

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 under same, requires 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 a 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 commercial compensatory mitigation source.

Typical Scenarios Giving Rise to Amendments to DCCRs

1. The proponent is the original or subsequent holder of the CWA permit that owns the property and wants to amend the restrictive covenant. The owner or original permit holder requests an amendment to the restrictive covenant from the Corps.
2. The proponent is not the owner or permit holder, but a third party. In this scenario, the owner of the restricted property must submit the request for the proposal for an amendment.
3. The proponent is a legal entity with condemnation authority, and ownership of the restricted property has already been obtained by eminent domain. (Note that unless regulated activities planned to occur within an existing mitigation site are proposed to be evaluated under a Section 404 Standard Individual Permit, the condemnation process must be completed prior to requesting the amendment.)

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 property was incorporated as a component of the approved mitigation plan after deliberation by the Savannah District

after public and/or agency comment 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 a minimum of double 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, future permitted impacts will also require compensatory mitigation as per the current version of the District's SOP. The owner or original permit holder 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 owner or original permit holder 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 (a) permit and/or (b) DCCR, stating the alternatives considered and the proposed impacts to the property, (c) the values and functions of the property to be impacted and, (d) the proposed replacement mitigation for the impacts to a protected area (refer to Flow Chart 1, which outlines the pathway for the recommended 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 to amend 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.

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 Savannah District Office of Counsel. If packages are too large to email, arrangements can be made for an electronic file transfer. The execution and recording of the amendment to the DCCR, and required replacement mitigation, shall be completed prior to incurring impacts to the property.