



US Army Corps of Engineers



REAL ESTATE PROTECTION

Applying the Clean Water Act Section 404

Rebecca Rowden

Office of Counsel

Savannah District

June 2010

Shepherdstown, WV



RULES AND REGULATIONS

**Generally the site protection rules for
compensatory mitigation are found at:**

**33 CFR 332.7 and
40 CFR 230.97**



SITE PROTECTION

“...mitigation project must be provided long-term protection through real estate instruments or other available mechanisms as appropriate.”

33 CFR 332.7(a)(1) 40 CFR 230.97(a)(1)



“...consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protections...”

33 CFR 332.7(a)(1) 40 CFR 230.97(a)(1)



In other words, what works?

What good is a site protection document if it is not legally sufficient, is not enforceable, is not properly recorded in the chain of title and does not protect the land over time?

There is no “one size fits all” document.



WHY ARE THERE SO MANY TYPES OF SITE PROTECTION DOCUMENTS?

- Real property laws differ from state to state
- The entities involved in site protection of CWA 404 mitigation property differ (individual, state, federal, military, tribal, corporation, agency).



TIMING

- **Banks: Site protection instrument must be finalized before any credits can be released.**
- **ILF: Site protection instrument must be finalized before advance credits become released credits**



Timing of Site Protection Permittee-Responsible Mitigation

A real estate instrument, management plan, or other long-term protection mechanism used for site protection of permittee-responsible mitigation must be approved by the district engineer in advance of, or concurrent with, the activity causing the authorized impacts.

33 CFR Part 332.7(a)



Enforcement

Where practicable, establish in an appropriate third party the right to enforce protection of mitigation sites and provide the resources necessary to monitor and enforce the sites protected.

Who provides the overall enforcement of the site protection document? The state? The Corps? Both? Where are the site protection documents kept?



WHAT ARE SOME EXAMPLES OF SITE PROTECTION DOCUMENTS?

- **Conservation easements**
- **Restrictive Covenants**
- **Transfer of title or deed restrictions**
- **Federal facility management plan**
- **Integrated natural resource management plan**
- **Multi-party agreements related to land**



What is the difference between a restrictive covenant and a conservation easement?

A title transfer?

What is a federal facility management plan?

What is a multi-party land use agreement?



CONSERVATION EASEMENT

- A CONSERVATION EASEMENT IS A RESTRICTION PLACED ON A PIECE OF PROPERTY TO PROTECT ITS RESOURCES.
- A THIRD PARTY, NON-OWNER, USUALLY A LAND TRUST OR GOVERNMENTAL ENTITY, HOLDS THE CONSERVATION EASEMENT



ADVANTAGES OF A CONSERVATION EASEMENT

- The holder generally has the right to enforce the terms of the easement against the owner. Someone is looking over the shoulder of the owner.
- Conservation easement remains even though property owner changes or the property passes on to heirs.
- Holder may have experience in managing aquatic resources, wildlife habitat or in protection of endangered species.
- A conservation easement allows owner to retain many private rights.



WHY MIGHT LAND TRUSTS OR NATURAL RESOURCE AGENCIES NOT WANT TO VOLUNTARILY HOLD CONSERVATION EASEMENTS ON PROPERTY?

- Property lacks suitable habitat or natural resources that the organization has as its mission to protect
- Property is small, hard to access or enforce
- The governmental agency or land trust may not have reliable yearly financial resources to fund stewardship and staff (budget cuts, not enough staff).



PROBLEMS WITH CONSERVATION EASEMENTS

- Land trusts can come and go. If a land trust disbands, a conservation easement can be extinguished for lack of a holder.
- Conservation easement holders may not choose to enforce the easement terms.
- There may be no state department or agency willing or authorized to hold a conservation easement.
- Governmental conservation easement holders may not have sufficient funds to monitor, manage and enforce during “lean spending” years.
- Management procedures may be contrary to the intent of CWA mitigation.



RESTRICTIVE COVENANTS

- A provision in a deed limiting the use of the property and prohibiting certain uses.
- 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.



ADVANTAGE OF RESTRICTIVE COVENANT

- Restrictive covenants can be written to “run with the land” in perpetuity or for a substantial period of time and the covenant remains regardless of ownership of the land. Every subsequent owner must comply.
- Owner acknowledges in the instrument that property is protected for “value received” (for the permit/bank that allows them to profit) and it is therefore a contractual agreement (quid pro quo) and can be enforced.
- No requirement to find a third party holder where one is not available.



Problems with Restrictive Covenants or Deed Restrictions

- There may be no third party (non-owner) conservation easement holder to determine if the owner is complying with the terms of the restrictive covenant.
- The government may not have the resources to monitor each site for compliance.
- Some states may not have laws that recognize restrictive covenants or only recognize a covenant created at the time of transfer of land. There may be time limits (number of years) on restrictive covenants.



FEDERAL FACILITIES MANAGEMENT

- Military installation generally do not have authority to limit the use of property on base by recording a document in the record deeds office.
- However, military installations have a land use management plan and a mitigation site can be shown on the installation land use plan as designated for “environmental conservation use” and relevant documents regarding its status may be placed in the installation management file.



Advantages of Title Transfer

- Ownership of the property is transferred to a land management entity (land trust, natural resource agency, governmental agency) who has staff to manage and protect the property.
- The mitigation sites are usually larger and part of a protected natural resource area or watershed.



PROBLEM WITH TITLE TRANSFER

Some agencies have converted mitigation sites to other purposes.

Beware of groups that form land management for-profit or non-profit corporations just to get CWA business and to sell credits but don't have experience or desire to enter into long term land and conservation resource management.

Even if you could require the mitigation site to revert to the owner, if the site protection agreement is violated, it could be problematic when attempting to implement.



Conservation Land Use Agreements

Can be used when the governmental entity or natural resource agency is already the owner of the mitigation land and no transfer of title will be required. The agreement may be recorded in land records office.

Can be used when the state and/or federal entity is going to become the owner but is not authorized to allow recordation of any limitation on the property's use. However, it is authorized to enter into a memorandum of agreement regarding the management of aquatic resources.



Multi-Party Land Use Agreements

Example: Land Trust has willing seller of land but funds are needed to acquire the property. There is a mitigation plan for restoration and enhancement on the property. After land trust acquires the property, and after the mitigation has been completed, the land trust plans to transfer the property to the U.S. Forest Service for long term management. The parties execute a multi-party agreement in return for funds from credit sales or for In-Lieu Fee funds.

Example: State non-game department owns the property. The state department agrees to allow restoration and enhancement on the property by the transportation department who needs compensatory mitigation credit. State non-game department agrees to manage and preserve CWA mitigation area for its restored and enhanced aquatic resources. The parties enter into a multi-party agreement.



Does your IRT or Corps District offer a credit incentive for every additional layer of legal site protection?

For example:

If the site is protected by two instruments i.e. restrictive covenant and a conservation easement, then there could be an incremental increase in mitigation credits.

If a governmental entity provides statutory protection, then additional credit could be added.



WHY WOULD YOU WANT TO PROVIDE EXTRA CREDIT FOR MULTIPLE SITE PROTECTION METHODS?

Each additional layer of protection makes it more likely than not, that the site will be protected by multiple parties and it will make it harder for any one entity to extinguish the site protection instrument in the future.



RECORDING THE SITE PROTECTION DOCUMENT

- The site protection document is recorded at the record deeds office in the county or parish where the land is located. It then provides a public record of the interests associated with land.
- Land management plans should be accessible (military base, tribal land office, natural resource area office).



WHO LOOKS AT LAND RECORDS?

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



WHAT DO YOU WANT TO KNOW ABOUT THE LAND BEFORE ACCEPTING IT AS A MITIGATION SITE?

- Who or what entity owns it?
- Does the owner have good title and title insurance?
- Who else has an interest in the land?
- Is the land protected already?



INTERESTS IN LAND

- **Ownership (individual, couple, family, partnership, LLC, business, in common, trust, government)**
- **Easements (utility, water/sewer, cable)**
- **Right-of-Ways (roads, access)**
- **Lien Holders (Financial institutions- mortgages)**
- **Property that passes by probate (wills and trusts)**
- **Leases, rights (mineral, timber, water)**



Title Insurance

The requirement of title insurance means that a title insurance company is hired to go to the record deeds office and research the history of the property (chain of title) going back 30-60 years to see if the owner has clear title and to see if there is any conflict in ownership. If there is clear title, then they back their determination with insurance.

It may be a good thing to require.



Will title insurance suffice to address all the issues regarding the property?

NO

- Title insurance just assures clear title.
- It often doesn't list all the existing easements, right-of-ways, tax liens, financial liens and other interests less than ownership.
- A search for other interests should be conducted by the attorney for the applicant or proponent and provided for review.



US Army Corps of Engineers



Will a record search for all other interests, claims, liens regarding the property reveal everything?

NO



So how do I find out about unrecorded interests in the land?

ASK

- Are there any outstanding mineral rights?
- Are there water rights affecting the property?
- Are there any outstanding timber rights?
- Is the property subject to any uses not of record?
- Are there any outstanding leases? Contracts?
- Is this land subject to any litigation? Zoning disputes?



US Army Corps of Engineers



**WILL THE SITE PROTECTION
INSTRUMENT BE GIVEN PRIORITY
OVER RECORDED PROPERTY
INTERESTS?**

MAYBE



FORECLOSURE

- If a mitigation bank or ILF property is used as collateral and the borrower defaults on the loan, the financial institution can foreclose on the property.
- If the site protection instrument was recorded after the deed to secure the debt, it could be wiped out by foreclosure.

How can this be prevented?



WHAT IS SUBORDINATION AND WHY IS IT IMPORTANT TO AVOID LOSING MITIGATION SITES TO FORECLOSURE?

Subordination allows more assurance that the site will withstand adverse actions. Consider putting the following language in your site protection document:



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 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 A CONSENT AND SUBORDINATION?

- Usually the wetlands/streams/buffers cannot be impacted without a permit and the lender wants the developer to be able to develop the land. They acknowledge the requirement associated with a permit/mitigation bank.
- The property may not diminish substantially in value. There are uplands that can be developed.
- The lender wants to lend money and have the developer or mitigation banker succeed and pay interest on the loan so the lender makes money.



REAL PROPERTY V PERSONAL PROPERTY

- The mitigation bank land is legally called “real property.”
- Mitigation credits that have monetary value are called “personal property.”
- Statutes and case law treat them differently
- What might happen when different entities own the (1) land and (2) the mitigation bank with the right to sell credits?
- Has your office dealt with the issue of division of property rights? You may want to discuss with counsel.



US Army Corps of Engineers



RULE ON NOTIFICATION

**60-day advance notification
before voiding or modifying any
site protection document or
mechanism**



Recommended Sixty-Day Notice Language

“... the (Corps) shall be provided with a 60-day advance written notice of any legal action concerning this (document) or of any action to extinguish, void or modify this (document) in whole or in part.”

“This (document) is intended to survive foreclosure, bankruptcy, tax liens, condemnation or judgments affecting the property.”



HOW DOES THE PUBLIC FIND OUT THAT NOTICE MUST BE GIVEN?

Title search of property prior to transfer or for use in planning for a development project reveals the site protection document, if it is properly recorded.

The site protection language in the site protection document recorded at the courthouse provides that a 60-day advance notice must be given.



TRANSFER NOTICE

Does your IRT have a policy regarding notice when the owner/sponsor of a mitigation bank or ILF project transfers the ownership of the bank/project willingly or unwillingly to another entity?



Suggested Language Regarding Notice

At any time during the life of the mitigation bank, or 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 “x” in writing and no further mitigation credits shall be sold or credited toward mitigation pending a review by “x”.



Suggested Language if Mitigation Bank is to Continue

The new transferee shall provide “x” with written adoption of the terms and conditions of the mitigation banking instrument and provide acknowledgement of the terms and conditions of the recorded (site protection document).



US Army Corps of Engineers



RULE

When changes result in incompatible use, agency must provide alternative mitigation acceptable to the Corps



US Army Corps of Engineers



THE SITE PROTECTION DOCUMENT SHOULD ADDRESS THE PROCESS OF AMENDMENT

“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 impact are not favored and will be considered only in rare circumstances following (Corps) policy and procedures.”



US Army Corps of Engineers



ARGUMENTS MADE BY
PROPONENTS TO IMPACT
CONSERVATION RESOURCES
ON SITES PROTECTED WITH A
SITE PROTECTION
INSTRUMENT



- It will only impact the buffer/upland and therefore no waters of the U.S. will be affected
- It is the best alternative for this (road/pipeline) because all other alternatives involve impacts to homes, businesses or developed areas (people v. natural resources)
- It will save lots of (taxpayer) money if we can cross the protected site and not have to go around it
- The values/functions/services of the wetlands or streams are not very high. It won't be a great loss.
- The wetlands/streams are no longer jurisdictional
- We have “political clout” and you should do as we say and get out of our way
- The military needs to impact the site for training.



SUGGESTED POLICY REGARDING AMENDMENTS

- Owner of property must consent
- Have proponent conduct alternatives analysis
- Cost saving, although a factor, is not the most significant consideration
- It is not relevant that proposed impact is to a buffer or upland. The mitigation was required after deliberation of the IRT as to the functions, services and values of the entire tract
- IRT/Corps may determine that the impact will affect the entire site and not just the portion directly proposed for impact
- Mitigation for impact to the protected site should be required at a substantially higher credit ratio than for permit actions.



US Army Corps of Engineers



AMENDMENTS TO SITE PROTECTION DOCUMENTS OR PROPERTY MANAGEMENT PLANS

**Does your IRT/Corps District have a
policy for proposals to amend the site
protection document or management
plan?**

Adopt a policy and put on your web site.



WHAT IS EMINENT DOMAIN?

It refers to the power of the government to appropriate property for public use.

Condemnation proceedings are held.

Owner loses title to the property or a portion of the property and is paid the fair market value of the land.



EMINENT DOMAIN

A court might consider the consequential value loss or an uneconomic consequence argument in addition to the fair market value where the site protection document cites the conservation values provided to the public on the site.

Suggested language in the site protection document:

“If protected mitigation property is taken in whole or in part through eminent domain, the consequential loss in the value of the property protected by the Clean Water Act is the cost of the replacement of the conservation functions, services and values of the aquatic resources on the property with other property providing those aquatic resources in the same watershed.”



EXHIBITS TO SITE PROTECTION DOCUMENTS

- The CWA permit, banking instrument (or the executive summary).
- Platted Survey and Legal Description (Survey shows any easements that will remain in place or proposed in the near future.)
- Conservation functions, services, values on the site to include aquatic resources, listed species, habitat, vegetation and contribution to the watershed.



CONSERVATION VALUES EXHIBIT

If the site owner sets out the conservation functions, services and values in the site protection document exhibit, it is difficult later to argue that it doesn't have conservation value.

Owner can state what services and functions will exist once the mitigation is completed rather than the proposed plan to restore or enhance.



CHANGE IN JURISDICTIONAL DETERMINATION

Once the mitigation property permit or instrument is finalized, and a site protection instrument is executed, then the contractual agreement is completed. The site protection document should state:

“The site will remain protected as conservation mitigation even though it may later be determined through case law decisions or otherwise not to have jurisdictional waters of the US.”

A deal is a deal! This position applies contract law. Owner acknowledged receipt of value in return for permit or instrument and agreed to protection of the site for its conservation use. Future CWA jurisdictional determinations are irrelevant.



US Army Corps of Engineers



QUESTIONS ?

COMMENTS ?