

ORIGINAL

CITY OF BELLEVUE, WASHINGTON

RESOLUTION NO. 7053

A RESOLUTION ratifying the signature of Steven Sarkozy, City Manager, on the Proposed Settlement Deal Points re Newport Yacht Club and Weinstein v. City of Bellevue and King County, USDC Cause No. C03-2534Z attached hereto.

THE CITY COUNCIL OF THE CITY OF BELLEVUE, WASHINGTON, DOES RESOLVE AS FOLLOWS:

Section 1. The City Council hereby ratifies the signature of Steven Sarkozy, City Manager, on the Proposed Settlement Deal Points re Newport Yacht Club and Weinstein v. City of Bellevue and King County, USDC Cause No. C03-2534Z, a copy of which is attached hereto and incorporated herein by reference.

Passed by the City Council this 19th day of July, 2004, and signed in authentication of its passage this 19th day of July, 2004.

(SEAL)

Connie B. Marshall
Connie B. Marshall, Mayor

Attest:

Myrna L. Basich
Myrna L. Basich, City Clerk

Newport Yacht Club and Weinstein v. City of Bellevue & King County
Cause No. C03-2534Z
(U.S.D.C., Western Dist. Washington)

PROPOSED SETTLEMENT DEAL POINTS FROM 7/7/04 MEDIATION SESSION

1. City – County Terms

- a. Upon County Council and City Council approval, County transfers title to Coal Creek Park ("Park") and Surrey Downs property in Bellevue to City. Upon transfer, City to take over all operation and maintenance in Park and Surrey Downs, except for district court building and facilities. District Court to retain use of Surrey Downs building and facilities rent-free through December 31, 2006. All other Surrey Downs and/or Coal Creek Park income streams to be redirected to City upon transfer.
- b. County pays City \$ 2.150 million dollars less credit for funds spent on approved work on overbank erosion in Cinder Mine area, representing County's portion of costs for Coal Creek Stabilization Proposal, attached as Exhibit A.
- c. County pays City \$250,000 as its contribution toward EIS for projects represented in Exhibit A.
- d. County contributes \$75,000 and City contributes \$25,000 for Plaintiffs' attorneys fees.
- e. City indemnifies and holds County harmless for any and all third party claims arising after Park transfer. County cross indemnifies and holds City harmless for all third-party claims arising prior to Park transfer.
- f. City responsible for all implementation and permitting activities for projects identified in Exhibit A and for drafting and developing EIS. County to cooperate and support as necessary, including release of information now subject to the joint defense privilege to the extent needed for the EIS and application process.

2. Coal Creek Stabilization Project.

- a. City will implement the Coal Creek Stabilization Proposal attached at Exhibit A. For the "source control" items listed on Exhibit A, the corresponding line item dollar amount represents the maximum dollar amount proposed for that project inclusive of design, permitting and construction costs but excluding the cost of a programmatic EIS, which will be funded separately.
- b. City will provide plaintiffs' experts with a reasonable opportunity to review with City and comment concerning modifications, changes and enhancements to the source control and flood control work to the extent such changes or enhancements do not increase the overall cost of the specific proposed tasks.

- c. The sediment removal capacity outlined in the Stabilization Proposal shall be increased by four hundred (400) cubic yards to a total capacity of one thousand five hundred (1,500) cubic yards at or near the existing I-405 pond or other locations acceptable to the City.
- d. The parties shall work cooperatively and in good faith to have the Washington Department of Transportation allocate monies to improve storm water detention and sediment capture capacity at the I-405/Coal Creek Parkway exchange as it impacts Coal Creek.

3. **Weinstein Berm & Salmon Channel**

- a. Weinstein shall design, obtain permits for, construct, and maintain a flood control berm on the Weinstein property along the south bank of Coal Creek. The application may include raising the level of the yard to match the berm height. NYC may be a co-applicant on any such permit application.
- b. Weinstein shall design, obtain permits for, construct, and maintain an environmentally friendly, salmon enhancement channel at the mouth of the creek for salmon passage across the delta (the "Salmon Channel"). NYC may be a co-applicant on any such permit application.
- c. Within ninety (90) days of the Order dismissing the action, defendant County shall pay \$250,000 for the berm and salmon channel. The \$250,000 will be direct deposited into an interest bearing escrow account at Chicago Title Insurance Company. Weinstein shall draw down on the escrow account to pay for the costs to design, permit, construct, operate and maintain the berm and Salmon Channel or Replacement Work (as defined in section 8.d. below). Escrow instructions concerning draws on the account shall be attached as an exhibit to the final settlement agreement and shall include without limitation the following instructions:
 - payment or reimbursement of appropriate invoices within sixty (60) days;
 - form of draw request shall be in letter format with backup documentation (invoices etc.) and conform to Chicago Title's general escrow draw requirements / forms; and
 - escrow funds shall be dedicated to payment of berm, Salmon Channel and any Replacement Work.
- d. Subject to the berm and Salmon Channel permits complying with applicable provisions of the Bellevue City Code, the City shall cooperate with Weinstein in securing such permits. In the event the permit application(s) result in a final DNS determination under SEPA (or if an administrative appeal is filed, upon the DNS being affirmed) or upon publication of an FEIS and upon receipt of a complete permit application, then the City will undertake to issue its permits for such work in a time frame which is no longer than the average time frame for an average shoreline permit pending in the City of Bellevue (currently estimated at 20 weeks). Furthermore, subject to applicable provisions of the

Bellevue City Code, the City shall defer to the review, recommendations and determinations of other permitting agencies in evaluating Weinstein's permit applications. The City and the County shall not oppose Weinstein's permit applications to permitting agencies. Weinstein may combine the permitting for the berm and Salmon Channel (or Replacement Work) with the permitting for the Salmon Habitat Enhancement (section 4 below).

- e. The City may charge Weinstein only reasonable and ordinary permitting costs.

4. **Weinstein Salmon Habitat Enhancement.**

- a. Subject to its compliance with applicable Bellevue City Code provisions, Defendants shall not oppose plaintiff Weinstein's development of enhanced salmon habitat facilities in and around his property at the mouth of Coal Creek.
- b. The cost of permitting, constructing, operating and maintaining such enhancements will be at Weinstein's sole cost and expense.
- c. Defendants shall allow Weinstein to use any technical data, reports, or other documents as may be prepared for the City or County in connection with the projects proposed in item 2 and 3 above. The City and County shall not charge Weinstein for the value or use of such materials, or the cost to develop them.
- d. Subject to the Salmon Pond permits complying with applicable provisions of the Bellevue City Code, the City shall cooperate with Weinstein in securing such permits. In the event any the permit application(s) result in a final DNS determination under SEPA (or if an administrative appeal is filed, upon the DNS being affirmed) or upon publication of an FEIS and upon receipt of a complete permit application, then the City will undertake to issue its permits for such work in a time frame which is no longer than the average time frame for an average shoreline permit pending in the City of Bellevue (currently estimated at 20 weeks). Furthermore, subject to applicable provisions of the Bellevue City Code, the City shall defer to the review, recommendations and determinations of other permitting agencies in evaluating Weinstein's permit applications.

5. **Duty to Operate and Maintain.**

The City shall operate and maintain the existing and proposed flood control and sediment management facilities in the Coal Creek basin from and including Coal Creek Park to the waters of Lake Washington.

6. **Marina Re-Dredge.**

Within ninety (90) days of the Order dismissing the action, Defendants City and County shall each pay NYC \$30,000 to be used for dredging in the marina. NYC shall segregate the combined total amount of \$60,000 from its general funds and apply the funds only to dredging costs incurred in the NYC marina.

7. Future Dredging – Lump Sum Payment.

a. Within ninety (90) days of the Order dismissing the action, defendant City shall pay \$700,000 for NYC's future navigation maintenance dredging costs. The \$700,000 will be direct deposited into an interest bearing escrow account at Chicago Title Insurance Company. NYC shall draw down on the escrow account to pay for the costs to design, permit, construct, and otherwise conduct navigation maintenance dredging in the following specified areas:

- NYC marina;
- Entrance to Grand Canal;
- South side of D dock; and
- Edges of Coal Creek Delta for navigational maintenance dredging.

NYC shall not construct boat slips on the south side of D dock as a consequence of the dredging. Escrow instructions concerning draws on the account shall be attached as an exhibit to the final settlement agreement and shall include without limitation the following instructions:

- payment or reimbursement of appropriate invoices within sixty (60) days;
- form of draw request shall be in letter format with backup documentation (invoices etc.) and conform to Chicago Title's general escrow draw requirements / forms;
- escrow funds shall be dedicated to dredging in areas set forth above in this paragraph.

- b. The decision of whether, where and when to dredge the specified areas shall be in NYC's sole and absolute discretion.
- c. The dredging costs may include, without limitation, design, permitting, engineering, legal, construction, consulting, mitigation and monitoring costs.
- d. Subject to any future dredge permits complying with applicable provisions of the Bellevue City Code, the City shall cooperate with NYC in securing such permits as required to perform future dredges. In the event any such future dredge permit applications result in a final DNS determination under SEPA (or if an administrative appeal is filed, upon the DNS being affirmed) or upon publication of an FEIS and upon receipt of a complete permit application, then the City will undertake to issue its permits for such dredges in a time frame which is no longer than the average time frame for an average shoreline permit pending in the City of Bellevue (currently estimated at 20 weeks). Furthermore, subject to applicable provisions of the Bellevue City Code, the City shall defer to the review, recommendations and determinations of other permitting agencies in evaluating NYC's permit applications. The City and the County shall not oppose NYC's permit applications to permitting agencies.

8. **Permitting.**

- a. The Parties' obligations to perform the work as set forth above is contingent upon receipt of all required permits and third-party approvals.
- b. The City's work described in item 2 above shall be prosecuted as a single project under a single programmatic EIS process and to the extent possible, under a single permit application. Plaintiffs and the County agree to support and not oppose the City's permit application and programmatic EIS for the work described in item 2 above. NYC and/or Weinstein may be co-applicants on the City's permit applications. Plaintiffs shall not use the status of co-applicant to oppose or otherwise impede the City's permitting. NYC and Weinstein shall each bear their own costs of participating as co-applicants and the co-applicant status of Weinstein or NYC shall be at no cost to the City.
- c. City charges against line item budget amounts in Exhibit A shall be limited to reasonable and customary costs for capital improvement projects.
- d. In the event any party fails to secure permits for work described above, Plaintiffs' release and covenant not to sue as set forth below shall remain in place but the parties shall negotiate in good faith to decide upon acceptable replacement work. Replacement work shall be of like kind, reasonably and technically feasible, shall be subject to the associated dollar amounts established in Exhibit A or the respective escrow account and shall not increase the projected maintenance costs. ("Replacement Work"). If the parties cannot agree on such Replacement Work, then they shall submit the issue to binding arbitration in accordance with the King County Mandatory Arbitration Rules. The parties shall select a mutually acceptable arbitrator and if the parties cannot agree upon an arbitrator then the arbitrator shall be selected by Bill Joyce in his sole discretion.

9. **Schedule and Milestones.**

- a. Within thirty (30) days of execution of the definitive settlement agreement, the City and Plaintiffs will develop and agree upon a list of key milestones and submittals for the City's overall project.
- b. The City and Plaintiffs will agree upon a schedule for implementation of the milestones and/or submittals up to and including the preparation of an environmental impact statement and JARPA submittals. The City shall respond to regulatory agency requests for additional information within 30 days unless the request requires the City to develop information which is not in its care, custody or control at the time of the request.
- c. If the City and Plaintiffs cannot agree upon the submittals and schedule, then the City and Plaintiffs shall reconvene with Bill Joyce to mediate the submittals and schedules.

10. **Form of Settlement and Release.**

- a. The settlement agreement shall be incorporated into a stipulated order to be executed by Judge Zilly. The Federal Court will retain jurisdiction to enforce the terms and conditions of the order and settlement agreement.
- b. The settlement agreement shall provide reasonable attorney fees to the prevailing party in any action to enforce the terms and conditions of the settlement agreement. The Court shall determine in its discretion which party is "prevailing" for purposes of an attorney's fees award.
- c. The settlement agreement and order shall also establish a dispute resolution procedure to be undertaken in advance of seeking court enforcement.
- d. Release of past/existing claims: The settlement agreement and the stipulated order shall provide a full and comprehensive release of, and shall dismiss with prejudice, the claims of NYC and Weinstein that were brought or could have brought by NYC or Weinstein in the lawsuit based upon the facts alleged in the operative complaint. Except for claims seeking or related to navigational access and/or dredging, NYC's release does not extend to claims, whether founded in tort, common law, statute, or otherwise, that an individual homeowner may have concerning damage to their individual real property (e.g. their homes, lots, pools etc.) arising from Coal Creek (e.g. flooding).
- e. Covenant Not to Sue for NYC future claims: For the period forty (40) years after entry of the Order dismissing the action, NYC shall covenant not to sue the City or the County for: (a) any future claims that NYC could bring for damage to its property, property for which it has management responsibility, Clean Water Act violations, RCRA violations or ESA violations arising from the facts alleged in the operative complaint, including without limitation re-sedimentation; and (b) any future claims for maintenance dredging to protect NYC's property or property it manages concerning or arising from the facts alleged in the operative complaint. Except for claims seeking or related to navigational access and/or dredging, the parties specifically acknowledge that the covenant not to sue is provided by NYC and is not intended to encompass the individual claims of NYC members, whether founded in tort, common law, statute or otherwise, concerning damage to their individual real property (e.g. their homes, lots, pools etc.) arising from Coal Creek (e.g. flooding).
- f. NYC Defense and Indemnification : During the time period of the covenant not to sue, NYC shall defend and indemnify the City and the County from and against claims by members of NYC for their personal claims which seek or relate to navigational access and/or dredging that concern or are derived from damage to the Club's property or damage to the individual's interest in the Club's property or property the Club manages, arising out of the facts alleged in this lawsuit.
- g. Covenant Not to Sue for Weinstein Future Claims: As to the Plaintiffs Weinstein's individual claims, Plaintiffs Weinstein, the Spendthrift Trust(s) holding title to the

Weinstein properties, and the successors in interest and assigns of each, covenant not to sue the City and County for any future damage claims, including damage claims resulting from re-sedimentation of Coal Creek, arising from actions, inactions or events alleged in this lawsuit.

11. Attorneys Fees.

The City and County shall reimburse Plaintiffs' attorneys fees in the amount of \$100,000.00, as provided for in Item 1.d. above.

12. City Ordinance Enforcement Action and Vegetation Order.

- a. Within 60 days of earlier of issuance of the permits for the berm and Salmon Channel or issuance of permits for the City's work set forth in section 2 above, Weinstein will remove the rocks in the area shoreward of the X shown on Exhibit B unless they are re-used or removed pursuant to the permits issued for the berm or Salmon Channel.
- b. Within 30 days of entry of the order, the City shall dismiss with prejudice its pending code compliance enforcement action against William Weinstein concerning the alleged placement of berming materials on his property from the east edge of his property to the X shown on Exhibit B attached hereto, and will dismiss without prejudice the enforcement action as to alleged fill with rocks shoreward/downstream of that point. If the alleged fill shoreward/downstream of X is either permitted by the permit for the berm or Salmon Channel, or if Weinstein removes them within 60 days of the earlier of issuance of the berm and Salmon Channel permits or issuance of permits for the City's work in section 2 above, the City will not pursue an enforcement action against the Weinstains related to that alleged fill. If the City is authorized by this section to pursue later the portion of the enforcement action dismissed without prejudice, the subsequent enforcement action will relate back to the date of the filing of the enforcement action being dismissed.
- c. After inspection and if warranted, the City shall also provide a certification that as of the inspection date, William Weinstein is in compliance with that certain order concerning maintenance of vegetation on his property located on the north side of Coal Creek
- d. Within fourteen (14) days of the date of the Order dismissing the action, the City will lift the current red tag on the Weinstein property.

13. **Final Settlement Agreement and Approvals.**

The agreements set forth in this deal point letter are subject to preparation and execution of a definitive settlement agreement and the review and approval of the City Council, County Council and NYC Board/Members and Weinsteins.

Accepted and Agreed this ___ day of July, 2004:

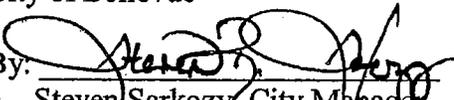
William Weinstein

Leanne Weinstein

The Newport Yacht Club, Inc.

By: _____
Steve Cole, Commodore

City of Bellevue

By: 
Steven Sarkozy, City Manager

King County

By: _____

EXHIBIT A

Coal Creek Stabilization Proposal

Having considered the plaintiffs' claims and after conducting additional field reconnaissance of the watershed, King County and the City of Bellevue developed the following list of projects to address erosion, sedimentation and flooding issues in the Coal Creek basin.

<u>Source Control</u>	<u>Estimated Cost</u>
Upper Reach Bank & Slope Stabilization (Cinder Mines) ⁽¹⁾	\$ 600,000
Middle Reach Bank Stabilization ⁽²⁾	\$ 700,000
Overbank erosion from upslope runoff (Cinder Mine Area) (3)	\$ 500,000
Overbank erosion from outfalls (Bellevue areas) (4)	\$ 475,000
Bed Grade Controls (I-405 to Newcastle Rd) (5)	\$ 800,000
<u>Sediment Removal</u>	
Add 1,100 CY of Sediment Capture at or near the I-405 Pond ⁽⁶⁾	\$ 700,000
Total Basin Stabilization Costs (Capital)	\$ 3,775,000

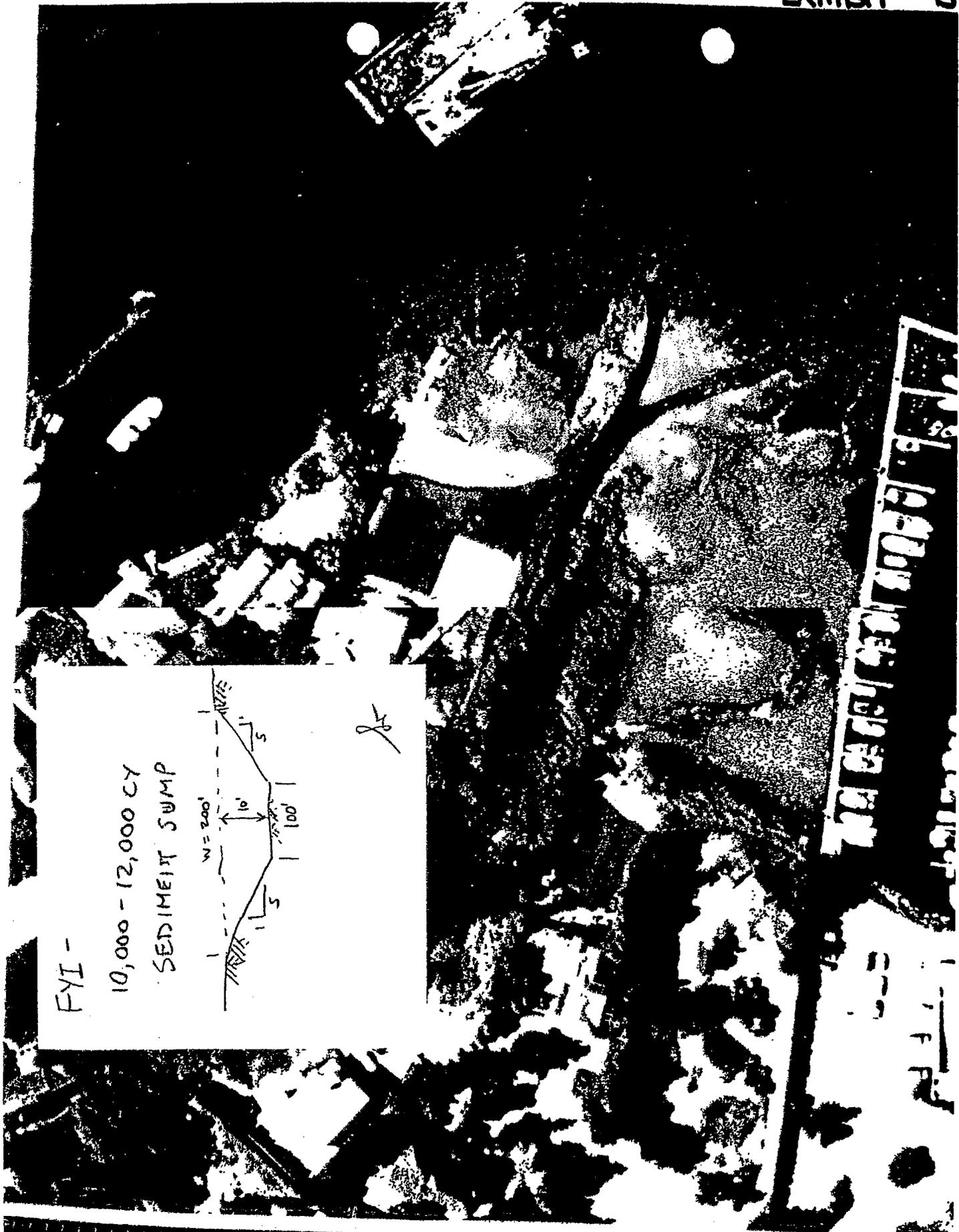
Notes

- (1) KCM/GeoEngr's Cinder Mine Assessment, April 2003. Approx. 975 LF of bank stabilization identified.
- (2) Stabilizes eroding stream banks between I-405 and Coal Creek Parkway.
- (3) Addresses overbank erosion from storm drain outfalls, primarily in Cinder Mine area.
- (4) Addresses overbank erosion from storm drain outfalls within Bellevue city limits.
- (5) Assumes root wad/boulder/log grade controls similar to those constructed by King County at Cinder Mines.
- (6) Existing basin-wide sediment volume = 1,900 CY. Increases total sediment volume to 3,000 CY.

Subject to the Protections of Federal Rule of Evidence 408

St/04082004

Coal Creek Stabilization Cost Summary Offer.doc



FYI -

10,000 - 12,000 CY
SEDIMENT SUMP

