

CONSERVATION RESTRICTIONS

1. Scope. This SOP applies to conservation restrictions for compensatory mitigation for ecological effects under Department of the Army permits and/or mitigation banking agreements. Conservation restrictions include conservation easements and restrictive covenants, whether in the form of a separate document or included as permit conditions.

2. Purpose. The purpose of this SOP is to govern generally aspects of the internal use, processing, and enforcement of conservation restrictions by the Charleston District. This is an internal policy document, and does not provide a private or citizens' right-of-action.

3. Definitions. As used herein, the term "applicant" includes an applicant for a mitigation bank as well as a permit, and includes a permittee.

4. Use of Current Models. Applicants will be provided with the model conservation restrictions established by the Office of Counsel and in use by the Charleston District at the time of their application. Applicants or Regulatory personnel may download or copy the current models by accessing the Charleston District, Office of Counsel web pages at:

http://www.sac.usace.army.mil/off_counsel/oc.htm

However, Regulatory personnel will regularly check the Office of Counsel web pages to ensure that the documents provided applicants are the current models. Models will be updated as necessary in the discretion of the Charleston District, and will state the date of their issuance. The Office of Counsel will coordinate with and advise the Chief, Regulatory Branch when changes are made to a model document.

5. Conservation Easements vs. Restrictive Covenants. For mitigation banks, conservation easements with third-party rights of enforcement will be used; **any exception must be preapproved by the Office of Counsel**. For permitting situations not involving mitigation banks, conservation easements or restrictive covenants, or both, may be used. However, if the applicant does not own the property on which the conservation restrictions are to be placed, then a conservation easement is preferable for compensatory mitigation (or the applicant may purchase credits from a mitigation bank). In order to "own the property," the applicant must be the same legal entity as the landowner (for example, if the applicant is an individual, and the landowner is a corporation, they are not the same). Exceptions allowing the use of restrictive covenants where the applicant does not own the property on which the restrictions are to be placed must be preapproved by the Office of Counsel.

6. Subdivisions. In the case of a permit for a subdivision, the permit will include a condition that the conservation restrictions will be included in the developer or owner's own general scheme of restrictions for the subdivision. The conservation restrictions to be included in the general scheme will be drafted by the Office of Counsel. In some cases, the language of the general scheme of restrictions for the subdivision may be sufficient without additional Corps restrictions, and in such cases the Office of Counsel may determine that the recording of a separate conservation restriction document is unnecessary.

7. Changes to Model Documents Before Recording. Changes necessary to customize a model document to a particular applicant, such as the filling in of blanks, determination of whether DHEC should be a party to the document, and the description of the real property to be protected, may be approved by Regulatory Branch personnel (the property description must be sufficient to enforce the restrictions). However, **ANY OTHER CHANGES** to a model document, such as ANY additional exceptions or modifications of standard wording, **must be pre-approved by the Office of Counsel**, and are subject to approval on a case-by-case basis (for example, exceptions approved in one case may not be suitable for another). An applicant will be required to clearly identify all proposed changes, including those necessary to customize the model, when the conservation restriction document is submitted for preliminary approval; if all changes are not clearly identified, the document may be returned to the applicant without approval. When Office of Counsel approval of changes is required, Regulatory Branch personnel will compare the proposed conservation restriction document against the model document and ensure that ***all*** changes are identified before submitting for Office of Counsel approval. This Paragraph is subject to periodic review by the Regulatory Branch and Office of Counsel to determine whether changes are necessary.

8. Record of Approval and Recording. Approval by the Office of Counsel of a conservation restriction document will be indicated by the attorney's initials on the approved version. The approved copy will be part of the official file. In addition, the official file will include the copy thereafter recorded by the applicant. All conservation restriction documents must be recorded and filed prior to either the issuance of the permit or to the transfer of the file from the project manager handling the permit to the Control Section for filing. All permits requiring conservation restrictions as mitigation will be tracked by entry in the database. The database entry will indicate the geographic location of the conservation restrictions. A standard special condition will be used (see attachment A.). Compliance with the condition shall be the obligation of the project manager until the condition is satisfied.

9. Changes to Conservation Restriction Documents After Recording. "Changes" include amendments, trades, corrections, or any other modifications of a recorded document. Because the conservation restrictions are legal documents, **no change may be processed or agreed to without being pre-approved by the Office of Counsel**. This Office of Counsel approval is separate and apart from any permitting process. Applicants will be informed up front to expect that the restrictions are permanent and that changes should NOT be anticipated; even where provision for changes is made in the recorded document, changes are the exception, not the rule. Applicants desiring any change must submit a copy of the recorded document in question in advance to the project manager and Office of Counsel, and prior to the issuance of any public notice involving the conservation restrictions. The determination of whether and how a change may be made to a recorded conservation restriction will be made by the Office of Counsel based upon the language in the recorded document, applicable policy, and coordination with the Regulatory Branch.

10. Enforcement. The Regulatory Branch will promptly notify the Office of Counsel of every violation of conservation restrictions of which it becomes aware. The resolution of all such violations will be coordinated and concurred with by the Office of Counsel.

11. Database Requirements. All permits requiring conservation restrictions as mitigation will be tracked by entry in the database. The database entry will indicate the ***geographic*** location (*geocode*) of the conservation restrictions. The centerpoint of the conservation restriction is sufficient. The data sheet will be used to provide the ***geographic*** location for entry into the database. A symbol will be used to identify conservation restrictions for ease of identification in MapInfo.

12. Authorizing Signature. This SOP is hereby authorized for use.

R.H. Riggs
Chief, Regulatory Branch

STANDARD SPECIAL CONDITION FOR
CONSERVATION RESTRICTIONS

1. That the permittee recognizes that its commitment to perform and implement the following conditions was a deciding factor towards the favorable and timely decision on this permit and that the permittee recognizes that a failure on its part to both actively pursue and implement these conditions may be grounds for modification, suspension or revocation of this Department of the Army authorization.

A. That as compensatory mitigation for the impacts to aquatic resources, the permittee agrees to preserve ___ acres of unaltered wetlands, preserve ___ acres of enhanced wetlands, preserve ___ acres of created wetlands, and preserve ___ acres of upland buffers. Preservation shall be by means of either deed restrictive covenants or conservation easement. The covenants or easement documents must be submitted to the District Engineer or his designee for review and approval prior to execution. **Sample language for restrictive covenants and easement documents are enclosed for your consideration.**

B. That the permittee must submit evidence of execution and recording of the preservation easements or covenants to both the Corps of Engineers and DHEC not later than 60 days from the effective date of this authorization, or prior to commencement of the authorized work, whichever is later.