

## **MODEL DECLARATION OF CONSERVATION COVENANTS AND RESTRICTIONS**

The following "Model Declaration of Conservation Covenants and Restrictions" document is provided for drafting purposes. Please check the Savannah District, Regulatory Division web site in order to view and access the most current draft restrictive covenant language and instructions.

The web site is located at: <http://www.sas.usace.army.mil>. Select the file entitled, "Permit/Regulatory Information" or "Obtaining a Permit." Select "Compensatory Mitigation." Scroll down until you see the files on: (1) Declaration of Conservation Covenants and Restrictions and (2) Amendments to the Declaration of Conservation Covenants and Restrictions. The web site is generally updated periodically.

Do not rely on out of date hard copies of previous draft models or old versions that you may have saved to your computer files, as they may be out of date. Please call Office of Counsel listed below should you have questions or wish to consult regarding any of the procedures involved in the processing of this legal document.

Do not execute and record the Declaration and exhibits until approved in writing by the Office of Counsel.

If the property is already protected for its conservation functions by an existing conservation easement, by statute, as a park, recreational area or green space owned by the state, county, city or other local department or agency, or if the property is secured by a Deed to Secure the Debt, then it may not be eligible as Clean Water Act Section 404 mitigation unless recorded instruments are subordinated to the Declaration of Conservation Covenant and Restrictions and do not conflict with its terms.

Consult with the (1) owner of the property, (2) the environmental consultant and (3) the surveyor, in order to provide all the exhibits required.

### **SUBMIT FOR REVIEW PRIOR TO RECORDING**

Attorney for permit or banking instrument holder should write letter requesting a review of the draft Declaration of Conservation Covenants and Restrictions and exhibits by:

U.S. Army Corps of Engineers  
Office of Counsel  
Lisa L. White  
Assistant District Counsel  
100 W. Oglethorpe Ave.  
Savannah, GA 31401.

Tel: 912-652-5277 (Attorney)  
Tel: 912-652-5125 (Support Staff)

The Declaration of Conservation Covenants and Restrictions may be submitted via regular or express mail. Electronic submissions will **not** be reviewed.

Reference the US Army Corps of Engineers permit number/banking instrument number. The number is set out on correspondence from the Regulatory Branch and generally has 9 digits.

Provide the name, telephone and mailing address of the attorney who is the point of contact for this draft document. Also provide the name, telephone and mailing address for the consultant.

The Office of Counsel will review and provide a written letter of approval with information regarding recording. For questions regarding this document, call Office of Counsel, 912-652-5277.

Instructions for use with this draft restrictive covenant **are in bold type** in the text or on separate instruction pages below. Enter data into the draft language where required. Follow instructions and then delete instructions no longer needed for draft text. See the list of exhibits below.

### **EXHIBITS REQUIRED**

1. A platted survey showing metes and bounds of the boundary of the parcel/s subject to the restrictive covenant prepared by a registered Georgia surveyor. By legend key, show approximate location of wetlands, streams and buffers located within the boundaries. Show existing structures such as roads and utility lines. See instructions in text. See instruction page for surveyors *infra*.
2. A legal description of the parcel or tract subject to the covenant. If metes and bounds shown on survey are extensive, the legal description can reference the survey.
3. A copy of the signed permit, permit letter, the after the fact permit letter, settlement agreement or the letter authorizing the Banking Instrument (“B.I.”), along with the B.I. The Declarant should be both the permittee/authorized bank sponsor and the owner of the property.
4. A one-page summary of the existing and/or proposed Conservation Functions and Services of the protected site as preservation, restoration, establishment and enhancement. This should be prepared by the environmental consultant. See one-page instructions and guidance for Exhibit C.
5. A resolution and adoption by a corporation or governmental entity authorizing the placement of a Declaration of Conservation Covenants and Restrictions on the property as required by a permit or banking instrument.
6. The consent and subordination signed by the financial lender, if applicable. See *infra*.
7. There may be additional exhibits based on the particular facts of each permit.

## **DOCUMENTS TO BE FORWARDED FOR REVIEW ONLY**

1. Following a title search, provide a copy of the **deed of title** showing the owner of the property or, in the alternative, a court order with citation, style of the case, forum, date and court assigned number showing the title holder.

2. A copy of all **recorded easements** or, if numerous, a list of easement holders and the nature of the easement with citation of recorded location. Note, only those easements or right-of-ways that go on or across the parcel/s subject to the declaration need be shown on the survey. If there are third party holders of **mineral or timber** rights, the conservation property will not be approved for use as mitigation.

3. **Drawing of developmental design**, if any, for purposes of showing that property subject to the declaration is not part of any residential, commercial or other subdivided lots but is an open and common area or a separate parcel. Note that **no tracts of land or lots may be sold** from a planned residential or commercial development until such time as the conservation restrictive covenant is recorded such that the covenant will be in the chain of title for all subsequent owners of lots in the development.

4. Provide county, state and/or federal **land conservation use documents** or **conservation easements** that pertain to the property, if any. State if the property is a public park, greenway or is protected statutorily for its conservation land use.

5. Obtain a copy of the **mitigation plan** or a copy of the **banking instrument** from the environmental consultant. "Mitigation" means the methodology of restoration, enhancement, establishment and preservation of wetlands, streams, buffers and is calculated using a credit system. In nationwide permits, the mitigation requirement may be set out in the permit itself.

6. A copy of **Deeds to Secure the Debt**, any liens of record, or leases, if any.

7. Copy of **Secretary of State listing of the corporation** if owner is a corporation. This may be printed from the Secretary of State web site. Please provide a list of the corporate officers and their mailing addresses. Provide a copy of a certificate of corporate resolution, authority and adoption of the declaration by the corporation with signature by the corporate officer/s authorized to sign the covenant.

8. If Declarant is a **governmental body** (county commission, water authority or city council) provide a copy of a resolution and adoption of the declaration by the governing body.

Please do **not forward original documents** to us. Copies are fine.

## **COMPLETION OF RESTRICTIVE COVENANT REQUIREMENT**

Once approved and recorded, the recorded Declaration of Conservation Covenants and Restrictions will be returned to the attorney listed on the top of the first page of the Declaration. A copy of the recorded document should be forwarded to Office of Counsel. Upon receipt by the Savannah District Office of Counsel, of a copy of the recorded Declaration of Conservation Covenants and Restrictions properly executed, and showing book and page numbers of its recorded location, the restrictive covenant requirement of the permit action, banking instrument or settlement agreement will be completed. If not forwarded, then the permit holder may be out of compliance with the permit action.

**DRAFT MODEL LANGUAGE  
NEXT PAGE**

(Leave 2" space for court clerk to stamp)

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Return to (Name of Attorney), Esq. (Address)

STATE OF GEORGIA  
COUNTY OF \_\_\_\_\_

**Cross reference to that certain \_\_\_\_ (deed) \_\_\_\_\_ dated \_\_\_\_\_ and recorded in Deed Book \_\_\_\_\_, Pages \_\_\_\_\_ (Name of County) County Records. Enter the Grantor/Grantee recorded deed/s relevant to place this document in the chain of title.**

### **DECLARATION OF CONSERVATION COVENANTS AND RESTRICTIONS**

THIS DECLARATION OF CONSERVATION COVENANTS AND RESTRICTIONS (this "Declaration") is hereby made by \_\_\_\_\_ (Insert the name/s of the owner/s of the property as shown on the deed of title) (further describe the owners i.e. a Georgia limited liability company, a governmental entity, or other legal entity) the undersigned "Declarant." Declarant is the owner in fee simple of a certain tract or parcel of real property lying in \_\_\_\_G.M.D, (County), Georgia. This tract of land was conveyed on (date) from (Grantor to Grantee) recorded in Deed Book \_\_\_\_, Page \_\_\_\_, (\_\_\_\_) County Records.) Declarant comes now and, for good and valuable consideration, declares conservation use restrictions on (if less than all the property cross-referenced above as having been conveyed by Grantor to Grantee, then state, "a portion of") the property hereinafter described. A legal description of the specific parcel or parcels of Property subject to this Declaration is more particularly described in Exhibit "A" hereto attached and made a part hereof. The Declaration hereinafter stated shall apply to Property described in Exhibit "A" and is by reference, incorporated herein for a description and for all other legal purposes.

**Exhibit A is a legal description of each parcel subject to the restrictive covenant. It is generally a portion of some larger parcel/s. The permit, mitigation bank or mitigation plan should be reviewed with the environmental consultant and/or owner to determine the specific property to be surveyed.**

**If the metes and bounds on the survey are extensive, then the legal description can reference the platted survey. For example, the legal description can state, "All that tract or parcel of land**

situate, lying and being in the \_\_\_ District, G.M., \_\_\_ County, Georgia, and being shown as \_\_\_ acres +/- on a plat entitled \_\_\_\_\_, dated \_\_\_\_\_, prepared by \_\_\_\_\_, GRLS # \_\_\_\_\_, recorded \_\_\_\_\_ in Plat Book \_\_\_, Page \_\_\_, in the Office of the Clerk of the Superior Court of \_\_\_ County, Georgia.

## PREMISES

WHEREAS, Declarant was (select one) (1) issued a permit, (2) authorized by that certain letter dated \_\_\_\_\_ to implement a Banking Instrument, (3) subject to an enforcement action by the US Army Corps of Engineers ("USACE") Action Number (enter permit number, banking instrument number, enforcement action number) pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) or Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401) under the administrative regulatory authority of the USACE Savannah District, Regulatory Division, setting forth authorization for certain dredge and/or discharge of fill activities in waters of the United States, including wetlands and streams; and,

### Note

The Declarant should be both the permit holder ("permittee") and the owner of the mitigation Property. If the person or entity to whom the permit/banking instrument is issued, is NOT the owner of the land subject to the restrictive covenant, or does not intend to acquire fee title to the land, the property may not be considered for mitigation. Contact the Corps of Engineers. The Declarant should be the owner of the mitigation bank land. The owner may contract with an agent or sponsor to manage the bank. If that is the case, it should be so stated.

If the owner is a subsidiary of a corporation, a holding company or a real estate management company, and the permittee is a parent corporation--but the two legal entities have the same managing partners or corporate officers, then draft a paragraph explaining the relationship between the two entities and list the names of the president and one other officer that are common to both. The President and one other officer may sign the declaration on behalf of both corporations.

In the alternative, if approved by USACE, the permit would have to be transferred into the name of the owner of the property prior to recordation of the restrictive covenant. The permit/banking instrument is considered contractual in nature and there must be privity of contract between the permittee/bank sponsor/owner of property and the USACE. Suggested language for various scenarios:

WHEREAS, the permit/banking authorization letter was issued to "X". X is acting as agent for "Y," the owner of the property. (Have both owner and agent sign the declaration as co-permittees)

WHEREAS, the (permit or banking authorization letter) was issued to "X" Corporation. X Corporation is the parent company of "Y" LLC," the owner of the property to be protected. X and Y Corporations have the same officers—(list). The officers will sign the declaration on behalf of both X and Y corporations (permittee and owner of the property).

WHEREAS, the (permit or banking authorization letter) was issued to "X". X has transferred the (permit or banking authorization letter) to "Y" with approval from USACE. A copy of the transfer document is attached hereto. (Only the transferee/owner of the property would sign as the new permittee).

WHEREAS, said (select one) (permit, banking instrument, settlement agreement) dated \_\_\_\_\_ is attached hereto as Exhibit "B" and by this reference is made a part hereof; and,

**Exhibit B - Attach the substantive document/s (1) letter or document authorizing the permitted activity, "the permit" (2) letter or document conditionally authorizing the permitted activity, "the conditional permit," (3) letter authorizing an after-the-fact permit and the settlement agreement or (4) a letter approving and authorizing a banking instrument and the banking instrument. An executive summary of the banking instrument may be used as Exhibit B in lieu of the entire banking instrument if reviewed and approved by Office of Counsel. The entire banking instrument will be incorporated by reference. Do not rely on the USACE Regulatory Branch to furnish copies of the authorizing letters, permit, banking instrument for use as Exhibit B. Please obtain the necessary documents from the permit holder, bank sponsor, environmental consultant or entity with whom USACE corresponded.**

WHEREAS, dredge and/or discharge of fill material in jurisdictional waters of the United States including wetlands and streams pursuant to the Clean Water Act, Section 404, and/or Rivers and Harbors Act of 1899, Section 10, requires compensatory mitigation and perpetual protection of the mitigation property; and,

WHEREAS, a dated platted survey with seal affixed by a Georgia registered surveyor of the bearings and distances and coordinate values of the boundary of the Property referenced as Exhibit A has been recorded at (plat book, drawer, page or otherwise) (the "Survey"). The survey approximately shows the actual or planned wetland, stream and buffer areas within the Property. The property contains \_\_\_\_\_ acres in \_\_\_\_\_ parcels of land. The property further contains approximately \_\_\_\_ acres of wetlands and \_\_\_\_ linear feet of a (select one or more if relevant: first, second or third order) tributary with buffer. The survey is made a part of this Declaration and is incorporated by reference. **For requirements for survey, see separate page for instructions. Do not record survey until reviewed and approved by Office of Counsel.**

WHEREAS, the Conservation Functions and Services are summarized and described in Exhibit "C", attached hereto and made a part hereof; and (Note – To Be Prepared By the wetland/stream consultant using the directions for Exhibit C--See instruction page below.)

**Note: Select one of the following four paragraphs below**

WHEREAS, ((1) Use this paragraph only with single permits and not with mitigation banks.) the Property is being preserved, restored, established or enhanced as a wetland, buffer to wetlands, stream, streamside buffer, and/or upland buffer to jurisdictional waters of the United States, as well as to non-jurisdictional waters of the United States where such property has been accepted as compensatory mitigation pursuant to the permit; and,

WHEREAS, ((2) this paragraph is to be used only with a commercial wetland mitigation bank and not with permits) the Property is approved as a commercial wetland and/or stream mitigation bank pursuant to the terms and conditions of the (Insert the name of the banking

**instrument and date**), said document being incorporated by reference. The purpose of the bank is to generate credits to compensate for wetland impacts that have been determined unavoidable after consideration of avoidance and minimization on Section 404, Clean Water Act or Section 10 Rivers and Harbors of 1899 permit actions. The banking instrument sets forth the success criteria required of the ecological project and the credit releases allowable. Declarant agrees to be responsible for certain restoration, enhancement, establishment and preservation of wetlands and/or stream and streamside lands on the Property pursuant to the banking instrument and any subsequent modifications. Credits from the bank are sold by the bank sponsor in return for a fee agreed upon by the bank sponsor and the permit holder where the Corps of Engineers has approved the use of banking credits as mitigation in whole or in part on permits issued. Each time credits are sold, Declarant shall provide the USACE with an accounting of the total number of credits in the bank, the number of credits released and the permit action associated with each release of credits. The Property is to remain subject to this Declaration of Conservation Covenants and Restrictions in perpetuity; and

WHEREAS, **((3) this language is to be used with a mitigation bank owned by a governmental entity only and not with permits.** the Property is approved as a wetland and/or stream and streamside mitigation bank pursuant to the terms and conditions of the **(Insert the name of the banking instrument and date)**, said document being incorporated by reference. The purpose of the bank is to generate credits for use by **(insert the governmental department, county or municipal entity)** as mitigation on permit actions where wetland impacts have been determined unavoidable after consideration of avoidance and minimization pursuant to Section 404, of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899. Credits from the bank are used as mitigation in part or in whole on permit actions approved by USACE. The banking instrument sets forth the success criteria required and the determination of credit releases allowable. Declarant agrees to be responsible for certain restoration, enhancement, establishment and preservation of wetlands, or stream and streamside lands on the Property. Declarant will provide USACE with a report of the total amount of credits available for release, credits already released with prior issued permits, and the permit number associated with the credit release, until all credits have been released. The Property is to remain subject to this Declaration of Conservation Covenants and Restrictions in perpetuity; and,

WHEREAS, **((4) This language is to be used with a sole source user of a bank, for use with mitigation with multiple permit actions by the owner/sole user. Do not use where there is only one permit action. Use when the sole user intends to use the property with several permitted actions either now or in the future.)** the Property is approved as a wetland, wetland buffer, upland and/or stream or streamside tract for use by **(name the sole source user)** as compensatory mitigation in part or in full, on multiple present and future permits, where wetland/stream impacts have been determined unavoidable after consideration of avoidance and minimization pursuant to the Clean Water Act, Section 404 or Rivers and Harbors Act of 1899, Section 10. Permits identified to date as having identified a portion of this tract for compensatory mitigation use are **(Identify permits, if any, by number where credits or acreage where used as mitigation from this sole source tract.)** The Declarant agrees to certain restoration, enhancement, establishment and preservation of wetland, stream and buffers on the Property pursuant to a mitigation plan. Declarant shall keep a total of all credits

available for release and the number of credits released on previous permits. A report shall be provided to USACE each time credits is released referencing the associated permit action, and the amount of credits/acreage remaining. The Property is to remain subject to this Declaration of Conservation Covenants and Restrictions in perpetuity; and,

**WHEREAS (Use this paragraph if the conservation property is part of a planned community and if the planned community/development/subdivision restrictive covenants have been recorded) the Property is part of a planned community known as \_\_\_\_\_ which is subject to the provisions of (General Restrictive Covenants or Charter or other document) recorded at Book \_\_\_\_, Page \_\_\_\_, et seq., in the Office of the Clerk of the Superior Court of \_\_\_\_\_ County, Georgia. This Declaration will be incorporated into the overall master land use plan; and,**

**WHEREAS, (Include this paragraph only if applicable) (Name of lender), is the owner and holder of a lien or deed to secure debt secured by the Property. The deed to secure debt from (name) to (name) is recorded at Deed Book \_\_\_\_, page \_\_\_\_, \_\_\_\_\_, County, Georgia. A Consent and Subordination has been executed by entities who have a security interest in the property in order to evidence its consent to the subordination of the security deed to this Conservation Declaration, said Consent and Subordination having been attached hereto and by this reference is made a part hereof. (See suggested language for use with a Consent and Subordination on separate page infra)**

**WHEREAS, (Include this paragraph only if applicable to historic/archeological protection of the property) certain cultural, archaeological or historic properties identified on the survey (Identify parcels as shown on survey) have been determined to be eligible for inclusion in the National Register of Historic Places and are being preserved and protected pursuant to Section 106 of the National Historic Preservation Act as regulated by the Georgia State Historic Preservation Division and as required by a special condition of the permit. (If there is a Memorandum of Agreement executed by the owner, USACE and the Georgia State Historic Preservation Division, reference it and incorporate it by reference.)**

NOW, THEREFORE, in consideration of the mutual benefits to be derived by the Declarant and each and every subsequent owner and occupant of the real property, and as required mitigation for dredge and/or discharge of fill material in waters of the United States including wetlands and streams, Declarant has promised to place certain restrictions on the Property exclusively for conservation purposes, in order that it shall remain substantially in its restored, enhanced, preserved, open, natural and/or scenic condition, in perpetuity.

## 1

### **Transfers, Amendments & Extinguishment**

Declarant does hereby declare that all of the Property described hereinafter shall be held, transferred, sold, conveyed and occupied subject to the terms and conditions of

the covenants, easements and affirmative obligations all of which shall run with the Property and will be binding on all persons, firms, associations, corporations or governmental entities having or hereafter acquiring any right, title or interest in said Property, or any part thereof, their heirs, executors, administrators, successors and assigns. The terms and conditions of this Declaration of Covenants and Restrictions shall be both implicitly and explicitly included in any subsequent transfer, conveyance, or encumbrance affecting all or any part of the conservation property. It shall set forth the terms and conditions of this document either by reference to this document and its recorded location or by attachment and incorporation by reference. The covenant shall not be amended or extinguished except by written approval of the USACE, or its successor in administration of the Clean Water Act or the Rivers and Harbors Act of 1899. Amendments to the restrictive covenant for the purpose of proposing additional impact are not favored and will be considered only in rare circumstances following the USACE policy and procedures. Amendments shall be signed by the USACE and shall be recorded in the official records of the county in which the Property is located.

## 2

### **Property as Open and Common Area**

The Property is set aside for conservation use and shall be designated as an undeveloped lot, buffer, open and common area or greenway and will not now, nor in the future, be made part of any single lot or lots in a residential or mixed use subdivision or a subdivided commercial development, but rather the Property shall be held, maintained and managed by the owner, developer, corporation, homeowner or business association as an open, common and undeveloped conservation area. There shall be no legal or de facto division, subdivision or partitioning of the protected Property used as mitigation unless approved by USACE and addressed in the permit or banking instrument.

## 3

### **Prohibited Uses**

Except as necessary (1) to carry out wetland/stream and/or buffer restoration, enhancement and/or establishment in keeping with the mitigation plan of the permit or banking instrument as approved by USACE; or, (2) to fence the property to keep out livestock, domestic animals, trespassers, or for protection or enhancement of the property; or, (3) to carry out management and maintenance of the property as approved in writing by the USACE; the actions encompassed as prohibited by this covenant shall include, but shall not be limited to the following:

- A. Clearing, cutting or mowing;
- B. Earthmoving, grading, removal of topsoil, cultivation, burning, filling or changes in the topography of the land in any manner;
- C. Placement of refuse, wastes, sewage, dredged spoil, solid waste, incinerator residue, garbage, sewage sludge, munitions, chemical wastes, biological materials,

radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, industrial, municipal, or agricultural waste on the Property;

D. Draining, ditching, diking, dredging, channelizing, pumping, impounding, excavating;

E. Diverting or affecting the natural flow of surface or underground waters within, or out of the Property; manipulating or altering any natural water course, body of water or water circulation and any activities or uses detrimental to water quality;

F. Mining, drilling;

G. Burning, systematically removing or cutting timber or otherwise destroying any vegetation. Upon approval from the USACE, selective pruning, unsafe trees or exotic non-native vegetation may be removed in accordance with current scientific best management practices as set out by the U.S. Forest Service or the Georgia Forestry Commission;

H. Spraying with biocides or use of herbicides or pollutants that violate water quality standards;

I. Introducing exotic species on the Property, altering the natural state of the wetlands or streams or causing erosion or sedimentation;

J. Grazing or use by domesticated animals such that animal wastes enter soil and water;

K. Construction of any kind in the wetlands, streams, buffers or upland, whether temporary or permanent.

L. Use of off-road vehicles and used of motorized vehicles except on existing roadways is prohibited.

M. As permitted or approved in writing by USACE the property may have: (1) a narrow pedestrian walking trail in the uplands or upland buffer using pervious materials, (2) minimal structures and boardwalks for the observation of wildlife and wetland/stream ecology, (3) crops for wildlife or placement of temporary hunting stands in uplands.

N. Display of billboards, signs, or advertisements on or over the Property, except for the posting of no trespassing signs, temporary signs indicating the property is for sale, signs identifying the trees, vegetation, wetlands or conservation values of the property and/or signs identifying the owner of the property.

O. Upon notice to USACE, conservation and wildlife habitat management plans may be implemented by the Georgia Department of Natural Resources Wildlife Resource Division, US Forest Service, conservation land trusts holding conservation easements, or

other conservation management entities where the management does not result in any impacts to the wetlands/streams/riparian corridors and its buffers, or to property protected for its historical, cultural and/or archeological value, and where the proposal would enhance the management of the property for its conservation use.

**Note**

**Do not add exceptions to A-O if they have not been approved and/or referenced in the mitigation plan or banking instrument.**

**4**

**Easements**

A. The protected property is free and clear of any and all liens, loans, claims, restrictions, easements and encumbrances, except as otherwise identified in this document and its exhibits.

B. Existing utility line easements, roads, right-of-ways, access easements and structures on the property, if any, are shown on the survey.

**Show easements on survey and identify by easement holder or right-of way entity. Show structures and roads that are on or cross the property.**

**If the property subject to the Declaration, or some portion of it, is to be used for a land application site, storm water outfall, a detention or retention pond, or used for water treatment or filtration, so state and describe.**

C. Environmental impacts, if any, caused by existing easements such as roads, utility lines or pipelines, where such easements are in place as of the date of the recording of this restrictive covenant, and where the easements are shown on the survey, shall not be considered as causing any prohibited impacts to the Property by their use and maintenance.

**Note**

**Provide copies of easements or right of ways for review by USACE only as to easements that run across the property protected by the restrictive covenant. If a large parcel is encumbered by numerous easements, provide a list of the easements, the nature of the easement, the holder of the easement and its recorded location.**

**Property subject to this restrictive covenant may not be eligible for use as mitigation if the property is subject to any prior recorded easements held by third parties that would conflict with the intent of this covenant. An example would be easements or leases granting mineral rights, timbering or water rights to a third party that could affect the preservation intent of the protection of the wetlands/streams. In those cases the applicant may want to have the easements extinguished, file an action to Quiet Title regarding the mineral rights or otherwise obtain title to the mineral rights i.e. pursuant to O.C.G.A. §44-5-168.**

D. Should an easement on the Property, not listed in paragraph (4)(A), or not meeting the criteria of paragraph (4)(A) and prior in time and recording to this restrictive covenant, be exercised in such a manner that it conflicts with the prohibited uses of the Property set out in this restrictive covenant, then the owners of the Property, whether the Declarant of this covenant or any heirs, executors, administrators, successors or assigns,

shall be responsible for providing alternative conservation mitigation in such amounts and of such service and function as the USACE or any enforcer of this covenant shall determine in accordance with the terms of the permit/banking instrument and with Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899 and their implementing regulations.

#### **Proposed Future Impacts to Property**

**(E) (Optional paragraph.) Set out proposed easements if they meet the criteria discussed in the instructions following. If the USACE is made aware by the applicant of reasonably foreseeable proposed impacts on the Property subject to the restrictive covenant due to infrastructure plans by the developer or by the county/city/water and sewer authority, and the location and acreage of those future proposed easements can be shown approximately on the survey and deducted from the calculation of mitigation credits associated with the permit/mitigation bank, then the proposed easements may be described in this paragraph and should be shown on the survey as “Proposed Easements.” This will make it less likely that the restrictive covenant would need to be amended in the future even though a Clean Water Act permit may be required for the proposed future impacts.**

**As an added precaution, the owner should make reasonable attempts to determine if any county/municipal proposed projects in the foreseeable future will likely impact the protected Property (i.e. storm water/drainage ditches or underground utility pipes). If the property is adjacent to a road or bridge, the owner should make a reasonable attempt to determine if widening is planned by Georgia Department of Transportation or the County Transportation Department in the foreseeable future or, as a precaution, pull the survey line back to allow for a widening in the future. In addition, the USACE can consider corridors needed for future linear projects such as road crossings, utility lines, electric, and water and/or sewer lines and discuss options with the developer to be shown on the survey. Use of corridors should be discussed with the Regulatory Branch early in the permit process.**

### **5**

#### **Representations**

Declarant represents and warrants that after reasonable investigation, and to the best of its knowledge:

A. No substance defined, listed, or otherwise classified pursuant to any federal, state, or local law, or regulation, as hazardous, toxic, polluting, or otherwise contaminating to the water or soil, has been released, generated, treated, stored, used, disposed of, deposited, abandoned, or transported in, on, from, or across the Property;

B. There are no underground storage tanks located on the Property, whether presently in service or closed, abandoned, or decommissioned;

C. The Property is in compliance with all federal, state and local laws, regulations and permits and there is no pending or threatened litigation in any way affecting, involving or relating to the Property and its use.

D. The conservation property is not land-locked and there is access to the protected property by road, dedication of pathway or by an access easement.

**6**  
**Affirmative Duties**

A. Declarant/Owner will take action to prevent the unlawful entry and trespass by persons whose activities may degrade or harm the conservation values of the Property or that are otherwise inconsistent with this Declaration.

B. A management plan shall be developed by Declarant and its successors for management of the property for its conservation duties. Adequate financial resources shall be allocated by owner of the mitigation property for protection of the property. Declarant shall take immediate action to cure violations of this restrictive covenant.

**7**  
**Exclusive Possession**

Declarant, its (personal representatives, heirs, executors, administrators) (successors and assigns), reserve all other rights accruing from its ownership of the Property including but not limited to the exclusive possession of the property, the right to transfer or assign their interest in the same, the right to take action necessary to prevent erosion on the Property, to protect the property from losing its conservation functions and services, or to protect public health or safety; and the right to use the property in any manner not prohibited by this Declaration and which would not defeat or diminish the conservation purpose of this Declaration.

**8**  
**Benefits to the General Public**

It is expressly understood and agreed that this covenant does not necessarily grant or convey to members of the general public, any rights of ownership, interest in, or use of the protected property unless so designated by the owner for such purpose. Nonetheless, the property has significant aesthetic and conservation value in its present or restored state as a predominately natural area which has not been subject to extensive development or exploitation. The protection of jurisdictional and non-jurisdictional waters of the United States, their buffers and uplands, floodplains, vegetation, scenic, open space, aquatic and wildlife habitat are considered of great importance to the well being of the general public and to all citizens of Georgia and are worthy of preservation and conservation.

**9**  
**Enforcement**

The USACE and/or the Environmental Protection Agency, or its successors, as third party beneficiaries hereof, are hereby specifically granted the authority to enforce the provisions of this Declaration pursuant to the Clean Water Act Section 404 and the Rivers & Harbors Act of 1899, Section 10, and implementing regulations. Appropriate

remedy for violation of this section is contemplated to include, without limitation, injunctive relief to restrain such violation, restoration, administrative, civil or criminal penalties as well as any other remedy available under law or equity. However, no violation of this covenant shall result in a forfeiture or reversion of title. It shall not be a defense, for purposes of this covenant, that the conservation functions and services of the property were impacted without the owner's knowledge or consent, or that the waters on the property are deemed to be non-jurisdictional waters of the United States either by their function or by statute. The property was offered and accepted as mitigation and is therefore subject to the contractual terms of the permit/banking instrument and this Declaration. Loss of conservation functions and services shall not be required to be replaced if damage is due to acts of God so long as there has been completion of the mitigation requirements of the permit/banking instrument as to restoration, enhancement, establishment and monitoring.

## **10**

### **Right of Ingress and Egress**

The USACE, and/or the Environmental Protection Agency, their assigned agents and contractors, shall at reasonable times and upon notice to the owner, have an access easement for the right of ingress and egress to inspect the property in order to monitor and to ascertain whether there has been compliance with this Declaration. Posted signs declaring the property to be conservation property shall be posted by the owner in order to provide notice of the land use designation.

## **11**

### **Covenant Runs with the Land**

This covenant shall not terminate upon some fixed amount of time but shall run with the land in perpetuity both as to benefit and as to burden and shall be enforceable against Declarant and all present and future owners, tenants and other holders of any interest in the Property. This covenant is established for the purpose of preserving, enhancing and conserving wetlands and streams, non-jurisdictional wetlands and streams accepted as mitigation, buffers, uplands, open areas and the associated conservation values, services and functions. Furthermore, this covenant carries out the statutory requirement of Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act and the implementing regulations.

## **12**

### **Intent of Clean Water Act**

The intent of the Clean Water Act ("CWA") Section 404 is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. The intent of this document is that the Property be perpetually protected as conservation lands.

### **13**

#### **Written Notice of Legal Action against Property**

Pursuant to the CWA the District Engineer, c/o Office of Counsel, United States Department of the Army, Corps of Engineers, Savannah District, Savannah, Georgia, shall be provided with a 60-day advance written notice of any legal action concerning this covenant, or of any action to extinguish, void or modify this covenant, in whole or in part. The restrictive covenant is intended to survive foreclosure, tax sales, bankruptcy proceedings, zoning changes, adverse possession, abandonment, condemnation and similar doctrines or judgments affecting the property. A copy of this recorded document shall accompany said notice.

### **14**

#### **Eminent Domain**

If any or part of the protected property is taken by exercise of the power of eminent domain, so as to terminate this covenant, in whole or in part, USACE shall be given notification for the purpose of providing the condemnor with the value and cost of the replacement in kind of the ecological units and the conservation functions, services and values of jurisdictional or non-jurisdictional mitigation on the property. Subject to approval by the USACE, options for compliance with the CWA Section 404 or the Rivers & Harbors Act of 1899 Section 10 by the condemnor are contemplated to include: (1) Re-recording of the USACE model Declaration of Conservation Covenants and Restrictions on the property by the new owner thereby preserving the existing waters of the U.S and their buffers on the site; (2) Funds sufficient for the acquisition and protection of alternative real property in the same watershed providing equivalent conservation functions, services and values of wetlands, streams, creeks, shorelines, other waters of the U.S. and their buffers; or (3) If available, the option to purchase conservation mitigation credits from an authorized wetland/stream mitigation bank sufficient to replace the conservation mitigation functions, services and values of the wetlands, streams, creeks, shorelines, and other waters of the U.S. and their buffers; (4) Payment to an in lieu fee mitigation wetlands/streams trust account approved by the USACE in an amount sufficient to purchase and protect alternative real property in the same watershed with the equivalent mitigation conservation functions, services and values, or (5) Any other alternative conservation mitigation as may be approved by USACE in compliance with the regulations and requirements.

### **15**

#### **Removal to U.S. Federal District Court**

The USACE reserves the right to remove a legal action affecting waters of the United States to the United States Federal District Court in the district where the land lies.

**16**  
**Recordation of Instrument**

Declarant shall execute and record this instrument in timely fashion in the official records of the Office of the Clerk of Superior Court in the county in which this Property lies and shall provide the USACE with a copy of the recorded covenant and exhibits. Declarant may re-record this instrument at any time as may be required to preserve its rights.

IN WITNESS WHEREOF Declarant has duly executed this covenant on this the \_\_\_\_\_ day of \_\_\_\_\_

See Directions For Signature Page On Next Page

## **Directions for Signature Page**

**(1) As required for Georgia real estate records, provide for signature/s to be signed, sealed and delivered in the presence of (A) an unofficial witness and (B) a notary public affixing seal. Provide that the (Declarant) personally appeared before (the notary public), the undersigned witness, and notary makes oath that (he/she) saw the within named, sign the Declaration of Conservation Covenants and Restrictions, and that (he/she) with the other witness named above, witnessed the execution thereof. Type the name, the street address, city, state, and zip code, of the owner. Prepare a draft signature page but do not have it executed until the entire document and exhibits are approved.**

**(2) Prepare the signature page according to the legal authority of the Declarant to sign and state the capacity in which the person/s is signing and the entity for which it is signed. The document should be executed by the Owner/s-Declarant/s. All holders of title to the property should sign. If owner is married, both spouses should sign. Type the full names/s and title below the signature line. If the owner is an estate, then the authorized trustee or administrator should sign and provide authorization documents.**

**(3) If the owner is a corporation, provide a copy of the Secretary of State page from the Secretary of State web site that shows that the corporation status is active, the address of the corporation and provide a list of the corporate officers. Provide a Certificate of Corporate Resolutions and Authority authorizing the officers of the company, or any of them, to execute and record the Declaration of Conservation Covenants and Restrictions. This may be a short one page document. The Declaration should be signed by the President and one other officer or both.**

**(4) If signing for a partnership, church or so forth, the document should be signed by the president or vice-president, a general partner, trustee or person who has authority to sign on behalf of the legal entity. Provide a Resolution and Adoption of the Declaration of Conservation Covenants and Restrictions by the governing entity.**

**(5) If prior approval by resolution and adoption of a county commission, governing body of a municipality or other government entity is required, provide copies of the resolution and adoption documents. The County Commissioner or Chairman of the Board should sign on behalf of the government if so authorized.**

**See next page for further instructions regarding subordination and exhibits.**

## Directions for Deed to Secure the Debt

If the property is encumbered with a deed to secure debt, prepare a "Consent and Subordination" signature page for purposes of having the holder of a deed to secure debt, consent and join in this Declaration of Restrictive Covenant. Suggested language for use is provided below:

### Consent and Subordination

The undersigned, \_\_\_\_\_ ("Lender"), beneficiary under a Deed to Secure Debt dated \_\_\_\_\_ and recorded in Deed Book \_\_, Pages \_\_\_\_, in the \_\_\_\_\_ County, Georgia records, for itself, its successors and assigns, consents to the foregoing Declaration of Conservation Covenants and Restrictions ("Covenant"). Lender agrees that, upon recordation of the Covenant, the restrictive covenants contained in the Covenant will run with the land which serves as security for the debt evidenced by the Security Deed and further agrees that any foreclosure or enforcement or any other remedy available to Lender under the Security Deed will not render void or otherwise impair the validity of the Covenant. The undersigned acknowledges that it has received and reviewed a copy of the Covenant and exhibits.

Title of Lending Agency

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

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

(Type name and agency and

sign)

Signed, sealed and delivered

This \_\_\_\_ day of \_\_\_\_\_, in

The presence of:

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

Witness \_\_\_\_\_

My Commission Expires: \_\_\_\_

(Notary Seal)

(See Next Page)

**INSTRUCTIONS AND GUIDANCE FOR EXHIBIT C –FOR USE BY ENVIRONMENTAL  
CONSULTANT--FUNCTIONS AND SERVICES**

Exhibit C to the restrictive covenant should be prepared by the wetland/stream consultant.

This document should not be a recital of, or copy of, the mitigation plan. It should be prepared as a short one-page exhibit for the purpose of briefly describing the conservation values and services that exist (preservation) or that will exist on the property assuming the restoration, establishment or enhancement is successful. Below are some questions to help frame this exhibit. They are not intended to be the sole functions and services associated with wetlands/streams/waters of the United States.

What is the larger geological area within which is this property if located? What watershed and Hydrologic Unit Code is it in? Does this site contribute to an approved watershed management plan? How? Is the site in a heavily developed, metropolitan, agricultural, rural or isolated area? Will it provide shoreline protection? What is the length of stream or acreage of wetland protected? Is it first or second order streams? Is it a perennial or intermittent stream? Does it include headwaters? Will the buffer span both sides of the river or encircle the entire wetland? What benefit does the open and green space provide?

Describe the physical and hydrological restoration that will result in reestablishing a functional wetland and/or a stream. Will the tributary provide valuable aquatic habitat for macroinvertebrates? What are or will be its functions as a stream? Does it improve stream flow or restore an original course of a tributary? Is the stream/wetland part of a larger system? Will it establish a hydrologic and/or geomorphic connection to streams/wetlands on adjacent properties? Will it enhance a swamp area? Will it function to improve water quality? Will it remove or retain inorganic nutrients? Will it function to reduce suspended sediments? Will it reduce sediment transport? Will it increase carbon export and aquatic drift?

Is the soil permeable and does it absorb rain thereby reducing storm water run off? Does the wetland/stream function to counteract the rate and/or volume of surface water runoff from pavement and buildings? Will it impede movement of flood water and distribute it more slowly? What percent of the tract is in the 100-year floodplain? Will it reconnect wetlands/streams to the historical river/wetland floodplain? Will it reduce velocities during storm events or floods and provide temporary surface water storage? Is it a stormwater /detention/retention/management pond? Is there a plan to oxygenate the pond? How?

Will it perform water purification functions by holding or transforming nutrients, sediments and pollutants? Does it serve to filter surface water? Will it replenish groundwater? Will it retain rainwater that may percolate into aquifers? Will it serve to improve a portion of a degraded stream? Will it hold soil in place with its root system or vegetation? Will it prevent water logging of agricultural lands? Will it convert pasture to a functioning stream and riparian zone? Will it help to attenuate downstream flooding?

Is it a forested wetland, scrub-shrub and/or emergent wetland? Is it a mature bottomland hardwood forest? Is it an isolated wetland, interdune wetland, cypress or gum pond, bog, swamp or other type of wetland community? Describe the canopy. Will it be reforested? Will the reforestation consist of native trees and shrub? Will it be a hardwood ecosystem? Does it have biodiversity? Will it provide essential nesting, wintering, feeding and resting grounds for species of migratory waterfowl or other water birds? Will it provide habitat for any aquatic species, plants, wildlife, migrating birds, endangered or threatened species? What habitat opportunities will the vegetation and/or forested parcel provide? Will it serve as a migration corridor? What vegetative species will be planted?

Does it have any unique features? Will it be used for hunting or education/wildlife management? Who will manage the property for its conservation functions and services? How will its use be protected? Fencing? Posting signs? Land use plan?

# United States Army Corps of Engineers, Savannah District

## PROVIDE TO SURVEYOR

### Instructions for Survey for use with Declaration of Covenants and Restrictions

**Do Not Record the survey until approved by the Department of the Army Corps of Engineers, Office of Counsel. Provide the platted survey to the attorney preparing the restrictive covenant on behalf of the owner of the property. For questions call Office of Counsel, Corps of Engineers, Lisa White, 912-652-5277.**

Surveys must contain the seal of a Georgia Registered Land Surveyor. The surveyor should determine the survey plat size approved or required by the land records office in the county where the land lies. Provide a vicinity map identifying roads adjacent to the site.

The survey should be a metes and bounds boundary survey of those parcels of land that will be subject to the restrictive covenant. Within the boundary survey is generally located wetland, streams and buffers. This property generally contains all property referenced as mitigation, including preservation, restoration, establishment and enhancement. Note that this may be different from a jurisdictional survey that would only show metes and bounds of jurisdictional wetlands or streams.

The bearings & distances should be tied in to at least one known coordinate, with a statement of precision closure <1:10,000. Use NAD 1983 DATUM.

State the total number of acres of each tract/parcel.

Use a legend to approximately identify the location of the wetlands, wetland buffers, streams or upland.

The legal description may reference the platted survey. For example:

"All that tract or parcel of land situate, lying and being in the \_\_\_\_\_ District, G.M., \_\_\_\_\_ County, Georgia, and being shown as \_\_\_\_\_ acres +/- on a plat entitled \_\_\_\_\_, dated \_\_\_\_\_, prepared by \_\_\_\_\_, GRLS # \_\_\_\_\_, recorded in Plat Book \_\_\_\_\_, Page \_\_\_\_\_, in the Office of the Clerk of the Superior Court of \_\_\_\_\_ County, Georgia.

Show easements, right-of-ways, roads and structures that go on or across the parcels subject to the restrictive covenant. Provide the width and length of the easement if known, and the holder of the easement.

Surveyor shall enter "Note" on survey that provides,

**"Wetlands, Streams and Buffers may be under the jurisdiction of the U.S. Army Corps of Engineers, permit number (enter permit/banking instrument number) and are protected by a recorded Declaration of Covenants and Restrictions." (Note: The permit/banking number can be obtained from the environmental consultant or the Regulatory Branch of the US Army Corps of Engineers.)**

Provide a minimum of three or four latitude/longitude coordinates which, when connected, will form a polygon that approximately circumscribes the mitigation area. This is for use with GIS mapping.