*REVISED MARCH 2015*

***NOTE****: THIS TEMPLATE IS ONLY INTENDED TO BE USED WHEN THE PERMITEE OWNS THE SITE PROPOSEDTO BE PRESERVED. IF ANOTHER ENTITY OWNS THE PRESERVATION SITE, PLEASE DISCUSS THE PROPOSAL WITH YOUR SUPERVISOR AND COUNSEL.*

DECLARATION OF RESTRICTIVE COVENANTS

OF

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(Owner)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, VIRGINIA

THIS DECLARATION OF RESTRICTIVE COVENANTS (“Declaration”) is made this \_\_\_\_\_day of \_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Owner.

**RECITALS**

WHEREAS, \_\_\_\_\_\_\_\_\_ is the owner (“Owner”) in fee of the real property, rights and interests (including in wetlands, submerged lands, uplands, and associated riparian/littoral rights) (“Property”), comprising of \_\_\_\_\_\_\_ acres + located in the Town of \_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_ County, Virginia. The property is more fully described as Tax Map ID Number \_\_\_\_\_\_\_\_\_ and is shown on Exhibit A attached hereto; it being the same Property conveyed to \_\_\_\_\_\_\_\_\_\_\_, by deed from \_\_\_\_\_\_\_\_\_, dated \_\_\_\_\_\_\_\_, and duly recorded in the Clerk's Office of the \_\_\_\_\_\_\_\_ of \_\_\_\_\_\_\_\_ in Deed Book \_\_\_\_, at page \_\_\_\_;

WHEREAS, Owner plans a [development, project, etc.] to be known as “\_\_\_\_\_\_\_\_,” completion of which will result in a discharge of dredged or fill material that requires authorization through a Department of the Army Permit (“DA Permit”);

WHEREAS, Owner obtained authorization for certain impacts to Waters of the U.S. through DA Permit Number \_\_\_\_\_\_\_, issued on \_\_\_\_\_\_, 20\_\_ by the U.S. Army Corps of Engineers, Norfolk District (“USACE”) in accordance with Section 404 of the Clean Water Act, 33 U.S.C. § 1344;

WHEREAS, Owner obtained authorization through Virginia Department of Environmental Quality (DEQ) Permit Number \_\_\_\_\_\_\_, issued on \_\_\_\_\_\_\_\_\_, 20\_\_, by the DEQ in accordance with State Water Control Law Sections 62.1-44.5 and 62.1-44.15:20 for impacts to State Waters.

WHEREAS, the Property includes a total of \_\_\_\_\_\_\_ **[acres or feet]** of **[type of resource serving as mitigation, including acreage of upland buffers]** (the “Mitigation Area”) as shown on the map, dated \_\_\_\_\_\_\_ and recorded with this Declaration of Restrictive Covenants as Exhibit \_\_\_;

WHEREAS, DA Permit Number \_\_\_\_/DEQ Permit Number\_\_\_\_\_ requires that Owner (i.e., Permittee) provide compensatory mitigation be provided to offset permitted impacts, and Owner (Permittee) has chosen to satisfy this requirement, **in whole or in part,** by completing Permittee-responsible mitigation on the Property;

WHEREAS, the USACE and the DEQ have determined that the Owner’s proposal to use portions of the Property, including the **[wetland and/or stream and their associated upland buffers to wetlands or streams]** functions and values provided by the Mitigation Area, is acceptable to offset impacts associated with DA Permit Number \_\_\_\_\_ and DEQ Permit Number \_\_\_\_\_;

WHEREAS, USACE regulations, at 33 C.F.R. § 332.7, require that the aquatic habitats, riparian areas, buffers, and uplands that comprise an overall compensatory mitigation project (the Mitigation Area) must be provided long-term protection through a real estate instrument, such as this Declaration;

WHEREAS, Owner has chosen to record this Declaration of Restrictive Covenants expressing Owner’s intent to preserve \_\_\_\_\_\_acres of the Property (the “Mitigation Area”) as shown on Exhibit B and as described as \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, in order to comply with DA Permit Number \_\_\_\_\_\_ and DEQ Permit Number \_\_\_\_\_ as well as USACE and DEQ regulations;

NOW THEREFORE, for good and valuable consideration as set forth above, Owner does hereby declare, covenant and agree, for itself and its successors and assigns, that said Property described as \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ shown on Exhibit B shall be hereafter held, occupied, used, leased, transferred, and sold subject to the following Restrictive Covenants which shall run with the land and be binding on Owner and all of Owner’s heirs, successors, assigns, lessees, and any other occupiers or users.

**COVENANTS AND RESTRICTIONS**

1. **Recordation.** Owner shall ensure that this Declaration is recorded in the land records of \_\_\_\_\_\_\_ County, and shall ensure that this Declaration is indexed against the land records for the Property. Owner shall ensure that these Covenants and Restrictions run with the Property in perpetuity and be binding on Owner and its successors, assigns, lessees, and any other occupiers or users of the Property.
2. **Conservation Purpose.** Owner declares, for itself and its successors and assigns, that the Property shall hereafter be held exclusively for conservation purposes, unless otherwise provided herein.
3. **Restrictions on Owner’s Activities.** The Property described as \_\_\_\_\_\_\_\_\_\_\_ shown on Exhibit B, Mitigation Area, attached hereto shall be preserved in perpetuity in its natural state, by **prohibiting** the following activities:

* 1. Destruction or alteration of the Mitigation Area shown on Exhibit B, *provided that* the following activities are **allowed**:
     1. Alteration necessary to construct the Mitigation Area and associated improvements, such as nature trails and interpretive stations, proposed to be built by \_\_\_\_\_\_\_\_\_\_\_, or its successors, and/or assigns as approved by the USACE and DEQ plans titled “\_\_\_\_\_\_\_” and dated \_\_\_\_\_\_ (Exhibit C);
     2. Alteration necessary to ensure the success of the Mitigation Area including monitoring, reconstruction or maintenance of the constructed Mitigation Area, as approved by the USACE and DEQ;
     3. Alteration to construct structures such as walkways, boardwalks, foot trails, wildlife observation or management structures, benches, observation decks, picnic tables, fence posts, and ecological, biological, hydrological or chemical monitoring, observation or management equipment including, without limitation, monitoring wells, or interpretive stations, or other structures as approved by the USACE and DEQ, provided that:
        1. any such structures permit, and do not impede, the natural movement of water, and
        2. structures and/or facilities do not alter the physical, biological, or chemical nature of the protected resource and/or its protected buffer
        3. such facilities are constructed and maintained in accordance with all applicable federal and state laws;
     4. Addition of signs constructed in public right of ways by or on behalf of the Virginia Department of Transportation or other governmental agencies;
     5. Removal of vegetation (where not precluded by federal or state law) when approved by the USACE and DEQ and conducted for
        1. Removal of noxious or invasive plants; or
        2. Public safety purposes
     6. Planting of native species of plants by hand for aesthetic landscaping or screening purposes; and
     7. Alteration as reasonably necessary to comply with state or federal law or appropriate court order.
  2. Construction, maintenance or placement of any structures including but not limited to buildings, building pads, and mobile homes, other than those which currently exist.
  3. Alteration of the physical, chemical, or biological properties of Waters of the U.S. or State Waters, including but not limited to the alteration of wetland acreage and their associated buffers, land clearing, ditching, draining, diking, damming, filling, excavating, grading, plowing, flooding/ponding, mining, drilling, placing of trash and yard debris or removing/adding topsoil, sand, or other materials, and the loss of functions in any surface waters or their associated buffer (except as may be necessary on a case-by-case basis with prior written approval by the USACE and DEQ);
  4. Permitting livestock to graze, inhabit or otherwise enter the Mitigation Area.
  5. Harvesting, cutting, logging, and pruning of trees and plants, or using fertilizers and spraying with biocides other than what is authorized by the USACE and DEQ;
  6. Utilizing a non-reporting Nationwide Permit or State Program General Permit under Section 404 of the Clean Water Act or state general permits under VWPP regulations to impact any Water of the U. S., or any State Waters on the Mitigation Area. Notification shall be required for the use of any Nationwide Permit, State Program General Permit, Regional Permit, or state general permit under VWPP regulations; and
  7. Further subdividing the Mitigation Area as shown on Exhibit B.

1. **Other Restrictions.** Owner represents and warrants that no restriction of record on the use of the Property, nor any presently existing future estate or interest in the Property, nor any lien, obligation, covenant, limitation, lease, mortgage, or encumbrance of any kind precludes the imposition or maintenance of this Declaration or the Restrictions established in this Declaration.
2. **Notice of Legal Action.** The USACE and DEQ shall be provided with a 60-day advance written notice of any legal action concerning this Declaration or of any action to extinguish, void or modify this Declaration in whole or in part.
3. **Survival of Restrictions.** This Declaration is intended to survive foreclosure, bankruptcy, condemnation or judgments affecting the Property.
4. **Amendment.** This Declaration of Restrictive Covenants shall not hereafter be altered in any respect without the express written approval and consent of the Owner or its successor in interest and the USACE and DEQ. In order to vacate, modify, or amend this Declaration after recording, the Owner or its successor must (1) notify the USACE and DEQ of the intended vacation, modification, or amendment; and (2) obtain written approval from the USACE and DEQ, indicating that such vacation, modification, or amendment does not cause non-compliance with the compensatory mitigation requirements being satisfied by the Property. Any amendments must be recorded in the land records for the Property.

# Compliance Inspections and Enforcement. The USACE, DEQ, and their authorized agents shall be allowed to enter and go upon the Property at reasonable times and under reasonable circumstances, to inspect the Property and take actions necessary to verify compliance with these restrictive covenants. Unless prior arrangements have been made with the property owner, any inspection and compliance verification activities undertaken during normal business hours shall be deemed reasonable time and circumstance. Nothing contained herein shall make an inspection time unreasonable during an emergency. The USACE and DEQ may enforce the Restrictions through any means permitted by law, including any proceeding at law or in equity or administrative proceedings, provided that no violation of the Restrictions contained in this Declaration shall cause a forfeiture or reversion of title. Failure by any agency (or owner) to enforce any covenant of restriction contained herein shall in no event be deemed a waiver of the right to do so thereafter.

# Effect of Prior Encumbrances. Should a servitude, interest, right, or lease on or to the Property, not acknowledged herein, listed in Exhibit A, or identified on Exhibit B, and prior in time and recording to this Declaration of Restrictions, or unrecorded, be exercised in such a manner that it conflicts with or voids the prohibited uses of the Property set out in this Declaration of Restriction, then the Owner and its successors, assigns, lessees, and any other occupiers or users of the Property, shall be responsible for providing alternative compensatory mitigation in such amounts and of such service and function as the USACE and/or DEQ (or their successors in interest) shall determine in their sole discretion, in accordance with the Clean Water Act and/or Sections 62.1-44.15:20-23 of the Code of Virginia.

## Eminent Domain. The Owner shall notify the USACE and DEQ, within 30 days, if any party initiates eminent domain proceedings involving the Mitigation Area.

## Severability Provision. The provisions hereof shall be deemed individual and severable and the invalidity or partial invalidity or unenforceability of any one provision or any portion thereof shall not affect the validity or enforceability of any other provision thereof.

1. **Notice to Government.**  Any permit application or request made to any government entity, which would affect the Mitigation Area on the Property, shall provide notice and copy of this Declaration of Restrictions to the government entity.
2. **Property Transfers.** Owner covenants to provide notice of this Declaration of Restrictions on any legal instrument used to convey any interest in the Property, provided that failure to include such notice shall not extinguish or otherwise impair the validity or enforceability of the Restrictions and Covenants established by this Declaration.

**Consent of Lender and Trustee (if applicable)**

Owner is the maker of a note dated\_\_\_\_\_\_\_\_\_\_\_, secured by, among other things, a deed of trust dated \_\_\_\_\_\_\_\_\_\_\_, from Owner to \_\_\_\_\_\_\_\_\_\_, as trustee, recorded in the Clerk’s office at Deed Book\_\_\_\_\_\_\_, Page \_\_\_\_. For the benefit of \_\_\_\_\_\_\_\_\_Bank (the “Deed of Trust”), \_\_\_\_\_\_\_\_\_\_\_\_\_, trustee joins herein for the sole purpose of subordinating the lien, dignity and priority of the Deed of Trust to these restrictive covenants. \_\_\_\_\_\_\_\_\_\_\_\_Bank joins herein for the sole purpose of consenting to trustee’s action.

WITNESS the following signature the day and year first above written.

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

BY: Its General Partner

BY: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

TITLE: \_\_\_\_\_\_\_\_\_\_\_\_

Commonwealth of Virginia, City of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, to wit:

I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a notary public for the state and city aforesaid, do certify that [Name] [ Title] whose name was signed on \_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_ in his capacity on that date to the foregoing document has acknowledged said document and signature before me in the city aforesaid.

Given under my hand and notarial seal this \_\_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

My commission expires \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

Signature block for Bank and Trustee, if applicable.

Exhibit A

Legal description of Property.

Exhibit B

Plat Map and /or Legal description of preserved area. If Plat is oversized it will be recorded separately. Exhibit B should contain a description that includes the reference to the Plat Book and Page number where the plat is recorded.