

PORTLAND & WESTERN RAILROAD, INC.
CONSTRUCTION AND MAINTENANCE AGREEMENT

RR MILEPOST 85-88
CITY OF ASTORIA, COUNTY OF CLATSOP STATE OF OREGON

THIS CONSTRUCTION AND MAINTENANCE AGREEMENT (this “Agreement”) made this day of _____ 2023 (“**Effective Date**”), by and between the **Columbia River Estuary Study Taskforce and selected contractor**, hereinafter called “**Agency**”, and **Portland & Western Railroad, Inc.**, hereinafter called “**Railway**”:

WITNESSETH:

WHEREAS, in an effort to improve fish passage through the railroad to floodplain habitats, Agency proposes culvert removal and bridge placement on Railway’s Astoria District between Mileposts 85-88 and Railroad Project 22PNWR42R, hereafter called “**Project**”; located in the City of Astoria, State of Oregon; and

WHEREAS, Agency is willing to undertake the expense for the Project as detailed in **Exhibit B**, except as provided in Section I. (C) of the Agreement; and

WHEREAS, attached hereto and hereby made a part hereof as **Exhibit A** is a Project Print showing the type, size and location of the Project; and

WHEREAS, Railway is willing to coordinate and cooperate with Agency to permit construction of the Project upon the terms and conditions herein stated and not otherwise; and

WHEREAS, said Project shall be constructed in accordance with full plans and full designs which shall be subject to the mutual approval of Railway and Agency.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, it is mutually agreed as follows:

I. Performance of Work

Agency and Railway will each perform various items of work as described below:

A. **WORK TO BE PERFORMED AND MATERIALS FURNISHED BY EITHER AGENCY OR ITS CONTRACTOR AT AGENCY EXPENSE.**

1. Project Plans & Specifications and Construction
Except as otherwise herein provided, furnish all plans, engineering, supervision, labor, material, supplies and equipment necessary for construction of the Project.
2. Maintenance of Roadway Traffic
Bear responsibility for all roadway traffic detours, maintenance of roadway traffic, and all other roadway modifications, permanent or temporary, necessary for the Project.

3. Schedule & Notification

Provide Project construction schedule and notify Railway (a) fifteen (15) days prior to the date Railway is to provide flagging services and (b) twenty (20) days prior to date construction is to begin. Thereafter, Agency will implement the entire Project in accordance with the mutually agreed upon schedule.

A. WORK TO BE PERFORMED AND MATERIALS FURNISHED BY RAILWAY AT AGENCY EXPENSE.

a. Flagging

Railway will schedule and perform flagging and furnish requested services and devices during construction operations of Agency or its contractor, as deemed necessary by Railway. Any flagging cost or protective services performed by Railway or its contractor shall be at Agency's expense.

b. Construction Engineering and Engineering Inspection

Perform engineering services, including submittal reviews, project coordination, and construction inspection, including field and office work and preparation of invoices for the Project.

B. COSTS AND PAYMENTS.

Railway's financial contribution to the total Project cost shall be zero percent (0%) of the total Project cost, or Zero and 00/100 U.S. Dollars (\$0.00) based upon the confirmed construction contract amount as set forth on **Exhibit B**. The total Project cost may be modified by amendment with the mutual consent of Agency and Railway. In the interest of clarity and to avoid ambiguity, the flagging and protective services provided by Railway pursuant to Section I. (B) above are included in the total Project cost.

II. Construction Plans and Specifications

Agency or its contractors shall perform its work in accordance with detailed plans and specifications which shall be prepared by Agency or its contractors and submitted to Railway for approval of those sections that are applicable to Railway's right-of-way, facility or operations. No work pursuant to said plans and specifications shall be performed on the right-of-way of Railway prior to receipt of notices to proceed given by Railway to Agency or its authorized representatives. Nothing provided in this Agreement with respect to said plans and specifications shall be construed or deemed to be a ratification or adoption by Railway of either or both said plans as its own.

III. Traffic Protection, Safety and Flagging

All work herein provided for, to be done by Agency or its contractors on Railway's right-of-way, shall be performed at such time and in such manner as not to interfere unreasonably with the movement of trains or traffic upon the tracks of Railway. Agency or its contractors shall enter into a "Right of Entry Agreement" with Railway prior to the first entry onto Railway's right-of-way, such Right of Entry

Agreement to be provided by Railway upon request. Agency or Agency's contractor shall reimburse Railway for one hundred percent (100%) of the actual costs related to flagging per Section I. (B)(1) of this Agreement. Railway will submit bills for flagging and other protective services and devices during the progress of the work contemplated by this Agreement. Railway may bill the Agency monthly or periodically for its force account when costs exceed One Thousand dollars (\$1,000).

Wherever the safeguarding of trains or traffic of Railway is mentioned in this Agreement, it is intended to cover and include all users of Railway's tracks having permission for such use.

IV. Conditions, Restrictions, and Limitations

All the aforementioned rights are granted subject to the terms, provisions, conditions, restrictions, limitations, covenants, reservations and exceptions contained in this Agreement, including, without limitation, those set forth in the Right of Entry Agreement, Attachment 2 (Roadway Worker Protection Training Policy) and Attachment 3 (Contractor Safety Rules), each as attached hereto and by this reference incorporated herein; Agency and its contractors, in the exercise of the rights and in the conduct of the Project, shall and will do, keep, observe and perform each and all of the terms, provisions, conditions, restrictions, limitations, covenants, reservations and exceptions thereof.

Agency shall ensure that its contractor(s) obtain and provide to Railway evidence that such contractor(s) have procured the insurance coverage described in **Exhibit C**, hereto attached, covering their work on Railway's property in connection with the Project.

Agency agrees that at no time shall it file or permit the filing of a lien or liens upon the property of Railway related to the Project. If, at any time during the progress of the Project, at the time of acceptance of this Agreement or thereafter, any indebtedness due a subcontractor of Agency has become or may become a lien or liens upon said work, equipment or materials, Agency shall immediately, upon request from Railway pay such claim or indebtedness or cause such lien to be dissolved and discharged by giving a bond, or otherwise. In the case of its failure to do so, Railway may suspend the use of its property until such claim or indebtedness is paid or may apply such money toward the discharge thereof or assert and enforce a claim against Agency for such claim or indebtedness, or declare this Agreement to be cancelled, take possession and control of the Project and complete the same or cause the same to be completed in accordance with the terms and conditions hereof.

V. Intentionally Omitted

VI. Funding and Signatory Warranty

Agency acknowledges that it has available all funds necessary to complete the Project, including the reimbursement of Railway for the estimated costs, as set forth in the initial estimate (**Exhibit B**).

Each party to this Agreement certifies that its signatory has the authority to enter into this Agreement on its behalf.

VII. Term, Ownership, and Maintenance Responsibilities

The term of this Agreement commences on the Effective Date and shall continue for a period not to exceed the earlier of the condition precedent in Section IX. (B), if it occurs, or twenty (20) months after either (i) the date construction commences within Railway's Right-of-Way or (ii) completion of the construction of the Project, as determined by Railway and subject to Section IX. (C). Agency's and Railway's obligations under Sections X. and XI. (B) shall survive the term of this Agreement.

Upon completion of the Project, Railway, at Railway's expense, will be responsible for the future maintenance of Railway's track infrastructure.

VIII. Assignment

Neither party has the right to assign this Agreement without the consent of the other. Notwithstanding the foregoing, this Agreement shall inure to the benefit of and be binding on the parties hereto, their successors and permitted assigns.

IX. Construction

- A. The parties acknowledge that time is of the essence in the completion of the Project.
- B. Agency shall complete all construction for the Project within twenty four (24) months of the Effective Date. If construction has not commenced within nine (9) months after the Effective Date, this Agreement becomes null and void.
- C. If construction has commenced and is not complete within twenty four (24) months of the Effective Date, Agency shall provide Railway a timeline for the completion of the construction. Railway will review and determine if amendments to the terms of this Agreement, including **Exhibit B**, or supplemental agreements are required prior to the completion of construction.

X. Indemnity

As a material inducement for entering into this Agreement, and without which Railway would not enter into the same, Agency covenants and agrees that:

- A. AGENCY SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS RAILWAY, ITS PARENTS, AFFILIATES, SUBSIDIARIES, AND THE OFFICERS, DIRECTORS, SHAREHOLDERS, AGENTS AND EMPLOYEES OF EACH ("RAILWAY INDEMNITEES") FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LOSSES, DAMAGES, CAUSES OF ACTION, SUITS, AND LIABILITIES OF EVERY KIND (INCLUDING REASONABLE ATTORNEYS' FEES, COURT COSTS, AND OTHER EXPENSES RELATED THERETO) FOR INJURY TO OR DEATH OF A PERSON OR FOR LOSS OF OR DAMAGE TO ANY PROPERTY WHATSOEVER (INCLUDING BUT NOT LIMITED TO PROPERTY OWNED BY OR IN THE CARE, CUSTODY, OR CONTROL OF RAILWAY INDEMNITEES, AGENCY OR ITS DESIGNEES), ARISING OUT OF OR IN CONNECTION WITH ANY WORK DONE, ACTION TAKEN OR PERMITTED BY THE AGENCY, ITS CONTRACTORS, AGENTS OR EMPLOYEES UNDER THIS

AGREEMENT AND/OR IN ANY WAY ARISING UNDER OR RELATED TO THE PROJECT OR THIS AGREEMENT.

IT IS THE EXPRESS INTENTION OF AGENCY AND RAILWAY THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH, TO THE FULLEST EXTENT PERMITTED BY LAW, INDEMNIFIES RAILWAY INDEMNITEES FOR THEIR OWN NEGLIGENCE, WHETHER THAT NEGLIGENCE IS ACTIVE OR PASSIVE, OR IS THE SOLE OR A CONCURRING CAUSE OF THE INJURY, DEATH OR DAMAGE; PROVIDED THAT SAID INDEMNITY SHALL NOT PROTECT RAILWAY INDEMNITEES FROM LIABILITY FOR DEATH, INJURY OR DAMAGE ARISING SOLELY OUT OF THE CRIMINAL ACTIONS OF RAILWAY INDEMNITEES. IT IS STIPULATED BY THE PARTIES THAT RAILWAY INDEMNITEES OWE NO DUTY TO AGENCY, ITS CLIENT, OR THEIR DIRECTORS, OFFICERS, EMPLOYEES, AGENTS OR INVITEES TO PROVIDE A REASONABLY SAFEWORK PLACE AND THAT ALL PARTIES ENTERING ONTO RAILWAY PROPERTY DO SO AT THEIR SOLE RISK.

- B. Agency shall be responsible for all damages and expenses on account of injuries, (including death) to, and property damage of, any of its employees, agents, subcontractors or representatives while on the property of Railway and shall indemnify, defend and hold Railway Indemnitees harmless from all claims of damage or suits which may arise, except and only to the extent that such claims, losses, damages or expenses are caused by the gross negligence of Railway Indemnitees.
- C. IN NO EVENT SHALL RAILWAY INDEMNITEES OR AGENCY BE LIABLE TO THE OTHER FOR ANY PUNITIVE, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES.

XI. Cancellation of Project; Termination of Agreement: Remedies

- A. If Agency determines it is necessary to cancel the Project for any reason, Agency may terminate this Agreement by delivery of written notice to Railway. Upon Railway's receipt of such notice, Railway shall proceed to stop work.
- B. Agency shall reimburse Railway for (i) all reasonable costs and expenses incurred in returning Railway's property to its original condition to Railway's reasonable satisfaction, and (ii) any of Railway's expenses incurred in connection with its provision of flagging and protective services up until the time of termination.
- C. Any delays in or failure of performance by either party under this Agreement will not constitute default or give rise to any claims for damages or penalties if the delay or failure is directly caused by a **Force Majeure Event**. A "**Force Majeure Event**" means any of the following and any other event, which are events, circumstances, or conditions beyond the reasonable control of the parties, including, without limitation, acts of God, riots, wars (whether declared or not), equipment malfunction, derailments, civil disturbances, civil disobedience, insurrections, acts of terrorism, sabotage, rockslides, landslides, snowslides, avalanches, earthquakes, explosions, floods, fire, underground damage, lightning, sustained abnormal weather conditions or other natural catastrophes and/or strikes, work slowdown, lockouts or other industrial disturbances, pandemics, epidemics, health emergencies, viruses (e.g. SARS Cov-2), disease (e.g. COVID-19), plague,

changes in law or regulations, quarantine, travel restrictions, differing or unforeseeable site conditions, acts of governmental agencies or authorities (whether or not such acts are made in response to other **Force Majeure Events**), whether or not of a similar kind or nature to any of the foregoing. The parties agree that a **Force Majeure Event** does not include economic hardship, changes in market conditions, or insufficiency of funds. Under no circumstances shall an obligation to pay monies owed under this Agreement be delayed, deferred, postponed or excused by a **Force Majeure Event**.

XII. General Provisions

SOLE BENEFIT. This Agreement is intended for the sole benefit of the parties hereto. Nothing in this Agreement is intended or may be construed to give any person, firm, corporation, or other entity, other than Railway Indemnitees, the parties' successors and permitted assigns, any right or benefit pursuant to any provision or term of this Agreement, and all provisions and terms of this Agreement are and will be for the sole and exclusive benefit of the parties to this Agreement.

WAIVER. Any waiver at any time by one party of a breach hereof by the other party will extend only to the particular breach so waived and will not impair or affect the existence of any provision, condition, obligation, or requirement of this Agreement or the right of either party hereto thereafter to avail itself of any rights under this Agreement with respect to a subsequent breach. No provision of this Agreement shall be waived by any act or knowledge of the parties hereto, but only by a written instrument signed by the party waiving a right hereunder.

SEVERABILITY. If any part of this Agreement is determined to be invalid, illegal or unenforceable, such determination shall not affect the validity, legality or enforceability of any other part of this Agreement and the remaining parts of this Agreement shall be enforced as if such invalid, illegal or unenforceable part were not contained herein.

MERGER. This Agreement and the exhibits attached hereto contain the entire agreement of the parties with respect to the subject matter of this Agreement, and supersede all prior negotiations, agreements and understandings with respect thereto, written or oral.

AMENDMENT. No provision of this Agreement shall be modified without the written concurrence of the parties hereto.

HEADINGS. The headings of the Sections of this Agreement are inserted for convenience only and are not intended to govern, limit or aid in the construction of any term or provision of this Agreement.

CONSTRUCTION OF TERMS. The terms of this Agreement have been arrived at after mutual negotiation and, therefore, it is the intention of the parties that its terms be not construed against any of the parties by reason of the fact that it was prepared by one of the parties.

GOVERNING LAW. This Agreement will be construed in accordance with the laws of the state where the work is performed.

COUNTERPARTS. This Agreement may be executed in any number of counterparts, each of which may be deemed an original for any purpose.

SURVIVAL. Agency's and Railway's indemnity obligations shall survive the expiration or termination of this Agreement along with any other right or obligation that is, by its express terms or nature and context, intended to survive.

The following is a list of the attachments:

Exhibit A – Project Plan Set

Exhibit B – Rail Services Cost Estimate - Not Included

Exhibit C – Insurance Requirements

Attachment 1 – G&W Code of Ethics and Conduct

Attachment 2 – Roadway Worker Protection Training Policy

Attachment 3 – Contractor Safety Rules

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year hereinafter written.

WITNESS:

INSERT CONTRACTOR

Authorized Representative Signature

Authorized Representative (print) / Title

WITNESS:

**PORTLAND & WESTERN RAILROAD,
INC.**

Authorized Representative Signature

Authorized Representative (print) / Title

RAILROAD RESTORATION AGENCY CREEK DRAFT FINAL DESIGN

Clatsop County, Oregon
September, 2023

COORDINATES:

AGENCY CREEK

LATITUDE : 46°11'10" N
LONGITUDE 123°36'27" W

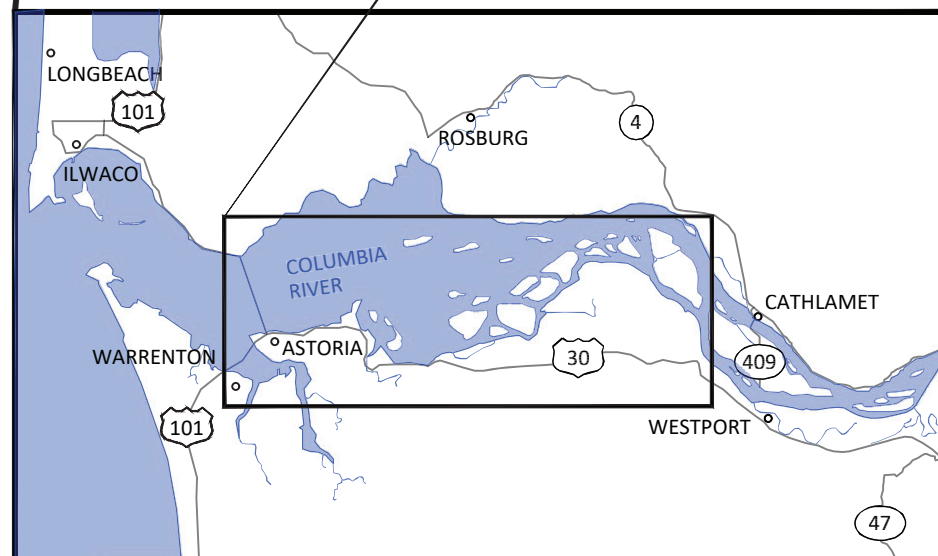
TOWNSHIP 8N, RANGE 7W,
SECTION 7 & TOWNSHIP 8N,
RANGE 8W, SECTION 12



LOCATION MAP
STATE OF OREGON
NOT TO SCALE



SITE MAP
NOT TO SCALE



VICINITY MAP
NOT TO SCALE

Sheet List Table

1	COVER, VICINITY MAP, AND SHEET INDEX	18	SITE ACCESS & DETAILS	37	BRIDGE STANDARDS - EMBEDDED PLATES
2	GENERAL NOTES (1 OF 2)	19	TEMPORARY FILL ACCESS DETAILS	38	BRIDGE STANDARDS - DECK AND CURB PLATES
3	GENERAL NOTES & QUANTITIES (2 OF 2)	20	REVEGETATION PLAN	39	BRIDGE STANDARDS - CURB AND WALK MISC.
4	HIP GENERAL CONSERVATION MEASURES (1 OF 3)	21	REVEGETATION DETAILS (1 OF 2)	40	BRIDGE STANDARDS - REAR BENDING DIAGRAM
5	HIP GENERAL CONSERVATION MEASURES (2 OF 3)	22	REVEGETATION DETAILS (2 OF 2)		
6	HIP GENERAL CONSERVATION MEASURES (3 OF 3)	23	BRIDGE STANDARDS - TITLE PAGE		
7	EROSION CONTROL DETAILS	24	BRIDGE STANDARDS - GENERAL NOTES		
8	EXISTING CONDITIONS & SURVEY CONTROL	25	BRIDGE STANDARDS - TYPICAL ELEVATIONS		
9	TEMPORARY ACCESS	26	BRIDGE STANDARDS - BENT CAP		
10	PROPOSED CONDITIONS OVERVIEW & INDEX	27	BRIDGE STANDARDS - ABUTMENT CAP		
11	PROPOSED CONDITIONS LEVEE A	28	BRIDGE STANDARDS - 20 INCH WING WALL		
12	PROPOSED CONDITIONS LEVEE B	29	BRIDGE STANDARDS - WINGWALL		
13	PROPOSED CONDITIONS LEVEE C	30	BRIDGE STANDARDS - 20 INCH SLAB BEAM		
14	PROPOSED CONDITIONS OPENING	31	BRIDGE STANDARDS - 20 INCH SLAB BEAM		
15	BRIDGE SPAN PROFILE AND BANK PROTECTION SECTION	32	BRIDGE STANDARDS - 30 INCH DOUBLE CELL BOX BEAMS		
16	BRIDGE PLAN AND ELEVATION	33	BRIDGE STANDARDS - SLOPED CURB AND STRAND PATTERN		
17	BRIDGE TYPICAL DETAILS	34	BRIDGE STANDARDS - HAND RAIL STANDARDS		
		35	BRIDGE STANDARDS - LIFTING DETAILS		
		36	BRIDGE STANDARDS - PILE SPLICE		

Draft
Not for Construction

THIS PROJECT WAS DESIGNED IN ACCORDANCE WITH THE BPA HABITAT IMPROVEMENT PROGRAM, PROGRAMMATIC BIOLOGICAL OPINION (HIP).

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NO.	BY	DATE	REVISION DESCRIPTION

ZS, CM DRAWN	MC, CA, MB DESIGNED	CA CHECKED
MC APPROVED	09/2023 DATE	190220 PROJECT

COLUMBIA RIVER ESTUARY STUDY TASKFORCE
RAILROAD RESTORATION
AGENCY CREEK - FINAL DESIGN

COVER, VICINITY MAP, AND
SHEET INDEX

SHEET
1 OF 40

RAILROAD RESTORATION WARREN SLOUGH DRAFT FINAL DESIGN

Clatsop County, Oregon
September, 2023

COORDINATES:

WARREN SLOUGH

LATITUDE : 46°11'42" N
LONGITUDE 123°34'21" W

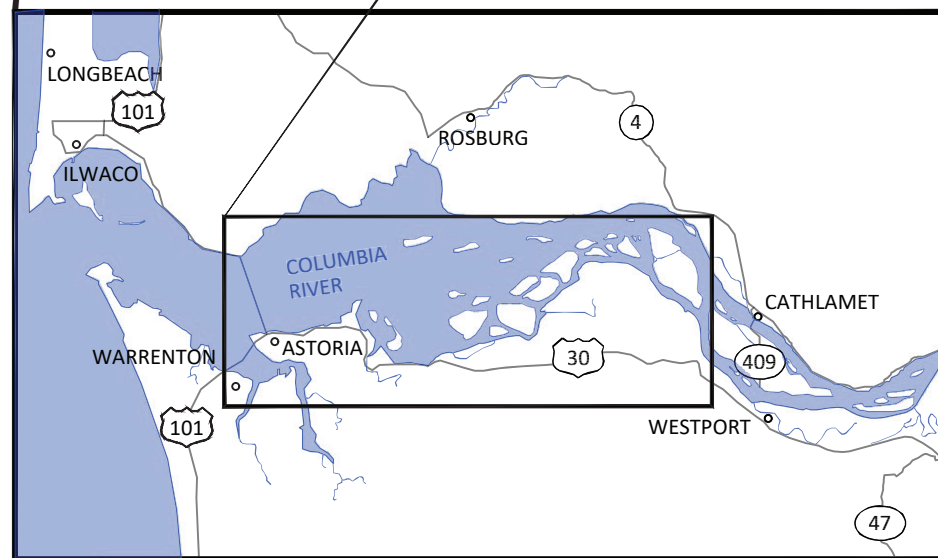
TOWNSHIP 8N, RANGE 7W,
SECTION 8



**LOCATION MAP
STATE OF OREGON**
NOT TO SCALE



SITE MAP
NOT TO SCALE



VICINITY MAP
NOT TO SCALE

Sheet List Table

1	Cover, Vicinity Map, & Sheet Index	18	Bridge Standards - Title Page
2	General Notes	19	Bridge Standards - General Notes
3	HIP General Conservation Measures (1 of 3)	20	Bridge Standard - Typical Elevation
4	HIP General Conservation Measures (2 of 3)	21	Bridge Standard - Bent Cap
5	HIP General Conservation Measures (3 of 3)	22	Bridge Standard - Abutment Cap
6	Erosion Control Details	23	Bridge Standard - 20 Inch Wing Wall
7	Existing Conditions & Survey Control	24	Bridge Standard - Wingwall
8	Temporary Access & Proposed Conditions	25	Bridge Standard - 20 In Slab Beam
9	Proposed Opening - Plan, Sequence & Erosion Control	26	Bridge Standard - 20 Inch Slab Beam
10	Bridge Span Profile and Bank Protection Section	27	Bridge Standard - 30 Inch Double Cell Box Beams
11	Bridge General Plan & Elevation	28	Bridge Standard - Sloped Curb And Stand Pattern
12	Bridge Pile Layout Plan & Typical Section	29	Bridge Standard - Handrail Details
13	13-DNU	30	Bridge Standard - Lifting Details
14	Temporary Fill Access Details	31	Bridge Standard - Pile Splice
15	Access Details	32	Bridge Standard - Embed Plates
16	Revegetation Plans	33	Bridge Standard - Deck and Curb Plates
17	Revegetation Details & Tables	34	Bridge Standard - Curb and Walk Misc
		35	Bridge Standard - Rebar Bending Diagram

Draft
Not for Construction

THIS PROJECT WAS DESIGNED IN ACCORDANCE WITH THE BPA HABITAT IMPROVEMENT PROGRAM, PROGRAMMATIC BIOLOGICAL OPINION (HIP).

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NO.	BY	DATE	REVISION DESCRIPTION

ZS	MC, CA, MB	CA
DRAWN	DESIGNED	CHECKED
MC	09/2023	190220
APPROVED	DATE	PROJECT

COLUMBIA RIVER ESTUARY STUDY TASKFORCE
RAILROAD RESTORATION
WARREN SLOUGH - FINAL DESIGN




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COVER, VICINITY MAP, &
SHEET INDEX

SHEET
1 OF 35