UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN A. RAPANOS, *et al.* Defendants.	No. 94-CV-70788-DT HON. BERNARD FRIEDMAN

CONSENT DECREE

TABLE OF CONTENTS

Table of Exhibits i

I. Jurisdiction and Venue 3

II. Applicability 4

III. Scope of Consent Decree 5

IV. Civil Penalties 8

V. Specific Provisions 9

A. Mitigation 9

B. Preservation 10

C. Future Work 11

VI. Notices and Other Submissions 12

VII. Retention of Records and Right of Entry 13

VIII. Dispute Resolution 15

IX. Force Majeure 17

X. Stipulated Penalties 19

XI. Addresses 20

XII. Costs of Suit 22

XIII. Public Comment 22

XIV. Continuing Jurisdiction of the Court 22

XV. Modification 23

XVI. Termination 23

TABLE OF EXHIBITS

1. Legal Descriptions of Pine River Site and Hines Road Site

2. Filled Wetlands at Hines Road Site, based on Plaintiffs' Exhibits 131(e) and 131(n) from the 1999 trial on liability and the March 24, 2000 Findings of Fact and Conclusions of Law (Docket # 232)

3. Filled Wetlands at Pine River Site, based on Plaintiffs' Exhibit 134(m) from the 1999 trial on liability and the March 24, 2000 Findings of Fact and Conclusions of Law (Docket # 232)

4. Legal Descriptions of Mitigation Sites

5. Second Amended Irrevocable Documentary Letter of Credit issued by Chemical Bank and Trust Company, dated July 17, 2007, Number 1417

6. Map of Pine River Site with Conservation Areas and Pine River Wetlands

7. Map of Hines Road Site with Conservation Areas, Filled Wetlands, and Hines Road Property

8. Form of Conservation Easement

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed the Second Amended Complaint ("Complaint") (Docket # 116) against Defendants John A. Rapanos, Judith Ann Nelkie Rapanos, Prodo, Inc., Rolling Meadows Hunt Club, and Pine River Bluff Estates, Inc. (collectively, "Defendants"), alleging that Defendants violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), and violated three EPA administrative orders;

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at six sites ("Sites") located in Midland and Bay Counties, Michigan, without authorization by the United States Department of the Army (the "Corps") or the State of Michigan;

WHEREAS, the Sites are: (1) the Salzburg Road Site; (2) the Hines Road (also known as Northwood) Site; (3) the Pine River Site; (4) the Freeland Site; (5) the Tittabawassee River (also known as Mapleton) Site; and (6) the Jefferson Avenue Site; and are more fully described in the Complaint and, for the Hines Road Site and the Pine River Site, in the legal descriptions attached as Exhibit 1;

WHEREAS, the Complaint seeks: (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendants, at their own expense and at the direction of EPA, to restore and/or mitigate the damages caused by their alleged unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, on February 23, 1999, the Court granted partial summary judgment for Defendants regarding the United States' claims at the Jefferson Avenue Site (Docket # 201);

WHEREAS, this matter proceeded to trial in April 1999 on liability at the remaining Sites and the Court issued its Findings of Fact and Conclusions of Law on March 24, 2000 (Docket # 232), finding that the Defendants violated three EPA Administrative Orders and violated section 301(a) of the CWA by discharging pollutants from a point source into a total of 54 acres of wetlands that were waters of the United States at the Salzburg Road, Hines Road and Pine River Sites without a valid permit;

WHEREAS, the Court also found that the government failed to prove by a preponderance of the evidence that the three parameter test for demonstrating the existence of wetlands under the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual was met at the Freeland Site or at the Tittabawassee River Site;

WHEREAS, the Court entered a Final Partial Judgment on February 21, 2003 (Docket # 271) which was appealed first to the United States Circuit Court for the Sixth Circuit, and then to the United States Supreme Court;

WHEREAS, the Supreme Court vacated the Sixth Circuit's decision and remanded the matter;

WHEREAS, the Sixth Circuit remanded this matter to the District Court for further proceedings;

WHEREAS, Defendants no longer hold title to, or control in any fashion, the Salzburg Road Site;

WHEREAS, Defendant Rolling Meadows Hunt Club does not hold title to or control in

any fashion any of the Sites;

WHEREAS, the Defendants neither admit nor deny that they violated CWA Section 301(a), or any EPA administrative orders;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' civil claims under the CWA set forth in the Complaint regarding the Sites;

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' civil claims under the CWA against Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' civil claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law;

THEREFORE, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the Eastern District of Michigan pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct business in this District, the Sites are located in this District, and the causes of action alleged in

the Complaint arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendants, their officers, directors, agents, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, a contractor or agent for any of the Defendants, whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against a Defendant, the Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting as a contractor or agent for the Defendants, to take any actions necessary to comply with the provisions hereof, except pursuant to Section IX ("Force Majeure").

5. A. The transfer of ownership or other interest in any of the "Mitigation Sites" (as defined in Section V.A "Specific Provisions - Mitigation"), or any of the "Conservation Areas" (as defined in Section V.B "Specific Provisions - Preservation"), or all or any portion of the Hines Road Site, or any portion of the Pine River Site which contains "Pine River Wetlands" (as defined in Section V.C. "Specific Provisions - Future Work"), shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to a Defendant's transfer of ownership or other interest in any of the Mitigation Sites, or any of the Conservation Sites, or all or any portion of the Hines Road Site or any portion of the Pine River Site which contains Pine River Wetlands, the Defendant making

such transfer shall provide written notice and a true copy of this Consent Decree to the proposed transferee. On January 31 and July 31 of each year, the Defendant making such transfer shall provide a written summary of all such transactions in the preceding July 1 - December 31 or January 1 - June 30, as applicable, to EPA and to the United States Department of Justice, at the addresses specified in Section XI ("Addresses") and shall confirm that the required information has been given to each transferee. As a condition to any such transfer referenced in this Paragraph, the Defendant making the transfer shall reserve all rights necessary to comply with the terms of this Consent Decree. The granting of an easement for utility purposes shall not be a transfer subject to the requirements of this Paragraph.

B. Each deed, title or other instrument conveying an interest in any of the Mitigation Sites, or Conservation Areas, or all or any portion of the Hines Road Site, or any portion of the Pine River Site which contains Pine River Wetlands, shall contain a notice stating that such property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendants under the CWA concerning the Sites. The United States covenants not to sue or bring any civil enforcement action against any Defendant for violations alleged in the Complaint. Entry of this Consent Decree by the Court shall dismiss the Complaint with prejudice and without costs to either party.

7. This Consent Decree does not impose any obligations upon the Defendants with

respect to the Salzburg Road Site, the Freeland Site, the Tittabawasse River Site or the Jefferson Avenue Site.

8. It is the express purpose of the Parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA.

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

10. Except as in accordance with this Consent Decree, Defendants and Defendants' agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

11. Attached hereto as Exhibits 2 and 3 are maps based on Plaintiff's Ex. 131(l), 131(n), and 134 (m) from the 1999 trial on liability, showing filled wetlands at the Hines Road and Pine River Sites. The Parties acknowledge that Nationwide Permit 32 ("NWP 32"), found at 72 Fed. Reg. 11092, 11,187 (Mar. 12, 2007), authorizes any fill that was placed as of April 20, 1999, *i.e.*, the last day of trial on liability, in the areas identified in Exhibit 2 and Exhibit 3, to remain in place subject to the conditions provided in NWP 32 and this Consent Decree. The Parties further acknowledge that NWP 32 authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required

by this Consent Decree shall be subject to the conditions of NWP 32 and this Consent Decree.

12. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, other than NWP 32, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

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

14. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

15. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law. Nothing in this Consent Decree shall affect the United States' rights to enforce this Consent Decree, or the United States' rights to take enforcement action for violations not alleged in the Complaint.

16. Except for Section I ("Jurisdiction and Venue"), nothing in this Consent Decree shall constitute an admission of fact or law by any Party. Defendants are not aware of any action by Defendants after April 20, 1999, that could be deemed a violation of the CWA at either the Hines Road Site or the Pine River Site.

17. Nothing in this Consent Decree shall be deemed an admission by Defendants that any portion of the Sites are subject to regulatory jurisdiction under the CWA.

18. Defendants waive any right to seek termination or modification of this Consent Decree based upon future decisions of any court in any case unrelated to the Defendants or this Consent Decree or the Sites, with respect to the regulatory jurisdiction under the CWA.

IV. CIVIL PENALTIES

19. Defendants shall pay a civil penalty to the United States in the amount of One Hundred Fifty Thousand Dollars ($150,000), within 180 days after entry of this Decree.

20. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 1994V00584, EPA Region 5, and DOJ case number 90-5-1-1-4274. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Eastern District of Michigan. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

21. Upon payment of the civil penalty required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section XI ("Addresses"), that such payment was made in accordance with this Section IV ("Civil Penalty").

22. Upon satisfaction of the requirements of this Section IV ("Civil Penalty"), Defendants' obligation under the Final Partial Judgment (Docket # 271) to provide written quarterly notice of all transfers of real estate where the consideration is in excess of $100,000 shall terminate.

23. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section X ("Stipulated Penalties") are penalties within the meaning of

Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

V. SPECIFIC PROVISIONS

A. MITIGATION

24. The Court's October 24, 2000 Order Regarding Remedy Phase (Docket # 257) requires Defendants to construct a mitigation project of at least 100 acres (including a buffer zone) in order to restore the functions and benefits of the 54 acres of filled wetlands, to monitor and maintain the mitigation project for 5 years and to ensure that the mitigation project will be adequately funded. The February 11, 2003 Partial Final Judgment (Docket # 271) additionally requires Defendants to transfer title to the mitigation project acreage to an independent third party with conservation management experience, to be approved by the Court, and to include in the deed or deeds transferring ownership appropriate restrictions to ensure that the mitigation project acreage remains intact in perpetuity. These requirements, collectively, the "Mitigation Work," are incorporated into this Consent Decree, and Defendants shall continue to be bound by them.

25. Defendants have undertaken to implement the Mitigation Work by constructing or reconstructing wetlands on three parcels in Bay and Arenac Counties, Michigan. These parcels, collectively the "Mitigation Sites," are designated as the Jay or J3 parcel, which is located at the intersection of Sandy Drive (or Bay-Arenac) Road in Arenac County, and the Houghteling (or H) and Johnson (or J1) parcels, which are in Bay County, between Rashotte Road and the D&M Railroad. Legal descriptions of the Mitigation Sites are attached as Exhibit 4.

26. Defendants currently have in place a Second Amended Irrevocable Documentary

Letter of Credit issued by Chemical Bank and Trust Company, dated July 17, 2007, Number 1417, attached as Exhibit 5, which ensures that the Mitigation Work will be adequately funded.

27. Upon certification by Dr. Gary Pierce, who has been appointed by the Court to oversee the Mitigation Work, that five years of monitoring has been completed and that wetlands on the Mitigation Sites meet the performance standard set forth in the document entitled "A Mitigation Plan for Restoring Forested and Shrub Wetlands As Ordered by United States District Court Eastern District of Michigan Southern Division" dated April 3, 2005, Defendants shall transfer title to the Mitigation Sites as required by the Mitigation Work. At the time of or in advance of such transfer, Defendants shall also transfer to a conservation management organization selected by Dr. Gary Pierce, and approved by the United States and by the Court, sufficient funds to maintain the wetlands in perpetuity. The amount of funds necessary to maintain the wetlands in perpetuity shall be recommended by Dr. Gary Pierce and approved by the Court, but in no event shall it be less than $25,000.

28. Upon completion of the requirements of this Subsection V.A. ("Specific Provisions - Mitigation"), the Second Amended Irrevocable Documentary Letter of Credit shall be released and the United States shall execute any documents reasonably requested by Defendants to document its release of such Letter of Credit.

B. PRESERVATION

29. Attached as Exhibits 6 and 7 are maps of the Pine River Site, and the Hines Road Site and a parcel contiguous to the Hines Road Site, which designate a total of 134.60 acres of land, including 53.40 acres of wetlands, as conservation areas ("Conservation Areas"). Within 21 days after entry of this Consent Decree, Defendants will either record or deliver to the

Michigan Department of Environmental Quality for recording conservation easements ("Conservation Easements") with the Midland County Register of Deeds in the form attached as Exhibit 8 with respect to the Conservation Areas. These Conservation Easements preclude any person from altering or developing the Conservation Areas except in accordance with the terms of the Conservation Easements.

C. FUTURE WORK

30. On Exhibit 6, there are also 13.40 acres of wetlands at the Pine River Site that have been delineated by the Defendants and confirmed by the Michigan Department of Environmental Quality ("MDEQ") as wetlands, but that will not be subject to a conservation easement as described herein (the "Pine River Wetlands").

31. Defendants shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner the Pine River Wetlands except as permitted by the MDEQ pursuant to applicable State of Michigan laws and rules. Nothing contained herein shall prevent Defendants from applying for permission from the MDEQ to conduct such work in the Pine River Wetlands, or to revise the delineation of the Pine River Wetlands.

32. The Hines Road Site and its contiguous parcel consist of approximately 297 acres. The Court's March 24, 2000 Findings of Fact and Conclusions of Law found 17 acres of the Hines Road Site to be filled wetlands. Pursuant to Paragraph 29 of this Consent Decree, Defendants are protecting 100 acres of the Hines Road Site and its contiguous parcel as Conservation Areas, which 100 acres includes approximately 2 acres of the 17 acres of filled wetlands. The other approximately 15 acres of filled wetlands are shown on Exhibit 7 and are addressed by Paragraph 11 of this Consent Decree. The remaining approximately 182 acres of

the Hines Road Site and its contiguous parcel, *i.e.*, 297 - 100 - 15 = 182, are collectively the "Hines Road Property" and are also shown on Exhibit 7. Defendants shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner the Hines Road Property except as permitted hereunder.

33. Prior to conducting any mowing, cutting, clearing, cultivating, dredging, excavating, farming, filling, dewatering, draining or otherwise disturbing (collectively "disturbing") in any manner on any portion of the Hines Road Property, Defendant(s) shall engage an expert to conduct an evaluation of the portion of the Hines Road Property to be so disturbed and to delineate wetlands regulated pursuant to Part 303 of the Michigan Natural Resources and Environmental Protection Act, MCL 324.30301 et seq., if any, on such portion and Defendant(s) shall confirm such evaluation with the MDEQ. Defendants agree not to disturb any portion of the Hines Road Property prior to obtaining concurrence from the MDEQ or its successor agency as to the regulatory status of the Hines Road Property.

34. In the event that any part of the relevant portion of the Hines Road Property is determined to be a wetland regulated by the State of Michigan, Defendants shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner the relevant part unless permitted by the MDEQ. Nothing contained herein shall prevent Defendants from applying for permission from the MDEQ to conduct such work on the Hines Road Property.

VI. NOTICES AND OTHER SUBMISSIONS

35. To ensure that the terms of this Consent Decree are complied with, Defendants shall, within fifteen (15) days of entry of this Consent Decree, record a certified copy of this Consent Decree with the Registers of Deeds for Bay, Midland, and Arenac Counties in Michigan.

36. Within 30 days after a specified deadline for completing any task as set forth in Sections V.A. ("Specific Provisions - Mitigation") and V.B. ("Specific Provisions - Preservation") of this Consent Decree, Defendants shall provide the United States with written notice, at the addresses specified in Section XI ("Addresses"), of whether or not that task has been completed.

37. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by this Consent Decree, if any.

38. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendants shall, by signature of a senior management official, certify such notices, documents and reports as follows:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature by John A. Rapanos shall satisfy this requirement on behalf of Defendants John A. Rapanos, Judith Ann Nelkie Rapanos, Prodo, Inc., and Rolling Meadows Hunt Club. With respect to Defendant Pine River Bluff Estates, signature by Judith Ann Nelkie Rapanos shall satisfy this requirement.

VII. RETENTION OF RECORDS AND RIGHT OF ENTRY

39. Until 1 (one) year after the termination of this Consent Decree, Defendants shall

preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in Section V ("Specific Provisions"), regardless of any corporate retention policy to the contrary. Until 1 (one) year after the termination of this Consent Decree, Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in Section V ("Specific Provisions").

40. After the conclusion of the document retention period, Defendants shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Defendants shall deliver any such records or documents to EPA. The Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Defendants assert such a privilege, they shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

41. A. Until termination of this Consent Decree, upon reasonable notice to Defendants, the United States and its authorized representatives and contractors shall have the authority at all reasonable times to enter the Defendants' business address, the Mitigation Sites,

the Conservation Areas, the Pine River Site, and the Hines Road Site, in order to either:

1) Monitor the activities required by this Consent Decree;

2) Verify any data or information submitted to the United States;

3) Obtain samples;

4) Inspect and evaluate Defendants' mitigation activities; or

5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

Nothing in this Consent Decree shall impose on Defendants any legal responsibility for the health or safety of persons entering these premises pursuant to this Paragraph 41(A).

Nothing in this Consent Decree shall preclude Defendants or their authorized representatives or contractors from accompanying the United States or its authorized representatives or contractors during any inspection conducted pursuant to this Paragraph 41(A). The United States shall promptly provide to Defendants a copy of any measurements or data (including laboratory data, photographs and/or video recordings) of, or relating to, any inspection conducted pursuant to this Paragraph 41(A).

B. The provisions of this Consent Decree are in addition to, and in no way limit, or otherwise affect, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from the Defendants as authorized by law.

VIII. DISPUTE RESOLUTION

42. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendant(s) affected by the dispute to attempt to resolve such dispute. The

period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendant(s) cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, one or more of the Defendant(s) files a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the moving Defendant(s) shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with this Consent Decree and/or the CWA, and that the moving Defendant(s)' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

43. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Defendant(s) shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendant(s) shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

44. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in Section

X ("Stipulated Penalties").

IX. FORCE MAJEURE

45. Defendants shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

46. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Consent Decree, Defendants shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section XI ("Addresses"). Such notice shall include a discussion of the following:

A. what action has been affected;

B. the specific cause(s) of the delay;

C. the length or estimated duration of the delay; and

D. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

47. Defendants may also provide to the United States any additional information that

they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely notification including the information described herein to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

48. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event and no penalties shall apply to such extended period of time. Defendants shall coordinate with EPA to determine when to begin or resume the operations that had been affected by any Force Majeure event.

49. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VIII ("Dispute Resolution").

50. Defendant(s) asserting a Force Majeure event shall bear the burden of proving by a preponderance of the evidence: (1) that the noncompliance at issue arose from causes beyond the control of Defendant(s) and any entity controlled by Defendant(s), including their employees, agents, consultants and contractors; (2) that Defendant(s) or any entity controlled by Defendant(s) could not have reasonably foreseen and prevented such noncompliance by the taking of reasonable actions; (3) that Defendant(s), their employees, agents, consultants could not have overcome the noncompliance by reasonable efforts; and (4) the number of days of noncompliance that were caused by such circumstances.

X. STIPULATED PENALTIES

51. After entry of this Consent Decree, if Defendants fail to timely fulfill any requirement of the Consent Decree, including all attachments and exhibits, the Defendants shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

A.	For Day 1 up to and including Day 30 of non-compliance	$500.00 per day
B.	For Day 31 up to and including 60 of non-compliance	$1,000.00 per day
C.	For Day 61 and beyond of non-compliance	$1,500.00 per day

Such payments shall be made within thirty (30) days of the date of accrual whether or not a written demand is made.

52. Any disputes concerning the assessment of stipulated penalties, the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to Section VIII ("Dispute Resolution") and/or Section IX ("Force Majeure") shall be resolved upon motion to this Court as provided in Section VIII ("Dispute Resolution").

53. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendants do not prevail on the disputed

issue, stipulated penalties shall be paid by Defendants as provided in this Section.

54. To the extent Defendant(s) demonstrates to the Court that a delay or other non-compliance was due to a Force Majeure event as defined in Section IX ("Force Majeure") or otherwise prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

55. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

56. Defendants shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 1994V00584, EPA Region 5, and DOJ case number 90-5-1-1-4274. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Eastern District of Michigan. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section XI ("Addresses").

XI. ADDRESSES

57. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

(1) John P. Steketee
Associate Regional Counsel
United States Environmental Protection Agency
Region 5
77 W. Jackson, Blvd (C-14J)
Chicago, IL 60604-3590
PH: (312) 886-0558
FAX: (312) 886-0747
Email: steketee.john@epa.gov

(2) David Schulenberg
United States Environmental Protection Agency
Region 5
77 W. Jackson Blvd
Chicago, IL 60604
PH: (312) 886-6680
FAX: (312) 886-0168
Email: schulenberg.david@epa.gov

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE:

Daniel R. Dertke, Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
PH: (202) 514-0994
FAX: (202) 514-8865
Email: daniel.dertke@usdoj.gov

C. TO DEFENDANTS:

(1) Arthur Siegal
Jaffe, Raitt, Heuer & Weiss, P.C.
27777 Franklin Road, Ste 2500
Southfield, MI 48034
PH: (248) 351-3000
FAX: (248) 351-3082
Email: asiegal@jaffelaw.com

(2) John A. Rapanos and Kristi Lynn Laundra
925 E. Wheeler Street

Midland, MI 48642
PH: (989) 839-0541
FAX: (989) 839-0744

XII. COSTS OF SUIT

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

XIII. PUBLIC COMMENT

59. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. §50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed Consent Decree is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree.

XIV. CONTINUING JURISDICTION OF THE COURT

60. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to

construe and effectuate the Consent Decree.

XV. MODIFICATION

61. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

XVI. TERMINATION

62. Except for Paragraphs 30-34 (relating to Section V.C. ("Specific Provisions - Future Work") and Paragraph 39 (relating to Section VII ("Retention of Records and Right of Entry"), this Consent Decree may be terminated by either of the following:

A. Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Defendants may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Defendants have obtained compliance with all provisions of this Consent Decree, including completion of the Mitigation Work and transfer of the Mitigation Sites, and compliance with the CWA at the Pine River and Hines Road Sites;

2. Defendants either (a) have maintained compliance with all provisions of this Consent Decree, including completion of the Mitigation Work and transfer of the Mitigation Sites, and compliance with the CWA at the Pine River and Hines Road Sites, for twelve (12) consecutive months, or (b) no longer hold title to, or control in any fashion, the Hines Road Site and the Pine River

Site;

3. Defendants have paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

4. Defendants have certified compliance pursuant to subparagraphs 1 through 3 of this Paragraph to the United States; and

5. within forty-five (45) days of receiving such certification from the Defendants, the United States has not contested in writing that such compliance has been achieved. If the United States disputes Defendants' full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

Termination of this Consent Decree shall relieve Defendants of further obligations and liabilities hereunder, except those Paragraphs listed in this Section XVI ("Termination").

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2009.

_____
United States District Judge

Consent Decree Signature Page
United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

ON BEHALF OF THE UNITED STATES:

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division

Dated: 12/29/08

Daniel R. Dertke
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

Consent Decree Signature Page
United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Dated: 12/15/08

RANDOLPH L. HILL
Acting Director
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Ariel Rios Building, 2241A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Consent Decree Signature Page
United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Dated: 12-9-08

Lynn Buhl
Regional Adminstrator
Region 5
U.S. Environmental Protection Agency

Consent Decree Signature Page
United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

ON BEHALF OF DEFENDANTS:

John A. Rapanos Date: 11-24-08

Judith Ann Nelkie Rapanos Date: 11-24-08

Prodo, Inc.

By: John A. Rapanos, its President Date: 11-24-08

Pine River Bluff Estates, Inc.

By: Judith Ann Nelkie Rapanos, its President Date: 11-24-08

Rolling Meadows Hunt Club

By: John A. Rapanos Date: 11-24-08

Consent Decree

United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Exhibit 1

Overall Legal Description for Pine River Site:

Part of the Southwest ¼ of the Northwest ¼ AND part of the Northwest ¼ of the Northwest ¼ AND part of the Northwest ¼ of the Southwest ¼ of Section 25 AND the North ½ of the Southeast ¼ AND part of the South ½ of the Northeast ¼ AND part of the North ½ of the Southwest ¼ AND part of the Southeast ¼ of the Southwest ¼ of Section 26, All in T14N, R1E, Homer Township, Midland County, Michigan described as: Beginning at the South ¼ of said Section 26, thence S89°44'24"W, along the South line of said Section 26, 1321.27 feet; thence N00°05'00"W, along the West 1/8 line of said Section 26, 322.04 feet; thence N89°44'14"E 356.82 feet; thence N00°19'15"W 520.69 feet; thence S89°44'14"W 305.00 feet; thence along an intermediate traverse line for the Pine River the following ten courses, N25°24'00"E 149.77 feet; thence N04°33'22"W 135.38 feet; thence N25°48'14"W 238.59 feet; thence N69°52'05"W 298.06 feet; thence S77°39'10"W 581.46 feet; thence N41°26'46"W 226.03 feet; thence N04°30'19"W 513.94 feet; thence N32°56'41"E 317.44 feet; thence N82°34'55"E 626.56 feet; thence N55°30'58"E 568.02 feet; thence leaving said traverse line, N89°47'22"E, along the East-West ¼ line of said Section 26, 1093.17 feet to the Center of said Section 26; thence N00°07'23"W, along the North-South ¼ line of said Section 26, 498.94 feet; thence along an intermediate traverse line for the Pine River the following two courses, S82°44'20"E 424.18 feet; thence N60°38'41"E 652.43 feet; thence leaving said traverse line, S00°07'23"E 761.52 feet; thence N89°47'22"E, along the East-West ¼ line of said Section 26, 327.94 feet; thence N00°06'43"W, along the East 1/8 line of said Section 26, 815.53 feet; thence along an intermediate traverse line for the Pine River the following two courses, N78°14'28"E 1291.45 feet; thence N41°40'10"E 584.09 feet; thence leaving said traverse line, S87°30'44"E 497.47 feet; thence S22°51'55"W 100.00 feet; thence S56°23'05"E 423.00 feet; thence N89°56'55"E 179.00 feet; thence S00°03'05"E, along the West 1/8 line of said Section 25, 1199.10 feet; thence N89°50'29"W, parallel to the East-West ¼ line of said Section 25, 1323.49 feet; thence S00°15'08"E, along the East line of said Section 26, 1290.54 feet; thence S89°42'14"W, along the South 1/8 line of said Section 26, 2638.87 feet; thence S00°07'23"E, along the North-South ¼ line of said Section 26, 1327.47 feet to the Point of Beginning. Contains 260.19 acres, more or less. Subject to easements, reservations, and restrictions of record, if any.

Legal Description for Hines Road Site:

The Hines Road Site consists of land in Homer Township and the City of Midland, Midland County, Michigan, consisting of 289.76 acres, more or less, and more particularly described as follows:

The Northwest 1/4 of Section 12, T14N, R1E,

EXCEPT a parcel described as commencing at the West 1/4 corner of Section 12, thence East 955.00 feet to the Point of Beginning, thence North 240.00 feet; thence East 299.00 feet; thence South 240.00 feet; thence West 299.00 feet to the Point of Beginning of this exception; and

ALSO EXCEPT a parcel described as Beginning at the Southeast corner of the Northeast 1/4 of Section 12, thence North 208.00 feet; thence West 208.00 feet; thence South 0.28 feet; thence West 103.86 feet; thence South 27.72 feet; thence West 570.00 feet; thence South 180 feet; thence East 881.86 feet to the Point of Beginning of this Exception;

AND

All that part of Section 1, T14N, R1E, lying South of the former C&O Railroad right-of-way (now the Pere Marquette Railtrail) and West of the North-South 1/8 Line;

EXCEPT a parcel known as the Duck Hunters Memorial, more fully described on the page attached hereto.

DUCK HUNTERS MEMORIAL

LEGAL DESCRIPTION

PART OF SECTION 1, T14N-R1E, HOMER TOWNSHIP, MIDLAND COUNTY, MICHIGAN BEGINNING N 00 DEG 12 MIN 28 SEC W, 224.77 FT. ALONG THE WEST SECTION LINE AND S 57 DEG 04 MIN 28 SEC E, 2608.37 FT. ALONG THE SOUTHERLY RIGHT OF WAY LINE OF THE PERE MARQUETTE RAIL TRAIL FROM THE WEST 1/4 CORNER OF SAID SECTION 1; THENCE S 16 DEG 55 MIN 34 SEC W, 155.58 FT.; THENCE N 32 DEG 31 MIN 29 SEC W, 43.21 FT.; THENCE N 62 DEG 41 MIN 53 SEC W, 41.62 FT.; THENCE N 17 DEG 04 MIN 42 SEC W, 37.65 FT.; THENCE N 02 DEG 20 MIN 04 SEC W, 30.73 FT.; THENCE S 69 DEG 46 MIN 17 SEC W, 39.46 FT.; THENCE S 76 DEG 12 MIN 07 SEC W, 36.55 FT.; THENCE N 57 DEG 32 MIN 40 SEC W, 56.81 FT.; THENCE N 69 DEG 46 MIN 22 SEC W, 38.86 FT.; THENCE S 75 DEG 01 MIN 14 SEC W, 51.05 FT.; THENCE S 32 DEG 50 MIN 23 SEC E, 31.02 FT.; THENCE S 52 DEG 10 MIN 32 SEC E, 41.51 FT.; THENCE S 87 DEG 06 MIN 17 SEC W, 29.87 FT.; THENCE S 60 DEG 39 MIN 31 SEC W, 16.08 FT.; THENCE N 55 DEG 33 MIN 16 SEC W, 28.39 FT.; THENCE N 77 DEG 06 MIN 36 SEC W, 56.68 FT.; THENCE N 67 DEG 52 MIN 51 SEC W, 43.51 FT.; THENCE S 01 DEG 48 MIN 41 SEC E, 19.92 FT.; THENCE S 62 DEG 28 MIN 33 SEC E, 23.75 FT.; THENCE S 47 DEG 22 MIN 41 SEC E, 41.18 FT.; THENCE S 64 DEG 59 MIN 28 SEC E, 35.15 FT.; THENCE S 67 DEG 39 MIN 38 SEC W, 15.00 FT.; THENCE S 42 DEG 18 MIN 27 SEC W, 14.46 FT.; THENCE S 01 DEG 07 MIN 16 SEC W, 18.45 FT.; THENCE S 29 DEG 08 MIN 30 SEC W, 21.32 FT.; THENCE S 64 DEG 49 MIN 18 SEC W, 67.53 FT.; THENCE S 24 DEG 44 MIN 17 SEC W, 37.40 FT.; THENCE S 18 DEG 49 MIN 15 SEC W, 39.07 FT.; THENCE S 40 DEG 16 MIN 13 SEC W, 45.20 FT.; THENCE S 48 DEG 47 MIN 51 SEC E, 24.20 FT.; THENCE N 74 DEG 06 MIN 26 SEC E, 28.91 FT.; THENCE N 17 DEG 51 MIN 35 SEC E, 32.92 FT.; THENCE N 79 DEG 27 MIN 25 SEC E, 28.91 FT.; THENCE N 80 DEG 21 MIN 17 SEC E, 27.72 FT.; THENCE S 58 DEG 21 MIN 49 SEC E, 30.70 FT.; THENCE N 87 DEG 09 MIN 22 SEC E, 33.49 FT.; THENCE S 50 DEG 35 MIN 26 SEC E, 28.30 FT.; THENCE S 04 DEG 00 MIN 43 SEC E, 26.60 FT.; THENCE S 60 DEG 19 MIN 23 SEC E, 70.58 FT.; THENCE S 61 DEG 43 MIN 01 SEC E, 37.72 FT.; THENCE S 53 DEG 03 MIN 23 SEC E, 78.78 FT.; THENCE N 84 DEG 56 MIN 47 SEC E, 24.68 FT.; THENCE N 05 DEG 02 MIN 01 SEC W, 28.62 FT.; THENCE N 62 DEG 38 MIN 05 SEC E, 32.12 FT.; THENCE N 43 DEG 58 MIN 51 SEC E, 31.13 FT.; THENCE S 57 DEG 28 MIN 12 SEC E, 22.13 FT.; THENCE S 28 DEG 39 MIN 35 SEC E, 30.27 FT.; THENCE S 45 DEG 46 MIN 39 SEC W, 20.62 FT.; THENCE S 29 DEG 57 MIN 00 SEC E, 29.71 FT.; THENCE S 53 DEG 27 MIN 05 SEC E, 32.53 FT.; THENCE S 13 DEG 42 MIN 37 SEC E, 45.25 FT.; THENCE S 10 DEG 27 MIN 42 SEC E, 49.34 FT.; THENCE S 32 DEG 08 MIN 04 SEC E, 47.24 FT.; THENCE S 41 DEG 50 MIN 49 SEC E, 45.18 FT.; THENCE S 57 DEG 41 MIN 31 SEC E, 42.44 FT.; THENCE S 42 DEG 58 MIN 45 SEC E, 47.48 FT.; THENCE S 27 DEG 40 MIN 33 SEC E, 36.72 FT.; THENCE S 45 DEG 27 MIN 01 SEC E, 42.48 FT.; THENCE S 36 DEG 48 MIN 15 SEC E, 38.96 FT.; THENCE S 76 DEG 00 MIN 56 SEC E, 30.18 FT.; THENCE N 63 DEG 31 MIN 50 SEC E, 15.82 FT.; THENCE N 16 DEG 01 MIN 02 SEC E, 18.39 FT.; THENCE N 24 DEG 33 MIN 28 SEC W, 40.51 FT.; THENCE N 32 DEG 35 MIN 07 SEC W, 20.68 FT.; THENCE N 56 DEG 51 MIN 02 SEC E, 21.01 FT.; THENCE S 47 DEG 54 MIN 20 SEC E, 25.82 FT.; THENCE S 46 DEG 21 MIN 36 SEC E, 36.08 FT.; THENCE S 43 DEG 40 MIN 52 SEC E, 54.55 FT.; THENCE N 60 DEG 47 MIN 07 SEC E, 141.21 FT.; THENCE N 00 DEG 59 MIN 38 SEC E, 49.01 FT.; THENCE N 50 DEG 52 MIN 56 SEC W, 36.82 FT.; THENCE N 61 DEG 22 MIN 06 SEC W, 36.20 FT.; THENCE N 45 DEG 26 MIN 47 SEC E, 23.98 FT.; THENCE N 75 DEG 51 MIN 30 SEC E, 37.13 FT.; THENCE N 69 DEG 22 MIN 44 SEC E, 45.40 FT.; THENCE S 78 DEG 17 MIN 33 SEC E, 31.18 FT.; THENCE N 63 DEG 37 MIN 23 SEC E, 31.67 FT.; THENCE N 36 DEG 25 MIN 56 SEC E, 41.82 FT.; THENCE N 15 DEG 48 MIN 45 SEC E, 28.10 FT.; THENCE N 50 DEG 17 MIN 28 SEC W, 35.70 FT.; THENCE N 86 DEG 45 MIN 09 SEC W, 32.32 FT.; THENCE N 52 DEG 14 MIN 35 SEC W, 37.89 FT.; THENCE N 02 DEG 48 MIN 11 SEC E, 32.21 FT.; THENCE N 14 DEG 20 MIN 21 SEC W, 55.94 FT.; THENCE N 54 DEG 19 MIN 55 SEC E, 38.38 FT.; THENCE N 57 DEG 04 MIN 28 SEC W, 576.67 FT. ALONG THE SOUTHERLY RIGHT OF WAY LINE OF THE PERE MARQUETTE RAIL TRAIL TO THE POINT OF BEGINNING. CONTAINING 8.62 ACRES.

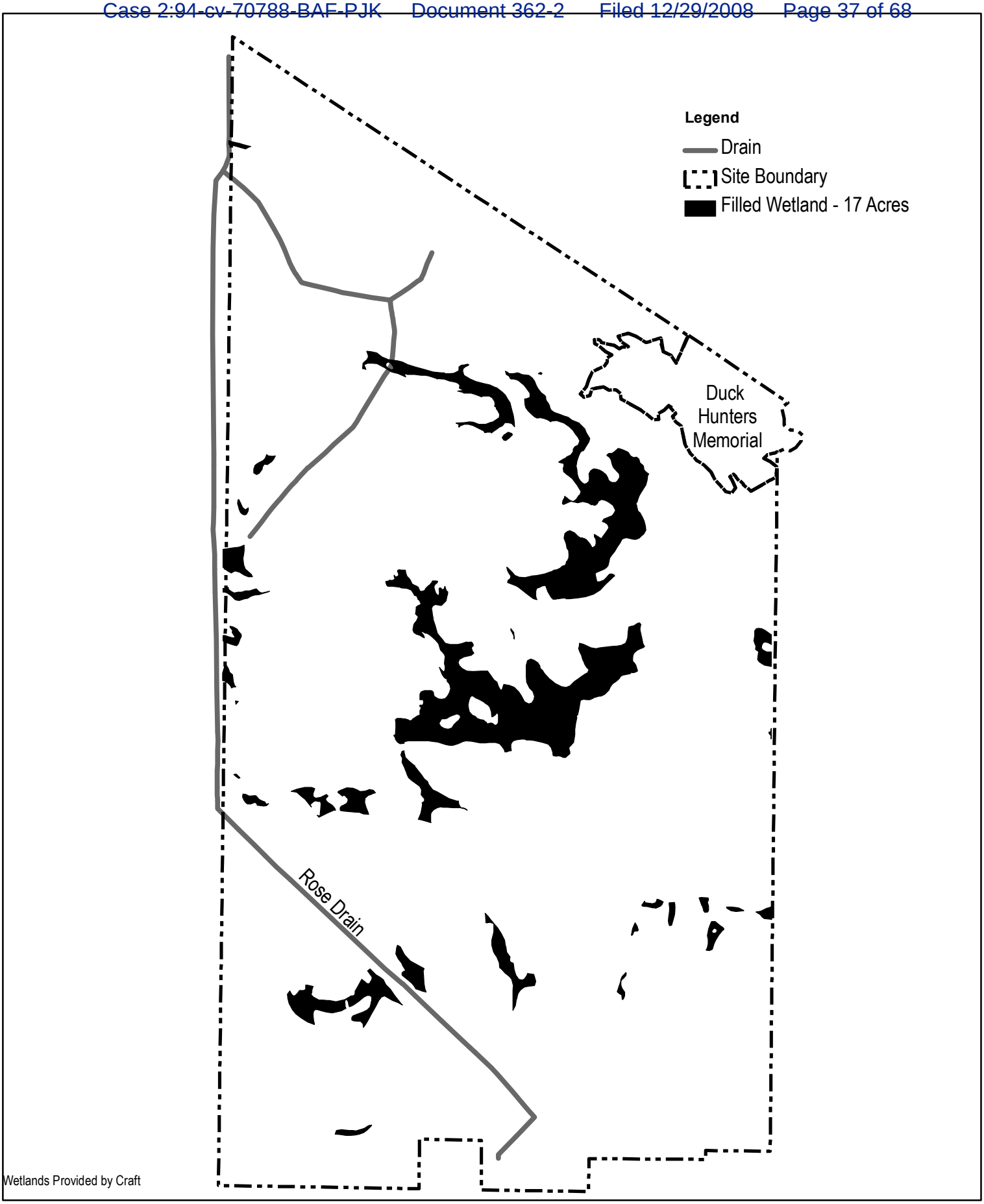
Jerome A. Schafer

JEROME A. SCHAFER, P.S. 16409
3-4-97

Consent Decree

United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Exhibit 2



Hines Road Site - Exhibit 2

0 150 300 600 Feet

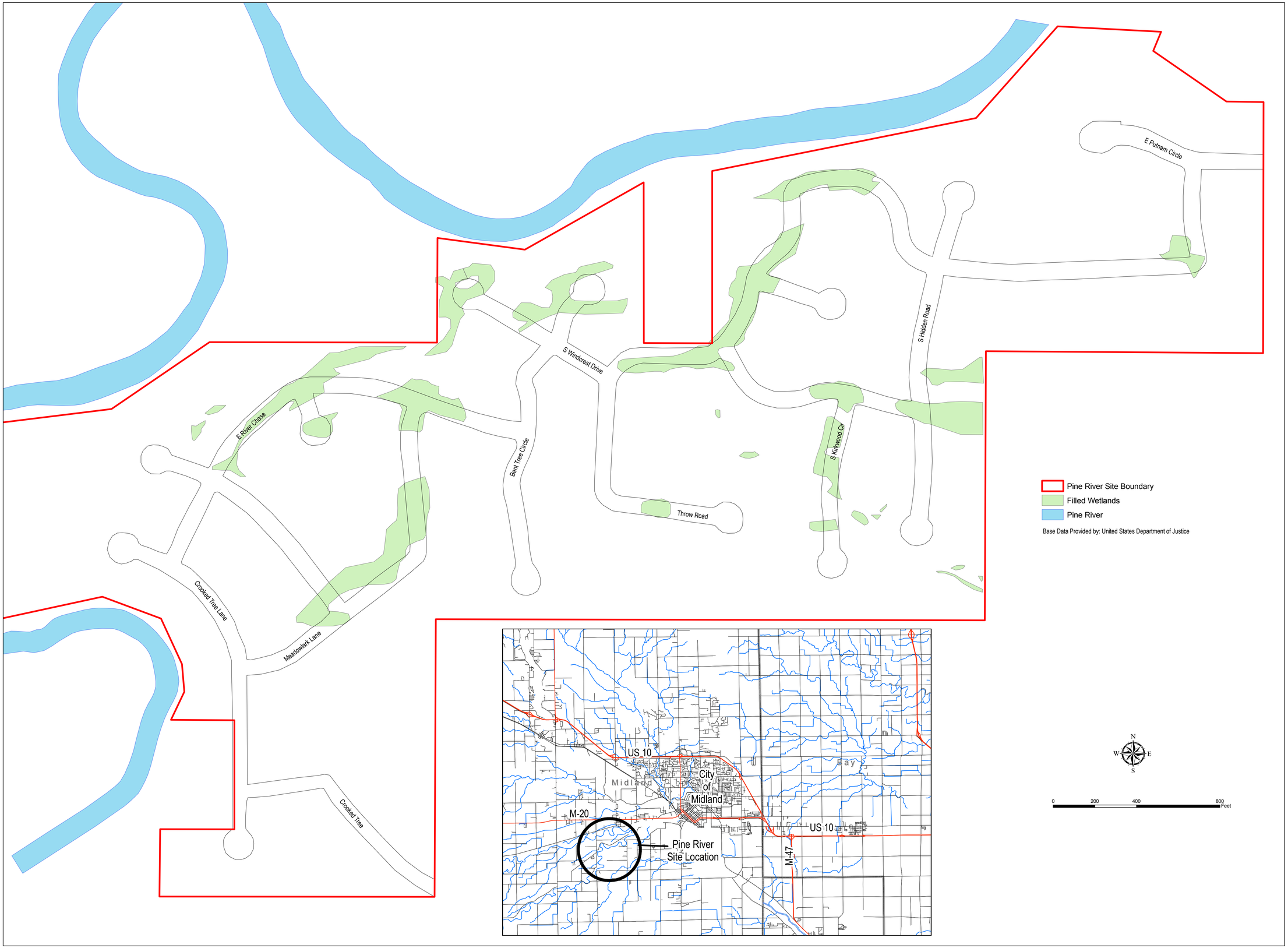
Hines Road - Homer Township, MI
November 2008

ECT Environmental Consulting & Technology, Inc.

Consent Decree

United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Exhibit 3



ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-07-08

US vs. Rapanos

Pine River Site

November 7, 2008

Drawing Title

Exhibit 3
Filled Wetlands

1" = 200' @ 24x36
Scale

Sheet 1 of 1
Sheet Number

Consent Decree

United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Exhibit 4

DESCRIPTION OF HOUGHTELING PROPERTY

A parcel of land located in Pinconning Township, Bay County Michigan described as follows:

The Northeast ¼ of the Northwest ¼ of Section 6, Town 17 North, Range 5 East, EXCEPT the right of way for Townline Road on the North side of said land.

Property Tax ID number 09-120-037-100-040-00

DESCRIPTION OF JOHNSON PROPERTY

A parcel of land located in Pinconning Township, Bay County, Michigan described as follows:

The Southwest ¼ of the Northwest ¼, lying East of the D&M Railroad Right of Way in Section 6, Town 17 North, Range 5 East, Subject to easements, restrictions, and reservations of record.

Property Tax ID number 09-120-037-100-050-02

DESCRIPTION OF JAY PROPERTY

A parcel of land in the Southeast ¼ of Section 31, Town18 North – Rang 5 East, Standish Township, Arenac County, Michigan described as follows:

Beginning at the South ¼ corner of said Section; thence N.00º - 15'-52"E., on the North and South ¼ line of said Section, 1328.19 feet; thence N.67º - 12'-52"E., 69.80 feet; thence N.77º-40'-38"E., 248.74 feet; thence N.85º-24'-30"E., 258.68 feet; thence N.82°-31'-17"E., 312.77 feet; thence N.85°-31'-18"E., 402.35 feet; thence S.88°-48'-44"E., 383.49 feet; thence S.73°-39'-41"E., 84.09 feet to the Westerly line of Al Heppner's Beach Subdivision as recorded in Volume 2 of Plats on Page 42 of Arenac County Records; thence S.05°-20'-06"W.(recorded as S.04°-46'-45"W.), on said Westerly line, 400.39 feet (recorded as 400.17 feet); thence S.13°-28'-17"W.(recorded as S.13°-02'-45"W.), on said Westerly line, 440.70 feet (recorded as 442.18 feet); thence S.04°-24'-57"W.(recorded as S.04°-02'-45"W.), on said Westerly line,.456.91 feet (recorded as 458.18 feet); thence S.88°-08'-12"W.(recorded as S.87°-54'-45"W.), 429.94 feet (recorded as 432.40 feet); thence S.08°54'-04"W.(recorded as S.07°-24'-45"W.), 158.91 feet (recorded as 159.00 feet) to South line of said Section; thence S.89°-11'-29"W. (recorded as S.88°-53'-15"W.), on said South line, 1117.40 feet to the point of beginning, subject to any easements of record.

Property Tax ID number 010-1-031-400-005-01

Consent Decree

United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Exhibit 5

SECOND AMENDED IRREVOCABLE DOCUMENTARY LETTER OF CREDIT

Date: July 17, 2007

Number: 1417

Beneficiary: United States District Court for the Eastern District of Michigan, Southern Division

Amount: Six Hundred Fifty Thousand and 00/100 Dollars ($650,000.00)

Subject to the conditions precedent hereinafter stated, we hereby irrevocably authorize you to draw on Chemical Bank (the "Bank"), for the account of John A. Rapanos, Judith Ann Rapanos, Prodo, Inc., a Michigan corporation, and Pine River Bluff Estates, Inc., a Michigan corporation (the "Account Parties"), up to the aggregate amount of Six Hundred Fifty Thousand and 00/100 Dollars ($650,000.00). Provided, however, that upon the first to occur of (i) the certification or acknowledgement that the Account Parties have completed the creation of wetlands as required under the Order Regarding Remedy Phase issued on October 24, 2000, by the Honorable Bernard A. Friedman of the United States District Court for the Eastern District of Michigan, Southern Division (the "Court"), in Civil Action No. 94-CV-70788-DT (the "Action"), or (ii) September 4, 2007, the amount available under this Letter of Credit shall decrease to Five Hundred Thousand and 00/100 Dollars ($500,000.00), or any lesser amount which may be set by Order of the Court. Until the earlier of the certification or acknowledgement described above or September 4, 2007, the full amount of Six Hundred Fifty Thousand Dollars ($650,000.00) shall be available hereunder. This Letter of Credit shall expire on June 30, 2012. This Letter of Credit shall be promptly surrendered to Bank upon expiration.

Subject to the foregoing and the further provisions of this letter of credit, a demand for payment may be made by presentation to Bank at 333 East Main Street, Midland, Michigan 48640 of your sight draft in the form of Exhibit A hereto. If a sight draft is so presented at or before 11:00 A.M., Midland, Michigan time, on any business day, payment will be made to the specified account in the amount of such sight draft in same day funds before the close of business on the same day. If a sight draft is presented after 11:00 A.M., Midland, Michigan time, on any business day, payment will be made to the specified account in the amount of such sight draft in same day funds before the close of business on the next business day. Business day means any weekday on which the Bank is open for the conduct of business in Midland, Michigan.

Sight drafts drawn under this Letter of Credit must bear the phrase "Drawn under Chemical Bank Letter of Credit Number 1417", and must reflect the signature of the individual authorized by the order of the Court authorizing the issuance of this Letter of Credit.

To the extent that any obligation of the Bank hereunder is conditioned upon or subject to an order of the Court, the Bank will be deemed to be in receipt of such order only when a true copy thereof is actually received by any officer of the Bank

This Letter of Credit sets forth in full the terms of our undertaking, and the undertaking shall not in any way be modified, amended, or amplified by reference to any document, instrument, or agreement referred to herein or in which this Letter of Credit is referred to or to which this Letter of Credit relates, and any such reference shall not be deemed to incorporate herein by reference any document, instrument, or agreement.

This Letter of Credit may not be transferred. This Letter of Credit is subject to the Uniform Customs Practice for Documentary Credits (1993 Revision), International Chamber of Commerce Publication No. 500.

This Second Amended Letter of Credit amends and replaces a First Amended Irrevocable Documentary Letter of Credit dated January 27, 2006.

Chemical Bank,
a Michigan banking corporation

By: Robert S. Rathbun

Its: Senior Lender/Community President

EXHIBIT A

SIGHT DRAFT

To: Chemical Bank
333 East Main Street
Midland, Michigan 48640

Drawn under Chemical Bank Letter of Credit Number _____ (the "Letter of Credit").

At sight, pay the sum of _____ Dollars ($_____) to _____, in connection with the wetlands remediation project referenced in the Order of the United States District Court for the Eastern District of Michigan, in case no. 94-CV-70708-DT, in payment for the services and goods described/itemized in the attached documents, consisting of _____ pages.

This Sight Draft may be executed in counterpart; facsimile or electronic copies reflecting signatures of the parties shall be effective to the same extent as originals.

United States Environmental Protection Agency

By: _____

Its: _____

Date: _____

Froghome Environmental, LLC

By: _____
Dr. Gary Pierce
Telephone: 616-721-4190

Date: _____

_____

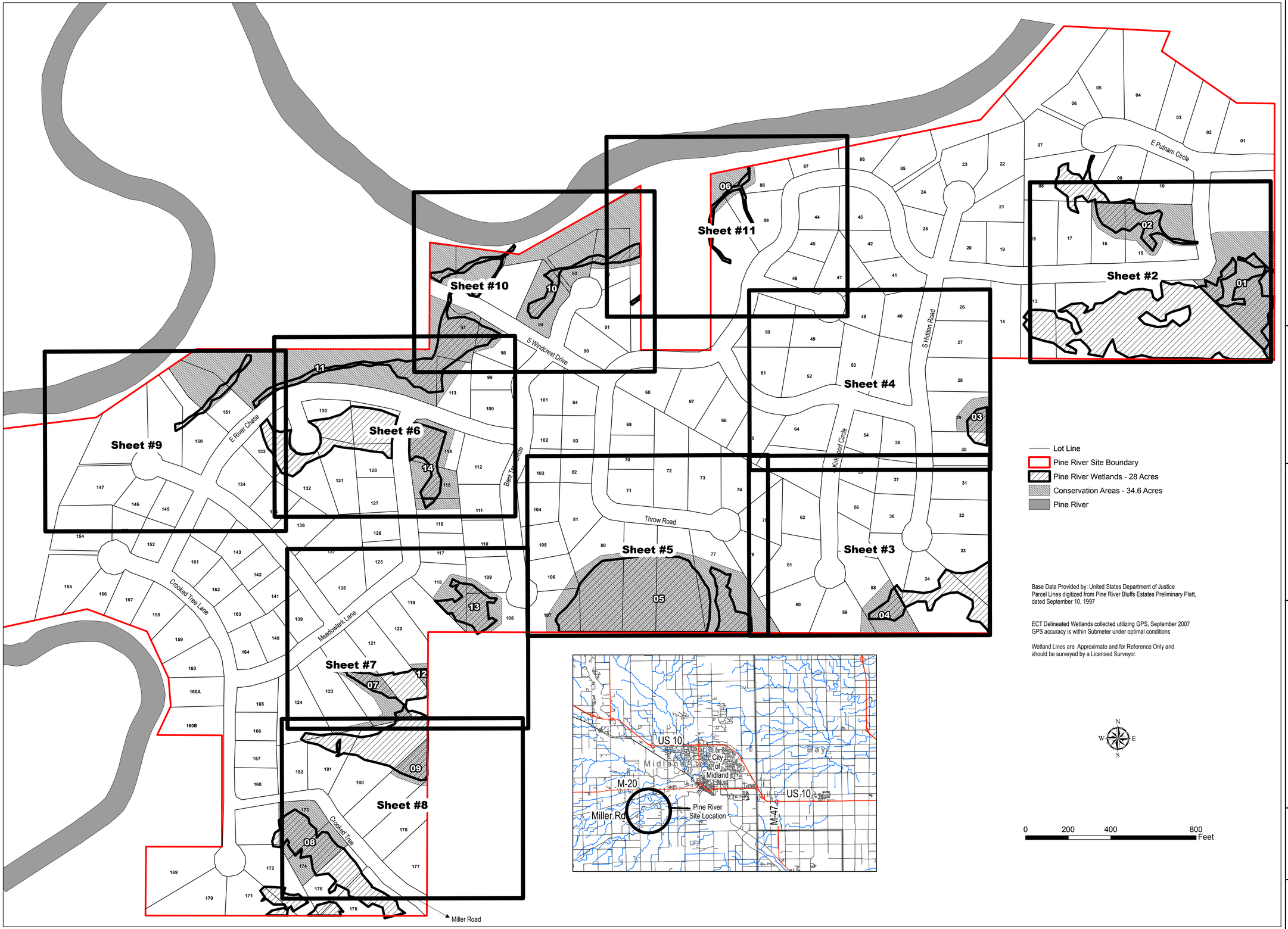
on behalf of all Defendants in Case No. 94-DV-70708-DT

Date: _____

Consent Decree

United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Exhibit 6



Base Data Provided by: United States Department of Justice
Parcel Lines digitized from Pine River Bluffs Estates Preliminary Platt, dated September 10, 1997

ECT Delineated Wetlands collected utilizing GPS, September 2007
GPS accuracy is within Submeter under optimal conditions

Wetland Lines are Approximate and for Reference Only and should be surveyed by a Licensed Surveyor.

ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Final — 11-06-08
Issued for — Date

US vs. Rapanos

Pine River Site

November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

1" = 200' @ 24x36
Scale

Sheet 1 of 11
Sheet Number

ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

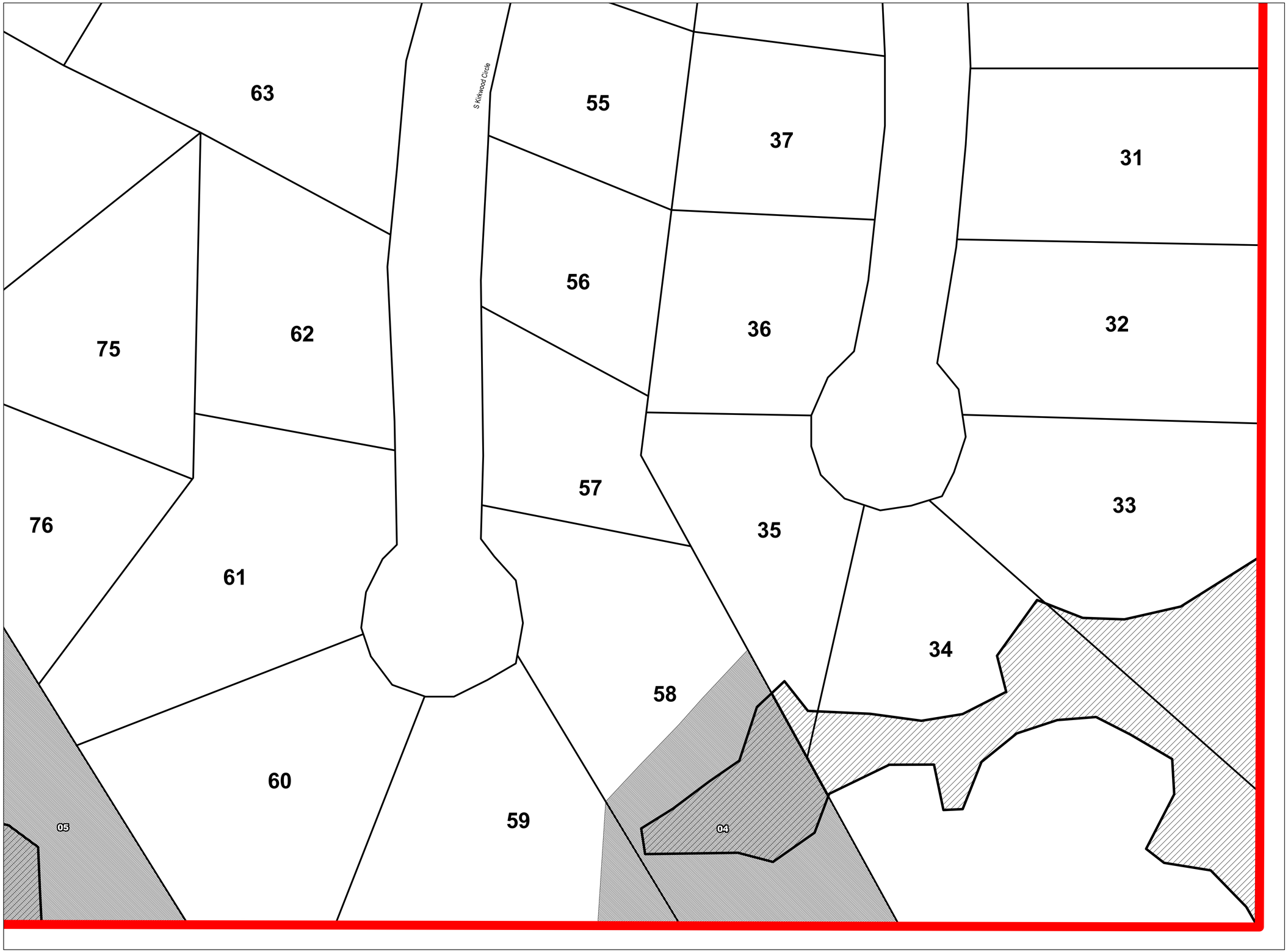
November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

0 20 40 80 Feet
Scale

Sheet 2 of 11
Sheet Number



ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

0 20 40 80 Feet
Scale

Sheet 3 of 11
Sheet Number

ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

0 20 40 80 Feet

Scale

Sheet 4 of 11

Sheet Number

ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

0 20 40 80 Feet
Scale

Sheet 5 of 11
Sheet Number

ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

0 20 40 80 Feet

Scale

Sheet 6 of 11

Sheet Number

ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

November 6, 2008

Drawing Title

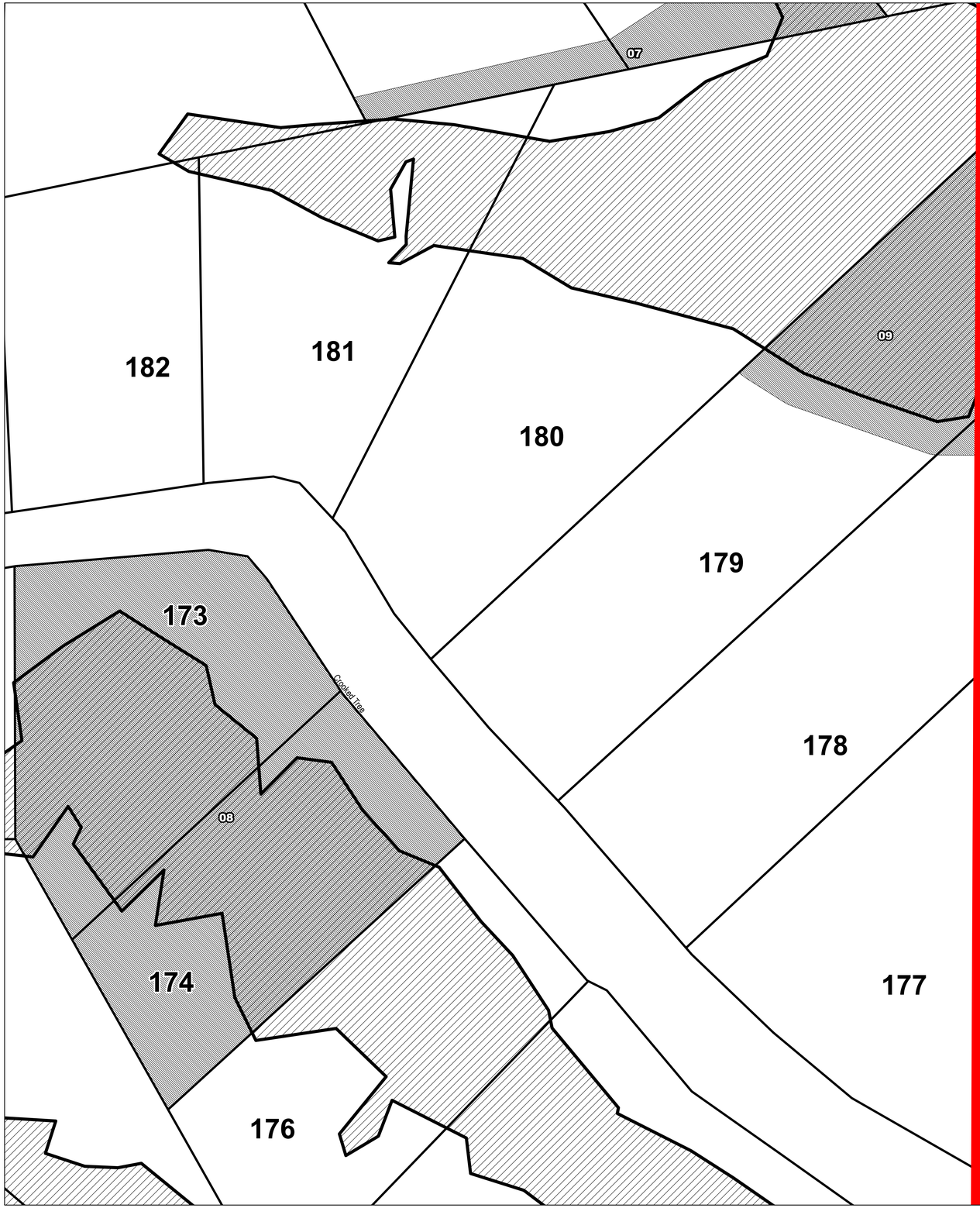
Exhibit 6
Conservation Areas

0 20 40 80 Feet

Scale

Sheet 7 of 11

Sheet Number



ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by
CT

Drawn by
DT

Checked by
DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

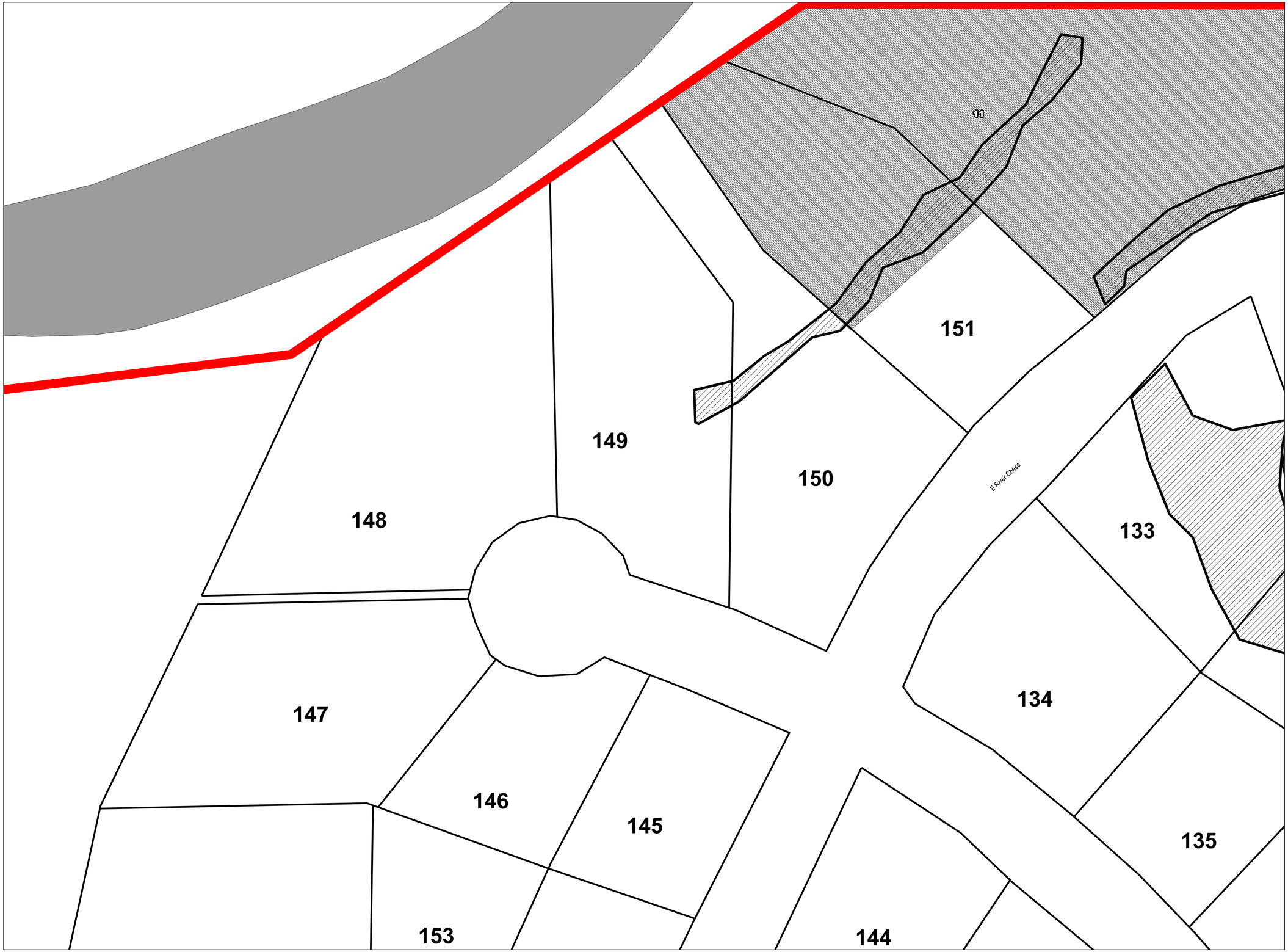
November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

0 20 40 80 Feet
Scale

Sheet 8 of 11
Sheet Number



ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

0 20 40 80 Feet

Scale

Sheet 9 of 11

Sheet Number

ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

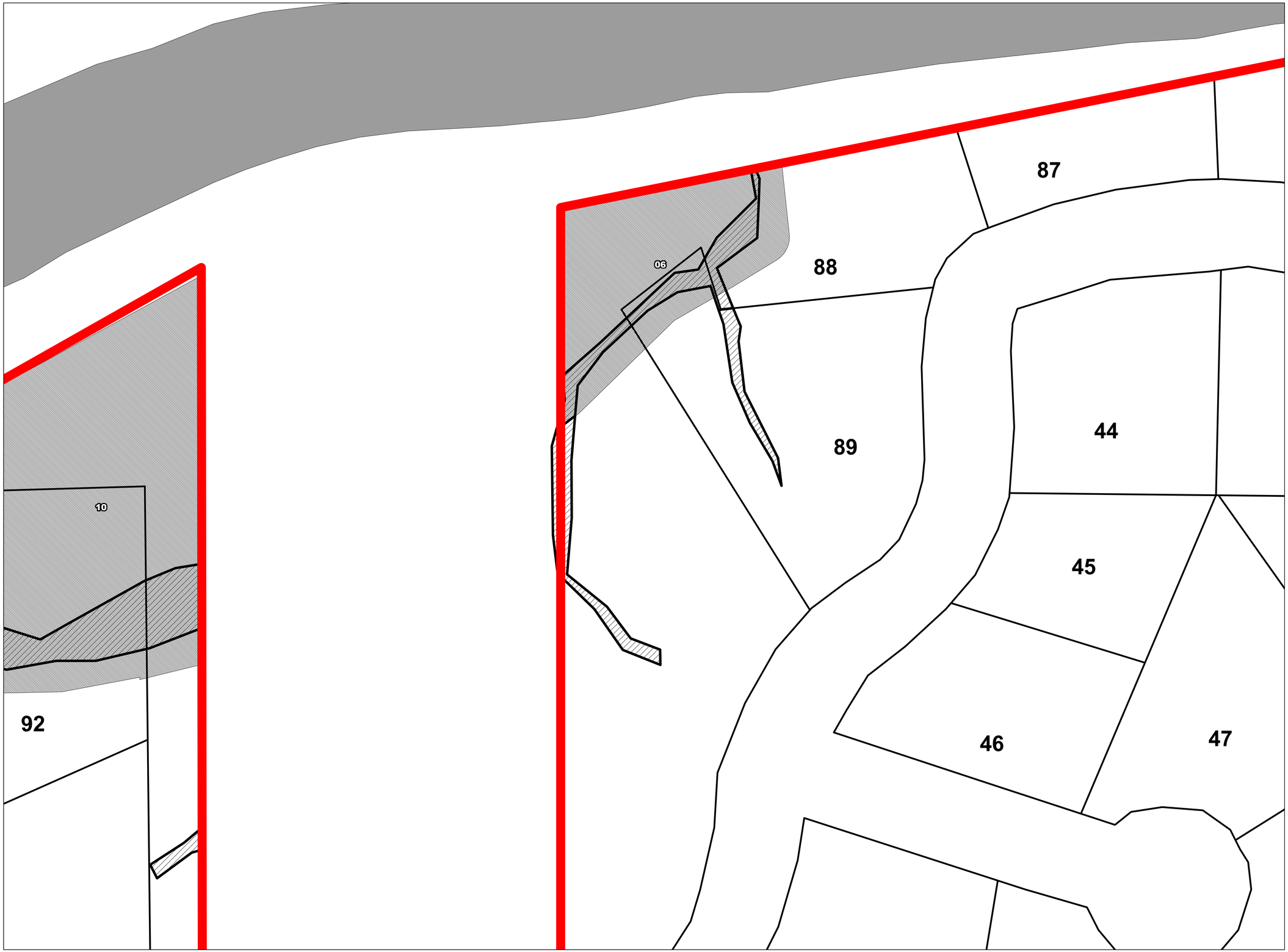
November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

0 20 40 80 Feet
Scale

Sheet 10 of 11
Sheet Number



ECT
Environmental Consulting & Technology, Inc.

2200 Commonwealth Blvd
Suite 300
Ann Arbor, MI 48105
Tel: 734-769-3004
Fax: 734-769-3164
www.ectinc.com

Project Number

Designed by CT

Drawn by DT

Checked by DT

Approved by

Issued for	Date
Final	11-06-08

US vs. Rapanos

Pine River Site

November 6, 2008

Drawing Title

Exhibit 6
Conservation Areas

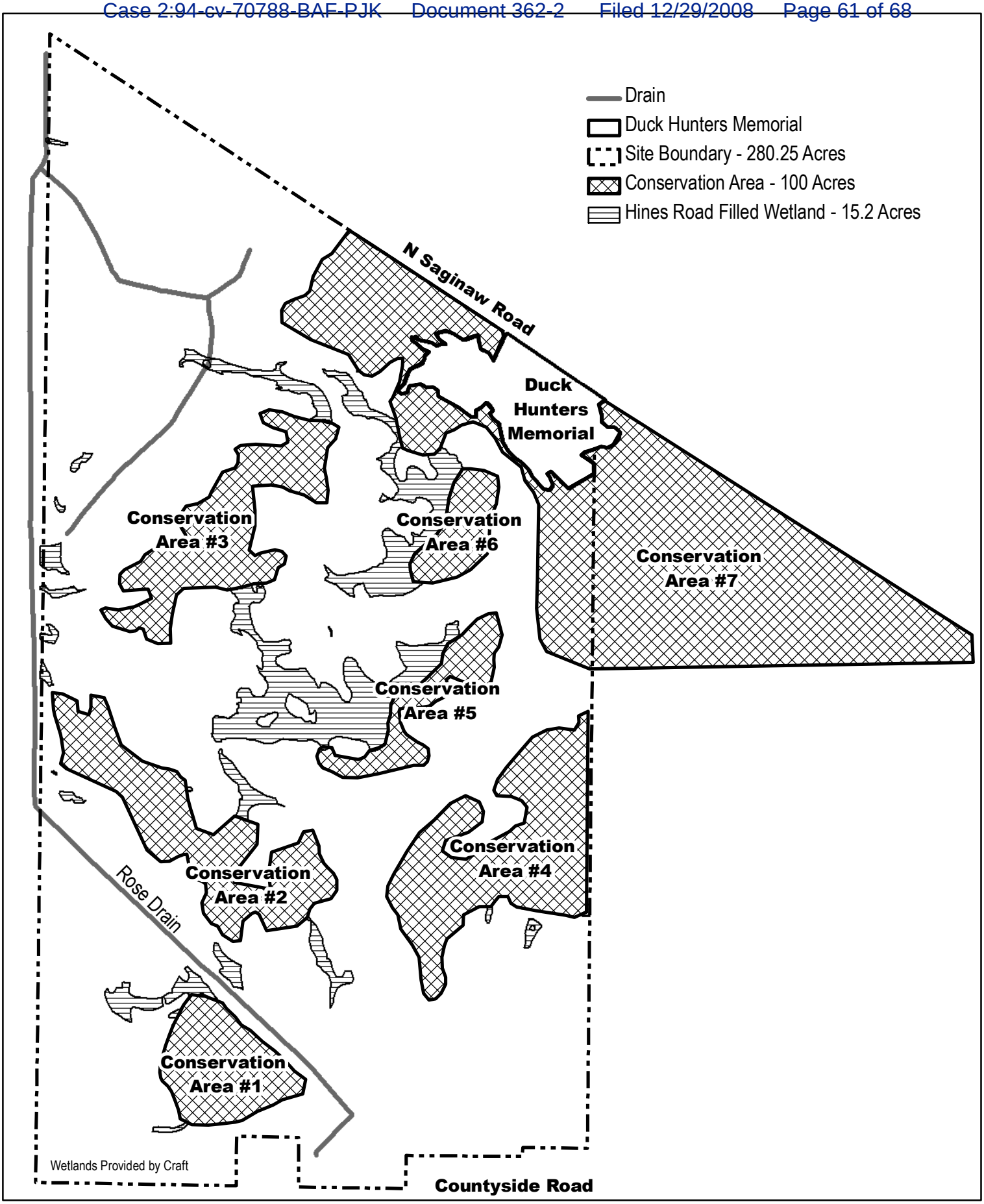
0 20 40 80 Feet
Scale

Sheet 11 of 11
Sheet Number

Consent Decree

United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Exhibit 7



Hines Road Site With Conservation Areas, Filled Wetland & Hines Road Property - Exhibit 7

0 150 300 600 Feet

Hines Road - Homer Township, MI
November 2008

ECT Environmental Consulting & Technology, Inc.

Consent Decree

United States v. Rapanos, *et al.*, No. 94-CV-70788DT (E.D. Mich.)

Exhibit 8

AGREEMENT FOR
CONSERVATION EASEMENT

(This instrument is exempt from County and State transfer
taxes pursuant to MCL 207.505(a) and MCL 207.526(a), respectively)

This CONSERVATION EASEMENT is created _____, 2008, by and between

GRANTOR (name) married/single (circle one), or corporation, partnership, municipality, or limited liability company (circle one), whose address

is _____ and its successors or assigns (Grantor) and the Michigan Department of Environmental Quality (MDEQ), whose address is Constitution Hall, 1 Floor South, P.O. Box 30458, Lansing, Michigan 48909-7958; or 525 West Allegan Street, Lansing, Michigan 48933 (Grantee);

The Grantor is the fee simple title holder of real property located in the Township of _Homer_, Midland County, and State of Michigan, legally described in Exhibit A.

MDEQ is the agency charged with administering Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), and

Grantor and MDEQ have agreed to enter into a Consent Agreement (the Consent Agreement) pursuant to Part 303 to assist the Grantor and the United States of America in resolving a federal civil action relating to wetlands, and

Grantor has agreed to grant the MDEQ a Conservation Easement that protects certain wetlands on the property and restricts further development in the areas legally described in Exhibit B and shown on Exhibit C. The Conservation Easement (the Easement Premises) consists of approximately _____ acres. The MDEQ shall record this Agreement with the county register of deeds after the effective date of the Consent Agreement between the MDEQ and the Grantor.

ACCORDINGLY, Grantor conveys this Conservation Easement to Grantee pursuant to Subpart 11 of Part 21, Conservation and Historic Preservation Easement, of the NREPA, MCL 324.2140 et seq., on the terms and conditions stated below.

1. The purpose of this Agreement is to protect the functions and values of existing or established wetlands and their natural resource values on the Easement Premises consistent with the Consent Agreement and the protection of the benefits to the public derived from wetlands and integral habitat, by requiring Grantor to maintain the Easement Premises in their natural and undeveloped condition.

2. Except as authorized in the Consent Agreement or as otherwise provided in this Agreement, Grantor shall refrain from, and prevent any other person from altering or developing the Easement Premises in any way. This includes, but is not limited to:

   a) Alteration of the topography;
   b) Creation of paths, trails, or roads;
   c) The placement of fill material as defined in Part 303 of the NREPA, MCL 324.30301 et seq., as amended;
   d) Dredging, removal, or excavation of any soil or minerals;
   e) Drainage of surface or groundwater;
   f) Construction or placement of any structure;
   g) Plowing, tilling, or cultivating the soils or vegetation;
   h) Alteration or removal of vegetation, including the planting of non-native species;
   i) Ranching
   j) Construction of unauthorized utility or petroleum lines;
   k) Storage or disposal of garbage, trash, debris, abandoned equipment or accumulation of machinery, or other waste materials, including accumulated vegetative debris such as grass clippings, leaves, yard waste, or other material collected and deposited from areas outside the Easement Premises;
   l) Use or storage of off-road vehicles including, but not limited to, snowmobiles, dune buggies, all-terrain vehicles, and motorcycles;
   m) Placement of billboards or signage, except as otherwise allowed in the Consent Agreement or this Agreement;
   n) Use of the wetland for the dumping of untreated stormwater at a volume that adversely impacts the hydrology of the wetland.

3. Cutting down, destroying, or otherwise altering or removing trees, tree limbs, shrubs, or other vegetation, whether living or dead, is prohibited within the Easement Premises, except with the written permission of Grantee, expressly for the removal of trees or limbs to eliminate danger to health and safety; to reduce a threat of infestation posed by diseased vegetation; or to control invasive non-native plant species that endanger the health of native species.

4. Grantor is not required to restore the Easement Premises due to alterations resulting from causes beyond the owner's control, including, but not limited to, unauthorized actions by third parties that were not reasonably foreseeable; or natural disasters such as unintentional fires, floods, storms, or natural earth movement.

5. Grantor may perform activities within the Easement Premises consistent with the Consent Agreement. Any activities undertaken pursuant to the Consent Agreement or this Agreement shall be performed in a manner to minimize the adverse impacts to existing wetland or mitigation areas.

6. Grantor warrants that Grantor has good and sufficient title to the Easement Premises described in Exhibit B.

7. Grantor warrants that any other existing interests or encumbrances in the Easement Premises have been disclosed to the MDEQ.

8. Grantor warrants that to the best of Grantor's knowledge no hazardous substances or hazardous or toxic wastes have been generated, treated, stored, used, disposed of, or deposited in or on the property.

9. This Agreement does not grant or convey to Grantee or members of the general public any right to possession or use of the Easement Premises.

10. Grantor shall continue to have all rights and responsibilities as owner of the property subject to this Agreement, until such time as Grantor sells part or all of the Easement Premises and then, with respect to such sold Easement Premises, the obligations hereunder with respect to such Easement Premises shall run with the land.

11. Grantee and its authorized employees and agents may enter the Easement Premises upon reasonable notice to Grantor to determine whether the Easement Premises are being maintained in compliance with the terms of this Agreement, mitigation, or other conditions of the Consent Agreement; and for the purpose of taking corrective actions for failure to comply. If Grantee is entering the Easement Premises for purposes of taking corrective actions, Grantor shall be provided with 14 days prior notice to provide the opportunity to cure the failure to comply.

12. This Agreement shall be binding upon the successors and assigns of the parties and shall run with the land in perpetuity unless modified or terminated by written agreement of the parties.

13. This Agreement may be modified only in writing through amendment of the Agreement. Any modification shall be consistent with the purpose and intent of the Agreement.

14. This Agreement may be enforced by either an action at law or in equity and shall be enforceable against any person claiming an interest in the Easement Premises despite a lack of privity of estate or contract.

15. Grantor shall indicate the existence of this Agreement on all future deeds, mortgages, land contracts, plats, and any other legal instrument used to convey an interest in the Easement Premises.

16. A delay in enforcement shall not be construed as a waiver of the Grantee's rights to enforce the conditions of this Agreement.

17. This Agreement shall be liberally construed in favor of maintaining the purpose of the Conservation Easement.

18. If any portion of this Agreement is determined to be invalid by a court of law, the remaining provisions will remain in force.

19. This Agreement will be construed in accordance with Michigan law.

20. In addition to the terms of the Consent Agreement, this document sets forth the entire agreement of the parties. It is intended to supercede all prior discussions or understandings.

21. Within 90 days after this Agreement is executed, Grantor shall place and maintain at Grantor's expense, signs, fences, or other suitable markings along the Easement Premises to clearly demarcate the boundary of the Easement Premises.

LIST OF ATTACHED EXHIBITS

Exhibit A: A legal description of the Grantor's property, inclusive of the Easement Premises.

Exhibit B: A legal description of the Easement Premises.

Exhibit C: A map depicting the Easement Premises that also includes identifiable landmarks such as nearby roads to clearly identify the easement site.

Exhibit D: Access Easement provided by the Grantor to MDEQ, which includes a legal description that provides a path of legal access to the Easement Premises and a map that indicates this access site that MDEQ staff will use for ingress and egress to and from the Easement Premises.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written. In signing this Agreement, the Signatory warrants that he or she has the authority to convey the Conservation Easement on behalf of the Grantor.

GRANTOR:

Signature: _____

_____
Type/Print Grantor's Name

_____President_____
Title (if signing on behalf of an organization)

_____
Organization Name (if signing on behalf of an organization)

STATE OF MICHIGAN)
) ss
COUNTY OF)

IF SIGNING ON BEHALF OF AN ORGANIZATION, THIS MUST BE COMPLETED:

The foregoing instrument was acknowledged before me this _____ day of _____, 20__, by _____, (name[s]) the _____, (title) of _____(Organization name) a _____, (state) corporation, partnership, municipality, or limited liability company (circle one), on behalf of the organization.

_____
(Signature of Notary Public)

_____
(Typed or Printed name of Notary Public)

Acting in: _____County, Michigan

My Commission Expires:_____

GRANTEE:

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LAND AND WATER MANAGEMENT DIVISION

_____
Elizabeth M. Browne, Chief

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

The foregoing instrument was acknowledged before me this _____ day of _____, 20__, by Elizabeth M. Browne, Chief, Land and Water Management Division, State of Michigan, on behalf of the Michigan Department of Environmental Quality.

_____
(Signature of Notary Public)

_____
(Typed or Printed name of Notary Public)

Acting in: Ingham County, Michigan

My Commission Expires:_____

Form Drafted By:
The Honorable Mike Cox, Attorney General
Department of Attorney General

Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, Michigan 48909

AFTER RECORDING, RETURN TO:

Michigan Department of Environmental Quality
Land and Water Management Division
Constitution Hall, 1st Floor South
P.O. Box 30458
Lansing, Michigan 48909-7958