

UNITED STATES ENVIRONMENTAL PROTECTION
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

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EPA REGION III, PHILA. PA

In the Matter of:	:	Proceeding to Assess Class II
	:	Administrative Penalty Under
City of Chesapeake, Virginia	:	Section 309(g) of the Clean Water Act
City Hall Building	:	
306 Cedar Road, 6 th Floor	:	Docket No. CWA-03-2011-0152
Chesapeake, VA 23322	:	
	:	
Respondent	:	CONSENT AGREEMENT AND
	:	FINAL ORDER
	:	

CONSENT AGREEMENT AND FINAL ORDER

I. STATUTORY AUTHORITY

1. This Consent Agreement and Final Order ("CAFO") is entered into by the Director of the Water Protection Division, United States Environmental Protection Agency, Region III ("Complainant") and City of Chesapeake, Virginia ("Respondent"), pursuant to Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules")*, 40 C.F.R. Part 22. The parties have agreed to settlement of the alleged violations of the Clean Water Act by Respondent.

II. EPA'S FINDINGS OF FACT AND JURISDICTIONAL ALLEGATIONS

2. Complainant initiated this proceeding for assessment of a Class II Administrative Penalty pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), by issuing an Administrative Penalty Complaint ("Complaint") to Respondent on June 16, 2011.
3. This Consent Agreement incorporates by reference the findings of fact and jurisdictional allegations contained in Paragraphs 1 through 67 of the Complaint, and adopts them as the EPA's Findings of Fact and Jurisdictional Allegations herein.

III. EPA'S CONCLUSIONS OF LAW

4. This Consent Agreement incorporates by reference the conclusions of law contained in Paragraphs 1 through 67 of the Complaint and adopts them as EPA's Conclusions of Law herein.
5. EPA concludes that Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, and are liable to the United States for a civil penalty in accordance with Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

IV. GENERAL PROVISIONS

6. For the purpose of the proceeding:
 - A. Respondent admits to the jurisdictional allegations of the Complaint and this CAFO;
 - B. Respondent neither admits nor denies the specific factual allegations and conclusions of law set forth in the Complaint and this CAFO;
 - C. Respondent consents to the assessment of the civil penalty (the "Civil Penalty") set forth herein;
 - D. Respondent agrees to undertake all actions required by this CAFO;
 - E. Respondent hereby expressly waives its right to contest the allegations set forth in the Complaint at a hearing under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B);
 - F. Respondent waives its right to appeal this Final Order under Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B).
7. Respondent agrees not to contest EPA's jurisdiction to issue and enforce the terms of this CAFO.
8. Concurrently with the entry of this CAFO, EPA and the City entered into a related Administrative Order for Compliance on Consent, EPA Docket No. CWA-03-0119DN (AOCC). EPA relied, in part, on the Parties' agreement articulated in the AOCC in entering into this CAFO.
9. Respondent consents to the assessment of the civil penalty herein, including the Supplemental Environmental Project described herein.
10. Each party to this agreement shall pay its own costs and attorney's fees.
11. This CAFO does not relieve Respondent of its obligations to comply with all applicable provisions of federal, state or local law, nor shall it be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 of the CWA, 33 U.S.C. § 1342 or any other law. Nor does this CAFO constitute a waiver, suspension or

modification of the requirements of the CWA, 33 U.S.C. §§ 1251 *et seq.*, or any regulations promulgated thereunder.

12. This Consent Agreement and the accompanying Final Order resolves the civil claims against the Respondent for the specific violations alleged in the Complaint issued in the above-captioned action. EPA reserves the right to commence an action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO, following its effective date.
13. Respondent represents that it is in compliance with the CWA and its MS4 Permit as described more fully in the Complaint. This CAFO is conditioned upon the accuracy of the Respondent's representations to EPA. EPA reserves the right to institute a new and/or separate action should Respondent fail to comply with the terms of this CAFO. That right shall be in addition to all other rights and causes of action, civil or criminal, the EPA may have under law or equity in such event.
14. This CAFO may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party had signed all other counterparts.
15. All of the terms and conditions of this CAFO together comprise one agreement, and each of the terms and conditions is in consideration of all of the other terms and conditions. In the event that this CAFO or one or more of its terms and conditions is held invalid, or is not executed by all of the signatories in identical form, or is not approved in such identical form by the Regional Administrator or his designee, then the entire CAFO shall be null and void.

V. PENALTY

16. For the purpose of this proceeding, the Respondent consents to the assessment of the Civil Penalty in the amount of \$30,000.00 in full and complete settlement of EPA's civil claims as set forth in the Complaint alleging violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311.
17. The \$30,000.00 penalty as provided for in Paragraph 16 shall be divided as follows: (a) a cash penalty in the amount of \$10,000.00; and (b) \$20,000.00 by the implementation of a supplemental environmental project ("SEP").

VI. PAYMENT TERMS

18. Within thirty (30) days of the effective date of this Order, Respondent shall pay the civil penalty of ten thousand dollars (\$10,000.00) in the following manner:

- A. All payments by Respondent shall reference Respondent's name and address, and the Docket Number of this action, CWA-03-2011-0152;
- B. All checks shall be made payable to "United States Treasury";
- C. All payments made by check and sent by regular mail shall be addressed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197 9000

Contact: Bryson Lehman 513-487-2123

- D. All payments made by check and sent by overnight delivery service shall be addressed for delivery to:

U.S. Bank
Government Lockbox 979077
U.S. EPA, Fines & Penalties
1005 Convention Plaza
Mail Station SL MO C2 GL
St. Louis, MO 63101

Contact: 314-418-1028

- E. All payments made by check in any currency drawn on banks with no USA branches shall be addressed for delivery to:

Cincinnati Finance
US EPA, MS NWD
26 W. M.L. King Drive
Cincinnati, OH 45268 0001

- F. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA - 021030004
Account No. = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read:

“D 68010727 Environmental Protection Agency”

- G. All electronic payments made through the Automated Clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

US Treasury REX / Cashlink ACH Receiver
ABA = 051036706
Account No.: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 Checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737
Contact: Jesse White 301 887 6548 or REX, 1 866 234 5681

- H. On Line Payment Option:

WWW.PAY.GOV/PAYGOV

Enter sfo 1.1 in the search field. Open and complete the form.

- I. Additional payment guidance is available at:

http://www.epa.gov/ocfo/finservices/make_a_payment.htm

- J. A copy of Respondent's check or a copy of Respondent's electronic fund transfer shall be sent simultaneously to the following:

U.S. Environmental Protection Agency
Regional Hearing Clerk (3RC00)
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029;

and

Douglas Frankenthaler
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III (3RC20)
1650 Arch Street
Philadelphia, PA 19103-2029

19. The following notice concerns interest and late penalty charges that will accrue in the event that any portion of the civil penalty is not paid as directed:

Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest and late payment penalties on outstanding debts owed to the United States and a charge to

cover the costs of processing and handling a delinquent claim, as more fully described below. Accordingly, Respondent's failure to make timely payment or to comply with the conditions in this CAFO shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.

Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a copy of this CAFO is mailed or hand-delivered to Respondent. However, EPA will not seek to recover interest on any amount of the civil penalty that is paid within thirty (30) calendar days after the date on which such interest begins to accrue. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R. § 13.11(b). Pursuant to Appendix 2 of EPA's *Resources Management Directives - Cash Management*, Chapter 9, EPA will assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each such subsequent thirty (30) days the penalty remains unpaid.

A penalty charge, not to exceed six percent, will be assessed monthly on any portion of the civil penalty which remains delinquent more than ninety (90) calendar days. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).

VII. SUPPLEMENTAL ENVIRONMENTAL PROJECT

20. Respondent shall perform a SEP as described in Attachment A.
21. Respondent hereby certifies that there is no current requirement under any federal, state or local law or regulation for Respondent to perform or develop the SEP within the next five years; nor is Respondent required to perform or develop the SEP by any agreement, grant or injunctive relief in this or any other legal proceeding or in compliance with state or local requirements. Respondent further certifies that it has not received, or will not receive, credit for the SEP activities in any other enforcement action in any form or for purposes of permitting or credit under State or federal law, including, without limitation for any Total Maximum Daily Load (TMDL) based discharge limit or for any wetlands credit or permit requirement.
22. Respondent agrees that EPA may request copies of any materials related to the SEP, at any time, upon reasonable advance notice to Respondent, to confirm that the SEP is being or has been performed in accordance with this CAFO. Respondent further agrees to provide requested information to EPA within fourteen (14) days of a reasonable request. The EPA reserves all existing inspection authority.
23. Within 60 days of completion of all SEP work, Respondent shall provide written notice ("SEP Completion Report") to EPA of SEP completion, describing all actions taken in furtherance of the SEP. Additionally, Respondent will provide EPA with sufficient documentation to confirm the completion of the SEP and the associated costs incurred and expended by Respondent in completion of the SEP.

24. Following receipt of the SEP Completion Report, EPA may do one of the following: (a) accept the SEP Report; (b) reject the SEP Report and notify the Respondent in writing of the deficiency in the SEP Report and grant the Respondent an additional thirty (30) days from receipt of such notice, to correct any deficiency; or (c) reject the SEP Report and seek stipulated penalties in accordance with Paragraph 27(i) of this CAFO.
25. If EPA elects to exercise option (b) as described in the preceding paragraph, it will permit the Respondent the opportunity to object in writing to the notification of deficiency or disapproval given pursuant to this paragraph within ten (10) days of receipt of such notification. EPA and Respondent shall have thirty (30) days from the receipt by EPA of the notification of objection to reach agreement. If agreement cannot be reached within this thirty (30) day period, EPA shall provide a written statement of its decision to Respondent.
26. The determination of whether the SEP has been satisfactorily completed pursuant to the terms of this CAFO and whether the Respondent has made a good faith, timely effort to implement the SEP is in the sole discretion of EPA.
27. In the event that Respondent fails to comply with any terms or provisions of this CAFO relating to the performance of the SEP and/or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP described in the Scope of Work, Respondent shall be liable for additional civil penalties according to the provisions set forth below:
 - (i) Except as provided in subparagraph (ii) immediately below, if the SEP has not been completed in accordance with this CAFO, Respondent shall pay an additional civil penalty to the United States of \$20,000.00.
 - (ii) If the SEP is not completed in accordance with the CAFO, but EPA determines that Respondent: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least ninety (90) percent of the amount of money which was required to be spent for that SEP was actually expended on the SEP, Respondent shall not be liable for any additional civil penalty.
 - (iii) If the SEP is completed in accordance with the CAFO, but the Respondent spent less than ninety (90) percent of the amount required to be spent for that SEP, Respondent shall pay an additional civil penalty to the United States of \$5,000.00.
 - (iv) If the SEP is completed in accordance with the CAFO and the Respondent spent at least ninety (90) percent of the amount of money required to be spent for the SEP, Respondent shall not be liable for any additional civil penalty.
 - (v) For failure to submit the SEP Completion Report required by Paragraph 23, above, Respondent shall pay an additional civil penalty in the amount of

\$250.00 each day after the date that the report is due until the report is submitted.

- 28. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit, nor shall it be construed to constitute EPA approval of the **work conducted by Respondent and the participating businesses** in connection with the SEP undertaken pursuant to this CAFO.
- 29. All submissions required herein shall be signed and dated by a responsible official of Respondent to include the following certification:

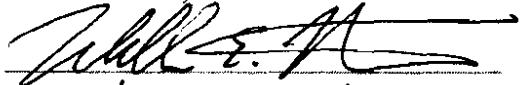
"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage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


Signed _____
 Title _____
 Date _____

VII. EFFECTIVE DATE

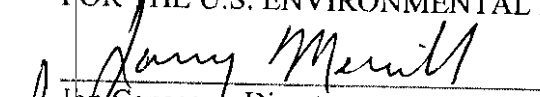
- 30. This CAFO shall become final and effective thirty (30) days after it is lodged with the Regional Hearing Clerk, pursuant to Section 309(g)(5) of the Act, 33 U.S.C. § 1319(g)(5).

FOR RESPONDENT, CITY OF CHESAPEAKE, VIRGINIA:

By: 
 Name: William E. Harrell
 Title: City Manager

APPROVED AS TO FORM


FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:



Jon Capacasa, Director
Water Protection Division

Date: 3/30/12

SO ORDERED in I/M/O *City of Chesapeake, Virginia*, Docket No. CWA-03-2011-0152,
pursuant to 33 U.S.C. § 1319(g) and 40 C.F.R. Part 22,
this ^{2ND} day of April, 2012.



Shawn M. Garvin
Regional Administrator
U.S. Environmental Protection Agency, Region III

Attachment A

**Supplemental Environmental Project
City of Chesapeake, Virginia**

Docket No. CWA-03-2011-0152

Respondent's supplemental environmental project ("SEP"), including project description, cost estimate, and time estimate are described are described below:

Project Description: The SEP consists of the Respondent's construction of a non-riparian, flood plain vegetation restoration project ("Restoration Project"). The Restoration Project is part of a larger project described in diagram "A". The Respondent may determine that an alternate location is more suitable for the Restoration Project. If Respondent makes such a determination, it may submit a request to construct the Restoration Project at the alternate location to EPA, along with the reasons for the request. If that occurs, Respondent and EPA will attempt to negotiate the alternate location in good faith.

The Restoration Project location is at the border of the City of Norfolk and is in an industrial area. The scope of the project includes ditch maintenance and installation of drainage pipes under a railroad track. The Respondent and the City of Norfolk are in the process of signing a cost sharing agreement for the entire project, of which the Respondent would contribute an additional \$20,000 towards the Restoration Project, as described in diagram "B".

The larger project includes the creation of an open channel in the drainage system to serve as a riparian buffer for the Halifax Lane outfall. The open channel would be located in a drainage easement to be acquired by the Respondent from United States Gypsum Co. as shown in diagram "B". The Respondent's \$20,000 allocation would be used toward plantings and matting of the slopes of the open channel. The Respondent's in-house engineers designed this open channel and the selected vegetation. The number and types of plants will be as described in diagram "C" or similar. The contractor who is selected to perform the work will be required to warranty that 75% of the plants survive after one year.

Cost Estimate: The cost estimate for plantings and matting is approximately \$23,600 (described further below) of which the Respondent would pay \$20,000, and any additional amount for plantings and matting would be absorbed by the project cost sharing agreement between the Respondent and the City of Norfolk.

\$ 1,134	Small and Midsize Shrubs	63 Each @ \$18.00/Each
\$ 925	Larger Shrubs	37 Each @ \$25.00/Each
\$ 5,080	Plugs Various Vegetation	2,032 Each @ \$2.50/Each
\$ 7,069	Upland Seed Mix	2,333 SY @ 3.02/SY
\$ 14,208	Subtotal for Plantings and Upland Seed	
\$ 9,402	KoirMatt	2,333 SY @\$4.03/SY
\$ 23,610	Total Cost of Plantings and Matting	

Estimated Timeline: Some of the Restoration Project timeline implementation estimates below are made with the understanding that they are subject to permitting by the Army Corps of Engineers and successful right-of-way acquisitions.

- Respondent expects to solicit sealed bids for the total project in May 2012 and to issue a notice to proceed in June 2012.
- The contractor is likely to begin planting in October and complete the plantings by the end of November 2012.
- The Respondent will likely expend the \$20,000 for the plantings and matting within the same timeframe, October to November 2012.

Diagram A

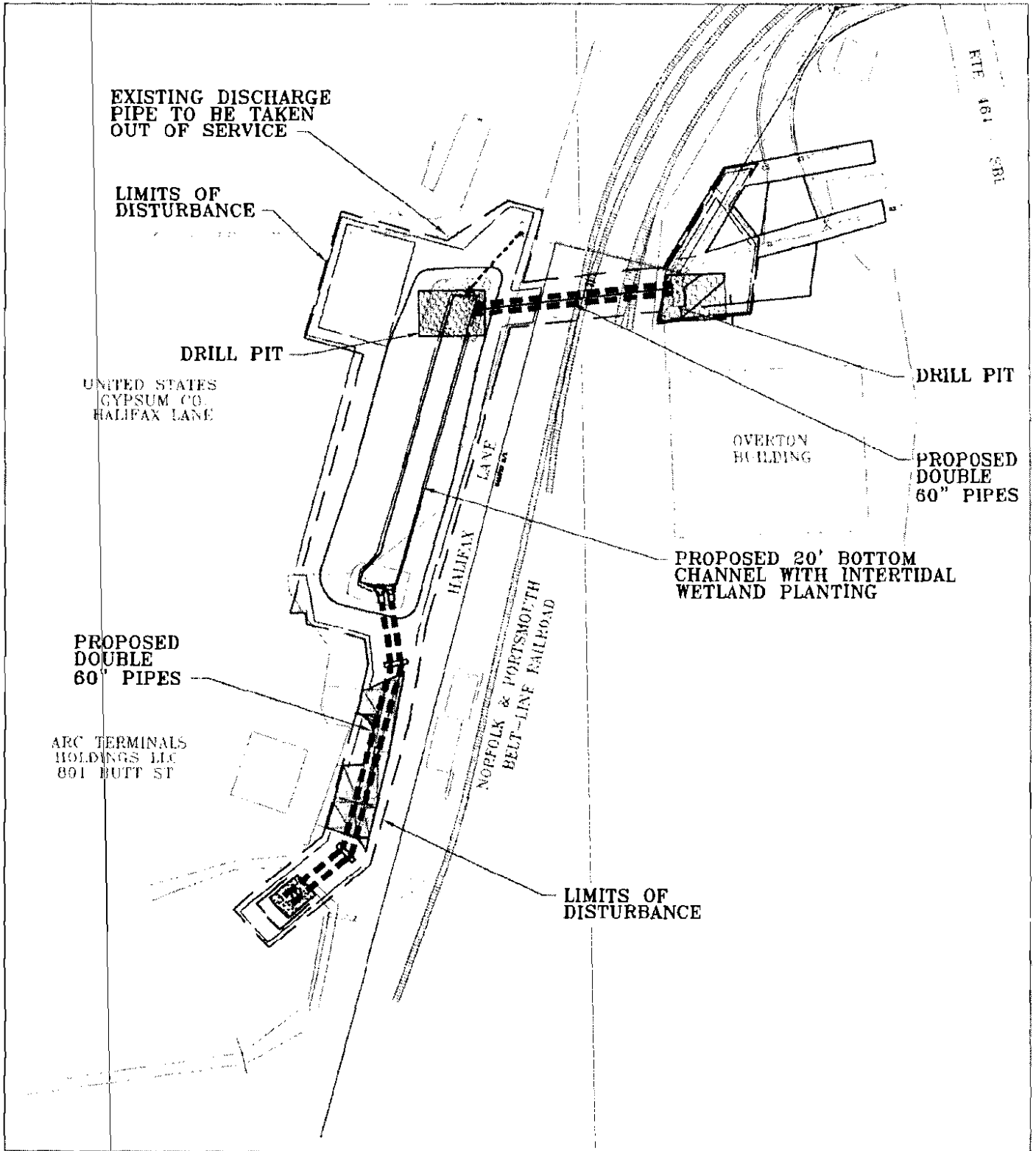
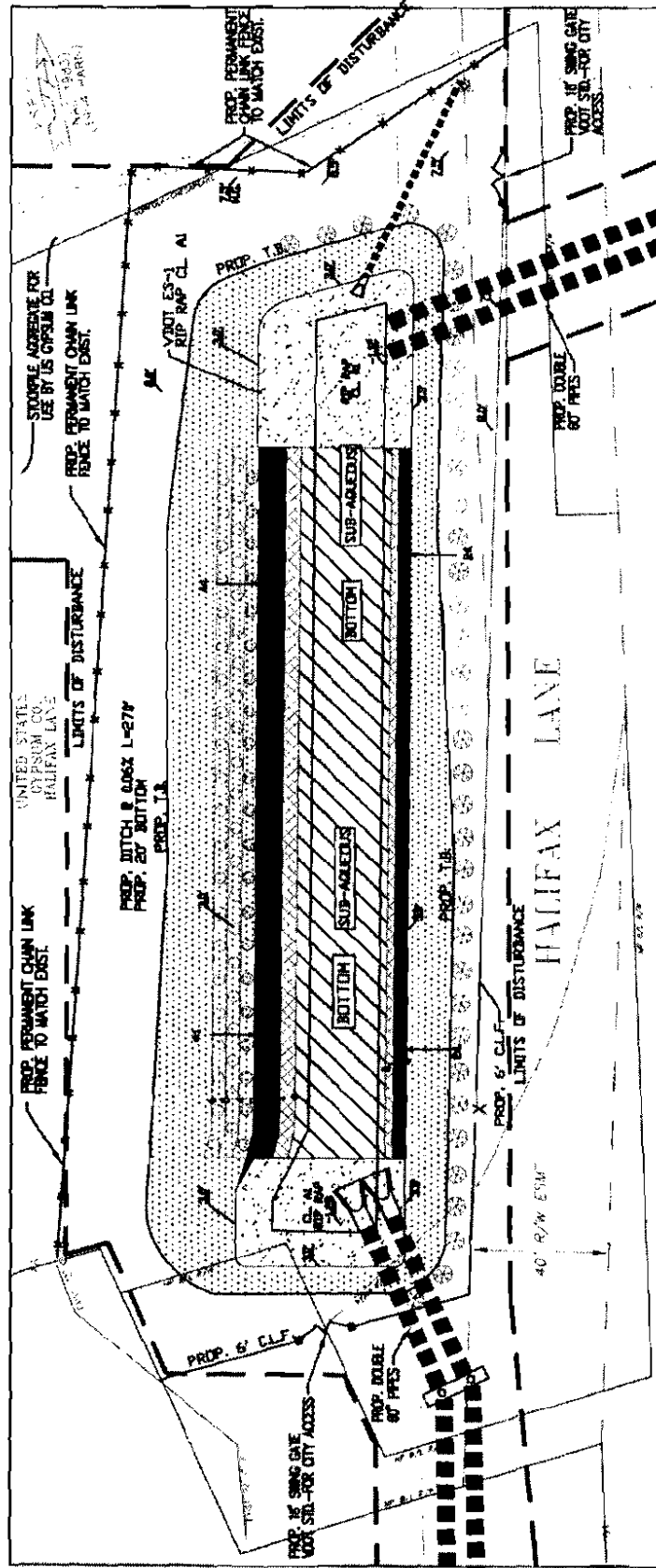


Diagram B

CONTRACTOR TO COORDINATE REMOVAL AND STOCKPILE OF AGGREGATE BASE PRIOR TO PERMANENT FENCE PLACEMENT

PERMANENT FENCE PLACEMENT TO BE PERFORMED PRIOR TO CHANNEL AND PIPE INSTALLATION.



COST ESTIMATE

\$ 14,200	PLANTINGS
\$ 9,400	KOURBATT
\$ 23,600	TOTAL SEP ESTIMATED COST

EXCAVATION OF WETLANDS

	INTERTIDAL WETLANDS	3911 SF
	SUBMERGED	5249 SF


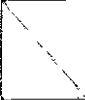




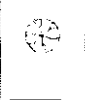
NOT TO SCALE

Diagram C

TYPICAL PLANTING SCHEDULE

NTS

HALIFAX LANE OUTFALL
WETLAND CREATION PLANTING SCHEME FOR
EXCAVATION AREA

	ESTIMATED QTY	ELEVATION RANGE (NAVD88)	SPECIES	PLANT SPACING	MINIMUM PLANT SIZE	NOTES
	362	0.0 TO 1.0 ft.	SPARTINA ALTERNIFLORA	18' CENTERS MAX.	1.5' PLUGS WITH MINIMUM OF 2 CULMS PER PLUG	PLANT EACH WITH 1/2 OUNCE OF OSMOCOTE OR APPROVED EQUIVALENT
	704	1.0 TO 3.0 ft.	SPARTINA PATENS	18' CENTERS MAX.	1.5' PLUGS WITH MINIMUM OF 2 CULMS PER PLUG	PLANT EACH WITH 1/2 OUNCE OF OSMOCOTE OR APPROVED EQUIVALENT
	210	1.0 TO 3.0 ft.	DISTICHILIS SPICATA	36' CENTERS MAX.	1.5' PLUGS WITH MINIMUM OF 2 CULMS PER PLUG	PLANT EACH WITH 1/2 OUNCE OF OSMOCOTE OR APPROVED EQUIVALENT
	21	3.0 TO 4.0 ft.	IVA FRUTESCENS	10' CENTERS MAX.	GALLON SIZE	
	42	4.0 TO 6.0 ft.	BACCHARIS HALIMIFOLIA	10' CENTERS MAX.	GALLON SIZE	
	756	3.0 TO 8.0 ft. (VARIABLE)	PANICUM VIRGATUM	48' CENTERS MAX.	1.5' PLUGS WITH MINIMUM OF 2 CULMS PER PLUG	PLANT EACH WITH 1/2 OUNCE OF OSMOCOTE OR APPROVED EQUIVALENT
	37	5.0 TO 8.0 ft. (AS SHOWN)	MORELLA CERIFERA	10' CENTERS MAX.	GALLON SIZE	

SIDESLOPES ABOVE ELEV. 3.0' IN EXCAVATED AREAS TO BE SEEDED WITH THE FOLLOWING MIX:

PANICUM VIRGATUM	33%
FESTUCA RUBRA	25%
LOLIUM MULTIFLORUM	18%
PHELEUM PRATENSE VAR. CLIMACQ	16%
TRIFOLIUM HYBRIDUM	5%
AGROSTIA ALBA	3%

A MINIMUM OF 75% OF THE PLANTS MUST SURVIVE AFTER 12 MONTH WARRANTY/ DEFECT PERIOD.
OTHER DISTURBED AREAS TO BE SEEDED IN ACCORDANCE WITH E&S PRACTICES FOR THE SEASON.
PLANTS ARE SENSITIVE TO WEATHER CONDITIONS, AND MUST BE PLANTED BETWEEN 01 OCTOBER
AND 30 APRIL.