

MODEL DECLARATION OF RESTRICTIVE COVENANTS – STATE OF NEW YORK

The following “Declaration of Restrictive Covenants” 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 Declaration of Restrictive Covenants 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 Declaration of Restrictive Covenants 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 Declaration of Restrictive Covenants 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, or settlement agreement. The Owner 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 New York 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 the Owner is a corporation, a copy of the Secretary of State listing of the corporation.
7. If the Owner 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 DECLARATION OF RESTRICTIVE COVENANTS/DEED RESTRICTIONS

THIS DECLARATION OF RESTRICTIVE COVENANTS, is made this [redacted] day of [redacted], 20[redacted], by [redacted] (the "Owner"), its successors and assigns, having an address at [redacted], [redacted], New York. The Owner 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 [redacted], issued on [redacted], [redacted], 20[redacted] 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. § 1344) and/or Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 401) and implementing regulations. In order to protect, restore, and maintain the chemical, physical, and biological integrity of waters of the United States, and as a condition of being issued the Permit, the Owner agrees to restrict use of the property as identified and described by metes and bounds on Exhibit B, attached hereto, and as set forth graphically on Exhibit C, attached hereto (the "Protected Property").

The Owner agrees that the Protected Property shall be bound by, held, transferred, sold, conveyed, leased, improved, hypothecated, occupied, or otherwise disposed of and used subject to the following restrictive covenants ("the Restrictions"), which shall be perpetual and run with the land and be binding on all the Owner's heirs, executors, administrators, assigns, lessees, or other persons, firms, associations, corporations, or governmental or other entities having or hereafter acquiring any right or interest in said Protected Property or any part thereof. The terms and conditions of the Restrictions shall be both explicitly and implicitly included in any subsequent transfer, conveyance, or encumbrance affecting all or part of the Protected Property. Any such transfer, conveyance, or encumbrance shall set forth the terms and conditions of this document by reference to this document and its recorded location.

A. RESTRICTIONS

These Restrictions on the Protected Property shall run with the Protected Property in perpetuity, and be binding on the Owner and its respective successors, assigns, lessees, and other occupiers and users. These Restrictions are subject to the Owner's Reserved Rights, which follow.

1. **General.** There shall be no future fillings, flooding, excavating, mining, or drilling; no removal of natural materials (soil, sand, gravel, rock, minerals, etc.); no dumping of materials; and no alteration of the topography which would materially affect the Protected Property in any manner, except as authorized by the Permit.

2. **Waters and Wetlands.** In addition to the general restrictions above, within the Protected Property there shall be no draining, dredging, damming, or impounding; no changing the grade or elevation, impairing the flow or circulation of waters, or reducing the reach of waters; and no other discharges or activity requiring a permit under applicable water pollution control laws and regulations, except as authorized by the Permit or by current New York State Department of Environmental Conservation permits, or any amendments thereof.

3. **Trees/Vegetation.** On the Protected Property there shall be no clearing, burning, cutting, or destroying of trees or vegetation, except as may be necessary to protect public health or safety or as authorized by the Permit; there shall be no planting or introduction of non-native or exotic species of trees or vegetation.

4. **Uses.** No agricultural, animal husbandry, industrial, residential development, mining, logging, or commercial activity shall be undertaken or allowed on the Protected Property.

5. **Structures.** There shall be no construction, erection, or placement of buildings, billboards, or any other structures, to include fences, parking lots, trailers, mobile homes, camping accommodations, or recreational vehicles, or additions to existing structures, on the Protected Property.

6. **New Roads.** There shall be no construction of new roads, trails, or walkways on the Protected Property without the prior written approval (including approval of the manner of construction) of the USACE.

7. **Utilities.** There shall be no construction or placement of utilities or related facilities (including telecommunications towers and antennas) on the Protected Property without the prior written approval (including approval of the manner of construction) of the USACE.

8. **Pest Control.** There shall be no application of pesticides or biological controls, including controls of problem vegetation, on the Protected Property without prior written approval (including approval of the manner of application) of the USACE.

9. **Vehicular Use.** There shall be no use of any motorized vehicle or motorized equipment, and no use of any non-motorized bicycle anywhere on the Protected Property, except in the case of emergency, for the purpose of enforcement of applicable laws and regulations, or for the purpose of monitoring compliance with the purposes of this instrument.

10. **Subdivision.** There shall be no division or subdivision of the Protected Property.

11. **Other Prohibitions.** Any other use of, or activity on, the Protected Property which is or may become inconsistent with the purposes of this Conservation Easement, the preservation of the Protected Property substantially in its natural condition, or the protection of its environmental systems, is prohibited.

B. RESERVED RIGHTS OF OWNER

Notwithstanding the foregoing Restrictions, the Owner reserves for itself, its heirs, executors, administrators, successors, and assigns all rights accruing from its ownership of the Protected Property, including the right to engage in or permit or invite others to engage in all uses of the Protected Property that are not expressly prohibited herein and are not inconsistent with the purposes of the Restrictions. Without limiting the generality of the foregoing, the following rights are expressly reserved:

1. **Right to Convey:** The Owner retains the right to sell, mortgage, bequeath, donate, or otherwise convey the Protected Property. Any conveyance shall remain

subject to the terms and conditions of this instrument, and the subsequent interest holder shall be bound by the terms and conditions hereof.

2. Right to Maintain: The Owner retains the right to maintain, renovate, and replace any existing structure(s), if any, on the Protected Property, in substantially the same location and size. Any expansion or replacement may not substantially alter the character or function of the structure.

3. Right to Access: The Owner shall retain the right of unimpeded access to the Protected Property.

C. GENERAL PROVISIONS

The following General Provisions shall be binding upon the Owner and its heirs, successors, grantees, transferees, administrators, assigns, lessees, licensees, and agents:

1. **Enforcement.** The Owner hereby grants the USACE a discretionary right to enforce the Restrictions in a judicial action against any person or other entity violating or attempting to violate the Restrictions; provided, however, that no violation of the Restrictions shall result in forfeiture or reversion of title. In any enforcement action for violations of this document, an enforcing agency shall be entitled to complete restoration of the Protected Property for any violation, as well as any other remedy available under law or equity, such as injunctive relief and administrative, civil, or criminal penalties. No omission or delay in acting by the USACE shall bar subsequent enforcement rights or constitute a waiver of any enforcement right. These enforcement rights are in addition to, and shall not limit, the enforcement rights available under other provisions of law or equity, or under any applicable permit or certification. Nothing herein shall limit the right of the USACE to modify, suspend, or revoke the Permit.

2. **Obligations of Ownership.** The Owner is responsible for payment of all real estate taxes, assessments, fees, or charges levied upon the Protected Property. Any liens, mortgages, or other encumbrances affecting the Protected Property shall be subject to the terms of this Declaration of Restrictive Covenants. Nothing herein shall relieve the Owner of the obligation to comply with federal, state, or local laws, regulations, and permits that may apply to the exercise of ownership, or rights under this Declaration of Restrictive Covenants, by the Owner.

3. **Recording.** The Owner shall have this Declaration of Restrictive Covenants duly recorded and indexed as such in the Office of the County Clerk of [REDACTED] County, New York, as described in ECL Section 49-0305.4. Upon recording, the Owner shall forward a copy of this Declaration of Restrictive Covenants to the New York Department of Environmental Conservation, as described in ECL Section 49-0305.4. The Owner's recording and transmission to the New York Department of Environmental Conservation shall take place prior to the Owner's commencing work as authorized by the Permit.

4. **Notification.** Any permit application, or request for certification or modification, which may affect the Protected Property, made to any government entity with authority over wetlands or other waters of the United States, shall expressly reference and include a copy (with the recording stamp) of this instrument. The Owner shall provide the USACE with written notice

of any legal action affecting this instrument, including but not limited to: foreclosure proceedings, tax sales, bankruptcy proceedings, zoning changes, adverse possession, abandonment, condemnation proceedings, and the exercise of the power of eminent domain. For any action that might result in this instrument becoming voided or modified, such notice shall be provided at least sixty (60) days before such action would be taken.

Any notice, request for approval, or other communication required by the terms and conditions of this instrument shall be sent by registered mail, pre-paid postage, to the following address:

U.S. Army Corps of Engineers
Regulatory Branch
1776 Niagara Street
Buffalo, New York 14207

5. **Property Transfers.** The Owner shall include the following notice on all deeds, mortgages, plats, or any other legal instrument used to convey any interest in the Protected Property:

NOTICE: This Property is subject to a Declaration of Restrictive Covenants dated [REDACTED], recorded in the [REDACTED] County Clerk's Office on [REDACTED] in Deed Book [REDACTED], Page [REDACTED] and enforceable by the U.S. Army Corps of Engineers.

The Owner shall provide the USACE with written notice of any transfer sixty (60) days prior to such transfer. The notice shall include the name, address, and telephone number of the prospective transferee, a copy of the proposed deed or other documentation evidencing the conveyance, and a survey map that shows the boundaries of the portion of the Protected Property being transferred. Failure to comply with this paragraph does not impair the validity or enforceability of these restrictive covenants.

6. **Successors in Interest** – These Restrictions shall be covenants running with the land and shall constitute a burden on the Protected Property and shall run to the benefit of the parties hereto and their successors in interest. All subsequent owners of the Protected Property shall be bound to all provisions of these Restrictions to the same extent as the current parties. All references to the USACE shall include successor governmental agencies, departments, or divisions, or any other successor entities prescribed by law.

7. **Amendment.** After recording, this instrument may only be amended by a recorded document signed by the USACE and the Owner. Amendment shall be allowed at the discretion of the USACE, in consultation with resource agencies as appropriate, and then only in exceptional circumstances. Any amendment must be consistent with the requirements of Section 401 and 404 of the Clean Water Act. There shall be no obligation to allow an amendment.

8. **Termination** – These Restrictions are intended to be perpetual in nature and run with the land. The Restrictions may be extinguished only by an unexpected change in condition

which causes it to be impossible to fulfill the conservation purposes of this instrument, or by exercise of eminent domain.

9. **Severability.** Should a court of competent jurisdiction find any separate part of this Declaration of Restrictive Covenants void or unenforceable, the remainder shall continue in full force and effect.

10. **Liberal Construction** – These Restrictions shall be liberally construed in favor of maintaining the conservation values of the Protected Property. 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.

11. **Subordination [IF APPLICABLE].** _____, the holder of that certain mortgage which encumbers some or all of the Protected Property and is recorded in the Office of the Clerk of _____ County at _____ (the “Mortgagee”), has executed this Declaration of Restrictive Covenants for the sole purpose of subordinating the Mortgage to the terms of this Declaration of Restrictive Covenants.

IN WITNESS WHEREOF, the Owner has set its hand as of the __ day of _____, 20__ at _____, New York.

DECLARANT/OWNER

[Name of Owner]

By: _____

Name:

Title:

MORTGAGEE [IF APPLICABLE – ALSO MUST BE NOTARIZED]

[Name of Mortgagee]

For Purposes of Paragraph (C)(11) Only:

By: _____

Name:

Title:

STATE OF NEW YORK)
) ss.:
COUNTY OF)

On the day of in the year 20__ before me, the undersigned, a notary public in and for said state, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed this instrument.

Notary Public

PROVIDE TO SURVEYOR

Instructions for Survey for use with the Model Declaration of Restrictive Covenants

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 a New York 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 Declaration of Restrictive Covenants."