



**US Army Corps  
of Engineers®**

The background of the cover is a photograph of a river flowing through a dense forest. The water is white and turbulent, suggesting rapids or a narrow channel. The trees are tall and thin, with sunlight filtering through the canopy, creating a dappled light effect on the water and the forest floor.

# **Compensatory Mitigation Site Protection Instrument Handbook for the Corps Regulatory Program**

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This handbook is intended for use in the Regulatory Program only and is not intended to apply to Corps owned property or to where the Corps is a party to a real estate instrument.

**Compensatory Mitigation  
Site Protection Instrument Handbook  
for the Corps Regulatory Program**  
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Developing suitable site protection instruments for mitigation projects can be challenging for the regulatory project manager placing demands on regulators outside their regular areas of practice and expertise. The Institute for Water Resources (IWR) prepared this white paper on site protection for compensatory mitigation projects to provide a reference resource for Corps district regulatory staff involved with ensuring that mitigation projects are protected.

“Compensatory Mitigation Site Protection Instrument Handbook for the Corps Regulatory Program” reviews different site protection approaches and considerations for protecting compensatory mitigation projects. It describes and compares key features of different site protection instruments.

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**Compensatory Mitigation Site Protection Instrument Handbook**  
**for the U.S. Army Corps of Engineers**  
**Regulatory Program**

## **1. Introduction**

Under the Final Rule, Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR part 332/40 CFR part 230, Subpart J (“Mitigation Rule”), all compensatory mitigation plans required for Department of the Army (DA) permits are required to address 12 fundamental components. One of these components is the “site protection instrument” (see 33 CFR 332.4(c)). In accordance with the Mitigation Rule, the long-term site protection required for compensatory mitigation sites must be provided through real estate instruments or other available mechanisms, as appropriate considering relevant legal constraints. 33 CFR 332.7(a)(1).

The site protection instrument<sup>1</sup> is a written description of the legal arrangements, including site ownership, management, and enforcement of any restrictions, that will be used to ensure the long-term protection of the compensatory mitigation project site. The Mitigation Rule requires adequate protection of all compensatory mitigation project sites to the extent appropriate,<sup>2</sup> whether the protection is accomplished through a real estate instrument, management plan, or other long-term protection instrument. Because real estate instruments have binding legal consequences and the legal frameworks for these instruments vary from state to state, it is necessary that U.S. Army Corps of Engineers (Corps) Regulatory Project Managers (PMs), in consultation with their Office of Counsel or Real Estate Office, understand key issues surrounding real estate instruments as they relate to the protection of compensatory mitigation sites in general, and specifically within the state in which the compensatory mitigation site is located.

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<sup>1</sup> The terms “Site Protection Instrument” will be used when generally referring to mechanisms used to protect the compensatory mitigation project site. The term “Real Estate Instrument” will be used when specifically referring to one or more types of real estate instruments used to protect compensatory mitigation project sites.

<sup>2</sup> The Mitigation Rule recognizes that there are situations where it may not be possible to require a real estate instrument, management plan, or other long-term protection instrument because the mitigation provider does not have the required property interest to impose an instrument or management plan (see 73 FR 19646):

There are other examples of situations where it may not be feasible to require site protection through real estate or legal instruments for compensatory mitigation projects. One potential situation is the construction of oyster habitat or the restoration of sea grass beds in state-owned tidal waters, where the project proponent does not have a real estate interest, but may obtain authorization to conduct those environmentally beneficial activities. Another example may be the restoration of tidal marshes or other coastal resources, since the long-term sustainability of those projects in the dynamic coastal environment cannot be assured because of the natural littoral processes that occur in those areas.

## ***A. Purpose of the Compensatory Mitigation Site Protection Instrument Handbook***

This handbook is intended for Corps Regulatory program staff to identify and explain some of the key issues surrounding site protection instruments as they apply to the protection of compensatory mitigation sites. It is not intended for Corps owned property or situations where the Corps is a party to a real estate instrument.

## ***B. Legal/Regulatory Context and Issues***

1. Regulatory Context: The Mitigation Rule states that compensatory mitigation projects must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. (33 CFR 332.7(a))
2. A real estate instrument should be legally sufficient, enforceable, properly recorded in the chain of title, and be able to ensure long-term protection of the compensatory mitigation site. A nationwide standardized real estate instrument is not possible since real property laws differ from state to state.
3. For compensatory mitigation required by Department of the Army permits, there is no legal authority for the Corps to hold a real estate interest in land; therefore, site protection must be accomplished through recognized forms of property protection instruments, some of which are usually administered by a third party.<sup>3</sup>
4. Ownership of the Land: Because the protection of a compensatory mitigation site requires involvement of the owner of the property or an entity with the pertinent property interest, it is preferable that the owner of the compensatory mitigation site (or an entity with a property interest in the mitigation site) be a permittee of a DA permit and/or sponsor of the mitigation bank or in-lieu fee program.<sup>4</sup>
5. The Corps' Office of Counsel (Counsel) plays an essential role in providing advice and determining the legal sufficiency of real estate site instruments and other site protection instruments for compensatory mitigation sites. Timely involvement of Counsel will

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<sup>3</sup> Many states regulate wetlands, streams, and aquatic resources and take the lead in site protection of aquatic resources both on behalf of the state program as well as the federal Clean Water Act 404 program. In those states, the Corps generally plays an oversight role, may negotiate with the State as to the wording of site protection documents and may have third party right of enforcement. In Corps districts where the state is not as active in site protection of wetlands, streams and aquatic resources, the districts generally look to 501(c)(3) non-profit land trusts, departments within the state, or to county or city forms of government to hold conservation easements. Absent any willing easement holder (or Grantee), the Corps looks to the property owner to protect the compensatory mitigation site either through a declaration of restrictive covenant or simply by virtue of the terms and conditions of the permit.

<sup>4</sup> The advantage of having the owner of the land or land interest be the permittee or co-permittee and sign the site protection instrument is to prove that the owner was on notice as to why use restrictions were placed on the land and that he or she agreed to those restrictions. So long as the owner of the property is the permittee or co-permittee and signs the protective instrument, he or she is accountable for the impacts to waters, wetlands, and other resources on the land being provided as compensatory mitigation, and accountable for the long term protection of the mitigation site according to the terms of the site protection instrument. Where the property owner is a limited liability corporation, partnership or business, it is advisable to identify the officers of the corporation, partnership or business and to require them to sign the permit or mitigation bank instrument as individuals and to take responsibility individually, jointly and/or collectively as owners of the land for the long term protection of the mitigation site according to the terms and conditions of the site protection instrument. For example in California, if the bank sponsor is not the property owner, the property owner is required to sign the banking instrument and a condition precedent to bank establishment is recordation of a conservation easement granted by the property owner. Further, in California, most (but not all) in-lieu fee (ILF) program sponsors are not the property owners of the lands on which an ILF compensatory mitigation project would be located. Generally, the ILF program sponsor purchases a conservation easement from the landowner.

enable the Corps Regulatory PMs to avoid various problems that can arise with the preparation of site protection instruments and writing permit conditions relating to site protection. The following offer examples of where Counsel's involvement is key:

- a. Real Property law is based on statutes and case law within the state where the subject property is located, is subject to change, and its application often depends upon the facts in a particular permit situation. Because of this, Corps Regulatory PMs need to involve Counsel to ensure that the proposed site protection instrument reflects the current state of real property law within that state and is properly applied to the facts of a particular permit and mitigation plan.
- b. Counsel is able to research real estate laws available in a particular state for long-term protection as well as to develop a real estate instrument that satisfies the requirements of the Mitigation Rule and reflects the conditions that PMs desire in the instrument. Counsel review of the language proposed for the site protection instrument is necessary to assure that it is legally sufficient, recordable, and enforceable within a legal context.
- c. Counsel, after researching the real property law of a state, may prepare a real estate instrument template for use by the Corps Regulatory PMs in that state. Using this approach, Counsel's review of the real estate instrument will be significantly streamlined and can focus on instances in which the permittee, sponsor, and/or Corps Regulatory PM wishes to vary from the language of the template.
- d. As part of our due diligence in accepting a site for compensatory mitigation, prior to approval of a mitigation plan, Counsel should be provided the opportunity to review any title search documentation and to evaluate property rights, interests (such as timber, or mineral rights), and encumbrances that could result in a site being deemed unacceptable as a compensatory mitigation site. Corps Regulatory PMs and their Counsel should be alert to the possibility of unrecorded interests, agreements, permits or licenses that may not show up in a title search or opinion, but which could impact the acceptability of a compensatory mitigation site.
- e. Counsel also may review the real estate instrument and exhibits and interact with the property owner's legal representative.
- f. Counsel can assist the Regulatory PM in determining the real estate instrument best suited for the specific circumstances.
- g. Counsel and the Regulatory PM could develop a checklist of items the landowner should provide as part of the review process for the site protection element of the mitigation plan (e.g. deeds evidencing ownership, maps, a preliminary and final title report, title insurance, draft easement). In addition, outlining a sequence of events when these items are needed for review would be helpful.

**Based on the above, it is advisable for the Corps Regulatory PMs to engage Counsel early in the permit review process if it is likely that site protection will be required. Inability to protect a compensatory mitigation site will affect permit compliance and may create enforcement issues.**

## II. Types of Real Estate Protection Instruments (including Advantages and Disadvantages)<sup>5</sup>

The real estate instruments most commonly used to protect compensatory mitigation sites and those cited in the Mitigation Rule at 33 CFR 332.7 include:

- A. *Conservation Easements*
- B. *Deed Restrictions (Restrictive Covenants)*
- C. *Transfer of Title*
- D. *Multi-Party Agreements, and*
- E. *Other Documents, such as Conservation Land Use Agreements, Federal Facility Management Plans or Integrated Natural Resources Management Plans, that protect real property or mitigation projects on Federal lands*

(It should be noted that not all forms of site protection may be available for a given compensatory mitigation site. It is incumbent upon Corps Regulatory PMs, acting on the advice of Counsel, to determine whether that method of site protection proposed for the mitigation project is appropriate given the characteristics of the compensatory mitigation project.)

### A. *Conservation Easements:*

A conservation easement is an interest in real property that precludes the property owner from using the land in ways that would adversely impact the natural resources on the property. The property owner (“Grantor”) makes a written conveyance of an easement (real estate instrument) which protects the natural resources and restricts the activities that can be conducted on the property. The party receiving the conservation easement is referred to as the “Holder” (or Grantee) and is usually a non-profit, land trust or governmental entity. The Holder does not gain ownership rights to or possession of the land, but does hold a real property interest. The conservation easement may also grant oversight and enforcement rights to a third party, typically in return for some benefit to the Grantor or property owner (such as issuance of a permit, mitigation bank approval, etc.).

#### 1. **Advantages.**

A conservation easement may convey to a Holder the legal authority to access the property, monitor compliance, and to enforce land use restrictions in accordance with the terms of the real estate instrument. In cases of non-compliance, the Holder may be authorized to take action to address non-compliance, including in some cases initiating litigation. The conservation easement should include a provision requiring the Holder to notify the Corps and other appropriate entities of any non-compliance in accordance with the terms of the real estate instrument. The Corps may then determine whether an enforcement action is necessary to ensure

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<sup>5</sup> Real property law differs from state to state. Also the entities engaged to protect DA permit compensatory mitigation sites may differ. In addition to (and especially in the absence of) the ability to use conservation easements, restrictive covenants, or the conveyance of the property to a conservation entity, the district looks to the permit conditions, the mitigation banking instrument, or the terms of the in-lieu fee program instrument to protect the compensatory mitigation site and ensure that the required compensatory mitigation continues to be provided over the long term. There are some statutes, such as the Uniform Environmental Covenants Act, that create environmental covenants that are perpetual. However, the state legislature must adopt the act and add language that would make it applicable to DA permit compensatory mitigation sites. An actual transfer of land from the owner to an entity that will hold and protect the land for its conservation values is another form of site protection.



compliance with the terms and conditions of the DA permit, the mitigation banking instrument or the ILF project instrument. The conservation easement, if properly drafted and recorded in the chain of title<sup>6</sup>, remains in force even if the property is transferred to a new owner by sale or other means.

A conservation easement may allow the land owner to retain many property rights. For example, a property owner could convey a conservation easement over wetland property while retaining the right to hunt on the property or to enjoy other compatible uses.

The typical conservation easement statute provides for a third-party right of enforcement which may be used to augment and back-up the capabilities of the Holder by providing that third party with the right to ensure compliance with the conservation restrictions, through litigation if necessary. Although the Corps may not hold real property interests unless it has the specific statutory authority to do so, it may be the recipient of a third-party right of enforcement if permitted under State law. Having an explicit third-party right of enforcement recognized in the conservation easement: 1) provides a legal basis to enforce the easement based on state law in addition to the permit conditions, and 2) provides notice in the chain of title as to the nature of and reason for the easement to both tribunals and subsequent purchasers.

The Holder, such as a land trust or natural resource agency, may have experience in monitoring aquatic resources, managing wildlife habitat or protecting endangered species. Therefore, not only is the land protected from future development and other incompatible activities through conveyance of the conservation easement, but under proper management, the Holder may increase its environmental values and functions.

Another advantage of the conservation easement is that the Holder is responsible for monitoring compliance and can take action to address non-compliance rather than the Corps. This in turn reduces Corps' compliance workload.

## **2. Disadvantages.**

Holders may have the discretion not to enforce the conservation easement terms.

A conservation easement could be extinguished for several reasons. One main reason is if the Holder of the easement ceases to exist, as in the case of a non-profit 501(c)(3) corporation or a land trust that dissolves.<sup>7</sup> A conservation easement can be extinguished for lack of a Holder. The easement may also be extinguished if the Holder does not enforce the use restrictions and/or if the land is used or developed for a contrary purpose to the easement.

It can often be difficult to find a Holder, especially for small compensatory mitigation sites. There may be no state or local governmental department or non-governmental agency willing or

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<sup>6</sup> The expression, "chain of title" simply refers to the recorded deeds of owners of a parcel of land going back over time. If a real estate instrument is not properly recorded to provide adequate "notice" to the public or future owners, it may not be recognized as an enforceable interest in land.

<sup>7</sup> In some districts, the requirement by the Corps that the compensatory mitigation site be protected by a conservation easement, or servitude, coupled with the lack of governmental entities or reputable land trusts who are willing to hold a conservation easement, has led to the formation of 501(c)(3) non-profit entities formed for the sole purpose of holding conservation easements on DA permit compensatory mitigation sites. Some districts have adopted standards for non-profit entities that are proffered as conservation easement holders, such as the "Land Trust Standards and Practices," set by the national Land Trust Alliance and accessible on their web site.

authorized to hold a conservation easement, especially if the property is small and difficult to access for enforcement purposes or if adjoining land uses are viewed by a potential Holder as incompatible with the conservation easement.

Insufficient funding is another reason that potential Holders may decline an easement. If an adequate endowment (funds necessary for easement Holder to meet their legal and management responsibilities) was not established or if the Holder's financial situation changes, the Holder may not have sufficient funds to monitor, manage and enforce the terms of the easement.

## **B. Deed Restrictions (Restrictive or Negative Covenants):**

A restrictive covenant is a condition in a deed limiting or prohibiting certain uses of real property. Restrictive covenants should "run with the land," meaning that they are enforceable by and against later owners or occupiers of the land. Land developers typically use restrictive covenants when they subdivide property to impose limitations on the use of property such as set back lines, common area use, architectural design rules, etc. Restrictive covenants are also used to protect compensatory mitigation sites. For example, the owner (or permittee) may agree to place limitations on the use of the compensatory mitigation property as a condition of a DA permit, for authorization to operate a mitigation bank, or to proceed with an In-Lieu Fee (ILF) project. The "Declaration of Conservation Covenants and Restrictions," is recorded in a record of deed office. For compensatory mitigation sites, the recorded restrictive covenant should be written so that it runs with the land. The compensatory mitigation project site and its aquatic resources are protected as a benefit to the owner, subsequent owners and to the public.<sup>8</sup> The Corps may enforce the use restrictions under the deed restriction or negative/restrictive covenant as long as it is a condition of a DA permit, a mitigation banking instrument, or an in-lieu fee program instrument. In other words, violation of the restrictive covenant would be a violation of the applicable permit condition(s). Therefore, it is important that the conditions of the DA permit and the deed restriction be linked together to create an enforceable real estate instrument.

### **1. Advantages.**

The restrictive covenant is written to "run with the land" in perpetuity or for a substantial period of time and the covenant remains in effect regardless of ownership of the land. Every subsequent owner or occupier must comply with the terms of the covenant. Also a deed restriction does not require a third party holder because the restrictions are on the land itself.

### **2. Disadvantages.**

Deed restrictions are more difficult to enforce because a third party cannot be given legal responsibility for monitoring and protecting the site and ensuring compliance with the terms of the deed restriction. The burden of enforcing the deed restriction or negative/restrictive covenant is on the property owner and potentially the Corps and/or state regulatory agencies.

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<sup>8</sup> State statutes, corresponding case law and surveys of the law, like Restatements of Property, published by the American Law Institute, are used by counsel to determine if restrictive covenants may be used to protect compensatory mitigation sites. Where restrictive covenants are used, the property owner, by virtue of issuance of a DA permit, banking instrument, or in-lieu fee program instrument, agrees to declare covenants, conditions and restrictions that run with the land as to certain platted and legally described wetlands, streams, aquatic resources, and buffers, and to record the declaration in the chain of title where it will serve as notice to future owners.

State statutes may limit the number of years that a deed restriction or negative/ restrictive covenant is in force and consider “covenanting parties’ intent” when determining whether enforcing the covenant would be adverse to “public policy”.<sup>9</sup> Therefore, it is imperative that the restrictive covenant include the purpose of the covenant and state that the covenant is a requirement to secure a DA permit, a mitigation banking instrument, or approval for an in-lieu fee project.

It should be noted that marketable title statutes typically apply to deed restrictions which could have the effect of sunsetting these restrictions. One option might include provisions in the deed restrictions for periodic re-recording of the restrictions knowing, however, that there is some risk that periodic recordation may not take place.

It is important that the deed restriction or restrictive covenant be written to “run with the land” and be recorded in the chain of title to serve as notice to anyone searching the property records. Without this, the deed restriction may not be enforceable to subsequent owners of the land. (This is also true of conservation easements.) Therefore, within the documentation that is filed with the deed, it is important to provide language and maps showing specific areas (e.g., aquatic resources such as wetlands, streams, upland buffers) on the parcel that are a protected interest on that property and indicate that they are part of a compensatory mitigation site required by a DA permit, or is a mitigation bank site or an in-lieu fee program project site.

### ***C. Transfer of (Fee) Title:***

In a transfer of title, ownership of the compensatory mitigation property is transferred to a natural resource management or other governmental agency, land trust, land management entity, or another non-profit entity deemed acceptable to the Corps. That entity must agree to manage and protect the mitigation site including its aquatic and other natural resources on the property.

#### **1. Advantages.**

Transferring real property to a land management entity (land trust, natural resource management or other governmental agency) is beneficial to the extent that the land management entity may have greater resources to staff, manage and protect the property including the aquatic resources on that property. Compensatory mitigation sites may become part of a larger protected area that is currently being managed by that land management entity.

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<sup>9</sup> In Indiana for example, the state Court allows restrictive covenants but only upholds them when they are justified and unambiguous and their enforcement is not adverse to public policy. Therefore, when a Court is called upon to interpret a restrictive covenant in that state, the restrictive covenant will be strictly construed, and if there are any doubts they will be resolved in favor of the free use of property and without the restrictions. The covenanting parties' intent must be determined from the specific language used in the covenant and from the situation of the parties when the covenant was made. Specific words and phrases cannot be read exclusive of other contractual provisions. In addition, the parties' intentions must be determined from the contract read in its entirety. When the restrictive covenant is a requirement to obtain a Corps permit, this should be stated clearly in the Declaration of Covenant document.

## **2. Disadvantages.**

It may be possible that once the land has been transferred, the receiving entity could convert compensatory mitigation sites to other purposes.<sup>10</sup> The perpetual set aside of lands for natural resources alone is often times unsustainable. Land owners often have limited resources for operation costs (e.g. property taxes, surveys etc.) or the costs needed to repair or restore the site if it is damaged due to a natural or unforeseeable event. Limited resources sometimes result in the landowner adapting the site for uses that generate income such as planting of crops; licensed hunting activities and structures; or opening the site to ecotourism or passive recreation. These may be incompatible uses, depending on the provisions of the approved mitigation plan (see 33 CFR 332.7(a)(2)).

Some Districts have placed reversionary clauses in title transfer agreement to address incompatible uses by a land management agency. A problem with reversionary clauses is even if the compensatory mitigation site reverts to the original owner if the real estate instrument is violated, the original land owner (or estate in case of his or her death) may be unwilling take the land back and manage it as a compensatory mitigation site, or the original land owner may no longer exist. However, some states have included in their reversionary provisions the ability for title to be transferred to a designated state agency such as a state wildlife or natural resource management agency in the event of change in use.

### ***D. Multi-Party Agreements***

These are agreements among several interested parties to protect a property. Those agreements establish roles and responsibilities for each of the signatory parties consistent with applicable federal and/or state statutes, as well as the objectives of the land trust.

Example 1: A Land Trust has a willing seller of land that has been identified as a priority area for aquatic resource restoration or protection but the Trust lacks funds necessary for long-term protection of the property. There is an approved mitigation plan for restoration and protection of aquatic resources on the property. After the Land Trust acquires the property and after the compensatory mitigation has been successfully completed, the Land Trust plans to transfer the property to the U.S. Forest Service who will be responsible for long-term management. The parties execute a multi-party agreement to establish their respective roles and responsibilities which will be undertaken after the permittee responsible for providing compensatory mitigation makes the necessary payment to the Land Trust. The Land Trust acquires the property and implements the approved mitigation plan. If the project covered under this agreement is permittee-responsible mitigation then the permittee remains responsible for ensuring the mitigation project meets its ecological performance standards until it enters the long-term management phase.

Example 2: A state non-game agency owns a property and agrees to allow restoration and enhancement activities to be undertaken on the property by the State's Department of Transportation who needs compensatory mitigation credit. The state non-game agency does not have the funds to conduct the restoration and enhancement activities, and is unlikely to obtain the necessary funds. The state non-game agency also agrees to manage and preserve the DA permit

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<sup>10</sup> Monitoring of mitigation projects for incompatible uses or activities is appropriate at all compensation sites regardless of the site protection instrument.

compensatory mitigation area for its restored and enhanced aquatic resources. The parties enter into a multi-party agreement via an MOA or MOU.

### **1. Advantages.**

There are more opportunities to leverage multiple agencies resources to ensure that a compensatory mitigation project is implemented and managed over the long term, through shared financial or monitoring obligations. Multi-party agreements also provide for participants with specialized areas of expertise which may increase the long-term ecological performance of the compensatory mitigation project and ensure that it will be protected and managed properly over the long term.

### **2. Disadvantages.**

Where there are several parties, there can be more issues over agreements and it could be more difficult to achieve consensus. For example, if one party does not fulfill its responsibilities, it jeopardizes the success of the entire compensatory mitigation project, including its long term management and protection. It is important to ensure that the agreement is coordinated through Counsel and contemplates potential conflicts and ways to resolve those conflicts, such as a mediation or arbitration clause.

Agreements are not necessarily as binding as a conservation easement and may not necessarily “run with the land” and usually have termination clauses.

### ***E. Other approaches to site protection, documents, such as Conservation Land Use Agreements, Federal Facility Management Plans or Integrated Natural Resources Management Plans, that Protect Real Property or Compensatory Mitigation Projects on Federal/State Lands***

Conservation Land Use Agreements are agreements to conserve property while allowing certain compatible uses but restricting other uses that are incompatible with compensatory mitigation. These types of agreements can be used when the governmental entity is already the owner of the compensatory mitigation land and no transfer of title will be required. These types of arrangements may also be necessary when a governmental entity is responsible for providing compensatory mitigation, and uses government land for a compensatory mitigation project, but cannot use a conservation easement or deed restriction to provide long-term protection because of statutory or regulatory restrictions applicable to government lands.

The agreement may be recorded in a land records office. These agreements can also be used when the federal government is going to become the owner but is not authorized to allow recordation of any limitation on the property or its use. Federal agencies including the Department of Defense, the U.S. Forest Service, and Bureau of Land Management are typically precluded by law from recording easements or restrictive covenants on their lands. This complicates long-term protection of compensatory mitigation projects on federal lands. However, federal agencies are authorized to use other tools to protect and manage compensatory mitigation sites on federal lands. Such tools may include memoranda of understanding, integrated natural resource management plans, federal facility management plans, and conservation land use agreements.

A governmental permittee or third party mitigation sponsor can lease a compensatory mitigation or conservation property to a non-profit conservation organization as a mechanism to conserve or protect a compensatory mitigation site. Department of Defense agencies have out-leased some compensatory mitigation and conservation properties to conservation organizations on a long-term basis as a mechanism for providing long-term site protection.

Where there is a conservation land use agreement, lease, or similar agreement all parties involved sign the agreement that sets out the applicable authorizing state and/or federal statutes. The agreement includes a legal description and survey of the compensatory mitigation property, the approved mitigation plan, and provides for any acquisition and transfer of ownership as well as funding methods. The agreement names the entity that will ultimately record the Conservation Land Use Agreement and will manage the property over the long term according to a memorandum of agreement. Additionally and importantly, the agreement specifies the way to report to the Corps on management issues and to address modifications, renovations, or termination of the agreement.

Federal agencies typically identify the compensatory mitigation or conservation lands in their land management plans. These plans are generally identified as Integrated Natural Resource Management Plans (INRMP) by Department of Defense (DoD) agencies, Forest Management Plans by the U.S. Forest Service, or Comprehensive Conservation Plans by the National Wildlife Refuge System and Federal Facility Management Plans by other agencies. These plans clearly identify the location and extent of the compensatory mitigation properties, suitable management activities, and incompatible activities. They are typically utilized by agency staff in planning future activities on federal lands. These plans are typically referenced by Conservation Land Use Agreements and together with conservation land use agreements may provide acceptable compensatory mitigation site protection on federal lands. Other government agencies (e.g., state agencies) may use similar plans to protect compensatory mitigation or conservation lands.

### **1. Advantages**

Land management plans or agreements are a mechanism to protect compensatory mitigation sites where laws prohibit recordation of real estate documents. Federal facility management plans, including INRMPs, are intended to be living documents, and may change over time. They are typically reviewed annually and may be revised every 5 years.

### **2. Disadvantages**

Leases are typically granted for limited terms (typically 10 but can also extend up to 99 years). Compensatory mitigation lands protected under these agreements have limited time periods for protection. These agreements are subject to periodic review and renewal. With these reviews, there is a potential for revision to the management plans resulting in reducing or even removing of a mitigation site from the plan.

Compensatory mitigation sites can be utilized for other purposes, for instance when land management plans are changed to meet national security requirements. However, change in use of these sites requires notification to the Corps, and the Corps may require the compensatory mitigation provider to provide replacement compensatory mitigation acceptable to the Corps.

### III. Important Issues to Consider

#### A. *What to include in a Site Protection Instrument*

- a. Express statement that the purpose of the instrument is to protect a compensatory mitigation site under Federal and (where applicable) State law;
- b. Express reference to the DA permit and/or mitigation banking or ILF program instrument.
- c. Survey/Legal Description (Survey shows any easements that will remain in place)
- d. Identification of other property rights/interests;
- e. Baseline- Description of conservation resources on the site, including listed species, habitat, and available information concerning the contribution they provide in terms of functions and services;
- f. Prohibited and Acceptable Uses (See K and L below);
- g. Third-party right of enforcement, where appropriate;
- h. State that any amendment of the instrument must be preapproved by the Corps and that approval must be reflected in an amendment recorded in the chain of title; and
- i. Provision regarding what happens in a “taking” by the Government (eminent domain).

**B. *When to Require, When to Record:*** It is important to develop a local policy and process regarding development and recordation of site protection instruments for compensatory mitigation projects in coordination with Counsel. (The owner of the real property and/or the permittee/banker/ILF sponsor will most likely be represented by legal counsel as well). Provided the applicant has identified a compensatory mitigation site that is acceptable to the Corps, the appropriate time to require submittal of title insurance, title search and a questionnaire regarding land issues would be just after a public notice has been issued for the permit application, mitigation bank prospectus, or ILF project proposal. For DA authorizations that do not require a public notice such as NWP or general permit verifications, the appropriate time to submit real estate information would be upon receipt of a proposed detailed mitigation plan. The Corps Regulatory PMs should not wait until the DA permit, mitigation banking instrument, or in-lieu fee project approval is being finalized to begin review of site protection issues. There is no point in proceeding with those actions if there are outstanding issues regarding the land, since a permit, instrument, or instrument modification cannot be issued until the mitigation plans have been approved.

A real estate instrument is recorded at the county register of deeds office in the county or parish where the land is located. It then provides a public record of the interests associated with the land. Land management plans should be accessible at any registry of deeds office, military base, tribal land office, natural resource area office or similar location for review by interested parties. Among those interested parties could be:

- Potential buyer of land
- Title Search – open to public
- Financial institutions prior to lending
- Private and governmental developers
- Court proceedings
- Land planning

**C. Marketable Title:** A marketable title is a title that is clear of any conflict of ownership and can be transferred by sale, gift, death, or donation to another person, conservation group or government entity. Twenty-two states have passed Marketable Title Statutes to provide clear marketable title by removing encumbrances of old and perhaps abandoned claims (including conservation easements and restrictive covenants) after a certain number of years (25-40 years). Some states (e.g. Massachusetts, North Carolina, California, Rhode Island and Wisconsin) specifically exempt conservation easements from their Marketable Title Statutes. In the other states, it is important for Corps Regulatory PMs to be aware of how these statutes could affect the legal protection of a compensatory mitigation site and what language or condition could be added to prevent extinguishment of the real estate instrument. One option is to condition the DA permit or third party mitigation instrument to require periodic re-recording of the site protection document.

**D. Title Insurance:** Title Insurance guarantees that the title is clear and there is no conflict of interest regarding ownership of a particular parcel. The requirement of title insurance means that a title insurance company is hired to go to the record of deeds office and research the history of the property (chain of title) going back 30-60 years (depending upon state law) to see if the owner has clear title and to see if there is any conflict in ownership. If there is clear title, then the company backs their determination with insurance. A title search provides a list of all interests in the real property that are recorded on the deed. It will not identify any agreements that have been made that bind the property but do not relate to ownership, unless a lien has been filed. Licenses or permits issued over the subject property are often not recorded and may not be identified. Title insurance does not identify any other interest such as mineral or timber rights, but rather insures the buyer against any future clouds on title that may be raised adverse to ownership. However, title insurance is not a substitute for a title report. A title report is a written analysis of the status of title to real property, including a property description, names of titleholders and how title is held, tax rate, encumbrances (easement, mortgages, liens, deeds of trusts, recorded judgments), and real property taxes due.

A title insurance company may be willing to insure property that is encumbered by easements or other interests that may be adverse to the use of the property as a compensatory mitigation site, but not adverse to ownership (e.g., oil wells, large pipelines, or drainage structures). Therefore, a title report should be requested and provided to Counsel for review. For smaller parcels of land, used for permittee-responsible mitigation title reports and title insurance may not be required by the Corps. Rather, the real estate instrument can include a statement by which the owner of the property (or entities with interests/rights in the property) warrants that there are no conflicting property interests or rights and pledges some type of corrective action or indemnification if it turns out that there are in fact conflicting interests or rights in the property.

Title insurance does not necessarily address all factors that could affect the suitability of the site for compensatory mitigation. Title insurance just assures clear title for the specified period of time. It often does not list all the existing easements, rights-of-way, tax liens, financial liens and other interests less than ownership. A title search for other interests should be conducted by a title company and provided to the Corps for review. The California Interagency Review Team has developed a template for this search for other property interests, known as a "Property Assessment and Warranty".



E. **Enforcement:** Where possible, the site protection instrument, DA permit, or third party mitigation instrument should establish a party with the right to access the site and enforce provisions in the site protection document that protect the compensatory mitigation site. The party(s) responsible for the overall enforcement of the site protection instrument should be clearly identified, and should have adequate resources to monitor and enforce the conditions that protect the compensatory mitigation site. For conservation easements<sup>11</sup>, the Corps may accept a third-party right of enforcement consistent with State law (consult with your legal counsel). The regulatory agencies (Corps and/or state) should have a copy of the final site protection instrument or in the case of a real estate instrument a recorded copy

F. **Eminent Domain** refers to the power of the government to appropriate property for public use. Condemnation proceedings can result in the loss of title to the property or a portion of the property. However, the landowner is paid the fair market value of the land lost. If eminent domain is proposed on a compensatory mitigation site required for a DA permit, or for a mitigation bank site or an in-lieu fee project site, try to negotiate a solution with the governmental entity and educate them on the value of the compensatory site to encourage continued protection of the site. Additionally, a court might consider the consequential value loss or an uneconomic consequence argument in addition to the fair market value where the real estate instrument cites the conservation values provided to the public by the site. For example, the potential effect of exercising eminent domain on conservation values could be demonstrated by explaining that a road right-of-way through a compensatory mitigation site not only results in the direct fill area loss, but secondary impacts such as fragmentation, loss of hydrology, or loss of buffer area. Suggested language in the real estate instrument:

*If protected compensatory mitigation property is taken in whole or in part through eminent domain, the consequential loss in the value of the property protected by the Corps' Regulatory Program is the cost of the replacement of the conservation functions, services and values of the aquatic and terrestrial resources on the compensatory mitigation property.*

G. **Subordination:** To subordinate means to make subject to or to relegate to a lesser position of priority. For compensatory mitigation sites, to subordinate would require that any pre-existing easements, liens or encumbrances take second priority to the use of the property as a compensatory mitigation site. For example, if a **real estate instrument** is recorded after a deed to secure a debt, the land may be foreclosed upon to settle the debt and the compensatory mitigation site protection instrument would be terminated. Subordination allows more assurance that the site will withstand adverse actions. Consider requiring language like the following in the **real estate instrument**:

*Consent and Subordination*

*The undersigned (Lender) beneficiary under a Deed to Secure Debt (dated) and recorded in (Deed Book) and (Pages) in the (County, State) records, for itself, its successors and assigns, consents to the foregoing (easement/covenant).*

*Lender agrees that, upon recordation of the (document), the provisions (of the document) shall run with the land which serves as security for the debt evidenced by the Security*

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<sup>11</sup> These rights have been upheld in Federal court. See, e.g., U.S. v. Bedford, 2009 WL 1491224 (E.D. Va. 2009).

*Deed and further agrees that any foreclosure or any other remedy available to Lender will not render void or otherwise impair the validity of the (easement, covenant).*

*The undersigned acknowledges that it has received and reviewed a copy of the (document and exhibits).*

***Why would a financial institution agree to or consent to subordination?*** The lender is in the business to loan money and may be confident that the party responsible for the compensatory mitigation project (e.g., developer or mitigation banker) will succeed and therefore pay interest on the loan so the lender can profit. The lender also acknowledges the Corps' compensatory mitigation requirements associated with a DA permit, mitigation banking instrument, and in lieu fee program instrument and understands that the areas placed in site protection would normally need permission from the Corps to be impacted. Additionally, the lender may determine that the real estate instrument does not diminish substantially the value of the property which may contain uplands outside of the protected compensatory mitigation area that still could be developed. For example, a lien or other financial debt owed may encumber a large tract of land where the area needed for compensatory mitigation only covers a small fraction of the total acreage. Therefore, to subordinate the encumbrance to the compensatory mitigation only may not substantially diminish the value of the property as a whole.

If, however, an institution is unwilling to subordinate, this might be reason to reject a proposed compensation site.

***H. Severed Rights/Split Estates:*** For many properties, subsurface rights (including oil and gas) may be severed from surface rights. Timber rights might be another severed right. These interests may have been severed in the past through a conveyance or reservation of rights. The owner of these severed rights or interests may not be the owner of the land surface and has the right to access those materials and to convey the associated rights. Long-term protection of a mitigation project may be complicated when the owner of mineral or timber rights is unwilling to agree to extinguish or subordinate its interest for the mitigation interest. The inability to resolve conflicts between surface rights, mineral, and timber rights has prevented development of a number of compensatory mitigation projects. In some cases, regulators have worked with the holders of those interests to minimize the impact of exercising those rights on compensatory mitigation projects. Mechanisms that have been used to minimize those impacts include mitigation providers purchasing those rights, and for holders of subsurface mineral rights directional drilling and establishing minimal pads or access areas for development, etc.

***I. Signage and posting:*** Proper signage and posting should be used to alert the public to the presence of the compensatory mitigation site. Signage should clearly indicate prohibited uses. Provisions for signage and posting should be required as permit special conditions or as part of the approved mitigation plan or third party mitigation instrument.

***J. Amendment/Notice/60-day language:*** Requests to amend a recorded *real estate instrument* or another type of site protection instrument are inevitable. Corps Project Managers should consider including the following language in the instrument to discourage such amendments:

*This (document) shall not be amended or extinguished except by written approval of the (Corps). Amendments to the (document) for the purpose of proposing additional impacts are not favored and will be considered only in rare circumstances following (Corps) policy and procedures.*

*or*

*After recording, these restrictive covenants may only be amended by a recorded document signed by the Corps and \_\_\_\_\_. The recorded document, as amended, shall be consistent with the District model conservation restrictions at the time of amendment. Amendment shall be allowed at the discretion of the Corps and \_\_\_\_\_, in consultation with resource agencies as appropriate, and then only in exceptional circumstances. Compensatory mitigation for amendment impacts will be required pursuant to District mitigation policy at the time of amendment. There shall be no obligation to allow an amendment.*

**The 60-Day Notice Requirement on Amendments.** To insure the Corps is aware of any proposed changes to a recorded site protection instrument, the instrument should include language requiring a 60-day advance notice before any amendment to a conservation document can occur (33 CFR 332.7(a)(3)). Assuming the site protection instrument is properly recorded, a title search of the property will provide notice to any subsequent owner of this requirement.

Some of the reasons or justifications for amendments sought by the permittee include:

- 1. It will only impact the buffer/upland and therefore no waters of the U.S. will be affected.** The compensatory mitigation was required after consideration of the functions and value of the entire tract, including any buffers. Impacting those buffers may affect the ability of the compensatory mitigation site to fulfill the ecological objectives stated in the DA permit conditions or approved mitigation plan. Corps regulations at 33 CFR 332.3(i) indicate that buffers are required where necessary to ensure long-term viability of a compensatory mitigation site
- 2. It is the best alternative for a linear project (e.g., roads or pipelines) because all other alternatives involve impacts to homes, businesses or developed areas. A publicly-sponsored project could save taxpayer money by crossing a protected site instead of having to go around it.** Cost savings, although a factor, are not the most significant consideration. A thorough alternatives analysis taking into account additional compensatory mitigation cost could prove that the requested amendment is not the least costly alternative.
- 3. The wetland area to be impacted is small, the functions and values are low, or the area is no longer jurisdictional.** The Corps may determine that the impact regardless of its size or quality could affect the entire site and not just the portion directly proposed for impact. Compensatory mitigation sites do not have to be jurisdictional under Section 404 of the Clean Water Act and/or Sections 9 and 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 332.1(b)).
- 4. An impact to the protected wetlands is needed for some national security interests (i.e., the military needs to impact the site for training activities).** Typically, acceptable replacement compensation would be required by the District.

Consider the following requirements when developing any policy for amendments:

- a. The owner of the property must consent and, if accepted, the amendment to the real estate instrument must be drafted, reviewed and pre-approved by the Corps, signed by all parties, and recorded in the record deeds office.
- b. The party responsible for the compensatory mitigation should conduct and provide to the Corps an alternatives analysis regarding other options that may be available. Cost saving, although a factor, should not be the controlling consideration.
- c. The Rule requires that when a change(s) is proposed to compensatory mitigation projects on public lands that would result in an incompatible use, acceptable alternative compensatory mitigation must be provided to the Corps (33 CFR 332.7(a)(4)) .
- d. Each district should develop a clear and consistent policy for amendments and post them on the district's Regulatory web site.
- e. It is not relevant whether the impact is to aquatic resources or to terrestrial resources (e.g. upland buffers) that are part of the approved compensatory mitigation project. The entire site was required as compensatory mitigation for permitted impacts and buffers provide important functions and are valuable to the sustainability of the aquatic resource. The Corps may determine that the impact will affect the sustainability, functions and services of the aquatic resources on much or even the entire site (for example due to changes in hydrologic regime) and not just the acreage on which the impact is proposed.
- f. Additional compensatory mitigation may be required to replace the resource functions, quality, temporal losses, etc. of the compensatory mitigation project that will be lost as a result of the impact resulting from the amendment.

Transfer of ownership of compensatory mitigation parcel may entail amendment of the permit, mitigation plan, and/or third party mitigation instrument. For mitigation banks and in lieu fee projects, it may be considered a streamlined modification of the instrument under 33 CFR 332.8(g)(2). It is especially important that the Corps PM be made aware of any change in property ownership. Language in the site protection instrument should be included to notify the Corps of such a change, such as:

*“At any time during the life of the mitigation bank or compensatory mitigation project, should the real property be transferred, sold or conveyed, be subject to foreclosure, bankruptcy or transferred by any other means whatsoever, the owner, sponsor or administrator shall immediately notify the Corps in writing and no further mitigation credits shall be sold or credited toward fulfilling mitigation requirements pending review and approval of the transfer by the Corps.”)*

(In the case of a mitigation bank wishing to continue to sell credits, add the following:

*The new transferee shall provide the Corps with a letter agreeing to adopt the terms and conditions of the mitigation banking instrument and provide acknowledgement of the terms and conditions of the recorded (real estate instrument) .*

**K. Merger.** Merger occurs when the Holder of the conservation easement becomes the owner of the land and the two entities “merge.” When this happens, there is no longer a third party who

has an interest in the land. In order to prevent the extinguishment of the conservation easement, it is recommended that the following language be included in the conservation easement:

*The doctrine of merger shall not operate to extinguish this Conservation Easement if the Conservation Easement and the Mitigation Property become vested in the same party. If the doctrine of merger applies to extinguish the Conservation Easement then, unless Grantor, Grantee and the Signatory Agencies otherwise agree in writing, a replacement conservation easement or restrictive covenant containing the same protections embodied in the conservation easement shall be recorded against the Mitigation Property. The owner of the Mitigation Property may suggest a new conservation easement holder and upon approval by the agencies, grant a conservation easement protecting the Mitigation Property.*

**L. Notice of Conservation Restrictions in other Permit Applications.** To ensure that other governmental entities are not induced to take action without knowledge of the conservation restrictions, consider including the following provision:

*Any permit application, or request for certification or modification, which may affect the Property, made to any governmental entity with authority over wetlands or other waters of the United States, shall expressly reference and include a copy (with the recording stamp) of these restrictive covenants.*

**M. Suggestions for Prohibited Uses<sup>12</sup>** (PM can add or subtract from this list)

- Clearing, cutting, mowing
- Earthmoving, grading, filling, topography change
- Mining, drilling, timbering
- Draining, diking
- Diverting or affecting the natural flow of surface or underground waters
- Spraying with herbicides or pesticides that violate water quality standards
- Grazing or use by domesticated animals
- Use of off-road vehicles and motor vehicles
- Creating fuel modification zones

**N. Possible Acceptable Uses of Land<sup>13</sup>** (PM can add or subtract from this list)

- Walking trails in uplands using pervious materials
- Minimal structures and boardwalks for the observation of wildlife, stream and wetland ecology
- Hunting, fishing, canoeing, hiking, passive recreation
- Carrying out approved conservation and wildlife management plans
- Fencing to prohibit entrance of livestock and trespassers

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<sup>12</sup> Incompatible uses are determined on a case-by-case basis during review and approval of the mitigation plan, and should be identified in the site protection instrument (see 33 CFR 332.7(a)(2)). In some cases what might be incompatible uses for one site may be considered necessary for maintenance of another mitigation site, such as grazing, burning, etc.

<sup>13</sup> In some cases, uses that are typically considered acceptable may be inappropriate for a particular site, for example walking trails in a wetland that is sensitive to disturbance.

- Posting of acceptable signs
- Grazing or use by domesticated animals, especially if an objective of the compensatory mitigation project is to maintain a plant community that is dependent on grazing

#### **IV. Frequently Asked Questions and Issues** (Examples of questions that may arise and are good to consider in reviewing **site protection instruments** )

##### **A. Questions to ask before accepting the land as part of the compensatory mitigation site to be provided long-term protection.** Remember, a record search and even title insurance search does not reveal everything. Ask the property owner the following questions:

1. Are there any outstanding mineral rights or leases? Contracts?
2. Are there water rights affecting the property?
3. Are there any outstanding timber rights or leases?
4. If there are other rights/leases, do they conflict with the protection requirements on the compensatory mitigation site?
5. Is this land subject to any litigation? Zoning disputes?
6. Is the property subject to any uses not of record?
7. Who or what entity owns it?
8. Does the owner have good title and title insurance?
9. Is the land protected already?
10. Who has an interest in the land? (i.e. ownership; individual, couple, family, partnership, LLC, business, in common, trust, government)
11. Are there any existing easements (utility, water/sewer, cable, drainage) on the property?
12. Are there any existing Right-of-Ways (roads, access)?
13. Are there any Lien Holders (Financial institutions- mortgages)?
14. Is this a property that will pass by probate (wills and trusts)?
15. If a road is shown on the plat, ask if it is a private or public road and will it remain as part of the compensatory mitigation area?
16. Will the owner have access to his or her land on the other side of the stream when the stream and buffers are protected with the real estate instrument? How will the owner get across? Does the title of the land go only to the middle of the stream channel?
17. Who is responsible for installing/maintaining fences, signs, etc. Are they located inside or outside the site protection boundary?
18. Does the Grantee have sufficient resources to maintain the property in a manner consistent with the terms of the conservation easement? Are there provisions for an endowment?
19. When can the real estate instrument be recorded?
20. Does the grantee have a schedule for performing site inspections?

##### **B. Other questions to ask when preparing the site protection instrument:**

1. **What if the applicant provides wrong information?** Consider including the following language in the DA permit, and/or third party mitigation instrument to protect the compensatory mitigation site in case any information provided is inaccurate or fraudulent and becomes an issue after the compensatory mitigation is accepted:

*Should an easement, right, interest, or lease on or to the property not shown on the survey or listed in the (document) and prior in time and recording to this*

*(document), or unrecorded, be exercised in such a manner that it conflicts with or voids the uses of the property set out in this (document), then the owners of the property shall be responsible for providing alternative compensatory mitigation in such amounts and of such resource type and function as the Corps or any enforcer of this (document) shall determine in accordance with the DA permit.*

- 2. Does your Corps District offer a credit incentive (such as an incremental increase in mitigation credits) for every additional layer of legal site protection? Why would you want to provide extra credit for multiple site protection methods on a compensatory mitigation property?** Each additional layer of protection makes it more likely that the compensatory mitigation site will be protected by multiple parties under changing circumstances. It will also make it more difficult for any one entity to extinguish the site protection instrument(s) in the future. For example: If the site is protected by two instruments (e.g., restrictive covenant and a conservation easement), then additional mitigation credit might be issued. Likewise if statutory protection is added by a governmental entity, then additional credit might be issued.
- 3. What might happen when one entity owns the land and another entity owns the mitigation bank with the right to sell credits?** The mitigation bank land is legally considered “real property.” On the other hand, mitigation credits that have monetary value are considered “personal property.” However, statutes and case law treat them differently. This issue should be discussed with Counsel and how it may affect enforceability of the site protection instrument. For example, in a bankruptcy case in Virginia, a federal judge determined that the bank lands were real property and separate from the bank credits (personal property) and allowed the bank lands to be auctioned as part of the resolution of the bankruptcy case.
- 4. Can the Corps be allowed to intervene in a litigation case to enforce a real estate instrument?** To preserve the Right to Intervene in Litigation, the following language could be inserted into the real estate instrument:  
*In any state court action or Federal Bankruptcy action affecting waters of the U.S., the United States Army Corps of Engineers reserves the right to request to be represented by the U.S. Department of Justice and/or to move for a removal of actions affecting waters of the U.S., to the United States Federal District Court in the district where the land lies.*

## **V. Examples of Corps District and State Model Site Protection Instruments, Documents, and Templates**

### **North Atlantic Division**

Baltimore District

[\(Draft\) Declaration of Restrictive Covenants](#)

New York District

[New York Model Conservation Easement](#)

[New Jersey Model Conservation Easement](#)

Norfolk District

[Model Declaration or Restrictions \(March 2015\)](#)

### **Northwestern Division**

Kansas City District

[Checklist for review of Conservation Easements and Restrictive Covenants](#)

[Conservation Easement Holder List December 4, 2012](#)

[Missouri Conservation Easement Template 2013](#)

[Kansas Conservation Easement Template](#)

[Kansas Declaration of Restrictions](#)

Omaha District

[Appendix I1: Conservation Easement for Mitigation Banks – template](#)

[Appendix I2: Deed Restriction - template](#)

Portland

[Portland District requires long-term site protection on compensatory mitigation projects In accordance with the Federal Compensatory Mitigation Rule for Losses of Aquatic Resources \(33 CFR 332.7\(a\)\).](#)

### **South Atlantic Division**

Charleston District

[Charleston District Conservation Easement Model of September 2010](#)

[Charleston District Restrictive Covenant Model of September 2010](#)

Mobile District

[Conservation Easement Template \(Mitigation Bank\)](#)

[Model Conservation Easement for Individual Permit](#)

[Instructions for using the Model Conservation Easement](#)

[Model Declarations of Restrictions](#)

Savannah District

[Amendments to the Declaration of Covenants and Restrictions Department of the Army Corps of Engineers, Savannah District 7 Jan 2004](#)

[U.S. Army Corps of Engineers, Savannah District Regulatory Program Standards for Qualified Conservation Easements](#)

[Model Declaration of Conservation Covenants and Restrictions updated December 2009](#)

Wilmington District

[Model Conservation Easement](#)

[Model Declaration of Restrictions](#)

[Wilmington District Process for Preservation of Mitigation Property November 25, 2003](#)

[Restrictive Covenant Guidance August 2003](#)



**South Pacific Division**

San Francisco District

[\(Draft\) Conservation Easement Deed](#)

[\(Draft\) Property Assessment and Warranty](#)

**Southwest Division**

Ft. Worth District

[\(Draft\) Conservation Easement Agreement](#)

Galveston District

[Example Deed Restriction](#)

[Example Conservation Easement](#)