

## INTERAGENCY REVIEW TEAMS

# Site Protection Instruments for Compensatory Mitigation

Under the final rule, Compensatory Mitigation for Losses of Aquatic Resources, 33 C.F.R. pt. 332 (Mitigation Rule), all compensatory mitigation plans authorized under a U.S. Department of the Army (DA) permit are required to address 12 fundamental components, one of which is *site protection*. The Mitigation Rule states that the long-term site protection of compensatory mitigation sites must be provided through real estate instruments or other available mechanisms, as appropriate.

The site protection (or real estate) instrument is a written description of the legal arrangements, including site ownership, management, and enforcement of any restrictions, that will be used to ensure the long-term protection of the compensatory mitigation project site. Since there is no legal authority for the U.S. Army Corps of Engineers (the Corps) to hold a real estate interest in land, site protection must be accomplished through recognized forms of site protection instruments, usually administered by a third party. Since real property laws differ from state to state, each Corps district must work closely with its Office of Counsel and the landowner to determine which instrument is preferred. The real estate instruments most commonly used include conservation easements, deed restrictions, transfer of title, multiparty agreements, and contractual documents.

A *conservation easement* involves a "Grantor" (the property owner) who makes a written conveyance of an easement to the "Holder," who is usually a nonprofit, land trust, or governmental entity with experience in monitoring aquatic resources, managing wildlife habitat, or protecting endangered species and can access the property, monitor compliance, and enforce land use restrictions in accordance with the terms of the real estate instrument. The owner may continue to use the property (e.g., hunting) provided the use is compatible. The conservation easement remains in force even if the property is transferred to a new owner; however, a conservation easement can be extinguished due to a change in use or for a lack of a Holder. Therefore, se-

lection of the Holder is important to the success of the conservation easement.

A *deed restriction* (restrictive or negative covenant) is a condition in a deed limiting or prohibiting certain uses of real property. It does not require a third-party holder because the restrictions are on the land itself and "run with the land," meaning that they are enforceable by and against later owners or occupiers of the land. Restrictive covenants can be used to protect compensatory mitigation sites if included as a condition of the DA permit. The burden of enforcing the deed restriction is on the property owner and potentially the Corps and/or state regulatory agencies. Also, some state statutes may limit the number of years that a deed restriction or negative/restrictive covenant is in force and consider "covenanting parties' intent" when determining whether enforcing the covenant would be adverse to "public policy." Therefore, it is imperative that the restrictive covenant includes the purpose of the covenant in securing a DA permit.

*Transfer of title* is the transfer of ownership of the compensatory mitigation property to a natural resource agency, governmental agency, land trust, land management entity, or another nonprofit entity deemed acceptable to the Corps. That entity must agree to manage and protect aquatic and other natural resources on the site as applicable. Since it may be possible that following the transfer the receiving entity could convert compensatory mitigation sites to other purposes, some Corps districts have placed reversionary clauses in title transfer agreement to address incompatible uses by a land management agency.

*Multiparty agreements* (e.g., mitigation banks, in-lieu fee projects, land trusts) are agreements among several interested parties whose roles and responsibilities are established consistent with applicable federal and/or state statutes. Multiparty agreements allow agencies to leverage their resources and specialized areas of expertise to provide and ensure the long-term protection of the compensatory mitigation project.

*Contractual documents* (e.g., conservation land use agreements, federal facility management plans or integrated natural resources management plans) are agreements to conserve property with certain allowable uses and are often used when the governmental entity is responsible for performing the mitigation and/or is the owner of the compensatory mitigation land. When conservation easement or deed restriction cannot be used due to statutory or regulatory prohibitions, memoranda of understanding, integrated natural resource management plans, federal facility management plans, and conservation land use agreements can be used.

Regardless what type of site protection instrument is used, the following information should be included: (1) expressed reference to the DA permit and/or mitigation banking instrument or ILF project plan and its purpose to protect a compensatory mitigation site under federal and, where applicable, state law; (2) survey/legal description and identification of other property rights/interests; (3) baseline description of conservation resources on the site, including listed species and their habitat; (4) third-party right of enforcement; (5) amendment/transfer 60-day notification requirements; (6) any prohibited and acceptable uses; (7) subordination clause requiring any preexisting easements, liens, or encumbrances to take second priority to the use of the property as a compensatory mitigation site. (Otherwise, if a real estate instrument is recorded *after* a deed to secure a debt, the land may be foreclosed upon to settle the debt and the compensatory mitigation site terminated.)

The Corps project manager should require a title search, title insurance, and a title report, especially for larger sites. A *title search* provides a list of all recorded interests in the real property. *Title insurance* guarantees that the title is clear and that there is no conflict of interest regarding ownership of a particular parcel. A *title report* is a written analysis of the status of title, including a property description, names of titleholders, encumbrances, tax rate, and any taxes due.

Site protection is a required component in any mitigation plan under the Mitigation Rule. Determining the best way to protect a site and preparing the site protection instrument should occur as soon as the mitigation site has been identified. Many Corps districts have developed real estate instrument templates to expedite the review process. ■

- Cynthia Wood