

Session 8: Real Estate Protection Instruments



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RULES AND REGULATIONS

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


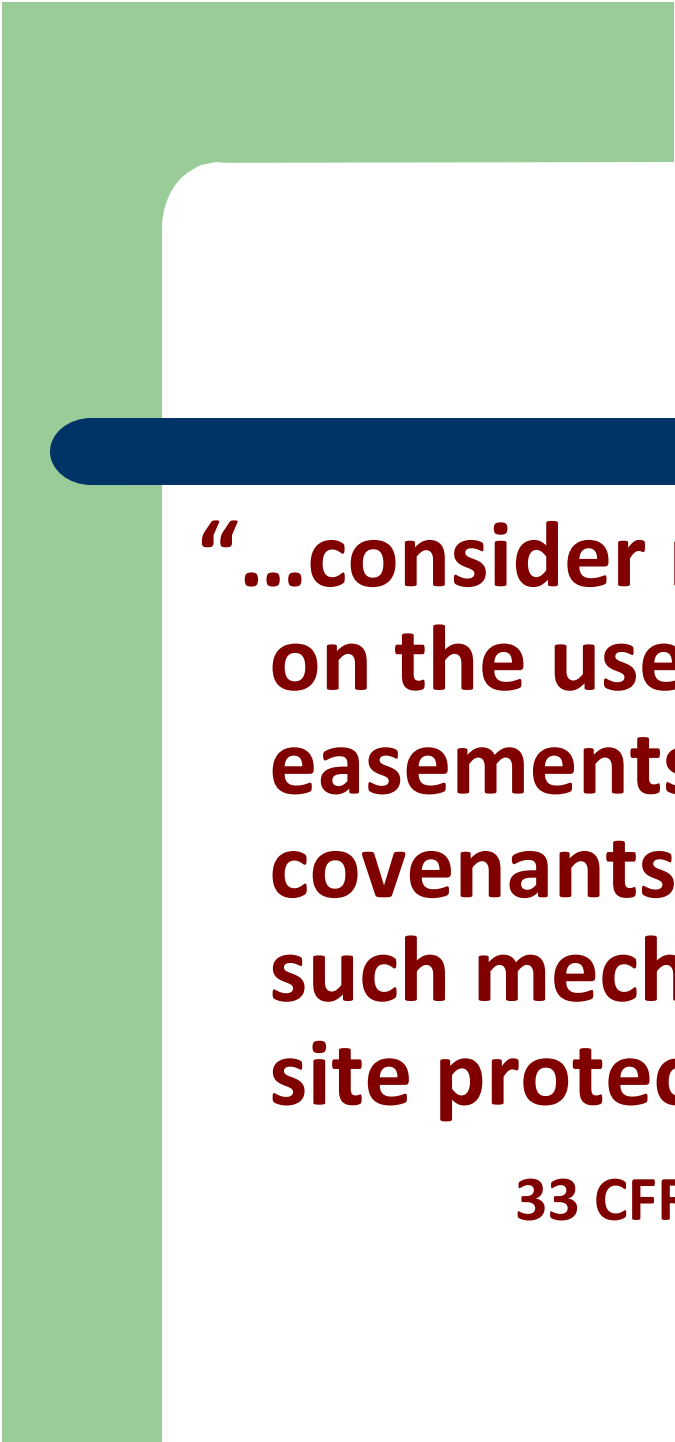
33 CFR 332.7 and

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)

TIMING

- **Mitigation Sites: site protection instrument should be finalized before work begins.**
- **Banks: site protection instrument must be finalized before any credits can be released and for ILF, before advance credits become released credits and/or ILF funds are released.**

TYPES OF SITE PROTECTION DOCUMENTS

- Conservation easements
- Restrictive Covenants
- Transfer of title
- Multi-party agreements
- Conservation Land Use Agreements
- Federal Facility management plans/integrated natural resources management plans

WHY ARE DIFFERENT SITE PROTECTION INSTRUMENTS USED IN DISTRICTS ?

- Real estate laws change from state to state
- The entities involved in protecting the property differ from state to state

What form of site protection does your Corps District use?

Involve Your Office of Counsel to:

- **Consider variation in state laws governing real estate**
- **Adapt instrument to the unique requirements of the site.**
- **Determine whether instrument is legally sufficient, enforceable, and can be recorded.**



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

Conservation Easement

Flexible legal instrument that can be tailored to:

- The particular property
- Wishes of the landowner (grantor), and
- Goals of the easement holder (grantee) or a regulatory agencies

Conservation Easement

- Voluntary, legally binding agreement
- Allows landowner to give up certain rights in the property while retaining ownership of others
- Designed to meet specific objectives (i.e. protect certain habitat values, species, preserve working land use, etc)

Conservation Easement

- Must be designed and stated to accomplish specific objectives, such as:
 - Protect natural habitat for endangered/threatened species
 - Protection of farm or forest land, open space, scenic view or buffer sensitive conservation lands.
- Easements can be tailored to meet landowner's needs.

Conservation Easement

- Typically includes a description of the property, identify the landowner (grantor) and easement holder (grantee) and a set of legal terms and conditions including the following:

Conservation Easement

- Purpose
- Baseline
- Rights and duties of grantee
- Restrictions/inconsistent uses of land
- Grantor's reserved rights in land
- Enforcement
- Provisions to assign, amend, enforce or extinguish.

ADVANTAGES OF A CONSERVATION EASEMENT

- **Third party holder may assume the responsibility for long-term management, for managing wildlife habitat or protection of endangered species and may provide educational programs**
- **Holder monitors condition of the property and generally has the right to enforce the terms of the easement against the owner**
- **Owner transfers the land to new owner but holder of conservation easement remains (forever)**
- **Allows owner to retain many private rights**

Disadvantages of Conservation Easements

- **Difficulty identifying easement holder, especially if property is small or hard to access**
- **Easement holders may**
 - Cease to exist
 - Choose not to enforce easement terms
 - Have insufficient funds to monitor/enforce
- **Changes in agency policies/procedures which may be contrary to the intent of the easement.**

Other Considerations for Conservation Easements

- **Duration of Easement**
- **Subsequent holders may have to accept**
- **Does not limit activities on adjoining or nearby properties**

Deed Restrictions

- **Private agreements that affect the use of land**
- **Limit or prohibit certain uses**
- **Resources are protected as a benefit to the owner, subsequent owners and to the public**

ADVANTAGE OF RESTRICTIVE COVENANT

- **“Run with the land” in perpetuity regardless of ownership. Subsequent owners must comply.**
- **Owner acknowledges that property is protected for “value received” in the instrument and it is therefore a contractual agreement (quid pro quo)**
- **No requirement for a third party holder**

Problems with Restrictive Covenants

- No third party (non-owner) easement holder to determine owner compliance
- Agency may not have the resources to monitor site.
- Some states may not recognize restrictive covenants or may set limits on their duration.
- Owner may petition court to remove deed restrictions.
- Can be terminated if the original purpose of the covenant is lost.

Title Transfer



- Ownership transferred to a conservation entity to manage & protect the property.
- Sites are usually larger & part of a protected natural resource area or watershed.
- Some land management agencies may not have experience in long term land management
- Some agencies have converted mitigation sites to other purposes
- Some missions are incompatible


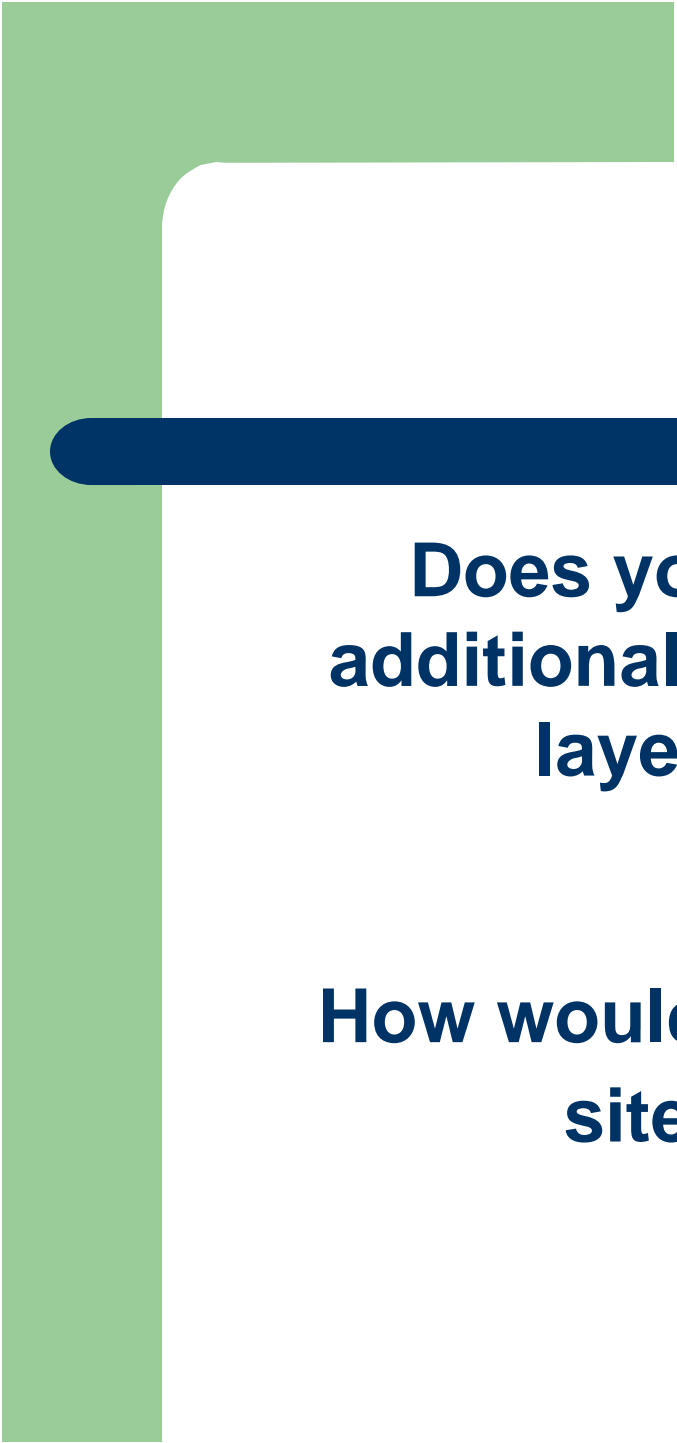
TITLE TRANSFER AS SITE PROTECTION

Problem:

Some agencies have converted mitigation sites to other purposes (e.g. wildlife food plots or wetlands habitats)

Solution:

Reversionary clause so that mitigation land reverts to original landowner if land is not managed for intended use.



Does your Corps District offer any additional incentives for every additional layer of legal site protection?

How would that work? How do you layer site protection documents?

MULTIPLE PARTY AGREEMENTS



- The land trust or natural resource agency or department who is the ILF proponent may not be the ultimate owner. They may be acquiring the land pending transfer
- The ultimate owner (Federal or State) agency cannot by statute accept transfer of real property if it has any limitation (recorded conservation easement or restrictive covenant or deed restriction)
- Multiple sources of funds (not just ILF)

CONSERVATION LAND USE AGREEMENT

- **All parties to the ILF project sign the agreement**
- **The agreement provides for acquisition and transfer of ownership**
- **The agreement names the entity that will ultimately record the site protection document**

Conservation Land Use Agreements

- Agency is land owner - no transfer of title
- State &/or federal entity may become land owner but cannot **record** any limitation on the property's use.
- **MOA** on the management of resources is allowed and may be recorded in land records office.

Integrated Natural Resource Mgmt Plan or Federal Facility Mgmt Plan

- Federal agency does not have authority to limit the use of property by recording a deed restriction.
- A conservation site can be shown on agency land use plan as designated for “environmental conservation use”





EXHIBITS TO SITE PROTECTION DOCUMENTS

- **The CWA permit or banking instrument, or the executive summary**
- **Survey/Legal Description (Survey shows any easements that will remain in place)**
- **Identification of other property rights/interests**
- **Baseline- Description of conservation functions, services, resources on the site including listed species, habitat, vegetation and contribution to the watershed.**

CONSERVATION VALUES

- 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 value.
- Once the mitigation property is finalized, then the contractual agreement is completed. The site protection document should state that it will remain conservation mitigation even though it may later be determined through case law decisions or otherwise not to be jurisdictional waters of the US. A deal is a deal!



**WHAT SHOULD THE REAL
ESTATE DOCUMENT SAY
REGARDING PROHIBITED USES
ASSOCIATED WITH MITIGATION
SITE ?**

Suggestions for Prohibited Uses



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



**WHAT ARE PERMITTED USES
THAT MAY BE STATED IN THE
REAL ESTATE INSTRUMENT?**

Possible acceptable uses of land:

- **Walking trails in upland 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**
- **Fence out livestock, trespassers**

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

- **Who or what owns it?**
- **Does the owner have good title?**
- **Does the owner have 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, land trust, government)
- Easements (utility, water/sewer, cable)
- Right-of-Ways (roads, access)
- Lien Holders (Financial i.e. mortgages)
- Property that passes by probate (wills and trusts)
- Leases, rights (mineral, timber, water)

Title Insurance

Title insurance company researches property history (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.

Good thing to require.

What is a marketable record title statue?

In some states, a marketable record title might mean a title of record which operates to extinguish interests and claims existing prior to a certain date.

Need to know if there are exceptions.

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**

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?**

When do I request this information?

- **Develop a policy and process regarding real property in coordination with counsel.**
- **Early in the process request submittal of title insurance, title search and questionnaire regarding land issues.**
- **There is no point in proceeding if there are outstanding issues regarding the land in conflict with mitigation and site protection requirements.**

HOW DOES SITE PROTECTION WORK ?

- **Recording at the courthouse in the record deeds office provides a public record of the interests associated with land.**

WHO LOOKS AT THOSE RECORDS?

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



What if the information provided is inaccurate or fraudulent and becomes an issue?

Your site protection document should address that issue.

Suggested language

“Should an easement, right 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 prohibited uses of the property set out in this (document), then the owners of the property 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 (document) shall determine in accordance with...CWA.”



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

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.

How can this be prevented?

Subordination Agreement

Provides more assurance that the site will withstand adverse actions

Consider the following sample agreement language:

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 enforcement 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.**
- **The property may not 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 so the lender makes money.**

One Approach to Conflicting Interests

If others will not subordinate their interests could condition permit/instrument so that if those interests are exercised the responsible party must provide acceptable replacement mitigation





**ARE YOU NOTIFIED WHEN
THERE IS A PROPOSAL TO
AMEND A SITE PROTECTION
DOCUMENT AND ASKED TO
COMMENT?**

RULE ON NOTIFICATION

**You must receive 60 day notice when
there is a proposal to amend site
protection mechanism**

33 CFR 332.7(a)(3)



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, condemnation or judgments affecting the property.”

THE SITE PROTECTION DOCUMENT MAY STATE SOMETHING TO THE EFFECT:

“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.”

Suggested policy for amendments

- **Property Owner must consent**
- **Alternatives analysis – cost is a factor, but not the most significant consideration**
- **Determine if impact will affect the entire site and not just the portion directly impacted**
- **More mitigation may be required for impacts to protected sites than for permit actions**

Who may want to amend the site protection document?

- **Department of Transportation**
- **Developers**
- **Linear project proponents**
- **Owners**
- **Local and state governmental**
- **Military**
- **Even the Corps!!!!**



Reasons given for impacting protected sites:

- **Impact is only to buffer/upland. No waters of the U.S. will be affected**
- **It is the best alternative for this (road/pipeline). Other alternatives involve impacts to homes, businesses or developed areas (people v natural resources)**
- **Will save lots of (taxpayer) money to cross the protected site and not have to go around it**
- **The values/functions/services of the wetlands or streams are not very high.**
- **The wetlands/streams are no longer jurisdictional**
- **The military or overriding national needs arises.**

SUGGESTED POLICY REGARDING AMENDMENTS

- **Owner of property must consent**
- **Alternatives analysis – cost saving, although a factor, is not the most significant consideration**
- **Determine if impact will affect the entire site and not just the portion directly impacted**
- **Mitigation for impact to the protected site may be required at a substantial higher credit ratio than for permit actions**

Enforcement



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

Who provides the enforcement of the site protection document?

What is Eminent Domain?

The power of the government to appropriate property for public use.

Condemnation proceedings are held.

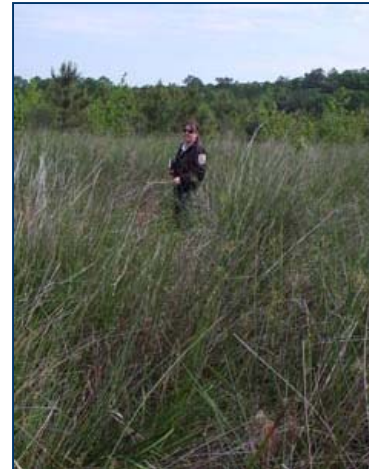
Owner loses title to all or part of the property and is paid the fair market value of the land.

Eminent Domain

Court might consider the loss of **consequential value in addition to fair market value** where the site protection document cites the conservation values provided to the public.



OR



Eminent Domain

Suggested language:

“If protected property is taken in whole or in part through eminent domain, the consequential value of the property protected by the ... Act is the cost of replacement of the conservation functions, services and values with other property in the same watershed.”

What about change in resource status?

Once the contractual agreement is completed, the site protection document should state:

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

Owner acknowledged receipt of value in return for instrument and agreed to protection of bank site.

Litigation in Court

“In any state court action, the USACE reserves the right to be represented by the U.S. Department of Justice and/or to remove a legal action affecting jurisdictional waters of the U.S./federally-listed species to the United States Federal District Court in the district where the land lies.”

Other approaches to site protection

- Involve counsel
- SOPs
- Checklists
- Templates
- Permit conditions



Questions?

