

AMENDMENTS TO THE DECLARATION OF COVENANTS AND RESTRICTIONS

Department of the Army Corps of Engineers, Savannah District

Policy

Compensatory mitigation required as a special condition of permits issued under the Clean Water Act, Section 404, (“CWA”) and the Rivers and Harbors Act of 1899, Section 10, require perpetual protection of real property by a Declaration of Covenants and Restrictions. The intent of this requirement is to restrict any further development on the property and to eliminate further impacts whether to wetlands, streams or their buffers including upland buffers. The policy of the Savannah District is that protected mitigation property not be further impacted. If the Savannah District does approve of an application to amend the restrictive covenant, the following procedures are applicable. The proponent may be required to mitigate at significantly higher ratios due to the protected status of the property. The preferred mitigation for property extinguished from the restricted area will be by the purchase of credits from a mitigation bank and/or payment to the Georgia Land Trust Service Center.

Scenarios Regarding Ownership Of Property Subject To Restrictive Covenant

1. The original or subsequent holder of the CWA permit owns the property and wants to amend the restrictive covenant. The permittee applies to the Corps for a modification and/or amendment to the restrictive covenant.
2. The proponent is not the owner or permit holder, but a third party. In this scenario, the owner of the restricted property must concur in writing with the proposal for an amendment.
3. The proponent is a legal entity with condemnation authority and ownership of the restricted property will be obtained by eminent domain.

Requirements

1. The proponent must submit an alternatives analysis. The analysis should state why the impact to protected mitigation property is preferred over alternatives where impacts to property are not protected by a recorded restrictive covenant or conservation easement. Cost, although a factor, is not the most significant consideration where there is an alternative that avoids the protected property. In addition, it is not relevant that the portion of the mitigation property proposed for impact is a buffer or upland rather than as wetland or stream, or that it is a non-jurisdictional wetland or stream. The mitigation was required as a special condition of the permit after deliberation by the Savannah District and after public and agency comment, and was accepted for the functions and values it provides on the entire property site.
2. Mitigation for impact to the restricted area should be at a minimum, a credit ratio double the Corps standard mitigation Standard Operating Procedures (“SOP”). There could be a

determination that the mitigation will be at significantly higher mitigation ratios. Impacts such as utility line right-of-ways can result in fragmentation of the tree canopy of a large wetland area. This is considered a major impact by the US Fish and Wildlife Service and could result in the fragmented wetland area losing much of its value. It is possible for such an impact to result in the need for a totally new mitigation site to replace the impacted wetland system. The applicant should explore the best mitigation to replace the values and functions impacted rather than simply offer mitigation for the numerical acreage or linear feet of impact to wetlands and streams. The applicant should propose acquisition of wetland and stream mitigation credits from an authorized mitigation bank, or if one is not available, or for additional credit, payment of a fee to the Georgia Land Trust Service Center (Hans Neuhauser, Director, 706-546-7507) for preservation of wetland and stream properties in Georgia.

3. Submit a written proposal to amend the original (1) permit and/or (2) restrictive covenant stating the alternatives considered, the proposed impacts to the property, (3) the values and functions of the property to be impacted and (4) the proposed mitigation for the impacts to a protected area. Attach copies of the permit and recorded restrictive covenant.

4. The proposal will go out on Joint Public Notice for comment and/or to the Agencies for comment. The notice should provide information about the alternatives, the proposed impact to the restricted property, and the mitigation proposed.

5. If an amendment to a restrictive covenant is approved, the attorney for the permittee should prepare a "First Amendment to Declaration of Covenants and Restrictions." The document should address:

- (A) The original permit (provide a copy)
- (B) The existing restrictive covenant (a copy showing book and page numbers of its recorded location at the county record deeds office)
- (C) A legal description of the property to be extinguished from the restrictive covenant by metes and bounds
- (D) A platted survey showing property to be extinguished from the restricted area.
This can be done as an overlay on the original platted survey.

The document must be reviewed by the Office of Counsel prior to recordation in the record deeds office in the county in which the land lies. The Corps must be a signatory on amendments to restrictive covenants. If additional real property is proposed by the permittee as mitigation, a Declaration of Covenants and Restrictions must be prepared using the latest draft model on the Savannah District web site. If the permittee proposes mitigation bank credits and in lieu fee payment to the Georgia Land Trust Wetland and/or Stream Trust Fund, then no additional restrictive covenant is required. The instructions and draft language for the Declaration of Covenants and Restrictions are on the Savannah District web site at www.sas.usace.army.mil. Select the yellow box that is titled, "Permitting Info." Scroll down to find "Instructions For Declaration of Covenants and Restrictions," "Declaration of Covenants and Restrictions." There is no draft language for use with Amendments To Covenants.

The amendment to the restrictive covenant and subsequent mitigation shall be completed prior to impacts to the property.