

## **MODEL CONSERVATION EASEMENT – STATE OF OHIO**

The following “Model Conservation Easement” document is provided for drafting purposes. Please check the Buffalo District, Regulatory Division website ([INSERT LINK](#)) in order to view and access the most current draft restrictive covenant language and instructions. Please contact the Buffalo District Office of Counsel 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 instrument and exhibits (including the survey(s)) until approved in writing by the USACE.

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 Conservation Easement and do not conflict with its terms.

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

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

The Attorney for the permit or banking instrument holder should write a letter requesting a review of the draft Model Conservation Easement and exhibits addressed to:

U.S. Army Corps of Engineers  
Office of Counsel  
1776 Niagara Street  
Buffalo, NY 14207-3199  
(716) 879-4184

\*NOTE that the Regulatory Branch employee to whom the Action has been assigned should be copied on the aforesaid letter and be provided a copy of the draft Conservation Easement and exhibits.

Please reference the U.S. Army Corps of Engineers permit number/banking instrument number on any communications to USACE (this number is set out on correspondence from the Regulatory Branch). Please provide the name, telephone, and mailing address of the attorney who is the point of contact for this draft document, as well as the name, telephone, and mailing address for the consultant.

The Office of Counsel will review the document and advise regarding necessary changes. For questions regarding this document, please call the Office of Counsel at (716) 879-4184. Once approved and recorded, a copy of the recorded document should be forwarded to the Buffalo

District Office of Counsel. If not forwarded, then the permit holder may be out of compliance with the permit action.

### **REQUIRED EXHIBITS**

The following documents must be attached as exhibits to the instrument:

1. Exhibit A: A copy of the signed permit, permit letter, after-the-fact permit letter, and/or settlement agreement. The Grantor should be both the permittee and the owner of the property.
2. Exhibit B: A legal description of the parcel or tract subject to the covenant.
3. Exhibit C: A platted survey showing metes and bounds of the boundary of the parcel(s) subject to the restrictive covenant prepared by a registered Ohio 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. Refer to the "Provide to Surveyor" instructions attached herein for survey requirements.

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

Copies of the following documents must be provided for review (do not send originals):

1. Deed of Title, showing the owner of the property. Title insurance is not required.
2. All Recorded Easements, or, if numerous, a list of easement holders and the nature of the easement with citation of recorded location. 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 delineation is not part of any residential, commercial, or other subdivided lots but is an open and common area or a separate parcel.
4. Any county, state, and/or federal land conservation use documents or conservation easements that pertain to the property. State if the property is a public park, greenway, or is protected statutorily for its conservation land use.
5. Any Deeds to Secure the Debt, any Liens of Record, or Leases.
6. If Grantor is a corporation, a copy of the Secretary of State listing of the corporation.
7. If Grantor is a governmental body, provide a copy of a resolution and adoption of the declaration by the governing body.

**DRAFT MODEL LANGUAGE BEGINS NEXT PAGE**

## MODEL CONSERVATION EASEMENT

**THIS DECLARATION OF CONSERVATION EASEMENT** is made this [ ] day of [ ], 20[ ], by and between [ ], (the “Grantor”), its successors and assigns, having an address at [ ] and [ ] (the “Grantee”), having an address at [ ].

**WHEREAS**, Grantor is the sole owner in fee simple of approximately a (insert number of acres) acre tract of certain real property located at insert address or general description of location, situated in [ ] County, Ohio; and

**WHEREAS**, Grantor seeks to develop the property in a manner which will result in impacts to waters of the United States. These impacts are authorized by Department of the Army Permit number [ ], issued on [ ], 20[ ], by the United States Army Corps of Engineers, Buffalo District (“USACE,” to include any successor agency), attached as Exhibit A (“the Permit”), in accordance with Section 404 of the Federal Clean Water Act (33 U.S.C. Section 1344) and/or Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Section 401) and implementing regulations; and

**WHEREAS**, in order to protect, restore, and maintain the chemical, physical, and biological integrity of the quality of the waters of the United States located on the real property, the USACE has required that Grantor, as a condition of being issued the Permit, grant a conservation easement in and to a portion of the Grantor’s real property, as identified and described by metes and bounds on Exhibit B, attached hereto, and set forth graphically on Exhibit C, attached hereto (“Easement Area”); and

**WHEREAS**, Grantee is an entity qualified to hold a Conservation Easement in accordance with Ohio Revised Code § 5301.69; and

**WHEREAS**, Grantor intends, as owner of the Easement Area, to convey to Grantee the right to preserve and protect the conservation values of the Easement Area in perpetuity for conservation and wildlife resources.

**NOW THEREFORE**, in consideration of the foregoing premises and the mutual promises and covenants contained herein, the parties hereto agree as follows:

1. **Grant of Easement:** Grantor hereby grants and conveys to Grantee, its successors and assigns, an estate, interest, easement, and servitude in and to the Easement Area of the nature and character and to the extent hereinafter expressed, to be and to constitute a servitude upon the Easement Area, which estate, interest, easement, and servitude will result from the covenants and restrictions set forth herein and hereby imposed upon the use of the Easement Area by Grantor, and, to that end and for the purpose of accomplishing the intent of the parties hereto, Grantor covenants on behalf of itself, its heirs, successors, and assigns with Grantee its successors and assigns to do and refrain from doing, severally and collectively, upon the Easement

Area, the various acts hereinafter described, it being hereby agreed and expressed that the doing and the refraining from said acts, and each thereof, is and will be for the benefit of Grantee.

2. **Term of Easement:** The easement granted hereunder shall be perpetual and shall have no expiration date. The Easement shall not be extinguished except by written approval of the USACE or its successors in administration.
3. **Conservation Values:** The Easement Area possesses substantial value in conserving and protecting the physical, biological, chemical, and overall ecological integrity of the Easement Area and is important to the protection of the existing or designated use of the waters of the state pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Section 1344, Section 6111.041 of the Ohio Water Pollution Control Act, and/or Sections 6111.02 to 6111.024 of the Ohio Water Pollution Control Act.
4. **Prohibited Actions:** Any activity on, or use of, the Easement Area inconsistent with the purposes of this Conservation Easement or detrimental to the conservation values expressed herein is expressly prohibited. By way of example, and not of limitation, the following activities and uses are explicitly prohibited except to the extent that an activity is required to fulfill the terms and conditions of the Permit that applies to the Property and/or the Easement Area and upon notification of Grantee:
  - a. **Division:** Any division or subdivision of the Easement Area is prohibited.
  - b. **Commercial, Industrial, or Agricultural Activities:** Commercial, residential development, or industrial activity is prohibited.
  - c. **Construction:** The placement or construction of any man-made modifications such as buildings, structures, fences, mobile homes, advertising, billboards, camping accommodations, roads, and parking lots is prohibited.
  - d. **Cutting Vegetation:** Any clearing, cutting, or burning of trees, ground cover, or vegetation, or destroying by means of herbicides or pesticides is prohibited, except in the management of those plant species deemed by the State of Ohio to be invasive species. Any control of these species shall be done in consultation with Grantee and with prior written approval by the USACE.
  - e. **Land Surface Alteration:** The removal, filling, or excavation of soil, sand, gravel, rock, minerals, or other materials from the Easement Area, or doing any act that would alter the topography of the Easement Area, is prohibited.

- f. **Dumping**: Waste, garbage, and unsightly or offensive materials are not permitted and may not be accumulated on the Easement Area.
- g. **Waters and Wetlands**: Water courses, streams, wetlands, and adjacent riparian areas may not be dredged, straightened, filled, channelized, impeded, diverted, or otherwise altered, except to the extent authorized by the Permit.
- h. **Recreational Trails and Vehicles**: Recreational uses that disturb or compact the soils or destroy or inhibit growth of vegetation are prohibited. Use of ATVs or other recreational motorized vehicles is prohibited.
- i. **Utilities**: Construction of utilities on the Easement Area is prohibited. Underground or above-ground utilities may only be constructed if no other alternatives are available and the USACE has approved the exception.
- j. **Other Activities**: Each and every other activity or construction project on the Easement Area which might endanger the conservation values of the Easement Area shall be prohibited.

5. **Rights of Grantee** Grantor confers the following rights upon Grantee to perpetually maintain the conservation values of the Easement Area:

- a. **Right to Enter**: Grantee has the right to enter the Property at reasonable times to monitor or to enforce compliance with this Conservation Easement; provided that such entry shall be upon prior reasonable notice to Grantor and during normal business hours. Grantee may not, however, unreasonably interfere with Grantor's use and quiet enjoyment of the Easement Area or the Property. Grantee has no right to permit others to enter the Easement Area or Property except as permission may be granted to other individuals for the purposes of carrying out the responsibilities of Grantee as required by this Conservation Easement. The parties hereto acknowledge and agree that the general public is not granted access to the Easement Area under this Conservation Easement.
- b. **Right to Preserve**: The Grantee has the right to prevent any activity on or use of the Easement Area that is inconsistent with the terms or purposes of this Conservation Easement.
- c. **Signs**: Grantee shall have the right to place signs on the Easement Area which identify the land as being protected by this Conservation

Easement. The number, size, and content of any such signs are subject to Grantor's prior approval and the requirements of the Permit.

6. **Rights Reserved to Grantor:** Grantor reserves to itself, and to its personal representatives, heirs, successors and assigns, all rights accruing from its ownership of the Easement Area, including the right to engage in or permit or invite others to engage in all uses of the Easement Area that are not expressly prohibited herein and are not inconsistent with the purposes of this Conservation Easement. Without limiting the generality of the foregoing, the following rights are expressly reserved:
  - a. **Right to Convey:** Grantor retains the right to sell, mortgage, bequeath, donate, or otherwise convey the Easement Area. Any conveyance shall remain subject to the terms and conditions of this Conservation Easement and the subsequent interest holder shall be bound by the terms and conditions hereof.
  - b. **Right to Maintain:** Grantor retains the right to maintain, renovate, and replace any existing structure(s), if any, on the Easement Area, in substantially the same location and size. Any expansion or replacement may not substantially alter the character or function of the structure, and requires Grantee's prior written approval.
  - c. **Right to Access:** Grantor shall retain the right of unimpeded access to the Easement Area.
7. **Grantee's Remedies:** In the event of a breach of this Conservation Easement, Grantee shall have the following remedies and shall be subject to the following limitations:
  - a. **Enforcement:** Grantor acknowledges and agrees that Grantee's and the USACE's remedies at law for any violation of this Conservation Easement are inadequate. In the event of a breach of any of the Restrictions set forth above, Grantee or the USACE must notify Grantor in writing of the breach. Grantor shall have thirty (30) days after receipt of such notice to undertake actions that are reasonably calculated to promptly correct the conditions constituting the breach. If Grantor fails to commence such corrective action within thirty (30) days, or fails to complete the necessary corrective action, Grantee or the USACE may undertake such actions, including legal proceedings, as are necessary to effect such corrective action. Among other relief, Grantee or the USACE shall be entitled to specific performance of the terms of this Conservation Easement and to complete restoration of the Easement Area, correcting damage caused by any breach of the Restrictions. The costs of a breach, correction, or restoration, including reasonable Grantee or USACE expenses, expert or

consultant expenses, court costs, and attorneys' fees, shall be paid by Grantor. Enforcement shall be at the discretion of Grantee or the USACE. Enforcement shall not be defeated because of any subsequent adverse possession, laches, estoppel, or waiver. Grantee's and the USACE's enforcement rights are in addition to, and shall not limit, enforcement rights available under other provisions of law or equity, or under any applicable permit or certification.

- b. **Delay in Enforcement**: A delay in enforcement shall not be construed as a waiver of Grantee's right to enforce the terms of this Conservation Easement.
  - c. **Grantor's Absence**: If Grantee determines that this Conservation Easement is, or is expected to be, violated, Grantee shall notify Grantor. If, through reasonable efforts, Grantor cannot be notified, and if Grantee determines that circumstances justify prompt action to mitigate or prevent impairment of the Conservation Easement, then Grantee may pursue its lawful remedies without prior notice and without awaiting Grantor's opportunity to cure; provided, however, that Grantee shall continue to use reasonable efforts to notify Grantor.
  - d. **Cumulative Remedies**: The preceding remedies of Grantee are cumulative. Any, or all, of the remedies may be invoked by Grantee if there is an actual or threatened violation of this Conservation Easement.
8. **Ownership Costs and Liabilities**: In accepting this Conservation Easement, Grantee shall have no liability or other obligation for costs, liabilities, taxes, or insurance of any kind related to the Easement Area. Grantee and its trustees, officers, employees, agents, and members have no liability arising from injury or death to any person or from physical damage to any other property located on the Easement Area or otherwise, unless due to Grantee's negligence or willful misconduct, or as required under this Conservation Easement. Grantor agrees to indemnify Grantee against all costs and liabilities relating to such claims.
9. **Cessation of Existence**: If Grantee shall cease to be authorized to acquire and hold conservation easements, then this Conservation Easement shall become vested in another qualified entity that is eligible to acquire and hold a conservation easement under Ohio law, upon the mutual consent of Grantor and the USACE. Grantor agrees to execute and deliver such documents and instruments as may be reasonably necessary to properly reflect the substitution of the replacement of Grantee hereunder.

10. **Termination:** This Conservation Easement may be extinguished only by an unexpected change in condition which causes it to be impossible to fulfill the Conservation Easement's purposes, or by exercise of eminent domain.
- a. **Unexpected Change in Conditions:** If subsequent circumstances render the purposes of this Conservation Easement impossible to fulfill, then this Conservation Easement may be partially or entirely terminated only by judicial proceedings. Grantee will then be entitled to compensation in accordance with applicable laws and in proportion to Grantee's interest in the Property at the effective date of this Conservation Easement. In the event of such termination, Grantee shall promptly notify the USACE and the OEPA in writing, and such notice shall include an explanation as to the circumstances underlying the termination.
- b. **Eminent Domain:** If the Easement Area is taken, in whole or in part, by power of eminent domain, then Grantee will be entitled to compensation in accordance with applicable laws and in proportion to the Grantee's interest in the Easement Area at the effective date of this Conservation Easement.
11. **Recordation:** Grantor, at its sole cost and expense, shall record this instrument in a timely fashion in the official records of [REDACTED] County, Ohio and Grantee may re-record it at any time as may be required to preserve its rights under this Conservation Easement. Grantor shall submit a copy of the notarized, recorded, and filed Conservation Easement to the USACE within thirty (30) days of the issuance of the Permit.
12. **Assignment:** This Conservation Easement is transferable, but Grantee may assign its rights and obligations hereunder only to an organization or entity that is agreed to by Grantor and the USACE, and is qualified to acquire and hold conservation easements under Ohio law, and any applicable federal tax law, at the time of transfer. As a condition of such transfer, Grantee shall require that the assignee organization agree in writing to assume all of Grantee's obligations and duties hereunder and to carry out the conservation purposes that this Conservation Easement is intended to advance. Grantee agrees to give written notice to Grantor and the USACE of an assignment at least thirty (30) days prior to the date of such assignment and to furnish promptly to Grantor an executed copy of the Assignment and the Assumption Agreement to be recorded in the official records of [REDACTED] County, Ohio. The failure of Grantee to give such notice shall not affect the validity of such assignment nor shall it impair the validity of this Conservation Easement or limit its enforceability in any way.
13. **Liberal Construction:** This Conservation Easement shall be liberally construed in favor of maintaining the conservation values of the Easement Area. The section



headings and subheadings identified herein are for reference purposes only and shall not be used to interpret the meaning of any provision hereof.

14. **Notices:** Any notice, request for approval, or other communication required under the Conservation Easement shall be sent by registered or certified mail, postage prepaid, to the following addresses (or such address as may be hereafter specified by notice pursuant to this paragraph):

To Grantor:

(Address and Contact information)

To Grantee:

(Address and Contact information)

To USACE:

U.S. Army Corps of Engineers, Buffalo District  
Regulatory Branch  
1776 Niagara Street  
Buffalo, NY 14207-3199

15. **Severability:** If any portion of this Conservation Easement is determined to be invalid or unenforceable, the remaining provisions of this agreement will remain in full force and effect.
16. **Warranty:** Grantor warrants that it owns the Easement Area in fee simple, and that Grantor owns all interests in the Easement Area that may be impaired by the granting of this Conservation Easement. Grantor warrants that there are no outstanding mortgages, tax liens, encumbrances, or other interests in the Easement Area that have not been expressly subordinated to this Conservation Easement. Grantor further warrants that Grantee shall have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement. Grantor also warrants that the subject real property is not land-locked and there is access to the Easement Area by road, dedication of pathway, or by an access easement.
17. **Successors:** This Conservation Easement shall be a covenant running with the land and shall constitute a burden on the Easement Area and shall run to the benefit of the parties hereto and their successors in interest. All subsequent owners of the Easement Area shall be bound to all provisions of this Conservation Easement to the same extent as the current parties.
18. **Termination of Rights and Obligations:** A party's future rights and obligations under this Conservation Easement shall terminate upon the transfer of that party's interest in the Easement Area. Liability for acts or omissions occurring prior to transfer shall survive any such transfer.

19. **Applicable Law:** This agreement shall be governed by, and construed in accordance with, the substantive law of the State of Ohio.
20. **Entire Agreement:** This Conservation Easement sets forth the entire agreement of the parties and supersedes all prior discussions and understandings.
21. **Subordination [IF APPLICABLE]:** \_\_\_\_\_, the holder of that certain mortgage which encumbers some or all of the Easement Area and is recorded in the Office of the Clerk of \_\_\_\_\_ County at \_\_\_\_\_ (the "Mortgagee"), has executed this Conservation Easement for the sole purpose of subordinating the Mortgage to the terms of this Conservation Easement.

IN WITNESS WHEREOF, Grantor and Grantee have executed this Conservation Easement, as of the date written above.

**GRANTOR:**

[NAME]

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

[Name]

[Title]

**GRANTEE:**

[NAME]

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

[Name]

[Title]

**MORTGAGEE [IF APPLICABLE – ALSO MUST BE NOTARIZED]**

[Name of Mortgagee]

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

Name:

Title:

STATE OF OHIO                    )  
COUNTY OF \_\_\_\_\_  )

Acknowledged before me by \_\_\_\_\_ this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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

STATE OF OHIO                    )  
COUNTY OF \_\_\_\_\_  )

Acknowledged before me by \_\_\_\_\_ this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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

## PROVIDE TO SURVEYOR

### Instructions for Survey for use with the Model Conservation Easement

**Do not record the survey until approved by the Buffalo District Office of Counsel. Provide the platted survey to the attorney preparing the restrictive covenant on behalf of the owner of the property.**

Surveys must contain the seal of an Ohio 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.

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 and distances should be tied in to at least one known coordinate, with a statement of precision closure  $<1:10,000$ .

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.

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.

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.

Provide a vicinity map identifying roads adjacent to the site.

If the property subject to the restrictive covenant is land-locked and there is no road/path to the property, the property owner must dedicate an access easement to and from the property that is identified on the survey.

Surveyor shall enter "Note" on survey that provides:

"Wetlands, Streams, and Buffers may be under the jurisdiction of the United States Army Corps of Engineers, permit number (*enter permit number*), and are protected by a recorded Conservation Easement."