

# Mitigation Site Protection



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## Basic requirement for site protection

“...mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate.”

*33 CFR 332.7(a)(1)*

## **Involve Counsel to:**

- **Consider variation in state laws governing real estate**
- **Adapt instrument to the unique requirements of the site**
- **Determine whether instrument is legally sufficient, enforceable, and can be recorded**

# Site protection may be provided through:

- Conservation easements
- Other restrictive covenants
- Title transfer
- Multiple party agreements
- Conservation Land Use Agreements
- Federal facility management plans/integrated natural resources management plans

# Rule Language

- “ ...consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection... “

*33 CFR 332.7(a)(1)*

# Site Protection Considerations

- State laws may result in termination of legal restrictions on deed
- Prohibition on incompatible uses of mitigation lands
- Other recorded easements, liens, & restrictions

# Timing site protection

- PRM: site protection must be approved by Corps **before or concurrent with** permitted impacts.
- Banks: site protection instrument must be finalized **before any credits** can be released
- ILFs: site protection instrument must be finalized **before “released” credits are available**

# Conservation Easement Defined

Binding agreement between a landowner (**Grantor**) and another entity (**Grantee**) that permanently limits uses of the land in order to protect natural resources.



# Conservation Easement elements

- Purpose
- Baseline
- Rights & duties of grantee
- Restrictions/inconsistent uses of land
- Grantor's reserved rights in land
- Enforcement
- Provisions to assign, amend, or extinguish



# Enforcement

“...Where practicable, establish in an appropriate third party the right to enforce sites and provide the resources necessary to monitor and enforce the sites protected...”

*33 CFR 332.7(a)(1)*



# Advantages of Conservation Easements:

- More secure form of protection than other mechanisms
- Holder monitors condition of the property
- Holder **may** assume responsibility for managing resources &/or protecting listed species.

# Advantages of Conservation Easements (cont.):

- Holder has right to enforce the easement against owner
- Easement remains even though property owner changes or the property passes on to heirs.
- Allows owner to retain many private rights.

# Potential Concerns with Conservation Easements

- Identifying easement holder
- Easement holders (e.g. land trusts) may:
  - Cease to exist
  - Choose not to enforce easement
  - Have insufficient funds to monitor & enforce during “lean ” years
- Changes in agency policies & procedures which may be contrary to intent of mitigation

# Other considerations

- Duration of Easement - AL
- Subsequent holders may have to accept easement - WV
- Does not limit activities on adjoining or nearby properties - KY

# Deed Restrictions

- Private agreements that affect the use of land
- Limit or prohibit certain uses
- Resources are protected as a benefit to the owner, subsequent owners and to the public.

## Advantages of Deed Restrictions:

- “Runs with the land” (in perpetuity) regardless of ownership . Subsequent owners must comply.
- Owner acknowledges that property is protected for “value received” in the instrument and it is therefore a contractual agreement
- No requirement for a third party holder



# Problems with Deed Restrictions

- No third party holder to determine owner compliance
- Agency may not have the resources to monitor site
- Some states may not recognize restrictive covenants or set limits on their duration
- Owner may be able to petition court to remove deed restrictions
- Can be terminated if the original purpose of the covenant is lost

# Title Transfer

- Ownership transferred to a conservation entity to manage & protect.
- Sites are usually larger & part of a protected natural resource area or watershed.
- Some land management agencies may not have experience in long term land management
- Some agencies have converted mitigation sites to other purposes
- Some missions are incompatible



# Multiple Party Agreements

Project proponent (e.g. land trust or natural resource agency) is not the ultimate owner



# Conservation Land Use Agreements

- Agency is land owner - no transfer of title
- Agreement may be recorded in land records office.
- State &/or federal entity may become land owner but cannot **record** any limitation on the property's use.
- **MOA** on the management of resources is allowed

# Integrated Natural Resource Mgmt Plan or Federal Facility Mgmt Plan

- Federal agency does not have authority to record a restriction on deed.
- A conservation site can be shown on agency land use plan as designated for “environmental conservation use”



# EXHIBITS TO SITE PROTECTION DOCUMENTS

- Mitigation plan, permit, bank instrument or executive summary
- Survey/Legal Description
- Identification of other property rights/interests
- Baseline – description of conservation functions, resources on the site, habitat, vegetation and contribution to the watershed

# Suggestions for Prohibited Uses

- Clearing, cutting, mowing
- Mining, drilling, timbering
- Draining, diking
- Earthmoving, grading, topography change
- Diverting the natural flow of waters
- Spraying with herbicides that violate water quality standards
- Grazing or use by domesticated animals
- Use of off-road vehicles and motor vehicles



## Potential acceptable uses of land:

- Walking trails
- Minimal structures/boardwalks for wildlife use
- Hunting, fishing, canoeing, hiking, passive recreation
- Carrying out approved conservation and wildlife management plans
- Fence out livestock, trespassers



# What do you need to know about land before accepting it as mitigation property?

- Who owns it?
- Does the owner have good title?
- Does the owner have title insurance?
- Who else has an interest in the land?
- Is the land protected already?

# Interests in land

- Ownership
- Easements
- Rights-of-Way
- Lien Holders
- Property that passes by probate
- Leases, rights



# Title Insurance

- Title insurance company researches property history (chain of title) back 30-60 years to see if owner has clear title and if there is any conflict in ownership.
- If there is clear title, then they back their determination with insurance.

# **Will title insurance address all the issues regarding the property?**

**NO**

- **Title insurance just assures clear title**
- **It may not list all existing interests other than ownership**
- **A search for other interests should be conducted**

# How do you find out about those other interests in the land?

**Property assessment & warranty** asks whether there are :

- Outstanding mineral rights?
- Outstanding timber rights?
- Any outstanding leases? Contracts?
- Water rights affecting the property?
- Is the property subject to any uses not of record?

# When to request this information?

- **Develop a policy/process with Counsel.**
- **Consider requiring submittal of title insurance, title search & property assessment/warranty when mitigation proposal is submitted**
- **No point in proceeding until outstanding issues that conflict with site protection requirements are resolved**

**Will the Site Protection  
Instrument be Given PRIORITY  
OVER RECORDED Property  
Interests?**

# Severed Rights/Interests

- Holders of other interests (e.g. sub-surface) MUST consent to Conservation Easements
- KY
- WV & VA
- AL
- OH



# **Subordination Agreement**

**Provides more assurance that the site will withstand adverse actions.**

**Consider following sample agreement language:**

# Consent and Subordination

The undersigned (Lender) beneficiary under a Deed to Secure Debt (dated) and recorded in (Deed Book) and (Pages) in the (County, State) records, for itself, its successors and assigns, consents to the foregoing (easement/covenant).

Lender agrees that, upon recordation of the (document) the provisions of the (document) shall run with the land which serves as security for the debt evidenced by the Security Deed and further agrees that any foreclosure or enforcement or any other remedy available to Lender will not render void or otherwise impair the validity of the (easement, covenant).

The undersigned acknowledges that it has received and reviewed a copy of the (document and exhibits).

# One Approach to Conflicting Interests

If others will not subordinate their interests could condition permit/instrument so that if those interests are exercised then

The responsible party must provide acceptable replacement mitigation



**You must receive 60 day notice  
when there is a proposal to amend  
site protection mechanism**

*33 CFR 332.7(a)(3)*



# Who may want to amend the site protection document?

- Land owners
- Developers
- Industry
- Linear project proponents
- Local & state government
- Other Federal agencies



# Reasons given to impact protected resources

- Only impacting buffer
- Best project alternative. Other alternatives will impact homes, businesses, etc.
- Less expensive to cross the protected site than go around it
- Functions provided are not important
- Overriding national needs/National Security

## Suggested policy for amendments

- Property Owner must consent
- Alternatives analysis – cost is a factor, but not the most significant consideration
- Determine if impact will affect the entire site and not just the portion directly impacted
- More mitigation may be required for impacts to protected sites than for permit actions

# What about change in resource status?

The site protection document should state:

**“The site will remain protected even though it may later be determined through case law decisions or otherwise not to have jurisdictional waters of the US/support listed species.”**

Owner acknowledged receipt of value in return for instrument and agreed to protection of site.



# Other approaches to site protection

- Involve counsel
- SOPs
- Checklists
- Templates
- Permit conditions



# *Questions?*

