

RECORDING REQUESTED BY:

Union Pacific Railroad  
10031 Foothills Blvd, Suite 200  
Roseville, California 95678

WHEN RECORDED, MAIL TO:

Department of Toxic Substances Control  
700 Heinz Avenue, Suite 200  
Berkeley, California 94710  
Attention: Mark Piros, Unit Chief  
Brownfields and Environmental  
Restoration Program



2009075192

03/13/2009 02:33 PM

OFFICIAL RECORDS OF ALAMEDA COUNTY  
PATRICK O'CONNELL  
RECORDING FEE: 66.00



SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

**COVENANT TO RESTRICT USE OF PROPERTY  
ENVIRONMENTAL RESTRICTION**

(RE: County of Alameda, West Oakland Rail Yard, I-880 Realignment Corridor  
"Southern Elevated Section", Oakland, California 94607, DTSC Site Code Number  
200486, APN # 50036-11)

This Covenant and Agreement ("Covenant") is made by and between Union Pacific Railroad ("UPRR", the "Covenantor"), the current owner of property situated in Oakland, County of Alameda, State of California, described in Exhibit "A", attached hereto and incorporated herein by this reference (the "Property"), and the Department of Toxic Substances Control (the "Department"). Pursuant to Civil Code section 1471, the Department has determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials as defined in Health and Safety Code section 25260. The Covenantor and Department, collectively referred to as the "Parties", hereby agree, pursuant to Civil Code section 1471, and Health and Safety Code section 25355.5 that the use of the Property be restricted as set forth in this Covenant; and the Parties further agree that the Covenant shall conform with the requirements of California Code of Regulations, title 22, section 67391.1.

ARTICLE I  
STATEMENT OF FACTS

1.01. The Property, totaling approximately 8.21 acres, is more particularly described and depicted in Exhibit "A", attached hereto and incorporated herein by this reference. The Property is located along I-880 and extends north from near Kirkham Street to past Center Street in Oakland, California. The Property was formerly part of the Southern Pacific Transportation Company's West Oakland Rail Yard. The Property is located in an area of mixed residential and industrial land uses. Footings and associated columns which support an elevated section of I-880 are located within the boundary of the Property. The surrounding facilities include the Oakland Naval Supply Center to the west, Port of Oakland operations to the west and south, and the Oakland Army Terminal to the south. Residential neighborhoods are within 600 feet of the property to the east.

1.02. The Property is being remediated pursuant to a Removal Action Workplan ("RAW") pursuant to Health and Safety Code, division 20, chapter 6.8 under the oversight of the Department. Because hazardous substances, as defined in Health and Safety Code section 25316, which are also hazardous materials as defined in Health and Safety Code section 25260, including polynuclear aromatic hydrocarbons ("PAH"; e.g. benzo(a)pyrene, dibenz(a,h)anthracene, indeno(1,2,3-cd)pyrene), aromatic hydrocarbons (e.g. benzene, toluene, ethylbenzene, xylenes) aliphatic volatile organic compounds (e.g. vinyl chloride, trichloroethylene, cis-1,2-dichloroethylene, and metals (e.g. lead) remain in the vadose-zone soil at the Property, the RAW provides that a Covenant be required as part of the site remediation. The Department circulated the RAW, which contains a Final Health Risk Assessment, together with a draft Notice of Exemption ("NOE") pursuant to the California Environmental Quality Act, Public Resources Code section 21000 et seq. for public review and comment. The Removal Action Workplan and the NOE were approved by the Department in March 1998. Remediation includes installing and maintaining a cover ("Cap") over the Property. The Cap consists of 4 inches of base material overlain by 2 inches of asphalt, as more particularly described in the engineering drawing attached as Exhibit "B" hereto. The Cap covers only the area under the Southern Elevated Section of I-880 (approximately 258,000 square feet) shown in Exhibit B. The operation and

maintenance of the Cap is pursuant to an Operation and Maintenance Manual incorporated into the Operation and Maintenance Agreement between UPRR and the Department dated June 15, 2007.

1.03. As detailed in the Final Removal Action Workplan as approved by the Department on March 20, 1998, all or a portion of the surface and subsurface soils within 5 feet of the surface of the Property contain hazardous substances, as defined in Health and Safety Code section 25316, which include the following contaminants of concern in the ranges set forth below: aromatic VOCs – benzene (up to 0.018 parts per million (ppm), toluene (up to 0.25 ppm), ethylbenzene (up to 0.033 ppm), xylenes (up to 0.071 ppm), and metal - lead (up to 1,710 ppm). Based on these results the Department concluded that use of the Property as a residence, hospital, school for persons under the age of 21 or day care center would entail an unacceptable cancer risk. The Department further concluded that the Property, as remediated, and subject to the restrictions of this Covenant, does not present an unacceptable threat to human safety or the environment, if limited to commercial and industrial use.

## ARTICLE II DEFINITIONS

2.01. Department. "Department" means the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.02. Environmental Restrictions. "Environmental Restrictions" means all protective provisions, covenants, restrictions, prohibitions, and terms and conditions as set forth in any section of this Covenant.

2.03. Improvements. "Improvements" includes, but is not limited to: buildings, structures, roads, driveways, improved parking areas, wells, pipelines, or other utilities.

2.04. Lease. "Lease" means lease, rental agreement, or any other document that creates a right to use or occupy any portion of the Property.

2.05. Occupant. "Occupant" means Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.06. Owner. "Owner" means the Covenantor, its successors in interest, and their successors in interest, including heirs and assigns, who at any time hold title to all or any portion of the Property.

### ARTICLE III GENERAL PROVISIONS

3.01. Runs with the Land. This Covenant sets forth Environmental Restrictions, that apply to and encumber the Property and every portion thereof no matter how it is improved, held, used, occupied, leased, sold, hypothecated, encumbered, or conveyed. This Covenant: (a) runs with the land pursuant to Health and Safety Code section 25355.5 and Civil Code section 1471; (b) inures to the benefit of and passes with each and every portion of the Property, (c) is for the benefit of, and is enforceable by the Department, and (d) is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof.

3.02. Binding upon Owners/Occupants. Pursuant to the Health and Safety Code, this Covenant binds all owners of the Property, their heirs, successors, and assignees, and the agents, employees, and lessees of the owners, heirs, successors, and assignees. Pursuant to Civil Code section 1471, all successive owners of the Property are expressly bound hereby for the benefit of the Department.

3.03. Written Notice of the Presence of Hazardous Substances. Prior to the sale, lease or sublease of the Property, or any portion thereof, the owner, lessor, or sublessor shall give the buyer, lessee, or sublessee written notice of the existence of this Covenant and its Environmental Restrictions.

3.04. Incorporation into Deeds and Leases. This Covenant and its Environmental

Restrictions shall be incorporated by reference in each and every deed and Lease for any portion of the Property.

3.05. Conveyance of Property. The Owner shall provide written notice to the Department not later than thirty (30) days after any conveyance of any ownership interest in the Property (excluding Leases, and mortgages, liens, and other non-possessory encumbrances). The written notice shall include the name and mailing address of the new owner of the Property and shall reference the site name and site code as listed on page one of this Covenant. The notice shall also include the Assessor's Parcel Number ("APN") noted on page one. If the new owner's property has been assigned a different APN, each such APN that covers the Property must be provided. The Department shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect proposed conveyance, except as otherwise provided by law, by administrative order, or by a specific provision of this Covenant.

3.06. Costs of Administering the Covenant to be paid by Owner. The Department has already incurred and will in the future incur costs associated with the administration of this Covenant. Therefore, the Owner hereby covenants for himself and for all subsequent Owners that, pursuant to California Code of Regulations, title 22, section 67391.1(h), the Owner agrees to pay the Department's costs incurred in administering the Covenant.

#### ARTICLE IV RESTRICTIONS

4.01. Prohibited Uses. The Property shall not be used for any of the following purposes:

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation
- (b) A hospital for humans.
- (c) A public or private school for persons under 21 years of age.
- (d) A day care center for children.

4.02. Soil Management.

- (a) No activities that will disturb the soil (e.g., excavation, grading, removal, trenching, filling, earth movement or mining) shall be allowed on the Property without a Soil Management Plan approved by the Department.
- (b) Any contaminated soils brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law.

4.03. Prohibited Activities. The following activities shall not be conducted at the Property:

- (a) Raising of food (cattle, food crops).;
- (b) Extraction of groundwater for purposes other than site remediation or construction dewatering.

4.04. Non-Interference with Cap. Owner agrees:

- (a) Activities that may disturb the Cap (e.g. excavation, grading, removal, trenching, filling, earth movement, or mining) shall not be permitted on the Capped Property without prior review and approval by the Department.
- (b) All uses and development of the Capped Property shall preserve the integrity of the Cap.
- (c) The Cap shall not be altered without written approval by the Department.
- (d) Owner shall notify the Department of each of the following: (i) the type, cause, location and date of any damage to the Cap and (ii) the type and date of repair of such damage. Notification to the Department shall be made as provided below within ten (10) working days of both the discovery of any such disturbance and the completion of any repairs. Timely and accurate notification by any

person falling within the definition of Owner or Occupant shall satisfy this requirement on behalf of all persons falling within the definition of Owner and Occupant.

4.05. Access for Department. The Department shall have reasonable right of entry and access to the Property for inspection, monitoring, and other activities consistent with the purposes of this Covenant as deemed necessary by the Department in order to protect the public health or safety, or the environment.

4.06. Access for Implementing Operation and Maintenance. The entity or person responsible for implementing the Operation and Maintenance Activities shall have reasonable right of entry and access to the Property for the purpose of implementing the Operation and Maintenance Activities until the Department determines that no further Operation and Maintenance is required.

## ARTICLE V ENFORCEMENT

5.01. Enforcement. Failure of the Owner or Occupant to comply with this Covenant may be grounds for the Department to require modification or removal, as appropriate, of any Improvements constructed or placed upon any portion of the Property in violation of this Covenant. Violation of this Covenant, including but not limited to, failure to submit, or the submission of any false statement, record or report to the Department, may be grounds for the Department to pursue administrative, civil or criminal actions.

## ARTICLE VI VARIANCE, TERMINATION, AND TERM

6.01. Variance. Covenantor, or any other aggrieved person, may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made in accordance with Health and Safety Code section 25233.

6.02 Termination or Modification. Owner, or any other aggrieved person, may apply to the Department for a termination or modification of one or more terms of this Covenant as they apply to all or any portion of the Property. Such application shall be made in accordance with Health and Safety Code section 25234.

6.03 Term. Unless ended in accordance with paragraph 6.02, by law, or by the Department in the exercise of its discretion, this Covenant shall continue in effect in perpetuity.

## ARTICLE VII MISCELLANEOUS

7.01. No Dedication Intended. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof to the general public or anyone else for any purpose whatsoever.

7.02. Department References. All references to the Department include successor agencies/departments or other successor entity.

7.03. Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of Alameda within thirty (30) days of the Covenantor's receipt of a fully executed original.

7.04. Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (2) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To Owner: Robert C. Bylsma  
Regional Environmental Counsel  
Union Pacific Railroad Company  
10031 Foothills Blvd, Suite 200  
Roseville, California 95678

Tony K. Love  
AVP Real Estate  
Union Pacific Railroad Company  
1400 Douglas Street, Room 1690  
Omaha, NE 68179

To Department: Mark Piros, Unit Chief  
Brownfields and Environmental Restoration Program  
Department of Toxic Substances Control  
700 Heinz Avenue, Suite 200  
Berkeley, California 94710

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

7.05. Partial Invalidity. If this Covenant or any of its terms are determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

7.06 Statutory References. All statutory references include successor provisions.

7.07 Inspection and Reporting Requirements. The Owner shall conduct an annual inspection and submit an Annual Inspection Report to the Department for its approval by January 15<sup>th</sup> of each year. The annual report, must include the dates, times, and names of those who conducted and reviewed the annual inspection report. It also shall describe how the observations were performed that were the basis for the statements and conclusions in the annual report (e.g., drive by, fly over, walk in, etc.) If violations are noted, the annual report must detail the steps taken to return to compliance. If the Owner identifies any violations of this Covenant during the annual inspections or at any other time, the Owner must within 10 days of identifying the violation: determine the identity of the party in

violation, send a letter advising the party of the violation of the Covenant and demand that the violation ceases immediately. Additionally, copies of any correspondence related to the enforcement of this Covenant shall be sent to the Department within ten (10) days of its original transmission.

IN WITNESS WHEREOF, the Parties execute this Covenant.

Covenantor: Union Pacific Railroad

By:           Tony K. Love          

Name: Tony K. Love

Title: AVP Real Estate, Union Pacific Railroad Company

Date: \_\_\_\_\_

Department of Toxic Substances Control

By:           Mark Piros          

Name: Mark Piros

Title: Unit Chief, Brownfields and Environmental Restoration Program -  
Berkeley Office

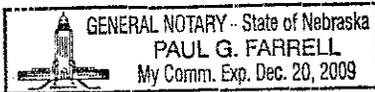
Date:           2/10/2009

ACKNOWLEDGEMENT

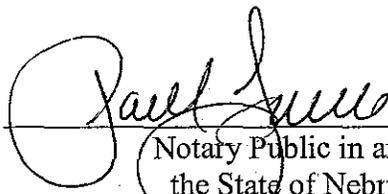
STATE OF NEBRASKA            )  
  ) ss:  
COUNTY OF DOUGLAS         )

On this 26<sup>th</sup> day of January, 2009, before me, *Paul G. Farrell*, a Notary Public on and for said County and State, personally appeared *Tony K. Love* to me known to be AVP-Real Estate of **UNION PACIFIC RAILROAD COMPANY** that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and that he was authorized to execute said instrument on behalf of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



↑(Affix Seal Here)↑

  
\_\_\_\_\_  
Notary Public in and for  
the State of Nebraska

My Commission Expires: December 20, 2009

STATE OF CALIFORNIA )  
 )  
COUNTY OF Alameda )

On February 10<sup>th</sup> 2009 before me, Nicole Thuemmler, notary public personally appeared Mark Piros who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct. WITNESS my hand and official seal.

Signature Nicole Thuemmler (Seal)

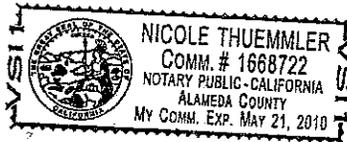


EXHIBIT A  
Legal Description  
And  
Plat of Site

PARCEL 2 (50036-11):

For freeway purposes, an AERIAL EASEMENT and right of way to construct, replace, inspect, maintain, repair, retrofit, operate or remove an overhead freeway bridge and highway supporting columns and footings, including any and all appurtenances thereto, over, under, upon and across the following described real property:

COMMENCING at a point on the northwesterly line of that parcel of land described in the Deed from Crocker Estate Company to Western Pacific Railway Company, dated September 26, 1905, recorded October 3, 1905, in Book 1083, Page 339, Alameda County Records, distant Thereon S. 33°26'14" W., 95.66 feet from the southerly line of 5th Street, as said street is shown on the "Map No 2 of the Briggs Tract", filed January 7, 1876, in Book 2 of Maps, Page 19, in the office of the County Recorder of Alameda County; thence along said northwesterly line S. 33°26'14" W., 412.92 feet to the northerly line of 3rd Street, as said street is shown on said map; thence continuing along the southwesterly prolongation of said northwesterly line S. 33°26'14" W., 116.69 feet; thence from a tangent that bears S. 78°46'57" W., along a curve to the right with a radius of 948.75 feet, through an angle of 04°41'35", an arc length of 77.71 feet; thence S. 83°28'32" W., 196.70 feet; thence along a tangent curve to the right with a radius of 2535.00 feet, through an angle of 13°10'37", an arc length of 583.00 feet; thence S. 88°47'25" W., 138.66 feet; thence from a tangent that bears N. 86°58'17" W., along a curve to the right with a radius of 2541.00 feet, through an angle of 3°13'35", an arc length of 143.09 feet; thence N. 06°15'18" E., 255.16 feet to the southerly line of that parcel of land described in that quitclaim deed to the City of Oakland recorded October 8, 2002 in the office of the County Recorder of Alameda County as Instrument No. 20022455185; thence along the southerly lines of said parcel of land the following 5 courses: (1) S. 76°45'42" E., 165.91 feet, (2) N. 89°30'28" E., 6.58 feet, (3) N. 00°06'06" E., 10.00 feet, (4) from a tangent that bears N. 89°53'54" E. along a curve to the left with a radius of 2169.25 feet, through an angle of 6°42'15", an arc length of 253.83 feet, and (5) N. 17°06'32" E., 27.33 feet to the southerly line of said 3rd Street; thence along last said line S. 72°53'28" E., 250.63 feet to the westerly line of Cypress Street as said street is shown on the map entitled "Map of Subdivision of Block 450, of Boardman's Official Map of the City of Oakland," filed August 13, 1869, in Book 3 of Maps, Page 29, in the Office of the County Recorder of Alameda County; thence along last said line S. 17°06'32" W., 79.99 feet; thence S. 72°53'28" E., 30.00 feet to the centerline of said Cypress Street; thence along said centerline of Cypress Street N. 17°06'32" E., 204.72 feet; thence N. 78°53'03" E., 188.00 feet; thence N. 79°21'20" E., 256.27 feet; thence along a tangent curve to the left with a radius of 1151.25 feet, through an angle of 09°06'39", an arc length of 183.07 feet; thence N. 58°41'18" E., 61.01 feet to the point of commencement.

CONTAINING 8.208 acres, more or less.

Together with all abutter's rights of access to and from owner's remaining property to the freeway viaducts.

ALSO, TOGETHER with the extinguishment of all easements of access to the freeway constructed on the easement hereinabove described.

PARCEL 2 (50036-11):

ALSO, TOGETHER with non-exclusive right of access to the aerial easement hereinabove described for the purpose of inspecting the uses made of the land under the aerial easement by way of such roads or passageways as may now or hereafter exist on Grantor's property; provided, however, that State's exercise of such right of access shall not unreasonably interfere with Grantor's use of such roads or passageways.

RESERVING unto Grantor, its successors and assigns, the general right to use and enjoy the area of land under the aerial easement hereinabove described. The general right to use and enjoy said land by Grantor, its successors and assigns, shall however, be subject to the following conditions:

1. No use may be made of the area of land under the aerial easement hereinabove described which would impair the full use and safety' of said freeway structure, or would otherwise interfere with the free flow of traffic thereon or would unreasonably impair the maintenance thereof.

2. No use may be made of the area of land under said aerial easement hereinabove described for the storage of flammable, volatile, explosive or corrosive substances, and such substances shall not be brought onto said land except in such quantities as are normally required for the maintenance operations of occupants of said land and except as may be transported by rail or pipelines. Installation of any pipelines carrying volatile substances shall have the written approval of the State as to the safety and compatibility with freeway purposes and discretion shall not be exercised in a capricious or arbitrary manner. The use of any such substances shall be in conformance with all applicable City, State, County and Federal code requirements and regulations. Nothing herein contained shall be construed as restricting or limiting the Grantor, its successors and assigns, as a common carrier, from transporting or storing any commodity, material or substance by rail under the aerial easements.

3. Grantor shall not improve, alter, erect, construct or place any building or structure or other obstruction or material within twenty-three (23) feet of the undersides nor within fifteen (15) feet (measured horizontally) of the sides of said freeway structure without the express written approval of the State. The State shall have the discretion to determine whether such proposed construction will be inimical to or incompatible with the full enjoyment of the public rights in the freeway or against the public interest, but such discretion shall not be exercised in a capricious or arbitrary manner.

Grantee, its successors and assigns forever, covenants and agrees to erect and maintain a fence on the ground under all aerial easement areas. Such fence shall be of type and material sufficient to prevent unauthorized access to the enclosed premises and Grantee shall promptly reimburse Grantor for any and all cost for failure to do so. The fence shall not restrict Grantor's access to the enclosed premises. and Grantee shall provide suitable gated access points for Grantor and keys to all gates. Grantee shall not permit any use of the grounds under any of the aerial easement areas by vehicles or equipment that would harm any improvements made by

PARCEL 2 (50036-11):

Grantor under said aerial easement areas, including asphalt surfaces, and shall indemnify and reimburse Grantor for any and all failures to do so.

The foregoing covenant, condition and restriction shall run with the Property, and a breach of the foregoing covenant, condition and restriction, or the continuance thereof, may, at the option of Grantor, its successors or assigns, be enjoined, abated or remedied by appropriate proceedings, It is understood, however, that the breach of the covenant, condition and restriction shall not defeat or render invalid the lien of any mortgage on the Property made in good faith and for value; PROVIDED, however, that any breach, or the continuance thereof, may be enjoined, abated or remedied by proper proceedings as aforesaid; and PROVIDED FURTHER, that the foregoing covenant, condition and restriction shall at all times remain in full force and effect against the Property, or any part thereof, title to which is obtained by foreclosure of any such mortgage..

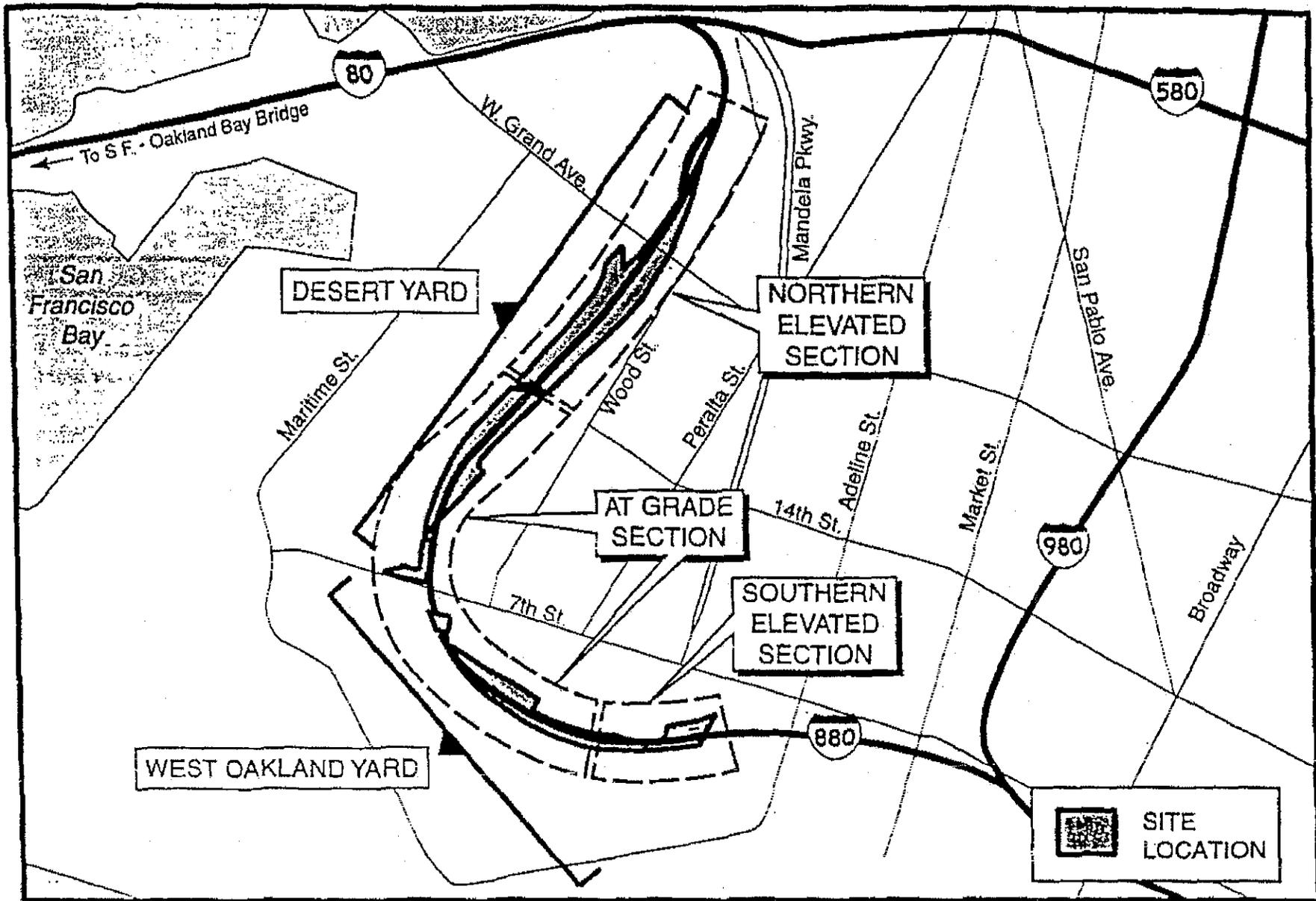
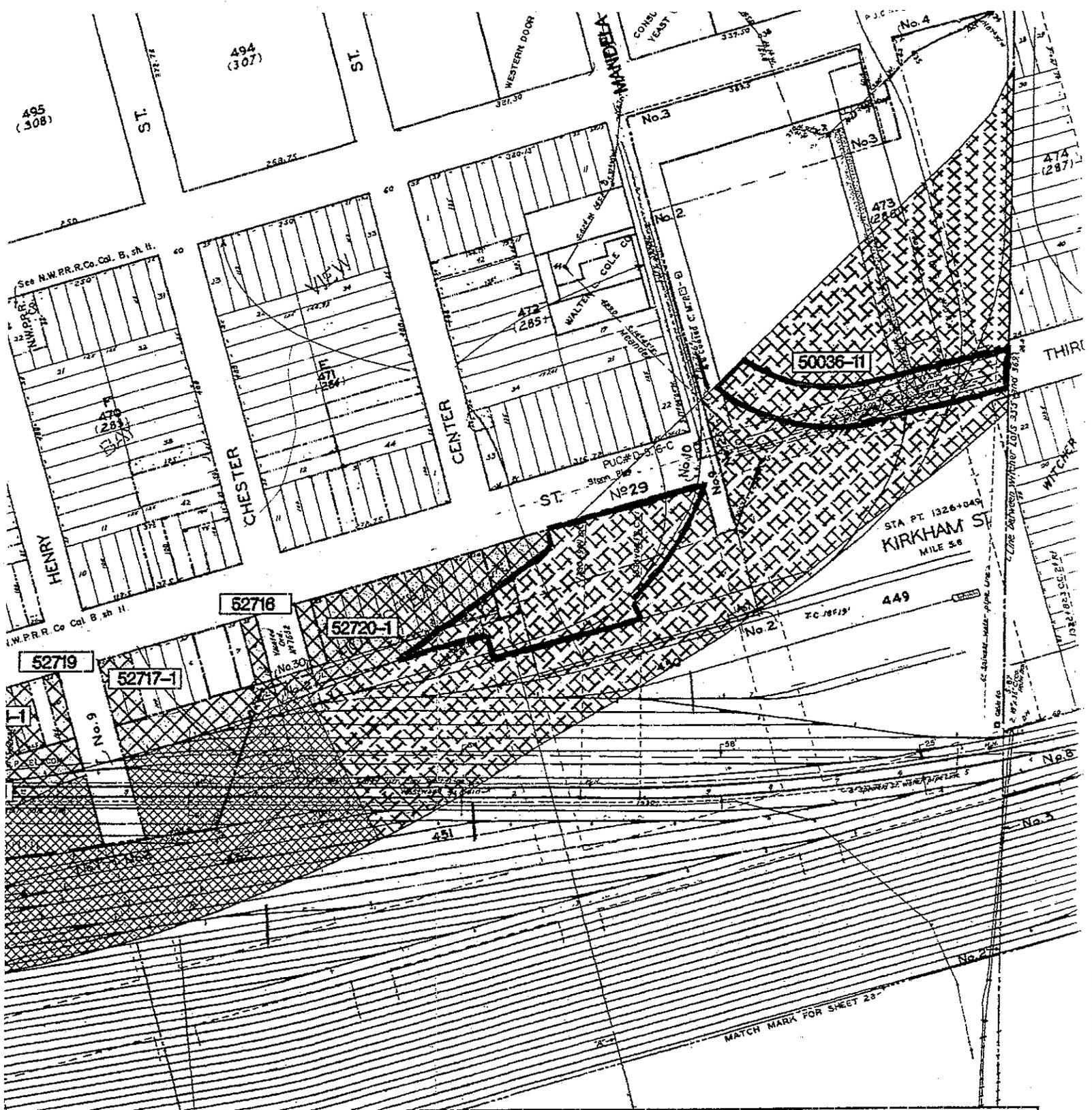


Figure 1 - Site Map

BACKGROUND

rail yard has been used primarily for railroad car storage and



SCALE: 1" = 200'

LEGEND

- U.P.R.R. RIGHT OF WAY
- FEE AREA SHOWN
- EASEMENT AREA SHOWN
- UTILITY EASEMENT AREA
- FEE AREA TO CITY OF OAKLAND

EXHIBIT "A-1"  
**UNION PACIFIC RAILROAD CO.**

TO ACCOMPANY AGREEMENT WITH  
 CALIFORNIA DEPT. OF TRANSPORTATION  
 OAKLAND, ALAMEDA COUNTY, CA.  
 M.P. 0.0-3.45+- MARTINEZ SUB.  
 SP CA V106 /1 & 2  
 REAL ESTATE DEPARTMENT OMAHA NE.  
 FILE #835-86 DATE: 5-1-2001 T.D.A.

# EXHIBIT B

## Cap Details

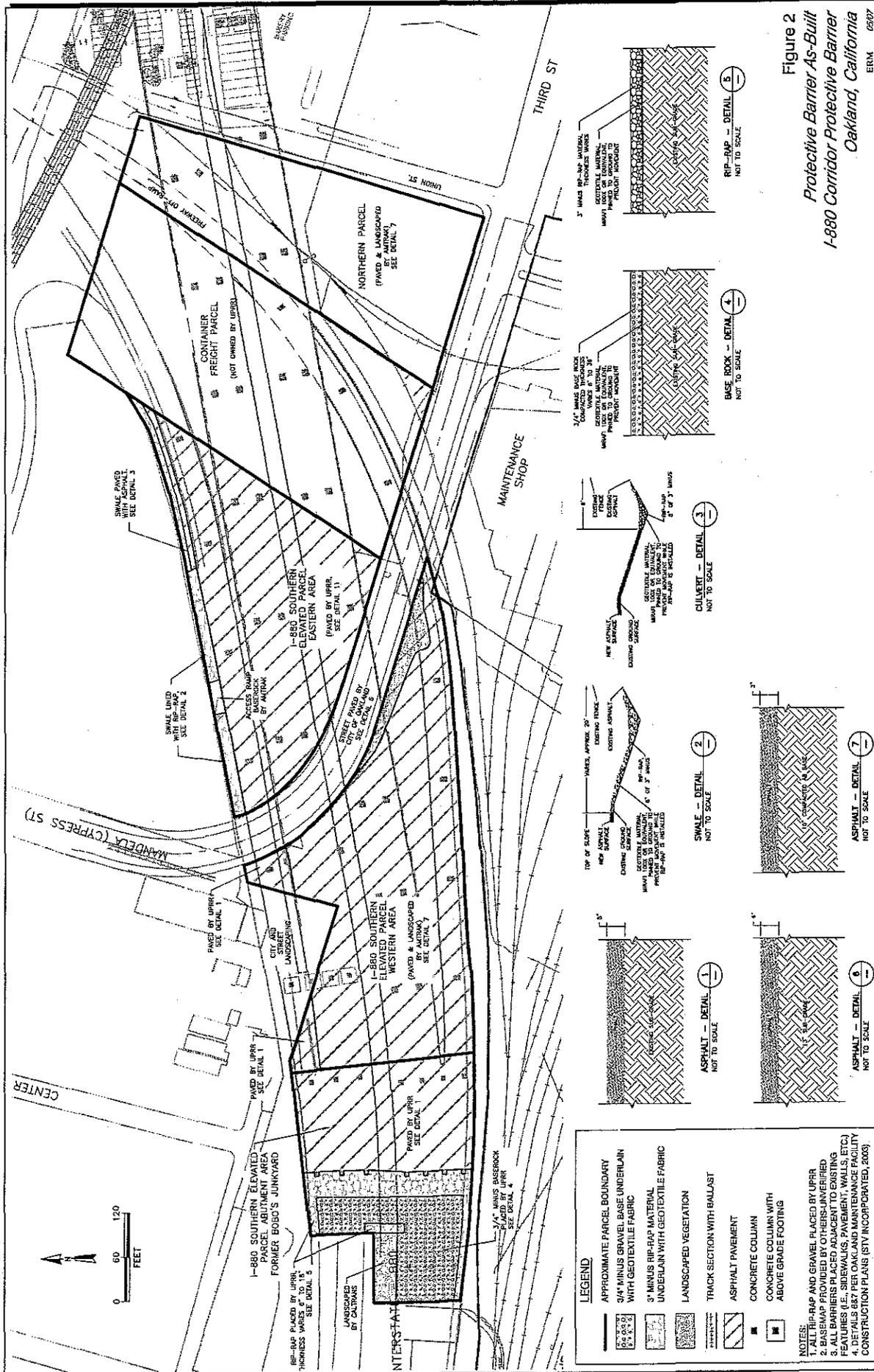


Figure 2  
 Protective Barrier As-Built  
 I-880 Corridor Protective Barrier  
 Oakland, California  
 ERM 05/07