

Charleston District Conservation Easement Model of September 2010

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STATE OF SOUTH CAROLINA CONSERVATION EASEMENT AND ACCEPTANCE

COUNTY OF _____

THIS INDENTURE, is made this ____ day of _____, 20____, by and between _____ ("Grantor(s)"), of _____, South Carolina, and _____, ("Grantee(s)"), of _____, South Carolina.

WHEREAS, Grantor is the owner in fee simple of certain real property [*"real property" includes surface waters and wetlands, any interest in submerged lands, uplands, associated riparian/littoral rights*] located in _____ County, South Carolina, more particularly described [*description of tract must include: 1) acreage, and 2) reference the surveyed plat(s) required below*] ("Protected Property");

WHEREAS, Grantor desires to convey to the Holder a conservation easement placing certain limitations and affirmative obligations on the Protected Property for the protection of wetlands, scenic, resource, environmental, and other values, and in order that the Protected Property shall remain substantially in its natural condition forever;

WHEREAS, Holder is qualified to hold a conservation easement, and is either

(a) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(b) a charitable, not-for-profit or educational corporation, association, or trust [*qualified under § 501(c)(3) and §170 (h) of the Internal Revenue Code*], the purposes or powers of which include one or more of the purposes (a) - (d) listed below;

(a) retaining or protecting natural, scenic, or open-space aspects of real property;

(b) ensuring the availability of real property for recreational, educational, or open-space use;

(c) protecting natural resources;

(d) maintaining or enhancing air or water quality.

WHEREAS, Grantor and Holder agree that third-party rights of enforcement shall be held by the U.S. Army Corps of Engineers, Charleston District and the S.C. Department of Health and Environmental Control ("Third-Parties," to include any successor agencies), and may be exercised through the appropriate enforcement agencies of the United States and the State of South Carolina, and that these rights are in addition to, and do not limit, the rights of enforcement under Department of the Army permit number _____, or any permit or certification issued by the Third-Parties.

[Insert for approved mitigation banks: WHEREAS, the Protected Property has been approved by the Third-Parties for use as a mitigation bank, to be known as _____ Mitigation Bank;]

COVENANTS, TERMS, CONDITIONS, AND RESTRICTIONS

A. PURPOSE

1. The purpose of this Conservation Easement is to ensure the Property will be preserved in a "Natural Condition", as defined herein in perpetuity and to prevent any use of the Property that will materially impair or interfere with the Conservation Values of the property (the "Purpose"). Grantor intends that this Conservation Easement will confine the use of the Property to such activities, including without limitation, those involving the restoration, enhancement, and/or preservation of aquatic resources in a manner consistent with the conservation purposes of this Conservation Easement.

2. The term "natural condition," as referenced in the preceding paragraph and other portions of this conservation easement, shall mean the condition of the property, as it exists at the time this Conservation easement is executed, as well as future restoration, enhancement, or other changes to the property that occur directly as a

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result of the compensatory mitigation measures required by section 404 Permit(s) pursuant [to the Mitigation Banking Instrument *[and/or described in the Final Mitigation and Monitoring Plan]* dated, _____, 20__ (“Mitigation Plan”), the cover page and Executive Summary of which are attached as Exhibit “_,” including implementation, maintenance, and monitoring activities (collectively, “Compensatory Mitigation”).

3. **Baseline Documentation.** The Current Conditions (which may or may not include restoration and enhancement efforts pursuant to compensatory mitigation activities), of the Property as of the date of this Deed are further documented in a "Present Conditions Report," dated, _____, 20__ and prepared by [*preparer's name*], which report is acknowledged as accurate by Grantor and Grantee. The present conditions report includes:

(a) a current aerial photograph of the Protected Property at an appropriate scale taken as close as possible to the date the donation is made;

(b) on-site photographs taken at appropriate locations on the Protected Property, including of major natural features; and,

(c) a surveyed plat of the Protected Property showing all relevant property lines, all existing man-made structures, improvements, features, and major, distinct natural features such as waters of the United States, and shall be recorded in the RMC office for each county in which the Protected Property is situated prior to the recording of this Conservation Easement, and is recorded at [insert book and page references, county and date of recording]

(d) [etc. - insert any additional documentation which may be used to evidence the natural condition of the Protected Property]

The Present Conditions Report has been provided to both parties and will be used by Grantee to assure that any future changes in the use of the Property will be consistent with the terms of this Deed. However, the Present Conditions Report is not intended to preclude the use of other evidence to establish the condition of the Property as of the date of this Deed.

4. **Baseline Documentation Update.** After the completion of the compensatory mitigation activities on the protected property, Grantor, grantee, and third-parties agree that the baseline documentation can and should be updated to reflect the new conditions of the protected property. In the event that such an update is needed, grantor agrees to provide such necessary update, including photographs, narratives, and any other data needed to accurately reflect the conditions of the protected property.

5. Grantor certifies to Third Parties and Grantee that to the Grantors actual knowledge, there are no previously granted easements existing on the property that interfere or conflict with the Purpose of this Conservation Easement as evidenced by the title Report attached at “Exhibit _.”

6. **Current Liens.** [*fill in as appropriate*] At the time of conveyance of this Easement, the Property is subject to a Mortgage or Deed of Trust, the holder of which has agreed, by separate instrument, a copy of which is attached hereto as **Exhibit** __, to subordinate its rights in the Property to the extent necessary to permit the Trust to enforce the purposes of this Easement in perpetuity and to prevent any modification or extinguishment of this Easement Deed by the exercise of any rights of the Deed of Trust holder.

NOW THEREFORE, for the foregoing consideration, and in further consideration of the restrictions, rights, and agreements herein, Grantor hereby conveys to Holder a conservation easement over the Protected Property consisting of the following:

B. PROHIBITED USES

Any activity on or use of the property inconsistent with the Purpose of this Conservation Easement and not reserved as a right of Grantor is prohibited. These Restrictions shall run with the land and be binding on Grantor's heirs, successors, administrators, assigns, lessees, or other occupiers and users, and are subject to the Reserved Rights which follow. The Following uses by Grantor, Grantee, their respective guests, agents, assigns, employees, representatives, successors, and third parties are expressly prohibited on the Property except as otherwise provided herein or unless specifically provided for in the Section 404 Permit and any amendments thereto, the Mitigation

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Plan, and any easements and reservations of rights in the chain of title to the property at the time of this conveyance (as set forth on Exhibit __):

1. **General.** There shall be no filling, flooding, excavating, mining or drilling; no removal of natural materials; no dumping of materials; and, no alteration of the topography in any manner.
2. **Waters and Wetlands.** In addition to the General restrictions above, there shall be no draining, dredging, damming or impounding; no changing the grade or elevation, impairing the flow or circulation of waters, reducing the reach of waters; and, no other discharge or activity requiring a permit under applicable clean water or water pollution control laws and regulations, as amended.
3. **Trees/Vegetation.** There shall be no clearing, burning, cutting or destroying of trees or vegetation, except as expressly authorized in the Reserved Rights; there shall be no planting or introduction of non-native or exotic species of trees or vegetation.
4. **Activities.** No industrial activities, commercial activities, residential activities, or agricultural activities (including livestock grazing) shall be undertaken or allowed.
5. **Structures.** There shall be no construction, erection, or placement of buildings, billboards, or any other structures, nor any additions to existing structures.
6. **New Roads.** There shall be no construction of new roads, trails or walkways without the prior written approval of the Holder and Third-Parties, including of the manner in which they are constructed.
7. **Utilities.** There shall be no construction or placement of utilities or related facilities without the prior written approval of Holder and Third-Parties.
8. **Pest Control.** There shall be no application of pesticides or biological controls, including for problem vegetation, without prior written approval from the Holder and Third-Parties.
9. **Subdivision.** There shall be no legal or de facto division, subdivision or portioning of the property.
10. **Other Prohibitions.** Any other use of, or activity on, the Protected Property which is or may become inconsistent with the purposes of this grant, the preservation of the Protected Property substantially in its natural condition, or the protection of its environmental systems, is prohibited.

[11. *Additional, case-specific restrictions may need to be inserted*]

C. GRANTEE'S RIGHTS

To accomplish the Purpose of this Conservation Easement, Grantor, its successor and assign hereby grants and conveys the following rights to Grantee and Third Parties.

1. To preserve and protect the Conservation Values of the Property, including enforcing the terms of this Conservation Easement in order to assure the protected property remains in its "natural condition," defined herein, in perpetuity.
2. To enter upon the property at reasonable times in order to monitor compliance with and to otherwise enforce the terms of this Conservation Easement.
3. To prevent any activity on or use of the property that is inconsistent with the Purpose of this Conservation Easement and to require the restoration of such areas or features of the Property that may be damaged by any act, failure to act, or any use that is inconsistent with the Purpose of this Conservation Easement.

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4. All mineral, air, and water rights necessary to protect and sustain the biological resources of the Property, provided that any exercise or sale of such rights by Grantee shall not result in conflict with the Conservation Purpose.

5. All present and future development rights allocated, implied, reserved or inherent in the properties; such rights are hereby terminated and extinguished, and may not be used or transferred to any portion of the Properties.

6. The right to enforce by means, including, without limitation, injunctive relief, the terms and conditions of this Conservation Easement.

D. GRANTOR'S RESERVED RIGHTS

Notwithstanding the foregoing Restrictions, Grantor reserves for Grantor, its heirs, successors, administrators, and assigns the following Reserved Rights, which may be exercised upon providing prior written notice to Holder and to Third-Parties, except where expressly provided otherwise:

1. **Landscape Management.** Landscaping by the Grantor to prevent severe erosion or damage to the Protected Property or portions thereof, or significant detriment to existing or permitted uses, is allowed, provided that such landscaping is generally consistent with preserving the natural condition of the Protected Property.

2. **Forest Management.** Harvesting and management of timber by Grantor is limited to the extent necessary to protect the natural environment in areas where the forest is damaged by natural forces such as fire, flood, storm, insects or infectious organisms. *[Additional language related to fire management plans may be added as necessary]* Such timber harvest and management shall be carried out in accordance with Best Management Practices approved by the South Carolina Forestry Commission or successor agency, as amended.

3. **Recreation.** Grantor reserves the right to engage in any outdoor, non-commercial recreational activities, including hunting (excluding planting or burning) and fishing, with cumulatively very small impacts, and which are consistent with the continuing natural condition of the Protected Property. No written notice required.

4. **Mineral Interests.** Grantor specifically reserves a qualified mineral interest (as defined in § 170(h)(6) of the Internal Revenue Code) in subsurface oil, gas or other minerals and the right to access such minerals. However, there shall be no extraction or removal of, or exploration for, minerals by any surface mining method, nor by any method which results in subsidence or which otherwise interferes with the continuing natural condition of the Protected Property.

5. **Road Maintenance.** Grantor reserves the right to maintain existing roads, trails or walkways. Maintenance shall be limited to: removal or pruning of dead or hazardous vegetation; application of permeable materials (e.g., sand, gravel, crushed) necessary to correct or impede erosion; grading; replacement of culverts, water control structures, or bridges; and, maintenance of roadside ditches.

6. **Vegetation, Debris, and Exotic Species Removal.** Grantor reserves the right to engage in the removal or trimming of vegetation downed or damaged due to natural disaster, removal of man-made debris, removal of parasitic vegetation (as it relates to the health of the host plant) and removal of non-native or exotic plant or animal species.

7. **Compensatory Mitigation.** Grantor reserves the right to perform any restoration, enhancement, and other wetland mitigation activities required by Section 404 permit's and/or Mitigation Banking Instruments, including the use of all equipment necessary to successfully complete any mitigation requirements contained therein.

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8. **Other Reserved Rights.** Grantor reserves the right to engage in all acts or uses not prohibited by the Restrictions, and which are not inconsistent with the conservation purposes of this grant, the preservation of the Protected Property in its natural condition, and the protection of its environmental systems.
9. *[Insert for approved mitigation banks: 7. Grantor reserves the sole and unrestricted right to sell credits or other entitlements or interests in the Protected Property in order to perfect and carry out the purpose of a mitigation bank.]*
10. *[Additional, case-specific reservations may be listed, e.g., fire or wildlife management plans.]*

E. GENERAL PROVISIONS

The following General Provisions shall be binding upon, and inure to the benefit of, the Grantor, Holder and Third-Parties, and the heirs, successors, administrators, assigns, lessees, licensees and agents of each:

1. **Marking of Property.** Grantor shall install and maintain permanent signs saying “Protected Natural Area” or establish an equivalent, permanent, marking system along the boundary of any protected areas such as upland buffers, riparian zones, and aquatic resources.
2. **Rights of Access and Entry.** Holder and Third-Parties shall have the right to enter and go upon the Protected Property for purposes of inspection, and to take actions necessary to verify compliance with the Restrictions. Holder shall also have the rights of visual access and view, and to enter and go upon the Protected Property for purposes of making scientific or educational observations and studies, and taking samples, in such a manner as will not disturb the quiet enjoyment of the Protected Property by Grantor. No right of access or entry by the general public to any portion of the Protected Property is conveyed by this Conservation Easement.
3. **Enforcement.** In the event of a breach of the Restrictions by Grantor or another party, the Holder or one of the Third-Parties must notify the Grantor in writing of the breach. The Grantor shall have thirty (30) days after receipt of such notice to undertake actions that are reasonably calculated to swiftly correct the conditions constituting the breach. If the Grantor fails to take such corrective action within thirty (30) days, or fails to complete the necessary corrective action, the Holder and/or the Third-Parties may undertake such actions, including legal proceedings, as are necessary to effect such corrective action. Among other relief, Holder and/or Third-Parties shall be entitled to a complete restoration for any breach of the Restrictions. Breaches of General Provisions of this Conservation Easement shall be actionable without notice. The costs of a breach, correction or restoration, including the Holder’s expenses, court costs, and attorneys’ fees, shall be paid by Grantor, provided Grantor is determined to be responsible for the breach. Enforcement shall be at the discretion of the Holder and/or Third-Parties, and no omission or delay in acting shall constitute a waiver of any enforcement right. These 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.
4. **Events Beyond Grantor’s Control.** Nothing herein shall be construed to authorize the Holder or Third-Parties to institute any proceedings against Grantor for any changes to the Protected Property caused by acts of God or circumstances beyond the Grantor’s control such as earthquake, fire, flood, storm, war, civil disturbance, strike, the unauthorized acts of third persons, or similar causes.
5. **Obligations of Ownership.** Grantor is responsible for any real estate taxes, assessments, fees, or charges levied upon the Protected Property. Grantor shall keep the Protected Property free of any liens or other encumbrances for obligations incurred by Grantor. Holder shall not be responsible for any costs or liability of any kind related to the ownership, operation, insurance, upkeep, or maintenance of the Protected Property, except as expressly provided herein. Nothing herein shall relieve the Grantor of the obligation to comply with federal, state or local laws, regulations and permits which may apply to the exercise of the Reserved Rights.
6. **Long Term Management.** Grantor will accomplish the long-term management activities identified in the approved mitigation plan, dated _____. The required activities include but are not limited to *management activities (i.e., control of invasive species, fire, etc) and the maintenance and/or replacement of structures (fences,*

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ditch plugs, weirs, etc) that are critical to the long-term success of the mitigation activities as described in the approved mitigation plan.

7. **Extinguishment.** In the event that changed conditions render impossible the continued use of the Protected Property for the conservation purposes, this Conservation Easement may only be extinguished, in whole or in part, by judicial proceeding.

8. **Eminent Domain.** Whenever all or part of the Protected Property is taken in the exercise of eminent domain so as to substantially abrogate the Restrictions imposed by this Conservation Easement, the Grantor and Holder shall join in appropriate actions at the time of such taking to recover the full value of the taking, and all incidental and direct damages due to the taking.

9. **Proceeds.** This Conservation Easement constitutes a real property interest immediately vested in Holder. In the event that all or a portion of this Protected Property is sold, exchanged, or involuntarily converted following an extinguishment or the exercise of eminent domain, Holder shall be entitled to the fair market value of this Conservation Easement. The parties stipulate that the fair market value of this Conservation Easement shall be determined by multiplying the fair market value of the Protected Property unencumbered by this Conservation Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of this easement at the time of this grant to the value of the Protected Property (without deduction for the value of this Conservation Easement) at the time of this grant. The values at the time of this grant shall be the values used, or which would have been used, to calculate a deduction for federal income tax purposes, pursuant to Section 170(h) of the Internal Revenue Code (whether eligible or ineligible for such a deduction). Holder shall use its share of the proceeds in a manner consistent with the purposes of this Conservation Easement.

10. **Notification.** Any notice, request for approval, or other communication required under this 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: _____

To Holder: _____

To Third Parties: U.S. Army Corps of Engineers
Attn: Regulatory Division
69A Hagood Avenue
Charleston, South Carolina 29403

9. **Assignment.** This Conservation Easement is transferable, but only to a qualified holder under 501 (C)(3) and § 170(h) of the Internal Revenue Code as described herein. As a condition of such transfer, the transferee shall agree to all of the restrictions, rights, and provisions herein, and to continue to carry out the purposes of this Conservation Easement. Assignments shall be accomplished by amendment of this Conservation Easement under paragraph 12. Grantee shall notify Third Parties at least 60 days prior to any such assignment or transfer.

10. **Failure of Holder.** If at any time Grantee is unable or fails to enforce this Conservation Easement, or if Grantee ceases to be a qualified holder under §501(c)(3) and § 170(h) of the Internal Revenue Code, and if within a reasonable period of time after the occurrence of one of these events the Grantee fails to make an assignment pursuant to paragraph 9, then the Holder's interest shall become vested in another qualified holder in accordance with an appropriate (e.g., cy pres) proceeding in a court of competent jurisdiction.

11. **Subsequent Transfer.** Grantor agrees to incorporate the terms of this Conservation Easement in any deed or other legal instrument which transfers any interest in all or a portion of the Protected Property. Grantor agrees to provide written notice of such transfer to Grantee and Third Parties at least 60 days prior to the date of transfer. The

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failure of Grantor to comply with this paragraph shall not impair the validity or enforceability of this Conservation Easement.

12. **Amendment.** This Conservation Easement may be amended, but only in writing signed by all parties hereto, and provided such amendment does not affect the purpose of this Conservation Easement or the status of the Grantee under any applicable laws, including S.C. Code Title 7, Chapter. Any amendments must be consistent with the conservation purposes of this grant.

13. **Severability.** Should any separable part of this Conservation Easement be found void or unenforceable by a court of competent jurisdiction, the remainder shall continue in full force and effect.

14. **Warranty.** Grantor warrants that it owns the Protected Property in fee simple, and that Grantor either owns all interests in the Protected Property which may be impaired by the granting of this Conservation Easement or that there are no outstanding mortgages, tax liens, encumbrances, or other interests in the Protected Property which have not been expressly subordinated to this Conservation Easement. Grantor further warrants that Holder shall have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement.

15. **Habendum Clause.** To have and to hold, this Easement together with all and singular the appurtenances and privileges belonging or in any way pertaining thereto, either in law or equity, either in possession or expectancy, for the proper use and benefit of the Grantee, its successors and assigns, forever.

[Signature Pages Attached]

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IN WITNESS WHEREOF, Grantor and Grantee have executed this Conservation Easement, and the Third-Parties have approved this Conservation Easement, on the date written above. By its execution and acceptance of this Conservation Easement, Grantee accepts the third-party rights of enforcement herein.

SIGNED, SEALED AND
DELIVERED IN THE PRESENCE OF:

GRANTOR:

(Witness)

Signature: _____

(Witness)

[type/print name of grantor]

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF _____)

I, a Notary Public, do hereby certify that _____ personally appeared before me this
day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and seal this _____ day of _____, 20____.

(Signature of Notary Public)

(Typed/Printed name of Notary Public)

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: _____

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**Continuation of Signature Page
For Deed of Conservation Easement**

GRANTEE:

(Witness)

Signature: _____

(Witness)

[type/print name of grantee]

[Title and Organization]

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF _____)

I, a Notary Public, do hereby certify that _____ personally appeared before me this
day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and seal this _____ day of _____, 20____.

(Signature of Notary Public)

(Typed/Printed name of Notary Public)

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: _____

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Approval by Third-Parties

U.S. Army Corps of Engineers,
Charleston District,

By: _____

[type/print name]

Title: _____

S.C. Department of Health and
Environmental Control

By: _____

[type/print name]

Title: _____