

U.S. Army Corps of Engineers, Savannah District

Amendments to Declarations of Conservation Covenants and Restrictions

Policy

Compensatory mitigation required either 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 or to establish a mitigation bank/in-lieu fee program mitigation site under same, require perpetual protection of real property by a Declaration of Conservation Covenants and Restrictions (DCCR). 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 to prevent future impacts to protected mitigation property. If the Savannah District does approve of a request to amend a DCCR, the following procedures are applicable. The proponent may be required to replace lost mitigation resources at significantly higher ratios due to the protected status of the property. The preferred replacement for property extinguished from the restricted area will be by the purchase of credits from an approved mitigation bank.

Typical Scenarios Giving Rise to Amendments to DCCRs

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 an 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 clearly demonstrate why it is necessary to impact protected mitigation property as opposed to property that is 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 protected mitigation property was incorporated as a component of the approved mitigation plan after deliberation by the Savannah District and after consideration of public and/or agency comment(s) and was accepted for the functions and values it provides on the entire property site.

2. If the Savannah District consents to the amendment of a DCCR, the credit ratio for the removal of the DCCR from the protected area will be, at minimum, double of that calculated using the current version of the District's Standard Operating Procedure for Compensatory Mitigation (SOP). It is possible that the replacement mitigation will be at significantly higher mitigation ratios (>2:1), at the discretion of the Savannah District, depending on the conservation values of the protected property and scope and location of the proposed impacts. Generally, Savannah District will not consent to amendment of a DCCR for impacts associated with new alignment projects extending through the interior of approved mitigation banks, In-Lieu Fee program mitigation sites, and permittee responsible mitigation sites. In addition to any compensation required for the removal of the DCCR, permitted impacts will also require compensatory mitigation as per the current version of the District's SOP. The prospective 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 prospective applicant should propose acquisition of wetland and stream mitigation credits from an authorized mitigation bank, or if one is not available, coordinate with an approved In Lieu Fee program.

3. Submit a written proposal to amend the original (1) permit and/or (2) DCCR stating the alternatives considered and the proposed impacts to the property, (3) the values and functions of the property to be impacted and, (4) the proposed replacement mitigation for the impacts to a protected area (refer to Flow Chart 1, which outlines the assessment for calculating replacement mitigation associated with amendment of a Restrictive Covenant and Conservation Easement). Attach copies of the permit and recorded DCCR.

4. The proposal will go out on Public Notice for comment and/or to the participating 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 DCCR is approved, the attorney for the permittee and/or property owners should prepare a draft "First Amendment to Declaration of Covenants and Restrictions" and submit the draft, along with the following:

- a. A copy of the original permit,
- b. A copy of the recorded DCCR showing the deed book and page numbers of its recorded location at the county clerk's office,
- c. A legal description of the property to be extinguished from the restrictive covenant by metes and bounds,
- d. A platted survey showing the property to be released from the DCCR area. This can be done as an overlay on the original platted survey.
- e. Updated title information showing any encumbrances placed upon the property since the filing of the original DCCR or any subsequent amendments.

6. The document must be reviewed and approved by the Savannah District Office of Counsel prior to recordation in the clerk's office in the county in which the protected property lies. Submit amendment packages by email to Assistant District Counsel John E. Ballard at john.e.ballard@usace.army.mil. If packages are too large to email, arrangements can be made for an electronic file transfer. Please call Mr. Ballard at (912) 652-6126 for arrangements for electronic file transfers or for questions regarding the DCCR amendment process. The amendment to the DCCR and required replacement mitigation shall be completed prior to impacts to the property.

Flow Chart 1: Assessment for Calculating Replacement Mitigation Associated with Restrictive Covenant and Conservation Easement Amendment Requests

