

U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT

INSTRUCTIONS FOR USING THE MODEL DECLARATION OF RESTRICTIVE COVENANTS AND MODEL CONSERVATION EASEMENT

WITH PERMIT APPLICATIONS UNDER SECTION 404 OF THE CLEAN WATER ACT AND SECTION 10 OF THE RIVERS & HARBORS ACT OF 1899

1. COMPENSATORY MITIGATION AND PERMITTING

Prospective applicants for permits from the U.S. Army Corps of Engineers, ("Corps of Engineers" or "Corps") Mobile District, Regulatory Branch under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act may decide to perform what is known as "compensatory mitigation" in return for unavoidable impacts to waters of the United States including wetlands due to the activities or work covered by a permit. In order to provide perpetual protection of the property, a legally binding Declaration of Restrictive Covenants or Conservation Easement is required, placing permanent conservation restrictions on the use of property containing waters of the United States including wetlands, wetland buffers, upland, streams and streamside buffers. The Corps will determine whether a Declaration of Restrictive Covenant or Conservation Easement is required.

These conservation restrictions significantly limit the property's future use. The Declaration of Restrictive Covenant or Conservation Easement and exhibits must be **approved** by the Corps of Engineers **prior to the recordation** of the documents in the county in which the land lies.

The tracts should contain wetlands, streams or streamside lands that are being restored, enhanced, created or preserved as compensatory mitigation along with buffers and uplands that add to the ecological function of the aquatic site.

2. THE APPLICANT AND OWNER OF LAND MUST BE THE SAME

It is preferred that the applicant for a permit be the title owner of the property being proposed for compensatory mitigation. If the title owner to the mitigation property is not the applicant, regardless of the size of the mitigation area, in most cases the Corps will require that the property be restricted in a conservation easement.

3. PREPARATION OF DOCUMENT/ ATTORNEY / SUBORDINATION AGREEMENTS

We prefer that the Declaration of Restrictive Covenants and Conservation Easement, legal documents, be prepared by a licensed attorney, or at a minimum, reviewed by an **attorney** prior to submittal for review by the Corps of Engineers, Mobile District.

A cover letter should accompany the submittal of the document indicating that a determination has been made that the applicant has clear title to the property free of

encumbrances, which would negate the intent of the parties to perpetually protect the wetlands, streamside lands and buffers. If there are mortgages or other liens on the property, subordination agreements with proper signatures by relevant financial institutions must be submitted with the Declaration of Restrictive Covenants or Conservation Easement. Proper authority to sign is essential, including for corporations, a certification of corporate authority. Proper recordation after approval by the Corps is also necessary for purposes of record notice and assurance that the Declaration of Restrictive Covenants or Conservation Easement will be within the chain of title on future record title searches.

A draft of the Declaration of Restrictive Covenants or Conservation Easement with exhibits should be forwarded to the Corps of Engineers. Model Declarations of Restrictive Covenants and Conservation Easements can be obtained from the Mobile District Regulatory Branch and are also available on the Mobile Regulatory Branch web site, www.sam.usace.army.mil/op/reg/. If there are proposed changes to the models, those changes should be highlighted in the submitted documents, and applicants should include in the cover letter to the Corps project manager the name, telephone and address of the applicant's attorney who will serve as a point of contact for the applicant in discussions about these legal documents. All correspondence should reference the Corps of Engineers permit number or enforcement action number. The number is referenced on all correspondence from the Corps.

4. ON SITE MITIGATION

In most cases, a portion of or all of the wetlands on site that are not proposed to be impacted for fill and/or dredge, may be considered for on site mitigation. That is, certain wetlands on site may be proposed in the mitigation plan, to remain undeveloped as preserved, restored or enhanced wetlands. Generally a buffer will be required around the wetland area at the time that the mitigation plan is accepted. These wetlands and buffers should be restricted by use of a Declaration of Restrictive Covenants or Conservation Easement. Both documents require a survey and legal description of the tract(s) including both wetland and buffer. The initial wetland delineation survey may include the buffer around the wetlands so that a subsequent survey addressing the buffers and wetlands may not be necessary or may require minor modification from the delineation survey. For mitigation on-site for residential, commercial or industrial projects, restrictions will only be considered where the restricted property is set aside as a separate single lot or as acreage separately surveyed and not made a part of lots to be developed as residential, commercial or industrial development. Provisions for long-term management of the restricted property and the legal entity who will be responsible for the long-term management should be addressed in the mitigation plan, and in the case of Conservation Easements, in the document itself. *See Model Conservation Easement.*

5. AMENDMENTS

Proposed amendments to the Restrictive Covenants and Conservation Easements must be pre-approved by the Mobile District of the Corps of Engineers. Amendments will be considered only in exceptional circumstances. Do not anticipate that amendments will be granted. Wording regarding future proposed utilities, road crossings, boardwalks, expansions or other potential future impacts to the property should be included in the original document.

Proposed amendments to recorded Restrictive Covenants and Conservation Easements may be forwarded for interagency review.

Where there is a determination to issue the permit with provision for impact to the protected land and where mitigation has been provided for the impact to the restricted land, the Declaration Restrictive Covenants or Conservation Easement must be amended after approval and signature by the Corps of Engineers.

6. CONDEMNATION OF RESTRICTED PROPERTY

If all or any part of property restricted by a Declaration of Restrictive Covenants or Conservation Easement is proposed for taking by the exercise of eminent domain, or acquired by purchase in lieu of condemnation, whether by public, corporate or other authorities, the Regulatory Branch of the Corps of Engineers shall be notified. A determination may be made that the proposed impact will substantially reduce or destroy the functions and values of wetlands in the restricted property in part or in whole. The fact that the impact proposed is not to wetland or streams, but to buffer or upland, is not necessarily viewed as an insignificant impact. If a permit or other authorization is required for any activity associated with the use of the property after such acquisition, a Joint Public Notice may be issued addressing the unavoidable impact to waters of the United States. Mitigation for impacts to property protected by restrictions may be subject to a significantly higher impact ratio than the standard operating procedures and will be in addition to any mitigation required on any new permit application or authorization request.

7. ENFORCEMENT OF PERMIT CONDITION

Imposition of legal binding restrictions on the use of property approved for mitigation for unavoidable impacts to waters of the United States is a special condition of permits authorizing such impacts. Full and complete compliance with this special condition will be required prior to the start of any work or activity authorized by the permit. Failure to comply with the permit condition with regard to placing legally binding restrictions on mitigation property, as well as any violation of those restrictions once imposed, may constitute a violation of the Clean Water Act and subject such persons to the full range of penalties available under that Act, including restoration and monetary fines up to \$27,500 per day, in addition to any other enforcement measures available under the Declaration of Restrictive Covenant or Conservation Easement.