

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

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UNITED STATES OF AMERICA;  
SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL, AND SOUTH CAROLINA  
DEPARTMENT OF NATURAL  
RESOURCES, AS AGENCIES OF THE  
STATE OF SOUTH CAROLINA AND  
AS TRUSTEES FOR NATURAL  
RESOURCES,

Plaintiffs,

v.

EVERGREEN INTERNATIONAL, S.A.,

Defendant.

CIVIL NO. 2:12-cv-02532-RMG

CONSENT DECREE

**I. BACKGROUND**

A. The United States of America, on behalf of the United States Department of the Interior (“DOI”) and the National Oceanic and Atmospheric Administration (“NOAA”) of the United States Department of Commerce, filed a complaint in this action (“Complaint”) pursuant to Section 1002 of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2702, seeking natural resource damages arising from an unlawful discharge of oil into the waters of the Cooper River and Charleston Harbor in South Carolina, on or about September 30, 2002 (“the Spill”). DOI, acting through the United States Fish & Wildlife Service (“FWS”), and NOAA have been designated Federal Trustees for natural resources impacted by unlawful discharges of oil under OPA. See Executive Order 12,580 and the National Contingency Plan, 40 C.F.R. § 300.600(b)(1) and (2).

B. The South Carolina Department of Health and Environmental Control and the South Carolina Department of Natural Resources are co-plaintiffs on the Complaint in this matter. These State agencies have been designated State Trustees for natural resources impacted by unlawful discharges of oil under OPA, and also seek damages for injury to natural resources arising from the Spill. The Pollution Control Act (“PCA”), S.C. Code Ann. § 48-1-10 et seq. (Rev. 2008 & Supp. 2011), provides additional authority for the State Trustees to seek damages arising from the Spill.

C. The Complaint alleges that on or about September 30, 2002, the M/V EVER REACH discharged an estimated 12,500 gallons of fuel oil into the Cooper River and nearby areas in Charleston Harbor, and that the Spill caused oiling along approximately 30 miles of shoreline, including marsh, mudflats, sand beaches, and manmade structures. The Complaint alleges that Evergreen International, S.A. (the “Settling Defendant”) is liable under OPA for damages for injury to, destruction of, loss of, or loss of use of natural resources resulting from the Spill. The Settling Defendant does not admit any liability to the Plaintiffs arising out of the transactions or occurrences alleged in the Complaint.

D. The Federal and State Trustees share trusteeship for natural resources affected by the Spill and have worked together to assess the natural resources injuries and losses caused by the Spill and to plan restoration to compensate for those losses. The Trustees believe the obligations of the Settling Defendant set forth in this Consent Decree, including the obligation to perform restoration and pay additional sums as described herein, constitute adequate compensation for Natural Resources Damages arising from the Spill.

E. The Parties to this Consent Decree recognize, and the Court by entering this Consent Decree finds, that this Consent Decree: (i) has been negotiated by the Parties in good

faith; (ii) will avoid prolonged and complicated litigation among the Parties; (iii) will expedite the restoration of natural resources or resource services that were injured or lost due to the Spill; and (iv) is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter and over the parties to this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1367, and Section 1017(b) of OPA, 33 U.S.C. § 2717(b). Venue is proper in this Court pursuant to 28 U.S.C. §§ 121 and 1391(b), and Section 1017(b) of OPA, 33 U.S.C. § 2717(b). The Complaint filed herein states claims upon which relief may be granted. For the purposes of this Consent Decree and the underlying Complaint, the Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. The Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

2. This Consent Decree shall apply to, be binding upon, and inure to the benefit of the United States, the State Trustees, and the Settling Defendant and its successors and assigns. Any change in ownership or corporate status of the Settling Defendant including, but not limited to, any transfer of assets or real or personal property shall in no way alter the Settling Defendant's responsibilities under this Consent Decree.

## **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in OPA, 33 U.S.C. § 2701 *et seq.*, or in the regulations promulgated under OPA at 15 C.F.R. Part 990, shall have the meaning assigned to them in OPA or in such

regulations. Whenever terms listed below are used in this Consent Decree or in the Appendices attached hereto and incorporated hereunder, the following definitions shall apply:

- a. "Consent Decree" means this Consent Decree, including Appendices.
- b. "Day" means a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or State or Federal holiday, the period shall run until the close of business of the next working day.
- c. "DOI" means the United States Department of the Interior and any successor departments or agencies of the United States.
- d. "Effective Date" means the effective date of this Consent Decree as provided by Section XIX of this Consent Decree (Effective Date and Retention of Jurisdiction).
- e. "Federal Trustees" means the United States Department of the Interior, acting through the United States Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration of the United States Department of Commerce.
- f. "Fund" means the Oil Spill Liability Trust Fund established pursuant to 26 U.S.C. §§ 4611 and 9509.
- g. "Future Costs" means all costs, including, but not limited to, direct and indirect costs, that the State and Federal Trustees have incurred or incur in connection with the implementation of the Restoration Project on or after January 1, 2012, including but not limited to costs involved in reviewing or developing plans, reports, and other items pursuant to this Consent Decree; implementing, monitoring, correcting or otherwise overseeing the Restoration Project; or otherwise enforcing this Consent Decree.
- h. "FWS" means the United States Fish and Wildlife Service.
- i. "Interest" means interest at the rate prescribed under OPA, 33 U.S.C.

§ 2705(b)(4), and shall be computed daily to the date of payment and compounded annually on June 1 of each year.

j. “Natural Resource Damages” means the damages described at Section 1002(b)(2)(A) of OPA, 33 U.S.C. § 2702(b)(2)(A).

k. “NOAA” means the National Oceanic and Atmospheric Administration of the United States Department of Commerce.

l. “OPA” means the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.

m. “Paragraph” means a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

n. “Parties” means the United States, the State Trustees, and the Settling Defendant.

o. “PCA” means the Pollution Control Act, S.C. Code Ann. § 48-1-10 et seq. (Rev. 2008 & Supp. 2011).

p. “Plaintiffs” means the United States and the State Trustees.

q. “Restoration Project” means the restoration actions defined, described, and scheduled in Appendix A to this Consent Decree, generally known as the Noisette Creek Wetland Restoration Project.

r. “SCDHEC” means the South Carolina Department of Health and Environmental Control.

s. “SCDNR” means the South Carolina Department of Natural Resources.

t. “Section” means a portion of this Consent Decree identified by a Roman numeral.

u. “Settling Defendant” means Evergreen International, S.A.

v. “Spill” means the occurrence on September 30, 2002, in which the vessel M/V EVER REACH released an estimated 12,500 gallons of heavy fuel oil into the Cooper River and nearby areas in Charleston Harbor.

w. “State Trustees” means SCDHEC and SCDNR.

x. “Subparagraph” means a portion of this Consent Decree identified by a lower case letter or an Arabic numeral in parentheses.

y. “Subsection” means a portion of this Consent Decree identified by a Roman numeral and an upper case letter.

z. “Trustees” means NOAA, DOI, acting through the FWS, SCDHEC, and SCDNR.

aa. “United States” means the United States of America.

## **V. COMPENSATION FOR NATURAL RESOURCE INJURIES**

### **A. RESTORATION PROJECT**

4. The Settling Defendant shall fund, perform, and complete the Restoration Project described in Appendix A (all provisions of which are incorporated in and enforceable under this Consent Decree), in accordance with the procedures set forth in this Section.

5. Settling Defendant’s Project Coordinator. Not later than 30 days after the effective date of this Consent Decree, the Settling Defendant shall notify the Trustees, in writing, of the name, address, and telephone number of its designated Project Coordinator. The person so designated shall have technical expertise sufficient to adequately manage all aspects of the Restoration Project and shall be responsible for supervising and directing all activities necessary to implement the Restoration Project in accordance with the terms of this Consent Decree. The Settling Defendant may subsequently change its designated Project Coordinator by providing

written notice to the Trustees at least 30 days prior to the change.

6. Trustee Council. The Trustees shall oversee implementation of the Restoration Project specified in this Consent Decree. Such oversight shall be effected through a Trustee Council, consisting of one representative designated by FWS, NOAA, SCDHEC, and SCDNR. This Council shall act on behalf of the Trustees, and by consensus, on all matters related to the Restoration Project under the terms of this Consent Decree, including, but not limited to:

- a. overseeing implementation of the Restoration Project, including construction and monitoring;
- b. identifying and determining appropriate additional or corrective actions to ensure that the performance criteria associated with the Restoration Project will be met;
- c. providing the Settling Defendant with a Construction Completion Certificate and a Project Completion Certificate, when the criteria for such certifications have been met; and
- d. performing duties associated with the formal dispute resolution process, whenever necessary, as described in this Consent Decree.

7. Restoration Project Construction. The Settling Defendant shall construct or otherwise implement the Restoration Project as defined, described, and scheduled in Appendix A to this Consent Decree. All Federal, State, and local permits, rights-of-way, and other documents or legal requirements necessary to implement the Restoration Project shall be obtained by the Settling Defendant at its expense, and the Settling Defendant shall comply with all applicable Federal, State, and local laws in implementing the Restoration Project.

8. Restoration Project Construction Completion.

- a. The Settling Defendant shall provide the Trustee Council with a written

report no later than 30 days after completing construction of the Restoration Project. Such report shall be signed by a registered professional engineer and the Settling Defendant's Project Coordinator and include information sufficient to show that all activities necessary to construction of the Restoration Project have been completed in accordance with the Construction Requirements identified in Appendix A to this Consent Decree. The report shall include the following statement, signed by a responsible corporate official of the Settling Defendant:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is 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.

The Trustee Council or its designees will inspect the Restoration Project after receipt of such report.

b. If, based upon its post-construction inspection of the Restoration Project and consideration of any other relevant information, the Trustee Council determines that construction of the Restoration Project is in accordance with the Construction Requirements identified in Appendix A of this Consent Decree, the Trustee Council shall issue and provide to the Settling Defendant a dated "Construction Completion Certificate," certifying that construction of the Restoration Project is complete.

c. If the Trustee Council determines that the Restoration Project has not been constructed in accordance with the Construction Requirements identified in Appendix A of this Consent Decree:

(1) The Trustee Council will determine what additional activities or corrective actions must be undertaken by the Settling Defendant for construction of the Restoration Project to conform to the Construction Requirements identified in Appendix A of



this Consent Decree, and will provide written notice to the Settling Defendant identifying those activities or corrective actions.

(2) Within 15 days after receipt of such notice, the Settling Defendant shall submit a draft work plan for conducting such activities or corrective actions, with the schedule for implementation, to the Trustee Council.

(3) The Trustee Council will approve the draft work plan or disapprove such plan with comments. In the event of disapproval, the Settling Defendant will have 30 days following receipt of the Trustee Council's comments to revise and resubmit the draft work plan for approval. This process will be repeated until the draft work plan is approved by the Trustee Council or until dispute resolution is invoked pursuant to Section X of this Consent Decree. Upon approval by the Trustee Council, the draft work plan shall become the final work plan for completion of the Restoration Project. The Settling Defendant shall implement the work plan according to the schedule identified therein.

(4) The Settling Defendant shall notify the Trustee Council of its completion of such activities and the Trustee Council shall thereafter again evaluate whether the Restoration Project has been constructed in accordance with the Construction Requirements identified in Appendix A of this Consent Decree. If the Trustee Council determines construction is complete, then it shall so certify as provided in Paragraph 8(b). If the Trustee Council determines that the performance criteria have not been achieved, it shall again follow the procedures specified in Paragraph 8(c) until the completion of construction is satisfactory to the Trustee Council, or if dispute resolution is invoked under Section X (Dispute Resolution), the issuance of a final determination that no further action to complete construction is necessary.

9. Restoration Project Site Protection. No later than two months from the date of

issuance of the Construction Completion Certificate, the Settling Defendant, working in concert with the City of North Charleston, shall act to place and record on the Restoration Project site a restrictive covenant in substantially the form of Appendix B to this Consent Decree that restricts future use(s) of the Restoration Project site in a manner sufficient to protect and preserve the ecological benefits of the Restoration Project in perpetuity. The Settling Defendant shall act to ensure that the restrictive covenant shall be recorded in the public records of Charleston County, South Carolina, and shall provide proof of recording to the United States and the Trustee representatives identified in Appendix C.

10. Restoration Project Monitoring. Following the date of issuance of the Construction Completion Certificate, the Settling Defendant shall initiate the Monitoring Plan set forth in Appendix A of this Consent Decree and submit Monitoring Reports to the Trustee Council as required therein.

11. Restoration Project Completion. At the end of the period prescribed for monitoring performance of the Restoration Project, and after receipt of the final Monitoring Report from the Settling Defendant, the Trustee Council shall determine whether the performance criteria for the Restoration Project specified in Appendix A have been achieved. If the Trustee Council finds that the performance criteria have been achieved, then it shall issue and provide to the Settling Defendant a dated "Project Completion Certificate" certifying that the Restoration Project is complete. If the Trustee Council finds that the performance criteria have not been achieved, the Trustee Council shall identify and notify the Settling Defendant of those further actions that need to be undertaken in order for the Project to meet its performance criteria. The procedures specified in Paragraph 8(c) shall be followed until the Restoration Project performance is satisfactory to the Trustee Council, or, if dispute resolution is involved

under Section X (Dispute Resolution), a final determination is issued that no further actions are required to be undertaken by the Settling Defendant. Upon issuance of the Project Completion Certificate by the Trustees, the Settling Defendant shall have fully performed its obligation to implement the Restoration Project under this Consent Decree.

12. Access. For the purpose of overseeing and monitoring implementation of the Restoration Project, the Trustees and their designated representatives shall:

a. Have the right to be present at all times that the Settling Defendant is performing any activity involved in the construction, monitoring, or correction of the Restoration Project;

b. Be provided access at all reasonable times to the locations (including vessels) being used by the Settling Defendant, including its contractors, in implementing the Restoration Project; and

c. Be provided access to all non-privileged documents of the Settling Defendant or its contractors relating to the Restoration Project.

The Trustees may designate other representatives, including, but not limited to, Federal and State employees, and Federal and State contractors and consultants, to observe, monitor, assess, or assist in overseeing the progress of the Restoration Project.

13. Use of Contractors by Settling Defendant. The Settling Defendant shall provide a copy of this Consent Decree to all contractors hired to perform any Restoration Project work or activity, and to each person representing the Settling Defendant with respect to the Restoration Project, and shall condition all contracts entered into for the purposes of performing any Restoration Project work or activity upon performance of that work or activity in conformity with the terms of the Consent Decree. The Settling Defendant or its contractors shall provide written

notice of the Consent Decree to all subcontractors hired to perform any portion of the Restoration Project. The Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Restoration Project contemplated herein in accordance with this Consent Decree.

**B. PAYMENT OF ADDITIONAL DAMAGES**

14. Within 30 days of the Effective Date of this Consent Decree, the Settling Defendant shall pay damages in the amount of \$121,000.00 to compensate for the lost recreational use of natural resources due to the Spill. Said damages shall be paid into DOI's Natural Resource Damage Assessment and Restoration Fund, for deposit and maintenance in a sub-account within that Fund to be known as the "EVER REACH Spill Restoration Account." Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with current EFT procedures, referencing DOJ Case Number 90-5-1-1-08592. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of South Carolina following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 pm (Eastern Time) will be credited on the next business day. Defendant shall provide written notice of this payment to all Federal and State parties in accordance with Section XVI (Notice). The funds paid into the DOI's Natural Resource Damage Assessment and Restoration Fund shall be held in that account for use by the Trustees, acting through the Trustee Council, solely to plan and implement a future restoration action of benefit to recreational fisheries affected by the Spill.

**VI. RESPONSIBILITY FOR COMPLIANCE**

15. This Consent Decree is not, and shall not be construed to be, a permit issued

pursuant to any Federal or State statute or regulation. The United States and the State Trustees do not, by their consent to this Consent Decree, warrant or aver in any manner that the Settling Defendant's compliance with this Consent Decree will constitute or result in compliance with the requirements of any Federal, State, or local laws or regulations. Nothing in this Consent Decree shall be construed to affect or limit in any way the obligation of the Settling Defendant to comply with all Federal, State, and local laws and regulations governing any activity required by this Consent Decree.

16. Notwithstanding any action by the Plaintiffs, including, without limitation, their issuance of a Restoration Plan or the review and approval of any design, plan, report, and other information or action formulated by the Settling Defendant under this Consent Decree, the Settling Defendant is and shall remain solely responsible for compliance with all terms and requirements of this Consent Decree, including those related to the construction requirements and performance criteria applicable to the Restoration Project, and the requirements of all Federal, State, and local laws and regulations.

#### **VII. REIMBURSEMENT OF COSTS**

17. Past Costs. Within 20 days after the Effective Date, the Settling Defendant shall pay the following sums to each Plaintiff, in accordance with the specified procedure for payment, to reimburse costs previously incurred by each Plaintiff:

a. Assessment Costs Incurred by NOAA and DOI/FWS. The Settling Defendant shall pay a total of \$792,058.45 to the United States to reimburse the natural resource damage assessment costs incurred by NOAA and DOI/FWS for the Spill through December 31, 2011. Payment shall be made by FedWire EFT to the U.S. Department of Justice in accordance with current EFT procedures, referencing DOJ Case Number 90-5-1-1-08592. Payment shall be

made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of South Carolina following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

(1) Of the total amount paid by the Settling Defendant under this Subparagraph, \$38,357.07 shall be applied to reimburse natural resource damage assessment costs incurred by DOI/FWS through December 31, 2011.

(2) Of the total amount paid by the Settling Defendant under this Subparagraph, \$753,701.38 shall be applied to reimburse natural resource damage assessment costs incurred by NOAA through December 31, 2011.

Settling Defendant shall also provide notice of this payment according to Section XVI (Notice).

b. Assessment Costs Incurred by SCDHEC. The Settling Defendant shall pay \$1,568.90 to SCDHEC to reimburse natural resource damage assessment costs it incurred for the Spill through December 31, 2011. Payment shall be made to SCDHEC by cashier's or certified check made payable to the South Carolina Department of Health and Environmental Control. The Settling Defendant shall send the check and notice of payment, referencing "the M/V EVER REACH Spill" Natural Resource Damages Settlement and this civil action case name and number to David Baize, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201. The Settling Defendant shall also provide notice of this payment according to Section XVI (Notice).

c. Assessment Costs Incurred by SCDNR. The Settling Defendant shall pay \$27,057.92 to SCDNR to reimburse natural resource damage assessment costs it incurred for the Spill through December 31, 2011. Payment shall be made by cashier's or certified check made

payable to the SC Dept. of Natural Resources. The Settling Defendant shall send the check and notice of payment, referencing “the M/V EVER REACH Spill” and this civil action case name and number, to Paul S. League, Deputy Chief Counsel, SC Department of Natural Resources, P.O. Box 167, Columbia, SC 29202.

18. Future Costs. The Trustees will continue to incur administrative and other costs to oversee and monitor the Settling Defendant’s implementation of the Restoration Project, as described in this Consent Decree. The Settling Defendant shall pay these Future Costs as follows:

a. Federal Trustees. The Federal Trustees will individually and periodically submit a bill to the Settling Defendant for costs incurred, to include a summary of those costs and instructions for payment. The Settling Defendant shall pay the costs so identified within 30 days of receipt of each bill and cost summary. In the event that payments required by this Paragraph are not made within 30 days, Interest on the unpaid balance shall be paid commencing on the 31<sup>st</sup> day after the Settling Defendant’s receipt of such bill and cost summary, and shall accrue through the date of payment. Disputes concerning the sufficiency of the supporting cost documentation provided by a Federal Trustee shall not defer payment obligations.

b. State Trustees. The State Trustees will individually and periodically submit a bill to the Settling Defendant for costs incurred, to include a summary of those costs, with supporting documentation, and instructions for payment. The Settling Defendant shall pay the costs so identified within 30 days of receipt of each bill and cost summary. In the event that payments required by this Paragraph are not made within 30 days, Interest on the unpaid balance shall be paid commencing on the 31<sup>st</sup> day after the Settling Defendant’s receipt of such bill and cost summary, and accruing through the date of payment. Disputes concerning the sufficiency of



the supporting cost documentation provided by the State Trustee shall not defer payment obligations.

19. Notice of Payment. Upon making any payment under this Section, the Settling Defendant shall send written notice that payment has been made to the United States, NOAA, DOI, SCDHEC, and SCDNR, in accordance with Section XVI and Appendix C.

20. Interest on Late Payments. In the event any payment required by this Section is not made when due, the Settling Defendant shall pay Interest on the unpaid balance commencing on the payment due date and accruing through the date of full payment. Interest payments shall be paid in the same manner as the overdue principal amount, and shall be directed to the same fund or account as the overdue principal amount. Interest is in addition to any Stipulated Penalties.

#### **VIII. INDEMNIFICATION**

21. The United States and the State Trustees do not assume any liability by entering into this Consent Decree. The Settling Defendant shall indemnify, save and hold harmless the United States and the State Trustees and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, (a) negligent or other wrongful acts or omissions of the Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any person acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree; or (b) any contract, agreement, or arrangement between the Settling Defendant and any person for performance of the Restoration Project including, but not limited to, claims on account of construction delays. Further, the Settling Defendant agrees to reimburse the United States and the State Trustees for all costs each incurs, including but not limited to attorneys fees and other



expenses of litigation and settlement, as a result of claims made against the United States or the State Trustees based on negligent or other wrongful acts or omissions of the Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree.

Neither the United States nor the State Trustees shall be held out as a party to any contract entered into by or on behalf of the Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendant nor any such contractor shall be considered an agent of the United States or the State Trustees.

22. The United States and the State Trustees shall give the Settling Defendant notice of any claim for which the United States or the State Trustees plans to seek indemnification pursuant to Paragraph 21 and shall notify the Settling Defendant prior to settling such claim.

23. The Settling Defendant waives all claims against the United States and the State Trustees for damages or reimbursement or for setoff of any payments made or to be made to the United States or the State Trustees arising from or on account of any contract, agreement, or arrangement between the Settling Defendant and any person for performance of the Restoration Project, including, but not limited to, claims on account of construction delays.

#### **IX. FORCE MAJEURE**

24. “Force majeure,” for the purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendant, of the Settling Defendant’s contractors, or of any entity controlled by the Settling Defendant or controlling the Settling Defendant, that delays or prevents the performance of any obligation under this Consent Decree, despite the Settling Defendant’s best efforts to fulfill the obligation. The requirement that the Settling Defendant exercise “best efforts to fulfill the obligation” includes using the best efforts

to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (1) as it is occurring and (2) following the potential force majeure, such that the delay is minimized to the greatest extent possible. "Force majeure" does not include financial inability to (a) make payments required by Subsection V.B (Payment of Additional Damages) or Section VII (Reimbursement of Costs), or (b) implement the Restoration Project, or otherwise satisfy the requirements of the Restoration Project Implementation Plan (Appendix A), as required by Subsection V.A of this Consent Decree.

25. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure, the Settling Defendant shall orally notify the Trustees within 48 hours of the time that the Settling Defendant first knew that the event might cause a delay. Within five days thereafter, the Settling Defendant shall provide in writing to the Trustees a detailed description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay or the effect thereof; a schedule for implementation of any measures to be taken to prevent or mitigate the delay; the Settling Defendant's rationale for attributing such a delay to a force majeure if it intends to assert such a claim; and a statement of whether, in the opinion of the Settling Defendant, such circumstances may cause or contribute to an endangerment to public health or the environment. The Settling Defendant shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude the Settling Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. The Settling Defendant shall be deemed to know of any circumstance that was known by, or should have been known by, the Settling Defendant, the

Settling Defendant's contractors, or any entity controlled by the Settling Defendant or controlling the Settling Defendant.

26. If the Trustees agree that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Consent Decree that are affected by the force majeure will be extended by the Trustees for such time as necessary to complete the obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, by itself, extend the time for performance of any other obligation. If the Trustees agree that the delay is attributable to a force majeure, the Trustees will notify the Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure. If the Trustees do not agree that the delay or anticipated delay has been or will be caused by a force majeure, the Trustees will notify the Settling Defendant in writing of their decision.

27. If the Settling Defendant elects to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), it shall do so no later than 15 days after receipt of the Trustees' notice, as described in Paragraph 29. In any such proceeding, the Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that the Settling Defendant complied with the requirements of Paragraphs 24 and 25, above. If the Settling Defendant carries this burden, the delay at issue shall not be deemed to be a violation by the Settling Defendant of the affected obligation of this Consent Decree identified to the Trustees and/or the Court.

**X. DISPUTE RESOLUTION**

28. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedure of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States or the State Trustees to enforce obligations of the Settling Defendant that have not been disputed in accordance with this Section.

29. Informal Dispute Resolution. If, in the opinion of either a Plaintiff or the Settling Defendant, there is a dispute which arises under or with respect to this Consent Decree, that Party shall send written notice to the other Parties to the dispute outlining the nature of the dispute and requesting negotiations to resolve the dispute. The Parties shall endeavor to resolve the dispute through good faith negotiations. The period for informal negotiations shall not exceed 30 days from the date the notice is sent, unless this time period is modified by written agreement of the Parties.

30. Formal Dispute Resolution.

a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Plaintiff(s) shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, the Settling Defendant invokes the formal dispute resolution procedures of this Section by serving the Plaintiff(s) with a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Settling Defendant.

b. Within 60 days after receipt of the Settling Defendant's Statement of Position, the Plaintiff(s) will serve on the Settling Defendant a Statement of Position, including,

but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Plaintiff(s). Within 15 days after receipt of this Statement of Position, the Settling Defendant may submit a Reply.

c. An administrative record of the dispute shall be maintained by the Plaintiff(s) and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section.

d. The Plaintiff(s) will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 30(c). This decision shall be binding on the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 30(e).

e. Any administrative decision made by the Plaintiff(s) pursuant to this Paragraph shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendant with the Court and served on all Parties within 10 days of receipt of the Plaintiff(s)' decision. The motion and supporting memorandum shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Plaintiff(s) may file a response to the Settling Defendant's motion within the time period allowed by the Local Rules of this Court. The Settling Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

f. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Plaintiff(s) is arbitrary and capricious or otherwise not in accordance with law. Judicial review of the decision of the

Plaintiff(s) shall be on the administrative record compiled pursuant to Paragraph 30(c).

31. The invocation of informal or formal dispute resolution procedures pursuant to prior Paragraphs shall not extend, postpone or affect in any way any obligation of the Settling Defendant under this Consent Decree that is not directly in dispute, unless the Plaintiffs or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XI (Stipulated Penalties).

#### **XI. STIPULATED PENALTIES**

32. The Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraph 33 to the United States and the State Trustees for the Settling Defendant's failure to comply with the requirements of this Consent Decree specified below, unless excused under Section IX (Force Majeure). "Compliance" by the Settling Defendant shall include the timely completion of the payments and activities identified in Paragraph 33 within the time schedules established by and approved pursuant to the requirements of the Consent Decree, the final work plan or any other documents approved by the Trustees pursuant to this Consent Decree.

33. The following stipulated penalties shall accrue per violation per day for the Settling Defendant's failure to comply with the time schedules established for the following implementation requirements:

- a. Failure to timely submit any draft or revised work plan required under

Paragraph 8:

<u>Penalty per Violation per Day</u>	<u>Period of Noncompliance</u>
\$ 250	1 <sup>st</sup> through 7 <sup>th</sup> day
\$ 500	8 <sup>th</sup> through 30 <sup>th</sup> day
\$ 1,000	31 <sup>st</sup> day and beyond

b. Failure to comply with schedules for Restoration Project implementation in Appendix A, including for monitoring, or for any other activities approved under Paragraph 8 to complete the Restoration Project:

<u>Penalty per Violation per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$ 750	8 <sup>th</sup> through 30 <sup>th</sup> day
\$ 1,250	31 <sup>st</sup> day and beyond

c. Failure to make the payments required by Subsection V.B and Section VII in a timely manner:

<u>Penalty per Violation per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$ 750	8 <sup>th</sup> through 30 <sup>th</sup> day
\$ 1,250	31 <sup>st</sup> day and beyond

34. All penalties shall begin to accrue on the day after performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

35. Following the determination by the Plaintiffs, individually or jointly, that the Settling Defendant has failed to comply with one of the requirements of this Consent Decree listed above, the Plaintiff(s) may send the Settling Defendant a written demand for the payment of penalties that describes the noncompliance.

36. Stipulated penalties shall be paid as follows: Fifty percent of any stipulated



penalties shall be paid to the United States in accordance with payment instructions provided by the Financial Litigation Unit of the United States Attorney's Office for the District of South Carolina following lodging of the Consent Decree, and shall be deposited in the United States Treasury. Twenty-five percent of any stipulated penalties under the preceding Paragraph shall be paid to SCDHEC, in accordance with the instructions set forth in Paragraph 17(b). Twenty-five percent of any stipulated penalties shall be paid to SCDNR, in accordance with the instructions set forth in Paragraph 17(c). Notwithstanding any other provision of this Section, the United States and the State Trustees, in their unreviewable discretion, may waive any portion of stipulated penalties owed to them that have accrued pursuant to this Consent Decree.

37. In the event the Settling Defendant fails to pay stipulated penalties when due, the United States and/or the State Trustees may institute a legal proceeding to collect such penalties, as well as Interest accruing on any unpaid balance, as provided by law.

38. All penalties due under this Section shall be due and payable within 30 days of the Settling Defendant's receipt of a demand for payment from the Plaintiff(s), unless the Settling Defendant invokes dispute resolution under Section X of this Consent Decree. In that case, Stipulated Penalties shall continue to accrue as provided in this Section and as specified in Paragraph 33, but need not be paid until the following:

a. If the dispute is resolved by agreement, accrued penalties agreed to be owed shall be paid to the United States and the State Trustees within 30 days of the agreement.

b. If the dispute is appealed to this Court and the Plaintiff(s) prevail in whole or in part, the Settling Defendant shall pay all accrued penalties determined by the Court to be owed to the United States and the State Trustees within 30 days of receipt of the Court's decision or order.



39. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State Trustees to seek any other remedies or sanctions available by virtue of the Settling Defendant's violation of this Consent Decree.

**XII. COVENANTS NOT TO SUE BY PLAINTIFFS**

40. Covenant by the United States. Except as specifically provided in Section XIII (Reservation of Rights by Plaintiffs), the United States covenants not to sue the Settling Defendant pursuant to Section 1002(b)(1) or 1002(b)(2) of OPA, 33 U.S.C. § 2702(b)(1) or 2702(b)(2), to recover Natural Resource Damages resulting from the Spill. This covenant not to sue shall take effect upon receipt of the payments due from Settling Defendant under Paragraphs 14 and 17 of this Consent Decree. This covenant not to sue is conditioned upon the satisfactory performance by the Settling Defendant of all of its obligations under this Consent Decree, including its obligations to complete the Restoration Project as described in Section V (Compensation for Natural Resource Injuries), to pay all Future Costs presented by the Federal Trustees under Paragraph 18, to pay all amounts that may become due to the United States under Section XI (Stipulated Penalties), and to pay any Interest owed to the United States due to the failure to timely pay any amount owed to the United States or the Federal Trustees. This covenant not to sue extends only to the Settling Defendant and does not extend to any other person.

41. Covenant by the State Trustees. Except as specifically provided in Section XIII (Reservation of Rights by Plaintiffs), the State Trustees covenant not to sue the Settling Defendant pursuant to Section 1002(b)(1) or 1002(b)(2) of OPA, 33 U.S.C. § 2702(b)(1) or 2702(b)(2), or the PCA, S.C. Code Ann. § 48-1-10 et seq. (Rev. 2008 & Supp. 2011), to recover Natural Resource Damages resulting from the Spill. This covenant not to sue shall take effect

upon receipt of the payments due from Settling Defendant under Paragraphs 14 and 17 of this Consent Decree. This covenant not to sue is conditioned upon the satisfactory performance by the Settling Defendant of all of its obligations under this Consent Decree, including its obligations to complete the Restoration Project as described in Section V (Compensation for Natural Resource Injuries), to pay all Future Costs presented by the State Trustees under Paragraph 18, to pay all amounts that may become due to the State Trustees under Section XI (Stipulated Penalties), and to pay any Interest owed to the State Trustees due to the failure to timely pay any amount owed to the State Trustees. This covenant not to sue extends only to the Settling Defendant and does not extend to any other person.

### **XIII. RESERVATION OF RIGHTS BY PLAINTIFFS**

42. General Reservations. The United States and the State Trustees reserve, and this Consent Decree is without prejudice to, all rights against the Settling Defendant with respect to all matters not expressly included within Section XII (Covenants Not to Sue by Plaintiffs). Notwithstanding any other provisions of this Consent Decree, the United States and the State Trustees reserve all rights against the Settling Defendant with respect to:

- a. claims based on a failure by the Settling Defendant to meet a requirement of this Consent Decree;
- b. liability under OPA or PCA for costs of response incurred by the United States or the State Trustees;
- c. liability for any other costs incurred or to be incurred by the Plaintiffs that are not within the definition of Natural Resource Damages;
- d. liability for damages for any injury to, destruction of, loss of, or loss of use of natural resources resulting from any event or releases or threatened releases of hazardous

substances or oil, other than the oil known to have been discharged in the Spill;

e. any and all criminal liability;

f. violation of any Federal or State law or regulation during the

implementation of Restoration Project or monitoring of such project; and

g. subrogated claims under Section 1015 of OPA, 33 U.S.C. § 2715, for any amounts paid or to be paid by the Fund to any person in connection with the Spill.

43. The Plaintiffs, individually or jointly, may take any and all legal or administrative enforcement actions appropriate to enforce the terms of this Consent Decree. In the event that the Plaintiffs take legal or administrative actions to enforce this Consent Decree, the Settling Defendant must pay all reasonable costs incurred by the United States and the State Trustees related to that action including, but not limited to, enforcement costs, attorneys fees, and Interest accruing on any unpaid balance.

44. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this Consent Decree, the United States and the State Trustees reserve the right to institute proceedings against the Settling Defendant in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damages assessment, based on: (i) conditions caused by the Spill, unknown to the Trustees as of the date of lodging of this Consent Decree, that result in releases of hazardous substances or oil that contribute to injury to, destruction of, loss of, or loss of use of Natural Resources; or (ii) information received by the Trustees after the date of lodging of this Consent Decree which indicates that the Spill has resulted in injury to, destruction of, loss of, or loss of use of Natural Resources of a type or future persistence that was unknown to the Trustees as of the date of lodging of this Consent Decree.

**XIV. COVENANTS BY SETTLING DEFENDANT**

45. The Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the Plaintiffs, their employees, agents, experts, or contractors, with respect to the Spill including, but not limited to the following:

- a. any claims against the Fund relating to the Spill; or
- b. any claims arising out of activities related to the Restoration Project,

including without limitation, claims based on the Trustees' approval of the Restoration Project, oversight of the Restoration Project, and/or approval of plans for such activities.

**XV. EFFECT OF SETTLEMENT**

46. Nothing in this Consent Decree shall be construed to create any right in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right of contribution), defenses, claims, demands, and causes of action which each Party may have with respect to the Spill against any person not a party hereto.

47. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs with respect to the Spill, Settling Defendant shall not assert, and may not maintain, any defense or claim based on the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or any other defenses based upon the contention that the claims raised by the Plaintiffs in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XII (Covenants Not to Sue by Plaintiffs).

48. The failure of any of the Plaintiffs to insist upon strict and prompt performance of any provision of this Consent Decree shall not operate as a waiver of any requirement of this

Consent Decree or of the Trustees' right to insist on prompt compliance in the future with such provision, and shall not prevent a subsequent action by any of the Trustees to enforce such provision.

#### **XVI. NOTICE**

49. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses set forth in Appendix C, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, the State Trustees, and the Settling Defendant, respectively.

#### **XVII. MODIFICATION**

50. Any material modification of this Consent Decree shall be made by agreement of the Parties to this Consent Decree and in writing, and shall not take effect unless approved by the Court. Any non-material modification of this Consent Decree shall be made by agreement of the Parties to this Consent Decree and in writing, and shall not take effect until filed with the Court. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Decree.

51. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon the entry of the Consent Decree in its entirety without modification, addition, or deletion except as agreed to by the Parties.

52. Economic hardship or changed financial circumstances of the Settling Defendant shall not serve as a basis for modifications of this Consent Decree.

**XVIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

53. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States and the State Trustees each reserve the right to withdraw or withhold their consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. The Settling Defendant consents to the entry of this Consent Decree without further notice. If for any reason the Court should decline to approve this Consent Decree in the form presented, or if approval and entry is subsequently vacated on appeal of such approval and entry, this agreement is voidable at the discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties. The Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States and the State Trustees have notified the Settling Defendant in writing that they no longer support entry of the Consent Decree.

**XIX. EFFECTIVE DATE AND RETENTION OF JURISDICTION**

54. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered, or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on this Court's docket.

55. The Court shall retain jurisdiction to modify and enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

**XX. SIGNATORIES/SERVICE**

56. Each undersigned representative of the Settling Defendant, the United States, and

the State Trustees certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document. This Consent Decree may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

57. The Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of the Settling Defendant with respect to all matters arising under or relating to this Consent Decree. The Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons. The Settling Defendant need not file an answer to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

#### **XXI. APPENDICES**

58. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the Restoration Project Implementation Plan.

“Appendix B” is the restrictive covenant.

“Appendix C” is the list of persons and addresses for notice pursuant to Section XVI.

#### **XXII. FINAL JUDGMENT**

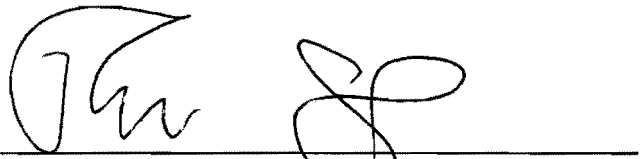
59. This Consent Decree and its appendices constitute the final, complete, and exclusive understanding among the Parties with respect to the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent

Decree.

60. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State Trustees, and the Settling Defendant.

**SO ORDERED.**

Date: October 24, 2012

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by several loops and a long horizontal stroke extending to the right.


UNITED STATES DISTRICT JUDGE



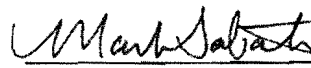
THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States et al. v. Evergreen International, S.A., relating to the M/V EVER REACH oil spill of September 2002.

**FOR THE UNITED STATES OF AMERICA:**

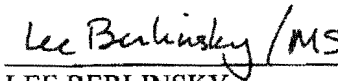
8/27/12  
Date

  
\_\_\_\_\_  
ELLEN M. MAHAN  
Deputy Chief  
Environmental Enforcement Section

8/27/12  
Date

  
\_\_\_\_\_  
MARK SABATH  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

8/27/12  
Date

  
\_\_\_\_\_  
LEE BERLINSKY  
Assistant United States Attorney  
District of South Carolina  
P.O. Box 978  
Charleston, SC 29402

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States et al. v. Evergreen International, S.A., relating to the M/V EVER REACH oil spill of September 2002.

**FOR THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL:**

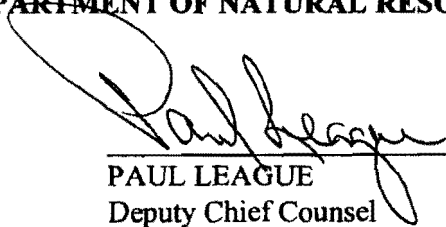
July 30, 2012  
Date

Catherine Templeton  
CATHERINE B. TEMPLETON  
Director  
South Carolina Department of Health and  
Environmental Control  
2600 Bull Street  
Columbia, SC 29201

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States et al. v. Evergreen International, S.A., relating to the M/V EVER REACH oil spill of September 2002.

**FOR THE SOUTH CAROLINA DEPARTMENT OF NATURAL RESOURCES:**

7/18/2012  
Date




\_\_\_\_\_  
PAUL LEAGUE  
Deputy Chief Counsel  
South Carolina Department of Natural  
Resources  
P.O. Box 167  
Columbia, SC 29202

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States et al. v. Evergreen International, S.A., relating to the M/V EVER REACH oil spill of September 2002.

**FOR EVERGREEN INTERNATIONAL, S.A.:**

7/3/12  
Date

  
\_\_\_\_\_  
SEAN HOUSEAL  
Womble Carlyle Sandridge & Rice, LLP  
P.O. Box 999  
Charleston, SC 29402

Agent authorized to accept service on behalf of above-signed party:

Sean Houseal  
Womble Carlyle Sandridge & Rice, LLP  
P.O. Box 999  
Charleston, SC 29402  
(843) 720-4622

**Appendix A**  
**Restoration Project Implementation Plan**

## Appendix A: Restoration Project Implementation Plan

### 1.0 INTRODUCTION

This document specifies requirements applicable to the implementation of the Noisette Creek Wetland Restoration Project (the "Restoration Project") by the Settling Defendant under the Consent Decree settlement of natural resource damage claims in United States et al. v. Evergreen International, S.A. This document is incorporated by reference therein and is an attachment to that Decree.

### 2.0 PROJECT DESCRIPTION

**2.1** Project Site - The Restoration Project will be implemented at the site of the former Naval golf course along Noisette Creek in North Charleston, SC. This land is owned by the City of North Charleston and the Noisette Company and is identified as a priority site for restoration in the Noisette Creek Restoration Plan ("Project Site"). The general location of the Project Site is depicted in Figure 1.

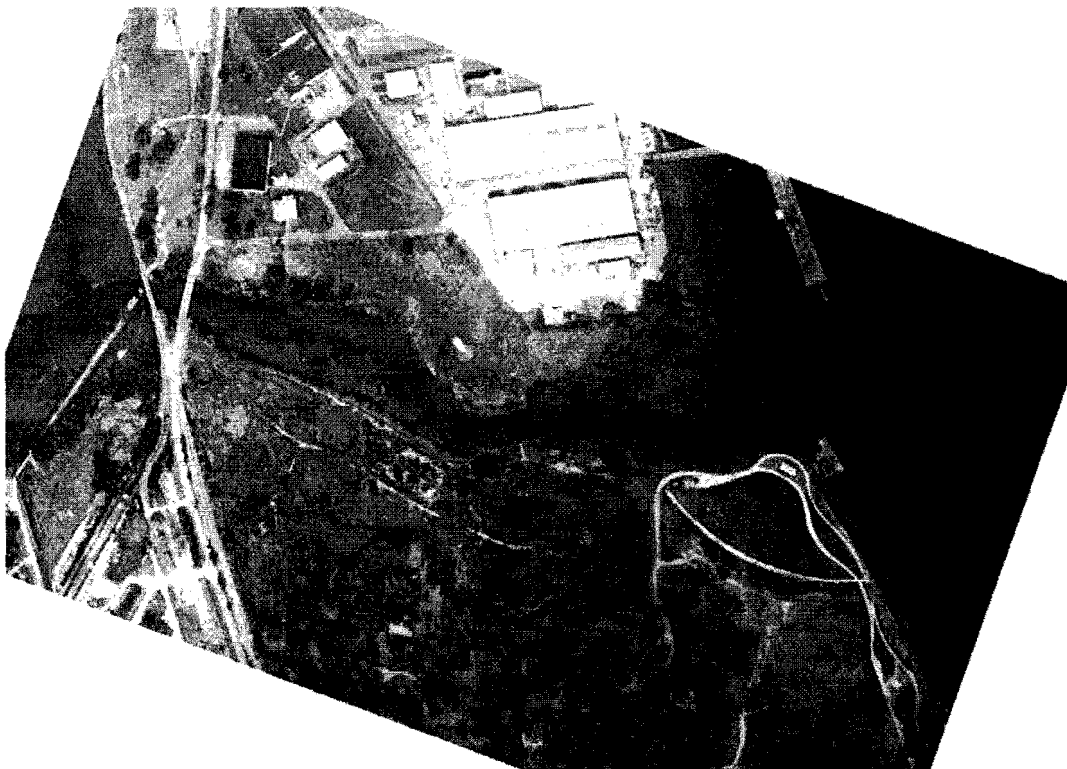


Figure 1 - Aerial view of the Noisette Creek Project Site (Gandy Photography, Inc., January 13, 2007)

**2.2** Project Overview - The Restoration Project will include breaching a berm in two areas along Noisette Creek to create to two primary tidal connections, the removal of roads, drainage

tiles, rip-rap and other sources of debris, and construction of a network of tidal creeks across the Project Site. A total of 11.7 acres of saltmarsh habitat will be restored through these actions. Additionally, five upland islands within the marsh site (~ .45 acres) will be retained and perimeter uplands bordering the entire site will be restored to functional marsh buffer habitat by removing exotic plant species (primarily Chinese tallow) and planting native upland species (such as red cedar and southern red oak). Figures 2, 3 and 4 provide an overview of the planned restoration actions at the Project Site as well as the site characteristics and hydrologic flow which are the intended restoration outcomes of this Project.

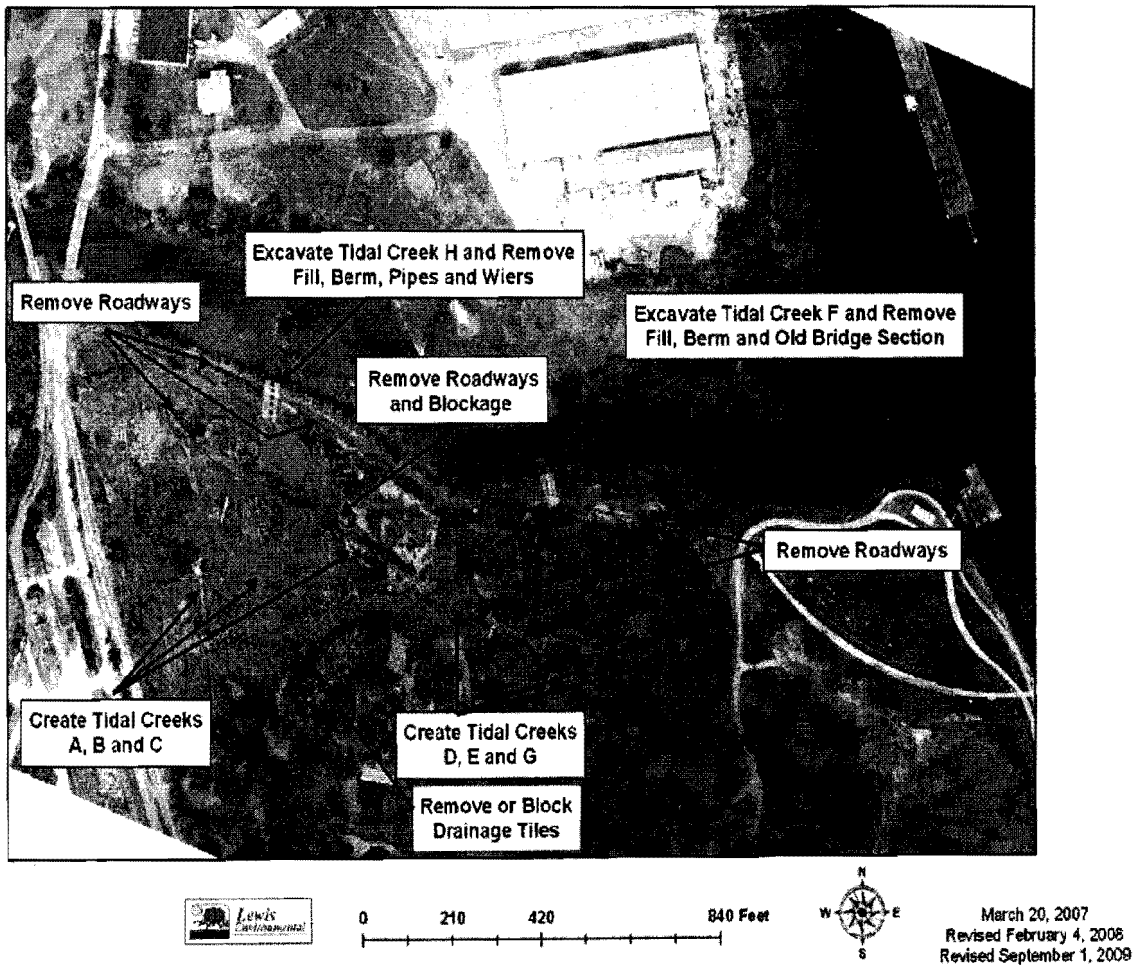


Figure 2 – Overview of Restoration Plan, Noisette Creek, SC (from Lewis Environmental, Inc., Sept 1, 2009)



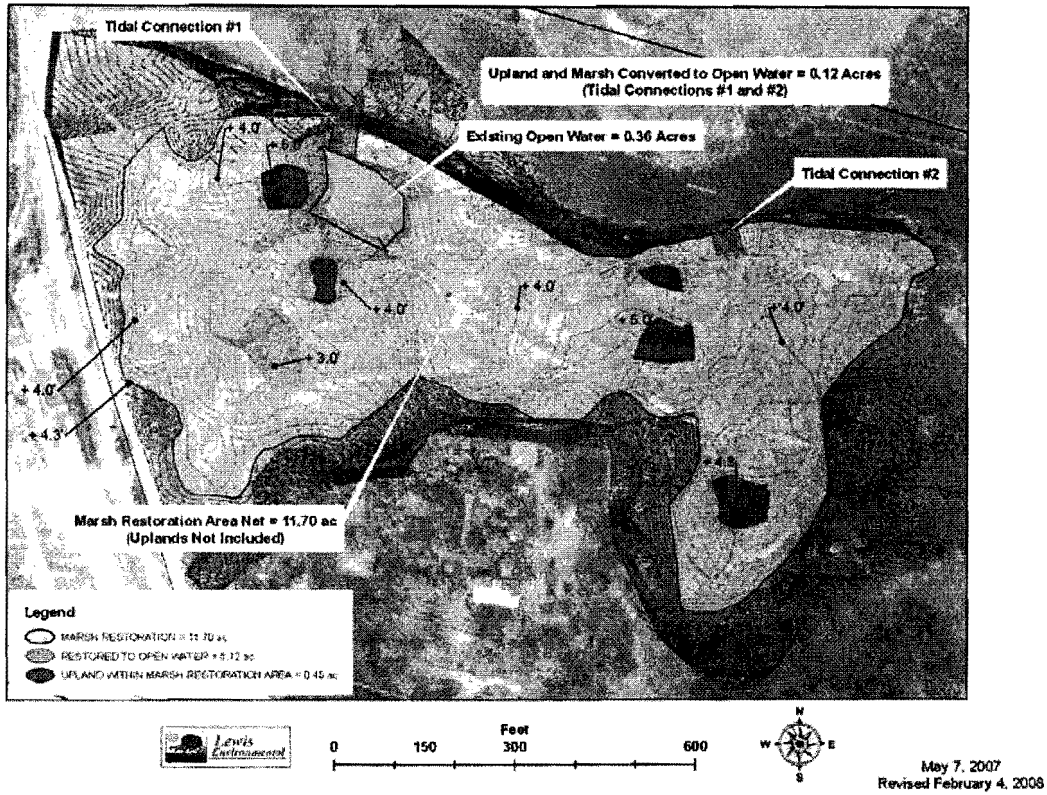


Figure 3 – Expected Site Characteristics Post-Restoration (from Lewis Environmental, Inc., February 4, 2008)



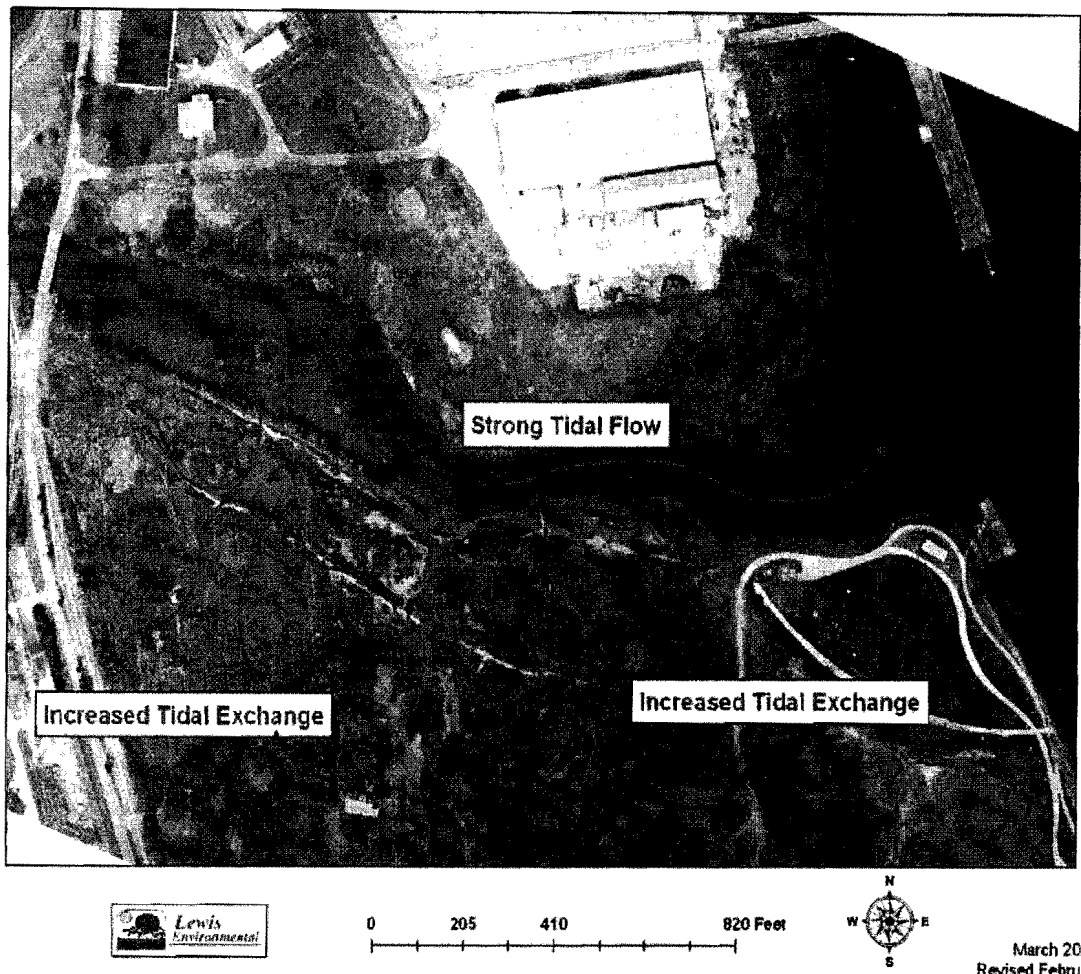


Figure 4 – Expected Site Hydrologic Flow Post-Restoration (from Lewis Environmental, Inc., February 4, 2008)

2.3 Project Goals - The Restoration Project goals are to create, enhance and improve at least 11.7 acres of sustainable tidal marsh habitat at the site and to restore buffer habitat on uplands on the marsh perimeter.

### 3.0 PROJECT IMPLEMENTATION REQUIREMENTS

3.1 Construction Requirements - The Restoration Project will be constructed in accordance with the Noisette Creek Restoration Construction Drawings attached hereto (Attachment 1).

3.2 Project Success Criteria and Monitoring Requirements - The completion of the Restoration Project will be determined in accordance with the criteria for Restoration Project success and the plan for Restoration Project monitoring identified in the Monitoring Plan attached hereto (Attachment 2).

## 3.3 Schedule for Implementation

ACTION	SCHEDULE
Defendant Authorizes Restoration Project Contractor to Proceed	Within 15 days of Effective Date of Consent Decree or of date all necessary regulatory permits have been obtained, whichever occurs last.
Restoration Project Construction	Completed within 120 days of Authorization to Proceed
Construction Report to Trustee Council	Within 30 days of completing Restoration Project Construction
Time Zero Monitoring & Report (Post-Construction)	Within 60 days of Certification of Construction Completion
Annual Monitoring & Report (Post-Construction)	At Time Zero plus 1 year, plus 2 years, plus 3 years, plus 4 years and plus 5 years. (NOTE: If Trustees determine Restoration Project has meet criteria for success after Year 3 monitoring event, the Trustees may eliminate monitoring at Year 4 and 5)

## List of Attachments:

1. Noisette Creek Restoration Construction Drawings (BP Barber, July 2009)
2. Monitoring Plan for the Evergreen Saltmarsh Mitigation Project [sic] (Tidewater Environmental Services, Inc., February 2010)

**ATTACHMENT 1**

**Noisette Creek Restoration Construction Drawings  
(BP Barber, July 2009)**



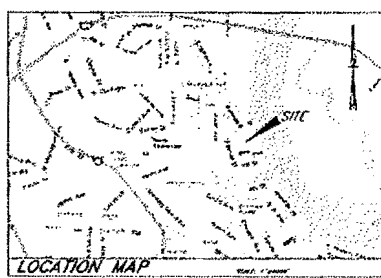
VICINITY MAP

# NOISETTE CREEK RESTORATION

PREPARED FOR

## BUIST MOORE SMYTHE MCGEE P.A.

CHARLESTON COUNTY  
SOUTH CAROLINA



LOCATION MAP

SHEET INDEX

FILE	SHEET NO.
DEMOLITION PLAN	1
OVERALL PLAN	2
GRADING & SEDIMENT CONTROL PLAN	3
CREEK PROFILES	4-5
CREEK CROSS SECTIONS	6-13
DETAILS	14

**PRELIMINARY**



**BP Barber**  
 Engineering • Experience • Excellence  
 406 SALT PINES DRIVE PARKWAY  
 N. CHARLESTON, SC 29403-2119  
 (843) 767-1402

JULY 2009

PROJECT NO.  
09263

FILE NO.  
C1-26-09

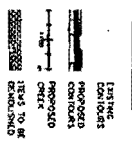
**GENERAL NOTES**

1. DISTANCES IS SHOWN TO THE FOLLOWING
2. 1/8" = 10' (VERTICAL SCALE)
3. ALL DISTANCES ARE TO BE MEASURED ON GROUND SURFACE
4. ALL DISTANCES ARE TO BE MEASURED TO THE CENTER OF THE ROAD OR TO THE CENTER OF THE RAILROAD TRACK
5. ALL DISTANCES ARE TO BE MEASURED TO THE CENTER OF THE STREAM OR TO THE CENTER OF THE CHANNEL
6. ALL DISTANCES ARE TO BE MEASURED TO THE CENTER OF THE LOT OR TO THE CENTER OF THE TRACT
7. ALL DISTANCES ARE TO BE MEASURED TO THE CENTER OF THE ROAD OR TO THE CENTER OF THE RAILROAD TRACK
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15. ALL DISTANCES ARE TO BE MEASURED TO THE CENTER OF THE LOT OR TO THE CENTER OF THE TRACT

**GRADING NOTES**

1. ALL GRADING SHALL BE TO THE FINISHED GRADE SHOWN ON THIS PLAN
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**LEGEND**



**SEDIMENT AND EROSION CONTROL NOTES**

1. ALL EROSION CONTROL MEASURES SHALL BE INSTALLED AND MAINTAINED THROUGHOUT CONSTRUCTION
2. ALL EROSION CONTROL MEASURES SHALL BE INSTALLED AND MAINTAINED THROUGHOUT CONSTRUCTION
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**PRELIMINARY**

**SEQUENCE OF CONSTRUCTION OPERATIONS**

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**EROSION CONTROL MAINTENANCE SCHEDULE**

ALL EROSION CONTROL MEASURES SHALL BE MAINTAINED THROUGHOUT CONSTRUCTION AND FOR A PERIOD OF 90 DAYS AFTER COMPLETION OF CONSTRUCTION

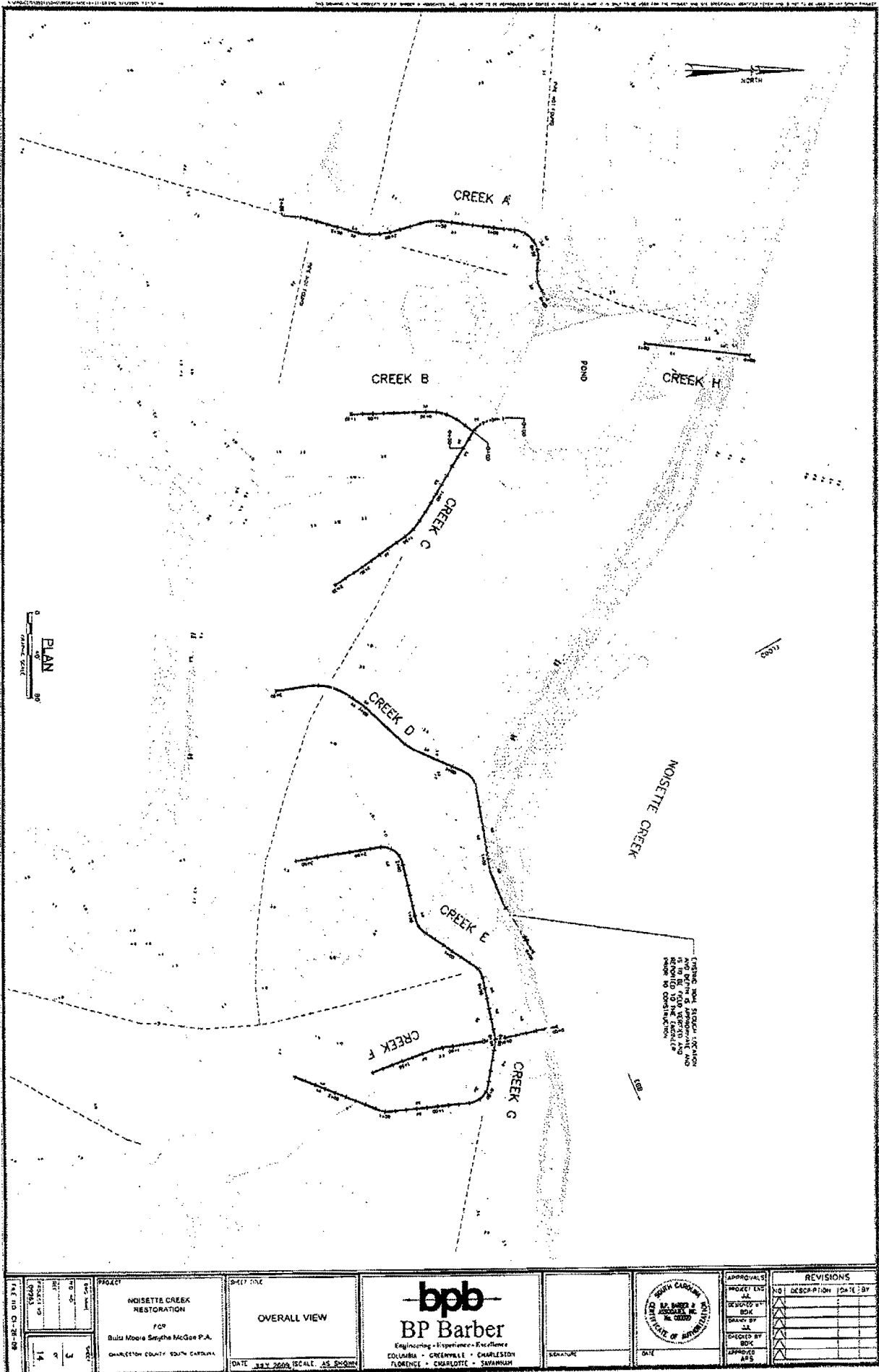
**STABILIZATION CLAUSE**

ALL DISTURBED AREAS SHALL BE RESTORED TO ORIGINAL OR BETTER CONDITION WITHIN 90 DAYS OF COMPLETION OF CONSTRUCTION

SHEET NOBETTE CREEK RESTORATION FOR Burt Moore Brynne McGee P.A. Charleston County South Carolina	SHEET TITLE NOTES AND LEGENDS DATE: 11/14/12 SCALE: AS SHOWN	COLUMBIA • GREENVILLE • CHARLESTON FLORENCE • CHARLOTTE • SAVANNAH	APPROVALS PREPARED BY: [Signature] CHECKED BY: [Signature] DATE: 11/14/12	REVISIONS NO. DESCRIPTION DATE BY
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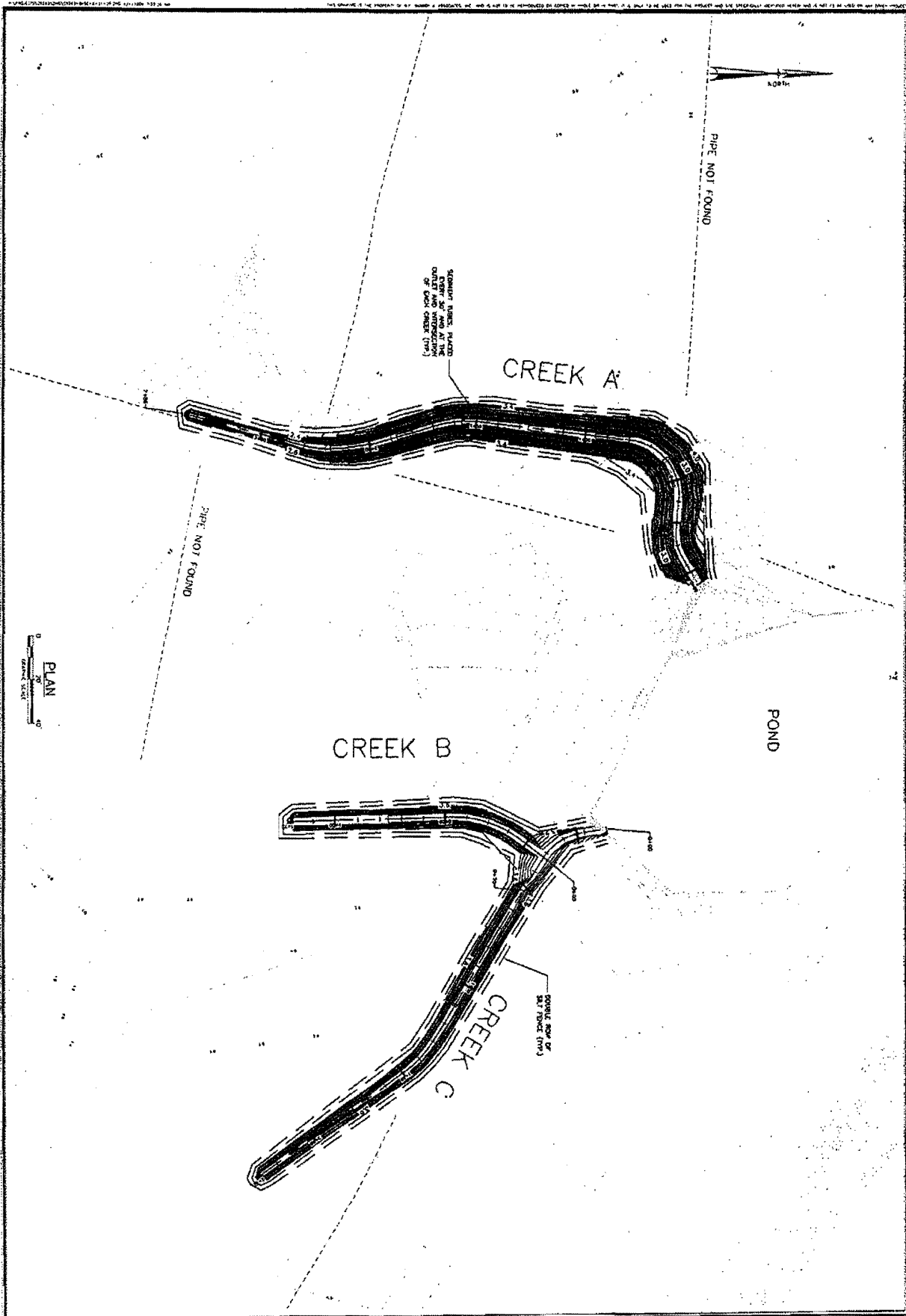




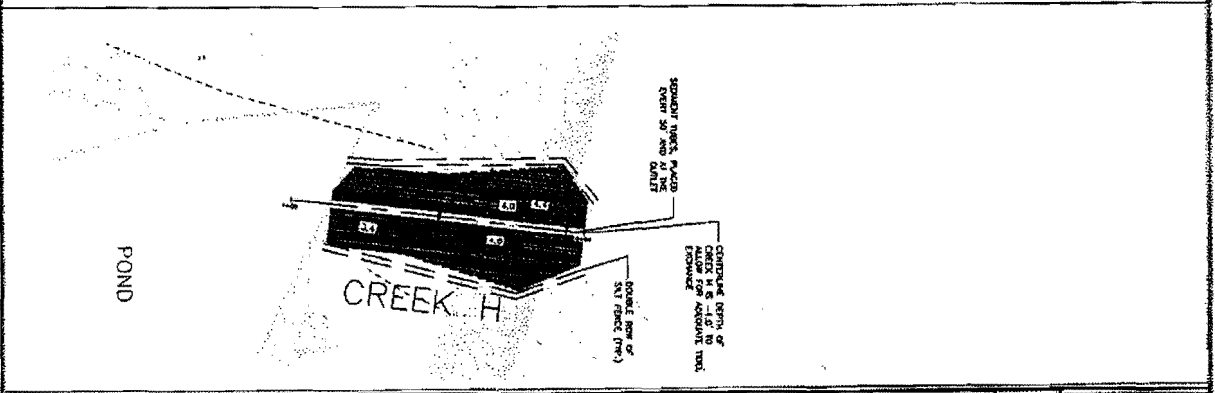
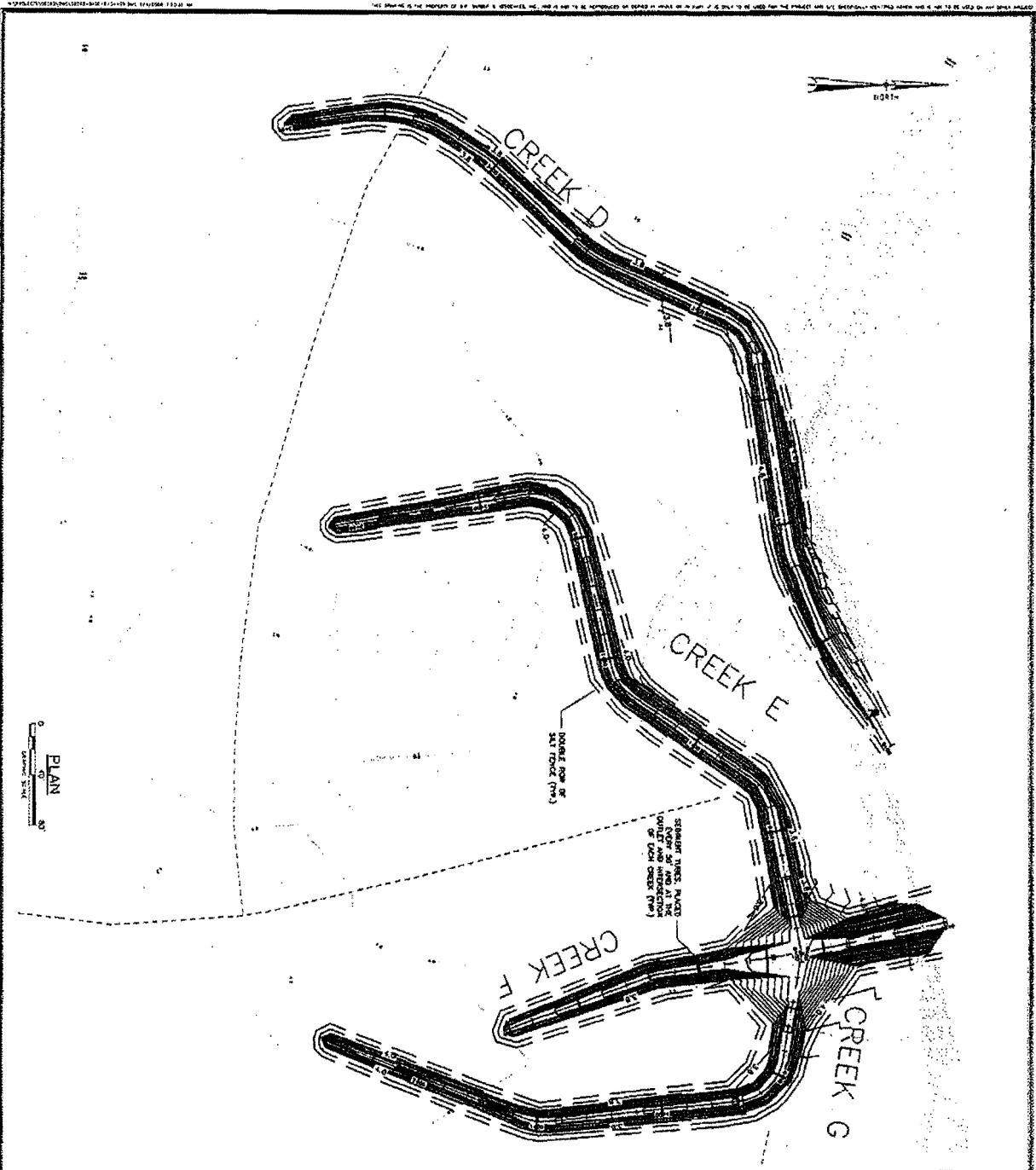


SHEET NO. 14 OF 14 DATE 01-28-09	PROJECT <b>NOISETTE CREEK RESTORATION</b> FOR BULL MOORE Stryke McGee P.A. CHARLESTON COUNTY SOUTH CAROLINA	SHEET TITLE <b>OVERALL VIEW</b> DATE 22Y 2009 SCALE AS SHOWN	<b>BP Barber</b> Engineering • Estimating • Excavation COLUMBIA • GREENWILE • CHARLESTON FLORENCE • CHARLOTTE • SAVANNAH	APPROVALS PROJECT ENG. J.A. DESIGNED BY BDK CHECKED BY J.A. EXHIBITED BY BDK DRAFTER APS	REVISIONS <table border="1"> <thead> <tr> <th>NO.</th> <th>DESCRIPTION</th> <th>DATE</th> <th>BY</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	NO.	DESCRIPTION	DATE	BY																
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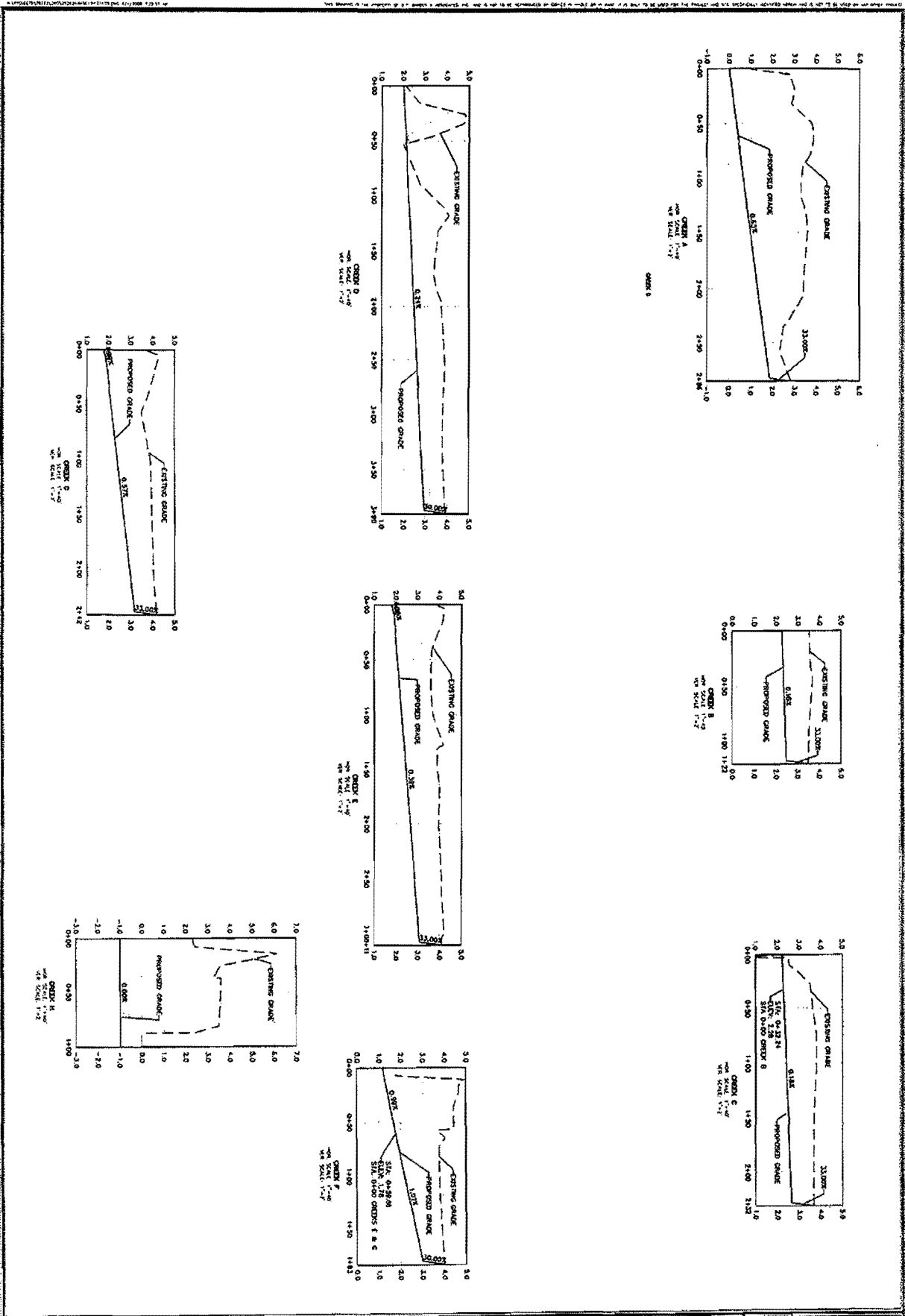




FILE NO. 01-28-08 PROJECT NO. 14 SHEET NO. 4	PROJECT <b>NOISSETTE CREEK RESTORATION</b> FOR Buki Moore Smythe McGee P.A. O-ALLENDALE COUNTY SOUTH CAROLINA	SHEET TITLE <b>GRADING &amp; SEDIMENT CONTROL PLAN</b>	 <b>BP Barber</b> Engineering - Experience - Excellence COLUMBIA • GREENVILLE • CHARLESTON FLORENCE • CHARLOTTE • SAVANNAH	APPROVALS: PROJECT ENG. JA DESIGNED BY BDR DRAWN BY JL CHECKED BY BDR APPROVED APS	REVISIONS <table border="1"> <thead> <tr> <th>NO.</th> <th>DESCRIPTION</th> <th>DATE</th> <th>BY</th> </tr> </thead> <tbody> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> </tbody> </table>	NO.	DESCRIPTION	DATE	BY																
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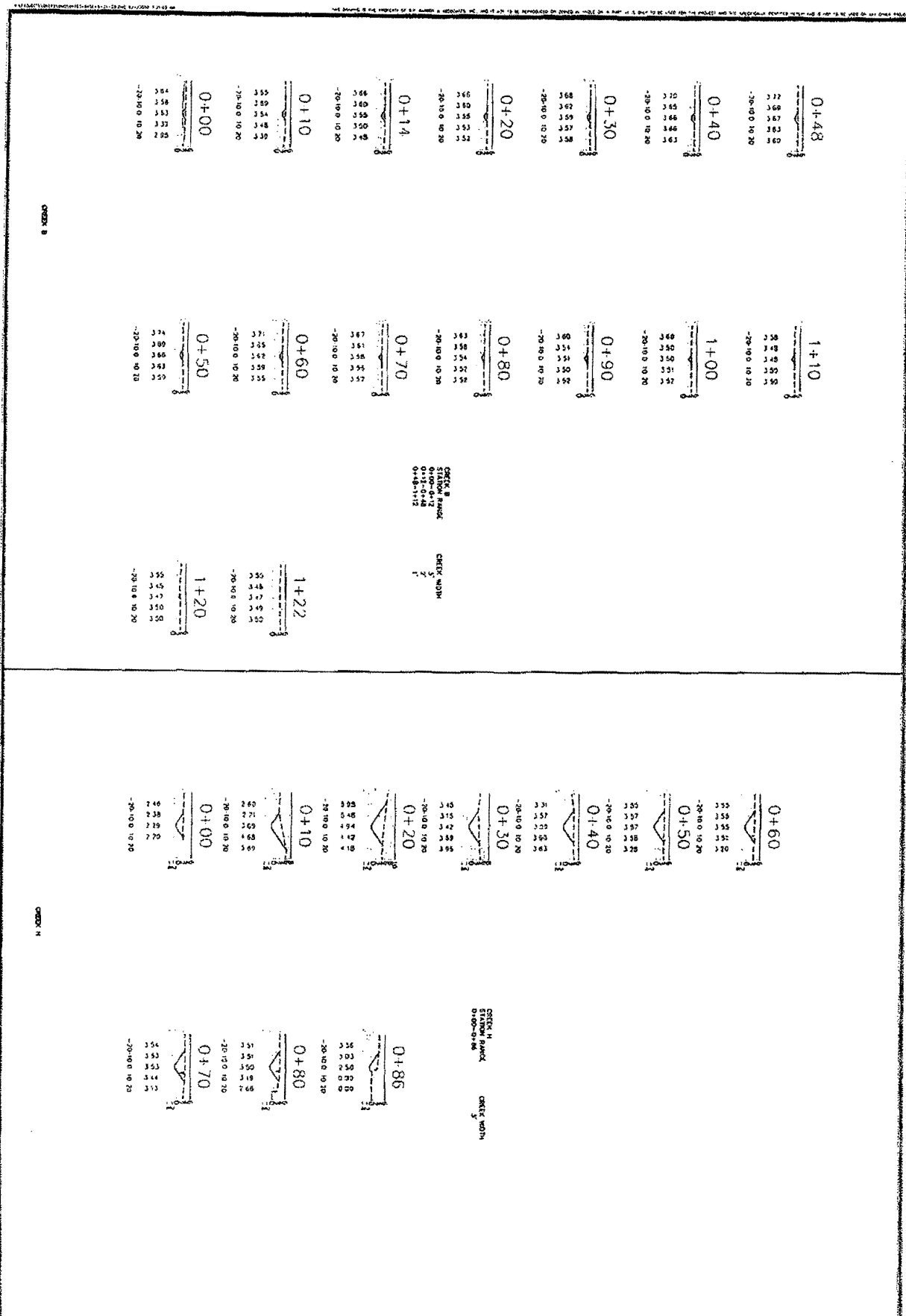


SHEET NO. 14 OF 14 DATE: JULY 2008 SCALE: AS SHOWN	PROJECT: NOBLETTE CREEK RESTORATION FOR Burt & Kate Smythe McGee P.A. CHARLESTON COUNTY SOUTH CAROLINA	SHEET TITLE: GRADING & SEDIMENT CONTROL PLAN GATE JULY 2008 SCALE: AS SHOWN	bpb BP Barber Engineering - Florence - Greenville Columbia - Greenville - Charleston Florence - Charlotte - Savannah	SOUTH CAROLINA STATE OF ARCHITECTURE LICENSE NO. 11510	APPROVALS: PROJECT ENG. [initials] DESIGNER BY: [initials] CHECKED BY: [initials] APPROVED: [initials]	REVISIONS: NO. DESCRIPTION DATE BY
	POND	DOUBLE ROW OF 3x4 FENCE (75%)	STANDARD TRENCH PLACING (WIDTH OF AND ANCHORAGE OF EACH CREEK (75%))	CONCRETE BENCH OF GATE IS 18" HIGH TO ALLOW FOR ADEQUATE TRENCHING	STANDARD TRENCH PLACING OVER AND OVER GATE	[REVISIONS TABLE]

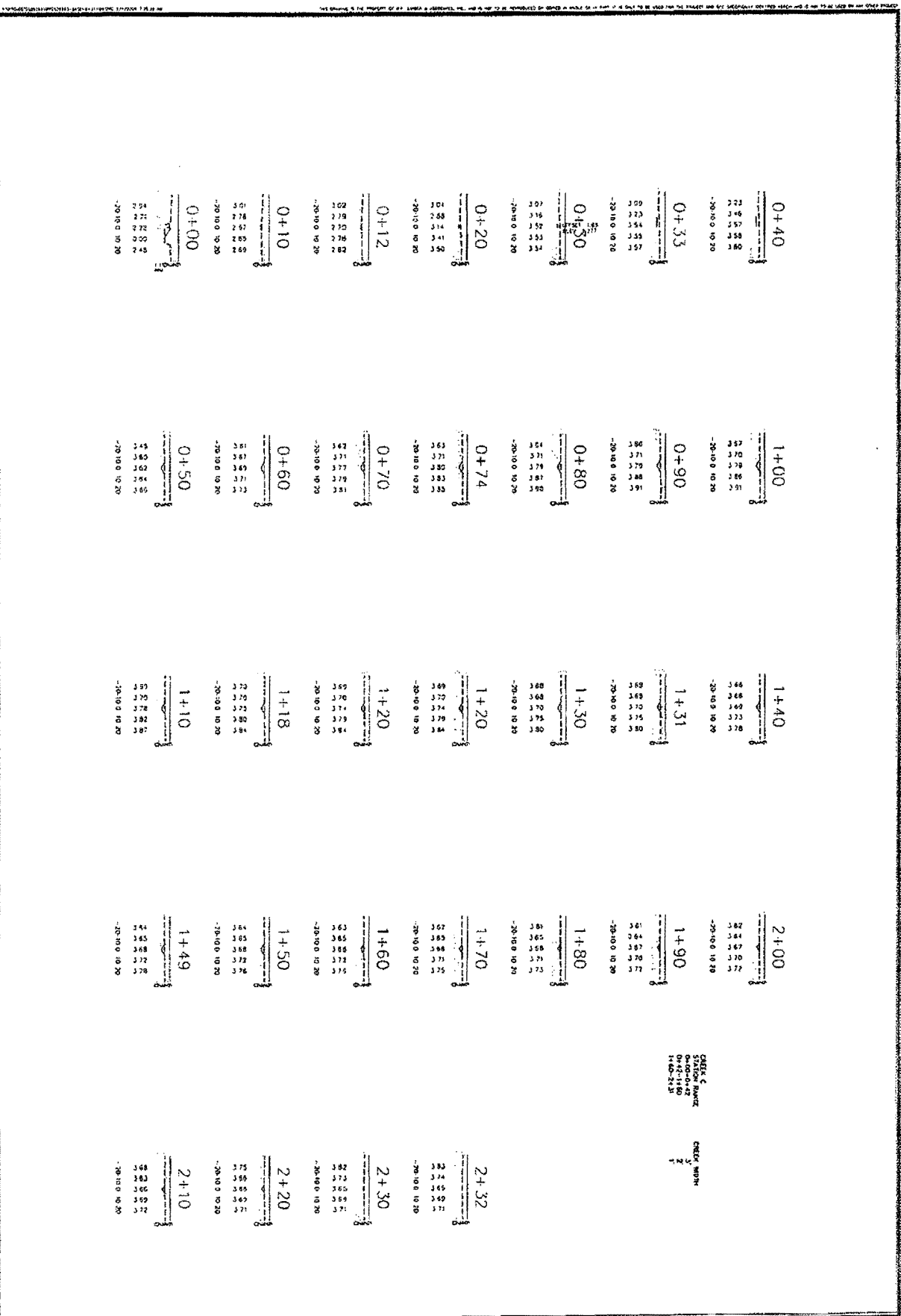


<p>PROJECT NO. 14</p> <p>DATE 10/24/12</p>	<p><b>NOISSETTE CREEK RESTORATION</b></p> <p>FOR</p> <p>Brian Moore Smythe McGee P.A.</p> <p>CHARLESTON COUNTY SOUTH CAROLINA</p>	<p><b>PROFILES</b></p> <p>DATE 10/24/12 SCALE AS SHOWN</p>	<p><b>bpb</b></p> <p><b>BP Barber</b></p> <p>Engineering • Performance • Excellence</p> <p>COLUMBIA • GREENWICH • CHARLESTON</p> <p>FLORENCE • CHARLOTTE • SAVANNAH</p>	<p>APPROVALS</p> <p>PROJECT ENGINEER</p> <p>DESIGNED BY</p> <p>CHECKED BY</p> <p>DRAWN BY</p>	<p>REVISIONS</p> <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>NO.</th> <th>DESCRIPTION</th> <th>DATE</th> <th>BY</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	NO.	DESCRIPTION	DATE	BY																
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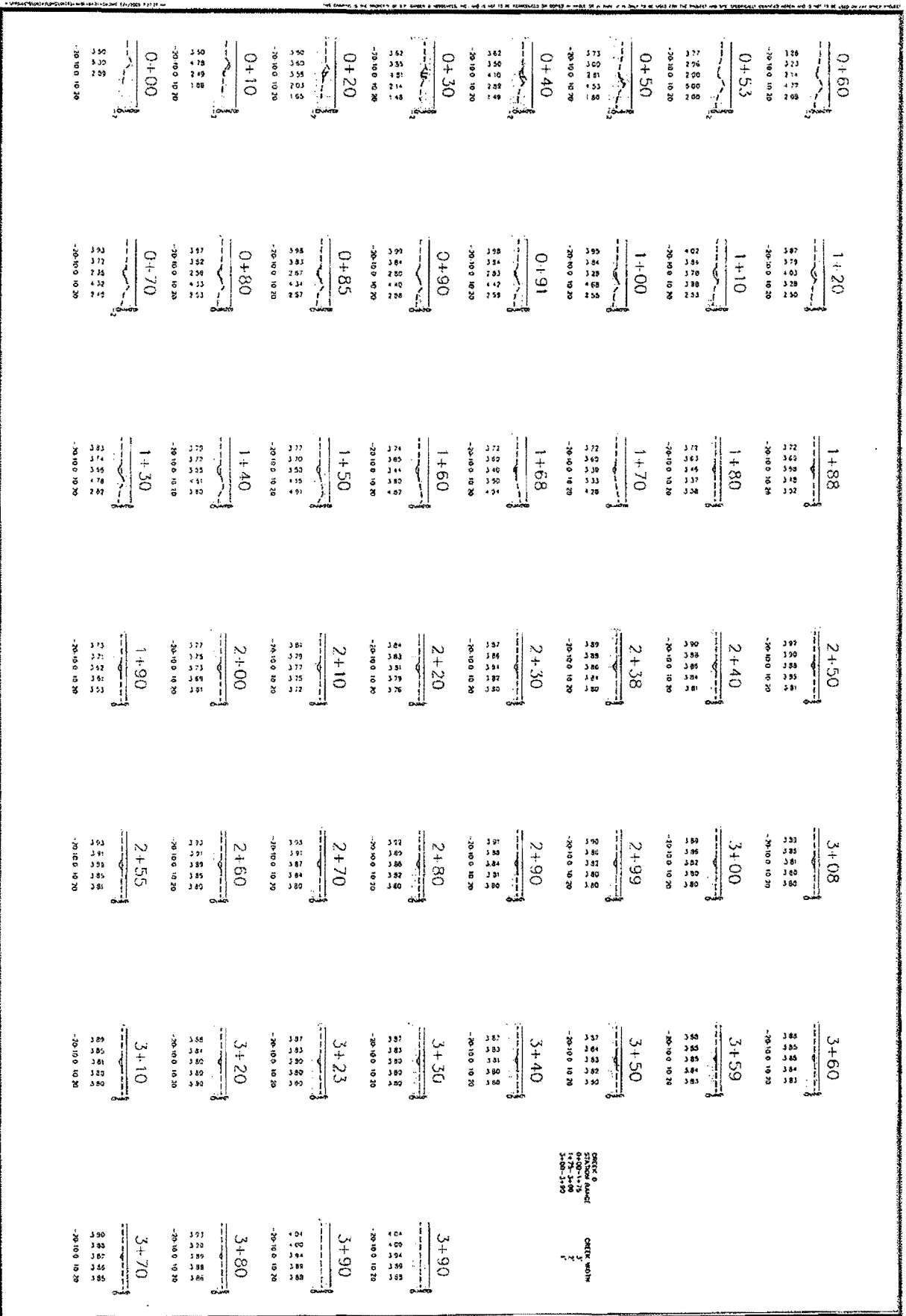


FILE NO. CL-M-20 PROJECT NO. 14 SHEET NO. 14	NOISSETTE CREEK RESTORATION FOR BULLI MOORE SMYTHE MCGEE P.A. CHARLOTTE COUNTY, NORTH CAROLINA	DATE: 2009 SCALE: AS SHOWN	 <b>BP Barber</b> Engineering - Experience - Excellence COLUMBIA • GREENVILLE • SPANGLERSVILLE FLORENCE • CHARLOTTE • SAVANNAH	 STATE OF NORTH CAROLINA PROFESSIONAL ENGINEER NO. 34868 DATE:	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th colspan="3">REVISIONS</th> </tr> <tr> <th>NO.</th> <th>DESCRIPTION</th> <th>DATE BY</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	REVISIONS			NO.	DESCRIPTION	DATE BY												
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PROJECT NOISSETTE CREEK RESTORATION FOR Buss Moore Smythe McGee P.A. CHARLESTON COUNTY SOUTH CAROLINA	SHEET NO. CROSS SECTIONS CREEK C DATE: JULY 2010 SCALE: AS SHOWN	BP Barber Engineering • Inspection • Excellence COLUMBIA • GREENVILLE • CHARLESTON FLORENCE • CHARLOTTE • RAYLEIGH	TITLE BLOCK NOISSETTE CREEK RESTORATION CROSS SECTIONS CREEK C	APPROVALS PROJECT ENG. [Signature] DESIGNER [Signature] CHECKED BY [Signature] APPROVED [Signature]	REVISIONS NO.   DESCRIPTION   DATE BY
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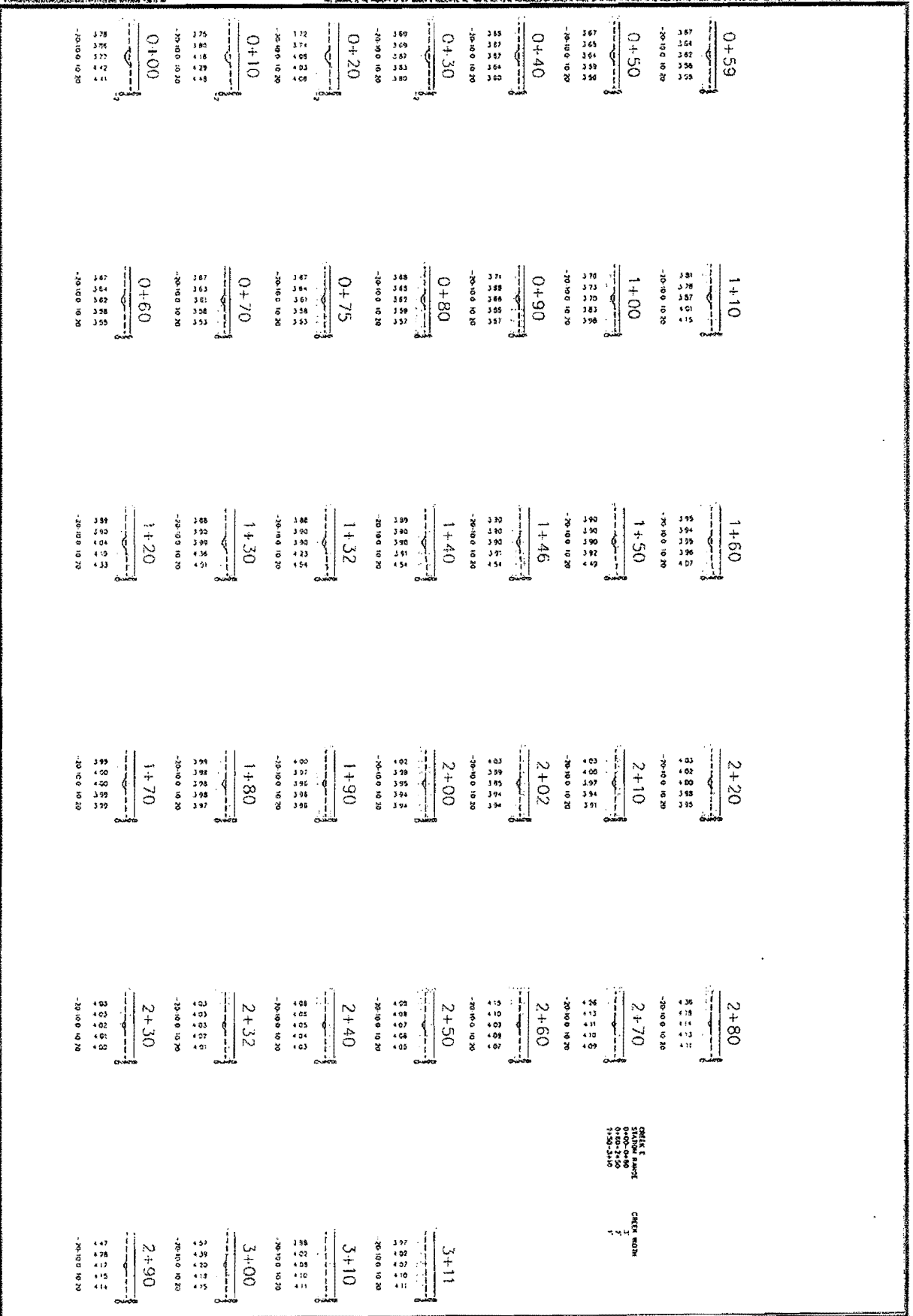


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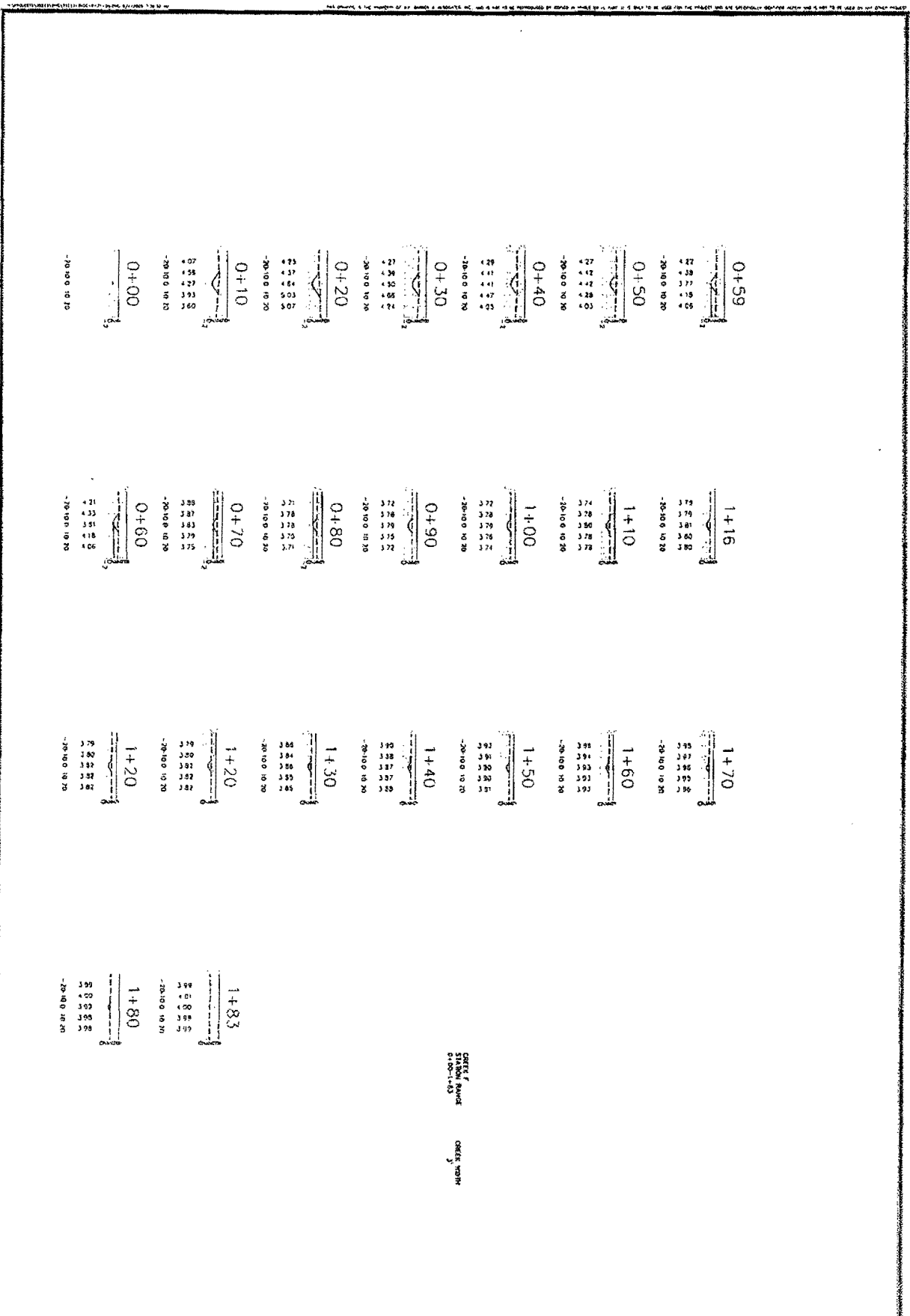




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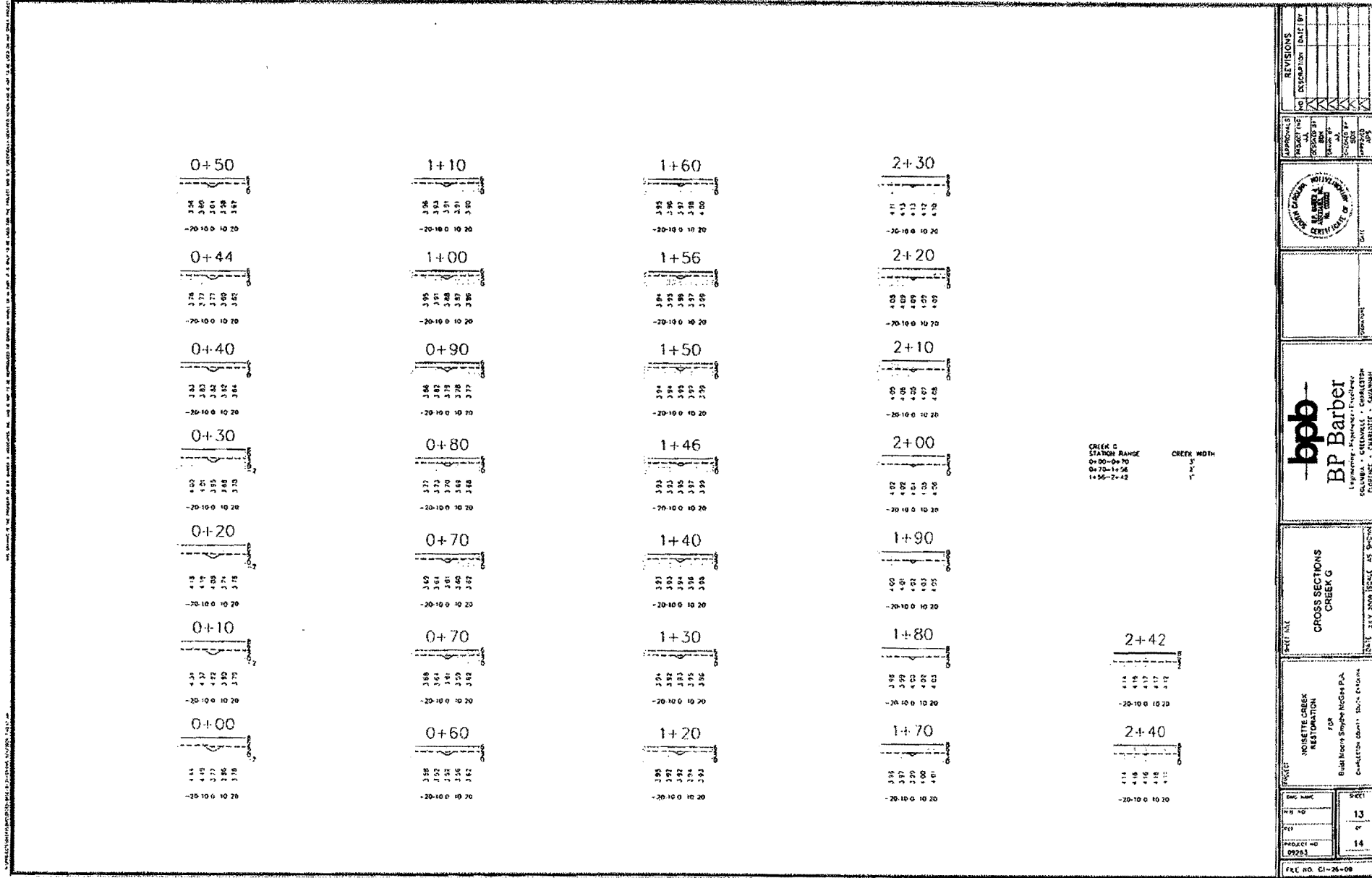
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<p>DATE: 10/23/12</p> <p>SCALE: 25:1</p>	<p><b>bpb</b></p> <p><b>BP Barber</b></p> <p>Engineering - Experience - Excellence</p> <p>COLUMBIA • GREENVILLE • CHARLESTON</p> <p>FORECAST • CHARLOTTE • SAVANNAH</p>	<p>STATE OF SOUTH CAROLINA</p> <p>BOB BERRY                  REGISTERED PROFESSIONAL ENGINEER                  No. 00209</p> <p>STATE OF MISSISSIPPI</p>	<p>APPROVALS</p> <p>PROJECT ENG. J.A.</p> <p>DESIGNED BY BOK</p> <p>DRAWN BY SA</p> <p>CHECKED BY BDA</p> <p>APPROVED BY AS</p>	<p>REVISIONS</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th>NO.</th> <th>DESCRIPTION</th> <th>DATE</th> <th>BY</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	NO.	DESCRIPTION	DATE	BY																
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PROJECT NO. 12 SHEET NO. 14	PROJECT NOISETTE CREEK RESTORATION FOR Bulli Moore Smyth McGee P.A. CHARLESTON COUNTY SOUTH CAROLINA	SHEET TITLE CROSS SECTIONS CREEK F	bp Barber Engineering • Expenses • Evidences COLUMBIA • GREENVILLE • CHARLESTON FLORENCE • CHARLOTTE • SAVANNAH	DATE MAY 2008 SCALE AS SHOWN	SIGNATURE  DATE	SOUTH CAROLINA PROFESSIONAL ENGINEER STATE OF ALABAMA	APPROVALS: PROJECT ENG. DESIGNED BY DRAWN BY CHECKED BY APPROVED APE	REVISIONS <table border="1"> <thead> <tr> <th>NO.</th> <th>DESCRIPTION</th> <th>DATE</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	NO.	DESCRIPTION	DATE												
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<p><b>bbp</b>  <b>BP Barber</b>                  ENGINEERS, ARCHITECTS &amp; PLANNERS                  COLUMBIA • GREENVILLE • CHARLESTON                  FLORENCE • CHATTANOOGA • SPANISH FORGE</p>	
<p><b>CROSS SECTIONS</b>  <b>CREEK G</b></p>	
<p>PROJECT: <b>NOISSETTE CREEK RESTORATION</b>                  FCP                  Build Moore Smythe NG&amp;G P.A.                  CHARLOTTE COUNTY DISTRICT, EASTON</p>	
SHEET NO. 13	TOTAL SHEETS 14
DATE: 09/25/12	
FILE NO. CI-26-08	



**ATTACHMENT 2**

**Monitoring Plan for the Evergreen Saltmarsh Mitigation  
Project [sic] (Tidewater Environmental Services, Inc.,  
February 2010)**



Following is the monitoring plan for the Evergreen Saltmarsh Mitigation Project as proposed by Tidewater Environmental Services Inc. (Tidewater).

### **Task 1: Baseline Monitoring**

Tidewater will initiate baseline monitoring of the proposed restoration site, located on Noisette Creek in Charleston County, South Carolina (see Figure 1 and 2). Beresford Creek, located across the Cooper River in Berkeley County, will be monitored as a reference site (see Figure 1 and 3). While residential communities are located in the uplands surrounding Beresford Creek, the adjacent saltmarsh and tidal tributaries provide a stable hydrologic and vegetative reference and display similar characteristics to the proposed restoration project. Baseline monitoring will entail the following.

*Hydrology* – Hydrology will be monitored through the installation of two (2) HOBO Water Level Loggers to monitor the existing tidal conditions within the restoration site. One (1) Water Level Logger will also be installed to monitor the entire tidal cycle at the reference site. All Water Level Loggers will be surveyed to determine the existing water surface elevations and tidal fluctuations. The Water Level Loggers will be distinctly marked and GPS located for efficient post-construction monitoring. The Water Level Loggers will monitor water levels within the restoration and reference sites at 15-minute intervals. Tidewater personnel will download the hydrology data from the Water Level Loggers monthly (until construction activities commence). The installation of Water Level Loggers will occur as soon as the monitoring plan is approved by the Natural Resource Damage Assessment Trustees (Trustees). Hydrologic monitoring will occur for a minimum of three months prior to commencing construction at the restoration site to obtain a full tidal and lunar cycle.

*Vegetation* – Vegetation will be monitored by establishing four (4) 1m<sup>2</sup> quadrats within the restoration site and one (1) 1m<sup>2</sup> quadrat within the reference site. Additionally, two (2) 30m line intercept transects will be established at the restoration site near the proposed creek locations. A transect within the restoration site will extend into an upland area, such as a former tee box location. Two (2) 30m line intercept transects will also be established at the reference site perpendicular to an established creek edge that represents the proposed creeks to be constructed within the restoration site. All vegetation within the quadrats or intercepting the line transects will be identified and overall percent cover will be taken for each species. In addition, stem counts will be conducted within four (4) randomly selected 0.625 m<sup>2</sup> sub-quadrats that are part of each of the established 1m<sup>2</sup> quadrats. The representative height of plants within the quadrats, as well as the percent bare ground, will also be recorded. The sampled sub-quadrats will be selected by numbering the sub-quadrats from 1 to 16 and using a random number generator to identify the four (4) sub-quadrats within each quadrat. The

**Tidewater Environmental Services Inc.**  
Post Office Box 865, Johns Island, SC 29457-0865  
Phone: (843) 762-3750 Fax: (843) 762-3795  
[www.tidewaterenvironmental.com](http://www.tidewaterenvironmental.com)





vegetation monitoring quadrats and line intercept transects will be distinctly marked and GPS located in order to replicate data during post-construction monitoring. One permanent photo station will also be established at each 1m<sup>2</sup> quadrat and 30m line intercept transect to document change in the development of the restoration and reference sites. Vegetation monitoring will occur as soon as the monitoring plan is approved by the Trustees.

*Additional Information* – Qualitative visual assessments of fish, invertebrates and avian wildlife utilizing the restoration and reference sites will be monitored prior to construction of the restoration site.

All hydrology, vegetation, and fauna data will be included in the Baseline Monitoring Report within 30 days of the final monitoring event and submitted to the Natural Resource Damage Assessment Trustees (Trustees) for review prior to restoration activities. Adjustments to the monitoring plan can then be initiated if needed before Time-Zero or Annual Monitoring commences.

#### **Task 2: Time Zero Monitoring**

After construction of the restoration plan is completed, Tidewater personnel will prepare a Time Zero Report documenting the post-construction condition of the vegetation, berm breaches and constructed tidal creeks. In addition, Tidewater personnel will provide narrative documentation of the restoration activities.

Time Zero Monitoring will utilize the baseline monitoring stations established prior to construction at the restoration and reference sites, as discussed below.

*Hydrology* – Tidewater personnel will monitor hydrology with the two (2) Water Level Loggers at the restoration site and one (1) Water Level Logger at the reference site. The Water Level Loggers will monitor water levels within the restoration and reference sites at 15-minute intervals.

The Time-Zero hydrologic connection at the berm cuts and constructed tidal creeks will also be documented by taking depth measurements along a permanently-established cross-section. These locations will also be used as permanent photograph stations to document conditions at the berm breaches and constructed tidal creeks. All hydrology data will be compiled and presented in the Time Zero Monitoring Report for review by the Trustees.

*Vegetation* – Vegetation will be monitored by Tidewater personnel within the four (4) 1m<sup>2</sup> quadrats established within the restoration site and the one (1) 1m<sup>2</sup> quadrat established at the reference site. Additionally, Tidewater personnel will monitor the two (2) 30m line





intercept transects established during baseline monitoring in the restoration site. Tidewater personnel will also continue to monitor the two (2) 30m line intercept transects within the reference site. All vegetation within the quadrats or intercepting the line transects will be identified and overall percent cover will be taken for each species. In addition, randomized stem counts will be conducted within four (4) 0.625 m<sup>2</sup> sub-quadrats that are part of each of the established 1m<sup>2</sup> quadrats. The representative height of plants within the quadrats, as well as the percent bare ground, will also be recorded. The sampled sub-quadrats will be selected by numbering the sub-quadrats from 1 to 16 and using a random number generator to indentify the four (4) sub-qdrats within each quadrat. Photographs will be taken at the permanent stations at each 1m<sup>2</sup> quadrat and 30m line intercept transect to document change in the development of the restoration site. Vegetation monitoring will occur immediately after construction is completed on the restoration site.

*Additional Information* – Tidewater personnel will take photographs at the permanent stations established during the Baseline Monitoring of the restoration site. In addition, the Time-Zero Report will include qualitative visual assessments of fishes, invertebrates and avian wildlife utilizing the restoration and reference sites.

Tidewater personnel will submit the Time Zero Report along with the as-built survey (to be performed by a licensed surveyor) to the Trustees within 60 days of the completion of construction.

### **Task 3: Annual Monitoring (Post-Construction)**

After the restorative activities have been completed, Tidewater personnel will initiate annual monitoring of the restoration and reference sites. Annual monitoring will take place for a period of five (5) years to ensure that the restoration site meets the pre-determined success criteria. If the restoration site meets the pre-determined success criteria after three (3) years of annual monitoring, the Trustees may decide to eliminate the final two (2) years of monitoring. An Annual Monitoring Report will be submitted to the Trustees within 60 days after the final monitoring event.

Annual monitoring will utilize the baseline monitoring stations established prior to construction at the restoration site, as discussed below.

*Hydrology* – Tidewater personnel will monitor hydrology with the two (2) Water Level Loggers at the restoration site and one (1) Water Level Logger at the reference site. The Water Level Loggers will monitor water levels within the restoration and reference sites at 15-minute intervals. Tidewater personnel will download the hydrology data from the Water Level Loggers monthly during the growing season.



The hydrologic connection at the berm cuts and constructed tidal creeks will also be monitored annually by taking depth measurements along a permanently-established cross-section. These locations will also be used as permanent photograph stations to document conditions at the berm breaches and constructed tidal creeks. All hydrology data will be compiled and presented in the Annual Monitoring Report for review by the Trustees.

*Vegetation* – Vegetation will be monitored by Tidewater personnel within the four (4) 1m<sup>2</sup> quadrats established within the restoration site and the one (1) 1m<sup>2</sup> quadrat established within the reference site. Additionally, Tidewater personnel will continue to monitor the two (2) 30m line intercept transects within the restoration site as well as the two (2) 30m line intercept transects within reference site. All vegetation within the quadrats or intercepting the line transects will be identified and overall percent cover will be taken for each species. In addition, randomized stem counts will be conducted within four (4) 0.625 m<sup>2</sup> sub-quadrats that are part of each of the established 1m<sup>2</sup> quadrats. The representative height of plants within the quadrats, as well as the percent bare ground, will also be recorded. The sampled sub-quadrats will be selected by numbering the sub-quadrats from 1 to 16 and using a random number generator to identify the four (4) sub-quadrats within each quadrat. Photographs will be taken at the permanent stations at each 1m<sup>2</sup> quadrat and 30m line intercept transect to document change in the development of the restoration site. Vegetation monitoring will occur once in the spring and fall seasons (i.e. during the growing season).

*Additional Information* – Tidewater personnel will take photographs at the permanent stations established during the Baseline Monitoring of the restoration site. In addition, qualitative visual assessments of fishes, invertebrates and avian wildlife utilizing the restoration and reference sites will be monitored during the hydrologic and vegetation monitoring events and documented in the Annual Monitoring Report.

The Annual Monitoring Report will include all hydrology, vegetation, and fauna data collected at the restoration and reference sites. The Annual Monitoring Report will compare the data to the following success criteria.

### ***Success Criteria***

*Hydrology* – Hydrologic restoration will result in a semi-diurnal inundation/wetting of the restoration site during average high tides and allow for sufficient drainage during average low tides. The water surface elevations derived from the Water Level Loggers will indicate that the required acreage of saltmarsh and tidal creeks have been restored. The hydrology data within the restoration and reference sites will be compared to monitor potential variance of the semi-diurnal inundation.

**Tidewater Environmental Services Inc.**  
Post Office Box 865, Johns Island, SC 29457-0865  
Phone: (843) 762-3750 Fax: (843) 762-3795  
[www.tidewaterenvironmental.com](http://www.tidewaterenvironmental.com)



*Vegetation* – The percent of vegetative cover, bare ground, and stem counts within the restoration site will not vary significantly from the reference site. The baseline monitoring within the reference site will determine the percent cover that is indicative of vegetative success within the restoration site. The vegetation success criteria will not apply to the former detention pond or newly constructed tidal creek channels.

*Additional Information* – Success criteria will not be associated with depth measurements of berm cuts and constructed tidal creeks nor will success criteria be associated with habitat utilization measurements.

**Appendix B**  
**Restrictive Covenant**

DECLARATION OF RESTRICTIVE COVENANT

THIS DECLARATION OF RESTRICTIVE COVENANT ("**Declaration**") is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by The City of North Charleston, South Carolina ("**Declarant**").

WHEREAS, Declarant is the owner of certain real property located in Charleston County, South Carolina, containing approximately 13 acres comprised predominately of wetlands within a Critical Area of the coast, as identified by South Carolina Department of Health and Environmental Control (SCDHEC)'s Office of Coastal Resource Management, and described more fully in Exhibit "A" attached hereto and incorporated herein by reference (the "**Property**"); and

WHEREAS, the SCDHEC, the South Carolina Department of Natural Resources, the National Oceanic and Atmospheric Administration of the United States Department of Commerce, and the United States Fish and Wildlife Service of the United States Department of the Interior (collectively, "the **Trustees**"), have asserted a claim against Evergreen International, S.A. ("**Evergreen**") pursuant to the Oil Pollution Act of 1990 ("**OPA**"), 33 U.S.C. § 2702(b) (the "**Claim**") seeking natural resource damages arising from an accidental discharge of oil into the waters of the Cooper River in Charleston, South Carolina, on or about September 30, 2002 (the "**Incident**"); and

WHEREAS, Evergreen disputes the Claim, but has nevertheless reached a "without prejudice" agreement in principal with the Trustees (the "**Settlement Agreement**") to settle the Claim; and

WHEREAS, in accordance with the Settlement Agreement, Evergreen has agreed to undertake certain restoration actions under OPA to compensate for the alleged harm to natural resources resulting from the Incident (the "**Restoration Project**"); and

WHEREAS, the Trustees have identified, as the preferred location for the Restoration Project, Declarant's real property described in Exhibit "A" attached hereto; and

WHEREAS, Evergreen has engaged a certified, environmental professional wetland scientist to prepare a wetlands restoration plan for the Restoration Project at the Property, which plan is defined and described in Exhibit "B" attached hereto; and

WHEREAS, the Trustees require that, following construction and implementation of the Restoration Project in accordance with Exhibit "B", the Property's restored wetlands shall be protected from development and otherwise preserved in perpetuity; and

WHEREAS, in order to ensure compliance with the Trustees' requirement that the Property's restored wetlands be protected from development, the Declarant is willing to subject the Property to a Restrictive Covenant as set forth herein.

NOW, THEREFORE, for and in consideration of the valuable benefits accruing to the Property due to the Restoration Project, the Declarant hereby establishes, imposes and

Declares the Property to be subject to the following prohibitions, restrictions and conditions, as more particularly set forth herein:

Restriction. No residential, commercial, or other development, or any structure or infrastructure related thereto, shall be permitted on the Property; provided, however, that subject to any applicable governmental approval(s), including certification and permitting, the following structures and/or uses may be allowed on upland areas adjacent to the Property so long as such structures and/or uses are not placed, constructed or permitted in such a manner as to disrupt, impede or interfere with the tidal exchange or ecological functionality of the wetlands with the Property and are not otherwise inconsistent with the terms of the Restoration Project described in Exhibit "B" attached hereto:

- (i) Construction, installation, replacement and maintenance of historical markers and directional or interpretive signage;
- (ii) Construction, installation, replacement and maintenance of tables or benches, paved and unpaved trails or wooden boardwalks incidental to any passive park or recreational uses or that support the overall use and enjoyment of the natural surroundings;
- (iii) Installation of site lighting, trash cans, recycling receptacles, bike racks, and other improvements consistent with a passive park;
- (iv) Construction and maintenance of a fishing dock or similar, if properly permitted;
- (v) Maintenance, care, removal and replacement of trees, shrubs, undergrowth or other vegetation on the Property to keep such vegetation in healthy and safe condition and to allow for the other permitted uses or structures hereunder;
- (vi) Passive uses of the Property for the purposes of educational, cultural, entertainment, or promotional events, and other passive recreational activities of general community interest not otherwise limited under the provisions hereof.

Binding Effect. This Covenant shall run with the land, and be binding upon the Declarant, and subsequent owners of the Property, and their respective heirs, successors and assigns. The restrictions contained herein shall be appurtenant to and for the benefit of all portions of the Property, and shall run with the land, and shall be binding upon each and every successor-in-interest of the Declarant, regardless of whether the deed or other instrument of conveyance by which such successor-in-interest acquires title shall recite that the Property is subject and subordinate to the terms and provisions hereof.

Amendment. This Covenant may not be modified in any respect whatsoever, or rescinded in whole or in part, except by the Declarant, its successor or assigns, and then only with the formal written consent of the Trustees, accompanied by a written instrument duly executed and acknowledged by the requisite parties, duly recorded in the public records of The City of North Charleston, South Carolina.

Miscellaneous. The ownership of the entire Property by the same party shall have no effect on the validity or enforceability of this Covenant. No waiver of any breach of any covenant or provision herein contained shall be deemed a waiver of any preceding or succeeding breach thereof, or of any other covenant or provision herein contained. If any term or condition of this Covenant or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Covenant shall not be affected thereby and each such term or condition of this Covenant shall be valid and enforceable to the full extent permitted by law. This Covenant shall be construed in accordance with and governed by the laws of the State of South Carolina. Time is of the essence of this Covenant.

IN WITNESS WHEREOF, the undersigned has executed this Covenant under seal as of the day and year first above written.

DECLARANT:

**The City of North Charleston, South Carolina**

By: \_\_\_\_\_, its Authorized Signer \_\_\_\_\_, 20\_\_

\_\_\_\_\_(Name)

\_\_\_\_\_(Title)

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

I certify that \_\_\_\_\_, as Authorized Signer of The City of North Charleston, South Carolina, personally appeared before me this day, acknowledging to me that he/she signed the foregoing document.

Date: \_\_\_\_\_, 20\_\_.

\_\_\_\_\_

Printed Name: \_\_\_\_\_, Notary Public

My commission expires: \_\_\_\_\_



**Appendix C**  
**Addresses for Notice Pursuant to Section XVI (Notice)**

**Appendix C**  
**Addresses for Notice Pursuant to Section XVI (Notice)**

As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Re: DJ # 90-5-1-1-08592

As to NOAA:

Stephanie Willis  
NOAA Office of General Counsel  
263 13th Ave. S., Suite 177  
St. Petersburg, FL 33701

Howard Schnabolk  
NOAA Coastal Services Center  
34 South Hobson Avenue  
Charleston, SC 29405-2413  
843-740-1328  
843-740-1315 (fax)

As to DOI/FWS:

Harriet Deal  
US DOI/FWS  
Regional Solicitor's Office  
75 Spring Street, S.W., Rm 304  
Atlanta GA 30303  
(404) 331-3379 x 231

As to SCDHEC:

Susan Lake  
Staff Attorney  
SCDHEC Office of General Counsel  
2600 Bull St.  
Columbia, SC 29201  
(803) 898-3570  
(803) 898-3367 (fax)

As to SCDNR:

Paul League  
Deputy Chief Counsel  
SC Department of Natural Resources  
P. O. Box 167  
Columbia, SC 29202  
(803) 734-4085  
(803) 734-3911 (fax)

As to EVERGREEN INTERNATIONAL, S.A.:

Sean Houseal  
Womble Carlyle Sandridge & Rice, LLP  
P.O. Box 999  
Charleston, SC 29402  
(843) 720-4622  
(843) 723-7398 (fax)