

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

_____	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. _____
	)	
SMITH FARM ENTERPRISES, LLC,	)	
	)	
Defendant.	)	
_____	)	

**CONSENT DECREE**

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed the Complaint herein against Defendant Smith Farm Enterprises, LLC (“Smith Farm” or “Defendant”), alleging that Smith Farm violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Smith Farm violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material, and by discharging stormwater associated with construction activity containing sediment, into waters of the United States, without a CWA permit, at a site known as the “Smith Farm Site,” located in Chesapeake and Suffolk, Virginia, and more fully described in the Complaint;

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States for alleged violations of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require Smith Farm, at its own expense and at the direction of EPA, to restore and/or

mitigate the damages caused by its unlawful activities; and (3) to require Smith Farm to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, Smith Farm filed a Petition for Review in the United States Court of Appeals for the Fourth Circuit, titled Smith Farm Enterprises, LLC, v. United States Environmental Protection Agency, No. 11-1355, in which Smith Farm challenges an action taken by the EPA, specifically, the decision of the EPA Environmental Appeals Board in In re: Smith Farm Enterprises LLC, CWA Appeal No. 08-02 decided March 16, 2011 (“EAB Decision”);

WHEREAS, the EAB Decision (1) found Smith Farm had violated Sections 301(a), 402 and 404 of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1311(a), 1342, and 1344, by discharging pollutants to waters of the United States as those terms are defined in the CWA in the course of undertaking certain activities at the Smith Farm Site and (2) directed Smith Farm to pay a penalty of \$34,000;

WHEREAS, Smith Farm contests the findings of fact and conclusions of law set forth in the EAB Decision;

WHEREAS, upon entry of this Consent Decree, Smith Farm will voluntarily dismiss its Petition for Review in Smith Farm Enterprises, LLC, v. United States Environmental Protection Agency, No. 11-1355 (4<sup>th</sup> Cir.);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' civil claims under the CWA set forth in the Complaint regarding the Smith Farm Site and claims giving rise to the penalties awarded by the EAB Decision;

WHEREAS, EPA and Smith Farm agree to enter into this Consent Decree to avoid protracted litigation and preserve judicial resources;

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

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the Complaint, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

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

#### I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) & (g)(8) of the CWA, 33 U.S.C. §§ 1319(b) & (g)(8). Venue is proper in the United States District Court for the Eastern District of Virginia pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because Smith Farm conducts business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

#### II. APPLICABILITY

2. The obligations of this Consent Decree shall apply to and be binding upon Smith Farm, its officers, directors, agents, employees and servants, and its successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with Smith Farm whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against Smith Farm, Smith Farm shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person,

firm or corporation acting in concert or participation with Smith Farm, to take any actions necessary to comply with the provisions hereof.

3. The transfer of ownership or other interest in the Smith Farm Site and the Preservation Sites (as described in Appendices E and F appended hereto and incorporated herein by reference) shall not alter or relieve Smith Farm of its obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in the Smith Farm Site and/or the "Preservation Sites", the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify EPA and the United States Department of Justice at the addresses specified in Section X below that such notice has been given. As a condition to any such transfer, Smith Farm shall reserve all rights necessary to comply with the terms of this Consent Decree.

### III. SCOPE OF CONSENT DECREE

4. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint and the obligation to pay the penalties awarded by the EAB Decision against Smith Farm under CWA Section 301.

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

6. Except as in accordance with this Consent Decree, Smith Farm and its agents, successors and assigns are enjoined from discharging any dredged and/or fill material at the Smith Farm Site , unless such discharge complies with the provisions of the CWA and its implementing regulations. Smith Farm does not waive any equitable arguments that it may have regarding an appropriate remedy should the Court find a violation of this injunction to have occurred.

7. The parties acknowledge that Nationwide Permit 32, found at 77 Fed. Reg. 10,184 (Feb. 21, 2012), authorizes any fill that was placed between November 1, 1998 and May 30, 2001 on the Smith Farm Site identified in Appendix A, to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

8. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers or EPA to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c). In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to the Smith

Farm Site, Smith Farm shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppels, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved as specified in Paragraph 4.

9. This Consent Decree in no way affects or relieves Smith Farm of its responsibility to comply with any applicable federal, state, or local law, regulation or permit.

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

11. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

12. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

13. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

#### IV. SPECIFIC PROVISIONS

##### CIVIL PENALTIES

14. Smith Farm shall pay a civil penalty to the United States in the amount of ten thousand Dollars (\$10,000) within 30 days of entry of this Consent Decree.

15. Smith Farm shall make the above-referenced payment to the United States by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing the U.S.A.O. file number, EPA Region 3 and the DOJ case number. Payment shall be made in

accordance with instructions provided to Smith Farm by the Financial Litigation Unit of the United States Attorney's Office for the Eastern District of Virginia, Norfolk Division. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

16. Upon payment of the civil penalty required by this Consent Decree, Smith Farm shall provide written notice, at the addresses specified in Section X of this Consent Decree, that such payment was made in accordance with Paragraphs 14 and 15.

17. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section IX) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

#### RESTORATION, MITIGATION AND PRESERVATION

##### **On-Site Restoration**

18. Smith Farm shall perform the following tasks to complete on-site restoration.

a. Within 180 days from the effective date of this Consent Decree, Smith Farm shall install earthen plugs in all ditch outlet locations identified in Appendix B. The plugs shall be designed and installed to prevent the ditches from draining adjacent wetlands. At a minimum, all plugs shall be at least 35 feet long, the width of the ditch and one foot higher than the adjoining landscape. The plugs shall consist of clay loam or sandy clay loam. Dredged material from the original construction of the ditches and currently located in spoil piles at the Smith Farm Site may be used. Fill material should be compacted with appropriate compaction equipment such as a sheepsfoot, rubber-tired or vibratory roller. The number of required passes by the compaction equipment over the fill material may vary with soil conditions. Fill material should contain

sufficient moisture such that the required degree of compaction will be obtained with the equipment used. The minimum required density is 95% of maximum dry density with a moisture content within  $\pm 2\%$  of the optimum. Each layer of the fill should be compacted as necessary to obtain minimum density. All compaction is to be determined by either Standard Proctor Test (ASTM D698) or the Modified Proctor Test (ASTM D1557) and soil conditions and the size and type of structure being built. Both faces of each plug shall be fortified with a non-erosive material to minimize sediment and erosion from the plug faces.

b. Within 90 days of the effective date of this Consent Decree, Smith Farm shall submit to EPA an inspection, reporting, and maintenance plan for the installed earthen plugs. The purpose of the inspection shall be to identify leaks, weeps, seeps, and/or other physical evidence that the plugs are failing to prevent the ditches from draining adjacent areas. Such plan shall include an inspection schedule requiring inspection of each plug at least every 90 days following installation, taking representative photographs of each plug during each inspection, and a process for reporting any identified leaks, weeps, seeps and/or other physical evidence of plug failure to the EPA within 30 days of the inspection. Such plan also shall include remedial steps to be taken within 30 days in the event that leaks, weeps, seeps, and/or physical evidence of plug failure are identified. EPA, in consultation with the Corps, will review the inspection, maintenance, and reporting plan and shall in writing: a) approve the plan; b) approve the plan upon specified conditions; c) approve part of the plan and disapprove the remainder; or d) disapprove the plan. If the plan is disapproved in whole or in part, Smith Farm shall submit a revised plan within 30 days to correct deficiencies identified by EPA. If EPA, in consultation with the Corps, again disapproves the plan in whole or in part, EPA may direct Smith Farm to resubmit additional revisions or EPA may itself correct deficiencies, subject to Smith Farm's



right to invoke Dispute Resolution pursuant to Section VII. Upon approval of the plan, Smith Farm shall implement the plan. Smith Farm shall continue implementing the plan until such time that, following installation of the earthen plugs identified in Paragraph 18(a), a total of 2 calendar years have passed (regardless of whether they are consecutive) during which the recorded precipitation at the appropriate weather station (i.e., Norfolk WSO) during the period December 1 – May 30 is considered typical (i.e., between 30th and 70th percentiles) or wetter (i.e., greater than 70<sup>th</sup> percentile), utilizing the current Natural Resources Conservation Service WETS tables.

c. Following installation of the earthen plugs identified in Paragraph 18a, the parties understand and agree that in the areas identified in Appendix B, EPA and the Corps will utilize the "atypical" method of identifying wetlands described in the Corps' 1987 Wetlands Delineation Manual until such time as a total of 2 calendar years have passed (regardless of whether they are consecutive) during which the recorded precipitation at the appropriate weather station (i.e., Norfolk WSO) during the period December 1-May 30 is considered typical (i.e., between 30th and 70th percentiles) or wetter (i.e., greater than 70<sup>th</sup> percentile), utilizing the current Natural Resources Conservation WETS tables. After that time, the parties understand and agree that the Corps and EPA will use the "routine" determination methodology of the Corps' 1987 Wetlands Delineation Manual and 2008 Atlantic and Gulf Coast Regional Supplement.

d. The plugs shall not be removed and Smith Farm shall not take any action that impairs the functional integrity of the plugs, and any improvement to the property that encompasses any of the plugs shall not impair the functional integrity of the plugs.

### **Preservation Areas**

19. Within 45 days of the effective date of this Decree, Smith Farm shall take all necessary steps to secure either through creation or purchase as appropriate and convey a conservation easement on the properties identified in subparagraphs a and c below. The conservation easements shall be those provided in Appendix C, shall allow for the access described in Paragraph 26, and shall be conveyed to Conservation, Inc. In addition, within 45 days of the effective date of this Decree, Smith Farm shall take all necessary steps to secure the transfer of and restrictions to the property identified in subparagraph b below to Conservation, Inc., such that Conservation, Inc., will hold title to that property, in fee simple, subject to the declaration of restrictions provided in Appendix D. The properties identified in the subparagraphs below are referred to as the "Preservation Sites."

- a. Fifteen (15) acres on the Smith Farm Site depicted in Appendix E.
- b. Eighty (80) acres north of the Smith Farm Site known as the "Johnson tract" and depicted in Appendix E.
- c. Two-hundred and thirty five acres (235) known as the "Kirk" site and depicted in Appendix F.

### **V. NOTICES AND OTHER SUBMISSIONS**

20. Within 30 days after the deadline for completing any task set forth in this Consent Decree, Smith Farm shall provide the United States with written notice, at the addresses specified in Section X of this Consent Decree, of whether or not that task has been completed.

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

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

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

23. To ensure that all parcels of land identified in Appendix A remain subject to the requirements of this Consent Decree and that any purchaser or transferee has notice of this Consent Decree and its requirements, Smith Farm shall, within fifteen (15) days of entry of this Consent Decree, record a certified copy of this Consent Decree with the Recorder of Deeds Office, in Chesapeake and Suffolk Counties, Virginia. Thereafter, each deed, title, or other instrument conveying an interest in any portion of the parcels of the Smith Farm Site identified in Appendix A shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree. Smith Farm may record with the Record of Deeds Offices referenced above any termination order entered by the Court pursuant to paragraph 51 below.

VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

24. Until five years following termination of this Consent Decree, Smith Farm shall preserve and retain all records, documents and information of whatever kind, nature or description now in its possession or control or which come into its possession or control that relate in any manner to the performance of the tasks set forth in this Consent Decree, regardless of any corporate retention policy to the contrary. Until five years following termination of this Consent Decree, Smith Farm shall also instruct its employees, contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks required by this Consent Decree.

25. At the conclusion of the document retention period, Smith Farm shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Smith Farm shall deliver any such records or documents to EPA. Smith Farm may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Smith Farm asserts such a privilege, it shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Smith Farm. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged, provided that this limitation does not apply for claims of attorney-client and attorney work-product privileges asserted for information

produced by outside counsel employed by Smith Farm who are also neither principles, shareholders, managers nor owners of Smith Farm

26. Until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times, after providing advance notice where practicable, to enter the Smith Farm's premises and the Preservation Sites to:

- 1) Monitor the activities required by this Consent Decree;
- 2) Verify any data or information submitted to the United States;
- 3) Obtain samples;
- 4) Inspect and evaluate Smith Farm's restoration and/or mitigation activities; and
- 5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from Smith Farm as authorized by law.

#### VII. DISPUTE RESOLUTION

27. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Smith Farm's failure to seek resolution of a dispute under this Section shall preclude Smith Farm from raising any such issue as a defense to an action by the United States to enforce any obligation of Smith Farm arising under this Decree.

28. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the parties to

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

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

30. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Smith Farm under this Consent Decree, except as provided in Section IX regarding payment of stipulated penalties.

VIII. FORCE MAJEURE

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

32. If Smith Farm believes that a Force Majeure event has affected its ability to perform any action required under this Consent Decree, Smith Farm shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section X.

Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay; and
- D. any measures taken or planned by Smith Farm to prevent or minimize the delay and a schedule for the implementation of such measures.

Smith Farm may also provide to the United States any additional information that it deems appropriate to support its conclusion that a Force Majeure event has affected its ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification

to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

33. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Smith Farm shall coordinate with the United States to determine when to begin or resume the operations that had been affected by any Force Majeure event.

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

35. Smith Farm shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Smith Farm and any entity controlled by Smith Farm, including their contractors and consultants; (2) that Smith Farm or any entity controlled by Smith Farm could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

#### IX. STIPULATED PENALTIES

36. After entry of this Consent Decree, if Smith Farm fails to timely fulfill any requirement of the Consent Decree, Smith Farm shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree unless excused by Section VIII (Force Majeure) as follows:

- A. For Day 1 up to and including Day 30 of non-compliance \$ 1000 per day



- B. For Day 31 up to and including 60 of non-compliance \$ 2000 per day
- C. For Day 61 and beyond of non-compliance \$ 3000 per day

A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

37. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

38. Smith Farm shall pay any stipulated penalty within forty-five (45) Days of the date Smith Farm receives a demand from the United States.

39. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

40. Stipulated penalties shall continue to accrue as provided in Paragraphs 36 and 37 during any Dispute Resolution, but need not be paid until the following:

A. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Smith Farm shall pay accrued penalties determined to be owing, together with interest, to the United States within thirty (30) Days of the effective date of the agreement or the receipt of EPA's decision or order.

B. If the dispute is appealed to the Court and the United States prevails in whole or in part, Smith Farm shall pay all accrued penalties determined by the Court to be

owing, together with interest, within sixty (60) Days of receiving the Court's decision or order, except as provided in subparagraph C, below.

C. If any Party appeals the District Court's decision, Smith Farm shall pay all accrued penalties determined to be owing, together with interest, within fifteen (15) Days of receiving the final appellate court decision.

41. Smith Farm shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraph 15 of this Consent Decree (for payment of the civil penalty), except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

42. If Smith Farm fails to pay stipulated penalties according to the terms of this Consent Decree, Smith Farm shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Smith Farm's failure to pay any stipulated penalties.

43. Subject to the provisions of Section III of this Consent Decree (Scope of Consent Decree/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Smith Farm's violation of this Consent Decree or applicable law.

#### X. ADDRESSES

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

A. TO EPA:

- (1) Stefania D. Shamet  
Assistant Regional Counsel  
Water and General Law Branch  
Office of Regional Counsel  
United States Environmental Protection Agency  
Region III  
MC 3RC20  
1650 Arch St.  
Philadelphia, PA 19103-2029
- (2) Associate Director, Office of Environmental Programs  
Environmental Assessment and Innovation Division  
United States Environmental Protection Agency  
Region III  
MC 3EA40  
1650 Arch Street  
Philadelphia, PA 19103-2029

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

David J. Kaplan  
Trial Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

C. TO SMITH FARM:

James M. Boyd  
Boyd & Boyd, P.C.  
One Commercial Place  
Norfolk VA 23510

XI. COSTS OF SUIT

45. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action accrued as of the date of entry of this Consent Decree.

## XII. PUBLIC COMMENT

46. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. Except as set forth in paragraph 47 below, Smith Farm agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified Smith Farm in writing that it no longer supports entry of the Consent Decree.

47. The Parties acknowledge that Smith Farm must obtain from the Commonwealth of Virginia a certification pursuant to Section 401 of the CWA , 33 U.S.C. § 1341, which certification is a condition precedent to authorization under Nationwide Permit 32 regarding the requirements set out in paragraph 7 of this Consent Decree. Procedures for obtaining Virginia's certification are described in the April 18, 2012, Section 401 Certification Decision by the Commonwealth of Virginia and by Virginia regulations. Accordingly, Smith Farm may withhold or withdraw its consent to the entry of the Consent Decree only if all of the following conditions are met: (a) Smith Farm files a complete or substantially complete application for such certification no later than 10 days after the Consent Decree has been lodged and diligently pursues that certification thereafter (including by promptly responding to any further requests for information), and (b) the Virginia Department of Environmental Quality either denies certification or grants certification conditioned upon Smith Farm providing additional and substantial mitigation beyond that required by the Consent Decree, such that Virginia's

certification imposes conditions that result in a substantial and unacceptable departure from the agreement embodied in the Consent Decree. In the event that Smith Farm believes that the conditions set forth in this paragraph are met, Smith Farm must first notify the United States thirty days before withholding or withdrawing its consent in order to provide the Parties an opportunity to resolve any disputes and secure entry of the Consent Decree.

### XIII. CONTINUING JURISDICTION OF THE COURT

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

### XIV. MODIFICATION

49. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by the United States and Smith Farm and approved by the Court, except that schedules for completion of tasks required by Paragraphs 18 and 19 may be modified by written agreement of all parties .

### XV. DISMISSAL OF PETITION OF REVIEW

50. No later than seven (7) days after entry of this Decree by the Court, Smith Farm shall move for the voluntary dismissal of its Petition for Review in United States Court of Appeals for the Fourth Circuit, titled Smith Farm Enterprises, LLC, v. United States Environmental Protection Agency, No. 11-1355, with each party to bear its own costs and

attorneys fees, in accordance with Federal Rule of Appellate Procedure 42(b), using the form of dismissal set forth in Appendix G hereto.

#### XVI. TERMINATION

51. Except for the requirements of paragraph 18(d) above, which may not be terminated, and except for the requirements of paragraph 23 above, which may be terminated only in accordance with the additional requirements set forth in Subparagraphs C below, the requirements of this Consent Decree (including those set forth in paragraph 6) may be terminated by either of the following:

- A.
  1. Smith Farm and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or
  2. After Smith Farm has completed all requirements in Paragraphs 18 and 19 of this Consent Decree, has complied with all other requirements of this Consent Decree, and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Smith Farm may serve a Request for Termination on the United States and EPA. The Request for Termination shall state that Smith Farm has satisfied all requirements of this Consent Decree, including but not limited to all requirements in Paragraphs 18 and 19, and shall include supporting documentation sufficient to demonstrate that it has satisfied the foregoing criteria. Following service of Smith Farm's Request for Termination, the Parties may confer informally concerning the Request.
- B.
  1. If the United States agrees that the Consent Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree.

2. If the United States does not agree that the Consent Decree may be terminated, Smith Farm may invoke the Dispute Resolution under Section VIII of this Consent Decree. However, Smith Farm shall not seek Dispute Resolution of any dispute regarding termination of this Consent Decree until 180 days after service of its Request for Termination.

C. The requirements of Paragraph 23 above may be terminated, except as to that paragraph's application to paragraph 18(d), either (1) in accordance with of the requirements in Subparagraph A.1 above or (2) in accordance with the requirements in Subparagraph A.2 above, provided that those requirements are met and, in accordance with paragraph 18(c), the referenced areas have been determined not to contain jurisdictional waters of the United States using the "routine" determination methodology.

#### XVII. SIGNATORIES/SERVICE

52. Each of the undersigned representatives of Smith Farm and the Department of Justice 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 the Party he or she represents to this document.

53. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Smith Farm agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XVIII. APPENDICES

54. The following Appendices A, B, C, D, E, F and G are attached to and part of this Consent Decree.

IT IS SO ORDERED.

Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

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ON BEHALF OF THE UNITED STATES:

IGNACIA S. MORENO  
Assistant Attorney General  
Environment & Natural Resources Div.

*George M. Kelley III AUSA For*  
DAVID J. KAPLAN

*JAN. 16, 2013*  
Dated

Senior Attorney  
U.S. Department of Justice  
Environment & Natural Resources Div.  
Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Telephone: (202) 514-0997  
Telefax: (202) 514-8865  
Email: David.kaplan@usdoj.gov

Local counsel for the United States:

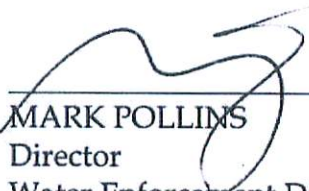
NEIL H. MACBRIDE  
UNITED STATES ATTORNEY

By: *George M. Kelley III*  
GEORGE M. KELLY, III

*JAN. 16, 2013*  
Dated

Assistant United States Attorney  
Virginia State Bar No. 13825  
Counsel for Defendant  
United States Attorney's Office  
World Trade Center, Suite 8000  
101 West Main Street  
Norfolk, VA 23510-1671  
Telephone: (757) 441-6331  
Fax: (757) 441-6689  
Email: George.Kelley@usdoj.gov

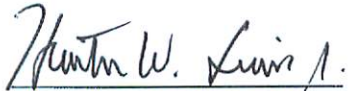
Dated: 1/16/13

  
\_\_\_\_\_  
MARK POLLINS  
Director  
Water Enforcement Division  
United States Environmental Protection  
Agency

Dated: 1/16/13

  
\_\_\_\_\_  
JAMES VINCH  
Attorney  
Water Enforcement Division  
United States Environmental Protection  
Agency

ON BEHALF OF SMITH FARM  
ENTERPRISES, L.L.C., Inc.:



HUNTER W. SIMS JR.  
Kaufman & Canoles, P.C.  
Virginia State Bar No. 9218  
150 West Main Street  
Post Office Box 3037  
Norfolk, Virginia 23514  
Telephone: (757) 624-3272  
Fax: (757) 624-3169  
Email hwsims@kaufcan.com

1/16/13  
Dated

Counsel for Smith Farm  
Enterprises, L.L.C.

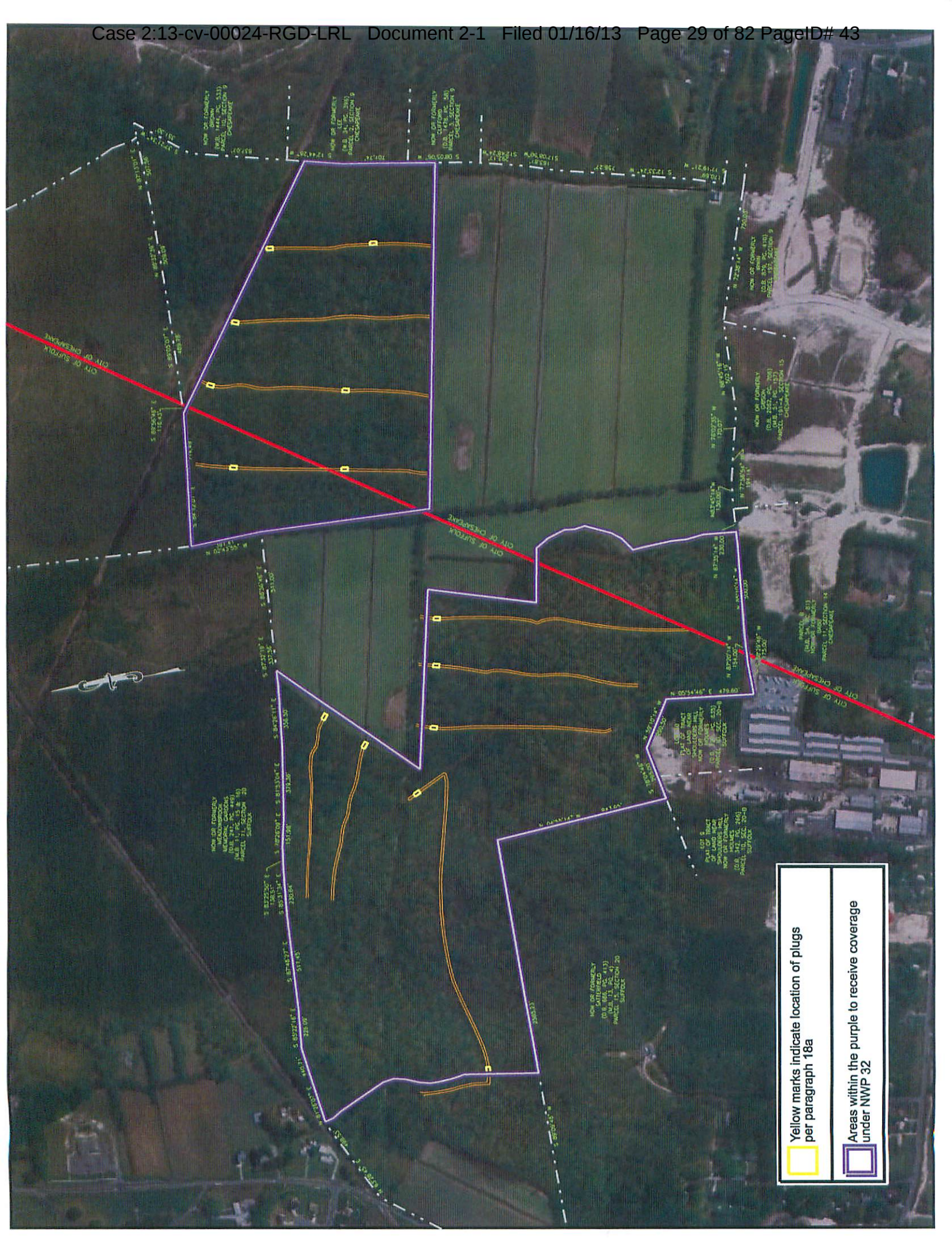




JAMES M. BOYD  
Boyd & Boyd, P.C.  
One Commercial Place  
Norfolk, VA 23510  
Telephone: (757) 622-3611

1/15/13  
Dated

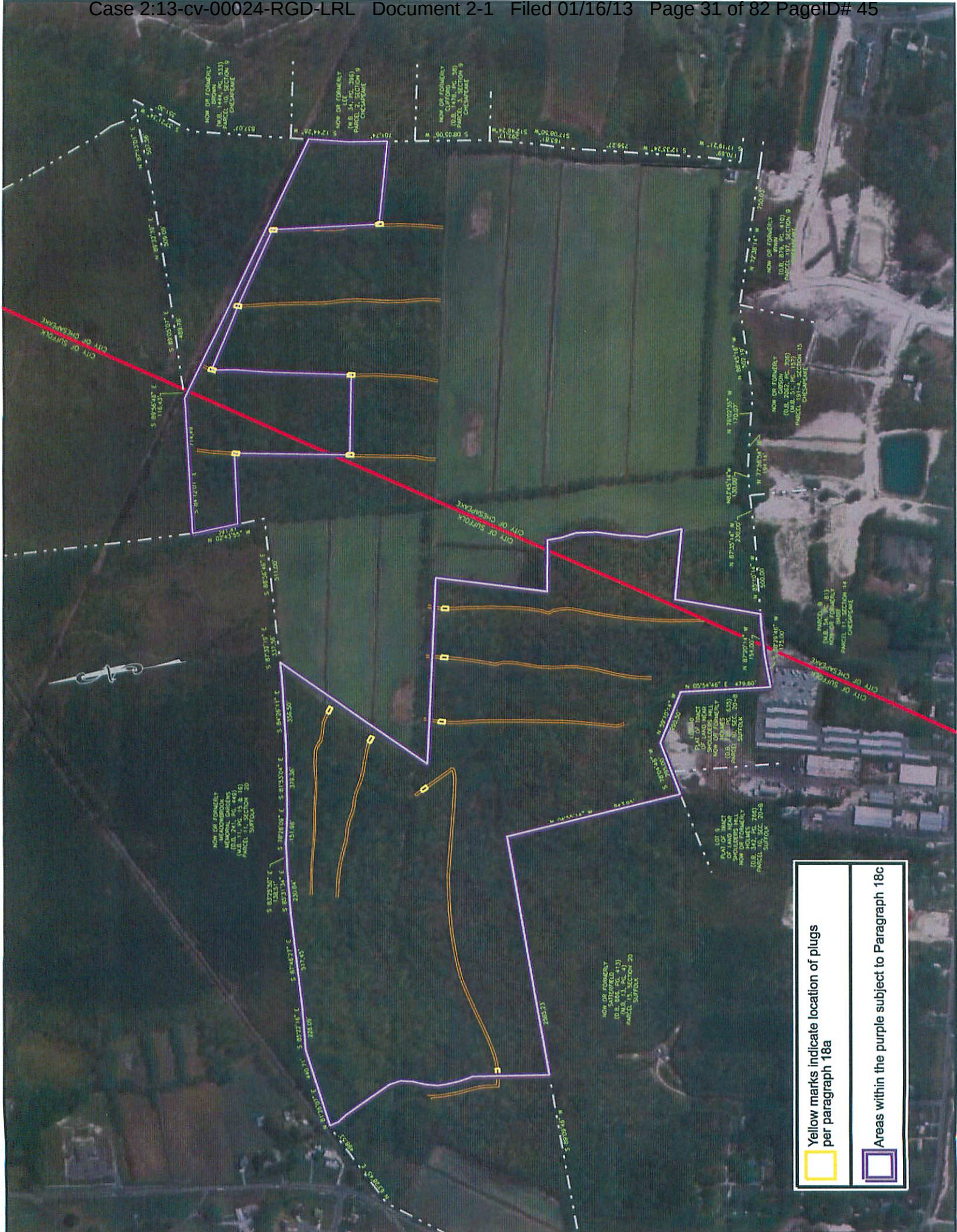
Manager of Smith Farms Enterprises, L.L.C.



**APPENDIX A**



	Yellow marks indicate location of plugs per paragraph 18a
	Areas within the purple to receive coverage under NWP 32

**APPENDIX B**



	Yellow marks indicate location of plugs per paragraph 18a
	Areas within the purple subject to Paragraph 18c

**APPENDIX C**



**Deed of Conservation Easement  
for 15 Acres on the Smith Farm Site**

## DEED OF CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT (“Deed of Conservation Easement”), made this \_\_\_\_ day of \_\_\_\_\_, 2013, by and between SMITH FARM ENTERPRISES, LLC, a Virginia limited liability company, GRANTOR, and CONSERVATION, INC., a Virginia non-profit Corporation, GRANTEE.

### WITNESSETH:

WHEREAS, the Grantor is the owner in fee simple of certain real property (described and referred to as the "Protected Property"), consisting of approximately 15 acres, situated in the Cities of Suffolk and Chesapeake, Commonwealth of Virginia, more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference; and

WHEREAS, one purpose of this Deed of Conservation Easement is to effectuate certain provisions of a judicial Consent Decree entered in the United States District Court for the Eastern District of Virginia, Norfolk Division, on \_\_\_\_\_, 2012 in the matter of United States v. Smith Farm Enterprises, LLC, Dkt. No. \_\_\_\_\_; and

WHEREAS, both the Grantor and the Grantee agree that the Protected Property contains productive and valuable wildlife habitat; serves an important function in enhancing water quality; and has substantial ecological, natural and open-space value, and the Grantor and Grantee have a common purpose of conserving the above-described values, including the Protected Property’s function in protecting water quality, important aquatic resources and habitats of Elizabeth River, a tributary of the Chesapeake Bay (collectively, “conservation values”); and

WHEREAS, the Commonwealth of Virginia has authorized the creation of Conservation Easements pursuant to the Virginia Conservation Easement Act, Virginia Code § 10.1-1009, *et seq.*, and the Grantor and Grantee wish to avail themselves of the provisions of that law; and

WHEREAS, any development of the natural and scenic condition of the Protected Property could have a deleterious effect on the purity of the air, water, and environment in and around the Protected Property, as well as the maintenance of water quality in the region and suitable habitat for wild flora and fauna of all types; and

WHEREAS, the Grantor and the Grantee both desire and intend that the conservation values of the Protected Property be preserved, enhanced and maintained by the restriction of future development on the Protected Property; and

WHEREAS, the conveyance of this Conservation Easement on the Protected Property by deed is in furtherance of and will serve clearly delineated federal, regional, state, and local conservation policies; and

WHEREAS, the Grantee is a non-profit corporation incorporated under the laws of the Commonwealth of Virginia, has had a principal office in the Commonwealth of Virginia for at least five (5) years, has been declared exempt from taxation as a charitable organization under Internal Revenue Code §501(c)(3), was created for the primary purpose of protecting, preserving and maintaining water quality, natural resources, and the environment and is an eligible and qualified "holder" of a conservation easement under the Virginia Conservation Easement Act, Virginia Code §10.1-10009 *et sec.*; and

WHEREAS, the Grantor is willing to grant a perpetual conservation easement over the Protected Property to protect, preserve or maintain the Conservation Values (as hereinafter defined) of the Protected Property, thereby restricting and limiting the use of the Protected Property, on the terms and conditions and for the purposes hereinafter set forth, and the Grantee is willing to accept such conservation easement; and

WHEREAS, Grantee has determined that the restrictions set forth herein will preserve and protect in perpetuity the conservation values of the Protected Property and will limit use of the Property to those uses consistent with, and not adversely affecting, the conservation values of the Protected Property; and

WHEREAS, on account of the fact that the Property may serve as compensation for impacts to waters of the U.S. including wetlands, the U.S. Army Corps of Engineers (Corps or USACE) and the Virginia Department of Environmental Quality (DEQ) are third-party beneficiaries under this conservation easement, except that nothing herein creates a property interest in the Federal Government with regard to this property."

WHEREAS, Grantee, by acceptance of this Easement, designates the Protected Property as property to be retained and used in perpetuity for the preservation and provision of conservation values pursuant to the Virginia Conservation Easement Act;

NOW THEREFORE, in consideration of the mutual covenants, terms, conditions, and restrictions hereinafter set forth, the foregoing recitals, the receipt of which is hereby acknowledged, the Grantor hereby grants and conveys to the Grantee as an absolute and unconditional gift forever and in perpetuity a conservation easement in perpetuity over the Protected Property and imposes conditions and restrictions which shall run with the land in perpetuity, as follows:

#### ARTICLE I. GENERAL PURPOSE AND DURATION

1. General Purpose: The purpose of this Deed of Conservation Easement is to preserve, protect and maintain permanently the conservation values of the Protected Property existing as of the date hereof as documented in the baseline documentation report entitled "Phase I Environmental Assessment and Baseline Condition Report for Approximately 25 Acres Boyd Property 2144 Jolliff Road, Chesapeake , Virginia" dated April 9, 2012 ( the "Baseline Documentation Report") (such values,

collectively, the "Conservation Values"), and to prevent the use or development of the Protected Property for any purpose or in any manner that would conflict with the maintenance of the Protected Property in its natural condition existing as of the date hereof and as documented in the Baseline Documentation Report.

2. Duration: This Deed of Conservation Easement constitutes a restriction granted in perpetuity on the use which may be made of the Protected Property and is in furtherance of and pursuant to the Virginia Conservation Easement Act, Chapter 18, Title 10.1, Sections 10.1-1009-1016 of the Code of Virginia. This Deed of Conservation Easement is an easement in gross and as such inheritable, assignable and runs with the land as an incorporeal interest in the Protected Property, enforceable by the Grantee against the Grantor and its personal representatives, heirs, successors, and assigns forever.

## ARTICLE II. PROHIBITED AND RESTRICTED ACTIVITIES

Any activity on, or use of, the Protected Property not reserved by Grantor and inconsistent with the purpose of this Deed of Conservation Easement is prohibited. The Protected Property shall be preserved in its natural condition existing as of the date hereof and restricted from any development or use that would impair or interfere with the Conservation Values of the Protected Property.

1. Structures: No commercial, agricultural or residential structures shall be allowed on, and no other building, facility or structure shall be constructed on, the Protected Property after the date of execution of this Deed of Conservation Easement, except as authorized below:
  - A. Structures such as deer stands and foot bridges existing as of the date hereof, and facilities and structures hereafter designed, constructed and utilized in connection with ecological, educational, recreational and naturalistic uses of the Protected Property which do not impair the intended purpose of this Conservation Easement, shall be permitted;
  - B. The improvement, repair, restoration, alteration, remodel and maintenance of all facilities and structures permitted in this Article shall be permitted, including but not limited to existing deer stands, provided any such structure does not alter or impair the natural movement of water and preserves the natural contour of the ground;
  - C. The replacement of all facilities and structures authorized in subparagraph 1.A. above with facilities and structures of similar size and purpose shall be permitted; and
  - D. The construction and maintenance of access to all uses permitted in this Deed of Conservation Easement and to all facilities and structures authorized in subparagraph 1.A above shall be permitted, provided such construction and

maintenance of access does not interfere with the conservation values of the Protected Property.

2. Signs and Billboards: Display of billboards, signs or other advertisements shall not be permitted on or over the Protected Property except to identify the nature of the Protected Property and to educate the public as to its value, and otherwise as may be permitted by and solely in the discretion and control of the Grantee.
3. Ecological Quality: Except for measures necessary for either or both of the management of wildlife and the control of alien invasive or noxious plant or animal species, there shall be no activities or uses of the Protected Property detrimental or adverse to the preservation and maintenance of the Conservation Values of the Protected Property.
4. Industrial and Commercial Activities: No agricultural, horticultural, mining, industrial or commercial activities shall be conducted on the Protected Property.
5. Trash, Rubbish, and Waste: There shall be no dumping of soil, trash, ashes, garbage, waste, or offensive materials on the Protected Property.
6. Excavation: There shall be no excavation or ditching on the Protected Property, other than maintenance of existing drainage ditches and canals with the written prior approval by the Third Party Beneficiaries.
7. Off Road Vehicles: Other than for permitted educational, recreational and naturalistic purposes, for emergencies (such as, by way of example and not limitation, forest fires), and for the enforcement of the purposes specified herein, operation of off road vehicles on the Protected Property shall be limited to the existing and other permitted access roads and trails located on the Protected Property.

### ARTICLE III. RIGHTS RESERVED BY THE GRANTOR

1. Reserved Rights: The Grantor reserves to itself, and to its personal representatives, heirs, successors, and assigns, all rights accruing from its ownership of the Protected Property including without limitation the rights to (a) engage in, or permit or invite others to engage in, all uses of the Protected Property that are not expressly prohibited or restricted, and are not inconsistent with the purpose of this Deed of Conservation Easement, and (b) sell, transfer, mortgage, encumber, gift or otherwise convey the Protected Property, in whole or in part, including without limitation to a long-term steward or similar long-term caretaker of the Protected Property, provided that any such sale, transfer, mortgage, encumbrance or gift conveyance is subject to the terms of this Deed of Conservation Easement. These rights shall be exercised so as to cause no damage to the Conservation Values of the Protected Property.

2. **Forest Management:** Harvesting and management of timber by Grantor shall be permitted only to the extent necessary to protect the natural environment in areas where the forest is damaged by natural forces such as fire, flood, storm, insects or infectious organisms. All such forest management activities undertaken on the Property shall be in accordance with a forest management plan prepared by a professional forester licensed in the Commonwealth of Virginia and a copy of such plan shall be provided to Grantee and must be approved in writing by Grantee and the Third Party Beneficiaries. Any such plan shall be guided by the following objectives:
  - a. Promote the recruitment and retention of a forest canopy of native tree species and species composition (i.e., forest community type) that is likely to occur on the site under natural biological and physiological processes.
  - b. Promote the recruitment and persistence of an intact, native herbaceous and woody understory that is characteristic of the given forest community type in terms of its composition and abundance.
  - c. Maintain soil productivity and prevent erosion.
  - d. Enhance and protect water quality.
  - e. Maintain biological diversity, native plant and animal species, and the ecological processes that support them.
  - f. Prevent and/or control the infestation of non-native, invasive species, pests and pathogens that threaten the health of the forest.
  - g. Promote an older, mature forest with vertical structural diversity where a continuum of age classes are present, including standing dead snags, trees greater than 150 years old occur throughout, and downed woody debris remains on the forest floor.

#### ARTICLE IV. RIGHTS OF THE GRANTEE

1. **Right of Entry:** The Grantee has the non-exclusive right to enter the Protected Property at reasonable times and under reasonable circumstances for the purpose of inspecting the Protected Property to determine compliance with the purposes and terms of this Deed of Conservation Easement.
2. **Consent:** In any case where the terms of this Deed of Conservation Easement requires the consent of the Grantee, such consent shall be requested by written notice to the Grantee, shall not be unreasonably withheld, conditioned or delayed by the Grantee and shall be deemed to have been given unless within thirty (30) days after receipt of notice the Grantee delivers notice to the Grantor of disapproval.

3. **Right to Perform Wetland, Wildlife and Other Ecological Enhancement:** The Grantee shall have the non-exclusive right to construct, monitor and maintain wetland, wildlife and other ecological restoration, creation, enhancement and preservation features within the Protected Property , provided that those features do not alter or impair the hydrology or hydrologic regime of the property or alter or impair the natural movement of water or the natural contour of the ground within the Protected Property.
4. **Hunting and other Rights:** The Grantee shall have the exclusive right to use, and the exclusive right to grant to others the right to use, the Protected Property for hunting. The Grantee shall have the non-exclusive right to use, and the non-exclusive right to grant to others the right to use, the Protected Property for educational uses, passive recreational uses (including, by way of example and not limitation, hiking, bicycling and bird watching) and naturalistic uses.
5. **Maintenance:** The Grantee shall have the non-exclusive right (but no duty) to conduct maintenance activities such as removal of diseased trees and alien invasive species, construction of fire breaks, conducting controlled burns and other activities associated with maintaining a healthy forested ecosystem.

#### ARTICLE V. ENFORCEMENT

1. To accomplish the purposes of this Deed of Conservation Easement, Grantee is allowed to prevent any activity on or use of the Protected Property that is inconsistent with the purposes of this Deed of Conservation Easement (except to the extent such activity or use is reserved unto Grantor as provided above or as otherwise expressly set forth herein) and to require the restoration of such areas or features of the Protected Property that may be damaged by such activity or use. Upon any breach of the terms of this Deed of Conservation Easement that comes to the attention of the Grantee, the Grantee shall notify the Grantor in writing of such breach. The Grantor shall have thirty (30) days after receipt of such notice to correct the conditions constituting such breach. If the breach remains uncured after thirty (30) days, the Grantee may enforce this Deed of Conservation Easement by appropriate legal proceedings including damages, injunctive and other relief. Notwithstanding the foregoing, the Grantee reserves the immediate right, without notice, to obtain a temporary restraining order, injunctive or other appropriate relief if the breach of the terms of this Deed of Conservation Easement would irreversibly or materially impair the benefits to be derived from this Deed of Conservation Easement. The Grantor and Grantee acknowledge that under such circumstances damage to the Grantee would be irreparable and remedies at law will be inadequate. The rights and remedies of the Grantee provided hereunder shall be in addition to, and not in lieu of, all other

rights and remedies available to Grantee in connection with this Deed of Conservation Easement. The costs of a breach, correction or restoration, including the Grantee's expenses, court costs, and attorney's fees, shall be paid by Grantor.

2. By virtue of the Grantee's acquisition of rights under this Conservation Easement, it shall be entitled, at its option, to standing before appropriate courts of law to pursue remedies or other matters which are necessary or incidental to protection of the conservation values of the Protected Property.
3. No failure on the part of the Grantee to enforce any covenant or provision hereof shall discharge or invalidate such covenant or any other covenant, condition, or provision hereof or affect the right to Grantee to enforce the same in the event of a subsequent breach or default.
4. Nothing contained in this Deed of Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury or change in the Protected Property resulting from causes beyond the Grantor's control, including, without limitation, fire, flood, storm, war, acts of God or third parties, except Grantor's lessees or invitees; or from any prudent action taken in good faith by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Protected Property resulting from such causes.

#### ARTICLE VI. TAXES

1. Taxes: The Grantor agrees to pay any and all real property taxes and assessments levied by an authorized authority on the Protected Property.

#### ARTICLE VII. GENERAL TERMS

1. Assignment, Transfer, and Reversion: Upon prior written notice to Grantor, the Grantee may assign its rights under this Deed of Conservation Easement to any conservation department of the United States Government or the Commonwealth of Virginia authorized to receive such rights, or to any non-profit, tax exempt 501(c)(3) organization or any qualified organization within the meaning of §170(h)(3) of the Internal Revenue Code or the comparable provision of any subsequent revision of the Code, or any eligible holder of a conservation easement under the Virginia Conservation Easement Act, Virginia Code §10.1-10009 *et sec.*, provided that the organization is engaged in promoting conservation of natural areas in such manner as to achieve the purposes and conditions herein and is an eligible "holder" of a conservation easement under the Virginia Conservation Easement Act. No assignment may be made unless the Grantee, as a condition of such assignment, requires the assignee to carry out the conservation purposes of this Deed of Conservation Easement and the Grantee transfers and conveys to such assignee the balance of any easement stewardship funds allocated to this Deed of Conservation Easement. If the Grantee acquires fee title to the land subject to this Deed of



Conservation Easement, then the rights of the Grantee in this Deed of Conservation Easement shall automatically vest in the Virginia Outdoors Foundation, an agency of the Commonwealth of Virginia. If any such assignee shall cease to exist or abandon this easement or the rights and duties of enforcement herein set forth, or if proceedings are instituted for condemnation of this Deed of Conservation Easement, the easement and rights of enforcement shall revert to the Grantee. If the Grantee shall be dissolved and if the terms of the dissolution fail to provide a successor, then the Court shall appoint a successor using the doctrine of *cy pres*.

The Grantor agrees to send in writing to the Grantee the names and addresses of any party to whom the Protected Property is to be transferred at or prior to the time said transfer is executed. The Grantor's rights and obligations under this Deed of Conservation Easement terminate upon any sale, transfer, gift or other conveyance (each, a "Transfer") of the Grantor's interest in any portion of the Protected Property with respect to and to the extent of such portion so sold, transferred, gifted or conveyed. The liability of the Grantor making such Transfer for acts or omissions occurring prior to such Transfer will survive such Transfer, but no Grantor making such Transfer shall be liable for any act or omission occurring from or after such Transfer.

2. Purpose of Transfer: The Grantee agrees to hold this Deed of Conservation Easement exclusively for conservation purposes, as defined in Internal Revenue Code §170(h)(4)(A). Nothing contained in this Deed of Conservation Easement is intended or shall be considered to grant any interest in the Protected Property to the general public or to otherwise permit the use of the Protected Property by the general public.
3. Extinguishment: This Deed of Conservation Easement shall not be extinguished except by order of a court of competent jurisdiction. Upon any extinguishment of this Deed of Conservation Easement, in whole or in part, or any other loss or impairment of all or any portion of the Conservation Values, including in all events but without limitation through the exercise of eminent domain or sale in lieu thereof, Grantor shall have the duty, either (i) to grant, convey or enter into any new, replacement or other conservation or similar easement, or (ii) to provide, acquire, obtain, protect, preserve or conserve any alternative, replacement or other ecological, natural, open-space or conservation values or functions.
4. Eminent Domain: Grantee shall be the sole party entitled to any and all amounts awarded, compensated or received in connection with any taking through the exercise of eminent domain or sale in lieu thereof of all or any portion of the Protected Property, including without limitation for costs and expenses in connection therewith.
5. Inclusion of Terms in Subsequent Deeds: The Grantor shall notify the U.S. Army Corps of Engineers, Norfolk District and the United States Environmental Protection Agency Region III thirty (30) days prior to any transfer of interest in the Protected Property. The Grantor agrees that the terms, conditions, restrictions and purposes of this Deed of Conservation Easement will be inserted by Grantor in any subsequent

deed or other legal instrument by which the Grantor divests itself of any interest in the Protected Property. This agreement will be binding on the Grantor (and their successors and assigns) even if the Grantor fails to insert the terms, conditions, restrictions and purposes of this Deed of Conservation Easement in any subsequent deed or other legal instrument.

6. **Construction and Severability:** It is the intention of the parties hereto that this Deed of Conservation Easement, which is by nature and character negative, in that the Grantor has restricted and limited its right to use the Protected Property rather than granted any affirmative rights to the Grantee except as otherwise set forth herein, be construed at all times and by all parties to effectuate its terms, conditions and purposes. If any provision of this Deed of Conservation Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of the Deed of Conservation Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.
7. **Other Applicable Laws:** The provisions of this Deed of Conservation Easement shall be construed consistent with Virginia law, and do not replace, abrogate, or otherwise set aside any local, state, or federal laws, requirements, or restrictions applicable to the Protected Property.
8. **Effects of Mortgages, etc.:** The Grantor and the Grantee agree that all mortgages and deeds of trust granted or entered into after the date hereof affecting the Protected Property will be subordinate to the rights of the Grantee under this Deed of Conservation Easement.
9. **Notifications:** Any notices pursuant to any provision of this Deed of Conservation Easement shall be sent by certified mail, return receipt requested, to the following addresses:

Grantor

Smith Farm Enterprises, LLC  
C/O James M. Boyd, Esq.  
Boyd & Boyd, P.C.  
Bank of America Center  
One Commercial Place  
Norfolk, VA 23510  
Facsimile: 757-626-0393

Grantee

Conservation, Inc.  
4101 Granby Street, Suite 404  
Norfolk, VA 23510  
Attn: Thomas Stokes  
Facsimile: 757-623-2785

**Third-Party Beneficiaries:**

U.S. Army Corps of Engineers, Norfolk District  
Chief, Regulatory Branch  
U.S. Army Corps of Engineers  
Norfolk District  
803 Front Street  
Norfolk, Virginia 23510

Virginia Department of Environmental Quality  
629 East Main Street  
P.O. Box 1105  
Richmond, VA 23218

**Additional Notice Recipient:**

U.S. Environmental Protection Agency Region III  
Associate Director, Office of Environmental Programs  
Environmental Assessment and Innovation Division  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103

10. **Entire Agreement:** This instrument sets forth the entire agreement of the parties with respect to this Deed of Conservation Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to this Deed of Conservation Easement.
11. **Binding Nature of Terms and Conditions:** The covenants agreed to and the terms, conditions, restrictions, privileges, and purposes imposed and created by this Deed of Conservation Easement shall be binding on not only the Grantor and the Grantee, but also their personal representatives, executors, heirs and successors to their interests and assigns.
12. **Recording:** The Grantee shall record this instrument in a timely fashion in the official real estate records of the Circuit Court of the City of Chesapeake, Virginia, and may re-record it at any time as may be required to preserve its rights under this Deed of Conservation Easement.
13. **Modification:** This Deed of Conservation Easement may be changed, modified or amended in whole or in part only by and through a written and recorded instrument or agreement executed by each of Grantor and Grantee. The USACE shall be provided 60 day advance written notice of any action to modify or extinguish this document. . Before any change, modification or amendment may proceed, the USACE and DEQ must consent to said change, modification or amendment.. This document is intended

to survive foreclosure, bankruptcy, condemnation or judgments affecting the property.

- 14. Counterpart Execution: This Deed of Conservation Easement may be executed simultaneously in one or more counterparts each of which shall be deemed an original agreement, but all of which together shall constitute one and the same instrument.
- 15. Compliance Inspections and Enforcement: The USACE, EPA, DEQ, and their authorized agents, shall have the right to enter and go upon the Property to inspect the Property and take actions necessary to verify compliance with these restrictive covenants. This right of entry is in addition to and does not limit any right of entry otherwise granted by Federal or State law. The restrictive covenants herein shall be enforceable by any proceeding at law or in equity or administrative proceeding by the USACE or DEQ. Failure by any agency (or owner) to enforce any covenant or restriction contained herein shall in no event be deemed a waiver of the right to do so thereafter.
- 16. Litigation in court: In any state court action, the USACE reserves the right to be represented by the U.S. Attorney or the U.S. Department of Justice and/or to remove a legal action affecting jurisdictional waters of the U.S. to the United States Federal District Court in the district where the land lies.

*[Signatures are on next page.]*

In WITNESS THEREOF, the Grantor and the Grantee have hereunto set their hands and seals the day and year above written.

GRANTOR  
Smith Farm Enterprises, LLC

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Its: \_\_\_\_\_  
 Date: \_\_\_\_\_

GRANTEE

Conservation, Inc.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

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

STATE OF VIRGINIA

COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2012 by James M. Boyd, as manager of Smith Farm Enterprises, LLC, a Virginia limited liability company, on behalf of said limited liability companies and said limited partnership.

My commission expires:

\_\_\_\_\_  
Notary Public

STATE OF VIRGINIA

CITY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2012 by Thomas L. Stokes as President of Conservation, Inc., a Virginia non-profit Corporation, on behalf of said corporation.

My commission expires:

\_\_\_\_\_  
Notary Public

**EXHIBIT A**

Legal Description of the Protected Property

**Deed of Conservation Easement  
for the Kirk Site**

Prepared by and  
after recording return to:  
J. Randolph Stokes, Esq.  
VSB # \_\_\_\_\_  
Stokes Law Group, PLC  
440 Granby Street  
Norfolk, Virginia 23510

Tax Parcel #20\*56  
Account #301339700

### DEED OF CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT ("Deed of Conservation Easement"), made this \_\_\_ day of \_\_\_\_\_, 201\_\_, by and between MMJ PROPERTIES, LLC, a Virginia limited liability company, GRANTOR, and CONSERVATION, INC., a Virginia non-profit corporation, GRANTEE.

#### WITNESSETH:

WHEREAS, the Grantor is the owner in fee simple of certain real property (described and referred to as the "Protected Property"), consisting of approximately 235 acres, situated in the Cities of Suffolk and Chesapeake, Commonwealth of Virginia, more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference; and

WHEREAS, both the Grantor and the Grantee agree that the Protected Property contains productive and valuable wildlife habitat; serves an important function in enhancing water quality; and has substantial ecological, natural and open-space value, and the Grantor and Grantee have a common purpose of conserving the above-described values, including the Protected Property's function in protecting water quality, important aquatic resources and habitats of Elizabeth River, a tributary of the Chesapeake Bay (all of which are among its Conservation Values as defined below); and

WHEREAS, the Commonwealth of Virginia has authorized the creation of Conservation Easements pursuant to the Virginia Conservation Easement Act, Virginia Code § 10.1-1009, *et seq.*, and the Grantor and the Grantee wish to avail themselves of the provisions of that law; and

WHEREAS, any development of the natural and scenic condition of the Protected Property could have a deleterious effect on the purity of the air, water, and environment in and around the Protected Property, as well as the maintenance of water quality in the region and suitable habitat for wild flora and fauna of all types; and

WHEREAS, the Grantor and the Grantee both desire and intend that the Conservation Values (defined below) of the Protected Property be preserved, enhanced and maintained by the restriction of future development on the Protected Property; and

WHEREAS, the conveyance of a conservation easement on the Protected Property by deed is in furtherance of and will serve clearly delineated federal, regional, state, and local conservation policies; and

WHEREAS, the Grantee is a non-profit corporation incorporated under the laws of the Commonwealth of Virginia, has had a principal office in the Commonwealth of Virginia for at least five (5) years, has been declared exempt from taxation as a charitable organization under Internal Revenue Code §501(c)(3), was created for the primary purpose of protecting, preserving and maintaining water quality, natural resources, and the environment and is an eligible and qualified "holder" of a conservation easement under the Virginia Conservation Easement Act, Virginia Code §10.1-10009 *et sec.*; and

WHEREAS, the Grantor is willing to grant a perpetual conservation easement over the Protected Property (the "Conservation Easement") to protect, preserve or maintain the Conservation Values (defined below) of the Protected Property, thereby restricting and limiting the use of the Protected Property, on the terms and conditions and for the purposes hereinafter set forth, and the Grantee is willing to accept such conservation easement; and

WHEREAS, the Grantor and the Grantee intend that the restrictions set forth herein will preserve and protect in perpetuity the Conservation Values (defined below) of the Protected Property and will limit use of the Protected Property to those uses consistent with, and not adversely affecting, the Conservation Values of the Protected Property; and

WHEREAS, the Grantee, by acceptance of this Deed of Conservation Easement, designates the Protected Property as property to be retained and used in perpetuity for the preservation and provision of Conservation Values (defined below) pursuant to the Virginia Conservation Easement Act;

NOW THEREFORE, in consideration of the mutual covenants, terms, conditions, and restrictions hereinafter set forth, the foregoing recitals, the receipt of which is hereby acknowledged, the Grantor hereby grants and conveys to the Grantee as an absolute and unconditional transfer forever and in perpetuity the Conservation Easement over the Protected Property and imposes conditions and restrictions which shall run with the land in perpetuity, as follows:

#### ARTICLE I. GENERAL PURPOSE AND DURATION

1. General Purpose: The purpose of this Deed of Conservation Easement is to preserve, protect and maintain permanently the conservation values of the Protected Property



existing as of the date hereof as documented in the baseline documentation report entitled “\_\_\_\_\_” dated \_\_\_\_\_, 2012 ( the “Baseline Documentation Report”) (such values, collectively, the “Conservation Values”), and to prevent the use or development of the Protected Property for any purpose or in any manner that would conflict with the maintenance of the Protected Property in its natural condition existing as of the date hereof and as documented in the Baseline Documentation Report. The Conservation Values include, but are not limited to, the Protected Property’s vegetation, topography, and productive and valuable wildlife habitat; the Protected Property’s important functions in protecting and enhancing water quality, aquatic resources and habitats of tributaries of the Chesapeake Bay; and the Protected Property’s substantial ecological, natural and open-space value.

2. Duration: This Deed of Conservation Easement constitutes a restriction granted in perpetuity on the use which may be made of the Protected Property and is in furtherance of and pursuant to the Virginia Conservation Easement Act, Chapter 18, Title 10.1, Sections 10.1-1009-1016 of the Code of Virginia. This Deed of Conservation Easement is an easement in gross and as such inheritable, assignable and runs with the land as an incorporeal interest in the Protected Property, enforceable by the Grantee against the Grantor and its personal representatives, heirs, successors, and assigns forever, subject to Article VII, Section 1 below.

## ARTICLE II. PROHIBITED AND RESTRICTED ACTIVITIES

Any activity on, or use of, the Protected Property not reserved by the Grantor and inconsistent with the purpose of this Deed of Conservation Easement is prohibited. The Protected Property shall be preserved in its natural condition existing as of the date hereof and restricted from any development or use that would impair or interfere with the Conservation Values of the Protected Property.

1. Structures: No building, facility or structure of any nature shall be allowed or constructed on the Protected Property after the date of execution of this Deed of Conservation Easement, except as authorized below:
  - a. Structures such as deer stands and foot bridges existing as of the date hereof, and facilities and structures hereafter designed, constructed and utilized in connection with ecological, educational, recreational and naturalistic uses of the Protected Property which do not impair the intended purpose of this Deed of Conservation Easement, shall be permitted;
  - b. The improvement, repair, restoration, alteration, remodel and maintenance of all facilities and structures permitted in this Article shall be permitted, including but not limited to existing deer stands;

- c. The replacement of all facilities and structures authorized in subparagraph 1.A. above with facilities and structures of similar size and purpose shall be permitted; and
  - d. The construction and maintenance of access to all uses permitted in this Deed of Conservation Easement and to all facilities and structures authorized in subparagraph 1.A above shall be permitted, provided such construction and maintenance of access does not interfere with the Conservation Values of the Protected Property.
2. Signs and Billboards: Display of billboards, signs or other advertisements shall not be permitted on or over the Protected Property except to identify the nature of the Protected Property and to educate the public as to its value, and otherwise as may be permitted by and solely in the discretion and control of the Grantee.
3. Ecological Quality: Except for measures necessary for either or both of the management of wildlife and the control of alien invasive or noxious plant or animal species, there shall be no timber harvesting, no destruction of existing vegetation, and no activities which alter the topography on the Protected Property, and there shall be no other activities or uses of the Protected Property detrimental or adverse to the preservation and maintenance of the Conservation Values of the Protected Property.
4. Agricultural, Residential, Industrial and Commercial Activities: No agricultural, horticultural, residential, mining, industrial or commercial activities shall be conducted on the Protected Property.
5. Trash, Rubbish, and Waste: There shall be no dumping of soil, trash, ashes, garbage, waste, or offensive materials on the Protected Property.
6. There shall be no discharge of dredge or placement of fill material on the Protected Property, including diking, damming, filling, grading, plowing, flooding/ponding, draining, drilling, or adding topsoil, sand, or other materials (except as may be necessary on a case-by-case basis with prior express written approval by the U.S. Army Corps of Engineers ("USACE") and the Virginia Department of Environmental Quality ("DEQ")).
7. Excavation: There shall be no excavation or ditching on the Protected Property other than maintenance of existing drainage ditches and canals.
8. Off Road Vehicles: Other than for permitted educational, recreational and naturalistic purposes, for emergencies (such as, by way of example and not limitation, forest fires), and for the enforcement of the purposes specified herein, operation of off road vehicles on the Protected Property shall be limited to the existing and other permitted access roads and trails located on the Protected Property.

**ARTICLE III. RIGHTS RESERVED BY THE GRANTOR**

1. **Reserved Rights:** The Grantor reserves to itself, and to its personal representatives, heirs, successors, and assigns, all rights accruing from its ownership of the Protected Property including without limitation the rights to (a) engage in, or permit or invite others to engage in, hunting and passive recreation on the Protected Property including, without limitation, hiking, birding, and eco-tours, but not including any activities that are expressly prohibited or restricted within this Deed of Conservation Easement, and (b) sell, transfer, mortgage, encumber, gift or otherwise convey the Protected Property, in whole or in part, including without limitation to a long-term steward or similar long-term caretaker of the Protected Property, provided that any such sale, transfer, mortgage, encumbrance or gift conveyance is subject to the terms of this Deed of Conservation Easement. These rights shall be exercised so as to cause no damage to the Conservation Values of the Protected Property.
  
2. **Forest Management:** Harvesting and management of timber by the Grantor shall be permitted only to the extent necessary to protect the natural environment in areas where the forest is damaged by natural forces such as fire, flood, storm, insects or infectious organisms. All such forest management activities undertaken on the Protected Property shall be in accordance with a forest management plan prepared by a professional forester licensed in the Commonwealth of Virginia and a copy of such plan shall be provided to the Grantee and must be approved in writing by the Grantee and the USACE and the DEQ. Any such plan shall be guided by the following objectives:
  - a. Promote the recruitment and retention of a forest canopy of native tree species and species composition (i.e., forest community type) that is likely to occur on the site under natural biological and physiological processes.
  - b. Promote the recruitment and persistence of an intact, native herbaceous and woody understory that is characteristic of the given forest community type in terms of its composition and abundance.
  - c. Maintain soil productivity and prevent erosion.
  - d. Enhance and protect water quality.
  - e. Maintain biological diversity, native plant and animal species, and the ecological processes that support them.
  - f. Prevent and/or control the infestation of non-native, invasive species, pests and pathogens that threaten the health of the forest.
  - g. Promote an older, mature forest with vertical structural diversity where a continuum of age classes are present, including standing dead snags, trees greater than 150 years old occur throughout, and downed woody debris remains on the forest floor.

#### ARTICLE IV. RIGHTS OF THE GRANTEE

1. **Right of Entry:** The Grantee has the non-exclusive right to enter the Protected Property at reasonable times and under reasonable circumstances for the purpose of inspecting the Protected Property to determine compliance with the purposes and terms of this Deed of Conservation Easement.
2. **Consent:** In any case where the terms of this Deed of Conservation Easement requires the consent of the Grantee, such consent shall be requested by written notice to the Grantee, shall not be unreasonably withheld, conditioned or delayed by the Grantee and shall be deemed to have been given unless within thirty (30) days after receipt of notice the Grantee delivers notice to the Grantor of disapproval.
3. **Right to Perform Wetland, Wildlife and Other Ecological Enhancement:** The Grantee shall have the non-exclusive right (but no duty) to construct, monitor and maintain wetland, wildlife and other ecological restoration, creation, enhancement and preservation within the Protected Property.
4. **Maintenance:** The Grantee shall have the non-exclusive right (but no duty) to conduct maintenance activities such as removal of diseased trees and alien invasive species, construction of fire breaks, conducting controlled burns and other activities associated with maintaining a healthy forested ecosystem.
5. **Damages:** In the exercise of the Grantee's rights under subparagraphs 1, 3 and 4 above and with respect to the Grantee's use of the Access Easement (as defined in Exhibit A), such activities shall not (i) in any material way harm, adversely affect, interfere with or damage the Protected Property or the Grantor's adjacent property (the "Grantor's Adjacent Property"), except as expressly permitted or imposed by this Deed of Conservation Easement and subject to the express limitations and restrictions set forth in Article II above; (ii) cause the Protected Property or the Grantor's Adjacent Property to fail to comply with any Applicable Laws (defined below); or (iii) adversely affect, restrict or interfere in any material way with the use of the Grantor's Adjacent Property or the exercise of the Grantor's rights set forth in Article III above (collectively, "Damages"). The Grantee shall indemnify and hold harmless the Grantor from and against all Damages resulting from the exercise of the rights set forth in this Article IV by the Grantee, its employees, contractors, consultants, representatives and/or agents, including the Grantor's expenses, court costs, and reasonable attorney's fees incurred as a result of any such Damages.

#### ARTICLE V. ENFORCEMENT

1. To accomplish the purposes of this Deed of Conservation Easement, the Grantee is allowed to prevent any activity on or use of the Protected Property that is inconsistent with the purposes of this Deed of Conservation Easement (except to the extent such

activity or use is reserved unto the Grantor as provided above or as otherwise expressly set forth herein) and to require the restoration of such areas or features of the Protected Property that may be damaged by such activity or use. Upon any breach of the terms of this Deed of Conservation Easement that comes to the attention of the Grantee, the Grantee shall notify the Grantor in writing of such breach. The Grantor shall have thirty (30) days after receipt of such notice to correct the conditions constituting such breach. If the breach remains uncured after thirty (30) days, the Grantee may enforce this Deed of Conservation Easement by appropriate legal proceedings including damages, injunctive and other relief. Notwithstanding the foregoing, the Grantee reserves the immediate right, without notice, to obtain a temporary restraining order, injunctive or other appropriate relief if the breach of the terms of this Deed of Conservation Easement would irreversibly or materially impair the benefits to be derived from this Deed of Conservation Easement. The Grantor and the Grantee acknowledge that under such circumstances damage to the Grantee would be irreparable and remedies at law will be inadequate. The rights and remedies of the Grantee provided hereunder shall be in addition to, and not in lieu of, all other rights and remedies available to the Grantee in connection with this Deed of Conservation Easement. The costs of a breach by the Grantor and any correction or restoration required as a result of such breach, including the Grantee's expenses, court costs, and reasonable attorney's fees, shall be paid by the Grantor.

2. By virtue of the Grantee's acquisition of rights under this Deed of Conservation Easement, it shall be entitled, at its option, to standing before appropriate courts of law to pursue remedies or other matters which are necessary or incidental to protection of the Conservation Values of the Protected Property.
3. No failure on the part of the Grantee to enforce any covenant or provision hereof shall discharge or invalidate such covenant or any other covenant, condition, or provision hereof or affect the right to the Grantee to enforce the same in the event of a subsequent breach or default.
4. Nothing contained in this Deed of Conservation Easement shall be construed to entitle the Grantee to bring any action against the Grantor for any injury or change in the Protected Property resulting from causes beyond the Grantor's control, including, without limitation, fire, flood, storm, war, acts of God or third parties, except the Grantor's lessees or invitees; or from any prudent action taken in good faith by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Protected Property resulting from such causes.

#### ARTICLE VI. TAXES

1. Taxes: The Grantor agrees to pay any and all real property taxes and assessments levied by an authorized authority on the Protected Property.

ARTICLE VII. GENERAL TERMS

1. Assignment, Transfer, and Reversion: Upon prior written notice to the Grantor, the Grantee may assign its rights under this Deed of Conservation Easement to any conservation department of the United States Government or the Commonwealth of Virginia authorized to receive such rights, or to any non-profit, tax exempt 501(c)(3) organization or any qualified organization within the meaning of §170(h)(3) of the Internal Revenue Code or the comparable provision of any subsequent revision of the Code, or any eligible holder of a conservation easement under the Virginia Conservation Easement Act, Virginia Code §10.1-10009 *et sec.*, provided that the organization is engaged in promoting conservation of natural areas in such manner as to achieve the purposes and conditions herein and is an eligible "holder" of a conservation easement under the Virginia Conservation Easement Act. No assignment may be made unless the Grantee, as a condition of such assignment, requires the assignee to carry out the conservation purposes of this Deed of Conservation Easement and the Grantee transfers and conveys to such assignee the balance of any easement stewardship funds allocated to this Deed of Conservation Easement. If the Grantee acquires fee title to the land subject to this Deed of Conservation Easement, then the rights of the Grantee in this Deed of Conservation Easement shall automatically vest in the Virginia Outdoors Foundation, an agency of the Commonwealth of Virginia. If any such assignee shall cease to exist or abandon the Conservation Easement or the rights and duties of enforcement herein set forth, or if proceedings are instituted for condemnation of this Deed of Conservation Easement, the easement and rights of enforcement shall revert to the Grantee. If the Grantee shall be dissolved and if the terms of the dissolution fail to provide a successor, then the Court shall appoint a successor using the doctrine of *cy pres*.

The Grantor agrees to send in writing to the Grantee the names and addresses of any party to whom the Protected Property is to be transferred at or prior to the time said transfer is executed. The Grantor's obligations under this Deed of Conservation Easement terminate upon any sale, transfer, gift or other conveyance (each, a "Transfer") of the Grantor's interest in any portion of the Protected Property with respect to and to the extent of such portion so sold, transferred, gifted or conveyed. The liability of the Grantor making such Transfer for acts or omissions occurring prior to such Transfer will survive such Transfer, but no Grantor making such Transfer shall be liable for any act or omission occurring from or after such Transfer.

2. Purpose of Transfer: The Grantee agrees to hold this Deed of Conservation Easement exclusively for conservation purposes, as defined in Internal Revenue Code §170(h)(4)(A). Nothing contained in this Deed of Conservation Easement is intended or shall be considered to grant any interest in the Protected Property to the general public or to otherwise permit the use of the Protected Property by the general public.
3. Extinguishment: This Deed of Conservation Easement shall not be extinguished except by order of a court of competent jurisdiction. Upon any extinguishment of this

Deed of Conservation Easement, in whole or in part, or any other loss or impairment of all or any portion of the Conservation Values, including in all events but without limitation through the exercise of eminent domain or sale in lieu thereof, the Grantor shall have the duty, either (i) to grant, convey or enter into any new, replacement or other conservation or similar easement, or (ii) to provide, acquire, obtain, protect, preserve or conserve any alternative, replacement or other ecological, natural, open-space or conservation values or functions.

4. **Eminent Domain:** The Grantee shall be the sole party entitled to any and all amounts awarded, compensated or received in connection with any taking through the exercise of eminent domain or sale in lieu thereof (“Condemnation Award”) of all or any portion of the Conservation Easement and all improvements made by the Grantee and located on the Protected Property, and the Grantor shall be entitled to any and all Condemnation Award for the residual value of the Protected Property as well as the entire Condemnation Award for the value of the Grantor’s Adjacent Property, with each party responsible for its own costs and expenses incurred in connection therewith.
5. **Inclusion of Terms in Subsequent Deeds:** The Grantor shall notify the Grantee, the USACE, Norfolk District, and the United States Environmental Protection Agency Region III (“EPA”) at least sixty (60) days prior to any transfer of interest in the Protected Property. The Grantor agrees that the terms, conditions, restrictions and purposes of this Deed of Conservation Easement will be inserted by the Grantor in any subsequent deed or other legal instrument by which the Grantor divests itself of any interest in the Protected Property by reference to this Deed of Conservation Easement. This agreement will be binding on the Grantor (and its successors and assigns) even if the Grantor fails to insert the terms, conditions, restrictions and purposes of this Deed of Conservation Easement in any subsequent deed or other legal instrument.
6. **Construction and Severability:** It is the intention of the parties hereto that this Deed of Conservation Easement, which is by nature and character negative, in that the Grantor has restricted and limited its right to use the Protected Property rather than granted any affirmative rights to the Grantee except as otherwise set forth herein, be construed at all times and by all parties to effectuate its terms, conditions and purposes. If any provision of this Deed of Conservation Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of the Deed of Conservation Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.
7. **Other Applicable Laws:** The provisions of this Deed of Conservation Easement shall be construed consistent with Virginia law (including, without limitation, the Virginia Conservation Easement Act), and do not replace, abrogate, or otherwise set aside any local, state, or federal laws, requirements, or restrictions applicable to the Protected Property or the Grantor’s adjacent property (collectively, “Applicable Laws”).

8. Effects of Mortgages, etc.: The Grantor and the Grantee agree that all mortgages and deeds of trust granted or entered into after the date hereof affecting the Protected Property will be subordinate to the rights of the Grantee under this Deed of Conservation Easement.
9. Notifications: Any notices pursuant to any provision of this Deed of Conservation Easement shall be sent by certified mail, return receipt requested, to the following addresses:

Grantor: MMJ Properties, LLC  
c/o Michael R. Kirk  
200 East Blackman Street  
Nags Head, North Carolina 27959

and

c/o Marie A. K. Clunan  
804 Bay Colony Drive  
Virginia Beach, Virginia 23451

Third Party Beneficiaries:

U.S. Army Corps of Engineers, Norfolk District  
Chief, Regulatory Branch  
U.S. Army Corps of Engineers  
Norfolk District  
803 Front Street  
Norfolk, Virginia 23510

Virginia Department of Environmental Quality  
629 East Main Street  
P.O. Box 1105  
Richmond, VA 23218

Additional Notice Recipient:

U.S. Environmental Protection Agency Region III  
Associate Director, Office of Environmental Programs  
Environmental Assessment and Innovation Division  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103

10. Entire Agreement: This instrument sets forth the entire agreement of the parties with respect to this Deed of Conservation Easement and supersedes all prior discussions,



negotiations, understandings, or agreements relating to this Deed of Conservation Easement.

11. **Binding Nature of Terms and Conditions:** The covenants agreed to and the terms, conditions, restrictions, privileges, and purposes imposed and created by this Deed of Conservation Easement shall be binding on not only the Grantor and the Grantee, but also their personal representatives, executors, heirs and successors to their interests and assigns.
12. **Recording:** The Grantee shall record this instrument in a timely fashion in the official real estate records of the Circuit Court of the City of Suffolk, Virginia, and may re-record it at any time as may be required to preserve its rights under this Deed of Conservation Easement.
13. **Modification:** This Deed of Conservation Easement may be changed, modified or amended in whole or in part only by and through a written and recorded instrument or agreement executed by each of the Grantor and the Grantee. The USACE shall be provided at least sixty (60) days advance written notice of any action to modify or extinguish this Deed of Conservation Easement. The USACE and DEQ must consent to said modification or extinguishment. This Deed of Conservation Easement is intended to survive foreclosure, bankruptcy, condemnation or judgments affecting the Protected Property.
14. **Third Party Beneficiaries:** On account of the fact that the Conservation Easement may serve as compensation for impacts to waters of the U.S. including wetlands, the USACE and the DEQ are third-party beneficiaries under this conservation easement, except that nothing herein creates a property interest in the Federal Government or the State Government, or any agency of either, with regard to the Conservation Easement or the Protected Property. Except as specifically set forth in the preceding sentence, no other person, party, entity or agency shall have any rights, interest or claim hereunder or be entitled to any benefit under or on account of this Deed of Conservation Easement as a third party beneficiary or otherwise.
15. **Counterpart Execution:** This Deed of Conservation Easement may be executed simultaneously in one or more counterparts each of which shall be deemed an original instrument, but all of which together shall constitute one and the same instrument.
16. **Compliance Inspections and Enforcement:** The USACE, EPA, DEQ, and their authorized agents, shall have the right to enter and go upon the Protected Property to inspect the Protected Property and take actions necessary to verify compliance with these restrictive covenants. This right of entry is in addition to and does not limit any right of entry otherwise granted by Federal or State law. The restrictive covenants herein shall be enforceable by any proceeding at law or in equity or administrative proceeding by the USACE or DEQ. Failure by Grantor, Grantee, any agency or any subsequent owner of the Protected Property to enforce any provision, covenant or

restriction contained herein shall in no event be deemed a waiver of the right to do so thereafter.

17. **Litigation in Court:** In any state court action, the USACE reserves the right to be represented by the U.S. Attorney or the U.S. Department of Justice and/or to remove a legal action affecting jurisdictional waters of the U.S. to the United States Federal District Court in the district where the land lies.

[SIGNATURE PAGES BEGIN ON NEXT PAGE]

IN WITNESS THEREOF, the Grantor and the Grantee have caused this Deed of Conservation Easement to be executed by their duly authorized representatives.

GRANTOR:

MMJ PROPERTIES, LLC,  
a Virginia limited liability company

By: \_\_\_\_\_ (SEAL)

Name: Michael R. Kirk

Title: Member

COMMONWEALTH OF VIRGINIA

CITY/COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2012, by Michael R. Kirk, as a Member of MMJ Properties, a Virginia limited liability company, on behalf of said limited liability company.

\_\_\_\_\_  
Notary Public

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

Notary Registration No. \_\_\_\_\_

GRANTOR:

MMJ PROPERTIES, LLC,  
a Virginia limited liability company

By: \_\_\_\_\_(SEAL)

Name: Marie Kirk Clunan

Title: Member

COMMONWEALTH OF VIRGINIA

CITY/COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2012, by Marie Kirk Clunan, as a Member of MMJ Properties, a Virginia limited liability company, on behalf of said limited liability company.

\_\_\_\_\_  
Notary Public

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

Notary Registration No. \_\_\_\_\_

GRANTOR:

MMJ PROPERTIES, LLC,  
a Virginia limited liability company

By: \_\_\_\_\_ (SEAL)

Name: Jeffrey T. Kirk

Title: Member

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

CITY/COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2012, by Jeffrey T. Kirk, as a Member of MMJ Properties, a Virginia limited liability company, on behalf of said limited liability company.

\_\_\_\_\_  
Notary Public

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

Notary Registration No. \_\_\_\_\_

GRANTEE:

CONSERVATION, INC.,  
a Virginia non-profit corporation

By: \_\_\_\_\_(SEAL)

Name: Thomas L. Stokes

Title: President

COMMONWEALTH OF VIRGINIA

CITY/COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by Thomas L. Stokes, as President of Conservation, Inc., a Virginia non-profit corporation, on behalf of said corporation.

\_\_\_\_\_  
Notary Public

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

Notary Registration No. \_\_\_\_\_

**EXHIBIT A**

Legal Description of the Protected Property

[TO BE INSERTED]

TOGETHER WITH together with a non-exclusive pedestrian and vehicular ingress/egress easement 10 feet (10') in width on and over that portion of the Grantor's Adjacent Property designated as "\_\_\_\_\_ " on the Survey referenced above for the sole purposes of providing the Grantee with access to the Protected Property to exercise its rights under this Deed of Conservation Easement (the "Access Easement"). The Grantor reserves the right to relocate the Access Easement on the Grantor's Adjacent Property from time to time.

**APPENDIX D**



## DECLARATION OF RESTRICTIONS

THIS DECLARATION OF RESTRICTIONS ("Declaration of Restrictions") made this \_\_\_ day of \_\_\_\_\_, 2013, by CONSERVATION, INC., a Virginia non-profit Corporation, as DECLARANT (to be indexed as GRANTOR).

### WITNESSETH:

WHEREAS, Declarant is the owner in fee simple of certain real property (described and referred to as the "Protected Property"), consisting of approximately 80.343 acres, situated in the Cities of Suffolk and Chesapeake, Commonwealth of Virginia, more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference; and

WHEREAS, one purpose of this Declaration of Restrictions is to effectuate certain provisions of a judicial Consent Decree entered in the United States District Court for the Eastern District of Virginia, Norfolk Division, on \_\_\_\_\_, 2013 in the matter of United States v. Smith Farm Enterprises, LLC, Dkt. No. \_\_\_\_\_; and

WHEREAS, Declarant believes that the Protected Property contains productive and valuable wildlife habitat; serves an important function in enhancing water quality, and has substantial ecological, natural and open-space value, and Declarant has the purpose of conserving the above-described values, including the Protected Property's function in protecting water quality, important aquatic resources and habitats of Elizabeth River, a tributary of the Chesapeake Bay (collectively, "conservation values"); and

WHEREAS, any development of the natural and scenic condition of the Protected Property could have a deleterious effect on the purity of the air, water, and environment in and around the Protected Property, as well as the maintenance of water quality in the region and suitable habitat for wild flora and fauna of all types; and

WHEREAS, Declarant desires and intends that the conservation values of the Protected Property be preserved, enhanced and maintained by the restriction of future development on the Protected Property; and

WHEREAS, the recordation of this Declaration of Restrictions on the Protected Property by deed is in furtherance of and will serve clearly delineated federal, regional, state, and local conservation policies; and

WHEREAS, Declarant is a non-profit corporation incorporated under the laws of the Commonwealth of Virginia, has had a principal office in the Commonwealth of Virginia for at least five (5) years, has been declared exempt from taxation as a charitable organization under Internal Revenue Code §501(c)(3), was created for the primary purpose of protecting, preserving and maintaining water quality, natural resources, and

the environment and is an eligible and qualified "holder" of a conservation easement under the Virginia Conservation Easement Act, Virginia Code §10.1-10009 *et sec.*; and

WHEREAS, Declarant is willing to grant a perpetual Declaration of Restrictions over the Protected Property to protect, preserve or maintain the Conservation Values (as hereinafter defined) of the Protected Property, thereby restricting and limiting the use of the Protected Property, on the terms and conditions and for the purposes hereinafter set forth; and

WHEREAS, on account of the fact that the Property may serve as compensation for impacts to waters of the U.S. including wetlands, the U.S. Army Corps of Engineers (Corps or USACE) and the Virginia Department of Environmental Quality (DEQ) (the "Third Party Beneficiaries") are third-party beneficiaries under this Declaration of Restrictions, and except for their status as third-party beneficiaries, nothing herein creates a property interest in the Third Party Beneficiaries or the Federal Government with regard to this property.

WHEREAS, Declarant designates the Protected Property as property to be retained and used in perpetuity for the preservation and provision of conservation values in the same manner as a conservation easement under the Virginia Conservation Easement Act;

NOW THEREFORE, in consideration of, the foregoing recitals, Declarant hereby imposes on, in and over the Protected Property conditions and restrictions which shall run with the land in perpetuity, as follows:

#### ARTICLE I. GENERAL PURPOSE AND DURATION

1. General Purpose: The purpose of this Declaration of Restrictions is to preserve, protect and maintain permanently the conservation values of the Protected Property existing as of the date hereof as documented in the baseline documentation report entitled "Phase I Environmental Assessment and Baseline Condition Report for Approximately 80 Acres Johnston/Shoulders Hill 3979 Pughsville Road, Suffolk, Virginia" dated April 9, 2012 ( the "Baseline Documentation Report") (such values, collectively, the "Conservation Values"), and to prevent the use or development of the Protected Property for any purpose or in any manner that would conflict with the maintenance of the Protected Property in its natural condition existing as of the date hereof and as documented in the Baseline Documentation Report.
2. Duration: This Declaration of Restrictions constitutes a restriction granted in perpetuity on the use which may be made of the Protected Property. This Declaration of Restrictions runs with the land as an incorporeal interest in the Protected Property, enforceable by the Third Party Beneficiaries (as defined below) forever.

## ARTICLE II. PROHIBITED AND RESTRICTED ACTIVITIES

Any activity on, or use of, the Protected Property not reserved by Declarant and inconsistent with the purpose of this Declaration of Restrictions is prohibited. The Protected Property shall be preserved in its natural condition existing as of the date hereof and restricted from any development or use that would impair or interfere with the Conservation Values of the Protected Property.

1. Structures: No commercial, agricultural or residential structures shall be allowed on, and no other building, facility or structure shall be constructed on, the Protected Property after the date of execution of this Declaration of Restrictions, except as authorized below:
  - A. Structures such as deer stands and foot bridges existing as of the date hereof, and facilities and structures hereafter designed, constructed and utilized in connection with ecological, educational, recreational and naturalistic uses of the Protected Property which do not impair the intended purpose of this Declaration of Restrictions, shall be permitted, provided any such structure does not alter or impair the natural movement of water and preserves the natural contour of the ground;
  - B. The , repair, restoration, remodel and maintenance of all facilities and structures permitted in this Article shall be permitted, including but not limited to existing deer stands;
  - C. The replacement of all facilities and structures authorized in subparagraph 1.A. above with facilities and structures of similar size and purpose shall be permitted; and
  - D. The construction and maintenance of access to all uses permitted in this Declaration of Restrictions and to all facilities and structures authorized in subparagraph 1.A above shall be permitted, provided such construction and maintenance of access does not interfere with the conservation values of the Protected Property.
2. Signs and Billboards: Display of billboards, signs or other advertisements shall not be permitted on or over the Protected Property except to identify the nature of the Protected Property and to educate the public as to its value, and otherwise as may be permitted by and solely in the discretion and control of the Third Party Beneficiaries.
3. Ecological Quality: Except for measures necessary for either or both of the management of wildlife and the control of alien invasive or noxious plant or animal species, there shall be no activities or uses of the Protected Property detrimental or adverse to the preservation and maintenance of the Conservation Values of the Protected Property.

4. **Industrial and Commercial Activities:** No agricultural, horticultural, mining, industrial or commercial activities shall be conducted on the Protected Property.
5. **Trash, Rubbish, and Waste:** There shall be no dumping of soil, trash, ashes, garbage, waste, or offensive materials on the Protected Property.
6. **Excavation:** There shall be no excavation or ditching on the Protected Property. other than maintenance of existing drainage ditches and canals with the written prior approval by the Third Party Beneficiaries
7. **Off Road Vehicles:** Other than for permitted educational, recreational and naturalistic purposes, for emergencies (such as, by way of example and not limitation, forest fires), and for the enforcement of the purposes specified herein, operation of off road vehicles on the Protected Property shall be limited to the existing and other permitted access roads and trails located on the Protected Property.

### ARTICLE III. RIGHTS RESERVED BY DECLARANT

1. **Reserved Rights:** Declarant reserves to itself, and to its personal representatives, heirs, successors, and assigns, all rights accruing from its ownership of the Protected Property including without limitation the rights to (a) engage in, or permit or invite others to engage in, all uses of the Protected Property that are not expressly prohibited or restricted, and are not inconsistent with the purpose of this Declaration of Restrictions, and (b) sell, transfer, mortgage, encumber, gift or otherwise convey the Protected Property, in whole or in part, including without limitation to a long-term steward or similar long-term caretaker of the Protected Property, provided that any such sale, transfer, mortgage, encumbrance or gift conveyance is subject to the terms of this Declaration of Restrictions. These rights shall be exercised so as to cause no damage to the Conservation Values of the Protected Property.
2. **Forest Management:** Harvesting and management of timber by Declarant shall be permitted only to the extent necessary either (i) to protect the natural environment in areas where the forest is damaged by natural forces such as fire, flood, storm, insects, infectious organisms or harvesting activities undertaken in the 10 years before the date of this Declaration or (ii) to enhance the natural environment whenever whenever jointly recommended by both a representative of the Virginia Department of Forestry and a representative of the Virginia Department of Game and Inland Fisheries and approved in writing by the USACE. All such forest management activities undertaken on the Property shall be in accordance with a forest management plan prepared by a professional forester licensed in the Commonwealth of Virginia and a copy of such plan shall be provided to the Third Party Beneficiaries and must be approved in writing by USACE. Any such plan shall be guided by the following objectives:

- A. Promote the recruitment and retention of a forest canopy of native tree species and species composition (i.e., forest community type) that is likely to occur on the site under natural biological and physiological processes.
  - B. Promote the recruitment and persistence of an intact, native herbaceous and woody understory that is characteristic of the given forest community type in terms of its composition and abundance.
  - C. Maintain soil productivity and prevent erosion.
  - D. Enhance and protect water quality.
  - E. Maintain biological diversity, native plant and animal species, and the ecological processes that support them.
  - F. Prevent and/or control the infestation of non-native, invasive species, pests and pathogens that threaten the health of the forest.
  - G. Promote an older, mature forest with vertical structural diversity where a continuum of age classes are present, including standing dead snags, trees greater than 150 years old occur throughout, and downed woody debris remains on the forest floor.
3. Right to Perform Wetland, Wildlife and Other Ecological Enhancement: Declarant shall have the right to construct, monitor and maintain wetland, wildlife and other ecological restoration, creation, enhancement and preservation features within the Protected Property, provided that those features do not alter or impair the hydrology or hydrologic regime of the property or alter or impair the natural movement of water or the natural contour of the ground within the Protected Property.
  4. Hunting and other Rights: Declarant shall have the exclusive right to use, and the exclusive right to grant to others the right to use, the Protected Property for hunting. Declarant shall have the exclusive right to use, and the exclusive right to grant to others the right to use, the Protected Property for educational uses, passive recreational uses (including, by way of example and not limitation, hiking, bicycling and bird watching) and naturalistic uses.

#### ARTICLE IV. RIGHTS OF THIRD PARTY BENEFICIARIES

1. Right of Entry: The Third Party Beneficiaries have the non-exclusive right to enter the Protected Property at reasonable times and under reasonable circumstances for the purpose of inspecting the Protected Property to determine compliance with the purposes and terms of this Declaration of Restrictions.
2. Consent: In any case where the terms of this Declaration of Restrictions requires the consent of the Third Party Beneficiaries, such consent shall be requested by written notice to the Third Party Beneficiaries, shall not be unreasonably withheld, conditioned or delayed by the Third Party Beneficiaries and shall be deemed to have

been given unless within thirty (30) days after receipt of notice the Third Party Beneficiaries deliver notice to Declarant of disapproval.

#### ARTICLE V. ENFORCEMENT

1. To accomplish the purposes of this Declaration of Restrictions, the Third Party Beneficiaries are allowed to prevent any activity on or use of the Protected Property that is inconsistent with the purposes of this Declaration of Restrictions (except to the extent such activity or use is reserved unto Declarant as provided above or as otherwise expressly set forth herein) and to require the restoration of such areas or features of the Protected Property that may be damaged by such activity or use. Upon any breach of the terms of this Declaration of Restrictions that comes to the attention of the Third Party Beneficiaries, the Third Party Beneficiaries shall notify Declarant in writing of such breach. Declarant shall have thirty (30) days after receipt of such notice to correct the conditions constituting such breach. If the breach remains uncured after thirty (30) days, the Third Party Beneficiaries may enforce this Declaration of Restrictions by appropriate legal proceedings excluding damages, and solely consisting of injunctive relief to prevent any violation of this Declaration of Restrictions. Notwithstanding the foregoing, the Third Party Beneficiaries shall have the immediate right, without notice, to obtain a temporary restraining order, injunctive or other appropriate relief to prevent a breach of the terms of this Declaration of Restrictions from irreversibly or materially impairing the benefits to be derived from this Declaration of Restrictions. Declarant and Third Party Beneficiaries acknowledge that under such circumstances damage to the Third Party Beneficiaries would be irreparable and remedies at law will be inadequate. The enforcement remedies of the Third Party Beneficiaries provided hereunder shall be in lieu of all other enforcement remedies available to Third Party Beneficiaries under this Declaration of Restrictions. Declarant shall under no circumstances be liable for damages or costs of litigation (including attorneys' fees) under this Declaration of Restrictions.
2. By virtue of the Third Party Beneficiaries' acquisition of rights under this Declaration of Restrictions, they shall be entitled, at their option, to standing before appropriate courts of law to pursue remedies or other matters which are necessary or incidental to protection of the conservation values of the Protected Property, provided, however, Declarant shall under no circumstances be liable for damages or costs under this Declaration of Restrictions.
3. No failure on the part of one or all of the Third Party Beneficiaries to enforce any covenant or provision hereof shall discharge or invalidate such covenant or any other covenant, condition, or provision hereof or affect the right of any of the Third Party Beneficiaries to enforce the same in the event of a subsequent breach or default.
4. Nothing contained in this Declaration of Restrictions shall be construed to entitle Third Party Beneficiaries to bring any action against Declarant for any injury or

change in the Protected Property resulting from causes beyond Declarant's direct control, including, without limitation, fire, flood, storm, war, acts of God or third parties, except Declarant's lessees or invitees; or from any prudent action taken in good faith by Declarant under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Protected Property resulting from such causes.

#### ARTICLE VI. GENERAL TERMS

1. **Assignment, Transfer, and Reversion:** Declarant agrees to send in writing to the Third Party Beneficiaries, no less than 60 days before any proposed assignment, transfer or revision, the names and addresses of any party to whom the Protected Property is to be assigned, transferred, or revised. . The proposed assignment, transfer or revision is subject to first receiving the written approval by the USCAE. Declarant's rights and obligations under this Declaration of Restrictions terminate upon any sale, transfer, gift or other conveyance (each, a "Transfer") of Declarant's interest in any portion of the Protected Property with respect to and to the extent of such portion so sold, transferred, gifted or conveyed.
2. **No Interest in General Public:** Nothing contained in this Declaration of Restrictions is intended or shall be considered to grant any interest in the Protected Property to the general public or to otherwise permit the use of the Protected Property by the general public.
3. **Extinguishment:** This Declaration of Restrictions shall not be extinguished except by order of a court of competent jurisdiction. Upon any extinguishment of this Declaration of Restrictions, in whole or in part, or any other loss or impairment of all or any portion of the Conservation Values, including in all events but without limitation through the exercise of eminent domain or sale in lieu thereof, Declarant shall have the duty, either (i) to grant, convey or enter into a new, replacement or other similar declaration of restrictions or similar conservation easement, or (ii) to provide, acquire, obtain, protect, preserve or conserve any alternative, replacement or other ecological, natural, open-space or conservation values or functions.
4. **Eminent Domain:** Declarant shall be the sole party entitled to any and all amounts awarded, compensated or received in connection with any taking through the exercise of eminent domain or sale in lieu thereof of all or any portion of the Protected Property, including without limitation for costs and expenses in connection therewith.
5. **Inclusion of Terms in Subsequent Deeds:** Declarant shall notify the U.S. Army Corps of Engineers, Norfolk District and the United States Environmental Protection Agency Region III thirty (60) days prior to any transfer of interest in the Protected Property. Declarant agrees that the terms, conditions, restrictions and purposes of this Declaration of Restrictions will be inserted by Declarant in any subsequent deed or other legal instrument by which Declarant divests itself of any interest in the

Protected Property. This agreement will be binding on Declarant (and their successors and assigns) even if Declarant fails to insert the terms, conditions, restrictions and purposes of this Declaration of Restrictions in any subsequent deed or other legal instrument.

6. **Construction and Severability:** It is the intention of the parties hereto that this Declaration of Restrictions, which is by nature and character negative, in that Declarant has restricted and limited its right to use the Protected Property rather than granted any affirmative rights to the Third Party Beneficiaries except as otherwise set forth herein, be construed at all times and by all parties to effectuate its terms, conditions and purposes. If any provision of this Declaration of Restrictions or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of the Declaration of Restrictions and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.
7. **Other Applicable Laws:** The provisions of this Declaration of Restrictions shall be construed consistent with Virginia law, and do not replace, abrogate, or otherwise set aside any local, state, or federal laws, requirements, or restrictions applicable to the Protected Property.
8. **Effects of Mortgages, etc.:** Declarant and the Third Party Beneficiaries agree that all mortgages and deeds of trust granted or entered into after the date hereof affecting the Protected Property will be subordinate to the rights of the Third Party Beneficiaries under this Declaration of Restrictions.
9. **Notifications:** Any notices pursuant to any provision of this Declaration of Restrictions shall be sent by certified mail, return receipt requested, to the following addresses:

Declarant

Conservation, Inc.  
4101 Granby Street, Suite 404  
Norfolk, VA 23510  
Attn: Thomas Stokes  
Facsimile: 757-623-2785

Third Party Beneficiaries

U.S. Army Corps of Engineers, Norfolk District  
Chief, Regulatory Branch  
U.S. Army Corps of Engineers  
Norfolk District  
803 Front Street  
Norfolk, Virginia 23510



Virginia Department of Environmental Quality  
629 East Main Street  
P.O. Box 1105  
Richmond, VA 23218

**Additional Notice Recipient:**

U.S. Environmental Protection Agency Region III  
Associate Director, Office of Environmental Programs  
Environmental Assessment and Innovation Division  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103

10. **Entire Agreement:** This instrument sets forth the entire agreement of the parties with respect to this Declaration of Restrictions and supersedes all prior discussions, negotiations, understandings, or agreements relating to this Declaration of Restrictions.
11. **Binding Nature of Terms and Conditions:** The covenants agreed to and the terms, conditions, restrictions, privileges, and purposes imposed and created by this Declaration of Restrictions shall be binding on not only Declarant and the Third Party Beneficiaries, but also their personal representatives, executors, heirs and successors to their interests and assigns.
12. **Modification:** This Declaration of Restrictions may be changed, modified or amended in whole or in part only by and through a written and recorded instrument or agreement executed by each of Declarant and Third Party Beneficiaries. USACE shall be provided 60 day advance written notice of any action to modify or extinguish this document. Before any change, modification or amendment may proceed, USACE and DEQ must consent to said change, modification or amendment. This document is intended to survive foreclosure, bankruptcy, condemnation or judgments affecting the property.
13. **Compliance Inspections and Enforcement:** USACE, EPA, DEQ, and their authorized agents, shall have the right to enter and go upon the Property to inspect the Property and take actions necessary to verify compliance with these restrictive covenants. This right of entry is in addition to and does not limit any right of entry otherwise granted by Federal or State law. The restrictive covenants herein shall be enforceable by any proceeding at law or in equity or administrative proceeding by USACE or DEQ. Failure by any agency (or owner) to enforce any covenant or restriction contained herein shall in no event be deemed a waiver of the right to do so thereafter.

14. Litigation in court: In any state court action, USACE reserves the right to be represented by the U.S. Attorney or the U.S. Department of Justice and/or to remove a legal action affecting jurisdictional waters of the U.S. to the United States Federal District Court in the district where the land lies.

IN WITNESS THEREOF, Declarant has executed this instrument.

DECLARANT  
Conservation, Inc.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

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

STATE OF VIRGINIA

CITY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2012 by Thomas L. Stokes as President of Conservation, Inc., a Virginia non-profit Corporation, on behalf of said corporation.

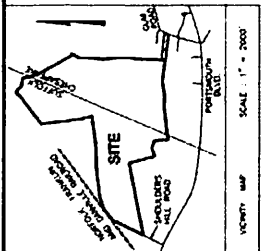
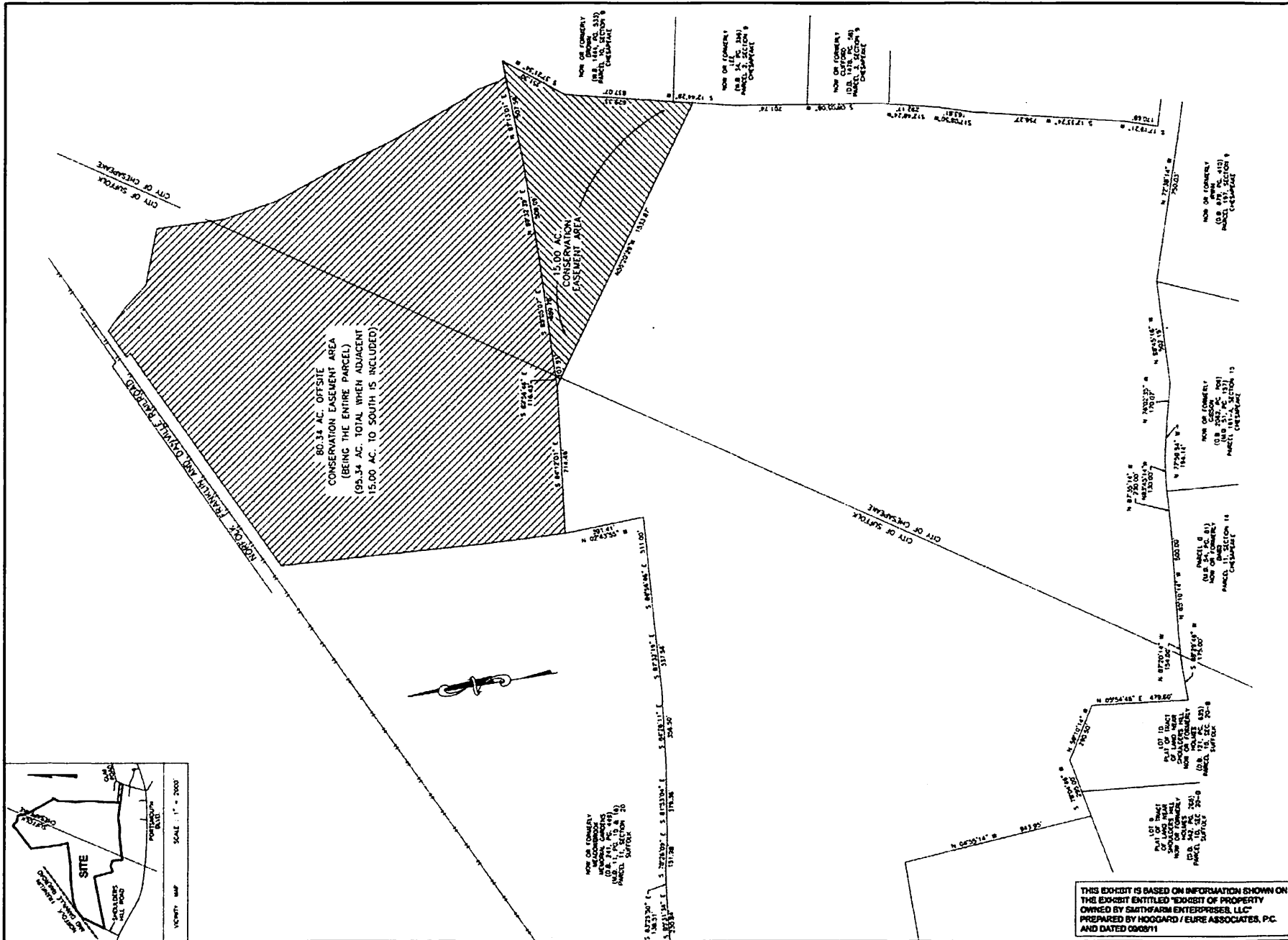
My commission expires: \_\_\_\_\_

Notary Public

**EXHIBIT A**

**Legal Description of the Protected Property**

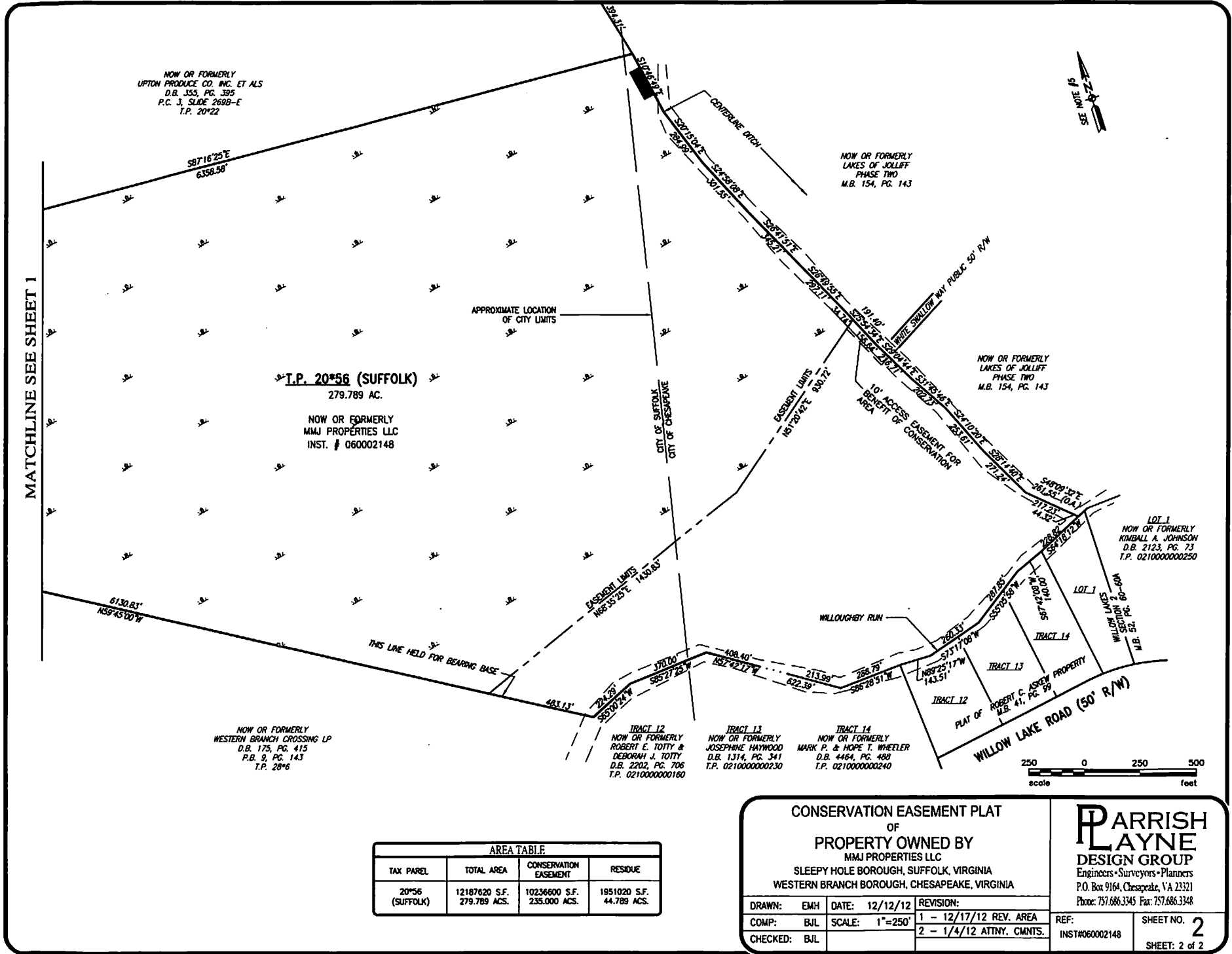
**APPENDIX E**



THIS EXHIBIT IS BASED ON INFORMATION SHOWN ON THE EXHIBIT ENTITLED "EXHIBIT OF PROPERTY OWNED BY SMITHFARM ENTERPRISES, LLC" PREPARED BY HOGGARD / EURE ASSOCIATES, P.C. AND DATED 09/05/11

<p><b>SMITH FARM</b> CHESTER AND SAVTAK, INDIANA</p>	
<p><b>SETTLEMENT EXHIBIT A</b> <b>PROPERTY OWNED BY SMITHFARM ENTERPRISES, LLC</b></p>	
<p><b>engineering services, inc.</b> 10011 East 10th Avenue, Suite 100, Greenwood, IN 46143 (773) 233-8888 www.esinc.com</p>	
<p>DATE: 09/05/11</p>	<p>SHEET: 1</p>
<p>PROJECT: 0230</p>	<p>DRAWN: KES</p>
<p>CHECKED: [Signature]</p>	<p>DATE: 09/05/11</p>
<p>SCALE: 0 100 200 400 600</p>	<p>NO. DATE REVISIONS</p>

**APPENDIX F**



MATCHLINE SEE SHEET 1

NOW OR FORMERLY  
UFTON PRODUCE CO. INC. ET ALS  
D.B. 355, PG. 395  
P.C. 3, SLIDE 269B-E  
T.P. 20\*22

NOW OR FORMERLY  
LAKES OF JOLLEFF  
PHASE TWO  
M.B. 154, PG. 143

NOW OR FORMERLY  
LAKES OF JOLLEFF  
PHASE TWO  
M.B. 154, PG. 143

LOT 1  
NOW OR FORMERLY  
KIMBALL A. JOHNSON  
D.B. 2123, PG. 73  
T.P. 021000000250

T.P. 20\*56 (SUFFOLK)  
279.789 AC.

NOW OR FORMERLY  
MMJ PROPERTIES LLC  
INST. # 060002148

NOW OR FORMERLY  
WESTERN BRANCH CROSSING LP  
D.B. 175, PG. 415  
P.B. 9, PG. 143  
T.P. 28\*6

TRACT 12  
NOW OR FORMERLY  
ROBERT E. TOTTY &  
DEBORAH J. TOTTY  
D.B. 2202, PG. 706  
T.P. 021000000160

TRACT 13  
NOW OR FORMERLY  
JOSEPHINE HAYWOOD  
D.B. 1314, PG. 341  
T.P. 021000000230

TRACT 14  
NOW OR FORMERLY  
MARK P. & HOPE T. WHEELER  
D.B. 4464, PG. 488  
T.P. 021000000240



AREA TABLE			
TAX PAREL	TOTAL AREA	CONSERVATION EASEMENT	RESIDUE
20*56 (SUFFOLK)	12187620 S.F. 279.789 ACS.	10236600 S.F. 235.000 ACS.	1951020 S.F. 44.789 ACS.

**CONSERVATION EASEMENT PLAT**  
OF  
**PROPERTY OWNED BY**  
MMJ PROPERTIES LLC  
SLEEPY HOLE BOROUGH, SUFFOLK, VIRGINIA  
WESTERN BRANCH BOROUGH, CHESAPEAKE, VIRGINIA

**PARRISH**  
**LAYNE**  
**DESIGN GROUP**  
Engineers • Surveyors • Planners  
P.O. Box 9164, Chesapeake, VA 23321  
Phone: 757.686.3345 Fax: 757.686.3348

DRAWN: EMH	DATE: 12/12/12	REVISION:	REF:	SHEET NO.
COMP: BJL	SCALE: 1"=250'	1 - 12/17/12 REV. AREA	INST#060002148	<b>2</b>
CHECKED: BJL		2 - 1/4/12 ATTN. CMNTS.		

SHEET: 2 of 2

**APPENDIX G**



**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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No. 11-1355  
(CWA-03-2001-0022)  
(CWA Appeal No. 08-02)

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SMITH FARM ENTERPRISES, LIMITED LIABILITY COMPANY

Petitioner - Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent - Appellee

-----  
COMMONWEALTH OF VIRGINIA

Amicus Supporting Petitioner

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**MOTION TO DISMISS**

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The undersigned hereby moves that the above appeal be dismissed upon such terms as have been agreed to by the parties. FRAP 42(b). Undersigned counsel

represents to the Court that all appellate counsel of record consent to this dismissal.

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Damien Michael Schiff  
Counsel for Appellant