

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. JKB-10-cv-3068
	)	
FREDERICK W. HERTRICH, III, <i>et al.</i>	)	
	)	
Defendants.	)	
	)	

**CONSENT DECREE**

WHEREAS Plaintiff the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed this case against Defendants Frederick W. Hertrich, III (“Defendant Hertrich”) and Charles Ernesto (“Defendant Ernesto”) (collectively, “Defendants”), alleging that they violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a);

WHEREAS the Complaint alleges that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States on property owned by Defendant Hertrich in Federalsburg, Maryland (the “Site”) as more fully described in the Complaint and Appendix A, without authorization by the United States Army Corps of Engineers (“the Corps”);

WHEREAS, in the Complaint, the United States sought, inter alia: to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d); to require Defendant Hertrich to fully restore the affected waters of the United States to their pre-fill condition; and such other relief as the Court deemed appropriate;

WHEREAS, Defendant Hertrich undertook restoration work on the Site between 2008 and 2010 pursuant to instructions and order from EPA and the State of Maryland, has completed the restoration of the Site in a manner satisfactory to EPA, and the Site will be subject to monitoring requirements as described below to ensure the long-term success of the restoration work;

WHEREAS, in order to settle the United States' claims, Defendants have agreed to the payment of a civil monetary penalty, and Defendant Hertrich has further agreed to impose a deed restriction on a portion of his property as more fully described in Section IV of this Consent Decree and Appendix A hereto;

WHEREAS this Consent Decree is intended to constitute a complete and final settlement of the United States' civil claims regarding the Site, as set forth in the Complaint, against Defendants;

WHEREAS the United States and Defendants 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' claims under the CWA against Defendants in this case; and

WHEREAS the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, 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) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the United States District Court for the District of Maryland pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Site is located in this District, and the cause of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

## **II. APPLICABILITY**

4. The obligations of this Consent Decree shall apply to and be binding upon the United States and Defendants, as well as Defendants' agents, successors and assigns.

5. The imposition of the deed restriction (defined below and in Appendix A, which is incorporated herein by reference) shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. In the event that Defendant Hertrich transfers ownership of the Site or any portion thereof prior to the termination of this Consent Decree, he shall provide notice to EPA and the United States Department of Justice at the addresses specified in Section VIII below at least fifteen (15) days prior to that transfer.

## **III. SCOPE OF CONSENT DECREE**

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged by the United States in the Complaint, and through the date of lodging, against both Defendant Hertrich and Defendant Ernesto under CWA Section 301 concerning the Site.

7. 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 obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA.

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 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).

9. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit. The parties agree, however, that this Consent Decree fully resolves and settles all civil claims against Defendants stemming from the violations alleged in the Complaint.

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

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

#### **IV. SPECIFIC PROVISIONS**

##### **CIVIL PENALTIES**

13. Defendant Hertrich and Defendant Ernesto shall pay a joint civil penalty to the United States in the amount of One Hundred Thousand dollars (\$100,000.00) within 60 days of the entry of this Consent Decree.

14. Defendants shall make the above-referenced payment 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 CDCS number 2012A43192, EPA Region Three (3) and the DOJ case number (90-5-1-1-18877). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney’s Office for the District of Maryland. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

15. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section VII) 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.

##### **INJUNCTIVE RELIEF - DEED RESTRICTION**

16. Within ninety (90) days after entry of this Consent Decree, Defendant Hertrich will impose a deed restriction on a portion of his property, in the form attached hereto as Appendix A, to secure environmental protection and benefits to the area identified in Exhibit 1 to Appendix A (the “Deed Restriction Area”).

17. Prior to executing the Deed Restriction, Defendant Hertrich shall not disturb in any manner whatsoever, or allow to be disturbed in any manner whatsoever, any of the land

designated in Exhibit 1 to Appendix A as subject to the Deed Restriction. After entering into the Deed Restriction, Defendant Hertrich shall not disturb or use the land subject to the Deed Restriction, or allow that land to be disturbed or used, except as allowed by the Deed Restriction. However, Defendant Hertrich shall allow EPA and its employees, authorized agents, and/or designated representatives (including contractors and subcontractors), upon reasonable prior notification and at reasonable times with proper identification, to enter the Deed Restriction Area for purposes of monitoring and measuring compliance with the terms and conditions of the Deed Restriction and this Decree.

18. Defendant Hertrich agrees to provide EPA with a copy of the executed and recorded Deed Restriction, within thirty (30) days of the recording of the Deed Restriction in accordance with paragraph 19 below.

19. Defendant Hertrich shall, within thirty (30) days of the execution of the Deed Restriction, record the Deed Restriction with the Clerk of Circuit Court of Caroline County, Land Records Department. Thereafter, each deed, title, or other instrument conveying an interest in any property identified in Appendix A shall contain notice stating that the property is subject to the Deed Restriction and shall reference the recorded location of the Deed Restriction.

#### MONITORING AND MAINTENANCE

20. In order to ensure the continued success of the restoration work previously completed on the Site, Defendant Hertrich shall conduct annual monitoring on the Site until October 31, 2015, in accordance with Appendix B to this Consent Decree, which is incorporated herein by reference.

## **V. RETENTION OF RECORDS**

21. Defendants shall preserve and retain all documents regarding the performance of their obligations under this Consent Decree in their possession, custody, or control, and shall instruct their contractors and agents to retain all such documents in their possession, custody, or control, until ninety (90) days after the termination of this Consent Decree.

## **VI. DISPUTE RESOLUTION**

22. 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 United States and the Defendant(s) affected by the 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 between the United States and Defendants 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, Defendants file 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, Defendants 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 Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

23. 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, it may move the

Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, Defendants 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 Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

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

#### **VII. STIPULATED PENALTIES**

25. After entry of this Consent Decree, if Defendants fail to timely fulfill the requirements of this Consent Decree set forth in Section IV above, Defendants shall pay to the United States a stipulated penalty of \$50.00 per day for each day of non-compliance for each violation.

26. Stipulated penalties under this Section shall begin to accrue on the day a violation occurs and shall continue to accrue until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree. Stipulated penalties for failure to pay the civil monetary penalty set forth in Section IV above shall accrue against Defendants jointly, rather than as against each of the Defendants separately.

27. Except as provided in Paragraph 29 below, Defendants shall pay any applicable stipulated penalty within thirty (30) days of receiving the United States' written demand. Defendants shall make any such payment in accordance with written instructions to be provided

by the United States. Upon any such payment, Defendants shall provide written notice, at the addresses specified in Section VIII of this Consent Decree.

28. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the negotiation procedure set forth in Paragraph 22 of Section VI (Dispute Resolution) shall be resolved upon motion to this Court as provided in Paragraphs 22-24 of Section VI.

29. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendants as provided in this Section.

30. To the extent Defendants prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

31. In the event that a stipulated penalty payment is not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

32. Defendants shall make any payment of a stipulated penalty 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 CDCS number 2012A43192, EPA Region Three (3) and the DOJ case number (90-5-1-1-18877). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the

United States Attorney's Office for the District of Maryland. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section VIII of this Decree.

### **VIII. ADDRESSES**

33. 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) Pamela J. Lazos (3RC20)  
Senior Assistant Regional Counsel  
United States Environmental Protection Agency  
Region 3  
1650 Arch Street  
Philadelphia, PA 19103
- (2) Todd Lutte (3EA30)  
Wetlands Team Leader  
United States Environmental Protection Agency  
Region 3  
1650 Arch Street  
Philadelphia, PA 19103

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Chief, Environmental Defense Section  
Attn: Amanda Shafer Berman; Elizabeth Dawson  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. 7611  
Washington, D.C. 20044

LARRY D. ADAMS  
Assistant United States Attorney  
3636 S. Charles Street, Fourth Floor  
Baltimore, MD 21201  
(410) 209-4800

C. TO DEFENDANTS :

Frederick W. Hertrich, III and Charles Ernesto  
c/o Mark F. Gabler, Esq.  
Rich and Henderson, P.C.,  
51 Franklin Street  
Annapolis, MD 21401

**IX. COSTS OF SUIT**

34. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action.

**X. PUBLIC COMMENT**

35. 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. Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified Defendants in writing that it no longer supports entry of the Consent Decree.

**XI. CONTINUING JURISDICTION OF THE COURT**

36. 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.

## **XII. MODIFICATION**

37. 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 both the United States and the Defendants and approved by the Court.

## **XIII. TERMINATION**

38. This Consent Decree may be terminated by either of the following:

A. Defendants 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

B. Defendants may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Defendants have fulfilled all obligations set forth in this Consent Decree, including those set forth in Appendices A and B, as well as the payment of all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

2. Defendants have certified compliance pursuant to subparagraph 1 above to the Court and all Parties; and

3. Within forty-five (45) days of receiving such certification from the Defendants, the United States has not contested in writing that such compliance has not been achieved. If the United States disputes Defendants's full compliance, then this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

IT IS SO ORDERED.

Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

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United States District Judge

WE HEREBY CONSENT to the entry of this Consent Decree in *UNITED STATES v. FREDERICK W. HERTRICH, III, et al.*, No. JKB-10-cv-3068, subject to the public notice requirements of 28 C.F.R. § 50.7.

**ON BEHALF OF THE UNITED STATES DEPARTMENT OF JUSTICE:**

IGNACIA S. MORENO  
Assistant Attorney General,  
Environment and Natural Resources Division

\_\_\_\_\_ Dated: \_\_\_\_\_  
Amanda Shafer Berman, Attorney  
U.S. Department of Justice, Environmental Defense Section  
P.O. Box 7611, Washington, D.C. 20044  
(202) 514-1950

ROD J. ROSENSTEIN  
United States Attorney, District of Maryland

\_\_\_\_\_ Dated: \_\_\_\_\_  
LARRY D. ADAMS  
Assistant United States Attorney  
3636 S. Charles Street, Fourth Floor  
Baltimore, MD 21201  
(410) 209-4800

WE HEREBY CONSENT to the entry of this Consent Decree in *UNITED STATES v. FREDERICK W. HERTRICH, III, et al.*, No. JKB-10-cv-3068, subject to the public notice requirements of 28 C.F.R. § 50.7.

**ON BEHALF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE:**

\_\_\_\_\_  
SUSAN SHINKMAN  
Director, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Dated: \_\_\_\_\_

\_\_\_\_\_  
MARK POLLINS  
Director, Water Enforcement Division  
Office of Civil Enforcement, Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Dated: \_\_\_\_\_

\_\_\_\_\_  
MELISSA KATZ  
Attorney Advisor  
Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Dated: \_\_\_\_\_

WE HEREBY CONSENT to the entry of this Consent Decree in *UNITED STATES v. FREDERICK W. HERTRICH, III, et al.*, No. JKB-10-cv-3068, subject to the public notice requirements of 28 C.F.R. § 50.7.

**ON BEHALF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
REGION III:**

\_\_\_\_\_ Dated: \_\_\_\_\_  
Shawn M. Garvin (3RC00)  
Regional Administrator  
U.S. Environmental Protection Agency, Region 3  
1650 Arch Street  
Philadelphia, PA 19103

\_\_\_\_\_ Dated: \_\_\_\_\_  
MARCIA E. MULKEY  
Regional Counsel  
U.S. Environmental Protection Agency, Region 3  
1650 Arch Street  
Philadelphia, PA 19103

\_\_\_\_\_ Dated: \_\_\_\_\_  
PAMELA J. LAZOS (3RC20)  
Senior Assistant Regional Counsel  
United States Environmental Protection Agency, Region 3  
1650 Arch Street  
Philadelphia, PA 19103

WE HEREBY CONSENT to the entry of this Consent Decree in *UNITED STATES v. FREDERICK W. HERTRICH, III, et al.*, No. JKB-10-cv-3068, subject to the public notice requirements of 28 C.F.R. § 50.7.

**FOR DEFENDANTS**

\_\_\_\_\_  
Frederick W. Hertrich, III

Dated:

\_\_\_\_\_  
Charles Ernesto

Dated:

**APPENDIX A – DEED RESTRICTION**

## **DECLARATION OF RESTRICTIVE COVENANTS**

THIS DECLARATION OF RESTRICTIVE COVENANTS (“Declaration”) made this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by Frederick W. Hertrich, III, having an address at \_\_\_\_\_ (“Declarant”);

WHEREAS, Declarant owns certain real property in Caroline County, Maryland (“the Property”), which was conveyed to the Declarant pursuant to two transactions. The first such transaction was by \_\_\_\_\_ by Deed dated \_\_\_\_\_ and recorded among the Land Records of Caroline County, Maryland in Liber \_\_\_\_\_, Folio \_\_\_\_\_; the second was by \_\_\_\_\_ by Deed dated \_\_\_\_\_ and recorded among the Land Records of Caroline County, Maryland, in Liber \_\_\_\_\_ Folio \_\_\_\_\_ (the “Property”); and

WHEREAS, the United States Department of Justice, the U.S. Environmental Protection Agency, and the Declarant have agreed that the Declarant would place certain restrictive covenants on a portion of the Property, in order that such property shall remain substantially in its natural condition in perpetuity for the purposes set forth below (the “Deed Restriction Areas”).

WHEREAS the Deed Restriction Areas, outlined in the map of the Property attached hereto as Exhibit 1, encompass approximately 80 acres, with a more precise description of the acreage and metes and bounds of the Deed Restriction Areas set forth in the survey attached hereto as Exhibit 2;

NOW, THEREFORE, Declarant hereby declares that the Deed Restriction Areas shall be held, transferred, conveyed, leased, occupied or otherwise disposed of and used subject to the following restrictive covenants, which shall run with the land and be binding in perpetuity on all heirs, successors, assigns, lessees, or other occupiers and users.

### **A. PURPOSE**

The Purpose of the Declaration is to preserve and protect in perpetuity the natural qualities of the Deed Restriction Areas, including, but not limited to, the habitat of fish, wildlife, plants, and their related ecosystems, and to prevent the use or further development of the Deed Restriction Areas in any manner that would conflict with said preservation and protection.

This Purpose is not likely to be adversely affected to any substantial extent by the continued use of the Deed Restriction Areas as authorized herein.

### **B. COVENANTS AND RESTRICTIONS**

Neither the Declarant, nor any subsequent owner(s) of the Deed Restriction Areas, shall undertake or cause to be undertaken within or upon the Deed Restriction Areas within the Property, as described in Exhibits 1 and 2, any of the following prohibited activities:

1. Division, subdivision and de facto subdivision of the Deed Restriction Areas;

2. Construction of buildings, structures, and other improvements including roads and motorized vehicle trails; with the exception that one single-family dwelling, an accompanying driveway, ancillary residential structures and associated utilities may be constructed on the upland area identified in Exhibits 1 and 2 as area "2a";
3. Industrial or commercial use of the Deed Restriction Areas, including, but not limited to, commercial logging, feedlots, dog kennels, mining, advertising, gravel extraction, campgrounds, motels, hotels, restaurants, vendors, and all enterprises likely to substantially intensify congestion, noise and/or traffic;
4. Agricultural use of the Deed Restriction Areas, including, but not limited to, farming and animal raising and/or grazing (including, but not limited to, cattle, equine, and poultry).
5. Use of motorized vehicles, including outdoor recreational vehicles, except as necessary to inspect the Deed Restriction Areas or to access the single-family dwelling allowed by paragraph B.2;
6. Installation of utility structures or buried or overhead power lines except in connection with the single-family dwelling allowed by paragraph B.2;
7. Disturbance or alteration of the top soil or existing slope and contours of the ground within the Deed Restriction Areas in a manner which could result in significant erosion of soil or substrate, with the exception of the removal of standing dead trees to prevent a hazard to persons or property;
8. Placing on the Deed Restriction Areas any soil, dredging spoils, landfill or other material in any amount that would significantly change the topography;
9. Intentional introduction of any exotic plant or animal species to the Deed Restriction Areas that is known or can be shown to be a threat to native species;
10. Change, disturbance, alteration or impairment of any watercourse within the Deed Restriction Areas;
11. Excavating, draining, mining, drilling, removing or exploring for or extracting materials on or below the surface of the Deed Restriction Areas;
12. Dumping or other disposal of refuse, trash, hazardous or toxic materials, or inoperative or abandoned vehicles on the Deed Restriction Areas;
13. Storage or warehousing of fuel, or radioactive, noxious, hazardous, toxic, or other waste materials and refuse within the Deed Restriction Areas;
14. Construction of fences except as necessary to preserve the natural environment of

the Deed Restriction Areas; and

15. Use of biocides or chemicals of any kind on the Deed Restriction Areas, except as necessary to control or remove non-indigenous fish, wildlife or plants.

The covenants and restrictions imposed under this Declaration shall not prevent any of the following activities within the Deed Restriction Areas:

1. Entrance by the Declarant or any subsequent owner(s) for the purposes of preserving, protecting, and maintaining the Deed Restriction Areas in accordance with the Purpose of the Declaration.
2. Entrance by Declarant or any subsequent owner(s) for passive recreational activities, which include such activities as walking, photography, bird and wildlife observation, and nature study, but do not include the use of motorized vehicles, the use of bicycles, or the riding of horses or other animals.

#### C. DURATION AND AMENDMENT

The covenants and restrictions listed herein are created pursuant to the Annotated Code of Maryland, Real Property, Article § 2-118 and shall run and bind with the Property, and be binding on the Declarant, its personal representatives, successors and assigns, unless and until terminated by any government agency with the legal authority to enforce these covenants and restrictions. The failure of the United States Department of Justice or the U.S. Environmental Protection Agency, or other such agencies, to enforce the provisions of this Declaration shall not be deemed a waiver of any rights created hereunder. After recording, these restrictive covenants may only be amended by a recorded document signed by the Declarant, after receiving the written approval of the U.S. Department of Justice and the U.S. Environmental Protection Agency, which must be recorded with any such amendment. This restrictive covenant is intended to survive foreclosure, bankruptcy, condemnation or judgments affecting the property.

#### D. RESERVED RIGHTS

It is expressly understood and agreed that these restrictive covenants do not grant or convey to members of the general public any rights of ownership, entry, or use of the Deed Restriction Areas. These restrictive covenants are created solely for the protection of the Deed Restriction Areas, and for the consideration and values set forth above. The Declarant reserves the ownership of the fee simple estate and all rights appertaining thereto, including without limitation the rights to exclude others and to use the Property for all purposes not inconsistent with these restrictive covenants and the Declaration's Purpose.

#### E. COMPLIANCE INSPECTIONS

The U.S. Department of Justice and the U.S. Environmental Protection Agency and its/their authorized agents shall have the right to enter and inspect the Deed Restriction Areas and take actions necessary to verify compliance with these restrictive covenants.

F. ENFORCEMENT

The Declarant grants the U.S. Department of Justice and the U.S. Environmental Protection Agency a discretionary right to enforce the covenants in a judicial action against any person or other entity violating or attempting to violate these restrictive covenants; provided, however, that no violation of these restrictive covenants shall result in a forfeiture or reversion of title. In any enforcement action, an enforcing agency shall be entitled to a complete restoration for any violation, as well as any other judicial remedy such as civil penalties.

G. PROPERTY TRANSFERS

Declarant shall include the following notice on all deeds, mortgages, plats or other legal instruments used to convey any interest in the Property and/or Deed Restriction Areas (failure to comply with this paragraph does not impair the validity or enforceability of these restrictive covenants):

NOTICE: This property is subject to the Declaration of Restrictive Covenant Recorded at \_\_\_\_\_.

H. RECORDING

The Declarant agrees to record this Declaration in the Land Records of the County and provide the United States with proof of recordation within thirty (30) days of recordation. A plat depicting the boundaries of the Deed Restriction Areas subject to these restrictive covenants shall be recorded in the deed records office for each county in which the Property is situated prior to the recording of these restrictive covenants. The plat is recorded at \_\_\_\_\_.

I. SEVERABILITY

If any portion of this Declaration, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

J. EMINENT DOMAIN

If the Property is taken in whole or in part through eminent domain, the consequential value of the Deed Restriction Areas is the cost of replacement of the conservation functions, services and values with other property in the same watershed.

IN WITNESS WHEREOF said DECLARANT has executed this Declaration the day and year first above written.

IN THE PRESENCE OF: Declarant

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

STATE OF MARYLAND, \_\_\_\_\_ of \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY, that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me the subscriber, a Notary Public of the State aforesaid, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be a Declarant of the foregoing Declaration of Restrictive Covenants and acknowledged that he/she/it executed the same for the purposes therein contained and in my presence signed and sealed the same.

WITNESS my hand and Notarial Seal.

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_

**DEED RESTRICTION - EXHIBIT 1**

**[Map of Property Showing Deed Restriction Areas]**



Google earth

Eye alt: 8253 ft

Henrich Property

20

2

White Rd

Village Rd

Henrich Property

© SPOT IMAGE  
© 2012 Google

38° 42' 54.34" N 75° 43' 13.10" W elev 42 ft

306

1900 ft

Imagery Date: 7/3/2010 1892

**DEED RESTRICTION – EXHIBIT 2**

**[Survey of Deed Restriction Areas,  
to be completed by Declarant prior to Execution of Deed Restriction]**

## **APPENDIX B – MONITORING AND REPORTING REQUIREMENTS**

1. Defendant Hertrich shall cause the restoration work undertaken on the Site between 2008 and 2010 pursuant to instructions or orders of the EPA to be inspected annually from 2012-2015.
2. The inspections shall be conducted by persons professionally qualified to evaluate the progress of the restoration work described in paragraph 1 above, who shall then complete a report, which may take the form of a brief letter, that includes:
  - Information about the stability of the channel (ditch) running west to east across the Site and the structures constructed within that channel;
  - Color photographs showing representative portions of the Site on which restoration work occurred;
  - Information regarding the survival rate of the trees, shrubs, and herbaceous cover planted as part of the restoration work previously completed on the Site.
  - A certification that the contents of the report are true, accurate, and complete.

Each annual report must be submitted to EPA within thirty (30) days of the inspection on which it is based, and must be submitted no later than October 31 of the corresponding year.

3. In the event that the survival rate of the trees, shrubs, and herbaceous cover planted as part of the restoration work described in paragraph 1 above does not meet or exceed an eighty-percent (80%) survival rate by the submission of the 2013 annual report, Defendant Hertrich may be required to take corrective action, which shall be limited to the amount of work necessary to meet an eighty-percent (80%) survival rate.
4. Until the termination of the Consent Decree, Defendant Hertrich shall, at reasonable times and with reasonable notice, grant EPA personnel access to the property for the purpose of collecting or confirming information on the progress of the restoration.