



A TRAINING COURSE FOR MITIGATION BANKING INTERAGENCY REVIEW TEAMS



ENVIRONMENTAL
LAW • INSTITUTE®

Reference Document: Real Estate Protection Instruments

A. Federal Real Estate Protection Instrument Policy

2008 Compensatory Mitigation for Losses of Aquatic Resources

§332.4 *Planning and documentation*

(c) *Mitigation Plan*. [The mitigation plan must include:]

(4) *Site protection instrument*. A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site (see § 332.7(a)).

§ 332.7 *Management*.

(a) *Site protection*.

(1) The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as federal, tribal, state, or local resource agencies, non-profit conservation organizations, or private land managers; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans. When approving a method for long-term protection of non-government property other than transfer of title, the district engineer shall consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection. To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an appropriate third party (e.g., governmental or non-profit resource management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections.

(2) The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.

(3) The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the district engineer before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.

(4) For compensatory mitigation projects on public lands, where federal facility management plans or integrated natural resources management plans are used to provide long-term protection, and changes in statute, regulation, or agency needs or mission results in an incompatible use on public lands originally set aside for compensatory mitigation, the public agency authorizing the incompatible use is responsible for providing alternative compensatory mitigation that is acceptable to the district engineer for any loss in functions resulting from the incompatible use.

(5) 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.

§ 332.8 Mitigation banks and in-lieu fee programs.

(t) Site protection.

(1) For mitigation bank sites, real estate instruments, management plans, or other long-term mechanisms used for site protection must be finalized before any credits can be released.

(2) For in-lieu fee project sites, real estate instruments, management plans, or other long-term protection mechanisms used for site protection must be finalized before advance credits can become released credits.

2003 Model Compensatory Mitigation Plan Checklist

- Site Protection and Maintenance
 - List parties and responsibilities
 - Provide evidence of legal protective measures

6. Site Protection and Maintenance

- a. Long-term legal protection instrument (e.g. conservation easement, deed restriction, transfer of title).
- b. Party(ies) responsible and their role (e.g. site owner, easement owner, maintenance implementation). If more than one party, identify primary party.



A TRAINING COURSE FOR MITIGATION BANKING INTERAGENCY REVIEW TEAMS



Reference Document: Real Estate Protection Instruments

B. Bibliography of Corps District & State Model Real Estate Protection Instruments

Baltimore District, U.S. Army Corps of Engineers. "Conservation Easement Agreement." Undated. No URL available.

"Deed of Conservation Easement." Undated. No URL available.

"Maryland Declaration of Restrictive Covenants." Undated.
<http://www.nab.usace.army.mil/Regulatory/Mitigation/RestrictiveCovenants.pdf>

"Maryland/Pennsylvania Declaration of Restrictive Covenants and Conservation Easement." Undated. No URL available.

Charleston District, U.S. Army Corps of Engineers. "Charleston District Conservation Easement Model." September 2010.
<http://www.sac.usace.army.mil/?action=mitigation.home>

"Charleston District Model Restrictive Covenants." September 2010.
<http://www.sac.usace.army.mil/?action=mitigation.home>

Galveston District, U.S. Army Corps of Engineers. "Draft Conservation Easement." Undated.
http://www.swg.usace.army.mil/reg/mitigation/protection_covenants/Conservation_Easement.doc

"Draft Deed Restriction." Undated.
http://www.swg.usace.army.mil/reg/mitigation/protection_covenants/Deed_Restriction.doc

Michigan Department of Environmental Quality, Land and Water Management Division. "Agreement for Conservation Easement." August 14, 2007.
http://www.michigan.gov/documents/deq/lwm-wetlands-conservationeasements_263027_7.pdf

“Conservation Easement Checklist.” November 7, 2007.
http://www.michigan.gov/documents/deq/lwm-wetlands-conservationeasementchecklist_263028_7.pdf

Mobile District, U.S. Army Corps of Engineers. “Conservation Easement for Individual Permits.” Undated.
http://www.sam.usace.army.mil/RD/reg/ce_wo_mb.doc

“Instructions for using the Model Declaration of Restrictive Covenants and Model Conservation Easement.” Undated.
http://www.sam.usace.army.mil/RD/reg/rc_ce_inst.doc

“Model Conservation Easement and Acceptance (For Use with Mitigation Banks).” Undated.
http://www.sam.usace.army.mil/RD/reg/ce_tmp_mb.doc

“Model Declaration of Restrictive Covenant for Use with Permits with Mitigation Plans.” Undated.
http://www.sam.usace.army.mil/RD/reg/rc_pwmp.doc

“Model Declaration of Restrictive Covenant for Use with Permits without Mitigation Plans.” Undated.
http://www.sam.usace.army.mil/RD/reg/rc_pwomp.doc

Norfolk District, U.S. Army Corps of Engineers. “Declaration of Restrictions.”
http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/Guidance/DECLARATION_OF_RESTRICTIONS.doc

“Project Manager Declaration of Restrictions Checklist.” Undated. No URL available.

Omaha District, U.S. Army Corps of Engineers. “Conservation Easement for Mitigation Banks – Template.” Undated.
<http://www.nwo.usace.army.mil/html/od-r/appendi1.pdf>

“Deed Restriction – Template.” October 2005.
<http://www.nwo.usace.army.mil/html/od-r/appendi2.pdf>

Sacramento, San Francisco, and Los Angeles Districts, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, California Department of Fish and Game, California Resources Agency, National Marine Fisheries Service, U.S. Environmental Protection Agency, and Natural Resources Conservation Service. March 2010. “Conservation Easement Deed Template for Mitigation and Conservation Banks in California.”

Go to RIBITS>Sacramento District>Bank and ILF Establishment or refer to CD

“Property Assessment and Warranty Standard Template.” December 2006.
Go to RIBITS>Sacramento District>Bank and ILF Establishment or refer to
CD

Savannah District, U.S. Army Corps of Engineers. “Amendments to Declaration of
Covenants and Restrictions.” January 7, 2004.

<http://www.sas.usace.army.mil/regulatory/documents/amendments.pdf>

“Instructions for Using the Model Declaration of Covenants and Restrictions
with Permit Applications.” January 7, 2004.

<http://www.sas.usace.army.mil/instructions.pdf>

“Model Declaration of Covenants and Restrictions.” October 15, 2008.

<http://www.sas.usace.army.mil/regulatory/documents/Rescovmodel2010.pdf>

“Standards for Qualified Conservation Easements.” Undated.

<http://www.sas.usace.army.mil/permit/CEG.pdf>

Wilmington District, U.S. Army Corps of Engineers. November 25, 2003.

“Wilmington District Process for Preservation of Mitigation Property.”
(includes Model Conservation Easement, Restrictive Covenants Guidance,
Model Declaration of Restrictions and Process Documents.)

<http://www.saw.usace.army.mil/wetlands/Mitigation/preservation.html>