

ATTACHMENT C

# 1996 Port of The Dalles – UPRR Agreement

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## AGREEMENT

THIS AGREEMENT, dated and effective as of October 4, 1996, is made and entered into by and between The Port of The Dalles (the "Port") and Union Pacific Railroad Company ("UP").

## RECITALS

- A. This Agreement arises out of environmental conditions at the Union Pacific Railroad Tie Treating Plant Site at the Dalles, Oregon (the "Tie Treating Plant Site"). The Tie Treating Plant Site includes an active wood-treating facility (currently operated by Kerr-McGee Chemical Corporation). The location of the Tie Treating Plant Site is described more specifically in Exhibit A.
- B. The Port is the owner of certain real property, including Riverfront Park, located adjacent to the Tie Treating Plant Site (the "Port Property"), as described more specifically in Exhibit B. The Port Property, including Riverfront Park and a small area of Columbia River Sediments adjacent to the undeveloped portion of Riverfront Park, are off-site of the Tie Treating Plant Site.
- C. The Port claims that contamination of shallow groundwater beneath the Port Property has resulted from environmental conditions at the Tie Treating Plant Site, and that UP is liable for the mandated remedies of the regulatory agencies which affect the Port Property (the "Subject Claims"). UP denies the Subject Claims.
- D. The Port has granted UP access to the Port Properties to carry out preliminary remedial and study activities. UP has undertaken environmental studies pertaining to the Port Properties. UP has spent approximately \$2,474,000 to date for Interim Remedial Actions (\$1,630,000.00 for removal of contaminated soils from Riverfront Park, and \$844,000 for construction of the Columbia River Sediment Cap) which benefit the Port Property.

E. A Remedial Investigation was completed for the Tie Treating Plant Site, including off-site areas, in August 1993. A Final Feasibility Study for the Tie Treating Plant Site was completed in September 1995 and approved by the Oregon Department of Environmental Quality's Waste Management Division, Site Response Section (Oregon DEQ) in October 1995.

F. Oregon DEQ prepared and issued a "Staff Report, Recommended Remedial Action for the Union Pacific Railroad Site, The Dalles, Oregon" in February 1996 (the "Recommended Remedial Action Report"). Oregon DEQ has made the Recommended Remedial Action report available for public review and comment. A Record of Decision subsequently was signed for the Tie Treating Plant Site on March 27, 1996 (the "ROD").

G. Among the elements of the Recommended Remedial Action identified in the Recommended Remedial Action Report and the Selected Remedial Action identified in the ROD is restriction on the use of groundwater.

H. The Parties desire to enter into this Agreement: 1) to ensure that groundwater within the unconfined aquifer at the Port Property including Riverfront Park is not accessed or used for any purposes and to impose certain other restrictive covenants; 2) to resolve any claims, causes of action or liabilities arising out of or related to contamination of such groundwater from contamination or environmental conditions at the Tie Treating Plant Site, as described more specifically below; and 3) to reimburse the Port for costs and expenses related to the Port's monitoring and oversight of UP's activities at the Port Site, including Riverfront Park and the Tie Treating Plant Site, and to finally resolve any liability for such costs and expenses.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained in this Agreement, the Parties agree as follows:

## AGREEMENT

1. Payment by UP. UP shall pay the Port \$10,000 in full and complete satisfaction of and to finally resolve any and all of the Port's past costs and expenses associated with or related to monitoring, review and oversight of UP's activities at the Port Properties, including Riverfront Park, and the Tie Treating Plant Site, and as consideration for the covenant not to sue in paragraph 2 below, the access provided in paragraph 4 below, and the covenants in paragraph 9 below. This amount shall be paid in full not later than 30 days following the effective date of this Agreement.

2. Port Covenant Not To Sue. In consideration of UP's payment of \$10,000 and UP's prior remedial activities on or related to the Port Property, the Port, its successors and assigns, hereby agrees to release and covenant not to sue UP, its successors and assigns, officers, directors, affiliates, subsidiaries, employees, agents, contractors, from and for any past, present or future liabilities, losses, damages, claims, causes of action, fines, penalties, charges or expenses, including, without limitation, costs and reasonable attorneys' fees incurred in defending against any claims, and any administrative or judicial proceedings, orders, judgments or enforcement actions of any kind ("Claims"), arising out of the present or future environmental condition or contamination of the groundwater migrating onto, at, beneath or migrating from the Tie Treating Plant Site or the Port Property, including Riverfront Park, whether known or unknown as of the date hereof, except and as necessary to enforce the indemnity granted in paragraph 3 below.

3. UP Indemnity. To the extent allowed by law, and except as provided in paragraph 2 above, UP agrees to indemnify and hold harmless the Port, and the Port's lenders, lessees, contractors and subcontractors and partners for the Port Property, together with the successors and assigns of each such person or entity, against any Claims arising out of: (a) contamination from the Tie Treating Plant Site on the Port Property, whether known or unknown as of the date hereof, which has a direct and material adverse affect on the Port's Property; (b) any necessary

remediation required by the United States Environmental Protection Agency or the Oregon DEQ under applicable environmental laws for contamination in, under, or emanating from the Port Property and directly attributable to contamination from or remediation of the Tie Treating Plant Site; and (c) any damage to or loss of physical improvements located on the Port Property, caused or permitted by UP as a direct result of any remedial investigation or remediation of contamination on the Port Property. This agreement to indemnify and hold harmless shall not apply in the event of: 1) any material breach of any representation, covenant, or obligation made herein by the Port or any other person or entity afforded indemnification under this paragraph; 2) any action by the Port or any other person or entity afforded indemnification under this paragraph that results in exacerbation of or contribution to environmental conditions or containment on, about, beneath, from or related to the Port Property, including Riverfront Park, after the effective date of this Agreement; 3) any hindrance or interference, or failure to provide access as provided by this Agreement, with respect to implementation, operation or maintenance of remedial, monitoring, investigatory, or operation and maintenance activities on or related to the Port Property, including Riverfront Park; 4) general liabilities not associated with environmental conditions on, about, beneath from or related to the Port Property; or 5) any Claims based upon stigma or other theories premised upon the proximity of the Port Property to the Tie Treating Plant Site.

4. Access. The Port for itself, its successors and assigns, hereby agrees to grant access to the Port Property, including Riverfront Park, to UP, its successors, assigns, agents, employees, representatives, contractors, and subcontractors and to State and Federal agencies, as may be required to conduct testing, monitoring, investigations or remediation of environmental conditions or contamination on, about, beneath, from, or related to the Port Property, including Riverfront Park.

5. Contribution and Other Claims. Except as specifically provided in paragraphs 2 and 3 above, this Agreement is not intended in any way to limit any rights of contribution, cost recovery or other claims relating to environmental conditions or contamination that the Parties may have against any other persons or entities not a party to this Agreement

## 6. Definitions.

a. For purposes of this Agreement, the terms "Contamination" or "Contaminated" mean the presence of any substance defined or listed as a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act or any comparable state law that is applicable, including, without limitation, petroleum oil and its fractions, creosote, arsenic and pentachlorophenol, in the soil, water (including surface water and groundwater) or ambient air if: 1) such presence of a hazardous substance constitutes a violation of applicable environmental laws; or 2) a removal or remedial action is required with respect to such presence of a hazardous substance, or legally could be required, by a Federal or State governmental agency or court under applicable environmental laws.

b. For purposes of this Agreement, the term "Environmental Conditions" shall mean any condition, quality, or other state of the land, subsurface strata, air, surface water, soils, ground water, fish, wildlife, biota, including the presence of Hazardous Materials in any quantity, and also including without limitation any such condition, quality, or other state arising out of, related to or resulting from the release or threatened release, generation, transport, handling, treatment, storage, disposal, management, presence of or exposure to any Hazardous Materials.

c. For purposes of this Agreement, the term "Hazardous Materials" shall mean any substance (i) the presence of which requires investigation of or remediation under any federal, state or local statute, regulation, ordinance, order, action, policy or common law; or (ii) which is defined as a "hazardous waste," "hazardous substance," "hazardous or deleterious substance," "solid waste" or "pollutant or contaminant" or "hazardous material" under any federal, state or local statute, regulation, rule or ordinance or amendments thereto including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §§ 9601 et seq.) and/or the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.), and/or Oregon's Environmental Cleanup Law, O.R.S. §§ 465.200 through 465.380, all as amended; or (iii) which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or hazardous; or (iv) the presence of which causes or

threatens to cause a nuisance or poses or threatens to pose a threat to human health, safety, the environment, or natural resources; or (v) without limitation which contains gasoline, diesel fuel or other petroleum hydrocarbons; or (vi) which contains polychlorinated biphenols (PCBs), creosote, DNAPLs, PAHs, arsenic, pentachlorophenol, asbestos or urea formaldehyde foam insulation.

d. For purposes of this Agreement, the term "Party" shall mean Port or UP.

e. For purposes of this Agreement, the term "Parties" shall mean Port and UP.

7. Third Party Beneficiaries. Notwithstanding anything stated elsewhere in this Agreement, UP agrees, that purchasers of Port Property that assume the Port's duties and obligations hereunder, shall have third party beneficiary status as to the provisions of paragraph 3 above. Specifically, at the closing of a sale or transfer of Riverfront Park to Northern Wasco County Parks and Recreation District or fractional interest thereof, UP agrees to give said District transferee the specific written indemnity as contained in paragraph 3 above. This paragraph does not diminish in any way the rights and duties otherwise owed under this Agreement, or create any other rights, duties or obligations in or to third parties. Except as specifically set forth herein, this Agreement shall not create third party beneficiaries, and none of the provisions of this Agreement shall be deemed to be for the benefit of any person or entity not a party to this Agreement.

8. Restrictive Covenants.

a. Within thirty (30) days of the effective date of this Agreement, The Port shall institute a restrictive use covenant which shall provide that ground water within the unconfined aquifer on the Port Property, including Riverfront Park in The Dalles, Oregon, shall not be accessed or used for any purpose other than as provided within the terms of the restrictive use covenant. Such restrictive use covenant shall burden the Port Property and River Front Park and shall run with the land and be binding upon any successors-in-interest, including any

successor owners of all or any part of the Port Property, including Riverfront Park. The restrictive use covenant shall prohibit the use, construction, installation and operation of any water well within the Port Property described in Exhibit B (except for testing and monitoring wells), but shall not restrict the use of the stilling well currently used by the Port to maintain water levels in the waterfowl or mitigation pond. The restrictive covenant shall also provide that the Port and successors in interest shall not excavate soils in a significant way, nor undertake any below ground level construction or alteration, or otherwise disturb the ground, soils or ground water in a way that may cause the migration of contamination without obtaining the express permission of UP and Oregon DEQ. The restrictive covenant shall also prohibit development of the Port Property or River Front Park for residential use. The restrictive covenant shall prohibit any development or construction by the Port which would interfere or hamper remedies currently implemented on the Port Property and Riverfront Park, or which are required to be implemented under applicable law by governmental entities. Exhibit C, attached hereto, depicts that unconfined aquifer where the ground water's use shall be restricted and the stilling well, and the location of residual soils contamination on the Port Property, including Riverfront Park.

b. The Port and UP shall agree on the specific form of the restrictive covenant to be filed. Nothing contained in the restrictive use covenant shall be deemed or construed to restrict the Port or its successors in interest from using the Port Property described in Exhibit B as a park, nature trail, or riverfront trail for the public use and benefit, or to restrict in the future public uses occurring as of the date of this agreement. The restrictive use covenant to be filed shall expressly provide that such public uses of the Port Property are not limited by the restrictive use covenant and are protected and preserved in perpetuity.

9. Binding Effect on Subsequent Transferees. In the event that the Port transfers or conveys all or any part of its interest in the Port Property, including without limitation any leasehold interest, the Port shall include in its transfer or conveyance documents the release and covenant not to sue described in paragraph 2 above, the access provisions in paragraph 4 above, and the restrictive covenants described in paragraph 8 above. No subsequent grant, transfer, lease or conveyance of title, easement or other form of conveyance or transfer of any interest in



all or any portion of the property shall be made or effected without these provisions. All such subsequent conveyances of title, grants, transfers or conveyance of any interest in all or any of the Port Property shall contain such provisions, except that each subsequent transferee's name shall be substituted in each subsequent documents as the person or entity subject to the above provisions and bound by such provisions.

10. No Admission of Liability. Nothing herein shall be construed as an admission of liability by either of the Parties, or of any of the terms and conditions contained herein. This Agreement may not be admitted into evidence in any judicial or administrative proceeding except for a proceeding to enforce this Agreement, including the Indemnity provision of paragraph 3 above. By entering into this agreement, UP does not admit and expressly denies any liability pertaining to contamination or environmental conditions at, to, from, beneath, about or related to the Tie Treating Plant Site or the Port Properties, including Riverfront Park.

11. Governing Law. This Agreement shall be governed by the laws of the state of Oregon. In any enforcement of this Agreement and the indemnity contained in paragraph 3 above, the parties stipulate that such action shall be brought in and resolved by a general Oregon state court of competent jurisdiction and venue.

12. Remedies. All remedies, available at law or in equity, including specific performance, shall be available for the enforcement of this Agreement. The Parties agree that this Agreement is capable of specific performance.

13. Authority. Each party warrants that the individual executing this Agreement acts with authority to bind that party.

14. Termination. This Agreement shall remain in force and effect until it is mutually terminated by written agreement of the parties.

15. Negation of Agency Relationship. This Agreement shall not be construed to create, either expressly or by implication, the relationship of agency or partnership between or among the Parties. No Party (including such Party's agents, employees or contractors) is authorized to act on behalf of any other Party in any manner relating to the subject matter of this Agreement. No party shall be liable for the acts, errors or omissions of the officers, agents, employees or contractors of any other Party entered into, committed or performed with respect to or in the performance of this Agreement.

16. Binding Effect. This Agreement is binding upon the Parties, their successors and assigns, and any subsequent transferees as provided by paragraph 10.

17. Perpetuities. Notwithstanding any provision of this Agreement to the contrary, any right to acquire any interest in real property or personal property under this Agreement must be exercised, if at all, so as to vest such interest in the acquirer within the time period allowed under applicable law.

18. Counterparts. This Agreement may be executed in any number of counterparts, each of which may have the signature of only one party, but each of which shall be deemed an original, and all of which, when taken together, shall be deemed to be a single agreement among all the parties.

DATED as of \_\_\_\_\_, 1996.

THE PORT OF THE DALLES

By:   
 Title: Port President

UNION PACIFIC RAILROAD COMPANY

By:   
 Title: Assistant Vice-President, Law