith
5 DEQ's comments on the draft report, in accordance with the approved work plan schedule and
6 terms; or

7 (iv) failure to record or comply with the Easement and
8 Equitable Servitude.

9 (c) Up to \$500 for the first week of violation or delay and up to \$500
10 per day of violation or delay thereafter, for:

11 (i) failure to submit a good faith draft work plan in accordance
12 with the SOW schedule and terms;

13 (ii) failure to submit good faith reports in accordance with the
14 SOW schedule and terms; or

15 (iii) any other violation of the Consent Judgment, SOW, or
16 approved work plan.

17 (2) Violations arising out of the same facts or circumstances or based on the
18 same deadline will be treated as one violation per day.

19 (3) Stipulated penalties shall not begin to accrue under this subsection until
20 Defendants receive a notice of violation from DEQ describing the violation and what is
21 necessary to correct it. If the violation was not intentional, and is capable of cure, and
22 Defendants correct the violation within 30 days of receipt of such notice of violation or such
23 other period as may be specified in the notice, DEQ may waive the stipulated penalties. This
24 opportunity to cure does not apply to violations subject to Subparagraph 4.N.(1)(a).

25 (4) Subject to Paragraph 4.N.(3), Defendants shall, within 30 days of receipt
26 of the notice, pay the amount of such stipulated penalty by check made payable to the "State of

1 Oregon, Hazardous Substance Remedial Action Fund” or request a contested case hearing in
2 accordance with Paragraph 4.N.(5) below. Defendants shall pay simple interest of 9% per
3 annum on the unpaid balance of any stipulated penalties, which interest shall begin to accrue at
4 the end of the 30-day payment period. Any unpaid amounts that are not the subject of a pending
5 contested case, or that have been determined owing after a contested case, are a liquidated debt
6 collectible under ORS 293.250 and other applicable law.

7 (5) In assessing a penalty under this subsection, the Director may consider the
8 factors set forth in DEQ’s civil penalty determination procedure (OAR 340-012-0045), provided
9 that such factors may not be used to increase a penalty beyond the amounts stipulated in this
10 subsection. Defendants may request a contested case hearing regarding the penalty assessment,
11 in accordance with OAR Chapter 340, Division 11. The scope of any such hearing shall be
12 consistent with the stipulations set forth in Section 2 of this Consent Judgment; shall be limited
13 to the occurrence or non-occurrence of the alleged violation, or conditions precedent to the
14 requirement allegedly violated; and shall not review the amount of the penalty assessed. Further
15 penalties shall not accrue pending any contested case regarding the alleged violation. Violations
16 arising out of the same facts or circumstances or based on the same deadline are considered as
17 one violation per day.

18 (6) If DEQ assesses stipulated penalties pursuant to this section for any failure
19 of Defendants to comply with this Consent Judgment, DEQ may not seek civil penalties from
20 Defendants for the same violation under ORS 465.900 or other applicable law.

21 O. Enforcement of Consent Judgment

22 (1) In addition to assessment of stipulated penalties under Subsection 4.N. of
23 this Consent Judgment or civil penalties under ORS 465.900, DEQ may seek enforcement of this
24 Consent Judgment by this Court. If DEQ seeks enforcement of this Consent Judgment by this
25 Court, DEQ may seek monetary sanctions, such as civil penalties, only if DEQ has not assessed
26 and collected any stipulated penalties under this Consent Judgment regarding the same violation.

1 (2) Subject to Section 2, Defendants do not admit any liability, violation of
2 law, or factual or legal findings, conclusions, or determinations made by DEQ under this
3 Consent Judgment.

4 (3) Nothing in this Consent Judgment is intended to create any cause of action
5 in favor of any person not a party to this Consent Judgment.

6 P. Indemnification and Insurance

7 (1) Defendants shall indemnify and hold harmless the State of Oregon and its
8 commissions, agencies, officers, employees, contractors, and agents from and against any and all
9 claims arising from acts or omissions related to this Consent Judgment of Defendants or its
10 officers, employees, contractors, agents, receivers, trustees, or assigns after the date this Consent
11 Judgment is approved by the Court. The State of Oregon will notify Defendants of any such
12 claims or actions as soon as practicable after receiving notice that such a claim or action is
13 threatened or has been filed. Defendants shall have the right to participate fully at their own
14 expense in the defense or settlement of such claims, including the right to promptly receive
15 related correspondence with the claimant and the opportunity to participate in related meetings
16 and telephone conferences with the claimant. The State will confer with Defendants regarding
17 litigation and settlement strategy and, to the extent practicable, will afford Defendants the
18 opportunity to review and comment on all pleadings and settlement documents before they are
19 filed with the court or sent to the claimant. Defendants shall have no obligations under this
20 paragraph with respect to any claim settled or otherwise compromised without Defendants
21 having been provided the opportunity to participate in accordance with this paragraph. DEQ
22 shall not be considered a party to any contracts made by Defendants or their agents in carrying
23 out activities under this Consent Judgment.

24 (2) To the extent permitted by Article XI, Section 7, of the Oregon
25 Constitution and by the Oregon Tort Claims Act, the State of Oregon shall indemnify and hold
26 harmless the Defendants and their respective officers, employees, contractors, and agents from

1 and against any and all claims arising from acts or omissions related to this Consent Judgment of
2 the State of Oregon or its commissions, agencies, officers, employees, contractors, agents, or
3 assigns (excepting acts or omissions constituting DEQ approval of Defendants' activities under
4 this Consent Judgment). Defendants shall notify the State of Oregon of any such claims or
5 actions as soon as practicable after receiving notice that such a claim or action is threatened or
6 has been filed. The State of Oregon shall have the right to participate fully at its own expense in
7 the defense or settlement of such claims, including the right to promptly receive related
8 correspondence with the claimant and the opportunity to participate in related meetings and
9 telephone conferences with the claimant. Defendants shall confer with the State of Oregon
10 regarding litigation and settlement strategy and, to the extent practicable, shall afford the State of
11 Oregon the opportunity to review and comment on all pleadings and settlement documents
12 before they are filed with the court or sent to the claimant. The State of Oregon shall have no
13 obligations under this paragraph with respect to any claim settled or otherwise compromised
14 without it having been provided the opportunity to participate in accordance with this paragraph.
15 Defendants shall not be considered a party to any contract made by DEQ or its agents in carrying
16 out activities under this Consent Judgment.

17 (4) Before commencing any onsite work under this Consent Judgment,
18 Defendants ZRZ Realty Company and Zidell Marine Corporation shall obtain and maintain for
19 the duration of this Consent Judgment comprehensive general liability and automobile insurance
20 with limits of \$1 million, combined single limit per occurrence, naming as an additional insured
21 the State of Oregon. If Defendants demonstrate by evidence satisfactory to DEQ that its
22 contractor(s) or subcontractor(s) maintain equivalent coverage, or coverage for the same risks
23 but in a lesser amount or for a lesser term, then Defendants may provide only that portion of the
24 insurance that is not maintained by its contractor(s) or subcontractor(s).

25 Q. Parties Bound

26 (1) This Consent Judgment shall be binding on the parties and their respective

1 successors, agents, and assigns after the date this Consent Judgment is approved by the Court.
2 The undersigned representative of each party certifies that he or she is fully authorized to execute
3 and bind such party to this Consent Judgment. No change in ownership or corporate or
4 partnership status relating to the Site shall in any way alter Defendants' obligations under this
5 Consent Judgment, unless otherwise approved in writing by DEQ.

6 (2) The parties agree that Defendant ZRZ Realty Company shall be the
7 primary performing party under this Consent Judgment, but that the obligations of Defendants
8 herein shall be joint and several as between all three Defendants. Notices, submissions, and
9 other communications to and from Defendants' project manager shall satisfy requirements as to
10 all Defendants, absent express written direction otherwise from a Defendant or DEQ.

11 R. Modification

12 DEQ and Defendants may modify this Consent Judgment by written agreement,
13 subject to approval by this Court. DEQ and Defendants may modify the SOW or a work plan
14 without having to obtain court approval, provided the modification is consistent with the ROD.

15 5. Contribution Actions

16
17 A. Pursuant to ORS 465.325(6)(b), upon resolution of their liability to the state,
18 Defendants ZRZ Realty Company, Zidell Marine Corporation, and Tube Forgings of America,
19 Inc. shall not be liable for claims for contribution regarding matters addressed in this Consent
20 Judgment. The "matters addressed" in this Consent Judgment means those matters for which
21 Defendants have resolved their liability to the state of Oregon as provided in Subsection 6.A., but
22 do not include matters as to which the state has reserved its rights under this Consent Judgment,
23 including without limitation those reservations in Subsections 6.A. and 6.B.
24

25 B. Subject to Paragraph 2.A.(4) and Subsection 4.P. of this Consent Judgment,
26 nothing in this Consent Judgment shall prevent Defendants from exercising any rights of

1 contribution or indemnification Defendants might have against any person regarding activities
2 under this Consent Judgment.

3 6. Covenants Not To Sue

4 A. Upon certification of completion under Section 7 of this Consent Judgment, the
5 State of Oregon covenants not to sue or take administrative action against Defendants concerning
6 any liability to the State of Oregon under ORS 465.200 to 465.455 and 465.900, and 42 USC §
7 9601 *et seq.*, with regard to the release or threatened release of hazardous substances addressed
8 by the certification(s) of completion; provided, this covenant does not release Defendants from
9 future liability to DEQ resulting from:

10 (1) Failure of remedial action; or,
11 (2) Information unknown to DEQ at the time of certification of completion
12 showing that the remedial action is not protective of public health, safety, and welfare or the
13 environment.

14 B. DEQ reserves all rights against Defendants with respect to any other matters,
15 including but not limited to:

16 (1) Claims based on failure by Defendants to meet any applicable requirement
17 of this Consent Judgment;

18 (2) Liability arising from disposal of hazardous substances removed from the
19 Site by Defendants;

20 (3) Liability under federal or state law for natural resource damages;

21 (4) Claims based on criminal liability;

22 (5) Any matters as to which the State of Oregon is owed indemnification by
23 the Defendant under Subsection 4.P. of this Consent Judgment;

24 (6) Liability for violations of federal or state law by the Defendants occurring
25 during implementation of the work required under this Consent Judgment; and

26 (7) Liability for oversight costs incurred by DEQ in connection with this

1 Consent Judgment.

2 C. The Director of DEQ has determined that the above covenant not to sue
3 will expedite the remedial action and is in the public interest, based on consideration of the
4 factors set forth in ORS 465.325(7)(a) and (d).

5 7. Certification(s) of Completion; Satisfaction of Judgment

6 A. Upon Defendants' completion of work in accordance with the SOW, Defendants
7 shall submit a final closeout report to DEQ signed both by an Oregon-registered professional
8 engineer and Defendants' Project Manager certifying that the remedial action for the Site has
9 been completed in accordance with this Consent Judgment. The report shall summarize the work
10 performed and include all necessary supporting documentation. DEQ will preliminarily
11 determine whether the remedial action has been fully and satisfactorily performed for the Site in
12 accordance with this Consent Judgment. Upon a preliminary determination that the remedial
13 action for the Site has been fully and satisfactorily performed, DEQ will provide public notice
14 and opportunity to comment on a proposed certification decision in accordance with ORS
15 465.320 and 465.325(10)(b). After consideration of public comment, and within 90 days after
16 receiving Defendants' closeout report, the Director of DEQ will issue a final certification
17 decision. The certification decision shall subsequently be submitted by DEQ to this Court.

18 B. Subject to the jurisdiction of this Court under ORS 465.325(10)(c), this Consent
19 Judgment shall be deemed satisfied upon filing of DEQ's certification(s) of completion for the
20 remedial action and payment by Defendants of any and all outstanding costs and penalties.
21 Notwithstanding the foregoing, the following Consent Judgment obligations of Defendant or
22 DEQ, as applicable, shall survive: Subsections 3.A. and 3.D. (Ongoing Obligations); Subsections
23 3.D. (Site Restrictions); Subsection 4.C. (Access); Subsection 4.G. (Records); Subsection 4.J.
24 (Reimbursement of DEQ Oversight Costs); Subsection 4.P. (Indemnification and Insurance);
25 Section 5 (Contribution Actions) and Section 6 (Covenants Not to Sue).

26 C. This Court retains jurisdiction over both the subject matter of this Consent

1 Judgment and the parties, regarding the surviving obligations described in Subsection 7.B.

2

IT IS SO ORDERED and ADJUDGED this day of _____, 2006.

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4

5

Circuit Court Judge, Multnomah County

6

7 Submitted by:

Lynne Perry

8 Assistant Attorney General

Attorney for Plaintiff

9

10 STATE OF OREGON, DEPARTMENT OF ENVIRONMENTAL QUALITY

11

12 By: _____ Date: _____

Dick Pedersen, Administrator, Northwest Region

13

14

15 ZRZ REALTY COMPANY

16

17 By: _____

Jay Zidell, President

Date: _____

18

19 ZIDELL MARINE CORPORATION

20

21 By: _____

Jay Zidell, President

Date: _____

22

23 TUBE FORGINGS OF AMERICA, INC.

24

25 By: _____

Jay Zidell, President

Date: _____

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Approved as to form and content by:

Date: _____

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1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Attorney for Defendants ZRZ Realty Company, Zidell Marine Corporation, and Tube Forgings of America, Inc.

Date: _____

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